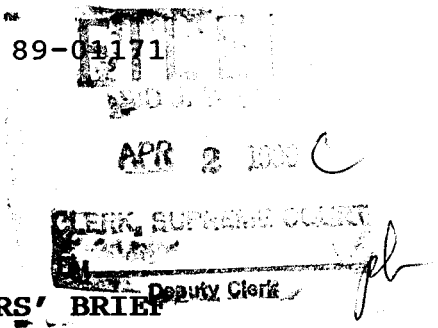
IN THE SUPREME COURT
OF FLORIDA

CASE NO. 75,756

DCA CASE NO. 89-01171



MICHAEL DEL DUCA and GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION,

Defendants, Petitioners,

vs.

PAUL E. ANTHONY, individually and as Personal Representative of the Estate of JACQUELYN ANTHONY, deceased, and as guardian of CORLETTA ANTHONY, a minor daughter of the deceased,

Plaintiffs, Respondents.

PETITIONERS' BRIEF ON JURISDICTION

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

This action presented the Second District Court of Appeal with a tension, if not a direct conflict, between decisions of other district courts of appeal. Rather than choosing between one of the rules of law offered by those other decisions, it created a third rule.

ARGUMENT

The question of law offered for review is as follows: what discovery constitutes "record activity" for the purposes of Florida Rule of Civil Procedure 1.420(e)? That rule provides for the dismissal of actions for failure to prosecute.

In the instant matter, the Second District Court of Appeal was confronted with a "tension, if not a direct conflict, ... between the decisions of the other districts on this issue." Anthony, at 9. The first district, in Karcher v. F.W. Schinz & Associates, 487 So. 2d. 389 (Fla. 1st D.C.A. 1986), approved a procedure by which the trial court examines not only the specific discovery activity in question, but also the "overall record" to determine whether the efforts to prosecute the case have been "very minimal". This rule permits the trial judge considerable, undefined discretion in deciding whether or not to dismiss actions for failure to prosecute.

The fourth district, on the other hand, uses a more narrow interpretation of the rule. In Philips v. Marshall Berwick Chevrolet, Inc., 467 So. 2d. 1068 (Fla. 4th D.C.A. 1985), it determined that dismissal would be appropriate only when the discovery was "repetitious or duplicitous". Philips, 467 So. 2d. at 1069. This approach severely limits the trial court's authority to dismiss actions for failure to prosecute.

In the instant action, the Second District Court of Appeal fashioned yet another rule, designed to give "more discretion than is provided by the bright line rule in Philips, but less

discretion than is provided by the 'genuineness' rule in Karcher." Anthony, at 14. This third rule is stated as follows:

> **[a] trial court may dismiss an action if the only activity within the relevant year is discovery activity by the plaintiff taken in bad faith merely as a means to avoid the application of rule 1.420(e) and without any design "to move the case forward toward a conclusion on the merits or to hasten the suit to judgment".** Anthony, at 14.

Thus, in its decision in this matter, the Second District Court of Appeal has announced a rule of law which expressly and directly conflicts with the decisions of two other district courts of appeal. The conflict is express in that the decision recognizes two existing, disparate rules of law, and, after expressing dissatisfaction with both, creates a third. The conflict is direct in that each of the three conflicting decisions determined whether minimal discovery efforts constituted record activity. Jurisdiction of the Supreme Court is appropriate pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

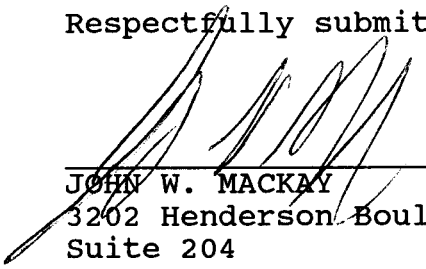
The Supreme Court should exercise its discretion and entertain this case on the merits if it finds that it does have jurisdiction so that an action is not more or less subject to dismissal based on the locale in which it was filed. In addition, the question of law offered for review is made even more confusing by the fact that all of the three interpretations of Florida Rule of Civil Procedure 1.420(e) seem to be at odds with the plain language of that rule.

CONCLUSION

Because the decision of the Second District Court of Appeal in this matter expressly and directly conflicts with decisions of other district courts of appeal on the same question of law, the discretionary jurisdiction of the Supreme Court may be sought to review it.

I CERTIFY that copies hereof were furnished to Ronald L. Napier, P.A., 1570 Shadowlawn Drive, Naples, FL 33942, Robert Alan Rosenblatt, P.A., Museum Tower, Suite 2650, 150 West Flagler Street, Miami, FL 33130, and Robert E. Doyle, Jr., Asbell, Hains, Doyle & Pickworth, 3174 East Tamiami Trail, Naples, FL 33962 by mail on this 02d day of April, 1990.

Respectfully submitted,



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