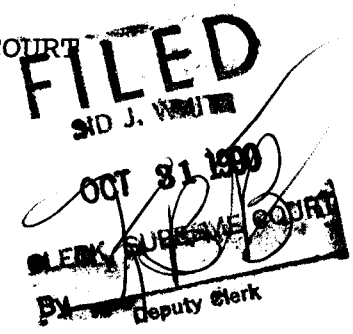
IN THE SUPREME COURT
OF FLORIDA

CASE NO. 75,756



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 THE MERITS

ORIGINAL

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

JOHN W. MACKAY
3202 Henderson Boulevard
Suite 204
Tampa, FL 33609
(813) 873-8835
Florida Bar # 367346
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

THE FACTS

This action for damages arises out of an automobile accident that occurred on 22 June 1979 in Collier County, Florida. (R-II - 10). The accident resulted in the death of Corletta Anthony. She was survived by Paul E. Anthony, her husband and personal representative, and Jacquelyn Anthony, her minor daughter. The husband has since passed away. (R-VI - 940).

THE CASE

This action was filed on 17 December 1979. (R-II - 9). Although there were occasional lapses in its prosecution, the case moved forward, under two different judges, until 16 January 1986.

After that date, there was no activity, record or otherwise, for more than eight months. Then, on 25 September 1986, the plaintiff filed his Notice of Taking Deposition of Peggy and Tom Nielson. (R-VI - 928). Shortly thereafter, plaintiff canceled the depositions and never reset them.

Once again the case stalled, and no activity of any kind took place until 28 October 1987, when the trial court issued its Motion, Notice, and Judgment of Dismissal pursuant to Fla. R. Civ. P. 1.420(e). (R-VI - 931). The defendants also filed Motions to Dismiss for Failure to Prosecute (R-VI - 932, 938). Plaintiff responded by filing his Motion and Affidavit of Good Cause of Why Action Should Remain Pending on 02 December 1987. (R-VI - 940).

At a hearing conducted on 28 December 1987, the trial court found that "good cause" did in fact exist for the failure to

prosecute, given that plaintiff Paul E. Anthony (the decedent's husband and personal representative) had taken ill and died. As a result, the action was not dismissed. (R-VI - 948).

Yet again, this case stood still, until one day before the expiration of still another one year period. Then, on 27 December 1988, the plaintiff filed a Request to Produce and a Notice of Service of Interrogatories. (R-VI - 946, 947). Copies are contained in the appendix to this brief.

The Request to Produce was not directed to any particular defendant and requested production of the following items:

> **1. Any and all statements obtained from the Plaintiff and members of the Plaintiff's family since December, 1987.**
>
> **2. Any and all documents obtained from any witness, which the Defendant plans to introduce at the time of trial.**

The interrogatories were not directed to any specific defendant, and asked the following questions:

> **1. Please state whether the Defendant intend [sic] to call any witnesses not previously disclosed in prior answers to interrogatories.**
>
> **2. State the current address of Peggy Nielson.**
>
> **3. State the current address of William Kehoe.**

In January 1989 all defendants moved to dismiss this action for failure to prosecute. Apart from the responses to these motions, the only item subsequently filed by the plaintiff was a Notice for Jury Trial filed 10 February 1989. (R-VI - 958).

The trial court set the matter for a status conference to be conducted on 01 March 1989. (R-VI - 965). Although plaintiffs'

counsel was granted permission to attend that hearing by telephone (R-VI - 984), he failed to appear in any manner.

The status conference went forward, and in the resulting order the trial court made the following finding of fact:

> **Based upon the overall record which shows very minimal prosecution by the Plaintiff since 1985 the discovery filed in 1988 was only intended to keep the case on the Court's docket and was not a genuine measure to hasten the suit to disposition.** (R-I - 1).

It dismissed plaintiff's action for failure to prosecute, pursuant to Fla. R. Civ. P. 1.420(e). In addition, the trial court dismissed plaintiff's action as a sanction because of counsel's failure to appear at the status conference. (R-I - 1).

Plaintiff appealed those dismissals. In an opinion filed on 28 February 1990 the Second District Court of Appeal reversed the decisions of the trial court, ruling that neither dismissal was appropriate.

In its opinion, the Second District Court of Appeal noted that "a tension, if not a direct conflict, exists between the decisions of the other districts" on the issue of the appropriate interpretation of Fla. R. Civ. P. 1.420(e). The decision went on to create a third interpretation of that rule. On 22 March 1990, petitioners sought to invoke the jurisdiction of the Supreme Court of Florida in order to resolve the conflict. On 04 October 1990, this Court accepted jurisdiction and scheduled oral argument.

ISSUE PRESENTED

What discovery constitutes "record activity" for the purposes of Florida Rule of Civil Procedure 1.420(e)?

SUMMARY OF ARGUMENT

This action presented the Second District Court of Appeal with the following question of law: 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.

Both the First and Fourth District Courts of Appeal had previously considered the question and established standards that discovery had to meet to constitute record activity. Unfortunately, those standards are in conflict. The court below considered those two standards and created a third standard, predicated on "bad faith".

The Second District Court of Appeal erred by creating the bad faith standard. That Court further erred by adopting that new standard and then denying the parties, and the trial court, an opportunity to apply it.

ARGUMENT

I.

THE SECOND DISTRICT COURT OF APPEAL ERRED BY CREATING A "BAD FAITH" STANDARD

A. THE EXISTING STANDARDS

i. The Rule itself.

Fla. R. Civ. P. 1.420(e) provides as follows:

> **All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute.**

The purpose of the rule is to **"encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that essentially has been abandoned."** Barnett Bank of East Polk County vs. Fleming, 508 So. 2d. 718, 720 (Fla. 1987). It serves to

> **expedite the course of litigation and keep dockets as nearly current as possible by penalizing those who would allow litigation to become stagnant.** Chrysler Leasing Corporation vs. Passacantilli, 259 So. 2d. 1 (Fla. 1972).

Fla. R. Civ. P. 1.100(a) limits the term "pleadings" to a complaint or petition, and the answer to it; an answer to a

counterclaim; an answer to a cross-claim; a third party complaint and the answer to it; and a reply. Discovery is not included within the term. As a result, discovery would have to constitute record activity pursuant to the "otherwise" portion of the rule. The courts have generally defined record activity as "any act reflected in the court file that was designed to move the case forward toward a conclusion on the merits or to hasten the suit to judgment." Barnett Bank, 508 So. 2d. at 720.

ii. The Fourth District's standard.

In Philips v. Marshall Berwick Chevrolet, Inc., 467 So. 2d. 1068 (Fla. 4th D.C.A. 1985), the Fourth District Court of Appeal considered the issue presented. The discovery before it consisted of plaintiff's interrogatories directed to defendant:

> **The first question asked Berwick to reveal whether Philips was ever one of its employees, the date of such employment, and the salary and manner of payment. The second question asked whether Berwick paid Philips anything in July of 1981, and, if so, how much and what for.** 467 So. 2d. at 1069.

That Court determined that discovery efforts are **"sufficient to preclude dismissal unless they are patently repetitious."** 467 So. 2d. at 1069. It reasoned that:

> **This rule is easy of application and relieves the trial court of the burden of determining whether just the right questions were propounded. We have no desire to send the trial courts into that quagmire.** 467 So. 2d. at 1070.

Although the Fourth District's approach does manage to avoid that quagmire, it sends its trial courts into another one - a quagmire of dormant actions kept alive by last-minute filings of discovery never designed to discover anything. The only hurdle

that such discovery must leap is that of repetition; it must be in some way unlike discovery filed in the past. The trial court's examination of the prosecution of the action is conducted in a vacuum, in that it is limited to the discovery itself.

iii. The First District's Standard.

The First District Court of Appeal confronted the issue presented in Karcher v. F.W. Schinz & Associates, 487 So. 2d. 389 (Fla. 1st. DCA 1986). The discovery before it consisted of plaintiffs' single interrogatory to a defendant asking for a detailed explanation for denials that were entered in response to request for admissions that had been answered a year earlier. 487 So. 2d. at 390.

That court affirmed the trial court's order of dismissal for failure to prosecute. It explained:

> **[T]he key issue in this appeal is whether Karcher's interrogatory filed on 4 January 1985 constitutes affirmative record activity. We find, as did the trial court, that it does not. The single interrogatory merely sought the basis for denials made by Boise Cascade in response to a request for admissions by Karcher, both of which had been filed one year earlier. [citation]. The conclusion that the January 1985 interrogatory was not a genuine measure to hasten the suit to disposition is further supported by the overall record which shows very minimal prosecution by Karcher.** 487 So. 2d. at 390-391.

An examination of the overall record allows the trial court to consider the prosecution of the action in context, and to clear its docket of litigation that essentially has been abandoned. It frees the trial court of the burden of maintaining on its docket actions kept alive only by annual, last-minute filings.

B. THE SECOND DISTRICT'S ANALYSIS

The Second District considered the issue presented in the case at bar. Anthony v. Schmitt, 557 So. 2d. 656 (Fla. 2d. DCA 1990). The discovery efforts in question consisted of interrogatories and request to produce, both of which are contained in the appendix to this brief.

The trial court employed the First District's standard, by considering the entire, "dismal record of prosecution". Anthony, 557 So. 2d. at 658.

The court below was unwilling to follow the First District. It found fault with a standard that permits an examination of the overall record:

> **The first district's analysis seems to give the trial judge considerable discretion to subjectively determine the quality of an attorney's efforts to litigate his or her client's case. We believe this analysis gives too much undefined discretion to the trial court and creates a rule, the unpredictability of which is assured by the differences among judges.** Anthony, 557 So. 2d. at 660.

At the same time, the court below was unwilling to follow the Fourth District. It expressed dissatisfaction with the Fourth District's standard, explaining that:

> **While the fourth district's bright line approach is enticingly simple, it severely limits the trial court's authority to control litigants who flagrantly employ abusive discovery to prevent dismissal of their actions. If the trial court is not empowered to dismiss such actions, it can only clean its docket by forcing such cases to trial. It seems unfair and inefficient to waste valuable trial time on cases in which the plaintiffs have little or no interest in pursuing their claims, when other plaintiffs are anxiously awaiting their day in court.** Anthony, 557 So. 2d. at 661.

The Court below then created a third approach to the problem:

> **A workable test is not easily fashioned for this problem. The trial court should have the power to dismiss an action after a year of meaningless activity when it is clear that the plaintiff is not prosecuting the case toward a resolution on the merits and when the plaintiff cannot express a valid reason for its delay. On the other hand, the rule should be sufficiently predictable that attorneys do not suffer suits for malpractice for engaging in delays which they reasonably expect to be appropriate. Accordingly, we attempt to state a rule giving more discretion than is provided by the bright line rule in Philips, but less discretion than is provided by the "genuineness" rule in Karcher. We hold that 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." Barnett Bank, 508 So.2d. at 720. Typically, discovery should not be regarded as bad faith activity unless the discovery is frivolous or clearly useless in the further prosecution of the case.** Anthony, 557 So. 2d. at 661-662.

In some applications this standard could be even less burdensome than the Fourth District's standard. It is not inconceivable that some discovery efforts could be patently repetitious without being frivolous.

In addition, this approach thrusts trial courts into a quagmire much greater than the one avoided by the Fourth District. The Fourth District's standard is as narrow as it is because that Court was attempting to protect trial courts from having to determine **"whether just the right questions were propounded."** Philips, 467 So. 2d. at 1070. The Second District's approach compels the trial court to consider not only what questions were asked, but why they were asked as well.

Petitioners suggest that an examination of the overall record could shed some light on the motivation of the party that filed the discovery. That approach however, would bring us back full circle to the First District's standard, a standard that the Second District found gave too much "undefined discretion" to the trial court. Anthony, 557 So. 2d. at 660.

Most troublesome, however, is the fact that the Second District's standard requires no significant movement on the part of plaintiff. This court has made clear that:

> **[T]o permit a case to be kept alive without any significant movement toward resolution is not consistent with the meaning, spirit, and purpose of Rule 1.420(e).** Barnett Bank, 508 So. 2d. at 720.

In the instant case, the Second District applied its new standard and found that:

> **[T]he plaintiff's attorney in this case avoids a dismissal, although by a thin margin. This discovery was clearly filed primarily to avoid the application of rule 1.420(e). Nevertheless, the interrogatory which asked for the undisclosed addresses of important witnesses does assist in moving the case toward a conclusion on the merits. It is not frivolous or clearly useless. The record does not support a determination that it was an activity taken in bad faith.** Anthony, 557 So. 2d. at 662.

That interrogatory, even as characterized by the Second District, does not constitute significant movement toward resolution of this action. It is, therefore, not consistent with the meaning, spirit, and purpose of Rule 1.420(e). See Barnett Bank, 508 So. 2d. at 720.

II.

THE SECOND DISTRICT COURT OF APPEAL ERRED BY DENYING THE TRIAL COURT AN OPPORTUNITY TO APPLY THE NEW STANDARD

Having created the new standard, the Second District Court of Appeal should have provided the parties an opportunity to address it, and the trial court an opportunity to apply it. The trial court is in the best position to view the progress of a case and to determine the good, or bad, faith of the litigants and their attorneys.

Because of this unique vantage point, there is a strong presumption of correctness in favor of a trial court's granting or denial of a motion to dismiss for lack of prosecution. See Douglas v. Eiriksson, 347 So. 2d. 1074, 1075 (Fla. 1st. DCA 1977), cert. den., 353 So. 2d. 674 (Fla. 1977). **"A ruling on a Motion for an Order of Dismissal is subject to attack only on the ground that it constitutes an abuse of discretion."** Harris v. Winn-Dixie Stores, Inc., 378 So. 2d. 90, 92 (Fla. 1st. DCA 1979). **"This heavy burden must be borne by the losing party..."** Eli Einbinder, Inc. v. Miami Crystal Ice Co., 317 So. 2d. 126, 128 (Fla. 3d. DCA 1975).

Instead, the Second District simply created the new standard and immediately applied it, supplanting the trial court altogether.

CONCLUSION

To permit a case to be kept alive without any significant movement toward resolution is not consistent with the meaning, spirit, and purpose of Fla. R. Civ. P. 1.420(e). Barnett Bank, 508 So. 2d. at 720. The Second District Court of Appeal in the instant action, and the Fourth District Court of Appeal in Philips, erred by creating standards that would permit such a case to be kept alive.

Petitioners respectfully suggest that the appropriate standard has been adopted by the First District, and that the proper application of that standard could include an examination of the overall record of the action.

Therefore, petitioners request that this matter be remanded to the Second District Court of Appeal for review pursuant to the First District's standard.

In the alternative, if this Court determines that the Second District's "bad faith" standard is the appropriate one, then the trial court's Order of Dismissal should have been reversed and the matter remanded to the trial court for consideration in light of that new standard.

Therefore, in that event, petitioners request that this action be remanded to the trial court for examination pursuant to the new standard.

CERTIFICATE OF SERVICE

I CERTIFY that copies hereof were served upon 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 29th day of October, 1990, pursuant to this Court's Order Accepting Jurisdiction and Setting Oral Argument entered 04 October, 1990.

Respectfully submitted,

JOHN W. MACKAY
3202 Henderson Boulevard
Suite 204
Tampa, FL 33609
(813) 873-8835
Florida Bar # 367346
Counsel for Petitioners