SUPREME COURT OF FLORIDA

MICHAEL DEL DUCA, ET AL.,

Petitioners,

vs.

PAUL E. ANTHONY, ETC.

Respondent.

CASE NO. 75,756

DISTRICT COURT OF APPEAL
2ND DISTRICT - NO. 89-01171

ON CERTIORARI TO THE DISTRICT COURT

OF APPEAL FOR THE SECOND DISTRICT OF FLORIDA

PETITIONER, PAUL SCHMITT'S BRIEF

ON THE MERITS

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INTRODUCTION

This Brief is filed on behalf of Petitioner, Paul J. Schmitt. In this Brief, Petitioners, Paul J. Schmitt, Michael Del Duca and General Accident and Life Assurance Corp. will be referred to as Petitioners except in those instances where it is necessary to distinguish among the "Petitioners" at which time each will be referred to by name. Respondent, Paul E. Anthony, will be referred to as "Respondent." References to the Record on Appeal as prepared by the Circuit Court Clerk and filed in the District Court of Appeal are by the letter "R" followed by the Clerk's volume and page number. (R- ____ - ____).

STATEMENT OF THE CASE

This cause commenced with the filing of a Complaint for wrongful death in the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida on December 17, 1979. (R-II - 9-16).

In January, 1989, after the case had been pending for more than nine years, Petitioners, (all Defendants) moved to dismiss Respondent's Complaint. (R-VI - 949-951). At the hearing on the motions to dismiss, the trial court made specific findings of fact and granted the motions. (R-I - 1).

On the Respondent's appeal of the dismissal to the Second District Court of Appeal, the District Court rendered an opinion February 28, 1990, and reversed the order of the trial court.

Following the decision of the Second District Court of Appeal, Michael Del Duca petitioned for a Writ of Certiorari. This Court accepted jurisdiction by its Order dated October 4, 1990.

STATEMENT OF THE FACTS

Respondent originally claimed against Petitioners on multiple theories. (R-II - 9-16). However, the single claim remaining against Paul J. Schmitt is based upon the vicarious liability theory created by Florida's Dangerous Instrumentality Law. All other counts and claims against Paul J. Schmitt have been dismissed. (R-III - 324, 325).

Throughout 1980 there was substantial activity in the case including motions and discovery. (R-II 9 to III 318). The discovery and motions continued through the first three months of 1981. (R-III - 320-350). Although there were substantial gaps in the prosecution of the case, trial preparation continued with motion practice, discovery, notices for trial and a pre-trial conference. The case was moved forward by two different judges through January 16, 1986. (R-VI - 927).

From January 16, 1986, there was no activity until the filing of a Notice of Taking Deposition on September 25, 1986. (R-VI - 928). The Notice of Taking Deposition was for a deposition of a witness not listed by any party in previous pretrial submissions to the Court. The day prior to the

deposition, counsel for Paul J. Schmitt contacted counsel for the Respondent to confirm that the deposition would take place as scheduled in the Florida Keys. At that time, counsel for the Respondent noted that the deposition was cancelled. The deposition has never been rescheduled.

On October 28, 1987, after more than a year had passed since the filing of the discovery document mentioned in the preceding paragraph, the Court caused issuance of a Motion, Notice and Judgment of Dismissal pursuant to Rule 1.420, Florida Rules of Civil Procedure. (R-VI - 931). Petitioners followed that filing with a Motion to Dismiss for Failure to Prosecute. (R-VI - 932-933). At a hearing held December 28, 1987, Judge Charles T. Carlton denied the Motion to Dismiss on the grounds that the Plaintiff's illness and subsequent death were "good cause" and therefore the matter was reinstated. (R-VI - 948).

On December 27, 1988, fifteen months after filing the 1986 discovery notice and one day before the expiration of one additional year without any activity in this case (record or otherwise) since the Order on the Motion to Dismiss was entered, Plaintiff's counsel filed a Request to Produce (R-VI - 946) and a Notice of Service of Interrogatories (R-VI - 947). The Request to Produce was not directed to any specific defendant and asked for two items:

> 1. Any and all statement obtained from the Plaintiff and members of the Plaintiff's family since December, 1987.

2. Any and all document obtained from any witness, which the Defendant plans to introduce at the time of trial.

(R-VI - 967). The Interrogatories ask the following questions:

1. Please state whether the Defendant intend 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.

(R-VI - 967).

In January 1989, all Defendants moved to dismiss Plaintiff's Complaint. (R-VI - 949-951). Apart from the responses to these motions, the only item subsequently filed by the Plaintiff in the case is a Notice for Jury Trial filed February 10, 1989. (R-VI - 958). At the hearing on the motions to dismiss, the Court made specific findings of fact. Included were the findings that the Request for Production and Notice of Service of Interrogatories filed by the Plaintiff on December 27, 1988 were the only matters contained in the record since December 28, 1987. (R-I - I).[1] The Court found that the overall record showed very minimal prosecution by the Plaintiff since 1985 and that the discovery filed December 27, 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).

1. It should be noted that the Order recites that the Request for Production and Notice of Service were filed on "December 27, 1985." This is an obvious typographical error and should read "1988."

SUMMARY OF THE ARGUMENT

The decision of the Second District Court of Appeal in Anthony v. Schmitt, 557 So.2d 686 (Fla. 2d DCA 1990) would allow dismissal of an action for failure to prosecute where some documents were filed within the relevant one-year period only if the discovery was filed in bad faith and not to move the case forward. This decision conflicts with Karcher v. F.W. Schinz & Associates, Inc., 487 So.2d 389, 390 (Fla. 1st DCA 1986) which grants the trial court discretion to examine the overall record in the case to determine whether the discovery (or other documents) filed during the one-year period was a genuine measure designed to hasten the suit to disposition.

Trial courts are given a great responsibility to provide prompt justice for the people of the state of Florida. Inherent in the courts ability to control its docket should be the power to examine the overall record of the case and determine factually whether a particular activity was designed to move a case toward disposition.

ARGUMENT

I. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IS IN CONFLICT WITH DECISIONS OF DISTRICT COURTS OF APPEAL OF THE FIRST AND FOURTH DISTRICTS.

Florida Rule of Civil Procedure 1.420(e), governs the procedure for dismissal for failure to prosecute.

> 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...

Fla.R.Civ.P. 1.420(e)

It is well settled in Florida that the "activity" of record, in order to preclude dismissal, must be an affirmative act designed to progress the suit to judgment. Karcher v. F.W. Schinz & Associates, Inc., 487 So.2d 389, 390 (Fla. 1st DCA 1986), citing Gulf Appliances Distributors, Inc. v. Long, 53 So.2d 706, 707 (Fla. 1951), Phillips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA 1985) and Anthony v. Schmitt, 557 So.2d 686 (Fla. 2nd DCA 1990). The conflict among these cases arises from the determination of what activity is sufficient to preclude dismissal.

In Karcher, the First District Court of Appeal concluded that the trial court could look at the overall record in making a determination that the activity in the court file was not intended to move the case forward. The Court stated that

> 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.

Karcher v. F.W. Schinz at 389.

In deciding Karcher, the First District Court did not follow the lead of the Fourth District Court in Phillips v. Marshall Berwick Chevrolet, Inc., above, which had been decided the previous year. There the Court followed a very narrow construction of the rule and held "only that repetitious or duplicitous discovery activity is insufficient" to prevent dismissal. Phillips v. Marshall Berwick Chevrolet, Inc. 467 So.2d 1068 (Fla. 4th DCA 1985) at 1069.

The Second District Court of Appeal noted the decisions in both Karcher and Phillips in deciding Anthony v. Schmitt. The Court went on to set forth a new rule which could perhaps be described as taking a middle ground between Karcher and Phillips, holding,

> 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 v. Schmitt at 662.

Thus, a conflict exists with regard to the limits of the trial courts' discretion in evaluating the activity necessary to avoid dismissal under rule 1.420(e). This Court has jurisdiction to resolve the conflict determining the proper interpretation of Rule 1.420(e).

II. IN DETERMINING WHETHER TO DISMISS AN ACTION FOR FAILURE TO PROSECUTE, THE TRIAL COURT MUST HAVE DISCRETION TO MAKE A FACTUAL DETERMINATION OF WHETHER THE ACTIVITY OF THE PLAINTIFF, IN LIGHT OF THE OVERALL CASE RECORD, APPEARS DESIGNED TO MOVE THE CASE TOWARD A CONCLUSION ON THE MERITS.

It is imperative that trial courts be able to control dockets in a manner that justice will be available to individual litigants and to society as a whole. Mr. Justice Dekle recognized this in considering Rule 1.420 when he wrote "we are interested today in moving causes and in expediting litigation in the proliferation of increasing law suits." Eastern Elevator, Inc. v. Page, 263 So.2d 218, 220 (Fla. 1972). Judge Carlisle in his dissent to the Phillips v. Marshall Berwick Chevrolet, Inc. majority noted,

> This is the age of case management. Trial Judges are being exhorted to take control of their dockets and to conclude their cases in an expeditious manner.

Phillips v. Marshall Berwick Chevrolet, Inc. at 1070. In order for a trial judge to take control of his docket he must be able to exercise some discretion in looking at the facts. That discretion should include the ability to look not only at the specific activity that occurred within the previous twelve months but to evaluate that activity in light of the overall case. Karcher at 391.

In keeping control of dockets, courts should not deny justice to individual litigants. Therefore Rule 1.420(e) should

be "sufficiently predictable that attorneys do not suffer suits for malpractice for engaging in delays which they reasonably expect to be appropriate." Anthony v. Schmitt at 661. However, the Second District Court has noted that there are a number of steps that a trial attorney can take to avoid dismissal including the filing of a motion for pre-trial conference, or by obtaining a stay if one is necessary. Anthony v. Schmitt at 662 n. 12. Thus, no attorney is without guidance in the steps which can be taken to avoid a dismissal of his client's cause.

The Second District, in seeking to limit the discretion of the trial judge from what was provided by Karcher has inserted a new element of "bad faith." While the Second District's analysis of the various cases construing Rule 1.420(e) is excellent, there should be no requirement of a finding of "bad faith." Further, the interpretation recommended by the Second District limits the Trial Court's discretion to an analysis of the activity in a vacuum.

Perhaps the better reasoned rule is stated by combining the language of the First and Second Districts. The trial court may dismiss an action pursuant to Rule 1.420(e) if the only activity within the relevant year is discovery activity by the Plaintiff which, in light of the overall prosecution of the case, appears merely to be a means to avoid the application of the rule and without any design to move the case forward to a conclusion on the merits or to hasten the suit to judgment.

The activity of the Appellant in the case at bar was carefully reviewed by the trial judge. After that review, Judge Blackwell found

> 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, Paragraph "2").The truly important distinction between the case at bar and the decision of the Second District Court of Appeal is found in looking at what the trial court noted as the "overall record." This litigation has now been pending for more than ten years. There have been long gaps in prosecution of the case throughout its existence. The Plaintiff was given numerous opportunities to revive or resume the prosecution of the case. However, those opportunities have never been seized upon and the most recent activity appeared to the trial court to have been only for the purpose of keeping the case on the docket and not for the purpose of actively prosecuting the matter and moving it toward judgment. (R-I - 1).

As the court stated in Saint Ann Airways v. Larotonda, 308 So.2d 129 (Fla. 3d DCA 1975), "The question to be asked is whether or not the act taken was intended to hasten the suit to judgment." The history of this case with its sparse record of any activity shows that the Plaintiff has failed to hasten the suit to judgment. Between January 1986 and April 1989, the Plaintiff filed only six items in this case. First was a Notice of Taking Deposition filed in September, 1986. Next is a

response to the Defendants' 1987 motions to dismiss. Third is the Motion to Substitute Personal Representative which was filed December 2, 1987. (No order appears in the record, although the Defendants raised no objection to the substitution.) In any event, all three of these items and the hearing on the motions to dismiss occurred more than twelve months prior to the filing of Appellee's Motions to Dismiss. The sixth item, Plaintiff's Notice for Trial was filed only after the filing of the Motion to Dismiss and the issuance of this Court's Order for a status conference. Therefore, the only activity in the Court file between the entry of the Order of Judge Carlton denying the 1987 Motion to Dismiss for Failure to Prosecute and the filing of the Motion to Dismiss giving rise to this petition were the Request for Production and the Notice of Service of Interrogatories.

Viewed in the light of the overall record, the Request for Production does not appear to be calculated to hasten the suit to judgment as required by Saint Ann Airways v. Larotonda, 308 So.2d 129, or directed toward disposition of the case as required by Eastern Elevator, Inc. v. Page, 263 So.2d at 220. The Interrogatories, like the Request for Production, are not directed to any particular Defendant. They proceed to ask the Defendants to disclose any witnesses not previously disclosed. It is important to note here that all of the parties in this case previously filed Pre-Trial Statements including witness lists. The Interrogatories then ask for the current addresses of Peggy Nielson and William Kehoe. Nielson is the witness whose

deposition was scheduled by the Plaintiff in the Florida Keys and then canceled. Further, William Kehoe appears to be a witness whose name appeared on a witness list filed by Defendants Del Duca and General Accident on October 29, 1985. At the time of the 364th day discovery in 1988, there had been no attempt by the Plaintiff to take a deposition of Mr. Kehoe for 37 months and no attempt to take the deposition of Ms. Nielson for 27 months. Thus, Judge Blackwell's conclusion that the Request for Production and the Interrogatories to Defendants were not genuine measures to hasten the suit to disposition is definitely be supported by the overall record as was the case in Karcher v. F.W. Schinz & Associates, Inc, 487 So.2d 389.

There was no finding of "bad faith" by the trial court. Petitioner submits that "bad faith" should not be a requirement since it seems to imply that some type of fraud must be visited upon the court; an occasion that we would hope would never occur and should certainly be so infrequent as to nearly curtail application of the rule. However, if "bad faith" means that a litigant's action was not really designed to move a case forward, then Judge Blackwell's order easily encompassed "bad faith."

The trial court had the parties' counsel before him. He examined the Court file. He heard the arguments. Respondent chose to present no facts by documents or testimony which would support any conclusion other than the one arrived at by the trial court. Respondent's action was properly dismissed because, in

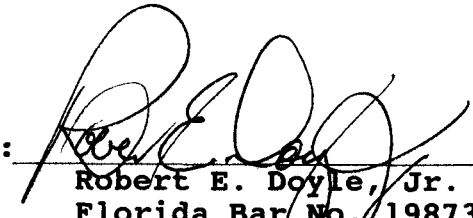
light of the overall case, there was no activity calculated to hasten the suit to judgment.

CONCLUSION

Based upon the foregoing argument and the authorities cited Petitioner PAUL SCHMITT requests this Honorable Court to reverse the decision of the Second District Court of Appeal and affirm the decision of the Circuit Court.

Respectfully submitted,

ASBELL, HAINS, DOYLE & PICKWORTH, P.A.



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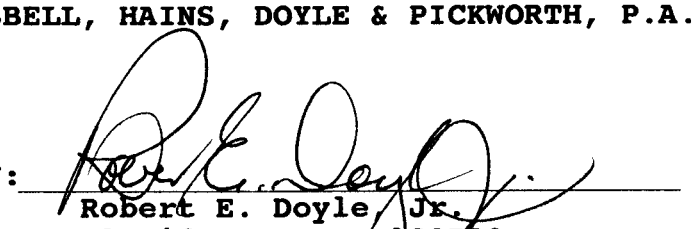
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner PAUL E. SCHMITT's Brief on the Merits has been furnished by Regular U.S. Mail to John W. Mackay, Esq., 3202 Henderson Boulevard, Suite 204, Tampa, Florida 33609, Ronald L. Napier, Esq., 1570 Shadowlawn Drive, Naples, Florida 33942 and Robert Alan Rosenblatt, Esq., Museum Tower, Suite 2650, 150 West Flagler Street, Miami, Florida 33130 this 1st day of November, 1990.

ASBELL, HAINS, DOYLE & PICKWORTH, P.A.

BY: 

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