

027 w/app 0/A.1-11-91

SUPREME COURT OF FLORIDA

FILED  
SID J. WHITE  
DEPT. OF  
CLERK OF THE COURT  
Clerk

MICHAEL DEL DUCA, et al., )  
 )  
 Petitioners )  
 )  
 v. )  
 )  
 ESTATE OF JACQUELYN ANTHONY, )  
 et al., )  
 )  
 Respondents. )

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

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PETITIONER, PAUL SCHMITT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	(i)
INTRODUCTION	(ii)
ARGUMENT	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4
APPENDIX	

TABLE OF CITATIONS

FLORIDA CASES:

PAGE

<u>Altchiler v. State Department of Professional Regulation,</u> 442 So.2d 349, 350 Fla. 1st DCA 1983).....	1
<u>Kelley v. Kelley,</u> 75 So.2d 191, 193 (Fla. 1954).....	1

## INTRODUCTION

This Reply 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." The only references to the Record on Appeal as prepared by the Circuit Court Clerk and filed in the District Court of Appeal are to a transcript of the hearing held on March 21, 1989 which is found at Pages 1006 - 1050 of the Record. This transcript is included as an appendix to this Brief and referred to by the transcript page number.

## ARGUMENT IN RESPONSE AND REBUTTAL

In brief reply to Respondent's Brief, Petitioner, Paul J. Schmitt, notes that Respondent now attempts to reach outside the record for support. Acting as an appellate court, this Court may base its review only upon the record established in the lower tribunals. Altchiler v. State Department of Professional Regulation, 442 So.2d 349, 350 Fla. 1st DCA 1983); Kelley v. Kelley, 75 So.2d 191, 193 (Fla. 1954). An appellate court should not consider evidence that was not presented to the lower courts and is free to strike any materials or matters outside the record which a party includes in an appendix or refers to in its argument. Altchiler, 442 So.2d at 350.

Respondent argues that the Request for Production filed after 364 days of inactivity was drafted in part because the Personal Representative had heard that "investigators" had been talking to his daughter. (Answer Brief of Respondent, p. 9). That the Personal Representative had heard that investigators were questioning his daughter is not a matter that is contained in the record. At the March 21, 1989 hearing<sup>1</sup>, counsel for Respondent made no mention of "investigators" and provided no other reason to indicate that the requested evidence was necessary to move the case forward. In fact, counsel's only words of explanation for the request were as follows:

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1. Transcript of the March 21, 1989 hearing is attached to this Reply as Appendix 1.

Really what we're doing here is updating to see if they have asked -- and the plaintiff has several -- has a very large family living here in Naples, just not the immediate relatives -- asking if they have taken any statements from any of these family members with respect since December 1987 which certainly we're entitled to know before trial. We also wanted additional documents obtained from any witnesses that the defendants intend to use at the time of trial. (Appendix 1, p. 17).

Accordingly, whether "investigators" had been talking to the Personal Representative's daughter is not a fact that can be considered by this Court.

In the opening paragraphs of the Argument of Respondent's Answer Brief, Respondent accuses defense counsel of misleading the trial court in the March 21, 1989, hearing by stating that one Peggy Nielson had never before appeared in proceedings in this case. (Answer Brief of Respondent, p. 9). This accusation cannot be supported by the record.

Counsel for Defendant, Paul Schmitt, did not represent Michael Del Duca and had no knowledge of the criminal trial. Counsel's actual statement was as follows:

Peggy Nielson was one of the witnesses whose deposition was scheduled for the Florida Keys. The deposition was scheduled by the plaintiff. We don't know why. And then they canceled it without ever resetting it. (Appendix 1, p. 8).

This statement was true.

Respondent's argument that Nielson testified in the criminal trial and had been listed on pre-trial witness lists (Answer Brief of Respondent, p. 9) is found only in counsel's unsupported statements. (Appendix 1, p. 19). Counsel for Respondent had an

opportunity to present evidence in support of these statements (and thereby make such evidence a part of the record), but failed to do so. Therefore, the substance of his remarks cannot properly be considered in this appeal.

Respondent claims that he had no opportunity to present evidence which would demonstrate how the interrogatories and request for production hastened the cause for trial. (Answer Brief of Respondent p. 11-12). The record reveals that Plaintiff-Respondent made no attempt to present such evidence. Because Plaintiff-Respondent could have presented evidence and failed to attempt to do so, his present complaint that he had no opportunity to present such evidence is unfounded.

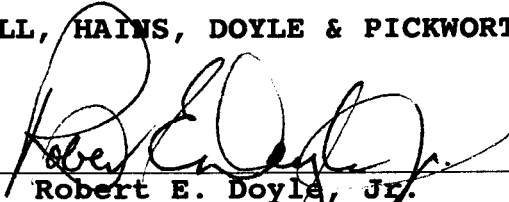
CONCLUSION

In his Answer Brief, Respondent has attempted to reach outside the record of this case and bring before this Court matters which are not a part of that record and which accordingly cannot properly be considered in this Appeal. Respondent also complains that he had no opportunity to present to the trial court evidence demonstrating the purpose of his interrogatories and request for production. In fact, Respondent failed to even attempt to present evidence. The Trial Court properly considered this case. In light of all the evidence found in the record, the Trial Court was correct in dismissing Respondent's cause. That dismissal should be re-instated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished by regular U.S. Mail this 17<sup>th</sup> day of December, 1990 to Robert Alan Rosenblatt, P.A., 150 West Flagler Street, Miami, Florida 33130;

SAS/vabl2208



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