IN THE SUPREME COURT OF FLORIDA

APPELLATE CASE NO. 4D 02-1402

MOGERMAN, O'LEARY & PATEL, INC.,
a Florida corporation,

Petitioner,

vs.

MARCIA SHERWIN,
Respondent.

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RESPONDENT'S ANSWER TO BRIEF ON JURISDICTION

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CHARLES WENDER
Attorney-at-Law, Chartered
Attorney for Appellee
190 West Palmetto Park Road
Boca Raton, Florida 33432
(561) 368-7004
(561) 368-5798 facsimile

On The Brief: CHARLES WENDER
Florida Bar No. 246271

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INTRODUCTION

The Petitioner, MOGERMAN, O'LEARY & PATEL, INC., seeks discretionary review in this Court, pursuant to Article V, §3(b)3 of the Florida Constitution, and Rule 9.030(a)(2)(iv), Florida Rules Appellate Procedure, under a claim of an express and direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law as a misapplication and wrongful extension of Applegate v, Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

RESPONSE TO "STATEMENT OF THE CASE AND FACTS"

(pp. 3-5, Petitioner's Brief on Jurisdiction)

On October 18, 1999 the Petitioner, MOGERMAN, O'LEARY & PATEL, INC., a Florida Limited Partnership, filed a Complaint seeking specific performance of a "written" real estate contract, although no contract was ever attached to the Complaint.

Respondent MARCIA SHERWIN, an elderly woman, filed a pro se Answer – alleging, among other things, that she was never properly served. Thereafter, the file literally sat idle for a whole year before the Petitioner's attorney, unilaterally and without leave of the Court, filed a "Renewed Notice of Lis Pendens". The file sat dormant for another year, when Petitioner's counsel filed, again without leave of the Court, a "Second Renewed Notice of Lis Pendens".

Life was breathed into the case, when in January 2002 the Respondent moved to dismiss and dissolve the illegal Lis Pendens, which called up the issue of proper service. In February 2002 an evidentiary hearing was held on the Respondent's initial objection to service and rogue Lis Pendens. After conducting that evidentiary hearing the trial court determined that the service was indeed improper and granted Appellee SHERWIN her relief. No transcript or proper record of that hearing was produced by the Petitioner.

Instead of following Rule 9.200(b)(4), Fla. R. App. P. (to establish a proper record), the Petitioner fashioned its own procedure and submitted an affidavit by Petitioner's counsel as to what she believed occurred at the hearing. This "record" by unilateral affidavit is contrary to the well-settled Rule 9.200(b)(4). Consequently, in the absence of a proper record, the Fourth District Court of Appeal affirmed the lower court.

RESPONSE TO "SUMMARY OF ARGUMENT"
(p. 6, Petitioner's Brief)

This Court lacks jurisdiction to entertain this appeal, as the District Court properly applied Applegate v, Barnettt Bank of Tallahassee, supra. Applegate stands for the proposition that absent a transcript or proper record concerning issues of fact, the Appellate Court must affirm the lower court. Here, the Petitioner simply failed to provide the District Court with a transcript of the critical evidentiary hearing or to provide a substitute, pursuant to Rule 9.200(b)(5), Fla. R. App. P. The District Court had no basis to determine if the trial court erred in finding that the Defendant below was not properly served with process and, accordingly, affirmed the presumptiously correct decision of the Circuit Court as "fact-finder".

RESPONSE TO "ARGUMENT"
(pp. 6-8, Petitioner's Brief

The District Court properly applied Applegate v. Barnett Bank of Tallahassee, supra, to the facts of this case. This case involved a rather routine, run-of-the-mill situation wherein the Respondent contested the validity of "service", and the trial court conducted an evidentiary hearing. This case also involves the not uncommon practice of not having a court reporter present at the evidentiary hearing.

Rather than follow a well-settled Rule of Appellate Procedure, 9.200(b)(4) (creating a record), the Petitioner used an unauthorized affidavit to create a unilateral record. The Petitioner has flaunted the Rules of Appellate Procedure and fashioned an ad hoc Rule of Appellate Procedure – which it would like this Court to adopt.

The Petitioner's unilateral statement of the case was not an adequate substitute for "a meaningful record", and the absence of a proper record in a "fact intensive" appeal is fatal to any appeal. See, Wright v. Wright, 431 So.2d 177 (Fla. 5th DCA 1983); Starks v. Starks, 423 So.2d 452 (Fla. 1st DCA 1982); Bei v. Harper,

475 So.2d 912 (Fla. 2d DCA 1985); and, in particular, Applegate v. Barnett Bank of Tallahassee, supra, which is on all fours of the District Court opinion. Here, Petitioner's counsel's unauthorized affidavit is not a sufficient substitute for "a record", and the Fourth District Court of Appeal appropriately so held.

As the court cautioned in Hadden v. State, 616 So.2d 153 (Fla. 1st DCA 1993):

> "We write to warn lawyers and judges that an unauthorized affidavit cannot substitute for an approved statement of the evidence secured under Rule 9.200(b)(4). If no transcript is available the parties must proceed by the method provided for by the rules."

Here, the Petitioner's counsel failed to heed that warning, and the District Court acted appropriately in not recognizing the Petitioner's ersatz practice.

CONCLUSION

THE FOURTH DISTRICT COURT OF APPEAL DID NOT MISAPPLY THE APPLEGATE DECISION IN ANY RESPECT, AND THE PETITION SHOULD BE DENIED.

Respectfully submitted,

CHARLES WENDER
Attorney-at-Law, Chartered
Florida Bar No. 246271
190 West Palmetto Park Road
Boca Raton, Florida 33432
(561) 368-7004
(561) 368-5798 facsimile

By:_____

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Charles Wender, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail and/or facsimile to Allyson D. Goodwin, Esquire, Renee G. Lillard, Esquire, and Damaso W. Saavedra, Esquire, SAAVEDRA, PELOSI & GOODWIN, A.P.A., 312 S.E. 17th Street, Second Floor, Fort Lauderdale, FL 33316, on this ____ day of June, 2003.

By:_____

Charles Wender, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure, and has been prepared in 14-point Times New Roman.

By:_____

Charles Wender, Esquire