

**SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

VS.

**Lwr. Tribunal: 1D12-3639;
OJCC No. 09-027890GCC**

**NEXT DOOR COMPANY and
AMERISURE INSURANCE CO.,**

Respondents. /

**MOTION TO STRIKE BRIEF AND APPENDIX
OF AMICUS CURIAE FLORIDA JUSTICE REFORM INSTITUTE
AND THE CHAMBER OF COMMERCE, INC.**

COMES NOW the petitioner, Marvin Castellanos, by and through his undersigned attorney, and moves this Court to strike the brief and appendix of amicus curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc., and for grounds would state:

This motion is made on authority of Fla. R. App. P. 9.220 and Fla. R. App. P. 9.300(a).

Fla. R. App. P. 9.220(b) allows the filing of an appendix to a brief to include the order or opinion to be reviewed and "may contain any other portions of the record and other authorities". (Emphasis added).

Most of the cases that interpret this rule deal with the failure to include material that should be included in an appendix, rather than what should not be included. However, there is one case which does deal with this issue specifically. In *Hillsborough County Board of County Commissioners v. Public Employees Relations Commission*, 424 So. 2d 132 (Fla. 1st DCA 1982), the Pinellas County Board of County Commissioners appeared as an amicus curiae and sought to have testimony in another case pending in the Second District Court of Appeal included in an appendix. Pinellas County contended that the case in the Second District Court of Appeal which involved Pinellas County was similar to the Hillsborough County case pending in the First District Court of Appeal. The First District Court of Appeal held that it could not take judicial notice of such testimony and that it was not within the meaning of "other authorities" in Florida Appellate Rule 9.220 dealing with an appendix. *Hillsborough County Board of County Commissioners*, supra, at 135. The Court also mentioned an earlier case in this regard, *Mitchell v. Gillespie*, 161 So. 2d 842 (Fla. 1st DCA 1964). The *Hillsborough County* case does indicate that "other authorities" in Rule 9.220 does not mean anything that a party cares to call "an authority" and wishes the Court to read and accept as a basis for the party's argument.

Incidentally, Federal Rule of Appellate Procedure (FRAP) 30 does not provide for "other authorities".

In the present case, Exhibits 1, 3, 4 and 5 in the Appendix are not part of the record for review. For these exhibits to be now considered by the Court and any argument based upon them is prejudicial to the petitioner. The petitioner has not been afforded the opportunity to cross-examine the completeness of the exhibits, nor the accuracy of any facts contained therein, nor the meaning nor the interpretation of such facts. This would be a denial of due process of law because the proceeding would not then be fair and meaningful.

At the outset, the petitioner accepts that "other authorities" could include the decision of courts and government agencies, positive laws such as bills, committee reports, session laws, statutes, ordinances, and resolutions and staff analyses; also reports, studies, memoranda and documents of federal, state, county, municipal and district governments and recognized treatises and published law reviews. "Other authorities" does not include reports, studies, memoranda and documents of private entities, such as trade associations, insurance companies, insurance rating companies and lobbyists.

The appendix which accompanies the brief of the amicus curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc., is referenced in the amicus curiae brief as "Appendix Authorities". (Brief, page v).

Exhibit 1 in the Appendix is an NCCI Filing Circular for 2008 and is referred to on pages 8, 9 and 11 of the amicus curiae brief. NCCI is the workers' compensation insurance industry's wholly-operated rating agency.

Exhibit 1 of the Appendix should be stricken and pages 8, 9 and 11 of the amicus curiae brief should be stricken.

Exhibit 3 in the Appendix is a slide presentation of the National Council on Compensation Insurance, Inc. (NCCI), referred to on page 10 of the amicus curiae brief.

Exhibit 3 of the Appendix should be stricken and page 10 of the amicus curiae brief should be stricken.

Exhibit 4 of the Appendix is a report on the cost effects of this Court's *Murray* decision. It is referred to on pages 9, 12 and 13 of the amicus curiae brief.

Exhibit 4 of the Appendix should be stricken and pages 9, 12 and 13 of the amicus curiae brief should be stricken.

Exhibit 5 of the Appendix is a report concerning attorney involvement. It is referred to on pages 6, 14 and 15 of the amicus curiae brief.

Exhibit 5 of the Appendix should be stricken and pages 6, 14 and 15 of the amicus curiae brief should be stricken.

Exhibit 6 of the Appendix is a publication of a research institute and an association. It is referred to on pages 16 and 19 of the amicus curiae brief.

Exhibit 6 of the Appendix should be stricken and pages 16 and 19 of the amicus curiae brief should be stricken.

We should not blame this amicus curiae for having done this, as they are lobbyists before the Legislature, which has no such Rule about what is said or argued.

Pursuant to Fla. R. App. P. 9.300(d)(10), the petitioner further requests that the time be tolled for the filing of the reply brief of petitioner, otherwise due to be filed on June 30, 2014, until such time as the Court rules on this motion.

WHEREFORE, the petitioner requests that the Court either:

1. Strike the brief and appendix of amicus curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc., as requested by this motion, or;

2. Strike the brief and appendix of amicus curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc., as requested by this motion, and allow this amicus curiae to file an amended brief and amended appendix that conforms to Fla. R. App. P. 9.220.

The petitioner further requests that the Court toll the time for the filing of the reply brief of petitioner from the date of this motion to, and including, June 30, 2014.

Respectfully submitted,

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By: Richard A. Sicking

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 19th day of June, 2014, to: Michael J. Winer, Esq. (mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., 110 North 11th Street, 2nd Floor, Tampa, FL 33602; Raoul G. Cantero, Esq. (raoul.cantero@whitecase.com) and David P. Draigh, Esq. (ddraigh@whitecase.com), White & Case, L.L.P., Southeast Financial Center, Suite 4900, 200 South Biscayne Blvd., Miami, FL 33131; Christopher Smith, Esq. (chris@cjsmithlaw.com), 2805 W. Busch Blvd., Suite 219, Tampa, FL 33618, Kenneth B. Schwartz, Esq. (kbs@flalaw.com), Kenneth Schwartz, P.A., 1803 S. Australian Avenue, Suite F, West Palm Beach, FL 33409; Richard W. Ervin, Esq. (richardervin@flappeal.com) and Susan W. Fox, Esq. (susanfox@flappeal.com), Fox & Loquasto, P.A., 1201 Hays Street, Suite 100, Tallahassee, FL 32301; William J. McCabe, Esq. (Billjmccabe@earthlink.net), 1250 S. Hwy. 17-92, Suite 210, Longwood, FL 32750; Kimberly A. Hill, Esq. (kimberlyhillappellatelaw@gmail.com), 821 S.E. 7th Street, Ft. Lauderdale, FL 33301; Noah Scott Warman, Esq. (NWarman@sugarmansusskind.com), Sugarman & Susskind, P.A., 100 Miracle Mile, Suite 300, Coral Gables, FL 33134; Geoffrey Bichler, Esq. (geoff@bichlerlaw.com), Bichler, Kelley, Oliver &

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