IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
STATE OF FLORIDA, et al.,

Petitioners,

vs.

DAVID KUHNLEIN and SCOTT
ENOS, et al.

PETERSON CONSULTING, L.L.C.,
as appointed agent of the court,
Respondent.

CASE NO. 88,267
District Court Case No. 96-699

RESPONSE BRIEF OF RESPONDENT, PETERSON CONSULTING, L.L.C.

On Certified Review from the District Court of Appeal,
Fifth District, State of Florida

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I. STATEMENT OF THE CASE

On September 29, 1994, this Court ruled Section 329.231, Florida Statutes, unconstitutional and relinquished jurisdiction to the trial court for disbursement of the monies collected thereby. Dep't of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). On March 25, 1995 the trial court entered its Order On Claims Administration (hereinafter "Administration Order") whereby the trial court appointed Peterson Consulting, L.L.C., formerly known as Peterson Consulting Limited Partnership, (hereinafter "Peterson"), among others, as "agents of the court" to assist the court in managing the refund process. The court directed that the State and Peterson execute a contract in order to document the State's obligation to pay for the Court's appointment of Peterson (hereinafter "Agreement"). Due to numerous delays by the State which postponed the timely completion of the refund process, Peterson exceeded its initial estimate of the cost of its services. However, the State refused Peterson's request for payment beyond the initial amount estimated by Peterson. Accordingly, Peterson filed a Motion to Compel Payment of Fees or, Alternatively, for Amendment of Order on Claims Administration Order (hereinafter "Motion to Amend Administration Order"). After hearing, the trial court entered its Order Granting The Motion Of Peterson Consulting Limited Partnership To Cancel Payment Of Fees Or, Alternatively, For Amendment Of Order On Claims Administration (hereinafter "Amendment To Administration Order").

The State timely appealed the trial court's Amendment To Administration Order. Peterson, however, filed a Motion to Dismiss the appeal because the trial court's Order was a non-final, interlocutory order, not subject to appellate review. The Fifth District Court of Appeal agreed with Peterson, but denied Peterson's motion. Instead, the Fifth District treated the State's appeal as a defective petition for writ of certiorari and then certified the matter to this Court as passing upon a question of great public importance requiring immediate resolution.

Although the State has failed to file an amended petition which conforms to the requirements of Rule 9.100, Florida Rules of Appellate Procedure, as directed by the Fifth District's May 1, 1996 Order, Peterson's response is filed as if the State had complied. Peterson believes the issues raised by the State can be adequately discerned from the State's defective petition and desires an immediate resolution of this issue.

II. STATEMENT OF THE FACTS

Pursuant to Rule 9.120(c), Florida Rules of Appellate Procedure, Peterson adopts the State's Statement of the Facts as set forth in the State's Brief, except as specified below. References to Petitioner's Appendix shall be designated as "App. ___". References to Peterson's Appendix shall be designated as "Peterson App. ___".

1. On March 24, 1995, the trial court entered its Administration Order. (App. 57).

2. Pursuant to paragraph 5 of the Administration Order the trial court appointed Peterson "as an agent of the Court to monitor and review the Comptroller's actions as Claims Administrator, the Treasurer's actions as Escrow Agent, and the actions of their representative designees in accordance with the Court-approved refund plan." (App. 57, ¶ 5).

3. Furthermore, paragraph 8 of the Administration Order provided that the State was to be responsible for all costs incurred by Peterson including fees for services agreed to by the Steering Committee and charged by Peterson for their services pursuant to a contract to be entered into with the State. (App. 57, ¶ 8).

4. A contract was apparently required in order to comply with State procedures for processing invoices. Accordingly, the State, through its Department of Highway Safety and Motor Vehicles, entered into an agreement with Peterson and listed a contract amount of $150,000 since, as representatives of the State informed Peterson, this amount was the maximum amount which the State's procedures allowed for purchase orders without competitive bidding even though the State's obligation for payment of all Peterson's costs was established by the Administration Order without limitation therein. (App. 6).

5. Because of numerous delays and inactions by the State in initiating and implementing the refund plan which resulted in extension of the impact fee filing deadline, the anticipated work by Peterson increased and, as a result, the cost of Peterson's work

increased. These events are more fully outlined in the Report of Peterson to the Court in August, 1995 and the Report of the Impact Fee Steering Committee to the Court on December 6, 1995, as well as memoranda from Ms. Kathleen Durdin of Peterson to the Impact Fee Steering Committee dated October 26, 1995, and November 30, 1995. (App. 12-44).

6. Due to the obligation of its appointment, Peterson continued to perform its duties after the $150,000 level. However, the State refused to pay any amounts above $150,000 and refused to amend voluntarily the Agreement even though the Administration Order provides that all expenses would be paid by the State. (App. 62-65).

7. Because of the State's refusal to perform its judicially ordered obligations, Peterson filed its Motion To Amend Administration Order.

8. On January 26, 1996, the trial court entered its Amendment To Administration Order granting Peterson's Motion to Amend Administration Order which modified the Administration Order to accurately reflect the trial court's intent and the intent of this Court as reflected in its opinion issued in this case on October 12, 1995. Kuhnlein v. Dep't of Revenue, 662 So. 2d 309, 315 (Fla. 1995).

9. The State appealed the Amendment To Administration Order. The Fifth District Court of Appeal denied Peterson's Motion to Dismiss Appeal and instead ordered the State to file a petition for

writ of certiorari and certified the issue to this Court for immediate resolution. (Peterson App. 1).

III. SUMMARY OF ARGUMENT

As an appointed "agent of the court", issues relating to Peterson's compensation are under the jurisdiction of and subject to the judicial discretion of the court making such appointment. Peterson's duties with regard to the impact fee disbursement are sufficiently analogous to those duties of a court appointed receiver such that the court had authority to order Peterson's compensation. Additionally, the trial court retained jurisdiction over the matter such that its Amendment To Administration Order was proper. By clarifying the Administration Order, the court emphasized that in return for Peterson's monitoring and reviewing the fee disbursement, Peterson would be justly compensated in accordance with the court's oversight authority, rather than being subject to the unilateral decisions of the State, which the court had ordered to refund monies unconstitutionally collected.

IV. ARGUMENT

A. This Court Should Deny Petitioner's Petition For Writ of Certiorari.

Certiorari review of a non-final order[1] of a lower tribunal is appropriate when the order departs from the essential requirements

[1] Although the State attempted to "appeal" the trial court's order as a final order, the Fifth District Court of Appeal, pursuant to Peterson's Motion to Dismiss, ruled that the trial court's Amendment to Administration Order was "not an appealable final order". Instead, the Amendment to Administration Order was interlocutory and thus, the appellate court considered the State's appeal as a defective writ of certiorari. (Peterson App. 1).

of law and, thus, causes material injury to the petitioner that cannot be adequately remedied on appeal. Vargas v. Americana of Bal Harbor, 345 So. 2d 1052 (Fla. 1976); ACandS, Inc. v. Askew, 597 So. 2d 895 (Fla. 1st DCA 1992); In re Estate of Hayward, 463 So. 2d 446 (Fla. 4th DCA 1985).

The State, however, has failed to show that (1) the Amendment To Administration Order was a departure from the essential requirements of law; (2) the State suffered the requisite injury; and (3) an adequate remedy at law is unavailable. Although the State's defective petition fails to set forth the issues in conformance with the applicable rules, the State has fully set forth the basis upon which it believes the Amendment To Administration Order was improper. However, the State's focus is incorrect. The State's arguments rest on the issue of improper joinder and that the trial court "abused its discretion in permitting an independent matter being heard in an entirely different case." (Brief of Appellants p.14). However, the real issue in this dispute is whether the trial court departed from the essential requirements of law by amending its prior Administration Order to clarify its intent, and the intent of this Court, that the State be responsible for compensating Peterson for its efforts as an agent of the court in overseeing the refund process.

B. The Trial Court's Order Did Not Depart From The Essential Requirements Of Law.

1. The trial court had inherent authority to amend its Administration Order to reflect and clarify its intent.

The rule at common law was that a court had absolute control over its own orders and could amend them at any time during the term in which they were made. Alabama Co. v. J.L. Mott Iron Works, 98 So. 825, 86 Fla. 608 (Fla. 1924). However, it is equally well settled under modern law that interlocutory judgments or decrees are always subject to a court's modification or rescission upon sufficient grounds at any time before final judgment. J.L. Mott, 98 So. at 826; Bing v. A.G. Edwards & Sons, Inc., 498 So. 2d 1279 (Fla. 4th DCA 1986); Marguilies v. Levy, 439 So. 2d 336 (Fla. 3d DCA 1983); Travelers Indemnity Co. v. Walker, 401 So. 2d 1147 (Fla. 3d DCA 1981). The trial court's Administration Order was interlocutory in nature and thus, subject to modification or amendment.[2]

The trial court entered the Amendment To Administration Order in order to more accurately reflect its:

> intent in entering the Order On Claims Administration dated March 24, 1995 that the state pay all Peterson's fees resulting from Peterson's performance of its responsibilities under the Claims Administration Order as an agent of this Court.

(App. 67). Additionally, the Amendment To Administration Order was issued in order to more accurately reflect the intent of this Court that the State "pay all further costs of administration of the refund". Kuhnlein, 662 So. 2d at 315.

As evidenced by the Amendment To Administration Order, the trial court did not intend to limit Peterson's compensation to any contractual limit. A careful reading of the Administration Order

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[2] See supra note 1.

and the Amendment To Administration Order clearly evidences the trial court's intention that it would create and oversee the relationship between the State and Peterson. However, the State argues that the Agreement governs the rights and obligations between the State and Peterson, regardless of the trial court's intent.[3]

Contrary to the State's inaccurate contention that the Amendment To Administration Order requires the State to compensate Peterson for "whatever work they had done, and would do, without limitation", the trial court properly provided restrictions on the State's obligation to render payment. As the court stated:

> [n]otwithstanding the foregoing, the Court reserves jurisdiction to review, if requested, the reasonableness of Peterson's fees upon the filing of a motion by the State within thirty (30) days after the State's payment of the final invoice submitted by Peterson.

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[3] In fact, the State's argument that the Agreement governs the entire relationship between itself and Peterson is illogical. The State may not preempt Peterson's rights contrary to the court's intent. The Agreement itself contains many provisions which are in direct conflict to the trial court's order. For example, Article 7 of the Agreement allows a unilateral termination of the Agreement by the State with only five (5) days notice if at any time the State is unsatisfied with Peterson's performance. (App. 6, Art. 7). In such an instance, it is only logical that the trial court's decision regarding the adequacy of Peterson's performance would govern, not the State's unilateral decision. Article 11 provides that only amendments which are mutually agreed upon and approved by the court shall be incorporated into the Agreement. (App. 6, Art. 11). Here again, it is illogical to assume that the State has complete authority over whether any amendments might be necessary. Since the court created the relationship of the parties and never relinquished jurisdiction thereof, such matters are within the court's discretion.

(App. 66, ¶3). Upon a careful consideration of the trial court's ruling, the Amendment To Administration Order is not unreasonable, and therefore, was within the court's inherent authority.

2. The trial court intended that the State be responsible for all of the fees Peterson reasonably incurred in the performance of its duties.

The Administration Order stated:

> [t]he State shall be responsible for all costs incurred by the Comptroller, Peterson Consulting, and the Treasurer in carrying out their respective appointments set forth above. These costs shall include the fees for services agreed to by the Steering Committee and charged by Peterson Consulting for their services pursuant to its contract with the State.

(emphasis added) (App. 59-60). As evidenced, it was the trial court's intent that the State be responsible for all of Peterson's fees. The trial court did not intend that Peterson's compensation be limited to a contract amount. Instead, it was the trial court's intent that the State's and Peterson's rights and obligations would flow from the court's order, not any agreement entered into between the State and Peterson. (App. 66, ¶¶ 5, 6 and 7).

Even between the State and Peterson, the Agreement was not intended to reflect all of the rights and obligations of the parties. The State indicated the Agreement was necessary only in order to create an account in the State's billing system such that payments could be generated from that account. (App. 1, ¶ 5). The State also informed Peterson that a maximum amount of $150,000.00 must be stated in the Agreement in order to comply with state law regarding bidding requirements, but that if Peterson's services

exceeded this amount, an amendment to the Agreement would be executed, if necessary. (App. 1, ¶ 6).

When Peterson sought compensation from the State for services rendered in an amount above $150,000.00, the State refused payment even though the Agreement specifically allows for such amendments. (App. 6, Art. 11). However, as the trial court noted:

> While it is always contemplated by the Court that parties stipulate, if such cannot be done then this Court has inherent authority and power to effectuate and monitor orderly distribution of the refund. (App. 66, ¶8).

3. As an "Agent of the Court", Peterson's compensation was properly subject to judicial discretion.

The Administration Order appointed Peterson:

> as an agent of the Court to monitor and review the Comptroller's actions as Claims Administrator, the Treasurer's actions as Escrow Agent, and the actions of their representative designees in accordance with the Court-approved refund plan. (App. 59).

Peterson was further instructed by the court to:

> assist the Steering Committee and the Court in monitoring the activities of the Comptroller, the Treasurer, and their respective designees, and performing such review functions as may be reasonably necessary. Peterson Consulting shall assist the Steering Committee in filing a written status report with the Court each month after the Court approves the refund plan. (App. 59).

Clearly then, Peterson's obligations were not limited as reflected in the Agreement. Peterson's duties were determined by the trial court. As an agent of the court, the trial court had full authority to order Peterson's compensation for the reasonable value of its services.

Receivers are also appointed agents of the court who generally engage in activities similar to those of Peterson as a function of

their overseeing obligations. Accordingly, cases involving a court's authority over receivers are relevant. Courts are generally vested with large discretion in determining who shall pay the costs and expenses of receiverships and the amounts thereof. Johnson v. Kruglak, 246 So. 2d 617, 619 (Fla. 3d DCA 1971); Deauville Corporation v. Blount, 34 So. 2d 537, 538 (Fla. 1948). In Lewis v. Gramil Corp., 94 So. 2d 174 (Fla. 1957), the court stated:

> [t]hat the allowance of fees and expenses to a receiver is within the sound discretion of the chancellor is clear, but as in all other matters such discretion is not an unbridled one. The allowance of such fees and expenses is discretionary only in the sense that there are of necessity no fixed rules, no schedule of fees, no mechanical means by which to determine what is a proper allowance thereof. Such allowance is not discretionary in the sense that the chancellor is at liberty to award anything more or less than fair and reasonable compensation for the services rendered or monies expended in each individual case.

Id. at 176. As in the cases involving receivers, Peterson's compensation was properly subject to the trial court's discretion.

Since the trial court had inherent authority to amend its Administration Order to properly reflect its intent on issues regarding Peterson's compensation, the Amendment To Administration Order did not depart from the essential requirements of law.

C. The Trial Court's Amendment To Administration Order Does Not Cause Petitioner Material Injury That Is Irreparable At Law.

The trial court entered its Amendment To Administration Order to clarify its intent, which obviously the State misinterpreted, that as an agent of the court, Peterson would be fairly compensated for its labor. The State has not demonstrated that it has suffered

any injury, much less a material and irreparable injury, by the trial court's Amendment To Administration Order. Furthermore, assuming that it has incurred a material injury, the State has an adequate remedy at law set forth in paragraph 3 of the Amendment To Administration Order which provides that the trial court retains jurisdiction to review the reasonableness of Peterson's invoices if requested by the State. Even absent this provision, however, the State has failed to show that the injury suffered, if any, is irreparable on a post-judgment appeal.

V. CONCLUSION

The trial court entered its Amendment To Administration Order reasonably and with proper authority. Therefore, the trial court did not depart from the essential requirements of law. Further, the State's alleged injury is neither material nor irreparable at law. Upon consideration of the foregoing arguments and legal authority, Respondent, Peterson, respectfully requests this Court to deny Petitioner's petition for writ of certiorari and affirm the trial court below.

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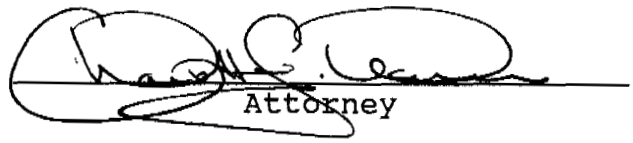
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Christopher K. Kay, Esq., Kay, Panzl & Lathan, LLP, P.O. Box 3353, Orlando, FL 32802; and Michael J. Beaudine, Esq., Foley & Lardner, P. O. Box 2193, Orlando, FL 32802-2193; W. Gordon Dobie, Esq. and Bruce R. Braun, Esq., Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601; Harry P. Chiles, Esq. and Eric J. Taylor, Esq., Office the Attorney General, The Capitol, Suite PL01, Tallahassee, FL 32399-1050; and Josephine A. Schultz, Esq., Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350, this 1st day of October, 1996.



Attorney

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

FLORIDA DEPARTMENT OF REVENUE, et al.,
Appellant,

v. CASE NO. 96-699

DAVID KUHNLEIN AND SCOTT ENOS, et al.,
Appellee.
_____/

DATE: May 1, 1996

BY ORDER OF THE COURT:

ORDERED that Appellees' Motion To Dismiss Appeal, filed April 11, 1996, is denied. Although not an appealable final order, the order is subject to review by writ of certiorari. Accordingly, pursuant to Florida Rule of Appellate Procedure 9.040(c), the March 5, 1996 Notice Of Appeal filed with the lower court is deemed a defective Petition For Writ Of Certiorari. The Petitioner shall have fifteen days from the date hereof to file an amended petition that conforms to the requirements of Florida Rule of Appellate Procedure 9.100. Respondent shall show cause, within fifteen days from service thereof, why the amended petition should not be granted.

The parties further are directed to file and advise this Court, within ten days from the date hereof, whether review of the subject lower court order should most properly be heard by the Supreme Court of Florida. *See Kuhnlein v. Department of Revenue*, 20 Fla.L. Weekly S281 (Fla. June 9, 1995); *Kuhnlein v. Department of Revenue*, 20 Fla.L. Weekly S526 (Fla. Oct. 12, 1995).

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Clerk of the Court, Orange County (CI92-6224)
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