IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC05-667
LOWER TRIBUNAL CASE NO. 5D03-1968

NOEL THOMAS PATTON, et al.,

Petitioners,

vs.

KERA TECHNOLOGY, INC., et al.,

Respondents.
_____/

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ANSWER BRIEF OF RESPONDENTS KERA TECHNOLOGY, INC. and GEORGE CHENG-HAO HUANG

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JOHN S. SCHOENE, ESQ.
JOHN S. SCHOENE, P.A.
Florida Bar Number: 313203
Counsel for Respondents
Suite 205
100 East Sybelia Avenue
Maitland, FL 32751
Telephone: 407-644-9900
Facsimile: 407-644-1282

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PREFACE

Petitioners, NOEL THOMAS PATTON, EVE M. PATTON, and EDWIN W. DEAN, plaintiffs in the Trial Court, shall be referred to as "Petitioners" or "Plaintiffs". Respondent, KERA TECHNOLOGY, INC., defendant in the Trial Court, shall be referred to as "KERA." Respondent, GEORGE CHENG-HAO HUANG, defendant in the Trial Court, shall be referred to as "HUANG." Respondent, GABRIEL SIMON, defendant in the Trial Court, shall be referred to as "SIMON." SIMON, KERA and HUANG may sometimes be collectively referred to as "Respondents" or "Defendants". The Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida shall be referred to as the Trial Court and the Fifth District Court of Appeal shall be referred to as the Fifth District.

For simplicity of reference, HUANG and KERA shall employ the same method of citation to the record of appeal as Petitioners, and SIMON. The record on appeal will be cited as [R. ___]. Pages 1 through 203 comprise Volume I and pages 204 through 317 comprise Volume II of the record on appeal. Petitioners' Initial Brief on the Merits shall be referenced as [IB].

TABLE OF AUTHORITIES

RULES:

STATEMENT OF FACTS

The Plaintiffs filed this suit in December 1998. Plaintiffs' Complaint sought recovery under a contract with Defendant, Gabriel Simon, George Cheng-Hoa Huang and Kera Technology, Inc. referred to as "Confidential Memorandum of Understanding" ("CMU") and two promissory notes signed by Simon, in the amounts of $200,000.00 and $100,000.00. [R.1-37] "New Kera" was to be formed after a due diligence period to acquire certain assets owned by Simon, Huang, Kera and Unidata under the CMU, paragraph 1, [R.12]. During this interim period when the parties were to develop a "business plan", the CMU provided for a bridge loan to keep Kera afloat. Pursuant to paragraph 6 of the CMU $300,000.00 was loaned to Simon (because he was solvent) which was then loaned to Kera, which, at the time, was in "severe financial distress." Complaint, paragraph 9 [R.3]. As acknowledged in the Amended Complaint, soon after the lawsuit was filed "Simon paid the $200,000.00 note." Amended Complaint, paragraph 37 [R.98].

The second note in the amount of $100,000.00 under the explicit terms of the CMU and the Note itself was made "without recourse to Simon", CMU, paragraph 6 [R.17, 21], and repayment by Simon to Plaintiff, Eve Patton, was conditioned upon repayment by Kera to Simon [R. 17, 24, 95], as noted above,

Kera was understood by all parties to be in "severe financial distress," and no where do Plaintiffs allege that Kera repaid or had the ability to repay Simon.

As this Brief is filed in January 2006, this case involving two promissory notes, one paid in full and the other never having become due according to its terms, enters its eighth year. See Defendants' Affirmative Defenses, paragraph 6 [R. 38-39].

In 1999, Plaintiffs' Atlanta counsel, Messieurs Lyons and Rainer, sought to be added as co-counsel *pro hac vice*, which motions were granted by order filed March 16, 1999. [R.40-45] In 1999, Terrance McCollough of Orlando became successor lead counsel for the plaintiffs.

Plaintiffs' Atlanta counsel were included on a single certificate of service on a response to plaintiffs' first request for production of documents on December 30, 1999. [R. 51-53] Thereafter, for a period of thirty-five months, up to the time of filing of Plaintiffs' motion to quash on December 10, 2002, the Atlanta counsel were not included on certificates of service on motions, notices of hearing, or court orders prepared or filed by either Plaintiffs' lead counsel or Defendants' counsel. [R. 54-147, 224-225] There is no record of any objection by Plaintiffs' lead counsel or Atlanta counsel during the thirty-five-month period to this method of

service on Plaintiffs' lead counsel only.

Defendants' filed Motions to Dismiss the Amended Complaint in May 2001. [R. 127-130, 133-134]. On May 3, 2001 a notice of hearing was filed by Plaintiffs for a July 9, 2001 hearing on the 2001 substantive motions. [R.131-32]. The Trial Court held a hearing on the Motions to Dismiss the Amended Complaint on July 9, 2001. Mr. McCollough appeared on behalf of Plaintiffs. At the hearing, the Trial Court granted in part and denied in part Defendants' Motions to Dismiss the Amended Complaint. [R. 211, 238]. The Trial Court directed McCollough to prepare and submit a proposed order after review by Defendants' counsel, which he never did [R. 211, 238].

Thereafter there was no record activity for a period of over one year and the LOP motions were filed by defendants in early August, 2003. [R. 137-140] Defendants LOP Motions were served on Plaintiffs consistent with service by the court and the parties for the previous three years, i.e. to Mr. McCollough at his address appearing in the court file [R. 137-140]. Both LOP motions stated that the court had previously ruled on defendants' motion to dismiss but that no order had been submitted as directed by the court. [R. 135 and 137] The LOP motion filed on behalf of Simon stated more specifically that Plaintiffs' counsel had been directed

to submit the order on the motions to dismiss heard on July 9, 2001. This fact was confirmed by statements of defendants' counsel in open court at the motion to quash hearing on December 20, 2002 before Judge Hauser. [R. 211/ lines 18-20; R. 211-212/ lines 22-1]. The assertion that Mr. McCollough was directed by Judge Hauser to prepare an order on the Motions to Dismiss was never disputed or denied by Petitioners anywhere in the record other than in these affidavits attached to their Motion for Rehearing. [See R. 271-273; 279, 281, 284, 290].

After filing of the LOP Motions and Notices of Hearing, there was no contact or communication with any of Plaintiffs counsel. [R. 39] At the August 21, 2002 hearing on the LOP Motions, the attorneys for Defendants advised the Trial Court of the factual background for the LOP Motions. [R. 239] Mr. McCollough did not appear at the hearing. On August 21, 2002, the Trial Court granted the LOP Motions and entered two orders dismissing the case for lack of prosecution. [R.145, 146-147] The orders were sent to Plaintiffs at the address for Mr. McCollough in the court file.

In early December 2002, Plaintiffs filed a Motion for Substitution of Counsel, to Quash Orders of Dismissal, and for Case Management Conference ("Motion to Quash"). [R. 148-151] No supporting affidavits or documentation of

any kind was filed with this Motion.

A hearing on Plaintiffs' Motion to Quash was held on December 20, 2002. At this hearing, Judge Hauser found that service on Mr. McCollough at his last known address was sufficient, but reserved ruling on whether duplicative service was necessary as to Plaintiffs' Atlanta counsel, because the Motion to Substitute Counsel was granted on a limited basis. [R. 222]

The hearing on Plaintiffs' Motion to Quash was held before Judge Hauser on February 12, 2003. [R. 182J] As a result, Judge Hauser quashed the August 21, 2002 dismissal orders on "the sole ground that the failure of Defendants to serve Plaintiffs' Atlanta attorneys with copies of their 2002 Motions, Notices of Hearing and the Orders thereon dismissing the action ..." [R. 266]. Defendants' attorneys thereafter served Plaintiffs' new lead counsel and their Atlanta counsel with the previous LOP Motions and a new Notice of Hearing before Judge Renee A. Roche scheduled for March 10, 2003. [R. 267A] The second Rule 1.420(e) hearing was held before Judge Roche on March 10, 2003 and an order confirming the results of the hearing was entered on April 8, 2003 [R. 304-305]. Thereafter Plaintiffs filed its Motion for Rehearing, Reconsideration and Clarification which for the first time contained affidavits of any kind. [R. 274-297]. There was no court reporter at the

hearing and no transcript exist. The Trial Court denied the Motion for Rehearing on May 12, 2003 without comment regarding the substance of the Motion or the attached affidavits. [R. 298].

Without explanation, the "facts" set forth in Petitioners Brief at pp. 4-6, 8 relative to McCollough's emails and other communications with Atlanta counsel, etc., are presented out of chronological sequence in terms of when they were made a part of the court file below. These "facts" are wholly from affidavits attached to Petitioners' Motion for Rehearing, Reconsideration and Clarification below [R. 274-297] (hereinafter "Motion for Rehearing"), which was denied without comment by the Trial Court. [R.298].

As presented out of sequence chronologically in the Statement of the Case and Facts of Petitioners' Brief, prior to Sections D, E and F, there is potential for confusion. Petitioners' Brief does not make clear that these matters were not before Judge Hauser at the Motion to Quash stage or even Judge Roche at the second hearing on the LOP motions.

Plaintiffs did not file any affidavits or verified pleadings prior to the second hearing on the LOP motions before Judge Roche to establish any relevant facts as to what occurred during the motion to dismiss hearing on July 9, 2001 or to

establish any other non record activity during the relevant one year period. Plaintiffs' sole filing to demonstrate good cause was the three-page, unverified "Plaintiffs' Response and Objection to Defendants' Motion to Dismiss for Failure to Prosecute" [R. 271-273]. Nothing else was filed for this second hearing on the LOP motions.

Plaintiffs acknowledged the problem created for the Trial Court at the second LOP hearing by the absence of a factual record in their Motion for Rehearing, at paragraph 4 as follows [R. 274]:

> 4. If and to the extent the court's ruling was based upon the facts and reasonable inferences it felt were in (or absent from) the record, the plaintiffs attach as Exhibits "1", "2" and "3" hereto the affidavits of plaintiff, Edwin Dean, Atlanta counsel, J. Marbury Rainer, and successor local counsel, Ken Mann …

The only affidavits appearing in the record below were belatedly filed with the Motion for Rehearing after Judge Roche dismissed the case the second time on March 10, 2003. Prior to filing of Plaintiffs' Motion for Rehearing, the issue of attorney misconduct as a separate grounds for "good cause" had not been raised "in writing" by Plaintiffs. (R. 271-273).

Petitioners also state at p.8 of the Petitioner's Brief, that "it is undisputed that McCollough never ... informed Petitioners or their co-counsel of [the]

existence [of the LOP motions]." The undersigned cannot locate this statement in the record below nor is it supported by any citation to the record by Petitioners. The content of this statement by Petitioners is certainly not conceded by Respondents anywhere in the record.

Lastly there is no transcript of the second hearing on Defendants' LOP motions, which resulted in entry of the order that is the subject of this appeal. The Court's Order Denying Plaintiffs' Motion for Rehearing does not indicate whether Plaintiffs belated affidavits were considered by the Trial Court for any purpose. [R. 298].

Plaintiffs then appealed the April 8, 2003 orders granting the LOP Motions to the Fifth District. After briefing and oral argument, the Fifth District affirmed the Trial Court's orders per curiam. On February 18, 2005, the Fifth District granted Petitioners' request for rehearing and substituted a written opinion for its previous per curiam affirmance (the "Fifth District Opinion").

SUMMARY OF ARGUMENT

The court correctly commenced the one-year look back period from the date the LOP motions were filed under Rule 1.420(e) and applicable case law. Petitioners cite no legal authority for disregard of this well settled rule.

The Petitioners made no showing of good cause by verified pleading or affidavit prior to the second hearing on the LOP motions before Judge Roche and made no showing of any non-record activity during the relevant one- year period. Dismissal was mandatory in accordance with *Metropolitan Dade County v. Hall* decision.

The ruling in *Dye* has no application to the facts of this case and was not the basis of the lower court's ruling. If necessary *Dye* should be disapproved.

The Trial Court did not abuse its discretion by not granting the Motion for Rehearing and consider the conduct of Petitioners' counsel as good cause under Rule 1.420(e). The issue of Petitioners' attorney's conduct was not even raised as "good cause" in Petitioners' filing with the court prior to the hearing on the LOP Motions.

The court below did not abuse its discretion in granting the LOP motions.

STANDARD OF REVIEW

The standard of appellate review with respect to dismissal for failure to prosecute is generally whether or not their Trial Court abused its discretion. *See, e.g., Sewell Masonry Co. v. DCC Const. Inc.*, 2003 WL 22970872, 29 Fla. L. Weekly D 35,862 So.2d 893 (Fla. 5th DCA 2003).

As this Court held in *Canakaris v. Canakaris*, 382 So.2d 1197 at 1203 (Fla. 1980), the applicable test is as follows:

> Discretion ... is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man [or woman] would take the view adopted by the trial court. If reasonable men [or women] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

ARGUMENT

I.

THE COURT CORRECTLY COMMENCED THE ONE YEAR LOOK-BACK PERIOD FROM THE DATE THE LOP MOTIONS WERE FILED.

Petitioners' argument that the one year, look-back period should be recalculated from the date of the second service of the Notice of Hearing on Petitioners' Atlanta counsel rather than the date of filing of the motions finds no support in the law. Petitioners have cited no case law to support their position. Circuit Judge Hauser quashed the original LOP dismissal orders but did not quash the motions themselves or otherwise direct the defendants to re-file the LOP motions. [R. 266]

Petitioners did not file a Motion to Strike or Quash the LOP motions in the

court below and never requested the motions to be stricken in their prayer for relief. Petitioners filed Plaintiffs' Motion for Substitution of Counsel, To Quash Orders of Dismissal, and for Case Status Management Conference [R. 148-151], wherein the relief requested was as follows: "Plaintiffs' request this court to enter its order ... quashing the orders filed August 21, and 22, 2002 ..." [LOP orders] [R. 151]. Now on appeal, Petitioners seek relief that was never requested below, a determination that the filing of the LOP motions were a nullity or somehow should be "negated" on appeal.

It is settled law, the one year period specified in Rule 1.420(e) is to be measured by calculating the time between the date of the last record activity and the date of filing of a motion to dismiss. "In the case at bar the Trial Court was correct in directing its focus back from ... the filing date of Defendants' Motion to Dismiss ..." *Government Employees Insurance Company*, 382 So.2d 124, 125 (Fla. 5th DCA 1980); Accord, *Florida Eastcoast RY. Company, v. Russell*, 398 So.2d 949 (Fla. 4th DCA), review denied, 411 So.2d 381 (Fla. 1981); *Fallschase Development Corp. v. Sheard*, 655 So.2d 214 (Fla. 4th DCA 1995). Pleadings filed after the filing of the motion to dismiss are not to be considered by the Trial Court. *Government Employees Insurance Company*, Id. at 125, citing *Chrysler Leasing*

Corp. v. Passacantilli, 259 So.2d 1 (Fla. 1972).

The undersigned respectfully submits that Petitioners' Atlanta counsel had been asleep at the wheel for a period of almost three years prior to the date of filing of the LOP motions. Petitioners' Atlanta counsel had not bothered to be included on certificates of service of motions, notices of hearing and orders either prepared by defendants' counsel or plaintiffs' lead counsel[1] for a period of thirty-five months [R. 52-147]. Although the LOP motions were served on Petitioners' local counsel (their chosen agent), in an abundance of caution with regard to any conceivable due process right[2], Judge Hauser's order quashing orders of dismissal [R. 266-267] and afforded the Petitioners a second hearing to make a showing of good cause. This was the proper remedy and the only remedy requested by Petitioners below. See, *Fallschase Development Corp. v. Sheard, supra*.

[1] Do Petitioners suggest that they were denied due process for 35 months by local counsel of their selection? Petitioners' Atlanta counsel have never suggested they were not provided with copies of pleadings and orders during this period. Defendants prepared certificates of service consistent with those of Petitioners' counsel on pleadings and orders without objection by anyone. [See R. 119,120].

[2] In the trial court's words it was "a very technical issue." [R. 220]

II.

THE FIFTH DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S RULING GRANTING THE LOP MOTIONS

A. Affirmance of the decisions below by Trial Court and the Fifth District Court of Appeals only requires adherence to the teachings of *Metropolitan Dade County v. Hall*, 784 So.2d 1087, 1090 (Fla. 2001):

> Rule 1.420(e) plainly states that actions shall be dismissed if it appears on the face of the record that there was no activity within the past year. This requires only a review of the record. There is either activity on the face of the record or there is not. If a party shows that there is no activity on the face of the record, then the burden moves to the non-moving party to demonstrate within the five (5) day time requirement and one of the three basis that would preclude dismissal exist.

At Footnote 4, this Court made clear that

> Dismissal is mandatory if it is demonstrated to the Court that no action towards prosecution has been taken within a year. The trial judge has no discretion in the enforcement of this aspect of the rule. The abuse of discretion standard is triggered only if the trial court must make a determination of good cause. (citations omitted).

There was no activity on the face of the record for more than one year prior to the filing of the LOP motions. At no time prior to the second hearing on the LOP motions did the Petitioners offer any evidence of non-record activity of any kind, much less non-record activity with any design to move the case forward [R.

271-273].

Finally, the Petitioners' "unfinished business" issue was totally unsupported by affidavit, verified pleading or deposition testimony filed before the five (5) day period or at the hearing itself. Petitioners' Brief [IB 19-21], queries "what if the court had not yet ruled on all or some of the dispositive issues before it on July 2001?" and what if "the court ruled but did not instruct Mr. McCollough to prepare an order." What if Mr. McCollough was instructed to submit a proposed order, as asserted in the Simon LOP motion and by both of Defendants' counsel at the hearing before Judge Hauser. [R. 211]?[3] Petitioners have not offered any legal authority for their unstated proposition that the Fifth District was somehow legally obligated to "assume" facts not in the record or consider multiple hypothetical factual scenarios rather than the actual facts in the record when reviewing the decision of the Trial Court. The Petitioners' go on to state, "simply put, there are too many unanswered questions to squarely say it is the Plaintiffs below and not the Trial Court which should bear the responsibility in punishment for failure to

[3] The undersigned counsel takes issue and offense at Petitioners' negative description of my representation to the Court as "unsubstantiated and self-serving statements of defense counsel." [IB 20]. The undersigned has personal knowledge of what occurred at the hearing in question and so advised Judge Hauser as an officer of the Court.

enter a written order on Respondents' dispositive motions" [IB 21]. (Emphasis added). Such a statement rings hollow in light of Petitioners failure to present any evidence at the second LOP hearing or provide a transcript of the hearing. Moreover, Petitioners' prior counsel, Mr. McCollough, was at the hearing on the dispositive motions to dismiss and could have offered affidavit or deposition testimony to establish the facts in question occurring at the hearing or outside the record at other times relevant to Rule 1.420(e). Lest we forget or forgive, it was Petitioners burden to show good cause under Rule 1.420(e).

Filing affidavits of counsel or other verified responses (prior to the hearing) is the generally accepted practice to show good cause and provide an evidentiary basis to the Trial Court to resolve "unanswered questions." See *Tomkins v. First Union Nat. Bank*, 833 So.2d 199 (Fla. 5th DCA 2002) verified response to Rule 1.420 motion; *Bakewell v. Shepard*, 310 So.2d 765 (Fla. 1st DCA 1975) affidavit of counsel. When there are facts which do not appear on the face of the record, they must be supported by affidavit, deposition or other proof. *Miller v. Mariner*, 403 So.2d 472 (Fla. 5th DCA 1981).

There has never been suggestion in the Court record that Mr. McCollough was not available to give an affidavit or provide deposition testimony as to what

his recollections were or what his file notes might have indicated regarding all of Petitioners' "unanswered questions." More importantly, in a deposition or in live testimony before the Court, Mr. McCollough would have been submitted to cross examination by Defendants' counsel, the other participants at the hearing in question. Once those facts were properly presented to the Court below they would have been in a posture to be disputed by Defendants' counsel by affidavit or sworn testimony and ruled upon by the Trial Court. See *Fort Walton Lumber & Supply Company v. Parrish*, 142 So.2d 346, 348 (Fla. 1st DCA 1962), requiring evidentiary hearing to resolve factual dispute over existence of "good cause" in Rule 1.420(e) context.

Petitioners had ample time to establish the relevant facts. Petitioners' Motion to Quash was filed in December 2002 and their second Rule 1.420(e) hearing was in March 2003. Petitioners had three months to be prepared and make a factual showing by providing testimony of their prior counsel or even Atlanta counsel. Yet Petitioners did nothing to establish non record facts to establish the circumstances of the alleged "unfinished business" and elected to appear at the second hearing on the LOP motions upon the mere filing of its "Objection". [R. 271-272]. The Objection was argued by Mr. Mann who had no personal

knowledge of any facts relevant to the Court's prior hearing or rulings.

It is the province of the Trial Court to resolve factual disputes. There is no way to determine at this late date whether the Trial Court would have been able to resolve the factual disputes in this case, if any. What is legally determinative, however, is that the Petitioners made no effort to establish the facts in this case for the Court's determination of whether there existed good cause. The utter lack of a factual record is the true "unfinished business" which dictates the outcome of this case in accordance with *Metropolitan Dade County v. Hall*, supra.

There is certainly no "mystery" [IB 19] as to whether the Trial Court felt there was an absence of facts for its determination. One has only to review the text of Petitioners' Motion for Rehearing and the attached affidavits [R. 274-297]. Petitioners repeatedly refer to "facts" appearing in their Motion for Rehearing and attached affidavits throughout Petitioners Brief, without any citation to any legal authority suggesting that the affidavits were properly before the Trial Court or their substance admissible under the Florida Rules of Evidence.

There is no indication one way or the other whether the Trial Court even considered Petitioners' belated affidavits or their sufficiency, i.e. all references to second-hand, out-of-court communications with Mr. McCollough are hearsay.

Petitioners offer no legal analysis or citation to authority on this issue either. There is no requirement that the Trial Court articulate any reasons for its denial of the Motion for Rehearing. Such a "denial without explanation is the common practice." *Stoner v. W.G., Inc.*, 300 So.2d 268 (Fla. 2d DCA 1974). Petitioners' Motion for Rehearing was denied without further hearing, thus, Defendants were never provided an opportunity to contest the legal sufficiency of the Motion for Rehearing or the affidavits themselves.

Consideration of the Motion for Rehearing is left to the sound discretion of the Trial Court. *Braznell v. Braznell*, 191 So.2d 457 (Fla.1939). What is more clear is that the Motion for Rehearing, on its face, does not articulate any basis for the Trial Courts' reconsideration, such as an oversight by the court , error on the face of the trial record or newly discovered evidence. *Braznell*, Ibid; *Cole v. Cole*, 130 So.2d 126 (Fla. 1961); *Stevens v. Stevens*, 666 So.2d 227 (Fla. 2d DCA 1995); *Noor v. Continental Casualty Co.*, 508 So.2d 363 (Fla. 2d DCA 1987). Petitioners have never articulated in their brief below or before this court any basis (factual or legal) for a finding that the Trial Court abused its discretion in its failure to grant the Motion for Rehearing. This is a separate and distinct issue on appeal which, apparently, Petitioners have abandoned or deemed to be without merit. See

Respondents' Argument, Part IV, infra. *Stevens*, supra. *Noor*, supra.

What cannot be disputed from the actual record before the Trial Court is that Petitioners did nothing during the one year period prior to the filing of the LOP motions. Then Petitioners did nothing for a second time when given a second opportunity to establish facts supporting any showing of good cause before Judge Roche. Petitioners even failed to have the show cause hearing transcribed. If a matter is worth litigating, trial proceedings should be reported and transcribed so an appellate court has a record to consider. *Wright v. Wright*, 431 So.2d 177 (Fla. 5th DCA 1983); *Gordon v. Burke*, 429 So.2d 36 (Fla. 2d DCA 1983). Without a transcript of the proceedings below, the "order of the Trial Court comes to [the appellate] court with a presumption of correctness." *VandenBoom v. YLB Investments, Inc.*, 687 So.2d 964 (Fla. 5th DCA 1997).

In their Brief at p. 21, Petitioners state "facts such as these beg a bright line solution to the question, 'May a plaintiff rely upon the fact that a trial court has failed to rule and enter a written order on a dispositive motion, regardless of which party if any is delegated the duty to prepare a proposed order, and preclude dismissal for failure to prosecute.'" (Emphasis added). The questioned posited by Appellants bears no relation to the facts presented to the Trial Court. Where did

Petitioners establish below the "fact" that the court had failed to rule? Do Petitioners now admit the "fact" that either party was directed to prepare a "proposed order?" Petitioners never attempted to establish such facts below. How can "facts such as these" which do not exist in the record below, "beg" for any relief, much less a bright line solution.

The better question for purposes of this appeal is, "How many failures, solely within the control of the Plaintiffs and their counsel, are to be overlooked or excused in order to then place the "burden" on the Trial Court to expedite the litigation rather than the Plaintiffs, all inconsistent with the longstanding application and intent of Rule 1.420(e)?" Petitioners brazenly take no responsibility for their (1) failure to select local counsel who would advance their cause, (2) failure to object to the manner of service of pleadings and orders for a period of 35 months, (3) failure to undertake any record activity for over one year, (4) failure to take any action when the "no activity" status of the case was reviewed in June 2002 by Mr. Mann at the insistence of Petitioners' Atlanta Counsel [R. 288], (5) failure to make any effort to properly present facts establishing good cause at the Rule 1.420(e) hearing despite three months to prepare and (6) failure to provide a transcript of the crucial hearing below for review by the Appellate

Court. [4]

The only "bright line rule" needed in this case is: When a party fails to even attempt to establish the facts not apparent from the record to establish good cause (or provide a transcript of the hearing), it cannot seek reversal of the decision below based upon "too many unanswered [factual] questions" Petitioners position in this appeal is inconsistent with elementary principles of estoppel and logic.

To permit the Petitioners to shift the burden of "responsibility" to "the Trial Court" on the basis of "too many unanswered questions" [IB 21], a circumstance of their own creation, would visit a gross injustice on the Defendants to this action who lives have been clouded by this litigation for seven plus (7+) years. When given a second opportunity, Petitioners simply failed to establish good cause at the Rule 1.420(e) hearing. In keeping with the teachings of *Metropolitan Dade*, the LOP motions were properly granted by the Trial Court, the trier of fact below.

When you couple the abuse of discretion standard of review with the lack of a factual record and a transcript of the proceedings, how could an appellate court

[4] The "icing on the cake" is surely the Petitioners' unabashed and wholesale reliance on the affidavits attached to their Motion for Rehearing, with no citation to any legal authority, no analysis of the breadth of the Trial Court's discretion to disregard them, and no discussion of the obvious hearsay nature of the unsworn, out-of-court communications with prior counsel, who, at the same time, Petitioners assert was untruthful.

determine with certainty that the Trial Court was "arbitrary, fanciful, or unreasonable?" *Canakaris*, supra. The Fifth District could not make such a determination after giving Petitioners more leeway than the law allows. See Part IV, infra. The Fifth District correctly ruled:

> Considering the totality of the circumstances in view of the limited record on appeal the trial court's order does not constitute an abuse of discretion. (opinion below P. 1180).

III.

THE RULING IN DYE V. SECURITY PACIFIC FINANCIAL SERVICES, INC. HAS NO APPLICATION TO THE "FACTS" OF THIS CASE, BUT, IF NEED BE, DYE SHOULD BE REJECTED BY THIS COURT AS UNWISE.

A. The decision in *Dye v. Security Pacific Financial Services, Inc.*, 828 So.2d 1089 (Fla. 1st DCA 2002) represented a dramatic extension of the rule approved by this court in *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000). In *Dye*, a motion to dismiss for lack of prosecution was filed one year after the defendant filed its motion to dismiss the complaint for failure to state a cause of action. No notice of hearing was filed and of course no hearing was held. In *Dye*, the court ruled that the "duty to proceed rested with the lower court" simply because a motion to dismiss was pending, but for which no party had set for

hearing.

In this case a notice of hearing was filed, a hearing was held, the Court ruled and directed Petitioners' counsel to submit a proposed order from all indications in the record available to the Trial Court at the Rule 1.420(e) hearing [R. 137-140; 211]. These facts are far different from those in *Dye*. Even Petitioners admit the facts in *Dye* are not present here. Petitioners state "the facts in this case are more akin to *Lukowsky* ..." [IB 26]. But of course in *Lukowsky v. Hauser & Metsh, P.A.*, 677 So.2d 1838 (Fla. 3d DCA) rev. denied sub nom., 688 So.2d 578 (Fla. 1996) the parties were awaiting the courts' ruling after a hearing, citing *Airline Pilots Ass'n v. Schneemilch*, 674 So.2d 782 (Fla. 3d DCA 1996), which cannot be said in this case.

The focus of the decision below was not to draw a conflict with *Dye* or *Lukowsky*, for that matter. In addition to the obvious deficiencies in the record, the focus of the Fifth District was the Petitioners' failure "to take any affirmative action toward resolving the case for more than one year", which "warranted dismissal." *Patton & Dean v. Kera Technology*, 895 So.2d 1175, 1178 (Fla. 5th DCA 2005) (Emphasis added). "Any affirmative action toward resolving the case" encompasses record and nonrecord activity of which there was absolutely no

showing to the Trial Court at the Rule 1.420(e) hearing. Surely the Trial Court cannot be said to have abused its discretion, acted arbitrarily, under the circumstances. This case is *Metropolitan Dade,* not *Dye.*

B. IF THE COURT DEEMS IT NECESSARY IN DECIDING THIS CASE TO REJECT OR ENDORSE THE RULING IN DYE, IT SHOULD BE REJECTED.

The implications of the decision in *Dye* are quite staggering. Is this Court prepared to rule that as a matter of routine, it is now the duty of Trial Courts and not that of the litigants to schedule hearings, every time a perfunctory motion to dismiss for failure to state a cause of action, more definite statement, failure to attach an exhibit, motion for leave to amend and motion for extension of time is filed at any stage of all civil litigation? If necessary, must the Trial Court resolve calendar conflicts of counsel or ensure availability of out-of-town counsel in order to set hearings on such pending motions? Is it then the Trial Court's duty to continuously monitor thousands of cases for such motions as they might be filed throughout the pendency of each action and thereafter insist on setting hearings when the parties of the litigation have not elected to do so? What circuit courts throughout the State have the staff to assume these duties which are no longer left to the litigants according to *Dye*?

If this is not the force of the ruling in *Dye*, there certainly is no limitation apparent from a reading of the First District's ruling.[5]

In the *Dye* setting, the litigants are hardly "left guessing as to what, if any, action should be taken" [IB 21], nor were they in this case. The *Dye* litigants simply had to schedule and file a notice of hearing or undertake any other available activity to further prosecution of their action. Is this not a minimum we can expect from members of the bar? The Fifth District struck the right balance in *Sewell Masonry Company v. DCC Construction, Inc.*, 862 So. 2d 893, 899 (Fla. 5th DCA 2003), rev. vol. dism. 870 So.2d 823 (Fla. 2004) when it stated:

> The extension in *Dye* of *Lukowsky* and *Fuster-Escalona* essentially transforms the obligation to move a case toward resolution from the parties onto the trial court. We concede that judges should be encouraged to take an active role in keeping themselves informed of the cases assigned to them, but the trial judge should not be placed in the role of scheduling hearings on motions for parties who do not themselves seek rulings on their pleadings. Litigants have an affirmative obligation to move their cases to resolution and not sit back and rely on the trial court to set their hearings for them.

[5] What if the Petitioners' attorney failed to appear at the court-scheduled hearing on a Motion to Dismiss? The case would be dismissed or is actually granting the Motion to Dismiss too severe a sanction or a trap for the unwary?

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING AND/OR REFUSING ON REHEARING TO CONSIDER THE CONDUCT OF PETITIONERS' COUNSEL AS "GOOD CAUSE" UNDER RULE 1.420(e).

For the first time in this appeal Petitioners tip toe around the issue of whether there was "an abuse of discretion" by the Trial Court's failure to grant their Motion for Rehearing and, in turn, consider the attached affidavits [IB 28]. Petitioners fail to address the issue head on, however. They devote one, conclusory sentence to this issue in their Brief [Ibid.]. Petitioners offer no legal analysis or citation to authority as to any basis for requiring the Trial Court to consider its Motion for Rehearing on the attached affidavits. See discussion, Part II, infra at p. 17-19. Similarly, Petitioners offer no factual analysis or citation to authority (before this court or the Fifth District below) to provide a basis for a finding that the court below abused its discretion in failing to grant the Motion for Rehearing.

In view of the fact that the Petitioners did not claim to have unearthed information which was not already available, the Trial Court was within its discretion to disregard the affidavits entirely and deny the Motion for Rehearing. *Noor*, supra. Petitioners indicated "no just cause or excuse" in their Motion, in this

record or in any of their Briefs, for not utilizing their affidavits at the proper time. See *Mahan v. Parliament Ins. Co.*, 382 So.2d 402 (Fla. 4th DCA 1980); *Drew v. Chambers*, 133 So.2d 589 (Fla. 1st DCA 1961).

It is possible that Petitioners expect this court to "assume" some facts or legal arguments on this critical issue as it expected of the Fifth District on issues of fact [IB 19-20]. Obviously, this is not the role of the court. As stated in *Polyglycoat Corporation v. Hirsch Distributors, Inc.*, 442 So.2d 958, 960 (Fla. 4th DCA 1983),

> This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. (citations omitted). When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived , abandoned, or deemed by counsel to be unworthy.

Without this predicate, why are such matters even being discussed on appeal? Or is this just another rule or tenet of settled law Petitioners ask, sub silentio, to be ignored in their favor?

Petitioners also fail to demonstrate where they raised "attorney misconduct"

as a grounds for "good cause in writing at least 5 days before the hearing" as required by Rule 1.420(e). The only mention of Petitioners' attorneys' conduct in the "Objection" filed before the Rule 1.420(e) hearing before Judge Roche was a passing reference as to why there was substitute counsel. Buried in "Plaintiffs' Response and Objection to Defendants' Motion to Dismiss and Failure to Prosecute" is the following at paragraph 2.d. [R.272]:

> Furthermore, in the context of the circumstances here present, as opposed to the usual perfunctory motion and order for substitution of counsel, the plaintiffs' motion that was served herein on December 6, 2002 to quash the orders of dismissal for failure to prosecute, to substitute undersigned counsel for predecessor counsel - - who, it is now painfully clear, had *abandoned* his clients - - and for a case management conference to get the case back on track, constituted additional record activity that preceded the defendants' recent attempt to resuscitate their improperly served 2002 motions to dismiss for failure to prosecute via noticing a new hearing date. (Emphasis added).

This paragraph in Petitioners' Objection concerned the one year look back issue, not attorney abandonment or misconduct as an independent ground to show good cause. The above is the only mention in the entire pleading of attorney conduct. The Petitioners' attorney's conduct was never offered in writing as "good cause" to

the Trial Court in Petitioners filing required under Rule 1.420(e). [R. 271-273]. Every other reference to the record below by Petitioners directed at the issue of attorney conduct as good cause is in the Motion for Rehearing and attached affidavits, where it was raised for the first time.

One has to question why Petitioners repeatedly cite to and rely on the substance of these affidavits, when the Trial Court had no reason to do so. Petitioners offer no legal authority or analysis on this issue.

Why the Fifth District considered the affidavits can only be explained as an extenuated effort to give Petitioners every benefit of the doubt and indulgence. There is certainly no legal basis apparent from its Opinion. More importantly, the indulgence of the Fifth District should not be allowed to prejudice the rights of Respondents here. Respondents Kera and Huang respectfully ask that the indulgence stop now and that the record below be referred to and considered in accordance with settled legal principles cited herein.

CONCLUSION

There is nothing in the record on this appeal, which is sufficient to disregard the discretion exercised by the Trial Court. For the reasons set forth above, the LOP motions should have been granted and the Trial Court judgment and the result

of the Fifth District Opinion must be affirmed. Respondents request this Petition be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been mailed this _____ day of January, 2006, to Todd M. Hoepker, Esq., P.O. Box 3311, Orlando, FL 32802-3311; Howard S. Marks, Esq., P.O. Drawer 1690, Winter Park, FL 32790 and J. Marbury Rainer, Esq., Parker, Hudson, *et al.*, 1500 Marquis Two Tower, 285 Peachtree Center Avenue, N.E., Atlanta, GA 30303.

_____
JOHN S. SCHOENE, ESQ.
JOHN S. SCHOENE, P.A.
Florida Bar Number: 313203
Counsel for Respondents
100 East Sybelia Avenue, Suite 205
Maitland, FL 32751
Telephone: 407-644-9900
Facsimile: 407-644-1282

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this initial brief complies with the font requirements of Rule 9.100(a) of the Florida Rules of Appellate Procedure.

_____
JOHN S. SCHOENE, ESQ.