IN THE SUPREME COURT OF THE STATE OF FLORIDA

NOEL THOMAS PATTON, EVE M. PATTON,
and EDWIN W. DEAN,

Petitioners,

CASE NO.:SC 05-667

VS.

KERA TECHNOLOGY, INC., GEORGE
CHENG-HAO HUANG, and GABRIEL SIMON,

Respondents.
_____/

_____

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
LOWER CASE NO: 5D03-1968

_____

ANSWER BRIEF ON MERITS OF RESPONDENT, GABRIEL SIMON

Todd M. Hoepker, Esquire
Florida Bar No: 0507611
Todd M. Hoepker, P.A.

Post Office Box 3311
Orlando, FL 32802-3311
(407) 426-2060

Attorney for Respondent SIMON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES

FLORIDA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

PREFACE

Petitioners, NOEL THOMAS PATTON, EVE M. PATTON, and EDWIN W. DEAN, plaintiffs in the Trial Court, shall be referred to as APetitioners.@ Respondent, GABRIEL SIMON, defendant in the Trial Court, shall be referred to as ASIMON.@ Respondent, KERA TECHNOLOGY, INC., defendant in the Trial Court, shall be referred to as AKERA.@ Respondent, GEORGE CHENG-HAO HUANG, defendant in the Trial Court, shall be referred to as AHUANG.@ SIMON, KERA and HUANG may sometimes be collectively referred to as "Respondents." 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, SIMON shall employ the same method of citation to the record of appeal as Petitioners, KERA and HUANG. 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).

STATEMENT OF THE FACTS AND THE CASE

Petitioners filed this action on or about December 10, 1998. [R.1-37] In their complaint, Petitioners sought damages against SIMON due to an alleged breach of contract and alleged failure to pay two promissory notes. Although Petitioners claim on page 1 of their Initial Brief that they are seeking payment of the two promissory notes, their amended complaint admits that one promissory note was fully paid by SIMON [R.98] The other promissory note was without recourse to SIMON and has express conditions to payment which were never satisfied. [R.17, 21, 24]

Petitioners' counsel at the time of the filing of the complaint was Mac Heavener, III, Esquire. Petitioners apparently obtained new counsel in 1999, when Terry L. McCollough, Esquire first appeared in the action.[1]

On March 2, 1999, Petitioners' Atlanta counsel, J. Marbury Ranier, Esquire and Charles W. Lyons, Jr., Esquire, filed Verified Motions for *Pro Hac Vice* Admission in the Trial Court. [R. 40-41, 44-45, 46-47, 48-49] On March 16, 1999, the Trial Court entered an Order granting the two Verified Motions for *Pro Hac Vice* Admission. [R.42-43] The Trial Court's orders admitting Petitioners' Atlanta counsel do not require that any motions, pleadings, orders, or other correspondence be served

1 No motion or application for substitution of counsel from Mr. Heavener to McCollough was ever made by Petitioners. No order allowing the substitution of counsel was ever entered by the Trial Court. Mr. Heavener did not file any additional pleadings in this case after McCollough began filing pleadings.

upon Petitioners' Atlanta counsel. [R. 42-43] Other than the Verified Motions for *Pro Hac Vice* Admission and a early discovery request, Petitioners' Atlanta counsel never signed any motions, certificates of service, notices, or other pleadings in this case. Petitioners' Atlanta counsel are referenced on only one certificate of service dated December 30, 1999. [R. 51-53] With that exception, Petitioners' Atlanta attorneys were not named on any certificates of service for the following three years after they were admitted to practice in this state, even on certificates of service on orders and pleadings prepared by McCollough. [R.224-225][2]

Respondents filed Motions to Dismiss Petitioners' Amended Complaint in early May 2001. [R. 127-130, 133-134] McCollough scheduled a hearing on the Motions for July 9, 2001 and filed a Notice of Hearing on May 3, 2001. [R. 131-132]

The Trial Court held a hearing on the Motions to Dismiss the Amended Complaint on July 9, 2001. McCollough appeared on Petitioners' behalf and Petitioners' Atlanta counsel did not appear. At the hearing, the Trial Court orally pronounced its rulings, granting in part and denying in part Defendants' Motions to Dismiss the Amended Complaint. [R. 211, 238] The Trial Court directed McCollough to prepare and submit a proposed

2 Petitioners' Atlanta counsel have never contacted, or corresponded with, Respondents' attorneys and never objected to their omission from the certificate of service. Petitioners' lead counsel also never objected to this method of service upon Petitioners.

order memorializing the Trial Court's rulings. [R. 211, 238]

After the hearing and in violation of the Trial Court's direction, neither McCollough nor Petitioners' Atlanta counsel ever prepared a proposed order and provided it to SIMON's counsel and counsel for KERA and HUANG. Neither McCollough nor Petitioners' Atlanta counsel ever called the attorneys for Respondents to discuss the Trial Court's rulings or the proposed order. Neither McCollough nor Petitioners' Atlanta counsel ever submitted a proposed order on Respondents' Motions to Dismiss the Amended Complaint as directed by the Trial Court at the July 9, 2001 hearing. [R. 211-212, 238]

There was no record activity in this case for a period of more than one year. There was absolutely no contact of any sort between Respondents' counsel, McCullough or Petitioners' Atlanta counsel. On August 1, 2002, SIMON filed a Motion to Dismiss for Lack of Prosecution and KERA and HUANG filed an Amended Motion to Dismiss for Lack of Prosecution on August 5, 2002 (collectively the "LOP Motions"). [R. 135-136, 137-138, 139-140] These pleadings were served upon McCollough at his last known address referenced in the Court file, 126 East Jefferson Street, Orlando, Florida 32803. Notices of Hearing on the LOP Motions were sent to the same address. [R. 141-142, 143-144]

SIMON's LOP Motion specifically alleged that McCollough was required to prepare a proposed order on the Motions to Dismiss the Complaint after the July 9, 2001 hearing, but failed to do

so. [R. 137-138] This allegation was later confirmed by representations made by Respondents' counsel in open court. [R. 211-212] The LOP Motions further asserted that there was no record activity for more than one year and that there was no non-record activity sufficient to prevent the case from being dismissed under Rule 1.420(e), Fla.R.Civ.P. After the filing of the LOP Motions and Notices of Hearing, Respondents' attorneys did not hear from McCollough or Petitioners' Atlanta counsel. [R. 239]

At the August 21, 2002 hearing on the LOP Motions, the attorneys for Respondents advised the Trial Court of the factual background for the LOP Motions. [R.239] Counsel for SIMON represented to the Trial Court that he never received any notification or returned mail (including SIMON's Motion to Dismiss for Lack of Prosecution and Notice of Hearing thereon) from the United States Post Office indicating that McCollough had moved or had not received such pleadings. [R. 220, 239] Neither McCollough nor Petitioners' Atlanta counsel appeared 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 McCollough at his last known address reflected in the Court file.[3]

3 Counsel for SIMON and counsel for the other Respondents did not hear from McCollough or Petitioners' Atlanta counsel after entry and service upon McCollough of the August 21, 2002 dismissal orders. [R.240]

Almost four months later, on December 10, 2002, Petitioners filed an unverified Motion for Substitution of Counsel, to Quash Orders of Dismissal, and for Case Management Conference ("Petitioners' Motion to Quash") alleging, *inter alia*, that this action should not have been dismissed. [R. 148-151] Petitioners did not attach or file any affidavits, letters, or other documentary evidence from themselves, McCollough or their Atlanta counsel. It is undisputed that Petitioners sought only to quash the August 21, 2002 dismissal orders and did not ask the Trial Court to quash or strike the LOP Motions as a result the failure to name Atlanta counsel on the certificates of service. (IB 9)

At the December 20, 2002 hearing on Petitioners' Motion to Quash, Petitioners did not submit or proffer any evidence from themselves, McCollough or their Atlanta counsel. The Trial Court found that there had been no record activity for more than one year and ruled that the service of the LOP Motions and Notices of Hearing thereon to McCollough at his last known address referenced in the Trial Court's file was sufficient notice to him. [R. 217-220] The Trial Court reserved ruling only on the issue of whether due process required service of the LOP Motions and Notices of Hearing on Petitioners' Atlanta counsel, in addition to service on local counsel. [R. 217-222]

After a subsequent hearing on February 12, 2003 regarding service on Petitioners' Atlanta counsel, Judge Hauser quashed

the August 21, 2002 dismissal orders on the sole ground that Petitioners' Atlanta counsel were not served with the LOP Motions and notices of hearing. [R. 266-267] The Trial Court did not find that the LOP Motions were null, void, invalid, or ineffective. [R. 266-267] Attorneys for Respondents then served Petitioners' new lead counsel and Atlanta counsel with the previous LOP Motions and notices of hearing on the LOP Motions. [R.267A-270][4]

Petitioners' statement of the "facts" in their Initial Brief is misleading because they are recited out of chronological sequence. Petitioners have failed to disclose that the purported "facts" from the last paragraph on page 4 through the last full paragraph on page 6 and in the last three paragraphs on page 8 were not before Judge Hauser during the hearings on December 20, 2002 and February 12, 2003 and were not before Judge Roche at any time prior to her entry of the April 8, 2003 dismissal order. These purported "facts" are taken from counsel's allegations and email communications contained in their Motion for Rehearing.

Prior to the March 10, 2003 hearing on the LOP Motions, Petitioners did not submit any evidence from anyone having personal knowledge of the course of the litigation, including

4 The LOP Motions were renoticed for hearing on March 10, 2003 before the Honorable Renee A. Roche, who was assigned to the case because of a change in judicial divisions.

McCollough or Petitioners' Atlanta counsel. By and through their new lead counsel, Kenneth Mann, Esquire, Petitioners merely filed an unverified Response and Objection to the LOP Motions, relying on the legal argument they previously made. [R.271-273] No sworn testimony or documentary evidence was proffered or admitted at the March 10, 2003 hearing before Judge Roche. There was no court reporter at the hearing and no transcript exists. By order dated April 8, 2003, Judge Roche granted the LOP Motions. [R.304-305]

Petitioners then filed their Motion for Rehearing, submitting for the first time affidavits from Petitioner, Edwin Dean, their Atlanta counsel, and Mann.[5] These affidavits reference alleged oral communications and emails between McCullough and Dean, McCullough and Atlanta counsel and McCollough and Mann.[6] [R. 274-297] The Trial Court denied the Motion for Rehearing on May 12, 2003 without comment and making no mention of the affidavits. [R. 298] Petitioners then appealed the April 8, 2003 orders granting the LOP Motions to the Fifth District.[7] After briefing and oral argument, the Fifth District

---

5 Petitioners apparently recognized the serious problem associated with their unverified submissions and noted in their Motion for Rehearing that the Trial Court had expressed concern about the lack of a record. [R. 274]

6 Respondents' counsel would have objected to the admission of these matters into evidence had they been proffered at any of the hearings.

7 Petitioners reference McCollough's suspension and subsequent

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 Fifth District's detailed analysis affirming the Trial Court's dismissal orders was correct and should be upheld. There was no record activity in this case for well over one year. The prescribed measuring period was not resurrected because the August 21, 2002 dismissal orders were quashed. The LOP Motions were not ruled null and void and were not quashed by the Trial Court. The measuring period runs backward one year from the date of the filing of the LOP Motions.

Dismissal was mandatory unless the Trial Court determined in its discretion that good cause existed for the lack of record activity. In order to avoid the mandatory dismissal of the action, Petitioners had the burden of demonstrating both prongs

---

disbarment in their statement of facts and summary of argument and claim, without any support, that this Court's disbarment of McCollough was taken, in part, for his actions in the case. This reference is wholly improper and irrelevant for at least three reasons. First, McCullough's disciplinary proceedings were not raised before the Trial Court in any manner. Second, the Fifth District refused to take judicial notice of McCullough's disciplinary record during the appeal. Third, this Court's opinion in The Florida Bar v. McCollough, 879 So.2d 625 (Fla. 2004), does not discuss his actions in this case. Petitioners should therefore not be allowed in inject McCullough's

of good cause for their lack of record activity five days before the hearings on Respondents' LOP Motions. Petitioners had two opportunities to show good cause, but never proffered any evidence as to their attorneys' contact with Respondents' counsel and excusable neglect.

Petitioners failed to sustain their burden to show that there was unfinished business in the case below. The Trial Court ruled on Petitioners' Motions to Dismiss Petitioners' Amended Complaint and Petitioners' counsel had the obligation to submit a proposed order to the Trial Court, but failed to do so. The inattention, negligence, or misconduct of counsel has never constituted, and does not constitute, good cause. The Fifth District properly held that, based on the totality of the circumstances in the limited record before it, the Trial Court did not abuse its discretion when it dismissed the action for lack of prosecution.

---

suspension and disbarment into this appeal for the first time.

STANDARD OF REVIEW

As correctly noted by the Fifth District, the standard of review on the appeal of a dismissal for failure to prosecute under Rule 1.420(e), Fla.R.Civ.P., is whether the trial court abused its discretion. Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001); Fishe & Kleeman, Inc. v. Aquarius Condo. Ass'n, Inc., 524 So.2d 1012(Fla. 1988); Cole v. Dep't of Corrections, 725 So.2d 854 (Fla. 5th DCA 1999) "Discretion. . . is abused when the judicial action is arbitrary, fanciful or unreasonable. . . If reasonable men 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." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

ARGUMENT

I. THE FIFTH DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DISMISSAL FOR LACK OF PROSECUTION BECAUSE DISMISSAL WAS MANDATORY UNDER RULE 1.420(e)

A. There Was No Record Activity for Over One Year

Rule 1.420(e), Fla.R.Civ.P. is a mandatory rule. Metropolitan Dade County at 1090. The rule is "intended to ensure" that cases "are diligently prosecuted by the parties." Moossun v. Orlando Regional Health Care, 826 So.2d 945, 949 (Fla. 2002). Under the rule, all actions where it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of one year shall be dismissed unless good cause is shown in writing. Unless a party shows good cause, the case must be dismissed and a trial judge has no discretion if there has been no record activity. Metropolitan Dade County at 1090.

Upon the filing of the motion to dismiss for failure to prosecute, trial courts are required to engage in a two-step process: a) determine whether any record activity has occurred during the one-year period prior to the filing of the motion to dismiss; and b) if not, determine whether there is good cause for the lack of record activity. Metropolitan Dade County at 1090; Frohman v. Bar-Or, 660 So.2d 633 (Fla. 1995). The one-year look-back period is measured backwards from the time the motion

to dismiss for lack of prosecution is filed. Frohman at 636, citing Chrysler Leasing Corp. v. Passacantilli, 259 So.2d 11 (Fla. 1972); Florida East Coast Ry. Co. v. Russell, 398 So.2d 949 (Fla. 4th DCA 1981), rev. denied, 411 So.2d 381 (Fla. 1981). It is undisputed that there was no record activity in this case for over one year prior to the filing of the LOP Motions by Respondents.[8]

B. The Measuring Period Was Not Resurrected By The Trial Court's February 25, 2003 Order

To avoid the inevitable result of a mandatory dismissal for lack of record activity, Petitioners assert that the one-year measuring period does not start on the date the LOP Motions were originally filed on July 21, 2002. (IB 16-18) They attempt to bootstrap on to the Trial Court's February 25, 2003 order by arguing that the measuring period began to run backward again in February 2003, after the Trial Court quashed the LOP orders and when Respondents' counsel re-served the LOP Motions on Petitioners' Atlanta counsel.

Petitioners then claim that record activity occurred prior to February 2003 when their new lead counsel filed a deposition transcript [R. 251-264] and a notice of hearing on Appellees' Motions to Dismiss the Amended Complaint that had already been

8 Judge Hauser also made this finding at the December 20, 2002

ruled upon by Judge Hauser in July 2001. [R. 265] Petitioners also suggest that the pleadings filed and the two hearings held in connection with their Motion to Quash constitute record activity. All of these actions took place almost five (5) months after the filing of the LOP Motions.

Petitioners' novel argument is based upon the faulty premise that somehow the LOP Motions were ruled to be nullity or were negated because they were not served upon Petitioners' Atlanta counsel. Petitioners conveniently neglect to mention that the Trial Court did not quash the LOP Motions or require that the LOP Motions be refiled. It did not rule that the LOP Motions were null, void, improper, or invalid in any way or that the measuring period would begin to run anew as a result of its quashing of the August 21, 2002 dismissal orders. Judge Hauser merely required service of the LOP Motions and notices of hearing on Petitioners' Atlanta counsel because he apparently believed they did not have the opportunity to present good cause for the admitted lack of record activity.[9] The LOP Motions were

---

hearing on Petitioners' Motion to Quash. [R. 217]

9 Respondents adamantly objected to Petitioners' assertion that their due process rights were somehow violated by the failure to serve their Atlanta counsel. [R. 224-234, 235-250] As argued throughout this Answer Brief, Petitioners' Atlanta counsel have completely ignored this case since they were admitted *pro hac vice* on March 16, 1999.

not refiled, but merely served again with notices of the March 10, 2003 hearing before Judge Roche.

Petitioners have failed to advise this Court that they never asked the Trial Court to strike or quash the LOP Motions or find that they were a nullity. Petitioners' Motion to Quash merely requests the Trial Court to nullify the August 21, 2002 dismissal orders. Petitioners are now impermissibly asking this Court to give them relief which they never requested below. It is axiomatic that this Court cannot grant such relief. Sunset Harbour Condo. Ass'n v. Robbins, 914 So.2d 925 (Fla. 2005); Dade County Sch. Bd v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999); Clark v. Osceola Clay & Topsoil Co., 99 So.2d 869 (Fla. 1957).

Although Petitioners claim that the Fifth District's reasoning that filing date of "the original LOP Motions should constitute the benchmark for calculating the one year period is at odds with the law and common sense", they have not cited and cannot cite any authority for the proposition that the one-year measuring period was automatically given new life by Judge Hauser's February 25, 2003 order. [IB 17-18] The decision in Florida East Coast Ry Co. v. Russell, supra has nothing to do with the "appropriate yardstick" to be used in this case and simply holds that dismissal for lack of prosecution was improper when the plaintiff had filed a notice for trial 14 days before

the defendant filed its dismissal motion. Conversely, pleadings filed after the filing of a motion to dismiss are not considered record activity which will prevent dismissal. Fallchase Dev. Corp. v. Sheard, 655 So.2d 214 (Fla. 1st DCA 1995); Government Employees Ins. Co. v. Whelus, 382 So.2d 124 (Fla. 5th DCA 1980)

SIMON has been unable to locate any case holding that the look-back period commences upon the date of "proper" service of a motion to dismiss or should commence to run again after the dismissal orders were quashed. As repeatedly stated in the cases, "[t]he 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 the filing of the motion to dismiss for lack of prosecution." Sewell Masonry Company v. DCC Const., Inc., 862 So.2d 893 (Fla. 5th DCA 2003), rev. voluntarily dismissed, 870 So.2d 823 (Fla. 2004) (emphasis added).

Petitioners argue that their due process rights have been violated by the refusal of the Trial Court and Fifth District to resurrect the look-back period. They do not explain, however, how these rulings affected those rights. Petitioners cannot identify any prejudice that they suffered when the August 21, 2002 dismissal orders were quashed and the LOP Motions were renoticed for hearing.

The essence of due process is the right to a hearing upon reasonable notice. Ryan's Furniture Exchange v. McNair, 162 So. 483 (Fla. 1935). Petitioners' due process rights in this regard consisted only of their ability to show good cause in writing five days prior to a noticed hearing and to demonstrate good cause at the hearing. The date the LOP Motions were filed or served has no bearing or effect on these rights. The Trial Court bent over backwards to ensure that Petitioners had the opportunity to show good cause at the hearing. The Trial Court believed, and the Fifth District agreed, that proper remedy for failure to serve Atlanta co-counsel was to quash the dismissal orders and reset the hearing. In the event of insufficient notice of hearing on a motion to dismiss for lack of prosecution, the appropriate remedy is to hold a second hearing and give the plaintiff another chance to show good cause under the rule. See Elegele v. Halbert, 890 So.2d 1272 (Fla. 5th DCA 2005); Fallschase Dev. Corp. v. Sheard, supra.

The Trial Court's February 25, 2003 order undoubtedly gave Petitioners the due process rights which they allegedly lost by the omission of their Atlanta counsel from the certificates of service. At the hearing which occurred almost one month later, Petitioners were given yet another opportunity to show good cause. Petitioners' protestations that they were denied due

process therefore ring extremely hollow.

Under any logical analysis, there was no record activity within the prescribed one-year period and Petitioners' transparent attempt to manufacture new activity must fail. Petitioners waived their right to later argue that the Trial Court should have quashed the LOP Motions because they never asked the Trial Court to do so. The progress of the litigation was entirely within Petitioners' control but they failed to take any action to move the case forward for over two and one-half years. There is no support under Florida law to fashion a new measuring period and Petitioners should not be permitted to extend the look-back period under these circumstances. Dismissal was therefore mandatory unless Petitioners could somehow show the required good cause.

II. THE FIFTH DISTRICT COURT CORRECTLY UPHELD THE TRIAL COURT'S DISMISSAL FOR LACK OF PROSECUTION BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

A. There was no Good Cause as a Result of the Alleged "Unfinished Business"

Petitioners had the burden of showing the existence of good cause for the lack of record activity five days before the hearings on the LOP Motions. Metropolitan Dade County at 1090. What constitutes good cause is not defined in Rule 1.420(e), but has been discussed repeatedly in case after case. Appellate

courts have uniformly held that two prongs must be satisfied: "a) some contact with the opposing party; and b) some form of excusable conduct or occurrence which arose other than through negligence or inattention to the pleading deadline". Blythe v. James Lock & Co. Ltd., 780 So.2d 237, 238 (Fla. 4th DCA 2001), citing numerous cases and quoting Palokonis v. EGR Enterprises, Inc., 652 So.2d 482, 483 (Fla. 5th DCA 1995); National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d 1191, 1195 (Fla. 3d DCA 2001), citing Modellista de Europa (Corp.) v. Redpath Investment Corp., 714 So.2d 1098, 1100 (Fla. 4th DCA 1998).

Petitioners had two opportunities to meet their burden and they failed to satisfy either part of the good cause test at each opportunity. Petitioners' first chance occurred before and at the hearing on the LOP Motions on August 21, 2002. Petitioners did not submit any good cause in writing and failed to appear before Judge Hauser. After Judge Hauser quashed the August 21, 2002 dismissal orders and when they were represented by their new lead counsel, Petitioners did not submit any verified pleadings, affidavits, or other documents from their prior lead counsel, their Atlanta counsel, or anyone else who had personal knowledge of the litigation. Petitioners were given a second chance to establish good cause before Judge Roche

on March 10, 2003, but they failed to proffer any evidence.

Plaintiffs never took and submitted their own depositions, or the depositions of McCullough, Mann, or their Atlanta counsel. Petitioners never attempted to offer any evidence from these individuals or any other knowledgeable witnesses to explain the lack of record activity until their Motion for Rehearing was filed. Petitioners were clearly required to submit evidence of good cause, rather than the unsworn allegations of new lead counsel who had no prior involvement in the case. Fort Walton Lumber & Supply Co. v. Parish, 142 So.2d 346 (Fla.1st DCA 1962).

After Judge Roche had granted the LOP Motions, Petitioners filed a Motion for Rehearing attaching for the first time affidavits by Dean, their Atlanta counsel and Mann regarding McCollough's lack of response and the emails and oral communications between them and McCullough, ostensibly in support of their argument that McCullough's inattention and negligence constitutes good cause.[10] Moreover, the affidavits and emails are clearly hearsay, would have been objected to by Respondents' counsel, and were not admissible evidence even if

10 As argued in Section II B of this Answer Brief, Petitioners failed to raise their issue below and the inattention, inadvertence, negligence, or intentional misconduct of Petitioners' counsel, whenever it occurs and wherever located,

they had been timely submitted to the Trial Court. The record is therefore devoid of the required evidence of both contact between McCollough or Petitioners' Atlanta counsel and Respondents' attorneys (because there never was any contact), or of any sort of excusable neglect by McCullough or Petitioners' Atlanta counsel.

Throughout their Initial Brief, Petitioners discuss the matters submitted for the first time in their Motion for Rehearing as if these matters were before the Trial Court at the hearing on March 10, 2003. Petitioners never cite any authority for the proposition that such matters could be considered by the Fifth District or this Court. Failing to expressly bring the issue to this Court's attention, Petitioners are impliedly asking this Court to rule that their Motion for Rehearing should have been granted.

Petitioners did not argue or brief the assertion that the Trial Court improperly denied the Motion for Rehearing before the Fifth District and the Fifth District Opinion is accordingly silent on this point. Petitioners are prohibited from now arguing for reversal of the Opinion on that ground. Morales v. Sperry Rand Corp.,601 So.2d 538 (Fla.1992).

Judge Roche denied the Motion for Rehearing without comment

---

does not constitute good cause.

and without stating whether she had considered the affidavits and email communications. SIMON does not know why these communications are discussed in the Fifth District Opinion. Because the Motion for Rehearing was denied without a hearing, Respondents had no opportunity to object their admissibility or make argument as to their relevance and were unable to contest the legal sufficiency of the request. Respondents will be clearly denied their own due process rights and severely prejudiced if these matters are now considered by this Court as part of the record in the Trial Court before the case was dismissed.

The consideration of a motion for rehearing is left to the sound discretion of the trial court. Braznell v. Braznell, 191 So. 457 (Fla. 1939). "There is no 'basic and fundamental' right to rehearing, and denial without explanation is the common practice." Stoner v. W.G., Inc., 300 So.2d 268 (Fla. 2d DCA 1974). Judge Roche was clearly within her discretion to deny the Motion for Rehearing without citing any reasons for her ruling and without mentioning the affidavits. She could have decided that they were hearsay and had no evidentiary value. The Motion for Rehearing on its face does not plead any of the authorized bases under Rule 1.530, Fla.R.Civ.P. for a rehearing of the April 8, 2003 dismissal order, such as newly discovered

evidence, the misapprehension of the law, or a misunderstanding of the record by the Trial Court. See Stevens v. Stevens, 666 So.2d 227 (Fla. 2d DCA 1995); Noor v. Continental Cas. Co., 508 So.2d 363 (Fla. 2d DCA 1987); Cole v. Cole, 130 So.2d 126 (Fla. 1961). Assuming arguendo that Petitioners made and preserved this argument before the Fifth District, they have not established the required abuse of discretion by the Trial Court in denying the Motion for Rehearing.

Realizing that there is no record with evidence from anyone with personal knowledge, Petitioners are forced to continue to repeat their well-worn "unfinished business" argument. Utilizing a line of factually inopposite cases, Petitioners argue that dispositive motions remained "pending" and conclude that good cause exists because no written order was entered on Respondents' Motions to Dismiss Petitioners' Amended Complaint. In doing so, Petitioners are asking this Court to ignore the long-standing abuse of discretion standard, shift Petitioners' burden of proof to Respondents, overlook the lack of a record, and assume facts not in the record.

Petitioners never met their heavy burden of establishing that there was unfinished business in the Trial Court. To satisfy this burden, they had to necessarily prove that the Judge Hauser did not rule on Respondents' Motion to Dismiss

Petitioners' Amended Complaint. The only evidence in the record directly leads to the opposite conclusion – that the Trial Court did rule and directed McCollough to prepare a proposed order. This evidence consists of the representations which Respondents' counsel made to the Court at the December 20, 2002 hearing before Judge Hauser. [R.211-212] Representations of counsel as officers of the court have been considered evidence. See Centennial Ins. Co. v. Fulton, 532 So.2d 1324 (Fla. 3d DCA 1988).

Petitioners allege that there is no way of knowing how the Trial Court ruled "without relying on the unsubstantiated and self-serving statements of defense counsel that the trial court had orally ruled on some, but not all, of the counts of the Amended Complaint." (IB 20) In addition to impugning the integrity of Respondents' counsel, this assertion completely misstates the record[11]. Respondents' counsel did not represent to Judge Hauser that he "had orally ruled on some, but not all, of the counts of the Amended Complaint". Instead, SIMON's counsel

11 Undersigned counsel for SIMON strenuously objects to this assertion and takes offense at its implication. Undersigned counsel was personally present and argued at the July 9, 2001 hearing on Respondents' Motions to Dismiss and was also present and argued at the August 21, 2002 hearing on the LOP Motions. Petitioners' current appellate counsel and Mann were not present at either hearing. As an officer of the court, undersigned counsel had a duty to accurately represent to Judge Hauser at the December 20, 2002 hearing what occurred at the previous hearings. Undersigned counsel assures this Court that he

represented to Judge Hauser that he had "dismissed" some, but not all, counts of the Amended Complaint. [R. 211-212]

In a desperate attempt to create confusion and to obfuscate the issue of whether the Trial Court ruled and directed McCollough to prepare the order, Petitioners again utilize the email communications wherein McCullough apparently represented that the Trial Court had reserved ruling and requested additional briefing. This disingenuous argument should be rejected. First, this hearsay was not submitted to the Trial Court until Petitioners filed their Motion for Rehearing and was therefore not considered by the Trial Court when it entered the dismissal order. Second, in an ironic twist which exposes the inherent weakness in the argument, Petitioners are relying upon McCullough's truthfulness to create this imagined conflict over whether the Trial Court ruled on Respondents' Motion to Dismiss the Amended Complaint and directed McCollough to prepare an order. At the same time, however, they rely on McCollough's lies and misrepresentations to excuse their failure to move this case toward disposition. Petitioners should be prohibited from taking these directly contradictory positions and using the lack of a record to their advantage.

Because they failed to establish a record, Petitioners also

---

complied with his ethical responsibilities and did exactly that.

attempt to pose hypothetical questions about matters that the Fifth District allegedly did not consider: a) did the Trial Court rule on some but not all of the dispositive issues before it on July 9, 2001?; b) did the Trial Court rule on the motion filed by Unidata?; and c) what if the Trial Court did not rule on the issues and there was unfinished business? [IB 19-21].[12] Petitioners' argument that reversal is warranted because of what they believe the Fifth District did not consider entirely misses the point. The assertion effectively turns Petitioners' burden and the abuse of discretion standard on their respective heads. Petitioners had the burden of proof to show that there was a recognized type of true "unfinished business" which would constitute good cause under Florida law. They utterly failed to do so because of the lack of record which they themselves failed to make. [13]

Petitioners assert that there are too many "unanswered questions" to say that they, and not the Trial Court, should

---

12 SIMON objects to Petitioners' claim that the Fifth District "assumed that the trial judge had in fact ruled upon Respondents' motions at the hearing, but did not instruct McCullough to prepare a proposed order on same". [IB 19] (emphasis in original) There is absolutely no support in the record for this claim. The Fifth District Opinion clearly states that "[e]ven if we assume…" Patton at 1178.

13 Petitioners also continue to ignore the fact that they can never satisfy the first prong of the good faith test – contact with opposing counsel.

bear the ultimate responsibility for the lack of a written order and the dismissal of their case. They suggest that this Court should adopt a bright-line rule that, regardless of whether a motion has been argued and if argued, regardless of which party is directed to prepare a proposed order, the lack of a written order on a motion should always preclude dismissal for failure to prosecute.

Petitioners then attempt to support this suggestion with a rationale that borders on the absurd. They state that the bench and bar would both benefit by a bright-line "solution" on the questions of: a) can a plaintiff rely on the fact that a trial court has failed to rule and enter a written order on a dispositive motion regardless of which party is delegated the duty of preparing the order?; b) what action, if any, must be taken pending a trial court's decision to avoid dismissal for lack of record activity?; and c) what steps are considered sufficient record activity that a plaintiff can undertake to prosecute its case which will not be deemed a nullity pending resolution of a dispositive motion? [IB 21-22].

Aside from being strictly hypothetical scenarios which are not established by the record in this case, Petitioners apparently want to treat trial lawyers like uneducated laymen. Surely any practicing civil litigation attorney knows how to

pursue a case and resolve issues regarding the entry of proposed orders. If a trial judge has not ruled on an argued motion or opposing counsel has not submitted a proposed order as directed within a reasonable period of time, any litigator with any common sense knows a number of different things he or she should do. They would, among other things, submit their own proposed order, send a letter to the judge politely requesting a ruling on the motion, file a motion for case management conference, or schedule the motion again for hearing.

There is no issue that is ripe for clarification in this area of jurisprudence. The Fifth District opinion was fact-intensive and based upon the "totality of the circumstances in view of the limited record." Patton at 1180. Petitioners had the burden to prove that there was unfinished business by virtue of an unresolved motion. There was absolutely no evidence before the Trial Court to suggest that Respondents' Motions to Dismiss the Amended Complaint had not been ruled upon.

There is no transcript of the hearing before Judge Roche on March 10, 2003. The lack of a transcript or stipulated facts is fatal to Petitioners' attempt to appeal the Trial Court's discretionary rulings. An appellant has the burden of bringing an adequate record to support its appeal. Wright v. Wright, 431 So.2d 177 (Fla. 5th DCA 1983) To overcome the presumption of

correctness given to a trial court's rulings and demonstrate error, a transcript of testimony and the proceedings is required. Haist v. Scarp, 366 So.2d 402 (Fla. 1978); National Enterprises, Inc. v. Foodtech Hialeah, Inc., supra; van den Boom v. YLB Inv., Inc., 687 So.2d 964 (Fla. 5th DCA 1997); South Florida Apartment Ass'n, Inc. v. Dansyear, 347 So.2d 710 (Fla. 3d DCA 1977). Petitioners' appeal should fail simply because they did not satisfy their burden and provide the Fifth District or this Court with a record or a transcript.

There is no irreconcilable conflict which creates the need for the rule suggested by Petitioners and their hypothetical scenarios. In each of the cases relied upon by Petitioners, the trial judge was the only person who could take action to move the case forward such as setting a case for trial, entering an order of recusal, or actually entering a written order after he or she took the matter under advisement. In each case only judicial labor remained to be taken, which the litigants had no ability to control. See e.g. Fuster-Escalona v. Witsotsky, 781 So.2d 1063 (Fla. 2000) (ruling on recusal motion); Lukowsky v. Hauser & Metsch, P.A., 677 So.2d 1383 (Fla. 3d DCA 1996) (summary judgment ruling); Air Line Pilots Ass'n v. Schneemilch, 674 So.2d 782 (Fla. 3d DCA 1996); Miami International Bank v.

Greenfield, 448 So.2d 559 (Fla. 3d DCA 1986) (setting trial after notice filed); Sarasota Cattle Co. v. Mikos, 431 So.2d 260 (Fla. 2d DCA 1983), aff'd Mikos v. Sarasota Cattle Co., 453 So.2d 402 (Fla. 1984) (notice for trial).

As noted by the Fifth District, certain types of unfinished business do not prevent dismissal. Fishe & Kleeman, Inc. v. Aquarius Condo. Ass'n, Inc., supra (limiting application of Mikos rule to cases where the trial court takes no action to set case for trial initially and refusing to apply the rule when the initial trial was continued and no action taken for over one year thereafter); Sewell Masonry Co., supra(noting that "it is not the duty of the trial judge to schedule hearings on motions for parties who do not themselves seek rulings on their pleadings"); Dashew v. Marks, 352 So.2d 554 (Fla. 3d DCA 1977)(holding that the court's failure to enter a written order on a oral decision did not relieve plaintiff of the duty to proceed and did not affect defendant's right to dismiss the case for lack of prosecution); Bakewell v. Shepard, 310 So.2d 765 (Fla. 2d DCA 1975)(court's failure to enter an order on a motion does not constitute good cause sufficient to avoid dismissal); Bogart v. F.B. Condominiums, Inc., 438 So.2d 856 (Fla. 2d DCA 1983)(dismissal justified because original trial was continued and plaintiff never rescheduled the trial) Cf Dye v. Pacific

Financial Services, Inc., 828 So.2d 1089 (Fla. 1st DCA 2002). In each of these cases, it is clear that the duty to proceed rested with the parties themselves, not the trial court, because they had complete control over the progress of the case.

Petitioners are essentially asking this Court to adopt the extreme position taken in Dye, where the First District reversed a dismissal when a motion, which never was scheduled for hearing or argued, remained "pending" before the trial judge. The facts referenced in Dye and the facts established by the record in this case are completely different. It is undisputed that Respondents' Motions to Dismiss were scheduled for hearing and argued. There was no evidence before the Trial Court that Judge Hauser had not ruled and had not directed McCollough to prepare a proposed order; the evidence was and is to the contrary. Because the cases are factually inopposite, no conflict between the Fifth District Opinion and Dye exists.

There is no reason why this Court should adopt the aberrational holding in Dye.[14] The rule proposed by Petitioners would allow a case to linger ad infinitum. It would permit a plaintiff to file a meaningless one-line motion to amend its

14 Professor Trawick has described the Dye decision as "ridiculous". H. Trawick Florida Practice and Procedure, §21-7, fn 20.

complaint or a frivolous motion to compel discovery and never schedule the motion for hearing to avoid dismissal. Similarly, it would allow a plaintiff's attorney to refuse to submit a proposed order on a motion which was argued to avoid dismissal. Such an interpretation would literally emasculate the purpose of Rule 1.420(e).[15]

The adoption of Petitioners' position would clearly shift the entire burden of expediting litigation to the trial courts and away from the litigants. It would mean that the trial judges would have to constantly monitor their cases, schedule hearings, ensure that proposed orders are submitted after hearings, resolve disputes over proposed orders, and confirm that orders were entered so that cases would not languish in court because of "unresolved motions". These obligations would necessarily require trial judges and their assistants to review their dockets to determine in what cases hearings were held and whether written orders were ever entered. It is well-documented

---

15 There is also no need for this Court to enact a bright-line rule based on Dye. Due to the recent amendment to Rule 1.420(e), these situations would not arise in the future. The amendment requires that an interested party seeking to dismiss an action after 10 months of no record activity must give 60 days notice to the opposing party before requesting dismissal. If a motion is unresolved after ten (10) months, an opposing party would undoubtedly provide the required notice to plaintiff's counsel, who would then be required to schedule and argue the motion at a hearing and submit an order to avoid dismissal if the plaintiff

that there is a severe shortage of trial judges and that judges in most, if not all, circuits in this state have tremendously overcrowded dockets. Requiring already overextended trial judges to schedule hearings on motions and become intimately involved with the entry of written orders is both impractical and unfair to the judiciary and to the litigants who have been sued.

With the exception of First District's Opinion in Dye, the decisions in this area can be reconciled by considering the practical realities of civil litigation. The parties and their attorneys do and should have the obligation to move cases forward toward resolution. There are certain limited situations when the responsibility to move a case forward rests solely with the trial court and the litigants are powerless to do so. If the ball is squarely in the court of the trial judge, a case should not be dismissed. There can be no doubt, however, that in this case the ball was always in the hands of McCollough and Petitioners' two Atlanta attorneys, who completely dropped the ball.

Petitioners have not disputed and cannot dispute the fact that

the Trial Court had ruled on Respondents' Motions to Dismiss

---

intended to proceed with the case.

their Amended Complaint and had directed Petitioners' counsel to submit an order.[16] The duty of preparing and submitting the order was clearly placed upon Petitioners and their counsel, consisting of three different attorneys at the time. There was simply nothing else for the Trial Court to do other than perform the ministerial function of signing an order which Petitioners' counsel was to prepare and submit.

Despite Petitioners' pleas to the contrary, the only relevant "unanswered questions" in this case involve two simple inquiries: a) why did three different lawyers fail to take any action whatsoever to prosecute a case for over one year?; and 2) why did three different lawyers fail to show good cause despite having at least two opportunities to do so? Petitioners have never submitted any evidence which provides proper answers or excuses.

There is no evidence of any record or non-record activity in this case and the Trial Court did not have to determine whether

16 Petitioners conceded before the Fifth District that the Trial Court "may have actually made some rulings on some of the motions that were argued July 9, 2001," but claim that "defense counsels' recollections of the rulings are sketchy at best…" (Petitioners' Fifth District Brief 13) SIMON disputes this characterization because the record clearly establishes that Judge Hauser granted Respondent's Motions to Dismiss the Amended Complaint and directed McCullough to prepare an order. [R.211, 212,228, 238]

there was any attempt to move the case forward below because there was no activity of any kind. The Trial Court had already discharged its duty by ruling on Respondents' Motions to Dismiss the Amended Complaint. Petitioners' three attorneys, not the Trial Court, affirmatively breached their obligation to move the case forward by failing to submit the order on Respondents' Motions to Dismiss the Amended Complaint. The alleged "unfinished business" in this case falls squarely into the laps of Petitioners and their counsel and far short of the good cause required to avoid dismissal.

B. The Alleged Inattention, Neglect, and Misconduct of Petitioners' Counsel is Not Good Cause

In Part IIB of their Initial Brief, Petitioners submit that their case should not have been dismissed because of McCullough's inattention, neglect, abandonment, and affirmative misrepresentations. (IB 28-30)[17] They essentially claim that McCullough's alleged "misdeeds" are compelling enough to

17 Recognizing that the only documents Petitioners submitted to the Trial Court regarding McCullough's alleged misconduct was in connection with their Motion for Rehearing, Petitioners argue that the Trial Court "abused its discretion by denying, or it appears, refusing on rehearing to consider, the gravity of the malfeasance of McCullough and its affect [sic] on Petitioners' ability to pursue their lawsuit". [IB 28] For the reasons argued in Section IIA of this Brief, Petitioners waived their right to contest the propriety of Judge Roche's order denying the rehearing and cannot request reversal on this ground.

constitute good cause. This argument completely lacks merit for two basic reasons. First, Petitioners failed to make this argument to the Trial Court and there was no record before the Trial Court or the Fifth District to demonstrate McCullough's alleged misconduct. Moreover, the premise of the argument is illogical and finds absolutely no support under Florida law.

From a legal standpoint, Petitioners have not cited, and cannot cite, any authority where a finding of good cause was based on the neglect or misconduct by counsel[18]. In sharp contrast, there are numerous decisions holding that counsel's inattention, negligence, and misconduct do not constitute good cause under Rule 1.420(e). See Orsonio v. Fuller, Mallah and Assoc., 857 So.2d 973 (Fla. 3d DCA 2003); Modellista, supra; Morris v. NN Investors Life Ins. Co., Inc., 553 So.2d 1306 (Fla. 3d DCA 1989); Paedae v. Voltaggio, 472 So.2d 768 (Fla. 1st DCA 1985) (summarizing numerous cases where attorneys' excuses for the lack of activity were unsuccessful); Industrial Trucks of Florida, Inc. v. Gonzalez, 351 So.2d 744 (Fla. 3d DCA 1977).

The Third District in Orsonio rejected a similar argument

18 The case relied upon by Petitioners, Martini v. Young, 2005 WL 3076498, 30 Fla. L. Weekly D2617 (Fla. 5th DCA 2005), is factually different and does not even involve Rule 1.420(e). The only question before the Fifth District in Martini v. Young was whether a motion for reconsideration suspended rendition of the lower court's dismissal order which would then determine whether

made by the appellant "out of hand" and quoted Senior Judge Owen's opinion in Modellista:

> [I]t must be recognized that (1) the failure to timely prosecute is almost invariably due to fault of the plaintiff's lawyer, and (2) making a party bear the consequence of its lawyer's fault is central to the principle of agency. The rule does not require a distinction as to who was at fault but if it did there was plenty of fault to go around here. Orsonio at 974-975, citing Modellista at 1099-1100.

The Fourth District addressed an argument identical to the one made by Petitioners in this case in Havens v. Chambliss, 906 So.2d 318 (Fla.4th DCA 2005). The plaintiffs in Havens, whose case had been dismissed for lack of prosecution, sought relief because their attorney "had falsely, and repeatedly" lied to them about the status of the case and had even "misrepresented that he had reached a settlement with the defendant's" insurer. Havens at 319. Reciting a laundry list of "conduct unsuccessfully proffered to show good cause" and recognizing the mandatory nature of the rule and harsh result of its ruling, the Fourth District unequivocally held the attorney's total abandonment and misrepresentation did not constitute good cause. Havens at 319. The decisions in Havens, Orsonio, Modellista, Morris, Paedae, and Industrial Trucks amply illustrate the common sense principle that Petitioners cannot establish good

---

the notice of appeal was timely filed by counsel.

cause by blaming the inactivity, negligence, misconduct or fraud of their own counsel.

Assuming arguendo that the argument was even made below, there was no evidence of McCullough's misconduct before Judge Roche on March 10, 2003. The only time Petitioners referenced McCollough's actions before the March 10, 2003 dismissal hearing was in their Response and Objection to the LOP Motions. [R.271-273] In paragraph 2(d) of the Response, Petitioners' new lead counsel mentions his predecessor counsel's alleged "abandonment" in passing and only in the context of his request for an order substituting him as counsel in place of McCollough. There is no discussion whatsoever of McCollough's alleged lies and misrepresentations or any other sort of misconduct. It is crystal clear that Petitioners never made this argument to the Trial Court and failed to preserve it for appellate review. Sunset Harbour Condo Ass'n v. Robbins, 914 So.2d 925 (Fla. 2005); Dade County Sch. Bd v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999); Clark v. Osceola Clay & Topsoil Co., 99 So.2d 869 (Fla. 1957).

The record before the Trial Court simply indicates that McCullough failed to prosecute the case for over one year and failed to show good cause five days before the August 21, 2002

hearing.[19] Petitioners and their Atlanta counsel failed to create a record which would have allowed the Trial Court or the Fifth District to assess McCullough's conduct. The reason for the lack of record is completely clear. Petitioners had not advanced an argument which they needed to support with a record. Petitioners should bear the entire responsibility for the failure to make this argument and preserve it for appellate review, for their self-described "murky" record, and for their blatant inactivity in this case.

Petitioners' belated argument also completely ignores the culpability of Petitioners' two Atlanta attorneys who were admitted to practice below *pro hac vice*. As noted by the Fifth District, Petitioners' "surprise appears disingenuous, at best". Patton at 1180. Despite acting as alleged co-counsel in the Trial Court, the two Atlanta attorneys never took any affirmative steps whatsoever in this litigation. The record shows that counsel for Respondents have never been contacted by Petitioners' Atlanta counsel, have never spoken to Petitioners' Atlanta counsel, and have never received any correspondence,

19 Petitioners make the misleading assertion on pg. 8 of the Initial Brief that it is "undisputed that McCullough never… informed Petitioners or their co-counsel" of the "existence" of the LOP Motions. Simon has never conceded that this alleged non-disclosure occurred and objects to this attempt to place it into the record. There is absolutely no support for this misstatement

pleadings, or communications whatsoever from Petitioners' Atlanta counsel. With minor exception, Heavener or McCollough signed each and every pleading, order, or certificate of service filed by Petitioners in this action. McCollough and Petitioners' Atlanta counsel never advised Respondents' counsel that they were required to separately serve Petitioners' Atlanta counsel and never objected to service on McCollough only as Petitioners' local counsel. [R.241]

Atlanta counsel and McCullough were Petitioners' attorneys in this case, involving one promissory note which was paid over seven (7) years ago and another promissory note which has never matured, since March 1999. It remained in its initial pleading stage over two years later when Respondents' Motions to Dismiss the Amended Complaint were argued and in the same stage over three years later when the case was dismissed. At any time during the one-year period following July 9, 2001 hearing on Respondents' Motions to Dismiss the Amended Complaint, Petitioners' Atlanta counsel and/or McCollough could have submitted the proposed order which they were required to submit. If they had any questions regarding the Trial Court's ruling or the preparation of the order, they could have contacted the attorneys for Respondents, filed a motion for clarification,

---

of the record.

requested a status or case management conference, and/or called those matters up for hearing. See Fishe & Kleeman, Inc. v. Aquarius Condo Ass'n, Inc., supra (specifying ways to bring matters to a trial court's attention through record activities). Yet three different attorneys representing Petitioners did absolutely nothing.[20]

Based on the record before the Trial Court and the Fifth District, it would be almost impossible to find a more egregious set of facts requiring a dismissal for failure to prosecute. There is no record and there is no transcript to support Petitioners' arguments. No good cause was ever shown or could have been shown by Petitioners. The dismissal by the Trial Court and the Fifth District Opinion clearly serves the purpose for which Rule 1.420(e) exists – the diligent prosecution of cases in Florida courts.

CONCLUSION

It is undisputed that there was no record activity in this case for over one year prior to the filing of the LOP Motions. Petitioners and their attorneys repeatedly failed to present any

20 Petitioners and their Atlanta counsel should not be permitted to have their cake and eat it too. Petitioners successfully argued below that they were denied due process because of the failure to serve Atlanta counsel with the LOP Motions, but the attorneys now apparently disclaim any responsibility and blame McCollough for over three (3) years of inactivity between the time they were admitted *pro hac vice* and the dismissal orders.

evidence of good cause and the Trial Court properly exercised its discretion and dismissed the action. The Fifth District correctly applied the law to the "totality of the circumstances in view of the limited record" under Rule 1.420(e), Fla.R.Civ.P. The Fifth District correctly found that there was no abuse of the Trial Court's discretion. For the reasons set forth in this Answer Brief, the Petition should be denied and the Fifth District Opinion and the Trial Court's April 8, 2003 dismissal order should be affirmed.

Dated this 11th day of January, 2006.

Respectfully submitted,

TODD M. HOEPKER, P.A.
Post Office Box 3311
Orlando, FL 32802-3311
(407) 426-2060
Attorney for Respondent SIMON

By: /s/ Todd M. Hoepker_____
TODD M. ESQUIRE, ESQUIRE
Florida Bar No: 0507611

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: JOHN S. SCHOENE, ESQUIRE, 100 East Sybelia Ave., Suite 205, Maitland, Florida 32751; HOWARD MARKS, ESQUIRE, P.O. Box 1690, Winter Park, Florida 32790-1690; and J. MARBURY RANIER, ESQUIRE and CHARLES W. LYONS, ESQUIRE, 1500 Marquis Two Tower, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303 on this 11th day of January, 2006.

/s/ Todd M. Hoepker_____
TODD M. HOEPKER, ESQUIRE

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New, pursuant to Rule 9.100(a) Florida Rules of Appellate Procedure.

By: /s/ Todd M. Hoepker_____
TODD M. HOEPKER, ESQUIRE

Z:\MyFiles\25075\00001\ANSWER BRIEF 2.doc