IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-667

NOEL THOMAS PATTON, ET AL.,

Petitioners,

vs.

KERA TECHNOLOGY, INC., ET AL.,

Respondents.

Appeal from the Fifth District Court of Appeal

Lower Case No. 5D03-1968

PETITIONERS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTORY AUTHORITY

INTRODUCTION

Throughout this Initial Brief on the Merits, the Plaintiffs/Appellants below, NOEL THOMAS PATTON, EVE M. PATTON and EDWIN W. DEAN, shall be referred to as "Petitioners" or "Plaintiffs." The Defendants/Appellees below, KERA TECHNOLOGY, INC., GEORGE CHENG-HAO HUANG and GABRIEL SIMON, shall be referred to as "Respondents" or "Defendants."[1] Citation to the Record on Appeal shall be designated "R. ____."

[1] Defendant below, UNIDATA, INC., is not a party to this appeal.

STATEMENT OF THE CASE AND FACTS

Petitioners seek reversal of the decision rendered by the Fifth District Court of Appeal on February 18, 2005, in *Patton v. Kera Technology, Inc.*, 895 So. 2d 1175 (Fla. 5th DCA 2005), affirming an Order of Dismissal for Lack of Prosecution entered by the Honorable Renee Roche in the Ninth Judicial Circuit in and for Orange County, Florida on April 8, 2003. (R. 304-305).

For the reasons articulated herein, Petitioners established record activity, or in the alternative, good cause sufficient to preclude dismissal of their case for lack of prosecution. Accordingly, this Court should reverse the decision below.

A. Background of the Dispute

The underlying business dispute between the parties began sometime in 1998 when Petitioners became interested in investing in an ophthalmic refractive surgery center and, in so doing, attempted to acquire Respondent, Kera Technology, Inc. ("KTI"), a Taiwanese corporation, and its patents and other intellectual property related to innovative laser eye surgery technology. (R 1-7). Respondents entered into a Memorandum of Understanding with KTI's principals that resulted in execution of promissory notes in the amount of $300,000.00 in Petitioners' favor.

On December 10, 1998, after relations between the parties had deteriorated, Petitioners brought suit against Respondents seeking payment under the promissory notes in the amount of

$300,000.00, plus interest, and consequential damages in excess of $250,000.00, for breach of the Memorandum of Understanding and for fraud. (R. 1-37).

Petitioners had retained the services of local counsel, Mac D. Heavener, III, Esquire, to file the Complaint on their behalf. (R 1-37). Although not yet granted Pro-Hac-Vice status, Heavener included Petitioners' out of state counsel, J. Marbury Rainer, Esquire and Charles W. Lyons, Esquire, on the certificate of service. (R. 37).

After Respondents' Answer to the Complaint had been filed, the trial court granted Pro-Hac-Vice admission to Rainer and Lyons on March 16, 1999, as co-counsel for Petitioners. (R. 40-49). Sometime thereafter, but before November 17, 1999, Petitioners retained the services of local attorney, Terry L. McCollough, to appear on their behalf in substitution of attorney Heavener. (R. 51). Rainer and Lyons, however, remained as co-counsel and appeared on the signature block included on the certificate of service on most, if not all, of the papers filed by McCollough through 2001.[2]

[2] Such papers included: a Motion to Compel Production filed on November 17, 1999, (R. 50-51), a Notice of Filing Original Interrogatory Answers filed on August 1, 2000, (R. 57), a Motion for Leave to Amend filed on March 21, 2001, (R. 89-117), and a Notice of Hearing on Respondents' Motions to Dismiss and Strike on May 3, 2001, (R. 131-32).

Respondents' counsel, on the other hand, failed to include Petitioners' out of state co-counsel on the certificate of service or otherwise failed to communicate with or serve Petitioners' co-counsel on all filings, save one Response to Plaintiffs' First Request for Production filed on December 30, 1999, until the more recent events giving rise to this appeal. (R. 52-53).

After conducting discovery in 1999-2000, including moving to compel production of various documents, (R. 50-88), McCollough filed a Motion to File Amended Complaint on March 28, 2001, including additional counts against Respondents and additional claims for fraudulent conveyance, civil remedies for criminal actions and constructive trust against Respondents and an additional defendant, Unidata, Inc. ("Unidata"). (R. 89-117). The trial court granted Petitioners' Motion and Unidata was served with the Amended Complaint on April 17, 2001. (R. 199-126).

B. Pending Motions to Dismiss Amended Complaint

On May 1, 2001, Respondent, Simon, filed a Motion to Dismiss Amended Complaint and to Strike, (R. 125-26), and Respondents, KTI and Huang, filed their Motion to Dismiss Amended Complaint on May 2, 2005, (R. 127-30). On May 3, 2001, McCollough filed a Notice for Hearing setting Respondents' motions for hearing before the Honorable James C. Hauser on July

9, 2001. (R. 131-32). McCollough included co-counsel Rainer and Lyons on this Notice. (R. 132). On May 8, 2001, Unidata filed its Motion to Dismiss Counts IV, V and VI of the Amended Complaint. (R. 133-34).[3]

It is undisputed that a hearing, in fact, was conducted before Judge Hauser on July 9, 2001, on Respondents' Motions to Dismiss. It is further undisputed that the hearing was unreported and no court minutes exist documenting a ruling, if any, by the trial court on July 9, 2001.

Furthermore, although it was not included on the Notice of Hearing filed by McCollough on May 3, 2001, (because it was filed thereafter), it is unclear whether the trial court also entertained Unidata's Motion to Dismiss Counts IV, V and VI of the Amended Complaint. What is known, however, is that at no time did the trial court enter a written order memorializing the outcome of the July 9, 2001, hearing.

Meanwhile, Petitioners and co-counsel became increasingly dissatisfied and alarmed at McCollough's failure to communicate the status of their lawsuit since the July 9, 2001, hearing on Respondents' Motions to Dismiss the Amended Complaint. As early

[3] Unidata, like Respondents' counsel, however, failed to include Petitioners' co-counsel on the certificate of service of this Motion. (R. 134).

as July 12, 2001, however, in an email to Petitioners, McCollough attempted to mollify Petitioners and represented:

> [S]orry for the delay in updating you. At the hearing [of July 9, 2001], the substance of the Amended Complaint was upheld by the Court. The judge is requiring some additional amendments in the form of more specific recitations of supporting facts and has asked for a short brief on one issue regarding the fraudulent conveyance action . . . The only part the judge felt was inappropriate was the final count for constructive trust. Frankly, I am not sure that he is wrong in concluding that it is duplicative and I am not concerned with having that count alone dismissed.
>
> I will be filing the brief and will keep you updated accordingly.

(R. 281).

After a series of other disgruntled emails from Petitioners regarding the status of their lawsuit, McCollough represented, or in hindsight, misrepresented, on October 7, 2001, that the brief had been filed and he was still awaiting the trial court's ruling on the motions to dismiss the Amended Complaint and, apparently, the court's ruling on certain outstanding discovery matters:

> Everything that Judge Hauser had asked for has been filed and we are awaiting a decision on the remaining issues from the Motions directed to the Amended Complaint. I will write to him to see if I can prompt him into a decision. I know that it has been a while since the hearing and filing but he has been getting more and more tardy with the timing of decisions taken under advisement. Additionally, although we have discovery overdue and outstanding, he was to rule upon those issues at the same time and incorporate them into the order . . .

(R. 284).

Later, as the case progressed into 2002 without an order on Respondents' dispositive motions, co-counsel made several attempts to contact McCollough to learn the status of the litigation to no avail. (R. 285-291).

By June 2002, co-counsel contacted Kenneth Mann, Esquire, (later to be substituted as local counsel for Petitioners), to review the court file and determine the status of the lawsuit. (*Id.*)

At that time, Mann confirmed that, indeed, no order had yet been entered on the July 9, 2001, hearing.[4] Mann, however, had been assured by McCollough by telephone in June 2002, that Judge Hauser had taken the Motions to Dismiss under advisement without ruling and he communicated same to Petitioners. (R. 286, 290).

C. <u>Motions to Dismiss for Failure to Prosecute</u>

On July 31, 2002, August 1 and August 7, 2002, however, Respondents filed their respective Motions and Amended Motions to Dismiss for Lack of Prosecution ("LOP Motions"), alleging no

[4] It is now clear that McCollough's email representation on October 7, 2001, that a supplemental brief had been filed, was utterly fabricated as the court docket does not reflect the filing of any such brief nor did opposing counsel receive any brief from McCollough. (R. 289). Unfortunately, Petitioners, unaware at the time of its significance, failed to share the email with co-counsel or Mann until sometime before April 2003 when it was presented to the trial court in a motion for rehearing. (R. 278-84).

record activity within the last year. (R. 135-140).[5] In each motion, however, Respondents acknowledged that a hearing was conducted on July 9, 2001, yet no order had been entered. In particular, Respondents, KTI and Huang, stated in their LOP Motion:

> 1. Various motions to dismiss were heard by the Court on July 9, 2001.
>
> 2. It does not appear from the court file that any orders were submitted to or entered by the Court, as a result of the hearing.

(R. 135, 139). Respondent, Simon, went on further to state:

> This Court heard argument on Defendants' Motions to Dismiss on July 9, 2001. The Court ruled that Plaintiff's counsel was required to prepare and submit a proposed order on the Motions to Dismiss after the hearing. No order was ever prepared or submitted.

(R. 137). The motions, however, equally lacked specificity as to what exactly occurred on July 9, 2001; namely, which Motion to Dismiss was granted, if any, by the trial court, and what became of the Motion to Strike or Unidata's Motion to Dismiss?

Moreover, it is undisputed that neither LOP Motion was served upon Petitioners' co-counsel, Rainer and Lyons, nor did Respondents serve Rainer and Lyons with the Notices of Hearing filed on August 13 and 16, 2002, setting the LOP Motions for hearing before Judge Hauser on August 21, 2002. (R. 141-44).

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[5] Unlike Respondents, Unidata did not move for dismissal for lack of prosecution, nor has Unidata filed any additional papers below.

Lastly, it is further undisputed that McCollough never appeared at the August 21, 2002, hearing on Respondents' LOP Motions, nor informed Petitioners or their co-counsel of its existence.

On August 21 and 22, 2002, the trial court entered Orders granting Respondents' LOP Motions without further comment. (R. 145-47). Although served on McCollough, neither Order was served on Petitioners' co-counsel, Rainer and Lyons, as evidenced by the face of the Orders themselves.

Unaware of the dire status of the case due to McCollough's affirmative misrepresentations, but after repeated unanswered attempts at communication with McCollough by email, letter and telephone, Petitioners elected to retain Mann as local counsel in October 2002. (R. 280, 286, 288).

After McCollough failed to answer Mann's letters and no response was forthcoming to an October 28, 2002, email from Mann to McCollough regarding substitution of counsel, Mann reviewed the court file only to learn that Orders had already been entered granting Respondents' LOP Motions. (R. 288- 289).

At no time did Petitioner's co-counsel ever receive copies of Respondents' motions, notices of hearing, or the Orders entered on their motions to dismiss the lawsuit for failure to prosecute. (R. 286-87).

D. Motion to Quash Orders of Dismissal and Substitution of Counsel

After discovering the dismissal, Mann immediately served Plaintiffs' Motion for Substitution of Counsel, to Quash Orders of Dismissal and for Case Management Conference on December 6, 2002, and filed said Motion on December 10, 2002. (R. 148-51).

In the Motion, Petitioners argued that the Orders granting Respondents' LOP Motions should be vacated because those Motions violated Petitioners' due process rights in that co-counsel never received them. In addition thereto, Petitioners argued that dismissal for lack of prosecution is inappropriate where, as here, a dispositive motion to dismiss remained pending for resolution by the trial court. (*Id.*)

Upon learning that Judge Hauser would soon be rotating out of the civil division effective December 31st, Petitioners noticed their Motion for Emergency Hearing before Judge Hauser on December 20, 2002. (R. 152).

On December 20, 2002, Judge Hauser conducted an Emergency Hearing on Petitioners' Motion for Substitution of Counsel, to Quash Orders of Dismissal and for Case Management Conference. (R. 183-223). At that hearing, counsel for Respondents, KTI and Huang, stated to the trial court that at the July 9, 2001, hearing:

> We had a motion to dismiss here and you told Mr. McCollough to draft an order [and] run it by us. That order was never submitted.

(R. 211). Counsel for Respondent, Simon, further claimed the trial court:

> [V]erbally dismissed two – two or three of the counts of the amended complaint and didn't dismiss one count of the amended complaint. You [trial court] told Mr. McCollough to prepare an order. That order was never prepared.

(R. 211).

Further, the trial court admitted to having "absolutely no recollection" of the July 9, 2001, hearing or its outcome. (Emphasis added)(R. 209). The trial court reserved ruling and requested additional briefing on whether failure to serve co-counsel violated Petitioners' due process rights and continued the hearing until February 12, 2003. (R. 199, 182A-182I, 224-34, 235-50).

On January 6, 2003, Petitioners filed their Memorandum of Law in Support of their December 6, 2002, Motion to Quash Final Orders of Dismissal of August 21 and 22, 2002, and Table of Cases, wherein Petitioners elaborated on the violation of due process inherent in the failure to properly serve Respondents' LOP Motions and the pending "unfinished business" of the trial court in failing to render an order on Respondents' dispositive motions to dismiss the Amended Complaint after hearing on July 9, 2001. (R. 153-182I).

On January 13, 2003, Petitioners filed a Notice of Hearing for continuation of the December 20, 2002, Emergency Hearing on Petitioners' Motion for Substitution of Counsel, to Quash Orders of Dismissal and for Case Management Conference to be conducted before Judge Hauser on February 12, 2003. (R. 182J). On January 16, 2003, Petitioners filed a Notice of Filing of the Transcript of the December 20, 2002, Emergency Hearing. (R. 183-203). On January 24 and February 7, 2003, Respondents filed their respective Memoranda of Law in Opposition to Petitioners' Motion. (R. 224-250).

E. Order Quashing Dismissals for Failure to Prosecute

On February 12, 2003, Judge Hauser conducted the continued Emergency Hearing. At that hearing, the trial court vacated the August 21 and 22, 2002, Orders granting Respondents' LOP Motions for denial of due process. The next day, on February 13, 2003, Petitioners filed a Notice of Filing the Deposition Transcript of Defendant Huang with Attachments taken on May 11, 2000. (R. 251-264).

Promptly thereafter, Petitioners sought, obtained, and filed on February 17, 2003, a Notice of Hearing for one hour on all of Respondents' dispositive motions to dismiss, i.e., Respondent, Simon's, Motion to Dismiss Amended Complaint and to Strike, Respondents, KTI and Huang's, Motion to Dismiss Amended Complaint, and Defendant, Unidata's, Motion to Dismiss Counts

IV, V and VI of the Amended Complaint, to be conducted before the new trial judge, the Honorable Renee Roche, on April 3, 2003. (R. 265).

Pursuant to its oral ruling on February 12, 2003, on February 25, 2003, Judge Hauser reduced his oral pronouncements to a written Order Quashing Orders of Dismissal and Granting Motion for Substitution of Counsel. (R. 266-67). Therein, he granted Petitioners' Motion for Substitution of Counsel and vacated the Orders entered on August 21 and 22, 2002, dismissing Petitioners' case for lack of prosecution, on the ground that Respondents failed to "serve plaintiffs Atlanta attorneys with copies of their 2002 motions, notices of hearing and the orders thereon dismissing the action for lack of prosecution denied the plaintiffs due process." (R. 266).

Thereafter, on February 26, 2003, Respondents filed a Notice for Hearing on their Motion to Dismiss for Lack of Prosecution before Judge Roche on March 10, 2003, and effectively re-served the Motion by attaching the Motion thereto as Exhibit "A." (R. 267A-270). For the first time, Respondents included Petitioner's local counsel, Mann, and out of state co-counsel, Rainier, on the certificate of service.[6] (R. 270).

[6] For unknown reasons, only Respondent Simon's Notice of Hearing is contained in the Second Amended Record on Appeal.

On March 3, 2003, Petitioners filed their Response and Objection to Defendants' Motions to Dismiss for Failure to Prosecute asserting many of the same arguments asserted in this appeal. (R. 271-73).

F. Second Hearing and Order on Motions to Dismiss for Failure to Prosecute

At the unreported hearing on March 10, 2003, Judge Roche took the matter under advisement and, on April 8, 2003, entered an Order of Dismissal for Lack of Prosecution granting Respondents' LOP Motions and dismissing the case without further comment. (R. 304).

On April 18, 2003, Petitioners served their Motion for Rehearing, Reconsideration and Clarification of the trial court's April 8th Order of Dismissal for Lack of Prosecution. (R 274-97). Attached to said Motion, Petitioners filed the Affidavits of Petitioner, Edwin Dean; Co-Counsel, Rainer; and local counsel, Mann, which addressed Petitioners', and their counsel's, knowledge of the July 9, 2001, hearing and the lack of communication and affirmative misrepresentations made by McCollough.

Nonetheless, on May 12, 2003, without hearing, and again, without comment, the trial court entered an Order denying Petitioners' Motion. (R. 298).

G. Appeal

Petitioners filed a timely Notice of Appeal on June 10, 2003, appealing the dismissal to the Fifth District Court of Appeal. (R. 306-309).

Subsequently, this Court suspended, then disbarred McCollough, in part, for his actions or inaction in the instant case. *See The Florida Bar v. McCollough*, 879 So. 2d 625 (Fla. 2004).

On February 18, 2005, the Fifth District, after rehearing, entered a written decision affirming the trial court's dismissal of the instant case for lack of jurisdiction. *See Patton v. Kera Technology, Inc.*, 895 So. 2d 1175 (Fla. 5th DCA 2005).

Petitioners timely filed a notice to invoke this Court's discretionary jurisdiction on April 18, 2005, on the basis that the Fifth District opinion expressly construed the due process clauses of the Florida and/or Federal Constitutions, and is in conflict with decisions with other district court of appeals and with one or more of this Court's holdings. This Court accepted jurisdiction on September 26, 2005. This appeal follows.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal affirming the dismissal of Petitioners' case for lack of prosecution is fatally flawed and must be reversed. First, Petitioners demonstrated sufficient record activity below to preclude dismissal for failure to prosecute, at a minimum, by their filings between the time when the trial court entered its order quashing the original motions dismissing the case for lack of prosecution for violation of due process and re-service of Respondents' LOP Motions.

Second, Petitioners also established good cause why their case should not be dismissed by demonstrating that Respondents' dispositive motions to dismiss the Amended Complaint remained unexplained and unresolved by the trial court; thus, "unfinished business" still remained for the trial court.

Finally, Petitioners also demonstrated that McCollough's affirmative misrepresentations and subsequent disbarring as result of his actions, or better yet, inactions in this case, effectively denied Petitioners a fair opportunity to prosecute their case, thereby also establishing good cause sufficient to preclude dismissal of this case.

LEGAL ARGUMENT

I. THE FIFTH DISTRICT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DISMISSAL FOR LACK OF PROSECUTION WHERE SUFFICIENT ACTIVITY APPEARED ON THE FACE OF THE RECORD AFTER THE TRIAL COURT QUASHED THE ORIGINAL DISMISSAL FOR LACK OF PROSECUTION BUT BEFORE RE-SERVICE OF RESPONDENTS' MOTIONS ON SAME.

The trial court abused its discretion and the Fifth District erroneously affirmed the dismissal of Petitioners' case for lack of prosecution where record activity occurred after the trial court quashed the Orders granting Respondents' LOP Motions for violation of due process and before re-service of Respondents' Motions. Namely, the following activity appears in the court file after the trial court's ruling on February 12, 2003: the Notice of Filing the Deposition of Huang in preparation for subsequent motions in connection therewith; Petitioners' Notice of Hearing on all Respondents' dispositive motions to dismiss the Amended Complaint; and the Order Quashing Orders of Dismissal and Granting Motion for Substitution of Counsel.[7]

Pursuant to this Court's most recent decisions, the Order Quashing Orders of Dismissal and Granting Motion for Substitution of Counsel would, in and of itself, constitute sufficient record activity to preclude dismissal. *See Wilson v.*

[7] Of course, Petitioners also contend that the record activity in December 2002 and January 2003, including the Motion for Substitution of Counsel, to Quash Orders of Dismissal and for Case Management Conference and its supporting Memoranda also constitutes sufficient record activity to preclude dismissal.

Salamon, 30 Fla. L. Weekly S701 (Fla. Oct. 20, 2005)(holding that under the plain meaning of Florida Rule of Civil Procedure 1.420(e), trial court orders that are entered and filed to resolve motions that have been properly filed in good faith should be treated as record activity precluding dismissal for failure to prosecute).

Moreover, this Court has further held that a trial court need not look behind the record to determine whether a record filing within the preceding year constitutes sufficient record activity to preclude dismissal; rather, this Court has espoused a bright-line rule that: "There is either activity on the face of the record or there is not." *Id.* (*quoting Metropolitan Dade County v. Hall*, 784 so. 2d 1087 (Fla. 2001)). Accordingly, the remaining documents filed in the time period after the Order quashing the original motions to dismiss for failure to prosecute but before re-service of Respondents' LOP Motions would, on their face, constitute sufficient record activity by virtue of their presence in the court's docket.

The Fifth District's reasoning that the trial court properly quashed the original orders granting dismissal because of lack of due process resulting from failure to serve Petitioners' co-counsel -- but that the original LOP Motions should constitute the benchmark for calculating the one year period on inactivity -- is at odds with the law and common

sense. While this may be true in the typical case where the motion to dismiss for lack of prosecution is not itself suspect for lack of due process, the appropriate yardstick for the one year look-back-period would most logically be the filing of the motion to dismiss for lack of prosecution. *See, e.g., Florida East Coast Ry. Co. v. Russell*, 398 So. 2d 949 (Fla. 4th DCA), *rev. denied*, 411 So. 2d 381 (Fla. 1981).

Here, however, as argued below in Petitioners' Motion for Rehearing, Reconsideration and Clarification, Florida Rule of Civil Procedure 1.420(e) expressly requires "reasonable notice" in addition to a sufficient period of record activity. Since the original orders granting dismissal for lack of prosecution had been quashed for lack of due process notice, it would be illogical to permit the motions themselves to be resuscitated *nunc pro tunc* to the date of improper service upon subsequent service over six months later.

The Fifth District's opinion utterly overlooks this distinction. Rather, the appropriate look-back-period is defined by the date in which Respondents afforded Petitioners due process and re-served the LOP Motions. Accordingly, the Fifth District's opinion should be reversed.

II. THE FIFTH DISTRICT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DISMISSAL FOR LACK OF PROSECUTION WHERE PETITIONERS DEMONSTRATED GOOD CAUSE WHY THE CASE SHOULD NOT BE DISMISSED.

B. Petitioners Properly Relied Upon The Fact That The Trial Court Had Not Yet Ruled On Respondents' Dispositive Motions As Good Cause To Preclude Dismissal For Failure To Prosecute.

The Fifth District affirmed the dismissal for lack of prosecution in this case predicated on its conclusion that no "unfinished business" remained for resolution by the trial court in ruling on Respondents' dispositive motions to dismiss the Amended Complaint. In doing so, the court assumed that that the trial judge had in fact ruled upon Respondents' motions at the hearing, but did not instruct McCollough to prepare a proposed order on same.

In the same breath, the court acknowledged that that the outcome of the July 9, 2001, hearing would remain a mystery:

> The hearing was held on July 9, 2001, but no transcript exists, and the parties disagree on the outcome of the hearing. McCollough informed Atlanta co-counsel by email that the court reserved ruling. However, Appellees assert that the court issued its ruling and instructed McCollough to submit a proposed order, which McCollough failed to do. Nothing in the record supports either party's assertion and at a subsequent hearing, the trial judge stated that he had "absolutely no recollection" of the disposition of the motions or of his decision.

Patton, 895 So. 2d at 1177; (Emphasis added).

What the Opinion below, however, fails to address is the most salient and equally viable point under these facts to both

the bench and bar; what if the trial court had not yet ruled on all or some of the dispositive issues before it on July 9, 2001? In fact, there is no way, in light of the lack of transcript, missing court minutes, and complete lack of recollection on behalf of the trial court to conclude otherwise, as did the Fifth District -- 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.

Moreover, as evidenced by the emails to his clients and his representations to subsequent counsel, McCollough, himself, claimed (no doubt also in self-serving fashion) that the trial court had reserved ruling in its entirety at the July 9, 2001, hearing and had requested additional briefing before it could enter an order on Respondents' motions.[8]

Lastly, there remains the untidy issue of what occurred on the motion to dismiss the Amended Complaint filed by Unidata, the most recently added defendant – did the trial court even address the motion? Did it also rule on same or is it, too, in judicial limbo, not having been dismissed or ruled upon in any

[8] Needless to say, this fact, compounded with the undisputed facts that McCollough had been disbarred, in part, for abandoning Petitioners' case and for misrepresenting that further briefing had in actuality been completed when it clearly had not should, in and of itself, establish good cause as argued more specifically below.

fashion? Thus, the fatal flaw in the Fifth District's reasoning below is the failure to consider the alternative, i.e., what if the trial court had not yet ruled and "unfinished business" remained for resolution by the trial court?

Simply put, there are too many unanswered questions to squarely say it is the plaintiffs below, not the trial court, which should bear the responsibility, and the punishment, for the failure to enter a written order on Respondents' dispositive motions for purposes of lack of prosecution. *See Wilson v. Salaman*, 30 Fla. L. Weekly S701 (Fla. Oct. 20, 2005)(Pariente, C.J., concurring)("Although I agree that much of the burden of moving cases to conclusion should remain on the litigants, trial judges have an obligation to ensure that cases do not languish on the docket."); *see also* Fla. R. Jud. Admin. 2.085(b).

Rather, 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 the proposed order, to preclude dismissal for failure to prosecute?" As this Court has recently concluded, confusion on the application of Rule 1.420(e) requires a plain bright-line reading of the rule to "further the purpose of decreasing litigation over the purpose of the rule

and fostering smooth administration of the trial court's docket." *Wilson, supra*.

Without such clarification, a plaintiff is left guessing as to what, if any, action should be taken pending the trial court's decision whether his or her case is a "go" or can go no further. For example, does a plaintiff incur the "real world" cost of pursuing discovery on claims that may not survive a motion to dismiss? Or, may a plaintiff rightfully rely upon the trial court to timely enter an order in a reasonable time without fear that its case might be dismissed in the meantime? *See Miami Nat'l Bank v. Greenfield*, 488 So. 2d 559, 563 (Fla. 3d DCA 1986)("It is uncontroverted in this case that MNB's counsel properly submitted an order in accordance with the trial court's oral pronouncement, and that the trial court inadvertently failed to act on the order. MNB had no obligation, under pain of dismissal of its complaint, to pressure the court in to signing the order . . . ").

Moreover, what steps or "record activity," if any, can a plaintiff undertake to prosecute its case or preclude dismissal for lack of prosecution that will not, itself, be deemed a "nullity" pending resolution of a dispositive motion? *See, e.g., Fallschase Dev. Corp. v. Sheard*, 655 So. 2d 214, 215 (Fla. 1st DCA 1995)(holding plaintiff's notice for trial a "nullity" for purposes of motion to dismiss for lack of prosecution when

filed while resolution of a dispositive motion to strike affirmative defenses remained pending); *Alech v. Gen. Ins. Co*., 491 So. 2d 337, 337-38 (Fla. 3d DCA 1986)(holding plaintiff's notice for trial a "nullity" for purposes of motion to dismiss for lack of prosecution when filed while resolution of a dispositive motion to strike plaintiff's punitive damages claim and paragraphs 25-28 of the complaint remained pending).

In *Fallschase Development Corporation*, for example, the First District in that case held that a notice for trial was deemed a "nullity" for purposes of avoiding dismissal for lack of prosecution where the notice was filed while a previously filed motion to strike affirmative defenses remained undecided by the trial court. There, the First District concluded that because the motion to strike remained outstanding, "[a]ccordingly, the action was not at issue, and the notice for trial was a nullity." *Id.*

The Third District in *Alech* reached an identical result where the plaintiff in that case filed a notice for trial while a motion to strike plaintiff's punitive damages claim and portions of the complaint remained outstanding. *Alech*, 491 So. 2d at 338 (*citing Leeds v. C.C. Chemical Corp.*, 280 So. 2d 718, 719 (Fla. 3d DCA 1973)("The determinative question is whether a cause is at issue where, with the last responsive pleading required under the rules, there also is a simultaneously filed a

motion to strike all or part of the pleading to which such responsive pleading is directed. Upon resolving the arguments of the parties relating thereto, we hold that the cause is not at issue while such motions directed to pleadings remain undisposed of . . . “)); *see also Carlson v. Jeflis Prop. Mgmt. Corp.*, 904 So. 2d 642, 644 (Fla. 2d DCA 2005)(exceptions to one year period of activity pursuant to Rule 1.420(e) exist when the action is in a state of limbo due to the failure of the court itself to act).

Likewise, this case, as in *Fallschase Development Corporation* and *Alech*, is also “not at issue” precisely because a written order has yet to be entered on dispositive motions to dismiss Petitioners’ Amended Complaint. Thus, at a minimum, until the trial court resolved Respondents’ motions to dismiss, Petitioners could not obtain any ultimate relief from the trial court, including adjudication of their claims, summary judgment or even a trial date.

Thus, both the bench and bar would benefit from uniformity as to what action, if any, a plaintiff may take to save its case from dismissal for lack of prosecution while a dispositive motion remains pending with the trial court. Under the analysis in *Greenfield*, for example, Petitioners should have been entitled to rely on the court’s control of entry of its own orders to preclude dismissal of its case.

Moreover, the case law is in conflict as to what extent, if any, a plaintiff may rely on an unresolved pending dispositive motion for purposes of dismissal for failure to prosecute. In the lower opinion, for example, the Fifth District expressly relied on two opinions; first, its holding in *Sewell Masonry Company v. DCC Construction, Inc.*, 862 So. 2d 893, *review voluntarily dismissed*, 870 So. 2d 823 (Fla. 2004), and, second, the Third District's holding in *Dashew v. Marks*, 352 So. 2d 554 (Fla. 3d DCA 1977), for its proposition that it is the plaintiff, not the trial court, that "bears responsibility to expedite litigation and Plaintiff's failure to take steps within Plaintiff's control to resolve the case or to ensure prompt dispatch of court orders warrants dismissal." *Patton*, 895 So. 2d at 1178.

In *Sewell Masonry Company*, the plaintiff in that case relied on two pending motions before the trial court as good cause to prevent the case from being dismissed for failure to prosecute. In so arguing, the plaintiff in that case relied on the Third District's holding in *Lukowsky v. Hauser & Metsch, P.A.*, 677 So. 2d 1383, 1384 (Fla. 3d DCA), *review denied sub nom.*, 686 So. 2d 578 (Fla. 1996), that whenever a dispositive motion is pending before the trial court, the duty to proceed rests "squarely" with the trial court and the cause cannot be dismissed for lack of prosecution. The Fifth District

distinguished the holding in *Lukowsky* by reasoning that in that case a motion was pending and the parties were awaiting the court's ruling (much like the instant case), whereas no such facts existed in *Sewell.* *See also Air Line Pilots Ass'n v. Schneernilch,* 674 So. 2d 782 (Fla. 3d DCA 1996)(same result as *Lukowsky* where pending motions have been argued and the trial court's ruling was pending).

Here, the facts in this case are more akin to *Lukowsky* than *Sewell*. Nevertheless, *Sewell* certified conflict with *Dye v. Security Pacific Financial Services, Inc.*, 828 So. 2d 1089 (Fla. 1st DCA 2002), which also relied upon *Lukowsky* and this Court's apparent approval thereof in *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000), to hold that it was error to grant a dismissal for failure to prosecute where a dispositive motion had not yet even been set for hearing.

The Fifth District below also relied on the holding in *Dashew*, wherein the Third District held that where a trial judge does recall if and what he ruled, plaintiff's counsel has the duty to see that an order gets entered within the one-year period prescribed under Rule 1.420, even if counsel erroneously believed that defense counsel had be directed to prepare the order. In *Sarasota Cattle v. Mikos*, 431 So. 2d 260, 261-62 (Fla. 2d DCA 1983), the Second District observed that: "Although *Dashew* does lend some support to appellees' position,

we do not necessarily agree with that view." This Court subsequently affirmed the Second District in *Mikos v. Sarasota Cattle Co.*, 453 So. 2d 402 (Fla. 1984).

In so doing, this Court tacitly expressed disagreement with *Dashew* by its statements: "We agree fully with the decision below and therefore approve it." *Mikos,* 453 So. 2d 403. If for additional emphasis, and despite the brevity of the opinion, this Court stated yet again: "We agree with the decision below in all respects."

Admittedly, *Mikos* involved "un-acted-upon" notices for trial rather than unconcluded dispositive motions, yet, the principle is the same in that like a notice for trial where the trial court drives its own docket, a trial court alone retains the authority to enter a written order, regardless of who prepares it.[9]

The point being that the issue is ripe for clarification as to who bears the responsibility to ensure that orders are entered and who bears the punishment when they are not on a motion to dismiss for failure to prosecute. Accordingly, this Court should reverse the opinion below in favor of a bright-line rule that plaintiffs may rely on resolution of pending

[9] Notably, *Dashew* also did not involve notices for trial but neither the Second District nor this Court saw fit to distinguish *Dashew* on this ground, nor did the Court limit its unqualified endorsement of *Mikos* to notices for trial.

dispositive motions for purposes of failure to prosecute to allow a more uniform application of the law and to prevent the confusion addressed in *Wilson*, *supra*.

B. McCollough's Affirmative Misrepresentations, Obfuscations and Ultimate Disbarring for His Actions, or Lack Thereof, in the Instant Case Adequately Established Good Cause to Preclude Dismissal for Failure to Prosecute.

The trial court abused its discretion by denying, or it appears, refusing on rehearing to consider, the gravity of the malfeasance of McCollough and its affect on Petitioners' ability to prosecute their lawsuit. Similarly, the Fifth District erroneously affirmed the dismissal without reversing the trial court for failure to consider McCollough's misdeeds as good cause precluding dismissal for failure to prosecute.

Florida's courts have repeatedly held that good cause must be excusable conduct other than negligence or inattention to deadlines and must show some "compelling reason" why the lawsuit was not prosecuted, including, but not limited to, calamity or unfair actions of opposing counsel. *See, e.g., Bruns v. Jones*, 481 So. 2d 544 (Fla. 5th DCA 1986).

Here, there can be no other conclusion from the face of this Record other than McCollough not only neglected, but abandoned Petitioners' case and affirmatively misrepresented his

efforts, or lack thereof, on their behalf.[10] Certainly, McCollough's own unfair actions prevented Petitioners from making informed decisions to prosecute their case, regardless of any actions by opposing counsel.[11]

Most assuredly, there are some occasions where courts have, and should, properly make a client bear the consequences of the neglect of its counsel. *See, e.g., Modellista de Europa v. Redpath Inv. Corp.*, 714 So. 2d 1098, 1100 (Fla. 4th DCA 1998). This case, however, is not one. *Cf. Martini v. Young*, 2005 LEXIS 18242 (Fla. 5th DCA Nov. 18, 2005)(Sharp, J., dissenting)("A party should not be made to suffer the loss of viable claims due to the malfeasance of an attorney when there is no evidence in the record to indicate that the party personally engaged in misconduct.")

The effect of McCollough's misrepresentations have wreaked a cumulative havoc on Petitioners' case, the least of which being the absence of an order on the July 9, 2001, hearing, and

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[10] Petitioners' situation in discovering McCollough's lies and further obfuscations of the true status of their case can be likened to that of the delayed discovery doctrine which provides a tolling of applicable deadlines during the time period in which active fraud precludes an otherwise diligent plaintiff from discovering the nature of the fraud itself.

[11] Arguably, Respondents' counsel were more than aware of McCollough's neglect as evidenced by his failure to even attend the hearing on Respondents' LOP Motions, or his purported failure to submit a proposed order on Respondents' dispositive motions for over one year.

the subsequent murky record, the total abandonment of Petitioners' case, including failure to even appear at the hearing on Respondents' LOP motions, and finally, McCollough's outright lies as to the progress of the case. All of the above must be construed as a "compelling reason" why the suit was not prosecuted and the affirmance below should be reversed.

III. CONCLUSION

This Court should reverse the decision of the Fifth District Court of Appeal affirming the dismissal of Petitioners' case below for failure to prosecute. For the foregoing reasons, Petitioners established record activity sufficient to preclude dismissal, at a minimum, during the time period between the trial court's ruling quashing the original orders dismissing the case for lack of prosecution due to Respondents' failure to properly serve the motions thereon and the time that Respondents re-served their LOP Motions.

Alternatively, Petitioners established good cause by demonstrating that a pending dispositive motion had yet to be ruled on by the trial court after hearing and the egregious nature of McCollough's affirmative misrepresentations and subsequent disbarring prevented a fair opportunity for Petitioners to prosecute their case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. mail this 21st day of November, 2005, to: Todd M. Hoepker, Esquire, P.O. Box 3311, Orlando, Florida 32802-3311; John S. Schoene, Esquire, 100 East Sybelia Avenue, Suite 205, Maitland, Florida 32751; and J. Marbury Rainer, Esquire and Charles W. Lyons, Jr., Esquire, Parker, Hudson, Et Al., 1500 Marquis Two Tower, 285 Peachtree Center Avenue, N.E., Atlanta, Georgia 30303.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in the foregoing Initial Brief on the Merits is Courier New 12 point.

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