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

NOEL THOMAS PATTON, *et al.*,
Plaintiffs/Appellants/Petitioners,

v.

KERA TECHNOLOGY, INC., *et al.*,
Defendants/Appellees/Respondents.
_____/

DISCRETIONARY PROCEEDING TO REVIEW DECISION OF 5TH DCA CASE NO. 5D03-1968

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PETITIONERS' AMENDED BRIEF ON JURISDICTION

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JURISDICTIONAL STATEMENT OF THE CASE

The petitioners/plaintiffs seek discretionary review of the decision rendered by the 5th DCA on March 17, 2005 in *Patton v. Kera Technology, Inc.*, 895 So.2d 1175 (Fla. 5th DCA 2005)("the lower court decision"). A true copy of the lower court order transmitting the corrected decision and a true copy of the corrected decision as electronically published are in the Appendix filed herein.

The lower court decision affirmed the trial court's dismissal of the petitioners'/plaintiffs' action against the respondents/defendants for lack of prosecution ("LOP dismissal") under Florida Rules of Civil Procedure 1.420(e). The petitioners timely filed a notice to invoke discretionary jurisdiction on April 15, 2005, and an amended notice on April 18, 2005, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A) and 9.120. The amended notice corrected a typographical error on the rendition date, from March 18, 2005 to March 17, 2005. As elaborated upon below, the petitioners contend this Court has discretionary jurisdiction because the lower court decision expressly construes the due process clause of the Florida and/or Federal Constitutions, and expressly and directly conflicts with decisions of other district courts of appeal and with one or more decisions of this Court on the same question of law - - namely, who has the ultimate responsibility for managing the trial court's docket - - the bench or the bar - - with respect to outstanding pleadings and motions of record?

JURISDICTIONAL STATEMENT OF THE FACTS

The petitioners adopt the facts recited in the lower court opinion, as clarified and elaborated upon herein. The respondents filed LOP dismissal motions in the summer of 2002. However, the service of these motions, as well as service of the notices of hearing thereon, as well as service of the trial court's August, 2002 LOP dismissal orders, were all found by the trial court and by the 5th DCA to violate the petitioners' constitutional right of due process because of the combination of the following: (a) the respondents failed to serve the plaintiffs'/petitioners' Atlanta co-counsel of record with their motions, their notices of hearing and the LOP dismissal orders; and (b) the absence of actual knowledge by the plaintiffs/petitioners of the summer 2002 LOP dismissal proceedings because their then-lead counsel, Terry Len McCollough had abandoned them without their knowledge, had never notified them of the LOP proceedings, and before abandoning them, had lied to them about having filed a brief with the trial court subsequent to and in connection with a July 9, 2001 hearing that had been held on the defendants' substantive motions to dismiss and strike the plaintiffs' amended complaint.[1] It is unclear whether or to what extent McCollough was also lying with respect to his claims shortly after the July 9, 2001 hearing and in a phone

[1] /This Court subsequently suspended, and shortly thereafter, disbarred McCollough. *See The Florida Bar v. McCollough*, ##s SC03-1695 (suspension) and SC03-2145 (disbarment), 879 So. 625 (Fla. 2004).

conversation in June 2002 [R. 281, 284, 290], that the trial court still had the matter under advisement. At the emergency hearing held on December 20, 2002, the initial trial judge indicated he had "absolutely no recollection" of what had occurred at the July 9, 2001 hearing [R. 209], and defense counsels' recollections were less than specific. [R. 211]

The lower court decision summarized all of the foregoing as follows:

> The unrecorded July 9, 2001 hearing cannot shed light on the results of the hearing, and the parties disagree on whether the court issued a ruling at that time. *Even if we assume* that the trial judge *ruled* upon appellees' motion [*sic* - - should read "motions"] at the hearing, but did not instruct appellants to prepare an order, appellants' failure to take any affirmative action toward resolving the case for more than one year warrants dismissal. [Emphasis added.]

Appendix at 5.

Nowhere, however, does the lower court decision address the reverse assumption, *i.e.*, what if one assumes the trial judge *did not* rule upon *all of* the respondents' dispositive motions at the July 9, 2001 hearing? *I.e.*, what if McCollough's emails and June 2002 phone conversation alleging that the trial court had reserved ruling were at least *partially* truthful? The lower court opinion does not address that the petitioners asserted therein (and they accordingly assert as a jurisdictional fact herein), that the "unfinished business" following the July 9, 2001 unrecorded, non-evidentiary, dispositive motions hearing, was not only the

absence of a written order on whatever rulings the trial court may have made, but the absence of clarity over whether the court had ruled on *all* issues at the July 9, 2001 hearing.

Even the respondents' Summer 2002 LOP dismissal motions themselves lacked preciseness as to what the trial court did on July 9, 2001. Respondent Simon's LOP dismissal motion merely recited that "the court ruled that plaintiffs' 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] But *whose* motions to dismiss? And what was the disposition of the motions to strike? The August 3, 2002 LOP dismissal motion by defendants Huang and Kera Technology was even more vague as to what occurred, and who, if anyone, was directed to do what:

> ¶ 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. 139] Following briefing by counsel of the due process issue, the trial court held a hearing on February 12, 2003 [R. 182J], at which time the trial court announced that the Summer 2002 LOP dismissal orders would be quashed for denial of due process. The order thereon was entered February 25, 2003 and filed February 26, 2003. [R. 266-267] In the interim, petitioners had promptly filed on February 13, 2003 the deposition transcript of Huang [R. 251 *et seq.*] and

coordinated and scheduled re-argument on the defendants' 2001 substantive motions, in view of: (a) the February 12th ruling that the LOP dismissal orders were quashed; and (b) as noted above, the original trial judge had no recollection of what had transpired at the July 9, 2001 substantive motion hearing. On February 17, 2003, after coordinating the date and time availability with opposing counsel and the successor judge's office, petitioners' counsel served a notice of hearing (filed on February 19, 2003), for a one hour hearing on April 3, 2003 for re-argument of the respondents' dispositive 2001 motions to dismiss and strike. [R. 265] The lower court opinion does not explicitly refer to this notice of hearing, nor to the fact it preceded the service and filing of the respondents' resurrected[2] LOP motions. Presumably it was within the penumbra of the phrase *"inter alia"*, where the 5th DCA wrote:

> Appellants timely filed a written response [to the respondents' resurrected LOP dismissal motions] [R. 271-273] asserting, *inter alia* that good cause existed to preclude dismissal because ... . [Emphasis added.]

Appendix at 4.

The petitioners' response and objection to the resurrected LOP dismissal motions [R. 271-73] did expressly refer to the fact petitioners' own February 17,

[2] /Petitioners use the phrase "resurrected", because respondents did not prepare new LOP motions in February 2003, but simply served their Summer 2002 LOP motions with their new notices of hearing -- this time including petitioners' Atlanta co-counsel as recipients.

2003 (served)/ February 19, 2003 (filed) notice of hearing for April 3, 2003 had already been served and filed prior to the respondents' service and filing of the notice of hearing for their resurrected LOP dismissal motions. No notice of hearing (for March 10, 2003) on their resurrected LOP dismissal motions was filed until February 26, 2003, service of which was on February 25, 2003 [R. 267A-B].

The petitioners' timely response and objection to the resurrected LOP dismissal motions not only addressed the foregoing matters and applicable case law, but also suggested that since Florida Rules of Civil Procedure 1.420(e) expressly requires "reasonable notice" in addition to a sufficient period of record inactivity; and since the original 2002 LOP dismissal orders had been quashed for lack of due process notice; "it would be illogical to permit them to be resuscitated *nunc pro tunc*." [R. 273] This too was not addressed in the lower court opinion -- unless encompassed and rejected within the "*inter alia*" language mentioned above.

SUMMARY OF JURISDICTIONAL ARGUMENT

The decision below expressly and directly conflicts with district court decisions from the 2nd DCA, the 3rd DCA and the 1st DCA, as well as with this Court's decisions, all as elaborated upon below; and it expressly interpreted the due process clause of the Florida and/or U.S. Constitutions in the context of Rule 1.420(e). Thus, this Court clearly has discretionary jurisdiction. Petitioners urge

this Court to exercise that discretion in favor of a review on the merits herein, with or without consolidation with *Cosio v. Keithly, infra*, because it is imperative to clarify whether it is the bench or the bar who, ultimately, has the primary burden under Rule 1.420(e) of ensuring that dispositive motions get heard, that rulings get made after hearings, and that orders get entered after rulings. Once this Court accepts discretionary conflict jurisdiction, the petitioners respectfully submit that it can and should also decide whether Rule 1.420(e) may be properly used as a "gotcha" or whether defense counsel seeking to employ it must meticulously comply with its requirements - - including the implicit requirement that Rule 1.420(e) be read *in pari materia* with Florida Rules of Civil Procedure 1.080(a) -- such that improper or inadequate notice of LOP dismissal proceedings may vitiate and render a nullity *for all purposes* the filing of a LOP dismissal motion.

JURISDICTIONAL ARGUMENT

The lower court decision by the 5th DCA expressly relied on *Sewell Masonry Co. v. DCC Construction, Inc.,* 862 So.2d 893 (Fla. 5th DCA 2003), *review voluntarily dismissed,* 870 So.2d 823 (Fla. 2004). *Sewell*, in turn, had expressly certified conflict with *Dye v. Security Pacific Financial Services, Inc.,* 828 So.2d 1089 (Fla. 1st DCA 2002), which, in deeming it error to grant an LOP dismissal even where a dispositive motion has never been set for hearing, had relied on the 3rd DCA's decision in *Lukowsky v. Hauser & Metsch, P.A.*, 677 So.

2d 1383 (Fla. 3d DCA 1996), *review denied sub nom.,* 686 So.2d 578 (Fla. 1996), and on this Court's apparent approval thereof in *Fuster-Escalona v. Wisotsky,* 781 So.2d 1063 (Fla. 2000) Recently, *Cosio v. Keithly,* 889 So.2d 1017 (Fla. 2d DCA 2005) has aligned with *Sewell* and certified conflict with *Dye.* The parties in *Cosio* recently completed the filing of their merits briefing in this Court. *Cosio v. Keithly,* Case No. SC 05-233. However, the case *sub judice* adds additional and more compelling arguments to the discussion on the proper contours and boundaries and equitable application of Rule 1.420(e). Moreover, as stated by this Court in *Ford Motor Co. v. Kikis,* 401 So.2d 1341, 1342 (Fla. 1981):

> It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under Section 3(b)(3) [of Article V of the Florida Constitution].

Besides relying on *Sewell, supra,* the lower court decision herein also relied in substantial part on *Dashew v. Marks,* 352 So.2d 554 (Fla. 3d DCA 1977).

In *Dashew,* the 3rd DCA held that where a trial judge *does* recall if and what he ruled, a plaintiff's counsel has the duty to see that an order gets entered within the one year period under Rule 1.420(e), even if counsel erroneously believed that defense counsel had been directed to prepare the order. However, in *Sarasota Cattle v. Mikos,* 431 So.2d 260, 261 (Fla. 2d DCA 1983), the 2d DCA observed that: "Although *Dashew* does lend some support to appellees' position, we do not necessarily agree with that view." 431 So.2d at 262. This Court subsequently

affirmed *Sarasota Cattle*. *See Mikos v. Sarasota Cattle Co.*, 453 So.2d 402 (Fla. 1984). In doing so, this Court tacitly expressed disagreement with *Dashew* by its statement: "We agree *fully* with the decision below and therefore approve it." 453 So.2d at 403.[emphasis added] And, as if for additional emphasis, and despite the brevity of the total opinion, this Court stated yet again, "We agree with the decision below in *all* respects." *Id.* [Emphasis added] Admittedly, *Mikos* dealt with un-acted-upon notices for trial, rather than with dispositive motions that were argued and not fully concluded. However, *Dashew* also did not involve notices for trial, yet neither the 2nd DCA nor this Court saw fit to distinguish *Dashew* on this ground, nor did this Court limit its unqualified endorsement of *Sarasota Cattle* to notices for trial.

Similarly, *Lukowsky v. Hauser & Metsch, P.A.*, 677 So.2d 1383 (Fla. 3rd DCA 1996) holds that "whenever a dispositive motion is pending before the court, and the parties are awaiting the court's ruling on that motion, the duty to proceed rests squarely upon the court." 677 So.2d at 1384. Petitioners have acknowledged that the situation is murky as to exactly what occurred at the July 9, 2001 unrecorded hearing on the dispositive motions. However, at least in part, the respondents contributed to that murkiness by their non-compliance with Florida Rules of Civil Procedure 1.420(e) and 1.080(a) and petitioners' due process rights: (a) in failing to give proper notice in connection with the Summer 2002 LOP

dismissal proceedings, and (b) by their own vagueness in describing the then-current status of the case in their summer 2002 LOP motions. For jurisdictional purposes, *Dye, Lukowsky* and *Sarasota Cattle, supra,* create conflict with the lower court decision, as does the broad language by this court in *Fuester-Escalona, supra* and in *Mikos, supra.*

CONCLUSION

For the reasons stated above, this Court has and should accept discretionary jurisdiction herein, and should direct the filing of briefs on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been mailed this 7th day of May, 2005, and the appendix was previously mailed on April 26, 2005, to: Todd M. Hoepker, Esq., P. O. Box 3311, Orlando, Florida 32802-3311, John S. Schoene, Esq., 100 East Sybelia Avenue, Suite 205, Maitland, Florida 32751, and J. Marbury Rainer, Esq., Parker, Hudson, *et al.*, 1500 Marquis Two Tower, 285 Peachtree Center Avenue, N.E., Atlanta, GA 30303.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this amended initial brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

__/s/_____
Kenneth L. Mann