IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners,

vs.

CASE NO.:SC 05-667
L.T. NO: 5D03-1968

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

Respondents.
_____/

ANSWER BRIEF ON JURISDICTION OF RESPONDENT, GABRIEL SIMON

Respectfully submitted,

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PREFACE

Petitioners, NOEL THOMAS PATTON, EVE M. PATTON, and EDWIN W. DEAN, Plaintiffs and Appellants below, shall be referred to as "Petitioners". Respondent, GABRIEL SIMON, Defendant and Appellee below, shall be referred to as ASIMON.@ Respondents, KERA TECHNOLOGY, INC., and GEORGE CHENG-HAO HUANG, Defendants and Appellees below, shall be referred to as the "Other Respondents". 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". The Fifth District Court of Appeal shall be referred to as the "Fifth District".

SIMON shall reference the opinion of the Fifth District upon which review is requested by Peitioners, Patton v. Kera Technology, Inc., 895 So.2d 1175 (Fla. 5th DCA 2005), as the "Fifth District Opinion" or the "Opinion".

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STATEMENT OF THE CASE

On April 8, 2003, the Trial Court entered an order dismissing the action below without prejudice for lack of prosecution pursuant to Rule 1.420(e), Fla.R.Civ.P. Petitioners' appealed and after oral argument, the Fifth District affirmed the Trial Court's dismissal order *per curium*. Petitioners filed a Motion for Clarification and Written Opinion. On February 18, 2005, the Fifth District granted Petitioners' Motion and substituted a corrected opinion for its previous *per curium* affirmance. Petitioners then filed a Motion to Stay or Recall Mandate and Motion for Certification, relying upon the same cases referenced in their Amended Jurisdictional Brief. On March 17, 2005, the Fifth District denied Petitioners' request to stay and to certify conflict to this Court.

Petitioners have filed an Amended Notice to Invoke Discretionary Jurisdiction, claiming that the Fifth District Opinion expressly conflicts with the United States and Florida constitutions and decisions of this Court and other courts of appeal.[1] This Answer Brief is filed in response to Petitioners' attempt to obtain discretionary review.

STATEMENT OF THE FACTS

SIMON objects to the inclusion in Petitioners' Jurisdictional Statement of the Facts

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1 Contemporaneously herewith, SIMON has filed a Motion to Strike Portions of Petitioners' Amended Notice to Invoke Discretionary Jurisdiction, Jurisdictional Statement of the Case, Jurisdictional Statement of the Facts and Summary of Jurisdictional Argument, in which he argues, *inter alia*, that there is no conflict between the Fifth District Opinion and the federal and state constitutions.

of any facts which do not appear within the four corners of the Fifth District Opinion. See Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).[2] Because the only facts relevant to this Court's decision on conflict jurisdiction are those disclosed in the Fifth District Opinion, SIMON relies upon those facts as stated and found relevant by the Fifth District. In particular, the Fifth District noted that:

a) "No transcript of that hearing [the second hearing on Respondent's LOP Motions held on March 10, 2003] exists and the order does not explain the reason for dismissal." Opinion, p.1178

b) "Here, the record indicates that no activity occurred between July 9, 2001 and July 31, 2002, when Appellees initially filed the LOP motion." Opinion, p.1178

c) "Appellants were notified two weeks prior the second hearing, allowing them sufficient time to submit a timely response demonstrating good cause sufficient to avoid dismissal. Further, Appellants were provided with an opportunity to be heard during the second hearing. Although no transcript of the hearing exists, the parties' briefs agree that the trial court heard argument of counsel, concluded that Appellants failed to demonstrate good cause, and dismissed the action without prejudice. On these facts, extending the one year time period under rule 1.420(e) is unwarranted." (citation omitted) Opinion, p.1179

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2 In his Motion to Strike Portions of Petitioners' Amended Notice to Invoke Discretionary Jurisdiction, Jurisdictional Statement of the Case, Jurisdictional Statement of the Facts and Summary of Jurisdictional Argument, SIMON requests, *inter alia*, that all facts not referenced in the Fifth District Opinion be stricken.

d) "Beyond October 7, 2001, no other communication between the parties exists in the record. Although Atlanta counsel may have been justified on relying on McCullough's initial report regarding the status of the case, their continued reliance without action or inquiry for nearly a year is unreasonable." Opinion, p.1180

e) "Appellants' surprise appears disingenuous, at best. A reasonably prudent attorney would likely recognize the risk of dismissal under these facts. When Appellants reviewed the record in 'late June 2002', the record indicated that no activity had occurred for eleven months, yet Appellants failed to file any document for nearly six months." Opinion, p.1180

f) "Considering the totality of the circumstances in view of the limited record on appeal, the trial court's order does not constitute an abuse of discretion." Opinion, p.1180

SUMMARY OF ARGUMENT

This case does not fall within the narrow class of cases invoking this Court=s jurisdiction. A decisional conflict under Art. V, ' (3)(b)(3), Fla. Const. requires that the decisions involve the same controlling facts and legal issues.

There is no conflict between the Fifth District Opinion and the other decisions cited by Petitioners. The Fifth District expressly found that there was no abuse of discretion by the Trial Court after an extensive recitation of the limited relevant facts in the record. The decisions are factually distinguishable and this Court and the district courts of appeal did

not decide the same legal issues based on the same controlling facts. Petitioners have therefore failed to establish that this Court has discretionary jurisdiction.

Moreover, even if this Court finds some form of conflict sufficient to support jurisdiction, it should exercise its discretion to decline review. There is no reason to allow Petitioners yet another appeal. The decision below does not create new law and all future cases under Rule 1.420(e) will be decided on a case-by-case basis.

ARGUMENT

I. THIS COURT LACKS DISCRETIONARY CONFLICT JURISDICTION UNDER ARTICLE V, §3(b)(3) OF THE FLORIDA CONSTITUTION

A. Standards For This Court=s Jurisdiction

The discretionary jurisdiction of this Court is extremely narrow. Mystan Marine, Inc. vs. Harrington, 339 So. 2d 200 (Fla. 1976). It extends solely to the classes referenced in Art. V, ' (3)(b)(3), Fla. Const. The only possible ground for discretionary jurisdiction in this case is a A...decision of a district court of appeal... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law@. Article V, ' (3)(b)(3), Fla. Const.

The decision to be reviewed and the conflicting decision must address the same legal issues. Times Publishing Co. v. Russell, 615 So. 2d 158 (Fla. 1993). There is no jurisdiction if the facts of the case are distinguishable from those in the case alleged to be in conflict. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). Applying

these exacting standards to the cases cited by Petitioners, it is clear that they have failed to demonstrate the required conflict between the Fifth District Opinion and any decision of this Court and lower appellate courts.

B. The Fifth District Opinion Does Not Conflict With Other Appellate Decisions.

It is difficult to determine the alleged conflict relied upon by Petitioners. Noticeably absent from Petitioners' Amended Brief is any reference to the express language and holdings contained in the Fifth District Opinion. Instead, Petitioners improperly rely on a policy argument relating to Rule 1.420(e) in attempting to establish conflict jurisdiction. Given the absence of any substantive reference to the Fifth District Opinion, Petitioners appear to assert a conflict by implication. Implied conflict is no longer a basis for this Court's discretionary jurisdiction. See Department of Health and Rehabilitation Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla.1986).

Petitioners have not asserted and cannot assert an express and direct conflict between any appellate decision whatsoever and the Fifth District's rejection of Petitioners' assertions that the one-year "look-back" period should be extended and that the alleged misconduct of their Florida counsel constitutes good cause. The only conceivable basis for conflict is Petitioners' "unfinished business" argument. Petitioners appear to argue that because the Fifth District Opinion refers to Sewell Masonry Co. v. DCC Const., Inc., 862 So.2d 893(Fla. 5th DCA 2003) and because Sewell Masonry

allegedly conflicts with certain language in Dye v. Security Pacific Financial Services, Inc., 828 So.2d 1089 (Fla. 1st DCA 2002), Fuster-Escalona v. Wisotsky, 781 So.2d 1063 (Fla. 2001), Lukowsky v. Hauser & Metsch, P.A., 677 So.2d 1383 (Fla. 3rd DCA 1996), Mikos v. Sarasota Cattle Co., 453 So.2d 402 (Fla.1984), and Sarasota Cattle Co. v. Mikos, 431 So.2d 260 (Fla. 2d DCA 1983), there is a conflict over that portion of their appeal. Given the fact-intensive analysis and unequivocal holdings of the Fifth District, Petitioners' convoluted argument has absolutely no merit.

To successfully overturn the Trial Court's order dismissing this action for failure to prosecute, Petitioners had to demonstrate that the Trial Court abused its discretion. Cole v. Dep't of Corrections, 726 So.2d 854 (Fla.4th DCA 1999) . As the Fifth District Opinion makes abundantly clear, Petitioners failed to meet their burden with the limited record made in the Trial Court.

Rule 1.420(e), which mandates dismissal if there has been no record activity for one year and no good cause is shown, 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). Record activity has been defined as an affirmative act, contained in the court file, which is designed to move a case forward to conclusion. Barnett Bank of East Polk County v. Fleming, 508 So.2d 718, 720 (Fla. 1987). It is undisputed that there was no record activity for over one year prior to the filing of the LOP Motions by SIMON and the Other Respondents.

Petitioners had to demonstrate the existence of good cause for the undisputed lack of record activity five (5) days before the hearings on the LOP Motions. Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001). The demonstration of sufficient cause for failure to prosecute "requires some contact with the opposing party and some form of excusable neglect or occurrence which arose other than through negligence or intention to pleading deadlines." National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d 1191, 1195 (Fla. 3rd DCA 2001), citing Modellista de Europa (Corp.) v. Redpath Inv. Corp., 714 So.2d 1098, 1100 (Fla. 4th DCA 1998).

The limited record below contained no such evidence of good cause. There are no transcripts to discern what occurred at the second hearing on the LOP Motions held on March 10, 2003 or at the July 9, 2001 hearing on Respondents' motions to dismiss and strike. Petitioners therefore could not and did not establish as a factual matter that there was "unfinished business".

The Fifth District recognized the concept of a court's "unfinished business", but found that it was not applicable to the particular facts and circumstances in this case. Opinion, p. 1178. The Opinion contains an exhaustive analysis of the factual basis of Petitioners' arguments and the law construing Rule 1.420(e). The Fifth District focused squarely on the real issue of whether Petitioners satisfied their heavy burden of proving that the Trial Court committed an abuse of discretion. Emphasizing that "[a] reasonably prudent attorney would likely recognize the risk of dismissal under these facts," it

specifically found that relief was not warranted. Opinion, p. 1180.

Petitioners reliance upon Dye, Fuster-Escalona, Lukowsky, Mikos, and Sarasota Cattle for conflict jurisdiction is entirely misplaced. The Fifth District Opinion does not even mention Dye, Fuster-Escalona, Mikos, or Sarasota Cattle. Petitioners requested that the Fifth District certify conflict with Dye and the other decisions to this Court, but their request was promptly denied. All of the appellate decisions are completely distinguishable because of the totality of the particular facts and circumstances recited in detail by the Fifth District. The decisions do not involve such facts and there were a myriad of reasons for the Fifth District's affirmance of the Trial Court's dismissal order unrelated to the purported "unfinished business". The cases therefore do not address the same legal or factual issues. As a result, the decisions are not inconsistent and there is absolutely no conflict for this Court to resolve.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE REVIEW

Assuming arguendo that this Court could find a conflict to support jurisdiction, it should exercise its discretion to decline review. No reason exists to allow Petitioners a second appeal. The Fifth District does not present a question of great public importance requiring further review by this Court. This case does not involve a previously unsettled issue of law nor does it create new law.

Petitioners' appeal was rejected because no abuse of discretion was shown

"considering the totality of the circumstances in view of the limited record on appeal." Future cases under Rule 1.420(e) will continue to be decided on a case-by-case basis. It is simply unnecessary to allow Petitioner yet another bite at the proverbial apple.

CONCLUSION

Petitioners have failed to establish the express and direct conflict required under Art. V, '(3)(b)(3), Fla. Const. Even if this Court finds some form of conflict to support jurisdiction, it should exercise its discretion and decline review of the Fifth District Opinion.

DATED this 16th day of June, 2005.

Respectfully submitted,
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By: _____//s_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to: JOHN S. SCHOENE, ESQUIRE, 100 E Sybelia Ave., Ste 205, Maitland, Florida 32751; KENNETH MANN, ESQUIRE, P.O. Box 551, Orlando, FL 32802-0551; and J. MARBURY RANIER, ESQUIRE, 1500 Marquis Two Tower, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303 on this 16th day of June, 2005.

By: _____//s_____

TODD M. HOEPKER, ESQUIRE

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is.

Times New Roman 14 pt. By: _____//s_____

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