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.
_____/

LIMITED RESPONSE TO SECTION I OF REPLY BRIEF

COMES NOW, Respondent, GABRIEL SIMON ("SIMON"), by and through his undersigned attorneys, and for his limited response to Section I of Petitioners' Reply Brief, alleges:

1. In Section I of the Reply Brief, Petitioners argue that the recent amendment to Rule 1.420(e), Fla.R.Civ.P., retroactively applies to this case and mandates the reversal of the Trial Court's dismissal for lack of prosecution. Relying exclusively on Smith v. Smith, 902 So.2d 859 (Fla. 1st DCA 2005), Petitioners claim that the amendment is "procedural" and "remedial" in nature, and that this Court's holding in Natkow v. Natkow,696 So.2d 315 (Fla. 1997), does not apply because this case is pending on appeal. As demonstrated below, Petitioners' assertions are contrary to the express language of the amendment

and this Court's previous holdings and are completely illogical.

2. Rules of civil procedure are prospective unless they specifically provide otherwise. Pearlstein vs. King, 610 So.2d 445 (Fla. 1992). The plain and clear language of the recent amendment to Rule 1.420(e) shows that this Court intended that it be applied prospectively and not retroactively. This Court's opinion adopting the amendment, In Re Amendments to the Florida Rules of Civil Procedure (Two Year Cycle), 917 So.2d 176 (Fla. 2005), expressly states that "...the amendments shall become effective on January 1, 2006, at 12:01 a.m.". Id. at 177 (emphasis added).

3. Petitioners blatantly overlook the above opinion and this Court's decision in Mendez – Perez v. Perez-Perez, 656 So.2d 458 (Fla. 1995). The certified question before this Court in Mendez-Perez was whether the 1993 amendment to Rule 1.540(b), Fla.R.Civ.P., was retroactively applicable to a final judgment of dissolution of marriage entered on July 20, 1990. The opinion implementing the amendment stated that it "will become effective at midnight, on January 1, 1993." In Re Amendment to the Fla. Rules of Civil Procedure, 604 So.2d 1110, 1111 (Fla. 1992). This Court therefore held it did not apply to the previous final judgment. This Court found the "plain language of [its opinion]

controlling. The amendment to rule 1.540(b) did not take effect until January 1, 1993. Under the rule in effect when Mendez-Perez's divorce was final, she had one year to bring a motion under rule 1.540(b) based on fraud". Id. at 460.

4. This Court subsequently considered the retroactive application of the amendment to Rule 1.540(b) in Natkow. The judgment dissolving the marriage in Natkow was entered prior to the effective date of the January 1, 1993 amendment. The Third District applied the 1993 amendment to the parties' 1992 dissolution judgment and reversed the trial court's ruling that the wife's motion to vacate was untimely filed. This Court quashed the Third District's opinion and relied on its previous analysis in Mendez-Perez. Reaffirming its holding that rules of procedure are prospective unless they specifically provide otherwise, this Court stated that "[T]he rule in effect at the time that a judgment of dissolution becomes final is controlling." Id. at 317 citing Mendez-Perez at 460. There is no recognized exception to the well-established principles in Mendez-Perez and Natkow for a case pending on appeal.

5. The First District's decision in Smith provides no support for Petitioners' argument. As Petitioners admit in their Reply Brief, Smith conflicts with Fifth District's opinion in Reddell v. Redell, 900 So.2d 670 (Fla. 5th DCA 2005). Petitioners

failed to candidly advise this Court that Smith also conflicts with numerous decisions of the Second District on this issue. See e.g. Sharon v. Sharon, 915 So.2d 630 (Fla. 2d DCA 2005); D'Angelo v. D'Angelo, 903 So.2d 378 (Fla. 2d DCA 2005); Nicoletti v. Nicoletti, 902 So.2d 215 (Fla. 2d DCA 2005).

7. The Smith decision can be readily distinguished from this case because the amendment to Rule 1.420(e) changed substantive obligations of parties seeking dismissals for lack of prosecution. The amendment at issue in Smith did not create new obligations but merely specified that the Rule 1.525, Fla.R.Civ.P. did not apply in family law cases. In sharp contrast, the amendment to Rule 1.420(e) drastically alters the method of obtaining a dismissal for lack of prosecution by now requiring the moving party to send a sixty (60) day notice as a prerequisite before moving to dismiss. There can be no retroactive application of a statute which affects the substantive rights, liabilities or duties of the parties. Arrow Air, Inc. vs. Walsh, 645 So.2d 422 (Fla. 1994).

8. Petitioners' assertion does not comport with common sense and is based on a completely illogical assumption. Their argument assumes that SIMON and the other Respondents could somehow anticipate and comply with the new sixty (60) day notice requirement, even though it was not imposed by this Court until

almost three and one-half years after the LOP motions were filed.[1] 9. The rule in effect at the time the LOP motions were filed and when the Trial Court dismissed this case obviously did not include the new notice provision of the January 1, 2006 amendment. This Court should summarily reject Petitioners' argument of retroactive application made in Section 1 of their Reply Brief.

Dated this 28th day of March, 2006.

Respectfully submitted,

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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 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

1 A simple hypothetical utilizing the summary judgment rule amply illustrates the absurdity of Petitioners' argument. Under Rule 1.510, Fla.R.Civ.P., the party moving for summary judgment must serve the non-moving party with the motion and supporting affidavits twenty (20) days before the hearing. If this Court subsequently amended Rule 1.510 to provide for a greater advance time period, it is elementary that an appellant could not invalidate a summary judgment pending on appeal for lack of compliance with a different time requirement which was not imposed at the time the motion was filed.

W. LYONS, ESQUIRE, 1500 Marquis Two Tower, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303 on this 28th day of March, 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

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