

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE No. SC03-\_\_\_\_\_  
LOWER CASE No. 3D02-2133

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THOMAS KRAMER,

*Petitioner,*

v.

VERENA VON MITSCHKE-COLLANDE and CLAUDIA MILLER-OTTO, in  
their capacity as the HEIRS OF SIEGFRIED OTTO, deceased,

*Respondents.*

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PETITIONER'S BRIEF ON JURISDICTION

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ON DISCRETIONARY REVIEW FROM A DECISION OF THE  
THIRD DISTRICT COURT OF APPEAL

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## INTRODUCTION

Petitioner Thomas Kramer invokes the Court's discretionary jurisdiction to review the Third District Court of Appeal's decision in *Vonmitschke-Collande v. Kramer*, Case No. 3D02-2133 (Fla. 3d DCA, December 18, 2002), under Article V, Section 3(b)(3) of the Florida Constitution. A copy of the Third District's slip opinion is appended to this brief.

The Third District held, based upon this Court's this decision in *Crown Corp. v. Robinson*, 174 So. 737 (Fla. 1937), that a *lis pendens* that is automatically dissolved upon the dismissal of an underlying action, Fla. R. Civ. P. 1.420(f), is reinstated, *nunc pro tunc*, upon a reversal of the dismissal order. In *Crown Corp.*, however, this Court reviewed an order dismissing the *lis pendens* itself (while the underlying action remained pending), and held that upon reversing *that* order the *lis pendens* was reinstated. Applying *Crown Corp.* here, where *only* the dismissal order was appealed, is a complete misuse of that precedent, and has created a heretofore — unannounced rule. This misapplication of *Crown Corp.* provides a basis for conflict jurisdiction. *E.g.*, *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 103 (Fla. 2001); *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1272 (Fla. 2000).

The Third District's decision also directly and expressly conflicts with this Court's decision in *American Legion Cmty. Club v. Diamond*, 561 So. 2d 268 (Fla. 1990), in which the Court held that a notice of *lis pendens* that is not based upon a "duly recorded" instrument is ineffective for any purpose beyond one year, absent a court order. Here, the Third District sought to avoid *American Legion*, by holding

that the expiration period had been tolled during the appeal from the order dismissing the underlying action. Lodging an appeal from the dismissal of the underlying action, but not the *lis pendens* itself, however, does not toll the expiration period.

The exercise of discretionary jurisdiction to review the Third District's decision is accordingly mandated.

### STATEMENT OF THE CASE AND FACTS

Respondents, Verena Von Mitschke-Collande and Claudia Miller-Otto, in their capacity as the heirs of Siegfried Otto (the Otto Heirs), initiated the underlying action against petitioner Kramer seeking, in pertinent part, the imposition of a constructive trust. Slip opinion at 2 & n.1.

<sup>1</sup> On August 1, 2000, the Otto Heirs also filed a *lis pendens*, secondary to their constructive trust claim. *Id.* The *lis pendens* was not founded on a "duly recorded" instrument. *Id.* at 4.

The trial court dismissed the Otto Heirs' action with prejudice on November 10,

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<sup>1</sup> The underlying action by the Otto Heirs is a recurrence of the action that Otto initially had filed against Mr. Kramer and several corporate entities, based upon an investment that soured, which action the trial court dismissed on *forum non conveniens* grounds. *Otto's Heirs v. Kramer*, 797 So. 2d 594, 595 (Fla. 3d DCA), *rev. denied*, 821 So. 2d 797 (Fla. 2001). Otto did not appeal that order, but instead brought a counterclaim in an earlier action that Mr. Kramer had initiated in a Swiss court. *Id.* at 596. Upon Otto's death, his heirs were substituted as parties and they obtained a partial ruling in their favor from the Swiss court. *Id.* In July 2000, during the pendency of the Swiss action, the Otto Heirs returned to the Miami-Dade County Circuit Court and filed the present underlying action against Mr. Kramer (and certain corporate entities), seeking to impose a constructive trust and also a bill of discovery. *Id.* See n.4, *infra*.

2000. *Id.* at 2. The dismissal caused the *lis pendens* automatically to dissolve under Rule 1.420(f) of the Florida Rules of Civil Procedure. Slip opinion at 2. The Otto Heirs appealed the dismissal order to the Third District. *Id.*<sup>2</sup> On July 2, 2001, with the *lis pendens* having been automatically dissolved and with the Otto Heirs' appeal pending, Mr. Kramer sold a parcel of property. *Id.* Thereafter, on December 4, 2001, the Third District reversed the dismissal order and reinstated the Otto Heirs' underlying action. *Id.* at 3.<sup>3</sup>

On remand, the trial court ruled that the Otto Heirs' *lis pendens* had been automatically dissolved upon the entry of the order dismissing the underlying action, and that the *lis pendens* was therefore "of no force and effect" at the time the property was sold. *Id.* at 2.

On the Otto Heirs' appeal, the Third District characterized the issue as "whether the *lis pendens* was effective on July 2, 2001 so as to give notice to parties to the sale." *Id.* at 3. The court answered that question in the affirmative, holding that *Crown Corp.* "made it abundantly clear that when an underlying case's dismissal is reversed, the accompanying *lis pendens* is reinstated." Slip opinion at 3. The court thereupon held that "the *lis pendens* remains as valid notice of the underlying suit," such that "[a]nyone acquiring an interest between the time of filing of the *lis pendens*

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<sup>2</sup> The *lis pendens*, however, was not brought to the Third District for appellate review. *Otto's Heirs*, 797 So. 2d at 596.

<sup>3</sup> The Third District, without any mention of the *lis pendens* or the automatic dissolution, permitted only the claim for a bill of discovery to proceed, ruling that the constructive trust claim would be abated pending the Swiss action. *Otto's Heirs*, 797 So. 2d at 598.

and its reinstatement after appellate review, takes her/his interest in the property subject to the *lis pendens*.” *Id.* at 3-4.

The Third District recognized that the *lis pendens* in *Crown Corp.* had been dissolved by court order, whereas here the dissolution occurred automatically under Rule 1.420(f). Slip opinion at 3, n.3. The court ruled, however, that “[t]his is a distinction without a difference,” because Rule 1.420(f) was intended “to provide for the automatic dissolution in order to resolve unnecessary title problems, not to create new ones.” Slip opinion at 3, n.3 (*citing* Court Commentary, Fla. R. Civ. P. 1.420 (1984)).

The court furthermore held that, under Section 48.23(4), Florida Statutes (2001), the Otto Heirs’ appeal from the order dismissing their underlying action served to toll the one-year expiration period that would otherwise have been applicable to the *lis pendens*. Slip opinion at 3-4.

### **SUMMARY OF ARGUMENT**

In *Crown Corp.*, this Court addressed an order that dismissed a *lis pendens*, while the underlying action *remained pending*. Upon reversing the dismissal of the *lis pendens*, the Court not surprisingly held that the *lis pendens* had effectively been reinstated. Here, however, the Third District reviewed only an order dismissing *the underlying action*, and not the *lis pendens*, which automatically had been *dissolved* under Rule 1.420(f). The Third District thus fundamentally misapplied *Crown Corp.* to hold that the *lis pendens* remained in effect, having been reinstated, *nunc pro tunc*.

In *American Legion*, this Court held that a notice of *lis pendens* that is not based upon a “duly recorded” instrument is ineffective for any purpose beyond one year, absent a court order. Here, the Third District sought to avoid *American Legion*, by holding that the expiration period had been tolled during the Otto Heirs’ appeal from the order dismissing their underlying action. An appeal from the dismissal of the underlying action, which does not address the *lis pendens* itself, however, does not toll the *lis pendens*’ expiration period. The Third District’s holding to the contrary directly and expressly conflicts with *American Legion*.

### ARGUMENT

The filing of a *lis pendens* provides notice to the public of the institution of an action that could affect title to a property. *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993) (citing *De Pass v. Chitty*, 105 So. 148 (Fla. 1925)).

The term ‘lis pendens’ literally implies a pending suit. The doctrine of lis pendens is defined as the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment therein.

*De Pass*, 105 So. at 149. The purpose of a *lis pendens* is to

protect[] ... purchasers or encumbrancers from becoming embroiled in the dispute, and of protecting the plaintiff from intervening liens that could impair any property rights claimed and also from possible extinguishment of the plaintiff’s unrecorded equitable lien. In sum, ... a *lis pendens* exists as much to warn third parties as to protect the plaintiff; and the procedural requirements associated with *lis pendens* should advance both of these important purposes.

*Chiusolo*, 614 So. 2d at 492.

There are two types of *lis pendens*, depending upon the plaintiff’s cause of

action. The first type exists secondary to an action in which the initial pleading shows that the action is founded upon a duly recorded instrument, such that the underlying action provides public notice of a cloud on the title. § 48.23(2), Fla. Stat. (2002). In this instance, the *lis pendens* is maintained as a matter of right for the duration of the action. *Id.* The second type of *lis pendens* exists secondary to an action in which the initial pleading does *not* show that the action is founded upon a duly recorded instrument, such that the *lis pendens* provides the first notice to the public of a clouded title. § 48.23(3), Fla. Stat. (2002). This type of *lis pendens* is ineffective beyond one year from the commencement of the underlying action, subject to the control of or discharge by the court. *Id.*

Here, because the underlying action is not founded on a recorded instrument, the *lis pendens* is subject to the one-year time limitation of Section 48.23(3) *and* to the automatic dismissal provision within Rule 1.420(f) of the Florida Rules of Civil Procedure. That rule provides that a *lis pendens* filed “in connection with a claim for affirmative relief” is automatically dissolved upon the dismissal of the underlying claim.

This Court explained its reasoning for adopting this provision:

A perennial real property title problem occurs because of the failure to properly dispose of notices of *lis pendens* in the order of dismissal. Accordingly, ... a separate subdivision [has been] created to automatically dissolve notices of *lis pendens* whenever an action is dismissed under this rule.

Court Commentary, Fla. R. Civ. P. 1.420 (1984). The rule was amended in 1992 to provide that such automatic dissolution would occur upon the dismissal of the claim upon which the *lis pendens* was based, even if other claims remain pending.

Committee Notes, Fla. R. Civ. P. 1.420 (1992).

**I. Misapplication of *Crown Corp.***

The Third District held that a *lis pendens* that is automatically dissolved upon the dismissal of the underlying action pursuant to Rule 1.420(f), is automatically reinstated, *nunc pro tunc*, in the event that the dismissed complaint is reinstated on appeal. This means that title remains clouded during the pendency of an appeal from the underlying action's dismissal, notwithstanding the dissolution of the *lis pendens* (and notwithstanding the Otto Heirs' failure to raise the *lis pendens* on appeal). The only authority cited by the Third District for this extraordinary holding is this Court's *Crown Corp.* decision, which pre-dates this Court's adoption of Rule 1.420(f). The Third District misapplied *Crown Corp.*

In *Crown Corp.*, the trial court dismissed *only* the *lis pendens*. 174 So. at 738-39. While the dismissal of the *lis pendens* was on appeal, the defendant secured a mortgage loan on the property. *Id.* This Court characterized the question on appeal, as follows:

Where a mortgagee makes a loan on certain property, which had theretofore been covered by a *lis pendens*, which had been dismissed prior to the actual making of said loan, and where the decision of the lower court in dismissing said *lis pendens* is reversed by the superior court under a stipulation of the parties to said cause, does the reversal reinstate the *lis pendens* as of the date of its dismissal so that said mortgagee is charged with notice thereof?

*Id.* at 738. The Court held that where a lender makes a loan while an order dismissing a *lis pendens* is on appeal, the lender is charged with constructive notice of the lien and takes its mortgage subject to the *lis pendens* in the event that the dismissal order

is reversed on appeal. *Id.*

Here, in sharp contrast, the Otto Heirs' appeal from the dismissal of the underlying action brought for review *only* the order dismissing the complaint on *forum non conveniens* grounds. 797 So. 2d at 596. The *lis pendens*, which had automatically dissolved under Rule 1.420(f), was neither raised by the Otto Heirs nor addressed by the Third District in reversing the dismissal order (and reinstating only the bill of discovery claim). 797 So. 2d at 598.

The Third District nonetheless ruled that *Crown Corp.* “made it abundantly clear that when an underlying case’s dismissal is reversed, the accompanying *lis pendens* is reinstated.” Slip opinion at 3. That is a mischaracterization of the *Crown Corp.* holding. *Crown Corp.* did *not* address the “underlying case.” There is nothing in *Crown Corp.* (or any other Florida decision) to support the Third District’s holding that a notice of *lis pendens*, having been *automatically* dissolved upon the dismissal of the underlying action to which the notice is secondary, is automatically revived, *nunc pro tunc*, upon reversal of the dismissal order.

In its attempt to explain away the distinction between this case and *Crown Corp.*, the Third District has forced an application of *Crown Corp.* that is completely at odds with the post-*Crown Corp.* adoption of Rule 1.420(f), to the point of nullifying its very purpose. The Third District remarked that providing for an automatic dissolution under Rule 1.420(f) was intended to “resolve unnecessary title problems, not to create new ones.” Slip opinion at 3, n.3 (*citing* Court Commentary, Fla. R. Civ. P. 1.420 (1984)). That, however, is actually *diserved* by the Third

District's holding. The "perennial real property title problem" that this Court sought to cure by adopting Rule 1.420(f) will actually be exacerbated by the Third District's misapplication of *Crown Corp.*

After this case, notices of *lis pendens* once thought to have been properly disposed of through the automatic dissolution rule, will be subject to *automatic* revival, *nunc pro tunc*. There will, in actuality, be *no* automatic dissolution if an appeal is taken, and the Court's purpose in adopting a rule that would create a reliable system to "properly dispose of notices of *lis pendens*," Court Commentary, Fla. R. Civ. P. 1.420 (1984), will be virtually nullified. A successful defendant will find no comfort from the dismissal of an action in which a *lis pendens* has been filed, but rather will be compelled to assume that an automatically dissolved *lis pendens* may likewise be automatically revived, *nunc pro tunc*. That, of course, means nothing less than the *continuation* of a "dissolved" *lis pendens*.

## **II. Conflict with *American Legion*.**

The Third District's opinion also conflicts with this Court's decision in *American Legion*. In *American Legion*, construing Section 48.23, Florida Statutes, the Court held that a *lis pendens* not based upon a recorded instrument or construction lien automatically expires within one year, and can only be maintained at the discretion of, and under the control of, the trial court. 561 So. 2d at 272. The Court explained that, "[b]ecause of its potential to cloud title," a *lis pendens* "is subject to scrutiny by the court for the protection of the title, the property owner, and existing lienholders, as well as the interest of the plaintiff." *Id.* The Court thereupon

held that “[i]f [the plaintiff] wanted the *lis pendens* to remain in effect beyond one year, it could have made this request to the trial court,” but that absent such a request, “no notice of *lis pendens* is effectual for any purpose beyond one year.” *Id.* (original emphasis) (*citing* § 48.23(2), Fla. Stat. (1985)).

The Third District sought to avoid the one-year limitation as applied in *American Legion*, by holding that here the one-year limitation on *lis pendens* was tolled by the pendency of the Otto Heirs’ appeal from the dismissal of their underlying action. Slip opinion at 4 (*citing* § 48.23(4), Fla. Stat. (2001)). That tolling provision applies only to the appeal of an “action that operates as a *lis pendens*.” § 48.23(1), Fla. Stat. (2001). *See, e.g., Haisfield v. ACP Florida Holdings, Inc.*, 629 So. 2d 963, 966 (Fla. 4th DCA 1993) (applying the tolling provision when *lis pendens* is the subject of appeal); *Hough v. Stewart*, 543 So. 2d 1279,1281 (Fla. 5th DCA 1989) (same). Inasmuch as the Otto Heirs’ appeal addressed the underlying action to which the *lis pendens* was secondary, but *not* the *lis pendens* itself, they did not bring their *lis pendens* within the protective fold of Section 48.23(4). The Third District’s holding in this case therefore directly and expressly conflicts with this Court’s holding in *American Legion*.

## CONCLUSION

Based on the foregoing, petitioner respectfully requests this Court to grant discretionary review in this cause.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that a copy of this petitioner's brief on jurisdiction was mailed on April \_\_\_\_, 2003 to: Vance E. Salter, Esq., Christopher N. Johnson, Esq., Hunton & Williams, 2500 Barclays Financial Center, 1111 Brickell Avenue, Suite 2500, Miami, Florida 33131

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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