IN THE SUPREME COURT OF FLORIDA

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**CASE NO.**

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**E.P. IACONIS**,

Petitioner,

vs.

**HARRY J. WARD**,

Respondent,

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On Petition for Review of a Decision of the
Fourth District Court of Appeal

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# PETITIONER'S INITIAL BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Petitioner Ike Iaconis sued Respondent Harry Ward for breach of an agreement to pay him certain fees for the accounting and expert witness services that Iaconis had provided to Ward. Ward sought discovery of certain documents to which Ward claimed entitlement. Iaconis resisted the discovery on trade secrets grounds and, after an in camera inspection the trial court ruled the documents were not trade secrets. Iaconis unsuccessfully sought certiorari review of that order (*Iaconis v. Ward*, Case No. 4D06-4733) (unpublished order) (May 4, 2007).

Following that decision, Ward filed a Renewed Motion to Compel Discovery and noticed that motion for hearing on the trial court's July 10, 2007 motion calendar. At that hearing Iaconis reminded the trial court that a special set hearing was scheduled for July 19, 2007 relating to all of the document production issues, but the trial court said " I am not going to hear it." Shortly thereafter, this colloquy occurred:

> THE COURT: You don't want me to release the records?
>
> MR. IACONIS: Your Honor, we are not suggesting that the records not be released, but there are at least a half a dozen items which were presented to the Court, which should be handled concurrently.
>
> I respectfully ask the Court –

> THE COURT: ***I'm dismissing your case with prejudice***.
>
> MR. IACONIS: Say again?
>
> THE COURT: ***I am dismissing your case with prejudice for failure to comply with the order of the Fourth District Court of Appeals.***
>
> ***The Court has said that your writ of certiorari was meritless, the records should be released to the Defendant for his defense –***
>
> MR. IACONIS: Your Honor, it was sent back to the Court. There was no – I apologize to say this Your Honor, but that is unfair and it's not due process Your Honor.
>
> THE COURT: Well you're the one that brought it about.
>
> MR. IACONIS: Your Honor, what did I bring about Your Honor?
>
> THE COURT: You're done. Have a nice day.

R7-1077 (emphasis supplied). An Order of dismissal was entered after the hearing. R7-1043. It said only that the Renewed Motion to Compel was "Granted, and the case is hereby dismissed with prejudice." *Id.*

Subsequently, without instructions from the court to do so, Ward submitted a proposed Final Judgment with extensive findings not made by the court at the

hearing, without first providing it to opposing counsel and affording them an opportunity to comment. Ward's counsel's transmittal letter to the court was as follows:

> July 10, 2007
>
> * * *
>
> Dear Judge Andrews:
>
> I am enclosing a proposed Order concerning the hearing held this morning at motion calendar. I have provided a copy of this to Mr. Carneal by fax. I do not expect him to agree to it.
>
> Very truly yours,
>
> /s/
>
> Thomas F. Luken

R12-1829-I.

Iaconis notified the court of his objections to the proposed order the next day, July 11, 2007. R12-1829-C-K. But that same day the court signed Ward's proposed Final Judgment, which provided:

> ORDERED AND ADJUDGED as follows:
>
> 1. That this court finds that the Plaintiff has continuously violated both the letter and the spirit of the Florida Rules of Civil Procedure and previously entered Orders of the court.

> 2. That the actions regarding the above were not as a result of neglect or inexperience thus were willful.
>
> 3. The court has considered that the Plaintiff was personally involved in these actions and that the actions regarding the above were not as a result of neglect or inexperience thus were willful and that the delay in providing the discovery has prejudiced the Defendant through undue expense, loss of evidence or in some other fashion and there has been no reasonable justification for non-compliance offered and that the delay caused in this case has caused significant problems with judicial administration, therefore, the court finds that no sanction less severe than dismissal with prejudice is a viable alternative. See *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). But more importantly see *Levine v. Del America*, 642 So. 2d 32 (Fla. 5th DCA 1994).
>
> 4. That the sanctions requested in the Motion to Compel are granted and ***sua sponte this case be and is hereby dismissed, with prejudice***, and Final Judgment is hereby entered in favor of the Defendant and the Plaintiff take nothing by this action and that the Defendant go hence without day.
>
> * * *

R7-1044-1045 (Final Judgment) (emphasis supplied).

Iaconis appealed that Final Judgment and the Fourth District Court of Appeal affirmed in the brief opinion attached as Appendix A. A motion for rehearing was denied and the Notice to Invoke Discretionary Review was timely

filed on October 17, 2008.

## SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review the decision below pursuant to Article V, section 3(b)(3) of the Florida Constitution. The decision below affirmed a dismissal with prejudice that was "*sua sponte*" entered by a trial judge at a motion calendar hearing on a motion to compel that was not noticed as a hearing on sanctions. Numerous Florida cases require that the subject of the noticed hearing be stated in the notice of hearing in order to meet the due process requirement of adequate notice in order to make the right to be heard meaningful. Here, the notice of hearing was totally insufficient to support a *sua sponte* sanction of dismissal with prejudice. The district's court's view that a mention in the motion to compel that sanctions were sought, was sufficient to overcome the inadequacy of the notice of hearing, conflicts with decisions of other district courts of appeal that make explicitness in the notice of hearing the *sine qua non* for due process protection.

The trial court's petulance, and perfunctory dismissal with prejudice denied due process of law. The appellate affirmance of that dismissal perpetuated the violation, but more importantly for the purpose of this brief, created the kind of express and direct conflict that justifies the exercise of jurisdiction.

## ARGUMENT

### THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THIS COURT

The conflict in this case is the product of the district court of appeals' decision to permit a party's case to be dismissed with prejudice as a sanction at a hearing that was not noticed as a hearing on sanctions. The court below sought to finesse that failure of notice this way:

> The trial court dismissed appellant's case as a sanction for failure to comply with multiple court orders requiring fulfillment of appellee's discovery requests. Dismissal at *a hearing noticed for appellee's renewed motion to compel* did not violate appellant's right to due process since appellant's motion included a request for sanctions.

Appendix A at 2 (emphasis supplied).

Thus, the court substituted a sentence mentioning sanctions in a motion to compel, for the type of notice required by due process of law: a notice of hearing that explicitly identifies the purposes of, and the subject matter of, the proceeding which is to take place before the court at the designated time. Florida law requires that adherence to due process of law. The cases set forth below create the express and direct conflict that gives this Court jurisdiction.

The conflict stems from this language in *Cornell v. Capitol City Partners,*

*LLC,* 932 So. 2d 442, 444 (Fla. 3d DCA 2006): "the granting of relief, which is not sought *by the notice of hearing* or which expands the scope of a hearing and *decides matters not noticed for hearing*, violates due process" (emphasis supplied).

That principle – that the *notice* must state the subject to be heard – is a longstanding one and its importance and scope are captured by this description in Trawick's Florida Practice and Procedure, 2007-2008 edition, §9:8:

> A notice of hearing is a notice to the opposing party that a matter, usually a motion, has been scheduled for determination. It is directed to the attorney for the party if he is represented by an attorney. The parts of the notice are the caption, commencement, body, signature and certificate of service. The caption is the same as that on pleadings, except its designation as the appropriate notice. The commencement is the direction to the party or attorney, usually the word "To:" followed by his name. The body must list each motion or other matter that will be heard, when, where and, if applicable, before whom or give notice of what has occurred. The signature and certificate of service are the same as for motions and pleadings. A motion can be combined with the notice of hearing on the motion. The notice of hearing cannot be combined with a pleading.

The requirement that the *notice* must be clearly informative and limits the relief is supported by other cases that further support the conflict. See *Levitt v. Levitt*, 454

So. 2d 1070, 1071 (Fla. 2d DCA 1984) ("but the notice of hearing indicates that only appellant's motion for continuance was to be considered at the hearing"). See also, *Grandini v. Carizo*, 891 So. 2d 1216 (Fla. 3d DCA 2005):

> The trial court's non-final order appointing a receiver of the two limited liability companies is reversed upon the following findings: (1) the parties were *not noticed* that the issue of receivership was going to be addressed at the evidentiary hearing; therefore, inadequate notice was given under Florida Rule of Civil Procedure §1.620(a); (2) the scope of the hearing was improperly expanded to address the receivership issue *which was not noticed*.

*Id.* at 1216 (emphasis supplied). That the title of the notice (or motion) must identify that which is to be heard has a long legal pedigree, going back to *Stringfellow v. Ajax-Grieb Rubber Co.,* 67 Fla. 317, 64 So. 947 (Fla. 1914): "when this default was entered, service had been made on both defendants; but the praecipe asked for a default only 'against the defendant,' without stating which one of the two, and the default entry is *erroneously entitled"* (emphasis supplied).

Here, according to the language of the decision below, the notice was erroneously entitled, but the Fourth District viewed the motion to compel, which was not entitled as seeking any sanction, sufficient because within the Motion there was "a request for sanctions." That was not only wrong, it was in express and

direct conflict with the case law cited: the sanction of default decided a matter *not noticed for hearing*, according to the plain words of the Fourth District's decision.

Why the court violated this principle is inexplicable. That court has been vigilant in enforcing the due process notice of hearing requirement and its vigilance has been used as authority by other courts. See *Connell,* supra at 444: "As noted by the Fourth District Court of Appeal, "the meaning of procedural due process is clear: 'Parties whose rights are to be affected are to be heard; and in order that they may enjoy that right they must first be notified.'" *Devaney*, 564 So. 2d at 1230 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972))."

Notification means notice of hearing, and the district court decision in this case was discordant with the cases that uphold that important due process guarantee.

## CONCLUSION

We respectfully request the Court to exercise its jurisdiction to review the decision below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 27th day of October, 2008 to the following person:

THOMAS F. LUKEN
3081 E. Commercial Blvd.
Suite 200A
Fort Lauderdale, FL 33308

_____

BRUCE S. ROGOW

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

_____

BRUCE S. ROGOW