ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case Number: 95,471

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On Appeal from the District Court of Appeal for
the Third District of Florida
D.C.A. Case No. 98-398

==========

BARBARA MOAKLEY,

Appellant,

v.

SHERI SMALLWOOD,

Appellee.
_____/

==========

APPELLEE'S ANSWER BRIEF ON JURISDICTION

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CITATIONS OF AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

Counsel for former wife subpoenaed former husband and two of his former attorneys, including Appellee, requiring their attendance and testimony at a post-judgment hearing scheduled by former wife's counsel on her motion to compel the production of an original promissory note. Former wife and her counsel conceded in their motion that Appellee did not have the note, and this fact was again confirmed to them by phone when the subpoena was served on Appellee. Because service occurred only one day before the hearing, Appellee had no opportunity to file or have heard any motion. Accordingly, she honored the subpoena and attended the hearing, some 50 miles (1 way) from her office. She simultaneously sought compensation, sanctions, and/or fees, costs, and expenses associated therewith. The trial court granted Appellee's motion and awarded monetary sanctions against both the former wife and her counsel on the basis that, under the circumstances, there was no reasonable justification for serving Appellee with the subpoena.

Appellee did not rely on the doctrine of "inherent powers" to support the court's award, and she did not contend it was proper on that basis when the matter was heard by the Third DCA on appeal. Indeed, Appellee agreed with Appellant that courts do not, and should not, have such "inherent powers". Clearly, the Third DCA disagreed. It affirmed on the basis of Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3rd DCA 1983), an "inherent powers" case.

SUMMARY OF THE ARGUMENT

There exists a conflict among the district courts within Florida and between the district courts and The Florida Supreme Court on whether courts have "inherent power" to assess attorney's fees against counsel as a sanction. The first, second, and fifth districts do not recognize such power; the third and fourth districts do.

There also exists a conflict between decisional authority and Rule 3-1.2 of the Rules Regulating The Florida Bar. That Rule specifies that The Florida Supreme Court has exclusive power to discipline attorneys. In promulgating and adopting that Rule, The Supreme Court did not indicate that its power could be exercised by all or any other courts. Had The Supreme Court intended to extend its disciplinary authority to other courts, surely it would have done so more clearly. Also, the doctrine of "exclusio" would indicate that such an extension was not intended.

The instant case is a part of those conflicts. The legal profession and the courts are left without guidance or clearly defined boundaries as to what is expected or permissible in the representation of clients, or the circumstances and procedures under which an attorney may be sanctioned for conduct in connection with litigation. In consequence, clients' rights to competent and zealous representation are compromised; conflicts of interest between client and counsel are inevitable, as is increasing

hostility and animosity between counsel; and wholly innocent, good-faith, permissible conduct is most unfairly and unevenly being made the basis of professional discipline and deprivations of property rights. Due process is violated.

Appellee agrees with Appellant that there are not, and should not be, "inherent powers" in every court to sanction attorneys through fee awards. Such broad sweeping powers not only pose serious due process problems, they imperil the independence of the bar; have a chilling effect on the ability of attorneys to represent their clients; and undermine the adversary system itself.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN MOAKLEY v. SMALLWOOD, _ So. 2d _, (Fla. 3rd DCA 1999) IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OR THE FLORIDA SUPREME COURT, AND PRESENTS AN ISSUE REQUIRING CLARIFICATION.

The order here presented for review sanctioned former wife's counsel by awarding fees to former husband's former counsel. The reason for the sanction was certain action taken by the former wife's counsel in connection with litigation. It is stipulated that such action was lawful and permissible. Appellee's only contention is that it was vexatious, aggravating, unnecessary, inconvenient, and costly, in terms of time, money, and energy. The Third District Court of Appeal affirmed, citing Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3rd DCA 1983), a case which recognized courts' inherent power to sanction attorneys.

The existence of a conflict among the districts in Florida on the issue of inherent powers is noted in 56 ALR 4th 486:

> "A conflict is evident between the appellate districts in Florida on the question whether courts have the inherent power to assess attorney fees against counsel."

According to the annotation, the fifth, second and first districts do not recognize such power; the third district does.

The fifth district case, State v. Harwood, 488 So. 2d 901 (Fla. 5th DCA 1986), held there was no authority for assessing attorney fees against an attorney who arrived late for a hearing. It suggested that, if the lower court felt offense to its authority or dignity, it might proceed under criminal contempt in accordance with Rule 3.830. Since those procedures were not followed, however, reversal of the order assessing fees was mandated. Moreover, the court observed that any sanction which might properly have been imposed would not be for the benefit of the opposing party.

The second district's finding in Israel v. Lee, 470 So. 2d 861 (Fla. 2d DCA 1985), is similar. The court there ruled that there was no authority for a fee award against a lawyer who refused to testify or produce documents. As in Harwood, supra, an order awarding such a fee was reversed. According to Israel:

> "(a)ttorney's fees may be awarded only where authorized by either a contract or by a statute or where the attorney's services create or bring a fund or other property into the court." (emphasis supplied)

That language was repeated by the first district in Miller v.

Col. Baking Co., 402 So. 1365 (Fla. 1st DCA 1981). There, because counsel's conduct caused a mistrial, he was ordered to pay the opposing party's fees. That order, too, was reversed for lack of authority. Like Harwood, Miller suggested indirect contempt might be used, but it specifically disapproved proceeding on a motion by counsel.

In contrast, opinions from the third district have recognized the existence of "inherent powers" and have permitted such powers to serve as a basis for fee awards entered to sanction counsel. Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3rd DCA 1983); Goldfarb v. Daitch, 696 So. 2d 1199 (Fla. 3rd DCA 1997); Smallwood v. Perez, 723 So.2d 938 (Fla. 3rd DCA 1999). In Patsy v. Patsy, 666 So. 2d 1045 (Fla. 4th DCA 1996), the fourth district aligned itself with the third.

While the cited cases reveal the conflict among Florida's district courts on the authority to award fees against counsel as a sanction, the question posed in the case here presented for review has ramifications far beyond the mere existence of such conflict. Other states and the Federal courts face the same issue.

In Bradt v. West, 892 S.W. 2d 56 (Tex. App. 1994), a fee award against counsel was reversed upon a finding there was no right to such recovery for an attorney's conduct in litigation. The language and reasoning of the Court are significant:

> "The public has an interest in 'loyal, faithful, and aggressive representation by the legal profession.' An

> attorney is thus charged with the duty of zealously representing his clients within the bounds of the law. In fulfilling this duty, an attorney 'ha(s) the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as (the attorney) deem(s) proper and necessary, without making himself subject to liability in damages.' Any other rule would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.
>
> Adhering to these principles, we hold that an attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party. An attorney should not go into court knowing that he may be sued by the other side's attorney for something he does in the course of representing his client; such a policy would favor tentative representation, not the zealous representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice." (at 71 & 72).

The United States District Court, Northern District of Texas, ruled the same way in Taco Bell Corp. v. Cracken (A-3). There, plaintiff sued to recover fees from opponent's lawyers based upon their "wrongful manipulation of the judicial system". Citing Bradt, the Court held plaintiff had no right of recovery against opposing counsel, and that such claims were barred as a matter of law. Summary judgment was entered in favor of the attorneys.

Nelson v. Dist. Ct Arapahoe Co., 136 Colo. 467, 320 P.2d 959, (Colo. 1958), is in accord. Pursuant to that ruling, complaints

about attorney conduct in litigation are to be dealt with under the courts' contempt powers and in accordance with the safeguards and procedures well established as being mandatory in matters of contempt.

Through the instant proceeding, this Court is again called upon to address the question of whether Florida will ultimately choose to follow the amorphous, elusive, and ephemeral inherent authority rule, leaving courts, counsel, and parties entirely at the whim of whatever judge happens to hear a particular case, and wholly unguided by any rules or procedures; or whether it will align itself with those jurisdictions which, upon careful and thoughtful reasoning, have determined to resolve such matters by application of the very definite rules of contempt or the established procedures concerning discipline. If this Court avails itself of this opportunity to decide that issue, it could provide Florida lawyers with some much needed guidance on what is expected of them, and it could do a great deal to promote uniformity in the standards and procedures employed by the lower courts across the state. At present there appear to be no clear standards which prescribe the boundaries of counsel's activities. There likewise appear to be significant discrepancies in the disposition of such cases. There have already occurred instances of counsel following the rules in all good faith, doing their best to represent their clients in ways which seem to be permissible and proper, striving

to conform to all of the ethical mandates, and yet still finding themselves subjected to harsh criticism and severe penalties. Moreover, there are similar situations, the outcome of which is being determined solely by the geographic location in which they happen to be heard. Neither is a desirable result, nor a result which our legal system can, or should, countenance.

For unannounced reasons, this Court passed on the opportunity to provide such guidance and to rectify just such an injustice in Smallwood v. Perez, supra. It still has before it, however, both Diaz v. Diaz, __ So.2d. __ (Fla. App. 3rd DCA 1998) and the instant case. It is respectfully submitted that, although the wrong which occurred in Smallwood will seemingly remain forever uncorrected, that need not be the case here. This Court is asked to exercise its discretionary powers of review.

CONCLUSION

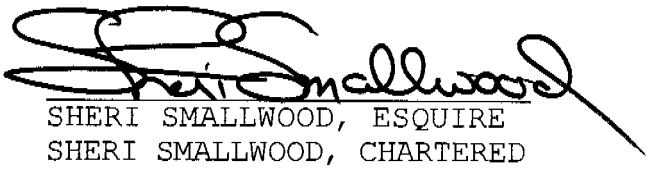
The decision of the Third District Court of Appeal, should be found to be in direct and express conflict with the cited decisions of other districts or of The Supreme Court and the referenced Rules. This Court should clarify Florida's position and determine the correct procedures to be followed in similar circumstances.

Respectfully Submitted,

SHERI SMALLWOOD, ESQUIRE
SHERI SMALLWOOD, CHARTERED

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the size and style of type used in the instant Answer Brief on Jurisdiction is 12 point Courier New, a font that is not proportionately spaced.



SHERI SMALLWOOD, ESQUIRE
SHERI SMALLWOOD, CHARTERED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail, with proper postage affixed, to John P. Fenner, Esq., 2300 Glades Road, Suite 203 East, Boca Raton, FL 33431, this 21st day of June 1999.

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Fla. Bar No. 176103

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

BARBARA MOAKLEY,	**	
Appellant,	**	
vs.	**	CASE NO. 98-398
SHERI SMALLWOOD,	**	
Appellee.	**	LOWER TRIBUNAL NO. 94-10288

Opinion filed March 24, 1999.

An appeal from the Circuit Court for Monroe County, Sandra Taylor, Judge.

John P. Fenner, Boca Raton, for appellant.

Sheri Smallwood, Chartered and Sheri Smallwood, for appellee.

Before COPE, GREEN and FLETCHER, JJ.

On Motion for Rehearing and Certification

PER CURIAM.

According to the findings of the trial court in post-dissolution proceedings, the former wife subpoenaed the former husband and two of his former attorneys, seeking to compel production of an original note which had been awarded to the former wife in the final judgment. On its face, the motion to compel production conceded that one of the former attorneys, appellee

Sheri Smallwood, did not have the note and she so testified. Because of short notice, Ms. Smallwood was unable to be relieved of the obligation to attend the hearing, fifty miles from her office. The trial court granted monetary sanctions against the former wife and her counsel.[1] The court concluded that there was no reasonable explanation for issuance of the subpoena to Ms. Smallwood. The former wife has appealed.

Because there is no transcript, the trial court findings constitute the established facts of the case. The former wife now suggests that there was a sound reason for issuing the subpoena and taking testimony, namely, that the former wife needed to make a record for her then-pending New York proceeding to reestablish the lost note. See Cardet v. Rodriguez, 673 So. 2d 578 (Fla. 3d DCA 1996); 53 Fla. Jur. 2d Evidence and Witnesses § 346 (1995). However, the former wife's motion did not say so, and it was filed as a post-dissolution motion to compel production of the original note, not a Florida evidentiary hearing ancillary to the New York action. More to the point, there is no indication in this record that this argument (or the others advanced on appeal) was made before the trial court. See Ascontec Consulting, Inc. v. Young, 714 So. 2d 585, 587 (Fla. 3d DCA 1998); Republic National Bank v.

[1] Appellate counsel was not trial counsel.

Araujo, 697 So. 2d 164, 166 (Fla. 3d DCA 1997).[2]

The former wife argues that there is no authority which supports the award of a monetary sanction in this case, and urges that this claim may be entertained on appeal as a matter of fundamental error, even though not raised in the trial court. So far as the trial court order reveals, the court viewed this case as one in which Ms. Smallwood was subpoenaed on short notice, for no good reason, to attend an evidentiary hearing fifty miles distant. Assuming the point is properly before us, we think Sanchez, 435 So. 2d at 350, and the other cases cited in our original affirmance provide authority for the award.[3]

We have not overlooked the fact that as appellee, Ms. Smallwood initially disclaimed reliance on the doctrine of inherent powers and instead sought to defend the sanctions order on other grounds. The fact remains that it is the correctness of the trial court's ruling that is under review, and based on the trial court's findings, we perceive no error.

The former wife also requests that this court certify direct conflict with State v. Harwood, 488 So. 2d 901 (Fla. 5th DCA 1986), Israel v. Lee, 470 So. 2d 861 (Fla. 2d DCA 1985), and Miller v.

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[2] This and other arguments were advanced by motion for rehearing in the trial court, but the motion was abandoned by the former wife's filing of the notice of appeal. See Fla. R. App. P. 9.020(h)(3).

[3] Sanchez was cited in Thaysen v. Thaysen, 583 So. 2d 663, 666 (Fla. 1991), for the proposition that "[i]t is improper . . . for attorneys to bring unwarranted or frivolous claims."

Colonial Baking Co., 402 So. 2d 1365 (Fla. 1st DCA 1981). The former wife reads those cases to say that the trial court has no inherent power to award a monetary sanction, unless explicitly provided for by statute, rule, contract, or incident to a contempt citation. We are not convinced that a head-on conflict actually exists, because none of the cited decisions squarely addresses the doctrine of inherent powers expounded in the line of cases cited in our original affirmance. We would hesitate in any event to certify conflict or a question in view of the lack of transcript and preservation. See Jordan v. State, No. 97-2002 (Fla. 3d DCA March 10, 1999) (on motion for rehearing and certification); State v. Oisorio, 657 So. 2d 4, 5-6 (Fla. 3d DCA 1995), approved on other grounds, 676 So. 2d 1363 (Fla. 1996).

Rehearing and certification denied.

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR MONROE COUNTY

IN RE: THE MARRIAGE OF:

BARBARA MOAKLEY,

Wife/Petitioner,

and

Case No.: 94-10288-FR-04

JOSEPH MOAKLEY,

Husband/Respondent.
_____/

ORDER DETERMINING MOTION TO QUASH, MOTION TO STRIKE, AND MOTION FOR PROTECTIVE ORDER TO BE MOOT, AND GRANTING FORMER COUNSEL'S REQUESTS FOR SANCTIONS, FEES, AND COSTS

THIS CAUSE having come on for hearing before the Court on December 10, 1997, upon the Motion to Quash and the Motion to Strike a Subpoena served upon former counsel for the former Husband on the Motion for Protective Order presented in connection with such Subpoena and the Request for Sanctions, Fees, and Costs, all of which were submitted by the former Husband's former counsel. Present at the hearing were counsel for the former Wife, the former Husband (appearing pro se), New York counsel for the former Husband (via telephone) and the subpoenaed attorney. The Court, having heard the evidence and testimony presented, together with the arguments and representations of counsel, and being otherwise fully advised herein, makes the following findings:

1. The Subpoena served upon the former Husband's former attorney by the former Wife's counsel was not timely and it therefore failed to afford adequate notice to said attorney, and

there has been no showing of any unusual or emergency circumstances which would justify such short notice in this case.

2. In response to the Subpoena, the former Husband's attorney did appear as commanded, at a location some 50 miles from her home and office.

3. The former Wife's attorney sought the production of a document from the former Husband. Apparently the former Husband, his New York counsel and the subpoenaed attorney all advised the former Wife's attorney prior to the hearing that the subpoenaed attorney did not have possession of the document.

4. At the contempt hearing, the former Wife's attorney admitted before this Court that the subpoenaed attorney had already told her she did not have the document the former Wife's attorney wanted. Additionally, the Court notes that the former Wife's counsel alleged in her underlying Motion that the former Husband had repeatedly advised her that his New York lawyer, and not the subpoenaed lawyer, had the document which the former Wife's attorney was seeking. This testimony was confirmed at the hearing by the former Husband's New York counsel and the subpoenaed attorney. It is unclear to this Court why it was necessary to subpoena former counsel to appear and testify when all involved agreed the subpoenaed attorney did not have the document.

5. In addition, the former Wife's counsel failed to provide a witness fee or mileage monies with the Subpoena, as required.

6. Inasmuch as there was inadequate time allowed, between the time the Subpoena was served and the time of the hearing for which the attorney was subpoenaed, to permit the subpoenaed

attorney's Motions to be hard, she properly appeared before the Court in response to the Subpoena.

7. As a direct result of the former Wife's attorney's actions, the former Husband's former counsel was compelled to file the subject Motions and to appear at the hearing. Under the circumstances she is entitled to reasonable fees to compensate her for the time expended in responding to this subpoena.

8. Based upon the evidence and testimony presented, the Court finds that the former Husband's former attorney reasonably devoted 4.5 hours to such efforts, and that it was necessary for her to do so. The Court deems it to be appropriate for her to be compensated for such time and effort at her usual hourly rate of $250.00 per hour, which figure the Court finds is reasonable and in keeping with the fees customarily charged by attorneys in this area. While this Court appreciates the time and effort put forward by the subpoenaed attorney in the preparation of her Motion to Quash and for Protective Order, this Court does not find it reasonable to expend 5.3 in preparation of the Motion. This Court finds 1.5 hours to be reasonable.

9. This Court can recall no testimony as to the nature of any costs incurred in responding to the subpoena.

NOW THEREFORE, It is,

ORDERED and ADJUDGED, as follows:

10. Given that the former Husband's former attorney has already properly appeared and responded to the Subpoena, this Court finds that the Motion to Quash and the Motion to Strike the Subpoena are moot, as is the Motion to Quash and the Motion to

Strike the Subpoena are moot, as is the Motion seeking a Protective Order with respect to it. The Court notes, however, that had there been an opportunity to hear such Motions prior to the date of the hearing for which the former Husband's former attorney was subpoenaed, the Court would have been inclined to grant the same.

11. Under the circumstances, the attorney for the former Wife, Margaret Broz, Esquire, and her client are hereby deemed to be responsible for compensating the subpoenaed attorney for her time in responding to the Subpoena in the amount of $1,125.00. Such responsibility is hereby imposed on the former Wife and former Wife's counsel as a sanction for their conduct in connection with these proceedings which the Court finds to have been unnecessary, and improper.

DONE AND ORDERED at Key West, Monroe County, Florida this 29th day of January, 1998.

SANDRA TAYLOR
Circuit Judge

cc: William Carew, Esq.
Margaret Broz, Esq.
Sheri Smallwood, Esq.
Joseph Moakley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TACO BELL CORP.,

Plaintiff,

VS.

JOHN R.W. CRACKEN, et al.,

Defendants.

Civil Action No. 3:93-CV-1615-D

MEMORANDUM OPINION
AND ORDER

This is an action to recover against two attorneys, and one attorney's professional corporation, on theories of fraud, abuse of process, conspiracy, and negligent misrepresentation for allegedly-collusive conduct that enabled the plaintiffs in a state-court wrongful death suit to maintain venue in a favorable forum. The court concludes that plaintiff's claims are barred as a matter of law, because each one arises out of conduct undertaken as part of the defendant-attorneys' duties in representing parties to a lawsuit to which plaintiff was also a party. Accordingly, defendants' motions for summary judgment are granted, and the actions against them are dismissed.

I

Plaintiff Taco Bell Corp. ("Taco Bell") sues defendants John R.W. Cracken, Esq. ("Cracken"), Cracken's professional corporation, John Robert William Cracken, P.C. ("Cracken, P.C."), Douglas H. Parks, Esq. ("Parks"), and Jerome Green ("Green"), in connection with their conduct in a Texas state-court wrongful death law-suit, Deborah R.V. Frost, et al. v. American Sec. Prods. Co. & Jerome Green, No. 14,967 (229th Judicial District, Duval County, Tex.) (the

A-3

"Fraga Suit"). According to Taco Bell's amended complaint, "Taco Bell seeks to recover actual and punitive damages for the injuries it suffered as a result of defendants' wrongful manipulation of the judicial system for their own improper gain . . . by collusively placing and maintaining venue of a wrongful death lawsuit against Taco Bell in Duval County, Texas." Am. Compl. at ¶ 1.

The Fraga Suit was a negligence action to recover for the wrongful deaths of four persons whom Green and another individual murdered during the course of an armed robbery at a Taco Bell restaurant located in Irving, Texas, a city located within Dallas County, Texas. The plaintiffs in the Fraga Suit (the "Fraga Plaintiffs") were survivors of the murder victims. Named as defendants were American Security Products Company ("American Security"), the designer and manufacturer of the restaurant wall safe, and Green. The Fraga Plaintiffs did not sue Taco Bell initially.

The Fraga Plaintiffs retained Cracken to represent them. Prior to filing suit, Cracken requested that Parks, who had been Green's court-appointed criminal defense counsel, represent Green in the contemplated wrongful death action. Cracken agreed to compensate Parks at the rate of $150 per hour for representing Green, and sent Parks the sum of $1,500 as a retainer.

Cracken thereafter filed the Fraga Suit in Duval County, Texas, which is located several hundred miles from the murder scene. Duval County was perceived to be a "plaintiff's venue" during the relevant time period. The county's jurors reportedly were disposed toward deciding personal injury or wrongful death claims in favor of plaintiffs, and the county was well-known for its large damages awards. Attorneys and others in the legal community viewed cases pending in Duval County as having a higher settlement value based on a higher probability of a large

recovery at trial. Duval County was considered a far more favorable forum for plaintiffs than was Dallas County.

At the time the suit was filed, Green was incarcerated at a Texas state penal institution located in Anderson County, Texas,[1] also located several hundred miles from Duval County. Prior to his imprisonment, Green had lived in Dallas County, but had never even been to Duval County. The petition in the Fraga Suit, however, alleged on information and belief that Green was a resident of Duval County.

In response to the Fraga Plaintiffs' petition, Green filed a general denial without objecting to venue, thus waiving his right to seek a transfer of venue. On Green's behalf, Parks also filed at the same time responses to the Fraga Plaintiffs' requests for admissions, in which Green admitted that he had chosen Duval County as his residence.

American Security--whose counsel Cracken was not paying--was not so compliant. It filed a motion to transfer venue of the case to Dallas County. The Fraga Plaintiffs opposed the motion on the basis of Green's admission of his Duval County residence. Taco Bell, which had not yet been joined as a defendant, reviewed American Security's motion and advised it that the motion was defective, because it failed to challenge venue facts regarding defendant Green. In addition, Taco Bell requested that American Security not set the venue hearing until after the statute of limitations had run, so that if Taco Bell were joined in the suit, it could participate in the venue challenge.

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[1]Pursuant to a plea bargain, Green entered a plea of guilty and was sentenced to four concurrent 50-year terms of imprisonment.

Prior to the originally-scheduled venue hearing, the Fraga Plaintiffs and American Security entered into a "high-low" settlement agreement, which limited American Security's potential liability to the sum of $250,000. The agreement provided that American Security could continue to pursue its motion to transfer venue, but that it would consent to the Fraga Plaintiffs' discovery schedule and trial setting. Because the $250,000 payment was contingent upon the Fraga Plaintiffs' obtaining a judgment, American Security remained a party to the litigation.

The state district judge denied the motion to transfer. Within minutes of the ruling, Cracken filed an amended petition that named Taco Bell as a defendant.

Taco Bell moved to vacate the state court's denial of the venue motion, and moved to transfer venue. Under Texas law, once venue had been established, no subsequently-added defendant could challenge the determination. At the hearing, counsel for Green and for American Security stated that neither had stipulated with the Fraga Plaintiffs that venue would be fixed in Duval County. Cracken also advised the judge that he had not entered into any stipulation with anyone to establish venue there. The state court judge denied Taco Bell's motion.

Taco Bell thereafter removed the case to the United States District Court for the Southern District of Texas, alleging that Green (who was not a diverse citizen from the Fraga Plaintiffs) had been fraudulently joined, and that his citizenship should be disregarded. Taco Bell also filed the instant suit against Cracken, Parks, and Green. American Security refused to join in the removal, contending that to do so would violate certain of the terms of the settlement agreement. Following mediation, Taco Bell settled the Fraga Suit for the sum of $8.25 million.

Taco Bell now seeks damages against defendants Cracken, Parks, and Green on the basis of claims for fraud, abuse of process, and conspiracy, and sues defendant Cracken, P.C. for

negligent misrepresentation. It contends it has incurred damages in the form of attorney's fees and other costs "to investigate and expose the defendants' conduct and in an attempt to reverse the effects of their misrepresentations, conspiracy, venue fraud and abuse of the legal process." P. Resp. at 13. Defendants Cracken, Cracken, P.C., and Parks move for summary judgment.[2] Taco Bell has responded to Parks' motion in tandem with the motion filed by defendants Cracken and Cracken, P.C. See P. Resp. at 2 n.2.

II

The court need only reach defendants' contention that under Texas law, they cannot be held liable for wrongful litigation conduct, and therefore are entitled to judgment as a matter of law.

A

This court's jurisdiction is invoked on the basis of diversity of citizenship. As an Erie[3] tribunal, the court applies the law as would a Texas court. Federal courts in Erie cases apply existing law or predict what the state's supreme court will do. They do not enlarge state law on their own initiative. See Civ Pub Serv Bd v General Elec. Co., 947 F.2d 747, 748 (5th Cir. 1991) (opinion denying rehearing) (it is not for court, Erie-bound to apply state law as state courts would do, to incorporate innovative theories of recovery into Texas law).

Where there is no definite decision of the state's highest tribunal, the court will look to decisions of the state's intermediate appellate courts. A decision of the Texas court of appeals is

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[2]The motions that the court decides today are amended motions for summary judgment. These amended motions supersede original motions, which are denied as moot. Defendant Green has not moved for summary judgment.

[3]Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

controlling on questions of state law absent a strong indication that the Supreme Court of Texas would decide the question differently. Allstate Ins. Co. v. Sheeby, 672 F. Supp. 956, 958 (N.D. Tex. 1987) (citing Mott v. Mitsubishi Int'l Corp., 836 F.2d 1073, 1074 (5th Cir. 1981)). "A federal court sitting in diversity is bound to follow decisions of the state's intermediate appellate courts unless it is 'convinced by other persuasive data that the highest court of the state would decide otherwise.'" Exxon Co. U.S.A. Div. of Exxon Corp. v. Banque de Paris et des Pays-Bas, 889 F.2d 674, 676 (5th Cir. 1989) (quoting West v. AT&T, 311 U.S. 223, 237 (1940)) (footnote omitted), cert. denied, 496 U.S. 943 (1990). "There is, therefore, a working presumption that state intermediate appellate court decisions represent accurate statements of state law." Id.

B

In Bradt v. West, 892 S.W.2d 56 (Tex. App. 1994, writ denied), an attorney and his professional corporation sued numerous defendants—including opposing attorneys—for conduct that resulted in the attorney's being held in contempt during the trial of a prior lawsuit. Id. at 60, 65.[4] The plaintiffs alleged claims for conspiracy to maliciously prosecute, malicious prosecution, intentional infliction of emotional distress, tortious interference with contractual relations, and liability under the Texas Tort Claims Act. Id. at 65. The defendants moved successfully for summary judgment, and the court of appeals affirmed. Id. at 65, 76. The attorney-defendants contended the plaintiffs had no right as a matter of law to recover for the attorneys' conduct in the underlying lawsuit. Id. at 71. The appellate court agreed. It held, in relevant part, that

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[4] In Bradt the Texas Supreme Court denied an application for writ of error. This means the court was "not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction." Tex. R. App. P. 133(a).

> an attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party.

Id. at 71-72 (emphasis added). The court reasoned that an attorney's knowledge that he may be sued by the other side's attorney would favor tentative rather than zealous representation of the client, which is contrary to professional ideals and public expectations. Id. at 72. Because such a policy "would dilute the vigor with which Texas attorneys represent their clients," it would "not be in the best interest of justice." Id. The law provides sanctions in the form of procedural rules and statutory remedies for an attorney's misconduct; it does not confer a cause of action upon the opposing attorney. See id.

The Texas rule "focuses on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit." Id. Therefore, the dispositive question is whether the attorney's conduct was part of the discharge of his duties in representing a party in a lawsuit. See id. Even meritless conduct is not actionable when it comes "in the discharge of [the attorney's] duties in representing a party in a lawsuit." Id. at 74. Under Texas law,

> An attorney has no right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party.

Id. at 76.

Although Bradt addresses the liability vel non of one attorney to an opposing attorney in the same lawsuit, its reasoning applies with at least equal force to the liability of an attorney to the opposing party. The knowledge of an attorney for one party that he may be sued by the other

party would exacerbate the risk of tentative representations to at least the same degree as would knowledge that opposing counsel could sue him. And it arguably could have a greater chilling effect, since a lawyer may reasonably think it more likely that a private party, rather than a fellow professional, would seek to retaliate in this manner. The court therefore predicts that Texas would apply the principles of Bradt to bar claims by one party against the opposing party's attorney. Cf. Marino v. Trevino, 578 S.W.2d 763, 771 (Tex. Civ. App. 1978, writ ref'd n.r.e.) (noting that cases generally hold that attorney for one party is exempt from liability to a party other than his client for damages resulting from the performance of services that the attorney engages in and that require the office, professional training, skill, and authority of an attorney).

Taco Bell's claims all rest on the premise that defendants manipulated the judicial system, and engaged in tortious conduct, for the purpose of obtaining venue in a particular forum. See Am. Compl. ¶¶ 40 (complaining of representations made concerning Green's residence and propriety of venue in Duval County, and those giving appearance of adversity between the Fraga Plaintiffs and Green); 47 (defendants made illegal, improper, or perverted use of legal process); 51 (defendants committed wrongful acts so as improperly to place and maintain venue in Duval County); & 53 (Cracken, P.C. made misrepresentations to guide Taco Bell). Taco Bell states in its brief that it seeks inter alia "to reverse the effects of [defendants'] misrepresentations, conspiracy, venue fraud and abuse of the legal process." P. Resp. at 13. It is therefore clear that Taco Bell—a party to a state-court lawsuit—is seeking to hold defendants liable for acts or omissions undertaken as part of the discharge of their duties as attorneys to opposing parties in the same lawsuit. Because, under Texas law, it is the kind—not the nature—of conduct that is controlling, Taco Bell's claims must be dismissed.

Nor would it avail Taco Bell to assert that because defendants engaged in fraud and civil conspiracy, such acts cannot be classified as proper conduct for a lawyer representing a client. In Bradt the court affirmed a summary judgment that dismissed claims of a similar nature, rejecting the proposition that they did not address protected conduct. See Bradt, 892 S.W.2d at 65, 76 (holding claims for conspiracy to maliciously prosecute, malicious prosecution, intentional infliction of emotional distress, tortious interference with contractual relations, liability under the Texas Tort Claims Act, and abuse of process were barred as a matter of law).

Accordingly, the court holds that Taco Bell cannot recover against defendants on theories of fraud, abuse of process, conspiracy, and negligent misrepresentation for conduct of the type in question.[3]

III

In its response, Taco Bell requests that the court grant Fed. R. Civ. P. 56(f) relief. See P. Resp. at 30 n.24. In view of the basis on which the court has granted summary judgment, the court denies this request.

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[3]In view of this determination, Taco Bell's March 19, 1996 motion for leave to file Rule 56(e) supplemental opposition is granted, and defendants' December 19, 1995 motion to strike summary judgment evidence is denied as moot.