IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA SUPREME COURT CASE NO. SC01-1830

BOCA BURGER, INC.	)	
	)	DCA CASE NO. 4D00-1255
Petitioner,	)	LT. CASE NO. 00-2282 12
	)	
v.	)	
	)	
RICHARD FORUM,	)	
	)	
Respondent.	)	

_____

RESPONDENT'S BRIEF ON THE MERITS

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RESTATEMENT OF THE CASE AND FACTS

INTRODUCTION

Petitioner and its counsel have employed bad faith litigation tactics. Forum v. Boca Burger, Inc., 788 So.2d 1055 (Fla. 4th DCA 2001) (A 1-6). Their misconduct was "incontestible" and "incontrovertible". Petitioner now seeks to avoid accountability and the imposition of attorney's fees and costs assessed against them pursuant to §57.105, Florida Statutes.

This case serves as a litmus test. If Petitioner prevails, it is hard to imagine when, if ever, a litigant and their counsel would be held financially responsible for taking legal and factual positions in bad faith, and for employing tactics which include legal artifice and trickery. In fact, the law in Florida would effectively be re-written to encourage the use of such tactics, and to reward those who employ them by providing a seemingly impenetrable "safe harbor" to those who are successful in their deceit.

The facts and issues which actually led to the imposition of sanctions against the Petitioner somehow never found their way into their initial brief. A brief summary of the relevant facts is, therefore, in order.

RESTATEMENT OF THE CASE AND FACTS

Petitioner successfully convinced the Lower Court that Rule 1.190(a) of the Florida Rules of Civil Procedure was somehow merely a suggestion. The plain and

unambiguous language of that rule permits a party to amend an initial pleading "at any time" prior to the filing of a responsive pleading. The statutory rights set forth in Rule 1.190 are so axiomatic and fundamental that there is literally no authority to the contrary, statutory or otherwise.

Yet in direct contravention of the black-letter Florida law, Petitioner emphatically argued that the statutory right to amend may be denied if the Defendant is somehow prejudiced. See Transcript at p. 9 (A 15). Petitioner even cited (but did not provide a copy of) case law from the Eastern District of Michigan Bankruptcy Court to support its position. In actuality, there is no such rule or rule of law, not even in the Eastern District of Michigan Bankruptcy Court, but the Lower Court was unfortutunately led into error by the Petitioner's bogus legal argument.

Sanctions were subsequently imposed on the Petitioner because there was "no possible view of the law" that supported Plaintiff's arguments to the Lower Court. Upon its review of the record, the Fourth District Court of Appeal found that the Plaintiff had put forth legal arguments which simply could not "be made in good faith" and referred to legal authority which did not even "remotely suggest" the proposition for which it was cited.[1]

Petitioner also "failed to acknowledge" and has continued to contest Plaintiff's

[1]/ Quotes are from the Fourth District's Opinion.

counsel's compliance with the rules regarding the appearance of additional counsel and specifically Rule 2.060(j) of the Florida Rules of Judicial Administration. Respondent's counsel filed a Notice of Appearance and stated in open court on no fewer than three separate occasions that its appearance was as "additional counsel". Indeed, during the March 28th hearing, Charles Fox Miller stated that the firm was "appearing as co-counsel..." Transcript at p. 5, line 9 (A 11), and that "Mr. Dawson's firm remains as co-counsel of record. We are not discharging Mr. Dawson's firm, we don't intend to discharge Mr. Dawson's firm" Transcript at p. 6, lines 5-8 (A 12). Finally, and so there was no possible chance for misunderstanding, Mr. Miller reiterated that Mr. Dawson was not being substituted by stating the following:

> "Mr. Dawson has been very recently asked by the Plaintiff to succeed his primary role in the case to our firm" (emphasis added). Transcript at p. 12, lines 15-17 (A 18).

Although the Lower Court ultimately recognized the appearance of Plaintiff's counsel, it is clear from the record that Petitioner nonetheless encouraged the Lower Court by the "tone and tenor" of their remarks to act "under a misimpression of impropriety" with respect to the Miller firm's appearance.[2]

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[2]/ To this day, Petitioner has never addressed or even attempted to reconcile the inherent quandary of how Respondent's counsel could simultaneously be without authority to file the Amended Complaint while somehow possessing the authority to defend the Motion to Dismiss on the Initial Complaint. Similarly, Petitioner never addresses how its Motion for Attorney's Fees and Costs (A 31), filed in the trial court on April 5, 2000, could be directed at co-counsel if it was without authority

Petitioner has been sanctioned for its bad faith conduct "both in the trial court and in [the Fourth District Court of Appeal], where they have persisted in trying to uphold this patently erroneous decision". Petitioner has sought rehearing, a rehearing *en banc*, and numerous stays,[3] each time reiterating old arguments and attempting to find new ones which might misdirect the Court's attention away from their own wrongdoing. For Petitioner to assert that they have been sanctioned for "merely defending an appeal of a favorable trial court ruling" is yet another indication that the Petitioner has still not learned from its mistakes.[4] See Petitioner's Brief at 1. What happened is clear. The Fourth District's opinion states it as well or better than can Respondent, notwithstanding Petitioner's effort to re-write history.

SUMMARY OF ARGUMENT

Petitioner argues that if this decision is not reversed, there will be a prevailing party rule; that lawyers will have to think long and hard before defending an appeal; that advocates' will be discouraged from expanding or changing the law; and that a

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to be in the case.

[3]/ Including asking the trial court to stay the case after their request was denied by the Fourth District. (A 34).

[4]/ Yet another example of Petitioner's repeated misconduct is its request that the decision of the trial court "be reinstated" (Petitioner's Brief at 33) after expressly abandoning this argument in its Motion to Stay Issuance of Mandate and For Stay Pending Further Appellate Review. (A 36 with emphasis added).

damper will be put on the zealous representation of clients. Respondent argues that if this decision is not upheld, lawyers will feel they have an unbridled license to argue anything they want to a court regardless of whether it has any merit in law or in fact; that there are no ethical bounds of advocacy; and that it is perfectly fine to win even if it means interpreting a clear record as standing for a point that no reasonable person could conclude says what they argue it says. The arguments made by Petitioner are both incomprehensible and, in some instances, reprehensible.

There never should have been a hearing on March 28. It is disingenuous for Petitioner to state "[b]ecause Judge Greene specially sets his own hearings, the March 28th hearing was not cancelled". See Petitioner's Brief at 6. It does not matter whether counsel or the trial court set a hearing. If the necessity for a hearing becomes moot, as it did here, counsel has a duty to advise the trial court that the hearing was no longer necessary.

At that hearing, Petitioner heavily relied upon a Michigan bankruptcy case that never again found its way into any of Petitioner's pleadings or briefs. Petitioner argues that the Miller firm did not properly appear at the March 28 hearing for purposes of presenting the Amended Complaint to the trial court, but that it did properly appear for purposes of defending the motion to dismiss what it acknowledged to be a deficient original complaint. Petitioner continues to maintain and even tells this Court

unequivocally that the Miller firm intended to "substitute" as counsel for the original lawyer, when the record is absolutely replete with unambiguous statements to the contrary.

If lawyers can cite clearly bad and inapplicable law to a court, make arguments that facts exist when the record clearly reflects to the contrary, cause opposing lawyers and their clients to litigate (quite expensively) for over two years to rectify the damage done by their wanton disregard for the law and the facts, and not pay the appropriate penalty therefore, then there will truly be chaos in our court system. The rambo litigator will not only live but will breed and create even more havoc. If we are a society to be governed by the rule of law, than compliance with that law has to begin with the attorneys, who are its guardian.

ARGUMENT

WHETHER THE FOURTH DISTRICT ERRED IN ASSESSING FEES AGAINST DEFENSE COUNSEL WHO "PLAINLY ATTEMPTED TO LEAD [THE] TRIAL COURT TO A RESULT THAT PLAINTIFF WAS NEEDLESSLY FORCED TO APPEAL"

(As Restated By Respondent)

Petitioner claims that the Fourth District "had no business"sanctioning it for misleading the trial court into error in bad faith, and making legal and factual argument they knew or should have known were false, and then attempting to

further perpetuate their wrongdoing on appeal. Petitioner's Brief at 12. Petitioner also argues that it should escape the sanctions imposed, regardless of its conduct, because (1) Respondent never preserved its right to fees in the lower court; (2) the "Arguable Substance" Rule provides Petitioner with an "unfettered right" to defend the result obtained in the lower court no matter how obtained; and (3) 57.105 is unconstitutional. Each of these assertions is without merit.

The Forum Court Had Jurisdiction To Impose 57.105 Liability For Petitioner's Improper Conduct

Petitioner disingenuously claims that the Fourth District could not award fees because Respondent did not request an award in the trial court. No such requirement exists. Fees were properly awarded in accordance with 57.105, which expressly provides that a court may assess 57.105 fees "upon the court's initiative or motion of any party."[5] Section 57.105.

If Petitioner's contention were correct, and it is not, there would be no practical means to seek sanctions. Respondent could not ask for 57.105 fees until the wrongful action occurred. Petitioner literally sprung their fallacious arguments on Respondent as the March 28th hearing unfolded and there could not have been

[5]/ Respondent filed its Motion for Attorney's Fees, Suit Monies and Costs on October 23, 2000. (A 39). Petitioner then filed its Response and Motion for Sanctions on November 1, 2000. (A 42).

any opportunity for Respondent to seek fees. What was Respondent supposed to do? Was Respondent supposed to seek fees from the court that just dismissed its entire case with prejudice? As the Fourth District recognized, Respondent's only practical recourse was to seek appellate relief from a ruling which should have never been made. Forum at 1062 (A 6).

Similarly, in Rapid Credit Corp. v. Sunset Park Center, Ltd., 566 So.2d 810 (3d DCA 1990), sanctions were imposed under section 57.105 against litigants who improperly secured a default against the opposing party, then sought to defend the default on appeal. In imposing sanctions, the Third District wrote:

> Too many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer's duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his client, and surely what we suspect really motivates many such inappropriate actions, his interests in his personal aggrandizement. 566 So.2d at 812.

As here, no request for sanctions was ever made below, nor could such a request be made, since the unwitting victim of these tactics was both unaware of the default and, in any case, forbidden from seeking sanctions by virtue of the existence of the default itself.

Petitioner cites to Kurzweil v. Larkin Hosp. Operating Co., 684 So.2d 901 (Fla. 3d DCA 1996) in support of its position that Respondent must request

sanctions in the Lower Court in order to obtain them on appeal. Petitioner's reliance on Kurzweil is, however, misplaced. First, unlike here, the lower court in Kurzweil had an opportunity to consider and specifically considered whether there was wrongdoing under section 57.105, and after full consideration of the evidence and the facts, refused to conclude that there was. The Third District merely concluded it could not usurp the trial court's discretion and make findings on appeal that were directly inconsistent with those found below. Kurzweil at 903. The very nature of Petitioner's wrongdoing denied the Lower Court the opportunity to make such findings, leaving the Fourth District as the first and only Court able to do so. Obviously, the trial judge did not know he was duped.

Certainly, Respondent had no opportunity to raise the issue of entitlement to fees in the lower court. Indeed, as far as Judge Greene was concerned when he dismissed the complaint with prejudice, the next time he would see Respondent's counsel was at a hearing on Petitioner's Motion for Fees.[6] Only when the Fourth District concluded that the trial court proceedings were essentially a sham, was an assessment of fees practical or legally compelling.

Second, the prevailing party in Kurzweil "won" on the merits, as opposed to Petitioner, who received a favorable ruling by misleading the lower court.

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[6]/ A hearing on the motion never took place.

Accordingly, the Fourth District was the first court to be able to review the record, and recognize that the favorable ruling obtained by Petitioner in the lower court had nothing to do with the substantive legal issues, but with trickery and deceit. As a result, the Fourth District had no lower court findings to interfere with, and was free to decide that "obviously the trial judge was mislead..." and assess fees for all of the misconduct. Forum at 1059 (A 3).

After arguing, presumably with a straight face, that Respondent should have raised the fee issue in the trial court, Petitioner moves on to cast aspersions on the Fourth District by claiming it impermissibly engaged in "fact-finding" outside the record. Petitioner wrongfully cites the Oliver decision, which does not support Petitioner's position. In fact, Oliver is a decision from 1940 which stands for no legal principle. It is a per curiam opinion that dismissed a matter on a writ of mandamus so that the trial court could take testimony. State ex rel. Oliver v. City of New Port Richey, 195 So. 418 (1940).

The Fourth District in no way engaged in the taking of testimony. Instead, it relied upon the whole record to reach conclusions about matters raised in the trial court and on appeal. There was no discretion exercised or to be exercised. "[T]here is no possible view of the law" that support the arguments advanced by Petitioner. Forum at 1061 (A 5). Specifically, the Fourth District concluded as

follows:

> "It is **incontestable** that there is no impropriety in the appearance of additional counsel–as indisputably these new lawyers for plaintiff were–filing the amended complaint and arguing on plaintiff's behalf at the hearing. It is just as **incontrovertible** that plaintiff had every right under the rule–so early in the case–to amend his complaint without leave of court, and therefore the legal sufficiency of the original complaint was clearly moot." Forum at 1059 (A 3) (emphasis added).

Under any standard of review, an appellate court has the duty of reviewing the applicable case law as it relates to the facts of the case before it. It is disingenuous for Petitioner to have this Court believe that an appellate court cannot reach conclusions based upon the facts in the record.

Petitioner's Conduct Is Not Protected By The "Arguable Substance" Rule

Despite misleading the lower court into error by "failing in its duty of candor," Petitioner seeks to shield itself behind the "Arguable Substance Rule." The Forum opinion, however, resonates with the message that a favorable ruling obtained through legal artifice and trickery is entitled to no presumption of correctness, let alone a safe harbor from section 57.105. To argue otherwise would mean that trial counsel could win by any means no matter how fraudulent or devious and still enjoy the protection sought here by Petitioner. Such a rule of law would reward wrongdoers and leave their victims with no adequate remedy.

Petitioner incorrectly interprets that Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982), and its progeny, to automatically grant a prevailing party "the unfettered right to defend [a trial court order] on appeal without being subject to the reach of section 57.105." Petitioner's Brief at 14. Respondent is aware of no rule of law which grants a prevailing party an "unfettered" or absolute safe harbor. If that were so, litigants could use all means within their disposal to win -- even illegal or unethical -- and then hide behind the court order it wrongfully procured.[7] Section 57.105 would then create the ironic and perverse incentive for litigants to increase the magnitude of their misconduct so as to maximize the likelihood of success in the lower court. The greater the wrongdoing, the greater the likelihood of avoiding sanctions and the greater the likelihood of success in the trial court which would be protected on appeal by the safe harbor Petitioner argues exists.

Even under the pre-1999 statute, an exception was recognized for rulings obtained through legal artifice and trickery. Indeed, even the Salter decision relied upon so heavily by Petitioner specifically distinguishes itself from an "award that was clearly prompted by egregiously unethical activities by appellee's counsel

[7]/ Applying Petitioner's logic to a criminal case, Petitioner would have this Court believe that evidence unlawfully obtained or illegally planted should be admissible simply because it exists.

which necessitated the appeal in the first instance." State Department of Highway Safety and Motor Vehicles v. Salter, 710 So.2d 1039, 1041 (Fla. 2d DCA 1998) (emphasis added).

In any case, Whitten and its progeny are no longer wholly applicable to the recently revised section 57.105. The pre-1999 version of 57.105, as interpreted by Whitten and its progeny, limited its analysis to matters where "the court must find a complete absence of a justiciable issue." Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982) (emphasis added). That is, the frivolousness of a claim is measured "when the claim is initially presented." Carnival Leisure Industries, Co. v. Holzman, 660 So.2d 410, 412 (Fla. 4th DCA 1995) (emphasis added).

Under the 1999 version of 57.105, it is now clear that the Legislature "significantly broadened the court's power to award fees under its aegis." Forum at 1060 (A 4). The scope of the statute has been broadened to include "any claim or defense [made] at any time during a civil proceeding." Florida Statute 57.105. Accord O'Grady v. Potash, 2002 WL 1173996 (Fla. 3d DCA 2002) (Third District's adoption of the Fourth District's interpretation of the 1999 version of §57.105).[8] Although Petitioner is correct that the aspirational goal of Whitten "to

[8]/ Clearly, there is no conflict between the Third and Fourth District Courts.

deter frivolous claims [and] frivolous defenses" remains intact, its breadth of application has changed considerably. See, e.g. "The Florida Legislature Encourages Courts to Sanction Unsupported Claims and Dilatory Action," 76-APR Fla. B. J. 8; "Attorneys' Fees On Appeal: Basic Rules and New Requirements," 76-APR Fla. B. J. 31. Now, there can be no question, if ever there was, that a ruling obtained by misciting law and deceiving a trial judge carries no presumption of correctness and offers no safe harbor. See Forum at 1062 (A 6), ("If in the circumstances of this case the rule of candor cannot be unflinchingly enforced under the 21st century version of section 57.105, then this freshly cast legislation is a vessel as empty as its predecessor was").

Petitioner warns that if the Forum opinion is affirmed, a party who prevails in the trial court "must now consider the extreme, indeed unprofessional, act of 'throwing in the towel' when there is any chance that an order may be reversed on appeal." Petitioner's Brief at 15. Relying on Florida Rule of Professional Conduct 4-1.3, which encourages lawyers to zealously advocate for their clients, Petitioner asserts the dangerous proposition that an "ethical conflict" will ensue. Petitioner claims the lawyer will be forced to make an "impossible evaluation" of "whether a reviewing court may view the victory in the trial court as a 'frivolous win'." Petitioner's Brief at 16. Petitioner's argument, however, only goes to show that

they just do not 'get it'.[9]

> "While counsel does have an obligation to be faithful to his client's lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty to zealously represent over all other duties." Lingle v. Dion, 776 So.2d 1073, 1078 (Fla. 4th DCA 2001) (emphasis added).

Petitioner's claim that the "practical effect" of the Forum opinion will be the "abandonment of the American Rule" is similarly baseless. Petitioner's Brief at 16. As this Court recently reaffirmed in Moakley v. Smallwood, citing Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 (Fla.1985), "[t]his state has recognized a limited exception to this general American Rule in situations involving inequitable conduct." Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 (Fla. 1985). Although Petitioner goes out of its way to say its argument is not "an overstatement," it is that, and a whole lot more. As referenced above, Petitioner did not incur sanctions "as a consequence of attempting to uphold the trial court's ruling" as it suggests, but because it "plainly attempted to lead [the] trial court to a result that plaintiff was needlessly forced to appeal." Forum at 1062

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[9]/ There cannot be an ethical conflict as to whether to act ethically. In Rapid Credit Corp. v. Sunset Park Center, Ltd. cited above, the sanctioned party also attempted to justify his bad faith conduct by "boldly" suggesting that it was required by his "duty to his client." The Third District found this "one of the most disquieting aspects of this unfortunate case" and "fresh evidence of what we already know: that the standards of our noble profession are in what appears to be a headlong descent into the pit." Id. at 812. Chief Judge Schwartz, specifically concurring.

(A 6).[10]

Section 57.105 Is Not Unconstitutional

Although never argued in the Fourth District, and only relegated to a footnote in its Motions for Rehearing, Petitioner now claims that it should not be subject to 57.105 liability on the basis that the Fourth District relied upon an unconstitutional statute. Petitioner asserts that section 57.105 violates due process; separation of powers; and the single subject requirement.[11] Respondent addresses each point below.

A. Due Process

Petitioner attempts to use this Court's recent decisions of Diaz v. Diaz, 27 Fla. L. Weekly S178 (Fla. 2002); 2002 WL 276477 (Fla.), and Moakley v. Smallwood, 27 Fla. L. Weekly S175 (Fla. 2002); 2002 WL 276466 (Fla.), to suggest section 57.105 is unconstitutional. At the same time, Petitioner

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[10]/ Petitioner has made a mockery of motion practice and the entire appellate process, having unsuccessfully asked for a stay in the Fourth District, then the trial court, and now for a second time in this Court. Movants first asked the Fourth District for a stay on August 14, 2001, then supplemented that request on August 28, 2001. After the Fourth District denied Movants' motion on October 3, 2001, Movants then simultaneously appealed the Fourth District's denial to both the trial court and the Florida Supreme Court. The trial court denied the motion on November 1, 2001 and this Court denied the motion on November 30, 2001. Petitioner has also sought a rehearing and a rehearing *en banc* in the Fourth District, as well as a rehearing to its Motion to Stay in this Court; all of which have been denied.

[11]/ Petitioner does not address, or even attempt to address, whether every prior version of section 57.105 was also unconstitutional.

acknowledges Moakley does not expressly deal with section 57.105. Not only does Moakley, and for that matter, Diaz, not expressly deal with 57.105, they do not impliedly deal with it either as both expressly decline to offer an opinion regarding whether their holdings would be different if applying section 57.105 analysis. Moakley at 6 ("we express no opinion as to whether the award of attorneys' fees would have been proper under this statute."); Diaz at 3 (citing the identical language). Moreover, both opinions also acknowledge that the 1999 amended version of 57.105 "is broader" than the previous version."[12] Id.

Regardless, the due process concerns in Moakley and Diaz are not present in Forum because the Fourth District merely applied the statutory mandate of 57.105 to a case where there was "no possible view of the law" which could have supported Petitioner's arguments. Forum at 1061 (A 5) ("the conduct of defense counsel cannot possibly turn on any representations of their client or for a good faith modification of existing law"). The statute itself provides notice to all litigants of the standard of liability to be imposed. The conclusions of law were enough to show that counsel knew or should have known it was peddling bad law.

Compare, for example, with Diaz where the trial court acknowledged "I

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[12]/ Under the 1999 amended version of 57.105, fees are assessed "at any time" when the party and/or its attorney "knew or should have known" that what they were asserting was not supported by law or fact.

don't know whether the husband got bad advice or whether the husband got advice and didn't want to follow it." Diaz at 2. Clearly, a factual issue remained unresolved in Diaz which needed to be answered before sanctions could be assessed.

Petitioner also incorrectly asserts that "it makes no difference whether [a fee assessment] is based upon inherent authority or 57.105." Petitioner's Brief at 20. The Moakley Court saw a difference, and set a priority that "if a specific statute or rule applies, the trial court should rely on the applicable rule or statute rather than on inherent authority." Moakley at 4. Here, the statute defines the requisite standard, whereas the inherent authority is left to each individual judge. See, e.g. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (recognizing that "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

It is worth noting, however, that even if 57.105 were unconstitutional, the Record in this case is so unambiguous that sanctions could be imposed through the Court's inherent authority.[13] Unless this Court concluded that Rule 1.190(a), Florida Rules of Civil Procedure, no longer means what it says, that an amended

[13]/ Moreover, the Court also has the inherent power of direct contempt to punish behavior that is "contemptuous on its face." See Carnival Corp. v. Beverly, 744 So.2d 489, 496 (Fla 1st DCA 1999).

complaint may be filed as a matter of right at any time before the filing of a responsive pleading, there is no escaping the fact that Petitioner successfully mislead the trial court. See, e.g. Patsy v. Patsy, 666 So.2d 1045 (Fla. 4th DCA 1996) (finding the trial court properly exercised its inherent authority to sanction an attorney for filing a sham pleading solely to delay proceedings.).

B. Separation of Powers

Petitioner argues that this Court has exclusive jurisdiction over the discipline of lawyers so 57.105 is unconstitutional. First, this is not discipline. Second, in arguing that the Legislature does not have the authority to impose "new monetary sanctions upon attorney conduct," Petitioner turns a blind-eye to the cases it has relied upon. Moakley, for example, states that "a trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct." Moakley at 4. See also Shelly v. District Court of Appeal, 350 So.2d 471, 472 (Fla. 1977) ("Contempt power is proper and historical alternative to existing formal disciplinary proceedings.").

Again, Petitioner ignores the Fourth District's holding that Petitioner persisted in trying to uphold this patently erroneous decision, and instead claims yet again that an attorney will be prejudiced by having "no advanced notice of what he can and cannot legitimately argue." Petitioner's Brief at 22. The very precise

statutory standards set forth in section 57.105 provide all the notice required, but no attorney should have to question whether it is permissible to mislead a court. As the Fourth District noted, "a [justice] system is surely defective ... if it is acceptable for lawyers to 'suggest' a trial judge into applying a 'rule' or a 'discretion' that they know – or should know – is contrary to existing law." Forum at 1062 (A 5).

C. Single-Subject Requirement

In a footnote only, Petitioner raises the argument that 57.105, as amended, is unconstitutional because the underlying public law, Chapter 99-225, violates the single-subject requirement. The Court has allowed Amicus to file briefs for and against this issue, so Respondent will not reargue the merits of why 57.105 is not unconstitutional.

Respondent does, however, point out that this is essentially a political matter, as Chapter 99-225 was the highly controversial tort reform legislation. That political debate should not affect the outcome of this appeal and prevent the assessment of fees for the clear wrongdoing of Petitioner.

Generally, public laws containing multiple subjects are cured upon re-enactment of the statute. See Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 515 So.2d 217 (Fla. 1987). Whether or not

the remainder of Chapter 99-225 was re-enacted, the Legislature has expressed its clear intent to re-enact 57.105. Indeed, the Legislature passed a new amendment to 57.105 in 2002, which was signed by the governor on April 23, 2002. It reinforces the import of the 1999 amendment by providing the offending party or counsel with a 21-day recapture period to cure the improper conduct. Chapter 2002-77.

WHETHER THE FOURTH DISTRICT MISCONSTRUED THE RECORD IN IMPOSING 57.105 LIABILITY ON PETITIONER FOR ARGUMENTS WHICH "COULD NOT BE MADE IN GOOD FAITH"

(As Restated By Respondent)

According to Petitioner, the Fourth District not only had "no business" imposing 57.105 fees against them, but it was "totally off base" in interpreting Petitioner's conduct. Petitioner's Brief at 22. It is respectfully suggested that Petitioner's arguments in this regard be reviewed with the lower court transcript in hand. As set forth below, Petitioner continues to make legal argument and factual assertions which go beyond any reasonable license of advocacy, and only seek to underscore the unbridled liberties already taken by Petitioner.

Petitioner Mislead The Lower Court To Error

The Fourth District reached the unequivocal conclusion that "there is no view of the law" that supports Petitioner's position that Respondent did not have

an absolute right to amend. No matter how "incontrovertible" the Fourth District found this point to be, however, Petitioner persists in arguing that "no interpretation could have been further from the truth" and that "without a doubt [Respondent's] right to amend was legally and factually limited ..." by the Miller firm's appearance in the matter. Petitioner's Brief at 26 and 28 (emphasis added).

The law and facts are clear. It is uncontested that Respondent timely submitted his Amended Complaint before any responsive pleading had even been filed, or served.[14] Yet in direct contravention of the black-letter Florida law, and based upon no applicable legal authority, the trial court refused to recognize Plaintiff's right to amend his initial pleading. The trial court, of course, was acting in reliance upon Petitioner's deceit, having been assured of what "the case law suggests." Transcript at p. 10, lines 7-8 (A 16).

What is perhaps more alarming, however, is the apparent ease at which Petitioner continues to try to gain an upper-hand through legal artifice and trickery,

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[14]/ Respondent is not going to reargue the law with respect to Rule 1.190(a), Florida Rules of Civil Procedure. Petitioner expressly abandoned this argument and therefore this Court did not grant jurisdiction on this issue. See Motion to Stay Issuance of Mandate and For Stay Pending Further Appellate Review dated August 14, 2001 at 1 (A 36) ("Boca Burger has decided to seek further review in the Florida Supreme Court on the limited issue of §57.105 sanctions ..." (emphasis added). Despite the fact that Petitioner has now appealed only the limited singular ruling of the imposition of sanctions under §57.105, they are apparently hoping for this Court to rule on a much broader array of matters not currently on appeal. See Petitioner's Brief at 33 ("Petitioner BOCA BURGER requests that ... the decision of the trial court dismissing this case with prejudice be reinstated.").

all in the apparent name of "zealous" representation. Petitioner is apparently willing to make any argument, no matter how untruthful it is. Petitioner cited case law from the Eastern District of Michigan which purportedly stood for the proposition that the statutory right to amend may be denied even before the filing of a responsive pleading. See Transcript at p. 9 (A 15) (citing to Chevy Chase Federal Savings Bank v. Davis, 121 B.R. 516 (E.D.Mich. 1990). There is no such rule or rule of law, not even in the Eastern District of Michigan Bankruptcy Court.[15]

Petitioner has never attempted to argue the merits of that Michigan case law again.[16] Instead, Petitioner has only attempted to "muddy" the waters by claiming on appeal that co-counsel was somehow not properly authorized to appear on behalf of Respondent. The facts of the record, however, belie Petitioner's claim.

Petitioner's attorneys knew the Miller firm was coming into the case before the 28th. The Amended Complaint was not signed by Dawson, the lawyer who signed the original complaint, but his office mate's name did appear as counsel on

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[15]/ In Chevy Chase, the Court denied an oral request for leave to amend at the hearing on a motion to dismiss, but the defendant had already filed a responsive pleading at the time the request for leave to amend was made. Id. at 516. Petitioner has cited other cases for the wrong proposition as well. It indicated in its Jurisdictional Brief that Volpicella v. Volpicella, 136 So.2d 231 (Fla. 2d DCA 1962) conflicts with Forum, but Volpicella is also inapplicable. Unlike Respondent, Volpicella sought leave to amend.

[16]/ Petitioner never put it before the Fourth District or this Court. See Petitioner's Table of Authorities in its Appellee's [Fourth District] Answer Brief at ii-viii (A 47).

the Amended Complaint.[17]

It could not be "clear that the Miller firm was not merely 'additional counsel', but was instead substituting as counsel..." Petitioner's Brief at 6. If anything was "clear", based upon the Record, it was that the Miller firm filed a Notice of Appearance and entered as co-counsel. Indeed, there is an unequivocal statement by Charles Fox Miller at the March 28 hearing as follows:

> "**We are appearing as co-counsel...**" Transcript at p. 5, line 9 (A 11).

Although these are not ambiguous words, Mr. Miller makes the same point on the next page of the transcript where he states as follows:

> **"Mr. Dawson's firm remains as co-counsel of record. We are not discharging Mr. Dawson's firm, we don't intend to discharge Mr. Dawson's firm."** Transcript at p. 6, lines 5-8 (A 12).

Finally, and so there was no possible chance for misunderstanding, Mr. Miller reiterated that Mr. Dawson was not being substituted by stating the following:

> **"Mr. Dawson has been very recently asked by the Plaintiff to secede his primary role in the case to our firm."** Transcript at p. 12, lines 15-17 (A 18).[18]

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[17]/ The Fourth District found this issue "incontestable".

[18]/ Petitioner is either intentionally seeking to mislead this Court, or is being strategically obtuse. Notwithstanding the actual words in the Transcript, as referenced above, Petitioner seeks to mislead this Court by claiming "New counsel made an

The Fourth District affirmed the Miller firm's appearance. "In this case there was no attempt to substitute new attorneys; they merely appeared as additional attorneys for plaintiff." Forum at 1058 (A 3) (emphasis added).

Despite the Court's unambiguous language, Petitioner persists in contending that the Fourth District "merely recast the Miller firm as additional counsel." Petitioner offers no factual or applicable legal basis for its claim, and instead relies on the same irrelevant cases (already briefed and argued in the Fourth District), which merely lay out the distinction between the appearance of additional or new counsel. See, e.g. Pasco County v. Quail Hollow Properties, 693 So.2d 82 (Fla. 2d DCA 1997). Rule 2.060(j), Florida Rules of Judicial Administration provides that appearance as co-counsel is proper when a notice of appearance is filed contemporaneously with the filing of the Amended Complaint. Even Petitioner acknowledged the Miller firm's compliance as follows:

> "[N]ew counsel filed his notice of appearance contemporaneous with the amended complaint." See (Petitioner's) Appellee's [Fourth District] Answer Brief at

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unsubstantiated statement that attorney Dawson had been asked by plaintiff **to withdraw from the case** ..." Petitioner's Brief at 26.

3 (A 54).

Petitioner does not even address the inherent inconsistency of its argument. Although Petitioner now makes claims about "defendant's attempt to exclude the Miller firm ...," Petitioner did not object, and in fact persisted in wanting to argue their motion to dismiss, despite the appearance of only the Miller firm at the March 28 hearing. See Transcript at p. 13, lines 14-18 (A 19). Moreover, Petitioner's counsel knew of the Miller firm's work on the case at least one (1) day before the March 28 hearing, yet never expressed any concern to counsel of record, and instead corresponded in writing with the Miller firm with copies to co-counsel.[19] There is not one scintilla of evidence in the record, nor could there be, that the Miller firm made an appearance without the authority of the plaintiff or co-counsel. Petitioner does not even appeal this issue on the merits.

The Lower Court's Error in Failing to Recognize the Amended Complaint Was Not "Harmless"

Because the Lower Court refused to recognize the properly filed Amended Complaint, the causes of action set forth therein were never argued or adjudicated. Accordingly, the Lower Court's ruling should be reversed and remanded so that

[19]/ Petitioner's lack of candor with respect to this and other issues is part of what has become a disturbing pattern of deceit. Throughout these proceedings, the Petitioner has shown little restraint in misrepresenting the facts, and has routinely miscited the holdings of cases to this Court and the Lower Court.

this case might properly proceed. Given his day in Court, Plaintiff will fully and confidently address Petitioner's Motion to Dismiss when and if it is filed.

Petitioner's attempts to raise the merits of the Amended Complaint for the first time on appeal is procedurally improper because the Appellate Court may not hear unheard questions of law and statements of fact not raised below. See, e.g., Snyder v. Volkswagen of America, Inc., 574 So.2d 1161 (Fla. 4th DCA 1991); Brooks v. State, 2000 WL 1233038 (Fla. 2d DCA 2000); In re Burton's Estate, 45 So.2d 873 (1950); Raybon v. Burnette, 135 So.2d 228 (Fla. 2d DCA 1961); Silver Springs Shores, Inc. v. Department of Revenue, 336 So.2d 382 (Fla. 1st DCA 1976); Maistrosky v. Harvey, 133 So.2d 103 (Fla. 2d DCA 1961).

Petitioner seeks to force Respondent to argue the merits of his Amended Complaint – including nine (9) claims for relief – in this brief, and that request is fundamentally unfair. Respondent is first entitled to his day in the Lower Court on his Amended Complaint, and only then should the appellate courts consider whether error was made with respect to the Lower Court's dealing with the Amended Complaint.

Although this point should not even be relevant, as more fully set forth in the Respondent's Initial Brief and Reply Brief to the Fourth District (A 55 and 88, respectively), Petitioner's position on preemption is simply wrong. Private causes

of action are not barred or preempted by either the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.*, or the Florida Food Safety Act, F.S. §500.01 *et seq*. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Barnett v. Winn-Dixie Stores, Inc., 1997 U.S. Dist. LEXIS 12521 (S.D.Ala. 1997) (concurrent jurisdiction exists for state private causes of action).[20]

Petitioner once again fails to address the substantial and dispositive case law against its position. Perhaps to detract from its significance, the Petitioner does not even address the two (2) controlling United States Supreme Court cases. See Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); Cippollone v. Liggett Group, Inc., 505 U.S. 504 (1992). Both cases hold that private causes of action such as Respondent's are not barred by Federal law, and Medtronic, Inc. even holds that the Federal Food, Drug and Cosmetic Act is not preempted by a Florida cause of action.

Similarly, Petitioner chooses to simply ignore the holdings of those cases following the above-cited Supreme Court decisions, most notably Barnett v. Winn-Dixie Stores, Inc., 1997 U.S. LEXIS 12521 (S.D.Ala. 1997). As set forth in the

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[20]/ Petitioner argued in its Answer Brief to the Fourth District that Respondent's Amended Complaint should be dismissed because class actions – and by implication class action lawyers – are bad. That argument still does not merit a formal response.

Initial Brief, Barnett is recent case law from within the Eleventh Circuit which specifically holds that a private cause of action for the misrepresentation of a food product is not preempted by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.* (1999).

Sloughing off the controlling legal authority, the Petitioner instead cites to inapplicable legal platitudes; makes vague references to legislative intent; or mistakenly relies upon law which predates the applicable case law. See, e.g. Cort v. Ash, 422 U.S. 66 (1975) (discussing the role of overall legislative scheme). Moreover, it is not a coincidence that Petitioner has totally abandoned its reliance on the cases it cited with such conviction to the Lower Court in support of its position. See, e.g., Grocery Manufacturers of America v. Gerace, 755 F.2d 993 (2d Cir. 1985).

Indeed, as further set forth in the Initial Brief, Federal law has been drafted so as to permit private causes of action under state law. State of Florida ex rel Broward County v. Eli Lilly & Co., 329 F.Supp. 364 (S.D.Fla. 1971) (Congress did not include a private cause of action in the Federal Food, Drug and Cosmetic Act because it did not want to duplicate existing state remedies.). Petitioner has even cited to this proposition in its Fourth District Answer Brief, presumably when it suited its purpose. See Orthopedic Equipment Co. v. Euster, 276 F.2d 455 (4th

Cir. 1960). Orthopedic Equipment Co, holds that:

> "[T]he statute [FDCA] imposes an absolute duty on manufacturers not to misbrand their products, and the breach of this duty may give rise to civil liability." Id. (emphasis added).

State law in Florida expressly conforms with this mandate. F.S. §500.02.

It is disingenuous, and frankly contrary to the law for Petitioner to assert that no private cause of action exists under these circumstances. This case, like so many others, may in fact be brought, as court after court has held that fraudulent or tortuous conduct in violation of a statutory or regulatory duty – even concerning food products – gives rise to precisely this type of private lawsuit. Barnett v. Winn-Dixie Stores, Inc., 1997 U.S. LEXIS 12521 (S.D.Ala. 1997) (supermarket cannot fraudulently label food products); Food Fair Stores of Florida, Inc. v. Macurda, 93 So.2d 860 (Fla. 1957) (segments of worms in canned spinach qualifies as food adulteration); Burke Pest Control, Inc. v. Joseph Schlitz Brewing Company, 438 So.2d 95 (Fla. 2d DCA 1983) (bug poison does not qualify as food additive under Federal Food, Drug and Cosmetic Act). Misrepresenting a product as "all natural," when it in fact contains chemicals is fraudulent, thereby giving rise to private, civil recourse.

Indeed, if Petitioner's argument was correct, how can they explain the

mountain of analogous food and beverage misrepresentation cases that lay across the legal landscape of settlements and judgments? The very existence of these cases alone, none of which were preempted by Federal or state law, illustrate the flaw in Petitioner's argument:

- Kraft General Foods, Inc. v. Rosenblum, 635 So.2d 106 (Fla. 4th DCA 1994) (consumer sued in Broward County, Florida, for misleading advertising on label of iced tea);

- Block v. McDonald's Corp., Case No. 01-CH-9137 (Cook Co., Ill., Cir. Ct.) (consumers sued for the fraudulent and deceptive advertising in the marketing of french fries containing "100 percent vegetable oil" that contained beef);

- Committee on Children's Television, Inc. v. General Foods Corporation, 673 P.2d 660 (Cal. 1983) (consumers sued for the fraudulent and deceptive advertising in the marketing of sugared breakfast cereals);

- Caro v. Procter & Gamble Company, 18 Cal. App. 4th 644 (Cal. App. 1993) (class action for unfair or fraudulent business practices in falsely representing "Citrus Hill" products to be fresh orange juice);

- Tylka v. Gerber Products Co., 1999 U.S. Dist. LEXIS 10718 (E.D.Ill. 1999) (class action under Illinois Consumer Fraud and Deceptive Business Practices Act alleging false and misleading advertising that its baby foods are nutritionally superior to other brands despite containing sugar);

- Kasky v. Perrier Group of America, Inc., 1991 U.S. Dist. LEXIS 21177 (S.D.Cal. 1991) (class action alleging that Perrier misrepresented through advertising and product labeling that its product is not processed or filtered before it is bottled);

- In re Perrier Bottled Water Litigation, 754 F.Supp. 264 (Conn. 1990) (class action alleging benzene existed in Perrier despite claim in was "naturally pure"); and

- "Firms Sued for Mislabeling Must Cease Kosher Business," LA Times, February 27, 1988 (discussing settlement for false advertising, fraud and deceptive trade practices for selling non-kosher poultry as kosher).

CONCLUSION

For almost two and a half years, since March 28, 2000, this case has been unnecessarily litigated up and down the court system taking literally hundreds of lawyer and judicial hours and costing, just on Respondent's side, in excess of $100,000. This is what happens when over zealous lawyers with no respect of a reasonable license of advocacy or respect for the rules, requiring, among other things, candor with the court, do the wrong thing.

The right thing was really simple and would have taken less than five minutes at a *de minimus* cost, to wit: a telephone call from a lawyer in the Miller firm to opposing counsel (at *any* time prior to the hearing on March 28) as follows:

Miller Firm: We are immediately filing a notice of appearance as co-counsel and an amended complaint. Please advise the court that the hearing on your motion to dismiss the original complaint is moot and should be cancelled.

Response: All right. I look forward to working with you.

End of story and all that happened, pursuant to either party's version, would never have occurred.[21]

That the Petitioner is still asking this Court to reinstate the trial judge's original order, even after having abandoned that argument in the Fourth District, illustrates just how vexatious and in bad faith are the actions of the Petitioner, and the award of attorney's fees and costs for *all* of Respondent's legal work is not only legally proper, but mandated if the lawyers of The Florida Bar are required to practice law in an ethical and legal manner.

[21]/ Then, of course, there would be no issue of "preemption", and the litigation on the merits could well have been over.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of July, 2002, a true and correct copy of Respondent's Brief on the Merits was furnished by FEDERAL EXPRESS to: **John R. Hargrove, W. Kent Brown, and Gordon James, III, Esqs.,** HEINRICH, GORDON, et al., 500 E. Broward Blvd., Suite 1000, Fort Lauderdale, Florida 33394, and copies were furnished by U.S. MAIL to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Respondent's Brief on The Merits complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

_____

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