LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA SUPREME COURT CASE NO. SC01-1830

BOCA BURGER, INC., **4DCA CASE NO. 00-1255**

Petitioner,

vs.

RICHARD FORUM,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

TABLE OF AUTHORITIES

Cases

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. MIAMI FORT LAUDERDALE, FLORIDA 33394-3092

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Statutes

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Other Authorities

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. MIAMI FORT LAUDERDALE, FLORIDA 33394-3092

STATEMENT OF THE CASE AND FACTS

I

THE CASE

This case began in February of 2000 when respondent RICHARD FORUM ("plaintiff") filed a two-count complaint for damages arising out of alleged food mislabeling. (App. A at 1-5; R:1-5) In an unprecedented decision, the Fourth District has assessed trial and appellate court fees under § 57.105, Florida Statutes (1999),[1] against petitioner BOCA BURGER, INC. ("defendant"), who was merely defending on appeal a favorable trial court ruling. Fees were also assessed against defense counsel. See Forum v. Boca Burger, 788 So. 2d 1055 (Fla. 4th DCA 2001).

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[1] The 1999 version of § 57.105(1) reads in pertinent part as follows:

> Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

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Plaintiff's complaint was originally signed and filed by a single attorney, Joseph Dawson, whose name appears on the signature page as plaintiff's sole counsel of record. (App. A at 5; R:5) It asserted two counts –- one for violations of the Florida Deceptive and Unfair Trade Practices Act and the other for mental anguish, labeled as a "personal injury" claim, resulting from those violations. (App. A at 2-5; R:2-5) Defendant moved to dismiss, claiming essentially that the suit was an improper attempt to assert a private right of action for food mislabeling which could not be maintained under Florida law. (App. B at 2-3; R:7-8, 11-12) A copy was served in the customary manner on plaintiff's sole counsel of record, attorney Dawson. (App. B at 3; R:8) A hearing on defendant's motion was set by the trial court for March 28, 2000, and the trial court itself sent the notice thereof to counsel bearing its form "stamp" that the hearing could not be cancelled without the court's permission.[2]

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[2] Judge Greene's practice is to order specially set hearings himself. (See App. D at 5, ¶ 5) The procedure is straightforward. Counsel requests a hearing by submitting a pre-signed notice. Once the court decides to hear the matter, a time is designated on the form, and the court itself sends out the pre-signed notice under counsel's signature, affixing a pre-printed stamp on the notice which reads as follows:

> This hearing may not be canceled by the parties unless the issues set for hearing have been resolved by written stipulation filed with the court (courtesy copy to the judge's office) or a court order canceling

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

The events occurring on the March 28th hearing date have brought about this court's review of the case.[3] On that day, a totally new set of lawyers –- the law firm of Miller, Schwartz & Miller, P.A. -- attempted to *substitute* for attorney Dawson without complying with the substitute counsel rule. See Fla. R. Jud. Admin. 2.060(h). That rule mandates that no substitute attorney may appear in the absence of an order *and* the written and filed consent of the client. (App. A at 11)

Shortly before the hearing, scheduled for 4:15 p.m. on March 28th, the new lawyers from the Miller firm faxed a nine-count amended complaint to defense counsel, Gordon James. (App. C; R:18-54) Plaintiff's *only* counsel of record, attorney Dawson, was not identified anywhere on the signature page of the proposed amended complaint, and neither Dawson nor plaintiff attended the hearing. (App. C at 30; App. D at 25; R:47)

Finding that the Miller firm was not appearing as *additional* counsel and that there was no compliance with Florida's judicial administrative rule governing substitution of counsel, the trial court refused to recognize the amended complaint as a valid and authorized pleading on behalf of plaintiff. (Tr.

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hearing.

(Id. at 18, Ex. C). These procedures were followed regarding the March 28th hearing. (See App. D at 5, ¶ 5)

[3] This court accepted jurisdiction of the case based on express and direct conflict with State Department of Highway Safety & Motor Vehicles v. Salter, 710 So. 2d 1039 (Fla. 2d DCA 1998) and Carnival Leisure Industries Ltd. v. Arviv, 655 So. 2d 177 (Fla. 3d DCA 1995). See also Enoch Assocs., Inc. v. Moult Investments, Ltd., 404 So. 2d 798 (Fla. 3d DCA 1981). Those cases hold that since a trial court order arrives in an appellate court as a "presumptively correct" ruling, an appellate court cannot assess § 57.105 fees against a party attempting to uphold the ruling on appeal. While not serving as a basis for the conflict, it should nevertheless be noted that the Fourth District itself has adopted this rule in other cases. See Coral Springs Roofing Co. v. Campagna, 528 So. 2d 557 (Fla. 4th DCA 1988); McNee v. Biz, 473 So. 2d 5 (Fla. 4th DCA 1985); see also Homestead Ins. Co. v. Poole, Masters & Goldstein, C.P.A., P.A., 604 So. 2d 825 (Fla. 4th DCA 1991).

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10-12)[4] Instead, the trial court directed its attention to the original Dawson complaint, determined that it alleged a claim for food mislabeling which is preempted as a matter of law, and dismissed the complaint with prejudice. (Tr. 22-23)

On appeal to the Fourth District, defendant contended that despite the liberality regarding amended pleadings, accepting the amended complaint would have been futile because "food mislabeling" is a preempted area of the law providing for no private right of action. The Fourth District not only disagreed, but determined that defendant and its counsel misled the trial court by making such an argument and "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, 768 So. 2d at 1059. Ignoring the strict requirements of the "substitute" counsel rule altogether, the Fourth District concluded that plaintiff's new lawyers "merely appeared as additional attorneys for plaintiff" who could appear at any time without leave of court and without the written consent of the party. Despite case law to the contrary, the Fourth District further concluded that preemption is an affirmative defense which cannot be raised in a motion to dismiss, and therefore ruled that defendant and its counsel had no right to assert that position as a ground for dismissal. Trial and appellate fees were then assessed under § 57.105, as amended.

II

THE FACTS

Late in the day before the March 28th hearing, defendant's trial counsel, Gordon James, retrieved a voice mail from the law firm of Miller, Schwartz & Miller to the effect that the Miller firm would be filing an amended complaint and requested that the next day's hearing be cancelled. (See App. D at 5, ¶ 5) Because Judge Greene specially sets his own hearings, the March 28th hearing was not cancelled. (See Tr.

[4] A copy of the hearing transcript is also contained in Appendix D to this brief. (See App. D, Ex. F)

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

1)

Miller's proposed complaint did not arrive in James' office until the next day when it was faxed over the lunch hour. The record reflects that James saw the nine-count Miller pleading for the first time at approximately 2:00 p.m. -- barely two hours before he was to be in court. (App. D at 5, ¶ 5) Because the amended complaint was not signed by Dawson and in fact eliminated attorney Dawson's name altogether, it was clear that the Miller firm was not merely "additional" counsel, but was instead *substituting* as counsel for Dawson. (See id.)

The transcript reveals that the only individuals present at the hearing on behalf of plaintiff were representatives of the *Miller* firm. Neither Dawson nor plaintiff himself were in attendance. (See App. D at 5, ¶ 5; Tr. 1) The transcript further reveals that the trial court had a problem with this. A surprised and annoyed Judge Greene stated:

> I have a fundamental problem. I have a fundamental problem that's taking place, which is twofold.
>
> Firstly, as of yet, I don't see an order for *substitution* of counsel; I don't see an appearance from [the Miller] firm. Secondly, and far more significantly, there is a Complaint that's been served; there's a Complaint that's been filed; I don't see a Motion to Amend the Complaint; I don't see a hearing by this Court authorizing the filing of the Amended Complaint; all that has been dropped off in my hands today is a courtesy copy of the Amended Complaint. And procedurally, there is a certain lack of following the rules [and] caselaw, and that's the problem.
>
> *At this point, the court can only recognize Mr. Dawson to begin with as counsel.* So let's take it step by step.

(Tr. 3-4; emphasis added). Judge Greene continued by stating that as to the appearance of new counsel, "candidly, I don't know if it's honestly worth the paper it's written on" and that he was "really hard pressed to even fathom this [substituted counsel] situation." (Tr. 4-5) He went on:

> The Amendment to the Complaint, filed two hours prior to the hearing, by

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

> a counsel who has only filed an appearance today; *who has not filed as a co-counsel*; there is no signature on the Complaint by the only counsel recognized in the case who filed the initial Complaint; the representation, even of you, Mr. Miller, that you're co-counsel to Mr. Orlando, who is a phantom to the file, and Mr. Orlando being, Michael Orlando, P.A., separate and distinct in letterhead from Joe Dawson, P.A., who is the counsel of record, yeah, the Court is not going to recognize the Amendment at this point for a multitude and litany of reasons that I've just stated.

(Tr. 11-12; emphasis added).

While the substitution issue set the stage for the dismissal, preemption was the basis for the ruling. (Tr. 23) As the hearing went forward, attorney James' associate, Clifford Wolff, argued that plaintiff's food mislabeling claim was preempted by federal and state law, so that any version of the complaint would be subject to dismissal with prejudice. (Tr. 13-23; see also App. B) Wolff also cited two non-Florida cases in support of his argument that in the limited circumstances where the non-moving party is prejudiced, a trial court has the discretion to reject a first amended pleading. Forum, 788 So. 2d at 1058. In a strange analytical twist, the Fourth District actually acknowledged Florida authority which supported Wolff's point, id. at 1059, yet chastised him for making the argument. In its bristling decision, the Fourth District determined that the new lawyers were properly before the court; that the new pleading should have been accepted as a matter of right; and that obtaining the dismissal and attempting to uphold it on appeal justified sanctions, which it imposed. Id. at 1061-63.

Review was sought in this court after post-decision motions were denied.

SUMMARY OF ARGUMENT

The 1999 version of § 57.105 establishes new criteria for the imposition of a fee award, but the *purpose* of the statute is unchanged -- it is designed to discourage frivolous litigation. Given the Fourth District's assessment against an appellee who has unsuccessfully defended a trial court's ruling, the statute

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

is in danger of becoming a mere "prevailing party" rule.

To reach its result, the Fourth District impermissibly became a fact-finder, which is not the role of an appellate court. To make matters worse, the facts it was "finding" were never presented to or ruled upon by the trial court in the first place, so no error was preserved. The Fourth District also disregarded several rules of law in the process of reaching its conclusion. First, it failed to recognize that § 57.105 fees cannot be assessed against an appellee who is attempting to *uphold* a favorable lower court ruling. Second, it ignored the strict requirements of the administrative rule governing the substitution of counsel. And third, it side-stepped the fact that the doctrine of preemption can be raised in a motion to dismiss.

The effect of the Fourth District's improper fact-finding and assessment of fees was that defendant and its counsel were not given the opportunity to be heard and they were left with no means of review. If left to stand, the ruling virtually ensures that any appellate lawyer will think twice before representing an appellee, particularly when an affirmance may be possible only by arguing that the trial court's ruling was right for the wrong reason.

ARGUMENT

I

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THE FOURTH DISTRICT ERRED BY RULING ON AN ISSUE NOT PRESERVED, BY FAILING TO RECOGNIZE THE "ARGUABLE SUBSTANCE" RULE AND BY UNCONSTITUTIONALLY ASSESSING FEES UNDER § 57.105

A. No Error Preserved

As the record discloses, fees were *never* requested in the trial court, and no findings were ever made in the trial court to justify the Fourth District's action. In other words, no § 57.105 issue was preserved below. While a motion for fees was filed on appeal, that motion only asked for *appellate* fees under Florida Rule of Appellate Procedure 9.400.[5]

In Kurzweil v. Larkin Hosp. Operating Co., 684 So. 2d 901 (Fla. 3d DCA 1996), the trial court awarded fees to a defending party in a medical malpractice case under Chapter 776, Florida Statutes. The plaintiff appealed the statutory fee determination, and the Third District held that Chapter 776 did not justify the fee award. The defending party argued that § 57.105 could nevertheless serve as an alternate basis. The Third District rejected the argument, holding that "[w]here the trial court has failed to make [§ 57.105] findings, [there is no] authority to do so in the first instance on appeal." Id. at 903.

The point here is basic to appellate practice. An appellate court has no jurisdiction to award attorney's fees for services rendered in the *trial* court where fees were never an issue. Kurzweil, 684 So. 2d at 902; see also Philip P. Padovano, FLORIDA APPELLATE PRACTICE § 1.7 at 15-16 (West 2001) (despite broad grant of jurisdiction, appellate review is limited solely to issues raised and decided below).

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[5] The motion on appeal, standing alone, cannot serve as a basis for an appellate court to review an issue that has not been properly preserved in the trial court. While § 57.105 permits an appellate court to assess fees for bad faith *appellate* conduct, that is the *only* point which plaintiff's motion in this case could possibly serve.

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

The Fourth District unfortunately saw things a bit differently. It first assumed the role of "fact-finder" — a role which the law forbids in an appellate court. See State ex rel. Oliver v. City of New Port Richey, 142 Fla. 514, 195 So. 418 (1940); Philip J. Padovano, FLORIDA APPELLATE PRACTICE § 7.1 at 106 (West 2001). Once it decided to disregard that fundamental principle, it proceeded on a flawed analytical course, presumably to justify the result it was intent on reaching. To say the least, it had no business engaging in an analysis of an issue not properly before it.

B. The "Arguable Substance" Rule

1. History of 1999 Amendment and the Whitten Standard

The legislative history of the 1999 amendment to § 57.105 makes it clear that despite the change in wording, its intended purpose remains constant. The very first page of the current version's staff analysis explains that the amendment authorizes sanctions "to deter frivolous claims [and] frivolous defenses." A later section of the analysis makes the same point. Judiciary Chairman Johnnie B. Byrd concluded that the legislation was necessary to accomplish the goal of "discourag[ing] frivolous litigation." See Fla. H.R. Comm. On Judiciary, HB775 (1999) Staff Analysis 1, 21 (final analysis June 2, 1999). Decisional law applying the 1999 version likewise recognizes this legislative purpose. See, e.g., Vasquez v. Provincial South, Inc., 795 So. 2d 216, 218 (Fla. 4th DCA 2001); Arenas v. City of Coleman, 791 So. 2d 1234, 1235 n.1 (Fla. 5th DCA 2001); Weatherby Assocs., Inc. v. Ballack, 783 So. 2d 1138, 1141-42 (Fla. 4th DCA 2001).

Significantly, the staff analysis states that the 1999 amendment to § 57.105 adopted language from Federal Rule of Civil Procedure 11, see Staff Analysis at 14, which is likewise designed to punish frivolous practice. See Fed. R. Civ. P. 11, Comm. Notes to 1993 Amendment. Given this legislative history, it is evident that the wording change of § 57.105 has not affected its essential purpose. Thus, Florida's watershed judicial statement of the meaning and intent of § 57.105 is still good law. See Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982), disapproved on other grounds, Florida

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Patient's Compensation Fund v. Rowe, 472 So. 2d 1148 (Fla. 1985).

In Whitten, this court acknowledged its earlier decision in Kittel v. Kittel, 210 So. 2d 1 (Fla. 1967), holding that statutes authorizing fee awards are in derogation of the common law and must therefore be strictly construed. Whitten, 410 So. 2d at 505. Specifically addressing a fee award under § 57.105, the court defined what is meant by a frivolous appeal. In the court's own words:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it....

Id. The court then went on to explain the purpose of § 57.105 as follows:

> The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities. Such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of prevailing litigants.

Id.

2. The Progeny of Whitten

Adopting the Whitten standard as to what type of conduct should be punishable under § 57.105, the Second District in State Department of Highway Safety & Motor Vehicles v. Salter, 710 So. 2d at 1039 (Fla. 2d DCA 1998), held that it is inappropriate to sanction a party who unsuccessfully attempts to uphold a trial court ruling on appeal. The court reasoned that because a trial court order is presumptively correct, a party has the unfettered right to defend it on appeal without being subject to the reach of § 57.105. Id. at 1041. Simply stated, imposing sanctions for defending a presumptively correct order would be a non-sequitur. Salter is a restatement of the "arguable substance" rule announced in Carnival Leisure Industries, Ltd. v. Arviv, 655 So. 2d 177 (Fla. 3d DCA 1995). In Arviv, the court said:

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

> Where a sitting circuit judge rules in favor of a litigant on a point of law, obviously the point has 'arguable substance'. . .

Id. at 181. Using the "arguable substance" characterization as the basis for its reasoning, the court held:

> [W]here a party wins a judgment or ruling in the lower tribunal and it is appealed, and where that party is unsuccessful on appeal, the appellate court could not award section 57.105 fees to the successful appellant. This is because, as a matter of law, the appellee's position contained a justiciable issue of law or fact. *The judgment of the trial court carries with it a presumption of correctness*.

Id. (emphasis added).

Implicitly rejecting the "arguable substance" rule, the Fourth District has interpreted the new version of § 57.105 in a dangerous way. A party who prevails in the trial court must now consider the extreme, indeed unprofessional, act of "throwing in the towel" where there is *any* chance that an order may be reversed on appeal.

Such precedent creates a variety of problems for parties and counsel evaluating appellate options after prevailing in the trial court. For example, an ethical conflict immediately arises. A lawyer has a duty to act "with zeal in advocacy upon the client's behalf", see Fla. R. Prof. Conduct 4-1.3 (comment); see also KPMG Peat Marwick v. Nat'l Union Fire Ins. Co., 765 So. 2d 36, 38 (Fla. 2000), meaning that *all possible good faith claims and defenses* are to be raised taking into account the law's ambiguities and potential for change, "even though the lawyer believes that the client's position ultimately will not prevail." See Fla. R. Prof. Conduct 4-3.1 (comment). If counsel were required in each instance after prevailing in the trial court to evaluate whether a reviewing court may view the victory in the trial court as a "frivolous win", counsel would be forced to make an impossible evaluation as to potential "degrees" of reversal. As a result, the presumption of correctness becomes meaningless, and the appellate principle of "right for the wrong reason" becomes an anachronism.

The practical effect of following the Fourth District's lead in Forum would come close to an abandonment of the "American Rule", requiring litigants to pay their own attorney's fees, in favor of a

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

"prevailing party" rule. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-84 (1983); compare Chambers v. NASCO, Inc., 501 U.S. 32, 54 (1991) with The Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967). This is not an overstatement because there is no conceivable way under the Whitten definition of a frivolous appeal that defendant and its counsel could have ever anticipated § 57.105 fees as a consequence of attempting to uphold the trial court's ruling. In future cases, any chance of losing will necessarily turn counsel's analysis into a fee shifting issue, which is not what § 57.105 is designed to accomplish.

C. Constitutional Principles

The 1999 version of § 57.105 is unconstitutional in that it violates due process and the separation of powers doctrine.[6] Each point is separately discussed.

1. Due Process

The 1999 amendment to § 57.105 provides for the imposition of monetary sanctions upon an attorney for what it characterizes as "bad faith" conduct, but it provides the attorney with no due process safeguards. There are no provisions for notice or an opportunity to be heard -- including the opportunity to present witnesses and other evidence -- which is a prerequisite to imposing sanctions. This basic flaw cannot be squared with this court's recent decision in Moakley v. Smallwood, 27 Fla. L. Weekly S357, 2002 WL 276466 (Feb. 28, 2002), which determined that the imposition of fees based on a court's

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[6] In addition, three circuit courts have ruled that Chapter 99-225, which contained the 1999 amendment to § 57.105, violates the single subject requirement and is therefore unconstitutional. Fla. Consumer Action Network v. The Honorable John Ellis (Jeb) Bush, Circuit Court of Second Judicial Circuit, Leon County, Florida (Feb. 9, 2001), presently pending before the First District as Case No. 1DO1-787; Waldron v. Armstrong, Circuit Court of Twelfth Judicial Circuit, Sarasota County, Florida (May 22, 2001); and Cadwell v. Boyd, Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida (May 16, 2001).

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

inherent power is subject to due process principles. See also Diaz v. Diaz, 27 Fla. L. Weekly S178, 2002 WL 276477 (Feb. 28, 2002).

While not expressly dealing with § 57.105 fees, Moakley is nevertheless on point. The case arose out of divorce proceedings, in which the trial court imposed fees against a former wife and her lawyer for bad faith litigation conduct. On review of the Third District's affirmance, this court approved the rule that a trial court has the inherent authority to assess fees for bad faith conduct even where no statute authorizes the award as an extension of the inequitable conduct doctrine. See Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998). Recognizing the severity of such an award, however, the court in Moakley held that due process can only be satisfied where notice and an opportunity to be heard are given. Therefore, express findings of bad faith must be made by the trial court and must be supported by detailed factual findings. See Moakley, 2002 WL 276466 at *4.

Although Moakley involved the imposition of fees against an attorney, the due process procedures described in Moakley should be equally applicable to the assessment of fees against a party since the theory is essentially the same. See T/F Systems, Inc. v. Malt, 27 Fla. L. Weekly D929, 2002 WL 662749 (Fla. 4th DCA Apr. 24, 2002). In this respect, an appropriate balance must be recognized by a court imposing sanctions between "condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes," and "ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests." Moakley, 2002 WL 276466 at *4. This is entirely consistent with the Whitten

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

standard discussed on pages 13-14 above. If this were not the case, there would not be any meaningful difference between a legal argument completely lacking in merit and one which has formed the basis for a trial court order on a "close call" point.

As noted earlier (see page 16, *supra*), rules of professional conduct *mandate* zealous advocacy -- a professional charge that cannot be compromised even where a lawyer ultimately expects to lose. Fla. R. Prof. Conduct 4-3.1 (comment). Balancing the tension between zealous advocacy and unprofessional conduct is certainly not an exact science, so much is left to the experience and sensibilities of lawyers and judges alike. In this case, the "zealous advocacy" was an attempt by a prevailing party to defend a favorable trial court ruling on appeal on readily substantiated positions. Under the circumstances of this case, or one like it, an appellate court should have no balance to strike at all. When an appellate lawyer is forced in a case such as this to anticipate sanctions should reversal occur, effective advocacy comes to a halt. No appellate lawyer in his or her right mind would want to handle such a case, and the intended cure for bad faith litigation becomes much worse than the problem.

Sorting this out is an easy matter. Where a fee assessment is a punishment, it makes no difference whether it is based upon

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

inherent authority or § 57.105. Imposing sanctions is a drastic measure requiring application of Moakley due process protections. There must be notice and a meaningful opportunity to be heard. In this case, defendant and its counsel were afforded neither.

2. Separation of Powers

The 1999 amendment to § 57.105 also violates the constitutional separation of powers contained in Article V, Section 15 of the Florida Constitution, which vests "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted" to the supreme court. The Florida Bar v. Massfelder, 170 So. 2d 834, 838 (Fla. 1964). The legislature does not have the authority to impose new monetary sanctions upon attorney conduct which is solely within the exclusive authority of the Florida Supreme Court pursuant to Article V, section 15.

The 1999 amendment provides for attorney's fees as sanctions or discipline for attorney conduct in litigating a claim or defense in bad faith. Prior to the 1999 amendment, an award of attorney's fees was not proper under § 57.105 unless the *entire* action or *entire* defense was so lacking in merit as to be frivolous. Under the amended statute, if the court finds that *any* claim or defense at *any* time during the litigation is not supported by the facts or the then-supporting law, attorney's

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

fees shall be imposed on the attorney and the client in equal amounts.

In other words, if the facts do not develop as anticipated, and a claim or defense is dismissed, even though the attorney's other claims or defenses for the client are supportable, the client and his attorney are subject to the imposition of attorney's fees as sanctions for even pursuing that claim or defense in the first instance. The attorney is only excepted from the imposition of attorney's fees if the trial court determines that he acted in good faith in relying upon his client as to the existence of the facts, or if the trial court determines the attorney presented a good faith argument for extension, modification or reversal of existing law or the establishment of new law, with a "reasonable expectation of success." See § 57.105(2), Fla. Stat. The latter language makes the statute totally subjective. An argument that one judge may view as having a "reasonable expectation of success," another judge may not. An attorney has no advance notice of what he can and cannot legitimately argue, without being subjected to the imposition of monetary sanctions. This obviously places a chilling effect upon an attorney's effective representation of his client.

II

THE FOURTH DISTRICT ERRED BY FAILING TO RECOGNIZE THE GOOD FAITH BASIS FOR

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DEFENDANT'S TRIAL COURT ARGUMENTS

The Fourth District decision is so fundamentally flawed for the reasons explained above that reversal is justified without having to examine the events of March 28th or the preemption argument. However, the transcript reveals that the Fourth District was totally off base in its analysis of these points as well.

A. No Proper Substitution of Counsel

Pitting itself against at least three other district courts of appeal, see Pasco County v. Quail Hollow Properties, Inc., 693 So. 2d 82 (Fla. 2d DCA 1997); Bortz v. Bortz, 675 So. 2d 622 (Fla. 1st DCA 1996); Hicks v. Hicks, 715 So. 2d 304 (Fla. 5th DCA 1998), the Fourth District threw out the express requirements of the substitution rule when it determined that "there was no attempt to *substitute* new attorneys." Forum, 788 So. 2d at 1058 n.3 (emphasis in original). The statement is absolutely wrong. The record discloses that Dawson alone filed the original complaint as the sole attorney for plaintiff; (App. A at 5; R:5) that neither Dawson's name nor his signature appear anywhere on the amended pleading; (App. C at 30; R:47) that an entirely new set of lawyers appears on the amended pleading; (R:46) that no order was ever entered -– or even requested -– substituting the new lawyers; (Tr. 3-5) that plaintiff himself gave no written authorization for the substitution and no prior appearance as

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

co-counsel was ever filed; (Tr. 4) and that neither plaintiff nor Dawson appeared at the March 28th hearing to explain the matter. (Tr. 1)

Florida Rule of Judicial Administration 2.060(h) reads in relevant part:

> **Substitution of Attorneys.** Attorneys for a party may be substituted at any time by *order of court*. *No substitute attorney shall be permitted to appear in the absence of an order*. The court may condition substitution upon payment of or security for the substituted attorney's fee and expenses, or upon such other terms as may be just. *The client* shall be notified in advance of the proposed substitution and *shall consent in writing to the substitution. The written consent shall be filed with the court*.

(Emphasis added). The rule is clear. Where counsel is "substituting" for another, two things are required: an order of court *and* written consent of the client which "shall be filed with the court." There are no exceptions.

Yet without ever referencing the substitution rule or even admitting to its existence for that matter, the Fourth District criticized defendant's counsel for "fail[ing] to acknowledge that the rules expressly permit the appearance of *additional* attorneys for a party without leave of court." Forum, 788 So. 2d at 1058 (emphasis in original). Ignoring subparagraph (h), it based its analysis instead on Rule 2.060(j) relating solely to "additional counsel", which requires no order of court.

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Subparagraph (j) says:

> **Addition of Attorneys.** After a proceeding has been filed in a court, additional attorneys may appear without securing permission of the court. All additional attorneys so appearing shall file a notice of appearance with the court and shall serve a copy of the notice of appearance on all parties in the proceeding.

The policy behind Rule 2.060(h) is explained in Quail Hollow:

> The reasons for requiring substitute attorneys to be officially recognized by the court and client are clear. ***The court must be able to rely on representations of attorneys because such representations bind the client.*** Initial pleadings of the various attorneys who are present at the beginning of a suit, signed in accordance with subsection (d) of rule 2.060, have the effect of notifying the court of that client's participation and his or her attorney's "appearance" in the suit. ***See Picchi v. Barnett Bank of South Florida, N.A.,*** 521 So. 2d 1090 (Fla. 1988) (citing with approval Trawick's Florida Practice & Procedure § 8-1, *Definitions* (1985)). Notices of appearance for attorneys who come upon the scene at later dates have a similar effect on the court and other parties. *The court and parties must know with whom they must deal.*

693 So. 2d at 83 (emphasis added). To the same effect is Harvey v. Rowe, 192 So. 878, 141 Fla. 287 (Fla. 1940):

> The very reason for the rule that the court should order a substitution where one is desired is that in this manner *regulation of the proceedings may be maintained, the court may know who has authority to act and the interests of attorneys as well as clients may be safeguarded.*

192 So. 2d at 880; 14 Fla. at 292 (emphasis added); see also Diem v. Diem, 187 So. 569, 570, 136 Fla. 824, 826 (Fla. 1939) (although party has right to change counsel, party has ***duty*** to obtain an order of court allowing substitution).

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Without a doubt, plaintiff's right to amend his complaint was legally and factually limited by Rule 2.060(h). On March 28th, attorney Dawson was plaintiff's ***only*** counsel of record. The record contains no substitution order and no written consent of plaintiff. Without these, the Miller firm lacked authority to file anything. Had there been some mitigating fact in this record, such as Dawson and plaintiff (or either of them) being present at the hearing, perhaps an argument could be made that the court and defense counsel were placing form over substance. But neither Dawson nor plaintiff was present at the hearing, and the record does not explain their absence. New counsel did make an unsubstantiated statement that attorney Dawson had been asked by plaintiff to withdraw from the case, (Tr. 12) but this oral revelation without Dawson or plaintiff present does nothing to satisfy the ***substitution*** rule. Given the strict wording of Rule 2.060(h), the trial court did not even have ***discretion*** to recognize Miller or his pleading.

Consistent with binding case law and the governing rule, Judge Greene had both the ***right*** and the ***duty*** to regulate the proceedings before him. He had the ***right*** and ***duty*** to know who had authority to act on plaintiff's behalf. And he had the ***right*** and ***duty*** to safeguard plaintiff's status in the case. Judge Greene therefore had the judicial responsibility to determine that no substitute lawyer would be permitted to appear in the absence of an order that ***he***,

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

as the presiding trial judge, would enter in accordance with Rule 2.060(h). See Brasch v. Brasch, 109 So. 2d 584, 587 (Fla. 3d DCA 1959) (litigant who wishes to *replace* his attorney *must* obtain the court's consent). At the time of the March 28th hearing, the Miller pleading stood for nothing so it could not be considered. See Quail Hollow, 693 So. 2d at 84; accord Bortz v. Bortz, 675 So. 2d 622, 624 (Fla. 1st DCA 1996) (holding that motion for rehearing filed by attorney who never sought leave to substitute for counsel of record was a nullity); see also Waite v. Wellington Boats, Inc., 459 So. 2d 431, 432 (Fla. 1st DCA 1984) (holding that a pleading not subscribed by counsel of record will be stricken).

Unfortunately, the Fourth District did not follow the rule. It merely recast the Miller firm as additional counsel and determined "that there is no impropriety in the appearance of additional counsel -- as indisputably these new [Miller] lawyers for plaintiff were ...." Forum, 788 So. 2d at 1059. Finding that "[t]here is no possible view of the law" to support defendant's attempt to exclude the Miller firm, the court determined –- without notice -- that the 1999 version of § 57.105 *mandated* a fee award because counsel "knew or should have known" that no facts or law supported defendant's position. Id. at 1060. No interpretation of Rule 2.060(h) could have been further from the truth.

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B. Preemption

The analysis of the Fourth District went further off course when it failed to acknowledge that the substitution of counsel issue was not the basis for the dismissal at all. This is plainly evident from the transcript. The trial court dismissed the case with prejudice because it found that no private right of action can be asserted for food mislabeling. (Tr. 22-23) This very point was the *feature* of defendant's argument in its answer brief on appeal and at oral argument.[7] In hindsight, it is almost shocking that not one word was uttered at oral argument by any panel judge regarding any concerns over § 57.105, bad faith, misleading arguments, or any of its implications. This point is significant because defendant was given no opportunity to address the charges of the Fourth District until *after* a decision was rendered.

The Fourth District bitterly criticized defense counsel for arguing against the amendment, suggesting that "the conduct of defense counsel cannot possibly turn on any representations of their client or for a good faith modification of existing law." Forum, 788 So. 2d at 1061. That statement served as yet another basis for fees. Stating that "it is not at all clear that

[7] Since the entire case is now before the court, see Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 531 (Fla. 1985), the court will hopefully address preemption. The issue will otherwise find its way back to the Fourth District once further trial proceedings are concluded.

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. MIAMI FORT LAUDERDALE, FLORIDA 33394-3092

plaintiff's claims will be barred by federal pre-emption," id., it concluded that "the pre-emption defense is an avoidance, not a real defense, and presumptively should be pleaded as an affirmative defense...." Id. at 1062. Once again, the Fourth District justified its harsh result on a faulty premise. In Florida, preemption can be resolved by way of a motion to dismiss so long as the defense is apparent from the face of the complaint. See Doe v. America Online, Inc., 718 So. 2d 385 (Fla. 4th DCA 1998), approved by, 783 So. 2d 1010 (Fla. 2001); Fla. R. Civ. P. 1.110(d). In Doe, the Fourth District itself expressly approved the practice of raising preemption as a ground for dismissal so long as the basis for preemption appears on the face of the complaint. In affirming a dismissal with prejudice of a suit preempted by a federal telecommunications statute, the court determined:

> [R]ule 1.110(d) provides that "[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)." Failure to state a cause of action is an affirmative defense under Florida Rule of Civil Procedure 1.140(b). Here, because the predicate facts for the defense of preemption appear on the face of the complaint, the trial court did not err when it considered section 230 [of the federal act] as a grounds for dismissal. See Fla. R. Civ. P. 1.110(d).

Doe, 718 So. 2d at 388. In this case, both versions of the complaint contained a consistent set of facts making it clear that the only real claim was food mislabeling. The trial court recognized that fact at the March 28th hearing and correctly ruled that new multiple labels in the amended complaint made no substantive difference.[8] The single claim was food mislabeling, which is a preempted area of the law. (Tr.

[8] Both the original complaint and the amended complaint were based upon the same facts, ultimately seeking the same relief –- the latter simply being in "shotgun" form. See, e.g. BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322,

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. MIAMI FORT LAUDERDALE, FLORIDA 33394-3092

22-23) Indeed, the record supports the trial court's conclusion.

While the amended complaint is pled in nine separate counts, all claims are based on the same general assertions set forth in plaintiff's original complaint.[9] The gravamen of both pleadings is a claim which is exclusively governed on an *intrastate* basis by the Florida Food Safety Act, §§ 500.01-500.601, Fla. Stat., and on an *interstate* basis by the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 *et seq.* *Neither of these acts creates or permits any private right of action for alleged* violations. Instead, both acts place the enforcement of mislabeling solely and exclusively in the hands of the governmental agencies charged with regulatory oversight. See § 500.171, Fla. Stat. (authorizing *only* the Department of Agriculture and Consumer Services to bring suit for violations of Chapter 500); Raye v. Medtronic Corp., 696 F. Supp. 1273, 1274 (D. Minn. 1988) (under federal act actions for mislabeling must be brought "by and in behalf of the United States"); Keil v. Eli Lilly & Co., 490 F. Supp. 479 (E.D. Mich. 1980) ("There is no private cause of action under the [federal] Food, Drug and Cosmetic Act.").

1326 n.6 (11th Cir. 1998). As Florida courts have routinely recognized, a single set of facts gives rise to a single cause of action. Therefore, a litigant cannot relabel failed claims in order to create a cause of action which does not otherwise exist. See, e.g., Fridovich v. Fridovich, 598 So. 2d 65, 69-70 (Fla. 1992); Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So. 2d 607, 609 (Fla. 4th DCA 1975).

[9] Plaintiff claimed that he had "purchased and consumed Boca Burgers regularly"; that defendant had mislabeled that product as "all natural"; and that "had [plaintiff] known the true nature of the ingredient contained in Boca Burgers he would not have purchased or consumed Boca Burgers." (App. C at 3, ¶¶ 8-9; R:20 ¶¶ 8-9) Plaintiff sought relief in two counts -- violation of Florida's Unfair and Deceptive Trade Practice Act, § 501.201, Fla. Stat., and personal injury claiming only "mental anguish". (App. A at 2-5; R:2-5) No physical injury was claimed. By comparison, counts one through four of the amended complaint assert federal RICO violations for mislabeling under 18 U.S.C. § 1961, *et seq.* (App. C at 11-23; R:28-40) Counts five and six allege violations of Florida's Unfair and Deceptive Trade Practices Act, see § 501.201 *et seq.*, Fla. Stat. (App. C at 24-26; R:41-43) Count seven alleges common law fraud. (App. C at 26-27; R:43-44) Count eight alleges breach of contract, warranty and rescission. (App. C at 27-28; R:44-45) And count nine alleges unjust enrichment. (App. C at 28; R:45)

LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

Without question, "food mislabeling" is regulated by a pervasive statutory regime. Unless such a regime explicitly imposes civil liability, no civil liability may be implied. Murthy v. N. Sinha Corp., 644 So. 2d 983, 986 (Fla. 1994); Tallahassee Memorial Regional Medical Ctr., Inc. v. Tallahassee Medical Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996) (implied preemption exists when legislative scheme is so pervasive as to evidence legislature's intent to be sole regulator); see generally Cort v. Ash, 422 U.S. 66 (1975) (analysis of whether private right of action exists under federal law focuses on overall legislative scheme and intent). To permit a customer such as plaintiff to seek personal damages for claimed food mislabeling would effectively create an unintended "second tier" authority to police and regulate a preempted area of the law. This is precisely what defendant argued in the trial court *and* on appeal.

Defendant obviously believes that this is a correct statement of the law, but even if this court were to disagree, the important point is that the contention is not frivolous, misleading or disingenuous, as contemplated by Whitten and its progeny. Preemption presented a good faith basis for the trial court's ruling, and without a doubt, this was not a § 57.105 case under *any* version of that statute.

CONCLUSION

For the reasons set forth above, petitioner BOCA BURGER requests that the decision of the Fourth District be quashed and that the decision of the trial court dismissing this case with prejudice be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served by U.S. mail on this ____ day of May, 2002 to Joseph R. Dawson, Esq., Joseph R. Dawson, P.A., 320 Davie Boulevard, Fort Lauderdale, Florida 33315 and to James Fox Miller, Esq., 2435 Hollywood Boulevard, Hollywood, FL 33020.

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