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

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC01-1830

BOCA BURGER, INC., **DCA CASE NO. 4D00-1255**

Petitioner,

vs.

RICHARD FORUM,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This case involves a claim for damages arising out of alleged food mislabeling. As the 23-page transcript of the March 28, 2000, hearing makes clear,[1] the lawsuit was dismissed with prejudice based on a single premise -– the trial court determined that the action was preempted under federal and state law. Despite the dismissal being based solely on preemption, the Fourth District sanctioned defendant and its counsel for allegedly misleading the trial court on matters that did not impact the ultimate decision to dismiss the case.

While several points are discussed below in response to arguments raised in the answer brief of respondent RICHARD FORUM ("plaintiff"), it is important to keep in mind that the § 57.105

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[1] In clear and unequivocal terms the trial court made the following determination on pages 22-23 of the transcript:

> THE COURT: ... The Court finds that the Complaint and the Causes of the Action currently before the Court are based upon the distribution as well as labeling of products, which are for ... intrastate purposes governed by Florida Statute 500.77(1), as well 500.178. Both Statutes provide that the enforcement for violations of the Acts are exclusively designated for enforcement through the Florida Office of State Attorneys, and that there is no private right, nor Cause of Action for the mislabeling or improper distribution of food products intrastate, as such Florida Law preempts private cause of action under the applicable States. As to the interstate distribution as well as labeling, 21 U.S. Code 301, likewise, preempts private action. Count I, based upon violation of the Florida Deceptive and Unfair Trade Practices Act, is going to be dismissed with prejudice. Count II, which is an action flowing from the same Act, which seeks damages for personal injury as a result of a violation of the Act, is likewise barred under Florida Statute 501.212(3) and, therefore, is as well dismissed with prejudice.

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issue *never* arose in this case until it surfaced for the first time in the Fourth District's opinion.[2] Forum v. Boca Burger, Inc., 788 So. 2d 1055 (Fla. 4th DCA 2001). Given the manner in which the Fourth District imposed sanctions, it is impossible to square its ruling with this court's recent opinion in Moakley v. Smallwood, No. SC95471, 2002 WL 276466 (Fla. Feb. 28, 2002), requiring a court to respect due process considerations when fees are being sought as a sanction.[3]

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[2] The issue was never raised in the trial court. The briefs in the Fourth District do not mention the issue either directly or indirectly. No questions were raised at oral argument. In fact, the only time the fee issue arose was in plaintiff's motion for *appellate* fees under Fla. R. App. P. 9.400, which did *not* assert a claim under § 57.105. (App. A) Petitioner BOCA BURGER, INC. ("defendant") responded to that motion and likewise did not address § 57.105. (App. B)

[3] Section 57.105 itself was amended this year to add a twenty-one day notice and response period. Ch. 2002-77, § 1, Laws of Fla. (App. C) Even though § 57.105 can be the basis for an independent court assessment, the fact remains that defendant was totally blindsided by the ruling *and* the ruling is not supported by the record.

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ARGUMENT

I

ERRONEOUS IMPOSITION OF § 57.105 SANCTIONS

A. Trial Court Fees Not Preserved

As explained in the initial brief (pages 10-11), an appellate court has no authority to assess *trial* level § 57.105 fees where the issue was never raised below. See Kurzweil v. Larkin Hosp. Operating Co., 684 So. 2d 901 (Fla. 3d DCA 1996). Unfortunately, that is precisely what occurred here. In Kurzweil, the court made it clear that it is the burden of the party seeking trial level § 57.105 sanctions to raise and prove entitlement *in the trial court*. In this case, however, there is no trial record at all on the fee issue.[4]

Plaintiff contends that preservation of the § 57.105 argument was impossible because he never had the opportunity to request fees until his appeal was perfected. This argument is nonsense. Plaintiff has overlooked or ignored trial court options which the rules of civil procedure expressly provide. He first had the option of laying a fee predicate during the March 28, 2000, hearing. He also had the benefit of Fla. R. Civ. P. 1.540(b)(3) affording him an entire year to allege and prove a fraud on the court.[5] The decision

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[4] As noted, it was raised for the first *and only* time in plaintiff's motion filed under Fla. R. App. P. 9.400 in the Fourth District at the same time plaintiff filed his reply brief. Moreover, the motion only asks for *appellate* fees.

[5] The central theme of plaintiff's answer brief is that defense counsel perpetrated a fraud on the trial court by misleading it into believing that the proposed amended pleading could not be filed without leave of court as a matter of right. While he uses the words "deceit" and "artifice", such words are essentially synonymous with "fraud". See Black's Law Dictionary at 405 (West 6th ed. 1990) ("deceit" is a "fraudulent and deceptive misrepresentation, artifice, or device"); id. at 113 ("artifice ... corresponds with trick or fraud").

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as to which direction his case should take was in plaintiff's hands, and he elected not to preserve the issue and to file a notice of appeal instead.

To support his contention that the Fourth District had jurisdiction to award trial court fees, plaintiff relies solely on Rapid Credit Corp. v. Sunset Park Centre, Ltd., 566 So. 2d 810 (Fla. 3d DCA 1990). In that case, plaintiff's counsel improperly obtained an *ex parte* clerk default knowing that opposing counsel had taken steps to defend the case. Counsel intentionally concealed the existence of the default from opposing counsel for months, then blatantly misrepresented to the court the procedural status of the case. Based on those misrepresentations, the trial court was fraudulently induced to uphold the default.

The sole issue before the appellate court in Rapid Credit was whether the default was improperly entered. While *appellate* fees were assessed under § 57.105, the point is only apparent from a footnote in the concurring opinion of Judge Schwartz in which he states that appellee's attempt to uphold the default on appeal was so frivolous that fees should be assessed.[6] There is *no* indication in Rapid Credit that *trial* level fees were ever sought or awarded, so the case has no bearing on plaintiff's claim for such fees as awarded by the Fourth District.

The point here is fundamental to appellate practice -- errors must be preserved or they are deemed waived. An appellate court has no jurisdiction to award attorney's fees for matters occurring in the trial court where fees were never an issue in the trial court. See Kurzweil, 684 So. 2d at 902; Phillip J. Padovano, FLORIDA APPELLATE PRACTICE § 1.7 at 15-16 (West 2001-02 ed.). Plaintiff himself has tacitly recognized this because his Rule 9.400 motion only sought *appellate* fees. (App. A, preamble) Since § 57.105 was never cited in plaintiff's motion, it is evident that the basis for the request was "inherent authority", triggering a Moakley analysis.

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[6] This ruling is also outdated in light of the Third District's later opinion in Carnival Leisure Industries, Ltd. v. Arviv, 655 So. 2d 177 (Fla. 3d DCA 1995). (See § I(C), *infra)*

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B. Application of Moakley

Relying principally on the United States Supreme Court's decision in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), this court in Moakley v. Smallwood, No. SC95471, 2002 WL 276466 (Fla. Feb. 28, 2002), held in the context of a trial court's inherent authority to assess fees for bad faith conduct that:

> [A]n appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while 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. The inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process.

Id. at *4. It is impossible to review the 23-page transcript in this case and conclude that the Fourth District struck the "appropriate balance" mandated by Moakley. Nor can the Fourth District's conclusion be reconciled with the "frivolous" standard set forth in Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501, 505 (Fla. 1982). (See Initial Brief at 13-17)

Plaintiff attempts to distinguish Moakley and Diaz v. Diaz, No. SC95534, 2002 WL 276477 (Fla. Feb. 28, 2002), solely on the basis that fees were awarded in those cases based on the court's inherent power, rather than § 57.105. The argument is not persuasive. Plaintiff himself never sought § 57.105 fees, as noted above. More

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importantly, the basis for a sanction — whether inherent authority, rule or statute — does not change the character of the ruling. Citing its earlier decision in Bitterman v. Bitterman, 714 So. 2d 356, 364 (Fla. 1998), this court in Moakley noted that the inequitable conduct doctrine afforded the lower courts in that case the inherent right to punish bad faith conduct where the higher standards of § 57.105 could not be met. By necessary implication, it makes no difference whether the sanction is based on inherent authority, rule or statute. Where fees are imposed as a sanction, due process principles must be applied.[7]

Following the lead of Moakley, the legislature this term has amended § 57.105 to include an express provision under subparagraph (4) giving the alleged offender a 21-day period to cure the sanctionable conduct. Ch. 2002-77, § 1, Laws of Fla.-should apply to the sanctions in this case. Principles of "restrained use" and "due process" were not followed by the Fourth District.

C. The "Arguable Substance" Rule

Both the Second and Third Districts have expressly held that where a trial judge has ruled in favor of a litigant on a point of law, the resulting order is said to have "arguable substance." As such, a party attempting to uphold it cannot be subject to § 57.105 fees on appeal. See State Dep't of Hwy. Safety & Motor Vehicles v. Salter, 710 So. 2d 1039 (Fla. 2d DCA 1998); Carnival Leisure, 655 So. 2d at 177. The rule is basically a variation of another principle of appellate law — that decisions arrive in appellate courts with a presumption of correctness, see Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979), so a party should not be sanctioned for attempting to uphold the decision on appeal.

Plaintiff contends, however, that from a policy standpoint no presumption of correctness should attach to any order which has been procured by fraud. (See note 5, *supra*) No cases support the

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[7] See Roadway Express, 447 U.S. at 767; see 5 Am. Jur. 2d *Appellate Review* §§ 960-966 (Law Co-op. 2d ed. 1995); see generally Fed. R. App. P. 38 Advisory Comm. Notes (under Roadway, notice and opportunity to be heard are absolute prerequisites to imposing appellate sanctions).

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contention. And while a "fraud on the court" exception to the "arguable substance" rule may well have some facial appeal, on analysis such a precedent would have dangerous consequences where fraud on the court is not raised below and instead is raised for the first time on appeal.[8] Assuming for the moment that the point has merit, the court would still have to conduct a *de novo* review of the trial record. In so doing, the appellate court is not to become a fact-finder, but rather must look to the trial record to determine whether the trial court's ruling under review is supportable.

A survey of cases where sanctions have been imposed for conduct amounting to "fraud on the court" reveals two common points –- a *deliberate* false statement made to the court *and reliance* by the court on that false statement.[9] Moreover, the burden to establish such misconduct is on the party seeking sanctions. See Moakley. In this case, the record contains no evidence establishing *either* an intent by defense counsel to deceive *or* any reliance by the court on misrepresented facts. The transcript is devoid of any such evidence and nothing was filed of record after the hearing tending to establish such facts, as described below.

1. No Intent to Deceive

Plaintiff argues that by relying on law from another jurisdiction, counsel intentionally misled the court

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[8] As noted, § 57.105 emerged in this case for the first time in the Fourth District's opinion. The initial brief of plaintiff in the Fourth District is totally silent on the issue, claiming instead that the trial court erred by refusing to accept the amended pleading, by "mistakenly interchanging the concepts of 'additional counsel' and 'substitution of counsel'", and by ruling that food mislabeling was a preempted area of the law. (Plaintiff's Initial Brief in the Fourth District at 5-6)

[9] See, e.g., Leo's Gulf Liquors v. Lakhani, 802 So. 2d 337 (Fla. 3d DCA 2001) (repeated lies under oath as to issue material to prosecution of case), rev. denied, 819 So. 2d 136 (Fla. 2002); Savino v. Fla. Drive In Theatre Mgmt., Inc., 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (plaintiff "lied about matters which went to the heart of his claim … [and] undermined the integrity of his entire action").

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into believing that it had discretion to refuse an amended complaint. Viewed in the context of the last minute "fire drill" caused by the Miller firm, defense counsel was simply reacting to the thirty-page, nine-count amended pleading delivered barely two hours prior to the scheduled hearing and signed only by *new* counsel who had not previously filed an appearance. Reference to plaintiff's sole counsel of record was totally omitted from the proposed amended version, and to make matters worse neither plaintiff himself nor his counsel of record attended the hearing. (Tr. 1-2) The record shows that defense counsel expressly acknowledged the wording of Rule 1.190(a), but suggested that the court may have discretion as to whether or not to accept an amended pleading where the opposing party is prejudiced. Looking at the record as a whole, there was no intent to deceive the court.[10]

2. No Reliance by Court

The transcript makes clear that the trial judge was predisposed to reject plaintiff's amended complaint based solely on *attorney Miller's own conduct*. Virtually the first words out of Judge Greene's mouth at the hearing were that he had a "fundamental problem" with new counsel's appearance as substituted counsel because the substitute counsel procedures had been ignored. (Tr. 3-4) Judge Greene continued by stating that as to the appearance of new counsel, "candidly, I don't know if [new counsel's appearance is] honestly worth the paper it's written on" and that he was "really hard pressed to even fathom this situation." (Tr. 4-5) Finding "nothing to authorize the appearance of Miller and Miller,"[11] (Tr.

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[10] In a strange twist, the Fourth District recognized two Florida cases which actually supported defendant's point, see Volpicella v. Volpicella, 136 So. 2d 231 (Fla. 2d DCA 1962); Nenow v. Ceilings & Specialties Inc., 151 So. 2d 28 (Fla. 2d DCA 1963), but rejected them and continued to view the citation of the out-of-state authority as the basis for the fee sanction. See Forum, 788 So. 2d at 1059.

[11] Neither the amended complaint nor Miller's notice of appearance contained the name of plaintiff's sole counsel of record. The notice was signed ***only*** by Miller, and it listed ***his*** firm alone as "counsel" for plaintiff. (Tr. 11-12) As such, the record facts afforded the trial court a sufficient basis for determining that the Miller firm was a ***substitute*** firm, which

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7) Judge Greene reached his own independent determination as to new counsel's improper appearance in the case under Rule 2.060(h) before anyone said a word about it. (Tr. 3–4)

The court then turned to the dispositive issue of preemption, hearing argument from both sides and then ruling that since the gravamen of the cause of action was food mislabeling an amended pleading would make no difference.[12] On that basis *alone*, he dismissed the action with prejudice.[13] (See note 1, *supra*) As such, the trial court did not rely on any argument about the right to file amended pleadings in reaching

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required ***written*** consent of the client under Fla. R. Jud. Admin. 2.060(h). In his answer brief, plaintiff argues that the trial court erred because his new lawyer announced three times during the hearing that he was merely "additional" counsel. In the face of a binding administrative rule, the trial court was not bound to accept this statement of new counsel, particularly when neither plaintiff's sole counsel of record nor plaintiff himself were present at the hearing and nothing in writing was offered which authorized new counsel to proceed. The very purpose of the rule is to safeguard a ***client's*** interest by imposing on counsel the burden of providing ***proper*** notice to the court, to the client ***and*** to opposing counsel regarding ***any*** change in representation. (Initial Brief at 23-28); see Garden v. Garden, No. 2D01-2736, 2002 WL 1787922 (Fla. 2d DCA Aug. 2, 2002) (counsel's timely notice requirement of withdrawal under Rule 2.060(i) implicates due process considerations).

[12] As an additional basis for sanctioning counsel, the Fourth District stated without any citation of authority that preemption cannot be resolved on a motion to dismiss. Forum, 788 So. 2d at 1061-62. The point is directly contrary to the decisions of this court. See Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001), approving, 718 So. 2d 385 (Fla. 4th DCA 1998); Citizens Nat'l Bank & Trust Co. v. Stockwell, 675 So. 2d 584 (Fla. 1996).

[13] To be sure, plaintiff has never suggested, much less argued, that defendant's preemption argument was frivolous or otherwise sanctionable under § 57.105. Nor could he -- preemption is a complex topic by its very nature, see Cort v. Ash, 422 U.S. 66 (1975), and both sides appropriately presented a thoughtful analysis on this difficult point, consistent with Fla. Rule of Prof'l Conduct 4-3.3, comment ("legal argument is a discussion seeking to determine the legal premises properly applicable to the case").

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this final ruling.

II

MERITS OF PREEMPTION ISSUE

In its initial brief (page 28, note 7), defendant suggested that the court address the dispositive issue of preemption in order to avoid a later appeal. See Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 531 (Fla. 1985).[14] In his answer brief, plaintiff contends that defendant has ignored two controlling decisions of the United States Supreme Court, namely Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), and Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1991). Despite characterizing these cases as "dispositive", plaintiff limits his own discussion of them to a single sentence. The reason is obvious. Neither case involves food or food mislabeling. Cipollone dealt with cigarettes and interpreted the Federal Cigarette Labeling and Advertising Act, and Medtronic concerned a pacemaker and interpreted the Medical Device Amendment to the Food, Drug and Cosmetic Act.

What plaintiff fails to address are those cases appearing in the initial brief (pages 31-32), holding that there is no private right of action under the controlling federal act.[15] See Raye v. Medtronic Corp., 696 F. Supp. 1273, 1274 (D. Minn. 1988); Keil v. Eli Lilly & Co., 490 F. Supp. 479 (E.D. Mich. 1980). In an ironic twist, plaintiff cites State of

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[14] Even if the court were not inclined to address and rule on preemption, the fact remains that it clearly formed the basis of the trial court's dismissal with prejudice and that it was not a frivolous argument.

[15] On pages 30-31 of his brief, plaintiff string cites numerous state cases (mostly from other jurisdictions) to suggest that mislabeling claims are not preempted under federal law. The issue of preemption was not raised or addressed in any of those cases, so they are not relevant to the issue at hand.

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Florida ex rel. Broward County v. Eli Lilly & Co., 329 F. Supp. 364 (S.D. Fla. 1971), which also concludes that there is no private right of action under the act. While the court in Eli Lilly does suggest that a private right of action was not created under the federal act in order to avoid duplication of state remedies, that statement does not of itself create a private right of action under state law that otherwise does not exist.

Regarding state preemption, plaintiff has chosen to ignore controlling law. Florida Statutes § 500.171 authorizes *only* the Department of Agriculture and Consumer Services to bring suit for violations of Chapter 500. Plaintiff likewise has sidestepped the "implied preemption" authorities discussed on page 32 of the initial brief, and instead offers cases that have nothing to do with the Florida Food Safety Act.[16] There is no private right of action for food mislabeling under federal or state law, and the trial court was correct in so ruling.

CONCLUSION

This case involves a trial record clear on its face that a good faith argument was made for *preemption* –- the sole dispositive issue. No fee issue was ever raised in the trial or appellate courts regarding trial level fees, and the only claim for appellate fees came in the form of a Rule 9.400 motion served with the reply brief. The Fourth District nevertheless assessed § 57.105 fees *across the board* and without warning. Both the imposition and severity of the sanctions levied by the Fourth District are

[16] Specifically, Food Fair Stores of Florida, Inc. v. Macurda, 93 So. 2d 860 (Fla. 1957), *predates* the adoption of the Act. Kraft Gen'l Foods, Inc. v Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994), relates to a promotional offer contained on the food product packaging and not to the ingredients, so the Act was not in issue. And Burke Pest Control, Inc. v. Joseph Schlitz Brewing Co., 438 So. 2d 95 (Fla. 2d DCA 1983), does not involve a claim against a food manufacturer and does not address the Act.

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inappropriate and must be reversed.

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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 27th day of August, 2002 to Joseph R. Dawson, Esq., Joseph R. Dawson, P.A., 320 Davie Boulevard, Ft. Lauderdale, FL 33315 and to James Fox Miller, Esq., 2435 Hollywood Boulevard, Hollywood, FL 33020.

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CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

By:_____
John R. Hargrove