IN THE SUPREME COURT OF FLORIDA

GARY MASSEY,

Appellant,

vs.

Case No.: SC07-776
Lower Case No.: 1D06-3657

CALVIN F. DAVID,

Appellee.
_________________________________/

ANSWER BRIEF OF APPELLEE CALVIN F. DAVID

On Appeal from the First District Court of Appeal

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PRELIMINARY STATEMENT

"R[volume]. [page]" refers to the Record on Appeal in Massey's cost appeal before this Court (Lower Case No. 1D06-3657). "PR[volume]. [page]" refers to the Record on Appeal in Massey's main appeal to the First District Court of Appeal (Lower Case No. 1D06-0627). "Amended Br. at [page]" refers to Appellant's Amended Initial Brief. References to trial exhibits are to exhibits from the 2004 Phase I trial and are indicated by "DX[number]" for David's exhibits and "PX[number]" for Massey's exhibits.

STATEMENT OF THE CASE AND OF THE FACTS

This cost appeal is from a legal malpractice case arising out of a toxic tort action initiated by Gary Massey in 1991. In the toxic tort action, Massey claimed that he suffered exposure to toluene and other chemicals from a wood-treating plant operated by Koppers Company, and a former pine distillation plant operated by Cabot Corporation, both in close proximity to Massey's Gainesville auto dealership. (PR42. 7605-06). He further claimed that this exposure operated as a trigger for the 1987 recurrence of his multiple sclerosis, first experienced in West Palm Beach in 1972. (PR42. 7605, 7606-07, 7627-28, 7659; see PR16. 2946).

Shortly prior to his scheduled November 1995 trial against Koppers and Cabot, Massey fired his attorneys. (DX48). After numerous unsuccessful attempts to employ substitute counsel (see, e.g., DX49; DX52; DX57; DX58), Calvin David of Ruden, McClosky, Smith, Schuster & Russell, P.A. ("Ruden") agreed to represent him under a court-approved retainer agreement. (DX10; DX12). The agreement provided that in the event of disagreement between Massey and David over "all manner of things . . .

including, but not limited to, pleadings, discovery, settlement, [and] trial tactics," a

third-party arbitrator, selected by Massey, would render a binding decision. (DX10; PR76. 1351). Just short of trial, and prior to a hearing on both defendants' motions for summary judgment, David recommended settlement amounting to a total sum of $895,000. (PR105. 2578-79, 2581-82). Massey objected. (PR105. 2582). The matter was presented to Russell Peavyhouse, the arbitrator selected by Massey. After hearing both Massey and David (PX51), Peavyhouse entered an Arbitration Decision holding the settlement should be accepted. (PX55). At a hearing attended by Massey (see PX59), the court, over Massey's objection, entered an order approving the settlement. (DX28; PX64).

Massey fired David (DX25), received the settlement proceeds (PX 123), and in July 1998, filed his action against David and Ruden claiming he was denied the right to pursue his claim for damages in the underlying case as a result of the enforcement of the retainer agreement.[1]

[1] A summary judgment for Ruden on the basis of res judicata and collateral estoppel (PR7. 1242-74), was

(PR1. 1-19). David moved to "bifurcate the trial as to David's alleged malpractice from the trial of the underlying tort case." (PR14. 2442-58). Following Massey's withdrawal of his objection (PR15. 2771), the trial court granted the motion and ordered the bifurcation of "the issue of the alleged negligence or liability on the part of the Defendant from issues of damages suffered by the Plaintiff." (PR15. 2766). The case proceeded to a Phase I trial on the issue of whether David, by entering into and enforcing the retainer agreement, breached the standard of care and his fiduciary duty to his client. (PR20. 3511-12; PR80. 1426). Following a two-week trial, the jury entered its verdict finding David was negligent and breached his fiduciary duty to Massey. (PR21. 3785; PR80. 1442).

Massey took the position that the Phase II trial should be limited "solely to the ascertainment of the measurement of the amount of damages suffered by Plaintiff Massey." (PR22. 3901). David relied on

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affirmed. Massey v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 788 So.2d 967 (Fla. 1st DCA 2001). A summary judgment for David on the same basis (PR9. 1603-09), was reversed, and the case was remanded for trial. Massey v. David, 831 So.2d 226 (Fla. 1st DCA 2002).

Olmsted v. Emmanuel, 783 So.2d 1122, 1125 (Fla. 1st DCA 2001), which required that in Phase II "the plaintiff has to prove that he 'would have prevailed on the underlying action but for the attorney's negligence.'" (PR22. 3973). The issue was presented to the trial court on four separate occasions and in each instance the court held that Massey still was required to "prove his case, that he would have recovered against [Koppers] and Cabot." (PR107. 2649-50, 2659; PR26. 4721-23; see PR22. 4054; PR97. 1879, 1880; PR41. 7578-80).

The Phase II trial was then held, which presented the trial of the underlying case, concentrating on the nature and amount of exposure Massey received from the organic solvents, the competing medical testimony as to whether such exposure could cause a recurrence of multiple sclerosis, and any damages that Massey incurred. The jury returned a verdict holding that in the underlying case Massey was unable to prove that the negligence of Koppers and Cabot was a legal cause of damage to him. (PR38. 6909-11; PR98. 1888). On that finding, the trial court entered final judgment on behalf of David. (PR38. 7047-48).

Massey filed several Motions for Fees and Costs (R1. 1-3, 9-11, 15-17; R2. 277-355, 368-400; R3. 401-44, 459-68), and David filed a Motion to Tax Costs. (R1. 18-200; R2. 201-76). The trial court entered an Order granting David's Motion in part and denying Massey's Motions (R3. 469-71), and thereafter entered a Final Judgment assessing costs. (R3. 472-74).

Massey appealed both the final judgment and the cost judgment. In his main appeal (No. 1D06-0627), Massey raised several issues, including one he again raises here in Point B(1), that the trial court erred by failing to enter a judgment in his behalf following the Phase I verdict. The district court implicitly rejected that contention, together with each of the other points raised, by affirming, after oral argument, the judgment in a per curium opinion. Massey v. David, 952 So.2d 1195 (Fla. 1st DCA 2007).

In his cost appeal (No. 1D06-3657), Massey contended the trial court had held that section 57.071(2), Florida Statutes, was unconstitutionally enacted; that the amount of expert fees awarded were unreasonable; and again that a judgment should have been entered in his favor at the

conclusion of Phase I to serve as a basis for an award of attorneys' fees and costs. Following oral argument, a separate panel of the district court rejected each of Massey's arguments. Massey v. David, 953 So.2d 599 (Fla. 1st DCA 2007).

As a basis for his claim that the trial court and district court must have "declared" the statute unconstitutional, Massey asserts:

> It is undisputed that David did not comply with the requirements of the statute.

(Amended Br. at 5); and

> Specifically, David did not provide Massey "with a written report signed by the expert witness which summarizes the expert witness's opinions and the factual basis of the opinions" . . . .

(Amended Br. at 7). Massey's statement is technically correct (David did not provide "a written report signed by the expert witness" as specified by section 57.071(2), Florida Statutes). However, well in advance of the Phase II trial, the attorneys for David did provide to Massey's attorney:

1) Initial expert witness disclosures with curriculum vitae and summary statements of the opinion of each of the experts (provided September 2003) (PR15. 2596-721);

2) Phase II expert witness disclosures which provided curriculum vitae and summary statements of the opinions as to each of the experts (provided February 2005) (PR25. 4384-474);

3) Extensive responses to Massey's expert interrogatories with respect to expert witnesses Guzelian, Laureno, Spencer and Wiggins, summarizing their opinions, the factual basis of the opinions, and listing all of the medical records, pleadings, documents and other materials relied upon by the experts in reaching their opinions (provided April 2005);

4) A 47-page affidavit signed by Dr. Phillip Guzelian in the underlying case which fully set forth the opinions he was to render in the Phase II trial, together with the bases for those opinions and all the materials he relied upon (PR33. 6080-136; PR34. 6137-56);

5) The sworn deposition testimony given by Dr. Robert Laureno in the underlying case which fully set forth the opinions he was to render in the Phase II trial;

6) The sworn deposition testimony of Mr. John Spencer in the underlying case which fully set forth the opinions he was to give in the Phase II trial; and

7) The sworn testimony given by Dr. Guzelian at the scientific inquiry or Frye hearing held prior to the scheduled November 1995 trial.[2]

Thus, Massey received much more in the discovery process than is required by the statute of which he seeks to take advantage. At no time during discovery did Massey's attorney claim the information with respect to the expert witnesses was insufficient, that the responses to expert interrogatories were incomplete, or that he needed additional information. With these materials in hand well prior to the Phase II trial, Massey's attorney

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[2] Although not part of the record on appeal, Massey acknowledges in pleadings that are a part of the record on appeal that he had copies of Laureno, Spencer and Guzelian's prior testimony. (See R2. 360, 361, 362; PR35. 6436).

chose not to further depose any of David’s expert witnesses.

SUMMARY OF ARGUMENT

Appellant Gary Massey attempts to bootstrap his contention (rejected twice by the district court), that he (the losing party in this decade-long legal malpractice case) is entitled to recover attorneys fees and costs from the prevailing party, to the district court's dicta or alternative holding. The district court's opinion simply cites with approval a prior district court's holding as to the constitutionality of section 57.071(2), Florida Statutes.

Because the district court has not "declared" a statute invalid, as required by article V, section 3(b)(1) of the Florida Constitution, the appeal should be dismissed for lack of jurisdiction. Should the Court consider the merits of the appeal, the decision of the District Court of Appeal, Fourth District, in Estate of Cort v. Broward County Sheriff, 807 So.2d 736 (Fla. 4th DCA 2002), correctly determined that section 57.071(2) was unconstitutional as it infringed on this Court's rule-making authority.

Likewise Massey's Issue Two - that the courts below should have issued a judgment in his favor following the verdict in Phase I and thereafter awarded him fees and costs - is not properly before this Court. This issue was raised before, and rejected by, the panel of the district court considering Massey's main appeal, which entered a per curium affirmance from which Massey did not (and could not) seek discretionary review in this Court. Massey v. David, 953 So.2d 599, 603 (Fla. 1st DCA 2007). Again, should the Court consider the merits of the issue, it is readily disposed of by the on-point decision in Sure Snap Corp. v. Baena, 705 So.2d 46 (Fla. 3d DCA 1997), discussed at length, and relied on by the district court in its opinion below. Id.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE OPINION BELOW DOES NOT DECLARE A STATE STATUTE INVALID.

Contrary to Massey's contention, the district court below did not declare a state statute unconstitutional, and thus this Court lacks jurisdiction to consider the appeal.

This Court has strictly construed the limits of its constitutional jurisdiction. Gandy v. State, 846 So.2d 1141, 1143 (Fla. 2003) ("'The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution.'") (quoting Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976) ("Time and again we have noted the limitations on our review and we have refused to become a court of select errors.") (footnote omitted)); see, e.g., Byrd v. State, 880 So.2d 616 (Fla. 2004) (dismissing appeal from decision declaring invalid a state statute where opinion signed by only one judge with other two judges concurring in the result).

In the instant case, the district court did not "declare" a statutory provision unconstitutional, as article V requires as a predicate for appeal jurisdiction, because the trial court never addressed the issue. The district court simply observed by way of dicta, or at best as an alternative holding, that had the trial judge addressed the constitutional issue and ruled consistent with the Fourth District's opinion in Cort that the statute was unconstitutional, he would have been correct. Massey, 953 So.2d at 602.

The trial court did not make a determination that section 57.071(2) was unconstitutional. (See R3. 469-71, 481). Indeed, nothing exists in the record to show that the trial court considered the constitutionality of section 57.071(2) or impliedly found the statute unconstitutional.[3] (R4. 1-59; R6. 69-97). Massey, in his own motions for rehearing, did not request the court make a finding that section 57.071(2) was unconstitutional. (R3. 475-76, 477). Instead, as conceded by Massey, the

[3] Through expert disclosures, answers to interrogatories, and affidavit and sworn deposition testimony, the statutory requirements were essentially met.

trial court followed the current state of the law. Mercury Ins. Co. of Fla. v. Coatney, 910 So.2d 925, 926 (Fla. 1st DCA 2005) ("In the absence of a supreme court decision on point, the trial court is bound to follow decisions of the district courts of appeal, and where there is no decision on point from the district court for the subject circuit, the trial court is bound to follow precedents of other district courts of appeal."), review denied, 924 So.2d 809 (Fla. 2006). As the trial court did not expressly nor impliedly make a determination as to the constitutionality of section 57.071(2), Massey's argument was not properly before the district court. Fleming v. Peoples First Fin. Sav. & Loan Ass'n, 667 So.2d 273, 274 (Fla. 1st DCA 1995) (in absence of a trial court decision, there is nothing for appellate court to review); see also Chipola Nurseries, Inc. v. Div. of Admin., State Dep't of Transp., 335 So.2d 617, 619 (Fla. 1st DCA 1976). Likewise it is not properly before this Court on appeal.

The district court's primary holding with respect to whether expert fees were properly awarded as taxable costs, was that the trial judge did not address the issue

of the constitutionality of section 57.071(2), Florida Statutes.

> Massey mentioned the statute in his written objections, conceding that the trial court had to follow the decision in Estate of Cort v. Broward County Sheriff, 807 So.2d 736 (Fla. 4th DCA 2002), which held the statute unconstitutional. Nothing, however, indicates the trial court specifically considered this statute in awarding costs to David. At no point during the hearing or in the order on appeal did the trial court mention Cort or section 57.071(2); nor did the court make any findings relating to the provisions of the statute, such as the furnishing of written reports to the opposing party, the filing of such reports, and the timing of such filings.

Massey, 953 So.2d at 602.

Alternatively, the district court noted 1) that if the trial court did consider Estate of Cort v. Broward County Sheriff, 807 So.2d 736 (Fla. 4th DCA 2002), the "court did not err in following that decision as it stands as the only appellate decision addressing this issue," Massey, 953 So.2d at 602; 2) the decision of the Fourth District in Cort was correct since "section 57.071(2) does not create a right to recover expert

witness fees, but rather sets forth the procedure for recovering under that right," id. (quoting Cort, 807 So.2d at 738); and finally, 3) that even if, as urged by Massey, the statute is substantive, it would not apply since it was added in 1999, well after the cause of action arose. Id.

The appeal should be dismissed pursuant to this Court's holding in Hanft v. Phelan, 488 So.2d 531, 532 (Fla. 1986):

> Article V, section 3(b)(1), Florida Constitution, provides, inter alia, that this Court "shall hear appeals . . . from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution." We find that by ruling in the alternative, and remanding for a factual determination below, the district court has not declared a state statute invalid as article V, section 3(b)(1) contemplates. Accordingly, the appeal is dismissed.

Accordingly, since the decision of the district court did not "declar[e] invalid a state statute" as required for appeal jurisdiction pursuant to article V, section 3(b)(1), but simply agreed, as an alternative basis to support its holding, that a prior opinion of

another district court was correct, the appeal should be dismissed.

II. ALTERNATIVELY, § 57.071(2) IS UNCONSTITUTIONAL AS A PROCEDURAL STATUTE INFRINGING ON THIS COURT'S RULE-MAKING AUTHORITY.

Should the Court address Massey's argument on appeal, the Fourth District Court of Appeal in Cort correctly determined that section 57.071(2) is unconstitutional as infringing on the rule-making authority of this Court and thus the trial court's award of expert witness fees was not barred by section 57.071(2). Cort, 807 So.2d at 738.

In holding section 57.071(2) unconstitutional, the Cort court held that section 57.071(2) did not create a right to recover expert witness fees, but rather set forth the procedure for recovering under that right. Id. The court noted that the substantive right for recovery of an expert witness fee as a taxable cost finds its basis in statutory law, § 92.231, Fla. Stat., and has existed since at least 1949. § 90.231, Fla. Stat. (1949); Cort, 807 So.2d at 738. The court further noted that the Uniform Guidelines for Taxation of Costs in

Civil Actions, adopted by the Florida Conference of Circuit Judges and published by this Court, discuss at length the taxation of costs for expert witness fees and set forth no deadlines or requirements such as those contained in section 57.071(2). Id. at 738-39. Likewise, the Florida Rules of Civil Procedure, although containing the procedure for discovery of facts and opinions held by experts, do not mention any deadlines or requirements as those set forth in section 57.071(2). Id. at 739. Lastly, the court noted that the legislature requested, in the note accompanying section 57.071, that the requirements of section 57.071(2) be adopted as a rule if it is determined that any provision of the statute improperly encroaches upon the authority of the Florida Supreme Court.[4] Id. & n.2.

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[4] Despite the legislature's request and the Cort decision in 2002, which created the opportunity for this Court to incorporate the procedural requirements of section 57.071(2) into the rules, the recently revised Uniform Guidelines make no mention of these requirements, nor do the recent Amendments to the Rules of Civil Procedure. Fla. R. Civ. P. app. II (Statewide Uniform Guidelines for Taxation of Costs); In re Amendments to the Fla. Rules of Civil Procedure, 917 So.2d 176 (Fla. 2005).

In reaching its conclusion, the Fourth District Court of Appeal found this Court's decision in Knealing v. Puleo, 675 So.2d 593 (Fla. 1996), persuasive:

> In Knealing, the supreme court found section 44.102(6)(b), Florida Statutes (1993), which allows a party to make an offer of judgment after mediation ends, unconstitutional. The court found that the statute did not expressly authorize an award of fees nor did it provide any other independent basis for awarding fees. The court stated "[r]ather than providing for an award of fees, section 44.102(6) alters the time limits for making and accepting an offer of judgment." Therefore, in finding the statute unconstitutional, the Knealing court was persuaded by section 44.102(6)'s failure to "create" a substantive right since section 768.79, Florida Statutes, already created the substantive right to attorney's fees based on an offer of judgment.

Cort, 807 So.2d at 738 (citations omitted).

Massey asserts that the Cort court's reliance on Knealing is misplaced and that section 57.071(2) does not set forth procedural requirements, but merely provides additional substantive rights to be read in conjunction with section 92.231, Florida Statutes. (Amended Br. at 11-16). In support of his assertion, Massey contends

that the difference between the statutes involved in Knealing and those involved in the instant matter were misperceived by the Cort court. The Cort court's analysis, however, is directly on point. Section 57.071(2) does not expressly authorize the right to recover expert witness fees nor provide any other independent basis for recovery, just as section 44.102(6)(b) was found by this Court not to expressly authorize an award of fees nor provide any other independent basis for awarding fees. Knealing, 675 So.2d at 596. Instead, section 57.071(2) alters the procedure for perfecting the substantive right for recovery of expert witness fees as taxable costs authorized by section 92.231(2), by imposing time requirements for the furnishing and filing of expert reports, which requirements ultimately determine whether one is entitled to recover under that right. As the district court recently noted in Williams v. State, 932 So.2d 1233, 1236-37 (Fla. 1st DCA 2006) (quoting Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So.2d 730, 732 (Fla. 1991)), "practice and procedure 'encompass the course, form, manner, means, method, mode, order, process or steps by

which a party enforces substantive rights or obtains redress for their invasion.'" Section 57.071(2) sets forth the manner, process or steps - the procedure - for recovering under the already created substantive right for recovery. Knealing, 675 So.2d 596; Cort, 807 So.2d at 738.

Moreover, section 57.071(2) cannot be construed as a substantive right merely "adding to" section 92.231. Section 92.231 created the substantive right for recovery of fees of testifying experts as costs. Section 57.071(2) does not expressly authorize an award of costs, but attempts to assert procedural limitations on the recovery by imposing disclosure and time requirements. Section 57.071(2) clearly alters the manner and steps by which one can recover expert witness fees and, as such, alters the procedure for recovery. Section 57.071(2) was correctly found by the Cort court as unconstitutional.

III. THE DISTRICT COURT DID NOT ERR IN REFUSING TO DIRECT ENTRY OF A JUDGMENT FOR MASSEY ON THE PHASE I VERDICT AND NOT AWARDING MASSEY FEES AND COSTS.

Standard of Review

An order granting or denying attorney fees and costs

is reviewed on the abuse of discretion standard. E & A Produce Corp. v. Superior Garlic Int'l, Inc., 864 So.2d 449, 451 (Fla. 3d DCA 2003); Goslin v. Racal Data Communications, Inc., 468 So.2d 390, 392 (Fla. 3d DCA 1985).

Appellant mistakenly asserts that the standard of review is de novo, citing Rittman v. Allstate Ins. Co., 727 So.2d 391, 393 (Fla. 1st DCA 1999). The Rittman case, however, did not involve a motion for fees and costs, but instead addressed the propriety of an order staying the judicial proceedings pending arbitration, a pure issue of law, which the appellate court reviewed de novo.

A. The district court was correct in not directing entry of judgment for Massey on the Phase I verdict.

As the district court correctly recognized, this issue was not properly before it on the cost appeal since it had already been decided adverse to Massey on his main appeal. Likewise, it is not properly before this Court. The district court stated:

> In his third point, Massey argues the trial court should have entered

> judgment for him following the Phase I trial, in which he prevailed, and pursuant to such judgment, awarded him fees and costs for the Phase I trial. The panel considering the main appeal in this case essentially decided this issue when it affirmed the judgment for David.

Massey, 953 So.2d at 603.

Nevertheless, if the Court should consider Massey's argument, Massey was not the prevailing party in the action and, as such, was not entitled to entry of a judgment in his favor.

As the district court recognized, Sure Snap Corp. v. Baena, 705 So.2d 46 (Fla. 3d DCA 1997), is directly on point.

> Thus, Sure Snap involves virtually the same general factual scenario as this case and, accordingly, the same reasoning applies. As in Sure Snap, the jury (in Phase II) ultimately returned a verdict awarding no damages. Therefore, Massey did not satisfy the third element of the legal malpractice claim-David's actions did not cause Massey to suffer any injury. Accordingly, the court properly entered a final judgment in favor of David at the conclusion of the proceeding, and Massey was not entitled to costs.

Massey, 953 So.2d at 603.

In Sure Snap, the lawyer failed to preserve his client's lender liability claim in the bankruptcy court below. In the malpractice action, the client presented expert testimony that the lender liability claim would have been worth $2.6 million in damages and the "jury found that Baena and the law firm were at fault in failing to preserve the lender liability claims." 705 So.2d at 48. Nevertheless, because the jury also found that the client "would not have been successful in the underlying civil suit," id., the client made no recovery against her lawyer.

The trial court held that the plaintiff was the prevailing party in the malpractice claim and awarded in excess of $150,000 in costs against Baena and the law firm. Id. On appeal, however, the district court reversed, holding the law firm could not be taxed with costs since the plaintiff would not have prevailed in the underlying action. Id. at 49. As the court clearly stated:

> Although the jury found that Baena and the law firm acted improperly in failing to preserve the civil suit,

the jury also found that Mrs. Shure and Sure Snap Corporation would not have been successful in the underlying civil suit. It is well settled that "[a] cause of action for legal malpractice has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client." The third element regarding the loss to the client is not satisfied unless the plaintiff demonstrates that there is an <u>amount of damages</u> which the client would have recovered but for the attorney's negligence.

Accordingly, even though the jury found that Baena and the law firm were at fault for failing to preserve the underlying claims, they are not legally and/or financially liable to Mrs. Shure, since their alleged inaction did not cause any injury to Mrs. Shure. Our holding is based upon the jury's finding that even if the underlying lender liability claim had proceeded to trial, Mrs. Shure and Sure Snap Corporation would not have prevailed. Mrs. Shure and Sure Snap Corporation failed to show that Baena and the law firm were the proximate cause of <u>any loss</u> to the client. They therefore did not satisfy the elements required of a valid claim for legal malpractice and cannot be said to have "prevailed" in an action for malpractice.

. . .

. . . The Final Judgment, which awards costs in favor of Mrs. Shure as the

> prevailing party on her claim of malpractice, must be reversed and this case is remanded to the trial court with directions to enter a judgment finding Baena and the law firm to be the prevailing parties . . . .

Id. at 48-49 (citations omitted). Likewise, as Massey failed to prevail in Phase II and show that David was the proximate cause of any loss to him, David, not Massey, was the prevailing party and Massey was not entitled to entry of a final judgment in his favor.

Despite the Sure Snap holding, which addresses the entry of a final judgment and the recovery of costs in a legal malpractice action such as the instant case, Massey relies on this Court's decisions in Ault v. Lohr, 538 So.2d 454 (Fla. 1989), and Tampa Electric Co. v. Ferguson, 118 So. 211 (Fla. 1928), neither of which apply to the recovery in a legal malpractice case. (Amended Br. at 19-21). The Ault case involved an assault and battery claim, 538 So.2d 455, and as stated by Massey, deals "explicitly with the question of whether punitive damages could be awarded in the absence of actual compensatory damages." (Amended Br. at 20). The Ault case simply has no application here. The issue here is

not whether Massey is entitled to punitive damages.

Tampa Electric, relied on by Massey, involved a vehicular collision case where the evidence of defendant's liability was uncontroverted. 118 So. at 212. The sole issue was the amount of plaintiff's damages. The jury entered a verdict for defendant and the trial judge granted a new trial. Id. The Court held in such instance, where there was no issue as to liability and the jury found no damages, rather than granting a new trial, the trial court should have entered a judgment non obstante veredicto for nominal damages. Id. Here in this bifurcated legal malpractice case, the Phase II jury found that neither Koppers' nor Cabot's negligence was a legal cause of damage to Massey. Thus a verdict for nominal damages would have been improper, even had Massey requested one, since the liability of the defendants in the underlying case was strongly contested and determined against Massey.

As Massey did not obtain a verdict in his favor in Phase II, he was not the prevailing party in the action and not entitled to entry of a final judgment in his favor. The trial court did not err in entry of the Final

Judgment on behalf of David nor did two separate panels of the district court of appeal err in affirming that holding.

B. The trial court was correct in not entering a cost judgment for Massey on the Phase I verdict.

A Final Judgment was entered in favor of David on July 27, 2005. (R7. 500-01). As a result of the judgment in his favor, David is entitled to recover costs pursuant to section 57.041, Florida Statutes. Section 57.041 provides:

> (1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment . . . .

Florida law is clear that only a party who recovers a judgment is entitled to recover costs under section 57.041, Florida Statutes. Cheetham v. Brickman, 861 So.2d 82, 83 (Fla. 3d DCA 2003) ("The law is clear that only a prevailing party who recovers a judgment is entitled to recover costs under section 57.041, Florida Statutes (2002)."); see also Higgs v. Klock, 873 So.2d 591, 592 (Fla. 3d DCA 2004) ("'[E]very party who recovers a judgment in a legal proceeding is entitled as a matter

of right to recover lawful court costs, and a trial judge has no discretion to deny costs to the parties recovering judgment.'") (quoting Weitzer Oak Park Estate, Ltd. v. Petto, 573 So.2d 990, 991 (Fla. 3d DCA 1991)).

As Massey did not recover a judgment in his favor, he is not entitled to recover costs.

C. The trial court was correct in not entering a fee award for Massey on the Phase I verdict.

Massey did not obtain, and was not entitled to obtain as set forth above, a final judgment in his favor to support an award of attorney's fees. Moreover, not only did Massey not prevail, but there is no contractual or statutory authority for his recovery of fees in this matter. Bane v. Bane, 775 So.2d 938, 940 (Fla. 2000) ("[A] court may only award attorney's fees when such fees are 'expressly provided for by statute, rule, or contract.'"); Hubbel v. Aetna Cas. & Sur. Co., 758 So.2d 94, 97 (Fla. 2000). Further, a claim for attorney's fees, whether based on statute or contract, must be pled. Caufield v. Cantele, 837 So.2d 371, 377 (Fla. 2002);

Stockman v. Downs, 573 So.2d 835, 837 (Fla. 1991). Massey did not plead any claim for attorney's fees.

Massey, however, claims entitlement to attorney's fees based on "the inherent authority of trial courts to assess attorneys' fees for the misconduct of an attorney in the course of litigation." Moakley v. Smallwood, 826 So.2d 221, 224-27 (Fla. 2002). Massey seeks to recover from David the attorney's fees he incurred in undoing David's wrongs, i.e., proving that David's wrongful actions invaded his rights and having his trial against Koppers and Cabot heard. (Amended Br. at 25-26). First, these fees are not, and do not equate to, a request for sanctions by the court against counsel for some bad faith tactic taken by counsel in the instant action. Second, the cases cited by Massey do not support Massey's claim and are distinguishable.[5] The cited cases involve the imposition of attorney's fees against a party's attorney to pay an opposing counsel's reasonable fees incurred as a result of litigation tactics taken by the attorney in

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[5] The cases cited by Massey involve instances where an attorney unnecessarily delayed litigation, served a pointless subpoena, failed to appear at a deposition scheduled by order of the court, and over-litigated a case and lied to the court.

the course of that litigation in bad faith. In those cases, the assessment of the fees was a sanction by the court for the bad faith conduct of a party's attorney during the course of that litigation, not in a subsequent malpractice proceeding as Massey is attempting to do here.[6] Moakley, 826 So.2d at 227.

Massey's reliance on U.S. Savings Bank v. Pittman, 86 So. 567 (Fla. 1920), is also misplaced. In Pittman, the attorney testified falsely before the trial judge in order to obtain a foreclosure and an illegal fee. The court ordered deducted from the fees to which he was entitled, those fees necessary to vacate and set aside the foreclosure judgment. 86 So. at 573. Again, this assessment was for the attorney's wrongful conduct during the course of that litigation, not in a subsequent

[6] The only scenario where the authority of the cases cited by Massey may have been applicable to impose attorneys' fees against David would have been if in the underlying litigation, the court made an express finding of bad faith litigation tactics by David, as Massey's attorney, and provided David notice and an opportunity to be heard. In any event, those fees would have been awarded to reimburse the opposing parties in the underlying litigation for their attorneys' fees, not to Massey. See Lathe v. Florida Select Citrus, Inc., 721 So.2d 1247 (Fla. 5th DCA 1998).

malpractice proceeding as Massey is attempting to do here.

The sanction cases relied on by Massey are inapplicable. Regardless, as found by the trial court, there was nothing about the circumstances of the case which would warrant fees. (R6. 79-80). The trial court properly exercised discretion in denying Massey's Motion for fees as well as costs, and the district court properly affirmed. (R3. 469).

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Alternatively, the opinion of the district court affirming the taxation of costs against Massey, and denying him entry of a judgment upon the Phase I verdict, should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Answer Brief of Appellee Calvin F. David has been furnished this day of June, 2007, by U.S. Mail to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2), Appellees' Answer Brief was prepared in Courier New 12-point font.

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