**IN THE SUPREME COURT OF FLORIDA**

**GARY MASSEY,**

**Appellant,**

**CASE NO. SC 07-776**

**ID06-3657**
**vs.** **Lower CASE NO. 1D06-3657**

**CALVIN F. DAVID,**

**Appellee.**

# APPELLANT AMENDED MASSEY'S INITIAL BRIEF

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## NOTES AS TO USAGE

Throughout this brief the following designations are used:

1. "David" refers to defendant/appellee Calvin F. David.

2. "Massey" refers to plaintiff/appellant Gary Massey.

3. V*XX*-*XXXX* indicate volume and page numbers in the record.

4. App. *X* indicates a numbered appendix to this brief.

## STATEMENT OF THE CASE AND OF THE FACTS

**Nature of Action**. This is a legal malpractice action in which Massey sued his former attorney, David, and the law firm, Ruden, McClosky, Smith, Schuster and Russell, P.A. (Ruden), claiming negligence and breach of fiduciary duties in the handling of Massey's underlying toxic tort action against industrial companies Koppers and Cabot. (V1: 1-19.)[1] Massey's underlying action alleged that Koppers and Cabot emitted toxic pollutants that caused Massey to suffer severe

[1]Record on Appeal; Companion Case 1D06-627.

neurological and mental injuries and extensive economic and non-economic damages. *Id.*

Against Massey's express and repeated objections, David negotiated a unwanted settlement of Massey's tort action against Koppers and Cabot and dismissed it shortly before trial was to commence on September 17, 1996. (App. 2.) Massey sued David and Ruden. (V1; 1-19.)[2] Massey's action against Ruden was dismissed and the district court affirmed. *Massey v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 788 So.2d 967 (Fla. 1st DCA 2001). Massey's action against David was also dismissed, but the district court reversed and remanded for trial. *Massey v. David,* 831 So.2d 226 (Fla. 1st DCA 2002).

Upon David's motion, the trial judge bifurcated the action between liability and damages in an order that stated:

> This cause coming on to be heard upon Defendant, CALVIN F. DAVID's Motion to Bifurcate Trial and the Court having heard argument of counsel finds that time and expenses will be saved in this matter by bifurcating the issue of the alleged negligence or *liability* on the part of the Defendant from issues of *damages* suffered by the Plaintiff.
>
> WHEREFORE, IT IS ordered and adjudged that trial in this cause scheduled to commence the week of January 5, 2004 *will be solely on the issue of liability* on behalf of the Defendant.

(App. 3.) (Italics provided).

[2]Record on Appeal; Companion Case 1D06-627

The Phase I trial on *liability* was conducted and the Phase I jury returned this verdict:

> We, the jury, return the following verdict:
>
> Was there negligence on the part of the Defendant, Calvin F. David, *which was a legal cause of damage to Plaintiff*, Gary Massey?
>
> Answer. **yes.**
>
> Did Defendant, Calvin F. David, breach his fiduciary duty to Plaintiff, Gary Massey, *that resulted in damages* to Gary Massey?
>
> Answer. **yes.**

(App. 4.) (Bold and italics supplied). To enforce this Phase I liability verdict, Massey moved for a judgment for costs and fees and the trial court reserved ruling upon it.

In violation of the bifurcation order and the Phase I verdict on liability, the trial judge required Massey to reprove *liability* in the Phase II trial instead of damages only. (App. 5.) Over Massey's objections, the trial judge withheld from the Phase II jury that this is a legal malpractice action; misled the jury to believe that it was trying a toxic tort action against non-parties Koppers and Cabot as defendants; and never informed the jury that David even exists much less that he is the actual defendant. (App. 5.) Massey made a motion for directed verdict as to liability, which the trial court denied. (App. 6.) The Phase II jury returned a

verdict in favor of non-parties Koppers and Cabot but returned no verdict for or against David. (App. 7.) Over Massey's objections, the trial judge entered a judgment of no liability for David on the merits and denied Massey's post-trial motions. Massey appealed and the district court affirmed without opinion in a *per curiam* decision. *Massey v. David*, 952 So.2d 1195 (Fla. 1st DCA 2007).

David filed a motion to tax costs (V1:18-200; V2:201-276) and Massey renewed his motion for fees and costs to enforce the Phase I liability verdict. (V1:15-17; V2:277-355; 368-400; V3:401-444; 459-458.) David's cost motion included massive expert witness fees that were not authorized by §57.071(2) Fla. Stat. Because *Estate of Cort v. Broward County Sheriff*, 807 So.2d 736 (Fla. 4th DCA 2002), had declared §57.071(2) to be unconstitutional and no other authority existed, the trial court was bound to ignore the statute. Against Massey's objections (V2:356-367; V3:445-58) the trial court entered an order granting David's cost motion (in part) and denying Massey's renewed motion for fees and costs. (App. 9; V3:469-471.) The cost judgment on that order taxed Massey for almost $100,000 in expert witness fees that are not authorized by §57.071(2). (App. 8; V3:475-76.) Massey appealed alleging *inter alia* it was error to declare §57.071(2) Fla. Stat. to be unconstitutional. The district court affirmed and

expressly accepted *Cort's* holding that §57.021(2) Fla. Stat. is unconstitutional. (App. 1.) The district court also denied Massey's appeal against the failure of the trial court to grant him relief required by this Court's precedents.

## SUMMARY OF ARGUMENT

The district court and *Cort* erred to hold §57.071(2) Fla. Stat. to be unconstitutional. The district court also committed error to deny Massey's motions for costs and fees as required by this Court's precedential decisions in *Tampa Electric Co. v. Ferguson*, 118 So. 211 (Fla. 1928), *Ault v. Lohr*, 538 So.2d 454 (Fla. 1989), *Lassiter v. International Union of Operating Engineers*, 349 So.2d 622, 626(Fla. 1977), and *United States Savings Bank v. Pittman*, 86 So. 567 (Fla. 1920).

§57.071(2) Fla. Stat. provides in part:[3]

> Expert witness fees *may not be awarded as taxable costs* unless. . .

[3] §57.071(2):
Expert witness fees may not be awarded as taxable costs unless the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness which summarizes the expert witness's opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. Such report shall be filed at least 5 days prior to the deposition of the expert or at least 20 days prior to discovery cutoff, whichever is sooner, or as otherwise determined by the court. .....

(Underlining supplied.) The "unless" is that expert witness fees are awardable as costs only if written reports are made available to the opposing party within a stated time. It is undisputed that David did not comply with the requirements of the statute. Although the trial court was bound to follow the *Cort* declaration that §57.071(2) is unconstitutional, the district court was not so bound and erred to endorse the *Cort* holding.

*Cort* and the decision below are in error. The operational portion of §57.071(2) -- "Expert witness costs may not be awarded unless" -- is plainly substantive on its face. The "unless" condition merely defines *which* expert costs may be taxed and does not attempt to prescribe how, when, where, which, or whether expert testimony must be obtained or used in the courts. This statute merely adds an additional condition on the substantive entitlement to costs to the "shall have testified" condition in §92.231 Fla. Stat. that the courts have uniformly acknowledged to be substantive. The time prescription in §57.071(2) works exactly as time prescriptions in statutes of limitations work: they prescribe the conditions that must be satisfied to create the substantive right to recover and have nothing to do with court practices and procedures to enforce the right. On this ground alone David's cost judgment must be reversed and remanded to remove unauthorized costs.

The trial judge and the district court also erred to deny Massey's motions for fees and costs. The Phase I liability jury found that David had been negligent and breached his fiduciary duties and that those wrongful acts were "a legal cause of damage to Massey." (App. 4.) The jury thus found that David wrongly invaded Massey's established legal rights and caused him to suffer damages. Under this Court's precedents in *Tampa Electric Company v. Ferguson*, 118 So.2d 211 (Fla. 1928); *Ault v. Lohr,* 538 So.2d 454 (Fla. 1989); and *Lassiter v. International Union of Operating Engineers*, 349 So.2d 622 (Fla. 1977), such a verdict mandates the trial court to enter judgment for Massey for not less than nominal damages even if he proved no actual compensatory damages. Accordingly, Massey was entitled to a judgment for not less than nominal damages and taxable costs.

Finally, the trial court erred when it denied Massey's motion for attorney fees. In this case, the unauthorized wrongful acts of David, a faithless lawyer, caused his client Massey to suffer legal damage and to incur massive litigation costs and fees to rectify the damage. In indistinguishable circumstances, this Court has held that a judgment must be entered against such a faithless lawyer to defray the costs of undoing the harm caused by similar wrongful acts. *United States Savings Bank v. Pittman*, 86 So.2d 567 (Fla. 1920). Because Massey proved all the elements that entitle him to a judgment for fees under *Pittman,* the district court

erred not to direct the trial court to award it.

## ARGUMENT

## QUESTIONS PRESENTED

### A. ISSUE ONE. DID THE DISTRICT COURT ERR TO DECLARE §57.071 FLA. STAT. UNCONSTITUTIONAL?

**Standard of Review.** The trial court entered a final judgment that was predicated in part on a declaration that §57.071(2) Fla. Stat.[4] is unconstitutional because it violates the Court's exclusive Article V §2(a) powers to prescribe rules of practice and procedure in the courts. The district court affirmed. The standard of review is *de novo. Bush v. Schiavo,*885 So.2d 321, 329 (Fla. 2004).

**Merits.** Massey filed numerous objections to certain items claimed in David's Motion to Tax Costs. (V2:356-367; V3:445-458) Among them was objection to certain expert witness fees not authorized by §57.071(2) Fla. Stat. 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" as prescribed for taxable costs in §57.071(2) Fla. Sta. Massey was well aware that *Estate of Cort v. Broward County Sheriff*, 807 So. 2d 736 (Fla. 4th DCA 2002) had declared §57.071(2) Fla. Sta. to be procedural in character and thus in violation of Article V §2(a) Florida Constitution. In the absence of a decision of this Court of any other district court to the contrary, Massey conceded that the trial court was bound to follow *Cort.* Nevertheless, Massey also submitted that *Cort* was incorrectly decided and argued that the district court of appeal should reject *Cort*, reverse the award, and remand to the trial court to remove costs unauthorized by §57.071(2).

Although the record otherwise established that David did not satisfy the cost requirements of §57.071(2) Fla. Stat., Massey filed an affidavit stating that the conditions had not been satisfied. (V3:454-458.) David has not refuted this. Massey requested the trial court to make a finding that the expert witness fees did not comply with §57.071(2), but the court's initial order contained no such a finding. Massey moved for rehearing and requested the trial court to make that finding. (V3:475-480.) David objected to the rehearing motion (V3:482-484) and the trial court denied it. (V3:481.) The appeal to the district court ensued and the district court adopting the *Cort* decision and affirmed. This is error.

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[4]See n. 3.

*Cort* correctly acknowledged that the prescription of what is a taxable cost is a matter of substance and within the power of the Legislature to prescribe. *Id.*, at 738. See also, *Higgs v. Klock*, 873 So.2d 591 (Fla. 2004). As this Court stated in *Board of County Com'rs, Pinellas County v. Sawyer*, 620 So.2d 757, 758 (Fla. 1993):

> Common law provided no mechanism whereby one party could be charged with the costs of the other. Cost provisions are a creature of statute and must be carefully construed.

Furthermore, that an enactment of the Legislature comes into court with a heavy presumption of constitutionality is axiomatic. *Leapai v. Milton*, 595 So.2d 12, 14 (Fla.1992) ("We have consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality.") It is also axiomatic that the Florida Legislature has no power to make law within the exclusive rule-making authority of this Court prescribed by Article V §2(a) Florida Constitution.[5] This then, requires this Court to ascertain whether the conditions prescribed by §57.071(2) are "practice or procedure" or substance.

[5]"(a)The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review....." Article V §2(a) Florida Constitution.

This Court explicated the legal standards that define the distinction between these two concepts as follows:

> With regard to the constitutionality of [a statute], we must determine whether the statute concerns matters of substantive law, which is within the legislature's domain, or whether it concerns matters of practice and procedure, which this Court has the exclusive authority to regulate. *Markert v. Johnson*, 367 So.2d 1003 (Fla. 1978). Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, 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. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses. (citations omitted). Substantive law creates substantive rights; rules of procedure, however, "merely provide the remedies to enforce rights." *State v. Dorian*, 619 So.2d 311, 313 (Fla. 3d DCA 1993), *quashed on other grounds*, 642 So.2d 1359 (Fla.1994); *see Birnholz v. 44 Wall St. Fund, Inc.*, 880 F.2d 335, 339 (11th Cir.1989) (finding that procedural rules are "legal machinery and not a fountain of legal rights").

*Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla.1991).

*Haven Federal Savings Loan Ass'n* correctly determined that a statute *directing* courts to sever counterclaims in certain actions is procedural and not substantive, thus rendering the statute unconstitutional. *Id.*, at 733. By contrast, this Court has plainly and repeatedly held that defining the entitlement to a cost award is a substantive matter to be prescribed by statute. See *e.g.*, *Timmons v.*

*Combs*, 606 So.2d 1, 3, 4 (Fla. 1992) ("In any event, in light of our ruling in *Leapai v. Milton,* it is clear that *the circumstances under which a party is entitled to costs* and attorney's fees is substantive and that our rule can only control procedural matters.") (Italics added.) Against this standard, *Cort* erroneously construed the conditions of §57.071(2) Fla. Stat. *that prescribe which expenses may be taxed as costs* to be a litigation procedure instead of what it truly is; namely, the definition of the substantive right. In relevant part, *Cort* stated:

> We agree with Allstate's argument that section 57.071(2) is unconstitutional because, through it, the legislature creates or modifies a procedural rule of court:
>
> > A rule of procedure prescribes the method or order by which a party enforces substantive rights or obtains redress for their invasion. Substantive law creates those rights. Practice and procedure are the machinery of the judicial process as opposed to the product thereof.
>
> *Military Park Fire Control Tax Dist. No. 4 v. DeMarois,* 407 So.2d 1020, 1021 (Fla. 4th DCA 1981). . . .
>
> More specifically, we find Allstate's reliance on *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. *See id.* at 596. 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. *See id.* 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." *Id.* 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. *Likewise, here, 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.*
>
> . . . . . We recognize that the substantive right for recovery of an expert witness fee as a taxable cost finds its basis in statutory law and has existed since at least 1949. *See* § 90.231, Fla. Stat. (1949); § 92.231, Fla. Stat. (2000). Nevertheless, due to the purely procedural nature of section 57.071(2), we are compelled to find that it intrudes upon the powers of the judiciary, through the Florida Supreme Court, to determine matters of practice and procedure before the Florida courts. *See* Art. V, § 2(a), Fla. Const.
>
> .....Moreover, Florida Rule of Civil Procedure 1.280(b)(4)(A) outlines the procedures for discovery of facts and opinions held by experts. There, no mention is made of having to file a report by the expert twenty days prior to the end of discovery or five days prior to the deposition of the expert.

*Cort,* at 807 So.2d 738. (Italics added.) The italicized portion of the quotation is plainly wrong; §57.071(2) prescribes a condition that must be satisfied to make a fee taxable but says nothing about procedure. In the last quoted paragraph *Cort* again failed to distinguish between a time limit on *which reports may be used in court* — which would be a procedural matter but is not involved in §57.071(2) — and a prescription as to which costs may be taxed — which is substance and is involved in §57.071(2).

*Cort* also misperceived the difference between the statutes involved in *Knealing v. Puleo,* 675 So.2d 593 (Fla.1996) and those involved herein. *Knealing* involved § 768.79 Fla. Stat.(1989) and §44.102(6) Fla. Stat. At the time *Knealing*

construed it, §768.79 read:

> (1)(a) In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer....

*Knealing*, 675 So.2d at 594, fn. 4. And at that time §44.102(6) read:

> (6)(a) When an action is referred to mediation by court order, the time periods for responding to an offer of settlement pursuant to s. 45.061, or to an offer or demand for judgment pursuant to s. 768.79, respectively, shall be tolled until:
> 1. An impasse has been declared by the mediator; or
> 2. The mediator has reported to the court that no agreement was reached.
> (b) Sections 45.061 and 768.79 notwithstanding, an offer of settlement or an offer or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

*Knealing*, 657 So.2d at pp. 595,6.

A mere glance at §44.102(6) proves that it has no function other than to prescribe a procedure - namely the "time limits for making and accepting an offer of judgment." (By contrast, as shown below §57.071(2) Fla. Stat. plays no role at all in how, when, whether, or which expert testimony may be used to resolve a dispute. It merely defines *which* costs may be taxed.) In *Knealing* this Court succinctly described the constitutional deficiency in §44.102(6), as follows:

> Rather than providing for an award of fees, section 44.102(6) alters the time limits for making and accepting an offer of judgment. Section 44.102(6)(a)

> tolls the time periods of section 768.79 as incorporated into Florida Rule of Civil Procedure 1.442 from the date of the order of mediation until the mediation is complete. The result is that a party may have more than the thirty days required by section 768.79 and rule 1.442 to accept an offer. Section 44.102(6)(b) allows a party to make an offer of judgment after mediation ends. As a result, a party may have less than the thirty days required by section 768.79 and rule 1.442 to consider and accept an offer. We have held that the time limits for acceptance of an offer of judgment, like those provided in section 44.102(6), are procedural. Florida Bar Re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So.2d 442, 443 (Fla.1989). Accordingly, we read section 44.102(6) as setting forth only procedural requirements.

*Id.* at 596.

The statutes involved in this case are distinctly different from those in *Knealing.* First , §92.231(2) Fla. Stat.[6] provides:

> (2) Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such

[6]92.231. Expert witnesses; fee

> (1) The term "expert witness" as used herein shall apply to any witness who offers himself or herself in the trial of any action as an expert witness or who is subpoenaed to testify in such capacity before a state attorney in the investigation of a criminal matter, or before a grand jury, and who is permitted by the court to qualify and testify as such, upon any matter pending before any court.
> (2) Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in an amount agreed to by the parties, and the same shall be taxed as costs. In instances where services are provided for the state, including for state-paid private court-appointed counsel, payment from state funds shall be in accordance with standards adopted by the Legislature after receiving recommendations from the Article V Indigent Services Advisory Board.

[Note: Subsection 2 was effective until July 1, 2006.]

> witness in an amount agreed to by the parties, and the same shall be taxed as costs. [Note: Subsection 2 was effective until July 1, 2006.]

This statute creates a substantive right to recover costs for expert witness fees, which even there is limited to fees for expert witnesses "who shall have testified in any cause." *Id.*

The second statute is §57.071(2), which provides:

> *Expert witness fees may not be awarded as taxable costs unless* the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness which summarizes the expert witness's opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. Such report shall be filed at least 5 days prior to the deposition of the expert or at least 20 days prior to discovery cutoff, whichever is sooner, or as otherwise determined by the court. .....

(Italics added.) Plainly, §57.0171(2) merely adds the "written report" condition to the "shall have testified" condition §92-231 had already imposed on the substantive right to recover costs. (This additional requirement is in harmony with this Court's independent decision in *In re Amendments to Uniform Guidelines for Taxation of Costs*, 915 So.2d 612, 616, (Fla. 2005); namely, to reduce the costs of litigation.)

*Cort* correctly acknowledged that §92.231(2) was the earlier in time of the two and constituted authority to award expert witness fees as costs. *Cort*, 807 So.2d at 738. What *Cort* failed to do was to acknowledge that §92.231(2)

contained its own limiting definition and also failed to construe the two statutes *in pari materia*.[7] Had it done so, *Cort* would have concluded that the function of §57.071(2) is to further limit cost awards authorized by §92.231(2) to those that meet the additional criteria stated in §57.071(2) and no others. The key words are, "*Expert witness fees may not be awarded unless....*" Those are words of limitation of the substantive right and are not words of procedure. In *toto* §92.231 and §57.071(2) describe *which* expert testimony may be the subject of a fee award, which is substance and not procedure. Furthermore, *Cort* entirely failed to note what §57.071(2) *does not do.* It:

**$** Does *not* impose any time limits on *filing* anything in court as a condition of having legal effect in the resolution of the disputed issues in the case, as does §44.102(6).

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[7]This Court recently explained the doctrine of *in pari materia* as follows:

> The doctrine of *in pari materia* requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent. *See Young v. Progressive Southeastern Ins. Co.*, 753 So.2d 80, 84 (Fla.2000) ("Where possible, courts must give effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.") (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla.1992)); *McGhee v. Volusia County*, 679 So.2d 729, 730 n. 1 (Fla.1996) (stating that the doctrine of *in pari materia* requires courts to construe related statutes together so that they are harmonized).

*Zold v. Zold*, 911 So.2d 1222. 1229 (Fla.2005).

- Does *not* purport to impose any limits on when, how, whether, or which expert witness depositions may be taken.
- Does *not* purport to impose any limits on how, when, whether, which, or under what circumstances expert testimony including depositions may be used as evidence in any case, and,
- Does *not* purport to prescribe or modify the procedure for making a claim for costs.[8]

The proper approach to construe §57.071(2) was applied to §92.231(2) Fla. Stat. by *Junkas v. Union Sun Homes, Inc.*, 412 So.2d 52 (Fla. 5th DCA 1982) and *KMS of Florida Corp. v. Magna Properties, Inc.*, 464 So.2d 234 (Fla. 5th DCA 1985). Both decisions denied the taxation of costs for which the §92.231 condition that the expert witness "shall have testified" had not been satisfied. The decisions correctly held that phase to be substantive and not procedural. This Court cited both decisions in *Coastal Petroleum Co. v. Mobil Oil Corp*., 583 So.2d 1022, 1023, n. 1 (Fla. 1991). Similarly,§57.071(2) merely adds the condition that expert witness costs are taxable only if the prescribed information has been supplied in

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[8] The procedure for claiming costs is prescribed by Fla. R. Civ. P. Rule 1.525. Motions for Costs and Attorneys' Fees:
Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a

advance. Both that condition and the §92.231(2) "shall have testified" condition are substantive. Both provisions define which fees may be taxed as costs and nothing more. In sum, *Cort* and the district court below erred to declare 57.071(2) unconstitutional on the ground that the "may not be awarded unless" condition is procedural.

Because prescribing which costs are taxable is a substantive determination, the Legislature might have prescribed that only X hours of work may be taxed, or the hourly rate at which expert fees may be taxed, or that only the costs of depositions actually used at trial may be taxed. Statutes of limitation in Chapter 95 Florida Statutes provide a compelling analogy. No court has every held these time restrictions to be procedural: they condition substantive rights with time-based restrictions and have nothing to do with court practices and the procedures employed to enforce them. Many statutory rights are similarly limited.

For these reasons, Massey respectively submits that *Cort* and the district court below erroneously declared §57.071(2) Fla. Stat. to be unconstitutional. The strong presumption of constitutionality of the statute in question has not been and cannot be overturned. Accordingly, Massey respectfully requests this Court to

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judgment of dismissal, or the service of a notice of voluntary dismissal.

grant the appeal, vacate the cost judgment and remand with directions that all costs not authorized by §57.071(2) Fla. Stat. be excluded.

**B. ISSUE TWO. DID THE DISTRICT COURT ERR NOT TO FOLLOW THIS COURTS PRECEDENTS IN *TAMPA ELECTRIC CO. v. FERGUSON, AULT v. LOHR, LASSITER v. INTERNATIONAL UNION OF OPERATING ENGINEERS,* AND *UNITED STATES SAVINGS BANK v. PITTMAN*?**

**Standard of Review.** The trial court denied Massey's motions for judgment and for fees and costs and the district court affirmed. The standard of review is *de novo. Rittman v. Allstate Ins. Co.*, 727 So.2d 391, 393 (Fla. 1st DCA 1999)(" The standard of review of a trial court ruling on a pure issue of law is *de novo,* i.e., an appellate court need not defer to the trial court on matters of law.")

**Merits**.

**(1) The District Court Erred Not to Order Judgment for Massey on the Phase I Verdict**

Upon David's motion the trial court bifurcated the trial of this malpractice action into Phase I on liability and Phase II on damages. In substance, the bifurcation order reads:

> This cause coming on to be heard upon Defendant, CALVIN F. DAVID's, Motion to Bifurcate Trial and the Court having heard argument of counsel finds that time and expense will be saved in this matter by bifurcating the issue of the alleged negligence or liability on the part of the Defendant from issues of damages suffered by the Plaintiff.
>
> WHEREFORE, it is ORDERED AND ADJUDGED that trial in this cause scheduled to commence the week of January 5, 2004 will be solely on

the issue of liability on behalf of the Defendant.

(App. 3.) Hence, the sole issue in the Phase I trial was whether David was *liable* to Massey for damages caused by David's actions.

The Phase I jury was instructed as David requested and returned the following verdict:

> We, THE JURY, return the following verdict:
>
> 1. Was there negligence on the part of Defendant, CALVIN F. DAVID, which was *a legal cause of damage to Plaintiff, GARY MASSEY*?
>
> [ANS. **Yes**]
>
> 2. Did the Defendant, CALVIN F. DAVID, breach his fiduciary duty to Plaintiff, GARY MASSEY that *resulted in damages to GARY MASSEY*?
>
> [ANS. **Yes]**

(App. 4.) (Italics and bold added.) In short, the Phase I jury determined that David committed legal malpractice that was a "legal cause of damage" to Massey. Both the trial court and the district court erroneously ignored this undisturbed jury finding. As the basis of its decision to deny Massey's appeal, the district court referred to *Sure Snap v. Baena*, 705 So.2d 46, 47-48 (Fla. 3rd DCA 1997) in which the "jury found the attorney and law firm at fault, but also determined the client suffered *no damage as a result*." (Italics added.) *Massey v. David*, _____ So.2d ____, ____ (Fla. 1st DCA 2007.) (Italics added.) The district court simply ignored

that the Phase I jury returned an entirely different verdict: David *did cause* Massey to suffer legal damages.

Although the Phase I jury heard evidence that Massey suffered economic damages of not less than $6.5 million, the trial court construed the jury's verdict that David's wrongs were "a legal cause of damage to plaintiff" to mean *only* that David had caused Massey to lose his right to a jury trial and not that he suffered actual compensable losses. (App. 5, p. 7.) In either event, however, that the jury returned an undisturbed verdict that David *tortiously invaded Massey's legal rights* cannot be refuted. The district court erred when it failed to apply this Court's holdings that such a verdict requires the award of a judgment for not less than nominal damages, even in the absence of actual compensatory damages. This Court's decisions in *Ault v. Lohr,* 538 So.2d 454 (Fla. 1989), *Tampa Electric Co. v. Ferguson*, 118 So. 211 (Fla. 1928), and *Lassiter v. International Union of Operating Engineers*, 349 So.2d 622, 626 (Fla. 1977) mandate this result.

In *Ferguson* the plaintiff sued for bodily injuries and emotional damages caused in an automobile accident. The jury returned a verdict for the defendant; the plaintiff moved for a new trial; and, the motion was granted. The defendant appealed the new trial order on a writ of error. Upon review, this Court reversed

the order for new trial, but also directed that "a judgment non obstante veredicto be entered for the plaintiff for nominal damages." This Court explained:

> The doctrine of nominal damages obtains in this state. If the declaration makes a case entitling the plaintiff to recovery whatever, though it be only nominal damages, it is not demurrable.....
>
> The plaintiff established by her declaration and the evidence a cause of action, but failed to show any substantial damages resulting from the accident and the alleged injury received.
>
> ..... That there was evidence that the plaintiff did sustain some slight injury to her body, and that such evidence was not so completely overcome as to render a verdict for damages on that score improper, is also true; however there was no evidence of the amount of such damages. *But, as a wrongful invasion of a legal right was alleged and proved, there should have been a judgment for the plaintiff for nominal damages.*
>
> .....It is therefore considered and ordered that the order granting a new trial be, and the same is hereby, reversed, and that a judgment non obstante veredicto be entered for the plaintiff for nominal damages.

*Id.*, at 211, 212. (Italics added.) Dealing explicitly with the question of whether punitive damages could be awarded in the absence of actual compensatory damages, *Ault* applied the *Ferguson* principle and declared:

> The narrow question for resolution by this Court is whether a plaintiff can recover punitive damages where the factfinder has found a breach of duty but no compensatory or actual damages have been proven. The law in this state is in conflict as illustrated by the above decisions.
> ..... We believe an express finding of a breach of duty should be the critical factor in an award of punitive damages. Accordingly, we hold that *a finding of liability alone* will support an award of punitive damages "even in the absence of financial loss for which compensatory damages would be

> appropriate." 349 So.2d at 626. We reject Ault's contention that at least nominal damages must first be awarded before punitive damages are proper. *We conclude that nominal damages are in effect zero damages and are defined as those damages flowing from the establishment of an invasion of a legal right where actual or compensatory damages have not been proven*. In approving an award of punitive damages upon an express finding of liability by the factfinder, we accept the view that *nominal damages will be presumed from an encroachment upon an established right.*

538 So.2d at 455. (Italics added.)

Hence, *Ferguson* and *Ault* plainly establish that a jury's finding that a defendant wrongly invaded a plaintiff's established legal right requires entry of a judgment for at least nominal damages.

*Lassiter v. International Union of Operating Engineers*, 349 So.2d 622, 626 (Fla. 1977) summed up the applicable law thus:

> Nominal damages are awarded to vindicate an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury.

David cannot deny that Massey "proved to the satisfaction of a jury" that David invaded his "legal rights." Accordingly, under the principle of *Ault*, *Ferguson*, and *Lassiter*, Massey is entitled to a judgment for not less than nominal damages and costs based upon the Phase I verdict. The district court erred to deny it.

**(2) The District Court Erred Not To Order A Cost Judgment for Massey on the Phase I Verdict**

Based upon his entitlement to a judgment for at least nominal damages,

Massey is also entitled to a cost judgment pursuant to §57.041 Fla. Stat., which provides in part: "(1)The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment....." Accordingly, Massey respectfully submits that this Court should reverse the decisions that denied his cost claim and remand for proceedings to ascertain the amount.

**(3) The District Court Erred Not To Order A Fee Judgment for Massey on the Phase I Verdict.**

Although Massey contended that the only purpose of the Phase II trial was to quantify the amount of damages Massey suffered, the trial court construed the Phase I verdict that David's wrongful acts were a legal cause of damages to Massey to mean only the "jury determined that Mr. Massey was deprived of is right to take his case to trial." At another point, the trial court reiterated "that damage was the loss of his ability to go to trial." (App. 5, p. 7.) Against Massey's objections, Phase II was conducted as a retrial of liability *with the underlying toxic tort defendants identified* to the jury as "the defendants." The jury was not informed that this is a malpractice action against David. (App. 5.) In this false context, the Phase II jury returned a verdict that *Koppers* and *Cabot*, who are not parties to this action and have no interest in it, were not liable to Massey. (App. 7.) The jury did not know of David's existence and returned no verdict whatsoever

concerning him. Massey objected to this procedure on the grounds that it intentionally deceived the jury as to the nature of the case and the identity of the parties. Massey appealed on this Court's "no lying to a jury" rule of *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993) and other decisions. The district court denied Massey's appeal without opinion. *Massey v. David*, 965 So.2d 1195 (Fla. 1st DCA 2007).

Even if *arguendo* the "legal damage" David caused Massey to suffer was *only* loss of his right to a trial on his underlying case, the district court still erred when it failed to award Massey legal fees to defray the costs incurred to rectify David's wrongs. Even under that theory of "legal damage," when Massey obtained the Phase II trial, he rectified the loss David had wrongfully deprived him of - the trial against Koppers and Cabot. In short, by his own legal efforts, Massey undid David's wrongs. In these circumstances, this Court's decision in *United States Savings Bank v. Pittman*, 86 So. 567 (Fla. 1920) entitles Massey to a fee award against David.

*Pittman* establishes that a former client, such as Massey, may recover costs and attorneys fees for efforts required to obtain relief from damage done by the faithless acts of a former lawyer, such as David. *Pittman* was a foreclosure action.

The faithless lawyer represented the assignee (the bank) of a lender against a debtor (Pittman) who had defaulted on a note secured by a mortgage on real property. On behalf of his client (the bank) the lawyer commenced a foreclosure action against the debtor. Thereafter, the bank instructed the lawyer to accept a deed to the mortgaged property and dismiss the foreclosure action. The debtor deeded the property to the bank, but the bank's lawyer did not dismiss the action against the debtor. Instead, the bank's lawyer, acting entirely on his own and against his client's directions, continued to prosecute the foreclosure action and obtained a deficiency judgment in the nature of a decree *pro confesso* against the debtor (Pittman). The bank's lawyer violated his client's directions for the purpose of obtaining a court-ordered "excessive and exorbitant fee" from his client. *Id.,* at 571. The lawyer's actions also placed his client (the bank) in breach of its settlement contract with the debtor and required the bank to employ additional counsel to undo the harm the first lawyer had caused.

*Pittman*, decided three points: first, the faithless lawyer was entitled to a *quantum meruit* recovery for the useful work he accomplished; second, he was entitled to no fee for his efforts after he had obtained the relief his client desired; and, third, his former client (the bank) was entitled to have the trial court:

> ...ascertain a reasonable fee [for the bank's] present attorneys for their

> services in procuring the vacation of the decree proconfesso and final decree of foreclosure wrongfully obtained by [the former lawyer] including the representation of the case in this court, as well as all court costs of this proceeding for the vacation of said decree proconfesso and final decree of foreclosure, including the costs of this appeal, and the amount of such last-mentioned attorney's fees and said court costs in the proceeding be adjudged against said [former lawyer]...

*Id.*, at 573.

The parallels to this case are exact. David abandoned Massey and caused his underlying case to be dismissed *against Massey's explicit directions to the contrary.* Furthermore, after Massey fired him, David actively opposed Massey's attempts to vacate the dismissal order and actively opposed Massey's appeals in the district court. To obtain relief from David's unauthorized and faithless acts, Massey was required to prosecute the malpractice action in the court below and in the district court. Under *Pittman*, Massey is now entitlement to a judgment for "court costs and attorney's fees" to defray the expense of relieving the damage David caused him to suffer.

Many decisions have applied the *Pittman* principle. These include: *Lathe v. Florida Select Citrus, Inc.*, 721 So.2d 1247, 1247 (Fla. 5th DCA 1998) ("A trial court has inherent authority to order an attorney, who is an officer of the court, to pay opposing counsel's reasonable attorney's fees incurred as a result of his or her actions taken in bad faith. See, e.g., *U.S. Savings Bank v. Pittman*, 80 Fla. 423, 86

So. 567 (Fla.1920) (attorney who wrongfully obtained decree for sole purpose of paying his fee properly charged with opposing counsel's fees)"; *Smallwood v. Perez*, 717 So.2d 154 (Fla. 3d DCA 1998) ("courts have inherent power to assess attorney's fees against counsel for litigating in bad faith, although caution must be exercised and due process satisfied"); *Sanchez v. Sanchez*, 435 So.2d 347 (Fla. 3d DCA 1983) ("...we hold, as a matter of law, that he was acting upon his own interests when he made necessary the totally unnecessary consumption of judicial effort involved in correcting the written judgment. As a consequence, the wife's attorney himself became liable for the husband's attorney's fees."); *Emerson Realty Group, Inc. v. Schanze*, 572 So.2d 942 (Fla. 5th DCA 1990)("We also direct the trial court to assess and impose on Ludwig and Mize, personally, a reasonable attorney fee and costs incurred by the plaintiff after the wrongful dismissal of its lawsuit and this appeal."); *Goldfarb v. Daitch*, 696 So.2d 1199 (Fla. 3d DCA 1997) review denied, 717 So.2d 531 (Fla. 1998) ("Finally, the attorney's fee award assessed against *Goldfarb* is proper. Assuming, without deciding, that section 57.105, Florida Statutes does not authorize the award, this case nevertheless falls under the rule that when an attorney acts in his own interest and not on behalf of a client, the court may use its inherent power to enter an attorney's

fees award against such an attorney to recover for the effort involved in undoing or correcting the results of the unauthorized acts."); and, *Patsy v. Patsy*, 666 So.2d 1045 (Fla. 4th DCA 1996) ("We agree with Sanchez, Emerson, and Roadway [Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)] that courts have the inherent power to assess attorney's fees against counsel for litigating in bad faith. We therefore affirm the order awarding attorney's fees and costs against Meisler.")

This Court has also held that a trial court possesses inherent power to award attorney's fees against a lawyer in favor of an opposing party injured by the bad faith litigation tactics of the opposing lawyer. See, e. g., *Moakley v. Smallwood,* 826 So.2d 221, 227 (Fla. 2002) ("Accordingly, we conclude that the trial court's exercise of the inherent authority to assess attorneys' fees against an attorney must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees.") *A fortiori*, a court may order costs to compensate a former client for the cost of undoing the damage done by a faithless lawyer. *Pittman* is proof of this.

For these reasons, Massey submits that the district court erred to deny his claim for fees for litigation required to overturn the harm done him by David's

faithless acts.

## CONCLUSION

For the reasons stated herein, Massey respectfully submits that this Court should hold that §57.071(2) is not unconstitutional and reverse and remand with directions that the courts below:

- Modify any cost award that David might be entitled to by eliminating those expert witness costs that are not in strict conformity with §57.071(2) Fla. Stat.
- Enter an order awarding Massey fees and costs for the relief he obtained in Phase I.

## CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies with his signature below that this brief is prepared in Times New Roman type font size 14.

## CERTIFICATE OF SERVICE

I certify that a copy of this amended brief was mailed this 30th day of May 2007 to John A. DeVault, III, Esq, The Bedell Building, 101 East Adams Street, Jacksonville, Fl. 32202, John H. Pelzer, Esq., P.O. Box 1900, Ft. Lauderdale, Fl. 33302 and by email to Robert C. Widman, Esq, 245 N Tamiami Trail, Suite E, Venice, Fl. 34285. The brief was sent by email to e-files@flcourts.org.

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