IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE BIONETICS CORPORATION,
a Virginia Corporation
and
BIONETICS PHOTO SERVICES LLC
a Florida Corporation

Petitioner,

vs.

JUDITH DEITZ, WILLIAM MOORE d/b/a/ TECHNIARTS ENGINEERING,
PHOTOSUPPORT, INC.
a Florida Corporation,
and
FRANK W. KENNIASTY, ESQUIRE

Respondents.

CASE NO.: SC09-1243
L.T. NO.: D07-3625 and 5D07-3646 (consolidated)

Respondent Kenniasty's Answer Brief on the Merits

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STATEMENT OF THE CASE

The issue before this Court is whether the July 1, 2002 amendment to F.S. § 57.105 applies to a motion for attorney's fees filed on March 28, 2003 – nine months after the amended statute took effect – when the underlying lawsuit was filed before July 1, 2002.

STATEMENT OF THE FACTS

Respondent, as the attorney in the instant case, filed Case No. 05-2001-CA-008868 on August 21, 2001 (R. 348-357) alleging negligent sequestration, malicious prosecution, misappropriation of trade secrets, and tortious interference with business relations after his clients prevailed in Case No. 99-15748-CA-D ("Previous Case"). The Previous Case was a dispute regarding ownership of motion picture processing equipment originally valued at over $1M, and the trial court found Respondent's clients were the proper owners of the equipment.

Petitioner filed a motion to dismiss, without requesting attorney's fees, on October 24, 2001 (R. 358-359). The trial court partially granted Petitioner's motion to dismiss with leave to amend (R. 561-562). Respondent then filed a series of amended complaints ending with the Fifth Amended Complaint which added a party (R. 546-556, 920-1055, 1519-1528, 1628-1640, 1958-1970). Petitioner filed motions to dismiss directed at every amended complaint and every count even though some of the counts had been previously sustained (R. 563-566,

1151-1155, 1619-1621, 1658-1660). Petitioner failed to request attorney's fees in all of its motions to dismiss (Id.). However, Petitioner sent a letter to Respondent on April 5, 2002 suggesting Petitioner would seek sanctions under § 57.105 directed solely at the claims of misappropriation of trade secrets and tortious interference with business relations (R. Exhibit - Defendant #5, 9/7/07).

On July 1, 2002, F.S. § 57.105(4) was amended adding the 21-day safe harbor provision. Also at that time, the three allegedly frivolous claims at issue in this case were pending: tortious interference with business relations, violation of the Procurement Integrity Act, and invasion of privacy (R. 920-1055). On March 28, 2003, or almost nine months later, Petitioner filed a motion for attorney's fees under § 57.105, without proper notice, after the three claims at issue had been dismissed or voluntarily withdrawn (R. 1675-1679). Petitioner's motion for attorney's fees also incorrectly alleged Respondent had filed the count of "tortuous [sic] interference with contractual relations" when Respondent had actually filed the count of tortious interference with business relations (Id. at ¶¶ 1c, 1e, 1f, 1g, 1h, 1k, and 2d).

On August 24, 2004 after a bench trial, the trial court entered a final judgment in favor of Petitioner on all remaining counts after considering the evidence; however, it found Petitioner's conduct was "reprehensible" and

"unethical" (R. 2379-2383). The trial court's final judgment also reserved jurisdiction for any applicable attorney's fees (Id. at ¶ 4).

On September 12, 2005, the trial court awarded entitlement to attorney's fees to Petitioner for three counts: "tortuous [sic] interference with [a] contract", invasion of privacy, and violation of the Procurement Integrity Act (R. 2601-2603 at ¶¶ 3-5). However, the trial court reserved ruling on the issue of whether Kenniasty would be held liable (Id. at ¶¶ 2, 9). The trial court also did not provide specific findings of facts in its order which supported the conclusion Kenniasty knew or should have known there were no material facts to support the claims (R. 2601-2603).

After a series of hearings on the amount of attorney's fees, Judge Barlow died before entering a final order (R. 94-347). Judge Wohn, as the successor trial court judge, granted attorney's fees and costs of $39,025.78 against Kenniasty. Kenniasty timely appealed the trial court's decision on numerous grounds, among which was Petitioner's failure to comply with F.S. § 57.105(4). The Fifth District reversed the trial court's decision finding the trial court erred in awarding § 57.105 fees because Bionetics failed to provide notice under the safe harbor provision of the statute. Petitioner timely filed a notice to invoke discretionary jurisdiction based on a direct conflict of another District Court of Appeal, and requested review of the case which this Court granted.

SUMMARY OF THE ARGUMENT

The Fifth District's decision is correct because it is a prospective application of the law regarding F.S. § 57.105 et seq. as amended on July 1, 2002. Both the Fourth and Fifth Districts have correctly found that § 57.105(4) applies to a motion for attorney's fees filed after July 1, 2002, even if the underlying lawsuit was filed before July 1, 2002, because the underlying judgment had not become final and the right to attorney's fees under § 57.105(1) had not yet accrued. The First District's apparent finding that accrual of the right to attorney's fees under § 57.105(1) occurs when the underlying lawsuit is filed is not supported by Florida or Federal law. The Fifth District's finding, on the other hand, is correct because it is consistent with Rule 1.525, this Court's precedent, Federal law as applied to the Rule 11 safe harbor provision, and with the principals of retroactivity as espoused by the U.S. Supreme Court. Finally, the Fifth Court's decision is correct because the claims were not frivolous, and there were no findings of fact to support the trial court's sanctions under § 57.105(1).

ARGUMENT

I. THE FIFTH DISTRICT COURT'S DECISION IS CORRECT BECAUSE IT IS A PROSPECTIVE APPLICATION OF THE LAW.

The Fifth District's finding in the instant case is a prospective application of the 2002 amendment to F.S. § 57.105, which added a 21-day notice provision under subsection (4), and therefore was correctly decided. F.S. § 57.105(4) provides:

> A motion by a Party seeking sanctions under this section must be served but may not be filed with or presented to the Court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. F.S. § 57.105(4) (2002).

The 4th DCA has also held that § 57.105(4), known as the "safe harbor provision," should be applied prospectively. Hampton v. Cale, 964 So.2d 822 (Fla. 4th DCA 2007). In Hampton, the court found that a demand for attorney's fees was not subject to § 57.105(4) because a contrary finding would equate to applying the statute retroactively. Id. However, the court also noted that it applied the safe harbor provision in Maxwell because the motion for attorney's fees was filed after the effective date of the change adding § 57.105(4), even though the offending claims were filed before the effective date of the amended statute. Id.; Maxwell v. Euro Concepts, 874 So.2d 709, 710 (Fla. 4th DCA 2004).

The Walker court, on the other hand, did not apply the amended statute when appellee's motion was filed after July 1, 2002 because the lawsuit was filed on June 11, 2002, or less than one month before the safe harbor provision under § 57.105(4) was enacted. Walker v. Cash Register Auto, 946 So. 2d 66 (Fla. 1st DCA 2006) *rev'd*, 959 So.2d 718 (Fla. 2007). Thus, the Walker court's reasoning in not considering appellee's compliance with § 57.105(4) appears to be based on the date the underlying lawsuit was filed, not the date the when the underlying judgment became final.

The Walker court's application of § 57.105(4) is flawed for two reasons. First, accrual of a claim under § 57.105(1) does not occur when the underlying lawsuit is filed, but when the underlying judgment becomes final. Secondly, a statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. These two points are discussed further herein.

A. Accrual of a claim under § 57.105(1) does not occur when a lawsuit is filed, but when the underlying judgment becomes final.

Petitioner argues that its right to attorney's fees under § 57.105(1) vested or accrued when the lawsuit was originally filed in August 2001, and thus the 2002 amendment to the statute does not apply. Petitioner's reasoning is contrary to Florida law as provided in Fla. R. Civ. P. 1.525 which states:

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. Fla. R. Civ. P. 1.525 (2001).

The current version of this rule is identical to the 2001 version when it was originally adopted. See Barco v. School Board of Pinellas County, 975 So. 2d 1116, 1119 (Fla. 2008). Rule 1.525 was adopted to establish a specific time standard for motions for attorney's fees and costs, thereby resolving the previous "reasonable time" standard. Id. In essence, Rule 1.525 is a statute of limitations for an attorney's fee claim ancillary to litigation. See Medical Jet v. Signature Flight Support, 941 So.2d 576 (Fla. 4th DCA 2006) (where the court held that a cause of action for statute of limitations purposes accrues when the last element of the cause of action occurs). Based on this rule, a claim for attorney's fees under § 57.105 cannot accrue until the filing of a judgment, including a judgment of dismissal, or the service of voluntary dismissal. The Walker court's finding that a claim for attorney's fees under § 57.105 accrues when the lawsuit is filed is in direct conflict with Rule 1.525, and therefore should be rejected.

A statute of limitations and accrual for an attorney's fee claim must be consistent as this Court has recognized. See Larson & Larson, P.A. v. TSE Industries, Inc., No. SC08-428 (Fla. Nov. 5, 2009). In Larson & Larson, this Court addressed the issue of when a two-year statute of limitations accrues on a claim for attorney's fees sought in a legal malpractice claim. Id. at 2. This Court approved

the Fourth District's bi-furcated approach finding the limitations period on a legal malpractice claim began to run on the underlying judgment when the judgment was final, but did not begin to run with respect to a subsequent sanctions judgment until the sanctions judgment became final.[1] Id. This Court noted that F.S. § 95.031(1) (2002) provides '[a] cause of action accrues when the last element constituting the cause of action occurs.' Id. at 5. This Court further reasoned:

> Sanctions such as attorney fees are collateral to the underlying judgment and do not prevent judgment in the underlying action from becoming final. However, being "collateral" does not mean they are subsumed by the underlying judgment. A judgment imposing such sanctions is appealable independently of the final judgment in the underlying action. See Janelli v. Pagano, 492 So. 2d 796, 796-97 (Fla. 2d DCA 1986) ("A subsequent attorney's fee order judgment is a final order appealable as such apart from the final judgment."); see also Oregon Natural Desert Ass'n v. Locke, 572 F.3d 610, 614 (9th Cir. 2009) ("An award of attorney fees raises legal issues collateral to and separately appealable from the decision on the merits." (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988))). Thus, as the Fourth District concluded, the finality of a determination regarding a claim for sanctions may occur independently of the finality of the underlying judgment. And a determination adverse to the client in the sanctions litigation does not ineluctably flow from an adverse determination in the underlying litigation. Id. at 23.

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[1] The sanctions claim in Larson & Larson arose under a federal patent statute (35 U.S.C. § 285 (2006)), whereas the sanctions claim in the present case arose under § 57.105. However, this Court's reasoning in Larson & Larson regarding accrual is applicable to both sanction statutes because both are applied when there is frivolous conduct or otherwise bad faith litigation. See Epcon Gas Sys., Inc. v. Bauer Compressors, Inc., 279 F.3d 1022, 1034 (Fed Cir. 2002).

Therefore, a sanctions claim for attorney's fees under § 57.105 does not accrue until the underlying judgment is final.

In Williams v. Cadlerock, 14 So. 3d 292 (Fla. 4th DCA 2009), the Fourth District addressed the issue of when a claim for attorneys fees accrues in either the trial court or appellate court. The court held that its decision to deny sanctions under § 57.105 for a prior appeal had no bearing on whether the trial court may impose sanctions for persisting in trying to enforce an invalid judgment. Id. at 294. The court reasoned that "the plain text of § 57.105(1) requires that a party must be the prevailing party in order to seek such sanctions." Id. at 295. The court concluded that until the trial court ruled on the merits, "any claim for fees under § 57.105(1) had not yet accrued and would have been premature." Id. Consequently, a claim for attorney's fees under § 57.105(1) cannot accrue until the underlying judgment is final and a prevailing party is determined.

Turning to the present case, the relevant cause of action at issue is a claim for attorney's fees under § 57.105(1). Florida Statutes § 57.105(1) (2002), provides in pertinent part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on an claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or
(b) Would not be supported by the application of then-existing law to those material facts. F.S. § 57.105(1) (2002).

This statute is directed at claims or defenses presented to a court which are frivolous. A frivolous claim has the following elements under the plain language of the statute: 1) the claim is disposed of and a prevailing party is determined, and 2) the court determines whether the losing party knew or should have known the claim was without material facts or not supported by then-existing law. Under the first element, a claim for attorney's fees cannot possibly accrue until a prevailing party is determined. Therefore, this Court's reasoning in Larson & Larson is consistent with Williams and Rule 1.525 to the extent that a claim for attorney's fees under § 57.105 cannot accrue until there is an underlying judgment, including a judgment of dismissal, or notice of voluntary dismissal.[2]

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[2] The Court should note there may be a conflict with Rule 1.525 and its finding in Larson & Larson that there are two accrual dates for the purposes of a sanctions claim, but this issue probably does not need to be decided here. If the sanctions claim does not accrue until the sanctions judgment is final, this would appear to conflict with Rule 1.525. However, the result would be the same in the present case no matter which standard was applied. Here, the three allegedly frivolous claims were pending in the underlying suit and had not been disposed of as of July 1, 2002. Therefore, Petitioner's claim for attorney's fees under § 57.105 was speculative at best when the safe harbor provision was enacted, and clearly had not accrued under either standard. Furthermore, there was no legitimate reason why Petitioner could not have provided notice to Respondent under § 57.105(4) in an attempt to dispense with the allegedly frivolous claims.

Petitioner cites several cases supporting its flawed reasoning that accrual occurred under § 57.105 when the lawsuit was originally filed. However, all of these cases are distinguishable, decided before Rule 1.525 was enacted, and support the proposition that accrual under § 57.105 does not occur when the lawsuit is filed. In Young v. Altman, 472 So.2d 1152 (Fla. 1985), this Court held that the assessment of attorneys fees under § 768.56, Fla. Stat., which authorized the trial court to award prevailing party attorneys fees in a medical malpractice action, could not be retroactively applied to a cause of action that vested prior to the date the statute became effective. Section 768.56 provides in relevant part:

> (1) Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization; however, attorney's fees shall not be awarded against a party who is insolvent or poverty-stricken. . . F.S. § 768.56 (1980).

This statute differs from § 57.105 because it is directed at damages or injury caused from medical malpractice, not at a sanctions claim arising from a frivolous lawsuit. Since the injury occurred in Young prior to the change in the statute, the right to attorney's fees had vested and the statute could not be applied retroactively. Therefore, accrual of the right to attorney's fees occurs under F.S. § 768.56 when the medical injury, loss, or death occurs, not when the lawsuit is filed.

Petitioner asserts an alleged conflict in L. Ross, Inc. v. R.W. Roberts Construction Co., 481 So.2d 484 (Fla. 1986), but this case also can be distinguished. In Ross, this Court held that Section 627.428 (formerly section 627.0127), Florida Statutes (1983), was substantive and could not be applied retroactively. Section 627.756 (formerly 627.0905), Florida Statutes (1983), extended the application of section 627.428 to actions in which owners, laborers, materialmen and subcontractors recover judgments against sureties in actions on payment bonds. Id. Section 627.756 originally contained a qualifying provision limiting attorney's fees to not more than twelve and one-half percent of the judgment recovered. Id. By statutory amendment effective October 1, 1982, this limitation on the amount of attorney's fees was repealed. Id. Appellant, a subcontractor, had an action pending against appellee Transamerica Insurance Company on a payment bond when the twelve and a half percent limitation was repealed. Id. Section 627.428 provides in relevant part:

> 1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. F.S. § 627.428(1) (2006).

This Court approved the Fifth District's decision in Ross which held "the right to recover attorney's fees ancillary to another particular underlying cause of action always accrues at the time the other, underlying cause of action accrues." L. Ross, Inc. v. R.W. Roberts Construction Co., 466 So.2d 1096 (Fla. 5th DCA 1985). The Fifth District further held accrual of the underlying action occurred when "the essential facts occurred and were sealed beyond change by the surety…" Id. at 1099. In Ross, the underlying facts had been "sealed beyond change" with respect to the construction work giving rise to action on the surety bond; however, the action on the bond was pending when the statute was changed. Id. Thus, the Fifth District correctly held the statute could not be applied retroactively based on the accrual date of the underlying cause of action, not on the filing date of the lawsuit.

In Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1998), this Court resolved a conflict between three District Court decisions as to the retroactive application of 733.6171, Fla. Stat., to a pending estate, where the statute increased the amount of attorneys fees that an attorney representing a personal representative could recover from the estate, by also allowing recovery for the attorney's time spent in litigating his fees. This Court held "substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues." Id. at 363. This Court analyzed the statute and determined that the attorney had a right to attorney's fees commencing upon initiation of

representation of the estate. Section 733.617(1), Florida Statutes (1991), entitled "Compensation of personal representatives and professionals," stated in relevant part:

> Personal representatives, attorneys, accountants, and appraisers and other agents employed by the personal representative shall be entitled to reasonable compensation. Reasonable compensation may include compensation for the services of the agents or employees of the person seeking compensation and may also include reimbursement of out-of-pocket costs. F.S. § 733.617(1) (1991).

Therefore, commencement of legal representation was the accrual and vesting of the right to attorney's fees, not the filing date of a lawsuit. Like Young and Ross, the action in Bitterman was not a sanctions claim ancillary to an underlying claim. Accordingly, an attorney or personal representative has an automatic right to attorney's fees from the onset of representation under F.S. § 733.617(1).

The essential rule which can be derived from the five aforementioned cases and Rule 1.525 is: a party has a right to attorney's fees when the underlying action accrues, except in the case of a sanctions claim which accrues when either the underlying judgment or the sanctions judgment becomes final. In the specific case of a § 57.105 sanctions claim, accrual occurs when the underlying judgment becomes final. As this Court has noted, a sanctions claim is different than an injury claim or a representation fee claim because until the sanctions judgment is final, the claim is "hypothetical" and "speculative." Larson & Larson, No. SC-08-428 at 10. Applying this rule in the present case, the right to attorney's fees had

not yet accrued when the amendment to § 57.105 became effective on July 1, 2002 because the underlying judgment had not become final. At that time, all three allegedly frivolous claims were still pending and no prevailing party had been determined. Therefore, Petitioner was bound to comply with the safe harbor provision of § 57.105(4).

Petitioner's argument that its right to attorney's fees accrued when the lawsuit was originally filed leads to the conclusion it had an automatic right to sanctions before there was a judicial determination on the merits of the case. This argument is fundamentally flawed, and not supported by Larson & Larson or the plain language of the § 57.105(1). If the Court were to adopt such a rule, litigants would be required to automatically assume all lawsuits are frivolous when filed. As this Court explained regarding a malpractice claim, "It requires a willing suspension of disbelief to conclude that there is no 'redressable harm' in such circumstances [before a judgment becomes final]." Id. at 8. This reasoning also applies to a sanctions claim under § 57.105(1) because a sanctions claim is an extraordinary remedy. Until a prevailing party is determined, litigants should assume a lawsuit is filed in good faith. After the underlying judgment is final, a prevailing litigant then accrues the potential right to sanctions, and could later be awarded sanctions if a court determines the losing party knew or should have known there were no material facts to support the claim.

B. A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.

The U.S. Supreme Court has held a statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Landgraf v. USI Film Products, 511 U.S. 244 (1994). Furthermore, the U.S. Supreme Court held that continuing conduct – i.e., conduct both preceding and subsequent to the enactment of a newly amended statute -- was subject to the amended statute and was not a retroactive application of law. Vargas v. Gonzales, 548 U.S. 30 (2006).

In Vargas, Humberto Fernandez-Vargas, a Mexican citizen, illegally re-entered the United States in 1982. Id. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) to enlarge the class of illegal reentrants whose orders may be reinstated and limit the possible relief from a removal order available to them. Id. After Vargas filed an application to adjust his status to that of a lawful permanent resident, the Government began proceedings to reinstate his 1981 deportation order, and deported him. Id. Vargas sought review of the reinstatement order, claiming that, because he illegally reentered the county before IIRIRA's effective date, this statute did not bar his application for adjustment of status, and that the statute would be impermissibly retroactive if it did bar his

adjustment application. Id. The court held that the statute barred his application and followed Landgraf v. USI Film Products, 511 U. S. 244, in determining that the new law had no impermissibly retroactive effect in his case. Id.

In the instant case, the Fifth District correctly applied the principals of retroactivity as espoused by the U.S. Supreme Court when it found § 57.105(4) did not apply retroactively to a motion for attorney's fees filed after July 1, 2002, when the alleged frivolous conduct continued before and after the statute's enactment. The three allegedly frivolous claims were continuing conduct much like the continuing conduct in Vargas where an illegal immigrant continued to reside in the United States when the immigration statute changed. Even though the claims in the instant case were filed before the safe harbor provision was enacted, the claims were continued after enactment, and Petitioner had an opportunity to provide notice. Therefore, there was no retroactive application of the law in the instant case because the amended statute was applied to prospective, continuing conduct which had not yet accrued. The First District, on the other hand, appears to have ignored these principals of retroactivity with its decision in Walker.

The Court should note that Petitioner has filed another claim with this Court for sanctions under § 57.105 on February 9, 2010, and also failed to comply with the safe harbor provision even though the statute has been if effect nearly eight years. Petitioner is apparently assuming that because the original lawsuit was filed

in August 2001, any subsequent claim for attorney's fees has vested, thereby rendering notice under § 57.105(4) unnecessary. Petitioner's position is completely without merit. It is well established law that an appellate court only has authority to impose sanctions under § 57.105 for conduct occurring in the appellate court. Boca Burger, Inc. v. Forum, 912 So.2d 562 (Fla. 2005). Therefore, this Court can only impose sanctions for conduct occurring before the Court, which in this case commenced when Petitioner filed its notice to invoke discretionary jurisdiction on July 9, 2009. Given any and all conduct before this Court obviously occurred after July 1, 2002, the safe harbor provision of § 57.105(4) clearly must apply.

If the Court were to adapt Petitioner's position, the result would be untenable. As the U.S. Supreme Court has stated, "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rule, the whole body of law would be ossified forever." Landgraf, 511 U.S. 244 at n. 25. Petitioner is effectively asking the Court to "ossify" the law by applying an outdated law to present conduct so that Petitioner may potentially seek a claim for sanctions under§ 57.105(1). Petitioner's claim for attorney's fees should be summarily denied, and Respondent respectfully requests the Court sanction Petitioner under § 57.105(1) for its clearly untenable claim.

II. THE FIFTH DISTRICT COURT'S HOLDING REGARDING § 57.105(4) IS CONSISTENT WITH FEDERAL LAW.

F.S. § 57.105(4) took effect on July 1, 2002, and was borrowed from the Federal Rule 11 safe harbor provision. Mullins v. Kennelly, 847 So.2d 1151, 1154 (Fla. 5th DCA 2003). Federal courts have addressed Rule 11 as applied to a motion for attorney's fees and found that service of notice was required before filing a motion for attorney's fees after the 1993 amendment to Rule 11 (which added a safe harbor provision), even if the underlying lawsuit was filed before the date of the amended statute. Ridder v. City of Springfield, 109 F.3d 288 (U.S. 6th Cir. 1997); Weinreich v. Sandhaus, 156 F.R.D. 60 (S.D. N.Y. 1994); Relo Insurance v. Salisbury, 1994 U.S. Dist. LEXIS 6309; Anderson v. Cooper, 1994 U.S. Dist LEXIS 1434; Agretti v. ANR Freight, 1994 U.S. Dist. LEXIS 1433.

In Ridder, plaintiff Ridder filed a complaint against the city of Springfield on January 4, 1990 alleging several causes of action stemming from an arrest. The magistrate judge noted several deficiencies in the complaint and allowed Ridder to file an amended complaint on October 1, 1990. Ridder, 109 F.3d 288. After most of the claims were dismissed, Ridder filed a second amended complaint on May 11, 1992. Id. The magistrate judge decided *sua sponte* that the filing of the second amended complaint was vexatious and unreasonable, but allowed Ridder leave to amend to file a third amended complaint which Ridder filed on August 17, 1993. Id. The parties proceeded with discovery on the basis of the third amended

complaint, and the city moved for summary judgment. Id. Rule 11 was amended on December 1, 1993 which added a 21-day notice "safe harbor" provision. Id.

After dismissing all claims against the city, the magistrate judge entered judgment in favor of the city of Springfield. Id. The city of Springfield then filed a Rule 11 motion for attorney's fees on March 28, 1995 which was granted, and Ridder's counsel was ordered to pay the city of Springfield $32,546.02 pursuant to Rule 11 and 28 U.S.C. § 1927. Id. The city of Springfield acknowledged that it had not served the 21-day "safe harbor" notice under Rule 11 on Ridder before filing the Rule 11 motion. Id. However, the magistrate judge ruled that the city's failure to comport with Rule 11's "safe harbor" provision was essentially harmless. Id.

The Sixth U.S. Circuit Court vacated the magistrate judge's ruling regarding Rule 11 sanctions finding the city of Springfield failed to afford counsel the required 21-day notice mandated in the 1993 revised rule. Id. The Circuit Court reasoned that strict adherence to rule was required, and that a party seeking sanctions must provide the opposing party sufficient opportunity to withdraw the claims or cure the offense. Id.

In the present case, Petitioner similarly failed to strictly comply with the 21-day notice under 57.105(4), even though the lawsuit was originally filed before the safe-harbor amendment was added. This fact pattern is essentially the same as

Ridder, and the findings are consistent. Therefore, the Fifth District's decision is consistent with Federal law regarding the safe harbor provision for sanctions under Rule 11, and should be affirmed.

In Weinreich v. Sandhaus, 156 F.R.D. 60 (S.D. N.Y. 1994), the court similarly denied plaintiff's motion for Rule 11 sanctions finding it was untimely. The case in Weinreich was tried from January 5 to January 18, 1994, and plaintiff moved for Rule 11 sanctions after the trial. Id. The case had been pending for more that eleven years prior to trial. Id. In denying plaintiff's motion for sanctions, the court reasoned sanctions should be imposed with caution, and that the rule was not a fee-shifting mechanism. Id. The court further reasoned that the majority of the sanctionable conduct occurred three to six years prior to the motion, and was therefore untimely on alternative grounds. Id.

In the present case, Petitioner failed to strictly comply with 57.105(4) despite having sufficient opportunity to do so. Petitioner's motion for attorney's fees was filed on March 28, 2003, or more than 19 months after the allegedly frivolous claims first appeared in Respondent's initial complaint. Furthermore, the March 28, 2003 motion for attorney's fees was not filed until nearly nine months

after the amended statute had been in effect on July 1, 2002. Therefore, Petitioner's motion was also untimely on alternate grounds.[3]

III. WALKER IS DISTINGUISHABLE FROM THE INSTANT CASE.

Walker is clearly distinguishable from the instant case, and that distinction may have adversely affected the First District's analysis and application of § 57.105(4). The appellant in Walker had the opportunity to present evidence at trial, and the trial court found the case was "unreasonable," "without foundation," and "absurd." Walker v. Cash Register Auto, 946 So. 2d 66 (Fla. 1st DCA 2006). Perhaps the First District was swayed by the trial court's clear and detailed finding that appellant's case lacked any merit, and thus overlooked appellee's failure to strictly comply with § 57.105(4).

In the instant case, however, Respondents never had the opportunity to present any evidence as all three allegedly frivolous claims were dismissed before trial in the pleading stage. More importantly, the trial court failed to make any findings of facts regarding the dismissed claims, and inappropriately dismissed the tortious interference with business relations claim according to the Fifth District.

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[3]Respondent argued in its Fifth District appellate briefs that Petitioner's motion for attorney's fees was untimely due to Petitioner's failure to comply with Fla. R. Civ. P. 1.525; and further, that the motion was untimely even if the rule did not apply. Because it reversed on other points, the Fifth District did not address these arguments which are still relevant, but will not be repeated in this brief.

Consequently, it appears the First District's flawed application of § 57.105(4) in Walker may have been caused by its rejection of a clearly frivolous case that went to trial. Conversely, there is no evidence in the Record that the three claims at issue in the instant case were frivolous. Accordingly, this Court should reject Walker and affirm the Fifth District's findings in the instant case.

IV. THE ISSUE OF AWARDING ATTORNEY'S FEES IS MOOT.

Petitioner initially conceded the issue of attorney's fees was moot with respect to the tortious interference with business relations claim because the Fifth District found the claim was not frivolous. However, Petitioner now re-argues the issue of attorney's fees is not moot with respect to all three claims. Clearly the issue of awarding attorney's fees is moot with respect to the tortious interference with business relations claim because the Fifth District found it was a valid claim. As to the other two claims, however, the Fifth District reversed the trial court's award of attorney's fees and noted the trial court failed to make any findings in its order citing Daniels v. Reeves, 712 So.2d 839, 840 (Fla. 1st DCA 1998). More importantly, the trial court erred by failing to make a factual inquiry into what Kenniasty knew or should have known when imposing sanctions under § 57.105 (R. 2975-2997). Hustad v. Architectural Studios, 958 So.2d 569 (Fla. 4th DCA 2007) (where the court reasoned a trial court must make a factual inquiry into what the losing party knew or should have known when considering sanctions under §

57.105). In sum, there is no evidence in the Record to support the trial court's order under § 57.105; therefore, the issue of an attorney's fee is moot for all three claims. Accordingly, this Court should affirm the Fifth District Court's decision.

V. PETITIONER IS ATTEMPTING TO RE-LITIGATE A MATTER WHICH IT PREVIOUSLY CONCEDED.

Petitioner argues in its jurisdictional brief:

> The Fifth District's decision that the tortious interference count was not frivolous does not make moot, and is irrelevant to, the court's retroactive application of the safe harbor amendment to Deitz and Moore's other frivolous counts for which the trial court awarded attorney's fees. A direct and express conflict with the above-cited cases still exists as to those counts (Petitioner Initial Jurisdiction Brief at 9-10).

Petitioner's statement can only be reasonably interpreted as a concession that the Fifth District's decision regarding the tortious interference with business relations claim was correct. Furthermore, Petitioner failed to address the issue of whether the Fifth District's decision was correct regarding the tortious interference with business relations claim in its jurisdictional brief, and has not cited any conflicting decisions with the instant case which would invoke the jurisdiction of this Court. Consequently, Respondent respectfully requests the Court ignore Petitioner's second point re-arguing the tortious interference with business relations claim as the Court lacks jurisdiction on the issue.

CONCLUSION

The Fifth District's decision is correct because it is a prospective application of the law regarding F.S. § 57.105. Both the Fourth and Fifth Districts have correctly found that § 57.105(4) applies to a motion for attorney's fees filed after July 1, 2002 because accrual of a claim under § 57.105(1) does not occur until the underlying judgment is final. The Fifth District's reasoning is consistent with Rule 1.525, the precedent of this Court, Federal law, and with the principals of retroactivity as espoused by the U.S. Supreme Court. Furthermore, the Fifth District's reasoning is correct because the claims were not frivolous, and there were no findings of fact to support the trial court's sanctions under § 57.105.

Ultimately this Court must answer the question whether the strict notice requirement under § 57.105(4) applies in the instant case. The Court should answer this question in the affirmative because Petitioner had ample opportunity to comply with any prospective motion for attorney's fees filed after July 1, 2002, but failed to do so. A contrary finding would eschew the basic notions of fairness and notice under the U.S. Constitution, and would essentially turn § 57.105 into an attorney's fee shifting mechanism – a purpose clearly contrary to legislative intent. Finally, further litigation in the instant case would be futile as the claims at issue were not frivolous. Respondent therefore respectfully requests this Court affirm the Fifth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joe Caruso, Esq., 190 Fortenberry Rd., Suite 107, Post Office Box 541271, Merritt Island, FL 32954 this 27th day of February, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure (2010).

_____

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