IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC09-1243
L.T. NO.: 5D07-3625 & 5D07-3646

THE BIONETICS CORPORATION,

Petitioner,

-vs-

FRANK W. KENNIASTY, JUDITH DEITZ
and WILLIAM MOORE, etc., et al.,

Respondents.
____________________________________/

SECOND AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

On Appeal from the Fifth District Court of Appeal of the State of Florida

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PREFACE

Review of this case has been accepted by the Court to resolve a conflict between the Fifth District's decision and decisions of this Court and other District Courts. The Fifth District held that Florida Statute §57.105's 21-day safe harbor amendment, which became effective July 1, 2002, is applicable to a cause of action that accrued prior to that date, so long as the motion for §57.105 attorneys fees was filed after that date. The Fifth District's decision is erroneous because the case law of this State provides that a statutory right to attorneys fees, and the corresponding obligation to pay such fees, is substantive; and that an amendment thereto cannot be applied retroactively to a cause of action that accrued prior thereto, or to rights and obligations as to attorneys fees that vested prior thereto.

STATEMENT OF THE CASE AND FACTS

I. Timeline of Events Relevant to Determining Whether The 21-Day Safe Harbor Amendment to §57.105, *Fla. Stat.*, Which Was Effective July 1, 2002, Can Be Retroactively Applied to This Case

August 21, 2001: Deitz and Moore, d/b/a Techniarts Engineering ("Techniarts") with Kenniasty as counsel, filed a four-count Complaint against the Bionetics Corp. ("Bionetics") (R2:348-357). Judge Allawas granted Bionetics' Motion to Dismiss in part by dismissing Techniarts' Count III for misappropriation of trade secrets and Count IV for tortious interference with business relations with leave to

amend; deferring ruling as to Count II for negligent sequestration, and denying dismissal of Count I for malicious prosecution (R2:358-59;R21:p.58).

February 13, 2002: Techniarts filed a First Amended Complaint alleging the same four counts (R3:546-567). Judge Bruce Jacobus granted Bionetics' Motion to Dismiss Count II for negligent sequestration with prejudice, and dismissed the other three counts with leave to amend (R4:563-66;R5:918-19).

April 10, 2002: Techniarts filed a Second Amended Complaint, totaling 35 pages, with 17 attachments, again amending its Count I for malicious prosecution, Count II for misappropriation of trade secrets, and Count III for tortious interference with business relations, plus it added three new counts: invasion of privacy in Count IV, trespass to property in Count V, and violation of the Procurement Integrity Act in Count VI (R6:920-1055). Judge T. Mitchell Barlow granted Bionetics' Motion to Dismiss with prejudice Count VI for violation of the Procurement Integrity Act, and dismissed the five other counts with leave to amend (R7:1151-55;R8:1324-29).

July 1, 2002: Subsection (4), known as the "safe harbor" provision, was added to §57.105, Fla. Stat., a statute imposing attorneys fees as sanctions for raising a claim or defense that the losing party knew or should have known was not supported by the material facts or the then-existing law. The safe harbor amendment gave the losing party a 21-day safe period within which to withdraw or correct his or her claim or

defense so as to avoid attorneys fees as sanctions. The safe harbor amendment, which took effect July 1, 2002, provided:

> 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.

September 17, 2002: Techniarts filed a Third Amended Complaint alleging malicious prosecution in Count I, misappropriation of trade secrets in Count II, and tortious interference with business relations in Count III (R9:1519-28). Judge Barlow denied Bionetics' Motion to Dismiss Count I for malicious prosecution count, but dismissed the other two counts with leave to amend (R10:1619-21,1626-27).

November 12, 2002: Techniarts filed a Fourth Amended Complaint, alleging malicious prosecution in Count I, misappropriation of trade secrets in Count II, and defamation in Count III (R10:1643-55). Judge Barlow denied Bionetics' Motion to Dismiss the misappropriation of trade secrets count, and granted dismissal of the defamation count with leave to amend (R10:1658-60,1663).

March 28, 2003: Bionetics filed a Motion for Attorneys Fees pursuant to §57.105, Fla. Stat. (R10:1675-79). The court deferred consideration and ruling on the motion until the conclusion of the case (R10:1726).

June 16, 2004: Techniarts filed a Fifth Amended Complaint for malicious prosecution, misappropriation of trade secrets, and negligent sequestration (R12:1958-70).

June 21, 2004: Bionetics filed an Answer to the Fifth Amended Complaint, and raised numerous affirmative defenses (R12:1973-80).

July 12-15, 2004: Judge Barlow held a non-jury trial on Techniarts' counts against Bionetics for malicious prosecution in filing the prior lawsuit contesting ownership of the film equipment, negligent sequestration of the film equipment, and misappropriation of trade secrets (the film equipment and/or its use in certain combinations) (R2379). At the conclusion of the trial, Judge Barlow granted Bionetics' Motion for Involuntary Dismissal (essentially a directed verdict), dismissing each of Techniarts' counts, and its case with prejudice (R15:2379-82).

July 21, 2004: Bionetics filed a second Motion for Attorneys Fees, "for which the court previously reserved ruling," *i.e.*, §57.105 attorneys fees (R15:2375-76).

August 24, 2004: Judge Barlow entered his written Final Judgment in favor of Bionetics as a result of the non-jury trial (R15:2379-83). In regard to the malicious prosecution count, Judge Barlow found that there had been a bona fide dispute between the parties as to the film equipment 's ownership, and therefore Bionetics had probable cause for filing the prior lawsuit (R15:2380). As to the negligent sequestration count, Judge Barlow found that even if Bionetics was negligent in its sequestration of the film

equipment, “there was no loss sustained which could be proximately caused” thereby (R15:2380). As to the count for misappropriation of trade secrets, Judge Barlow found that neither the film equipment, nor its use in certain combinations, constituted trade secrets; that it was readily available on the commercial marketplace; and therefore there was nothing for Bionetics to misappropriate (R15:2381-82). As a result of hearing Techniarts' evidence in that non-jury trial, Judge Barlow became well aware of the across-the-board deficiencies in Techniarts' proof that Bionetics' conduct was the cause of Techniarts' alleged damages. The Final Judgment reserved jurisdiction to consider Bionetics' request for attorneys fees (R15:2382-83).

II. Judge Barlow Determined That Techniarts and Its Counsel, Kenniasty, Were Liable for §57.105 Attorneys Fees on Three Counts

Judge Barlow held a hearing, at which he received the Motion for Attorneys Fees, the supporting affidavits, and heard argument of counsel on October 27, 2004 and August 22, 2005 as to Bionetics' entitlement to §57.105 attorneys fees from Techniarts (R18:2875). Techniarts and Kenniasty did not include a transcript of the August 22, 2005 hearing in the Record-on-Appeal before the Fifth District. As a result of those two hearings, on September 12, 2005, Judge Barlow entered an order finding that Bionetics was entitled to §57.105 attorneys fees with regard to Techniarts' counts for tortious interference and invasion of privacy, because Techniarts and its attorney knew, or should have known, that those claims were not supported by the material

facts necessary to establish the claims (R16:2601-02). Judge Barlow also ruled that Bionetics was entitled to §57.105 fees on Techniarts' count for violation of the Procurement Integrity Act, because Techniarts and its attorney knew or should have known that the claim was not supported by the material facts **and** the then-existing law (R16:2602). The court denied Bionetics' claim for attorneys fees as to Techniarts' trespass and defamation counts (R16:2602-03). Bionetics did not request attorneys fees for the three counts that were the basis of the non-jury trial.

III. Judge Robert Wohn Determined The Reasonable Amount of Error! Bookmark not defined.§57.105 Attorneys Fees to be Awarded Bionetics

On December 19, 2005, February 24, 2006, and July 10, 2006, Judge Barlow received testimony as to the reasonable amount of fees to be awarded Bionetics, and took the issue under advisement (R18:2875). Judge Barlow died before ruling on the amount of attorneys fees to be awarded. The case was subsequently assigned to Judge Robert Wohn, Jr., who held an evidentiary hearing and heard argument on September 7, 2007 as to a reasonable attorneys fee for Bionetics' attorney on Techniarts' tortious interference with business relations, invasion of privacy and violation of the Procurement Integrity Act counts. Judge Wohn determined that a reasonable attorneys fee for Bionetics' counsel for litigating those claims was $44,400, plus an additional $27,600 for litigating the issue of entitlement to attorneys fees (R18:2898). The total attorneys fees awarded Bionetics was $72,000, plus recoverable costs of $6,051.56

(Id.).[1] Judge Wohn entered Final Judgments for one-half those amounts, or $39,025.78, against Techniarts and against their attorney, Kenniasty, respectively (Id.).

IV. The Fifth District Reversed Bionetics' Award of §57.105 Attorneys Fees

The Fifth District reversed the award of attorneys fees to Bionetics, ruling that Bionetics had failed to comply with the 21-day notice provision, also referred to as the "safe harbor" amendment, that was added as Subsection (4) to §57.105, Fla. Stat., by a July 1, 2002 amendment. Kenniasty v. Bionetics Corp., 10 So.3d 1183, 1186 (Fla. 5th DCA 2009). The Court ruled that the safe harbor amendment applied to this case, even though the lawsuit was filed prior to the effective date of that amendment. The Fifth District rejected Bionetics' argument that the "safe harbor" amendment was substantive, and thus could not be applied to a lawsuit filed prior to the amendment's effective date, stating (Id. at 1186):

> Although Deitz and Moore filed suit prior to the effective date of §57.105(4), this safe harbor provision applied because Bionetics filed its motion for attorney's fees on March 28, 2003, well after its July 1, 2002 effective date. Bionetics erroneously contends that the safe harbor provision of §57.105(4) represented a substantive rather than procedural statutory change and therefore could not be applied to this lawsuit.
>
> * * *
>
> ... **the safe harbor provision applies in situations like this case where the lawsuit was filed before July 1, 2002 [the amendment's effective date] but the motion for attorney's fees was not filed until after this date**. (emphasis added)

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[1] / The amount of attorneys fees was not challenged in the Fifth District appeal.

In addition, the Fifth District stated that after examining the tortious interference count pled by Techniarts, the count "does not meet the threshold required for a finding of frivolousness under §57.105" (10 So.3d at 1187).[2] Importantly, the Fifth District did not state that it had come to the same conclusion as to the invasion of privacy and violation of the Procurement Integrity Act counts.

Because of the conflict between the Fifth District's decision and the decisions of this Court and other District Courts, this Court agreed to accept jurisdiction to review that conflict.

SUMMARY OF ARGUMENT

The Fifth District's ruling that the safe harbor amendment to §57.105(4) can be retroactively applied to lawsuits filed before the amendment's effective date, so long as the motion for attorneys fees was filed after the amendment's effective date, ignores the controlling case law of this State. Cases decided by this Court and other District

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[2]/ The Fifth District stated that it was hampered in determining whether §57.105 attorneys fees were permissible for the tortious interference count, because Judge Barlow had made no findings of fact as to that count, and because he had referred to that count as one for "tortious interference with contract," rather than "tortious interference with business relations." However, the Court obviously was not that hampered, because it went on to decide that attorneys fees were not permissible as to that count (10 So.3d at 1187).

Courts have long established that an amendment to an attorneys fee statute which changes the rights and obligations of the parties in regard to recovery of, or payment of, attorneys fees is a substantive change, which cannot be retroactively applied to a lawsuit filed prior to the amendment's effective date. Thus, the controlling date for purposes of applying §57.105(4)'s safe harbor amendment is the date the cause of action accrued, and the date the right to attorneys fees vested, not the date the motion for attorneys fees was filed.

The Fifth District also incorrectly ruled that, as to Techniarts' tortious interference count, Judge Barlow had impermissibly awarded **Error! Bookmark not defined.**§57.105 attorneys fees to Bionetics because Techniarts' allegations were not "frivolous." The Fifth District never even decided whether the basis upon which Judge Barlow decided entitlement, *i.e.*, that Techniarts knew, or should have known, that the tortious interference count was not supported by the material facts, was erroneous. Techniarts did not include the August 22, 2005 transcript of the second day of the entitlement hearing in the Record-on-Appeal before the Fifth District. The existing record demonstrates that Bionetics' conduct did not amount to tortious interference, nor did it cause Techniarts' alleged damages.

ARGUMENT

POINT I

THE FIFTH DISTRICT ERRONEOUSLY RULED THAT THE SAFE HARBOR AMENDMENT TO Error! Bookmark not defined.**§57.105, WHICH BECAME EFFECTIVE JULY 1, 2002, COULD BE RETROACTIVELY APPLIED TO THIS CASE SINCE BIONETICS' MOTION FOR ATTORNEYS FEES WAS FILED AFTER THAT DATE, EVEN THOUGH THE PARTIES' RIGHTS AND OBLIGATIONS AS TO ATTORNEYS FEES ACCRUED PRIOR TO THE AMENDMENT'S EFFECTIVE DATE**

I. Standard of Review

The issue of whether a statutory amendment applies retroactively is a question of law that is reviewed *de novo*. **Error! Bookmark not defined.**Jennings v. Election Com'n, 932 So.2d 609, 612 (Fla. 2nd DCA 2006).

II. The Fifth District's Application of The Safe Harbor Amendment to Deny Counsel for Bionetics' Motion for Error! Bookmark not defined.**§57.105 Attorneys Fees Is Contrary to Controlling Florida Law And Is Unconstitutional**

The effect of applying the safe harbor amendment's 21-day notice provision to Bionetics' Motion for Attorneys Fees was an unconstitutional retroactive application of the amendment so as to deny Bionetics' substantive right to recover attorneys fees, and void Techniarts' substantive obligation to pay attorneys fees, which right and obligation had already vested.

A) It is Well-Established by Decisions of This Court, and Other District Courts, That an Amendment to a Statute That Changes The Rights and Obligations of The Parties in Regard to The Recovery of, or Payment of, Attorneys Fees is a Substantive Change That Cannot be Applied Retroactively

Three cases decided by this Court control the issue in this case:

1) **Young v. Altenhaus**, 472 So.2d 1152 (Fla. 1985), held that the assessment of attorneys fees under **Error! Bookmark not defined.**§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, even though the lawsuit was filed after the effective date of the statute. The Court explained that statutes providing for payment of attorneys fees are substantive, because under the common law each party is required to pay their own attorneys fees unless a right to assess those fees is awarded by a statute or agreement between the parties; and that the reason a statutory right to attorneys fees is substantive is because it imposes a "new obligation or duty" (**Error! Bookmark not defined.**Id. at 1154). In other words, it gives to a party (who did not previously have that right) a legal right to attorneys fees from a party (who did not theretofore have an obligation) to pay those fees (Id.). As to when rights or obligations under an attorneys fee statute vest, the Court held that the controlling moment was when the underlying cause of action accrued. (Id.).

2) **L. Ross, Inc. v. R.W. Roberts Construction Co.**,481 So.2d 484 (Fla. 1986), went one step further by essentially holding that since a statute providing for the payment of attorneys fees is substantive, a statutory amendment that affects the right

and concomitant obligation to pay those fees, is likewise substantive. The Court reviewed the Fifth District's decision in **Error! Bookmark not defined.**L. Ross, Inc. v. R.W. Roberts Construction Co., 466 So.2d 1096 (Fla. 5th DCA 1985), which had held that a statutory amendment repealing a limitation (12½ percent of the judgment recovered) on the amount of attorneys fees recoverable from sureties on a payment bond could not be applied to a cause of action against a surety that pre-existed the amendment, stating (Id. at 1098):

> Substantive rights and obligations created by statutes do not vest and accrue as to particular parties until the accrual of a particular cause of action giving rise to the substantive rights and obligations in a particular instance. Substantive rights and obligations as to the receipt and payment of attorney's fees is somewhat particular because, whether those rights and obligations are viewed as a separate cause of action, or as costs taxed in another, underlying, cause of action, they are ordinarily merely incidental to the other, underlying cause of action and, in a sense, the right to receive, as well as the reciprocal obligation to pay, attorney's fees, is merely ancillary to, and an incident of, the accrual of the underlying cause of action concerning which the right to recover attorney's fees is given. Therefore 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. **This means 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.** (Emphasis added)

This Court affirmed the Fifth District's Ross decision, stating (481 So.2d at 485):

> The right to attorneys fees is a substantive one, as is the burden on the party responsible for paying the fee. A statutory amendment affecting the substantive right and concomitant burden is likewise substantive. (Emphasis added)

This Court rejected the surety's argument in Ross that the repeal of the limitation on the amount of attorneys fees recoverable was remedial, and therefore procedural, rather than substantive, by quoting the following statements from the Fifth District's opinion (Id.):

> This argument [that the amendment is procedural, affecting only the measure of damages for vindication of an existing substantive right] fails to recognize that substantive rights do not exist in an absolute binary world but are relative and are often a matter of degree and that damages always follow the right and that any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages.

3) **Bitterman v. Bitterman**, 714 So.2d 356 (Fla. 1998) resolved a conflict between three District Court decisions as to the retroactive application of **Error! Bookmark not defined.**§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 attorneys time spent in litigating his fees. The Fourth District in Bitterman v. Bitterman, 685 So.2d 861 (Fla. 4th DCA 1996) had ruled that §733.6171could be applied where the estate proceeding, and thus the attorneys fee hearing, were not concluded until **after** the statute's effective date, even though the estate was pending prior to the statute's effective date.

Two conflicting decisions had been rendered by the Fifth District. In Williams College v. Bourne, 656 So.2d 622 (Fla. 5th DCA 1995) ("Williams College II") the estate was pending, and the services rendered in litigating the issue of attorneys fees occurred, **prior to** the enactment of §733.6171. The Fifth District found **Error! Bookmark not defined.**Ross, supra, controlling, because even though Ross involved a different attorneys fee statute, the Fifth District concluded that its logic applied equally to §733.6171, and thus that statute could not be applied retroactively. The Fifth District held that once the services of an attorney for the personal representative were rendered, the estate's obligation to pay attorneys fees was based on the then-applicable law, and could not be increased by a subsequent legislative enactment (656 So.2d. at 623). In Williams College v. Bourne, 670 So.2d 1118 (Fla. 5th DCA 1996) ("Williams College III"), unlike Williams College II, attorneys fees were sought for services rendered in litigating attorneys fees **after** the statute's effective date. Nonetheless, the Fifth District again ruled that the application of §733.6171 would constitute an impermissible retrospective increase in the estate's burden to pay attorneys fees (670 So.2d at 1121).

This Court's Bitterman decision resolved the conflict in the above three District Court decisions discussed, supra, by adopting the reasoning of the Fifth District in Williams College III, which it quoted extensively in its opinion, including the following quotations (714 So.2d. at 363-364):

The ability to collect attorney's fees from an opposing party, as well as the obligation to pay such fees, is substantive in nature. *L. Ross, Inc. v. R. W. Roberts Constr. Co.*, 466 So.2d 1096, 1098 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla. 1986). Substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested. Id. Nor may the legislature increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred.

Essential to the resolution of this matter is a proper determination of the specific points in time at which the legal rights and obligations of the parties must be compared in order to determine if a party's substantive rights have been affected.

* * *

The relevant inquiry in the case before this court, is therefore, when the "cause of action" arose between the parties.

* * *

Without expressly stating so, the *Williams II* panel utilized principles analogous to those found in *Young* and *L. Ross* to find that Ward [the personal representative's attorney] had a **cause of action against the estate for the value of his services from the moment he began to render them. It was at that moment when**, although the ultimate fee amount would increase over the course of Ward's services, **the estate's liability to compensate Ward was legally fixed, as was the legal formula by which the fees would be calculated**. The subsequent enactment of a statute that provided for a new formula could not constitutionally be effective to enhance that liability.

Here, Ward is seeking fees for the litigation over the reasonableness of his fee request [footnote omitted]. The personal representative's attorney has the right to recover fees incurred in the representation of the estate from the moment such representation is commenced; however, under prior law, recovery did not include time spent on his own compensation. Under the new statute, the attorney can expect that if the request is opposed and a hearing required, the fees incurred in that proceeding will likewise be compensable. **To the extent Ward did or did not possess the right to compensation calculated in a certain way and the right to charge his time to litigate his own compensation, these rights were inextricably bundled at the moment Ward began his representation of the estate. It was at that time that any right he had to receive his**

> **fees and any corresponding obligation of the estate to pay those fees was legally vested.** The effective date of section 733.6171(7), Florida Statutes (1993), was October 1, 1993. Prior to that date, and certainly on the date Ward began his representation, Ward was not entitled to receive fees for time expended in determining the amount of his fees. ... (emphasis added).

Applying the above principles established in Williams College II to Bitterman, this Court concluded that the law firm's right to recover "attorney's fees for litigating attorneys fees," and any corresponding obligation of the estate to pay those fees, "legally vested" when the law firm first began its representation of the personal representative in 1992. Awarding attorneys fees under §733.6171 retrospectively increased the estate's obligation to pay fees, which was impermissible and unconstitutional (Id. at 364). The Court stated:

> The 1993 changes can only be applied to cases for which the legal right to attorney's fees vests on or after October 1, 1993. (Id.)

In the present case, it is clear that Techniarts' counts for tortious interference with business relations, invasion of privacy and violation of the Procurement Integrity Act were filed and pursued **prior** to the safe harbor amendment's July 1, 2002 effective date. Those counts were either subsequently dismissed with prejudice, or dismissed and subsequently abandoned. Counsel for Bionetics had the legal right to recover §57.105 attorneys fees for services rendered in defending Bionetics against those counts "from the moment he began to render them." Bitterman, 714 So.2d at 364. It is undisputed that moment occurred **prior** to the safe harbor amendment's July 1, 2002

effective date (R2:358-59;R4:563-566;R7:1151-55), and thus the amendment could not be retroactively applied to the parties' already vested rights and obligations as to **Error! Bookmark not defined.**§57.105 attorneys fees.

Numerous District Court decisions have held amendments to other attorneys fees statutes to be substantive, and thus inapplicable retroactively. See for example: Kraft Dairy Group v. Sorge, 634 So.2d 720, 721 (Fla. 1st DCA 1994) (holding that because attorneys fee provisions directly affect the rights of the parties, amendments to the worker's compensation attorneys fee statute after the claimant's injury may not be retroactively applied); Foliage Design Sys., Inc. v. Fernandez, 589 So.2d 389 (Fla. 1st DCA 1991) (amendment that placed a ceiling for computation of attorneys fees is substantive and cannot be applied retroactively); Sir Elec., Inc. v. Borlovan, 582 So.2d 22, 23 (Fla. 1st DCA 1991) ("[S]tatutory amendment changing the measure of attorneys fees is substantive, and cannot be applied retroactively); Volusia Mem'l Park v. White, 549 So.2d 1114, 1118 (Fla. 1st DCA 1989) (holding that amendment that adds a "bad faith" requirement is substantive and that "the substantive rights of the parties are fixed as of the date of the injury and are not subject to impairment by subsequent amendment to the law").

B) District Courts Have Held That The 2002 Safe Harbor Amendment, the Initial Enactment of §57.105, and its Other Amendments, Constitute Substantive Changes That Cannot Be Applied Retroactively

While the above decisions involved attorneys fee statutes other than **Error! Bookmark not defined.**§57.105, they nonetheless established the general principle that statutory rights and obligations as to attorneys fees are substantive, and that a subsequent statutory enactment or amendment cannot affect those substantive rights once they have vested. One District Court has applied those general principles in specifically addressing the retroactivity of **Error! Bookmark not defined.**§57.105's safe harbor amendment. In Walker v. Cash Register Auto Ins. of Leon Cty., Inc., 946 So.2d 66 (Fla. 1st DCA 2006), the First District held that the 21-day safe harbor amendment to §57.105(4), which became effective July 1, 2002, was a substantive change that could not be retroactively applied to a case filed on June 11, 2002, stating (946 So.2d at 71):

> ... The supreme court has held that "rights to attorney's fees granted by statute are substantive rather than procedural." (cases omitted).
>
> *   *   *
>
> [4] While the court in **Error! Bookmark not defined.***Maxwell Building Corp. v. Euro Concepts, LLC*, 874 So.2d at 711, was not considering retroactive application of subsection (4), the court did describe subsection (4) as "a procedural change" to the statute. **We hold, to the contrary, that subsection (4) is a substantive addition.** **Subsection** Error! Bookmark not defined.**(4) does more than require the giving of notice. It creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or amendment of meritless allegations and claims.** The withdrawal or amendment of a claim, allegation or defense could substantively alter a case. *Compare, Stolzer v. Magic Tilt Trailer, Inc.*, 878 So.2d 437 (Fla. 1st DCA 2004) (holding that statutory amendment to Chapter 440, Florida Statutes, that allowed employer/carrier 30 days, rather than 14 days, within which to provide benefits before being responsible for payment of attorney fees, was

> substantive change to statute, and this amendment could not be applied retroactively). Because we conclude that the safe harbor provision of subsection (4) is a substantive change, we hold that it does not have retroactive application and, therefore, could not be applied to the instant case. (Emphasis added)

Just as §57.105's 2002 safe harbor amendment cannot be applied retroactively, cases have also held that the initial enactment of §57.105 in 1978 affected substantive rights and obligations, and thus could not be applied retroactively. Love v. Jacobson, 390 So.2d 782, 783 (Fla. 3rd DCA 1980) and Porteous v. Fowler, 394 So.2d 154, 155 (Fla. 4th DCA 1981).[3]

As held in Walker, supra, the 2002 safe harbor amendment to §57.105 effected a substantive change in the statute. It decreased the availability of attorneys fees that had been available to a movant under the prior version of the statute. As stated in L. Ross, Inc. v. R.W. Roberts Constr. Co., Inc., 466 So.2d at 1099, the creation or increase of a limitation on a substantive right serves to decrease that substantive right; whereas, the repeal or decrease of a limitation on a substantive obligation or burden serves to increase that substantive obligation or burden. It does not matter whether it is the right

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[3]/ Cases have also held that other amendments to §57.105 enacted prior to the 2002 amendment involved here were likewise substantive, and could not be applied retroactively; and Dep't of HRS v. Dubay, 522 So.2d 109, 110 fn4 (Fla. 5th DCA 1988)(1986 amendment providing for §57.105 attorneys fees against a party's attorney could not be applied retroactively).

or the burden that is increased or decreased, the change nonetheless effects a substantive change. Foliage Design Systems v. Fernandez, 589 So.2d at 390.

As applied here, the Fifth District's application of the 2002 amendment adding the 21-day "safe harbor period" placed a limitation on Bionetics' already vested substantive right to obtain **Error! Bookmark not defined.**§57.105 attorneys fees, and created an opportunity that did not previously exist for Techniarts to avoid having to pay those fees. The result was to eliminate Bionetics' already-vested substantive right to §57.105 attorneys fees, which was impermissible under Florida law and unconstitutional.

C) Other Decisions Have Held Statutory Amendments Repealing or Increasing a Grace Period, During Which a Party Can Avoid Payment of Attorneys Fees, To Be Substantive Changes That Cannot Be Applied Retroactively

Several Florida decisions have held that amendments to other attorneys fee statutes which have changed a "grace period" [also called a "safe harbor" period] during which a party can avoid attorneys fees are substantive, and cannot be applied retroactively to cases filed before such amendments. For example, **Error! Bookmark not defined.**Baptist Manor Nursing Home v. Madison, 658 So.2d 1228 (Fla. 1st DCA 1995) held that a 1990 statutory amendment to §440.34(3)(b) repealing a 21-day grace period, within which an employer had to accept a claim for benefits in order not to be liable for attorneys fees, was substantive and could not be applied retroactively.

Stolzer v. Magic Tilt Trailer, Inc., 878 So.2d 437, 438 (Fla. 1st DCA 2004) held that a 2002 amendment to the worker's compensation attorneys fee statute, which increased the time period from 14 days to 30 days for the employer/carrier to provide benefits before being responsible for payment of attorneys fees, was a substantive change that could not be applied retroactively to a 2000 accident. Likewise, Zabik v. Palm Beach County School District, 901 So.2d 887, 890 (Fla. 1st DCA 2005) held that an employer/carrier was not entitled to the increased 30-day grace period, where the claimant's accident occurred before the 2002 statutory amendment, because the amendment was a substantive change that could not be applied retroactively (Id.). Therefore, the First District held, "the attorney's fee statute in effect on the date of the accident applies... " (Id.).

The above cases deal with the retroactive application of a repeal or increase in grace periods [safe harbor periods] contained in attorneys fee statutes. This case deals with the retroactive application of the initial creation of §57.105's 21-day safe harbor period. There is no rational distinction between the above cases and the present case. Whether a statutory amendment increases, decreases, repeals or creates a grace period or safe harbor period, the result is the same, *i.e.*, a substantive change in the parties' vested rights and obligations as to attorneys fees, which cannot be applied retroactively.

To summarize, this Court's opinions and the District Court opinions, discussed in Section II(A) through (C), supra, support the conclusion that the 21-day safe harbor amendment to §57.105 cannot be applied retroactively to this case. They also demonstrate that the fact that Bionetics filed its Motion for Attorneys Fees after the safe harbor's effective date was irrelevant. The parties' rights and obligations as to attorneys fees under §57.105 are substantive, and therefore the July 1, 2002 safe harbor amendment could not be applied retroactively to this case to change those already vested substantive rights and obligations.

D) The Cases Relied Upon in The Fifth District's Opinion Are Contrary To This Court's Opinions, And The Other District Court Opinions, Cited *Supra*

The Fifth District's opinion in the present case cited three cases to support its "common sense conclusion" that the controlling date for purposes of applying the safe harbor amendment to **Error! Bookmark not defined.**§57.105 is the date the motion for attorneys fees is filed, rather than the date the parties' rights and obligations as to attorneys fees vested. **Error! Bookmark not defined.**10 So.3d at 1186. Those three cases are contrary to the opinions of this Court and the District Courts, discussed supra.

1) Airtran Airways, Inc. v. Avaero Noise Reduction Joint Venture, 858 So.2d 1232 (Fla. 5th DCA 2003), held that even though the causes of action had accrued in 1995, since the lawsuit was brought, and all matters pertaining to its maintenance and defense occurred after an October 1999 amendment to **Error!**

Bookmark not defined.§57.105,[4] the amendment applied to all "actions taken, positions maintained or papers filed subsequent to October 1, 1999"(Id. at 1233).

2) **Maxwell Bldg. Corp. v. Euro Concepts, LLC**, 874 So.2d 709 (Fla. 4th DCA 2004), concerned whether the plaintiff was entitled to **Error! Bookmark not defined.**§57.105 attorneys fees for defending against counterclaims raised by the defendants. The defendants' counterclaims were initially filed **prior** to the July 1, 2002 safe harbor amendment to §57.105; whereas, the plaintiff's motion for §57.105 attorneys fees was filed **after** July 1, 2002. The Fourth District concluded the safe harbor amendment "was a procedural change in the statute," and applied the amendment to that case (**Error! Bookmark not defined.**Id. at 711).

3) **Hampton v. Cale, Inc.**, 964 So.2d 822 (Fla. 4th DCA 2007) - The Fourth District explained that although it had labeled the 2002 amendment to §57.105 as "procedural" in Maxwell, supra, it had not applied the amendment retroactively in that case (Id. at 824-25). The Court stated that it agreed with the First District's decision in Walker, supra, that the 2002 safe harbor amendment to §57.105 created substantive rights; and that any procedural aspects of the amendment were "intimately related to"

[4]/ Prior to an October 1, 1999 amendment to §57.105, the statute had limited fee awards to cases where the trial court found a complete absence of a justiciable issue of law or fact. The 1999 amendment authorized an award of fees if a party or his counsel knew or should have known that any claim or defense asserted was not supported by material facts or the then-existing law.

and affected the parties' substantive rights; and therefore the 2002 amendment **could not be applied retroactively** (Id. at 825). The Fourth District stated that the only reason it applied the safe harbor amendment in Maxwell was "because the motion for section 57.105 fees had been filed **after** the effective date of the statute [amendment]" (Id. at 824), which was obviously not true in the Hampton case. The lawsuit in Hampton was also filed in May 2000, prior to the safe harbor amendment's effective date. Accordingly, the Fourth District refused to apply the amendment in Hampton, stating that it affected substantive rights and could not be retroactively applied.

The above three cases were cited by the Fifth District to support its holding in this case that "**the safe harbor amendment applies in situations like this where the lawsuit was filed before July 1, 2002, but the motion for attorneys fees was not filed until after this date**." 10 So.3d at 1186. In other words, according to the Fifth District, where a cause of action accrues **prior** to the effective date of the 2002 safe harbor amendment (which admittedly effected a substantive change) but the motion for §57.105 fees is not filed until **after** the amendment's effective date, the amendment is applicable to any "papers filed, actions taken or matters occurring" **after** the amendment's effective date, even though it does not apply to any "papers filed, actions taken or matters occurring" **prior** to the amendment's effective date. (Id.)

The Fifth District's reliance upon Airtran, Maxwell, and Hampton, supra, as support for the above legal principle is misplaced for the following reasons. First,

none of those three cases even mention this Court's controlling decisions in Ross, **Error! Bookmark not defined.**Young, or Bitterman. Second, the holdings in **Error! Bookmark not defined.**Airtran, **Error! Bookmark not defined.**Maxwell and **Error! Bookmark not defined.**Hampton are contrary to this Court's decisions and the other District Court decisions discussed in Section II(A) through (C), supra. Third, the Fifth District's decision in the present case, and the Airtran, Maxwell and **Error! Bookmark not defined.**Hampton decisions upon which it relies, ignore the controlling issue, *i.e.*, the point in time the parties' substantive rights and obligations as to attorneys fees "legally vested" under §57.105, which is controlling in deciding whether an amendment, which affects those substantive rights and obligations, can be applied retroactively. In the present case, the point in time that the parties' substantive rights and obligations as to attorneys fees "legally vested" under §57.105 was when Techniarts first pled the three counts upon which attorneys fees were awarded, and the moment that Bionetics' counsel first began rendering his services defending against those counts, both of which occurred prior to the safe harbor amendment's effective date.

Fourth, the Fifth District's conclusion that the controlling factor is when the motion for §57.105 attorneys fees is filed is flawed. That would mean that if the motion is filed after the safe harbor amendment's effective date, the amendment's 21-day notice requirement would have to be satisfied or attorneys fees would be denied.

That would be true, under the Fifth District's ruling, even though the parties' rights and obligations as to attorneys fees vested prior to the amendment's effective date. This clearly results in an impermissible and unconstitutional retroactive application of the safe harbor amendment.

Fifth, the Fifth District's decision in this case, and the cases upon which it relies, accomplish indirectly what they admit cannot be done directly. **They admit** that a statutory amendment that affects substantive rights cannot be applied retroactively, and **they admit** that the safe harbor amendment to §57.105 is substantive, yet they apply the amendment retroactively nonetheless. They claim that they are applying the amendment prospectively, not retroactively, because it is only being applied to conduct that occurs after the amendment's effective date. That argument ignores this Court's rejection in Bitterman, supra, of a very similar argument that so long as §733.6171 was only applied to attorneys fees litigated after the statute's effective date, the statute was not being retroactively applied. 714 So.2d at 364. As this Court explained, any right to recover attorneys fees for services rendered before and after a statutory amendment are "inextricably bundled" at the moment an attorney begins his or her representation of the client (Id.):

> It was at that time that any right he had to receive his fees and any corresponding obligation of the [opponent] to pay those fees legally vested (Id.)

Sixth, to the extent Techniarts claims that the 21-day notice requirement is procedural only, which it clearly is not, Antunez v. Whitfield, 980 So.2d 1175 (Fla. 4th DCA 2008), disposes of that argument. The Fourth District held that an amendment to an attorneys fee statute, providing for an award of attorneys fees arising out of a trial *de novo* after a non-binding arbitration award, could not be applied retroactively "since the amendment ... affects the right to attorneys fees, it is substantive in nature, **regardless of any procedural aspect it might otherwise have**." (Id. at 1179). As the Fourth District explained (Id. at 1178):

> In this case, [plaintiff's] right to obtain attorney's fees was affected by the amendment to section **Error! Bookmark not defined.**44.103(6) because it altered the requirements that needed to be met before an award would have been proper. Her right to attorney's fees vested prior to the October 1, 2007 amendment ... If the amended statute were applied to these facts, she would no longer be entitled to those fees. Thus the amendment to the statute appears to be substantive. (Emphasis added)

The same analysis applies in this case. The safe harbor amendment affected Bionetics' right to attorneys fees, because it altered the requirements that needed to be met in order to obtain attorneys fees by imposing a new 21-day notice provision. Application of that new requirement to this case impermissibly deprived Bionetics' counsel of the right to attorneys fees that had already vested.

E) Whether Bionetics' Motion for Attorneys Fees was Filed Before or After the Safe Harbor Amendment's July 1, 2002 Effective Date is Irrelevant

The Fifth District's statement that "the common sense conclusion" is that the safe harbor amendment applies whenever a motion for attorneys fees is filed **after** the amendment's July 1, 2002 effective date" (10 So.3d at 1185) has no legal basis. As indicated, supra, this Court held in Bitterman that the parties' substantive right and obligation as to statutory attorneys fees are determined by when those rights and obligations legally vest (714 So.2d at 363). In that case, the attorney's right to recover fees from the estate vested at the moment he first represented the personal representative (Id. at 364). As this Court explained, it was at that point that the legal formula by which attorneys fees would be calculated was legally fixed, as well as the estate's liability for such fees. "It was at that time that any right he had to receive his fees and any corresponding obligation of the estate to pay those fees became legally vested." (Id.).

As applied to this case, prior to July 1, 2002, Techniarts' obligation to pay Bionetics' attorneys fees was determined by the pre-2002 version of §57.105, which did not require Bionetics to give Techniarts 21 days notice as a condition precedent to obtaining attorneys fees. That version of §57.105 legally fixed both Techniarts' and Bionetics' rights and obligations as to attorneys fees. Accordingly, whether Bionetics' Motion for §57.105 Attorneys Fees was filed before or after the effective date of the

safe harbor amendment, an act which the Fifth District found controlling, was actually irrelevant.

F) Even if Techniarts was Entitled to 21 Days Notice Under the 2002 Safe Harbor Amendment to §57.105, Counsel for Bionetics' April 5, 2002 Letter to Techniarts' Counsel Provided That Notice

Bionetics strongly feels that the version of **Error! Bookmark not defined.**§57.105 that existed prior to its 2002 safe harbor amendment is applicable to this case. Therefore Bionetics was not required to give Techniarts the 21 days notice required by that amendment. However, if such notice was required, it was provided by counsel for Bionetics April 5, 2002 letter informing Techniarts and his counsel that if they continued to pursue the tortious interference with business relations count, Bionetics would seek to recover attorneys fees under §57.105 against both of them (R18:2774).

The Fifth District ruled that the April 5, 2002 letter was insufficient to supply the notice required by the safe harbor amendment, because the amendment required a "motion," not a "letter," citing to Anchor Touring, Inc. v. Fla. Dept. of Transp., 10 So.3d 670 (Fla. 3rd DCA 2009) and Nathan v. Bates, 998 So.2d 1178 (Fla. 3rd DCA 2008). Those cases hold that since §57.105, and its safe harbor amendment, are in derogation of the common law, the amendment must be strictly construed, and its requirement of a "motion" does not equate to a "letter." Bionetics' response is that if the safe harbor amendment must be "strictly construed" because it is in derogation of

the common law, the amendment **necessarily** must also be "strictly applied" so that it does not retroactively affect already-vested rights and obligations as to attorneys fees.

III. This Court's Controlling Decisions Require Reversal of The Fifth District's Decision in This Case

The foregoing Section II(A) through (F), and this Court's decisions discussed therein, demonstrate that the point in time that Counsel for Bionetics' substantive right to attorneys fees under §57.105 "legally vested" was when he first began rendering services to defend against the three counts upon which attorneys fees were subsequently awarded. Likewise, the point in time that Techniarts' substantive obligation to pay attorneys fees under **Error! Bookmark not defined.**§57.105 "legally vested" was when Techniarts first pled the three counts upon which attorneys fees were awarded. Both of those acts occurred prior to the safe harbor amendment's effective date, and therefore **Error! Bookmark not defined.**§57.105's 21-day safe harbor amendment could not be applied to deny counsel for Bionetics' Motion for §57.105 Attorneys Fees. To do so was both impermissible under Florida law and unconstitutional.

POINT II

THE FIFTH DISTRICT ERRED IN REVERSING JUDGE BARLOW'S RULING THAT BIONETICS WAS ENTITLED TO ATTORNEYS FEES ON TECHNIARTS' COUNT FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS, BASED UPON ITS CONCLUSION THAT THE COUNT WAS NOT "FRIVOLOUS"

I. Standard of Review

Whether a claim is frivolous within the meaning of §57.105, thus mandating an award of fees, is a matter left to the sound discretion of the trial court. See **Error! Bookmark not defined.**Bowen v. Brewer, 936 So.2d 757, 762 (Fla. 2nd DCA 2006), *rev. den.*, 952 So.2d 1188; Yakavonis v. Dolphin Petroleum, Inc., 934 So.2d 615, 618 (Fla. 4th DCA 2006). Accordingly, the standard of review of Judge Barlow's determination of Bionetics' entitlement to **Error! Bookmark not defined.**§57.105 attorneys fees on the tortious interference count, based upon his finding that Techniarts and its counsel knew or should have known that claim was not supported by the material facts, is abuse of discretion.

II. The Applicable Version of §57.105; The Bases for Judge Barlow's Ruling That Bionetics Was Entitled to Attorneys Fees on The Tortious Interference Count; And The Entirely Different Basis For The Fifth District's Reversal of That Ruling

The applicable version of §57.105 that existed prior to its 2002 amendment, provided, 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 any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense **when initially presented to the court or at any time before trial**:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest. (Emphasis added)

Judge Barlow ruled that Bionetics was entitled to an award of attorneys fees on the tortious interference count under the above statute, because he found that: (1) the claim was not supported by the material facts, **and**; (2) Techniarts and its attorney knew or should have known that fact (R16:2601-02). In addition to reversing Bionetics' attorneys fees award for failure to give 21-days notice, the Fifth District gave a second reason for reversing reversed Judge Barlow's award of attorneys fees on one of the three counts, the tortious interference with business relations count, stating (10 So.3d at 1187):

> ... After examining this count [for tortious interference with business relations], we are bound to agree that it does not meet the threshold required for a finding of frivolousness under **Error! Bookmark not**

defined.§57.105. The allegations are prolix and messy, but they do state a claim. (Emphasis added)

Accordingly, the Fifth District addressed whether Techniarts' tortious interference allegations were legally sufficient, *i.e.*, supported by the then-existing law (10 So.3d at 1187). It did not address the actual basis for Judge Barlow's award of attorneys fees on the tortious interference count, *i.e.*, that the allegations were not supported by the material facts; and that Techniarts and its attorney, Kenniasty, knew or should have known that from the time the tortious interference count was pled or when it was repeatedly dismissed and ultimately abandoned (R16:2602).

III. Judge Barlow Correctly Ruled That Techniarts' Tortious Interference Count Was Not Supported by the Material Facts

A) Techniarts Alleged That The Damages That Flowed From Bionetics' Alleged Tortious Interference With Its Business Relations Was That It Was Prevented From Bidding on Two Government Contracts, One With Boeing and One With Lockheed

In the factual allegations portion of Techniarts' original Complaint, Techniarts alleged that Bionetics had filed a prior lawsuit against it over the ownership of certain photographic (film/motion picture) equipment; that the court had entered, at Bionetics' request, an order sequestering that equipment until ownership of the equipment was decided (R1:348); that Bionetics' true motivation in having the film equipment sequestered was to keep it from Techniarts' possession "so that Plaintiffs could not use the equipment for bids on two government contracts with Boeing Corporation and

Lockheed Martin Corporation" (R1:351,Par.16). Techniarts repeated those identical factual allegations in its First Amended Complaint (R3:549,p.16), Second Amended Complaint (R5:918-19,pars.101-08), and Third Amended Complaint (R9:1522). Techniarts' count for tortious interference with business relations in each of those complaints had much broader conclusory allegations that Techniarts had ongoing business relations "with NASA, the U.S. Air Force, Boeing Corp., and Lockheed Corp," and that Bionetics had wrongfully interfered with those ongoing business relations (R1:355;R3:554-56;R6:952; R9:1527). However, Techniarts alleged that the manner of Bionetics' tortious interference with its business relations was (R6:952):

> 192. Defendant intentionally and wrongfully interfered with the on-going business relations by spreading malicious and false rumors about Plaintiffs, wrongfully initiating the sequestration of the Equipment, and advising Plaintiffs' current and prospective customers that Plaintiffs' MOPIX Equipment was legally tied up under order of sequestration. (Emphasis added)

Techniarts **only allegations as to the harm caused by Bionetics' conduct was that it prevented Techniarts from bidding on two government contracts with Boeing and Lockheed**. Those allegations were not supported by the material facts, and Techniarts and its attorney knew or should have known that when the tortious interference count was "initially presented to the court" on August 21, 2001, or "at anytime" thereafter while amending the count three times before abandoning it more than two years later. When Techniarts' Fourth Amended Complaint finally abandoned its count for Tortious

Interference With Business Relations, it changed the count to one for Defamation (R10:1654-55), which the court ultimately dismissed and Techniarts' thereafter abandoned.

B) Techniarts and its Attorney Knew, or Should Have Known, That The Material Facts Did Not Support Their Claim That Sequestration of The Photographic (Film/Motion Picture) Equipment Prevented It From Bidding on Two Contracts, One With Boeing and One With Lockheed

The basis for Judge Barlow's ruling on Bionetics' entitlement to §57.105 attorneys fees on Techniarts' tortious interference count was that the count was not supported by the material facts, and because Techniarts and Kenniasty knew, or should have known, that fact. Techniarts and Kenniasty did not have the August 22, 2005 transcript of the second day of the entitlement hearing included in the Record-on-Appeal.

The December 14, 2001 deposition of William Moore, one of the owners doing business as Techniarts, is contained in the record and Kenniasty attended that deposition (R2:373-470). Moore testified that Techniarts submitted a bid in response to Lockheed's Request for Proposals ("RFP") regarding a film contract, and Techniarts was the successful bidder (R3:434-35). Techniarts had no problem performing its film contract with Lockheed, who was very pleased with its performance under the contract (R3:442-43). Techniarts also submitted a bid, as did Bionetics and Johnson Controls, in response to Boeing's RFP regarding another film contract, and the successful bidder

was Johnson Controls (R3:448-49). Moore admitted that he did not know why Johnson Controls was the successful bidder and Techniarts was not (R3:452).

Moore also admitted that Techniarts was never the unsuccessful bidder, with Bionetics becoming the successful bidder, when they both submitted bids in response to a RFP (R3:452-53). While Moore testified that Techniarts did not get the "follow along" video contract with Lockheed, that was because Techniarts had "declined to bid" (R3:454). At that point, Techniarts had left the area (R3:457-58). Bionetics and Johnson Controls bid on that RFP, and Moore heard that Bionetics was the successful bidder (R3:456-57,459-460). Moore admitted, however, that the "follow along" contract was "primarily a **video** contract, not a **film** contract," and therefore the fact that Techniarts did not have possession of the sequestered film equipment would have been less important in bidding on the **video** contract (R3:457). Moore did not really know why Bionetics won the bid on the "follow along" contract over Johnson Controls (R3:460). He could only say that although Johnson Controls had access to a film/motion picture lab, it "had a terrible weakness in video" (R3:458-460).

Techniarts' allegations also claimed that Bionetics wrongfully interfered with its business relations by spreading malicious and false rumors about Techniarts (R6:952). Yet, Moore admitted that while he and other Techniarts employees were told that Bionetics said "low" things about Techniarts, they were never told what those things were and they never asked (R3:405-06). Therefore, Moore did not know "how low or

what the lowness was" in regard to those alleged statements (R3:407). In regard to Techniarts' allegation that Bionetics advised Techniarts' current and prospective customers that its film equipment was legally tied up under order of sequestration (R6:952), if that was said, it was true.

Moore's deposition was filed in the present lawsuit on January 11, 2002 (R3:373-470). His deposition made it clear that Techniarts and its attorney were well aware that Bionetics' prior lawsuit over ownership of the photographic (film/motion picture) equipment, the trial court's sequestration of that equipment at Bionetics' request while that lawsuit was pending, and Bionetics' alleged malicious and false rumors, did not constitute tortious interference, and **did not cause** Techniarts to be unable to bid on two contracts, one with Lockheed and one with Boeing, as Techniarts had alleged. Moore's admissions refuted those allegations. Moore **admitted** Techniarts was the successful bidder on the film contract with Lockheed. Johnson Controls was the successful bidder on the film contract with Boeing, and Moore **admitted** that he did not know what caused Boeing to pick Johnson Controls' bid over its bid. Techniarts did not bid on Lockheed's "follow along" contract, because it was a video (not film) contract, not because Techniarts' film/motion picture equipment was sequestered. Moore **admitted** that sequestration of its film equipment was a less important factor in its decision not to bid on Lockheed's "follow along" video contract.

The bottom line is that the material facts in this case showed that Techniarts did

not, and could not, present any evidence that Bionetics' conduct constituted tortious interference or that there was a causal connection between the sequestration of Techniarts' film equipment, and alleged malicious and false rumors, with Techniarts' failure to be the successful bidder on Boeing's film contract (which was given to Johnson Controls) and with its failure to bid on Lockheed's "follow along" **video** contract. One had nothing to do with the other, and Techniarts and its counsel were well aware of that fact.

IV. Additionally, Techniarts' Tortious Interference Count Was Not Based on The Then-Existing Law Because The Act of Bidding on a Government Contract is Insufficient to Establish a "Business Relation" as a Matter of Law

While Judge Barlow did not rule that Techniarts' claim for tortious interference was not supported by the then-existing law, Bionetics believes that is an additional reason its award of attorneys fees on the tortious interference count should be affirmed. This Court has held that in order to establish tortious interference with a business relationship, the plaintiff must allege and prove a business relationship that "afford[ed] the plaintiff existing or prospective legal or contractual rights." Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1994). In order to prove an existing or prospective legal right, there must be an identifiable understanding or agreement between the parties, which in all probability would have been completed had the defendant not interfered. Id. at 814-15; Central States, Southeast and

Southwest v. Florida Society of Pathologists, 824 So.2d 935, 940 (Fla. 5th DCA 2002). Loss of future customers is not sufficient to state a claim for tortious interference with a business relationship, which requires the existence of a present relationship, not a prospective relationship that one hopes to have in the future. Beacon Property Management, Inc. v. PNR, Inc., 785 So.2d 564 (Fla. 4th DCA 2001), *overruled on other grounds*, 842 So.2d 773 (Fla. 2003) (the plaintiff's "prospect of having future customers" is insufficient to establish the requisite business relationship).

Just as a "mere offer to sell does not give sufficient legal rights to support a claim of interference with a business relationship" (647 So.2d at 814), neither does Techniarts' intention to bid on government contracts. The Fifth District stated in St. Johns River Water Management Dist. v. Fernberg Geological Services, Inc., 784 So.2d 500, 504 (Fla. 5th DCA 2001), "there must be a business relationship in existence" (Id. at 505); "the speculative hope of future business is not sufficient to sustain the tort of interference with a business relationship;" and a defendant cannot cause a third party to sever or breach a business relationship, where no business relationship existed (Id. at 506). Since Techniarts' factual allegations acknowledged that it had no existing business relation with which Bionetics interfered, and that it merely hoped for future business relationships, as a result of bidding on two government contracts with Boeing and Lockheed, that speculative hope cannot sustain a claim for tortious interference with business relationships as a matter of law.

V. Judge Barlow Made The Required Factual Findings On Entitlement to Attorneys Fees

The Fifth District erroneously stated in its opinion that Judge Barlow "made no findings" to support his ruling that Bionetics was entitled to an award of attorneys fees under §57.105 as to the tortious interference with business relationships count. 10 So.3d at 1187. The Fifth District cited Daniels v. Reeves, 712 So.2d 839 (Fla. 1st DCA 1998), and Glisson v. Jacksonville Transp. Auth., 705 So.2d 136 (Fla. 1st DCA 1998) (Id.). Those cases merely hold that an order finding liability for attorneys fees under §57.105 must contain findings of fact upon which the court bases that conclusion. Judge Barlow complied with those cases because he made the following findings (R16:2602):

> ... the Court finds that the losing parties or the losing parties' attorney, knew or should have known, when the claim was filed as part of the Second Amended Complaint on July 19, 2001, and at all times thereafter until it was ultimately dismissed by court order November 8, 2003, (and thereafter abandoned by Plaintiffs) that the claim was not supported by the material facts necessary to establish a claim of tortious interference with contract as require by Florida Statute 57.105(a).

The above findings were in accord with the requirements of **Error! Bookmark not defined.**§57.105(1)(a). Moreover, those findings were the result of two hearings held on October 27, 2004 and August 22, 2005, where the court considered the supporting affidavits, plus other documents in the court file, and argument of counsel

(R16:2601). As previously noted, Techniarts and Kenniasty did not have the August 22, 2005 transcript placed in the Record-on-Appeal before the Fifth District.

VI. Judge Barlow Obviously Made a Scrivener's Error in Referring to Techniarts' Tortious Interference With Business Relations Count as a Tortious Interference With Contract Count

All of Techniarts' complaints, as amended, and all of Judge Barlow's orders, except for his entitlement order, referred to the tortious interference count as a Tortious Interference With Business Relations count. Despite that scrivener's error, the Fifth District addressed the tortious interference with business relations count actually pled, although it failed to address the basis for Judge Barlow's award of attorneys fees on that count. Accordingly, the issue is not whether Judge Barlow awarded attorneys fees on a non-existent tortious interference with contract count. The issue is whether the count that was **actually pled** was unsupported by the material facts, and whether Techniarts and its counsel knew or should have known that to be true, as Judge Barlow found.

The fact that Judge Barlow mistakenly labeled the count for tortious interference as one "with contract," instead of one "with business relations," is irrelevant. The confusion most probably occurred because Techniarts' allegations were that Bionetics' tortious interference prevented it from bidding on two contracts with Lockheed and Boeing. Notwithstanding the label given to the tortious interference count, Judge Barlow made a factual finding that it was not supported by the material facts, and also

made a factual finding that Techniarts, and its attorney knew, or should have known, that fact.

At the time Judge Barlow entered his entitlement order to attorneys fees on Techniarts' counts for tortious interference, invasion of privacy, and violation of the Procurement Integrity Act, he had already held a non-jury trial on Techniarts' counts for malicious prosecution, negligent sequestration, and misappropriation of trade secrets. He granted an involuntary dismissal/directed verdict against Techniarts on those claims because of a total failure of proof (R15:2379-83). At that point, Judge Barlow was very well aware that Techniarts had no evidence that Bionetics' conduct caused any damages to Techniarts, regardless of the different labels given to its different counts.

CONCLUSION

Based upon the foregoing, this Court should reverse the Fifth District's decision, and reinstate the Final Judgment awarding Bionetics attorneys fees and costs against Judith Deitz and William Moore, d/b/a Techniarts Engineering, and their attorney, Frank W. Kenniasty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Frank W. Kenniasty, Esquire**, 1683 Clover Circle, Melbourne, FL 32935 (*Pro Se*); and **Elizabeth Siano Harris, Esquire**, STADLER & HARRIS, P.A., 1820 Garden Street, Titusville, FL 32796 *(Counsel for Respondents DEITZ and MOORE)*; by mail on February ______, 2010.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Amended Initial Brief of Petitioner on The Merits is Times New Roman 14 pt.

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