IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: SC 09-1243

THE BIONETICS CORPORATION,
Petitioner,

v.

JUDITH DEITZ, WILLLIAM MOORE, d/b/a/
TECHNIARTS ENGINEERING, PHOTOSUPPORT, INC.,
a Florida Corp., and FRANK W. KENNIASTY.
Respondents.
_____/

RESPONDENTS' JUDITH DEITZ and WILLIAM MOORE ANSWER BRIEF ON JURISDICTION

ON REQUESTED DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner, BIONETICS CORPORATION, shall be referred to as "Bionetics. Respondents, JUDITH DEITZ and WILLIAM MOORE, shall be referred to as either "Ms. Deitz" or "Mr. Moore," respectively or "Deitz and Moore." Respondent, FRANK KENNIASTY, shall be referred to as "Mr. Kenniasty."

STATEMENT OF THE CASE AND FACTS

The relevant facts in this matter are set forth in the Fifth District Court of Appeal's written opinion in Kenniasty v. Bionetics Corp., __ So. 3d ___, 2009 WL 1636266 (Fla. 5th DCA June 10, 2009) as follows:

1) Mr. Kenniasty along with Deitz and Moore sought review of the trial court's order awarding Bionetics $39,025.78 in attorney's fees and costs against each pursuant to section 57.105, Florida Statutes (2002). (Appendix at pg. A-2).

2) The Fifth District Court reversed, finding that the trial court erred in awarding Bionetics section 57.105 fees because Bionetics had failed to provide proper notice under the safe harbor provision of the statute, and Mr. Kenniasty had properly stated a cause of action for tortious interference with business relations and therefore, the claim was not frivolous. (Appendix at pg. A-6 – A-8).

3) In 2001, Deitz and Moore filed a four-count complaint against Bionetics alleging (I) malicious prosecution; (II) negligent sequestration; (III) misappropriation of trade secrets; and (IV) tortuous interference with a business relations. (Appendix at pg. A-3). Bionetics filed a motion to dismiss. The trial court denied the motion as to count I, deferred ruling

on count II, and granted the motion as to counts III and IV with leave to amend. (Appendix at pg. A-4).

4) On February 13, 2002, Deitz and Moore filed an amended four count complaint, alleging (I) malicious prosecution; (II) negligent sequestration; (III) misappropriation of trade secrets; and (IV) tortuous interference with business relations. Bionetics again move to dismiss the amended complaint. The trial court granted the motion with prejudice as to count II, and with leave to amend as to counts I, III and IV. (Appendix at pg. A-4).

5) On April 10, 2002, Deitz and Moore filed a second amended complaint, alleging six counts: (I) malicious prosecution; (II) misappropriation of trade secrets; (III) tortuous interference with a business relations; (IV) invasion of privacy; (V) trespass to property; and (VI) violation of the Procurement Integrity Act (41 U.S.C. §423). Bionetics again filed a motion to dismiss all counts. The trial court granted the motion with leave to amend counts I through V and with prejudice as to count VI. (Appendix at pg. A-4).

6) On September 17, 2002, Deitz and Moore filed a third amended complaint, alleging (I) malicious prosecution; (II) misappropriation of trade secrets; (III) tortuous interference with business relations.

7) On November 12, 2002, Deitz and Moore filed a fourth amended complaint, alleging (I) malicious prosecution; (II) misappropriation of trade secrets; and (III) defamation. Bionetics filed a motion to dismiss counts II and III. The trial court denied the motion as to count II but granted the motion as to count III with leave to amend. (Appendix at pg. A-4 – A-5).

8) On April 5, 2002, Bionetics sent attorney Frank Kenniasty a letter advising Mr. Kenniasty and Deitz and Moore that Bionetics intended to seek attorney's fees under section 57.105 in the event that Deitz and Moore continued with claims for misappropriation of trade secrets and tortious interference with business relations. (Appendix at pg. A-6 – A-7).

9) On March 28, 2003, Bionetics filed a motion for attorney's fees pursuant to section 57.105, Florida Statutes (2002). The trial court deferred ruling on the motion until conclusion of the trial. (Appendix at pg. A-5).

10) Following a non-jury trial, the trial court granted Bonetics motion for involuntary dismissal. (Appendix at pg. A-5).

11) On July 21, 2004, Bionetics filed a second motion for attorney's fees pursuant to section 57.105. (Appendix at pg. A-5).

12) Relying on Hampton v. Cale, Inc., 964 So. 2d 822 (Fla. 4th DCA 2007), Maxwell Building Corp. v. Euro Concepts, 874 So. 2d 709 (Fla. 4th DCA 2004) and Airtran Airways, Inc. v. Avaero Noise Reduction Joint Venture, 858 So. 2d 1232 (Fla. 5th DCA 2003), the court held that although Deitz and Moore filed suit prior to the effective date of section 57.105(4), the safe harbor provision applies because Bionetics filed its motion for attorney's fees on March 28, 2003, well after its July 1, 2002 effective date. (Appendix at pg. A-5).

13) As such, the court reversed the award of attorney's fees in favor of Bionetics. Bionetics now seeks to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Conflict jurisdiction requires an express and direct conflict between the decision challenged and an opinion of this Court or another district court. Here, contrary to Bionetics' assertion, the district court ruled that section 57.105(4), Florida Statutes, was a substantive amendment and thus could not be applied retroactively. As such, the district court applied section 57.105(4) prospectively to actions taken, positions maintain and papers filed

after the effective date of the statutory amendment and properly concluded that Bionetics had failed to comply with the statute's safe harbor provision. Accordingly, Bionetics has failed to demonstrate any express or direct conflict or that the district court's decision is irreconcilable with the decisions of other district courts. As such, this Court should decline to exercise its discretionary jurisdiction.

ISSUE

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS MATTER PURSUANT TO THE CONFLICT JURISDICTION PROVISON OF ARTICLE V, SECTION 3(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. Gandy v. State, 846 So. 2d 1141, 1143 (Fla. 2003); Fla.R.App.P. 9.030(a)(2)(A)(iv).

The conflict must be direct and unequivocal. Mora v. City of Fort Lauderdale, 446 So. 2d 97, 98 (Fla. 1984). See also Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994)(finding that decision must be "in express and direct express conflict with a decision of another district court of appeal or of this Court on the same question of law"). "[I]nherent or so called 'implied' conflict" is insufficient. Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla.

1986). One of the tests of express and direct conflict is whether it has been shown from the opinions that the holdings of the district court of appeal are irreconcilable. Aravena v. Miami-Dade County, 928 So. 2d 1163 (Fla. 2006).

Here, Bionetics asserts that the Fifth District Court's decision is in express and direct conflict with Walker v. Cash Register Auto Ins. of Leon County, Inc., 946 So. 2d 66 (Fla. 1st DCA 2006) wherein the court held that the statutory amendment was substantive and could not be applied retroactively. To buttress its claim of conflict, Bionetics contends that the Fifth District's decision is contrary to this Court's ruling in L. Ross, Inc. v. R.W. Roberts Construction, Inc., 481 So. 2d 484 (Fla. 1986)[1] wherein this Court, after having examined the application of a statutory amendment to section 627.756, Florida Statutes, concluded that the right to attorney's fees is a substantive right and thus a statutory amendment affecting that substantive right is likewise substantive. Id. at 485. Bionetics' conflict argument is premised on its assertion that the Fifth District Court of Appeal

[1] In furtherance of this argument, Bionetics cites Baptist Manor Nursing Home v. Madison, 658 So. 2d 1228 (Fla. 1st DCA 1995), Marcus v. Miller, 663 So. 2d 1340 (Fla. 4th DCA 1995), Pickett v. Tequesta Dev. Co., 639 So. 2d 1133 (Fla. 5th DCA 1995), Brodose v. School Board of Pinellas County, Florida, 622 So. 2d 513 (Fla. 2nd DCA 1993), Stolzer v. Magic Tilt Trailer, Inc., 878 So. 2d 437 (Fla. 1st DCA 2004), and Zabik v. Palm Beach County School District, 901 So. 2d 887 (Fla. 1st DCA 2005).

in the instant case ruled that section 57.105(4) was a procedural change to the statute and afforded it retroactive application. Bionetics urges that in so ruling the district court ignored the principal that the right to attorney's fees is a substantive right, and any change affecting that substantive right is likewise substantive and cannot be given retroactive application. Bionetics' argument fails because the district court clearly found the statutory amendment to be a substantive change and gave it prospective application to actions taken, positions maintained and papers filed after July 1, 2002, the effective date of the statutory amendment.

Turning first to the decision in Walker, the First District Court of Appeal considered there whether the defendant corporation had complied with section 57.105(4)'s safe harbor provision. The lawsuit was filed on June 11, 2002 and section 57.105(4) became effective on July 1, 2002. The court held that subsection (4) was a substantive change, and thus could not have retroactive application. 946 So. 2d at 72. In so ruling, the Walker court noted that the Fifth District had "held that the broad changes made in 1999 to section 57.105 do not have retroactive effect," and cited Airtran Airways, Inc. v. Avaero Noise Reduction Joint Venture, 858 So.2d 1232

(Fla. 5th DCA 2003) and Mullins v. Kennelly, 847 So. 2d 1151 (Fla. 5th DCA 2003).[2]

Specifically, in Airtran, the trial court failed to apply the 1999 version to a claim for attorney's fees arising from a lawsuit filed in May 2000. The court again held that the 1999 version of the statute applied to actions taken, positions maintained and papers filed subsequent to October 1, 1999. Id. at 1233. See also Jackson v. York Hannover Nursing Centers, Inc., 853 So. 2d 598, 602 (Fla. 5th DCA 2003). The Walker court recognized the Airtran and Mullins decisions and ruled likewise. Thus no conflict exists between Airtran and Walker.

Bionetics seeks to impute conflict by noting the Fifth District's reference to Maxwell Bldg Corp. v. Euro Concepts, LLC, 874 So. 2d 709 (Fla. 4th DCA 2004). In Maxwell, the Fourth District Court held "section 57.105(4) is a procedural change in the statute that became effective July 1, 2002." Id. at 711. However, the analysis cannot end there as the Fourth

[2] The decision in Mullins was issued five months before Airtran and is cited by the court in Airtran. In Mullins v. Kennelly, the Fifth District examined whether 1999 revision of section 57.105 applied to a case where the lawsuit was filed prior to the October 1, 1999 effective date of the statutory revision. The court held "the 1999 amendment to section 57.105 substantively changed the statute by creating rights to fees under circumstances not previously authorized. As a result, we conclude that the revised statute cannot be applied retroactively to papers filed, actions taken or matters occurring prior to the effective date of the amendment." 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003).

District followed the Maxwell decision with Hampton v. Cale, Inc., 964 So. 2d 822 (Fla. 4th DCA 2007). In Hampton, the court held "a 2002 amendment to section 57.105, which requires twenty-one days' notice to the non-moving party to withdraw a challenged claim or defense, is not retroactive." Id. at 823. In so ruling, the Hampton court distinguished Maxwell by noting that in Maxwell it did not decide the issue whether the 21-day safe harbor was retroactive. The Hampton court specifically noted that it applied the amendment in Maxwell because the section 57.105 motion had been filed after the effective date of the statute. The court further explained that the amendment to section 57.105 "has procedural aspects, but affects substantive rights and cannot be retroactive," thus clearly distinguishing the Maxwell decision. Id. at 825.

The Airtran, Hampton, and Walker decisions each hold that the amendment to section 57.105(4) was a substantive change and could not be applied retroactively. The holding in the instant case likewise concludes that section 57.105(4) is not retroactive and can only be give prospective application. These decisions are clearly congruous and cannot give rise to the direct and express conflict required to invoke the discretionary jurisdiction of this Court.

CONCLUSION

Based on the foregoing argument and authority, Deitz and Moore respectfully submit that this Court lacks jurisdiction to consider this case, and Bionetics' petition for review must be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Joe Teague Caruso, Esq., 190 Fortenberry Road, Suite 107, Merritt Island, Florida 32952 and Frank W. Kenniasty, Esq., 1683 Clover Circle, Melbourne, Florida 32935 by U.S. Mail this 30th day of July 2009.

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this Respondent's Jurisdiction Answer Brief has been prepared in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, using 14 point Times New Roman.

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Elizabeth Siano Harris, Esq.