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 Reply Brief on Jurisdiction

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The narrow issue before this Court is whether the Fifth District Court of Appeal's decision in the instant case expressly and directly conflicts with Walker v. Cash Register Auto, 946 So.2d 66 (Fla. 1st DCA 2006) which held that the 2002 amendment to F.S. § 57.105(4) is a substantive change and cannot be applied retroactively.

STATEMENT OF THE FACTS

Respondent concurs with most of the facts as stated in Petitioner's brief except Petitioner's characterization of the Fifth District's holding. The Fifth District did not expressly find that the amendment to § 57.105(4) was procedural; rather, it rejected Bionetics' reasoning that the amendment could not be applied to the lawsuit (A4 – A5).

SUMMARY OF THE ARGUMENT

The Fifth District's decision below is not expressly and directly in conflict with Walker because the Fifth District relied on Hampton v. Cale, 964 So.2d 822, 823 (Fla. 4th DCA 2007) which held the 2002 amendment to § 57.105(4) cannot be applied retroactively. The Hampton court distinguished its earlier decision in Maxwell v. Euro Concepts, 874 So.2d 709 (Fla. 4th DCA 2004) by citing to Walker and clearly acknowledging the 2002 amendment to § 57.105(4) was a substantive

change which could not be applied retroactively. Therefore, the Fifth District's decision below is in harmony with both Walker and Hampton.

The Fifth District's application of the amendment to Petitioner's motion for attorney's fees in the instant case is also consistent with Hampton in that the Fifth District held the amendment to the statute applies to an attorney's fee motion filed after July 1, 2002, even if the lawsuit was filed prior to July 1, 2002 because such a finding under these facts was a ***prospective*** application of the statute. The Walker court, on the other hand, did not expressly state whether a motion for attorney's fees filed after July 1, 2002 was a retroactive or prospective application of the statute when the lawsuit was filed before July 1, 2002. Therefore, there is no direct conflict. More importantly, this Court previously addressed the same issue of conflict and declined jurisdiction. Walker v. Cash Register Auto, 946 So. 2d 66 (Fla. 1st DCA 2006) *rev'd,* 959 So.2d 718 (Fla. 2007).

Even if there is a conflict between the Fifth District's opinion below and Walker, which Respondent does not concede, the issue of attorney's fee is moot because Petitioner has conceded the Fifth District's finding that Respondent stated a valid claim for tortious interference with business relations. As to the other two claims, the attorney's fee issue is also moot because the Fifth District reversed the trial court's award of attorney's fees and noted that the trial court failed to make any findings in its order (A6).

ARGUMENT

I. THE FIFTH DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH WALKER.

The Fifth District's decision below does not expressly and directly conflict with Walker because the Fifth District relied on Hampton. In Hampton, the court stated:

> Plaintiffs argue that this amendment is procedural and therefore retroactive, citing our decision in Maxwell Building Corp. v. Euro Concepts, LLC, 874 So.2d 709 (Fla. 4th DCA 2004). In Maxwell, as plaintiffs recognize in their brief, this court did not have to decide whether the twenty-one day safe harbor amendment was retroactive, because the motion for section 57.105 fees had been filed in October, 2002, after the effective date of the statute. We concluded in Maxwell that the primary purpose of the safe harbor provision had been served, in that the plaintiffs had well more than twenty-one days to withdraw their claims. Hampton, 964 So.2d 822.

The Hampton court therefore distinguished its decision in Maxwell by noting the motion for attorney's fees in Maxwell was filed ***after*** the July 1, 2002 amendment to § 57.105(4) whereas the attorney's fee motion in Hampton was filed ***before*** the July 1, 2002 amendment. Id.

Furthermore, the Hampton court cited to Walker and clearly acknowledged the 2002 amendment to § 57.105(4) was a substantive change which could not be applied retroactively:

> After our decision in Maxwell, the first district decided the retroactivity of the safe harbor amendment in Walker v. Cash Register Auto Insurance of Leon County, Inc., 946 So.2d 66 (Fla. 1st DCA

> 2006). In explaining why the safe harbor amendment was substantive, the first district explained: "As a general rule, procedural changes in the law are applied retroactively, while substantive changes are applied prospectively only (citations omitted)".

Therefore, the Fifth District's decision below is in harmony with both Walker and Hampton.

The Fifth District's analysis of Petitioner's motion for attorney's fees as applied to the amended statute is also consistent with Hampton in that it held the amendment to the statute applies to an attorney's fee motion filed after July 1, 2002, even if the lawsuit was filed prior to July 1, 2002 because such a finding under these facts was a ***prospective*** application of the statute. This finding is consistent with the plain language of the statute. The amendment to § 57.105(4) states:

> 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 (emphasis added).

This section of the statute is clearly directed towards motions, not towards the filing of the lawsuit. In contrast, § 57.105(1) is directed towards "any claim or defense at any time during a civil proceeding." Therefore, the proper analysis of determining whether the application of § 57.105(4) is prospective or retroactive must begin by determining when the motion was filed as the Fifth District properly held, not when the lawsuit was filed as argued by Petitioner.

The Walker court, on the other hand, did not expressly state whether a motion for attorney's fees filed after July 1, 2002 was a retroactive or prospective application of the statute, and further acknowledged the Maxwell court's analysis of retroactivity as applied to attorney's fees motions:

> While the court 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. . . 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.

Therefore, the Walker holding was limited to determining that the amendment to § 57.105(4) was a substantive change, could not be applied retroactively, and could not be applied to the facts of the case. The holding did not expressly state whether the amended statute applied to a motion for attorney's fees filed after July 1, 2002 as did the Fifth District in its opinion below. Accordingly, there is not a direct and express conflict. Finally, this Court previously addressed the same issue of conflict and declined jurisdiction. Walker v. Cash Register Auto, 946 So. 2d 66 (Fla. 1st DCA 2006) *rev'd*, 959 So.2d 718 (Fla. 2007).

II. THE FIFTH DISTRICT COURT'S HOLDING IS CONSISTENT WITH FEDERAL LAW AS APPLIED TO ATTORNEY'S FEES MOTIONS FILED AFTER THE AMENDED FEDERAL RULE 11.

Federal courts have addressed the same issue under 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. Therefore, the Fifth District's holding is not only consistent with Walker and Hampton, it is also consistent with Federal courts.

III. THE FIFTH DISTRICT COURT'S OPINION APPLIES NARROWLY TO THE FACTS OF THE INSTANT CASE, AND LIKELY WILL NOT APPLY TO ANY FUTURE CASES.

The Fifth District's holding applies narrowly to the facts of the instant case where the motion for attorney's fees was filed after the amendment to § 57.105(4) and the lawsuit was filed before effective date of the amendment. Since the amendment took effect over seven years ago, it is extremely unlikely that this Court would ever be presented with the same issue. Therefore, this Court should decline jurisdiction in this case.

IV. EVEN IF THERE IS A CONFLICT BETWEEN THE FIFTH DISTRICT COURT'S DECISION AND WALKER, THE ISSUE OF AWARDING ATTORNEY'S FEES IS MOOT.

Petitioner concedes the issue of attorney's fees is moot with respect to the tortious interference with business relations claim because the Fifth District found the claim was not frivolous. However, Petitioner argues the issue of attorney's fees is not moot with respect to the claims of invasion of privacy and violation of the Procurement Integrity Act. As to these two claims, however, the Fifth District reversed the trial court's award of attorney's fees and noted the trial court failed make any findings in its order citing Daniels v. Reeves, 712 So.2d 839, 840 (Fla. 1st DCA 1998). Therefore, the issue of an attorney's fee award is moot for all three claims. Accordingly, this Court should decline jurisdiction.

CONCLUSION

The Fifth District's decision below is not expressly and directly in conflict with Walker because the Fifth District relied on Hampton which held the 2002 amendment to § 57.105(4) cannot be applied retroactively. Furthermore, the Hampton court cited to Walker and clearly acknowledged the 2002 amendment to § 57.105(4) was a substantive change which could not be applied retroactively. Therefore, the Fifth District's decision below is in harmony with both Walker and Hampton.

The Fifth District's application of the amendment to Petitioner's motion for attorney's fees is also consistent with Hampton in that it held the amendment to the statute applies to an attorney's fee motion filed after July 1, 2002, even if the lawsuit was filed prior to July 1, 2002 because such a finding under these facts was a ***prospective*** application of the statute. The Walker court, on the other hand, did not expressly state whether a motion for attorney's fees filed after July 1, 2002 was a retroactive or prospective application of the statute when the lawsuit was filed before July 1, 2002. Therefore, there is no direct conflict. More importantly, this Court already addressed the same issue of conflict and declined jurisdiction. Walker v. Cash Register Auto, 946 So. 2d 66 (Fla. 1st DCA 2006) *rev'd,* 959 So.2d 718 (Fla. 2007).

Even if there is a conflict between the Fifth District's opinion below and Walker, which Respondent does not concede, the issue is moot because Petitioner has conceded the Fifth District's finding that Respondent stated a valid claim for tortious interference with business relations. As to the other two claims where the Fifth District also reversed the trial court's award of attorney's fees, the attorney's fees issue is also moot because the Fifth District found the trial court failed make any findings in its order.

Finally, The Fifth District's holding applies narrowly to the facts of the instant case where the motion for attorney's fees was filed after the amendment to § 57.105(4) and the lawsuit was filed before the effective date of the amendment. Since the amendment took effect over seven years ago, it is extremely unlikely that this Court would ever be presented with the same issue. Accordingly, this Court should decline jurisdiction.

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; and Elizabeth Siano Harris, Esq. 1820 Garden Street, Titusville, FL 32796; this 20th day of July, 2009.

_____

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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 (2006).

_____

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