

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. KENNIASY, JUDITH DEITZ  
and WILLIAM MOORE, etc., et al.,

Respondents.

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**BRIEF OF PETITIONER ON JURISDICTION**

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

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES	ii-iii
STATEMENT OF THE CASE AND FACTS	1-4
SUMMARY OF ARGUMENT	4
ARGUMENT	5-10

<b><u>A) The Fifth District’s Decision Conflicts With Walker v. Cash Register Auto Ins. of Leon Cty., Inc., 946 So.2d 66 (Fla. 1<sup>st</sup> DCA 2006)</u></b>	5-6
<b><u>B) The Fifth District’s Decision Conflicts With Decisions Holding That the Right to Attorney’s Fees, And Burden of Paying Them, Are Substantive</u></b>	6-8
<b><u>C) The Fifth District’s Decision Conflicts With Decisions Holding Other Amendments to Attorney’s Fees Statutes To Be Substantive, And Thus Inapplicable to Cases Filed Prior Thereto</u></b>	8-9
<b><u>D) The Fifth District’s Ruling That One Count, The Tortious Interference Count, Was Also Not Frivolous, Does Not Effect The Other Counts, Nor Make Application of The Safe Harbor Amendment to Those Counts Moot</u></b>	9-10

CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF TYPE SIZE & STYLE	12

## TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Antunez v. Whitfield</u> 980 So.2d 1175 (Fla. 4 <sup>th</sup> DCA 2008)	7
<u>Baptist Manor Nursing Home v. Madison</u> 658 So.2d 1228 (Fla. 1 <sup>st</sup> DCA 1995)	8
<u>Bitterman v. Bitterman</u> 714 So.2d 356 (Fla. 1988)	4, 7
<u>Brodose v. School Bd. of Pinellas Cty., Fla.</u> 622 So.2d 513 (Fla. 2 <sup>nd</sup> DCA 1993)	8
<u>Kincaid v. World Ins. Co.</u> 157 So.2d 517 (Fla. 1963)	6
<u>L. Ross, Inc. v. R.W. Roberts Constr., Inc.</u> 481 So.2d 484 (Fla. 1986)	4, 6
<u>Leapai v. Milton</u> 595 So.2d 12 (Fla. 1992)	5
<u>Marcus v. Miller</u> 663 So.2d 1340 (Fla. 4 <sup>th</sup> DCA 1995)	4, 8
<u>Maxwell Bldg. Corp. v. Euro Concepts, LLC</u> 874 So.2d 709 (Fla. 4 <sup>th</sup> DCA 2004)	3, 5, 6
<u>Pickett v. Tequesta Dev. Co.</u> 639 So.2d 1133 (Fla. 5 <sup>th</sup> DCA 1994)	8
<u>Stolzer v. Magic Tilt Trailer, Inc.</u> 878 So.2d 437 (Fla. 1 <sup>st</sup> DCA 2004)	4, 5, 9
<u>Timmons v. Combs</u> 608 So.2d 1 (Fla. 1992)	5

<u>Walker v. Cash Register Auto Ins. of Leon Cty., Inc.</u> 946 So.2d 66 (Fla. 1 <sup>st</sup> DCA 2006)	4-6, 10
<u>Young v. Altenhaus</u> 472 So.2d 1152 (Fla. 1985)	4, 6, 7
<u>Zabik v. Palm Beach Cty. School Dist.</u> 901 So.2d 887 (Fla. 1 <sup>st</sup> DCA 2005)	4, 9
Chapter 440, <u>Fla. Stat.</u>	5
§57.105, <u>Fla. Stat.</u>	2, 3, 9, 10
§57.105(4), <u>Fla. Stat.</u>	1, 3-5
§57.105(a)(1), <u>Fla. Stat.</u>	2
§733.617, <u>Fla. Stat.</u>	7
§768.56, <u>Fla. Stat.</u>	6

## **STATEMENT OF THE CASE AND FACTS**

### **A) Timetable For The Relevant Sequence of Events Involved in This Petition:**

**2001:** Deitz and Moore, with Kenniasty as counsel, filed a 4-count Complaint against Bionetics for malicious prosecution, negligent sequestration, misappropriation of trade secrets, and tortious interference with business relations (A2). The trial court granted Bionetics' Motion to Dismiss 2 of the 4 counts (A3).

**February 13, 2002:** Deitz and Moore filed an Amended Complaint alleging the same 4 counts (A3). The court granted Bionetics' Motion to Dismiss with prejudice the negligent sequestration count, with leave to amend as to the other counts (A3).

**April 10, 2002:** Deitz and Moore filed a Second Amended Complaint consisting of 6 counts (A3), *i.e.*, the 3 amended counts, plus counts for invasion of privacy, trespass to property, and violation of the Procurement Integrity Act. The trial court granted Bionetics' Motion to Dismiss with prejudice violation of the Procurement Integrity Act, and dismissed with leave to amend the other counts (A3).

**July 1, 2002:** Subsection (4) was added to §57.105, Fla. Stat., by an amendment that took effect July 1, 2002, and 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:** Deitz and Moore filed a Third Amended Complaint alleging three counts: malicious prosecution, misappropriation of trade secrets, and tortious interference with business relations (A3). The trial court denied Bionetics' Motion to Dismiss as to the malicious prosecution count, and dismissed with leave to amend the other counts (A3).

**November 12, 2002:** Deitz and Moore filed a Fourth Amended Complaint for malicious prosecution, misappropriation of trade secrets, and defamation. The trial court denied Bionetics' Motion to Dismiss the misappropriation of trade secrets count, and granted dismissal with leave to amend the defamation count.

**March 28, 2003:** Bionetics filed a Motion for Attorney's Fees pursuant to §57.105, Fla. Stat.

**August 24, 2004:** Following a non-jury trial, the trial court granted Bionetics' Motion for Involuntary Dismissal, dismissing Deitz and Moore's case with prejudice (A4).

**July 21, 2004:** Bionetics filed a second motion for an award of attorney's fees pursuant to §57.105, Fla. Stat.

**B) The Trial Court's Ruling**

The trial court awarded Bionetics' attorney's fees and costs of \$39,025.78 against Deitz and Moore, and their attorney, Frank Kenniasty, pursuant to §57.105(a)(1). (A1)

C) **The Fifth District Reversed The Trial Court's Award of Attorney's Fees**

The Fifth District reversed the award of attorney's fees, ruling that Bionetics had failed to comply with the 21-day notice provision added to §57.105 by a July 1, 2002 amendment, which the court ruled 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 amendment to §57.105 was substantive, and thus could not be applied to a lawsuit filed before the amendment's effective date, stating (A4):

... 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 Fifth District relied upon Maxwell Bldg. Corp. v. Euro Concepts, LLC, 874 So.2d 709, 711-12 (Fla. 4<sup>th</sup> DCA 2004), which had held the safe harbor amendment to be a procedural change to §57.105. The Fifth District concluded that the amendment applied where a motion for attorney's fees is filed after the effective date of the amendment, even though the lawsuit was filed before the amendment, stating (A5):

... 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.

The Fifth District's decision is wrong, and directly and expressly conflicts with other Florida cases which hold that an amendment to an attorney's fee statute which changes the rights and obligations of the parties in regard to recovery of, or payment of, attorney's fees is a substantive change, which cannot be retroactively applied to a lawsuit filed prior to the amendment's effective date. In other words, the controlling date for purposes of applying the safe harbor amendment to §57.105(4) is the date the lawsuit was filed, not the date the motion for attorney's fees was filed.

### **SUMMARY OF ARGUMENT**

The Fifth District's ruling that the safe harbor amendment to §57.105(4) is procedural, not substantive, and therefore retroactively applies to lawsuits filed before its effective date, so long as the motion for attorney's fees was filed after the amendment's effective date, directly and expressly conflicts with Walker v. Cash Register Auto Ins. of Leon Cty., Inc., 946 So.2d 66 (Fla. 1<sup>st</sup> DCA 2006); L. Ross, Inc. v. R.W. Roberts Constr., Inc., 481 So.2d 484 (Fla. 1986); Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); Marcus v. Miller, 663 So.2d 1340 (Fla. 4<sup>th</sup> DCA 1995); Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1988); Stolzer v. Magic Tilt Trailer, Inc., 878 So.2d 437 (Fla. 1<sup>st</sup> DCA 2004); and Zabik v. Palm Beach Cty. School Dist., 901 So.2d 887, 890 (Fla. 1<sup>st</sup> DCA 2005).



## ARGUMENT

A) **The Fifth District's Decision Conflicts With *Walker v. Cash Register Auto Ins. of Leon Cty., Inc.*, 946 So.2d 66 (Fla. 1<sup>st</sup> DCA 2006)**

In Walker, 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 (Id. at 71-72):

... The supreme court has held that “rights to attorney’s fees granted by statute are substantive rather than procedural.” (cases omitted); *see also Timmons v. Combs*, 608 So.2d 1, 2-3 (Fla. 1992) (“it is clear that the circumstances under which a party is entitled to costs and attorney’s fees is substantive”), and *Leapai v. Milton*, 595 So.2d 12 (Fla. 1992).

\* \* \*

[4] While the court in *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 (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. 1<sup>st</sup> 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)

\* \* \*

...We certify conflict with *Maxwell Building Corp. v. Euro Concepts, LLC*.

A direct and express conflict exists where a district court's decision on its face so collides with a prior decision of another appellate court on the same point of law as to create an inconsistency or conflict among precedents. Kincaid v. World Ins. Co., 157 So.2d 517 (Fla. 1963). This case meets that test. The relevant facts in this case are identical to the facts in Walker: each lawsuit was filed before the safe harbor amendment; whereas, the motions for attorney's fees were filed after the amendment. The Fifth District in the present case held that the amendment was procedural and applied to cases filed before the amendment; whereas Walker held that the amendment was substantive, and could not be applied retroactively to cases filed prior thereto. Finally, the Fifth District in this case relied upon the Fourth District's Maxwell decision; whereas, Walker certified conflict with Maxwell.

**B) The Fifth District's Decision Conflicts With Decisions Holding That the Right to Attorney's Fees, And Burden of Paying Them, Are Substantive**

The Fifth District's holding conflicts with L. Ross, Inc. v. R.W. Roberts Construction, Inc., 481 So.2d 484, 485 (Fla. 1986), where this Court stated:

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.

In Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), this Court held that the assessment of attorney's fees under §768.56, Fla. Stat., which authorized the trial court to award prevailing party attorney's fees in a malpractice action, could not be

retroactively applied to causes of action which accrued prior to the date the statute became effective. The Court cited well-established law that a statute providing for payment of attorney's fees, or any amendment thereto, is substantive, because the American Rule adopted in Florida requires each party to pay their own attorney's fees unless directed otherwise by statute or an agreement between the parties (Id. at 1154).

Subsequently, in Bitterman v. Bitterman, 714 So.2d 356, 363 (Fla. 1998), this Court resolved a conflict between the district courts in regard to the point in time when the substantive right to attorney's fees vests. The issue was whether an amendment to §733.617, Fla. Stat., which governs compensation of attorneys for representing the personal representative of a decedent's estate, could be applied retroactively. This Court held that the prior version of the statute applied, because substantive rights and obligations as to attorneys fees vest and accrue when the underlying cause of action accrues, which in that case occurred prior to §733.617's amendment, and that substantive rights could not be affected by statutory amendments once those rights had vested.

Finally, in Antunez v. Whitfield, 980 So.2d 1175 (Fla. 4<sup>th</sup> DCA 2008), the Fourth District held that an amendment to an attorney's fee statute, providing for an award of attorney's fees arising out of a trial de novo after a non-binding arbitration award, did not apply retroactively "**since the amendment ... affects the right to attorneys fees, it is substantive in nature, regardless of any procedural aspect it**

**might otherwise have.”** The above cases make it apparent that whether a motion for attorney’s fees is filed before or after the effective date of an attorney’s fee statute, or amendment thereto, an act which the Fifth District found controlling, is actually irrelevant.

C) **The Fifth District’s Decision Conflicts With Decisions Holding Other Amendments to Attorney’s Fees Statutes To Be Substantive, And Thus Inapplicable to Cases Filed Prior Thereto**

Also in conflict with the Fifth District’s decision are decisions which hold that an amendment to an attorney’s fee statute which grants, repeals or increases a safe harbor or grace period are substantive, and cannot be applied retroactively to cases filed before such amendments. For example, Baptist Manor Nursing Home v. Madison, 658 So.2d 1228 (Fla. 1<sup>st</sup> DCA 1995), held that a statutory amendment which repealed a 21-day grace period within which an employer must accept a claim for benefits or be liable for attorney’s fees was substantive, and could not be applied retroactively. Likewise, Marcus v. Miller, 663 So.2d 1340 (Fla. 4<sup>th</sup> DCA 1995), held that an amendment to the offer of judgment statute could not be applied to a cause of action that accrued before the statute was amended. See to the same effect Pickett v. Tequesta Dev. Co., 639 So.2d 1133 (Fla. 5<sup>th</sup> DCA 1994) and Brodose v. School Bd. of Pinellas Cty., Fla., 622 So.2d 513 (Fla. 2<sup>nd</sup> DCA 1993), cited in Marcus v. Miller, supra.

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

The above cases demonstrate that the fact that Bionetics filed its Motion for Attorney's Fees after the 2002 amendment to §57.105, which added the 21-day safe harbor provision, was irrelevant. The parties' rights and obligations as to attorney's fees under §57.105 are substantive, and thus the 21-day safe harbor amendment to §57.105, which became effective after this lawsuit was filed, could not be applied retroactively to this case.

**D) The Fifth District's Ruling That One Count, The Tortious Interference Count, Was Also Not Frivolous, Does Not Affect The Other Counts, Nor Make Application of The Safe Harbor Amendment to Those Counts Moot**

The Fifth District's decision that the tortious interference count was not frivolous does not make moot, and is irrelevant to, the court's retroactive application of the safe harbor amendment to Deitz and Moore's other frivolous counts for which

the trial court awarded attorney's fees. A direct and express conflict with the above-cited cases still exists as to those counts.

### **CONCLUSION**

This Court has jurisdiction to review the Fifth District's decision, since it directly and expressly conflicts with the First District's Walker decision, which held that the safe harbor provision of §57.105 is substantive, and cannot be applied to cases filed before its effective date; whereas, the Fifth District held that the safe harbor amendment was procedural and could be applied retroactively. The Fifth District's decision also conflicts with decisions that have held that amendments to other attorney's fees statutes, which changed the parties' rights and obligations as to attorney's fees, are substantive and thus could not be retroactively applied to lawsuits filed prior to the amendments' effective dates.

**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; and **Elizabeth Siano Harris, Esquire**, STADLER & HARRIS, P.A., 1820 Garden Street, Titusville, FL 32796; by mail on July 14, 2009.

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**CERTIFICATE OF TYPE SIZE & STYLE**

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14 pt.

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