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.
___________________________________/

REPLY BRIEF OF PETITIONER ON THE MERITS

On Appeal from the Fifth District Court of Appeal of the

State of Florida

CARUSO, SWERBILOW & CAMEROTA, P.A.

190 Fortenberry Rd., Suite 107

Merritt Island, Florida 32954-1271
Telephone: (321) 453-3880
Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii-iv

RESPONSE TO KENNIASTY'S STATEMENT OF THE CASE 1

RESPONSE TO KENNIASTY'S STATEMENT OF THE FACTS 1

ARGUMENT 1-15

I. **THE FIFTH DISTRICT APPLIED THE SAFE HARBOR AMENDMENT RETROACTIVELY, RATHER THAN PROSPECTIVELY** 1-11

II. **THE FEDERAL COURT'S INTERPRETATION OF RULE 11 IS NOT CONTROLLING IN INTERPRETING §57.105, *FLA. STAT.*** 11-12

III. ***WALKER* HAS BEEN APPROVED BY THIS COURT** 12

IV. **THE ISSUE OF AWARDING ATTORNEYS' FEES IS NOT MOOT** 13-14

V. **BIONETICS' JURISDICTIONAL BRIEF CONCEDED NOTHING** 14-15

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF TYPE SIZE & STYLE 17

TABLE OF AUTHORITIES

PAGE

Adlow, Inc. v. Mauda, Inc.
632 So.2d 714 (Fla. 5th DCA 1994) 13

Barco v. School Bd. of Pinellas Cty.
975 So.2d 1116 (Fla. 2008) 2

Bradley v. School Bd. of Richmond
416 U.S. 696 (1974) 15

Daniels v. Reeves
712 So.2d 839 (Fla. 1st DCA 1998) 13

Fernandez v. Chiro Risk Mgmt.
700 So.2d 65 (Fla. 2nd DCA 1997) 13

Glisson v. Jkvl. Transp. Auth.
705 So.2d 136 (Fla. 1st DCA 1998) 13

Hampton v. Cale, Inc.
964 So.2d 822 (Fla. 4th DCA 2007) 1

Hernandez -Vargas v. Gonzales
548 U.S. 30 (2006) 9, 10

Hustad v. Architectural Studio
958 So.2d 569 (Fla. 4th DCA 2007) 13, 14

Kaufman v. Sweet, et al. Corp.
144 So.2d 515 (Fla. 3rd DCA 1962) 12

Landgraf v. USI Film Prods.
511 U.S. 244 (1994) 9, 10,15

Larson & Larson, P.A. v. TSE Indus. Inc.
22 So.3d 36 (Fla. 2009) 2-4

Maxwell v. Euro Concepts
874 So.2d 709 (Fla. 4th DCA 2004) 1

Med'l Jet v. Signature Flight Support
941 So.2d 576 (Fla. 4th DCA 2006) 2

Menendez v. Progressive Express Ins. Co.
35 Fla.L.Weekly S81 (Fla. Feb. 4, 2010) 5-9, 12

Mickler v. Graham
611 So.2d 93 (Fla. 1st DCA 1992) 13

Mullins v. Kennelly
847 So.2d 1151 (Fla. 5th DCA 2002) 12

Savoie v. State
422 So.2d 308 (Fla. 1982) 15

State Farm Mut. Auto Ins. Co. v. Laforet
658 So.2d 55 (Fla. 1995) 5

Stolzer v. Magic Tilt Trailer, Inc.
878 So.2d 437 (Fla. 1st DCA 2004) 5, 7, 8

T.I.E. Comms., Inc. v. Toyota Motors Center, Inc.
391 So.2d 697 (Fla. 3rd DCA 1980) 11

Timmons v. Combs
608 So.2d 13 (Fla. 1992) 11

Walker v. Cash Register Auto Ins. of Leon Cty., Inc.
946 So.2d 66 (Fla. 1st DCA 2006) 1, 5, 7, 8, 12

Williams v. Cadlerock Joint Venture, LLP
14 So.3d 292 (Fla. 4th DCA 2009) 2-4

Young v. Altenhaus
472 So.2d 1152 (Fla. 1985) 5, 6

§627.727(4), Fla. Stat. 8

§627.727(4)(b), Fla. Stat. 8

§57.105, Fla. Stat. 1-5, 7-15

§627.736, Fla. Stat. 6, 8

§627.736(11), Fla. Stat. 5

§768.56 Fla. Stat. 6

Fla.R.Civ.P. 1.525 2, 4, 5

RESPONSE TO KENNIASTY'S STATEMENT OF THE CASE

Kenniasty argues that the issue on appeal pertains to whether the safe harbor amendment to §57.105, Fla. Stat., applies to a motion for attorneys' fees filed after the amendment's effective date, when the lawsuit was filed before the amendment. An additional relevant factor that must be considered is that the counts the trial court found to be frivolous were filed before the safe harbor amendment's effective date.

RESPONSE TO KENNIASTY'S STATEMENT OF THE FACTS

Kenniasty states that Judge Barlow found Bionetics' conduct unethical and reprehensible. The Judge was referencing conduct of Bionetics' employees, that occurred unbeknownst to Bionetics (R:2382). Contrary to Kenniasty's claim, the court made the required findings that he knew, or should have known, that there were no

material facts to support the counts on which it awarded §57.105 attorneys fees'.

ARGUMENT

I. THE FIFTH DISTRICT APPLIED THE SAFE HARBOR AMENDMENT RETROACTIVELY, RATHER THAN PROSPECTIVELY

Kenniasty first argues that Hampton v. Cale, Inc., 964 So.2d 822 (Fla. 4th DCA 2007), which relied upon Maxwell v. Euro Concepts, 874 So.2d 709, 710 (Fla. 4th DCA 2004) were correctly decided, whereas a conflicting case, Walker v. Cash Register Auto Ins. of Leon Cty., Inc., 946 So.2d 66 (Fla. 1st DCA 2006) was incorrectly decided. Kenniasty makes two arguments to support his contention:

A. Kenniasty Incorrectly Argues That A Claim for §57.105 Attorneys' Fees Accrues When The Underlying Judgment Becomes Final

Kenniasty argues that reading §57.105 together with Fla.R.Civ.P. 1.525 (which he claims is essentially a statute of limitation for attorneys' fees) and Med'l Jet v. Signature Flight Support, 941 So.2d 576 (Fla. 4th DCA 2006)(which held that a statute of limitation accrues when

the last element of a cause of action accrues) means that a claim for §57.105 attorneys' fees cannot accrue until the filing of the underlying judgment, or dismissal of an underlying claim. Kenniasty is mixing apples and oranges. He cannot cite any case to support his contention that the version of §57.105 to be applied to an attorneys fee claim is determined by when the underlying judgment or order of dismissal becomes final.

In regard to Rule 1.525, Bionetics' motions for §57.105 attorneys fees' were filed before judgment or dismissals were filed in the underlying action (R10:1675-79; R15:2375-76). Thus, they were timely filed under Rule 1.525, which sets forth the outside deadline for filing such motions. Barco v. School Bd. of Pinellas Cty., 975 So.2d 1116, 1121-24, (Fla. 2008).

To support Kenniasty's argument that a claim for §57.105 attorneys fees' accrues when an underlying judgment becomes final, which is also when the statute of

limitation on the attorneys' fees claim begins to run, he relies upon 2 cases, Larson & Larson, P.A. v. TSE Indus. Inc., 22 So.3d 36 (Fla. 2009) and Williams v. Cadlerock Joint Venture, LLP., 14 So.3d 292 (Fla. 4th DCA 2009). Larson held that: (1) a claim for legal malpractice as to an underlying judgment accrues, and its statute of limitations begins to run, when that judgment becomes final; (2) a claim for legal malpractice as to a separate §57.105 attorneys' fee judgment accrues, and its statute of limitations begins to run, when that judgment becomes final, and; (3) if the §57.105 attorneys fees' judgment is entered after the underlying judgment, it is appealable independently of the underlying judgment. Larson does not apply because this case does not concern when a claim for legal malpractice accrues or its statute of limitation begins to run.

Contrary to Kenniasty's claim, Larson, supra, did not concern when the statute of limitation accrues on a claim

for attorneys' fees sought in a legal malpractice case (KB7). Rather, it concerned when a legal malpractice claim's statute of limitations accrues on an order requiring the client to pay §57.105 attorneys fees'. Kenniasty is confusing when an underlying judgment becomes final, at which time the statute of limitations for legal malpractice begins to run, with when a claim for sanctions accrues in the underlying lawsuit. He incorrectly concludes that a claim for §57.105 attorneys' fees in an underlying action does not accrue until the underlying judgment becomes final (KB9). Larson did not even address that scenario.

The second case relied upon by Kenniasty, Williams v. Cadlerock Joint Venture, LLP, supra, is likewise inapplicable here. In Williams, the Fourth District agreed with the appellant/defendant that a New York judgment against him was void, but denied him §57.105 attorneys' fees as sanctions. In a later appeal, that

Court held that its denial of attorneys fees in the prior appeal did not preclude, or collaterally estop, the trial court from subsequently awarding §57.105 attorneys' fees as sanctions for the plaintiff's persistence in trying to enforce the void judgment against the defendant. Nor was the defendant barred from claiming §57.105 attorneys' fees in the trial court, because he had not challenged, in the prior appeal, the failure of the trial court to award it §57.105 attorneys fees. The Fourth District aptly pointed out that §57.105 required a party to prevail in order to recover sanctions. Before the prior appeal, the trial court had ruled in the plaintiff's favor, and it was only when the Fourth District held the judgment void that the defendant became a "prevailing party" entitled to §57.105 attorneys' fees. Therefore, it would have been premature for the defendant to challenge the trial court's failure to award fees in the prior appeal. This case differs from Williams, supra, because Bionetics was the

prevailing party when it was awarded §57.105 attorneys' fees. The fact that Bionetics' motions for attorneys' fees were filed after the safe harbor amendment was effective is irrelevant, since Techniart's frivolous claims were filed before, and defended before, the effective date of that amendment.

Kenniasty incorrectly concludes that by reading together Larson, Williams and Rule 1.525, a claim for §57.105 attorneys' fees cannot accrue until after a prevailing party is determined, which means that there must first be an underlying judgment or order of dismissal. Kenniasty even admits in footnote 2 (KB10) that Larson conflicts with Rule 1.525, since they provide two different accrual dates. The reason they conflict is that neither determines the accrual date of a claim for §57.105 attorneys' fee.

Kenniasty's Brief, pages 11-14, attempts to distinguish the cases relied upon in Bionetics' Brief, by

essentially arguing that they did not concern §57.105 attorneys' fees. He claims that the rule to be drawn from those cases is that a "party has the right to attorneys' fees when the underlying action accrues, except in the case of a sanctions claim which accrues when either the underlying judgment or the sanction judgment becomes final" (KB14). Thus, Kenniasty argues, Bionetics' claim for §57.105 attorneys' fees did not accrue until after the safe harbor amendment's effective date.

Kenniasty's Brief overlooks this Court's decision in Menendez v. Progressive Express Ins. Co., 35 Fla.L.Weekly S81 (Fla. Feb. 4, 2010). Menendez reversed the Third District's ruling that an amendment to §627.736(11), Fla. Stat., which required notice of intent to initiate litigation and gave an insurer additional time to pay overdue PIP benefits, could be applied retroactively to the insured's claim "because it was merely procedural" and did not unconstitutionally alter existing rights (Id. at

*1). This Court held that ruling conflicted with State Farm Mut. Auto Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995), Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), Walker, supra, and Stolzer v. Magic Tilt Trailer, Inc., 878 So.2d 437 (Fla. 1st DCA 2004) (Bionetic's main Brief cited each decision except Laforet). This Court ruled in Menendez:

> . . .because we conclude that the 2001 Amendment creating the statutory presuit notice provisions constitutes a substantive change to the statute, we hold that it cannot be retroactively applied to insurance policies issued before the effective date of the amendment.(35 Fla.L. Weekly S81 at *1)

The Court looked at the date the policy was issued, not when suit was filed or the accident occurred, because "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract" (Id. at*2). Although the Legislature intended the amendment to be applied retroactively, the Court compared §627.736's requirements before and after the amendment. Because the amendment

attached new legal consequences to events completed before its enactment (Id.), the Court held that it could not be retroactively applied (Id.at*4).

One of the insured's arguments in Menendez was that the amendment affected her right to retain counsel, because there was no longer a right to attorneys' fees if the insurer paid the claim within the additional time allowed by the amendment (Id. at*4). The Court agreed that "problematic provisions" of the amendment both implicated attorneys' fees, and gave the insurer additional time to pay PIP benefits. The Court noted that it generally held that statutes imposing limitations on the right to recover attorneys' fees do not apply retroactively (Id. at*4); and that a statutory right to fees is substantive, not procedural. The Court cited, Young v. Altenhaus, supra, which held that §768.56 Fla. Stat., permitting an attorneys' fee award to the prevailing party in a medical malpractice case, was a

substantive statute in light of the prior obligations under the American Rule adopted in Florida, which required each party to pay its own fees, unless otherwise directed by statute or an agreement between the parties.

Menendez noted that District Courts had also concluded that statutes limiting the ability to seek attorneys' fees are substantive, and that a statutory amendment creating or increasing a safe harbor period of time constitutes a substantive change that cannot be retroactively applied. The Court cited Stolzer v. Magic Tilt Trailer, Inc., supra, which held that a statutory amendment delaying a claimant's ability to recover attorneys' fees, by giving the employer/carrier 30 days rather than 14 days within which to provide benefits before being responsible for attorneys' fees, was a substantive change. It also cited with approval Walker, supra, which held that §57.105's safe harbor amendment was substantive because it "created an opportunity to avoid the sanction of attorneys' fees

by creating a safe period for withdrawal or amendment of meritless allegations and claims" which "could substantively alter a case" (Id. at*5). Menendez further stated (Id. at *5-6):

> Under the holdings of these cases, the 2001 statutory amendment cannot be applied retroactively because it allows an insurer to avoid an award of attorneys' fees, which constitutes a substantive change to the statute in effect at the time the insureds' insurance policy was issued. According to the new statutory presuit notice provisions, an insured is precluded from recovering attorneys' fees if the insurer pays the claim within the additional time period provided by the statute. **Similar to the safe harbor provisions at issue in *Stolzer* and *Walker*, which were found to be substantive, the amended statute in this case creates a "safe period" by extending the period of time in which the insurer could pay a claim**. Thus, the amendment relieves the insurer of the obligation to pay fees and also constitutes a substantive change to the statute as it existed before the 2001 amendment.
>
> * * *
>
> *6 In our view, the statute, when viewed as a whole, is a substantive statute. Pursuant to the 2001 version of section 627.736, an insured must now take **additional steps** beyond filing an application for PIP benefits and beyond complying with section 627.727(4). This includes the preparation and provision of a written notice of intent to litigate, which requires the inclusion

> of additional information that may not be sent until the claim is considered overdue under section 627.727(4)(b). An insurer has **additional time** to meet its obligation under the statute, and an action for a claim of benefits and attorneys' fees cannot be initiated until the additional time for payment has expired. **Thus, the statute** allows the insurer additional time to pay the claim and **affects the insured's right to sue and recover attorneys' fees**. (Emphasis added)

Based on the above analysis, the Court concluded that the statutory amendment could not be applied retroactively. Menendez's ratification of Stolzer and Walker, supra, requires reversal of the Fifth District's decision in the present case. While Kenniasty's Brief argues that Walker ignored the proper principles of retroactivity (KB 17), Menendez cited Walker as being correctly decided.

Kenniasty argues that Bionetics' contention that the right to §57.105 attorneys' fees accrues when the underlying lawsuit was filed leads to unreasonable results. In fact, Bionetics' Brief argued that the controlling date was when the underlying cause of action

accrued and/or when the right to attorneys' fees accrued or vested (Bionetics' Merits Brief, p.p.9,25). At times those dates are identical. Bionetics' right to §57.105 fees vested or attached when Techniarts first pled the 3 frivolous counts upon which attorneys' fees were awarded, and Bionetics' counsel first began rendering services defending against those counts. The subsequent safe harbor amendment attached new legal consequences to that conduct. Before that amendment, Bionetics was not required to give Techniarts 21 days notice to withdraw or correct those 3 counts in order to obtain attorneys' fees. After the amendment, Bionetics was not entitled to attorneys' fees under §57.105 unless it first gave 21 days notice, during which Techniarts could avoid attorneys' fees by withdrawing or amending its claims. The amendment was substantive because it increased the limitations placed on Bionetics' right to attorneys' fees and decreased Techniarts' obligation to pay such fees.

B. Kenniasty Incorrectly Argues That *Landgraf* And *Vargas* Require §57.105's Safe Harbor Amendment To be Applied Retroactively

Kenniasty argues that the Fifth District correctly applied the principles of retroactivity espoused in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), and Hernandez -Vargas v. Gonzales, 548 U.S. 30 (2006). He claims that both cases held that a statute does not operate retrospectively merely because it is applied to conduct antedating a statute's enactment or amendment, or upsets expectations based on prior law (KB16-18). First, Landgraf and Vargas are not new, and neither require the safe harbor amendment to be applied retroactively in this case. In fact, this Court cited Landgraf in Menendez when it ruled a statutory amendment could not be retroactively applied, just as Landgraf held that the 1990 version of the Civil Rights Act **could not be retroactively applied** to a civil rights case pending when that Act was passed.

Therefore, the result in Landgraf supports Bionetics,' not Kenniasty's, argument.

In Vargas, an alien illegally reentered the U.S., after being deported, and lived here for 20 years, fathering a son by a U.S. citizen. When Vargas reentered the U.S., the Immigration Act allowed an illegal reentrant to remain in the U.S. if he married a U.S. citizen. A 1997 amendment eliminated that provision. Vargas married his child's mother in 2001, and applied to become a permanent resident. The government again deported him instead, and Vargas appealed. The Supreme Court held the 1997 amendment applied to Vargas, even though he had reentered the U.S. before its effective date, and that it did not retroactively affect any right of, or impose any burden on him, a continuing illegal violator of the Immigration Act. The Court reasoned that the amendment was not being retroactively applied to Vargas. The amendment applied to him because he failed to take action to avoid the new

law. It was not effective until 6 months after it was enacted, thus giving him a grace period to either marry his child's mother and apply for U.S. citizenship, or leave the U.S. voluntarily and reenter legally.

Kenniasty claims that like Vargas, although his 3 frivolous counts were filed before the safe harbor amendment, they continued thereafter, and, thus the amendment applied. There is no comparison between the rights of the **illegal** alien in Vargas and the rights of these parties under §57.105. Nor did Vargas (or Landgraf) concern amendments affecting the right to attorneys' fees, as here, which Florida courts have held to affect substantive rights and cannot be applied retroactively.

Kenniasty next argues that since Bionetics' motion for §57.105 appellate attorneys' fees filed with this Court was not preceded with 21 days' notice, the Court cannot award appellate attorneys' fees under T.I.E. Comms., Inc. v. Toyota Motors Center, Inc., 391 So.2d 697 (Fla. 3rd DCA

1980) and §57.105. Bionetics contention is that the same version of §57.105 applies in the appellate court as applies in the trial court. However, out of an abundance of caution, Bionetics will amend its motion for appellate attorneys fees, after first giving 21 days notice.

II. THE FEDERAL COURT'S INTERPRETATION OF RULE 11 IS NOT CONTROLLING IN INTERPRETING §57.105, *FLA. STAT*.

Kenniasty argues that Florida's safe harbor amendment was patterned after Federal Rule 11; and that federal cases hold that Rule 11's safe harbor amendment applies if a motion for fees is filed after its effective date, even if the underlying lawsuit was filed before. First, Rule 11 is a procedural rule, not a substantive statute, as §57.105. Florida's Legislature enacts substantive law and its changes, whereas this Court controls changes to procedural rules. "Circumstances under which a party is entitled to costs and attorneys' fees is substantive [whereas rules] can only control procedural matters." Timmons v. Combs, 608 So.2d 1, 2-3 (Fla. 1992). Thus,

cases interpreting Federal Rule 11 are not controlling in interpreting §57.105, Fla. Stat.

Second, Florida courts are not bound to follow the federal courts' interpretation of a federal rule. For example, Kaufman v. Sweet, et al. Corp., 144 So.2d 515, 517-18 (Fla. 3rd DCA 1962), refused to follow the federal courts' interpretation of a federal procedural rule when construing a similar Florida rule, but chose to follow the minority view. A state statute modeled after a federal rule will only be given the same construction by Florida courts as given the federal rule by the Federal courts if "such construction is harmonious with the spirit and policy of Florida legislation on the subject." Mullins v. Kennelly, 847 So.2d 1151, 1154 (Fla. 5th DCA 2002). The federal cases which hold that notice is required under Rule 11's safe harbor amendment, even if the underlying lawsuit was filed prior thereto (KB19), are contrary to Florida law. Walker, supra, held that §57.105's safe harbor

amendment was a substantive change that could not be applied retroactively, and Menendez, supra, ratified Walker.

III. *WALKER* HAS BEEN APPROVED BY THIS COURT[1]

Kenniasty argues that Walker is distinguishable because the First District ignored the appellee's failure to provide notice under §57.105 (KB22). Walker was correctly decided because Menendez approved Walker's holding that §57.105's safe harbor amendment was a substantive change that could not be applied retroactively.

IV. THE ISSUE OF AWARDING ATTORNEYS' FEES IS NOT MOOT

Contrary to Kenniasty's claim, Bionetics' Jurisdictional Brief did not concede that the issue of attorneys' fees was moot as to Techniart's tortious interference count (KB23). Nor is the issue of attorneys'

---

[1] /Kenniasty's Brief, p.6, states that Walker was "rev'd, 959 So.2d 718 (Fla. 2007)." In fact, Walker was neither reversed nor reviewed by this Court. Rather, the Court denied review of Walker at 959 So.2d 718.

fees pertaining to that count moot simply because the Fifth District incorrectly found it was not frivolous (See Point V, infra.).

As to the other 2 frivolous counts, Kenniasty argues that the trial court failed to make any findings to support its sanctions order, citing Daniels v. Reeves, 712 So.2d 839 (Fla. 1st DCA 1998) and Hustad v. Architectural Studio, 958 So.2d 569 (Fla. 4th DCA 2007). The Fifth District's decision also cited Glisson v. Jkvl. Transp. Auth., 705 So.2d 136 (Fla. 1st DCA 1998). Those cases did not require the trial court to find anything more than it did, *i.e.*, that Techniarts and Kenniasty knew or should have known when those counts were first filed that they were not supported by the material facts or the existing law (R2602). That finding of fact is sufficient. See Fernandez v. Chiro Risk Mgmt., 700 So.2d 65,65-66 (Fla. 2nd DCA 1997); Adlow, Inc. v. Mauda, Inc., 632 So.2d 714, 715 (Fla. 5th DCA 1994); Mickler v. Graham, 611 So.2d 93,

94 (Fla. 1st DCA 1992) (factual finding that there was a complete absence of justiciable issue of law or fact raised was sufficient to award attorneys fees under the prior version of §57.105). Hustad held that whether a claim is frivolous under the meaning of §57.105 is a matter left to the sound discretion of the trial court. In exercising that discretion, the court must make an **inquiry** into what a losing party (or his attorney) knew or should have known (958 So.2d at 571). Hustad does not address what findings the court must make in its order.

The trial court made the required inquiry. It held an October 27, 2004 hearing on the issue of entitlement, which was continued on August 22, 2005, but Kenniasty did not appear at those hearings (R16:2601). The Court allowed Kenniasty to subsequently demonstrate why he should not be responsible for one-half of the §57.105 fees (R16:2603), but he presented no evidence that he acted in

good faith based on his clients' representations as to the material facts. (R18:2897).

V. <u>BIONETICS' JURISDICTIONAL BRIEF CONCEDED NOTHING</u>

Bionetics' Jurisdictional Brief never conceded that the fact that the Fifth District found the tortious interference count not to be frivolous made the issue of attorneys fees as to that count moot. Bionetics' Jurisdictional Brief addressed jurisdiction only. Bionetics' argument, quoted at Kenniasty's brief p.24, was merely to the effect that, **as to the issue of jurisdiction**, it was irrelevant that the Fifth District found the tortious interference count not frivolous. The **jurisdictional conflict** still existed, since the Fifth District retroactively applied the safe harbor amendment to the other 2 frivolous counts. Bionetics was also not required to address the merits of whether the tortious interference count was in fact frivolous in its jurisdictional brief. That issue was properly addressed

at pages 33-39 and 41-42 of its Merits Brief. Thus, Kenniasty's argument that this Court has no jurisdiction to decide whether the tortious interference count was frivolous is incorrect. Once the Court accepts jurisdiction, it can review all issues decided below. Savoie v. State, 422 So.2d 308, 312 (Fla. 1982).

Kenniasty's Brief does not respond to Bionetics' argument that the Fifth District erroneously found the tortious interference claim not to be frivolous, nor dispute the evidence or arguments in that regard contained in Bionetics' Merits Brief, p.33-39. He appears to acknowledge that there was no evidence to support that count.

As to Kenniasty's Notices of Supplemental Authority, only 3 Wisconsin cases which have no relevance here, and Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974), concerned an attorneys' fees statute. Bradley held applicable the statutory version in effect at the time the

appellate court rendered its decision, but recognized "exceptions" to prevent manifest injustice, as here (Id. At 716-17). Landgraf, 511 U.S. at 276-281, distinguished Bradley, and made it very clear that Bradley did not alter the well-established presumption against the retroactive application of statutes.

CONCLUSION

Based upon the foregoing, this Court should reinstate the trial court's award of §57.105 attorneys' fees to Bionetics .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Frank W. Kenniasty, Esquire**, ***Pro Se***, 1683 Clover Circle, Melbourne, FL 32935; **Judith Deitz**, ***Pro Se***, 8639 B. 16th Street, Silver Springs,

MD 20910; and **William Moore, *Pro Se***, 8639 B. 16th Street, Silver Springs, MD 20910; by mail on March ____, 2010.

CARUSO, SWERBILOW & CAMEROTA, P.A.

190 Fortenberry Rd., Suite 107
Merritt Island, Florida
32954-1271

Telephone: (321) 453-3880
Attorneys for Petitioner

BY: ____
JOE TEAGUE CARUSO, Esquire
Florida Bar No. 103744

CERTIFICATE OF TYPE SIZE & STYLE

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

____

JOE TEAGUE CARUSO, Esquire
Florida Bar No. 103744