IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2311
L.T. Case No. 4D09-2555

ROMILDO MEISTER,

Petitioner,
v.

ELIZARDO RIVERO,
et al.,

Respondents.
_____/

On a Certified Question of Great Public Importance
From the District Court of Appeal
For the State of Florida
Fourth District

RESPONDENTS' ANSWER BRIEF

Respectfully Submitted:

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TABLE OF CONTENTS

Pages

TABLE OF CITATIONS

CASES Pages

FLORIDA CONSTITUTION

STATUTES

RULES

OTHER

LIMITED STATEMENT OF THE CASE

Subject to the specified corrections, Respondents adopt Petitioner's statement of the case and of the facts including the nature of the case, the course of the proceedings and disposition in the lower tribunals (although not delineated as such). *See* Fla. R. App. P. 9.210(b)(3); Fla. R. App. P. 9.210(c). Respondents do not intend to argue in this section of Respondents' Answer Brief but merely wish to point out and explain the need for the necessary corrections to Petitioner's Statement of the Case and of the Facts.

Respondents have recognized that this Court has encouraged "appellees not to rewrite the statement of case and facts except where clearly necessary." *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1106 (Fla. 1996) (per curiam). Accordingly, Respondents, standing in the nature of appellees, did not find it clearly necessary to rewrite Petitioner's statement of the case and of the facts. *Id*. However, Respondents found it necessary to correct certain misstatements of fact asserted by Petitioner. *See* Judge Peter D. Webster, *Ethics and Professionalism on Appeal*, 85 FLA. B.J. 16, 16-20 (2011) ("In written materials to the court, never misstate or distort any representation of fact or statement of law.").

Included in Petitioner's facts, Petitioner asserted that the trial court's judicial assistant called Defendants' lead attorney, left him a voice mail message and called

him a second time on May 15.[1] The judicial assistant's Affidavit rebuked the notion that she called Defendants' lead attorney a second time.[2] The trial court's finding that its judicial assistant called a second time was not supported by the judicial assistant's Affidavit, the only evidence presented on this point.[3]

Rather, the judicial assistant's Affidavit stated "[a]t 10:33 on 13 May 2009, I left a voice mail message on Mr. Gelinas' direct voice mail … I had no further contact with either attorney."[4] *Rivero v. Meister*, 46 So. 3d 1161, 1162 (Fla. 4th DCA 2010) ("On May 13, the court's judicial assistant called both sides to inform them that this case would go to trial on May 18. She left a message on the defendants' lead attorney's voice mail."). The District Court's use of the singular form, a message, is the equivalent of one message, which is consistent with the judicial assistant's Affidavit.

Petitioner also asserted that the "trial court entered a written order describing the Defendants' attorneys' misconduct: (1) failing to keep apprised of the cases ahead of them as the trial court instructed; (2) failing to check their voice mail to see if the trial court called them to trial; and (3) failing to notify the plaintiff and

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[1] Petitioner's Petition, at p. 2.
[2] Respondents' Appendix ("R. App.") Exhibit No. 4; *see also* R. App. Exhibit No. 3, p. 4, lines 19 – 23. While not material, nevertheless, it is a misstatement of fact, which opens to question Petitioner's other asserted facts.
[3] R. App. Exhibit No. 1, at second page. Record, at p. 32.
[4] R. App. Exhibit No. 4. Record, at p. 5.

the trial court that other courts called them to trial."[5] These findings were not the findings of the trial court but, instead, were the District Court's conclusions based upon the record. *Rivero v. Meister*, 46 So. 3d 1161, 1162-63 (Fla. 4th DCA 2010).

At most, the only actual finding of fact made by the trial court, with respect to Defendants' trial attorneys' conduct, was that "no effort was made to contact the cases scheduled on the same date before this [Circuit] Court"[6] upon which, given the circumstances, the trial court concluded was negligent conduct, not bad faith, on the part of the Law Office of Jason Gelinas.[7] *Rivero v. Meister*, 46 So. 3d 1161, 1162 (Fla. 4th DCA 2010) ("Instead, the trial court found that the defendants' attorneys acted negligently."). Petitioner also appeared to have contradicted Petitioner's own factual presentation to the Court when Petitioner subsequently recognized the District Court reversed the trial court order because the trial court's order did not contain detailed factual findings describing specific acts of bad faith conduct that resulted in the plaintiff's unnecessary incurrence of attorneys' fees.[8] *Id*. at 1163. Thus, Petitioner recognized the lack of detailed factual findings.

Again, Respondents' intent was not to be argumentative, but merely to explain and inform the Court why at least certain portions of Petitioner's asserted facts were erroneous and warranted correction.

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[5] Petitioner's Petition, at p. 3, 7, 15.
[6] R. App. Exhibit No. 1, at second page.
[7] R. App. Exhibit No. 1, at third page.
[8] Petitioner's Petition, at p. 4, 16.

SUMMARY OF ARGUMENT

A fair, unbiased reading of *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) leads to the undeniable conclusion that bad faith conduct in *Moakley* did not include objectively (or subjectively) reckless conduct, otherwise known as negligence. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (Damoorgian, J., concurring) ("*Moakley* simply does not allow for the imposition of sanctions for negligent conduct."). Moreover, Petitioner's assertions contradicted Petitioner's own argument on this point and should be rejected.

Moakley reaffirmed the Court's *Bitterman* holding that exercise of a court's inherent authority to sanction misconduct by a party or the party's attorneys should rarely be used. Mere reckless, negligent conduct was not embraced within the factually undefined definition of bad faith under Florida's inequitable conduct doctrine. The rare occurrence contemplated by *Bitterman* and *Moakley* would be a thing of the past as the flood gates open to sanctions being imposed upon parties or their attorneys for ordinary negligence under a trial court's inherent authority.

Petitioner's argument that this Court is bound by decisions of the United States Supreme Court, on a decision not expressly construing federal law, should also be rejected. It has long been established that this Court is the final arbiter of issues regarding state law including the inequitable conduct doctrine, or the common law in and for the State of Florida.

It has also long been established that, on appeal, a reviewing court will apply the law in effect at the time of its decision. As such, *Moakley* does not permit reversal of *Rivero* or the imposition of sanctions against Respondents' trial attorneys. Given the myriad of alternatives for disciplining attorneys, the Court should decline the invitation *to expand* the factually undefined definition of bad faith conduct in *Moakley* and affirm the District Court's decision below. Furthermore, the apparent unfairness of the result in *Rivero* did not necessarily foreclose Plaintiff's recovery of attorney's fees.

The dearth of case law concerning attorneys who failed to appear for trial strongly suggests that no change in the undefined definition of bad faith is necessary. And, if the Court should decide otherwise, any change in the law should be declared to apply only prospectively; a point of law waived or abandoned by Petitioner.

The Court should note that Petitioner also failed to: (i) argue on the trial court's due process violation, (ii) argue on the unfairness of the District Court's decision, and (iii) argue or request that the District Court's decision be reversed, although Petitioner requested "that the trial court order awarding sanctions … be approved and affirmed."[9] However, Petitioner could not request the latter without arguing in favor of the former. Moreover, Petitioner's failure to argue against

[9] Petitioner's Petition, at p. 19.

Rivero was tacit recognition *Rivero* was correctly decided. Therefore, the Court should conclude Petitioner waived or abandoned all these points, even if Petitioner subsequently attempts to argue these points in Petitioner's Reply Brief.

ARGUMENT

CERTIFIED QUESTION:

> "DOES THE DEFINITION OF "BAD FAITH CONDUCT" IN *MOAKLEY v. SMALLWOOD*, 826 So. 2d 221 (Fla. 2002), INCLUDE RECKLESS MISCONDUCT WHICH RESULTS IN THE UNNECESSARY INCURRENCE OF ATTORNEYS' FEES?"

STANDARD OF REVIEW.

Respondents agree with Petitioner to the extent Petitioner asserted the standard of review by a district court of a trial court order granting sanctions for attorney misconduct is abuse of discretion.[10] *Shniderman v. Fitness Innovations & Techs., Inc.*, 994 So. 2d 508, 514 (Fla. 4th DCA 2008); *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010) (citing *Shniderman*).

However, where the answer to a certified question presents purely legal questions that the Court must resolve, the appropriate standard of review is de novo. *Ellis v. Hunter*, 3 So. 3d 373, 378 (Fla. 5th DCA 2009); *see Files v. State*, 613 So. 2d 1301, 1301 (Fla. 1992) ("However, in answering the certified question and approving the decision of the district court in this case, we emphasize that [the

[10] Petitioner's Petition, at p. 16.

abuse of discretion] standard does not apply in instances where a strict rule of law has developed and is applicable under the facts of a particular case.").

I. BAD FAITH CONDUCT IN *MOAKLEY v. SMALLWOOD*, 826 So. 2d 221 (Fla. 2002) DID NOT INCLUDE OBJECTIVELY RECKLESS, NEGLIGENT CONDUCT.

(A) Petitioner's Own Assertions Denied That *Moakley* Included Objectively Reckless, Negligent Conduct, Which Conclusion Was Supported by the District Court's Decision in *Rivero*.

First and foremost, Petitioner affirmatively recognized that the "opinion in *Rivero* noted that *Moakley* does not define bad faith in the majority opinion … and urged this Court to include at least both intentional misconduct and reckless misconduct in the definition of bad faith."[11] *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (citing Chief Justice Wells' concurring opinion in *Moakley*); *Moakley v. Smallwood*, 826 So. 2d 221, 228 (Fla. 2002) (Wells, C.J., Lewis, J.) (concurring in result only) ("However, bad faith is not defined."). In addition to Petitioner's affirmative recognition that *Moakley* did not provide a definition of bad faith, Petitioner argued, in relevant part, "[t]his Court should expand its definition of "bad faith" to include such reckless conduct."[12]

Since Petitioner is obviously requesting this Court *to expand* the undefined definition of bad faith to include reckless, negligent conduct, it follows that bad faith conduct as provided in *Moakley* did not include reckless, negligent conduct.

[11] Petitioner's Petition, at p. 4 – 5; 10 – 11.
[12] Petitioner's Petition, at p. 7, 17, 19.

See Moakley v. Smallwood, 826 So. 2d 221, 222-27 (Fla. 2002). And sheer logic and reason leads to the conclusion that bad faith conduct, in *Moakley*, did not include objectively reckless, negligent conduct, even if such conduct resulted in the unnecessary incurrence of attorneys' fees. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (Damoorgian, J., concurring) ("*Moakley* simply does not allow for the imposition of sanctions for negligent conduct."). The District Court's majority opinion further reinforced the conclusion:

> The defendants' attorneys acknowledge that their failure to appear was an embarrassing and regrettable event. However, they contend that the trial court abused its discretion when it imposed the monetary sanctions for their failure to appear at trial. They primarily argue that, under *Moakley*, a court must find an attorney's conduct to have been in bad faith, **and the record establishes that their conduct was not in bad faith**. They rely on the plaintiff's motion, which recognized that they did not fail to appear "knowingly or with intent."[13] They also rely on the court's order, which found that the matter was caused by their "negligence." We are compelled to agree with the defendants' attorneys. (**Emphasis** added).

Rivero v. Meister, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010).

Thus, it should be clear that *Moakley*, in its undefined definition of bad faith, did not include objectively reckless, negligent conduct, as a basis for sanctioning attorneys. And the Court should not change the clear foundational elements of *Moakley* which provides a limited amount of authority to sanction intentional bad faith acts, under a trial court's exercise of inherent authority.

[13] Petitioner's Petition, at p. 2.

While *Moakley* admittedly did not define bad faith, the term "bad faith" has been defined, in the abstract, as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." BLACK'S LAW DICTIONARY 94 (6th ed. 1991). The nature of an affirmative act or acts done in bad faith appears, quite naturally, fact intensive and should be assessed in the light of the relevant facts and circumstances. *See id*. The fact intensive nature of bad faith may be the reason why the *Moakley* majority did not define bad faith for purposes of Florida's inequitable conduct doctrine.

Like the task of defining what may be indefinable, obscenity, for instance, the definition of bad faith for purposes of Florida's inequitable conduct doctrine, should be left to the sound judicial discretion of the trial courts that are likely to know it when they see it. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see Patsy v. Patsy*, 666 So. 2d 1045, 1046-47 (Fla. 4th DCA 1996) (affirming trial court order imposing sanctions against an attorney for bad faith filing of a motion to disqualify counsel); *David S. Nunes, P.A. v. Ferguson Enter., Inc.*, 703 So. 2d 491, 491 (Fla. 4th DCA 1997) (per curiam) (affirming the assessment of attorney's fees against counsel under the court's inherent power to do so); *Lathe v. Florida Select Citrus, Inc.*, 721 So. 2d 1247,

1247 (Fla. 5th DCA 1998) (upholding the imposition of sanctions based on the court's inherent authority where attorney's actions were taken in bad faith); *In re Estate of DuVal*, 174 So. 2d 580, 587 (Fla. 2d DCA 1965) (affirming award of attorney's fees against estate for actions taken to require recalcitrant legal representative to perform his duties); *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998) (approving award of attorney's fees by the probate court (and district court) based upon the inequitable conduct doctrine), *cert. denied*, 525 U.S. 1187 (1999).

(B) The Parties Do Not Dispute A Court's Inherent Authority to Impose Attorneys' Fees Against An Attorney for Bad Faith Conduct, But Exercise of Such Authority Is Extremely Limited.

Respondents do not quarrel with, dispute or take issue with a trial court's inherent authority to impose attorneys' fees against an attorney for bad faith conduct, especially since that was the express holding in *Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002).[14] However, that power or authority, as Petitioner has also affirmatively recognized,[15] which arises from Florida's inequitable conduct doctrine, was reserved for those extreme cases where a party acts in bad faith, vexatiously, wantonly or for oppressive reasons. *Id*. at 224-25. Thus, even Petitioner recognized that an "act" is required to invoke a court's inherent authority, as opposed to a failure to act, under the inequitable conduct doctrine.

[14] Petitioner's Petition, at p. 8.
[15] Petitioner's Petition, at p. 9, 11.

"We note that this doctrine is rarely applicable." *Id*. at 224; *Nedd v. Gary*, 35 So. 3d 1028, 1030 (Fla. 4th DCA 2010) (quoting *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998), *cert. denied*, 525 U.S. 1187 (1999); *T/F Sys., Inc. v. Malt*, 814 So. 2d 511, 513 (Fla. 4th DCA 2002) ("This court has warned that a court is authorized to award inequitable conduct fees only in very limited circumstances.") (quoting *Bane v. Bane*, 775 So. 2d 938, 941 n.3 (Fla. 2000)); *North County Co. v. Bologna*, 816 So. 2d 842, 844 (Fla. 4th DCA 2002) ("The supreme court cautioned, however, that the [inequitable conduct] doctrine was applicable only in very limited circumstances."); *Bane v. Bane*, 775 So. 2d 938, 941 n.3 (Fla. 2000) ("In very limited circumstances, courts are also authorized to award fees based upon the misconduct of a party.") (citing *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998) ("explaining that although "rarely applicable," the inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith"), *cert. denied*, 525 U.S. 1187 (1999)).

Inherent authority to impose attorneys' fees against an attorney for bad faith conduct was clearly intended to be exercised rarely. It should be equally clear that Florida's inequitable conduct doctrine under *Moakley* did not include or provide for sanctions to be assessed when such conduct only rises to the level of reckless, negligent conduct. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010)

(Damoorgian, J., concurring) ("*Moakley* simply does not allow for the imposition of sanctions for negligent conduct."). The rare occurrence contemplated by *Bitterman* and *Moakley* would be a thing of the past as the flood gates open to sanctions being imposed upon parties or their attorneys for ordinary negligence under a trial court's inherent authority.

(C) The Supreme Court of Florida Is Not Bound by Decisions Rendered by the United States Supreme Court on Issues of State Law Including the Inequitable Conduct Doctrine.

Petitioner also wrongly argued that the decisions of the United States Supreme Court are binding upon this Court based on the premise that Florida's inequitable conduct doctrine was modeled after the same federal doctrine.[16] Petitioner's premise was equally as faulty as Petitioner's argument.

Instead, for over 90 years and long before considering federal court decisions, "since 1920, this Court has recognized the inherent authority of trial courts to assess attorneys' fees for the misconduct of an attorney in the course of litigation." *Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002) (citing *United States Sav. Bank v. Pittman*, 86 So. 567, 572 (Fla. 1920)). The *Moakley* court also relied on other precedents from this Court before turning to consider federal court decisions on this point of law. *Moakley*, at 224 (citing *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d

[16] Petitioner's Petition, at p. 6, 11, 17, 19.

606, 608-09 (Fla. 1994); *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998), *cert. denied*, 525 U.S. 1187 (1999)).

After reviewing federal court decisions in this country on this issue, the *Moakley* court turned back to consider numerous Florida appellate court decisions on point. *Moakley*, at 225 (citing *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985); *Hilton Oil Transport v. Oil Transport Co.*, 659 So. 2d 1141, 1153 (Fla. 3d DCA 1995); *In re Estate of DuVal*, 174 So. 2d 580, 587 (Fla. 2d DCA 1965); *Patsy v. Patsy*, 666 So. 2d 1045 (Fla. 4th DCA 1996); *David S. Nunes, P.A. v. Ferguson Enter., Inc.*, 703 So. 2d 491, 491 (Fla. 4th DCA 1997); *Lathe v. Florida Select Citrus, Inc.*, 721 So. 2d 1247, 1247 (Fla. 5th DCA 1998)).

The *Moakley* court also considered decisions rendered by other state appellate courts before further considering more recent decisions rendered by the United States Supreme Court on point. *Moakley*, at 225-26. The *Moakley* court observed that "many [state and the District of Columbia] jurisdictions recognize this limited inherent authority to impose attorneys' fees against an attorney for bad faith conduct in the course of litigation."[17] *Id*. at 225. And none of *Moakley's* nine (9) cited state court decisions from other jurisdictions addressed the imposition of sanctions for anything less than affirmative bad faith conduct. *Id*. at 225-26 (citations omitted).

[17] Petitioner's Petition, at p. 9 – 10, n.1.

Thus, it cannot genuinely be asserted that Florida's inequitable conduct doctrine was modeled after the same federal doctrine.[18] At most, the federal inequitable conduct doctrine may be said to have influenced the contours and reach of the Florida inequitable conduct doctrine, but not to any greater extent than decisions on point under Florida law as well as from other jurisdictions. *See Nedd v. Gary*, 35 So. 3d 1028, 1030 (Fla. 4th DCA 2010) ("*Bitterman v. Bitterman* defines the contours of the inequitable conduct doctrine.");[19] *see also Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 n.13 (1980) (expressly providing "this opinion addresses only bad faith conduct"); *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (addressing only bad faith conduct)).

Other than the High Court's consideration of 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 37, *Roadway Express, Inc. v. Piper*, 447 U.S. at 757, the United States Supreme Court made clear that their opinion in *Roadway Express* only addressed bad faith conduct. *Id*. at 767 n.13. Relying on their decision in *Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962), the *Roadway Express* court

[18] Petitioner's Petition, at p. 6, 11, 17, 19.

[19] Similar to *Moakley*, *Bitterman* relied upon federal and other Florida appellate court decisions in defining the contours of Florida's inequitable conduct doctrine. *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998), *cert. denied*, 525 U.S. 1187 (1999). *Moakley*, however, took a broader view by considering appellate court decisions from other jurisdictions, as well, on this point of law.

reaffirmed "the well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices." *Id*. at 765.

When considering United States Supreme Court decisions, "state courts are [only] bound by the decisions of the United States Supreme Court construing federal law." *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) (citing *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931)). Lower level federal court decisions are merely persuasive authority. *Carnival Corp. v. Carlisle*, 953 So. 2d at 465 (citation omitted). However, Florida trial courts and Florida's District Courts of Appeal are bound to follow controlling precedents established by the Florida Supreme Court. *See e.g.*, *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973); *see also Hoffman v. Jones*, 280 So. 2d 431, 440 (Fla. 1973) ("We hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida."); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 612 (Fla. 2009) (Pariente, J., concurring) ("Florida trial judges are bound to follow the precedent laid down by the Supreme Court of Florida.").

"This Court has stated that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (citing *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980)). Thus, it is clear that this Court ultimately establishes the

common or decisional law that is controlling in and under Florida law. *Pardo v. State*, 596 So. 2d at 666; *see Stephen Bodzo Realty, Inc. v. Willits Int'l Corp.*, 428 So. 2d 225, 227 (Fla. 1983) ("This Court has never hesitated to revisit the common law when it became an anachronism and ceases to serve the cause of justice.") (string citation omitted); *T/F Sys., Inc. v. Malt*, 814 So. 2d 511, 513 (Fla. 4th DCA 2002) ("*Moakley* extended the *Bitterman* inequitable conduct doctrine to cover the situation where the court imposes a sanction against a party's attorney");[20] *see also Rosenberg v. Gaballa*, 1 So. 3d 1149, 1150 (Fla. 4th DCA 2009) (rejecting argument that section 57.105, Florida Statutes (1999), as amended, "rendered obsolete the inequitable conduct doctrine of *Moakley*").

Even when the Court considers decisions from other jurisdictions including decisions reported by the federal judiciary, on such issues as the inequitable conduct doctrine, when relied upon and adopted, such law then becomes the common law of Florida in the context and within the contours set forth by this Court. Even the High Court long ago recognized its judicial reach across these United States was confined to federal law. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (providing state court could not lawfully follow its own precedent where issue was a federal question decided upon federal law).

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[20] *Compare with United States Sav. Bank v. Pittman*, 86 So. 567, 572 (Fla. 1920) (approving an award of attorney's fees against an attorney, who acted in his self-interest and against the wishes of his client); *see also Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002) (discussing *Pittman*).

II. SINCE FLORIDA PRECEDENTS HAVE ESTABLISHED THAT, ON APPEAL, THE COURT WILL APPLY THE LAW IN EFFECT AT THE TIME OF DECISION, *MOAKLEY* DOES NOT PERMIT REVERSAL OF *RIVERO* OR PERMIT THE IMPOSITION OF SANCTIONS AGAINST RESPONDENTS' TRIAL ATTORNEYS.

The general rule, as well as the Florida rule, is that an appellate court will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed. *Florida East Coast Ry. Co. v. Rouse*, 194 So. 2d 260, 262 (Fla. 1967) (per curiam); *Brown v. Henrich*, 203 So. 2d 183, 184 (Fla. 4th DCA 1967) ("an appellate court must apply the law prevailing at the time it renders its decision") (citing *Florida East Coast Ry. Co. v. Rouse*, 194 So. 2d 260 (Fla. 1967)); *Hillhaven Corp. v. Dep't of HRS*, 625 So. 2d 1299, 1302 (Fla. 1st DCA 1993) ("it is well established that an appellate court is required to apply the law in effect at the time of its decision, rather than the law prevailing at the time the judgment was rendered below") (citing *Florida East Coast Ry. Co. v. Rouse*, 194 So. 2d 260, 262 (Fla. 1967); *In re Forfeiture of the Following Described Property: 1985 Mercedes Serial No. WDB7AQ4C1FF070173*, 596 So. 2d 1261, 1264 (Fla. 1st DCA 1992)); *Levine v. Federal Deposit Ins. Corp.*, 651 So. 2d 134, 136 (Fla. 4th DCA 1995) (recognizing "the maxim that courts must apply the law in effect when it renders its decision").

In this case, as is typical, there was no intervening change in the law between entry of the trial court's May 27, 2009 Order Granting Plaintiff's Motion for Sanctions[21] and the District Court's decision in *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA 2010). *See Clay v. Prudential Ins. Co. of Am.*, 670 So. 2d 1153, 1154 (Fla. 4th DCA 1996) ("A change in the state of the law, intervening between trial and appeal, seldom occurs and is usually not foreseeable."). Indeed, both the lower court and *Rivero* relied upon this Court's decision in *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002).[22] *Rivero v. Meister*, 46 So. 3d at 1163-64. And *Moakley* did not permit the imposition of sanctions against a party's attorneys for reckless, negligent conduct. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (Damoorgian, J., concurring) ("*Moakley* simply does not allow for the imposition of sanctions for negligent conduct.").

Furthermore, in order to have been affirmed on appeal before the District Court, the trial court's Order Granting Plaintiff's Motion for Sanctions was required to: (i) be based upon an express finding of bad faith conduct, (ii) supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees, (iii) be predicated on a high degree of specificity in the factual findings, (iv) award a sanction amount directly related to the attorneys' fees and costs that the opposing

[21] R. App. Exhibit No. 1, at third page.
[22] R. App. Exhibit No. 1, at second page.

party incurred as a result of the specific bad faith conduct of the attorney, and (v) be appropriate only after notice and an opportunity to be heard, including the opportunity to present witnesses and other evidence.[23] *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002); *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010) (discussing *Moakley* requirements for the imposition of sanctions upon exercise of the trial court's inherent authority).

Having failed to comply with all of the *Moakley* requirements for the imposition of sanctions upon exercise of the trial court's inherent authority, reversal was the required and proper result in *Rivero*. *Id*. at 1164; *Allegheny Cas. Co. v. Roche Surety, Inc.*, 885 So. 2d 1016, 1020 (Fla. 5th DCA 2004) ("In the instant case, the trial court did not follow the procedures described in *Moakley*, so the award of attorney's fees must be reversed."); *see State, Dep't of Revenue v. Barry S. Franklin & Assoc., P.A.*, 841 So. 2d 608, 608-09 (Fla. 3d DCA 2003) (per curiam) ("The findings of fact do not support an award of attorney's fees pursuant to the inequitable conduct doctrine. … As such, we reverse the award of attorney's fees in favor of appellee.") (citations omitted).

Moreover, the trial court did not comply with the due process requirements specified in *Moakley*.[24] *Moakley v. Smallwood*, 826 So. 2d at 226-27. Denial of due process was made evident by the trial court's statement at the hearing on

[23] Petitioner's Petition, at p. 10.
[24] Record, at p. 7, 11, 12.

plaintiff's motion for sanctions that "the issue here this morning is not whether sanctions are going to be imposed, just the amount."[25] *Rivero v. Meister*, 46 So. 3d at 1163 (quoting the trial court's statement).

The trial judge, having obviously pre-judged plaintiff's motion for sanctions, could not be said to have allowed Defendants' attorneys to exercise their due process right of a real opportunity to be heard. *Moakley v. Smallwood*, 826 So. 2d at 227; *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard."); *see also Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981) ("This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly preserved below, the error must amount to a denial of due process. … Thus, we are really dealing with denial of due process.") (citations omitted).

Denial of Respondents' attorney's due process rights was raised and, therefore, preserved in the District Court.[26] And even if not raised in the trial court, denial of due process or a real opportunity to be heard constituted fundamental error. *Ray*, 403 So. 2d at 960. Given the fundamental error by the trial court, or yet another basis to reverse the trial court's order, this is simply not

[25] R. App. Exhibit No. 3, p. 9, lines 12 – 14. Record, at p. 11 – 12. Petitioner's Petition, at p. 3.
[26] Record, at p. 7, 11, 12.

the case to consider expanding the undefined definition of bad faith for purposes of the inequitable conduct doctrine.

Even though the trial court, just before the hearing ended, seemed to recede from it's earlier comment,[27] the trial court still awarded sanctions against Defendants' attorneys in the specific amount requested by Plaintiff's counsel.[28] *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010) ("Therefore, the Court imposes sanctions against the defendants' attorneys in the amount of $10,750.00."). During the hearing, Defendants' attorney properly argued the sanction should be commensurate with the offense.[29] Yet, even before the hearing on plaintiff's motion for sanctions began, the trial court's decision to award sanctions in favor of Plaintiff's counsel and against Defendants' attorneys was constitutionally infirmed and, for all intents and purposes, *fait accompli*.

Petitioner apparently waived or abandoned the due process issue having failed to address it in Petitioner's Petition. *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So. 2d 275, 281 (Fla. 2d DCA 2008) (per curiam) (holding appellant failed to argue the point in his initial brief and deeming any potential issue on the point to have been waived or abandoned) (citing *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959); *Polyglycoat Corp. v. Hirsch*

[27] R. App. Exhibit No. 3, p. 18, lines 21 – 24.
[28] R. App. Exhibit No. 1, at third page. Record, at p. 6. Petitioner's Petition, at p. 3. Plaintiff's counsel did not have time records. R. App. Exhibit No. 3, at p. 10 – 11.
[29] R. App. Exhibit No. 3, p. 14, line 24 – p. 17, line 6.

Distribs., Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1983)); *North v. State*, 32 So. 2d 915, 919 (Fla. 1947) ("This issue has not been properly argued or presented by any question in the brief of appellant, and therefore we must assume that the point has been abandoned.") (citations omitted).

(A) The Court Should Not Change the Inequitable Conduct Doctrine By Defining Bad Faith to Include Reckless Negligent Conduct But, If The Court Determines It Should, the Change in the Law Should Only Apply Prospectively.

"As a general rule, a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only." *Melendez v. Dreis & Krump Mfg. Co.*, 515 So. 2d 735, 736 (Fla. 1987); *Kalisch v. Kalisch*, 646 So. 2d 292, 292 (Fla. 3d DCA 1994) (citing *Melendez*) (other citations omitted); *City of Daytona Beach v. Amsel*, 585 So. 2d 1044, 1046 (Fla. 1st DCA 1991) (citing *Melendez*) (other citations omitted); *D'Aquisto v. Costco Wholesale Corp.*, 816 So. 2d 1231, 1232 (Fla. 5th DCA 2002) (citing *Melendez*). A court is neither required to apply, nor prohibited from applying a decision retrospectively. *Sult v. Weber*, 210 So. 2d 739, 747 (Fla. 4th DCA 1968) (citing *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

The Court is constitutionally permitted, in the exercise of its judicial prerogative, to determine whether any newly announced rule of law should be applied retroactively, or on a prospective basis only so as not to be available to the

person who has raised the issue. *Smith v. Brantley*, 400 So. 2d 443, 453 (Fla. 1981) (England, J., concurring, in part, dissenting, in part) (citing *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Wainright v. Stone*, 414 U.S. 21 (1973)). Statutes or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity. *Int'l Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d 1119, 1122 (Fla. 4th DCA 1982) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973)).

Some courts have adopted the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, a final decision of the Court, should not have those rights, positions, and courses of action impaired or abridged by reason of a change by a subsequent decision of the same court overruling its former decision. *Florida Forest & Park Serv. v. Strickland*, 18 So. 2d 251, 253 (Fla. 1944); *see Frazier v. Baker Material Handling Corp.*, 559 So. 2d 1091, 1092 (Fla. 1990) (discussing exception to general rule recognized in *Strickland*); *Int'l Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d 1119, 1120 (Fla. 4th DCA 1982) (same). Accordingly, such courts have given to such overruling decisions a prospective operation only. *Strickland*, 18 So. 2d at 253 (string citations omitted).

In *Lockwood*, the Fourth District recognized the High Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), which promulgated a three phase test to determine whether a decision should have retroactive effect. *Int'l Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d at 1121. Formulating that test the court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must weigh the merits and demerits in each case looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity. [Internal citations omitted].

Id. (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

If this Court were to expand the undefined definition of bad faith in *Moakley*, for purposes of the inequitable conduct doctrine to include reckless, negligent conduct, the Court would certainly establish a new principle of law in Florida, either by overruling clear past precedent, *Moakley* and *Bitterman*, on which litigants have relied as well as by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, the prior history of the rule, that a trial court possesses the inherent authority to impose attorney's fees against a party or an attorney for bad faith

conduct, was intended for the rare and extreme cases. It seems that retrospective operation of a new rule will neither further nor retard the rule, so that the second factor in the Chevron test is also satisfied. *Int'l Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d at 1122.

Finally, retroactive application of an expanded definition of bad faith to include reckless negligent conduct, could produce substantial inequitable results if applied retroactively, particularly, to the thousands of litigants across Florida and their attorneys, whose cases are in the pipeline and have not yet reached final resolution. Moreover, such a change in the law could only concern substantive law, which is presumed to apply prospectively. *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 696 (Fla. 5th DCA 2002). Having met all three phases of the *Chevron* test, *Int'l Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d at 1121, if the Court should decide to expand the undefined definition of bad faith in *Moakley* to include reckless negligent conduct, the Court should declare by its opinion that the new rule will have prospective effect only. *See Smith v. Brantley*, 400 So. 2d 443, 453 (Fla. 1981) (England, J., concurring, in part, dissenting, in part) (identifying the two factors regarded as the touchstones for determining pure prospectivity; the contrary state of the law at the time and substantial reliance).

Petitioner apparently waived or abandoned the retrospective/ prospective application issue having failed to address it in Petitioner's Petition. *David M.*

Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co., 972 So. 2d 275, 281 (Fla. 2d DCA 2008) (per curiam) (holding appellant failed to argue the point in his initial brief and deeming any potential issue on the point to have been waived or abandoned) (citing *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959); *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983)); *North v. State*, 32 So. 2d 915, 919 (Fla. 1947) ("This issue has not been properly argued or presented by any question in the brief of appellant, and therefore we must assume that the point has been abandoned.") (citations omitted).

III. THE COURT SHOULD DECLINE THE INVITATION TO EXPAND AFFIRMATIVE ACTS OF BAD FAITH, FOR PURPOSES OF THE INEQUITABLE CONDUCT DOCTRINE, TO INCLUDE A FAILURE TO ACT OR RECKLESS, NEGLIGENT CONDUCT.

Relying on the Restatement (Second) of Torts (1965), this Court has already recognized that an act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person. *U.S. v. Stevens*, 994 So. 2d 1062, 1067 (Fla. 2008) (citing § 302A of the Restatement). At the same time, the Court recognized that the duties described in sections 302, 302A and 302B of the Restatement attach to acts of *commission*, which historically generate a broader umbrella of tort liability as opposed to acts of *omission*, which are the subject of sections 315 and 314A of the Restatement. *Id*. at 1068 (*emphasis* by the court). "The duties of one who merely omits to act are more restricted, and in

general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty." *Id*.; *see Deane v. Johnston*, 104 So. 2d 3, 9 (Fla. 1958) (a reckless or wanton disregard is not classified as an intentional wrong) (citing Prosser on Torts, 2d Ed., page 30).

By the same token, the Court has also been quite candid concerning its jurisprudence in the frequently visited area of common law negligence.

> Our jurisprudence reflects a history of difficulty in dividing negligence into degrees. The distinctions articulated in labeling particular conduct as 'simple negligence,' 'culpable negligence,' 'gross negligence,' and 'willful and wanton misconduct' are best viewed as statements of public policy. These semantic refinements also serve a useful purpose in advising jurors of the factors to be considered in those situations where the lines are indistinct. We would deceive ourselves, however, if we viewed these distinctions as finite legal categories and permitted characterization alone to cloud the policies they were created to foster.

Ingram v. Pettit, 340 So. 2d 922, 924 (Fla. 1976); *Lemay v. Kondrk*, 860 So. 2d 1022, 1024 (Fla. 5th DCA 2003) (Orfinger, J., dissenting) (quoting *Ingram*).

> As *Ingram* recognized, the concept of dividing negligence into degrees (or perhaps, more appropriately, kinds) has been problematic. Courts have encountered great difficulty in attempting to draw clear and distinct lines between the various grades of negligence, concluding that "[p]erhaps no rule can ever be devised which will definitively separate one from another." *Carraway v. Revell*, 116 So. 2d 16, 19 (Fla. 1959). … Negligence and intentional misconduct describe points on a range of conduct that is potentially negligent; what lies between negligence and intentional misconduct constitutes the degree of negligence.

Lemay v. Kondrk, 860 So. 2d 1022, 1025 (Fla. 5th DCA 2003) (Orfinger, J., dissenting).

With intentional misconduct and negligence lying at opposite points in a range of conduct, the Court should not muddy the clear bad faith waters in *Moakley* with unintentional or negligent conduct. *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) made clear that a trial court, in rare circumstances, may exercise its inherent authority to award attorneys' fees against an attorney for bad faith conduct. *Id*. at 226. Quoting *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998), *cert. denied*, 525 U.S. 1187 (1999), the *Moakley* court reaffirmed that such authority "is reserved for those extreme cases where a party [or their attorney] acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Moakley*, at 224. Stated otherwise, bad faith is demonstrated by an affirmative act of misconduct by the actor and not by a failure to act. *See id*.; BLACK'S LAW DICTIONARY 94 (6th ed. 1991) (defining bad faith as an act, not negligence) (discussed *infra*).

As such, acts of *omission* or a failure to act or what is commonly known as ordinary negligence, otherwise characterized as reckless conduct, were <u>not</u> deemed sanctionable conduct under a court's inherent authority by *Moakley*. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (Damoorgian, J., concurring) ("*Moakley* simply does not allow for the imposition of sanctions for negligent conduct."). Acts of omission or failure to act were precisely what Defendants' attorneys were admittedly found to have done, in this case. *Rivero v. Meister*, 46 So. 3d 1161, 1162-63 (Fla. 4th DCA 2010) ("However, the trial court did not find

that the defendants' attorneys acted in bad faith. Instead, the trial court found that the defendants' attorneys acted negligently. … This situation was caused by the *negligence* of the defendants' attorneys."); *see also* Joan Indiana Rigdon, *Does Obamacare Violate the Constitution?* 25 DISTRICT OF COLUMBIA B.J. 5, 25 WASHINGTON LAWYER (2011) ("We make a fundamental distinction---all of law makes a fundamental distinction between acts and omissions. It is not murder to fail to rescue a person. It's murder to kill them").

The rather "bright-line" rule in *Moakley* should not be muddied, confounded or overcome with acts of *omission* or a failure to act or what is commonly known as reckless, negligent conduct. Instead, the Court should decline the invitation to expand affirmative acts of bad faith, for purposes of Florida's inequitable conduct doctrine, to include a failure to act or reckless, negligent conduct.

(A) <u>There Exist Other Alternatives to Addressing An Attorney's Failure to Act During the Course of Litigation.</u>

Then, Chief Justice Wells (and Justice Lewis) did not join the majority opinion in *Moakley* because he concluded that it was not in accord with this Court's precedent in *Burns v. Huffstetler*, 433 So. 2d 964 (Fla. 1983). *Moakley v. Smallwood*, 826 So. 2d 221, 227-29 (Fla. 2002) (Wells, C.J., Lewis, J.) (concurring in result only). Chief Justice Wells explained his reasoning:

> There are three alternative methods for the disciplining of attorneys, and the first two procedures derive directly from this Court's delegation of its power to regulate the practice of law in Florida, as

> conferred by article V, section 15, Florida Constitution. The first alternative is the traditional grievance committee-referee process in which an attorney is prosecuted by The Florida Bar under the direction of the Board of Governors. Under this procedure, sanctions are imposed by the Supreme Court after the Court considers the referee's recommendation. *See* Fla. Bar Integr. Rule, art. XI, Rules 11.02-11.13. The second alternative is a procedure initiated by the judiciary with the state attorney prosecuting. Judgment is entered by the trial court and is subject to review by the supreme court. *See* Fla. Bar Integr. Rule, art. XI, Rules 11.14. The third alternative is the exercise of the inherent power of the courts to impose contempt sanctions on attorneys for lesser infractions, a procedure which this Court expressly approved in *Shelley v. District Court of Appeal*, 350 So. 2d 471 (Fla. 1977).

Moakley, at 228 (Wells, C.J., Lewis, J.) (concurring in result only) (citing *Burns v. Huffstetler*, 433 So. 2d 964, 965 (Fla. 1983)).

Like the former Chief Justice recognized, "[t]he trial court has many options available to it in fashioning an appropriate sanction, including imposing fines, awarding attorney's fees under section 57.105, Florida Statutes (2004), finding counsel in contempt, or referring the matter to the Florida Bar." *Am. Express Co. v. Hickey*, 869 So. 2d 694, 695 (Fla. 5th DCA 2004) (reversing trial court's improper dismissal of amended complaint where attorney failed to meet deadlines and appear at scheduled hearing). A court has the inherent jurisdiction to enforce its own orders. *Gil v. Mendelson*, 870 So. 2d 825, 826 (Fla. 3d DCA 2003) (per curiam); *see Johnson v. Landmark First Nat'l Bank*, 415 So. 2d 161, 162 (Fla. 4th DCA 1982) (providing the severity of sanctions imposed by the trial court is a matter within its sound discretion). "Even without an adjudication of contempt, a

trial court may order a properly noticed party who fails to appear for a deposition to make other parties whole for financial losses that the failure to appear causes." *H.K Dev., LLC v. Greer*, 32 So. 3d 178, 182 (Fla. 1st DCA 2010).

For failure to timely appear for trial, as was the situation in this case, a court is also empowered to discipline the offending attorney by contempt or other appropriate punishment. *Catogas v. Sapp*, 397 So. 2d 1182, 1183 (Fla. 3d DCA 1981) (per curiam); *see Beasley v. Girten*, 61 So. 2d 179, 180-81 (Fla. 1952) (providing a court may cite counsel for contempt or a lesser degree of punishment for failing to appear at pre-trial conference); *Shelley v. District Court of Appeal*, 350 So. 2d 471 (Fla. 1977) ("We hold that the imposition of a summary contempt sanction is a proper and necessary disciplinary tool to aid a judicial tribunal in carrying out its necessary court functions").

Thus, there exist many other alternatives to addressing an attorney's failure to act during the course of litigation, as opposed to modifying the near century-long, settled inequitable conduct doctrine in Florida, from which arises a court's inherent authority to sanction attorneys for affirmative bad faith conduct. Additionally, if the Court determines the foregoing alternatives insufficient to capably address circumstances such as occurred in the trial court in this case,[30] the

[30] Such a conclusion, however, may depart from precedent. *See The Florida Bar v. Negretti*, 346 So. 2d 68, 69-70 (Fla. 1977) (per curiam) *The Florida Bar v.*

Court may also send the issue of bad faith sanctions against lawyers to the rules committees.[31] *Moakley v. Smallwood*, 826 So. 2d 221, 229 (Fla. 2002) (Wells, C.J., Lewis, J.) (concurring in result only).

A few other Florida appellate decisions appear to warrant consideration by the Court on the issue of a court's authority to address an attorney's failure to timely act during the course of litigation. In *Dep't of Children & Families v. M.G.*, 838 So. 2d 703 (Fla. 5th DCA 2003), the Fifth District held the trial court had the authority to assess attorney's fees occasioned by counsel's belated request for a continuance on the morning trial was scheduled to begin. *Id*. at 703-04. The court expressly rejected "the Department's contention that the absence of a contractual or statutory basis for the recovery of attorney's fees is fatal to the award." *Id*. at 704. The court further held that *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) had no application to the assessment of fees because it was not a situation involving sanctions for bad faith conduct. *M.G.*, at 704. The District Court in *Dep't of Children & Families v. M.G.*, 838 So. 2d 703 (Fla. 5th DCA 2003) relied, in material part, on *Flea Market, U.S.A., Inc. v. Cohen*, 490 So. 2d 210 (Fla. 3d DCA 1986) yet, its opinion, did not identify the source of the trial court's authority

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Cervantes, 494 So. 2d 491, 491-92 (Fla. 1986) (per curiam); *The Florida Bar v. Weisser*, 526 So. 2d 63, 64-65 (Fla. 1988) (per curiam) (all discussed *infra*).

[31] Petitioner's Petition, at p. 10.

to assess attorney's fees in that instance. One is compelled to wonder if the source of that authority was the Third District's decision in *Cohen*.

In *Cohen*, the court held it was not an abuse of discretion for the trial court to condition granting appellant's eve-of-trial motion for continuance upon the payment of the appellees' attorney's fees caused by the delay. *Id*. at 210 (citing *Western Union Tel. Co. v. Suit*, 15 So. 2d 33 (Fla. 1943) (other secondary sources omitted)). Interestingly enough, *Western Union* concerned a case that was tried before the circuit court, after two prior continuances, without defendant or defendant's counsel present because defendant's counsel was critically ill. *Western Union Tel. Co. v. Suit*, 15 So. 2d at 34-35.

Rather than try the case without the defendant or defendant's counsel present, this Court concluded that the trial court "could have granted an adjournment of the trial for such time as he thought was proper and entered at once a judgment against the defendant for the per diem and mileage of plaintiff and his witnesses." *Id*. at 35 (citing § 54.07, Fla. Stat.).[32] However, by the time *Cohen* was decided, the statutory basis for *Western Union's* conclusion was no longer available.[33]

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[32] "The court may at the trial of any cause where it may deem it right for the purposes of justice, order an adjournment for such time, and subject to such terms and conditions as to costs and otherwise, as it may see fit." § 54.07, Fla. Stat. (1941) (repealed 1967).

[33] *Supra* note 32.

While *Flea Market, U.S.A., Inc. v. Cohen*, 490 So. 2d 210 (Fla. 3d DCA 1986) concerned the recovery of attorney's fees occasioned by the delay, *Western Union* only seemed to concern the possible recovery of costs as result of the delay. As such, *Western Union* would not appear to have provided the source of the trial court's authority in *Cohen* to exchange the grant of a continuance for attorney's fees. And there was no indication (in the District Court's opinion) that the Department agreed to being assessed with fees; only that they accepted the continuance and, therefore, according to the court, assented to the conditions imposed. *Cohen*, at 210. If they had agreed, the Department could not have appealed the ruling. *See Dep't of Health v. Fresenius Medical Care Holdings, Inc.*, 935 So. 2d 636, 637-38 (Fla. 1st DCA 2006) (per curiam) (providing favorable trial court ruling on behalf of appellant cannot be basis for appeal).

Like *Dep't of Children & Families v. M.G.*, 838 So. 2d 703 (Fla. 5th DCA 2003), *Flea Market, U.S.A., Inc. v. Cohen*, 490 So. 2d 210 (Fla. 3d DCA 1986) did not identify the source of the trial court's authority for imposing attorney's fees for granting a last-minute continuance just before trial was to begin.

The Court should also take note that this case does not solely concern the admitted failure to perform certain necessary acts on the part of Defendants' trial attorneys. It also concerns the failure of the trial court to comply with the dictates of *Moakley*. *Moakley's* undefined definition of bad faith did not need to nor does it

necessarily need to include reckless, negligent misconduct. *Contra Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) ("In our view, "bad faith" should be defined to include at least both intentional conduct *and* reckless conduct.") (*Emphasis* by the court). If the trial court viewed the circumstances which occurred before the trial court as having constituted affirmative acts of "bad faith conduct" and, apparently, the trial court did not, the trial court should have found the high degree of specificity *Moakley* requires in its factual findings in the order first appealed from.[34] *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002). Instead, the trial court merely found Defendants' trial attorneys were negligent. *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010) ("This situation was caused by the *negligence* of the defendants' attorneys.") (quoting trial court's order granting sanctions).

To the extent they have not sufficiently done so before, Respondents' trial attorneys concede their omissions constituted negligent conduct but, under *Moakley*, such conduct was not sanctionable based upon the inherent authority of the trial court. *Rivero v. Meister*, 46 So. 3d 1161, 1164 (Fla. 4th DCA 2010) (Damoorgian, J., concurring) ("In this case, defense counsel acknowledged that he was negligent."). As such, *Rivero* was correctly decided by the District Court and the trial court's order appropriately reversed. No matter the numerous, repetitive

[34] R. App. Exhibit No. 1.

adjectives Petitioner used to describe Defendants' trial attorneys' negligent conduct,[35] their conduct was simply that; negligent but not in bad faith, just as admitted by Plaintiff's counsel,[36] found by the trial court,[37] and essentially agreed with by the District Court. *Rivero v. Meister*, 46 So. 3d 1161, 1162-64 (Fla. 4th DCA 2010) (requesting this Court expand the inequitable conduct doctrine, as to bad faith, to include reckless misconduct, essentially, because "the record establishes that their conduct was not in bad faith").

(B) The Apparent Unfairness of the Result in *Rivero* Did Not Necessarily Foreclose Recovery of Plaintiff's Attorney's Fees.

Petitioner did not address the District Court's expressed concern for the unfairness of their decision in *Rivero*. *Rivero v. Meister*, 46 So. 3d 1161, 1162 (Fla. 4th DCA 2010) ("We write to address both the reversal and our concern with the unfairness of this result."). Therefore, Petitioner waived or abandoned the unfairness issue. *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So. 2d 275, 281 (Fla. 2d DCA 2008) (per curiam) (holding appellant failed to argue the point in his initial brief and deeming any potential issue to have been waived or abandoned) (citing *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959); *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983)); *North v. State*, 32 So. 2d 915, 919 (Fla. 1947) ("This issue has not been

[35] Petitioner's Petition, at p. 7, 17, 18, 19.
[36] R. App. Exhibit No. 2, p. 2, at ¶ III.
[37] R. App. Exhibit No. 1, at third page.

properly argued or presented by any question in the brief of appellant, and therefore we must assume that the point has been abandoned.") (citations omitted).

"We are concerned with the unfairness of this result." *Rivero v. Meister*, 46 So. 3d 1161, 1163-64 (Fla. 4th DCA 2010). The *Rivero* court was not alone or the first reviewing court to be concerned with fashioning a decision in which fairness to the parties involved was considered important. *See e.g., Neonatology Assoc., P.A. v. Agency for Health Care Admin.*, 698 So. 2d 641, 642 (Fla. 2d DCA 1997) (per curiam) (affirming, reluctantly, order under appeal while expressly recognizing the unfairness of the result); *Wells Fargo Armored Servs. v. Lee*, 692 So. 2d 284, 286-87 (Fla. 1st DCA 1997) (noting the Supreme Court's opinion in *Quality Engineered Installation* emphasized the unfairness that could result from a rule denying prejudgment interest on award of attorney's fees before the amount had been set); *Martin v. Paunovich*, 632 So. 2d 611, 612-13 (Fla. 5th DCA 1993) (Griffin, J. dissenting) (recognizing unfairness of the result in the case, in which the majority decision per curiam affirmed); *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991) (recognizing unfairness of the situation and disqualifying law firm from further representation); *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929, 930-31 (Fla. 1996) (recognizing unfairness which results to a party entitled to the payment of attorney fees when the party who owes the attorney fees withholds payment); *but see Wade*

v. Alamo Rent-A-Car, Inc., 510 So. 2d 642, 643 (Fla. 4th DCA 1987) ("We therefore affirm … with the observation that any perceived unfairness in this result is a matter properly addressed to the legislature."); *Cassidy v. Firestone Tire & Rubber Co.*, 495 So. 2d 801, 802 (Fla. 1st DCA 1986) (affirming summary judgment in products liability action where plaintiffs failed to bring action within statute of limitations and failed to show "substantial inequity or unfairness" which would result upon application of *Pullum v. Cincinnati Inc.*, 476 So. 2d 657 (Fla. 1985), which upheld statute as constitutional).

As Petitioner indicated, "Meister filed suit against Rivero and Irizarry for personal injury damages resulting from an automobile accident November 3, 2005."[38] Personal injury damage cases brought by injured plaintiffs are fairly common cases for issuance of proposals for settlement by plaintiffs pursuant to Rule 1.442 and section 768.79, Florida Statutes (2006). *See e.g.*, *Wagner v. Brandeberry*, 761 So. 2d 443, 444-48 (Fla. 2d DCA 2000); *Liguori v. Daly*, 756 So. 2d 268, 268-70 (Fla. 4th DCA 2000); *Morgan v. Beekie*, 879 So. 2d 110, 111 (Fla. 5th DCA 2004).

Assuming Plaintiff served a proposal for settlement upon Defendants during the litigation, compliant with the rule and statute, which meets the threshold for an award of attorney's fees following trial, the apparent unfairness of the result in

[38] Petitioner's Petition, at p. 1.

Rivero would not have foreclosed recovery of Plaintiff's reasonable attorney's fees (even though not assessable against Defendants' trial attorneys). *See Donovan Marine, Inc. v. Delmonico*, 40 So. 3d 69, 72 (Fla. 4th DCA 2010) ("An award of attorney's fees is mandatory when [as here] the statutory prerequisites have been met."). Moreover, "section 768.79(1) serves as a sanction for an unreasonable rejection of a good faith offer of settlement." *Segundo v. Reid*, 20 So. 3d 933, 936 (Fla. 3d DCA 2009). In terms of recovery, however, an injured plaintiff is not very likely to be concerned with 'where' the monetary recovery comes from, just so long as the plaintiff recovers.

And, as already discussed, there are other alternatives available to the Florida judiciary to address attorney misconduct.

(C) <u>The Dearth of Reported Decisions Wherein An Attorney Failed to Appear for Trial Strongly Suggests This Type of Occurrence Is Extremely Rare, Just As A Trial Court Being Called Upon to Exercise Its Inherent Authority Is Also Rare.</u>

After diligent search, and given the hundreds of thousands of reported Florida state court decisions since Florida became a state in 1845 or a period of time exceeding 165 years,[39] it appears there is a dearth of common law authority in which an attorney failed to appear for trial and was sanctioned as a result. *See e.g.*, *The Florida Bar v. Negretti*, 346 So. 2d 68, 69-70 (Fla. 1977) (per curiam)

[39] The earliest reported decisions from this Court were rendered in 1846. *See e.g.*, *Stewart v. Preston*, 1 Fla. 1 (Fla. 1846); *Stewart v. Preston*, 1 Fla. 10 (Fla. 1846). And on 01/27/11, Westlaw had 650,758 cases in their Florida state case database.

(disciplinary proceeding in which attorney was suspended from the practice of law for failing to inform his client of the trial date, failed to appear for trial and judgment was entered against his client); *Lowe v. State*, 468 So. 2d 258, 258 (Fla. 2d DCA 1985) (per curiam) ("We affirm the trial court's judgment adjudicating appellant, an attorney, guilty of indirect criminal contempt for failure to appear at the scheduled time of a nonjury trial."); *The Florida Bar v. Cervantes*, 494 So. 2d 491, 491-92 (Fla. 1986) (per curiam) (disciplinary proceeding in which attorney was disbarred for, among other things, failing to appear at calendar call and trial on behalf of client, who had judgment entered against him); *The Florida Bar v. Weisser*, 526 So. 2d 63, 64-65 (Fla. 1988) (per curiam) (disciplinary proceeding in which attorney was suspended from the practice of law for six months where attorney failed to appear at calendar call, failed to appear at trial, filed a motion for continuance but did not request a hearing and a judgment was entered against his client); *see also O'Country v. Town Sandwich Shop*, 332 So. 2d 648, 648-49 (Fla. 3d DCA 1976) (per curiam) (affirming judgment where defendant/appellant's attorney and his witnesses failed to appear for trial and no legal ground was raised on motion for new trial).

Other than the Fourth District's decision from which arose the certified question, *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA 2010), only *Negretti*, *Lowe*, *Cervantes*, and *Weisser* stand out as decisions (three of the four from this

Court) which enforced the imposition of sanctions for failure to appear at trial, although reversible trial court error was found in *Rivero*. *Rivero,* at 1163-64. Thus, diligent search has revealed merely four (4) reported decisions in which an attorney failed to appear for trial, was sanctioned as a result, and the sanction was either established by this Court or affirmed on appeal.

These (non-scientific) results demonstrate that the occurrence in the trial court below, wherein Defendants' trial attorneys' failed to appear for trial, was as rare an occurrence as a trial court's exercise of its inherent authority should be. *Moakley v. Smallwood*, 826 So. 2d 221, 224-25 (Fla. 2002) ("We note that this doctrine is rarely applicable. … Moreover, appellate decisions that have addressed this issue have recognized that trial courts must sparingly and cautiously exercise this inherent authority to award attorney's fees against an attorney."). Accordingly, the empirical data born out by Florida case law indicates that exercise of a court's inherent authority to sanction attorneys, under the inequitable conduct doctrine, has---as expected---been sparingly used and that's the way it should be and should remain.

Not to overlook decisions to the contrary, also identified were other Florida state court decisions which determined that, notwithstanding an attorney's failure to appear for trial, such failure would not result in sanctions. *See e.g.*, *Hunnefeld v. Futch*, 557 So. 2d 916, 918 (Fla. 4th DCA 1990) ("Appellant's second contempt

conviction was for his failure to appear at trial which resulted from misinformation obtained from the associate, not intentional disobedience of a court order.") (reversing contempt conviction and sentences and remanding with directions to discharge appellant); *Joyner v. Hair*, 485 So. 2d 491, 492 & n.4 (Fla. 3d DCA 1986) (observing "the trial court was obviously satisfied with the appellee's explanation that his failure to appear for the scheduled trial was inadvertent," where the attorney telephoned the court the day of trial but got lost on his way and arrived too late); *Catogas v. Sapp*, 397 So. 2d 1182, 1183 (Fla. 3d DCA 1981) (per curiam) ("dismissing plaintiff's complaint without prejudice for failure of counsel to appear on time for trial [which] is too severe a sanction to visit upon a litigant"); *Hollie v. Hollie*, 388 So. 2d 1389, 1390 (Fla. 1st DCA 1980) (per curiam) (observing the attorney did not appear at the final hearing, which was not condoned, although he had filed a motion for continuance and a motion to withdraw as counsel); *Fisher v. State*, 248 So. 2d 479, 480-88 (Fla. 1971) (recognizing attorney failed and refused to appear for trial where trial court first allowed attorney to withdraw and then *sua sponte* set aside order of withdrawal) (reversing judgment and discharging petitioner from custody); *see also Div. of Admin., State DOT v. Davis*, 511 So. 2d 686, 687 (Fla. 4th DCA 1987) ("The issue we consider is whether the trial court erred in hearing a case without a jury after appellant and its attorney failed to appear for trial even though demand for jury

trial had been made in appellant's petition. We conclude that it did."); *Thompson v. State*, 427 So. 2d 341, 341-43 (Fla. 1st DCA 1983) (reversing judgment and sentence for indirect criminal contempt where attorney failed to appear for trial on trial date but had arranged in advance that his law partner would handle the trial if he hadn't returned from Egypt, which the attorney had previously disclosed to the client); *In re Taylor*, 240 So. 2d 170, 170-72 (Fla. 1st DCA 1970) (per curiam) (affirming trial court finding that appellant was guilty of contempt for failure to appear at trial but vacating sentence where there were two co-counsel present at the trial and there was no interruption of the trial or delay).

It seems clear that, even considering the (seven other)[40] occasions when trial counsel was not sanctioned for failure to appear at trial, overall, these are fairly rare occurrences in the annals of 165 years of Florida jurisprudence. A reasonably competent, ethically-bound trial attorney is extremely unlikely to commit such an error as to fail to appear for trial, when on notice of same; an error Respondents' trial attorneys admittedly regret. *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010). It follows that *Rivero* hardly begets a case upon which this Court should materially change the nearly century old Florida inequitable conduct doctrine by defining undefined bad faith to include reckless, negligent conduct. The sheer rarity in which these situations have occurred, strongly suggests such a

[40] In the eighth decision, *In re Taylor*, the sanction was affirmed but the sentence vacated. *Taylor*, 240 So. 2d at 170-72.

material change in the law is not necessary. As aptly prognosticated in the *Moakley* concurring opinion, "I deplore th[e lawyer] abuse, but I have to weigh this against the problems I foresee with opening a new way to sanction lawyers." *Moakley v. Smallwood*, 826 So. 2d 221, 228 (Fla. 2002) (Wells, C.J., Lewis, J.) (concurring in result only).

CONCLUSION

The certified question, "DOES THE DEFINITION OF "BAD FAITH CONDUCT" IN *MOAKLEY v. SMALLWOOD*, 826 So. 2d 221 (Fla. 2002), INCLUDE RECKLESS MISCONDUCT WHICH RESULTS IN THE UNNECESSARY INCURRENCE OF ATTORNEYS' FEES?" … should be answered in the negative. Furthermore, the District Court's decision should be affirmed in all material respects and the Court should decline to expand the inequitable conduct doctrine with respect to the factually undefined definition of bad faith to include reckless, negligent conduct.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Respondents' Answer Brief was electronically filed with the Clerk of the Supreme Court of Florida and furnished by U.S. mail, postage prepaid, to: Lynn G. Waxman, Esq., LYNN G. WAXMAN, P.A., Attorneys for Petitioner, P.O. Box 32068, Palm Beach Gardens, Florida 33420 and Elliot Brooks, Esq., YOUNG, BROOKS & PEFKA, P.A., Attorneys for Petitioner, 1860 Forest Hill Blvd., Suite 201, West Palm Beach, Florida 33406, on this 28th day of January 2011.

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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that Respondents' Answer Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure because it has been prepared in Times New Roman 14-point font (except for the title of the brief on the cover page, which font size is larger).

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