IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2311

District Court of Appeal No.: 4D09-2555

ROMILDO MEISTER,

Petitioner,

vs.

ELIZARDO RIVERO, ET AL.,

Respondents.

****

AN APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RELY BRIEF OF PETITIONER

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POINT I

"BAD FAITH CONDUCT" IN *MOAKLEY V. SMALLWOOD,* 826 So.2d 221 (Fla. 2002), INCLUDES OBJECTIVELY RECKLESS MISCONDUCT WHICH RESULTS IN THE UNNECESSARY INCURRENCE OF ATTORNEYS' FEES

A. Florida Definition of Bad Faith [1]

Defendants' attorneys reply by arguing "bad faith" as stated in *Moakley* should not be further defined because it is a fact intensive determination, better left to the sound discretion of the trial court. (Respondents' brief p. 8-9) Defendants' attorneys support their position by arguing the Florida inequitable conduct doctrine is to be reserved for those extreme cases where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons," relying upon *Moakley,* at 224-225, and *Bitterman v. Bitterman,* 714 So.2d 356, 365 (Fla. 1998) (inequitable

[1] Respondents' answer brief fails to address the issues in the same order as they were presented in Petitioner's Initial Brief, which prevents the court and responding party from ascertaining which arguments are being addressed. Fla. R. App. P. 9.210 (c), *Rolling v. State ex rel. Butterworth,* 630 So.2d 635, 636 (Fla. 1st DCA 1994), *see Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1122 (Fla.1984) ("answer briefs should be prepared in the same manner as the initial brief so that the issues before the Court are joined"). Additionally, Respondents have failed to address Petitioners' argument in Point I B., Federal Definition of Bad Faith. See *Denny v. Denny*, 334 So.2d 300, 302 (Fla. 1st DCA 1976) (appellee should address and respond to points raised by appellant); *American Baseball Cap, Inc. v. Duzinski*, 308 So.2d 639 (Fla. 1st DCA 1975).

conduct doctrine applicable only when one party has exhibited "egregious conduct or acted in bad faith.") (Respondents' brief p. 10-11) Based upon these authorities, Defendants' attorneys conclude the inequitable conduct doctrine under *Moakley* does not include reckless conduct. Their argument is, however, contradictory.

As explained in Meister's initial brief, the definitions of vexatious, egregious or bad faith conduct are synonymous and include reckless misconduct. "Vexatious" is defined as "without reasonable or probable cause or excuse; harassing; annoying." *Black's Law Dictionary* 1596 (8th ed. 2004), *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1190 (11th Cir.2006), *as amended* 500 F.3d 1230, 1242 (11th Cir. 2007) An attorney acts "unreasonably and vexatiously" when the attorney's conduct is so egregious that it is tantamount to bad faith. *Amlong*, at 1239. "Recklessness" is defined as conduct which grossly deviates from reasonable conduct. *Id.*, at 1240 (quoting *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir.2003) and *Black's Law Dictionary* 1298-99, *supra*). The Eleventh Circuit in *Amlong*, *id.*, and other federal courts have found "reckless" conduct sufficient to justify the bad faith standard for statutory sanctions. *Estate of Blas ex rel. Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir.1986); *Manax v. McNamara*, 842 F.2d 808, 814 (5th Cir.1988).

Defendants' attorneys next argue decisions of the United States Supreme Court

interpreting the federal inequitable conduct doctrine are not binding upon this Court because the Florida inequitable conduct doctrine was influenced from, not modeled upon, the federal doctrine. (Respondents' brief p. 12) According to Defendants' attorneys, " ' *Bitterman* defines the contours of the inequitable conduct doctrine' " in Florida, quoting *Nedd v. Gary,* 35 So.3d 1028, 1030 (Fla. 4th DCA 2010). (Respondents' brief p. 14)

Meister does not dispute that this Court has long recognized the authority of its judiciary to impose sanctions for inequitable conduct. *Moakley,* at 224 (relying upon *United States Sav. Bank v. Pittman,* 80 Fla. 423, 86 So. 567, 572 (1920)). Nor does Meister dispute that both *Moakley* and *Bitterman* rely upon authorities from Florida and foreign jurisdictions in support of this doctrine. Meister argues, however, that the definition of the standard of behavior warranted for imposition of sanctions under the Florida inequitable conduct doctrine was adopted from the same federal doctrine.

As outlined in Meister's initial brief, *Bitterman*, at 365, adopted the standard from federal precedent, "in bad faith, vexatiously, wantonly, or for oppressive reasons," relying upon *Vaughan v. Atkinson*, 369 U.S. 527, 530-31, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Rolax v. Atlantic Coast Line R.R. Co.*, 186 F.2d 473, 481 (4th Cir.1951); *Foster v. Tourtellotte,* 704 F.2d 1109, 1111 (9th Cir.1983) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129, 94 S.Ct.

2157, 2165, 40 L.Ed.2d 703 (1974)); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.1982) (quoting *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973)). [2] (Petitioner's brief p. 8-9). Furthermore, *Moakley* relied upon the above language from *Bitterman* and from *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980) which found that the court's authority to sanction counsel for litigating in bad faith conduct included the right to "assess those expenses against counsel who willfully abuse judicial processes." *Id.* (Petitioner's brief p. 9-11)

The fact that *Moakley* reviewed the history of the Florida inequitable conduct doctrine does not prove that the standard adopted therein was not modeled after the federal doctrine, as argued by Defendants' attorneys. (Respondents' brief p. 13-14) The early decisions, *Pitman*, *id.*, and *In re DuVal's Estate*, 174 So.2d 580, 587 (Fla. 2d DCA 1965) refer to the court's inherent authority to assess attorney's fees, and do not address the standard for imposition thereof. *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1148 (Fla.1985) discusses in one sentence that the inequitable

[2]The United States Supreme Court recognized in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.4, 88 S.Ct. 964, 966, 19 L.Ed. 2d 1263 (1968) the well-established authority of federal courts to award counsel fees to a successful plaintiff where a defense has been maintained " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " (quoting 6 Moore's Federal Practice, 1352 (1966 ed.)).

conduct doctrine is an exception to the American Rule for taxation of attorney's fees by contract or statute.

Two other cases discussed, *Patsy v. Patsy,* 666 So.2d 1045, 1047 (Fla. 4th DCA 1996) and *Hilton Oil Transport v. Oil Transport Co., S.A.,* 659 So.2d 1141, 1153 (Fla. 3d DCA 1995), both rely upon the federal definition. *David S. Nunes, P.A. v. Ferguson Enterprises, Inc.,* 703 So.2d 491, 491 (Fla. 4th DCA 1997) relies upon *Patsy* and the cases cited therein. Only *Lathe v. Florida Select Citrus, Inc.,* 721 So.2d 1247, 1247 (Fla. 5th DCA 1998), relies upon inherent authority from *Pittman.*

Defendants' attorneys' argument that the Florida inequitable conduct doctrine is not modeled after the federal doctrine is, thus, rather disingenuous. Defendants' attorneys recognize that *Bitterman* defines the contours of the inequitable conduct doctrine, yet *Bitterman* holds the doctrine is reserved "in bad faith, vexatiously, wantonly, or for oppressive reasons," the federal precedent. Regardless of *Moakley,* therefore, Florida courts are free under *Bitterman* to award sanctions for the more expansive federal definition. *See e.g. Nedd v. Gary, id.* (following *Bitterman*, not *Moakley*).

Defendants' attorneys next argue a change or expansion of the definition of bad faith to include reckless conduct would establish a new principle of law overruling both *Moakley* and *Bitterman,* which cannot be given retroactive application.

(Respondents' brief p. 24) This argument is erroneous because a decision from this Court clarifying whether bad faith as defined in *Moakely* includes the same definition from *Bitterman* would not represent a change in substantive law. *See Fiore v. White*, 531 U.S. 225, 228, 121 S.Ct. 712, 714, 148 L.Ed.2d 629 (2001) (decision which merely clarifies existing law does not establish new law and presents no issue of retroactivity). For the same reason, the three-phase test for retroactive application, *International Studio Apartment Ass'n, Inc. v. Lockwood*, 421 So.2d 1119, 1121 (Fla. 4th DCA 1982) (quoting *Chevron Oil Company v. Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), would fail.

A decision from this Court clarifying *Moakley* would not overrule clear past precedent, nor decide an issue of first impression whose resolution was not clearly foreshadowed. *Lockwood, id.* As argued many times by Meister, this Court already determined in *Bitterman* that the inequitable conduct doctrine definition of bad faith includes conduct which is vexatious, or reckless. Defendants' attorneys have recognized that *Bitterman* defines the contours of the inequitable conduct doctrine and that *Moakley* relies upon the definition of bad faith from *Bitterman.* Retrospective operation of a clarification of *Moakley* would not retard the definition's operation; some authorities rely upon *Bitterman* exclusively. *Lockwood, id., see e.g. Nedd v. Gary.* Finally and for the same reasons, substantial inequitable results would not be

produced were clarification announced. *Lockwood*.

Defendants' attorneys' argument that this Court should decline to reach the issue of whether unintentional conduct or negligence should warrant sanctions ignores the main premise of Meister's brief and the federal definitions of reckless conduct cited therein. (Respondents' brief p. 26-29) Many federal circuits have recognized that the propriety of sanctions requires an objective analysis of the attorney's conduct, (Petitioner's initial brief p. 14 n.4) and that sanctions can be imposed for egregious conduct even if the attorney acted without malicious intent or bad purpose. *Amlong ,id., Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1178 (11th Cir. 2005)(award of sanctions requires either subjective bad faith, which may be inferred from reckless conduct, or mere reckless conduct, which is "tantamount to bad faith").By relying upon these persuasive decisions of federal district courts concerning the award of sanctions for bad faith conduct, this Court would not have to reexamine the principles of negligence, as argued by Defendants' attorneys.

Defendants' attorneys next argue this Court should not examine whether reckless conduct is an element of bad faith because such conduct is sanctionable by other means, relying upon *Western Union Telegraph Co. v. Suit*, 15 So.2d 33 (1943) and *Flea Market, U.S.A., Inc. v. Cohen,* 490 So.2d 210, 210 (Fla. 3d DCA 1986). (Respondents' brief p. 29-36) In *Western Union,* sanctions were awarded for granting

a continuance under a now-repealed statute, § 54.07, Fla. Stat. In *Cohen,* attorney's fees were awarded to compensate the mother's attorney for trial preparation in the specific absence of bad faith. Neither case, however, provides an alternative remedy for sanctioning the failure to appear at trial at issue, nor provides guidance in answering the certified question.

Defendants' attorneys argue, in conclusion, because imposition of sanctions for failure to appear at trial are rare in Florida, it is unnecessary for this Court to expand or clarify its definition of bad faith as defined in *Moakley.* (Respondents' brief p. 39-44) This argument ignores the purpose of this Court's jurisdiction to answer certified questions from District Courts of Appeal which appellate judges have determined to be of great public importance. *See Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So.2d 251, 252 (Fla. 4th DCA 2003) (District courts of appeal can certify questions of great public importance to supreme court when decision will affect a large segment of the public and extant decisional law may not coalesce around single answer to the question posed).

In *Rivero v. Meister,* 46 So.3d 1161, 1164 (Fla. 4th DCA 2010) the question was certified because the appellate court was concerned with the unfairness of the plaintiff and his attorney incurring $10,750 in fees and costs as result of the defendants' attorneys' failure to obey trial management orders and to appear at trial.

The court in *Meister* reasoned that because the defendants' attorneys' conduct was reckless, but not specifically defined as bad faith in *Moakley,* the supreme court may wish to reexamine the definition of bad faith to determine whether such reckless misconduct was included therein.

This Court must, in answering the certified question, thus, balance the competing arguments of an appellate court's concern with the financial effect of attorney misconduct upon innocent litigants and their counsel against that of the members of the state bar who act without regard for opposing parties, their counsel, and the judiciary, claiming such conduct was not intentional and should be excused.

In conclusion, Defendants' attorneys have failed to address or attempt to distinguish the numerous federal authorities cited by Meister which have found the definition of bad faith under the inequitable conduct doctrine included reckless misconduct. Defendants' attorneys' lack of response on the main premise of Meister's argument waives any disagreement thereto and, thus, concedes the pertinence of the federal definition. *See Raskin v. Community Blood Centers of South Florida, Inc.*, 699 So.2d 1014, 1017 (Fla. 4th DCA 1997) (failure to address issues raised in opposing brief leaves court to believe such are waived, abandoned, or deemed by counsel to be unworthy). In the absence of any arguments to the contrary from Defendants' attorneys about the relevance and validity of this federal definition, the appellate

court decisions establishing such definition become persuasive authority to be adopted by this Court in answering the certified question. *Carnival Corp. v. Carlisle,* 953 So.2d 461, 465 (Fla. 2007) (quoting *Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P.2d 182, 185 (1944) ("[D]ecisions of lower federal courts are persuasive and usually followed unless a conflict between the decisions of such courts makes it necessary to choose between one or more announced interpretations.")).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, Petitioner requests that the certified question be answered in the affirmative, and that the trial court order awarding sanctions because of Defendants' attorneys' reckless conduct be approved and affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been filed electronically with the Clerk of Court and furnished by U.S. mail to: H. Michael Muniz, Esq., Thomas Crowder, Esq., Jason Gelinas, Esq., Jones & Valliere, P.A., 3000 W. Cypress Creek Road, Ft. Lauderdale, FL 33309, counsel for Appellant , this 10th day of February, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is submitted in Times New Roman 14 point font, Fla. R. App. P. 9.210(a)(2).

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Counsel for Petitioner