

**IN THE
SUPREME COURT OF FLORIDA**

CASE NO.: SC16-1921

NICOLE LOPEZ,

Petitioner,

vs.

SEAN HALL,

Respondent.

**On Review from the District Court of Appeal,
First District of Florida**

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Nicole Lopez filed a Petition for Protection Against Repeat and Dating Violence on February 10, 2014. [R. V.1, pp. 1-56]. Ms. Lopez subsequently filed an Amended Petition. [R. V.1, pp. 87-140]. Her Amended Petition for Injunction for Protection Against Repeat Violence was supported by forty-seven pages of exhibits. [R.V.1, pp.87-140]. The case proceeded to a hearing on February 27, 2014 following which the trial court extended the Temporary Injunction and continued the case for the parties to conduct discovery. [R.V.1, pp.145-147].

Discovery and hearings upon the Petition followed. [R. V.1, pp. 141-200; V.2, pp. 201-400; V.3, pp. 401-552]. The case was stayed for a period of time with the temporary injunction remaining in place during which time the Jacksonville Sheriff's Office conducted a related investigation. Nicole Lopez subsequently voluntarily dismissed her Amended Petition on September 10, 2014. [R.V.3, 433-36]. Prior to the dismissal Respondent Sean Hall moved pursuant to §57.105, Fla. Stat. (2014), for an award of attorney's fees against both Ms. Lopez and her attorney. Hall asserted the domestic violence proceeding was a "sham prosecution." [R.V.3, pp.403-408].

The trial court held a hearing on the issue of Respondent's Hall's entitlement to attorney's fees after Ms. Lopez voluntarily dismissed her petition. [R.V.3, pp.433-436; 504-506]. The issue before this Court is purely a question of law so

the allegations and counter-allegations made below regarding the basis for a domestic violence injunction are not pertinent to the issue before this Court. The trial court did not consider the truth or falsity of any allegations in determining Appellant Hall was not entitled to attorney's fees. [R. V.3, pp.550-552].

The trial court had continued the hearing due to the court's concern that since fees were being sought against both Ms. Lopez and her attorney Christopher Wickersham that Mr. Wickersham might have a conflict. [R. V.3, pp. 488-492]. The court also passed the case for the parties to discuss the possibility of settlement. [R. V.3, pp. 493-501]. Ultimately, the matter was rescheduled for hearing upon the legal issue of whether attorney's fees could be awarded in a domestic violence injunction proceeding and the court ruled such fees were not recoverable. The trial court entered its order denying attorney's fees on January 6, 2015 holding that such fees were not permitted in a domestic violence proceeding for repeat violence under §57.105, Fla. Stat. The trial court expressly did not address whether if fees were permitted under the law whether such fees as sanctions would be warranted against either Ms. Lopez or her attorney Christopher W. Wickersham, Jr. [R.V.3,pp.550-52].

The appeal by Mr. Hall to the First District Court of Appeal followed. [R. V.3, pp. 433-36, 504-506, 550-52, 553-56]. The First District Court of Appeal issued its decision on July 28, 2016. In holding that attorney's fees under §57.105,

Fla. Stat. are permitted in a domestic violence proceeding for repeat violence the First District expressly recognized its decision conflicted with decisions issued by the Third and Fourth District Courts of Appeal. “We recognize that this holding conflicts with the Fifth District's opinion in [*Dudley v. Schmidt*, 963 So.2d 297 (Fla. 5th DCA 2007)] and with the Third District's opinions in [*Ratigan v. Stone*, 947 So.2d 607 (Fla. 3d DCA 2007)] and [*Cisneros v. Cisneros*, 831 So.2d 257 (Fla. 3d DCA 2002)], and we certify conflict with those decisions.” *Hall v. Lopez*, 1D15-0531 (Fla. 1st DCA July 28, 2016). The appeal to this Court followed.

SUMMARY OF THE ARGUMENT

The standard of review upon an appeal from an order denying attorney’s fees is set forth in the recent decision of: *Blue Infiniti, LLC, et. al, v. Wilson*, 170 So. 3d 136 (Fla. 4th DCA 2015), wherein the court held:

“Generally, the standard of review of a trial court's order awarding section 57.105(1) attorney's fees is abuse of discretion. However, to the extent a trial court's order on fees is based on an issue of law, this court applies de novo review.” *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 74 (Fla. 4th DCA 2013) (citing *Ferere v. Shure*, 65 So. 3d 1141, 1144 (Fla. 4th DCA 2011)) (internal citation omitted).

The question before this Court is purely a question of law so the standard of review is de novo. The issue before this Court is whether an award of attorney’s fees is

allowed in a domestic violence injunction proceeding brought pursuant to Chapter 741, Florida Statutes.

Section 741, Florida Statutes, provides a unique mechanism within the *criminal* code, not *civil*, which grants a private right to enjoin an ongoing criminal act to a victim of the behavior prohibited by a criminal statute. The statute at issue in this case, namely §784.046, Fla. Stat., is contained within the criminal code, at Title XLVI, Chapter 784, Florida Statutes, entitled: "*Crimes: Assault; Battery; Culpable Negligence*". A domestic violence proceeding under that Chapter proceeds statewide in separate "DV" divisions which are established for the purpose of handling domestic violence injunctions.

When viewed in the proper context and the plain language of §57.105, Fla. Stat., the First District Court of Appeal misapprehended the possible applicability of the civil fee shifting statute to a private right of action entwined in a criminal statute. The unique hybrid nature of §784.046, Fla. Stat., is made clear by the fact that §784.047, Fla. Stat., makes it a first degree misdemeanor up to a third degree felony for a mere violation of any kind of a domestic violation injunction.

A domestic violence injunction proceeding is not a "*civil proceeding*" within the meaning of § 57.105, Fla. Stat., or any other fee shifting provision which would otherwise apply to civil actions. Section 57.105, Florida Statutes, provides in pertinent part:

Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time **during a civil proceeding or action** in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

(emphasis added). The question before this Court is whether a domestic violence injunction proceeding is one to which §57.105, Fla. Stat. applies.

A domestic violence injunction is a private right provided within the criminal, not civil, code, to allow victims of the behavior prohibited by that criminal statute to enjoin an ongoing criminal act. The implicit reasoning of the other District Courts with which the First District certified conflict in holding that a domestic violence injunction proceeding is not one in which attorneys fees may be awarded under §57.105, Fla. Stat., is that the same are not "civil proceedings". They are pure creatures of statutory creation, existing within the criminal, not civil, code, provided for the express purpose of allowing a victim of the behavior prohibited by that criminal statute to enjoin an ongoing criminal act.

The only cost shifting mechanisms within the criminal code lie within

§939.06, Fla. Stat. (2016), which allows for costs under limited circumstances when a defendant is acquitted, and §939.12, Fla. Stat. (2016), which allows for a cost award when a defendant prevails in the Florida Supreme Court. Neither of these provisions nor any other provision within the Criminal Code allows for an award of attorney's fees in a domestic violence injunction proceeding.

The holdings of *Dudley v. Schmidt*, 963So.2d 297 (Fla. 5th DCA 2007), *Ratigan v. Stone*, 947 So.2d 607 (Fla. 3d DCA 2007), and *Cisneros v. Cisneros*, 831 So.2d 257 (Fla. 3d DCA 2002), that attorney's fees are not recoverable in domestic violence injunction cases under §57.105, Fla. Stat. are correct. This Court should hold the First District Court of Appeal erred below and hold the Second, Third and Fifth District Courts of Appeal are correct in holding that attorney's fees as a sanction are not permissible under §57.105, Fla. Stat. in domestic violence injunction cases.

ARGUMENT

ISSUE ONE

THE FIRST DISTRICT ERRED IN HOLDING THAT ATTORNEY'S FEES AS SANCTIONS ARE PERMITTED PURSUANT TO §57.105, FLA. STAT., IN DOMESTIC VIOLENCE INJUNCTION CASES

According to the Office of the State Courts Administrator's Florida's Trial Court Statistical Reference Guide, FY 2014-15, 5-1 (December 2015), 83,961 domestic violence cases were filed in Florida during the 2014-2015 fiscal year. And there were 84,279 dispositions entered in domestic violence cases during that time. Domestic violence petitions made up twenty-nine point five percent (29.5%) of all family court filings during that period. In the Fourth Circuit alone there were 5,878 domestic violence petitions filed in the 2014-2015 fiscal year. *Office of the State Courts Administrator, Florida's Trial Court Statistical Reference Guide, FY 2014-15, 5-1 (December 2015) available at <http://flcourts.org/publications-reports-stats/statistics/trial-court-statistical-reference-guide.shtml>*. The potential impact of opening up domestic violence proceedings to attorney fee motions and hearings would represent a monumental burden on Florida's family law courts.

Most domestic violence injunction cases are resolved on the day they are heard for trial. Ms. Lopez' case where the parties continued the case for discovery and a related police investigation is the exception. If this Court were to hold that

§57.105, Fla. Stat., can be applied to domestic violence cases then the next question this Court would have to address is whether the filing and service of a §57.105 motion would trigger a stay of proceedings for whatever period of time is necessary for the twenty-one day notice period provided by §57.105(4), Fla. Stat. to pass. Ms. Lopez believes this Court will not have to make that decision because the reasoning of the majority of district courts of appeal that §57.105, Fla. Stat., does not apply to these proceedings is sound.

The First District, in *Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997), while holding attorney's fees were not recoverable in cases brought pursuant to Chapter 741, Florida Statutes, commented, "In denying this request, we are not unaware that many of the public policy reasons for granting attorney's fees in a chapter 61 proceeding exist in a domestic violence proceeding. This is a matter, however, that should be dealt with by the Legislature rather than the courts." *Id.* at 1274. To date the Legislature has not enacted any such fee provision within Chapter 741.

It may well be that the Legislature recognizes that if attorney's fee awards were to be allowed in such cases that the deluge of fee motions which would be filed by successful petitioners and disgruntled respondents would create an overwhelming burden for trial courts. It may also be that the Legislature does not wish to discourage those who need the protection of an injunction from seeking

such relief. Regardless, the First District's prior holding, in *Lewis*, remains sound. *See also, Geiger v. Geiger*, 926 So.2d 432 (Fla. 1st DCA 2006) (*per curiam*) (holding, "However, because there is no provision for an award of attorney's fees in a section 741.30, Florida Statutes, proceeding, this cross appeal is without merit.").

The First District reasoned:

Turning to the case before us, the trial court was correct in observing that section 784.046, like section 741.30, does not authorize an award of attorney's fees, and *Cisneros v. Cisneros*, 831 So.2d 257 (Fla. 3d DCA 2002)] and [*Ratigan v. Stone*, 947 So.2d 607 (Fla. 3d DCA 2007)] support its conclusion that attorney's fees pursuant to section 57.105 may not be awarded in an action for injunction against violence. However, in concluding that the trial court lacked authority to award attorney's fees pursuant to section 57.105 in the domestic violence proceeding, *Cisneros* cited Abraham and Lewis and Ratigan relied on Belmont, Baumgartner, Abraham, and Lewis—cases that did not pertain to an award of fees pursuant to section 57.105. As such, those cases are inapposite. Given the absence of a statutory provision providing that an award of attorney's fees pursuant to section 57.105 is impermissible in a Chapter 784 (or Chapter 741) proceeding, and in light of the language in section 57.105 that its provisions apply to civil proceedings/actions and are supplemental to other sanctions/remedies, we hold that an award of attorney's fees pursuant to section 57.105 is not prohibited in an action under section 784.046. **We recognize that this holding conflicts with the Fifth District's opinion in**

Dudley and with the Third District's opinions in Ratigan and Cisneros, and we certify conflict with those decisions.

Hall v. Lopez, 1D15-0531 (Fla. 1st DCA July 28, 2016). Thus, the First District's holding is premised on the Court's finding that §57.105, Fla. Stat. does not expressly prohibit an award of attorney's fees in domestic violence injunction proceedings.

It bears noting that in reaching its holding the court, in *Hall*, departed from the First District's own precedent. In *Bane v. Bane*, 775 So.2d 938 (Fla. 2000), this Court recognized:

The former husband has brought to our attention *Belmont v. Belmont*, 761 So.2d 406 (Fla. 2d DCA 2000), and *Baumgartner v. Baumgartner*, 693 So.2d 84 (Fla. 2d DCA 1997), in which the Second District held that attorney's fees could not be awarded in a domestic violence injunction case. The First and Third Districts have reached the same conclusion. *See Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997); *Abraham v. Abraham*, 700 So.2d 421 (Fla. 3d DCA 1997). In reaching this determination, the court in *Lewis* made clear that the domestic violence injunction proceedings were not actions under chapter 61, but were instead separate proceedings under chapter 741, Florida Statutes, which does not contain a provision authorizing attorney's fees. 689 So.2d at 1273-74; *see also Belmont*, 761 So.2d at 407 (citing *Lewis*); *Abraham*, 700 So.2d at 421 & n. 1 (chapter 61 fees improper for services rendered in a

domestic violence proceeding that was filed and litigated before the dissolution petition was filed); *Baumgartner*, 693 So.2d at 85-86 (same). Thus, the important distinction between these cases and the present case is that the cases concerning domestic violence injunction proceedings all involved an independent action under chapter 741, and none of the actions were filed under chapter 61 or pertained to enforcement or modification of the final judgment of dissolution. In making this distinction, we note that the issue of whether attorney's fees are authorized in a domestic violence injunction proceeding is not before us, and therefore we neither approve nor disapprove of these cases.

Id. at 942, n.4. The First District, in *Hall*, by finding that §57.105, Fla. Stat. may serve as a basis for a fee award in a domestic violence proceeding, made an end run around its prior recognition in *Lewis*, 689 So.2d at 1274, that “This is a matter, however, that should be dealt with by the Legislature rather than the courts.”

In contrast to *Hall*, in *Dudley v. Schmidt*, 963 So.2d 297, 297 (Fla. 5th DCA 2007), the Fifth District concluded: “There is no basis for the imposition of attorney’s fees in a proceeding for injunction against repeat violence under section 741.30, Florida Statutes (2005). Attorney’s fees cannot be awarded in a domestic violence case.” (citations omitted). One of the cases cited as precedent by the court, in *Dudley*, was *Baumgartner v. Baumgartner*, 693 So.2d 84 (Fla. 2d DCA 1997). In *Baumgartner*, the court reversed an award of attorney’s fees which had

been awarded in a domestic violence injunction proceeding. *Id.* at 86. In doing so the court held:

We cannot imply a right to attorneys' fees under this statute, especially given the legislature's efforts to minimize the involvement of attorneys in its enforcement. We are fully aware that attorneys often become involved in these proceedings. Indeed, the Hillsborough Association of Women Lawyers recently received a well deserved award from the Hillsborough County Bar Association for its extensive pro bono work in helping victims obtain domestic violence injunctions. See HCBA Lawyer, Vol. 7, No. 7, April 1997, at 31. Providing trial courts with the discretion to award attorneys' fees in appropriate cases would certainly encourage greater reliance upon this statute. Nevertheless, the power to amend this statutory cause of action belongs to the legislature.

Id. This Court has recognized the well-established rule that, “Generally, a court may only award attorney's fees when such fees are "expressly provided for by statute, rule, or contract." *Bane v. Bane*, 775 So.2d 938, 941 (Fla. 2000) (citation omitted). Thus, while the court, in *Hall*, recognized its decision conflicted with precedent of the Third District and Fifth District, it also conflicts with precedent of the Second District, and with its own decision in *Lewis*, *supra*.

In *Ratigan v. Stone*, 947 So.2d 607, 608 (Fla. 3d 2007), the Third District found, “[T]here was no statutory authority to award attorneys fees as sanctions in the separately-filed domestic violence case.” And in *Cisneros v. Cisneros*, 831 So.2d 257, 258 (Fla. 3d 2002), the Third District vacated an award of attorneys

fees holding, “The trial court was also without jurisdiction to award trial level attorneys fees pursuant to section 57.105, Florida Statutes for the domestic violence proceeding.” *Citing, Abraham v. Abraham*, 700 So.2d 421, 422 (Fla. 3d DCA 1997), *Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997). Thus, the First District’s decision, in *Hall*, squarely conflicts with the precedent of the Third, Fifth and Second District Courts of Appeal and with its own holding in *Lewis, supra*.

In *Baumgartner*, 693 So.2d 84 (Fla. 2d DCA 1997), the court recognized that the domestic violence injunction procedure was designed to minimize the involvement of attorneys. These proceedings which now account for roughly thirty percent of all family law filings in Florida are typically streamlined hearings. If the Florida legislature had intended attorneys fee award to be part of the process it would have stated so, especially after multiple appellate courts have commented that it is the legislature’s province to provide for such if that is what the lawmakers desire.

The unique hybrid nature of §784.046, Fla. Stat., also bears noting. Section 784.046(9)(a), Florida Statutes, provides, “The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection.” Furthermore, the very next statute within the Criminal Code, §784.047, Fla. Stat., makes it a first degree misdemeanor up to a third degree felony for a mere violation of any kind of a domestic violation injunction. Thus, domestic violence

proceedings are not a "*civil proceeding*" within the meaning of § 57.105, Fla. Stat., or any other fee shifting provision which would otherwise apply to civil or family-law actions. Rather, actions for injunctions against domestic or repeat violence under §§ 741.30 or 784.046, Fla. Stat., are not "civil actions," they are a pure statutory creature afforded by the criminal code to enjoin a quasi-criminal act.

In *Dudley v. Schmidt*, 963 So.2d 297 (Fla. 5th DCA 2007), the appellant contended the trial court had erred in denying him attorney's fees pursuant to §57.105, Fla. Stat (2005), because the appellee had made false statements in her petition for injunction against repeat violence. The court, in *Dudley*, flatly rejected the appellant's argument holding:

There is no basis for the imposition of attorney's fees in a proceeding for injunction against repeat violence under section 741.30, Florida Statutes (2005). Attorney's fees cannot be awarded in a domestic violence injunction case. *See Bane v. Bane*, 775 So.2d 938, 942 n. 4 (Fla.2000) (citing *Belmont v. Belmont*, 761 So.2d 406 (Fla. 2d DCA 2000), *Abraham v. Abraham*, 700 So.2d 421 (Fla. 3d DCA 1997), *Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997), and *Baumgartner v. Baumgartner*, 693 So.2d 84 (Fla. 2d DCA 1997)). *See also Ratigan v. Stone*, 947 So.2d 607, 608 (Fla. 3d DCA 2007) (holding trial court erred in awarding attorney's fees in the domestic violence injunction proceeding because there is no statutory authority to award fees as sanctions in such case); *Geiger v. Schrader*, 926 So.2d 432, 433 (Fla. 1st DCA 2006) (holding there is no provision for an award of attorney's fees in a section 741.30 proceeding); *Cisneros v. Cisneros*, 831 So.2d 257, 258 (Fla. 3d DCA 2002) (holding trial court was without jurisdiction to

award trial level attorney's fees pursuant to section 57.105 for domestic violence proceeding).

Id. at 297-98. Thus, the trial court in this case was correct in denying Hall's fee motion.

Likewise, in *Cisneros v. Cisneros*, 831 So.2d 257, 258 (Fla. 3rd DCA 2002) (*per curiam*), a case relied upon by the trial court below, the court expressly recognized, "The trial court was also without jurisdiction to award trial level attorneys fees pursuant to section 57.105, Florida Statutes for the domestic violence proceeding. *See Abraham v. Abraham*, 700 So.2d 421, 422 (Fla. 3^d DCA 1997); *Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997)."

The First District below also cited and relied upon *Bierlin v. Lucibella*, 955 So.2d 1206 (Fla. 4th DCA 2007). In *Bierlin*, the Fourth District awarded appellate attorney's fees pursuant to §57.105, Fla. Stat. and held the trial court on remand abused its discretion by failing to award attorney's fees pursuant to §57.105, Fla. Stat. where the petitioner "repeatedly failed to meet the statutory pleading requirements." 955 So.2d . at 1208. Notably, the Fourth District's is bereft of any analysis of whether such fees are permissible in a Chapter 784 proceeding through §57.105, Fla. Stat. Thus, the First District's holding below and the Fourth District's holding *in Bierlin* stand as anomalies for the proposition that while the legislature did not create a fee mechanism in the domestic violence injunction statutes that such fees may nonetheless be recoverable through §57.105, Fla. Stat., because the

legislature did not say they weren't recoverable through that mechanism. This Court should reject that argument.

This Court should instead hold that the Second, Third and Fifth District Courts of Appeal are correct in holding that attorney's fees are not recoverable as sanctions pursuant to §57.105, Fla. Stat., in domestic violence injunction cases. The Florida Legislature did not provide a means to seek attorney's fees in 1979 when Florida's domestic violence injunctions were created as a cause of action within the criminal code. Nor has the legislature enacted a fee mechanism within the domestic violence injunction statutes at any time since. Accordingly, this Court should reverse the decision of the First District and hold that attorney's fees are not permitted under §57.105, Fla. Stat. in domestic violence injunction cases.

CONCLUSION

The First District Court of Appeal erred in holding that attorney's fees as sanction are permitted under §57.105, Fla. Stat. Given the unique hybrid nature of the domestic violence injunction statutory scheme within the criminal code and the absence of any express legislative authority for attorney's fees within those acts, this Court should hold the district courts of appeal which have held that attorney's fees as sanctions in such cases are not permitted are correct. The logistical issues and time consuming fee hearings which would be created by injecting attorney fee motions into domestic violence proceedings would be an additional heavy burden

on the trial courts and litigants and that also weighs heavily against sanctioning that practice without an express directive from the legislature. Accordingly, this Court should hold the First District Court of appeal erred below and rule that §57.105, Fla. Stat., is not applicable in domestic violence injunction proceedings.

Respectfully submitted,



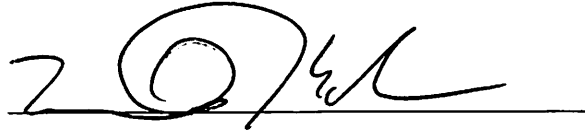
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to **Earl M. Johnson, Jr., Esq.**, via email at: jaxlawnl@gmail.com; this 27th day of February, 2017.

A handwritten signature in black ink, appearing to be 'E.M.J.', written over a horizontal line.

Attorney

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is 14-point Times Roman.

A handwritten signature in black ink, appearing to be 'E.M.J.', written over a horizontal line.

ATTORNEY

[Brief on merits.fsc]