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

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

As stated in her Initial Brief on the Merits 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 Respondent Hall was not entitled to attorney's fees. [R. V.3, pp.550-552]. Ms. Lopez responds only briefly to put Mr. Hall's assertion in context. Mr. Hall asserts that the trial court read Ms. Lopez her Miranda rights. In fact, the trial court instructed both parties, "So if either of you thinks there has been perjury, you are welcome to go the State Attorney's Office and see if they are willing to prosecute this as a criminal matter." [Vol. 3, R. 481-81]. The trial court then cautioned Ms. Lopez that in light of Mr. Hall's counsel threatening to seek perjury charges that Ms. Lopez did not have to testify upon Mr. Hall's attorney's fee motion if she chose not to. [Vol. 3, R. 486].

It also bears noting that Mr. Hall did testify at the February 27, 2014 hearing until such time as the hearing was continued to allow for further discovery. [V. 3, R. 347-62]. Prior to continuing the hearing the trial court observed:

> I'll tell you honestly, I don't know what to make of this case. There is some very odd – there are some very odd things going on, and I don't know what to make of them. And I think it would be helpful, frankly, to have a continuance so that mid-trial discovery can be conducted. I would like to have a representative from Western Union

> testify. I would like to have a computer person who knows technology testify.
>
> * * * * *
>
> Either somebody is engaging in some very aberrant behavior and potentially criminal behavior, and I would like to have better information on which to decide which party it is, so I'm going to grant your motion [to continue] Mr. Wickersham.

[V. R. 364-65]. The case then subsequently proceeded to the hearing on the legal issue of entitlement to attorney's fees under §57.105, Fla. Stat. Following the First District Court of Appeal issuing its decision, the appeal to this Court followed.

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

The gist of Respondent Hall's argument is that because the plain language of §57.105, Fla. Stat., does not preclude it from applying to domestic violence injunction proceedings that it must apply. In *Castaway Lounge of Bay County, Inc., v. Reid*, 411 So.2d 282 (Fla. 1st DCA 1982), the First District used that same argument in rejecting the assertion that §57.105, Fla. Stat., did not apply to contempt proceedings. The court, in *Castaway Lounge*, held, "We reject that

argument because the fee was reasonable, based on the hours the plaintiff's attorney spent in seeking and enforcing the injunction, and because Section 57.105 applies to "any civil action" without excluding contempt." *Id.* at 285.

However, Florida courts have also long narrowly construed attorney's fees provisions. In *Florida Hurricane Protection and Awning, Inc., v. Pastina*, 43 So.2d 893 (Fla. 4th DCA 2010), the court addressed whether attorney's fees were available to a prevailing homeowner under the reciprocity provision of §57.105, Fla. Stat. The court reasoned:

> We begin by reviewing basic, long-established tenets of law concerning attorney's fees. "It is well-settled that attorneys' fees can derive only from either a statutory basis or an agreement between the parties." *Trytek v. Gale Indus., Inc.*, 3 So.3d 1194, 1198 (Fla.2009) (citing *State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 832 (Fla.1993)). Statutes awarding attorney's fees must be strictly construed. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278 (Fla.2003).
>
> We therefore strictly construe the wording of section 57.105(7).

Id. at 895. The court, in *Florida Hurricane*, accordingly went on to hold that the homeowner was not entitled to attorney's fees under the reciprocity clause of §57.105(7), Fla. Stat., because the contract at issue had only provided for attorney's fees in connection with a collection action. *Id.* at 895-96.

It bears noting that §57.105, Fla. Stat., provides:

> (1)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). Thus, §57.105, Fla. Stat., expressly contains a requirement that there be a finding of intent or reckless disregard that a claim or defense was not supported by law or facrts in order to trigger liability for cost shifting.

In *Sand Lake Hills Homeowners Association, Inc., v. Busch*, (Fla. 5th DCA 5D16-21 January 20, 2017), the court addressed whether a homeowners association was subject to attorney's fees under a fee shifting statute which concerns false or fictitious claims to land. The provision at issue was §712.08, Fla. Stat., which provides:

> **Filing false claim**.- *No person* shall use the privilege of filing notices hereunder *for the purpose of asserting false or fictitious claims to land*; and in any action relating thereto if the court *shall find* that *any person has filed a false or fictitious claim*, the court may award to the prevailing party all costs incurred by her or him in such action, including a reasonable attorney's fee, and *in*

> *addition* thereto may *award to the prevailing party all damages that she or he may have sustained as a result of the filing of such notice of claim.*

Id. (emphasis in original). Key to the *Sand Lake Hills'* court's decision was the finding that, "[s]ection 712.08 does not require the filer to intentionally or knowingly file the false or fictitious claim." The court further found that false or fictitious "does not require deliberate untruthfulness." The court, in *Sand Lake Hills*, then held:

> To read the word "intentionally" into the statute would make section 712.08 a penal statute, rather than a remedial statute that provides a remedy to a person who expends attorney's fees to clear the title of a "false or fictitious claim" on his, her, or its real property. See Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981) ("A remedial statute is 'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.' It is also defined as '(a) statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before.'" (quoting Black's Law Dictionary (5th ed. 1979))).

In contrast, to the fee shifting provision found in the marketable title provision of §712.08, Fla. Stat., the statute at issue in this case contains an express finding of intent or reckless disregard. As such, §57.105, Fla. Stat., must be deemed a penal provision.

Section 57.105, Fla. Stat., is expressly designed to discourage and penalize the filing of knowingly false claims or defenses. As a penal provision the statute

must be extremely narrowly construed. Appellee Hall does not address the logistical nightmares which the application of §57.105, Fla. Stat., would create if it were held to apply to domestic violence injunction proceedings.

The safe harbor provision of §57.105(4), Fla. Stat., which the legislature enacted in 2002 was clearly not designed with the domestic violence injunction statutes in mind. The safe harbor provision of §57.105(4), Fla. Stat., provides: "A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." In contrast, §784.046(4)(c), Fla. Stat., provides:

> Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. However, an ex parte temporary injunction granted under subparagraph (2)(c)2. is effective for 15 days following the date the respondent is released from incarceration. A full hearing, as provided by this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the ex parte injunction and the full hearing before or during a hearing, for good cause shown by any party.

Thus, under §57.105, Fla. Stat., the legislature intended trial court's to proceed with the utmost haste. In contrast, under §57.105, Fla. Stat., the legislature intended fees and costs to be assessed only in the worst of the worst cases where after 21 days notice a party or an attorney insists on pursuing a claim or defense

which that party **knows** is without factual or legal basis. Other provisions within the domestic violence statutes also cry out for speed, such as §784.046(8)(c), Fla. Stat., which mandates that law enforcement agencies take action within 24 hours after service or issuance of an injunction. In short, the plain reading and practical realities of §57.105, Fla. Stat., and §784.046, Fla. Stat., show that the two do not mesh and the legislature did not intend §57.105, Fla. Stat., to be a fee shifting mechanism within the domestic violence statutes. Accordingly, this Court should reject the Appellee's argument and hold the First District erred in finding that §57.105, Fla. Stat., can apply to domestic violence injunction proceedings.

ISSUE TWO

THE FIRST DISTRICT AND THE TRIAL COURT CORRECTLY DECLINED TO CONSIDER APPELLEE HALL'S CLAIM OF ENTITLEMENT TO FEES VIA THE COURT'S INHERRENT AUTHORITY

Appellee Hall did not claim the trial court had inherent authority to assess sanctions in his Motion for Section 57.105 Attorney's Fees and Sanctions. [Appendix, D]. Appellee Hall did not file a cross-appeal at any stage of these proceedings. Thus, this issue has been waived. Furthermore, there is no record evidence of the type of flagrant disruption of judicial process which might justify a

trial court assessing costs or fees as sanctions pursuant to the court's inherent authority. This claim deserves no further comment and should be flatly rejected by this Court.

Respectfully submitted,

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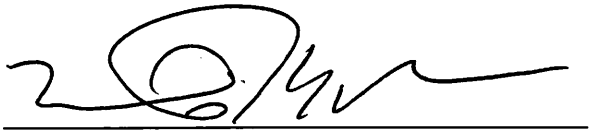
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to **Earl M. Johnson, Jr., Esq.,** via email at: jaxlawnfl@gmail.com; this 17th day of April, 2017.



Attorney

CERTIFICATE OF COMPLIANCE

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

ATTORNEY

[Brief on merits.fsc]