

IN THE SUPREME COURT OF FLORIDA

KATHLEEN M. REILLY and
RAYMOND J. REILLY, her Husband
Petitioners,

Vs.

Case No.: SC03-1614
Lower Tribunal No.: 2D02-2622

PATRICK M. BRINKER,
Respondent.

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PETITIONER'S INITIAL BRIEF
ON JURISDICTION

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PREFACE

The Petitioners are KATHLEEN M. REILLY and RAYMOND J. REILLY, her husband, and the Respondent is PATRICK M. BRINKER. The parties will be referred to as Petitioner and Respondent, or REILLY'S and BRINKER. References to the record on appeal are designated by the abbreviation "R" followed by the appropriate page number, pursuant to the Clerk's index of the volumes of the record, placed in parenthesis. References to the Appendix are designated by the abbreviation "APP." Followed by the appendix number and page number.

STATEMENT OF THE CASE

On June 6, 2001, Petitioner's filed a sworn Petition, in the Juvenile Court below. The Petitioner's sought to terminate the parental rights of Respondent for a minor child born out of wedlock to Respondent and Petitioner's deceased daughter. (See Petitioners Brief below).

The lower trial court granted a Motion for Protective order to the city of Bradenton Police Department. This precluded the Petitioner's from calling police officers to testify that they told and had shown to Petitioner's probable cause affidavits and arrest warrants, they had issued, for the arrest of the Respondent, and an accomplice, for the murder of Petitioner's daughter. (id).

When the Motion for Protective Order was granted, Petitioner's immediately sought a continuance of the trial, which was denied. The trial Judge then lulled the Petitioner's into a false sense of security stating that Petitioner's could take a voluntary dismissal, without prejudice, and would only be liable for costs, but not attorney fees. Accordingly, Petitioner's took a voluntary dismissal for "tactical reasons"(id).

However, on April 2, 2002, the lower trial court entered an

order granting attorney's fees against the Petitioner's in favor of Respondent, pursuant to F.S. 57.105 (2001). On May 15, 2002, Petitioner's timely perfected a Notice of Appeal to the Second District Court. (id).

On June 20, 2003, the Second District, entered a written percuriam decision, with one dissent, affirming the trial court Order awarding fees, (APP - 1). Additionally, the Second District granted Respondent's Motion for Attorney's fees against both Petitioner's and their counsel.

On July 2, 2003, the Petitioner's, timely filed a Motion for Rehearing and Rehearing En Banc, which was partially granted (APP - 2).

On September 8, 2003, Petitioner's filed a Notice of Appeal to this court, pursuant to Fla. R. APP. P. 9.030 (a) (2) (i), or (ii) and (iv).

STATEMENT OF THE FACTS

In its affirmance decision, the Second District stated:

"having reviewed the record in this cause, we conclude that there was a sufficient basis for the trial court to make an award of attorney's fees pursuant Section 57.105, Florida Statutes (2001)".

Notably, the trial court granted 57.105 fees to the Respondent based solely, on only one of the many allegations in Petitioner's Petition, that the Respondent was considered a

suspect in the homicide of the daughter of Petitioner's.

Importantly, the Petitioner's never directly accused the Respondent of murdering the Petitioner's daughter. The Petitioner's only alleged that the Respondent was considered a Suspect, based upon what they were shown and heard from the police.

Because of the Protective Order, the Petitioner's were prevented from proving "material facts", that Respondent was considered a suspect in the murder of their daughter.

There was absolutely nothing in the record to evidence that the Petition, or Appeal, filed by the Petitioner's, were pursued and perfected in bad faith, or that there was not an attempt to extend, or a question the validity of statutory and case law, in this case. Therefore, there was no record basis to justify either an award of trial court or Appellate attorney's fees against Petitioner's, pursuant to 57.105.

Finally, there was absolutely no testimony, or evidence, introduced by the Respondent in the trial court, to dispute, or refute, the allegations that Respondent was considered a suspect in the murder of the Petitioner's daughter.

During oral argument in the Second District Court, Judge Northcutt, who dissented, pointed out that the Petitioner's were prevented from establishing "material facts" to support their

claim that the Respondent was considered a suspect in the murder of their daughter. He recognized that their was no competent substantial evidence in the record below, to sustain the findings of the trial court awarding 57.105 fees to the Respondent. Also, that the majority opinion was contrary to the manifest weight of the evidence in the record, because their was no evidence to support the trial courts ruling.

SUMMARY OF ARGUMENT

The opinion of the Second District Court of Appeals conflicts with the decisions of the Florida Supreme Court and District Courts, for the following reasons:

1. There was no competent substantial evidence to sustain the findings of the trial or Appellate Court;

2. The Final Judgment of the trial court, awarding fees, did not state any written findings of why the claims of the petitioner's were not supported by material facts to support their claims, or that their were no other justicible issues raised in the Petitioner's complaint.

3. The taking of a Voluntary Dismissal, for tactical reasons, at the suggestion and the encouragement of the trial court, did not entitle the Respondent to 57.105 fees;

4. There was no finding in the Final Judgment that the Petitioner's were lying.

5. The record below did not show that the Petitioner's, or their counsel, had not exerted reasonable efforts to ascertain the parties and issues prior trial;

6. Subsequent developments, which render a claim to be without justicible issue of law or fact, should not have subjected the Petitioner's to attorney's fees, or penalize them for exercising their constitutional rights of access to the Florida Courts;

7. New 57.105 is still a higher standard, than entitlement to a Summary Judgment, making prior case law still applicable to the new version of 57.105;

8. The public policy of 57.105 is not to cast a "chilling affect" to deny the Petitioner's access to the courts, but to discourage unwarranted controversy,. The record is completely devoid of any basis to show that the controversy was unwarranted.

If the this courts determines that it has conflict Jurisdiction, it may consider other issues raised by the Petitioner's, such as the unconstitutionality of 57.105, which had been raised by Petitioner's multiple times in both courts below.

The opinion of the Second District has upheld the constitutionality of section 57.105, (1999) and (2001), contrary

to Petitioner's rights of due process of law, the separation of powers doctrine and the rule prohibiting the encompassing of more than one subject.

ARGUMENT

The opinion of the Second District Court conflicts with the decisions of the Florida Supreme Court and other District Courts. It was an abuse of discretion, of both the lower court and the Second District, to affirm the erroneous order of the trial court granting 57.105 fees to the Respondent. There was no competent substantial evidence in the record to sustain the findings of the trial or Appellate Court, and therefore conflicts with Dinkel v. Dinkel, 322 So. 2nd (Fla. 1975).

The Final Judgment awarding fees to the Respondent did not contain any written findings by the lower court of why the claims of the Petitioner's were not supported by material facts to support their claims. Therefore, the opinion conflicts with Witten v. Progressive Cas. Ins. Co., 410 So. 2nd 501, 506 (Fla. 1982).

The record below contains an order where the trial court denied the Respondent's Motion to Strike, or Dismiss the Petitioner's Petition. This order emphasizes the fundamental necessity and the error of the lower court in failing to set forth written findings in the Final Judgment, awarding 57.105

fees to the Respondent. Accordingly, the record conflicts with the Second District opinion Executive Centers of Am., Inc., v. Durability Ceiling and Interiors, Inc., 402 So. 2nd 24 (Fla. 3rd DCA 1981).

F.S. 57.105 (2001), did not eliminate the requirements that specific written findings must be stated in the Final Judgment as to why the trial court is awarding 57.105 fees.

The record below clearly shows that there were numerous justicible issue raised in Petitioner's complaint. Accordingly, the opinion of the Second District conflicts with the Fourth District Court Vasquez v. Provencial South, Inc., 795 So. 2nd 216 (Fla. 4th DCA 2001), and Pappalardov Richfield Hospitality Serv., 790 So. 2nd 1276 (Fla. 4th DCA 2001).

The opinion also conflicts with the decisions from the Third, Fourth and Fifth District. The record showing that the voluntary dismissal, by the Petitioner's, for "tactical reasons", at the suggestion and encouragement of the trial court, did not entitle the Respondent to 57.105 fees Vitamins Fund Inc, Co. v. Rojas, 447 So. 2nd 1023 (Fla. 3rd DCA 1984); Angora Ent. V. Condominium Ass'n of Lake Side Village, Inc., 432 So. 2nd 792 (Fla. 4th DCA 1983); Xerox Corp v. Sharifi, 502 So. 2nd 1003 (Fla. 5th DCA 1987).

The opinion also conflicts with the case of Snow v. Rosse,

455 So. 2nd 615 (Fla. 4th DCA 1980). There was no finding in the Final Judgment that the Petitioner's were lying, in either their uncontroverted sworn complaint, sworn affidavits or the sworn testimony in their depositions.

The opinion also conflicts with McHan v. Huggins, 459 So. 2nd 1172 (Fla. 5th DCA 1984); Stevenson v. Futherford, 440 So. 2nd 28 (Fla. 4th DCA 1983). The record below did not show that the Petitioner's, or their counsel, had not exerted reasonable efforts to ascertain parties and issues prior to trial.

The opinion also conflicts with the cases that state that subsequent developments, which render a claim to be without justicable issue of law or fact, should not have subjected the Petitioner's to attorney's fees and thereby penalize them for exercising their constitutional rights of access to the Florida Courts Schwartz v. W/k Partners, 530 So. 2nd 456 (Fla. 5th DCA 1998).

Under prior 57.105, the Florida Supreme Court has ruled that the standard for Summary Judgment (there is no genuine issue as to any material fact and the parties are entitled to Summary Judgment as a matter of a law). This is a lower standard then that of frivoulousness, which is a higher standard, that requires a complete absence of a judicial issue of both law and fact Witten v. Progressive Cas. Ins. Co.,

(Supra); Personal One, Inc., v. John Sommerer and Co., 564 So. 2nd 1217 (Fla. 3rd DCA 1990).

The new 57.105 is still a higher standard than entitlement to Summary Judgment. The new statute says "not supported by the material facts to support the claim" and only eliminates the word justiciable issue of law, unless it can be shown, as a good faith effort to extend or reverse existing law. Accordingly, the above cited cases would still be the law under the new version of 57.105.

Thus, the opinion conflicts with the public policy and purpose of 57.105 Stevenson v. FutherFord, 440 So. 2nd 28 (Fla. 4th DCA 1983). The public policy under 57.105, reflected in Stevenson is not to cast a "chilling effect," so as to deny the Petitioner's access to the courts, but to discourage unwarranted controversy. In the instant case, the record is completely absent of any evidence, or pleadings, to show that the controversy was unwarranted.

Finally, if this court determines that it has conflict jurisdiction, this court may consider any issue that may affect this case, such as the unconstitutionality of F.S. 57.105. Notably, the unconstitutionality of 57.105 had been raised by the Petitioner's five (5) different times in the trial court and twice (2) in the Second District. There is presently pending in

this court, the case of Boca Burger, Inc, v. Richard Forum, Sup. Crt case Number SC01-1830, challenging the unconstitutionality of F.S. 57.105 (1999). Trushin v. State 425 So. 2nd 1126 (Fla. 1982); Bould v. Touchette, 349 So. 2nd 1181 (Fla. 1977).

The opinion of the Second District Court, in the instant case, has upheld the constitutionality of F.S. 57.105 in the face of the constitutional challenge raised by the Petitioner's, both in the trial court and the Second District. The 1999 and version of 2001 57.105 is unconstitutional because it violates due process, separation of powers doctrine, and the act encompasses more than one subject. Moakley v. Smallwood 826 So. 2nd 221 (Fla. 2002); the Florida Bar v. Massfelder, 170 So. 2nd 834 (Fla. 1964); State v. Johnson, 616 So. 2nd 1 (Fla. 1993); State v. Lee, 356 So. 2nd 276 (Fla. 1978); Williams v. State, 459 So. 2nd 319 (Fla. 5th DCA 1984); Heggs v. State, 759 So. 2nd 620 (Fla. 2000).

CONCLUSION

Based upon the record and the written opinion of the Second District Petitioner's respectfully request this court to accept conflict jurisdiction.

DATE, SIGNATURE AND CERTIFICATE OF SERVICE

DATED AND SIGNED the below date by the undersigned. I hereby certify that a true copy of the foregoing has been furnished by (Mail/Hand Delivery/Fax) to: Stanley R. Swartz, Esquire 1111 Third Avenue West, Suite 150, Bradenton, Florida 34205, on this ____ day of October, 2003.

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate procedure Rule 9.210 (A) (2), I hereby certify that this Brief was prepared in Courier New 12 type, Word perfect 8, on this ____ day of October, 2003.

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APPENDIX

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1. Order from the Second District Court of Appeals
granting attorney's fees to Appellee, dated June 20, 2003,
pursuant to 57.105, Florida Statutes (2001). 1
2. Order partially granting Appellant's Motion for Rehearing,
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