**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC03-227**

**JBE ASSOCIATES, a general partnership,**

**Petitioner,**

**vs.**

**BAL BAY REALTY , LTD.,**

**Respondent.**

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# RESPONDENT'S SECOND[D] AMENDED ANSWER BRIEF ON JURISDICTION ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CASE NO. 4D01-2781

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[*] Amended only to remove Preface.

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## INTRODUCTION AND STATEMENT OF THE CASE

Petitioner asks this Court to accept jurisdiction in this case to determine whether the Fourth District Court of Appeal erred in reversing, as unreasonably untimely, an award of attorney's fees filed pursuant to a common-law rule of procedure which has since been superceded by Rule 1.525, Fla. R. Civ. P.[1] That rule, as articulated in *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991), requires post judgment motions for attorney's fees and costs to be filed within a reasonable time after final judgment, failing which, they ought to be denied as untimely filed.

Ignoring relevant precedent in complete agreement with this case below, Petitioner stretches to find a conflict with two earlier cases of this court, *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) and *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976). These two cases established the near un-tamperable discretion of a trial judge, who observes the demeanor of live witnesses, in fashioning alimony, support and equitable distribution of marital assets. Petitioner finds conflict between that standard and the legal standard regarding whether a judge may entertain an untimely motion for attorneys fees The comparison is simply far-fetched.

In its original opinion on appeal, filed September 25, 2002, the Fourth District found that the Petitioner's delay was unreasonable as a matter of law.

After

[1] Fla. R. Civ. P. 1.525 does not apply to the action below.

consideration of the Petitioner's motions for rehearing and certification arguing a conflict with the rule in *Shipley v. Belleair Group, Inc.*, 759 So. 2d 28, the court substituted a new opinion (the "January 8 Opinion"), which clarified that it had not "announced any bright-line requirement as to when a post-judgment motion for attorney's fees should be considered untimely" and agreeing with *Shipley* that such a determination "must be made based upon all the facts and circumstances of a particular case." *Bal Bay Realty, Ltd., v. Pepsomers Corporation*, 833 So. 2d 320 (Fla. 4th DCA 2003).

The Petitioner now seeks appellate intervention from this court in its bid to expand the boundaries of "reasonableness" to encompass the unprecedented period of its own delay. The Respondent argues that the Fourth District's opinion, which comports with well established precedent, should be affirmed. Moreover, the suggestion that appellate courts are powerless to review an abuse of discretion in determining reasonableness in the timing of procedural matters is patently absurd.

Because no conflict exists, because the common law rule at issue has now been superceded by Rule 1.525, and because the length of the Petitioner's delay is so far outside the previously-established boundaries of reasonableness, the Court should decline to exercise its discretionary jurisdiction under Art. V. § 3(b)(3) of the Constitution of Florida.

## SUMMARY OF THE ARGUMENT

> The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. ***Different results reached from substantially the same facts comport with neither logic nor reasonableness.***[2]

Ironically, this quote is taken from the very case that Petitioner picked so carefully through, to fashion his "claim" of conflict. It best explains why a trial judge's broad discretion in believing witnesses and weighing testimony, is so different from a determination of unreasonable delay in filing a motion for attorney's fees. Moreover, no reported case in Florida, dealing with the issue in this case, has allowed an award of attorney's fees on a motion filed later than two months after the entry of final judgment, where, as in this case, the trial court had not reserved jurisdiction to award such fees.

Here, following years of established precedent, the District Court found that JBE's motion for trial and appellate fees, filed 14 months and 21 months post-judgment, and eight months post-mandate, was not filed within a reasonable time and that the trial court had abused its discretion by granting the motion, especially as the trial court relied on a case that allowed a similar motion which was filed only eight days post-mandate.

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[2] *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (emphasis added.)

Essentially, the Petitioner argues that because the Fourth District did not vote **unanimously** to reverse the trial court, then it clearly misapplied existing law regarding appellate review based upon an abuse of discretion standard. In the alternative, Petitioner argues that because the Fourth District (through review of the record evidence) found the trial court to have abused its discretion, then the Fourth District improperly "substituted its judgment" for that of the trial court. Both of these arguments must fail.

Where an appellate court determines upon review of the record that a trial court has acted in accordance with "whim," "caprice" or in an "inconsistent manner" relative to established precedent, and when the trial court has based its ruling on "inherently incredible and improbable testimony or evidence," then that appellate court is within its prerogative to review, and where required, reverse the trial court. *See Canakaris*, 382 So. 2d at 1203, That is all that occurred in this case -- nothing more. There is no basis for the Court to take this case. There is no confusion in the law or conflict among districts or with this Court.

## ARGUMENT

### I. THE DISTRICT COURT FOLLOWED FIRMLY-ESTABLISHED EXISTING PRECEDENT IN DECIDING TO REVERSE THE AWARD OF FEES BY THE TRIAL COURT

No Florida decision has permitted an attorney's fee award by post-judgment motion, filed as late as JBE's motion was filed, where, as in this case, the final

judgment did not reserve jurisdiction to award fees.[3] To the contrary, the longest delay previously permitted for the filing of an attorney's fees motion under such circumstances, is approximately two months after entry of final judgment. *See Folta*, 493 So. 2d at 443. Moreover, there are numerous decisions reversing, as unreasonably tardy, attorney's fees awards pursuant to post-judgment motions filed as late as, and even much earlier than, JBE's motion, even where, unlike in this case, the judgment actually reserved jurisdiction to award fees.[4]

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[3] The district court acknowledged that while the trial court did not reserve jurisdiction in the final order to award attorney's fees, the absence of such a reservation would not necessarily deprive the trial court of jurisdiction to entertain a post-judgment motion for fees "***provided that the motion is filed within a reasonable time after entry of final judgment***." *See Bal Bay Realty, Ltd., v. Pepsomers,* 833 So. 2d 320, 322 fn. 2 (Fla. 4th DCA 2003) (emphasis added) (citing *Folta v. Bolton,* 493 So. 2d 440, 443 (Fla. 1986)). *See also Finkelstein v. North Broward Hospital District,* 484 So. 2d 1241, 1243 (Fla. 1986).

[4] *See, e.g., Swortz v. Southern Rainbow Corp.*, 603 So. 2d 107 (Fla. 3d DCA 1992) (reversing award on motion filed *two months* after final judgment); *Wunderle v. Fruits, Nuts & Bananas, Inc.*, 715 So. 2d 325 (Fla. 2d DCA 1998) (reversing award on motion filed *two months* after verdict); *McAskill Publications, Inc. v. Keno Brothers Jewelers, Inc.*, 647 So. 2d 1012, 1013 (Fla. 4th DCA 1994) (reversing fee award, concluding that a court generally should not grant a motion for attorney's fees filed *almost three months* after the judgment on the merits because of 'unreasonable tardiness'); *Department of Legal Affairs v. Heim,* 697 So. 2d 999 (Fla. 5th DCA 1997) (reversing award on motion filed *16 months* after voluntary dismissal); *National Environmental Products, Ltd., Inc. v. Falls*, 678 So. 2d 869 (Fla. 4th DCA 1996) (reversing award, holding that motion filed *19 months* after entry of a judgment that did not reserve jurisdiction to award fees and *six months* after issuance of the appellate mandate in the appeal "far exceed[ed] a reasonable time" and was "presumptively" and "clearly" unreasonable); *Bass v. State Farm Life Insur. Co.*, 649 So. 2d 924 (Fla. 3d DCA 1995) (trial court lacked jurisdiction to grant attorney's fees motion filed *22 months* after final judgment despite intervening appeal and order granting appellate attorney's fees).

In its January 8 Opinion, the Fourth District paid particular attention to three cases. First, the court discussed *United States Fidelity & Guaranty ("USF&G") v. Martin County*, 669 So. 2d 1065 (Fla. 4th DCA 1996), upon which the trial court had based its award. The Fourth District noted that while the trial court relied on *USF&G,* it failed to give any weight to the "substantial difference" between the eight ***days*** elapsed time in *USF&G* and the eight ***months*** in this case. The court seemed perplexed that this difference meant nothing to the trial court.

Next, the Fourth District considered *McAskill*, 647 So. 2d 1012, noting that the court had, in dicta, opined that "a trial court generally should not grant a post-judgment motion for attorney's fees filed almost three months after the judgment on the merits because of 'unreasonable tardiness.'" *Id.* at 1013. Finally, the court reviewed the decision in *Falls*, 678 So. 2d 869. Acknowledging that *Falls* was distinguishable in several respects, the Fourth District court noted that there were several parallels that made *Falls* instructive and "persuasive" in the instant proceedings. *See Bal Bay*, 833 So. 2d at 323. In *Falls*, the court ruled that a motion filed 19 months after entry of final judgment and six months after the appellate mandate "far exceed[ed] a reasonable time" and was "presumptively" and "clearly" unreasonable. *Falls,* 678 So. 2d at 871-72. Consistently, in this case, the Fourth District found that a delay of 14 months and 21 months, respectively, after final judgment was not reasonable.

The Fourth District, following *Falls'* lead, even gave credit to the Petitioner for "time spent waiting on the appeal to be finalized," *Bal Bay*, 833 So. 2d at 323. But that was not enough to justify the eight month delay between the mandate and filing the motion. Additionally, under *Falls*, the Fourth District considered the 'special or extenuating circumstances' considered by the trial court, but rejected its conclusions "that the case was complicated and it took extra time to separate the fees attributable to the cross-claims from those of the main action." *Bal Bay*, 833 So. 2d at 323. While the Fourth District said some "minimal" delay would be appropriate, the 15 to 20 hours (less than three full days) that counsel for JBE argued was used to complete this task, was insufficient to justify an eight month delay. *Id.* at 324. This is not an abuse of appellate authority.

Accordingly, the District Court found that under the facts and circumstances of this case, the trial court abused its discretion in awarding attorney's fees and costs based on motion filed after such an unreasonable delay. The Fourth District applied legal precedent where the trial court before it, failed to do so.

## II. *CANAKARIS* AND *SHAW* HAVE NOTHING TO DO WITH THIS CASE

Petitioner's arguments that the decision below, conflicts with *Canakaris* and *Shaw* is absurd. Those two cases deal with the almost sacrosanct power of a trial judge to make judgments regarding the truthfulness and demeanor of witnesses and to make those difficult discretionary decisions regarding the award of alimony,

support and equitable distribution in the absence of a strict rule of law. They do not support the premise that a trial judge may utilize his discretion to ignore binding precedent regarding the time for filing attorney's fees motions.

Petitioner looks also to *Canakaris'*[5] language, "discretion is abused only when no reasonable man would take the view adopted by the trial court," to stand for the proposition that since the District Court below was divided in its opinion, it must show that the trial judge's view was not totally unreasonable. That being the case, Petitioner then suggests that where a court is reviewing abuse of discretion cases, unless its decision is unanimous, the result below must be affirmed. *Canakaris* says no such thing. Indeed, no case does.

Relying on *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976), the Petitioner also argues that the Fourth District substituted its judgment for that of the trial court because it 're-evaluated' the evidence. Petitioner thus demonstrates a fundamental misunderstanding of the role of the appellate court and the state of the law as it applied to post-judgment attorney's fees motions prior to Rule 1.525, Fla. R. Civ. P.

1. **Appellate Review Of Attorney's Fee Motions Prior To Rule 1.525 May Require Both *De Novo* And Abuse Of Discretion Reviews.**

As the District Court stated in its opinion, "most appellate courts considering a trial court's determination as to the timeliness of a post-judgment motion for attorney's fees have apparently reviewed the order for [de novo] legal error, rather

[5] *See Canakaris v. Canakaris,* 382 So. 2d 1197 (Fla. 1980)

than an abuse of discretion." *See Bal Bay,* 833 So. 2d at 324 (citing to the decisions in *Falls; USF&G; McAskill; Swortz;* and *Wunderle*.)

In this case, because the trial court applied the correct rule of law -- that a post-judgment motion must be filed within a reasonable time after final judgment -- the only issue here was whether the trial court had properly defined "reasonable time" as contemplated by the *Stockman* case and its progeny. Using an abuse of discretion standard, the District Court found that the trial court had failed to properly apply the "reasonableness" test because the record evidence did not support the Petitioner's unreasonable delay between the final judgments, the appellate mandate and the motion for attorney's fees.

This Court has held that the "trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge or in an inconsistent manner." *Canakaris*, 382 So. 2d at 1203. The Petitioner's argument that the district court improperly re-evaluated the evidence flies in the face of accepted jurisprudence that the appellate court;

> does not review a trial judge's conscience -- it reviews the record upon which a trial judge bases his conscience. If the record does not support the finding, it necessarily follows that an abuse of discretion is indicated on the part of the trial judge.

*See Winn-Dixie Stores, Inc., v. Robinson*, 472 So. 2d 722 (Fla. 1985) (Shaw, J. concurring in part and dissenting in part) (citing *McAllister Hotel, Inc., v. Porte*, 123 So. 2d 339 (Fla. 1960)).

That is exactly what occurred in this case. The Fourth District, reviewed the record evidence and decided that, based on the established case law and the 'special' or 'extenuating circumstances' presented, an eight month delay to complete 15 to 20 hours of work was unreasonable and totally unsupportable by the record. The Fourth District went as far as to rule that "whether reviewed *de novo* or for an abuse of discretion, the order on JBE's motion for attorney's fees should have been denied as untimely." *Bal Bay*, 833 So. 2d at 324 (internal citations and footnotes omitted).

## CONCLUSION

For the foregoing reasons, Bal Bay would suggest that no conflict exists, that even if it did, the enactment of Rule 1.525 greatly reduces, if not erases the precedential value of this case, and respectfully requests that this Court decline to exercise its discretionary jurisdiction under Art. V. § 3(b)(3) of the Constitution of Florida.

Respectfully submitted,

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I hereby certify that this Brief complies with the font requirements of Rule 9.210(a)(2).

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