

2020 WL 6472539

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District Court of Appeal of Florida, Third District.

Meryl M. LANSON, et al., Appellants,  
v.  
Justus W. REID, et al., Appellees.

No. 3D18-2616

Opinion filed November 4, 2020

#### Synopsis

**Background:** Following dismissal of plaintiffs' underlying claims and dismissal by the Third District Court of Appeal, [Lindsey, J., 2019 WL 1051383](#), of plaintiffs' appeal, the Circuit Court, 11th Judicial Circuit, Miami-Dade County, [Thomas J. Rebull, J.](#), issued final judgment awarding attorney fees and costs to defendants and denied plaintiffs' motion for rehearing. Plaintiffs appealed.

The District Court of Appeal, [Hendon, J.](#), held that trial court acted within its discretion in awarding attorney fees under statute authorizing award of such fees as sanction for raising unsupported claims or defenses.

Affirmed.

**Procedural Posture(s):** On Appeal; Judgment; Motion for Attorney's Fees; Motion for Costs.

An Appeal from the Circuit Court for Miami-Dade County, [Thomas J. Rebull, Judge](#). Lower Tribunal No. 06-9516

#### Attorneys and Law Firms

Mary Alice Gwynn, P.A., and [Mary Alice Gwynn](#) (Delray Beach), for appellant Baron's Stores, Inc.; Meryl M. Lanson, in proper person.

Kaplan Zeena LLP., and [James M. Kaplan](#) and [Annette Urena Tucker](#), for appellees [Mark R. Osherow](#) & Mark R. Osherow, P.A.; and [Boyd Richards Parker & Colonnelli, P.L.](#), and [Elaine D. Walter](#), [Craig J. Shankman](#), and [Yvette R. Lavelle](#), for appellees [Justus W. Reid](#), Justus W. Reid, P.A., [Peter Bernhardt](#), and Reid Metzger & Bernhardt, P.A.

Before [EMAS, C.J.](#), and [SCALES](#), and [HENDON, JJ.](#)

#### Opinion

[HENDON, J.](#)

\*1 Meryl M. Lanson, individually and as the Personal Representative of the Estate of Norman Lanson, and Baron's Stores, Inc. (collectively, the "Appellants"), appeal from the February 26, 2018 final judgment awarding section 57.105 attorney's fees and section 57.041 costs in favor of Justus W. Reid, Justus W. Reid, P.A., Peter Bernhardt, and Reid, Metzger & Bernhardt, P.A. (collectively, the "Reid Appellees"), and the November 27, 2018 order denying rehearing.<sup>1</sup> We affirm.

The underlying facts of this decades-long litigation have been laboriously recited in previous state and federal appeals and we decline to do so again.<sup>2</sup> The sole remaining issue on appeal is whether the trial court abused its discretion when it awarded the Reid Appellees section 57.105 fees.

#### Standard of Review

"[T]he award of attorney's fees is a matter committed to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion." [DiStefano Constr., Inc. v. Fid. & Deposit Co., 597 So. 2d 248, 250 \(Fla. 1992\)](#). A trial court's award of costs is also reviewed by appellate courts for an abuse of discretion. [Albanese Popkin Hughes Cove, Inc. v. Scharlin, 141 So. 3d 743, 745 \(Fla. 3d DCA 2014\)](#).

### Analysis

An award of fees under section 57.105<sup>3</sup> requires a determination by the court that “the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law.” [Blue Infiniti, LLC v. Wilson](#), 170 So. 3d 136, 140 (Fla. 4th DCA 2015). To award attorney’s fees under this statute, the court must make specific findings of bad faith, and should recite the facts on which it bases its conclusions in the order awarding such fees. [Gonzalez v. Int’l Park Condo. I Ass’n, Inc.](#), 217 So. 3d 1128, 1133 (Fla. 3d DCA 2017). The statute has two separate standards: a “knew or should have known” standard under section 57.105(1), that requires courts to impose sanctions for any claim or defense that the losing party knew or should have known was not supported by the facts or law necessary to sustain the claim, and an “unreasonable delay” standard under section 57.105(3), that provides for the imposition of sanctions without regard for the substantive merits of a pleading or motion, and that applies whenever the court determines that the action was primarily undertaken to cause “unreasonable delay” in the proceedings. In determining an award of fees under section 57.105, “[t]he [trial] court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law.” [Asinmaz v. Semrau](#), 42 So. 3d 955, 957 (Fla. 4th DCA 2010) (quoting [Wendy’s of N.E. Fla., Inc. v. Vandergriff](#), 865 So. 2d 520, 523 (Fla. 1st DCA 2003)); [Blue Infiniti, LLC v. Wilson](#), 170 So. 3d 136, 140 (Fla. 4th DCA 2015); [Montgomery v. Larmoyeux](#), 14 So. 3d 1067, 1073 (Fla. 4th DCA 2009) (holding a trial court’s findings must also “ ‘be based upon substantial competent evidence presented to the court at the hearing on attorney’s fees *or otherwise* before the court and in the trial record.’ ” quoting [Weatherby Assocs., Inc. v. Ballack](#), 783 So.2d 1138, 1141 (Fla. 4th DCA 2001)) (emphasis added).

\*2 The Appellants rely on the [Blue Infiniti](#) case for the proposition that they were deprived of an evidentiary hearing. In [Blue Infiniti](#), however, the appellees could not “point to anything in the record that would constitute substantial competent evidence for the trial court to find that the RICO count filed by Blue Infiniti could not be supported by the facts or an application of existing law.” [Blue Infiniti](#), 170 So. 3d at 140. Thus, as the record was unclear whether Blue Infiniti had asserted a frivolous

claim, an evidentiary hearing was warranted. In the Appellants’ case, the record is very clear that the claims they asserted over the past decade were legally meritless.

The trial court held a hearing on whether the Reid Appellees were entitled to 57.105 fees.<sup>4</sup> The trial court in its order granting entitlement found, pursuant to [section 57.105](#), that the record contained competent substantial evidence of the Appellants’ frivolous filings and general disregard of court orders, specifically finding that the Appellants knew or should have known that their claims (a) were not supported by the material facts necessary to establish the claim or defense; (b) were not supported by the application of then-existing law to those material facts; and (c) Appellants’ attorney, as a matter of law, is thus precluded from asserting good faith reliance upon the representations of the clients as a defense.

With that in mind, the trial court issued a Standing Order on fees. That order required the Appellants to make specific objections to the eleven years of detailed time and costs entries submitted by the Reid Appellees, and to state for each item whether the charge was agreed or contested. For each contested item, the Standing Order required the Appellants to state the basis for any objection and cite supporting authority. The multiple blanket objections filed by Appellants in response did not comply with the order, nor did they provide legal authority on which the objections were based. Further, the Appellants did not specifically object to the hourly rates for attorneys and paralegals contained in the Appellees’ time records. Instead, the Appellants filed motions to strike, for protective orders, to sanction, etc.

The Standing Order on Fees recited that “[a]ny item not addressed shall be deemed agreed to and any objection thereto waived.” As the trial court held a hearing on entitlement, heard argument, and subsequently gave the Appellants ample opportunity to contest the fees, the Appellants have been afforded due process. Failing to appropriately respond to the court’s Standing Order on fees, the Appellants have waived any objections to the fee award. See [Sec. Pac. Credit Corp. v. Oasis Plaza Corp.](#), 714 So. 2d 1039, 1040 (Fla. 3d DCA 1998) (holding [section 57.105](#) fees were warranted as counsel did not act in good faith by re-litigating claims that had already been determined to be without merit); [O’Brien v. Brickell Townhouse, Inc.](#), 457 So. 2d 1123, 1123–24 (Fla. 3d DCA 1984) (affirming fee award and holding there is no requirement that a trial court must take evidence to determine whether a matter is frivolous, it may do it on the record alone). Finding no abuse of discretion in the trial court’s ruling, we affirm.

\*3 Affirmed.

### All Citations

### Footnotes

- 1 The Appellants also appealed from the trial court's March 27, 2017 final order dismissing with prejudice the Appellants' consolidated malpractice lawsuit against Mark R. Osherow, Mark R. Osherow, PA., and the Reid Appellees. In its final order, the trial court ruled that the Appellants had failed to state any cognizable cause of action against any defendant under any of the theories presented. In addition, the trial court determined that a cause of action for legal malpractice cannot exist as a matter of law where subsequent counsel had an opportunity to rectify prior counsel's alleged negligence and failed to do so. On March 6, 2019, this Court specifically ruled that because the Appellants' appeal of that final order was filed more than twenty months late, this Court lacked jurisdiction and, accordingly, dismissed the portion of the appeal directed to that final order. The only remaining issue on appeal is the ruling on the award of section 57.105 fees in favor of the Reid Appellees.
- 2 See [Lanson v. Kopplow](#), 56 So. 3d 779 (Fla. 3d DCA 2011); [Lanson v. Kopplow](#), 46 So. 3d 566 (Fla. 2010); [Lanson v. Kopplow](#), 990 So. 2d 1076 (Fla. 3d DCA 2008); [Lanson v. Kopplow](#), 954 So. 2d 1170 (Fla. 3d DCA 2007); [In re Baron's Stores, Inc.](#), 2007 WL 1120296 (Bkrcty.S.D. Fla. Apr. 12, 2007), *aff'd* [Baron's Stores, Inc. v. Cooper \(In re Baron's Stores, Inc.\)](#), 307 Fed. Appx. 396, 398 (11th Cir. 2009).
- 3 [Section 57.105, Florida Statutes \(2019\)](#), provides, in part,
  - (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.
  - (2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.
- 4 The Appellants have not provided any transcript of that hearing, and thus the trial court's findings must be presumed correct. [Applegate v. Barnett Bank of Tallahassee](#), 377 So. 2d 1150, 1152 (Fla. 1979) (holding that, given the presumption of correctness of the trial court's ruling, where no transcript is provided to appellate court, then the appellate court is unable to conclude that the trial court abused its discretion).

West's Florida Statutes Annotated

Title VI. Civil Practice and Procedure (Chapters 45–89) ([Refs & Annos](#))

Chapter 57. Court Costs ([Refs & Annos](#))

West's F.S.A. § 57.105

57.105. Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions;  
service of motions; damages for delay of litigation

Effective: October 1, 2019

[Currentness](#)

(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.

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

(d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(4) 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.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)–(4). Such award shall be a final order subject to judicial review pursuant to [s. 120.68](#). If the losing party is an agency as defined in [s. 120.52\(1\)](#), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

(8) Attorney fees may not be awarded under this section in proceedings for an injunction for protection pursuant to [s. 741.30](#), [s. 784.046](#), or [s. 784.0485](#), unless the court finds by clear and convincing evidence that the petitioner knowingly made a false statement or allegation in the petition or that the respondent knowingly made a false statement or allegation in an asserted defense, with regard to a material matter as defined in [s. 837.011\(3\)](#).

### Credits

Laws 1978, c. 78–275, § 1; Laws 1986, c. 86–160, § 61; Laws 1988, c. 88–160, § 1, 2; Laws 1990, c. 90–300, § 1. Amended by Laws 1995, c. 95–147, § 316, eff. July 10, 1995; Laws 1999, c. 99–225, § 4, eff. Oct. 1, 1999; Laws 2002, c. 2002–77, § 1, eff. July 1, 2002; Laws 2003, c. 2003–94, § 9, eff. June 4, 2003; Laws 2010, c. 2010–129, § 1, eff. July 1, 2010; Laws

**57.105. Attorney's fee; sanctions for raising unsupported claims or..., FL ST § 57.105**

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2019, c. 2019-167, § 4, eff. Oct. 1, 2019.

[Notes of Decisions \(1333\)](#)

West's F. S. A. § 57.105, FL ST § 57.105

Current through Chapter 184 (End) of the 2020 Second Regular Session of the Twenty-Sixth Legislature

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