

SUPREME COURT OF FLORIDA

CASE NO. SC2020-1509

RICHARD J. DIAZ, and
RICHARD J. DIAZ, P.A.,

Petitioners,

v.

ROBERTO KASINSKY and
LEO BENITEZ,

Respondents.

**PETITIONERS' AGREED
MOTION TO FILE CORRECTED BRIEF**

Petitioners, Richard J. Diaz and Richard J. Diaz, P.A., by and through undersigned counsel, move this Honorable Court to file a corrected brief, and as grounds therefore state:

1. Our jurisdictional brief was inadvertently filed before the table of contents and table of citations had been revised.
2. This error was detected after filing.
3. We would like to file a corrected brief that includes the correct table of contents and table of citations. A copy of the corrected brief is attached as Exhibit 1
4. We have reached out to counsel for Respondent, who has graciously indicated he does not oppose this motion.

WHEREFORE, Petitioners' counsel respectfully requests that this Honorable

Court enter an Order granting this motion to file a corrected brief, attached.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed this **26th** day of **October 2020**, and served electronically upon: **LEO BENITEZ, ESQ.** Benitez & Associates, 122 Minorca Avenue, Coral Gables, Florida 33134.

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PETITIONERS' CORRECTED BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

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I. STATEMENT OF THE CASE AND FACTS

This case presents numerous Fourth District cases that allow for the recovery of “fees on fees” when the underlying attorney’s fees are awarded as a sanction. It further conflicts with longstanding binding precedent of this Court and others that allows for the award of attorney’s incurred in litigating the issue of entitlement to attorney’s fees. This Court should accept jurisdiction to resolve the conflicts in the law created by this confusing opinion.

This opinion marks the conclusion of an 11 year saga in which the Petitioners, Richard J. Diaz and Richard J. Diaz, P.A, (collectively “Diaz”) were sued by their former client, Roberto Kasinsky (“Kasinsky”) for an alleged failure to represent Kasinsky’s family member in a criminal matter in Columbia. (Op.2) Diaz was eventually able to establish that an affidavit that had been submitted by Kasinsky, through his lawyer, Leo Benitez, (“Benitez”) to defeat summary judgment, was fraudulent. (Id.) The trial court then dismissed the case with prejudice, and the Third District affirmed the dismissal on appeal. (Id.)

Subsequently, Diaz sought sanctions against both Kasinsky and Benitez under Fla. Stat. 57.105 and *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002). (Op. at 2) After two evidentiary hearings before two different judges, the trial court awarded Diaz his defense fees under both 57.105 and *Moakley*, against both Kasinsky and Benitez. (Op.3) The Third District affirmed the award on appeal. (Id.)

Finally, Diaz sought to recover the fees he incurred litigating both the entitlement to and the amount of the 57.105 and *Moakley* fees. The trial court denied Diaz's motion, "concluding that to award 'fees on fees' ... it would have to find that [Respondents] also acted in bad faith in defending the *Moakley* motion itself at the two evidentiary hearings." (Op.3) Diaz appealed the trial court's order.

The Third District affirmed the order, holding that a trial court may only award "fees on fees" if the moving party establishes that the defense of the underlying *Moakley* sanctions motion was *also* conducted in bad faith. (Op.4) The Panel further failed to award Diaz any fees for litigating the issue of entitlement to the attorney's fees, despite having acknowledged such fees are recoverable. (Op.5)

II. SUMMARY OF THE ARGUMENT

The Third District's opinion holds that, in order to obtain "fees on fees," a party must establish that the defense of an underlying *Moakley* motion sanctions was *also* conducted in bad faith. This holding expressly and directly conflicts with six cases from the Fourth District Court of Appeal. Each of these cases held that a trial court has discretion to award "fees on fees" whenever the original fee award was entered as a sanction. There is no additional requirement that such an award may be given only when the court finds that the defense of the sanctions claim was conducted in bad faith.

The opinion further conflicts with dozens of cases that have held that a party is entitled to recover fees incurred in proving *entitlement* to attorney's fees as a sanction. Though the opinion contains a citation to this law, the Panel nevertheless failed to award Diaz his fees for proving entitlement, even though the Panel's holding appeared limited to fees incurred in proving the *amount* of attorney's fees.

III. ARGUMENT

A. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISIONS IN *BENNET V. BURGES*, *CONDREN V. BELL*, *WIGHT V. WIGHT*, *COX V. GREAT AM. INS. CO.*, AND *FORMAN V. FORMAN*.

The Panel holds that, in order to obtain “fees on fees,” a party must establish that the defense of the underlying *Moakley* motion was *also* conducted in bad faith. This holding expressly and directly conflicts with six cases from the Fourth District Court of Appeal.

The first is *Condren v. Bell*, 853 So. 2d 609 (Fla. 4th DCA 2003). In *Condren*, the trial court awarded “fees on fees” and held that “‘because the award of attorney's fees and costs is a sanction’ it should include those attorney's fees incurred in determining the amount of fees to be awarded.” *Condren* at 610. The Fourth District affirmed, stating “We further find that because the fees awarded for litigating the issue of fees was a sanction and supported by substantial competent evidence, the award does not run afoul of *State Farm Fire & Cas.Co. v. Palma*, 629 So. 2d 830

(Fla.1993).” *Id.* The only basis given in *Condren* for awarding “fees on fees” was the fact that the underlying fee award *was a sanction*. There was no requirement that a trial court make any additional findings with respect to the defense of the sanction award.

Condren’s holding was first cited in *Wight v. Wight*, 880 So. 2d 692, 693 (Fla. 2d DCA 2004), which noted that *Condren* permitted the awarding of “fees for fees *because the fee awarded was a sanction.*” (emphasis supplied)¹ In 2010, the Fourth District next applied *Condren* in *Bennett v. Berges*, 50 So. 3d 1154 (Fla. 4th DCA 2010), which specifically dealt with a *Moakley* fee award.

In *Bennett*, the Fourth District first reviewed the propriety of the *Moakley* fee award. In doing so, the court set forth the *Moakley* standard, citing the exact language the Panel used in the instant opinion. (Op.6) Specifically, the *Bennett* court noted that the standard required detailed factual findings of the bad faith conduct, and reiterated that the “sanction must be *directly related* to the attorney’s fees and costs that the opposing party has incurred as a result of the specific bad faith conduct.” *Bennett* at 1160.

¹ In 2007, a District Court relied on *Condren* to hold that “if fees are awarded as a sanction, then the movant may recover fees expended in litigating not only entitlement to a sanction of attorneys’ fees but also to the amount of the fees which comprise the sanction.” *King v. Sch. Bd. of Monroe County, Florida*, 2007 WL 9702610, at *7, FN 12 (S.D. Fla. Sept. 25, 2007).

Though both the Fourth District and the Panel cited the exact same standard, only the Panel applied that standard to the “fees on fees” award. The Fourth District, instead, simply relied on the *Condren* holding to affirm the award, as follows:

The court also assessed “fees on fees” for all of the time spent by appellees in the two hearings to secure an award. Appellants contend that it was improper to assess those fees. In *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 833 (Fla.1993), the supreme court held that in cases involving disputed insurance claims, statutory fees may be awarded pursuant to section 627.428(1) “for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees.” However, this court has affirmed an award of attorney's fees, including fees incurred in determining the amount of fees to be awarded, where the award of attorney's fees was a sanction. See *Condren v. Bell*, 853 So.2d 609, 610 (Fla. 4th DCA 2003) (holding that “because the fees awarded for litigating the issue of fees was a sanction and supported by substantial competent evidence, the award does not run afoul of [*Palma*]”); accord *Bates v. Islamorada*, 939 So.2d 171, 172 (Fla. 3d DCA 2006) (“The fees awarded in the instant case differ in that they were not statutorily based, and were instead, awarded as **sanctions** levied against the appellants for failing to comply with the trial court's orders.”) (emphasis in original). Because the trial court awarded fees as a sanction against Bennett, it was within its discretion to include “fees on fees” for the time spent in litigating the amount of fees.

Bennett at 1160–61. The Panel’s ruling here expressly and directly conflicts with the last sentence of the excerpt above, which grants discretion to trial courts to award “fees on fees” without any additional showing of bad faith conduct.

In *Cox v. Great Am. Ins. Co.*, 88 So. 3d 1048, 1050 (Fla. 4th DCA 2012), the Fourth District makes the existence of this conflict even clearer:

In *Condren*, we approved an award of attorney's fees for litigating the amount of fees, reasoning that because fees were awarded as a sanction, “the award [did] not run afoul of *State Farm Fire & Cas. Co. v. Palma*,

629 So.2d 830 (Fla.1993).” 853 So.2d at 610. *Condren* does not identify any statutory or rule basis for the sanction; the award arose from a final judgment enforcing a settlement agreement. 853 So.2d at 609. We conclude that the basis for the sanction was the inherent authority of the court, “the inequitable conduct doctrine,” which “permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith.” *T/F Sys.*, 814 So.2d at 513 (quoting *Bitterman v. Bitterman*, 714 So.2d 356, 365 (Fla.1998)).

Above, the Fourth District is explicitly stating that a party is entitled to fees for litigating the amount of fees when the underlying sanctions were awarded for conduct meeting the *Moakley* standard – either egregious or in bad faith. *See also Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386, 389 (Fla. 4th DCA 2012) (Awarding fees for litigating the amount of fees and noting that the Court had previously done so when the underlying fees were awarded as a sanction.)

Most recently, the Fourth District applied *Condren* and *Bennet* to award “fees on fees” when the underlying fee award was granted as a sanction under Fla.Stat. 744.331:

As to the trial court's award of \$1,400 in fees for the time spent in litigating the amount of fees, which Wife also challenges, we hold that it was within the court's discretion to include “fees on fees” because it awarded the underlying fees as a sanction under section 744.331, Florida Statutes. *See Bennett*, 50 So. 3d at 1158–59 (recognizing that, in certain circumstances, a trial court can award “fees on fees” as a sanction); *Condren v. Bell*, 853 So. 2d 609, 610 (Fla. 4th DCA 2003) (same). Section 744.331, which governs the procedures for determining incapacity, provides that fees “may be assessed against the petitioner if the court finds the petition to have been filed in bad faith.” § 744.331(7)(c) 2., Fla. Stat. (2017). Because an award of attorney's fees

under the statute is predicated upon a finding of bad faith conduct on the part of the petitioner, it is clear that the legislature intended for an award of fees under the statute to serve as a sanction.

Forman v. Forman, 288 So. 3d 697, 698–99 (Fla. 4th DCA 2019).

Collectively, these cases make clear that in the Fourth District, a trial court has discretion to award fees for litigating not only the entitlement to, but also the amount of, fees incurred in obtaining an attorney’s fee award as a sanction. These cases require no further finding with respect to the character of the defense of the motion for sanctions. Had Petitioners obtained their *Moakley* award in the Fourth District, the trial court would have been able to award the entirety of the Petitioners’ “fees on fees” request.

The Panel’s holding that a party is required to establish bad faith in the defense of a *Moakley* sanction in order to obtain “fees on fees” expressly and directly conflicts with the Fourth District cases set forth above. This Court should accept jurisdiction to resolve this conflict and promote uniformity in the law.

B. THE DISTRICT COURT’S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH NUMEROUS DECISIONS HOLDING THAT A PARTY MAY RECOVER ATTORNEY’S FEES INCURRED IN PROVING ENTITLEMENT TO FEES AS A SANCTION.

Apparently lost in the shuffle in the drafting of the Opinion was the fact that Diaz was seeking to recover “fees on fees” both for proving his entitlement to the fees and the amount of the fees. The Opinion acknowledges this fact, stating that,

“After two evidentiary hearings, the court awarded Diaz and his law firm attorneys’ fees against both Kasinsky and Benitez pursuant to both section 57.105 and *Moakley*, making findings of bad faith as to both.” (Op.2-3) While the Panel did not provide further detail regarding the first evidentiary hearing, it noted that the second evidentiary hearing did involve a question of entitlement, and was not limited to determining the *amount* of sanctions: “the focus of that hearing was on: (a) when Benitez knew or should have known that the underlying litigation was brought in bad faith, and (b) the reasonable amount of fees and costs it should award.” (Op.7, FN5) Despite this acknowledgment, the Opinion made no further reference to the fees that Diaz sought for proving entitlement. Instead, the Panel affirmed the trial court’s ruling by holding only that it was “not an abuse of discretion where the defense *of the amount* of sanctions to be imposed was reasonable.” (Op.7) (emphasis supplied)

Adding insult to injury is the fact that the Panel correctly pointed out in the Opinion that “[i]t is settled that in litigating over attorney’[s] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney’s fees incurred in litigating the amount of attorney’s fees.”” *Burton Family P’ship v. Luani Plaza, Inc.*, 276 So. 3d 920, 922 (Fla. 3d DCA 2019) (quoting *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003))” (Op.5) But the Panel failed to apply that holding to the facts of the instant case.

The quoted language above contains no limitations. Our research revealed no circumstance where any Court determined that fees for litigating entitlement were *not* recoverable. Instead, this Court and the District Courts have repeatedly reiterated this principal in cases involving statutory attorney's fees under Fla.Stat. 627.428, (*State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993)), contractual attorney's fees, (*Dept. of Trans. v. Winter Park Golf Club, Inc.*, 687 So.2d 970 (Fla. 5th DCA 1997)), statutory attorney's fees under Fla.Stat. 768.79, (*Oruga Corp., Inc. v. AT & T Wireless of Florida, Inc.*, 712 So. 2d 1141 (Fla. 3d DCA 1998)); and, most importantly, statutory attorney's fees as a sanction under Fla.Stat. 57.105 (*Eisman v. Ross*, 664 So. 2d 1128 (Fla. 3d DCA 1995)).

Diaz obtained fees under both 57.105 and *Moakley*. There is no reason why Diaz should not be entitled to the fees he incurred while litigating his entitlement to the 57.105 fees, pursuant to *Eisman*. And there is no reason why fees incurred litigating entitlement to *Moakley* fees are not recoverable in the same manner fees incurred litigating entitlement to 57.105 fees are. After all, *Moakley* presents a more difficult standard for obtaining fees than 57.105. It would make little sense to provide a lesser remedy to a party who was able to prove a greater wrong.

Fla.Stat. 57.105 is entirely silent on whether a party is entitled to fees litigating entitlement to attorney's fees.² So, the determination that a party may recover fees

² As are Fla. Stat. 768.79, and 627.428.

for litigating entitlement in each of these statutes was a common law determination. It is thus irrelevant that *Moakley* sanctions are a creation of the common law. The argument for allowing a party to recover fees for litigating entitlement is the same under either circumstance. The Panel's decision to preclude Diaz from recovering *any* attorney's fees incurred for litigating the sanctions issue, including fees for litigating entitlement to those sanctions, expressly and directly conflicts with the dozens of cases that hold otherwise.

V. CONCLUSION

The Court has jurisdiction based on the express and direct conflict between the opinion and the opinions of this Court and the District Courts of Appeal. Review should be granted to reestablish uniformity on the questions of law at issue in this case.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was electronically filed this **26th** day of **October 2020**, and served electronically upon: **LEO BENITEZ, ESQ.** Benitez & Associates, 122 Minorca Avenue, Coral Gables, Florida 33134.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the above and foregoing Petitioner's Brief on
Jurisdiction is typed in Times New Roman, 14pt. font.

By: /s/ Douglas Eaton
Douglas F. Eaton