Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: ATTORNEY'S FEES—Petitioner failed to comply with the safe harbor provision in § 57.105(4), Fla. Stat., and the Motion for Attorney's Fees is therefore denied. The Petition for Writ of Certiorari is dismissed as moot. *Holly Forkel v. State of Florida, Dep't of Highway Safety and Motor Vehicles*, No. 12-CA-4847-ES (Fla. 6th Cir. App. Ct. August 18, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

HOLLY FORKEL,
Petitioner, **UCN: 512012CA004847AXES**

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

Petition for Writ of Certiorari

Eilam Isaak, Esquire,
Anne Morris, Esquire,
for Petitioner,

Karen E. Lloyd, Esquire,
Assistant General Counsel,
Department of Highway Safety and Motor Vehicles,
for Respondent.

ORDER

This matter comes before the Court on Petitioner's amended Petition for Writ of Certiorari and Motion for Attorney's Fees. Petitioner sought review in this Court of an order sustaining the suspension of her driver's license by Respondent. The parties agree that such relief has been rendered moot by a change in the law and that Respondent has removed the suspension at issue from Petitioner's driving record. Petitioner seeks attorney's fees, citing Fla. R. App. P. 9.400(b), and § 57.105, Fla. Stat., claiming Respondent's actions made necessary the filing of the underlying Petition, and that there was no justiciable issue at the time the Petition was filed, thereby entitling

Petitioner to attorney's fees as a sanction for Respondent's failure to remove the suspension prior to the filing of the Petition. We find the relief sought by the Petition has been rendered moot as agreed by the parties. We find Petitioner failed to comply with the safe harbor provision in § 57.105(4), Fla. Stat., and therefore deny the motion for attorney's fees. The Petition for Writ of Certiorari is dismissed and the Motion for Attorney's Fees is denied.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested on May 5, 2012, for driving under the influence in violation of § 316.193, Fla. Stat., and refused to submit to a breath test as required by § 322.2615. Petitioner's driver's license was suspended and review was sought pursuant to statute. Petitioner subpoenaed one witness, the arresting officer, who failed to appear at the hearing and failed to provide, in writing, just cause for the failure to appear. Petitioner did not seek enforcement of the subpoena, but moved to invalidate the suspension based on the failure to appear, which motion was denied by order on June 15, 2012. Petitioner then filed two additional motions to invalidate the suspension, based on the failure to appear, which were denied.

On July 16, 2012, Petitioner filed a Petition for Writ of Certiorari seeking review in this Court of the hearing officer's order sustaining the suspension, relying on the standards set forth in *DHSMV V. Hofer*, 5 So. 3d 766 (Fla. 2d DCA 2009) (a person may not be deprived of a license without the due process protections required by law, which include notice and a meaningful opportunity to be heard); *Pfleger v. State of Florida, DHSMV*, 18 Fla. Law Weekly Supp. 328 (6th Cir. App. Ct. Pinellas Cty.) (*petition for writ of certiorari denied*, *October 21, 2011*, *by Dep't of Highway Safety and Motor Vehicles v. Pfleger*, 88 So. 3d 159 (Fla. 2d DCA 2011)) (requiring a petitioner to seek enforcement of a subpoena added a step to the review process which violated petitioner's due process right to be heard); and *Robinson v. State of Florida, DHSMV*, 18 Fla. Law Weekly Supp. 1099 (6th Cir. App. Ct. Pinellas Cty.) (*petition for writ of certiorari denied*, *June 27, 2012*, *by Dep't of Highway Safety and Motor Vehicles v. Robinson*, 93 So. 3d 1090 (Fla. 2d DCA 2012) (holding that invalidation of the suspension is an appropriate remedy for the due process violation that occurs when the witness fails to appear)).

On February 12, 2014, Petitioner filed an amended Petition for Writ of Certiorari, raising essentially the same issues as the earlier Petition, and also filed a motion seeking attorney's fees pursuant to Fla. R. App. P. 9.400(b), and § 57.105, Fla. Stat. On February 24, 2014, this Court issued an order directing Respondent to show cause why the Petition ought not be granted. Respondent moved to dismiss the Petition as moot, declaring Respondent's intent to remove Petitioner's suspension based on the officer's failure to appear, citing the amendments to § 322.2615(11), Fla. Stat., which now provides in part: "If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension." (Effective July 1, 2013). Respondent noted, however, that at the time the order was entered on June 15, 2012, the only remedy provided by statute for the failure of a witness to appear was a separate petition for enforcement of the subpoena pursuant to § 322.2615(6)(c), Fla. Stat. (2012). Respondent claims that based on the law in effect at the time the Petition was filed, Petitioner has not demonstrated entitlement to attorney's fees, and that the motion does not comply with the safe harbor provisions of § 57.105, Fla. Stat., and Fla. R. App. P. 9.410(b), and therefore must be denied. On May 14, 2014, Petitioner filed a Reply stating that Petitioner is in agreement that the Petition should be dismissed as moot because the relief sought is no longer necessary or available, stating that the challenged suspension had been removed. However, Petitioner maintains attorney's fees should be awarded in this case.

MOTION FOR ATTORNEY'S FEES

Fla. R. App. P. 9.400 provides:

> With the exception of motions filed pursuant to rule 9.410(b), a motion for attorneys' fees may be served not later than the time for service of the reply brief and shall state the grounds on which recovery is sought.

Section 57.105, Fla. Stat., 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.
> . . .
>
> (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.

Petitioner contends that based on the opinions of the Sixth Circuit Appellate Court, Pinellas County,[1] and the Second District Court's opinion in *Robinson*, *supra*, Petitioner is entitled to attorney's fees because these opinions were binding on Respondent, and Respondent's position at the time the original Petition was filed was not supported by the law in existence as applied to the facts of this case.

Respondent claims Petitioner is not entitled to attorney's fees due to failure to comply with the safe harbor provision in § 57.105(4), which provides:

> (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;

Respondent claims the failure to comply with this provision precludes an award of attorney's fees. *See City of North Miami Beach v. Berrio*, 64 So. 3d 713 (Fla. 3d DCA 2011) (holding it was error for the trial court to award attorney's fees pursuant to §

[1] *Pfleger v. State of Florida, DHSMV,* 18 Fla. Law Weekly Supp. 328 (6th Cir. App. Ct. Pinellas Cty.) (petition for writ of certiorari denied by *Dep't of Highway Safety and Motor Vehicles v. Pfleger*, 88 So. 3d 159 (Fla. 2d DCA 2011)); and *Robinson v. State of Florida, DHSMV*, 18 Fla. Law Weekly Supp. 1099 (6th Cir. App. Ct. Pinellas Cty.) (petition for writ of certiorari denied by *Dep't of Highway Safety and Motor Vehicles v. Robinson,* 93 So. 3d 1090 (Fla. 2d DCA 2012).

57.105 because the party failed to comply with the safe harbor provision). *See also Seekell v. Crown Eurocars, Inc.*, Case No. 13-0041-AP-88B (Sixth Cir. App. Ct. Pinellas Cty., February 6, 2014) (reversing the trial court's award of attorney's fees for failure to comply with the safe harbor provision in § 57.105) (citing *Anchor Towing, Inc. v. Fla. Dep't of Transportation*, 10 So. 3d 670, 672 (Fla. 3d DCA 2009) (holding that a letter threatening to seek attorney's fees pursuant to this statute was not sufficient, as the statute clearly requires service of a copy of a motion)).

Respondent also cites Fla. R. App. P. 9.410(a), which provides that the court may award attorney's fees as a sanction for any filing "that is frivolous or in bad faith." The Rule further provides:

> A copy of a motion for attorneys' fees as a sanction must initially be served only on the party against whom sanctions are sought. That motion shall be served no later than the time for serving any permitted response to a challenged paper, or, if no response is permitted as of right, within 15 days after a challenged paper is served.

Fla. R. App. P. 9.410(b)(3). Respondent claims Petitioner's failure to serve Respondent with a copy of any motion for attorney's fees and afford Respondent an opportunity to remedy the action complained of, prior to filing such motion with the Court, precludes an award of attorney's fees pursuant to the applicable law.

In the event Petitioner is not in violation of the safe harbor provision of § 57.105(4), or Appellate Rule 9.410(b)(3), Respondent claims that at the time the original Petition was filed Respondent's position was in accordance with Florida law, or at least raised a justiciable issue. Prior to the July 1, 2013 amendments, the statutory provision addressing the issue provided:

> A party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged.

§ 322.2615(6)(c), Fla. Stat. Respondent cites further authority which it claims supported its position at the time. See *Dep't of Highway Safety and Motor Vehicles v. Elias*, 997

So. 2d 1172 (Fla. 3d DCA 2008); *Kubashek v. Dep't of Highway Safety and Motor Vehicles*, 957 So. 2d 15 (Fla. 5th DCA 2007); *Dep't of Highway Safety and Motor Vehicles v. Lankford*, 956 So. 2d 527 (Fla. 1st DCA 2007).

Whether a claim or defense is frivolous is a question to be "determined as of the time it is initially presented, and if it can pass muster at that point, subsequent developments which render the claim or the defense to be without justiciable issue in law or fact should not subject the losing party to attorney's fees." *Schwartz v. W-K Partners*, 530 So. 2d 456, 457 (Fla. 5th DCA 1988). The original Petition was filed on July 16, 2012. Although the Second District Court's ruling in *Robinson*, 93 So. 3d 1090, was issued June 27, 2012, prior to the filing of the original Petition, the Department sought rehearing of the opinion, which was not denied until August 14, 2012, after the Petition had been filed. Therefore, Respondent claims at the time the original Petition was filed, its position raised a justiciable issue and was not frivolous or in bad faith.

Petitioner replies that the cases relied upon by Respondent do not address the issues raised in the Petition, as made clear by the opinion rendered by the Second District Court of Appeal in *Robinson*, 93 So. 3d 1090, 1094, in which the Court found no error with the Sixth Judicial Circuit Court's holding in *Robinson v. State of Florida, DHSMV*, 18 Fla. Law Weekly Supp. 1099, and found there to be "no established district court opinion addressing this issue." The Court then certified the question to the Florida Supreme Court to address the issue, which denied review. *See Florida Dep't of Highway Safety and Motor Vehicles v. Robinson*, 112 So. 3d 83 (Fla. 2013).

Petitioner further contends attorney's fees are warranted because despite the Second District Court's opinion in *Robinson* and the statutory amendments in 2013, Respondent had not removed the license suspension at any point during the pendency of the Petition. Further, that because *Robinson* was issued prior to the filing of the Petition, Respondent was given an opportunity to remove the suspension and was required to do so at that time based on binding precedent, citing *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) ("if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it"). Nevertheless,

Petitioner suffered the full administrative license suspension during the pendency of the Petition and incurred additional expenses by seeking appellate review.

We decline to determine Petitioner's entitlement to attorney's fees based on the contentions above because Petitioner failed to comply with the safe harbor provision of § 57.105, Fla. Stat. Petitioner relies on an email exchange between the parties, attached to Petitioner's Reply filed May 14, 2014, in which Petitioner inquires as to whether the suspension would be invalidated based on the Second District's opinion in *Robinson*, in an attempt to avoid having to file a Petition with this Court and seek attorney's fees. The response to Petitioner's email states that because the Department was seeking rehearing in *Robinson*, the suspension would not be removed at that time.

It is well established that in Florida, "statutes awarding attorney's fees must be strictly construed." *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006); *Washington Mut. Bank, F.A. v. Shelton*, 892 So. 2d 547, 550 (Fla. 2d DCA 2005). The statute clearly requires the motion be served on the opposing party 21 days prior to filing the motion with the court. § 57.105(4), Fla. Stat. The notice period must be observed and avoiding this statutory requirement would "frustrate the legislative intent." *City of North Miami Beach v. Berrio*, 64 So. 3d 713, 715 (Fla. 3d DCA 2011). Respondent claims the requirements of the statute were not observed, and Petitioner has not provided any evidence that Respondent was served with the motion as required by law prior to filing the motion with this Court. Any reliance on email exchanges prior to filing the original Petition does not demonstrate compliance with the statute, which requires service of the motion. *See Robbins v. Rayonier Forest Res., L.P.*, 102 So. 3d 737 *(*Fla. 1st DCA 2012) (a motion for attorney's fees as a sanction is appropriately denied by the appellate court when the party fails to comply with the safe harbor provisions of the statute); *Anchor Towing, Inc. v. Fla. Dep't of Transp.*, 10 So. 3d 670, 672 (Fla. 3d DCA 2009); *Seekell v. Crown Eurocars, Inc.*, Case No. 13-0041-AP-88B (Sixth Cir. App. Ct. Pinellas Cty., February 6, 2014). Although this Court has jurisdiction to award attorney's fees pursuant to § 57.105 as a sanction for raising claims on appeal

that are not justiciable or supported by law or fact,[2] we deny Petitioner's Motion for Attorney's Fees due to the failure to comply with the plain language of the statute.

CONCLUSION

Petitioner concedes the Petition for Writ of Certiorari in this case should be dismissed as moot, the relief sought having been previously granted. We therefore dismiss the Petition accordingly. Based on Petitioner's failure to comply with the safe harbor provision in either § 57.105(4), Fla. Stat., or Fla. R. App. P. 9.410(b)(3), the Motion for Attorney's Fees is denied.

It is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DISMISSED.

It is further ORDERED that the Petitioner's Motion for Attorney's Fees is DENIED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 18th day of August, 2014.

Original order entered on August 18, 2014 by Circuit Judges Stanley R. Mills, Linda Babb and Daniel D. Diskey.

[2] *Florida Houndsmen Ass'n, Inc. v. State, Fish and Wildlife Cons. Comm'n*, 134 So. 3d 999 (Fla. 1st DCA 2012).