IN THE SUPREME COURT OF FLORIDA

CASE NO.95,534

DIOSDADO C. DIAZ and DENNIS HABER, ESQ.,

Petitioners,

-vs.-

RINA COHAN DIAZ and LEINOFF & SILVERS, P.A.

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been prepared using 12 point Courier New font, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND OF THE FACTS

The Academy accepts the version of the Statement of the Case and of the Facts set forth by the Petitioner Haber, being the party whose position the Academy supports in this Amicus Brief.

SUMMARY OF THE ARGUMENT

A rule of law which permits Party A's attorney's fees to be imposed in part or in whole upon counsel for Party B as a punishment for the position taken in litigation by Party B, or as punishment for the fact of litigating at all[1] (rather than settling the case), would inappropriately interfere with the attorney-client relationship between Party B and his or her attorney. Such a rule would diminish the willingness of counsel to take on difficult cases, thereby restricting the availability of counsel to litigants. Such a rule would do violence to the attorney-client privilege, by providing incentive to attorneys to divulge confidential communications between themselves and their clients. The risk of liability for fees would impair the effectiveness of those counsel who

[1] This brief does not address the situation of an attorney's liability of fees for contempt.

did risk taking on tough cases, by providing reasons for them not to learn from their clients all of the facts which may be material. The Academy of Florida Trial Lawyers ("AFTL") submits that such a rule would violate litigant's federal constitutional right to due process of law, and might well violate their right of access to the courts under the Florida Constitution.

To impose liability upon a litigant's attorney for the opponent's attorney's fees as a result of unnecessary litigation and refusal of a settlement offer would impair the non-prevailing party's right to retain counsel in civil cases. Such a right has been recognized under the Fifth Amendment to the United States Constitution and should be found to exist under the access-to-courts provision of the Florida Constitution. A constitutional violation results from the rule which would permit an attorney to minimize his or her exposure by divulging communications with the client. An additional constitutional violation results from the chilling affect that such a rule would have on attorneys' willingness to accept difficult cases.

Lawyers who can reduce their liability for attorney's fees by divulging matters otherwise protected by the attorney-client privilege are placed in a hopeless conflict of interest

by such a rule. A constitutional violation would be presented by such a conflict, and by the chilling effect on communications between attorney and client during the course of the representation which such a rule would lead to. Lawyers will not ask all the right questions if knowledge of certain facts will expose them to liability of a greater percentage of the fees, and lawyers who are less prepared because of their situation will not fully meet the client's need for effective counsel.

Further, attorneys will be reluctant to take difficult cases if they are exposed to the risk of liability for fees. The unavailability of retained counsel in certain civil cases will constitute a denial of litigants' constitutional right to counsel.

ARGUMENT

THE DECISIONS BELOW UNCONSTITUTIONALLY IMPAIR LITIGANTS' RIGHT TO RETAIN COUNSEL IN CIVIL CASES

The way in which litigants' due process and access-to-courts rights would be violated by such a rule is that the rule would interfere with litigants' right to retained counsel in civil cases. Although "[t]here is a paucity of authority dealing with the existence of a right to [retained] counsel in

civil cases," because the rule is so well-established and unquestionable, "the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101,1117 (5th Cir. 1980). One author has written that there is no express federal constitutional provision recognizing the right to retain counsel in civil cases, because that practice already was well-established in the British system: "Because English practice had recognized the right to retain civil counsel, there was no need to reaffirm the prerogative." Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322,1327 (1966).

The AFTL submits that there likewise is a right to retain counsel in civil cases within the Florida Constitution's right of access to courts under Article 1, Section 21. For the courts to be truly "open to every person for redress of any injury," within the meaning of that constitutional provision, litigants need to enjoy the right to retain counsel to assist them in civil proceedings. Where such a right is denied, the affected litigant has no effective access to courts and cannot enjoy the benefits of Florida's access provisions.

A rule of law which would expose one's counsel to the opposing party's attorney's fees based upon the litigant's prosecution of the action and failure to accept a settlement would drive a wedge between attorney and client, discourage attorneys from taking on difficult cases to begin with, and reward attorneys for divulging confidential attorney-client matters. The effect of such a rule would be to unacceptably interfere with litigants' right to retain counsel in civil cases.

For one thing, it is difficult to envision a rule of law imposing liability upon retained counsel which did not tailor the apportionment of the award to counsel in some manner commensurate with counsel's participation in unnecessary litigation and the decision to refuse reasonable settlement offers.

For example, under §57.105(1), Fla. Stat., the court may discharge an attorney from his or her obligation to pay half of the prevailing party's fee for frivolous litigation, where "the losing party's attorney . . . acted in good faith, *based on the representations of his client.*" (Emphasis added). In other words, if the attorney takes the stand and testifies as to what he or she was told by his client prior to the

commencement of litigation, the attorney may exonerate himself or herself and shift the entire burden for fees onto the client. The same idea of an attorney limiting his or her liability by blaming the client for litigation conduct no doubt would be part and parcel of the rule which would be recognized in this case, if it is.

Although the order of the trial court which led to this proceeding did not expressly state that the apportionment of fees would be any different if the attorney or the client were found to be more culpable, it is implicit in the order that the apportionment of half the fees to the attorney and client was the result of the trial court's inability to otherwise make an apportionment. Paragraph *1* of the order states: "The court is unaware as to whether Respondent or Respondent's counsel, Dennis Haber, or they jointly[,] caused this senseless and bad faith litigation. There is no way for the court to make such a determination at this time." In other words, if there were such a way, the award might well have been different.

The Third District in the decision under review recognized that the imposition of liability upon an attorney for his opponent's fees will necessarily lead to disclosure of attorney-client communications. The Third District affirms

the order awarding fees, in part because "[t]here was no suggestion in the trial court that the husband's counsel was misled in any way by the husband." *Diaz v. Diaz*, 727 So. 2d 954,958 (Fla. 1999). If there had been evidence that counsel was misled (which would require evidence of confidential communications), the attorney's liability would be lessened. That is a conflict.

The rule of law which penalizes counsel for litigating aggressively and which recognizes the possibility of decreased liability for fees by shifting responsibility to one's client necessarily imposes a conflict of interest between attorney and client and requires the attorney to suffer financially or to divulge confidential attorney-client communications. A corollary of that is that such a rule would inhibit open communications between attorney and client in the preliminary stages of the relationship, preventing full and frank disclosure of all relevant information about the case.

An attorney might well refrain from asking certain questions and obtain less than a complete picture of the case, if he or she thought that knowing more about the case would put him or her in a position of more culpability when it came time to award fees against that side. That inhibition of communication between attorney and client is a violation of

one's right to retain civil counsel.

The *Potashnick* case, *supra*, involved a trial judge's ruling permitting a litigant from consulting fully with his attorney during breaks and recesses in the litigant's testimony. The Fifth Circuit held that such a rule limiting communication between counsel and client impinged upon the litigant's due process right to retain counsel. 609 F.2d at 1118. A rule limiting pretrial communication between attorney and client is no less offensive to the constitutional right than a rule limiting communication during trial.

In addition to denying litigants their constitutional right to retain counsel by suppressing communication between attorney and client and by creating a conflict of interest between counsel and client, the rule of law which would impose liability for the opponent's fees upon the attorney will dissuade counsel from accepting cases in the first place.

Such a rule would harm litigants most in the cases which already involve the most difficulty in retaining competent counsel: the difficult cases. Attorneys already are reluctant to take on cases which require them to buck trends, to make new law, to challenge established ideals, or to do a lot of work for little prospect of reward. If such cases carried with them the additional burden of exposing the attorneys to

liability for the opposing party's fees, then already-reluctant counsel would be absolutely unwilling to take on such cases. That rule would deny litigants their Fifth Amendment and access-to-courts rights to counsel, wholly apart from the constitutional violation which results from the interference with communications between attorney and client.

The AFTL submits that the right of civil litigants to retain counsel is more important a right than the prevailing party's "right" to collect part of their fees for unnecessary litigation from the attorney for the non-prevailing party, if that should be recognized as a right at all. Where a prevailing party is entitled to fees from the non-prevailing party because of unnecessary litigation, the question of counsel's liability for some or all of those fees is at most a question of the collectibility of the award, not a substantive right to recover of the prevailing party. A rule which simply increases the collectibility of an award is far less important than a rule which permits litigants to find attorneys in difficult cases and promotes full and frank exchange of information and ideas between them before and during the lawsuit. The right to counsel is too important to impair in the way which the rulings below would do.

CONCLUSION

The rule of law recognized in the opinion under review would have the effect of denying litigants' Fifth Amendment due process right to retain counsel and their right under the Florida Constitution to access to the courts. Therefore, the Third District's decision should be quashed.

Respectfully submitted,

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