Case No. 95,534
Discretionary Review from the District Court of Appeal,
Third District
Florida Bar No. 283975

In the
Supreme Court of Florida

DIOSDADO C. DIAZ, et al.,
Petitioner,

vs.

RINA COHAN DIAZ, et al.,
Respondent.

BRIEF OF AMICUS CURIAE
Family Law Section of the Florida Bar

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TABLE OF CONTENTS

Page

Table of Citations iii

Required Statement 1

Introduction 1

Historic Background 2

Argument:

I.

IS THERE "INHERENT AUTHORITY" IN THE TRIAL COURTS TO IMPOSE ATTORNEY'S FEE AWARDS IN MATRIMONIAL CASES PERSONALLY AGAINST AN ATTORNEY IN THE CASE OUTSIDE OF §57.105, FLORIDA STATUTES AND OTHER THAN AS A SANCTION FOR THE VIOLATION OF A SPECIFIC RULE OF PROCEDURE OR AS A SANCTION FOR CONTEMPT . . . 7

II.

ASSUMING SUCH "INHERENT AUTHORITY" EXISTS, WHAT ARE THE PROPER LIMITATIONS UPON THE EXERCISE OF SUCH POWER 15

III.

ASSUMING SUCH "INHERENT POWER" EXISTS, WHAT ARE THE PROCEDURAL AND JURISDICTIONAL RULES FOR THE APPLICATION OF THIS POWER 22

IV.

DOES THIS COURT'S OPINION IN *ROSEN V. ROSEN*, 696 So.2d 697 (Fla. 1997) AUTHORIZE THE AWARD OF ATTORNEY'S FEES TO A PARTY BASED UPON THE "IMPROPER" LITIGATION CONDUCT OF THE OTHER PARTY IRRESPECTIVE OF THE FINANCIAL CIRCUMSTANCES OF THE PARTIES 25

Conclusion 27

Certificate of Service 28

TABLE OF CITATIONS

Page

Anderson v. State
267 So.2d 8 (Fla. 1972). 18

Coburn v. Domanosky
257 Pa. Super. 474, 390 A.2d 1325 (1978) 10

Diaz, et al. v. Diaz, et al.
727 So.2d 954 (Fla. 3rd DCA 1999). 2

Eash v. Riggins Trucking, Inc.
757 F.2d 557, 561 (3rd Cir. 1985). 15

Emerson Realty Group, Inc. v. Schanze
572 So.2d 942 (Fla. 5th DCA 1990). 12

In Re Novak
932 F.2d 1397 (11th Cir. 1991). 23

Kay v. Kay
723 So.2d 366 (Fla. 3rd DCA 1999). 25

Levin, Middlebrooks v. United States Fire Insurance Co.
639 So.2d 606 (Fla. 1994). 24

Miami Herald Publishing Co. v. Collazo
329 So.2d 333 (Fla. 3rd DCA 1976) 18

Moakley v. Smallwood
730 So.2d 286 (Fla. 3rd DCA 1999). 6

Patsy v. Patsy
666 So.2d 1045 (Fla. 4th DCA 1996). 11

Roadway Express, Inc. v. Piper
447 US 752 (1980) . . . . . .
8, 12

Rosen v. Rosen
696 So.2d 697 (Fla. 1997) . . . . . .
1, 25

Sanchez v. Sanchez
435 So.2d 347 (Fla. 3rd DCA 1983). . . . . .
9

Select Builders of Florida, Inc. v. Wong
367 So.2d 1989 (Fla. 3rd DCA 1979) . . . . . .
18

Sheiner v. Giblin
73 So.2d 851 (Fla. 1954). . . . . .
18

Smallwood v. Perez,
735 So.2d 495 (Fla. 3rd DCA)
rev. den. 735 So.2d 1287 (Fla. 1999) . . . . . .

REQUIRED STATEMENT

This Brief of Amicus Curiae has been prepared using 12 point Courier New font, a non-proportional font.

INTRODUCTION

The Family Law Section of the Florida Bar submits this brief, as Amicus Curiae, in order to address the following issues:

1. Is there "inherent authority" in the trial courts to impose attorney's fee awards in matrimonial cases personally against an attorney in the case outside of §57.105, Florida Statutes and other than as a sanction for the violation of a specific rule of procedure or as a sanction for contempt?

2. Assuming such "inherent authority" exists, what are the proper limitations upon the exercise of such power?

3. Assuming such "inherent power" exists, what are the procedural and jurisdictional rules for the application of this power?

4. Does this court's opinion in ***Rosen v. Rosen***, 696 So.2d 697 (Fla. 1997) authorize the award of attorney's fees to a party based upon the "improper" litigation conduct of the other party irrespective of the financial circumstances of the parties?

The Family Law Section of the Florida Bar takes no position with respect to any issues other than the foregoing which may be raised by the parties hereto or as to the factual statements which may be set forth by any of the parties in their respective briefs to this Court.

The Family Law Section submits this Amicus Curiae Brief on its own behalf as distinguished from the Florida Bar as a whole.

HISTORIC BACKGROUND

The instant case is one of three recent decisions of the District Court of Appeal, Third District, finding that trial courts "have the inherent power to assess attorney's fees against counsel for litigating in bad faith." ***Diaz, et al. v. Diaz, et al.,*** 727 So.2d 954 (Fla. 3rd DCA 1999). These cases have affirmed the award of attorney's fees against counsel representing a party in a matrimonial matter upon the basis of the court's "inherent authority" to award such fees without reference to any statute or rule of procedure.

In the first of the three cases, ***Smallwood v. Perez***, 735 So.2d 495 (Fla. 3rd DCA), rev. den. 735 So.2d 1287 (Fla. 1999), the District Court originally affirmed, without opinion, the trial court's imposition of attorney's fees against the attorney who had represented the husband in a dissolution of marriage action. Thereafter, on rehearing, the District Court rendered an opinion reversing the trial court's award and setting forth the following facts:[1]

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[1] All of the following statements of fact are derived from the original opinion issued by the District Court at 717 So.2d 154 (Fla. 3rd DCA 1998), which was withdrawn from the National Reporter System following the issuance of the District Court's opinion on rehearing en banc. However, the original opinion can be located at 23 FLW D2134 (Fla. 3rd DCA 1999) and 1998 WL 617525 and must be referenced in order to locate Judge Schwartz's dissent which was subsequently adopted by the District Court as its opinion in the

1. The trial court entered a final judgment of dissolution of marriage and awarded the wife the sum of $5,000 as a partial reimbursement of her attorney's fees, to be paid by the husband.

2. Thereafter, the husband sought appellate review of the trial court's final judgment of dissolution of marriage and the appeal was affirmed without opinion.

3. One week after the affirmance, the wife filed - in the concluded dissolution action - a "Motion for Sanctions" in which she sought an award of attorney's fees against the husband's trial counsel, Ms. Smallwood, for all of the attorney's fees incurred by the wife in the underlying dissolution of marriage proceeding. The wife alleged that the basis upon which her motion was filed was neither statutory nor contractual but, rather, that the trial court "should exercise its inherent power to assess attorney's fees as sanctions against the husband's counsel individually."

The original panel opinion in ***Smallwood*** held that although the trial courts possess "inherent power to assess attorney's fees against counsel for litigating in bad faith," the trial court's award of fees against the husband's attorney was "procedurally barred" because the claim was brought against the attorney well after the rendition (and, therefore, the finality) of the dissolution judgment. The Court opined:

Efficiency requires one attorney's fee proceedings, not

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case.

> **two. Where a litigant has a viable basis to invoke the inherent power of the court to assess attorney's fees against opposing counsel for bad faith litigation in a matrimonial case, the motion must be made and considered in conjunction with any attorney's fee request under section 61.16. To hold otherwise would allow successive attorney's fees motions in which the trial court must first visit, and then revisit, the history and merits of the case.**
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> *** * ***
>
> **It also makes sense to consider this type of motion for sanctions in the original proceeding for dissolution of marriage . . . . In the (rare) case where a fee award legitimately should be assessed against counsel in the exercise of the court's inherent power, the fee is intended to compensate the aggrieved party for attorney time unnecessarily expended. It follows that such an award should be considered in the context of the remaining award made in the matrimonial action.**
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> *** * ***
>
> **In sum, we conclude that the former wife could not make successive motions for trial-level attorney's fees. She first obtained an award of trial-level fees from the former husband. Much later, she filed a motion for more fees for the same trial-level work against the former husband's counsel. Both requests should have been made contemporaneously and heard together. As the second motion was impermissibly successive, the order awarding fees against the former husband's trial counsel is reversed.**

Judge Schwartz filed a dissenting opinion with respect to the foregoing, opining that motions seeking attorney's fees against counsel individually are not barred by any sort of time or jurisdictional issues:

> **Unlike the court, however, I see no reason either as a matter of jurisdiction . . . or policy to hold that the order under review was precluded by the earlier order assessing fees against the husband under section 61.16, Florida Statutes (1997). Indeed, I believe the contrary**

> **is true. Not only are the 61.16 fees directed against a different person, they serve entirely different purposes, and are based on entirely different considerations specifically relating, in large measure, to the ability of the client-spouse to pay.**
>
> *** * ***
>
> **Indeed, because one of the factors which should be considered . . . is the extent to which the excessive expenses caused by the opponent's lawyer may properly be assessed against and, even more significantly, actually recovered from his client, it seems affirmatively appropriate to me that these awards be separately and sequentially determined.**

Following the rendition of the above opinion, the District Court of Appeal considered the ***Smallwood*** case on rehearing en banc and withdrew the original panel opinion and adopted Judge Schwartz's dissent as the opinion of the court. 735 So.2d 495 (Fla. 3rd DCA 1999).

In the instant case, the trial court awarded attorney's fees against the husband's counsel as part of its order emanating from an attorney's fee hearing conducted pursuant to Section 61.16, Florida Statutes, although the husband's counsel was neither aware nor on notice that an award of the wife's attorney's fees were being sought against him personally. Citing to the original panel decision in ***Smallwood***, the Third District again stated that the trial courts have "inherent power" to assess attorney's fees against counsel and added:

> **A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees . . .**

> **We leave for another day what the procedure should be in the event that an attorney desires to defend against a claim of this type on the basis that he or she had reasonably relied on the representations of the client in making litigation decisions.** (*Diaz* at 958).

In the third decision from the Third District on this issue, ***Moakley v. Smallwood***, 730 So.2d 286 (Fla. 3rd DCA 1999), the District Court opined that the trial court properly exercised its "inherent power" to order an attorney, along with his client, to pay a monetary sanction to the opposing attorney for having caused that attorney, "for no good reason," to attend an evidentiary hearing fifty miles distant on short notice.

ARGUMENT

The Family Law Section of the Florida Bar respectfully submits that the issues raised by the instant case are, minimally, the following:

1. Is there "inherent authority" in the trial courts to impose attorney's fee awards in matrimonial cases personally against an attorney in the case outside of §57.105, Florida Statutes and other than as a sanction for the violation of a specific rule of procedure or as a sanction for contempt?

2. Assuming such "inherent authority" exists, what are the proper limitations upon the exercise of such power?

3. Assuming such "inherent power" exists, what are the procedural and jurisdictional rules for the application of this power?

I.

IS THERE "INHERENT AUTHORITY" IN THE TRIAL COURTS TO IMPOSE ATTORNEY'S FEE AWARDS IN MATRIMONIAL CASES PERSONALLY AGAINST AN ATTORNEY IN THE CASE OUTSIDE OF §57.105, FLORIDA STATUTES AND OTHER THAN AS A SANCTION FOR THE VIOLATION OF A SPECIFIC RULE OF PROCEDURE OR AS A SANCTION FOR CONTEMPT?

The term "inherent power" means the authority of a trial court to control and direct the conduct of litigation without any express authorization in a constitution, statute, or written rule of court. This authority, in other words, flows from the powers possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it

jurisdiction. Meador, D.J., *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805 (1995).

The inherent powers of a court fall into two general categories: those necessary for case management (the power to consolidate cases, set trial dates, grant continuances, call recesses, control witnesses and spectators in the courtroom, and so on) and the power to sanction. It is this second type of inherent power that is at issue in this case.[2][2]

The earliest mention of such "power" appears in ***Roadway Express, Inc. v. Piper***, 447 US 752 (1980), a decision rendered at a time when there was no Federal statutory authority for an award of attorney's fees against counsel for any sort of "unreasonable" or "vexatious" litigation. Although such statutory authority was subsequently granted to the courts by the amendment of 28 U.S.C. §1927, ***Roadway Express*** nevertheless gave rise to a series of cases - at the Federal level - finding

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[2] Hereafter, the term "inherent power" shall be used to mean a trial court's inherent power to sanction as opposed to any other actions which might be taken by the court under such inherent authority.

"inherent power" to exist in the courts for the purpose of "vindicating judicial authority." These cases, however all address the inherent powers of the *federal* courts and nothing in any such decision states or even suggests that the courts addressed the existence or nature of such powers, if any, in the state courts.

The first mention in Florida matrimonial jurisprudence of the "inherent power" of a court to sanction an attorney by way of an award of attorney's fees for conduct other than contempt, the violation of a discovery rule or pursuant to §57.105, Florida Statutes, is the Third District's opinion in ***Sanchez v. Sanchez***, 435 So.2d 347 (Fla. 3rd DCA 1983). Therein, the husband was ordered to pay rehabilitative alimony to the wife in the amount of $100 per month for one year but the trial judge mistakenly entered an order requiring the husband to pay the sum of $100 per week. When the husband's counsel became aware of the mistake, he consulted with the wife's counsel in an attempt to correct the error through an agreed order. The wife's counsel refused to cooperate and the husband was then forced to file a motion to amend the judgment. Following a hearing, the trial judge ordered the wife to pay the husband's attorney's fees incurred with respect to the motion to correct the judgment and, on appeal, the District Court held that the trial court should have required the husband's attorney to pay the fee. In so holding, the Third District opined that, "such an award may be proper against an attorney as an exercise of the inherent power possessed by the courts," and cited as authority the Pennsylvania decision of ***Coburn v. Domanosky***, 257

Pa. Super. 474, 390 A.2d 1325 (1978).

In the ***Coburn*** case, the court sanctioned an attorney for his conduct at a call of the calendar (he was not prepared to proceed to trial) by entering a compulsory nonsuit against his client. In reversing, the Pennsylvania court held that a fairer remedy would have been to assess any expenses incurred by the opposing party against the attorney and that doing so would "represent an exercise by the court of its inherent power to conduct its business . . . ."

Significantly, both ***Sanchez*** and ***Coburn*** share certain specific procedural facts. In both cases, the sanction was imposed (or would have been had the trial judge in ***Sanchez*** imposed the sanction that the District Court believed it had the power to do) (1) upon the court's own motion; (2) at the time of the incident; and (3) upon the trial judge having personally observed the incident. In neither case was the trial court's "inherent power" invoked by the motion or pleading of one of the parties to the action and in both cases the alleged misconduct of the attorney was as to a specific incident, not with respect to his or her method or approach to the handling of the entire case before the court.

Following ***Sanchez***, the Fourth District rendered its opinion in ***Patsy v. Patsy***, 666 So.2d 1045 (Fla. 4th DCA 1996), wherein the husband's counsel filed a motion to disqualify the attorney for the wife, alleging that he had perpetrated a fraud upon the court. At the hearing upon the motion, the trial judge found that the motion

had no factual basis, was filed solely to delay the proceedings and was a sham. The trial court then assessed attorney's fees against the attorney who filed the motion. The Fourth District affirmed, finding that "courts have inherent power to assess attorney's fees against counsel for litigating in bad faith."

A number of significant points are made by the ***Patsy*** case. First, the same factors appear, to wit: the trial judge imposed the sanction upon the court's own motion after having personally observed the egregious conduct and did so immediately upon the happening of the event in issue. Second, the ***Patsy*** court relied upon the Third District's decision in ***Sanchez*** in affirming the trial court and, as aforesaid, these identical factors appear in ***Sanchez*** and in the case law underlying this court's decision in

Sanchez.[3]

The ***Patsy*** case made it clear that there is a conflict of authority between the various district courts of appeal as to whether there is such "inherent power" to sanction attorneys by the assessment of attorney's fees in the trial courts. Citing the Third District's decision in ***Sanchez***, the ***Patsy*** court opined that, "the fact that no statute or rule authorizes the imposition of attorney's fees against counsel for litigating in bad faith, however, does not preclude courts from doing so under the inherent power possessed by the courts." The Court went on, however, to note that:

> **On the other hand, in *Israel v. Lee*, 470 So.2d 861 (Fla. 2nd DCA 1985), the trial court assessed attorney's fees against counsel for refusing to comply with court orders and a subpoena, and the second district reversed, holding that in the absence of a contractual provision or a statute there was no authority to assess attorney's fees against counsel. The court did not discuss the issue of whether counsel was acting in bad faith or if the court had the inherent power to assess fees.** (Id. at 1047).

In point of fact, there are several conflicting cases on this point and the existence of such conflict in Florida law has been recognized by the American Law Reports in *Attorney's Liability Under State Law for Opposing Party's Counsel Fees,* 56 A.L.R.4th 486

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[3] The ***Patsy*** court also relied upon ***Emerson Realty Group, Inc. v. Schanze***, 572 So.2d 942 (Fla. 5th DCA 1990) and ***Roadway Exp., Inc. v. Piper***, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980). The ***Emerson*** case does not state the basis upon which sanctions were imposed upon the attorneys.

(1987):

> **A conflict is evident between the appellate districts in Florida on the question of whether courts have the inherent power to assess attorney's fees against counsel. In . . . the Fifth, Second and First Districts, although they did not address the issue in terms of inherent judicial power, the courts implicitly failed to recognize any such power.**
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> **The [First District] court reversed an award of attorney fees and costs against the plaintiff's attorney in *Miller v. Colonial Baking Co*., 402 So.2d 1365 (Fla. lst DCA 1981), finding no authority for such an assessment. [T]he case did not fit within the general rule allowing an award of attorney's fees only where authorized by contract or statute, or where awarded for an attorney's services in bringing a fund into court, nor did it come within any of the judicially recognized exceptions to the rule.**
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> **However, the [Third District] in Florida recognized that a fee award against an attorney may be within the inherent power of the courts . . . .**
>
> **Despite having indicated on an earlier appeal in the case that both the party and his attorney should be held liable for attorney's fees, the [Second District] court held that there was no authority for making a fee award in the absence of contractual provision, statutory authorization, or a fund brought into court by an attorney's services, in *Israel v. Lee*, 470 So.2d 861 (Fla. 2nd DCA 1985).**
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> **In *State v. Harwood*, 488 So.2d 901 (Fla. 5th DCA 1986) the [Fifth District] court held that there was no authority for assessing a defendant's attorney fees against the state attorney, after the assistant state attorney arrived 17 minutes late for a hearing on the defendant's motion to suppress evidence. The court suggested that the contempt procedure was the appropriate remedy for the court to pursue if it believed that the failure of the assistant state attorney to appear on time was an offense against the authority or dignity of the court.**

Thus, although it is clear that the Third and Fourth District Courts of Appeal have found such inherent power to exist, neither

the First nor Second District Courts have done so, even when presented with the opportunity.[4][4] It is also clear that the rare exercise of the court's "inherent power" (the ***Sanchez*** and ***Patsy*** cases were separated by thirteen years) was limited to the very specific circumstances previously described herein, to wit: the trial judge imposed the sanction upon the court's own motion after having personally observed the egregious conduct and did so immediately upon the happening of the individual event in issue. Now, however, reading the instant case in conjunction with ***Smallwood***, the exercise of such "inherent powers" has been extended to cover the entirety of an attorney's conduct in a case, with or without specific notice to the attorney, upon motions and/or pleadings brought by one party in the underlying case (to which the attorney himself or herself is not a party) and after the underlying case has been concluded. The Family Law Section submits that the concept of the "inherent power" of a court was never intended to be so far stretched.

II.

ASSUMING SUCH "INHERENT AUTHORITY" EXISTS, WHAT ARE THE PROPER LIMITATIONS UPON THE EXERCISE OF SUCH POWER?

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[4] The position of the Fifth District is not clear. Although the court did not find such inherent power in ***State v. Harwood***, it did assess attorney's fees against counsel in ***Emerson***, albeit without stating a basis for the award. However, in ***Emerson***, the facts set forth in the decision make it quite clear that the attorneys involved committed a fraud upon the court.

Although finding the existence of such powers, neither the Third District nor the Fourth District Court of Appeal has delineated the boundaries of a court's "inherent power." This lack of definition of or limitations upon a judicial power that has been termed both "nebulous" and "shadowy" has given rise to some severe criticism.[5][5] Professor Trawick, in *Florida Practice and Procedure* (1997), states:

> **The approach taken in *Patsy v. Patsy* . . . on a sham motion is inappropriate for both sham and frivolous motions because (1) it is not authorized by law and (2) the inherent powers doctrine application is wrong. Inherent power is not intended to cover every matter that some judge deems appropriate for remedial action. Thus used, it means that the judge is making the law and this is one step from a totalitarian state and two steps from tyranny. If the act of the lawyer requires sanctions, the sanctions should be a fine or reprimand for abusing the court's procedure, not a gift to the opponent. The inherent power doctrine is a judicial descendant of the divine right of kings - a doctrine discarded in England in 1688.** (Id. at §9-2, n. 6).

Such fears are not without foundation. As one writer has put it, "We fear judicial power. Judges, with little democratic

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[5] The terms "nebulous" and "shadowy" were used in ***Eash v. Riggins Trucking, Inc.***, 757 F.2d 557, 561 (3rd Cir. 1985).

control, decide the fate and fortune of citizens who come before them. So, for the longest time, legal scholarship has worked to justify the exercise of that power by seeking to understand and strengthen the constraining force of the law. Law, not judges, decides cases . . . ." Meyer, L., *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467 (1996). In the case of a court's "inherent power" to sanction, judges decide cases.

Beyond such fears, however, there are a number of practical and policy reasons for this Court to strictly limit the use of a trial court's inherent power to sanction. First, easy recourse to "inherent powers" could encourage abandonment of the Rules of Procedure and the sanctioning statutes. Allowing courts to abandon these rules in favor of inherent authority even when such rules or statutes apply, risks halting the development of case law defining the proper application of such express sanctioning provisions. These decisions provide guidance to lower courts and give parties notice of the standards by which they must conduct litigation. Second, merely requiring a finding of some poorly defined "bad faith" creates an opportunity for the "standardless

exercise of judicial power"[6] and fails to provide adequate or sufficient notice to litigants and counsel as to the precise nature of the prescribed conduct which, in turn, implicates due process considerations. Third, a well developed definition of and limitation upon the use of inherent power to sanction would allow for more meaningful appellate review. The imposition of sanctions should be scrutinized carefully to ensure that litigants (and attorneys) receive equal treatment and the abuse of discretion level of review is amorphous unless the reviewing court can analyze whether specific legal standards have been misapplied. Fourth, absent specific restrictions upon the use of inherent powers, there is a risk of a "litigation explosion" resulting from attorneys seeking to have the court employ its inherent powers (as occurred in the instant case) for the imposition of sanctions against their opponents for a wide variety of actual and perceived litigation abuses. This, in turn, could cause lawyers to provide tentative rather than zealous representation which would be "contrary to professional ideals and public expectations."[7]

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[6] ***Chambers v. Nasco, Inc.***, 111 S.Ct. at 2141, (Kennedy, J., dissenting).

[7] ***Taco Bell Corp. v. Cracken***, No. 3:93-CV-1613D, United States District Court, Northern District of Texas, Dallas Division (1996), as reported in American Bar Journal, December, 1996, at 20.

A review of Florida decisions clearly establishes that to the extent such inherent power exists, it is "necessity-based." In other words, a court's inherent authority to sanction exists only to the extent necessary to remedy abuses of the judicial process when a court's ability to perform its judicial function is threatened and no other appropriate mechanism is available. It is not a matter subject to the "motion" of a party to litigation (or, for that matter, by one attorney against another) but, rather, must arise from the court upon conduct perceived directly by the court and deemed by the court to be an immediate threat to the functions and administration of that court.

The necessity-based foundations that underlie the precedents recognizing a court's inherent power appear clearly in the decisional law. In ***Sheiner v. Giblin***, 73 So.2d 851 (Fla. 1954), this Court held that the inherent powers of a court "necessarily exist to enable the court to preserve its dignity and integrity." In ***Anderson v. State***, 267 So.2d 8, 10 (Fla. 1972), this Court stated, "Every court has inherent powers to do all things that are reasonably necessary for the administration of justice . . . ." This same declaration of the nature of a court's inherent power was repeated by the Third District Court in ***Miami Herald Publishing Co. v. Collazo***, 329 So.2d 333, 335 (Fla. 3rd DCA 1976). Later, in ***Select Builders of Florida, Inc. v. Wong***, 367 So.2d 1989, 1091 (Fla. 3rd DCA 1979), the court held that the trial court was correct in striking a notice of voluntary dismissal and reinstating

a case to prevent a fraud upon the court because, "it certainly was within [the court's] inherent power (as an equity court) to protect its integrity."

This necessity prerequisite is not simply a doctrinal guidepost; it is essential because it limits the otherwise vague boundaries of the inherent power to sanction. Thus limited, the inherent power to sanction cannot be invoked either to bypass sanctioning rules approved by democratic means or, as here, to create a "mini" cause of action within the pending litigation, replete with separate pleadings, separate hearings and, indeed, separate parties.

The nature of the type of limitations and restrictions which should be placed upon a trial court's use of its inherent powers to sanction already appear, for the most part, in the existing case law, statutes and rules of procedure. A court's exercise of inherent authority should be subject to the following limitations:

1. The authority may not be exercised in a way that violates any applicable constitutional provision, valid statute, or applicable rule of procedure. ***Anderson v. State***, 267 So.2d 8, 10 (Fla. 1972)

2. The authority may not be exercised in such a way or to grant such relief as would exceed the scope of a court's jurisdiction. ***Anderson v. State***, 267 So.2d 8, 10 (Fla. 1972)

3. The authority may not be exercised in a way that amounts to an abuse of discretion.

4. The authority may not be exercised unless and until all express rules, statutes and disciplinary measures have been exhausted.

5. The authority may be exercised solely upon the court's own motion and only with respect to conduct or actions perceived directly by the court and deemed by the court to be an immediate threat to the functions and administration of that court.

The Family Law Section submits that there is no necessity for a trial court to *ever* resort to "inherent power" to award attorney's fees against an attorney in matrimonial litigation as a sanction for his or her generalized "bad conduct" throughout the underlying litigation for the simple reason that rules and statutes and procedures currently exist through which to address such circumstances. To begin, the trial courts possess contempt powers should an attorney's conduct rise to such level. Next, the trial judge has the power and authority (and, indeed, the duty) to report any such egregious conduct to The Florida Bar. Third, Rule 12.200, Florida Family Law Rules of Procedure authorizes both Case Management and Pretrial Conferences at which trial judges are empowered to take all of the following actions (among others) to control and limit the action and the costs thereof, including: (1) coordinate the progress of the action if complex litigation factors are present; (2) appoint court experts and allocate the expenses for the appointments; (3) compel the parties to consider and determine proposed stipulations and the simplification of the issues; (4) limit the number of expert witnesses; (5) require the

filing of preliminary stipulations; and (6) schedule or hear motions related to admission or exclusion of evidence. In other words, the trial courts are not powerless in the face of extreme behavior rather, the courts have a plentiful arsenal and need only use it.

III.

ASSUMING SUCH "INHERENT POWER" EXISTS, WHAT ARE THE PROCEDURAL AND JURISDICTIONAL RULES FOR THE APPLICATION OF THIS POWER?

Assuming for the sake of argument that there is such a thing as an "inherent power" in the trial courts to sanction attorneys (outside of the confines of a particular statute or rule), the question then arises as to when jurisdiction to do so exists and what are the proper procedural safeguards?

According to this Court and the Third District in ***Anderson v. State***, 267 So.2d 8, 10 (Fla. 1972) and ***Miami Herald Publishing Co. v. Collazo***, 329 So.2d 333, 335 (Fla. 3rd DCA 1976):

> **Every court has the inherent power to do all things that are reasonably necessary for the administration of justice *within the scope of its jurisdiction*, subject to valid existing laws and constitutional provisions.** (Emphasis supplied).

In other words, the existence of "inherent power" cannot serve to confer jurisdiction upon a court to take any action which it does not otherwise have jurisdiction to do nor exceed that which would be otherwise permissible under the law.

According to the opinion of the Third District in ***Smallwood***, a court has jurisdiction to proceed, under its "inherent power" to assess attorney's fees against an attorney even after all of the proceedings in the underlying case have been concluded and the case has been rendered final in all respects as to all parties. According to the Third District in the instant case, the trial court may use its "inherent power" to assess attorney's fees

against an attorney who is not a party to the underlying action as a result of a hearing at which the attorney is not on notice that such a "sanction" might be imposed.

A court cannot resort to "inherent power" as a means of disguising an act which exceeds the scope of the court's jurisdiction. *See, e.g.*, ***In Re Novak***, 932 F.2d 1397 (11th Cir. 1991) - "a federal court may not take action under the guise of its inherent power when that action either contravenes a statute or rule or unnecessarily enlarges the court's authority." Yet, as described by the Third District in this case and in ***Smallwood***, the fee awards can only be viewed as one of three alternatives: a disguised award of attorney's fees to a party not entitled to such an award (as in ***Smallwood*** where the fee award was made long after the court's jurisdiction to do so under §61.16 had terminated) or a contempt adjudication or a disguised award of "damages" for wrongful litigation conduct.

These are the precise dangers of the use of "inherent power" which must be guarded against. If the "inherent powers" of the courts are viewed as a means of enabling a party to seek further or additional attorney's fees beyond that awarded between the parties by filing motions against the attorneys in the case *after* the court has determined the liability of the parties to one another (as the Third District suggested was proper in ***Smallwood***), then there will be no finality to matrimonial litigation. If, on the other hand, a court's "inherent power" may be used to punish an attorney for

his or her purported "misconduct," then attorneys will be denied the protections afforded by Rule 3.840, Florida Rules of Criminal Procedure, including appropriate and proper notice. Lastly, if "inherent power" is used as a means of awarding "damages" for the conduct of attorneys in litigation, then the use of such "inherent power" for such purposes will create a new cause of action not otherwise recognized in this State. *See*, ***Levin, Middlebrooks, et. al. v. United States Fire Insurance Co.***, 639 So.2d 606 (Fla. 1994).

The Family Law Section respectfully submits that should this Court determine that the trial courts possess the "inherent power" to assess attorney's fees against an attorney in a matrimonial case outside of §57.105 or the Rules of Civil Procedure, then this Court must set forth the jurisdictional and procedural requisites for the imposition of such a sanction.

IV.

DOES THIS COURT'S OPINION IN *ROSEN V. ROSEN*, 696 So.2d 697 (Fla. 1997) AUTHORIZE THE AWARD OF ATTORNEY'S FEES TO A PARTY BASED UPON THE "IMPROPER" LITIGATION CONDUCT OF THE OTHER PARTY IRRESPECTIVE OF THE FINANCIAL CIRCUMSTANCES OF THE PARTIES?

As part of the District Court's holding in the instant case, the court opined that the principles enunciated by this Court in ***Rosen v. Rosen***, 696 So.2d 697 (Fla. 1997), as applicable to a *denial* of attorney's fees to a party having engaged in vexatious litigation were equally applicable to the *award* of attorney's fees to the opposing side. The instant case is one of several decisions rendered by the district courts of appeal following ***Rosen*** that have so extended this Court's holding and have added that, in the context of an *award* of attorney's fees based upon the opposing party's "improper conduct," the criteria of need and ability to pay are no longer necessarily relevant. *See e.g.,* ***Kay v. Kay***, 723 So.2d 366 (Fla. 3rd DCA 1999) - (attorney's fees may be awarded without regard to ability to pay where the award is based on party's improper conduct during litigation).

In view of this Court's language in ***Rosen*** that "the financial resources of the parties are the primary factor to be considered" in the award of attorney's fees, it is somewhat difficult to comprehend how this Court's decision has been so far expanded. The Family Law Section respectfully submits that this Court should clarify whether its holding in ***Rosen*** - which addressed a *denial* of attorney's fees to the party guilty of excessive litigation -

should be extended to form an independent basis (outside of the "need/ability to pay" formulation of §61.16, Florida Statutes) for an *award* of fees to the opposing party where excessive litigation is found to have occurred.

CONCLUSION AND CERTIFICATE OF SERVICE

Based upon the foregoing argument and authority, the Family Law Section of the Florida Bar respectfully submits that to the extent a trial court possesses "inherent authority" to assess attorney's fees against an attorney for "improper litigation conduct," such power should not be exercised unless and until all express rules, statutes and disciplinary measures have been exhausted and then only upon the court's own motion and only with respect to conduct or actions perceived directly by the court and deemed by the court to be an immediate threat to the functions and administration of that court. The Family Law Section further submits that the trial courts should not be permitted to employ "inherent power" to extend or exceed the jurisdiction of the court to award attorney's fees nor should the courts be permitted to exercise such "inherent power" without proper and adequate notice to the party (the attorney) who may be the subject of such sanction.

WE HEREBY CERTIFY that a copy of the foregoing Brief of Amicus Curiae, the Family Law Section of the Florida Bar, was served by mail upon the following: Helen Ann Hauser, Esq., 3250 Mary Street, Suite 400, Coconut Grove, Florida, 33131; Deborah Marks, Esq., 800 Brickell Avenue, Suite 1115, Miami, Florida, 33131; Robert I. Barrar, Esq., 333 N.E. 23rd Street, Miami, Florida, 33137; Andrew M. Leinoff, Esq., 1500 San Remo Avenue, Coral Gables, Florida, 33146; Mark A. Gatica, Esq., 9130 South Dadeland Blvd., Suite 1225, Miami, Florida, 33156-7849; David B. Pakula, P.O. Box 14519, 633

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