IN THE SUPREME COURT OF FLORIDA

CASE NO: 95,534

Diosdado C. Diaz and Dennis Haber, Esquire,

Petitioners,

vs.

Rina Cohan Diaz and Leinoff & Silvers, P.A.,

Respondents.

On review from the Third District Court of Appeal,
Case No. 97-334

CONSOLIDATED ANSWER BRIEF OF RESPONDENTS LEINOFF & SILVERS, P.A. AND RINA COHAN DIAZ

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INTRODUCTION

This case is before this Court on discretionary review from a decision of the Third District Court of Appeal, reported at *Diaz v. Diaz*, 727 So.2d 954 (Fla. 3d DCA 1999). That opinion was entered in an appeal from a final order of the trial court entered on January 2, 1997, awarding the Wife attorneys' fees and costs incurred in a dissolution of marriage proceeding. [R2. 16-19]. In that order, the trial court awarded the Wife $40,000 for attorneys' fees and costs, from a total of $72,000 that were reasonably incurred in the divorce. The fees and costs were assessed against the Husband and his counsel, jointly and severally, due to the unnecessary litigation caused by them. [R2. 16-19].

In this brief the Petitioner, DIOSDADO C. DIAZ, will be referred to by name or as "the Husband." Petitioner, DENNIS HABER, will be referred to as " the Husband's counsel." Respondent, RINA COHAN, will be referred to by name or as "the Wife." Respondent, LEINOFF & SILVERS, P.A., will be referred to as "the Wife's counsel." The Following symbols are adopted for references in this brief:

"R1." for "original record on appeal in Third District Case No. 96-515 (pp. 1-471);

“R2.” for “original record on appeal in Third District Case No. 97-334 (pp. 1-23);"

"T1." for "transcript of proceedings taken on July 28, 1995;"

"T2." for "continuation of transcript of proceedings taken on July 28, 1995;"

"T3." for "transcript of proceedings taken on August 31, 1995;"

"T4." for "transcript of proceedings taken on September 1, 1995;"

"T5." for "continuation of transcript of proceedings taken on September 1, 1995;"

"T6." for "transcript of proceedings taken on December 26, 1995;"

"T7." for "transcript of proceedings taken on March 14, 1996;"

"T8." for "transcript of proceedings taken on May 23, 1996;"

"T9." for "transcript of proceedings taken on December 10, 1996."

All emphasis is supplied, unless specifically indicated otherwise.

STATEMENT OF THE CASE AND FACTS

Respondent objects to the statement of the case and facts contained in the initial brief filed by Haber, on the basis that the statement contained therein is inappropriately argumentative, fails to present the facts in a light most favorable to the Respondents, and omits numerous material facts. Respondents present the following statement of the facts which more accurately reflects the proceedings and findings in the trial court:

The trial in this matter occurred over three days in 1995. [R1.431]. The final judgment contained the following findings:

> The parties were married on February 19, 1984. They separated on June 9, 1994. These dissolution proceedings were commenced shortly thereafter. [R1.431].
>
> * * *
>
> During the parties' marriage they had a moderately comfortable standard of living. Much of that standard of living was supplemented by gifts from the Wife's parents, credit cards, and debt. The parties incurred over $36,000 in credit card debt.
>
> The Husband is a police officer who worked full-time during the entire marriage. He always worked considerable overtime, and received additional pay as a member of the bomb squad. The Wife is a lawyer who at one time worked with the State Attorney's Office, but left that employment two years after the marriage due to burn-out. The Wife subsequently opened her own practice, but worked on only a part-time basis and generally lost money. Since Tanya's birth in 1989, the Wife worked minimal hours in her practice, while the Husband was the primary wage earner. [R1.432].
>
> * * *

> The Wife brought several items of her separate, pre-marital property into the marriage. Prior to the parties' marriage, the Wife's father gifted to her non-voting shares in his business. He established a trust for the Wife's benefit, which was funded from distributions and dividends generated by the stocks. [1] The trust income was deposited into an account in the Wife's name, and used by her before and during the marriage.
>
> Prior to the marriage, the Husband and Wife executed a pre-nuptial agreement. The one page document provides merely that, in the event of a dissolution of the parties' marriage, the Husband would have no interest in or claim to the Wife's trust assets. The Husband did not deny the validity of the agreement, and eventually–near the time of trial–stipulated that for equitable distribution purposes the trust assets identified therein were the Wife's. [R1.433].

The court found that the only marital assets were the Husband's pension, the marital portion of which was valued at $255, 813; the Husband's deferred compensation plan, which was valued at $39,680; and the Husband's interest in the "1%" fund, the marital portion of which was valued at $69,836. [R1.435-6]. These assets had a combined total value of $369,329. The court divided these assets on a 75/25 basis, in favor of the Husband. [R1.441-2].

The Husband also pressed a claim for alimony. The trial court found:

---

[1]The Wife's father established similar trusts for each of his three daughters, and annually funded each trust, in his sole discretion, in an equal amount. [T1.34].

> The Husband is not entitled to an award of alimony of any type. He has no unmet needs for reasonable expenditures. Nor has he demonstrated that the Wife has the ability to meet any claimed need for support. Any claim for alimony by the Husband is baseless and borders on Florida Statute 57.105. In fact, the Husband's claim for alimony borders on the ludicrous. The court does not know where the claim came from. Given the level of the Husband's income as well as his expenses, the court does not understand either his debt or his claim for alimony. [R1.436].
>
> * * *
>
> The Wife's recent work history–for the past seven years-- is precisely as she is working now. The Wife nets minimal sums as a sole practitioner. She received her income from her passive ownership interest in her family business. This is her employment capability. Sums that she earned while working full-time over six years ago are not relevant now. It is hoped that the Wife will obtain gainful employment in the future, but that will be her choice.
>
> The Husband's request for rehabilitative alimony is similarly unpersuasive. In this case, the Husband was employed as a policeman throughout the marriage. He is not entitled to alimony of any type–permanent, temporary, or otherwise. [R1.437].

These findings were consistent with the court's pronouncements at the conclusion of the trial. The court stated:

> The husband's claim for alimony is baseless. I have put a little note when I started here. The husband's claim for alimony borders on the ludicrous. I mean, I don't know where that claim came from. Given the level of his income and paucity of living expenses when he was living with the wife at her house, the court does not understand his debt, either, unless it is because of the extra contributions to differing deferred compensation plans and insurance. [T6.606].
>
> * * *

There was a lot I couldn't understand in this case. What the court cannot understand and what the court finds appalling is the amount of money spent to litigate this case or the husband's reluctance to bring it to trial. The court was shocked to hear the husband's testimony that he cashed in a $40,000 pension as a retainer for his attorney. [T6.606-7].

* * *

Let me say something else about the husband's claim for alimony. There are two types of alimony you can get someone, rehabilitative alimony. In order to make a claim for rehabilitative alimony you must have a plan which shows that you have a goal in order to enhance your income. In order to get permanent income I think it shows that your skills have atrophied somewhat or that you cannot maintain the reasonable standard of living. In this case, all of the testimony shows that the husband's income has consistently gone up. Some of it is the result of increases in the pay scale, some of it is in line with his substantial amount of overtime, but his skills certainly haven't atrophied. There's nothing else for him to do, and, quite frankly, I don't -- I didn't see a very elaborate lifestyle in the evidence. I mean, the wife had a house. He moved into the house. He had a house which he sold. I didn't find, you know, elaborate travel. I mean, the wife bought expensive clothes but I don't think there was any evidence that the husband did or that his style or standard of living has changed or that he cannot comfortably maintain that style or standard. What was his income last year, $80,000 or in '94? I'm not sure what it was.

MR. LEINOFF: Over 80.

THE COURT: But I looked around and I read both memorandums and I can't figure out how there could be a claim for alimony here. I mean, the wife's source of income to begin with is non-marital. Of course I'm thinking of Rosen versus Rosen, which was one of the first cases that came out, I think, back in the seventies on this subject where the husband was a lawyer who practiced law only part-time because he had substantial family income, and I don't remember the exact holding

of the case but they said in effect they could look to his non-marital assets to provide for the wife if the other needs weren't being met, but the only thing would be if there was some claim here that he's entitled to live in the same kind of house that she lived in before they got married and balance it out. $80,000 a year. He can certainly find a nice place to live that's not over a garage. [T6.608-9].

* * *

THE COURT: I mean that should be clear. I'm denying the husband's claim for alimony. That didn't take a lot to figure out. [T6.610].

* * *

The other thing that really concerns me about this case is I don't know why it was so expensive to try. Folks, I'm going to reserve on the issue of attorney's fees and entitlement and amount, and I am really very concerned. I guess I'll learn a lot more about this case at that hearing probably than I have learned at this stage thus far. I'm very concerned and I sent a memo to Judge Kreeger as I said I was going to do, and I don't know if she has anything to do about it but as I heard the testimony at the time of trial from the accountant, he was not contacted much less retained until after it was announced that he would be coming into the case and Judge Kreeger got out of the case.

MS. KARLAN: He was listed as a --

THE COURT: Excuse me. He was listed. He was listed in a pre-trial catalog before he was ever contacted about testifying in this case. Now I don't know how many accountants there are in Dade County, but why that particular accountant was listed, probably the only accountant that Judge Kreeger would have to recuse herself on, I don't know.

MS. KARLAN: Judge, I think there was already evidence that there was a relationship between him and Mr. Haber before.

THE COURT: Excuse me. I know, and that's even more disturbing to me. That's even more disturbing to me. I don't know why this case took so long to try. [T6.619-20].

* * *

> THE COURT: You weren't here, obviously, when I said that the first thing I wrote down when I sat down is that the husband's claim for alimony borders on the ludicrous, and I also made some notes -- I was trying to work with both of the judgments that you all gave me and getting nowhere fast in doing that because I had the feeling that you all had tried different cases or maybe we were, you know, in a different room in this case, and in that one I have written here the claim borders on 57.105. I mean, there is no way that I could figure out, and I reviewed your cases. Given the circumstances of the case, they certainly do not justify any award of alimony and, you know, even if the genders were reversed it would be the same thing, you know. [T6.654-5].

The Wife requested an award of attorneys' fees and costs pursuant to both Florida Stat. §61.16 and Florida Stat. §57.105. The hearing on attorneys' fees commenced on March 14, 1996. [T7]. At the start of the hearing the court indicated that--solely on equitable grounds--the court had awarded the Wife less in the divorce than she was otherwise legally entitled pursuant to statute. The court explained:

> THE COURT: You know, one of the things that really upset me about this case as I think I said it on record is that she was -- if you just read the statute books, she was entitled to one half of the pension, his pension that accumulated during the marriage. I put in an equitable factor there because we have equitable distribution. They are right, as a matter of statute of law. Whether it is correct as a matter of equity. I do not know. [T7. 27-8].

During that hearing, it was established that in September, 1994, (prior to commencement of the proceedings) the Wife conveyed a settlement offer

to the Husband requesting $50 per week in child support, medical insurance for the child, and no more. She waived any claim whatsoever to the marital estate, which consisted solely of the Husband's benefits earned during the marriage, and later valued at $369,329. [T7.43-5]. There was no response to that offer. Instead, the Husband's counsel called and advised the Wife's counsel that there would be litigation, as the Husband was seeking alimony. [T7.45].

Further testimony revealed that another settlement offer was conveyed to the Husband in March, 1995. The terms were substantially similar to those proposed six months earlier. [T7.46-7]. Again, there was no response to the offer.

After hearing the testimony and the arguments of counsel, the court again expressed its concerns regarding the fees incurred in the case. The court stated:

> THE COURT: Let me ask you this. These people lived together for ten years. Mr. Diaz knew that his wife had an interest in her father's business that had been gifted to her. We know that he knew that because there was a prenup, for whatever it was worth, that reflected it was that way. He knew that she wasn't working for the State attorney anymore and whether or not the business was that great, I assume we produce tax returns, joint

> tax returns, so he knew what income she stated is on her tax return and we know what the source of the money was.
>
> We're talking $100,000 in attorney's fees in this case when there was no issue that I can find. [T7. 120-121].

The court was appalled by the fact that no counter-offer was ever transmitted to the Wife's counsel, and the consequences of continued litigation were, apparently, never expressed to the Husband. The court asked:

> What was the demand? I guess there wasn't one except in mediation, which we can't go into, but did anybody ever sit down and discuss with this gentleman? Was he aware -- I mean the result of my final judgment, which may very well be reversed on appeal, because I even noted that I was trying to do what I felt was equitable given the circumstances of this case are devastating compared to the original settlement offer he had. He had an offer. He could have walked out of here with everything in his column and an obligation for $50 a week in child support, and these people have gone through two years of hell. [T7. 145-146].
>
> * * *
>
> THE COURT: Mr. Haber, let me say this. Yes, this is because he had riding on the table $200,000. I didn't give her the $200,000 because I made a finding that she chose not to work. She doesn't have to chose to work. She has the largess of her family. I was also considering, but I didn't deduct for this that because she carried most of the basic living expenses of the family, i.e., the house, that he was able to put more aside in those pension and profit sharing plans, deferred income plans. I didn't do that, but that's why you go to a lawyer, because when somebody -- lawyers are supposed to diffuse the anger and bitterness and look at the business side of it, because divorce today is akin to the dissolution of a small business. It's economic. They have taken out the emotional. They have said that we can't

> consider the fault of a party other than the impact upon the financial aspect of the two. That's what it says, and this is why this litigation was totally unnecessary.
>
> You didn't need to discovery the world in this case. There wasn't a lot that had to be discovered in this case. It wasn't very complicated. [T7. 147-148].

At the conclusion of the hearing–after hearing all of the testimony and reviewing all of the exhibits–the trial court announced:

> ...I'm going to award the wife some attorney's fees. I'm not going to award her all of her attorney's fees. I'm going to deduct it by a figure which I think, based on my knowledge and experience in this field, would have been a reasonable amount for early skirmishing that lawyers want to do and counsel, you may want to do, and I am going to let you respond to this. ***I'm considering awarding a part of these fees against counsel because I think this litigation was totally uncalled for, and totally unnecessary, and I don't know exactly who was responsible for carrying it on to this extreme,*** but it has already cost Mr. Diaz $300,000 that he could have had, that he should have had in his pocket, and these people could have gone on with their way without this bitterness and this litigation that has gone on all these years, and if you all can't tell it, and I'm sure the record can't reflect it, I also dropped my teeth in this trial when he said he cashed in his pension and profit sharing plan. That should have been a great big warning bell right at the beginning, and I am just utterly appalled and very upset at what has happened in this litigation, and I was during the course of the trial because I kept waiting for the other shoe to drop and it never dropped. Nothing came of this and there was nothing to find and there was nothing to look for.
>
> She had non marital property. She had a lot of non marital property. You all had as much access to the income, tax returns, as she did because they were joint tax returns, and to go through

> all of this and the emotional trauma that has been involved, especially when both of these people have had additional trauma in their lives during this, and not resolve their case, it is what gives lawyers a bad name. Let me tell you folks, it is what gives lawyers a bad name, ***and if you want to respond to that, Mr. Haber, I will allow you to do so before I enter a ruling, and I will probably call you on it***... [T7. 155-7].

The court conducted a subsequent hearing on May 23, 1996. [T8]. ***Haber did not attend that hearing.*** [T8.3]. The court announced its ruling, based upon a finding that the case should have been settled and the parties should have been divorced in an uncontested final hearing. As a result, the court determined that $40,000 was a reasonable fee award, and that award should be the joint and several responsibility of the Husband and Haber. As the court explained:

> The reason that I can't do it other than that, and I am not entitled to the nature of the relationship between the two. I don't know what passed between them, I don't know how they made this decision to proceed. I know that Mr. Haber has got to assume some of the responsibility because it is so obvious to me that this is a case that never should have been. [T8.13].

The court did not immediately enter an order. Nonetheless, Haber filed a motion for rehearing which was heard on December 10, 1996. [T9]. At that hearing the court again set forth the reasoning behind its oral ruling:

THE COURT: All right. Let me tell you that this has not been easy. I have thought about this case for a very, very long time and, quite frankly, I am in a quandary as to what to do. I was disturbed with the way this case was tried. It was almost impossible to get the husband to trial on this case. I was very disturbed when, during the course of the trial, he told me he cashed in a forty thousand dollar pension plan for his attorney's fees and I couldn't figure out why this case took so much time or money or why it was so allegedly complicated.

And then we came to the attorney's fees hearing on this case and I was shown, and they were admitted into evidence, I believe, copies of settlement letters that were written by the wife to the husband prior to the time that this case was ever filed.

And there is no way that anyone with any knowledge of family law, could not have figured out that he couldn't do better accepting the settlement. The only thing at issue here was money. There was never a conflict as to custody of the children or the child, the daughter. So far as I know there was never a visitation problem.

And the wife's offer of, "I will settle for 50 dollars a week child support," and perhaps some help with the private schooling, if that comes on, is far below anything that was attained during the course of the litigation.

Because at the end of this trial, not only did the husband pay, what was it, six hundred dollars in child support, but I awarded the wife one half of one half of the pensions that were accumulated during the marriage and I made sort of equitable findings on why I didn't give her a whole one half of the pensions accumulated during the course of the marriage.

But I even stated then that I didn't know what the appellate court was going to do with that, because if you had a reading of the law, she was entitled to one half of the pensions that were acquired during the course of the marriage, except that since I found that equitably since she'd had knowingly waived her right to earning a pension somehow, I think equitably that is fair. I don't know what the appellate court has done on that issue. [T9. 3-5].

* * *

Something has to be done to stop this kind of totally unnecessary and frivolous litigation. I mean, this was a very simple divorce.

When the wife says, "Give me a little child support and I will go my separate way," somebody is going to have to explain to me why it took eight months and several motions for continuances filed on behalf of the husband plus ---

MR. LEINOFF: Alimony requests.

THE COURT: I know. But the alimony requests could not possibly have offset the ---

MR. LEINOFF: His alimony request; the wife made none.

THE COURT: I know that, Mr. Leinoff. But his request for alimony and -- I mean, the fact that he was earning more than he did than at the time of the marriage and all the rest of that business, could not possibly have been greater than her claim for his pension, which was clear under the statute.

I mean, at the most, his claim was a long shot. That is an understatement. Her's was a certainty. [T9. 7-8].

* * *

THE COURT: Well, I will tell you the problem that I have with that argument. If there was any consideration given to the settlement offer, and some should certainly have been given, then the proper response would have been the corresponding back, "We would like to consider your offer, but before we do so we need the following information."

And what Mr. Leinoff is telling you, that ***on the verge of this case going to trial, and it was set several times, before it actually went to trial, no one ever responded to the settlement offers.*** [T9. 42].

* * *

THE COURT: And what offends me in this situation is someone made a good faith effort to settle this case early on.

I am then faced with a year of litigation with a trial which eventually cost the husband substantially more than he would have had to pay if he would have settled for it. [T9. 53].

* * *

> But what I do know after I heard all of this case is that the wife made a very good faith effort to avoid not only the financial burden that was a result of this litigation, but also the emotional stress that is put on the family unit whenever there is a litigation. That was apparent to me.
>
> And the question was, was there a method or an avenue to place the burden where it belonged. The financial burden of this litigation should not be borne by a litigant who early on makes a genuine and a sincere effort to avoid litigation by agreeing to take substantially less than she would otherwise be entitled to and still be forced through a year and then have to bear the cost too.
>
> Somehow or other that just didn't seem right to me and it seemed to me that there should be a remedy. [T9. 53-4].

* * *

> At some point I think a lawyer has a responsibility to say, "no". I think there is an obligation to say, "This is what is at risk."
>
> I figured that out at the last hearing when I had all of the figures in front of me. I figured out what this man put on the table to go in and get 25 thousand dollars worth of lump-sum alimony. That is what caused me so much concern. Because there was no way he could come out ahead. Absolutely no way. [T9. 79].

The trial court's order awarding fees and costs was entered on January 2, 1997. [R2. 16-19]. From this order, the Husband and his counsel appealed. The decision of the Third District Court of Appeal affirming that order was entered on November 4, 1998, and the subsequent motions for rehearing and rehearing en banc were denied on April 7, 1999. [R2.23].

SUMMARY OF THE ARGUMENT

All members of this profession know that it is under attack from every corner. More than merely being the punch line of an entire genre of mostly tasteless humor, this profession is blamed for a host of societal ills, including increased medical malpractice premiums, high jury awards, and for all of the legal system's injustices. Lawyers are often perceived as owning and controlling the legal system, using barracuda "win-at-all costs" tactics while charging excessive fees.[2]

Sadly, the conduct in this case justifies this view, even to an insider. The trial court found the Husband's claims "ludicrous,""baseless," and described the litigation as " totally unnecessary and frivolous." The record overwhelmingly supports that terminology.

Faced with an unwilling participant in the legal process who did everything possible to avoid litigation–who wanted nothing more than to take nothing and "walk away" from the marriage–but who nonetheless incurred over $72,000 in fees and costs defending against the Husband's "totally unnecessary and frivolous" litigation, the trial court utilized two of three remedial measures available to it for shifting the cost of this frivolous litigation

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[2]Podgor, Lawyer Professionalism in a Gendered Society, 47 S.C.L.Rev. 323 (1996).

to the culpable parties. The trial court, pursuant to Florida Stat. §61.16, assessed fees $40,000 of the Wife's fees against the Husband; and pursuant to its inherent power to control the litigation before it, assessed joint and several liability for that fee against the Husband's counsel.

Analysis of this case begins with this Court's opinion in *Rosen v. Rosen*, 696 So.2d 697 (Fla. April 24, 1997). Pursuant to *Rosen*, the trial court is required to consider ***all aspects of the litigation***, including ***the merits of the positions*** and whether the litigation is conducted in a manner that frustrates or stalls the proceedings. That pronouncement is entirely consistent with a long line of cases emanating primarily from the Third and Fourth District Courts of Appeal, which stand for the proposition that a party engaging in litigious conduct should be responsible for the financial results of that conduct. In this case the trial court found, in no uncertain terms, that the Husband's position was without merit, beyond frivolous, dilatory, and wasteful.

Our system's first defense against this type of frivolous litigation is competent counsel, who is charged with a responsibility to file no papers or advance no claims in bad faith. In this case, there was an utter failure to discharge that duty. The Husband's counsel–whether acting on the

Husband's instructions or on his own initiative--completely violated that duty by requesting alimony when there was no legal basis; by contesting child support when the Wife was willing to accept less than one-third the sum that the guidelines required; by contesting equitable distribution when the Wife was willing to walk away with no marital assets whatsoever; and by causing the recusal of the trial court judge on the eve of trial through the contrivance of filing an amended witness list three days before the start of trial, which listed an expert (that was not even contacted until several weeks later) with whom the judge announced she had a conflict.

The trial court must have the means of addressing frivolous litigation. Florida recognizes the inherent authority of all courts to ensure the proper functioning of the proceedings before the court. That authority includes the power to sanction counsel engaged in bad faith litigation. This case justifies the exercise of the that authority. Accordingly, the order under review should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY ASSESSED THE WIFE'S FEES AND COSTS AGAINST THE HUSBAND WHERE THE TRIAL COURT

DETERMINED THAT THE LITIGATION WAS FRIVOLOUS.

A. The trial court's findings of fact reach this Court with a presumption of correctness.

It is well settled that a trial court's findings of fact and conclusions of law come to the appellate court clothed with the presumption of correctness and will not be disturbed unless they are shown to be clearly erroneous. *Taylor Creek Village Association v. Houghton*, 349 So.2d 1219 (Fla. 3rd DCA 1977). It is fundamental that findings of fact by a trial judge in a non-jury proceeding will not be set aside on review unless totally unsupported by competent and substantial evidence. *Lee v. Lee*, 563 So.2d 754 (Fla. 3rd DCA 1990). In this case, the competent and substantial evidence overwhelmingly supports the trial court's findings of fact.

B. The trial court's finding that the litigation should have never occurred justified the entry of an award of fees and costs.

The order awarding the Wife fees and costs based on a finding that:

> It is readily apparent that Respondent exercised bad faith in litigating these proceedings and caused a dissipation of assets and expenditure of funds in a wasteful and inappropriate fashion. [R1. 18].

Since that time, this Court has clarified the scope of the trial court's analysis when considering a request for fees in matrimonial cases. In *Rosen v. Rosen,* 696 So.2d 697 (Fla. 1997), this Court stated:

> We resolve this conflict by pointing out that proceedings under chapter 61 are in equity and governed by basic rules of fairness as opposed to the strict rule of law. *See* § 61.011, Fla.Stat. (1995) ("Proceedings under this chapter are in chancery."). The legislature has given trial judges wide leeway to work equity in chapter 61 proceedings. *See, e.g.,* § 61.001, Fla.Stat. (1995). Thus, section 61.16 should be liberally--not restrictively--construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties.
>
> Section 61.16 constitutes a broad grant of discretion, the operative phrase being "from time to time." The provision simply says that a trial court may from time to time, i.e., depending on the circumstances surrounding each particular case, award a reasonable attorney's fee after considering the financial resources of both parties. Under this scheme, the financial resources of the parties are the primary factor to be considered. However, other relevant circumstances to be considered include factors such as the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation. Had the legislature intended to limit consideration to the financial resources of the parties, the legislature easily could have said so. [Footnote omitted].
>
> Consistent with our opinion in *Quanstrom*, we find that section 61.16 governs the standard to be applied in determining an award of attorney's fees in dissolution of marriage, support, and child custody cases. The lodestar, which is produced by multiplying the number of hours reasonably expended by a

> reasonable hourly rate, may be used as a starting point in determining a reasonable attorney's fee. We further find that a court may consider all the circumstances surrounding the suit in awarding fees under section 61.16. Moreover, in situations where a court finds that an action is frivolous or spurious or was brought primarily to harass the adverse party, we find that the trial court has the discretion to deny a request for attorney's fees to the party bringing the suit.

Rosen v. Rosen, *supra*, at 700-701.

Rosen effectively ratifies a long line of cases that have assessed attorney's fees against parties engaging in frivolous or vexations litigation in dissolution of marriage proceedings. For example, in *Johnson v. Johnson*, 396 So.2d 192 (Fla. 4th DCA 1980), the court affirmed the award of $5000 in fees to the wife which were incurred as a result of additional work made necessary by the vexatious, oppressive, and wanton conduct of the husband during the divorce proceedings. *Id.*, at 194.

Likewise, in *Meloan v. Coverdale*, 525 So.2d 935 (Fla. 3d DCA 1988), *pet. rev. den.*, 536 So.2d 243 (Fla. 1988), the court reversed an award of fees to the former wife in a case where she had clearly caused unnecessary post-judgment litigation. The court stated:

> We hold that it was an abuse of discretion for the trial court in this case to require Henry, the party who was compelled to resort to an enforcement action in court, to pay not only his

> attorney's fees but also the entire amount of attorney's fees incurred by Carol, the party who, without good cause, resisted the action. More is required of a court when assessing attorney's fees in a domestic relations proceeding than a mechanistic exercise in identifying the relative financial circumstances of the parties and, excluding all other factors, strictly assessing the entire cost of litigation against the party who has the superior financial position. We, therefore, reverse the award of attorney's fees to Carol for services connected to the enforcement litigation. On remand, we direct the trial court to take into account the aforementioned factors as well as Henry's superior financial position in determining an equitable award of Carol's attorney's fees. On remand, the trial court may also consider whether Carol should defray any portion of Henry's attorney's fees.

Meloan v. Coverdale, supra, at 937-8.

Similarly, in *Ugarte v. Ugarte*, 608 So.2d 838 (Fla. 3d DCA 1992), the court observed:

> A party's financial status should not isolate him from the consequences of his conduct within the judicial system. A fee order based upon additional work made necessary by the appellant's litigious conduct is permissible. The instant award serves to avoid an inequitable diminution of the former wife's share of the parties' assets.

Id., at 841.

In *Thornton v. Byrnes*, 537 So.2d 1088 (Fla. 3d DCA 1989), the court again considered the allocation of responsibility for attorneys' fees and costs caused by unnecessary litigation. This court stated:

> It was error, however, for the trial court to adopt the master's recommendation that "in view of the totality of financial disclosure as to the assets of both parties," the mother was not entitled to any attorney's fees or costs. While we recognize that an award of attorney's fees is a matter of discretion with the trial court, *Colbath v. Colbath*, 268 So.2d 361 (Fla. 1972), it is an abuse of that discretion to look exclusively to the financial circumstances of the parties in determining whether to award fees. *Meloan v. Coverdale*, 525 So.2d 935 (Fla. 3d DCA), *rev. denied*, 536 So.2d 243 (Fla. 1988). The trial court must consider other relevant factors, including "whether the modification or enforcement action brought or defended by the party seeking fees was meritorious or was litigated in good faith and whether the actions of one party compelled the other party to resort to the courts for a remedy." *Id.* at 937.

Thornton, supra, at 1090. *See,* also, *Arouza v. Arouza*, 670 So.2d 69 (Fla. 3d DCA 1996) ("...attorney's fees may be assessed in domestic cases against a party who initiates a baseless cause of action which results in meritless litigation and the unnecessary expenditure of fees...").

The Fourth District Court of Appeal reached a similar result in *Mettler v. Mettler*, 569 So.2d 496 (Fla. 4th DCA 1990). In that case, the trial court assessed fees and costs totaling $42,000 against the former wife as a result of her inequitable conduct and litigiousness during the proceedings. The former wife alleged error, claiming the fees and costs exceeded her ability to pay. The court affirmed, stating:

> While the purpose of considering the parties' finances in awarding attorney's fees is to insure that both parties are not limited in their ability to receive adequate representation due to disparate financial status, this equitable principle must be flexible enough to permit the courts to consider cases with special circumstances. *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828, 835 (Fla. 1990). A party's financial status should not insulate them from the consequences of their conduct within the judicial system. *See* generally *Steinfeld v. Steinfeld*, 565 So.2d 366 (Fla. 4th DCA 1990); *Landers v. Landers*, 550 So.2d 554 (Fla. 5th DCA 1989); *Meloan v. Coverdale*, 525 So.2d 935 (Fla. 3d DCA 1988). Here appellant abused the system through inequitable conduct which resulted in needless litigation and legal fees. She cannot now avoid the consequences of that conduct by using her diminished financial status as a shield. Rather than impermissibly awarding the fee as a punitive measure, the award was based on the additional work made necessary by appellant. The award serves to avoid an inequitable diminution of former husband's share of the parties' assets.

Mettler v. Mettler, supra, at 498. See, also, *Sutter v. Sutter*, 578 So.2d 788 (Fla. 4th DCA 1991).

Prior to *Rosen v. Rosen*, *supra*, perhaps the most widely cited opinion on this issue was *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991). In that case, the parties expended marital assets on what the court classified as "avoidable litigation," which would ultimately have the effect of impairing the welfare of the parties' four minor children. The court excoriated the attorneys and the court below for allowing the litigation to get out of hand:

Since we authorize the trial court to consider the current financial condition of the parties on remand, we discuss what will surely be this couple's biggest economic problem in the future. The attorneys' fees at trial in this case approached $60,000. Post-trial attorneys' fees must also be significant.

This couple has four children that need all the care and education that money can buy. Nevertheless, this couple has spent--and our system of divorce has permitted them to spend--roughly 50% of their entire savings on a divorce battle over a big stamp collection and a house full of Hummel figurines. Unless the couple sells their collections to pay their attorneys, it appears that either the attorneys must defer their fees or the parties will ultimately be forced to use virtually all of the equity in their children's homestead to pay for this Pyrrhic victory.

Admittedly, many people approach divorce from a very emotional perspective. It is not the purpose of our system of justice, however, to augment those emotions. It is at best tolerable when our system allows a childless, wealthy couple to engage in extended, expensive divorce litigation, seemingly as a form of perverse entertainment. *See* generally *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987). It is entirely another matter when our system allows families to spend limited resources that are needed for the welfare of their children on avoidable litigation.

If the attorneys involved in this case had represented a litigation-sophisticated business, they would have been required to analyze the issues at the beginning of the dispute and develop a cost-effective method to resolve those issues and end the dispute. The business would have demanded an estimation of the fees and costs and asked for a method to minimize those nonproductive expenses. Florida's families are entitled to legal advice that is as sensible and cost-effective as that given to Florida's corporations.

Although we believe this case is the great exception and not the rule, it is an example of the stereotype invoked by the public to unfairly discredit the entire marital bar. We are convinced that both the marital bench and bar are strongly committed to an

> efficient and effective system of divorce. Nevertheless, the system would sometimes work with greater efficiency if at the outset of a divorce proceeding the parties understood the probable cost of the impending litigation and also understood that, no matter who is ordered to pay the attorneys, the payments will reduce either marital assets or future earning capacity that may be needed to pay child support or alimony. ...

Wrona, supra, 696-7.

The language in all of these opinions dovetails with the language used by this court in *Rosen.* In all of these cases, the appellate courts are extending Florida Stat. §61.16 beyond the rote need and ability to pay, and requiring the trial courts to consider all equitable factors necessary to do equity and justice between the parties. In *Rosen*, that meant denying the wife's request for fees. In countless cases decided in the years preceding *Rosen*, that often meant awarding fees to a spouse based upon the other spouse's litigiousness or vexatious conduct. The opinion below is not an extension of *Rosen*. Rather, *Rosen* is a ratification of the substantial body of law which preceded it, but which did not directly apply to the specific facts before the court when it authored that opinion.

Conversely, the Husband's reliance on *Aue v. Aue*, 685 So.2d 1388 (Fla. 1st DCA 1997), is misplaced. *Aue* was decided a few months prior to the

publication of this Court's opinion in *Rosen, supra*. That court did not have the benefit of this Court's discussion of the broad range of discretion the trial court possesses when considering a request for fees and costs.

Further, the opinion only states that "[p]rior to the entry of final judgment the former husband offered to pay..."[3] certain sums as alimony and child support. The opinion does not state when that offer was made, and in fact, the language used leads to an inference that the offer was made after the conclusion of the trial but prior to the entry of the final judgment. That is a monumental distinction. In this case the Wife offered, prior to the initiation of any proceedings, to walk away from the marriage with no marital assets, minimal child support, and no spousal support or award of fees and costs whatsoever. She repeated this offer during the proceedings. Unlike *Aue*, this entire proceeding could have--and indeed should have— been avoided.

In any event, the Wife here attempted, in good faith and in substantial detriment to her financial wherewithal, to leave this marriage with no marital assets. She attempted to resolve all issues by asking for nothing and leaving with nothing. There was no possibility that the Husband could do better by

[3]Aue v. Aue, supra, at 1388.

litigating. All he could do was waste money. And that is precisely what he did.

More instructive and more compelling is the discussion contained in the concurring opinion of Judge Polen in *Oldham v. Oldham*, 683 So.2d 579 (Fla. 4th DCA 1996). In that case the court reversed the equitable distribution and also remanded for a redetermination of the attorneys' fees awarded to the wife. Judge Polen, concurring specially, provided a cogent analysis of the attorneys' fee issue in the context of an unreasonable rejection of a settlement offer. Using an analysis that uncannily foreshadowed this Court's Rosen analysis, Judge Polen stated:

> I am also constrained to agree that the reversal of the property awards requires us to reverse the attorney's fee award to the wife as well. But for that, I would not only have affirmed the trial judge's award of a portion of the wife's attorney's fees, but would endorse the method by which he determined a reasonable fee.
>
> In doing so, I would emphasize that in an appropriate dissolution case, as here, once the issue of entitlement to attorney's fees has been determined utilizing the established "need and ability to pay" standard, the trial judge may consider whether litigation was unnecessarily prolonged by a party's unreasonable refusal to accept an offer of settlement, in setting a reasonable attorney's fee. An appropriate case, as pointed out by Judge Gross in his order (quoted in substantial part below), is one where the only issues between the parties are economic issues. This consideration is appropriate under several of the *Rowe [v.*

> *Rowe, 472 So.2d 1145 (Fla. 1985]* criteria, including results obtained and the time and labor required.
>
> In his Order Awarding Attorney's Fees, Judge Gross noted that the former husband made a pretrial offer to settle property issues, which offer was nearly $20,000 more favorable than the former wife's ultimate equitable distribution award. After the settlement offer was rejected, the former wife's attorneys expended an additional 120 hours litigating the case. Primary physical custody of the parties' child was never an issue. In determining a reasonable fee to the former wife, the court therefore sought to "impose economic sanity on this field by saying that at some point in time the wife has to act responsibly and bear the risk of rejecting reasonable offers of settlement." In this regard, Judge Gross considered the former wife's rejection of the more favorable offer of settlement in the context of the results obtained criterion of *Rowe,* and held the former wife responsible for 60% of her attorney's fees.

Oldham v. Oldham, 683 So.2d 579, 581 (Fla. 4th DCA 1996), specially concurring opinion of Judge Polen.

Oldham, Rosen, and Wrona provide a road map for this issue. The fact that the Husband would have left this marriage in a far better financial position had he accepted the Wife's numerous offers to settle cannot be seriously disputed. Nor can it be seriously disputed that the Wife did not want to litigate. Ultimately, this Court must ask: Why did this litigation occur? Who was responsible for the exorbitant fees that were generated in this case? The trial court determined that the neither the Wife nor her counsel were

responsible. The Wife, at all times, attempted to conclude the proceedings with minimal conflict. The Husband, on the other hand, litigated for the sole apparent purpose of litigating, even though he had no justiciable claims and risked exposing his valuable assets which were acquired during the marriage. Accordingly, the culpable parties were properly assessed responsibility for the wasteful expenditure of fees and costs in this proceeding.

Pursuant to all relevant authorities, the Husband was properly ordered to assume responsibility for a substantial portion of the Wife's fees and costs. That determination should be affirmed.

II. THE TRIAL COURT HAS THE INHERENT AUTHORITY TO SANCTION THE HUSBAND'S COUNSEL FOR THE WIFE'S FEES AND COSTS.

When a party brings a frivolous legal proceeding, societal resources–court personnel and facilities, judicial time, jury time–must be devoted to the proceeding. Further, a legal proceeding imposes costs on the other party, including time, legal fees, and in some cases, unwanted publicity.[4] Fee shifting statutes are helpful, but the relief provided is often inadequate, incomplete, or technically unavailable.

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[4]Crystal, Limitations on Zealous Representation in an Adversarial System, 32 Wake Forest L. Rev. 671, 680 (1997).

There are several factors which justify sanctioning lawyers in egregious cases. First, lawyers are officers of the court who have duties not only to their client, but also to the legal system. Imposing sanctions on lawyers for participating in frivolous contentions reflects the principle that lawyers have obligations beyond their clients. Second, the lawyer is normally an active participant in the client's decision making process. Imposing sanctions on both the lawyer and the client recognizes this joint decision making process. Indeed, with respect to certain tactical matters, the lawyer, rather than the client, has the authority to make the decision. In these cases, the lawyer properly bears responsibility. Third, in some cases, clients may not have sufficient assets to satisfy any award of sanctions. Sanctions directed only against the client in these cases would be insufficient to deter frivolous legal contentions[5].

A. The State of Florida recognizes the "bad faith" exception to the American Rule regarding attorneys' fees and costs.

Pursuant to Rule 4-3.1, Rules Regulating the Florida Bar, an attorney "...shall not bring or defend a proceeding, or assert or controvert an issue

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[5] *Id.*

therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." This case represents a total abrogation of that duty.

Fortunately, the trial court is not powerless when confronted with that abrogation. Although Florida adheres to the so-called "American Rule" regarding the award of attorney's fees in civil litigation, which provides that attorneys' fees may only be awarded pursuant to a contract or statute, *see*, *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796), this State also recognizes the various exceptions to that rule. The exception relevant to this proceeding is the "bad faith" exception.

The bad faith exception is a necessary concomitant of the inherent powers doctrine. This Court expressly acknowledged the breadth of that doctrine in *Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994). *See,* also, *Rose v. Palm Beach County*, 361 So.2d 135 (Fla. 1978). This court applied the doctrine in *Walker v. Bentley*, 678 So.2d 1265 (Fla. 1996) ("this Court has repeatedly found that the power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and

integrity of the judiciary"). See, also, *Burk v. Washington*, 713 So.2d 988 (Fla. 1998).

The Third District Court of Appeal recognized the inherent powers doctrine in *Rodriguez v. Thermal Dynamics, Inc.*, 582 So.2d 805 (Fla. 3rd DCA 1991):

> The trial court's order of dismissal was obviously entered in the exercise of its inherent authority to manage and control its docket. We respect that right and duty, and observe that in the event of future substantial derelictions by Rodriguez or his counsel to thwart or prevent the progression of this case, the trial court will be authorized to exercise its inherent authority to dismiss the action.

Id., at 806.

In *U.S. Savings Bank v. Pittman*, 86 So. 567 (Fla. 1920), this Court applied the bad faith exception and reversed a final judgment of foreclosure. The Court also awarded the party attorneys' fees which were ordered to be paid by counsel who had engaged in unnecessary litigation subsequent to the entry of the final judgment. *Id.*, at 573. That case represented the earliest reported application of the inherent powers doctrine in the State of Florida.

Although the doctrine remained dormant for several decades, the Third District Court of Appeal resurrected that exception in *Sanchez v. Sanchez*,

435 So.2d 347 (Fla. 3d DCA 1983). In that case, the court expressly held that the trial court has the inherent authority to assess a party's attorneys' fees and costs against the opposing party's attorney when that attorney has precipitated wasteful litigation. In *Sanchez, supra,* the court determined that the course of conduct pursued by counsel could not have been authorized by the client, as the Code of Professional Responsibility (now, the Rules Regulating the Florida Bar) requires an attorney to withdraw rather than accede to a request to pursue baseless, vexing litigation. *Id.* at 349-350.

Over a decade later, in *Patsy v. Patsy*, 666 So.2d 1045 (Fla. 4th DCA 1996), the Fourth District Court of Appeal also found an inherent power to assess attorneys' fees against counsel for litigating in bad faith. In that case, the sanctioned attorney filed a motion to disqualify opposing counsel, which resulted in a finding by the trial court that the motion had no factual basis and was filed solely for the purpose of delaying the proceedings. The trial court assessed attorneys' fees and costs totaling $1870. *Id.*

The Fifth District Court of Appeal applied the doctrine in *Emerson Realty Group, Inc. v. Schanze*, 572 So.2d 942 (Fla. 5th DCA 1990). In that case, the court reversed an order of dismissal and directed the trial court to

impose on counsel a reasonable fee incurred by the opposing party after the wrongful dismissal of its lawsuit and the appeal. More recently, in *Lathe v. Florida Select Citrus, Inc.*, 721 So.2d 1247 (Fla. 5th DCA 1998), the court responded to the argument that counsel may not be sanctioned unless he is held in contempt of court. The court stated:

> He is wrong. A trial court has inherent authority to order an attorney, who is an officer of the court, to pay opposing counsel's reasonable attorney's fees incurred as a result of his or her actions taken in bad faith.

Id., 1247.

The Third District Court of Appeal has actively enforced attorneys' fees awards entered pursuant to the inherent powers doctrine. The court applied the doctrine in *Smallwood v. Perez*, 735 So.2d 495 (Fla. 3d DCA 1999), *pet. rev. den.*, 735 So.2d 1287 (Fla. 1999); and *Moakley v. Smallwood*, 730 So.2d 286 (Fla. 3d DCA 1999), *pet. rev. gr.,* 741 So.2d 1146 (Fla. 1999). *See*, also, *Goldfarb v. Daitch*, 696 So.2d 1199, 1205 (Fla. 3d DCA 1997) ("...this case nevertheless falls under the rule that when an attorney acts in his own interest and not on behalf of his client, the court may use its inherent power to enter an attorney's fees award against such an attorney to recover for the effort involved in undoing or correcting the results of the unauthorized acts").

To date, the Second District Court of Appeal has not definitively addressed the issue. *American Bank of Lakeland v. Hooven*, 471 So.2d 657 (Fla. 2nd DCA 1985), is inapplicable to this proceeding. In that case, fees were assessed against a party, and not against counsel. The opinion does not address the inherent authority of the court to enter orders necessary for the administration of justice.

Israel v. Lee, 470 So.2d 861 (Fla. 2nd DCA 1985), is likewise distinguishable. *Israel, supra*, dealt with an award of fees in an appeal, decided pursuant to the prevailing party language found in Rule 9.400, Fla.R.App.P. Neither this rule nor that language are applicable to this proceeding. There is no reference anywhere in that opinion to any misconduct or bad faith litigation that occurred in the appellate court. Clearly, *Israel, supra*, is not applicable to this case.

The First District Court of Appeal is also inconclusive. *Miller v. Colonial Baking Co. of Alabama*, 402 So.2d 1365 (Fla. 1st DCA 1981), relied upon by Haber, is inapplicable. There was no finding in that case that the sanctioned attorney had engaged in bad faith or unnecessary litigation. The rule of law announced in that case was merely a general statement describing the

"American Rule" on attorney's fees, with no discussion of the numerous exceptions to the rule. The analysis in *Miller, supra*, is too limited to establish that court's position. The Third District Court of Appeal interpreted these cases similarly in *Moakley v. Smallwood, supra*, at 287.

The sanction imposed in this case is completely justified by the record. It is documented and undisputed that the Wife wanted nothing more than to get a divorce and go her own way.[6] Although she was statutorily entitled to one-half of the active appreciation in the Husband's retirement plans during the marriage[7], she was willing to walk away with nothing. Further, pursuant to the statutory child support guidelines, the Wife was entitled to over $800 per month in child support.[8] All she requested, however, was $50 per week. She did not want to go through the trauma of a contested divorce, and she did

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[6]The Husband's argument that the Wife's failure to disclose her financial condition at the time that the initial offer was conveyed somehow justified the proceedings below is specious. As the trial court observed, all he had to do was send a letter stating that the offer was under consideration pending the receipt of financial disclosure. Instead, the Husband chose to litigate.

[7]The appreciation of these assets due to the Husband's marital labor exceeded $365,000. [R1. 435-436].

[8]This sum was reduced by the trial court because it expected contributions from the Wife's parents. [T8.605].

not want to expend the funds necessary to pursue all of her legal rights upon dissolution. She just wanted to walk away. But the Husband and his counsel would not allow her that option.

This case represents the model of avoidable, unnecessary, and wasteful litigation. From the inception, there were no justiciable issues. There was no good faith attempt to extend the limits of existing law. No argument was made for modification of existing law. There was never a suggestion that existing law should be overturned. The Husband requested rehabilitative alimony, but offered no rehabilitative plan. He requested permanent alimony, but showed no need for spousal support, and no ability on the part of the Wife to pay. He requested $25,000 in lump sum alimony, but ultimately spent approximately $45,000 and cost the parties cumulatively over $100,000 in fees and costs seeking that award. Does it make any realistic economic sense whatsoever for the Husband to cash in a $40,000 retirement plan in order to pursue a baseless claim for $25,000? Can this be classified as anything other than frivolous litigation? Is the trial court powerless when presented with that evidence?

This was litigation for the sake of engaging in litigation, and appears to be little more than an attempt by counsel to earn a fee. Indeed, as the trial court properly stated over and over again, even if the Husband were to somehow prevail on his alimony claim, he would have been giving up--and, indeed, did give up--far more than he could have gained. He was risking nearly $200,000 in assets, plus the payment of increased child support and the expenditure of additional attorneys' fees, for a minuscule chance to prevail on what ultimately became--post-trial--a request for $25,000 in lump sum alimony. Whether viewed in 20/20 hindsight at the end of the case or at the inception of the proceedings, the conclusion is inescapable. This litigation should never have occurred. Unfortunately, it did occur.

Whether the Husband or his counsel bears greater responsibility for the outrageous conduct of this case may never be known. In truth, it does not really matter. The Husband's attorney has a responsibility to counsel the Husband, and to withdraw if the Husband insists upon pursuing frivolous litigation. There was, apparently, a total dereliction of that duty. There is no evidence in the record to suggest that this duty was even minimally discharged.

Rather, the record shows that counsel sought and obtained numerous continuances; engineered the disqualification of the predecessor trial court judge; and at all times failed or refused to transmit a counter-proposal to the Wife's settlement overtures. This case was conducted by the Husband and his counsel in a manner totally repugnant to the admonitions in *Wrona*. Only the Husband's counsel, however, can be expected to have read *Wrona* prior to embarking upon this strategy. Accordingly, until an alternate factual basis is demonstrated, the trial court properly held the Husband and his counsel jointly and severally liable for the unnecessary fees and costs incurred in this proceeding.

Apparently, the Florida Legislature agreed wholeheartedly with the analysis of the Third District Court of Appeal. Effective October, 1999, Florida Stat. §57.105, now closely parallels that court's holding in this case. That statute now provides:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee 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.
>
> However, the losing party's attorney is not personally responsible 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....

Application of that statute to these facts would have resulted in the same outcome as the trial court's sanction through the use of its inherent powers. As the trial court found, on ample evidence, there was no basis for the Husband's claims. The proceeding was frivolous from the beginning. It was avoidable, unnecessary, and wasteful. Florida courts should properly sanction counsel who engage in that conduct.

B. Imposition of sanctions against counsel in this case is consistent with Federal and State law decisions.

The leading authority on inherent powers is *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (U.S. 1980). In that case, the United States Supreme Court described the inherent powers of federal courts as those which "are necessary to the exercise of all others." The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice

and in maintaining the authority and dignity of the court." 447 U.S., at 764, 100 S.Ct., at 2463. The Court further explained that in narrowly defined circumstances federal courts have inherent authority to assess attorney's fees against counsel in response to abusive litigation practices. 447 U.S., at 765, 100 S.Ct., at 2463.

Further, the Court recognized that the power of a court over members of its bar is at least as great as it is over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse the judicial process. 447 U.S., at 766, 100 S.Ct., at 2464.

As the Court explained, the bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. Bad faith may be found not only in the actions which led to the lawsuit, but also in the conduct of the litigation. *Id.* That is precisely what happened in this case.

The Supreme Court revisited the inherent powers doctrine in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In that case, the Court explained that certain implied powers must necessarily result

from the nature of their institution, powers which cannot be dispensed with in a Court because they are necessary to the exercise of all others. For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. 501 U.S. 32, 23, 111 S.Ct. 2123, 2132.

The Court cautioned that because of their potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. Outright dismissal of a lawsuit is a particularly severe sanction, yet it is within the court's discretion. Consequently, the less severe sanction of an assessment of attorney's fees is undoubtedly within a court's inherent powers as well. 501 U.S. 32, 45, 111 S.Ct. 2123, 2133.

While it is certainly true that some states have declined to adopt the bad faith exception as an inherent power, there appear to be more states that have adopted that rule. Indeed, in *Johnston v. Arbitrium (Cayman Islands)*

Handels AG, 720 A.2d 542 (Del. 1998), the Supreme Court of Delaware affirmed a fee award of over $1.6 million dollars based upon the bad faith exception to the American Rule.

In *CFM of Connecticut, Inc. v. Chowdhury*, 685 A.2d 1108 (Conn. 1996), the Supreme Court of Connecticut reaffirmed its adherence to the bad faith exception to the American Rule, and the application of that exception to counsel engaging in bad faith litigation.

Likewise, in *New Mexico State Highway and Transportation Dept. v. Baca*, 896 P.2d (N.M. 1995), the Supreme Court of New Mexico recognized that both trial and appellate courts must have inherent authority to impose a variety of sanctions on both litigants attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings. *Id.*, at 1151. The court upheld the right of a trial court to award attorney's fees in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation. *Id.*, at 1152.

Similarly, in *Wilson v. Henkle*, 724 P.2d 1069 (Wash.App. 1986), a Washington appellate court held that a Washington court has the inherent power to assess the litigation expenses, including attorney fees, against an

attorney for bad-faith litigation conduct. *Id.*, at 1077. The court recognized that the trial court did not have authority to conduct disciplinary proceedings, but nonetheless had the authority and duty to see to the ethical conduct of the attorneys practicing before it. *Id.*

These decisions demonstrate that the trial court's order in this case is entirely consistent with the treatment of this issue in federal and state courts throughout the United States. Frivolous litigation is subject to sanctions. Sanctions include an award of attorney's fees, and that award may be entered against counsel for the litigious party.

Finally, it is appropriate to enter the sanctions in the case from which the misconduct emanates. One of the purposes for sanctions is to make the offended party whole. That result cannot be guaranteed in bar disciplinary proceeding. Moreover, that relief, if it comes at all, may be too late for the offended party. Further, the offended party has no standing in a disciplinary proceeding. The aggrieved party is reduced to the status of mere witness. Clearly, it is far more efficient and fair to all parties that the sanctions be entered in the court and case where the frivolous litigation occurred, and by the judge who witnessed first hand the conduct giving rise to the sanctions.

III. THE PROCEEDINGS COMPORTED WITH DUE PROCESS REQUIREMENTS.

Haber's claim that the proceedings in the trial court did not provide him with due process of law is entirely fraudulent. The trial court provided Haber with ample notice and at least two separate opportunities to be heard. As a tactical matter, he chose to avail himself of neither.

The Wife filed a motion requesting fees and costs pursuant to both Florida Stat. §61.16 and Florida Stat. §57.105. That motion provided notice to Haber that an award of fees could be entered against him, personally. The version of Florida Stat. §57.105 in effect at the time of the hearing specified that "The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney..." Florida Stat. §57.105 (1995). When Haber walked into that first hearing on fees and costs, he was already on notice that an award of fees could be entered against him.

At the conclusion of that March 14, 1996 hearing, the court specifically advised Haber that it was considering entering an award of fees against him based upon his conduct in the proceedings. The court stated:

> I'm considering awarding a part of these fees against counsel because I think this litigation was totally uncalled for, and totally unnecessary, and I don't know exactly who was responsible for carrying it on to this extreme... [T7.156].

Haber received notice from the Wife, and from the Court. Any suggestion that he was never on notice that an award of fees could be entered against him is fallacious.

The court did not enter an order after that hearing. Instead, it scheduled another hearing on May 23, 1996. ***Haber did not attend that hearing.*** At the conclusion of that hearing, the court announced its findings and the substance of its order. But the court still did not enter an actual written order.

Nonetheless, Haber filed a motion for rehearing. The matter was not addressed again until December, 1996. Still, no written order had been entered. On December 10, 1996, the court considered the motion for rehearing. Haber was provided an opportunity to be heard, but he instead relied on the attorney-client privilege as a defense. Haber maintained the position that he could not exculpate himself because he was constrained by the attorney-client privilege. At no time prior to or during that hearing did he ever request an in camera hearing, a hearing before a special master or other judicial official, or otherwise propose any means whatsoever to present his

testimony to the court. Instead, he maintained the position that because he could not divulge attorney-client confidences, no sanctions could be entered against him. That was the extent of his defense.

It was only after providing Haber two opportunities to be heard and nearly ten months of notice that an award of fees could be entered against him, that the court finally entered the order under review. During all of this time, Haber never once requested an opportunity to testify, whether by proffer, by sealed affidavit, in an ex parte proceeding, or otherwise. Accordingly, any alleged errors in the procedures utilized by the trial court were not preserved for review.

Due process requires notice and an opportunity to be heard. It does not require that the party take advantage of the opportunity to be heard. *Florida Bar v. Carricarte*, 733 So.2d 975 (Fla. 1999); *Florida Bar v. Daniel*, 626 So.2d 178 (Fla. 1993). Haber can make no credible claim that he was denied due process in this proceeding. The sanctions were properly imposed, and should be affirmed.

CONCLUSION

This was, as the trial court stated on countless occasions, a case that should never have occurred. The Wife offered more than the Husband could have ever acquired in litigation. The Husband spent and caused the Wife to spend more in attorney's fees and costs than he was even seeking from the Wife. Family litigation, just as in all litigation, must be approached with an eye toward settlement and a consciousness of the economic impact of the decisions and strategies being pursued.

Florida family law recognizes the equitable nature of Chapter 61 proceedings. Within that context, the assessment of fees against the Husband is not only authorized, but mandatory. The trial court would have abused its discretion had it not entered an award of fees against the Husband.

Likewise, Florida law also recognizes the duty of counsel to avoid frivolous litigation. Through the court's inherent powers, the trial court has the authority to fill in the interstices when rules and statutes are inadequate. That power is substantial, but the use of it is tightly circumscribed. It was properly used in this case when, after all of the evidence was received, the absolutely baseless position and ludicrous claims of the Husband were demonstrated. Perhaps the Husband could not be expected to know that his claims were

without merit. But his attorney should have known. And if he did not know, then he should have discovered that fact before $100,000 in fees and costs were incurred in the proceeding. The trial court's exercise of its inherent power was fully justified under the facts of this case.

The trial court's order awarding fees and costs should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Answer Brief was mailed on February 28, 2002, to Andrew Leinoff, Esquire, 1500 San Remo Avenue, Suite 206, Coral Gables, Florida 33146; Robert Barrar, Esquire, Rubin and Barrar, P.A., 333 N.E. 23rd Street,

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NOTE ON TYPE STYLE

This brief was prepared using Arial 14 pt. type, a proportional font.