IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,534
DCA CASE NO.97-334

DIOSDADO C. DIAZ and
DENNIS HABER, ESQ.,

Petitioners,

and

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

Respondents.
_____/

Initial Brief on the Merits of Diosdado C. Diaz

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CERTIFICATION OF TYPE AND INTRODUCTION

This Brief is prepared in Times New Roman (proportional type) 14pt.

In this Brief the Petitioner, Dennis Haber shall be referred to as "Haber." Petitioner Diosdado C. Diaz, shall be referred to as "Husband" or "DC." Respondent, Rina Cohan Diaz, shall be referred to as "Rina." Respondent Leinoff & Silvers, P.A. shall be referred to as "Leinoff." The Third District opinion herein ***Diaz v. Diaz***, 727 So. 2d 954 (Fla. 3d DCA 1998) shall be referred to as "***Diaz***." References to the record on appeal shall be designated (R.)

This Petitioner will not deal with the inherent authority to sanction lawyers, per se, as that is more properly dealt with by the attorney Petitioner, Haber. This Petitioner will deal with the extension of ***Rosen v. Rosen*** to permit an AWARD of fees as opposed to the denial of them for "bad faith" litigation, and will deal with the impact upon litigants where attorneys are made responsible for fees for failure to accept settlement offers. As these two issues are, in fact, interrelated they shall be sent with as a single point.

All emphasis in this Brief is added.

STATEMENT OF THE CASE AND FACTS

This Respondent adopts the statement of the Case and Facts as set forth by Petitioner Haber.

SUMMARY OF THE ARGUMENT

The opinion below engrafts an offer of judgment rule onto marital and family law cases, in violation of F.S. 45.061, and to the detriment of the parties and their attorney/client relationship. There is no legal basis to extend ***Rosen v. Rosen*** to permit ASSESSMENT of fees for litigation considered to be less than wise by trial courts. The chilling effect of the Third District opinion is extreme.

ARGUMENT

There is No Authority to Assess Fees
Against a Party For Unreasonable Refusal
to Settle; and to Assess Fees Against
A Party's Attorney in Such Circumstances
Destroys the Attorney Client Relationship

The impact of the underlying opinion herein cannot be overstated. In one day, the statutory prohibition against applying an offer of judgment rule to dissolution of marriage cases was superseded by the allowance of fee shifting based upon "inherent authority." In one opinion, offers of judgment made pretrial and prediscovery became paramount determining factors in fee hearings. In one opinion, this Court's reasoning in ***Rosen v. Rosen***, 696 So. 2d 697 (Fla. 1997) became the basis to ASSESS fees as opposed to deny them. In one opinion attorneys not only became guarantors of their client's positions, but had to fear

taking legitimate longshots that their client's wished to take to Court for fear of being held responsible for the fees of the other side. In one opinion, the necessity for disclosure was abrogated since if you made a REALLY good offer that the other side couldn't evaluate properly you could get fees even if they were the impecunious spouse. So many problems, derived from so few words.

The sole basis for the award of fees against the Husband in this case, where he was clearly the party with the lesser fiscal capacity, was that he failed to accept a reasonable settlement agreement, made pre trial, and that he pursued a "long shot" such that the expenditure of funds for the litigation rose, in the opinion of the trial judge, to the level of fiscal dissipation.

The legislature has dealt with offers of settlement in F.S. 45.061. In setting out a procedure for fee shifting for unreasonable rejection of compromise, the legislature placed into the law a number of significant safeguards. The first is that the offer of settlement cannot be a basis for fee shifting unless it is served more than 60 days after the service of a summons and complaint. Secondly, even where there is a better result achieved by the settlement than that of the rejected offer, the Court is required to evaluate whether there had been sufficient disclosure to enable the offeree to realistically evaluate the offer. The legislature specifically excluded even from that class of cases for which these regulated offers could provide an

independent basis for fees **all** cases related to dissolution of marriage , alimony, nonsupport, eminent domain or child custody.

Even had there been statutory authority to assess fees for unreasonable failure to accept a settlement offer in accordance with the F.S. 45.061 scheme, the extension to the within case would fail. The offer which was "unreasonably rejected" was made presuit and prediscovery. There was not even the basic exchange of mandatory disclosure to enable both parties to have the basics for evaluation. Although the original offer looked good, there are significant holes, to wit: the greatest advantage to the initial offer- extremely low child support- is an illusory judgment as it is modifiable at any time to reflect the support needs of the child involved. As child support is the right of the child, that judgment would not necessarily have even been accepted by the lower tribunal as there was no express reason for deviating from guidelines. And, the Husband had the right to investigate the possibility that he was entitled to alimony from his wealthy, voluntarily underemployed, spouse.

By assessing fees for unreasonable failure to settle, the lower tribunal and thereafter by affirming it the Third District, took a major leap from the language contained in **Rosen v. Rosen,** *supra*. In ***Rosen***, at pg. 8, this Court held that in situations where a court finds that an action is frivolous or spurious or was brought

primarily to harass the adverse party, the trial court has the discretion to DENY a request for attorney's fees to the party bringing the action. Accordingly, even though the Husband was the lesser fiscally able spouse, the findings of the lower tribunal would clearly support a DENIAL of fees to him. However, nothing in ***Rosen*** supports the leap to an award of fees even if the action is inappropriate. The primary factors for award still remain those set forth by F.S. 61.16 which, in the sections dealing with frivolity, also speak only to denying fees to a party not acting in good faith. In order to support an award of fees, there needs to be some supporting authority. [1] Although this Court held that proceedings under F.S. Chapter 61 are governed by fairness and equity, it did not hold that all law was abrogated in favor of a Judge simply choosing to do what he or she felt was best.

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[1]The current incarnation of F.S. 57.105(1999) effective October 1, 1999 may well support such an award, but it was not effective at the time of this fee award and has no application herein. At this time, at least parties are on notice of the potential for fees to be assessed against them for circumstances amounting to bad faith or frivolous litigation. That statute, however, still provides protection for a party litigating where the existing facts MAY reasonably lead to the relief sought- and thus the trial court's own finding that the alimony claim was at least a long shot would probably have protected the Husband even under the current law.

To provide equity and justice between parties, parties must be allowed to pursue their legitimate relief- and although they may not recover fees if they push the envelope to add the hammer of fees being assessed against them would place a hard chill on receipt of appropriate relief. Mrs. Canakaris could never have gotten her 15% of the marital assets if she were faced with this interpretation of the law. No lawyer would have taken her case. The law could not have evolved.

The legislature has taken great pains to limit recovery of fees in family law cases where inappropriate defenses were being interposed, but it should be noted that even in the contempt situation dealt with in footnote 3 of ***Rosen***, the legislature did not permit or mandate fees to be awarded AGAINST a noncompliant spouse.

Compounding the problem is the fee award against counsel. By assessing fees against counsel, an immediate conflict is set up between marital clients and their lawyers.

A client has the right to expect the zealous, unimpeded representation of counsel. In much the same way as this Court held that there must be absolute immunity for conduct occurring during a judicial proceeding because participants must be free to engage in unhindered communication and to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct; this Court must now

defend the right of litigants AND their counsel from participating in a lawsuit within the bounds of the law free from the fear of having to defend their actions in a motion for "***Diaz*** sanctions." *See*, ***Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Company***, 639 So. 2d 606 (Fla. 1994) It is critical that parties be able to pursue legitimate claims. It is critical that parties have their full attention and representation of their attorneys- without the attorneys feeling that they must hold back and be unduly cautious because to not do so will potentially result in personal exposure.

The Texas District Court in ***Bradt v. West***, 892 S.W. 2d 56 (Tex. App. 1st Dist. 1994) held that absent evidence that an attorney's conduct rose to the level of abuse of the system, an attorney should not be sanctioned for conduct taking place during the proceedings- because of the impact on the attorney/client relationship. It held, that "a litigant might be denied a full development of his case if his attorney were subject to the threat of [sanctions] for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he or she is entitled."

If this Court were to adopt the position set forth by the Third District, then from day one a client would have to wonder whether the advice to settle was based upon a reasoned legal opinion, or fear and self interest on the part of the lawyer.

The client trust in the unfettered representation of the lawyer is substantially eroded.

Further, the "***Diaz*** rule" will, in far too many instances, result in unrepresented parties. If an attorney even mildly disagrees with client strategy, fearing personal retribution for doing one's job, that lawyer is going to have to withdraw. With the huge problem already associated with pro se family law cases, this opinion if left to stand will only exacerbate the situation.

Access to the Courts means meaningful access. If a lawyer is timid, unduly watchful of his/her own self interest, then the access is not meaningful.

Further, if the extension in ***Diaz*** that a failure to settle even without discovery is grounds to warrant fees being assessed, then the preferred method for dealing with any case would be to send an early settlement offer that might look good without discovery. Fear may well settle some cases- but without disclosure how can those settlement agreements be in the best interest of the public? Full and fair disclosure is key to a valid and fair settlement. What litigant can appropriately settle without even a financial affidavit? What lawyer can provide adequate advice- any evaluation without even a financial affidavit would render one subject to a finding of prima facie malpractice.

Thus, the tension of ***Diaz*** must be resolved. How can a court control out of

control cases- but still preserve an attorney/client relationship that works and still preserve the dignity and integrity of the process? The answer lies in the available procedural rules- case management; discovery conferences- not in pitting lawyer against client and applying 20-20 hindsight to settlement offers.

The Husband does not mean to imply that settlement prospects have no place in assessing fees. As stated earlier, failure to accept a good settlement made after disclosure that would enable a reasonable opportunity to respond, may well be a basis for a failure to award fees. But, if there is a legitimate claim it is inappropriate for a Court to sanction a party for pursuing it. If it is within the law, then a party has a right to seek that relief. Unless and until alimony is abolished, a party with an arguable case for it has a right to go for it without fear of being slammed for exercising their right to access to the Courts.

In ***Aue v. Aue***, 685 So. 2d 1388 (Fla. 1st DCA 1997) that Court appropriately held that there was no basis or authority for denying fees in dissolution cases solely for the failure to accept an offer of settlement. There is no more right now to assess fees on that basis.

CONCLUSION

For the above stated reasons, it is respectfully requested that this Court quash the decision of the Third District in this case, explain and clarify this Court's decision in ***Rosen v. Rosen***, determine when - if ever- the failure to accept a settlement proposal may be considered by the lower tribunal, and reverse all awards of attorney's fees and costs.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to all counsel on the attached list.

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