ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,534
DCA NO. 97-334 (Third)

DIOSDADO C. DIAZ and
DENNIS HABER, ESQ.,

Petitioners,

v.

RINA COHAN DIAZ and
LEINOFF & SILVERS, ESQ.,

Respondents.
_____/

AMENDED
JURISDICTIONAL BRIEF OF
PETITIONER DIOSDADO C. DIAZ

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Diaz v. Diaz, 727 So. 2d 954 (Fla. 3d DCA 1999) is attached

TABLE OF CITATIONS

JURISDICTIONAL STATEMENT AND TYPEFACE NOTE

This Court has authority, in accordance with Article V, Section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(2)(A)(iv) to review decisions of the District Courts of Appeal where direct and express conflict exists between the decision under review and the decisions of other District Courts or of this Court. The conflict merely needs to be apparent from enunciated rules of law. ***The Florida Star v. B.J.F.***, 530 So. 2d 286 (Fla. 1988)

This brief is printed in Courier New 14 point.

STATEMENT OF THE FACTS AND CASE

Upon review of an Order assessing attorneys fees and costs against the husband and his counsel jointly in a dissolution of marriage action, the Third District affirmed holding that the Husband should have accepted a pre-suit settlement offer and that he should have known that his alimony claim which the lower tribunal deemed to be a "longshot" was baseless litigation for which it was appropriate to assess fees.

The precise nature of the litigation below is reflected in the opinion that is attached hereto. There are two facts not reflected in the opinion which are important considerations for this Court for the purpose of considering whether to actually take this case - the first is that the fee award was joint and several between attorney and client (not even the 50-50 which F.S. 57.105 would have supported had it been found that the claim was totally devoid of merit) and the second is that the attorney, Dennis Haber, WITHDREW prior to trial and still had fees assessed against him. He did not litigate this case- when his client still refused to settle after the discovery was in, he withdrew. It didn't protect him.

SUMMARY OF THE ARGUMENT

By its actual holding, despite the language that attempts to say that this opinion is not an attempt to engraft an offer of judgment analysis onto a dissolution of marriage action, the Third District created conflict. The Third District found that the lower tribunal was

authorized to affirmatively assess fees in accordance with F.S. 61.16 based upon the nature of the claims brought, stretching this Court's analysis in ***Rosen v. Rosen***, 696 So. 2d 697 (Fla. 1997) which only authorized denial of fees under circumstances where the litigation was found to be vexatious. Finally, the Third District found that lower tribunals had "inherent authority" to impose attorneys fees to the other side from attorneys acting within the scope of their employment and not in pursuit of frivolous claims, if the success of those claims was unlikely - in the absence of any authorizing statute or rule. In all of those conclusions, the Third District created conflict and created bad law that this Court should address and reverse.

ARGUMENT

Express and Direct Conflict Exists Between the Within Case and Decisions Of Other District Courts of Appeal and Of This Court in Three Respects:

A. A lower tribunal does not have authority to find that failure to accept a settlement offer in favor of pursuit of a "long shot" constitutes bad faith litigation so as to warrant an assessment of fees

The core of the decision of the Third District herein was that the Husband, who had the lesser financial capability than did the wife, inappropriately failed to accept a pre-suit offer that had him paying substantially less child support than he ultimately had to pay and gave him more assets than he ultimately got. He should have "known better" and thus he had to pay a large portion of the Wife's fees. The problem with that analysis is that the Husband had at least a colorable claim that perhaps a part of the trusts had commingled into marital assets and he might have been entitled to alimony. His own self support did not exclude him from that potential. *i.e.* ***Young v. Young***, 677 So. 2d 1301 (Fla. 5th DCA 1996) Although alimony was a longshot, it was not found to be frivolous by the lower tribunal, and was of substantial benefit to the Husband if he won. Yet he, and his lawyer, were effectively punished for pursuing legitimate claims. Although the Third District cites ***Aue v. Aue***, 685 So. 2d 1388 (Fla. 1st DCA 1997) with a mild attempt to distinguish it, the cases directly conflict. In ***Aue*** the

First District specifically stated that a spouse was not precluded from receiving fees even if there was an unreasonable refusal to settle. In that case, as here, the first analysis should have provided a basis to settle- but the First DCA appropriately found that failure to settle when there was at lease some basis not to do so was not a basis for assessment or denial of fees and the Third DCA, with 20-20 hindsight, assessed fees. The applications of the rules of law clearly conflict. Further, especially with pre-suit or early suit offers, it is nearly impossible to gauge with the same clarity as one can at the end of a trial. Initially, the equitable distribution issues were not as clear. There is a reason why dissolution of marriage actions are specifically excluded from the offer of judgment statute! Offer of Judgment analysis, rejected by the legislature for dissolution of marriage actions, should not be permitted to be adopted as it has been here, by caselaw.

B. The discretion to deny fees to a spouse on an equitable basis in accordance with this Court's interpretation of F.S. 61.16

in ***Rosen v. Rosen*** does not equate to a right to assess fees "equitably"

In ***Rosen v. Rosen***, 696 So. 2d 697 (Fla. 1997) this Court permitted a court to go outside of the strict need/ability analysis in dissolution of marriage actions to consider the conduct of a party in litigation when determining the amount of fees to be awarded, and stated that a lower tribunal would be justified in denying fees to a party who engaged in vexatious or harassing litigation. This is similar to the ability of a court under F.S. 61.16 to deny fees to a party who is unjustifiably defending a contempt action. Herein the Third District EXPANDED that reading dramatically to use it to authorize an award of fees to the other side. That opens an entirely new analysis and is not a mere application of the prior analysis of this Court. It is very different to say that an impecunious spouse cannot receive fees from a well intentioned defending spouse because to hold otherwise would be to encourage litigation where a winning party would also bear the insult of paying for the losing party's fees

on a baseless claim than it is to hold that an impecunious spouse who is pursuing arguable claims would have to pay the other side's fees. That new analysis does place Florida into a pure "prevailing party" standard- just the fear that the was expressed by Justice Overton in his partial dissent in ***Rosen***.

The ***Diaz*** application has a clear chilling effect on litigation. Pre-suit offers would be reviewed based upon full information standards, and as all involved in litigation know it is frequently not until later in a case that there is enough information to make a full decision. Of note here is that the offer was made before even mandatory disclosure had been exchanged. Without that basic information, which this Court has held essential in all cases, how can an opinion on settlement be responsibly formed?

C. No court has "inherent authority" to assess fees against an attorney on the basis of improper litigation decision making in the absence of Rule or Statute

The award of fees jointly between attorney and client was based upon the "inherent authority" of a lower tribunal to assess fees against attorneys. It is clear that there is no statute that authorizes the fees herein, as the claims were not found to be frivolous. [1]

As noted by Alan Stephens, Annotation, Attorney's Liability Under State Law for Opposing Party's Counsel Fees, 56 A.L.R. 4th 486 (1997) "a conflict is evident between the appellate districts in Florida on the question of whether courts have the inherent power to assess attorneys fees against counsel." Supporting the right are the Third and Fourth Districts, and opposing it are the Fifth, Second and First. Specifically, the following courts held that there was no such ability:

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[1] It should be noted that in accordance Laws 99-225, passed during the 1999 legislative session and signed by the Governor- F.S. 57.105 may justify the assessment of a 50-50 split of fees in cases with a finding that a claim was baseless as of 10/1/99. That, however, was not the law as of the time of the decision under review. The fact that the substantive change was made is further proof that without it, there was no authority to make this type of assessment or there would have been no need for legislative reform on the issue.

State v. Harwood, 488 So. 2d 901 (Fla. 5th DCA 1986); ***Israel v. Lee,*** 470 So. 2d 861 (Fla. 2d DCA 1985); ***American Bank of Lakeland v. Hooven,*** 471 So. 2d 657 (Fla. 2d DCA 1985); ***Miller v. Col. Baking Co.,*** 402 So. 2d 1365 (Fla. 1st DCA 1981).

The ability to assess attorneys' fees against counsel, especially for something like wrongful refusal to settle, sets up direct conflict between attorney and client. Attorneys are charged with zealously representing their clients. They may not settle without their client's direct approval, and they can't force a client to settle. If the client has a colorable claim and wants to pursue it- who is the attorney to say no? Now, if the attorney can be hit with the fees for the other side, the attorney cannot move forward with that zealous representation. It will create tentative representation, not zealous representation. Further, if the attorney withdraws it leaves the courts with more pro se litigants- when the claim is not frivolous! (And in this case, even withdrawing was no shield.) An

attorney should be permitted to represent a client, and a client should expect the attorney to represent him/her to the full extent of his/her talents within the bounds of the law. So long as the claim is not palpably frivolous, then there should be no right to assess fees against the attorney. If there is that risk, then how can a client ever trust the advice he or she is receiving is based upon a fair evaluation of the facts and not fear or self interest of the attorney that a judge will second guess them later and assess fees? The whole basis of the attorney client trust is undermined by a fee award such as is set forth here.

CONCLUSION

This Court can take this case based upon any of the conflicts set forth above. It is respectfully requested that this Court do so, because this case totally undermines the attorney client trust and improvidently allows 20-20 hindsight to engraft an offer of judgment theory on to dissolution of marriage actions.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was faxed and mailed this 14th day of June, 1999 to Andrew M. Leinoff, Esq., Counsel for Leinoff & Silvers, P.A., 1500 San Remo Avenue, Suite 206, Coral Gables, FL 33146; Robert Barrar, Esq., Counsel for Rita Cohan Diaz, 333 NE 23rd St., Miami, FL 33137; Helen Ann Hauser, Counsel for Dennis Haber, 3250 Mary Street, Suite 400, Coconut Grove, FL 33133 and to Jane Estreicher, Esq.[2], Chair, Family Law Section of The Florida Bar, Hastings and Estreicher, 600 1st Ave N Ste 306, St. Petersburg, FL 33701-3609.

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by: _____
DEBORAH MARKS
Bar No. 351490

[2] The Family Law Section of The Florida Bar filed a Motion in the Third District to Appear as Amicus Curiae at the time of the filing of the Motion for Rehearing which indicated that they would pursue their attempt to appear as Amicus Curiae in this Court should this Court accept jurisdiction.

Diosdado C. DIAZ and Dennis Haber, Esq., Appellants,
v.
Rina Cohan DIAZ and Leinoff & Silvers, P.A., Appellees.

No. 97-334.

District Court of Appeal of Florida, Third District.

Nov. 4, 1998.

Rehearing Denied April 7, 1999.

Following dissolution, former wife sought award of attorney fees from former husband and his counsel. The Circuit Court, Dade County, Eleanor Schockett, J., ruled for former wife, and defendants appealed. The District Court of Appeal, Cope, J., held that: (1) evidence was sufficient to support court's finding that husband was frivolous in bringing action, as required to warrant award of attorney fees, and (2) imposition of attorney fees on husband's counsel was proper, absent showing that husband misled counsel into proceeding with action.

Affirmed.

[1] DIVORCE ⚿288
134k288
Evidence, offered in post dissolution proceeding for attorney fees, that wife made generous settlement offer before litigation began, that husband's assets were marital assets, and that wife's major assets were exclusively nonmarital assets, was sufficient to support court's finding that husband was frivolous in bringing dissolution action, as required to warrant award of attorney fees to wife. West's F.S.A. § 61.16.

[2] DIVORCE ⚿189
134k189
Wife was entitled to award of attorney fees from counsel who represented husband in frivolous dissolution action, absent any indication that husband misled counsel into proceeding with litigation.

[2] DIVORCE ⚿288
134k288
Wife was entitled to award of attorney fees from counsel who represented husband in frivolous dissolution action, absent any indication that husband misled counsel into proceeding with litigation.

***955** Deborah Marks, North Miami; Dittmar & Hauser and Helen Hauser, Coconut Grove, for appellants.

Leinoff & Silvers and Mark Gatica; Ellis Rubin, and Robert I. Barrar, Miami, for appellees.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

COPE, Judge.

In this post-judgment proceeding, the former husband in a dissolution action and his counsel appeal an assessment of attorney's fees against them. We affirm.

Appellant Diosdado Diaz and appellee Rina Cohen Diaz were married in 1984. At the time of the marriage, Rina owned certain shares of stock in her father's privately held corporation and was the beneficiary of a trust established by her father. The trust held shares of the father's corporations and was revocable. However, Rina received the income from the trust which was used to supplement the income she was then earning as a member of the Dade County State Attorney's office. Because the shares were already owned and the trust had been previously established, the parties entered into a pre-nuptial agreement whereby Diosdado waived any claim to any interest in shares of Rina's father's corporations. At the time of the marriage Diosdado was a career police officer.

During the marriage, the parties maintained separate finances in all respects, except that the parties filed joint income tax returns. The parties resided in a home already owned by Rina for which she continued to pay all expenses. Because Diosdado consequently had few expenses, he was able to make substantial contributions to retirement and deferred compensation funds for which he was eligible. Rina left the State Attorney's office and opened a private law practice.

During the marriage the parties maintained a comfortable lifestyle, living in the home Rina owned and driving modest cars, but enjoying some fine

dining and travel which was paid for by Rina's parents. Rina's family provided other gifts for the family, but the parties also incurred $36,000 in credit card debt.

In 1989 the parties' daughter was born. Rina became essentially a full-time caregiver and earned very little income from her law practice. Because of Rina's separate income from the trust it was not necessary for Rina to practice law.

The parties separated in June 1994, and in the fall Rina made a pre-suit settlement offer in hopes of resolving the dissolution of marriage by agreement. Rina requested that Diosdado pay approximately $200 per month in child support, an amount well below the child support guidelines, and maintain health insurance for the child. Under the proposal, neither party would receive equitable distribution or alimony from the other. During the marriage Diosdado had accumulated $325,000 in pension and deferred compensation benefits, which were marital property; under the settlement proposal, these assets would have remained his alone. Rina's significant assets, by contrast, were all nonmarital. Diosdado refused the settlement offer and made no counteroffer.

In November 1994, Rina filed a petition for dissolution of marriage. Diosdado filed a counterpetition in which he asked, among other things, for permanent alimony. Both parties agreed that Rina should have primary residential responsibility for the child.

Diosdado thereafter attempted to obtain discovery relating to the trust, the assets of the trust, the income earned thereby and the assets of the corporations. Eventually, Diosdado conceded that the trust and its assets were nonmarital property and ceased his efforts to make them part of the marital estate. He continued to press his claim for alimony. In March 1995, Rina made a subsequent offer to settle for $500 per month in child support plus health insurance, but with each party maintaining their assets. That offer was also rejected and no counteroffer made. Mediation was unsuccessful.

The case ultimately went to a three-day trial. In the final judgment of dissolution, the trial court denied Diosdado's alimony claim. The court found that $325,000 of Diosdado's ***956** pension and deferred compensation plans were marital and awarded Rina a twenty-five percent share. The court ordered Diosdado to pay $600 per month in child support, pursuant to the guidelines, plus health insurance. Both parties appealed and the judgment was affirmed.

Pursuant to a reservation of jurisdiction, the trial court conducted an evidentiary hearing on the wife's motion to assess attorney's fees against Diosdado and his counsel. [FN1]

> FN1. Counsel on this appeal did not serve as trial counsel.

[1] The trial court found 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." The court then determined that the husband and his counsel should be responsible for paying $40,000 of the wife's attorney's fees and court costs, leaving the wife responsible for $32,000 in attorney's fees and court costs. The husband and his counsel have appealed, contending that there was no authority for such an award, and alternatively, that under the circumstances the attorney's fee award is unreasonable.

We begin with the Florida Supreme Court's recent decision in Rosen v. Rosen, 696 So.2d 697 (Fla.1997), which interpreted section 61.16, Florida Statutes. Section 61.16 authorizes the trial court, "after considering the financial resources of both parties, [to] order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter...." § 61.16(1), Fla. Stat. (Supp.1996). The court said:

> [P]roceedings under chapter 61 are in equity and governed by basic rules of fairness as opposed to the strict rule of law.... The legislature has given trial judges wide leeway to work equity in chapter 61 proceedings. 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.

... 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.

696 So.2d at 700-01 (citations omitted; emphasis added). [FN2]

FN2. Although the Rosen decision was written in the context of a denial of attorney's fees, the principles outlined there also authorize an award of fees to the opposing side, if there is an appropriate showing.

Here the wife made a presuit effort to settle this case with a very generous settlement offer. The trial judge concluded, and we agree, that under any reasonable analysis at the start of the case, it should have been clear that the husband could not do better, and most likely would do much worse, by litigating the case. Despite overwhelming odds of a litigation disaster, the husband rejected settlement, made no counterproposal, ***957** and embarked on an expensive and wasteful litigation strategy.

From a child support standpoint, the wife proposed that the husband pay approximately $200 per month in child support, an amount which was far below the child support guidelines. It should have been clear at the outset that in the event of litigation, the husband likely would have to pay guidelines support, and that was the ultimate result. In the end Diosdado was ordered to pay $600 per month.

From an equitable distribution standpoint, the marital home, the wife's stock, and the trust assets were all the wife's separate nonmarital property and had maintained that separate status throughout the marriage. The only significant marital asset was the portion of the husband's pension and deferred compensation plans to which he had contributed substantially during the marriage. The marital portion of those assets was valued at approximately $325,000. The wife's settlement proposal would have allowed the husband to retain the entirety of those assets. It should have been clear that by electing to litigate, presumptively the wife would be entitled to one-half of the $325,000 sum. In the end, after trial, the court awarded one-fourth of those assets to the wife. [FN3]

FN3. In the final judgment, the trial court found equitable reasons to deviate from the otherwise presumptive fifty-fifty division.

From the standpoint of alimony, the trial court concluded that the claim for permanent periodic alimony was at best a longshot. This marriage lasted ten years from the date of marriage to date of separation. It falls into the so called "gray area" for permanent alimony. See Victoria M. Ho & Janeice T. Martin, Appellate Court Trends in Permanent Alimony for "Gray-Area" Divorces, 71 Fla. B.J. 60 (Oct.1997). Here, the husband was forty-four years old at the time of the final hearing, productively employed with an increasing income, and in good health. Although the wife had the greater income, the husband's income was in the $55,000 to $80,000 range in the three years prior to the decree. The husband's request at the conclusion of the trial was for $500 per month permanent periodic alimony plus a $15,000 lump sum award. Both requests were refused.

The trial court concluded that at the outset of this case, it should have been obvious that (1) the wife had made a generous and desirable settlement offer; (2) there was no realistic possibility to do better in litigation; and (3) there was a high probability that the husband in litigation would do much worse. In litigation, it was probable that the $200 per month child support figure would increase to the much higher guidelines level; that fifty percent of the marital share of the husband's pension and retirement plans would be placed at risk; and that the permanent alimony claim was unlikely to succeed. The trial court concluded that the majority

of the time spent on litigation in this case was baseless. We conclude that this determination is supported by competent substantial evidence.

We acknowledge that section 61.16, Florida Statutes, is not intended to operate as an offer-of-judgment statute. Thus, the fact that the husband obtained a bad result in litigation does not, in and of itself, warrant an assessment of attorney's fees against him. See Aue v. Aue, 685 So.2d 1388 (Fla. 1st DCA 1997). However, the award in this case is not based simply on the poor result. Instead, the trial court analyzed the issues in the case as they should have reasonably appeared at the outset.

The husband counters that at the outset of the case, the husband had less- than-complete information about the parties' financial positions because of the parties' unusual financial arrangements. The husband did, of course, have the parties' joint income tax returns, but he points out that he was not privy to the wife's other financial records.

However, as the court noted, in the presuit stage, the husband never made any request for additional information so as to allow him to evaluate the reasonableness of the wife's settlement proposal. The husband never countered with a settlement proposal of his ***958** own. The husband instead opted for litigation, unproductive discovery battles, and pursuit of claims with no reasonable prospect of success.

[2] We turn next to the appeal of the husband's counsel. [FN4] As recently summarized in Smallwood v. Perez, 717 So.2d 154, 23 Fla. L. Weekly D2134 (Fla. 3d DCA 1998):

> FN4. In this appeal, the husband and the husband's counsel are separately represented.

> Courts have the inherent power to assess attorney's fees against counsel for litigating in bad faith. See Patsy v. Patsy, 666 So.2d 1045, 1047 (Fla. 4th DCA 1996); Sanchez v. Sanchez, 435 So.2d 347, 350 (Fla. 3d DCA 1983); see also Roadway Express, Inc., v. Piper, 447 U.S. 752, 764-67, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). See generally Alan Stephens, Annotation, Attorney's Liability Under State Law for Opposing Party's Counsel Fees, 56 A.L.R.4th 486 (1987); Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So.2d 606, 608-09 (Fla.1994) (discussing trial court's inherent powers). "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...." Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (citation omitted); see also Patsy, 666 So.2d at 1047.
>
> 23 Fla. L. Weekly at D2135, 717 So.2d at 156.

Under the circumstances existing here, we conclude that the trial court was authorized to enter an attorney's fee award against counsel, and that the award is supported by the record.

The husband's counsel contends that an award of attorney's fees should not be allowed in circumstances like the present case because the attorney is not able to defend himself without breaching the attorney client privilege. We disagree. The trial court's evaluation was based on the facts which were reasonably known prior to filing suit and soon thereafter. There was no suggestion in the trial court that the husband's counsel was misled in any way by the husband. 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. [FN5]

> FN5. The same issue potentially exists in claims made under section 57.105(1), Florida Statutes (1997), which states in part:
>
> 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 in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that 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. (Emphasis added).

Affirmed.

END OF DOCUMENT

IN THE SUPREME COURT OF FLORIDA

DIASDADO C. DIAZ and
DENNIS HABER, ESQ.,

Petitioner,

vs

RINA COHAN DIAZ and
LEINOFF & SILVERS, ESQ.,

Respondents

Case No. 95-534
DCA NO. 98-1939

FILED
DEBBIE CAUSSEAUX
JUN 25 1999
CLERK, SUPREME COURT
By _____

AMENDED CERTIFICATE OF SERVICE

NOTICE IS GIVEN that DIASDADO C. DIAZ, files this Amended Certificate of Service and States: The undersigned counsel prepared the Amended Jurisdictional Brief of DIASDADO C. DIAZ (which brief only changed the method of pagination from the original pursuant to the directions of the clerk), and filed same on June 21, 1999. The undersigned was in Tallahassee that morning, and was driving back to Miami that date. At the time, the undersigned expected to arrive in Miami in time to copy and post the copies of the brief to those on the certificate of service. Unfortunately, due to bad traffic, the undersigned did not make it to the office and the brief was not served as had been certified. This date (one day later) the brief is being faxed and served as set forth below.

I CERTIFY that a true and correct copy of the foregoing was faxed and mailed to Mark Gatica, Esq., Two Datran Center, Suite 1225, 9130 South Dadeland Boulevard, Miami, FL 331561 Andrew Leinoff, Esq., 1500 San Remo Avenue, Suite 206, Coral Gables, FL 33146; Robert Barrar, Esq., 333 NE 23rd Street, Miami, FL 33136 and Helen Hauser, Esq., 3250 Mary Street, Suite 400, Coconut Grove, FL 33133.

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