IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,534

Third District Court of Appeal Case no. 97-334

DIOSDADO C. DIAZ and DENNIS HABER, ESQ.,
Petitioners,

vs.

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

PETITIONER HABER'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

The petitioner invokes the "conflict" jurisdiction of this Court, Article V, section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(2)(A)(iv). This appeal presents for review an opinion of the Third District affirming the trial court's order, in a dissolution of marriage proceeding, which directly assessed $40,000 of the wife's attorney fees against the husband and his counsel, jointly, for failing to settle the proceeding at an earlier stage, without any finding of contemptuous or improper conduct beyond mere maintenance of the action itself, based upon "inherent authority"; and, particularly as to the attorney, without any statute or rule even colorably authorizing such assessment.

The facts recited in the Third District's opinion, at 727 So. 2d 954, are as follows: The wife, an attorney, had substantial income-generating non-marital assets which had been given to her in trust by her father. After the birth of the parties' child, she became essentially a full-time caregiver and earned "very little" from practicing law, which she could do with ease because of her trust income. Still, the wife continued to pay all household expenses. The husband was a career police officer. Husband and wife "maintained separate finances in all respects, except that the parties filed joint income tax returns," Diaz, 727 So. 2d at 954. The parties enjoyed a comfortable lifestyle, assisted by further gifts from the wife's parents. After ten years, the wife desired a divorce. Before any financial discovery, she offered a presuit settlement in which each party would retain separate property,

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there would be no equitable distribution or alimony, the child would reside with the wife, and the husband would pay child support of $200 per month and maintain health insurance for the child. This offer was not accepted. The husband filed a counterpetition seeking alimony, but agreeing that the wife should have primary custody of the child. Later, the wife made another offer to settle, identical to her first offer but for the amount of child support sought, $500.00 per month. This offer was also not accepted, and the case went to trial. The husband attempted to obtain discovery regarding the wife's trust, but ultimately conceded that these assets were nonmarital. The husband received no alimony, the wife was awarded 25% of the husband's pension plan, and the husband was required to pay child support of $600.00 per month, and maintain health insurance for the child.[1]

As the opinion recites, "The trial court found that `Respondent [husband] 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 fees and court costs, leaving the wife responsible for $32,000 in attorneys' fees and court costs," Id., at 955. The opinion further states, "The trial

[1]The trial court's rulings on property distribution and on the discovery sought by the husband were the subject of a prior appeal and cross-appeal to the Third District, which was affirmed without opinion, Diaz v. Diaz, 727 So. 2d So. 2d 931 (Fla. 3d DCA 1997).

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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," even though the court also acknowledges that the alimony claim by the husband was in the "gray area" and that the trial court called it "at best a longshot" rather than wholly frivolous, Id., at 956.

The attorney contended on appeal that there was no authority whatsoever for an assessment against him under these circumstances and further, that he had been unable to properly defend himself without violating the attorney-client privilege. The former husband contended that the trial court was simply punishing him for refusing an offer of settlement, for which there is no statutory authority in family-law cases, and not for conduct meriting an award of fees pursuant to section 61.16, Fla. Statutes.[2]

The Third District opinion expressly states, "Courts have the inherent power to assess attorneys' fees against counsel for litigating in bad faith," Id. at 958, and also rejects the attorney's claim that attorney-client privilege prevented him from defending himself fairly. As to the award against the former husband, the appellate court acknowledged that section 61.16 "is not intended to operate as an offer-of-judgment statute," citing

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[2]He also contended that the trial court had failed to consider the financial circumstances of the parties as required by section 61.16, but the appellate opinion does not specifically address that issue.

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Aue v. Aue, 685 So. 2d 1388 (Fla. 1st DCA 1997), but concluded that "the award in this case is not based simply upon the poor result. Instead, the trial court analyzed the issues in the case as they should have reasonably appeared at the outset," Id. at 596. The attorney and the former husband contend in this proceeding that these pronouncements are in conflict with Florida precedent.

The former husband and the attorney filed timely motions for rehearing, certification, and rehearing en banc, which were supported by an amicus brief from the Family Law Section of the Florida Bar. The Third District denied all of these motions, and this petition for further review was timely filed thereafter.

SUMMARY OF THE ARGUMENT

This Court has clearly enunciated the principle that a litigant cannot be awarded attorneys' fees in the absence of statute or contract. The Second District has stated that in the absence of contempt, attorneys' fees can be awarded only pursuant to statute or contract, or when the attorney creates a fund. The First, Second and Fifth Districts have held that an attorney cannot be made to pay the other party's fees even where his conduct is contemptuous. All of these cases expressly and directly conflict with the Third District's award of fees jointly against the attorney and his client in this case. In addition, the First District has held that mere failure to settle does not justify an assessment of fees in a family-law context, creating a direct conflict with the Third District's holding in this case.

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JURISDICTIONAL ARGUMENT:

THE THIRD DISTRICT'S OPINION CREATES DIRECT AND EXPRESS CONFLICTS ON TWO SIGNIFICANT POINTS OF LAW--WHETHER A COURT HAS INHERENT POWER TO ASSESS AGAINST A PARTY AND HIS COUNSEL THE OTHER PARTY'S ATTORNEYS' FEES IN THE ABSENCE OF A RULE, STATUTE, OR AGREEMENT AND IN THE ABSENCE OF CONTEMPTUOUS CONDUCT; and WHETHER MERE FAILURE TO ACCEPT AN OFFER OF SETTLEMENT WHICH IS NOT STATUTORILY AUTHORIZED ALLOWS A COURT TO ASSESS AGAINST THE REJECTING PARTY THE OTHER PARTY'S ATTORNEYS' FEES.

The Third District's pronouncement that "[c]ourts have the inherent power to assess attorneys' fees against counsel for litigating in bad faith," Diaz v. Diaz, 727 So. 2d 954, 958 (Fla. 3d DCA 1999), is a statement of a rule of law that expressly and directly conflicts with several other appellate expressions from this Court and from other district courts of appeal, thereby vesting jurisdiction in this Court, City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So. 2d 632 (Fla. 1976). It was not necessary that the Third District specifically identify any conflicting decisions, so long as it clearly enunciated the rules of law which establish the conflicts, The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988); Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). Similarly, the court's statement that the continued pursuit of family-law litigation (i.e., failure to accept the two settlement offers) constitutes a basis for an award of attorneys' fees against the litigant expressly conflicts with another court's statement; the conflicting case was actually identified by the Third District opinion, although there was an attempt to distinguish the case.

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The Third District's conclusion that "inherent power" will justify the award of attorneys' fees against an attorney and also against his client conflicts with this Court's own pronouncement that Florida espouses the "American Rule"--i.e., "attorneys fees may only be awarded by a court pursuant to an entitling statute or an agreement of the parties," Dade County v. Pena, 664 So. 2d 959, 960 (Fla. 1995). When Fla. Stat. sec. 57.105 was first adopted, its Constitutionality was challenged on the basis that the statute infringed upon the procedural and rulemaking authority of the courts. This Court responded, "To the contrary, an award of attorneys' fees is *a matter of substantive law properly under the aegis of the legislature.*" Accordingly, this Court has held that a litigant's ability to recover attorneys' fees is for the legislature to determine, not for the judicial branch.

Although some Federal courts have held that attorneys' fees may be awarded for litigation pursued "in bad faith, vexatiously, wantonly or for oppressive reasons," Hilton Oil Transport v. Oil Transport Co., 659 So. 2d 1141 (Fla. 3d DCA 1995), citing Foster v. Tourtellotte, 704 F. 2d 1109, 1111 (9th Cir. 1883), the Fourth District concluded that Florida has not adopted this rule, Department of Revenue v. Arga Co., 420 So. 2d 323 (Fla. 4th DCA 1982). In Arga, supra, the trial court imposed a $200 fee and ultimately struck a litigant's pleadings for failure to comply with discovery. Then the court awarded fees to the successful party on the basis of "bad faith." The appellate court explained that in Florida, one is required to meet the more stringent standard of

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section 57.105, which requires a "complete absence of a justiciable issue of law or fact," Arga, supra, 420 So. 2d at 324. Once again, Arga's ruling directly conflicts with the holding of the Third District.

In Israel v. Lee, 470 So. 2d 861, 862 (Fla. 2d DCA 1985), the Second District held that an attorney who had repeatedly and wrongfully invoked the attorney-client privilege, to the extent that he was held in contempt and actually jailed, still could not be assessed for the other party's fees. "Attorney's fees may be awarded only where authorized by either a contract or by a statute or where the attorney's services create or bring a fund or other property into the court." This statement is another clear conflict.

In American Bank of Lakeland v. Hooven, 471 So. 2d 657 (Fla. 2d DCA 1985), an attorney caused a mistrial by violating a court order not to mention certain inadmissible evidence. His client was assessed for attorneys' fees and costs, as a sanction. The appellate court reversed, holding that the fees had not been awarded as a sanction for contempt of court and were not otherwise justified by any statute. "Unless accorded as a fine or sanction for indirect contempt of court, attorney's fees are to be awarded only when provided for by agreement, by statute, or when the attorney creates a fund," Hooven, supra, 471 So. 2d at 658. Because there was no question of contempt in the case at bar, this holding likewise directly conflicts with the Third District's.

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In a Fifth District case arising from a criminal proceeding, the trial court had assessed the State Attorney $225.00 in legal fees incurred by the defendant, for harm occasioned by counsel's tardiness. The appellate court determined that there was absolutely no authority permitting such assessment. It suggested that if counsel's conduct amounted to contempt, sanctions might be imposed under the Rules of Criminal Procedure, but even then, "any sanctions imposed would not be for the benefit of the defendant," State v. Harwood, 488 So. 2d 901, 902 (Fla. 5th DCA 1986).

In Miller v. Colonial Baking Co. of Alabama, 402 So. 2d 1365 (Fla. 1st DCA 1981), an attorney was personally assessed with fees for causing a mistrial by having lunch with two of the jurors. The appellate court reversed on the basis that attorneys' fees can only be awarded by agreement or statute, or when the attorney creates a fund or other property. It explained that "although the court might have been authorized, through appropriate proceedings, to impose a fine or sanctions against the plaintiffs' attorney for indirect contempt of court, it was not authorized to assess costs and attorneys' fees against him for his actions which resulted in the mistrial." The court could perhaps assess costs against his client at the close of the case, but nothing further, Miller, supra, 402 So. 2d at 1367.

The Third District opinion primarily relied upon two cases from its own forum and from the Fourth District. Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3d DCA 1983) and Patsy v. Patsy, 666 So. 2d 1045 (Fla. 4th DCA 1996). While undersigned counsel disagrees with the

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interpretation placed upon these two cases in the opinion, it is clear that there are at least two other Florida cases which are susceptible of interpretations which likewise expressly and directly conflict with the authorities cited above. This uncertainty in the law creates considerable difficulties for counsel. As the issue so directly affects the Constitutional concerns of access to courts and the right to vigorous representation, Petitioners request that this Court exercise its power to resolve the conflicts.

There is also a direct and express conflict created by the holding of the Third District that the trial court could fairly conclude "that the majority of the time spent on litigation in this case was baseless" simply because the wife had offered to settle on terms that seemed advantageous and that "it should have been clear that the husband could not do better, and most likely would do much worse, by litigating the case," Diaz, 727 So. 2d at 956. The First District reversed a trial court decision which denied an otherwise eligible spouse's claim for attorneys' fees "based solely on the trial court's finding that she unreasonably rejected her former husband's offer of child support." The court stated, "there is no authority for denying attorney's fees in dissolution cases solely for the failure to accept an offer of settlement...In fact, section 45.061(4), Florida Statutes, specifically exempts dissolution proceedings from the offer of settlement statute," Aue v. Aue, 685 So. 2d 1388 (Fla. 1st DCA 1997). Although the Third District attempted to distinguish Aue, there is a clear conflict.

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CONCLUSION

A conflict as defined in Florida jurisprudence clearly exists on the face of the Third District opinion which is herein presented for review. This is, furthermore, a holding which has greatly concerned the bar of this State. A court's ability to arbitrarily determine that litigation is unwarranted and to assess costs against a litigant and his counsel, without statutory authority and without apparent limitation or due-process guarantees, strikes at the heart of a litigant's right of access to the courts and to vigorous representation by counsel. The matter urgently requires the attention of this Court.

NOTE ON TYPEFACE

The typeface used herein is Courier regular, proportionately spaced, twelve point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 27th day of May, 1999 to: Andrew M. Leinoff, Esq., Leinoff & Silvers, P.A., 1500 San Remo Ave., Suite 206, Coral Gables, Fl 33146, counsel for Respondent Leinoff & Silvers; Robert I. Barrar, Esq., Rubin and Barrar, 333 N.E. 23rd St., Miami, Fl 33137, counsel for Respondent Rina Cohan Diaz; and to Deborah Marks, Esq., ABRAMS, ETTER and MARKS, P.A.,800 Brickell Avenue, Ste. 1115, Miami, Fl 33131, counsel for co-Petitioner D.C. Diaz.

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By: Helen Ann Hauser
HELEN ANN HAUSER

APPENDIX

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.

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