IN THE SUPREME COURT OF FLORIDA

Diosdado C. Diaz and
Dennis Haber,

Petitioners,

v.

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

Respondents.
_____/

Case No: 95,534
(DCA No. 97-334)

**CONSOLIDATED BRIEF ON JURISDICTION
OF RESPONDENTS LEINOFF & SILVERS, P.A.,
AND RINA COHAN DIAZ**

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INTRODUCTION

This is a proceeding for discretionary review of an opinion of the Third District Court of Appeal dated November 4, 1998. In this brief Petitioner, DIOSDADO C. DIAZ, will be referred to by name or as "the Husband;" Petitioner, DENNIS HABER, will be referred to by name or as "the Attorney;" Respondent, RINA COHAN DIAZ, will be referred to by name or as "the Wife;" and Respondent, "Leinoff & Silvers, P.A., will be referred to as "the Wife's counsel." All emphasis is supplied, unless specifically indicated otherwise.

This brief is printed in Courier New 12 point type.

STATEMENT OF THE CASE AND FACTS

The Respondents agree with the statement of the case and facts as set forth in the brief of HABER, but would direct the Court's attention to the following additional facts which are found in the opinion of the District Court of Appeal, but which were not mentioned in HABER'S brief:

1. The Husband rejected at least two offers of settlement, and never made a counteroffer. The Court stated:

> 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, and embarked on an expensive and wasteful litigation strategy.***

Diaz v. Diaz, 727 So.2d 954, 956 (Fla. 3rd DCA 1998).

2. The trial court concluded that the majority of the time spent litigating the case was baseless. The Court stated:

> 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.***

Id., at 957.

3. While the Wife obviously attempted to avoid litigation at all costs--even to the extent of disclaiming any interest whatsoever in the marital estate and accepting nominal child support, the Husband nonetheless forced the Wife to engage in costly and wasteful litigation. The Husband made no attempt to evaluate the Wife's settlement offer. He requested no information from the Wife. Instead, he was determined to litigate, no matter the cost or the outcome. The Court concluded:

> However, as the court noted, in the presuit stage, the husband never made any request for additional information so as to allow him to

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> evaluate the reasonableness of the wife's settlement proposal. The husband never countered with a settlement proposal of his own. ***The husband instead opted for litigation, unproductive discovery battles, and pursuit of claims with no reasonable prospect of success.***

Id., at 957-8.

4. Further, there was no suggestion in the trial court that the Husband's Attorney was misled in any way by the Husband. Id., at 958.

5. Respondents specifically object to the facts included on page 2 of the Husband's brief, which he concedes were not included in the opinion of the District Court of Appeal. "Facts" which are not found within the four corners of the opinion cannot form the basis of this Court's conflict jurisdiction.[1] Moreover, the allegation that the Husband's Attorney withdrew from the case ***before*** the trial is patently false.[2]

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal approved a trial court order which did no more than apply the inherent authority of every court to do those things necessary to enforce its orders, to conduct business in a proper manner, and to protect the courts from

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[1]Reaves v. State, 485 So.2d 829 (Fla. 1986).

[2]In fact, he did not withdraw until June 13, 1996. The trial concluded in September, 1995.

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acts obstructing the administration of justice. The pursuit of wasteful, bad faith litigation has long been recognized in Florida as an act obstructing the administration of justice and activating the court's inherent authority.

The assessment of fees against counsel has been recognized in this state for decades, although that remedy is infrequently applied. It is justified only in extreme circumstances, such as the established facts in this case.

The assessment of fees against a party in a divorce proceeding on the basis of factors other than need and ability to pay is recognized in every District Court of Appeal in the State of Florida. The precedents predate this Court's pronouncements in Rosen,[3] but gained added force as a result of that decision. Trial courts are now specifically directed to consider all factors in a divorce proceeding, including "... 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." Rosen, supra, at 701. This language effectively insulates the trial court's order from any challenge by the Husband.

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[3]Rosen v. Rosen, 696 So.2d 697 (Fla. 1997).

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ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

Conflict jurisdiction, based upon Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., must be premised upon either:

> (1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court [or another District Court of Appeal]. (Emphasis in original).

Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). The decision of the Third District Court of Appeal in this matter does not present conflict pursuant to either of these tests.

A. The decision of the Third District Court of Appeal does not announce a rule of law that conflicts with a rule previously announced by this Court or the other District Courts of Appeal.

This Court has long recognized the inherent authority of trial courts to do those things necessary to enforce its orders, to conduct business in a proper manner, and to protect the courts from acts obstructing the administration of justice. Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co., 639 So.2d 606 (Fla. 1994). As described by the United States Supreme Court, the inherent powers of federal courts are those which "are necessary to the exercise of all others." Roadway Express, Inc. v. Piper, 447

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U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (U.S. 1980). 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. 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.

Florida recognizes the doctrine of inherent authority. This court expressly acknowledged the breadth of that doctrine in Levin, Middlebrooks, supra. 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).

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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.

The inherent authority to assess fees against counsel for litigating in bad faith was recognized by this Court nearly 80 years ago. In U.S. Savings Bank v. Pittman, 86 So. 567 (Fla. 1920), this Court reversed a final judgment of foreclosure, and awarded a party fees to be paid by counsel who had engaged in unnecessary litigation subsequent to the entry of the final judgment. Id., at 573.

The inherent authority to assess fees against counsel for engaging in bad faith litigation, as set forth in Roadway, supra, and U.S. Savings Bank, supra, has been expressly recognized in the Third District Court of Appeal (Smallwood v. Perez, 717 So.2d 154 (Fla. 3rd DCA 1998), pet. for review den., (Fla. May 20, 1999)(Table

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No. 94,872)[4]; Hilton Oil Transport v. Oil Transport Co. S.A., 659 So.2d 1141 (Fla. 3rd DCA 1995)); the Fourth District Court of Appeal (Patsy v. Patsy (Fla. 4th DCA 1996)); and the Fifth District Court of Appeal (Emerson Realty Group, Inc. v. Schanze, 572 So.2d 942 (Fla. 5th DCA 1990); Lathe v. Florida Select Citrus, Inc., 721 So.2d 1247 (Fla. 5th DCA 1998)).

The Second District Court of Appeal has not definitively addressed the issue. The two cases cited by the Husband's Attorney do not state a rule of law which conflicts with the decisions listed above. 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. It 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 the opinion to any misconduct or bad faith litigation that occurred

[4]In Smallwood v. Perez, supra, this Court recently denied a petition for discretionary review of an order assessing fees against counsel in a divorce proceeding.

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in the appellate court. Clearly, Israel, supra, is not applicable to this case, and no conflict can be found in these two opinions.

The First District Court of Appeal is not in conflict, either. Petitioner cites conflict with Miller v. Colonial Baking Co. of Alabama, 402 So.2d 1365 (Fla. 1st DCA 1981). However, 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 so-called "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 provide a valid basis for finding conflict.

Haber's reliance on State v. Harwood, 488 So.2d 901 (Fla. 5th DCA 1986), is entirely misplaced. The Fifth District Court of Appeal has effectively overruled that opinion with its decisions in Emerson Realty, supra, and Lathe v. Florida Select Citrus, Inc., supra, both of which were decided subsequent to the opinion in State v. Harwood, supra.

Likewise, Haber's reliance on Department of Revenue of State v. Arga Co., 420 So.2d 323 (Fla. 4th DCA 1982), is similarly misplaced. In Patsy v. Patsy, supra, the Court described the limitations of that opinion. Specifically, the Court held that Department of Revenue, supra, only applied to an award of fees assessed against a party, and not to an award of fees assessed

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against counsel. Patsy v. Patsy, supra, at 1047. This decision does not conflict with the opinion under review.

Finally, the Husband's attempt to create conflict between the decision under review and this Court's decision in Rosen v. Rosen, 696 So.2d 697 (Fla. 1997), fails. In Rosen, this Court affirmed the trial court's consideration of additional factors beyond the rote need and ability to pay that are specifically described in §61.16, Florida Statutes. This Court noted the equitable nature of the proceedings, and authorized the consideration of all equitable factors, including "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." Id., at 700. These statements fully support the trial court's award.

Nonetheless, the Husband directs the Court's attention to the language in Rosen wherein this Court specifically authorized the preceding factors as a basis to deny fees in a proper proceeding. The Husband incorrectly argues that the decision under review vastly expands that language, thereby creating conflict. In fact, the expansion began long before the entry of Rosen. A long line of cases has developed which authorizes fee awards under precisely these circumstances. See, Ugarte v. Ugarte, 608 So.2d 838 (Fla. 3d DCA 1992) (A fee order based upon additional work made necessary by

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the appellant's litigious conduct is permissible); Meloan v. Coverdale, 525 So.2d 935 (Fla. 3d DCA 1988), *rev. denied*, 536 So.2d 243 (Fla. 1988) ("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"); Mettler v. Mettler, 569 So.2d 496 (Fla. 4th DCA 1990) (fees properly assessed against Wife, despite her diminished financial status, who had abused the system through inequitable conduct which resulted in needless litigation and legal fees, as additional work was made necessary by her conduct).

A fee award based upon additional work caused by a litigious or recalcitrant spouse is neither new nor novel. Rather, it is a remedy fully consistent with the purposes of Chapter 61, and authorized pursuant to the broad grant of discretion to trial judge's to do equity and justice in dissolution of marriage proceedings. The opinion of the Third District in this proceeding does not conflict with or expand the language in Rosen, supra. Rather, it represents sound exercise of the trial court's discretion in a case where the litigation was entirely caused by one side, could have been avoided in its entirety, but instead resulted in the diminution of the marital estate by over $120,000.

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The trial court merely shifted financial responsibility for this fiasco to the party that caused it. The equitable considerations underlying Chapter 61 require no less.

B. The Third District Court of Appeal did not apply a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court or another District Court of Appeal.

Both the Husband and his Attorney attempt to find conflict between the decision under review herein and the decision of the First District Court of Appeal in Aue v. Aue, 685 So.2d 1388 (Fla. 1st DCA 1997). That decision is easily distinguished.

Significantly, 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..."[5] 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

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

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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.

Further, the Aue opinion only describes the support provisions that were offered to the wife, with no mention whatsoever of the provisions relating to distribution of the marital estate. These provisions may have been "deal breakers." We cannot tell from the sketchy facts provided in this opinion.

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

This is not a case about pursuing a "long shot" remedy or changing existing law. This case represents nothing more than another example of litigious conduct in the family court. It is unnecessary litigation run amok. It is litigation with no purpose other than to harass, annoy, and unnecessarily expend resources that could and should be preserved. It is litigation driven by emotion, incompetence, or both. The remedy adopted by the trial

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court is consistent with the decisions of this Court and the various other appellate courts in this State. This Court should decline to review that decision.

CONCLUSION

The decision of the Third District Court of Appeal conflicts with no prior decisions of this Court or the other appellate courts in Florida. It applies the specific requirements of Chapter 61 to a situation where the Husband and his Attorney have engaged in unnecessary, wasteful litigation on a scale previously undocumented in the jurisprudence of this State. The cases cited by Petitioner do not address this situation. Conflict has not been demonstrated. This Court should decline to exercise its discretionary jurisdiction to review the decision of the court below.

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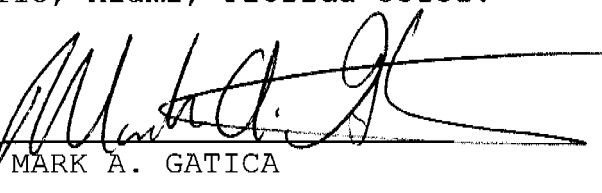
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on July 15, 1999 to Andrew M. Leinoff, Esquire, Co-Counsel for Respondent, Leinoff & Silvers, P.A., 1500 San Remo Avenue, Suite 206, Coral Gables, Florida 33146; Robert Barrar, Esquire, Law Offices of Ellis Rubin and Robert I. Barrar, P.A., Counsel for Respondent, Rina Cohan Diaz, 333 N.E. 23rd Street, Miami, Florida 33136; Helen Hauser, Esquire, Dittmar & Hauser, P.A., Counsel for Petitioner, Dennis Haber, 3250 Mary Street, Suite 400, Coconut Grove, Florida 33133; and Deborah Marks, Esquire, Abrams, Etter and Marks, P.A., Counsel for Petitioner, Diosdado Diaz, 800 Brickell Avenue, Suite 1115, Miami, Florida 33131.

By: 
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