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 REPLY BRIEF

Respectfully submitted,

Helen Ann Hauser
Fla. bar no. 353906
DITTMAR & HAUSER
Counsel for Petitioner Haber
3250 Mary Street, Suite 400
Coconut Grove, Fl 33133
(305) 442-4333

TABLE OF CONTENTS

Table of Contents.....i

Table of Citations.....ii

Summary of the Argument.....1

Argument:

I. NO PRIOR PRECEDENT FROM THIS COURT OR FROM FLORIDA INTERMEDIATE APPELLATE COURTS PROVIDES ANY REASONED BASIS FOR ADOPTING A NEW, UNLIMITED "INHERENT POWER" TO PERSONALLY SANCTION ATTORNEYS FOR PURSUING ALLEGEDLY MERITLESS LITIGATION 2

II. THE ATTORNEY WAS NOT AFFORDED DUE PROCESS IN THIS CASE.....13

Conclusion.....15

Note on Typeface.....15

Certificate of Service.....16

TABLE OF CITATIONS

CASES:

Bitterman v. Bitterman, 714 So. 2d 356 (Fla. 1998).....7,8,9

David S. Nunes, P.A. v. Ferguson Enterprises, Inc., 703 So. 2d 491 (Fla. 4th DCA 1997).....4

Department of Revenue v. Arga Co., 420 So. 2d 323 (Fla. 4th DCA 1982).....4

Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759 (Fla. 1977).....5

Fredericks v. Sturgis, 598 So. 2d 94 (Fla. 5th DCA 1992).....3

Gibson v. Troxel, 453 So. 2d 1160, 1163 (Fla. 4th DCA 1984).....4

Goldfarb v. Daitch, 696 So. 2d 1199 (Fla. 3d DCA 1997).....10

Hilton Oil Transport Co. v. Oil Transport Co., 659 So. 2d 1141 (Fla. 3d DCA 1995).....8

In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965).....8

Kittel v. Kittel, 210 So. 2d 1 (Fla. 1968).....5

Lamb v. Fowler, 574 So. 2d 262 (Fla. 1st DCA 1991).....4

Lathe v. Florida Select Citrus, Inc., 721 So. 2d 1998 (Fla. 5th DCA 1998).....2,10

Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994).....6

McElhiney v. Ash Properties, Inc., 411 So. 2d 291 (Fla. 1st DCA 1982).....4

Miller v. Colonial Baking Co. of Alabama, 402 So. 2d 1365 (Fla. 1st DCA 1981).....4

Moakley v. Smallwood, 730 So. 2d 286 (Fla. 3d DCA 1999).....10

Patsy v. Patsy, 666 So. 2d 1045 (Fla. 4th DCA 1996).....4

Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978).....6,7

Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3d DCA 1983).....10

Smallwood v. Perez, 717 So. 2d 154 (Fla. 3d DCA 1998).....2

State v. Harwood, 488 So. 2d 901 (Fla. 5th DCA 1986).....3

Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996).....5

Young v. Young, 677 So. 2d 1301 (Fla. 5th DCA 1996).....11

STATUTES AND RULES:

Fla. Stat. sec. 57.105 (1997).....8,13

Fla. Stat. sec. 61.16 (1997).....9

R. Regulating Fla. Bar 4-1.6.....14

SUMMARY OF THE ARGUMENT

No Florida precedent has ever really discussed the justification, dangers, and benefits (if any) of recognizing an "inherent power" for trial courts to enter personal sanctions against attorneys by requiring them to pay fees to the opposing party. The few cases accepting the doctrine have simply ignored prior Florida precedent refusing to allow such awards against counsel or parties. Where actually discussed in other contexts in Florida cases, "inherent power" is depicted as restricted to situations where it is absolutely necessary to protect the court's own integrity. Thus, if this Court finds that there is "inherent power" in Florida trial courts to sanction counsel for conduct which violates no statute, rule, or order and is not contemptuous, the power must be reserved for outrageous conduct, and full due process must be provided. Situations involving professional judgment should never be subject to this sort of sanction. An attorney's failure to force his client to settle a colorable claim, the conduct in this case, is not misconduct at all, and surely does not rise to such a level as to threaten the integrity of a court. Further, the attorney was never given fair notice that this novel theory would be used by the trial court, nor did he have an opportunity to present evidence in his own behalf, due to the strictures of attorney-client confidentiality.

ARGUMENT:

I. NO PRIOR PRECEDENT FROM THIS COURT OR FROM FLORIDA INTERMEDIATE APPELLATE COURTS PROVIDES ANY REASONED BASIS FOR ADOPTING A NEW, UNLIMITED "INHERENT POWER" TO PERSONALLY SANCTION ATTORNEYS FOR PURSUING

ALLEGEDLY MERITLESS LITIGATION

The respondent has located some additional Florida authority not previously cited by petitioner. However, additional cases from the District Courts of Appeal merely serve to further demonstrate how badly the issue has become clouded, and how important it is for this Court to make a rational and definitive pronouncement as to whether trial courts have "inherent authority" to award attorneys' fees against counsel for conduct which is not contemptuous and if so, what process is due and what standards are to be applied . For example, the recent Fifth District case of Lathe v. Florida Select Citrus, Inc., 721 So. 2d 1998 (Fla. 5th DCA 1998), citing the *dictum* from Smallwood v. Perez, 717 So. 2d 154 (Fla. 5th DCA 1998), affirms the imposition of a small amount of attorneys' fees against an attorney who actually *lied* to the trial court and *admitted* doing so, although he argued that the court had neglected to make a formal finding of contempt first. The appellate court rejected the attorney's argument that the award was invalid because there was no technical finding of contempt. (Of course, it was clear that his conduct was contemptuous, whether or not the court had so adjudicated.) Further, in citing Perez for the proposition that "courts have inherent power to assess attorneys' fees against counsel for litigating in bad faith," the Fifth District added, *"although caution must be exercised and due process satisfied,"* Lathe, 721 So. 2d at 1247, language extremely relevant to the issues in this

case, but not cited by respondent.

In deciding Lathe, the Fifth District never made any attempt to distinguish its prior case of State v. Harwood, 488 So. 2d 901, 902 (Fla. 5th DCA 1986), wherein the same tribunal struck down an award of fees to the opposing party for harm occasioned by counsel's tardiness, determined that there was absolutely no authority permitting such assessment, and suggested that if counsel's conduct amounted to contempt, sanctions might be imposed, but "any sanctions imposed would not be for the benefit of the defendant." The Fifth District has also held that even where the facts justify a finding of civil contempt against counsel for deliberate failure to attend mediation and the court awards fees, the award is invalid unless it includes a finding that counsel has the present ability to pay the sanctions, something that was obviously never considered in the instant case, Fredericks v. Sturgis, 598 So. 2d 94 (Fla. 5th DCA 1992).

As previously stated, the First District has remained consistent; it has reiterated that attorneys' fees cannot be awarded in circumstances other than where authorized by contract or statute, or where the attorney has created a fund, *e.g.,*McElhiney v. Ash Properties, Inc., 411 So. 2d 291 (Fla. 1st DCA 1982), *citing* Miller v. Colonial Baking Co. of Alabama, 402 So. 2d 1365 (Fla. 1st DCA 1981). However, an exception is made for civil contempt, which can allow a court in its discretion to assess fines and

award attorneys' fees, Lamb v. Fowler, 574 So. 2d 262 (Fla. 1st DCA 1991).

By contrast, jurisprudence from the Fourth District is wholly inconsistent. In deciding Patsy v. Patsy, 666 So. 2d 1045 (Fla. 4th DCA 1996) and David S. Nunes, P.A. v. Ferguson Enterprises, Inc., 703 So. 2d 491 (Fla. 4th DCA 1997), the Fourth District never noted nor mentioned its own contradictory prior precedent, Gibson v. Troxel, 453 So. 2d 1160, 1163 (Fla. 4th DCA 1984), wherein it reversed a $5,000 award of attorneys' fees against counsel for causing a mistrial by making improper comments. The appellate court in that case found no authority to assess attorneys' fees as a sanction , and remarked that "attorneys fees may be awarded only when provided for by agreement, by statute, or for creating a fund, unless they are accorded as a fine or sanction for indirect contempt," *citing* Miller v. Colonial Baking Co. of Alabama, 402 So. 2d 1365 (Fla. 1st DCA 1981). As previously noted, the Fourth District also ignored its prior precedent in Department of Revenue v. Arga Co., 420 So. 2d 323 (Fla. 4th DCA 1982).

These cases, and those previously discussed in the Petitioner's initial brief at pp. 31-36, demonstrate that although some of the District Courts of Appeal have recently been attracted to the illusory "quick fix" which the Federal doctrine of "inherent powers" appears to offer for the problem of attorney misconduct, none of them have thought through the implications of what they have done, nor even recognized that

they are departing from prior precedent. Indeed, only the Lathe court gives at least lip service to concerns of fairness, due process, and the possible abuse of unfettered judicial power.

Historically, cases from this Court do not support such a widespread expansion of a trial court's power to award attorneys' fees to the other party as a sanction, and certainly not as a sanction against counsel. Before there was a statute allowing fees in family law cases, this Court struck down an equitable award of fees to a spouse, reiterating that fees can be awarded only where there is a contract or statute, or where the attorney creates a fund, Kittel v. Kittel, 210 So. 2d 1 (Fla. 1968). This holding was reiterated in Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759 (Fla. 1977), where the Court disapproved an expansive interpretation of a fees statute. In Walker v. Bentley, 678 So. 2d 1265, 1267 (Fla. 1996), this Court discussed the nature of the contempt power, holding 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," although the legislature does have power to limit the sanctions which a court may impose for contempt. As previously stated, it was the contempt power that was the basis for this Court's statement in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla.

1994), that a court has "inherent power" to protect itself "from acts obstructing the administration of justice... In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine *as punishment for contempt*, Mabie, supra, 639 So. 2d at 608-09 (emphasis added). The quoted language by no means suggests that trial courts may institute some undefined *ad hoc* sanction against attorneys for acts not amounting to contempt. Rather, the contempt power exists of necessity, because a court must protect its own processes against abuses which flout its authority and thereby undermine the institution itself.

Most importantly, the case of Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978) defines the limits of "inherent authority" in the context of a certiorari proceeding. A county court had ordered Palm Beach County, on behalf of an indigent criminal defendant, to pay additional witness fees in excess of the statutory amounts, because the trial had been moved to a new venue three hundred miles away at the request of the defendant's court-appointed counsel. The reviewing Circuit Court quashed the order, finding that the county court had no authority to issue it. The trial court had issued the order because the defendant had argued that otherwise, he would be unable to compel the attendance of necessary witnesses and would therefore be denied due process of law, equality before the law, and a chance for a fair trial. The

county argued that the concept of "inherent power" is "derivative of the concepts of separation of powers and judicial independence. As such, it is a very narrow doctrine positing only that courts have authority to do things that are absolutely essential to the performance of their judicial functions," Rose, 361 So. 2d at 137. This Court agreed, noting that "inherent power should be exercised only after established methods have failed or an emergency has arisen," Id., at 138, note 9. Further, "The doctrine of inherent power should be invoked only in situations of clear necessity," Id. at 138. Finally, "actions taken by trial courts and purporting to be based strictly on inherent judicial authority are subject to judicial review and the burden must be on the issuing court to show that the action is necessary to enable the court to perform one of its essential judicial functions," Id., at 139. Although the specific question in Rose concerned an order requiring another branch of government to expend funds, the discussion of the narrow limits on inherent power is certainly instructive in the case at bar.

Substantially after the rulings in the case at bar, this Court decided Bitterman v. Bitterman, 714 So. 2d 356 (Fla. 1998), a case arising from a contentious estate. Because a single recalcitrant heir/personal representative had hired a law firm, directed its actions, and then unfairly resisted its attempts to be paid for its work after it withdrew, the court awarded fees *to the law firm* pursuant to the probate code for

its work in the estate, and thereafter awarded fees under section 57.105 against the heir. This Court found no basis for section 57.105 fees, but found that the heir could be liable to the law firm for its fees under an "inequitable conduct" theory, nevertheless noting that the doctrine is "rarely applicable," Id., at 365. Notably, the lawyers in that case were awarded their full fees *even though* they filed a pleading in the estate which, they told the client in writing, was highly unlikely to be successful, though not quite frivolous. This Court then stated, "attorneys' fees based on a party's inequitable conduct have been recognized by other courts in this country," citing Federal authority. The Court also made reference to Hilton Oil Transport Co. v. Oil Transport Co., 659 So. 2d 1141 (Fla. 3d DCA 1995), which merely states in *dictum* that a number of Federal courts have recognized a "bad faith" exception to the "American rule"; and to In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965), which merely holds that attorneys who are obliged to perform extraordinary services in the administration of estates are entitled to a reasonable fee for their work. None of these Florida authorities even suggests that the attorney who represented the recalcitrant party can be personally liable for the opposing party's fees, merely that the party might; indeed, one of the beneficiaries of the Bitterman ruling was the law firm which had represented the wrongdoer. And, of course, the trial court did not rely upon Bitterman in its ruling, nor did the appellate court. The issue presented in this

case is, therefore, simply the "inherent power" doctrine, as it applies to counsel.

From the perspective of "inherent powers" there was plainly no judicial necessity to sanction attorney Haber personally, for *possibly* failing to advise his client to settle a "long-shot" claim. The prosecution of the husband's claim in this case surely posed no threat to the integrity of the judicial process. If the opposing party was unfairly harmed by the continuation of the litigation, there were other means to remedy the situation, through section 61.16, Fla. Statutes (1997)-- provided that the requisite statutory factors were fairly considered, which the husband contends did not occur. The trial court simply wanted to avoid the very clear mandate of Fla. Stat. sec. 57.105 as it then existed, which did not permit fees to be awarded against counsel unless the action is wholly frivolous from the outset, and even then, did not allow more than a 50% assessment *which cannot be imposed* if the attorney has relied in good faith upon facts told to him by his client. The judge did not like the law. She therefore invented an "inherent power" to create a new fees entitlement which the legislature had not seen fit to grant to litigants.

The ramifications of such a power are mind-boggling. Can an attorney be personally sanctioned for calling witnesses that the court considers redundant, thereby lengthening the trial? Can he or she be personally assessed fees for selecting an expert whom the court later deems unqualified after the witness has testified or been

deposed, so that the other party has incurred expenses? If failure to settle a colorable claim is sanctionable, where could we possibly draw the line? If this Court finds an "inherent power" to sanction attorneys for conduct which is not contemptuous, the line should be drawn at least at the point where the attorney is exercising professional judgment or acting within the scope of his or her ethical duty to the client. Obviously, no exercise of professional judgment is involved in lying to a tribunal, *e.g.,* Lathe v. Florida Select Citrus, Inc., 721 So. 2d 1998 (Fla. 5th DCA 1998), or in refusing to consent to correction of a scrivener's error, *e.g.,* Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3d DCA 1983). It may be said that none is involved in issuing a burdensome subpoena to a fellow attorney with inadequate notice and without investigating whether the attorney has relevant information, *e.g.,* Moakley v. Smallwood, 730 So. 2d 286 (Fla. 3d DCA 1999), or in accepting funds on behalf of someone who is not a client, *e.g.,* Goldfarb v. Daitch, 696 So. 2d 1199 (Fla. 3d DCA 1997). Indeed, the Third District's specific justification for its holdings in Sanchez and Goldfarb was that the attorney could not have been legitimately representing a client when engaging in the sanctioned conduct. But there is no doubt that the decision to settle a case is within the professional judgment of counsel and further, that counsel is ethically permitted to continue representing a client who has a colorable claim and who does

not wish to settle.[1] For errors in professional judgment, the remedy of malpractice exists already. The trial court cannot conduct an *ad hoc* malpractice trial at the close of every case, with the "damages" to be awarded to the opposing party.

Not least of the considerations in addressing this issue is the *perception* of fairness in Florida courts. If we allow standardless, "I know bad faith when I see it" sanctions against attorneys in a state which has an elected judiciary whose campaign financing largely comes from attorneys, it will likely be said of many a judge that he or she imposes sanctions, or declines to do so, on the basis of who has supported prior campaigns. Large firms that have many dollars to contribute will have at least a perceived advantage in this arena.

As previously explained, approval of this remedy will not have the effect of correcting misconduct or stopping meritless litigation, as its proponents hope. Instead, every hard-fought case will carry with it a motion for "Diaz fees," and there will be endless litigation over them. It will, however, frighten all Florida attorneys, but especially small firms and solo practitioners, away from accepting meritorious but

---

[1]Respondent incorrectly claims that the husband's alimony claim was neither novel nor meritorious. Obviously, a husband seeking alimony based solely upon loss of lifestyle, without diminution of his personal income, is not common; the trial judge rejected the claim out of hand, but at least one Florida case has awarded alimony to a spouse in precisely that situation, Young v. Young, 677 So. 2d 1301 (Fla. 5th DCA 1996). It may be fairly said that a claim with only one precedent on point is somewhat novel, but also it is clearly not frivolous.

novel cases. Still more will be impelled to withdraw from representation after receiving a settlement offer that some court, in the exercise of hindsight, may deem so reasonable that it should have been accepted. Access to courts will therefore be effectively denied for many litigants. The ephemeral benefits that one might hope to gain are surely not worth the consequences.

Finally, the experiences of other U.S. jurisdictions, which were exhaustively chronicled in the petitioner's initial brief, offer only limited guidance. The presence of an integrated bar, the disciplinary procedures of the state bar, the current status of statutory law, the adequacy of existing court rules, and the presence of an elected judiciary are all factors which may make Florida more prone reject others' solutions. Notably, however, all of the jurisdictions which do allow "inherent power" sanctions against attorneys have imposed clear limits. And, nowhere has either party found a case which sanctions counsel for merely failing to make a client settle a colorable claim. Thus, no authority on point justifies the trial court's actions in this case.

II. DUE PROCESS WAS NOT AFFORDED TO THE ATTORNEY IN THIS CASE

Respondent suggests that attorney Haber had fair notice that these sanctions were being sought against him, by the mere fact that respondent asked for fees pursuant to section 57.105. In fact, Haber prepared a defense to a fees claim under that section

and *prevailed* on that defense [Tr 12/10/96, pp. 36-37]. He could not have imagined that the trial court would then bypass the statute and come up with a new theory to hold him personally liable. Respondent also points out that Haber did not attend the second hearing, but omits to tell the Court that Haber had no reason to expect that the Court would entertain additional argument or evidence on the fees issues, which had already been heard; rather, the hearing was for the purpose of discussing a method for getting health insurance for the wife. As the husband's co-counsel stated, arguing the fees award "is not what our job is today." [Tr 5/23/96, p. 18].

Respondent suggests that if the husband and his counsel were acting in good faith, they would have propounded settlement offers themselves or at least sent correspondence to the wife asking for financial information so that they could evaluate her offer. The latter suggestion is absurd, in light of the wife's total amnesia, absence of records and recalcitrance in furnishing financial discovery. It can hardly be expected that she would have voluntarily furnished that which she failed to furnish under the discovery rules. Without this information, the husband felt unable to make offers. The wife's own expert accountant, testifying at the first fees hearing, was asked, "And would you agree that it would be foolish to make any type of a settlement offer or even accept a settlement offer or even counter without all of the facts at hand?" Her response was, "Absolutely." [Tr 3/14/96, p. 39]. Ultimately, the husband

did enter into settlement negotiations, and asked a mere $25,000 in lump sum alimony [Id., p. 104; Tr 12/19/96, p. 23].

Respondent further suggests that Haber should have profferred the confidential testimony which he might have elicited in the absence of an attorney-client privilege, but cites no authority which would allow a breach of attorney-client privilege for such proffer. It is doubtful whether a judge's unexpected, *sua sponte* threat to sanction counsel under a novel "inherent power" theory, with no pending motion or pleading charging any violation of a statute, rule, or court order, constitutes the sort of "proceeding concerning the lawyer's representation of the client" which will relieve the lawyer of his duty to preserve client confidences under Rule 4-1.6. Further, the trial court *agreed* that an evidentiary hearing would be needed, and suggested that Haber obtain a remand for such hearing if the appellate court agreed with the "inherent power" theory [Tr 12/10/96, pp. 87-91]. Thus, Haber and his counsel had no reason to expect that a proffer would be necessary.

CONCLUSION

In light of prior jurisprudence in Florida, and after evaluating the experiences of other jurisdictions, this Court should hold that Florida trial courts have no power to impose sanctions upon counsel for conduct which violates no statute, rule, or court

order, and does not amount to contempt. The dangers of recognizing such vast, amorphous power far outweigh its highly speculative benefits. If, however, this Court chooses to grant some degree of "inherent power" sanctions to trial courts, it must place strict limitations upon the power, in accordance with the jurisprudence of other state and Federal courts. Under those standards, it is clear from the record in this case that the conduct of the Petitioner, Dennis Haber, Esq., was in no way improper, and the trial court's award against him should be reversed. It is likewise clear that Haber was not afforded due process, so that at minimum, remand for a fair hearing would be necessary if this Court considered his conduct even questionable.

NOTE ON TYPEFACE

The typeface used herein is Times New Roman, , proportionately spaced, fourteen point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this __ day of March, 2000 to: All parties on the attached mailing list.

By: _____

Helen Ann Hauser
Fla. bar no. 353906
DITTMAR & HAUSER
Counsel for Petitioner Haber
3250 Mary Street, Suite 400
Coconut Grove, Fl 33133
(305) 442-4333