

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.

REPLY BRIEF OF
PETITIONER DIOSDADO C. DIAZ

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Typeface Note

This brief is typed in Times New Roman 14, a proportional type.

Summary of the Argument and Argument

There is no authority to assess fees against a party for unreasonable refusal to settle; and to assess fees against a party's attorney in such circumstances destroys the attorney client relationship

As the contents of this reply argument are so short, this Appellant has taken the liberty of omitting the summary of the argument, as he simply cannot get more concise.

Appellant Diaz does not wish to get into a war of analysis of existing cases. This Appellant, in the initial brief and in the policy portion of the jurisdictional brief, addressed the positive reasons why the case below was wrongly decided. Nothing in the Answer Brief dispelled those policy reasons. The heart of the Answer brief is "no abuse of discretion" and "this was vexatious so vexations litigation must be punished." Appellant Diaz submits that the Appellant is missing the point.

First, there is one factual aspect of this particular case which has been overlooked. Appellant Diaz did not receive a 50-50 distribution of marital assets- he received 75% of the marital estate and that was affirmed on appeal- based in large part on need. That was effectively receipt of alimony- although less than he sought. Thus, alimony was not only not really a longshot it was an accomplished goal. Appellee would counter that she offered 100% as a settlement offer, prefiling,

But, the problem with that argument was that at that time, and since the parties had maintained separate fiscal information throughout the marriage, the Husband and his Counsel were unable to know whether that was actually 100% or whether there would be additional periodic support available. The Husband was clearly used to support from the Wife throughout the marriage- she payed the household bills from her resources- so without support he was going to suffer a severe decrease in his spendable income from the standard set within the marriage. Unless and until he knew the extent of her resources, her ability to mitigate the decrease in marital lifestyle was unknown and to settle without that periodic support would have been inappropriate. Full and complete financial disclosure is required for settlement offers to be upheld¹- so how can one be punished for failing to accept a settlement offer before same is received? Yet, that is the result in this case- and the result which Appellee asks this Court to validate.

As argued in the initial brief, the legislature specifically found that offers of judgment or compromise will not constitute a basis for fee shifting in marital and family law cases involving alimony. That is because given the totality of the situation it is impossible to weigh adequately whether one has really done better. Can we say definitively that Mr. Diaz has done better by keeping more of his pension plan and not getting periodic alimony? No. Although there is a large value

¹See, *i.e.* **Casto v. Casto**, 508 So. 2d 330 (Fla. 1987) and cases cited therein.

to the lump sum of the plan, periodic alimony which he might have obtained when the wife paid all of the living expenses and many of the frivolities during the marriage, is modifiable. If he had that periodic award, even at a lower level, and got ill or suffered another change in circumstance, the value of that award skyrockets- and the child support would then drop. Too many variables for comfortable 20-20 hindsight exist.

Just because the Husband earned sufficient sums to not live in a hovel does not exempt him from alimony. That was conclusively proven in *Young v. Young*, 677 So. 2d 1301 (Fla. 5th DCA 1996). At the time the settlement offer was rejected, it could not be rationally evaluated- and the choice to obtain discovery in a filed setting does not equate to vexatious litigation. With a filed case the formality of responses to discovery coupled with the sanctions available if discovery is incomplete ordinarily results in more complete disclosure. There is no requirement of pre-filing discovery or mediation. But, the Husband was faulted here for failing to do just that.

Sometimes when we learn more about a situation, we find that the things we thought just aren't true. We find that people living a high lifestyle that looks like they make tons of money are hugely in debt. We find that there really was no commingling of assets even if we thought there was. But, it would have been wrong to assume those negatives and settle based upon assumptions. The income

might have been as great as it appeared- much commingling might have undone separate property. A client who settled too early could have been greatly shortchanged. It is just not true that “any lawyer” could evaluate any situation without full information- they might say “it looks good” but they aren’t going to sign off with a just take it piece of advice when all of the factors have not been evaluated. Nor should they- as it would only leave open far more 12.540 proceedings- not to mention grievances and malpractice cases.

The meritless position cases cited by the Appellee as a basis for an award of fees were those cases where the basis for the action itself was meritless, not the decision to obtain full information before settling. If an action is filed seeking modification of property division 5 years after a final judgment of dissolution of marriage is entered, fees against lawyer and offending client are appropriate. Repetitive motions to modify custody based upon the same allegation of substantial change- continually disproven- may ultimately form a basis for assessment of fees. This is not those cases.

This Court must not allow the zeal to contain what is perceived as a crisis (and it is) in escalating marital law fees to create a situation where lawyers and their clients will be afraid to become informed for fear of finding out that they should have taken an offer and will be hit not only with having to pay their own fees but those of the other side. It will completely erode confidence in the advise of

a lawyer if the client believes that the lawyer is just trying to sell them down the river because they are afraid of *Diaz fees*. It will make tentative lawyers withdraw early and leave even more pro se litigants. And, no good comes of it for unless it is the disclosure which is underscored, it will encourage parties to withhold information early and make uneducated settlement offers.

CONCLUSION

For the reasons set forth in all of the briefs filed on behalf of the Appellants and the Amicus Curiae, it is respectfully requested that the Opinion of the Third District in this matter be reversed.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of March, 2000 to Mark Gatica, Esq., Two Datan Center, Suite 1225, 9130 South Dadeland Boulevard, Miami, FL 33156; Andrew Leinoff, Esq., 1500 San Remo Avenue, Suite 206, Coral Gables, FL 33146; Robert Barrar, Esq., 333 NE 23rd Street, Miami, FL 33136; Helen Hauser, Esq., 3250 Mary Street, Suite 400, Coconut Grove, FL 33133; Roy D. Wasson, Esq., 1320 South Dixie Highway, Suite 450, Coral Gables, FL 33146; David Pakula, Esq., P.O.Box 14529, Ft. Lauderdale, FL 33302; Ky M. Koch, Esq., 200 N. Garden Avenue, Suite A, Clearwater, FL 33756; M. Katherine Ramers, Esq., 1112 Pinehurst Road, Dunedin, FL 34698; and Cynthia L. Greene, Esq., 9150 Southwest 87th Avenue, Miami, FL 33176.

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