Diosdado Diaz vs Rina Cohan Diaz

THE NEXT CASE ON THE COURT'S CALENDAR IS DIAZ VERSUS DIAZ. MS. HAUSER, I SEE THAT YOU AND MS. MARKS ARE GOING TO DIVIDE YOUR TIME.

YES, WE ARE.

PLEASE KEEP TRACK OF IT, BECAUSE WE WILL STAY WITHIN THE TOTAL TIME.

WE WILL DO OUR BEST. GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS HELEN HAUSER. I HAVE THE HONOR TO REPRESENT DENNIS HABER, WHO IS A SOLE PRACTITIONER IN MIAMI. HE HAS GOT A GENERAL CIVIL PRACTICE, COMMERCIAL LITIGATION, AND OTHER TYPES OF CIVIL PRACTICE. IT IS RATHER FITTING THAT HE IS A STANDARD BEARER FOR SO MANY SEGMENTS OF THE BAR ON THIS ISSUE, ALTHOUGH HE IS A RELUCTANT STANDARD BEARER AND NEVER ANTICIPATED IN A CONTROVERSY OF THIS TYPE. WE HAVE, AS AMICAE, BOTH, INTERESTINGLY AS A DEFENSE AND THE PLAINTIFF'S BAR AND THE FAMILY LAW SECTION OF THE FLORIDA BAR, ALL OF WHOM AGREE WITH US THAT THIS DECISION CREATES A MAJOR PROBLEM FOR THOSE OF US OUT HERE ON THE FRONT LINES, TRYING TO PRACTICE LAW IN THIS STATE. I ASKED MR. HABER WHAT HE WANTED ME TO SAY TO THE COURT, AND HE SAID I WOULD LIKE YOU TO POINT OUT THAT I WAS RETAINED AFTER THE SUIT WAS FILED, WHICH IS AFTER THE FAMOUS GENEROUS OFFER HAD ALREADY GONE BY, THAT I DID ONE DEPOSITION IN THE CASE, WHICH WAS THE DEPOSITION OF THE WIFE, WHICH GAVE ME VERY UNSATISFACTORY DISCOVERY IN THIS CASE. THAT AFTER THAT --

IS THAT IN THE RECORD? I THOUGHT THAT MR. HABER -- HE DIDN'T APPEAR -- WAS A HEARING THAT HE DIDN'T APPEAR FOR.

OH, YES. THERE WAS A HEARING ON THE MOTION FOR ATTORNEYS FEES, UNDER 57.105 AND 61.16. THAT WAS A HEARING IN MARCH. AND THERE WAS TESTIMONY TAKEN THERE. IN WHICH MARCH 14, '96, PAGE 112, MR. HABER TESTIFIED I WAS, FIRST, RETAINED AFTER THE SUIT WAS FILED, SO THAT IS IN THE RECORD. NOW, WE HAD AN UNFORTUNATE PROBLEM IN THE THIRD DCA. THEY LOST THE TRANSCRIPT, AND I HAD GIVEN THEM ANOTHER COPY OF THE TRANSCRIPT, AND THEY DID NOT SEND IT UP HERE, AND SO I HAVE DONE IT AGAIN AND SENT IT DIRECTLY TO THIS COURT, BUT IT WAS IN THE RECORD BEFORE THE THIRD DCA AND IT IS HERE THAT HE WAS RETAINED --

BECAUSE ABOUT THE SECOND -- WASN'T THERE A SECOND OFFER HERE, AND WAS HE REPRESENTING -- WAS MR. HABER REPRESENTING THE HUSBAND, WHEN THE SECOND OFFER WAS MADE?

HE DID NOT WITHDRAW FROM THE REPRESENTATION. WHAT HE DID WAS TO BRING IN A LAWYER WHO HAS EXPERIENCE IN FAMILY LAW, AND SHE HANDLED THE MEDIATION, AND SHE HANDLED THE TRIAL. HE DID NOT APPEAR AT THE TRIAL.

BUT HE WAS, STILL, THE ATTORNEY OF RECORD.

HE WAS ONE OF THE ATTORNEYS. THERE ARE ACTUALLY THREE ATTORNEYS OF RECORD. AND THE TRIAL ATTORNEY WAS NOT SANCTIONED, WHICH IS TOTALLY INCOMPREHENSIBLE TO US. THIS WAS A FRIVOLOUS CASE. WHY ISN'T IT FRIFLOUS, AS TO -- FRIVOLOUS, AS TO HER, TOO, WHICH IS --

WE ARE HERE ON, I GUESS, THE BROADER QUESTION, WHICH IS THAT SHOULD THERE BE NO RULE OR NO PROCEDURE AT ALL, OR IS IT JUST IMPROPERLY APPLIED IN THIS CASE, AND I GUESS, ON THE BROADER QUESTION, IT DOES -- IT SEEMS THAT THERE IS DISPUTE AS TO WHETHER A NARROWLY-DRAWN RULE THAT WOULD GIVE NOTICE, OPPORTUNITY TO BE HEARD, WOULD REQUIRE SPECIFIC FINDINGS, THAT THAT TYPE OF RULE MIGHT BE APPROPRIATE. COULD YOU ADDRESS WHETHER -- ARE YOU SAYING THERE SHOULD BE NOTHING WHATSOEVER TO DEAL WITH ATTORNEYS WHO ENGAGE IN BAD FAITH LITIGATION?

WELL, YES. THERE ARE TWO STEPS TO THE ANALYSIS. THE FIRST IS SHOULD FLORIDA JUMP ON THE BANDWAGON? ATTORNEYS IN BAD FAITH, SHOULD WE DO THAT, AND THAT IS THE CONFLICT JURISDICTION THAT WE ARE HERE ON, BECAUSE THE DCA'S DISAGREE. THE SECOND STEP IS, IF --

THE SUPREME COURT HAS HAD A -- THE FLORIDA BAR HAS HAD A RULE FOR MANY YEARS THAT SANCTION ATTORNEYS WHO IMPROPERLY ENGAGE IN DISCOVERY. CAN ATTORNEYS BE LIABLE IN THOSE CASES OR NOT?

THERE ISN'T, REALLY, JURISPRUDENCE, MUCH ON THE ISSUE, BUT IN PRACTICE, YES, THEY WILL FIND AN ATTORNEY WHO HAS DELIBERATELY OBFIST INDICATED IN DISCOVERY, BECAUSE HE -- OBFISCATED IN DISCOVERY, AND THERE IS A RULE. YOU ARE PERFECTLY RIGHT.

THE COURT HAS PROVIDED FOR THAT SINCE 1976, INCLUDING AGAINST THE ATTORNEY.

THE FEDERAL COURTS HAVE, NOW, WHICH THEY DIDN'T HAVE AT THE TIME THAT THE ROADWAY EXPRESS CASE CAME OUT, SAYS THAT, IF THERE IS A PARTY THAT PROLONGS THE PROCEEDINGS AND LITIGATES IN BAD FAITH, AN ATTORNEY CAN BE SANCTIONED. WE DON'T HAVE THAT.

WE HAVE A STATUTE, NOW, WHICH SAYS THAT FEES CAN BE AWARDED AGAINST COUNSEL, SETTING OUT SPECIFIC --

IF YOU ARE TALKING ABOUT 57.105, THAT IS FOR FRIVOLOUS LITIGATION, WHICH IS DEFINED IN THE STATUTE. WE DON'T HAVE THAT HERE.

OKAY.

WHAT WE HAVE HERE WAS A CASE, THE THIRD DCA CALLED IT A GRAY AREA, AS TO WHETHER YOU CAN GET ALIMONY IN A LONG-TERM MARRIAGE -- A MIDDLE-TERM MARRIAGE OF THIS TYPE, WHERE THERE IS A LIFESTYLE PROBLEM BECAUSE THE WEALTHIER SPOUSE HAS BEEN SUPPLEMENTING THE LIFESTYLE OF THE OTHER SPOUSE, AND THERE IS, IN FACT, A CASE, YOUNG VERSUS YOUNG, WHICH WAS EXACTLY OUR SITUATION OUT OF ANOTHER DCA, WHERE THAT WAS AWARDED, SO WE HAD A REAL CLAIM HERE. THE TRIAL JUDGE, HERSELF, DID NOT CALL IT FRIVOLOUS, BECAUSE THERE WAS A MOTION, UNDER 57.105, AND THE JUDGE -- OF COURSE WE WERE UNDER THE OLD STATUTE AT THAT TIME. THE JUDGE SAID THIS IS NOT A 57.105 CASE. I UNDERSTAND THAT. IT WAS A LONG SHOT. THAT IS WHAT SHE CALLED IT.

THE PROBLEM IS, IF WHAT YOU ARE SAYING IS 57.105 WILL NEVER ADDRESS THE SITUATION IN A DOMESTIC RELATIONS CASE, BECAUSE, YOU KNOW, WHETHER YOU GET ALIMONY OR NOT OR HOW MUCH, YOU KNOW, BECAUSE THERE IS SO MUCH DISCRETION THERE IS ALMOST -- WHERE WOULD -- YOU WOULD NEVER HAVE FRIVOLOUS LITIGATION IN A DIVORCE, DOMESTIC --

YOU CAN HAVE FRIVOLOUS LITIGATION. CERTAINLY YOU CAN HAVE A MOTION FILED THAT ALLEGES THAT SOMEBODY FAILED TO PICK UP THE CHILD WHEN, IN FACT, HE DID. YOU CAN HAVE INDIVIDUAL PARTS OF THE PROCEEDING, ESPECIALLY NOW, UNDER THE NEW STATUTE, YOU CAN ISOLATE, THAT THERE CAN BE ACTIONS TAKEN WITHIN THE LITIGATION WHICH ARE FOR THE PURPOSES OF HARASSING THE OTHER PARTY. BUT MY VIEW IS BAD FAITH IS DIFFERENT FROM MERITLESS LITIGATION.

ARE YOU -- SO I GUESS IT IS GOING BACK TO THE QUESTION I HAD, AS FAR AS DO YOU THINK THAT 57.105 PERSPECT I FEEL WILL ADDRESS THIS SITUATION? OR WOULD YOU THINK THAT A RULE CHANGE THAT IS A PERSPECTIVE INNATE, IS, REALLY, THE WAY, IF THE COURT DECIDES THAT SOMETHING SHOULD BE DONE IN THIS AREA, THAT A PERSPECTIVE RULE CHANGE --

OUR POSITION IS THAT IT IS DANGEROUS TO ALL OF US IN THE BAR, TO ADOPT INHERENT POWERS, WHICH IS STANDARD LESS. WE HAVE, NOW, THIS LEGISLATURE HAS GIVEN US A NEW 57.105, WHICH IS ADDRESSING FRIVOLOUS LITIGATION. LET'S GIVE IT A CHANCE AND SEE IF THAT IS GOING TO SOLVE OUR PROBLEM, BUT TO GO OUT AND ADOPT, I CAN DECIDE, AT THE END OF THE CASE. I AM THE JUDGE. THAT IT WAS IN BAD FAITH. I DON'T TAKE EVIDENCE FROM THE LAWYER AND THE CLIENT, BECAUSE THEY -- I DIDN'T GIVE THEM A WAIVER OF THEIR ATTORNEY-CLIENT PRIVILEGE AND THEY DON'T WANT TO TESTIFY AGAINST ONE ANOTHER. THE CLIENT IS NOT COMPLAINING THAT HE GOT BAD ADVICE, SO WE DON'T HAVE A MALPRACTICE SITUATION, WHERE THE LAWYER MIGHT, POSSIBLY, HAVE AN INSURANCE COMPANY COME IN AND PROVIDE HIM SOME DEFENSE. WHAT YOU HAVE IS THE OPPORTUNITY FOR A TRIAL JUDGE TO COME BACK AND SECOND-GUESS WHAT A LAWYER HAS DONE IN A CASE, WITHOUT AN ADEQUATE RECORD, WITHOUT PROPER NOTICE, AND WITHOUT DUE PROCESS. JUST COME IN AND SAY, WELL, I THINK THAT YOU OUGHT TO PAY SOME OF THE LITIGATION ON THE CASE. THIS IS AN ALARMING POWER. I MEAN, THIS IS A TYRANNY.

WHAT WERE THE FEES IN THIS CASE? THE ATTORNEYS FEES ON BOTH SIDES.

THE AWARD?

NO. THE ATTORNEYS FEES ON BOTH SIDES. HOW MUCH?

THE WIFE WAS CLAIMING A TOTAL OF ABOUT $72000 FOR HER SIDE, AND THE HUSBAND, I THINK, SOMEWHAT LEFT, IN THE 50s, IN AN AMOUNT THAT WAS ASSESSED AGAINST THE HUSBAND, JOINTLY AND SEVERALLY, WAS $40,000.

BUT SHOULD THE COURT BE IN A POSITION IN WHICH IT SEES THIS MATTER UNFOLDING IN FRONT OF IT, IN WHICH THESE LAWYERS THAT ARE IN THIS LITIGATION, SPEAKING HYPOTHETICALLY, NOT IN THIS PARTICULAR CASE BUT SPEAKING TO THE INHERENT POWER, AND THEY ARE FIGHTING OVER EVERY STICK OF FURNITURE AND EVERY FORK AND RUNNING UP LEGAL FEES THAT THE COURT JUST SEES IS, REALLY, NOT IN THE PURSUIT OF JUSTICE IN THAT CASE. AND IS THE COURT JUST POWERLESS TO DO ANYTHING ABOUT THE FACT THAT -- AND THE COURT SAYS, YOU KNOW, YOU HAVE GOT TO STOP THIS. WE HAVE GOT -- THIS MATTER CANNOT BE LITIGATED THIS WAY.

WELL, THIS, JUDGE, IS A DECISION FOR THE PARTIES. IF THE PARTIES ARE PROPERLY WARNED AND THEY KNOW THAT THERE CAN BE FEE SHIFTING OR AT LEAST THEY ARE GOING TO HAVE TO PAY THEIR OWN ATTORNEYS, IF THEY DON'T END UP PAYING THE OTHER PARTY'S FEES, THIS IS THEIR DECISION. IF YOU START SECOND-GUESSING WHEN A CASE OUGHT TO HAVE BEEN SETTLED, YOU ARE DESTROYING THE ATTORNEY-CLIENT RELATIONSHIP. EVERY OFFER OF SETTLEMENT IS GOING TO CREATE A CONFLICT, BECAUSE THE LAWYER IS GOING TO BE AFRAID IF I DON'T WITHDRAW NOW, THERE GOES MY KIDS' COLLEGE FUND.

BUT WE, ALL, KNOW FROM OUR LITIGATION EXPERIENCE, THAT THERE ARE BLATANT EXAMPLES OF THE FACT THAT CLIENTS ARE TAKEN ADVANTAGE OF, RIGHT BEFORE THE COURT. WE KNOW THAT, DON'T WE? I MEAN, IN REAL TERMS.

THERE ARE SOME.

RIGHT. AND SO IS THE COURT JUST TO BE POWERLESS?

I THINK THE COURT HAS TO DEAL WITH IT THROUGH THE PARTIES, AND IF THE PARTIES HAVE, IN FACT, BEEN MISSED A ADVISED, THERE IS MALPRACTICE LITIGATION, BUT TO DO IT THIS WAY, AS AN AD HOC, STAR CHAMBER MALPRACTICE CASE, IT IS OUTRAGEOUS AND INTERFERES WITH OUR POWER TO PRACTICE LAW. I NEED TO YIELD TO MS. MARKS.

IS MS. MARKS GOING TO DEAL WITH THE ISSUE OF THE HUSBAND'S FEES?

THE ISSUE OF THE HUSBAND'S FEE AND, ALSO, THE TENSION THAT GROWS BETWEEN ATTORNEY AND CLIENT, BECAUSE THAT IS A CLIENT ISSUE AS WELL. GOOD MORNING. DEBORAH MARKS ON BEHALF OF DCD S. IF THIS WERE IN THE LAW OF THE LAND, BACK IN THE MID TO LATE '70s, DIAZ VERSUS DIAZ, SMALLWOOD VERSUS PERES AND SOME OF WHAT WE BELIEVE TO BE THE MISS SBEMPTATIONS OF ROSE EN-- MISINTERPRETATIONS OF ROSSIN VERSUS ROSSIN AND, PERHAPS, ELEANOR SNOVITZ, BECAUSE SHE WAS DOING FAMILY LAW AT THE TIME, IF SHE SAID MY CLIENT WANTS ALL OF THE ASSETS, BECAUSE THEY ALREADY IN THE HUSBAND'S NAME. I WOULD LOOK AT HER AND SAY IT IS NOT DONE. IT IS GOING TO BE CONSIDERED LUDICROUS, AND I AM AFRAID, FRANKLY, THAT WITH THIS BEING THE LAW OF THE LAND, THAT I WOULD BE AFRAID OF PUTTING MY TRIAL AT-RISK, IF I WERE TO TAKE THE CLAIM TO THE COURT.

IS THAT BASED ON FIRST IMPRESSION?

OR AN EXTENSION OF CURRENT LAW OR SOMETHING THAT SOME JUDGES MIGHT CONSIDER A LONG SHOT OR A GRAY AREA AND OTHERS MIGHT NOT. YOU HAVE TO BE VERY CAREFUL, WHEN YOU ARE SITTING THERE, AS A JUDGE, TO TRY AND SECOND-GUESS THE MOTIVATIONS OF LAWYER AND CLIENT. AND WHAT WE ARE DOING, HERE, BY THIS SERIES OF CASE LAW, IN ADDITION TO TURNING LAWYERS INTO GUARANTORS FOR THEIR CLIENT, IS YOU ARE BUILDING ATTENTION THAT IS TRULY IRREVOCABLE BETWEEN ATTORNEY AND CLIENT. NOW, I AM NOT GOING TO STAND HERE AND DEFEND EVERY LAWYER'S DECISION AND TELL YOU EVERY LAWYER IS ACTING IN GOOD FAITH OR THAT THE COURT SHOULD HAVE ABSOLUTELY NOTHING THEY CAN DO. I DON'T THINK THAT IS REASONABLE, EITHER. BUT TO GO IN AND CREATE AN INHERENT AUTHORITY TO FEE SHIFT, WHICH IS A SUBSTANTIVE RIGHT, AND WHICH THIS COURT HAS SAID, WHICH THIS COURT SAID, IN BITTERMAN, SHOULD BE RARELY APPLICABLE, AND TAKE IT INTO THE DOMESTIC ARENA, WHERE SMALLWOOD VERSUS PERES, THE THIRD DISTRICT SAID SHOULD BE ENCOURAGED AND APPLIED, AND SEE WHAT WE HAVE SEEN, WHICH IS MORE LITIGATION, IS A REAL PROBLEM.

WITH RESPECT TO THE PARTY, THIS COURT, IN ROSSIN, DID FIND THAT THERE COULD BE A BASIS FOR THE COURT TO ASSESS FEES FOR VEX ARBS LITIGATION.

THIS COURT DIDN'T QUITE SAY THAT. WHAT THIS COURT IS HE WHAT THIS COURT SAID, IN ROSSIN, WHICH IS CONSISTENT WITH THE STATUTE IN 61.16, IS THAT THE COURT COULD DENY FEES TO A PARTY THAT HAD ACTED EXCESSIVELY. IT DIDN'T TURN AROUND AND SAY YOU COULD, THEN, AWARD FEES IRRESPECTIVE OF NEED ANDABILITY. THAT WAS KNEW TO THE CASE LAW THAT INTERPRETED AND SOME OF THE OTHER CASE LAW THAT SURROUNDED IT, AND IT IS A MAJOR DIFFERENCE, AND I THINK THAT THE COURT NEEDS TO STRONGLY CONSIDER WHETHER IT WANTS TO TAKE THAT NEXT STEP. THERE ARE OTHER THINGS THAT CAN BE DONE. THERE HIS CASE MANAGEMENT. THERE IS THE ABILITY TO SET PRELIMINARY HEARINGS ON ISSUES. IF YOU SEE SOMETHING GETTING OUT OF CONTROL. THERE ARE TWO THINGS THAT WE HAVE BEEN TRYING TO DO, AS A COURT AND A BAR, THAT -- AND I AM ALMOST RUNNING INTO TIME, BUT LET ME DO THIS, ANYWAY. WE ARE TRYING TO MAKE DISCLOSURE MORE IMPORTANT. WE DID MANDATORY DISCLOSURE BY RULE. WE HAVE BEEN COMING IN AND SAYING THAT, IF ONE PUTS EVERYTHING ON THE TABLE, WE WILL BE ABLE TO DEAL WITH CASES MORE EASILY. THIS CASE, UNDER ITS FACTS, DISCOURAGINGS THAT, BECAUSE -- DISCOURAGES THAT, BECAUSE WHAT IT DID WAS ENCOURAGE THE PARTY NOT TO GIVE FULL DISCLOSURE BUT TO GIVE A GREAT SETTLEMENT OFFER, AND WHEN THAT WASN'T TAKEN, AND THERE ARE SERIOUS DISCLOSURE ISSUES IN THIS

CASE AS IT WENT ALONG, THE COURT SECOND-GUESSED AND SAID YOU SHOULD TAKE IT, ANYWAY. THE FIRST OFFER WAS MADE AFTER THE CASE WAS FILED. THE SECOND OFFER WAS MADE AFTER THE WIFE'S DEPOSITION, WHERE SHE SAID I DON'T REMEMBER ANYTHING. I DON'T KNOW ANYTHING. THE TRUST ASSETS AND ALL OTHER INCOME AND EVALUATION WERE CLEARLY UNKNOWN AND BEING FOUGHT FOR PROTECTION. HOW CAN YOU APPROPRIATELY EVALUATE WHETHER THERE HAS BEEN COMMINGLING AS TO A CLIENT, UNLESS YOU HAVE THOSE RECORDS, BECAUSE THE SECOND DEPOSITION WASN'T SECOND-GUESS SECOND-GUESSED AFTER THEY FOUND THEIR WASN'T ANYTHING IN THERE. THE COURT CAME BACK AND SAID YOU SHOULD HAVE TAKEN THE SETTLEMENT OFFER. THE THING THAT WE HAVE BEEN TRYING TO DO, AS A COURT AND A BAR AND AS A COMMUNITY, IS TO MAKE FAMILY LAWLESS ADVERSARIAL. WHEN YOU GET INTO A POSITION WHERE YOU CAN START FILING DIAZ MOTIONS AND SENDING ROSSIN LETTERS TO THE OTHER SIDE, WHICH IS HAPPENING. I MEAN THAT IS WHERE THIS IS GOING. YOU INCREASE THE HOSTILITY. YOU INCREASE THE TENSION. AND IT IS ABSOLUTELY COUNTERPRODUCTIVE. THE ANSWER IS FORCE THE DISCLOSURE. DO PRELIMINARY DISCUSSION, AND MAKE SURE THAT WE ARE NOT SO ARE A GANT AS TO BELIEVE -- ARROGANT AS TO BELIEVE THAT WE HAVE FINISHED THE EVOLUTION OF FAMILY LAW AND THAT EVERYTHING AS IT IS, IN FACT, WHAT IT IS GOING TO BE, BECAUSE AT THAT POINT WE MIGHT AS WELL REPLACE ALL OF US WITH COMPUTERS AND TAKE ALL OF OUR FINANCIAL AFFIDAVITS, WHEN THEY GET DONE, AND CRUNCH IT RIGHT THERE.

YOU ARE WELL INTO YOUR REBUTTAL.

YES. I AM GOING TO SAVE THE REST FOR REBUDGETS. -- FOR REBUTTAL.

MAY IT PLEASE THE COURT. MARK GATICA, ON BEHALF OF RESPONDENT, AND I WILL, ALSO, BE REPRESENTING, FOR THIS ARGUMENT, THE OTHER RESPONDENT, RINA COHAN DIAZ. THE ISSUE BEFORE THIS COURT IS NOT WHETHER INHERENT POWERS EXIST. IT IS NOT WHERE THEY ORIGINATED OR TO WHAT EXTENT THEY EXIST. THE ISSUE FOR THIS COURT TO DECIDE, AS JUSTICE PARIENTE AND JUST ATIS WELLS APTLY FRAMED -- AND JUSTICE WELLS APTLY FRAMED, IS WHETHER INCLUDING IN COURTS VEXATIOUS AND FRIVOLOUS LITIGATION. THIS LITIGATION IS LUDICROUS. IT IS BEYOND LUDICROUS.

IS IT A FACT THAT MR. HABER WAS NOT TRIAL COUNSEL, THAT HE GOT INVOLVED AFTER A SETTLEMENT OFFER AND THAT, REALLY, HE WAS NOT THE PERSON THAT WAS PRIMARILY INVOLVED?

I WOULD BE HAPPY TO, YOUR HONOR. THE CHRONOLOGY IS THAT, IN THE FALL OF 1994, THE PETITIONER, RINA COHAN DIAZ, CONTACTED COUNSEL AND ASKED HER COUNSEL TO CONVEY AN OFFER TO HER HUSBAND, SAYING I WANT A DIVORCE, BUT I DON'T WANT TO FIGHT ABOUT IT. I JUST WANT $.

A WEEK IN CHILD SUPPORT AND THAT IS IT. YOU CAN HAVE THE ENTIRE MARITAL ESTATE. THAT IS IT. ALL I WANT IS $.

A WEEK IN CHILD SUPPORT. THERE WAS NO RESPONSE TO THAT OFFER. HER ATTORNEY WAS, THEN, REQUIRED UPON TO INITIATE A DIVORCE PROCEEDING, AND IN NOVEMBER 1984, THE PETITION FOR DIVORCE WAS FILED. MR. HABER WAS RETAINED IMMEDIATELY T THERE WERE DISCUSSIONS. THERE WAS, STILL, NO RESPONSE TO THE SETTLEMENT OFFER, WHICH REMAINED ON THE TABLE FOR SOME TIME. MR. HABER CONTINUED AS COUNSEL OF RECORD THROUGH THE ENTIRE PROCEEDING.

YOU SAID COUNSEL OF RECORD, BUT I ASKED YOU IS IT CORRECT THAT, IN TERMS OF DECISIONS, TRIAL DECISIONS, TAKING THIS TO TRIAL, THAT THERE WAS AT LEAST ONE OR TWO OTHER ATTORNEYS INVOLVED?

ANOTHER ATTORNEY WAS BROUGHT IN, WHEN THE CASE WAS ACTUALLY TRIED IN SEPTEMBER OF '95. HOWEVER, MR. HABER WAS LEAD COUNSEL AT ALL TIMES, CONTROLLED THE LITIGATION. ALL COMMUNICATIONS WERE WITH MR. HABER.

THAT IS ALL IN THE RECORD?

THAT IS ALL IN THE RECORD, AND IN FACT, MR. HABER FILED A MOTION FOR FEES AT WHICH HE TESTIFIED THAT HE INCURRED FEES OF $25,000 IN THIS MATTER.

LET ME BRING THIS TO WHAT APPEARS TO ME, TO BE THE ISSUE, THOUGH, AND THAT IS THAT THIS, AS TO COUNSEL, THIS AWARD OF FEES WAS NOT ON THE BASIS OF THE STATUTE. IT WAS ON THE BASIS OF THE FACT THAT THE COURT SAID THAT IT HAD THE POWER TO CONTROL THIS KIND OF CONDUCT BY COUNSEL, THROUGH THE AWARD OF FEES. CORRECT?

THAT'S CORRECT.

NOW, IF THAT IS ACCEPTED BY THIS COURT, WHAT IS THE STANDARD BY WHICH THE COURT, TRIAL COURTS COURT'S DETERMINATION -- TRIAL COURT'S DETERMINATION THAT LITIGATION IS VEXATIOUS OR SHOULDN'T HAVE BEEN DONE. WHAT IS THE STANDARD THAT THAT TRIAL COURT'S DECISION IS GOING TO BE REVIEWED?

I THINK THE LEGISLATURE HAS PRETTY MUCH ANSWERED THAT QUESTION FOR THE COURT, IN ITS 1998 MODIFICATION TO 57 .105.

BUT WE ARE NOT DEALING WITH A STATUTORY BASIS. WE ARE DEALING WITH SOME TYPE OF OTHER POWER GIVEN TO THE TRIAL COURT, AND I AM CONCERNED ABOUT WHETHER, IN FACT, THE ONLY TYPE OF REVIEW THAT WE WOULD HAVE AVAILABLE WOULD BE AN ABUSE OF DISCRETION. AND IF IT IS AN ABUSE OF DISCRETION FROM SITTING IN A TRIAL -- APPELLATE BENCH, IT WOULD BE VERY HARD TO SAY THAT THIS TRIAL JUDGE ABUSED DISCRETION IN THIS INSTANCE, DIDN'T IN THAT INSTANCE OF CANAKARAS, EVERYTHING UNFOLDING BEFORE THE TRIAL JUDGE. WE ARE GOING TO GIVE THE TRIAL JUDGE THE BENEFIT OF THE DOUBT, AND SO WE ARE GIVING, IN FACT, ENORMOUS POWER TO A TRIAL JUDGE, TO BE -- WHICH COULD BE EASILY EXERCISED IN AN ARBITRARY MANNER, AGAINST COUNSEL. ISN'T THAT -- IS THAT NOT A FAIR CONCERN?

YOUR HONOR, IT IS A REASONABLE CONCERN, YOUR HONOR. HOWEVER, THERE ARE, ALREADY, NUMEROUS CIRCYOU MEAN STRIPINGSS -- CIRCYOU MEAN DESCRIPTIONS, ALREADY, IN -- CIRCUMSCRIPTIONS ALREADY IN EFFECT. IT IS DESCRIBED WHERE THESE TYPES OF SANCTIONS SHOULD BE AVAILABLE, AND THE TRIAL COURT, ALREADY, HAS THE POWER TO HOLD COUNSEL IN CONTEMPT OF COURT, WITH APPROPRIATE SAFEGUARDS THERE.

BUT I HATE TO INTERRUPT YOU, BUT I AM CORRECT, WE ARE NOT APPLYING 57.105 HERE, RIGHT?

WE ARE NOT APPLYING 57.105, BUT THIS TYPE OF CASE PRETTY MUCH MIRRORS A 57.105 ACTION THIS. IS A CASE THAT SIMPLY SHOULD NOT HAVE BEEN. IT WAS FRIVOLOUS FROM THE BEGINNING, AND THOSE ARE, EXACTLY, THE WORDS FROM THE TRIAL COURT. THIS CASE WAS FRIVOLOUS LITIGATION. HIS CLAIMS WERE LUDICROUS.

HOW DO WE KNOW IT IS FRIVOLOUS. IF SOMEONE HAS GOT A TRUST THAT IS PREMARITAL BUT THAT ALLOWED THEM TO LIVE A CERTAIN LIFESTYLE. IT HAS BEEN TEN YEARS OUT. LET'S JUST REVERSE IT. DOES IT LOOK MORE FRIVOLOUS, BECAUSE IT WAS THE HUSBAND SEEKING THE FEES? LET'S JUST ASSUME IT WAS THE WIFE SEEKING AND THE HUSBAND HAD A SUBSTANTIAL TRUST FUND. SHE DOESN'T -- AND ISN'T THE OTHER PARTY ENTITLED TO GET DISCOVERY OF WHAT IS IN THAT TRUST FUND, TO SEE IF THERE IS A BASIS TO ASSERT A CLAIM FOR ALIMONY?

HE KNEW WHAT WAS IN THE TRUST FUND, YOUR HONOR. HE SIGNED A PRENUPTIAL AGREEMENT.

I GUESS MY CONCERN IS THAT, IF THERE IS TO BE A DOCTRINE, THAT IT BE VERY NARROWLY SET FORTH, AND WHAT WOULD YOU SAY WOULD BE THE PARAMETERS, IF WE WERE TO SAY, YES, THERE IS INHERENT AUTHORITY. MAYBE REF RECOGNIZED IT, IN CASES LIKE BITTERMAN, THAT CONDUCT OF A PARTY IN LITIGATION COULD GIVE RISE TO SANCTIONS. HOW WOULD YOU ARTICULATE WHAT THE RULE WOULD BE?

THE RULE SHOULD APPLY, WHEN THE LITIGATION IS COMPLETELY GIVELOUS OR WHEN IT -- FRIVOLOUS OR WHEN IT BECOMES APPARENT TO ANY --

COMPLETELY FRIVOLOUS. IN A DIVORCE CASE, EVERY HEARING THAT IS BROUGHT IS ABOUT SOMETHING THAT IS CONTESTABLE, LIKE JUSTICE WELLS WAS SAYING. IT IS THE SILVERWARE THIS TIME. NEXT TIME IS PIECES OF PROPERTY. THINGS THAT CAN BE DIVIDED. IS THAT COMPLETELY FRIVOLOUS?

THE RULE WOULD HAVE TO BE APPLIED ON A CASE-BY-CASE BASIS, DEPENDING UPON THE TOTALITY OF THE CIRCUMSTANCES.

I MEAN ISN'T THIS RULE ESSENTIALLY, I GUESS WHAT JUDGE SHOCK WAS TRYING TO DO IS SAY YOU KNOW WHAT? DIVORCE CASES ARE GETTING OUT OF HAND. THEY SHOULD BE RESOLVED. THEY SHOULDN'T BE LITIGATED, AND WE JUST WANT TO PUT A STOP, BY WE ARE GOING TO MAKE THE ATTORNEY PAY THE ATTORNEYS FEES.

I THINK THAT IS AN OVEREXTENSION OF WHAT SHE ACTUALLY DID. WHAT SHE DID WAS LOOKED AT THIS CASE AND SAID THERE WAS TIME, HERE, REASONABLY SPENT, FINDING OUT WHAT THE ISSUES WERE, AND WHAT THE ASSETS WERE, AND AFTER THAT, AFTER EVERYTHING WAS ON THE TABLE, AFTER HE KNEW THAT HE WAS ONLY LOOKING FOR $25,000, WHY WAS HE SPENDING $45,000 TO SEEK A $25,000 LUMP SUM ALIMONY AWARD?

LET ME DIRECT YOUR ATTENTION TO MS. MARC'S POINT. WOULD YOU SPEAK TO THE AWARD, AS TO THE PARTY?

YES, YOUR HONOR. MS. MARKS CORRECTLY POINTED OUT TO THE COURT THAT ROSSIN DID NOT AWARD FEES TO A PARTY, BASED UPON THE OTHER PARTY'S CONDUCT. HOWEVER, THAT WASN'T THE ISSUE BEFORE THE COURT. AND, IN FACT, THERE HAVE BEEN NUMEROUS DECISIONS, SPANNING THE LAST 20 YEARS IN THIS STATE, IN WHICH A PARTY'S VEXATIOUS CONDUCT HAS BEEN CITED AS AN AWARD OF FEES. GOING BACK TO THE FOURTH DISTRICT'S DECISION IN JOHNSON VERSUS JOHNSON IN 1980, NUMEROUS DECISIONS FROM THE THIRD DISTRICT, INCLUDING ARUSA VERSUS ARUSA, UGARTE VERSUS UGARTE, MALONE VERSUS COVERDELL.

AND ALL OF THOSE AWARDED FEES, EVEN THOUGH THERE WAS NO SHOWING OF NEED AND ABILITY TO PAY, SOLELY ON THE BASIS OF THE LITIGATION NOT BEING NECESSARY?

THEY AWARDED FEES, REFERRING TO SECTION 61.16, AND AS THE COURT DID IN ROSSIN, SAYING YOU LOOK AT THE NEED AND ABILITY TO PAY, BUT YOU HAVE TO CONSIDER THESE OTHER FACTORS, INCLUDING THE CONDUCT OF THE LITIGATION.

BUT IN THE CASE WHERE WE WOULD BE EXTENDING AND SAYING, FOR THE FIRST TIME, THAT EVEN IF THERE ISN'T NEED AND ABILITY TO PAY, THAT IT -- THAT FEES CAN PROPERLY BE AWARDED.

IT WOULD BE THE FIRST PRONOUNCEMENT FROM THIS COURT, BUT IT WOULD BE CONSISTENT WITH DECISIONS FOR THE PAST 20 YEARS, OF WHICH --

YOU ARE SAYING -- I AM THINKING BACK TO A SITUATION IN THE FOURTH DISTRICT, WHERE NEED AND ABILITY TO PAY WASN'T THE FORMULA, AND MY UNDERSTANDING OF ROSSIN WAS THE COURT SAID, LISTEN, THERE COULD BE A NEED AND ABILITY TO PAY, BUT IF YOU ENGAGE IN VEXATIOUS LITIGATION, YOU ARE NOT GETTING YOUR FEES. 41.16 ISN'T GOING TO BE A KEY TO WALK THROUGH THIS WHOLE LITIGATION ON SOMEBODY ELSE'S DOLLAR, IF IT IS NOT APPROPRIATELY BROUGHT, BUT, NOW, YOU ARE SAYING THAT, EVEN FOR A PARTY THAT DOESN'T HAVE A NEED AND ABILITY TO PAY PROBLEM, THAT THERE -- THAT THEY DON'T NEED THE FEES, THAT IT COULD BE -- 61.16 COULD BE USED TO, ALSO, AWARD FEES, AND WOULDN'T THAT -- I GUESS IT IS A DRAMATIC DIFFERENCE IN WHAT WILL HAPPEN, IN DIVORCE LITIGATION.

IT IS NOT A DRAMATIC DIFFERENCE, BECAUSE IT HAS BEEN DONE FOR 20 YEARS, AND IN ADDITION TO THE JOHNSON CASE WHICH I REFERENCED, THERE WAS, ALSO, MET LETTER -- METLER VERSUS METLER, DECIDED IN THE FIFTH DISTRICT COURT OF APPEALS.

I IT THAT, SINCE -- I TAKE IT THAT, SINCE MS. MARKS REFERRED TO WHAT IS CALLED THE ROSSIN LETTER, THAT IF THE COURT IS IN A DEFENSIVE POSTURE, THIS THAT ROSSIN IS BEING READ IN AN OFFENSIVE WAY, THAT NOT ONLY NEED AND ABILITY TO PAY BUT OTHER FACTORS ARE TAKEN INTO CONSIDERATION AS TO THE DETERMINATION OF LEGAL FEES. IS THAT YOUR EXPERIENCE?

YES, YOUR HONOR, THAT THE -- ROSSIN WAS ESSENTIALLY DEFENSIVE, BUT IT HAS BECOME, BASED POP THE LANGUAGE THE -- BASED UPON THE LANGUAGE THIS COURT USED, WHICH DIRECTS THE ATTENTION OF THE TRIAL COURT TO THE CONDUCT OF THE PARTIES DURING THE LITIGATION AND OTHER EQUITABLE FACTORS, THAT IT SHOULD BE USED AS A BASIS FOR AN AWARD OF FEES, AS WELL. OKAY. NOW, THE USE OF THE INHERENT AUTHORITY BY THE COURT IS NOT SOMETHING NEW. IN FACT, THIS COURT RECOGNIZES THAT POWER, IN A 1920 CASE IN UNITED STATES SAVINGS BANK VERSUS PITTMAN. IT WAS NOT USED SUBSTANTIALLY -- IT WAS NOT USED, OFTEN, AFTER THAT. HOWEVER, IT WAS RECOGNIZED BY THE UNITED STATES SUPREME COURT IN THE ROADWAY EXPRESS CASE VERSUS PIPER, AND SINCE THEN, IT HAS -- THE DOCTRINE HAS BEEN FLUSHED OUT IN THE FEDERAL COURTS AND IN NUMEROUS STATE COURTS, AS WELL. IT IS A DOCTRINE THAT IS ALIVE IN THE UNITED STATES. IT IS A DOCTRINE THAT IS NECESSARY IN THIS STATE, NOT IN EVERY CASE, NOT IN THE VAST MAJORITY OF CASES. BUT IN THOSE CASES WHICH ARE AT THE EXTREME, IN WHICH THEY JUST SIMPLY SHOULD NOT OCCUR, WHERE A WIFE SAYS ALL I WANT IS $50 A WEEK IN CHILD SUPPORT AND I WILL WALK AWAY. I DON'T WANT ANYTHING ELSE. WHY SHOULD SHE BE REQUIRED TO SPEND $70,000 LITIGATING AGAINST HER HUSBAND?

COULD YOU ADDRESS THE FACT THAT THERE IS NO OFFER OF JUDGMENT RULE AS PERTAINS TO DIVORCE CASES, AND ISN'T WHAT REALLY HAPPENED, HERE, NOT ONLY AN APPLICATION OF SOME JUDGE-MADE OFFER OF JUDGMENT RULE, BUT EVEN A HARSHER APPLICATION, BECAUSE THESE ARE GETTING ASSESSED AGAINST THE ATTORNEY?

THERE COULD NEVER, REALISTICALLY, BE AN OFFER OF JUDGMENT RULE IN DIVORCE CASES, BECAUSE YOU JUST HAVE SUCH A PANOPLY OF ISSUES THAT TAKE PLACE IN A PARTICULAR CASE.

THIS ONE COULD HAVE BEEN ONE. JUST SAY HERE IS THE OFFER. THE OFFER IS I WANT THIS MUCH IN CHILD SUPPORT. THIS MUCH IN ALIMONY.

BUT, YOUR HONOR, IF THE HUSBAND BANNED HAD -- IF THE HUSBANDS HAD AGREED TO ALL FINANCIAL TERMS BUT SAID I WANT CUSTODY OF THE CHILD, HOW COULD THAT --

IS THIS, THOUGH, SO YOU ARE SAYING THERE COULDN'T BE ONE, BUT THIS IS ONE BEING IMPOSED AFTER THE FACT, WITHOUT ANYONE BEING TOLD, IN ADVANCE, THAT THIS MIGHT BE THE CONSEQUENCES?

JUDGE, WHAT I AM SAYING IS THAT THERE COULD BE NO WAY TO MEASURE WHETHER A PARTY HAS DONE 25% BETTER OR WORSE THAN AN OFFER THAT WAS MADE --

AN ALIMONY AWARD? WOULDN'T THAT BE A SIMPLE THING TO DO?

IN LIMITED CIRCUMSTANCES, ON DISCREET ISSUES, PERHAPS, BUT IN A DIVORCE CASE, THERE ARE SO MANY OTHER THINGS THAT GO INTO THE EQUATION. WHO IS GOING TO RETAIN THE MARITAL HOME? WHO IS GOING TO RETAIN CERTAIN AS SNETS THAT A SIMPLE 25 -- ASSETS? THAT A SIMPLE 25 PERCENT ANALYSIS, IN MOST CASES, WOULD NOT BE POSSIBLE, BUT WHAT MAKES THIS CASE SPECIAL. WHAT MAKES THIS CASE UNIQUE, IN REQUIRING SOME TYPE OF SANCTION, IS THAT THIS IS A CASE WHERE THERE WAS NOTHING TO LITIGATE. THE WIFE SAID ALL I WANT IS $50 A WEEK IN CHILD SUPPORT. YOU CAN HAVE EVERYTHING ELSE. AND AT THAT POINT, THAT OFFER ---.

IF HE HAD COME BACK AND SAID I AM NOT GOING TO PAY THAT. I WANT ALIMONY. YOU ARE SAYING FROM THE GET-GO, IF HE HAD RESPONDED AND SAID THAT, THAT HE COULD NEVER HAVE DONE THAT. THAT WOULD HAVE BEEN -- IT WAS TOTALLY I AM PERMISSIBLE, BASED ON THE LAW CONCERNING ALIMONY OF A TEN-YEAR MARRIAGE.

HE HAD NO REALISTIC BASIS TO ASSERT A CLAIM FOR ALIMONY, YOUR HONOR. HE HAD INCREASED HIS INCOME EVERY YEAR DURING THE MARRIAGE. HE WAS EARNING $80,000 A YEAR AT THE TIME OF THE DIVORCE. THE WIFE'S INCOME WAS ENTIRELY PASSIVE, FROM A TRUST, THAT WAS CONTROLLED BY THE SOLE DISCRETION OF HER FATHER.

SO WHY WASN'T THE TRIAL ATTORNEY SANCTIONED?

THE -- I DON'T KNOW, QUITE FRANKLY, WHY THE TRIAL ATTORNEY WASN'T.

THE PERSON THAT BROUGHT THIS TO TRIAL OVER A SEVERAL DAY PERIOD IS NOT EVEN INVOLVED IN THIS CASE, TO EXPLAIN WHY THAT PERSON THOUGHT THAT IT WAS AN APPROPRIATE CASE TO BRING. WHY ARE -- I GUESS THAT -- MAYBE THAT IS TOO FACT SPECIFIC, BUT SINCE THAT SEEMS TO BE WE ARE LOOKING AT HOW WOULD WE HAVE STOPPED THIS AND WE ARE PICKING ON ONE PERSON, WHY SHOULDN'T THEY HAVE ALL BEEN SANCTIONED?

JUDGE, THE LITIGATION WAS CONTROLLED FROM THE INCEPTION UP TO THE POINT OF TRIAL, BY MR. HABER. THE TRIAL ATTORNEY CAME IN TO TRY THE CASE. THAT WAS BASICALLY HER ROLE IN THE MATTER. MR. HABER IS THE ONE WHO REJECTED THE OFFERS OF SETTLEMENT DURING THE LITIGATION, AND MR. HABER WAS THE ONE WHO PROLONGED THE LITIGATION, BY ENGINEERING THE REFUSAL OF THE -- THE RECUSAL OF THE FIRST TRIAL COURT JUDGE.

MR. HABER OR MR. HABER'S KRINT?

I GUESS WE -- CLIENT?

I GUESS WE DON'T KNOW THAT, BECAUSE THEY CHOSE NOT TO DEFEND THAT ON THAT BASIS. SO BETWEEN MR. HABER AND HIS CLIENT, ONE OF THEY REJECTED THE ATTEMPT TO AVOID LITIGATION, AND ON THAT BASIS, THE TRIAL COURT PROPERLY SANCTIONED MR. HABER AND HIS CLIENT, JOINTLY AND SEVERALLY.

COUNSEL, AT THE TRIAL LEVEL, IN REFERENCE TO JUSTICE WELLS, THE CHIEF JUSTICE HAS MENTIONED, THE FIGHTS OVER THE, FOR AND THE TABLE AND THE DOGS AND THE DISHES AND THOSE TYPES OF THINGS, IS IT COMMON THAT THAT IS GENERALLY GENERATED BY COUNSEL OR IS THAT GENERALLY GENERATED BY THE PARTIES? A DISGRUNTLED P.O.W.s -- A DISGRUNTLED SPOUSE, ONE OR THE OTHER?

GENERALLY IT COULD BE EITHER. THE CLIENT WHO COMES TO THE TABLE WITH SUCH A CHIP ON THE SHOULDER THAT ANY RESOLVE OF THE ISSUE WOULD BE FRUIT LESS.

IN THAT CASE WE THROW THE CLIENT AND ATTORNEY INTO A REAL FIGHT OVER WHO WANTED THE, FOR?

THAT SAME DISPUTE EXISTS, UNDER 57.105, ALSO, AND IN THAT SITUATION, IT IS THE ATTORNEY'S BURDEN TO COME FORTH AND SHOW THAT HE ADVISED THE CLIENT AND IT IS THE CLIENT'S DECISION TO GO FORWARD. I WOULD ASK THAT THE COURT AFFIRM THE JUDGMENT OF THE TRIAL COURT AND REMAND THIS PROCEEDING. THANK YOU.

THANK YOU VERY MUCH. REBUTTAL.

I NEED TO POINT OUT THAT, AT THE LAST HEARING BEFORE THE JUDGE ENTERED THE ORDER, WE DID PROFFER THAT WE HAD A DEFENSE, BUT THAT IT WOULD INVOLVE BREAKING THE ATTORNEY-CLIENT PRIVILEGE. WE SPECIFICALLY ASKED THE JUDGE, IF THIS GOES UP TO THE DCA AND COMES BACK, WHERE THEY SAY THAT YOU DO HAVE THE AUTHORITY TO AWARD THIS, CAN WE HAVE AN EVIDENTIARY HEARING? THE JUDGE SAID SURE. THE THIRD DCA COMPLETELY OVERLOOKED THAT. WE HAVE NEVER HAD THE OPPORTUNITY TO PRESENT ANY EVIDENCE, AS TO WHETHER LAWYER OR CLIENT WAS AT FAULT, AND, YES, WE HAVE ASSERTED THAT WE HAVE A DEFENSE, BUT WE DON'T THINK IT -- THIS IS NOT WHAT LAWYERS AND CLIENTS SHOULD BE DOING, WHEN THEY ARE TRYING TO SOLVE A CASE. THAT IS EXACTLY WHY AN OFFER LIKE THIS AND A CASE LIKE THIS PUTS EVERY LAWYER AND EVERY CLIENT, NOT JUST IN DIVORCE CASES, AT ONE ANOTHER'S THROATS.

THERE IS A NUMBER OF CASES, BOTH SINCE THIS AND BEFORE THIS, THAT, IF WE DISAPPROVE THIS CASE, THE THIRD DISTRICT, WAURBD, WOULD IT NECESSARILY INVOLVE QUASHING ALL OF THE OTHER DISTRICTS?

NO. IF YOU LOOK AT MOST OF THE OTHER CASES, PATSY FOR EXAMPLE, YOU HAVE CONDUCT THAT IS EITHER CON TEMPIOUS OR -- CONTEMPTUOUS OR VIOLATES THE SMALLY RULE, SO THERE ARE OTHER BASIS, IN RULES -- IN RULES, THAT HOLD THE COURT'S ORDER.

ARE YOU SAYING THAT THE TRIAL COURT HAS NO AUTHORITY -- TRIAL COURT HAS NO INHERENT THOURT? -- AUTHORITY?

I WOULD LIKE YOU TO HOLD THAT THE TRIAL COURT HAS NO INHERENT AUTHORITY TO VIOLATE THE RULE AND IS CONTEMPTUOUS.

IN THE CASE INVOLVED ASSESSING FEES, WOULD THAT HAVE TO BE QUASHED?

WELL, I THINK THAT THAT, PROBABLY, WAS CONTEMPTUOUS. I MEAN, THAT WAS SOMEBODY WHO INVENTED A CLAIM, MISNAMED THE PARTY, BROUGHT HIM IN, ENGINEERED A FAKE DISMISSAL. I THINK THAT WE DON'T HAVE TO CALL THIS INHERENT POWERS, BUT THE COURTS WHICH HAVE RECOGNIZED INHERENT POWERS HAVE RESTRICTED IT TO THINGS LIKE FRAUD ON THE COURT, FABRICATING EVIDENCE, FILING IT, A MOTION TO RECUSE COUNSEL THAT YOU KNOW IS BASELESS. THOSE ARE THE KINDS OF THINGS THAT ANYBODY CAN LOOK AT AND SAY OH, MY GOD. THIS IS IMPROPER.

NOW, IN RESPECT TO THE LAWYER, THE LAWYER SAYS, YOU KNOW, IF IT COMES BACK, IF IT TURNS OUT THAT YOU HAVE GOT THE POWER TO DO THIS. GIVE ME A CHANCE FOR AN EVIDENTIARY HEARING, HOW ABOUT MISS MARC'S CLIENT? DID SHE --

WE WILL BE AT ONE ANOTHER'S THROATS, WHICH IS A TERRIBLE, TERRIBLE RESULT.

WELL, BUT, IN DEFENDING AGAINST THE AWARD AGAINST HER, WAS THERE AN ASSERTION THAT THIS IS SOMETHING THE LAWYER DID?

NO. NO. HER CLIENT TESTIFIED TO THE EFFECT THAT HE DID NOT KNOW WHAT THIS WOMAN HAD, AND THAT IS WHY HE DIDN'T SETTLE THE CASE. THAT WAS HIS WHOLE POINT. BUT, YES, THE CONSEQUENCES OF WHAT WILL HAPPEN, IF WE HAVE TO HAVE THIS KIND OF EVIDENTIARY HEARING, ARE UNIMAGINABLE, AND THIS IS GOING TO HAPPEN, CASE AFTER CASE AFTER CASE, IF THIS DOESN'T GET OVERRULED.

OF COURSE THAT IS THE POSTURE OF 57.105.

57.105, WE ARE GOING TO HAVE TO DEVELOP A PROCEDURAL METHOD TO DO THIS, BECAUSE, YES, IT DOES CREATE THAT NIGHT MAYOR. BUT AT LEAST THAT IS SOMETHING THE LEGISLATURE AUTHORIZES HERE. NOBODY AUTHORIZED THIS. IT CAME OUT OF THIN AIR. I WOULD LIKE TO GIVE MISS MARKS A MINUTE.

THANK YOU.

IF THIS CASE WERE UNDER THE NEW 57.105, NO FEES WOULD HAVE BEEN ASSESSED AGAINST EITHER PARTY, EITHER OF THE DEFENDING PARTIES HERE, THE APPELLANTS HERE, BECAUSE THE NEW 57.105 ONLY GIVES YOU AN ENTITLEMENT TO SEEK FEES AND TO RECEIVE FEES. WHEN THE CLAIM IS NOT SUPPORTED BY THE MATERIAL FACTS NECESSARY OR WOULD NOT BE SUPPORTED BY THE APPLICATION OF THEN EXISTING LAW TO THOSE MATERIAL FACTS. WHAT YOU HAD IN THIS CASE WAS A REAL POTENTIAL FOR AN ALIMONY CLAIM, AND IN FACT THE HUSBAND GOT SOME ALIMONY. IT WAS DISGUISED AS INEQUITABLE SDRIPUATION BUT IT WAS THERE -- DISTRIBUTION BUT IT WAS THERE, AND GOING BACK TO THE ORIGINAL OFFER THAT WAS EVALUATED, THE OFFER TO PAY LESS THAN GUIDELINES CHILD SUPPORT IS PARTIALLY LESS THAN A LOSER, BECAUSE, ONE, YOU ARE NOT GOING TO ACCEPT IT. IT IS A DEVIATION, AND SECOND, IT IS MOD FINAL, SO EVEN IF HE REJECTED GIVING UP OTHER CLAIMS TO TAKE A LOWER CHILD SUPPORT AWARD, THERE IS NOTHING TO SAY HE WOULDN'T BE BACK IN COURT, GIVING GUIDELINE SUPPORT LATER, AND THERE ARE FACTORS THAT GO INTO IT.

YOUR TIME IS UP.

THANK YOU. WE ASK FOR RECUSAL.

THANK YOU VERY MUCH. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.