IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
Complainant-Appellee,	)	
v.	)	Supreme Court Case No. 64,278
FRED J. WARD,	)	TFB Case No. 17F80F11
Respondent-Appellant.	)	
	)	

ANSWERING BRIEF ON BEHALF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

Upon this appeal, The Florida Bar will be referred to as "the bar" or "appellee." Fred J. Ward will be referred to as "appellant" except in quotes from the trial transcript or referee's report where he is referred to by name or as "respondent."

Page number references are to the trial transcript pages except when following excerpts from cases when such references are to case report page numbers.

ISSUES INVOLVED

In the bar's view, the following issues are presented upon this appeal:

I. By permitting his client to execute and deliver a warranty deed and affidavit of title knowingly omitting reference to an extant notice of appeal did appellant assist his client in conduct known to appellant to be fraudulent?

II. Did appellant secure an informed consent from his client before undertaking representation of such client in a litigation where appellant's own personal, financial and business interests were at stake?

III. Did appellant accept employment in contemplated litigation knowing he would be called as a witness?

IV. Is a thirty (30) day suspension appropriate discipline under the circumstances?

STATEMENT OF CASE AND FACTS

Appellant has not recited a statement of the facts. Appellee offers the following:

In 1978, appellant represented his mortgagee/client, Wolkowitz, in a mortgage foreclosure proceeding resulting in a final judgment of foreclosure from which the mortgagor filed a notice of appeal in January, 1979. Wolkowitz bid the property in upon the foreclosure auction and received a clerk's certificate of title in February, 1979.

In May, 1979, Wolkowitz entered into a written agreement wherein and whereby he agreed to sell the premises he acquired in the foreclosure action to Gold and assigns. Gold thereafter assigned the contract to herself and her husband. (The foregoing facts are alleged in appellee's complaint and admitted in appellant's answer).

The contract signing took place at appellant's office. Appellant then and there informed Gold that there was a nuisance suit involving the subject property and advised her to seek legal counsel. (6).

The Gold's were first represented by Attorney Fischer to whom appellant caused to be furnished an abstract of title. Unfortunately, the abstract did not contain a copy of the notice of appeal. (49-52).

Subsequently, the Gold's replaced their attorney with Attorney Stuart C. Elliot who, after examination of the title abstract, addressed a letter to the issuing title company raising numerous concerns about the mortgage foreclosure proceeding. Elliot made no reference to the appeal. (56, appellee's exhibit 8). Copied with such letter, appellant forwarded copies of certain of the foreclosure pleadings to Elliot and

without alluding to the notice of appeal, opined in a letter to the title company that the judgment of foreclosure was "res judicata." (60, appellee's exhibit 9).

Title closed in or about July, 1979 with appellant, Wolkowitz, Elliot and the Golds present. (59). There was no mention made concerning the appeal. (58). Despite their actual knowledge of the extant appeal, appellant had Wolkowitz execute and deliver to the Golds a warranty deed and affidavit of title, neither of which referred to the appeal. (9-12, appellee's exhibits 2 and 3).

The affidavit of title prepared by appellant and executed by Wolkowitz provided, inter alia,:

> 2. That his possession has been peaceful and undisturbed; and that his title thereto has never been disputed, questioned, or rejected.
>
> 3. That he has not known of any facts by reason of which his possession of, or title to, the said premises might be disturbed or questioned, or by reason of which any claim to said premises (or any part thereof) or interest therein, adverse to him, might arise or be set up.
>
> 4. That no person has any lease, option, deed or contract of any nature whatsoever for the purpose of, or claim to or against such premises, or any part thereof, except as hereinafter stated; that the said premises are now free and clear of all taxes (except taxes for the current year that are a lien against said property but not payable) encumbrances, or liens, by mortgage, decree, judgment, statute, or any other liens of any nature and description, except the following: Subject to an existing first mortgage in favor of Coral Gables Federal Savings and Loan Association with an unpaid balance of $55,462.14." (Appellee's exhibit 3).

Elliot discovered the notice of appeal upon attendance at the clerk's office for recordation of the closing documents. He immediately informed his clients and instructed appellant to hold and not disburse the sale proceeds. Demand was then made that the sale be rescinded which demand appellant and his client refused. Such refusal prompted a suit instituted in the appropriate circuit court wherein the Golds sued Wolkowitz, appellant, appellant's professional corporation, Elliot, the title company and the realtors. (60-70).

Appellant appeared in such litigation on behalf of himself, his professional corporation and Wolkowitz, representing all such interests up until the time of trial (admitted by appellant's response to appellee's requests for admissions).

After a jury trial, a verdict was rendered awarding to the Golds compensatory damages, and upon the jury's express finding of fraud on the part of Wolkowitz and appellant, punitive damages were assessed against each. Gold v. Wolkowitz, 430 So.2d 556 (Fla. 3d DCA 1983).

ARGUMENT

I. APPELLANT, WHILE REPRESENTING A CLIENT, ASSISTED SUCH CLIENT IN CONDUCT KNOWN TO APPELLANT TO BE FRAUDULENT.

The evidence adduced below was abundant, clear, convincing and, it is respectfully submitted, permitted of no other conclusion but that appellant knowingly assisted his client in fraudulent conduct.

Both Gold and Elliot testified that they were unaware of the existence of the appeal until after title closing. (26, 57, 60). Despite Elliot's letter to the abstract company (copied to appellant) which clearly indicated his lack of notice of the extant appeal, appellant chose to keep such information hidden and to divert attention by reference to the "res judicata" effect of the judgment of foreclosure (appellee's exhibits 8 and 9). Rather than disclose the existence of the appeal upon title closing, appellant, with full knowledge of the facts, prepared and had his client execute and deliver to the purchasers an affidavit of title expressly misrepresenting the status of title (appellee's exhibit 3). It was such evidence that prompted the referee to find that:

> "Respondent prepared the affidavit of ownership and warranty deed for his client, Mr. Wolkowitz He thereafter assisted and counseled Mr. Wolkowitz in delivering the affidavit and deed at the closing. Contrary to the plain language on the affidavit no reference was made to any pending appeal. While the appeal was a matter of record, it is abundantly clear from the totality of the circumstances that neither Mr. Elliot nor his clients were aware of the existence of such an appeal. Therefore, I find respondent guilty of violating Disciplinary Rule 7-102(A)(7) in that his assistance of his client in the preparation and delivery of the affidavit of ownership was conduct which respondent knew to be fraudulent." (referee's report, page 4).

It is respectfully submitted that appellant has failed in his burden to demonstrate that the referee's findings are erroneous. As stated in The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981):

> "The burden is on the respondent to demonstrate that the referee's report is erroneous. Fla. Bar Integr. Rule 11.09(3)(e). The referee's findings of fact are presumed correct and will not be disregarded unless clearly erroneous or lacking support in evidence."

Appellee agrees with appellant that the case of Gold v. Wolkowitz, 430 So.2d 556 (Fla. 3d DCA 1983) was not available to appellee as res judicata or collateral estoppel. Appellant's guilt had to be, and was, it is respectfully submitted, established solely and exclusively by the evidence adduced before the referee. The case, however, is worthy of consideration. As a reported case of a Florida appellate level court, it is respectfully submitted that Gold v. Wolkowitz, supra, is, as all other cases, a part of the corpus juris for whatever significance it may have.

In appellee's view, Gold v. Wolkowitz, is conclusive and establishes as a matter of unchallenged law that based upon the facts considered by the District Court of Appeal, appellant was guilty of the commission of the tort of civil fraud. Secondly and of particular significance, the District Court of Appeal determined that the facts supported the imposition of punitive damages.

As the Supreme Court of Florida pointed out in the landmark case of Winn & Lovett Grocery Co. v. Archer, 1936, 126 Fla. 308, 171 So. 214, 221, exemplary or punitive damages:

> "... are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort."
>
> "Exemplary or punitive (sometimes called vindictive) damages are assessable dependent on the circumstances showing moral turpitude or atrocity in the defendant's conduct in causing an injury that is wanton and malicious or gross and outrageous to such an extent that the measured compensation of the plaintiff should have an additional amount added thereto as 'smart money' against the defendant, by way of punishment or example as a deterrent to others inclined to commit similar wrongs."

It is noteworthy then to track the facts found as established by the District Court of Appeal measured against those established in the case sub judice.

Each and every fact set forth in Judge Jorgenson's opinion in the second paragraph thereof was, it is respectfully submitted, established before the referee.

Appellant attempted to overcome the effect of the decision by adducing additional evidence concerning what, if any notice of the pending appeal was given by appellant to the Gold's or to Elliot. The District Court of Appeal found:

> "A significant trial issue was the question of whether the Gold's or Elliot had ever been advised by Wolkowitz or Ward of the pendency of the foreclosure appeal. There

was some uncorroborated testimony by Wolkowitz that he had informed Mrs. Gold of a title problem during their first discussions regarding the purchase. The record is uncontroverted that neither Wolkowitz or Ward ever notified the Golds or Elliot of the pendency of the foreclosure appeal." (557).

In the case at bar, Mrs. Gold testified that no one had ever advised her of the pendency of an appeal (26). Her recollection was that the most that she had been told was that there was some type of nuisance suit affecting the subject premises. Mrs. Wolkowitz, testified that she was present when the deposit receipt was signed and that Mr. Ward specifically advised Mrs. Gold of the existence of the appeal (169). Appellant testified that he expressly informed Mrs. Gold upon execution of the deposit receipt that there was an appeal filed. He conceded however, that upon being deposed on February 19, 1980 in connection with the civil fraud litigation, he testified as follows:

Q. What specifically did you say to Mrs. Gold on May 18, 1979, in your office regarding the appeal?

A. Just that I was pretty sure that we could satisfy her attorney, that even though there was an appeal, it was no impediment to her buying it.

Q. What was her response to that?

A. I'm not really sure she understood. She says, "well, I will leave it up to the lawyers". I think that was her response. (181, 182).

Appellant never made any attempt to inform Attorney Elliot of the pending appeal.

In appellee's view, the addition of Mrs. Wolkowitz's testimony did not vitiate the effect of the conceded total failure to communicate a highly technical legal issue to Attorney Elliot. The garbled effect of appellee's conversation with Mrs. Gold is highlighted by her handwritten note to Mr. Elliot. (Appellee's exhibit 1). It would be a sad precedent, indeed, if attorney's could use laymen for the transmittal of legal arguments to other attorneys. The only effect of appellant's attempt to emphasize that he did, in fact, transmit the existence of the notice of appeal to Mrs. Gold, was to emphasize and underscore the great importance that appellant placed upon the existence of the outstanding appeal.

Appellant's defense is two-pronged. Firstly, he contends that he was under no duty or obligation to reveal to Gold's attorney the existence of the pending appeal in that he, appellant, had a right to assume that the notice of appeal was included in the abstract of title or that the purchasers' lawyer would search the records and thereby find the notice. In the alternative, appellant contends that as a matter of law the appeal did not and could not have any effect on the title passing to the purchaser and therefore no reason existed to reveal the existence of the notice of appeal. Appellee does not regard either assertion as constituting a legitimate defense.

Regardless of whether or not the notice of appeal should have been reported in the abstract of title or found by an actual search of the public records, the evidence abundantly established that Attorney Elliot was unaware of its existence. A reading of Mr. Elliot's July 10, 1979 letter to the Lawyers Title Guaranty Fund permits of no other conclusion (Appellee's exhibit 8). When after receipt of Elliot's letter,

appellant represented that Cooper, was "bound by the doctrine of res judicata" (Appellee's exhibit 9) there existed no further reason or need on the part of Elliot to ever contemplate the existence of the appeal. When appellant prepared and had his client execute the warranty deed (Appellee's exhibit 2) and the "no-lien affidavit" (Appellee's exhibit 3) knowing of the extant appeal the fraud became unpenetrable.

The District Court of Appeals squarely addressed respondent's defense that the notice of appeal, as a public record, was discoverable. It stated:

> "The appellees argue that notwithstanding the fraud the Golds had some further duty to inquire with respect to the exact status of the title. That issue has been put to rest. The Florida Supreme Court, Justice Alderman speaking for the court, held in Besett v. Basnett, 389 So.2d 995 (Fla. 1980), that "a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him," 389 So.2d at 998.
>
> "We see no difference in the issues as framed in Besett and those present in the case sub judice. Both Wolkowitz and Ward knew that there was a cloud on the title to the real property in question. Despite their knowledge Ward prepared, and Wolkowitz executed, the affidavit reflecting no clouds on the title." (557).

Appellant's attempt to establish that the notice of appeal in no event constituted a "cloud on title" at best is inconsistent and at worst produced confusion and an exercise in sophistic obsfucation.

The inconsistency is established by appellant's assertion that he deemed the existence of the appeal as so important that he felt it necessary to explore all of its ramifications with Mrs. Gold including a

dissertation on supersedeas, etc. and the importance of Mrs. Gold's securing a seasoned or very experienced expert in real estate law. If the law pertaining to restitution, supersedeas and the effect of a notice of appeal is so crystal clear one must then rhetorically pose the following questions:

1. Why did appellant deem it necessary to bring the matter up in the first place?

2. Why does the Attorney's Title Insurance Fund regard the existence of such notice of appeal as rendering title uninsurable? (This testimony was elicited by appellant from appellee's expert, John Hume, Esquire at pages 102 and 103 of the transcript).

3. Why did the District Court of Appeal in Gold v. Wolkowitz, supra, determine such notice of appeal to constitute "a cloud on the title to the real property in question"? (the court stated: "Both Wolkowitz and Ward knew that there was a cloud on the title to the real property in question." (page 557).

Appellee will not revisit the testimony of each witness. The only observation that will be made concerns the so-called expert testimony. Appellee respectfully submits that the jousting that took place conclusively established but one fact, viz., that the law pertaining to restitution rights against purchasers from a party to the record are clear as mud. All of the experts seemed baffled by the Florida Supreme Court's use of the phrase "beneficial assignees" in the Simms and Sundie cases. (Simms v. City of Tampa, 42 So. 884; Sundie v. Haren, 253 So.2d 857).

Although Simms presented a simple fact pattern involving a third party purchaser at a judicial sale the court nonetheless deemed it necessary to carefully distinguish the rights acquired by strangers at a judicial sale from those acquired by parties to the record at such sale. The court did not address the rights of strangers who acquire title from a party to the record who in turn acquired title at a judicial sale.

The Restatement of the Law, Restitution, Section 74 hardly resolves the issue. Subsection "i" states:

> "If the judgment or the execution was void, the purchaser (third party purchaser) is under a duty of restitution to the judgment debtor."

In subsection "j" the following recitation appears:

> "If the judgment creditor purchases at a valid execution or judicial sale and sells the property to a purchaser, the fact that the purchaser had notice of a pending appeal does not prevent the sale from being effective although the appeal succeeds, if the judgment set aside was not void." (emphasis applied)

Subsection "j" also recites:

> "If the judgment reversed was void, a transferee from the judgment creditor obtains no rights thereby and is under the same duty of restitution to the judgment debtor as would be the creditor, as to which see section 73."

Finally, several illustrations are set forth including illustration 25 which appellant relied heavily upon. The restatement, in the body of subsection "j" carefully points out, however, that such illustration applies only "if the judgment set aside was not void."

In short, the only certainty involved concerning the law of restitution and consequently the effect of an outstanding notice of appeal such as in the instant case, is that there are, indeed, circumstances where the subsequently reversed judgment (if void) could result in having the third party purchasers, either from the judgment creditor or at the execution sale, forced to restore the property to the judgment debtor. It is obviously because of this possibility that the title company in question refused to permit insurance to issue with an outstanding notice of appeal. It is respectfully submitted that such consideration also led the District Court of Appeal to make reference to such notice of appeal as a "cloud on title". The fact that the Cooper appeal had or did not have merit and appellant's evaluation thereof, are not relevant. The only time that one could know for certain as to whether or not the notice of appeal did, in fact, constitute a substantial cloud, is after the fact.

ARGUMENT

II. APPELLANT, WITHOUT CONSENT OF HIS CLIENT AFTER FULL DISCLOSURE, ACCEPTED EMPLOYMENT IN A LITIGATION WHERE EXERCISE OF HIS PROFESSIONAL JUDGMENT ON BEHALF OF HIS CLIENT WAS OR REASONABLY MIGHT HAVE BEEN AFFECTED BY APPELLANT'S OWN FINANCIAL, BUSINESS OR PERSONAL INTERESTS.

By request for admission and appellant's response thereto (both request and response numbered 2b) appellant admitted that in the action, Gold v. Wolkowitz, supra, appellant appeared as attorney for himself, his professional association, and Wolkowitz and conducted all proceedings in such case on behalf of such parties up until the time of trial.

Upon the conclusion of appellee's case and after appellant rested, applications were made and renewed to dismiss Count II of the complaint upon the ground that appellant allegedly made full disclosure of the potential conflicts involved in the Gold v. Wolkowitz, action, supra to his clients and secured their express consent to represent them. It is respectfully submitted that no adequate disclosure was made to Mr. and Mrs. Wolkowitz and that the fact that another attorney was called upon to conduct the trial does not constitute a defense to the charge.

The testimony elicited from Mrs. Wolkowitz and appellant is totally devoid of any hint or inference that appellant, at any time disclosed to his clients the basic and fundamental conflict that existed between his and his professional association's positions as defendants and that of his clients. Mrs. Wolkowitz testified that the substance of appellant's conversations with her and her husband regarding the subject litigation was that:

"There was a possibility that there would be a law suit." (170).

"It could result in being sued by Mr. and Mrs. Gold." (171).

Appellant's testimony was to similar effect. (162-164). This is hardly the type of disclosure that would be warranted under the circumstances. It is respectfully submitted that appellant should have immediately referred his clients to another attorney for purposes of evaluation of their rights not only regarding the Golds, but, equally as important, their rights regarding cross-claims against appellant. That appellant never fully appreciated or understood the very real conflict that existed between himself and his clients was emphasized and underscored by his testimony regarding what he apparently perceived as an heroic act in paying the punitive damages assessed against him. Once must speculate as to whether appellant would have been directed to pay the punitive damages assessed against his clients had an appropriate cross-claim been asserted in the action. Appellant did not, by any standards, secure his clients' informed consent and thereby violated Fla. Bar Code Prof. Resp., D.R. 5-101(A).

ARGUMENT

III. APPELLANT ACCEPTED EMPLOYMENT IN CONTEMPLATED LITIGATION KNOWING THAT HE WOULD BE CALLED AS A WITNESS.

It is respectfully submitted that the referee best stated the basis for finding appellant to have violated Fla. Bar Code Prof. Resp., D.R. 5-101(B). He stated:

> "Since Mr. Ward and his professional association and Mr. Wolkowitz were all co-defendants and charged with fraud and misrepresentation, it is obvious that a very real potential existed for Mr. Ward to be called as a witness in his own behalf, on behalf of his professional association and certainly on behalf of his client, Mr. Wolkowitz, against whom the Golds were seeking both compensatory and punitive damages. Under such circumstances, Mr. Ward by not refusing such employment when he knew that he would have to at one point in the proceeding become a witness, violated Disciplinary Rule 5-101(B)." (referee's report, page 2).

ARGUMENT

IV. THE RECOMMENDED DISCIPLINE IS APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS PROCEEDING.

An attorney's assistance of his client in conduct known to the attorney to be fraudulent has historically been viewed by this Court as ethical impropriety requiring severe sanctions. When considered together with the conflict violations it is respectfully submitted that the thirty (30) day suspension recommended by the referee must be viewed as a minimum discipline.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), this Court ordered a disbarment where the attorney involved permitted his client to perpetrate a fraud upon the court by introducing false testimony. The Court approved a one (1) year suspension in The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981) where the respondent therein urged witnesses to testify under oath to matters which the attorney knew or should have known that the witnesses did not believe and were false. By knowingly permitting his client to execute and deliver the warranty deed and affidavit of title involved in this proceeding, appellee suggests that appellant's conduct is akin to the violations involved in the cases, supra, and warrants the recommended discipline.

CONCLUSION

For the reasons above stated it is respectfully requested that this Court approve and adopt the recommendations of the referee herein and order that appellant be suspended from The Florida Bar for a period of thirty (30) days and pay the costs of the proceeding.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answering Brief on Behalf of The Florida Bar was furnished to Richard R. Kirsch, P.A., Attorney for Respondent, 224 S.E. 9th Street, Fort Lauderdale, FL 33316, by regular mail, on this 30th day of JANUARY, 1985.

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