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IN THE SUPREME COURT OF FLORIDA

DANIEL MONES, P.A.,

Petitioner,

vs. CASE NO. 66,296

JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC.,

Respondents

ANSWER BRIEF OF RESPONDENTS JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC.

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Other Citations:

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INTRODUCTION

Petitioner seeks this Honorable Court to reverse the unanimous per curiam decision of the The Third District Court of Appeals. The record before that Court was, pursuant to Rule 9.130(e), the Appendix to Appellant's Brief. Reference to the record shall be made by the letter "R" followed by the corresponding page number of that appendix.

Respondent has prepared and submitted with this brief an appendix. Reference to this appendix shall be made by the letter "A" followed by the corresponding page number.

The Petitioner, an attorney, DANIEL MONES, P.A., will hereinafter be referred to as "Petitioner" and the Respondents, JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC., the clients, will hereinafter be referred to collectively as "Respondents".

STATEMENT OF THE CASE AND FACTS

This Honorable Court has accepted Petitioner's petition for discretionary review to determine to what extent and under what circumstances does an attorney have a right to impose an attorney's charging or retaining lien on settlement proceeds deposited into the attorney's trust account on behalf of a client. The Respondents share the Petitioner's view of the great significance of these issues to members of the Florida Bar and would add that the issues raised herein are of equal significance to clients, litigants, and the perception of attorneys as fiduciaries and trustees by the general public.

The Petitioner, an attorney, represented the Respondents in a Mechanic's Lien Foreclosure action. The case was settled at the first deposition and pursuant to the terms of the settlement, Twenty Two Thousand Dollars and 00/100 ($22,000.00) was placed in the Petitioner's trust account for disbursement to the Respondents after the performance of certain conditions precedent by the Respondents (R-75). After the conditions precedent to the disbursement occurred, the Respondents thereafter requested the Petitioner to disburse said funds to the Respondents. The Petitioner demanded that the Respondents, an interior contractor, complete construction work on the residence of DANIEL MONES before the Petitioner would disburse the trust funds to the Respondents. After the Respondents completed said work, the Respondents again requested disbursement of the trust funds at which time the Petitioner claimed a forty (40%) percent contingency fee interest in said settlement funds and further, advised said Respondents of his intention to apply the balance of said trust funds to satisfy unrelated legal fees purportedly due Petitioner by Respondents.

Respondents retained counsel who served written notice on the Petitioner on April 5, 1984 of the Respondents' objection to the Petitioner's claim for fees and specifically advised the Petitioner not to disburse the trust funds to his own account until the entitlement of said monies could be determined (R 17-18, A1-2). With said written notice, the Petitioner was provided with copies of relevant case law and a copy of Fla. Bar Integr. Rule, art. XI, Rule 11.02(4) (R 20-36). Further, the Respondents offered to have any fee dispute determined by the Dade County Bar Association Fee Arbitration Committee which the Petitioner refused (R-18, A-2).

In addition to the forty (40%) percent contingency fee claim by the Petitioner, the Petitioner presented Respondents with an "Accounting" for approximately Twenty Nine Thousand Dollars and 00/100 ($29,000.00), in additional unrelated fees allegedly due Petitioner from Respondents dating back some six (6) years (R-72). Respondents maintain the "Accounting" to be clearly excessive, extortionate and fraudulent. It is undisputed that over the Respondents' vehement objection, the Petitioner disbursed the subject Twenty Two Thousand Dollars and 00/100 ($22,000.00) deposited in his trust account on behalf of the Respondents to his own account. (Petitioner argues in its brief at page sixteen (16) that "whether petitioner retained the funds in question in his office or trust account is not in issue in these proceedings".)

Litigation ensued wherein the Petitioner claimed attorney's fees allegedly due him and Respondents asserted counts against the Petitioner for fraud, breach of fiduciary duty, conversion and foreclosure of a mechanic's lien in the sum of Forty Seven Thousand Six Hundred Seventy One Dollars and Forty Six Cents ($47,671.46) for work performed on the Petitioner's residence by the Respondents (R-86). Respondents filed

their Verified Motion for Emergency Relief (R 13-36) and Memorandum of Law in Support thereof (R 40-65) which was denied by the trial court without opinion (R-84). Respondents filed an Interlocutory Appeal pursuant to Rule 9.130(3)(c)(ii) of the Florida Rules of Appellate Procedure. The Third District Court of Appeals, after considering the briefs filed by the parties, reviewing the entire record below, and after hearing oral argument, in its unanimous per curiam decision, directed the Petitioner to return the trust funds to the client without prejudice to the attorney's right to pursue his "claim" for fees allegedly due. The Third District Court of Appeals expressly held "we only conclude that under the facts of this case, the attorney has no charging or retaining lien on the trust funds in this case". Smith, et al. v. Daniel Mones, P.A., 458 So.2d 796 (Fla. 3d DCA 1984). The Appellants filed a Motion for Rehearing which was denied. The mandate of The Third District Court of Appeals was issued and the trial court entered an Order in accordance therewith. After the Petitioner failed to comply with the Order of the trial court, the Respondents filed its Motion for Contempt. At a hearing on said Motion for Contempt, the trial court, without jurisdiction, deviated from the mandate of The Third District Court of Appeals and amended its Order to have the subject Twenty Two Thousand Dollars and 00/100 ($22,000.00) placed in the Court Registry based on the Petitioner's application for Emergency Stay by this Honorable Court. This Honorable Court granted Petitioner's Emergency Motion for Stay and jurisdictional briefs were thereafter submitted. This Court accepted discretionary review of the unanimous per curiam decision of The Third District Court of Appeals.

Petitioner's Statement of the Case and Facts fail to reference:

(1) That the Petitioner converted the trust funds to his own account over the objection of the Respondents;

(2) That the trust monies were deposited into the Court Registry only after Court Order;

(3) That no written contingency agreement between the parties exists, but rather, Petitioner has presented an "Affidavit" prepared by the Petitioner at the time of the filing of this litigation and executed by a former employee of the Respondents embittered against the Respondents for being discharged for an attempted embezzlement of corporate funds.

Throughout its Statement of the Case and Facts and its Argument, the Petitioner's statement that the Petitioner collected the sum of Thirty Six Thousand Dollars and 00/100 ($36,000.00) in the Mechanic's Lien Foreclosure of which Twenty One Thousand Dollars and 00/100 ($21,000.00) was deposited in his trust account and Fifteen Thousand Dollars and 00/100 ($15,000.00) of which was transferred to the Respondents is misleading. The sum of Fifteen Thousand Dollars and 00/100 ($15,000.00) was received by the Petitioner on behalf of the Respondents on or about August, 1983. All of said monies were forwarded to the Respondents by the Petitioner and Petitioner claimed no contingency interest in said monies. The subject Mechanic's Lien Foreclosure was filed on December 21, 1983, some six (6) months subsequent. Accordingly, as the record reflects, the amount recovered in the Mechanic's Lien Foreclosure was the sum of Twenty Two Thousand Dollars and 00/100 ($22,000.00) (R-75) which was deposited into Petitioner's trust account and thereafter disbursed by the Petitioner to his own account over the objections of the Respondents.

ISSUE I

WHETHER AN ATTORNEY HAS A CHARGING LIEN ON SETTLEMENT PROCEEDS DEPOSITED INTO THE ATTORNEY'S TRUST ACCOUNT ON BEHALF OF A CLIENT FOR LEGAL FEES ALLEGEDLY DUE BASED ON A CLAIMED CONTINGENCY INTEREST IN SAID PROCEEDS AND FOR LEGAL FEES ALLEGEDLY DUE FOR UNRELATED LEGAL SERVICES WHEN THE ATTORNEY FAILS TO FILE A NOTICE OF CHARGING LIEN IN THE PARTICULAR SUIT IN WHICH THE SETTLEMENT PROCEEDS WERE COLLECTED AND WHEN THE ATTORNEY DISBURSES ALL OF THE SETTLEMENT PROCEEDS TO HIMSELF OVER THE OBJECTIONS OF THE CLIENT.

ARGUMENT ON ISSUE I

The subject Mechanic's Lien Foreclosure was settled for the total sum of Twenty Two Thousand Dollars and 00/100 ($22,000.00) which was deposited in the trust account of the Petitioner (R-75). The Respondents had no contingency agreement with the Petitioner nor has Petitioner produced any contingency agreement. Rather, the Petitioner prepared an affidavit immediately prior to the institution of this litigation which was executed by a former employee of the Respondents who is embittered against the Respondents due to his discharge for an attempted embezzlement of corporate funds. Over the express and vehement objections of the Respondents, the Petitioner did thereafter disburse all of the trust monies deposited into his trust account to his own account. The sum of Twenty Two Thousand Dollars and 00/100 ($22,000.00) was then deposited in the Circuit Court Registry only after Court Order.

A "charging lien" is the right of an attorney to have the expenses and compensation due him for his services in a suit secured to him in the judgment, decree or award for his clients. A charging lien cannot arise where no proceeds have been recovered in the suit in which the services are claimed. It does not cover a general balance due for

services rendered in other suits or transactions, and the value of the services rendered in one (1) suit may not be included in a judgment establishing a charging lien of an attorney in a different suit. A charging lien may not be enforced in an independent action at law. Sinclair, Louis, Siegel, Heath, Nussbaum & Savertnik, P.A. v. Baucom, 426 ~~248~~ So.2d 1383 (Fla. 1983); Gay v. McCaughan, 105 So.2d 771 (Fla. 1958); Worley v. Phillips, 264 So.2d 42 (Fla.2d DCA 1972); Chancey v. Bauer, 97 F.2d 293 (CA 5 Fla. 1938); Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950) and 4 Fla. Jur.2d Attorneys at Law §176 (1978).

This Court held in its recent decision rendered in Sinclair, supra, that in order to perfect a charging lien, there must be timely notice of the lien given in that particular suit in which the proceeds were recovered. Since no notice of charging lien was filed in the subject Mechanic's Lien Foreclosure, the Petitioner has no charging lien.

In Worley v. Phillips, supra, The Second District Court of Appeals stated:

> The charging lien is an equitable right to have the costs and fees due the attorney for services in the suit secured to him in the judgment or recovery in that particular suit. (Emphasis Added). (at page 43).

This Court, in In Re: Warners Estate, 35 So.2d 296 (Fla. 1948), in discussing the rational for the imposition of an attorney's charging lien stated:

> The parties are before the Court, the subject matter is there, and there is no reason whatsoever why they should be relegated to another forum to settle the controversy. (at page 299).

In Sinclair, supra, this Court stated:

> The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's right to payment for services rendered while protecting the confidential nature of the attorney-client relationship. (at page 1385).

In Nichols v. Kroelinger, supra, this Court stated:

> If the product of the litigation is in the hands of the court, the latter may on application of the attorney, enter an order directing payment of the fee..... The Rule is well settled that an attorney's charging lien does not extend beyond the fees and charges in the suit in which the judgement is recovered unless there is a statute so providing. (at page 724).

In Nichols, supra, the attorney failed to file a timely notice of his claim and this Honorable Court held that "he failed to move in time to recover from that source". (at page 724).

The Petitioner's argument that an attorney is not required to file a notice of charging lien in the case in which the proceeds were collected is in direct contradiction to a well established rule which was most recently approved and confirmed by this Court in Sinclair, et al. v. Baucom, 248 So.2d 1383 (Fla. 1983). Further, the Petitioner's argument that notice of a charging lien may be perfected and enforced in an independent action, belies the reasoning of this Court as expressed in In Re: Warners Estate, supra, for the enforcement of charging liens in the proceedings where the proceeds were collected.

Petitioner argues that they filed the action against Respondents almost immediately upon dispute arising regarding the Petitioner's fee entitlement and that there has been no showing of prejudicial delay. The record reflects that approximately one (1) month went by between the date of the settlement (R-73) and the institution of the subject litigation (R-1). Further, the Petitioner induced the Respondents to

perform contracting work on his residence during this period and advised the Respondents that he would not disburse the trust funds until the work was completed. The Respondents detrimentally relied on said misrepresentation and were prejudiced. Further, and most importantly, an attorney must be required to confront or settle his claim for a fee to be taken from settlement proceeds prior to the dismissal of the action when the client's rights are forever prejudiced and the attorney's right to impose a charging lien is untimely. It is unconscionable to permit Petitioner to settle a case on behalf of the Respondents, make arrangements to have the settlement proceeds deposited into his trust account, dismiss the action with prejudice and then claim a contingency interest and charging lien in all of the proceeds. Respondents would respectfully submit it would have been more appropriate for the Petitioner to advise the Respondents of his intentions of keeping all of the settlement proceeds prior to the settlement than to surreptitiously conceal his intention until after the funds were transferred to the Petitioner's trust account and the case dismissed with prejudice. By compelling an attorney to file his Notice of Charging Lien in the proceedings which they were collected, the attorney cannot defraud the client because he cannot dismiss the case with prejudice until the issue of the attorney's charging lien is determined.

In Sinclair, supra, this Court held that:

> Finally, the remedy is available where there has been an attempt to avoid the payment of fees, Worley v. Phillips, or a dispute as to the amount involved. Renno v. Sigmon. (at page 1385).

The record clearly reflects that the Respondents offered to have any fee dispute determined by the Dade County Bar Association Fee

Arbitration Committee (R-18, A-2) which the Petitioner refused. This can hardly be characterized, as the Petitioner urges, as a situation in which the client has attempted to avoid the payment of fees. At all times, the Respondents were ready, willing and able to submit to the jurisdiction of a Bar Association for the determination of the Petitioner's alleged fee. Rather, the Petitioner with full knowledge of the case law, Integration Rules and Disciplinary Rules, willfully and over the objection of the client, converted all of the trust monies to his own account and now attempts to speciously assert a charging lien to condone his reprehensible and unethical conduct.

This Honorable Court has consistently held that at all times, an attorney is under the highest standard with respect to his relations with clients. Renno v. Sigmon, 4 So.2d 11 (Fla.1941); Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957). See also, Reid v. Johnson, 106 So.2d 624 (Fla. 3d DCA 1958). In Gerlach v. Donnelly, supra, this Court stated:

> There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. The relationship has its very foundation in the trust and confidence the client reposes in an attorney selected to represent him. The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity. (at page 498).

In Renno v. Sigmon, supra, this Court stated:

> When a justiciable controversy arises between attorney and client as to fees alleged to be due the attorney, or as to interest acquired by attorney as to any property involved in the litigation, the burden is on the attorney to show not only the existence of conditions supporting his position, but also to show that no advantage has been taken by him. See Halstead v. Florence Citrus Grower's Association, 139 So. 132 (Fla. 1932) and Devant v. Lambdin, 186 So. 201 (Fla. 1938). (at page 12).

Petitioner argues that the decision under review abolishes or greatly diminishes the right of an attorney's charging lien. On the contrary, the Third District Court of Appeals expressly recognized the right of an attorney to a charging lien but held that under the circumstances of this case that "the attorney is nonetheless not entitled to a charging lien on these funds because no notice of such lien was ever filed, nor was the matter ever pursued in the mechanic's lien action below". Smith, et al. v. Mones, P.A., supra. (at page 797). The Court held "we only conclude that under the facts of this case the attorney has no charging or retaining lien on the trust funds in this case". (Emphasis Added). Smith, et al. v. Mones, P.A., supra. (at page 797).

An attorney's charging lien is equitable in nature. Sinclair, Louis, et al. v. Baucom, supra; Nichols v. Kroelinger, supra; Goethel v. First Properties International, Ltd., 363 So.2d 1117 (Fla. 3d DCA 1978); Worley v. Phillips, supra; and Scott v. Kirtley, 152 So. 721 (Fla. 1933).

On page sixteen (16) of the Initial Brief of the Petitioner filed with this Court, Petitioner speciously argues that:

> Whether Petitioner retained the funds in question in his office or trust account is not an issue in these proceedings. In these proceedings dealing with lien rights it is pertinent only that Petitioner retain the settlement proceeds in his possession until the subject action was filed and subsequently deposit same in the Registry of the Court. The funds are currently in the Registry of the Court.

As noted earlier, the funds were only deposited into the Court Registry after Court Order and after the Petitioner converted the trust monies to his own account over the express objection of the Respondents.

Assuming arguendo that the Court is considering expanding the rule that an attorney need not file notice of a charging lien in the proceeding

in which the proceeds were collected and will permit an attorney to notice and foreclose an attorney's charging lien in an independent action, the Respondents would urge the Court to expressly hold that the Petitioner, due to his conversion of the trust funds to his own account over the objections of the Respondents, is equitably estopped from imposing an equitable charging lien under the the doctrines of In Pari Delicto or Unclean Hands. The doctrine of unclean hands has been defined as "the equitable principal which requires a denial of relief to a complainant who is himself guilty of inequitable conduct in reference to the matter in controversy". 27 Am. Jur. 2d Eq. §136; 28 Am. J. Rev. Ed. Inj. §33.

In the Selected Opinions of the Professional Ethics Committee of the Florida Bar, Opinion 82-2, Chairman Ervin stated the opinion of the Committee as follows:

> Funds received and held in trust by an attorney for some different purpose may not, over the client's or former client's objections, ethically be applied to the satisfation of an attorney's claim, or claimed lien, for costs and fees without prior approval of the application by a court of competent jurisdiction. Further, where the property held in trust is money or other readily divisible property, the retention under claim of lien of an amount or portion in excess of that necessary to satisfy the obligation to the attorney is not ethically proper.

This Court has found the conversion by an attorney of funds deposited into his trust account to be a reprehensible and disbarrable offense. The Florida Bar v. Tarrant, 464 So.2d 1199 (Fla. 1985); The Florida Bar v. Segal, 462 So.2d 1091 (Fla. 1985); and The Florida Bar v. Altman, 465 So.2d 514 (Fla. 1985).

The Fla. Bar Code of Prof. Resp., D. R. 9.102 which was in effect at the time of the subject conversion provides as follows:

Preserving Identity of Funds and Property of a Client

> (A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> Subdivision (a)(2) effective until June 30, 1984.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The Fla. Bar Integr. Rule, art. XI, Rule 11.02(4) provides in pertinent part as follows:

Trust Funds and Fees

> Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or set-off for attorney fees, and refusal to account for and deliver over such property and money upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for his services or to preclude the payment of agreed fees from the proceeds of transactions or collections. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate or the demand is fraudulent.
>
> In a controversy alleging a clearly excessive, extortionate or fraudulent fee, the announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal

> for determination may be considered in any determination as to any intent or in mitigation of discipline; provided such willingness shall not preclude admission of any other relevant admissable evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to such other injury to the client occasioned by such controversy.

Accordingly, it would be repugnant to permit an attorney to seek equitable relief in the form of a charging lien when the attorney himself is guilty of inequitable conduct by converting the client's trust funds to his own account over the express objections of the client. The Third District Court of Appeals in its per curiam decision specifically held "we only conclude that under the facts of this case, the attorney has no charging or retaining lien on the trust funds in this case". (Emphasis Added). Smith, et al. v. Mones, P.A., supra. (at page 797).

Without specifically enunciating the doctrine of unclean hands, The Third District Court of Appeals was obviously influenced, perhaps decisively, by the Petitioner's willful misconduct. The Petitioner is estopped from invoking an equitable lien on the subject proceeds. The holding of The Third District Court of Appeals "that under the facts of this case, the attorney has no charging or retaining lien on the trust funds in this case" must be affirmed.

The Respondents urge this Court to expressly find that the Petitioner's conduct in disbursing the trust funds to his own account over the objection of the Respondents constitutes a clear and unequivocable violation of the referenced Disciplinary Rules and Integration Rules and constitutes a conversion of the Respondents' funds. Further, the Court is urged to establish a rule that assuming the Petitioner had a valid charging lien, that same is rendered invalid when an attorney converts settlement

proceeds from his trust account to his own account over the objections of the client. In formulating such a policy, the Court would preserve the valid charging lien rights of an attorney, sanction unethical attorneys, protect clients from the unauthorized disbursements of trust monies until the determination and entitlement of same can be determined by a court of competent jurisdiction, and help improve and restore the perception of attorneys by the general public as fiduciaries and the repository of trust. An attorney must not benefit by disbursing trust funds to his own account over the objections of the client. The decision of The Third District Court of Appeals must be affirmed.

ISSUE II

WHETHER AN ATTORNEY HAS A RETAINING LIEN ON SETTLEMENT PROCEEDS DEPOSITED INTO THE ATTORNEY'S TRUST ACCOUNT ON BEHALF OF A CLIENT FOR LEGAL FEES ALLEGEDLY DUE BASED ON A CLAIMED CONTINGENCY INTEREST IN SAID PROCEEDS AND FOR LEGAL FEES ALLEGEDLY DUE FOR UNRELATED LEGAL SERVICES WHEN THE ATTORNEY DISBURSES ALL OF THE SETTLEMENT PROCEEDS TO HIMSELF OVER THE OBJECTIONS OF THE CLIENT.

ARGUMENT ON ISSUE II

As noted earlier, the total sum collected in the subject Mechanic's Lien Foreclosure was Twenty Two Thousand Dollars and 00/100 ($22,000.00) and not the Thirty Six Thouand Dollars and 00/100 ($36,000.00) as alleged by the Petitioner in its brief (R-75). Petitioner claims a forty (40%) percent contingency interest in the amount collected in said foreclosure despite the fact that the Petitioner had no contingency agreement with the Respondents. Petitioner argues that he has a valid retaining lien against all of the settlement proceeds collected in the Mechanic's Lien action. Petitioner cites Goethel v. First Properties International, Ltd., 363 So.2d 1117 (Fla. 3d DCA 1978); Conroy v. Conroy, 392 So.2d 934 (Fla. 2d DCA 1980); and Dowda and Fields, P.A. v. Cobb, 452 So.2d 1140 (Fla. 5th DCA 1984) to support its untenable position. Further, the

Petitioner argues that The Third District Court of Appeals misapplied this Honorable Court's decision rendered in The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982).

Goethel, supra, is wholly inapplicable to the facts of this case. The case did not involve an attorney's trust account, but rather, a retaining lien on certain property. The Third District Court of Appeals ruled in Goethel, supra, that the trial court was within its right to order the personal property which was the subject matter of the retaining lien returned to the client conditioned on the client posting a bond. The case did not address the issue of settlement funds deposited into an attorney's trust account for disbursement to the client. Further, the Court stated:

> It must be recognized that the claims of lien of the attorney and accountant were equitable in nature. See Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950). They cannot be used as a sword to enforce an inequitable situation. Therefore, we hold that the trial court was not in error in allowing the substitution of cash deposited into the Registry of the Court for the property upon which the Plaintiff's claim a lien. (at page 1121).

In Conroy v. Conroy, supra, the Court examined the propriety of an attorney's charging lien under the particular facts of that case. Only in a footnote did the Court make a passing remark regarding an attorney's retaining lien without any of the qualifications regarding an attorney's trust account which have long governed the imposition of an attorney's retaining lien. As in Conroy v. Conroy, supra, in the case of Dowda and Fields, P.A. v. Cobb, supra, The Fifth District Court of Appeals simply stated that Florida recognizes an attorney's possessory retaining lien and therefore this case is wholly distinguishable from the case at bar. In Dowda, supra, the attorneys followed the proper procedures for enforcing a charging lien by filing a "Notice of Intent to Claim Charging Lien" in the proceedings in which the proceeds were secured.

Further, this case in no way involves an attorney's trust account and does not suggest that an attorney has a retaining lien on all funds deposited into an attorney's trust account for disbursement to the client in settlement of a client's claim.

The Petitioner argues that this Court should make clear that the restriction of an attorney's retaining lien apply only to monies or property:

(1) entrusted by the client;

(2) for a specific purpose.

Petitioner argues, in essence, that a retaining lien may be imposed by an attorney on any and all proceeds deposited in the attorney's trust account on behalf of the client. Such a view would seriously erode the confidence in, and fiduciary nature of, an attorney's trust account. If an attorney has an absolute right to impose a retaining lien on any funds received in trust on behalf of a client for any and all claims for which an attorney may have against the client, the likelihood of abuse would be significant. Such a rule would undoubtedly result in attorney's extorting monies from clients by withholding funds rightfully due the client.

According to the argument of Petitioner, the Petitioner should be entitled to a retaining lien not only for the forty (40%) percent contingency fee claimed in the proceeds but should be permitted to impose a retaining lien for past legal services rendered in unrelated cases. To permit an attorney to hold "ransom" funds deposited into an attorney's trust account for disbursement to the client would further tarnish the public image of attorneys as fiduciaries to their clients. Respondents urge the Court to maintain the integrity of an attorney's trust account.

In the instant case, the sum of Twenty Two Thousand Dollars and 00/100 ($22,000.00) in settlement proceeds was deposited into the

trust account of the Petitioner for disbursement to the Respondents. In The Florida Bar v. Bratton, supra, this Court held:

> An attorney must not allow his claim of a fee for past services rendered to conflict with his duties as a trustee when entrusted with money for a specific purpose of his client. (at page 755).

The subject trust monies were deposited into the Petitioner's trust account for the specific purpose of disbursement to the Respondents. At no time prior to the deposit of the settlement proceeds into the Petitioner's trust account did the Petitioner ever disclose his intentions to impose a retaining lien on any or all of said proceeds, much less convert said monies to his own account over the express objections of the Respondents.

In the case of Adams, George, Lee, Schulte & Ward, P.A. v. Westinghouse Electric Corporation, 597 F.2d 570 (1970), the United States Fifth Circuit Court of Appeals, in interpreting Florida law, stated:

> Briefly stated, the law firm claims that it has what is known as a "general or retaining lien," which it says operates on any property in its hands that belongs to a client who owes it any amount of money, no matter how valuable the property held or how small the amount of the claim. This lien is distinguished from a "charging lien" which arises when counsel obtains property or collects money in litigation and claims a lien for services in creating the fund. A principal distinction between these types of liens is that the retaining lien cannot be foreclosed whereas the charging lien can. Plaintiffs frankly contend that the value of the retaining lien is that it gives great leverage by creating "embarrassment" to the client who is unable to get any part of its money until the relatively small part owed to the lawyers has been agreed upon. They cite a district court opinion for this proposition. In dictum, the United States Court for the Southern District of Florida stated: "Its (the retaining lien's) value to the attorney is only in proportion to the extent that such rention by him will embarrass the client". Cooper v. McNair, 49 F.2d 778 (S.D. Fla. 1931). (at page 573).

Clearly, a retaining lien is a mere possessory or passive lien and provides no basis whatsoever for the Petitioner to convert the trust funds to his own account. Cooper v. McNair, 49 F.2d 778 (S.D. Fla. 1931).

The case of The Florida Bar v. Heller, 248 So.2d 644 (Fla. 1971) appears to closely resemble the facts of the instant case. (A copy of this opinion was forwarded to the Petitioner before he disbursed the trust monies to his own account (R-20)). In The Florida Bar v. Heller, supra, the attorney claimed a lien on all the settlement proceeds. The Circuit Court held that he was not entitled to a lien on the funds recovered in the collection case except for the agreed one-third (1/3) fee. This court held that Heller's refusal to account for and deliver over the funds to the client upon demand constituted a conversion of funds warranting Heller's suspension from the practice of law. It is important to note that in Heller, supra, Heller and the client agreed that Heller had a one-third (1/3) contingency interest in the proceeds. In the instant case, the Petitioner's claim of a contingency in the proceeds is vehemently contested by the Respondents. Further, in the instant case, the Petitioner willfully, over the objections of the client, converted the funds from his trust account to his own account.

Accordingly, since the settlement proceeds were deposited into the Petitioner's trust account for disbursement to the Respondents, the Petitioner could not impose a retaining lien of any portion of the trust funds and was under a duty to account and deliver the trust funds to the Respondents. At best, had the Petitioner not converted the trust funds to his own account over the objections of the client, the attorney could retain the claimed contingency interest in said proceeds in his trust account until a court of competent jurisdiction could determine the Petitioner's entitlement to same.

Assuming arguendo that the Court holds that an attorney may impose a retaining lien on proceeds deposited into his trust account for attorney's fees associated with the procurement of said funds, and/or for past legal fees rendered in unrelated cases, as in the case of the Petitioner's claimed charging lien, the Petitioner, under the facts of this case, should be estopped from imposing an equitable retaining lien on the funds under the Doctrines of In Pari Delicto or Unclean Hands.

An attorney's retaining lien is equitable in nature. Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950); Scott v. Kirtley, 152 So. 721 (Fla. 1934); and Goethel v. First Properties International, Ltd., 363 So.2d 1117 (Fla. 3d DCA 1978). The Petitioner willfully and over the objections of the client converted the trust monies to his own account. The Petitioner is estopped from invoking equitable relief. Despite Petitioner's contention on page sixteen (16) of its brief that "whether Petitioner retained the funds in question in his office or trust account is not an issue in these proceedings" the Respondents would disgree and submit that this fact is critically relevant to the issues presented in these proceedings. The distinction between an attorney's trust account and his own account are obvious. The danger of the monies not being available and the client having to resort to an already overtaxed Florida Bar Client Security Fund favors a strong policy requiring a clear distinction between the accounts. Petitioner's argument that the monies are still in the "Petitioner's possession", regardless of which account, is specious.

Since an attorney's retaining lien is a mere passive lien and cannot be foreclosed or have other affirmative rights associated with it, it provides no basis whatsoever for the Petitioner to convert the trust funds to his own account. The Court is urged to expressly find

that the Petitioner's disbursement of the trust funds to his own account, over the objection of the client, constitutes a defalcation and conversion of the trust monies.

Accordingly, if the Court is inclined to find that the Petitioner had a retaining lien on any of the settlement funds deposited into his trust account, the Court should also find that given the misconduct of the Petitioner, that any retaining lien which may have been available to Petitioner was lost upon the Petitioner disbursing the trust funds to himself over the objections of the Respondents. Indeed, how could the Petitioner have a "retaining lien" on trust funds he already disbursed to his own account?

Hence, The Third District Court of Appeals decision holding that the Petitioner, under the circumstances of this case, had neither a charging or retaining lien on the proceeds must be affirmed.

CONCLUSION

The Petitioner has no charging lien on the proceeds because of his failure to file a timely notice of charging lien in the action in which the proceeds were collected and because a charging lien cannot be enforced in an independent action at law. Assuming, however, that this Court expands the rights of an attorney's charging lien and permits the notice of charging lien to be perfected and enforced in an independent action at law, when an attorney converts the trust funds to his own account over the objections of the clients, the attorney should be sanctioned and equitably estopped from enforcing an equitable charging lien.

Petitioner could not impose a retaining lien on the settlement proceeds deposited into the Petitioner's trust account since the trust

funds were deposited into the attorney's trust account for the specific purpose of disbursement to the client. Further, trust funds are not subject to setoffs for past legal services rendered in unrelated cases. Assuming, however, that the Petitioner had a retaining lien on a portion or all of the trust funds, the Petitioner's disbursement of the trust funds to his own account over the objections of the client abolishes the retaining lien. Since the Petitioner, under the circumstances of this case, has no retaining or charging lien on the trust funds he is required to deliver same to the Respondents.

In formulating a rule of law regarding attorney's retaining and charging liens, it is important that the protection and rights of both attorneys and clients be considered and that the perception by the general public of attorneys as fiduciaries and the repository of trust be enhanced, and not diminished. Unethical and inequitable conduct by an attorney must not be condoned. The Third District Court of Appeals has ruled that under the circumstances of this case, the Petitioner has no retaining or charging lien. This decision must be affirmed.

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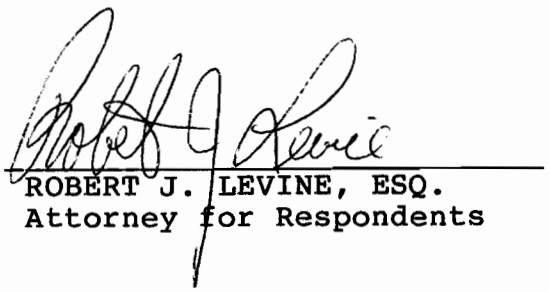
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Respondents, JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC. was been mailed on this 28th day of May, 1985 to: Thomas E. Ervin, Jr., Esq., Ervin, Varn, Jacobs, Odom & Kitchen, PO Drawer 1170, Tallahassee, FL 32302 and to Mallory H. Horton, Esq., Suite 401, Concord Building, 66 West Flagler Street, Miami, FL 33130.

By: 
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