IN THE SUPREME COURT OF FLORIDA

DANIEL MONES, P.A.,

Petitioner,

vs. CASE NO. 66,296

JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC.,

Respondents

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

ROBERT J. LEVINE, ESQ.
LEVINE & DRUCKER, P.A.
155 South Miami Avenue
Penthouse One
Miami, FL 33130
(305) 372-1350

TABLE OF CONTENTS

CITATIONS OF AUTHORITIES

CASES CITED: PAGE

IN THE SUPREME COURT OF FLORIDA

DANIEL MONES, P.A.,

Petitioner,

vs. CASE NO. 66,296

JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC.,

Respondents
_____/

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

STATEMENT OF THE CASE AND FACTS

Petitioner seeks discretionary review before this Honorable Court of the unanimous per curiam decision of the The Third District Court of Appeals. The District Court of Appeals' decision is in complete harmony with existing case law. Petitioner's preliminary statement and statement of the case and facts contains misstatements of fact and law.

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. After the conditions precedent to disbursement occurred, the Respondents thereafter requested the Petitioner to disburse said funds to the Respondents. The Petitioner then 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 per cent (40%) contingency fee interest in said settlement funds and further, advised said Respondents of his intention to apply the balance of said settlement funds to satisfy unrelated legal fees purportedly due Appellant by Respondents. In addition to the foregoing, the Petitioner presented Respondents with an "accounting" for approximately Twenty Nine Thousand Dollars and 00/100 ($29,000.00), over and above said Twenty Two Thousand Dollars and 00/100 ($22,000.00), in additional unrelated fees allegedly due Petitioner from Respondents dating back some six (6) years. It is undisputed that the Petitioner disbursed said trust funds to his own account, even though Respondents vehemently disputed the Petitioner's right to said funds. Litigation ensued wherein the Petitioner claimed attorney's fees allegedly due him and the Respondents asserted counts against the Petitioner for fraud, breach of fiduciary duty, conversion and the foreclosure of a mechanic's lien in the sum of Forty Seven Thousand Six Hundred and Seventy One Dollars and Forty Six Cents ($47,671.46) for work performed on the Petitioner's residence by the Respondents which was to be in exchange for the legal services rendered by the Petitioner.

The Petitioner converted the Twenty Two Thousand Dollars and 00/100 ($22,000.00) deposited in his trust account on behalf of the Respondents under the specious guise of a "charging lien" or "retaining lien". The Third District Court of Appeals, after 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". The District Court of Appeals held, under the facts of this case, that an attorney's charging lien was not available to the Petitioner because of the Petitioner's failure to comply with the clear requirement of filing a timely notice of charging lien in the proceedings in which the settlement proceeds were recovered. Further, the District Court held that a retaining lien was not available under these facts because set-offs for past legal services allegedly rendered in unrelated cases cannot be imposed on an attorney's trust account.

The facts of this case are that there was never an "agreement" regarding the alleged fees due the Petitioner, other than that legal services were to be bartered in exchange for contracting services; that Petitioner has produced no "contingency agreement" between the parties; that there was no notice of charging lien filed; and that the Petitioner, unilaterally and over the vehement objections of the Respondents, converted all of the settlement proceeds deposited into his trust account for disbursement to the Respondents to his own account.

ARGUMENT

ARGUMENT ON JURISDICTIONAL POINT I

THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IS IN CONFORMITY ON THE SAME POINT OF LAW WITH THE FLORIDA BAR v. BRATTON, 413 So.2d 754 (Fla. 1982).

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

account of the Petitioner for the express purpose of disbursement to the Respondent after the conditions precedent to disbursement had occurred. 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 trusted with money for a specific purpose of his client". After an exhaustive review of the record, the Third District Court of Appeals found that the trust monies were deposited in 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 unilaterally, and over the objections of the Respondents, convert said monies to his own account. There was never any "agreement" regarding fees allegedly due Petitioner other than the agreement that legal services would be bartered for interior contracting services. Petitioner has produced no contingency agreement nor did Petitioner file any notice of charging lien. Rather, Petitioner simply claimed that legal fees were allegedly due and converted all of the trust funds to his own account.

ARGUMENT ON JURISDICTIONAL POINT II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IS IN CONFORMITY ON THE SAME POINT OF LAW WITH DOWDA AND FIELDS, P.A. v. COBB, 452, So.2d 1140 (Fla. 5th DCA 1984), AND CONROY v. CONROY, 392 So.2d 934 (Fla. 2d DCA 1980).

The Third District Court of Appeals in its opinion cited Conroy v. Conroy, supra. In Conroy, the Court examined the propriety of an attorney's "charging lien" under the particular facts of that case. In a footnote, the Court made a general statement 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.

In Dowda and Fields, P.A. v. Cobb, supra, the Fifth District Court of Appeal simply stated that Florida recognizes an attorney's possessory retaining lien. Like Conroy, this decision in no way conflicts with the opinion in the instant case which expressly recognizes the right of an attorney to claim a charging lien and retaining lien under appropriate circumstances.

ARGUMENT ON JURISDICTIONAL POINT III

THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IS IN CONFORMITY ON THE SAME POINT OF LAW WITH SINCLAIR, ETC. & ZAVERTNIK, P.A. v. BAUCOM, 428 So.2d, 1383 (Fla. 1983).

The Petitioner's argument that The third District Court of Appeal's opinion in this cause is in "express and direct conflict" on the same point of Law with Sinclair, etc. & Zavertnik, P.A. v. Baucom, 428 So.2d, 1383 (Fla. 1983) is illustrative of the specious nature of this petition for discretionary review. It has long been the rule, established by this Court and upheld by this Honorable Court in Sinclair, 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 are recovered. See also, 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 772 (Fla. 1950). Notwithstanding the foregoing, the Petitioner now claims and argues that the Respondent received "actual notice" and that the filing of formal notice is unneccessary. Not only did the Respondents not receive "actual notice", but the Petitioner willfully failed to disclose his intention of converting the trust funds to his own account in a premeditated scheme to defraud the Respondents of their settlement proceeds.

ARGUMENT ON JURISDICTIONAL POINT IV

THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IS IN CONFORMITY ON THE SAME POINT OF LAW WITH IN RE WARNERS ESTATE, 35 So.2d 296 (Fla. 1948).

In Re Warners Estate, supra, this Honorable Court held that a Probate Court has jurisdiction to withhold distribution of an estate pending resolution of a timely claim for attorney's fees made by the attorneys for the legatees of the estate. In Warner, the attorney made a timely claim against the estate prior to the distribution of the estate. This case is clearly distinguishable from the case at bar. Weksler v. Stamatinos, 314 So.2d 616 (Fla. 3d DCA 1975) is equally distinguishable from the case at bar. In Weksler, not only was there timely notice of the lien given in the particular suit in which the proceeds were recovered, there was an "Agreed Order" providing for the attorney's fee to be paid from any recovery. The "Agreed Order" provided "no settlement shall be made without an order of this Court". The issue in Weksler, was the right of the attorney to have his fee determined on a quantum meruit basis. The Court held that based on the written stipulation of the parties, the attorney's lien upon the settlement proceeds should not be extinguished by the disbursement of same until his fee was actually determined. The Court ordered the money placed into the registry of the Court pending a determination of the legal fees due the attorney. In the instant case, not only was there no agreed order and written stipulation of the parties preserving the fund for the payment of legal fees, there was not even the filing of a simple notice of charging lien.

CONCLUSION

Petitioner's petition for discretionary review is without merit. The unanimous per curiam decision rendered by the Third District Court

of Appeals after a complete review of the record below is in complete conformity with existing case law throughout the state. In order for an attorney to invoke a "charging lien", timely notice of the lien must be filed in that particular suit in which the proceeds are recovered. Further, a retaining lien could not be imposed on any part of the Twenty Two Thousand Dollars and 00/100 ($22,000.00) in trust funds because set-offs for alleged past legal services in unrelated cases cannot be imposed on an attorney's trust account. This has long been the rule established by this Honorable Court and recognized uniformally throughout each district. Petitioner's application for discretionary review should be summarily denied.

Respectfully submitted,

LEVINE & DRUCKER, P.A.
155 South Miami Avenue
Penthouse One
Miami, FL 33130
(305) 372-1350

By: _____
ROBERT J. LEVINE, ESQ.
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Answer Brief of Respondents, JEFFREY SMITH and FIRST IMPRESSIONS INDUSTRIES, INC. was been mailed on this 9th day of January, 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: _____
ROBERT J. LEVINE, ESQ.
Attorney for Respondents