


IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

DEC 21 1984

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

DANIEL MONES, P.A.,
Petitioner,

vs.

CASE NO. 66,296

JEFFREY SMITH and FIRST
IMPRESSIONS INDUSTRIES, INC.,

Respondents.

JURISDICTIONAL BRIEF OF
PETITIONER, DANIEL MONES, P.A.

THOMAS M. ERVIN, JR.
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR PETITIONER
DANIEL MONES, P.A.

TOPICAL INDEX

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT:	
<u>JURISDICTIONAL POINT I</u>	
THE DECISION OF THE DISTRICT COURT OF APPEAL THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH <u>THE FLORIDA BAR V. BRATTON</u> , 413 SO.2D 754 (FLA. 1982).	4
<u>JURISDICTIONAL POINT II</u>	
THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH <u>DOWDA AND FIELDS, P.A. V. COBB</u> , 452 SO.2D 1140 (FLA. 5TH DCA 1984), AND <u>CONROY V. CONROY</u> , 392 SO.2D DCA 934 (FLA. 2D DCA 1980).	6
<u>JURISDICTIONAL POINT III</u>	
THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH <u>SINCLAIR, ETC. & ZAVERTNIK, P.A. V. BAUCOM</u> , 428 SO.2D 1383 (FLA. 1983).	7
<u>JURISDICTIONAL POINT IV</u>	
THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH <u>IN RE WARNERS ESTATE</u> , 35 SO.2D 296 (FLA. 1948).	8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

CITATION OF AUTHORITIES

	<u>PAGE</u>
<u>CASES CITED:</u>	
<u>Conroy v. Conroy</u> , 392 So.2d 934 (Fla. 2d DCA 1980)	6
<u>Dowda and Fields, P.A. v. Cobb</u> , 452 So.2d 1140 (Fla. 5th DCA 1984)	6
<u>Fort Motor Company v. Kikis</u> , 401 So.2d 1341 (Fla. 1981)	6
<u>Gibson v. Avis Rent-A-Car System, Inc.</u> , 386 So.2d 520 (Fla. 1980)	5
<u>In Re Warners Estate</u> , 35 So.2d 296 (Fla. 1948)	8,9
<u>Sinclair, etc. & Zavertrnik, P.A. v. Baucom</u> , 428 So.2d 1383 (Fla. 1983)	7,8
<u>The Florida Bar v. Bratton</u> , 413 So.2d 754 (1982)	4,5
<u>Weksler v. Stamatinos</u> , 314 So.2d 616 (Fla. 3d DCA 1975)	9

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 BRIEF OF
PETITIONER, DANIEL MONES, P.A.

PRELIMINARY STATEMENT

These proceedings are of great importance not only to petitioner, but to every member of The Florida Bar. The decision of the District Court of Appeal, Third District, expressly holds that an attorney who has by settlement recovered funds for his client cannot have a charging lien for earned fees if he did not file notice or proceed in the original, settled action, even though he institutes a separate action asserting the charging lien while the funds are in his possession.

It further expressly holds that an attorney may never have a retaining lien for earned fees on monies, such as settlement proceeds, which have been secured on behalf of the client from third parties and placed in the attorney's trust account. The District Court's decision ordering that all such funds be forthwith delivered to the client, even assuming that all claimed fees are due and owing to the

lawyer, removes the lien protection which has been recognized for attorneys for over a century.

STATEMENT OF THE CASE AND FACTS

This is a proceeding regarding an attorney's liens for services rendered his former clients. Petitioner had represented respondents for a period of time and earned fees for his earlier representation which remained unpaid. Petitioner then undertook the representation of respondents on a contingent fee basis in a mechanics' lien foreclosure action.

Ultimately the mechanics' lien action was settled with a recovery of \$37,000* for respondents, the initial \$15,000 of which had been disbursed to respondents and \$22,000* of which was deposited in petitioner's trust account. After settlement of the original mechanics' lien action, petitioner rendered an overall accounting to respondents. Respondents owed petitioner \$14,400 in the mechanics' lien representation on a 40% contingency basis. Petitioner's accounting also reflected an additional balance owed of fees for extensive earlier representation of approximately \$30,000.

A fee dispute arose, at which time petitioner disbursed the remaining \$21,000* in settlement proceeds to himself and filed suit against respondents for the balance

*Ultimately \$1,000 of the \$22,000 settlement proceeds were refunded to payors pursuant to the contract for settlement, leaving only \$21,000 in petitioner's possession, and \$36,000 total recovery.

due and owing for earlier representation. Respondents moved in the trial court to compel petitioner to immediately pay over the settlement proceeds, and petitioner opposed the motion. Petitioner asserted that he was entitled to retain possession of the funds by reason of a valid charging lien on 40% of the total settlement recovery in the mechanics' lien action (\$14,400) and a retaining lien as to all settlement proceeds in his possession (\$21,000).

By order of June 8, 1984, the trial court denied respondents' motion for return of settlement proceeds, and respondents took interlocutory appeal to the District Court of Appeal, Third District of Florida.

By opinion issued October 16, 1984, the District Court reversed, holding (1) that petitioner was entitled to no charging lien; (2) that petitioner was entitled to no retaining lien; and (3) that, on remand, petitioner should be required to surrender possession and pay over to respondents the sum of \$22,000, without prejudice to his right to continue the action below. The District Court expressly stated that its decision assumed (without deciding) that all fees claimed by petitioner were due and owing, but nevertheless required immediate payment by petitioner. A copy of the decision of the District Court is included in appendix to this brief (A 1).

By Order of December 3, 1984, the District Court of Appeal denied rehearing. These proceedings to invoke

discretionary jurisdiction based on conflict of decisions were timely commenced.

ARGUMENT

JURISDICTIONAL POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH THE FLORIDA BAR V. BRATTON, 413 SO.2D 754 (FLA. 1982).

This jurisdictional point arises from a clear and express misapplication of law, thereby creating the requisite conflict jurisdiction for review by this Court.

In the instant case the District Court expressly acknowledged that the funds in question were settlement proceeds which petitioner had secured from a third party on behalf of respondent and then placed in his (petitioner's) trust account. As to petitioner's assertion of a retaining lien the District Court held, even assuming the claimed fees were due and payable, that:

Finally, a retaining lien could not be imposed on any part of the \$22,000 trust fund because set-offs for past legal services rendered in unrelated cases, as here, cannot be imposed on an attorney's trust account. The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982); Fla. Bar Integr. Rule, Art. XI, Rule 11.02(4).

(A 1)

This Court did not so hold in The Florida Bar v. Bratton, supra. In that disciplinary case the client had entrusted \$10,000 to his attorney for the specific purpose of posting bond in a foreclosure proceeding. In rejecting

the attorney's lien assertion (or defense) as to such funds, this Court held in pertinent part at page 755:

Respondent argues that he held a lien on the \$10,000 and was entitled to retain it. Although article XI, rule 11.02(4) provides for retention of money or property upon which a lawyer has a lien and for 'payment of agreed fees from the proceeds of transactions or collections.' these provisions are not applicable when funds have been entrusted for a specific purpose and there is no agreement for payment of fees therefrom. 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. . . . (Emphasis supplied.)

Thus, in the instant case the District Court misapplied the law by relying on The Florida Bar v. Bratton, supra, where that decision involved a situation materially at variance with the facts and circumstances in this case. The Bratton case, supra, dealt with the availability of an attorney's lien on funds entrusted to the lawyer by his client for a specific purpose, while this case involves the entitlement of a lawyer to a lien on settlement proceeds secured by the lawyer's labors from third parties. In this case there was no entrustment by the client for a specific purpose, but only the fruit of petitioner's labors.

Misapplication of the law by a district court creates the requisite jurisdictional conflict, Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980), where the district court's discussion of the legal principles applied expressly demonstrates the misapplication. See

Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

This Court, therefore, has jurisdiction for review of the decision below.

JURISDICTIONAL POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT 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 DCA 934 (FLA. 2D DCA 1980).

This point also relates to the District Court's express holding that petitioner was not entitled to a retaining lien. As demonstrated in the preceding point, the District Court expressly held that no retaining lien could be imposed by petitioner on settlement proceeds which had been recovered by petitioner on behalf of respondents and then deposited in petitioner's trust account (A 1).

In Conroy v. Conroy, 392 So.2d 934 (Fla. 2d DCA 1980), the court held in pertinent part at page 935:

Attorney's retaining liens attach to the property of a client which comes into his attorney's possession and can be used to enforce all debts owed by the client to the attorney regardless of whether the property related to the matter for which the money is owed to the attorney.

In Dowda and Fields, P.A. v. Cobb, 452 So.2d 1140 (Fla. 5th DCA 1984), the court held in pertinent part at page 1142:

In Florida, as in most states, an attorney has a possessory retaining lien on his client's papers, money, securities and other property in his possession. . . .

The decision of the District Court of Appeal, Third District, is in express and direct conflict with the above-quoted decisions of the Second and Fifth District Courts of Appeal.

JURISDICTIONAL POINT III

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, 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).

This point arises from the District Court's express denial of a charging lien because petitioner had not filed notice or pursued such a lien in the original action which, upon settlement, was dismissed with prejudice. Respondents, however, were provided with actual notice of petitioners' claim, and with record notice by this timely action while the settlement funds secured by petitioner's labors were in the possession of the petitioner.

In Sinclair, etc. & Zavertnik, P.A. v. Baucom, 428 So.2d 1383 (Fla. 1983), this Court held in pertinent part at pages 1384 and 1385:

The charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. It serves to protect the rights of the attorney. Worley v. Phillips, 264 So.2d 42 (Fla. 2d DCA 1972). Charging liens have been recognized in Florida for more than a century. See, e.g., Carter v. Davis, 8 Fla. 183 (1858); Carter v. Bennett, 6 Fla. 214 (1855); Randall v. Archer, 5 Fla. 438 (1854). The requirements for perfection of this lien are not statutorily imposed. Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950); St. Ana v. Wheeler Mattison Drugs, Inc., 129 So.2d 184 (Fla. 3d DCA), cert. denied.

133 So.2d 646 (Fla. 1961). Rather, the requirements have developed in case law which has delineated the equitable nature of the lien. See Greenfield Villages.

* * * *

There are no requirements for perfecting a charging lien beyond timely notice. . . .

The decision of the District Court of Appeal, Third District, holding that no charging lien was available because of lack of formal notice or proceedings in the original action, is in express and direct conflict with this Court's above-quoted holding that "timely" notice was the only requirement for perfecting a charging lien. Such notice is "timely" if, as in the instant case, the proceeds remain in the attorney's possession at the time of notice.

JURISDICTIONAL POINT IV

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH IN RE WARNERS ESTATE, 35 SO.2D 296 (FLA. 1948).

The District Court of Appeal, Third District, has by its decision ordered that all settlement proceeds secured through petitioner's labors be forthwith paid over to respondents, even "assuming . . . that all the legal fees claimed by the attorney are now due and owing." (A 1).

This Court, in In Re Warners Estate, 35 So.2d 296 (Fla. 1948), held in pertinent part at page 298 as to the purpose of charging liens:

The law is settled in this jurisdiction that a litigant should not be permitted to walk away with his judgment and refuse to pay his attorney for securing it.

The decision of the District Court is in direct conflict with the above-quoted decision of this Court.

Further, while jurisdiction will not arise from intradistrict conflict, it is pertinent to exercise of this Court's jurisdiction that the instant decision is directly contrary to the Third District's decision in Weksler v. Stamatinos, 314 So.2d 616 (Fla. 3d DCA 1975), where the Court ordered that all previously distributed settlement proceeds be deposited in the registry of the court by client and attorneys until conclusion of an independent action regarding entitlement of attorney's fees from the proceeds. Unlike the instant case, all parties were thereby protected until the fee entitlement issue was resolved.

CONCLUSION

From the foregoing it is clear that the requisite express and direct conflict is present. This Court has jurisdiction for review.

This Court's jurisdiction should clearly be exercised. The District Court has denied petitioner all recognized protection to which he is entitled by directing immediate payment of all settlement proceeds to the former clients. The District Court has also announced conflicting and erroneous rules of law as to attorney's charging and retaining liens.

This Court should exercise its jurisdiction to review and correct the District Court's errors.

Respectfully submitted,

Thomas M. Ervin, Jr.

THOMAS M. ERVIN, JR.
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief of Petitioner, Daniel Mones, P.A., and attached Appendix has been furnished by U. S. mail to ROBERT J. LEVINE, ESQ., 155 South Miami Avenue, Penthouse One, Miami, FL 33130, and to MALLORY H. HORTON, ESQ., Suite 410, Concord Building, 66 West Flagler Street, Miami, FL 33130, this 21st day of December, 1984.

Thomas M. Ervin, Jr.

ATTORNEY