IN THE SUPREME COURT OF FLORIDA

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DANIEL MONES, P.A.,

Petitioner,

vs. CASE NO. 66,296

JEFFREY SMITH, et al.,

Respondents.

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

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_______________________________/

REPLY BRIEF OF
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PRELIMINARY STATEMENT

Because of page limitations imposed by Rule 9.210 (a)(5), Florida Rules of Appellate Procedure, and the numerous portions of respondents' answer brief requiring rebuttal, this brief will be restricted almost exclusively to direct reply. Petitioner, therefore, relies upon and recommends his initial brief for encompassing treatment of the merits of the case.

Petitioner further submits that substantial portions of respondents' answer brief are subject to motion to strike for misstatement of the record, for statements of alleged facts exceeding the record, and for erroneous and misleading treatment of cited authorities. Petitioner foregoes such a motion in the belief that such a motion would serve only to delay where the proceedings have reached the reply brief stage. Specific instances of abuse by respondents will be treated below.

REPLY ARGUMENT

POINT INVOLVED

THE ANSWER BRIEF OF RESPONDENTS FAILS TO DEMONSTRATE ANY BASIS WHATSOEVER FOR AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA.

As the Court will recall, this case involves petitioner's entitlement to (1) a charging lien for a 40% contingent fee on $36,000 recovered by petitioner in the "Tigges" matter (fee of $14,400); and (2) a retaining lien for said amount; and (3) a retaining lien for approximately $30,000 additional attorneys' fees owed by respondents to petitioner.

The liens are asserted by petitioner against $21,000 in settlement proceeds from the "Tigges" matter which petitioner, having sued respondents, retained in his possession until deposited by him in the registry of the trial court. The deposited sum of $22,000 (an excess $1,000 having been deposited because of district court error) remains in the registry while proceedings below are stayed at their current interlocutory state. In brief synopsis of the case to date, petitioner sued respondents as their former attorney and, by interlocutory motion, respondents sought to compel payment to them of all "Tigges" settlement proceeds being retained by petitioner. The trial court denied respondents' motion (A 26), thereby authorizing petitioner to continue his retention during further proceedings.

On interlocutory appeal, the district court reversed and instructed the trial court to require payment of the funds to respondents immediately. Smith et al. v. Daniel Mones, P.A. 458 So.2d 796 (Fla. 3d DCA 1984).

In so holding, the district court stated it assumed that all fees claimed by petitioner were due and owing from respondents. The district court held that, despite this assumption, petitioner could have no charging lien on the settlement funds in his possession because he had not filed and had such lien determined in the "Tigges" proceedings. The district court held that petitioner could have no retaining lien because retaining liens could not be asserted against any funds which had been placed in an attorney's trust account. The express rulings of the district court as to both charging liens and retaining liens were clearly erroneous.

Respondents have attempted at page 9 of their answer brief to convince this Court that they were somehow misled or taken advantage of by petitioner's lien assertion after settlement of the "Tigges" matter. In their brief respondents have stated, in pertinent part:

> 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.

This argument of respondents is clearly inapplicable and absurd in the context of the instant case. Respondents admit they received the first $15,000 recovered in the Tigges matter. Respondent Jeffrey Smith expressly approved the final settlement on the record (A 21). Petitioner was employed on a contingent fee basis (A 24-25).

Further, petitioner does not, as suggested, assert a charging lien on <u>all</u> of the settlement recovered ($36,000) or even on <u>all</u> of the $21,000 balance which has not been paid over to respondents. He asserts a charging lien of $14,400, which is 40% of the full $36,000 recovery. He also asserts a retaining lien in said amount for his "Tigges" services.

As to the remaining amount of $6,600 ($21,000, less $14,400 "Tigges" fees) petitioner asserts a retaining lien for earlier services. As to respondents' suggestion of surprise or deception, however, this Court will note that by statement of November 30, 1982, respondents had been billed by petitioner for a total due and owing of $31,690 and by statement of March 16, 1984, for an additional sum of $8,100 (A 14).

These obligations were outstanding, unprotested, and well known to respondents. There was no surprise or deception regarding these prior obligations at the time of the "Tigges" settlement. There was only a thwarted desire of respondents to secure and dissipate the settlement funds

so that petitioner could be deprived of his earned fees. The prevention of such is precisely the function of attorneys' charging and retaining liens.

At pages 9 and 10 of their answer brief, respondents state:

> 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 Petitioners alleged fee.

Again, respondents attempt to mislead the Court by mischaracterization of the facts and record.

This Court will see from review of respondents' demand letter of April 5, 1984 (A 5-6) that respondents were willing to submit to fee dispute arbitration only if petitioner paid over to them $13,200 more of the settlement sums he retained. In other words, waiver of petitioner's lien rights as to $28,200 ($15,000 plus $13,200) of the $36,000 he had recovered for respondents was the price respondents insisted on for "voluntary" submission to fee arbitration. Petitioner understandably, and properly, chose to pursue his rights in litigation.

At page 5, and again page 6, of their answer brief respondents have attempted to undercut the affidavit of Jack Wynn (A 24-25) establishing petitioner's employment on a contingent fee basis by describing Wynn as:

> a former employee of the Respondents who is embittered against the Respondents due to his discharge for an attempted embezzlement of corporate funds.

This improper, defamatory and untrue allegation is not based upon a shred of evidence in the record of these proceedings. It is _wholly_ the figment of counsel's argument.

Respondents' treatment of case authorities fails to disclose any improved level of candor to this Court.

At page 19 of their answer brief respondents cite _The Florida Bar v. Heller_, 248 So.2d 644 (Fla. 1971), state that the case appears to "closely resemble the facts of the instant case," and represent to this Court that:

> 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.

This Court did not hold, as respondents state, that failure to deliver over the funds "to the client upon demand" was either improper or disciplinable. Indeed, in _The Florida Bar v. Heller_, _supra_, this Court held _exactly to the contrary_. In that case Heller had posted supersedeas bond after an adverse trial court ruling as to his retaining lien. Subsequently his supersedeas bond failed by reason of insolvency of his bond surety, and the trial court's decision was affirmed by the district court, certiorari was denied by this Court, and the decision holding Heller

lacked a retaining lien became final. Heller still did not pay over the funds after final disposition of the initial case, and disciplinary proceedings were instituted two years later.

In the subsequent disciplinary proceedings reported at 248 So.2d 644, this Court held as to Heller's retention of the funds prior to final disposition of the earlier fee entitlement proceedings:

> Heller may have initially entertained a bona fide belief that he had a valid lien on the proceeds received by him in the Barnett case which would justify his retention of the same. This was a justiciable issue and Heller was entitled to have the issue decided by a court of competent jurisdiction. However, when the original supersedeas bond was cancelled due to receivership of the surety company, and the appellate courts held that he did not have a valid retaining lien on the funds, Heller was under an absolute obligation to either post a substitute supersedeas bond or pay the money to the Receiver. He did neither and continued to withhold funds belonging to his client, the Receiver. (Emphasis supplied.)
>
> The Florida Bar v. Heller, 248 So.2d 644, 646 (Fla. 1971).

Thus, this Court expressly recognized that retention of the funds by Heller until final disposition of the initial fee and retaining lien litigation was proper. Retention was proper even on appeal after adverse final judgment while a supersedeas bond remained in full force and effect. Heller's misconduct was in retaining the funds absent supersedeas and after final appellate disposition.

In the instant case the trial court ruled in petitioner, Mones', favor, thereby authorizing retention

of the funds. When the district court erroneously reversed, petitioner, Mones, not only promptly posted supersedeas bond but also delivered the funds into the registry of the trial court while discretionary review of this Court was sought. As to the issue of petitioners' entitlement to retain the funds until final disposition of the justiciable issue of his fee and lien entitlement, The Florida Bar v. Heller, 248 So.2d 644 (Fla. 1971), is direct authority that petitioner was and is so entitled.

Petitioner, Mones, in his initial brief, cited and quoted this Court's decision in Nichols v. Kroelinger, 46 So.2d 722, 724 (Fla. 1950), as holding that where the res is in the possession of the lienor (as in the instant case) and the owner-debtor seeks to deprive the lienor of it, then courts of law may take cognizance of the lien. Thus, notice of petitioner's charging lien by an action at law or equity is "timely" if instituted while the res remains in petitioner's possession.

At page 8 of their answer brief respondents cite and quote from Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950). In support of respondents' contention that notice of attorneys' lien had to be filed in the earlier "Tigges" proceedings, respondents state:

> 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)

Thus, respondents represent to this Court that Nichols, supra, holds and stands for the proposition that a charging lien which is unnoticed and unasserted in earlier proceedings is lost.

To the contrary, in Nichols v. Kroelinger, supra, this Court held that the attorney could not assert his claim for fees against the estate of his former client where he had allowed the statute of limitations on such a claim to run by 18 years' delay. This Court also held at page 724 that the attorneys' lien against the judgment he had secured for the deceased "inheres in the judgment so long as it is kept alive" and that the attorney could resort to and move against the judgment to satisfy his lien.

This Court's decision in Nichols v. Kroelinger, supra, is clear authority for the timeliness of an assertion of charging lien rights against a res which remains in the lienor's possession, as in the instant case.

Respondents have in their answer brief cited Adams, George, Lee, Schulte & Ward v. Westinghouse, 597 F.2d 570 (5th Cir. 1979), and several other authorities which deal with limits on the "coercive" use of attorneys' retaining liens.

Petitioner agrees with the holding of these authorities to the effect that the attorney can exercise his retaining lien rights only up to the amount of claimed indebtedness to him. An attorney may not "retain" more than claimed

to be owed. In the instant case, however, the record clearly established that petitioner's claim against respondents, his former clients, exceeds the amount against which he asserts a retaining lien by approximately $30,000. Thus, the authorities cited by respondents serve to demonstrate that petitioner did not overreach in asserting a retaining lien against all funds in his possession.

Turning again to the issue of the attorneys' charging lien, respondents have erroneously cited several decisions of this Court for the proposition that an attorneys' charging lien may not be enforced in a separate action at law. Contrary to respondents' assertions, Nichols v. Kroelinger, 46 So.2d 722, 724 (Fla. 1950), expressly holds that a court of law may take cognizance of a charging lien where (as here) the res is in possession of the lienor.

In Sinclair, etc., & Zavertnick v. Baucom, 428 So.2d 1383 (Fla. 1983), this Court did not hold that a charging lien could not be enforced in a separate action. This Court, rather, held that a charging lien was timely asserted in the original action, even though filed after motion for dismissal and hearing thereon. This Court also held, without reference to specific court or action, that:

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

Worley v. Phillips, 264 So.2d 42 (Fla. 2d DCA 1972), is also cited by respondents as barring charging lien enforcement in a separate action. The court did not

so hold. In that case the court merely held that the attorney was not required to assert a charging lien in the first action as a prerequisite to maintenance of a suit for fees in a second action.

In Gay v. McCaughan, 105 So.2d 771 (Fla. 1958), also cited by respondents, this Court did not hold that a charging lien could not be enforced by separate action. Rather, this Court held that the attorney could not assert his fee claim against his client in the initial action absent the creation of a fund or res in that action.

Not a single one of the cases cited by respondents holds that an attorneys' charging lien cannot be enforced by a promptly instituted separate action where the res (settlement proceeds) created through the attorneys' services remains in the attorneys' possession.

Respondents' error in interpretation and reliance on such cases is based upon a fundamental failure to recognize that the ordinary means of resolution of attorney-client lien and fee disputes is by separate, adversary proceedings. The exception, albeit one commonly employed, is that where a judgment or fund has been created the attorney may elect to assert his charging lien rights in the initial action.

The cases relied upon by respondents do not eliminate the right to proceed and enforce the charging lien in a separate action - they merely delimit the circumstances under which the fee dispute may be resolved in the initial

action without separate adversary proceedings, those circumstances being where (1) a fund has been recovered (2) against which the attorney gives timely notice of an asserted charging lien (3) for services rendered in the recovery of said fund.

Respondents have cited no case that holds that a separate action for enforcement is barred or precluded merely because an attorney chooses to forego assertion in the initial action. Petitioner has, however, cited a number of cases where such separate actions were approved by this Court. Greenfield Villages, Inc. v. Thompson, 44 So.2d 679 (Fla. 1950); Foreman, et al. v. Kennedy, 156 Fla. 219, 22 So.2d 890 (1945); Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1934); Alyea v. Hampton, 112 Fla. 61, 150 So. 242 (1933); Randall v. Archer, 5 Fla. 438 (1853).

In his initial brief petitioner called to this Court's attention Goethel v. First Properties, Intern., Ltd., 363 So.2d 1117 (Fla. 3d DCA 1978); Conroy v. Conroy, 392 So.2d 934 (Fla. 2d DCA 1980); and Dowda & Fields, P.A. v. Cobb, 452 So.2d 1140 (Fla. 5th DCA 1984), all of which expressly recognize an attorneys' retaining lien on all property and monies of a client which can be used to enforce all debts owed by the client to the attorney.

Respondents have cited absolutely no authority to the contrary. Lacking any such authority, respondents have traveled with the error of the district court and attempted to stretch this Court's decision in The Florida Bar v. Bratton,

413 So.2d 754 (Fla. 1982), to effectively eliminate all retaining liens. This issue was thoroughly covered in petitioner's initial brief wherein it was demonstrated that the restrictions of Bratton, supra, apply only to funds entrusted to the attorney (1) by the client (2) for a special purpose. There was no such entrustment in the instant case. In the interest of space limitation, petitioner will not treat this showing further in this brief.

Finally, and as was expected, respondents have departed from the basis (albeit, erroneous) recited by the district court, and have urged that the transfer of the retained settlement proceeds from petitioner's trust account to his office account (and thereafter to the registry of the court) bars petitioner from assertion of any charging or retaining lien.

To the extent that this action may have constituted error of judgment on petitioner's part, it should be noted that the action (1) was taken only after full accounting to the former clients; (2) was taken where the clients owed petitioner an additional $30,000 in fees; (3) was taken in a matter where the trial court after hearing denied respondents' motion for payment over of the monies and thereby authorized petitioner's retention; (4) was absolutely without prejudice to respondents in that respondents would not have had possession of the funds upon retention in either account; (5) never resulted in relinquishment of possession and

entitlement to assert lien rights; and (6) upon erroneous reversal by the district court, was promptly "cured" by both posting of supersedeas bond and deposit of the funds in the registry of the trial court.

Under these circumstances, which are matters of record, it is clear that respondents' contentions of lien loss as a matter of law are without merit.

It is equally clear that, if the temporary transfer of funds from one account to another has any significance, it is a matter for the trial court as finder of fact after review of all circumstances, not for interlocutory appellate disposition on respondents' argument and self-serving characterization.

In such trial proceedings petitioner would be enabled to present the testimony of distinguished attorneys in the community whom he consulted prior to the transfer and who expressed their opinion that the transfer was authorized. If the temporary transfer has any significance, then petitioner's good-faith reliance on the opinion of three experienced, distinguished counsel in the community is equally significant. The determination of such matters is the province of the trial court.

CONCLUSION

Petitioner respectfully submits that the errors of the district court, and conflict with prior appellate authority, are clearly established. The district court

erred in reversing the trial court, abolishing petitioner's lien rights as an attorney, and directing that the settlement proceeds recovered by petitioner's labors be paid over to respondents irrespective of the fees owed by respondents to petitioner.

This Court should reverse the decision of the district court, reinstate petitioner's charging and retaining lien rights, and direct that the funds in question be retained in the registry of the trial court until final determination of petitioner's entitlement to fees from respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner, Daniel Mones, P.A., has been furnished by U. S. mail to Toland & Levine, Suite 401, 1101 Brickell Avenue, Miami, FL 33131, and to MALLORY H. HORTON, ESQ., Suite 410, Concord Building, 66 West Flagler Street, Miami, FL 33130, this 19th day of June, 1985.

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ATTORNEY