

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs
GEORGE W. WILDER,
Respondent.

Supreme Court Case No. 71,847

The Florida Bar File Nos.
87-26,502 (15E) and 87-26,503 (15E)

FILED

SID J. WHITE

MAR 16 1989

CLERK, SUPREME COURT

By

Deputy Clerk

RESPONDENT'S INITIAL BRIEF ON PETITION
FOR REVIEW OF A REFEREE'S REPORT
ENTERED FEBRUARY 13, 1989

Respectfully Submitted by:
George W. Wilder, Pro Se
111 Estado Way
St. Petersburg, FL 33704
March 15, 1989



GEORGE W. WILDER

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STATEMENT OF THE CASE

This is a Petition for Review from the Report of Referee in the above styled cause which heard argument and testimony from the Florida Bar, its witnesses and the Respondent on October 6, 1988. Various Depositions and other hearings were held in West Palm Beach on previous occasions, notably the Depositions of George W. Wilder, the Respondent, Leonardo Bustamante and Eugenia Ponce, the Complainants, on December 16, 1987; the Deposition of Leonardo Bustamante, one of the Complainants, on September 30, 1988; the Depositions of George W. Wilder, the Respondent, and Randall Christopher, the Complainant, on December 16, 1987; and the Deposition of Randall Christopher on September 30, 1988.

As a result of the above, a Hearing was held before the Honorable Judge J. Rogers Padgett on the aforementioned date in Tampa, and which resulted in the Report of the Referee which is the subject of this Petition for Review.

STATEMENT OF FACTS

The Respondent/Petitioner is not in disagreement with the bare bones of Judge Padgett's findings of fact as set forth in his Report other than that as set forth below:

1. Paragraph II(D) of said Report: Judge Padgett states that:

"Respondent thereafter failed and neglected to pursue the clients' claim or to refund to the clients the sum of \$375.00 received by him from the clients, as aforesaid".

Respondent/Petitioner would state that neither did he neglect to pursue the matter, but that he also offered to refile the clients' Complaint at his own cost.

2. Paragraph II(F) of said Report: Judge Padgett states that:

"In fact, no papers were ever filed in the subject action and no copy thereof was ever delivered to or received by the Sheriff of Palm Beach County".

Respondent/Petitioner would state that, by his own testimony, said papers were in fact filed in the Palm Beach County, County Court, sometime in early January, 1987.

3. Paragraph II(H) of said report: Judge Padgett states that:

"After instituting an action respondent failed and neglected to pursue the action and permitted the same to be dismissed, with prejudice, without conferring with Christopher".

Respondent/Petitioner would state that through his testimony, and through the testimony and inconsistencies of Mr. Christopher's statements, the facts would indicate that Mr. Christopher was fully aware of Respondent's efforts on his part, that he, the Complainant was conferred with, and that the action was for a questionable soft tissue injury, as well as property damage, for which the client advised the Respondent/Petitioner to get it all or none at all.

SUMMARY OF ARGUMENT

ISSUE I

While the findings of fact made by the Referee that the Respondent failed to file pleadings as he indicated to his clients and failed to make restitution, Respondent's testimony is that he did. Even if he did not, Respondent did offer to re-file the case at his own expense, and in that way make restitution.

ISSUE II

The testimony of Mr. Christopher is so contradictory and vague that his statements that he was never advised as to the proceedings in his case or that the case was about to be dismissed, are unreasonable.

ISSUE III

In view of the case law, the punishment recommended by the Referee is excessive.

ISSUE I

DO THE FINDINGS OF FACT IN THE REFEREE'S REPORT
CLEARLY INDICATE THAT THE RESPONDENT/PETITIONER WAS
NOT NEGLECTFUL TO FILE OR PURSUE THE CLAIM OF THE CLIENTS
OR THAT HE DID NOT FAIL TO OFFER TO REFUND THE CLIENTS
THEIR FEE BY OFFERING TO REFILE THEIR CASE ?

As stated in Judge Padgett's Report, his finding of fact was that the Respondent failed and neglected to pursue the claim for what he was retained, namely the filing of an action to recover wages not paid to the Bustamantes (hereinafter clients).

The facts of the case clearly indicate that several conversations took place between the Respondent and the Clients. But the real question remains whether the Respondent did, indeed, actually file the Complaint in question. According to Respondent's testimony, as taken under oath, Respondent filed the Complaint in early January, 1987, (see Wilder Deposition, December 16, 1987, Page 86) and that he was in a hurry to do so in that he had a hearing and another filing to make (id, Page 95).

Respondent further testified that he failed to acquire a receipt for the filing and that he paid for the filing fee and the Sheriff's return of Summons in cash (id, Page 86). Both parties admit that Respondent did make a phone call to the Office of the Clerk of Courts to ascertain the case number, was able to ascertain one, but that such case number turned out to be totally

irrelevant to clients' case.

By the Referee's Report, Judge Padgett states that he found the "Respondents story as a contrived tale" (Referee's Report, Paragraph IV, Page 3). The fact remains that by Respondent's own testimony, under oath, he has stated that he did in fact file the Complaint. That the Referee found that the testimony was a "contrived tale" would seem unreasonable in view of the fact that no testimony was ever elicited from any of the Palm Beach County Clerk's Office that such an occurrence had never happened. The only testimony to such an effect was Respondent's own that it had never happened to him.

Assuming, arguendo, that Respondent did indeed not file any papers, Complaints, Summons, etc., then the next question would be: what did Respondent do upon learning that there was in fact no record of a filing? By Clients own admission, Respondent offered to refile the Complaint at his own cost. While Client originally stated that such an offer was not made (Bustamante Deposition, December 16, 1987, Page 104), he subsequently recanted that testimony and stated that such offer had been made (Bustamante Deposition, September 30, 1988, Page 26), that if it had been made, he would have "jumped on it" (Bustamante Deposition, December 16, Page 104), and that Respondent never asked him for more money to do so (Bustamante Deposition, September 30, 1988, Page 32).

The question then is, are the facts supported by the testimony of all the parties? Clearly not. As to the finding that the Respondent failed to pursue the claims of his clients, in violation of Rule 4-1.3, the testimony shows that the Respondent either filed a claim for his clients within 3 months of being retained, or, if not, because of mistake, misfeasance or malfeasance on the part of others unknown, offered to refile the case at his own expense as soon as the problem became known.

ISSUE II

WAS MR. CHRISTOPHER, THE CLIENT FULLY AWARE OF,
AND COGNIZANT OF THE EFFORTS PUT FORTH BY THE
RESPONDENT ON HIS BEHALF, AND THUSLY NEGATING THE
CLAIM THAT RESPONDENT FAILED AND NEGLECTED TO PURSUE
HIS ACTION AND ALLOWING IT TO BE DISMISSED ?

With regard to Mr. Christopher, the Referee's Report states that the Respondent failed and neglected to pursue Mr. Christopher's action and allowed it to be dismissed with prejudice. Respondent's contention all along was that Mr. Christopher was fully aware of the efforts made by the Respondent, was fully aware of the hearing date on the Motion to Dismiss, and was adamant in insisting that the case proceed on both the property damage and personal injury issues. Mr.

Christopher, the Complainant insists that he was unaware of these facts.

Specifically, regarding a letter sent to him concerned with the need to see a physician regarding his permanency of injury, which he states he never received, his testimony was that "if he did, I never received the letter" (Christopher Deposition, December 16, 1987, Page 11). This in response to a direct question concerning oral discussions. Coupled with Mr. Christopher's confusion over his address at the time of the letter (see Christopher Deposition, December 16, 1987, Pages 13, 14, and the September 30, Deposition, Page 25), the fact that the Respondent repeatedly has stated that Mr. Christopher was aware of this fact, it would appear that Mr. Christopher's memory is very selective. In fact, Mr. Christopher later states that he was informed of the need to see a doctor in order to prove permanent (Christopher Deposition, September 30, 1989, Page 29).

Further along these lines, there is the question of whether or not Mr. Christopher received copies of interrogatories propounded by the Defendant. Initially, Mr. Christopher states that he never saw them (Christopher Deposition, December 16, 1987, Page 18), then admits that he filled them out in longhand, (id, Page 20). Also, while stating that it had nothing to do with interrogatories, and while he did not fill out anything by hand, he verbally explained to Mr. Wilder answers to a set of

questions relating to his April accident (Christopher Deposition, September 30, 1988, Page 24).

Mr. Christopher's testimony would appear that he had no knowledge of any of the events that took place in this law suit. Yet the inconsistencies as enumerated above would indicate that this was in fact not so. The Respondent's contention is that Mr. Christopher was aware of the status of the case and was aware of the nature of the Motion to Dismiss. As such, there was no neglect in pursuing this claim.

ISSUE III

IS THE PUNISHMENT AS SET FORTH IN THE REFEREE'S REPORT
TOO EXTREME AS ENUMERATED BY THE CASE LAW AND
FLORIDA'S STANDARDS FOR IMPOSING LAWYER SANCTIONS ?

Judge Padgett has recommended in his report that because of the violations as enumerated above, that the Respondent be suspended for one hundred eighty (180) days; a refund to the Bustamantes of \$375.00 within 30 days of the Court's final order, and a restitution to Randall Christopher of \$940.00.

This recommendation is based upon Florida's Standards for Imposing Lawyer Sanctions, as enumerated by Judge Padgett in Paragraph IV of his Report, wherein it states the Aggravating

circumstances of:

1. Submission by Respondent of false statements. (Rule 9.22(f)).
2. Respondent's refusal to acknowledge the wrongful nature of his conduct (Rule 9.22(g)).

However, other than stating in Paragraph VI of the Report (wherein Judge Padgett stated that Respondent had no other disciplinary record, a mitigating factor under (Rule 9.22(a))), Judge Padgett did not refer to any of the other mitigating or aggravating factors that are set forth in said Standards.

Particularly, there is no mention of the fact that the Respondent did in fact, in the case of the Bustamantes, offer to refile their case at his own expense. Nor is there any mention of the fact of the conflicting testimony of Mr. Christopher as to whether or not he was fully aware of his situation.

As to the length of the suspension itself, a comparison to some recent cases is helpful:

In THE FLORIDA BAR v SAPP, 526 So. 2d 908 (FLA. 1988), the court ordered a 30-day suspension to an attorney who had violated former Disciplinary Rules 1-102(A)(4) (conduct involving dishonesty), 6-101(A)(3) (neglect of a legal matter), and 7-101(A)(2) (failure to carry out a contract of employment). Further, the attorney had already been suspended in separate proceedings.

In THE FLORIDA BAR v SHUPACK, 523 So. 2d 1139 (Fla. 1988), the court ordered a 91 day suspension to an attorney for violation of DR 1-102(A)(4) and DR 7-102(A)(7). Again, the attorney in question had also been previously disciplined with a thirty-day suspension for another violation of DR 1-102(A)(4).

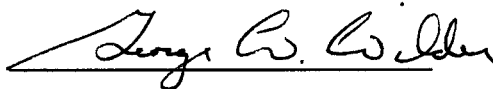
In THE FLORIDA BAR v HARPER, 518 So. 2d 262 (Fla. 1988), the court ordered a six-month suspension, but stated that a violation of DR 1-102(A)(4) and 6-101(A)(3) would warrant a three month suspension. (The six month suspension was ordered because of an additional violation of DR 9-102(A), DR 9-102(B)(3) and DR 9-102(B)(4).

Respondent's punishment as recommended by the Referee of 180-day suspension is excessive in view of these cases. Respondent has not been previously suspended. Respondent would contend that his situation is more similar to that of Mr. Sapp, and would state that a 30-day suspension may even be excessive in view of Mr. Sapp's previous suspension.

CONCLUSION

Respondent would ask that the court consider his arguments as to his version of the events that took place in these two matters and conclude that there was no intentional effort on his part to in any harm these clients. Further, in light of the case law and Florida's Standards for imposing Lawyer Sanctions, that the punishment recommended by the Referee be rescinded or reduced.

Respectfully submitted



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St. Petersburg, FL 33704

I hereby certify that a true and correct copy of the foregoing was mailed this 15th day of March, 1989, to DAVID. M. BARNOVITZ, Cypress Financial Center, 5900 N. Andrews Ave., Suite 835, Ft. Lauderdale, Florida 33309.



George W. Wilder