047

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)

RESPONDENT'S REPLY BRIEF

Respectfully Submitted by:
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March 11, 1989

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Again, the appellant has no basic disagreement with the facts as presented except for the following and in contravention of the facts as stated by Mr. Barnovitz.

1. The statements that appellant refused to refund the fee, that the clients (through implication), would be billed for additional work, and that the clients were never provided with any documents, correspondence, pleadings or writings is in part prevarication and at best wishful thinking. The clients received no correspondence. However, the Bustamante's received a copy of the complaint, and it was made a part of the complaint filed with the Bar.

The fact that appellant refused to refund the fee is true, but appellee's contention that appellant's offer to refile the case was " . . . untrue", " . . . self serving" . . . and not supported by any evidence" (Appellee's Answer Brief, unnumbered page 12) is in appellee's own words, inaccurate and untrue. A review of Mr. Bustamante's testimony during the December, 1987, and September, 1988, depositions clarify this mis-statement made by appellee. Mr. Bustamante clearly states in his deposition of September 30, 1988, that "He suggested to me that we might have to refile the case . . ." (page 26). Also, in the same deposition on page 32, Mr. Bustamante again states that he was aware of an offer to refile the suit and that it not would cost him any more money.

2. The statements made by the appellee in the Bustamante case to the effect that no attempt was made by the appellant, once the awareness of the extent of what had happened, to report the claims of missing monies and the complaint. Appellee attempts to make a point that because appellant did not berate or ". . . report his claims of missing envelopes and cash to any personnel at the clerk's office and made no attempt to contact the sheriff's office" (Appellee's Answer Brief, page 3) that this is somehow prima facia neglect. To the contrary, in the real world, berating a clerk of any circuit court or in the sheriff's office is counter-productive. The best solution is to start over and get the job done. This is exactly what appellant attempted to do by offering to refile the case.

3. Appellee's statements regarding the Christopher case center on a attempt to concentrate on the notion that the appellant, or through his wife, did not convey to Mr. Christopher the absolute need to provide proof of medical loss to the Defendant's in that case until after the case had been dismissed. This attempt at selective fact finding is also incorrect. Throughout appellant's testimony, he has stated that Mr. Christopher was aware that medical proof of injury was required, especially in an automobile accident case, and that Mr. Christopher insisted that the case go forward (notwithstanding the property damage claim) to the end.

Further, appellant strongly objects to the innuendo, and provocative misstatements as propounded by the appellee that are not supported by any facts. Specifically:

A. "Frustrated by what they perceived as a lack of action and concerned that appellant was not being forthright . . ." (Appellee's Answer Brief, page 1, emphasis provided).

B. " . . . appellant picked up the telephone, purportedly called a clerk at the courthouse and then wrote a notation of a file number allegedly assigned to the client's case." (Appellee's Answer Brief, page 2, emphasis provided).

C. "The client's were never furnished with any documents, correspondence, pleadings or writings . . ." (Appellee's Answer Brief, page 2, emphasis provided).

D. "In addition to the client's testimony regarding the charade . . ." (Appellee's Answer Brief, page 2, emphasis provided).

E. " . . . the file number was phoney" (Appellee's Answer Brief, page 3, emphasis provided).

F. " . . . appellant's tale . . ." (Appellee's Answer Brief, page 3, emphasis provided).

G. Appellant " . . . returned the check to Hertz . . ." (Appellee's Answer Brief, page 4, emphasis provided).

H. " . . . appellant made no effort to communicate with Mr. Christopher to resolve this seeming anomaly". (Appellee's Answer Brief, page 4, emphasis provided).

I. "By fabricating a false story in a clumsy attempt to avoid his responsibility and then refusing to acknowledge the wrongful nature of his misconduct . . ." (Appellee's Answer Brief, page 7, emphasis provided).

J. Mr. Bustamante " . . .never saw a trace of a file present at the kitchen table consultations" (Appellee's Answer Brief, page 8, emphasis provided).

K. " . . . appellant contrived a tale . . ." (Appellee's Answer Brief, page 8, emphasis provided).

L. "Somehow, appellant wishes this court to substitute . . ., regarding the incredible story . . ." (Appellee's Answer Brief, page 8, emphasized provided).

M. "Even more astounding . . ." (Appellee's Answer Brief, page 9, emphasis provided).

N. "Poor Mr. Christopher" (Appellee's Answer Brief, page 9, emphasis provided).

O. " . . . appellant's failure to oppose the application to dismiss his client's action . . ." (Appellee's Answer Brief, page 9, emphasis provided). This statement by appellee is, of course refuted by his own words on page 10 of his Answer Brief where he states that appellant " . . .nevertheless personally attended at the return of the application . . .", for . . . some unspecified reason . . ." (page 9). Incredible as this argument may sound, why else would the appellant attend the hearing but to oppose the motion to dismiss?

P. " . . . even if he contrived the tale . . ." (Appellee's Answer Brief, page 11, emphasis provided).

It is respectively submitted that these statements made by the appellee will be viewed by the court for what they are; an effort to influence and prejudice.

To back up his point and to offer to this court that this is the gospel, Mr. Barnovitz's makes an uncalled for attempt to portray the Appellant as working out of his kitchen (Appellee's Answer Brief page 1, wherein he states "At the time of the representation appellant operated from his kitchen where he conducted all office consultations" (emphasis provided)). How gratuitous! Mr. Barnovitz is fully aware that the appellant, at the time of the incident, was in the process of changing jobs and moving to the Tampa Bay area, and that he had given up his lease on his office. To propose this as "proof" of neglect stretches credulity.

The statement that Mr. Bustamante never received any correspondence is true, in that none was ever sent, nor was any ever required because of the constant communication by telephone.. However, the statement that Mr. Bustamante never received copies of any pleadings is incorrect. As is the statement that Mr. Bustamante never saw a file, since in fact, appellant's file contained little more than his notes, research and the complaint, which he gave to Mr. Bustamante, who gave it to the Bar Committee, and which is an exhibit in this matter.

Which brings us to the point of whether a "tale" was "contrived" because appellant " . . . wouldn't believe the story . . .."). Appellee states "Appellant, himself, regarded his story as unworthy of belief", (Appellee's Answer Brief, page 3), and then quotes from the record (107) to this effect. However, appellee also quotes from the record and in the same paragraph

SUMMARY OF ARGUMENT

Again, the question remains whether appellant did or did not file the case in the Bustamante complaint. If he did not, then the question becomes whether appellant offered to refile the case at his own cost with no further cost to the client. The evidence is overwhelming that such is the case, and in light of this, that the recommended sanctions are excessive.

Appellee's argument is that Mr. Christopher was unaware of the dismissal because he was so advised some six month's after the dismissal by appellant's "wife/secretary". In fact, it would stretch credibility to expect that Mr. Christopher was not aware of the need for medical proof from day one or that he was unaware of the Motion to Dismiss in light of the fact that appellant attended the hearing.

POINT 1

REGARDING THE BUSTAMANTE COMPLAINT, NO CLEAR AND CONVINCING EVIDENCE HAS BEEN PRESENTED TO SHOW FRAUD AND NEGLECT

Appellee, through Mr. Barnovitz, attempts to make light of the question ". . . whether the respondent did, indeed, actually file the complaint." (appellee's answer brief, page 8). It is in fact, the key question in this matter. If in fact it was filed, the fraud issue is moot. Appellee goes to great lengths to make the point that not a " . . . scintilla of evidence that any such work product existed during the course of his representation". (Appellee's Answer Brief, page 8).

To attempt to do so, Appellee states the reason for this lack of evidence is that:

1. Mr. Bustamante never received any correspondence from Appellant. (Appellee's Answer Brief, page 8).

2. Mr. Bustamante never received copies of any pleadings. (Appellee's Answer Brief, page 8).

3. Mr. Bustamante never saw a trace of a file present at " . . . kitchen table consultations". (Appellee's Answer Brief, page 8).

4. "Appellant "contrived a tale" because he stated that he " . . . wouldn't believe the story I told earlier". (Appellee's Answer Brief, page 8).

that appellant states ". . . but it happened and that's all I can say" (Appellee's Answer Brief, page 3).

POINT 2

REGARDING THE CHRISTOPHER COMPLAINT, NO CLEAR AND CONVINCING EVIDENCE HAS BEEN PRESENTED TO SHOW FRAUD OR NEGLECT

With regard to the Christopher Complaint, the first issue that needs to be addressed is the assertion by the appellee that Mr. Christopher's check was returned to the Hertz Company when in fact, such was not the case, and of which, the appellee is fully aware (see statement in Appellee's Answer Brief, page 4). Mr. Christopher was fully advised of the danger of cashing a check in that in so doing it may preclude any other recovery.

Secondly, appellee attempts to make an issue of the fact that Mr. Christopher called appellant's "wife/secretary" sometime in December of 1986, and that she stated that "we are waiting for the medical" (Appellee's Answer Brief, page 4), and that appellant testified that he did not call Mr. Christopher back. And that, therefore, because his "wife/secretary" was unaware that the case had been dismissed, that when appellant failed to call the client back, this is clear evidence of "neglect". This of course assumes that the call was made in December of 1986, and that the "wife/secretary" was kept fully informed of every nuance of every case.

POINT 3

THE RECOMMENDED SANCTION IS NOT WARRANTED BY THE AGGRAVATING FACTORS WHEN WEIGHED AGAINST MITIGATING FACTORS AND THE CASE LAW

Appellant has already set forth cases which are on point as regarding the sanctions that have been imposed by the court in situations similar to this. Appellee cites the case of The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987), for the proposition that the referee's recommendation of a 180 day suspension in this case is justified. However, it should be noted that in the Palmer case, the facts were that Mr. Palmer did not:

1. Contact the client for six months.
2. Falsely told the client the case had been delayed.
3. File suit.
4. Tell the truth regarding securing court dates, and then stating that the case had been settled, and that a settlement check was in the mail.

This case is clearly distinguishable to the matter at hand.

One: In both complaints against the appellant, there is testimony that there was always contact between the appellant and his clients.

Two: There is no question that a suit was filed in the Christopher case, and the major area of contention is the filing of the Bustamante complaint and the offer to refile.

Three: In the Christpher case, there is no evidence other than that appellant told the client that the case had been dismissed, while in the Bustamante case, the appellant made it clear to the clients when the full facts had been made known, that something had indeed happened and that he would refile the case.

It is appellant's contention that the facts most closely representing the facts in this case are those as set forth in The Florida Bar v. Sapp, 526 So.2d, 908 (Fla. 1988), and in appellant's initial brief.

CONCLUSION

Appellant respectfully submits that based on the foregoing, that the court not follow the referree's recommendation and order no sanction larger than a 30 day suspension and restitution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to David M. Barnovitz, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309, this 11th day of April, 1989.

GEORGE W. WILDER