

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. 72,406

v.

EDWARD J. WINTER, JR.,

Respondent.

FILED

SID J. WHITE

MAY 31 1989

CLERK, SUPREME COURT

By

Deputy Clerk

AMENDED RESPONDENT'S BRIEF

EDWARD J. WINTER, JR.

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RESPONDENT

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STATEMENT OF THE CASE

Respondent , pro se, is not an attorney. He was formerly licensed to practice law in Florida. He resigned from the Florida Bar due to serious cardio-vascular problems which were diagnosed by several independent clinics and groups of physicians.

The Supreme Court of Florida granted Mr. Winter's petition to resign permanently from the Florida Bar. This final order was to become effective February , 1988.

In May, 1988 the Florida Bar sought to have Respondent held in contempt of Court.

A Referee, Judge Burnstein, held hearings pursuant to orders of this Court. A hearing was held in Ft. Lauderdale on December 2, 1988. A second hearing was held about 21 days later. Respondent could not attend or have counsel attend the first hearing. He filed responsive pleadings and attached copies of exhibits.

Respondent attended the second hearing before Judge Burnstein on December 23, 1988.

The Referee's recommendation is currently the issue and topic of this proceeding.

STATEMENT OF THE FACTS

Prior to resigning permanently from the Florida Bar, Respondent was quite active and involved with a socially beneficial organization named " FATHERS FOR EQUAL RIGHTS".

Respondent resigned, effective February, 1988 from the Florida Bar. He was under a direct Court order of The Supreme Court of Florida to take all necessary steps to protect the interests of his former clients.

As he was diligently attempting to obey this direct order, he studied carefully the Rules Regulating the Florida Bar, the Code of Professional Responsibility and the Canons of Ethics governing attorneys, and , more specifically, what steps to take to accomplish this.

Respondent filed certain pleadings in two pending litigated cases, after the effective date of his resignation. It was carefully explained to the Referee the reasons for doing so. It appears this explanation was more or less ignored.

The Florida Bar evidently became very upset that Mr. Winter, Respondent, was still active and involved, to the extent his physical and health condition would permit, in " FATHERS FOR EQUAL RIGHTS." One can only speculate that the Florida Bar is upset with this "group" because they perhaps perceive it as " cutting into" information furnished ^{by} those who enjoy the monopoly of the practice of law. Mr. Winter's (Respondent's) heart condition and cardio-vascular problems forced him to retire from the practice of law.

The exhibits filed by the Bar and Respondent reflect the above true state of facts.

It clearly appears the Florida Bar never attempted to prove Mr. Winter had the current, present ability to comply with any Court order.

Indeed, they cannot and could not. Respondent disagrees with the " Statement of the Facts" contained in Complainant's Brief. The Bar refers to evidentiary support which was in their words, " overwhelmingly conclusive" . They state it was " uncontraverted" (sic) by Winter. (page 6 of Complainant's Initial Brief). This is totally false, as the record shows. Both the Transcripts of the two hearings and the exhibits filed by both parties prove this is untrue.

It appears the Bar is trying to seriously mislead this Court by the false statements found in their Brief.

For the record, Respondent respectfully moves for an order striking their Brief which is full of inaccuracies.

The exhibits of course speak for themselves. Respondent's pleadings filed before the Referee rebut and contradict all the basis for the Bar's charges and complaints.

SUMMARY OF ARGUMENT

The record proves Respondent did not violate the order of the Florida Supreme Court. The attached exhibits, together with the pleadings filed before Judge Burnstein, Referee, prove Mr. Winter did all in his power to close out his law practice and fully protect the interests of his former clients.

The Brief filed by Complainant obviously ignores the facts.

" IN RE THE INTEREST OF S L T , 180 So. 2d 380 (Fla. 2d DCA 1965) - 180 So. 2d 374 at page 380, states:

A sentence of imprisonment is not available in a civil contempt proceeding where the accused meets his burden of proving his inability to comply, so even if the proceeding could be sustained as for civil contempt, nevertheless, the finding of ability to comply and the sentence were erroneous.

The order appealed is reversed.

The Florida Bar had full knowledge of Respondent's bankruptcy filing. They knew he was not able to pay some \$700.00 or so , or more in disciplinary costs. And yet, they try to mislead the Referee and this Court on page 4 of their Brief.

The Referee herself, even when Respondent was not present to present evidence, expressed grave doubts about " FATHERS FOR EQUAL RIGHTS " participation was nothing more than a person exercising their First Amendment rights. And yet, incredibly, the Bar tries to make this sound like " practicing law."

Throughout these proceedings, Respondent proved his inability to comply.

We find at 17 Am Jur 2d " CONTEMPT" , Section 51, " Inability to comply with order" :

" The inability of an alleged contemnor, without fault on his part, to render obedience to an order or decree of Court is a good defense to a charge of contempt. "

Respondent submits this is such an elementary principle of law as to not require citation or statement of authority.

If Respondent is ordered to do something, like protect his former client's interests and he does *so*, to the best of his ability, then what remains to be said? Is he to be penalized or punished for that ?

No proof exists in the record to justify the result or sanctions the Bar seeks.

Respondent submits the Florida Bar's position is entirely without merit. One could easily draw the inference from the Bar's Brief that " FATHERS FOR EQUAL RIGHTS" is not simply a socially beneficial organization, which Winter has participated in for some 17 years. The Bar would have this Court believe that " FATHERS FOR EQUAL RIGHTS" is a group which engages in the illegal and unauthorized practice of law. The United States Supreme Court-has consistently held that a socially beneficial organization can supply information to its members without being accused of or charged with " practicing law without a license." We respectfully ask this Court to take judicial notice of this essential fact.

ISSUES PRESENTED

I

DOES THIS COURT HAVE JURISDICTION OVER THE PARTIES
OR THE SUBJECT MATTER ?

II

DOES THE FLORIDA BAR HAVE JURISDICTION OVER RESPONDENT ?

III

WHERE THE RECORD CLEARLY SHOWS THE RESPONDENT
DOES NOT AND DID NOT HAVE THE PRESENT ABILITY
TO COMPLY WITH A VALID ORDER OF COURT, WOULD
HE BE DENIED DUE PROCESS OF LAW AND EQUAL
PROTECTION OF THE LAWS TO ORDER HIM HELD IN
INDIRECT CIVIL CONTEMPT OR ANY OTHER FORM
OF CONTEMPT , IN VIEW OF THE FACT THAT IT IS
A FUNDAMENTAL PRINCIPLE OF CONSTITUTIONAL
LAW THAT A PERSON CANNOT BE HELD IN CONTEMPT
FOR VIOLATING A COURT ORDER UNLESS IT IS PROVED
BY CLEAR AND CONVINCING EVIDENCE THAT HE HAD
THE CURRENT ABILITY TO COMPLY AND DID NOT ?

ISSUES AND ARGUMENT

DOES THIS COURT HAVE JURISDICTION OVER THE PARTIES
OR THE SUBJECT MATTER ?

I

ARGUMENT

It is respectfully submitted that this Court had and has no jurisdiction over Respondent. He has never waived or given up the jurisdictional issue. He is not a member of The Florida Bar. He has been hospitalized over 14 times, as of this writing, with a serious cardio-vascular heart condition and complications.

Respondent resigned from THE FLORIDA BAR effective February, 1988.

Therefore, it is respectfully urged that the Court has no jurisdiction over the parties or the subject matter.

ISSUES AND ARGUMENT

DOES THE FLORIDA BAR HAVE JURISDICTION OVER
RESPONDENT ?

II
ARGUMENT

The record clearly shows that Respondent resigned as of February, 1988, from the FLORIDA BAR.

The critical issue of jurisdiction therefore comes into play. The Florida Bar has absolutely no jurisdiction over Respondent.

He has filed and served the required certificate giving the names and addresses of former clients to whom notice was given in writing. This notice, required by the applicable Rules which were in effect in 1988, proves that while Mr. Winter was in hospital with cardio-vascular surgery, angioplasty, catheterization procedures, etc., he gave a power of attorney. This person notified all the former clients, and this fully complied with the Rule.

Therefore, the Florida Bar has no cause to complain.

There is no basis at all, in the record, for the Florida Bar to claim jurisdiction over Respondent.

He could not pay the costs due to declaring bankruptcy; the Florida Bar or its duly authorized representatives were given written notice from the Federal Bankruptcy Court in Tampa, Florida, from the Clerk of Court, Hon. Alexander Paskay, Bankruptcy Court Judge, U. S. District Court, Tampa, Florida, presiding. These costs debt items were fully discharged in the said bankruptcy of EDWARD J. WINTER, JR.

ISSUES AND ARGUMENT

of
the
Court

WHERE THE RECORD CLEARLY SHOWS THE RESPONDENT DOES NOT AND DID NOT HAVE THE PRESENT ABILITY TO COMPLY WITH A VALID ORDER OF COURT, WOULD HE BE DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS TO ORDER HIM HELD IN INDIRECT CIVIL CONTEMPT OR ANY OTHER FORM OF CONTEMPT, IN VIEW OF THE FACT THAT :

a. IT IS A FUNDAMENTAL PRINCIPLE OF CONSTITUTIONAL LAW THAT A PERSON CANNOT BE HELD IN CONTEMPT FOR VIOLATING A COURT ORDER UNLESS IT IS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT HE HAD THE CURRENT ABILITY TO COMPLY AND DID NOT ?

III

ARGUMENT

Firstly, Respondent is a " PRO SE " litigant. He is not an attorney; he is not practicing law and he is not admitted to the Bar. Therefore, he respectfully prays this Court will take note of the case of the landmark case of HAINES V. KERNER, U. S. Supreme Court, 30 L. Ed 2d 652, 404 U S 519, (1972.) , which states that a pro se litigant is not held to the same stringent standards as lawyers, in drafting pleadings.

(Exhibit, Copy attached, 92 S Ct 594.)

It is a fundamental principle of law, so widely recognized as not to require statement or citation of authority, that :

" IN ORDER TO HOLD A PERSON IN CONTEMPT FOR DISOBEYING A COURT ORDER, IT MUST FIRST BE PROVED THEY HAD OR HAVE THE PRESENT, CURRENT, ABILITY AND MEANS TO COMPLY WITH THAT COURT ORDER." We submit this applies directly to this case,

of
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Court

A careful examination of the record shows that every allegation made by the Florida Bar has been met and proven untrue.

During the time Respondent was closing out his law practice, and during the time he was notifying his former clients they would have to make arrangements to retain other counsel, he did everything possible to obey this Court's DIRECT ORDER to protect the clients' interests.

In fact, Respondent was placed in a position of being "damned if I do and damned if I don't."

The record shows that two clients were in the middle of ongoing, heavily contested litigation. In the case of the COPELAND ELECTRIC case Respondent filed pleadings and served them on opposing counsel. The client, it was fully explained to the Bar, could not afford counsel. Respondent had been handling the litigation for an employee of COPELAND ELECTRIC who had no money for attorney fees. Therefore, when Mr. Winter filed pleadings, after the legal date, after he resigned, he did so because he was under said direct order of the Florida Supreme Court.

In the second case, "NEW JERUSALEM CHURCH", it was right in the middle of an appeal. The former clients owed Mr. Winter over \$ 31,000.00 and they had no money for a new lawyer. Therefore, to obey this Court's order Mr. Winter filed a pleading in the appellate Court. Again, he was PROTECTING the former clients' rights, as ordered to do.

It was carefully explained to the referee. The Bar simply did not want to accept the truth. Mr. Winter, Respondent, did exactly what the Florida Supreme Court ordered him to do. He took all necessary steps to protect these former clients' rights. Now, they seek to PUNISH and incarcerate him for doing this.

The Complainant needs, perhaps, to be reminded that Respondent is not being accused of an act which is "MALUM IN SE" or even "MALUM PROHIBITUM" . . . he is being accused of being in contempt for a completely technical violation!

True, the rules are there to protect the innocent public and to protect clients. But we submit it is bizarre to accuse Mr. Winter of "CONTEMPT" when the record clearly shows and proves he was OBEYING the very Court he is accused of showing contempt for !

On page 4 of its initial brief, the Bar states Mr. Winter . . . " . . . violated the Supreme Court's order dated January 28, 1988, that is a fact. . . ." The truth is Mr. Winter took steps and performed acts, in writing, for his former clients, which appeared to be "in violation."

However, when the circumstances and explanation of Mr. Winter doing all he could and all he was ordered to do are considered, it is proven the Bar is trying to seriously mislead this Court. In its overzealous and frenzied attempts to obtain CONTEMPT, the Bar tries to mislead the Court and deceive the very Court Mr. Winter was careful to obey. This gives new meaning to the word "fraud" and deception.

A perfect example of the Bar's trickery is found when they file an exhibit, dated 5 March 1988. It is a handwritten receipt for \$85.00 cash from Mr. Comiskey. It was written in Palmetto, Florida. Mr. Winter, on behalf of FATHERS FOR EQUAL RIGHTS, collected the \$ 85.00 for the organization. He was acting as the "Assistant Director", which he has been for about 17 years. The money was owed to FATHERS FOR EQUAL RIGHTS. There is nothing, absolutely nothing, illegal or "contemptuous" about this receipt or transaction. But the Bar tries to mislead the Referee, Judge Burnstein, at a hearing which Respondent could not attend in Ft. Lauderdale.

Another perfect illustration is where the Bar procures a letter from Mr. John E. Harper from Radio Station WNWS in Miami , Florida. This letter dated November 4, 1988 relates to Mr. Winter's appearing on the Sandy Payton Radio Talk show, with two attorneys. Mr. Winter was appearing on behalf of FATHERS FOR EQUAL RIGHTS.

Again, at a hearing which Respondent could not attend, Bar Counsel, Mr. Thaler knowingly used perjured, false testimony, (Mr. Thaler's own) , to poison the mind of the Referee against Mr. Winter. This is truly, we submit, shocking and outrageous conduct on the part of THE FLORIDA BAR.

In February, 1988, Mr. Winter appeared on behalf of FATHERS FOR EQUAL RIGHTS at the " GENDER BIAS COMMISSION." This was in Ft. Lauderdale, Florida; Justice Kogan was present. FATHERS FOR EQUAL RIGHTS sent out to persons who inquired , a xerox copy of a newspaper story which appeared in the Ft. Lauderdale News/Sun Sentinel on February 26, 1988. Many persons contacted FATHERS FOR EQUAL RIGHTS. They wanted to know about our participation, (I say " our " because Mr. Winter has for about 17 years been an active, involved member) , involvement, etc., in these major social issues.

Evidently one of these "persons" was a " SPY" for the Florida Bar. The Complainant files this newspaper story as an "Exhibit" , in the record, again, trying to somehow poison the mind of the Referee.

The Florida Bar would have this Court ignore page 27 of one portion of the transcript. It is from the hearing held in Ft. Lauderdale, Florida on December 2, 1988. We wish to respectfully emphasize, Mr. Winter, Respondent, was not

present. Here, from the transcript, page 27, are the words, verbatim, from the Referee :

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THE COURT: I am between a rock and a hard place here. I sympathize with your concern over allowing him to practice law when he is not a licensed lawyer in good standing. However, if he is conducting some type of support group, that support group is kept alive by contributions and serves some kind of legitimate purpose, then I am not so sure that is an unauthorized practice of law. I don't know.

MR. THALER: I understand. That is why I said this presentation on that subject is going to fall short.

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In other words, according to the Florida Bar's theory, Mr. Winter is using Mr. Fishman's name to conduct his law practice and we don't have any proof of that yet because we have not done a search of the files.

THE COURT: I suppose it is possible, but it is far from proved.

MR. THALER: I understand that.

THE COURT: We will mark this into evidence as Exhibit 29.

(page 30, transcript of December 2, 1988 hearing)

When the record is considered as a whole, there is no proof of any conduct or behavior which even approaches, we submit, the level or standard of " CONTEMPT."

Respondent has great respect for this Court and all Courts. He has great respect for Court orders. He never at any time intended to manifest any " contempt."

When the Bar tries to mislead a Court , they have huge, enormous resources at their disposal.

Mr. Winter, Respondent, could not attend the December 2, 1988 hearing in Ft. Lauderdale, before Referee to defend himself and he had no money to retain counsel.

The Bar took unfair and illegal advantage of this and Bar Counsel knowingly testified untruthfully at the said December 2, 1988 hearing. (concerning' Mr. Winter, Respondent , giving legal advice over the radio program on WNWS)

The transcript reveals Mr. Thaler, Bar Counsel, falsely represented to Judge Burnstein, Referee, that Mr. Winter gave legal advice on the radio program when he appeared with two local attorneys.

In summary, the Bar has failed to prove Mr. Winter, Respondent did any acts which constituted contempt. Mr. Winter fully explained the filing of legal pleadings. The burden of proof, at this point, shifted to the Complainant to go forward and produce proof. They had no proof and could produce or manufacture none which showed or demonstrated any " CONTEMPT." Thus their arguments fail. Their position has no merit.

Respondent has fully and in a candid manner answered all additional allegations.

The Bar's petition should be denied.

Concerning the attached Exhibits, they are respectfully made

a part hereof and incorporated herein by reference.

Respondent also certifies, pursuant to Rule 3-5.1 (h) , of the applicable Rules, that he has fully complied.

In'this regard, a separate certificate, dated 22 December 1988 has been filed and served. A copy of said certificate has been mailed to Hon. Stephen Tabano, Assistant Director of Lawyer Regulation , The Florida Bar .

In short, Respondent has proved he did not have the present, current ability to comply with all " time deadlines " involved, due to a Tampa bankruptcy involving approximately \$ 1.2 million and due to being over 14 times in hospital with a cardio-vascular condition. He has applied for Social Security disability due to his heart condition. He was not able to comply at an earlier date. It was physically impossible. The Bar would have this Court ignore the facts.

In addition , the attached Exhibits filed by Respondent conclusively demonstrate the Bar's Exhibits and allegations have been totally rebutted.

It is obvious, when considering all the above, the Complainant has totally failed to prove any " contempt".

C O N C L U S I O N

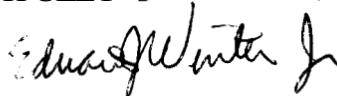
As a ~~pro se~~ litigant, we respectfully submit the Florida Bar has failed in its attempt to prove " CONTEMPT. ".

It should not be allowed to mislead the Court.

The record clearly demonstrates there is no conduct or behavior constituting " contempt. "

Therefore, the Bar's petition should be denied.

RESPECTFULLY SUBMITTED,



.....
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CERTIFICATE OF SERVICE

I CERTIFY that on this 30 th day of May, 1989
I served by Hand Delivery, a copy of this Brief on :
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.....

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