IN THE **SUPREME** COURT OF **FLORIDA**

(Before a Referee)

THE FLORIDA RAR

Complainant,

Supreme Court Case #: 77,773

Florida Bar **File** #: 89-52,722 (17C)

vs

RAY SANDSTROM,

Respondent

_____/

REPLY BRIEF OF **APPELLANT/RESPONDENT**

[On Respondent's Petition to Review Proceedings had and taken in Dade County, Florida, before the Honorable Joel H. Brown, as **Referee, upon a** Bar **Complaint, against** Respondent]

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PRELIMINARY STATEMENT

Same as **in the** initial **brief, and references to** the **Bar's answer brief shall be as** (AB, **p 1).**

STATEMENT OF THE CASE AND FACTS

The Bar's statement of the 'facts' at pages 1-10 is argumentative and not objective.

SUMMARY OF REPLY ARGUMENTS

The Bar does not address the Respondent's arguments at the points in the initial brief. The Bar moreover continues to make irrelevant and unfounded contentions to support the Referee. The Bar's 'language' employed to characterize testimonies is exaggerated or not fairly descriptive of the actual pertinent testimonies. The Bar fails to present any record or case law to support its 'contentions' contrary to Respondent's representations supported by the record and legal authorities.

ARGUMENTS

POINT I REPLY

THE BAR DOES NOT ANSWER RESPONDENT'S POINT ONE IN THE INITIAL BRIEF, BUT POSITS CONTENTIONS WITHOUT RECORD SUPPORT

Respondent notes for the Court that he obviously has never confronted the various witnesses that testified at the Rule 3.850 hearing, upon which testimonies the Bar substantially depends to support the Referee's findings and conclusions. Instead a cold record is presented in lieu of live witnesses and fresh cross-examination on behalf of Respondent for purposes of the present cause. The only live testimony ever given to the Referee was of Respondent himself, and Respondent's sworn testimony is

uncontroverted in fact. Not even the client **Arner** presented himself to be confronted in support in the Bar's contentions. It appears to be the Bar's, as well as the Referee's, position that because the trial judge in the Arner-case granted the Rule 3.850 relief vis-a-vis the State of Florida, thus and necessarily did Respondent offend the cited Rules of Professional ***Conduct.*** It **was** this very prospect of 'rubber-stamping' that Respondent apprehended and sought to avoid at the outset of the hearing before the Referee below (R. 9 - 14).

The Bar addresses the point one in the initial brief at pages 14-19. It begins by asserting the Respondent's "most significant failing * * * **was** his failure to develop the very critical medical aspect of his client's case" (AB, **p** 14) and then quotes the Referee's reported 'findings' (AB, **p** 14-17). The Bar then contends that Respondent in his brief on this point "ignores the emphatic testimony offered at the Rule 3.850 hearing [] to the effect that decedent would not have died save for an erroneous diagnos s and negligent surgical procedure" (AB, p 17). Referring to the case law cited by Respondent in the initial brief, the **Bar** submits "that Respondent's reliance upon such 'precedent' is misplaced" (AB, p 17). It then, in an effort to display some distinction in those authorities from facts constituting the client Arner's case, represents that "the evidence adduced at the Rule 3.850 hearing [] establish that the misdiagnosis and resultant negligent surgical intervention were the sole causes of death", and that one doctor at that hearing (Marracini) "opined that but for the operation the victim would

have lived" and that another therein (Levy) "opined that had the malpractice not occurred, the decedent would have survived the blow to the head" (AB, p 18).

The Bar's contentions are rather exaggerated so far as record support for same is concerned. Clearly Respondent did not ignore the testimonies at the Rule hearing, but extensively referred thereto in his initial brief on this point. There is no testimony at the Rule hearing that misdiagnosis and/or negligent surgical intervention were the "sole cause of death". The Bar in so maintaining ignores the testimony, for example, of doctor Marracini who rather 'opined' that internal bleeding "was one of two mechanisms occurring on or about that time [of death]; the other being pneumonia" (Exhibit '3', p 25). Nowhere is it maintained that 'but for' the surgical intervention the deceased would have survived the head injury, or that such surgery was the 'sole cause of death'. A review of all the testimonies establish instead that the weakened condition of the deceased, as a direct result of the head injury, was the underlying influence for death.

The Bar too ignores that the surgery was performed as a direct result of the deceased's condition caused by and related to the subject head injury. In no way and at no time was that injury divorced from the actions of the treating doctors; everything was committed on the deceased pursuant to treating her and saving her from the result of the sustained head injury. The Bar seems to be promoting that the head injury was not lethal in itself. Such a position is categorically rejected in the

facts sub judice. Clearly, without medical intervention the deceased shall have died. Reference to ROSE V STATE, 591 So2d 195 (4DCA 1991), wherein the district court denied motion for rehearing on the issue of intervening cause of death, is unavailing to the Bar's position. That case cites to this Court's decision in JOHNSON V STATE, 59 So 895 (Fla 1912), that "[t]he true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded [person] suffering from it will afford the defendant no protection against the charge of unlawful homicide", and notes that "[t]his rule has been followed consistently". 16 FLW, at D1250. [Note that the court in ROSE would not imply in the majorities affirmance in STATE V ARNER, 538 So2d 528 (4DCA 1989), "facts which are not there"]. It is beyond cavil that the head injury imposed on Arner's wife sub judice was "in itself dangerous to life" (as well as lethal in itself . Therefore, the case law supports that the testimonies adduced by Arner at the Rule 3.850 hearing respecting the allegedly negligent surgery were inapposite to the charge: "if medical negligence was not a legal 'cause' of death *so* as to avoid criminal responsibility, it was not a material fact in issue, and evidence of it was immaterial and irrelevant [such that] the trial court does not err by excluding such evidence". 16 FLW, at D1250.

Respondent submits that he ought not be faulted for not having pursued such a theory beyond what he did do without contradiction or question, i.e. consulted an independent **expert** who confirmed the state's medical examiner's autopsy report that

the legal cause of death was the head injury and not solely some other superseding, intervening source or means. And the trial transcripts support moreover that Respondent verily 'milked' the issue for all it was worth in fact and made it an alternative facet of the case for the jury to consider.

[Attached hereto is a copy of the 'no contest' plea by Arner to the reduced charge of second degree murder, without reservation of any right to appeal the 'defense' said by the Bar to constitute medical intervention as the sole cause of the victim-wife's death. Exhibit 1].

POINT II REPLY

THE BAR DOES NOT ANSWER RESPONDENT'S POINT TWO IN THE INITIAL BRIEF

Respecting the alleged failure of Respondent to have challenged by pre-trial motion to suppress the admission of the contents of the trunk of the deceased's vehicle pursuant police inventory thereof, the Bar merely notes of Respondent's initial brief on this point that he "suggests that 'the suppression issue was not significant in the circumstances of the client Arner's case'". (AB, p 18-19). Allowing that such an opinion and observation is permissible, the Bar says that "the test is whether or not the findings of the referee are supported by competent evidence" and then states that "[i]n a detailed and careful analysis, both the trial court and referee specified precisely how and why the failures attributed to appellant impacted the underlying criminal case". (AB, p 19). The Bar

then submits that said 'suggestion' does not meet the burden to show that the Referee's findings are 'clearly erroneous or lacking in evidentiary support'.

Respondent did more than simply 'suggest' that the issue was not significant. He referenced the testimonies in support of that contention in multiple respects. One, was that Arner did not in fact and law have 'standing' to make the challenge based on any expectation of privacy in the vehicle even if it was his to have given to the victim-wife to exclusively possess [noting Arner's own testimony at the trial that the vehicle in question was not his, but was his wife's]. Two, that Arner, not having possessed the vehicle when police received it, was not the party to whom those officers were required to depend to provide an alternative to impoundment before an inventory search was performed. Three, that in any event the police were authorized to take the vehicle into protective custody and exigent circumstances were not further required to justify a warrantless search of the car's trunk. Four, that the police shall have inevitably determined the car's trunk's contents. And, five, that Arner's singular defense in any event was that 'he did not do it, somebody else did'. The aforesaid contentions were supported with primary case law authority. It thus cannot be said that Respondent merely 'suggested' insignificance of the issue. It is notable that the Bar makes no effort to distinguish the authorities cited or to cite alternative authority so as to make the issue rather 'significant'. Moreover, Respondent even cited authorities to support the effort he did make at trial to

suppress the trunk's contents, and referenced the trial record that the alleged publication of the photographs to the jury in fact did not occur as the trial court assumed. The Bar neither attempts to controvert that, as in any event it could not. It thus does appear that the Referee's findings on this point are sans record support and are clearly erroneous.

POINT III REPLY

THE BAR IGNORES THE RECORD AND THE REFEREE'S FINDING RESPECTING THE FENCE ISSUE

The Bar entirely ignores the alleged omission respecting the fence, as well as the Referee's purported finding in that regard, by the response in its answer brief. (AB, p 19-20). The Referee 'finds' that "a fence surrounding the scene of the alleged crime * * * was not erected until over a year after the alleged crime". That finding is absolutely without record support and is in fact exactly contrary to all testimonies. No witness, including Hutton, purported to testify that the fence depicted in a photograph at trial was erected a year after the crime in question. Such is simply not testified to. Neither was there any testimony at the trial that a fence surrounded anything, let alone the crime scene as alleged and found. Rather the record bears out only that a fence was in the background of a photograph taken where and at the time a hammer was found amidst some foliage near the vehicle wherein the victim-wife was found by police, and on the same day thereof. No fabricated or misleading evidence was utilized by the state and no such contention has

been established in fact at any time that such a transgression occurred. Indeed, Hutton, at the Rule hearing, merely testified that a permit to erect some more fencing was gotten a year or so later, not even that same was actually erected; and he admits that the fence in the photograph in fact did exist at the time of crime, exactly contrary to the Referee and Bar contentions.

The Bar, as does the Referee in his Report, depends upon bare allegation in defiance of established fact to assert this ground against Respondent. The Bar, as it cannot, does not answer the Respondent's initial brief at this point.

POINT IV REPLY

THE BAR FAILS TO SUPPORT ITS CONTENTION AND REFEREE'S FINDING THAT THE TAPE RECORDING WAS CRITICAL TO IMPEACH THE WITNESS WADE

Respondent adequately set forth in his initial brief both the cumulative nature of the tape respecting the witness Wade's impeachment [which the district court verily agreed with in its written opinion on direct appeal of Arner's case] and that in fact Respondent's manner of establishing a predicate for its introduction was in any event sufficient, even citing authorities in support thereof. The Bar cites no authority for its contentions, for example that "appellant waited until another witness was called and then, inappropriately, attempted to introduce the tape into evidence'' (AB, p 21). It ought be noted that the district court of appeal on direct appeal perceived that the evidence code then in effect precluded in any event the tape

being introduced because not of a judicial proceeding. ARNER v STATE, 459 So2d 1136 (4DCA 1.984). It appears too that the non-admission of the tape was harmless; the witness was so thoroughly impeached by Respondent at trial that the tape shall have been surplusage and over-kill. It ought be again noted that the witness admitted the very thing for which Respondent sought to have it admitted, viz that the witness thereon conveyed a calm and uncoerced demeanor when giving exculpatory information as to Arner in the case (which she had since recanted).

Respondent submits he ought not be faulted as to this issue.

POINT V REPLY

THE BAR DOES NOT ADDRESS THAT THE SELECTED PASSAGES IN THE TRIAL TRANSCRIPT ARE TAKEN ENTIRELY OUT OF CONTEXT BY THE REFEREE IN ORDER TO ILLUSTRATE AND 'FURTHER EMPHASIZE' THAT RESPONDENT WAS 'GROPING HIS WAY THROUGH TRIAL WITH NO REAL UNDERSTANDING OR APPRECIATION OF THE PHYSICAL EVIDENCE IN THE CASE'

The Bar again does not answer Respondent's initial brief at this point. The Referee's references to cited passages simply are not of the import ascribed thereto. A reading of the surrounding colloquy and context in which such passages occurred displays that same are not indicative that Respondent was 'groping' at all; in fact, the statements by Respondent were true to their reference. The fact that the Bar and Referee needed even to resort thereto, it is submitted, reflects the absence of

any true basis to complain of his representation of the client, Arner,

Respondent did not fail Arner, and did not fail to become sufficiently familiar with the case in order to be that counsel for Arner guaranteed by the sixth Amendment and the Rules Regulating the Florida Bar.

POINT VI REPLY

THE COSTS WERE EXCESSIVE

In FLORIDA BAR v WILSON, 17 FLW S293 (Fla 1992), this Court declared that the attorney "should not be held responsible for costs generated by charged violations that the bar failed to prove"; rather, that costs are limited to "those charges that the bar proved". Appellant submits that it is considerable too that because the Bar elected to proceed upon a 'paper basis' to the Referee, rather than present live witnesses for cross-examination by Respondent, Respondent ought not be subjected to total costs of the whole record beyond that part thereof which predicated the particular contentions made by the Bar of misconduct by Respondent. The fact that presentation of the whole paper record would be most fair does not detract from that, fairly, Respondent ought not be burdened with that cost as to matters therein not supportive of misconduct. See WILSON, supra.

CONCLUSION

WHEREFORE, the Referee's Report ought be rejected and the **Bar's** complaint dismissed; or the cause remanded for imposition of a private reprimand and re-determination of 'costs' as stated.

CERTIFICATE OF SERVICE

I HEREBY **CERTIFY** a copy hereof has been **mailed** to **the DAVID M.** BARNOVITZ, Bar Counsel, **The** Florida Bar, **5900** N. Andrews Avenue, Suite **835,** Ft. Lauderdale, **FL 33309,** this 5th day of June, **1992.**

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