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SUP ME COURT

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO: 78 823

v.

MICHAEL KINNEY,

Respondent.

RESPONDENT'S INITIAL BRIEF

Scott K. Tozian, Esquire
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Fla. Bar No. 253510
Attorney for Respondent

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PRELIMINARY STATEMENT

All references to the facts of the case below are taken from the Stipulation of Facts signed by Complainant's counsel and Respondent unless otherwise noted. Additionally, the following abbreviations are used in the brief:

TFB Ex.	=	The Florida Bar's Exhibit
R.R.	=	Report of Referee
R.	=	Transcript of final hearing before Referee on March 27, 1992

STATEMENT OF THE CASE AND OF THE FACTS

This disciplinary proceeding is before this Court upon Respondent's Petition For Review of the Report of Referee. Jurisdiction is conferred by Article V, §15, Florida Constitution. In his Petition for Review, Respondent contests both the Referee's recommended findings of guilt and his recommendation of discipline.

The Florida Bar's Complaint consisted of one count alleging the Respondent failed to act with reasonable diligence and promptness in violation of Rule 4-1.3 of the Rules Regulating The Florida Bar, and that Respondent failed to keep a client reasonably informed about the status of a legal matter in violation of Rule 4-1.4(a). Final hearing on this complaint was conducted before the Referee on March **27, 1992.** The Referee recommended that Respondent be found guilty of a violation of Rule 4-1.3 and recommended that Respondent be found not guilty of Rule 4-1.4(a).

A portion of the record from the final hearing consists of a Stipulation of Facts signed by counsel for Complainant and Respondent which was changed by the Referee to reflect two dates which needed correcting. [R. 5, 6]. An additional deletion was reflected by the Referee pursuant to the parties inability to **agree** on whether or not Respondent attended a motion for summary judgment reflected on page 3 of the Stipulation of Facts. **[R. 7-91.**

Additionally, three witnesses testified before the Referee in this cause, Agnes Schuchardt, the complaining witness; Respondent, and Respondent's secretary, Linda Fagan. The undisputed facts showed that Ms. Schuchardt **was** injured in a slip and fall accident

which occurred on July 16, 1984 at a doctor's office. At the time of the accident, the doctor was insured by Iowa National Mutual Insurance Company. (hereinafter Iowa National). In April 1985, Ms. Schuchardt retained the Law Offices of Dennis Slater to represent her interests as a result of her injuries from the July, 1984 accident. On October 11, 1985 an order appointing ancillary receiver for purposes of liquidation was entered after Iowa National was declared insolvent by the Insurance Commissioner's Office of the State of Florida. As a result of this order, all claims against Iowa National were required to be filed with the ancillary receiver on or before October 10, 1986 or be forever barred. On or about June 9, 1986, a claim was filed on behalf of Ms. Schuchardt with the ancillary receiver by Dennis Slater, Esquire. Pursuant to Section 631.68, Florida Statutes, Ms. Schuchardt's claim would be forever barred if not settled or if suit not instituted within one year of the deadline for filing claims to wit: October 10, 1987.

Subsequent to the June 9, 1986 filing of her claim with the ancillary receiver, but prior to the filing of suit, Respondent took over the representation of Ms. Schuchardt in May or June, 1987. [R. 21]. The file maintained by Respondent did not reflect the filing of the claim with the ancillary receiver which would put Respondent on notice of the applicability of the one year filing limitation set forth in Section 631.68, Florida Statutes. [TFB Ex. 5, pg. 2]. Accordingly, Respondent filed suit on behalf of Ms. Schuchardt on June 13, 1988, well within the four year statute of

limitations, but outside of the one year limitation statutorily imposed by reason of the insolvency of the insurer.

After discovering the insolvency of Iowa National and his failure to file suit within one year of the claims deadline, Respondent wrote Ms. Schuchardt on April 27, 1989. [TFB Ex. 4]. Thereafter, on May 11, 1989 Respondent met with Ms. Schuchardt in his office and advised her that her suit had not been filed in a timely manner. Respondent testified before the Referee that he suggested to Ms. Schuchardt that she should get a lawyer to file a law suit against him and that she should have that lawyer contact Respondent and that he would be glad to give her lawyer the file. Respondent further testified that he told Ms. Schuchardt that obtaining counsel for purposes of a malpractice action was **her** right and Respondent thought she should do it. [R. 47, 48]. Ms. Schuchardt also testified that Respondent met with her and advised her that he had made a mistake and that he took full responsibility and that she should get an attorney because she probably had a suit against him for not filing her suit in a timely fashion. [R. 25, 29]. Thereafter, Ms. Schuchardt's suit resulting from the slip and fall accident was dismissed on a motion for summary judgment by reason of the failure to file the suit within one year of the claims deadline.

The evidence further revealed that Respondent has been a licensed attorney since 1945; had previously been with the law firm of Fowler, White, Gillen and Kinney for almost twenty-five years, and that Respondent has served on the Supreme Court Committee on

Jury Instructions for the last twenty-four years. [R. 71, 72].

Based upon these facts, the Referee found Respondent guilty of Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness). The Referee further found that by clear and convincing evidence that Respondent failed to file suit on behalf of Ms. Schuchardt within the legal deadline for the filing of her law suit. [R. R. 1). Moreover, the Referee found Respondent not guilty of violating Rule 4-1.4 (a lawyer shall keep a client reasonably informed about the status of a legal matter).

As discipline, the Referee recommended that Respondent receive a public reprimand and be placed on a term of three years probation during which Respondent would be required to file a monthly report with the Clerk of the Supreme Court of Florida with a copy to Bar Counsel listing all new clients; the nature of the legal matter for which Respondent was retained; the deadline for filing of a law suit on the client's behalf; and the court in which the law suit should be filed.

SUMMARY OF ARGUMENTS

The Referee's recommendation of a finding of guilt as to Rule 4-1.3 involving a lack of diligence is not supported by the facts below. The proximate cause of Ms. Schuchardt's lost cause of action was not a lack of diligence on the part of Respondent but a lack of recognition of the insolvency of the insurer.

The Referee's recommendation of guilt as to 4-1.3 and finding a lack of diligence by Respondent is not supported by the facts and evidence below. The undisputed facts reveal that Respondent was retained in June, 1987 to take over the representation of the client, Ms. Schuchardt. The Stipulation of Facts revealed that a complaint was filed on behalf of Ms. Schuchardt on June 13, 1988, approximately one year after Respondent was retained. The Complainant, who bears the burden of proof in this cause, did not offer evidence that Respondent did not diligently work-up or pursue Ms. Schuchardt's cause of action during the twelve months which elapsed between his being retained and his filing suit on her behalf. Therefore, there is no evidence to support a finding that Respondent lacked diligence. Clearly, the proximate cause of Ms. Schuchardt's loss was not a lack of diligence on the part of Respondent, but Respondent's lack of knowledge of the insolvency of the insurer and thus his failure to recognize the applicability of the one year limitation in filing suit. This Court has previously held that an attorney's conduct in overlooking or misconstruing a statute of limitations was insufficient to warrant disciplinary action. Based on the past decisions of this Court and the facts

and evidence adduced at trial below, the dismissal of this action against Respondent is required.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT DO NOT ESTABLISH CLEAR AND CONVINCING EVIDENCE OF A LACK OF DILIGENCE ON THE PART OF RESPONDENT BUT SIMPLY RESPONDENT'S FAILURE TO RECOGNIZE A STATUTE OF LIMITATIONS.

The Referee decreed that the facts of this case and more importantly the facts upon which he based his decision were "set forth in the Stipulation of Facts filed with this Referee on March 27, 1992 . . .". [R.R. 1]. Minor changes were reflected on this stipulation by the Referee at final hearing. [R. 6 - 9]. A thorough review of this four page Stipulation of Facts reveals that the client, Ms. Schuchardt was injured on July 16, 1984 and initially hired Attorney Dennis Slater as her counsel in April, 1985. Thereafter, Mr. Slater filed a claim with the ancillary receiver on June 6, 1986, some fourteen months after being retained. Pursuant to Section 631.68, Florida Statutes, Ms. Schuchardt's claim would have to be settled or suit filed by October 10, 1987. Although he represented Ms. Schuchardt for nearly three (3) years, Mr. Slater did not settle the claim or file suit and Respondent took over the representation of Ms. Schuchardt in approximately May or June, 1987. [R. 21]. The facts below do not reveal if Mr. Slater advised Respondent of the insolvency of Iowa National; do not reveal if Mr. Slater advised Respondent of the one year limitation upon the filing of suit; and do not reveal if Respondent was aware that suit had to be filed by October, 1987, a period of only four or five months after Respondent was retained.

The Stipulation of Facts which was adopted by the Referee as

his finding of facts simply reveal that a ter being retained in May or June of **1987,** Respondent filed suit on June 13, 1988 approximately one year after being retained. The Stipulation of Facts and thus the findings of fact of the Referee do not reflect that Respondent failed to work on the case during this year, nor do they reflect a lack of diligence on the part of Respondent.

Clearly, the Referee's findings of fact simply show that Respondent **was** unaware of the shorter statute of limitations caused by the insolvency of the insurer. Therefore, there is no proof of a lack of diligence on Respondent's part.

It is well settled that the Complainant bears the burden of proving its case by clear and convincing evidence in attorney disciplinary matters. The Florida Bar v. McCain, 361 So.2d 700 (Fla. **1978).** Respondent's act **of** overlooking a statute of limitations without further evidence, requires the Referee to inferentially determine that Respondent was not diligent in the handling of this file. However, this Court has consistently required evidence of a clear and convincing nature and has previously rejected Referee's findings based upon inferences that were "highly probable". The Florida Bar v. Ragano, 403 So.2d **401,** 405 (Fla. **1981).**

The evidence shows and this Court should find that Respondent merely overlooked or failed to recognize the shorter statute of limitations triggered by the insolvency of the insurance company. Accordingly, given the absence of proof of a lack of diligence on Respondent's part, the Referee's finding to that effect is

unsupported and must be overturned.

ARGUMENT

II. THE ACT OF RESPONDENT OVERLOOKING OR FAILING TO RECOGNIZE THE SHORTER STATUTE OF LIMITATIONS IS INSUFFICIENT TO WARRANT DISCIPLINARY ACTION.

Having established that there is a total absence of proof concerning Respondent's lack of diligence this Court must consider what, if any, guilt and therefore discipline should attach to Respondent's conduct in this cause.

This Court has been faced with a similar factual scenario in The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980). In Neale, the accused attorney represented a client in her claim for injuries as a result of a dog bite which occurred in 1970. Attorney Neale failed to settle the case after three years and in 1973 filed suit on behalf of his client. A few days before trial, Neale learned that the dog had a history of biting, and therefore, Neale concluded that punitive damages might be viable. In order to refile the suit to include punitive damages, Neale took a voluntary non-suit believing that a four year statute of limitations controlled. However, the existing statute of limitations on strict liability arising from dog bites was three years and the suit subsequently brought by Neale was dismissed.

The Referee found that Neale's late discovery of the dog's vicious propensities reflected inadequate preparation under the circumstances. The Referee found that Neale would have learned this fact sooner had he properly questioned his client or made independent investigations that would have resulted in the learning

of the dog's history of biting. Based upon these findings, the Referee recommended an eighty-nine day suspension followed by a two year probation. The Board of Governors of The Florida Bar recommended that the suspension be of a one year duration with required proof of rehabilitation.

This Court rejected the recommendations of both the Referee and The Florida Bar and dismissed the charges against Neale. In support of the dismissal, this Court found that there was a distinction between simple negligence by an attorney and conduct which should lead to discipline. The Court found that Neale's overlooking or misconstruing the statute of limitations did not warrant disciplinary action, although it may well be a basis of a negligence action against Neale. Finally, the Court noted that Neal had sought to compensate his client for the loss caused by his action.

The case at bar is indistinguishable. Respondent filed suit on behalf of Ms. Schuchardt well within the statute of limitations applying to personal injury actions. However, Respondent was unaware of the insolvency of the insurer which caused a much shorter and more obscure statute of limitations to apply. There was no evidence offered by The Florida Bar, or otherwise adduced at trial, to indicate that Respondent did not exercise due diligence in the handling of this suit. The mere fact that Respondent was counsel for Ms. Schuchardt for a period of approximately one year prior to the filing of suit, is no indication of a lack of diligence. In contrast, in the case against Neale, the accused

attorney was counsel of record for a period of at least three years prior to filing suit and this Court found that the three year period between his hiring and the filing of suit did not give rise to discipline. Despite the Referee's findings that the late discovery by Neale of the dog's propensities to bite reflected inadequate preparation, this Court did not ratify this inference reached by the Referee and rejected that finding of inadequate preparation.

Furthermore, upon discovery of his mistake Respondent immediately instructed his client as to her remedies and urged her to seek counsel for the purpose of a malpractice action against him. This action by Respondent is the equivalent of Neale's seeking to compensate his client, as noted in the Court's opinion.

As this Court noted in Neale, "[t]he rights of clients should be zealously guarded by The Florida Bar, but care should be taken to avoid the use of disciplinary action . . . as a substitute for what is essentially a malpractice action." at 1265.

Accordingly, Respondent respectfully submits that the act of overlooking an obscure statute of limitations is insufficient to warrant disciplinary action under the past decisions of this Court.

CONCLUSION

The Referee's Findings of Fact do not establish a lack of diligence but a mere passage of time between the retention of Respondent and the filing of suit on behalf of his client. While Respondent filed suit well within the normally applicable statute of limitations, the insolvency of the insurer triggered a shorter more obscure statute to apply. The Respondent failed to recognize this statute of limitations until it had passed. Upon learning of the passage of this statute he immediately contacted his client and notified her of his actions and her remedies.

Respondent has been practicing law for a period of forty-seven (47) years with distinction and has served on the Supreme Court Committee on Jury Instructions for the past twenty-four years.

Respondent's client was informed of her civil remedies as to his actions and therefore, the client suffered no prejudice as a result of Respondent's actions. Given the totality of facts of this case and the total absence of proof of a lack of diligence on Respondent's part, the disciplinary charges against Respondent should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 20 day of July, 1992, to: Susan V. Bloemendaal, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.

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