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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

Case No. 84,843
[TFB Case No. 94-31,598(5A)]

v.

GARY A. POE,

Respondent.

_____/

REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Reply Brief, the appellant, The Florida Bar, reiterates the Symbols and References contained in its Initial Brief.

The bar's exhibits entered into evidence at the final hearing will be referred to as "Bar Exh.", followed by the exhibit number and page number. Also, the Respondent's Response Brief will be referred to as the "Answer Brief" or abbreviated as "AB" followed by the page referenced.

STATEMENT OF THE CASE

The bar reiterates the Statement of the Case contained in its Initial Brief.

STATEMENT OF THE FACTS

The bar reiterates the Statement of the Facts of its Initial Brief. However, an emphasis of the following facts is provided.

On December 17, 1992, the respondent, Gary A. Poe, filed a Petition for Modification of Amended Final Judgment of Dissolution of Marriage and Other Relief (hereinafter referred to as "the petition") in the Fifth Judicial Circuit Court, Citrus County, Florida. The petition sought, inter alia, to modify Randall Bergeron's $50.00 per month (for 100 months) child support payments to his former wife, Linda Bergeron. The petition sought to have this money paid directly to the respondent for an attorney's fee debt which had been assumed by Linda Bergeron and secured by a second mortgage. When the petition was filed, the attorney's fee debt was already discharged in Linda Bergeron's bankruptcy by order dated August 6, 1990. However, the petition alleged that Randall Bergeron was indebted to the respondent for this fee.

Linda Bergeron hired an attorney to defend the petition. Her attorney filed a motion to dismiss, which was granted with prejudice by order dated February 26, 1993, as to two of the three counts of the petition. The dismissed counts included the respondent's attempt to have the $50.00 per month child support

payment "modified" by payment of such amount to the respondent. The surviving count concerned Randall Bergeron's child visitation rights. The state court also retained jurisdiction to determine Linda Bergeron's attorney's fees incurred in defending the petition.

Linda Bergeron retained another attorney to file a motion for sanctions against the respondent and Randall Bergeron in the United States Bankruptcy Court for the Middle District of Florida, Ocala Division, for willfully violating the permanent injunction of discharge imposed by Section 524(a)(2) of the Bankruptcy Code. The bankruptcy court granted the motion and imposed monetary sanctions against both the respondent and Randall Bergeron. The bankruptcy court held that the respondent and Randall Bergeron had attempted (through filing of the petition) to collect a debt that had been discharged.

ARGUMENT

THE REFEREE MADE CLEARLY ERRONEOUS CONCLUSIONS OF FACT IN THIS CASE WHICH WERE NOT SUPPORTED BY THE EVIDENCE PRESENTED.

The referee's recommendation of not guilty essentially disregards the findings of two courts of competent jurisdiction and the respondent's own admissions. Two courts ruled against the respondent concerning his attempt to circumvent the permanent bankruptcy discharge of his attorney's fee. The Honorable Jerry A. Funk, United States Bankruptcy Judge, held that the respondent had attempted to collect payment of a discharged debt in willful violation of the permanent injunction. Judge Funk ordered sanctions against the respondent and his client, Randall Bergeron. The Honorable James Thurman, Circuit Court Judge, dismissed, with prejudice, the respondent's attempt to collect this debt in state court.

The referee's recommendation of not guilty is clearly erroneous because it is premised upon supplemental factual conclusions (found in the Report of Referee, Section III) that show a misapprehension of the evidence. For example, the referee found that the circuit court maintained concurrent jurisdiction with the bankruptcy court to determine child support issues once Linda Bergeron's bankruptcy action was concluded. However, the conclusive

evidence before the referee showed the two courts did not find concurrent jurisdiction concerning the facts alleged in the petition. The bankruptcy court found that the respondent's petition was not truly about modifying child support; rather, the respondent sought to have Randall Bergeron's $50.00 per month child support payment to Linda Bergeron terminated because she was supposed to have been paying such amount to the respondent. The respondent sought payment of a fee debt that had been discharged in bankruptcy. The referee's reliance on the respondent's effort to seek the concurrent jurisdiction of the state court presupposes the respondent's legitimate purpose to modify child support, a purpose that was not supported by the competent evidence before the referee.

The referee's other supplemental findings of fact reveal a similar misapprehension of the evidence. Despite the findings of a state court judge and a bankruptcy court judge that the respondent had attempted, in substance, to collect a discharged debt rather than modify child support, the referee concluded that there was some evidence the $50.00 per month payment was intended to go toward payment on the mortgage against the family dwelling. However, this conclusion disregards the respondent's own admission to paragraph 12 of the bar's complaint that he sought a modification of child support "because the $50 per month payments

were not to be used for child support, but were to be paid to the respondent towards the debt owed on the second mortgage he held." In other words, in this disciplinary proceeding the respondent has admitted to the same improper basis in filing the petition for which Judge Funk ultimately imposed sanctions against him and for which Judge Thurman dismissed, with prejudice, the applicable petition count.

The referee accepted into evidence a letter dated March 4, 1988, from Alfred Deutschman to Lewis Dinkins offered by the respondent at the final hearing to show that the $50.00 per month payments were intended to be applied toward his lien for fees, despite Judge Funk's finding that such amount was for child support. (A copy of this letter was also attached to the Answer Brief as Exhibit A-2.) Judge Funk found that the marital final judgment of dissolution between the Bergerons was clear on its face that the $50.00 per month payment was intended for child support and that there was no basis to go beyond the four corners of the judgment to determine the purpose of such payment. (Bar Exh. D, p.4) Clearly, the respondent's intent and purpose behind filing the petition was to obtain a court order directing the $50.00 per month payments to be made to the respondent for his fee debt, despite the August 6, 1990, discharge of that debt in Linda Bergeron's bankruptcy.

The Answer Brief also fails to acknowledge Judge Funk's specific finding that the respondent filed the petition in "an attempt to collect payment from the debtor [Linda Bergeron] on a debt arising out of his [the respondent's] mortgage." (Bar Exh. D, p. 5) Judge Funk made this finding after a hearing on Linda Bergeron's motion for sanctions against the respondent and Randall Bergeron. The Answer Brief argues that the respondent had an obligation to eliminate Randall Bergeron's $50.00 per month payment to Linda Bergeron, but such argument was deemed untenable by Judge Funk.

The respondent testified at the final hearing - and states in his Answer Brief - that Randall Bergeron remained obligated to pay the respondent's fee although Linda Bergeron's obligation to pay the fee had been discharged. However, the Stipulation and Property Settlement Agreement between Randall and Linda Bergeron, which was entered into evidence at the final hearing in this matter, clearly states in Section V that "the Wife specifically agrees to assume any mortgages and liens on such real property and mobile home, including any bank loans and the mortgage to Gary Poe, Esquire." (Bar Exh. C, p. 3) There is no evidence that Randall Bergeron remained liable for the respondent's attorney fee debt after the entry of this stipulation. The debt was the sole obligation of Linda Bergeron, was secured by a second mortgage, and was

discharged in bankruptcy.

The respondent's final hearing testimony that Randall Bergeron remained liable for the debt is directly contradicted by the stipulation and by an excerpt of Fred Deutschman's March 4, 1988, letter contained in the Answer Brief, which states, in part, that "we [Linda Bergeron] will specifically assume responsibility for paying off the [Poe] lien with the transfer of the house." Moreover, the respondent testified at the final hearing that he could not recall a single instance between August 1990 (the month his fee debt was discharged in bankruptcy) and December 1992 (the month he filed the petition) where Randall Bergeron had made a payment for the respondent's fee.

The respondent's reliance on Scharmen v. Scharmen, 613 So. 2d 121 (Fla. 1993) is misplaced. The Answer Brief repeatedly refers to "concurrent jurisdiction" as if a recitation of this term creates a justiciable claim in state court which would retroactively allow the filing of the petition. The facts and legal issues of Scharmen are generally irrelevant to the facts and legal issues surrounding the respondent's petition filing. The nondischargeable attorney's fee in Scharmen was in the nature of alimony, maintenance or support; the respondent's discharged fee was for Randall Bergeron's criminal defense representation and was

completely unrelated to the Bergerons' divorce.

Section III, paragraph 6 of the Report of Referee and the respondent's Answer Brief also misconstrue the final hearing testimony of Edward Jackson, the bankruptcy attorney who represented the respondent before Judge Funk at the sanctions hearing. The referee found that "respondent's action was endorsed by an expert bankruptcy attorney." (ROR, p.5) In the Answer Brief, the respondent states that "Mr. Poe sought the advice of Attorney Edward Jackson, a bankruptcy specialist, prior to pursuing the legal course of action which he took." (AB, p. 9) To the contrary of both the Report of Referee and the Answer Brief, Mr. Jackson testified that he first reviewed the petition in December 1993 (approximately one year after the respondent filed it) in preparation for the bankruptcy court sanctions hearing. The record shows no evidence that the respondent relied upon Mr. Jackson's advice before filing the petition.

This court may find an attorney guilty of ethical misconduct when a referee has recommended a finding of not guilty. In The Florida Bar v. Weed, 513 So. 2d 126 (Fla. 1987), the court overturned a referee's not guilty finding and disciplined an attorney who had already been disciplined by an appellate court for failing to timely file appellate briefs for his clients. The

appellate court had publicly reprimanded the attorney, but did not find him to be in contempt. However, the lack of a contempt finding was not an impediment to further bar discipline. In the instant case, Judge Funk heard arguments on Linda Bergeron's sanctions motion, found the respondent had willfully and intentionally violated the permanent injunction, and disciplined the respondent by imposing on him the fees and costs incurred by Linda Bergeron in defending the petition and reopening the bankruptcy case for sanctions. Just as the evidence in Weed clearly showed the attorney's violation of the appellate court's brief requirements, the evidence in this case clearly shows the respondent's willful and intentional violation of the permanent injunction imposed by Bankruptcy Code Section 524(a)(2).

In conclusion, the bar has shown that the referee's supplemental findings of fact are inconsistent with the evidence. Judge Funk found that the respondent filed the petition to obtain payment of a discharged debt and that such petition was a willful and intentional violation of the Bankruptcy Code. A reading of Scharmen, the pivotal case upon which the respondent relies, clearly shows that the dischargeability of the respondent's fee was not a legal or factual issue supported by Scharmen. Although a state court has jurisdiction to modify child support, the

respondent's petition argued that the $50.00 per month payment was not child support, but was intended to pay the respondent's debt. The evidence does not reveal any obligation of Randall Bergeron to pay the discharged debt nor does it reveal that he made any such payments to the respondent. Despite the respondent's assertion in his Answer Brief, the respondent did not consult with Edward Jackson, an expert bankruptcy attorney, before filing the petition, as stated by Edward Jackson under oath. Based upon the foregoing, the referee's recommendation of not guilty is clearly erroneous and should be overturned by the court.

CONCLUSION

WHEREFORE, The Florida Bar prays that this court will: 1) uphold the referee's findings of fact in Section II of the Report of Referee; 2) reject the referee's supplemental findings of fact in Section III of the report and the referee's recommendation of a not guilty finding; 3) find the respondent guilty of the charges as set forth in the bar's complaint, and either remand this case to a referee or order supplemental briefs on the issue of discipline.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent's counsel, Leonard Klatt, 103 N. Apopka Avenue & Courthouse Square, Inverness, Florida, 34450-4237; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 9th day of August, 1995.

JAMES W. KEETER
Bar Counsel