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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Supreme Court Case No. 85,125

The Florida Bar File No. 95-50,361 (15D)

THE FLORIDA BAR,

Complainant,

vs.

RICHARD E. BOSSE,

Respondent.

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

The Respondent, RICHARD E. BOSSE, respectfully files this Reply Brief to address the arguments raised by The Florida Bar in its Answer Brief.

REPLY TO COUNTER STATEMENT OF THE FACTS

The Florida Bar makes reference to the affidavit of CYNTHIA BOSSE (Respondent's Exhibit 2 in evidence), in which the then MRS. BOSSE avers that she told her husband about receipt of the Bar's check. It is significant to note that when she "reminded him" that she had told him about the check in January, BOSSE indicated to her that he did not remember. Add to this the unrefuted testimony and documentary evidence of CYNTHIA BOSSE's depletion of the family checking account, and THOMAS MURPHY's and RICHARD BOSSE's testimony, and it is readily apparent that she simply never told her then husband.

The major portion of the Florida Bar's "facts" is a mere reprinting of LEWIS KAPNER' affidavit in toto (pp. 4-10). The affidavit recounts KAPNER'S attempt to collect his fees. It also makes it clear that KAPNER told BOSSE as early as June 21, 1993, that he knew that BOSSE had received the check. KAPNER stated that he "really" did not know that BOSSE had received the check, but had assumed that he did. When LEWIS KAPNER told BOSSE that he knew BOSSE had received the check, it must logically be assumed that BOSSE believed him, and that BOSSE had no obligation to affirmatively state, "Yes, I received the check". BOSSE rightly assumed that KAPNER already knew -- he told him he knew. RICHARD BOSSE never deceived LEWIS KAPNER into believing he did not receive the check. In essence, the record is devoid of any substantial, competent evidence that BOSSE acted with deceit or dishonesty with KAPNER. He did not deceive him -- ever.

REPLY TO POINT I

The Bar's reliance on Florida Bar vs. Hill, 265 So.2d 698 (Fla. 1972) is entirely misplaced. Hill involved not only the nonpayment of a debt, but also Hill's writing of a worthless check. Hill is generally cited for, not surprising, the prohibition of writing "bad checks". See, Florida Bar vs. Davis, 361 So.2d 159 (Fla. 1978) and Florida Statute 832. et al., making it a crime to write a worthless check. That part of the Hill case dealing with the nonpayment of a debt is now controlled by the latter case of Florida Bar vs. Cook, 567 So.2d 1379 (Fla. 1990).

The Bar concedes that there is no controlling case law in support of its present position. Rather relying on case law, statutes or any legality, the Bar resorts to so-called self-evident principles (p.18, Appellee's Brief). These "fundamental assumptions", however, are contrary to the general principles that a "cost award" is personal to the litigant -- it is theirs to do what they wish, and that a creditor has no standing to enforce a cost award -- a creditor has no lien on such an award and is not a third-party beneficiary of such an award. The Courts have never inquired as to what a litigant does with their cost award once it is paid. The judicial branch of our government has never been so intrusive. (See, Article I, Section 23 of the Florida Constitution.) The Bar's position suggests that when a litigant successfully recovers damages for a specific loss the "recovery money" must be used to pay that specific loss. There is no law for this proposition.

The Bar postulates that it is per se dishonest for a litigant to petition for costs and then not pay the specific creditor from those precise proceeds. This proposition is novel and contrary to established principles of law. Even if this was the law, this is not what happened here. The overwhelming mountain of evidence was that BOSSE did not learn of the receipt of the check until April, and by then his funds were substantially depleted. BOSSE did not "pocket the funds", as the

vernacular expression implies. He simply did not pay his debt to KAPNER -- choosing to use the funds to feed, cloth and house his family. For BOSSE to have acted dishonestly he would have to have been under a specific obligation, or had a special duty to pay KAPNER from those specific funds,. In other words, RICHARD BOSSE would have to be a trustee or a fiduciary of LEWIS KAPNER. The award of costs and the payment of that award does not create any special obligation above and beyond that of another creditor.

We expect the best from our profession. The public and the profession deserve no less. Attorneys, all of us, strive for their best, but we are not perfect. Lawyers are human beings who live with the reality of errant spouses, destroyed careers, malicious Bar proceedings, and some unpaid debts. The Bar's disciplinary arm is not to micro-manage attorneys' lives. The dire circumstances in which RICHARD BOSSE found himself were not of his making and, in large part, were the direct result of The Florida Bar pursuing him in a spurious disciplinary proceeding. He has been embarrassed and humiliated in defending his failure to pay LEWIS KAPNER, who befriended him and gave testimony crucial to his exoneration. However, not paying KAPNER under these circumstances is not a matter for which BOSSE should be punished. He did not act illegally, dishonorably or deceitfully, and his nonpayment of the debt is not a disciplinary matter. KAPNER, himself, underoath, is in accord.

CONCLUSION

THE RESPONDENT DID NOT ACT WITH DISHONESTY, DECEITFULNESS OR FRAUD WITH HIS COST AWARD. HE SIMPLY FAILED TO TIMELY PAY A DEBT.

Respectfully submitted,

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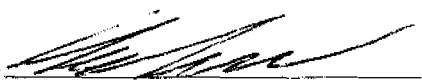
BY: 
Charles Wender, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to DAVID M. BARNOVITZ, ESQUIRE, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309, on this 4th day of November, 1996.

BY: 
Charles Wender, Esquire