097

IN THE SUPREME COURT OF FLORIDA

JAMES O. WALKER, III

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

SUPREME COURT NO: 85,698

THE FLA BAR NO: 94-51,027(17C)

FILED
SID J. WHITE
DEC 4 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF

LAW OFFICE OF
JAMES O. WALKER, III, ESQ.
Suite 100, Square One Bldg.
351 South Cypress Raod
Pompano Beach, FL 33060
(954) 941-1148
Fla. Bar No: 294829
Petitioner, Pro Se

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

Garfinkel treated Ms. Cunningham for several months, March through July, 1991, and discussed with her an auto accident which occurred in June of 1987. At no point in time did he discuss with this patient the "status" of her personal injury claim arising out of that accident. Garfinkel had no previous dealings with the Respondent's office and no contact with Respondent during the treatment period. Garfinkel never inquired of Ms. cunningham regarding the status of her injury claim arising out of the 1987 accident, nor does the record support any other effort, before sending the LOP, on his part to determine the status of the claim. More importantly, his unrebutted testimony supports that he relied upon his assumptions which he claims was supported or "confirmed" by his receipt of the LOP; And there is no record evidence to support his failure to at least inquire of Ms. Cunningham relative to the status of her claim(s) arising out the 1987 accident.

Respondent only learned of the status and circumstances surrounding Ms. Cunningham's 1987 accident by way of the attorney-client relationship, and defended Ms. Cunningham in a law suit filed by one of the local hospitals for services rendered arising out of the June, 1987 accident which Ms. Cunningham thought had

been resolved during her settlement years previous to her initial visit to Garfinkel's office.

Respondent, as an attorney, had a continuing duty, even after the attorney-client relationship had terminated, to maintain the confidences of a client. Respondent, likewise, had a duty or obligation, as an attorney, to respond and cooperate with the Bar upon receipt of the Inquiry/Complaint Form. Here, several of the remarks or expressions made by Respondent in his specific responses to each of the several inquiries directed to him for answer or response were taken out of context, but when viewed in context and the light of the specific inquiry to which it pertains, it is clear that there was no intention on the part of Respondent to misrepresent anything but only to cooperate and respond to the inquiry made and directed to him. Contrary to the Bar's claim, Respondent had no duty to disclose any client confidences or other information learned as a result of the attorney-client relationship even if the attorney-client relationship had terminated.

ARGUMENT

The Bar argues that Respondent's execution of the letter of protection (LOP) and alleged subsequent assurances to Garfinkel were intentional acts on the part of Respondent constituting fraud and misrepresentations of material facts, namely that Ms. Cunningham may have had a pending personal injury claim from which some settlement, verdict or judgment might be derived and Garfinkel's fee could be protected.

As to the LOP, it, as represented by the Bar in its Answer Brief, stands unchallenged as being the product of a then standing procedure but the same is not true for the alleged subsequent assurances. Not only were such denied but even if such representations had been made, the same did not refer to and could not have referred to a personal injury claim for or on behalf of Ms. Cunningham because that claim had been resolved by settlement years prior to Ms. Cunningham's initial visit to Garfinkel's office. If such representations were made, they must have referred to the defense against Florida Medical Center's suit against Ms. Cunningham while represented by Respondent; Even if that were the case, it nevertheless, is of little significance because that pertains to a matter of public record and for all of the above and following reasons: Garfinkel's account or ledger cards shows the transactions recorded by his office regarding Ms. Cunningham. T-33. (Respondent's 1, 2, 3 and 4 introduced in evidence at T-25);

None of these cards make any specific mention or reference to any specially dated accident; Only one person made the entries on these cards from which he testified and she is no longer with his office. T-36; According to his cards, the first alleged phone call to Respondent's office reflects that his (Garfinkel's) office was advised on February 4, 1992 that "still pending".

The "still pending" language necessarily implies a prior discussion of some sort and that the account or ledger cards are not wholly accurate or reliable.

As to the claim that the LOP and the alleged subsequent assurances mislead Garfinkel and induced further treatment of Ms. Cunningham, it is best addressed by Garfinkel's testimony which clearly evidences that he operated upon assumptions independent of the LOP or the alleged subsequent assurances, to wit:

> "From initial contact (with Ms. Cunningham), we didn't have anything other than the fact that she was in an accident. T-42; As long as there is an attorney representing the patient in regard to a specific incident; Well, she was injured in an accident here. She had in Florida, the right, the ability, to get some compensation for her pain and suffering; That's obvious under, you know, and then the mere fact that we had this lien form signed confirmed to me that there was in fact some representation going on." T-43.

More importantly, in this regard, it must be kept in mind that the LOP was not endorsed by Respondent until September, 1991 and, according to Garfinkel's account/ledger cards, his initial conference with Ms. Cunningham was during the month of March, 1991,

about six (6) months apart. Ms. Cunningham was last treated and finalized on July, 1991, almost three (3) months before execution of the LOP.

Far from the claim that "it seems the epitome of hubris" on the part of Respondent to suggest that no inference of an underlying action or a personal injury claim was pending because of the duty one owes himself, it was a matter of making clear the elements required to be shown when one claims that he has been induced to rely upon the alleged misrepresentation of fact by another. Here, the terms of the LOP are quite clear, the manner in which Respondent might breach the same are evident from the face of the document and the responsibilities created for performance by the Respondent are likewise clearly ascertainable, all without resort to any rule of construction; **no inferrrences are required**, to wit: Respondent's duties and responsibilities, if any under the LOP, are simply to protect and pay from whatever settlement, verdict or judgment, notwithstanding the fact that this LOP makes no reference to and bears no specific dated accident or incident.

Under the theory of fraud where it is claimed that one relies upon the representations or misrepresentations of another, the case law, not Respondent, requires for a prima facie showing that the **one who makes such a claim must take due care for his/her own interest in the subject matter by inspection, investigation or examination where the subject matter (status of Ms. Cunningham's personal injury claim, if any, arising out of a 1987 vehicular**

accident) is equally open to their inspection. If one does not avail himself of those means and opportunities (Here, Garfinkel treated Ms. Cunningham from March, 1991 through July, 1991, approximately six (6) months) he will not be heard to say that he was deceived by the other's misrepresentation. Potakar v. Hurtak, 86 So. 2d 502, 503 (Fla. 1955); Scocozzo v. General Development Corp., 191 So. 2d 572, 576 (Fla. 4DCA 1966). Although he treated Ms. Cunningham for several months, the **record is completely barren respecting any effort on Garfinkel's part, prior to his receipt of the LOP and the alleged "subsequent assurances", to inquire of Ms. Cunningham or Respondent for that matter as to the status of Ms. Cunningham's personal injury claim, if any there existed.** The record is likewise silent of any other efforts on Garfinkel's part to ascertain the status of this claim he was so concerned about; But his unrebutted testimony clearly evinces that he operated **under assumptions based upon his long years of chiropractic practice and what he perceived the laws of Florida to be when one is involved in a vehicular accident.** He claims his reliance on the circumstances known to him at that time (his assumptions) were buttressed by receipt of the LOP, so it is clear that his reliance was well in advance of receiving the LOP; but more importantly, there has been no evidence to explain why Garfinkel did not inquire of Ms. Cunningham respecting what was the status of her personal injury claim arising out of the 1987 accident, and the record in this case is wholly without any support that Garfinkel availed himself of the

opportunity to so inquire of Ms. Cunningham.

As to the claim of inducing further treatment of Ms. Cunningham, such claim is not and can not be supported by the record in this case. According to Garfinkel's ledger/account cards his last date of treatment or date of Ms. Cunningham's alleged maximum medical improvement (MMI) date was July 25, 1991. T-19. The LOP was not sent to Respondent until September, 1991, over two months after his last treatment of Ms. Cunningham. (See Bar's Exhibit A received in evidence at pages 6, 7).

As to the claim that Respondent was duty bound to disclose the status of Ms. Cunningham's personal injury claim.

Firstly, it has been apparently overlooked that Respondent, as I believe is either the rule or required procedure when responding to a Bar Inquiry/Complaint Form, was instructed that his response to the inquiry/complaint was to also be served upon the Complainant, not just the Bar; And each such response made by Respondent was copied and provided to the complainant herein, Garfinkel. So whatever disclosure made to the Bar was likewise made to Garfinkel.

The Rule which the Bar contends was violated itself, in the very last sentence of sub-paragraph (b) of 4-8.1, clearly declares that there is no duty to disclose if information is otherwise protected by Rule 4-4.1. This latter rule represents the explicit terms and conditions under which an attorney is duty bound in Florida to make a disclosure of information or confidences of a

client. Briefly, disclosure is required to prevent a client from committing a crime, or to prevent a death or substantial bodily harm to another. A comment which follows after Rule 4-1.6 declares in clear, unambiguous terms that the duty of confidentiality continues after the client-lawyer relationship has terminated. So, in order for Respondent to be duty bound to disclose there must be one of three possible scenarios, (1) Respondent was aware that his client/former client was about to commit a crime, (2) Respondent was aware that his client/former client was about to cause death or substantial bodily harm to another, or (3) Respondent's knowledge respecting the status of Ms. Cunningham's personal injury claim was acquired independent of the client-lawyer relationship.

If a client communicates with an attorney in confidence of relationship and under circumstances from which it may reasonably be presumed that communication will remain in confidence, an attorney-client privilege arises. Schetter v. Schetter, 239 So. 2d 51, 52 (Fla. 4DCA 1970). Once the attorney-client relationship is established, all confidential communications are privileged. Dees v. Scott, 347 so. 2d 465, 476 (Fla. 1DCA 1977), Burt v. Government Employees Ins. Co., 603 So. 2d 125 (Fla. 2DCA 1992).

The existence of the attorney-client privilege does not depend on whether client actually hires the attorney; It is enough if client merely consults attorney about legal questions with a view to employing attorney professionally. Dean v. Dean, 607 So. 2d 494, 497 (Fla. 4DCA 1991). The attorney-client privilege once

established endures even after the attorney-client relationship terminates. Hoyas v. State, 456 So. 2d 1225, 1228 (Fla. 3DCA 1984). Here, it is acknowledged by the Bar in its brief, as communicated by Ms. Cunningham's testimony before the referee, that she communicated the facts and circumstances of her 1987 vehicular accident and the settlement thereof to Respondent in his capacity as an attorney, for the purpose of Respondent to under take the representation for a specific purpose relative the accident and the settlement thereof. It is also unrebutted that the record in this case is silent regarding any evidence which would tend to support that there was evidence brought to Respondent's attention at any point that disclosure of the confidences communicated by Ms. Cunningham to Respondent were required to prevent the death of anyone or that disclosure was required to prevent the likelihood of substantial bodily injury to anyone.

More importantly, the March 9, 1994 letter by Respondent relied upon by the Bar for the claim that Respondent intentionally led the physician/complainant and the Bar into believing that the only reason that the physician (Garfinkel) had not been responded to was due to the fact that "we have not received any settlement, judgment or verdict regarding the 06/16/87 accident referred to by Complainant's letters, Bar Complaint or the purported lien," **is taken wholly out of context.** This was the first response to the complaint/inquiry form which was perceived as a charge that Respondent had executed an agreement to protect and pay a sum of

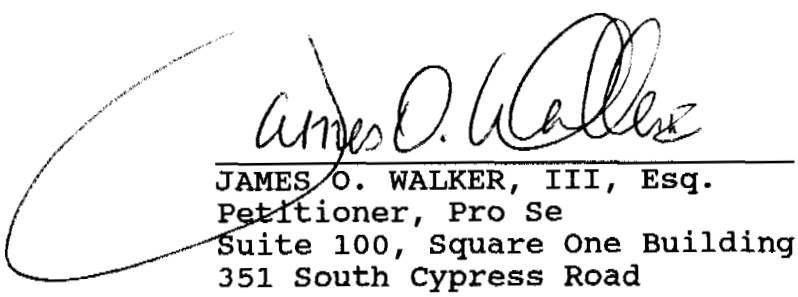
money arising out the 1987 accident of Ms. Cunningham, and that Respondent had dishonored the agreement. Consistent with that perception, Respondent, as expressed in the letter itself, intended to dispel and communicate that that was not the case, and the letter itself bears out that intent. Lastly, this letter further represented:

> The status, if any, of Florence Cunningham's case(s) handled by this office is privileged and not subject to disclosure without her consent to do so. If, however, the Complainant provides me with a duly executed consent or authority for disclosure from Florence Cunningham, then I would be more than happy to disclose the status of the 06/16/87 accident case.
>
> If I can be of further assistance in this regard, please advise at your earliest convenience.

When this letter is read in the context of which it was written, it is clear that the conclusion or the assumption made to the effect that either the Complainant or the Bar was intentionally led to believe that the only reason that Garfinkel have not been responded to (concerning the status of Ms. Cunningham's 1987 injury claim) was due to the fact that Respondent had not received any settlement, judgment or verdict is not supported by the evidence. As a matter of fact, this letter, in the second from the last paragraph, speaks to the issue of the status of the claim and clearly evidences a spirit of cooperation. Accordingly, there is not basis to support any justifiable reliance on the part of Garfinkel or the Bar for their claimed assumptions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Reply Brief has been furnished by mail/hand delivery, this 30th day of November, 1995 to David M. Barnovitz, Esq., Bar Counsel-The Florida Bar, Suite 835, 5900 North Andrews Avenue, Ft. Lauderdale, Florida 33309, The Florida Bar Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.



JAMES O. WALKER, III, Esq.
Petitioner, Pro Se
Suite 100, Square One Building
351 South Cypress Road
Pompano Beach, Fl 33060
(954)941-1148
FBN: 294829