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CLERK, SUPREME COURT
By _____
Chief Deputy Clark

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant

Case No. 86,952

[TFB Case No. 95-31,031(9A)]

v.

ROY L. BEACH, Respondent

REPLY BRIEF

Roy L. Beach
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Fla. Bar No.: 306657

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SUMMARY OF ARGUMENT

Due process requires a fair trial before anyone, even a lawyer, suffers the loss of life, liberty or property. This concept includes the property rights that a professional enjoys in his license to practice his profession. The Bar alleged, tried and argued intentional wrongdoing on my part. I defended against allegations of intentional wrongdoing. The Referee found that clear and convincing evidence of intentional wrongdoing on my part was lacking and I was found not guilty of any intentional wrongdoing. The Referee then went on to find me "guilty" of a "reckless disregard for the truth" even though the pleadings did not set forth such a theory to support the Bar's attempt to sanction me. The Bar never sought to amend it's pleadings, before, during or after the trial to allege that my conduct was anything other than intentionally wrongful. The evidence presented at trial by both the Bar and myself was all geared to a showing of intentional wrongdoing or a lack thereof. The written argument submitted by the Bar attempted to persuade the Referee to discipline me because of the intentional wrongful conduct I had supposedly engaged in. My response was geared to arguing that the evidence was clearly lacking to show any intentional wrongdoing. Nobody ever mentioned the phrase "reckless disregard for the truth" except the Referee after I had pointed out to him that his initial proposed report

was flawed. To find me guilty of a "reckless disregard for the truth" without first telling me that such a theory was being considered to justify sanctions against me and to deprive me of a valuable property right is a denial of due process and must not be allowed to stand.

In addition, there is no record evidence that is clear and convincing to support a finding of a reckless disregard for the truth. All of the evidence presented by the Bar was geared towards a showing of intentional misconduct not a reckless disregard for the truth. There is evidence to support an argument that my sources of information were wrong, but there is no evidence to support a conclusion that I should have known they were wrong at the time I relied upon them. There is no evidence to justify a finding that I knew what the truth was and that I disregarded it. There is no evidence to support a conclusion that my sources were so untrustworthy that I should not have believed them when they told me certain things could be done. Absence such evidence, the Referee should not have taken on the role of a "Monday morning quarterback" to tell me that I should not have trusted what appeared at the time to be reliable and knowledgeable sources.

The Referee's decision cannot stand as a violation of due process and it is not supported by any competent evidence, let alone clear and convincing evidence.

I. THE REFEREE'S DETERMINATION THAT THE RESPONDENT HAD ENGAGED IN ACTS CONTRARY TO HONESTY AND JUSTICE BECAUSE OF A RECKLESS DISREGARD FOR THE TRUTH CONSTITUTES A DENIAL OF DUE PROCESS BECAUSE THE COMPLAINT AGAINST THE RESPONDENT NEVER ALLEGED A RECKLESS DISREGARD FOR THE TRUTH SO AS TO PUT THE RESPONDENT ON NOTICE THAT HE WOULD HAVE TO DEFEND AGAINST SUCH A CHARGE.

The Bar, in it's answer brief, argues that there is ample evidence to support the Referee's findings that I had engaged in acts contrary to honesty and justice because of a reckless disregard for the truth. While such an argument could be made, it completely overlooks **and** ignores the denial of due process argument raised in my initial brief.

This court, in Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126 (Fla. **1985)** reversed a decision which held a defendant liable under a theory of law which had not been set forth in the pleadings against the defendant. In that case, this court noted that while the theory which **was** applied against the defendant **was** a correct statement of the law in Florida, it **was** still wrong to apply that theory to the defendant. The pleadings did not put the defendant on notice that it would have to defend against the theory finally applied against it. The pleadings specified different theories of liability which the defendant prevailed against in the trial below. There was

no motion made to conform the pleadings to the evidence presented at trial. There was no showing that the issue had been tried by consent. There were no amendments to the pleadings. This court held that the defendant had been "sandbagged" and thus deprived of a fair trial and had been denied due process of law as guaranteed by the U.S. and Florida Constitutions.

The Fifth District Court of Appeals, in Delk v. Department of Professional Regulation, 595 So.2d 966 (Fla. 5th DCA 1992) held that:

> "A professional has a property interest in his license to practice his profession protected by the due process clauses of the state and federal constitutions which provide that no person shall be denied of life, liberty, or property without due process of law." at 967.

That court went on to say that due process means that:

> "... the proof at trial or hearing be the conduct charged in the accusatorial document,..." at 967.

The respondent in Delk, supra, had been tried on charges that he had violated two statutes that had been amended after the complained of conduct. The state proceeded against him under the statutes as amended, not as they had been prior to the amendment. After the hearing officer had made his findings of fact and conclusions of law and had made a recommendation to the Board of Dentistry, that Board (acting as the final decision maker) decided that the findings of fact found by the hearing officer better supported a finding of guilt under a statute

that was different from the statute specified in the complaint against the respondent. The Fifth DCA said that such a switch from one statute charged and tried to another statute constituted a denial of due process and thus reversed.

Another Fifth DCA case, Department of Environmental Regulation v. Montco Research Products, Inc., 489 So. 2d 771 (Fla. 5th DCA **1986)** resulted in the quashing of the trial court's action in granting relief that was not before the trial court. In that case, the Department wanted to conduct certain tests on the defendant's land, alleging that the land had been contaminated by hazardous waste material. The Department wanted to be able to use the money in a state wide trust fund that had been set aside for the purpose of paying for such tests. The trial court granted permission to conduct the tests, but he denied the Department permission to use the requested trust funds despite the lack of any pleadings seeking such a prohibition. There had been no pleadings addressing that point, no evidence presented and no arguments made by counsel. The DCA said that:

> "The trial court lacks jurisdiction to determine matters which are not the subject of appropriate pleadings and notice. (Cite omit.) Therefore a determination by the trial court on an issue which is neither raised by the pleadings or on which the parties have been given notice to be heard is violative of due process and is a departure from the essential requirements of law." at 773.

In Lentz v. Lentz, 414 So.2d 292 (Fla. **2d** DCA 1982), a

custodial parent objected to the trial court's enlargement of the non-custodial parent's extended visitation from three weeks to four weeks. The non-custodial parent had filed pleadings seeking enforcement of her three week visitation period and the trial court gave her four. The appellee argued that the appellant should not have been surprised at the enlargement because of contact between the parties on that point. The DCA said:

> ''Even if that is so, we do not agree that a lack of surprise alone can overcome fundamental lack of due process to the appellant resulting from the failure to give him notice and an opportunity to be heard on the issue decided against him in the order." at 293.

The Referee, in deciding that I had engaged in a reckless disregards of the truth, denied me due process of law. The complaint filed by the Bar is extensive and incorporated the Immediate Final Order entered against AFBG and the undersigned. That Immediate Final Order is rife with allegations and findings of fraud and misrepresentation by the respondents named therein. The Bar sought a Summary Judgment against me alleging that the findings of fact and conclusions of law of fraudulent conduct made by the Department of Insurance showed conclusively that I had engaged in the wrongful acts complained of by the Bar. That request was denied by the Referee. The Bar adopted and argued the same facts and theories of law utilized by the Department of Insurance. The majority of the documents presented

by the Bar were Cease and Desist Orders entered in other states and in Florida alleging a willful violation of the respective statutes in each such state. The witnesses presented against me were almost the same witnesses used by the Department of Insurance. (The attorney for the Department did not testify before the administrative hearing officer and a couple of witnesses who did testify there did not testify before the Referee. The transcript of that administrative hearing had been provided to the Referee so, in effect, their testimony was made available for his review and consideration.) The written arguments filed by the Bar herein all argued that I had engaged in intentional misconduct. The pleadings were never amended. No request was made asking that the pleadings be amended to conform with the evidence at trial. No argument was made that the issue of "reckless disregard for the truth" had been tried by consent. Indeed the phrase was not even mentioned in the initial findings and report of the hearing officer and did not come to the attention of either counsel until after I had filed my motion seeking a clarification of the Referee's initial ruling.

In Delk, supra, the respondent had a valuable property right in his license to practice his profession; a property right protected by the due process clauses of the state and federal constitutions. So do I.

In Delk, supra, the respondent had been charged with

conducting violating certain rules, regulations, and statutes. So was I.

In Delk, supra, the pleadings were never amended. Neither were the pleadings in the case against me.

In Delk, supra, a trial was had on the pleadings and both sides sought to prove or disprove the conduct and violations set forth in the pleadings, The same occurred in this case.

In Delk, supra, the ultimate decision maker (the Board of Dentistry) determined that the respondent's conduct was wrongful for a reason not specified in the pleadings or tried in the hearing. The same occurred in this case. The pleadings and the trial focused on intentional misrepresentations and misconduct but the Referee instead found me guilty on a theory not set forth in the pleadings or argued by counsel.

In Delk, supra, the respondent was denied due process of law and was entitled to a reversal of the decision against him. The proof adduced at his trial or hearing was not of the conduct charged in the accusatorial document.

In Montco, supra, the trial court's granting of relief which had not been set forth in any pleadings, memorandum of law, evidence or even argument of counsel was a denial of due process and a departure from the essential requirements of law. Here, the Referee's finding that I had been guilty of a reckless disregard for the truth is also a departure from the essential requirements of law. The pleadings never alleged a reckless

disregard for the truth. No motion ever used that phrase. The attorneys on both sides of the case presented evidence aimed at proving or disproving intentional misconduct. No witness or evidentiary document used the phrase "reckless disregard for the truth". Both attorneys argued in their written argument to the Referee intentional misconduct or lack thereof. The Referee, after finding a lack of evidence to support the Bar's contention that I had engaged in intentional misconduct, nevertheless granted them "relief" based on a theory which had never been plead, tried, argued or even suggested by either side.

The appellant in Lentz, supra, was determined to have had his due process rights violated even if, arguably, there was no surprise on his part that the opposing side wanted an additional week of visitation. If his due process rights were violated even in the absence of surprise, how then can my due process rights be said to have been upheld when neither side had any idea that the hearing officer was basing his recommendation of guilt on a theory which neither side had advanced in any pleading, at trial, or in opening or closing statements? Indeed, the Referee's initially found me guilty without making any mention of "reckless disregard for the truth' and it was only after I pointed out certain inconsistencies in his findings and conclusions of law that he came out with a 'reckless disregard for the truth".

This court, in Tamiami Trail Tours, Inc., supra, ruled

that a defendant who had been found guilty on a theory of law which had not been set forth in the pleadings against it was denied due process of law. This is so even though the theory relied upon by the trial court was a valid theory of liability under Florida law. There was no mention of a "reckless disregard for the truth" in the complaint filed against me. There was no attempt made to amend the pleadings before, during, or after the trial below. I beat the theories of liability set forth in the complaint which alleged intentional misconduct and conduct prejudicial to the administration of justice. The defendant in Tamiami Trail Tours, supra was "sandbagged" and so was I. They were denied due process of law and were entitled to a reversal. So am I.

II. ALL OF THE FACTS CITED IN THE BAR'S REPLY BRIEF IN SUPPORT OF THE REFEREE'S DECISION DO NOT SUPPORT A FINDING OF A RECKLESS DISREGARD FOR THE TRUTH.

The Bar, in it's attempt to point to evidence supporting the Referee's finding that I had engaged in conduct contrary to honesty and justice because of a reckless disregard for the truth, has failed to do so.

The Bar points to the testimony of Mr. Faircloth who was the attorney for the Department of Insurance in the administrative proceedings against AFBG. Mr. Faircloth's testimony is

replete with allegations and conclusions that I had engaged in intentional misconduct and that his department had even considered seeking criminal charges against the respondents in those proceedings. He stated that I had engaged in a "twisting" scheme but "twisting", as defined by Florida statutes, requires a 'knowing misrepresentation". The testimony of Mr. Faircloth might have supported a finding of intentional misconduct on my part but the Referee found that evidence of intentional misconduct on my part was insufficient.

The Bar points to my knowledge of how the proposed program was to work and my close nexus to the other principals of AFBG as evidence supporting the Referee's conclusion. But that is evidence of nothing except that I knew the proposed program and that I knew the other principals of AFBG. What "truth" does this information show that I recklessly disregarded?

The Bar cites to some legal research I conducted. This goes to support my claim that I undertook a good faith attempt to try and determine the legality of AFBG's proposal (called by the Bar an 'insurance fraud scheme" even though the Referee found a lack of evidence to support any form of intentional wrongdoing on my part.) There is no testimony or suggestion that I ignored or acted contrary to what my research revealed. If I did not act contrary to the law as revealed by my legal research, then what "truth" did I recklessly disregard?

The Bar cites to the above and to 'other evidence' to

support the Referee's conclusion but does not specify what they mean. There is evidence that people in the Department of Insurance believed the proposed program would not work for a variety of reasons. There is no evidence that I knew what they knew or that I deliberately did not seek to find out so there cannot be any evidence that I "recklessly disregarded" the "truth" as known by those witnesses. As pointed out in my initial brief, I had information from several sources in two different fields of endeavor which told me the program was feasible and there is no evidence in the record, or anywhere else for that matter, which would support a conclusion that I should have ignored that information in favor of "facts" or "truth" which I did not know. There is no evidence that the witnesses from the Department of Insurance were any better trained than the insurance people that I talked to or that those witnesses were any better trained in the field of finance than the people I was communicating with. There maybe evidence in the record which arguably could support a finding of intentional misconduct, but the Referee has already determined that there was a lack of clear and convincing evidence to support a finding of intentional wrongdoing. The Bar does not dispute that finding by the Referee.

We can see that there is a lack of clear and convincing evidence to support the Referee's finding that I had engaged in conduct contrary to honesty and justice by a reckless disregard for the truth.

CONCLUSION

The Referee has denied me due process of law by finding me guilty of acts which were not alleged in the accusatory documents (Delk, supra), were not advanced at trial by either side (Montco, supra) and which were not tried by consent nor which were set forth in some form of amendment to the pleadings. (Tamiami Trail Tours, Inc., supra). Denial of due process is a fundamental error which mandates reversal even if there is no surprise to the person whose constitutional rights have been denied. (Lentz, supra).

There is a complete lack of evidence to support a finding that I disregarded any truths that I knew or that I did not seek to determine the truth. Therefore the Referee's finding that I had engaged in a "reckless disregard for the truth" is lacking in evidentiary support and must be reversed.

The charges against the undersigned should be dismissed because the Referee has determined that the Bar had failed in it's burden to prove the allegations of intentional misconduct set forth in the complaint against me and the "violation" found by the Referee resulted from a denial of due process and cannot be allowed to stand.

PRAYER FOR RELIEF

The Respondent prays this Court to enter an order reversing the Referee's finding of guilt, affirming his findings of not guilty, and exhonerating the Respondent of the charges herein.

CERTIFICATE OF SERVICE

I BEREBY CERTIFY that the original and seven copies of the above has been served on Clerk of the Supreme Court, 500 S. Duval St., Tallahassee, FL 32399-1927 and a copy has been furnished to Staff Counsel, the Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to James Keeter, Bar Counsel, 880 N. Ogange Ave., Suite 200, Orlando, FL 32801-1085 by mail this 5th day of June, 1997.

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