IN THE SUPREME COURT OF FLORIDA

JOE RAWLS WOLFE,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

_____/

Case No. 94,573
TFB No. 99-10,581(6E)(HRE)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Answer Brief, THE FLORIDA BAR, Respondent, will be referred to as "The Florida Bar" or "The Bar". The Petitioner, JOE RAWLS WOLFE, will be referred to as "Petitioner".

"T" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 94,573 held on August 19, 1999. "TT" will refer to the transcript of the hearing before the Referee in this case on September 1, 1999. "RR" will refer to the Report of Referee in this case dated September 16, 1999. Petitioner's Conditional Guilty Plea for Consent Judgment entered in Supreme Court Case No. 85,676 on October 30, 1995 will be referred to as "GP".

Petitioner's Initial Brief in Supreme Court Case No. 94,573 will be referred to as "IB". Petitioner's exhibits in this case will be referred to as "Pet. Exh." and Respondent's exhibits in this case will be referred to as "Resp. Exh."

Rules Regulating The Florida Bar will be referred to as "Rule" or "Rules".

STATEMENT OF THE FACTS AND OF THE CASE

THE BAUMGARDNER TRUST

On October 10, 1976, Richard B . Baumgardner, Sr. died, leaving a trust for his three children, Richard B. Baumgardner, II, Margaret Frances Baumgardner (now Kennard), and William Daniel Baumgardner. 10% of the trust was to be distributed to the children each year (each to receive an equal share), with each child being entitled to claim his share of the trust corpus upon reaching the age of 50 (GP, p.2). The initial value of the Baumgardner Trust was $732,949.20 (GP, p. 2).

The terms of the Trust exempted the trustee from filing a bond, from accounting to the court, and from the provisions of Chapter 737, Florida Statutes (GP, p.2). The Trust gave the trustee the power to:

> Purchase or otherwise acquire and to retain any property, whether or not such property is authorized for investment by law, or is unsecured, unproductive, or is of a wasting nature, all without diversification as to kind or nature. (GP, p.2)

The initial trustee was the decedent's widow, June E. Baumgardner. After certain intra-family litigation, she resigned as trustee. Petitioner, who was known to the family for years as a friend and attorney, was appointed trustee in 1980 (GP, p. 2). The required distributions to the three beneficiaries were made monthly from 1982 thru October of 1993 (GP, p. 2). Thereafter distributions were to be made annually(GP, p. 3).

Petitioner was the owner of a 79% interest in a real estate development corporation known as Salt Lake Development Corporation (Salt Lake) (GP, p. 3). Petitioner also owned 50% of an apparel manufacturing company known as Leftcoast Apparel, Inc. (Leftcoast) (GP, p.3). In 1989, after Salt Lake sold residential lots, obtaining mortgages on them, Petitioner, in his capacity as trustee, used the funds of the Baumgardner Trust to purchase mortgage receivables from Salt Lake, the company of which he owned a 79% interest, for $60,000, and then an additional $ 114,844 (GP, p.3). These transactions were carried out by Petitioner without the consent of the beneficiaries of the Baumgardner Trust and without any notice to them (GP, p.3). One of those mortgages went into default, the other was foreclosed upon, with Petitioner, as trustee of the Baumgardner Trust, purchasing the property at the foreclosure sale (GP, p.3). The Baumgardner Trust thereby became the owner of one of the properties.

In December 1988, Petitioner, as trustee of the Baumgardner Trust, loaned $75,000 of the Trust's funds to Leftcoast (GP, p.3), the apparel company in which he owned a 50% interest. He then loaned Leftcoast another $50,000 (GP, p.3). These loans were repaid by January 31, 1989 (GP, p.3). Both transactions were carried out by Petitioner without notification to and without consent from the beneficiaries of the Baumgardner Trust (GP, p.3).

In 1990, Petitioner, as Trustee of the Baumgardner Trust, loaned another

$375,000 to Leftcoast (GP, p.3). At the time of the Petitioner's Conditional Guilty Plea for Consent Judgment (Guilty Plea) in 1995, only $20,500 had been repaid, leaving a balance owed to the Trust of $354,490. Interest was paid from time to time, totaling $10,345(GP, p.3).

Continuing his self-dealing, in the fiscal year ending January 31, 1991, without the knowledge or consent of the Trust's beneficiaries, Petitioner loaned another $92,000 to Leftcoast,(GP, p.3). This was secured by accounts receivable of the company. $85,217 of this loan was repaid, leaving a balance of $6,782 (GP, p.3).

Petitioner followed this same self-dealing pattern in 1991, loaning Leftcoast another $195,500 of the Trust's funds (GP, p.3). This loan was secured by a mortgage on property owned by Petitioner and known as the "Island Property"(GP, pp. 3-4). At the time of Respondent's Guilty Plea in 1995, the entire balance of this loan was still outstanding (GP, p.4).

Eventually Leftcoast was liquidated, with the proceeds used to partially satisfy the loans from the Baumgardner Trust. In the fiscal year ending January 31, 1992, Petitioner consolidated the unsecured loans owed to the Baumgardner Trust and personally assumed Leftcoast's debts (GP, p.4). In 1991 Respondent paid principal and interest totaling $53,111.27 (GP, p.4). In 1992, he paid only $61,460 of interest; and in 1993, only $51,462.27 of interest (GP, p.4).

Then in 1993, Petitioner, acting as Trustee of the Baumgardner Trust, made an

unsecured loan to himself of $9,230 (GP, p.4).

OTHER MISCONDUCT

In September 1990, Petitioner loaned himself $50,000 from his attorney trust/escrow account (GP, p.4). In September/October 1990, he loaned himself another $25,500 from the same trust account, including funds held for the installation of a stop light, money which had been entrusted to Petitioner at a real estate closing. The funds also included unallocated interest earned on client funds in a money market account. The $25,500 was repaid by the end of October 1990. $44,800 of the $50,000 self-loan was repaid by June 1991, with the balance repaid by July 1994 (GP, p.4). All of these transactions took place without the knowledge or written consent of any client (GP, p.4). By August 1994, all these particular loans and advances, plus interest, had been repaid (GP, p.4).

Between September 1990 and April 1994, there were shortages in the Petitioner's trust accounts. These were caused primarily by the loans which he made to himself personally and to his businesses. By July 1994, after the Florida Bar's audit, all of Petitioner's trust account shortages were covered (GP, p.5).

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

Pursuant to a Conditional Guilty Plea for Consent Judgment (Guilty Plea) dated October 30, 1995, Petitioner was suspended from the practice of law for three (3) years. He was to be eligible to petition for reinstatement after the expiration of thirty

(30) months if, among other things, he received a full release of liability from the beneficiaries of the Baumgardner Trust (GP, p.6). Contrary to Petitioner's representation, there was no provision in the suspension order for reinstatement in 2.5 years if $300,000 was paid to the Baumgardners (IB, pp. 5, 9).

The relevant Disciplinary Rules specified in the Guilty Plea were:

Rule 4-1.15(a) - Failure to hold in trust certain funds for his clients held in connection with his representation;

Rule 4-1.15(b) - Failure to promptly deliver to a client or third person funds that the client or third person is entitled to receive;

Rule 4-8.4(a) - Violate or attempt to violate a disciplinary rule;

Rule 5-1.1(a) - Failure to apply funds of his clients only for specific purposes;

Rule 5-1.1(e) - Failure to place nominal or short-term funds of clients into an interest-bearing account;

Rule 5-1.2(c)(a)(B) - Failure to make monthly comparisons between the total of reconciled balanced and the total of trust ledger cards;

Rule 5.1.2(c)(2) - Failure to annually prepare a detailed listing of unexpended funds held for each client; and

Rule 5-1.2(c)(4) - Failure to authorize and request banks on his trust accounts to notify Staff Counsel of the Florida Bar in the event any trust account is returned due to insufficient funds or uncollected funds. (GP, pp. 5-6).

THE BAUMGARDNER CIVIL LITIGATION

By a Complaint dated March 5, 1994, about nineteen (19) months before the

Guilty Plea was tendered in the instant matter, a civil action against Petitioner was commenced on behalf of the Trust of Richard B. Baumgardner, Sr. The complaint alleged, among other things, breach of trust, improper investment, self-dealing, and fraud. It resulted in a jury verdict in favor of the Trust for $1.5 million compensatory damages and $ 3.0 million punitive damages (total $4.5 million) (T, p. 32). The verdict was appealed by Petitioner. A settlement of $850,000 was eventually reached in April 1999 (T, pp. 32-33), about three and one-half years after Petitioner's Guilty Plea in the Bar disciplinary matter. After paying attorney's fees and legal expenses, each of the three Baumgardner Trust beneficiaries received approximately $151,000 (T, p. 166). In exchange for the settlement, Petitioner received a release from further civil liability.

REINSTATEMENT PROCEEDINGS

By Petition for Reinstatement dated December 22, 1998, Petitioner is seeking reinstatement to the Florida Bar. A hearing upon the reinstatement petition was held before Referee Claudia R. Isom. Petitioner admitted that during the trial of the civil action brought against him by the Baumgardner Trust, he gave a $500,000 "mortgage" in favor of his mother. That mortgage was recorded (T, p.62). However, a "mortgage" which he says he provided to the Trust when he loaned himself $195,000 was never recorded (T, pp. 54, 77). Because of his selective recording, the mortgage given in

favor of his mother became superior to the unfiled "mortgage" for $195,000 Petitioner had supposedly given to secure some of the misappropriated Baumgardner Trust money.

Petitioner further admitted that over the years after he used Baumgardner Trust money, he had received offers exceeding $900,000 on various properties he owned (T, pp. 59, 60). Yet Petitioner did not accept those substantial offers, declining money which could have been utilized to help recompense the Baumgardner beneficiaries for Petitioner's breach of his fiduciary obligations. He also admitted that he could have sold his boat for $50,000 to $100,000, but did not do so (T, p.60).

Petitioner represents on page 5 of his Initial Brief that during the suspension the Referee noted that Petitioner failed to perform any community activities, and also failed to engage in pro bono activities (T, pp. 46, 61), activities which could have suggested some modicum of remorse.

Petitioner did admit that his improper conduct cost the Baumgardner Trust about $650,000 (T, p.18). However, he repeatedly characterized his improper actions as "mistakes" and referred to his having "borrowed" money from escrow funds. He stated that he had "ignored" trust rules, and created a "conflict" by loaning money from the Baumgardner Trust to his apparel company (T, pp. 18, 37, 40).

At the referee hearing, testimony was given by each of the beneficiaries of the Baumgardner Trust regarding the personal and economic toll Petitioner's actions had

upon each of them. Each testified as to Petitioner's failure to exhibit remorse or to apologize to them (T, pp. 175, 203, 209). Margaret Frances Baumgardner Kennard, a Registered Nurse, testified that she depended upon the annual income from the Trust, and that she had anticipated receiving at least $300,000 as her distribution at age 50. She related that Petitioner had lied to her, saying everything was fine when she questioned him about the Trust. She also indicated that Petitioner's "settlement" offers in the civil litigation were not nearly enough, and that the eventual settlement was based on the decision that "...part of it is better than none at all". Ms. Kennard expressed fear that what Petitioner had done in the past to her and her family could be done again to others. She said she would not trust him with such a position again (T, pp.170 - 177).

Richard B. Baumgardner II, a Certified Public Accountant, reiterated that Petitioner was never granted permission for use of trust funds for his own purposes, and said that he would have objected to Petitioner's self-dealing had he known about it. He felt that the settlement offers before trial in the civil case were not serious, and that the eventual settlement of $850,000 fell "far short" of what it would have taken to make the trust corpus whole. He estimated that the settlement monies received by each beneficiary after attorney's fees and costs was about 30% of what should have been received. Petitioner has never expressed remorse to him and he does not feel it would be proper to give Petitioner a position of trust in the future (T, pp. 183, 184,

186-188, 203).

The most heart wrenching example of the results of Petitioner's "mistakes" was given by William Baumgardner, a beneficiary of the Baumgardner Trust. Mr. Baumgardner is a maintenance worker at a house of worship. He relied upon the Trust distributions to live on, and to make his mortgage payments. Petitioner's actions cost Mr. Baumgardner his home. He was forced to sell his home at a loss in order to pay various bills, as well as to sell other personal property (T, p.206).

Petitioner did not make any settlement offers before litigation was commenced against him (T, p. 206). William Baumgardner acknowledged that the eventual settlement for $151,000 which he received was "better than nothing". Like the other beneficiaries, he reported that Petitioner has not apologized to him (T, pp. 204, 206-209, 211).

A summary of the severity of the consequences of Petitioner's conduct and his attitude was given by Howard Dennis Rogers, Esq., the attorney who represented the Baumgardner Trust in its litigation against Petitioner. Mr. Rogers spoke of how throughout the litigation Petitioner only spoke of his "mistakes". At the civil trial, expert testimony was given as to Petitioner's self-dealing and breach of trust, and how the damages sustained by the beneficiaries was estimated by a financial planner to be between $1.2 million and $2.2 million (T, pp.157-158). In 1987, the Trust corpus had been about $1,025,000. By 1993, due to Petitioner's actions, it had fallen below

$200,000. Mr. Rogers pointed out that the alleged security that Petitioner had given in exchange for the $195,000 which he had improperly taken from trust funds was a "mortgage" which was never recorded. Indeed, this alleged "mortgage" has yet to be seen by Mr. Rogers. He recounted that during the liquidation of Petitioner's apparel company, Petitioner continued to take more money from the trust in an attempt to salvage an insolvent corporation, and even formed another company called Left Coast Trucking. He stated that although the beneficiaries were the only creditors of Petitioner to whom Petitioner owed a fiduciary duty, they were kept as unsecured creditors (T, pp.156-159, 161-163, 166).

Mr. Rogers explained that Petitioner was a hard negotiator throughout the civil trial (T, p.166). Mr. Rogers testified that each beneficiary received $151,000 from the settlement, but their shares of the trust should have been about $500,000 each, had it been managed conservatively and properly (T, p.167).

THE REFEREE'S DECISION AND REPORT

On September 1, 1999, Referee Claudia R. Isom announced her recommendation. Referee Isom focused in large part on whether Petitioner had sufficiently demonstrated good moral character, personal integrity and general fitness for a position of trust and confidence. While finding Petitioner had acted in a financially responsible manner during his suspension, she also found that he had done nothing to demonstrate that he had fulfilled his moral debt to the public and to The

Florida Bar. In her opinion, his remorse did not extend beyond his personal humiliation at having been caught short. Even though Petitioner's own statements suggested he was able to catch the trust beneficiaries up on their payments by the time the law suit was filed, the referee noted Petitioner's attitude: he had treated everything just as a matter of money, even though one of the beneficiaries lost his house and his lifestyle as a consequence of the late payments (TT, p.8).

Judge Isom pointed out that as attorneys, we are dedicated to more than just our own self gratification. She found that Petitioner, over the almost four years since his suspension, had not demonstrated any true remorse for the damage he had done to the community and to the reputation of attorneys as a whole. She recognized his lip service to the concept of remorse, noted that he felt badly for tarnishing his family name, but did not find that his actions demonstrated his remorse (TT, p.9). Her finding was not contrary to Petitioner's having "made the appropriate assurances as to his sense of repentance"(IB, p.7).

Judge Isom issued her Report of Referee dated September 16, 1999. In her report, she recommended that Petitioner not be reinstated. Among the salient facts, she pointed to the misappropriation of trust funds and the ensuing lawsuit, with the beneficiaries receiving $15,000 (sic) instead of an estimated $500,000; the loss of monthly income and its significant impact on the lifestyle of two of the beneficiaries (RR, p.2); and how through Petitioner's bankruptcy, eight to ten of his creditors

settled for 20 cents on the dollar. Judge Isom specifically noted that :

> *"The Petitioner's claims regarding his efforts to fully reimburse the trust beneficiaries prior to the case going to trial were not supported by the evidence."* (RR, p. 3) (emphasis added).

The referee further stated:

> *"The petitioner is not presently fit to resume the practice of law in that he has failed to present evidence of an unimpeachable character."*
>
> *"Although petitioner has testified as to his remorse,. . . his actions, or lack of action, have demonstrated that he has failed to grasp the moral implications of his transgression."* (emphasis added)

She determined that the evidence prevents a finding that he has demonstrated unimpeachable moral character (RR, p. 3).

SUMMARY OF THE ARGUMENT

A hearing upon Petitioner's petition for reinstatement following a three-year suspension was held before the Honorable Claudia R. Isom, Referee. She found that Petitioner had not established his unimpeachable character as required, and she recommended that he not be reinstated (RR, p. 4). Petitioner seeks to have this Court overturn the referee's findings of fact and her recommendation.

Petitioner has fallen far short of meeting the heavy burden required to overrule the referee's findings of fact and recommendation. Further, he has not proven his rehabilitation as required in order to permit his reinstatement to the Bar.

Petitioner was suspended following very serious misconduct, including a pattern of financial self-dealing to the detriment of those to whom he had a fiduciary duty. The Petitioner was an attorney for and a friend of the Baumgardner family when he was appointed Trustee of the Baumgardner Trust. The original value of the Trust was over $700,000 in 1976 (GP, p.2), and rose to over $1 million by 1987 (T, p. 157). Petitioner embarked upon a course of improperly using the Trust funds as his own. He loaned, "mortgaged" and otherwise transferred Trust funds to himself and his businesses. By 1993, the value of the Trust had fallen below $200,000 (T, p. 159).

After Petitioner's misconduct was discovered and The Florida Bar had filed a complaint with this Court, Petitioner entered into a Conditional Guilty Plea for Consent Judgment. He received a three- year suspension from the practice of law (GP, p. 6).

Petitioner has demonstrated that he lacks remorse for what he has done to others. His self interest continues to take precedence, as shown by his less than stellar efforts to compensate those whom he has harmed. Petitioner's self-dealing resulted in devastating consequences to the beneficiaries of the Baumgardner Trust. This was especially true for a beneficiary who was forced t sell his home because of the unethical conduct of the Petitioner. Petitioner, if truly remorseful, would have done everything in his power to make those whom he had harmed whole. He did not. Petitioner fought tenaciously in a civil action to avoid full compensation, used delay tactics, and even engaged in questionable practices regarding a supposed recording of a mortgage. Throughout this entire sordid tale, Petitioner has refused to truly acknowledge his moral guilt or to express true contrition.

The findings of fact and recommendations of the Referee should be adopted. Petitioner should not be reinstated to The Florida Bar.

ARGUMENT

The Report of Referee should be upheld and the Petitioner should not be reinstated to the practice of law.

The party challenging a Referee's recommendation in a reinstatement proceeding has the burden of showing that the report of the referee was erroneous, unlawful, or unjustified. The Florida Bar re: Grusmark, 662 So.2d 1235,1236 (Fla. 1995); The Florida Bar v. Ross, 732 So.2d 1037,1042 (Fla. 1999); The Florida Bar v. Sweeney, 730 So.2d 1269,1271 (Fla. 1999).

The referee's findings of fact carry with them a presumption of correctness and shall be upheld unless shown to be clearly erroneous or without support in the record. The Florida Bar v. Rue, 663 So. 2d 1320 (Fla. 1995).

The burden to the challenging party is to show that there was no evidence to support the findings of fact or that the record evidence clearly contradicts the Referee's conclusions. The Florida Bar v. Cibula, 725 So.2d 360,362 (Fla. 1999).

If the Referee's findings are supported by competent substantial evidence, the Supreme Court is precluded from reweighing the evidence and substituting its judgment for that of the Referee. The Florida Bar v. Cox., 718 So.2d 788 (Fla, 1998).

It is respectfully submitted that the findings and recommendation of the referee are supported by the record and are not clearly erroneous, unlawful nor unjustified. The Petitioner has failed to meet the burden required to overturn the findings of fact

and recommendation of the Hon. Claudia R. Isom, Referee. It was she, after all, who observed the witnesses first hand and was in the unique position of being able to assess their credibility. Please see: The Florida Bar v. Vernell, 721 So.2d, 705, 708 (Fla. 1998); The Florida Bar v. Lecznar, 690 So.2d 1284, 1287 (Fla. 1997). She was able to determine that remorse was inadequate, and restitution to beneficiaries was coerced and insufficient.

The burden of proving rehabilitation is on the Petitioner. When seeking reinstatement or readmission, the individual involved "bears the heavy burden of establishing rehabilitation." The Florida Board of Bar Examiners re: W.H.V.D., 653 So.2d 386, 388 (Fla. 1995); The Florida Bar v. Janssen, 643 So.2d 1065,1066 (Fla. 1994). Please also see The Florida Board of Bar Examiners re: J.C.B, 655 So.2d 79 (Fla. 1995). As this Court stated in The Florida Bar, Petition of Rubin, 323 So.2d 257,258 (Fla. 1975), at page 258:

> The right to practice law is conferred or withheld on the basis of factors not customarily considered in the licensing of tradesmen or businessmen. Because of a lawyer's interaction with the public, a wide range of factors may be considered in determining whether an individual shall be allowed to enter or resume this profession. *An attorney once removed or suspended must demonstrate rehabilitation, and the burden of doing so requires more than recitations of intent and contrition*. Unsatisfied judgments, and a failure to acknowledge judgment liens in a personal financial statement filed for the purpose of demonstrating reinstatement, are antithetical to an affirmative showing of rehabilitation. They do not demonstrate that a lawyer suspended for "violations of his oath as an attorney" has progressed in his understanding of

> professional responsibility to the point that he may now be reposed with the public's trust. (Emphasis added)

Respondent grounds his argument for reinstatement upon the testimony that he is, allegedly, a good lawyer and person. Petitioner's witnesses did address Petitioner's reputation in the community and legal profession. Attorney Burke said that Petitioner would be considered by him to be honest and trustworthy, but for this event (T, p. 92). Attorney Robinson said he was surprised by Respondent's problems and disappointed (T, p. 104). Petitioner's legal assistant said that Petitioner is as honest as they come (a rather said statement about "they"), and that during his entire career as an attorney his actions were above reproach (P's exh. 8/8, p. 2). Frank Kunnen talked for Petitioner's moralistic mannerisms (P's exh. 8/9). Several witnesses talked about his superb legal abilities. He points to the fact that he has obtained a release from the beneficiaries of the Baumgardner Trust. But the law requires much more from a person seeking reinstatement or readmission to the Bar following disciplinary transgressions than evidence people were surprised by his misdeeds, that he has "moralistic mannerisms", or has good legal skills.

For example, in The Florida Bar re: Hessler, 493 So.2d 1029 (Fla. 1986), this Court addressed a case in which the attorney had misappropriated funds from an estate. The Court decided that the attorney would not be reinstated absent full restitution. Full restitution was required in another case as well, when the attorney

had been disbarred for failing to turn over client funds. This Court declined to readmit the individual until after the client had been reimbursed. The Florida Bar v. Rodman, 474 So.2d 1176 (Fla. 1985). See also The Florida Bar v. Blalock, 325 So.2d 401 (Fla. 1976).

The above decisions support the Referee's recommendation that Petitioner should not be reinstated. Petitioner made partial payment to the Baumgardner Trust, for the damage he caused, but never made the Trust whole. Even that partial payment came years after his improper conduct took place, and not until a civil lawsuit, trial and adverse judgment had been rendered against him. The partial payment made by Petitioner was far less than the actual losses to the beneficiaries, and even lower than the jury award against him. The fact that he received a "release" in exchange for that settlement does not negate the fact that he failed to make full restitution for his damages.

In The Florida Board of Bar Examiners re: J.C.B., infra, this Court denied readmission under facts similar to the instant case. J.C.B. had been disciplined for improperly using funds belonging to his client. In addition, he had failed to satisfy outstanding debts, in part because he turned down high paying job opportunities which would have enabled him to do so. That is not unlike Petitioner, who could have sold his properties for hundreds of thousands of dollars in order to recompense the beneficiaries, but elected to not do so. When faced with outstanding judgments to

creditors, J.C.B. paid some, but left prior judgments unsatisfied. In the instant case, Petitioner gave precedence to paying off his own business obligations over repaying monies owed to the beneficiaries to whom he owed a fiduciary duty. In J.C.B. the former attorney, again like Petitioner, refused to truly admit the wrongfulness of his conduct. Instead he characterized it as mere carelessness and gross negligence, never admitting that he had stolen client funds. In the case sub judice, Petitioner has repeatedly minimized his actions as "mistakes", and has failed to take moral responsibility for what he has done.

In J.C.B., Id. at 80, the Court clearly indicated that a former attorney seeking readmission must meet the requirement of showing positive action on his part to prove his rehabilitation. In denying his application, this Court stated: "In seeking readmission, J.C.B. bears the heavy burden of establishing rehabilitation. See The Florida Bar re: Janssen, 643 So.2d 1065, 1066 (Fla. 1994): The Florida Bar re: Jahn, 559 So.2d 1089,1090 (Fla. 1990)."

The Court in J.C.B. further commented that an applicant such as J.C.B. who affirmatively asserts rehabilitation from prior conduct bearing adversely on character and fitness for admission must show rehabilitation by:

> such things as a person's occupation, religion, community or civic service. *Merely showing that an individual is now living as and doing those things he or she should have done throughout life, although necessary to prove rehabilitation, does not prove that*

> *the individual has undertaken a useful and constructive place in society. The requirement of positive action* is appropriate for applicants for admission to the bar because service to one's community is an implied obligation of members of the bar. Supra at 82. (Emphasis added).

Petitioner in the instant case was determined to have not shown true contrition. One factor noted by the referee was lack of community or civil service. That was not the only negative aspect of the Petitioner's conduct. It is the referee's province to weigh the attitude and degree of contrition of the applicant. The Florida Bar Petition of Rubin, Supra. Referee Isom did so, and found Petitioner lacking.

In weighing whether the Petitioner has met the heavy burden of establishing unimpeachable character, the Court is necessarily faced with applying a subjective standard. Merely engaging in a laundry list of "good acts" during the period of suspension should not, by itself, be sufficient to establish good, unimpeachable, character. If it did then all suspended or disbarred attorneys could be reinstated by the simple expedient of mechanically and without sincerity or remorse engaging in certain enumerated types of conduct during the period involved.

Webster's Third New International Dictionary, G & C Merriman Company, 1976, at page 2499 defines "unimpeachable" as " *that which is not to be called into question, that which is exempt from liability to accusations, that which is irreproachable or blameless*." Petitioner's conduct does not meet that definition.

When the adjective "unimpeachable" is utilized to modify the word "character", as this, our highest court has done in establishing the lofty standards necessary to permit reinstatement to our profession, one realizes the truly heavy burden, which Petitioner is required to satisfy. Unquestionably, the standards which a petitioner seeking reinstatement to the Bar must meet impose a "heavy burden" to establish rehabilitation. See The Florida Bar v. Janssen, Supra; and The Florida Bar re: Timson, 301 So. 2d 448, 449 (Fla. 1975). This is as it should be. Has Petitioner established that his moral and ethical qualities are beyond question? Has he shown that his self-discipline and judgment are now beyond reproach? Has Petitioner proven that the complex of his moral and habitual ethical traits are such that they can now be referred to as "excellent" or of a high standard? Has Petitioner met the "heavy burden" imposed upon him by the settled law in this state, of showing that he is now of an "unimpeachable character". No, he has not.

It is helpful in evaluating Respondent's character to review his own testimony before the Referee. Under cross-examination, he did not acknowledge his own conduct to be highly improper or unethical. He did not admit his conduct was the misappropriation of money entrusted to him in a fiduciary capacity. His version of his inexcusable conduct in misappropriating hundreds of thousands of dollars from the sanctity of a trust, his hiding his unethical activities over a long period of time from the trust beneficiaries, his ravishing and greatly devaluing the assets of the trust, his

deceitful gesture of allegedly giving a mortgage relating to some of the misappropriated funds and then failing to record it, his giving his own unsecured promissory notes for huge amounts of the money which he had used without the knowledge or consent of the trust beneficiaries, and for devastating the life of a beneficiary who relied upon the trust income and was forced to sell his home and other assets, can best be described as a half-hearted attempt at exculpation by a man who truly does not appreciate the severity of the many wrongful and unethical acts he engaged in, or does not care except for how he himself was harmed by being caught.

Petitioner describes his conduct as a "mistake" in "borrowing" money from the trust for several years (T, p.70), a "philosophical mistake" involving his business approach (T, p.68). He does get around to calling it a "tragic mistake" (T, p.70).

Petitioner could have learned much from the person who was most harmed by Petitioner's misconduct, William Baumgardner. Mr. Baumgardner testified that as a direct result of the Petitioner's unethical behavior, Mr. Baumgardner was forced to undertake the type of personally and emotionally difficult, but honorable conduct, which to this day the Petitioner has refused to engage in. Mr. Baumgardner sold his home and liquidated other assets in order to pay his creditors after the trust had been depleted by Petitioner. He acted honorably. However, Petitioner chose not to sell land he owned to the county for over seven hundred thousand dollars. He chose not to sell his yacht and utilize the funds to help make his victims whole, claiming he

continued to hold onto it because his work on it would eventually lead to a higher sale price. Petitioner admitted that even after he had placed it on the market and there were no takers at his asking price, he did not lower the price in an attempt to obtain funds to set his defalcations right. Self interest prevailed over obligation to those harmed.

Petitioner has attempted to distort and downplay his conduct in the lawsuit brought by the Trust beneficiaries and the eventual settlement of that civil suit. A judgment of $4.5 million dollars was rendered against Petitioner. It took years of litigation before that verdict was obtained. And even then Petitioner appealed, still fighting to not be held fully responsible for his inexcusable conduct. During the trial itself Respondent executed a mortgage of $500,000 in favor of his mother and recorded it while still having never recorded the mortgage he gave for some of the trust funds which he took.

In The Florida Bar re: Jahn, supra at 1090, this Court stated that: *Reinstatement is more a matter of grace than of right and is dependent upon rehabilitation.*"(emphasis added). Petitioner has not established his rehabilitation as required by the law of this state; the grace of reinstatement has not been earned.

In The Florida Bar v. Grusmark, 662 So.2d 1235, 1236 (Fla. 1995) the Court reiterated that the Court may "...consider all aspects of Petitioner's character to determine present fitness to resume practice of law". In putting post discipline

conduct into context, it is quite proper to consider the past misconduct of the person seeking reinstatement. The Florida Bar re: Peter M. Lopez, 545 So.2d 835,836 (Fla. 1989); The Florida Bar re: Jahn, Supra at 1090. Evidence of pre-suspension conduct is relevant and admissible upon the issue of reinstatement. The mere fact that a number of years may have passed since Petitioner's highly unethical conduct took place should not be determinative. The mere passage of time is not evidence of rehabilitation. The Florida Bar re: Jahn, supra, at 1090. The referee's decision is sound in light of Petitioner's past misdeeds and his attitude toward them.

CONCLUSION

The Referee found that Petitioner has not met the burden of showing that he is of unimpeachable character. She recommended he not be reinstated.

Petitioner has not met the burden of showing that the report of referee was clearly erroneous, unlawful, or unjustified. Substantial facts demonstrate a focus of self interest rather than making the Trust beneficiaries whole on a timely basis, lack of genuine remorse, and lack of rehabilitation.

The Referee's findings of fact and recommendations should be upheld, and the petition for reinstatement denied.

Respectfully Submitted,

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Thomas E. DeBerg
Assistant Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by regular U. S. mail to Debbie Causseaux, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Roland D. Waller, Esq., Counsel for Petitioner, at Waller & Mitchell, 5332 Main Street, New Port Richey, FL 34652; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, at 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of December, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this Answer Brief has been written in font size and style Times New Roman, 14 pt.

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Thomas E. DeBerg