IN THE SUPREME COURT OF THE STATE OF FLORIDA

BARBARA MOAKLEY,
Appellant,

vs.

SHERI SMALLWOOD,
Appellee.
_____/

Sup. Ct. Case No. 95,471
DCA Case No. 98-398

APPELLEE'S ANSWER BRIEF ON THE MERITS

SHERI SMALLWOOD, CHARTERED
SHERI SMALLWOOD, ESQUIRE
Appellee
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AUTHORITIES CITED

PRELIMINARY STATEMENT

This case presents for review a facially innocuous Order, which is sustainable under the

Court's power to compel the payment of witnesses or to require parties and counsel before it to do that which equity, justice, and the law require. The importance of the case, and the real issue this Court is asked to decide, however, lie elsewhere.

Through this case, this Court is actually being asked to, and has the opportunity to, decide whether all of Florida's Courts have "inherent authority" to sanction counsel for actions taken in connection with litigation. Both Appellant and Appellee argue that the lower Courts lack that authority.

STATEMENT OF THE CASE AND THE FACTS

If the true issue is the inherent authority of the lower Courts, there are few facts of importance which need be stated.

This was a divorce case involving the marriage between Joseph and Barbara Moakley. Appellant Broz, and Mr. Fenner, were counsel for the wife. Appellee represented the husband for a brief period at the end of the case. Final Judgment was entered January 1997. Among other things, it required the husband to assign a note and mortgage to the wife. Before the Judgment was effectuated, Appellee withdrew and was released of all further obligations in connection with the case. Appellants knew at that time that Appellee did not have the original note and mortgage.

Appellee had no further contact with the matter or the parties for most of a year. Then suddenly, in December of 1997, Appellants served her with a subpoena commanding her to appear a day or two later, at a hearing, 50 miles away, to testify in the case. Appellee called the Appellant attorney and repeated that she did not have the documents in question. She voiced her objection to

being compelled to drive 100 miles to tell the Court that. Appellant counsel refused to release Appellee from the subpoena. Appellee honored the subpoena, appeared at the hearing, and

requested compensation.

The trial Court concluded that the Appellee was entitled to reasonable compensation in a particular amount which was explained in the Order. The amount related to the time Appellee had been required to expend in responding to the subpoena. The wife, as the party, was directed to pay such sum to the Appellee. Because the Court could see no good reason for the wife's attorney's actions in compelling Appellee to appear at the hearing, said attorney was Ordered to contribute to the payment.

Contrary to Appellant's statement, Appellee did not leave the hearing "before she could receive her witness fee". Appellee remained at the hearing until excused by the Court. No such fee was ever tendered to her.

Appellee does not recall whether she formally testified at the hearing or whether she spoke as an officer of the Court under recognition of the Judge. Although she has no present memory of any specific statements she may have made, whatever she said related either to actions taken by her in her professional capacity as counsel for the husband or to her time and fees for purposes of her request for compensation.

Also, although Appellants would have this Court believe that the underlying case was always a Marathon case (Marathon being the city 50 miles away to which Appellee was summoned), the fact is that all of the work Appellee did, and every proceeding which was conducted in the matter throughout the time Appellee was involved with it, took place in Key West. At all times pertinent hereto, other than the December 1997, hearing which led to the Order here under review, this was

handled as a Key West case, by a Judge assigned to Key West. Mediation was in Key West. The non-jury trial took place in Key West. The Final Judgment was prepared, presented, and entered

in Key West. The few hearings which occurred post-Judgment, but prior to Appellee's withdrawal, were scheduled and noticed by Appellant counsel for Key West, and the same were actually conducted in Key West.

SUMMARY OF THE ARGUMENT

1. The trial Court's Order in this case is sustainable, and it should be upheld, but not under inherent power.

2. The exercise by trial Courts of inherent powers to discipline lawyers, in the absence of contempt, contravenes the Florida Constitution's grant of exclusive jurisdiction over that subject matter to The Florida Supreme Court (Art. V, Sec. 15).

3. Trial Courts do not and should not have such inherent authority.

ARGUMENT

For purposes of this brief, it is stipulated that Appellants' actions which led to the challenged Order did not violate any specific, written, substantive, material rule or law. No one disputes that attorneys may issue subpoenas to compel the attendance of witnesses at hearings. Rule 1.410, F. R. Civ. P. In doing so, however, they and their clients obligate themselves to compensate their witnesses. Keitel v. Keitel, 701 So.2d 413 (Fla. App. 4th DCA 1997). Section 92.151, F.S., provides that "(c)ompensation shall be paid to the witness by the party in whose behalf the witness is summoned".

Likening this case to one in which a party and its counsel subpoena a doctor, such

compensation includes not only the actual cost of the time the witness spends testifying, but also the time required for the witness to prepare and to travel to and from the proceeding. Gardner vs.

Woodward, 1999 WL 454389 (Fla. App. 4th DCA 1999). It also encompasses expenses reasonably incurred by the witness in responding to the subpoena. Additional reference is made to Section 92.153, F.S.. Appellee met the definition of a "disinterested witness". By law it is directed that she "shall be paid" for any costs reasonably incurred, directly or indirectly, in producing, searching for, reproducing, or transporting documents pursuant to a summons, and such payment is to be made by the person requesting the summons.

Appellee respectfully submits that the right to compensation does not depend upon the nature of the witness's testimony, but rather upon the characteristics and qualifications of the witness. There are times when a doctor may be called to testify, or may actually be questioned once s/he is on the stand, only about what s/he saw and did, fact matters, without ever being required or asked to give an opinion. That does not prevent the doctor from receiving his/her fees as a professional. S/he is entitled to be compensated for his/her services and for the time necessarily taken away from his/her practice and other endeavors. S/he is entitled to reimbursement for what it cost him/her to appear.

When a witness is subpoenaed, the paper s/he receives does not, as a rule, specify that s/he is being called as an expert, skilled, professional, or lay witness. It simply commands him/her to appear. Moreover, the witness has no control over what s/he will be, or actually is, asked. It is respectfully submitted that a party and/or attorney cannot avoid the obligation to pay compensation to a professional, expert, orskilled witness, simply by refraining from asking him/her an opinion question.

In litigation, and in the law in general, that which is fair, right, just, and equitable should be

done. The rule is, and must be, that the party/attorney who subpoenas a witness has the obligation to pay him/her, and if the witness is an expert, skilled, or professional, that stature is reflected in

the amount which must be paid.

There are some cases which indicate that it is within a trial Court's discretion whether or not to award witness fees. Travieso vs. Travieso, 474 So. 2d 1184 (Fla. 1985). Those cases appear to pertain to circumstances in which opposing parties to an action dispute which of them should bear such expense, however, and Appellee does not believe they are applicable to the instant situation. To the extent they may be read to extend to the issue of whether a witness is entitled to compensation or not, it is respectfully submitted that they should be interpreted as placing the matter squarely within the lower Court's discretion, and as we all know, appellate Courts do not substitute their judgment as to such matters for that of the trial Courts.

When the issue is clearly the witness's entitlement to compensation, there appears to be considerably less latitude afforded by the caselaw. Where the witness expects to be compensated for his/her testimony, the award is mandatory and not discretionary. Stokus vs. Phillips, 651 So.2d 1244 (Fla. App. 2d DCA 1995).

Based upon such authority, the Appellee respectfully submits that she was entitled to receive reasonable compensation for her services as a witness at a professional rate, and that Appellants had the obligation to pay the same.

Appellants seemingly agree that Appellee was entitled to receive a fee. What they appear to contest is the amount of the same. In that regard, Section 92.231, Fla. Stat. is instructive. It provides for the compensation of expert witnesses and of skilled witnesses. Under the facts of this case, Appellee could have been either, and as such, she was entitled to a fee in the amount the trial

Judge deemed reasonable.

Respondent respectfully submits that the trial Court's Order in this case can and should be

upheld on the basis of such authority. Note is made, however, that the Order could also be sustained on the basis of implied contract (when one engages the witness, s/he impliedly agrees to pay a fair and reasonable fee for the witness's services), under the theory of quantum meruit, or some form of the inequitable conduct doctrine. Bitterman vs. Bitterman, 714 So.2d 356 (Fla. 1998). It might be found to be nothing more than an application of the rule that one is responsible for the direct and proximate, reasonably foreseeable consequences of his/her actions.

Appellants' argument that there was no notice as to the matter of the witness's right to compensation or the amount thereof is fallacious. It must be remembered that in the context of these proceedings, the Appellee was a witness and nothing more. She was not a party. She was not the attorney of record for a party. There is nothing in the law, of which Appellee is aware, that would permit third party strangers to a case, to assume the right to file pleadings and to set and notice hearings. Were there such provision, all semblance of order in legal proceedings would be lost, and the case, as well as the issues and expenses, would be totally removed from the control of the parties.

The only reasonable and logical time and place to deal with the issue of witness fees, and to secure the evidence needed for an award of the same, is when the witness testifies. Otherwise, multiple hearings would be required, considerable unnecessary and avoidable expense would be incurred by all concerned, and witnesses would be subjected to the totally unjustifiable burden of redundant appearances.

The law recognizes this. The Legislature provided, in Section 92.151, Fla. Stat., that if a

witness serves without payment in advance, at the completion of his/her services, s/he may exhibit his/her account for compensation, for approval by the Court, and for payment by the party in whose

behalf s/he was summoned. The matter is handled right then and there. It was in this case. The Appellants are not entitled to two chances to make their case.

The argument to this point clearly justifies the Court's Order to the wife requiring her to compensate the Appellee. There is equally compelling authority upon which the Court could direct the Appellant counsel to contribute to payment of Appellee's fees.

Stated in the simplest of terms, attorneys are not permitted to make misrepresentations to or to mislead Courts. The attorney Appellant in this case did. The Court had every right to hold her responsible for her actions, and in doing so it was not necessary for it to rely upon or to resort to any "inherent powers".

Along with the subpoena, the attorney Appellant presented a Motion. In it she sought an Order to Show Cause against Appellee. Attorney Appellant asserted that, as of that time, December 1997, Appellee:

1) had "an obligation to assist her client in complying with court orders and in effectuating the transfers agreed upon by the parties";
2) had failed to do so; and
3) had offered no explanation for such failure.

Appellant counsel asked the Court to Order Appellee:
A) "to comply with the transfer of documents ordered";
B) to tender the original note and mortgage;
C) to enter an Order to Show Cause against Appellee for her "failure to ensure compliance with court orders".

At the time the Appellant attorney presented that Motion, she knew the Appellee did not have the documents; she knew the Appellee had neither a client, nor an obligation as alleged. She knew

that there was no responsibility on Appellee which Appellee had not met. Her allegations to the contrary were false, and she knew them to be false when she made them.

Moreover, the attorney Appellant knew the Court lacked jurisdiction over the Appellee, that the Court could not Order the Appellee to transfer any documents, and there was no Order on which Appellee could be held in contempt. Appellant counsel's novel suggestion that the Court could Order Appellee to show cause why she should not be held in contempt for her alleged failure to ensure compliance with Court Orders is so totally divorced from reality that no more need be said about it.

Appellant attorney knew her Motion was baseless when she filed it. It could have had no purpose other than harassment. The award against her can and should be sustained on that basis.

Although the Court might easily end its review of this case on such reasoning, it is doubtful that it granted certiorari only to dispose of the case in summary fashion. It is thought that the Court must have desired and intended to go beyond merely sustaining the Order, to address the underlying, and considerably more important, issue of "inherent authority", that being the basis of the District Court's ruling, and it is to that issue that the Appellee now turns.

The Appellant attorney's actions in this case were irksome, inconsiderate, unnecessary, and professionally discourteous. She exercised bad judgment. She imposed upon and burdened Appellee for no good reason. While all would probably agree that such actions are inappropriate, not everyone would say they should form the basis for imposition of sanctions, and even those who would agree that sanctions might follow, would not be in accord

as to which Court might have the authority to impose the same, or the standards by which such conduct should be judged. The question is: does each and every Court have the power ("inherent authority") to discipline counsel for actions of the type identified.

Appellee respectfully submits that the answer to that question is, should be, and must be, no.

Appellant correctly observes that Article V, Section 15, of Florida's Constitution vests exclusive jurisdiction over the discipline of lawyers in The Supreme Court. Without going into the reason for such provision or the history behind its adoption, both of which Appellants have covered well, Appellee accepts the provision as a given, and submits that it means exactly what it says. Under the Constitutional scheme of things, The Supreme Court has "exclusive jurisdiction to regulate ... the discipline of persons admitted (to the practice of law)."

The Supreme Court has implemented the Constitutional grant of authority through a comprehensive set of rules regulating The Florida Bar. Those rules reserve unto the Supreme Court, its ultimate decision-making power over the regulation and discipline of counsel. They establish a very definite structure and a fixed set of procedures for disciplinary actions. They include standards and criteria by which attorney conduct may be judged.

Whether one agrees with the Rules or not, they exist, and at least they provide some degree of due process in the procedure.

Rule 3-3.5, of the Rules Regulating the Florida Bar contains a limited delegation of authority to the Circuit Courts to act with respect to certain aspects of lawyer discipline. Significantly, however, the Supreme Court's ultimate decision-making authority is not delegated. The Rule provides that the jurisdiction given to the Circuit Courts lasts only until the final determination of the cause. The final determination continues to be made by The Supreme Court.

The powers granted to Circuit Courts to act with respect to lawyer discipline are exercised in accordance with Rule 3-7.8, R. Regulating Fla. Bar. This case was not brought under the partial delegation of authority. The procedures required under the Rule were not followed. Nevertheless,

those procedures are important to this Court's decision in the instant situation in that they clearly

envision an absolute right to review in The Supreme Court.

Subsection (e) of Rule 3-7.8, provides that a respondent attorney may appeal from a judgment entered by a Circuit Court. Such an appeal is brought and handled under Rule 3-7.7, R. Regulating Fla. Bar. Review under 3-7.7 is a matter of right. If a disciplinary case is properly presented to The Supreme Court in accordance with that Rule, it will be reviewed before any discipline is imposed. This is in contrast to the circuitous, protracted, and uncertain review where the lower Courts act pursuant to the so-called "inherent powers".

Recent history reveals that review of the "inherent authority" cases is spotty and inconsistent. The primary way in which they are brought up to this Court for review is by petition for certiorari. Such writ is entirely discretionary. If it is not granted, there is effectively no review available, and this is contrary to this Court's promises and intentions when The Bar was integrated. Petition of Florida State Bar Ass'n. et al., 40 So.2d 902 (Fla. 1949).

One such case arose not long ago. In it, a lawyer was sanctioned by a Circuit Court Judge under his so-called "inherent authority". In actuality, the lawyer was not guilty of what the Judge found. The facts set out in his decision, the ones upon which he allegedly made his ruling and determined to punish the lawyer, were not the true and actual facts in the case. Because of the way in which the case was conducted, however, it was never possible for his decision to be reviewed by anyone.

The lawyer in that case was unjustly subjected to a totally humiliating experience. She was put through a process in which there were no procedural safeguards; there were no rules or standards. The lawyer suffered egregious personal, financial, and professional injury, entirely at the whim of

a lower Court Judge, whose actions were completely arbitrary and capricious. Yet, because the

matter was supposedly encompassed by the Judge's "inherent powers", review was never possible.

The rest of the story about that other case is that the Judge who disciplined the lawyer was himself, almost immediately thereafter, suspended and removed from the bench for misconduct and gross abuse of his position. He has been afforded every conceivable right and procedural benefit. His case has been and continues to be subjected to review at several levels and by any number of different persons, panels, and bodies. There is not a single aspect of the proceedings against him which has not been reviewed ad nauseum.

No one individual should have the power to destroy the life and professional career of another without there being some system of checks and balances. Unfair and unjust things happen. Wrong decisions are sometimes made. That is why appeals exist. Where there is in effect no review and no appeal, totalitarianism and abuse flourish.

If the trial Court in the case which is here before this Court is found to have exercised "inherent power" to discipline the Appellant attorney, Appellee concurs that it wrongfully intruded upon The Supreme Court's exclusive jurisdiction.

CONCLUSION

On the particular facts of this case, the lower Court's Order can and should be sustained, but not as an exercise of any inherent powers. The Order can be upheld as a mere determination of counsel's and the party's obligation to compensate their witness and to shoulder the consequences of their own conduct.

The Order is not proper, however, if it was an exercise of the trial Court's "inherent authority" to discipline attorneys. Such authority does not and should not exist.

This Court should seize upon this opportunity to address the so-called "inherent authority" cases and to restore order and fairness to the same. Any disciplinary action against an attorney must

be predicated upon clear, known standards; it must be conducted within an established structure and pursuant to definite procedural rules; it must include sufficient safeguards to prevent injustice and abuse; there must be an absolute right of review in The Supreme Court afforded.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY THAT to the best of my knowledge and upon information and belief, the size and style of type used in the instant Answer Brief is 12 point Courier New, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served by U. S. Mail, with proper postage affixed, upon John P. Fenner, Esquire, 2300 Glades Road, Suite 203 East, Boca Raton, Florida 33431, this 15th day of November 1999.

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