IN THE SUPREME COURT OF FLORIDA

SHERRIE LLEO ABRAHAM,

Petitioner,

Case No. 95,799
Third DCA No. 98-1939

v.

GEORGE ABRAHAM,

Respondent.
_____/

MAIN BRIEF ON THE MERITS OF ABRAMS' FIRM

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PREFACE AND TYPE CERTIFICATION

The following will be used:

The former husband will be referred to as “husband”

The former wife will be referred to as “wife”

The law firm of Abrams, Abrams & Etter, P.A. will be referred to as “the Abrams’ firm”

The record below was provided by appendix. References in this Brief to the record will be designated as follows: references to the appendix filed by the former Husband shall be designated (AG pg.) and references to the Appendix filed by the Abrams’ firm will be referred to as (AAE pg.)

This Brief is typed in Times New Roman, a proportional font, 14 point.

STATEMENT OF THE FACTS AND CASE

This underlying cause was a dissolution of marriage action. In connection therewith, the wife applied to the court for temporary relief and, on February 14, 1997, the trial court entered its order awarding temporary relief (AG 1) in which it awarded the wife combined alimony and child support, ordered the husband to pay certain bills, and awarded the wife temporary attorney's fees and costs. The attorney's fees awarded were "for the wife" and "on behalf of the wife" and were to be paid directly to the wife's attorneys the Abrams' firm.[1] The husband paid a substantial portion of the fees ordered to be paid by him. He appealed from this order, and the third district reversed and remanded, which remand, in essence, required a new hearing on the amount of temporary attorney's fees to which the wife was entitled. ***Abraham v. Abraham***, 700 So. 2d 421 (Fla. 3d DCA 1997). This court also denied the wife final appellate attorney's fees, although the trial court had previously awarded the wife $5,000 in interim fees, which the husband had paid (and for which he had not sought review by motion.) On November 10, 1997, a status conference lasting more than 2-1/2 hours was held before the Honorable Jennifer Bailey (who was the judge at the

[1]The Abrams' firm subsequently withdrew as attorneys for the Wife and she was thereafter represented by other counsel.

time)[2] at which status conference, the time and methodology of scheduling a hearing on the remanded issues of the wife's application for temporary support and temporary attorney's fees was raised and discussed at length. No hearing was, in fact, scheduled on the remanded issues, as Judge Bailey was recused and never entered an order on the status conference hearing. Subsequently, the Abrams firm was replaced by other counsel and this matter was settled by the parties without their participation. The Third District, in ***Abraham v. Abraham,*** 700 So. 2d 421 (Fla. 3d DCA 1997), never found that the wife was not entitled to temporary attorney's fees, but rather that the manner in which the fees were calculated by the trial court was in error. The matter was remanded for consideration of a proper temporary attorney's fee.

After the temporary order was reversed and remanded, the husband filed his motion for disgorgement seeking return of temporary support and attorney's fees he had paid and, after the case was settled by the parties in mediation, he filed his amended motion for disgorgement in which he abandoned his claim for return of temporary support paid to the wife, but still sought return of attorney's fees paid (AG

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[2]The trial judge who rendered the order appealed from herein was the fifth judge on this case. The husband requested and received disqualifications from Judges Gersten and Taylor, the wife requested disqualification from Judge Bailey and Judge Fierro disqualified himself.

22 and 23-24). The motions make reference to return of fees "incurred by the Petitioner [wife]" to which "the wife was not entitled." At no time in these proceedings was the former wife's law firm of the Abrams' firm made a party to these proceedings, nor did said law firm act in any capacity other than as counsel for the wife. The only parties to this litigation were the husband and the wife, and the benefits and obligations at issue related solely to the dissolution of their marriage. After hearing, the husband's motions were denied (AG 68). The Abrams' firm filed claims of charging lien in this cause (AAE 3,4 and 5) over which the court retained jurisdiction (AAE 6). Included in the claims for charging lien is the allegation that the husband and wife conspired to create a settlement designed to defeat a claim for liens by said law firm (by structuring things as support and not distribution), and that because the husband and wife settled their case with knowledge of the law firm's charging lien, that the husband as well as the wife should be responsible for payment of the lien. The claim of the Abrams' firm is still pending before the trial court. In the event that a court would order restitution of fees paid by the husband to the Abrams' firm, the sums ordered to be repaid would constitute part of the fees sought by said law firm against its former client, the wife.

The Third District Court of Appeal heard argument in this case and entered its opinion in March of 1999. ***Abraham v. Abraham***, 730 So. 2d 746 (Fla. 3d DCA

1999) Treating the appeal as a motion to enforce mandate, the lower tribunal held that since they had reversed a portion of the temporary fees directed to services expended in a domestic violence proceeding filed and litigated prior to the dissolution of marriage action, the Husband's motion for restitution was erroneously denied as to the payment made directly to the attorneys (although the remaining restitution was found to be moot as a result of the settlement.) The Court found that there was contrary authority, but reversed based upon "law of the case."

The Husband filed a Motion for Clarification or Rehearing seeking to clarify the Order to require repayment of all fees, including the temporary appellate fees, which was denied.

This review timely follows.

SUMMARY OF ARGUMENT

The sole basis for the Third District's decision that resitution was necessary from the Abrams firm to the Husband was the fact that the payment was made directly to the firm as opposed to the Wife. That distinction is without substance, and to permit it to stand would be to eviscerate the provision in F.S. 61.16 that permits a lawfirm to enforce a fee award in its own name. It is abundantly clear that the fees were paid for the Wife's benefit- and therefore were the equivalent of an award to her. If this logic were to stand, and a portion of temporary support were made payable to a mortgage company or a car financing company or a credit card company, would those entities be subject to disgorgement if the temporary support were to be reversed? Under the "logic" of the underlying opinion, the answer would be yes.

The trial court was correct in denying the husband's motion for disgorgement. The Husband conceded that had the check been made payable to the Wife and endorsed to the lawfirm, no disgorgement order would have been appropriate. The fact that the check was written to the lawfirm for the benefit of the Wife does not and should not present a rational basis to change that result.

The law is well-established that restitution of attorneys' fees paid to a law firm in connection with an action later reversed on appeal or otherwise set aside is not liable for restitution (even if the party is liable for restitution) when the law firm did

not engage in any known wrongdoing. There have been no allegations whatsoever that the Abrams' firm engaged in any wrongdoing or acted in any capacity other than as attorneys for the wife.

The appellate court did not rule that the wife was not entitled to any temporary attorney's fee, but rather the trial court, in awarding a temporary fee, took into consideration matters it should not have, and remanded for a new hearing. After the reversal on appeal and after the husband filed his motion for disgorgement, the parties settled their case, and the Abrams' firm was not a party to the settlement. There is now no means to schedule a pendente lite hearing after final judgment to determine what would have been a proper temporary attorney's fee to the wife.

The court had discretion, based upon all the equities of the case to deny the husband's motion, and the court did not abuse its discretion.

ARGUMENT

POINT I

AN AWARD OF ATTORNEY'S FEES MADE PAYABLE TO A LAW FIRM ACTING IN GOOD FAITH AS A REPRESENTATIVE OF A PARTY AND AWARDED ON BEHALF OF THAT PARTY IS NO DIFFERENT THAN AN AWARD MADE PAYABLE TO THAT CLIENT, AND AS SUCH IS NOT SUBJECT TO DISGORGMENT WHERE DISGORGMENT WOULD NOT HAVE BEEN MANDATED FROM THE RECIPIENT PARTY

The only attorneys' fees at issue in these proceedings arise from Section 61.16, Florida Statutes, which provides, in part that

> The court may from time to time, after considering the financial resources of both parties, **order a party** to pay a reasonable amount for attorney's fees, suit money, and the cost **to the other party** of maintaining or defending any proceeding under this chapter including enforcement and modification proceedings and appeals . . . (Emphasis added).

The sole involvement of the Abram's firm in this case was as attorney for the wife. The gravamen of the husband's argument in the Third District, and the basis of the Third District's opinion, is that because Section 61.16 permits a court to order that the attorney's fees be paid directly to the wife's law firm, which firm can enforce the order in its name, that this section authorizes a court to require the law firm (even

after the husband and the wife settle their case as to all issues between them and generally release each other from liability) to return the funds paid to said law firm for the benefit of the wife.[3] **There is no issue whatsoever in this case that all fees awarded to the wife and paid by the husband were for the benefit of the wife and not for the benefit of the Abrams' firm.**

Therefore, the husband should not have been seeking return of attorney's fees from the Abrams' firm, but from the wife, since she is the party and it was she who was awarded the fees. This court recognized this fact in its order reversing the award of fees by making reference to "attorney's fees to the wife for services rendered by her lawyers." ***Abraham v. Abraham***, 700 So. 2d 421 (Fla. 3d DCA 1997).

In a case cited by Judge Cope in his dissent, ***Wall v. Johnson***, 80 So. 2d 362 (Fla. 1955), a paternity case that was reversed by the Supreme Court as having been barred by the statute of limitations. The trial court denied the putative father's request for restitution of attorney's fees paid to the mother's attorneys, and this Court denied certiorari, thereby affirming the trial court. In that case, after examining the cases

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[3]This section was added to the statute to protect an attorney when both parties settled their case or reconciled and tried to defeat the legitimate rights of a spouse's attorney to his or her fees. ***Knott v. Knott***, 395 So. 2d 1196 (Fla. 3d DCA 1981); ***Krauss v. Krauss***, 622 So. 2d 102 (Fla. 3d DCA 1993).

cited by the putative father seeking restitution, the court found

> The rule governing restitution in cases like this is well stated in 5 Am.Jur., Attorneys At Law, Section 147 (Cumulative Supplement 1954, page 41), as follows:
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> "The general rule is that even though the attorney retains as payment for his services, or for some other debt owing by the client, under an agreement with the latter, part or all the proceeds of a judgment recovered by the client which is subsequently reversed, he is not obliged to make restitution to the judgment debtor provided he acted in good faith in prosecuting the action in which the judgment was recovered."
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> * * * *
>
> There is not the slightest suggestion here that there was any fraud or contempt in securing the order under which the funds in question were paid to [mother's attorneys] and by them paid to their client, nor is there any showing whatever that [the attorneys] did not act in good faith in prosecuting the action wherein the judgment sought to be set aside and restitution made was prosecuted. They [the attorneys] have not been made parties to the cause and no process has been served on them.

The case closest to the facts sub judice was also cited by the dissent. In ***Martin v. Lenahan***, 658 So. 2d 119 (Fla. 4th DCA 1995), the law firm of Grossman and Roth, P.A. represented the plaintiff in a medical malpractice action. After a jury

verdict, the case was settled for $2,250,000, and from this settlement, the law firm received $750,000 in attorney's fees. An action was subsequently filed seeking relief from judgment based on the fraud of the plaintiff in his claim for injuries, and the plianitff was convicted of criminal charges. As in the instant case, the rule 1.540 action was subsequently settled, and the settlement specifically provided that it would not affect the defendant's and insurer's rights to seek restitution from the pliantiff's attorneys. Grossman and Roth, P.A. was not a party to the settlement nor the Rule 1.540 action. The trial court denied restitution of attorney's fees from the lawfirm of Grossman and Roth, P.A. to the defendants. The Fourth District phrased the issue before the court as

> whether an attorney who has acted in good faith in conneciton with the judgment recovered but later set aside is obligated to make restitution.

Citing ***Wall v. Johnson***, 80 So. 2d 362 (Fla. 1955) as authority, the trial court's decision to deny restitution was affirmed.

> In accordance with ***Wall***, Grossman and Roth, P.A. should not be liable for restitution, as there is no evidence of any complicity in the fraud perpetrated by the Lehahans [plaintiff]. See also ***Pickard v. Maritime Holdings, Corp.*** 161 So. 2d 239 (Fla. 3d DCA 1964) (attorney acting under employment, at direction of his client and in legal manner,

> is not liable for the consequences of his client's actions); ***Baum v. Heiman***, 528 So. 2d 63 (Fla. 3d DCA 1988) (restitution is appropriate against the party who prevails under the erroneous judgment not third parties); ***Sundie v. Haren***, 253 So. 2d 857 (Fla. 1971) (as to nonparties, a purchase at an execution sale pursuant to a judgment afterwards reversed is final). As Grossman and Roth, P.A. was not a party to the malpractice proceeding which resulted in the judgment now set aside, but rather a third party paid for valuable services who did not engage in any known wrongdoing, it should not be liable for restitution.

In the case, sub judice, there has never been an issue rasied that the Abrams' firm secured the order reversed on appeal by fraud, error, deception or any wrongdoing. It merely acted as attorneys for the wife. Nor has any court determined that the wife in this action was not entitled to a temporary attorney's fee award. In fact, had the case gone forward on remand, the temporary attorneys fees could easily have been higher.

Furthermore, considering the financial resources available to the parties in the case, it would be inequitable to require restitution. The husband's financial affidavit shows a monthly income of $50,268 and net worth of $4,055,667 (AAE 1). The wife's financial affidavit shows income of $-0- and net worth of $ unknown (AAE 2).

Prior to settling their case, both the husband and wife were aware that

attorney's fees were due and outstanding to the Abrams' firm and were aware that said law firm timely filed a notice of claim of charging lien. They knew that this court had reversed the award of temporary attorney's fees which was never heard on remand, and that it was still an outstanding issue in the litigation. The husband's first motion for disgorgment was filed and pending as well. In the event that restitution of fees would be proper in this case (and it is respectfully submitted that it is not), then the wife should be responsible to the husband for said restitution. But the dissolutoin of marriage action between the parties has been settled and neither party has filed to set aside the agreement for any reason. The trial court accepted their agreement and incorporated it in its final judgment of dissolution of marriage. The agreement made no provision for the wife to repay to the husband amounts he paid her for temporary support or temporary attorney's fees which were reversed on appeal, and provided that the husband would contribute $15,000 towards the wife's professional fees to be paid to wife's then present counsel, and that he would "have no further responsibility for wife's professional fees or costs. . ." The agreement between the husband and wife further provided that "nothing in this agreement shall prevent either party from seeking a return of fees and costs paid to the Abrams' law firm or from contesting any claims of said law firm." As in ***Martin v. Lenahan***, Abrams' firm was not a party to the mediation agreement. It is obvious that the parties were attempting to settle their

case to the detriment of attorney's fees owed to the wife's former law firm.

It must be kept in mind that the Third District in ***Abraham v.Abraham***, 700 So. 2d 421 (Fla. 3d DCA 1997) did not find that the wife was not entitled to an award of temporary attorney's fees, but rather remanded to conduct a new hearing on the proper amount of that fee. If the parties have already settled their case, how could such a hearing take place? The husband has taken the position he is entitled to restitution of fees paid without a hearing to determine the proper amount of fees that he should have paid. He wanted EVERYTHING returned even if part was clearly within the bounds of the lower tribunal's discretion.

In the event that the Abrams' firm is required to return fees it received from the husband pursuant to orders of the trial court later reversed and remanded for a new hearing, without such a hearing taking place because the parties settled their case, said law firm would suffer irreparable and inequitable harm. How would said law firm require the trial judge to conduct a hearing on temporary attorney's fees legitimately due from the husband and wife when the husband and wife have already settled their case? If the law firm is required to reimburse the husband and then obtains the re-reimbursement from the wife as part of its charging lien, how does this affect the settlment between the husband and the wife?

More importantly, if this opinion is allowed to stand, then it would completely

remove the ability of a lawfirm to have a temporary fee (or any fee potentially subject to appeal for that matter) directed to the attorney's name. Each attorney would have to have the check drawn to the client and endorsed. What end does that serve except to emasculate the protection statutorily given to attorney's by F.S. 61.16 that permits the fee to be awarded to a party to be directed to the firm? And, what type of precedent does this set? If a temporary support award includes as an incident of support payment to a mortgage company, credit card company, bank or car finance company, might those entities be brought in to "disgorge" if the temporary support was reversed and the parties settled with the express reservation to preserve the claim for disgorgement even though the payments were for the benefit of a party against whom all other claims were waived? That is the logical extension of the decision of the Third District- and it simply doesn't work.

It is significant to note that as a result of the settlement the Third District found that the remaining restitution issues were moot. The Third District correctly noted that all claims between the Husband and Wife were resolved. As the fees paid on behalf of the Wife were and remain the Wife's responsibility- then those fees should have been a part and parcel of the settlement.

CONCLUSION

For all reasons set forth in this brief, the decision of the third district court of

appeals should be quashed with directions to reinstate the determination of the lower tribunal that no disgorgement of the attorney's fees paid to the Abrams lawfirm is required.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was mailed to ARNOLD GINSBURG, ESQ., GINSBURG & SCHWARTZ, 410 Concord Building, 66 West Flagler Street, Miami, FL 33130, counsel for George Abraham, to PAUL H. BASS, P.A., 201 Alhambra Circle, #801, Coral Gables, FL 33134, counsel George Abraham, to PAUL LOUIS, ESQ., 169 East Flagler Street, Suite 1125, Miami , FL 33131, counsel for Sherrie Lleo Abraham this 10th day of December, 1999.

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