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IN THE SUPREME COURT OF FLORIDA

Case No. SC21-1564
TFB File 2018-50,796 (15A)

THE FLORIDA BAR,

Complainants,

v.

CURTIS ALVA,

Respondent.

CORRECTED REPLY BRIEF OF RESPONDENT CURTIS ALVA

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I. THE BAR DOES NOT DISPUTE THAT THE ROR CONTAINS SIX CRITICAL ERRORS

The Report of the Referee ("ROR") recommends suspension on the basis that Respondent pursued relief for a breach of the Engagement Agreement's ("EA") requirement of payment within 10 days, but that Respondent knew the breach never happened because payment to Respondent was "clearly made timely." Respondent argues that the Referee erred, and payment was not clearly made timely. In its Answer Brief ("AB"), the Bar elects not to dispute the Respondent's argument that the Referee's "clearly timely payment" conclusion was in error.

The Respondent also argues that the erroneous conclusion of clearly timely payment was the predicate for each, and every finding of the guilt recommended in the ROR and was also the predicate for the suspension recommended. Bar also elects not to dispute that the clearly timely payment error was the predicate for each finding of guilt and the suspension recommended.

The ROR also concluded, without any evidence pursuant Rule 4-1.5(b) nor any expert opinion pursuant Rule 4-1.5(b), that the fee was unreasonable, excessive, overreaching, or unconscionable. Respondent argues that that it was error to reach that conclusion without referring to

Rule 4-1.5(b). The Bar does not dispute that no evidence or opinion regarding the factors in that Rule was offered by the Bar.

The ROR also accepted and relied upon the opinions of Mr. Betensky that the fee was excessive, overreaching, and unconscionable. Respondent argues that Betensky made more than a dozen material errors in his analysis, that invalidate his opinions. IB 31-33. The Bar does not dispute any of the errors attributed to his analysis and opinions.

The ROR recommended that Respondent pay $25,000 in restitution for the retainer that was held in trust, despite the fact that repayment of the $25,000 had already been ordered by the Circuit Court. Respondent argued that that recommendation was in error because identical relief had already been ordered, among other things.

The Bar does not dispute that the Supreme Court should not accept that recommendation. The Bar acknowledges that such relief has been mooted by the relief ordered by the Circuit Court.

The Bar also does not dispute that there is a line of cases in Florida, which permit the victim of a willful, material breach of contract to nullify the contract and seek, as a remedy for the breach, payment for the fair value of all of the services provided pursuant to the nullified contract, beginning as of the day before the contract was entered.

This is the line of cases that Respondent researched and relied upon before the issuance of the February 26 Invoice[1]. T4 76:20-78:21. Respondent argues that it was error for the Referee not to recognize the nullification and restitution available to victims pursuant to those cases. The Bar does not dispute that pursuant to those cases a victim can go back to the very first invoice issued in a case and recalculate the fees due for that work at a rate equal to the fair value of that work, even if it increases the fees due, under every already paid invoice, provided that a credit is given for the full amount of all fees already paid. The Bar argues, however, without citing any testimony or documents, that Respondent instead purported to follow an implied contract theory. AB 21-24.

In addition to these undisputed legal errors in the ROR, the Bar also does not dispute certain critical facts submitted by Respondent, including the facts that just before Dr. Colorchip stopped paying invoices, in December of 2017, Dr. Colorchip hired replacement counsel but did not disclose to Respondent that replacement was imminent, or even contemplated, and that in between the time that replacement counsel was hired and the time that the clients disclosed the replacement, a

[1] At trial, and in the Initial Brief, "February 26 Invoice" refers to the Invoice issued on February 26, 2018, in the amount of $126,834.95. In the AB, the Bar refers to that Invoice as Florida Bar Exhibit 5, or as the "126,650.00. Invoice." AB 22.

month later, they ran up a $25,000 bill with Respondent. IB 5.

II. WITHOUT CLEARLY TIMELY PAYMENT, THERE IS NO "KNOWING VIOLATION" OF ANY ETHICS RULE.

Despite the undisputed, critical errors in the ROR, the Bar still asks the Supreme Court to accept the recommendation of the Referee that the Respondent be suspended. In order for a bar member to be suspended, the member must knowingly engage in a violation that causes harm to a client. Standard 7.1(b).

The ROR purported to satisfy (albeit erroneously) the "knowing violation" element of Standard 7.1(b) with the conclusion that payment was clearly timely. In fact, the "clearly timely" conclusion was the predicate for the "knowing violation" element for every recommendation of guilt in the Report. IB 20-21.

The Referee reasoned that if payment was clearly timely, then Respondent knowingly made a false claim that Dr. Colorchip had breached the EA. If there was no basis for claiming breach, then Respondent knowingly made a false declaration of nullification, and a false claim for restitution. Id.

If payment was clearly timely, then Respondent knowingly breached the EA, which knowing breach is the Referee's sole grounds for finding that the fee was clearly excessive.

Additionally, if payment was clearly timely, then Respondent knowingly created a bad faith "dispute" about ownership of the retainer funds, which would not trigger the protections of the safe harbor in Rule 5-1.1(f).

The clearly timely conclusion was also the basis for the Referee's conclusion that Respondent's acts were no different than grand theft.(ROR18-19).

Without the erroneous conclusion that payment was clearly timely, there is no other trial evidence to satisfy the Bar's burden of proving the "knowingly" element of Standard 7.1.(b).

III. PAYMENT WAS NOT TIMELY

Nevertheless, the Bar still asks the Supreme Court to suspend Respondent—on the basis that payment was timely, even if it wasn't "clearly timely," and on certain other bases.

The Bar first argues that payment was timely because Dr. Colorchip had made attempts to have a revised, lower invoice issued. If a revised invoice had been issued, then the 10-day deadline would have restarted on the new issuance date and Dr. Colorchip would have paid within the new 10-day period. AB.29-30. However, no lower amount was agreed to, and no new invoice was issued, so no new 10-day period began.

The Bar's second argument is that on February 27, Dr. Colorchip sent an email stating that it had approved payment in full. AB 27. The Bar does not explain why an approval email on February 27 satisfies a payment deadline that passes on January 19.

IV. THERE IS NO EXTENSION, LEGAL EXCUSE, OR LEGAL JUSTIFICATION FOR DR. COLORCHIP'S UNTIMELY PAYMENT

The Bar does make multiple arguments that sound in excuse or justification, but the Bar never asks the Supreme Court to find excuse or justification and neither defense is meritorious. Nor does the Bar show how dispute over excuse or justification, would satisfy the "knowing violation" standard. The Bar only asks that the Supreme Court find that payment was timely.

The Bar admits there was no extension requested or granted. In fact, Dr. Colorchip refused to even discuss an extension. Appx. 96. The Bar then argues Dr. Colorchip only was asking questions and negotiating for a lower amount. AB 27. However, Dr. Colorchip was also NOT paying the invoice. Respondent has never said that asking questions was a breach or that negotiating the amount was a breach. However, not paying timely was a breach.

There is a dispute between the parties about whether the questions and negotiations were in good faith, but that dispute goes solely to the

issue of whether Respondent had a colorable basis for notifying a former client that bad faith non-payment of an invoice can be a basis for seeking treble damages.

V. NULLIFICATION WAS JUSTIFIED

The Bar also argues that even if payment wasn't timely, the belatedness wasn't willful. AB 26-27. However, willfulness requires only that the nonpayment be deliberate, and there is copious evidence that it was deliberate. IB 9-11.

The Bar also argues that it wasn't material. AB 30-31. However, Respondent was deprived of $25,000, and that deprivation remained. Only after Respondent nullified the EA was the $25,000 paid, but by then, the debt was $126,000.

VI. RESPONDENT PURSUED NULLIFICATION AND RESTITUTION THEORY—NOT AN IMPLIED CONTRACT THEORY

The Bar argues that Respondent pursued an nullification-implied contract legal theory, which was improper because the law will not imply a contract where one already exists, such as the engagement agreement in place here. AB 21-23. Moreover, the Bar argues, the pursuit of this incorrect legal theory satisfies the "knowing violation" requirement of Standard 7.1(d), because Respondent has substantial experience practicing law and knew or should have known that a legal theory of

nullification and implied contract was completely unsupported by the facts or the law. AB 16.

The Bar's nullification-implied contract argument is a straw man. The Bar builds specious legal theory—nullification-implied contract—and then forcefully knocks it down: "It has no support in the facts or the law!" "It is so baseless," the Bar exclaims, "that a bar member can be suspended for a year for pursuing it!"

However, there is no testimony or document to show that Respondent ever pursued a nullification-implied contract theory. The Bar argues that Respondent's theory was that he could nullify the contract for breach, and then exclaim, "Aha! There is no contract, but I provided services, which enriched Dr. Colorchip, so the law should imply a contract and give me a higher rate."

This argument, in fact, contradicts all the relevant trial testimony and all the contemporaneous documents. There is undisputed testimony that after Respondent was terminated and Dr. Colorchip was no longer his client and before the February 26 Invoice was issued, Respondent researched nullification and restitution and found the cases cited to the Referee, T4 12:12-16:1788:15-92:13; T8 41:12-45:5, and now repeated to the Supreme Courtin the IB. IB 24-28; T4 76:20-78:21. Those cases

undisputedly provide that nullification is available to a victim of breach of contract if the breach is willful and material. IB 25. They further undisputedly show that such a victim may elect to pursue either damages for breach, specific performance, or restitution. IB 27-28. And those cases show that if the victim pursues restitution, the measure of the restitution is the fair value of the services provided, beginning from the day before the contract was made and continuing to the time of the nullification, minus a credit for any payments already made. IB 26-28.

The additional evidence, which the Bar also does not dispute, is that there is a contemporaneous email from Respondent to Dr. Colorchip stating that if Dr. Colorchip does not pay at least the undisputed portion of the December invoice, then Respondent will nullify the contract and demand payment for the fair value of all of his services provided during the time period of the contract. Appx. 72-73.

The Bar, instead, engages in a play on words. The Bar argues that the February 26 Invoice is a "quantum meruit" invoice, therefore it must be issued pursuant to an implied contract theory. That is incorrect. Quantum meruit can mean "the value of the services rendered" *Baruch v. Giblin, 122 Fla. 59 (1935)* at *63-64, and thus it is method for measuring the size of a remedy. *Ballard v Krause,* 248 So.2d 233 (Fla. 4th DCA

1971) at *234-235. It is also a nickname for an implied contract theory, but that is not it's only meaning. Quantum meruit, as a measure of restitution, is also a term used by Florida courts in cases where no implied contract is alleged *Ballard v Krause*, 248 So.2d 233 (Fla. 4th DCA 1971) at *234-235. Rather, a breach of contract is the basis for the remedy. IB 26.

The Bar offers no explanation as to why Respondent would pursue an implied contract theory, because then, as the Bar explicitly concedes, his higher rate would only apply to the December invoice, *Ballard v Krause*, 248 So.2d 233 (Fla. 4th DCA 1971); *Forbes v Prime General Contractors, Inc.*, 255 So.3d 448 (Fla. 2d DCA 2018); *Ocean Communications, Inc. v Bubeck, 956 So.2d 1222* (Fla 4th DCA 2007), instead of all eighteen invoices as it does under a restitution theory.

The Bar admits, as it must, then whenever it uses the term "quantum meruit" in its brief, it means "an implied contract remedy to address unjust enrichment." AB 21-22. Thus when the Bar says that Respondent's "quantum meruit theory is legally indefensible," AB 24, the Bar means that a theory of nullification as a basis for an implied contract is indefensible, and when the Bar says Respondent's theory of nullification and quantum meruit relief was completely unsupported by

the facts or law, AB 15-16, the Bar means that nullification as a basis for an implied contract is completely unsupported by the facts or law.

Nowhere does the Bar say, nor could it say, that nullification as a basis for restitution is indefensible, or unsupported by law, or unsupported by our facts, and nowhere does the Bar say that pursuing nullification and then restitution, as Respondent did here, is a violation of any of the ethical rules.

VII. BREACH VICTIMS CAN ELECT TO RECALCULATE THE FEES DUE TO THEM PURSUANT TO A RESTITUTION THEORY

The Bar is most strident in its arguments about the fees that were recalculated under the restitution theory, from the beginning of the representation. They call it double-billing, back dating, unilateral, grossly disproportional, retroactive, penalizing, retaliatory, strong arming and based solely upon the Respondent's belief that he should have been paid what he personally thought he was worth from the beginning. AB 15, 21-24, 25, 30.

Despite all the vitriol, the Bar never disputes Respondent's cases that show exactly when the elements of nullification and restitution have been satisfied and exactly how to measure the remedy and exactly when the time period for the remedy begins. It is not double billing; it is a recalculation of fees *Forbes v Prime General Contractors, Inc.*, 255 So.3d

448 (Fla. 2d DCA 2018);at *451; *Ballard v Krause*, 248 So.2d 233 (Fla. 4th DCA 1971) at *234-235. It is not backdating; it covers the same time period as the nullified contract. It is not disproportional or penalizing; it is limited to the fair value of the services provided. It is not retaliatory or strong arming; it is compensation for the harm inflicted on the victim by the willfully breaching party. It is not unilateral or based solely upon what the victim thinks his services are worth. It is based upon fair value.

VIII. RESTITUTION IS MOOT

The issue of the $25,000 duplicate restitution of the retainer amount, which was recommended by the Referee, no longer requires any labor by the Supreme Court because the Bar informs us of their position that the $25,000 restitution recommendation is moot. AB 34-35.[2]

IX. NO BREACHES OF CONTRACT OCCURRED UNTIL AFTER REPLACEMENT COUNSEL WAS HIRED

Just before Dr. Colorchip stopped paying invoices, in December of 2017, Dr. Colorchip hired replacement counsel, but did not disclose to Respondent that replacement was imminent, or even contemplated, and in between the time that replacement counsel was hired and the time

[2] To further update the Supreme Court on this issue, the appeal of the judgment in the civil case regarding the $25,000 retainer was resolved in the favor of Dr. Colorchip, on November 2, 2023, but Dr. Colorchip did nothing to have the Circuit Court Clerk release the $25,000 appeal bond. So, on January 8, 2024, Mr. Alva, by motion, requested that the bond be released to Dr. Colorchip. That motion was granted on January 12, 2024.

that the clients disclosed the replacement, a month later, they ran up a $25,000 bill with Respondent. IB 5.

The Bar argues that the dispute over the December Invoice in January 2018 was largely due to block billing, the size of the invoice over $25,000.00 for a single month and some time entries spaned an entire workday. However, that conclusion is contradicted by the evidence. Eighteen monthly invoices were generated and every one of them was block billed, see e.g., TFB-Ex 9, just like the December Invoice. Every one of them, except the invoice issued after replacement counsel was hired, was paid within 10 days. Moreover, six invoices were $20,000 or higher including invoices for $45,000, $44,000, and $35,000, see e.g., TFB-Ex 8, 9, and all were paid within 10 days. A review of just one of those invoices, #66 shows eight entries for 6 hours or more, all of which were paid within 10 days. TFB-Ex 9.

X. PAYMENT WAS NOT OVERLOOKED

The Bar argues that the non-payment between January 19, 2018, and February 5, 2018, was because the Invoice had been overlooked. AB.15, 24, 27. That is contrary to the evidence. On January 23, 2018, O'Rourke was already refusing to pay anything for December or January, 14 days after the December Invoice was emailed and 13 days before it

was allegedly noticed. Appx 86.

XI. THE BAR INCORRECTLY ARGUES THAT THE DECEMBER INVOICE WAS PAID IN FULL BEFORE THE FEBRUARY 26 INVOICE WAS ISSUED THUS CURING THE BREACH.

The Bar repeatedly claims that the February 26 Invoice was issued after the December Invoice was paid in full. AB 21. That is incorrect. On February 26, 2018, with still no payment made, Respondent determines to nullify the EA and demanded restitution. Appx 66-70.

On February 27, 2018, the day after the EA was nullified and restitution demanded and the February 26 invoice issued, the former clients wrote "Per Dave's advice I have issued to you full payment of the $25,040 invoice to my bank for payment yesterday." Id. Respondent replied 2 hours later, "Not sure what "payment yesterday" means, but "I'll let you know when I receive it." Appx. 64. Dan McCool replied, "As quickly as the bank processes it you should have it shortly." Id.

At trial, Dan McCool explained that what he meant by "to my bank for payment yesterday" was that he had sent a "Bill Pay" instruction to his bank, "which typically takes 10 days." Appx. 502, 606:12-19.

For this payment, it took 8 days, and on March 7, 2018, Respondent wrote, "Thanks also for sending the payment for December…" Appx. 236.

XII. THE BAR CITES NO AUTHORITY TO SUPPORT THE CLAIM THAT THE REMEDY OF NULLIFICATION AND RESTITUTION NEEDS TO BE DISCLOSED IN AN ENGAGEMENT LETTER

The Bar cites no authority to support the claim that remedy of nullification and restitution needs to be disclosed in an engagement letter.

CERTIFICATE OF SERVICE

We certify that, pursuant to and in compliance with Florida Rule Judicial Administration 2.516, this Reply Brief was e-filed via eDCA and was served via electronic correspondence and/or via US Mail on February 7, 2024, upon: Mark Lugo Mason , mmason@floridabar.com, 651 E Jefferson St, Tallahassee, FL 32399-6584 and Curtis Alva, Esq., Curtis@alvalaw.com, Law Office of Curtis Alva, 200 E 13th Street, Riviera Beach, FL 33404.

/s/ Curtis Alva

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that Respondent's Second Amended Initial Brief complies with the font requirements of Fla. R.App.P. 9.210(a)(2).

/s/ Curtis Alva