IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WARREN R. TRAZENFELD,

Respondent.
_____/

Supreme Court Case
No. SC00-2571

The Florida Bar File
No. 2000-70,234(11E)

Complainant's Initial Brief

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar served a complaint upon the Respondent on December 12, 2000. The complaint (attached hereto and incorporated as Exhibit "A") alleged *inter alia*, that Respondent did not properly advise his client, Monika Lent, of how she should properly comply with a state circuit court order. Also, there were allegations that Respondent sent a letter to a critical witness, Dietrich Kermer, threatening to take legal action if he testified.

Specifically, the said circuit court order had required Lent and her counsel, the Respondent,to provide a **complete** waiver of Lent's attorney/client privilege so that Mr. Kermer's testimony could be procured for the then pending litigation. Respondent was responsible for advising Lent to issue only a **limited** waiver. As a result of the limited waiver and Respondent having advised Kermer that he would initiate litigation against him if he disclosed client confidences, Lent's pending action against attorney Thomas Bauer and Bauer, Miller and Webner, P.A. was dismissed with prejudice. A copy of the circuit court order and the resulting opinion rendered by the 3rd District Court of Appeal in Lent v. Bauer, 710 So. 2d 156 (Fla 3rd DCA 1998), is attached as Composite Exhibit "B".

Based upon the above conduct of Respondent and the Lent v. Bauer decision, The Florida Bar initiated a file - Case No. 1998 -71,747 (11F) - against the

Respondent which resulted in the “11F” Grievance Committee’s finding of No Probable Cause (with accompanying Letter of Advice) being issued to Respondent.

Subsequent to the “11F” Grievance Committee’s finding of No Probable Cause (with accompanying Letter of Advice), Ms. Monika Lent filed a separate complaint against Respondent which resulted in The Florida Bar opening a second file against the Respondent before Grievance Committee “11E” - Case No. 2000-70,234 (11E) - which is the immediate action from which this appeal rises.

Respondent has claimed that the immediate action - Case No. 2000-70,234 (11E) - is barred by res judicata and double jeopardy. Respondent filed a "Motion for Summary Resolution" (hereinafter referred to as Respondent’s Motion for Summary Judgment) and a “Memorandum of Law” with Exhibits in support thereof (attached herein and incorporated as Composite Exhibit “C”).

Argued in support of Respondent’s Motion for Summary Judgment was the fact that in Case No. 98-71,747(11F), Grievance Committee “11F” assessed Respondent's conduct vis-á-vis Rules 4-3.4 (Fairness to opposing party and counsel), 4-4.4 (Respect for rights of third persons), and 4-8.4 (Misconduct) as opposed to The Florida Bar’s subsequent File, Case No. 2000-70,234 (11E) which assessed Respondent’s conduct vis-á-vis Rules 4-1.4(b) (Duty to explain matters

to client) and 4-8.4(d) (Conduct prejudicial to the administration of justice). See Exhibits “A” and “B” of Respondent’s “Memorandum of Law”.

A third document, which was attached as Exhibit “C” to Respondent’s “Memorandum of Law” was a "Notice of No Probable Cause and Letter of Advice to Respondent" in case No. 1998-71,747(11F), which specified no particular rule violations.

Exhibit “D” of Respondent’s “Memorandum of Law” was the deposition of the Bar's expert witness, William Scarrit, Esq., who admitted that he had no knowledge of whether the facts presented in Case No. 2000-70, 234 (11E) were different from the facts presented in Case No. 1998-71,747 (11F). (Dep. p. 22). Other than Scarrit's deposition, the Respondent offered no sworn evidence of any kind, including affidavits.

The Bar filed a Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment. The Bar pointed out that Rule 3-7.4 of the Rules of Discipline provides that the Bar may proceed with a case regardless of a No Probable Cause finding by a Grievance Committee. The precise subsection of the Rule states:

> 3-7.4(j)(3) (Effect of No Probable Cause finding). A finding of no probable cause by a grievance committee shall not preclude the reopening of the case and further

proceedings therein.

The Respondent (apparently having overlooked the rule) advanced a narrower theory of the applicable law after the Bar relied upon Rule 3-7.4(j)(3):

> Without question, Rule 3-7.4 of the Grievance Committee Procedures provides that finding of no probable cause by a grievance committee does not prevent a grievance committee from undertaking a further investigation in a matter which had been closed. Rule 3-7.4(j)(3). The express wording of the Rule itself merely states that a grievance committee may "re-open" an investigation that it has already closed, and conduct "further proceedings therein." Obviously, this is not tantamount to the situation which has occurred here, i.e., where a completely different grievance committee has initiated a brand new prosecution involving the same incident. That will the precise basis for Respondent's res judicata argument. (Emphasis added, Respondent's response to Complainant's Motion for Rehearing)

Therefore, the proposition before the Court was whether a different Grievance Committee was barred from re-considering a matter which was previously considered by an another Committee of the same judicial circuit. (Note that the Bar is merely assuming arguendo that the factual allegations before each of these Committees were the same). Respondent asserted that res judicata and "double jeopardy" barred further proceedings. The Respondent did not explicitly challenge the constitutionality of the rule which permits re-opening a matter.

The Referee granted the motion for summary judgment, but solely upon the

basis of res judicata. The Referee did not enter any finding regarding double jeopardy. The Referee's Report is attached as Exhibit “D”.

The Bar filed its Petition for Review on November 2, 2001.

SUMMARY OF ARGUMENT

The Referee erred as a matter of law by granting summary judgment to the Respondent. Res judicata does not apply to a Grievance Committee. This Court has clearly held that for res judicata to apply there must be a final judgment from a court of competent jurisdiction in an adversarial proceeding.

Rule 3-7.4(j)(3) of the Rules of Professional Conduct specifically permits reopening a matter previously considered, when there is a no probable cause finding. Furthermore, this Court has held that a Grievance Committee's function is analogous to that of a grand jury in which the doctrine of res judicata does not apply.

Respondent claimed that courts from several jurisdictions have applied res judicata to Grievance Committees. Respondent, however, submitted as authority only two misleading cases from Connecticut. One case, State Wide Grievance Committee v. Dey, 1998 WL 707, was an unreported trial court case that found that res judicata did not apply. The second case as referenced by Respondent, Statewide Grievance Committee v. Presnick, 577 A.2d 1058 (Conn. 1990), concern Connecticut's "Statewide Grievance Committee." The primary and fundamental distinction between the Florida Grievance Committee and the Connecticut Grievance Committee being that the later did not operate in the same manner or

capacity as Florida local Grievance Committees in that the Connecticut Committee actually presented and litigated its cases at trial. See Presnick at 1059. As such the Presnick decision pertains to an undisputed principle which is that if a case has been fully litigated in a court of competent jurisdiction, and is final, res judicata may apply.

Likewise, the Dey case, as referenced by Respondent, merely stands for the proposition that a matter which is fully litigated and adjudicated may be subjected to the doctrine of res judicata. Both cases, of course, are immaterial and irrelevant to the instant matter.

While Respondent presented no authority which actually supported his position, The Florida Bar advanced caselaw from other states which have reasoned that res judicata does not apply to a Grievance Committee since the Grievance Committee proceedings are legally analogous to a grand jury proceeding. Those states include, *inter alia*, Texas, New York, and Nebraska.

Furthermore, this matter was not ripe for consideration by a summary proceeding. Respondent did not prove the non-existence of any disputed material facts, the movant's burden under Florida law. Reasonable inferences clearly negated Respondent's position, and Florida law requires that the Court accept those inferences in favor of the non-movant. Furthermore, summary judgment only

applies when the facts are clearly crystallized.

The facts were not crystallized by Respondent's reliance upon the deposition of the Bar's expert witness. Respondent did not establish by undisputed evidence that he was entitled to Summary Judgment. Many reasonable inferences existed which required denial of the Motion for Summary Judgment.

I

ARGUMENT

THE REFEREE ERRED BY GRANTING SUMMARY JUDGMENT TO THE RESPONDENT

IA
RES JUDICATA DOES NOT APPLY UNLESS THE ELEMENTS OF A FINAL JUDGMENT ARE PRESENT, FROM A COURT OF COMPETENT JURISDICTION, IN AN ADVERSARIAL PROCEEDING.

This Court dealt with this legal issue in In Re Inquiry Concerning a Judge (J. Cail Lee), 336 So.2d 1175 (Fla. 1976). Judge Lee's extra-judicial conduct had been reviewed by the Judicial Qualifications Commission. The Commission recommended a public reprimand and this Court approved, stating that:

> Under the totality of circumstances in this case, we accept the recommendation of the Commission and hereby reprimand Judge Lee for his conduct in this matter. Further, we admonish Judge Lee to comply with his oath as a member of the judiciary and to abide by the Code of Judicial Conduct, noting that the full record of this inquiry may be introduced into evidence in any subsequent inquiry concerning Judge Lee which may be brought before the Judicial Qualifications Commission. The occasion of any other incidents which might by themselves justify only a reprimand may then be considered in determining whether the accumulated misconduct is sufficient to warrant removal from office. In re Kelly, 238 So.2d 565 (Fla. 1970). We reiterate what we said there:

> "Because of the nature of the proceeding, the doctrines of res judicata and double jeopardy do not apply ... The reprimand does not amount to an acquittal, nor does it have the elements of a final judgment necessary to invoke the principles of res judicata." (At 1177, emphasis added).

The inapplicability of res judicata to a Grievance Committee decision is also supported by Albrecht v. State, 444 So.2d 8, 11 (Fla. 1984):

> The general principle behind the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable as well as actually litigated issue.

Similarly, Black's Law Dictionary provides the following definition of res judicata:

> res judicata 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been -- but was not -- raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

A Grievance Committee recommendation is not a final judgment of a court of competent jurisdiction. Therefore, res judicata does not apply. Florida law establishes that a Grievance Committee proceeding is “comparable to proceedings

before a grand jury". The Florida Bar v. Swickle, 589 So.2d 901, 903 (Fla. 1991). In The Florida Bar v. Wagner, 175 So.2d 33, 35 (Fla. 1965), this Court reiterated that "we analogized the Grievance Committee investigation to a proceeding before a grand jury" and added that "there is no adversary proceeding until the matter reaches the Referee." (At 35, emphasis added).

Furthermore, Rule 3-7.4(j)(3) authorizes reopening a matter. That subsection states:

> Effect of No Probable Cause Finding. A finding of no probable cause by a grievance committee shall not preclude the reopening of the case and further proceedings therein.

Respondent has provided no case from any jurisdiction, that supports his argument that res judicata bars these proceedings. In fact, cases from other jurisdictions support the Bar's position.

Gonzalez v. State Bar of Texas, 904 S.W. 2d 823, 830, 831 (Tex.App. 1995), provides an excellent discussion of this issue. It is clear that res judicata does not apply regardless of whether the matter was closed previously on substantive grounds. The Court stated the following:

> ... the proceeding before the Grievance Committee is not an adversary process. The committee is an investigating body. The aim of its inquiry is to collect and assemble facts and information that will enable the committee to

take such future action as it may deem expedient for the public welfare. The Grievance Committee is not designed or equipped by the rules and regulations of the State Bar Act to conduct a trial. The adversary process and petitioner's day in court is commenced by the filing of the formal complaint as provided by the Texas Bar Act. 475 S.W. 2d at 399. (citations omitted) *See also McGregor v. State, 483 S.W.2d 559, 562 (Tex.Civ.App. –Waco 1972, rev'd other grounds, dism'd as moot,* 487 S.W. 2d 693 (Tex. 1972) (per curiam)) (the power of a grievance committee to serve as an investigatory agency, under the procedures outlined in the rules, ends with the filing of the lawsuit); Green v. State, 589 S.W. 2d 160, 164 (Tex.Civ.Appt.--Tyler 1979, no writ) (a grievance committee does not have statewide jurisdiction, promulgates no rules and does not decide "contested cases"); *accord Galindo v. State*, 535 S.W.2d 923, 927 (Tex.Civ.App. – Corpus Christi 1976, no writ) ("the Grievance Committee' proceedings do not accord finality in that such action taken by the Committee ... can always be brought before a district court for a final determination of the merits of the complaints"); *State v. Sewell*, 487 S.W. 2d at 718 (the committee's prior decision did not ever rise to the level of a final determination of the merits of the complaints before them, and they are not **res judicata**); *see also Minnick v. State Bar of Texas*, 790 S.W.2d 87 (Tex.App. –Austin 1990, writ denied).

Res judicata is the doctrine that a right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense, cannot be disputed in a subsequent suit between the same parties or their privies. *See Sutherland v. Cobern*, 843 S.W. 2d 127, 130 (Tex.App.--Texarkana 1992, writ denied).

Collateral estoppel is narrower than res judicata. It is

> frequently characterized as issue preclusion because it bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. *See* Buster *v. Metropolitan Transit Auth.*, 835 S.W.2d 236, 237 (Tex.App.--Houston [14th Dist.] 1992, no writ) (emphasis ours).
>
> Under neither doctrine may it be accurately argued that a right or issue was ever litigated or directly determined before a court of competent jurisdiction.

The Texas Supreme Court in State v. Sevell, 487 S.W. 716 (Texas 1972) referred to a New York decision and also rejected the application of **res judicata** to Grievance Committees:

> The Grievance Committee's prior investigations and its decision to take disciplinary action or to forego such action have been inquisitorial in nature, but they have not been decisions upon the merit of the complaints. The preliminary investigation of an attorney for alleged misconduct has been compared to an inquisition by a grand jury. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, 60 A.L.R. 851, 859 (1928). Surely the further investigation of other misconduct would not be barred by the prior hearings by the Grievance Committee. The Committee's prior decisions did not ever rise to the level of a final determination of the merits of the complaints before them, and they are not res judicata. (At 718).

Likewise, the Nebraska Supreme Court stated in Graham v. Waggner, 367 N.W. 2d 707, 709 (Nebr. 1985):

> The doctrine of res judicata applies when the same

> cause of action is sought to be litigated a second time .... The doctrine rests upon the principle that a final judgment on th merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.

Since res judicata does not apply to Grievance Committees, the Referee's reliance upon the Connecticut case of State Wide Grievance Committee v. Dey, 1998 WL 707, 804 quoting from Connecticut Natural Gas Corp. v. Miller, 684 A.2d 1173 (Conn. 1996) is misguided. The Referee referred to the following passage:

> (A) decision whether to apply the doctrine of *res judicata* to claims that have not actually been litigated should be made based upon a consideration of the doctrines underlying policies, namely, the interests of the Defendant and of the Courts in bringing litigation to a close .. And the competing interest of .... the vindication of a just claim ... put otherwise, the principle of *res judicata* is based on the public policy that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate. *Id*. 322-23, 684 A.2d 1173. (Emphasis added).

The Referee concluded: "There is nothing in this case which indicates that The Florida Bar did not have a full and air opportunity to both investigate and litigate the matters involving the Lent litigation in 1998."

The Referee appears to have been misled by Respondent's reliance upon the foregoing case. Dey merely provided the above dicta in a general discussion of res

judicata. Dey did not hold that res judicata applied to a Grievance Committee. The passage from Dey is merely a restatement of the legal principle that when a matter has been litigated and decided by a final judgment of a court of competent jurisdiction, res judicata would apply to those matters which should have been litigated at the time.

The Referee has changed the law. She is interpreting the Connecticut case to mean that once a Grievance Committee considers a matter, it has an opportunity to consider that matter fully, and failure to do so bars ultimate litigation of the examined matter as well as matters that should have been known at the time.

That interpretation is incorrect as all of the foregoing citations indicate. These is no presumption of correctness of a Referee's finding of law. The Florida Bar v. Inglis, 491 So.2d 38 (Fla. 1985). The Referee's finding is inconsistent with Florida Law and must be rejected.[1]

The reference to the Dey decision by the Respondent contained in his

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[1] Policy considerations also support the prevailing legal principle that res judicata does not apply to a grievance committee. The doctrine of res judicata includes that which could or should have been litigated at the first trial. It is reasonable to include matters which could have been known or should have been known within the scope of res judicata after a trial has been completed. The parties would, of course, have had access to all forms of discovery, and the benefit of examination of witnesses at trial. A grievance committee can only conduct a limited, cost efficient investigation. The investigation of every Bar complaint cannot be as comprehensive as every matter that goes to trial.

response to the Bar's Motion for Rehearing apparently misled the Referee. There are a number of reasons why that case is totally inapplicable.

First, the passage quoted by the Referee refers to a discussion by another court of matters barred by res judicata, including those that a party had an opportunity to litigate. However, the Dey court ultimately rejected res judicata as a basis for its ruling. The court stated:

> While the court does not view the doctrine of res judicata as a bar, it holds that the related doctrine of collateral estoppel should preclude the statewide counsel from seeking reciprocal discipline under §2-39 of the Rules of Practice. "Claim preclusion (res judicata) and issue preclusion (collateral estoppel have been described as related ideas on continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits ... [I]ssue preclusion, prevents a party from relitigating an issue that has been determined in a prior suit ..." (Emphasis added).

Therefore, assuming that this Connecticut case has some application to Florida law, it is clear that the Referee has quoted from an irrelevant portion of the decision as res judicata was rejected as a bar to the Dey case.

Second, despite the passage quoted above, the court did not clearly rule that collateral estoppel was applicable. Rather, the Court finally held:

> The court holds that under the facts and circumstances of this case, while the Superior Court could not be barred from hearing the claim in this

> particular case, if it chose to do so, there is no good reason to do so, and the Statewide Bar Counsel as litigant should not relitigate an issue that has already been decided on the merits by a Committee of the Superior Court, in this court's opinion, correctly. (Emphasis added).

Third, the Dey case is not a reported decision[2] and is only the decision of a trial court, not a decision of an appellate court. It's weight as authority in this State is non-existent.

Fourth, the facts in Dey do not even remotely resemble the facts in this case. It pertains to reciprocal discipline - federal discipline hearing and state hearings, both local and statewide - which was the subject of previous litigation.

Fifth, the Connecticut grievance system is not the same as the Florida Grievance System. The Connecticut Statewide Grievance Committee has a supervisory and prosecutorial role, as mentioned above, and is not simply making a determination as to probable cause as the Florida Grievance Committee. Moreover, the Connecticut Grievance Committee is required to prove its case based upon "clear and convincing evidence" as opposed to Florida's Grievance Committee which merely makes a probable cause determination. Statewide Grievance Committee v. Presnick, 577 A.2d 1058 (Conn. 1990). For all of the

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[2] Westlaw includes miscellaneous decisions in its database upon request.

above, the Court's application of Dey, is erroneous.

The Referee may have also been misled by another argument and case presented by the Respondent. In Respondent's Response to the Bar's Motion for Rehearing, the Referee claimed:

> Several courts have determined that a state bar committee cannot prosecute a second Bar action that is based in part upon issues which had been the subject of an earlier proceeding. See, e.g., STATE-WIDE GRIEVANCE COMMITTEE V. PRESNICK, 577 A.2d 1058 (Ct. 1990). In the PRESNICK case, the Supreme Court of Connecticut reversed an Order of disbarment where the disbarment proceeding was "improperly based, in part, on issues that had been the subject of an earlier proceeding."

Neither Presnick nor any other case holds that a no probable cause determination of a Grievance Committee cannot be revisited. Reliance upon Presnick is, perhaps, the result of confusion because the style of the case refers to a "Statewide Grievance Committee."

The Presnick case, however, has nothing to say about the applicability of res judicata to local Grievance Committees. Presnick pertained to the attempt of the Connecticut Statewide Grievance Committee to present for trial a matter that had been the subject of a previous trial. A statewide committee in Connecticut is not the same as a Florida committee as discussed above. The Bar does not, of course,

deny that a matter which had been tried, i.e., litigated, cannot be litigated a second time. That principle, however, has nothing to do with this case. Furthermore, Respondent provided no case from any other state, despite the claim in his memorandum.

Furthermore, no case holds that the same committee must consider a re-opened matter. Respondent based his argument upon the allegation of forum shopping. Did the Respondent establish as an undisputed fact that there was forum shopping? In fact, there was no evidence of forum shopping and clearly no undisputed evidence. That circumstance clearly pertains to the next issue which follows in this brief.

IB

IF RES JUDICATA DID APPLY TO GRIEVANCE COMMITTEES, GRANTING SUMMARY JUDGMENT WAS NEVERTHELESS, ERROR BECAUSE THE MOTION AND DOCUMENTARY SUPPORT DID NOT MEET THE REQUIREMENTS FOR SUMMARY CONSIDERATION

The Respondent's "Memorandum of Law" was supported by the Exhibits identified in the Statement of the Case and Facts of this brief.

Attached was a letter from the Bar referring to Case No. 2000-70,234(11E). The letter referred to Respondent's violations of Rules 4-1.4(b) (Duty to explain matters to a client) and 4-8.4(d) (conduct prejudicial to the administration of justice). The letter was identified as Exhibit A of Respondent's "Memorandum of Law".

A second letter from the Bar was attached as Exhibit B of Respondent's "Memorandum of Law". It referred to Rules 4-3.4 (Fairness to opposing party and counsel), 4-4.4 (Respect for rights of third persons) and 4-8.4 (Misconduct) in Case No. 98-71,747(11F).

A third letter from the Bar was attached as Exhibit C of Respondent's "Memorandum of Law". It was a "Notice of No Probable Cause and Letter of Advice to Respondent" in Case No. 98-71,747(11F). It specified no particular rule

violations.

Exhibit D of Respondent's "Memorandum of Law" was the deposition of the Bar's expert witness, William Scarrit, Esq., who stated he had no knowledge of whether the facts presented after the case was reopened were different from the first case. (Depo. P. 22). Other than Scarrit's deposition, the Respondent offered no sworn evidence of any kind including affidavits.

Assuming arguendo that res judicata could be applied to a Grievance Committee, there was nevertheless, no basis for summary judgment. First the submitted materials were insufficient to establish a basis for summary judgment. The reasons are numerous.

In order to prevail on a motion for summary judgment, the movant must establish the non-existence of any disputed material facts. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). All reasonable inferences will be made against the movant. Yost v. Miami Transit, 66 So.2d 218 (Fla. 1964). A court that draws its own inferences from among the possible inferences to enter a summary judgment thereon, deprives the parties of their right to trial. Register v. Redding, 129 So.2d 289 (Fla. 1st DCA 1961). Summary judgment may only be entered when the facts are clearly crystallized. Yost, supra.

Further, summary judgment is a drastic remedy. Seven Up Bottling v.

George Construction, 166 So.2d 155 (Fla. 1964). Only by scrupulous adherence to the rules provided for summary decrees can the courts be sure that the stringent remedy is not abused, Seven Up, supra.

A restatement of the legal principles governing a motion for summary judgment was provided in Holl v. Talcott, supra, p. 43-44, as follows:

> As this court and other appellate courts have repeatedly held, the burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried.
>
> This means that before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. Matarese v. Lessburg Elks Club, supra. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party. The proper rule on this subject was well applied in the Matarese case. There the District Court of Appeal, Second District, reversed a summary final judgment entered against a plaintiff, not because it found the movant- defendant's affidavits were successfully met by the opposing party-plaintiff, but because the movant's affidavits and other evidence did not establish the absence of genuine triable issues of material fact.
>
> The rule simply is that the burden to prove the non-existence of genuine triable issues is on the moving party,

> and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden.

The attachments to Respondent's "Memorandum of Law" cannot possibly have provided a basis for summary judgment. Most basic is the fact that Respondent did not and could not prove the existence of a final judgment of a court of competent jurisdiction.

Second, Respondent did not and could not prove identity of issues Albrecht, supra. Respondent did not overcome the reasonable inference that the Bar had received new information, nor that the new information combined with the prior information justified a re-opening of the case. Furthermore, as this Court pointed out in Lee, supra, grievance subject matter may be considered again in relation to other misconduct. Respondent did not disprove the reasonable inferences that the Bar conducted a reasonable cost-efficient investigation but nevertheless did not discover some new facts ultimately provided by another source.

Respondent did not disprove the reasonable inference that Ms. Lent, who was not the original complainant, presented new facts not previously available to the Bar. Note that Exhibit A & Exhibit B of Respondent's "Memorandum of Law" evidence the fact that Grievance Committee 11E undertook consideration of Rules

that were not previously considered by Grievance Committee 11F. Respondent did not provide any evidence of forum shopping, and certainly not undisputed evidence to warrant summary judgment.

Most important is that Respondent has not crystallized the facts which are the basis of his motion and supporting evidence. Yost, supra. At the time of the entry of the order granting summary judgment, Respondent's paper documentation merely created a mystery. Why the Bar re-opened the case was unknown. Whether the previous facts were identical was not established. Whether the same party in interest provided the reason for reopening was unknown. Whether referral to a new committee was required by administrative rules was not known.

Furthermore, the Respondent did not even vaguely support his argument that res judicata applied only because a different Grievance Committee re-investigated the Respondent. Respondent conceded that the Bar was authorized by Rule 3-7.6 to reopen a matter previously heard by the same committee. Respondent, however, provided neither facts nor law which even suggested that consideration by a different committee would create a barrier based upon res judicata.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's Report granting summary judgment should be disapproved and this matter should be sent back to the Referee for a final hearing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Answer Brief was forwarded Via Airborne Express (# 3370028023) to Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Robert M. Klein, Attorney for Respondent, at Stephens, Lynn, Klein, La Cava, Hoffman & Puya, 9130 South Dadeland Boulevard, PHII, Two Datran Center, Miami, Florida 33156, and to Patricia S. Etkin, Co-Counsel for Respondent, at 8181 West Broward Boulevard, Suite 262, Plantation, Florida 33324, on this _____ day of _____, 2001.

_____

Randolph Max Brombacher
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Randolph Max Brombacher
Bar Counsel

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