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)

The Florida Bar's Amended Reply Brief

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ARGUMENT

THE REFEREE ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT

The Bar would submit to this Court that following the plethora of arguments raised by the Respondent, it would be helpful to return to the issues which are the basis of this appeal. In addition to consideration of the basic issues, some arguments which the Bar believes to be immaterial and/or misrepresentations will be discussed later in this brief.

However, first, and perhaps most important is the issue as set forth by the Respondent in a pleading dated June 22, 2001 and quoted in our initial brief at page 4:

> 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 be the precise basis for Respondent's res judicata argument. (Response to Motion for

Rehearing. Emphasis added).

The same rule, Rule 3-7.4(j)(3) - which permits the re-opening of a case by a grievance committee - was recognized by the Referee in the order granting summary judgment. The Respondent has taken the position in this case that the reopening was effectuated by a different committee, and therefore because there is a possibility of "forum shopping", the legal principle of res judicata applies.[1] Respondent's Memorandum of Law in Support of Summary Resolution, p. 4; Order on Motion for Summary Resolution, p. 2.

Certainly the existence of forum shopping has never been established as a fact in this case. Even more apparent is that the existence of forum shopping was not established as an undisputed issue of material fact which would serve as a basis for summary judgment (if the law governing res judicata did apply). Therefore, Respondent's argument fails on that basis alone.

In addition, the possibility or existence of forum shopping, is not a recognized basis for applying res judicata in this state. In other words, undisputed proof of forum shopping if established, would beg for a remedy, but the proper

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[1] In addition to the lack of proof of forum shopping, the argument ignores the composition of committee structure. Members change and attendance varies. Bar Counsel could not possibly predict who will attend and how they would vote.

remedy is not the wanton application of res judicata. As discussed in our initial brief res judicata requires a final judgment from a court of competent jurisdiction in an adversarial proceeding. Respondent has not in any manner refuted that statement of the law in this state. Therefore, even assuming *arguendo* that forum shopping[2] was found to have occurred, res judicata is inapplicable to the instant factual scenario.

Moreover, the Referee's order is also improper due to the inherent inconsistency of her review and application of Rule 3-7.4. The order recognizes that pursuant to Rule 3-7.4, the same Grievance Committee can revisit a No Probable Cause case yet at the same time, the Referee has also determined that a different Grievance Committee can not revisit a No Probable Cause case on the basis that the doctrine of res judicata applies. Applying the doctrines of res judicata as the Referee has done is improper since such a decision can not logically result in one Grievance Committee being legally distinct from another.

In short, the Respondent fails to defend the Referee's interpretation of Rule

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[2] Virtually any investigative agency is subject to charges of forum shopping, e.g. a new grand jury, a second review of evidence by the intake division of the State Attorney's Office. The possibility does not recommend that the review process should be limited to a one time only review. A review of evidence by an Assistant State Attorney is and should be allowed to be continuous, renewed, or intermittent. Further, investigators or investigating bodies of any agencies are free to reevaluate their opinions, and should be.

3-7.4 by arguing two (2) legally untenable and inconsistent positions at once, namely that (1) the revisiting of a file by a new committee - as opposed to the revisiting of a file by the same committee - is subject to res judicata, and (2) all grievance committees are subject to res judicata.

I A

RES JUDICATA DOES NOT APPLY UNLESS THERE IS A FINAL JUDGMENT FROM A COURT OF COMPETENT JURISDICTION IN AN ADVERSARIAL PROCEEDING

The law regarding res judicata as set forth in the above caption, and in the Initial Brief, was essentially ignored by Respondent. Rather, Respondent relies upon The Florida Bar v. Gentry, 447 So.2d 1342 (Fla. 1984). Respondent argues that the Gentry court might have applied res judicata to grievance committees. However, Gentry was a situation where the Grievance Committe had imposed discipline, unlike the instant case.

Furthermore, in Gentry the issue of whether res judicata should apply to grievance committees was not raised. Consequently, Gentry is inapplicable to the instant factual situation. See State v. DuBose, 128 So.4 (Fla. 1930) (No court decision is authority on any question not raised and considered, though involved); see also Cusick ex rel Cusick v. City of Neptune Beach, 765 So.2d 175 (Fla. 1st

DCA 2000) (Stare decisis does not apply unless the factual situation is similar to that in the former case). Since the Bar has not attempted to act in a manner similar to the circumstances in Gentry, the general rule prohibiting the application of res judicata to investigatory functions must prevail.

Moreover, Respondent has simply ignored this Court's ruling in In Re Inquiry Concerning a Judge (J. Cail Lee) 336 So.2d 1175 (Fla. 1976), stating that:

> "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 rule was applied and quoted from In Re Kelly, 238 So.2d 565 (Fla. 1970).

Also, Respondent has not even mentioned The Florida Bar v. Swickle, 589 So.2d 901, 903 (Fla. 1991) or The Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965). Those cases analogize grievance committee investigations to a grand jury. In Wagner the applicable rule of law was clearly set forth, i.e.: "[T]here is no adversary proceeding until the matter reaches the Referee." (At 35; Emphasis added). Respondent does mention Albrecht v. State, 444 So.2d 8 (Fla. 1984). However, he ignores the principle that res judicata requires a "final judgment from a court of competent jurisdiction."

In addition to Gentry which the Referee also cites, Respondent relied upon an unreported trial court decision, Statewide Grievance Committee v. Dey, 98 Westlaw 707084, partially quoting from another case, regarding a holding that did not apply claim preclusion (res judicata or collateral estoppel) but the opposite ("the Superior Court could not be barred from hearing this claim"), in regard to dual state and federal jurisdiction, pertaining to a different disciplinary system.

Respondent has failed to address the issues regarding Dey raised by the Bar and has also failed to rehabilitate another Connecticut case, Statewide Grievance Committee v. Presnick, 577 A.2d 1058 (Conn. 1990). Presnick deals with a second effort to litigate the same manner, not an effort to reopen a case on the investigatory level.

Respondent also seeks to argue that "the Bar had an opportunity to follow appropriate procedures to re-open Trazenfeld I, but it chose not do so." (Respondent's Brief, page 17). Reference is made to Rule 3-7.5(d) which applies to the circumstance wherein a Designated Reviewer disagrees with a committee, not the circumstance herein. Furthermore, if applicable, that argument would be waived because it was never presented to the Referee.

The heading that "Court (sic) in other jurisdictions have applied res judicata to Bar proceedings" (Respondent's Brief, p. 19) is totally unsubstantiated and is

not material. Res judicata clearly applies to some Bar proceedings, i.e., those before a Referee, but not to grievance committees.

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

One of the most basic principles is that the movant has the burden of proving the non-existence of any disputed material fact. Holl v. Talcott, infra. The Respondent did not and cannot support that burden. In an apparent effort to avoid that settled principle, he asserts a totally false premise stating:

> The Florida Bar argues that summary judgment was erroneously entered in favor of Trazenfeld because issues of fact precluded its entry. The Bar raises this issue for the first time on appeal. (Brief, p. 22)

Respondent adds:

> The Bar further argues that Trazenfeld's Motion for Summary Resolution "merely created a mystery," and that "[m]any reasonable inferences existed which required denial of the Motion for Summary Judgment." (Initial Brief at 24, 8). The Bar raises a number of points that *might have* demonstrated that issues of fact existed to preclude summary judgment, i.e., "Why the Bar re-opened the case was unknown," "Whether the previous facts were identical was not established." Whether the

> same party in interest provide the reason for reopening was unknown." (Initial Brief at 24). However -- again -- the Bar raises these issues for the first time on appeal. The record demonstrates that these issues were *not* raised before the Referee.

However, Respondent's claim ignores the record. On page 9 of the Bar's Memorandum of Law in Opposition to Summary Judgment, we stated:

> Furthermore, it is axiomatic that in order to prevail on summary judgment, the movant must establish the non-existence of any disputed issue of material fact. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). All reasonable inferences will be resolved against the movant. Yost v. Miami Transit Co., 66 So.2d 214 (Fla. 1953).
>
> Respondent failed to establish the non-existence of any disputed fact. The Scarrit deposition, by Respondent's own admission, establishes that there is a dispute. It raises the issue of whether a new rule violation presented to the committee constitutes a new matter. One of the elements of res judicata is, of course, identity of the issues.

The Bar has presented specific examples of disputed material facts in its initial brief. The absence of those particular facts or questions in the trial memorandum does not mean that the "issue" has been waived. The Bar has merely illustrated through examples the issue presented to the Referee. Respondent's argument is also ambiguous due to the wording utilized. He asserts that this issue was not "raised before the Referee." Surely, the Respondent cannot be applying

his argument to the hearing before the Referee on August 9, 2001 with the expectation that all issues would have been raised at that time. As Bar counsel declared on the record:

> MR. BROMBACHER: Well, I'm opposed to having to address this Motion for Summary Judgment in a legal memorandum. This was noticed on June 22nd. The Motion for Summary Judgment came over at 6:31 last night to my fax. Then, I received a memorandum of law at 10:00 o'clock, and then a revised one at 11:54 p.m. It came in on my fax at 11:59 p.m.
>
> I obviously haven't had any time to review it and to compound matters, the exhibits to accompany this legal memorandum were hand-delivered to me at 11:00 a.m., so I can in no way respond to any of this. They've had plenty of time. (T. 3; emphasis supplied).

The Bar was provided with the opportunity to submit a memorandum of law, but not with an additional hearing.

It is difficult to ascertain the "issue(s)" which Respondent believes were not raised. The Bar has presented the argument that there was a failure on the part of the Respondent to meet the requirements of summary judgment. The Bar specified the movant's burden, and the rule requiring inferences in favor of the non-movant. Even if the Bar had not presented these arguments to the Referee, it would not have constituted a waiver.

Granting summary judgment in this case by applying incorrectly the legal

principles governing summary judgment constitutes "fundamental error." Fundamental error is one which affects the very essence of the lawsuit. Coleman v. Allen, 320 So.2d 864 (Fla. 1st DCA 1973); Frankowitz v. Beck, 257 So.2d 918 (Fla. 3rd DCA, 1972). A fundamental error may be raised for the first time on appeal. Jefferson v. City of West Palm Beach, 233 So.2d 206 (Fla. 4th DCA 1970); Wofford Beach Hotel v. Glass, 170 So.2d 62 (Fla. 3rd DCA, 1964).

Rule of Civil Procedure 1.510 requires that movant must "show that there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." Respondent totally failed to meet the burden and the Referee's ruling should be rejected.

II

RESPONDENT'S ARGUMENTS REGARDING THE MERITS OF THE UNDERLYING CONDUCT ARE NOT MATERIAL NOR SUPPORTED BY THE RECORD

Respondent's defense of his misconduct and his rejection of the Third District's finding of misconduct is not material to the issue of res judicata. Furthermore, Respondent's references to his own argument[3] cannot provide factual sustenance for the issues in his brief, and references to that hearing are outside the record. The record consists of "the report and record filed by the Referee." (Rule 3-7.7(c)(2)). The hearing transcript was not part of the record. It was furnished to Respondent in response to a Motion to Strike to establish that the transcript did not include testimony. The transcript was never filed with the Referee. Furthermore, the effort to expand the record by claiming a proffer of the Trazenfeld deposition at the hearing is unconscionable. The brief refers to pages 32-34. As far as can be determined, the alleged proffer appears on page 32 wherein counsel for the Respondent stated:

> Well, as Mr. Trazenfeld said in his deposition,

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[3] In the Answer Brief on page 5, there are numerous references to "T. 19". Those references do not pertain to any evidence but, rather, to arguments of counsel.

> which unfortunately was never provided to Mr. Scarritt, it never dawned on me that her pleadings would be stricken.

The Bar would suggest that the foregoing is not equivalent to offering a document into evidence.

Respondent presents an additional argument in the Statement of the Case and Facts which is (1) not material to the summary judgment ruling, (2) demonstrates the existence of disputed facts, and (3) attempts to shift the burden of proof to the non-movant, the Bar. Respondent states:

> Lent provided the revised consent and, in the end, Kermer did not appear for deposition. The Bar did not provide any evidence as to why Kermer was not deposed. There is no indication that Lent's late husband's daughters provided the requisite consent. (T 28-29). Indeed, to this day, no one has ascertained the exact basis for Mr. Kermer's refusal to testify. The Bar, and its expert, William Scarritt, have apparently surmised that Kermer's refusal to testify is based on the Lent consent. (T 29). (Brief p. 6).

Obviously, if the foregoing was material, it would merely prove that there were disputed issues of fact.

In a later passage in his brief, Respondent demonstrates an additional effort to shift the Burden to the Bar. Respondent takes the position that:

> The Bar's Letter of Advice demonstrates a comprehensive and exhaustive investigation of the

> conduct which formed the basis of the Bar's complaint in Trazenfeld I. There is nothing to indicate that the Committee did not consider Trazenfeld's conduct in its entirety in connection with the Lent litigation, including the conduct it now raises in an entirely new proceedings. Indeed, in Trazenfeld I, the Bar specifically stated, "[p]ossible violations of the following rules, and other rules deemed applicable will be considered ..." (Bar's Appendix "B," Exhibit "B"). Therefore, there is a greater likelihood than not that Grievance Committee 11F in Trazenfeld I considered all applicable rules, including Rule 4-1.4(b) which the Bar purports to allege as a "new" violation.
>
> There is no reason to think that the Grievance Committee in Trazenfeld I did not consider all of Trazenfeld's conduct in the Lent litigation before it issued its finding of no probable cause. (Brief, pp. 15).

The Bar would submit that the assertions of "nothing to indicate the Committee did not consider," "a greater likelihood," and "no reason to think" do not provide the kind of certainty required before summary judgment can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Amended Reply Brief was forwarded 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 150 South Pine Island Road, Suite 320, Plantation, Florida 33324, on this _____ day of _____, 2002.

_____

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