IN THE SUPREME COURT
OF FLORIDA

Case No. SC04-1493

THE FLORIDA BAR

v.

DONALD ALAN TOBKIN

TOBKIN'S AMENDED INITIAL BRIEF

DONALD ALAN TOBKIN, M.D.
FBN: 742953
P.O. Box 220990
Hollywood, Florida 33022
(954)258-6030

TABLE OF CONTENTS

Page(s)

Issues Presented for Review ……

I. WHETHER THE REFEREE ERRED BY FAILING TO DISMISS THE COMPLAINT AGAINST ATTORNEY TOBKIN, WHERE FLORIDA BAR FAILED ITS BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT:

a. THE FLORIDA BAR ALLEGED AND PROVED THAT FLORIDA BAR SATISFIED ALL CONDITIONS PRECEDENT WITH:

1. UNBIASED AND DULY CONSTITUTED GRIEVANCE COMMITTEE MEMBERS, WHO PARTICIPATED IN AND DETERMINED PROBABLE CAUSE AGAINST TOBKIN

2. THE FLORIDA BAR DID NOT AMBUSH AND PREJUDICE TOBKIN AT "TRIAL" BY FAILING TO FURNISH TOBKIN ANY PRETRIAL PROPOUNDED DISCOVERY (ANSWERS TO 11 INTERROGATORIES) …… 5,6,13, 14,15, 16,17

(RESPONSES TO REQUESTS FOR ADMISSION)

IN VIOLATION OF REFEREE'S ORDER AT HEARING FOR FLORIDA BAR TO ANSWER INTERROGATORIES, THE FLORIDA BAR'S SUBSEQUENT INTENTIONAL SUBMISSION OF A KNOWINGLY FALSE ORDER ON DISCOVERY RULING TO REFEREE TOBKIN'S PRETRIAL PETITION FOR EXTRAORDINARY WRIT INVOLVING SAID DISCOVERY (WILLFUL AND INTENTIONAL NONCOMPLIANCE BY FLORIDA BAR AND PREJUDICE (SURPRISE IN FACT) TO TOBKIN), AND LEGALLY INSUFFICIENT OBJECTIONS TO TOBKIN'S PRETRIAL DISCOVERY PROPOUNDED UPON FLORIDA BAR

b. COUNTS I-III FAILED TO STATE A CAUSE OF ACTION, WHERE SAID COMPLAINT ALLEGATIONS AROSE FROM HEARSAY LANGUAGE FROM OBJECTED TO UNAUTHENTICATED FLORIDA 4th D.C.A. OPINION AND WITHOUT MANDATE EVER ISSUED IN ROSE v. FIEDLER, 855 So.2d 122 (FLA. 4th D.C.A. 2003), WHERE THIS SUPREME COURT DISAPPROVED AND/OR QUASHED SAID DECISION AND EXCULPATED ATTORNEY TOBKIN OF THE ALLEGED

Page(s)

ETHICAL BREACHES, WHERE TOBKIN ETHICALLY DISCHARGED HIS DUTY OF ZEALOUSLY ADVOCATING HIS CLIENT'S CAUSE, AND WHERE FLORIDA BAR NEITHER ALLEGED NOR PROVED TOBKIN CAUSED ANY HARM, ESPECIALLY TO TOBKIN'S MALPRACTIVCE PLAINTIFF/CLIENT, BEATRICE ROSE? 4,5,7, 10,16

II. WHETHER THE REFEREE ERRED BY FAILING TO ACQUIT TOBKIN OF THE ALLEGED CHARGES, WHERE THE FLORIDA BAR FAILED ITS BURDEN OF PROVING BY CLEAR AND CONVINCING ADMISSIBLE EVIDENCE THAT TOBKIN WAS GUILTY OF THE CHARGED ETHICAL MISCONDUCT, OR WHERE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED? 13,14, 16,17

III. WHETHER THE REFEREE ERRED BY IMPOSING ANY DISCIPLINE AND COSTS UPON TOBKIN OR, ALTERNATIVELY, SAID DISCIPLINE AND COST IMPOSITION WAS UNWARRANTED AND TOO SEVERE? 1,5,7, 11,12, 17

Page(s)

Table of Citations iii

Preliminary Statement 1-5

Standards of Review 5-7

Statement of the Case and Facts 7-11

Summary of the Argument 11-12

Argument 12-17

Conclusion 17-18

Certificate of Service 18

Certificate of Compliance 18

TABLE OF CITATIONS

Cases	Page(s)
Binger v. King Pest Control 401 So.2d 1310,1314 (Fla. 1981)	10
Grau v. Wells 795 So.2d 999 (Fla. 4th D.C.A. 2001)	9
Ham v. Dunmire 891 So.2d 492 (Fla. 2004)	10
Mercer v. Raine 443 So.2d 944,949 (Fla. 1983)	10
Orlando Sports Stadium, Inc. v. Sentinel Star Company 316 So.2d 607,608,610 (Fla. 4th D.C.A. 1975)	9
Rose v. Fiedler 855 So.2d 122 (Fla. 4th D.C.A. 2003)	4,5,10
The Florida Bar v. Catalano 651 So.2d 91 (Fla. 1985)	4,8
The Florida Bar v. Rayman 238 So.2d 594 (Fla. 1970)	11
The Florida Bar v. Rubin 362 So.2d 12,16,17 (Fla. 1978)	9,10
Williams v. Department of Rehabilitative Serv. 589 So.2d 359 (Fla. 1st D.C.A. 1991)	10

Others

Rules Reg. Fla. Bar 3-7.7(c)(5) 7

PRELIMINARY STATEMENT

("Tobkin") Donald Alan Tobkin, M.D., Esquire, is a plaintiffs' medical malpractice, solo practice trial lawyer with a 17-year record of no discipline or legal malpractice. Tobkin is also a Florida licensed practicing physician with almost a 30-year record of no discipline or medical malpractice. In this case, the Florida Bar never established that Tobkin caused harm; only zealous advocacy for his clients.

This complaint was initiated, not by any harmed medical malpractice clients but rather by Tobkin's litigation adversaries:

1. Medical malpractice insurance defense counsel to Omar Hussamy, M.D., in Rose v. Hussamy, etc.

and 2. Perennial Defendant adversary HCA/Columbia Hospital Corporation of America, Inc. (under a fraud/ruse) of providing affidavits to the Grievance Committee 17H from clerks and administrators who falsely swore that there were employed by Aventura Hospital or Aventura Cancer X-Ray Center, rather than the truth which was first learned by ambush at trial before the Referee that each of the "aggrieved" complainants were actually exclusively employed, controlled, and paid by

HCA/Columbia. Nonetheless, even with this bias, the witness at hearing conceded/stipulated to Tobkin's law abiding behavior (the grievance) was a one time voice raising by Tobkin, which occurred when Plaintiff/Medical Malpractice Breast Cancer Victim, Lauren Bronfman, Esquire, multiple opposing defense counsel ex parte obtained Ms. Bronfman's mammograms and bone scans without a valid subpoena, without consent and prior authorization or court order, and in blatant disregard for a pending Plaintiff's motion for protective order.

Initially, years ago, the Florida Bar sent these grievances to two separate other grievance committees, 17(F) & 17(G), which could not find any probable cause for years against Tobkin.

Delayedly and subsequently, the Florida Bar apparently forum shopped this matter to Grievance Committee 17(H). At that juncture, Tobkin repeatedly and timely requested disqualification in 17(H) of two (2) specific grievance committee members:

1. A local Neurosurgeon Designated Reviewer who reportedly held strong Anti-Plaintiff medical malpractice attitudes and behaviors involving "Tort Reform" money caps on medical malpractice awards and

blocking access to the Courts to medical malpractice victims by limiting Plaintiff's attorney's contingency fees and costs contracts and;

2. A local lawyer in a close-knit nuclear family with a Circuit judge mother and uncle who either had long-standing automatic recusal orders for all cases involving Tobkin or had to have the exercise of jurisdiction involving Tobkin forestalled via Writ of Prohibition. Also, said lawyer became the Chairperson who signed the instant complaint. The Chairperson's father was in contentious litigation involving Tobkin and Tobkin's mentor. Said family resided for decades in Hollywood, Florida, near Tobkin and his mentor.

These 2 17(H) committee members controverted the truthfulness of lack of neutrality toward Tobkin and his causes for his clients and refused disqualification and apparently voted probable cause (A 2 out of 3 vote = probable cause). The absurdity of the Florida Bar guaranteeing neutrality is apparent because a dozen or hundreds of qualified neutral persons could have been substituted in the 17th and other Circuits here.

Both before and during the proceedings, the Florida Bar offered absolutely no admissible clear and convincing evidence of the names and number of individuals who purported attended

and voted probable cause at a "duly" constituted 17H Grievance Committee voting meeting, here.

The Florida Bar fatally failed to both allege and prove before the Referee by clear and convincing evidence that 17H Grievance Committee and the Florida Bar satisfy this mandatory condition precedent before filing the complaint against Tobkin (See The Florida Bar v. Catalano, 651 So.2d 91 (Fla. 1985)).

The Florida Bar filed a four (4) Count complaint against Tobkin. Counts I-III were based on a final default judgment order in Rose, which arose from an allegedly advanced alcoholic, mixed chemical dependent impaired 19th Judicial Circuit Judge Scott Kenney's misperceptions and ex parte communications with Rose predecessor judges who were ultimately disqualified because of close personal friendship, neighbors, and doctor-patient relationships with Defendant Doctors Fischman and Hussamy.

In this circumstance, Judge Kenney ordered a midtrial default against Plaintiff Beatrice Rose. On Appeal in Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003), Judge Kenney was reversed but his caustic criticisms of Tobkin were incorporated into the 4th D.C.A. Appellate opinion/decision.

The Florida Bar relied on the 4th D.C.A. Rose hearsay language to charge Tobkin in Counts I-III.

This Supreme Court wants to quash that entire decision from the 4th D.C.A., SC03-1399 and SC03-1400. In other words, Tobkin's prosecution and Referee's report was initiated and prosecuted solely on the assumed validity of the hearsay contained in Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003).

Count IV was commenced-concealed HCA/Columbia adversaries, which Tobkin was ambushed with at Referee trial here because the Florida Bar prejudicially withheld ordered answers to interrogatories from Tobkin's pretrial preparation.

The record shows the Bar never had true probable cause to file this complaint against Tobkin.

The record shows insufficient nonhearsay clear evidence that Committee 17H was verifiably duly constituted to properly vote probable cause, here.

There is insufficient evidence in the record to sustain the Referee report for discipline and costs against Tobkin.

STANDARDS OF REVIEW

Denovo review is the standard here on all questions of law which includes:

1. Interpretation and application of Florida Bar Rules Regulating Attorneys and Discipline

2. Interpretation and application of salient Florida Rules of Civil Procedure
3. Motions to dismiss
4. Failure to disqualify and recuse allegedly biased participating Bar Grievance Committee Members and Designated Reviewers in the ultimate determination of probable cause for ethical breaches and filing of Bar complaint
5. Insufficiency of the evidence to establish guilt on the charges
6. Penalties/Dismissal against Florida Bar for failure to “turn square corners” and prejudicial prosecutory conduct by willfully and completely obstructing Tobkin’s rights to Referee ordered and Florida Rule of Civil Procedure required answers to eleven (11) basic interrogatories that went to the heart of Fla. Bar’s allegations against Tobkin including whether Tobkin caused any harm, names and addresses of witnesses concerning the allegations in the complaint, any statements obtained, what are the elements of each claimed violation by Tobkin, what is the complete contended factual basis and the persons with said

factual knowledge of each respective paragraph in the complaint.

7. Motion for judgment of acquittal or for directed verdict in favor of Tobkin

The Florida Bar had the burden of proving by clear and convincing admissible evidence that the Florida Bar had a complete cause of action including alleging and proving that the Florida Bar satisfied all conditions precedent including that grievance committee participants were unbiased and properly complied with “presuit” pre-probable cause investigations and that Florida Bar proved every element of the allegations including harm, injury, or damage.

Hearsay evidence should not and cannot be considered clear and convincing evidence.

The party seeking review must demonstrate that the Referee’s report is erroneous, unlawful, or unjustified. Rule Reg. Fla. Bar 3-7.7(c)(5)

STATEMENT OF THE CASE AND FACTS

1. Tobkin seeks review of Referee’s report recommending minor discipline and assessment of costs based on Florida Bar’s recommended report. (A-1,2,6)

2. Referee rejected every one of Tobkin's appended challenges to dismiss the complaint, acquit, and impose no, or lesser, sanctions and costs upon Tobkin based on erroneously applied aggravating and failure to properly apply mitigating factors, on the facts of this case. (A-3,4,5,7,8,11-18,24-33)

3. The appendix and transcript fully flesh out Tobkin's main arguments and legal authorities to support arguments that the Referee erred by failing to dismiss this complaint against Tobkin, where the Florida Bar failed its burden of proving its case against Tobkin by clear and convincing evidence in five (5) distillate points as follows:

    a. Bar failed to plead and prove that Bar satisfied the mandatory conditions precedent of unbiased and identifiable, qualified individuals who duly constituted Grievance Committee 17(H) and found probable cause to bring Counts I-III (from Rose medical malpractice case) and Count IV (Bronfman medical malpractice case). (A-4,5,7,8,17,19,20); The Florida Bar v. Catalano, 651 So.2d 91 (Fla. 1985) (complaint by Florida Bar dismissed for failure to comply with mandatory conditions precedent of a properly and duly constituted grievance committee finding of probable cause against the accused

attorney); Grau v. Wells, 795 So.2d 999 (Fla. 4th D.C.A. 2001) (Tobkin persuaded both the trial and appellate courts to strike party opponent pleadings for failure to undertake a reasonable and "unbiased" mandatory presuit investigation of the claim.) Orlando Sports Stadium, Inc. v. Sentinel Star Company, 316 So.2d 607,608,610 (Fla. 4th D.C.A. 1975) (A complaint must be dismissed as incomplete or failure to state a cause of action for failure to satisfy conditions precedent under Florida Rules of Civil Procedure); The Florida Bar v. Rubin, 362 So.2d 12,16,17 (Fla. 1978) (This Supreme Court dismissed disciplinary action against accused attorney for lack of fairness to the accused attorney.) (The Florida Bar is subject to the reciprocal demand to also "turn square corners".)

b. The Florida Bar ambushed and prejudiced Tobkin at trial by failing to answer (11 interrogatories) discovery which Referee at hearing ordered, answered, where did not answer said interrogatories, where said discovery went to the heart of Tobkin's ability to prepare and defend, where Florida Bar intentionally submitted to Referee an order which sustained all of Bar's blanket objections to

discovery, despite Tobkin's protest to Bar Counsel and via Petition of Extraordinary Writ and Motion to this Supreme Supervising Tribunal. (A-2,3,4,5,8,9, 10,11,12,15,16,17,18,19,20,21,22,23) (A-2 through 5, 8-12,15-33) The Florida Bar v. Rubin, 362 So.2d 12,16,17 (Fla. 1978), Binger v. King Pest Control, 401 So.2d 1310,1314 (Fla. 1981) (Trial ambush and incurable surprise in fact) Ham v. Dunmire, 891 So.2d 492 (Fla. 2004); Mercer v. Raine, 443 So.2d 944,949 (Fla. 1983)

c. Counts I-III failed to state a cause of action, where said counts and allegations contained therein arose from objected to hearsay language from an unauthenticated decision without an issued decisional mandate, in Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003), where this Supreme Court seemingly disapproved and will quash said decision. Said quashal should exculpate Attorney Tobkin of the alleged Rose related ethical breaches and demonstrate that Tobkin ethically discharged his duty to zealously advocate his client Beatrice Rose's medical malpractice/spoliation causes. (A-3-10,24-25,31-33) Williams v. Department of Rehabilitative Serv., 589 So.2d 359 (Fla. 1st D.C.A.

1991); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970)

d. The Florida Bar failed to prove that Tobkin caused harm to any client. (A-1,3,4,5,11,12,15,19,20)

e. The Referee erred by imposing the recommended discipline, sanctions, and all costs upon Tobkin. If any discipline was warranted, then Referee erred by failing to properly apply the mitigating factors in the Rules. And if Tobkin is not guilty of the charges, then costs should be imposed upon the Florida Bar. (A-3,4,5,15)

SUMMARY OF ARGUMENT

The Referee's report should be quashed on alternative main reasons as follows:

1. The complaint should have been dismissed for the Florida Bar's failure to prove by clear and convincing evidence that fair, unbiased, properly and duly constituted named individuals on a Grievance Committee 17(H) found probable cause to initiate disciplinary complaint against Tobkin.
2. The Florida Bar prejudicially stonewalled Tobkin's rights to pretrial discovery and failed to "turn round corners," in this case.

3. The Florida Bar's record evidence is legally insufficient to sustain Referee's report of discipline and imposition of costs against Tobkin.
4. The evidence established that Tobkin zealously advocated his clients', Rose and Bronfman, rights within the bounds of permissible ethics.
5. Tobkin caused no harm to his clients.
6. Costs should be imposed upon the Florida Bar on this.

ARGUMENT

Tobkin's litigation/medical malpractice adversaries both filed the grievances, here, and sat in judgment of Tobkin on the Grievance Committee 17(H), in issue. No client complained about Tobkin. No client was harmed by Tobkin. No client testified against Tobkin.

Particularly in Rose (Counts I-III), the evidence was both specious and insufficient. The record shows an impaired trial judge's illness and misperceptions were exploited by Defendants Doctors Hussamy and Fischman, through their respective counsel to drown Mrs. Beatrice Rose's case and cannibalize Mrs. Rose's lawyer.

The same scenario existed for breast cancer medical malpractice victim Plaintiff Lauren Bronfman, Esquire.

The complainants and grievance committee members modus operandi was simply, “If you don’t like the message, then kill the messenger.” Tobkin was the messenger. The message was that the involved Defendants practiced “bad medicine” and got caught doing so, despite altered medical records and Defendant’s misleading/false testimony.

Tobkin zealously advocated his clients’ apparent unpopular causes, here. That is ethical. It is not unethical, as claimed by Tobkin’s clients’ adversaries, including the biased neurosurgeon and lawyer Grievance Committee 17(H) pro-probable cause participants.

Ironically, Florida Bar Counsel’s prejudicial and seemingly intentional obstruction of Tobkin’s rights to discovery, with impermissible blanket objections to just eleven (11) interrogatories that went to the heart of Tobkin’s defense; purposely and knowingly preparing, causing to the Referee to sign an improper order which sustained the Florida Bar’s objections to answering Tobkin’s interrogatories, was the same type of dis-ingenuous and unethical pretrial discovery misconduct alleged by the Florida Bar against Tobkin. The hearing transcript will show that the Referee granted Tobkin’s ore tenens procedural motion at hearing, and required the Bar to answer said interrogatories. The Bar never answered any of said interrogatories.

Said Bar's prejudicial pretrial discovery obfuscation is grounds, alone, for quashing the Referee's report, dismissing with prejudice all charges against Tobkin, and imposing monetary costs and sanctions against the Florida Bar and in favor of Tobkin.

Uppermost, The Florida Bar's prejudicial and prosecutory misconduct required dismissal. Florida Bar intentionally and knowingly submitted a false order to Referee which fraudulently stonewalled Tobkin from obtaining answers to Tobkin's 9/06/04 interrogatories (1-11), which went to heart of the case and Tobkin's ability to obtain dismissal and/or acquittal of all charges.

10/01/04 Transcript, Page 4

(Bar Prosecutor) "if we need to conduct discovery, it would process under normal civil rules."

See 11/10/04 Transcript, Especially Pages 48-66

p53 (Tobkin) "probable cause hasn't been met… There is no authority for them not responding to discovery. It is not burdensome. It's my defense…"

p54 (Tobkin) "They haven't met the conditions precedent. And you should dismiss on Catalano…"

"And the Bar… we're now halfway through the time limit to trial -- and has stonewalled…"

		"When the prosecutor… does not timely give you discovery, then their case is dismissed…"
p66	(Tobkin)	"And now, we're at the 64th day. How soon shall the Bar give answers to the (11) interrogatories?"
	(Prosecutor)	"Your Honor, if you'll give us 15 days, that should be sufficient."
p66	(The Referee)	"15 days"
	(Tobkin)	"15 days to answer shall be fine."
p70	(Tobkin)	"It's by inner lineation. I've asked the Court to grant me by inner lineation within 15 days of today that they answer the interrogatories. The eleven interrogatories (sic) (eleventh interrogatory) will be compressed to just say the contention interrogatory as to each paragraph in your complaint…"
p71	(Tobkin)	"That will tell me what the –- what the Prosecutor's case is about and who their witnesses are and what their evidence is."

2/08/05 Trial Transcript

p12	(Tobkin)	"The next reason for dismissal is… The Bar's failure to comply with reasonable discovery requests –– objecting and stonewalling and failing to answer fairly standard interrogatories…"
		"And the Court order at hearing on November 11, 2004, that ore tenus the interrogatories were amended and were in conformance. And The Bar failed, to comply with this Court's order to file answers, the most rudimentary information, regarding witnesses,

regarding factual bases, and contention for each of the allegations…”

p13 (Tobkin) “You ordered that the Florida Bar answer interrogatories. They didn’t. And not only that they submitted an order to you that was patently… opposite to what the Court ruled. I brought it to the Prosecutor’s attention.

“He nonetheless insisted. Called him no less than seven times. Nonetheless insisted on submitting an order that was patently misleading and false regarding your order… It was on the discovery. That’s misconduct, your Honor, that’s prejudicial misconduct."

“I had no idea who the witnesses would be today. No discovery’s been provided to me in this regard. Your Honor, I ask that you –- that you dismiss The Bar’s complaint…”

The transcript must be read in its entirety, to show that the Referee’s report is unlawful, erroneous, and unjust. The Prosecutor failed his burden of clear and convincing evidence of any misconduct in Rose or in Bronfman by Tobkin. The Bar’s insufficient case consisted of objectionable and largely inadmissible hearsay documents, which are legally insufficient to prove The Bar’s allegations against Tobkin. In Count IV, the Bar’s 2 live witnesses were so biased, gave false testimony and affidavits. Worse, The Bar failed to present Attorney Paris or

any witness to testify that Tobkin yanked x-rays from Attorney Paris.

Everything in transcript supports rejection of Referee's report, dismissal of complaint, acquittal of Tobkin and imposition of harsh sanctions and costs against Florida Bar for prosecutorial misconduct, Binger Ham prejudicial, intentional, and willful Referee ordered discovery violations and a fraud on the Tribunal by foisting a knowingly false 12/10/04 discovery order on the interrogatories for the Referee's signature. Said misconduct by Bar was aggravated and callous because of repeated verbal requests for correction to Prosecutor, a December 2004 Extraordinary Writ to this Supreme Court and an unnecessary trial before this Referee.

WHEREFORE, exonerate Tobkin and punish the Florida Bar.

CONCLUSION

The Referee's report should be quashed as erroneous, unlawful, or unjustified.

Review of the appendix and transcript established the Florida Bar failed to prove a sufficient case to justify any discipline against Tobkin.

The ethical grievances here, were initiated solely by opponents and adversaries to medical malpractice victims' rights

to redress and access to the Courts, through the victims' lawyer advocate.

Allegorically, considering the source, these grievances should be viewed as flattery to a zealous advocate for the victims of medical malpractice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via mail/facsimile/hand delivery on this 23rd day of July, 2005 to: **Eric Montel Turner, Esquire**, 5900 N. Andrews Ave., Suite 900, Ft. Lauderdale, FL 33309; and **John Anthony Boggs, Esquire**, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32301-2546.

DONALD ALAN TOBKIN, M.D.
FBN: 742953
P.O. Box 220990
Hollywood, FL 33022
(954)258-6030

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Appellate papers comply with the font requirements in Rule 9.100(l) Fla. R. App. P.

DONALD ALAN TOBKIN, M.D.
FBN: 742953

DAT/ken