IN THE SUPEME COURT OF FLORIDA
CASE NUMBER SC 07- 661

LOWER TRIBUNAL NUMBERS
TFB 2005-30,980 (07B) and TFB 2006-30,684(07B)

THE FLORIDA BAR
COMPLAINANT
V.
CHARLES BEHM
RESPONDENT

RESPONDENT'S REPLY BRIEF

FILED BY CHARLES BEHM, ESQUIRE, RESPONDENT
POB 10 POMONA PARK, FLORIDA 32181

ORIGINAL

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ARGUMENT

As to Count I

THE RESPONDENT CHALLENGES AMOUNTS AND DOCUMENTATION, NOT THE GENERAL RULE THAT COSTS ARE APPLICABLE.

In its Answer, the Florida Bar misses the issue in applying the findings of The Florida Bar v. Kassier, 730 S2d 1273,1276 (Fla 1998) (A.B. p. 9). The Respondent acknowledges that the Referee has discretion in awarding costs in Bar disciplinary proceedings. The Respondent does not challenge the existence of costs in general. The Respondent does challenge which costs are applicable to this case and the amounts claimed regarding those costs.

The Bar argues that "all the costs listed by the Bar in its Affidavit of Costs are permitted under Rules 3-7.6(q) and 5-1.2(f) and there is no evidence in the record that the costs were excessive". (A.B. p. 9). What remains obvious by its absence is that there is no evidence in the record of any documentation justifying the costs claimed, or any documentation within the record to prove that the costs were truly incurred and if so, to what amount. These issues were raised previously and to date no documentation has been produced.

For the Bar to submit the affidavit of costs including the claimed costs of the CPA without any supporting documentation by the CPA is to submit hearsay as fact. (See Florida Statute §90.801 and §90.802) It is relevant to note that the hearing on the objections to costs was conducted without the CPA being sworn, nor did he provide any supporting documentation of his own. He did not provide any affidavit of costs, invoicing, master time sheets, or any other supporting documentation that might bolster the Bar's Affidavit of Costs.

The phone calls and email which is suggested by the Bar as definitive of the amount of time that the CPA Pearson committed to the case in the form of costs is sketchy at best and does not create the justification of costs exceeding $9,000.00 for a compliance audit. In live testimony Mr. Pearson stated that he "spoke to [the Respondent] on the telephone at least once", and "at least once sent him an email" (T- 18 Oct 2007 p.85-88). Bar's Exhibit 9 and Exhibit 10 comprised the two brief emails sent by Mr. Pearson to the Respondent, (18 Oct 2007 p.85, lines 17-19) See also Appendix A). The Bar's Exhibit 11 was comprised of Mr. Pearson's two page cover letter reporting addressed to the Bar and reporting on level of compliance (See Appendix A).

Mr. Pearson testified to examining less than a hundred transactions (T-18 Oct 2007 p.91 Line 23). A review of the records submitted to the Bar plus testimony regarding “at least one phone call” and two emails from the C.P.A. doing the compliance audit, the unsworn statement of Mr. Pearson that he invested 118 hours in this case, Mr. Pearson’s two page cover letter reporting addressed to the Bar and reporting on level of compliance (submitted as Bar Exhibit 11), and the unsupported Affidavits of Cost submitted by the Bar, comprise the whole of the evidence in the record for which the Bar wishes to claim $9,294.15 in costs related to the compliance audit. How is this reasonable or within the discretion of the Court ?

If one generously grants an hour to the two emails, one phone call, and two page report, that leaves 114 hours for Mr. Pearson to review “less than 100 transactions” for compliance with the Bar’s record keeping rules and write a report stating that the records are not in compliance (T-18 Oct 2007 p.91 Line 23 and see Bar Exhibit 11 listed as part of Appendix A). The record simply does not support the findings of the Referee sufficient to justify the costs imposed.

As to Count II

THE FLORIDA BAR HAS FAILED TO ESTABLISH OR OVER COME IT'S LACK OF ONE OF THE MOST BASIC TENANTS OF OUR JUDICIAL SYSTEM; THAT OF SUBJECT MATTER JURISDICTION INCLUDING ITS UNDERLYING COMPONENTS SUCH AS STANDING.

The challenge to the Court and the Bar's lack of jurisdiction was never waived. It was timely challenged, but was denied by the referee. It is axiomatic that subject matter jurisdiction is indispensable to a court's power to adjudicate rights between parties. Additionally, it is well-settled that lack of subject matter jurisdiction can be raised as a defense at any time, including after entry of a final judgment or for the first time on appeal. In re Brown's Estate, 134 So.2d 290 (Fla. 2d DCA 1961); see also Rule 1.140(h)(2), Fla.R.Civ.P.

Absolutely nothing has been submitted to the record on appeal or through the ANSWER BRIEF, that would indicate that the Florida Bar acquired jurisdiction to prosecute the Respondent regarding Count II of their complaint., the Bar has never had standing to bring Count II against the Respondent and the Court never had standing to hear it. The Supreme Court has stated that "standing is a necessary component of subject matter

jurisdiction" Rames v. Byrd. 521 US 811. Standing is perhaps the most important of [the jurisdictional] doctrines…standing represents a jurisdictional requirement which remains open to review at all stages of the litigation…" NOW, Inc. v. Scheideler, 510 US 249.

These rulings in the U.S. Supreme Court and similar rulings in other jurisdictions have established the requirements that standing and Subject matter jurisdiction must be clearly established before the Florida Bar could prosecute a disciplinary action or the Referee could preside the allegations in Count II. Without standing there is no actual or justiciable controversy and courts will not entertain such cases Clifford S. v. Superior Court , 45 Cal. Rptr.2d 333,335. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause …[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. Miss. So----- of Pardons and Paroles, 896, A2d 809, 812 (Conn 2006).

Nowhere in the record on review or in the ANSWER BRIEF, does the Florida Bar demonstrate that it has either "standing" nor "subject matter jurisdiction" to pursue its Count II against the Respondent. [Jurisdiction]

means, among other things, that the court has jurisdictional power to adjudicate the class of cases to which the particular case belongs. Lovett v. Lovett, 93 Fla. 611, 112 So. 768; Crill v. State Road Department, 96 Fla. 110, 117 So. 795; Curtis v. Albritton, 101 Fla.

The Florida Bar has failed to adequately address these points brought up in the AMENDED INITIAL BRIEF. Additionally, the Bar should know that in both administrative and general civil litigation, standing is a matter of subject matter jurisdiction and may not be assumed or stipulated. Grand Dunes v. Walton Comaty, 23 Fla. L. Weekly D 1 228a (Fla. 1 st DCA May 12, 1998); Askew v. Hold the Bulkhead--Save our Bas, 269 So.2d 696 (Fla. 2nd DCA 1972), *overruled on other grounds,* Save Sand Key v. United States Steel, 281 So.2d 572, 577 (Fla. 2nd DCA 1973). *See also* Polk Cognty v. Sofka, 702 So.2d 1243, 1245 (Fla. 1997) (parties cannot stipulate to subject matter jurisdiction);

An incorrect decision on subject matter jurisdiction is fundamental error. It constitutes a departure from the essential requirements of law, sufficient to justify invocation of this court's certiorari jurisdiction. Stel-Den of America, Inc. v. Roof Structures, Inc., 438 So.2d 882 (Fla.App. 4 Dist., 1983) Also

see Hartford Accident and Indemnity Co. v. Thomasville, 100 Fla. 748, 130 So. 7 (Fla.1930).

Thus, the Florida Bar's and the referee's lack of subject matter jurisdiction was properly raised in the Respondent's pretrial motion. So too, it is properly before this court, and without the Bar having jurisdiction no further legal action by the Bar, including any disciplinary action arising from Count II can have legal validity nor effect.

The Bar Cannot Grant Judge Spanhour's Jurisdiction, Any More Than The Bar Can Expand Their Own.

The Bar states in the Answer Brief that it entered its exhibits 1-20 to show that the "Respondent had received taxable income and was legally obligated to file income tax returns and pay federal income taxes. " (A.B. p.11).

As its Exhibit 2 at trial, the Bar submitted the Order of Judge Spanhour dated 9 November 2005, regarding "taxable income" (A.B. p. 11). The North Carolina hearing involved procedural matters related to a personal injury case in which the Respondent was injured. Judge Spanhour specifically asked about the military service of the Respondent and it was clarified that the Respondent does not receive any kind of military pension.

(See transcript of hearing as Reply Brief Appendix B p. 19-21) It was also established that the Respondent receives only income from his personal service as an attorney. (Ibid). There is no mention of taxable income with in the transcript of the hearing and the court had no jurisdiction to make such a determination. See Reply Brief Appendix B p. 19-21).

It is respectfully submitted that an examination of pages 19 – 21 of the transcript of the hearing that produced that Order, reveals no admission by the Respondent as to having taxable income (See Reply Brief Appendix B p. 19-21). It is also respectfully submitted that in a civil case involving personal injury, the North Carolina Judge had no more subject matter jurisdiction than the Florida Bar or the Referee to make such determinations, yet, without any due process or jurisdiction, concluded that the Respondent had "taxable income" and stated such in his Order. (Ibid. Also see Bar Exhibit 2).

This finding was not an issue in the personal injury case and so was never appealed by the Respondent. It was not known by the Respondent until some months later that the North Carolina judge had taken it upon himself to

use his unfounded conclusion to file a bar complaint against the Respondent through the Florida Bar.

Without Jurisdiction And Due Process The Bar's Power Becomes Abosolute And Arbitrary

The Bar argues that criminal prosecution is not a condition precedent to the Florida Bar bringing its disciplinary proceedings. (Ans. Brf. P 6). The Bar totally ignores the fact that the Respondent has received absolutely no due process through the criminal system even though the Bar claims that the Respondent committed a criminal act, and has committed "blatent violation of the law" (Answer Brief p.6). Every representation by the Bar indicates that this is a conclusion of the Florida Bar without support.

The Florida Bar cannot arbitrarily skip past the requirements of due process, standing, and subject matter jurisdiction and appoint itself as the trier of fact. This is clear over reaching by the Bar in direct violation of Article 9 of the Florida Constitution:

Florida Constitution Section 9. Due process.--No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

The Bar must also be restricted in its application of Rule 3-3.4, because an administrative agency may not enlarge its jurisdiction, nor may it have jurisdiction conferred upon it by agreement or consent of the parties. Swebilius v. Florida Construction Industry Licensing Bd., 365 So. 2d 1069 (Fla. lst DCA 1979).

It can not be ignored in a society based upon the rule of law that issues of the Florida Bar's standing, Subject matter jurisdiction and some degree of due process guaranteed under the law would be pre-requisites to disciplinary proceedings. Otherwise the Bar's authority becomes absolute and arbitrary. The same argument applies to the involvement of the Referee and the quasi-judicial administrative hearing.

The Bar Improperly Concludes That The Actions Of The Respondent Are In Violation Of Established Law And The Cases Cited By The Bar Are Easily Distinguished From The Instant Case And Do Not Establish Subject Matter Jurisdiction

The Bar states in its Answer Brief that "As a practicing attorney, Respondent should know that his arguments are baseless and contrary to established law." (A.B. p.12). Again, the Bar jumps to a conclusion that there has been a violation of the law, without standing, subject matter jurisdiction or the first application of due process regarding the Respondent. The Bar attempts this with full knowledge that other attorneys have challenged the I.R.S. under identical circumstances involving the filing of income tax returns and been vindicated in their arguments. "The established law" as suggested by the Bar (A.B. p.11) or its proper application must include those cases as well.

For example, the very attorney who represented the Respondent in Count II, Tommy Cryer, Esquire, has not filed income tax returns in over ten years, was tried and was himself acquitted of the very accusations which the Bar seeks to single handedly convict the Respondent (see Appendix C Judgment of Acquittal and The Memorandum).

The Bar cites to The Florida Bar v. Levin, 570 S2d 917 (Fla 1990) as proof that the Bar can discipline under Rule 3-4.4 without a criminal prosecution. (A.B. p.15). Levin is clearly differentiated from the instant case in that Levin admitted to knowledge that he was doing something illegal and he continued doing it. There is no such admission anywhere in the record regarding the Respondent.

The Bar cites to The Florida Bar v. Blankner, 457 So2d 476 (Fla 1984), and The Florida Bar v. Pearce, 631 1092 (Fla 1994). (A.B. p.15). In both cases the lawyer had been convicted or plead out to a crime. Neither situation applies to the Instant Case regarding the Respondent.

The Bar cites to The Florida Bar v. Palmer, 588 S2d 234 (Fla 1991) regarding consent judgment, however unlike the Instant Case, the standing and subject matter jurisdiction of the Court or Bar was never an issue. (A.B. p.11). No consent judgment was entered into by the Respondent, until after the objections to the Bar and Court lacking subject matter jurisdiction had been raised by the Respondent and denied by the Referee.

Conclusion

Count I

The Court has discretion to impose costs but that discretion has limits. In the Instant Case there is no documentation support the costs of over$15,000.00. The Court exceeded its discretion and the costs, particularly regarding the alleged $9,294.15 for the audit should be dismissed for lack of documentation or testimony as unnecessary, excessive, or not properly authenticated.

Count II

Neither the Bar nor the Court ever had standing or Subject matter jurisdiction to pursue prosecution of Count II. The objection was timely raised and denied by the Referee. Count II should be dismissed accordingly, and the consent judgment should be considered null and void. The matter should be remanded to the Referee for further review and revised sentencing regarding Count I.

Respectfully Submitted,

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that a true copy of this RESPONDENT'S AMENDED INITIAL BRIEF, with all appendix has been conveyed by U.S. mail this 10th day of June, 2008 to Frances R. Brown-Lewis, at the Florida Bar, 1200 Edgewater Drive, Orlando , Florida 32804.

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the RESPONDENT'S AMENDED INITIAL BRIEF complies with the font requirements of Rule 9.210(a) of the Fla. R. App. P., in that the document has been submitted in 14 point type of the Times New Roman font.

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