IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. SC14-1056

v.

ADAM ROBERT FILTHAUT,

The Florida Bar File
No. 2013-10,737 (13F)

Respondent.

ADAM ROBERT FILTHAUT'S REPLY BRIEF

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I. THE REFEREE ERRED IN DENYING THE RESPONDENT'S MOTION TO DISQUALIFY THE REFEREE.

The Respondent was denied due process when the Referee erred in denying his motion to disqualify the Referee. Rule 2.160(d) sets forth the following bases for a disqualification motion, at least one of which must be shown in the motion: 1.) the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge, or 2.) the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof.

In its response the Bar did not address *Dougan v. State*, 105 So. 3d 519 (Fla. 2012), as revised on denial of reh'g (Nov. 30, 2012) which stands for the proposition that:

> *"Florida Rule of Judicial Administration* 2.330 governs the disqualification of trial judges. The rule provides that '[t]he judge against whom an initial motion to disqualify ... is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged.' Fla. R. Jud. Admin. 2.330(f). 'Whether the motion is legally sufficient requires a determination as to whether the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.' *Rodriguez v. State,* 919 So.2d 1252, 1274 (Fla.2005)."

Nor did the Bar address the well established principle that an independent judiciary should maintain the dignity of the judicial office at times and avoid even

the appearance of an impropriety at all times, and where the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired, a judge shall disqualify himself or herself where his or her impartiality might reasonably be questioned. See *Fla. Code. Canon 3, ABA Model Code of Judicial Conduct 1 and Canon 2* (2007) (emphasis added). Most importantly, the Bar did not address the specific allegations the Respondent made in his two motions to disqualify the Referee, both of which should have been granted pursuant to Florida Rule of Judicial Administration 2.330 and Florida Statutes Section 38.10.

In his first motion to recuse the Respondent clearly demonstrated that the Pinellas County State Attorney's Office did not properly calculate the number of text messages in from the night of January 23, 2013 because of double counting. R 286:6. Further the Respondent provided proof that Mr. Campbell lied to the Pinellas State Attorney's Office about what occurred on January 23, 2013. R. 286:7. The Respondent next presented evidence that the Referee's son, Greg Baird, is a prosecutor with the Pinellas State Attorney's Office who was supervised by the lead prosecutor who exonerated Mr. Campbell, discussed the case with him and further wrote a faulty report in which the Referee relied upon in reaching its decision in this case. R 286:8. Judge Baird's son is "related" and "interested in the

result thereof" and the Pinellas County State Attorney relied on faulty evidence in reaching the conclusion the Referee relied upon in reaching its decision.

In the second motion to recuse, the Respondent set forth facts that further showed the Referee's bias. R 337:4. After the Respondent and The Florida Bar reached a fair and equitable resolution in this case, the Referee rejected the consent judgment. This is problematic on two accounts. First, the Referee rejected a fairly reached settlement by all of the parties, which resulted in the conclusion that at that exact moment in time he had unfairly prejudged the Respondent's case before hearing any facts.

This conclusion of Referree bias is supported by the Referee's ultimate conclusion of permanent disbarment without leave to reapply for the Respondent at the end of this case. The Referee could not have issued a harsher penalty. One must conclude that the harshest penalty was what the Referee desired from the moment he was appointed to referee this case. R 337:5. Second, in reaching his conclusion, the Referee relied once again on a faulty report generated by the Pinellas State Attorney's Office. R 337:5-10. And once again in this motion, the Respondent pointed out that the Referee's son, Greg Baird, is a assistant prosecutor at the Pinellas State Attorney's Office who works under Assistant State Attorney Loughery, the lead prosecutor who dismissed Mr. Campbell's DUI case and wrote

an erroneous report justifying his decision that the Referee based his ultimate conclusion upon. R 337:10.

II. THE REFEREE ERRED WHEN IT DID NOT GRANT THE RESPONDENT'S SUMMARY JUDGMENT MOTION.

The Referee denied the Respondent's motion for summary judgment. He did so without an order, instead just announcing in open court that it was denied. Prior to doing so however, he allowed the Bar to submit documents that were not properly maintained in the court file at the time of the Respondent's filing. This included an affidavit from Kristopher Personius.

Pursuant to 3-7.6(f)(1), Rules Regulating The Florida Bar, the Florida Rules of Civil Procedure apply to disciplinary proceedings unless otherwise noted. Florida Rules of Civil Procedure 1.510(c) provides that summary judgment is appropriate where…it is shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Summary Judgment can be for all or part of the matters raised. Fla. R. Civ. P. 1.510(b). In Bar proceedings, the referee has the authority to enter summary judgment. *The Florida Bar v. Miravalle*, 761. So.2d 1049 (Fla. 2000).

Florida courts repeatedly have held that a trial court should not enter summary judgment unless a movant conclusively demonstrates the absence of any genuine issue of material fact. *See, e.g.*, *Moore v. Morris,* 475 So.2d 666 (Fla. 1985) (a trial court must always deny a summary judgment motion unless the facts

are crystallized); *Underwriters at Lloyds, London v VIP Distribs., Inc.*, 629 So.2d 291 (Fla. 3d DCA 1993) (on a motion for summary judgment, the movant bears the burden of demonstrating the non-existence of any disputed issue of material fact). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits conclusively show that there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510.

It is well-established law in Florida that a party moving for summary judgment has "the burden of proving a negative, i.e., the nonexistence of a genuine issue of material fact," and that it must do so conclusively. *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Florida courts have construed this principle to require a movant to demonstrate that the undisputed facts conclusively establish that the opposing party cannot prevail. *Florida E. Coast R.. Co. v. Metropolitan Dade County*, 438 So.2d 978 (Fla. 3d DCA 1983). *See also Archie v. State Farm & Cas. Co.*, 603 So. 2d 126 (Fla. 2d DCA 1992). To meet this burden, a movant must "overcome all reasonable inferences which may be drawn in favor of the opposing party." *Star Lakes Estates Ass'n, Inc. v. Auerbach*, 656 So. 2d 271, 274 (Fla. 3d DCA 1995) (citations omitted). *See also Holl v. Tolcott*, 191 So. 2d 40, 43 (Fla. 966) (moving party must demonstrate the absence of all reasonable inferences which may be drawn in favor of the moving party); *Albelo v. Southern Bell*, 682

So. 2d 1126, 1129 ("even where the facts are uncontroverted, the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts"). However, once the movant tenders competent evidence to support the motion, the party against whom the judgment is sought must present contrary evidence to reveal a genuine issue of material fact. It is not enough for the party opposing summary judgment merely to assert that an issue exists. *Buitrago v. Rohr*, 672 So. 2d 646, 648 (Fla. 4th DCA 1996).

The allegations raised by The Florida Bar in their Complaint against the Respondent are not supported by facts or law and partial summary judgment is appropriate as discussed in the original motion. R 349:1.

Rule 4-3.4

There is simply no evidence in the record that Respondent presented, participated in presenting or threatened to present criminal charges against Campbell. In fact, the record evidence is quite the opposite. While Respondent may have provided information to Sergeant Fernandez that Campbell was at Malio's consuming alcohol on the evening of January 23, 2013, Campbell has testified that he voluntarily consumed alcohol and voluntarily drove without Personius or any other person asking him to drive. Campbell's voluntary actions resulted in his arrest. Furthermore, if Campbell truly felt that he was not intoxicated, he could have avoided being arrested and charged with driving under

the influence if he had cooperated with law enforcement. Instead, Campbell again, on his own volition, decided to lie to law enforcement about whether he consumed any alcohol that evening, lied about the number of alcoholic drinks he consumed, lied about being infirm, lied about having a speech impediment, he refused field sobriety exercises and refused to take a breathalyzer. He refused because he knew he was intoxicated and he would fail those exercises. In fact, Officer McGinnis testified that, in his opinion, Campbell was impaired under the law.

Additionally, the Bar has failed to provide a single piece of evidence that suggests that any alleged report Respondent may have made to law enforcement was for the "*sole"* purpose of gaining an advantage in a civil matter. According to Merriam Webster, "*sole*" is defined as "being the only one." It is undisputed that while Respondent's firm was engaged in a trial in which Campbell and his firm were opposing counsel, Respondent had no involvement in the trial. Furthermore, to meet their burden in proving this allegation, it is incumbent upon The Florida Bar to exclude all other possibilities. In fact, Sgt. Fernandez testified that he has known Filthaut was against drunk drivers. As The Florida Bar is unable to present any evidence that the "sole" purpose of Respondent informing law enforcement that Campbell may drink and drive was to gain an advantage in a civil matter, summary judgment must be granted as a matter of law.

Rule 4-3-5(c)

The Florida Bar alleged, "by relaying information to the Tampa Police Department, Respondent engaged in conduct intended to disrupt a tribunal." Other than the fact that Respondent may have provided information to law enforcement that Campbell may drink or drive, the discovery failed to reveal any evidence that Respondent intended to disrupt the tribunal. To prove intent, the Bar must provide evidence that the conduct was deliberate and knowing. *The Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). There is no evidence that Respondent acted deliberately and knowingly such that any action he might have taken would almost certainly result in the disruption of the tribunal. In fact, the evidence suggests otherwise. Campbell testified that he was ready to proceed with trial the following morning and present Michelle Schnitt as a witness. The only reason trial did not proceed the following morning was based upon stipulation of the parties and they agreed they would work on jury instructions.

As stated above, the element of intent requires a showing that the conduct was deliberate and knowing. To meet its burden, the Bar must advance evidence that Respondent was aware that it was certain that providing information to law enforcement about Campbell drinking at Malio's would result in a disruption of the tribunal. The Bar has failed to do so. It was not even certain that Campbell would

drive while intoxicated, make an illegal right hand turn warranting a traffic stop, lie to Officer McGinnis repeatedly, refuse field sobriety tests, refuse a breathalyzer test and have the parties stipulate to a continuance when Campbell has testified he was prepared to proceed forward with trial and witness testimony.

The Florida Bar essentially argues in its response brief that it is inappropriate to report a driver driving while impaired. There is no evidence in the record of a nefarious plan. The Respondent did what he was told to do. Because there is no evidence that Respondent was aware that it was a certainty that reporting a potential drunk driver to law enforcement would result in a disruption of the tribunal, summary judgment must be granted as a matter of law.

Rule 4-8.4

The general rule of attorney conduct is stated in 3-4.3 Rules Regulating the Florida Bar which provides that "[t]he commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise. . . may constitute a cause for discipline." *The Florida Bar v. Brake*, 767 So.2d 1163 (Fla. 2000). The exception to this general rule is 4-8.4(d) and applies only when a lawyer engages in misconduct while employed in a legal capacity. *Id.*

To the extent that Respondent may have provided information to law enforcement that Campbell was going to drink and drive, there is no evidence that this was done while employed in a legal capacity.

Respondent was not was not employed as Mr. Clem's attorney nor did he participate in or attend the trial as counsel. As this rule, by its express nature, requires that Respondent be engaged in a legal capacity at the time of the alleged misconduct and there is no evidence of such, summary judgment should have been entered as a matter of law.

III. THE REFEREE IMPOROPERLY RELIED ON FACTS NOT IN EVIDENCE.

The Respondent filed a motion for the Referee to disclose all information obtained by independent fact research during the trial. R 415:1. The record shows that the Referee did his own research with respect to witnesses Doctor Frankl. R 415:2. The record also shows that the Referee did his own research with respect to James Murman. R 415:2-3. The Referee refused to advise Respondent what research he conducted. R 415:1.

The Bar's response does not address the fundamental due process violation these acts caused. As argued initially, the Respondent was not privy to all of the evidence used against him and, thus, was unable to subject the evidence obtained by the Referee's independent investigation to a rigorous cross-examination. The

Bar did not address this issue because it cannot. It is fundamentally unfair and a violation of the Respondent's due process rights.

IV. THE REFEREE'S FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

The Bar does not address Respondent's argument that there is zero evidence that Respondent destroyed or otherwise consented to the destruction of the cellular phone he used on January 23, 2013. While Mr. Adams, Ms. Personious and Sergeant Fernandez have all admitted at various points under oath to deleting information from their respective cellular phones, the Respondent has not and no one has suggested at any point that he did. Since there is no evidence on the record supporting his finding, the Referee relies solely on the adverse inference that the Respondent deliberately destroyed his cell phone.

A respondent's silence may be used against him or her in a disciplinary proceeding but it should not be the only piece of "evidence" used to convict him of a particular rule violation. As stated in his initial brief, in similar cases involving other professions, the Supreme Court of the United States has held that a teacher who invokes the Fifth Amendment privilege against self-incrimination cannot be discharged from employment. In *Slochhower v. Board of Education*, 350 U.S. 551 (1956), the Court wrote:

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilty or a conclusive presumption of perjury… The

privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id*., at 557-558.

V. PERMANENT DISBARMENT OF THE RESPONDENT IS NOT SUPPORTED BY THE FACTS AND THE LAW.

Discipline must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *Florida Bar v. Brake,* 767 So.2d 1163, 1169 (Fla. 2000) (quoting *Florida Bar v. Cibula,* 725 So.2d 360, 363 (Fla. 1998)). This Court deals more severely with cumulative misconduct than with isolated misconduct." *Florida Bar v. Greenspahn,* 386 So.2d 523, 525 (Fla. 1980); *see also Florida Bar v. Spann,* 682 So.2d 1070, 1073 (Fla. 1996).

Permanent disbarment of the Respondent is inappropriate. As stated in his initial brief, there have been a host of respondents with more egregious conduct than the Respondent Filthaut that ultimately were not permanently disbarred by this Court. *The Florida Bar v. Bailey*, 803 So.2d 683 (Fla. 2001); *The Florida Bar v. Massari*, 832 So.2d 701 (Fla. 2002); *The Florida Bar v. Gross*, 896 So.2d 742

(Fla. 2005); *The Florida Bar v. Kandekore*, 932 So.2d 1005 (Fla. 2006); *The Florida Bar v. Thompson*, 994 So.2d 306 (Fla. 2008); *The Florida Bar v. Tipler*, 8 So.2d 1109 (Fla. 2009); *The Florida Bar v. Dupree*, No. SC13-921 (Fla. 2015). Why is the Florida Bar requesting that Respondent be disbarred but not do so in the above cases?

The Florida Bar argues that Respondent deliberately hid evidence because he did not report Kris Personius as a witness. There is zero evidence in the record that Respondent was aware of Mr. Personius as a witness until the Florida Bar disclosed Mr. Personius and a taped recording that he made in violation of Florida Criminal Statutues during Respondent's trial. Under the Florida Bar's logic, each of the Florida Bar's trial team committed the same offense because they were aware of this tape for months without disclosing it to Respondent.

Additionally, the Bar does not address the equity argument Respondent made with respect to his role in the case at hand when compared to his supervisors Robert Adams and Stephen Diaco and his fellow non-equity attorney Brian Motroni. The Bar fails to even mention Mr. Motroni's name during the relevant portion of its response brief. This is telling. How is it fair and just that Mr. Diaco and Mr. Adams receive the same sanction as the Respondent? The Respondent had no knowledge that Ms. Personius operated under false pretenses on January 23, 2013. Further, there is no evidence to show that the Respondent had any control

over Mr. Personius or had any knowledge that she was communicating with Mr. Campbell inside Malio's.

Finally, the Bar utterly fails to explain in its response brief why permanent disbarment is proper now when approximately one year ago today it was not. As stated in his initial brief, the Bar agreed to a 91 day suspension only to have the Referee deny the agreement. Nothing new was learned over the course of the next 12 months that drastically altered the facts known to the parties. The Respondent Filthaut did not wish to proceed to trial. He wanted to resolve this case but was not allowed because, for whatever reason, the Referee would not approve of a resolution. In keeping with the argument contained in his initial brief and his response brief, it is believed that the Referee desired disbarment long before he heard one witness testify under oath or one piece of evidence introduced at trial. And rather than stand on principle and fight for what was right and just the Bar caved to the public pressures of this media firestorm and now argues for something that it did not even remotely argue for less than one year ago today. This is unjust.

CONCLUSION

WHEREFORE, the Respondent, ADAM ROBERT FILTHAUT, by and through his undersigned counsel, respectfully petitions this Honorable Court to overturn the recommendations contained in the Report of the Referee.

Date: March 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, a copy of the foregoing was served on the following by registered e-mail via the electronic docket of this Honorable Court for service to all counsel of record:

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CERTIFICATON OF TYPE SIZE AND STYLE

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