

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Supreme Court Case

No. SC13-1382

The Florida Bar File No.

2010-31,481 (09A)

JAMES NEWELL CHARLES,

Respondent.

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**RESPONDENT'S REPLY BRIEF**

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## **PRELIMINARY STATEMENT**

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." James Newell Charles, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee. The symbol "TI" will be used to designate Volume I of the transcript of the Final Hearing, and "TII" will be used to designate Volume II of the transcript of the Final Hearing. Exhibits introduced by the parties will be designated as TFB Ex. \_\_ or Resp. Ex. \_\_. In respect to the Bar's exhibits, those in its binder (TFB Exhibit 17 on the Index) will be referenced as TFB Ex. 17-\_\_, with the number following the hyphen the tab number in the Bar's binder. Similarly, the Respondent's binder Exhibits (TFB Exhibit 18 on the Index) will reflect Resp.18-\_\_. The Florida Bar's Answer Brief will be referenced as (AB\_).

## **ARGUMENT**

### **A REHABILITATIVE SUSPENSION WOULD ONLY BE SUPPORTED IF THERE WAS COMPETENT SUBSTANTIAL EVIDENCE THAT THE MISSTATEMENT IN THE AGREEMENT FILED IN THE FEDERAL COURT WAS AN INTENDED, PLANNED ACT BY THE RESPONDENT**

The Respondent stands by the position taken in his Initial Brief that the case law supporting a rehabilitative suspension for a Rule 4-8.4(c) violation involve matters in which the Respondent engaged in a planned and calculated course of dishonest conduct. There is no competent substantial evidence to support a finding that Respondent's conduct was part of an intentional, before the fact plan.

The undisputed evidence in this matter reflects that Michael Roper and the Respondent had spoken about Mr. Roper serving as an expert. In fact, Mr. Roper conceded at his deposition that he told the Respondent that he would be happy to serve as his expert.<sup>1</sup> (TI, 46) Mr. Roper, contacted by the Attorney General's Office years after his interactions with the Respondent, just had no recollection of amounts being discussed. Based on his perception of what he believed an appropriate settlement and attorney fee amount in 2006 (after having been apprised of the situation by the Attorney General's Office), he did not believe that he had authorized the Respondent to represent that he had reviewed the amounts in

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<sup>1</sup> It is noteworthy that the Respondent was Mr. Roper's opposing counsel at that time.

question. The Respondent believed that the amounts had been provided to Mr. Roper, though perhaps verbally, and that at one encounter with Mr. Roper he had DuPont related materials with him. (TII, 118) Unfortunately, by the time the situation came under scrutiny, the Respondent had no documentation that file materials were provided for Mr. Roper's review. But again, the issue arose years after the fact.

The Florida Bar acknowledges that a misrepresentation, in order to violate Rule 4-8.4(c), must be knowing or intentional. (AB, 19) The Respondent urges this Court to take a reasonable step back and put this situation into context. It defies common sense that the Respondent would knowingly or intentionally name a member of The Florida Bar *by name in writing* in respect to his serving as an expert when he did not believe that that expert was willing to serve. Such a matter is so easily susceptible to verification and determination it would have made no sense for Respondent to do so, particularly since he had access to other potential experts.<sup>2</sup>

It would have been as likely as not that Judge Antoon would have, prior to entering the final judgment in the federal court matter, direct the filing of an affidavit by the expert. Why would the Respondent expose himself to that risk? It

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<sup>2</sup> In disallowing E. Clay Parker as Respondent's expert Judge Parson's had said, in so many words, that he would not need his expert testimony. This also calls into question the materiality of the statement in the agreement. (TII, 100)

simply is incredible that: 1) the Office of the Attorney General managed to portray this some nefarious scheme by the Respondent; 2) that Judge Parsons bought into this fiction; and 3) now that notion has been perpetuated by The Florida Bar to the Referee against all of the surrounding circumstances that scream out that the Respondent simply failed to follow through completely with Mr. Roper.

Rather, the totality of the evidence suggests that when the Attorney General's Office unexpectedly withdrew from the case after improperly declining to provide a defense to the Estate of Tanguosso, the Respondent simply did not prepare the case as if he would have done had the matter proceeded to a contested evidentiary hearing. There is nothing to show that Respondent did not *believe* that he had provided information to Mr. Roper. There is no smoking gun letter or email or notes. The reasonable hypothesis of the error is one of inadvertent omission, yet this ember has been fanned into a forest fire, and the Respondent faces a sanction appropriate for those who *plan* to perpetuate a deception or fraud on a court. That simply did not happen here, and there is no competent substantial evidence to suggest that this resulted from a plan or scheme.

The Florida Bar understandably wants to rest on the well-established law that this Court will not reweigh the Referee's findings of fact when they are

supported by competent substantial evidence.<sup>3</sup> In this case, however, there are aspects to the case such that elements of the law must be considered as inseparable from the analysis of whether there was competent substantial evidence before the Referee to support the Referee's findings.

Rather, the evidence on which the Referee relied was found in the judgments of Judge Parsons, and those orders were inconsistent with the law and initial mandate of the 5<sup>th</sup> District Court of Appeals in *Gallagher v. DuPont*, 918 So. 2d 342. There was no basis for Judge Parsons finding that any statement in the settlement agreement was a fraudulent representation to Judge Antoon. The representation as to Mr. Roper's involvement was made to the attorney for the Estate of Tanguosso, yet there was no evidence that he relied on any reference to Mr. Roper. How can it be said that Judge Antoon was misled, when Judge Antoon did not review the settlement for reasonableness?

Judge Parsons also found that the Respondent somehow engaged in deception when he *settled* the case rather than have an evidentiary hearing. Judge Parsons' final judgment is simply wrong in its representation that the Respondent somehow took the easy way out and did not seek an evidentiary

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<sup>3</sup> Respondent concedes that the testimony of James Peters could constitute competent substantial evidence of the Rule 4-8.4(d) violation. As to the violations of Rule 4-3.1 and 4-8.4(c), however, it is clear that the Referee relied almost exclusively on the judgments of Judge Parsons. Respondent does not agree that these judgments, rendered against the clear legal standards for the proceeding in question can form a proper basis for a finding of competent substantial evidence.



hearing. (TFB Ex. 1, 15) The February 15, 2002 hearing was intended to be an evidentiary hearing, as evidenced by the transcript. (Resp. Ex. 28) Furthermore, the docket entry for this hearing clearly reflects that it was to be an evidentiary hearing. (Resp. Ex. 25) Simply put, the hearing did not go forward, the Office of the Attorney General was allowed to withdraw, and then this matter proceeded on a different track. But the fact that the matter was then handled through the settlement agreement rather than a hearing – when the Attorney General’s Office had withdrawn – cannot reasonably be twisted into misconduct by the Respondent. Yet Judge Parsons made such a finding.

It is clear that Judge Parsons incorrectly conducted a trial *de novo*, rather than simply look to expert testimony in determining the reasonableness of the settlement agreement. And inexplicably he did not then allow the Respondent’s expert E. Clay Parker to testify, though he took testimony from Mr. Roper. The affidavit of Respondent’s expert James Tanner supports the reasonableness of the settlement. (Resp. Ex. 16; TII, 63) The notion that somehow Respondent submitted a *material* false statement to Judge Antoon on which Judge Antoon *relied* is simply overwhelmed by evidence to the contrary.

It is obvious that Judge Parsons punished the Respondent for having the audacity to stand his ground against the Office of the Attorney General. The Respondent had litigated a complex case in federal court. After an appeal, and

before it reached its conclusion, the key defendant, Tangusso, died. This increased the complexity considerably. Then the Office of the Attorney General withdrew, albeit wrongfully. This too increased the complexity. Through a tremendous amount of hard work to determine how to proceed on behalf of his client, Respondent secured a settlement on behalf of his client. At that point, the giant of the Attorney General's Office, previously asleep, awoke with a vengeance and began a full-on assault against the Respondent personally.<sup>4</sup> And the Respondent would not give in. At the end of the day, that is what the underlying case -- and its scathing judgments -- is about. This was the scenario discussed in *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002), and about which Justice Wells expressed concern.

The Respondent did not tie up the loose ends in respect to retaining Mr. Roper, but nowhere is there evidence that there was a knowing or intentional misrepresentation to the federal court. Perhaps the Respondent should have been charged with a violation of Rule 4-3.4(a), for failure to correct a material fact. However, Respondent still contends that the amounts of the settlement and attorney's fees had been given to Mr. Roper. Furthermore, the Attorney General's Office never elected to attempt to reopen the federal court case. (TI, 115) In light

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<sup>4</sup> Respondent believes that the Attorney General's Office turned Mr. Roper against him by suggesting that Mr. Roper had responsibility for estimating the amounts in the settlement agreement, thereby implying that Mr. Roper had done something improper. (TII, 107)

of that, how material could the use of Mr. Roper's name have been, if the Attorney General's Office didn't even make an attempt to set aside the judgment in the federal court? And finally, because he had, by the time that the Roper issue had been inserted in the state court action by the Attorney General's Office, found other experts supporting the settlement, the materiality of the representation to the federal court was reduced even further. So even though it would have been more appropriate for this case, the evidence does not even support a finding of a violation of Rule 4-3.4(a).

### **CONCLUSION**

Though The Florida Bar's Answer Brief accurately sets forth recitations of some of the applicable case law, Respondent stands by his contentions in his Initial Brief that the cases involving rehabilitative suspensions involve conduct significantly more planned and deliberate than that of Respondent. If this Court agrees that a violation of Rule 4-8.4(c) must involve knowing or intentional conduct, then Respondent contends that there was no competent substantial evidence to support such a finding. Respondent urges this Court to scrutinize the judgments from Judge Parsons against the backdrop of the proceeding which should have taken place, rather than what did take place, a full blown trial *de novo*. Again, Respondent contends that the appropriate discipline is one of thirty days or less, based on the case law cited in the Respondent's Initial Brief.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I furnished a copy of the foregoing by email to Patricia Ann Toro Savitz, Esq., Bar Counsel for The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, Florida 32801-5200, [psavitz@flabar.org](mailto:psavitz@flabar.org), to Adria E. Quintela, Esq., Staff Counsel for The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323, [aquintel@flabar.org](mailto:aquintel@flabar.org) this 22 day of July, 2014.

### **CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN**

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that e-mail forwarded to the Court has been scanned and found to be free of viruses, by Avast.

Respectfully submitted,

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