



Jan. 11, 2018

Board of Disciplinary Appeals

No. 05-16-00390-CV

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

LLOYD EUGENE WARD

Appellant's

v.

COMMISSION FOR LAWYERS DISCIPLINE

Appellee

*On Appeal from the Evidentiary Panel
for the State Bar of Texas District 6-2
No. 201401402*

**APPELLANT'S LLOYD E. WARD'S
RESPONSE BRIEF
(Oral Argument Requested)**

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Restatement of the Issues

Appellee's Petition allegations of violations

Appellee takes the position that it may find any facts available to support the findings made by the Evidentiary Panel in this action, but fails to address and chooses to ignore the fact that the claims now made by Appellee were not set forth in their Original or Amended Petition, and was not the basis of any of the alleged Disciplinary Rules of Professional Conduct violations.

The Amended Petition of Appellee alleged only causes of action based upon (1) failed to communicate the Citi Bank credit card settlement to Mr Haylock, (2) Failed to communicate that the Citi Bank Settlement would leave insufficient funds to settle the Chase Bank credit card, (3) failed to refund settlement fees charged to Mr Haylock and (4) failure to refund monies to Mr Haylock left in his own personal bank account. Appellee has now chosen to ignore its own pleadings and allegations of rule violations and find “any evidence in the record,” to support the Evidentiary Panel’s findings. As will be addressed below, the Appellee cannot prosecute a cause of action based upon facts not alleged in its Amended Petition.

Appellee’s position that it failed to comply with mandatory disclosure provisions, based upon Appellant having a copy of the Petition’s, cannot stand as (1) the rule is mandatory regarding exclusion with good cause, and Appellee has not asserted any claim of good cause in its argument before the Evidentiary Panel or in its Brief in this action; and (2) while Appellee seeks to sanction (with the potential penalty requested being disbarment), Appellant for failure to comply with the State Bar Disciplinary Rules, it asserts it is not required to follow the same rules it prosecutes.

Argument and Authorities

Reply to Response to Issue Number One

Appellee seeks to use a standard of “no showing of unfair prejudice or unfair surprise,” as its basis to allow the use of information not provided in its Disclosure Response, however, the standard used in Rule 2.17(d)¹, is “unless the panel finds that there was good cause..” The cases cited by Appellant do not stand for the proposition cited by Appellant, and in fact, substantiate the good cause requirement under Rule 2.17(d). The Court in *Bellino v Commission for Lawyers Discipline* 124 S.W.3d 380, 383 (Tex.App.-5th Dist. 2003, pet. denied), actually found under *T.R.C.P. Rule 193.6(a)* that “A party who fails timely to respond to a discovery request, or to supplement its response, shall not be entitled to offer testimony of a witness having knowledge of a discoverable matter unless the trial court (1) finds good cause sufficient to require admission, **or** (2) determines the other party will not be unfairly surprised or prejudiced. Tex.R. Civ. P. 193.6(a). As shown, Rule 2.17(d) does not provide either good cause OR unfair surprise or prejudice standard; it only provides for good cause.

Further, while Appellee asserts that such exclusion would only affect “Introduction of specific evidence or witness not disclosed,” such allegations are entirely inaccurate, as Rule 2.17(a)(5) requires “*A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions,*” and

¹ Rule 2.17(d) in relevant part provides:
“A party who fails to make, amend, or supplement a disclosure in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the panel finds that there was good cause for the failure to timely make, amend, or supplement the disclosure response; or the failure to timely make, amend, or supplement the discovery.”

the exclusion would preclude the alleged violation of Rules 1.03(b), 1.14(b), 1.15(d), and 8.04(a)(3) and any evidence relating to such alleged violations. As such violations were not disclosed, nor any facts to support such alleged violations, the alleged violation found 8.04(a)(3) would be excluded in its entirety.

In neither the argument before the Evidentiary Panel, nor in its brief, has Appellee asserted that good cause exist, what such good cause would be, nor did the Evidentiary Panel find good cause. There is the further issue in that the Rule requires that “the panel finds there was good cause...” which the Evidentiary Panel did not find, the Evidentiary Panel specifically found that *“If I recall correctly, supplemental pleadings do not initiate the previous filing of an amended petition. Supplemental merely adds to as opposed to supplement the original pleadings. So with that understanding, I’m going to deny your motion.”* Such findings is not a good cause finding.

Appellee has acquiesced that no good cause exist, and this Honorable Board should reverse and render judgment for Appellant, and find Appellee lacked authority to prosecute a violation of Rule 8.04(a)(3), and a finding of such violation is invalid as a matter of law and remove the Public Reprimand from Appellant’s record.

Reply to Response to Issue Number Two

Appellee has chosen to ignore the argument and authority cited by Appellant, that requires Appellee to establish and prove the causes of action alleged by Appellee, and instead takes the position that the finding may be upheld by any facts available to support the findings made by the Evidentiary Panel in this action.

The Amended Petition of Appellee alleged only causes of action based upon (1) failed to

communicate the Citi Bank credit card settlement to Mr Haylock, (2) Failed to communicate that the Citi Bank Settlement would leave insufficient funds to settle the Chase Bank credit card, (3) failed to refund settlement fees charged to Mr Haylock and (4) failure to refund monies to Mr Haylock left in his own personal bank account. Appellee has now chosen to ignore its own pleadings and allegations of rule violations and find “any evidence in the record,” to support the Evidentiary Panel’s findings. As will be addressed below, the Appellee cannot prosecute a cause of action based upon facts not alleged in its Amended Petition.

Appellant made, and lost the argument, that Mr. Hayes was not his client, however, Appellee as Plaintiff still had the burden of proof in substantiating and providing evidence to support the causes of action which it alleged. As substantiated in Appellee’s brief, Mr Haylock in fact refuted the claims made by Appellee, and Appellee can not, and did not, bring to the Honorable Boards attention, any testimony by Appellant that supports Appellee’s causes of action as alleged.

The Texas Supreme Court in *Stoner v Thompson*, 578 S.W.2d 679 (1979), stated that a judgment must be based upon pleadings, and that “[A] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent” *Oil Field Haulers Association, Inc. v. Railroad Commission*, 381 S.W.2d 183, 191 (Tex. 1964). In determining whether a cause of action was pled, plaintiff’s pleadings must be adequate for the court to be able, from an examination of the plaintiff’s pleadings alone, to ascertain with reasonable certainty and without resorting to information aliunde the elements of plaintiff’s cause of action and the relief sought with sufficient information upon which to base a judgment. *C & H Transportation Company v. Wright*, 396 S.W.2d 443 (Tex.Civ.App.1965, writ ref’d n. r. e.), see

In Re Elliot 504 S.W.3d 455 504 S.W.3d 455 (Tex.App.-Austin 2016), at footnote 63.

The facts alleged in Plaintiff's pleadings cannot support the award rendered, as such facts were not alleged nor proven, and this Honorable Board should reverse and render judgment for Appellant, and find Appellee failed to prove its causes of action as plead under Rule 8.04(a)(3), and such violation is invalid as a matter of law and remove the Public Reprimand from Appellant's record.

Conclusion

The Appellee should be limited to the claims and rule violations set forth in its disclosure, which under the amended petition, would be Rule 1.01(b)(1), and the Evidentiary Board examined the claim under Rule 1.01(b)(1) and found no violation occurred. Further, the Amended Petition of Appellee alleges as a cause of action that (1) failure to communicate the Citi Bank credit card settlement to Mr Haylock, (2) Failure to communicate that the Citi Bank Settlement would leave insufficient funds to settle the Chase Bank credit card, (3) failure to refund settlement fees charged to Mr Haylock and (4) failure to refund monies to Mr Haylock left in his own personal bank account. Those facts are unsupported, and in fact, in exact opposition to the testimony of Mr Haylock. The Judgment of Public Reprimand should be set aside in this action.

Respectfully Submitted

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Certificate of Service

This is to certify that a true and correct copy of this Response to Motion to Strike, has been served on the Commission for Lawyers Discipline, by electronic service through this Court's electronic filing service provider or by email to cynthia.burton@texasbar.com, on this 11th day of January, 2018.

S/Lloyd Ward
Lloyd Ward

Certificate of Words

This is to certify that the Appellant Brief, exclusive of cover page, index and table of contents is 1,885 words

S/Lloyd Ward
Lloyd Ward