IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BROOKE GIRLEY,

Respondent.

_____/

Supreme Court Case
No. SC22-859

The Florida Bar File Nos.
No. 2021-30,854(9B)

REPLY BRIEF OF BROOKE GIRLEY
Appeal Seeking Review of Referee Report

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SUMMARY OF ARGUMENTS IN REPLY

It is a troubling, and indeed dangerous world to live in when the warnings of a civil rights lawyer are seen as attempts to undermine the very system she hopes to improve. It is further concerning when that same lawyer draws upon her cases, experiences, and scholarship to highlight her concerns, she is labeled unethical and deserving of discipline. If the Bar's prosecution is permitted, that is exactly the world this Court will create. Metaphorically, the Bar is attempting to shoot the messenger.

As noted in her Initial Brief, Respondent is a long-time civil rights advocate and scholar who regularly speaks out against injustice. What Respondent did in the summer of 2021 was no different than what she has always done. What was different is that the judge in the case filed a Bar complaint against the Respondent, who was not a participant in the case, and her father. Interestingly, the judge later denied filing a Complaint, and the Bar and Referee called this about-face mere "semantics." This type of confusion and evolution has been part and parcel of the prosecution against the Respondent. Regrettably, the Bar's Answer Brief is no different.

The Bar grossly mischaracterizes the Respondent's words to the point of bordering on material misrepresentations. They implicitly deny the validity of the Respondent's experience and scholarship. It labeles the uncomfortable truth the Respondent spoke as "misleading" because it calls attention to the troubling parts of our court system. In other words, the Bar simply does not like the content of the Respondent's speech because it calls out systemic injustice. The Bar's attempt to label that speech as impugning the integrity of the judiciary does not render it no less of a clear constitutional violation.

Therefore, the Bar has failed to substantiate the findings and recommendations of the Referee's report, and it has not rebutted the constitutional issues raised by the Respondent. Respondent now re-incorporates the positions in her Initial Brief and offers the following additional argument.

ARGUMENT

I. The Bar Is Attempting to Disguise Its Violation of Respondent's Constitutional Rights by Mischaracterizing Her Truthful Comments

A. The Bar Continues to Evolve Its Explanation Regarding Why It Prosecuted Respondent

In its Answer the Bar attempts to retreat from the initial reason it gave for prosecuting the Respondent. Specifically, paragraph 12 of the Complaint states, "Respondent made statements on social media suggesting that the court system does not provide equal justice to all." (Rec. at 3). The Referee in her report also discussed how, "Respondent widely disseminated a message through social media that the court system is not fair and doesn't provide equal justice to everyone." (Rec. at 762). Therefore, it is quite perplexing now that the Bar argues that "this case does not hinge on the broader topic of equal rights in the court system" and that the Responded "misses the point." (TFBA[1]. at 34, 48). If there is confusion, it does not rest with the Respondent.

The reason for the Bar's retreat may stem from the record evidence that clearly demonstrate Respondent's good faith basis for critiquing the system. The Bar tacitly admits this in its Answer. (TFBA at 38). Moreover, as the ACLU's brief highlights, prosecuting the Respondent for such critiques is a violation of her constitutional rights.

[1] References to Bar's Answer Brief: TFBA at #.

Unfortunately, instead of acknowledging this, the Bar has chosen to shift its theory of the case again and to argue it is prosecuting the Respondent for impugning a judge's integrity by "claim[ing] that the judge abused his authority in granting a directed verdict and suggested a race-based motive for the judge's ruling." (TFBA at 2). Now, the Bar argues, all her broad comments from social media that the Bar used to show that she implied that the "court system does not provide equal justice to all," should only be seen as narrow comments intended to impugn the judge's integrity.

Such a shift in reasoning underscores the due process claims asserted in her Initial Brief. The Bar has continued to present the Respondent with a case that is a moving target. She is left guessing the precise basis for her discipline.

This shift also underscores her First Amendment claims as outlined further below.

B. The Bar's Prosecution Violates Respondent's Free Speech By Continuing to Misconstrue the Respondent's Directed Verdict Comments and Prosecuting Her for What it Admits Are True Statements

The Bar's Answer makes it clear that it is attempting to punish the Respondent for what it admits are truthful statements. For

example, the Bar acknowledges that "[a]dmittedly, she [Respondent] did not explicitly call Judge Weiss a racist, and she did not explicitly state that he issued an adverse final order on his own initiative with no pending motion before him." (TFBA. at 28). It concedes that her comment about the delayed directed verdict without post-trial motions was "technically true," and that she "admittedly…clarified the matter in response to a question…" (TFBA at 23, 24). The Bar further admits that these statements could be "open to multiple interpretations such that the statements might not be deemed explicitly untrue (i.e. the judge "single-handedly" overturned a verdict "on his own")." (TFBA at 26). In other words, there is no categorically false statement the Bar can point to that the Respondent made.

Specifically, the Bar's argument hinges its impunity charge based on its understanding of the directed verdict and what it believes the Respondent meant when she accurately stated that the judge acted without any posttrial motions. (TFBA at 23, 24, 25, 26, 35-38). It is the Bar's contention that when the Respondent made comments about the directed verdict, it was "intended to mislead." (TFBA at 23). However, this assertion has no basis in fact, or in the record.

The Respondent testified that she had never in her nearly fourteen years of practicing law[2] experienced a judge reverse a jury verdict one week after the jury rendered its verdict without either party filing any post-trial motions. (Trans. at 28). Also, experienced trial attorney and professor Jonathan Barry-Blocker, testified that he had never heard of a judge taking such action. (Trans. at 115).

The Bar tries to dismiss these statements as "technically true," but technically true statements is another way of saying *true*. More importantly, the specificity of her words speak to her intent rather than the mere conjecture of the Bar. The Respondent did not simply state that she did not know that a judge could reserve ruling on a motion for directed verdict. Indeed, she does. What the Respondent found to be an aberration was the very specific circumstances of this case.

This is not a post hoc explanation but has been her consistent claim immediately following the directed verdict when she responded to Prof. Barry-Blocker, until her testimony at trial. Therefore, the Bar's Reliance on *The Florida Bar v. Forrester*, 818 So.2d 477 (Fla. 2002) is inapposite here. In that case the attorney hid a document from

[2] The Bar's Answer incorrectly states that Respondent only practiced law for two years before working in media. Respondent practiced full time for two years but has continued to practice law on a part time basis through the present.

opposing counsel during a deposition and sought to avoid accountability by using artful language.

Here, the Respondent has not engaged in any such overt action and nor is she simply using "artful" language to circumvent the truth. Rather, the focus on the post-trial motion is significant because it points to Fla. R. Civ. P. 1.480, which governs motions for directed verdict and states:

> (b) **Reservation of Decision on Motion**. When a motion for a directed verdict is denied *or for any reason is not granted*, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 15 days after the return of a verdict, *a party who has timely moved for a directed verdict may serve a motion to set aside the verdict*… (emphasis added)

In other words, the filing of post-trial motions is not merely a technicality, but rather a reference to the substance of the rule dictating directed verdicts. It is the filing of the post-trial motion that triggers the court's power to enter a directed verdict beyond the normal time frame.

To be sure, the Bar pointed to the fact that courts can reserve ruling, but as noted below, those rulings are immediately following the jury's verdict. There is no indication that any of those verdicts were entered a week after the trial or without a renewal of the motion, and certainly they were not for such large verdicts as here.

Furthermore, Florida courts have noted how Rule 1.480 fits within the court's discretion to reserve on motion for directed verdicts.

> "Patently, the rule contemplates that when a court fails to grant a motion for directed verdict at the close of the evidence, a party has only ten days after reception of the verdict to move for a judgment in accordance with the motion *even in cases in which the trial court has deferred ruling on the motion*. *Williams v. Sch. Bd*, 770 So.2d 706, 706 (Fla. 4th DCA 2000) (relying on *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 50-53, 73 S. Ct. 125, 127-28, 97 L. Ed. 77 (1952)(emphasis added).

While the Bar spends a considerable amount of space copying and pasting caselaw it gleaned from footnote two within the *Gutierrez v. L. Plumbing, Inc.*, 516 So.2d 87 (Fla. 3d DCA 1987), none of the caselaw speaks to the specific timeframe a court has to rule on a reserved directed verdict, especially in light of Rule 1.480.

The matter of *Ricks v. Loyola*, 822 So.2d 502 (Fla. 2002) deals with a request for a mistrial, not a directed verdict. Also, there was no week delay. In *Gutierrez* the court found directed verdict to be improper, and only mentioned in a footnote the generalized preference for courts to wait until a jury renders its verdict to enter directed verdict. But this footnote cannot be said to have extended a court's ability to rule long after the jury verdict, again, especially in light of Rule 1.480 requirements.

Likewise, in *Mabrey v. Carnival Cruise Lines*, 438 So.2d 937 (Fla. 3d DCA 1983) the court reserved its decision on directed verdict

then *orally announced its intention to grant the directed verdict at the trial*. The court allowed the matter to go to the jury, and after the jury rendered a verdict, the court then officially entered a directed verdict. There was no week delay in the entry of the directed verdict. The same is true in *Dysart v. Hunt*, 383 So.2d 259 (Fla. 3d DCA 1980); *Freeman v. Rubin*, 318 So.2d 540 (Fla. 3d DCA 1975); *Ed Ricke & Sons, Inc. v. Green*, 468 So.2d 908 (Fla.1985). In those cases, the trial court's entry of directed verdict was done immediately following the jury verdict, or as in the case of *Ditlow v. Kaplan*, 181 So.2d 226 (Fla. 3d DCA 1965), after the Defendant renewed its motion. More importantly, none of these cases entailed the court overturning of such a significant award as here, without any post-trial motions.

Collectively, then, the Bar has not produced any case law showing that a court can enter a directed verdict one week after trial without any post-trial motions being filed, or that it is normal practice for a court, especially considering Rule 1.480's requirements. Indeed, it cannot not produce such case law because it does not exist. Contrary to the Bar's assertion, the Respondent does not have a knowledge gap. If such a knowledge gap exists, relating to this issue, it appears to be with the Bar.

What the trial judge did in this case is an aberration and rarity even within existing caselaw. Perhaps that is why the judge refused to state how many times he has made such a delayed ruling prior to the *Baiwyo Rop v. Adventist Health System, Case No. 2017-CA-009484-O (Fla. 9th Cir. Ct. 2017) matter*. The power and timeframe to rule on a reserved motion is not endless; Rule 1.480 clearly contemplates a limit. There are limits to the court's power to reserve on a directed verdict.

Therefore, Respondent's questioning of whether the judge in the underlying case exceeded those limits cannot constitute misleading or dishonest conduct; rather it is an honest expression of her opinion as to the state of the law. What the Bar characterizes as misleading is at most a difference of opinion about the state of the law. The court may ultimately disagree with the Respondent's analysis because admittedly the caselaw does not explicitly outline the appropriate timeframe, but that is not grounds for discipline.

C. Respondent Never Made Statements Implying Judge Weiss Was Racist Or Did not Respect the Constitutional Rights of a Black Plaintiff

The Bar admits that "[Respondent] did not explicitly call Judge Weiss a racist." (TFB A. at 28). Nevertheless, it seeks to inject racism

where it does not exist. It does so by pointing to two statements that were not made by the Respondent, but were retweets of her brother, her accurate description of the judge's race, a quote from the infamous Supreme Court case *Dred Scott* case, and the broad critique of the court system as a "sham." (Rec 607-608, 619-24; T.T. at 46-49).

The Bar fails to address the elephant in the room, though. The underlying case was about racial discrimination. Therefore, any critique of the case necessarily involved a discussion around the topic of race, racism, and its history in this country. That was the basis for Respondent mentioning *Dred Scott* and the comment "even when we win we lose," to highlight how the result in the underlying case fit within a broader context of systemic racism.

The Bar argues that because Respondent mentioned the judge's race she was implying he was racist or racially motivated. The Respondent never said that, and in fact when asked if she thought his actions were racially motivated she said, "I don't know. I hope not." (Rec. at 638).

Furthermore, calling attention to one's race does not automatically imply that one is a racist. Rather, race is often a proxy

for a set of cultural and lived experiences that one brings to the interpretation of evidence. The lens the judge brought to the evidence is significant, especially when considering Justice Marshall's warning in *Batson v. Kentucky*, 476 U.S. 79, 106 (1986)**,** who worried that our "subconscious bias" is at play in our decision, and we are not aware. That is how systemic racism works, not because any one person is overtly racist, but because our implicit biases are permitted to go unchecked.

The Respondent has voiced such critiques of systemic racism prior to this case and continues to do so as a professor. So what is the difference here? What the Bar is effectively doing here, is saying to the Respondent that she can theoretically comment on racial injustice, but she cannot say words that make the Bar feel uncomfortable. This is clearly unconstitutional and falls short of the Bar's burdent.

II. Respondent is Not Time Barred From Raising Her Religious Freedom and Equal Protection Claim

Respondent is not barred from Religious Freedom and Equal Protection Arguments. While courts generally will not consider an issue raised for the first time on appeal, this is not an absolute bar. As the court said in *Dean Witter Reynolds, Inc. v. Fernandez*, "This

principle is not a jurisdictional limitation but merely a rule of practice, and "the decision whether to consider an argument first made on appeal . . . is 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.'" 741 F.2d 355, 360 (11th Cir. 1984)(quoting R*oofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir.1982)).

The 11th Circuit has carved out five special circumstances when they will consider an issue first raised on appeal: “(1) when the issue "involves a pure question of law" and "refusal to consider it would result in a miscarriage of justice," (2) when "the appellant raises an objection to an order which he had no opportunity to raise at the [lower] court level," (3) when "the interest of substantial justice is at stake," (4) when "proper resolution is beyond any doubt," and (5) when the "issue presents significant questions of general impact or of great public concern." *Finnegan v. Comm'r*, 926 F.3d 1261, 1271-72; (11th Cir. 2019); *see also Cooper v. PHEAA*, 820 Fed.Appx. 861, 865 (11th Cir. 2020); *Hickman v. Fla. Dept. of Corr*, 2022 U.S. App. LEXIS 22733, *6 (11th Cir. 2022). Therefore, if the constitutional issue had not ripened before or falls within one of these exceptions, it may be raised for the first time on appeal.

Here, the Respondent's Religious Freedom claims fit into the special circumstances outline by the 11th Circuit. Specifically, prosecuting the Respondent because she exercised her religious freedom implicates a substantial interest of justice are at stake. Moreover, such a prosecution presents significant questions of general impact or of great public concern.

As noted in the Initial Brief, this was during the pandemic, so religious organizations met virtually. The program started with an opening hymn and prayer. Had this conversation happened in a church and Respondent made those comments, no one would argue that the Bar's actions violated Respondent's Religious Freedom.

It is also clear that the Bar does not fully comprehend the religious nature of the interview. For example, one of the quotes from the Respondent that it highlights is "break every chain." (TFB A. at 28). The Respondent was referring to the title and chorus of a well-known gospel song by Tasha Cobbs-Leonard. The fact that the Bar chose to use the lyrics to this gospel song as an example of how she implied the judge was racially motivated is perplexing and deeply problematic. The Bar is literally using the Respondent's religious music to prosecute her. This speaks to the danger of when the

government attempts to enter the religious sphere to regulate it and extrapolate meaning. The Bar, as an arm of the government, is simply not competent or constitutionally permitted to do so.

Likewise, with respect to Respondent's Equal Protection argument, special circumstances two, three, and five are undeniably present, and arguably number four. Respondent did not have a chance to raise at the hearing level because the comments were made four months later, and the serve as the basis of her equal protection claim. Also, Respondent's denial of equal protection causes an interest of substantial justice to be at stake and presents significant questions of general impact or of great public concern.

The Bar's contention that the politicians' comments are distinguishable because they had no financial incentive, and they were not a participant is without merit. To begin, the Bar cites no case law that stands for that proposition that there must be a financial incentive for a Bar prosecution. Furthermore, the well-known politicians' comments are not divorced from personal incentive either.

The context of their comments is after the leader of their political party was convicted of thirty-four felonies. If their leader's conviction stands, it has the potential to disrupt their party's political

power, which will in turn disrupt their power, both individually and collectively. Their comments, then, can be viewed as their attempt to hold on to personal political power.

If the Bar believes the Republican lawyers can make their comments to millions of followers, then surely that protection must also extend to the Respondent. Their harsh comments to their millions of followers and Fox News viewers that assailed against the system, prosecutors, and the government at large should not receive more protection than the Respondent's comments during a Facebook live interview and podcast.

If the fear is that the Respondent was spreading falsity to his congregation during his interviews, then surely that holds true when Senator Marco Rubio, for example, called a court proceeding a "sham" to his millions of followers, and liken the court to a communist show trial. Senator Rubio is also a designated campaign surrogate for the Trump campaign. The Bar cannot deny the double standard. It can only try to avoid it. Such matters of national importance are ripe for review.

Finally, the Bar also appears to be arguing incoherent views with respect to the Respondent's association with the firm and how it

implicates culpability. On the one hand, it says she had a financial incentive and "had an apparent connection to the case, both as a lawyer with the firm representing the plaintiff and the daughter of the lawyer..." such that she could be disciplined for her comments on social media. (TFBA at 40). But on the other hand, when she answered questions online about the case "she falsely implied" what the Bar just described as an "apparent connection" to the case. (TFBA at 32). Also, the Bar argues, her answers were necessarily misleading because she did not have personal knowledge.[3] (TFBA at 19-20). In other words, she is associated enough to be disciplined for her comments, but not associated enough to have a factual basis for her comments regarding the case.

At the end of the day, the Bar appears to be punishing her, not because of what she's said, but in part, because she is related to Attorney Jerry Girley. This is clearly unconstitutional.

III. The Bar Failed to Refute Existing Precedent That Demonstrates a 30-Day Suspension Is Not Appropriate

The Bar's main argument is not that the Respondent did not present precedent indicating that a 30-day suspension is a great

[3] The Bar's argument is essentially that only personal knowledge qualifies one to discuss a matter. If this is so, then it would invalidate professions such as historians, scholars etc, and disrupt other areas in society.

deviation from how the court traditionally handles such cases. Rather, the Bar argues that this court should deviate from precedent because it was strict in the *Jacobs* case, a case that is markedly different from this one. There, the respondent was the lawyer on record, filed documents with the court and engaged in conduct over the course of years. This is not a case about a few social media post by a non-party attorney.

On a final note, the Respondent is deeply concerned about the Bar's basis for the 30-day suspension. During its closing and in its Answer, the Bar maintains that this will protect the public from such behavior and deter others from engaging in similar conduct.

However, at the disciplinary hearing for both the Respondent and her father, there were numerous members of the public there in support. The Virgil Hawkins Bar Association has also written a letter in support of them. In other words, the community views the Bar's actions as trying to silence voices that speak up for marginalized communities. Thus, the Respondent is left to wonder which members of the public the Bar is trying to protect? She respectfully contends this prosecution does not protect Black, Brown, or other historically marginalized communities.

CONCLUSION

Wherefore, this Court should not uphold the Referee's finding of guilty because there is a lack of record evidence to support guilt and a 30-day suspension, and the Bar's prosecution of the Respondent is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the Florida e-portal system on this the 11th day of September 2024 and that a copy was served via email upon Mark Lugo Mason mmason@floridabar.org, Ashley Taylor Morrison, Esq., Bar Counsel, amorrison@floridabar.org, Carrie Lee, Bar Counsel, clee@floridabar.org; and Patricia Ann Toro Savitz, Esq., Bar Counsel, The Florida Bar, psavitz@floridabar.org.

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CERTIFICATE OF COMPLIANCE WITH Fla. R. App. P. 9.210(a)(2)

I hereby certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.210(a)(2)(B) for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2004 in Arial 14-point font. The length of this brief is 3899 words.

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