

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

COPY

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NEIL J. GILLESPIE,	:	
	:	
Plaintiff,	:	
	:	CASE NO.: 05-CA-7205
vs	:	
	:	
BARKER, RODEMS & COOK,	:	
P.A., a Florida	:	
corporation; WILLIAM J.	:	
COOK,	:	
	:	
Defendants.	:	
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TRANSCRIPT OF:	HEARING
BEFORE:	THE HONORABLE JAMES M. BARTON, II
DATE:	August 15, 2007
PLACE:	Hillsborough County Courthouse In Chambers 800 East Twiggs Street Tampa, Florida
TIME:	9:24 a.m. to 10:04 a.m.
REPORTED BY:	Michele Coburn Notary Public State of Florida at Large

1 APPEARANCES:

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Appeared on behalf of Plaintiff

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Appeared on behalf of Defendants

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Certificate of Reporter

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1 Transcript of proceedings on August 15, 2007,  
2 commencing at 9:24 a.m., at the Hillsborough County  
3 Courthouse, In Chambers, 800 East Twiggs Street, Tampa,  
4 Florida, before Michele Coburn, Notary Public, State of  
5 Florida at Large.

6 THE COURT: We're here in Gillespie versus  
7 Barker, Rodems & Cook, P.A. This is the plaintiff's  
8 motion to withdraw voluntary dismissal or,  
9 alternatively, to amend answer to include counter  
10 complaint, which I guess is another way to go.

11 There were some of these older cases cited  
12 involving voluntary dismissals. The Second District  
13 in particular had taken a pretty harsh line back in  
14 the early to mid-'80s saying, you know, "Notice of  
15 voluntary dismissal is a volitional act and it  
16 divests the court of jurisdiction to do anything  
17 except maybe award fees and costs. And if they do  
18 it by mistake, well, too bad."

19 But the Supreme Court finally -- because some  
20 of the other districts had felt otherwise. And  
21 finally in Miller versus Fortune Insurance Company,  
22 at 484 So.2d 1221, the Florida Supreme Court said,  
23 you know, "1.540 is designed to rectify mistakes.  
24 And if something is truly a mistake, even a notice  
25 of voluntary dismissal, we're going to let the

1 plaintiff try to convince the Court that it was one  
2 of those mistakes that should be corrected."

3 So to me, the question here is whether the  
4 allegation of the motion that Mr. Gillespie at the  
5 time was representing himself and didn't really  
6 understand the legal significance of -- I think the  
7 implication is he may have thought that, "Hey, if he  
8 dismissed whatever he dismissed, then that would  
9 basically wipe out the whole case," which, of  
10 course, as we know in the legal profession, it  
11 doesn't.

12 And it's my understanding that the defense does  
13 want to maintain its counterclaim?

14 MR. RODEMS: Yes, Your Honor.

15 THE COURT: Well, I mean, sometimes in other  
16 settings when there's a notice of voluntary  
17 dismissal -- and this happened a lot in county court  
18 because plaintiffs -- "Judge, I'm tired of this.  
19 I'll just voluntarily dismiss my case," and I'll  
20 say, "Well, you can do that. But you understand the  
21 other side has filed a counterclaim and that's still  
22 on the table."

23 And then the defendant a lot of times will say,  
24 "Okay. Well, if they're dismissing theirs, we'll  
25 dismiss ours. Everybody has better things to do and

1 so let's move on with our lives. Let's dismiss  
2 everything."

3 But that's up to the parties in each case and  
4 that's why I pose this question before I make -- and  
5 of course, the rule is specifically that a plaintiff  
6 can't dismiss an action when there's a counterclaim  
7 pending unless the defendant says, "Yeah" -- exactly  
8 what I've outlined -- "Judge, they dismiss their  
9 case, we'll dismiss our counterclaim and that will  
10 be it."

11 So that's why I was asking.

12 MR. RODEMS: Well, just so that the record is  
13 clear, you know, if this motion to withdraw the  
14 complaint is denied, then we will dismiss our  
15 counterclaim because we really don't have an  
16 interest in prolonging this case. We do have some  
17 outstanding orders regarding attorney's fees  
18 entitlement, but we haven't addressed the amount.  
19 We certainly would want to liquidate those.

20 THE COURT: That's a separate issue --

21 MR. RODEMS: Yes, sir.

22 THE COURT: -- which the Court retains  
23 jurisdiction to determine.

24 MR. RODEMS: Yes, sir.

25 THE COURT: So I don't know what the

1 plaintiff's position now is regardless of the  
2 counterclaim or not. "Judge, we want" -- and I'm  
3 mouthing perhaps what the plaintiff might say -- "We  
4 want our case reinstated."

5 So I don't know what the plaintiff's true -- I  
6 mean, at one point, obviously, Mr. Gillespie just  
7 wanted to get rid of everything.

8 MR. BAUER: Your Honor, at this time the  
9 plaintiff wants their case reinstated. We believe  
10 the rule requires because a counterclaim has been  
11 filed that for there to have been an order done in  
12 the case, for the -- for the action to have -- or  
13 excuse me -- for the client's claim to be dismissed,  
14 he withdraws that prior to the Court ruling on that.

15 I believe he's entitled to withdraw any motions  
16 prior to the Court ruling on them if a court order  
17 is required. And I'm sure from past experience the  
18 Court has looked at the case law that I cited in my  
19 memorandum.

20 I did want to clarify one case that I cited in  
21 the case. I believe I cited it a little strongly,  
22 and it was the case --

23 THE COURT: So the plaintiff has changed his  
24 mind?

25 MR. BAUER: Yes, Your Honor.

1 THE COURT: He wants to press forward no matter  
2 what the defendant does?

3 MR. BAUER: We have a Fifth DCA case that  
4 clearly states that an attempt to file a dismissal  
5 where a counterclaim is pending is not valid. And  
6 that would be --

7 THE COURT: But the plaintiff can always -- I  
8 mean, we've all read what Mr. Gillespie wrote. And  
9 actually --

10 MR. BAUER: Yes, Your Honor.

11 In Publix Super Market -- or Rogers versus  
12 Publix Super Market, cited at 575 So.2d 214 --

13 THE COURT: I mean, what the plaintiff did was  
14 not dismiss the action. The plaintiffs -- the  
15 plaintiff moved for an order of voluntary dismissal  
16 under the rule that's now being discussed. And so  
17 he didn't take a voluntary dismissal. He just moved  
18 the Court -- I don't know if it was me at that  
19 point. I forget when I inherited this case. But in  
20 any event -- I think before an order was ever  
21 entered or a hearing held, because it was only a  
22 week and a day later that the plaintiff withdrew his  
23 motion, which anybody can do. Right?

24 MR. RODEMS: Actually, Your Honor, just to  
25 correct the record, he filed that motion, but then

1 he subsequently filed a notice of voluntary  
2 dismissal. And if I can give you some background.

3 THE COURT: Okay. Well, that's okay.

4 MR. RODEMS: Okay.

5 THE COURT: So I guess the question is -- he  
6 actually filed it on the same day.

7 MR. RODEMS: Yes, sir.

8 THE COURT: It's one thing to say that, "I'm a  
9 plaintiff and I'm going to dismiss the action. And  
10 by dismissing the action that I, the plaintiff,  
11 filed, then gee, I thought that would dismiss  
12 everything, even the counterclaim."

13 But obviously, Mr. Gillespie knew more than  
14 that because he expressly states, both in his notice  
15 of voluntary dismissal and in his motion, that he  
16 understands that the counterclaim was going to  
17 remain for adjudication. So you can't really say he  
18 didn't understand what he was doing. I mean, he may  
19 have made a bad decision.

20 So to me, there are a couple of questions. One  
21 is, does this -- because you can withdraw a motion,  
22 which he did on February the 15th. The question is,  
23 does this notice of voluntary dismissal have any  
24 efficacy at all?

25 And you said you have a case that says that?



1 MR. BAUER: Yes, Your Honor. I had this.

2 In the case I presented to the Court -- and I'm  
3 getting a copy for opposing counsel as well --  
4 Publix attempted to file a replevin action against  
5 another party. There's a whole slew of facts in it.  
6 It's quite messed up with everything.

7 Ultimately what it boils down to is, Publix  
8 attempted to dismiss the action and they filed a  
9 notice dismissal in the action -- what it appears to  
10 be.

11 The court found that regardless of that  
12 effort -- and I have it highlighted. Regardless of  
13 the effort, the amended complaint still stood  
14 because the attempt to dismiss was not effective  
15 when it was filed under Rule 1.420 when a  
16 counterclaim still stood.

17 It appears to me from the case law that Rule  
18 1.420 cannot be used to dismiss a party, any party.  
19 You have to use Rule 1.- -- if I'm not mistaken, I  
20 think it's 1.30, but I'm not sure on that, Your  
21 Honor.

22 But there's a clear Rule of Civil Procedure  
23 that's required for dismissing a party. And that's  
24 what Mr. Gillespie would have had to use to have  
25 dismissed his particular claim.

1 I don't believe that in specifically citing  
2 Rule 1.420 that he can dismiss an action. Even  
3 if -- even assuming that he has dismissed it, their  
4 counterclaim is still standing. We are entitled  
5 while it's standing to file a motion for a  
6 counterclaim, to amend our answer to his  
7 counterclaim to include a count ourselves. The  
8 Rules of Civil Procedure allow that.

9 There's been -- there's been statements that  
10 our claim will be barred by the statute of  
11 limitations. However --

12 THE COURT: Well, let's deal first with whether  
13 this statement by the Fifth District -- if there's  
14 any countervailing authority.

15 Do you have anything?

16 MR. RODEMS: Yes, Judge.

17 First of all, let me address the issue of  
18 Mr. Gillespie citing the wrong -- or allegedly  
19 citing the wrong rule.

20 In the case of Evans versus Hineman,  
21 168 So.2d 183 -- and this is a Second District case.  
22 Let me just hand that to you -- the court --

23 THE COURT: Were these rules even in existence  
24 at that time.

25 MR. RODEMS: They were, but they were numbered

1 something differently.

2 But basically, you have a situation where there  
3 was a default order entered and then the party  
4 suffering the default moved to set aside the  
5 default, and the court granted it. And then the  
6 party who received the default wanted to challenge  
7 that.

8 And the first argument was, the rule in effect  
9 at the time regarding relief from a mistake was  
10 1.38(b). The first argument was, the party moving  
11 to set aside default couldn't use it because it  
12 hadn't passed.

13 And the second thing is that the plaintiff  
14 didn't even invoke the rule, and that's the  
15 important point here.

16 The court said, relying on federal law, that  
17 nomenclature is unimportant. "Since nomenclature is  
18 unimportant, the moving papers may be treated as a  
19 motion under 60(b)," the federal rule in the case  
20 that they were relying on.

21 And the Second DCA said, "The failure of the  
22 plaintiffs to denominate or make reference to  
23 Rule 1.38(b) does not deprive them of their right to  
24 rely on it."

25 And there are a whole line of cases, Judge --

1 THE COURT: And that's the precursor to  
2 Rule 1.540. Right?

3 MR. RODEMS: Yes, sir.

4 But there's a whole slew of cases that talk  
5 about the concept that if someone mislabels a motion  
6 or cites the wrong rule, that doesn't bar them from  
7 bringing their motion forward because the Court  
8 should look at what the intent of the party was and  
9 what the substance of the motion is and not the  
10 label. Okay.

11 THE COURT: So --

12 MR. RODEMS: So my point is, is whether he  
13 cited Rule 1.420 or 1.250, if we look at the notice  
14 of dismissal -- and I hope I didn't give you my only  
15 copy. But if we look at the notice of dismissal,  
16 it's clear that Mr. Gillespie in the substance of  
17 his notice of dismissal states that he dismisses  
18 this action without prejudice pursuant to Rule 1.420  
19 and defendants' counterclaim can remain for  
20 adjudication.

21 So in other words, Mr. Gillespie intended to  
22 dismiss his claims but understood that the  
23 counterclaim would remain pending.

24 So the first issue that I'd like to address on  
25 that is -- Mr. Bauer brings is that Mr. Gillespie's

1           inadvertent citing of 1.420 does not mean that his  
2           notice of dismissal is invalid.

3           THE COURT: Why do you say it was inadvertent?  
4           I mean, it seems to me that he did exactly what he  
5           thought he wanted to do at the time.

6           MR. RODEMS: Oh, well, no. No.

7           The word "inadvertent" means the fact that he  
8           may have cited the wrong rule. Instead of 1.420,  
9           perhaps he should have cited 1.250.

10          My point is, is that regardless of which rule  
11          he should have cited, if we look at the substance of  
12          his motion, he fully intended -- no "inadvertent" --  
13          he fully intended to dismiss his claim.

14          THE COURT: Why is this analysis any different?  
15          Because it looks to me like you are treating a  
16          notice under 1.250(b) as you would as if it were  
17          filed under 1.420 and all the exceptions as well.

18          MR. RODEMS: I wholeheartedly agree. But I  
19          didn't raise that point; he did. Mr. Bauer did. He  
20          said, "Hey, Mr. Gillespie, you filed it under the  
21          wrong rule. So therefore, it doesn't count." And  
22          that's not the law. I'm just pointing that out. I  
23          agree with you that it doesn't matter which rule he  
24          cited it under.

25          THE COURT: It's going to get back to, how do

1 you get around the Fifth District case that says  
2 that -- you know, he has to do it by motion and  
3 order. He withdrew the motion and his notice of  
4 voluntary dismissal is no good. He's got to do it  
5 with an order.

6 MR. RODEMS: Well, the law in Randall Eastern  
7 Ambulance Service, Inc., versus Elena, which is a  
8 Supreme Court case, clearly holds that the plaintiff  
9 at any time may dismiss their action or their  
10 claims. The right to dismiss one's own lawsuit  
11 during the course of trial is guaranteed.

12 THE COURT: Except was there a counterclaim in  
13 this case? I mean, nobody is disputing this  
14 principle of law. But we're honing in on when  
15 there's a counterclaim pending, what can a plaintiff  
16 do?

17 MR. RODEMS: Well, let me see the case that  
18 Mr. Bauer is citing.

19 Okay. Your Honor, if you'll go to the language  
20 of 1.420(a)(2), it says -- this is under the heading  
21 "Voluntary dismissal by order of court if  
22 counterclaim." And then it says, "Except as  
23 provided in Subdivision (a)(1) of this rule, an  
24 action shall not be dismissed at a party's instance  
25 except on order of the court and on such terms and

1 conditions as the court deems proper."

2 THE COURT: And that's what he was trying to  
3 do. He says, "I'm dismissing this action."

4 MR. RODEMS: Right.

5 But Mr. Gillespie used the word "action" when  
6 he meant claims. He clearly meant that because he  
7 said, "Hey, wait a second. I understand that the  
8 counterclaims can remain for adjudication."

9 So if Mr. Gillespie tried to dismiss the entire  
10 action, Rule 1.420(a)(2) applies to prevent the  
11 clerk from inadvertently dismissing the entire  
12 action, not to prevent a person from dismissing  
13 their own individual claims.

14 And the prophylactic reason for this is what  
15 you pointed out. If Mr. Gillespie wants to dismiss  
16 his claims, he should dismiss them. If he files a  
17 dismissal of the action and the clerk closes the  
18 file, then the defendant is left with coming back to  
19 court and saying, "Hold on just a second. I had  
20 counterclaims."

21 So the Publix case, to the extent it relies on  
22 1.420(a)(2), is referring to the fact that the  
23 entire action could not be dismissed, not the  
24 counterclaims.

25 And what I would suggest to the Court is, if

1 there's a contrary reading to Publix, it's extending  
2 beyond 1.420(a)(2) and it's incorrect.

3 Mr. Gillespie has the right to dismiss his  
4 claims at any time he wishes. He does not have the  
5 right, if there's a counterclaim, to dismiss the  
6 action, and that's the difference.

7 So if Mr. Gillespie was seeking to dismiss the  
8 action, he would need a court order. And of course,  
9 had he come in to Judge Isom at the time and said,  
10 "I wish to dismiss the action," she would have  
11 denied the motion if we opposed it because of our  
12 counterclaims.

13 The thing I'd point out, Your Honor, is that  
14 this clearly was not a mistake by Mr. Gillespie. It  
15 was a tactical move on his part. At the time that  
16 he did all of this, Judge Isom had just entered an  
17 order finding that he had to pay attorney's fees or  
18 was responsible -- or denying him a motion to  
19 dismiss and he was unhappy with Judge Isom's ruling.

20 In fact, during the ruling he moved to  
21 disqualify her on the record and she said, "You're  
22 going to have to file an appropriate motion," and we  
23 canceled the proceedings that day because of his  
24 statement.

25 So he goes back to his house and files the



1 motion. Judge Isom convenes a telephone conference,  
2 and Mr. Gillespie follows that telephone conference  
3 with the notice of voluntary dismissal.

4 So again, Your Honor, a party under 1.250 can  
5 dismiss their claims at any time. Dropping parties:  
6 "Parties may be dropped by an adverse party in the  
7 manner provided for voluntary dismissal, subject to  
8 the exception stated in that rule."

9 The exception, of course, is, you can drop a  
10 party, but you can't dismiss the action. That's all  
11 it's saying. So the Publix case is just not on  
12 point. The language, whatever it is and whatever  
13 the circumstances in that case, were not clear.

14 THE COURT: Well, he's not merely dropping a  
15 party like a party in a multi-party complaint where  
16 you drop a party, but your complaint remains pending  
17 against remaining parties. He's trying to dismiss  
18 his action or his complaint. So where's --

19 MR. RODEMS: Well, I understand that.

20 THE COURT: So that's not -- I disagree with  
21 your analysis there.

22 MR. RODEMS: Well, let me see if I can explain  
23 it as I see it.

24 There's a reason that 1.250 exists.

25 THE COURT: I agree. Because a lot of times we

1 see situations, as I said, where a plaintiff will  
2 sue multiple parties and, for one reason or another,  
3 all the -- okay. That defendant. I've lumped them  
4 all together. But, for example, "I thought that  
5 John Smith owned the motor vehicle, but it turns out  
6 he didn't. So I'm dropping him. But my -- I can do  
7 that unilaterally but, obviously, the rest of my  
8 case remains pending against the remaining parties."

9 MR. RODEMS: Sure.

10 THE COURT: That's where you drop parties, not  
11 dismiss a lawsuit.

12 MR. RODEMS: Okay. But an action refers to all  
13 the matters pending before the court.

14 THE COURT: Correct.

15 MR. RODEMS: If the plaintiff has filed a  
16 one-count, one-defendant claim, that is the action.  
17 If the -- if the plaintiff has filed against two  
18 defendants with two different claims, then he has  
19 multiple claims. If he wishes to drop the claims  
20 against one party, he would do so pursuant to 1.250.

21 When a counterclaim is filed, the action then  
22 becomes the plaintiff's claims and the defendant's  
23 counterclaims. And in that circumstance if the  
24 plaintiff wishes to drop his claims, mislabeling it  
25 as dropping the action doesn't change the nature of

1 the beast. He was dropping his claims.

2 Under the tight analysis of which rule you  
3 should use, arguably 1.250 is the proper rule to use  
4 when you're dismissing your claims or individual  
5 parties. And that would be appropriate when there's  
6 an action.

7 When you're under 1.420, however, you cannot  
8 dismiss the action without the order of the court.  
9 You can dismiss your claims against the parties and  
10 allow the counterclaim to proceed. Otherwise, we  
11 create a situation where the rule doesn't make any  
12 sense.

13 If you have the right to voluntarily dismiss  
14 your claims when you've only brought them yourself,  
15 why would you lose that right when a counterclaim  
16 has been filed?

17 The only reason you would lose the right to  
18 dismiss the action when a counterclaim is filed is  
19 because you're affecting other parties' rights.

20 Mr. Gillespie chose to dismiss only his claims.  
21 The fact that he labeled it dismissing the action  
22 doesn't change the nature of it. He chose to do it  
23 under 1.420. His error was it should have been  
24 under 1.250. But the bottom line is, once he  
25 dismissed his claims, the case law is clear that the

1 court loses jurisdiction only if there's a mistake.

2 And as you've said, Your Honor, there's not a  
3 mistake here. He understood what he was doing. He  
4 was dismissing his claims, although he labeled it an  
5 action, and he was intending for the counterclaim to  
6 be allowed to proceed and he, unfortunately, cited  
7 1.420.

8 But if we look at what was clearly done in the  
9 case, he intended to dismiss his claims. He  
10 intended to allow the defendant's action to proceed  
11 over the defendant's claims to proceed.

12 So at this point there is no technical reason  
13 for him to withdraw it. There has been no mistake  
14 or error. It was a tactical decision on his part  
15 because the litigation wasn't going well. Perhaps  
16 he wanted to close off his fee entitlement or  
17 perhaps he just wanted to extend an olive branch to  
18 the court, having previously moved to recuse Judge  
19 Nielsen and then moved to recuse Judge Isom, and had  
20 been subjected to several orders, and also was  
21 facing, Your Honor, a motion for sanctions for not  
22 complying with the discovery orders.

23 I mean, when he threw in the towel, he wanted  
24 to be done with this. And, you know, again there's  
25 no basis to allow him at this later date to undo

1 what he's done.

2 THE COURT: All right. Well, because of, I  
3 guess, a lot of things, the motion for sanctions was  
4 never considered. It could well be that's still on  
5 the table.

6 MR. BAUER: That's been withdrawn, I believe,  
7 Your Honor. It hasn't been -- I've been advised by  
8 counsel that they are withdrawing the --

9 MR. RODEMS: That's a different motion. The  
10 motion for sanctions I was referring to happened to  
11 be because of his failure to comply with discovery.  
12 He subsequently did comply with discovery.

13 MR. BAUER: And that's been withdrawn.

14 THE COURT: In any event, I disagree with  
15 analysis on both sides to some extent. Again, my  
16 view is, especially without any case law, this is  
17 not a setting where Rule of Civil Procedure 1.250  
18 applies. This is not an attempt to drop a party or  
19 even parties.

20 I guess there still are technically two  
21 parties, two defendants -- there would be anyway --  
22 Cook individually and the law firm?

23 MR. RODEMS: Yes, sir.

24 THE COURT: Right.

25 Again, if he would have said, "I'm dropping the

1 law firm, but I still want to sue Cook," or vice  
2 versa, I can understand looking at 1.250. But  
3 that's not what is going on here. These facts are a  
4 little bit different than under the Fifth District  
5 case at 575 So.2d 214. But nevertheless, it's all  
6 we've got.

7 So I'm finding that under this situation the  
8 plaintiff could not unilaterally dismiss his  
9 complaint unless he got an order of court, and he  
10 didn't get one. He withdrew his motion that this  
11 notice of voluntary dismissal that the plaintiff  
12 filed on February 7, '07, is a nullity. So I would  
13 grant this motion on that basis.

14 I disagree with the movant that there is such a  
15 thing unless it's in the rule as a counter complaint  
16 to a counter complaint. If you look at what  
17 pleadings are allowed in the State of Florida,  
18 there's a complaint, a counterclaim, a third-party  
19 complaint, a cross claim, but no, as it's been  
20 termed, counter-counter complaint.

21 So I would make a finding of law -- a  
22 conclusion of law that that is not possible in the  
23 State of Florida unless the Rules of Civil Procedure  
24 are amended, which I think we've got enough  
25 pleadings allowed for in this state.

1           So that being said, if we could, in the little  
2 bit of time we have left, figure out where all you  
3 want to go from here.

4           MR. BAUER: I believe there is a -- that  
5 because we've been dealing with this and I didn't  
6 want to spend my client's money on looking at the  
7 rest of the pleadings, we needed to determine  
8 whether or not we had a case.

9           There has been a motion filed by my client of  
10 when he was pro se to allow an amendment to include  
11 punitive damages that he states that there's been  
12 enough evidence on the record.

13           I'm not sure that that's the case. I need to  
14 review that and determine whether or not that motion  
15 needs to be pulled or supplemented with other  
16 affidavits or whatever that's necessary to do that  
17 and determine whether or not that --

18           THE COURT: What's the theory of the now --  
19 none of these pleadings so far are yours, are they?

20           MR. BAUER: No, sir. The only thing that's  
21 been mine is the memorandum of law to support --

22           THE COURT: Right.

23           MR. BAUER: -- the voluntary dismissal.

24           THE COURT: So far what is the plaintiff's  
25 theory against the defendants?

1 MR. BAUER: The theory against the defendants  
2 is fraud and breach of contract and malpractice, are  
3 the theories.

4 MR. RODEMS: No. There's no claim for  
5 malpractice.

6 THE COURT: Is it hard to say in your view? I  
7 mean, you looked at it. Well, what's been the basis  
8 of whatever the legal cause of action is?

9 MR. BAUER: I think we have a -- we have a  
10 situation where what's happened is, there was a  
11 contract that certain attorney's fees would be paid  
12 for. It's my understanding -- and I was not there  
13 to see what happened. It's that my client states  
14 that when he signed the agreement for the -- there  
15 was a contingency-fee situation in a class-action  
16 lawsuit stating what the attorney's fees were going  
17 to be.

18 There was some settlement negotiations with the  
19 defendant which -- excuse me -- with the defendant  
20 in that case that my client was not present for. He  
21 came to the understanding that there had been a  
22 ruling that the Court had awarded certain attorney's  
23 fees and that he -- and this is what it was and he  
24 had to sign the distribution agreement.

25 He alleges that he was led to that



1 understanding by the defendants. And that was not  
2 the case. It was a settled negotiation. He  
3 believes that the defendants negotiated it for their  
4 sole benefit to get \$50,000 in attorney's fees where  
5 he was getting a recovery of something like 1,000 or  
6 \$3,000.

7 THE COURT: What was the basis of the class  
8 action, do you know?

9 MR. RODEMS: Yes, Your Honor. The basis of the  
10 class action was a Truth In Lending Act claim.  
11 Mr. Gillespie was using the services of a payday  
12 loan company. We allege the payday loan company  
13 violated the Truth In Lending Act. The Truth In  
14 Lending Act is a fee-shifting statute.

15 At the conclusion of the negotiations, which  
16 Mr. Gillespie participated in, Your Honor, the  
17 defendant agreed to pay to Mr. Gillespie \$2,000,  
18 which was the TILA damages available under the TILA  
19 statute. Because of the claim for a court-awarded  
20 attorney's fee, the defendant negotiated and settled  
21 with the law firm for \$50,000 in attorney's fees.

22 Mr. Gillespie was advised of this, signed the  
23 closing statement, understood who was paying his  
24 attorney's fees. Mr. Gillespie did not have to pay  
25 for a penny of his fees. He accepted the money and

1 two years later comes back with this notion that  
2 somehow or other we were supposed to share the  
3 attorney's fees with him.

4 He filed three Bar grievances against my  
5 partner. He filed a breach-of-contract action and a  
6 fraud claim against us. We have a motion for  
7 judgment on the pleadings pending before the Court  
8 that was pending before all of this --

9 THE COURT: On the pleadings?

10 MR. RODEMS: Motion for judgment on the  
11 pleadings.

12 And, Your Honor, you're going to be -- when you  
13 get a chance to look at the complaint that  
14 Mr. Gillespie filed, you asked him if he was  
15 uncertain about what was going on. There's no  
16 uncertainty there.

17 Mr. Gillespie filed an exhaustive complaint  
18 with numerous allegations -- two claims, not  
19 three -- two claims: Breach of contract and fraud,  
20 no legal malpractice -- and in doing so, attached  
21 the closing statement, the contract and virtually  
22 every other document out there on the case.

23 Those documents, of course, are part of the  
24 pleadings for the purposes of consideration. And we  
25 believe that when you examine the complaint and the

1 attachments to it, you're going to reach the  
2 conclusion, as we did, that Mr. Gillespie has no  
3 claim whatsoever and judgment on the pleadings is  
4 going to be appropriate.

5 THE COURT: I mean, it is an '05 case. I mean,  
6 it's not the oldest case on the docket.

7 But if you say it's ready to go, why don't  
8 you-all coordinate a hearing time on that and any  
9 other motions that are on the table? And we'll go  
10 from there.

11 MR. BAUER: And if I may clarify, I was not  
12 attempting to mislead the Court. The Court asked  
13 what was the plaintiff's theory. I interpreted that  
14 as to -- because I've come on board, everything  
15 hasn't been clarified. I do believe that the  
16 plaintiff has articulated to me that he wishes to do  
17 that, and we'll need to deal with that.

18 Those are our theories that are going to be  
19 available now that our case is still alive -- that  
20 we can amend our complaint.

21 THE COURT: So have you figured out kind of  
22 what his damages will be? Is it all or part of the  
23 attorney's fees? I mean, did he think he would get  
24 attorney's fees or additional damages?

25 MR. RODEMS: His claim for damages is about

1 \$6,200.

2 THE COURT: What now?

3 MR. RODEMS: His claim for damages is about  
4 \$6,200 under the breach-of-contract theory.

5 MR. BAUER: They are. But there's also the  
6 attempt for punitive damages.

7 THE COURT: Well, forget that for a minute. We  
8 need to figure out if this is a circuit-court case.

9 If you could kind of -- I know you're just  
10 relatively new into the case. If you can kind of go  
11 through these things and see, you know -- if the  
12 breach damages are -- is that what he put in there?

13 MR. RODEMS: Yes, sir.

14 THE COURT: \$6,200?

15 MR. RODEMS: Approximately.

16 THE COURT: Okay. What about the fraud  
17 damages?

18 MR. RODEMS: His allegations of fraud are  
19 exactly the same as the contract. And, you know,  
20 the fraud, he's saying, is the breach of the  
21 contract. That's addressed in our motion.

22 THE COURT: So if there's a jurisdictional  
23 issue too, I mean, that's the first thing I have to  
24 address. And then if there is, then it's going to  
25 go to county court.

1 I mean, I hope you've talked to him and maybe  
2 told him that even assuming that somehow they  
3 weren't supposed to get \$50,000 in attorney's fees,  
4 I think they they'd be in big trouble, along with  
5 him, if there was any agreement to share attorney's  
6 fees with a non-lawyer. That is ethically not  
7 permitted, and I assume you've told him that.

8 So I'm curious as to what additional damage to  
9 get above the \$15,000 threshold excluding, in my  
10 view, any claim for fees, costs and even punitive  
11 damages.

12 MR. BAUER: I will address -- if the Court  
13 would like, I'll address that in a memorandum, if  
14 that's what the Court is directing.

15 THE COURT: Well, it's my -- based on what I've  
16 just been told and maybe -- I mean, if you have  
17 something like right now, you can say, "Well, here's  
18 this one element of damage that's worth \$100,000  
19 alone, Judge, or at least 20-," in good faith.  
20 Again, you don't have to show it with mathematical  
21 certainty. But it's going to be something you can  
22 claim in good faith.

23 MR. BAUER: Truthfully, Your Honor, I've been  
24 trying to fight to keep this case alive. I don't  
25 have -- that has been --

1 THE COURT: That's why this is kind of a case  
2 management. I mean, we hear a judgment -- motion  
3 for judgment on the pleadings is going to be set.  
4 But if you can do that, maybe get a little extra  
5 time. Because the first step, based on what you've  
6 just told me, is to see if it's going to remain in  
7 circuit court.

8 MR. RODEMS: Well, let me offer this, Your  
9 Honor. Based on Mr. Gillespie's complaint, it  
10 belongs in circuit court. His allegations are that  
11 there's in excess of \$15,000 in damages.

12 THE COURT: While normally that is enough, if  
13 somebody challenges that, whether it's the plaintiff  
14 directly or if it even comes to the judge's  
15 attention that -- you know, each count is a  
16 stand-alone count. You can't glop them together and  
17 say, "Well, if you add Counts I and II damages up,  
18 then you get 15,000."

19 And again, you don't have to even make a  
20 prima-facie case. But there's got to be some  
21 good-faith showing that the plaintiff's best-case  
22 recovery will net at least \$15,000.01. And if not,  
23 then that needs to be -- unless it's some kind of  
24 statutory action that, by statute, has to go in  
25 circuit court regardless of the jurisdictional

1 amount. That's not what I understand.

2 MR. RODEMS: I don't believe that's the case.

3 But clearly we have not challenged the circuit  
4 court's jurisdiction over this matter on the basis  
5 of the damages being less than 15,000 because the  
6 complaint --

7 THE COURT: How about the counterclaim?

8 MR. BAUER: The counterclaim could easily be --

9 THE COURT: How much have you figured?

10 MR. RODEMS: Well, our damages under the  
11 counterclaim are easily in excess of 15,000.

12 THE COURT: Okay. Well, that, in and of  
13 itself -- that brings it back to circuit court.

14 MR. RODEMS: To be honest, we're already here.  
15 We would prefer that the --

16 THE COURT: So set that motion, coordinate the  
17 time. And if you're going to have something else,  
18 figure out how much hearing time you're going to  
19 need before you get an actual date. Okay?

20 MR. RODEMS: And who is responsible for  
21 drafting the order?

22 THE COURT: Who prevails. Put it in the basis  
23 I'm ruling on and make it clear.

24 MR. BAUER: I'll cite the case law you  
25 articulated.

1 THE COURT: No counterclaim. And it's not, in  
2 my view, a 1.250.

3 MR. BAUER: Yes.

4 THE COURT: All right. Thank you.

5 MR. RODEMS: Thank you for your time, Judge.

6 THE COURT: Sure.

7 (Proceedings concluded at 10:04 a.m.)  
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1 CERTIFICATE OF REPORTER  
2  
3

4 STATE OF FLORIDA

5 COUNTY OF HILLSBOROUGH  
6

7 I, MICHELE COBURN, Notary Public, State of  
8 Florida at Large, certify that I was authorized to and  
9 did stenographically report the foregoing proceedings and  
10 that the transcript is a true record of the testimony and  
11 proceedings.  
12

13 I further certify that I am not a relative,  
14 employee, attorney, or counsel of any of the parties, nor  
15 am I a relative or employee of any of the parties'  
16 attorney or counsel connected with the action, nor am I  
17 financially interested in the action.  
18

19 Dated: November 8, 2007.  
20  
21

22 *Michele Coburn*  
23

24 MICHELE COBURN  
25