IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

NEIL J. GILLESPIE
Appellant,

Appellant Case No.: 2D10-5197
Lower Court Case No. 05-CA-007205

vs.

BARKER, RODEMS & COOK, PA
a Florida Corporation; and
WILLIAM J. COOK,
Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT FOR THE
THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA

APPELLANT'S INITIAL BRIEF

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February 7, 2011

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STATEMENT OF THE CASE AND FACTS

As set forth in Plaintiff's First Amended Complaint (R. at 2130 - 2280), the Alpert law firm, Alpert, Barker, Rodems, Ferrentino & Cook, P.A., sought Appellant to serve as class-action representative in two separate lawsuits, one against ACE Cash Express and one against AMSCOT Corporation. The litigation was over so-called "payday loans" which are delayed deposit check cashing schemes that can result in usurious rates of interest for the consumer. The Alpert firm needed Appellant to intervene and save the AMSCOT case from dismissal as its initial plaintiff Eugene Clement was unqualified. Appellees assumed the case after the Alpert firm imploded. Appellees later failed to prevail on the merits, and AMSCOT settled for business reasons. In settling AMSCOT, Appellees broke the contingent fee agreement with Appellant, lied about a claim to $50,000 in "court-awarded fees and costs" and wrongfully took over 90% of the total recovery.

The Florida Attorney General intervened in the ACE class-action. Appellees did not prevail on the merits is ACE either. Appellees represented Appellant so poorly that he called opposing counsel for help and negotiated his own settlement. The Florida AG did better for its constituencies. The AG obtained $250,000 for the Florida State University School of Law, and $250,000 for the Department of Banking and Finance. The AG also obtained loan forgiveness for many

consumers. Appellees finished poorly for their remaining client Eugene Clement, and later split their attorney's fees with him.

During the course of representation, Mr. Barker, Mr. Rodems and Mr. Cook conspired to exploit their clients, broke bar rules, and breached their duty to clients. Appellees' formed their firm in secret while working for the Alpert firm. The charade went on for months. Co-conspirators Barker, Rodems and Cook secretly arranged to take clients, cases, and employees away from Jonathan Alpert. Once Appellees controlled the AMSCOT case, they stopped representing the interest of Appellant. Appellees hijacked the case for their own benefit. They disobeyed Appellant's instructions to settle. Appellant was a hostage in the case.

After taking 90% of the AMSCOT settlement by fraud, Appellees relied upon the parol evidence rule to enforce their scam. When Appellant complained to the Florida Bar, Appellees accused him of extortion. When Appellant later alerted AMSCOT, Appellees sued him for libel. It was part of a corrupt business model.

In early December 1999 the Alpert firm commenced at least three separate class action lawsuits with plaintiff Eugene R. Clement. After the Alpert firm imploded all three cases were assumed by Appellees, who failed to prevail on the merits in any case.

1. On December 9, 1999 the Alpert firm filed a class action complaint in United States District Court, Middle District of Florida, Tampa Division, Eugene R. Clement v. AMSCOT Corporation, case no. 99-2795-CIV-T-26C. ("AMSCOT"). The action was based on "payday lending" and alleged violation of federal and state laws. Mr. Alpert signed the complaint as lead attorney in the lawsuit. Appellant was later sought to intervene to save this action from dismissal because Mr. Clement was unqualified.

2. On December 6, 1999 the Alpert firm and Mr. Clement commenced a class action complaint in United States District Court, Middle District of Florida, Tampa Division, Eugene R. Clement v. Payday Express, Inc., case no. 99-2768-CIV-T-23C. ("Payday Express"). The action was based on "payday lending" and alleged violation of federal and state laws. Mr. Alpert signed the complaint as lead attorney in the lawsuit. Appellant was not involved in this lawsuit, but the outcome of this case is pertinent to Appellant's claim that Appellees were not entitled to "court-awarded fees and costs".

3. On December 6, 1999 the Alpert firm and Mr. Clement commenced a lawsuit state court, Eugene R. Clement v. ACE Cash Express, Inc., case no. 99-09730, Circuit Court for the 13th Judicial Circuit in Hillsborough Co. ("ACE"). The action was based on "payday lending" and alleged a violation of the Florida

Deceptive and Unfair Trade Practices, sections 501.201 to 501.23 of the Florida Statutes. Appellant's lawsuit against ACE would later be consolidated with this case, and the Florida Attorney General would later intervene in this action.

The AMSCOT and Payday Express cases each pled three counts, one federal and two state. Count I alleged violation of the Federal Truth in Lending Act (TILA). Count II alleged violation of state usury laws pursuant to sections 687.02, 687.03, and 687.04 Florida Statutes. Count III alleged violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.23 Florida Statutes. A count was later added to the Payday Express case alleging violation of civil RICO under 18 U.S.C. § 1962(c) which was later dismissed.

The lead plaintiff in the AMSCOT case, Eugene R. Clement, was unqualified to serve as a class representative and doomed the case from the outset. AMSCOT's lawyer, John Anthony, challenged the ability of Mr. Clement to serve as class representative in AMSCOT's Response in Opposition to Clement's Motion for Class Certification and Memorandum of Law in Support. Mr. Anthony wrote: "It has become unquestionably clear, after taking Clement's deposition, that his complete lack of trustworthiness, honesty and credibility make Clement a wholly inadequate class representative." (p.4, ¶1). "First Clement lied under oath numerous time, including making misrepresentations about his criminal

background." (p.4, ¶2). Clement had suffered both a conviction and pre-trial intervention for prostitution within the past two years, the later just nine months prior. (p.4, ¶2). Clement's debt exceeded $450,000.00, and there was some question about Clement's sanity. (p.6, ¶1,2).

Appellees Pressured Appellant to Intervene in the AMSCOT Lawsuit

Mr. Cook of Appellees law firm was under pressure to replace the unqualified Mr. Clement as lead plaintiff in the AMSCOT lawsuit to prevent its dismissal. Mr. Cook solicited Appellant to intervene in the AMSCOT lawsuit to save the litigation. Mr. Cook's pressure on Appellant to sue AMSCOT created a conflict with Appellant because Mr. Cook already represented Appellant in the ACE lawsuit. Appellant wanted to keep Mr. Cook happy for the benefit of Appellant's interest in the ACE lawsuit.

Appellees Offered Appellant Incentives to Sue AMSCOT Corporation

Mr. Cook offered Appellant a number of incentives to sue AMSCOT, as recovery of $148.47 Appellant paid in fees to AMSCOT was not compelling. Mr. Cook offered Appellant the following incentives to sue AMSCOT:

a. Mr. Cook told Appellant that he would receive a fee for serving as a class representative, and the amount awarded by the Court to compensate Appellant would likely be between $5,000.00 and $10,000.00. Mr. Cook said class

representatives in the Tampa Bay Buccaneers lawsuit received $5,000.00 each, and this case was worth more, he said.

NOTE: In Reuter v. Check 'N Go of Florida, Inc., Fifteenth Judicial Circuit, Palm Beach County, Florida, case no.: 502001CA001164XXOCAI, the Final Approval Order And Judgment of May 16, 2008 by Circuit Court Judge Edward A. Garrison approved $25,000 to Donna Reuter as a reasonable Class Representative Award.

b. Mr. Cook said Appellant would receive statutory damages in addition to the recovery of the $148.47 Appellant paid in fees to AMSCOT. The statutory damages under TILA, the federal Truth In Lending Act, are $1,000.00.

c. Mr. Cook said Appellant would likely receive punitive damages under the state law claim of Usury, section 687, Florida Statutes, and actual damages under the state law claim of Deceptive and Unfair Trade Practices Act, ¶ 501 Fla. Stat.

d. Under the terms of the contingent fee agreement, the above awards and damages and any costs and attorney's fees awarded would become part of the Total Recovery and divided according to the percentages of the fee agreement.

e. Mr. Cook said Appellant would get special attention as a favorite client of his newly formed law firm. The new firm would be anxious for business which Appellees hoped Appellant would provide. Cook said once Appellees were free from the control of Mr. Alpert they would be able to decide themselves what cases

to accept and litigate. Following the breakup of the Alpert firm, Appellant brought new potential claims to Appellees at BRC, which now represented Appellant in the AMSCOT lawsuit and the ACE lawsuit. In a March 22, 2001 letter to Mr. Cook, Appellant requested representation in his efforts with the Florida Department of Vocational Rehabilitation. (DVR). Mr. Cook responded March 27, 2001 that we are not in a position to represent you for any claims you may have with Vocational Rehabilitation. In a May 22, 2001letter to Mr. Cook, Appellant requested representation in his effort to obtain job placement services from St. Petersburg College for students with disabilities. Mr. Cook responded May 25, 2001 we are not in the position to pursue litigation with St. Petersburg College.

No Signed Contingent Fee Contract

Appellees began representing Appellant in the AMSCOT case on a contingent fee basis December 12, 2000 after the Alpert firm imploded. There is no signed contingent fee agreement between Appellees and Appellant.

TILA Claims Not Valid in ACE Lawsuit

On December 21, 2000 United States District Court Judge James S. Moody, Jr. issued an Order in the ACE lawsuit that dismissed with prejudice Count I, Appellant's TILA claims, and remanded the case to the Circuit Court of the Thirteenth Judicial Circuit for Count II, the alleged violation of state usury laws

pursuant to sections 687.02, 687.03, and 687.04 Florida Statutes, and Count III alleged violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.23 Florida Statutes. Judge Moody explained his decision to dismiss with prejudice the TILA claims on page 3, paragraph 3 of the Order. "On March 31, 2000, the Federal Reserve Board ("FRB") promulgated revisions to a regulation that interprets TILA as applying to check-cashing transactions. See 65 Fed. Reg. 17129, 30 (2000), to be codified at 12 C.F.R. pt. 226. The revision to the regulation states, however, that the effective date of the new rule is March 24,2000, but that compliance is "optional" until October 1, 2000. Id. The Court agrees with Defendant that the plain language of the regulation means that compliance was not mandated until October 1, 2000. The transactions at issue in this case occurred prior to the FRB's regulation. Since Plaintiffs' transactions occurred prior to October 1, 2000, TILA is not applicable and cannot form a basis for relief against Defendant. Accordingly, Plaintiffs' claims under TILA are dismissed." (Exhibit 7 of Plaintiff's First Amended Complaint).

TILA Claims Not Valid in Payday Express Lawsuit

On April 6, 2001, United States District Judge Steven D. Merryday issued an Order in the Payday Express lawsuit that dismissed with prejudice the TILA and RICO claims, and dismissed without prejudice the remaining state law claims

of usury and FDUTPA. Judge Merryday held that "Because TILA's mandatory disclosures were not required of the defendants before October 1, 2000, TILA cannot form a basis for relief of the plaintiff's claims." (page 4, last paragraph).

TILA Claims Not Valid in AMSCOT Lawsuit

On August 1, 2001, United States District Judge Richard A. Lazzara issued an order in the AMSCOT lawsuit denying class certification as moot, dismissed Count I with prejudice, the alleged violation of the Federal Truth in Lending Act (TILA). The Order dismissed Counts II and III without prejudice to bring in state court, and closed the file. Count II alleged violation of state usury laws pursuant to sections 687.02, 687.03, and 687.04 Florida Statutes. Count III alleged violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.23 Florida Statutes. (Exhibit 8, Plaintiff's First Amended Complaint). Appellees knew ten (10) months before making the closing statement in the AMSCOT settlement that the lawsuit was not a fee-shifting TILA case. On August 1, 2001 the lawsuit ceased being a fee-shifting TILA action when the TILA claim was dismissed with prejudice. Appellees also knew from the decisions in ACE and Payday Express that TILA could not form a basis for relief in AMSCOT.

Breach of Fiduciary Duty

Appellees represented Appellant as his attorneys. Appellees owed Appellant a fiduciary duty. It is long established that the relationship between an attorney and his client is one of the most important, as well as the most sacred, known to the law. The responsibility of an attorney to place his client's interest ahead of his own in dealings with matters upon which the attorney is employed is at the foundation of our legal system. Deal v. Migoski, 122 So. 2d 415, Fla. App. 1960. It is a fiduciary relationship involving the highest degree of truth and confidence, and an attorney is under a duty, at all times, to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty, and fidelity. Gerlach v. Donnelly, 98 So. 2d 493, Fla. 1957. On August 15, 2001 Appellees said they would not honor the contingent fee agreement with Appellant. Mr. Cook said Appellant's damages were limited to $1,000, the fee-shifting provision of TILA. This was false. Appellees did not prevail on any TILA claims.

Appellees Commit Fraud Against Their Own Clients

Appellees conspired to defraud Appellant and the others in the AMSCOT lawsuit using a corrupt business model that relied upon a five part deception. See Plaintiff's First Amended Complaint. (R. 2130-2280). During the August 15, 2001 meeting with Appellant, Mr. Cook falsely told Appellant that Appellees incurred costs and expenses of $33,000 in the AMSCOT lawsuit. Appellant later learned

that the actual costs and expenses were only $3,580.67, plus $2,544.79 paid to Mr. Alpert, for total costs and expenses of $6,125.46. These costs and expenses were not itemized on the closing statement as required by Bar Rule 4-1.5(f)(5).

Appellees Hijacked The AMSCOT Lawsuit And Held Appellant Hostage

On August 16, 2001 Appellant instructed Mr. Cook by letter to settle the AMSCOT lawsuit. Appellant believed Appellees no longer represented his interest in the litigation. Appellees did not obey Appellant's August 16, 2001 written instructions to settle the AMSCOT lawsuit. Appellees did not obey Appellant's September 15, 2001 written instructions to settle his claims the AMSCOT lawsuit. Appellees did not obey Appellant's September 21, 2001spoken instructions to settle his claims in the AMSCOT lawsuit. Appellees hijacked the AMSCOT lawsuit for their own benefit and held Appellant hostage for Appellees' gain.

On or about July 25, 2005, Appellant sent a copy of his August 16, 2001 letter to Appellees instructing them to settle the lawsuit to Ian Mackechnie, President of AMSCOT with a cover letter. (Exhibit 11 Plaintiff's First Amended Complaint). A month later John Anthony responded to Appellant and wrote (in part): "Amscot is disappointed that your lawyer apparently did not obey your instructions regarding discontinuing litigation you and he knew to be frivolous." (Exhibit 12 Plaintiff's First Amended Complaint).

Appellees Invasion of Appellant's Privacy

Appellees' published Appellant's privileged medical information during the course of the AMSCOT lawsuit. Appellees' published information about Appellant's disability, treatment and rehabilitation. Appellant's medical condition was not at issue in the AMSCOT lawsuit. The AMSCOT litigation concerned check cashing, the federal Truth In Lending Act (TILA), Florida state usury law, and the Florida Deceptive and Unfair Trade Practices Act.

Appellees' Abuse of Process Counterclaim Against Appellant

Appellees BRC and Mr. Cook countersued Appellant January 19, 2006 in a counterclaim for libel over a July 25, 2005 letter Appellant wrote to Ian Mackechnie, President of AMSCOT Corporation. The filing of a counterclaim may constitute issuance of process for the purpose of an abuse of process action. Peckins v. Kaye, 443 So.2d 1025, 1026 (Fla. 2d DCA 1983). On September 7, 2006 attorney David M. Snyder representing Appellant notified Mr. Rodems by letter that "Defendant's counterclaim for defamation, while it may have stated a cause of action at the outset, has little chance of ultimate success given the limited distribution and privileged nature of the publication complained of. *See e.g. Nodar v. Galbreath,* 462 So. 2d 803 (Fla. 1984)." Appellees counterclaim for libel against Appellant is a willful and intentional misuse of process for the collateral

purpose of making Appellant drop his claims against Appellees and settle this lawsuit on terms dictated by them. Appellees have perverted the process of law for a purpose for which it is not by law intended. Appellees used their counterclaim as a form of extortion. On at lease six (6) separate occasions Appellees, by and through their counsel Mr. Rodems, offered a "walk-away" settlement. In a letter to Appellant dated November 19, 2007, Chief Branch Disciplinary Counsel Susan V. Bloemendaal, The Florida Bar, responded to Appellant's allegation that Mr. Rodems improperly filed a counterclaim. Bloemendaal wrote (relevant portion): "Concerning you allegation that the claim is frivolous, this is an issue for the trial court in the pending civil case."

Appellant Sued Appellees August 11, 2005

In August 2005 Appellant sued Appellees, his former lawyers Barker, Rodems & Cook, PA for defrauding him of $6,224.78 in prior representation. Appellees are unlawfully representing itself against a former client on matter that is substantially the same as the prior representation. Appellees intentionally disrupted the tribunal with a strategic maneuver to gain an unfair advantage. The case is in its 5th year. The case is on its 5th trial judge. This is the 4th appeal to the DCA and there was one Petition For Writ of Prohibition. Appellant was formerly represented by counsel, Robert W. Bauer of Gainesville, but he dropped the case

when it became too difficult. Attorney Seldon J. Childers subsequently reviewed the case for Appellant and determined Barker, Rodems & Cook actually defrauded him of $7,143, not $6,224.78 claimed in the original pro se complaint. Appellant filed Plaintiff's First Amended Complaint (R. 2130-2280) but the court refused to allow even one amended complaint.

Mr. Rodems Strategic Maneuver To Intentionally Disrupt The Tribunal

On March 3, 2006 Mr. Rodems representing Appellees telephoned Appellant at home about scheduling the motion to disqualify counsel and an argument ensued where Rodems threatened to reveal Appellant's confidential client information. On March 6, 2006 Mr. Rodems intentionally disrupted the tribunal with a sworn affidavit under the penalty of perjury that falsely placed the name of the Judge Nielsen in Defendants' Verified Request For Bailiff And For Sanctions. (R. 97 - 100) Mr. Rodems falsely named Judge Nielsen in an "exact quote" attributed to Appellant. Appellant responded in Plaintiff's Verified Response to Defendants' Verified Request for Bailiff and for Sanctions, and to Mr. Rodems' Perjury, and Plaintiff's Motion for An Order of Protection. (R. 101 - 123). A voice recording of the call impeached Mr. Rodems' sworn affidavit. Mr. Rodems provided written consent to record calls (R. 643-645). January 29, 2007 Appellant submitted Plaintiff's Motion with Affidavit for an Order to Show cause

why Ryan Christopher Rodems should not be Held in Criminal Contempt and Incorporated Memorandum of Law. (R. 992-1087). The motion was not heard and Judge Isom referred Appellant to law enforcement. (Transcript, February 5, 2007). (R. Missing). Kirby Rainsberger, Legal Advisor to the Tampa Police Department, reviewed the matter and wrote February 22, 2010 that Mr. Rodems was not right and not accurate in representing to the Court as an "exact quote" language that clearly was not an exact quote. A copy of the information was provided to Judge Barton March 11, 2010 consisting of 125 pages and one audio CD. As of today Judge Barton, and Court Counsel David Rowland refused or failed to include the information in the record on Appellant's request. (R. Missing).

Appellant initially had a good working relationship with Judge Nielsen and his judicial assistant Myra Gomez. Appellant prevailed on Defendants' Motion to Dismiss and Strike filed August 29, 2005 (R. Missing). By Order January 13, 2006 Appellant established a cause of action for fraud and breach of contract against Appellees. (R. Missing). After Rodems' stunt Judge Nielsen did not manage the case lawfully, favored Appellees in rulings, and responded to Appellant sarcastically. Following the hearing of April 25, 2006 Mr. Rodems waited outside Judge Nielsen's chambers to taunt Appellant and provoke a fight. At the next

hearing June 28, 2006 Appellant requested protection from the Court to prevent a reoccurrence.

MR. GILLESPIE: Thank you, Judge. And, Your Honor, would you ask that Mr. Rodems leave the area. The last time he left, he was taunting me in the hallway and I don't want that to happen today.

THE COURT: Well, you can stay next to my bailiff until he goes home and then you can decide what you want to do, sir.

(Transcript, June 28, 2006, beginning on page 21, at line 20) (R. 227 - 254).

The Court was hostile and prejudiced against Appellant, and after denying a motion to disqualify that was untimely, Judge Nielsen recused himself sua sponte.

Mr. Rodems Unlawfully Representing Appellees

Appellant established by Order January 13, 2006 a cause of action for fraud and breach of contract against Appellees. (R. Missing). This was grounds to disqualify Rodems as counsel for his firm. Partners in the practice of law are each responsible for the fraud or negligence of another partner when the later acts within the scope of the ordinary business of an attorney. Smyrna Developers, Inc. v. Bornstein, 177 So.2d 16, Fla. App., 1965. Appellant submitted Plaintiff's Motion to Disqualify Counsel February 4, 2006. (R. 88-92). The motion was denied with prejudice, except as to the basis that counsel may be a witness, and on that basis, the motion is denied without prejudice. (R. 177). The transcript shows

the question of disqualification on the counterclaim was not heard or considered at all. (R. 255-291). Under Florida law, the question is not whether Mr. Rodems may be a witness, but whether he "ought" to be a witness. Proper test for disqualification of counsel is whether counsel ought to appear as a witness.[1] Matter of Doughty, 51 B.R. 36. Disqualification is required when counsel "ought" to appear as a witness.[3] Florida Realty Inc. v. General Development Corp., 459 F.Supp. 781. Appellant filed Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher Rodems & Barker, Rodems & Cook, PA July 9, 2010. (R. 2635-2705 and R. 27-06-2826). The motion properly raises the witness issue. The motion properly considered de novo disqualification on the counterclaim.

Mr. Rodems' Aggravated Appellant's Disability

Beginning March 3, 2006 Mr. Rodems directed, with malice aforethought, a course of harassing conduct toward Appellant that aggravated his disability, caused substantial emotional distress and served legitimate purpose, in violation of Florida Statutes, §784.048[1]. Mr. Rodems telephoned Appellant and threatened to reveal client confidences learned from prior representation[2] and taunted him about his

[1] As used in section 784.048(1)(a) "Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose. As used in section 784.048(1)(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. (relevant portion). As used in section 784.048(2) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

[2] March 3, 2006 telephone call, Mr. Rodems to Gillespie

vehicle. Mr. Rodems submitted a pleading to the Court falsely naming Judge Nielsen in an "exact quote" attributed to Appellant[3]. Mr. Rodems has engaged in name-calling by phone and by letter. Mr. Rodems has called Appellant "cheap" and a "pro se litigant of dubious distinction"[4]. Mr. Rodems has written Appellant that "you are a bitter man who has apparently been victimized by your own poor choices in life" and "you are cheap and not willing to pay the required hourly rates for representation."[5] Mr. Rodems has set hearings without coordinating the time and date with Appellant. On one occasion Mr. Rodems waited outside chambers to harass Appellant following a hearing[6]. Mr. Rodems has accused Appellant of criminal extortion for trying to resolve this matter through the Florida Bar Attorney Consumer Assistance Program (ACAP). This list of Mr. Rodems' harassing behavior is representative but not exhaustive. For more examples see Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher Rodems & Barker, Rodems & Cook, PA filed July 9, 2010. (R. 2635-2705 and R. 27-06-2826).

The lawsuit was reassigned to Judge Isom November 22, 2006. Judge Isom's web page advised that the judge had a number of relatives practicing law and "If you feel there might be a conflict in your case based on the above

[3] March 6, 2006, *Defendants' Verified Request For Bailiff And For Sanctions*
[4] December 13, 2006 voice mail by Mr. Rodems to Gillespie
[5] December 13, 2006, letter by Mr. Rodems to Gillespie
[6] Following the hearing of April 25, 2006

information, please raise the issue so it can be resolved prior to me presiding over any matters concerning your case". One relative listed was husband A. Woodson "Woody" Isom, Jr. Appellant found a number of campaign contributions from Defendant Cook and witness Jonathan Alpert to both Judge Isom and Woody Isom. This lawsuit is about a fee dispute. The only signed fee contract is between Appellant and the Alpert firm. Plaintiff's Amended Motion To Disclose Conflict was heard February 1, 2007. (R. Missing). The hearing was transcribed by Mary Elizabeth Blazer of Berryhill and Associates, Inc. court reporters. The transcript of the hearing was filed with the Clerk of the Circuit Court. (R. Missing). The transcript shows that Judge Isom failed to disclose that husband Woody Isom is a former law partner of Jonathan Alpert who formerly represented Appellant in this matter. Mr. Rodems also failed to disclose the relationship. Appellant only learned of the relationship in March 2010 while researching accusations made in one of the many offensive letters sent by Mr. Rodems to Appellant. While presiding over the case the transcript shows Judge Isom failed to follow her own law review on case management and discovery, Professionalism and Litigation Ethics, 28 STETSON L. REV. 323. Judge Isom's essay shows how she provided intensive case management to lawyers rather than impose sanctions. Judge Isom did not provide intensive case management to Appellant but paved the way to impose an

extreme sanction of $11,550 against him. Judge Isom also knowingly denied Appellant the benefits of the services, programs, or activities of the court, specifically mediation services. On February 5, 2007 Judge Isom determined that Appellant was disabled and the record shows attempts by the Court to moderate Mr. Rodems' harassing behavior toward Appellant. Judge Isom offered to grant a 3 month stay in the proceedings for Appellant to find counsel but Mr. Rodems objected and the Court capitulated to Rodems disapproval. Appellant moved to disqualify Judge Isom February 13, 2007. Judge Isom denied the motion as legally insufficient but recused sua sponte the same day.

February 13, 2007 the case was reassigned to Judge Barton. February 20, 2007 Appellant filed Plaintiff's Accommodation Request Americans with Disabilities Act (ADA). (R. Missing). The motion stated that Mr. Rodems was familiar with Appellant's disability from prior representation and that Rodems was aggravating Appellant's disability such that by reason of his disability, Appellant was excluded from participation in or denied the benefits of the services, programs, or activities of the 13th Circuit and is subjected to discrimination by the 13th Circuit. Plaintiff's Amended Accommodation Request Americans with Disabilities Act (ADA) was filed March 5, 2007. (R. Missing). February 27, 2007 the Florida Bar Lawyer Referral Service referred Mr. Bauer to Appellant for the

practice area of Libel and Slander. Early in February 2007 Appellant voluntarily dismissed his action but then withdrew the dismissal. The case remained alive on the counterclaim. The Second District Court of Appeal held in 2D07-4530 that the voluntary dismissal was not effective because of the counterclaim. April 2, 2007 Mr. Bauer filed a notice of appearance on behalf of Appellant in the lawsuit. (R. Missing). March 20, 2008 Judge Barton awarded Mr. Rodems $11,550 in sanctions against Appellant for a discovery error and a misplaced defense of economic loss to the counterclaim pursuant to section 57.105 Florida Statutes. (R. 1461-1462). July 7, 2008 Judge Barton found Appellant in contempt for failing to submit a Fact Information Sheet, Fla.R.Civ.P Form 1.977. Mr. Bauer later wrote a letter to the Court, addressed to Judge Barton, dated July 24, 2008 and admitted that the failure to provide the Fact Information Sheet was Bauer's fault and not Appellant's noncompliance. Mr. Bauer's letter was time stamped by the Clerk July 29, 2008 at 9.32AM but is missing from the Index. (R. Missing).

Mr. Bauer was at a disadvantage litigating the lawsuit without Appellant's presence and testimony in court. The record shows times when Judge Barton raised questions that could have easily been answered if Appellant was present to testify, but Mr. Bauer refused to allow Appellant to attend the hearings. All the hearings were transcribed by are now missing from the Index, see Appellant's

Motion For Extension of Time To Prepare Record and Index, Exhibit C. This worked to the advantage of Mr. Rodems who made misrepresentations on the record. Mr. Rodems misrepresented to the Court that there was a signed contingent fee agreement between Appellees and Appellant when there was none. This necessitated Plaintiff's Motion for Rehearing submitted July 16, 2008. (R. 1479-1487). July 8, 2008 Mr. Bauer sent Appellant an email stating why he did not want Appellant to attend the hearings.

> "No - I do not wish for you to attend hearings. I am concerned that you will not be able to properly deal with any of Mr. Rodems comments and you will enflame the situation. I am sure that he makes them for no better purpose than to anger you. I believe it is best to keep you away from him and not allow him to prod you. You have had a very adversarial relationship with him and it has made it much more difficult to deal with your case. I don't not wish to add to the problems if it can be avoided."

The behavior Mr. Bauer attributed to Mr. Rodems, comments made "for no better purposes than to anger you", is unlawful harassment and a violation of section 784.048, Florida Statutes. See the affidavit of Neil J. Gillespie submitted to the Clerk September 18, 2010 but now missing from the Index. (R. Missing). Appellant also submitted the affidavit of Neil J. Gillespie July 7, 2010 showing

there is no signed contingent fee agreement between Appellees and Appellant but now missing from the Index. (R. Missing).

Mr. Bauer Complains About Mr. Rodems' Unprofessional Behavior

August 14, 2008 Mr. Bauer himself complained on the record about Mr. Rodems' behavior. "...Mr. Rodems has, you know, decided to take a full nuclear blast approach instead of us trying to work this out in a professional manner. It is my mistake for sitting back and giving him the opportunity to take this full blast attack." (Transcript, August 14, 2008, Emergency Hearing, Judge Marva Crenshaw, page 16, line 24). (R. 1523-1543)

Appellant Hired Dr. Karin Huffer as ADA Advocate

After Mr. Bauer left the case Mr. Rodems resumed his course of harassing conduct toward Appellant that aggravated his disability, caused substantial emotional distress and served legitimate purpose in violation of section 784.048 Florida Statutes. January 26, 2010 Appellant attended his first hearing before Judge Barton and raised the issue of accommodations under the Americans With Disabilities Act (ADA). Judge Barton stated on the record that he was unaware of Appellant's ADA requests made February 20, 2007 and March 5, 2007, and Appellant noted Mr. Bauer failed to raise the issue: (Transcript, January 26, 2010, page 8, beginning at line 11) (R. 1694-1734). February 19, 2010 Appellant filed a

Notice of ADA Accommodation Request of Neil J. Gillespie (R. 1685-1687) and hand delivered the following to Gonzalo B. Casares, ADA Coordinator for the 13th Circuit, with a copy to Judge Barton:

a. ADA Assessment and Report, Karin Huffer, MS, MFT (ADA Report)

b. ADA Accommodation Request of Neil J. Gillespie (ADA Request)

c. ADA form provided by the 13th Judicial Circuit. Line 6, Special requests or anticipated problems (specify): "I am harassed by Mr. Rodems in violation of Fla. Stat. section 784.048."

d. Notice of ADA Accommodation Request of Neil J. Gillespie

e. Transcript, hearing before the Honorable Claudia Isom, February 5, 2007

The above documents were also provided to the Second District Court of Appeal to the Court's ADA Coordinator, Marshal Jacinda Suhr "For the duration of all proceedings in the 2DCA". Appellant also filed February 19, 2010 Plaintiff's Motion For An Order of Protection - ADA. (R. 1688-1693). This was in response to a motion from Mr. Rodems demanding to make Appellant's ADA request part of the adversarial litigation. Rodems filed "Defendants' Motion For An Order Determining Plaintiff's Entitlement to Reasonable Modifications Under Title II Of The Americans With Disabilities Act" February 12, 2010. (R.. 1667-1680) Mr. Rodems also complained in a letter to Judge Barton March 11, 2010 that treating

the ADA as an administrative function was an ex parte communication. Language on the envelope containing the ADA documents clearly indicated otherwise: "The ADA Request and ADA Report are to be kept under ADA Administrative Confidential management except for use by the ADA Administrator revealing functional impairments and needed accommodations communicated to the Trier of Fact to implement administration of accommodations. This information is NOT to become part of the adversarial process. Revealing any part of this report may result in a violation of HIPAA and ADAAA Federal Law."

Appellant sought inclusion of the letters to Judge Barton in the Record and Index, see Appellant's Motion For Extension of Time To Prepare Record and Index, Exhibit D. The 13th Circuit failed to timely respond to Appellant's ADA request. Thirty days passed without a response.

Judge Barton announced at the hearing May 5, 2010 that he would not comply with ADA law that required the following determinations:

a. Whether Gillespie had a "disability" as defined by Title II of the ADA

b. If Gillespie had a "disability," then what specific "modifications" he is requesting to the Court's "rules, policies, or practices ... for the receipt of services or the participation in programs or activities provided by" Court.

c. Whether the requested "modifications would fundamentally alter the nature of the service, program, or activity." of the Court.

(Transcript, May 5, 2010, page 4, line 23) (R. 2339-2410)

Appellant learned of a business relationship between Appellees and Chere Barton, wife of Judge Barton, see Plaintiff's Motion To Disqualify Judge Barton May 20, 2010. (R. 2286-2328). Judge Barton disqualified by Order May 24, 2010. (R. 2329).

Case Reassigned to Judge Martha J. Cook May 24, 2010

Appellant tried in good faith to cooperate with Judge Cook, see Plaintiff's Notice of Filing Letter to the Honorable Martha J. Cook. (R. 2411-2415). Judge Cook favored Appellees from the outset. Judge Cook's approach to almost all motions Appellant's filed was to deny the motions without a hearing. Judge Cook kept court files locked in chambers so Appellant could not have access. Judge Cook's judicial assistant would not cooperate in setting hearings. Mr. Rodems set hearings without coordinating the time and date with Appellant. Once Appellant received an anonymous letter from Judge Cook with misinformation about the ADA. Judge Cook was hostile to Appellant's efforts with the ADA. In response Appellant moved to disqualify Judge Cook five times, each one denied. November

18, 2010 Appellant filed a Petition for Writ of Prohibition in the Second District Court of Appeal, see 2D10-5529. Judge Cook recused sua sponte.

September 28, 2010 Hearing on Final Summary Judgment

Dr. Huffer wrote Appellant has been subjected to ongoing denial of accommodations, exploitation of his disabilities, am routinely denied participatory and testimonial access to the court, discriminated against in brutal ways, ridiculed by the opposition, and accused of malingering by the Judge. Dr. Huffer also wrote that Appellant faces risk to life and health and exhaustion of the ability to continue to pursue justice. (Oct-28-10) (R. Missing). Because of the foregoing it was appropriate for Appellant to file a federal ADA/Civil Rights lawsuit against the 13th Judicial Circuit, see Gillespie v 13th Judicial Circuit et al, case no. 5:10-cv-00503, United States District Court, Middle District of Florida, Ocala Division. (R. Missing) Judge Cook is a defendant in her capacity as a judge and personally.

As set forth in Appellant's affidavit of October 28, 2010 (R. Missing) the lawsuit against Judge Cook and the 13th Judicial Circuit was filed the morning of September 28, 2010 just after the court opened 8:30am in Ocala, Florida. Appellant had hoped to file the lawsuit weeks earlier but could not. When Appellant arrived in Tampa for the hearing before Judge Cook at 11:00am she was unaware of the lawsuit. Therefore Appellant had a duty to inform her prior to the

hearing, and did so by handing a copy of the complaint to Deputy Henderson prior to the hearing and asked him to give it to Judge Cook while she was still in chambers. This was not for service of process, but to inform Judge Cook that she was a defendant in a lawsuit. Rule 3, FRCP, Commencement of Action, a civil action is commenced by filing a complaint with the court. Deputy Henderson refused to take the complaint and he refused to hand it to Judge Cook in chambers. Instead Deputy Henderson went back to Judge Cook's chambers where Appellant assume he said something to the judge. As such Deputy Henderson left Appellant no choice but to address the issue in open court as shown in the record. The transcript was filed with the Clerk but is incorrectly listed on the Index as T1-T26. The date (Oct-22-10) is wrong, and the page count is wrong. The transcript of the hearing September 28, 2010 is 31 pages, not 25 pages in T1-T26. Judge Cook ordered Appellant removed from the hearing September 28, 2010 before the hearing commenced. Appellant had no representation at the hearing. Judge Cook later falsified a record when she wrote that Appellant voluntarily left the hearing in a contempt order dated September 30, 2010. Appellant's affidavit of November 1, 2010, swears to the foregoing. (R. Missing). Judge Cook falsified a record in violation of Florida Statutes, section 839.13(1) as set forth in the affidavit. On January 12, 2011 Major James Livingston, Commander of the Court Operations

Division, provided Appellant with a letter that confirms Appellant's assertion that Judge Cook ordered Appellant removed from the courtroom September 28, 2010, and that Appellant did not leave voluntarily. Major Livingston's letter was docketed with the Clerk January 21, 2011. (R. Missing).

SUMMARY OF ARGUMENT

This appeal addresses whether Final Summary Judgment should be granted when there is an existing genuine issue of material fact. The lower court failed to consider Plaintiff's First Amended Complaint filed May 5, 2010. (R. 2130-2280). The lower court failed to hear Plaintiff's Motion for Summary Judgment filed April 25, 2006 (R. 128-176) and Affidavit In Support (R. 124-127) docketed with the Clerk in advance of Appellees Motion for Final Summary Judgment. Plaintiff's Motion for Punitive Damages Pursuant to Section 768.72 Florida Statutes, submitted January 18, 2007 also puts forth additional issues of material fact that preclude Final Summary Judgment. (R. 700-900 and 901-966).

This appeal addresses whether Final Summary Judgment should be granted when Appellees' claim to attorney's fees under TILA - the Truth In Lending Act - was dismissed with prejudice by prior courts and rulings. Under the doctrine of res judicata matters that have been definitively settled by judicial decision are finally disposed and bars any future action on those claims.

Many of the problems in this litigation are due to Appellees unlawfully representing themselves against a former client on the same matter as the prior representation, see Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher Rodems & Barker, Rodems & Cook, PA. (R. 2635-2705).

STANDARD OF REVIEW

Review of a summary judgment requires a two-pronged analysis. First, a summary judgment is proper only if there is no genuine issue of material fact, viewing every possible inference in favor of the party against whom summary judgment has been entered. Second, if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397 (Fla. Dist. Ct. App. 2d Dist. 2004). If the record demonstrates that there was a genuine issue of material fact or that the appellee was not entitled to judgment as a matter of law, the appellate court must reverse and allow the cause to proceed below, most likely to trial, where disputed material fact issues are to be resolved by the factfinder. Watson v. Hahn, 664 So. 2d 1083 (Fla. Dist. Ct. App. 5th Dist. 1995). On an appeal from a summary judgment, the reviewing court is concerned with determining whether or not there remain any genuine issues of material fact. Higgs v. Florida Dept. of Corrections, 654 So. 2d 624 (Fla. Dist. Ct. App. 1st Dist. 1995); Williams v. Roth, 622 So. 2d 606 (Fla. Dist. Ct. App. 1st Dist. 1993); Brooks v. Bolanos, 357 So. 2d 225 (Fla. Dist. Ct. App. 2d Dist. 1978).

If the existence of genuine issues of material fact or the possibility of their existence is reflected in the record, or if the record raises the slightest doubt in

such respect, the summary judgment cannot be upheld. Furlong v. First Nat. Bank of Hialeah, 329 So. 2d 406 (Fla. Dist. Ct. App. 3d Dist. 1976); Fletcher v. Petman Enterprises, Inc., 324 So. 2d 135 (Fla. Dist. Ct. App. 3d Dist. 1975); Fletcher Co. v. Melroe Mfg. Co., 261 So. 2d 191 (Fla. Dist. Ct. App. 1st Dist. 1972). Where no genuine issue as to any material fact is shown to exist, the only question for the appellate court is whether the summary judgment was properly granted under the law. Wesley Const. Co. v. Lane, 323 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1975). Under de novo review of summary judgment, a District Court of Appeal is obligated to construe the law that applies to the issues, and is not required to defer to the trial judge. Del Rio v. City of Hialeah, 904 So. 2d 484 (Fla. Dist. Ct. App. 3d Dist. 2005). A summary judgment will be reversed where the trial court has erroneously determined that no triable issue of fact was presented. Stanford v. Silins, 515 So. 2d 434 (Fla. Dist. Ct. App. 5th Dist. 1987); Gazie v. Illinois Employers Ins. of Wassau, 466 So. 2d 1132 (Fla. Dist. Ct. App. 4th Dist. 1985); Tompkins v. Rosenberg, 194 So. 2d 688 (Fla. Dist. Ct. App. 3d Dist. 1967). Where the record reveals a genuine issue of fact not apparent from the pleadings, the appellate court is not limited to the issues presented by the pleadings and may return the case for amendment of the pleadings. Forte v. Tripp and Skrip, 339 So. 2d 698 (Fla. Dist. Ct. App. 3d Dist. 1976).

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING FINAL SUMMARY JUDGMENT TO THE APPELLEES BECAUSE A GENUNIE ISSUE OF MATERIAL FACT EXISTS AS SET FORTH IN PLAINTIFF'S FIRST AMENDED COMPLAINT.

This case has many genuine issues of material fact that exist. Appellant was wrongly ordered removed from the hearing on Final Summary Judgment and had no one to represent him. The record has a number of documents showing that a genuine issue of material fact existed. As set forth in Plaintiff's First Amended Complaint (R. at 2130 - 2280), the Alpert law firm, Alpert, Barker, Rodems, Ferrentino & Cook, P.A., sought Appellant to serve as class-action representative in two separate lawsuits, one against ACE Cash Express and one against AMSCOT Corporation. The litigation was over so-called "payday loans" which are delayed deposit check cashing schemes that can result in usurious rates of interest for the consumer. The Alpert firm needed Appellant to intervene and save the AMSCOT case from dismissal as its initial plaintiff Eugene Clement was unqualified. Appellees assumed the case after the Alpert firm imploded. Appellees later failed to prevail on the merits, and AMSCOT settled for business reasons. In settling AMSCOT, Appellees lied about a claim to $50,000 in "court-awarded fees and costs" and wrongfully took over 90% of the total recovery. That is one of

many genuine issues of material fact. Where no genuine issue as to any material fact is shown to exist, the only question for the appellate court is whether the summary judgment was properly granted under the law. Wesley Const. Co. v. Lane, 323 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1975). Under de novo review of summary judgment, a District Court of Appeal is obligated to construe the law that applies to the issues, and is not required to defer to the trial judge. Del Rio v. City of Hialeah, 904 So. 2d 484 (Fla. Dist. Ct. App. 3d Dist. 2005). A summary judgment will be reversed where the trial court has erroneously determined that no triable issue of fact was presented. Stanford v. Silins, 515 So. 2d 434 (Fla. Dist. Ct. App. 5th Dist. 1987); Gazie v. Illinois Employers Ins. of Wassau, 466 So. 2d 1132 (Fla. Dist. Ct. App. 4th Dist. 1985); Tompkins v. Rosenberg, 194 So. 2d 688 (Fla. Dist. Ct. App. 3d Dist. 1967).

Furthermore, where the record reveals a genuine issue of fact not apparent from the pleadings, the appellate court is not limited to the issues presented by the pleadings and may return the case for amendment of the pleadings. Forte v. Tripp and Skrip, 339 So. 2d 698 (Fla. Dist. Ct. App. 3d Dist. 1976). In a letter to Appellant dated November 19, 2007, Chief Branch Disciplinary Counsel Susan V. Bloemendaal, The Florida Bar, responded to Appellant's allegation that Mr. Rodems improperly filed a counterclaim. Bloemendaal wrote (relevant portion):

"Concerning you allegation that the claim is frivolous, this is an issue for the trial court in the pending civil case." Plaintiff's First Amended Complaint, Count 11. (R. 2130-2280). Appellees voluntarily dismissed the counterclaims September 28, 2010 (R. 3013)

A. This Court should reverse the award of Final Summary Judgment in favor of Appellees because the trial court abused its discretion if finding there was no genuine issue of material fact.

Summary judgment is proper only if there is no genuine issue of material fact, viewing every possible inference in favor of the party against whom summary judgment has been entered. Second, if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397 (Fla. Dist. Ct. App. 2d Dist. 2004). The record in this case demonstrates that there was a genuine issue of material fact and that the appellee was not entitled to judgment as a matter of law because of res judicata. The appellate court must reverse and allow the cause to proceed below, most likely to trial, where disputed material fact issues are to be resolved by the factfinder. Watson v. Hahn, 664 So. 2d 1083 (Fla. Dist. Ct. App. 5th Dist. 1995). On an appeal from a summary judgment, the reviewing court is concerned with determining whether or not there remain any genuine issues of material fact. Higgs v. Florida Dept. of Corrections, 654 So. 2d 624 (Fla. Dist. Ct.

App. 1st Dist. 1995); Williams v. Roth, 622 So. 2d 606 (Fla. Dist. Ct. App. 1st Dist. 1993); Brooks v. Bolanos, 357 So. 2d 225 (Fla. Dist. Ct. App. 2d Dist. 1978).

If the existence of genuine issues of material fact or the possibility of their existence is reflected in the record, or if the record raises the slightest doubt in such respect, the summary judgment cannot be upheld. Furlong v. First Nat. Bank of Hialeah, 329 So. 2d 406 (Fla. Dist. Ct. App. 3d Dist. 1976); Fletcher v. Petman Enterprises, Inc., 324 So. 2d 135 (Fla. Dist. Ct. App. 3d Dist. 1975); Fletcher Co. v. Melroe Mfg. Co., 261 So. 2d 191 (Fla. Dist. Ct. App. 1st Dist. 1972). In this case a number of genuine issues of material fact are raised in Plaintiff's First Amended Complaint (R. 2130-2280) Plaintiff's Motion for Summary Judgment (R. 128-176) and Affidavit In Support Of Plaintiff's Motion For Summary Judgment (R. 124-127) and Plaintiff's Motion for Punitive Damages Pursuant to Section 768.72 Florida Statutes (R. 700-900 and 901-966). The genuine issues of material fact in Plaintiff's First Amended Complaint:

Count 1, Breach of Fiduciary Duty

Count 2, Breach of Implied in Law Contract, AMSCOT

Count 3, Breach of Implied in Fact Contract, AMSCOT

Count 4, Fraud, AMSCOT Release And Settlement

Count 5, Fraud, Closing Statement

Count 6, Negligence

Count 7, Negligent Misrepresentation

Count 8, Unjust Enrichment

Count 9, Civil Conspiracy

Count 10, Invasion of Privacy

Count 11, Abuse of Process

Count 12, Claim for Punitive Damages, §768.72 Florida Statutes

B. This Court should reverse the award of Final Summary Judgment in favor of Appellees because the trial court abused its discretion in not allowing Plaintiff's First Amended Complaint.

July 29, 2010 Judge Cook signed "Notice Of Case Management Status and Orders On Outstanding Res Judicata Motions" and "Notice Of Court-Ordered Hearing On Defendants' For Final Summary Judgment". (R. 2940-2946). Judge Cook's denial of Motion for Leave to Submit Plaintiff's First Amended Complaint filed May 5, 2010 is reversible error. Pursuant to Rule 1.190(a), Fla.R.Civ.P. A party may amend a pleading once as a matter of course. Leave of court shall be given freely when justice so requires. Plaintiff's First Amended Complaint is a new complaint that is largely re-written, which will re-set all case deadlines and permit more discovery, new motions to dismiss, motions for summary judgment, and a new answer with affirmative defenses and counter-claims, all of which will

have to be dealt with just as they were the first time around. A court should not dismiss a complaint without leave to amend unless the privilege of amendment has been abused or it is clear that the complaint cannot be amended to state a cause of action. Trotter v. Ford Motor Credit Corp. 868 So.2d 593 (Fla. App. 2 Dist., 2004). Procedural rule allowing amended pleadings to relate back to the date of the original pleading is to be construed liberally. Rule 1.190(c). Stirman v. Michael Graves Design Group, Inc., 983 So.2d 626 (Fla. App. 3 Dist., 2008).

II. THE TRIAL COURT ERRED IN AWARDING FINAL SUMMARY JUDGMENT TO THE APPELLEES BECAUSE APPELLEES ARGUMENTS WERE ALREADY DISMISSED WITH PREJUDICE BY PRIOR COURTS AND RULINGS. PURSUANT TO THE DOCTRINE OF RES JUDICATA MOTIONS FOR FINAL SUMMARY JUDGMENT ON THE SAME FAILED ARGUMENT MUST BE DENIED.

When a Court dismisses a motion "with prejudice" that means that the motion in question is "finally disposed ... and bars any future action on that claim. Additionally, pursuant to the doctrine of res judicata, these motions must be denied. The doctrine of res judicata - matters that have been "definitively settled by judicial decision." Black's Law Dictionary, 7th Edition.

A. This Court should reverse the award of Final Summary Judgment in favor of Appellees because the trial court abused its discretion. When a prior Court dismisses a claim "with prejudice" that means that the claim in question is "finally disposed ... and bars any future action on that claim. Additionally, pursuant to the doctrine of res judicata, these claims must be denied. The doctrine of res judicata - matters that have been "definitively settled by judicial decision."

Appellees Final Summary Judgment turns on a fraudulent claim that Barker, Rodems & Cook had a $50,000 "claim against AMSCOT for court awarded fees and costs" under a fee-shifting provision of the Truth In Lending Act (TILA). United States District Judge Richard A. Lazzara dismissed the TILA claims "with prejudice" August 1, 2001 in the underlying case Clement et al. v AMSCOT case no. 8:99-cv-2795-T-26-EAJ. The case had three claims: Count I alleged violation of the Federal Truth in Lending Act (TILA); Count II alleged violation of state usury laws pursuant to sections 687.02, 687.03, and 687.04 Florida Statutes; Count III alleged violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.23 Florida Statutes. In his Order Judge Lazzara denied as moot Plaintiffs' Renewed Motion for Class Certification (Dkt. 89) dismissed with prejudice Count I the TILA claims, and dismissed Counts II and III without prejudice to bringing them in state court. See Plaintiff's First Amended Complaint. (R. 2130-2280). Attorney Robert W. Bauer argued for Appellant that there was no claim of court-awarded attorney's fees October 30, 2007 during a hearing for judgment on the pleadings: (Transcript, October 30, 2007, page 39) (R. Missing)

22 [MR. BAUER] Another issue to point out the fact this is for

23 their claim of court-awarded attorney's fees, there

24 was no claim. The claim had already been determined

25 by the court, denied. It didn't exist any more.

(Transcript, October 30, 2007, page 39)

1 [MR. BAUER] Yes, there was an appeal outstanding, but that

2 doesn't resurrect any claim. The only thing that's

3 going to resurrect a claim is an overruling by the

4 appellate court. A claim no longer exist once it's

5 been denied, even if it's on appeal. So in

6 asserting there existed a claim for attorney's fees

7 is false. It -it's not there.

Two other federal judges dismissed with prejudice TILA claims in other cases filed by the Alpert firm and later assumed by Appellees In all three cases the courts held that the transactions in question occurred before the law governing the transactions was effective. Appellees later prevailed on partial judgment on the pleadings because Appellees' counsel Mr. Rodems misrepresented to the court that there was a signed representation contract with Appellant when there was not, see Plaintiff's Motion for Rehearing. (R.1479-1487). Judge Cook found that it does not matter if the contract was signed, but it does and is a genuine issue of material fact.

TILA Claims Not Valid in Payday Express Lawsuit

Clement v. Payday Express, Inc. case no.: 8:99-cv-2768-T-23EAJ

On April 6, 2001, United States District Magistrate Judge Steven D. Merryday issued an Order in the Payday Express lawsuit that dismissed with prejudice the TILA and RICO claims, and dismissed without prejudice the remaining state law claims of usury and FDUTPA. Judge Merryday held that "Because TILA's mandatory disclosures were not required of the defendants before October 1, 2000, TILA cannot form a basis for relief of the plaintiff's claims."

TILA Claims Not Valid in ACE Cash Express Lawsuit

Clement & Gillespie v ACE Cash Express, case no.: 8:00-cv-593-T-26C

On December 21, 2000 United States District Court Judge James S. Moody, Jr. issued an Order in the ACE lawsuit that dismissed with prejudice Count I, Plaintiff's TILA claims, and remanded the case to the Circuit Court of the Thirteenth Judicial Circuit for Count II, the alleged violation of state usury laws pursuant to sections 687.02, 687.03, and 687.04 Florida Statutes, and Count III alleged violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.23 Florida Statutes. Judge Moody explained his decision to dismiss with prejudice the TILA claims on page 3, paragraph 3 of the Order. "On March 31, 2000, the Federal Reserve Board ("FRB") promulgated revisions to a

regulation that interprets TILA as applying to check-cashing transactions. See 65 Fed. Reg. 17129, 30 (2000), to be codified at 12 C.F.R. pt. 226. The revision to the regulation states, however, that the effective date of the new rule is March 24,2000, but that compliance is "optional" until October 1, 2000. Id. The Court agrees with Defendant that the plain language of the regulation means that compliance was not mandated until October 1, 2000. The transactions at issue in this case occurred prior to the FRB's regulation. Since Plaintiffs' transactions occurred prior to October 1, 2000, TILA is not applicable and cannot form a basis for relief against Defendant. Accordingly, Plaintiffs' claims under TILA are dismissed."

Res judicata prevents Appellees from raising the same arguments that Judge Nielsen dismissed on Appellees motion to dismiss, see Plaintiff's rebuttal to Defendants Motion Dismiss and Strike, October 7, 2005 (R. 19-23) and case law (R. 35-78), Defendants reply (R. 79-85) and Plaintiff's Second Rebuttal (R. 86-87). Appellees claims to court-awarded TILA attorneys fees were "finally disposed of which barred any future action on that claim. The doctrine of res judicata holds that these matters that have been "definitively settled by judicial decision". Judge Nielsen's order January 13, 2006 found Appellant established a cause of action for fraud and breach of contract. (R. Missing).

CONCLUSION

The trial court erred in granting Final Summary Judgment because a genuine issue of material fact exists. The standard of review precludes Final Summary Judgment where a genuine issue of material fact exists. In this case Plaintiff's First Amended Complaint (R. 2130-2280) has a number of genuine issues of material fact. It was reversible error of the trial court not to allow at least one amended complaint. Pursuant to Rule 1.190(a), Fla.R.Civ.P. A party may amend a pleading once as a matter of course.

When a Court dismisses a claim or motion "with prejudice" that means that the claim or motion in question is "finally disposed and bars any future action on the claim. The doctrine of res judicata bars future action on matters that have been "definitively settled by judicial decision." Appellees Final Summary Judgment turns on a fraudulent claim that Barker, Rodems & Cook had a $50,000 "claim against AMSCOT for court awarded fees and costs" under a fee-shifting provision of the Truth In Lending Act (TILA). Three federal judges in Appellees cases dismissed "with prejudice" all the TILA claims. They are gone forever.

Appellees' counsel Mr. Rodems misrepresented to the court that there was a signed representation contract with Appellant when there was not, see Plaintiff's Motion for Rehearing, submitted by the Law Office of Robert W. Bauer. (R.1479-

1487). Many of the problems in this litigation are due to Appellees unlawfully representing themselves against a former client on the same matter as the prior representation, see Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher Rodems & Barker, Rodems & Cook, PA. (R. 2635-2705).

Respectfully Submitted, February 7, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLANT NEIL J. GILLESPIE was furnished to Ryan Christopher Rodems, Esq. 400 North Ashley Drive, Suite 2100 Tampa, FL 33602 by U.S. Mail on February 7th 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief has been prepared in accordance with Rule 9.210(a) and is submitted in Times New Roman, 14-point font.

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