STATE OF FLORIDA
DISTRICT COURT OF APPEAL
SECOND DISTRICT

NEIL J. GILLESPIE

Appellant,

Case No. 2D10-5197
L.T. NO.: 05-CA-007205

vs.

BARKER, RODEMS & COOK, P.A.,
a Florida Corporation; and

WILLIAM J. COOK,

Appellees.
_____/

APPELLEES' ANSWER BRIEF

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit,
In and for Hillsborough County, Florida

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STATEMENT OF THE CASE AND FACTS

Appellees Barker, Rodems & Cook, P.A. (Appellee BRC) and William J. Cook (Appellee Cook) disagree with Appellant Neil J. Gillespie's Statement of the Case and Facts. Appellant fails to cite the record or transcript for the substantial majority of the assertions he claims as facts, in violation of Fla. R. App. P. 9.210(3)(" The initial brief shall contain . . . A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. References to the appropriate volume and pages of the record or transcript shall be made."). Moreover, most of Appellant's factual assertions are unrelated to the primary argument that Appellant raises in his Initial Brief: that the trial court erred in granting Appellee's motion for summary judgment on September 28, 2010, which disposed of Count I against Appellee BRC, alleging breach of contract.

On August 15, 2005, Appellant filed a two count complaint against Appellees, alleging breach of contract against both in Count I and, using the same facts, fraud against both in Count II. (A.1).[1] On January 19, 2006, Appellees

[1] Citations to the Appendix are by tab number.

answered the Complaint and served counterclaims. (A.2).

On February 4, 2006, Appellant moved to disqualify the Appellees' counsel, (R.1-88-92)[2], but Judge Richard Nielsen denied the motion on May 12, 2006. (R.1-177).

On February 8, 2006, Appellant moved to dismiss and strike the counterclaims. (R.1-93-94). On May 3, 2006, Appellees' filed an amended motion for sanctions under section 57.105, Florida Statutes, asserting "Plaintiff's Motion to Dismiss and Strike Counterclaim, served February 8, 2006, contains claims and contentions that Plaintiff knew or should have known were not supported by the material facts necessary to establish the claims or would not be supported by the application of then-existing law to those material facts, or both." (A.3).

On March 3, 2006, during a telephone conversation regarding the case, Appellant threatened to "slam" Appellees' counsel "against the wall;" as a result, Appellee's counsel filed a verified request that a bailiff be present at all hearings. (R.1-97-100).

On March 28, 2006, Appellee's served discovery on Appellant. Appellant did not properly respond to it, and Judge Nielsen granted Appellees' motion to

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[2] Citations to the Record are by volume and pages.

compel by written Order entered July 24, 2006. (A.4).

Because Appellant did not comply with the July 24, 2006 Order compelling discovery, Appellees moved for an order to show cause on August 25, 2006. (R.2-220-223). At the hearing on October 4, 2006, Plaintiff claimed an entitlement to appointment of counsel under the ADA. (R. 2-220-223). When the Court asked for citations supporting his claim for an attorney under the ADA, Plaintiff declined to offer any, telling the Court "I am not an attorney and I have not been to law school." (R.2-292-303). Judge Nielsen denied Appellant's request for appointment by the Court of an attorney for him. (R.2-292-303). Appellant represented to the Court during this hearing that an insurer may provide counsel to defend him on Defendants' counterclaims, but if it did not, he intended to hire an attorney. (R. 2-292-303). Judge Nielsen adjourned the hearing to give Appellant time to retain counsel, and he ordered Appellant to advise the Court of his progress in retaining counsel by October 18, 2006. (R.2-292-303).[3]

Subsequently, Plaintiff filed letters dated October 16 and 18, 2006 in response to the Court's request for information regarding Appellant's progress hiring counsel. (R.3-327-429). Rather than provide a progress report, Appellant submitted numerous attachments including, among other things, transcripts of

[3] A written Order was entered on October 23, 2006. (R.2-325-326).

telephone conversations between Appellant and Appellees' counsel, correspondence regarding settlement discussions, criticisms of the Court's rulings on matters in this case, allegations about an alleged act by Jonathan L. Alpert more than five years earlier in an unrelated case, criticism of Judge Nielsen for his decisions in other cases, as well as hearsay statements purportedly from unidentified members of the Florida Bar criticizing Judge Nielsen and Appellees and their counsel. (R.3-327-429).

On November 3, 2006, Appellant moved to disqualify Judge Nielsen. (R.3-430-482). Appellant accused him of being "hostile" to pro se plaintiffs and having a "sadistic quality." (R.3-430-482). In that same motion, Appellant also accused Appellees' counsel of aggravating his "existing disability," which required medical treatment "that reduced Plaintiff's intellectual ability to represent himself." (R.3-430-482). The motion to disqualify was untimely and legally insufficient, and Judge Nielsen denied it on November 20, 2006. (A.5). Two days later, however, Judge Nielsen entered an Order of recusal. (R.3-515-516).

On November 29, 2006, Judge Claudia Isom was assigned to the case. On January 30, 2007, Appellees filed their motion for summary judgment. (R.7-1094-1168).

On February 5, 2007, Judge Isom held a hearing on several matters,

including appellant's motion for reconsideration of all of Judge Nielsen's rulings, and after several rulings unfavorable to Appellant, including the denial of his motion for rehearing on the July 24, 2006 Order compelling discovery, Appellant stated "Judge, I'm going to ask that you disqualify yourself. I'm not getting a fair hearing here. I've asked to have an attorney present many times. Everything I say is not considered. I don't even know why I'm sitting here. And I'm very ill. I've expressed that to you. I can't even effectively assist myself. So I'm not going to participate in this charade anymore." (A.6). Judge Isom terminated the proceedings to afford Appellant an opportunity to file a written motion to disqualify her. (A.6).

Before moving to disqualify Judge Isom, Appellant filed "Plaintiff's Notice of Voluntary Dismissal," and "Plaintiff's Motion for an Order of Voluntary Dismissal" on February 7, 2007. (A.7).

On February 13, 2007, Appellant moved to disqualify Judge Isom.[4] That same day, Judge Isom entered the "Court Order Of Recusal And Directing Clerk To Reassign To New Division," finding the motion to disqualify her to be legally insufficient, but nevertheless recusing herself. (R.8-1316-1317).

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[4] In his motion to disqualify Judge Isom, Gillespie accused her of "forc[ing] Plaintiff to participate in a hearing . . . without counsel." (A.7). Judge Isom denied the motion as legally insufficient. (R.8-1316-1317).

Judge James D. Barton II was next assigned to the case. During this time period, Appellant retained an attorney who entered an appearance in the case. On February 15, 2007, Appellant served his "Withdrawal Of Plaintiff's Motion For An Order Of Voluntary Dismissal" and "Withdrawal Of Plaintiff's Notice Of Voluntary Dismissal." (R.8-1323-1324). The trial court granted Appellant's motion on September 7, 2007, (R.8-1424-1425), and Appellees served and filed a petition for writ of prohibition with this Court on or about September 26, 2007, which this Court denied on February 8, 2008.

On July 20, 2007, the trial court granted Appellees' May 3, 2006 motion for sanctions under section 57.105, Florida Statutes. (R.8-1420-1421).

On March 27, 2008, Judge Barton ruled, after an evidentiary hearing in which appellant was represented by counsel, that Appellant must pay $11,500.00 in sanctions because of his discovery violations, which resulted in the July 24, 2006 Order compelling discovery, and his pleading in violation of section 57.105, Florida Statutes, which resulted in the Order granting sanctions on July 20, 2007. (R.8-1461-1462).

On October 13, 2008, Appellant's attorney moved to withdraw, (R.9-1517-1518), which was granted on or about October 1, 2009. (R.9-1563-1564). The case was stayed to provide Appellant with 60 days within

which to find replacement counsel. (R.9-1563-1564). He never did so.

Despite the stay, on October 5, 2009, Appellant filed a pro se motion to disqualify Judge Barton, alleging under oath that "[a]s a proximate cause of Judge Barton's actions, plaintiff's mother, Penelope Appellant, died September 16, 2009." (A.8). That motion was denied as legally insufficient on October 9, 2009. (R.9-1562).

At hearings on discovery issues on January 26, 2010, Appellant claimed to be disabled and that he required accommodations. (R.10-1694-1734). Judge Barton inquired as to what accommodations were required, and Appellant requested an opportunity to file written support, which Judge Barton granted. (R.10-1694-1734). Thereafter, Appellant apparently submitted a hearsay report from a purported expert *ex parte* to Judge Barton. Despite Defendants' objections to the *ex parte* communication, Appellant has never filed the *ex parte* hearsay report or served a copy on Defendants.

At a hearing on May 5, 2010, Appellant served a motion for leave to file an amended complaint. (R.11-1978-2093; R.12-2094-2129). Appellant also inquired as to Judge Barton's relationship to a court reporter named Cherie J. Barton. (R.13-2339-2410). Ms. Barton's court reporting company had transcribed depositions for attorneys in other cases in which Appellee's counsel

was one of the attorneys of record. (R.12-2281-2284). Thus, on May 20, 2010, Appellant filed a second motion to disqualify Judge Barton on the basis that his wife's court reporting company had transcribed depositions for Appellee's counsel. (R.13-2286-2328). On May 24, 2010, Judge Barton granted the motion to recuse himself. (R.13-2329).

Judge Martha J. Cook was next assigned to the case. Within three weeks, Appellant filed a motion to disqualify Judge Cook on June 14, 2010, (R.13-2432-2466), which was denied as legally insufficient. (R.14-2528-2535). Appellant filed a total of five motions to disqualify Judge Cook, all of which were denied. In the third motion to disqualify Judge Cook, dated July 23, 2010, Appellant alleged:

> Judge Cook is biased toward Appellant on matters of disability. Judge Cook is emotional on matters of disability because daughter [ ] is disabled. This information is public knowledge and Judge Cook seeks publicity about her daughter's disability. In a St. Petersburg Times story May 13,2009 reporting on [ ]'s disability, the Times wrote "Her mother, Hillsborough Circuit Judge Martha Cook, fought back tears as [ ] told the story." (Exhibit B). Another story published April 12,2001, Birthing Bad Legislation (Exhibit C) wrote "Martha Cook-Sedgeman, chokes up with happiness as she describes her daughter" [ ] who was born two months premature. Her birth mother exited when [ ] was 1 day old. There were clearly problems at birth, which would become apparent later as a 70 percent loss of hearing. The [ ], who had arranged to adopt [ ] before her birth, had to guarantee an unexpected $100,000 in medical bills. "The costs were staggering," Martha recalls.
>
> Judge Cook is typical of a certain kind of parent of disabled children who are hostile to adults with disabilities. Some of Appellant's disabilities are

congenital like [ ]'s but Appellant's disabilities were much more extensive. (R.15-2852-2872).

At various times, there were rulings disposing all of on Appellant's claims. On November 28, 2007, the trial court granted Appellee Cook's motion for judgment on the pleadings as to Count I, alleging breach of contract. (R.8-1449-1450). On July 7, 2008, the trial court granted Appellee Cook's motion for judgment on the pleadings as to Count II, alleging fraud. (R.8-1473-1474). Appellant did not appeal those rulings.

On July 7, 2008, the trial court also granted Appellee BRC's motion for judgment on the pleadings as to Count II, alleging fraud. (R.8-1473-1474). In his Initial Brief, Appellant does not challenge the ruling granting judgment on the pleadings in favor of Appellee BRC as to Count II, alleging fraud.

On September 28, 2010, the trial court granted Appellee BRC's motion for final summary judgment on Count I, alleging breach of contract, ruling:

> A review of the pleadings, admissions, affidavits and other materials as would be admissible in evidence on file shows there is no genuine issue as to any material fact, and the following material facts are undisputed:
>
> Plaintiff Neil J. Gillespie and two other individuals, who are not parties to this action, hired Defendant BRC to bring claims against Amscot for alleged violations of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. (Complaint, ¶¶ 6, 11).
>
> Under TILA, an aggrieved individual may claim actual damages or statutory

damages of up to $1,000.00. 15 U.S.C. § 1640(a)(1), (2). Under 15 U.S.C. § 1640(a)(3), an aggrieved individual may also make a claim to have his or her attorneys' fees and costs paid by the losing party under, but only if he or she is represented by counsel. Hannon v. Security Nat. Bank, 537 F.2d 327, 328-29 (9th Cir. 1976)(denying attorneys' fees under TILA to pro se plaintiff, and holding that "[t]he purpose behind granting attorney's fees is to make a litigant whole and to facilitate private enforcement of the Truth in Lending Act.").

Defendant BRC filed a lawsuit under TILA in the United States District Court, Middle District of Florida, on behalf of Plaintiff and the two other individuals, (Complaint, ¶ 9), seeking, among other things, damages and court-awarded attorneys' fees. (Affidavit of William J. Cook, Esquire, ¶ 4). After discovery, William J. Cook, Esquire, an attorney employed by Defendant BRC, testified by affidavit that it became clear that none of the plaintiffs had actual damages. (Affidavit of William J. Cook, Esquire, ¶ 3).

After substantial litigation and discovery, the district court dismissed the TILA claims, and Defendant BRC filed a notice of appeal. (Complaint, ¶ 9); (Affidavit of William J. Cook, Esquire, ¶ 7). While the case was on appeal, the parties began settlement negotiations. (Complaint, ¶¶ 22-23, Exh. 4-6).

Under the "Class Representation Contract," which Plaintiff attached to his Complaint as Exhibit 1, Defendant BRC had a duty to investigate and litigate Plaintiff's "potential claims from [his] payday loans with AMSCOT Corporation." After the TILA action was dismissed, however, Plaintiff expressed a desire to end the litigation and avoid claims against himself, and he directed Defendant BRC orally and in writing to negotiate a settlement of his claims under TILA. (Complaint, Exh. 4 and 5);(Affidavit of William J. Cook, Esquire, ¶¶ 6-8).

Eventually, Amscot made a settlement offer which Plaintiff accepted. (Complaint, ¶¶ 32-35). Amscot agreed to pay Plaintiff and the other two plaintiffs $2,000.00 each, $50,000.00 to Defendant BRC to settle the TILA plaintiffs' claims for court-awarded attorneys' fees and costs, and a general release of all claims against the TILA plaintiffs. (Complaint, ¶¶ 34-35 and Exh. 2; (Affidavit of William J. Cook, Esquire, ¶¶ 6-8 and Exh. 1)). Under the settlement agreement, neither Plaintiff nor the other two individuals had to

pay any portion of their $2,000.00 to Defendant BRC for attorneys' fees or costs. (Affidavit of William J. Cook, Esquire, ¶ 11). The Settlement Agreement, which Plaintiff, Amscot and Defendant BRC signed, constituted a modification to the Class Representation Contract for which there was consideration, as Defendant BRC took on the task of negotiating a general release, which was not a duty under the Class Representation Contract, and stated as follows: "Amscot shall pay the Firm the sum of Fifty Thousand Dollars and No/100 ($50,000), in satisfaction of Plaintiffs' claims for attorneys' fees and costs, as more fully described herein, against Amscot as asserted in the Action." (Affidavit of William J. Cook, Esquire, Exh. 1).

Plaintiff also signed a Closing Statement, which included the following statement: "In signing this closing statement, I acknowledge that Amscot Corporation separately paid my attorneys $50,000.00 to compensate my attorneys for their claim against Amscot for court-awarded fees and costs. I also acknowledge that I have received a copy of the fully executed Release and Settlement Agreement dated October 30, 2001." (Complaint, Exh. 2)(Emphasis added).

(R.16-3004-3009).

Based on these undisputed material facts, the trial court ruled:

In Count I against Defendant BRC, Plaintiff contends that, even though he entered into the Settlement Agreement with Amscot, by which Plaintiff, Amscot and Defendant BRC agreed that Amscot would pay $50,000.00 to Defendant BRC to settle Plaintiff's and the other two plaintiffs' claim for court-awarded attorneys' fees and costs, and even though Plaintiff signed the Closing Statement, which acknowledged that the payment of $50,000.00 was intended to resolve the claims for court-awarded attorneys' fees and costs, and even through Plaintiff did not pay any portion of the $2,000.00 Amscot paid him to Defendant BRC as attorneys' fees, Defendant BRC should have paid Plaintiff some portion of the $50,000.00 paid to settle the claims for court-awarded attorneys' fees. (Complaint, ¶¶ 12-20). Plaintiff claims that the failure to do so was a breach of his contract with Defendant BRC.

Based on the undisputed material facts, and having read and considered the proceedings, heard from counsel and Plaintiff, and being otherwise fully

advised in the premises, Defendant BRC is entitled to a judgment as a matter of law on Count I for several reasons. First, Amscot, not Plaintiff, paid the Plaintiff's attorneys' fees, and Defendant BRC did not take a percentage of the $2,000.00 paid to Plaintiff for his claims for statutory damages. In other words, Defendant BRC did not charge Plaintiff any attorneys' fees. As the Class Representation Contract states, "[i]n rare cases, the Defendant(s) may pay all or part of the attorneys' fees." Amscot paid 100% of Plaintiff's and the other two plaintiffs' attorneys' fees, as agreed to by Plaintiff, Amscot and Defendant BRC, and as permitted by TILA and the Rules Regulating the Florida Bar. R. Regulating Fla. Bar 4-1.8(f)(authorizing a lawyer to accept payment of his or her fees for representation of a client by one other than the client).

Defendant BRC did not breach any contract with Plaintiff by accepting the payment of $50,000.00 that Plaintiff directed Amscot to pay to it. Moreover, Defendant BRC could not ethically share with Plaintiff any portion of the attorneys' fees it was paid. R. Regulating Fla. Bar 4-5.4(a)("A lawyer or law firm shall not share legal fees with a nonlawyer. . .."); Prof'l Ethics of the Fla. Bar, Op. 60-33 (1961)(Quoting with approval, HENRY S. DRINKER, LEGAL ETHICS 182: "The only situations in which a lawyer may properly permit a client to receive and retain fees paid by others on account of his legal services are when such payments are to reimburse the client in whole or in part for the client's legal expenses actually incurred in the specific matter for which they are paid."). The law assumes that parties have made a contract for a lawful purpose. *See, e.g., J.R.D. Management Corp. v. Dulin*, 883 So. 2d 314, 316-17 (Fla. 4th DCA 2004).

Finally, Plaintiff is estopped as a matter of law from adopting a contrary position in this litigation to the one he took during settlement negotiations with Amscot, in the Settlement Agreement signed by him, Amscot and Defendant BRC, and in the Closing Statement. "In order to demonstrate the existence of estoppel, a party must establish (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance upon that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance." *Sun Cruz Casinos, L.L.C. v. City of Hollywood, Fla.*, 844 So.2d 681, 684 (Fla. 4th DCA 2003). According to the undisputed testimony by Mr. Cook, Defendant BRC relied on the statements Plaintiff made in the Settlement

> Agreement with Amscot that Amscot was authorized to pay Defendant BRC $50,000.00 for the claim for court-awarded attorneys' fees and costs, as well as in the Closing Statement, and Defendant BRC would not have accepted the money if Plaintiff had not agreed to the terms of settlement. Therefore, as a matter of law, Plaintiff is estopped from changing his position with Amscot that its payment of $50,000.00 was to settle and resolve Plaintiff's obligation to pay Defendant BRC attorneys' fees and costs.

(R.16-3004-3009).

On September 28, 2010, Appellees dismissed their counterclaims, (A.9), thereby disposing of the last of the causes of action pending in the trial court.

Appellant filed his notice of appeal of the order granting summary judgment as to Count I on October 22, 2010. (R.16-3025-3027).

On November 15, 2011, the trial court entered the Order Prohibiting Plaintiff from Appearing Pro Se, after issuing a show cause order as to why Appellant should be permitted to continue appearing pro se. The trial court found that Appellant was "an abusive litigant," and prohibiting Appellant "from filing any paper with this court which is not signed by an attorney duly licensed to practice law in the State of Florida." (A. 10). Appellant did not appeal that ruling.

SUMMARY OF THE ARGUMENT

Appellant raises only two issues in this appeal. First, he claims the trial court erred in granting Appellee BRC's motion for summary judgment on Count I, alleging breach of contract. Second, he claims the trial court erred in denying Appellant leave to file an amended complaint, which he claims would have shown a disputed issue of fact, thereby precluding summary judgment on Count I.

Based on the undisputed material facts, and a correct application of the law, the trial court granted final summary judgment in favor of Appellee BRC on Count I, alleging breach of contract. Because Appellant's proposed amended pleading was insufficiently pled and futile, the trial court's denial of the motion for leave to file it was not an abuse of discretion. Because the amended complaint was not "on file," the trial court could not consider it in ruling on the motion for summary judgment. Even if it had been "on file," the amended complaint added no new facts to the breach of contract issue, and therefore would not have prevented the summary judgment.

ARGUMENT

I. IN GRANTING APPELLEE BRC'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO COUNT I, ALLEGING BREACH OF CONTRACT, THE TRIAL COURT CORRECTLY APPLIED THE LAW TO THE UNDISPUTED FACTS

Standard of Review

The standard of review when reviewing the entry of summary judgment is *de novo*. *Schroeter v. Cincinnati Ins. Co.*, 971 So.2d 1042, 1043 (Fla. 2d DCA 2008).

The trial court correctly determined that there were no material facts in dispute and correctly applied the law in granting Appellee BRC's motion for final summary judgment as to Count I, alleging that Appellee BRC breached its contract with Appellant.

Although Appellant argues that there were material facts in dispute, he fails to cite any. In fact, the trial court derived the majority of the undisputed facts from Appellant's own Complaint.

Appellant hired Appellee BRC to represent him in a Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq*., claim against Amscot. Under TILA, an aggrieved individual may claim actual damages or statutory damages of up to $1,000.00. 15 U.S.C. § 1640(a)(1), (2). Under 15 U.S.C. § 1640(a)(3), an aggrieved individual may also make a claim to have his or her attorneys' fees and costs paid by the losing party under, but only if he or she is represented by counsel.

Hannon v. Security Nat. Bank, 537 F.2d 327, 328-29 (9th Cir. 1976)(denying attorneys' fees under TILA to pro se plaintiff, and holding that "[t]he purpose behind granting attorney's fees is to make a litigant whole and to facilitate private enforcement of the Truth in Lending Act.").

Eventually, after the TILA claim was dismissed, Appellant and Amscot agreed to a settlement. Appellant signed a settlement agreement with Amscot which stated as follows: "Amscot shall pay the Firm the sum of Fifty Thousand Dollars and No/100 ($50,000), in satisfaction of Plaintiffs' claims for attorneys' fees and costs, as more fully described herein, against Amscot as asserted in the Action." (R.16-3004-3009). Appellant also signed a Closing Statement, which included the following statement: "In signing this closing statement, I acknowledge that Amscot Corporation separately paid my attorneys $50,000.00 to compensate my attorneys for their claim against Amscot for court-awarded fees and costs. I also acknowledge that I have received a copy of the fully executed Release and Settlement Agreement dated October 30, 2001." (R.16-3004-3009).

Based on these undisputed facts, the trial court correctly ruled that Appellee BRC did not breach any contract with Appellant:

> In Count I against Defendant BRC, Plaintiff contends that, even though he entered into the Settlement Agreement with Amscot, by which Plaintiff, Amscot and Defendant BRC agreed that Amscot would pay $50,000.00 to Defendant BRC to settle Plaintiff's and the other two plaintiffs' claim for

court-awarded attorneys' fees and costs, and even though Plaintiff signed the Closing Statement, which acknowledged that the payment of $50,000.00 was intended to resolve the claims for court-awarded attorneys' fees and costs, and even through Plaintiff did not pay any portion of the $2,000.00 Amscot paid him to Defendant BRC as attorneys' fees, Defendant BRC should have paid Plaintiff some portion of the $50,000.00 paid to settle the claims for court-awarded attorneys' fees. (Complaint, ¶¶ 12-20). Plaintiff claims that the failure to do so was a breach of his contract with Defendant BRC.

Based on the undisputed material facts, and having read and considered the proceedings, heard from counsel and Plaintiff, and being otherwise fully advised in the premises, Defendant BRC is entitled to a judgment as a matter of law on Count I for several reasons. First, Amscot, not Plaintiff, paid the Plaintiff's attorneys' fees, and Defendant BRC did not take a percentage of the $2,000.00 paid to Plaintiff for his claims for statutory damages. In other words, Defendant BRC did not charge Plaintiff any attorneys' fees. As the Class Representation Contract states, "[i]n rare cases, the Defendant(s) may pay all or part of the attorneys' fees." Amscot paid 100% of Plaintiff's and the other two plaintiffs' attorneys' fees, as agreed to by Plaintiff, Amscot and Defendant BRC, and as permitted by TILA and the Rules Regulating the Florida Bar. R. Regulating Fla. Bar 4-1.8(f)(authorizing a lawyer to accept payment of his or her fees for representation of a client by one other than the client).

Defendant BRC did not breach any contract with Plaintiff by accepting the payment of $50,000.00 that Plaintiff directed Amscot to pay to it. Moreover, Defendant BRC could not ethically share with Plaintiff any portion of the attorneys' fees it was paid. R. Regulating Fla. Bar 4-5.4(a)("A lawyer or law firm shall not share legal fees with a nonlawyer. . .."); Prof'l Ethics of the Fla. Bar, Op. 60-33 (1961)(Quoting with approval, HENRY S. DRINKER, LEGAL ETHICS 182: "The only situations in which a lawyer may properly permit a client to receive and retain fees paid by others on account of his legal services are when such payments are to reimburse the client in whole or in part for the client's legal expenses actually incurred in the specific matter for which they are paid."). The law assumes that parties have made a contract for a lawful purpose. *See, e.g., J.R.D. Management Corp. v. Dulin*, 883 So. 2d 314, 316-17 (Fla. 4th DCA 2004).

> Finally, Plaintiff is estopped as a matter of law from adopting a contrary position in this litigation to the one he took during settlement negotiations with Amscot, in the Settlement Agreement signed by him, Amscot and Defendant BRC, and in the Closing Statement. "In order to demonstrate the existence of estoppel, a party must establish (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance upon that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance." *Sun Cruz Casinos, L.L.C. v. City of Hollywood, Fla.*, 844 So.2d 681, 684 (Fla. 4th DCA 2003). According to the undisputed testimony by Mr. Cook, Defendant BRC relied on the statements Plaintiff made in the Settlement Agreement with Amscot that Amscot was authorized to pay Defendant BRC $50,000.00 for the claim for court-awarded attorneys' fees and costs, as well as in the Closing Statement, and Defendant BRC would not have accepted the money if Plaintiff had not agreed to the terms of settlement. Therefore, as a matter of law, Plaintiff is estopped from changing his position with Amscot that its payment of $50,000.00 was to settle and resolve Plaintiff's obligation to pay Defendant BRC attorneys' fees and costs.

(R.16-3004-3009).

In his Initial Brief, Appellant asserts that his amended complaint raised "a number of genuine issues of material fact . . .." (Initial Brief at 41). The amended complaint raised no new facts regarding the breach of contract, and so it would not have created a genuine iossue of material fact as to the issues on summary judgment. Moreover, the motion for leave to amend was denied on July 30, 2010, (R.16-2940-2946), well before the motion for summary judgment was heard and granted, and as discussed below, rightly so. Thus, this situation was not the same as in *Hervey v. Alfonso,* 650 So.2d 644, 647 (Fla. 2d DCA 1995)("[E]ven if summary judgment is warranted as to the claim alleged, nevertheless, if the record indicates

that the plaintiff may have a cause of action not previously pled, or a better one than originally pled, it is entirely appropriate from a procedural standpoint to grant summary judgment without prejudice to the plaintiff seeking leave to amend to assert such a claim."). After Appellant's motion for leave to file the First Amended Complaint was denied, he made no further effort to seek leave to file a proper amended complaint.

Instead, the case proceeded to a hearing on Appellee BRC's motion for summary judgment as to Count I, alleging breach of contract. Because the First Amended Complaint was not "on file," the trial court could not have considered the allegations of the First Amended Complaint in determining whether to grant summary judgment on Count I of the Complaint. Fla. R. Civ. P. 1.510(c)("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.")(Emphasis supplied).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT LEAVE TO FILE THE INSUFFICIENTLY PLED AND FUTILE FIRST AMENDED COMPLAINT

Standard of Review

The standard of review when reviewing a trial court's denial of motion for

leave to file an amended pleading is abuse of discretion. *Craig v. East Pasco Medical Center, Inc.*, 650 So.2d 179, 180 (Fla. 2d DCA 1995).

The trial court did not err in denying Appellant's motion for leave to amend the Complaint. While the right to amend a pleading shall be liberally granted, there is not a corresponding right to file an amended pleading that fails to meet the pleading standards of Fla. R. Civ. P. 1.110(b) and is futile.[5] *Thompson v. Bank of New York*, 862 So.2d 768, 770 (Fla. 4th DCA 2003)(affirming denial of leave is proper if the amendment would be futile, and "a proposed amendment is futile where it is insufficiently pled.").

The First Amended Complaint was insufficiently pled because it violated Florida Rule of Civil Procedure 1.110(b). It consisted of 240 paragraphs and twelve counts in the classic and well-condemned shotgun pleading style. (R.12-2130-2280). Each of the successive twelve counts of the First Amended Complaint not only incorporated by reference the preliminary allegations of the First Amended Complaint, but also incorporated by reference all the allegations of each preceding count, a practice that violates Rule 1.100(b). *Gerentine v. Coastal Sec.*

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[5] As argued below, because of pleading defects and failure to state causes of action, the trial court's ruling denying leave to file the First Amended Complaint was proper. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla.1999)("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support judgment in the record.").

Systems, 529 So.2d 1191, 1194 (Fla. 5th DCA 1988).

> The trial court also found that the second amended complaint in its entirety, violated the rules of pleading as set forth in section 1.110(b), Florida Rules of Civil Procedure, in that each count, not only incorporated by reference the preliminary allegations of the complaint, but also incorporated by reference all the allegations of each preceding count. By the time a defendant reached the sixth count of the complaint, he would find himself faced with 72 previous paragraphs, many with numerous subdivisions, replete with evidentiary facts and together forming a total morass which would make it difficult if not impossible to respond to. . . . Because the second amended complaint did not provide short and plain statements of the ultimate facts as required by the rules of pleading, the court correctly dismissed it.

Id. Plainly, it did not contain a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief," as required by Rule 1.110(b), but was a "convoluted, verbose, narrative style pleading," *Barrett v. City of Margate*, 743 So.2d 1160, 1163 (Fla. 4th DCA 1999), "involving multiple sets of circumstances, making a cumbersome pleading difficult to respond to," *Dewitt v. Rossi*, 559 So.2d 659, 659 (Fla. 5th DCA 1990), and containing numerous "vague and indefinite, largely repetitive of allegations contained elsewhere, or amounting to nothing more than legal conclusions of the pleader," *Danese v. Holley*, 159 So.2d 667, 668 (Fla. 1st DCA 1964).

Appellant's First Amended Complaint was also insufficiently pled because it named four separate defendants, but lumped them all together in every count under the descriptive term "defendants." It would have been impossible for each

defendant to ascertain what claims were pled against him or it. In *Pratus v. City of Naples*, 807 So.2d 795, 796-97 (Fla. 2d DCA 2002), the Court held that, in a case with three defendants, "each claim should be pleaded in a separate count instead of lumping all defendants together."

Because the First Amended Complaint failed to comply with Rule 1.110(b), the trial court's denial of leave to file it was correct. Even though pro se, Appellant was required to comply with the rules of procedure pertaining to pleading. *Barrett*, 743 So.2d at 1162 ("In the history of jurisprudence, pro se litigants have frequently been granted leniency in technical matters. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). . . . Notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for all citizens, pro se litigants are not immune from the rules of procedure."); *Kohn v. City of Miami Beach*, 611 So.2d 538, 539-40 (Fla. 3d DCA 1992)("We conclude that it is a mistake to hold a pro se litigant to a lesser standard than a reasonably competent attorney. . . . a party's self-representation does not relieve the party of the obligation to comply with any appropriate rules of civil procedure. . . . Compassion for a pro se litigant and justice under law are entirely different concepts that should not be confused.").

Appellant's First Amended Complaint was futile not only because it was

insufficiently pled, but also because the claims were barred by the statute of limitations, the doctrine of *res judicata*, or failed to state a cause of action. A proposed amendment is futile if it is "insufficient as a matter of law." *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So.3d 883, 885 (Fla. 4th DCA 2009)(quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir.1999)). In *Weaver*, the Eleventh Circuit held that "denial of leave to amend is justified by futility when the 'complaint as amended is still subject to dismissal.'" 169 F.3d at 1320 (quoting *Halliburton & Assoc., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 444 (11th Cir.1985)). Moreover, "Florida Rule of Civil Procedure 1.110(b) requires each claim for relief to state a cause of action." *Pratus*, 807 So.2d at 796.

The trial court's denial of the motion for leave to file the amended pleading was not an abuse of discretion because it was "subject to dismissal" or failed to "state a cause of action." In Count 1 of the First Amended Complaint, Appellant alleged breach of fiduciary duty because "Defendants sought to advance its [sic] own interests over the interests of [Appellant]." (R.11-1978-2093; 12-2094-2129). The exhibits Appellant attached to the First Amended Complaint, however, showed that Appellee Cook followed the directions Appellant gave to him. Appellant advised Appellee Cook in writing on August 15, 2001 to demand $1,000 to settle Appellant's claims and $10,000 to settle the claims for attorneys' fees and costs,

Exhibit 9, and that Appellee Cook did so on August 20, 2001, Exhibit 14. As Exhibit 17 shows, Amscot actually agreed to pay Appellant $2,000.

Thus, the breach of fiduciary duty claim was futile for two reasons, based on the Appellant's allegations and attachments: First, Appellant's First Amended Complaint attaches exhibits showing that Appellee Cook complied with Appellant's instructions to demand $1,000 to settle his claims. "If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss." *Fladell v. Palm Beach County Canvassing Bd.*, 772 So.2d 1240, 1242 (Fla. 2000). An attorney who abides by his client's directing does not breach a fiduciary duty. Second, Appellant objectively had no damages. Appellant demanded his attorney offer to settle for $1,000, and his attorney actually obtained more money; and, Appellant accepted the settlement. He suffered no damages, even if he could somehow establish that the fiduciary duty owed was breached. Without damages, there is no cause of action.

In Counts 2 and 3 of the First Amended Complaint, Appellant repled breach of contract against Appellee Cook, despite that the trial court previously granted judgment on the pleadings as to Appellee Cook on Count I of the Complaint, alleging breach of contract. Thus, the Court correctly denied the motion for leave to file the First Amended Complaint. *New River Yachting Center, Inc. v.*

Bacchiocchi, 407 So.2d 607, 609 (Fla. 4th DCA 1981)(affirming trial court's refusal to entertain appellants' "motion for leave to amend, holding that the earlier summary judgment effectively closed the door to relitigation of the same cause of action."). In *Bacchiocchi*, the Fourth DCA held that "the summary final judgment is res judicata and serves as a bar to further litigation of the same claim. Once a party has had an opportunity to litigate a matter in an action in a court of competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent." *Id.*

Considering res judicata, the statute of limitations or any other affirmative defense apparent from the face of the complaint which would subject them to dismissal is a basis to deny the motion for leave to file the First Amended Complaint. "If the face of the complaint contains allegations which demonstrate the existence of an affirmative defense then such defense can be considered on motion to dismiss." *Frank v. Campbell Property Management, Inc.*, 351 So.2d 364, 364-65 (Fla. 4th DCA 1977)(citing Fla. R. Civ. P. 1.110(d)).

Likewise, Counts 4 and 5 of the First Amended Complaint repled fraud, but the trial court had already granted judgment on the pleadings as to Count II of the Complaint, which alleged fraud against Appellees BRC and Cook. The judgment on the pleadings "effectively closed the door to relitigation of the same cause of

action," and this serves as a basis to deny the motion for leave to file the First Amended Complaint. *New River Yachting Center, Inc.*, 407 So.2d at 609.

As to Counts 4 and 5, Appellant sued two new defendants, Barker and Rodems, on the basis that "[u]nder Florida law, partners engaged 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. Dist. Ct. App. 2d Dist. 1965)." (R.11-1978-2093; 12-2094-2129). Yet, in paragraph 2, Appellant alleges that Barker, Rodems & Cook, P.A., is a "Florida professional service corporation." Under section 621.07, Florida Statutes, an attorney, as an "officer, agent, member, manager, or employee of a corporation or limited liability company . . . shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by that person, or by any person under that person's direct supervision and control." Because Appellant did not allege any acts by Defendants Barker or Rodems other than being "partners engaged in the practice of law," Counts 4 and 5 and any other counts pending against Defendants Barker or Rodems failed to state a cause of action and therefore were futile. *O'Keefe v. Darnell*, 192 F.Supp.2d 1351, 1361 (M.D.Fla. 2002).

Counts 6 and 7 of the First Amended Complaint, alleging negligence and

negligent misrepresentation, were futile because they were barred by the statute of limitations, and this defense is also apparent on the face of the complaint. The statute of limitations for professional negligence is two years. Fla. Stat. § 95.11(4)(a). The events Appellant alleged against the defendants ended on November 1, 2001, and therefore, any complaint alleging professional negligence filed after November 1, 2003 was clearly time-barred. Appellant filed the Complaint in this action on or about August 11, 2005, and claims for negligence would have been barred on that date. *Garden v. Frier*, 602 So.2d 1273 (Fla. 1992)(when party is a professional, two years statute of limitations applies for negligence, not four year statute of limitations).

In Count 8 of the First Amended Complaint, entitled "Unjust Enrichment," Appellant incorporated paragraphs 1-180, including those in Counts 1 and 2, alleging breach of contract and alleging that the contingency fee contract should govern the dispute. "[W]here there is an express contract between the parties, claims arising out of that contractual relationship will not support a claim for unjust enrichment." *Moynet v. Courtois*, 8 So.3d 377, 379 (Fla. 3d DCA 2009). Appellant also attached as exhibits the settlement agreement he executed with Amscot and the Closing Statement he executed with Defendant BRC, both of which are written contracts which detail the Appellant's agreement with Amscot that it

would pay $50,000 to Defendant BRC to satisfy Appellant's claims for court-awarded attorneys' fees and costs, and Appellant's agreement with Appellee BRC that Amscot would satisfy Appellant's attorneys' fees and costs. *Fladell,* 772 So.2d at 1242 ("If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss."). While a party can plead inconsistent positions, when the facts alleged in support of one claim, but defeat another, and those facts are incorporated in both counts, the inconsistent claims can be dismissed. *Compare Mitrani v. Admiral's Port Townhomes, Inc.*, 553 So.2d 244, 245 (Fla. 3d DCA 1989)(where count III did not incorporate facts from counts I and II, facts alleged in counts I and II cannot defeat count III).

Count 9, entitled "Civil Conspiracy," alleged only actions by the corporation and its employees, and therefore failed to state a cause of action because "neither an agent nor an employee can conspire with his or her corporate principal or employer" unless they have "a personal stake in the activities that are separate and distinct from the corporations' interest," *Lipsig v. Ramlawi*, 760 So.2d 170, 180-81 (Fla. 3d DCA 2000), an allegation Appellant did not make.

In Count 10, entitled "Invasion of Privacy," Appellant alleged that, during the

TILA litigation, "Defendants published information about Appellant's disability, treatment and rehabilitation" in interrogatory answers and in a deposition on May 14, 2001 by not objecting to the inquiries. (First Amended Complaint, ¶¶ 213-216). Yet, this information was relevant, and therefore, as a matter of law, there could be no invasion of privacy. Appellant alleged that he was a plaintiff in the TILA class action and was slated to be a class representative. The federal class action rule permits a person to serve as a class representative only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Therefore, Appellant's health was at issue and questions about his medical condition were relevant and appropriate. *See, e.g., In re American Medical Systems, Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996)(Class representative's history of psychological problems raised "serious question" as suitability to serve as a class representative); *Roundtree v. Cincinnati Bell, Inc.*, 90 F.R.D. 7, 10 (S.D.Ohio 1979)(Class representative's history of physical ailments and corresponding neurosis "may affect Appellant's ability to vigorously participate in the prosecution of a class action").

In Count 11 of the First Amended Complaint, Appellant alleged "Abuse of Process," arguing that Appellees' counterclaims filed in this action constituted an abuse of process. Appellant alleged "[u]pon information and belief, Defendants'

counterclaim for libel against Appellant is a willful and intentional misuse of process for the collateral purpose of making Appellant drop his claims against Defendants and settle this lawsuit on terms dictated by them." (First Amended Complaint, ¶ 223)(Emphasis supplied). Again, Appellant's allegations defeat the cause of action. "There is no abuse of process when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior motive." *Thomson McKinnon Securities, Inc. v. Light*, 534 So.2d 757, 760 (Fla. 3d DCA 1988).

In Count 12 of the First Amended Complaint, Appellant attempted to plead a claim for punitive damages. There is no cause of action for "punitive damages." If a particular cause of action allows a party to claim punitive damages, then a claimant may follow the statutory procedure to plead punitive damages. Appellant had not complied with section 768.72(1), Florida Statutes. Count 12 was futile and failed to state a cause of action.

Because of the pleading defects and futility, the trial court correctly denied Appellant leave to file the First Amended Complaint. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d at 644 (Fla.1999)("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support judgment in the record."). There was no abuse of discretion.

CONCLUSION

Appellant filed a two-count Complaint against Appellees BRC and Cook as a result of a contract for Appellant's representation in a TILA lawsuit that was settled on terms he agreed to. Despite agreeing to the settlement, which included that Amscot would pay Appellant's attorneys' fees, Appellant sued Appellees BRC and Cook, his attorneys in the underlying TILA case, alleging breach of contract and fraud.

As the trial court determined, Appellant's own allegations demonstrated that there was no breach of contract or fraud. Both counts against Appellee Cook were disposed of by motions for judgment on the pleadings, and Appellant did not appeal those rulings. Count II, alleging fraud against Appellee BRC was also disposed of by a motion for judgment on the pleadings, and Appellant does not challenge that ruling in his Initial Brief. The only matter challenged was the trial court's granting of summary judgment on Count I against Appellee BRC, alleging breach of contract. Based on the undisputed material facts, the trial court correctly determined that Appellant agreed in writing to the settlement of his claim, including the payment by Amscot of his attorneys' fees. Summary judgment was proper. Although Appellant sought leave to amend his Complaint, the proposed amended pleading

was insufficiently pled and, more importantly, futile. The denial of leave was therefore not an abuse of discretion.

The trial court's rulings on summary judgment and the denial of the motion for leave to file the futile amended pleading should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of February, 2011.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the font of this brief is Times New Roman 14-point.

RYAN CHRISTOPHER RODEMS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 14th day of February, 2011 by U.S. Mail to Neil J. Gillespie, 8092 SW 115th Loop, Ocala, Florida 34481.

RYAN CHRISTOPHER RODEMS, ESQUIRE