

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

NEIL J. GILLESPIE
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.

**APPELLANT'S MOTION FOR LEAVE TO FILE
AN AMENDED INITIAL BRIEF**

Appellant pro se Neil J. Gillespie moves for leave to file an Amended Initial Brief, and in support thereof states:

1. This Court Ordered, March 23, 2011, that the Clerk of the Circuit Court shall respond to the Appellant's motion to compel completion of appellate record within 10 days. Appellant has received a corrected Index from the Clerk within that time. Appellant received the corrected Index in the mail March 30, 2011 from the Clerk.
2. The Order of March 23, 2011 denied Appellant's Motion for leave to file an Amended Initial Brief without prejudice to the appellant to refile the motion once the issue surrounding the record is resolved. The refiled motion should specify why an amended brief needs to be filed.
3. Appellant therefore refiles the motion for leave to file an Amended Initial Brief. As set forth in paragraph one, the issue surrounding the record has been resolved. Appellant needs to file an Amended Initial Brief as set forth in the following paragraphs.

4. In creating a new Record and Index, the previous page numbers changed. The old page numbers referenced in Appellant's Initial Brief are now moot. This issue also holds true for Appellees' Answer Brief which also referenced the old pages numbers that are now moot. In addition, Appellees submitted a separate Appendix containing documents now in the corrected Record and Index.

5. The corrected Index is fifteen (15) pages larger than the initial one, reflecting a substantial increase in the Record available for review. Appellant needs to amend his Initial Brief to include lower tribunal documents that are now part of the record but were not part of the initial Index. Appellees submitted a separate Appendix with Appellees' Answer Brief containing documents not in the initial Index. Appellant did not submit an Appendix with his Initial Brief. In final appeals with records, appendices that include lower tribunal documents that are not part of the record are disfavored if not prohibited. (Email to Appellant from James R. Birkhold, Clerk of the Court, The Second District Court of Appeal, February 9, 2011).

6. The Clerk's Certificate dated March 22, 2011 accompanied the corrected Index. A copy of the Clerk's Certificate is attached hereto as Exhibit A. The Clerk certified that after a diligent search, the two documents listed below could not be located:

(a) 7/20/10, Plaintiff's Notice of Filing Affidavit, Neil J. Gillespie, no Signed Contract. The Document Appears to be the Affidavit Docketed on 7/23/10 as Affidavit of Neil J. Gillespie.

(b) Notice of Filing Affidavit of William J. Cook, Esquire Filed 6/3/10, However a Copy of This Appears to be Attached to Plaintiff's Motion to Strike Affidavit of

William J. Cook, Esquire, Motion to Quash Order Granting Defendant's Motion for Writ of Garnishment After Judgment, Filed 6/30/10.

7. The document listed in the above paragraph 6(a), Plaintiff's Notice of Filing Affidavit, Neil J. Gillespie, no Signed Contract, is instrumental to the Initial Brief, see pages 27-28. A pleading in a cause after filing becomes a part of the record and should not be altered, amended, or destroyed without permission of the court, on due notice to the opposite party, and should be kept by the clerk in files of his office. Gracy v. Fielding, 83 Fla. 388, 91 So. 373. Appellant did not receive notice that his affidavit would be removed from the Clerk's file. The Clerk of the Circuit Court has a legal duty to maintain and to provide access to the records contained in its files unless the records are legally exempt from disclosure. Radford v. Brock, App. 2 Dist., 914 So.2d 1066 (2005). The Clerk has failed its duty to maintain the file in this case. Therefore Appellant moves to include a copy of this document by way of an Appendix pursuant to Rule 9.220, Florida Rules of Appellate Procedure.

8. By Order of March 23, 2011 this Court denied Appellant's Motion to Compel the Thirteenth Judicial Circuit and Judge Barton to file communication in the case with the Clerk. These documents are vital to Appellant's Initial Brief, see page 20, paragraph one. Judge Isom referred Appellant to law enforcement, and Kirby Rainsberger, Legal Advisor to the Tampa Police Department, reviewed the matter and wrote February 22, 2010 that Mr. Rodems (Appellees' counsel) 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. These documents are public records under Rule 2.420, Florida Rules of Judicial Administration:

Rule 2.420, Public Access To Judicial Branch Records, (a) Scope and Purpose.

Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government...(b) Definitions. (1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity...

As the lower tribunal and presiding judge, the Thirteenth Judicial Circuit and Judge Barton made and received records in connection with the transaction of official business. A paper is filed when it is delivered to the proper officer and received by him to be kept in his official custody. Coult v. McIntosh Inv. Co., 133 Fla. 141, 182 So. 594 (1938); Vickers v. Glenn, 102 Fla. 535, 136 So. 326 (1931); Waring v. O'Doniel, 102 Fla. 354, 135 So. 850 (1931); Cook v. J. I. Case Plow Works Co., 85 Fla. 421, 96 So. 292 (1923); Franklin County v. State, 24 Fla. 55, 3 So. 471, 12 Am.St.Rep. 183 (1887). Appellant moves to include documents made and received by the Thirteenth Judicial Circuit and Judge Barton in connection with the transaction of official business but not in the Record or Index, by Appendix pursuant to Rule 9.220, Florida Rules of Appellate Procedure.

9. Appellant's Initial Brief submitted February 7, 2011 was premature due to confusion inadvertently created by the lower tribunal. On February 3, 2011 Appellant submitted a Motion for Extension of Time to Prepare Record and Index. The Court granted the motion February 17, 2011. However the Court issued an Order February 3, 2011 that denied Appellant's motion to prepare and transmit record as moot, as the clerk has informed this court that she sent out the index to the parties on January 25, 2011. This Order was directed to a "motion" forwarded by the Clerk of the Circuit Court, not by Appellant. In fact it was not a "motion" at all, but misidentified directions to the clerk. Appellant received the Order Saturday, February 5, 2011 and believed it denied his Motion for Extension of Time to Prepare Record and Index. Since the extension of time (EOT) for the Initial Brief date certain was Sunday February 6, 2011, Appellant submitted his admittedly incomplete Initial Brief Monday February 7, 2011 so as not to be late. Appellees submitted their Answer Brief February 14, 2011. The Court granted Appellant's motion for Extension of Time to Prepare Record and Index February 17, 2011. Appellant and Appellees have been prejudiced by this confusion and inadvertent turn of events. Appellant submitted his Initial Brief before issues with the Record and Index were resolved. Appellees Answer Brief was submitted before issues with the Record and Index were resolved. In fairness to both sides, Appellant should be allowed to amend his Initial Brief as if it conformed to the Court's Order of February 17, 2011. Appellees should be allowed to amend (if they choose) their Answer Brief after Appellant submits his Amended Initial Brief.

10. Appellant plans to submit a Reply Brief in this appeal. The time for Appellant's Reply Brief has been tolled while the issues with the Record and Index were resolved, pursuant to Rule 9.300(b), Fla. R. App. P. Appellant moves for a date certain to submit his Reply Brief.

11. In consideration of the foregoing, Appellant moves for leave to file an Amended Initial Brief and requests thirty (30) days to do so.

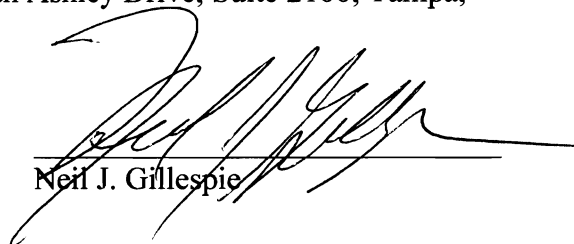
WHEREFORE, Appellant moves the Court to grant his motion for leave to file Appellant's Amended Initial Brief within thirty (30) days and other relief as this Court deems necessary.

RESPECTFULLY SUBMITTED April 1, 2011.


Neil J. Gillespie, Appellant pro se
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Certificate of Service

I certify that a copy hereof has been furnished to Ryan C. Rodems, attorney for Appellees Barker, Rodems & Cook, PA, 400 North Ashley Drive, Suite 2100, Tampa, Florida 33602 by mail on April 1, 2011.


Neil J. Gillespie

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

NEIL J. GILLESPIE,
Plaintiff/Appellant

VS

Case No: 05-CA-007205

BARKER, RODEMS & COOK, P.A.,
A Florida Corporation; and
WILLIAM J. COOK,
Defendants/Appellees

CLERK'S CERTIFICATE

I, Pat Frank, Clerk of the Circuit Court for the County Of Hillsborough, State
Of Florida having by law the custody of the seal and all records, books, documents and
Papers of or pertaining to the Circuit Court do hereby certify that, **After a Diligent Search,**
The two documents listed below could not be located:

- 1. 7/20/10, Plaintiff's Notice of Filing Affidavit, Neil J. Gillespie, no Signed Contract. The Document Appears to be the Affidavit Docketed on 7/23/10 as Affidavit of Neil J. Gillespie.**
- 2. Notice of Filing Affidavit of William J. Cook, Esquire Filed 6/3/10, However a Copy of This Appears to be Attached to Plaintiff's Motion to Strike Affidavit of William J. Cook, Esquire, Motion to Quash Order Granting Defendant's Motion for Writ of Garnishment After Judgment, Filed 6/30/10.**

In Witness Whereof, I have hereunto set my hand and the seal of said Circuit Court

This 22ND day of March, 2011.



PAT FRANK
CLERK OF CIRCUIT COURT

By  _____
DEPUTY CLERK