

JOHN F. HARKNESS, JR. EXECUTIVE DIRECTOR

651 East Jefferson Street Tallahassee, FL 32399-2300

850/561-5600 www.floridabar.org

January 7, 2013

Mr. Neil J. Gillespie 8092 S.W. 115th Loop Ocala, FL 34481

Re: Robert W. Bauer; The Florida Bar File No. 2013-00,540 (8B)

Dear Mr. Gillespie:

Enclosed is a copy of our letter to Mr. Bauer which requires a response to your complaint.

Once you receive Mr. Bauer's response, you have 10 days to file a rebuttal if you so desire. If you decide to file a rebuttal, you must send a copy to Mr. Bauer. Rebuttals should not exceed 25 pages and may refer to any additional documents or exhibits that are available on request. Please address any and all correspondence to me. Please note that any correspondence must be sent through the U.S. mail; we cannot accept faxed material.

Please be advised that as an arm of the Supreme Court of Florida, The Florida Bar can investigate allegations of misconduct against attorneys, and where appropriate, request that the attorney be disciplined. The Florida Bar cannot render legal advice nor can The Florida Bar represent individuals or intervene on their behalf in any civil or criminal matter. Further, please notify this office, in writing, of any pending civil, criminal, or administrative litigation which pertains to this grievance. Please note that this is a continuing obligation should new litigation develop during the pendency of this matter.

Please review the enclosed Notice on mailing instructions for information on submitting your rebuttal.

Sincerely,

Annemarie Craft, Bar Counsel

Attorney Consumer Assistance Program

ACAP Hotline 866-352-0707

Enclosures (Notice of Grievance Procedures, Copy of Letter to Mr. Bauer; Notice - Mailing Instructions)

cc: Mr. Robert W. Bauer



JOHN F. HARKNESS, JR. EXECUTIVE DIRECTOR

651 EAST JEFFERSON STREET TALLAHASSEE, FL 32399-2300

850/561-5600 www.floridabar.org

January 7, 2013

Mr. Robert W. Bauer 2815 NW 13th St Ste 200E Gainesville, FL 32609-2861

Re: Complaint by Neil J. Gillespie against Robert W. Bauer

The Florida Bar File No. 2013-00,540 (8B)

Dear Mr. Bauer:

Enclosed is a copy of an inquiry/complaint and any supporting documents submitted by the above referenced complainant(s). Your response to this complaint is required under the provisions of Rule 4-8.4(g), Rules of Professional Conduct of the Rules Regulating The Florida Bar, and is due in our office by **January 22, 2013**. Responses should not exceed 25 pages and may refer to any additional documents or exhibits that are available on request. Failure to provide a written response to this complaint is in itself a violation of Rule 4-8.4(g). Please note that any correspondence must be sent through the U.S. mail; we cannot accept faxed material. You are further required to furnish the complainant with a complete copy of your written response, including any documents submitted therewith.

Please note that pursuant to Rule 3-7.1(b), Rules of Discipline, any reports, correspondence, papers, recordings and/or transcripts of hearings received from either you or the complainant(s) shall become a part of the public record in this matter and thus accessible to the public upon a disposition of this file. It should be noted that The Florida Bar is required to acknowledge the status of proceedings during the pendency of an investigation, if a specific inquiry is made and the matter is deemed to be in the public domain. Pursuant to Rule 3-7.1(f), Rules of Discipline, you are further required to complete and return the enclosed Certificate of Disclosure form. Further, please notify this office, in writing, of any pending civil, criminal, or administrative litigation which pertains to this grievance. Please note that this is a continuing obligation should new litigation develop during the pendency of this matter.

Mr. Robert W. Bauer January 7, 2013 Page Two

Finally, the filing of this complaint does not preclude communication between the attorney and the complainant(s). Please review the enclosed Notice for information on submitting your response.

Sincerely,

Annemarie Craft, Bar Counsel

Attorney Consumer Assistance Program

ACAP Hotline 866-352-0707

Enclosures (Certificate of Disclosure, Notice of Grievance Procedures, Copy of Complaint, Notice - Mailing Instructions)

cc: Mr. Neil J. Gillespie

NOTICE Mailing Instructions

The Florida Bar converts its disciplinary files to electronic media. All submissions are being scanned into an electronic record and hard copies are discarded. To help ensure the timely processing of your inquiry/complaint, please review the following guidelines prior to submitting it to our office.

- 1. Please limit your submission to no more than 25 pages including exhibits. If you have additional documents available, please make reference to them in your written submission as available upon request. Should Bar counsel need to obtain copies of any such documents, a subsequent request will be sent to you.
- 2. Please do not bind, or index your documents. You may underline but do not highlight documents under any circumstances. We scan documents for use in our disciplinary files and when scanned, your document highlighting will either not be picked up or may obscure any underlying text.
- 3. Please refrain from attaching media such as audio tapes or CDs, oversized documents, or photographs. We cannot process any media that cannot be scanned into the electronic record.
- 4. Please do not submit your original documents. All documents will be discarded after scanning and we will not be able to return any originals submitted to our office. The only original document that should be provided to our office is the inquiry/complaint form.
- 5. Please do not submit confidential or privileged information. Documents submitted to our office become public record. Confidential/privileged information should be redacted. Such information includes, but is not limited to, bank account numbers, social security numbers, credit card account numbers, medical records, dependency matters, termination of parental rights, guardian ad litem records, child abuse records, adoption records, documents containing names of minor children, original birth and death certificates, Baker Act records, grand jury records, and juvenile delinquency records. If information of this nature is important to your submission, please describe the nature of the information and indicate that it is available upon request. Bar counsel will contact you to make appropriate arrangements for the protection of any such information that is required as part of the investigation of the complaint.

Please be aware that materials received that do not meet these guidelines may be returned. Thank you for your consideration in this respect.

THE FLORIDA BAR INQUIRY/COMPLAINT FORM

PART ONE (See Page 1, PART ONE – Required Information.):

Your Name: Neil J. Gillespie	Attorney's Name: Robert W. Bauer
Organization:	Address: 2815 NW 13th Street, Suite 200E
Address: 8092 SW 115th Loop	City: Gainesville State: FL
City: Ocala State: FL	Zip Code: 32609 Telephone: (352) 375-5960
Zip Code: 34481 Phone: (352) 854-7807	
Email: neilgillespie@mfi.net	
ACAP Reference No. none	
Please see accompanying letter and appendix showing exhib	ns.): The specific thing or things I am complaining about are: oits available. o): The witnesses in support of my allegations are: [see attached]
sheet].	

PART FOUR (See Page 1, PART FOUR - Signature.): Under penalties of perjury, I declare that the foregoing facts are

Signature 10/31/2012

true, correct and complete.

Attorney Consumer Assistance Program
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399·2300

Complaint against attorney Robert W. Bauer, Florida Bar ID No.: 11058 2815 NW 13th Street, Suite 200E, Gainesville, FL 32609, telephone (352) 375-5960

I. New Complaint Against Robert W. Bauer

This is a new complaint against Mr. Bauer for misconduct during and after his representation of me in Gillespie v. Barker, Rodems & Cook, PA, et al., case no. 05-CA-7205, Hillsborough Co.

This new complaint seeks discipline for Mr. Bauer's misconduct. I am not seeking return of \$19,212 in fees paid to him¹. This complaint is about justice. Since 2011 I learned Mr. Bauer has hurt a lot of good, honest people: His own clients. Some of the survivors of Mr. Bauer's misconduct have contacted me, and their information is provided in this complaint.

Mr. Bauer's former clients tell a similar story: Mr. Bauer is not competent, he is not diligent, he takes the client's money, and he fails to complete the matter. A number of the complaining clients are disabled and/or elderly, showing a pattern of disregard by Bauer toward elderly and disabled clients. Mr. Bauer uses pro se pleadings as his own, and the work of law students, which he then submits to the court as his own pleadings, according to a motion filed by former Bauer client Dr. Angela Woodhull. This was my experience with Mr. Bauer too.

On October 3, 2012 Bauer client Kimberly Pruett-Barry called me claiming he was not diligent. Ms. Pruett-Barry and husband William retained Bauer to sue another lawyer, Peter R. McGrath. Kim Barry told me *I'm sick, sick to my stomach, made a huge mistake hiring this guy*, and that Mr. Bauer had run up a \$40,000 bill and took all the couple's savings.

According to Kim Barry, their case is similar to mine in that they sued their former lawyer for wrongdoing. Kim says Mr. Bauer is milking his client, churning fees, and not getting results. Kim emailed me stating, *Bauer*. He definitely fails to "move a case forward", I think he tries to rack up a bill. Bauer did the same with me too. The record in my case shows Mr. Bauer's lack of competence & lack of diligence angered Judge Barton. The public needs protection from Bauer.

Finally, it appears Mr. Bauer may be collaborating with Mr. Rodems and Mr. Castagliuolo in a pattern of racketeering activity to undermine the following Bar complaints and obstruct justice:

Eugene P Castagliuolo, File No. 2013-10,162 (6D) Ryan Christopher Rodems, File No. 2013-10,271 (13E)

Mr. Castagliuolo even provided copies of his filings and responses to the Florida Bar in the above captioned complaint to Mr. Bauer and Mr. Rodems, as indicated by the abbreviation "cc:" preceding their names, suggesting this racketeering activity is currently ongoing.

¹ Mr. Bauer charged me \$31,863 in legal fees. Much of the money was wasted or not productive, including costs to re-litigate matters previously decided res judicata, and \$5,600 in travel time. Also, Bauer never filed the amended complaint he promised. \$19,212 was paid to Bauer from my Social Security disability benefits or borrowed on credit cards or other loans. \$12,650 remains unpaid and subject to an improper attorney charging lien.

Representation Timeline of Robert W. Bauer

- February 26, 2007. Referral to Mr. Bauer for libel by the Florida Bar LRS Referral Service.
- March 1, 2007. Initial \$25 LRS consultation with Mr. Bauer at his office.
- March 8, 2007. Paid Mr. Bauer \$3,000 on credit card to review my pro se lawsuit 05-CA-7205.
- April 2, 2007. Notice of Appearance by Mr. Bauer in 05-CA-7205, Hillsborough Co., FL.
- April 24, 2007. Mr. Bauer and I executed an hourly fee contract (\$250 per hour).
- March 31, 2008. Mr. Bauer proposed new representation contract with higher costs; declined.
- October 13, 2008. Mr. Bauer moved to withdrawal in 05-CA-7205; granted Oct-09-2009.
- October 13, 2008. Mr. Bauer moved to withdrawal in 2D08-2224; DENIED Oct-30-2008.
- October 27, 2008. Submitted my ADA disability request to Mr. Bauer; no response/refused.
- October 30, 2008. Order in 2D08-2224, Bauer's motion to withdraw as counsel DENIED.
- Mach 9, 2009. Mr. Bauer submitted but did not sign a contingent fee agreement; declined.
- Mach 9, 2009. Mr. Bauer demanded I sign settlement agreement for his malpractice; declined.
- May 14, 2009. My proposed contingent fee agreement to Mr. Bauer; no response/refused.
- May 14, 2009. My proposed settlement agreement to Mr. Bauer; no response/refused.
- October 1, 2009. Hearing on Motion to Withdrawal, 05-CA-7205, granted on my consent.
- October 9, 2009. Order Granting Motion To Withdrawal As Counsel, 05-CA-7205.
- November 23, 2009. Mr. Bauer advised of \$12,650 charging lien; \$19,212 was paid to Bauer.
- October 23, 2012. Karen Kelly advised Mr. Bauer has not paid his 12% LRS fee; \$2,305.49.

II. Previous Complaint Against Robert W. Bauer, 2011-00,073 (8B)

Previously I made complaint no. 2011-00,073 (8B) against Mr. Bauer that was closed March 18, 2011 when James N. Watson, Jr., Chief Branch Discipline Counsel, issued a Letter Report Pursuant to Rule 3-7.4(k) of No Probable Cause Finding. The letter stated: (Exhibit 1).

Pursuant to Rule 3-7.4(k), this document serves as a Letter Report of No Probable Cause Finding. On the basis of a diligent and impartial analysis of all the information available, on March 15, 2011, the grievance committee found no probable cause for further disciplinary proceedings in this matter. The membership of the committee is made up of both attorneys and non-attorneys. This case is now closed.

Because the Bar only has the authority to address questions of ethics, the committee could not address any legal issues about which you may feel concerned. If you have further concerns about what your legal remedies may be, you must consult with legal counsel of your choice. The Florida Bar is unable to provide legal advice in this respect.

Mr. Watson's Letter Report failed to comply with Rule 3-7.4(k) because it did not explain why the complaint did not warrant further proceedings. Also, the Letter Report failed to include any documentation explaining why the complaint did not warrant further proceedings. Mr. Watson forwarded the matter for review to Carl Schwait², Designated Reviewer, who deferred to the finding of the grievance committee by letter June 27, 2011. (Exhibit 2). Mr. Schwait replied: "After comprehensively reading all documents in my possession in reference to the above styled complaint, I have determined that I wish to defer to the finding of the grievance committee."

Mr. Schwait did not respond to my letter dated July 31, 2011 (Exhibit 3) requesting he comply with Rule 3-7.4(k) and explain why the complaint did not warrant further proceedings. Mr. Schwait did not respond to my assertion that I made meritorious complaints to the Florida Bar against lawyers guilty of multiple breaches of the Bar's Rules, which complaints the Bar has failed to honestly adjudicate. Mr. Bauer, a referral from the Florida Bar LRS, determined that my former lawyer Mr. Cook of Barker, Rodems & Cook, P.A. was "a slimy attorney". Mr. Bauer said "the jury would love to punish a slimy attorney". (Transcript, Mar-29-2007, p.29, line 17).

Mr. Schwait did not respond to my accusation that Mr. Rodems improperly submitted a thirteen page diatribe to the Bar in Mr. Bauer's defense that was a false and misleading, and a palpable conflict of interest, since he is a partner with Mr. Cook at Barker, Rodems & Cook, P.A. The information provided by Mr. Rodems, then incorporated by reference into Mr. Bauer's response, resulted in new breaches of the ethics rules, including:

Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit, and misrepresentation. Rule 4-8.4(d), conduct prejudicial to the administration of justice.

The Florida Supreme Court has delegated to the Florida Bar the function of disciplining its members. The Supreme Court and the Bar have a fiduciary duty to protect members of the public harmed by the unethical practice of law and lawyers. The Florida Bar unfortunately is being operated, and demonstrably so, in a fashion as to protect itself and bad lawyers rather than the public. For example, the Florida Bar's claim that the grievance committee is its "grand jury" is profoundly misleading as set forth in my April 11, 2011 email to Mr. Watson. (Exhibit 4).

Brian S. Kramer was assigned November 15, 2010 as the Investigating Member in my complaint against Mr. Bauer. In March 2011 I provided Mr. Kramer more allegations of misconduct against Mr. Bauer. Mr. Kramer responded by email March 14, 2011 at 8:12 a.m.: (Exhibit 5).

I have received a letter from you essentially asking to add additional grounds to your complaint against Mr. Bauer. Please be advised that this is not a proper procedure to allege additional complaints against Mr. Bauer. To do so, you must direct your complaints to the Florida Bar, not to the Grievance Committee, or to the investigating member. There is a well defined process or review that every complaint goes through prior to being assigned to a committee. It is not unusual that multiple complaints will be made by one individual against a particular lawyer. However, each complaint must be reviewed and the notice requirements of due process followed in order to the complaint to be properly placed against a lawyer. Please direct all additional complaints about Mr.

² Carl Schwait is a member of the Bar's Board of Governors, and managing partner of the Dell Graham law firm.

Bauer's conduct to the Bar. Directing them to me or to the Committee will not result in discipline against Mr. Bauer. Please let me know if you have any questions. Thank you.

In view of the foregoing, and the failure of Mr. Watson's Letter Report to explain in compliance with Rule 3-7.4(k) why the complaint did not warrant further proceedings, it appears that my complaint was deficient. The Letter Report shows no consideration of, or adjudication of, any violation of the Rules of Professional Conduct. Therefore the proceedings in file no. 2011-00,073(8B) did not make a res judicata consideration of a breach of the Rules by Mr. Bauer.

New Allegations Against Robert W. Bauer

Limited by the Bar's prohibition on submitting more than 25 pages. A lawyer should not accept representation unless it can be competently and promptly completed.

III. Mr. Bauer has Refused to Return My Case File - Time is of the Essence

Rule 4-1.16(d) Protection of Client's Interest

A lawyer must take all reasonable steps to mitigate the consequences of withdrawal to the client.

Justice Thomas granted my Rule 13.5 Application to extend time to file until December 10, 2012 a petition for writ of certiorari to the U.S. Supreme Court in C.A.11 cases 12-11028 and 12-11213. (Exhibit 6). Mr. Bauer and his firm are Defendants in each case. I need the file to prepare my petition. Mr. Bauer has refused to return my file for several years on the basis of an improper charging lien of \$12,650. By letter September 19, 2012 to Mr. Bauer's counsel, I demanded return of my file from Catherine B. Chapman. (Exhibit 7). Ms. Chapman did not respond.

In my letter dated September 19, 2012 to Ms. Chapman, I responded to Mr. Bauer's letter dated August 24, 2012 that stated, "If you wish to contact me at the number listed above I would be happy to discuss resolving the lien in manner that is acceptable to all parties.". That offer is rejected. If Ms. Chapman or Mr. Bauer want to discuss a proposed resolution, I requested they respond with a written proposal. I also reject Mr. Bauer's offer made by email August 27, 2012, that stated, "Mr. Gillespie is free to contact me on an unrecorded line and I will be happy to speak with him." Again, if Mr. Bauer has something substantive to say, I request he submit his offer or thoughts in a letter. I believe this is a reasonable step under Rule 4-1.16(b).

All calls on my home office business telephone extension are recorded for quality assurance purposes pursuant to the business use exemption of Florida Statutes chapter 934, specifically section 934.02(4)(a)(1) and the holding of <u>Royal Health Care Servs.</u>, <u>Inc. v. Jefferson-Pilot Life</u> Ins. Co., 924 F.2d 215 (11th Cir. 1991). There are no exceptions to this policy for Mr. Bauer.

IV. Misconduct & RICO Activity Undermine Bar Complaints, Civil Litigation

Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit, and misrepresentation.

Rule 4-8.4(d), conduct prejudicial to the administration of justice.

Rule 4-8.3(a), reporting misconduct of other lawyers.

Crimes and misconduct by the lawyers at Barker, Rodems & Cook, P.A. form the basis of all my Bar complaints, and involve 20 related civil lawsuits and legal proceedings. A list is found at Exhibit 8. Mr. Bauer and Mr. Rodems engaged in a pattern of racketeering activity to subvert or undermine my initial complaint against Bauer, file no. 2011-00,073 (8B).

While the Florida Bar does not have jurisdiction to consider civil or criminal violations of RICO, the Racketeering, Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1961-68, it does have jurisdiction and a duty to investigate related breaches of the Rules of Professional Conduct, Rules 4-8.4(c), 4-8.4(d), and 4-8.3(a), breaches of duty that facilitate the RICO activity.

Mr. Rodems and Mr. Bauer engaged in a pattern of RICO activity in violation of Rules 4-8.4(c), 4-8.4(d), and Rule 4-8.3(a), to improperly force a settlement in my federal Civil Rights and ADA disability lawsuit, commenced in U.S. District Court, M.D.Fla., case no. 5:10-cv-00503, to which Mr. Bauer and his firm are Defendants. The case will soon to be submitted as a petition for writ of certiorari to the U.S. Supreme Court in C.A.11 cases 12-11028 and 12-11213.

On June 21, 2011 Mr. Rodems improperly obtained for Mr. Bauer's benefit a settlement from me during a coercive confinement at the Edgecomb Courthouse in Tampa, held without disability accommodation. This is from ¶5, Florida Supreme Court petition SC11-1622, January 9, 2012:

5. At the direction of Judge Arnold I voluntarily appeared June 21, 2011 for a deposition at the Edgecomb Courthouse in Tampa to purge the contempt and rescind the arrest warrant, but that turned out to be a trap to force a walk-away settlement agreement in the lawsuits. Upon my arrival at the courthouse, I was taken into custody and involuntarily confined by two Hillsborough County Sheriff's Deputies, Deputy Randy Olding and Deputy Larry Berg. I was denied accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., and the Federal Protection and Advocacy for Mentally III Individuals Act, 42 U.S.C. 10801 et seq. After being held in custody during the deposition for over four (4) hours without a lunch break, or the usual mid-day meal provided to a prisoner, I became confused and disoriented. The record (A.4.1.125) shows that I was so impaired that I could not make a decision to sign the agreement. My counsel Eugene Castagliuolo (A.7), whom I hired from Craigslist a couple weeks earlier, made the decision to settle because "judges have mud on their shoes". I signed the agreement while confused and in a diminished state. Castagliuolo disobeyed my prior written and verbal instructions not to accept a walk-away settlement agreement. Once I was released from custody and had a meal, I realized the settlement was a mistake and promptly disaffirmed the agreement by written notice to Mr. Rodems, Mr. Castagliuolo and Major James Livingston of the Hillsborough County Sheriff's Office. (A.2.1.2-3).

It appeared that the settlement resolved the \$12,650 charging lien used by Mr. Bauer to hold my case file. Mr. Bauer said no. Bauer sent me a letter dated August 24, 2012 stating that Rodems' "Settlement Agreement and General Mutual Release" of June 21, 2011 does not bind him, it binds me. Mr. Bauer's letter appears at Exhibit 17. This is the operative quote:

Mr. Rodem's (sic) release dated June 21, 2011 does not have any legal effect on the amount of money that is owed to this firm. Further, it does not bind this firm in any way. I (sic) does bind you - but not us.

I was shocked by Mr. Bauer's statement, as Mr. Castagliuolo made the decision to accept this settlement. I do not understand how a settlement can only bind me. Castagliuolo never explained this to me. I believe this is further evidence that Mr. Castagliuolo worked against my interest, and engaged in a pattern of RICO activity with Mr. Bauer and Mr. Rodems to undermine my Bar

complaints, and civil litigation, through an ongoing pattern of misconduct in violation of Rules 4-8.4(c), 4-8.4(d), and 4-8.3(a), breaches of duty that facilitate the RICO activity.

Mr. Bauer and Mr. Rodems also engaged in an earlier pattern of misconduct in violation of Rules 4-8.4(c), 4-8.4(d), and 4-8.3(a), breaches of duty that facilitate RICO activity, as follows:

In a letter to Florida Gov. Charlie Crist dated January 4, 2010 (Exhibit 9) Mr. Bauer endorsed Mr. Rodems for judge and praised him as "honorable and professional". This is impeached by Bauer's statement to me that Rodems mislead Judge Barton during a hearing October 30, 2007.

Transcript, my telephone call with Mr. Bauer, February 9, 2009, page 11

- 11 MR. BAUER:...[I] think it clearly puts
- 12 before the Court the mistake or perjury, whichever
- 13 the Court determines that they wish to interpret as
- 14 Mr. Rodems misleading the Court when he said that
- 15 certain things were present that weren't. If you
- 16 read those motions I clearly said that in there.

Mr. Bauer is referring to Rodems' false statement to the Court that I signed a representation agreement; I did not. An attorney who mislead the Court is not "honorable and professional". First, Mr. Bauer had a duty under Rule 4-8.3(a) to report Mr. Rodems' misconduct to the Bar.

Second, Mr. Bauer's letter is evidence of a pattern of RICO activity in breach of the Rules of Professional Conduct, Rules 4-8.4(c), 4-8.4(d), and 4-8.3(a), intended to undermine Bar complaints. In a quid pro quo, Mr. Bauer provided a letter to Gov. Crist supporting Mr. Rodems for judge, a nomination to which I objected to by letter to Gov. Crist. In return, Mr. Rodems provided the Bar a letter in support of Mr. Bauer in my complaint against Bauer. Mr. Rodems' letter was essentially a 13 page diatribe of false and misleading statements to obstruct justice.

On July 16, 2007, Mr. Bauer filed on my behalf <u>Plaintiff's Motion For Rehearing</u> of an order granting Mr. Rodems judgment on the pleadings. In it Mr. Bauer alleged Mr. Rodems mislead the court as described in ¶2-4. (Exhibit 20).

- 2. Plaintiff moves for rehearing on the grounds that the Court's judgment was based on the Defendants' representations that there was a signed attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 3. Defendants have not produced a signed copy of the attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 4. Defendants have only produced a signed copy of the attorney fee agreement between Alpert, Barker, Rodems, Ferrentino & Cook and the Plaintiff...

<u>Plaintiff's Motion For Rehearing</u> was signed by attorney Tanya M. Bell (nee Uhl) ID No. 52924, for the Law Office of Robert W. Bauer, PA. Mr. Bauer has apparently disavowed this motion, according to his response to TFB dated August 18, 2010. But Ms. Bell confirmed to me in a letter dated August 5, 2010 (Exhibit 21) that Bauer made a direct request that she sign the pleading. Ms. Bell left the Bauer law firm shortly after this motion was submitted.

During a hearing August 14, 2008 before Judge Marva Crenshaw, Mr. Bauer accused Rodems of not working in a professional manner. An attorney who does not work in a professional manner is, by definition, not "honorable and professional".

Transcript, page 16, beginning at line 24

- 24 [MR. BAUER] Mr. Rodems has, you know, decided to take a full
- 25 nuclear blast approach instead of us trying to work
- 1 this out in a professional manner. It is my
- 2 mistake for sitting back and giving him the
- 3 opportunity to take this full blast attack.

Mr. Bauer refused to permit me to attend or testify at hearings in my case because Mr. Rodems would knowingly make comments to prod me "for no better purpose than to anger you". Bauer wrote me this email July 8, 2008 at 6.05 p.m. stating in part:

"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."

An attorney who knowingly prods me with comments to anger and inflame me, and deny me access to court in my case, is not an "honorable and professional" attorney suitable for judge.

Finally, Mr. Bauer determined that Mr. Cook was "a slimy attorney" for defrauding me in the settlement of the Amscot case. If Mr. Cook was "a slimy attorney", then Mr. Rodems was a slimy attorney too. 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 (2dDCA, 1965). Mr. Rodems' misleading legal arguments in defense of his partner and firm created new ethics breaches, see my complaint against Mr. Rodems, File No. 2013-10,271 (13E).

Mr. Castagliuolo admitted August 30, 2012 in a written response to Theodore P. Littlewood Jr., Bar Counsel in TFB File No. 2013-10,162 (6D), that Mr. Rodems made an unsolicited offer to Castagliuolo to assist him in any future Bar grievance from me. From page 3, ¶1:

"My opposing counsel at Gillespie's deposition was Ryan Christopher "Chris" Rodems. Chris once remarked to me, unsolicited, that he would be happy to speak to The Florida Bar on my behalf if Gillespie grieved me the way he did Bob Bauer."

This evidence shows how the lawyer discipline process in Florida is subverted and undermined, here by Mr. Rodems, who's misconduct is at the center of this matter, through an ongoing breach of Rules 4-8.4(c), 4-8.4(d), and 4-8.3(a), where lawyer-adversaries conspire to, and engage in, conduct involving dishonesty, fraud, deceit, or misrepresentation, to obstruct justice and mislead the Bar or its tribunal, to avoid discipline well in advance of any Bar complaint. This activity raises an immediate conflict between the lawyer-adversaries and the lawyer representing the client. If the misconduct is not reported as required under Rule 4-8.3(a), the client is not being represented in a zealous, competent or diligent manner because the lawyer has a conflict with his client created by the offer of assistance from opposing counsel in any future Bar complaint.

V. Statement of the AMSCOT Case

Closing Statement Fraud - Breach of Bar Rule 4-1.5(f)(5)

My former attorney William J. Cook prepared and signed a fraudulent **Closing Statement** while representing me in the settlement of <u>Eugene R. Clement</u>, <u>Gay Ann Blomefield</u>, <u>and Neil Gillespie v. AMSCOT Corporation</u>, Case No. 01-14761-AA, U.S. 11th Circuit Court of Appeals, in violation of Fla. Bar Rule 4-1.5(f)(5). Mr. Cook and Barker, Rodems & Cook, P.A. ("BRC") represented me and the 2 other plaintiffs in litigation against AMSCOT Corporation ("Amscot" or "AMSCOT"), a failed class action lawsuit over "payday loans". BRC was a successor firm and substitute counsel to Mr. Cook's previous firm, Alpert, Barker, Rodems, Ferrentino & Cook, P.A. 3 ("Alpert firm") which commenced and litigated the Amscot lawsuit for one year.

The contingent fee agreement between me and Mr. Cook and BRC in the Amscot lawsuit was not signed by any of the parties, in violation of Fla. Bar Rule 4-1.5(f)(2). The only signed contingent fee agreement is with me, Mr. Cook, and the Alpert firm, which firm closed⁴.

This case boils down to the veracity of a single sentence on the Closing Statement (Exhibit 10) prepared and signed by Mr. Cook for BRC as of October 31, 2001. The sentence states:

"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."

This sentence was later determined false. The Closing Statement is a fraud. There were no court-awarded fees of \$50,000 to Mr. Cook or BRC. The Closing Statement itself is evidence of fraud by Mr. Cook and BRC against me and the other two clients in the AMSCOT case.

As a matter of law it was impossible to have the court-awarded fees claimed by Mr. Cook and BRC on the Closing Statement, because the federal trial court <u>Order</u> (Doc. 116) entered August 1, 2001 by U.S. District Judge Richard A. Lazzara dismissed those claims with prejudice in <u>Clement, Blomefield and Gillespie v. AMSCOT Corporation</u>, case no. 99-2795-CIV-T-26C, U.S. District Court, M.D.Fla., Tampa Division. The Court found that all of the transactions in this action occurred before the effective date of the applicable law, 65 Fed. Reg. 17129, Regulation Z, promulgated pursuant to the TILA, the Truth-in-Lending Act. Judge Lazzara held:

After considering the arguments made and all the authorities now before it, the Court finds that count I fails to allege a claim for relief under the TILA⁵. Moreover, any attempt at stating a claim under the TILA would be futile. Having reached this conclusion, the motion for class certification is now moot. (Doc. 116, pp. 3-4)

PACER, Case 8:99-cv-02795-RAL Document 116 Filed 08/01/01 Page 1 of 18 PageID 1340.

³ The Alpert firm also represented me in a payday loan case against ACE Cash Express, and other matters. Mr. Cook and BRC later represented me in the ACE Cash Express lawsuit as substitute counsel, and other matters.

⁴ The facts surrounding the closure of Alpert firm, and the formation of BRC, were outrageous, and likely created a separate set of ethics violations for Mr. Cook and his BRC partners, *see* <u>Plaintiff's First Amended Complaint</u>, filed *pro se* May 5, 2010 in 05-CA-7205, *and* <u>Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher</u> Rodems & Barker, Rodems & Cook, PA, July 9, 2010, 05-CA-7205.

⁵ As to the remaining two state-law claims for usury and violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), the Court finds it inappropriate to exercise its pendent jurisdiction.

The Closing Statement prepared and signed by Mr. Cook for BRC as of October 31, 2001 failed to disclose or itemize \$3,580.67 in costs and expenses, and failed to reflect \$2,544.79 paid to attorney Jonathan L. Alpert. Mr. Cook's failure to disclose or itemize a total of \$6,125.45 in expenses under Rule 4-1.5(f)(5) was done in furtherance of his fraud against his clients.

Fla. Bar Rule 4-1.5(f)(5). In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

Mr. Cook maintains he was not required to disclose or itemize under Rule 4-1.5(f)(5) costs of \$3,580.67, or show \$2,544.79 paid to Mr. Alpert, because "AMSCOT Corporation separately paid my attorneys \$50,000.00 to compensate my attorneys for their claim against AMSCOT for court-awarded fees and costs." But the "claim" to \$50,000.00 for "court-awarded fees and costs." was later determined false. There was no "claim" to \$50,000 for "court-awarded fees and costs."

Mr. Bauer outlined this fraud to Judge Barton October 30, 2007 during a hearing for judgment on the pleadings: (Transcript, October 30, 2007, pp.39-40)

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

- 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.

Mr. Cook's *Closing Statement Fraud* was a trick to evade the terms of an (unsigned) contingent fee agreement, and payment to me of \$9,143, my lawful share of the \$56,000 total recovery. Instead, Mr. Cook and BRC paid me \$2,000. Likewise with the other two plaintiffs, Mr. Clement and Ms. Blomefield. Mr. Cook's fraud resulted in \$21,431.03 unjust enrichment for him and BRC. Mr. Cook and BRC took over 90% of the Amscot total recovery for themselves through fraud against their clients. Mr. Bauer noted it was against the Rules to enforce an oral agreement:

Transcript, telephone call, March 29, 2007, page 16:

- 2 MR. BAUER: The way that I'm looking at this
- 3 is that they either are entitled to nothing because
- 4 they are attempting to enforce an oral contingency
- 5 fee agreement, which is against the Professional
- 6 Code of Ethics, or they should be entitled to
- 7 45 percent of 56,000.

Mr. Bauer was referring to the 45% contingency fee provided by Rule 4-1.5(f)(4)(B)(i). Mr. Bauer also knew <u>Plaintiff's Motion for Summary Judgment</u> was filed but not yet heard.

Transcript, telephone call, March 29, 2007, pages 16-17:

- 23 MR. GILLESPIE: Yes, that's what I argued in
- 24 my summary judgment. And that might be a good
- 25 place if you want to review sort of the chain of
- 1 documents and everything.
- 2 MR. BAUER: Your summary judgment has not been
- 3 heard, correct?
- 4 MR. GILLESPIE: That's correct.
- 5 MR. BAUER: Okay.

VI. Statement of the Case, August 11, 2005 through January 13, 2006

Gillespie v. Barker, Rodems & Cook (BRC), 05-CA-7205

Res Judicata Established - Pro Se - Order entered January 13, 2006

On August 11, 2005 I sued Mr. Cook and BRC by filing a pro se Complaint to recover \$6,224.78⁶ stolen by them from my settlement in the Amscot case, <u>Gillespie v. Barker Rodems & Cook, PA, et al.</u>, case no. 05-CA-7205. Ryan Christopher Rodems represented his partner and law firm against me, and later countersued me for libel.

Mr. Rodems argued that the "claim" for \$50,000 in "court-awarded fees and costs" actually referred to a fee-shifting provision of the TILA. In fact, the \$50,000 "claim against AMSCOT for court-awarded fees and costs" is a fraud, a misleading legal argument by Mr. Rodems to the Court. There were no attorneys fees awarded under the TILA in this case. None. There was no possibility of an awarded of attorneys fees under the TILA in this case because the trial court Order entered August 1, 2001 by Judge Lazzara dismissed the TILA claims with prejudice.

PLEADINGS AND LEGAL ARGUMENTS CONSIDERED BY JUDGE NIELSEN

Order On Defendants' Motion To Dismiss And Strike, January 13, 2006 **Res Judicata Ruling** - Rodems Claims and Contentions Not Meritorious

Appearing pro se, I prevailed on Mr. Rodems' motion to dismiss and strike, when Judge Richard Nielsen entered <u>Order On Defendants' Motion To Dismiss And Strike</u>, January 13, 2006. (Exhibit 11). Judge Nielsen rejected Rodems' misleading legal argument, a false "claim" of \$50,000 in "court-awarded fees and costs". Under the legal doctrine of res judicata, Mr. Rodems was precluded from ever again asserting a "claim" for \$50,000 in "court-awarded fees and costs" in this matter, a claim or contention rejected by the Court as not meritorious. (Rule 4-3.1)

Judge Nielsen's <u>Order On Defendants' Motion To Dismiss And Strike</u> (Exhibit 11) referenced the following pleadings, which are listed here showing the most relevant legal arguments:

- <u>Defendant's Motion to Dismiss and Strike</u>, a 2 page pleading, August 29, 2005 (Exhibit 12)
- <u>Plaintiffs Rebuttal to Defendant's Motion to Dismiss and Strike</u>, 16 pages (Exhibit 13), with <u>Notice of Service</u> of 42 pages of case law (Exhibit 14), submitted October 7, 2005 after

⁶ Florida attorney Seldon J. Childers later determined that the amount stolen was \$7,143.68, see <u>Plaintiff's First Amended Complaint</u>, filed pro se May 5, 2010 with knowledge of Judge Barton.

receipt of Mr. Rodems' caselaw. Because Rodems failed to coordinate the time and date of the hearing with me, Judge Nielsen allowed me to attend the hearing telephonically, since I reside about 100 miles from the court. Rodems unilaterally set an early 10:30 a.m. time for the hearing September 26, 2005. Judge Nielsen concluded the hearing unfinished, and directed Rodems to provide me copies of his case law by mail, since Rodems failed to provide me the cases beforehand. Since I appeared telephonically, I could not see the cases Rodems presented. Therefore the Court allowed me to respond in writing.

My rebuttal stated that the Defendants owed me and breached a fiduciary duty, that this action was originally filed in 1999 by another firm, Alpert, Barker, Rodems, Ferrentino & Cook, PA, which also represented me in other lawsuits, that during the Alpert representation the Defendants formed in secret a new firm, Barker, Rodems & Cook, and conspired to take clients from the Alpert firm, and engaged in a long list of misconduct to hijack the case for their own benefit, including, "Defendants also created a phony Closing Statement falsely reflecting \$50,000 in court-awarded attorney's fees and costs. (p. 6). "Notwithstanding that the Closing Statement is a sham, the statement did not reflect an itemization of all costs and expenses, together with the amount of the fee received by each participating lawyer or law firm.(p.7). The rebuttal also notes Mr. Rodems' testimony at the hearing September 26, 2005 admitting no signed contingent fee contract:

3(a)(i) In his argument, Mr. Rodems referred to Plaintiff's <u>Exhibit 1</u> of the Complaint, the Representation Contract, and stated that the contract was not signed, but that he would accept the contract as if it were signed. Mr. Rodems contradicts the very rule he asks this Court to honor. The Representation Contract is not signed because the parties never executed the contract. If the plain language of this document controls, then the document is not executed. Mr. Rodems appears to mislead the Court about this fact.

• <u>Defendant's Reply to Plaintiffs Rebuttal to Defendant's Motion to Dismiss and Strike</u>, a seven (7) page pleading submitted October 10, 2005. (Exhibit 15). In this pleading Rodems admitted on page 5, for the first time, how the fraud of Mr. Cook and BRC actually worked:

So, when Mr. Gillespie signed the Closing Statement, Gillespie knew the \$50,000 payment by Amscot to BRC was for the <u>claim</u> against Amscot for court-awarded fees, not for an award of fees.

- <u>Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike</u>, a two (2) page pleading submitted October 31, 2005 (Exhibit 16), framed this case in two paragraphs:
 - 1. Defendants' central argument implodes on page 5 of its Reply dated October 10, 2005, paragraph 3 b. ii. Here Defendants argue that the \$50,000 is for a <u>claim</u> for courtawarded fees, and not an <u>actual</u> fee award. This begs the question without an <u>actual</u> court-awarded fee, there is no <u>claim</u> for a court-awarded fee. Because Defendants did not prevail in court, they cannot rely on a statutory claim for court-awarded fees, <u>because</u> there is none. This is how Defendants created the impression that the Appellate Court awarded fees, when in fact the it ruled that the parties bear their own costs and attorney's fees. <u>This is Defendants' fraud on its own clients</u>. Fraud is an exemption to the parole evidence rule, blocking Defendants reliance on <u>Franz Tractor v. Case</u>, 566 So. 2d 524.

2. Defendants breached their fiduciary duty to Plaintiff. 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). 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). Defendant Cook failed to report John Anthony's \$5,000 "improper payoff attempt" to the Florida Bar, even though Cook believed that "the Florida Bar would likely prohibit such an agreement." Instead, Defendants jumped into bed with Amscot's lawyer to collected \$50,000. Even though Defendants argue that the \$50,000 is for attorney's fees, they refuse to account for the fee, or provide a method for determining the fee.

Mr. Rodems at this point also had personal responsibility, because 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. <u>Smyrna Developers, Inc. v. Bornstein</u>, 177 So.2d 16 (2dDCA, 1965). Mr. Rodems himself now had an actual conflict.

VII. Mr. Rodems' False Affidavit - Disrupted Tribunal - Strategic Advantage

After Judge Nielsen rejected Mr. Rodems' misleading legal argument, his "claim" for \$50,000 in "court-awarded fees and costs", this case was essentially decided in my favor. In response to certain defeat, Mr. Rodems filed a vexatious libel counterclaim. Mr. Rodems also disrupted the tribunal for strategic advantage. On March 6, 2006 Mr. Rodems submitted to the Court an affidavit falsely invoking the name of Judge Nielsen in an allegation that was later disproved, a failed stunt that resulted in the recusal of the Judge. This was the beginning of Rodems' "full nuclear blast" litigation later described by Mr. Bauer. As a result, February 7, 2007 I took a voluntary dismissal without prejudice. I moved to withdrawal my voluntary dismissal a week later in the hopes of finding counsel. Judge Barton granted my pro se motion to withdrawal my voluntary dismissal August 15, 2007, which was affirmed on appeal in 2D07-4530.

VIII. Mr. Bauer - Not Competent (Rule 4-1.1) - Not Diligent (Rule 4-1.3)

A lawyer should not accept representation unless it can be competently and promptly completed.

Res Judicata Established - Pro Se - Order entered January 13, 2006

The Florida Bar Lawyer Referral Service (LRS) referred, and I retained, Mr. Bauer for the practice area of law of libel and slander, to defend the libel counterclaims in <u>Gillespie v. Barker</u>, <u>Rodems & Cook</u>, <u>P.A. et al.</u>, case no. 05-CA-7205, Hillsborough Co. Bauer filed an amended answer to the libel counterclaim and nothing else; Bauer did not conduct discovery in the libel counterclaim. Bauer just ignored the counterclaim, which was vexatious litigation. Bauer was not competent (Rule 4-1.1) and not diligent (Rule 4-1.3) in defense of the counterclaim.

Mr. Bauer successfully argued my **pro se motion** to withdrawal my voluntary dismissal, drafted and filed before I ever knew or heard of Robert Bauer. Otherwise Mr. Bauer was not competent (Rule 4-1.1) and not diligent (Rule 4-1.3) in litigating my claims. The transcripts show Mr Bauer

angered Judge Barton due to his incompetence and delay. Bauer even risked my incarceration when he failed to prepare for a contempt hearing. Mr. Bauer was wrong to anger Judge Barton.

- Mr. Bauer was not competent and not diligent in failing to litigate <u>Plaintiff's Motion for Summary Judgment</u> filed April 26, 2006 with <u>Affidavit in Support</u>, based on the Court's <u>Order On Defendants' Motion To Dismiss And Strike</u> entered January 13, 2006 that established a cause of action for Fraud and Breach of Contract, and rejected Mr. Rodems' misleading legal argument that his firm was entitled to a "claim" of \$50,000 in "courtawarded fees and costs".
- Mr. Bauer was not competent and not diligent when he failed to object to re-litigation of
 matters already decided res judicata by Judge Nielsen's <u>Order On Defendants' Motion To
 Dismiss And Strike</u> entered January 13, 2006, specifically Rodems' false "claim" to \$50,000
 in "court-awarded fees and costs".
- Mr. Bauer was not competent and not diligent for not seeking section 57.105 attorney's fees for Defendants' motion for judgment on the pleadings, and motion for summary judgment, based on Rodems' false "claim" for \$50,000 in "court-awarded fees and costs", a misleading legal argument that was rejected by Judge Nielsen's Order January 13, 2006, and precluded from further proceedings under the legal doctrine of res judicata.
- Mr. Bauer was not competent and not diligent when he angered Judge Barton by failing to amend the complaint. A transcript of a hearing October 30, 2007 on Defendants' motion for judgment on the pleadings shows Judge Barton understood the importance of amending the complaint, since this was a hearing for judgment on the pleadings. The record shows several exchanges like this with the Judge: (Transcript, October 30, 2007, pp. 14 & 19 respectively).

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8 THE COURT: So are we on the pro se version of
9 the complaint?
10 MR. BAUER: Yes, Your Honor.
11 THE COURT: How do you feel about that?
12 MR. BAUER: I'd like to amend it and make it

4 [MR. BAUER] I don't see that -- I have been on this case
5 for a whole of six months. I don't think my failure
6 to have amended the complaint in six months is
7 overly egregious considering we have had multiple
8 issues to deal with, the hearings that have been
9 required to come down here, the writ of certiorari
10 that has been filed. I don't think there's been any
11 delay on my part or on the part of my firm.
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• During a hearing on Mr. Bauer's motion to withdrawal October 1, 2009, Judge Barton agreed with me that it was "outrageous" to be using a pro se Complaint after 4 years: (Page 5).

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16 MR. GILLESPIE: The thing is we're into our fourth 17 year on this case.
18 THE COURT: I understand.
19 MR. GILLESPIE: And we still are working on the 20 Plaintiff's pro se complaint
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21 THE COURT: Right.
22 MR. GILLESPIE: which is really sort of
23 outrageous.
24 THE COURT: Right....
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• Mr. Bauer was not competent and not diligent when he angered Judge Barton again March 20, 2008 when he repeatedly moved to continue a hearing because he was unprepared and failed to have an expert witness appear. (Page 5).

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5 THE COURT: So, I mean, we're way down the 6 line here. It's been continued once and if we 7 continue it again, for what, a couple of years? 8 Would that be enough time?
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- Mr. Bauer was not competent and not diligent when failed to call me as a witness or otherwise rebut Mr. Rodems' false testimony on behalf of his firm and partner during the improper re-litigation of matters already decided res judicata by Judge Nielsen's Order entered January 13, 2006, specifically Rodems' phony "claim" to \$50,000 in "court-awarded fees and costs", and the existence of a signed contingent fee agreement between me and Mr. Cook and Barker, Rodems & Cook, PA in the AMSCOT lawsuit, which was not signed by any party in violation of Bar Rule 4-1.5(f)(2).
- Mr. Bauer was not competent and not diligent when he allowed Rodems to essentially testify during hearings on summary judgment and judgment on the pleadings, even though Judge Nielsen ruled May 12, 2006 that a motion to disqualify Mr. Rodems was not denied with prejudice on the basis that Rodems would be a witness. Mr. Rodems' "representation" in this case is essentially witness testimony.
- Mr. Bauer was not competent and not diligent when he failed to seek ADA disability accommodation to allow me to attend hearings and testify in my case. Mr. Bauer refused to permit me to attend court hearing because he said Mr. Rodems would knowingly make comments to prod me, "for no better purpose than to anger you". Bauer wrote me this in an email July 8, 2008 at 6.05 p.m., stating in part:

"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."

Mr. Bauer was informed about my disability from my ADA accommodation requests submitted to the Court February 20, 2007 and March 5, 2007. My ADA documents show I am disabled, that Mr. Rodems knew of my disability from his firm's prior representation of me, and that Rodems was engaged a course of harassing conduct (in violation of Section 784.048(2), Florida Statutes), the Intentional Infliction of Emotional Distress, a tort by Mr. Rodems to injure me by aggravating my existing medical conditions. The ADA document showed that I sought medical treatment and was prescribed Effexor XR to the maximum dosage.

I believe if Mr. Bauer had spent 10 minutes - <u>just 10 minutes</u> - and explained to Judge Barton the nature of Mr. Rodems' criminal conduct relative to my PTSD and other disabilities, and

provided the Court a copy of my ADA motion, which shows Mr. Rodems' harassment, this case would have gone better. But Bauer never informed Judge Barton, as the Court and I discussed:

Transcript, January 26, 2010, page 8.

- 12 [THE COURT] if you are saying your disability, which is yet
- 13 unclear to me, hasn't been dealt with accordingly
- 14 -- I believe this is the first time we are hearing
- 15 about this.
- 16 MR. GILLESPIE: Actually it is not, Your
- 17 Honor. This information was presented to you when
- 18 you were a Judge way back on March 5th, 2007,
- 19 Plaintiff's Amended Accommodation Request under the
- 20 ADA. What had happened is shortly after that date,
- 21 Mr. Bauer took the case over and this motion wasn't
- 22 heard.

On August 6, 2012 with leave of the U.S. Court of Appeals, I submitted Amended Motion for Disability Accommodation, showing disqualification of Rodems was required under the ADA.

- On July 1, 2008 Mr. Bauer was not competent and not diligent when he risked my incarceration and failed to sufficiently prepare for a contempt hearing July 1, 2008. Mr. Rodems sought to have me incarcerated after Mr. Bauer failed to inform me about a Fact Information Sheet: Transcript, July 1, 2008, page 5-6.
 - 23 MR. RODEMS: That's the point that I was going
 - 24 to make is that that remedy of law may not carry
 - 25 the day depending upon what happens with the
 - 1 remainder of this morning's hearing time, so that's
 - 2 why we sought incarceration...

Mr. Bauer wrote this to the Bar in his response August 18, 2010: "Because my staff was removed from his case, they did not follow our standard operating procedures in regards to Mr. Gillespie's documents. As such, he was not provided with the Fact Information Sheet required to be filled out in connection with the Final Judgment ordered against him on March 27, 2008. This was an oversight for which I apologized to Mr. Gillespie, opposing counsel, and the Court in the letter dated July 24, 2008." A copy of Mr. Bauer's letter appears at Exhibit 19.

What was Mr. Bauer thinking for the 2 1/2 hour drive from his office in Gainesville, to the Tampa Courthouse? What did Mr. Bauer plan to tell Judge Barton if a warrant for my arrest was issued? Why did Mr. Bauer fail to call me on his cell phone, on the long drive to Tampa, and ask me about the Fact Information Sheet? It seems like Mr. Bauer wanted me to fire him.

XI. Mr. Bauer Lied to The Florida Bar - His Response August 18, 2010

Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit, and misrepresentation Rule 4-8.4(d), conduct prejudicial to the administration of justice

Mr. Bauer lied, misrepresented facts, or made misleading legal arguments to the Florida Bar in his response dated August 18, 2010 to my initial complaint, file no. 2011-00,073 (8B), contrary to Rule 4-8.4(c) and Rule 4-8.4(d). Mr. Bauer's response consisted of 24 pages; a 10 page letter, and 14 pages of exhibits. A copy of Mr. Bauer's response is provided at Exhibit 18.

Due to the Bar's prohibition on submitting more than 25 pages, I cannot in this initial complaint fully list and respond to every lie, falsehood, misrepresentation, or misleading legal argument made by Mr. Bauer in his response dated August 18, 2010. Therefore I have listed below fifteen (15) instances of Mr. Bauer's conduct involving misrepresentation, dishonesty, fraud, deceit, and conduct prejudicial to the administration of justice. Seven of the 15 are further discussed below.

- 1. Mr. Bauer made false statements about my voluntary dismissal, SOL, dismissal w/prejudice.
- 2. Mr. Bauer mislead the Bar about amending my pro se Complaint.
- 3. Mr. Bauer made false statements about the disqualification of Mr. Rodems as counsel.
- 4. Mr. Bauer made false statements, and appears to disavowal, Plaintiff's Motion For Rehearing.
- 5. Mr. Bauer lied in his statement "Mr. Rodems was at all times cordial and professional."
- 6. Mr. Bauer made false statements about his appeals court misconduct.
- 7. Mr. Bauer made false statements about a stay of final judgment.
- 8. Mr. Bauer made false statements about his withdrawal as counsel, hearing w/Judge Barton.
- 9. Mr. Bauer made misleading statements about viable claims and a contingency fee agreement.
- 10. Mr. Bauer made false statements about discovery sought and owed by Mr. Rodems.
- 11. Mr. Bauer made misleading statements about his 2007 efforts and a "walk-away" settlement.
- 12. Mr. Bauer made false and misleading statements about the recusal of two judges.
- 13. Mr. Bauer falsely stated that Amscot involved the "Fair Debt Collections Practice Act".
- 14. Mr. Bauer lied in his statement that I threatened his office staff.
- 15. Mr. Bauer made misleading statements about my disability and communication.
- 1. Mr. Bauer misled the Bar on page 2 of his response August 18, 2010 that the effect of my voluntary dismissal was to dismiss my claims with prejudice because the statute of limitations (SOL) had expired. This is false. My voluntary dismissal had no effect, determined by Order of Judge Barton, sustained on appeal in 2D07-4530 per curiam. SOL was not an issue.

My voluntary dismissal February 7, 2007 was determined to be of no effect. Judge Barton granted **my pro se motion** as set forth in <u>Order Granting Plaintiff's Motion To Withdrawal Plaintiff's Notice of Voluntary Dismissal</u> entered August 31, 2007. (Exhibit 22). Mr. Bauer successfully argued **my pro se motion**, but Bauer did not draft the motion or file the motion, I did. Judge Barton held as follows in the Order granting **my pro se motion**:

This action, having come before the Court on Plaintiffs Pro Se Motion to Withdraw Plaintiffs Notice of Voluntary Dismissal, and the Court, having reviewed the file and having heard oral argument from counsel for both sides, finds:

- 1. The Pro Se Plaintiff filed his Notice of Voluntary Dismissal on February 7, 2007 prior to retaining his current counsel.
- 2. Notices of Voluntary Dismissal cannot be filed pursuant to Rule 1.420 when a counter-claim is pending without first receiving leave of court. <u>Rogers v. Publix Super Markets, Inc.</u>, 575 So.2d 214 (Fla. 5th DCA, 1990)
- 3. Therefore, the Notice of Voluntary Dismissal was not effective to dismiss the Plaintiffs cause of action.
- 4. The Pro Se Plaintiff filed a Motion for an Order of Voluntary Dismissal prior to retaining his current counsel pursuant to Rule 1.420 on February 7, 2007 and such

motion required a court order for it to be effective.

- 5. On February 15, 2007 the Pro Se Plaintiff filed a Notice of Withdrawal of Voluntary Dismissal.
- 6. Plaintiffs Motion for an Order of Voluntary Dismissal was ineffective to dismiss the Plaintiffs case.
- 7. It is further determined that as a matter of law that Plaintiff is not entitled to file a counter-complaint⁷ in response to Defendant's Counter-Complaint absent a modification of the current rules of civil procedure.

ORDERED: Plaintiffs Notice of Voluntary Dismissal is hereby withdrawn.

Mr. Rodems appealed Judge Barton's <u>Order Granting Plaintiff's Motion To Withdrawal Plaintiff's Notice of Voluntary Dismissal</u>. Rodems lost. The 2dDCA held in 2D07-4530 that my claims were not dismissed, citing Fla.R.Civ.P. 1.420(a)(2), and <u>Rogers v. Publix Super Markets</u>, <u>Inc</u>., 575 So. 2d 214, 215-16 (Fla. 5th DCA 1991) (holding that when counterclaim is pending, plaintiff cannot unilaterally dismiss complaint without order of court). (Exhibit 23)

Mr. Bauer has repeatedly and falsely represented to the Florida Bar that my claims were dismissed with prejudice, and that the SOL had expired, in furtherance of other dishonesty to the Bar, his other responses made August 18, 2010 involving misrepresentation, dishonesty, fraud, deceit, and conduct prejudicial to the administration of justice. In the past I wrote that Mr. Bauer resurrected my claims; I was wrong. My voluntary dismissal was determined to be of no effect.

2. Mr. Bauer mislead the Bar on page 4 of his response August 18, 2010 about amending my original pro se Complaint. The record shows repeated attempts by Judge Barton bring this to the attention of Mr. Bauer, but Bauer refused to motion the Court to amend the Complaint.

Transcript, October 30, 2007, Page 33

- 2 THE COURT: Let me ask this: And we are still
- 3 on this original complaint?
- 4 MR. BAUER: Yes, Your Honor.

Mr. Bauer wrote me a "case status" letter September 5, 2007, "I believe it is necessary at this time to reevaluate the initial complaint and draft an amended complaint to include allegations of malpractice and breach of fiduciary duty." Exhibit 24. Still, Bauer never amended the complaint.

3. Mr. Bauer made a number of false statements to the Bar on page 5 of his response August 18, 2010 about the disqualification of Mr. Rodems as counsel for his firm and partner. Mr. Bauer failed to inform the Bar that Judge Nielsen's Order entered May 12, 2006 allowed for rehearing a motion to disqualify Mr. Rodems on "the basis that counsel may be a witness". (Exhibit 24)

Judge Baron agreed with Judge Nielsen's Order, and suggested during a hearing January 26, 2010 that I make a "renewed motion to disqualify" Mr. Rodems, whose misconduct was the central obstacle in resolving this case. Transcript, January 26, 2010, page 31:

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1 [MR. GILLESPIE]...This is what the Judge wrote: "This
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² motion to disqualify is denied with prejudice

⁷ This incompetent pleading was drafted and submitted by Mr. Bauer.

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3 except as to the basis that Counsel may be a
4 witness and on that basis the motion is denied
5 without prejudice." Now, for Mr. Rodems being a
6 witness, the nature of this case is essentially he
7 is a perpetual witness. The transcripts show that
8 his representation is essentially on going
9 testimony about factual matters. Many times in the
10 transcripts he is confused. He is saying, Judge,
11 we -- Oh, I don't mean we, I mean I as my attorney
12 for the firm think this about my client, which is
13 actually myself. That confusion is evident in the
14 transcripts over and over again. I really believe
15 he needs to be disqualified because of his ongoing
16 testimony in this matter.
17 THE COURT: All right. Well, I assume there
18 will be a renewed motion to disqualify that will be
19 filed and then again set for a hearing once we
20 establish our procedure, but we can't do that until
21 we get what I directed you to produce within ten
22 days from Ms. Huffer.
```

Mr. Bauer also misled the Bar with this statement: "Mr. Gillespie made a motion for rehearing in December of 2006 which was also denied." The motion for rehearing was tabled by Judge Isom with a referral to law enforcement to investigate Mr. Rodems' false affidavit to the Court. So Bauer simply lied to the Bar when he wrote the motion for rehearing Dec-2006 was "denied".

Mr. Bauer further misled the Bar in his statement about allegations in my Bar complaint showing the disqualification of Rodems was required: "These are the same arguments that were made in support of the February 2006 motion and denied." Mr. Bauer knows this is a false statement, as set forth in ¶¶ 60-61, Emergency Motion to Disqualify Defendants' Counsel Ryan Christopher Rodems & Barker, Rodems & Cook, PA, July 9, 2010:

- 60. A hearing on Plaintiff's Motion to Disqualify Counsel was held April 25, 2006. Mr. Rodems presented the following case law in support of his position. The cases are largely irrelevant to this matter and set of facts. Rodems failed to disclose to the court legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel....
- 61. Mr. Rodems violated FL Bar Rule 4-3.3(c) when he failed to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, in this instance Gillespie pro se. Rodems failed to disclose McPartland v. ISI Inv. Services, Inc., 890 F.Supp. 1029, or U.S. v. Culp, 934 F.Supp. 394, legal authority directly adverse to the position of his client. McPartland and Culp are just two of a number of cases Rodems failed to disclose, see this motion, and the Table of Cases that accompanies this motion. Counsel has a responsibility to fully inform the court on applicable law whether favorable or adverse to position of client so that the court is better able to make a fair and accurate determination of the matter before it. Newberger v. Newberger, 311 So.2d 176. As evidenced by this motion, legal authority directly adverse to the position of Mr. Rodems and BRC was not disclosed to the court by Rodems.

4. Mr. Bauer made a number of false statements to the Bar on page 3 of his response August 18, 2010 about his failure to present evidence that there was no signed contingent fee agreement.

Mr. Gillespie also alleges that I "failed to present evidence that there was no signed contingent fee agreement," subsequent to Mr. Rodems' representations that there were. This allegation underscores much of the basis for my motion for withdrawal.

Mr. Bauer is impeached by his motion filed on my behalf July 16, 2008, <u>Plaintiff's Motion For Rehearing</u> of an order granting Mr. Rodems judgment on the pleadings. In it Mr. Bauer alleged Mr. Rodems mislead the court as described in ¶¶2-4. (Exhibit 20).

- 2. Plaintiff moves for rehearing on the grounds that the Court's judgment was based on the Defendants' representations that there was a signed attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 3. Defendants have not produced a signed copy of the attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 4. Defendants have only produced a signed copy of the attorney fee agreement between Alpert, Barker, Rodems, Ferrentino & Cook and the Plaintiff...

<u>Plaintiff's Motion For Rehearing</u> was signed by attorney Tanya M. Bell (nee Uhl) ID No. 52924, for the Law Office of Robert W. Bauer, PA. Mr. Bauer has apparently disavowed this motion, according to his response to on page 5 made August 18, 2010. But Ms. Bell confirmed to me in a letter dated August 5, 2010 (Exhibit 21) that Bauer made a direct request that she sign the pleading. Ms. Bell left the Bauer law firm shortly after this motion was submitted.

5. Mr. Bauer made a boldface lie to the Bar on page 9 of his response August 18, 2010 that "Mr. Rodems was at all times cordial and professional."

"Mr. Gillespie points to a letter I wrote to Governor Crist endorsing Mr. Rodems for consideration as a judicial nominee....Within the scope of his representation of BRC in this matter, Mr. Rodems conducted himself as an honorable and ethical officer of the court. At no time did I find his behavior to be unethical. Although we were engaged in litigation that was very contentious, and treated me with dignity and respect. I found Mr. Rodems to be a competent and skilled attorney with all of the intangible qualities of character that we look for in members of our profession and hope to find in those seated on the bench. Therefore, I was pleased to write the letter attached to Mr. Gillespie's grievance when asked."

Mr. Bauer's high praise of Mr. Rodems is impeached in this complaint, and in these complaints:

Ryan Christopher Rodems, File No. 2013-10,271 (13E) Eugene P Castagliuolo, File No. 2013-10,162 (6D)

6. Mr. Bauer made false statements to the Bar on page 8 of his response August 18, 2010 in his excuses for not seeking attorneys fees on Rodems' failed appeal in 2D07-4530. Bauer wrote:

Mr. Rodems' appeal was based on a position supported with legal precedent. While I did prevail, Mr. Rodems' claims were not without merit and certainly did not rise to the level of frivolity sufficient to justify Section 57.105, sanctions against him. Unfortunately, Mr.

Gillespie made a very large legal blunder in voluntarily dismissing his claims against BRC. Due to this error, I had to take significant steps to reinstate the claims. The statute of limitations had tolled and, but for my actions on his behalf, Mr. Gillespie would have no viable causes of action today.

My voluntary dismissal was determined to be of no effect. Judge Barton granted **my pro se motion** as set forth in <u>Order Granting Plaintiff's Motion To Withdrawal Plaintiff's Notice of Voluntary Dismissal</u> entered August 31, 2007. (Exhibit 22). Mr. Bauer successfully argued **my pro se motion**, but Bauer did not draft or file the motion, I did. SOL was not an issue.

The 2dDCA held per curiam in 2D07-4530 that my claims were not dismissed, citing Fla.R.Civ.P. 1.420(a)(2), and <u>Rogers v. Publix Super Markets, Inc.</u>, 575 So. 2d 214, 215-16 (Fla. 5th DCA 1991) (holding that when counterclaim is pending, plaintiff cannot unilaterally dismiss complaint without order of court).

Mr. Bauer was not competent and not diligent for not seeking attorney's fees for Rodems' failed appeal that was not supported by material facts or the application of existing law to those facts.

- 7. Mr. Bauer made false statements to the Bar on page 7 of his response August 18, 2010 about a stay of final judgment: "He refused, however, to post a bond with the court." "Because Mr. Gillespie was unwilling to post a bond, there was little I could do to defend against an action...." ¶8. This statement is false because Bauer knew that I applied for, and was denied-not able to get a bond. Bauer advised against a bond in his email to me August 19, 2008 4:24 p.m.
- 8-15 More information is available about Mr. Bauer's conduct involving misrepresentation, dishonesty, fraud, deceit, and conduct prejudicial to the administration of justice.

VII. Mr. Bauer Failed To Report Misconduct of Mr. Rodems, Rule 4-8.3(a)

Rule 4-8.3(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Mr. Rodems committed multiple violations of the Rules of Professional Conduct in this matter, see my complaint, Ryan Christopher Rodems, File No. 2013-10,271 (13E). Below are breaches of the Rules I believe Mr. Bauer should have reported to the Bar.

Rule 4-3.1, Meritorious Claims and Contentions

Rule 4-3.3, Candor Toward the Tribunal

Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit, misrepresentation

Rule 4-8.4(d), conduct prejudicial to the administration of justice

Mr. Rodems asserted a number of misleading legal arguments to the Court, including his false "claim" to \$50,000 in "court-awarded fees and costs". Appearing pro se, I prevailed on Rodems' motion to dismiss and strike January 13, 2006, when Judge Richard Nielsen entered <u>Order On Defendants' Motion To Dismiss And Strike</u>. Judge Nielsen rejected Rodems' misleading legal argument, a false "claim" of \$50,000 in "court-awarded fees and costs". Under the legal doctrine

of res judicata, Mr. Rodems was precluded from ever again asserting this misleading legal argument, a false "claim" for \$50,000 in "court-awarded fees and costs" in this matter.

Mr. Bauer knew Mr. Rodems' legal claims and contentions were not meritorious (Rule 4-3.1). Bauer knew Rodems' false "claim" for \$50,000 in "court-awarded fees and costs" was a breach of Rule 4-3.3(a)(1) and (4), making a false statement of fact and/or law to a tribunal, and offering false evidence. Mr. Rodems' "representation" was in fact his own false testimony. Likewise with the "slimy attorney" William Cook, guilty of closing statement fraud, Rule 4-1.5(f)(5), and no signed contingent fee agreement, Rule 4-1.5(f)(2). Mr. Bauer also knew that the all foregoing claims and contentions were considered, and rejected as not meritorious, by Judge Nielsen's Order On Defendants' Motion To Dismiss And Strike, January 13, 2006, decided res judicata, precluding further assertion of Rodems' rejected claims and contentions.

Mr. Rodems presented false evidence and mislead the court during hearings on October 30, 2007 and July 1, 2008 for the purpose of obtaining a dismissal of claims against BRC and Mr. Cook. Mr. Rodems misrepresented to Judge Barton that there was a signed contingent fee agreement between Plaintiff Neil Gillespie and Defendants William J. Cook and Barker, Rodems & Cook, PA when in fact there was none. Mr. Bauer failed to present evidence that there was no signed contingent fee agreement, such as my testimony or my affidavit. Instead Mr. Bauer submitted Plaintiff's Motion For Rehearing July 16, 2008 asserting that there was no signed contingent fee agreement, which motion Mr. Bauer now appears to disavowal, according to his 2010 response.

For additional misconduct of Mr. Rodems that Mr. Bauer was obligated to report under Rule 4-8.3(a), see this complaint, beginning on page 4, section *IV. Misconduct & RICO Activity Undermine Bar Complaints, Civil Litigation*.

Dissatisfied Clients of Robert W. Bauer

<u>Dr. Angela V. Woodhull, Ph.D. - Filed Sanction Motion Against Robert Bauer</u> Improper Charging Liens, Using Pro Se and UPL Pleadings, Misogyny

Dr. Angela V. Woodhull, Ph.D. is another dissatisfied former client of Mr. Bauer. Dr. Woodhull contacted me November 5, 2011 by email. Dr. Woodhull is a delightful and charming lady, who is also an author, a licensed private investigator, and a college professor. Dr. Woodhull offered to serve process on Mr. Bauer and the other defendants in my federal cases. Dr. Woodhull is authorized to serve process under Florida law as a licensed P.I. Dr. Woodhull is also the author of "Police Communication in Traffic Stops" available on Amazon.com.

Dr. Woodhull states Robert Bauer filed a number of improper "Attorney Charging Liens" in cases involving Dr. Woodhull's mother, including the <u>Guardianship of Louise A. Falvo</u>, Case No. 2008-CP-000741, and the <u>Estate of Louise A. Falvo</u>, Case No. 01-2008-CP-1083, Eighth Judicial Circuit, Alachua County; and other cases, including in the Fifth District Court of Appeal. Dr. Woodhull provided me January 4, 2012 a certified copy of her pro se pleading in the estate case, the docket entry of December 18, 2009, <u>Response To And Motion To Strike Or In The Alternative Motion To Dismiss Attorney Bauer's Motions For Attorney's Charging Lien And Motion For Sanctions Against Attorney Robert Bauer.</u>

Dr. Woodhull's pleading complains about a number of the same issues as me, that Bauer uses law students and unlicensed law school graduates to draft his pleadings, as well as using his client's pro se pleadings⁸ and submitting them to the court as his own work. Dr. Woodhull's pro se pleading appears at Exhibit 25, and states in paragraph 1:

Bauer said that law student David Sams would be working on preparing the defenses and counterclaim in order to save Woodhull money, even though this was the unauthorized practice of law.

Dr. Woodhull described Mr. Bauer's misogyny on page 4, beginning at paragraph 12:

12. After the hearing that day, walking down the courthouse hall with Attorney Bauer, Attorney Bauer turned to Woodhull's fiance, David A. Newman, and stated, "She is rather obnoxious. How do you put up with her?"

<u>Kimberly Pruett-Barry dissatisfied with Robert W. Bauer</u> Failed to "move a case forward" and "he tries to rack up a bill"

Kimberly Pruett-Barry and husband William hired Mr. Bauer to sue attorney Peter R. McGrath. Kim told me *I'm sick*, *sick to my stomach*, *made a huge mistake hiring this guy*, and that Mr. Bauer had run up a \$40,000 bill and took all their savings. Kim emailed October 20, 2012 stating, *Bauer*. *He definitely fails to "move a case forward"*, *I think he tries to rack up a bill*.

<u>Anna</u> - <u>Fired Robert Bauer - a "nightmare"</u> "I plan to raise the ROOF off this mess!"

Another dissatisfied client of Mr. Bauer, Anna , contacted me July 8, 2011 by email "help advise! I hired and fired bauer..nightmare". Anna hired and later fired Robert Bauer as counsel in a libel case, v. Anna , Case No. has new counsel now, and believes Mr. Bauer should be brought to justice for mishandling her case, stating "I plan to raise the ROOF off this mess!" (email available upon request)

Phillip Strauss v. Robert W. Bauer, TFB File No.: 2012-00,146 (8B) Mr. Strauss, age 90, said of Mr. Bauer "that bum took advantage"

Former client Phillip Strauss called me January 4, 2012 at 11.13 a.m. and complained about Robert Bauer. Mr. Strauss also made a Bar complaint, TFB File No.: 2012-00,146 (8B), August 24, 2011. Mr. Strauss, age 90, said of Mr. Bauer "that bum took advantage" in a small claims court case, with a "low effort attorney that screwed me up completely" and lost the case, a claim that involved a porch that had fungus, which his insurance company denied coverage to repair. Mr. Strauss also believes "the law system in Florida is for the birds", and "they take care of their own, crooks or whatever they are, those are rats". At the time he called me, Mr. Strauss was living in New York with family, and had put his home in Gainesville up for sale. Mr. Strauss

⁸ Opposing counsel Mr. Rodems also complained about Mr. Bauer using my pro se pleadings as his own. Rodems' email to Mr. Bauer April 26, 2007 at 9:56 a.m. states in part, "I am surprised you would rely on any portions of the pleadings Gillespie filed." I was surprised too, since I was paying Bauer \$250 per hour. Rodems' email is available.

said he is willing to make a trip to Florida to help out in any action to hold Mr. Bauer accountable. Mr. Strauss requested a copy of his Bar complaint, since his copy was left behind in Gainesville, which I provided him by email. Mr. Strauss concluded our call by thanking me. A digital recording of the call is available. (complaint closed/insufficient evidence).

<u>DeCoursey v. Robert W. Bauer, TFB File No. 2012-00,054(8b)</u> Pattern of Complaints by Elderly and Disabled Clients

Another dissatisfied client of Mr. Bauer filed a Bar complaint, <u>James and Betty DeCoursey v. Robert W. Bauer</u>, TFB File No. 2012-00,054(8b), July 8, 2011. The complaint alleges that the DeCourseys are disabled and elderly, and that Mr. Bauer failed to properly represent them in a foreclosure matter. (complaint closed/insufficient evidence).

Conclusion

Appearing pro se, I prevailed on Mr. Rodems' motion to dismiss and strike, when Judge Richard Nielsen entered Order On Defendants' Motion To Dismiss And Strike, January 13, 2006. (Exhibit 11). Judge Nielsen rejected Rodems' misleading legal argument, a false "claim" of \$50,000 in "court-awarded fees and costs". Under the legal doctrine of res judicata, Mr. Rodems was precluded from ever again asserting a "claim" for \$50,000 in "court-awarded fees and costs" in this matter, a claim or contention rejected by the Court as not meritorious.

After Judge Nielsen rejected Mr. Rodems' misleading legal argument, his "claim" for \$50,000 in "court-awarded fees and costs", this case was essentially decided in my favor. In response to certain defeat, Mr. Rodems filed a vexatious libel counterclaim. Mr. Rodems also disrupted the tribunal for strategic advantage. As a result, February 7, 2007 I took a voluntary dismissal without prejudice. I moved to withdrawal my voluntary dismissal a week later in the hopes of finding counsel. Judge Barton granted my pro se motion to withdrawal my voluntary dismissal, argued by Mr. Bauer August 15, 2007, and affirmed on appeal in 2D07-4530.

After that, Mr. Bauer's representation was a disaster, not competent, and not diligent, which angered Judge Barton. Mr. Bauer lied, made misrepresentations, and made misleading legal arguments to the Bar in his response August 18, 2010 to my first complaint. Mr. Bauer failed to report Mr. Rodems' misconduct, and then engaged in racketeering activity as described herein.

Given the serious and ongoing nature of Mr. Bauer's misconduct with me and his other clients, the Bar should find probable cause and recommend Bauer's disbarment to protect the public. Every document, email and transcript mentioned in this complaint is available. All Mr. Bauer's hearings were transcribed. Persons named in this complaint are witnesses. Under penalty of perjury, I declare the foregoing facts are true, correct, and complete. Thank you.

Sincerely,

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481 Enclosures

Sent to the Florida Bar October 31, 2012 by U.P.S. Ground, No. 1Z64589FP290944350.

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<u>Appendix to the Florida Bar Complaint Against Robert W. Bauer - October 31, 2012</u> The following Exhibits are cited in the Bar complaint and are available upon request.

	The following Exhibits are cited in the Bar complaint and are available upon request.
Exhibit 1	March 18, 2011 Letter Report Pursuant to Rule 3-7.4(k), TFB File No. 2011-00,073(8B)
Exhibit 2	June 27, 2011 letter of Carl Schwait, Designated Reviewer, to Neil Gillespie
Exhibit 3	July 31, 2011 letter of Neil Gillespie to Carl Schwait, Designated Reviewer
Exhibit 4	April 11, 2011 email of Neil Gillespie to James Watson, Chief Branch Discipline Counsel
Exhibit 5	March 14, 2011 email of Brian Kramer, Investigating Member, to Neil Gillespie
Exhibit 6	Justice Thomas Granted Rule 13.5 Application, SCOTUS, C.A.11 cases 12-11028 and 12-11213
Exhibit 7	September 19, 2012 letter of Neil Gillespie to Catherine Chapman, re Mr. Bauer & my case file
Exhibit 8	List of 20 related legal proceedings in Gillespie v. Barker, Rodems & Cook, P.A.
Exhibit 9	January 4, 2010 Mr. Bauer to Gov. Crist, support Rodems for judge (Gov. Crist rejected Rodems)
Exhibit 10	Closing Statement (Fraud), Amscot lawsuit, October 31, 2001, Barker, Rodems & Cook, PA.
Exhibit 11	Order On Defendants' Motion To Dismiss And Strike, January 13, 2006 (Judge Nielsen)
Exhibit 12	Defendant's Motion to Dismiss and Strike, August 29, 2005.
Exhibit 13	Plaintiffs Rebuttal to Defendant's Motion to Dismiss and Strike, October 7, 2005.
Exhibit 14	Plaintiff's Notice of Serving Case Law In Rebuttal, D's Motion to Dismiss & Strike, Oct-07-05.
Exhibit 15	Defendant's Reply to Plaintiffs Rebuttal to Defendant's Motion to Dismiss and Strike, Oct-10-05.
Exhibit 16	Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike, October 31, 2005.
Exhibit 17	August 24, 2012 letter of Mr. Bauer to Gillespie, Mr. Rodems' agreement does not bind him, only me.
Exhibit 18	August 18, 2010 Response of Robert Bauer to the Florida Bar, File No. 2011-00,073 (8B)
Exhibit 19	July 24, 2008 letter of Mr. Bauer to Judge Barton, his misrepresentations to the Court.
Exhibit 20	Plaintiff's Motion For Rehearing, Order granting Rodems judgment on the pleadings, Jul-16-08.
Exhibit 21	August 5, 2010 letter of Ms. Bell, Esq. to Neil Gillespie, re Plaintiff's Motion For Rehearing.
Exhibit 22	Order Granting Plaintiff's Motion To Withdrawal Plaintiff's Notice of Voluntary Dismissal

Order filed February 8, 2008 in 2D07-4530, sustained per curiam Judge Baron's above Order.

September 5, 2007 case status letter of Mr. Bauer to Neil Gillespie, time to amend the complaint.

Sanction Motion Against Robert W. Bauer by Dr. Angela V. Woodhull, Case: 01-2008-CP-1083

Exhibit 23

Exhibit 24

Exhibit 25



JOHN F. HARKNESS, JR. EXECUTIVE DIRECTOR

TALLAHASSEE BRANCH OFFICE 651 EAST JEFFERSON STREET TALLAHASSEE, FLORIDA 32399-2300

(850) 561-5845 www.floridabar.org

March 18, 2011

Neil Gillespie 8092 SW 115th Loop Ocala, FL 34481

RE: Robert W. Bauer; TFB File No. 2011-00,073(8B)

Dear Mr. Gillespie:

Pursuant to Rule 3-7.4(k), this document serves as a Letter Report of No Probable Cause Finding. On the basis of a diligent and impartial analysis of all the information available, on March 15, 2011, the grievance committee found no probable cause for further disciplinary proceedings in this matter. The membership of the committee is made up of both attorneys and non-attorneys. This case is now closed.

Because the Bar only has the authority to address questions of ethics, the committee could not address any legal issues about which you may feel concerned. If you have further concerns about what your legal remedies may be, you must consult with legal counsel of your choice. The Florida Bar is unable to provide legal advice in this respect.

Pursuant to the Bar's records retention schedule, the computer record and file will be disposed of one year from the date of closing.

Sincerely,

James N. Watson, Jr.

Chief Branch Discipline Counsel

cc: Melissa Jay Murphy, Chair

Brian Stuart Kramer, Investigating Member

Robert W. Bauer



JOHN D. JOPLING* CARL B. SCHWAIT* ELLEN R. GERSHOW DALE J. PALESCHIC JENNIFER C. LESTER* DAVID M. DELANEY SUSAN M. SEIGLI

June 27, 2011

Mr. Neil Gillespie 8092 S.W. 115th Loop Ocala, Florida 34481

Re: Gillespie v. Robert W. Bauer

The Florida Bar File No. 2011-073(8B)

Dear Mr. Gillespie:

After comprehensively reading all documents in my possession in reference to the abovestyled complaint, I have determined that I wish to defer to the finding of the grievance committee.

Very truly yours,

Carl B. Schwait

Care B. Schwart

CBS/vp

cc:

Mr. Jim Watson

Mr. Jim Davey

Mr. Brian Kramer

2

*Florida Board Certified Civil Trial Lawyer | † Florida Board Certified in Wills, Trusts & Estates | ‡ National Board Certified Civil Trial Advocate **Florida Board Certified in Health Law July 31, 2011

Mr. Carl B. Schwait Designated Reviewer 203 N.E. First Street Gainesville, Florida 32601

> RE: Gillespie v. Robert W. Bauer The Florida Bar File No. 2011-073(8B)

Dear Mr. Schwait:

Your letter of June 27, 2011 states "After comprehensively reading all documents in my possession in reference to the above-styled complaint, I have determined that I wish to defer to the finding of the grievance committee." This is my request to review the documents you comprehensively read. Otherwise your determination does not honestly resolve this matter.

Your letter, as well as Mr. Watson's letter of March 18, 2011, fails to comply with Rule 3-7.4(k) because it did not explain why my complaint did not warrant further proceedings given the overwhelming evidence of misconduct. You and Mr. Watson also failed to include any documentation explaining why the complaint did not warrant further proceedings.

I have made a number of meritorious complaints to The Florida Bar against lawyers guilty of multiple breaches of the Bar's Rules, which complaints the Bar has failed to honestly adjudicate. Initially my complaint was against William J. Cook of Barker, Rodems & Cook, PA (BRC). Subsequently Mr. Bauer, a referral from the Bar, determined that the Bar was incorrect in failing to proceed against Mr. Cook. Mr. Bauer encourage and reinstated my dismissed civil case against Cook and BRC, then dropped the mater when it became too difficult, leading to this complaint.

Before Mr. Bauer responded to my complaint, Mr. Rodems submitted a thirteen page diatribe to the Bar in Bauer's defense that was a false and misleading, and a palpable conflict of interest, since he is a partner with Cook in BRC. The information provided by Mr. Rodems, and incorporated into Mr. Bauer's response, resulted in new breaches of the ethics rules, specifically:

Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit, and misrepresentation

Rule 4-8.4(d), conduct prejudicial to the administration of justice

The documents you comprehensively read must have been false and misleading to lead you to defer to the finding of the grievance committee. Therefore I need to review the documents to make a new complaint for violations of Rules 4-8.4(c) and (d).

The Florida Supreme Court has delegated to the Florida Bar the function of disciplining its members. The Supreme Court and the Bar have a fiduciary duty to protect members of the public harmed by the unethical practice of law and lawyers. The Florida Bar unfortunately is being

operated, and demonstrably so, in a fashion as to protect itself and bad lawyers rather than the public. For example, the Bar's claim that the grievance committee is its "grand jury" is profoundly misleading as set forth in my April 11, 2011 email to Mr. Watson.

Please advise the undersigned when the documents you comprehensively read will be available for my review. Also advise when the undersigned can expect the Bar's compliance with Rule 3-7.4(k), an explanation why my complaint did not warrant further proceedings given the overwhelming evidence of misconduct. Kindly include any documentation explaining why the complaint did not warrant further proceedings. Thank you.

Sincerely,

Neil J. Gillespie

8092 SW 115th Loop Ocala, Florida 34481

(352) 854-7807

cc: Mr. James Watson

Mr. James Davey

Mr. Brian Kramer

Neil Gillespie

From: "Jim Watson" <jwatson@flabar.org> **To:** "Neil Gillespie" <neilgillespie@mfi.net>

Cc: <RWB@bauerlegal.com>; "Jim Watson" <jwatson@flabar.org>

Sent: Tuesday, April 19, 2011 7:29 AM

Attach: NOTICÉ OF GRIEVANCE PROCEDURES.pdf; 2009, 04-22-09, Salter, Feiber reply.pdf

Subject: Re: Fw: Complaint, Gillespie v Robert W. Bauer, The Florida Bar File No. 2011-00,073(8B)

Mr. Gillespie:

This is to advise you that this matter has been forwarded to Carl Schwait, Designated Reviewer, for his review. You will receive a response from him when his review has been completed.

Thank you, Dana Thrash for

Jim Watson, Chief Branch Discipline Counsel The Florida Bar Tallahassee Branch Office of Lawyer Regulation 651 E. Jefferson Street Tallahassee, FL 32399-2300 (850)561-5783 / (850)561-5829 (fax) jwatson@flabar.org

"Neil Gillespie" < neilgillespie@mfi.net>

To "James N Watson, Jr." <jwatson@flabar.org>, "James A G Davey,

Jr." <jdavey@flabar.org>

04/18/2011 11:28 AM

cc "James A G Davey, Jr." < jdavey@flabar.org >, "Brian Stuart Kramer"

<kramerb@sao8.org>, "Melissa Jay Murphy"
<melissam@salterlaw.net>, "Carl B Schwait"

<cschwait@dellgraham.com>

Subject Fw: Complaint, Gillespie v Robert W. Bauer, The Florida Bar File No. 2011-00,073(8B)

Dear Mr. Watson:

Below is an email I sent you last Monday, April 11, 2011. When can I expect a response from you? Thank you.

Sincerely,

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481 (352) 854-7807 neilgillespie@mfi.net

---- Original Message -----

From: Neil Gillespie
To: Jim Watson

Cc: James A G Davey, Jr.; Brian Stuart Kramer; Melissa Jay Murphy; Carl B Schwait

Sent: Monday, April 11, 2011 4:46 PM

Subject: Re: Complaint, Gillespie v Robert W. Bauer, The Florida Bar File No. 2011-00,073(8B)

Dear Mr. Watson:

Thank you for your response. I trust that your trial is complete and you are back in the office.

Attached is a "Notice of Grievance Procedures" provided to me by the Florida Bar July 30, 2010. The relevant portion to our discussion is paragraph 4:

4. The grievance committee is the Bar's "grand jury." Its function and procedure are set forth in Rule 3-7.4. Proceedings before the grievance committee, for the most part, are nonadversarial in nature. However, you should carefully review Chapter 3 of the Rules Regulating The Florida Bar.

The claim that that the grievance committee is the Bar's "grand jury" is misleading. The grievance committee bears little in common with an actual grand jury.

As previously noted, an actual grand jury issues a finding of fact or presentment that is signed by all the members. The presentment is filed with the clerk of the court and is a public record.

While the grievance committee has nonlawyer members, only a quorum is needed for a vote, and the quorum is not requited to have any nonlawyer members. A grievance committee could be composed entirely of lawyers. An actual grand jury would not be composed entirely of lawyers.

The selection and composition of an actual grand jury is different than the Bar's "grand jury". Actual grand juries are larger, usually 15 to 21 members.

In an actual grand jury, jurors are selected at random and their names are taken from lists prepared by the clerk of the circuit court. Most government officials are disqualified to serve on an actual grand jury. An elected public official is not eligible to be a grand juror.

In contrast, the Bar's "grand jury" draws from a small pool of self-selected members. The Eighth Circuit Grievance Committee "B" consists of ten members; seven lawyers and three nonlawyers. The Bar's "grand jury" requires a quorum (in my case 5 members), non of whom are required to be nonlawyers. I know of no prohibition on government or elected officials serving on a grievance committee. For example, I believe that Mr. Kramer, as an Assistant State Attorney, is a government official. This is not permitted on an actual grand jury.

In an actual grand jury witnesses will be called one by one and placed under oath to tell the truth, and subject to penalties for perjury. Under Rule 3-7.4(d) grievance committees may be informal in nature and the committees shall not be bound by the rules of evidence. Under Rule 3-7.4(h) the respondent may be required to testify and to produce evidence...and given an opportunity to make a written statement, sworn or unsworn, explaining, refuting, or admitting the alleged misconduct. No one is placed under

oath nor subject to the penalties for perjury in the Bar's "grand jury".

Given the result of the grievance committee in my case, I believe Messrs. Bauer and Rodems (and perhaps others) made false statements and misrepresentations prejudicial to the administration of justice. In an actual grand jury, witnesses must be truthful of face penalty of perjury. In the Bar's "grand jury" providing false information appears commonplace, and it appears that lying goes unchecked and unpunished. From what I see, it is a routine part of the process to allow the respondent to avoid justice. Even former adversaries such as Mr. Rodems can, in essence, join with the respondent against the complainant.

I found nothing in the rules that would prevent the respondent, the respondent's counsel or designee, a witness, or a third party, from independently contacting members of the grievance committee to influence their vote.

The following are events in my bar complaint against Mr. Bauer: (please correct if needed)

Pursuant to Rule 3-7.3(a) bar counsel Annemarie Craft (ACAP) reviewed my complaint/inquiry against Mr. Bauer and determined that the alleged conduct, if proven, would constitute a violation of the Rules Regulating The Florida Bar warranting the imposition of discipline. Ms. Craft notified me (October 13, 2010) that she forwarded the complaint to The Florida Bar's Tallahassee Branch Office for consideration. Ms. Craft was the second bar counsel assigned; the initial bar counsel, William Kitchen, was removed from the inquiry.

Pursuant to Rule 3-7.3(c) my complaint (July 29, 2010) was in writing and under oath, although the response from Mr. Bauer, and a 13 page diatribe from attorney Ryan C. Rodems were not made under oath. (Note: The Bauer and Rodems correspondence contained a number of false statements and misrepresentations prejudicial to the administration of justice.)

Pursuant to Rule 3-7.3(b) bar counsel James A G Davey, Jr. in the Tallahassee Branch Office decided to pursue an inquiry, opened a disciplinary file as a complaint, and investigated the allegations contained in the complaint.

Pursuant to Rule 3-7.3(f) Mr. Davey referred the complaint (November 5, 2010) to Melissa Murphy, Chair Eighth Judicial Circuit Grievance Committee "B" for its further investigation. Mr. Davey instructed Ms. Murphy assign the complaint to a grievance committee member for investigation and enclosed a Notice of Assignment of Investigating Member and/or Panel form. Mr. Kramer was assigned as investigating member (November 15, 2010.

Pursuant to Rule 3-7.4(j) Finding of No Probable Cause (1) the grievance committee terminated the investigation by finding that no probable cause exists to believe that the respondent has violated these rules.

In a letter dated March 18, 2011, you wrote me stating that: "Pursuant to Rule 3-7.4(k), this document serves as a Letter Report of No Probable Cause Finding. On the basis of a diligent and impartial analysis of all the information available, on March IS, 2011, the grievance committee found no probable cause for further disciplinary proceedings in this matter. The membership of the committee is made up of both attorneys and non-attorneys. This case is now closed." (relevant portion)

Rule 3-7.4(k) states: "(k) Letter Reports in No Probable Cause Cases. Upon a finding of no probable cause, bar counsel will submit a letter report of the no probable cause finding to the complainant,

presiding member, investigating member, and the respondent, including any documentation deemed appropriate by bar counsel and explaining why the complaint did not warrant further proceedings." (relevant portion)

It appears that your letter of March 18, 2011 fails to comply with Rule 3-7.4(k) because it failed to explain why the complaint did not warrant further proceedings given the overwhelming evidence of misconduct. You also failed to include any documentation explaining why the complaint did not warrant further proceedings.

The second paragraph of your March 18, 2011 letter states: "Because the Bar only has the authority to address questions of ethics, the committee could not address any legal issues about which you may feel concerned. If you have further concerns about what your legal remedies may be, you must consult with legal counsel of your choice. The Florida Bar is unable to provide legal advice in this respect."

Consult with legal counsel of your choice? That statement belies the fact that Mr. Bauer, a referral from the bar, was my counsel to represent me against prior counsel Barker, Rodems & Cook, PA. Subsequent to Mr. Bauer, I retained attorney Seldon J. Childers to review the representations or Mr. Bauer and Barker, Rodems & Cook, PA. Mr. Childers prepared but refused to sign the following documents (September 17, 2009) regarding the prior representation, and dropped the matter when I would not agree to a "walk-away" settlement with the prior attorneys.

Analysis of Case and Recommendation Economic Analysis Spreadsheet Case Spreadsheet

So it appears your suggestion to "consult with legal counsel of your choice" is not tenable.

Subsequent to the closure of the complaint, I learned that Melissa Murphy, Chair Eighth Judicial Circuit Grievance Committee "B", is with the firm Salter, Feiber, Murphy, Hutson & Menet, P.A.. Attached you will find correspondence dated April 22, 2009 from Kristine Van Vorst of Salter Feiber, addressed to me, declining representation in a mortgage matter. When I called Ms. Van Vorst for a referral April 27, 2009, she was not available and I spoke with Kimberly, an assistant. Kimberly suggested Robert Bauer, then Barbara Cusumando. So it appears that Salter Feiber is biased in favor of Mr. Bauer, a fact that may have prevented a fair consideration of the complaint by Ms. Murphy, the presiding member of the grievance committee.

While a complainant has no right of appeal (Rule 3-7.4(i)) I ask that the designated reviewer request a review by the disciplinary review committee (Rule 3-7.5(a)(2)) and make a recommendation of probable cause that further disciplinary proceedings are warranted. (Rule 3-7.5(a)(5)(G). Rule 3-7.5 refers to a "disciplinary review committee" but this term is not defined in Rule 3-2.1 so please explain. I do not believe a review by the grievance committee would be useful since it ruled 5-0 against action and appears Salter Feiber is biased in favor of Mr. Bauer, but do not reject such review out of hand.

In my view the grievance process is a parody of justice. Thank you.

Sincerely,

Neil Gillespie 8092 SW 115th Loop Ocala, FL 34481 cc: Mr. James A G Davey, Jr.

Mr. Brian Kramer Ms. Melissa Murphy Mr. Carl B Schwait

---- Original Message -----

From: <u>Jim Watson</u>
To: <u>Neil Gillespie</u>

Sent: Wednesday, March 23, 2011 1:36 PM

Subject: Re: Complaint, Gillespie v Robert W. Bauer, The Florida Bar File No. 2011-00,073(8B)

Mr. Gillespie:

I did not state that the grievance committee operated like a grand jury....what I said was that their deliberations were confidential like those of a grand jury.

It is not necessary that there be non-lawyer members present to constitute a quorum....as my original email said a quorum requires three or more members and two of those three members must be lawyers.

Mr. Schwait is one of the Board of Governors members for the 8th Judicial Circuit. He represents the interests of the attorneys who practice in the 8th circuit as well as takes part in the review of Greivance Committee actions and any disciplinary matters that are referred to the Board of Governors for actions required under our rules.

Any further matters which you might raise will have to wait until next week as I am preparing for a trial that begins on Friday. Thanking you for you consideration. Jim Watson

Jim Watson, Chief Branch Discipline Counsel
The Florida Bar
Tallahassee Branch Office of Lawyer Regulation
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850)561-5783 / (850)561-5829 (fax)
jwatson@flabar.org

NOTICE OF GRIEVANCE PROCEDURES

- 1. The enclosed letter is an informal inquiry. Your response is required under the provisions of The Rules Regulating The Florida Bar 4 8.4(g), Rules of Professional Conduct. Failure to provide a written response to this complaint is in itself a violation of Rule 4 8.4(g). If you do not respond, the matter will be forwarded to the grievance committee for disposition in accordance with Rule 3-7.3 of the Rules of Discipline.
- 2. Many complaints considered first by staff counsel are not forwarded to a grievance committee, as they do not involve violations of the Rules of Professional Conduct justifying disciplinary action.
- 3. "Pursuant to Rule 3-7.1(a), Rules of Discipline, any response by you in these proceedings shall become part of the public record of this matter and thereby become accessible to the public upon the closure of the case by Bar counsel or upon a finding of no probable cause, probable cause, minor misconduct, or recommendation of diversion. Disclosure during the pendency of an investigation may be made only as to status if a specific inquiry concerning this case is made and if this matter is generally known to be in the public domain."
- 4. The grievance committee is the Bar's "grand jury." Its function and procedure are set forth in Rule 3-7.4. Proceedings before the grievance committee, for the most part, are non-adversarial in nature. However, you should carefully review Chapter 3 of the Rules Regulating The Florida Bar.
- 5. If the grievance committee finds probable cause, formal adversarial proceedings, which ordinarily lead to disposition by the Supreme Court of Florida, will be commenced under 3-7.6, unless a plea is submitted under Rule 3-7.

SALTER, FEIBER, MURPHY, HUTSON & MENET, P.A.

ATTORNEYS AT LAW

JAMES G. FEIBER, JR.*
DENISE LOWRY HUTSON
DAVID E. MENET
MELISSA JAY MURPHY
JAMES D. SALTER
KRISTINE J. VAN VORST

3940 NW 16TH BLVD., BLDG. B GAINESVILLE, FLORIDA 32605

Post Office Box 357399 Gainesville, Florida 32635-7399 352.376.8201 Fax 352.376.7996

WWW.SALTERLAW.NET

*CERTIFIED CIVIL MEDIATOR

April 22, 2009 VIA CERTIFIED MAIL

Neil J. Gillespie 8092 SW 115th Loop Ocala, Fl 34481

RE: Representation

Dear Mr. Gillespie:

Thank you for your correspondence dated April 20, 2009 including attachments thereto.

On the basis of our preliminary review of the facts of your claim, we have concluded that we are not interested in pursuing the possibility of handling of your claim. Of course, we are not passing judgment on the merits of any claims that might be made on your behalf.

This letter confirms that we have not been retained as attorneys for you on any basis. However, we do urge you to retain an attorney as soon as possible if you want to pursue any claims that might exist to recover damages on your mother's behalf.

We have not undertaken to advise you concerning any statutes of limitation that might be applicable to your claim. Again, if you want to pursue any claims, you should retain an attorney as soon as possible and obtain advice from that attorney concerning the applicable statutes of limitation. We suggest that you contact The Florida Bar Referral Service at 1-800- 342-8011 in getting a referral for an attorney in your area.

We appreciate the opportunity to discuss your case with you.

Very Truly Yours,

Kristine Van Vorst

KVV/kmc

Neil Gillespie

From: "Brian Kramer" <kramerb@SAO8.ORG>
To: "Neil Gillespie" <neilgillespie@mfi.net>
Sent: Monday, March 14, 2011 8:12 AM
Subject: Complaint Against Robert Bauer

Mr. Gillespie:

I have received a letter from you essentially asking to add additional grounds to your complaint against Mr. Bauer. Please be advised that this is not a proper procedure to allege additional complaints against Mr. Bauer. To do so, you must direct your complaints to the Florida Bar, not to the Grievance Committee, or to the investigating member. There is a well defined process or review that every complaint goes through prior to being assigned to a committee. It is not unusual that multiple complaints will be made by one individual against a particular lawyer. However, each complaint must be reviewed and the notice requirements of due process followed in order to the complaint to be properly placed against a lawyer. Please direct all additional complaints about Mr. Bauer's conduct to the Bar. Directing them to me or to the Committee will not result in discipline against Mr. Bauer. Please let me know if you have any questions. Thank you.

Brian.



No. 12A215

Title: Neil J. Gillespie, Applicant

V.

Thirteenth Judicial Circuit, et al.

Docketed: August 31, 2012

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (12-11028, 12-11213)

Aug 13 2012 Application (12A215) to extend the time to file a petition for a writ of certiorari

from October 11, 2012 to December 10, 2012, submitted to Justice Thomas.

Sep 13 2012 Application (12A215) granted by Justice Thomas extending the time to file until

December 10, 2012.

Attorneys for Petitioner:

Neil J. Gillespie 8092 SW 115th Loop (352) 854-7807

Ocala, FL 34481

Party name: Neil J. Gillespie

<u>ехнівіт</u>
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Catherine B. Chapman Guilday, Tucker, Schwartz & Simpson, P.A. 1983 Centre Pointe Boulevard, Suite 200 Tallahassee, FL 32308-7823

Dear Ms. Chapman:

Please be advised that Justice Thomas granted my Rule 13.5 Application to extend time to file a petition for writ of certiorari to the U.S. Supreme Court in C.A.11 cases 12-11028 and 12-11213 where you represented Robert W. Bauer and the Law Office of Robert W. Bauer, P.A.

On September 13, 2012, Application 12A215 was granted by Justice Thomas extending the time to file until December 10, 2012. A copy of the docket is attached. This is a link to the decision: http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12a215.htm

Mr. Bauer and his law firm were Defendants/Appellees in Application 12A215, and will be Defendants/Appellees in my petition for writ of certiorari to the U.S. Supreme Court. On August 27, 2012 at 5:22 p.m. I asked you by email "Please advise if you will represent Mr. Bauer in my petition for writ of certiorari to the U.S. Supreme Court. If so, I will serve you under Supreme Court Rule 29." As of today I do not have the courtesy of a response from you. In an abundance of caution I served you under Supreme Court Rule 29, which added time and cost to this matter. Your failure to respond as to whether or not you represent Mr. Bauer is conduct prejudicial to the administration of justice, and conduct inconsistent with the effective and expeditious administration of the business of the courts. Withholding my file is obstruction of justice.

In response to Mr. Bauer's letter dated August 24, 2012, "If you wish to contact me at the number listed above I would be happy to discuss resolving the lien in manner that is acceptable to all parties.", that offer is rejected. If you or Mr. Bauer have something substantive to say, put it in writing in a letter. I also reject Mr. Bauer's offer made by email August 27, 2012, "Mr. Gillespie is free to contact me on an unrecorded line and I will be happy to speak with him." Again, If you or Mr. Bauer have something substantive to say, put it in writing in a letter.

Please be advised that all calls on my home office business telephone extension are recorded for quality assurance purposes pursuant to the business use exemption of Florida Statutes chapter 934, section 934.02(4)(a)(1) and the holding of Royal Health Care Servs., Inc. v. Jefferson-Pilot Life Ins. Co., 924 F.2d 215 (11th Cir. 1991). There are no exceptions for Mr. Bauer or anyone else.

I demand the immediate return of my file to prepare for my petition for writ of certiorari to the Supreme Court of the United States. Time is of the essence. Thank you.

Neil J. Gillespie Milly 8092 SW 11 Ocala, Florida 34481

Enclosure

- 20 Cases Related to <u>Gillespie v. Barker, Rodems & Cook, PA</u>, 05-CA-007205 *RCR* denotes cases where Ryan Christopher Rodems represented his firm and partner against former client Gillespie
- 1.RCR Hillsborough Co. 05-CA-7205, Gillespie v. Barker, Rodems & Cook, P.A., Aug-11-2005 to Jun-21-2011, (Mr. Bauer appeared for Gillespie April 2, 2007 through October 1, 2009).
- 2.RCR <u>Hillsborough Co. 05-CA-7205</u>, Vexatious libel counterclaim, BRC v. Gillespie, Jan-19-2006 to Sep-28-2010, (Mr. Bauer appeared for Gillespie April 2, 2007 October 1, 2009)
- 3.RCR 2dDCA, 2D06-3803: Gillespie v. BRC, discovery related appeal (Gillespie pro se) (closed)
- 4.RCR 2dDCA, 2D07-4530: BRC v. Gillespie, voluntary dismissal (Mr. Bauer for Gillespie) (closed)
- 5.RCR 2dDCA, 2D08-2224: Gillespie v. BRC, § 57.105 sanctions (Mr. Bauer for Gillespie) (closed)
- 6. RCR 2dDCA, 2D10-5197: Gillespie v. BRC, appeal final summary judgment (Gillespie pro se) (closed)
- 7. RCR 2dDCA, 2D10-5529: Gillespie v. BRC, prohibition, remove Judge Cook (Gillespie pro se) (closed)
- 8. RCR 2dDCA, 2D11-2127: Gillespie v. BRC, prohibition/venue, Judge Arnold (Gillespie pro se) (closed)
- 9. RCR Fla.Sup.Ct. SC11-858: Gillespie v. BRC, habeas corpus, prohibition (Gillespie pro se) (closed)
- 10.RCR Fla.Sup.Ct. SC11-1622: Gillespie v. BRC, mandamus, other relief (Gillespie pro se) (closed)

13.

- 11.RCR Federal Ct. 5:10-cv-503: Gillespie v. Thirteenth Judicial Circuit, Fla., Civil Rights/ADA (closed, appeal)
- 12. <u>Federal Ct. 5:11-cv-539</u>: Estate/Gillespie v. Thirteenth Jud. Cir., FL., Civil Rights, ADA (closed, appeal)

C.A.11, 12-11028-B: Estate/Gillespie v. Thirteenth Jud. Cir., FL., Estate claims, Civil RICO (closed, appeal)

- 14.*RCR* C.A.11, 12-11213-C: Gillespie v. Thirteenth Judicial Circuit, Fla., Civil Rights, ADA, (closed, appeal)
- 15.RCR SCOTUS Rule 22 Application, Justice Thomas May 31, 2011, not docketed. (Gillespie pro se) Emergency Petition for Stay or Injunction, re: Supreme Court of Florida SC11-858
- 16.RCR SCOTUS Rule 22 Application, Justice Thomas June 11, 2011, not docketed. (Gillespie pro se) Emergency Petition for Stay or Injunction, re: Supreme Court of Florida SC11-858
- 17.*RCR* SCOTUS Petition for Writ of Certiorari August 20, 2012 review Fla.Sup.Ct. case no. SC11-1622, Returned August 23, 2012 because the petition was determined out-of-time.
- 18.RCR SCOTUS Rule 13.5 Application to Justice Thomas August 13, 2012 GRANTED September 13, 2012, No. 12A215 extended the time to file a petition to Dec-10-2012, C.A.11, 12-11028-B and 12-11213-C
- 19. <u>Original case 99-2795-CIV-T-26C</u>, Eugene R. Clement v. AMSCOT Corp. class action Dec-09, 1999
- 20. Original Appeal 01-14761-AA, Clement, Blomefield, Gillespie v. AMSCOT Corp, filed August 20, 2001

EXHIBIT



The Law Offices of

Robert W. Bauer, P.A.

2815 NW 13th Street, Suite 200E, Gainesville, FL 32609 www.bauerlegal.com

Robert W. Bauer, Eso. David M. Sams, Esa.

Phone: Fax:

(352)375.5960 (352)337.2518

January 4, 2010

Honorable Charlie Crist Office of the Governor The Capitol, PL05 Tallahassee, FL 32399-0001

Fax: 850-487-0801

Ref: Ryan Christopher Rodems

Dear Governor Crist,

I have recently become aware that Ryan Rodems has been nominated for both a County Court judgeship and Circuit Court judgeship. I had the opportunity of meeting and getting acquainted with Mr. Rodems in a case in which we served as opposing counsel. The case to which I refer is Gillespie v. Baker, Rodems, and Cook, PA. et al. Case No. 2D08-2224. I would like to also take the opportunity to give you my opinion of Mr. Rodems and the professional relationship we shared in connection with the aforementioned case.

While there were times when Mr. Rodems and I strongly disagreed during the course of litigation, I believe that Mr. Rodems consistently performed in an honorable and professional manner. Even in the most contentious moments of the case, Mr. Rodems never wavered in his civility or composure towards me or my client. I found Ryan Rodems to be a zealous advocate while still maintaining a professional approach in his efforts to bring the case to a resolution. Throughout litigation, Mr. Rodems displayed an exceptional knowledge of both procedural and substantive law, including the areas of contracts, fraud, and fiduciary duty with which the case dealt. Overall, my professional relationship with Ryan Rodems was rewarding, enjoyable, and exemplary of the relationship that I hope to achieve with any opposing counsel that I may encounter. I say this even thou our styles are very different and often in complete opposition.

It is my personal opinion that Ryan Christopher Rodems is an honorable and honest gentleman capable of satisfying the duties and responsibilities of a judgeship should he be appointed to such a position in either County or Circuit Court.

Should you have any questions regarding my experiences of working with Mr. Rodems, please contact me at 352-375-5960.

Sincerely,

Kobert W. Bauer, Esq.

BARKER, RODEMS & COOK, P.A. **CLOSING STATEMENT**

Style of Case: Eugene R. Clement, Gay Ann Blomefield, and

Neil Gillespie v. AMSCOT Corporation.

As of: October 31, 2001

Our File No.: 99.4766

ATTORNEYS' FEES

\$50,000.00

& COSTS

PAYMENTS TO CLIENTS

EUGENE R. CLEMENT **GAY ANN BLOMEFIELD** \$ 2,000.00

2,000.00

NEIL GILLESPIE

2,000.00

TOTAL

\$ 56,000.00

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 courtawarded fees and costs. I also acknowledge that I have received a copy of the fully executed Release and Settlement Agreement dated October 30, 2001.

BARKER, RODEMS & COOK, P.A.

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

NEIL J. GILLESPIE,

PLAINTIFF,

DIVISION "F"

CASE NUMBER 05-CA-72105

VS.

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

DEFENDANTS.

CLERK OF CIRCUIT OF CHERK OF CHECHT PORTY, FL

ORDER ON DEFENDANTS' MOTION TO DISMISS AND STRIKE

THIS CAUSE came on for hearing on September 26, 2005, upon Defendant's Motion to Dismiss and Strike, and counsel for the parties being present and having made arguments and the court having considered the Plaintiff's Rebuttal to Defendant's Motion to Dismiss and Strike. Defendant's Reply to Plaintiff's Rebuttal to Defendant's Motion to Dismiss and Strike and the Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike, and the court being advised fully in the premises, it is thereupon,

ADJUDGED as follows:

- 1. Defendant's Motion to Dismiss and Strike is granted in part and denied in part.
- 2. Those portions of Defendant's Motion to Dismiss and Strike seeking to dismiss the Complaint are denied. Defendant shall have fifteen days from the date of this order within which to file responsive pleadings.

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EXHIBIT

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- 3. Those portions of Defendant's Motion to Dismiss and Strike seeking to strike portions of the Complaint is granted in the following particulars:
 - a. Paragraphs 47, 48, 49 and 50 of the Complaint are stricken.
 - b. Exhibit 8 to the Complaint is stricken.
 - c. All references to or demands for punitive damages are stricken or failure to comply with §768.72 of the Florida Statutes.

ORDERED in Chambers, at Tampa, Hillsborough County, Florida, this

____ day of **_____ AN 1 3 2006**___, 20____

RICHARD A. NIELSEN CIRCUIT JUDGE

Copies furnished to:

Ryan C. Rodems, Esquire 300 West Platt Street, Suite 150 Tampa, Florida 33606

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481 STATE OF FLORIDA (COUNTY OF HILLSBOROUGH)

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE IN MY OFFICE. WITHES MY HAND AND OFFICIAL SEAL THIS 3127 DAYOF QUALITY

3

CLERK OF CHOUIT COURT

IN THE CIRCUIT COURT FO THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

NEIL J. GILLESPIE,

Plaintiff,

vs.

Case No.:

05CA7205

Division:

 \mathbf{F}

BARKER, RODEMS & COOK, P.A., a Florida corporation; and WILLIAM J. COOK,

RECEIVED

AUG 29 2005

CLERK OF CIRCUIT COURT

Defendants.

DEFENDANTS' MOTION TO DISMISS AND STRIKE

Defendants, Barker, Rodems & Cook, P.A. and William J. Cook, pursuant to Rules 1.140(b)(6) and (f), Florida Rules of Civil Procedure, move to dismiss the Plaintiff's Complaint and strike certain allegations and claims, and state as follows:

- 1. Count I fails to state a cause of action for breach of contract.
- 2. Count I is barred on its face by the doctrines of waiver and estoppel.
- 3. Count II fails to state a cause of action for fraud.
- 4. Count II is barred by the economic loss rule.
- 5. Count II must be dismissed for failure to comply with section 768.72(1), Florida Statutes.
- 6. Both counts must be dismissed as to William J. Cook because Defendant Cook acted at all times within the course and scope of his employment with Defendant Barker, Rodems & Cook, P.A, did not act on his own behalf, and was not a party to the contract at issue.
 - 7. Paragraphs 47 through 50 and Exhibit 8 should be stricken as immaterial,

impertinent, or scandalous.

8. Plaintiff's claim for attorney's fees must be stricken because he is proceeding prose.

WHEREFORE, Defendants Barker, Rodems & Cook, P.A. and William J. Cook move to dismiss and strike the claims and allegations described herein.

RESPECTFULLY SUBMITTED this 29 day of August, 2005.

Ryan Christopher Rodems, Esquire

Florida Bar No. 947652

Barker, Rodems & Cook, P.A.

300 West Platt Street, Suite 150

Tampa, Florida 33606

Telephone:

813/489-1001

Facsimile:

813/489-1008

Attorneys for Defendants,

Barker, Rodems & Cook, P.A. and William J. Cook

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants' Motion to Dismiss and Strike has been furnished via U.S. Mail to Neil J. Gillespie, 8092 SW 115th Loop, Ocala, Florida 3448, this 29th day of August, 2005.

Ryan Christopher Rodems, Esquire

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

NEIL J.	GILLESPIE

Plaintiff,

CASE NO.: 2005 CA-7205

VS.

BARKER, RODEMS & COOK, P.A., a Florida corporation,

DIVISION: F

WILLIAM J. COOK,

Detend	lants.	

PLAINTIFF'S REBUTTAL TO

DEFENDANTS' MOTION TO DISMISS AND STRIKE

1. Mr. Rodems' argument before this Honorable Court belies the fact that Defendants once represented Gillespie as his lawyers, and owed Gillespie a duty under the attorney/client relationship. 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). 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).

2. The Fiduciary Relationship

- (a) <u>Background</u>. The Amscot Action was originally filed December 9, 1999 by the law firm Alpert, Barker, Rodems, Ferrentino & Cook, PA; Eugene Clement was the sole plaintiff, and Gillespie signed-on November 3, 2000. In a different lawsuit, Gillespie signed a Representation Contract with the Alpert firm on March 21, 2000, against ACE America's Cash Express; this lawsuit was later joined by Florida Attorney General Robert Butterworth. Jonathan Alpert, the senior partner, had a national reputation, and his law firm appeared stable and competent. Then Mr. Alpert unexpectedly ran for State Attorney; he lost the November 7th election, and a month later the law firm dissolved.
- (b) <u>Barker</u>, <u>Rodems & Cook</u>, <u>P.A</u>. was formed on or about August 4, 2000, while the Defendants were still employed by the Jonathan Alpert law firm. For a period of four months the Defendants were employed by the Alpert firm while quietly working on their other plans. Defendants are all members of The Florida Bar: Chris Barker, age 40, J.D. University of Alabama; Ryan Rodems, age 38, J.D. Florida State; and William Cook, age 37, J.D. Stetson. By contrast, of the Amscot plaintiffs, one was in his 70's and retired, possibly with a high school education; another was middle aged and worked for a temp service, and Gillespie, age 49, disabled since 1993, but with a BA earned over a twenty year period, with a few paralegal courses. The lawyers and their clients were a very disparate group, with the lawyers in a vastly superior position of knowledge and power.
- (c) Evidence of malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud. When the Alpert firm dissolved, Defendants quickly moved into new offices as Barker, Rodems & Cook, P.A. While Defendants immediately filed a Joint Stipulation for Substitution of

Counsel in the Amscot Action, Defendants failed to execute the required contingent fee contracts with their clients. After a short honeymoon period, the situation deteriorated.

The following is alleged in the Complaint: Defendants failed to prevail on the merits of the Amscot Action, and failed to attain class action status. On August 1, 2001, United States District Judge Richard Lazzara issued an order in the Amscot Action denying Class Certification as moot, dismissed Count I with prejudice, dismissed Counts II and III without prejudice to bring in state court, and closed the file. Soon after, the attorney for Amscot, John Anthony, called Defendants trying to hire Plaintiff's lawyers, offering Defendants a \$5,000 "consulting fee" or "non-returnable retainer." Defendant Cook described the money as an "improper payoff attempt" and not an offer to settle. Mr. Cook said that "the Florida Bar would likely prohibit such an agreement" but Mr. Cook did not report John Anthony's "improper payoff attempt" to the Florida Bar. Instead, Mr. Cook turned on his clients and embraced John Anthony in pursuit of a \$50,000 payment. Cook concocted a "sticking part" argument, saying Amscot was mad at the plaintiffs for suing and therefore did not want to pay them anything, while maintaining that Amscot wanted to pay Cook and the law firm money to settle the Action. Cook told Gillespie that the law firm incurred about \$33,000 in costs and expenses when in fact it was later revealed that the actual amount was \$3,580.67, and \$2,544.70 paid to Mr. Alpert. During this time Cook and the law firm refused to account for its attorney's fees as required by the Client's Statement of Rights, which the law firm also neglected to execute. Mr. Cook disparaged the Representation Contract, saying Gillespie's recovery was limited to \$1,000, citing a Truth In Lending Action (TILA) statutory limitation, even though the limitation was moot under the circumstances. As for Gillespie's recovery as potential

class action representative, this too was ignored or discounted, even though Gillespie endured a nasty deposition by John Anthony, Mr. Cook was not zealously representing Gillespie's interest, but was focused on his own plans to extract \$50,000 from Amscot. There was no basis for the amount of the \$50,000 demand, other than greed. Cook never presented Gillespie with any itemization of costs, no time sheets, no hours worked or hourly rate, nothing, no method of determining the \$50,000 lawyer's fee. Cook's stance and separate negotiation with Amscot placed Cook in a position of conflict with his clients, and Gillespie was concerned with possible adverse consequences of a failed Amscot Action, including paying Amscot's costs and attorney's fees. Because Cook said Gillespie's recovery was limited to \$1,000, it was in Gillespie's interest to settle quickly. It was not in Gillespie's interest to help Cook and the law firm secure a \$50,000 windfall, to which there was no evidence of entitlement. If this highly speculative effort failed, or other unforeseen events intervened, Gillespie would be stuck paying Amscot's costs and attorney's fees. Gillespie discussed this with Cook, in his law office, and Cook stated that he would accept \$10,000 from Amscot for fees and costs, but wanted to first try and get \$50,000 instead. On August 15, 2001, Cook wrote Gillespie that he would appeal Judge Lazzara's order, and demand a settlement from Amscot of \$1,000 for each Amscot plaintiff and \$50,000 for himself. This prompted Gillespie's August 16, 2001 letter to Cook the next day, a communication of protest challenging Cook's "sticking part" argument. Gillespie wrote (Exhibit 5 of the Complaint):

"I agree with you that the Defendant will probably not accept your settlement offer. I believe the sticking point is your request for \$50,000 in attorney's fees and costs. I do not believe the \$1,000 request each for

myself, Mr. Clement and Ms. Blomefield is a barrier to settlement.

Therefore I suggest you ask for a lesser amount of attorney's fees and costs. Given your lack of success in this matter thus far, I suggest you ask for \$10,000 in attorney's fees and costs. I believe this is a more realistic amount. Given how poorly the case has gone up to now, I believe it is in our interest to settle quickly."

In a memo dated Monday, August 20, 2001, Cook wrote the following to memorialize his conversation with Gillespie: (Exhibit 6 of the Complaint).

- "a. COOK: "I explained to him that I did not believe that the sticking part was created through the attorney's fees, but rather it was the payment to the clients."
- b. COOK: "I told him of my conversation with John Anthony in which he offered to pay this firm \$5,000.00 but would not agree to pay our client's anything."
- c. COOK: "I told him I rejected that offer. He asked me why I had not mentioned the settlement offer to him previously. I told him it was not a settlement offer. It was an improper payoff attempt."
- d. COOK: "I told him that the \$50,000.00 demand was not set in stone and we would consider the \$10,000.00 offer that he suggested.

Paragraph 31 of the Complaint alleges how Defendants essentially took a prohibited proprietary interest in the Amscot Action:

"31. Once COOK admitted to GILLESPIE that the LAW FIRM would accept \$10,000 for legal fees, anything more was lawfully part of the Total

Recovery to which plaintiffs were entitled a percentage under the terms of the Representation Contract. The proposed settlement was economic in nature, for business reasons, and was not based on any legal victory, nor constrained by Truth In Lending Act (TILA) limitations or its fee-shifting provision. This settlement was market driven and COOK was rolling the dice, not collecting lawyer's fees. COOK's demand was speculative and the LAW FIRM had taken a proprietary interest in the action, under the guise of collecting lawyer's fees."

Another example of Defendants' indifference to Gillespie in the settlement was the forgiveness of outstanding loans to Amscot plaintiffs Clement and Blomefield. When Gillespie told Cook that he did not have any outstanding debt to Amscot, and that debt forgiveness to the other Amscot plaintiffs created an inequity in the settlement, Cook was dismissive. And although Defendants did ultimately secure for all three Amscot plaintiffs another \$1,000 each from Amscot, this was minimal, late in arriving, a form "hush money" to protect their \$50,000 windfall from Amscot.

One of the more egregious acts in this matter was Defendants' ruse that the United States Court of Appeals for the Eleventh Circuit awarded the Defendants \$50,000 in attorney's fees and costs. Defendants also created a phony Closing Statement falsely reflecting \$50,000 in court-awarded attorney's fees and costs. Plaintiff alleges this wanton, unconscionable and self-serving behavior in Paragraphs 38 and 39:

"38. Once Amscot agreed to pay the plaintiffs a monetary settlement, COOK's earlier "sticking part" argument failed as a strategy to evade the Representation Contract with GILLESPIE. Therefore COOK utilized a

new ruse. COOK told GILLESPIE that the *United States Court of Appeals*for the Eleventh Circuit awarded \$50,000 in attorney's fees and costs to
the LAW FIRM, and that this fact precluded recovery under the
Representation Contract, citing a "whichever is higher" provision for
court-awarded attorney's fees and costs.

39. The LAW FIRM prepared a phony Closing Statement dated
October 31, 2001 falsely reflecting the \$50,000 court-awarded attorney's
fees and costs. (Exhibit 7)."

Under the Florida Rules of Professional Conduct, in the event there is a recovery, upon the conclusion of the representation, the lawyer must prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of the fee received by each participating lawyer or law firm. A copy of the closing statement must be executed by all participating lawyers, as well as the client, and each must receive a copy. (Rules Regulating the Florida Bar, Rule 4-1.5(f)(5). Notwithstanding that the Closing Statement is a sham, the statement did not reflect an itemization of all costs and expenses, together with the amount of the fee received by each participating lawyer or law firm. In the past Defendants responded to this by saying it was not required because Amscot paid them separately, but nothing in the Rules Regulating the Florida Bar creates an exemption to Rule 4-1.5(f)(5).

Taken together, Defendants' behavior deprived Gillespie of the knowledge and information required to make an informed choice when he signed the closing statement.

The present case involves the following two separate contracts:

- (i) The Representation Contract (contingent fee), Exhibit 1 to the Complaint; and
- (ii) The Settlement Agreement of October 30, 2001 between Amscot Corporation, Neil Gillespie, Barker, Rodems & Cook, P.A., and the other two plaintiffs to the Action, Eugene R. Clement and Gay Ann Blomefield.

Defendants induced Gillespie to enter into the second contract, the Settlement Agreement of October 30, 2001, under false pretenses. Defendants told Plaintiff that the United States Court of Appeals for the Eleventh Circuit awarded Defendants \$50,000 in attorney's fees and costs, when in fact the Appellate Court ruled that each party must pay its own costs and attorney's fees. Defendants wanted Gillespie to believe that the Appellate Court awarded it \$50,000 so that Defendants could collect the money and avoid the terms of the contingent fee contract. Gillespie plead the essential elements of fraud in the Complaint, Exhibit 46:

- "46. COOK and the LAW FIRM committed fraud because:
- a. COOK's statement to GILLESPIE that the Appellate Court awarded the LAW FIRM \$50,000 in attorney's fees and costs was a material fact that was untrue, as was the LAW FIRM's Closing Statement to GILLESPIE listing court-awarded fees and costs of \$50,000. The Closing Statement's disclosure was a material fact that was untrue; and
- b. The falsehood described above was known by COOK and the LAW FIRM to be untrue at the time it was made; and
- c. The falsehood by COOK and the LAW FIRM was stated for the purpose of inducing GILLESPIE to approve a settlement; and

- d. GILLESPIE relied upon the falsehood from COOK and the LAW FIRM as true and correct, and approved the settlement on October 30, 2001; and
- e. By approving the settlement GILLESPIE suffered financial loss of \$6,224.78, by accepting the sum of \$2,000 instead of the sum of \$8,224.78 to which GILLESPIE was entitled under law and the Representation Contract.

Defendants behavior was a breach of fiduciary duty showing that Defendants acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud. Plaintiff moves to amend the Complaint to include a count of Breach of Fiduciary Duty, a count separate from that of Fraud and Breach of Contract. Gillespie sustained independent damages, the debt forgiveness other Amscot plaintiffs enjoyed created an inequity in his settlement, because Gillespie did not have any outstanding debt with Amscot, and other damages.

As to the existing Count II, Fraud, it may be more accurately plead as Fraud in the Inducement. If fraud occurs in connection with misrepresentations, statements or omissions which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort. (Susan Fixel, Inc. v Rosenthal & Rosenthal, Inc., 842 So. 2d 204). Defendants induced Gillespie enter into a settlement agreement with Amscot under false pretenses, and that contract was separate and distinct from the contingent fee contract between Defendants and Gillespie.

3. Mr. Rodems argued the following case law before this Honorable Court September 26, 2005:

- (a). Defendants' rely upon <u>Geico General Ins. Co., Inc. v. Graci</u>, 849 So. 2d 1196, and <u>Franz Tractor Co. v. J.J. Case Co.</u>, 566 So. 2d 524, arguing that when there are conflicts between the allegations and the documents attached as exhibits, the plain language of the document will control.
- (i). In his argument, Mr. Rodems referred to Plaintiff's Exhibit 1 of the Complaint, the Representation Contract, and stated that the contract was not signed, but that he would accept the contract as if it were signed. Mr. Rodems contradicts the very rule he asks this Court to honor. The Representation Contract is not signed because the parties never executed the contract. If the plain language of this document controls, then the document is not executed. Mr. Rodems appears to mislead the Court about this fact.
- (ii) Concerning Exhibit 2 of the Complaint, the Closing Statement, Mr. Rodems argues that because the Closing Statement conflicts with the pleadings, that the plain language of the Closing Statement controls. In Geico and Franz Tractor, the truthfulness of the exhibits is not in question, so the plain language controls. In the present case, Plaintiff attached the Closing Statement as evidence of deceit, showing that it is impeached by the United States Court of Appeals ruling, attached as Exhibit 7. The Closing Statement was produced by the Defendants, but it is a sham document, an exception to the rule, and Plaintiff objects on the grounds of estoppel. The truthfulness of the Closing Statement is a matter of fact for the jury to decide. In the alternative, upon leave to amend the Complaint, Plaintiff will remove the Closing Statement exhibit, plead the allegation by reference in the Complaint, and then impeach the Closing Statement with the Appellate Court ruling, Exhibit 7.

(b). Defendants rely on six cases in an effort to thwart a claim of punitive damages for fraud, on the grounds that Plaintiff's allegations breach of contract and fraud arise from the same set of facts, and are thus barred. Also, estopple is cited in <u>Taylor</u>, and the economic loss rule in <u>Sarkis</u>, as a further bar to punitive damages.

Mr. Rodems cited the following cases:

Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So. 2d 1120

Lake Placid Holding Co. v. Paparone, 508 So. 2d 372

Taylor v. Kenco Chemical & Mfg. Corp., 465 So. 2d 581

John Brown Automation, Inc., v. Nobles, 537 So. 2d 614

Sarkis v. Pafford Oil Co., 697 So. 2d 524

R.D.M.H., Inc., v. Dempsey, 618 So. 2d 794

Mr. Rodems' argument is misplaced because five of the six cases cited are between parties dealing at arm's-length and therefore not on point with the present case that involves the attorney-client relationship and accompanying fiduciary duty. In the remaining case, Lake Placid Holdings, a finding of breach of fiduciary duty was vacated by the court. If an attorney is guilty of oppressive conduct showing a great indifference to the person and property of his client, malice may be imputed and punitive damages awarded, even in an action based on breach of contract. (Singleton v. Foreman, 435 F.2d 962). Punitive damages are awardable when the offending party acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud. (Stintson v. Feminist Woman's Health Center, Inc., 416 So. 2d 1183). Plaintiff has established that Defendants acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others,

wantonness, oppression, outrageous aggravation and fraud. In <u>Stintson</u> the lawyers obfuscated, manipulated and deceived their clients in a tortious attempt to take all of the settlement money. In the present case Defendants took most of the settlement money, about ninety percent. Therefore punitive damages should remain.

- (iii). Defendants' remaining case, <u>Taylor Woodrow Homes Florida</u>, <u>Inc.</u>, <u>v. 4/46-A Corp</u>, 850 So. 2d 536, sets forth the essential element of fraud, which Plaintiff already alleged in the Complaint, paragraph 46. In the alternative, Plaintiff moves for leave to amend the Complaint.
- 5. Count I states a cause of action for breach of contract. A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that plaintiff would be entitle to no relief under any state of facts which could be proved in support of claim; on motion to dismiss on the pleadings it must be assumed that all of the allegations of the complaint are true. In the alternative, Plaintiff moves to amend the Complaint.
- 6. Count I is not barred by the doctrines of waiver and estoppel. "The doctrine of estoppel...should be applied with great caution." (22 Fla. Jur. 2d, *Waiver and Estoppel* § 5, p. 489, citations omitted). "The doctrine of estoppel is not applicable to transactions which are...contrary to public policy." (id. at 490). The prohibition on estoppel contrary to public policy should defeat Defendants' claim, because the attorney-client relationship has vital public policy implications.
- 7. Defendants claim that Count II of the Complaint fails to state a cause of action for fraud. Plaintiff disagrees, and points to Paragraph 46 of the Complaint which sets forth the essential elements of fraud:

- "46. COOK and the LAW FIRM committed fraud because:
- a. COOK's statement to GILLESPIE that the Appellate Court awarded the LAW FIRM \$50,000 in attorney's fees and costs was a material fact that was untrue, as was the LAW FIRM's Closing Statement to GILLESPIE listing court-awarded fees and costs of \$50,000. The Closing Statement's disclosure was a material fact that was untrue; and b. The falsehood described above was known by COOK and the LAW FIRM to be untrue at the time it was made; and
- c. The falsehood by COOK and the LAW FIRM was stated for the purpose of inducing GILLESPIE to approve a settlement; and
- d. GILLESPIE relied upon the falsehood from COOK and the LAW FIRM as true and correct, and approved the settlement on October 30, 2001; and
- e. By approving the settlement GILLESPIE suffered financial loss of \$6,224.78, by accepting the sum of \$2,000 instead of the sum of \$8,224.78 to which GILLESPIE was entitled under law and the Representation Contract."

Plaintiff believes Count II states a cause of action for fraud, and Paragraph 46 states the essential elements of fraud. In the alternative, Plaintiff moves to amend the Complaint.

8. Defendants claim that Count II of the Complaint is barred by the economic loss rule. Plaintiff stated a cause of action for fraud in Paragraph 46 of the Complaint. When fraudulent misrepresentation and negligent misrepresentation in the formation of a

contract are alleged, the economic loss rule does not bar tort action based on such misrepresentations, even absent a tort independent of breach of contract. (Wassall v. W.H. Payne, 682 So. 2d 678).

- 9. Plaintiff complies with section 768.72(1) Florida Statutes, claim for punitive damages, as follows: (In the alternative Plaintiff moves to amend the Complaint).
- (a) There is a reasonable showing by the evidence in the record which would provide a reasonable basis for recovery of such damages. Defendants acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud.
- (b) If an attorney is guilty of oppressive conduct showing a great indifference to the person and property of his client, malice may be imputed and punitive damages awarded, even in an action based on breach of contract. (Singleton v. Foreman, 435 F.2d 962). Punitive damages are awardable when the offending party acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud. (Stintson v. Feminist Woman's Health Center, Inc., 416 So. 2d 1183). Plaintiff has established that Defendants acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation and fraud.
- (c) Defendant Cook is personally liable in this lawsuit "Because an attorney has a fiduciary responsibility to the client, that attorney may be personally responsible for breaching that duty." (4 Fla. Jur. 2d, § 478, p. 544). Also, the Florida Supreme Court has specifically rejected a defendant attorney's attempt to use the professional association as a shield to prevent personal liability. (Krehling v. Baron, 900 F. Supp. 1574).

- (d) Ryan Rodems and Christopher Barker have vicarious liability for the acts of a partner, if not directly for their own acts. A law firm's liability may be based on its duty to supervise the activities of a partner of that firm. (Rules Regulating the Florida Bar, Rule 4-5.1(a).
- 10. Defendant Cook is personally liable in this lawsuit "Because an attorney has a fiduciary responsibility to the client, that attorney may be personally responsible for breaching that duty." (4 Fla. Jur. 2d, § 478, p. 544). Also, the Florida Supreme Court has specifically rejected a defendant attorney's attempt to use the professional association as a shield to prevent personal liability. (Krehling v. Baron, 900 F. Supp. 1574).
- 11. As for Paragraphs 47 through 50 and Exhibit 8, striking of the pleadings is not favored and is an action to be used sparingly by the courts, with any doubts to be resolved in favor of the pleadings. A motion to strike matter from the pleadings as redundant, immaterial, or scandalous should only be granted if the material is wholly irrelevant, and can have no bearing on the equities and no influence of the decision. (Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co., 342 So. 2d 1005). Paragraphs 47, 48, and 49 are important in pleading the facts of Defendants' behavior after the discovery of fraud. Paragraph 50 sets forth the history with the Florida Bar. Plaintiff waited a year before filing an ethics complaint, allowing Defendants every opportunity to explain. During his argument before this Court, Mr. Rodems suggested that the Florida Bar exonerated Defendants; Paragraph 50 explains and answers his assertion. Exhibit 8 supports the Complaint, and is evidence of Plaintiff's attempt to secure an explanation for the "improper payoff attempt" by attorney John Anthony. Of note, Defendants did not object to Paragraph 51, so it remains.

12. Plaintiff drops his claim for attorney's fees at this time.

New matter. May this Honorable Court kindly take notice that the two other plaintiffs in the Amscot Action, Eugene R. Clement and Gay Ann Blomefield, are similarly situated to Gillespie and may not have knowledge of this lawsuit or awareness of their rights.

WHEREFORE, Plaintiff rebuts Defendants' Motion to Dismiss and Strike and requests that this Honorable Court deny the motion, with leave to amend the Complaint, and other remedies the Court deems appropriate.

RESPECTFULLY SUBMITTED this day of October, 2005.

Neil J. Gillespie, Plaintiff pro se 8092 SW 115th Loop

Ocala, Florida 34481

Telephone: (813) 810-0151

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Plaintiff's* Rebuttal to Defendants' Motion to Dismiss and Strike and case law has been furnished via hand delivery to Ryan Christopher Rodems, Attorney at Law, Barker, Rodems & Cook, P.A., Attorneys for Defendants, 300 West Platt Street, Suite 150, Tampa, Florida

Neil J. Gillespie

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

NEIL J. GILLESPIE,	
Plaintiff, vs.	CASE NO.: 2005 CA-7205
BARKER, RODEMS & COOK, P.A., a Florida corporation,	DIVISION: F
WILLIAM J. COOK,	
Defendants.	_/

PLAINTIFF'S NOTICE OF SERVICE OF CASE LAW IN REBUTTAL TO DEFENDANTS' MOTION TO DISMISS AND STRIKE

Plaintiff pro se, Neil J. Gillespie, provided the following case law to Defendants' attorney, Mr. Ryan Rodems, via hand delivery:

- 1. <u>Deal v. Migoski</u>, 122 So. 2d 415
- 2. Gerlach v. Donnelly, 98 So. 2d 493
- 3. Susan Fixel, Inc. v Rosenthal & Rosenthal, Inc.
- 4. Singleton v. Foreman, 435 F.2d 962
- 5. <u>Wassall v. W.H. Payne</u>, 682 So. 2d 678
- 6. Stintson v. Feminist Woman's Health Center, Inc., 416 So. 2d 1183
- 7. <u>Krehling v. Baron</u>, 900 F. Supp. 1574

8. <u>Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co.</u>, 342 So. 2d 1005

RESPECTFULLY SUBMITTED this ______ day of October, 2005.

Neil J. Gillespie, Plaintiff pro se

8092 SW 115th Loop Ocala, Florida 34481

Telephone: (813) 810-0151

CERTIFICATE OF SERVICE

122 So.2d 415

122 So.2d 415

(Cite as: 122 So.2d 415)

C

District Court of Appeal of Florida, Third District. John J. DEAL, Appellant,

v. Walter J. MIGOSKI, Appellee. No. 59-143.

July 14, 1960.

Action by plaintiff to rescind assignment of his distributive interest in estate of his grandmother to his attorney, employed for perfecting settlement of estate, on ground that purchase by attorney was unconscionable. The Circuit Court for Dade County, George E. Holt, J., entered decree for attorney and plaintiff appealed. The District Court of Appeal, Pearson, J., held that where undisputed facts showed that attorney purchased client's interest while employed to secure settlement of estate, that purchase price was far less than the distributive share and that client at time of purchase was unemployed and desperate for money, burden was upon attorney to adequately demonstrate that the purchase was for a full and complete consideration, and principle of clean hands would not be applied against client whom attorney claimed had not revealed that he had made a previous assignment of income from estate.

Reversed and remanded for further proceedings.

West Headnotes

[1] Attorney and Client \$\infty\$ 123(2)

45k123(2) Most Cited Cases

Responsibility of an attorney to place client's interest ahead of his own in dealing with matters upon which attorney is employed is foundation of legal system, and if an attorney purchases from the client subject matter of the attorney's employment then transaction is suspect. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10.

[2] Attorney and Client €=123(2)

45k123(2) Most Cited Cases

Where attorney employed by another purchases the subject matter of his employment, upon action being filed to rescind transaction attorney has burden of proving that he paid full and complete consideration for purchase. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10.

Page 1

[3] Attorney and Client © 123(2)

45k123(2) Most Cited Cases

[3] Equity \$\infty\$ 65(2)

150k65(2) Most Cited Cases

Where attorney was employed by client having distributive interest in estate to effect a settlement of such estate and purchased client's interest for a price which was considerably less than the distributive share, and at time of purchase client was unemployed and desperately needed funds, attorney had burden of demonstrating that purchase was for a full and complete consideration and doctrine of clean hands would not be invoked against client who did not reveal to attorney that he had made a previous assignment of income from estate. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10; Preamble.

*416 Cunningham & Weinstein, Miami, for appellant.

John D. Brion and Wilbur C. Rollins, Miami, for appellee.

PEARSON, Judge.

The appellant, John J. Deal, owned a distributive interest in the estate of his grandmother. The appellee was Deal's attorney who was hired to effect a prompt settlement of the estate. For his fee the attorney was to receive one-third of Deal's ultimate distribution. The attorney, however, purchased the client's entire interest in the estate. Thereafter Deal brought a complaint in chancery seeking rescission

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and alleged that the purchase was unconscionable. This appeal is from a final decree for the defendant. The decree is reversed and the cause remanded for further proceedings.

The final decree was in part as follows:

'The Plaintiff has filed his complaint herein seeking cancellation and rescission of an assignment of his interest in the estate of his grandmother, Margaret C. Deal, deceased, to the Defendant Walter J. Migoski, an attorney, on the grounds of misrepresentation and fraud while acting as Plaintiff's attorney, and seeking to enjoin the Defendant Wallace Ruff, as Administrator C.T.A., D.B.N. of said estate from disbursing any funds thereof to the Defendant Walter J. Migoski.

'The Defendant Walter J. Migoski's answer denies the wrongdoing charged to him, claiming that he paid full value for the inheritance and setting up the additional defense that the Plaintiff did not come into equity with clean hands, by reason of the fact that the Plaintiff had previously assigned the income from the inheritance to his mother and father without disclosing such prior assignment, whereby a fraud was perpetrated on the defendant Migoski.

From the issues made by the pleadings and the proof submitted, the *417 Plaintiff has failed to prove the material allegations of his complaint and the Court finds that the Defendant Walter J. Migoski under the circumstances acted in good faith and paid a good and sufficient consideration, namely, \$2,500.00, for the assignment of the inheritance which consisted of a one-sixteenth interest in and to the Estate of Margaret C. Deal, without notice or knowledge of the prior assignment of the income to Plaintiff's father and mother, namely, Daniel F. Deal and May Gertrude Deal, which is dated July 16, 1938.'

[1][2] It is apparent that the chancellor has failed to apply the proper rule as to the burden of going forward with the evidence. 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. If an attorney in contravention of

Canon 10, Rule B, Section (I) of the Code of Ethics Governing Attorneys, 3 F.S. '59, 31 F.S.A., [FN1], purchases from his client the subject matter of the attorney's employment, then the transaction is suspect. Upon action being filed to rescind the transaction, the attorney has the burden of proving that he paid full and complete consideration for the purchase. Gerlach v. Donnelly, Fla.1957, 98 So.2d 493; Renno v. Sigmon, 148 Fla. 229, 4 So.2d 11; Bolles v. O'Brien, 63 Fla. 342, 354, 59 So. 133; Williams v. Bailey, 69 Fla. 225, 67 So. 877. See also Williston, Contracts, § 1625A (rev. ed. 1937.)

FN1. 'Acquiring Interest in Litigation .-- The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.'

[3] Certain facts appear without dispute from this record: 1) Migoski purchased his client's interest in an estate while he was employed to secure settlement of the estate. 2) The purchase price was \$2,500 and the distributive share was at trial, two and one-half years later, worth from \$7,200 to \$8,500, exclusive of income and charges for probate. 3) The client was at the time of the purchase unemployed and desperate to find a source of money to meet daily needs. Therefore it is necessary to determine whether the attorney has met the burden cast upon him by his conduct.

In an attempt to invoke the principle, 'He who comes into a court of equity must come with clean hands', the attorney complained that Mr. Deal did not reveal to him that he had made a previous assignment to his mother and father of the income from the estate. While Mr. Deal's explanation that he forgot the informal assignment is not adequate to relieve him of responsibility, the effect of the assignment was not to destroy the advantage gained by Mr. Migoski. It only decreased and postponed the enjoyment of the advantage.

The principle of clean hands requires a plaintiff to be free of any inequitable conduct relative to the controversy. See cases cited at 12 Fla.Jur., Equity § 55. See Faber v. Landman, Fla.App.1960, 123 So.2d 405. There are some recognized limitations

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to this principle. 2 Pomeroy, Equity Jurisprudence, § 399 (5th ed. 1941), and cases cited therein

The relation of attorney and client is one of the most important as well as one of the most sacred relations known to the law. It is indeed a relation affected by a very vital public interest which is predicated on trust and confidence. State v. Snyder, 136 Fla. 875, 187 So. 381 [FN2].

FN2. The preamble to Rule B, of the Code of Ethics Governing Attorneys, 3 F.S. '59, 31 F.S.A., reads as follows:

'In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.'

*418 We therefore hold that the public interest requires the intervention of the court, if the defendant-lawyer is unable to satisfy the burden cast upon him to prove that no advantage has been taken by him of his client, notwithstanding the wrongdoing of the plaintiff-client. To apply the principle of clean hands in the instant case would be to ignore the exacting standards placed upon lawyers, who are officers of the court. The principle should not be applied by the court as a shield to protect its own officers if there is a question of unconscionable advantage. It is true that courts should be cautious in affording relief to a complaining party, who is guilty of wrongdoing; but where vital public interests are involved, the door should not be closed.

When the matter is again entertained by the

chancellor the issue before him will be whether the attorney has adequately demonstrated that the purchase was for a full and complete consideration and free of all the advantages which an attorney ordinarily has of knowing more of a client's legal rights than the client knows.

Reversed and remanded for further proceedings in accordance with the opinion.

HORTON, C. J., concurs.

CARROLL, CHAS., J., concurs specially

CARROLL, CHAS., Judge (concurring specially).

I concur in the court's reversal of the decree, but I do not agree with the majority's direction for further trial of this case.

It was established that the value of the interest purchased by the lawyer was far more than he paid for it. This is so, even giving effect to the assignment the plaintiff had made of the income for a period.

By the defendant attorney's own testimony, he and the plaintiff discussed the value of plaintiff's share in the estate and estimated it to be in excess of \$7,000 after administrative expenses; and the attorney informed the plaintiff that an outsider approached to buy his share in the estate would regard the purchase as a speculation, and probably would not be willing to pay more than one-third of the value of the plaintiff's interest [FN1].

FN1. The testimony of Walter J. Migoski on this feature was as follows:

'Q. Did you have any discussion with him as to the value of his inheritance, the price he should ask? A. Yes, I did; and I made certain notations on my files, and if I may use that file to refresh my memory--my scribbled notes show a gross estimated estate of \$113,500. Dividing that into sixteen parts would give an interest of \$7,093 as the estimated interest of his share. * * * That, combined with the

(Cite as: 122 So.2d 415)

brokerage commission that would have been involved in the sale of those properties [of the estate], the expenses of closing, that I would easily figure on about \$20,000 as gross expenses, which would include the brokerage commissions, attorney's fees, administrative fees, and so on. Taking that into consideration, we arrived at a figure of a little over \$7,000 as the estimated value of this one-sixteenth interest in the estate. As I mentioned previously----

'Q. You told him to answer these ads that appeared in the papers, and so on. Had he set any figure, or was it just inquiry? Was he making any figure as to what he should ask for his inheritance? A. I said based upon a figure of \$7,500, and that he would probably realize one-third of that. In my opinion, a prospective speculator or buyer would not pay any more than that. And we arrived at \$2,500 as a reasonable figure that he could expect to get.

'When he told me that it was all right, what he would be willing to accept for it, I advised him to try to sell it to other people. He came back to see me and had had no success. I then said I had a Canadian client who perhaps would be interested.'

[After explaining that his Canadian client, though interested, had not purchased plaintiff's interest because he was required to return to Canada on business] '* * * When Mr. Deal came back to me, I then advised him that in my opinion I could sell it, and if he was interested, I would go ahead. He asked me right then and there, could I advance him some money, and I immediately made out a check for him on, I believe--* * *'.

*419 It appears that the plaintiff was so pressed for funds that he was willing to sell on that basis if that was all he could get, and he authorized his attorney to so proceed. The attorney purchased the interest for himself, while the plaintiff was given to believe the attorney was selling it to a third party.

But the plaintiff's lawyer was not uninformed on the value of the plaintiff's interest in the estate. Conceding that an outside party, not having the full knowledge of the estate enjoyed by the plaintiff and his lawyer, understandably would consider it a speculation, and be willing to buy it only at a fraction of its represented value, the situation was different as to the plaintiff's attorney. He knew the value, and under the applicable law he was required to make full disclosure to his client of the circumstances of the sale to him, as well as to pay full value. Is it not reasonable to assume that the plaintiff would have expected to receive more from his lawyer, who knew the estate and its value, than from an uninformed third party he understood was to be the purchaser? Otherwise, why would the lawyer, while buying the interest for himself, allow his client to believe he was selling to an outsider to the estate on a 'speculation' basis?

This record shows, by the plaintiff's testimony, that even when he and his wife signed the papers for transfer of his interest in the estate to Migoski he understood that the transfer was being handled through Mr. Migoski for some 'northern buyer' with whom the attorney was in contact. The testimony given in the case by the defendant attorney does not contain any denial of this. The lawyer testified that he instructed and informed the plaintiff about the papers by which the assignment was being made to him in his name, but his testimony does not disclose what the explanation was, and nowhere does the attorney clearly or flatly state that he informed the plaintiff that it was he, and not a northern buyer as the plaintiff says he understood it, who was buying plaintiff's interest in the estate. In addition to this nondisclosure on the part of the attorney, there were the circumstances of the financial distress of the and an established plaintiff inadequacy consideration. The result was that the lawyer acquired property of his client under conditions and circumstances in which the courts hold he may not be permitted to retain it.

The law applicable to this situation is well stated in 1 Black, Rescission and Cancellation, § 51 (2d ed. 1929), as follows:

'The relation of attorney and client is likewise one

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which requires the exercise of the utmost good faith and integrity. Any transaction or dealing between them will be closely scrutinized by the courts, and the attorney will not be allowed to retain any unconscientious advantage which he may have gained, even though he was guilty of no actual fraud. It is necessary, in fact, for him to show, in order to defend his position, that there was no fraud or mistake, no undue influence or bad advice on his part, no concealment or misrepresentation, and no inequitable advantage taken of his dominating position. An attorney who bargains with his client in a matter of advantage to himself must, if the transaction is afterwards questioned, show that it was fairly conducted, and that he discharged his duties to his client not only by refraining from all misrepresentation and concealment, but by diligence to see that the client was fully informed of the nature of the transaction and of his own rights and interests, either by independent advice or else by such advice from the attorney himself as he would have given if *420 he had been a stranger to the transaction. These rules are applicable with perhaps peculiar severity where the attorney buys property from his client or sells to him * * *'.

I therefore, concur in the reversal of the decree, but I can not agree that there is need for any further trial in this matter; and it is my opinion that this court should remand the cause with directions to enter a decree in favor of the plaintiff for rescission of this sale of his interest in the estate to his lawyer.

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(Cite as: 98 So.2d 493)

C

Supreme Court of Florida. Kingsley H. GERLACH, Appellant,

Jess Stanley DONNELLY, as Executrix under the Last Will and Testament of Emmett Donnelly, deceased, Appellee.

Nov. 20, 1957.

Action to cancel notes brought by purported maker against executrix of estate of deceased payee. The Circuit Court, Polk County, D. O. Rogers, J., dismissed complaint, and maker appealed. The Supreme Court, Drew, J., held that evidence supported finding that notes were actually signed by maker, but did not support conclusion that maker had had any knowledge or recollection of signing notes or that they represented any legal obligation of maker to payee.

Reversed.

Thomas and Hobson, JJ., dissented.

West Headnotes

|1| Bills and Notes 517 56k517 Most Cited Cases

| | | | | Bills and Notes € 518(1)

56k518(1) Most Cited Cases

In action to cancel notes brought by purported maker against executrix of estate of deceased payee, evidence supported finding that notes were actually signed by maker but did not support conclusion that maker had had any knowledge

or recollection of signing notes or that notes represented any legal obligation of maker to payee.

[2] Executors and Administrators 433

162k433 Most Cited Cases

In action to cancel notes brought by purported

maker against executrix of estate of deceased payee, all defenses which would have been available between parties to note were available. F.S.A. § 674.18.

[3] Bills and Notes \$\infty\$492

56k492 Most Cited Cases

Presumption of delivery of note falls in face of direct proof. F.S.A. § 674.18.

|4| Bills and Notes €==517

56k517 Most Cited Cases

In action to cancel notes brought by purported maker against executrix of estate of deceased payee, direct testimony that there was no delivery of notes and that they were procured by fraud overcame presumption of delivery before it arose. F.S.A. §§ 90.05, 674.18.

[5] Witnesses € 164(6)

410k164(6) Most Cited Cases

In action to cancel notes brought by purported maker against executrix of estate of deceased payee, dead man's statute did not preclude maker from testifying as to transactions. F.S.A. § 90.05.

[6] Bills and Notes € 493(1)

56k493(1) Most Cited Cases

Presumption that every negotiable instrument has been issued for a valuable consideration is rebuttable and may be overcome by proof. F.S.A. § § 90.05, 674.27.

[7] Bills and Notes €-518(1)

56k518(1) Most Cited Cases

In action to cancel notes brought by purported maker against executrix of estate of deceased payee, evidence overcame presumption of consideration. F.S.A. §§ 90.05, 674.27.

[8] Attorney and Client €== 106

45k106 Most Cited Cases

An attorney is under duty at all times to represent

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his client and handle his client's affairs with utmost degree of honesty, forthrightness, loyalty and fidelity.

[9] Attorney and Client € 123(2)

45k123(2) Most Cited Cases

Burden is upon attorney to establish by clear and convincing evidence fairness of an agreement or transaction purporting to convey a property right from a client to his attorney, and burden is cast upon attorney in such transactions to establish that they were made upon full and adequate consideration.

[10] Attorney and Client € 123(2)

45k123(2) Most Cited Cases

In action by client, who was purported maker of notes, to cancel notes brought against executrix of estate of deceased attorney, who was payee, evidence precluded conclusion that obligations were valid and enforceable.

[11] Attorney and Client € 123(1)

45k123(1) Most Cited Cases

Attorneys are required to establish fairness and validity of transactions between himself and his client, and courts have power to closely scrutinize and supervise the actions of attorneys.

*494 Arthur A. Simpson, of Macfarlane, Ferguson, Allison & Kelly, Tampa, for appellant.

Boone D. Tillett, Jr., Lake Wale, for appellee.

DREW, Justice.

Emmett Donnelly, a member of the Bar of Florida, was arrested on June 8, 1954 for complicity in a conspiracy to murder Kingsley H. Gerlach, his client of more than 23 years. A search was made of Mr. Donnelly's office at the time of his arrest and in his safe the sheriff found two promissory notes bearing the signature of Kingsley H. Gerlach. Both were demand notes payable to Emmett Donnelly. One for \$20,000 was dated April 21, 1950 and the other for \$12,000 was dated April 19, 1952 and each provided for interest at 5% per annum until paid. At the time of the search Mr. Gerlach was on

the outside of the office of Mr. Donnelly. The sheriff testified that Mr. Donnelly made no comment when asked about the notes but when they were exhibited to Mr. Gerlach, the sheriff said 'I remember Mr. Gerlach being very much offended at the presence of those notes and he made some remark and those notes seemed to disgust him.' The notes were retained by the authorities as evidence.

Mr. Donnelly was released on bond. Sometime during the following day, he died of gunshot wounds which were--in the opinion of the authorities--self-inflicted.

During the latter part of the month this suit was instituted for the purpose of cancelling the two notes. Gerlach alleged in his complaint that Donnelly had acted as his attorney for many years and had handled many legal transactions for him; that during said time he, the said Gerlach, had signed numerous documents prepared by the said Donnelly and submitted to him for signature. He further alleged that he had the utmost confidence in Donnelly and because of this he signed many documents without reading them. He alleged that he never knew of the existence of said notes until June 8, 1954. Gerlach further alleged that he was not indebted to Donnelly in any amount whatsoever and that said notes were obtained from him in some manner unknown to him and, if signed by him, he had no knowledge or recollection of ever having signed the same.

The executrix answered asserting that the notes which were the subject matter of the litigation here were in the possession of the county solicitor of Polk County; she asserted her lack of knowledge of many of the allegations in the complaint and denied others. She directly alleged that Emmett Donnelly was for a number of years a practicing attorney at Lake Wales, Florida and that during said period of time handled various and sundry legal transactions for the plaintiff Gerlach. She further alleged that the said Gerlach executed the said two notes, describing them.

On the issues so made the cause was tried before the circuit judge and resulted in a decree holding

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that the signatures on the promissory notes were the genuine signatures of plaintiff Gerlach and further 'that the plaintiff has failed to prove his case by the greater weight of the testimony; that this suit is based on two promissory notes, one for \$20,000 and one for \$12,000, both of which are presumptively valid and based on a good and sufficient consideration. The burden of proving lack of consideration and that the signatures were not the plaintiff's thereon is on the plaintiff which he has failed to sustain.' The court thereupon decreed that the relief prayed for be denied and dismissed the complaint at the cost of plaintiff. It is from *495 this decree that this appeal has been prosecuted.

The essential facts developed at the hearing of this cause and pertinent to its ultimate disposition are as follows: In the early part of 1954 the appellant Gerlach learned of the alleged existence of a conspiracy on the part of Donnelly and others to murder him. He was placed under the surveillance of guards while the investigation of the conspiracy was being made by the law enforcement agencies.

Early in March, 1954, realizing the necessity of procuring legal advice, he employed Mr. Chester Ferguson of Tampa and related the facts to him. Mr. Ferguson testified that after taking the necessary precaution of preparing a new will and revoking any possible outstanding powers of attorney and having Mr. Gerlach execute them, he forwarded to Mr. Donnelly a letter advising Mr. Donnelly of his employment by Mr. Gerlach and requesting the delivery of any of Gerlach's papers in the possession of Donnelly. Among other things this letter stated: 'On questioning Mr. Gerlach he stated that he had paid all bills for services rendered by you to date and that he was not indebted to you in any amount whatsoever. So that this may be a matter of record, I will appreciate your confirming this fact.' A few days later Mr. Donnelly replied to the letter stating, 'Mr. Gerlach is not indebted to this office for any current legal services.' Parenthetically, it should be here observed that at the time of this exchange of correspondence and of several letters which followed in rapid succession relating to various matters and sundry papers belonging to Gerlach and in the possession of Mr.

Donnelly, Mr. Ferguson had no knowledge whatever of the existence of said notes nor, according to the positive testimony of Mr. Gerlach, did he. Mr. Ferguson further testified that in addition to the letter he received from Mr. Donnelly above mentioned, that Mr. Donnelly telephoned him in this general period of time inquiring as to why Mr. Gerlach had employed other counsel. During the course of this conversation Mr. Ferguson testified, 'I wanted to be certain that Mr. Gerlach was not indebted to him in any way because I didn't want to represent a client that was indebted to another lawyer and my recollection is that Mr. Donnelly assured me that Mr. Gerlach didn't owe him anything.' This conversation took place and these letters were exchanged in March and April of 1954 whereas the notes which were the foundation of this cause of action were not discovered until the arrest of Mr. Donnelly the following June 8th. It is pertinent to observe and we reiterate that at the time they were discovered, Mr. Donnelly refused to discuss them saying that he did not desire to do so until he had consulted his attorney. Donnelly, of course, knew at that time that he was under indictment for conspiracy to murder Mr. Gerlach. Moreover Mr. Gerlach testified that he had paid Donnelly from time to time 'many thousands of dollars' for legal services rendered for him. The last payment made to Mr. Donnelly was in June of 1952 in the sum of \$1,500, at which time Mr. Gerlach also paid Mr. Donnelly \$100 for expenses in connection with a trip concerning a case in the Supreme Court. Moreover, an extensive investigation was made of the records of Mr. Donnelly, following his apparent suicide, by accountants employed for that purpose. No credible evidence was found among Donnelly's books, records or possessions which in any way sheds any light upon or relates to these outstanding obligations. Mr. Donnelly kept no detailed records of accounts. There was no transaction among those handled for Mr. Gerlach upon which it could be inferred that any such fee could have been logically earned. Although these notes were apparently in existence, one for at least four years prior to Mr. Donnelly's death, and the other for two years, he had never mentioned their existence or the fact that he possessed them to any of his friends or

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associates. On occasions he had mentioned some sort of indebtedness from Gerlach but this evidence is so vague and inconclusive as to have little if any probative *496 value. During the whole period of time that these notes were in the possession of Donnelly, no demand was ever made for payment nor was any interest ever paid thereon. The record further establishes that during this whole period of time Mr. Gerlach had on deposit in the local bank an average daily balance in an amount in excess of that due upon said obligations, both principal and interest.

It is suggested in the answer that these notes represent an amount due for legal services and were executed to secure the payment thereof. There is no suggestion in the record that the relationship of these parties was anything other than attorney and client. The testimony of a witness for the executrix-- an attorney who was called by Mr. Donnelly in the early stages of the investigation of the conspiracy-was that Mr. Donnelly had intimated to him that Mr. Gerlach was indebted to him for a substantial sum of money for services in connection with a legal matter arising out of a claim against his brother's estate and in connection with other litigation between Gerlach and his wife. No suggestion is made in this record that this obligation, if actually one existed, was other than for services growing out of the relationship of attorney and client.

[1] We think the lower court misconstrued the legal effect of the evidence before it and placed too great an emphasis on the proposition of the *presumptive validity* of these notes which he found to be signed by Gerlach. The evidence amply supports the finding of the lower court that the notes were actually signed by Gerlach but the record does not support the conclusion that Gerlach had any knowledge or recollection of signing the notes or that they represented any legal obligation of Gerlach to Donnelly. The prima facie case made by introduction of the notes in evidence was overcome by the testimony of Mr. Ferguson and Mr. Gerlach and the witnesses who testified for him.

[2] The executrix of Donnelly's estate stands in no

better position than Donnelly would have stood had he not died and had this litigation been between him and Gerlach. So far as this case is concerned, it is a suit between the original maker and payee of a promissory note. All defenses which would have been available between the parties to the note are available here. No question of a holder in due course is in any way involved in this litigation.

Section 674.18, Florida Statutes 1955, F.S.A. which raises the presumption of delivery of a promissory note, by its very terms limits its effect. The statute provides:

'When incomplete and revocable

'Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.' (Emphasis added.)

[3] The statute provides that the presumption exists only until the contrary is proven. Ergo, the presumption falls in the face of direct proof. Gerlach's testimony that he never knowingly signed the notes *497 nor knew of their existence until they were discovered upon Donnelly's arrest and that he owed nothing to Donnelly; Ferguson's testimony that Donnelly told him that Gerlach was not indebted to him; the letter from Donnelly stating that Gerlach was not indebted for any 'current legal services'; Donnelly's refusal to discuss the notes when they were discovered; Gerlach's reaction when exhibited the notes, as well as the

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circumstances of the conspiracy of Donnelly to murder Gerlach and the other testimony delineated above, completely overcame the presumption of delivery of these obligations.

[4] If this were a suit upon the notes brought by Donnelly against Gerlach, the introduction of the notes in evidence would be sufficient to eliminate the necessity of proof of delivery. But in this case, brought against the estate of Donnelly to cancel these notes as fraudulent, the direct testimony that there was no delivery of the instruments and that they were procured by fraud overcomes the presumption before it arises.

[5][6][7] There is some discussion in the brief about the dead man's statute, F.S.A. § 90.05, but this statute does not preclude the plaintiff Gerlach testifying as to the transaction. The reason that this is true is set forth in Security Trust Company v. Calafonas, Fla.1953, 68 So.2d 562, 563, wherein we quoted with approval the following language from Blount v. Blount, 158 Ala. 242, 48 So. 581, 582, 21 L.R.A., N.S., 755:

"* * A transaction between two parties necessarily implies action, consent, knowledge or acquiescence on the part of both. Hence, if a grantor never in truth and in fact executed or attempted to execute an alleged deed to a given grantee, he is not and cannot be a party to the transaction, which on its face purports to be the execution by him of a deed to the named grantee.

* * *

"We are not now writing as to the probative force of such proof of execution, filing, and recording of the deed, but as to the conclusiveness of such matters to show a transaction between the grantor and grantee. We hold that the grantor in such document, no matter what its nature, character, or recitals, is not precluded, by such proof, such filing, and such recording, from showing that his alleged signature thereto and his acknowledgment thereto are forgeries and frauds, perpetrated without his knowledge or consent. If this be not true, one man can acquire, for his estate after his death, all the property of another, without the knowledge or consent of such other, and yet do it

by due process of law. We say the law is not, and ought not to be such as to allow such proceedings or results."

The trial court held in the quoted portion of its decree that the burden of showing lack of consideration was on the plaintiff. The negotiable instruments law (the applicable section being 674.27, F.S.A.) provides that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. This is a presumption, like delivery, which may be overcome by proof. It is a rebuttable presumption. Florida National Bank and Trust Co. of Miami v. Brown, Fla.1950, 47 So.2d 748. The presumption of consideration as well as delivery is rebuttable under the statute as between the original parties to the transaction. This presumption having been here overcome by overwhelming evidence and there being no testimony which in our judgment has probative force sufficient to overcome the direct and positive testimony of the appellant here that there was no consideration and that there had been no delivery, the conclusion is inescapable that the decree of the lower court was the result of misconstruing the legal effect of the evidence and was therefore erroneous.

There is another reason why this decree must be reversed.

*498 [8][9][10][11] There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. The relationship has its very foundation in the trust and confidence the client reposes in an attorney selected to represent him. The 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 Business transactions between attorney and client are and always ought to be subject to the closest scrutiny because of this underlying relationship. It is an ancient and firmly established principle of the law that the burden is placed upon an attorney to established by clear and convincing evidence the fairness of an agreement or transaction purporting to convey a property right from a client to his attorney. Moreover, the burden is cast upon the

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attorney in transactions of this kind to establish that such was made upon full and adequate consideration. Bolles v. O'Brien, 1912, 63 Fla. 342, 59 So. 133. See also Williams v. Bailey, 1915, 69 Fla. 225, 67 So. 877; Halstead v. Florence Citrus Growers' Ass'n, 1932, 104 Fla. 21, 139 So. 132; and Renno v. Sigmon, 1941, 148 Fla. 229, 4 So.2d 11.

The latest expression of this Court upon the subject is found in Brass v. Reed, Fla. 1953, 64 So.2d 646, 648, where among other things, we said:

'The only difference in dealings between attorney and client and other people is that relationship between attorney and client is very intimate, close, personal and confidential, and an attorney is required to exercise in all his dealings with his client a much higher standard than is required in business dealings.'

With these principles in mind, there is no view which could be taken of the evidence in this cause upon which a conclusion could be lawfully reached that these obligations were valid and enforceable. It imposes no undue hardship upon an attorney to require him to justify the fairness and validity of transactions between him and his client, and this rule vests in the courts the power to closely scrutinize and supervise the actions of those who are its officers.

This cause is reversed with directions to enter a decree in accordance with the views herein expressed.

TERRELL, C. J., ROBERTS and THORNAL, JJ., and STURGIS, District Judge, concur.

THOMAS and HOBSON, JJ., dissent.

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842 So.2d 204, 28 Fla. L. Weekly D847

(Cite as: 842 So.2d 204)

C

Briefs and Other Related Documents

District Court of Appeal of Florida,
Third District.
SUSAN FIXEL, INC., Appellant,
v.
ROSENTHAL & ROSENTHAL, INC., Appellee.
No. 3D02-1139.

April 2, 2003.

Wholesaler brought action against its factor, alleging, inter alia, breach of fiduciary duty, fraud in the inducement, fraudulent misrepresentation, and negligent misrepresentation. The Circuit Court, Miami-Dade County, Eleanor L. Schockett, J., granted factor's motion to dismiss. Wholesaler appealed. The District Court of Appeal, Nesbitt, Senior Judge, held that: (1) factually intensive nature of implied fiduciary duty inquiry precluded dismissal of claim that factor breached fiduciary duty to wholesaler; (2) wholesaler adequately alleged cause of action, so as to avoid dismissal, for fraud in the inducement; (3) wholesaler adequately alleged cause of action, so as to avoid dismissal, for negligent misrepresentation; and (4) tort claims brought by wholesaler against factor were not barred by economic loss rule.

Reversed and remanded.

West Headnotes

|1| Pretrial Procedure € 622

307Ak622 Most Cited Cases

A motion to dismiss tests whether the plaintiff has stated a cause of action.

|2| Appeal and Error € 893(1) 30k893(1) Most Cited Cases

Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review.

[3] Pretrial Procedure 679

307Ak679 Most Cited Cases

[3] Pretrial Procedure 681

307Ak681 Most Cited Cases

When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

4 Corners

[4] Pretrial Procedure \$\infty\$681

307Ak681 Most Cited Cases

Consideration of potential affirmative defenses or speculation about the sufficiency of evidence which plaintiff will likely produce on the merits is wholly irrelevant and immaterial in ruling on motion to dismiss.

[5] Fraud €--7

184k7 Most Cited Cases

Fiduciary relationships may be implied in law and such relationships are premised upon the specific factual situation surrounding the transaction and the relationship of the parties.

[6] Pretrial Procedure €==680

307Ak680 Most Cited Cases

Factually intensive nature of implied fiduciary duty inquiry precluded dismissal for failure to state cause of action of wholesaler's claim that factor breached fiduciary duty to wholesaler.

[7] Pleading \$\infty\$ 248(17)

302k248(17) Most Cited Cases

Failure of wholesaler to assert claim for breach of fiduciary duty against its factor in second amended complaint did not preclude wholesaler from

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asserting claim in third amended complaint, where rule governing amended and supplemental pleadings embodied liberal amendment policy, and there was an absence of any prejudice to factor or abuse of amendment privilege by wholesaler. West's F.S.A. RCP Rule 1.190.

[8] Fraud 5-3

184k3 Most Cited Cases

To state a claim for fraud in the inducement, a plaintiff must allege (1) a misrepresentation of a material fact; (2) knowledge by the person making the statement that the representation is false; (3) intent by the person making the statement that the representation would induce another to rely and act on it; and (4) that the plaintiff suffered injury in justifiable reliance on the representation.

|9| Fraud € 32

184k32 Most Cited Cases

If fraud occurs in connection with misrepresentations, statements or omissions which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.

[10] Factors € 43

167k43 Most Cited Cases

Wholesaler adequately alleged cause of action against its factor, so as to avoid dismissal, for fraud in the inducement, where wholesaler alleged that factor's false material representations were made to induce wholesaler to enter into agreement with manufacturer, that wholesaler reasonably relied upon the representations in entering into agreement, and that, as a result, wholesaler was damaged.

|11| Fraud € 3

184k3 Most Cited Cases

The elements of a fraud claim are (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induce another's reliance; and (4) consequent injury by the other party acting in reliance upon the representation.

[12] Factors \$\infty\$=43

167k43 Most Cited Cases

Wholesaler adequately alleged cause of action against its factor, so as to avoid dismissal, for negligent misrepresentation, where wholesaler alleged that factor had a duty to wholesaler to use due care in disclosing financial information about manufacturer with which factor also had a business relationship, that factor failed to use such due care, and that wholesaler justifiably and detrimentally relied upon the false information negligently supplied by factor.

[13] Factors \$\infty\$=43

167k43 Most Cited Cases

Fraud and misrepresentation claims brought by wholesaler against its factor were not barred by economic loss rule, where the various claims were distinct and independent from the contractual relationships between the parties.

*205 Adorno & Yoss and Samantha N. Tesser, Fort Lauderdale, for appellant.

Ferrell, Schultz, Carter, Zumpano & Fertel and Alan Fertel, Miami, and H. Eugene Lindsey, for appellee.

Before COPE and WELLS, JJ., and NESBITT, Senior Judge.

NESBITT, Senior Judge.

[1][2][3][4] Appellant Susan Fixel, Inc. ("Fixel"), a Florida corporation engaged in the business of wholesaling clothes, filed a Third Amended Complaint which included, in Counts II-V, claims against its factor [FN1] Appellee Rosenthal & Rosenthal, Inc. ("Rosenthal"), for breach of fiduciary duty, fraud in the inducement traudulent misrepresentation and negligent misrepresentation. *206 Upon Rosenthal's motion to dismiss, the trial court dismissed all of the claims for failure to state a cause of action, found that there was no fiduciary duty between Rosenthal and Fixel, and, noting it was the Third Amended Complaint, ruled the dismissals were with prejudice. The trial court gave Fixel leave "to attempt to state a cause of action sounding in contract" against Rosenthal. We reverse.

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FN1. Black's Law Dictionary (7th ed.1999), defines a factor, in part, as one who buys accounts receivable at a discount.

A motion to dismiss tests whether the plaintiff has stated a cause of action. Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review. When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

Bell v. Indian River Mem. Hosp., 778 So.2d 1030, 1032 (citations omitted). See also Siegle v. Progressive Consumers Ins. Co., 819 So.2d 732, 734-35 (Fla.2002); Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla.1985); Orlando Sports Stadium, Inc. v. State, 262 So.2d 881, 883 (Fla.1972); Alvarez v. E & A Produce, 708 So.2d 997, 999 (Fla. 3d DCA 1998). Consideration of potential affirmative defenses or speculation about the sufficiency of evidence which plaintiff will likely produce on the merits is wholly irrelevant and immaterial to deciding such a motion. Barbado v. Green & Murphy, P.A., 758 So.2d 1173 (Fla. 4th DCA 2000); Abrams v. General Ins. Co., 460 So.2d 572 (Fla. 3d DCA 1984); Parkway Gen. Hosp., Inc. v. Allstate, Ins. Co., 393 So.2d 1171 (Fla. 3d DCA 1981).

Casting the allegations of the Third Amended Complaint in a light most favorable to Fixel, and accepting them as true, the claims against Rosenthal are based upon the following facts:

In 1997, Fixel and Rosenthal entered into a Factoring Agreement, under which Rosenthal purchased Fixel's receivables based upon a credit-risk evaluation and Fixel drew funds according to an agreed advance rate. Fixel and Rosenthal also entered into a letter agreement, pursuant to which Rosenthal agreed to make inventory advances to Fixel up to \$150,000.00, secured by a security interest in Fixel's inventory. The parties established an ongoing relationship in

which Rosenthal knew that Fixel placed trust and confidence in Rosenthal, and that, separate from the relationship established by the terms of the parties' contracts, Rosenthal assumed a role of superiority and exerted influence over Fixel, which relied upon Rosenthal for its counsel and guidance with regard to its business dealings.

During this time period, Rosenthal also was the factor of C & L Textile Corporation ("C & L"), a clothing manufacturer. By virtue of its relationship with C & L, Rosenthal knew that C & L was experiencing deep financial difficulties, rendering it difficult for C & L to support and maintain its existing business. Nevertheless, Rosenthal, for its financial benefit, wanted to create a relationship between Fixel and C & L, even though Rosenthal knew that such an agreement was not in Fixel's best interest. Rosenthal, exerting extensive control, pressured Fixel to enter into a contract with C & L by threatening to call in Fixel's inventory loan and terminate its factoring relationship with Fixel, which on short notice would have immediately put Fixel out of business. This pressure was combined with repeated false representations from certain of Rosenthal's employees and representatives throughout September and October, 1998 concerning C & L's financial status and ability to *207 handle Fixel's business, including representations that:

- a. "They [C & L] have an open checkbook with us [Rosenthal];"
- b. Fixel would be getting a financially secure partner with C & L;
- c. "C & L had the financial wherewithal" to produce and ship Fixel's inventory; and
- d. "C & L could do whatever Fixel needed them to do financially."

Rosenthal undertook activities beyond the performance of its contractual duties in advising and guiding Fixel. In October of 1998, relying upon Rosenthal's false representations (which Fixel alleges was reasonable in light of its relationship of trust and confidence with Rosenthal), and in response to the pressure Rosenthal exerted, Fixel entered into a written agreement with C & L (the "C & L Agreement"), pursuant to which C & L was to

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be responsible for Fixel's production and shipping. Meanwhile, Rosenthal and C & L structured a linancial arrangement between themselves, without the prior knowledge or consent of Fixel, pursuant to which Rosenthal and C & L would benefit economically from C & L's new business relationship with Fixel. Without Fixel's consent, Rosenthal deducted 15% of the money it was advancing to C & L for shipments and applied this against money allegedly owed by Fixel to Rosenthal. Again, without Fixel's consent, C & L would then deduct the 15% from the money owed to Fixel from the shipped orders.

C & L did not, in fact, have the credit worthiness or cash resources, or the "open checkbook" with Rosenthal, needed to provide the goods and services which it agreed to provide for Fixel, which caused damages to Fixel. [FN2] Rosenthal induced and coerced Fixel to enter into the C & L Agreement for Rosenthal's own economic benefit to the detriment of Fixel. Rosenthal used its inside superior knowledge as C & L's factor, its relationship of trust, influence and superiority over Fixel, and Fixel's reliance upon Rosenthal's counsel and guidance, to orchestrate the C & L Agreement.

FN2. Fixel has also sued C & L for breach of contract.

Rosenthal argues that Fixel's claims for breach of fiduciary duty, fraud in the inducement, fraudulent misrepresentation and negligent misrepresentation are insufficient as a matter of law because its relationship with Fixel is governed by the parties' contracts. Rosenthal further asserts Fixel's claims can only be asserted as breach of contract claims, that the economic loss rule precludes the various tort claims, and that there is, as a matter of law, no fiduciary duty between Rosenthal and Fixel.

[5] In Doe v. Evans, 814 So.2d 370 (Fla.2002), a fiduciary relationship was characterized as follows:

If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a

predicate for relief.

814 So.2d at 374, quoting Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 421 (Fla.1927). See also Dale v. Jennings, 90 Fla. 234, 107 So. 175 (1925); First Nat. Bank and Trust Co. v. Pack, 789 So.2d 411 (Fla. 4th DCA 2001); Capital Bank v. MVB, Inc., 644 So.2d 515, 518 (Fla. 3d DCA 1994), rev. denied 654 So.2d 918 (Fla.1995). Fiduciary relationships may be implied in law and such relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties." Id. at 518; Doe v. Evans, supra, at *208 374. See also Hooper v. Barnett Bank of West Florida, 474 So.2d 1253 (Fla. 1st DCA 1985), decision approved, 498 So.2d 923 (Fla.1986).

Depending upon the specific factual circumstances, courts have found the existence of fiduciary relationships between borrowers and lenders. Barnett Bank v. Hooper, 498 So.2d 923 (Fla.1986); First Nat. Bank and Trust Co. v. Pack, supra; Capital Bank v. MVB, Inc., supra at 519 (and authorities cited therein). numerous relationships have been found "where the bank knows or has reason to know that the customer is placing trust and confidence in the bank and is relying on the bank so to counsel and inform him." Capital Bank v. MVB, Inc., supra at 519, quoting Klein v. First Edina Nat'l Bank, 293 Minn. 418, 196 619 N.W.2d Additionally, (1972)circumstances" may impose a fiduciary duty where the lender takes on extra services for a customer, receives any greater economic benefit than from a typical transaction, or exercises extensive control. Capital Bank v. MVB, Inc., supra at 519, citing Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wash.App. 456, 656 P.2d 1089 (1982).

[6][7] Fixel asserts a similar claim for breach of fiduciary duty against Rosenthal, its factor, claiming Rosenthal knew Fixel placed trust and confidence in Rosenthal and relied upon Rosenthal for its advice and counsel, and that Rosenthal took on "extra services" in its orchestration of the C & L Agreement and exercising extensive control over Fixel. Fixel alleges Rosenthal breached the fiduciary duty which arose between them by: (a) coercing Fixel into entering a business relationship

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with C & L to benefit Rosenthal's own financial interests to the detriment of Fixel; (b) repeatedly misrepresenting C & L's financial ability to produce and ship Fixel's inventory; (c) not acting in Fixel's best interest and not disclosing accurate financial information regarding C & L; (d) benefitting from the C & L Agreement; and (e) taking unfair advantage of Fixel. Such a claim is not precluded as a matter of law. See, e.g., Dresses for Less, Inc. v. CIT Group/Commercial Serv., Inc., 2002 WL 31164482 (S.D.N.Y.)(fiduciary duty claim against factor stated a cause of action); Resnick v. Resnick, 722 F.Supp. 27 (S.D.N.Y.1989)(same). See also Restatement (Second) of Agency § 14N, cmt. a "factors" (listing as among independent contractors who are "fiduciaries"). Because of the factually intensive nature of an implied fiduciary duty inquiry, such claims are better addressed by a summary judgment motion, or at trial, than on a motion to dismiss. Dresses for Less, Inc. v. CIT Group/Commercial Serv., Inc., supra, *16-17. See, e.g., Bonnie & Company Fashions, Inc. v. Bankers Trust Co., 945 F.Supp. 693, 712 (S.D.N.Y.1996)(on summary judgment motion, evidence submitted was insufficient to establish extra-contractual fiduciary duty between borrower and bank/factor). [FN3]

> FN3. We reject Rosenthal's contention that Fixel was precluded from asserting a claim for breach of fiduciary duty in the Third Amended Complaint because it failed to do so in the Second Amended Complaint. Given the liberal amendment policy embodied by Rule 1.190 Fla. R. Civ. P., and the absence of any prejudice to Rosenthal or abuse of the amendment privilege by Fixel, allowing the claim to be asserted in the Third Amended Complaint was appropriate. Hall v. Wojechowski, 312 So.2d 204 (Fla. 4th DCA 1975); Penn Cork and Closures, Inc. v. Piggyback Shippers Ass'n of Florida, Inc., 281 So.2d 46 (Fla. 3d DCA 1973).

[8][9][10] Fixel alleges that Rosenthal's false material representations were made to induce Fixel to enter into the C & L Agreement, that Fixel reasonably relied *209 upon the representations in entering into the C & L Agreement, and, as a result, was damaged. To state a claim for fraud in the inducement, a plaintiff must allege (1) a misrepresentation of a material fact; (2) knowledge by the person making the statement that the representation is false; (3) intent by the person making the statement that the representation would induce another to rely and act on it; and (4) that the plaintiff suffered injury in justifiable reliance on the representation. Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 497 (Fla. 4th DCA 2001); Palumbo v. Moore, 777 So.2d 1177, 1179 (Fla. 5th DCA 2001); W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So.2d 297, 304 (Fla. 1st DCA 1999); Hillcrest Pacific Corp. v. Yamamura, 727 So.2d 1053, 1055 (Fla. 4th DCA 1999); Kutner v. Kalish, 173 So.2d 763 (Fla. 3d DCA 1965).

If the fraud occurs in connection with misrepresentations, statements or omissions which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.

Allen v. Stephan Co., 784 So.2d 456, 457 (Fla. 4th DCA 2000). We conclude that Fixel adequately alleged a cause of action for fraud in the inducement.

[11] Similarly, the elements of a fraud claim are (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induce another's reliance; and (4) consequent injury by the acting in reliance upon the other party representation. Lopez-Infante v. Union Cent. Life Ins. Co., 809 So.2d 13, 15 (Fla. 3d DCA 2002); Ward v. Atlantic Sec. Bank, 777 So.2d 1144, 1146 (Fla. 3d DCA 2001). We conclude that Fixel adequately alleged a cause of action for fraudulent misrepresentation.

[12] Alternatively, based on the alleged fiduciary relationship, Fixel alleges that Rosenthal had a duty to Fixel to use due care in disclosing financial information about C & L, that it failed to do so, and that Fixel justifiably and detrimentally relied upon the false information negligently supplied by

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Rosenthal. Fixel's allegations adequately state a cause of action for negligent misrepresentation. *Gilchrist Timber Co. v. ITT Rayonier*, 696 So.2d 334 (Fla.1997)

[13] The various tort claims as alleged by Fixel are distinct and independent from the contractual relationships between the parties, and, as such, are not barred by the economic loss rule. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238 (Fla.1996)(fraudulent inducement is not barred by economic loss rule); Allen v. Stephan Co., 784 So.2d 456 (Fla. 4th DCA 2000)(economic loss rule does not bar tort actions for negligent misrepresentation and fraudulent inducement); Invo Florida, Inc. v. Somerset Venturer, Inc., 751 So.2d 1263 (Fla. 3d DCA 2000)(economic loss rule does not abolish cause of action for breach of fiduciary duty, even if there is an underlying contract); Clayton v. State Farm Mut. Auto. Ins. Co., 729 So.2d 1012 (Fla. 3d DCA 1999)(torts independent of contractual breach, such as fraudulent inducement, not barred by economic loss rule). See also Moransais v. Heathman, 744 So.2d 973 (Fla.1999); PK Ventures, Inc. v. Raymond James & Assocs., Inc., 690 So.2d 1296 (Fla.1997).

The matters raised by Rosenthal in opposition to Fixel's claims, including that it was contractually permitted to deduct certain monies flowing between Fixel and C & L, are in the nature of defenses or issues which may be addressed by way of summary judgment, depending on the development of the factual record. We do not *210 opine about whether Fixel will be able to present evidence to support its allegations, or whether the relationship and dealings between Fixel and Rosenthal gave rise to a fiduciary duty. We simply hold that the dismissal of these claims for failure to state causes of action was erroneous.

We reverse the order of dismissal, and remand this matter to the trial court for further proceedings consistent with this opinion.

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C

United States Court of Appeals, Fifth Circuit. Geneva Ann SINGLETON, Plaintiff-Appellant,

Percy FOREMAN, Defendant-Appellee.
No. 29195.

Dec. 1, 1970.

Diversity action by client against discharged attorney to recover jewelry given as security under contingent fee agreement and to recover for alleged emotional distress client suffered by reason of attorney's conduct following discharge after attorney refused to permit client to settle divorce action. The United States District Court for the Middle District of Florida, Joseph P. Lieb, Chief Judge, rendered judgment of dismissal on the pleadings, and plaintiff appealed. The Court of Appeals, Goldberg, Circuit Judge, held that complaint that attorney, who allegedly caused client to enter into contingent fee agreement at time client was distraught over proposed divorce action, refused to return jewelry and entered on course of abuse and oppression causing client extreme mental pain and suffering, stated cause of action against attorney, under Florida law, both in contract and

Reversed and remanded.

West Headnotes

| I | Federal Civil Procedure 1771 | 170Ak1771 Most Cited Cases (Formerly 170Ak1) Dismissal of action on the pleadings is not looked on favorably.

[2] Federal Civil Procedure € 1773 170Ak1773 Most Cited Cases

[2] Federal Civil Procedure 1829

170Ak1829 Most Cited Cases

A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim; on motion to dismiss on the pleadings it must be assumed that all of the allegations of the complaint are true.

[3] Attorney and Client \$\infty\$ 129(2)

45k129(2) Most Cited Cases

Complaint that attorney, who allegedly caused client to enter into contingent fee agreement at time client was distraught over proposed divorce action and who had been discharged as counsel, refused to return jewelry given as security for retainer and entered on course of abuse and oppression causing client extreme mental pain and suffering, stated cause of action against attorney, under Florida law, both in contract and tort.

[4] Federal Courts € 410

170Bk410 Most Cited Cases

(Formerly 106k359)

Florida conflicts law was to be applied in determining whether Florida or Tennessee law should be applied in Florida diversity action by client against attorney involving contract which had been entered into in Tennessee and under which attorney had agreed to represent client in forthcoming Florida divorce action.

[5] Attorney and Client € 147

45k147 Most Cited Cases

Florida law governs validity and interpretation of contingent fee contract, which had been entered into in Tennessee by attorney and client, under which attorney had undertaken to represent client in forthcoming Florida divorce action and on which client sued attorney in Florida court following discharge of attorney.

[6] Attorney and Client € 147

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45k147 Most Cited Cases

Contract for contingent fee in divorce cases are void and unenforceable under Florida law.

|7| Contracts € 138(1) 95k138(1) Most Cited Cases

|7| Contracts € 139

95k139 Most Cited Cases

Under Florida law, courts generally will not aid either party to an illegal contract but will leave them where they place themselves; however, Florida law recognizes an exception to such rule when law or public policy requires action by the courts, or where the parties are not in pari delicto.

[8] Attorney and Client \$\iiin\$ 147

45k147 Most Cited Cases

Client, who had merely entered into contingent fee contract under which attorney undertook to represent client in forthcoming Florida divorce action was not in pari delicto with attorney, who allegedly subsequently entered on course of abuse and oppression directed toward client causing client extreme mental pain and suffering and, thus, Florida courts would go to aid of client, who discharged attorney, to extent of returning consideration client had tendered in performance of her part of the invalid contract.

[9] Contracts € 171(1)

95k171(1) Most Cited Cases

Under Florida law, a contract should be treated as entire when, by a consideration of its terms, nature, purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration; a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement.

[10] Contracts € 137(1)

95k137(1) Most Cited Cases

Where retainer and contingent fee were related to whole object of employment of attorney, i. e., representation of client in forthcoming Florida divorce action, contract was not subject to divisible classification and invalid contingent fee made entire contract void and unenforceable under Florida law

and, thus, retainer could not be allowed to stand on ground that contract was divisible.

[11] Attorney and Client €-76(1)

45k76(1) Most Cited Cases

[11] Attorney and Client € 106

45k106 Most Cited Cases

Implicit in every attorney-client contract under Florida law is a covenant by the attorney that he will conduct himself according to customary professional standards; the attorney is under a duty to represent his client with the utmost degree of honesty, forthrightness, loyalty and fidelity and must resign if at any time in the course of litigation his interest in the suit becomes adverse or hostile to his client.

[12] Attorney and Client 101(1)

45k101(1) Most Cited Cases

An attorney never, under Florida law, has right to prohibit his client from settling an action in good faith.

[13] Attorney and Client 76(1)

45k76(1) Most Cited Cases

If true, attorney who allegedly exploded into torrent of abuse and refused to allow client to settle pending divorce action and threatened to ruin both client and her husband, allowed himself to be in economic and personal hostility to client, the wife, and thus was, under Florida law, under legal duty to withdraw and, if true, client, who sued on contingent fee contract, had absolute right to fire attorney and terminate any rights which he might have had under contract.

[14] Contracts 261(1)

95k261(1) Most Cited Cases

Under Florida law, when one party to a contract unjustifiably refuses to perform a substantial part of his duty under the contract, the other party has the right to rescind the contract and recover what he has paid pursuant to the agreement; rule applies equally to situations where there is an unsuccessful attempt to perform.

[15] Damages €= 57.11

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115k57.11 Most Cited Cases (Formerly 115k54, 115k49)

Florida law recognizes a cause of action for insulting and abusive language resulting in mental distress if the conduct was sufficient to cause severe emotional distress to one of ordinary sensibilities.

[16] Damages \$\infty\$ 89(2)

115k89(2) Most Cited Cases

Florida does not allow exemplary damages for simple breach of contract; however, where the acts constituting the breach also may amount to an independent tort, exemplary damages may be recovered.

|17| Damages € 89(2)

115k89(2) Most Cited Cases

(Formerly 115k91(1))

If simple breach of contract is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, claim for exemplary damages is properly asserted under Florida law.

|18| Attorney and Client €==129(4)

45k129(4) Most Cited Cases

If proven, claim that attorney, who was discharged by client and sued by client to recover jewelry given as security under contingent fee agreement, engaged in conduct so hostile and threatening to client following discharge for failure to permit client to settle case that client sustained emotional distress, client would be entitled to recover punitive damages. *964 Raymond E. LaPorte, Tampa, Fla., for plaintiff-appellant.

William R. Hapner, Jr., Tampa, Fla., for defendant-appellee.

Before TUTTLE, BELL, and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Once again-- it seems to be habitual-- we are confronted with a case demonstrating the dangers of rendering a judgment of dismissal on the basis of bare-bone pleadings. Finding that the plaintiff did plead facts sufficient to state a *965 claim upon

which relief can be granted, we reverse.

We must here review an unseemly and deplorable belligerancy between an attorney, Percy Foreman, and his client, Mrs. Geneva Singleton. The difficulties began in February 1969 when Mrs. Singleton who was apparently experiencing marital difficulties traveled from her home in Tampa, Florida, to Memphis, Tennessee, to consult with the defendant, a Texas attorney. Following consultation Mrs. Singleton retained Mr. Foreman to represent her in a divorce action in the State of Florida. The parties entered into the following contract pertaining to Mr. Foreman's employment:

This is to make a record of our agreement concerning my employment as your principal attorney to represent you in a divorce action to be filed in the Circuit Court of Hillsborough Co., Florida, within the near future. I am not licensed to practice law in Florida, but I have never been refused permission to try an isolated case there, and I anticipate engaging a licensed lawyer who maintains offices in Tampa and with whom I have previously worked.

'My normal retainer for accepting a case outside Texas, where there is child custody and/or a considerable estate to establish, is \$25,000.00. This is not applied to the per diem but is a retainer paid solely for my agreement to represent the client. My actual fee in your case is to be one-third of the value of any recovery that may be obtained for you, plus a reasonable fee of any alimony and or support payments the Court may grant or allow, such reasonable fee of such installment payments is to be fixed by the Court.

The one-third of the base recovery in property or money is to be my property absolutely, whether obtained by me or anyone else. That is, should you elect to dispense with my services and engage another lawyer, I am still entitled to receive the one-third of any recovery and a reasonable amount of any payments made after the divorce.

'I agree to pay any local lawyer that I may engage out of the above fee arrangement. But it is

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anticipated that he and I will apply for an advance for attorneys fees and trial expenses. Any such fees so advanced by order of the Court will apply to our total or over all fee.

'I have made no statement, representation or warranty concerning the outcome of this case. We both know that it is a hard fight. But I have promised to appear at the final trial of this case in person and to try to be present at the first hearing. I will prepare all pleadings and have the final decision on all important matters, subject, of course, to consultation with you when such is possible.

'To secure the payment of my \$25,000.00 retainer, you have given me this date the following jewelry and personal property, to-wit:

	Description	Appraised
1-	Platinum pin, consisting of 35 diamonds and 36 emeralds total weight diamonds 6 1/2 cts emeralds 7 1/2 cts (J-15)	\$ 5,800.00
1 -	Lady's platinum ring (damaged by cutting off finger) with two long baguettes and 2.25 emerald cut diamond, white	. 500 00
	and clear (J-1)	3,500.00
1-	Lady's 18 kt yellow gold heavy hand-made ring, consisting of 1-22 cts. turquoise and 102 round diamonds (J-14)	3,200.00
1-	Lady's platinum bracelet containing 1 emerald cut diamond, 2 kite shaped diamonds, 52 round diamonds (mostly full cuts) and 39 baguettes and tapered baguette diamonds (J-13)	3,600.00

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1-	Lady's 23 jeweled 14 K white gold Bulova Diamond watch with diamond attachment (J-9)	1,200.00
1-	Lady's large turquoise ring, white gold circled by 20 diamonds (J-8)	400.00
1-	Yellow gold, heavy bracelet with four charms hand made	400.00
1 -	Diamond, 14 kt. white gold pin 'GS'	150.00
1-	14 kt yellow gold shrimp on black onyx (J-18)	250.00
1-	Yellow gold wedding band cut in two	
1-	Twenty Dollar (U.S.) Gold piece made into a locket-charm	100.00

*966 'You will note the total value of the above are less than my stated retainer fee. But, since you have evidenced a willingness to do whatever you could in the way of placing your jewels with me, I agree to hold all the above until the final disposition of your case, including any appeals, and that you shall have all the above personal property returned to you upon payment to me out of your portion of the recovery, in addition to by one-third fee aforesaid, the total value of each or any of the above items you may care to redeem.

'The above jewels are not a part of the fee provided in the court's advance order or the one-third attorney fee but are to be considered soley as my separate retainer in the case. It is not contemplated that any local attorney will have any claim on them whatsoever. 'As evidence that the above is our agreement, you will sign the original and two copies of this agreement.

Yours very truly, (S) PERCY FOREMAN

'The above is our agreement and I have signed each page of the original and two copies of same. I fully understand it.

(S) GENEVA A. SINGLETON'

By February 28, 1969, 21 days after their initial meeting and approximately 10 days after the plaintiff's divorce petition was filed in Florida, discord and dissent between the parties had reached such a crescendo that Mrs. Singleton dismissed Mr. Foreman as her attorney. Subsequently Mrs. Singleton brought this suit in a Florida court against

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Mr. Foreman, alleging the following:

'Plaintiff, GENEVA ANN SINGLETON, sues

Delendant, PERCY FOREMAN, and alleges:

- I This is an action for compensatory and exemplary damages in the sum of two million dollars.
- 2. That on or about February 7, 1969, the plaintiff, while in a state of despair and confusion due to marital problems and discord, traveled from her residence in Tampa, Florida to Memphis, Tennessee to seek the advice and counsel of the defendant PERCY FOREMAN, concerning her domestic and marital problems.
- 3. That after a discussion between the plaintiff and defendant, the defendant undertook to represent the plaintiff in a divorce action to be filed in the Circuit Court of Hillsborough County, Florida.
- 4. That on or about February 10, 1969, the defendant drafted an alleged agreement and secured the signature of the plaintiff to same. That a copy of said alleged agreement is attached hereto as Exhibit A and the contents of Exhibit A are incorporated herein as fully as if set forth herein.
- 5. That at the time of affixing her signature to said Exhibit A the plaintiff was distraught, confused, apprehensive and was not fully aware of the contents of Exhibit A at the time of affixing her signature.
- 6. That plaintiff's medical condition, as described in paragraph 5 was due to the actions of the defendant in that the defendant exhorted the plaintiff to be distrustful of everyone including plaintiff's mother, sister and family; that the defendant instructed the plaintiff to keep the purported agreement, Exhibit A, a secret and especially not to mention *967 same to the attorney he planned to associate in the case in Tampa, Florida named James Thompson; that defendant further oppressed the plaintiff and her spirit by requiring the plaintiff to deliver to defendant certain

items of jewelry described on page two of Exhibit A attached hereto; that in addition the defendant told plaintiff that he had to have the Jaguar coat that he saw upon the plaintiff although it was then the middle of winter in Memphis, Tennessee; that plaintiff prevailed upon the defendant to allow her to keep the coat since she would then be without any coat with which to keep herself warm while she remained in Memphis or while she was returning to Tampa, Florida; and that defendant then told plaintiff that he would let the plaintiff keep the coat until May, 1969.

- 7. That the defendant then entered upon a course of abuse and oppression directed toward plaintiff which caused the plaintiff extreme mental pain and suffering; that the defendant cursed the plaintiff, and in some instances the plaintiff's mother in the presence of the plaintiff, with language so vile, scurrilous, and indecent that plaintiff is embarrassed to repeat them in this pleading and to spread said language upon the public records.
- 8. That defendant's abuse of plaintiff continued until on or about February 28, 1969 when plaintiff advised defendant that she did not want his legal services for any purpose.
- 9. That on or about February 27, 1969, the plaintiff attempted to discuss a possible out of court settlement of plaintiff's divorce complaint which had been filed by defendant and James Thompson, in plaintiff's name, against her husband, Henry Charles Singleton. Said divorce complaint was filed February 17, 1969 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, being case number 176010.
- 10. That while attempting to discuss the terms of settlement that plaintiff desired, the defendant exploded into a torrent of abuse, cursing and vile language directed at plaintiff. In the course of said obscenities, the defendant told the plaintiff that she was a 'stupid'; that plaintiff did not 'have any more to say in this case than a chair in the Court room'; and that if plaintiff attempted to obtain the services of another lawyer that, 'I'll ruin you and that husband of yours.'

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- 11. That the alleged agreement, Exhibit A, was and is offensive to and violative of public policy and is void ab initio.
- 12. That the plaintiff has requested that defendant return the jewelry itemized in Exhibit A, but defendant has failed and refused to return said jewelry.
- 13. That in addition to the unwarranted abuse described hereinabove which defendant has directed toward plaintiff, the defendant is also attempting to obtain monies from the plaintiff in excess of one million dollars for purported attorney fees for alleged representation in her above mentioned divorce suit.
- 14. That the defendant is guilty of professional misconduct as follows:
- (a) securing and attempting to enforce the alleged agreement attached as Exhibit A, which is repugnant to the law governing the conduct of members of the legal profession;
- (b) in attempting to secure an exorbitant fee, greatly in excess of the reasonable value for services rendered or to be rendered by him for plaintiff;
- (c) in the oppression and abuse of the plaintiff as hereinabove described.
- 15. That plaintiff is entitled to exemplary damages because defendant should be taught that when individuals approach him for aid and services, as plaintiff did, much as one would approach a priest or minister, he should not be allowed to conduct himself in the manner in which he has toward the plaintiff; that defendant's actions apparently follow a similar pattern or modus operandi with other clients, such as his actions *968 in representing 'Candy' Mossler and James Earl Ray, wherein he has reportedly demanded exorbitant fees and in some instances obtained jewels and property which he has refused to return.
- 16. That as a proximate result of defendant's

conduct and actions the plaintiff has experienced extreme mental suffering to her physical detriment and will continue to so suffer in the future.

WHEREFORE, plaintiff demands a judgment from the defendant for the value of the jewels which defendant has converted to his own use, plus compensatory and punitive damages in the total sum alleged.'

Foreman removed the cause from the state court to the United States District Court for the Middle District of Florida, where he then filed a motion to dismiss, asserting that Mrs. Singleton's complaint failed to state a claim upon which relief could be granted. The trial court apparently agreed and granted the motion to dismiss after Mrs. Singleton declined to amend her pleadings.

[1][2][3] The central issue in this case, therefore, is whether the trial court was in error in dismissing the action on the pleadings. We are moved to note at the onset that dismissal at such an early stage is not looked upon favorably. Barnes v. Merritt, 5 Cir. 1967, 376 F.2d 8, n. 6. Chief Judge Brown has characterized such a procedure as both a 'precarious one with a high mortality rate,' Barber v. Motor Vessel 'Blue Cat,' 5 Cir. 1967, 372 F.2d 626, 627, and 'a tortuous thing,' Arthur H. Richland Co. v. Harper, 5 Cir. 1962, 302 F.2d 324. Though our opinions are replete with homilies and entreaties not to deal cavalierly with cases in this manner, they, like much of scripture, have too often gone unheeded. [FN1]

FN1. For a list of the evergrowing number of cases where the trial judge disregarded the caution we have so often tried to instill, see Millet v. Godchaux Sugars, Inc., 5 Cir. 1967, 241 F.2d 264, n. 1, and Barber v. The Motor Vessel 'Blue Cat,' 5 Cir. 1967, 372 F.2d 626, n. 1.

The rule is clear and often repeated-- a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of

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his claim. Barnes v. Merritt, supra; Arthur H. Richland Co. v. Harper, supra; 2A J. Moore, Federal Practice P12.08 (1968). Stated another way, on a motion to dismiss on the pleadings the court must assume that all of the allegations of the complaint are true in order to determine whether a cognizable claim is stated. Gardner v. Toilet Goods Association, Inc., 1967, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704. Sitting as diversity court in the State of Florida we must apply this federal standard to determine whether under the substantive law which a Florida court would apply Mrs. Singleton has stated a claim upon which relief can be granted. Evaluating Mrs. Singleton's complaint according to these standards, we think she has stated claims, both in contract and in tort for which a Florida court could grant relief.

The Applicable Law

[4] At the outset we are faced with a conflicts problem because the contract between Mrs. Singleton and Mr. Foreman was apparently made in Tennessee, but was to be performed in Florida. Since we are sitting as a Florida court we must look to the conflicts rule of the State of Florida to determine whether the law of Florida or the law of Tennessee should in this instance be applied. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 1941,313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. Unfortunately, however, the relevant Florida conflicts rule is not entirely clear.

[5] At one time Florida apparently followed the rule that matters concerning the validity and interpretation of contracts were governed by the lex loci contractus, Walling v. Christian & Craft Grocery, 1899, 41 Fla. 479, 27 So. 46. Later cases indicate, however, that the Florida courts subsequently moved to a more flexible position and followed the *969 rule that the nature, validity, and interpretation of contracts are to be governed by the place where the contract is made or the place where the contract is to be performed. Brown v. Case, 1920, 80 Fla. 703, 86 So. 684; Connor v. Elliott, 1920, 79 Fla. 513, 85 So. 164; Fincher Motors, Inc. v. Northwestern Bank & Trust Co., Fla.App.1964, 166 So.2d 717. We have discovered no case where

Florida authorities have discussed appropriate law to be applied when, as here, the place of making and the place of performance are not the same. Consequently, we must attempt to guess which law the Florida court would apply in this situation. [FN2] We conclude that the Florida courts, in a case where the place of making differs from the place of performance would choose between the two according to which place had the more significant relationship to the contract. Applying that test to the instant case, we find that Florida, the place of performance, has the more significant relationship to the contract. The Tennessee contracts, arising solely from the transitory presence of the parties, were insignificant and entirely fortuitous. All that was to follow from the contract was performable in Florida since the contract dealt with a divorce and property settlement to be obtained in Florida. It concerned sensitive domestic relations matters peculiarly within Florida's domain. We have no doubt that in such a situation a Florida court would choose to apply Florida law. We therefore will do the same.

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FN2. It may be that because Tennessee has absolutely no interest in having its law applied that the instant problem is more properly characterized as a 'false conflict.' See Lester v. Aetna Life Insurance Co., 5 Cir. 1970, 433 F.2d 884. We do not decide this question since under either approach Florida law would apply.

Claims Stated

[6][7][8] It is immediately apparent to us that at the very least Mrs. Singleton's complaint states a cognizable claim for a return of the retainer paid to Mr. Foreman. The contract provided for a retainer and a contingent fee out of the proceeds from the divorce settlement. Contracts for a contingent fee in divorce cases are void and unenforceable under Florida law. Salter v. St. Jean, Fla.App.1964, 170 So.2d 94; Sobieski v. Maresco, Fla.Ct.App.1962, 143 So.2d 62. Although Florida follows the general rule that courts will not aid either party to an illegal contract but will leave them where they place themselves, Florida also recognizes an exception to

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this rule when 'law or public policy requires action by the courts, or where the parties are not in pari delicto.' Stewart v. Sterns and Culver Lumber Co., 1908, 56 Fla. 570, 48 So. 19, 25. Since on the pleadings Mrs. Singleton can in no manner be considered in pari delicto with Mr. Foreman, we think the courts of Florida would go to her aid to the extent of returning the consideration which she tendered in performance of her part of the invalid contract. Restatement of Contracts § 604 (1932).

[9][10] Foreman, however, contends that even if the contract is invalid as to the contingent fee, the retainer should be allowed to stand since the contract is divisible. We do not agree. Florida law provides that 'a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration.' Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley and Beckwith, Inc., Fla.1953, 66 So.2d 818, 821. Similarly, 'a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement.' Id. at 821. Judged by this standard, we think the contract here was clearly non-divisible. The retainer and contingent fee were related to the sole object of employment, the divorce. The parties did not contemplate a piece work relationship. We think it obvious that Mr. Foreman did not agree and *970 would not have agreed to handle the divorce for the retainer alone. With the illegal portion of the contract excised, the greater portion of the consideration was eliminated. It is impossible to think that a portion of the contract with this much significance could be entirely 'eliminated from the contract and still leave a valid working arrangement fairly reflecting the original mutual understanding between the parties.' Local No. 234 v. Henley and Beckwith, Inc., supra, at 822. The contract is thus not subject to divisible quantification. The retainer and the contingent fee both related to the whole obligation. We conclude, therefore, that the invalid contingent fee made the entire contract void and unenforceable.

- [11] Furthermore, even if the retainer could be considered a separate part of a divisible contract, we think Mr. Foreman would still be required to return the retainer since, if the allegations are supported by fact, he clearly breached the entire contract. Implicit in every attorney-client contract is a covenant by the attorney that he will conduct himself according to customary professional standards. In Florida, as elsewhere. attorney-client relationship is regarded demanding an extremely high standard of conduct. Gerlach v. Donnelly, Fla.1958, 98 So.2d 493. The attorney is under a duty to represent his client with the 'utmost degree of honesty, forthrightness, loyalty and fidelity.' Smyrna Developers, Inc. v. Bornstein, Fla.App.1965, 177 So.2d 16, 18. He must resign if at any time in the course of litigation his interest in the suit becomes 'adverse or hostile to his client,' United States Savings Bank v. Pittman, 1920, 80 Fla. 423, 86 So. 567, 572. Hostility or adverse positions need not always be of an economic character. Indeed, custom requires that the attorney treat his clients with civility, common decency, and loyalty, both as to legal problems and as to their personal relationships.
- [12] Moreover, it is clear that an attorney never has the right to prohibit his client from settling an action in good faith. Sentco v. McCulloh, Fla.1955, 84 So.2d 498; Florida Bar Rules, Canon No. 7. A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. He has no authoritarian settlement thwarting rights by virtue of his employment. This is particularly true where, as here, the client's lawsuit is one for divorce, for public policy favors reconciliation.
- [13] Judging Mr. Foreman's conduct according to these rules, and assuming, as we must, that the allegations in the complaint are true, we think it quite clear that he breached the most fundamental aspects of the confidential relationship with Mrs. Singleton. The complaint alleges that when she indicated a desire to settle her divorce action, Mr.

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Foreman 'exploded into a torrent of abuse,' refused to allow her to settle, and threatened to ruin both Mrs. Singleton and her husband. He thus allowed himself to be in economic and personal hostility to his client and at this point was under a legal duty to withdraw from the case. United States Savings Bank v. Pittman, supra. Instead, Mr. Foreman, it is alleged, threatened to ruin his client and her husband if they obtained the services of different counsel.

[14] Such irresponsible and reprehensible conduct on the part of an attorney, if factually established, would give the client an absolute right to fire the attorney with cause, thereby terminating any rights which he may have under the contract of employment. Goodkind v. Wolkowsky, 1938, 132 Fla. 63, 180 So. 538, aff'd 147 Fla. 415, 2 So.2d 723, reaff'd 151 Fla. 62, 9 So.2d 553. Rosenkrantz v. Hall, Fla.Ct.App.1964, 161 So.2d 673. Further, it is settled Florida law that when one party to a contract unjustifiably refuses to perform a substantial part of his duty under the contract,*971 the other party has the right to rescind the contract and recover what he has paid pursuant to the agreement. Savage v. Horne, 1947, 159 Fla. 301, 31 So.2d 477; Givens v. Vaughn-Griffin Packing Co., 1941, 146 Fla. 575, 1 So.2d 714; Ganaway v. Henderson, Fla.App.1958, 103 So.2d 693; Pinellas Central Bank & Trust v. International Aerodyne, Inc., Fla.App.1970, 233 So.2d 872. In Binz v. Helvetia Florida Enterprises, Inc., Fla.App.1963, 156 So.2d 703, 704, cert. denied, 162 So.2d 665, appeal dism. 379 U.S. 12, 85 S.Ct. 117, 13 L.Ed.2d 24, the Florida court stated the applicable rule:

'It is axiomatic that where a promise to pay a sum of money is made upon the consideration of a promise to perform certain service, the consideration fails if the services are not performed, and the promise based thereon is discharged.'

In Binz there was no attempt to render any services under the contract. Our court in analyzing this rule, however, has concluded that it applies equally to the situation where there is an unsuccessful attempt to perform. Sanitary Linen Service Co. v. Alexander Proudfoot Co., 5 Cir. 1970, 435 F.2d 292.

In the instant case we can form no other conclusion but that the alleged acts of Mr. Foreman constitute an absolute refusal to perform substantial duties under the contract, rendering his entire performance unsuccessful. If we assume that he did and said that which Mrs. Singleton alleges, his conduct was so pockmarked with hostility and arrogance that Mrs. Singleton was justified in rescinding the entire contract and demanding the return of her consideration. Sanitary Linen Service v. Alexander Proudfoot Co., supra; Binz v. Helvetia Florida Enterprises, Inc., supra. We therefore hold that Mrs. Singleton's complaint states a valid cause of action for the return of the jewels or their value since she paid this much on the contract which Mr. Foreman did not successfully perform.

[15] Moreover, Mrs. Singleton has alleged that she suffered physical and mental disturbances as a result of Mr. Foreman's conduct, and she asked, in addition to actual damages, a sum for exemplary damages. Florida recognizes a cause of action for insulting and abusive language resulting in mental distress if the conduct was sufficient to cause severe emotional distress to one of ordinary sensibilities. Stores of Florida, Slocum Fair V. Food Fla.1958,100 So.2d 396; Korbin v. Berlin, Fla.App.1965, 177 So.2d 551, cert. denied, 183 So.2d 835; Gay v. McCaughan, 5 Cir. 1960, 272 F.2d 160. We think the conduct alleged was sufficient to state a cause of action under the Slocum and Korbin principle.

[16][17][18] Florida, like most states, does not allow exemplary damages for simple breach of contract. However, where the acts constituting the breach also amount to an independent tort, exemplary damages may be recovered. Griffith v. Shamrock Village, Fla.1957, 94 So.2d 854. If the breach is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, the claim for exemplary damages is properly asserted. Griffith v. Shamrock Village, supra; Associated Heavy Equipment Schools, Inc. v. Masiello, Fla.Ct.App.1969, 219 So.2d 465. We have held that Foreman's alleged conduct was sufficient to state an independent tort action, and, since that alleged conduct was both oppressive and showed

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such a great indifference to the persons and property rights of others, malice may be imputed, thus justifying punitive damages. Kirksey v. Jernigan, Fla.1950, 45 So.2d 188.

In sum, we find that Mrs. Singleton's complaint stated claims on which relief can be granted under Florida law. The facts as ultimately developed may not be congruent with the allegations contained in the complaint, but Mrs. Singleton deserves the opportunity to submit proof of her jeremiad.

The case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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C

District Court of Appeal of Florida, First District. Richard D. WASSALL, Appellant, W.H. PAYNE and Dean Highfield, Appellees.

No. 95-3874.

Nov. 7, 1996.

Purchaser and lessee brought action against vendor and real estate broker, alleging fraudulent misrepresentation, negligent misrepresentation, and negligence per se in connection with sale of real estate that was subject to flooding. The Circuit Court, Bay County, N. Russell Bower, J., granted broker judgment on lessee's pleadings as to counts fraudulent misrepresentation, negligent misrepresentation and negligence per se, and dismissed lessee's cause of action against vendor for fraudulent misrepresentation. Lessee appealed. The District Court of Appeal, Van Nortwick, J., held that: (1) privity requirement did not preclude lessee's material misrepresentation or negligence per se claims, and (2) economic loss rule did not bar action.

Reversed and remanded.

West Headnotes

|1| Brokers € 102 65k102 Most Cited Cases

[1] Fraud € 29

184k29 Most Cited Cases

Privity requirement did not preclude lessee, who actively participated in negotiations which preceded sale, from bringing suit against vendor and real estate broker for material misrepresentation of material latent defects in connection with sale of real estate.

[2] Fraud € 25

184k25 Most Cited Cases

When fraudulent misrepresentation and negligent misrepresentation in formation of contract are alleged, economic loss rule does not bar tort action based on such misrepresentations.

[3] Brokers € 101

65k101 Most Cited Cases

Privity requirement did not preclude lessee, who actively participated in negotiations which preceded sale, from bringing suit against real estate broker for negligence per se in connection with sale of real estate that was subject to flooding.

*679 Robert M. Ervin, Jr. and J. Stanley Chapman of Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, for Appellant.

Mark D. Dreyer of Harrison, Sale, McCloy & Thompson Chartered, Panama City, for Appellees.

VAN NORTWICK, Judge.

Richard D. Wassall appeals two orders, one granting appellee Dean Highfield a judgment on the pleadings on Wassall's count against him for misrepresentation, fraudulent negligent misrepresentation and negligence per se; and the other dismissing with prejudice Wassall's cause of action against appellee W.H. Payne for fraudulent misrepresentation. Wassall had leased property which Payne sold to Dorothy Frazier, for which sales transaction Highfield allegedly acted as the broker. In the appealed orders, the trial court concluded that Wassall could not state a cause of action against appellees, because Wassall, as lessee from Frazier, had no privity of contract with either Highfield or Payne, and because neither Highfield nor Payne had a duty to disclose to Wassall the latent defects of the property which caused it to flood on occasion. Wassall contends, and we agree, that the lack of privity of contract does not preclude his action for fraudulent or negligent

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misrepresentation, and, thus, the orders appealed must be reversed.

I

On April 24, 1989, Frazier purchased real property and improvements from Payne, with Highfield allegedly acting as the real estate broker for this transaction. One day later, Wassall leased the premises from Frazier. Pursuant to the lease, Wassall was responsible for making the payments to Payne for purchase of the property.

As Wassall alleges, he was an active participant in the negotiations which preceded the sale and, initially, it was he, not Frazier, who was planning to purchase the property. He also alleges that, prior to this sale and lease, he inquired whether the property was subject to flooding and that both Payne and Highfield misrepresented the property's propensity for flooding to him. He alleges further that Payne made this misrepresentation knowingly and with the intent that Frazier and Wassall rely upon the misrepresentation and consummate the sale and lease; and that he detrimentally relied upon this misrepresentation and expended money on improvements to the property before realizing that the property was subject to periodic flooding. Wassall's allegations are the same regarding Highfield, except that he alleges Highfield made the misrepresentation either knowingly or without knowledge of its truth or falsity.

*680 Both Frazier and Wassall filed a complaint against Payne, Highfield, and Bay County. In the order on appeal, the trial court granted a judgment on the pleadings as to Wassall's claims against Payne and Highfield. Frazier's claims are still pending in the trial court, as are Wassall's claims against Bay County for negligence, inverse condemnation and trespass.

Н.

[1] At the outset, we point out that this suit involves alleged misrepresentations by both appellees which preceded the creation of the contracts for sale and lease of the subject real property. The complaint alleges that the misrepresentations induced Frazier to buy and

Wassall to lease this property. As the supreme court explained in A.R. Moyer, Inc. v. Graham, 285 So.2d 397, 399 (Fla.1973):

Privity is a theoretical device of the common law that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modern concepts of tort liability.

In this instance, the distinction between tort and contract is important. It cannot be said that Wassall contractually accepted the risk that defendants would lie to him (as it is alleged) so that he would enter into the lease in the first instance. Thus, the theoretical underpinnings for contractual limitation of the defendants' liability are not present in this case.

We conclude that the instant case is governed by the principles enunciated by the Second District in Wallis v. South Florida Savings Bank, 574 So.2d 1108 (Fla. 2d DCA 1990). In Wallis, the court determined that the Wallises had stated a cause of action against South Florida Savings Bank for intentional misrepresentation in connection with obtaining the Wallises' personal guarantee of a loan by Park Bank to a developer. The Wallises alleged that they gave their guarantee based upon South Florida's representation that it would loan the developer \$27,000,000. South Florida failed to honor its commitment letter and the development went into foreclosure. As explained by Judge Altenbernd in his concurring opinion:

The primary theory which the Wallises allege against South Florida is a more traditional theory of fraud. They allege that South Florida made a material misrepresentation of fact concerning its ability to lend \$27,000,000. South Florida allegedly knew this statement was untrue and knew that the Wallises were relying upon its accuracy when they agreed to guarantee the subordinated loan. They allege that South Florida intended to induce persons in their capacity to rely upon the incorrect information in the commitment letter. Finally, they allege that they were damaged by their justifiable reliance on the misrepresentation. If true, these allegations are enough to establish fraud--so long as the

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relationship between South Florida and the Wallises is sufficiently close to create a duty owing under a theory of fraud.

Frequently, the relationship which creates a duty owing in fraud is also a relationship involving contractual privity. See, e.g., Johnson [v. Davis, 480 So.2d 625 (Fla.1985)]. In this case, no contractual privity exists. It is not clear that the Wallises are third-party beneficiaries of any contract executed by South Florida. See Deanna Constr Co. v. Sarasota Entertainment Corp., 563 So.2d 150 (Fla. 2d DCA 1990). There are occasions, however, when third persons with close connections to a business transaction may allege a cause of action in fraud or negligence against a party involved in the transaction. See 37 Am.Jur.2d Fraud and Deceit § 297 (1968). See generally First Fla. Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla.1990); Restatement (Second) of Torts § 552 (1976). The buy-out of this partnership was in the broadest sense a single business transaction. If the allegations of the complaint are true, South Florida certainly had reason to expect that another bank or a guarantor would rely upon its commitment to loan \$27,000,000. The inaccuracy of representation could greatly increase the risks of a subordinated bank or guarantor. If South Florida had actual knowledge *681 that Mr. Propps [the developer] was using the commitment letter to induce the Wallises or other people to undertake financial risks in this development, it does not appear ill-conceived to make the bank liable for some measure of resulting damage. By this court's decision, we are merely giving the Wallises an opportunity to prove a set of facts which establishes such a relationship and which also establishes the remaining elements of the alleged fraud.

Id. at 1110-1111.

We distinguish the instant case from this court's opinion in *Haskell Co. v. Lane Co., Ltd.*, 612 So.2d 669 (Fla. 1st DCA), rev. dismissed sub nom., Service Merchandise Co., Inc. v. Lane Co., Ltd., 620 So.2d 762 (Fla.1993). In Haskell, this court held that the requirement of privity precludes a lessee from bringing a suit for nondisclosure of

material latent defects in connection with the sale of real estate. The instant action, however, is not a suit involving mere nondisclosure, but instead seeks a recovery for the separate and distinct tort of material misrepresentation.

Ш

[2] Although not a basis for the trial court's rulings in this case, appellees suggest that this court should affirm the trial court on the grounds that the economic loss rule precludes the instant action. This rule has been summarized by this court to mean that "absent a tort independent of breach of contract, remedy for economic loss lies in contract law." Monco Enterprises, Inc. v. Ziebart Corp., 673 So.2d 491, 492 (Fla. 1st DCA 1996). Until recently, the district courts of appeal were split regarding the economic loss rule's application to the tort of fraud in the inducement. Compare, Monco Enterprises, supra; TGI Development, Inc. v. CV Reit, Inc., 665 So.2d 366 (Fla. 4th DCA 1996); and Williams v. Peak Resorts International, Inc., 676 So.2d 513, 517-518 (Fla. 5th DCA 1996) with Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995), quashed, 21 Fla. L. Weekly S446, 685So.2d 1240 [1996 WL 600478] (Fla. October 17, 1996); and Florida Bldg. Inspection Services, Inc. v. Arnold Corp., 660 So.2d 730 (Fla. 3d DCA 1995). The Supreme Court resolved this conflict, however, in HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 21 Fla. L. Weekly S447, 685 So.2d 1238 [1996 WL 600501] (Fla. October 17, 1996), in which the court held that the "cause of action for fraud in the inducement is an independent tort and is not barred by the economic loss rule." Id. at S448, at ----. Thus where, as here, fraudulent misrepresentation and negligent misrepresentation in the formation of a contract are alleged, the economic loss rule does not bar the tort action based on such misrepresentations. *Id.*

We do not address whether the elements of fraudulent misrepresentation and negligent misrepresentation have been sufficiently pled to state a cause of action under those theories. Because the trial court has not had an opportunity to rule on sufficiency of the allegations of fraudulent misrepresentation or negligent misrepresentation, it

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would be premature for this court to decide that issue *Wolfe v. American Sav. and Loan Assoc. of Florida*, 539 So.2d 606 (Fla. 3d DCA 1989).

IV

[3] Finally, turning to the dismissal of the claim for negligence per se, the trial court's order indicates that it erroneously considered the sufficiency of this cause of action based solely upon the privity requirement. We thus reverse the trial court's decision that Wassall does not have a cause of action against Highfield for negligence per se. In so doing, we decline to consider whether there are other factual and legal arguments which, if they had been considered by the trial court, might have justified dismissal of the claim for negligence per se. See e.g., Greenberg v. Mahoney Adams & Criser, P.A., 614 So.2d 604, 605 (Fla. 1st DCA 1993).

REVERSED and REMANDED for proceedings consistent with this opinion.

BOOTH and BENTON, JJ., concur.

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416 So.2d 1183

416 So.2d 1183

(Cite as: 416 So.2d 1183)

C

District Court of Appeal of Florida, First District. Betty Owen STINSON and Kent Spriggs, Appellants/Cross Appellees,

FEMINIST WOMEN'S HEALTH CENTER, INC., Appellee/Cross Appellant. No. AE-403.

> June 28, 1982. Rehearing Denied Aug. 6, 1982.

Attorneys brought suit for fees due on settlement proceeds. Client filed counterclaim. The Circuit Court for Leon County, John A. Rudd, J., assessed compensatory and punitive damages against attorneys, determined amount of their attorney fees for representing client in previous action, dissolved their charging liens for those fees and awarded attorney fees, and attorneys appealed. The District Court of Appeal, Wigginton, J., held that: (1) trial court did not err in awarding compensatory and punitive damages; (2) as foundation for punitive damage award against client's former attorneys, judge properly computed compensatory damages as interest on money that would have come to client, less agreed-upon fees and costs, at time of settlement; (3) trial judge did not err in failing to require client to pay interest on its former attorneys' fees and costs; and (4) trial judge was without authority to award client its fees on its counterclaim.

Affirmed in part, reversed in part and remanded.

West Headnotes

|1| Attorney and Client € 109

45k109 Most Cited Cases

Award of compensatory damages against client's former attorneys was supported by judge's conclusions, supported by the record, that at outset of client's action, parties agreed that attorneys

should be paid at rate of \$30 per hour, not \$60 per hour as claimed by attorneys, that attorneys represented to client that they would deliver settlement check and would look to client for payment of their fees, but instead, their machinations tied up check for months, and that attorneys obfuscated, manipulated and deceived their clients in tortious attempt to take all of the settlement money.

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[2] Damages €==91.5(1)

115k91.5(1) Most Cited Cases

(Formerly 115k91(1))

Generally, punitive damages are not awardable unless offending parties have acted with malice, moral turpitude, gross negligence, reckless indifference to rights of others, wantonness, oppression, outrageous aggravation or fraud.

[3] Attorney and Client € 129(4)

45k129(4) Most Cited Cases

Trial judge did not err in awarding punitive damages against attorneys, finding that attorneys had acted oppressively and with indifference to persons and property rights of others, and that their behavior had been egregious and self serving and unconscionable.

[4] Damages € 87(2)

115k87(2) Most Cited Cases

Punitive damages are recoverable only where actual damages are shown.

[5] Attorney and Client 29(4)

45k129(4) Most Cited Cases

As foundation for punitive damage award against client's former attorneys, judge properly computed compensatory damages as interest on money that would have come to client, less agreed-upon fees and costs, at time of settlement.

|6| Interest € 14 219k14 Most Cited Cases

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Trial judge did not err in failing to require client to pay interest on its former attorneys' fees and costs, where attorneys, not client, caused settlement funds to be out of circulation.

[7] Attorney and Client 129(4)

45k129(4) Most Cited Cases

Trial judge was without authority to award client its fees on its counterclaim against its former attorneys, where no statute made such fees recoverable and parties' contract did not provide for attorney fees in event of breach or default. West's F.S.A. § 713.76(1, 2).

*1184 Joseph C. Jacobs and Robert King High, Jr., of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for appellants/cross appellees.

Baya Harrison, III, of Fuller, Johnson & Harrison, Tallahassee, for appellee/cross appellant.

WIGGINTON, Judge.

Kent Spriggs and Betty Owen Stinson, members of the Florida Bar, appeal from a final judgment in which the trial court assessed compensatory and punitive damages against them, determined the amount of their attorneys' fee for representing the appellee in a previous action, dissolved their charging liens for those fees, and awarded the appellee attorneys' fees in the action below. We affirm in part and reverse in part.

In the autumn of 1975, Spriggs and Stinson (and another attorney who is not a party to this appeal) were engaged by the Health Center to represent it in a dispute with the Florida Board of Medical Examiners and a group of individual doctors. The protracted pretrial phase of the ensuing lawsuit progressed through the federal court system until 1979, when the case was remanded for trial. Feminist Women's Health Center, Inc. v. Mohammad, 415 F.Supp. 1258 (N.D.Fla.1976), aff'd , 586 F.2d 530 (5th Cir. 1978), rehearing denied. 591 F.2d 1343 (5th Cir. 1979), cert. denied, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979). In January, 1980, shortly before the scheduled trial date, the parties reached settlement and the attorneys each filed a lien on the Health Center's

\$75,000 settlement proceeds. After the attorneys and their client failed to agree on the amount of their fees, the attorneys filed this action in circuit court, and the Health Center through new counsel filed a counterclaim. That is the sanitized version of the events leading to this appeal.

Spriggs and Stinson argue that the award of compensatory and punitive damages is unsupported by the record. We cannot agree.

[1] In affirming the award of damages against the appellants, we make the following findings: First, the record supports the judge's conclusion that at the outset of the action against the doctors, these parties agreed that the attorneys should be paid at the rate of \$30 per hour, not \$60 per hour as Spriggs and Stinson have claimed. Second, the record supports the judge's conclusion that Spriggs and Stinson had represented to the Health Center that they would deliver the \$75,000 settlement check to the Center and would then look to the Center for payment of their fees; instead, the attorneys' machinations tied up the check for months. Third, the record supports the judge's conclusion that Spriggs and Stinson obfuscated, manipulated and deceived their clients in a tortious attempt to take all of the settlement money.

*1185 [2][3] Generally, punitive damages are not awardable unless the offending parties have acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation or fraud. See 17 Fla.Jur.2d, Damages, §§ 109, 119 and authorities cited therein. The trial judge awarded punitive damages here, finding that Spriggs and Stinson had acted "oppressively and with indifference to the persons and property rights of others," that their behavior had been "egregious" and "self serving" and "unconscionable." The trial judge did not err.

[4][5][6] As a foundation for punitive damages, [FN1] the judge properly computed compensatory damages as the interest on the money that would have come to the Health Center, less the agreed-upon fees and costs, at the time of

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settlement. We reject the appellants' contention that an award of prejudgment interest is improper under these circumstances. See Bergen Brunswig Corporation, et al. v. Florida Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982). We also reject the appellants' alternative argument that they, too, should be awarded prejudgment interest. The record shows that the attorneys, not the Health Center, caused the settlement funds to be out of circulation. Accordingly, the trial judge did not err in failing to require the Health Center to pay interest on the attorneys' fees and costs.

FN1. Under Florida law, punitive damages are recoverable only where actual damages are shown. *Martin v. Security Services, Inc.*, 314 So.2d 765, 772 (Fla.1975), citing *McLain v. Pensacola Coach Corp.*, 152 Fla. 876, 13 So.2d 221 (1943).

Because the record supports the judge's computation of the attorneys' fees, we disagree with the appellants' argument that their fees should be redetermined on a quantum meruit basis. Similarly, we disagree with the Health Center's cross appeal argument that the fees should be reduced or not allowed.

[7] Nevertheless, we must reverse the portion of the final judgment that awarded the Health Center its fees in this action. It is fundamental that attorneys' fees are not recoverable in the absence of a statute or contract which makes them recoverable. Section 713.76(2), Florida Statutes, cited in the final judgment as authorizing the fee award, is inapplicable. By its terms, that statute only permits an award of attorneys' fees when the offending party has violated Section 713.76(1). Further, the parties' contract did not provide for attorneys' fees in the event of breach or default.

The Health Center, citing this Court's opinion in Howard v. Crawford and Company, 384 So.2d 1326 (Fla. 1st DCA 1980), argues that attorneys' fees may be awarded when the complaining party proves fraud. However, the attorneys' fee awarded in Howard had accrued some time earlier, in a

different case. That decision manifested the widely-held view that attorneys' fees are awardable where the wrongful act has forced the aggrieved person into litigation with a third party. See generally 22 Am.Jur.2d, Damages, § 166, "Litigation against third person as result of defendant's wrongful act." The Howard opinion did not create a "fraud exception" to the general rule prohibiting the award of fees. Consequently, the trial judge was without authority to enter the fee award below.

Finally we note that the trial court dissolved the attorneys' liens and directed that full payment be made to the Health Center, which in turn was ordered to pay the appellants their portion of the judgment. Because the appellants perfected their liens before this suit was instituted, we believe that justice would be better served if the judge computed the net award for each party and ordered the clerk to disburse the funds directly.

Accordingly, the final judgment is affirmed in part, reversed in part, and remanded for further proceedings.

JOANOS, J., and OWEN, WILLIAM C., Jr., Associate Judge, concur.

416 So.2d 1183

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United States District Court, M.D. Florida,

Fort Myers Division.

Henry W. KREHLING, Jr., Plaintiff, v.

Eli BARON, John N. Brugger, Jr., John F. Forsyth,
Forsyth, Brugger, Reina &
Bourgeau, P.A., Barclay Building Corp., Deauville
Lake Development Corp.,
Montclair Building Corp., Chatham Square
Development Corp., Elba Development
Corp., Attorney's Title Insurance Fund, Inc., and
Commonwealth Land Title,
Defendants.

No. 93-347-CIV-FTM-17D.

June 23, 1995.

Former client of law firm who brought civil Racketeer Influenced and Corrupt Organizations (RICO) action against law firm, attorney who had represented him, and other corporations based on alleged fraudulent activities in connection with real estate transactions subsequently amended complaint and added state law claim for breach of fiduciary duty against second attorney at firm, and second attorney moved to dismiss for failure to state claim. The District Court, Kovachevich, J., held that: (1) allegations that second attorney had been aware of fraudulent actions undertaken by attorney but had not taken steps to prevent them stated claim for relief, and (2) court would exercise supplemental jurisdiction over state law breach of fiduciary duty claim.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 1773

170Ak1773 Most Cited Cases

Complaint should not be dismissed for failure to state claim unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Page 1

[2] Federal Civil Procedure € 1829

170Ak1829 Most Cited Cases

Trial court in ruling on motion to dismiss is required to view complaint in light most favorable to plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 673 170Ak673 Most Cited Cases

[3] Federal Civil Procedure € 1772

170Ak1772 Most Cited Cases

Threshold of sufficiency that complaint must meet to survive motion to dismiss for failure to state claim is exceedingly low; plaintiff need not set forth all facts upon which claim is based, and short and plain statement is sufficient if it gives defendant fair notice of what claim is and grounds upon which it rests. Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure © 673

170Ak673 Most Cited Cases

Provisions of Federal Rules of Civil Procedure which outline standard by which adequacy of pleadings is to be judged, taken together, underscore emphasis placed on clarity and brevity by Rules, and reflect basic philosophy that simplicity, flexibility, and absence of legalistic technicality are touchstones of good procedural system; true test of sufficiency of complaint is whether it provides adequate notice to defendant to make defendant aware of basis of claims, and theory is that more detailed information should be developed through discovery process. Fed.Rules Civ.Proc.Rule 8(a), (e)(1), 28 U.S.C.A.

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[5] Attorney and Client € 129(2) 45k129(2) Most Cited Cases

Under Florida law, allegations that attorney at law firm had been informed that second attorney at firm was committing fraud in connection with real estate transactions involving client, and had failed to take steps to prevent second attorney from committing further fraud, were sufficient to state claim for breach of fiduciary duty against attorney; allegations if true would establish breach of professional duty on part of attorney to prevent violation of professional rules by second attorney, which would allow attorney to be held personally liable regardless of membership in professional service corporation. West's F.S.A. § 621.07; West's F.S.A. Bar Rule 4-5.1(c)(2).

[6] Corporations € 1.4(1)

101k1.4(1) Most Cited Cases

Under Florida law, corporate entity as method of doing business will not be permitted to protect the unfaithful or unethical.

[7] Federal Courts 2 15

170Bk15 Most Cited Cases

State law breach of fiduciary duty claim asserted by former client of law firm against attorney at firm based on alleged failure of attorney to take steps to stop fraudulent behavior was based on same common nucleus of operative fact as civil Racketeer Influenced and Corrupt Organizations (RICO) action brought by client against law firm, second attorney at firm, and other corporations based on alleged fraud in real estate transactions, and court could exercise supplemental jurisdiction over fraud claim; both claims revolved around same central fraud, and same evidence would be involved. 18 U.S.C.A. § 1964; 28 U.S.C.A. § 1367.

[8] Federal Courts €=15

170Bk15 Most Cited Cases

Court would not decline to exercise supplemental jurisdiction over state law claim for breach of fiduciary duty asserted against attorney in connection with action in which civil Racketeer Influenced and Corrupt Organizations (RICO) claims were asserted against law firm, second attorney at firm, and other corporations based on

alleged fraud in real estate transactions; claim did not assert novel or complex issue and did not predominate over RICO claim, court had not dismissed all claims over which it had original jurisdiction, and judicial economy would be advanced by considering claim. 18 U.S.C.A. § 1964; 28 U.S.C.A. § 1367.

*1575 W. Donald Cox, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, FL, Allen I. Saeks, Michael J. Wurzer, Patrick M. O'Brien, Leonard, Street and Deinard, P.A., Minneapolis, MN, for plaintiff.

Mark V. Silverio, Cynthia Byrne Halle, Law Office of Mark V. Silverio, Miami, FL, for defendants except Brugger, Forsyth, Brugger, Reina & Bourgeau, P.A.

Bruce McLaren Stanley, Henderson, Franklin, Starnes & Holt, P.A., Ft. Myers, FL, for defendants John N. Brugger, Jr., Forsyth, Brugger, Reina & Bourgeau, P.A.

Michael S. Pasano, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, Melissa Hammersley Clark, Zuckerman, Spaeder, Taylor & Evans, Tampa, FL, for defendant John F. Forsyth.

Dwight A. Whigham, Winesett, Avery, Dupree & Whigham, P.A., Ft. Myers, FL, for *1576 defendant Attorney's Title Insurance Fund, Inc.

Mark A. Brown, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL, for defendant Commonwealth Land Title Insurance Company.

KOVACHEVICH, District Judge.

ORDER ON MOTION TO DISMISS

This cause is before the Court on Defendant John F. Forsyth's Motion to Dismiss (Dkt. 87) and response (Dkt. 96).

STANDARD OF REVIEW

[1][2] A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355

(Cite as: 900 F.Supp. 1574)

U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

BACKGROUND

Plaintiff filed his Complaint against Defendants on December 7, 1993 (Docket No. 1). This Complaint was amended on February 22, 1995 (Docket No. 81). It contains the following facts as pled:

Defendant John F. Forsyth was an attorney at the law firm of Forsyth, Brugger, Reina & Bourgeau, P.A. (hereafter, the "Firm"). In the spring of 1991, Defendant was informed by an employee that another attorney for the Firm was writing fraudulent title insurance policies, and closing the sale of certain properties without paying or satisfying all the lienholders. The attorney named was Brugger. Defendant informed the employee that he would look into the situation. However, Defendant took no action.

In January of 1992, Defendant was again informed that Brugger was committing fraud. However, Defendant again did not take any affirmative steps to look into the allegations made against Brugger. Plaintiff alleges that as a result, Defendant, through his financial interest in the firm received a benefit from Brugger's allegedly fraudulent activity.

allegedly fraudulent activities These connected with land developments in which Plaintiff was defrauded by Brugger, through one or more of the corporate defendants, of over \$2.4 million. The alleged fraud perpetrated against Plaintiff was made possible by the Firm in several ways. First, Brugger and the Firm were counsel to both Plaintiff and Corporate defendants; Brugger had advised Plaintiff that recording mortgages Plaintiff held over the properties was unnecessary. Second, Brugger and the Firm were responsible for forwarding the proceeds of the sales of the property to Plaintiff, who held mortgages on these properties; the proceeds were allegedly not forwarded to Plaintiff. Third, Brugger acted as title insurance agent by acquiring title insurance for the property; Brugger, because he had advised against recording Plaintiff's mortgages, knew that the properties had liens held against the property by Plaintiff.

The allegations against Defendant Forsyth are contained in Count Seven of Plaintiff's First Amended Complaint (Docket No. 81). It alleges the following:

First, Defendant owed a duty to Plaintiff to prevent Brugger from continuing the fraud being committing when informed of Brugger's activities. Second, Defendant breached his fiduciary duties to Plaintiff by failing to take any action to prevent Brugger from committing any further fraud upon Plaintiff, once Defendant was apprised of its activity. Third, this breach was the proximate cause of the injuries suffered by Plaintiff. Based on these Counts in Plaintiff's Complaint, Defendant moves for dismissal (Docket No. 87).

DISCUSSION

Defendant proffers two theories for dismissal. The first is to dismiss for failure to state a claim. The second is that the Court does not have jurisdiction over this claim, and in the alternative, that the Court should elect not to exercise supplemental jurisdiction over this claim.

[3] Defendant's first theory alleges that Plaintiff has "[failed] to state a claim upon which relief can be granted." Rule 12(b)(6). *1577 The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low. Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation, 711 F.2d 989 (11th Cir.1983). Federal Rule of Civil Procedure 8 outlines the standard by which the adequacy of pleadings are to be judged. Rule 8(a)(2) requires the Plaintiff to provide in the complaint a "short and plain statement of the claim showing that the pleader is entitled to relief." The plaintiff need not set forth all the facts upon which the claim is based; rather, a short and plain statement is sufficient if it

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gives the Defendant fair notice of what the claim is and the grounds upon which it rests. *Id.* In addition to Rule 8(a), Rule 8(e)(1) states that each "averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

[4] Taken together, Rules 8(a) and 8(e)(1) underscore the emphasis placed on clarity and brevity by the Federal pleading rules. These rules reflect the basic philosophy of the Federal Rules that simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system. 5 Wright & Miller, Federal Practice and Procedure. Civil 2d § 1217 at p. 169. The true test of the sufficiency of the complaint is whether it provides adequate notice to Defendant to make Defendant aware of the basis of the claims. The theory is that more detailed information should be developed through the discovery process.

Plaintiff's First Amended Complaint alleges that Defendant committed a wrongful act by failing to take action when informed by an employee of the Firm of Brugger's activity. Florida Statute § 621.07 establishes limited liability for members of a professional service corporation. However, it also creates several exceptions.

An individual will be personally liable for any negligent or wrongful act or misconduct committed by them, or by any person under that person's direct supervision regardless of their membership in a professional service corporation. Fla.Stat.Ann. § 621.07 (1995). Defendant contends that his failure to act does not bring his conduct within the exceptions created by the statute.

[5] However, the weight of authority renders Defendant's argument unpersuasive. Assuming all the allegations in the First Amended Complaint as true, Defendant is subject to Rule 4-5.1(c)(2) of the Rules Regulating the Florida Bar, which provides that:

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional conduct if: the lawyer is a partner in the law firm in which the other lawyer practices, and knows of the

conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rules Regulating the Florida Bar, 4-5.1(c)(2) (1994).

[6] Therefore, Defendant Forsyth, through his knowledge of Brugger's activity, violated Rule 4-5.1(c)(2) by his failure to either report or stop the conduct once he was apprised of its existence. Furthermore, the Supreme Court of Florida has specifically rejected Defendant's attempt to use the professional association as a shield to prevent personal liability. The Court said that "[t]he corporate entity as a method of doing business will not be permitted to protect the unfaithful or unethical." *In re The Florida Bar*, 133 So.2d 554, 556 (Fla.1961).

Accordingly, the First Amended Complaint has set forth sufficient facts to show that Defendant committed a wrongful act within the meaning of § 621.07, and if proven would leave the Defendant personally liable for his misfeasance. The pleadings establish sufficient evidence to defeat Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

The second prong of Defendant's Motion to Dismiss, based on Rule 12(b)(1), is a dismissal for lack of jurisdiction over the subject matter. Defendant attacks Plaintiff's use of 28 U.S.C. § 1367 to establish supplemental jurisdiction. The Court has original jurisdiction over Plaintiff's Racketeer Influenced and Corrupt Organization Act (hereafter "RICO") claim. 18 U.S.C. § 1964 (1995). To establish supplemental jurisdiction over claims against Defendant, Plaintiff must meet the requirements of 28 U.S.C. § 1367 (1994). Section 1367 provides:

*1578 [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims in that action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or

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intervention of additional parties. § 1367.

[7] Moreover, in United Mine Workers v. Gibbs, the Supreme Court established that "[t]he state and federal claims must derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Applying this test to Plaintiff's claim against Defendant, both claims share common elements. First, they revolve around the central fraud involving the federal RICO claim. Second, the evidence for the non-federal claim will involve the same witnesses and evidence as the federal RICO claim. These parallel connections create the same case or controversy within the meaning of Article III of the United States Constitution. Therefore, supplemental jurisdiction should be correctly exercised under § 1367.

Defendant argues in the alternative that even if supplemental jurisdiction over Plaintiff's complaint is proper, the Court should nonetheless decline to exercise it. There are four examples, under § 1367, wherein the court should exercise its discretion. These are:

- (1) the claim raises a novel or complex issue of State law;
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
- (3) the district court has dismissed all claims over which it has original jurisdiction; or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.28 U.S.C. § 1367 (1994)

[8] Applying these to Plaintiff's claim, first, the breach of fiduciary duty is not such a novel or complex issue of State law that this court should not exercise jurisdiction. Second, this claim does not predominate over the RICO claim. Third, this court has not dismissed all claims over which it has original jurisdiction.

Regarding the fourth exception of § 1367, in *Palmer v. Hospital Authority of Randolph County*, such factors as "judicial economy, convenience, fairness to the parties, and whether all the claims

would be expected to be tried together" should be used in determining whether to decline to exercise supplemental jurisdiction. *Palmer v. Hospital Authority of Randolph County*, 22 F.3d 1559, 1569 (11th Cir.1994).

In this case, because it was previously determined that the federal and non-federal claims arise out of the same case or controversy, judicial efficiency would be more properly served by the inclusion of the state claim. With the broad approach of "judicial economy" on this matter, this Court views the following reasons as persuasive. First, the evidence and witnesses for the claims are the same. Second, not exercising supplemental jurisdiction would require the simultaneous presentation of two trials which would require those same witnesses to be present at both. These offer strong motivation decline supplemental jurisdiction. not Therefore, the Court will not decline to exercise supplemental jurisdiction over non-federal claim. Accordingly, it is

ORDERED that Defendant's Motion to Dismiss (Docket No. 87) be **DENIED** as to all Counts.

900 F.Supp. 1574

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342 So.2d 1005.

342 So.2d 1005

(Cite as: 342 So.2d 1005)

C

District Court of Appeal of Florida, Fourth District. BAY COLONY OFFICE BUILDING JOINT VENTURE, a partnership, et al., Appellants,

v

WACHOVIA MORTGAGE COMPANY, a North Carolina Corporation, et al., Appellees.

No. 76--1894.

Feb. 4, 1977.

From order of the Circuit Court, Broward County, Leroy H. Moe, J., striking affirmative defenses, defendants appealed. After plaintiffs gave notice of withdrawal of opposition to appeal and moved that their brief be stricken, the District Court of Appeal, Fourth District, Alderman, J., held that trial court erred in striking, sua sponte, three of the affirmative defenses.

Order reversed as to striking of three affirmative defenses

West Headnotes

[1] Pleading € 360

302k360 Most Cited Cases (Formerly 302k360(1))

Trial court may not on its own initiative strike an affirmative defense for reason that it is legally insufficient. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[2] Pleading €-354

302k354 Most Cited Cases (Formerly 302k354(4))

Affirmative defense may not be stricken merely because it appears to a judge that defendant may be unable to produce evidence at trial to sustain such a defense. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[3] Pleading \$\infty\$ 352

Page 1

302k352 Most Cited Cases

Striking of pleadings is not favored and is an action to be used sparingly by courts, with any doubts to be resolved in favor of the pleadings. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[4] Pleading € 354

302k354 Most Cited Cases (Formerly 302k354(4))

Trial court erred in striking, sua sponte, three of defendant's affirmative defenses, in view of fact that such defenses were not scandalous or impertinent matter and were not entirely without any possible relation to controversy in question. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[5] Pleading €-362(3)

302k362(3) Most Cited Cases

[5] Pleading \$\infty\$ 364(3)

302k364(3) Most Cited Cases

Matter should be stricken as redundant or immaterial only if it is wholly irrelevant and can have no bearing on the equities and no influence at all on the decision. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

*1005 James W. Geiger, Fort Lauderdale, for appellants.

Patrick G. Kelley of Kelley, Tompkins, Frazier & Kelley, Fort Lauderdale, for appellees.

*1006 ALDERMAN, Judge.

After this appeal had been filed, and briefs from both parties received by this court, the appellees gave Notice of Withdrawal of Opposition to Appeal and moved that their own brief be stricken. With the contestants in apparent agreement that the court below should be reversed, we have considered the record carefully and find that we must concur that the trial court erred in striking, sua sponte, three of the appellants' affirmative defenses.

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Because there was no motion to strike the affirmative defenses numbered 4, 5 and 6, the court's authority to strike was limited to the provisions of Fla.R.Civ.P. 1.140(f):

Motion to Strike. A party may move to strike or the court may strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time.'

[1][2][3][4][5] The trial court may not on its own initiative strike an affirmative defense for the reason that it is legally insufficient; in that case a motion by a party is required. Fla.R.Civ.P. 1.140(b). Neither may an affirmative defense be stricken merely because it appears to a judge that the defendant may be unable to produce evidence at trial to sustain such a defense. Windle v. Sebold, 241 So.2d 165 (Fla.4th DCA 1970). In the present case, there obviously being no scandalous or impertinent matter, the only possible justification for the trial court's striking the three affirmative defenses at issue here would be that those defenses were redundant or immaterial. Recalling that the striking of pleadings is not favored and is a drastic action to be used sparingly by courts, and further that any doubts are to be resolved in favor of the attacked pleadings, we conclude that affirmative defenses 4, 5 and 6 in this case were not so entirely without any possible relation to the controversy as to warrant their being stricken. Van Valkenberg v. Chris Craft Industries, Inc., 252 So.2d 280, 284 (Fla.4th DCA 1971). Matter should be stricken as redundant or immaterial only if it is wholly irrelevant and can have no bearing on the equities and no influence at all on the decision. Gossett v. Ullendorff, 114 Fla. 159, 154 So. 177 (1934); Pentecostal Holiness Church, Inc. v. Mauney, 270 So.2d 762 (Fla.4th DCA 1972).

The order from which this appeal is taken is reversed as to the striking of affirmative defenses 4, 5 and 6.

CROSS and LETTS, JJ., concur.

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IN THE CIRCUIT COURT FO THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

NEIL J. GILLESPIE,

Plaintiff.

vs.

Case No.:

05CA7205

Division:

 \mathbf{F}

BARKER, RODEMS & COOK, P.A., a Florida corporation; and WILLIAM J. COOK,

Defendants.	
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<u>DEFENDANTS' REPLY TO PLAINTIFF'S REBUTTAL TO</u> <u>DEFENDANTS' MOTION TO DISMISS AND STRIKE</u>

Pursuant to the Court's directive at the hearing on Monday, September 26, 2005, on Defendants Barker, Rodems & Cook, P.A. (BRC) and William J. Cook's motion to dismiss, Defendants reply to Plaintiff's Rebuttal to Defendants' Motion to Dismiss and Strike, as follows:

- 1. Plaintiff has made a series of false, scandalous, and irrelevant allegations in both his complaint and his rebuttal, none of which supports either count against either Defendant.

 Plaintiff's pro se status or unfamiliarity with the law do not excuse his uncorrectable pleading defects, and therefore the Complaint should be dismissed with prejudice. See Anderson v.

 School Board of Seminole County, 830 So.2d 952 (Fla. 5th DCA 2002); Kohn v. City of Miami Beach, 611 So.2d 538 (Fla. 3d DCA 1992).
- 2. <u>Breach of contract</u>. In Count I, Plaintiff sues both Defendants for breach of contract. Plaintiff hired BRC to sue Amscot. Plaintiff claims that the contract between BRC and him, which he attached to the complaint in this action as Exhibit "1", was breached by, in effect, the defendant, Amscot, paying all of his attorneys' fees.

a. As pleaded, Count I fails to state a cause of action for breach of contract against BRC. It is fundamental that, "[a]ny exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis for a motion to dismiss." Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524, 526 (Fla. 2d DCA 1990). Here, the documents attached to Plaintiff's Complaint contradict the allegations of the Complaint.

. :

First, the contract (Exhibit "1" to the Complaint) says at page 2 that a Defendant may pay "all or part of the attorneys' fees." Here, as the closing statement Plaintiff attached as Exhibit "2" confirms, the Defendant paid all of the Plaintiff's attorneys' fees. Thus, the \$50,000 payment for attorneys' fees and costs was in compliance with the contract.

In addition, Exhibits "2", "4" and "5" show that Plaintiff agreed to Amscot paying all of his attorney' fees and therefore negate any allegations that he did not approve of the payment or that the contract did not allow the payment. "When there are conflicts between the allegations and documents attached as exhibits, the plain language of the documents control." Geico General Ins. Co., Inc. v. Graci, 849 So.2d 1196, 1199 (Fla. 4th DCA 2003).

b. Realizing that the documents he attached are fatal, Mr. Gillespie promises to amend his complaint and leave out the documents that defeat his allegations: "In the alternative, upon leave to amend the Complaint, Plaintiff will remove the Closing Statement exhibit, plead the allegation by reference in the Complaint, and then impeach the Closing Statement with the Appellate Court ruling, Exhibit 7." (Plaintiff's Rebuttal at page 10). The Court should not permit the Plaintiff to unnecessarily prolong his meritless case by giving Plaintiff the opportunity to mislead the Court and Defendants with allegations he knows are

contradicted by the documents he has filed.

- c. Plaintiff fails to offer any legal support for a breach of contract action against Defendant Cook, in his individual capacity. Mr. Cook was not a party to the contract. As a matter of law, Mr. Cook is entitled to dismissal with prejudice of Count I against him.
- 3. Fraud. Count II fails to comply with section 768.72(1), Florida Statutes and should be dismissed on that basis alone. It also is barred by the economic loss rule, and the Complaint's exhibits contradict any allegations of justifiable reliance. Count II should be dismissed with prejudice, as Plaintiff again merely proposes to remove any contradictory documents if he is allowed leave to amend. (Plaintiff's Rebuttal at page 10). Mr. Gillespie should not be given an opportunity to commit fraud on the Court.
- a. Count II fails to state a cause of action for fraud because Plaintiff has not alleged an independent tort, and a fraud claim will not arise from what amounts to a claim of breach of contract. Mr. Gillespie's fraud claim alleges that Mr. Cook told him that the Court awarded fees of \$50,000, thereby triggering a clause that said the attorney's would be the higher of 45% or the Court awarded fee. He says he relied on that representation. He alleges that, under the contract, the fees should have been 45%. At bottom, Mr. Gillespie is saying that the Defendants somehow tricked him into allowing BRC to take a greater fee than permitted under his contract. Even assuming the patently false allegations are true, they do not allege an independent tort separate from his breach of contract claim and therefore must be dismissed.
- i. If the alleged tort or fraud arises from the same conduct that breaches the contract, the tort or fraud count cannot survive. Richard Swaebe, Inc. v. Sears

 World Trade, Inc., 639 So.2d 1120, 1121 (Fla. 3d DCA 1994)("The relationship between RSI

and SWT was strictly contractual and RSI has not proved that a tort independent of the contractual breaches was committed. The fraud for which the jury found SWT liable was not a separate and independent underlying tort, but rather merely a breach of the RSI/SWT contracts.

See Lewis v. Guthartz, 428 So.2d 222 (Fla.1982)(without proving a separate and independent tort, even flagrant and oppressive breach of contract could not be converted into tort in order to recover punitive damages)"); Lake Placid Holding Co. v. Paparone, 508 So.2d 372, 377 (Fla. 2d DCA 1987)(Reversing judgment of fraud: "The alleged fraud and breach of fiduciary duty attributed to Tobler and LPHC 'arose from the same conduct which [constituted] a breach of contract.' Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581, 590 (Fla. 1st DCA 1985))"; Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581, 590 (Fla. 1st DCA 1985); John Brown Automation, Inc. v. Nobles, 537 So.2d 614, 617 (Fla. 2d DCA 1988); Sarkis v. Pafford Oil Co., 697 So.2d 524, 527 (Fla. 1st DCA 1997).

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- ii. Moreover, the damages Gillespie claims in the fraud count are the exact same as in the breach of contract: \$6,224.78. R.D.M.H., Inc. v. Dempsey, 618 So.2d 794, 795 (Fla. 5th DCA 1993)("[W]e reverse the remaining award of compensatory damages for fraud and the associated punitive damage award. An award of compensatory damages for both breach of contract and fraud is erroneous where the plaintiff fails to establish that he sustained compensatory damages based on fraud which were in any way separate or distinguishable from the compensatory damage award for breach of contract.").
- b. <u>Count II also fails to state a cause of action for fraud because the exhibits</u>

 attached to the complaint refute one of the elements of fraud: Reliance. "In order to recover for fraud in the inducement, the plaintiff must prove by the greater weight of the evidence that: 1) a

false statement was made regarding a material fact; 2) the individual who made the statement knew or should have known that it was false; 3) the maker intended that the other party rely on the statement; and 4) the other party relied on the false statement to its detriment." <u>Taylor</u> <u>Woodrow Homes Florida, Inc. v. 4/46-A Corp.</u>, 850 So.2d 536, 542 (Fla. 5th DCA 2003).

- i. "Reliance on the alleged false statement is an essential element and if the evidence shows that the recipient of the statement knew it was false, reliance on the statement is unjustified. . . Moreover, the courts have held that a party may not recover in fraud for an alleged false statement when proper disclosure of the truth is subsequently revealed in a written agreement between the parties. . . ." <u>Id</u>. at 542-43.
- ii. In his complaint, Mr. Gillespie alleges that he relied on Mr. Cook's purported statement that the Court awarded the fees to BRC. The Closing Statement, however, shows that Mr. Gillespie knew Amscot paid BRC \$50,000 to settle its <u>claim</u> for court-awarded fees and that there was no actual fee award. Here is what it said: "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." So, when Mr. Gillespie signed the Closing Statement, Gillespie knew the \$50,000 payment by Amscot to BRC was for the <u>claim</u> against Amscot for court-awarded fees, not for an <u>award</u> of fees.
- iii. Thus, the closing statement again contradicts the specific allegations of reliance in the complaint in that it shows that after Mr. Cook's purported false statement, Mr. Gillespie signed a document that disclosed the "truth." As a matter of law, Mr.

Gillespie cannot claim he relied on the false statement. See Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 542-43 (Fla. 5th DCA 2003) ("Moreover, the courts have held that a party may not recover in fraud for an alleged false statement when proper disclosure of the truth is subsequently revealed in a written agreement between the parties.").

Because the Closing Statement Mr. Gillespie signed shows that he knew the payment was for a <u>claim</u> for court-awarded fees, not for an <u>award</u> of fees by the Court, Mr. Gillespie cannot claim to have relied on the presumed-to-be-true allegation that Mr. Cook told him that the Court awarded BRC \$50,000 in fees.

iv. Another document shows that Mr. Gillespie clearly knew the Defendants were negotiating a claim for court-awarded fees: Mr. Gillespie's letter, attached to the Complaint as Exhibit 5. In it, he tells Defendants exactly how to negotiate the settlement, with BRC demanding money to settle his claims, and then separately negotiating to settle BRC's claims for court-awarded fees and costs. He was well aware that BRC was asking for \$50,000 for its attorneys' fees claim, and he told BRC to ask for \$1,000.00 for his claims, and to reduce the attorneys' fees demand to \$10,000. The document belies any claim of reliance, and without reliance, there is no fraud.

In summary, Defendants are entitled to dismissal with prejudice. It is proper to deny leave to amend when "the complaint is clearly unamendable. . . . Stated another way, where a party may be able to allege additional facts, or where the ultimate facts alleged may support relief based upon another theory, dismissal of a complaint with prejudice is an abuse of discretion." Thompson v. Investment Management and Research, Inc. 745 So.2d 475, 476-77 (Fla 5th DCA 1999). Here, Mr. Gillespie asks for permission to allege less to avoid the outcome of his initial

complaint which pleads enough information to demonstrate that he has no cause of action for breach of contract or fraud.

RESPECTFULLY SUBMITTED this / O day of October 2005

Ryan Christopher Rodems, Esquire

Florida Bar No. 947652

Barker, Rodems & Cook, P.A. 300 West Platt Street, Suite 150

Tampa, Florida 33606

Telephone: 813/489-1001 813/489-1008 Facsimile:

Attorneys for Defendants,

Barker, Rodems & Cook, P.A. and William J. Cook

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants' Reply to Plaintiff's Rebuttal to Defendants' Motion to Dismiss and Strike has been furnished via U.S.

Mail to Neil J. Gillespie, 8092 SW 115th Loop, Ocala, Florida 34481, this

October, 2005.

Ryan Christopher Rodems, Esquire

Barker, Rodems & Cook, P.A. 300 West Platt Street, Suite 150 Tampa, Florida 33606

Gillespie - 05.5422



Neil J. Gillespie 8092 SW 115th Loop Ocala Florida 34481 Inliadadallalaadillaad

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

NEIL J. GILLESPIE,

Plaintiff,

CASE NO.: 2005 CA-7205

VS.

BARKER, RODEMS & COOK, P.A., a Florida corporation,

DIVISION: F

WILLIAM J. COOK,

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<u>PLAINTIFF'S SECOND REBUTTAL TO</u> DEFENDANTS' MOTION TO DISMISS AND STRIKE

- 1. Defendants' central argument implodes on page 5 of its *Reply* dated October 10, 2005, paragraph 3 b. ii. Here Defendants argue that the \$50,000 is for a <u>claim</u> for court-awarded fees, and not an <u>actual</u> fee award. This begs the question without an <u>actual</u> court-awarded fee, there is no <u>claim</u> for a court-awarded fee. Because Defendants did not prevail in court, they cannot rely on a statutory claim for court-awarded fees, <u>because</u> there is none. This is how Defendants created the impression that the Appellate Court awarded fees, when in fact the it ruled that the parties bear their own costs and attorney's fees. <u>This is Defendants' fraud on its own clients</u>. Fraud is an exemption to the parole evidence rule, blocking Defendants reliance on <u>Franz Tractor v. Case</u>, 566 So. 2d 524.
- 2. Defendants breached their fiduciary duty to Plaintiff. 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). 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). Defendant Cook failed to report John Anthony's \$5,000 "improper payoff attempt" to the Florida Bar, even though Cook believed that "the Florida Bar would likely prohibit such an agreement." Instead, Defendants jumped into bed with Amscot's lawyer to collected \$50,000. Even though Defendants argue that the \$50,000 is for attorney's fees, they refuse to account for the fee, or provide a method for determining the fee.

WHEREFORE, Plaintiff requests that this Honorable Court deny Defendants' motion, with leave for Plaintiff to amend the Complaint, or in the alternative, to enter summary judgment for Plaintiff.

RESPECTFULLY SUBMITTED this 31st day of October, 2005.

Neil J. Gillespie, Plaintiff pro se

8092 SW 115th Loop Ocala, Florida 34481

Telephone: (813) 810-0151

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US Mail, first class, to Ryan Christopher Rodems, Attorney at Law, Barker, Rodems & Cook, P.A., Attorneys for Defendants, 300 West Platt Street, Suite 150, Tampa, Florida 33606, this 31st day of October, 2005.

Meil J. Gillespie

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481

Telephone: (813) 810-0151

October 6, 2005

Clerk of the Circuit Court Circuit Civil P.O. Box 989 Tampa, FL 33601-0989

RE: Gillespie v. Barker, Rodems & Cook, P.A., et al, Case no: 2005 CA-7205, Division F

To the Clerk of the Court:

Kindly date stamp and file the enclosed document, *Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike*, in the above captioned lawsuit.

Thank you.

Sincerely,

Meil J. Gillespie

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original document *Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike* has been furnished via U.S. Mail to the Clerk of the Circuit Court, Circuit Civil, P.O. Box 989, Tampa, Florida 33601-0989, this 31st day of October, 2005.

leil J. Gillespie

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481

Telephone: (352) 854-7807

October 31, 2005

The Honorable Richard A. Nielsen Circuit Court Judge Circuit Court, Division "F" 800 E. Twiggs Street, Room 524 Tampa, Florida 33602

> RE: Gillespie v. Barker, Rodems & Cook, PA, et al, Case number: 2005-CA-7205, Division F

Dear Judge Nielsen,

Enclosed you will find a courtesy copy of *Plaintiff's Second Rebuttal to Defendant's Motion to Dismiss and Strike* in the above captioned lawsuit.

Thank you.

Sincerely,

Neil J. Gillespie

Enclosure

cc: Ryan Christopher Rodems

The Law Offices of

Robert W. Bauer, P.A.

2815 NW 13th Street, Suite 200E, Gainesville, FL 32609 www.bauerlegal.com

Phone:

(352)375.5960

Fax:

(352)337.2518

August 24, 2012

Mr. Neil Gillespie 8092 SW 115th Loop Ocala, Florida 34481

Re:

Case # 05-CA-007205 - 060703

Dear Mr. Gillespie:

I am in receipt of your August 17, 2012 letter requesting your file. Mr. Rodem's release dated June 21, 2011 does not have any legal effect on the amount of money that is owed to this firm. Further, it does not bind this firm in any way. I does bind you – but not us.

We continue to exercise our charging lien. If you wish to contact me at the number listed above I would be happy to discuss resolving the lien in manner that is acceptable to all parties.

Sincerely,

Robert W. Bauer, Esq.

The Law Offices of

Robert W. Bauer, P.A.

2815 NW 13th Street, Suite 200E, Gainesville, FL 32609 www.bauerlegal.com

Robert W. Bauer, Esq. David M. Sams, Esq.

Phone:

(352)375.5960

Fax:

(352)337.2518

August 18, 2010

William Gautier Kitchen The Florida Bar 651 East Jefferson Street Tallahassee, FL 32399-2300

Re:

Neil Gillespie; The Florida Bar File No. 2011-00,073 (8B)

Mr. Kitchen:

Please accept this letter as my response to your letter of July 30, 2010, in accordance with Rule 4-8.4(g), Rules Regulating the Florida Bar. I am also enclosing a completed disclosure form mandated by Rule 3-7.1(g).

Prior to my response to the allegations contained in Mr. Gillespie's complaint form, it is important that I provide The Florida Bar with a summary of the events leading up to my representation of Mr. Gillespie that resulted in his filing of this complaint.

I. SUMMARY OF EVENTS PRIOR TO REPRESENTATION OF MR. GILLESPIE

Prior to this lawsuit, Mr. Gillespie was the plaintiff in a suit against Amscot Cash Advance. After losing in lower court, Mr. Gillespie appealed the ruling on grounds arising out of the Fair Debt Collection Practices Act. It appears from the record that the Defendant's were not confident that they would win on appeal and agreed to pay each of the three plaintiffs \$2000, as well as to pay \$50,000, in attorneys fees. Sometime after the close of this matter, Mr. Gillespie determined that the law firm representing him in his action against Amscot breached their fee agreement with him.

Mr. Gillespie initiated a lawsuit against Barker, Rodems, & Cook, P.A. ("BRC") in August of 2005, and was proceeding with his claims pro se. Mr. Gillespie alleged that BRC breached their contingency fee contract with him by retaining a greater percentage of the proceeds from a settlement than they were entitled to. Contemporaneous with filing his claims against BRC, Mr. Gillespie published a letter to a representative of Amscot, the defendant in the underlying lawsuit, making allegations of fraud and wrongdoing on the part of BRC and one of its partners. Based on this letter, BRC and the partner named in the letter filed a counterclaim against Mr. Gillespie alleging libel.

Despite having claims against him, Mr. Gillespie chose to proceed with the case pro se. Mr. Gillespie was without the requisite knowledge or skill required to litigate this case, but chose

August 18, 2010 Page 2 of 10 Letter to Mr. Kitchen

to continue anyway. This had disastrous results and, when I met with him in early 2007, Mr. Gillespie had:

- (a) Been ordered to comply with a discovery request and to pay the Defendant's fees and costs related to his continuous non-compliance;
- (b) A motion for Section 57.105, Florida Statute sanctions filed against him, but had chosen to permit the frivolous claims to remain in place for eight months after being served with the motion before choosing to voluntarily dismiss them;
- (c) Voluntarily dismissed his claims against BRC without prejudice, while counterclaims were still pending against him. However, because the statute of limitations period had tolled, the effect was that the counts were dismissed with prejudice; and,
- (d) Filed motions to disqualify two judges who were formerly assigned to the case. Both motions were denied, but the judges subsequently recused themselves on their own motions.

As is evident from the foregoing, Mr. Gillespie was in a precarious situation when he approached me about representing him. Initially, I agreed to review the transcripts and pleadings that had been filed in the case up to that point, and to advise him as to how he should proceed with the case. In reviewing the file, it became evident that from the inception of the case, Mr. Gillespie had difficulties understanding and complying with the Rules of Civil Procedure. Mr. Gillespie was implored by the court to secure representation and the record showed that he had great difficulty in doing so. Furthermore, in April of 2007, Mr. Gillespie no longer had any claims pending against BRC, and there was no legitimate basis for a recovery on which a contingency fee agreement could be based. Mr. Gillespie represented to me, however, that due to the pending claims against him for libel and the pending motion for sanctions, he wished to be represented by counsel on an hourly fee basis. Mr. Gillespie also requested me to; if possible, reinstate his claims against BRC. I found this to be consistent with his representations to the Court during the February 5, 2007, hearing (transcript available upon request) immediately proceeding my initial consultation with him.

On April 5, 2007, I sent a letter to Mr. Gillespie advising him of his options in the pending action against BRC. In this letter I advised him that there was already an order against him awarding entitlement to attorneys' fees to BRC and that it was likely that he would be ordered to pay further attorneys' fees pursuant to the motion for section 57.105 sanctions. However, I advised Mr. Gillespie that I had negotiated a "walk away" settlement with BRC, and in consideration for both sides relinquishing their claims, BRC would not pursue the attorneys' fees that they were entitled. Because Mr. Gillespie had already dismissed his claims, I felt that I had negotiated an agreement that was very advantageous to Mr. Gillespie. However, Mr. Gillespie did not agree as he advised me that he did not wish to settle this action in the way that I had proposed and requested that I continue preparing for the case. A copy of this letter is attached as Exhibit A.

At this point, I agreed to represent Mr. Gillespie in this matter and negotiated a fee agreement with him wherein he agreed to an hourly billing rate. This fee agreement was

August 18, 2010 Page 3 of 10 Letter to Mr. Kitchen

voluntarily entered into and signed by Mr. Gillespie on April 24, 2007. The agreement provided that I would bill for my time in connection with Mr. Gillespie's case at a rate of \$250/hour. A copy of this fee agreement is attached as Exhibit B.

II. RESPONSE TO SPECIFIC COMPLAINTS OF MISCONDUCT

1. <u>Failure to zealously litigate claims:</u>

During my initial conversations with Mr. Gillespie, we discussed strategy and concluded that I would attempt to reinstate his claims against BRC even though they were dismissed after the statute of limitations had tolled. Because reinstating claims in the same action as they were voluntarily dismissed was a novel legal issue and one outside of normal practice, I proceeded on dual fronts with two strategies I thought had the most prudent chances for success. I filed a motion to withdraw voluntary dismissal accompanied by a memorandum of law supporting it. Additionally, I amended the answer originally filed by Mr. Gillespie. At the time, we had no causes of action pending against BRC, so additionally, I included as part of the answer, a counter-complaint re-alleging the counts previously dismissed by Mr. Gillespie and adding a count for breach of fiduciary duty. This dual-front strategy was ultimately successful as my motion to withdraw voluntary dismissal was granted, and, as of today, the claims are still viable.

Mr. Gillespie also alleges that I "failed to present evidence that there was no signed contingent fee agreement," subsequent to Mr. Rodems' representations that there were. This allegation underscores much of the basis for my motion for withdrawal. The Complaint originally drafted by Mr. Gillespie includes a count for breach of contract and, specifically alleges in paragraph 6: "GILLESPIE and the LAW FIRM [BRC] had a written representation contract." The hearings in question were on Defendant's Motion for Judgment on the pleadings. Had I argued that no contract existed between the parties as Mr. Gillespie now claims I failed to do, it would have been repugnant to his position. Additionally, Mr. Gillespie now asserts that I failed to prove the non-existence of a contract by submitting affidavits. Clearly, Mr. Gillespie makes this assertion without an understanding of what is appropriate to argue in a hearing on a motion for judgment on the pleadings. Mr. Gillespie did not understand the procedural or substantive law surrounding this issue and now wishes to supplant his legal prowess with mine.

While Rule 4-1.2 provides that a lawyer should abide by their client's decisions concerning objectives, the comment to the Rule reads that "the lawyer should assume responsibility for the technical and legal tactical issues" Mr. Gillespie made numerous tactical and legal errors during his time as a pro se litigant. It was for this reason that he solicited my services. We met and mutually agreed upon the objectives of the representation. Mr. Gillespie acknowledges this in his Pro Se Response to Attorney Robert W. Bauer's Motion for Withdrawal of Counsel (Exhibit C). However, Mr. Gillespie was consistently unwilling to permit me to represent him in a way that was professionally and legally appropriate. He consistently insisted that I take legal and procedural actions that were inappropriate and impermissible under the Rules of Civil Procedure, in the given situation. Mr. Gillespie had difficulty understanding why I was unable to make the procedural and legal moves he mandated, and as a result, our relationship as attorney and client became strained.

August 18, 2010 Page 4 of 10 Letter to Mr. Kitchen

Mr. Gillespie claims that I failed to amend the pro se complaint. As previously explained, the actions I pursued were first aimed at re-establishing Mr. Gillespie's claims. Upon doing so, a motion for judgment on the pleadings was filed and noticed. The resultant order from the Court granted the motion as to Count II and dismissed it as to Count I. Rather than give leave to amend, however, the court explicitly ordered "in lieu of an amended complaint, all factual allegations contained in Count II are incorporated in Count I." A responsive pleading had been filed in this matter and without leave, an amendment was not permissible. Furthermore, because of the voluntary dismissal of his claims, there were statute of limitations issues involved in attempting to bring new causes of action.

2. Failure to zealously litigate against the BRC counterclaim:

As Mr. Gillespie correctly points out, I filed an Amended Answer to Defendant's Counterclaim. This answer was and is still to my knowledge, legally sufficient and effective. During my representation of Mr. Gillespie, discovery was conducted within the scope of BRC's claims. The purposes for the counter-counter complaint were fully discussed above, and, as noted; related to re-establishing Mr. Gillespie's claims rather than defending against BRC's counterclaim.

3. Failure to zealously pursue case management:

Mr. Gillespie seems to focus on Mr. Rodems' behavior with respect to case management in this paragraph of his grievance. While that is outside of the scope of any complaint against me and therefore does not warrant a response, I will respond to the overall allegation that I did not pursue case management. When I first became involved with this matter, there were a number of motions pending and Mr. Gillespie had already been ordered to pay attorneys' fees for non-compliance with a discovery request. Additionally, Mr. Gillespie filed a motion to have Judge Neilson disqualified. The motion was denied but Judge Neilson withdrew on his own motion and Judge Isom was appointed. Shortly before I began representing Mr. Gillespie, he filed a motion to have Judge Isom disqualified as well. Again, despite the motion being denied, she withdrew sua sponte. The constant reassignment of this case that resulted left a docket full of unheard motions and a backlog of issues to address.

I contacted Mr. Rodems immediately upon becoming involved in this matter and worked with him in amicably preparing for and conducting discovery. We were able to resolve many of the issues that existed and move the case forward. The motions were set and heard in relatively short order. Again, Mr. Gillespie was dissatisfied with the procedural tactics that I employed on his behalf; however, his dissatisfaction comes from an insufficient understanding of the Rules of Civil Procedure and is not predicated upon my failure to uphold any of my duties under the Rules of Professional Conduct. While I did not march into court demanding that the Judge reserve time on his docket to help with scheduling as Mr. Gillespie suggests I should have, I did work with opposing counsel to clear the procedural matters still pending and continue the discovery that had already been ordered. Because of the number of times the courts time was unnecessarily consumed by Mr. Gillespie prior to my representation of him, I felt it was

August 18, 2010 Page 5 of 10 Letter to Mr. Kitchen

important to strive to complete the discovery process and disposition of pretrial motions in a way that did not require the court's involvement any more than was necessary.

4. Failure to zealously pursue discovery:

As explained above, Mr. Gillespie had voluntarily dismissed his claims against BRC prior to my representation of him in this matter. Because of this, much of the discovery he sought prior to the dismissal was moot. The few items that still existed from his discovery requests had either been properly objected to by Mr. Rodems, or produced within the appropriate time limits. Because the discovery requests had been appropriately complied with by Mr. Rodems, the motions that Mr. Gillespie filed to compel discovery were improper. I conducted discovery during my time as Mr. Gillespie's legal counsel in an ethical and amicable manner as I am sure Mr. Rodems will attest. In fact, upon learning of this grievance, Mr. Rodems wrote a thirteen page letter in support of my representation of my conduct during the course of my representation of Mr. Gillespie. In his letter, which is available upon request, Mr. Rodems wrote: "I found Mr. Bauer to be competent, bright, hardworking, and very conscientious of his client's interests."

Mr. Gillespie was under the false understanding that the order of entitlement of attorneys' fees against Mr. Gillespie could somehow be "mitigated" by my filing of burdensome and frivolous discovery requests. Despite my explanations to him as to the origin of the entitlement, he continued to implore me to undertake these dilatory tactics and became upset when I explained that I could not do so in good legal or ethical conscience.

5. Failure to seek disqualification of BRC's counsel Ryan Christopher Rodems:

This issue is another where Mr. Gillespie demanded that I take a position that was not procedurally available. My repeated attempts to explain the Rules of Civil Procedure in this regard were fruitless and led to my belief that our relationship had deteriorated to the point that we could no longer effectively communicate. Mr. Gillespie originally filed a Motion to Disqualify Counsel in February of 2006. The motion was heard and an order denying the motion was entered on May 12, 2006. Mr. Gillespie made a motion for rehearing in December of 2006 which was also denied. From that time forward, Mr. Gillespie wanted me to continue to present the same arguments that had already been denied by the court.

Throughout my representation of Mr. Gillespie, he suggested that I attempt to get Mr. Rodems disqualified as counsel for Defendants. It became apparent that Mr. Gillespie had a severe dislike of Mr. Rodems and was upset that the Court had denied his original motion in this regard. This is further evidenced by Mr. Gillespie's extensively explained arguments for disqualification of Mr. Rodems that are contained in his grievance against me. These are the same arguments that were made in support of the February 2006 motion and denied. Since then, there have been no novel arguments to support Mr. Rodems disqualification. When I attempted to explain this to Mr. Gillespie, he became enraged and insisted that his legal analysis of the issue was sacrosanct.

6. Failure to zealously defend against sanctions:

August 18, 2010 Page 6 of 10 Letter to Mr. Kitchen

The claims relative to the Section 57.105 sanctions all originate from a time prior to my representation of Mr. Gillespie. I attempted to resolve the issues surrounding those sanctions and represented him in the hearing relative to that motion. The Judge however, did not find that the fact that Mr. Gillespie was a pro se litigant, excused him from compliance with the rules, especially when he was advised by opposing counsel that his actions giving rise to the sanctions were improper and given numerous opportunities to correct them. The transcript of the July 3, 2007 hearing on Defendant's Amended Motion for Sanctions Pursuant to § 57.105, Florida Statues, is available upon request and serves as a good barometer of the efforts I undertook to correct the issues caused by Mr. Gillespie in this matter. The Honorable Judge Barton II, as part of his order granting sanctions against Mr. Gillespie stated: "The way in which Mr. Gillespie's side has been presented today -- with a high degree of professionalism and confidence reflects the wisdom [of retaining counsel in this matter]."

I believe that the statement of the court speaks for itself with respect to my representation of Mr. Gillespie in the aforementioned hearing. Mr. Gillespie erroneously believes, as mentioned earlier, that there was a way for me to "mitigate" the fees incurred by opposing counsel as a result of Mr. Gillespie's frivolous claims. For more than eleven months, Mr. Gillespie refused to withdraw the frivolous responses to the Defendant's counter-claim. In his grievance against me, he still asserts that the counter-claim constitutes abuse of process. Because Mr. Gillespie refused to withdraw the responses, BRC was required to prepare a motion to dismiss, notice the hearing, prepare and deliver the arguments in support of their motion. Clearly, because the response had already been deemed frivolous by the Court, there was very little room for argument that BRC was not entitled to their fees. Mr. Gillespie is too personally involved in this matter to understand the requirement of the Rules of Civil Procedure in this regard, and does not understand that the claims he forwarded are inappropriate responses in an answer to a counter-claim for libel.

7. Failure to inform contrary to Rule 4-1.4(a):

Soon after my representation of Mr. Gillespie began, he became hostile towards my staff. Mr. Gillespie, on numerous occasions, acted hostilely towards my staff while attending meetings at my office (See Affidavit of Beverly Lowe, Exhibit D). He also expressed displeasure that he was being billed for time spent by my law clerks and paralegals in connection with his case. While the billing practices employed during the scope of our representation of Mr. Gillespie fell within the fee agreement he signed (Exhibit B), I advised my staff that they were no longer to work on his case in an attempt to appease him.

Because my staff was removed from his case, they did not follow our standard operating procedures in regards to Mr. Gillespie's documents. As such, he was not provided with the Fact Information Sheet required to be filled out in connection with the Final Judgment ordered against him on March 27, 2008. This was an oversight for which I apologized to Mr. Gillespie, opposing counsel, and the Court in the letter dated July 24, 2008 (Exhibit 10 of Mr. Gillespie's grievance).

August 18, 2010 Page 7 of 10 Letter to Mr. Kitchen

This letter is evidence of both my propensity as a human being to make a mistake, and my commitment to the notions of justice and ethics. I fully admitted and took responsibility for this mistake in 2008 and worked to ensure that it did not bias my client. The Judge did not sanction Mr. Gillespie for contempt and agreed not to do so if Mr. Gillespie submitted the Fact Information Sheet within ten days. Mr. Gillespie is confused as to the Court's retention of jurisdiction; as the Fact Information Sheet has been properly filled out, there were no further sanctions imposed. I regret my oversight in this matter. However, to err is human and I don't believe that the Rules of Professional Conduct contemplate an attorney being more than that.

8. Failure to zealously stay the Final Judgment:

Mr. Gillespie's initial response to the Final Judgment ordered against him was to appeal. He asked several times that I initiate such action, but there was not a good and sufficient basis to do so. Because enforcement of judgments is done ex parte, it was not possible for me to know what actions Mr. Rodems was taking in that regard. Upon learning that Mr. Rodems intended to proceed with garnishment, I filed an emergency motion for stay. At this hearing, the judge agreed to stay the judgment and requested that we post a bond. I explained to Mr. Gillespie that, if we were able to get his case before a jury, he had a good possibility of being awarded a judgment that could act as a setoff against the judgment that was already entered against him. He refused, however, to post a bond with the court. This refusal resulted in further collection efforts against him.

Chapter 77, Florida Statutes, specifically provides that the judgment creditor is not required to notice the judgment debtor of a garnishment until after the response of the garnishee has been received. Because Mr. Gillespie was unwilling to post a bond, there was little I could do to defend against an action that I was, statutorily, not entitled to notice of until after the action had already commenced.

9. Withdrawal as Counsel:

As stated previously, the relationship between Mr. Gillespie and I became strained soon after I made my appearance in his case. Mr. Gillespie had difficulty understanding and accepting the procedural steps that were necessary to advance his claim. When I explained to him that the procedures that he suggested were not appropriate within the Rules of Civil Procedure, he became frustrated and angry.

For reasons unclear to me, Mr. Gillespie also became hostile towards my staff and often questioned their qualifications. This made communication with Mr. Gillespie even more difficult. In actuality, many of those individuals listed at page 3 of Mr. Gillespie's grievance are now members of our profession and the Florida Bar. I feel it is our duty as Bar Member's, especially in Gainesville, to help train our future colleagues and as such, I have continually employed law clerks while they are attending the University of Florida, Levin College of Law. It was due to Mr. Gillespie's unwillingness to treat my staff with respect coupled with his frustration and inability to communicate effectively with me, that I felt it necessary to withdraw as his counsel in this matter (See Exhibit D). My Motion was heard and considered by Judge

August 18, 2010 Page 8 of 10 Letter to Mr. Kitchen

Barton, who agreed with me and granted the motion.

Furthermore, the issues surrounding communication between Mr. Gillespie, and I had nothing to do with his disability. As a review of the communications and transcripts in his case shows, Mr. Gillespie is a very capable individual and, if he has difficulty expressing himself, it is not apparent to those with whom he is speaking. Our inability to effectively communicate was predicated on Mr. Gillespie's desire to dictate the legal and procedural methods of his representation. When his strategies and ideas were in contradiction with what was permitted by the Rules of Civil Procedure and professional ethics, he was unable or unwilling to accept it and would project his frustration onto our relationship. Our office made many concessions to accommodate Mr. Gillespie's demanding communication requests. For example, we agreed to have all telephone conversations recorded so that he could have them transcribed and included in his records. However, despite our efforts, communication continued to deteriorate.

10. Appeals Court Misconduct:

- a. Mr. Rodems' appeal was based on a position supported with legal precedent. While I did prevail, Mr. Rodems' claims were not without merit and certainly did not rise to the level of frivolity sufficient to justify Section 57.105, sanctions against him. Unfortunately, Mr. Gillespie made a very large legal blunder in voluntarily dismissing his claims against BRC. Due to this error, I had to take significant steps to reinstate the claims. The statute of limitations had tolled and, but for my actions on his behalf, Mr. Gillespie would have no viable causes of action today.
- b. As I stated earlier, Mr. Gillespie was adamant about appealing the Final Judgment. I explained to him that an appeal was not appropriate, but he proceeded to file the appeal anyway without my knowledge or assistance. Despite this, I prepared and filed a brief on his behalf in order to protect his legal position as much as possible. A reply brief was not necessary, so one was not filed. It is important to point out the dichotomous instructions that I often received from Mr. Gillespie in situations like this one. He has complained that I billed him too much without making satisfactory advances in his case; however, he often desired me to take action that was not only unnecessary or inappropriate, but also fee inducing. When I would choose not to do so, as in the case of filing a reply brief, he was unhappy with my representation. Conversely, when I would attend a hearing, he felt the time it took me to drive to Tampa or prepare for the hearing was too much and was unhappy with my representation.

11. Withdrawal and pro se response:

Mr. Gillespie's correspondence to the court dated October 1, 2009, that is referenced in paragraph 11 of his grievance serves as a better example of why it was necessary for me to withdraw as his counsel than anything I could say to you in support of my motion for

August 18, 2010 Page 9 of 10 Letter to Mr. Kitchen

withdrawal. As you can see from the four-corners of this correspondence, Mr. Gillespie was contemporaneously upset that I had billed too many hours on his case, and upset that I had not taken more action. The conflicting nature of his requests made it necessary for me to withdraw as his counsel. Clearly, the feelings intimated by Mr. Gillespie in this correspondence to the court show the impossibility of an attorney-client relationship continuing. I have attached this correspondence as Exhibit C.

12. Response to Allegations of Fraud:

Mr. Gillespie points to a letter I wrote to Governor Crist endorsing Mr. Rodems for consideration as a judicial nominee, as evidence that I committed fraud. I told Mr. Gillespie, at the outset of my representation, that if we can survive summary judgment and get in front of a jury, they would love to punish a "slimy attorney." This was in regards to his claims against BRC and his accusations that they lied to him. This comment is true today as it was then; jury's have distaste for attorney's that are unethical and Mr. Gillespie alleged just that. Furthermore, the comment was based on Mr. Gillespie's claims against Mr. Cook, not Mr. Rodems.

Within the scope of his representation of BRC in this matter, Mr. Rodems conducted himself as an honorable and ethical officer of the court. At no time did I find his behavior to be unethical. Although we were engaged in litigation that was very contentious, Mr. Rodems was at all times cordial and professional and treated me with dignity and respect. I found Mr. Rodems to be a competent and skilled attorney with all of the intangible qualities of character that we look for in members of our profession and hope to find in those seated on the bench. Therefore, I was pleased to write the letter attached to Mr. Gillespie's grievance when asked.

III. RESPONSE TO OTHER ALLEGATIONS NOT COVERED BY RULES OF PROFESSIONAL CONDUCT:

In addition to the foregoing complaints, Mr. Gillespie made a number of accusations. While they do not allege a rule violation or any misconduct, they do impugn my character and, as such, I will briefly respond to them.

Mr. Gillespie clearly enjoyed the opportunity to litigate this case pro se. When it came time to turn over his representation, however, he became frustrated with his loss of control over the specific actions taken. Mr. Gillespie always appeared to me to be an intelligent man, but he did not attend law school and other than one or two paralegal courses, has no legal training. Frankly, Mr. Gillespie often wanted to give legal suggestions and advice without sufficient knowledge to do so. He continuously requested that I take actions that were inappropriate and would give rise to liability on both of our parts.

Mr. Gillespie wished to be involved in all of the minute procedural aspects of his case and as such, representation of him became difficult. He made threats to my office staff and did not wish to have my law clerks work on his case. At the same time, however, he became agitated if I would bill for research or other tasks that he did not wish me to delegate. I tried

August 18, 2010 Page 10 of 10 Letter to Mr. Kitchen

numerous times to address these issues with Mr. Gillespie in an attempt to reach an accord. By October of 2008, our relationship was such that my representation of him was no longer possible.

Mr. Gillespie claims that I accomplished little in my representation of him. I believe a review of the case proves otherwise. I was successful in reestablishing his claims against BRC and in securing a stay of the final judgment against him. This was done despite Mr. Gillespie's continuous undermining of my efforts. Please recall that Mr. Gillespie had made several serious legal errors, including dismissing his claims after the expiration of the statute of limitations and with counter-claims still pending.

The closing paragraph of Mr. Gillespie's grievance is, in my view, telling of his motives. Prior to filing, Mr. Gillespie asked that I cancel his bill. He threatened to file this grievance if I did not agree to his demands. Mr. Gillespie signed a fee agreement wherein he agrees to the hourly rates at which he was charged. My office conducted the work billed to Mr. Gillespie as per the terms of his agreement, and I was not going to conduct this work without compensation based upon threats of this nature. Mr. Gillespie has filed five, if not more grievances in this matter and appears to use them as his own form of leverage.

At the time I undertook his representation, Mr. Gillespie had no viable claims on which to base a contingency fee agreement. He came to me because he needed an attorney to defend against the claims that had been levied against him. I did so and was also able to revive the claims against BRC. I was up front with Mr. Gillespie about the possible costs of this litigation from the beginning, and advised while I could not anticipate the cost; it would likely be at least \$18,000. It is apparent to me that Mr. Gillespie is using the Florida Bar's formal complaint structure as his personal counsel in trying to leverage a return of the fees that I earned in prosecuting and defending claims during my representation of him. I hope that, upon review of the foregoing, the same is apparent to you. Additionally, I hope it is apparent that at all times during my representation of Mr. Gillespie, I conducted myself with professionalism, dignity, and within the bounds of the Rules of Professional Conduct. If I can provide you with any further information, please feel free to contact me.

CERTIFICATE OF DISCLOSURE

I HEREBY CERTIFY that on this	<u>18th</u> day of <u>August</u>	, 2010, a true copy of the foregoing
disclosure was furnished to	David M. Sams	, a member of the law firm of
The Law Office of Robert W. Bar	uer, P.A, with which	I was associated at the time of the
act(s) giving rise to the com	plaint in The Florida Bar	r File No. 2011-00,073 (8B).

Robert W. Bauer, Esq.

cc: Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481 LAW OFFICE OF

ROBERT W. BAUER, P.A.

2815 NW 13th Street Suite 200 Gainesville, FL 32609

> Tele: 352.375.5960 Fax: 352.337.2518

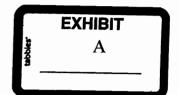
Internet address: RWB@bauerlegal.com

April 5, 2007

Neil Gillespie 8092 SW 115th Loop Ocala, Florida 34481

Ref: Initial Status Review of Case

Dear Mr. Gillespie:



This is a follow-up to the telephone conversation which we had on March 29, 2007. During that telephone conversation we discussed that I had reviewed your case and determined that some of the pleadings may not have been legally sufficient when filed. Further, I advised that there were discovery demands that we would be required to comply with. I advised you that I believed it proper to contact opposing counsel and advise them that we would comply with such requests and you stated that you agreed. Further, we discussed the possibility of speaking with opposing counsel and defering any hearings for 57.105 sanctions. I also reviewed the original complaint and determined that it appeared to contained two well plead causes of actions that could reasonably be pursued in a court action.

After speaking with you I contacted opposing counsel as you directed and discussed the possibility of moving forward with this case without having the hearing scheduled for April 3rd and 4th. Opposing counsel had advised that those hearings had been consolidated to a single date of April 4th at 9:30. Opposing counsel appeared willing to forego the Motion to Compel Discovery, however was not willing to forego any 57.105 sanctions - unless both parties relinquish their claims and sign a full waiver. Mr. Rodem advised that he was not fully authorized at this time to give a "walk away" offer, but he felt that likely his partners would concur with that offer. He also advised that he believed that your voluntary dismissal of your complaint would be effective and he stated that he had case law on the issue. I requested that he forward the case law to me for my review. Mr. Rodems said the case law would be coming forthwith.

Regardless of the case law, it seems likely that if your Notice of Nondismissal is not effective, it is likely that we can come up with some type of pleading to reinstate your complaints. However, I can not give you an informed opinion on that matter until I have conducted extensive research.

I make no suggestions as to what actions you should take in regards to whether or not you wish to accept their offer to walk away from this complaint with both sides bearing their own costs – but bear in mind that you do have one order against you awarding entitlement to attorney's fees

for contempt and there is a reasonable liklyhood that you may bear some attorney's fees for the 57.105 complaint. It may be advantageous to you to forestall any further costs by settling at this time. However, there is always a possibility that the litigation could have a fortuitious outcome for you.

I have also advised opposing counsel that there are numerous motions outstanding and it probably would be in everyone's benefit for us to cancel the April 4th hearing and schedule a hearing wherein we can take care of all of the outstanding motions at one time. Mr. Rodems had no problem with this suggestion and agreed that that was probably in everyone's best interest. If you have any objection to doing so, please advise as soon as possible. Thank you and have a good day.

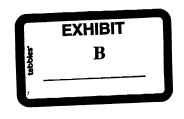
On or about April 2, 2007 I spoke with you again and you advised that you did not wish to settle this action with a "walk away" and you requested that I continue preparing for the case.

Sincerely,

Robert W. Bauer, Esq.

EXHIBIT

A



ATTORNEY CONSULTATION AND FEE CONTRACT

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THIS AGREEMENT ("Agreement") is made on April 5, 2007, in Gainesville, Florida, between Neil Gillespie ("Client"), and Law Office of Robert W. Bauer, P.A., of Gainesville, Alachua County, FL ("Attorney"):

In consideration of the mutual promises herein contained, the parties hereto agree as follows:

I. PURPOSE OF REPRESENTATION

1.01 The Client hereby retains and employs the Attorney to represent Client in the following matter:

To represent him in case 05-CA-7205, Gillespie v. Barker, Rodems, & Cook, P.A. in the Thirteenth Judicial Circuit for Hillsborough County, Florida.

II. ATTORNEY'S FEE

2.01 In consideration of services rendered and to be rendered by the Attorney, Client agrees to pay for the Attorney's time at the following hourly rates:

Robert W. Bauer, Esq.	\$250
Law Clerks	\$100
Paralegals	\$75

However, if Client's claim is governed by a statute or law which sets the Attorney's fees, and the law precludes any other fee arrangement other than the amount set by law, then the amount payable to the Attorney shall be limited to the maximum allowed by law.

- 2.02 Client agrees to deposit a non-refundable retainer of \$0 with the Attorney to pay for the Attorney's initial research, review and preparation of Client's case.
- 2.03 At the time of each billing, the amount of legal services and expenses billed by the Attorney shall be disbursed from the Attorney's Trust Account to the Attorney's Operating Account.
 - a. Each billing will reflect the legal services rendered and the deposit necessary to cover the estimated legal services and expenses for the next billing period.
 - b. Client agrees to make such additional deposits for expenses as are required by the Attorney within ten (10) days from the statement's date.
 - c. Unpaid fees and expenses, if not paid within ten (10) days from the

statement's date, shall bear interest at the rate of five percent (5%) per annum until paid.

d. All sums due and to become due are payable at the Attorney's office in Alachua County, FL.

III. APPROVAL NECESSARY FOR SETTLEMENT

- 3.01 The Attorney is authorized to enter into any and all settlement negotiations on behalf of those whom the Attorney represents. This includes, but is not limited to, the Attorney's prerogative to pursue cash or structured payment settlement negotiations.
- 3.02 Client grants to the Attorney a power of attorney to handle negotiations and settlement discussions regarding Client's legal matter to the same extent as fully as Client could do so in person.
 - a. This expressly includes the right to sign Client's name on and to any insurance company drafts, money orders, cashier's checks, checks or other negotiable instruments made payable to the Attorney and Client, the Attorney, or to Client without the joinder of the Attorney, submitted to the Attorney on behalf of Client in full or partial settlement of this case.
 - b. This limited power of attorney further authorizes the Attorney to place the monies, referred to above, in the Attorney's trust account and from that trust account, make distributions and payments to the Attorney for the agreed to fee stated above, reimbursement to Attorney for any and all expenses incurred by the Attorney in handling this case, payments to Client of Client's interest in the monies recovered as stated above, and payments to parties other than Client and Attorney for their services performed, fees charged or bills rendered in connection with representing Client, including but not limited to expert witness fees, trial preparation bills paid to outside services, court reporter fees, deposition fees, investigative services, costs of exhibits or other expenses incurred by Attorney on behalf of Client.
- 3.03 No settlement shall be made without Client's approval, nor shall Client obtain any settlement on the aforesaid claims without the Attorney's approval.
- 3.04 Attorney is granted a limited power of attorney so that the Attorney may have full authority to prepare, sign and file all legal instruments, pleadings, drafts, authorizations and papers as shall be reasonably necessary to conclude this representation, including settlement and/or reduce to possession any and all monies or other things of value due to Client under this claim as fully as Client could do so in person.

IV. REPRESENTATIONS

4.01 It is expressly agreed and understood that no promises or guarantees as to the outcome of the case have been made to Client by Attorney. Attorney has not represented to

	EXHIBIT
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Client that Client will recover all or any of the funds so desired. Client also acknowledges that obtaining a judgment does not guarantee that the opposing party will be able to satisfy the judgment. It is further expressly understood and agreed that no other representations have been made to Client, except for those set out in this Agreement.

V. EXPENSES

- 5.01 All reasonable expenses incurred by the Attorney in the handling of this legal matter shall be paid by Client as incurred.
- 5.02 The expenses contemplated include but are not limited to court costs, consultants' costs, bonds, records, copy costs, certified copies, transcripts or depositions, telephone calls, duplication costs, photographs, expert and other witness fees, cost of investigation and investigator's fees, postage, travel, parking, and any other case expenses. Client has deposited with Attorney an expense deposit in the amount of \$3,000 which shall be deposited in the Attorney's Trust Account. The Attorney may draw against the expenses in the trust account as the expenses are incurred.
- 5.03 Any expenses not timely paid by Client shall be deducted by the Attorney prior to Client receiving his interest in the amount set forth in paragraph two (2) above. Client shall remain liable and promptly pay for all expenses incurred in this representation.

VI. COOPERATION OF CLIENT

- 6.01 Client shall keep the Attorney advised of Client's whereabouts at all times, and provide the Attorney with any changes of address, phone number or business affiliation during the time period which Attorney's services are required. Client shall comply with all reasonable requests of the Attorney in connection with the preparation and presentation of Client's legal matter.
- 6.02 The Attorney may withdraw from the case and cease to represent Client for any reason, including without limitation: Client's failure to timely pay fees and expenses or deposits in accordance with this Agreement, subject to the professional responsibility requirements to which Attorneys are subject.
- 6.03 It is further understood and agreed that upon such termination of any services of the Attorney, any of Client's deposits remaining in Attorney's Trust Account shall be applied to any balance remaining owing to Attorney for fees and/or expenses and any surplus then remaining shall be refunded to Client.

VII. ASSOCIATION OF OTHER ATTORNEYS OR SERVICES

- 7.01 The Attorney may, at Attorney's sole discretion and expense, employ any other person or service that the Attorney believes is necessary to help or assist in this legal representation.
- 7.02 The rights set forth in this Agreement are subject to the professional responsibility requirements which regulate Attorneys.

EXHIBIT
B

VIII. FLORIDA LAW TO APPLY

8.01 This Agreement shall be construed under and in accordance with the laws of Florida, and venue for the adjudication of any dispute relating to this Agreement shall be Alachua County, FL.

IX. PARTIES BOUND

9.01 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.

X. LEGAL CONSTRUCTION

10.01 In case any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

XI. PRIOR AGREEMENTS SUPERSEDED

11.01 This Agreement constitutes the sole and only agreement by and between the parties. It supersedes any prior understandings or written or oral agreements between the parties concerning the subject matter discussed herein.

TAX DISCLOSURE AND ACKNOWLEDGMENT:

CLIENT IS ADVISED TO OBTAIN INDEPENDENT AND COMPETENT TAX ADVICE REGARDING THESE LEGAL MATTERS SINCE LEGAL TRANSACTIONS CAN GIVE RISE TO TAX CONSEQUENCES.

THE UNDERSIGNED LAW OFFICE AND ATTORNEY HAVE NOT AGREED TO RENDER ANY TAX ADVICE AND ARE NOT RESPONSIBLE FOR ANY ADVICE REGARDING TAX MATTERS OR PREPARATION OF TAX RETURNS, OR OTHER FILINGS, INCLUDING, BUT NOT LIMITED TO, STATE AND FEDERAL INCOME AND INHERITANCE TAX RETURNS.

FURTHERMORE, CLIENT SHOULD OBTAIN PROFESSIONAL HELP REGARDING THE VALUATION AND LOCATION OF ALL ASSETS WHICH MAY BE THE SUBJECT OF A LEGAL MATTER INCLUDING BUT NOT LIMITED TO PENSIONS, EMPLOYMENT BENEFIT AND PROFIT SHARING RIGHTS THAT MAY BE CONTROLLED BY ANY OTHER PARTY TO THE LEGAL MATTER.

I certify and acknowledge that I have had the opportunity to read this Agreement. I further state that I have voluntarily entered into this Agreement fully aware of its terms and conditions.

EXHIBIT
B

Robert W. Bauer, Esq 2518 NW 13th Street Suite 200E Gainesville, FL 32609 (352) 375-5960 (352) 337-2518 (telefax) Florida Bar No. 0011058

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

NEIL J. GILLESPIE

Plaintiff,

EXHIBIT

C

Case No.: 05-CA-7205

Division: C

VS.

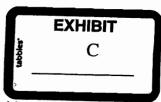
BARKER, RODEMS & COOK, PA a Florida Corporation; and WILLIAM J. COOK,

Defendants.	
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Plaintiff Neil J. Gillespie's pro se Response to Attorney Robert W. Bauer's Motion For Withdrawal of Counsel

Plaintiff Ncil J. Gillespic, pro se, states the following regarding attorney Robert W. Bauer's motion to withdrawal as counsel served October 13, 2008:

- Attorney Robert W. Bauer was referred to plaintiff for this matter by The Florida
 Bar Lawyer Referral Service February 26, 2007 for the practice area of Libel and Slander.
 A copy of the LRS referral is attached as Exhibit A.
- 2. Lawyer Referral Rule 8-1.1, Statement of Policy and Purposes, states that "Every citizen of the state should have access to the legal system" ... and (a) "make legal services readily available to the general public through a referral method that considers the client's financial circumstances..." (Exhibit B)
- The Florida Bar LRS application, Rules, IV, states: (relevant portion, Exhibit C)
 D. Λ panel member, in filing an application as provided, agrees to:



- (2) charge for further services only as agreed upon with the client in keeping with the stated objectives of the Service and the client's ability to pay;
- (3) carry, and continue to carry, professional liability insurance with limits not less than \$100,000;
- (4) permit any dispute concerning fees arising from a referral to be submitted to binding arbitration if the client so petitions;
- 4. Attorney Bauer also agreed to remit to the LRS 12% of any attorneys' fees due for services performed in connection with any Regular Panel cases. Mr. Bauer has received \$19,212.44 in attorney's fees from plaintiff, but has not remitted any of the approximately \$2,305.49 he owes to the LRS with his monthly LRS reports.
- 5. Plaintiff retained Mr. Bauer on or about March 8, 2007. Prior to his notice of appearance in April, 2007, Mr. Bauer did a complete review of the case file and advised plaintiff on March 29, 2007 by telephone that the case was fairly strong, if we get in front of a jury, if we survive any summary judgments, we can do very well in front of a jury, if we can hold those punitive damages, Mr. Bauer said "If we can substantiate that that stuff was willful and if I can get, you know, the jury would love to punish a slimy attorney." Plaintiff responded: "You know, I want to get a good outcome with the case, I'm not interested in any personal ax to grind."
- 6. Mr. Bauer changed plaintiff his full hourly rate of \$250 per hour plus all expenses, including \$250 per hour for travel to Tampa, charges for associates, law clerks, legal assistants, and charges for filing, copying and mailing documents. Mr. Bauer told plaintiff the case may cost as much as \$18,000 total. Plaintiff has paid Mr. Bauer

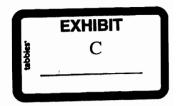


\$19,212.44. Plaintiff does not have the ability to pay more and relies on disability income. Mr. Bauer has been churning fees at a rate that could reach six figures.

- Mr. Bauer has been negligent in his representation of plaintiff, including:
- a. Mr. Bauer has not submitted an amended complaint. This action is alive on plaintiff's pro se complaint submitted August 11, 2005. On several occasions the Court has asked Mr. Bauer about the complaint and he did not submit an amended one.
- b. Mr. Bauer failed to obtain defendants' outstanding discovery, even while appearing before the court several times on plaintiff's outstanding discovery. Mr. Bauer should have simultaneously raised the issue of defendants outstanding discovery to mitigate sanctions. Plaintiff's motion to compel defendants discovery was submitted December 14, 2006. A second motion to compel was made February 1, 2007.
- c. Mr. Bauer failed to timely stay the judgment pending the appeal to the 2DCA of the March 20, 2008 award to defendants of \$11,550 in attorneys fees. Instead plaintiff's bank account and attorney trust fund were garnished.
- d. On July 1, 2008, Mr. Bauer misrepresented to the Court that plaintiff failed to complete a fact information sheet, resulting in a finding of contempt. Mr. Bauer later wrote to the Court about his error but the contempt stands.
- c. Following the March 20, 2008 hearing and award of \$11,550 in attorneys fees,

 Mr. Bauer stopped providing plaintiff documents in the case. Plaintiff was forced to

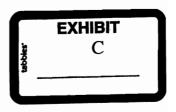
 travel to Tampa to purchase documents from the clerk for \$1.00 per page.
- f. While Mr. Bauer prevailed in the 2DCA on an interlocatory appeal to reinstate plaintiff's claims from the voluntary dismissal, he failed to move for attorney's fees.



g. Mr. Bauer has been unable to maintain continuity of his office staff, and has very high employee turnover (perhaps reaching 500%) due to his narcissistic personality and unprofessional behavior. Some employees with little or no legal background were billed to plaintiff as legal assistants at \$100/hr. (KAM). When plaintiff inquired about the experience of people working on his case, Mr. Bauer became angry and accusatory.

h. Mr. Bauer has admittedly overbilled plaintiff, and continues to charge plaintiff for items not related to the case, such as his notice to the Court of his personal family vacation. There is also a question about billing for travel time at full hourly rate, and whether Mr. Bauer is conducting other business or pleasure during that time billed to plaintiff. The dates in question are July 3, 2007 (5hrs), August 15, 2007 (7.8hrs), October 30, 2007 (7hrs), and March 20, 2008 (3hrs), involving about \$5,700 in billed time.

- Mr. Bauer has failed to zealously represent plaintiff. The above examples are illustrative and not exhaustive or all-inclusive as a courtesy to Mr. Bauer.
- 8. Mr. Bauer has grown tired of litigation that has proved difficult, and he wants to move on to easier and more profitable matters. On August 14, 2008 during an emergency hearing for a stay before Judge Crenshaw, Mr. Bauer complained to the Court that "Mr. Rodems has, you know, decided to take a full nuclear blast approach instead of 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." (Exhibit D, pages 16-17)
- 9. On October 13, 2008, Mr. Bauer moved to withdrawal as counsel stating "[M]ovant is unable to communicate effectively with Plaintiff in a manner consistent with good attorney-client relations." Therefore plaintiff requested an accommodation under the Americans with Disabilities Act to restore effective communication with me in a



manner consistent with good attorney-client relations. (Exhibit E). At all times pertinent to this matter plaintiff was disabled. Plaintiff offered to retain co-counsel to assist with the case. Mr. Bauer did not respond to plaintiff's ADA request.

- 10. On May 14, 2009, plaintiff provided Mr. Bauer (at his request) a signed settlement agreement and a signed contingent fee contract, etc. Mr. Bauer did not respond.
- 11. Because of the forgoing, plaintiff has claims against Mr. Bauer for legal malpractice, fraud, breach of fiduciary duty, breach of contract, ADA violations, and other causes of actions, bar grievances, and LRS complaints. Mr. Bauer's interests are in conflict with plaintiff and Bauer can no longer represent plaintiff.
- 12. Plaintiff moves the Court for a 60 day stay to find replacement counsel.
- 13. Plaintiff moves the Court for leave to submit Plaintiff's First Amended Complaint.
- 14. Plaintiff requests a stay the \$11,550 judgment for sanctions to defendants pending the outcome of this case.

I certify that on October 1, 2009, a true and correct copy of the foregoing was served by hand in court on Ryan Christopher Rodems and by fax to Robert W. Bauer at:

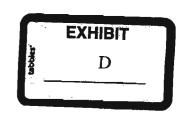
Ryan C. Rodems, Esq. 400 N. Ashley Dr., Suite 2100 Tampa, Florida 33601 Robert W. Bauer, Esq. 2815 NW 13th Street, Suite 200E Gainesville, FL 32609

RESPECTFULLY SUBMITTED October 1, 2009

Neil J. Gillespie, pro so

Ocala, FL 34481

Telephone: (352) 854-7807



AFFIDAVIT OF BEVERLY LOWE

BEFORE ME, the undersigned authority, personally appeared Beverly Lowe, who being duly sworn, declared as follows:

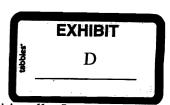
My name is Beverly Lowe.

During the relevant times hereto sworn, I was the Office Manager at The Law Office of Robert W. Bauer, P.A.

When I began at Mr. Bauer's Office, Mr. Gillespie was already a client with the firm. I was told that he suffered from some form of disability, possibly PTSD, and that we should take precautions when dealing with him. As such, I ensured that when I or others dealt with him, we were very courteous and accommodating to him. Despite these efforts, I witnessed Mr. Gillespie threaten to sue Mr. Bauer on more than one occasion if Mr. Bauer didn't do things the way that Mr. Gillespie wanted him to.

The worst incident I recall occurred on November 20, 2009. I was in my office when I heard our receptionist, Allison Beal, shouting, "You can't go back there!" While I can't remember what Mr. Gillespie said in response, I do remember him screaming back at the top of his lungs while continuing through reception and into our offices. Although I was on my way out of the office to pick up my daughter from school, I decided that I needed to stay and make sure our receptionist, Mrs. Beal, was safe. I waited in the reception area with Mrs. Beal, but could hear Mr. Gillespie screaming outside of Mr. Bauer's office.

Mr. Bauer had exited his office and came into the hallway between his office and reception where Mr. Gillespie confronted him. Mr. Gillespie put his face a few inches away from Mr. Bauer's face and screamed at the top of his lungs. I stood at Mrs. Beal's desk and told her to dial 9-1, but wait to press the last 1 until I told her. Mr. Gillespie's message did not resonate with me such that I can recall it today, but I do recall him screaming expletives over and over at Mr. Bauer. I heard Mr. Bauer tell Mr. Gillespie that he needed to leave or the police would be called. At that point, I told Mrs. Beal to press the last 1. Before she did, however, Mr. Gillespie stormed back into the reception area. I quickly moved out of the way so as not to be confronted. Despite my efforts, Mr. Gillespie stopped, turned on me and started screaming more expletives. I began to respond, but before I was able to finish, he again began screaming obscenities and stormed out of the office. I was very afraid



throughout the entire ordeal that he was going to hurt someone in the office. Additionally, I was afraid to go to my car and waited several minutes before leaving the building. After this incident, I felt the need to have a discussion with the employees on how to handle a client or previous employee that entered the office with a gun.

I declare under penalty	of perjury that the foregoing is true and correct.
SIGNED on Aug 18	Mil
	Beverly Lowe, Affiant
STATE OF FLORIDA COUNTY OF Hachua SUBSCRIBED AND SWORN by Beverly E. Lowe	TO BEFORE ME on $8/17/10$
SUSAN D. REYNOLDS Commission # EE 014668 Expires August 5, 2014 Bonded Thru Troy Fain Insurance 800-385-7019	Notary Public, State of Florida Susan D. Reynous (Print, Type, or Stamp Commissioned Name of Notary Public)
Personally Known OR Produced	d Identification
Type of Identification Produced	

THE LAW OFFICES OF

ROBERT W. BAUER, P.A.

2815 NW 13th Street, Suite 200, Gainesville, FL 32609 www.bauerlegal.com



Robert W. Bauer, Esq. Tanya M. Uhl, Esq. Phone: (352)375.5960 Fax: (352)337.2518

July 24, 2008

The Honorable James M. Barton, II 800 E. Twiggs St., Room 512 Tampa, Florida 33602 Manner of delivery - U.S. Mail

Re: Gillespie v. Barker, Rodems, and Cooke

as-7305

008 JUL 29 AM 9: 32

Dear Judge:

After speaking with my client, making a thorough review of our files and computer records I must regretfully inform the court and opposing counsel that I inadvertently made misrepresentations at our last hearing. In that hearing I stated that my office had forwarded the Information Fact Sheet to Mr. Gillespie. I also stated that my office had called him to tell him to fill it out. I now understand that was not correct. Because of my assertions the Court found Mr. Gillespie to be in contempt. I wish at this time set the record straight.

While I did truly believe that those things had happened at the time I advised the court of such, I now know that I was in error in not having personally confirmed such. I take full responsibility for the error and I wish to clarify this to insure that the court realizes that Mr. Gillespie did not ignore the courts directive.

I apologize both to the court, opposing counsel and Mr. Gillespie for my error.

Sincerely,

Robert W. Bauer, Esq.

cc: Ryan Rodems

Neil Gillespie

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

NEIL J. GILLESPIE

|--|

v.

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

Defendant,

Case No.:05-CA-007205

Division: C

PLAINTIFF'S MOTION FOR REHEARING

Plaintiff, NEIL J. GILLESPIE, files this Motion for Rehearing in accordance with Rule 1.530 of the Florida Rules of Civil Procedure, and alleges the following:

- 1. This action was heard on October 30, 2007, and July 1, 2008, and the resulting judgment was entered on July 7, 2008. A copy of the judgment is attached as Exhibit A and made a part of this Motion for all purposes.
- 2. Plaintiff moves for rehearing on the grounds that the Court's judgment was based on the Defendants' representations that there was a signed attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 3. Defendants have not produced a signed copy of the attorney fee agreement between Barker, Rodems & Cook and the Plaintiff.
- 4. Defendants have only produced a signed copy of the attorney fee agreement between Alpert, Barker, Rodems, Ferrentino & Cook and the Plaintiff. A copy of the fee agreement is attached as Exhibit B and made a part of this Motion for all purposes.
- 5. Defendant Cook signed the attorney fee agreement between Alpert,

- Barker, Rodems, Ferrentino & Cook and the Plaintiff.
- 6. Defendants breached the attorney fee agreement by disregarding the provisions of the agreement and taking an amount of attorneys' fees that far exceeded the amount enumerated in said agreement.
- 7. The total recovery in the class action lawsuit was \$56,000.
- 8. Defendants took \$50,000 under the false assertion that this was the amount of court-awarded attorneys' fees.
- 9. In the attorney fee agreement, the Defendants were entitled to receive either court-awarded attorneys' fees, 33.334% of total recovery prior to the time an answer is filed or a demand for appointment of arbitrators is made, or 40% of the total recovery from the time of the filing of an answer or the demand for appointment of arbitrators through the entry of judgment. The law firm was entitled 5% of the total recovery after a notice of appeal is filed by any party or if post judgment relief or action is required for recovery on the judgment.
- 10. Defendants were actually entitled to \$31,325.46, which consists of the attorneys' fees, costs and expenses, and the expenses paid to the former law firm.
- 11. Defendants received \$18,675.54 more than they were entitled to.
- 12. Each plaintiff in the class action suit was entitled to \$8,224.78.
- 13. Plaintiff recovered only \$2,000.00 from the class action suit.
- 14. Plaintiff was damaged by this breach of the fee agreement in the amount of \$6,224.78.

- 15. Defendant Cook was the Plaintiff's lawyer individually.
- 16. The final judgment on Defendant Cook on the count of breach of contract is contrary to law because it was through Defendant Cook's actions in negotiating and representing the settlement, in which the law firm breached the attorney fee agreement.
- 17. The final judgment on the count of fraud is contrary to law in that the conduct of the Defendants in making false representations to the Plaintiff is not an act in performance of the fee agreement.
- 18. The final judgment on the count of fraud is contrary to law in that the Plaintiff's claim is not barred by the economic loss rule because the Defendants' fraudulent actions were independent of the Defendants' actions in breaching the contract.
- 19. Defendants breached the contract by receiving a greater percentage of the total recovery amount than they were entitled.
- 20. Defendants committed fraud outside of the scope of their legal representation and the attorney fee agreement by deceiving their client, the Plaintiff.
- 21. The scope of the Defendants' representation of the Plaintiff did not include deceiving their client with false representations about the terms of the settlement of the case.
- 22. The scope of the Defendants' representation of the Plaintiff did not include falsifying a closing statement to induce the Plaintiff to settle.
- 23. Plaintiff is entitled to a rehearing to decide the issues based on the signed

fee agreement that is to be produced by Defendants.

- 24. Plaintiff is entitled to a rehearing to decide the issues based on the conduct of making false representations to the Plaintiff.
- 25. Plaintiff is entitled to a rehearing to decide the issues based on the conduct of preparing a false closing statement.

WHEREFORE, Plaintiff, NEIL J. GILLESPIE, requests that the Court set aside the judgment entered on July 7, 2008, and grant a new hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above PLAINTIFF'S MOTION FOR REHEARING has been sent by U.S. Mail to the following this day of _______, 2008.

Ryan C. Rodems, Esq. 400 North Ashley Drive, Suite 2100 Tampa, FL 33602

Law Office of Robert W. Bauer, P.A.

Robert W. Bayer, Esq. Florida Bar No. 0011058

Tanya M. Uhl Esq. Florida Bar No. 0052924

2815 NW 13th Street, Suite 200E

Gainesville, Florida

Telephone: (352) 375-5960

Fax: (352) 337-2518

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

NEIL J. GILLESPIE,			
Plaintiff,			
vs.	Case No.:	05CA7205	
BARKER, RODEMS & COOK, P.A., a Florida corporation; and WILLIAM J. COOK,	Division:	С	
Defendants/			
FINAL JUDGMENT	AS TO DEFENDAN	T COOK	
THIS ACTION was heard on Defend	lants' Motion for Judg	gment on the F	Pleadings on
Tuesday, October 30, 2007 and Tuesday, Jul	y 1, 2008, and		
IT IS ADJUDGED that Plaintiff Neil	J. Gillespie take noth	ning by this ac	tion against
Defendant William J. Cook, whose address i	s 400 North Ashley D	Prive, Suite 21	00, Tampa,
Florida 33602, and that Defendant Cook go l	nence without day and	l recover costs	s from Plaintiff,
the amount of which the Court shall retain ju	risdiction to determin	ie.	
DONE AND ORDERED in Chamber	rs this day of	July, 2008.	ORIGINALSIGNED
			JUL 7 = 2008 JAMES M. BARTON, 1
			CIRCUIT JUDGE
	James M. Barton, II Circuit Judge	_	
Copies to:			
Robert W. Bauer, Esquire (Counsel for Plain Ryan Christopher Rodems, Esquire (Counsel	•		

EXHIBIT
A

CLASS REPRESENTATION CONTRACT

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I. PURPOSE

INVe, Noil Gillespie
do hereby retain and employ the law firm of Alpert, Barker, Rodems, Fe
P.A., to investigate my potential claim resulting from My + (ansach)
AMSCOT
and, if advisable, to pursue necessary litigation on my behalf.

I/We understand that I/we may be one of several plaintiff(s) or part of a class of plaintiff(s) represented by Alpert, Barker, Rodems, Ferrentino & Cook, P.A.

II. COSTS AND EXPENSES

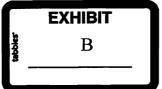
I/We hereby agree to pay for the costs and expenses of the investigation and preparation of my/our claims for damages. Should it be necessary to institute a lawsuit or arbitration proceeding, I/we agree to pay all costs and expenses associated with any Court or arbitration proceeding. If an appeal of any decision is filed, regardless of the person or party filing such appeal, I agree to pay the costs and expenses associated with initiating or responding to such appeal.

I/We authorize Alpert, Barker, Rodems, Ferrentino & Cook, P.A., to advance and pay any costs and expenses it deems appropriate to the handling of my case. I/We will pay Alpert, Barker, Rodems, Ferrentino & Cook, P.A., for the costs and expenses advanced out of the portion of any recovery remaining after attorneys' fees have been subtracted. I/We will then receive the portion of what remains, which is known as the "net recovery". Thus, the "total recovery" (all monies received or collected, including attorneys' fees, if awarded) less Alpert, Barker, Rodems, Ferrentino & Cook, P.A.'s attorneys' fees and any costs and expenses will equal the "net recovery".

I/We understand that my/our portion of the "net recovery" will be a prorated or per person share which will be proportional to that of all other class members. The amount of money I/we receive will be determined by dividing the "net recovery" (the amount of any recovery remaining after attorneys' fees and expenses have been subtracted) by the number of class members who are determined eligible to receive proceeds from any judgment or settlement. I/We understand that the Court or other tribunal may approve a different ratio or formula depending upon the circumstances.

If there is no recovery, or if the total recovery is not adequate to pay for all of the costs and expenses advanced, I/we understand that Alpert, Barker, Rodems, Ferrentino & Cook, P.A., will not seek payment from me for any expenses.

If I/we terminate this contract, then Alpert, Barker, Rodems, Ferrentino & Cook, P.A., may seek payment from me/us for any costs and expenses allowed by law.



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III. ATTORNEYS' FEES

In almost all cases in America, each party to a lawsuit or arbitration proceeding pays its own attorneys' fees. In rare cases, the Defendant(s) may pay all or part of the attorneys' fees or the Court or arbitration panel may award attorneys' fees based upon a statute or otherwise.

I/We agree to pay Alpert, Barker, Rodems, Ferrentino & Cook, P.A., an attorneys' fee if it is successful in obtaining any monies or other benefit on my behalf. I/We understand that Alpert, Barker, Rodems, Ferrentino & Cook, P.A., will receive the attorneys' fees awarded by a Court or arbitration panel or will receive the applicable percentage of the "total recovery" (all monies received from the Defendant(s) including, but not limited to, money for actual damages, punitive damages, interest, penalties, attorneys' fees and expenses), whichever is higher. The applicable percentages shall be as follows:

- A. 33.334% of the "total recovery" prior to the time that an answer is filed or a demand for appointment of arbitrator(s) is made; thereafter.
- B. 40% of the "total recovery" from the time of the filing of an answer or the demand for appointment of arbitrator(s), through the entry of a judgment;
- C. An additional 5% of the "total recovery" after a Notice of Appeal is filed by any person or party or if post-judgment relief or action is required for recovery on the judgment.

In the event that my/our claim is settled on terms of an agreement calling for payment in installments, whether monthly, annually or otherwise, in the future, my/our attorneys' contingent fee percentage shall be calculated on the costs of any structured settlement or, if the cost is unknown, on the present money value of the structured settlement. If both the damages <u>and</u> the attorneys' fees are to be paid out in future installments, this limitation shall not apply.

<u>I/We understand that if there is no recovery. I/we will not be indebted to Alpert, Barker, Rodems, Ferrentino & Cook, P.A., for any attorneys' fees.</u>

If I/we terminate this contract, then Alpert, Barker, Rodems, Ferrentino & Cook, P.A., may seek payment from me/us for any attorneys' fees allowed by law.

IV. ALPERT, BARKER, RODEMS, FERRENTINO & COOK, P.A. MAY WORK WITH OTHER LAWYERS ON MY CASE

I/We understand that Alpert, Barker, Rodems, Ferrentino & Cook, P.A., in its discretion, may work with other lawyers on my/our case if deemed necessary. If Alpert, Barker, Rodems, Ferrentino & Cook, P.A., agrees to work with other lawyers on my/our case, I/we understand that the attorneys' fees I/we will have to pay will not increase. Other law firms or lawyers hired by Alpert, Barker, Rodems, Ferrentino & Cook, P.A., will be paid out of the attorneys' fees agreed to in this contract and, if I/we so desire, I/we will be advised regarding how the attorneys' fees are divided.

V. WHAT THIS CONTRACT COVERS

A. Scope of Representation

At the time of signing this contract, I/we also signed a Statement of Client's Rights as well as an Acknowledgment regarding investigation of my claim. These three documents encompass the entire agreement between me/us and Alpert, Barker, Rodems, Ferrentino & Cook, P.A. These signed agreements take the place of any prior, oral or written agreements and may only be changed or modified by a separate, written agreement signed and dated by me/us and Alpert, Barker, Rodems, Ferrentino & Cook, P.A.

This contract is to be interpreted in accordance with Florida law.

I/We understand that if Alpert, Barker, Rodems, Ferrentino & Cook, P.A., determines, at some later date, that my claim should not or cannot be reasonably prosecuted by the Firm, the Firm may notify me in writing of this decision and withdraw as my attorneys. Under such circumstances, I shall be responsible to Alpert, Barker, Rodems, Ferrentino & Cook, P.A., only for any fees and costs permitted by law.

B. Documents and Information

I/we authorize the lawyers to utilize my/our documents and/or information in any regulatory, enforcement, or other proceedings of any kind as may be necessary in the lawyers' sole discretion.

APPROVAL OF THIS CONTRACT

The undersigned client(s) has/have, before signing this contract, received and read the Statement of Client's Rights and understands each of the rights set forth therein. The undersigned client(s) has/have signed the Statement and received a signed copy to refer to while being represented by the undersigned attorneys.

This contract may be cancelled by written notification to the attorneys at any time within three (3) business days of the date the contract was signed, as shown below, and if cancelled the client(s) shall not be obligated to pay any fees to the attorneys for the work performed during that time. If the attorneys have advanced funds to others in representation of the client(s), the attorneys are entitled to be reimbursed for such amounts as the attorneys have reasonably advanced on behalf of the client(s).

I/We have read this contract and any documents specifically referenced herein, and agree to all terms referenced within such documents.

DATED: 11/3/2000	DATED: 11-3-2000
Alpert, Barker, Rodems,	Client / July
Ferrentino & Cook, P.A. Post Office Box 3270	0 (
Tampa, Florida 33601-3270	Oli 4
813/223-4131	Client

UAW LEGAL SERVICES PLAN

UAW-GM UAW-Ford UAW-Chrysler LLC

2454 McMullen Booth Road, Bldg. B - Suite 425, Clearwater, FL 33759 Phone: (727) 669-5319 or (877) 309-1787 Fax: (727) 669-0978

Robert Burrell Managing Attorney Tanya Bell Staff Attorney

August 5, 2010

Neil J. Gillespie 8092 SW 115th Loop Ocala, Florida 34481

Dear Mr. Gillespie:

I am in receipt of your letter dated August 3, 2010 in which you request that I provide you an explanation as to the extent of my involvement in your case. In regards to the Plaintiff's Motion for Rehearing that I signed, I did so at the direct request of Robert W. Bauer in his absence. I did not prepare that Motion or even work on that Motion. To my knowledge, I was not directly involved in your case.

Thank you for your time.

Sincerely,

Attorney at Law

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

NEIL J. GILLESPIE,

Plaintiff,

CASE NO.: 05-CA-7205

VS.

BARKER, RODEMS & COOK, P.A., a Florida corporation; WILLIAM J. COOK,

		ar	

ORDER GRANTING PLAINTIFF'S MOTION TO WITHDRAW PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL

This action, having come before the Court on Plaintiff's Pro Se Motion to Withdraw Plaintiff's Notice of Voluntary Dismissal, and the Court, having reviewed the file and having heard oral argument from counsel for both sides, finds:

- 1. The Pro Se Plaintiff filed his Notice of Voluntary Dismissal on February 7, 2007 prior to retaining his current counsel.
- Notices of Voluntary Dismissal cannot be filed pursuant to Rule 1.420 when a counter-claim is pending without first receiving leave of court. <u>Rogers v. Publix</u> <u>Super Markets, Inc.</u>, 575 So.2d 214 (Fla. 5th DCA, 1990)
- 3. Therefore, the Notice of Voluntary Dismissal was not effective to dismiss the Plaintiff's cause of action.
- 4. The Pro Se Plaintiff filed a Motion for an Order of Voluntary Dismissal prior to retaining his current counsel pursuant to Rule 1.420 on February 7, 2007 and such motion required a court order for it to be effective.
- 5. On February 15, 2007 the Pro Se Plaintiff filed a Notice of Withdrawal of Voluntary Dismissal.
- 6. Plaintiff's Motion for an Order of Voluntary Dismissal was ineffective to dismiss the Plaintiff's case.
- 7. It is further determined that as a matter of law that Plaintiff is not entitled to file a

counter counter-complaint in response to Defendant's Counter-Complaint absent a modification of the current rules of civil procedure.

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ORIGINAL SIGNED

Plaintiff's Notice of Voluntary Dismissal is hereby withdrawn.

AUG 3 1 2007

JAMES M. BARTON, II

The Honorable James M. Barton, II Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER GRANTING PLAINTIFF'S MOTION TO WITHDRAW PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL was served to the following by U.S. Mail this ____ day of 2007:

Ryan C. Rodems, Esq. 400 N Ashley Dr., Ste 2100 Tampa, FL 33602

Robert W. Bauer, Esq. 2815 NW 13th St., Ste 200E Gainesville, FL 32609

Judicial Assistant

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BARKER, RODEMS & COOK, P.A., a Florida corporation; and WILLIAM J. COOK,	<pre>} COP</pre>	Y
Petitioners,)	FYI Only
v .) Case No. 2D07-4530	
NEIL J. GILLESPIE,)	
Respondent.)	No Action Necessary

Opinion filed February 8, 2008.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; James M. Barton, II, Judge.

Ryan Christopher Rodems of Barker, Rodems & Cook, P.A., Tampa, for Petitioners.

Robert W. Bauer, Gainesville, for Respondent.

PER CURIAM.

Denied. <u>See</u> Fla. R. Civ. P. 1.420(a)(2); <u>Rogers v. Publix Super Markets</u>, <u>Inc.</u>, 575 So. 2d 214, 215-16 (Fla. 5th DCA 1991) (holding that when counterclaim is pending, plaintiff cannot unilaterally dismiss complaint without order of court).

WALLACE and LaROSE, JJ., and THREADGILL, EDWARD F., SENIOR JUDGE, Concur.



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

NEIL J. GILLESPIE,

Plaintiff,

VS.

Case No.:

05CA7205

Division:

F

BARKER, RODEMS & COOK, P.A., a Florida corporation; and WILLIAM J. COOK,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL

THIS CAUSE having come on to be heard on Tuesday, April 25, 2006, on Plaintiff's

Motion to Disqualify Counsel, and the proceedings having been read and considered, and counsel and Mr. Gillespie having been heard, and the Court being otherwise fully advised in the premises, it is ORDERED:

The motion to disqualify is denied with prejudice, except as to the basis that counsel may be a witness, and on that basis, the motion is denied without prejudice.

DONE and ORDERED in Chambers, this 2th day of May, 2006.

Richard A. Nielsen Circuit Judge

Copies to:

Neil J. Gillespie, pro se Ryan Christopher Rodems, Esquire

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE IN MY OFFICE. WITNESS MY HAND AND OFFICIAL SEAL THIS 300 DAYCE

PAT FRANK FIR OF CIRCUIT COURT 24

258

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY, FLORIDA

IN RE: ESTATE OF File No: 01-2008-CP-1083

LOUISE A. FALVO,

Deceased. Division: PROBATE

RESPONSE TO AND MOTION TO STRIKE OR IN THE ALTERNATIVE MOTION TO DISMISS ATTORNEY BAUER'S MOTIONS FOR ATTORNEY'S CHARGING LIEN AND MOTION FOR SANCTIONS AGAINST ATTORNEY ROBERT BAUER

- 1. Sometime in 2008 Woodhull hired Attorney Robert Bauer to defend her against the Tower Oaks Homeowners' Association. Woodhull gave Mr. Bauer \$2,500.00 in cash as a retainer. Bauer said that law student David Sams would be working on preparing the defenses and counterclaim in order to save Woodhull money, even though this was the unauthorized practice of law.
- 2. Woodhull provided law student David Sams with rough draft defenses as the answer to the civil complaint filed by the Tower Oaks Homeowners' Association, that included "selective enforcement" and "statute of limitations" as defenses; however, when Attorney Bauer via the work produce of Sams (based upon Woodhull's rough draft) filed in the "answer",



"selective enforcement" and "statute of limitations" were not included as defenses. Woodhull asked Mr. Bauer about the failure to include "selective enforcement" and "statute of limitations" as defenses in a follow up phone call. Attorney Bauer said that "selective enforcement" did not need to be plead. Attorney Bauer also failed to list "statute of limitations" as a defense, although this defense also appeared on the rough draft answer that Woodhull had provided to David Sams, the law student who was composing legal documents without a law license.

- 3. The "counterclaim" was phrased very weakly—so weakly that no relief could be granted --even if Woodhull had prevailed-- according to final judgment rendered by Judge Toby Monaco.
- 4. Attorney Bauer failed to pay the \$300.00 counterclaim fee in the TOHA case; the clerk of court had to send Bauer a letter to pay that fee and then and only then did he pay the \$300.00 filing fee.
- 5. Thereafter, Mr. Bauer simply "sat" on the case for approximately six months and conducted no discovery and did nothing. Certainly, the "answer" to the original civil complaint did not cost \$2,500.00 to compose, especially since the writing of it paralleled precisely what Woodhull had already precomposed and given to law student David Sams as a rough draft guideline to

- follow (which had included the additional defenses of "statute of limitations" and "selective enforcement").
- 6. Meanwhile, Woodhull's mother died and Woodhull subsequently initiated an administration of the estate in Alachua County. Shirley Mascarella then decided to hire an attorney and initiate a will contest.
 - 7. The court then mandated that if Woodhull wished to be the personal representative Woodhull would have to hire an attorney. Attorney Robert Bauer was then paid an additional \$2,500.00 retainer to become the attorney of record on the Estate of Louise A. Falvo will contest.
- 8. The first hearing was a challenge of venue, a threshold issue. Woodhull told Robert Bauer that they would have to prove that Woodhull's mother had lived (homesteaded) and died in Alachua County and Woodhull told Bauer she had a paper in her possession signed to the tax collector, homestead office, stating that Falvo wished to keep her homestead in Alachua County.

 In a phone conversation with Woodhull, Mr. Bauer stated that that particular paper proving Falvo's homestead intentions, would not be necessary to bring to court.
- 9. Woodhull brought the paper anyway which proved Falvo's homestead intentions to the court .

- 10.Getting Attorney Bauer to enter that paper into the court record took some effort on Woodhull's part. Woodhull tapped Bauer on the shoulder, pointed at the paper, etc., until finally he entered the necessary paper into the court record.
 - 11. Based largely upon that paper that Louise A. Falvo signed declaring she wished to keep her homestead in Alachua County, the Judge Monaco ruled that venue would stay in Alachua County.
 - 12. After the hearing that day, walking down the courthouse hall with Attorney Bauer, Attorney Bauer turned to Woodhull's fiancé, David A. Newman, and stated, "She is rather obnoxious. How do you put up with her?"
 - 13. David replied that we put up with each other and that he loves me dearly.
 - 14. Woodhull tried to brush off Bauer's comment as a "joke" but thereafter Woodhull had some serious reservations about Attorney Bauer representing her. This inappropriate and unprofessional comment had quite an unsettling effect. However, Woodhull had no problem with law student David Sams.
 - 15. Woodhull was in the middle of another legal matter, a wrongfully taken guardianship that had been commenced against her mother,

- Louise A. Falvo, in Seminole County with a forgery of Woodhull's signature. The attorneys and guardian who had taken possession of Woodhull's mother and her assets were billing ex parte quite excessively.
- about the excessive billing. Woodhull had been challenging the wrongfully taken guardianship pro se, both in Seminole County and at the 5th DCA. Woodhull had even opened a guardianship file in Alachua County so that the guardianship could be transferred to the correct venue. Attorney Bauer suggested that in order to prevail on the will contest in Alachua County, it would be best to represent Woodhull in ALL cases (the appeals at the 5th DCA, the guardianship, etc.). Woodhull stated "I will think about it." Attorney Bauer stated that BEFORE he could get started, he would need a retainer of \$4,000.00—just to obtain and read the files from Seminole County and the 5th DCA.
- 17. Woodhull never returned to Mr. Bauer's office with the mandated \$4,000.00 retainer. Woodhull never signed a contract(s).
- 18.A few weeks later, Woodhull was in Daytona Beach looking over her appeal file when lo and behold, there was an "Entry of Appearance"

- from Attorney Robert Bauer! Woodhull sent Bauer and/or Sams an e-mail about this matter, seeking an explanation.
- 19.Bauer had also put in a Motion for Stay at the 5th DCA. This was exactly OPPOSITE of what I wanted. Woodhull wanted the 5th DCA to expedite their decision because if the guardianship were set aside, then a will contest in Alachua County would also become unnecessary. The POD/ITF designations that the guardian had destroyed would be restored and Woodhull could simply walk into the banks and claim her inheritance money.
- 20. Woodhull then wrote a motion to the 5th DCA telling them that

 Attorney Bauer was not authorized to represent Woodhull and that

 Woodhull wished to continue representing herself pro se. The 5th

 DCA asked Attorney Bauer to write back an explanation. Attorney

 Bauer stated that "we" had a "verbal agreement." Based upon that

 malarkey, the 5th DCA allowed Woodhull to start representing myself again.
- 21.On the day that Woodhull put in the motion to the 5th DCA to continue representing herself, pro se, Woodhull sent a copy of that motion to Attorney Bauer. Woodhull also included a small piece of

- paper in which she had written, something to the effect "Please also remove yourself from 08-GA-0508 and 08-GA-0509."
- 22. Woodhull realized after she had mailed that little piece of paper that she had no proof that it had been sent. However, the "angels" must have been with Woodhull.
- 23. Woodhull called Mr. Bauer's secretary and asked her to send, via email, a copy of the motion to the 5th DCA regarding continuing to represent myself. She agreed to do so, and lo and behold, she also sent, via e-mail a copy of the little note stating "Please also remove yourself from 08-GA-0508/0509."
- 24. Woodhull then showed this paper to Mr. Bauer, via an e-mail. Mr. Bauer then stated in an e-mail back to Woodhull that he "didn't like Woodhull's attitude." Woodhull stated that she I didn't like Bauer's attitude, either, and the two therefore parted company on the two legitimate cases for which Bauer had legitimately been retained.
- 25. However, Attorney Bauer continued to say he was representing

 Woodhull. He sent several e-mails stating that he needed

 "clarification" regarding which cases he was representing Woodhull

 on and saying that he would continue to represent Woodhull on ALL

 cases until Woodhull said otherwise.

- 26. Attorney Bauer then "sat" on Woodhull's case, unauthorized, until there was an objection to billing statement filed by Attorney Nardella and then Attorney Bauer put in a motion to withdraw. During the alleged "three months" that Attorney Bauer alleges he "represented" Woodhull in the Seminole County proceedings Attorney Bauer took no action, conducted no discovery, knowing full well that he was not authorized to take any action.
- 27.On December 16, 2009, Woodhull received notice that Attorney

 Bauer has placed liens on the will contest and filed this notice of lien
 into every and all cases. Woodhull is charging Woodhull
 approximately \$10,000.000 PLUS the costs of filing all of those liens.

 Attorney Bauer has no final judgment that states he prevailed in a
 breach of contract against Woodhull. Yet, Attorney Bauer is charging
 Woodhull \$10,000.00 for unauthorized representation plus the cost of
 preparing papers to file the various liens.
- 28. Attorney Bauer is looking to be paid out of the estate of Louise A.

 Falvo from curator Judith Paul. Attorney Bauer suspected a "conflict of interest" in this arrangement since Attorney Judith Paul is part of Knellinger and Associates who works with Attorney Bauer in bill collection proceedings. And Attorney Paul was formerly the attorney

- for the Eighth Judicial Circuit, Alachua County, prior to going into private practice.
- 29. Woodhull received a letter of non-engagement (probably a standard form letter) from Mr. Bauer 2007—the first time Woodhull met with Attorney Bauer regarding the homeowners' association who threatened legal action against Woodhull for two years prior to commencing actual civil litigation. The follow up (form) letter from 2007 states that Mr. Bauer does not represent me, even though we had an initial meeting, and that unless he receives a retainer and we sign a letter of engagement, he is not my attorney (standard procedure).
- 30. Attorney Bauer produced no favorable fruits for Angela V. Woodhull.
- 31.As it stands, Attorney Bauer charged \$2,500.00 in the homeowners' association dispute for creating nonsubstantive documents that Woodhull was then forced to hire another attorney to amend. These nonsubstantive documents, based upon Woodhull's own compositions and legal research, certainly did not cost \$2,500.00 to compose and therefore a refund is due Woodhull.
- 32.In the Estate of Louise A. Falvo, Attorney Bauer attended one hearing, yet held a retainer of an additional \$2,500.00. Certainly the lax preparation for one hearing on the issue of venue did not cost

- \$2,500.00 and again, it was Woodhull's research and documentation that saved the day. Woodhull also was forced to create her own appellate brief as the result of ineffective representation from Mr.

 Bauer. Therefore, a refund of the balance is due to Woodhull.
- 33. Attorney Bauer claims that there was a "verbal" contract entered into between Woodhull and Bauer. However, the supporting documents show otherwise.
- 34.In addition, the supporting documents show that there was "NO"

 "meeting of the minds, as Attorney Bauer asked for "clarification" of which cases he was on or off. Mr. Bauer therefore cannot ask for compensation when there was no meeting of the minds and no written contract whatsoever.
- 35. Attorney Bauer does not state the alleged terms of the alleged verbal agreement; it therefore remains unenforceable, nebulous, and undefined. As such, Attorney Bauer cannot be compensated. In fact, there was no agreement—whether verbal or written because there was no meeting of the minds or meeting of the terms of an agreement. Attorney Bauer demanded \$4,000.00 up front to get started. No \$4,000.00 was ever forthcoming by Woodhull to Attorney Bauer. Bauer therefore violated his own written

policy of requiring a retainer accompanied with <u>a written contract</u> PRIOR to commencing legal engagement.

- 36.In e-mail correspondence to Attorney Bauer, Mr. Bauer was properly noticed that he had violated his own policies (of mandating a retainer and signed contract prior to putting in a Notice of Appearance).
- 37. As a result of all of the above, a Florida Bar complaint has been filed.
- 38. "Where there is unethical misconduct on the part of the attorney, a charging lien is not permitted. *Andrew Hall & Associates v. Ghanem*, 679 So. 2d 60, 61-62 (Fla. 4th DCA 1996)
- 39. Here, we have an attorney who conducted no discovery on each and every case for which he claims to have "represented" Woodhull. This also violates the Florida Bar rules of "due diligence."
- 40.At the very least, if Attorney Bauer had obtained a transfer of venue of the guardianship proceedings in Seminole County to the appropriate venue, Alachua County, "something" would have been accomplished. However, Attorney Bauer entered a Notice of Appearance on the guardianship of a deceased woman, and this, too, is a peculiar and irregular request for reimbursement from the assets of the deceased.
- 41. A charging lien cannot be applied to the Guardianship of Louise A.

 Falvo in Seminole or Alachua County because Attorney Bauer never worked

on the cases. He simply put in an unauthorized notices of appearance, and then motions for withdrawal. Likewise, with the appellate case at the 5th DCA: Attorney Bauer simply put in an unauthorized Notice of Appearance, a Motion for Stay (contrary to his client's desire for the case to be decided expeditiously), a reply to justify his Notice of Appearance, and then a Motion to Withdraw. This is not called "working on the case." "In other words, his equitable lien never attached to the recovery in this case, because he never worked on this case." (as quoted from *Hogbenvs. Wyndham International* (United States District Court Southern District of Florida Case No. 05-20944-Civ-LENARD/TORRES)

42. There is no express or implied contract between Bauer and Woodhull.

43. The undisputed fact that Bauer sent Woodhull several letters demanding "clarification" of a non-issue (even though Woodhull had already clearly stated "Remove also from 08-GA-0508/0509) show that Robert Bauer's Motion for Attorneys' Charging Lien" must fail since the first element ("express or implied contract") cannot be proved or supported by Attorney Bauer and therefore must be stricken from the record and/or dismissed with prejudice. (See Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom. 428 So.2d 1383, 1384 (Fla.1983) as cited in: In re: Rosa Beatrice Washington, Martha Irene Weed v. Rosa Beatrice Washington,

Case No. 99-14373 United States Court of Appeals, Eleventh Circuit. Feb. 28, 2001).

- 44. Woodhull never even knew until December 16, 2009 what a "charging lien" even is. In order to charge a "charging lien" the client needs to be informed ahead of time. Woodhull was never informed prior receiving mail on December 16, 2009—the charging liens.
- 45. Attorney Alan Hawkins advised Woodhull "not to worry" about any bills from Attorney Bauer because they were not legitimate and that there is a big difference between sending a bill and collecting on that bill. (Woodhull had explained to Hawkins how Bauer imposed himself on ALL of Woodhull's cases—without authority)
- 46. The pattern of behavior of Woodhull is clearly to opt for selfrepresentation-- unless attorney's fees are guaranteed by the
 prevailing party, or unless the law mandates legal representation.

 Therefore, for Bauer to claim that a "verbal agreement" existed with
 someone (Woodhull) who is known to always select "pro se" is also
 not believable.
- 47. Woodhull at no time has waived or waives her right to homestead protection guaranteed to her under the Florida Constitution,

 ARTICLE X, SECTION 4(A) OF THE FLORIDA CONSTITUTION.

Nor has Woodhull ever agreed verbally or in writing to a wavier of homestead protection guaranteed to her under the Florida Constitution, Article X, Section 4(a).

- 48. No charging lien has been written as part of the court orders that permitted Attorney Bauer to withdraw shortly after making his (unauthorized) appearances in any of Woodhull's pro se cases.
 - 49. Woodhull was never fully informed regarding the contents of a retainer agreement because there never was any retainer agreement.
 - 50. Attorney Bauer is obligated to READ a written agreement to Woodhull (*In re Kindy's Estate*, 310 So.2d 349, 350 (Fla. 3DCA), cert.den. 324 So.2d 83 (Fla. 1975). However, there was no written agreement, in fact, no verbal agreement, no agreement whatsoever, and there was no meeting of the minds between Attorney Bauer and Woodhull.
 - 51. No notice of a charging lien was included in any of Attorney Bauer's notice of withdrawals. In fact, up until December 16, 2009, Woodhull have never ever heard of the word "charging lien."
 - 52. All invoices of Attorney Bauer are disputed and it actually appears that Woodhull is owed a refund of her retainers in both the Estate of

- Louise A. Falvo and Tower Oaks Homeowners' Association given the little work that Attorney Bauer actually performed.
- 53. Attorney Bauer can make no claims on Woodhull's jewelry, personal property, or automobile, as none of these items were part of the litigation. ("By definition, an attorney's charging lien cannot attach to property not involved in the suit and not before the court." (*Cole v. Kehoe*, 710 So. 2d 705, 706 (Fla. 4th DCA 1998) as cited in *Rudd v. Rudd* No. 4D06-102 [July 18, 2007]). (*Braverman v. Oliveri*, 564 So. 2d 190 (Fla. 1990); *Glickman v. Scherer*, 566 So. 2d 574 (Fla. 4th D.C.A. 1990))
 - 54. The Federal Uniform Commercial Code requires a "written" contract for any amount over \$500.00. Therefore, Florida case law allowing for charging liens can be challenged all the way to the U.S. Supreme Court. Attorneys are not above the law.
 - unsubstantiated "charging liens" in various courts shows further evidence of wrongdoing and incompetence and further reason why Woodhull was rationale enough to not wish to hire Attorney Bauer on any additional cases and terminate Attorney Bauer from two cases, since the required mandates set forth regarding "charging liens" cannot (and were not) be met by Attorney Bauer.

- 56. As further evidence of incompetence, Attorney Bauer has filed one of his "charging liens" in a closed case for which he never even entered his appearance. (5D08-1899). Even if the case were still open,Attorney Bauer's Motion for Charging Lien would be untimely, as the court cannot grant relief once final judgment has been entered.
- 57. As further evidence of incompetence, Attorney Bauer styled the Alachua County probate of the Estate of Louise A. Falvo as a "guardianship" case (01-C)-001983) on all of his motions and notices to the various clerks of court. For this "work," Attorney Bauer believes he is "entitled" to compensation when he cannot even style a case appropriately? I think not.

MEMORANDUM OF LAW

"It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services." *Mitchell v. Coleman*, 868 So. 2d 639, 641 (Fla. 2d DCA 2004) (as cited in *Rudd v. Rudd* DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT July Term 2007 No. 4D06-102 [July 18, 2007].

Arabia v. Siedlecki, 789 So.2d 380, 383 (Fla. 4DCA 2001), rev. denied sub nom. Lavalle, Brown, Ronan & Soff, P.A. v. Arabia, 817 So.2d 848 (Fla. 2002), "An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney." In the instant case, the "contract" is completely unclear because there was no contract read to the alleged "client."

"We next turn to appellant's arguments regarding the lien's scope and the inclusion of improper fees. "By definition, an attorney's charging lien cannot attach to property not involved in the suit and not before the court." *Cole*, 710 So. 2d at 706." (As cited in *Rudd v. Rudd*, APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, July Term 2007, No. 4D06-102 [July 18, 2007]).

"As in this case, the charging lien at issue in <u>Cole</u> also included fees incurred in enforcing the lien. *Id.* We found the inclusion of these fees improper because the attorney's efforts in enforcing the lien did not contribute to the wife's interests....

"The fees associated with enforcing and perfecting the lien should be stricken." (As cited in *Rudd v. Rudd* APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT July Term 2007 No. 4D06-102 [July 18, 2007]).

"It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will only attach to the tangible fruits of the services." *Rudd*, 960 So. 2d at 887 (quoting *Mitchell v. Coleman*, 868 So. 2d 639, 641 (Fla. 2d DCA 2004)) (as cited in *Richman*, *Green*, *Weil*, *Brumbaugh*, *Mirabito* & *Christensen v. Michael Chernak*, *Kathleen Chernak*, and the Watershed Treatment Programs, Inc, The Watershed-Act II, Inc., a Florida Corporation DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT January Term 2008 No. 4D07-647 [March 12, 2008]).

"Where there is unethical misconduct on the part of the attorney, a charging lien is not permitted." *Andrew Hall & Associates v. Ghanem*, 679 So. 2d 60, 61-62 (Fla. 4th DCA 1996)

An evidentiary hearing may be in order, in which it may be determined that NO award of attorneys' fees is in order under the circumstances and the evidence presented. In *Crown Custom Homes, Inc. v. Sabatino* (2D08-1612, 2D08-1613) the Second District reversed the trial court's determination of the amount of attorneys fees for a new evidentiary hearing

A charging lien is a lien against the fruits of the litigation in question. By definition it does not apply to property outside the subject matter of the litigation, and it will not apply in cases where there are no tangible fruits of the litigation. (*Braverman v. Oliveri*, 564 So. 2d 190 (Fla. 1990);

Glickman v. Scherer, 566 So. 2d 574 (Fla. 4th D.C.A. 1990))

In order to have a valid charging lien the attorney's services must contribute to a positive judgment or settlement for the client. (*Rochlin v. Cunningham*, 739 So. 2d 1215 (Fla. 4th D.C.A. 1999); *Litman v. Fine, Jacobson, et al.*, 517 So. 2d 88, 91-92 (Fla. 3d D.C.A. 1987), rev. denied, 525 So. 2d 879 (Fla. 1988)). (If this court schedules an evidentiary hearing, Attorney Bauer will be very hard pressed to show how his unauthorized Entry of Appearances followed by Motions for Stay and Motions to Withdraw helped to "contribute to a positive judgment or settlement for the 'client."")

WHEREFORE, Attorney Bauer's "liens" (entered in three courts) for alleged (and <u>unauthorized</u>) attorney's "services" should be <u>dismissed with</u>

<u>prejudice</u> and stricken from the record, and Attorney Bauer should be sanctioned for his actions.

Respectfully submitted,

Angela V. Woodhull, Petitioner/Defendant/ Appellant, pro se

P.O. Box 14423

Gainesville, FL 32604

(352) 327-3665

(352) 682-9033

CERTIFICATE OF SERVICE

In order to properly defend herself, Angela V. Woodhull had to file the above document in three different courts. Therefore, a true and correct copy of the above styled document, with various and appropriate court names listed in the style of the case, was mailed by U.S. mail this 17th day of December 2009 to:

Maryann Morse, Clerk of Court Seminole County Eighteenth Judicial Circuit Court 301 N. Park Avenue Sanford, Florida 32771

Clerk of Court Fifth District Court of Appeal 300 Beach Street Daytona Beach, Florida 32114

Alachua County Clerk of Court 201 E. University Avenue

Gainesville, Florida 32601

Judith Paul, Esq.
Law Firm of Richard Kenllinger, P.A.
2815 NW 13th Street, Suite 305
Gainesville, FL 32609

Alan T. Hawkins, Esq. 1502 N.W. Sixth Street, Suite C Gainesville, FL 32601

John Stinson, Esq. Jesse Caedington, Esq. Scruggs and Carmichael One S.E. First Avenue Gainesville, Florida 32601

Attorney Anthony Nardella c/o Zimmerman, Kiser, & Sutcliffe 315 E. Robinson Street Suite 600 Orlando, FL 32801

Angela V. Woodhull, Appellant/Defendant/Petitioner, pro se

I swear and attest, under penalties of perjury, that all of the above information is true and correct

information is true and correct.

Angela V, Woodhull, Appellant/Defendant/Petitioner, pro se

STATE OF FLORIDA COUNTY OF ALACHUA

Signed and sworn before me this 17th day of December 2009 by Angela V. Woodhull.

Notary Public

My commission expires:



YAHOO!, MAIL

RE: 2909--Emergency Request. Thank you. Tuesday, December 23, 2008 11:17 AM From Robert W. Bauer, Esq. Tue Dec 23 08 17:32 2008 X-Apparently-To: angelavwoodhuli@vahoo com via 206 190.37 40, Tue, 23 Dec 2008 08:17:36 :0800 Raturn-Path: <re></r>Return-Path: X-YMailISG: uP2XtGAWLDs9I___aqwuGC4.78RMgbkY1EiBROyuapixYeIymeEpbQCw OWafCEna_dmUeC2Pp9qx26C1sWQi3OrfBHhQH4pRegOUKeBBKUbeVv_6Wb0LdbcnvKUKu2WUAkI0zQx5NC6tFcYud1g51Xk_5soa1K73WYNU5t Authentication-Results: mta184.mail.ac4 yahoo com from=bauerlegal.com; domainkeys=neutral ino sig) from 74 208 4.194 (EHLO mout perfora net) (74.208 4.194) by mta184 mail act yahoo com with SMTP; Tue, 23 Dec 2008 08:17:35 -0800 Received: from STATION5 (wsp-98-190-41-72 ga at cox.net [98.190.41 72]) by mirelay perfora net (node+mrus1) with ESMTP (Nemesis) id OMKpCa-1LF9wp2gBH-0007e7; Tue, 23 Dec 2008 11 17:35 -0500 To: <angelavwoodhull@yahoo.com> Cc: "David M. Sams" <dms@bauerlegal.co References: <!8/AMMAMAMAMADbra3TcB55HpIY5bq1,ZH/CgAAAEAMACvig+Lre4pCgOCdyfQA3LIBAMAM==@bauerlegal.com> <339040 58144 qm@web53603.mail.re2.yahoo.com> In-Reply-To: <339040.58144.qni@web53603.mail.re2.yahoo.com Subject: RE 2909--Emergency Request Thank you Date: Tue, 23 Dec 2008 11.17.32 -0500 <!&!AAAAAAAAAAAAAAAAAAAAbbra3TcB55Hp[Y5bq1j2H/CqAAAEAAAABClUf4LR05KjiIXcYuWW5kBAAAAAa==:pbauerlegal.com> Message-1D:

MIME-Version. 1.0

Content-Type: multipart/alternative. boundary="....= NextPart 000 005F 01C964F0 115EBD80" X-Mailer: Microsoft Office Outlook 12 0

AchSBp9h0LGpgkBQA+IXqiAH8ZzCwB0MYzq

Content-Language: en-us
Disposition-Notification-To: "Robert W. Bauer, Esq." www.bauerlean.com/

X-Provags-ID: V01U2FsdGYkX19/Vw10CI3h0h00YAE:C5xn8U/0x5AZXdouzkX bPmiNBu0TV5P8T7V9ZghG3YruFHUhnHKPwuKFzRiK17AvZs251 wHpLTRaDsVJyV2xyIdJl8yUK9ojoDDH

There has been substantial confusion on our part regarding the cases that you wish us to represent you in. Please be aware that all your cases are connect except for the Home Owners association case. Therefore, that were paid out of your mother's estate. However, it is always your choice. I need a clear understanding of what cases you want us to represent you in. Please advise us as to what cases you wish for us to assist

Robert W. Bauer, Esq. Law Office of Robert W. Bauer. P.A. 2815 NW 13th St. Suite 200E Gainesville, FL 32609 352 375.5960 352 337.2518 - Facsimile Bauerlegai.com

From: Angela V. Woodhull [mailto:angelavwoodhull@yahoo.com]

Sent: Sunday, December 21, 2008 3:43 AM

To: Robert W. Bauer, Esq.

Subject: 2909--Emergency Request, Thank you.

Please remove from 2909. I petitioned the Alachua County court several months ago to "stay" proceedings until 2909 had been decided. The opposite has now been done, which sabotages 2909. I d Angela Woodhull

P.S.--Please also remove NOA from Seminole County 2008-GA-0508/0509. I will not be signing the agreements that you sent to me AFTER putting in your NOAs.

No virus found in this incoming message

Checked by AVG - http://www.avg.com Version: 8.0.176 / Virus Database: 270.10.0/1861 - Release Date: 12/22/2008 11:23 AM

ATTORNEY CONSULTATION AND FEE CONTRACT

THIS AGREEMENT ("Agreement") is made on, in Gainesville, between Angela Woodhill ("Client"), and Law Office of Robert W. Bauer, P.A., of Gainesville, Alachua County, FL ("Attorney"):			
In consideration of the mutual promises herein contained, the parties hereto agree as follows:			
I. PURPOSE OF REPRESENTATION			
1.01 The Client hereby retains and employs the Attorney to represent Client in the following matter:			
Pursuing claims against guardian and review probate issues for Alachua County Probate Division File No. 01-2008-CP-001083.			
II. ATTORNEY'S FEE			
2.01 In consideration of services rendered and to be rendered by the Attorney, Client agrees to pay for the Attorney's time at the following hourly rates:			
Robert W. Bauer \$200.00			
Law Clerks \$100.00-125.00			
Paralegals \$75.00			
However, if Client's claim is governed by a statute or law which sets the Attorney's fees, and the law precludes any other fee arrangement other than the amount set by law, then the amount payable to the Attorney shall be limited to the maximum allowed by law.			
**********************************It is often the practice of law firms to include the cost of general secretarial duties or other costs into an increased rate for attorney's fees in order to cover general overhead. That is not the practice of this firm. This firm believes that this is not the fairest manner of billing and that by applying the above rates to all personnel and charging for all duties there is greater clarify of the services provided and each client is paying a correct and fair amount for the services provided. This practice allows for duties to be performed by the member of the firm that has the skills required to perform a task yet has the lowest chargeable fees available to the client. Please initial in the space provided to indicate that you agree to this type of billing structure initial. (If you do not agree to this structure you have the right to request an hourly attorney fee that is			

calculated to cover overhead costs)*****************************

- 2.02 Client agrees to deposit a non-refundable retainer of \$0 with the Attorney to pay for the Attorney's initial research, review and preparation of Client's case.
- 2.03 At the time of each billing, the amount of legal services and expenses billed by the Attorney shall be disbursed from the Attorney's Trust Account to the Attorney's Operating Account.
 - a. Each billing will reflect the legal services rendered and the deposit necessary to cover the estimated legal services and expenses for the next billing period.
 - b. Client agrees to make such additional deposits for expenses as are required by the Attorney within ten (10) days from the statement's date.
 - c. Unpaid fees and expenses, if not paid within ten (10) days from the statement's date, shall bear interest at the rate of 10% percent per annum until paid.
 - d. All sums due and to become due are payable at the Attorney's office in Alachua County, FL.

III. APPROVAL NECESSARY FOR SETTLEMENT

- 3.01 The Attorney is authorized to enter into any and all settlement negotiations on behalf of those whom the Attorney represents. This includes, but is not limited to, the Attorney's prerogative to pursue cash or structured payment settlement negotiations.
- 3.02 Client grants to the Attorney a power of attorney to handle negotiations and settlement discussions regarding Client's legal matter to the same extent as fully as Client could do so in person.
 - a. This expressly includes the right to sign Client's name on and to any insurance company drafts, money orders, cashier's checks, checks or other negotiable instruments made payable to the Attorney and Client, the Attorney, or to Client without the joinder of the Attorney, submitted to the Attorney on behalf of Client in full or partial settlement of this case.
 - b. This limited power of attorney further authorizes the Attorney to place the monies, referred to above, in the Attorney's trust account and from that trust account, make distributions and payments to the Attorney for the agreed to fee stated above, reimbursement to Attorney for any and all expenses incurred by the Attorney in handling this case, payments to Client of Client's interest in the monies recovered as stated above, and payments to parties other than Client and Attorney for their services performed, fees charged or bills rendered in connection with representing Client, including but not limited to expert witness fees, trial preparation bills paid to outside services, court reporter fees, deposition fees, investigative services, costs of

exhibits or other expenses incurred by Attorney on behalf of Client.

- 3.03 No settlement shall be made without Client's approval, nor shall Client obtain any settlement on the aforesaid claims without the Attorney's approval.
- 3.04 Attorney is granted a limited power of attorney so that the Attorney may have full authority to prepare, sign and file all legal instruments, pleadings, drafts, authorizations and papers as shall be reasonably necessary to conclude this representation, including settlement and/or reduce to possession any and all monies or other things of value due to Client under this claim as fully as Client could do so in person.

IV. REPRESENTATIONS

4.01 It is expressly agreed and understood that no promises or guarantees as to the outcome of the case have been made to Client by Attorney. Attorney has not represented to Client that Client will recover all or any of the funds so desired. Client also acknowledges that obtaining a judgment does not guarantee that the opposing party will be able to satisfy the judgment. It is further expressly understood and agreed that no other representations have been made to Client, except for those set out in this Agreement.

V. EXPENSES

- 5.01 All reasonable expenses incurred by the Attorney in the handling of this legal matter shall be paid by Client as incurred.
- 5.02 The expenses contemplated include but are not limited to court costs, consultants' costs, bonds, records, copy costs, supply costs that may be directly attributed to the client, certified copies, transcripts or depositions, telephone calls, duplication costs, photographs, expert and other witness fees, cost of investigation and investigator's fees, postage, travel, parking, and any other case expenses. Client shall deposit with Attorney an expense deposit in the amount of \$2,500.00 which shall be deposited in the Attorney's Trust Account. The Attorney may draw against the expenses in the trust account as the expenses are incurred.
- 5.03 Any expenses not timely paid by Client shall be deducted by the Attorney prior to Client receiving her interest in the amount set forth in paragraph two (2) above. Client shall remain liable and promptly pay for all expenses incurred in this representation.

VI. COOPERATION OF CLIENT

- 6.01 Client shall keep the Attorney advised of Client's whereabouts at all times, and provide the Attorney with any changes of address, phone number or business affiliation during the time period which Attorney's services are required. Client shall comply with all reasonable requests of the Attorney in connection with the preparation and presentation of Client's legal matter.
- 6.02 The Attorney may withdraw from the case and cease to represent Client for any reason, including without limitation: Client's failure to timely pay fees and expenses or deposits in

accordance with this Agreement, subject to the professional responsibility requirements to which Attorneys are subject.

6.03 It is further understood and agreed that upon such termination of any services of the Attorney, any of Client's deposits remaining in Attorney's Trust Account shall be applied to any balance remaining owing to Attorney for fees and/or expenses and any surplus then remaining shall be refunded to Client.

VII. ASSOCIATION OF OTHER ATTORNEYS OR SERVICES

- 7.01 The Attorney may, at Attorney's sole discretion, employ any other person or service that the Attorney believes is necessary to help or assist in this legal representation this shall include the use of contract Attorney's or Foreign Resource Attorneys who are familiar with the laws rules and practice of law in the jurisdiction which the clients case is being forwarded. The Attorney may charge the rate stated in the above rate structure for "Associated Attorneys" which shall be reflected on the clients bill as ASAvfor any such retained assistance. Any such work shall be review and supervised by the Attorney such that the work can reasonably be forwarded as the work of the Attorney.
- 7.02 The rights set forth in this Agreement are subject to the professional responsibility requirements which regulate Attorneys.

VIII. FLORIDA LAW TO APPLY

8.01 This Agreement shall be construed under and in accordance with the laws of Florida, and venue for the adjudication of any dispute relating to this Agreement shall be Alachua County, FL.

IX. PARTIES BOUND

9.01 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.

X. LEGAL CONSTRUCTION

10.01 In case any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

XI. PRIOR AGREEMENTS SUPERSEDED

11.01 This Agreement constitutes the sole and only agreement by and between the parties. It supersedes any prior understandings or written or oral agreements between the parties concerning the subject matter discussed herein.

XII. RESOLUTION OF FEE DISPUTES BY ARBITRATION

12.01 Any controversy or claim arising out of or relating to a fee charged pursuant to this Contract shall be settled by arbitration under Chapter 682, Florida Statues. Judgment upon the award rendered may be entered in any court having competent jurisdiction.

TAX DISCLOSURE AND ACKNOWLEDGMENT:

CLIENT IS ADVISED TO OBTAIN INDEPENDENT AND COMPETENT TAX ADVICE REGARDING THESE LEGAL MATTERS SINCE LEGAL TRANSACTIONS CAN GIVE RISE TO TAX CONSEQUENCES.

THE UNDERSIGNED LAW FIRM AND ATTORNEY HAVE NOT AGREED TO RENDER ANY TAX ADVICE AND ARE NOT RESPONSIBLE FOR ANY ADVICE REGARDING TAX MATTERS OR PREPARATION OF TAX RETURNS, OR OTHER FILINGS, INCLUDING, BUT NOT LIMITED TO, STATE AND FEDERAL INCOME AND INHERITANCE TAX RETURNS.

FURTHERMORE, CLIENT SHOULD OBTAIN PROFESSIONAL HELP REGARDING THE VALUATION AND LOCATION OF ALL ASSETS WHICH MAY BE THE SUBJECT OF A LEGAL MATTER INCLUDING BUT NOT LIMITED TO PENSIONS, EMPLOYMENT BENEFIT AND PROFIT SHARING RIGHTS THAT MAY BE CONTROLLED BY ANY OTHER PARTY TO THE LEGAL MATTER.

I certify and acknowledge that I have had the opportunity to read this Agreement. I further state that I have voluntarily entered into this Agreement fully aware of its terms and conditions.

SIGNED on this	day of	, 2008.
SIGNED on this	day of	2008

Statement and Acknowledgement of Office and Billing Policies

Please initial in the space provided to acknowledge that you understand the proceeding statements:

I have retained the services of this law office under the complete knowledge that I am obliged to pay fees in accordance with how much time the attorney, associate attorneys, law clerks, paralegals, and legal assistants devote to my case.	
Initials	
I am aware that the billing is done in .1 increments, (meaning that every 6 minutes allotted to my case I will be billed the corresponding amount for each of the aforementioned persons), as specified in the Fee Agreement.	
Initials	
I am aware that phone calls to the office, including calls to assistants, will be billed to the client in accordance with the billing procedure. That is to say, that a one minute phone call to the attorney or assistants will result in a charge reflective of the .1 increment, regardless if the duration of the call is not this amount.	
Initials	
I am aware that while telephone calls to the office regarding my case will be billed, telephone calls to the office regarding my bill will not be. If I require clarification as to a charge on my billing statement, I will not hesitate to call.	
Initials	
I am aware that this billing procedure is not standard practice, but it is one that my attorney believes to be the most equitable agreement for the client. Other firms forego charging the client a specific fee for each individual working on their case and may instead increase the attorney's fees or increase the time increments to cover employee overhead. I agree with this firm's billing practices and accept the rates set out in the Fee Agreement*.	
· Initials	
I acknowledge that delays will occur in my case, and these delays may or may not be the direct result of difficulties in negotiations with the opposing party, delays in the Court's operation, or the amount of work a case may require from this office.	
Initials	
I am aware that responses to my calls, messages, and e-mails, depending on the week, may take so	
days, so I must be patient in waiting for a reply. Initials	
I acknowledge that in order to ensure that delays are not made due to this office's oversight I will be kept up to date, via U.S. mail, of all items sent and received regarding my case. I will read over these	
* If aligns does not agree with this hilling practice, a written notice must be submitted and client	

^{*} If client does not agree with this billing practice, a written notice must be submitted and client will be subject to an hourly fee calculated to cover all overhead.

documents and retain these for my records.		
	Initials	
I acknowledge that I am in receipt of "Keys to Reducing your Attorney's Fees," and I will read these instructions so that I can be up to date with the status of my case, while not incurring unnecessary attorney's fees.		
	Initials	

.

Keys to Reducing your Attorney's Fees

It is often the case that client billing statements reflect charges that could have been avoided if the client had taken steps so as not to incur unnecessary charges. In order to provide the client with the best service and the most equitable means of charging for these services, this office has devised a list on how to reduce the client's attorney's fees:

- 1. Refrain from asking to speak to the attorney when you have a question that can be answered easily by a legal assistant or a paralegal. Over the long run, this can save the client hundreds of dollars since the assistant and paralegal hourly rate is significantly less than the attorney's rate.
- 2. Refrain from contacting the attorney's office several times throughout the day. It is more cost effective to gather all documents and write down every question you have regarding your case. Since a 1 minute phone call will be charged the same as a 6 minute phone call, several calls will amount to a greater fee than one phone call that lasts a bit longer. Remember we bill in .1 increments which is a 6 minute increment.
- 3. Refrain from sending numerous faxes, e-mails, and any other correspondence. The same charges considered for telephone calls are applicable to faxes, e-mails, and correspondence. Send the information by grouping it together in one document.
- 4. Before calling the office about a letter or document you have received please read over the document carefully. At times the impulse is to call the attorney's office to explain why a certain document was sent when the answer lies in the document itself.
- 5. When dates for hearings, depositions, or mediations are made over the telephone with the legal assistant ensure that you have a calendar to confirm you are available that date. Having to cancel a hearing and rescheduling will significantly increase billing charges. Costs to telephone opposing counsel, the JA, client, and mailing new notices are billed to the client in the event of a cancellation.
- 6. If you are contacted to come into the office and sign a document, please read over the copy of the document that has been mailed to you prior to your meeting. Reading it at the time of the signing will only make the duration of the meeting longer and thereby increase the amount you are billed.
- 7. Do not make any unscheduled visits to the office. The attorney may have an appointment scheduled and may not be able to speak with you, but nevertheless the time spent speaking with assistants while they determine what your needs are will be billed.

If you choose to disregard these suggestions, this office will nevertheless handle your requests in a courteous manner. We are always happy to assist you, but please note that you will be billed.

Dec. 23, 2008
RobertPlease remove also from
Servole Conty GAOS-0508/0509
Your Notre of Appearage.
Makyon
Agel Worth

IN THE FLORIDA DISTRICT COURT OF APPEAL FOR THE FIFTH DISTRICT

CASE NO.: 5D08-2299

ANGELA WOODHULL, Appellant, pro se

٧.

GUARDIANSHIP OF LOUISE A. FALVO, etc. Appellees

NOTICE TO COURT/CONTINUOUS NOTICE OF APPEARANCE NOTICE OF CLARIFICATION TO THIS COURT

This Appellant (Appellant Angela Woodhull) has filed this case pro se and continues and remains pro se in this appeal 5D08-2909 throughout this appeal.

Respectfully submitted,

Angela Woodhull, Appellant, pro se P.O. Box 14423

Gainesville, FL 32604-2423

(352) 332-0515

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant Angela Woodhull's NOTICE TO COURT/CONTINUOUS NOTICE OF

APPEARANCE/ NOTICE OF CLARIFICATION TO THIS COURT

has been furnished via U.S. Mail this 23nd day of December, 2008 to Anthony Nardella, Jr., Esquire, counsel for Appellee Rebecca Fierle, c/o Zimmerman, Kiser, and Sutcliff, P.A., 315 E. Robinson Street, Suite 600, Orlando, Florida 32801, and Robert W. Bauer, 2815 NW 13th Street, Suite 200, Gainesville, FL 32609.

I SWEAR AND ATTEST, UNDER PENALITIES OF PERJURY, THAT THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Angela Woodhyll

STATE OF FLORIDA

COUNTY OF LOO

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the above county and state, to take acknowledgments, Angela Woodhull, personally appeared to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that they executed same.

Witness my hand and official seal on this 22nd day of December, 2008.

Notary Public

My commission expires: Ut \0,803

ALEXIS WHITE

Metery Public - State of Floride
ldy Comm. Expires Oct 16, 2812

Commission & DD 831863

Berded Through Rational Natury Assn.

IN THE FLORIDA DISTRICT COURT OF APPEAL FOR THE FIFTH DISTRICT

2909 AW

CASE NO.: 5D08-1359

ANGELA WOODHULL, Appellant, pro se

٧.

GUARDIANSHIP OF LOUISE A. FALVO, etc. Appellees

NOTICE TO COURT AND PETITION FOR EXPEDITIOUS REVIEW OF APPEAL #5DO-2909 AND MONETARY SANCTIONS OF ATTORNEY ANTHONY NARDELLA

Petitioner ANGELA WOODHULL, pro se, would like to point out to this court two important matters.

- There appears to have been a misunderstanding between Attorney
 Robert W. Bauer and Petitioner Woodhull due to the unauthorized
 Notice of Appearance that was entered on December 8, 2008 in this case.
 - 2. On December 8, 2008, Mr. Bauer entered a Notice of Appearance in this appeal 5D08-2909.
 - 3. On December 11, 2008, I received an e-mail from Mr. Bauer's office asking me to sign fee agreements. It therefore appears that the cart was accidentally placed before the horse. (See Exhibit A)
 - 4. I cannot afford legal representation in multiple cases, unfortunately,

as most of the human race cannot, I suspect. I therefore sent an e-mail to Mr. Bauer asking him to withdraw from appeal 5D08-2909 because the stay I previously requested was in the Alachua County probate court, not here.

5. I pray that this 5th District Court of Appeal will therefore expeditiously decide the matter of these ex parte orders that were appealed in 5D08-2909 from Seminole County probate 2008-GA-0508/0509. I fear that because a curator has now been appointed in the Alachua County probate matter (proper venue) that the closing of the guardianship in Seminole County could once again render this appeal moot which, in effect, would be an obstruction of justice. "Mootness" is never appropriate when matters of the law are still undetermined and remain unsolved and/or affect the outcomes of other related cases (See, for example Merkle v. Guardianship of Jacoby, 912 So.2d 595 (Fl, 2005), Godwin v. State, 593 So.2d 211 (Fla., 1992), Montejo v. Martin Memorial Medical Center, Inc., Case No. 4D03-2638 (FL 5/5/2004) (Fl, 2004), Holly v. Auld, 450 So.2d 217 (Fla., 1984), Clark v. State ex rel. Rubin, 122 So.2d 807 (Fla. App. 3 Dist., 1960))

- Therefore, the erroneous decision of "mootness" in
 Appeal 5D08-1899 should not also be misapplied to 5D08-2909.
- 7. The estate of Louise A. Falvo cannot continue to be liable for attorneys who surreptitiously remove assets from Louise A. Falvo's estate.
- 8. While this appeal has been pending, Attorney Anthony Nardella has taken an additional approximately \$20,000.00 from the estate of Louise A. Falvo on or about October 22, 2008 again, ex parte—and yet and still another undisclosed amount on or about November 22, 2008.
- 9. These are exorbitant amounts removed for "watching" and "protecting" a dead woman in a still open guardianship and an appropriate accounting is in order.
- 10. In addition, the Alachua County Court wrote an order somewhere in the last week of October 2008 that no one in possession of Louise A. Falvo's assets should remove them or waste them while the issue of venue was pending for decision in Alachua County. When Anthony Nardella then removed assets of Louise A. Falvo's estate on or about November 22, 2008—he was clearly in contempt of the Alachua County Court. A "clarification" order was later written that

- "absolved" Nardella but Nardella clearly went ahead and in a clandestine manner (ex parte) removed the assets to himself PRIOR to any clarification.
- 11. The taking of additional funds are appealable matters under
 1.540(b)(3) and should have never occurred while the pendency of this appeal—regarding the same, identical issue (ex parte orders written)—exists for this appellate review.
- 12. Therefore, Anthony Nardella should be sanctioned for the removing of these additional and exorbitant funds from the estate of Louise A.

 Falvo during the pendency of an appeal that involves the same, identical matter. It is as though Anthony Nardella has already held court, and as "judge" of this court has already decided that Petitioner Woodhull is the loser and therefore Attorney Anthony Nardella can flaunt his victory by removing additional assets from the estate of Louise A. Falvo without any consequence. This is rather a rather outrageous obstruction of justice and should be of concern to this court.

WHEREFORE, Petitioner Woodhull prays for an expeditious review of 5D08-2909 and the sanctioning of Attorney Anthony Nardella (in, at least, the equal amount of his stealthy taking) for brazenly removing additional assets of Louise A. Falvo's estate, ex parte, during the pendency of this appeal which involves the same, identical issues.

Respectfully submitted,

Angela Woodhull, Appellant, pro se P.O. Box 14423

Gainesville, FL 32604-2423

(352) 332-0515

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of Appellant Angela Woodhull's NOTICE TO COURT AND PETITION FOR

EXPEDITIOUS REVIEW OF APPEAL #5DO-2909 AND MONETARY

SANCTIONS OF ATTORNEY ANTHONY NARDELLA has been furnished via U.S. Mail this 22nd day of December, 2008 to Anthony

Nardella, Jr., Esquire, counsel for Appellee Rebecca Fierle, c/o

Zimmerman, Kiser, and Sutcliff, P.A., 315 E. Robinson Street, Suite 600,

Orlando, Florida 32801, and Robert W. Bauer, 2815 NW 13th Street, Suite 200, Gainesville, FL 32609.

My commission expires: Dt 10,200

Commission # DD 831693



Please sign attached fee agreements

Thursday, December 11, 2008 1:03 PM

From April H. Ray Thu Dec 11 10:03:51 2008

Return-Path: <ahr@bauerlegal.com>

Authentication-Results: mta195.mail.ac4.yahoo.com from=bauerlegal.com; domainkeys=neutral (no sig)

from 74.208.4.195 (EHLO mout.perfora.net) (74.208.4.195) by mta195.mail.ac4.yahoo.com with SMTP; Thu, 11 Dec

2008 10:03:53 -0800

from STATION1 (wsip-98-190-41-72.ga.at.cox.net [98.190.41.72]) by mrelay.perfora.net (node=mrus0) with ESMTP (Nemesis) id 0MKp8S-1LApt4342Z-0002Pb; Thu, 11 Dec 2008 13:03:53 -0500 Received:

From: "April H. Ray" <ahr@bauerlegal.com> <angelavwoodhull@yahoo.com> Subject: Please sign attached fee agreements Date: Thu, 11 Dec 2008 13:03:51 -0500

Message-ID: <000001c95bba\$d643ebf0\$82cbc3d0\$@com>

MIME-Version: 1.0

Content-Type: multipart/mixed; boundary="---=_NextPart_000_0001_01C95B90.ED6DE3F0"

Thread-Index: AcibuoWQEn29qh/4Sj6YCNtT+4+3xw==

en-us ofxilZaEFODZcXC6L/mpCy0DJ3raXsS929U8/YZw7fVFhPo9C9 NAkay3LNxCVW4+MBmzXWLWLHlctHTt6 Content-Language:

Content-Length: 210104

12-10-08 Attorney Fee Agreement for Hourly Clients for Appeal 1899.docx (25KB), 12-10-08 Attorney Fee Agreement for Hourly Clients for Appeal 2909.docx (25KB), 12-10-08 Attorney Fee Agreement for Hourly Clients for Case Number 2008-GA-508.docx (25KB), 12-10-08 Attorney Fee Agreement for Hourly Clients for Case Number 2008-GA-509.docx (25KB), 12-10-08 Attorney Fee Agreement for Hourly Clients for File No 01 2008 CP 001083.docx (25KB), 12-10-08 Attorney Fee Agreement for Hourly Clients for File No 01 2008 CP 001083.docx (25KB),

Attorney Fee Agreement for Hourly Clients.doc (25KB)

Please sign and date the attached agreements for clarification of your files. Please mail or drop off the completed agreements as soon as possible, you do not have to make an appointment.

April Ray The Law Office of Robert W. Bauer, P.A. 2815 NW 13th St. Suite 200 E Gainesville, Fl (352) 375-5906 Fax- (352) 337-2518



Please sign attached fee agreements Thursday, December 11, 2008 1 03 PM From April H. Ray Thu Dec 11 10:03:51 2008 X-Apparently-To: angelavwoodhull@yahoo.com via 206 190.37 43, Thu. 11 Dec 2008 10:03:54 0800 Return-Path: <ahr@bauerlegal.com> X-YMailTSG: 5MLRQekWLDxDc6EWve_X5KFXV19hdmkl0lmh0bticT56xxgRD0xG0qA5KkjolfVfjHyx0sbz41601ZhnR039v1GAYsr5fx3OGo_1k.hbwtHQlVmhT1PvZ8l6aQ7rmabw0aBG-lQ.uz7.wAu9Y.4)xvL_BU3PMyS8juBRxwYMuKvext X-Originating-IP: [74.208 4 195] mta195.mail ac4 yahoo com from=bauerlegal com; domainkeys=neutral rno sig)
from 74 208.4.195 (EHLO mout.perfora net) (74.208.4.195) by mta195.mail.ac4 yahoo com with SMTP; Thu, 11 Dec 2008.10:03:53 -0800 Authentication-Results: Received: from STATION1 (wsip-98-190-41-72.ga at cox.net [98.190.41-72]) by mirelay perfora net (node=mrus0) with ESMTP (Nemesis) id DMKp85-1LApt43422-0002Pb: Thu, 11 Dec 2008 13:03:53 -0500 "April H. Ray" <ahr@bauerlegal.com> From: To: <angelavwoodhull@yahoo.com>
ject: Please sign attached fee agreements Subject: Thu, 11 Dec 2008 13:03:51:0500 <000001c95bbasd643ebf0s82cbc3d0s@com> Message-ID: MIME-Version: Content-Type: 1 0 multipart/mixed; boundary="....*_NextPart_000_0001_01C95890 ED6DE3F0" X-Mailer: Microsoft Office Outlook 12.0 Thread-Index: AcibuoWQEn29qhf4Sj6YCNtT+4+3xw== Content-Language: X-Provags-ID: VOLUZFsdGVkX18JzL)w9Zbfx+PUArTyoyniudq0LrfRL6JoLn2 ofxilZaEFODzcXC6L/mpCy0DJJraXs59Z9U8/YZm7NFhPo9C9 NAkay3LNxCVW4+MBmzXWLWLHIctHTt6 Content-Length: 210104 6 Files (150KB)

Please sign and date the attached agreements for clarification of your files. Please mail or drop off the completed agreements as soon as possible, you do not have to make an appointment.

April Ray The Law Office of Robert W. Bauer, P.A. 2815 NW 13th St. Suite 200 E Gainesville, Fl (352) 375-5906 Fax- (352) 337-2518



Files you requested

Tuesday, January 20, 2009 10:01 AM

From April H. Ray Tue Jan 20 07 01:46 2009

X-Apparently-To: angelavwoodhuli@yahoo.com via 206 190.37 39, Tue, 20 Jan 2009 07.01:52 -0800 Return-Peth: <a href="https://doi.org/10.1007/nc.2015/nc.2015-0.0007/nc.2015/nc.

X-YMailISG: QAPSDDIWLDv1ioDP.JyWK85xxjHj.o1CUIC sWAHrK2bawkFViv6OUXEYryI0Yxyv5z88CRgt4ASsTa3b58h_mLyK0h8JyAqt7JUnX6NSOR1V7hjBYjp6OUIkr6LEpmfy4PZ5rwDAg2KP8KSapzLh5eUpvJg;X4vCUVhhkH P2eRwM

X-Originating-1P: [74 208.4 194]

Authentication-Results:

mta240 mail.mud yahoo com from=bauerlegal.com, domainkeys=neutral (no sig)
from 74.208 4.194 (EHLO mout perfora net) (74.208.4.194) by mta240 mail mud yahoo com with SMTP, Tue, 20 Jan 2009.07-01-51 -0800 Received:

Received: from STATION1 (wsip-98-190-41-72 ga.at cox net (98 190 41 72)) by increay perfora net (node=mirus1) with ESMTP (Nemesis) id OMKpCa-11PIGr129m-0007Mz, Tue, 20 Jan 2009 10 01:51 -0500

From: "April H. Ray" <ahrylbauerlegal com> To: <angelavwoodhull@yahoo.com>

Subject: Files you requested

Tue, 20 Jan 2009 10:01.46 -0500

Message-ID: <001701c97b10\$05b486a0\$111d93e0\$@com>

MIME-Version: 10

Content-Type: multipart/mixed; boundary="... = NextPart 000 0018 01C97AE6.1CDE7EA0"

X-Mailer: Microsoft Office Outlook 12.0

Thread-Index: Aci7EADrilpXJfZjQ0aDbCz52t÷hkQ==

Content-Language: en-us

X-Provags-1D: V0112FsdGVkX19H0ZTs4n3dkaNlwUys83LTIWidE+mSLkuK1Mw 3N+7/AvvSCm4SngIA0/Ev21wbRb/1oLAAarcm8SZATAipjomVh exGQ2Gv/lvg833Hr/nwyFWP08nD5x3p 266710

1 File (192KB)



12-29-20..

Mrs Woodhull,

I am emailing you with the files that you requested from Mr. Sams. If there are any problems with the file please let me know and I will resend them

April Ray Law Office of Robert W. Bauer, P.A. 2815 NW 13th St. Suite 200E Gainesville, FL 32609

352.375.5960 352.337.2518 - Facsimile Bauerlegal.com



Here is your reply Tuesday, January 20, 2009 12:51 PM

From Angela V. Woodhull Tue Jan 20 09:51:01 2009

Received: from [74.230.134.224] by web53609.mail.re2.yahoo.com via HTTP; Tue, 20 Jan 2009 09:51:01 PST

X-Mailer: YahooMallWebService/0.7.260.1 Date: Tue, 20 Jan 2009 09:51:01 -0800 (PST)

From: "Angela V. Woodhull" <angelavwoodhull@yahoo.com>

Reply-To: angelavwoodhull@yahoo.com

Subject: Here is your reply

To: "Beverly E. Lowe" <bel@bauerlegal.com> <017b01c97b26\$181f2dc0\$485d8940\$@com>

MIME-Version: 1.0

Content-Type: multipart/alternative; boundary="0-1226690025-1232473861=:7544"

Content-Length: 4779

On December 23, 2008, I sent a note to your office which read "Please remove also from Seminole County GA-08-0508/0509 Your Notice of Appearance.

Thank you,

Angela Woodhull

It does get much clearer than that.

In fact, you just sent me verification that that note was received by your office, so any representation that I never agreed to in writing has never been a representation.

Mr. Bauer represents me in two matters--

- 1. The probate of the estate
- 2. The Tower Oaks Homeowners' Association.

This has been and will remain the only two sources of representation that have been agreed upon from the onset of representation. Thank you,

Angela Woodhull

You are holding David Newman hostage? Ha! Ha! That's too funny!! Have a great day and thank you for your assistance today. AW

--- On Tue, 1/20/09, Beverly E. Lowe <bel@bauerlegal.com> wrote:

From: Beverly E. Lowe <bel@bauerlegal.com>
Subject: Please call our office as soon as possible

To: angelavwoodhull@yahoo.com

Date: Tuesday, January 20, 2009, 12:39 PM

Mr. Bauer needs the clarification of representation he sent you.

We need an answer before your representative leaves our office.

Beverly Lowe Office Manager Law Office of Robert W. Bauer, P.A. bel@bauerlegal.com (352)375-5960



Excuse the type Tuesday, January 20, 2009 12:52 PM

From Angela V. Woodhull Tue Jan 20 09:52:44 2009

Received: from [74.230.134.224] by web53609.mail.re2.yahoo.com via HTTP; Tue, 20 Jan 2009 09:52:44 PST

X-Mailer: YahooMailWebService/0.7.260.1

Date: Tue, 20 Jan 2009 09:52:44 -0800 (PST)

From: "Angela V. Woodhull" <angelavwoodhull@yahoo.com>

Reply-To: angelavwoodhull@yahoo.com

Subject: Excuse the type

To: bel@bauerlegal.com

MIME-Version: 1.0

Content-Type: multipart/alternative; boundary="0-937777381-1232473964=:8382"

Content-Length:

"It 'doesn't' get much clearer than that." sorry for the typo AW

--- On Tue, 1/20/09, Angela V. Woodhull <angelavwoodhull@yahoo.com> wrote:

From: Angela V. Woodhull <angelavwoodhull@yahoo.com>

Subject: Here is your reply

To: "Beverly E. Lowe" <bel@bauerlegal.com> Date: Tuesday, January 20, 2009, 12:51 PM

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To: angelavwoodhull@yahoo.com

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We need an answer before your representative leaves our office.

Beverly Lowe Office Manager Law Office of Robert W. Bauer, P.A. bel@bauerlegal.com (352)375-5960

September 25, 2008

Robert Bauer, P.A., et al. 2815 NW 13th St Gainesville, FL 32609

Dear Mr. Bauer,

I am going to continue representing myself in the 5th DCA Court of Appeals regarding Cases 5D08-1899/2909. However, I did provide you yesterday with a retainer for representing me in: 01-2008-CP-01083, Alachua County Circuit Eight Judicial, regarding the probating of Louise A. Falvo's Last Will and Testament dated March 22, 2008. Please let me know when you have entered your appearance on this probate matter: 01-2008-CP-01083,

Sincerely,

Angela V. Woodhull.

STATE OF FLORIDA COUNTY OF ALACHUA

The above letter was signed and sworn before me this 25th day of September 2008 by Angela Woodhull.

Notary Public

My commission expires:

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

ANGELA WOODHULL,

Appellant,

٧.

CASE NO. 5D08-2909

GUARDIANSHIP OF LOUISE A. FALVO,

Appellee.

DATE: January 9, 2009

BY ORDER OF THE COURT:

ORDERED that within ten days from the date hereof, Attorney Robert W. Bauer, Esq., shall file a response to Appellant's assertion that she will proceed pro se and file a motion to withdraw, if appropriate.

I hereby certify that the foregoing is (a true copy of) the original Court order.

613

cc: Robert V Batter,

Anthony M. Nardella, Esq.

TOURT COUNTY TO THE PROPERTY OF THE PROPERTY O

J. K. Irby, Clerk of the Circuit & County County, Eighth Indicial Circuit of Plonda, in and for Alachus County, hereby certifies this to be a true and correct copy of the document now of record libitins office. Without my hand and seed that

the Cliquit County Cou

Deputy Clerk