

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4DCA#23- 1058

Lower Tribunal Case No. 50-2020-CC-005756-XXXX-MB

EVAN S. GUTMAN

Appellant,

vs.

CITIBANK, N.A.

Appellee

**APPELLANT'S REPLY BRIEF
(Time Sensitive)**

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INTRODUCTION AND EXPLANATION OF REFERENCES

Appellant Evan Gutman will be referred to as Appellant. Appellee Citibank, N.A. will be referred to as Citibank.

References to the Appendix previously submitted by the Appellant and approved by this Court as well as with Consent of Citibank Counsel, shall be delineated as "A." Thus, A5 for example, refers to Page 5 of the Appendix previously submitted.

REPLY BRIEF

THE COURT: **Fire away.**

. . . .

MR. POPE: Just to confirm, **Your Honor, it's fine to fire away ?**

THE COURT: Yes, that's fine.

Official Transcript of Hearing Held March 24, 2023 - (A12, A13) (See Exhibit 2 Attached) - Reference to Court is Judge Edward Garrison and to Mr. Pope is Citibank Attorney, Carter Pope, Esq.

Appellant Replies to Citibank's contention Judicial Disqualification as raised by Appellant is procedurally deficient. Previously, this Court Affirmed the underlying judgment without opinion. In that appeal, Appellant asserted judicial disqualification based on two Motions to Disqualify. Since that appeal was affirmed without opinion, it has no precedential effect. Appellant may raise the issue again and "Supplement" matters herein.

The crux of Citibank's contention appears to be an assertion the Transcript of the Attorney Fee Hearing (A12, A13, Exhibit 2) may not be utilized by this Court to determine the overall unfairness of the hearing. That is absurd. The Transcript supplements the record and is relied upon heavily for purposes of Judicial Disqualification (A5 - A68). Additionally, Citibank consented to Supplementing the record with the Transcript and this Court Ordered such. The contention it can not be utilized to determine

the overall unfairness of the hearing, including judicial disqualification is **absurd**.

Citibank asserts a Motion for Judicial Disqualification must be filed within 20 days after discovery of facts constituting the grounds for the Motion, to comply with Judicial Administration Rule 2.330(c). Appellant responds as follows. Rule 2.330(c) addresses only Statutory Judicial Disqualification. In addition to Statutory Judicial Disqualification, there is also the legal doctrine known as Constitutional Judicial Disqualification. Citibank Counsel has misapprehended that Rule 2.330 is the sole basis for judicial disqualification. Rule 2.330 is a rule predicated only upon "Statutory Disqualification." However, principles of "Constitutional Disqualification" under the 14th Amendment Due Process Clause, do not require any compliance with Rule 2.330. Pursuant to the Supremacy Clause of the U.S. Constitution (Article VI), as well as principles of Federalism, a State may provide greater protections than the U.S. Constitution, but may not allow for lesser protections. Thus, Judicial Disqualification requires an examination of constitutional principles under the 14th Amendment, in addition to Statutory principles under Rule 2.330.

These points have axiomatically been delineated in several judicial opinions. For instance, in Caperton v A.T. Massey Coal Co., Inc. 556 U.S.

868 (2009), the U.S. Supreme Court expressly held that the Due Process Clause required recusal, writing as follows: (emphasis added):

"It is axiomatic that a "a fair trial in a fair tribunal is a basic requirement of due process. Murchison, supra, at 136, 75 S. Ct. 623. As the Court has recognized, however, "most matters relating to judicial disqualification do not rise to a constitutional level. . . .

. . .

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. . . .

. . .

The Court articulated the controlling principle:

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Caperton, supra at 876-878 (2009)

Further, as regards timeliness, in Liljeberg v Health Services Acquisition Corp. 486 U.S. 847 (1988), the U.S. Supreme Court in Affirming the Federal Fifth Circuit Court of Appeals, held that even under principles of "Statutory Disqualification" pursuant to 28 USC 455(a), the issue of judicial disqualification could be raised for the very first time Ten Months after the Judgment had become Final. (See Liljeberg, supra at 850-851).

The issue of timeliness raised by Citibank is not tenable. Under Citibank's theory, if a Judge committed a Felony years ago, a litigant would have to file a motion to disqualify within 20 days of learning of its' existence, no matter how immoral or heinous the Felony was. There are certain words spoken or acts committed that are so serious they should not preclude judicial disqualification after a short period of 20 days. The critical nature of a fair adjudication can not be construed so strictly, but requires constitutional flexibility as the U.S. Supreme Court indicates.

An evidentiary hearing was held regarding attorney fees on March 24, 2023. This Court has already issued an Order allowing the record to be supplemented by the transcript of that hearing (Exhibit 1). Notably, Citibank did not object to the Motion to Supplement. The transcript presents substantial evidence Judge Garrison was biased and rendered rulings in a one-sided manner in favor of Citibank. Citibank's notion that the Transcript may Supplement the record, but this Court is precluded from considering the overall unfairness of the Hearing is absurd. More specifically, at the Hearing, amongst other issues, Judge Garrison used inappropriate and intimidating language directed precisely at Appellant. The language he utilized could possibly be construed as a thinly veiled threat, although Appellant declines to assert such at this time. Rather,

Appellant asserts the language utilized was inappropriate and intimidating. This is particularly the case since two Motions to Disqualify had previously been filed. Accordingly, Appellant requests this Court consider the transcript of the March 24, 2023 hearing in its entirety, along with reconsidering issues presented in the prior two Motions to disqualify; as this Court's prior ruling is not precedential since no opinion was written. Specifically, as shown by Pages 7-8 of the hearing transcript (A12, A13; and Exhibit 2 attached) the following words were spoken by Judge Garrison and then also confirmed by Citibank Counsel, Carter Pope, Esq. :

THE COURT: **Fire away.**

. . . .

MR. POPE: Just to confirm, **Your Honor, it's fine to fire away ?**

THE COURT: Yes, that's fine.

Lastly, Citibank asserts even though Appellant filed Two Motions to Disqualify Judge Garrison; a third Motion to Disqualify needed to be filed. That is incorrect. Judicial Disqualification was squarely raised in the two prior motions, and addressed by Appellant in his earlier appeal of the underlying judgment in this Court. The appeal of the underlying judgment is intricately linked to this Attorney Fee Appeal. Appellant should not be required to file a third Motion to Disqualify when newly discovered evidence

demonstrates this Court erroneously rejected the issue of judicial disqualification in the earlier appeal. Nor, should this Court's consideration of the overall unfairness of the hearing be restricted in any manner, particularly considering that Citibank consented to supplementation of the record with the transcript (A5 - A68). No limitation was placed upon such consideration. Rather, this Court should reconsider judicial disqualification, which then may allow Appellant to file a Motion with the Trial Court under FRCP 1.540 to Vacate the underlying judgment. Put simply, the matters within the March 24, 2023 transcript do not replace the issues presented in the two earlier Motions to Disqualify; but instead Supplement them.

The context of Judge Garrison's utilization of the phrase "Fire away" was clearly directed towards Appellant. This is evidenced by the fact he confirmed to Mr. Pope that Citibank may "fire away." Further, the fact two Motions to Disqualify had already been denied by the Court, indicated there was professional friction between Judge Garrison and Appellant.

Accordingly, Judge Garrison should have been particularly cognizant of avoiding inappropriate and intimidating language.

Appellant vigorously asserts **if a litigant were to direct such inappropriate intimidating language towards a Judge, such would probably not be received too well.** In this regard, the following should be

noted. Whether this Court issues a written opinion or not, an affirmance of the attorney fee judgment will "Substantively" be treated by the general public as valid "Precedential" authority indicating such language may be used by anyone in a Hearing. Such is the case even if this Court's rulings as a matter of "Form" consider such as not precedential. That is the reality of the situation and how the public will view it regardless of judicial opinions. Put simply, an acceptance of the intemperate ill-advised language of Judge Garrison will be treated by the public as an acceptance for litigants to use similar language. That is NOT a Pandora's Box this Court should open in today's highly charged World and Environment. Appellant emphasizes while he currently declines to assert Judge Garrison's language was a thinly disguised threat, it could reasonably be construed as such. It is particularly troublesome he utilized such language when the two prior Motions to Disqualify evidenced friction already existed.

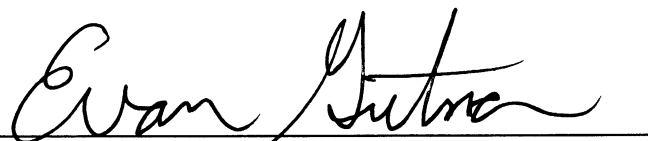
Throughout this litigation, Appellant has consistently presented his legitimate legal arguments in a concededly passionate, but also respectful and lawful manner. Accordingly, Appellant was entitled to be treated with dignity, rather than subjected to intimidating inappropriate language by Judge Garrison, coupled with consistently declining to allow Appellant to be legitimately heard (A62-A63 and Exhibit 2). Appellant incorporates

by reference herein the two prior Motions to Disqualify and Supplements such in this appeal. The Court's decision in the earlier appeal is without precedential effect. Based on the foregoing, and the Transcript evidence, Appellant asserts this Court should address the overall unfairness of the hearing and reconsider its' decision declining to Disqualify Judge Garrison.

CONCLUSION

Appellant has delineated this Reply Brief as "TIME SENSITIVE" and is filing a Request for an Expedited Ruling on this appeal, as the parties have a hearing scheduled on December 6, 2023, the nature of which may infringe upon Appellant's legitimate First Amendment Religious Rights.

For the reasons herein Appellant requests the Judgment on Attorney Fees be Reversed. Submitted this 19th day of November, 2023.

A handwritten signature in black ink, reading "Evan Gutman", written over a horizontal line.

Evan Gutman, CPA, JD
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished to opposing counsel by E-Mail and a follow up copy will be sent via US Mail, to Donald Mihokovich, Esquire, of the law firm of Adams and Reese, LLP. addressed as follows:

ADAMS AND REESE LLP
Attn: Donald Allen Mihokovich, Esq.
100 North Tampa Street, Suite 4000
Tampa, FL 33602

Dated this 19th day of November, 2023.



Evan Gutman CPA, JD

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that to the best of my knowledge and belief, the foregoing comports with the Font and Spacing requirements of Fla. R. App. 9.210 and 9.045(b).



Evan Gutman CPA, JD

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401**

October 2, 2023

EVAN S. GUTMAN,
Appellant(s)

v.

CITIBANK N.A.,
Appellee(s)

CASE NO. - 4D2023-1058

L.T. No. - 502020CC005756XXXMB


BY ORDER OF THE COURT:

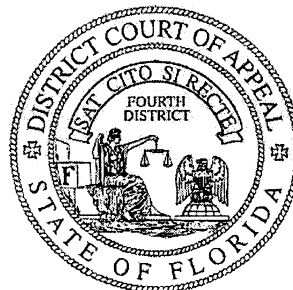
ORDERED that appellant's September 29, 2023 motion to supplement the record is granted. The material requested in the motion shall be included in the record on appeal. The clerk of the lower tribunal shall prepare and file the supplemental material in this court within ten (10) days from the date of this order. Appellant shall monitor the supplementation process.

Served:
Clerk - Palm Beach
Kenneth M. Curtin
Hon. Edward A. Garrison
Evan S. Gutman
Donald Allen Mihokovich

KL

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.


4D2023-1058 October 2, 2023
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2023-1058 October 2, 2023



1 Aircraft v. Horowitz, equitable relief claims
2 preclude an award of attorney's fees. And the
3 assertion that an unjust enrichment claim is a
4 claim for equitable relief have been held in the
5 case of Bowleg v. Bowe, where the Court basically
6 stated Bowleg's second count fails because the
7 theory of unjust enrichment is equitable in
8 nature.

9 Similarly, the Eleventh Circuit Court of
10 Appeals in Tooltrend, Inc. v. CMT Utensili, they
11 also held that an unjust enrichment claim -- they
12 basically said: We first turn to the elements of
13 an unjust enrichment claim in the state of
14 Florida. A claim for unjust enrichment is an
15 equitable claim.

16 So since their complaint itself seeks
17 equitable relief, I would just respectfully ask
18 for reconsideration on the entitlement.

19 THE COURT: The motion to postpone the
20 hearing today is denied, and the motion for
21 reconsideration on the order on entitlement is
22 denied.

23 Fire away.

24 MR. CURTIN: Do you want me to sit up there?

25 THE COURT: Probably be better. If you

1 would raise your right hand. Mr. Curtin, do you
2 swear to tell the truth, the whole truth and
3 nothing but the truth?

4 MR. CURTIN: I do, Your Honor.

5 THE COURT: Have a seat, please.

6 MR. POPE: Just to confirm, Your Honor, it's
7 fine to fire away?

8 THE COURT: Yes, that's fine.

9 DIRECT EXAMINATION

10 BY MR. POPE:

11 Q. Will you please state your name for the
12 record?

13 A. Kenneth Michael Curtin.

14 Q. Okay. And will you please describe for me
15 your education, experience and employment background?

16 A. I will. Graduated high school in 1987 just
17 north of Tampa in Hernando County. I immediately went
18 into the Marine Corps. I spent several years in the
19 Marine Corps. I was injured in the Marine Corps in a
20 helicopter accident, and my Marine Corps career ended
21 at that point in time, and I went to college.

22 I graduated from the University of South
23 Florida in Tampa with an undergraduate degree in
24 criminal justice, an undergraduate degree in history
25 and a minor in French. And I then moved out to North

1 on just now is that due to the number of documents
2 filed and motions filed, this came -- this case became
3 more complex, I believe you indicated?

4 A. Mr. Curtin said that.

5 Q. I think you're right. Do you believe that to
6 be the case yourself, though?

7 A. I think you complicated the case by your
8 filings, yes.

9 Q. Okay. The question I have is if you look at
10 the docket list, did Citibank submit more pleadings
11 and documents to the Court or did I submit more
12 pleadings and documents to the Court?

13 MR. CURTIN: Objection, Your Honor,
14 relevancy. We're talking about a specific
15 timeframe between July, I think 29th, 2022 up
16 until the order on entitlement. We're not
17 talking about the whole entire case, Your Honor.

18 THE COURT: Sustained.

19 MR. GUTMAN: I would like to note for the
20 record, Your Honor, I didn't get an opportunity
21 to respond, but...

22 THE COURT: You'd like to what?

23 MR. GUTMAN: I didn't get an opportunity to
24 respond to Mr. Curtin.

25 THE COURT: I didn't think a response was

1 necessary.

2 MR. GUTMAN: Okay. I understand. I have no
3 further questions.

4 THE COURT: Any redirect on Mr. Matlow's
5 testimony?

6 MR. CURTIN: No, Your Honor.

7 THE COURT: Thank you, Mr. Matlow. Watch
8 your step coming down.

9 MR. CURTIN: We rest our case, Your Honor.

10 THE COURT: Any testimony for the defense or
11 just argument?

12 MR. GUTMAN: I am done, Your Honor.

13 THE COURT: Let's take about a five-minute
14 break, and I will entertain your summation and
15 we'll wrap this up.

16 MR. CURTIN: Thank you, Your Honor.

17 (A short recess was taken.)

18 THE COURT: Have a seat. I'm not sure
19 there's much of a closing from Mr. Curtin, but
20 take a few moments, if you'd like.

21 MR. CURTIN: No, Your Honor. I think our
22 summary attached as Exhibit No. 2 says it all,
23 Your Honor, that we're asking for a total of
24 \$26,957.50, which I think equates to 89.3 hours,
25 Your Honor, of attorney time and paralegal time.