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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4DCA#22-2201
Lower Tribunal Case No. 50-2021-CA-000114-XXXX-MB

EVAN S. GUTMAN

Appellant,

vs.

CALVARY SPV 1, LLC as assignee of CITIBANK, N.A.

Appellee,

On Appeal from Final Judgment
of the County Court for the Fifteenth Judicial Circuit
of Florida In and For Palm Beach County

APPELLANT'S INITIAL BRIEF

EVAN S. GUTMAN, CPA, JD
Appellant Pro Se
Member State Bar of Pennsylvania
Member District of Columbia Bar
Admitted to U.S. Tax Court Bar
Florida Certified Public Accountant
1675 NW 4th Avenue, Apt. 511
Boca Raton, FL 33432
561-990-7440

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INTRODUCTION and EXPLANATION OF REFERENCES

Appellant Evan Gutman will be referred to as Appellant. Appellee Calvary SPV 1, LLC will be referred to as Calvary.

References of record shall be designated as “R” followed by the appropriate page designations as set forth in the record on appeal transmitted by the Clerk of the lower Court. Leading Zeros for the page numbers are omitted.

The first Two Key critical questions presented in this appeal are as follows:

1. Does a Prior Business Relationship Exist between two parties **IF** a Prior Business Relationship Does NOT Exist between them ?

2. May an alleged Assignee of an alleged Debt assert a Dispute does not exist, if they ADMIT in writing a Dispute exists ?

On its face, the two foregoing questions seem to be so simplistic the answers are "Res Ipsa Loquitur" (the thing speaks for itself) to the average Nonattorney citizen. Nevertheless, it is conceded the trial judge as a matter of substance did in fact answer both of the foregoing questions in the Affirmative, which resulted in a Final Judgment in Cavalry's favor. It is Appellant's position such a basis to support the final judgment rendered lacks rationality and logic.

A third question raised in this appeal is whether the Florida State Bar's "Good Moral Character" requirement violates a Litigant's U.S. constitutional due process and equal protection clause rights to a fair and impartial adjudication, by undermining the Adversarial Process upon which our system is purportedly based; and the ability of a litigant to be judged by a neutral arbiter, or hire zealous counsel, possessing good moral character.

A fourth question raised in this appeal is whether Palm Beach County Court Rule 4 and the Palm Beach County Online Scheduling System for Hearings unconstitutionally infringe upon a Pro Se litigant's equal protection and due process clause rights to a fair and impartial adjudication under the U.S. Constitution.

STATEMENT OF THE CASE AND FACTS

On January 6, 2021, Calvary filed a Complaint against Appellant based on one Count of Account Stated related to an alleged credit card debt from its alleged assignor, Citibank, N.A. (R8). Within 11 days, on or about January 17, 2021, Appellant filed an Answer (R12) and a Counterclaim (R36). The Crux of the Answer and Counterclaim was that Cavalry had no prior business relationship with Appellant and also that multiple letters of dispute regarding the alleged debt had been sent and received by Cavalry. As a result of the foregoing, Appellant asserted Cavalry was instituting a multitude of meritless lawsuits against improverished litigants in Florida and was thus violating numerous laws pertaining to debt collection practices. The actions of Cavalry delineated in the Counterclaim **occurred both prior to** and during the litigation.

On February 18, 2021, Cavalry filed a Motion for an Extension of Time to respond to the Counterclaim (R63). Nothing further transpired in the case for a period of approximately 11 months, during which Cavalry never responded to the pending Counterclaim. On December 14, 2021, County Judge April Bristow "Sua Sponte" and without any Hearing granted Cavalry's request for an extension filed approximately 11 months earlier, notwithstanding that Cavalry had not responded to the Counterclaim in any

manner at that time (R67). Approximately 19 days later, on January 2, 2022, Appellant filed a Motion for Leave to Amend the Counterclaim to include a Claim for Punitive Damages based on numerous matters including the multitude of meritless lawsuits Cavalry had been filing (R68). Three days later, on or about January 5, 2022 Cavalry filed a Motion to Dismiss Appellant's Counterclaim (R105). The crux of Cavalry's legal argument was that under Florida law, they were entitled to a "PRIVILEGE" to engage in Illegal acts during the course of a litigation. (R105). Appellant filed an extensive opposition to Cavalry's outrageous claim of "Privilege" for debt collector attorneys to violate the law (R108). In the opposition, Appellant asserted the doctrine of litigation privilege delineated in Echevarria v Cole, 950 So.2d 380 (2007) upon which Cavalry relied, was reformulated in Debrincat v Fischer, 217 So.3d 68 (2017); and interpreted adversely to Echevarria, supra by the Federal Eleventh Circuit in Sun Life Assurance Company of Canada v Imperial Premium Finance, LLC, 904 F.3d 1197 (2018). Appellant also challenged the constitutionality of Palm Beach County Rule 4 in the Opposition and incorporates those arguments herein (R116-R123).

A Hearing was held on March 24, 2022 on Cavalry's Motion to Dismiss and Judge Bristow held Cavalry was in fact allowed to engage in

Illegal Acts Violating the law, pursuant to the "Privilege" bestowed upon them by the Florida Supreme Court in Echevarria v Cole, supra (2007). (R134). Appellant contends herein such a holding and ruling constitutes a substantial collapse of the sacred rule of law that largely transforms members of the Judiciary into effectively being "Advocates" (rather than Neutral Arbiters) for large corporate monied interests who benefit the most from the "Privilege" at the expense of impoverished litigants. Judge Bristow did provide Appellant with an opportunity to filed an Amended Counterclaim and Appellant filed such on or about April 22, 2022, which remains pending (R150).

Having quite successfully asserted their **"Privilege" to engage in RAMPANT Illegal acts against massive numbers of the Populus**, Cavalry predictably moved for Summary Judgment on April 11, 2022 (R139). Appellant filed an Opposition to Cavalry's Motion on or about July 12, 2022 (R210). A Hearing was held on the Summary Judgment Motion on August 5, 2022 before County Judge Frank S. Castor.

Judge Castor substantively ruled a prior business relationship existed between Cavalry and Appellant, even though no prior business relationship existed between them. (R258). He arrived at this conclusion by asserting the business relationship required need not be with an assignee, but is

sufficient if with the original creditor. In support of his legal conclusion Judge Castor relied upon; well "Nothing." He did not provide a single legal citation, case precedent, statute, or anything at all to support his position on this issue. Put simply, he just decided on his own that's the way it should be. Accordingly, this is now a key issue pending before this Court.

Judge Frank S. Castor did cite Farley v Chase Bank, 37 So.2d 936 (Fla.4th DCA 2010) for the premise a prior business relationship is an element of an account stated claim, and Appellant does not dispute such. However, Farley, supra dealt with a original creditor and not an assignee and is thus not applicable regarding the prior business relationship issue as pertains to an assignee. Judge Castor also held without legal basis, Appellant's letters of dispute were not timely filed, notwithstanding Cavalry's written acknowledgments the dispute existed. (R258) and (R88)(R236)(R239)(R240)(R243)R244).

At the Hearing on the Summary Judgment Motion, Appellant pointed out that Cavalry was refusing to serve him with legal documents thru the E-Portal as required since Appellant had filed an appropriate designation of E-Mail Service (R234) and (R250). Judge Castor indicated clearly he could not care less about that issue, even though it is a fundamental element of constitutional due process.

SUMMARY OF ARGUMENT

No prior business relationship existed between Calvary and Appellant, which thereby precludes an "Account Stated" claim on an alleged debt. The attempt by Calvary to effectively "piggyback" upon the business relationship that existed between its' alleged Assignor, Citibank, N.A. would relegate judicial decision-making to nothing more than a manipulative exercise in semantics. The reason is that to hold such, would effectively mean a "prior business relationhip exists between two parties, even IF a prior business relationship does NOT exist between them. The principles are diametrically opposed.

The multiple letters of dispute regarding the alleged debt sent by Appellant and acknowledged by Calvary precluded a Final Judgment being rendered in favor of Calvary. The assertion by Cavalry the letters sent were not "timely;" and Judge Castor's acceptance of such a fallacious argument is directly inimimal to the Florida Supreme Court's Opinion in the seminal case of Daytona Bridge Co. v Bond, 47 Fla. 136 (1904). Cavalry's argument on timeliness is also fallacious because they openly admitted in writing themselves the alleged debt was disputed (R243 and R244), thereby accepting its timeliness. To hold otherwise would lead to the

irrational conclusion effectively adopted by Judge Castor that "A Dispute does NOT exist, even it Exists."

The willingness of Judge Castor to Grant Summary Judgment to Cavalry at a Hearing they flatly refused to serve Appellant with notice of via the E-Portal; reflects adversely upon his Moral Character. Accordingly, it is also presented herein as grounds for Reversal the Florida State Bar's so-called "Good Moral Character" requirement for admission as an attorney to the State Bar violates a Litigant's U.S. constitutional due process and equal protection clause rights to a fair and impartial adjudication, by undermining the Adversarial Process upon which our system is purportedly based. It also undermines the ability of a litigant to be judged by a rational neutral arbiter, or hire zealous counsel, possessing good moral character.

Additionally, the constitutionality of Palm Beach County Rule 4 is challenged due to its exclusion of Pro Se litigants and allowing debt collector attorneys to Unilaterally schedule hearings in the OLS system.

STANDARD OF REVIEW

The standard of review of pure questions of law is *de novo*. Granada Lakes Villas Condominium Association, Inc. v Metro-Dade Investments Co., 125 So.3d 756 n.2 (Fla. 2013).

ARGUMENT

1. Calvary as an alleged assignee was not entitled to a Judgment on an Account Stated Claim because NO prior business relationship existed between Calvary and Appellant, which is an essential legal element to an Account Stated Claim. Calvary's complaint failed to even plead the existence of a prior business relationship between the parties.

The seminal case in Florida for an "Account Stated" claim is Daytona Bridge Co. v Bond, 47 Fla. 136 (1904), where the Supreme Court wrote in part (emphasis added):

> "An account **stated must be based upon previous dealing and transactions between the parties**, and while it is not necessary in order to support a count upon account stated to show the nature of the original debt or to prove the specific items constituting the account . . . . **it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of an concerning which an account was stated**. . . .
>
> **. . . The mere failure to object "immediately" or "within a reasonable time" to an account sent by mail to one who has never had any dealings with the send, will not render the account so sent an account stated so as to authorize a recovery upon it.**

The above language in Daytona clearly asserts the "previous transactions and dealings" must be " between the parties." As supported by Appellant's Affidavit (R249), Defendant has never had previous dealings or transactions with Plaintiff, an essential element for an Account Stated claim. Similarly, in C. & H. Contractors, Inc. v McKee, 177 So.2d 851 (Fla. App. 2nd DCA 1965) the Court wrote (emphasis added):

> "Although it could be argued that defendant's apparent silence upon receipt of the bills gives rise to a presumption of acquiescence to the debt, we do not feel that such is the case. There were apparently no previous dealings between Cate Contractors and defendant, and **it has been held that mere failure to object to an account sent by mail to one who has had no dealings with the sender does not give rise to such a presumption of acceptance of the account.** See, for example, Daytona Bridge Co. v Bond, 47 Fla. 136 (1904) . . . . **Although this rule has been applied in cases involving accounts stated**, an issue which is not before us here, we feel that the rule is equally applicable to the facts in this case. . . ."

The Court's final judgment in this case, (written by Calvary Counsel for Cavalry and never even submitted to Appellant for review before being signed by the Judge), cites Farley v Chase Bank, 37 So.2d 936 (Fla. 4th DCA 2010). However, Farley, is a case involving an original creditor rather than an assignee. While it does stand for the premise a prior business relationship is an element of account stated, it does not even deal with the doctrine's impact upon an assignee. Notwithstanding, the final judgment makes a massive unsupported leap in logic by incorrectly asserting the business relationship required need not be with the assignee. Appellant asserts Daytona, supra, as well as C. & H. Contractors, are indicative the business relationship needs to be with the party actually seeking to collect on the alleged debt. To the extent Cavalry incorrectly asserts Farley refutes that premise, Appellant requests this Court clarify the issue.

If the assignee may in fact "piggyback" on to the original creditor's "prior business relationship" fairness mandates the debtor should similarly be allowed to contest all provisions within the original creditor contract when defending against an account stated claim. Put simply, it is not fair to allow an assignee to "piggyback" upon the original creditor's status, unless the debtor is allowed to do the same against the assignee. See Ham v Portfolio Recovery Associates, Inc. 308 So.3d 942 (2020) holding on a somewhat related issue that provision for award of attorney fees in contract is reciprocally applied in an account stated action because it is "with regard or relation to" the credit card contract.

In Farley, supra this Court held in 2010 that a debtor may overcome a prima facie case of an account stated by "meeting the burden of proving fraud, mistake or error" in the account. However, Farley, does not contain a provision to defend against the debt based upon the invalidity or unenforceability of the underlying contract as being unconscionable. In light of the Florida Supreme Court's holding in Portfolio Recovery, supra that an account stated action is "with regard to or relation to" a credit card contract, Appellant requests this Court reexamine its own holding in Farley, focusing on application to an assignee, rather than the original creditor.

Suffice it to say, this is an issue of monumental societal importance. Cavalry has been filing massive numbers of frivolous lawsuits for years in Florida against impoverished debtors who have no means to defend themselves. They do not attach documents to their complaints as required by FRCP 1.130; intentionally refuse to serve documents upon defendants as required by E-Portal court rules (presumably hoping defendants will be unaware of the documents or hearings); set hearings unilaterally; and decline to adhere to legal requirements pertaining to letters of dispute they receive. The impact of such is a heavily and unnecessarily overburdened court system with litigants and victims in immensely more important cases involving child custody, divorce, criminal acts, lack of housing, elderly care, all paying the price so that Cavalry and its attorneys may merrily proceed on their way of collecting judgments they are not legally entitled to.

2. Calvary was not entitled to Judgment on their Account Stated Claim because Appellant expressly disputed the alleged debt in writing multiple times via Certified Mail to both Calvary and their alleged assignor, Citibank, N.A.. Calvary expressly admitted to the dispute in writing.

Calvary's motion for summary falsely states in Paragraph (2) the allegations in the Complaint are "**undisputed**." (R139) Calvary then "doubled-down" on Page 2 of their motion (R140) by stating:

> "the claim that this account was **disputed in a timely manner is untrue**. . . ." (R140)

As shown by Appellant's Opposition to the Summary Judgment Motion (R210), containing Exhibits 5(a); 5(b);5(e) and 5(f) (See R235, R236, R239, R240) Appellant sent four letters of dispute on the subject account. Those letters were sent to Cavalry, Citibank's attorney, and Cavalry's attorneys. The first letter was sent as early as August 28, 2019 to Citibank's attorney. (R240). At the summary judgment hearing, Counsel for Cavalry asserted that letter should not be considered at all because Citibank's Counsel was not representing Citibank on that particular account at the time. Counsel failed to recognize that as Citibank's attorney, the law firm of Debski & Associates had an agency relationship with Citibank and was functioning within the parameters of that agency. Citibank, N.A. as

the Principal was liable for the Agent's actions or inactions pursuant to agency legal doctrines of "Apparent Authority" and "Actual Authority." Additionally, no alleged assignment of the subject account had even been asserted by Cavalry at the time, so the letter could not be sent to them.

As shown by Exhibits 6(c) and 6(d) attached to the Opposition (R243) (R244) Cavalry acknowledged the existence of the dispute in writing thereby adopting the position the dispute letters were timely submitted within a reasonable period of time. Having acknowledged the existence of the disputes in writing, Cavalry should not be allowed to "backtrack" on the issue. In fact, as shown by Exhibit 6(c) and 6(d) in the Opposition (R243 and R244) Cavalry even went so far as to inform credit reporting agencies of the existence of the dispute. Put simply, Cavalry adopted a position the disputes were timely filed; or in the alternative "Waived" any right to later assert they were untimely. As shown by Exhibits 6(c)–6(d), Plaintiff's multiple letters state (emphasis added):

> "Cavalry is **in receipt of a letter of dispute** made pursuant to the Fair Credit Reporting Act ("FCRA") on the above-referenced account.
>
> **In acknowledgement of the dispute**, we have requested that consumer reporting agencies **report the account as disputed**."
>
> (R243) and (R244)

Suffice it to say, Plaintiff can not reasonably assert with a straight face, the alleged debt was not disputed to both themselves and Citibank Counsel prior to any alleged assignment. Also see, the seminal case of Daytona Bridge Co. v Bond, 47 Fla. 136 (1904), where the Florida Supreme Court wrote as follows (emphasis added):

> **. . . The mere failure to object "immediately" or "within a reasonable time"** to an account sent by mail **to one who has never had any dealings with the sender,** will not render the account so sent an account stated so as to authorize a recovery upon it.

Since the alleged debt was disputed multiple times in writing to Cavalry, Citibank Counsel and Calvary Counsel, and since Cavalry acknowledged the existence of the disputes in writing, the final judgment erroneously entered by the trial court should be reversed.

3. The Florida State Bar's "Good Moral Character" requirement for admission as an attorney to the State Bar violates a Litigant's U.S. constitutional due process and equal protection clause rights to a fair and impartial adjudication, by undermining the Adversarial Process upon which our system is purportedly based. It also undermines the ability of a litigant to be judged by a rational neutral arbiter, or hire zealous counsel, possessing good moral character.

Appellant raised this legal challenge at the trial court in Paragraph (6) of his Opposition to the Motion for Summary Judgment (R211). Appellant's research indicates trial judge Frank S. Castor was admitted to the Florida State Bar on October 1, 1996. Like other Bar Applicants at that time he was presumably subjected to an extensive examination of his "Moral Character." That was approximately 26 years ago. Yet, since his original admission to the Bar, his Moral Character for purposes of maintaining his law license, has not been reexamined in any manner because that is not a recurring Bar requirement. Appellant's position is regardless of the quality of his Moral Character in 1996, such is not representative of his "Current Moral Character" due to the lapse of time. That impacts adversely upon Appellant's right to a fair and impartial adjudication, equal protecton of the laws and due process for the following reasons.

Litigants seek zealous attorneys who will faithfully represent their interests. The determination of the type of lawyer they will have is made

through the State Bar admissions process. The State Bar admissions process ultimately affects all Nonattorneys one way or the other. If it is designed to foster a fear and subservience within the attorney, then their clients will not have zealous representation. If it is designed to place new attorneys at a disadvantage compared to older attorneys by requiring new attorneys to disclose an unreasonable amount of information about their personal life, then the clients of new attorneys are at a comparable disadvantage. If it is designed to instill in the new attorney an understanding that rules apply one way to big firm lawyers and large corporations, but in an entirely different way to weak individuals, the attorney will likely conduct himself in accordance with such knowledge.

If the admissions process is designed to exclude minorities, then Nonattorney minorities will not be able to obtain competent representation. If it is designed to glean out individuals with bad "Attitudes," clients must expect courts will ultimately adjudicate cases based upon litigant "attitudes," or the "attitude" of attorneys representing the litigants. This impacts adversely upon the litigants right to a fair and impartial adjudication predicated on the facts, law, conduct and evidence; rather than "Attitudes."

Appellant's position is that to conform with constitutional doctrine the admissions process should be predicated upon Judges and Attorneys

being subjected periodically to the same inquiries of Bar applicants. The basic humanistic principle underlying the foregoing assertion has been presented by the U.S. Supreme Court in varying contexts, such as in *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972), quoting *Railway Express Agency v. New York*, Justice Jackson Concurring, 336 U.S. 106, 112-113 (1949) writing as follows (emphasis added):

> "The framers of the Constitution knew, and we should not forget today, that there is **no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."**

In Konigsberg v State Bar of California, 353 U.S. 252, 263 (1957) the U.S. Supreme Court wisely stated in reference to the so-called "good moral character" standard (emphasis added):

> "Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a **dangerous instrument** for arbitrary and discriminatory denial of the right to practice law."

Stated plainly, in order to avoid the danger of arbitrary admission determinations, any moral character inquiries made of an Applicant, must be asked regularly and periodically of the licensed attorney and Judge. The failure to make similar inquiries of licensed attorneys, as a matter of substance, and regardless of how the Judiciary may phrase the issue in

form, results in licensed attorneys and Judges being held to a lower standard of moral conduct. This occurs because as each year passes, the conduct of a licensed attorney during the preceding year escapes any character review, unless it is illegal, or unless an ethical complaint is filed against the attorney. Since attorneys are reluctant to file ethical complaints against each other (because they want the same "courtesy" extended to them), the overwhelming portion of immoral conduct by licensed attorneys and Judges escapes any review. The Bar Applicant is being required to **"Proactively"** report his conduct, whereas in contrast the licensed attorney need only respond in a **"Reactive"** manner and only if an ethical complaint is filed or if they are convicted of a crime. This is an irrational disparity.

The U.S. Supreme Court has addressed the character and fitness review process for Bar admissions on numerous occasions. The matter was dealt with in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); In re Stolar, 401 U.S. 23 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971); and Baird v. State Bar of Arizona, 401 U.S. 1 (1971). These cases were all

brought under the First Amendment and the Court was sharply split. The cases all taken in conjunction with each other, resolved virtually nothing and only demonstrated the U.S. Supreme Court has not taken any decisive stance and basically just seeks to avoid this divisive complex issue.

Typically, Justice Hugo Black led the portion of the Court supporting the Applicants and condemning the Bar admission committees. Justice John Harlan consistently led the portion of the Court supporting the State Bars. Harlan was the most stalwart supporter of the State Bar admission committees. The last three U.S. Supreme Court opinions addressing the moral character issue were Stolar, Baird and Wadmond, all issued on the same day, February 23, 1971. Up until that day, Justice Harlan's support of the State Bars had been unwavering. In Stolar however, Justice Harlan in dissent made an absolutely incredible statement demonstrating he was beginning to change his mind regarding the State Bars. He wrote as follows, (Stolar at 36, emphasis added):

> ". . . Knowing something of the great importance which the New York Bar attaches to the independence of the individual lawyer, I have little doubt but that the candidates involved in *Wadmond* will promptly gain admission to the Bar if they straightforwardly answer the inquiries put them without further ado. And I should be greatly surprised if the same were not true as to Mrs. Baird and Mr. Stolar in Arizona and Ohio. **But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular belief, it would be time enough for this Court to intervene.**"

Since Harlan wrote that momentous statement indicating that even he as the strongest supporter of the State Bars could foresee a time when the U.S. Supreme Court might need to intervene in the Bar admissions process, numerous states have denied admission to Bar Applicants because of unorthodox or unpopular beliefs. Appellant submits if John Harlan were around today, even he would agree there is a need to change the admissions process, because the State Bars have abused the virtually unwavering support he gave them as a U.S. Supreme Court Justice.

None of the U.S. Supreme Court cases addressing the moral character issue squarely addressed the issue Appellant now brings to the Court. Appellant contends simply the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by allowing licensed attorney members of the Bar to be held to a lower standard of conduct than Nonattorney Bar Applicants. Concomittantly, Appellant contends such impacts adversely upon a litigant's right to a fair and impartial adjudication pursuant to the Due Process Clause also.

The subjective nature of personal inquiries made of Bar Applicants is excessively irrational and unconstitutional. Accordingly, the solution is to diminish the number and nature of questions Bar Applicants are required to answer, and then to subject licensed attorneys and Judges to the same

limited scope of questions periodically and regularly. In all fairness, it is absurd that Bar Applicants can be denied admission for not paying credit card debts, while Judges remain on the bench if they do not pay their credit card bill. The question needs to be eliminated in both instances to achieve a parity of result. Similarly, it is absurd that Bar Applicants are required to provide detailed highly personal documents and information related to their divorces; when Judges are not required to do so periodically. The process needs to become a simplified objective process, whereby licensed attorneys and Judges report the same information as Bar Applicants. That is the only way it can be fair and that litigants can have Counsel who are not totally and completely subservient to the licensing agency providing their livelihood and the large law firms controlling those licensing agencies.

4. Palm Beach County Court Rule 4 and the Palm Beach County Online Scheduling System for Hearings unconstitutionally infringe upon a Pro Se litigant's due process and equal protection clause rights under the U.S. Constitution, to a fair and impartial adjudication.

Appellant first raised his Rule 4 challenge at the trial court level in his Opposition to Cavalry's Motion to Dismiss his Counterclaim (R108). Cavalry did in fact "Merrily" enjoy a Dismissal of the Counterclaim based upon Judge April Bristow's opinion that Calvary and their attorneys had a Legitimate Legal "PRIVILEGE" to engage in and commit virtually any Illegal acts during the course of the litigation. **FN 1**

FN 1 - In all fairness to Judge Bristow, her erroneous decision relied upon Echevarria v Cole 950 So.2d 380 (2007) in both this case and a related Citibank, N.A. case. In Ecchevaria, the Florida Supreme Court did provide "Absolute Immunity" to Illegal Acts during the course of litigation. However, after her ruling, Judge Bristow made comments recognizing the legitimacy of Appellant's position. Those supportive comments provided Appellant with high hopes for her continued participation. However, subsequent to those supportive comments, Judge Bristow was reassigned somewhat "Mysteriously" for unknown reasons from the Civil Division into the Criminal Division (presumably by the Chief Judge). Appellant's position has consistently been the holding in Ecchevaria, supra and also its current reckless application by the trial court, constitutes a substantial collapse of the sacred rule of law. It also raises troubling issues pertaining to the legitimacy of the Judiciary as a whole. Put simply, the Judiciary has a duty to uphold the law, not to promote its violation and general illegality under the guise of a so-called "litigation privilege." Appellant submits one would be hard-pressed to find a single member of the general public who would contest the foregoing assertion.

Appellant's Opposition to Cavalry's Motion to Dismiss also included the argument Palm Beach County Court Rule 4 unconstitutionally violates the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution, on the ground it deprives Pro Se Litigants of a fair and impartial adjudication by totally excluding them from its contours, provisions, protections and penalties. Accordingly, having been intentionally "shunted" by the Judiciary by express exclusion, the Rule advances justifiable sentiments of "Incivility" and intellectual hostility by the general public towards Palm Beach County Judges.

Such acrimonious sentiments advanced by Rule 4, are not beneficial to Judges, licensed attorneys or the litigants. The Rule is specifically designed to provide inferior justice to Pro Se Litigants, by treating them as an inferior class compared to litigants represented by attorneys. The applicable portions of Rule 4 are as follows (emphasis added) (R128):

"2. Prior to filing and serving a Notice of Hearing for a Uniform Calendar hearing or a specially set hearing, **the attorney** noticing the motion **shall attempt to resolve the matter and shall certify the good faith attempt to resolve.**[1]

3. The term "attempt to resolve the matter" in paragraph 2 **shall require counsel to make reasonable efforts to speak to one another** (in person or via telephone) **and engage in reasonable compromises in a genuine effort to resolve or narrow the disputes** before seeking Court intervention.[2] **All parties are to act courteously and professionally in the attempted resolution of the disputes**. . . .

. . .

> [1] **The requirements of this rule do not apply when the moving party or non-moving party is pro se."**
>
> (R128)

FIRST, as a preliminary matter, from the outset, Rule 4 is in direct violation of Rule 2.120 of the Judicial Administration Rules, which in and of itself is sufficient to invalidate Rule 4. Rule 2.120 specifically states as follows, in part (emphasis added):

> **"Rule 2.120. Definitions**
> The following terms have the meanings shown as used in these rules:
> **(a) Court Rule:** A rule of practice or procedure adopted **to facilitate the uniform conduct of litigation applicable to all proceedings, all parties**, and all attorneys.
>
> **(b) Local Court Rule:**
> (1) A rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application that does not conflict therewith."

The analysis is as follows. Subsection (a) above indicates "Court Rules" apply to "all proceedings" and "all parties." Subsection (b) then provides the ability for local courts to adopt their own rules based upon "local conditions" that "supplies an omission in or facilitates application of a a rule of statewide application." However, Subsection (b) does not provide authority for a local court to adopt a rule that wholly negates the proviso of Subsection (a) requiring that the rules apply to "all proceedings" or "all

parties" in the local court. Accordingly, by totally excluding every single litigation involving a Pro Se litigant in Palm Beach County from the provisos of Rule 4, the Palm Beach County Court has positively violated the express terms of Subsection (a) of Florida Judicial Administration Rule 2.120.

SECOND, the manner in which Rule 4 is enforced also violates Rule 2.120 of the Judicial Administration Rules. The reason is as follows. On or about February 8, 2017 Palm Beach County Circuit Judge Peter D. Blanc sent a letter to 15th Judicial Circuit Attorneys regarding amendments to Rule 4 (R132-R133). Page 2 of his letter expressly states as follows regarding enforcement:

> **"ENFORCEMENT OF RULE:** It is important to note that enforcement of the Rule will vary from judge to judge."

Based upon Appellant's reading of Rule 2.120 there is absolutely no provision in Judicial Administration Rule 2.120 for any Local Court Rule to be predicated upon anything less than uniform application of all Local Court Rules in that locality. The concept in Judge Blanc's letter it is "important to note" that "Enforcement" "will vary from judge to judge" (meaning for all practical purposes Judges "fly by the seat of their pants" so to speak) does not conform with the State Supreme Court's Rule 2.120 mandate.

THIRD, Palm Beach County Rule 4 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution for the following reasons. The Fourteenth Amendment provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Pursuant to principles of Substantive Due Process and Equal Protection, challenges to the legitimacy of a law (or in this instance a Court Rule) are typically analyzed under a rubric of Strict Scrutiny, Intermediate Scrutiny or Rational Basis Scrutiny. Rational Basis Scrutiny is considered the lowest level of scrutiny a law needs to withstand challenge and Strict Scrutiny the highest. Classifications affecting Fundamental Rights are subject to Strict Scrutiny. See Clark v Jeter, 486 U.S. 456, 461 (1988), Justice O'Connor for a Unanimous Court writing:

> "classifications affecting fundamental rights . . . are given the most exacting scrutiny."

Appellant now analyzes Rule 4 under both Strict Scrutiny (the highest level) and Rational Basis Scrutiny (the lowest level). Under Strict Scrutiny,

classifications are constitutional only if "narrowly tailored to further compelling governmental interests." Grutter v Bollinger, 539 U.S. 306, 326 - 327 (2003). Under the more lenient standard of Rational Basis Scrutiny, classifications are constitutional unless the challenger can demonstrate they are not "rationally related to a legitimate governmental interest." Cleburne v Cleburne Living Center Inc. 473 U.S. 432, 439-440 (1985). The language of Rule 4 indicates its purpose is to resolve matters, stating :

> (3) The term "attempt to resolve the matter" in paragraph 2 shall require counsel to make reasonable efforts to speak to one another (in person or via telephone) and engage in reasonable compromises in a genuine effort to resolve or narrow the disputes before seeking Court intervention. . . .

Appellant asserts that requiring Counsel to "attempt to resolve" matters before seeking Court intervention is not a compelling, nor legitimate State interest, nor is it the true and genuine State interest of Rule 4. Appellant also asserts even if it were a valid State interest, the means stated to achieve such are not narrowly tailored as required by Strict Scrutiny, nor rationally related to that interest as required by Rational Basis Scrutiny. The multiple reasons that requiring Counsel to "attempt to resolve" matters is not a valid State interest, nor the true and genuine State interest for enacting Rule 4, are as follows:

FIRST, the Parties are in Court for the precise reason they were unable to resolve matters without Court intervention. They are in Court precisely because Court resolution is needed. Accordingly, for the Court then to require them to try and "resolve" matters without judicial decision-making relegates litigation to nothing more than a costly farce. If they could have resolved the matters between themselves, they would not be in Court.

SECOND, by requiring Counsel to "attempt to resolve" matters before seeking judicial decisions, Counsel are substantively being required to function in part as collaborative mediators, rather than advocates in an adversarial setting. Since the foundation of our system is as an adversarial process, the Rule undermines that foundation by requiring Counsel to work together, instead of as adversaries.

THIRD, by requiring Counsel to "attempt to resolve" matters, Rule 4 mandates the Parties incur often unnecessary legal fees. Litigants must pay for time spent by Counsel, even though both Counsel and both Parties often know full well that such is nothing more than a total waste of time.

FOURTH, attorneys become Judges to decide issues. If they do not want to decide issues, they should not become Judges. However, to accept a position as a Judge, only then to evade deciding issues by pressuring (mandating) the Parties to resolve matters, diminishes faith and

confidence in the judiciary. Put simply, if you don't want to be responsible for deciding legal issues, don't become a Judge. But, the concept of becoming a Judge and then evading judicial decision-making by relying on manipulative procedural rules, like Rule 4 is unacceptable.

Similarly, along these lines, Appellant understands there is substantial information indicating Judges handle extremely voluminous dockets. Often one Judge is responsible for hundreds of cases, which in all fairness must be incredibly difficult. Accordingly, it is reasonable to conclude the real reason for enacting Rule 4, was not to help litigants at all. Rather, it was simply for the benefit of the Judges. The Rule does in fact diminish judicial workloads by transferring the judicial obligation to decide issues, to attorneys who then charge clients substantial sums to resolve those issues. Appellant sympathizes with the plight of Judges and their heavy dockets. Nevertheless, Judges should not Evade their SWORN decision-making duty to the Public, by adopting Court Rules for their own personal benefit at the expense of litigants.

FIFTH, litigants often do not want their attorney to communicate with opposing Counsel. Counsel often does not want to communicate with opposing Counsel. It is their right to make that decision and adopt that

strategy. Often, but not always, it will be the proper strategy. In either case, it is their decision to make. Rule 4 infringes upon that right.

SIXTH, it is well-known in the context of settlement negotiations, there is often a fine line between legitimate settlement negotiations, and that which constitutes the criminal act of Extortion. In general, attorneys are less likely to communicate illegal statements in writing. People overall, are more prone to communicate illegal statements verbally, than in writing. Accordingly, by requiring Counsel to communicate verbally, Rule 4 promotes commission of Extortion by certain Counsel. Similarly, Rule 4 often unjustifiably exposes Counsel and their clients, to baseless allegations of Extortion. The best way to avoid a baseless allegation of Extortion is to not speak with the opposing side. The Court should not preclude Counsel from avoiding baseless allegations of Extortion, by refusing to speak with the opposing side.

Even if the asserted State interest was the genuine State interest, Rule 4 would still be unconstitutionally in violation of the Equal Protection Clause to the 14th Amendment for the following reason. The rule is not "narrowly tailored" or "rationally related" to achieving the State's asserted interest, because it excludes a massive percentage of litigants (and perhaps even the majority of litigants in the County) from its provisions.

The Rule expressly indicates it totally excludes Pro Se litigants. Thus, to the extent the Rule may provide ancillary benefits to some litigants represented by Counsel, such benefits are not similarly enjoyed by the massive numbers of Pro Se Litigants swept into the wide net of litigants wholly excluded from the Rule. If the Rule is in fact beneficial to litigants, the exclusion of Pro Se litigants from receiving such benefits, is indicative of a judicial animus against them as a class.

SEVENTH, the Judiciary's invidious animus against Pro Se litigants evidenced by Rule 4 has manifested itself in establishing an OLS scheduling system, which logistically allows members of the Florida State Bar to schedule hearings on their motions without the Consent of an opposing Pro Se litigant; even though Pro Se litigants must logistically obtain opposing Counsel's Consent to proceed within OLS to schedule a Motion. That point is aggravated by Divisional Rules of trial judges, some of which require consent and some of which do not. Thus, depending on the particular trial Judge's divisional rules, the setting of hearings is like a "**Litigation Judicial Procedural Demolition Derby Road Rally**" with no uniformity and each litigant's fate is based upon the predilections of the particular Judge assigned as evidenced by their unilaterally adopted

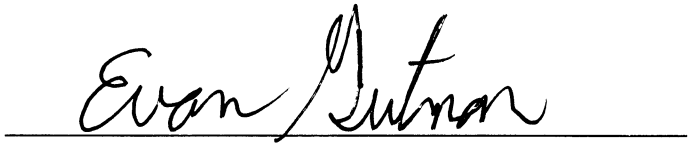
Divisional Rules. Thus, whether a litigant even gets a hearing (much less a fair ruling), depends on the judicial assignment "Lottery," so to speak.

Accordingly, Appellant requests Rule 4 be declared in violation of his constitutional Due Process and Equal Protection Clause rights to a fair and impartial adjudication.

CONCLUSION

For the reasons presented herein based upon supporting legal authority, principles of rationality and common sense, Appellant respectfully requests the Trial Court's Final Order of Summary Judgment be Reversed. The directions to the lower Court should include that Appellant is to be Refunded the Money payment he deposited with the Clerk of the Court in the amount of $ 14,623.11 for the purpose of obtaining an Automatic Stay of Enforcement of the Money Judgment pursuant to FRAP 9.310(c)(1)

Submitted humbly and graciously this 17th day of October, 2022.



Evan Gutman, CPA, JD
Appellant Pro Se
Member State Bar of Pennsylvania
Member District of Columbia Bar
1675 NW 4th Avenue, Apt. 511
Boca Raton, FL 33432
561-990-7440

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 Jason Scott Dragutsky, Esquire, of the law firm of Hayt Hayt & Landau, P.L. addressed as follows:

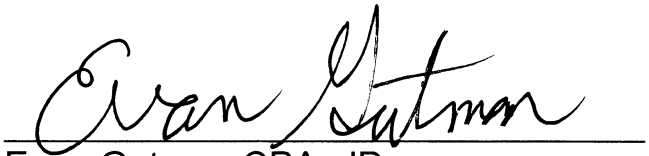
Hayt, Hayt, & Landau
Attn: Jason Dragutsky, Esq.
7765 SW 87th Avenue, Suite 101
Miami, Florida 33173

Dated this 17th day of October, 2022.

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