IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4DCA#22-1089
Lower Tribunal Case No. 50-2019-CA-013570-XXXX-MB

EVAN S. GUTMAN

Appellant,

vs.

DISCOVER BANK

Appellee,

On Appeal from Final Judgment
of the Circuit 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

Evan S. Gutman will be referred to as Appellant. Discover Bank, N.A. will be referred to as Discover Bank.

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STATEMENT OF THE CASE AND FACTS

Discover Bank initiated a breach of contract cause of action (R.11-22). Appellant accepted service on October 30, 2019 and within approximately 48 hours on November 1, 2019 sent in his Answer, asserting several affirmative defenses (R.26-34) The case was assigned to Circuit Judge Cymonie Rowe. The first affirmative defense asserted by Appellant was that the alleged credit card agreement was an unenforceable contract of adhesion containing multiple provisions Void as against public policy, and which were so numerous and seriously egregious they could not fairly be severed from the alleged contract as a whole (R.27) Throughout the litigation Appellant concentrated on this defense repeatedly in multiple filings, **FN 1** including particularly strong focus on the contract provision :

a. **"You are in default if: . . . you die. . . ."** (R.104)(R.144)(R.670)(R.690)

Black's Law Dictionary defines the term "Default" as follows (emphasis added) (R.674)

> **Default.** By its derivation, **a failure**. An omission of that which ought to be done. . . . Specifically, the omission or **failure to perform a legal or contractual duty.**"

FOOTNOTE 1 - See - (R.27) (R.63-116) (R.117-148) (R.462-463) (R.640-676) (R.677-700) (R.1498-1544) (R.1817-1861)

Thus, by definition, regarding this objectionable provision Discover Bank has adopted a nationwide policy in contravention of our nation's respect for life and the solemnity of death. More specifically, it is Discover Bank's position that when a person "Dies" and passes from the secular world to the non-secular world, that human being is "per se" automatically guilty of "Fault." This contemptible notion applies regardless of how the person lived their life. Discover Bank effectively asserts that even if a person throughout their entire life has been Charitable, Observing their Faith, Sympathetic to the Impoverished, Respectful to Others, Kind, Caring, Generous, Protecting the Innocent, and totally up to date on their credit card payments; the moment that Saint-Like person passes to the next world, they are in DEFAULT of Discover Bank's contract agreement. The contract provision Shocks the Human Conscience egregiously by penalizing a law-abiding person (or their Estate) who has led a virtuous life, solely based upon the involuntary act of dying.

On or about November 8, 2019, just seven days after Appellant submitted his Answer, Discover Bank illegally accessed Appellant's credit report for the specific purpose of gain an unfair advantage in the pending litigation (R.44) (R.52-60) (R.63-116). Based on existing Florida law the illegal act of Discover Bank in doing so may possibly be protected by

absolute immunity pursuant to Litigation Privilege as a permissible purpose. The operative phrases are “may possibly” and "existing Florida law." In the latter regard, Appellant seeks to directly modify “existing Florida law” by this appeal.

On February 24, 2020, Appellant filed a Motion for Leave to file a Counterclaim including Punitive damages, based upon Discover Bank's obtaining illegal access to his credit report and the unconscionable severity of the multiple contract provisions that are Void as against public policy (R.63-116). Discover Bank filed a motion for summary judgment on March 24, 2020, (R.154-155) which Appellant responded to (R.461-475). However, Discover Bank never requested a hearing on that motion (presumably realizing it was “weak”). Discover Bank then filed an amended motion for summary judgment on July 20, 2020 (R.617-622). Appellant opposed the amended motion in his opposition of August 17, 2020 (R.677-700). A hearing was held on Discover Bank's amended motion for summary judgment on September 14, 2020 at which time Circuit Judge Cymonie Rowe denied Discover Bank’s motion (R.1352). Ten days later, on September 24, 2020, Judge Rowe granted Appellant's motion for leave to file his counterclaim including punitive damages (R.1427-1428).

On October 16, 2020 the law firm of Burr & Forman filed a Notice of Appearance in the County Court, even though the case was in the jurisdiction of the Circuit Court. Accordingly, **their Notice of Appearance was effectively VOID** since it was filed in the wrong Court (R.1436).

On November 5, 2020, Chief Judge Marx removed Judge Rowe from the case by reassigning her to the Juvenile Division. Thus, the Judge who rendered two monumental rulings in Appellant's favor was no longer the Judge. In her place, Judge G. Joseph Curley, Jr. (previously a partner at a law firm focusing on "creditor rights") was assigned to the case.

On November 12, 2020, the law firm of Burr & Forman filed a Motion on behalf of Discover Bank to compel arbitration of the counterclaim in the County Court, even though the case has always been in the jurisdiction of the Circuit Court. (R.1440). Accordingly, similar to their Notice of Appearance, their Motion to Compel Arbitration should not even have been accepted for filing by the trial court, much less set for a hearing or ruled upon because it was VOID from inception, due to having been filed in the Wrong Court. Additionally, at the time of filing that Motion, neither Sarah R. Craig, Esq. or her law firm, Burr & Forman had been substituted in as counsel in the case. **Appellant has consistently maintained their motion should not have been considered because it was filed in**

violation of Florida Rule of Judicial Administration 2.505(e) in existence at the time (R.1498). Interestingly, the 2012 version of the rule still in existence in 2021, was amended almost immediately after Appellant raised the objection. However, the amendment does not apply to Discover Bank's Motion, since the amendment effective date was months later.

The impact of Chief Judge Marx's reassignment of Judge Rowe and appointment of Judge Curley to the case predictably became apparent at the first hearing, held on July 16, 2021. The topic was Burr & Forman's defective motion. Although Appellant was online for the Zoom hearing and also called the Judge's chambers by telephone indicating such, Judge Curley did not admit Appellant to the Zoom hearing, therefore depriving Appellant of his due process right to be heard. Detailed facts proving such are delineated in Appellant's Motion to Disqualify Judge Curley submitted January 18, 2022, which Judge Curley granted (R.1646-1756) (R.1805).

Predictably, with Appellant having been excluded from the hearing by a Judge who was previously a partner with a well-connected large law firm priding itself on "creditor rights" legal services; Discover Bank's motion to compel arbitration was granted in a "NON-FINAL" Order (R.1628). The Nonfinal Order that Judge Curley signed emanated from the County Court, even though he was never elected or appointed to the County Court, and

even though the case has always been in the jurisdiction of the Circuit Court. It also dismissed the counterclaim "pending arbitration" rather than staying the claim as the statute requires. Additionally, Judge Curley never even issued any subsequent Order indicating how arbitration would proceed and thus such has never occurred. **The intent was apparently to simply make the Counterclaim just "DISAPPEAR." It has never been adjudicated by either the Court or by arbitration, and thus, remains "pending."** On August 17, 2021, Discover Bank then filed their third summary judgment motion stylistically titled as a "Renewed Motion for Summary Judgment" (R.1630-1638). They filed it in the County Court once again, although the case has always been in the Circuit Court. Accordingly, it also never should have been accepted for filing by the trial court, no hearing should have been set and it was VOID from inception.

On January 18, 2022, Appellant filed a comprehensive Motion to Disqualify Judge Curley for reasons including those set forth above (R.1646-1756). Two days later, on January 20, 2022, Appellant filed a Motion to Vacate his Void and Unenforceable Order on grounds including that the County Court delineated did not have jurisdiction of the case (R.1757-1785). The motion also pointed out the counterclaim was wrongly dismissed rather than stayed as the statute requires. Judge Curley granted

Appellant's motion to disqualify and recused himself, but did not rule upon the motion to vacate the Order (R.1805).

Circuit Judge Samantha Schosberg Feuer was then assigned to the case. On March 4, 2022, Judge Feuer held hearings on Appellant's Motion for Reconsideration and Discover Bank's Motion (their Third Attempt at summary judgment). She verbally denied Appellant's Motion, but did not rule on Discover Bank's Motion. On April 1, 2022, she issued a “FINAL” Order granting Discover Bank's Summary Judgment Motion. Her Order (similar to Judge Curley) emanated from the County Court, though the case has always been in Circuit Court jurisdiction. It also appears to adopt “Verbatim” the drafting of the Order by Discover Bank Counsel, without even substantively addressing Appellant’s positions. (R.1891-1897).

To date, Judge Feuer has declined to render any Order or written ruling of any nature on Appellant's Motion for Reconsideration verbally denied from the bench; or issue any type of Final Order Dismissing the Counterclaim. On April 29, 2022, Appellant filed a document labelled as “REQUEST FOR “FINAL” ORDER DISMISSING COUNTERCLAIM SO LEGITIMATE APPEAL RIGHTS MAY PROCEDURALLY BE PURSUED.” (R.1927-1929). The purpose of filing that request was based on the fact an Order considered to be a "FINAL" Order is required under Florida Rules

of Appellate Procedure for Appellant to appeal such. Apparently, seeking to escape appellate review of her erroneous verbal decision, Judge Feuer to date has declined to issue any Order on Appellant's Motion or subsequent formal request**.** **FN 2** Florida Rule of Judicial Administration 2.215(f), which Judge Feuer appears to have violated, states expressly :

> **(f) Duty to Rule within a Reasonable Time.** Every judge has a duty to rule upon and announce an order or judgment on every matter submitted to that judge within a reasonable time.

The importance of judges complying with court rules, such as rendering a ruling as required, mandated by the Supreme Court, rather than substituting their personal preferences has been delineated as follows:

> "The Court of this state are not empowered to develop local rules which contravene those promulgated by the Supreme Court." Berkheimer v Berkheimer, 466 So.2d 1219, 1221 (Fla. App. 4th DCA 1985). "Nor may courts devise practices which skirt the requirements of duly promulgated rules."
>
> WG Evergreen Woods SH, LLC v Fares, 207 So. 3d 993 (Fl. App. 5th DCA 2016)

FOOTNOTE 2 - There is of course no better way for a Judge to avoid Reversal on Appeal of an issue they are not comfortable with, than to just decline to render any Ruling at all. Of course, while such may be a "Time-Honored" Judicial Strategic Technique, the ability of a Judge to evade appellate review to protect their own professional self-interest, raises unsettling questions about the entire Judiciary. These questions extend well beyond one Judge, whose decision to "decline to decide," is probative of questionable moral character; or alternatively a greater purpose in mind.

SUMMARY OF ARGUMENT

Judicial rules and policies being directly and frontally challenged in this Appeal undermine the fairness of the adjudicative process in all Florida cases. Accordingly, until remedied any litigation in Florida cannot be said to provide litigants or the State with fairness. The problem is not a particular Judge, or even a small group of Judges. Rather, it is the system itself and the underlying court rules, which from inception foster invidious favoritism. The rules of the system render the playing field in violation of the Due Process and Equal Protection Clauses.

The needless complexity of court rules combined with economic incentives, cause the rules to be applied unevenly. They are applied Hyper-Strictly to litigants without counsel; versus so “Strangely Liberal” to well-connected attorneys, those attorneys are substantively not even bound by the rules. Similarly, licensed attorneys regularly waive each other's valid objections on a “quid pro quo” basis at the expense of client interests to further their own self-interested goals. In both instances, the invidious uneven application nullifies the legitimacy of the rules. Put simply, the playing field is rigged. The rules intended to level the playing field have become the precise instrument that rigs the playing field in favor of well-connected attorneys at the expense of litigants and the general public.

No matter how knowledgeable one is regarding the written law, it is impossible to win a poker game when one side is allowed to deal from the bottom of the deck. It is impossible to win a dice game, if the dice are loaded. It is the system itself that is infected. Notably it is not the fault of one person, law firm, attorney or Judge. The problem is you can't win a litigation when rules are systemically applied one way to licensed attorneys (Liberally), and an opposite way to Pro Se litigants (Hyper-Strictly). The underlying facts on the record in this litigation prove this assertion.

Appellant admittedly asserts quite vigorously what we are taught to believe constitute our due process rights. Similar to the Justices of this Court, we are all victims of a judicial system, legal profession, and in fact a World widely recognized as gone awry. So, nobody can be personally faulted as the main cause. Rather, the focus is upon the rules and how they are unevenly applied. It is a legal system the general public has quite justifiably lost faith and confidence in. In all fairness, one would be hard-pressed to find a single person, whether Nonattorney, Attorney or Judge, who when spoken to privately would express genuine faith in our Courts. Appellant's goal is to directly challenge the judicial rules and policies delineated herein to promote the public's interest in fair adjudications where the Florida State Bar and related powerful monied interests failed to do so.

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. The extension of Absolute Judicial Immunity for commission of Illegal Malicious Acts to Members of the Judicial Qualifications Commission (JQC) acting in a Non-Judicial capacity in the case of Laura M. Watson v Florida Judicial Qualifications Commission, No. 17-13940 (11th Cir. Fed. Ct. of Appeals, August 15, 2018); and also to Debt Collector Attorneys in Echevarria v Cole, 950 So.2d 380 (2007) under the variant of Absolute Immunity known as "Litigation Privilege" unconstitutionally infringe upon the Due Process rights of a Pro Se litigant to receive a fair and impartial adjudication.

In Echevarria v Cole, 950 So.2d 380 (2007) the Florida Supreme Court held as follows (emphasis added):

> "The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin. **"Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding. . . . so long as the act has some relation to the proceeding."**

It really is a quite incredible holding and one Appellant believes is unparalleled in any other U.S. State. For a State Supreme Court to expressly hold it provides absolute immunity for commission of any illegal act of any nature during the course of a litigation, constitutes a substantial collapse of the law. The premise can only breed disrespect. It's really an amazing opinion. The open question is whether Echevarria has been overruled "Sub Silentio" since its issuance in 2007. So far as Appellant knows, the Florida Supreme Court has never expressly overruled it. That

point however, is not dispositive as to whether it has been overruled “Sub Silentio” by other opinions. More specifically, in 2017 the Florida Supreme Court carved out at least one exception to Echevarria, when it held in Debrincat v Fischer, 217 So.3d 68 (2017) that litigation privilege does not bar the filing of a malicious prosecution claim. By carving out at least one exception, the Court’s prior language that “litigation privilege applies across the board” was arguably overruled “Sub Silentio” in Debrincat.

Subsequent to Debrincat, numerous Appellate Courts have found reasons to disregard the language in Echevarria, that “litigation privilege applies across the board” and declined to apply litigation privilege to a wide variety of egregious conduct. See for example, Miller v Henderson Machine, Inc., 310 So.3d 44 (Fla 4th DCA 2020) ("trial court had authority to protect the proper administration of justice" by declining to apply litigation privilege); Hollander v Fortunato, 305 So.3d 344 (Fla. 3rd DCA 2020) ("litigation privilege does not apply under these circumstances, where respondent alleged in the trial court that petitioners violated section 559.72 . . . by sending threatening collection letters demanding payment") ; Pace v Bank of New York Mellon Trust, 224 So.3d 342 (Fla 5th DCA 2017) ("Bank's process server's alleged comments to the tenants are not covered by absolute immunity under the litigation privilege"); Inlet Beach Capital

Investments v The Enclave at Inlet Beach Owners Assocaition, Inc.,236 So.3d 1140 (Fla. 1st DCA 2018) (Debrincat not limited to situations where a party is added to the litigation) ; Estape v Seidman, 269 So.3d 565 (Fla. 4th DCA 2019) ("statutory grant of confidentiality prevails over the litigation privilege, a common law doctrine").

The Fourth District DCA appears particularly receptive to declining to apply litigation privilege to egregious conduct. This is in conjunction with the Federal 11th Circuit's interpretation of Debrincat. More specifically, in Sun Life Assurance Company v Imperial Holdings Inc., 904 F.3d 1197, 1218 -1220 (2018) the Federal 11th Circuit wrote (emphasis added):

> "**1. Florida's Litigation Privilege**
>
> Sun Life contends that it cannot be sued for filing its declaratory judgment claim because its act of filing a lawsuit is absolutely immune from liability under Florida's litigation privilege. At its most basic level, Florida's litigation privilege "provides legal immunity for actions that occur in judicial proceedings." Echevarria, McCalla, Raymer . . . 950 So.2d 380, 383 (Fla. 2007). **Because the filing of a lawsuit is an "action that occurs in a judicial proceeding" id., Sun Life contends that its filing of its declaratory judgment claim is protected by the privilege. The district court ultimately disagreed. . . . We are in accord with the district court.**
>
> Florida adopted its litigation privilege to protect testifying witnesses against defamation suits premised on statements they made in open court. See Myers v Hodges, 53 Fla. 197, 44 So. 357, 361-362 (1907). The concern was with chilling robust courtroom testimony. . . .
>
> **. . .**

> Although at its inception the privilege offered immunity only from actions sounding in defamation . . . . the Florida Supreme Court has significantly expanded the privilege. In Levin, it extended the privilege to protect not just allegedly defamatory litigation conduct but any "tortious behavior . . . [which had] some relation to the [judicial] proceeding. . . . **In Echevarria, the Court expanded the privilege beyond the tort context to hold immune from suit a party facing claims that its litigation conduct violated a statute.** . . .
> **. . .**
> **Echevarria, however, is not the Court's latest word on Florida's litigation privilege. In Debrincat v Fischer, 217 So.3d 68 (Fla.2017), the Court receded somewhat from the broad language in Echevarria. . . . It concluded that the litigation privilege does not provide immunity from claims for malicious prosecution, principally because if it did so it "would eviscerate [that] long-established cause of action."** Debrincat, 217 So.3d at 70.
>
> **After Debrincat**, and despite the broad formulations in Levin and Echevarria, **we do not think that the Florida Supreme Court is of the view that the litigation privilege offers per se immunity against any and all causes of action arise out of conduct in judicial proceedings**. See id. **Rather, the applicability of the privilege must be assessed in light of the specific conduct for which the defendant seeks immunity**. In this case, therefore, we must ask whether Florida's litigation privilege would immunize a defendant from a breach of contract claim where the act that allegedly breached the contract was the filing of a lawsuit. We think it would not.
> **. . .**
> **We are further persuaded by Debrincat, which made plain that the litigation privilege should not be applied in novel ways that serve to "eviscerate" long-standing sources of judicially available recovery**. . . . "

Thus, after Debrincat, according to the Federal 11th Circuit in Sun Life, supra, the Florida Supreme Court's current position is there are in fact

certain **"acts"** occurring during the course of a judicial proceeding that are not protected by litigation privilege (including malicious prosecution claims). This is in direct contrast to the earlier position delineated in Echevarria.

In the instant case, Appellant's pending Counterclaim is predicated in part upon the assertion Discover Bank illegally accessed his credit report after the litigation was initiated for the purpose of gaining an advantage in the litigation. Thus, Discover Bank is using litigation privilege as a "SWORD," rather than as the "SHIELD" for which it was originally intended in the seminal case of Myers v Hodges, 44 So. 357 (1907) to promote, rather than hinder the implementation of justice and fair adjudications. Accordingly, Appellant contends where a Plaintiff's conduct indicates they intentionally utilize litigation privilege as a "SWORD" to frustrate Due Process and undermine the trial process, this Court should hold that litigation privilege is inapplicable. A holding by this Court along such lines would be in conjunction with the overall intent and function of litigation privilege, as delineated by the Federal 11th Circuit in Sun Life, supra.

With the foregoing in mind, it is appropriate to examine exactly what Absolute Judicial Immunity or its extension to certain Non-Judicial individuals under the so-called doctrine of "Litigation Privilege" really is. Under Florida law and Federal law, duly appointed or elected Judges are

currently entitled to Absolute Immunity for commission of intentional illegal malicious acts. Appellant concedes this Court lacks the power to hold otherwise based on well-established judicial precedent. However, as regards Non-Judicial individuals the Courts now seem to focus on the type of conduct engaged in, the egregious nature of the conduct; whether justice and the dignity of the Court would be furthered or hindered by application of the privilege; whether the privilege as a common law doctrine is nullifying statutory rights; and whether the privilege is asserted in good faith.

On August 15, 2018, the U.S. Court of Appeals for the Eleventh Circuit, in the case of Laura M. Watson v Florida Judicial Qualifications Commission, No. 17-13940 (August 15, 2018) held as follows (R.1686):

> "The District Court did not err when it dismissed Watson's claim against the JQC and Bar Officials because (1) the members of the JQC investigative panel were entitled to absolute prosecutorial immunity based on the functions of their position; (2) the members of the JQC hearing panel were entitled to absolute judicial immunity based on the functions of their position; and (3) the Bar Officials were entitled to absolute immunity as agents of the Florida Supreme Court acting in disciplinary proceedings."

The foregoing holding by the Federal Court of Appeals was presumably based in large part upon Page 11 of the JQC's Answer Brief in the Appeal where they stated as follows (emphasis added) (R.1707):

> "Absolute or quasi-judicial immunity does not turn on an official's rank or title, but rather on the function that official performs. After

> reasoned analysis, the District Court concluded that: (1) **the JQC functions as a quasi-judicial agency;** (2) disgruntled judges who are disappointed in the outcome of JQC proceedings are just as likely as any other litigant to pursue claims against the JQC's members. . . ."

Thus, the linchpin of the 11th Circuit's opinion is the JQC "**functions as a quasi-judicial agency**." However, the JQC's Brief disregarded the Florida Supreme Court's decision in State of Florida ex rel. Jack M. Turner v Richard T. Earle Jr., 295 So. 2d 609, 611 (Fla. 1974). In that case, the Florida Supreme Court had already decided whether JQC functions, constituted the exercise of "quasi-judicial" powers and held they do **NOT**. Specifically, the Court held expressly in Turner, supra, (emphasis added):

> "Since the commission **lacks the power essential to** judicial or **quasi-judicial tribunals** either to reach a final decision or to implement that decision, prohibition is an inappropriate remedy. . . ."

This indicates multiple dilemmas as follows. FIRST, it appears the Eleventh Circuit's decision as to whether the JQC is a "quasi-judicial tribunal" is in direct contradiction with the Florida Supreme Court's decision in Turner, supra. That is problematic from several perspectives, not the least of which is the constitutional conflict which can exist between State's regulating their Courts, and Federal Constitutional limitations upon such.

SECOND, the fact the JQC did not point out the Supreme Court's holding in the Turner case to the 11th Circuit presents two possibilities. The first possibility is Counsel for the JQC was unaware of the Turner case. That is not only unlikely, but would also be suggestive of incompetency by JQC Counsel if such were the case. The more likely possibility is JQC Counsel was aware of the Turner case, but made a conscious decision to not mention it. If so, that violates Florida Bar Rule of Professional Conduct 4-3.3 Candor Toward the Tribunal, which states (emphasis added):

> **"(a) False Evidence; Duty to Disclose**. A lawyer shall not knowingly:
> **. . .**
> (3) **fail 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 the Watson case, Page 11 of the Answer Brief of the Florida State Bar described Absolute Immunity as follows, (emphasis added) (R.1708):

> "(rule of prosecutorial immunity insulated state bar and its agent acting within scope of office from liability for **malicious** prosecution in an action brought against them by a member of bar against whom a grievance had been filed, regardless of motive for that filing and without regard to whether or not there was probable cause for such filing)."

Similarly, the 11th Circuit's opinion utilized the term "malicious" in describing Absolute immunity as follows (emphasis added) (R.1689):

"Absolute immunity can cover even wrongful or **malicious** acts. . . ."

Thus, to understand Absolute Immunity, once needs to understand what the term "malicious" means. Black's Law Dictionary defines the term "Malicious" as follows (emphasis added) (R.1709):

"**Malicious**. Characterized by, or involving, malice; having, or done with, **wicked, evil** or mischievous intentions or motives. . . ."

Based on the foregoing, what the JQC and Florida State Bar were seeking in the Watson case was immunity to commit "Wicked" and "Evil" acts. While these characteristics under the guise of the less offensive term of "malicious" were granted by the 11th Circuit, Appellant requests this Court retreat from that position. It is undisputed Absolute Immunity is enjoyed by Judges functioning in a judicial capacity. While uncontroverted, that itself rests upon tenuous ground. Judicial power is at a "Zenith" when judging others, but at a "Nadir" when judging itself. To extend Absolute Immunity to the JQC, (which the Florida Supreme Court's opinion in Turner, indicates is not acting as a quasi-judicial tribunal), or to mere Florida Bar officials who are not Judges at all, or to debt collector attorneys is irrational.

Once the JQC and/or certain members of the Florida State Bar have the absolute legal immunity to commit "Wicked" and "Evil" acts against duly

elected Florida Trial Court Judges, one can fairly expect any Trial Court Judge's ability to render a fair and impartial adjudication will be impaired for fear of maintaining their own position as an elected Judge. While this impacts adversely upon all litigants including those represented by Counsel, the impact upon Pro Se litigants is particularly exacerbated. This is due to the systemic animus the Judiciary has historically demonstrated against Pro Se litigants. (See for example the express exclusion of Pro Se Litigants from Palm Beach County Rule 4 also a subject of this Appeal).

Similarly, Appellant contends the variant of absolute judicial immunity known as litigation privilege provided to debt collector attorneys, who repeatedly utilize it as a “SWORD” to commit unlawful statutory acts, so infects the fairness of the adjudicative process that it infringes upon a litigant’s right to a fair and impartial adjudication. It also encroaches upon legitimate powers of the State Legislature by effectively nullifying fair debt collection statutes and other legislative statutes when violated during the course of a litigation. This includes Discover Bank's gaining illegal access to Appellant's credit report after the litigation began.

For these reasons, the trial court’s judgment should be reversed.

2. 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 excluding them from its provisions; and also infringes upon the due process rights of litigants represented by Counsel by requiring their Attorney to communicate and cooperate opposing Counsel even if not in the best interests of their clients.

The most applicable portions of Palm Beach County Local Rule No. 4 states in part, as follows (emphasis added) (R.1717):

> "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."**

FIRST, from the outset, Rule 4 violates Rule 2.120 of the Judicial Administration Rules, which is sufficient to invalidate Rule 4. Rule 2.120 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 allows local courts to adopt their own rules based upon "local conditions" that "supplies an omission in or facilitates application of a rule of statewide application." However, Subsection (b) does not provide authority for a local court to adopt a rule that negates the proviso of Subsection (a) requiring that rules apply to "all proceedings" or "all parties" in the local court. Thus, by excluding every litigation involving a Pro Se litigant from the provisos of Rule 4, the Court violated the terms of Subsection (a) of Rule 2.120.

SECOND, the manner in which Rule 4 is enforced violates Rule 2.120 of the Judicial Administration Rules. The reason is as follows. On February 8, 2017, Palm Beach County Circuit Judge Peter D. Blanc sent a

letter to 15th Judicial Circuit Attorneys regarding amendments to Rule 4. Page 2 of his letter states as follows regarding enforcement (R.1706):

> **"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 it contains no provision for any Local Court Rule to be predicated upon anything less than uniform application of all Local Rules within that locality. The concept in Judge Blanc's letter that it is "important to note" that "Enforcement" "will vary from judge to judge" (meaning for practical purposes each Judge may "fly by the seat of their pants" so to speak) is not in conformity with the State Supreme Court's express mandate in Rule 2.120.

THIRD, 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 analyzed under a rubric of Strict Scrutiny, Intermediate Scrutiny

or Rational Basis Scrutiny. Rational Basis Scrutiny is 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."

Thus, from a perspective of the Equal Protection Clause, the first determination is whether the "right of access" to the Courts is a "fundamental right." Within the criminal context, the U.S. Supreme Court has held uniformly it is a "fundamental right." However, within the context of civil litigation, the matter is less clear. In fact, there is such a convoluted mix of statements on the issue it would not be possible, nor productive to present them all. That said, Appellant's position is this Court should hold the right of access to the Courts in a civil litigation is a "Fundamental Right" subject to Strict Scrutiny. This position is best supported by the statement of the U.S. Supreme Court in Chambers v Baltimore and Ohio Railroad Company, 207 U.S. 142, 148-149 (1907), where the Court wrote as follows (emphasis added):

> "The right to sue and defend in the courts is the alternative of force. In an organized society **it is the right conservative of all other rights**, and lies at the foundation of orderly government."

Then see also, Justice Brennan writing on the issue of suffrage in Plyler v Doe, 457 U.S. 202, 216 (1982), Footnote 15 as follows (emphasis added):

> ". . . we have explained **the need for strict scrutiny** as arising from the significance of the franchise **as the guardian of all other rights.**"

The concept in the two citations above is if a "right" is critical to the exercise of all other rights, it should be considered a "Fundamental Right." Appellant asserts the right of access to the Court within the context of civil litigation, is a Fundamental Right, and therefore subject to Strict Scrutiny. However, Appellant also asserts Rule 4 would not survive even Rational Basis Scrutiny. Accordingly, Appellant 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 expressly (R.1717):

> (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 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 amongst 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 an adversarial process, the Rule undermines such by requiring Counsel to work together.

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

FOURTH, Appellant understands there is substantial information indicating Judges handle voluminous dockets. One Judge is often responsible for hundreds of cases. Assuming this Court agrees with that assertion, it is reasonable to conclude the real reason for enacting Rule 4, was not to help litigants at all. Rather, it was for the benefit of the Judges. Appellant sympathizes with the plight of Judges and their heavy dockets. Nevertheless, Judges should not avoid their decision-making duty, by adopting Rules for their own benefit at the expense of litigants.

FIFTH, attorneys become Judges to decide issues. If they do not want to decide issues, they should not become Judges. To accept a

position as a Judge and then avoid deciding issues by pressuring (mandating) the Parties to resolve matters diminishes faith in the judiciary.

SIXTH, litigants often do not want their attorney to communicate with opposing Counsel. Counsel also often does not want to. It is their right to make that decision and adopt that strategy. It may be the proper strategy to adopt. Rule 4 infringes upon that right, often to the client's detriment.

SEVENTH, it is well-known in the context of settlement negotiations, there is often a fine line between legitimate settlement negotiations and that which constitutes Extortion. In general, attorneys are less likely to communicate illegal statements in writing. People overall, are more prone to communicate illegal statements verbally. Accordingly, by requiring Counsel to communicate verbally, Rule 4 promotes Extortion. 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. The Court should not preclude Counsel from avoiding baseless allegations of Extortion, by refusing to speak.

Even if the asserted State interest was the true and genuine State interest, and also a compelling and legitimate State interest, Rule 4 would still be unconstitutional 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 Palm Beach County litigants from its provisions. The Rule expressly indicates it excludes Pro Se litigants. Thus, to the extent the Rule may provide ancillary or minor benefits to some litigants represented by Counsel, such benefits are not similarly enjoyed by the massive numbers of Pro Se Litigants. They are instead swept into a wide net of litigants wholly excluded. If the Rule is in fact beneficial, the exclusion of Pro Se litigants from receiving such benefits, is indicative of a judicial animus against them as a class.

The impact of all this is as follows. Rule 4 creates substantial incentives for litigants to not proceed Pro Se due to its existence. However, it also creates incentives for other litigants to not engage Counsel, if they seek a truly adversarial process. In short, Rule 4 results in a well-informed litigant's decision of whether to engage Counsel or not, being based upon either the "Harm" or "Benefit" the Rule will result in with respect to their particular litigation.

For the foregoing reason, Appellant requests Palm Beach County Local Rule 4 be declared in violation of Appellant's constitutional Due Process and Equal Protection Clause rights to a fair and impartial adjudication; and the trial court’s FINAL Order be Reversed on that basis.

3. Florida Rule of Judicial Administration 2.215 unconstitutionally violates the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution, on the grounds it substantively deprives litigants in all cases in Florida, both Civil and Criminal, of the right to a fair and impartial adjudication by a Fully Independent Thinking Trial Court Judge, not subjected to Undue Influence. The Rule unconstitutionally vests virtually Unbridled and Dictatorial Power within one Chief Judge of each County, who then has virtually total power and control over all other Judges in that County. The Rule creates two Classes of Trial Court Judges with one Class having virtually total control over the Subservient Class, even though both are duly Elected or Appointed, and the Subservient Class constitutes the majority of Judges.

The crux of our legal system is the ability of a litigant to receive a fair and impartial adjudication from a disinterested trial court judge. See In Re Murchison, 349 U.S. 133, 136 (1955), Tumey v Ohio, 273 U.S. 510, 532 (1927). In Murchison, supra, the Court wrote (emphasis added):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always **endeavored to prevent even the probability of unfairness**. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.** That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "**every procedure which would offer a possible temptation** to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, **denies the latter due process of law**." Tumey v Ohio, 273 U.S. 510, 532."

In ascertaining the degree to which Florida Rule of Judicial Administration 2.215 infringes upon that Due Process right, the applicable Rule provisions to be considered are as follows (emphasis added):

> **Rule 2.215. Trial Court Administration**
>
> **"(a) Purpose.** The purpose of this rule is to fix administrative responsibility in the chief judges of the circuit courts and the other judges that the chief judges may designate. . . .
>
> **(b) Chief Judge.**
> **. . .**
> (2) . . . The **chief judge shall exercise administrative supervision over all judges**. . . . The chief judge shall have the authority to require that all judges of the court, . . . comply with all court and judicial branch policies, administrative orders, procedures and administrative plans.
> **. . .**
> **(4) The chief judge shall assign judges to the courts and divisions, and shall determine the length of each assignment. The chief judge is authorized to order consolidation of cases, and to assign cases to a judge or judges for the preparation of opinions, orders, or judgments . . . .** If a judge is temporarily absent, is disqualified in an action, or is unable to perform the duties of the office, **the chief judge or the chief judge's designee may assign a proceeding pending before the judge to any other judge or any additional assigned judge of the same court. The chief judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit. . . . The assigned judges shall be subject to administrative supervision of the chief judge for all purposes of this rule. . . .**
>
> **(5)** The chief judge may designate a judge in any court or court division of circuit or county courts as "administrative judge" of any court or division to assist with the administrative supervision of the court or division. **To the extent practical, the chief judge shall assign only one administrative judge to supervise the family court. The designee shall be responsible to the chief judge,**

> **shall have the power and duty to carry out the responsibilities assigned by the chief judge, and shall serve at the pleasure of the chief judge.**
> **. . .**
> (11) **The failure of any judge to comply with an order or directive of the chief judge shall be considered neglect of duty** and may be reported by the chief judge to the chief justice of the supreme court who shall have the authority to take any corrective action as may be appropriate. The chief judge may report the neglect of duty by a judge to the Judicial Qualifications Commission or other appropriate person or body, or take such other corrective action as may be appropriate.

The impact of the foregoing taken as a whole is as follows. One single Judge in each County, known as the "Chief Judge" exercises administrative supervision over all judges, assigns judges to the courts and divisions, assigns cases to selected judges for the preparation of opinions and orders, and the failure of any judge to comply with an order or directive of the chief judge shall be considered neglect of duty. Suffice it to say, **one would have to be a pretty Dumb Judge to not try and keep the Chief Judge happy and satisfied.** And the best way to do that is to render judgments, rulings and opinions in a manner that will please the Chief Judge. Failure to do so may result in the Chief Judge reassigning you to a division where you have no interest in working, being assigned cases you would prefer not to work on, or being unjustifiably declared in neglect of duty. As a basic principle of human nature, it is equally clear if you keep

the Chief Judge happy and render rulings and opinions that he (she) likes, your career as a trial court Judge may blossom and flourish. Notably, Subsection b(5) of the Rule also allows the Chief to designate other Judges as "administrative judge" of any division and that designee according to the language of the subsection (emphasis added):

> "**shall have the power** and duty to carry out the responsibilities **assigned by the chief judge**, and **shall serve at the pleasure of the chief judge**."

Thus, not only does the Chief Judge function with virtually total power, but the Chief Judge can also designate other Judges to function substantively as their "Lieutenants," so to speak. And those "designees" according to the language of the rule, serve at the "**pleasure**" of the Chief Judge. Appellant openly concedes such immense power probably is a "pleasurable" experience. This is notwithstanding that both the Chief Judge and all other Judges were equally elected by the public, or appropriately appointed. Plaintiff understands neither the public, nor the Governor's office who appoints Judges, has any influence on who will be the Chief Judge in each County controlling all the others.

Unfortunately, stuck in the middle of the power games between the Chief Judge and the other Judges is the litigant in any particular case. The litigant is under the mistaken impression they are going to have a fair and

impartial adjudication by an "independent" Judge who renders decisions "**without fear or favor**." See Florida Code of Judicial Conduct stating in part (emphasis added):

> "**Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary**
>
> An **independent** and honorable judiciary is indispensable to justice in our society. . . .
>
> **Commentary**
> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and **independence of judges**. The integrity and independence of judges **depend in turn upon their acting without fear or favor.**

Appellant can not receive a fair and impartial adjudication in the credit card litigation in which he is a Defendant and which still has Counterclaim "pending" (if procedure is complied with at all). This is because he will not have the benefit of an independent thinking Judge who will rule without fear or favor, no matter what Judge is assigned to the case. Instead, any Judge assigned would be nothing short of an absolute fool to not take into consideration how the Chief Judge would like the case ruled upon. For the foregoing reason, Plaintiff requests Florida Rule of Judicial Administration 2.215 be declared in violation of Plaintiff's constitutional Due Process and Equal Protection Clause rights protected by the Fourteenth Amendment and the trial court' FINAL Order be Reversed on that basis.

4. Florida State Bar Unauthorized Practice of Law (UPL) prohibitions, <u>forming the basis of the entire legal monopoly</u> unconstitutionally infringe upon the due process and equal protection clause rights of all litigants to receive a fair and impartial adjudication. UPL prohibitions diminish the competency of legal services provided to litigants by attorneys by creating economic incentives for attorneys to waive procedural errors of each other at the expense of their client's interests. UPL prohibitions also result in uneven application of court rules, which are applied hyper-strictly to Pro Se litigants, while liberally construed for licensed attorneys.

Appellant challenged the "competency" argument underlying State Bar UPL prohibitions in his Motion to Vacate and for Reconsideration filed on January 20, 2022. (R.1765) (See Footnote 4 of Motion). State bars and the Judiciary consistently maintain the Unauthorized Practice of Law (hereinafter "UPL") prohibitions exist for the purpose of protecting the public from incompetent legal services performed by Nonattorneys. Correlated with this is the assertion UPL prohibitions are not intended to further the economic interests of the legal profession. Appellant contends the exact opposite. Appellant contends UPL prohibitions "Harm" the general public and increase the propensity of incompetent legal services. This occurs because they cause court rules to be applied liberally to licensed attorneys to further their economic interests, and hyper-strictly against Pro Se litigants. Historically, this has been known as the "invidious application of the procedure / substance dichotomy."

This litigation provides a perfect fact set to prove Appellant's position. Such is due to the multiple acts of incompetency performed by Plaintiff's Counsel and the Court itself, which are now all on the record. As Appellant has repeatedly emphasized Discover Bank's counsel, Burr & Forman, LLP **consistently** filed legal documents in the wrong Court. Additionally, they drafted multiple court orders for the wrong court, which two trial judges actually signed without performing an adequate review. More specifically, the Complaint and all filings until Burr & Forman, LLP "appeared" were filed in the Circuit Court. The Circuit Court has always had jurisdiction of the case without interruption. Yet, the very first filing of Sarah R. Craig, Esq. of Burr & Forman, LLP, which was her Notice of Appearance of Counsel on 10/16/20 was improperly filed in the County Court (R.1436). On 11/12/20, she then filed Discover Bank's Motion to Compel Arbitration in the County Court in error (R.1440). On 2/9/21, she filed a Motion for a Protective Order with the wrong court (R.1554). That same day, she filed a Notice of Service of Responses to Discovery in the wrong court (R.1581). On 7/8/21, she filed a Reply in Support of her motion to compel arbitration in the wrong court (R.1619). On 7/23/21, Judge G. Joseph Curley, Jr. signed a Court Order emanating from the wrong court, prepared by Ms. Craig (R.1628). That same court order dismissed Appellant's counterclaim pending

arbitration, even though the applicable statute clearly indicates the matter should be stayed if arbitration is order. On 8/17/21, she filed a Renewed Motion for Summary Judgment in the wrong court (R.1630). On 3/1/22, she filed a Reply in Support of Summary Judgment in the wrong court (R.1862). On 4/1/22, Judge Feuer signed a court order granting summary judgment from the wrong court (prepared by Ms. Craig) (R.1891).

Thus, at a minimum Ms. Craig submitted **at least 9 separate legal documents to the wrong Court, and even continued to do so when the matter was brought to her attention.** Astoundingly, Ms. Craig's 3/1/22 filing, along with submission of the court order signed by Judge Feuer occurred "AFTER" Appellant had filed a motion to disqualify Judge Curley emphasizing the multiple submissions to the wrong court. That is unbelievable. In light of the **massive multiplicity of filings in the wrong court**, coupled with two court orders signed by two different trial judges (both drafted by Discover Bank Counsel and adopted “blindly” by those two Judges) it can not reasonably be contended these were inadvertent errors. Quite to the contrary. It appears both Ms. Craig and the two trial court judges are quite intent on proving there is no legal obligation for licensed attorneys to file legal documents with the proper court for the documents to be binding upon unrepresented litigants. By continuing to do so after notice

of the issue, they are communicating they will not be told otherwise. The concept that court orders issued from the wrong court without jurisdiction of the case should be deemed binding upon litigants, rather than declared Void on their face is so bizarre and strange it is difficult to comprehend.

More poignantly, are trial court orders binding if labelled as Appellate Fourth District DCA Orders? Are Fourth District DCA Orders binding if labeled as Florida Supreme Court Orders ? Are State Court Orders binding if labelled as coming from a Federal Court? Are Palm Beach County trial court Orders binding if labelled as coming from Broward County? Are Florida Court Orders binding if labeled as coming from Minnesota? And if so, should “purported” Orders labelled as coming from litigants be binding upon Florida Judges? This issue seems so clear on its face, yet clearly it is a point that needs to be driven home hard to Discover Bank Counsel, as well as the two trial court judges “involved.” Put simply, a court order is not binding and is VOID on its very face, if it does not at least correctly label the Court issuing it. Such particularly applies if the mislabeling is intentional or a result of a pervasive wanton disregard for procedure as occurred in this case. The matter is irreftuably "Res Ipsa Loquitur" ("the thing speaks for itself"). To hold otherwise, relegates the entire judiciary as nothing more than an absolute farce in a collapsed legal system.

Another example in this specific case of incompetency undermining the legitimacy of UPL prohibitions is that on November 12, 2020, Burr & Forman filed a Motion on behalf of Discover Bank to compel arbitration of the counterclaim (R.1440). At the time, Burr & Forman had not even been substituted in as counsel (R.1498). Appellant has steadfastly maintained their motion should not have been considered at all, because it was filed in violation of Florida Judicial Administration Rule 2.505(e) in existence at the time (R.1498) and (R.1757). Judge Curley rejected that argument presented in Appellant's opposition (R.1498), choosing instead to substitute his personal preferences in favor of a validly enacted Supreme Court rule. Similarly, on March 4, 2022 Judge Feuer did the same, rejecting the exact same contention contained within Appellant's motion for reconsideration (R.1757). Judge Feuer's rejection was in apparent reliance upon Ms. Craig's contention that Appellant's motion was not filed within the 10 day period for requesting a rehearing. However, Appellant's motion pointed out with authoritative citations to well-accepted case law a trial court always has "inherent power" to modify its errors prior to entry of a final judgment and a motion for reconsideration is reviewable for abuse of discretion (R.1762). To date, Judge Feuer has declined to issue any written ruling on

Appellant's filed motion in an apparent attempt to evade reversal. These points are important for the following reason.

On the one hand, a licensed attorney (Ms. Craig) for a well-connected creditor law firm, was given such a "Strangely Liberal" construction of court rules, that the construction nullified Florida Supreme Court Rule 2.505(e). On the other hand, Appellant a pro se, had the 10 day rule for rehearing (not to be confused with Reconsideration) applied so "Hyper-Strictly" it required the trial court to expressly violate principles of stare decisis holding a trial court always has inherent power to modify its' own decisions prior to final judgment. Put simply, this demonstrates that no matter how knowledgeable or well-versed in the law an individual is, you can't win a litigation if the rules only apply to one side and not the other. You can't win a poker game if the other side is allowed to deal from the bottom of the deck, no matter how good of a poker player you are. And you can't win a "Dice Game" no matter how lucky you are, if the Dice are loaded. The foregoing are specific examples of how the incompetency of opposing counsel was not only ignored by the trial court, but in fact supported by two trial court Judges intent on giving Discover Bank an undeserved victory.

Appellant now turns to more general principles that undercut the legitimacy of the State Bar's fallacious argument that UPL prohibitions

protect the public from the provision of incompetent legal services. Appellant wrote his senior year law school thesis in 1994 on the topic of UPL, which focused in large part on Florida caselaw. The Florida Judiciary has historically taken a controversial role in promoting UPL prohibitions. While the scope of UPL varies from state to state, generally speaking it is defined as the provision of "legal services." In turn, "legal services" are generally defined as rendering "legal advice" or preparation of "legal documents." Courts have wrestled with defining "legal advice" or preparation of "legal documents" since the 1930s. The more expansive the definitions, the more the legal profession economically benefits. To the extent UPL prohibitions minimize provision of incompetent legal services society also benefits. However, when UPL prohibitions exclude competent individuals from providing low-cost legal services, society is harmed. Thus, whether society is harmed or benefits is contingent upon who is excluded from providing legal services. In contrast, whether UPL prohibitions are enforced against either competent or incompetent people, **the legal profession always economically benefits.**

The financial incentives for State Bars to maximize UPL enforcement mandates the Bar's UPL policy be critically examined. In assessing the legitimacy of the assertion that services performed by Nonattorneys are

incompetent, it is critical to examine whether Nonattorneys are held to a higher standard of proficiency by Courts. This is because in a typical UPL enforcement action, the State Bar adopts the posture that not only was the service prohibited, but also the legal advice given or the legal document prepared contained errors. The flaw in this argument is that licensed attorneys regularly provide incorrect legal advice and prepare legal documents containing errors. The record in the instant case demonstrates such. Certainly, the record in this case "elegantly" demonstrates how Florida trial court Judges have a predisposition to ignore blatant incompetency and errors of licensed powerful Florida attorneys, but "disgracefully" pounce on litigants not licensed to practice law in Florida.

Even if procedural issues were not applied unevenly and unfairly against Nonattorneys, the State Bar's competency assertion is still infirm. The reasons are as follows. **FIRST**, in virtually every instance where a licensed attorney files a motion that is opposed by another attorney, one party wins and one loses. If the losing attorney was wrong, it means that attorney presented an erroneous position. Thus, if incorrect legal advice or preparation of erroneous documents constitutes grounds for precluding someone from providing legal services, there are thousands of licensed attorneys who should be excluded from practicing law. In fact, since one

would be hard pressed to find a trial lawyer who has not lost at least one motion or case, a solid assertion could be made they all should be excluded from practicing law. (Facetiously, it might not be a bad idea.)

SECOND, the fact that appellate courts regularly reverse trial courts undermines the competency argument. The law can not simultaneously require a motion should have been granted and also that it should not have been granted. That means most appellate opinions reversing a trial court judgment, mandates a conclusion the trial court judge did not competently apply the law. The same premise applies when a State Supreme Court reverses an appellate court, or the U.S. Supreme Court reverses a State Supreme Court decision. Put simply, two courts at two different levels with diametrically opposed opinions can not both be legally correct.

THIRD, the mere existence of dissenting judicial opinions undermines the competency argument. One does not have to look far on any appellate court to find one or more Justices asserting the majority is wrong. Since both the majority and the dissent can not be correct, it inescapably means any number of appellate justices do not understand the law competently. In fact, pursuant to this theory there is legitimacy in the assertion every U.S. Supreme Court opinion decided 5 - 4, means at least 4 U.S. Supreme Court Justices were not as competent as they should have been.

FOURTH, in Florida particularly, the competency argument is undermined by the fact Trial Judges are often assigned to divisions in legal subject areas where they have no experience at all. Judges who previously worked solely in criminal law may be assigned to the probate division. Judges who worked solely in the Estate area may be assigned to the criminal division. Put simply, there are massive numbers of Judges in Florida assigned to divisions where they don't have the slightest degree of competency or experience. The fact that many Judges do not have competency regarding the legal subjects they rule upon (affecting litigant lives) undercuts the legitimacy of State Bar competency arguments supporting UPL prohibitions.

The constitutional justification for UPL prohibitions adopted by Courts has chiefly relied on the speech-conduct dichotomy. The basic premise is speech is subject to greater protection under the First Amendment than conduct which is subject to greater State regulation. The seminal case is U.S. v O'Brien, 391 U.S. 367 (1968), where the Court's opinion stated:

> "When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental restrictions on First Amendment freedoms."

The threshold issue in determining whether a particular service constitutes engaging in the practice of law is whether the service constitutes "speech" or "conduct." If it includes both speech and nonspeech elements, the respective elements must be weighed to determine which of the two comprises a greater proportion of the action. UPL prohibitions are justifiable only to the extent they primarily constitute "conduct" rather than "speech." The difficulty however, is that virtually everything a person does encompasses both speech and nonspeech components. Even when a person engages in pure political speech or religious prayer (uniformly regarded as the Zenith of activity protected under the First Amendment), they unavoidably make facial expressions, hand movements or shifts in body posture. Arguably therefore, pure political speech or religious prayer could be manipulatively classified as conduct under the same theory used to justify UPL prohibitions.

The bottom line is the mere speaking of words containing legal information; or the writing down of information on legal documents; contains vastly greater elements of "speech," compared to the "nonspeech" (i.e. "conduct" elements). This exposes the vulnerability of UPL prohibitions. The problem is exacerbated by the fact that although Courts regularly classify the mere speaking of words containing legal information

as “conduct” rather than “speech”; they adopt a diametrically opposed stance in legal subject areas that do not enhance the economic interests of the legal profession. Some examples are as follows. In Cohen v California, 403 U.S. 15 (1971) the Court held that wearing a jacket bearing the words "(F*ck) the Draft " in a corridor of the Los Angeles Courthouse was protected speech. In Gooding v Wilson, 405 U.S. 518 (1972) the Court invalidated a Georgia statute that criminalized "abusive language tending to cause a breach of the peace." In Police Department of the City of Chicago v Mosley, 408 U.S. 92 (1972) the Court invalidated a city ordinance that prohibited picketing, except for peaceful picketing of a school in a labor dispute. In each case, (which did not affect economic interests of the legal profession), the challenged actions contained higher proportions of conduct compared to its speech elements. Yet, in each one the Court concluded it was protected speech. Thus, it is only in the one isolated area benefitting attorney economic interests that Courts regularly conclude such is regulatable “conduct,” rather than protected “speech,” notwithstanding the speech elements outweigh the conduct elements.

When Judges apply UPL principles on behalf of the State Bars, they play a bit of what is known as a "**Shell Game**" so to speak. It works as follows. UPL prohibitions are justified on the basis the challenged services

are “conduct” rather than “speech.” But then, those prohibitions are applied most aggressively to cases where the speech element outweighs the conduct element. For instance, giving verbal legal advice is typically determined to constitute engaging in the practice of law; but processing legal forms is not. This is notwithstanding that processing legal forms is imbued with greater elements of conduct, compared to verbal legal advice.

UPL prohibitions came very close to collapsing entirely in NAACP v Button, 371 U.S. 415 (1963) where the Supreme Court held within the context of the case, that litigation was a form of political expression. The Court rejected the State of Virginia's false assertion the purpose of the UPL prohibitions was to insure high professional standards. It further determined a State may not, under the "**guise**' of prohibiting professional misconduct ignore constitutional rights. It is also noteworthy in Johnson v Avery, 393 U.S. 483 (1969) the Court held a State may not validly enforce a regulation which absolutely bars prison inmates from furnishing legal assistance to other prisoners. The rather innocuous result is that to a certain extent imprisoned criminals are legally allowed to provide free legal assistance to other convicted criminals free of concern of UPL prohibitions, while law-abiding citizens may not help other law-abiding citizens.

Based on the foregoing, Appellant asserts the facts on record in the instant case provide remarkable support for the premise Florida State Bar UPL prohibitions diminish the competency of legal services performed, thereby undermining the overall fairness and impartiality of the litigation. Specifically, the facts on record demonstrate well-connected licensed attorneys not only perform services incompetently, but yet still win those cases against pro se litigants, due to an invidious application of court rules. Such is due to a judicial bias against pro se litigants designed to foster the economic interests of the legal profession. Put simply, licensed attorneys enjoy such "Strangely Liberal" application of court rules in their favor, it nullifies the legitimacy of the rules. In contrast, pro se litigants are subjected to such "Hyper-Strict" application it nullifies their legitimate due process rights to a fair and impartial adjudication. It is logistically impossible to win a litigation, if only one side is subjected to the rules and the other is exempted from them. The UPL prohibitions provide the necessary economic incentives for such uneven application of court rules.

CONCLUSION

For the reasons presented herein based upon supporting legal authority, coupled with principles of rationality and basic 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's Counterclaim remains pending on the record, as it has never been adjudicated either by the Court or in Arbitration, and is therefore to be formally reinstated on the docket by the trial court, since it is pending. Appellant also requests the direction to the lower Court indicate Appellant is to be Refunded the Money payment he deposited with the Clerk of the Court in the amount of $ 18,031.48 for the purpose of obtaining an Automatic Stay of Enforcement of the Money Judgment pursuant to FRAP 9.310(c)(1)

Respectfully submitted this 20th day of June, 2022.

Evan Gutman CPA, JD
Member State Bar of Pennsylvania
Member District of Columbia Bar
Admitted to Federal Ninth Circuit Court of Appeals
Admitted to Federal Sixth Circuit Court of Appeals
Florida Certified Public Accountant

1675 NW 4th Avenue, #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 U.S. Mail and E-Mail to Sarah R. Craig, Esquire, of the law firm of Burr & Forman, LLP addressed as follows:

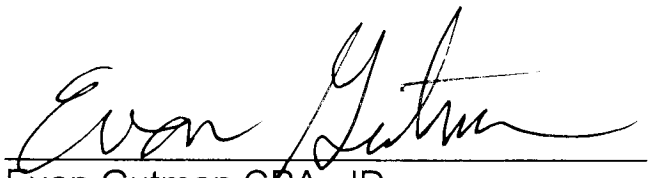
Burr & Forman LLP
Attn: Sarah R. Craig, Esq.
201 N. Franklin Street, Suite 3200
Tampa, FL 33602

Dated this 20th day of June, 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. P. 9.210.



Evan Gutman CPA, JD