IN THE DISTRICT COURT OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO.: 4D16-2864
LT NO.: 09-011600 (05)

WILLIAM J. WICHMANN, individually,
WILLIAM J. WICHMANN, P.A.,

Appellant,

v.

CONRAD & SCHERER, LLP,

Appellee.
_____/

# ANSWER BRIEF OF CONRAD & SCHERER, LLP.

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## PREFACE

This Answer Brief is submitted on behalf of CONRAD & SCHERER, LLP., Plaintiff below.

WILLIAM J. WICHMANN is referred to as Appellant or Wichmann.

CONRAD & SCHERER, LLP. is referred to as Appellee or Conrad & Scherer.

The following symbols will be used:

"R. __" references are to the page number of the Record on Appeal.

"I.B. ___" references are to the Initial Brief of Appellant.

Unless otherwise indicated, all emphasis is supplied by the writer.

## STATEMENT OF CASE AND FACTS

### *1. The Original Claim*

This appeal stems from Appellant, William Wichmann's disingenuous attempt to muddy the waters in a suit brought against him by his former employer, Conrad & Scherer, LLP.

Wichmann worked at the Conrad & Scherer law firm as a non-equity, "contract partner" for four years. (R. 737) His relationship with his employer was governed by a Partnership Agreement. *Id*. On February 21, 2009, Wichmann abruptly cleaned out his office and secretly took over 200 of Conrad & Scherer's mass tort case files in a massive client-grabbing scheme. (R. 729) Over 140 of those cases were *Engle* progeny tobacco cases pursued under written fee agreements between the clients and a team of three law firms: Conrad & Scherer, Fitzgerald P.A. (consisting of attorney Mike Fitzgerald), and the Engstrom, Lipscomb, & Lack firm (the "Lack Firm") in California. (R. 729)

The timing of Wichmann's departure was no coincidence. Wichmann grabbed these clients within days of the first big South Florida verdict for an *Engle* progeny tobacco client - an $8 million dollar verdict in the *Hess v. Philip Morris, Inc.* case. *Id*. It was a critical moment when the *Engle* progeny cases greatly increased in value, and Wichmann, along with his friend, Mike Fitzgerald, devised

a plan to cut Conrad & Scherer out of the fee creating a windfall for themselves. *Id*.

When he walked out the door with these files, Wichmann had not obtained any written client consent. (R. 730) On the day he sent his notice of termination, Wichmann used the Conrad & Scherer computer network system to draft a number of "notices of change of law firm" for *Engle* Tobacco and Chiquita Banana cases – drafting these before 9 a.m. on Monday morning, February 23. (R. 731-732)

After his departure, Wichmann, with the assistance of Mike Fitzgerald, secretly sent a letter to over 100 tobacco clients that was false, disparaging, and totally misrepresented the circumstances in order to justify the client-grabbing and gain the clients' consent. (R. 732-733) The letter contained a number of false statements, including that the clients had never retained Conrad & Scherer, and that the client fee agreement was directly with Wichmann. *Id*. As to the Chiquita Banana wrongful death cases, Wichmann admitted he never obtained any written consent from the clients to take those cases from Conrad & Scherer. (R. 733)

In carrying out this scheme, Wichmann blatantly ignored both Florida state bar rules and Wichmann's partnership agreement with Conrad & Scherer:

- **Wichmann violated Rule 4-5.8(c)(l) of the Rules Regulating the Florida Bar governing required conduct when departing a firm (and attempting to take cases with him);**
- **Wichmann violated the rules required to sign up a client under a new co-counsel arrangement when the arrangement changed;**
- **Wichmann breached Section 8.2 of the Partnership Agreement with**

**Conrad & Scherer which required that he work full time for the law firm and perform as an attorney "on behalf of the partnership."**

- **Wichmann also violated the general standards of conduct required by Florida Statute 620.8404. These were specifically incorporated into his partnership agreement and required him to refrain from competing with the law firm for business and required him to discharge all of his duties consistently with the obligations of good faith and fair dealing.**

(R. 734)

Based on Wichmann's violation of the Partnership Agreement and Florida's statute and Rules governing attorneys, Conrad & Scherer filed an action against Wichmann on February 2, 2009. (R. 1-53)

***2. The Drummond Case.***

Between 2005 and 2009, Conrad & Scherer became involved in large mass tort litigation involving wrongful death cases against Dyncorp, Chiquita Brands International, Inc., Dole and others, including Drummond Corporation ("Drummond"). (R. 736) After Conrad & Scherer's case against Drummond was dismissed, Drummond filed a retaliatory law suit against Conrad & Scherer alleging that Terry Collingsworth, and/or Bill Scherer, and/or Billy Scherer,[1] engaged in a witness payment scheme in order to bolster its claims against the corporation. See

[1] Terry Collingsworth was also a contract partner with Conrad & Scherer working in the firm's Washington, D.C. office. He is no longer with the firm. Bill Scherer is the managing partner of Conrad & Scherer. Billy Scherer is Bill Scherer's son. He was an attorney at Conrad & Scherer, but is no longer employed by the firm.

*Drummond Company, Inc. v, Collingsworth, Conrad & Scherer, et. al.*, Case 2:ll-cv-03695-RDP-TMP D (N.D. Ala. 2015).

In September, 2015, a hearing was held before Judge Proctor of the United States District Court Northern District of Alabama to determine whether the crime-fraud exception to the work product and attorney client privileges was applicable to certain discovery requests. (R. 822) Although Judge Proctor found that the exception did apply, he expressly stated that the court made NO FINDING that any crime or fraud actually occurred:

> **It is important to note that application of the crime-fraud exception to certain categories of discovery sought in this case is not a sanction as to liability or wrongdoing. *The court has made no finding that any crime or fraud actually occurred.* Instead, the court finds that application of the exception is necessary to get to the truth – not to find evidence of a crime or fraud, but to further expose whether a crime or fraud in fact occurred.**

(R. 866) [emphasis supplied]

***3. Wichmann's eleventh hour Counterclaim.***

Five months after Judge Proctor's Order came out in the Drummond case, Wichmann, ***for the first time in this seven year litigation,*** filed a five count Counterclaim. (R. 788-877) Wichmann based his eleventh hour Counterclaim on the same allegations set forth in the Drummond case and addressed by Judge Proctor in his discovery order. *Id*. For the first time, Wichmann alleged that he left Conrad

& Scherer because Terry Collingsworth, and/or Bill Scherer, and/or Billy Scherer, were engaged in an illegal witness payment scheme in the Drummond and/or Dole case. (R. 805-814) Wichmann also alleged that after he left Conrad & Scherer, Bill Scherer interfered with his business relationship with the now defunct law firm of Rothstein, Rosenfeld and Adler ("RRA").[2] (R. 814-817)

During the seven years of protracted litigation that preceded the Counterclaim, there were several occasions where Wichmann enumerated his reasons for leaving Conrad & Scherer, including in his deposition and his response to a Bar Complaint. Prior to the eleventh hour Counterclaim, ***Wichmann never mentioned the alleged witness payment scheme as a reason for disassociating with the firm***. (R. 896-897)

Conrad & Scherer filed a motion to dismiss Wichmann's Counterclaim asserting that it was permissive and therefore barred by the statute of limitations. (R. 878-916) Conrad & Scherer also asserted that, even if the Counterclaim were found to be compulsory, it nevertheless should be dismissed based on several other grounds, including laches and waiver. *Id*. On July 12, 2016, the trial court found that Wichmann's Counterclaim was permissive and therefore barred by the statute of limitations. (R. 942-944) Conrad & Scherer's motion to dismiss the Counterclaim was granted and a final order of dismissal with prejudice was entered.

[2] In his Brief, Wichmann neglects to mention the name of the firm, but instead refers to it as "the new firm." Of course the RRA law firm was forced to break up after its managing partner was found guilty of operating a multi-million dollar Ponzi scheme.

*Id*. This appeal ensued.

## SUMMARY OF ARGUMENT

Wichmann's eleventh hour Counterclaim does not bear a logical relationship to the original claim. It does not arise from the same aggregate of operative facts as the original claim. Further, it is not a defense to the original claim. Pursuant to Florida law, Wichmann's Counterclaim is permissive. As a permissive counterclaim, it is subject to the statute of limitations. As alleged in the Counterclaim, the actions giving rise to Wichmann's claims occurred over seven years ago. Because the Counterclaim is time barred, the trial court properly dismissed it with prejudice.

## ARGUMENT

### I. STANDARD OF REVIEW.

Appellate courts review counterclaims *de novo* and determine, as a matter of law, whether each count states a cause of action. *Cunningham v. MBNA Am. Bank, N.A.*, 8 So. 3d 438, 441 (Fla. 2d DCA 2009).

### II. JURISDICTION.

The appellate court's jurisdiction is limited to a trial court's dismissal of a counterclaim that "adjudicates a distinct and severable cause of action." *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 960 (Fla. 4th DCA 2016)(quoting *S.L.T. Warehouse Co. v. Webb*, 304 So.2d 97, 100 (Fla.1974)). In

order for the court to have jurisdiction, there must first be a finding that the dismissed counterclaims are permissive, rather than compulsory. *Id.*

Appellant, however, contends that his Counterclaim is ***compulsory.*** But dismissal of a compulsory counterclaim is "not appealable until a final disposition of the original cause has [been] obtained on the merits." *Id*. (quoting *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So.2d 507, 509 (Fla. 2d DCA 1993)). Therefore, if any of the counts contained in the Counterclaim are found to be compulsory, the appeal as to those counts is subject to dismissal for lack of jurisdiction. *Id.*

## III. WICHMANN'S COUNTERCLAIMS ARE PERMISSIVE, AND THEREFORE BARRED BY THE STATUTE OF LIMITATIONS.

The entire crux of this appeal is whether Wichmann's Counterclaim is permissive and therefore subject to the statute of limitations. Wichmann asserts that the Counterclaim is compulsory. But the only support for his assertion is a total misstatement of the facts. Because there is no logical relationship between the original claim and Wichmann's Counterclaim, the trial court correctly dismissed the Counterclaim with prejudice.

### *A. Wichmann's Counterclaims are permissive.*

Conrad & Scherer's action against Wichmann is based on whether he followed the procedures mandated by Florida law and the Bar Rules when he left

Conrad & Scherer and took over 200 files that belonged to the firm without proper consent from the clients. Conversely, Wichmann's eleventh hour counterclaims are based on two allegations: (1) that Conrad & Scherer engaged in an illegal "witness payment" scheme in the Drummond and/or Dole case; and (2) that after Wichmann left the firm, Bill Scherer interfered with his business relationship with the RRA law firm. Because the Counterclaim does not arise from the same transaction or occurrence as the main claim, and further, does not bear a logical relationship to Conrad & Scherer's client grabbing suit, the counterclaim is permissive.

By definition, a permissive counterclaim does **not** arise out of the transaction or occurrence that is the subject matter of the main claim. *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 960 (Fla. 4th DCA 2016)(citing Fla. R. Civ. P. 1.170(b)). Conversely, compulsory counterclaims bear a "logical relationship" to the plaintiff's claims in that they arise out of the "same aggregate of operative facts as the original claim." *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 960 (Fla. 4th DCA 2016)(quoting *Londono v. Turkey Creek, Inc*., 609 So.2d 14, 20 (Fla.1992)). Unlike permissive counterclaims, a compulsory counterclaim is equivalent to a defense to the plaintiff's action and is not an independent cause of action seeking affirmative relief. *Mayo Clinic Jacksonville v. Alzheimer's Institute of America, Inc.*, 683 F. Supp. 2d 1292 (M.D. Fla. 2009) (applying Florida law).

The test in Florida for determining whether a counterclaim is compulsory or

permissive is set out in *Londono v. Turkey Creek Inc.*, 609 So.2d 14, 20 (Fla.1992):

> **[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis for both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.**

*Id*. (citing *Neil v. South Florida Auto Painters, Inc*., 397 So.2d 1160 (Fla. 3d DCA 1981). In this case, the same aggregate of operative facts ***does not*** serve as the basis for both claims. Nor does the aggregate core of facts upon which the original claim rests activate additional legal rights in Appellant.

**1. <u>Counts I - III.</u>**

In Counts I – III of his Counterclaim, Wichmann brings claims for breach of fiduciary duty, fraud by concealment, and breach of contract. Wichmann's chief allegation supporting these three counts is that certain attorneys at Conrad & Scherer engaged in an illegal "witness payment" scheme in Drummond and/or the Dole case:

> **[Conrad & Scherer] conspired to perpetuate, and in fact perpetuated a scheme to manufacture, file and maintain frivolous and fraudulent cases against U.S. corporations including Drummond and Dole and others, for actions overseas, and to engage in illegal acts, including but not limited to witness bribery, suborning perjury.**

(R. 805, 808, 811)

Appellant's counterclaims based on the alleged witness payment scheme do

not bear any logical relationship to the original claim. This becomes obvious when considering the core issues and what would have to be proven in the original claim versus Counts I – III of the Counterclaim:

| **Original Claim** | **Counterclaim: Counts I - III** |
|---|---|
| Whether Wichmann improperly took over 200 of Conrad & Scherer's mass tort case files including over 140 *Engle* progeny tobacco cases pursued under written fee agreements between the clients and a team of three law firms: Conrad & Scherer, Fitzgerald P.A., and the Engstrom, Lipscomb, & Lack firm. R. p. 2 | Whether one or more Conrad & Scherer attorneys entered into an illegal "witness payment" scheme in the Drummond and/or Dole case. R. p. 14 |
| Whether Wichmann and Fitzgerald conspired to convert 140 *Engle* cases from Conrad & Scherer once a big plaintiff verdict occurred in the *Engle* Case (which occurred just days before Wichmann's abrupt departure), so they could benefit from what they thought would be a quick and more lucrative settlement just for themselves. R. p.4 | |
| Whether Wichmann violated Rule 4-5.8(c)(l) of the Rules Regulating the Florida Bar ("a lawyer who is leaving a law firm shall not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.") (R. p. 12) | |
| Whether Wichmann violated 2.505(e)(2) Fla.R.Jud.Admin., which conditions a substitution of counsel "only by order of court and with written consent of the client, filed with the court." R. p. 13 | |

| | |
|---|---|
| Whether Wichmann breached his Partnership Agreement by utilizing retainer agreements which purportedly reflected an attorney client relationship between the client and Wichmann himself rather than Conrad & Scherer while he was employed by Conrad & Scherer. R. p. 42 | |

The original claim and counterclaim are two entirely separate controversies with distinct and unrelated facts. Wichmann tacitly admits this when he contends that "boiled down to their most basic nature, the claims of both the Complaint and Counterclaim stem from the employment relationship between Wichmann and Conrad & Scherer[.] (I.B. 24) But boiling down claims "to their most basic nature" is not the test set forth in *Londono*. Rather, it is whether the counterclaim arises out of the same aggregate of operative facts as the original claim. In his case, the answer to that inquiry is simply: ***no, the counterclaim does not arise out of the same aggregate of operative facts as the original claim.***

The Fourth DCA's recent decision in *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 959 (Fla. 4th DCA 2016) is instructive. In *4040 IBIS*, JPMorgan Chase brought a foreclosure action against the borrowers. Borrowers filed their answer, affirmative defenses, and two counterclaims for breach of contract and defamation. The Borrowers alleged that Chase's predecessor, Washington Mutual improperly purchased force-placed insurance on the property and created an impound/escrow account with a deficit exceeding $15,000 (the price of the insurance). Washington Mutual then allegedly misapplied the Borrowers' principal

and interest payments to pay down the escrow account. The Borrowers alleged that when Chase acquired the loan, it exacerbated the problem by increasing the deficit in the impound/escrow account for the payment of property taxes that had already been paid. According to the Borrowers, this misallocation of principal and interest, first by Washington Mutual and then by Chase, created a "phantom default."

Three years later, borrowers filed an amended answer, including nine counterclaims. Borrowers set forth additional facts in a section entitled "Illegal Force–Placed Insurance Scheme." The allegations supporting those counterclaims were that Chase (1) purchased insurance at above-market premiums, (2) engaged in undisclosed commissions, and (3) received illegal kickbacks. Chase moved to dismiss all of the Borrowers' counterclaims with prejudice and the trial court granted the motion. Borrowers appealed the dismissal of their counterclaims.

Recognizing that compulsory counterclaims arise out of the "same aggregate of operative facts as the original claim," the Fourth DCA found that the Borrowers' counterclaims for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Unconscionability, Violation of the FCRCPA, Conspiracy to Violate the FCRCPA, Defamation per se, and Violation of the FCCPA were compulsory because each of the claims were "related to the mortgage, creation of the impound/escrow account, and the diverting of the Borrowers' principal and interest payments into that account which allegedly resulted in the phantom default

and improper acceleration of the debt." *Id*. at 961, Fn 2. As pled, each of those counterclaims bore a logical relationship to the foreclosure claim.

Conversely, the court held that the Borrowers' two counterclaims based on allegations that Chase's predecessor participated in a force-placed insurance ***scheme*** were permissive. The court held that the alleged illegal scheme constituted separate and distinct activity that did not arise out of the 'same aggregate of operative facts' as the acts giving rise to the foreclosure. The Fourth DCA held that because the counterclaims were permissive, they were subject to the statute of limitations, and therefore properly dismissed with prejudice by the trial court.

As in *4040 IBIS Circle,* Wichmann's counterclaim based on his allegation that Conrad & Scherer engaged in an illegal witness payment scheme bears no logical relationship to the original client grabbing action. Because the same operative facts do not serve as the basis for both claims, Counts I, II, and III of Wichmann's counterclaim are permissive.

Wichmann, however, contends that Counts I –III of his Counterclaim are compulsory. He is incorrect for two reasons. First, the alleged witness payment scheme does not absolve Wichmann of his failure to follow the procedures set forth in the Bar Rules prior to walking out with over 200 Conrad & Scherer files. Nor does it provide legal justification for his breach of the Partnership Agreement. Simply put, the alleged witness payment scheme is not a defense to the original

action, and Wichmann's counterclaims based on this allegation are not compulsory.

Second, Wichmann's contention is based on a false premise. Wichmann states that "Conrad & Scherer's claims against Wichmann stem in large part on (*sic*) the allegations that Wichmann "stole" clients from the firm….it is these ***exact same cases*** in which Wichmann alleged Conrad & Scherer was engaged in fraudulent and illegal conduct[.]" I.B. 26. (emphasis supplied) This is incorrect. The alleged witness payment scheme involves the Drummond and Dole cases. The original claim is based on Wichmann's conversion of 140 *Engle* progeny tobacco cases, and his conspiracy with Mike FitzGerald, to cut Conrad & Scherer out of its share of the attorneys' fees. While Wichmann also converted the Chiquita Banana cases, there is no allegation that the witness payment scheme included the Chiquita cases. Wichmann's assertion that the original case and Counterclaim involve the "exact same cases" is simply false.

**2. <u>Counts IV & V.</u>**

In Wichmann's remaining counts, he bring claims for intentional interference with a business relationship (Count IV) and conspiracy to commit intentional interference with a business relationship. These two claims are based on Wichmann's allegation that, after accepting a position with the now defunct law firm of Rothstein, Rosenfeld and Adler, Bill Scherer "contacted RRA senior partner Scott Rothstein and persuaded him to revoke the offer of employment[.]" [Answer to Fifth

Amended Complaint and Counterclaim for Damages, ¶¶ 51] Again, the operative facts supporting Counts IV and V of Wichmann's Counterclaim do not arises out of the same aggregate of operative facts as the client grabbing action. Bill Scherer's alleged interference with Wichmann's business relationship with the RRA law firm occurred ***after*** he left Conrad & Scherer, and is a separate and distinct claim bearing no logical relationship to the original claim.

A case styled *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 206 (Fla. 4th DCA 2002) is on point. In *Callaway*, Banyon sued Callaway alleging that Callaway improperly cancelled an option agreement under which Banyon had the right to purchase certain parcels of land. Callaway filed a counterclaim for disparagement of title alleging that Banyon engaged in conduct designed to prevent Callaway from selling the previously optioned property. Recognizing that the nefarious conduct alleged in the counterclaim occurred ***after*** the conduct giving rise to the original claim, the Fourth District stated that:

> **While Banyon's complaint focuses on the breach of the agreement, Callaway's counterclaim focuses on Banyon's actions *after* the alleged breach. The counterclaim is based on allegations that Banyon maliciously and unlawfully undertook actions to cloud the title to Callaway's property in order to prevent its disposition[.]**

[e.s.] The Fourth DCA therefore held that Callaway's counterclaim was permissive.

As in *Callaway*, the alleged conduct giving rise to Counts IV and V occurred

after Wichmann improperly left the firm with 200 of Conrad & Scherer's files and is completely unrelated to the original claim. Because the same operative facts do not serve as the basis for both claims, Counts IV and V of Wichmann's counterclaim are permissive.

### *B. Wichmann's permissive counterclaims are barred by the statute of limitations.*

Wichmann contends that he became aware of the allegedly improper behavior giving rise to his Counterclaim in 2007 and 2008. ***More than seven years*** have transpired between the time he became aware of the allegedly improper conduct and the filing of his Counterclaim. Wichmann's permissive counterclaim is time barred.

Permissive counterclaims are subject to the statute of limitations. *Smith v. Florida Dept. of Corr.*, 27 So. 3d 124, 126 (1st DCA 2010). As this Court has made clear, a motion to dismiss is properly granted when the facts "affirmatively appear[ing] on the face of the complaint... establish conclusively that the statute of limitations bars the action as a matter of law." *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th DCA 2008) (quoting *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007)). Wichmann's claims are governed by the following limitation periods:

- **Count I – Breach of Fiduciary Duty: 4 years.** § 95.11(3)(o); *Patten v. Winderman*, 965 So. 2d 1222, 1224 (Fla. 4th DCA 2007);
- **Count II – Fraud by Concealment: 4 years.** § 95.11(3)(j); *Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013);

- **County III - Breach of Contract: 5 years.** § 95.11(2)(b); *Tech. Packaging, Inc. v. Hanchett*, 992 So. 2d 309, 315 (Fla. 2d DCA 2008);

- **Count IV – Intentional Interference with Business Relationship: 4 years.** § 95.11(3)(o); *Taplin v. Taplin*, 88 So. 3d 344 (Fla. 3d DCA 2012);

- **Count V – Conspiracy to Commit Intentional Interference with Business Relationship: 4 years.** § 95.11(3); *Young v. Ball*, 835 So. 2d 385, 386 (Fla. 2d DCA 2003).

Permissive counterclaims are subject to the statute of limitations because the rationale for disregarding such limitations for compulsory counterclaims simply does not apply. *Allie v. Ionata*, 503 So. 2d 1237, 1240 (Fla. 1987).[3]

The basis of Counts I, II and III of Wichmann's Counterclaim is the alleged witness payment scheme. Wichmann alleges he became aware of the scheme in 2008. (R. 813) As to Counts IV and V, Wichmann alleges that the interference with his offer from the RRA law firm occurred in 2009. (R. 814-818)

Wichmann did not raise his claims until April, 2016, over seven years after becoming aware of the actions upon which his Counterclaim is based. (R. 788-877)

Wichmann's claims all have a four or five year statute of limitations. § 95.11, Fla. Stat. The face of the Counterclaim conclusively establishes that the statute of

[3] In *Allie*, the court recognized: (1) the policy behind the statute of limitations (to protect defendants against lost evidence, facts that have become obscure from the lapse of time, etc.) is inapplicable to compulsory counterclaims because it is essentially a defense to the main action; and (2) that this rational does not apply to permissive counterclaims.

limitations bars the action as a matter of law. See *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (4th DCA 2008). Because his claims are time barred, the trial court properly dismissed Wichmann's permissive Counterclaim with prejudice.

## IV. WICHMANN'S SECOND POINT ON APPEAL IS MOOT.

The arguments set forth in Wichmann's second point on appeal were raised below as an alternative basis for dismissal in the event the trial court found the Counterclaim to be compulsory. As previously stated, if any of the counts are determined to be compulsory, the appeal must be dismissed for lack of jurisdiction as to those counts. *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 959 (Fla. 4th DCA 2016). Therefore, the arguments set forth in Wichmann's second point on appeal are moot and do not warrant a response.

## V. CONCLUSION.

Based on the foregoing, Wichmann's Counterclaim is permissive and therefore barred by the statute of limitations.

WHEREFORE Appellee, CONRAD & SCHERER, LLP, respectfully request that the trial court's order be affirmed. Alternatively, if this court determines that any of the counts contained in the Counterclaim are compulsory, Appellee respectfully requests that the Appeal be dismissed as to those counts.

## CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the type and style used in this brief is 14 point Times New Roman.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Mail to all counsel on the attached Service List on this 24th day of May, 2017.


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