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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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**Arlene Durham**

**v.**

**Louis Cohen**

**Appeal from Elmore Circuit Court  
(CV-17-57)**

THOMPSON, Presiding Judge.

On December 29, 2016, Louis Cohen filed a complaint in the Elmore District Court ("the district court") against Arlene Durham, seeking to recover damages for a fence damaged by fire in March 2015. Cohen had constructed the fence

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between the parties' properties. He alleged that Durham had caused the fire. Durham answered and denied liability. Durham later moved to dismiss the complaint or, in the alternative, for a more definite statement of Cohen's claims. The district court did not rule on Durham's motion, and, instead, it scheduled the matter for trial. Thereafter, Durham amended her answer to the complaint.

The district court conducted an ore tenus hearing. On July 20, 2017, the district court entered a judgment finding that Cohen's fence had been damaged as a result of Durham's reckless conduct and awarding Cohen \$6,630 in damages.

On August 1, 2017, Durham filed an appeal in the Elmore Circuit Court ("the trial court") from the district court's July 20, 2017, judgment; in her appeal, Durham requested a trial by jury. See § 12-12-71, Ala. Code 1975 ("[A]ll appeals from final judgments of the district court shall be to the circuit court for trial de novo," and "[a]n appellant shall not be entitled to a jury trial in circuit court unless it is demanded in the notice of appeal ...."). On August 23, 2017, Durham also filed in the trial court a counterclaim against Cohen. In that counterclaim, Durham alleged that the parties

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had been involved in a previous litigation that had been settled in December 2014. Durham alleged that, since that settlement, Cohen had taken actions against Durham, and, based on those actions, she asserted claims of malicious prosecution, conversion or theft, and the tort of outrage or stalking. Among other things, Durham alleged that Cohen had made false allegations related to the March 2015 fence fire that was the subject of the district-court action and that those allegations had resulted in her being arrested and criminally charged in connection with the fire. In her counterclaim, Durham sought awards of compensatory and punitive damages.

On August 30, 2017, Cohen, proceeding pro se, filed a motion pursuant to Rule 12(b)(6), Ala. R. Civ. P., seeking to dismiss the August 23, 2017, counterclaim, alleging that Durham's allegations in her counterclaim were false. The trial court conducted a hearing on the motion to dismiss. On September 27, 2017, the trial court entered an order dismissing Durham's counterclaim without stating a reason for doing so; no transcript of that hearing is contained in the record on appeal.

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Durham later sought orders requiring the production of certain discovery, and the trial court denied those requests.

The trial court conducted a jury trial on Cohen's claims against Durham. The jury returned a verdict in favor of Cohen and awarded him \$2,750 in damages. On June 18, 2018, the trial court entered a judgment on the jury's verdict. Both parties filed postjudgment motions, and the trial court denied those motions. Durham timely appealed.

Durham first argues that the trial court erred in dismissing her counterclaim. The applicable standard of review for a Rule 12(b)(6), Ala. R. Civ. P., dismissal is as follows:

"On appeal, a dismissal is not entitled to a presumption of correctness. Jones v. Lee County Commission, 394 So. 2d 928, 930 (Ala. 1981); Allen v. Johnny Baker Hauling, Inc., 545 So. 2d 771, 772 (Ala. Civ. App. 1989). The appropriate standard of review under Rule 12(b)(6) [, Ala. R. Civ. P.,] is whether, when the allegations of the complaint [(or counterclaim)] are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff [(or counterclaimant)] will ultimately prevail, but only whether she may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v.

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United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff [(or counterclaimant)] can prove no set of facts in support of the claim that would entitle [her] to relief. Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986)."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). See also Hightower & Co. v. United States Fid. & Guar. Co., 527 So. 2d 698, 702 (Ala. 1988) ("When the trial court is called upon to consider a Rule 12(b)(6) motion, it must examine the allegations in the complaint, or, as in the instant case, the counterclaim, and construe it so as to 'resolve all doubts concerning [its] sufficiency in favor of the [claimant].' In so doing, the court does not consider whether the claimant will ultimately prevail, only whether he has stated a claim under which he may possibly prevail.").

Rule 13, Ala. R. Civ. P., governs the assertion of counterclaims and cross-claims, and, with regard to counterclaims asserted in a circuit court on appeal of a district-court judgment, it provides:

"(j) Appealed Actions. Where an action is commenced in a court from which an appeal lies to the circuit court for a trial de novo any counterclaim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the

pleading within thirty (30) days after the appeal has been perfected to the circuit court or within such further time as the court may allow; and other counterclaims and cross-claims shall be permitted as in an original action. When a counterclaim or cross-claim is asserted by a defendant in an appealed case, the defendant shall not be limited in amount to the jurisdiction of the lower court but shall be permitted to claim and recover the full amount of its claim irrespective of the jurisdiction of the lower court. If the plaintiff appeals a case to the circuit court from a lower court and obtains a trial de novo in the circuit court, the plaintiff shall be limited in the amount of his recovery to the jurisdictional amount that could have been claimed and recovered in the lower court, unless the defendant asserts a counterclaim in excess of the jurisdictional amount of the lower court. If a defendant appeals to the circuit court from a judgment rendered by a lower court, the plaintiff in the circuit court on a trial de novo shall be permitted to claim and recover the full amount of its claim even though the amount might exceed the jurisdiction of the lower court. For purposes of this Rule 13(j), the word 'appeal' includes petition for writ of certiorari.

"(dc) District Court Rule. Rule 13 applies in the district court except that, (1) Rule 13(a) is modified so as to excuse the pleader from asserting a compulsory counterclaim when the claim is beyond the jurisdiction of the district courts and, (2) Rule 13(j), Appealed Actions, is deleted."

(Emphasis added.)

In a case with facts similar to those of this case, this court discussed the application of Rule 13(j), Ala. R. Civ. P. In Brewer v. Bradley, 431 So. 2d 544 (Ala. Civ. App. 1983),

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Maudrean Bradley sued Waylon Brewer in the district court, seeking to recover past-due rent. In the district court, Brewer announced his intention to assert counterclaims in excess of the jurisdictional limits of the district court, and the district court entered a judgment in favor of Bradley on her claims. Brewer appealed that district-court judgment to the circuit court; in addition, he filed counterclaims alleging conversion and seeking an order awarding him possession of certain personal property. Bradley moved to strike Brewer's counterclaims, and the circuit court granted that motion. The circuit court later entered a judgment on a jury verdict in favor of Bradley on her claims. Brewer v. Bradley, 431 So. 2d at 545. On appeal, this court reversed the judgment, concluding that the circuit court had erred in striking Brewer's counterclaims. This court explained:

"A party is not required to file a compulsory counterclaim in the district court if the claim exceeds the jurisdiction of that court. A permissive counterclaim need not be filed in the district court regardless of the amount which might be claimed therein, but, if the claim exceeds the jurisdictional limit of the district court, a permissive counterclaim could not be processed by that court.

". . . .

"After an appeal to the circuit court from the district court, either a compulsory counterclaim seeking an amount in excess of \$5,000, or a permissive counterclaim for any sum, may then be originally filed, asserted and claimed and recovery may be had for the full amount of the defendant's claim without consideration of the \$5,000 monetary jurisdictional limitation which is imposed upon the district court. Rule 13(j), A[1a]. R. Civ. P."<sup>1</sup>

Brewer v. Bradley, 431 So. 2d at 545-46.

Durham filed her counterclaim on August 23, 2017, i.e., within 30 days of her August 1, 2017, appeal to the circuit court of the district-court judgment, as is required by Rule 13(j). Among other things, Durham alleged that Cohen had maliciously caused her to be arrested in relation to the March 2015 fire and that the charge against her was "discharged"; that Cohen had attempted to convert her property by threats of criminal prosecution against her; and that Cohen's conduct had been intentional and outrageous so as to cause her extreme emotional distress. Thus, several of the allegations set forth in Durham's counterclaim pertained to the ongoing disputes between the parties as a result of the March 2015 fire, and those claims arise out of the same occurrence that

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<sup>1</sup>The jurisdiction of the district courts now encompasses actions in which the amount in controversy does not exceed \$10,000. § 12-12-30, Ala. Code 1975.



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gave rise to Cohen's claims, i.e., the March 2015 fire. Durham's counterclaims were compulsory claims properly and timely asserted under Rule 13(j), Ala. R. Civ. P. "Under Rule 13(a), Ala. R. Civ. P., a counterclaim is compulsory 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.'" Gerelds v. Raleigh Villas Apartments, 710 So. 2d 926, 927 (Ala. Civ. App. 1998); see also Committee Comments on 1973 Adoption of Rule 13 ("A counterclaim is compulsory if there is any logical relation of any sort between the original claim and the counterclaim."). Under Rule 13(j), such counterclaims may be asserted in Durham's appeal to the circuit court. Brewer v. Bradley, supra.

Further, Durham's counterclaims contain allegations that, if later proved to be true, could entitle her to relief. Nance v. Matthews, 622 So. 2d at 299. We make no determination whether Durham can prevail on her claims. American Auto. Ins. Co. v. McDonald, 812 So. 2d 309, 311 (Ala. 2001) ("In our review, we need not determine whether the plaintiff will ultimately prevail, only whether he has stated a claim on which he may possibly prevail."). Because Durham

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has asserted counterclaims that might entitle her to relief if proven, we conclude that the trial court erred in granting the Rule 12(b)(6) motion to dismiss those counterclaims.

We further conclude that, because the claims and the counterclaims in this case are interrelated, the trial court erred in trying the action solely on Cohen's claims and, therefore, that its June 18, 2018, judgment should be reversed and the matter remanded for a new trial on all the parties' claims.

In Redmond v. Harrelson, 355 So. 2d 356 (Ala. 1978), Lowell Harrelson sued the Thomas Redmond and Ruth Ann Redmond on a \$50,000 promissory note. The parties had executed four separate contracts related to the Redmonds' purchase of a franchised motel. One of those contracts provided that Harrelson would indemnify Thomas Redmond for obligations pertaining to the motel that arose before the date those contracts were executed. After the execution of the documents, Thomas Redmond learned that Harrelson owed the franchise owner \$15,000, and that delinquency prevented Thomas Redmond from obtaining the financing necessary to purchase the motel. The Redmonds asserted a counterclaim, which the trial

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court struck the day before the jury trial, stating that the Redmonds could assert their claims in a separate action. The trial court entered a judgment on a jury verdict in favor of Harrelson. On appeal, our supreme court reversed. In pertinent part, the court explained:

"A counterclaim, such as the one involved in the present appeal, which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim is compulsory and must be asserted in the pending case. Ala. R. Civ. P. 13(a).

"It is of further importance that the Redmonds' counterclaim raised the same issues as did their affirmative defense of failure of consideration. Certain facts crucial to the issues raised in the counterclaim were therefore determined in the primary suit. Thus, in spite of the stipulation to the contrary, the trial court's action effectively barred subsequent litigation on the claim for breach of the Agreement because of the doctrine of collateral estoppel. Ala. R. Civ. P. 13(a) and Committee Comments. See also 6 Wright & Miller, Federal Practice and Procedure: Civil § 1410 (1971)."

Redmond v. Harrelson, 355 So. 2d at 358 (emphasis added). In that case, because the claim and the counterclaim were interrelated, the supreme court reversed the judgment and remanded the action for a new trial. Id.

In Ex parte Fletcher, 429 SO. 2d 1041 (Ala. 1982), Public Finance Company of Alabama, the lender, sought to recover on

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an unpaid note, i.e., a contract. Willie Fletcher, the defendant, asserted a counterclaim alleging a violation of the federal Truth in Lending Act ("TILA"). In the trial court, the lender admitted the violation of TILA, but it alleged that the applicable one-year statute of limitations barred Fletcher's counterclaim. The trial court entered a judgment in favor of the lender on its claim under the note but denied Fletcher's counterclaim. This court affirmed. Fletcher v. Public Fin. Co. of Alabama, 429 So. 2d 1039 (Ala. Civ. App. 1981). Our supreme court reversed this court's judgment. In doing so, the supreme court overruled a number of previous cases to conclude that a counterclaim asserted under TILA was a compulsory counterclaim that related back, under Rule 13, Ala. R. Civ. P., to the time the lender's claim arose. Ex parte Fletcher, 429 So. 2d at 1044. On remand, this court issued an opinion containing only one sentence and no analysis. This court ordered the cause remanded for "a new trial ... of said counterclaim and any other action deemed by the court to be appropriate in the case." Fletcher v. Public Fin. Co. of Alabama, 429 So. 2d 1046, 1046 (Ala. Civ. App. 1983) (emphasis added). At that time, a violation of TILA

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could render a contract void under Alabama law. See the version of § 5-18-15(h), Ala. Code 1975, in effect when the Fletcher decisions were issued; Trustees Loan & Disc. Co. v. Carswell, 435 So. 2d 114, 116 (Ala. Civ. App. 1983). The appellate-court opinions in the Fletcher appeals did not address any argument regarding whether the contract evidencing the debt might be rendered void. However, by this court's referencing "any other action deemed by the court to be appropriate in the case" in its remand instructions, it appears that this court was not limiting the trial court to considering only the counterclaim on remand.

In this case, as in Redmond v. Harrelson, supra, the operative facts underlying some of Durham's counterclaims are the same as those upon which Durham's liability was decided. For example, the evidence regarding the circumstances and cause of the fire pertains to Durham's counterclaim that Cohen maliciously prosecuted her by stating to law enforcement that she had intentionally set the fire. Durham's counterclaim alleging a pattern of harassment and threats by Cohen and Cohen's claims of misconduct by Durham are interrelated and pertain to Durham's allegation that Cohen made false

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allegations in having her arrested. Moreover, the jury's consideration of those counterclaims and the allegations of a pattern of harassment and threats could have allowed it to view either party's actions differently or impacted its determination of the credibility and motivations of the parties. The function of the jury is to serve as the trier of fact, and a part of that role is to assess the credibility of witnesses. McCombs v. Bruno's, Inc., 667 So. 2d 710, 713 (Ala. 1995); Bell v. Greer, 853 So. 2d 1015, 1018 (Ala. Civ. App. 2003).

Further, the failure to allow Durham to assert her counterclaims in the same action and trial as Cohen's claims, which are based on the same evidence, would operate to preclude those claims from being prosecuted effectively on remand. Rule 13(a), Ala. R. Civ. P. ("In the event an otherwise compulsory counterclaim is not asserted in reliance upon any exception stated in paragraph (a), relitigation of the claim may be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim."); Redmond v. Harrelson, 355 So. 2d at 358

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("Certain facts crucial to the issues raised in the counterclaim were therefore determined in the primary suit. Thus, in spite of the stipulation to the contrary, the trial court's action [in dismissing the counterclaim] effectively barred subsequent litigation on the claim for breach of the Agreement because of the doctrine of collateral estoppel."); and Owens v. Owens, 31 So. 3d 722, 728 (Ala. Civ. App. 2009) (holding that a litigant's failure to assert a compulsory counterclaim in an earlier action barred his asserting that claim in a later action).

Durham was entitled to have the same jury that decided Cohen's claims also determine her counterclaims that are based on substantially the same evidence. "Where the evidence to be submitted on plaintiff's cause of action is the same as, or is interrelated with, the evidence on the counterclaim, it is appropriate to try the claims together." Yost v. American Nat'l Bank, 570 So. 2d 350, 352-53 (Fla. Dist. Ct. App. 1990).

Further, our supreme court has explained:

"The purpose of Rule 13[, Ala. R. Civ. P.,] 'is to avoid circuity of actions and to enable the court to settle all related claims in one action and thereby avoid a wasteful multiplicity of litigation on claims that arose from a single transaction or occurrence.' Grow Group, Inc. v. Industrial

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Corrosion Control, Inc., 601 So. 2d 934, 936 (Ala. 1992), citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1409 (2d ed. 1990)."

Ex parte Cincinnati Ins. Cos., 806 So. 2d 376, 379 (Ala. 2001).

Allowing the original judgment to stand while ordering a trial on only the counterclaims would result in an improper severing of the actions. Such an instruction could result in the counterclaims being barred by the doctrines of res judicata or collateral estoppel and could result in inconsistent verdicts on the parties' competing claims.

"There is no shorthand solution to avoid repugnant and inconsistent verdicts in the ever-increasing multiplicity of claims, cross-claims, and counterclaims. Our inquiry is limited only to pointing out the potential problems so that, where a problem becomes apparent, litigants and trial courts may fashion a solution to avoid needless trials and the attendant costs, delays, and expenditure of judicial effort."

Travelers Express, Inc. v. Acosta, 397 So. 2d 733, 738 (Fla. Dist. Ct. App. 1981).

Given the foregoing, we conclude that the underlying facts of the claims and counterclaims in this case are intertwined and that the claims and counterclaims should be tried together before a jury; therefore, we reverse the entire



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judgment. Redmond v. Harrelson, supra. We reverse the judgment and remand the cause to the trial court for a new trial. Given our holding, we pretermit discussion of the remaining issues raised by Durham.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Donaldson and Hanson, JJ., concur.

Edwards, J., concurs in the result, without writing.

Moore, J., concurs in part and dissents in part, with writing.

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MOORE, Judge, concurring in part and dissenting in part.

I agree that Arlene Durham properly filed her counterclaim against Louis Cohen in the Elmore Circuit Court ("the circuit court") on appeal from the judgment of the Elmore District Court. In her counterclaim, Durham asserted that Cohen had committed acts of malicious prosecution and outrageous conduct by filing criminal charges against Durham for allegedly starting a fence fire on March 29, 2015, and that Cohen, after December 2017, had also committed various acts of conversion, trespass, invasion of privacy, and malicious prosecution. Regardless of whether the counterclaim is considered compulsory or permissive in nature, the circuit court erroneously dismissed the counterclaim, which, as the main opinion explains, was properly filed in the circuit court and stated valid causes of action.

Using the reasoning that compulsory counterclaims should be tried together with the claims asserted in a complaint, the main opinion reverses the judgment entered by the circuit court in favor of Cohen and orders a new trial on the claims asserted by Cohen in the complaint and on the claims asserted in the counterclaim by Durham. I could not locate any Alabama

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appellate-court opinion that reversed a judgment favorable to the appellee on the basis that the trial court had erroneously dismissed a counterclaim asserted by the appellant in the underlying civil action.<sup>2</sup> The Alabama caselaw I have discovered does not support that disposition.

In Romar Development Co. v. Gulf View Management Corp., 644 So. 2d 462 (Ala. 1994), our supreme court affirmed a judgment entered by the trial court in favor of Gulf View Management Corporation on its action against Romar Development Company seeking a declaratory judgment, but the court reversed the judgment insofar as the trial court had dismissed a compulsory counterclaim asserted by Romar Development. The supreme court did not order a new trial of the entire case, but only on the claims raised in the counterclaim. In Ex parte Fletcher, 429 So. 2d 1041 (Ala. 1982), our supreme court reversed the judgment of this court in which we affirmed a

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<sup>2</sup>I also could not locate any authoritative caselaw from any other jurisdiction reversing a judgment and remanding the cause for a new trial of all the claims and counterclaims asserted based solely on an error by the trial court in dismissing a counterclaim. The only case I could find disposing of an appeal in this manner, Wohlfahrt v. Holloway, No. 01-99-00205-CV, Feb. 1, 2001 (Tex. Ct. App. 2001), is an unpublished opinion with no precedential value.

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money judgment in favor of a lender and the dismissal of a counterclaim. The supreme court reasoned that the trial court had erroneously dismissed the counterclaim, which it determined was a compulsory counterclaim that had been timely filed. On remand from the supreme court, this court instructed the trial court as follows:

"In accord with the mandate and direction of the Supreme Court of Alabama ordered in its decision of October 29, 1982, 429 So. 2d 1041 (motion for clarification denied February 11, 1983), the judgment of the Circuit Court of Madison County, Alabama, denying the counterclaim of defendant Willie D. Fletcher because of the running of the statute of limitations is hereby reversed and set aside, 429 So. 2d 1039, and a new trial is directed of said counterclaim and any other action deemed by the court to be appropriate in the case."

Fletcher v. Public Fin. Co. of Alabama, 429 So. 2d 1046, 1046 (Ala. Civ. App. 1983) (emphasis added). Notably, this court did not order the trial court to vacate the money judgment entered in favor of the lender and to retry the entire case.

The appellate courts did not explain in either case why they remanded for a new trial on only the counterclaim. In Romar Development Co., the supreme court analyzed the arguments made by Romar Development against a judgment declaring an easement in favor of Gulf View Management. The

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court determined that Gulf View Management had obtained the easement by contract and, after modifying the description of the easement, affirmed the declaratory judgment. The supreme court then separately addressed that aspect of the judgment dismissing the counterclaim, concluding that the trial court had erroneously dismissed that counterclaim based on a mistaken application of the statute of limitations. In Ex parte Fletcher, the borrower appealed a money judgment that had been entered in favor of the lender, solely on the issue whether the trial court had erred in dismissing the counterclaim. On appeal, this court affirmed the judgment, holding that the counterclaim had been correctly dismissed as untimely. See Fletcher v. Public Fin. Co. of Alabama, 429 So. 2d 1039 (Ala. Civ. App. 1981). On certiorari review in Ex parte Fletcher, our supreme court reversed this court's decision solely on the basis that the counterclaim had been filed timely. This court and the supreme court did not discuss the validity of the money judgment entered by the trial court because, apparently, that issue was not raised at any point in the appellate proceedings.

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As I read those cases, if a trial court does not commit reversible error in entering a judgment on a claim asserted by the plaintiff in a complaint, but errs to reversal in dismissing a counterclaim asserted by the defendant in the action, the appropriate remedy on appeal by the defendant/appellant is to reverse the judgment of dismissal as to the counterclaim and remand the cause for a new trial solely on the counterclaim. Remanding the cause for a new trial on all the claims and counterclaims would be warranted only if the trial court committed reversible error in entering a judgment in favor of the plaintiff/appellee on his or her claims. For example, in Redmond v. Harrelson, 355 So. 2d 356 (Ala. 1978), the holder of a promissory note filed a civil action for damages based on nonpayment of the note. The obligors asserted a failure of consideration for the note and counterclaimed alleging breach of a separate contract between the parties. The trial court in that case struck the counterclaim and entered a judgment in favor of the note holder. Our supreme court determined that the trial court had erred in excluding testimony supporting the failure-of-consideration defense and that the trial court had also erred

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in striking the counterclaim, which it determined was compulsory in nature. Accordingly, the supreme court reversed the judgment and remanded the cause for a new trial on both the claims asserted by the note holder and the counterclaims asserted by the obligors.

In this case, the circuit court entered a money judgment in favor of Cohen on his claim that Durham had recklessly set fire to his fence. Durham argues that the money judgment should be reversed because of various procedural errors committed by the circuit court. The main opinion does not address those points of error, but reverses the money judgment solely on the basis that the circuit court erred in dismissing the counterclaim asserted by Durham. In light of the foregoing caselaw, I do not believe that the main opinion correctly disposes of this appeal. I believe the appropriate action would be to address the points of error directed at the money judgment to determine whether the money judgment should be reversed. If it is determined that the money judgment should be reversed, then the remand instructions in the main opinion would be correct; however, if it is determined that the money judgment should be affirmed, then the judgment

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should be reversed only insofar as it dismisses the counterclaim asserted by Durham and the cause remanded for a new trial solely on the counterclaim.

In reaching that conclusion, I do not disagree with the general principle that a compulsory counterclaim ordinarily should be tried together with the complaint in the same action. I also recognize that a compulsory counterclaim cannot be raised in a subsequent action. However, when a trial court erroneously strikes or dismisses a counterclaim, preventing a consolidated trial on the complaint and the counterclaim in the same civil action, I do not see how that error alone gives the defendant a right to a second opportunity to try the complaint. Any concern that the counterclaim would be barred in a subsequent action would be remedied by a remand for a trial on the counterclaim in the same action. I believe that, unless exceptional circumstances exist, it would be improper to further require a new trial on the claims in the complaint that have already been adjudicated.

In summary, although I agree that the circuit court erred in dismissing the counterclaim asserted by Durham, I do not



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agree that the judgment should be reversed in its entirety without a determination that the circuit court committed reversible error in entering the money judgment in favor of Cohen, as argued by Durham. Therefore, I dissent insofar as the main opinion reverses the circuit court's judgment in its entirety and remands the cause for a new trial of the complaint and the counterclaim.