IN THE SUPREME COURT OF FLORIDA

CORAL RIDGE PROPERTIES, INC.
and WESTINGHOUSE ELECTRIC
CORPORATION,

Petitioners,

vs.

CASE NO. 68,477

PLAYA DEL MAR ASSOCIATION, INC.,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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I.

CORRECTION OF PETITIONER'S STATEMENT OF THE CASE

The only issue before this Court is whether a defending party may have summary judgment granted in its favor upon the grounds of a written "release" without ever filing an Affirmative Defense of Release and where the trial court does not allow the non-movant party to conduct discovery intended to disprove the validity of that "unpleaded" Affirmative Defense of Release.

The remainder of Petitioner's statement of The Case is essentially correct, but for enumerated Paragraph (5) on page 3. Rather, a single decision was rendered in which the Fourth District Court of Appeal held that "it was error to enter judgment based upon 'release' when that Affirmative Defense had never been asserted in a pleading." See Appendix I (Fourth District Court of Appeal Opinion).

II.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE FACTS

RESPONDENT filed the instant Complaint against FLORIDA POWER & LIGHT COMPANY and CORAL RIDGE PROPERTIES, INC.

(hereafter referred to as "PETITIONER"), as a result of a fire that occurred on August 31, 1982 in the "vault room" of the Playa Del Mar Condominium. R. 1-20. The Playa Del Mar Condominium is a 29-story building containing 370 units plus appurtenances, common facilities and elements for the use of all the members of the Association. PETITIONER, as developer, constructed the Playa Del Mar Condominium and supervised the marketing of the sale of the individual units. R.1-20.

On December 6, 1983 RESPONDENT filed the instant Complaint against FLORIDA POWER & LIGHT COMPANY and PETITIONER. On January 12, 1984 PETITIONER filed with the lower Court and served upon RESPONDENT a Motion to Dismiss the Complaint. R. 27-29. No party ever scheduled a hearing upon PETITIONER's Motion to Dismiss and, of course, the lower Court never ruled upon such Motion.

On February 3, 1984 PETITIONER filed with the Court and served upon RESPONDENT its Motion for Summary Judgment and stated in support of such Motion "that on December 15, 1982, the Plaintiff [RESPONDENT] in this action, PLAYA DEL MAR ASSOCIATION, INC., executed a Release in favor of this Defendant [PETITIONER], said Release releasing all claims which the PLAYA DEL MAR ASSOCIATION, INC.. may have against this Defendant arising out of the alleged defective construction of the Playa Del Mar Condominium." R. 30-31. Simultaneously, PETITIONER served a Notice of Hearing upon its Motion for Summary Judgment for March 1, 1984. The hearing was

rescheduled for March 27, 1984. The Release upon which PETITIONER relied was the culmination of a claim that arose before the fire damage of August, 1982.

On March 12, 1984 RESPONDENT filed the Affidavit of Mr. Benjamin H. Sperling, in his capacity as the administrator for the PLAYA DEL MAR ASSOCIATION, INC. [RESPONDENT]. On March 16, 1984 RESPONDENT filed Sworn Statements of Mr. Benjamin Sperling and Mr. David R. MacKenzie in opposition to PETITIONER's Motion for Summary Judgment. R. 39-94. On March 22, 1984, RESPONDENT filed Sworn Statements of Mr. Irving Hoffman and Mr. Raymond Srebnik in opposition to PETITIONER's Motion for Summary Judgment. PETITIONER then cancelled its hearing on the Motion for Summary Judgment. PETITIONER then deposed Mr. MacKenzie, the transcripts of which were filed with the lower Court by RESPONDENT in opposition to PETITIONER's Motion for Summary Judgment. R. 183-209.

Likewise, RESPONDENT noticed the deposition of Richard G. Gordon and William Blyer for June 14, 1984. Mr. Gordon and Mr. Blyer had previously represented PETITIONER in the litigation instituted before the fire of August 1982 that resulted in the Release upon which PETITIONER based its Motion for Summary Judgment.

Although PETITIONER had already taken the deposition of Mr. MacKenzie and its Motion for Summary Judgment was still pending, PETITIONER moved for a Protective Order preventing RESPONDENT from taking the depositions of Mr. Gordon and Mr.

Blyer based upon the argument that such discovery was precluded by the attorney-client privilege, the work product protection, and because such discovery did not relate to any evidence or issues asserted by PETITIONER. R. 118-119. (emphasis supplied).

On July 11, 1984 at the hearing on PETITIONER's Motion for Protective Order, RESPONDENT argued that the depositions of Mr. Gordon and Mr. Blyer were clearly within the bounds of discovery and absolutely necessary for RESPONDENT to properly respond to PETITIONER's Motion for Summary Judgment. R. 167-178. Mr. Gordon and Mr. Blyer had personal knowledge of the settlement transactions and negotiations that gave rise to the Release upon which PETITIONER based its Motion for Summary Judgment. In fact, these attorneys actually drafted such Release. RESPONDENT argued to the lower Court that the depositions of Mr. Gordon and Mr. Blyer may actually reveal a mutual mistake in the drafting of that Release insofar as it might affect the litigation involving the August 1982 fire. PETITIONER argued that the status of the present litigation did not require such depositions and to conduct such depositions at that time would simply be premature. R. 167-178. (emphasis supplied).

The trial Court granted the Motion for Protective Order but indicated that such depositions may in fact be taken if the potential testimony of Mr. Gordon and Mr. Blyer becomes relevant, especially with respect to any motion for summary judgment. The trial Court stated:

> Well, what I am inclined to do, go ahead and grant the Motion for Protective Order. And if any issue comes up or anybody's unduly prejudiced or placed at a disadvantage at the time of summary judgment, I think the end of justice [sic] it requires that the deposition is [sic] taken if there is relevancy or materiality. If not, there is a difference ... so pending the hearing on Motion for Summary Judgment, I'm going to go ahead and grant the Motion.

R. 177-178.

Subsequently, on July 20, 1984 PETITIONER filed another Motion for Summary Judgment upon the basis of the aforementioned Release. R. 123-125. On August 3, 1984 PETITONER filed an Amendment to Motion for Summary Judgment. R. 163-165. On August 3, 1984 PETITIONER filed with the lower Court and served upon RESPONDENT a Notice of Hearing upon its Motion for Summary Judgment, scheduled for September 5, 1984. RESPONDENT filed and served its "Memorandum of Law in Opposition to CORAL RIDGE's [PETITIONER's] Motion for Summary Judgment" after which PETITIONER filed its "Memorandum in Support of Motion for Summary Judgment." R. 183-209 and R. 258-264, respectively.

On September 15, 1984 PETITIONER argued that the Release entered on December 15, 1982 between PETITIONER and RESPONDENT barred the instant causes of action against PETITIONER. The Release states in pertinent part:

> First Party [RESPONDENT] ... hereby remise, release, acquit, satisfy and forever discharge the said Second Party [PETITIONER] from all past, present and future claims, demands and causes of action arising from

> alleged defective construction of the Playa del Mar excepting those of compliance with and performance of any obligation and duty arising out of the terms of the Settlement Agreement entered into by and between said parties, as a full and final compromise and settlement of all matters arising out of the lawsuit filed in the Seventeenth Judicial Circuit, In and For Broward County, Florida ... .

See Appendix "II" (Release).

The applicable Settlement Agreement provides in pertinent part:

> WHEREAS, the parties have reached a compromise and settlement of all such claims, and the parties desire to effect a full and final compromise and settlement of all matters and all causes of action arising out of the allegations set forth in said lawsuit, as well as all causes of action arising out of the construction and the sale of the PLAYA DEL MAR by CORAL RIDGE [PETITIONER] except as to any obligations or duties arising under this Settlement Agreement.

See Appendix "III" (Settlement Agreement).

Furthermore, PETITIONER argued that the dismissal with prejudice of the prior litigation entered on May 29, 1984 acts as res judicata to the instant case and bars any further litigation by RESPONDENT against PETITIONER.

In opposition to PETITIONER's Motion for Summary Judgment, RESPONDENT argued before the trial Court the following:

> 1. The Release and Settlement pursuant to the previous litigation included unintended language that was the product of a mutual

mistake thus creating a genuine issue of material fact precluding summary judgment from being rendered in favor of CORAL RIDGE [PETITIONER].

2. The Release should be set aside because it was executed pursuant to a mistake as to a past or present fact, thus placing a genuine issue as to a material fact within the province of the jury and precluding resolution by the lower Court as a matter of law pursuant to CORAL RIDGE's [PETITIONER's] Motion for Summary Judgment.

3. The Release and Settlement are ambiguous as to the intent of the parties, lending themselves to more than one reasonable interpretation and thus presenting a genuine issue as to a material fact precluding the rendering of summary judgment against PLAYA [RESPONDENT].

4. PLAYA [RESPONDENT] was denied the opportunity to conduct discovery as related to the Settlement and Release and the intent of the parties pursuant to such. Thus the rendering of summary judgment against PLAYA [RESPONDENT] was premature and denied PLAYA [RESPONDENT] its rights to discovery.

5. PLAYA [RESPONDENT] did not have an opportunity to plead avoidances to CORAL RIDGE's [PETITIONER's] defenses of Release and res judicata because CORAL RIDGE [PETITIONER] never filed an answer or affirmative defenses but simply responded to the complaint by filing a Motion to Dismiss that was never ruled upon.

On January 14, 1985 the trial Court rendered Final Summary Judgment in favor of PETITIONER and against RESPONDENT. R. 257. In response to this holding, RESPONDENT appealed to the Fourth District Court of Appeal which reversed the lower Court. See Appendix "I" (Fourth District Court of Appeal Opinion). On July 7, 1986 this Court accepted jurisdiction and dispensed with oral argument.

III.

ISSUES

A. WHETHER IT IS ERROR TO ENTER SUMMARY JUDGMENT BASED UPON RELEASE AND RES JUDICATA WHEN SUCH AFFIRMATIVE DEFENSES HAVE NEVER BEEN ASSERTED IN A PLEADING.

B. WHETHER RESPONDENT WAS IMPROPERLY PRECLUDED FROM OBTAINING EVIDENCE IN SUPPORT OF ITS AVOIDANCE OF MUTUAL MISTAKE.

C. WHETHER MUTUAL MISTAKE IN THE DRAFTING OF THE RELEASE AND SETTLEMENT PRESENTS A GENUINE ISSUE OF MATERIAL FACT.

D. WHETHER THERE IS A GENUINE ISSUE OF MATERIAL FACT CONCERNING A MISTAKE OF FACT.

E. WHETHER THERE WAS A GENUINE ISSUE OF MATERIAL FACT CONCERNING THE MEANING OF THE RELEASE AND SETTLEMENT AGREEMENT.

F. WHETHER THE PRIOR LAWSUIT WAS RES JUDICATA.

IV.

SUMMARY OF ARGUMENT

A defendant cannot obtain summary judgment on Affirmative Defenses of Release and Res Judicata before pleading such Affirmative Defenses in response to the Complaint.

A plaintiff cannot be denied discovery of the intent of the defendant in entering into and preparing a Release and Settlement Agreement, if the plaintiff is attempting to avoid defendant's "Affirmative Defense" of Release on the basis of mutual mistake.

When a party has competent evidence of a mutual mistake in the drafting of a document, notwithstanding the opposing

party's denial of mutual mistake, such creates genuine issue of material fact to be determined by the trier of fact and not as a matter of law pursuant to a motion for summary judgment.

When a written release is raised as a defense to a claim, there is a genuine issue of material fact concerning the validity of that written release if there is competent evidence that a mutual mistake of fact existed when the release was drafted and agreed upon. This genuine issue of material fact would preclude the granting of summary judgment as a matter of law.

The written Release and Settlement Agreement upon which PETITIONER based its Motion for Summary Judgment contains within the four corners of the documents a genuine issue of material fact concerning the meaning of those documents, which would preclude the granting of summary judgment.

The prior case upon which PETITIONER relies in its defense of res judicata did not decide the issue of the cause of the fire and the amount of the resulting damages because the fire had not occurred. The instant causes of action brought for damage as a result of the fire are not identical and do not arise out of the same transactions as those in the prior lawsuit, and thus the defense of res judicata is invalid.

V.

ARGUMENT

A. WHETHER IT IS ERROR TO ENTER SUMMARY JUDGMENT BASED UPON RELEASE AND RES JUDICATA WHEN SUCH AFFIRMATIVE DEFENSES HAVE NEVER BEEN ASSERTED IN A PLEADING.

PETITIONER has gone to great pains to state the facts and phrase the issue in terms of whether a defendant may obtain summary judgment before the defendant has Answered the Complaint (e.g., p. 3 and p. 9 of PETITIONER's BRIEF ON THE MERITS). This was not the issue before the trial Court, this was not the issue before the Fourth District Court of Appeal, this was not the ruling of the Fourth District Court of Appeal (See Appendix "I"), and this is not the issue presently before this Court. The fundamental issue before this Court is whether "it was error to enter judgment based upon 'release' when that affirmative defense had never been asserted in a pleading."

The Fourth District Court of Appeal cited Rule 1.110(d) of the Florida Rules of Civil Procedure and the cases of Strahan Manufacturing Company v. Pike, 194 So. 2d 277 (Fla. 2nd DCA 1967) and Meigs v. Lear, 191 So. 2d 286 (Fla. 1st DCA 1966) in direct support of its holding that "it was error to enter judgment based upon 'release' when that affirmative defense had never been asserted in a pleading." (emphasis supplied). For additional support the Fourth District Court of Appeal cited the cases of Couchman v. Goodbody & Company, 231 So. 2d 842

(Fla. 4th DCA 1970) and Mills v. Dade County, 206 So. 2d 227 (Fla. 3rd DCA 1968).

Although PETITIONER's initial brief states that these cases "do not justify the [Fourth District Court of Appeal's] holding in any respect," PETITIONER fails to distinguish these cases from the present case and does not cite a single Florida case in contradiction to these cases which were cited by the Fourth District Court of Appeal in its opinion. See PETITIONER's BRIEF ON THE MERITS, p. 10.

PETITIONER does make an extremely weak attempt to distinguish Couchman v. Goodbody & Company from the present case. PETITIONER states that "Couchman dealt with a summary judgment entered in favor of Plaintiff against a defendant who had answered, although summary judgment was based on an affidavit filed by Plaintiff addressing issues beyond those actually set forth in the initial pleading, and no amendment of the pleadings was filed before Plaintiff sought summary judgment." PETITIONER cites page 844 of Couchman in support of this statement. Frankly, such statement does not exist in the published opinion of Couchman. Moreover, it was the Defendant that had filed an affidavit in opposition to Plaintiff's Motion for Summary Judgment, not the Plaintiff.

First, PETITIONER's presentation of the Couchman facts is erroneous. Second, PETITIONER fails to actually distinguish the Couchman rationale from the present case. PETITIONER does not even attempt to distinguish Rule 1.110(d) of the Florida

Rules of Civil Procedure or the cases of Strahan, Meigs, and Mills, all of which were cited by the Fourth District Court of Appeal in support of its reversal of the trial Court's Entry of Final Summary Judgment against RESPONDENT.

Moreover, PETITIONER obtained jurisdiction with this Court by representing that the Fourth District Court of Appeal's opinion that "it was error to enter judgment based upon 'release' when that affirmative defense had never been asserted in a pleading," conflicted with other Florida Appellate Court decisions. As PETITIONER's BRIEF ON THE MERITS so blatantly reveals, there is not a single Florida Appellate Court decision in conflict with the Fourth District Court of Appeal's holding that "it was error to enter judgment based upon 'release' when that affirmative defense had never been asserted in a pleading."

Note that the only proposition for which PETITIONER cites the case of Edgewater Drugs, Inc. v. Jack's Drugs, Inc., 138 So. 2d 525 (Fla. 1st DCA 1962) is that "Rule 1.510 of the Florida Rules of Civil Procedure clearly contemplates the possibility of moving for summary judgment before a defendant has answered." PETITIONER's BRIEF ON THE MERITS, p. 9. This was the case PETITIONER cited for conflict jurisdiction. Edgewater Drugs, Inc. actually held that a plaintiff can move for summary judgment upon the issues raised in its complaint before the defendant files an answer after twenty (20) days from commencement of the action. The Edgewater Drugs, Inc. Court interpreted the affidavits not as "setting out defenses"

but rather as admissions by the defendant against its own interest. (emphasis supplied). The Edgewater Drugs, Inc. Court expressly stated:

> On the other hand, no where in the record or briefs in this Appeal do we find even an indication that the Defendant/Appellant has any real defense on the merits of this action. In fact, its president in his affidavit admits that that corporation purchased from the Plaintiff the goods involved in this action.

Id. at 529.

Moreover, the issue in Edgewater Drugs, Inc. was not one concerning an affirmative defense but rather that of improper venue and failure to state a cause of action which according to the Florida Rules of Civil Procedure may be raised by motion as stated in Rule 1.140(b) of the Florida Rules of Civil Procedure.

Thus, PETITIONER manipulates its way before this Court on a conflict that does not exist and then it blatantly states that the Fourth District Court of Appeal cited cases that "do not justify [its] holding in any respect," without examining those cases beyond a factually erroneous distinction.

With this preface, PETITIONER then attempts to rely upon four Federal Court cases Batiste v. Burke, 746 F. 2d 257 (5th Cir. 1984); Funding Systems Leasing Corporation v. Pugh, 530 F. 2d 91 (5th Cir. 1976); and Herron v. Herron, 255 F. 2d 589 (5th Cir. 1958).

The Batiste Court simply gave a footnote to the present issue and stated:

> In the light of Fed. R. Civ. P. 8(c), the propriety of raising affirmative defenses by motion is in some doubt. ... Batiste neither objected below nor raised the issue before us. Objection to raising a defense by motion may be waived if the non-movant responds to the merits of the motion. ... We, therefore, consider Burke's defense to have been properly before us.

Id. at 258-59, n. 1. Batiste did not address the present issue because the non-movant did not object in the trial Court and did not raise the issue before the United States Fifth District Court of Appeal. On the other hand, in the present case RESPONDENT vehemently and repeatedly objected to any Motion for Summary Judgment upon the grounds of release and res judicata being heard by the trial Court before RESPONDENT received an Answer containing such Affirmative Defenses and before RESPONDENT was allowed discovery on those defenses and in support of its avoidance of mutual mistake. R. 177-178 and R. 183-209. In pertinent part RESPONDENT stated to the trial Court:

> PLAYA [RESPONDENT] was denied the opportunity to conduct discovery as related to the Settlement and Release and the intent of the parties pursuant to such, thus the rendering of summary judgment against PLAYA [RESPONDENT] was premature and denied PLAYA [RESPONDENT] its rights to discovery.
>
> PLAYA [RESPONDENT] did not have an opportunity to plead avoidances to CORAL RIDGE's [PETITIONER's] defenses of Release and res judicata because CORAL RIDGE [PETITIONER] never filed an Answer or Affirmative Defenses, but simply responded to the Complaint by filing a Motion to Dismiss that was never ruled upon.

R. 183-209. Batiste does not support PETITIONER's argument.

PETITIONER states that Pugh "held specifically that so long as the Motion for Summary Judgment is the first pleading filed by the Defendant, Affirmative Defenses can indeed be raised by the Motion. Id. at 96." (emphasis supplied). PETITIONER's BRIEF ON THE MERITS, p. 11. The Pugh Court "held" no such thing! The language cited by PETITIONER is pure dicta. The Pugh Court simply held that:

> When the Defendant has waived his Affirmative Defense by failing to allege in his answer, or have it included in a Pre-Trial Order of the District Court that supercedes the pleadings, he cannot revive the defense in a Memorandum in Support of a Motion for Summary Judgment. ... We hold that Appellant waived his §105-303 argument by failing to affirmatively set forth this argument in a responsive pleading. Accordingly, the argument cannot be considered on Appeal.

Id. at 96.

The last Federal Court case cited by PETITIONER in support of its unsupportable position is that of Herron. Actually, the case of Herron is in support of RESPONDENT's position. The Herron Court expressly stated:

> It is clear that Rule 8(c) requires Affirmative Defenses to be pleaded, in order to prevent surprise. There is general agreement also, under Rule 9(f), that even the defenses of limitations or latches may be asserted by Motion to Dismiss for failure to state a claim - provided that the Complaint shows affirmatively that the claim is barred. [citations omitted].

> Even if a Complaint does not show on its face the factual basis for an Affirmative Defense, a litigant may go beyond the pleadings, under Rule 56, by a Motion for Summary Judgment. But only if the facts are undisputed. The 1946 Amendment to Rule 12(b) requires a Motion to Dismiss to be treated as a Motion for Summary Judgment, if the movant goes outside the pleadings to prove his Affirmative Defense. In short, the Motion to Dismiss is thereby converted into a Motion for Summary Judgment. [citations omitted].
>
> The rules safeguard a complainant from surprise. ...
>
> Spiraling back through the convolutions in this case to the original Complaint, we find an action to establish an oral trust allegedly created in 1932. Denial that there was a trust produced a material issue of fact. In going into disputed facts and dismissing the suit, the trial judge went beyond the scope of his authority as defined in Rules 12(b) and 56.
>
> The solid justice embedded in these two rules is well illustrated in the instant case. There may or may not have been a trust. But the complainant was entitled to a fair shake at proving the existence of the trust. Instead, without notice, without an opportunity to produce witnesses or to examine books and records of obvious bearing on the issue, without realizing what was happening to him - it happened: The case was disposed of on the merits. Rules 12(b) and 56 are to prevent just such an oddity.

Id. at 593-94. Substitute Rule 1.110(d) and Rule 1.510 of the Florida Rules of Civil Procedure for Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure, respectively, and the fact that RESPONDENT in this case was also "entitled to a fair shake at proving the existence of" a mutual mistake, and that RESPONDENT in this case was "without an opportunity to produce

witnesses or to examine books and records of obvious bearing on the issue" of whether a Release actually precluded recovery or whether there was in fact a mutual mistake in the preparation of that Release, and we simply have a Florida version of Herron, which the United States Fifth Circuit Court of Appeal found to be an "oddity" that should not prevail.

PETITIONER does address the Florida case of Danford v. City of Rockledge, 387 So. 2d 968 (Fla. 5th DCA 1980), but does not argue that its rationale is erroneous or that its facts are distinguishable. Rather PETITIONER argues that RESPONDENT failed to timely raise this "procedural irregularity" before the trial court and thus RESPONDENT is estopped from asserting such "procedural irregularity" and prejudice. PETITIONER's BRIEF ON THE MERITS, p. 11. PETITIONER blatantly states to this Court, and apparently without shame, that:

> In this case, the first time the point was ever raised by PLAYA DEL MAR [RESPONDENT] was in the Fourth District.

PETITIONER's BRIEF ON THE MERITS, p. 12. This the record contradicts. RESPONDENT expressly stated in its Memorandum of Law in Opposition to PETITIONER's Motion for Summary Judgment that:

> PLAYA [RESPONDENT] was denied the opportunity to conduct discovery as related to the Settlement and Release and the intent of the parties pursuant to such, thus the rendering of Summary Judgment against PLAYA was

> premature and denied PLAYA its rights to discovery.
>
> PLAYA did not have an opportunity to plead avoidances to CORAL RIDGE's [PETITIONER's] defenses of Release and res judicata because CORAL RIDGE never filed an Answer or Affirmative Defenses but simply responded to the Complaint by filing a Motion to Dismiss that was never ruled upon.

R. 183-209. PETITIONER received a copy of RESPONDENT's Memorandum of Law in Opposition to PETITIONER's Motion for Summary Judgment which contained these arguments of "procedural irregularity" and prejudice. PETITIONER has had access to the record and through prior briefs filed before the Fourth District Court of Appeal has been directed to pages 186-209 of the Record, which contain RESPONDENT's Memorandum of Law in Opposition to the Motion for Summary Judgment stating these contentions of "procedural irregularity" and prejudice. Once again, however, PETITIONER has the audacity to represent to another Court, even yet the Supreme Court of Florida, that RESPONDENT cannot rely upon the case of Danford, which expressly states that "an affirmative defense of res judicata or Release should not be raised by a Motion for Summary Judgment prior to raising such defense in an Answer," because RESPONDENT raised these points of "procedural irregularity" and prejudice for the first time before the Fourth District Court of Appeal. At best PETITIONER's argument is wrong.

As the undisputed facts of the record clearly indicate, there does not exist any averment in any pleading in the record that raises the Affirmative Defenses of Release or res

judicata. RESPONDENT does not raise such issues in its Complaint -- the only actual pleading in the record. PETITIONER's Motion to Dismiss and Motion for Summary Judgment do not constitute pleadings. Simply stated and beyond dispute, the trial Court entered summary judgment upon the basis of Release and res judicata although PETITIONER had filed no pleading that could form the basis for such a judgment. This is reversible error. Danford at 969-70.

The Fourth District Court of Appeal in Couchman quotes extensively from the Third District Court of Appeal of Turf Express, Inc. v. Palmer, 209 So. 2d 461 (Fla. 3rd DCA 1968), which, as quoted by the Fourth District Court of Appeal in Couchman states:

> Appellant's first point urges that the Court erred in entering a summary judgment upon the promissory note because the Appellee filed no pleading which could form the basis for such a judgment. We hold that the entry of the Summary Final Judgment was error and reverse... Indeed, the very language of Rule 1.510(c), supra, seems to provide for a summary judgment only when the claim is supported by the 'pleadings.' A trial court may not grant a summary judgment upon an issue raised by an affidavit in support of the Motion rather than by a Complaint.
>
> This holding appears necessary to us, because the contrary holding would deprive the party defending against the Motion for Summary Judgment of an opportunity to raise defenses to the claim.

Turf Express, Inc., pp. 843-44, as cited by Couchman.

RESPONDENT argued in opposition to PETITIONER's Motion for Summary Judgment before the lower Court that the rendering of summary judgment at that time deprived RESPONDENT of an opportunity to raise defenses or avoidances to PETITIONER's "Affirmative Defenses" of release and res judicata, namely mutual mistake. In the case of Holley v. Universal Rental Properties, 416 So. 2d 861 (Fla. 1st DCA 1982) the Court found that where the defense of res judicata does not appear on the face of a pleading, it may not be raised on a Motion to Dismiss, but must be pleaded and proved as an Affirmative Defense. Vaswani v. Ganobsek, 402 So. 2d 1350 (Fla. 4th DCA 1981); Frank v. Campbell Property Management, Inc., 351 So. 2d 364 (Fla. 4th DCA 1977). See generally, Sottile v. Gaines Construction Company, 281 So. 2d 558 (Fla. 3rd DCA 1973).

B. WHETHER RESPONDENT WAS IMPROPERLY PRECLUDED FROM OBTAINING EVIDENCE IN SUPPORT OF ITS AVOIDANCE OF MUTUAL MISTAKE.

Section II of PETITIONER's BRIEF ON THE MERITS entitled "Mere Assertion of 'Mistake' in the Execution of an Unambiguous Release Does Not Create a Fact Issuee," is built entirely upon a single erroneous presumption: Throughout its argument PETITIONER cites case law and implicitly, if not explicitly, represents to this Court that RESPONDENT was attempting to conduct discovery to avoid a written Release based upon the defense of unilateral mistake. Never does PETITIONER in its

Brief use the term of art "mutual mistake." RESPONDENT would have this Court read its argument with the understanding that RESPONDENT was attempting to conduct discovery in order to avoid an Affirmative Defense of written release on the basis of RESPONDENT's own unilateral mistake. It is painfully obvious that PETITIONER has chosen to state only half-truths.

Rather, the whole truth is as follows. RESPONDENT had requested relevant discovery from PETITIONER in attempts to ascertain the intention of PETITIONER concerning PETITIONER's drafting of the Release that PETITIONER relied upon in its Motion for Summary Judgment and, apparently, upon which the trial court relied upon in granting that Motion. RESPONDENT submitted sworn testimony of attorney MacKenzie indicating that the intent of the parties in drafting the Release and Settlement Agreement was simply to bar subsequent litigation concerning the specific defects enumerated and identified in the Complaint and Settlement Agreement. PETITIONER postponed its hearing on its pending Motion for Summary Judgment until they completed the deposition of MacKenzie. Meanwhile, RESPONDENT scheduled the deposition of PETITIONER's attorneys Gordon and Blyer, who had actually drafted the subject Release and Settlement Agreement. PETITIONER then filed a Protective Order to prevent RESPONDENT from conducting such discovery and argued before the trial Court in support of their Motion for Protective Order that the personal knowledge of attorneys Gordon and Blyer was not related in any way to any "defenses"

presented by PETITIONER and the taking of such depositions at such time would be premature. Of course, RESPONDENT argued that the testimony of MacKenzie and others have already shown that there is a possibility of a mutual mistake in the drafting of the Release and Settlement Agreement upon which PETITIONER based their Motion for Summary Judgment. Nevertheless, the trial Court granted PETITIONER's Motion for Protective Order but did indicate that RESPONDENT may be entitled to take such depositions at a later date:

> Well, what I am inclined to do, go ahead and grant the Motion for Protective Order. And if any issue comes up or anybody's unduly prejudiced or placed at a disadvantage at the time of summary judgment, I think the end of justice requires that the deposition is [sic] taken if there is relevancy or materiality. If not, there is a difference.

After the trial Court granted PETITIONER's Motion for Protective Order, PETITIONER again moved for summary judgment pursuant to which the trial Court granted such Motion without ever allowing RESPONDENT the opportunity to depose the persons most knowledgeable concerning the negotiations surrounding the Release and Settlement Agreement upon which the trial Court relied in granting PETITIONER's Motion for Summary Judgment.

RESPONDENT requested relevant discovery of information from PETITIONER in an attempt to ascertain the intention of PETITIONER concerning the Release and Settlement Agreement that PETITIONER relied upon in its Motion for Summary Judgment. The intent of PETITIONER is certainly within its own particular

knowledge, and RESPONDENT can only obtain such information through discovery requests such as the requested depositions subpoena duces tecum of Gordon and Blyer, the authors of the Release and Settlement Agreement. See Fla. R. Civ. P. 1.510 and 1.510(d).

The prejudice to RESPONDENT of not being afforded the opportunity to depose Gordon and Blyer would, of course, be clearly demonstrated if a paper or testimony elicited through the depositions indicated that the intent of PETITIONER and its representatives was to release PETITIONER only for the defects expressly enumerated and described in the Complaint or Settlement Agreement. Because, however, summary judgment was rendered against RESPONDENT after RESPONDENT was expressly denied a right to conduct such discovery, the only evidence in the record of mutual mistake is that of the Sworn Statements and Affidavits of MacKenzie and the other representatives of RESPONDENT participating in the negotiation for the Release and Settlement Agreement. These statements support RESPONDENT's contention that there was a mutual mistake in the drafting of such documents and that the Release and Settlement Agreement were only intended to apply to defects actually "enumerated" in the Complaint and Settlement Agreement. In its present status, the record may appear to only indicate a unilateral mistake, but in actuality RESPONDENT was halfway to proving a mutual mistake when the trial court denied it the only discovery which could possibly establish the existence of a mutual mistake.

Professor Moore has discussed the right of access to discovery when opposing a Motion for Summary Judgment stating:

> The deposition and discovery rules provide effective means whereby any party to an action may obtain from any person, including an adverse party, non-privileged factual data concerning all the issues of the case -- not merely data in support of the party's claim or defense, but also factual information concerning his adversary's claim or defense. As a general proposition, then, all parties have access to proof from the modern federal procedure and since depositions, answers to Interrogatories and Admissions may be used, with or without affidavits and other extraneous materials, both in support of and in opposition to a Motion for Summary Judgment, the problem of access to proof is not nearly so important as it would be if there were not effective deposition and discovery procedure and the parties were confined to the use of affidavits... .
>
> The party opposing summary judgment must be given a reasonable opportunity to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving party.

(emphasis supplied). J. Moore, Moore's Federal Practice Procedure, §66.15 [5] (1984). See In Little John v. Shell Oil Company, 456 F. 2d 225 (5th Cir. 1972) (The court reversed summary judgment for the defendant on grounds, inter alia, that the plaintiff had not had an adequate opportunity for discovery.)

As stated in Schoenbaum v. First Brook, 405 F. 2d 215 (2nd Cir. 1968):

> The District Court's grant of summary judgment against the plaintiff was accompanied by a refusal of his request for discovery. This Court has indicated that summary judgment should rarely be granted against a plaintiff in the shareholder's derivative action especially when the plaintiff has not had an opportunity to resort to discovery procedure. ... The plaintiff typically has in his possession only the facts which he alleges in his complaint.

Id. at 218.

Similarly, facts of PETITIONER's intent regarding the terms and conditions of the Release and Settlement Agreement are particularly within the knowledge of PETITIONER. The only manner in which RESPONDENT may obtain those facts is to subpoena the papers and documents of the drafters and depose the drafters. Because PETITIONER blocked such discovery and the trial Court indicated on the record that discovery might have to be re-opened if prejudice were to accrue against the RESPONDENT as a result of its inability to take the depositions, the Motion for Summary Judgment should not have been granted and the Fourth District Court of Appeal's reversal of that Final Summary Judgment should be affirmed.

C. WHETHER MUTUAL MISTAKE IN THE DRAFTING OF THE RELEASE AND SETTLEMENT PRESENTS A GENUINE ISSUE OF MATERIAL FACT.

In opposition to PETITIONER's contention of release and res judicata as contained in its Motion for Summary Judgment, RESPONDENT raised as an avoidance mutual mistake in the

drafting of such Release and Settlement Agreement. RESPONDENT argued before the trial Court that both PETITIONER and RESPONDENT intended the Release and Settlement Agreement to preclude subsequent actions arising from defects in the construction of the RESPONDENT Condominium that were actually alleged in that Complaint. Florida Power & Light Company was the only party who had access to the vault room where the fire occurred before December 15th and during the negotiations and drafting of the Release and Settlement Agreement. Certainly, even when construing the facts in favor of PETITIONER, it cannot be said that RESPONDENT ever intended to Release a claim for defects in construction which it was not permitted to see.

Mr. MacKenzie, the attorney who represented RESPONDENT against PETITIONER in the litigation that resulted in the Release and Settlement Agreement, testified under oath that his recollection of the settlement process was that both parties intended for the Release and Settlement Agreement to apply to only those specific defects enumerated in that Complaint. He testified in pertinent part as follows:

> ... In fact, there was never any discussion about anything that wasn't alleged in the Complaint. The matters that were alleged in the Complaint were in many instances matters of substance. We went through the Complaint with the Association, with the developer's representatives, and his attorney and agreed to eliminate from ultimate action by the developer by way of either payment of cash or correction of those items that we thought perhaps insignificant and not really worth arguing and hassling over.

> But in all instances everything was specifically identified. I mean I have myriads of drafts of discussion memorandums where both sides came to the table and argued about the specifics of different items, but there was never any talk about a release to an unknown - to a latent matter. It was always in reference to that which we all had knowledge. And that is what we were discussing - the items which we had knowledge.
>
> . . .
>
> I believe the final draft of that agreement was prepared by Mr. Blyer, the attorney for Coral Ridge Properties [PETITIONER].
>
> The settlement agreement specifically set our various areas which the developer would correct. And by this time, you have to understand, many items we had complained of had already been corrected. It was an ongoing process from the date of settlement whereby Coral Ridge [PETITIONER] would come in and do certain aspects of the work they recognized themselves responsible for. Like they came in and attempted to correct the pool - the marciting of the pool.
>
> . . .
>
> The intent of that settlement agreement was upon successful completion by Coral Ridge [PETITIONER] to release them from any claims or liabilities of defects specifically identified in the lawsuit. And the language of the releases was tied to the lawsuit and the allegations in the lawsuit of defects for that purpose.

This testimony was a part of the record when the trial court granted the Motion for Summary Judgment.

In the case of Steffens v. Steffens, 422 So. 2d 963 (Fla. 4th DCA 1981), the Fourth District Court of Appeal stated:

> When an instrument is drawn and executed which is intended to carry into execution an

> agreement, but which by mistake of the draftsman violates or does not fulfill that intention, equity will reform the instrument so as to conform to the intent of the parties ... it was harmful error for the trial court to have excluded from evidence the proper testimony relevant to the issue made in the counter-petition for reformation.

Id. Significantly, that Court stated in the footnote:

> While the record is not entirely clear as to the basis upon which the trial court refused to admit the proffered evidence, it appears that the court felt, that as a matter of law, there could be no mutual mistake absent agreement by both parties that, in fact, there had been a mutual mistake. Clearly, the issue of mutual mistake arises only when alleged by one party and denied by the other. Agreement on the matter would eliminate it as an issue to be tried.

Id. at 964, n. 1 (emphasis in original).

RESPONDENT has the right to tender evidence in support of its contention that the Release and Settlement Agreement previously entered into was drafted erroneously due to a mutual mistake, and that once the issue of mutual mistake is raised and PETITIONER failed to present any evidence to the contrary, the rendering of summary judgment against RESPONDENT was error.

In the case of Ayr v. Chance, 372 So. 2d 1000 (Fla. 4th DCA 1979) the Court District Court of Appeal reversed the trial Court's rendering of summary judgment and found:

> The Plaintiffs have raised an issue of fact as to whether language contained in the release was included therein by mutual mistake. This material issue of fact precludes the entry of a summary judgment.

Id. at 1002.

In the case of Ayr, the Plaintiffs had filed an action for personal injury sustained as a result of alleged negligent operation of a motor vehicle driven by Mr. Mitchell Chance and owned by Mr. David Chance. During the court of the lawsuit, Plaintiffs settled their claim against David Chance and executed a release discharging not only David Chance but "all other persons, firms, corporations, associations, or partnerships of and fro any and all claims..." Id. at 1000. Afterwards, Mitchell Chance moved for summary judgment relying on the language of the release. The trial court granted the motion for summary judgment and held that all defendants were released by the broad and unambiguous language contained in the written release. Id. at 1001.

Like RESPONDENT, the Plaintiffs in Ayr raised the issue of mutual mistake as their defense to the motion for summary judgment. The Ayr Plaintiffs placed into evidence and argued that the parties did not intend to release all other parties despite the language contained within the release. In reversing the trial court's rendering of summary judgment, this Court stated:

> As in Spear [Spear v. Macdonald, 67 So. 2d 630 (Fla. 1953)], the Plaintiffs claim that no one intended that language discharging Mitchell and Reserve be incuded in the release executed to conclude the settlement with David and Heritage. If parties may be relieved of the unintended language included in a deed, why should this relief not also be granted when unintended language is included in a release? We believe such relief should be and is available to a party who can sustain the burden of proof on the issue of mutual mistake. The Third District Court of Appeal has reached the same results in a recent decision involving a similar factual situation. Alexander v. Kirkham, 365 So. 2d 1038 (Fla. 3rd DCA 1978).

Id. at 1001-2.

In Alexander v. Kirkham, 365 So. 2d 1038 (Fla. 3rd DCA 1978) the District Court of Appeal reformed a release agreement to reflect the contracting parties' intent after the plaintiffs alleged that the release was entered into as a result of mutual mistake. Discussing its holding, the court stated:

> This determination is in entire accordance with the established law as to the effect of a "mutual mistake" such as this one. Whatever the general rule as to the effect of a so-called pure "mistake of law," See A. Corbin on Contracts, Section 161 (1960 rev.), it has long been clear in Florida and elsewhere that relief will be granted when, as here, the language employed by the parties fails to have the legal effect or to express what they mutually intended.

Id. at 1039-40.

The cases of Ayr and Alexander, both are in accord with longstanding black letter contract law. In Jacobs v. Parodi, 50 Fla. 541, 39 So. 833, 837-37 (1905), the Supreme Court of Florida held:

> Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or to law, does not fulfill that intention or violates it, equity will correct the mistake, so as to produce a conformity to the intention. 1 Story's Equity Jurisprudence, Section 115.
>
> . . .
>
> In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant it relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language emplyed in writing.

Id. (emphasis added).

At the hearing on the Motion for Summary Judgment and in response to RESPONDENT's assertions of mutual mistake, PETITIONER erroneously relied upon Hurt v. Leatherby Ins. Co., 354 So. 2d 918 (Fla. 4th DCA 1978). PETITIONER argued that Hurt prevented the admission of parole evidence to support a content of mutual mistake. Hurt, however, did not involve a contention of mutual mistake but instead involved the question of a unilateral mistake. Id. at 919. In Hurt, the party seeking reformation argued "that he made a unilateral mistake in that he really didn't intend to release anybody." Id.

Thus, RESPONDENT, having raised the legal issue of mutual mistake as an avoidance of the agreements relied upon by PETITIONER, through Affidavits and sworn testimony without opposition, a genuine issue of material fact has been raised precluding summary judgment.

D. WHETHER THERE IS A GENUINE ISSUE OF MATERIAL FACT CONCERNING A MISTAKE OF FACT.

The fire originated in the vault room of the Playa del Mar Condominium. The only party with access to the vault room before the fire was Florida Power & Light Company. In the case sub judice RESPONDENT has alleged a design and construction defect in the vault room caused by PETITIONER. Neither RESPONDENT nor PETITIONER, however, could determine whether any defects existed within the vault room at the time of the prior Release and Settlement Agreement because they were not permitted access to inspect the vault room for defects.

A case that is almost on point is that of Ormsby v. Ginolfi, 107 So. 2d 272 (Fla. 3rd DCA 1958). Ms. Ormsby sought reversal of summary judgment entered against her in a suit she had brought to recover damages for personal injuries as a result of the Defendant's alleged negligent operation of an automobile. After the accident, Ms. Ormsby had executed and delivered to the Defendants a general release from liability for any and all "known and unknown" personal injury suffered by her as a result of the accident. The settlement compensated Mrs. Ormsby for the amount of the estimated cost of repairs to her car. Subsequently, Mrs. Ormsby commenced an action to recover damages for alleged personal injuries suffered in that same accident. Here there were even separate incidents giving rise to two separate actions. The Defendants pleaded that the release barred such action and moved for summary judgment

against Ms. Ormsby. At the hearing on Defendants' motion for summary judgment, evidence was submitted that Ms. Ormsby signed the release with the belief that she had not suffered any personal injury as a result of the accident and that the consideration for the release excluded any item for personal injuries. The Defendants contended that Ms. Ormsby's testimony to the effect that she was "shook up" was susceptible to the conclusion that she was aware, at the time she executed the release, of possible injuries to her person as a result of the accident, and from that premise, the Defendants insisted there could be no mistake of fact capable of invalidating the Release. The lower Court agreed with the Defendants and granted their motion for summary judgment.

The Appellate Court disagreed with the Defendants' contention and reversed the trial Court's granting of summary judgment. The Appellate Court stated:

> It is generally held that a contract of this nature may be set aside upon proof that it was executed pursuant to a mistake as to a past or present fact, and the proofs here are adequate to raise a genuine question of fact as to whether the release was executed under a bona fide mistake of fact. Our adherence thereto does not do violence to the companion rule that unknown or unexpected consequences of known injuries will not invalidate a release.
>
> The proofs before the trial court on the motion for summary judgment must be considered in the light most favorable to the non-moving party. The items making up the consideration given for the release, if

> capable of proof, as appears to be the case in the cause on review, are facts which a jury is entitled to weigh in determining whether the plaintiff did in fact execute the release under the mistaken belief that she suffered no personal injuries as a result of the accident. On motion for summary judgment any doubt in this behalf must be resolved against the movant and in favor of a jury trial. Testing the proofs in this case by that end and other rules of law applicable to motions for summary judgment we conclude that the summary judgment herein was erroneously granted.

Id. at 273-74 (citations omitted).

Ormsby clearly holds that a release executed pursuant to a mistake as to a past or present fact, such as the exitence of the unknown and unascertainable defect in the present case, may be set aside. This legal conclusion finds further support in the case of Boole v. Florida Power & Light, 147 Fla. 589, 3 So. 2d 335 (1941).

In Boole the appellant was involved in a truck collision but an x-ray of his chest disclosed no damage. He accepted $15.00 for the cost of actual medical expenses and executed a release as to "any and all injuries and damages to person or property arising from or which may in the future arise or develop out of, or out of the treatment of, an accident." Id. at 336. Sixteen days after signing the release and twenty-five days after the accident, Boole died apparently from aggravation by the accident of a pre-existing cardiac condition.

The Supreme Court of Florida noted:

> The release quoted above purports to cover claims, rights, and demands which decedent never had or may have in connection with any of the injuries and damages to personal property resulting from or which may in the future arise or develop out of, or out of the treatment of, any accident or injury which happened as stated in the quoted release.

Id. at 337. Nevertheless, the Supreme Court of Florida found that substantial competent evidence raised the issue that a mutual mistake of fact existed because neither party anticipated or contemplated that the decedent's injury was serious in its nature and that the release was executed and the small consideration was paid to compensate for the decedent's doctor's bill and x-ray plate. Id.

The Supreme Court of Florida reversed the directed verdict rendered in favor of the Defendants and ruled that the matter "should have been submitted to the jury with appropriate instructions." Id. at 338. The Supreme Court of Florida further states:

> Under the replication alleging a mutual mistake of fact as to the extent of decedent's injury and that the release was not given to cover injuries to the decedent not then known or contemplated in the execution of the release, the evidence adduced tending to show amount paid for the printed general release was for expenses only and nothing for personal injuries which were assumed to be not serious. See 53 C.J. 1212; 23 R.C.L. 391.

> Where there is some substantial evidence tending to prove the issue for the plaintiff, a verdict should not be directed for the defendant.

Id. at 337-38.

In the case sub judice, the record expressly reveals that there is simply no dispute that neither RESPONDENT nor PETITIONER ever had the opportunity to inspect the vault room in the Playa del Mar Condominium for any design or construction defects before December 15, 1982, when the Release and Settlement was executed. Attorney MacKenzie testified that agents and attorneys for PETITIONER on numerous occasions went through the entire condominium looking for defects; however, the one place in the condominium where no party was allowed to enter was the vault room. RESPONDENT in the case sub judice has alleged the existence of a defect in that vault room. Thus there existed a certain mutual mistake of fact -- that no defect existed in the vault room -- at the time the parties entered into the Release and Settlement Agreement in December of 1982. The record is quite clear that RESPONDENT has raised as an avoidance to PETITIONER's contentions of release and res judicata that there was a mutual mistake of fact which has simply gone unopposed by PETITIONER thus precluding the granting of summary judgment.

E. WHETHER THERE WAS A GENUINE ISSUE OF MATERIAL FACT CONCERNING THE MEANING OF THE RELEASE AND SETTLEMENT

Attached as Exhibit "B" to PETITIONER's Motion for Summary Judgment is a Settlement Agreement executed by RESPONDENT and

PETITIONER as a result of alleged construction defects in the Playa del Mar Condominium. See Appendix "III." The Settlement Agreement notes that RESPONDENT and PETITIONER were involved in Case No. 79-18985 where RESPONDENT was "alleging the existence of certain construction defects in the condominium project." As provided in affidavit and sworn testimony by RESPONDENT in opposition to PETITIONER's Motion for Summary Judgment, the attorney for RESPONDENT and the representatives of RESPONDENT signing the Settlement Agreement believed that all parties understood that the intent of the Settlement Agreement was to release PETITIONER only for those "certain defects" which were noted in the Complaint and Settlement Agreement. PETITIONER attached a copy of that Complaint as Exhibit "A" to its Motion for Summary Judgment. See Appendix "IV" (Prior Complaint). Beginning at page 5, paragraph 25, of that Complaint, RESPONDENT specifically alleged the certain defects, and such list continues for over ten pages in that Complaint. The Settlement Agreement itself similarly lists at least twenty-five specific defects. Nevertheless, neither the Complaint nor the Settlement Agreement ever identifies a defect existing in the vault room.

Where there are general and specific provisions in a contract relating to the same thing, the special provision will govern in the construction over matters stated in general terms. 11 Fla. Jur. 2d Contracts, Section 119 (1979 & Supp. 1984). The expression in a contract of one or more things of a

class implies the exclusion of all not expressed, although all would have been applied had none been expressed. Id. Therefore, the inclusion of the specific defects within the Complaint and Settlement Agreement, at the very least, create an ambiguity as to the intent of the Settlement Agreement and Release.

"Where the terms of the instrument are ambiguous, casting doubt on the intent of the parties, this intent must be determined by the trier of fact, and is not to be determined upon a motion for summary judgment." 30 Fla. Jur. Summary Judgment Section 8 (1974 & Supp. 1984); See Stone v. Lingerfeldt, 330 So. 2d 40 (Fla. 4th DCA 1976) (In an action involving the rights and liabilities of the parties under a written preincorporation agreement, the trial court erred in entering summary judgment where some provisions of the agreement were ambiguous so as to cast doubt upon the intent of the parties).

Nevertheless, PETITIONER relies upon provision 3 of the Settlement Agreement requiring a general release and voluntary dismissal. That provision provides in pertinent part:

> The Association ... shall place ... a fully executed general release releasing Coral Ridge [PETITIONER] ... from all past, present and future claims, demands and causes of action arising from alleged defective construction of the Playa del Mar ...

The ambiguity of that clause arises from the term "alleged." Indeed, as defined in Black's Law Dictionary (5th Ed. 1979), "alleged" means "stated; recited; claimed; asserted; charged." The only stated, recited, claimed, asserted, or charged defective construction was expressly noted in both the Complaint and the Settlement Agreement, neither of which said anything about a defect in the vault room.

Accordingly, when reading the Release and Settlement Agreement together, at the very least, the construction of the terms of these written instruments can be reasonably susceptible to more than one interpretation. "Where, as here, the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented which cannot properly be resolved by summary judgment." Quayside Associates v. Harbour Club Villas Condominium Association, 419 So. 2d 678, 679 (Fla. 3rd DCA 1982); See also, Ellenwood v. Southern United Life Insurance Company, 373 So. 2d 392 (Fla. 1st DCA 1979).

F. WHETHER THE PRIOR LAWSUIT WAS RES JUDICATA

PETITIONER claims that the May 29, 1984 Order in Case No. 79-18985, Playa del Mar Association, Inc., et al., v. Westinghouse Electric Corporation and Coral Ridge Properties, Inc., precludes the instant causes of action on the basis of res judicata. Nearly three years before the fire that gave rise to

the instant cause of action, RESPONDENT and other parties instituted an action against PETITIONER as a result of known construction defects existing in the Playa del Mar Condominium. A copy of RESPONDENT's Complaint was attached to PETITIONER's Motion for Sumary Judgment. In "Count I -- Breach of Warranty, in paragraph 23," RESPONDENT alleged:

> Plaintiffs have made demands upon the developers to correct the defects and deficiencies set forth hereinafter of which the developers are, or should be, aware, but to date have failed or refused to properly repair and/or correct said defects and deficiencies.

(emphasis supplied). Paragraph 25 of that Complaint continues for over ten pages, specifically noting the certain defects found in the Playa del Mar Condominium.

In "Count II -- Negligence, Paragraph 29," RESPONDENT alleged in pertinent part:

> Developers were careless and negligent in designing, constructing, supervising, inspecting and approving for occupancy the condominium building and improvements ... [and] as a direct and proximate result of which the developers constructed the condominium building and improvements and sold parcels thereof to the unit owners with the defects and deficiencies hereinabove set forth.

(emphasis supplied)

In "Count III -- Strict Liability," RESPONDENT again specifically referenced the particular items by alleging the following:

> In the defective and deficient conditions hereinabove set forth.

(emphasis added). Similarly, RESPONDENT also referenced the specific defects in its counts of breach of express warranty and breach of contract, as contained in paragraph 41 and 49 respectively.

PETITIONER has placed no other documents, pleadings or otherwise, from Case No. 79-18985 into the instant record other than the Complaint and the Order of May 25, 1984.

RESPONDENT in the case sub judice alleges various legal theories showing that PETITIONER was responsible for the fire at the Playa del Mar Condominium in August 1982. RESPONDENT alleges that the fire originated in the vault room which was not accessible to any party other than the co-defendant, Florida Power & Light Company. Therefore, the damage alleged in the instant Complaint, and the acts, non-actions, and other contributing causes to the fire in the instant case, as well as the accrual of the instant cause of action, are distinct from the previus suit which specifically addressed each defect sued upon.

Florida case law is clear that the instant cause of action did not arise until, at the very least, the fire occurred. Diamon v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981) (In an action against drug manufacturer the action did not accrue until the victim learned twenty years after the drug use that the drug caused cancer). See First Federal Savings and

Loan Association of Wisconsin v. Dade Federal Savings and Loan Association, 403 So. 2d 1087 (Fla. 5th DCA 1981) (cases cited therein indicate that a cause of action does not arise until such time as the party should have known he had a cause of action against the Defendant for a particular wrong). Thus, the previous lawsuit is not res judicata because the two actions lack the requisite identity of the things sued for as well as the requisite identity of causes of action.

A final judgment or decree rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and constitute a bar to a subsequent action involving the same cause of action. However, the following conditions must be met for the doctrine of res judicata to apply:

1. Identity of the things sued for;

2. Identify of the cause of action;

3. Identity of the persons and parties to the action; and

4. Identify of the quality and capacity of the person for or against whom the claim is made.

32 Fla. Jur., 2d Judgments and Decrees, Section 107 (1981 & Supp. 1984).

If any one of these requirements is not met the doctrine of res judicata does not apply. The mere fact that there may be an identity of the quality of the persons for or against whom

the claim is made where there is no identity of the things sued for or the cause of action, does not allow for the application of res judicata. Id. See also, Maloney v. Heffler Realty Co., 316 So. 2d 594 (Fla. 2d DCA 1975) (damages recovered by land owner in a prior suit for expenses incurred as a result of an alleged failure on the part of the defendants to properly protect his house, pool and patio from damages occurring from the dust, debris, and sand which resulted from defendants' construction of a condominium project on lands adjoining did not bar recovery on Plaintiff's subsequent suit for damages sustained after the first action was filed).

"Clearly, a judgment is not res judicata as to rights which were not in existence and which could not have been litigated at the time the prior judgment was entered." Wagner v. Baron, 64 So. 2d 267, 268 (Fla. 1953) (reversing summary judgment based on res judicata where matters presented in the instant suit were not presented in the prior suit).

In Shearn v. Orlando Funeral Home, 88 So. 2d 591 (Fla. 1956), a widow of a deceased motorist brought actions against the funeral home for pain and suffering in her capacity as administratrix of the deceased's estate. Thereafter she brought an action personally against the guneral home for damage to her automobile and for her injuries as a result of the same collision. Among the technical defenses raised, the Defendant pleaded that the subsequent action was res judicata

because it arose out of the same incident or occurrence alleged in the first complaint. Discussing this contention, the Florida Supreme Court stated:

> All the facts essential to the maintenance of the two suits under consideration herein are not identical nor would the same evidence sustain both.

Id. at 593 (emphasis in original).

Similarly, RESPONDENT in the instant case has shown that the prior lawsuit involved specific allegations of defects that were then known and could be litigated, although the facts essential to the instant case are distinct from the previous litigation because they involve a latent defect that was not, and could not have been discovered until the fire occurred. Furthermore, actions or non-actions of PETITIONER contributing to the fire could not be ascertained until the fire actually occurred and were never litigated in the previous action. Moreover, the most essential fact -- the fire and its damage -- was never litigated in the previous action. The requisite legal elements as well as facts required to bring a cause of action for a fire are different than the legal elements and facts necessary to show merely that a construction defect existed. The instant causes of action brought for damage as a result of fire are not identical and do not arise out of the same transactions as those in the other lawsuit. See, supra, Service Products Corporation v. North Store Corporation, 214 So. 2d 664, 666 (Fla. 3rd DCA 1968) (a particular element of

damages that might have been claimed under an action for breach of one contract does not bar recovery of that same element under an action for breach of another contract that has not been subject to litigation).

Analogous to the instant case is that of Burleigh House Condominium, Inc. v. Buchwald, 368 So. 2d 1316 (Fla. 2d DCA 1979). In Burleigh a condominium association brought an action to recover damages in equitable relief against a corporate condominium developer regarding unconscionable provisions of unreasonable and excessive rental for community recreational facilities. Id. at 1317. The developer listed three prior cases that were litigated between it and the condominium association as grounds for applying res judicata. Id. at 1320. The trial court granted the developer's motion for summary judgment but the appellate court reversed finding that identity of the causes of action were not present to bar the instant proceeding.

Additionally, public policy considerations noted by the Supreme Court of Florida prevent res judicata from applying to the instant case. The Supreme Court of Florida has specifically noted several exceptions or qualifications to the doctrine which makes it inappropriate to this case:

> (a) that the doctrine will not be invoked where it will work an injustice;
>
> (b) that it is not applicable to a judgment which might have rested on either of two

> grounds, only one of which goes to the merits;
>
> (c) that it ordinarily does not apply to voluntary dismissals;
>
> (d) that, generally, the effect of a judgment was res judicata must be determined from the entire record of the case, and not just the judgment itself; and
>
> (e) that the burden of establishing the certainty of the matter formerly adjudicated is on the party claiming the benefit of it.

deCancino v. Eastern Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973).

In the case of sub judice it is quite apparent that PETITIONER did not place the entire proceedings of the previous action before the trial Court and, in fact, the trial Court never actually took proper judicial notice of the previous action nor was it even given such an opportunity to do so. This is significant because on the face of the previous Complaint, as well as indicated in affidavits and sworn testimony in opposition to the motion for summary judgment, the previous action involved only the specific existing defects described in that Complaint and not a cause of action concerning the cause of the fire.

Second, PETITIONER's reliance upon res judicata will give rise to intentional shoddy construction practices by developers in an attempt to gain the technical benefits of res judicata. Developers could intentionally leave one or more defects and refuse to fix them. After being sued for the defects and obtaining either an adverse verdict or dismissal after

settlement, the developer could rely upon res judicata as a bar to subsequently discovered latent defects that did not manifest themselves at the time of the original suit. Without dispute, the instant latent defect in the vault room was not, and could not be, discovered by RESPONDENT until after such fire occurred. It would be a strange quirk in the law if developers, manufacturers, and others could bar themselves from subsequent liability merely because latent defects did not become manifest until after obvious defects have been litigated.

VI.

CONCLUSION

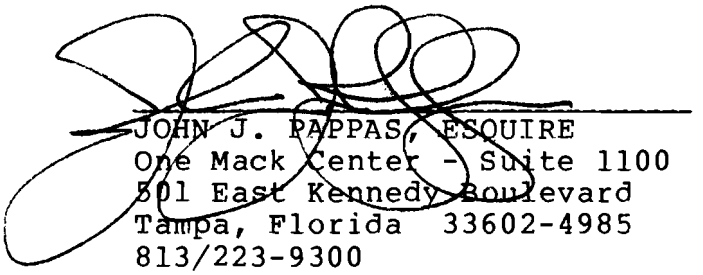
A defendant cannot obtain summary judgment on an "Affirmative Defense" of Release and Res Judicata without actually pleading such grounds as affirmative defenses. No doubt, at least in part, the rationale for such rule and law is to expressly frame the issues so that competent counsel and court can properly define the scope of discovery. At least in part, because RESPONDENT did not plead these affirmative defenses, the trial court failed to allow RESPONDENT to conduct discovery to prove a mutual mistake as an avoidance to these "Affirmative Defenses."

The absurd shamelessness with which PETITIONER presents its position is beyond belief. PETITIONER informed the trial Court that RESPONDENT's attempts to conduct discovery in order to

prove the avoidance of mutual mistake "did not relate to any evidence or issues asserted by PETITIONER and that the status of the present litigation did not require such depositions and to conduct such depositions would be premature." R. 118-119 and R. 167-178. Audaciously PETITIONER persisted upon obtaining a summary judgment based upon its grounds of release and res judicata, knowing full well that if RESPONDENT was allowed the discovery requested and established its avoidance of mutual mistake, that such release would be void and PETITIONER's defense meritless.

The Florida Rules of Civil Procedure do not support such shenanigans and neither should this Court.

BUTLER AND BURNETTE



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Playa del Mar Association, Inc.'s Request for Admissions to Florida Power & Light Company has been furnished by U.S. Mail to PAUL R. REGENSDORF, ESQ., Fleming, O'Bryan & Fleming, Post Office Box 7028, Ft. Lauderdale, FL 33338; ROBERT J. MANNE, ESQ., Becker, Poliakoff & Streitfeld, P.A., 6520 N. Andrews Avenue, Ft. Lauderdale, FL 33301; EARLE LEE BUTLER, ESQ., Butler & Pettit, P.A., 1995 E. Oakland Park Blvd., Suite 100, Ft. Lauderdale, FL 33306; RICHARD G. GORDON, ESQ., Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, One Corporate Plaza, 18th Floor, 110 East Broward Boulevard, Ft. Lauderdale, Florida 33301; and RONALD C. DILLON, ESQ., 3300 University Drive, Coral Springs, FL 33065 this 19 day of August, 1986.

JOHN J. PAPPAS