IN THE SUPREME COURT OF FLORIDA

Case No. 68,471

CORAL RIDGE PROPERITES, INC. and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

v.

PLAYA DEL MAR ASSOCIATION, INC.,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

I

INTRODUCTION

Respondent Playa Del Mar Association, Inc. (hereafter referred to as Playa del Mar or Respondent) hereby submits its Answer Brief in response to the Brief filed on behalf of Petitioners' Coral Ridge Properties, Inc. and Westinghouse Electric Corporation (hereafter referred to as Petitioners) in this proceeding. This proceeding is, in essence, an appeal of a decision of the District Court of Appeal, Fourth District, which rendered one decision in two consolidated cases (Case Nos. 85-741 and 85-242) that were pending before that Court. The undersigned represented Respondent in Case No. 85-741 only in the District Court. The Opinion of the District Court reversed Final Summary Judgments entered by two separate trial courts. Although the two cases were in a similar posture procedurally, because an answer had not been filed by the Petitioners in the trial court in either case, there were significant differences in the substance of the facts in the record of each case relative to the issue of whether genuine issues of material fact existed. Thus, when the District Court of Appeal reversed the trial court on the procedural ground that an answer had not been filed by Petitioners, it was able to simply enter a sua sponte order consolidating the two appeals (A-36) and did not address in its Opinion the issue of whether a genuine issue of material fact

existed on the issues presented such as mutual mistake.[1]

In its Brief, Petitioners' Statement of the Facts makes reference only to the Record in the District Court Case No. 85-242 only and asserts in Footnote No. 1 on Page 4 of its Brief that the records in the two cases have "basically the same relevant materials." That is incorrect. Moreover, the Petitioners' Statement of the Case and Facts totally ignores a voluminous record in the trial court and in Case No. 85-741 in the District Court on the question of whether a genuine issue of material fact exists on a number of issues such as mutual mistake.

As a result, the undersigned is submitting the Respondent's own Statement of the Case and Facts to this Court as it existed in District Court Case No. 85-741. References to the Record will be in Case No. 85-741 in the Record on Appeal in the District Court. In order to assist this Court in reviewing the record and in order to avoid having to wade through two separate records, many of the documents referred to in this Brief will be included in an Appendix submitted with the Brief.

References to the Record will be (R-___). To the extent documents are contained in the Appendix, reference will be (A-___).

The following are the facts before this Court, based upon the Record in District Court Case No. 85-741.

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[1] The District Court did note in its Opinion that it seemed "likely based upon the rule in such cases as Ayr v. Chance, 372 So.2d 1000 (Fla. 4th DCA 1979)" that a basis for mutual mistake existed. 481 So.2d at 944.

FACTS

This Petition seeks to reverse an Opinion of the District Court of Appeal, Fourth District which reversed a trial court order granting Final Summary Judgment in favor of Petitioners against Respondent.

Respondent filed its Fifth Amended Complaint in the trial court on October 26, 1984. This multi-count Complaint sought damages from Petitioners for the replacement of a defective electrical bus duct system installed when the building was originally constructed (R-1-8).

The facts giving rise to the lawsuit, as alleged in the Complaint, began on August 31, 1982, when a fire occurred at the Playa del Mar Condominium (R-2). After the fire an investigation was conducted and it was discovered that the electrical bus duct system had corroded and was unfit, thereby posing a safety hazard to the Condominium and its occupants (R-2-3). As a result, Respondent was required to replace the system at a cost in excess of Three Hundred Fifty Thousand ($350,000.00) Dollars (R-3-4).

The lawsuit against Petitioners alleges that they were negligent, breached implied warranties, and were strictly liable for selling the building with a defective electrical bus duct system (R-1-8). It was alleged that Petitioners acted as Developers of the Condominium and designed, manufactured, constructed, assembled, packaged, distributed, shipped, installed, inspected and approved the installation of the electrical bus duct system at the

Condominium (R-2). In addition, Petitioner Westinghouse also was named as a Defendant in its capacity as supplier of the electrical bus duct system (R-2).

The Fifth Amended Complaint asserts specifically that the problems with the electrical bus duct systems were first discovered at the time of the fire in 1982 and that Playa del Mar and its owners were unaware of these problems prior to that time (R-2-3).

On November 14, 1984, Petitioners filed their Motion for Summary Judgment, alleging they were entitled to judgment as a matter of law in this action because of a Settlement Agreement entered into between Respondent and Petitioners in February, 1982 which settled a 1979 lawsuit between them (R-9-48). Petitioners asserted that it was clear and unambiguous from the Settlement Agreement, Releases executed pursuant thereto and the Dismissal With Prejudice of the 1979 lawsuit, that the claims alleged in the instant suit were released, and that the issues pending concerning the defective electrical bus duct system were res judicata (R-9-11). Since the Complaint in the 1979 lawsuit, the Settlement Agreement relating to that case and Releases and Dismissals executed pursuant thereto are such crucial documents in this Appeal and are repeatedly referred to in Petitioners' Brief, these documents are included in their entirety in the Appendix to this Brief.

On December 3, 1984, Petitioners filed their Motions to Dismiss the Fifth Amended Complaint (R-49-51, R-52-54). Those motions were never heard and, therefore, Petitioners never asserted an answer or affirmative defenses to that Complaint.

Other than the documents relating to the Settlement of the 1979 lawsuit, which are included in the Appendix to this Brief, Petitioners submitted no other affidavits or sworn testimony in support of their Motion for Summary Judgment.

On February 22, 1985, as part of a Notice of Filing, Playa del Mar submitted the following sworn testimony regarding the Settlement and Releases in the prior lawsuit.

1. SWORN STATEMENT OF DAVID McKENZIE (R 57-74)

David R. McKenzie served as attorney for Respondent in the lawsuit filed against Petitioners in 1979 (R-65). McKenzie drafted the Complaint, participated in settlement negotitations and the ultimate settlement of the lawsuit with the Petitioners (R 65-66).

McKenzie's recollection of the settlement process was that both parties intended for the settlement and releases to apply only to those specific defects set forth in the Complaint and not to any unknown or latent defects (R-66-67). As McKenzie recalled:

> 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 his 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 (R 66-67).

* * *

I believe the final draft of that agreement was prepared by Mr. Blyer, the attorney for Coral Ridge Properties (R-67).

* * *

The settlement agreement specifically set out 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 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 (R-68).

* * *

The intent of that settlement agreement was upon successful completion by Coral Ridge 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 (R-69).

2. AFFIDAVITS OF SREBNIK AND GREENWOOD (R-75-78)

Raymond Srebnik and James A. Greenwood submitted affidavits relative to their knowledge of the facts surrounding the lawsuit originally filed by Respondent against Petitioners in 1979. The two affiants were unit owners at the Condominium as well as directors and officers of Respondent.

These affidavits demonstrate that only those defects they knew of in 1979 were alleged in the lawsuit. The defects "alleged" served as the basis of the claims specifically settled and released

by Respondent (R-75, 77). None of these individuals was aware of the existence of a defect concerning the electrical bus duct system until after the fire occurred at the Condominium. No unknown defects were intended to be settled or released (R 75-76, 77-78). To the contrary, only those particular defects and deficiencies specifically identified in the lawsuit were the subject of the settlement.

3. DEPOSITION OF WERNER BUNTEMEYER (PRESIDENT OF CORAL RIDGE) (R 79-170)

Werner Buntemeyer is the President of Petitioner Coral Ridge Properties and signed the Settlement Agreement on behalf of Coral Ridge on March 3, 1982 (R-82, 84-85). On January 15, 1985, Buntemeyer testified that the attorney for Petitioner Coral Ridge Properties drafted the Settlement Agreement and that he was unaware of any problem relating to the electrical bus duct system at the time of the settlement (R-93). This testimony appears as follows:

Question: "Who prepared the Settlement Agreement, sir?"

Answer: "The attorney for Coral Ridge Properties."

(R-93, Lines 10-12)

* * *

Question: "At the time that you signed the Settlement Agreement, were you ever aware of a problem with the electrical bus duct system at the Condominium?"

Answer: "No."

(R-95, Line 25; R-96, Lines 1-3)

Buntemeyer also pointed out that Petitioner Coral Ridge Properties, Inc. investigated the defects alleged in the lawsuit

prior to entering into a settlement agreement (R-88). Under these circumstances, only the defects that were alleged actually were considered part of the settlement.

4. ANSWERS TO INTERROGATORIES SUBMITTED BY CORAL RIDGE IN RESPONSE TO INTERROGATORIES PROPOUNDED BY FRANK J. ROONEY, INC. (EXHIBIT 5)

Petitioners filed a lawsuit against Frank J. Rooney, Inc. and Richard C. Reilly seeking indemnification for money paid to the Association as part of the settlement of the 1979 lawsuit (R-248). Rooney served as general contractor and Reilly as architect for the construction of the Condominium (R-248).

Following service of the indemnification lawsuit on Rooney, Rooney propounded interrogatories to Petitioners requesting an itemization of damages (R-243-269). Petitioners responded by filing a breakdown of the settlement paid to the Respondent, which allocated and identified the specific items settled and their value (R-248, 260). None of the items listed pertain to the electrical bus duct system and no value was assigned as payment for any latent or unknown claims (R-248, 260).

On March 6, 1985, the trial court entered an Order granting Petitioners' Motion for Summary Judgment and a Final Summary Judgment (R-270, 272).

On March 26, 1985, Respondent filed its Notice of Appeal to the District Court of Appeal, Fourth District.

On December 31, 1985, the District Court of Appeal entered an Order, sua sponte, consolidating Case No. 85-741 with 85-242 (A- 36).

On that same day, it issued its Opinion reversing the Final Summary Judgments in both cases. Playa del Mar Association, Inc. v. Florida Power & Light, et al., 481 So.2d 943 (Fla. 4th DCA 1985) (A-37).

SUMMARY OF ARGUMENT

The District Court of Appeal was correct in reversing the Final Summary Judgment entered by the trial court.

First, the District Court correctly ruled that it was error for the trial court to enter summary judgment on affirmative defenses of release and res judicata which had never been asserted in a pleading. Not only was the case law the District Court cited on this point correct but to permit summary judgment to be entered on an affirmative defense that had never been pled would be contrary to the letter and spirit of the law regarding pleading practice.

Second, even if this Court disagrees with the District Court's ruling that affirmative defenses must first be pled before they can be the basis for summary judgment, it is manifestly clear in the instant case there are genuine issues of material fact regarding the existence of the affirmative defenses of release and res judicata. In fact, the District Court itself noted that even though the case could be decided on procedural grounds, it was "likely" there was a valid claim of mutual mistake asserted by Respondent on the issue of release. Thus, summary judgment was inappropriate for procedural and substantive reasons.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN RULING THAT SUMMARY JUDGMENT CANNOT BE GRANTED BASED UPON AN AFFIRMATIVE DEFENSE WHICH HAS NEVER BEEN ASSERTED IN A PLEADING

On appeal to this Court Petitioners assert the District Court erred in holding that an affirmative defense must be pled before it can be the subject of a motion for summary judgment. Petitioners' assertion is without merit.

All Florida cases which have considered the issue have held that fundamental justice and procedural fairness require an affirmative defense be pled before it may be the subject of a motion for summary judgment.[2] Danford v. City of Rockledge, 387 So.2d 968 (Fla. 5th DCA 1980); B.B.S. v. R.C.B., 252 So.2d 837 (Fla. 2d DCA 1971); Mills v. Dade County, 206 So.2d 227 (Fla. 3d DCA 1968); Strahan Manufacturing Co. v. Pike, 194 So.2d 277 (Fla. 2d DCA 1967); Meigs v. Lear, 191 So.2d 286 (Fla. 1st DCA 1966). In fact, in Danford v. City of Rockledge, supra, the District Court of Appeal, Fifth District, specifically followed this principle in a case involving the affirmative defenses of release and res judicata,

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[2] The only case cited by Petitioners as a basis for conflict jurisdiction is Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So.2d 525 (Fla. 1st DCA 1962), which involved a plaintiff, not a defendant, who moved for summary judgment before the opposing party, the defendant, answered. This is quite clearly different from the instant cases and the cases cited here since there is a pleading, the Complaint, upon which the summary judgment motion is based. Thus, it is still Respondent's position that there is no basis for this Court to exercise its conflict jurisdiction.

presently being asserted in this appeal.

The reason for these decisions is quite simple. Obviously the rules of procedure regarding pleadings were established in order to have the parties frame the issues involved in the case. Once the issues have been framed through the complaint, answer and affirmative defenses and reply to affirmative defenses, then the parties are aware of the factual evidence that must be presented. By allowing a party to move for summary judgment based upon an affirmative defense without pleading that defense permits a practice of obtaining summary rulings in a case by ambush. The issues in the case are not framed. Plaintiff has not had any opportunity to reply to the affirmative defenses with avoidances and the Court, without this information, attempts to rule summarily in the case. The District Court of Appeal, First District, confronted the issue in Meigs v. Lear, supra, and concluded this practice should be frowned upon and is contrary to the modern rules of procedure requiring notice as to what issues evidence is going to be introduced upon.

> The summary judgment proceeding under Rule 1.36 was certainly not designed to be used as a substitute for the parties' pleadings. While the Florida Rules of Civil Procedure, when adopted by the Supreme Court of Florida in 1954 and when that court later amended them, contain many innovations in the procedures in civil cases before the courts of Florida, the Supreme Court wisely recognized and preserved in the new rules the vital function of the parties' pleadings in framing the issues upon which evidence could be submitted by the parties in support of their respective positions on the issues framed by the pleadings.

181 So.2d at 288.

A review of the Rules of Procedure supports Respondent's position.

Although Petitioners cite the language "at any time" in Fla.R.Civ.P. 1.510(b) to support their position that it was appropriate to assert a motion for summary judgment based upon release and res judicata before pleading those defenses, that Rule is taken out of context.

First, Fla.R.Civ.P. 1.110(d) pertaining to Affirmative Defenses, specifically lists release and res judicata as defenses which must be set forth affirmatively in response to a preceding pleading.

> (d) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. (Emphasis added)

Similarly, Fla.R.Civ.P. 1.510(c) regarding the issue of when a motion for summary judgment should be granted, provides that summary judgment shall be rendered only if the pleadings, along with discovery and affidavits, show that there is no genuine issue of material fact.

> (c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. The adverse party may serve opposing affidavits prior to the day of hearing.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Emphasis added)

Without a pleading asserting an Affirmative Defense of release or res judicata, there is no basis under Fla.R.Civ.P. 1.510(c) for the trial court to grant a motion for summary judgment.

Thus, Petitioners' reliance on the language "at any time" in Fla.R.Civ.P. 1.510(b) is misplaced since a pleading upon which the motion for summary judgment is based serves as a prerequisite to the motion pursuant to Fla.R.Civ.P. 1.510(c).

Despite Petitioners' citations to the contrary, at least one federal court has agreed that the issues must be framed in a pleading before summary judgment may be granted. Bowers v. E.J. Rose, 149 F.2 612 (9th Cir. 1945)

Finally, Petitioners assert in their Brief that Respondent never raised this point in the trial court. Besides being factually incorrect, since it was raised, this point was never asserted by Petitioners in the District Court except in their Motion for Rehearing. Moreover, there is no support in the Record for this assertion because there is no transcript of the proceedings in the trial court.

The District Court was correct in holding that an affirmative defense of release or res judicata must be pled before it can serve as a basis for a motion for summary judgment.

POINT II

EVEN IF THE DISTRICT COURT ERRED IN ITS PROCEDURAL HOLDING, THE TRIAL COURT ERRED IN GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO PETITIONERS' AFFIRMATIVE DEFENSES OF RELEASE AND RES JUDICATA

A. INTRODUCTION

As set forth in Point I of this Brief, it is Respondent's position that the District Court was correct in holding that Affirmative Defenses of release and res judicata must be pled before they can be the subject of a motion for summary judgment. However, even if the District Court was incorrect in its ruling on that procedural aspect of this case, it is clear that a genuine issue of material fact existed as to the Affirmative Defenses of release and res judicata. As noted by the District Court in its Opinion, even though it did not have to reach the issue because of its procedural holding, the District Court stated that it was likely a valid claim of mutual mistake existed in favor of Respondent on the issue of release.

Thus, if this Court does agree the District Court erred in its procedural holding, then this Court must address the question of whether a genuine issue of material fact existed as to the affirmative defenses.

Respondent asserted in the trial court and in the District Court, three avoidances to Petitioners' affirmative defense of release. Those three avoidances were (1) the Settlement Agreement

and Releases were ambiguous on the issue of whether unknown claims such as the electrical bus ducts were to be included in the settlement; (2) the Settlement Agreement and Releases resulted from a mutual mistake of the parties and (3) the Settlement Agreement and Releases resulted from a mistake of fact by the parties. Genuine issues of material fact existed as to each of these avoidances.

The law is clear that in a Motion for Summary Judgment the burden of proof is on the moving party to conclusively show there is an absence of a genuine issue of any material fact. Wills v. Sears, Roebuck & Company, 351 So.2d 29 (Fla. 1977), Holl v. Talcott, 191 So.2nd 40 (Fla. 1966), Becker v. Kodel, 355 So.2d 852 (Fla. 3rd DCA 1978), Cook v. Martin, 330 So 2d 498 (Fla. 4th DCA 1976). Any doubts regarding the existence of genuine issues of fact and all reasonable inferences are to be resolved in favor of the party defending against the Motion for Summary Judgment. Davis v. 7 -Eleven Food Stores, Inc., 294 So.2d 111 (Fla. 1st DCA 1974), Buntin v. Carter, 234 So.2d 131 (Fla.4th DCA 1970). Moreover, it is well established that where the terms of a written agreement are disputed and reasonably susceptible to more than one construction, an issue of fact is presented which cannot be resolved by Summary Judgment. Quayside Association v. Harbor Club Villas Condominium Association, 419 So.2d. 678 (Fla.3d DCA 1982); see also, Ellenwood v. Southern United Life Insurance Company, 373 So.2d. 392 (Fla. 1st DCA 1979).

B

THE TRIAL COURT ERRED IN GRANTING FINAL SUMMARY JUDGMENT BASED UPON THE SETTLEMENT AGREEMENT AND RELEASE BECAUSE THERE WAS A GENUINE ISSUE OF FACT AS TO WHETHER THE SETTLEMENT AGREEMENT AND RELEASE INCLUDED THE CLAIMS OF RESPONDENT IN THE INSTANT LAWSUIT REGARDING THE BUS DUCTS

In their Motion for Summary Judgment, Petitioners maintained that the Settlement Agreement and Releases pertaining to the 1979 lawsuit were not ambiguous and were intended to release them from the claims actually asserted in that suit as well as any claim regarding the electrical bus duct system. This contention was asserted by Petitioners even though no one was aware this particular claim existed.

It was Respondent's position that the prior settlement was only intended to release Petitioners from claims regarding the defects known at the time of the settlement and alleged in that lawsuit. Further, Respondent believes the Settlement Agreement and Releases support that position or are, at a minimum, ambiguous and subject to more than one interpretation. As a result, a question of fact exists and the trial court erred in granting Final Summary Judgment.

The paramount concern of the Court in construing a "contract" is to fulfill the intention of the parties. Royal Continental Hotel v. Broward Vending, 404 So.2d. 782 (Fla. 4th DCA 1981), Hughes v .Professional Insurance Corporation, 140 So.2d 340 (Fla. 1st DCA 1962) cert. denied 146 So.2d 377 (Fla. 1962).

In determining the intention of the parties, the contractual

language controls if it is without ambiguity and clear. Royal Continental Hotels v. Broward Vending, supra; Royal America Realty v. Bank of Palm Beach and Trust Company, 215 So.2d 336 (Fla. 4th DCA 1968); Mason v. Avdoyan, 299 So.2d 603 (Fla. 4th DCA 1974). However, where an ambiguity exists, parol evidence may be admitted to resolve the ambiguity and explain the intention of the parties to the contract. Royal Continental Hotel v. Broward Vending, supra; Royal America Realty v. Bank of Palm Beach and Trust Company, supra.

It is a long standing principle of contract law that individual terms of a contract are not to be read in isolation but the contract documents are to be read as a whole and in relation to one another. Excelsior Insurance Company v. Pomona Park Bar and Package Store, 369 So.2d 938 (Fla. 1979) Triple E Development Company v. Florida Gold Citrus Corporation, 51 So.2d 435 (Fla. 1951); J.C. Penney Company v. Koff, 345 So.2d 732 (Fla. 1st DCA 1977).

In the instant case there are a number of references in the Settlement Agreement and Releases which highlight the intention of the parties regarding settlement of the 1979 lawsuit. A full understanding requires reference to all of them.

A review of these documents establishes that an unknown defect such as the electrical bus ducts was never intended to be settled or released. This fact is supported by the Settlement Agreement and Releases which are devoid of any reference to the fact that "unknown" or "latent" defects were included in the settlement.

The relevant portions of the settlement documents are as

follows:

1. The first page of the Settlement Agreement has two "Whereas" clauses which read as follows:

> WHEREAS, the ASSOCIATION and the CLASS REPRESENTATIVES filed an action against CORAL RIDGE and Westinghouse Electric Corporation in the 17th Judicial Circuit, In and For Broward County, Florida, on December 20, 1979, the case being entitled "PLAYA DEL MAR ASSOCIATION, INC., a Florida Corporation not-for-profit, FRED L. JOHNSON, and WILLIAM A. DE VOS and CHARLOTTE T. DE VOS, Individually and as Representatives of the Class vs. WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation registered to do business in Florida, and CORAL RIDGE PROPERTIES, INC., a Delaware Corporation registered to do business in Florida, and CORAL RIDGE PROPERTIES, INC., a Delaware corporation registered to do business in Florida, Case No. 79-18985 "Futch", alleging the existence of certain construction defects in the condominium project known as the PLAYA DEL MAR; and,
>
> 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 in 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, except as to any obligations of duties arising under this Settlement Agreement. (Emphasis added.) (R-35; A-22).

2. Paragraph 3 on Page 5 of the Settlement Agreement provides as follows:

> Simultaneous with the execution of this Agreement, the ASSOCIATION and CLASS REPRESENTATIVES shall place in escrow with their attorney of record, David McKenzie, a fully executed General Release releasing CORAL RIDGE and Westinghouse Electric Corporation 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 our of the terms of this Agreement), together with a Voluntary Dismissal With Prejudice of the aforedescribed lawsuit. Within five days of completion of work hereunder, which completion shall be certified by TECON, INC., the General Release and the Voluntary Dismissal shall be delivered to CORAL RIDGE and the Voluntary Dismissal

With Prejudice shall be filed with the Court. (Emphasis added.) (R-39; A-26)

3. The Release executed by Respondent in addition to the standard form language, had the following provision:

> First party hereby remise, release, acquit, satisfy and forever discharge the said second party 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 17th Judicial Circuit, In and For Broward County, Florida, the case being entitled "PLAYA DEL MAR ASSOCIATION, INC., a Florida corporation not-for-profit, FRED L. JOHNSON, and IRVING HOFFMAN and CONSTANCE E. HOFFMAN, Individually and as Representative of the Class vs. WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation registered to do business in Florida and CORAL RIDGE PROPERTIES, INC., a Delaware corporation registered to do business in Florida", Case No. 79-18985. (Emphasis added.) (R-44-45; A-31-32).

4. Since the Settlement Agreement and Release executed pursuant thereto refer to the allegations of the 1979 lawsuit (Case No. 79-18985) which was dismissed with prejudice, reference to the Complaint in that case is important (R-14-34; A-1-21).

Commencing on Page 6 and continuing through Page 15 (R 19-27; A 6-15) there is a listing of some 53 specific defects which are the subject of the lawsuit. Moreover, in Paragraph 29 (R-29; A-16), Paragraph 35 (R-30; A-17) and Paragraphs 41 (R-32; A-19) of the Complaint these specific defects were reincorporated and as was made clear in Paragraph 29 of the Complaint, the Respondent was only seeking damages for specifically enumerated defects.

> as a direct and proximate result of which the DEVELOPERS constructed the condominium buildings and improvements and sold

> parcels thereof to the unit ownrs with the defects and deficiencies hereinabove set forth. (Emphasis added)

(R-29; A-16)

In construing the language set forth above in the various documents, it is evident that the settlement of the 1979 lawsuit did not encompass an "unknown" defect such as the electrical bus duct system. This view finds support from the following:

A. Nowhere in any document, be it the Settlement Agreement or Release, is there any language whatsoever which states "unknown" or "latent" defects are included. In fact, the only document where "latent" defects are even mentioned is in Paragraph 22 of the Complaint in the 1979 lawsuit (R-18; A-5). Paragraph 22 stated that the specific defects listed in the Complaint were latent to unit owners at the they purchased and closed on the units. Clearly, that language does not mean that every latent defect is alleged in the lawsuit, but simply that the unit owners did not waive their right to make a claim on the specific defects listed by closing on their units.

B. As can be seen from the Paragraph 3 of the Settlement Agreement and the Release, the settlement was as to "past, present and future claims, demands and causes of action arising from alleged defective construction..." (R-26; R-44-45; A-26; A-31-32).

C. The "WHEREAS" clause also referred to a settlement of "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 PLAYA DEL MAR..." Although Respndent would assert that this only referred to known defects, this language could create the impression that unknown defects are included. (R-35; A-22).

The effect of this language is diminished by the fact that it was not part of the Agreement itself, but only a part of a "Whereas" clause.

Generally, commentators have noted that preliminary or "whereas" clauses do not ordinarily form any part of the real agreement and are not permitted to control the express provisions of a contract. 17 Am. Jur. 2d Contracts § 268 (1964 & 1984 Supp.) A "whereas" clause has been defined as an introductory or prefatory statement and is not an essential part of the operative provisions of a contract. Black's Law Dictionary, (5th Ed. 1979). In particular, a recital clause merely provides the background of a contract. 17 Am Jur. 2d Contracts § 268 (1964 & 1984 Supp.).

In any case, even if one was going to attach significance to this "Whereas" clause, all it does is create an ambiguity or inconsistency with the body of the Settlement Agreement.

The Release relied upon by CORAL RIDGE and WESTINGHOUSE is a RAMCO form which contains printed form language and language added by the parties. The broadly drafted form language and the more specific language added by the parties does not refer to the release of "unknown" claims or defects. Therefore, there is no indication that an unknown claim or defect was intended to be released.

Moreover, by adding this language, Petitioners converted a standard general release into a limited release, specifically discharging Defendants from "alleged" defects and deficiencies as more fully argued in "B" above.

In a case similar to the instant one, this Court held that summary judgment cannot be granted on the basis of this type of release since, at a minimum, an ambiguity exists. In Hurt v. Leatherby Insurance Company, 380 So.2d 432 (Fla. 1980) the plaintiff was injured in an automobile accident and signed a general release consisting of a printed form. The release also provided additional spaces for adding discharged parties. One of the named Defendants to the lawsuit, not specifically mentioned in the release, asserted they were released based upon the executed release form. On appeal from an order granting summary judgment, this Court reversed, pointing out that a latent ambiguity existed, thereby creating an issue of fact. In this regard, the Court stated:

> The presence of the two types of releases, one printed and one written, within a single form, creates at least a latent ambiguity.
>
> * * *
>
> Another basic rule is that where written and printed provisions conflict, the written terms ordinarly prevail.
>
> * * *
>
> We feel that the better rule in these particular circumstances is to allow extrinsic evidence of the parties' intent.

Hurt, 380 So.2d at 434.

As a result, the above establishes that, taken as a whole, the Settlement Agreement and Releases are ambiguous.

The extrinsic evidence regarding this ambiguity makes it even clearer that Summary Judgment should not have been granted. It was established by the testimony that:

1. The Settlement Agreement was drafted by Petitioners' lawyer Bill Blyler. See Affidavit of Buntemeyer (R-93) and Sworn Statement of McKenzie (R-67).

2. The lawyer for Respondent who participated in the negotiations and the preparation of the settlement documents testified the intent of the agreement was to release Petitioners as to the defects specifically identified in the lawsuit and that no other matters were ever discussed. See Sworn Statement of McKenzie (R-66-69).

3. Respondent, through it's officers and directors, Srebnik and Greenwood, did not intend to release Petitioners for unknown defects or for that matter any defects not specifically named in

the lawsuit. See Affidavits of Srebnik and Greenwood (R-75-78).

4. Neither Petitioners nor Respondent was aware of any problems with the electrical bus ducts when the settlement was reached. See Deposition of Buntemeyer (R-) and Affidavits of Srebnik and Greenwood (R-95-96).

5. Petitioners filed sworn answers to interrogatories in another lawsuit wherein it admitted it paid certain sums of money for corrective work as part of the settlement, none of which was for the electrical bus ducts. See Answers to Interrogatories of CORAL RIDGE (R-248, 260).

Finally, Petitioners, in support of their argument that the corroded bus ducts were part of the settlement, place reliance on the fact that the Release referred to "past, present and <u>future</u> claims, demands and causes of actions arising from <u>alleged</u> defective construction." This is, at best, a strained reading of the Release. All this language really means is that a claim would not be permitted for any of the defects alleged in the lawsuit even if such a claim arose in the future. For instance, if after the settlement one of those defects listed in the lawsuit created damage, or needed to be repaired, that defect would constitute a "<u>future claim</u> arising from <u>alleged</u> defective construction" which would be considered as resolved by the settlement. It did not preclude claims for defects never alleged and unknown at the time of the settlement.

Thus, Petitioners' assertion throughout its Brief that one should be sympathetic to its "plight" of being subjected to an unjustified claim which was released by an "unambiguous" settlement

has no basis. The fact of the matter is that Petitioners are trying to avoid a valid claim by hiding behind a settlement agreement where neither party intended to settle an unknown claim such as the electrical bus ducts.

As a result, the trial court erred in granting Summary Judgment because an ambiguity existed in the settlement documents and there is a genuine issue of material fact as to the intention of the parties.

C

THE TRIAL COURT ERRED IN GRANTING FINAL SUMMARY JUDGMENT BASED UPON THE SETTLEMENT AGREEMENT AND RELEASE BECAUSE THERE WAS A GENUINE ISSUE OF FACT AS TO WHETHER THERE WAS A MUTUAL MISTAKE

It is a long established principle of contract law that parole evidence is admissible where a document does not express the true intention of the parties. Ayr v. Chance, supra; Spear v. MacDonald, 67 So.2d 630 (Fla. 1953). This is permissible whether an ambiguity exists in the document or not.

The issue of mutual mistake has been raised by the filed affidavits, statements and depositions demonstrating that the parties only intended to settle, release and discharge those matters specifically listed in the Complaint. As set forth in the previous section, the extrinsic or parole evidence has established that matters not specifically alleged in the lawsuit were never discussed, investigated, known or intended to be settled, including any claim

for the electrical bus duct system.

Introduction of parole evidence which merely raises the issue of mutual mistake will preclude granting of summary judgment. Steffens v. Steffens, 422 So.2d 963 (Fla. 4th DCA 1982); Bagnasco v. Smith, supra; Ayr v. Chance, supra.

In Bagnasco v. Smith, supra, a case virtually on point with the instant case, the appellees filed a motion for Summary Judgment in a personal injury action based upon a release. Appellant in response to the Motion for Summary Judgment filed an Affidavit saying the release which served as the basis of the Motion was executed based upon a mutual mistake. The Court in reversing the Summary Judgment held:

> Although the reply of the appellant was not as well drawn as it might have been in seeking to avoid the effect of the release on the grounds of mutual mistake, there was no challenge to the technical sufficiency of the reply on that ground; and the subsequent filing of the affidavit by appellant's counsel clearly presented the claim of mutual mistake.

Bagnasco, supra, at 481-482.

In Steffens an antenuptial agreement was sought to be reformed based upon mutual mistake of fact. The trial court refused to admit proffered evidence relevant to mutual mistake and Summary Judgment was granted. On appeal, the District Court reversed and held that evidence relevant to mutual mistake should have been admitted. Further, the Court held there is no requirement that both parties agree that an issue of mutual mistake exists. As the District Court pointed out in a footnote to the opinion:

> 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.

Steffens, 422 So.2d at 964, n. 1. (Emphasis added).

Based upon Steffens, a party alleging mutual mistake has the right to offer parole evidence in support of its claim. Once evidence in support of mutual mistake is raised, summary judgment should not be entered.

Similarly, Ayr v. Chance, supra, involved an appeal from an order of the trial court, granting summary judgment to Defendants based upon a release executed by the Plaintiffs. Initially, Plaintiff instituted a lawsuit for personal injuries resulting from the negligent operation of a motor vehicle owned by David Chance and driven by Mitchell Chance.

During the litigation, Plaintiff settled with David Chance and executed a release discharging David Chance and "all other persons, firms, corporations, associations or partnerships of and from any and all claims..." Ayr, 372 So.2d at 1000. Relying on this release, Mitchell Chance moved for summary judgment. At the hearing, the Plaintiff raised the defense of mutual mistake and submitted evidence and argued that the parties did not intend to release all other parties despite the broad language of the release. The trial court granted summary judgment, but the Fourth District court of Appeal reversed and held that:

> The Plaintiffs... have raised an issue of facts as to whether language contained in the release was included therein by mutual mistake. This material issue of

> fact precludes the entry of as summary judgment.

Ayr, 372 So.2d at 1002.

This doctrine was followed in two recent case by the District Court of Appeal, Third District, in Milford v. Metropolitan Dade County, 430 So.2d 951 (Fla. 3d DCA 1983) petition for revision denied, 440 So.2d 352 (Fla. 1983), and Gonzalez v. Travelers Indemnity Company of Rhode Island, 408 So.2d 741 (Fla. 3d DCA).

In the instant case, the affidavits of unit owners and statement of David R. McKenzie establish there was never any settlement discussions concerning the electrical bus duct claim or an intent to settle any defects other than those specifically alleged in the lawsuit. Therefore, an issue of material fact exists as to whether or not the settlement agreement and release reflects that true intention of the parties.

Moreover, assertions by Petitioners that extrinsic evidence may not be used to create a mutual mistake miss the distinction between ambiguity and mutual mistake. Whereas extrinsic evidence may not be used to create an ambiguity, it is relevant to show that a mutual mistake exists notwithstanding a lack of ambiguity. Steffens v. Steffens, supra; Bagnasco v. Smith, supra; Ayr v. Chance, supra.

Finally, Petitioners contend that each of the cases cited by Respondent is distinguishable because they either involve third party claims or involve claims for reformation of a written instrument.

As for the fact that Ayr v. Chance, supra and Bagnasco v.

Smith involve third party claims, it is immaterial to the Court's holdings. It is not discussed by the court in either opinion as being a factor and is simply not germane to the issue of mutual mistake.

Similarly Milford v. Metropolitan Dade County, supra; Steffens v. Steffens, supra; and Gonzalez v. Travelers Indemnification Company, supra, only raised the issue in the context for an equitable action for reformation rather than in a legal action for damages. This factor does not change the underlying principle that where a written document does not reflect the intention of the parties it must not be allowed to thwart that intention. The notion that the obsolete distinction between courts of equity versus courts of law should influence this principle, is absurd.

An issue of fact exists on the issue of mutual mistake and precludes summary judgment.

D

THE TRIAL COURT ERRED IN GRANTING FINAL SUMMARY JUDGMENT BASED UPON THE SETTLEMENT AGREEMENT AND RELEASE BECAUSE THE PARTIES WERE UNAWARE OF THE DEFECT IN THE ELECTRICAL BUS DUCT SYSTEM AND, AS A RESULT, A MISTAKE OF FACT EXISTED

The law is clear that a contract or release may be set aside upon showing is was executed pursuant to a mistake as to a past or present of a party to it. Boole v Florida Power & Light, 3 So.2d 335 (Fla. 1941); Ormsby v. Ginolfi, 107 So.2d 272 (Fla. 3d DCA 1958) cert. denied 114 So.2d 439 (Fla. 1959).

This avoidance is distinguishable from mutual mistake where the document does not reflect the intentions of both parties.

In Ormsby, Plaintiff executed a release for all "known and unknown" personal injuries resulting from an automobile accident. Following settlement Plaintiff commenced an action to recover damages for personal injuries sustained in the accident. Defendants asserted the claim was barred by the executed release and moved for summary judgment. At the hearing, it was established that the Plaintiff signed the release based upon her belief she had not suffered any personal injuries as a result of the accident. Further, that the consideration exchanged for the release excluded any item for personal injuries.

Upon consideration of the above factors, the trial court granted summary judgment which was reversed on appeal.

The Appellate Court held summary judgment was inappropriate when a genuine issue of fact is raised as to whether the release was executed under a bona fide mistake of fact. In this regard, the 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.

Ormsby, 107 So.2d at 273.

The instant case creates even a stronger argument for relief from the Final Summary Judgment because the release here, unlike in Ormsby, makes no mention of releasing WESTINGHOUSE or CORAL RIDGE

for "unknown" injuries.

In Boole, supra, the appellant was involved in a truck collision and later an x-ray taken of his chest disclosed no injury. 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...

Boole, 3 So.2d at 336.

Sixteen days after signing the release and twenty-five days after the accident, Boole died, apparently from aggravation of a pre-existing cardiac condition.

On the basis of the release the trial court granted a directed verdict. On appeal to this Court, the ruling was reversed despite the broad language of the release. The Court found that the evidence presented raised an issue of mutual mistake because:

> ...neither party anticipated or contemplated that the decedent's injury was serious in nature and that the release was executed and the consideration was paid to compensate for the decedent's doctor bill and x-ray plate showing no ribs broken...

Boole, 3 So.2d at 337 (Emphasis added).

Petitioners paid no consideration in settlement of this lawsuit for the bus duct claim because, in fact, it was not a known or contemplated defect at the time the settlement was executed by the parties (R-66-69, 95-96, 248, 260).

Furthermore, it is established that each settled claim had a value and the total value covered all matters alleged in the

lawsuit and nothing more. (See Answers to Rooney's Interrogatories propounded to CORAL RIDGE (R-248, 260).

Moreover, the case law is clear that a general release does not affect a claim which matured or accrued after the date of release. Ciliberti v. Ciliberti, 416 So.2d 48 (Fla. 3d DCA 1982); Sottile v. Gaines Construction Co., supra; Restifo v. McDonald, 230 A.2d 199 (Pa. 1967); Rensink v. Wallenfang, 699 N.W.2d 196 (Wis. 1954). Since an action does not accrue until the Plaintiff is aware of the invasion of his legal right or, in this case, knowledge of the defect in the bus ducts, the settlement agreement and releases executed by the parties cannot apply to it. As alleged, it was only after the fire that the parties had any knowledge of the defective nature of the bus duct claim. Based upon these holdings, the bus duct claim could not have been released.

Moreover, Petitioners' reliance on Van de Water v. Echols, 382 So.2d 147 (Fla. 4th DCA 1980) is misplaced.

In Van de Water the Court affirmed a Summary Judgment based on a release where the injury complained of, a subdural hematoma, was the "later result of the known head injury." The Court in upholding the validity of the Release affirmed Ormsby, holding that mistake of past or present fact was grounds for setting aside a Release but that unknown consequences of a known injury were not. In analogizing Van de Water to the instant case, if Playa del Mar had sought in the instant lawsuit to recover from Defendant for an injury, i.e. a roof leak occurring after the settlement, suffered as a result of one of the defects listed in the lawsuit (a poorly installed roof)

then its action would be precluded because it would be for the unknown consequences of the known injury of a poorly installed roof. However, that is not the case since the installation of defective bus ducts was not a known injury at the time of the Release. Thus, the analysis of Ormsby and Boole rather than Van de Water apply in the instant case.

Finally, Petitioners' reference to the fact that the 1979 lawsuit was not formally dismissed until after the instant lawsuit was filed fails to tell the entire story.

It is unrebutted that at the time of the original settlement neither Respondent nor Petitioners knew of the problem with the bus duct. The President of Coral Ridge Properties had admitted that fact (R 95-96). The Settlement Agreement dated February 25, 1982 (R-35; A-22) contractually obligated Respondent to execute the Release and voluntarily dismiss the 1979 lawsuit upon completion of certain remedial work performed at the building and payment of certain sums of money. Since it took in excess of a year to perform the remedial work, the Release and Voluntary Dismissal were not actually provided until 1984. The obligation however to provide them occurred in February, 1982. The fire occurred at Playa del Mar in October, 1982 and the problems with the bus ducts were discovered shortly thereafter. Thus, although the Release and Voluntary Dismissal technically postdate the discovery of the bus duct problem, the obligation to provide them predates it and the mistake of fact occurred at the time when the Settlement Agreement was executed. Any argument that a mistake of fact did not occur

because the Release and Voluntary Dismissal were given subsequent to the discovery of the corroded bus ducts is without merit.

Thus, an issue of fact existed on the issue of mistake of fact.

E

THE TRIAL COURT ERRED IN GRANTING FINAL SUMMARY JUDGMENT BECAUSE THE CLAIM BY RESPONDENT IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA

Petitioners' claim that the Order rendered May 29, 1984 in Case No. 79-18985, Playa Del Mar Association, Inc., et al. v. Westinghouse Electric Corporation and Coral Ridge Properties, Inc., makes the instant causes of action brought by Respondent res judicata. Nearly three years prior to the fire giving rise to the discovery of the instant cause of action regarding the bus ducts, Respondent and other parties instituted an action against Petitioners, as a result of specific known construction defects existing in the Playa Del Mar Condominium. These specific defects were referred to in Counts I, II and III of the original Complaint relating to breach of warranty, negligence and strict liability.

The Association, in the case sub judice, alleges through various legal theories that Petitioners were responsible for the defective electrical bus duct system at the Condominium. The facts and damages relative to the electrical bus duct system are distinct from the previous lawsuit which specifically addressed each defect sued upon and did not include a claim for the bus ducts.

In Florida, res judicata requires the presence of four identities:

1. identity of the thing sued for;
2. identity of the cause of action;
3. identity of the persons or parties to the action; and
4. identity of the quality and capacity of the person for or against whom the claim is made.

Cartee v. Carswell, 425 So.2d 204 (Fla. 5th DCA 1983); Husky Industries, Inc. v. Griffith, 422 So.2d 996 (Fla. 5th DCA 1982).

If these requirements are not met, the doctrine of res judicata does not apply.

Res judicata does not apply in the instant case because the requirements set forth above have not been met for three reasons.

First, the matter sued upon is different. 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 (Fla. 1953). Similarly, judgment is not res judicata as to issues which were not identified and listed in the prior suit, Cartee v. Carswell, supra.

The matter sued upon in the instant lawsuit was not one of the defects specifically named in the previous lawsuit, and thus was not the subject of that proceeding.

Second, the cause of action in the instant case is different from the prior lawsuit. As this Court held in Shearn v. Orlando

Funeral Home, 88 So.2d 591 (Fla. 1956), for a cause of action to be considered to be the same in determining whether res judicata applies, the essential facts must be the same. Furthermore, the evidence sought to be introduced must be the same to sustain each lawsuit. Clearly that is not the case here. Since, if Respondent had proven the existence of the known defects specifically alleged in the 1979 lawsuit that evidence would not have proven the claim in the instant suit regarding the electrical bus duct system.

Third, res judicata requires an identity of the quality and capacity of the person for or against whom the claim is made. This element is not satisfied as it concerns Petitioner WESTINGHOUSE. WESTINGHOUSE was sued in the 1979 lawsuit as Developer only (R 16-17; A 24-25). In the instant case, WESTINGHOUSE has not only been sued as Developer but also as the manufacturer, supplier and distributor of the electrical bus duct system at the Condominium (R-2). Thus, since WESINGHOUSE is being sued in a different capacity, it is not res judicata.

Based upon the foregoing factors, the Association should not be barred from bringing the instant action because the matters sued for in the instant action are distinct from the thing sued for in the prior action. The instant case presents different evidence, duties, and facts regarding the bus ducts that were never part of the previous lawsuit.

CONCLUSION

The District Court of Appeal was correct in reversing the summary judgment entered by the trial court for the reasons set forth above.

Respectfully submitted,

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By: _____
Robert J. Manne

By: _____
for Steven B. Lesser

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by mail this 14th day of August, 1986 to JOHN PAPPAS, ESQUIRE, Butler, Burnett, Wood & Freemon, P.A., 501 Kennedy Blvd., Tampa, FL 33062; JOHN HARGROVE, ESQUIRE, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, P.A., One Corporate Plaza, 18th Floor, 110 E. Broward Blvd., Ft. Lauderdale, FL 33301; and PAUL REGENSDORF, ESQUIRE, Fleming, O'Bryan & Fleming, P.A., P.O. Drawer 7028, Ft. Lauderdale, FL 33338.

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