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IN THE *SUPREME* COURT OF FLORIDA

JAVIER H. LONDONO, M.D., CHARLES A. WILLIAMS, *JR.*, ESQUIRE, AND JOHN HOCE,

Petitioners,

vs.

TURKEY CREEK, INC., a Florida corporation, and NORWOOD W. HOPE,

Respondents.

CASE NO.: 76,765

DISTRICT COURT OF APPEAL
FIRST DISTRICT
CASE NO.: 89-2123

ON WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL

CASE NUMBER: 89-2123

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RESPONDENTS' AMENDED *ANSWER* BRIEF

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PRELIMINARY STATEMENT

The Petitioners, **JAVIER H. LONDONO, M.D., CHARLES A. WILLIAMS, *JR.* ESQUIRE and JOHN HOCE,** Defendants/Appellees below, are referred to herein as the "Petitioners", the "threesome", the "Defendants" or are referred *to* by their last names.

The Respondents, **TURKEY CREEK, INC. and NORWOOD W. HOPE,** Plaintiffs/Appellants below, are referred to throughout this brief as either "Respondents", "Turkey Creek" or "Plaintiffs". References to the record are indicated herein by the prefix "R".

The Appendix attached to this brief is referred to as Respondents' Appendix or "A" and documents are referred to by the tabbed attachment number such as "A-2".

STATEMENT OF THE CASE AND FACTS

The Respondents hereby adopt the statement of the case and the statement of the facts set forth by the Petitioners in the Initial Brief.

SUMMARY OF THE ARGUMENT

This case is before the Supreme Court for discretionary review, because the First District certified that its ruling, reversing the summary final judgment against the respondents on their count for malicious prosecution, conflicted with the Fourth District's ruling on the same issue. There is no inter-district conflict with the First District's handling of the other counts of the complaint, and thus there is no jurisdictional basis for their review by the Supreme Court.

The respondents further argue that the summary judgment granted as to their claim for malicious prosecution should be reversed. The basis for the summary judgment being entered against them was the taxation of a cost judgment in their favor in the earlier declaratory judgment lawsuit filed by the petitioners. The cost judgment entered in the earlier action was not an election of remedies, because it did not satisfy the damages caused the respondents by the petitioners. Further the remedy of damages is consistent with the cost judgment, because the facts to be relied upon in obtaining a cost judgment are not inconsistent with the facts to be relied upon in obtaining damages for malicious prosecution.

The respondents further argue that the authorities relied on by the court below in granting the summary judgment are inapplicable to the instant case because they involve governmental officials who attempted

to briny a malicious prosecution action. The petitioners are not governmental entities or officials, the damages suffered run against their personal finances, and there is no issue of petitioning a government for redress of a grievance against the government. Nor will there be any double recovery by them as a result of the cost judgment, since the damages suffered exceed $4,000,000.

TURKEY CREEK, INC., and NORWOOD W. HOPE, argue that the trial court erred in dismissing with prejudice their claim for slander of title. The court's basis for dismissal was that this claim should have been brought as a compulsory counterclaim in a prior action in which the petitioners sought a judgment declaring invalid certain of TURKEY CREEK, INC.'S, rights under recorded declarations, and by-laws. The gist of the respondents' argument on this count is that the instant case involves a distinct controversy arising out of facts involving the petitioners' tortious conduct, and not from the same facts, transaction or occurrence giving rise to the prior lawsuit.

As to the latter points on appeal, the trial court erroneously went beyond the allegations within the four corners of the second amended complaint and improperly weighed the evidence it speculated might be introduced in a trial. The trial court also erred in ruling, as a matter of law, that the petitioners' actions as alleged in the second amended complaint were justified. There was no allegation in the

second amended complaint that the pending TURKEY CREEK, INC.-OIDC relationship, with which the petitioners intentionally interfered, was detrimental to their established economic interests, nor was there an allegation that their interference was necessary to protect their interests. Further, counts one and two of the second amended complaint contain the essential allegations of the causes of action pursued, and its dismissal with prejudice was error.

As counts one and two properly state causes of action for the tort of interference, the tortious conspiracy claim of count three is proper. All the essential allegations are contained in count three, and it too should be reinstated by this court.

I. THIS COURT HAS NO JURISDICTION TO REVIEW PORTIONS OF THE DISTRICT COURT OPINION WHICH DO NOT DIRECTLY AND EXPRESSLY CONFLICT WITH OTHER DISTRICT COURTS

This court's jurisdiction in the instant case is predicated on Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. This court accepted jurisdiction because the First District's opinion directly and expressly conflicted with the ruling of the Fourth District in Cypher v. Seqal, 501 So.2d 112 (Fla. 4th DCA 1987).

The instant case involved a five count complaint which was dismissed by the trial court, without leave to amend. The ,plaintiffs appealled to the First District. Both parties presented their positions by briefing each count as a separate point on appeal. The First District dealt with each of the five issues as distinctly as they were laid out in the complaint and the briefs.

One of the counts of the complaint presented a claim for malicious prosection. It fell via a summary judgment because the plaintiffs, defendants in the first action, had obtained a cost judgment in their favor. The trial court based its ruling on Cate v. Oldham, 450 So.2d 224 (Fla. 1984) and Cypher v. Seqal, 501 So.2d 112 (Fla. 4th DCA 1987). The First District reversed the summary judgment, expressing disagreement with the Fourth District's interpretation, in Cypher, of

the Supreme Court's holding in Cate. (I.B. App. 1, p. 11). It concluded its opinion by acknowledging confict with Cate.

The Respondents herein have always accepted that conflict exists between the First District and the Fourt District. However, that conflict is limited only *to* the malicious prosecution issue. Cypher does not conflict with Turkev Creek, Inc. on the remaining points resolved in the First District's opinion. Without this conflict, there can be no jurisdiction. All issues raised by the Petitioners, save malicious prosecution, should be dismissed.

The remaining issues are addressed by the Respondents in this brief, not as a sign of vacillation, but as a signal of caution.

TI. WHEN NO DOUBLE RECOVERY WILL OCCUR, A NONGOVERNMENTAL DEFENDANT WHO RECOVERS A COST JUDGMENT AGAINST AN UNSUCCESSFUL PLAINTIFF SHOULD BE ENTITLED TO SUE FOR MALICIOUS PROSECUTION

Restricting a defendant who has recovered a cost judgment from suing the plaintiff for malicious prosecution has two rationales. First, in the case of a public official as plaintiff, such an action would unconstitutionally chill the citizenry's right to seek a redress of its grievances with the government. Second, no unfair double recovery (costs and damages) should be allowed to occur, for private or public litigants. Cate v. Oldham, 450 So.2d 224 (Fla. 1984); Cypher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1987). Neither problem is presented by allowing TURKEY CREEK, INC., and HOPE to pursue a malicious prosecution claim against the defendants, notwithstanding the cost judgment awarded them in the underlying litigation.

HOPE is an individual citizen with no public or governmental appointment. TURKEY CREEK, INC., is a Florida corporation engaged principally in the development and sale of real property; it is neither a municipal corporation nor a governmental entity.

Allowing these two private citizens to bring a malicious prosecution action against these defendants would in no way chill the threesome's constitutional right to seek a redress of their grievances from pubic officers. Thus, the only possible policy obstacle is the concern over a possible double recovery, which might arise from allowing the lawsuit to follow the entry of a cost judgment. The First District properly noted that such a result would not occur and found that the plaintiffs should be allowed to pursue their claim for damages.

Any legal analysis should begin with this court's opinion in Cate v. Oldham, 450 So.2d 224 (Fla. 1984). This is the operative part:

> At common law successful defendants could either tax costs and fees in the original action, or they could sue for malicious prosecution upon the basis of those losses; they could not do both. Parker v. Langley, 93 Eng. Rep. at 297. There being no Florida decision or statute to the contrary, the common law rule precludes such an attempt at double recover here.

Id. at 227.

It thus follows that when the malicious prosecution action does not attempt a recovery duplicative of the cost judgment, it should be permitted. Parker v. Langley, supra., in language not readily decipherable by this (fairly) recent Florida law graduate, seems to suggest the same result.

> I know not whether these actions have not in some measure been allowed upon the reason of the statute of 8 Eliz. C. 2, so that what that Act declares to be injustice and vexatiaus, and orders a judgment to be given for costs and **damaqes** thereupon, should afterwards be likewise in those cases at the election of the party, or in other like cases to be the foundation of an action upon the case to recover damages .... Id at 297. (emphasis added).

Apparently the successful English defendant had the option, in the initial lawsuit, to recover from the unsuccessful plaintiff his damages, fees, and costs. Should he so elect, he would be barred from seeking further recovery in an independent lawsuit. Justice Atkins, writing far the majority in Cate, seemed to speak to this point by noting the successful common law defendant's option to "tax costs and fees" at the conclusion of the initial lawsuit. The breadth of this recovery, which included defense attorneys' fees, justifies the election.

But in the instant case, the cost judgment **was** inadequate to satisfy the respondents' damages incurred by the first lawsuit. The cost judgment taxed costs of $5,611.50; the respondents suffered damages from the malicious pursuit of the first lawsuit which exceed $4,000,000. The respondents incurred defense attorneys' fees which exceeded $100,000; none were taxed against the losing threesome. Nowhere in this scenario is there a risk of double recovery.

Three decisions steadily narrowed the scope of relief available to a wrongfully prosecuted defendant. In Parker, the successful defendant could recover in the initial action not only his costs and fees but his damages. Cate did not mention damages, but suggested that the opportunity to tax the prevailing defendant's fees and costs **was** an adequate remedy. The Fourth District Court of Appeal, in Cypher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1987), held that the recovery of a cost judgment alone adequately vindicated the wronged defendant and terminated his right to seek full compensation, without considering the cost of representation or consequential damages.

Constricting the potential recovery of wronged defendants, and limiting their access to judicial relief, runs counter **to the** rationale behind this cause of action.

> Malicious prosecution as an action at common law was to protect the individual from unjustifiable litigation in the protection of the interest of (1) damage to reputation, (2) putting in jeopardy life, limb or liberty, and (3) **damage** to property, as for example expenditure of money to defend oneself of criminal charges. Cate v. Oldham, supra., at 227 (emphasis supplied), quoting Board of Education v. Marting, 217 N.E.2d at 217 (citations omitted).

Realistically, the award of costs in Florida is almost a ministerial act. The parties appear before the trial court with

a myriad of affidavits, court reporter bills, expert witness fee statements and the like. After a perfunctory hearinq, costs are awarded and included in the judgment purely as a function of winning. Inquiry into the motives of the losing plaintiff, or the impact of the litigation on the prevailing defendant, is nonexistent.

The recovery of compensatory damages, which may include attorneys' fees, typically requires a massively greater effort: the successful prosecution of a malicious prosecution lawsuit. It is unfair to require the wronged defendant to waive the certainty of a cost judgment for the vagaries of another lawsuit, in order to recover his taxable costs. This is particularly true when there is no risk of double recovery. The malicious losing plaintiff, soon to be a defendant, could assert the collateral source rule, the affirmative defense of setoff, res judicata, or other technical objections to prevent a double recovery of the costs. But he should not be able to shield himself from a $4,000,000 tort claim behind a $5,600 cost judgment.

The limitation imposed by Cypher eviscerates the malicious prosecution cause of action. Taxable costs are recoverable purely as a function of winning the lawsuit. The broader spectrum of compensatory and punitive damages is available only

to the successful defendant who can meet the stringent burden of proving the requisite elements of malicious prosecution.

A view from another angle may be helpful. To truly be a double recovery, the taxable costs must be identical in nature and amount to the damages caused by the litigation. Thus, in the instant case, to be an impermissible double recovery the $5,611.50 cost judgment must represent the full measure of damages caused TURKEY CREEK, INC., and HOPE by the threesome's malicious prosecution of the first lawsuit. Although a concededly stretched analogy, this is akin to barring an injured plaintiff from pursuing a tort claim because his medical bills were paid by his no-fault insurer.

The "two bites at the apple" argument raised by the petitioners (I.B. 16-18) is initially compelling but ultimately misplaced. It is incorrect to equate, as petitioners try to do, the award of attorneys' fees in a post-trial order, with the inclusion of attorneys' fees as an element of damages in a malicious prosecution lawsuit. The former award is made under the terms of the applicable statute or contract provision; the latter is included in the overall calculation of damages caused by one's adversary's malicious prosecution. This imposes on the the defendant/non-plaintiff a much greater burden.

Far example, suppose a successful defendant moves a trial Court for an award of attorneys' fees against the plaintiff pursuant to Section 57.105, Florida Statutes (1989), arguing that the claim was frivolous. Suppose further that the motion is denied because the judge finds that the plaintiff's claim Presented at least a justiciable issue of fact or law. Again, suppose that the defendant can prove that the plaintiff maliciously and wrongfully sued him and that the lawsuit cost him his job, his marriage and his social standing. In this scenario, the instant petitioners would argue that the unsuccessful effort to prove legal frivolity (the 57.105 motion) constituted the damaged defendant's only bite at the apple, and that he is forever out of court. Parenthetically, this is what happened in the instant case during the first litigation. TURKEY CREEK, INC.'S motion was made pursuant to Section 57.105, Elorida Statutes (1983) and was aimed at only a portion of the complaint. It was denied by the trial court (A.B. App. 1 and 2).

Inverting the hypothesis, assume that the trial court granted the Section 57.105 motion (and was affirmed on appeal). No one would argue that the finding of frivolity equalled a finding of malice; surely one can be stupid without being mean. The point is, attorneys' fees are awarded under a different standard than damages in a malicious prosecution suit.

Pope v. Pol-lock, 21 N.E. 356 (Ohio 1889), is a very helpful opinion, partially distinguishing Parker v. Langley, supra. There, the plaintiff leased a dwelling from the defendant. For some reason, the defendant began a pattern of judicial harassment, suing the tenant in repeated actions for forcible detainer, to recover the premises, etc. The tenant won each of the lawsuits, and then sued the landlord for malicious prosecution.

In its opinion, the Ohio Supreme Court noted the history of allowing suits when the victim had been wrongfully prosecuted in criminal matters. It then outlined the theories behind various jurisdictions allowing and not allowing the actions in response to civil actions.

> Where such suits have been maintained, the right has been placed upon the ground that taxable costs, including, as in most states, but the fees of witnesses and officers of court, afford a very partial and inadequate remuneration €or the necessary expenses of defending an unfounded suit, and no remedy at all to repair the injury received.
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> It is a wrong to disturb one's property or peace; and to prosecute one maliciously and without probable cause, is to do that person a wrong. The common law declares that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character.
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> * * *

> In England the taxed costs which may be awarded to a successful defendant include not only fees of court officers and witness, but attorney's charges for preparing the case for trial, and the honorarium of the barrister who tries it, and in a number of American states a like taxation of casts prevails. But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial, to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred, for in cases where damages may be recovered for malicious injury, fees of counsel, as well as court *costs,* are included in compensatory, and not punitive, **damages.** The reason for the rule having failed, there is much ground for saying that the rule itself fails.

In short, the malicious prosecution cause of action has two admirable policy goals: to compensate a person wrongfully sued for all his damages, and to deter malicious use of the court system. The latter objective is buttressed by the availability of punitive damages, another tool of deterrence. Barring a private defendant, who has taxed costs against an unsuccessful plaintiff, from bringing the action would frustrate these policy objectives. There would be only minuscule compensation, and there would be no deterrence.

The plaintiffs' claim for malicious prosecution should be reinstated.

III. WHETHER THE TRIAL COURT ERRED IN RULING THAT THE APPELLANTS' CLAIM FOR SLANDER OF TITLE WAS A COMPULSORY COUNTERCLAIM.

Compulsory counterclaims are governed by Rule 1.170(a), Florida Rules of Civil Procedure, which provides in pertinent part:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court. cannot acquire jurisdiction...."

The transactions and occurrences which were the subject of the appellees' prior claims were centered around the appellants' management of the P.U.D. Specifically, the appellees challenged the appellants' amendment of the homeowners associations' by-laws and declarations, and the appellants' administration and development of the P.U.D. and the homeowners associations. However, the methods by which the appellants administered and developed the P.U.D. did not give rise to the appellants' claim for slander of title. The facts, transactions and occurrences which gave rise to the appellants' claim for slander of title concerned the appellees' activities, before, during, and after

the appellees' suit seeking a declaratory judgment. This Court is presented with two separate controversies. Although the parties are the same, and although some overlap exists in the time period during which these separate controversies occurred, each arises from distinct, unrelated facts, and they are unrelated claims.

The appellees filed their complaint for declaratory judgment on or about March 30, 1982. By that time they had maliciously publicized false information about the appellants and the appellants' land within the P.U.D. However, the appellees continued those publications far beyond that time, resulting in the appellants' loss of a $4,000,000 project with OIDC in May 1984. The appellees accomplished this by posting large signs and hillboards with false and defamatory information, by mailing out a false and defamatory "survey" to local real estate attorneys, by lying to zoning officials, and to OIDC, and by organizing and beginning their conspiracy to wrongfully induce the appellants to disregard the various rights and obligations in the by-laws and declarations. These activities gave rise to the appellants' claim for slander of title of their land within the P.U.D.

However, none of the methods by which the appellees effected their malicious publication had anything to do with the transactions and occurrences which formed the basis of the

appellees' lawsuit against the appellants. That lawsuit sought a declaratory judgment as to the various methods by which the appellants managed and administered the P.U.D., far example by retaining voting rights, assessing maintenance costs through homeowners associations, and amending the by-laws of the homeowners associations.

The tests applied in determining whether a counterclaim is a compulsory one include the following inquiries: (1) are issues of fact and law raised by the claim and counterclaim largely the same; (2) will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim; (3) would the doctrine of res judicata bar the counterclaim if it is asserted subsequent to the action; and (4) is, there a logical relation between the claims? Rudner v. Cabrera, 455 So.2d 1093 (Fla. 5th DCA 1984); Bratcher v. Wronkowski, 417 So.2d 1132 (Fla. 5th DCA 1982); City of Mascotte v. Florida Municipal Liability Self Insurers Program, 444 So.2d 965 (Fla. 5th DCA 1984).

The answer to each of those inquiries in the instant case is negative. First, whereas the appellees' original claim sought a judgment declaring the validity of amendments to the restrictive covenants, appellants' instant claim seeks monetary damages for the appellees' tortious conduct, including the various means by which they published false and defamatory messages about the

appellants and the P.U.D. The fact that some of the methods used by the appellees to wrongfully seek their goals gave the appellants a cause of action does not sufficiently relate the controversies, because those tortious methods were not in any way an issue in the appellees' original lawsuit against the appellants. In that prior lawsuit, only restrictive covenant amendments, voting rights, and assessments were in issue. Further, the appellants' tortiaus conduct had nothing to do with the validity of the declarations, or vice versa. The two lawsuits involve distinct theories of law, seek distinct remedies, and are based on distinct facts. Accordingly, the claim and counterclaim do not involve issues of fact and law which are substantially the same. Under the first test, the instant claim is not a compulsory counterclaim.

Second, while some pieces of evidence, such as the content of the restrictive covenants and by-laws of the homeowners associations, may be relevant to both lawsuits, the vase weiqht of the evidence in the appellants' claim below is wholly irrelevant to the appellees' prior action. In their claim for slander of title, the appellants will produce evidence of appellees' malicious publication of false information. Little or none of that was relevant to, nor was any of that evidence introduced in, the appellees' prior action, because it simply

did not support or refute the issues in the prior action, to wit whether appellants were entitled ta employ certain methods to develop, manage **and** administer the P.U.D. Therefore, the appellees fail to pass the second test for holding that the appellants count for slander of title is a compulsory counterclaim.

The third requirement provided by the authorities cited above is likewise unsatisfied. Specifically, res judicata would not bar the appellants' action for slander of title, because that issue was not raised, not litigated, and not adjudicated in the appellees' prior action. The reason it was not raised, litigated, nor adjudicated previously is that it arose from a different set of facts. Further, a5 an action in tort, it has nothing to do with the appellees' action for a declaratory judgment as to the various rights between the appellees and appellants governed by restrictive covenants, homeowners association declarations **and** by-laws. The appellees' cause of action was to determine the appellants' right to administer the P.U.D., while the appellants' cause of action concerns the tortious method by which the appellees conducted a challenge to that right, and that challenge reaches far beyond, and involves conduct subsequent to, the appellees' prior lawsuit. The appellants' claim for slander of title is not a compulsory

counterclaim, and the order of the court below holding to the contrary should be reversed.

Finally, there is no logical relation between the appellants' instant claim and the prior claim of appellees. The preceding discussion of the first three tests demonstrates that the claim for damages as a result of the appellees' tortious behavior has no logical relation whatsoever to a judgment declaring the validity of the appellants' rights under the by-laws and recorded declarations of the homeowner associations and the P.U.D. Any further expansion here would be redundant. None of the tests for a compulsory counterclaim set forth by Florida law are met in the instant case, and the order dismissing count one with prejudice should be reversed.

IV. COUNT ONE OF THE SECOND AMENDED COMPLAINT ADEQUATELY STATES A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS, AND ITS DISMISSAL WITH PREJUDICE WAS REVERSIBLE ERROR.

It is appropriate to review the legal standard which should have been applied by the trial court in resolving the defendants' motions to dismiss the second amended complaint. When considering a motion to dismiss for failure to state a cause of action, factual allegations of the complaint must be taken as true, and all reasonable inferences are construed in favor of the plaintiff. Cutler v. Board of Regents of State of Florida, 459 So.2d 413 (Fla. 1st DCA 1984). The trial court must confine itself to considering those facts contained within the four corners of the complaint. Consideration of the defendant's affirmative defenses, or the likely sufficiency of the plaintiff's evidence, is wholly irrelevant and immaterial to resolving the motion. Abrams v. General Insurance Co., Inc., 460 So.2d 572 (Fla. 3rd DCA 1984). It is improper to speculate about the facts which may ultimately be proved at trial. Singer v. Florida Paving Company, Inc., 459 So.2d 1146 (Fla. 3rd DCA 1984).

Should the trial court determine from the complaint that it fails to state a cause of action, it should ordinarily grant the motion to dismiss without prejudice to the plaintiff's right to

amend. Delia & Wilson, Inc. v. Wilson, 448 So.2d 621 (Fla. 4th DCA 1984). The dismissal should only be with prejudice when it is clear from the complaint that the plaintiff could never state a cause of action. Sidener v. Jones, 455 So.2d 643 (Fla. 1st DCA 1984). Leave of court should be freely given when justice so requires. Rule 1.190(a), Florida Rules of Civil Procedure.

The dismissal of the second amended complaint should be reviewed against this backdrop. The elements of a cause of action for intentional interference with a contractual relationship are:

(i). the existence of a contractual relationship between the plaintiff and a third party;

(ii). the defendant's knowledge of that contractual relationship;

(iii). the defendant's intentional procurement af the contract's breach;

(iv). the absence of justification or privilege for the defendant's breach;

(v). damages resulting from the breach.

See Florida Telephone Corp. v. Essig, 468 So.2d 543 (Fla. 5th DCA 1985) and Standard Jury Instruction Civil 85-1, 475 So.2d 682 (Fla. 1985). In the instant case, each of these elements are specifically and plainly alleged:

(i). Paragraph 36 - "At all times material hereto, the plaintiff TURKEY CREEK, INC., and Owens-Illinois Development Corporation (hereinafter "OIDC") enjoyed a contractual relationship which afforded OIDC a series of options to purchase from TURKEY CREEK, INC., certain lands within the project. These options were to be exercised in certain phases or sequences, and would total approximately $4 million in sales. TURKEY CREEK, INC. was to receive development rights for each property on which OIDC exercised an option. This provided the plaintiff an opportunity to profit in two ways: first, from the sale of its property; and second, from the development of the property after it was sold to OIDC. A copy of the original option contract is attached hereto as Exhibit A and its terms and contents incorporated herein by reference. At all times material hereto, TURKEY CREEK, INC., was ready, willing and able to perform its obligation related to the sale of its Land to OIDC."

(ii). Paragraph 37 - "At all times material hereto, the defendants had actual and direct knowledge of said contractual relationship between the plaintiff TURKEY CREEK, INC., and OIDC."

(iii). Paragraph 38 - "From January 1982 through May 1984, without. justification and in a deliberate effort to interfere with the contractual relationship between the plaintiff TURKEY CREEK, INC., and OIDC, the defendants, individually and in concert, undertook the actions more particularly described above in paragraphs 23 through 34."

(iv). **Paragraph 39** - "As a direct and proximate result of the actions by the defendants, OIDC terminated its contractual relationship with the plaintiff, TURKEY CREEK, INC., on **or about** 15 **May 1984,** without exercising its remaining options. This resulted in the plaintiff, TURKEY CREEK, INC., losing all profits it would have received had OIDC completed the exercise of its purchase options and the resultant development of said property by TURKEY CREEK, INC. Additionally, the plaintiff, TURKEY CREEK, **INC.,** suffered various consequential and incidental damages. The plaintiff also suffered damage to its business reputation, and lost other business opportunities, all of which shall continue in the future."

It thus appears that, taking these allegations as true for purposes of resolving the motions to dismiss, the Second Amended Complaint on its face states a prima facie case. In its order of dismissal (R-205) the judge said, "Next, the second amended complaint fails to supply an essential element of the tort of interference, namely the absence of justification or privilege." This finding clearly ignores the plain language of **paragraph 38** of the pleading.

The court then goes on to find that the allegations of the complaint clearly show that the defendants acted with justification and thus **are** immunized from liability. This too is error, and the citation to Harry Pepper & Associates, Inc., v. Lasseter, 247 So.2d 736 (Fla. 3rd DCA 1971) is misleading. In Harry Pepper, the amended complaint which was dismissed **had** attached to it a deposition transcript which was incorporated by reference into the pleading. There, the sworn testimony clearly contradicted the allegations in the complaint and evidently facially established a privilege. The appellate opinion does not enlighten us about the acts complained of, the contract interfered with, or provide any other guidance for reviewing the instant. case.

The order of dismissal erroneously resolved the issue of justification as a matter of law. Determining whether the defendants' conduct was justified, "seems to turn upon whether the subject conduct is considered to be 'unfair' according to contemporary business standards.'' Azar v. Lehigh Corporation, **364** So.2d 860 (Fla. 2d DCA 1978). Said another way, determining justification depends on a balancing of competing interests:

> The question of whether appellants' admittedly intentional interference was unjustifiable **depends** upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important. Insurance Field Services, Inc. **v.** White & White Inspection and Audit. Services, Inc., 384 So.2d 303, 306, (Fla. 5th DCA 1980), quoting Restatement 2d Torts Section 767.

The evaluation of these competing interests, and the comparison of the methods employed to prevailing community mores and business standards, is a jury function. Restatement 2d Torts, Section 767, comment one; Manufacturing Research Corporation v. Greenlee Tool Company, 697 F.2d 1037 (11th Cir. 1982). The trial judge erred in the case at bar by resolving this critical issue as a matter of law. A local jury should be given an opportunity, after hearing all the evidence, to state via its verdict whether the defendants' conduct transgressed the rules of fair play and violated the plaintiffs' rights.

It is certainly true that defendants have latitude to protect their existing economic rights, and that actions to do so may be privileged. Ethyl Corporation v. Balter, 386 So.2d 1220 (Fla. 3rd DCA 1980). But those actions must not be wrongful, and this evaluation is for the jury. Furthermore. to be privileged the actions taken by the defendants must be directed at a contract, the performance of which will be harmful to them.

In Nitzberg v. Zalesky, 370 So.2d 389 (Fla. 3rd DCA 1979), this point was made clear. There, a lender made a substantial loan to a resort hotel organization. The resort then entered into an employment agreement with the plaintiff which obligated the resort to pay a stated salary, provide stock options and bonus opportunities, etc. Down the road, the financial condition of the resort deteriorated rapidly, requiring the lender to step in and force the hotels to tighten their belts. As part of the exercise, executive salaries (including the plaintiff's) were reduced. The financial picture continued to darken and the plaintiff eventually left the resort's employ. He then sued the resort and the lender, alleging inter alia that the lender wrongfully caused the procurement of the resort's breach of his employment contract.

The lender's actions were reasonable and privileged. It was necessary for the lender to interfere in the employer-employee contract in order to preserve the lender's existing economic interests in its loan arrangement. "If a person has a present existing economic interest to protect, such as ownership interest or a prior contract right of his own, he is privileged to prevent performance of a contract of another which threatens it." Id. at 391.

A similar result was reached in Serafino v. Palm Terrace Apartments, Inc., 343 So.2d 851 (Fla. 2d DCA 1976). The plaintiffs wanted to obtain the assignment of an apartment lease from one of the apartment tenants, which has to be approved by the landlord. The plaintiffs sought this assignment so it could sublease the unit to others, presumably for a profit. The landlord, who had preexisting leases with all its other tenants, declined to approve the assignment as it was felt that such a sublease would be disharmonious with the complex setting. The plaintiffs sued the complex, alleging the landlord wrongfully interfered with the lease assignment relationship between the plaintiffs and the tenant whose apartment they sought. The appellate court ruled this defendant's behavior was privileged, as it was necessary to protect the landlord's preexisting contractual and property rights.

Nitzberg and Serafino illustrate the critical distinction which makes the instant order of dismissal and finding of justification improper. In those two cases, the defendant interfered with contractual and business relationships between the plaintiff and a third party, because the performance of that contract would have injured the defendant's existing economic interest. In contrast, there is no allegation within the four corners of the second amended complaint that shows that the defendants were going to be harmed by the performance of the TURKEY CREEK, INC.-OIDC contracts. Their conduct might arguably be privileged if such was the case, but it is not. The Second Amended Complaint plainly establishes (its allegations must be accepted as true) the defendants' actions were intended to disrupt the OIDC deal not because its performance would be bad for the defendants, but because its nonperformance would ruin the plaintiffs.

By no stretch of the imagination can it be said that the Second Amended Complaint establishes that (1) the defendants believed the performance of the OIDC contract would damage the defendants' existing economic rights, and (2) their interference with that relationship was necessary to protect their own property rights. Thus, the order of dismissal holding the defendants' to be justified as a matter of law is error.

In its order of dismissal, the trial court seems to make contradictory references to the matter of malice and ill-will. On the one hand, the order says (R-206) that the malevolence of the defendants and their ill-will does not vitiate the righteousness of their actions. On the other hand, the order seems to fault (R-207) the second amended complaint for not containing allegations of malice or sham.

In Florida, malice alone is sufficient motivation to make the defendant's interference actionable, even if the acts were not directed at giving the defendant a competitive advantage. Tamiami Trail Touts, Inc. v. Cotton, 463 So.2d 1126 (Fla. 1985). But actual malice or ill-will are not essential elements of the cause of action, and they need not be pleaded as such. McDonald v. McGowan, 402 So.2d 1197 (Fla. 5th DCA 1981). However, evidence of malice may be admissible to support a claim for punitive damages. Southern Bell Telephone and Telegraph Co. v. Roper, 482 So.2d 538 (Fla. 3rd DCA 1986).

The 11th Circuit, in a case arising under Florida law, clarified the Ethyl decision and role of malice in these actions:

> The Ethyl court inferred ... that if the acts complained of were "solely the conception and birth of malicious motives" the interference would be actionable. Id. at 1225. This is certainly not to say the converse is true, i.e., that there can be no claim

> for tortious interference without proof that the defendant acted solely out of malice. This significant inquiry to determine the privilege of justification is whether the means employed are improper. Home leans heavily on the fact that it had a legitimate right to protect its interests and the interests of the unit owners under the condominium declaration. We agree, but the questions remain, were the means to the end employed by Home improper? Was the interference with Brod's employees and the relationship between Brod and the unit owners "sanctioned by the rules of the game?" G.M. Brod & Company, Inc. v. U.S. Home Corporation, 759 F.2d 1526, 1535 (11th Cir. 1985).

The appellants herein respectfully suggest that the proper analytic mode is as follows:

1. Confine the analysis to the allegations set forth in the Second Amended Complaint, and presume them to be true. Cutler v. Board of Regents, supra.

2. Compare the allegations therein to the elements of the cause of action, and determine that the essential pleading requirements are met.

3. Review the allegations and determine that they do not show unequivocally that the defendant were interfering with the OIDC contract to prevent that contract from harming their established economic interests. Nitzberg v. Zalesky, supra.

4. Note that the allegations do not establish that the defendants' methods and means to an end, as described in the pleadings, were proper or "sanctioned by the rules of the game", as a matter of law. G.M. Brod & Company, Inc. v. U.S. Home Corp, supra.

Accordingly, the order of dismissal should be reversed.

V. COUNT TWO OF THE SECOND AMENDED COMPLAINT ADEQUATELY STATES A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH *AN* ADVANTAGEOUS BUSINESS RELATIONSHIP, *AND* ITS DISMISSAL WITH PREJUDICE WAS REVERSIBLE ERROR.

The legal analysis of this issue is virtually identical to the preceding issue on appeal, **and** the appellants for brevity and simplicity adapt the preceding argument and incorporate it herein by reference.

VI. COUNT THREE OF THE SECOND AMENDED COMPLAINT ADEQUATELY STATES A CAUSE OF ACTION FOR TORTIOUS CONSPIRACY, *AND* ITS DISMISSAL WITH PREJUDICE WAS REVERSIBLE ERROR.

Almost on its face the order dismissing Count III of the Second Amended Complaint is deficient. Its comment (R-209) that it does not appear that the combination of the three defendants and their committee through sheer force of numbers or economic power could beggar the plaintiffs, is plainly an impermissible evaluation of evidence expected to be presented at trial. Singer v. Florida Paving Company, Inc. supra. Again, the trial court should have confined itself to judging only the adequacy of the allegations in the Second Amended Complaint. Abrams v. General Insurance Co., Inc., supra.

Ordinarily, to state a claim for civil conspiracy, the plaintiff must allege that two or more persons acted in concert to achieve an improper goal, or to obtain a proper goal through improper acts. Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984). This requirement was met in paragraph 53 of the Second Amended Complaint: "... the defendants intentionally and deliberately organized themselves and other P.U.D. residents far the purpose of wrongfully inducing the plaintiffs to disregard their rights set forth in the by-laws and recorded Declarations,

by adversely affecting the plaintiffs' business interests and activities within the P.U.D."

Another type of actionable conspiracy exists: where the coercive power of a confederation greatly exceeds that of isolated and disharmonious individuals, and where that coercive power is wrongfully brought to achieve an improper result, or a proper result through improper means, a cause of action for conspiracy arises. Churruca v. Miami Jai-Alai, Inc., 353 So.2d 547 (Fla. 1977). This was properly alleged in paragraphs 54 and 55:

> 54. The defendants organized and operated their conspiracy or confederation, previously described herein as "the committee", for the purpose of wrongfully exerting greater coercive political, economic, legal and social pressure on the plaintiffs than they would be able to exert individually, in order to wrongfully induce the plaintiffs to disregard their rights under the by-laws and recorded Declarations.
>
> 55. The defendants succeeded in this endeavor insofar as the committee did in fact have the capacity and ability to do greater harm to, and wrongfully exert greater political, economic, and social pressure on the plaintiffs than the actions of the defendants acting individually. For example, to disseminate the false information about the P.U.D. and the plaintiffs, the defendants held large meetings at various public meeting facilities, dominated several public meetings of various governmental boards or bodies, attracted a large amount of media attention, and raised and spent money on behalf of the members of the committee.

Thus, upon the reinstatement of Counts One and Two, this Court should likewise reverse the dismissal of Count Three.

CONCLUSION

The scope of discretionary review in this case should be limited to the malicious prosecution issue. None of the matters briefed by the Petitioners present the interdistrict conflict necessary to confer jurisdiction for review.

The appellants' claim for slander of title did not arise out of the same transactions or occurrences which gave rise to the appellees' suit for declaratory judgment. The appellants claim that the appellees slandered title to land within the P.U.D. by tortiously disseminating false information. The fact that appellees did so during the course of their declaratory judgment action challenging certain rights of the appellants, and thereafter, does not sufficiently relate the two distinct controversies. These controversies involve different issues of law and fact, different evidence, and the appellants' claim for slander of title should be reversed.

Likewise, this Court should reverse the summary judgment on the malicious prosecution count. No election of remedies has been made because the costs taxed are a consistent remedy with the unsatisfied damages now sought. Further, the appellants are not governmental entities, and the injury caused by the appellees clearly runs against the appellants' personal finances. The appellants therefore do have a greater right to seek greater

sanctions than a cost judgment. Moreover, no issue of governmental redress is present in this action. Therefore, the order of the Court below as to the malicious prosecution count should also be reversed.

The order of dismissal of Counts One, Two, and Three of the Second Amended Complaint was improper. All the allegations of the causes of action for intentional interference with a contractual relationship, intentional interference with an advantageous business relationship, and tortious conspiracy were set forth in the document. That is the only test in resolving a motion to dismiss for failure to state a cause of action.

The defense of privilege or justification requires a determination of whether the defendants' conduct was within acceptable community standards, this is a jury function. The trial judge committed error when he decided this question in favor of the defendants based on his speculations about what the evidence might show at trial.

At any rate, to be justified, the defendants' interference with the TURKEY CREEK, INC.-OIDC relationship must be intended to prevent that relationship from harming the defendants' economic interest. There is no allegation in the Second Amended

Complaint that said relationship was harmful to the defendants or that their actions were intended to prevent that harm.

Both orders should be reversed and all Counts reinstated.

RESPECTFULLY SUBMITTED

MICHAEL W. JONES, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven true and correct copies of the foregoing have been furnished to The Honorable Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925, and a true and correct copy to James J. Pratt, Esquire, 231 East Adams Street, Jacksonville, Florida, John F. Roscow, 111, Esquire, Post Office Box C, Gainesville, Florida 32602, and to Andrew G. Pattillo, Esquire, Post Office Box 1450, Ocala, Florida 32678, by delivery to the U.S. Mail this 20th day of June 1991.

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