O.A. 10-01-91

OBW/app

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondents.

CASE NO. 76,765

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

ON WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL

CASE NUMBER 89-2123

INITIAL BRIEF OF PETITIONERS ON THE MERITS

SCRUGGS & **CARMICHAEL,** P.A.
Post Office Drawer C
Gainesville, Florida 32602
(904) 376-5242
Attorneys for Petitioners
BY: John F. Roscow, III
Florida Bar I.D. No. 098580

TABLE OF CONTENTS

CITATION OF AUTHORITIES

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 Petitioners' Appendix or "A" and documents are referred to by the tabbed attachment number such as "A-2".

The Petitioners, Londono and Hoce, have authorized the Petitioner, Williams, to file this brief on their behalf as well as Williams. Consequently, in the interest of economy, no separate briefs will be filed by Londono or Hoce, and this brief will be deemed their unified brief.

STATEMENT OF THE CASE

This is an appeal from the Opinion of the District Court of Appeal of Florida, First District, dated 12 September 1990. A copy of that Opinion is attached to the Appendix as A-1. This Court entered its Order Accepting Jurisdiction and Setting Oral Argument on 12 April 1991.

Turkey Creek filed an Amended Complaint in the Circuit Court for the Eighth Judicial Circuit of Florida on 23 January 1987 seeking damages from Williams, Londono and Hoce, on five different causes of action (R-29). By Order of 13 November 1987, the Honorable Benjamin M. Tench granted the Defendants' Motion to Dismiss Count I which stated a cause of action for slander of title (R-54-56); the basis for dismissal was that this cause of action was a compulsory counterclaim which should have been raised in prior litigation between these same parties. A copy of excerpts from the Revised Second Amended Complaint in that prior litigation is attached to the Appendix as A-2.

The trial court also granted summary judgment as to Count II of Turkey Creek's Complaint which stated a cause of action for malicious prosecution (R-54-56); the court's basis for granting that motion was that a cost judgment taxed in Hope's and Turkey Creek's favor as Defendants in the prior litigation barred them from bringing a subsequent malicious prosecution action, The Final Judgment in the prior litigation is attached as A-4 to the Appendix and the Final Judgment for Costs is attached as A-5.

Judge Tench's 13 November Order was appealed to the First District (R-57-58). The propriety of that appeal was attacked by the threesome who argued that the remaining counts of the Amended Complaint were so linked to the dismissed counts as to make review premature. By its Order dated March 8, 1988 (R-202), the First District dismissed this first appeal as an unauthorized appeal from a non-final order.

During the pendency of the first appeal, Turkey Creek filed and served a Second Amended Complaint containing counts for intentional interference with contractual rights, intentional interference with an advantageous business relationship, and civil conspiracy (R-59-179). This pleading was attacked by defensive motions (R-180-201), which were for the most part granted by the trial court in its Order filed July 6, 1989 (R-203-209). That Order dismissed with prejudice all remaining counts of the Second Amended Complaint.

Turkey Creek then appealed the August 1989 Order as well as the 1987 Order previously appealed (R-210-211).

The Opinion of the First District Court of Appeal reversed the trial court as to each and every count that Turkey Creek had ever asserted. The Petition for Writ of Certiorari to this Court followed. This Court's grant of certiorari is apparently based on the acknowledged conflict between the First District's Opinion and the holding of the Fourth District in Cypher v. Seqal, 501 So.2d 112 (Fla. 4th DCA 1987).

STATEMENT OF THE FACTS

The Statement of the Facts which follows is taken virtually verbatim from the Statement of the Facts presented by Turkey Creek as Appellant, to the First District Court of Appeal. Williams, Londono and Hoce acknowledge that this Statement comports with the allegations contained in the Amended Complaint or the Second Amended Complaint, whichever is applicable. For purposes of this appeal, the threesome will stipulate, as they did in the First District, that the factual allegations contained herein are properly pled and that the conclusions that Turkey Creek has drawn from those factual allegations are logically derived unless otherwise noted in the body of the brief.

Hopefully, this gesture will enable the Court to review the appealed decision without becoming bogged in a morass of bickering over inconsequential factual matters.

Turkey Creek, Inc., is a Florida corporation involved in the business of developing and selling real estate for profit. Norwood W. Hope is the president and majority stockholder of Turkey Creek, Inc. Turkey Creek and Hope developed, and for several years have been selling residential real estate in a planned urban development (hereinafter P.U.D.) called Turkey Creek, situated in Alachua County, Florida. The Respondents are or were residents of the P.U.D. Further, the Respondent, Charles A. Williams, Jr., is an attorney and the Respondent, Javier Londono, is a physician. The Respondent, John Hoce, operates

several corporations involved in various business activities, such as a restaurant and floor cleaning business.

In the course of developing and operating the P.U.D., Turkey Creek formed several not-for-profit corporations called "homeowners associations" to facilitate the administration of the P.U.D. Each such corporation was governed by its "Declaration of Covenants, Conditions, and Restrictions" (hereinafter "Declarations") and its bylaws. Turkey Creek recorded those Declarations in the Public Records of Alachua County, Florida. The recorded Declarations specifically refer to the Homeowners Associations' Bylaws, which were at all times available at Turkey Creek's offices in the P.U.D. for inspection by property owners or prospective purchasers.

By the terms of the Declarations and Bylaws, Turkey Creek retained voting rights in the associations and enjoyed the right to amend the Bylaws from time to time. The Declarations and Bylaws also allowed Turkey Creek to provide to the associations maintenance services and to charge the associations for those services. The associations accrued deficits for these maintenance charges. The threesome challenged, by various methods, each of these rights of Turkey Creek enjoyed under the Declarations and Bylaws.

The means by which the threesome sought to usurp Turkey Creek's rights under the Bylaws and Declarations included knowingly disseminating false and misleading information to the

public regarding the value, vendability, and marketability of land within the P.U.D. by means of billboards, mobile signs, and through the creation of an "owners ad hoc committee", and by misinforming the media. The threesome also gave this false information to the City of Alachua zoning officials and local realtors and real estate attorneys.

Further, the threesome directly contacted and gave similar false information to Owens-Illinois Development Corporation (OIDC), another property owner in the P.U.D., with whom Turkey Creek enjoyed a contract and options worth over four million dollars to Turkey Creek in land sales and development income. The arrangement afforded OIDC a series of options to purchase from Turkey Creek certain lands within the P.U.D. These options were to be exercised in certain phases or sequences. For each option exercised by OIDC, Turkey Creek was given the development rights for the property. This provided Turkey Creek 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.

In 1982, the threesome brought suit challenging Turkey Creek's rights under the Declarations and Bylaws. Turkey Creek prevailed in that prior action and a cost judgment was entered in its favor. As a direct result, however, of the threesome's activities and the negative publicity arising therefrom, OIDC declined to exercise its options with Turkey Creek which repre-

sented a loss to Turkey Creek of over four million dollars.

Accordingly, Turkey Creek initiated the instant action against the threesome. The initial complaint contains separate counts alleging slander of title, malicious prosecution, tortious interference with a contract, tortious interference with an advantageous business relationship, and civil conspiracy. The initial complaint was dismissed with leave to amend. Thereafter, the counts alleging slander of title and malicious prosecution were dismissed with prejudice and the remaining counts dismissed with leave to amend. The Defendants then filed additional motions directed to the remaining counts (intentional interference with a contract, intentional interference with an advantageous business relationship, and civil conspiracy) which were granted, with prejudice. The appeal to the First District Court ensued and, as has previously been stated, the trial court was reversed as to all counts,

SUMMARY OF THE ARGUMENT

I

A private litigant is barred from maintaining a subsequent malicious prosecution action where has has previously elected to tax costs and/or fees after successfully defending the underlying action. This result is premised on the English common law, Cate v. Oldham, 450 So.2d 224 (Fla. 1984) and the interpretation of Cate as it applies to private litigants in Cypher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1987) and its progeny. The contrary holding of the First District in Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990) should be rejected.

It is inherently fair to allow a defendant at the successful conclusion of litigation to elect whether or not to accept a cost judgment for his court costs and possible attorney's fees and sanctions or, in the alternative, to waive the assessment of those limited damages and seek a broader range of recovery in a separate malicious prosecution case. To allow two bites at the apple results in situations, one being the Jaye case presently before this Court, where certain attorney's fees are disallowed in the underlying action only to be sought again in the malicious prosecution suit. It encourages judicial efficiency as one hearing resolves all issues. It avoids confusion such as whether or not the issue of attorney's fees, although presented, was ruled upon in the initial action. It prevents splitting causes of action. The election in question is not one of inconsistent

remedies but rather of substantive rights - the election, once made, acts as an estoppel or waiver to a malicious prosecution action as well as to the elements of damage which are already res judicata.

II

The trial court correctly ruled that Turkey Creek's claim for slander of title was a compulsory counterclaim in the prior litigation. The threesome have agreed with the tests applied by the First District to determine the compulsory nature of the counterclaim but have arrived at different conclusions in applying the law to the stated facts. It is their contention that the litigation, which they filed claiming that Turkey Creek's incessant meddling with the P.U.D.'s Restrictive Covenants, had destroyed the marketability of title to their homes. This lawsuit activated in Turkey Creek its claims that the threesome's activities directed against Turkey Creek in seeking redress had slandered the title to Turkey Creek's undeveloped properties remaining in the P.U.D. making those lands unsalable. The threesome contend that the decision of the Third District in Bieley v. duPont, Glore, Forgan, Inc., 316 So.2d 66 (Fla. 3d DCA 1975) is directly on point and require claims of defamation, libel, slander and the like to be asserted as compulsory counterclaims.

III and IV

The Petitioners contend that the Second Amended Complaint failed to state a cause of action for tortious interference with contractual rights ok an advantageous business relationship because the complaint facially disclosed the existence of a protected First Amendment constitutional right, the right to petition one's government. When a constitutional right is present, the plaintiff must allege and prove not only that the defendant is acting with malice when his privilege or justification becomes apparent but that, because of the ease of alleging malice, the plaintiff must allege and prove that the privilege or justification revealed was but a sham to cover the defendant's true intention which was solely to injure the other party. To impose a lesser standard is to chill First Amendment rights.

Should this Court believe, however, that the complaint's allegations are sufficient, the Court should correct the holding of the First District that Turkey Creek is a private litigant and not a governmental or quasi-governmental authority. Petitioners have not yet pled to the complaint and such a holding forecloses them from pleading and proving that Turkey Creek is indeed a governmental entity and hence the standard of proof that they contend for should be applied at trial.

V

The Second Amended Complaint failed to state a cause of action far the independent tort of conspiracy and its dismissal

with prejudice was proper. There are two types of conspiracy in Florida: The first is where two or more conspire to commit an independent wrong or tort which would constitute a cause of action if the wrong was done by one person. If any of the first four counts stated a cause of action, then a conspiracy action of this type would admittedly stand. The second type of conspiracy recognized in Florida is an independent tort, some times referred to as an economic boycott. This conspiracy arises where the conduct complained of would not be actionable if done by one person but if, by reason of force of numbers of other exceptional circumstances, the defendants possessed some peculiar power of coercion over plaintiff, then this independent tort arises. The stature of these Defendants in the economic community is such that their concerted actions could never give rise to the independent tort of conspiracy.

ARGUMENT

POINT 1

A PRIVATE LITIGANT IS BARRED FROM MAINTAINING A SUBSEQUENT MALICIOUS PROSECUTION ACTION WHERE HE HAS PREVIOUSLY ELECTED TO TAX COSTS AND/OR FEES AFTER SUCCESSFULLY DEFENDING THE UNDERLYING ACTION.

In Cate v. Oldham, 450 So.2d 224 (Fla. 1984), the issue posed was whether, under the common law of Florida, a state official, who had been sued in his official capacity for alleged negligence in the exercise of his official duties, could maintain an action for malicious prosecution against the unsuccessful plaintiffs in the negligence action. The answer was no. The rationale behind the decision was two-fold:

(1) There is no historical basis for a state officer to retaliate with a malicious prosecution action when he has been sued in his official capacity and, additionally, such an action would be constitutionally suspect as it would chill the right of an individual to petition and seek redress from his government; further, and separately,

(2) At common law, a successful defendant can either tax costs and fees in the original action, or he could sue for malicious prosecution, but he could not do both.

Thus, not only is a government official sued in his governmental capacity barred from filing a retaliatory suit by historical and constitutional limitations, but the true gravamen of Cate is that regardless of the first set of limitations, Oldham could

not have maintained a malicious prosecution action against Cate because he had already sought a cost judgment in the initial case. The key verbage is:

> At common law successful defendants could either tax costs and fees in the original action, or they could sue for malicious prosecution on 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 recovery here. Id. at 227.

This court went on to state that a government official sued only in his official capacity, and from whom no relief was sought that would run against his personal finances, could claim no greater right to seek greater sanctions. No greater right than who? The obvious answer is that the government official has no greater right than a private individual to maintain a malicious prosecution action after already taxing fees and costs in the original action.

As if the law was not perfectly clear after Cate, the District Court of Appeal in Cypher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1987), specifically addressed the issue as it pertained to a government official in his individual capacity. Cypher, a police officer, together with his employer, the Town of Palm Beach, caused Segal's arrest and subsequent unsuccessful criminal prosecution. Segal, in retaliation, was equally unsuccessful in suing Cypher and the Town of Palm Beach for malicious prosecution.

Cypher, keeping the judiciary busy, then brought his own malicious prosecution action against Segal which terminated unsuccessfully when summary judgment was entered by the trial court in Segal's favor. In granting the summary judgment, the trial court reasoned that as the town attorney sought costs in Segal's malicious prosecution action (ostensibly for the town and Cypher although the town had borne all of the costs), then Cypher had elected his remedy; regardless of the issue as to whether Cypher had been sued only in his official capacity, he was barred from bringing the malicious prosecution action. The trial judge also found that Cypher was sued in the first action only in his "official capacity" thus barring the suit under the first rationale of Cate.

The issue with which the Appellate Court was confronted was:

> Assuming that Segal had sued Cypher in his individual capacity in the first action, ... whether the defendant's election to tax costs in that case is a defense in this one.

The court noted that although no motion to tax costs was filed in the initial action, the order taxing costs was included in the final judgment. Cypher argued that he should not be bound by the fortuitous fact that the town's attorney included his name in the initial cost judgment awarding reimbursement for the town's expenses, but the record lent no support to the argument that the inclusion was accidental. Cypher, like Turkey Creek here, also

claimed that **the** mere fact that costs were sought in the initial case was not an election as to the damages which he now sought, damages which were unavailable in the first case, Those additional claims included damage to his reputation and for pain and suffering from his exposure to financial loss caused by the punitive damage claim asserted against him. Turkey Creek's additional claims include four million dollars that it contends it has in damages.

> Nevertheless, we conclude that the appellant had a choice at the conclusion of the initial suit to pursue an independent cause of action or to obtain more limited relief by way of seeking a cost judgment in that case. Once such an election was made and the judgment entered thereon, the appellant was barred from seeking additional damages, Id. at 114.

The court is talking about Cypher in his individual capacity because in his governmental capacity, he, under Cate v. Oldham, supra, would have had no such election and would have been confined solely to recovering a cost judgment. The Appellate Court's version of the above conclusion was:

> In summary, we conclude that the trial court did not err in determining that the appellant was barred, by taxing costs in the initial suit, from instituting a separate action for additional damages, regardless of whether or not he had been sued in his official capacity in the first instance; therefore, we affirm. Id.

Subsequent to Cypher, **the** Fourth District Court of Appeal has, in both Riverbend Marine, Inc. v. Sailing Associates, Inc., 539 So.2d 507 (Fla. 4th DCA 1989) and Jaye v. Royal Saxon, Inc.,

573 So.2d 425 (Fla. 4th DCA 1991), two cases involving only private parties as litigants, reasserted the rationale of Cate and Cypher which bars a private litigant from bringing a subsequent action for malicious prosecution where the plaintiff has previously elected to tax costs and/or fees after successfully defending the underlying action. The Fourth District noted that the First District, in Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), disagreed with its interpretation of the Cate language and, consequently, certified the issue to the Supreme Court as one of great public importance.

Turkey Creek's argument is quickly dismissed when one realizes that the litigant can indeed pursue all of his malicious prosecution damages - he must merely elect to waive obtaining a judgment for his costs and fees in the underlying litigation and pursue all of his daamges in the malicious prosecution action. To allow the litigant to pursue both avenues produces a host of inequitable results and confusion not perceived by the First District. For one example, in Royal Saxon, Inc., v. Jaye, 536 So.2d 1046 (Fla. 4th DCA 1988), Mildred Jaye, the dissident owner of a cooperative apartment, prevailed after a 12-day trial in her contentions that the cooperative apartment operated by Royal Saxon, Inc., could not require her to turn over a duplicate of her apartment key to the association and that the association's eviction action against her was unfounded. Her attorneys were awarded $33,250.00 in the "key" case and $54,125.00 in the

"eviction" case for a total of $87,375.00. Those awards to Jaye's counsel were upheld by the Fourth District. As to appellate fees, however, the Fourth District held:

> With respect to attorney's fees in this court, the same are denied in all respects.

Jaye promptly sued Royal Saxon for malicious prosecution. The trial court held that the plaintiff in a malicious prosecution action, who has previously taxed costs in a successfully defended underlying action, was barred by that election from seeking additional damages. The Fourth District affirmed in Jaye v. Royal Saxon, Inc., 573 So.2d 425 (Fla. 4th DCA 1991). That case is now before this Court as Jaye v. Royal Saxon, Inc., Docket Number 77,570. An examination of the record in Jaye reveals that a substantial portion of the malicious prosecution damages that Jaye now seeks is $25,000.00 to $30,000.00 for appellate legal fees. Because the entitlement to those appellate fees has previously been considered and denied in the Fourth District Court of Appeal (and certiorari was denied by this Court at 544 So.2d 200 (Fla. 1989)), to allow Jaye to again pursue those same fees in a separate action for malicious prosecution would be inequitable and unjust. One bite at the apple is sufficient. The same is true in Turkey Creek - the Final Judgment of 22 October 1984 retained jurisdiction to enter an appropriate order taxing costs and resolving Defendants' motion for attorney's fees relating to certain counts (see Appendix). Turkey Creek elected to proceed under that reservation of jurisdiction and on 20 March 1985 received an award of $5,611.50. The record does not disclose whether the award included attorney's fees and, if so,

how much; likewise, the record does not show if the court adjudicated the issue of attorney's fees adversely to Turkey Creek, The key, however, is that an opportunity was afforded to Turkey Creek to make its presentation to the trial court to seek such damages and, if dissatisfied with the award, Turkey Creek should not be allowed to not only collect that cost judgment but proceed again down the avenue of malicious prosecution seeking damages that well may have previously been determined.

The First District's Opinion in Turkey ~~Creek~~ then concludes by a discussion of "election of remedies." Obviously, some confusion exists over the common law term "election" which the First District must have assumed was equated to "election of remedies." As "election of remedies" generally entails (1) the existence of two or more remedies, (2) the inconsistency between such remedies, and (3) a choice of one of them. It is patent that the "election" referred to is one other than of remedy because the element of "inconsistency" is absent. See 1 Fla.Jur.2d "Actions" §152. These petitioners would suggest that the "election" is actually one of substantive rights. When a course of action has been followed that results in the rendition of an order which is advantageous or potentially advantageous to the claimant, it should preclude (through either an estoppel or a waiver) a claimant pursuing a second course of action against his opponent which involves component claims which have already been determined at a full hearing and which should be res judicata.

Pope v. Pollock, 21 N.E. 356 (Ohio 1889), is apparently the only other United States case based on Parker v. Langley, supra. That court asserts that prior to the Statute of Marlbridge, 52 Hen. III (1259), malicious prosecution actions were allowed under the common law but afterwards they have been uniformly denied. The Ohio court failed, however, to recognize the election that is inherent in Parker. The Ohio court proceeds to note that under the common law of England, the taxed costs which were awarded included not only the fees of court officers and witnesses, but also the attorney's charges for preparing the case and the honorarium paid to the barrister who tries it; such an award was deemed sufficient punishment to the plaintiff for prosecuting and recompense to the defendant for defending a malicious action. Ohio law, however, precluded the award of attorney's fees and this consideration weighed heavily on the court's decision permitting malicious prosecution actions. If, however, the court had recognized the election component of Parker, it is submitted that the decision could well have reached a different result. In Turkey Creek, as well as Royal Saxon, traditional costs as well as attorney's fees were made available to the successful defendants and their option, we would submit, should be to accept the equivalent of a common law award as full recompense or waive it per Parker and seek malicious prosecution damages in a separate action. Not only is such a course fair, but it saves valuable judicial time expended in cost, fee and sanction hearings in

the underlying action which the now malicious prosecution plaintiff would advance again in his new case.

In conclusion, it is submitted that a successful litigant should not be allowed to split his cause of action against his adversary collecting some damages in the underlying action and others in a subsequent malicious prosecution suit. Permitting the bifurcated actions advocated by the First District allows a claimant to advance once again claims that have been rejected by the initial tribunal(s) or claims whose acceptance or rejection by the initial tribunal(s) is unclear because of the form of the order. Under the Fourth District's methodology, a successful claimant in the underlying action has the option of accepting his costs and, if applicable, fees and/or sanctions, from the initial tribunal(s) as full redress or, in the alternative, and at his own option, pursuing a malicious prosecution action in order to seek a broader range of damages. The choice lies with the injured party - nothing could be fairer.

POINT II

THE TRIAL COURT CORRECTLY RULED THAT TURKEY CREEK'S CLAIM FOR SLANDER OF TITLE WAS A COMPULSORY COUNTERCLAIM IN THE PRIOR LITIGATION.

The trial court ruled that Turkey Creek's claim for slander of title was a compulsory counterclaim in the prior litigation. The First District erroneously reversed that ruling.

The First District's opinion analyzes Rule 1.170(a) (compulsory counterclaims) and examines in depth various tests which have been devised over the years to determine whether a claim held by the defendant against the plaintiff must indeed be asserted as a compulsory counterclaim or forever barred. The threesome have no quarrel with this analysis and, in fact, suggest that the analysis closely follows their answer brief filed in the First District.

The critical test, in modern form, is known as the logical relationship test:

> ... A claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant. (emphasis in the original). Neil v. South Florida Auto Painters, Inc., 397 So.2d 1160 (Fla. 3d DCA 1981) at 1164.

Obviously, if there is a logical relationship between the original claims and the counterclaim, then the counterclaim is compulsory. Neil became engaged in an altercation with South

Florida over the paint job that had been performed on her car. Neil failed to raise counterclaims for assault and battery, false imprisonment, and intentional infliction of emotional distress in South Florida's suit against her for the value of the paint job. The Third District found those intentional torts to constitute compulsory counterclaims as they bore a logical relationship to the original claim in that they arose out of the same aggregate of operative facts.

The Neil court has added that "stating the test is far easier than determining whether claims are or are not logically related." With that, the First District agreed as, again, do Londono, Williams and Hoce. We would submit, however, that there is a compelling logical relationship between the threesome's initial complaint and Turkey Creek's prospective counterclaim.

The threesome's action against Turkey Creek commenced in 1982. Attached in the Appendix are excerpts from their revised Second Amended Complaint (A-2). Even the most cursory examination of the complaint reveals that the three homeowners contended that Turkey Creek, Inc.'s, incessant amendments to the various declarations and covenants of Turkey Creek, a P.U.D., had, as stated in paragraph 83, made "the title to the [homeowners] property unmarketable by increasing assessments unreasonably without providing reasonable services ... ". Not only does the threesome's underlying complaint have as its gravamen the unmarketability of property in Turkey Creek, but their subsequent actions,

of which Turkey Creek now complains in its retaliatory action, smack of "slander to title." For example, in late 1981 and early 1982, Londono, Williams and Hoce, according to paragraph 30(C) of Turkey Creek's Second Amended Complaint, sought to have the "restrictive covenants, conditions, etc., ... be revised in a manner satisfactory to counsel for the homeowners and recorded to 'restore marketability'." Turkey Creek's Count I of its Amended Complaint which sounded in disparagement and slander of title, contended that despite knowing that Turkey Creek was dependent on a favorable public perception and reputation in order to market its lands, defendants "systematically, intentionally, repeatedly, and maliciously, disseminated false and harmful misinformation and misrepresentations to real estate salesmen, financiers and lenders, prospective buyers, lawyers and others, in a position to directly affect the plaintiff's legitimate business endeavors within Turkey Creek." (See Paragraph 24). Paragraph 26 gives as one example of defendants' conduct a "defamatory survey disseminated in January of 1982 which 'falsely and maliciously implied that the title to the plaintiff's property within Turkey Creek was unmarketable'." Paragraph 28 of the Amended Complaint proceeds to allege that the actions of Londono and Williams and their ad hoc committee has placed into disrepute the quality, value, salability and marketability of Turkey Creek's lands. Additionally, lenders failed and refused to loan money for the purchase of plaintiff's land because of their concern about the marketability of title in the project.

No reasonable man could fail to recognize that the three-some's actions during **1981** and 1982, if true, were disparaging and slandering the title to Turkey Creek's lands. How could it possibly be argued that there is no logical relationship between Williams', Londono's and Hoce's claim that Turkey Creek, through its actions, had destroyed the marketability of their homes in the P.U.D., and the claim of Turkey Creek that the threesome had destroyed the marketability and value of its undeveloped lands in the P.U.D.?

The First District places much emphasis on Harris v. Steinem, **571** F.2d 119 (2d Cir. 1978) when the reasoning of the more recent case of Pochiro v. Prudential Ins. Co. of America, **827** F.2d 1246 (9th Cir. 1987) is much more in point.(1) Prudential sued Pochiro and his wife contending that they had appropriated for their own use confidential customer information obtained while Pochiro was an employee of Prudential. Pochiro, in retaliation, filed a second suit contending, inter alia, that he had been defamed by Prudential's statements labeling him as a "crook." Prudential's suit resulted in a verdict in the company's favor while Pochiro's claims were ultimately dismissed by the federal court for his failure to raise them as compulsory counterclaims in Prudential's original state court action.

---

(1) Although the retaliatory cause of action in Harris, like Pochiro, sounded in "defamation," Harris is clouded by attenuating issues such as was Gloria Steinem a public figure and, if so, what standard applies for defamatory speech - none of these issues are present in either Pochiro or Turkey Creek.

The Ninth Circuit first held that the question of whether the Pochiros' claims are compulsory counterclaims which should have been pleaded in the earlier Prudential state court action was a question of state law. No Arizona decision addressed the matter. In Florida, however, the Third District in Bieley v. duPont, Glore, Forgan, Inc., 316 So.2d 66 (Fla. 3d DCA 1975) addressed the question of whether a counterclaim for defamation (as well as other causes of action) should be dismissed as being premature but without prejudice to the Bieleys filing such independent causes of action as they deemed appropriate. The Third District held:

> The order of dismissal with leave to file an independent cause of action is reversed as to the remaining allegations which constitute libel, invasion of privacy, or other stated causes of action because, if and when properly pleaded, the allegations constitute a compulsory counterclaim. (Emphasis added). Id. at 67.(2)

The First District's opinion omits any reference to Bieley.

Returning to Pochiro, the Ninth Circuit notes that Arizona's definition under the Rules of Civil Procedure of a compulsory counterclaim is identical to Federal Rule of Civil Procedure 13(a) (which in turn is identical to Rule 1.170(a), Florida Rules

---

(2) The Third District subsequently receded from its position in other parts of the opinion that the tort of abuse of process may not be brought as a counterclaim and now holds that it may be filed as permissive counterclaim; *see* Blue v. Weinstein, 381 So.2d 308 (Fla. 3d DCA 1980). As we are concerned only with the torts of libel, slander and the like, Blue does not affect the pertinent portions of the holding of Bieley.

of Civil Procedure). Arizona, like the Federal Courts, and like the First District, applies the liberal "logical relationship test" to determine whether two claims arise out of the same "transactions or occurrence."

Pochiro then applies a common sense approach to determine whether the two claims are logically related by seeking the effect of one on the other. Imagine the impact on Turkey Creek's claim for slander of title against Londono and Williams if in the first action the court had found that Londono and Williams were indeed correct and Turkey Creek's actions had destroyed the marketability of the title to their homes. The collateral estoppel effect of Londono's and Williams's victory, would have either eliminated Turkey Creek's claims or totally emasculated the corporation's contentions. The facts necessary to prove the two claims must necessarily overlap. For example:

Point 1: In mid-1982, the threesome contend in their lawsuit that the title to the property at Turkey Creek is unmarketable because of the corporation's incessant meddling with the covenants and restrictions;

Point 2: In January of 1982, Turkey Creek claims that the threesome distributed a defamatory survey of lawyers' opinions as to the state of title at Turkey Creek with the defamatory nature of the survey being that it falsely and maliciously implied that the title to lands in the P.U.D. was unmarketable;

Point 3: The key fact to resolve Points 1 and 2 is whether or not the title to lands in the P.U.D. is indeed unmarketable

and, if so, why?

Certainly there is a logical relationship between the two claims.

All parties agree that the cause of action for defamation accrues at the time of publication. Miceli v. Gilmac Developers, Inc., 467 So.2d 404 (Fla. 2d DCA 1985). In Turkey Creek, uncontrovertedly the vast majority of the defamatory statements had been made prior to January of 1984 which was when Turkey Creek first answered the threesome's Second Amended Complaint giving it its first opportunity to counterclaim. In fact, Turkey Creek would have had until October of 1984, the time of entry of the Final Judgment, to amend in order to assert its counterclaim. Although the First District bemoans the fact that all of Turkey Creek's "damages" may not have fully materialized in January of 1984, its opinion is devoid of any citation to the effect that 'a claim is not a compulsory counterclaim if your damages have not fully materialized at the time the cause of action accrues.'

To conclude, the tests for a compulsory counterclaim applied by the First District are correct. It is the application of those tests to the facts of Turkey Creek where the opinion has run amok.

POINT III

COUNT I OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS AND ITS DISMISSAL WITH PREJUDICE BY THE TRIAL COURT WAS PROPER.

All parties to this appeal agree that there are five elements to a cause of action for intentional interference with a contractual relationship. These elements were derived from Florida Telephone Corp. v. Essig, 468 So.2d 543 (Fla. 5th DCA 1985):

(1) The existence of a contractual relationship between Turkey Creek, Inc., and a third party:

(2) Defendant's knowledge of that contractual relationship;

(3) The Defendants' intentional procurement of the contract's breach:

(4) Damages resulting from that breach: and

(5) Absence of any justification or privilege.

The threesome agree that the first four elements have been properly pled but they contend that Turkey Creek has failed to establish from the face of its complaint the absence of justification or privilege for the Defendants' breach – in fact, the Second Amended Complaint affirmatively shows the threesome's justification or privilege.

The First District held that:

> [A] statement 'made by one who has a duty or interest in the subject matter to one who has a corresponding duty or interest' is qualifiedly privileged. ... In those circumstances in which there is a qualified privilege, the privilege carries with it the obligation to employ means that are not improper.

The Appellate Court then found, accepting the allegations of the complaint as true, that the threesome made numerous false statements to third parties with full knowledge of the statement's falsity and with the purpose of harming Turkey Creek's economic interests. Thus, the complaint, it held, makes a facially sufficient claim that any privilege was lost by the threesome's use of improper means,

We agree that under a traditional economic scenario, the law as described and the conclusions drawn from applying the allegations of the complaint to the law would be correct. It is, however, the threesome's contention that when the privilege which appears from the face of the pleadings is a first amendment conditional privilege rather than an economic conditional privilege, then, as a minimum standard, the pleader must show "actual malice" on the defendant's part, namely: A desire to harm which is independent of and entirely unrelated to a desire to protect a recognized social or economic interest. The primary federal right that is involved is the right to petition - in this case, the right to petition for redress that which the threesome contend to be a quasi-governmental entity, Turkey Creek, Inc.

The threesome's Answer Brief in the First District describes in detail the evolution of the First Amendment privilege from Middlesex Concrete Products & Excavating Corp. v. Carteret Industrial Association, 181 A.2d 774 (N.J. 1962) through such cases as State of Missouri v. National Organization for Women,

620 F.2d 1301 (6th Cir. 1980). The federal standard which Petitioners contend is applicable is that found in Sierra Club v. Butz, 349 F.Supp. 934 (U.S.D.C. N.D.Ca1.1972) which, after analyzing Arlington, found that its "malice standard" did not supply the "breathing room" the First Amendment freedoms need in order to survive. Because under modern pleading standards "malice" is so easy to allege, the Sierra court found that liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petition is a "sham" and the real purpose is not to obtain governmental action but to otherwise injure the plaintiff. The Sierra standard was recognized in State of Missouri, supra.(3) The Sierra/State of Missouri standard is, of course, higher than the standard traditionally found in Florida in cases involving pure economic relationships. Thus, Ethyl Corp. v. Balter, 386 So.2d 1220 (Fla. 3d DCA 1980) stands for the principle that the safeguarding or promotion of one's own financial or contractual interests, so long as improper means are not employed, is simply not actionable. Balter holds that one may take authorized steps to protect one's own interest even while also harboring some personal malice or ill-will toward the plaintiff. Thus, Balter approves the

---

(3) An example of "sham" is found in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 30 L.Ed 2d 642 (U.S. 1972) where one group of truckers successfully alleged that a second group's continued objections and resistance to applications for operating permits was a sham having no real factual basis but simply a desire to destroy competition.

proposition that if one digs a well because he really wants the water or starts a business for personal advantage or gain, his neighbor is without remedy however much he suffers and even though the act may have been tinged with animosity and malice. The Balter standard has been perhaps even further elevated in McCurdy **v.** Collis, 508 So.2d 380 (Fla. 1st DCA 1987) where it was stated at **383:**

> A qualified privilege to interfere is not negated by Concomitant evidence of malice. It is only when malice is the sole basis for interference that it will be actionable.

Obviously if Turkey Creek was required to plead that the threesome's activities were not intended to seek redress for perceived injuries but were inspired solely to injure Turkey Creek, it becomes much harder to state, much less prove, a cause of action. Although this standard makes it most difficult to state a cause of action in cases involving First Amendment rights, federal law and our constitution have served as a bull wask against those who would otherwise chill First Amendment rights by pursuing litigation against those advocating a cause adverse to the plaintiff.

The First Amendment standard advanced by Petitioners is, of course, dependent upon one critical element - it applies when seeking relief of one's grievances from a governmental entity. Consequently, Petitioners' standard depends on whether Turkey Creek, Inc., is a governmental (or quasi-governmental entity) or,

if it is not, then the applicable standard would admittedly be that denominated by the First District in McCurdy V. Collis, supra.

The vexatious part of the First District's Opinion is its rejection of the trial court's holding that Turkey Creek should be considered as a quasi-governmental entity. The Appellate Court specifically finds that all of the parties to this action are private entities and consequently, since no state action is involved, constitutional considerations do not come into play. This holding, of course, becomes the law of the case.

First, we are before this Court on the dismissal of a Second Amended Complaint; the threesome have yet to plead to it. The First District's holding is based upon the well pled allegations of that complaint with no consideration whatsoever as to what may be pled in the future by the Defendants. These Defendants represent to this Court, for example, that they will plead that Turkey Creek operates its own "police force" which cites drivers for traffic infractions; it operates its own "judiciary" who adjudicates the guilt or innocence of the offending driver and then levies fines which become liens against the offender's homeplace. These allegations, and multiple others concerning governmental activities, are not presently before the Court so the issue of Turkey Creek's status as a quasi-governmental entity should not be prejudged solely on Turkey Creek's own pleadings. At the worst, the First District should have simply stated that 'from the face of the allegations of the Second Amended Complaint, it

has not been made to appear that Turkey Creek is a quasi-governmental agency as contended by Londono, Hoce and Williams.' This leaves the door open for the Defendants to come forward with their own allegations and proof as to Turkey Creek's quasi-governmental nature,

Secondly, there are before the Court at this time sufficient well pled facts to establish, without any pleadings from the Defendants, that Turkey Creek is a quasi-governmental entity. In Brock v. Watergate Mobile Home Park Ass'n, 502 So.2d 1380 (Fla. 4th DCA 1987), the Appellate Court found the pleadings to be insufficient to establish that conduct being performed by private persons or groups constituted state action. Brock utilized the "public function" test under which state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature.(4) Brock found that a homeowners association lacks the municipal character of a company town as the homeowners owned their property and hold title to the common areas pro rata - moreover, the services provided by the Watergate Homeowners Association, unlike those provided in a company town, were merely a supplement to, rather than a replacement for, those provided by local government. The association's activities in maintenance,

(4) There is also a state involvement test, not material here, under which there must be a sufficient close nexus between the state and the challenged activity such that the activity may be fairly treated as that of the state itself.

assessment and collection activities were not sufficiently connected to the state to warrant a finding of state action.

In Turkey Creek, the key lies with the right of the corporation to retain the voting rights in each of the owner's associations until certain contingencies occurred (paragraph 21). The second key lies in the corporation's power to operate various public utilities services within the P.U.D. and set user fees for those utilities (paragraph 30 (Section I)). Here, a private entity is exercising powers traditionally reserved to the state without being accountable to the membership of the association. Turkey Creek's activities replace government activities rather than supplement them.

Although it may be fairly debatable at the present stage of the pleadings, the threesome submit that the retention of the voting rights combined with the power to operate various public utilities services in the P.U.D. so impregnates Turkey Creek with a municipal nature as to make it governmental in nature. See, for example, Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973). At a minimum, the determination as to whether or not Turkey Creek is a quasi-governmental entity, as a matter of law, should be left open until the pleadings close and all of the facts are before the trial court.

POINT IV

COUNT II OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH AN ADVANTAGEOUS BUSINESS RELATIONSHIP AND ITS DISMISSAL WITH PREJUDICE BY THE TRIAL COURT WAS PROPER.

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

POINT V

COUNT III OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR THE INDEPENDENT TORT OF CONSPIRACY AND ITS DISMISSAL WITH PREJUDICE WAS PROPER.

The First District found that Turkey Creek's claim for conspiracy stated a cause of action because if the threesome conspired to interfere with Turkey Creek's contractual rights and advantageous business relationships, it followed that the claim for conspiracy must stand. The basis for that cause of action for that type of conspiracy is where two or more conspire to commit an independent wrong or tort which would constitute a cause of action if the wrong was done by one person. The threesome agree.

The Appellate Court, however, overlooked the entire thrust of the conspiracy argument which centered around a second type of conspiracy recognized in Florida, namely where the conduct complained of would not be actionable if done by one person, but by reason of force of numbers or other exceptional circumstances, the defendants possess some peculiar power of coercion which would give rise to an independent tort of conspiracy, sometimes referred to as an "economic boycott." Am. Diversified Ins. v. Union Fidelity Life Ins., 439 So.2d 904 (Fla. 2d DCA 1983). Turkey Creek argued that this second type of conspiracy was properly pled in paragraphs 54 and 55 of its Second Amended Complaint and was supported by Churruca v. Miami Jai-Alai, Inc., 353 So.2d 547 (Fla. 1978).

On the other hand, the threesome contend that if the plaintiffs have failed to state a cause of action for intentional interference, (with either a contractual or advantageous business relationship), slander, and disparagement to title or malicious prosecution, then plaintiffs cannot state a cause of action for conspiracy under the "independent wrong" theory for there are no "independent wrongs" left for Hoce, Londono and Williams to conspire about. Turning to a cursory examination of the "economic boycott" cases, it becomes apparent that the allegations of the complaint do not demonstrate that the threesome in the present action "by force of numbers or other exceptional circumstances within the requirements of Snipes, Churruca, and Margolin, attempted to destroy appellant's business by working together." Am. Diversified Ins., supra, at 906.

In Churruca v. Miami Jai-Alai, Inc., supra, the defendants were a small group comprised of all of the jai-alia fronton owners within the State of Florida who refused to extend new employment contracts to the plaintiff players because those players all participated in an ineffectual strike for greater benefits against the frontons in the preceding season. The crux of Churruca was that:

> When the conduct of a combination of employers, maliciously conceived and executed, amounts to a 'black-listing' of employees so as to permanently deprive them of the means of earning a livelihood, a common law cause of action is presented upon which a jury may return damages. Id. at 551.

In Snipes v. West Flagler Kennel Club, Inc., 105 So.2d 164 (Fla. 1958), the plaintiff, who raised and raced greyhounds, brought suit against five racetrack corporations for conspiring to destroy him financially by refusing to schedule plaintiff's greyhounds on his tracks. The complaint went on to allege that the defendants, through their force of numbers and economic stature, intimidated other dog track owners in the state into becoming unwilling participants in the conspiracy. The tort's essential elements were held to be a malicious motive and coercion through numbers or economic influence.

Margolin v. Morton F. Plant Hospital Assn., Inc., 342 So.2d 164 (Fla. 2d DCA 1977) presented a situation in which the plaintiff, Margolin, a surgeon and member in good standing of the hospital, sued the hospital's executive director, the president of its staff, and all of the licensed physicians who practiced anesthesiology at the hospital contending that they had conspired together to bring about his economic ruin by refusing to render to his patients anesthesiology services at the hospital thereby precluding him from using the hospital to practice surgery. The material allegations included the fact that the defendants as a whole exercised absolute control over the availability and rendering of general anesthesia services to all surgeons and patients at the hospital. The complaint stood.

On the other side of the coin, the recent case of Martin v. Marlin, 529 So.2d 1174 (Fla. 3d DCA 1988) acknowledges that while

Florida courts have recognized under certain circumstances a cause of action called the "independent tort of conspiracy" that is, a conspiracy accompanied by an underlying tort, there can be no conspiracy when the concerted acts of the defendants do not create a greater harm than if the acts were committed by one person alone. The power must lie in numbers, when acting in concert, to inflict injury which does not reside in persons acting separately. Further, the mere fact that the combined actions of two or more persons may exert more pressure on the person affected, the nature of the individual act is not altered, nor its character affected or changed, by the Combination.

To allege that a doctor, a lawyer and a professional cleaner could effectively control and manipulate a vast group of homeowners at Turkey Creek near Gainesville thereby beggaring plaintiffs is somewhat akin to contending that a sport fisherman, a sailor and an outdoor motor repairman could effectively control schools of mullet in the Gulf near Cedar Key thereby beggaring a professional fisherman of his livelihood. What type of allegations would support a cause of action against the threesome? If it had been alleged that these three gentlemen were the chief executive officers and constituent members of the boards of directors of all of the local banks of Alachua County and exerted their influence upon other board members so as to cause the banks to deny Hope and Turkey Creek construction loans, then there could well be a cause of action. Or, if the three defendants

were shown to be highly connected with public utilities in the area and those utilities refused to extend existing electrical services in the P.U.D. because of the defendants' actions, then again, there could be an ostensible cause of action. As it were, if the butcher, the baker and candlestick maker lived at Turkey Creek and acted in concert in the exact same manner that Williams, Londono and Hoce did, their actions would presumably have had no greater or less effect upon the plaintiffs, But if one tries to substitute the butcher and the baker and the candlestick maker for the fronton owners in Churruca, the dog track owners in Snipes, ok the anesthesiologists in Margolin, then there would be a total failure, respectively, of economic pressure upon the plaintiff jai-alai players, the dog racer or the struggling surgeon.

It is respectfully submitted that this Court finds that Counts III and IV of Turkey Creek's Second Amended Complaint presently state a cause of action, then Count V does indeed state a cause of action for traditional conspiracy. This Court should point out, however, that no cause of action has been stated under the independent tort of conspiracy or "economic boycott."

CONCLUSION

Certiorari, having been granted, this Court should approve the decision of the Fourth District in Cypher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1987) barring a subsequent malicious prosecution action after a private litigant has elected to assess costs and fees in the underlying action, and quash the conflicting opinion of the First District in Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990).

Slander to title should be held by this Court to be a compulsory counterclaim approving Bieley v. duPont, Glore, Forgan, Inc., 316 So.2d 66 (Fla. 3d DCA 1975) and disapproving the contrary ruling of the First District.

The trial court's order dismissing the Second Amended Complaint's causes of action in tortious interference should be reinstated or, at a minimum, this Court should reverse the First District's holding that Turkey Creek is a private litigant thereby allowing the threesome to allege facts showing it to be a governmental or quasi-governmental entity.

The trial court's dismissal of the cause of action for the independent tort of conspiracy should be reinstated.

Respectfully submitted,

SCRUGGS & CARMICHAEL, P.A.
Post Office Drawer C
Gainesville, Florida 32602
(904) 376-5242
Attorneys for Petitioners

BY: _____
John E. Roscow, III
Florida Bar I.D. No. 098580

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondents.

CASE NO. 76,765

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

ON WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL

CASE NUMBER 89-2123

APPENDIX TO INITIAL BRIEF OF PETITIONERS ON THE MERITS

SCRUGGS & CARMICHAEL, P.A.
Post Office Drawer C
Gainesville, Florida 32602
(904) 376-5242
Attorneys for Petitioners
BY: John F. Roscow, III
Florida Bar I.D. No. 098580

INDEX TO APPENDIX