O.A. 10-1-91 ORT

IN THE SUPREME COURT OF FLORIDA

JAVIER H. LONDONO, M.D., CHARLES A. WILLIAMS, JR., ESQUIRE, AND JOHN HOCE,	*	
Petitioners,	*	**CASE NO.** 76,765
v.	*	**DISTRICT COURT OF APPEAL FIRST DISTRICT - NO. 89-2123**
TURKEY CREEK, INC., a Florida corporation, and NORWOOD W. HOPE,	*	
Respondents.	*	

ON **WRIT** OF **CERTIORARI** TO THE FIRST **DISTRICT** COURT OF APPEAL

CASE **NUMBER 89-2123**

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

Case Law — Page

Other:

POINT I

ONCE THE SUPREME COURT ACCEPTS JURISDICTION OVER A CASE IN ORDER TO RESOLVE THE LEGAL ISSUES IN CONFLICT, IT MAY, IN ITS DISCRETION, CONSIDER OTHER ISSUES PROPERLY RAISED AND ARGUED BEFORE THE COURT.

Respondents mistakenly argue that this Court has no jurisdiction to consider any issue raised by Petitioners' appeal except the one issue in which the First District's Opinion directly and expressly conflicts with the ruling of the Fourth District Court of **Appeal.**

Once the Supreme Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to the Supreme Court on appeal. Savoie v. State, 422 So.2d **308** (Fla. 1982). The authority to consider issues other than those upon which jurisdiction is based is discretionary and should be exercised only when those other issues have been properly briefed and argued and are dispositive of the case. Referring in Savoie to a prior opinion by Justice Drew, this Court stated:

> Needless steps in litigation should **be** avoided wherever possible and courts should always bear in mind that almost universal command of constitutions that justice should be administered without 'sale, denial or delay'. Piecemeal determination of a cause by our appellate court should **be** avoided and when a case is properly lodged here, there is no reason why it should not be terminated here... '[m]oreover, the efficient and speedy administration of justice is ... promoted' **by** doing **so.**
> Id. at 312.

See also Jacobson v. State, 476 So.2d 1282 (Fla. 1985) and ~~Cantor~~ v. Davis, 489 So.2d 18 (Fla. 1986).

In Turkey Creek, all of the issues, many of which are either dispositive of the case or critical to the future handling of the case by the lower courts, have been fully briefed and will be argued before this Court. Those issues should be dealt with now so as to avoid a piecemeal determination of the case.

POINT II

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

Turkey Creek's primary argument centers around its contention that if no double recovery is achieved by the malicious prosecution plaintiff, then the defendant can claim no harm. This theory completely begs the question of why the malicious prosecution plaintiff, having failed in the underlying suit to recover his fees, should be granted a new lease on life so as to pursue these same fees again in the malicious prosecution action. Here, for example, Respondents' Appendix to its Answer Brief contains pleadings from the original case not heretofore before the Court (but to which Petitioners have no objection) showing that they sought attorney's fees pursuant to §57.105 Florida Statutes (1981) contending that not only was there a complete absence of a justiciable issue of either law or fact raised but that the Plaintiffs and their attorneys knew, prior to filing those counts, that they were completely without merit and that no factual basis existed to support the Plaintiffs' claims.

If you compare Turkey Creek's pleading when it sought attorney's fees in the initial case with the basic elements of malicious prosecution (prior civil proceeding brought by the now defendant which terminated in the then defendant's favor with a

want of probable cause in instituting that proceeding, malice and damages) it becomes clear that we are really talking about the same animal whether it be denominated as a snake or a serpent. In fact, the Second District Court of Appeal has stated in Central Florida Machinery Co., Inc. v. Williams, 424 So.2d 201, 204 (Fla. 2d DCA 1983):

> It seems to us incongruous to impose a standard of frivolousness for an award of attorney's fees pursuant to Section 57.105 and a standard invoking a lesser degree of care to support an award of damages for malicious prosecution.

Turkey Creek elected to seek its counsel's fees below; the matter was argued before the trial court; the trial court rejected Turkey Creek's claim. We must ask the Same question as was contained in our Initial Brief: Why should Turkey Creek now have a second bite at the apple?

Turkey Creek then refers to Pope v. Pollock, 21 N.E. 356 (Ohio 1889) which approved the maintenance of malicious prosecution actions in Ohio; but Pope specifically recognized that in England, taxed costs could include attorney's fees while in Ohio they could not. Here, Turkey Creek sought and was denied attorney's fees – Florida law in no wise precluded their recovery had the trial court agreed with the allegation and proofs of Turkey Creek's motion.

Turkey Creek next contends that the award of costs in Florida is almost a ministerial act; Petitioners would submit that when there are no real disagreements, the hearing may be perfunctory

but in many instances, condemnation for example, the cost hearing takes on the trappings of a full trial. Although the basic court costs themselves, such as filing fees and witness subpoenas, may be awarded merely as a function of winning, discretionary awards, such as the amount of an expert witness's compensation, can turn in large part on the obdurate behavior of the losing party in the trial below.

Respondents contend it is unfair to require the wronged defendant to waive the certainty of a cost judgment for the vagaries of another lawsuit. Making elections, however, is an everyday fact of law: Should Turkey Creek go for its $5,600.00 in court costs before the trial court - should it *go* for $5,600.00 plus $100,000.00 in legal fees before the trial court - or should it skip the trial court and go for $4,105,600.00 in a separate malicious prosecution action? Once apprised of the risks involved (1) and the realistic awards obtainable, Turkey Creek should be compelled to make the election of going for the $105,600.00 or the $4,105,600.00. The world is full of elections - think of all the harsh results Vanna White has seen while the "Wheel of Fortune" spun.

As far as policy goals are concerned, the high cost of litigation today coupled with judicious use of Section 57.105 (and

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(1) For example, this malicious prosecution suit was filed in 1985 and has yet to clear the pleading hurdle while having probably consumed well over one year's worth of work for the multiple counsel and members of the judiciary involved.

the myriad of other salutory statutes governing awards of attorney's fees) will accomplish the same effect as that undoubtedly sought by the British courts in Parker v. Langley, 93 Eng.Rep. 297, namely speed the litigation to its conclusion reserving separate malicious prosecution actions only to those who wish to make the election when they feel themselves truly harshly aggrieved and damaged.

POINT III

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

Respondent, like the First District Court of Appeal, continues to ignore Bieley v. duPont, Glore, Forgan, Inc., 316 So.2d 66 (Fla. 3d DCA 1975) which holds four-square that causes of action such as libel constitute a compulsory counterclaim. "Libel and slander" are inherently tied to "slander of title". This Court has gone so far in the past as to hold that the Statute of Limitations for "slander to title" did not fall under the general provisions of the four year Statute governing actions "not specifically provided for in this Chapter" but instead fell under the two year Statute for "libel and slander" even though the two year Statute in no wise referred to actions for the wrongful, intentional or malicious disparagement and impairment of the viability of title to real property. Old Plantation Corp. v. Maule Industries, 68 So.2d 180 (Fla. 1953). Respondents' persistent, and thus far successful, avoidance of Bieley, supra, gives rise to the same frustration in Petitioners that consumes a presidential debater when his opponent utterly fails to address the question which has been propounded.

Turkey Creek next attempts to side-step this issue by contending that certain of the threesome's acts are alleged to have occurred at a point in time which is subsequent to the date upon which the threesome claims the corporation should have filed its

compulsory counterclaim. But a compulsory counterclaim should operate in the same manner as a Statute of Limitations in that acts which were committed prior to the magic date could not give rise to liability if a defendant affirmatively asserted the defense of compulsory counterclaim. Turning again to Old Plantation, supra, we see:

> The cause of action accrued when the wrongful acts alleged in the complaint were committed. The wrongful and malicious filing of the notice of lien by the appellee (as so alleged in the complaint) was the tort which gave rise to the action and the date the tort was committed marked the point that the statute began to run. Appellee could have instituted suit on any day thereafter.
> Id. at 183.

Thus, if a defamatory sign was parked in front of Turkey Creek's property during 1983 but had been removed by January of 1984 (when Turkey Creek first answered the threesome's second amended complaint), the cause of action based upon that act of placing the sign would now be barred because of the failure to file the compulsory counterclaim. Admittedly, if in December of 1984, the threesome re-erected the sign, then the cause of action for slander to title would once again arise based upon the new act of tortious conduct.

The threesome's theory is borne out by numerous cases from other areas of the law. For example, installments due at different times under a note mature or accrue the day after each is to be paid and the Statute of Limitations (assuming no accelera-

tion) may apply to some payments but not to others. Central Home Trust Co. v. Lippincott, 392 So.2d 931 (Fla. 5th DCA 1981). Further, if the threesome's initial actions caused permanent damage or were of such a character that the injury would inevitably result and the damages could be determined or estimated, then a single cause of action should have been brought for the entire damages, both past and prospective. On the other hand, if the threesome's initial activities caused no permanent damage to the land or if the situation involved other elements of uncertainty such as the inability to make reasonably accurate estimates of future damages, then each repetition of tortious activity would give rise to a new cause of action.(2)

If this Court is of the opinion that a counterclaim for slander to title was not compulsory, then this issue merits na further attention. But if this Court is of the opinion that a counterclaim for slander to title was compulsory, then it is critical to the parties in the lower courts to know a formula for determining that point in time before which the threesome's acts cannot be considered. The case would then proceed forward only on acts which occurred after this "bar date."

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(2) *See,* for example, Town of Miami Springs v. Lawrence, 102 So.2d 143 (Fla. 1958) and Kulpinski v. City of Tarpon Springs, 473 So.2d 813 (Fla. 2d DCA 1985) where extensive discussions are had as to whether the creation of a flooding condition gives rise to a single cause of action when the flood first occurs or gives rise to a new cause of action each time the property is reflooded.

POINTS ~~IV AND V~~ CONSOLIDATED

COUNTS I AND II OF THE SECOND AMENDED COMPLAINT FAIL TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS OR WITH AN ADVANTAGEOUS BUSINESS RELATIONSHIP AND WERE PROPERLY DISMISSED BY THE TRIAL COURT.

Respondent takes the position that paragraph 38 of its Second Amended Complaint (in which it alleges that the Defendants acted "without justification") adequately provides the fifth element of tortious interference, namely that the Defendants' actions were taken in the absence of any justification or privilege. On the other hand, the threesome contends that when the privilege which appears from the fact of the complaint 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 First Amendment right that the Petitioners contend is shown by the face of the pleadings is the right to petition what they assert to be a quasi-governmental entity, namely Turkey Creek. The First District Court of Appeal has found in its Opinion that Turkey Creek should not be considered to be a quasi-governmental entity - consequently, no constitutional considerations come into play.

If indeed the face of the pleadings do not disclose that Turkey Creek is a quasi-governmental entity, then the Respondents are probably correct that their Second Amended Complaint does state a cause of action in tortious interference, even though it contains a mere conclusory allegation that the Defendants acted "without justification." If, however, from the face of the pleadings Turkey Creek is found to be a quasi-governmental entity, then Petitioners contend that the analysis of the trial court was correct.

But either way, the true ill of the First District's Opinion is it's finding that all parties to this action are private entities - a finding which becomes the law of the case and which is based solely upon the allegations of the Respondent's Second Amended Complaint. Such a finding forecloses the Petitioners from pleading and proving that indeed Turkey Creek is a quasi-governmental authority; their First Amendment defenses have been amputated before they ever respond to Turkey Creek's allegations. Needless to say, the Respondents completely ignore this critical issue in their Answer Brief. The threesome submits that this evasive action is simply because there is no legal justification for the First District's holding.

Furthermore, an examination of the United States Supreme Court's decision in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. ed. 2d 686 (1964) would show that the rule that the 14th Amendment is directed against state action and not private action has

no application where the state courts in a civil lawsuit have applied a state rule of law which is claimed to impose invalid restrictions on a party's constitutional freedoms. Sullivan states that it matters not whether that law has been applied in a civil action and that it is common law only. Consequently, it would appear that the First Amendment is applicable to this state court proceeding even if amongst private individuals as it calls into play the threesome's First Amendment rights.

POINT VI

COUNT III OF THE SECOND AMENDED COMPLAINT FAILS TO ADEQUATELY STATE A CAUSE OF ACTION FOR TORTIOUS CONSPIRACY AND WAS PROPERLY DISMISSED WITH PREJUDICE.

Respondent first contends that ordinarily to state a claim for civil conspiracy, the plaintiff must allege that two or mare persons acted in concert to achieve an improper goal, or to obtain a proper goal through improper acts. With this, the threesome has agreed.

It must, however, be pointed out that "[w]here a complaint claims damages in two counts based on the same facts, only one cause of action is alleged despite the fact that the second count charges a conspiracy to commit the tortious acts, and only one recovery is permissible." Fish v. Adams, 401 So.2d 843, 846 (Fla. 5th DCA 1981). Here, the traditional conspiracy count is duplicitous and should fail if the other counts which form the foundation for the "conspiracy" are upheld. Note also that ~~Leach~~ v. Feinberg, 101 So.2d 52 (Fla. 3d DCA 1958) infers that a complaint for "malicious conspiracy" should be maintained instead as one for "malicious prosecution."

The second theory of conspiracy, that being the "economic boycott" type, has been adequately addressed in Petitioner's Initial Brief. The fact that Petitioners acted in conjunction with a "committee" in no wise provides sufficient ultimate facts to place the threesome's actions on a par with the actions of the

fronton owners in Churruca v. Miami Jai-Alai, Inc., 353 So.2d 547 (Fla. 1977) not to mention the chilling effect that this decision would have on Petitioner's constitutional rights.

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.