IN THE SUPREME COURT OF FLORIDA

MILDRED R. JAYE,

Petitioner,

vs.

ROYAL SAXON, INC.,

Respondent.
_____/

CASE NO.: 77,570

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This malicious prosecution action arose out of protracted litigation between Jaye and Royal Saxon. The underlying lawsuit resulted in a 12 day jury trial and over $87,000.00 in legal fees and costs awarded to Jaye, The facts in the underlying case are set forth in Royal Saxon, Inc. vs. Jaye, 536 So.2d 1046, (Fla, 4th DCA, 1988). The underlying cases were instituted by Royal Saxon and involved counterclaims by Jaye for declaratory and injunctive relief and damages for retaliatory eviction, breach of fiduciary duty, mismanagement of the cooperative, and selective and unequal enforcement of the rules and regulations, the by-laws and the proprietary lease of the cooperative. It was decided that Jaye was the prevailing party and she requested and was awarded costs and attorney's fees. The trial court entered summary judgment in favor of Royal Saxon finding that Jaye had elected her remedy by taxing fees and costs and was precluded from pursuing an action for malicious prosecution.

This lawsuit was filed by Jaye against Royal Saxon on June 9, 1989. (A-1) Summary judgment was entered in favor of Royal Saxon on November 20, 1989 (A 16-17). The Plaintiff's motions for rehearing and to amend the complaint were filed after the summary judgment was entered. (A 18-23) These motions were denied.

It was undisputed in the trial court that Jaye had elected to tax costs and attorney's fees in the underlying action and was awarded costs and attorney's fees by the court. Copies of the judgments for costs and fees were part of the record before the

lower court. (A 10-15) There was no testimony presented by the parties at the summary judgment hearing. The trial court made its finding on a pure question of law. The petitioner's Statement of Facts includes assertions that are not record evidence and are unnecessary for the resolution of this legal issue.

The summary judgment was appealed and affirmed by the Fourth District Court of Appeals, holding that a plaintiff who has taxed fees and costs in a previous action is barred by that election from pursuing a malicious prosecution claim.

SUMMARY OF THE ARGUMENT

This court's decision in Cate vs. Oldham, 450 So.2d 224, Fla., 1984) holds that at common law a successful defendant could either tax costs and fees in the original action or sue for malicious prosecution, but could not do both. The Fourth District Court of Appeal in Cypher vs. Segal, **501** So.2d **112**, (4th DCA, **1987)** followed Cate and has properly affirmed Summary Judgment in favor of Respondent, Royal Saxon, Inc., in this malicious prosecution action where the prevailing party, Jaye, elected to tax costs and attorney's fees in the underlying action. A substantial fee in excess of Eighty Seven Thousand Dollars ($87,000.00)was awarded Jaye in the underlying action.

This decision offers the prevailing party an election to tax costs and fees in the underlying action, or to pursue a malicious prosecution action. Both remedies are not available. The law does not favor malicious prosecution suits because of their potential interminable nature. The effect of this decision will help to bring this sort of litigation to an end. The decision of the District Court should be approved, and the certified question should be answered in the affirmative.

There was no abuse of discretion by the trial court in denying the Plaintiff's Motion to Amend the complaint which was filed after the Summary Judgment was granted.

ARGUMENT

A. WHETHER CATE V OLDHAM APPLIES TO PRIVATE LITIGANTS TO BAR A SUBSEQUENT ACTION FOR MALICIOUS PROSECUTION WHERE THE PLAINTIFF HAS PREVIOUSLY ELECTED TO TAX COSTS AND/OR FEES AFTER SUCCESSFULLY DEFENDING THE UNDERLYING ACTION

This court in Cate vs. Oldham, 450 So.2d 224, (1984) held that a malicious prosecution action is barred where the Plaintiff has elected to tax costs and fees in the underlying action. The decision was based on common law and was not limited to public officials. The court in Cate held:

> "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 laws; they could not do both. Parker vs. Langley, 93 Eng.Rep. at 297. There being no Florida decision or statute to the contrary, the common law rule precludes such attempt at double recovery here."

The Fourth District Court of Appeal in Cypher vs. Segal, 501 So.2d 112, (Fla., 4th DCA, 1987) and in River Bend Marine, Inc. vs. Sailing Associates, Inc., 539 So.2d 507, (Fla., 4th DCA, 1989) has followed this rationale to apply to private litigants.

The court in Cypher vs. Segal, made the point that it was the election of a remedy that was the basis of their decision that the Plaintiff was barred from seeking further relief in a malicious prosecution action. The Plaintiff, Cypher, like Jaye, filed a malicious prosecution action seeking damages for harm to his reputation, and for pain and suffering from his exposure to financial loss caused by the punitive damage claim. These damages were over and above the costs and fees of defending the initial lawsuit. The Cypher court was mindful of that when they

decided at page 114 as follows:

> "Here the appellant claims additional damage to his personal reputation, and for pain and suffering from his exposure to financial loss caused by the punitive damages claim. 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 judgment entered thereon, the appellant was barred from seeking additional damages. Cate vs. Oldham."

There is no compelling reason to limit the holding in Cate only to public officials. A public official can be subject to the same anxiety, mental anguish, humiliation and vexation as a private citizen who might be wrongfully sued. The election of remedies should equally be applied to private citizens.

The First District in Turkey Creek, Inc. vs. Londono, 567 So.2d 943, (1st DCA, 1990) has disagreed with Cypher vs. Segal by stating as follows:

> "We do not read Cate to preclude appellant's subsequent suit for damages which could not have been recovered in the original action, such as compensation for harm to reputation."

This Court in Cate held that a remedy was elected when the public official chose to tax costs and, therefore, the subsequent malicious prosecution action was not allowed. The public official in Cate was not allowed to seek damages for harm to reputation or any other special damages that might have been claimed.

This court relied, in part, on City of Long Beach vs. Bozek, 645 P.2d 137, (Cal.Sup.Ct., 1982) when Cate vs. Oldham was decided. The holding in Bozek was that a public official is

precluded from suing for malicious prosecution. The reasoning was based on the right of citizens to petition the government for grievances. The Bozek case involved a city which filed a malicious prosecution action against a citizen to obtain reimbursement for expenses incurred in defending against the previous suit which it could not recover as costs. Bozek page 139, footnote 3. The Bozek court recognized that recovery of the expenses of defending a suit is persuasive justification for a malicious prosecution action. It also noted an interest in the efficient administration of justice by discouraging baseless lawsuits. The Bozek court, however, declined to formulate a general rule allowing malicious prosecution actions only for individual Plaintiffs. This court in Cate vs. Oldham established a general rule that a prevailing party is barred from filing a malicious prosecution action if an election has been made to pursue costs and/or fees in the original case.

The tort of malicious prosecution has its origin in English common law. It is a tort that is not favored because it can have a chilling effect on the right to resort to litigation for the legitimate settlement of grievances. The Florida courts have looked upon malicious prosecution with disfavor. In Duncan vs. Germaine, 330 So.2d 479, the Court stated:

> "One of the hallmarks of civilization is that persons aggrieved by the conduct of another resort to law for settlement of such grievances rather than resorting to self help. We do not encourage resort to the law if the price for bringing such legal proceeding unsuccessfully includes facing a subsequent suit for malicious prosecution."

The practical result of the holdings in Cate and Cypher is

to bring litigation to an end. Courts have been long aware of the potential problem of interminable litigation that could be spawned by malicious prosecution suits. Ely vs. Davis, 15 SE 878, (Sup.Ct. N.C., 1892) comments on a malicious prosecution action from a century ago. The North Carolina legislature provided for the award of costs to the successful litigant in civil actions as Florida does now. These costs were the only compensation allowed since the fifty-third year of Henry III. The Court stated:

> "The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have their claims determined in the courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause, an action for malicious prosecution would lie against him, would open the floodgate to a species of litigation hitherto unknown in North Carolina, the absence of which up to the present time indicates that it has not heretofore been recognized."

The Ely Court notes that an action for malicious prosecution would not lie unless there was an arrest of the person or seizure of property or where there was some special damage resulting from the action which would not necessarily result in all cases. By establishing an election of remedies this Court in Cate held that it was reasonable to compel public officials to seek redress in the suit in which they are named defendants. The reasoning behind this is to stem the floodgates of litigation and to discourage malicious prosecution suits.

In this case the Plaintiff, Mildred Jaye, has recovered over $87,000.00 in attorney's fees and costs against Royal Saxon. The underlying litigation began in 1979 and the same dispute is still

making its way through the courts in 1991. In Royal Saxon, Inc. vs. Jaye, 536 So.2d 1046, (4th DCA, 1988) the Court in commenting on this litigation stated:

> "The court below painstakingly supervised the inordinately long wax between the litigants, and no useful purpose would be served here by renewing the battles between them. Far too much judicial time and effort have been expended in these proceedings, and the trial court is to be commended for trying to make sense out of chaos."

This is precisely the type of litigation that was meant to end, once and for all, when Jaye elected to tax costs and fees after prevailing in the initial lawsuit. By answering the certified question in the affirmative, this court will uphold its precedent set in Cate that an election of remedies will bar a malicious prosecution suit if the prevailing party elects to tax costs and/or fees.

The prevailing party is given a choice to tax costs in the underlying action. This right is well established by Florida law. There is nothing to prove to obtain those costs except that one is the prevailing party. On the other hand, if the election is made to pursue a malicious prosecution action all of the elements of malicious prosecution must be proven before the prevailing party will collect costs, fees and any other special damages which might be claimed. In this case, Jaye could have preserved her cause of action for malicious prosecution by electing not to tax costs and fees in the underlying suit. Having made that choice she is now precluded from subjecting Royal Saxon to further litigation.

An example can be made in reference to Florida Statute

57.105 which allows a prevailing party to obtain attorney's fees if it is determined that an action is frivolous. If a party elects to pursue fees under F. S. 57.105 a further malicious prosecution action should not be allowed because a remedy has been elected. The holdings in Cate, Cypher, and River Bend agree with this concept and advance the public policy of terminating litigation and the judicial disfavor of malicious prosecution.

The purpose of statutory provisions allowing attorney's fees to the prevailing party is punitive in nature and is to discourage litigation. The case of Government Employees Insurance Company vs. Battaglia, 503 So.2d 358, (5th DCA, 1987), discusses the purpose of Florida Statute Section 627.428 which allows attorney's fees against an insurer if an insured is the prevailing party in litigation. The court stated at page 360:

> "The purpose of Section 627.428 is to penalize a carrier for wrongfully causing its insured to resort to litigation to resolve a conflict when it was reasonably within the carrier's power to do so.''

If the Plaintiff is allowed to recover attorney's fees against the losing party and is further allowed to pursue a malicious prosecution claim the statutory purpose to avoid litigation is thwarted. Judicial economy is not served by allowing a recovery for costs and attorney's fees and further allowing a claim for malicious prosecution arising out of the same litigation. Malicious prosecution suits conceivably could go on forever as the acrimony increases with each new lawsuit.

The Turkey Creek court stated that election of remedies was not a factor in Cate because the taxing of costs and fees was the public official's exclusive remedy. That is not so because this

court concluded that successful defendants had a clear choice to either tax costs or sue for malicious prosecution. Mr. Oldham could have elected to sue Mr. Cate for malicious prosecution if he had not chosen the other remedy. It is the election to pursue costs and fees that bars the malicious prosecution action. The question of whether the Plaintiff has recovered "dollar for dollar" economic loss is not pertinent because a malicious prosecution action is open to the prevailing party if they elect not to tax costs and/or fees in the underlying action.

The case cited by petitioner, Law Offices of Harold Silver vs. Farmers Bank & Trust Company, 498 So.2d 984, (Fla., 1st DCA, 1986) is not on point because the defense of election of remedies is not mentioned and it is assumed that it was never raised. It is argued that the First District ignored Cate vs. Oldham. It was not ignored, it was never raised for consideration.

It is further argued that the Fourth District decisions, McLain vs. Hall, 521 So.2d 190, (4th DCA, 1988) and Hall vs. City of Pompano Beach, 487 So.2d 318 (Fla., 4th DCA, 1986) reject Cypher vs. Segal. This argument is incorrect because a close reading of the McLain and Hall cases finds no reference to Cypher vs. Segal. The Cypher decision was not discussed by the court and there is no indication that election of remedies was ever raised as a defense in either of the Hall cases.

The argument is made that this court misinterpreted the case of Parker vs.Langley, 93 Eng.Rep. 293, (K.B. 1714) when ~~Cate vs.~~ Oldham was decided. A semantic argument regarding a distinction between costs and damages rather than costs and fees is

misleading. The important language in Parker vs. Langley is regarding the election of the party. At common law a defendant could either tax costs and fees in the original action or they could sue for malicious prosecution. They could not do both. In this case, the trial judge made note of the importance of the election in the final summary judgment (A 16-17) which states:

> "Plaintiff, Mildred R. Jaye, elected to tax costs and attorney's fees against Royal Saxon, Inc. in the underlying cases. It is noted that Mrs. Jaye may not have recovered all of the fees that were sought in the underlying actions, however, Mrs. Jaye did make the election to seek those fees."

It is the election of the remedy and not the amount recovered that is important.

The Florida courts recognize the rule against splitting causes of action. This rule requires that all damages sustained or accruing as a result of a single wrongful act must be claimed and recovered in one action or not at all. The purpose of this rule is to end litigation and to protect parties from being harassed with a multiplicity of suits.

In Mims vs. Reid, 98 So.2d 498, (Fla.Sup.Ct., 1957), the Court quoted 1 Fla.Juris.Actions, para. 42 as follows:

> "The law does not permit the owner of a single or entire cause of action or an entire indivisible demand to divide or split that cause of action so as to make it the subject of several actions, without the consent of the defendant. All damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all. The law presumes that a single cause of action can be tried and determined in one suit, and will not permit the plaintiff to maintain more than one action against the same party for the same cause. This rule is founded on the plainest and most substantial justice-namely, that litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits. If the first suit is effective and available,

> and affords ample remedy to the plaintiff, the second suit is unnecessary and consequently vexatious. The rule against splitting causes of action is closely related to the doctrine of res judicata in this respect."

It is conceded that this case may not present a textbook example of splitting a cause of action but because the Plaintiff has elected to split her damages the principle should be applied. The remedy in the first suit was to tax costs and fees. This remedy was effective and available, whether it was adequate is now being questioned by the Plaintiff. The adequacy of the remedy is of no concern because this was the Plaintiff's choice to make. By electing to pursue those damages she has split her cause of action and this litigation should come to an end.

This court should not recede from its holding in Cate vs. Oldham. A remedy was elected when the successful defendant taxed fees and costs in the underlying litigation, and this action for malicious prosecution is barred. The certified question should be answered affirmatively.

ARGUMENT

B. THE TRIAL COURT WAS CORRECT IN DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT WHICH WAS MADE AFTER SUMMARY JUDGMENT HAD BEEN ENTERED.

The Plaintiff filed a Motion to Amend the complaint after the Motion for Summary Judgment had been granted. The fact that a Motion for Rehearing had also been filed does not mean the Motion to Amend is timely.

The underlying causes of action in this case were filed in 1979 and 1982. This malicious prosecution action was commenced on June 9, 1989. Summary Judgment was granted November 20, 1989 and the Motion to Amend was filed after the Summary Judgment was granted.

Florida law holds that the ruling of the trial court on a motion to amend pleadings will not be disturbed unless there is an abuse of discretion shown. Randle vs. Randle, 274 So.2d 557, (Fla. 3rd DCA, 1973). In Randle the defendants moved to amend their answer and add a counterclaim two and one half years after the original answer and just prior to a hearing on a Motion for Summary Judgment. The court refused to allow the amended pleadings and it was held that no abuse of discretion was shown. The order was affirmed.

Jaye's Motion to Amend included the addition of a new cause of action and new parties to the case. Inman v. Club on Sailboat Key, Inc., 342 So.2d 1069 (Fla. 3rd DCA, 1977) decided a similar issue by holding:

Appellant was attempting to raise new issues for the

> first time in her Motion for Rehearing and for Leave to Amend; and Summary Judgment already having been entered, the trial court did not abuse its discretion in denying the proposed amendment at this state of the proceedings.

Like Inman, the Plaintiff here is attempting to raise new issues for the first time in a Motion for Rehearing and a Motion for Leave to Amend after Summary Judgment has been entered.

The trial court is within its discretion to deny a Motion to Amend if it appears that the Motion to Amend will be fruitless. See Maiden v. Carter, 234 So.2d 168, (Fla. 1st DCA, 1970).

Cypher vs. Segal concludes that by taxing costs in the initial suit the Plaintiff is barred from instituting a separate action for additional damages. Because she is barred from instituting a separate suit for additional damages, the Amended Complaint would be fruitless. Therefore, the trial court was correct in denying the Motion to Amend.

Because it has not been shown that the trial court abused its discretion in denying the Motion to Amend, the trial court's order should be affirmed.

CONCLUSION

This court should answer the certified question affirmatively and approve the decision of the Fourth District Court of Appeal which affirms the summary judgment in favor of Respondent, Royal Saxon, Inc.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true **copy** of the **foregoing has** been **furnished to MICHAEL B.** SMALL, **ESQUIRE, Small, Small** & **Small, P.A. Paramount Center – Penthouse, 139 North County Road,** Palm **Beach,** FL **33480 and MARGUERITE H. DAVIS, ESQUIRE,** Katz, Kutter, Haigler, **Alderman, Davis, Marks & Rutledge, P. A., First Florida Bank Building, 215** S. **Monroe** Street, Suite 400, **Tallahassee, FL 32301, by Mail, this** 25th **day of April,** 1991.

JOHN J. BUFFIN