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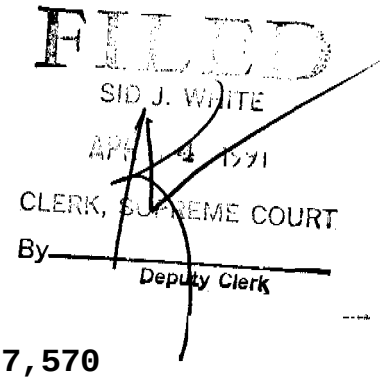

IN THE SUPREME COURT OF FLORIDA

MILDRED R. JAYE,

Petitioner,

v.

ROYAL SAXON, INC.,

Respondent.

CASE NO: 77,570

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

A. JURISDICTION:

This cause is presented to the Supreme Court as a result of an appellate decision by the District Court of Appeals, Fourth District of Florida in the case of Jaye v. Royal Saxon, Inc., 573 So.2d 425 (FL-4th DCA-1991) (A-8) which directly conflicted with Turkey Creek, Inc. v. Londono, 567 So.2d 943 (FL-1st DCA-1990) (A-9) and which certified the following question as being of great public importance:

> "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's discretionary jurisdiction is invoked pursuant to Rule 9.030(a)(2)(iv) and (V), Florida Rules of Appellate Procedure.

B. STATEMENT:

This cause involves an appeal from a final summary judgment in a malicious prosecution action entered by the lower trial court, being the 15th Judicial Circuit Court in and for Palm Beach County, Florida, Judge Edward Garrison presiding. The petitioner, Mildred Jaye, was the plaintiff in the lower court. The respondent Royal Saxon, Inc., was the defendant in the lower court. The petitioner Jaye initiated an action for malicious

prosecution against the respondent Royal Saxon, Tnc., as a result of having prevailed in defending two separate trial court actions and four appeals, all initiated by the respondent Royal Saxon, Inc. against the petitioner Mildred Jaye. (A-1) The trial court issued a final summary judgment against the petitioner Mildred Jaye based totally upon the trial court's interpretation of Cypher v. Segal, 501 So.2d 112 (FL - 4th DCA - 1987), and Cate v. Oldham, 450 So.2d 224 (FL - 1984). (A-3) The trial court interpreted the Cypher and Cate decisions as barring actions by private parties for malicious prosecution, if the prevailing party in the underlying wrongful litigation, elected to seek an award of costs or attorney fees. It is undisputed, that the petitioner Mildred Jay did seek and did receive a partial award of attorney fees based upon F.S. 719.303 and a partial award of costs in the underlying wrongful litigation in the trial court. However, in two of the four appellate actions, the petitioner Jaye did not receive an award of attorney fees. Royal Saxon v. Jaye, 536 So.2d 1046 (FL - 4th DCA - 1988); rev. den. 544 So.2d 200 (FL - 1989).

The petitioner Jaye timely filed a motion for rehearing (A-4), which was denied. (A-7) During the time that the motion for rehearing was pending, and within 10 days following the rendition of the summary judgment the petitioner Jaye filed a motion to amend the complaint, adding additional adverse parties and stating an additional cause of action for intentional infliction of emotional distress and adding parties defendant (A-5) which was denied. (A-6)

The Record is referred to as "(R ___)." The Appendix is referred to as "(A ___)." There was no evidentiary hearing, so there is no transcript.

The petitioner Mildred Jaye seeks the reversal of the final summary judgment and the reversal of the order denying the requested amendment.

STATEMENT OF FACTS

The petitioner Mildred Jaye is a cooperative unit owner in the Royal Saxon Cooperative in Palm Beach. She has resided there for 20 years. The Royal Saxon Cooperative is operated by its officers and board of directors in accordance with its bylaws, propriety lease, and Chapter 719, F.S., otherwise known as the Florida Cooperative Law. Petitioner has for years been looked upon as a ''thorn in the side" of the board of directors and officers of the Royal Saxon Cooperative. Several of the officers have previously testified under oath that they would do anything to get rid of Mildred Jaye. She repeatedly reported violations of building codes, fire codes, health safety codes, code enforcement laws, cooperative laws and any other state, local laws or ordinances, which she felt that the board and officers were violating. *See* Royal Saxon v. Jaye, 536 So.2d 1046 (FL - 4th DCA - 1988); rev. den. 544 So.2d 200 (FL - 1989). As a result, the board and officers were cited on numerous occasions before various state and local agencies. In 1979, the board voted to commence an

action in the Palm Beach County Circuit Court for an injunction to force Mildred Jaye to turn over her key and to prohibit certain wearing apparel in the lobby and bringing her bicycle inside the building. While that action was pending, the board authorized the commencement of an action to evict Mildred Jaye from the cooperative apartment which she owned, purportedly based upon her challenge of a 1981 board approved special assessment. She offered to pay the assessment, but under protest. The board refused to accept payment and initiated the eviction action. After an extensive jury trial on both cases, which were consolidated for trial, Mildred Jaye received a directed verdict in the first case and a jury verdict in the second. She received a partial award of attorney fees and costs in the lower court. Appeals were taken from the principal judgments **and** from subsequent attorney fee judgments. Mildred Jaye prevailed in all of the appeals.

Mildred Jaye filed a malicious prosecution action against the board, claiming that the underlying wrongful litigation was maliciously prosecuted as a means to get rid of Mildred Jaye from the building and to inflict harassment, financial ruin, embarrassment, and humiliation upon her. **(A-1)** Mildred Jaye claimed that she was ostracized and singled out for verbal and physical abuse, ignored, spat upon and that her life was a living hell during the seven years of the litigation and pending appeals. She asked for general, compensatory and punitive damages in the malicious prosecution action.

The trial court granted a motion for summary judgment

(A-2) and entered a final summary judgment against petitioner purportedly based upon an interpretation of Cate v. Oldham **and** Cyphsr v. Seqal, supra, because Mildred Jaye had received a partial award of court costs in accordance with Chapter 57, **F.S.**, and a partial award of attorney fees in accordance with Section 719.303, **F.S.**, which mandates that the trial court award reasonable attorney fees to the prevailing party in an action between the cooperative association and a cooperative unit owner. **(A-3)** The trial court denied tha motion to amend the complaint to add parties and to state an additional cause of action for intentional infliction of emotional distress. **(A-6)**

The District Court of Appeals, Fourth District of Florida reluctantly affirmed Cypher v. Segal, supra, but certified the question as being one of great public importance and specifically noted direct conflict with Turkey Creek, Inc. v. Londono, 567 So.2d 943 (FL-1st DCA-1990).

The petitioner Mildred Jaye seeks a reversal of the final summary judgment and contends that the trial court and Fourth District misinterpreted or wrongfully interpreted Cate v. Oldham and that the Fourth District should have receded from Cypher v. Segal, supra. The petitioner further seeks reversal of the order denying the motion to amend the complaint.

SUMMARY OF THE ARGUMENT

The issues in this case are clear. The petitioner contends that the Fourth District misinterpreted or erroneously interpreted Cate v. Oldham by extending its rule of law to Cypher v. Segal, supra, and reluctantly extended the erroneous decision to the instant case. The petitioner argues that the First District correctly interpreted Cate v. Oldham and declined to apply it to Turkey Creek, Inc. v. Londono, supra. The appellate courts of this state never intended Cate v. Oldham to bar private litigants from bringing malicious prosecution actions, or for that matter, wrongful eviction, abuse of process or slander of title actions, in cases where the prevailing party in the underlying wrongful litigation elected to seek an award of costs or attorney fees. To the extent that Cypher v. Segal extended the rule of law in Cate v. Oldham to private litigants, it should be receded from, distinguished or overturned.

The petitioner further contends that the trial court should have granted the timely motion to amend the complaint filed within 10 days following the issuance of the summary judgment and pending the determination of the motion for summary judgment.

ARGUMENT

I

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?"

The Fourth District reluctantly responded in the affirmative, but certified the above question as being of great importance. It was apparent at the oral argument before the Fourth District in the instant case that the judges were leaning toward receding from Cypher. However, both Judge Stone and Dell were on the panel which issued the opinion in Cypher and they stopped short of receding from that opinion, but Judge Warner, did not. She specifically disagreed with Cypher. (A-8)

In response to a motion for summary judgment filed by the respondent cooperative association, the trial court ruled that the cases of Cypher v. Segal, 501 So.2d 112 (FL - 4th DCA - 1987) and Cate v. Oldham, 450, So.2d 224 (FL - 1984) controlled. (A-3) The petitioner further argued that the Florida Supreme Court in the Cate case never intended to establish a legal precedent that would bar malicious prosecution actions by private litigants where either attorney fees or costs were awarded in the underlying wrongful litigation. To do so, would constitute a failure to recognize that

the damages in a malicious prosecution action are not limited simply to a "dollar for dollar" economic loss consisting of attorney fees and costs in the underlying wrongful litigation. Likewise, to follow the argument of the respondent, which was accepted by the trial court, even if the award of attorney fees or costs, was only partial, and did not constitute a full recovery of attorney fees and costs, the mere award, regardless of the amount, would constitute a bar against bringing a malicious prosecution action, or for that matter, a wrongful eviction, abuse of process or slander of title action. Each of these actions are similar in many elements to a malicious prosection action.

The elements of a cause of action for malicious prosecution are:

> "An action for malicious prosecution lies in all cases where there is a concurrence of the following six essential elements: (1) the prior commencement or continuance of a civil or criminal judicial proceeding; **(2)** its legal causation by the present defendant against the plaintiff; (3) its bona fide termination in favor of the plaintiff; **(4)** the absence of probable cause for prosecution of such proceeding; (5) the presence of malice in instituting the proceeding; and (6) damage conforming to legal standards resulting to the plaintiff. If any one of these elements is lacking, an action for malicious prosecution will not lie. **241** Fla. Jur. 2d, Malicious Prosecution, page **547.**

In Law Offices of Harold Silver v. Farmers **Bank** and Trust Co., the District Court of Appeal, First District for the State of Florida, ignored Cate v. Oldhem, 450 So.2d **224** (FL - **1980)** and confirmed that a malicious prosecution action may be maintained for

injuries, including punitive damages, even after receiving a statutory award of costs in the underlying wrongful action. Law Offices of Harold Silver v. Farmers Bank and Trust Co., 498 So.2d 984 (FL - 1st DCA - 1986). The District Court of Appeals, First District reversed the trial court's determination that a recovery for wrongful levy bass a malicious prosecution action. The defendant in the underlying wrongful action recovered damages by virtue of Section 56.16, F.S. for a wrongful levy. In light of the "common law tort of malicious prosecution" and the rule of statutory construction harmonizing legislative mandates with the common law, "statutes designed to alter the common law must be in unequivocal terms." Law Offices of Harold Silver v. Farmers Bank and Trust Co., ibid. As a result, because a malicious prosecution action provides for the award of damages beyond those provided in Section 56.18, F.S. the separate tort of malicious prosecution is available, ibid. Similarly, in the instant case involving Royal Saxon v. Jaye, Jaye was the prevailing party. The trial court, affirmed by this appellate court in Royal Saxon v. Jaye, (FL - 4th DCA, Case No. 85-1625); (FL - 4th DCA, Case No. 85-2814). In Royal Saxon v. Jaye, 536 So.2d 1046 (FL - 4th DCA - 1988); rev. den. 544 So.2d 200 (FL - 1989), the trial court awarded partial attorney fees and costs in accordance with Section 719.303, F.S. However, the Fourth District did not award appellate legal fees.

The impracticality of Cypher v. Segal, 501 So.2d 112 (FL - 4th DCA - 1987) and its rejection by this very same District Court of Appeal, 4th District of the State of Florida is

demonstrated in the decision of McLane v. Hall, 521 So.2d 190 (FL - 4th DCA - 1981), referred to as "Hall II" and Hall v. City of Pompano Beach, 487 So.2d 318 (FL - 4th DCA 1986), referred to as "Hall I". In both Hall decisions, multiple tort claims were brought by Mr. Hall against several defendants including the City of Pompano Beach and Mr. McLane. In dismissing the cases, the trial court found no probable cause and awarded attorney fees pursuant to Section 57.105, FL, STAT (1983). This District Court of Appeals, 4th District of the State of Florida, responded that it was not convinced of the absolute frivolity of Mr. Hall's claim. As a result, the award of attorney fees was vacated, but all other portions of the trial court's award, including costs, were affirmed. See Hall v. City of Pompano Beach, ibid - "Hall I".

After remand, the trial court dismissed Mr. McLane's subsequent malicious prosecution action, relying upon Cypher v. Segal, ibid. However, this District Court of Appeals, 4th District of the State of Florida, ignored Cypher, supra, and remanded the cause for an independent determination of whether probable cause existed for the first suit (the underlying wrongful litigation), inasmuch as "Hall I" was predicated only on a finding that the action was not frivolous. The important and underlying point being, that Cypher, supra, nor Cate, supra, were applied because of the circumstances.

In order to understand the limited precedent sat in Cate, it is important to discuss the circumstances. The case clearly illustrates that the decision was based on Parker v. Langley, 93

ENG. REP. 293 (K.B. 1714). Cate, supra, at pages 225-227 and Cypher, supra, at page 114 cite Parker for the proposition that:

> "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 these **losses;** they could not do both." (Emphasis added.)

Regretfully, the above quote, in fact, is a misreading of the Parker case. Parker made no such common law holding. At issue in Parker was whether an action for malicious prosecution may be maintained without showing the result of the underlying (wrongful) litigation. (93 ENG. REP. at 293). The Chief Justice held in Parker, supra, that inasmuch as there was no showing as to whether the underlying litigation was resolved, not to mention that it was resolved in favor of the present plaintiff, required that the subsequent malicious prosecution claim must be dismissed. Parker v. Langley, ibid at 297.

Parker v. Langley, 93 Eng. Rep. 293, (K.B. 1714) (Reports in the King's Bench, Gilb **Cas.** 161.) at 297 says, to wit:

> "I know not whether these actions have not in some measure been allowed upon the reason of the statute of 8 Eliz. ***c.*** 2, so that what that Act declares to be injustice and vexations, and orders a judgment to be given for costs and damages thereupon, should afterwards be likewise in those cases at the election of the party, or in other like cases to be the foundation of an action upon the case to recover damages, and that statute enacts that the defendant shall have costs and damages awarded him, if the plaintiff declares not within three days after bail put in the cases within the statute." (Emphasis added.) At 297.

In Cate, and Parker v. Langley at 297 was misconstrued. Rather than "costs and fees" in the original action, Parker v. Langley says "costs and damages" (Emphasis added.). Petitioner respectfully suggests to this court that there is a significant legal difference between recovery in the underlying action of "costs and fees" and recovery in the underlying action of "costs and damages" (emphasis added). In the later case it clearly would be double recovery and the doctrine of election of remedies would apply; but not in the former case.

Notably, appellate courts in this state have shown a disfavor for malicious prosecution actions, perhaps because of the psychology, that litigation has to stop sometime. However, as long as a cause of action for malicious prosecution still remains viable, it makes little common sense to enforce the provisions of such statutes as Section 57.021, FL STAT (1987), which **says:**

> "The clerk of the court or the judge shall **tax** the costs accruing at each action when it is determined . . .; or

Section 57.041 FL STAT (1987), which says:

> "The party recovering judgment shall recover all his legal casts and charges which shall be included in the judgment . . ."

and prohibit malicious prosecution actions because fees or casts were awarded in the underlying action.

> "The prevailing party in any such action . . . is entitled to recover reasonable attorney fees. This relief **does** not exclude other remedies provided by law." (Emphasis added.) Section 719.303(1), **F.S.**

Carried further, there are at least two dozen separate statutes which all provide that in certain causes of action, attorney fees may be awarded, such as the condominium statute (Chapter 718), the cooperative statute (Chapter 719), the mechanics lien statute (Chapter 713), the Little FTC Act (Chapter 501), the Mobile Home Act (Chapter 723), the Landlord/Tenant Act (Chapter 83), the Civil Theft Statute (Chapter 772), etc. Perhaps each one of these statutes should be further restricted by the admonition, "that attorney fees in accordance with these statutes shall not be requested if the prevailing party who was wrongfully sued in the underlying wrongful litigation intends to pursue an action for malicious prosecution." However, neither the Florida Legislature, nor the Florida Supreme Court, nor any Florida appellate courts, have ever stated that the aforementioned statutory authorities represented a bar to malicious prosecution actions, or for that matter, to wrongful eviction, slander of title or abuse of process actions.

Once again, it is important to refer to the source of the problem - Parker v. Langley, supra, as quoted in Cate v. Oldham, supra. The Florida Supreme Court made known its dislike for malicious prosecutions in Glass v. Perish, 51 So.2d 717, 721 (FL - 1951), but the Florida Supreme Court could not, and did not cite any specific language from Parker, supra, to justify its conclusion, that the common law mandates that if either costs or fees were awarded in the original action, that the prevailing party could not sue for malicious prosecution.

Perhaps one could argue that it was the intent of Cate v. Oldham, supra, to establish an offset or credit against any malicious prosecution judgment for attorney fees and costs already awarded in the underlying wrongful litigation, much the same as there is an offset for collateral source payments in other tort actions. It would be logical to argue that if attorney fees and costs were awarded in the underlying wrongful action, that either the amount of those fees and costs would represent a set off, or alternatively, that the prevailing party in the underlying wrongful litigation could not include attorney fees and costs as an element of damages, and would be limited to such other elements of damage as may exist, other than the attorney fees and costs.

However, in a malicious prosecution action, in addition to exemplary or punitive damages which may be recovered, a successful claimant is entitled to recover compensatory damages.

> "A cause of action for malicious prosecution is actionable per se, and certain kinds of damage necessarily follow and are presumed to exist. There is no fixed rule of damages in actions for malicious prosecution, the object being remuneration to the plaintiff for a personal injury incapable of exact cash valuation. Compensatory damages in actions for malicious prosecution, as in other types of actions, are those which arise from actual and indirect pecuniary loss, expenses, mental suffering, and bodily pain and suffering. The plaintiff is entitled to recover damages not only for an unlawful arrest and imprisonment and for the expenses of his defense, but for injury to his name and character by reason of a false accusation." 24 Fla. Jur. 2d, Malicious Prosecution, page 578.

The old adage, about mixing "apples and oranges" definitely is pertinent to this discussion. The relief afforded under statute or contract for an award of attorney fees and costs to the prevailing party is different than the relief afforded in an action for malicious prosecution which is far more expansive, contains other elements and affords personal relief for mental anguish and suffering, damage to reputation and embarrassment, as well as for monetary damages, which coincidentally may include attorney fees and costs.

Neither the Parker court, supra, nor the Cate court, supra, ever reached the underlying issue. The Parker court, based upon statute, 8 Eliz. c. 2 never reached the question of whether costs and damages could be awarded if the claimant failed, as required by the 1565 law, to make a claim for injuries within three days after release from jail. (93 ENG. REP. at 297.) Coincidentally, the Parker court, supra, did not even reach the issue of whether a common law award taxing costs barred a malicious prosecution action, because at common law, there was no provision for the taxation of costs. Taxation of costs was not a right, but was based upon a privilege extended by statute.

Interestingly enough, the only other reported decision in the United States which cited Parker, supra, as authority, contained in "West Law Data Base" other than the Cate and Cypher cases is a 100 year old case in Ohio, styled as Pope v. Pollock, 40 Ohio 367, 21 NE 356 (OH 1889). In the Pope case, the Ohio Supreme Court found that the common law "supported malicious

prosecution actions until the year 1250" when the Statute of Malbridge, 52 HEN. 111, provided a successful defendant with the remedy of a claim for costs. The Ohio court concluded that the award of costs was based upon statute, not based upon common law principles, as suggested in Cate, supra (emphasis added). As a result, the Ohio court held malicious prosecution actions were not barred, but in fact were traditionally available even where costs were taxed. (Ibid at page 357.)

Ninety years later, in the reading of the "English rule", in Jacques v. McLaughlin, 401 A2d 430 (RI - 1979), the Rhode Island Supreme Court held, that "the old common law rule" was that some "special injury" had to be recited in order to state a malicious prosecution action. In the instant case as well as in numerous other exceptions to Cate, the petitioner has suffered a special injury, being a grievous harm to her reputation; to her lifestyle; and to her peace and tranquility. She has been ostracized, spat upon, verbally and physically abused, ridiculed and held in destain. Her rights as a co-operative unit owner were stripped during the litigation. She was not officially recognized at co-operative meetings. She was not permitted to speak or vote at co-operative meetings. She was not sent notices, minutes or announcements of co-op business. She suffered extreme mental distress and anguish. She was socially and politically isolated. These special injuries are more than sufficient to allow petitioner to proceed with her malicious prosecution action and are capable of only of being addressed in a malicious prosecution action.

Petitioner is entitled to proceed to jury trial. "It has been said that in an action for malicious prosecution, the fixing of the amount of damages is peculiarly within the province of the jury" 24 Fla. Jur. 2d, Malicious Prosecution, page 580; Brickman v. Garrido, 291 So.2d 26 (FL - 3rd DCA 1974); Maiborne v. Kuntz, 56 So.2d 720 (FL - 1952).

It is respectfully submitted that the certified question:

> "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?"

should be answered in the negative and Cate should be clarified accordingly.

B. WHETHER TURKEY CREEK, INC. v. LONDON0 OR JAYE v. ROYAL SAXON CORRECTLY EXTENDS AND APPLIES THE RULE OF LAW OF CATE v. OLDHAM TO PRIVATE LITIGANTS

There is a direct contradiction between those statutes that mandate that costs shall be awarded or that attorney fees shall be awarded to the prevailing party and to the precedent purportedly set in Cypher, ibid extended to Jaye. By statute, the party in an action at law is absolutely entitled to the taxation of costs. Murray v. Plasteridge, Inc., 338 So.2d 260 (FL - 4th DCA - 1976) and Draqstrem v. Butts, 370 So.2d 416 (FL - 1st DCA - 1979). In Dorf v. Usher, 514 So.2d 68 (FL - 4th DCA - 1987). The

District Court of Appeals, 4th District of the State of Florida, interpreted Section 57.105, FL STAT. (1985) as requiring that an unwarranted claim must be punished by an award of attorney fees which is required to be levied. In Villa Sorrento, Inc. v. Elden, 458 So.2d 1177 (FL - 4th DCA - 1984), the Fourth District specifically held that, "if a statute specifically provides for the award of attorney fees to the prevailing party, the language is mandatory , . . . - only the determination of the amount is discretionary."

> "For one remedy to bar another remedy on grounds of inconsistency they must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically follow one without renouncing the other." Barbe v. Villeneuve, 505 So.2d 1331 (FL-1987).

What did Cate really say? The Cats decision is Limited by its own language to claims in which no more than what could have been taxed in the underlying wrongful litigation. The court said:

> " Here (s)he has personally suffered no loss which is not readdressable through his or her application for redress in a suit in which he or she originally sued."

The Cate court was not concerned, as this court should be, with claims by private litigants or beyond that which could have been taxed in the original litigation.

Petitioner by this appeal as she did in the lower court in pursuit of her complaint make a good faith argument to reverse the existing rule of law which the lower court erroneously attributed to Cypher.

It is respectfully submitted that to the extent that Cypher extends Cate to private litigants, it is an unwarranted extension of Cate without the public policy base upon which Cate was decided. Petitioner urges this court to recede from Cypher to the extent that it extends the rule of law of Cate to private litigants and instead adopt Turkey Creek, Inc., as the rule of law in Florida.

A cost judgment in an underlying action is not ''double recovery". It is, and should be no more than, a factor of damage mitigation. The law generally requires one to mitigate his damages and, indeed, damage mitigation should be and generally is encouraged. 17 Fla. Jur. 2d, Damages, Section 90. The holding in Cypher, however, discourages damage mitigation and penalizes the unwary who pursue damage mitigation by cost judgment and thereby divest themselves of legitimate economic and non-economic damages ordinarily recoverable by malicious prosecution.

Petitioner has found no American case in support of Cypher, as extended to Jaye. To the contrary, Turkey Creek, Inc. is directly in conflict. It is urged that this is so because there is no reason for a de minimus cost judgment to bar a later malicious prosecution suit between private parties. A cost judgment is not "double recovery."

Strong public policy and constitutional reasons may support Cate. But the Cate case is based on the valid recognition that retaliatory suits by the government, or its officers, would have a chilling effect on the right of citizens to petition the

government for redress of grievances. Cate rightly acknowledges the privilege to sue the state without reprisal. However, the public policy and constitutional reasoning of Cate does not apply to suits between private litigants. To the extent that Cypher extends Cate to private litigants, it does so without the Cate public policy foundation which is the heart of the Cate decision.

The Fourth District in Cyphsr said it based its ruling On Cate. Cypher was a police officer. He was sued in his official capacity along with his employer, the Town of Palm Beach. The Cypher court on appeal, however, at the first paragraph of its opinion at page 112, makes an unnecessary assumption. Based on that unnecessary assumption Cypher takes Cate one step further:

> "Assuming that Segal had sued Cypher in his individual capacity in the first action, the primary question on appeal is whether the defendant's election to tax costs in that case is a defense in this one." (at 112) (emphasis added).

The assumption that Segal had sued Cypher in his individual capacity in the first action was unwarranted and clearly was not necessary to the disposition of the case. The Cypher court could have done what the lower court did and simply affirmed Cypher based on Cate. The assumption made by Cypher thus is no more than obiter dicta. The assumption of Cypher upon which the lower court in the instant case relied was not essential to the Cyphes decision, but rather, as obiter dicta it was a "gratuitous opinion, which whether right or wrong binds no one, not even the judge that utters it." 13 Fla. Jur. 2d, Courts and Judges, Section 155, Page

274. Dicta is without force as a judicial precedent. Pell v. State (1929) 97 Fla. 650, 122 So. 110; Schelman v. Guaranty Title Co. (1943) 153 Fla. 379, 15 So.2d 754, 149 ALR 1029, on reh; State v. Florida State Improv. Com., (1952, Fla.) 60 So.2d 747; State ex rel Florida Bar v. Evans, (1957, Fla.) 94 So.2d 730; State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Dept. of Business Regulation, (1973, Fla.) 276 So.2d 823. 13 Fla.Jur. 2d, Courts and Judges, Section 155, page 274.

In Turkey Creek, the First District said:

> "We do not read Cate to preclude appellants' subsequent suit for damages which could not have been recovered in the original action, such as harm for reputation. No double recovery is involved where a plaintiff brings a malicious prosection action for damages which were not recovered in the original action."

Turkey Creek, Inc. v. Londono, 567 So.2d 943, 948 (FL-1st DCA-1990).

The First District went on to distinguish Cate from Cypher and Turkey Creek:

> "Election of remedies was not a factor in Cate, as the court held that the taxing of costs and fees in the original action was the public official's exclusive remedy. Additionally, while the court referred to the right to petition government for grievances against private parties, Cate at 225-226, the court in no way limited the right of a private party to sue for malicious prosection. Requiring an election of remedies in the fashion of the Cypher court does not protect the right to petition, since the same remedies are available to a defendant who does not seek costs in the first action.

Cypher should be distinguished, receded from or overturned to the extent that it extends the public policy rule of law of Cate to private litigants and Turkey Creek should be adopted as the correct extension or reading of Cate.

ARGUMENT

II

WHETHER THE LOWER COURT SHOULD HAVE PERMITTED PLAINTIFF TO AMEND THE COMPLAINT ADDING A COUNT FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS PENDING DETERMINATION OF THE MOTION FOR REHEARING OF THE SUMMARY JUDGMENT

The lower trial court answered in the negative. Petitioner respectfully submits that the lower trial court should have granted petitioner's timely "motion to amend complaint pending determination on rehearing of motion for summary judgment." (A-5) Although the trial court had granted appellee's motion for summary judgment, the summary judgment was not final because appellant had timely filed a motion for rehearing.

In Dorset House Association, Inc. v. Dorset, Inc., 371 So.2d, 541 (FL - 3rd DCA - 1979) the appellate court held, that, "Where summary judgment should be granted, but it appears that a party may have a cause of action not pleaded, proper procedure is to enter summary judgment, but with leave to amend in same suit." Dorset House Association, ibid, at 542; Purinson v. Antenna

Specialists Company, 408 So.2d 617 (FL - 3rd DCA -1982); O'Brien v. Young, 538 So.2d 112 (FL - 2nd DCA - 1989). In Johnson v. Headly, 419 So.2d 401 (FL - 4th DCA - 1982), this Fourth District held that, "it is clearly an abuse of discretion to refuse leave to amend, except under very limited circumstances. Reid v. Reid, 396 So.2d 818 (FL - 4th DCA - 1981). It was an abuse of discretion here. See Schunkman v. Stolar, 347 So.2d 653 (FL -3rd DCA -1977).

Petitioner should not have been denied her right to amend her complaint, even if the court entered the summary judgment - but with leave to amend. The lower trial court's order denying the motion to amend should be reversed.

CONCLUSION

The Fourth District misinterpreted Cate, by extending its rule of law in Cypher to private litigants as in Jaye to deny the prevailing party who successfully defended against wrongful litigation, from bringing a malicious prosecution action, simply because the prevailing party elected to seek an award of attorney fees and/or costs in the underlying wrongful litigation. To affirm this erroneous interpretation, would be to set a precedent, denying all litigants who have been wrongfully sued the right to seek damages in addition to attorney fees and costs, simply because they included a prayer for attorney fees and costs in their pleadings. Such a precedent would be without authority, unfair and unjust and contrary to public policy. Cypher is bad law as it extends Cate

to private litigants. Turkey Creek correctly represents the rule of law in Florida.

Petitioner further contends that she should have been allowed to amend her complaint pending determination of her motion for rehearing of summary judgment, to add parties defendants and to state a cause of action for intentional infliction of emotional distress,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above mentioned was served by U.S. mail on John Bulfin, Esq., Rider, Wiedeshold, Moses & Bulfin, P.A., Northbridge Centre, Suite 800, 515 North Flagler Drive, West Palm Beach, Florida 33402 and Marguerite H. Davis, Esq., 215 S. Monroe Street, Suite 400, Tallahassee, Florida 32301, this 2nd day of April, 1991.

SMALL, SMALL & SMALL, P.A.

BY

MICHAEL B. SMALL, ESQ.
Florida Bar No: 074872
Paramount Center - Penthouse
139 North County Road
Palm Beach, FL 33480
Telephone: (407) 833-1100
Telecopier: (407) 835-0547
Attorneys for Petitioner

C:/WP/DOCS/JAYE/SAXON.P15

IN THE SUPREME COURT OF FLORIDA

MILDRED R. JAYE,

Petitioner,

v.

ROYAL SAXON, INC.,

Respondent.

_____/

CASE NO: 77,570

APPENDIX TO PETITIONER'S INITIAL BRIEF

SMALL, SMALL & SMALL, P.A.
MICHAEL B. SMALL, ESQ.
Florida Bar No: 074872
Paramount Center - Penthouse
139 North County Road
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Telephone: (407) 833-1100
Telecopier: (407) 835-0547
Attorneys for Petitioner

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jaye-me1.cmp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA.

CASE NO: CL 89 5760 ME

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.
_____/

COPY
ORIGINAL - NOT FILING

JUN - 9 1989

JOHN B. DUNKLE CLERK
CIRCUIT CIVIL DIVISION

COMPLAINT

THIS IS civil action for general and punitive damages in excess of $100,000.00.

1. The plaintiff sues the defendant for general and punitive damages in excess of $100,000.00 for malicious prosecution.

2. The plaintiff is the owner of a cooperative unit in the Royal Saxon cooperative at 2840 South Ocean Boulevard, Palm Beach, Florida.

3. The defendant, Royal Saxon, Inc., is a Florida corporation, appears as the landlord on the Proprietary Lease between the plaintiff and the defendant, and is responsible for the management and operation of the Royal Saxon cooperative.

4. The business and operation of the Royal Saxon cooperative is carried out by its board of directors and officers.

COUNT I

5. The board of directors of the Royal Saxon cooperative authorized its attorneys to file a complaint in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, in 1979, against the plaintiff for an injunction prohibiting certain alleged behavior purportedly of the plaintiff and mandatorily requiring the Plaintiff to turn over the key to her cooperative unit.

6. A complaint was filed in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, by the defendant

,against the plaintiff styled as Royal Saxon, Inc. v. Mildred Jaye, Case No: 79-5203.

7. After prolonged Litigation, the trial court directed a verdict: and entered judgment in favor of the plaintiff against the defendant on all counts in defense of the complaint.

8. The trial. court entered judgment in favor of the plaintiff and against the defendant on June 10, 1985.

9. The defendant appealed the judgment and a subsequent attorney fee award in favor of the plaintiff which was entered effective November 18, 1985, in appellate Case Nos: 85-1624 and 85-2815 in the District Court of Appeal of the State of Florida, Fourth District.

10. The District Court: of Appeal, Fourth District affirmed the June 10, 1985, judgment in favor of the plaintiff and the November 18, 1985, judgment in favor of the plaintiff.

11. The prosecution of the lower court action and the two appeals against Mildred Jaye was without probable cause and was commenced arid continued by said defendant from malice toward the plaintiff and to wrong and injure her.

12. The defendant well knew, or should have known, that the prosection of the lower court action arid the appeals was false and groundless and without probable cause. The defendant used arid abused the process of the court through the lower court: action and appeals to wrong and injure the plaintiff, to harass the plaintiff, to intimidate the plaintiff, to create an atmosphere of animosity and acrimony toward the plaintiff, to shun and set the plaintiff aside from the rest of the Royal Saxon cooperative community and to financially devastate the plaintiff.

13. By reason of the facts herein set forth, the plaintiff has suffered grievously arid has been brought to scandal, great humiliation, mental suffering and damage to her reputation and to her integrity. She has been shunted aside, ignored, harassed, intimidated, physically and verbally abused end deprived of her rights as a cooperative owner in the Royal Saxon, all as a result of the actions and conduct of the defendant Royal Saxon, Inc., through its officers and members of the board of directors.

14. As a result of the actions and conduct of the defendant, the plaintiff was caused to employ legal counsel and to incur substantial expense and damages for legal representation, costs, experts and witnesses in her defense. Although she received a partial award of attorney fees, she has only recovered a portion of the legal fees and expenses, which she has paid or has incurred.

15. The defendant, through its officers and members of the board of directors, has acted with actual malice arid was guilty of a wanton and outrageous disregard of the rights arid feelings of the plaintiff Mildred Jaye and by reason thereof, plaintiff is entitled to an award of punitive damages against the defendant.

WHEREFORE, plaintiff prays for judgment against the defendant Royal Saxon, Inc. for compensatory and punitive damages in excess of $100,000.00, plus prejudgment interest, costs of this litigation and for trial by jury on all issues so triable.

COUNT II

16. The board of directors of the Royal Saxon approved an assessment in the spring of 1981. Mildred Jaye's proportionate share of that assessment was $191.33.

17. Mildred Jaye contested and disputed the assessment, which was subsequently determined by a jury to be totally improper and illegal.

18. Although given several and various opportunities to remedy or redress the wrongful claim which the defendant, Royal Saxon, alleged that it had against the unit owner, Mildred Jaye, for $191.33, on September 25, 1981, the defendant, Royal Saxon, Inc., its board of directors and officers, without benefit and right to a "hearing" to plaintiff, authorized the commencement of the harshest of all remedies available by initiating an eviction proceeding to evict and remove the unit owner, Mildred Jaye, from the cooperative unit which she owned. The defendant filed the eviction proceedings in the Palm Beach County Court. The case was transferred to the Circuit Court, Case No: 82-800.

19. The avenues available to the Royal Saxon included but were not limited to, arbitration, mediation, a suit for money

damages In Small Claims Court, the filing of a lien, and accepting the money which the unit: owner offered to pay "in protest" on three occasions, but which the board of directors and officers refused to accept.

20. The defendant, Royal Saxon, looked upon the possible eviction of the plaintiff, Mildred Jaye, as an opportunity to get rid of her, because in the eyes of the officers and directors of the Royal Saxon, she had become "a thorn in their side."

21. Upon initiation of the eviction proceedings, the Royal Saxon divested Mildred Jaye of all of her rights, tenants and interest in ownership of her cooperative unit and her rights under her proprietary lease.

22. The Royal Saxon divested the plaintiff, Mildred Jaye, of her right to vote, her right to participate in meetings; her right to be recognized; her right to receive minutes; her right to examine books and records: her right to receive notices and agenda of annual meetings of owners: and all other rights incidental to ownership and tenancy in the Royal Saxon.

23. The divestation of her rights of ownership continued from immediately before the commencement of the eviction proceedings to well after the end of the jury trial in the eviction action and the rendition of a judgment in favor of Mildred Jaye on June 10, 1985.

24. The jury in the eviction action rendered a verdict, on December 11, 1984, finding in favor of Mildred Jaye on almost every single issue as it related to the eviction proceedings commenced by the Royal Saxon. Judgment: was entered on June 10, 1985.

25. Thereafter, the defendant initiated appeals from the June 10, 1985, judgment and the November 18, 1985, judgment awarding attorney fees in the lower court in the District Court of Appeal, Fourth District in Case No: 85-1625 and 85-2814.

26. The District Court of Appeals, State of Florida, Fourth District affirmed the lower court judgments of June 10, 1985, end November 18, 1985, in the aforementioned appellate cases.

27. The prosecution of the eviction action and the subsequent: appeals against Mildred Jaye was without probable cause and was commenced and continued by said defendant from malice towards the plaintiff and to wrong and injure her.

28. The defendant well knew, or should have known, that the prosecution of the eviction action was false and groundless and without probable cause.

29. The defendant used and abused the process of the court to wrong and injure the plaintiff and to use the court to forcibly and involuntarily remove Mildred Jaye from her own cooperative unit.

30. The defendant well knew, or should have known that the prosecution of the lower court action and the appeals was false and groundlees and without probable cause. The defendant used and abused the process of the court through the lower court action and appeals to wrong and injure the plaintiff, to harass the plaintiff, to intimidate the plaintiff, to create an atmosphere of animosity and acrimony, to shunt and set the plaintiff aside from the rest of the Royal. Saxon cooperative community and to financially devastate the plaintiff.

31. By reason of the facts herein set forth, the plaintiff has suffered grievously and has been brought to scandal, great humiliation, mental suffering and damage to her reputation and to her integrity. She has been shunted aside, ignored, harassed, intimidated, physically and verbally abused and deprived of her rights as a cooperative owner in the Royal Saxon, all as a result of the actions and conduct of the defendant Royal Saxon, Inc., through its officers and members of the board of directors.

32. As a result of the actions and conduct of the defendant, the plaintiff was caused to employ legal counsel and to incur substantial expense and damages for legal representation, costs, experts and witnesses in her defense. Although she received a partial award of attorney fees, she has only recovered a portion of the legal fees and expenses, which she has paid or has incurred.

33. The defendant, through its officers and members of the board of directors, has acted with actual malice and was guilty of a wanton and outrageous disregard of the rights and feelings of the plaintiff Mildred Jaye and by reason thereof, plaintiff is entitled to an award of punitive damages against the defendant.

WHEREFORE, plaintiff prays for judgment against the defendant Royal Saxon, Inc., for compensatory and punitive damages in excess of $100,000.00, plus prejudgment interest, for costs of this litigation and for trial by jury on all issues so triable.

Respectfully,

MILDRED R. JAYE

STATE OF FLORIDA)

COUNT OF PALM BEACH)

MILDRED R. JAYE, being first duly sworn deposes and says that: she has read the foregoing complaint by her subscribed and that she knows the contents therein to be true, accept as to those matters stated upon information and belief and as to those matters she believes to be true.

MILDRED R. JAYE

SUBSCRIBED AND SWORN to before me this 9th day of June, 1989.

NOTARY PUBLIC

My Commission Expires:

Notary Public State of Florida at Large
My Commission Expires February 24, 1990
Bonded Thru Cornelius, Johnson & Clark, Inc.

SMALL, SMALL & SMALL, P.A.

By
MICHAEL B. SMALL, ESQ.
Attorneys for Plaintiff
Paramount Center - Penthouse
139 North County Road
Palm Beach, FL 33480
407/833-1100
Telecopier: 407/835-0547

ad/1971
&

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.

DEFENDANT'S, ROYAL SAXON, MOTION FOR SUMMARY JUDGMENT

The Defendant, ROYAL SAXON, INC., moves this Court for an Order granting summary judgment in its favor, arid states as follows:

1) That there are no genuine issues of material fact to be decided in this case. The essential matter of law to be argued is that the Plaintiff is precluded from maintaining an action for malicious prosecution because she elected her remedy when she chose to tax attorneys' fees and costs in the initial action.

2) The Plaintiff, MILDRED R. JAYR, has brought an action against the Defendant, ROYAL SAXON, INC., for malicious prosecution regarding two underlying cases which were consolidated. The cases were styled Royal Saxon, Inc. v. Mildred Jaye, Case No.: 79-5203 CA (L) 01 E consolidated 82-800 CA (L) 01 E. In the underlying cases, MILDRED JAYE was the Defendant/Counterplaintiff.

3) In the underlying cases, Ms. JAYE elected to tax costs and attorneys' *fees* against ROYAL SAXON, INC. Attached to this Motion are the following certified copies of pleadings in the underlying cases:

Exhibit 1 - Judgment dated November 18, 1985 awarding attorneys' fees in the amount of $54,125.00, Case No.: 82-800 CA (L) 01 E.

Exhibit 2 - Judgment dated November 18, 1985 awarding attorneys' fees in the amount *of* $33,250.00, Case No.: 79-5203 CA (L) 01 E.

Exhibit 3 - Judgment taxing costs in the amount of $7,496.02 dated October 25, 1988, consolidated cases: 79-5203 CA (L) 01 E and 82-800 CA (L) 01 E.

Exhibit 4 - Judgment awarding appellate legal fees dated December 13, 1988, Case No.: 82-800 CA (L) 01 E, 4th DCA 85-2814.

4) The case of Cate vs. Oldham, 450 So.2d 224, (Sup.Ct.Fla., 1984) holds as follows:

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

5) The Fourth District Court of Appeal has followed Cate vs. Oldham in the case of Cypher vs. Segal, 501 So.2d 112, (4th DCA, 1987). The Cypher case involves a malicious prosecution suit hy a police officer of the Town of Palm Beach after he prevailed in a prior suit by Joseph Segal. The trial court granted summary judgment in favor of the Defendant, Segal, holding that Cypher had elected his remedy when he chose to tax costs in the original action. Cypher made the argument that Cate, supra, was distinguishable because it dealt with a government official sued in his *official* capacity. Cypher argued that because he was sued for punitive damages the action was personal. It was also argued that Cypher was seeking additional damages to his personal reputation, and for pain and suffering from his exposure to financial loss caused by the punitive damage claim. The court held that the trial judge was correct in determining that Cypher was barred from instituting a separate action for additional damages because he had taxed costs in the original suit, regardless *of* whether or not he had been sued in his official capacity in the first instance.

6) The Cypher case holds that it makes no difference whether Mr. Cypher has been sued in the original case in his official capacity or individually and, therefore, Cypher can be applied to the case at hand.

7) It is clear from the attached exhibits that Mrs. JAYE

recovered costs and attorneys' fees against ROYAL SAXON, INC. in the underlying lawsuits. The Cate case and the Cypher case are directly on point. Applying this rule of law, MILDRED JAYE has elected her remedy by taxing costs and attorneys' fees in the underlying action and she is therefore precluded from recovery. There is no question of material fact to be decided in that regard and, therefore, ROYAL SAXON, INC. is entitled to a summary judgment in its favor.

WHEREFORE, it is respectfully requested that this Court enter a summary judgment in favor of ROYAL SAXON, INC.

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 ANNE ZIMET, ESQUIRE, Becker, Poliakoff & Streitfeld, P. A., 450 Australian Avenue South, Suite 720, Reflections Centre, West Palm Beach, FL 33101, by Mail, this 13th day of October, 1989.

WIEDERHOLD, MOSES & BULFIN, P.A.
Suite 700, Comeau Building
319 Clematis Street
Post Office Box 3918
West Palm Beach, Florida 33402
(107)659-2296 Broward(305)763-5630
Attorneys for ROYAL SAXON, INC.

By John J. Bulfin
John J. Bulfin
Florida Bar No.: 260126

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 82-000 CA(L) 01 E

ROYAL SAXON, INC., a Florida corporation,

Plaintiff/Counterdefendant,

vs.

MILDRED R. JAYE,

Defendant/Counterplaintiff.

FILED

JUDGMENT

THIS CAUSE having come on to be heard upon the filing of a Motion to Award Attorney Fees pursuant to Judgment. Notice of Hearing having been furnished to counsel of record, a hearing having been conducted by this court and the court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the defendant/counterplaintiff Mildred Jaye does recover her attorney fees in the amount of $64,125.00 from the plaintiff/counterdefendant Royal Saxon, Inc., 2840 S. Ocean Blvd., Palm Beach, Florida 33480, payable to defendant/counterplaintiff's attorney, Michael B. Small, Esq., 238 Phipps Plaza, Palm Beach, Florida 33480, for all of which let execution issue.

DONE AND ORDERED at West Palm Beach, Florida this 18th day of November, 1985.

W.C. Williams III
CIRCUIT COURT JUDGE

Copies furnished to:
Michael B. Small, Esq., 238 Phipps Plaza, Palm Beach, Florida 33480
E. Cole FitzGerald, Esq., 826 N. Flagler Drive, West Palm Beach, Florida

PALM BEACH COUNTY - STATE OF FLORIDA
I hereby certify that the foregoing is a true copy of the record in my office
This 12th Day of October, 1989
JOHN B. DUNKLE
Clerk Circuit Court
By Doreen M. Bryan D.C.

RECORD VERIFIED
PALM BEACH COUNTY, FLA
JOHN B. DUNKLE
CLERK CIRCUIT COURT

(322)

EXHIBIT "1"

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 79-8203 CA(L) 01 E

FILED

ROYAL SAXON, INC., a Florida corporation,

Plaintiff/Counterdefendant,

vs.

MILDRED R. JAYE,

Defendant/Counterplaintiff.

JUDGMENT

THIS CAUSE having come on to be heard upon the filing of a Motion to Award Attorney Fees pursuant to Judgment, Notice of Hearing having been furnished to counsel of record, a hearing having been conducted by this court and the court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the defendant/counterplaintiff Mildred Jaye does recover her attorney fees in the amount of $33,250.00 from the plaintiff/counterdefendant Royal Saxon, Inc., 2400 S. Ocean Blvd., Palm Beach, Florida, payable to defendant/counterplaintiff's attorney, Michael B. Small, Esq., 239 Phippm Plaza, Palm Beach, Florida 33480, for all of which let execution issue.

DONE AND ORDERED at West Palm Beach, Florida this 18th day of November, 1985.

W C Williams III
CIRCUIT COURT JUDGE

Copies furnished to:
Michael B. Small, Esq., 238 Phipps Plaza, Palm Beach, Florida 33480
William Pruitt, Jr., Esq., Suite 501, 501 S. Flagler Drive, West Palm Beach, Florida

PALM BEACH COUNTY - STATE OF FLORIDA
I hereby certify that the foregoing is a true copy of the record in my office.
This 12th Day of October, 1989
JOHN B. DUNKLE
Clerk Circuit Court
By [signature] D.C.

RECORD VERIFIED
PALM BEACH COUNTY, FLA
JOHN B. DUNKLE
CLERK CIRCUIT COURT

239

EXHIBIT "2"

OCT-31-1988 03:35pm 88-302372

ORB 5857 Pg 489

jay-jdgm.oat

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO: 29-8203 CA(L)01K
CONSOLIDATED
82-800 CA(L)01K

ROYAL SAXON, INC.,

Plaintiff,

vs.

MILDRED R. JAYE,

Defendant.
_____/

FILED
88 OCT 26 AM 8:52

JUDGMENT TAXING COSTS

THIS CAUSE having come on to be heard upon thm renewed Motion to Tax Costs in favor of tho defendant/counterclaimant, Mildred Jaye, as tho prevailing party in tho within cause, tho court having previously conducted several hearings, having received transcribed testimony and supporting evidence, having received affidavits as to costs, counsel of record having agreed that this aourt may consider and rule upon the Renewed Motion to Tax Costs based upon tho existing record, supplemented only by additional Memorandums, should counsel choose to submit the same, and the aourt being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that costs are taxed against tho plaintiff Royal Saxon, fno., 2840 South Ocean Boulevard, Palm Beach, Florida 33480, in the amount of $7,496.02 including interest, payable to defendant's counsel, Michael B. Small, Esq., of SMALL AND BERRIS, P.A., Paramount Center, 139 North County Road, Palm Beach, Florida 33480, lor all of which execution shall issue.

DONE AND ORDERED at West Palm Beach, Florida, this 25th dry of October, 1988.

W C Williams III
CIRCUIT COURT JUDGE

Copies furnished to:

MICHAEL B. SMALL, ESQ.
Paramount Center
139 North County Road
Palm Beach, FL 33480

JAMES PATRICK GARRITY, ESQ.
Ninth Floor - Barnett Centre
628 North Flagler Drive
West Palm Beach, FL 33401

374

RECORD VERIFIED
PALM BEACH COUNTY, FLA.
JOHN B. DUNKLE
CLERK CIRCUIT COURT

EXHIBIT "3"

DEC-22-1988 10:53am 88-354492

ORB 5912 Pg 760

jay-fees.aud

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA.

CASE NO: 82-800 CA (L) 01 AF
4TH DCA: 85-2814

ROYAL SAXON, INC.,

Plaintiffs/Appellant,

vs.

MILDRED JAYE,

Defendant/Appellee.
_____/

JUDGMENT AWARDING APPELLATE LEGAL FEES

THIS CAUSE having come on to be heard upon Order of the Fourth District Court of Appeals awarding appellate legal fees and directing this trial court to determine the amount, affidavits having been presented, evidence and testimony having been taken at a hearing conducted by the trial court. and the trial court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the court does enter Judgment awarding appellate legal fees and in so doing, makes these specific findings:

1. That defendant/counterclaimant/appellee Mildred Jaye has been declared to be the prevailing party by this court and by the Fourth District Court of Appeal in Florida in Case No: 85-2814.

2. As the prevailing party, the defendant/counterclaimant/appellee is entitled to an award of attorney fees pursuant to the authority of Section 719.303, Florida Statutes and by Order of the Fourth District Court of Appeals in November 10, 19118.

3. The court finds that the defendant/counterclaimant/appellee's attorney performed approximately 54.3 hours in office and 11.1 hours out of office of legal services from December 12, 1985, to December 6, 1988, incidental to defending the appeal initiated by Royal Saxon on December 12, 1985.

EXHIBIT "4"

4. The legal services performed In behalf of the defendant/counterclaimant/appellee were necessary nnd reasonable.

5. The court has considered the results obtnlned, which were substantial in this case; the difficulty and complexity of the issues involved; the experience and expertise of Mildred Jaye's attorney; the voluminous Record on appeal; and the length of tho appeal. tn so doing, the court is guided by tho provisions of Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility. the court has also taken into consideration thnt the payment of an attorney fee to the unit owner defendant/counterclaimant/appellee's attorney, was for the most part dependent or contingent upon the defendant/counterclaimant/appellee prevailing and being entitled to an award of attorney fees pursuant to statutory authority. As such, the expectation of being paid an appellate attorney's fee was to a great extent analogous or similar to a contingency loo relationship, conditioned upon the cllsnt prevailing.

6. Tho trial court considers Mildred Jaye's attorney's hourly rates of $200.00 par for in-office and $250.00 lor out-of-office appellate legal services principally rendered In 1987 and 1988 to be reasonable and justified in an amount of $13,347.50, together with a "lodestar" of fifty (50%) percent equaling $6,673.75. the total of the hourly plus "lodestar" is $20,021.25.

7. Based upon the above findings, tho affidavits, the live testimony end evidence, the court does award $20,021.25 to Mildred Jaye's attorney, Michael B. Small, Esq., far appellate legal services.

THEREFORE, It IS

ORDERED AND ADJUDGED thmt thm defendant/counterclaimant/appellee's attorney Michael D. Small, Esq., 139 North County Road, Paramount Center, Palm Beach, FL 33480, does recover $20,021.25 against the plaintiff/counterdefendant/appellant Royal Saxon, Inc., 2840 South Ocean Boulevard, Palm Beach, FL 33480, for all of which execution shall Issue: and it in

ORB 5912 Pg 762

DONE AND ORDERED at West Palm Beach, Florida, this 13th day of December, 1988.

W. C. Williams III
CIRCUIT COURT JUDGE

Copies furnished to:

MICHAEL B. SMALL, ESQ.
Paramount Center - Penthouse
319 North County Road
Palm Beach, FL 33480

JAMES PATRICK GARRITY, ESQ.
Ninth Floor - Barnett Center
625 North Flagler Drive
West Palm Beach, FL 33401

PALM BEACH COUNTY - STATE OF FLORIDA
I hereby certify that the foregoing is a true copy of the record in my office
This 12th Day of October, 1989
JOHN B. DUNKLE
Clerk Circuit Court
By _____ D.C.

RECORD VERIFIED
PALM BEACH COUNTY, FLA.
JOHN B. DUNKLE
CLERK CIRCUIT COURT

ad/1971

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.

FINAL SUMMARY JUDGMENT

This cause came to be heard on Defendant's, ROYAL SAXON, INC., Motion for Summary Judgment. The Court heard argument of counsel.

The Plaintiff filed a Complaint against the Defendant alleging malicious prosecution in two Counts. The basis for the causes of action was the institution of two lawsuits filed in the Fifteenth Judicial Circuit In and For Palm Beach County, Florida by the Defendant against the Plaintiff styled Royal Saxon, Inc. vs. Mildred Jaye, Case Nos.: 79-5203 CA (L) 01 E and 82-800 CA (L) 01 E. These cases were consolidated for trial and tried before Judge Williams *of* this Court.

The Court makes the following findings of fact:

Plaintiff, MILDRED R. JAYE, elected to tax costs and attorneys' 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.

The Court makes the following conclusions of law:

The cases of Cate vs. Oldham, 450 So.2d 224, (Fla., 1984) and Cypher vs. Segal, 501 So.2d 112, (Fla., 9th DCA, 1987) are controlling. These cases hold that a successful Defendant who chooses to tax costs or fees against an unsuccessful Plaintiff is precluded from pursuing an action for malicious prosecution.

It is hereby ORDERED AND ADJUDGED:

Defendant's, ROYAL SAXON, INC., Motion for Summary Judgment

is granted and Plaintiff, MILDRED R. JAYE, go hence without day. The Court reserves jurisdiction to assess costs, if any, in favor of ROYAL SAXON, INC.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida, this _____ day of November, 1989.

Circuit Court Judge

Copies Furnished to:

JOHN J. BULFIN, ESQ., P. O. Box 3918, W. Palm Beach, FL 33402

MICHAEL E. SMALL, ESQ., Paramount Center - Penthouse, 139 North County Road, Palm Beach, FL 33480

ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, Reflections Centre, W. Palm Beach, FL 33401

jaye-rs.p2

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.
_____/

MOTION FOR REHEARING OF FINAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW the above-named plaintiff by and through her undersigned attorneys arid respectfully moves this honorable court to re-hear/reconsider the Final Summary Judgment entered in the within cause as to claim for malicious prosecution and in support thereof, says:

1. That it: is respectfully submitted that the court erroneously interpreted the rule of law in Cate v. Oldhem, 450 So2d 224 (FL-1984) and Cypher v. Segal, 501 So2d 112 (PL-4th DCA-1987) because the rule of law in those cases should be limited to public officials or officials of governmental bodies.

2. That the District: Court: of Appeals, First District of the State of Florida in Law Offices v. Farmer's Bank arid Trust Company, 498 So2d 984 (FL-1st DCA-1986), which post-dates Cate by two (2) years, specifically held that a malicious prosecution action may be maintained for injuries, including punitive damages, after receiving a statutory award for costs in the original ("wrongful") action. The decision reversed a trial court determination that recovery for a wrongful levy bars a malicious prosecution action. The defendant in the original ("wrongful") action recovered damages by virtue of Section 56.16, P.S., for a wrongful levy. (See page 985 of the opinion) Malicious prosecution is a "common law tort" and the Rule of Statutory of Construction harmonizing legislative mandates with the common law "statutes designed to alter the common law must bespeak in unequivocal terms." Thus, a malicious prosecution

action provides for an award of damages beyond those, which are provided in the statute. Far example, Florida Statute 719.303, being that provision of the Florida Co-operative Law, which allows for the awerd of reasonable attorney fees in certain actions between the co-operative association arid a unit owner, provides a statutory authority for the award of attorney fees to the prevailing party, but does include or allow for the award of damages, which a malicious prosecution action would include. As a result, because the statute does not specifically suggest: that it is an alternative to an action for malicious prosecution, according to the Law Office V. Farmer's Bank and Trust Company, ibid, case, a malicious prosecution action can be maintained even when there has been a statutory award of attorney fees and costs.

3. That contrary to the representations of the Royal Saxon's attorneys, that Cate V. Oldhem, ibid, arid Cypher v. Segal, ibid, controlled and that there was no contrary authority, they neglected to advise this court: that the Fourth District Court: of Appeals, which was the same court, which rendered the decision in Cypher v. Segal, entered contradictory decisions in McLain v. Hall, 521 So2d 190 (FL-4th DCA-1988), known as "Hall II" and Hall v. City of Pompano Beach, 487 So2d 318 (FL-4th DCA-1986), known as "Hall I." In both Hall decisions, the Halls had initiated multiple tort claims against several defendants, including the City of Pompano Beach and Mr. McLain. The trial court found no probable cause and awarded the defendants their attorney fees pursuant to Section 57.105, F.S. (1983). The Fourth District Court of Appeals, State of Florida, in spite of the apparent lack of probable cause was not convinced that: the claims were brought with absolute frivolity and lack of total merit. As a result, the Fourth District Court of Appeals vacated the attorney fees awerd under Section 57.105, F.S., but all other portions of the trial court's award, including coats, was affirmed. After remand, the trial. court dismissed Mr. McLain's subsequent malicious prosecution action against Mr. Hall, relying on the Cypher and Cate cases. The Fourth District Court of Appeals remanded as to whether probable cause existed for the

first suit in as much as "Hall I" was predicated on a finding that the action was not frivolous, but: without mention a8 to whether there is probable cause.

4. That by declaring that a party who previously prevailed and was awarded his/her costs, would now be precluded and barred from initiating an action for malicious prosecution, this trial court has specifically ruled contrary to those cases, which have held that the prevailing party in an action at law is absolutely entitled to tax its costs. Murray v. Plasteridge, Inc., 338 So2d 260 (FL-4th DCA-1976) arid Dragstream V. Butts, 370 So2d 416 (FL-1st DCA-1979). A similar result is obtained contrary to those cases, which have specifically held that in those instances where the statutes have declared that the prevailing party is entitled to en award of reasonable attorney fees, that the trial court must award attorney fees. Villa Sorrento, Inc. v. Elden, 458 So2d 1177 (FL-4th DCA-1984). In the Villa Sorrento case, the District Court: of Appeal specifically held that, "In a statute providing that the prevailing party is entitled to attorney fees, the language is 'mandatory, ..." The court wnet on to say that only the determination of the amount is discretionary.

5. That the Cate and Cypher decisions are limited by their own language to claims for no more than which could have been taxed in the first (wrongful) litigation. This point waa specifically stated:

> "He or she has not personally suffered a loss, which is not re-addressable through his or her application for redress in a suit in which he or she is originally sued."

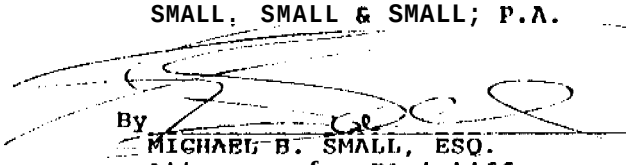
Ibid 227. The Cate court was not concerned, as is this court, with claims beyond that which could have been taxed in the original litigation. Obviwusly Mildred Jays, the plaintiff in this action, has auffered extreme mental anguish, distress, damage to her reputation, chagrin, humiliation, embarrassment, deprivation of her rights as a unit owner, intimidation, social and political isolation, none of which were capable of being addressed in the first action or in an award of attorney fees and costs. They can only be addressed in a malicioue prosecution action, or for intentional infliction of emotional distress.

WHEREFORE, plaintiff respectfully prays that: this honorable cwurt rehear/reconsider its Order granting Motion for Summary Judgment.

I HEREBY CERTIFY that: a true and accurate copy of the foregoing has been furnished by U.S. mail to: JOHN J. BULFIN, ESQ., P.O. Box 3918, West Paliii Beach, FL 33402, arid ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, West Paliii Beach, FL 33401, this 22nd day of November, 1989.

Respectfully,

SMALL, SMALL & SMALL; P.A.



By
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jaye-rs.p2

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA.

CASE NO: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON; INC.,

Defendant.

MOTION TO AMEND COMPLAINT PENDING
DETERMINATION ON REHEARING OF MOTION FOR SUMMARY JUDGMENT

COMES NOW the above-named plaintiff by and through her undersigned attorneys and respectfully moves this honorable court for permission to file an amended complaint, pending determination by this court of the plaintiff's Motion for Rehearing of the Summary Judgment entered against the plaintiff and in favor of the defendant as to the single count for malicious prosecution, and in support thereof, says:

1. That the plaintiff has filed a detailed Motion for Rehearing of this court's Summary Judgment in favor of the defendant and against the plaintiff incidental to the plaintiff's malicious prosecution action.

2. That plaintiff seeks permission to file an amended complaint adding additional defendants and a count II to the complaint, stating a cause of action for intentional infliction of emotional distress, as reflected in the attached proposed amendment.

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail to: JOHN J. BULFIN, RSQ., P.O. Box 3918, West Palm Beach, FL 33402, and ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, West Palm Beach, FL 33401, this 22nd day of November, 1989.

Respectfully,

SMALL, SMALL & SMALL, P.A.

By _____
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jaye-rs.p2

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA.

CASE NO: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC., a Florida corporation, CHARLES CUMMINGS, MARION HIRSCHBERG, CHARLOTTE MORRIS, and SARA KING, jointly and severally,

Defendants.
_____ /

AMENDED COMPLAINT

THIS IS A CIVIL ACTION for general and punitive damages in excess of $100,000.00.

GENERAL ALLEGATIONS

1. The plaintiff sues all of the defendants for general and punitive damages in excess of $100,000.00 for malicious prosecution and for intentional infliction of emotional distress.

2. The plaintiff is the owner of a cooperative unit in the Royal. Saxon cooperative at 2840 South Ocean Boulevard, Palm Beach, Palm Beach County, Florida.

3. The defendant: Royal Saxon, Inc., is a Florida corporation, appears as the landlord on the Proprietary Lease between the plaintiff and the defendant, and is responsible for the management and operation of the Royal Saxon cooperative.

4. The business and operation of the Royal Saxon cooperative is carried out by its board of directors and officers.

5. At all. material times, defendants Charles Cummings, Sara King, Charlotte Morris and Marion Hirschberg were owners of cooperative units in the Royal Saxon cooperative at 2840 South Ocean Boulevard in the Town of Palm Beach, Palm Beach County, Florida.

6. At all materiels times from August 1 through December 31, 1981, the defendant Charles Cummings was president and a member of the board of directors of the Royal Saxon, Inc.

7. At all materials times from June 1 through December 31, 1985, defendant Charles Cummings was chairman of the executive committee and a member of the board of directors of the Royal Saxon, Inc.

8. At all materials times from August 1 through December 31, 1981, defendant Charlotte Morris was vice president end a member of the board of directors of the Royal Saxon, Inc.

9. At all material times from August 1 through December 31, 1981, defendant Marion Hirschberg was secretary and a member of the board of directors of the Royal Saxon, Inc.

10. At all material times from June 1 through December 31, 1985, defendant Marion Hirschberg was a member of the executive committee and a member of the board of directors of the Royal Saxon, Inc.

11. At all material times from June 1 through December 31, 1981, defendant Sara King was vice president, a member of the executive committee and a member of the board of directors of the Royal Saxon, Inc.

COUNT I

Plaintiff incorporates paragraphs 1 through 11 in the General Allegations with full force and efficacy.

12. The board of directors of the Royal Saxon cooperative authorized its attorneye to file a complaint in the Fifteenth Judicial. Circuit Court in and for Palm Beach County, Florida, in 1979, against the plaintiff for an injunction prohibiting certain alleged behavior purportedly of the plaintiff and mandatorily requiring the plaintiff to turn over the key to her cooperative unit.

13. A complaint: was filed in the Fifteenth Judicial Circuit Court in and for Palm Reach County, Florida, by the defendant against the plaintiff styled as Royal Saxon, Inc., v. Mildred Jaye, Case No: 79-5203.

14. After prolonged litigation, the trial court directed a verdict and entered judgment in favor of the plaintiff against the defendant on all counts in defense of the complaint.

15. The trial court entered judgment in favor of the plaintiff and against the defendant on June 10, 1985.

16. The defendant appealed the judgment: and a subsequent attorney fee award in favor of the plaintiff which was entered effective November 18, 1985, in appellate Case NO: 85-1624 and 85-2015 in the District: Court of Appeal. of the State of Florida, Fourth District.

17. The District Court of Appeal, Fourth District, affirmed the June 10, 1905, judgment: in favor of the plaintiff and the November 18, 1985, judgment in favor of the plaintiff.

18. The prosecution of the lower court action and the two appeals against Mildred Jaye was without probable cause and was commenced and continued by said defendant from malice toward the plaintiff and to wrong and injure her.

19. The defendant well knew, or should have known, that the prosecution of the lower court action and the appeals was false and groundless and without probable cause. The defendant used and abused the process of the court through the lower court: action and appeals to wrong and injure the plaintiff, to harass the plaintiff, to intimidate the plaintiff, to create an atmosphere of animosity and acrimony toward the plaintiff, to shun and set the plaintiff aside from the rest of the Royal Saxon cooperative community and to financially devastate the plaintiff.

20. By reason of the facts herein set forth, the plaintiff has suffered grievously and has been brought to scandal, great humiliation, mental suffering and damage to her reputation arid to her integrity. She has been shunted aside, ignored, harassed, intimidated, physically and verbally abused and deprived of her rights as a cooperative owner in the Royal Saxon, all as a result: of the actions and conduct of the defendant Royal Saxon, fnc., through its Officers and members of the board of directors.

21. As a result of the actions and conduct of the defendant, the plaintiff was caused to employ legal counsel and to incur substantial expense end damages for legal representation, costs, experts end witnesses in her defense.

Although she received a partial award of attorney fees, she has only recovered a portion of the legal fees and expenses, which she had paid or has incurred.

22. the defendant, through its officers and members of the board of directors, has acted with actual malice and was guilty of a wanton and outrageous disregard of the rights and feelings of the plaintiff Mildred Jaye and by reason thereof, plaintiff is entitled to an award of punitive damages against the defendant.

WHEREFORE, plaintiff prays for judgment against the defendant: Royal. Saxon, Inc., for compensatory and punitive damages in excess of $100,000.00, plus prejudgment interest, costs of this Litigation and for trial. by jury on all issues so triable.

COUNT II

Plaintiff incorporates paragraphs 1 through 11 in the General Allegations with full force and efficacy.

23. The board of directors of the Royal Saxon approved an assessment in the spring of 1981. Mildred Jaye's proportionate share of that assessment was $191.33.

24. Mildred Jaye contested and disputed the assessment, which was subsequently determined by a jury to be totally improper and illegal.

25. Although given several and various opportunities to remedy or redress the wrongful claim, which the defendant Royal Saxon alleged it had against the unit owner Mildred Jaye for $191.33, on September 25, 1981, the defendant Royal Saxon, Inc., by its president Charles Cummings, its vice president charlotte Morris and its secretary Marion Hirschberg, as officers and members of the board of directors, without benefit and right to a "hearing" to plaintiff, authorized the commencement of the harshest of all remedies available by initiating an eviction proceeding to evict and remove the unit owner, Mildred Jays, from the cooperative unit which she owned. Defendant Royal Saxon by and through the individual defendants, Charles Cummings, Marion Hirschberg and Charlotte Morris, filed the eviction praweedinge

in the Palm Beach County Court. The case was transferred to the Circuit Court, bearing Civil Action Case No: 82-800.

26. The avenues available to the Royal Saxon included but were not limited to, arbitration, mediatian, a suit for money damages in Small Claims Court, the filing of a lien, and accepting the money, which the unit owner offered to pay "in protest" on three occasions, but which the individual defendants Charles Cummings, Marion Hirschberg and Charlotte Morris refused to accept.

27. The defendant Royal Saxon by the individual actions of its president Charles Cummings, its vice president Charlotte Morris and its secretary Marion Hirschberg looked upon the possible eviction of the plaintiff Mildred Jaye as an opportunity to get rid of her because in the eyes of the individual defendants, she had become a "thorn in their side."

28. Upon initiation of the eviction proceedings, all of the defendants divested Mildred Jaye of all of her rights, tenants and interest in ownership of her cooperative unit and her rights under her proprietary lease.

29. All of the defendants divested Mildred Jaye of her right to vote, her right to participate in meetings; her right to be recognized: her right to receive minutes; her right to examine booke and records: her right to receive notices and agenda of annual meetings of owners: and all other rights incidental to ownership and tenancy in the Royal Saxon.

30. The divestation of her rights of ownership continued from immediately before the commencement of the eviction proceedings to well after the end of the jury trial in the eviction action and the rendition of a judgment in favor of Mildred Jaye on June 10, 1985.

31. The jury in the eviction action rendered a verdict, on December 11, 1984, finding in favor of Mildred Jeye on almost every single issue as it related to the eviction proceedings commenced by the Royal Saxon. Judgment was entered On June 10, 1985.

32. Thereafter, the defendant Royal Saxon by the individual 'acts of defendants Charles Cummings, Sarah King and Marion Hirschberg as members of the executive committee and board of directors of the Royal Saxon, Inc., initiated appeals from the June 10, 1985, judgment arid the November 18, 1985, judgment awarding attorney fees in the lower court in the District Court of Appeal, Fourth District in Case No: 85-1625 and 85-2814.

33. The defendant Royal Saxon, Inc., voluntarily dismissed appellate action 85-1625 and the District Court of Appeals, Stake of Florida, Fourth District affirmed the lower court judgment of November 18, 1985.

34. The prosecution of the eviction action and the subsequent: appeals against Mildred Jaye was without probable cause and was commenced and continued by all of said defendants from malice towards the plaintiff and to wrong and injure her.

35. All of the defendants well knew, or should have known, that the prosecution of the eviction 'action was false and groundless end without probable cause.

36. All of the defendants used and abused the process of the court to wrong and injure the plaintiff and to use the court: to forcibly and involuntarily remove Mildred Jaye from her own cooperative unit.

37. All of the defendants well knew, or should have known, that the prosecution of the lower court action and the appeals was false and groundless and without probable cause. All of the defendants used and abused the process of the court through the lower court: action and appeals to injure and wrong the plaintiff; to harass the plaintiff: to intimidate the plaintiff; to create an atmosphere of animosity and acrimony: to shunt and set the plaintiff aside from the rest of the Royal Saxon cooperative community: and to financially devastate the plaintiff.

38. The individual defendants Charles Cummings, Charlotte Morris and Marion Hirschberg personally authorized the filing of the defendant Royal. Saxon's lawsuit against the plaintiff.

39. The defendants Charles Cummings, Marion Hirschberg and 'Sara King personally authorized the filing of defendant Royal Saxon's appeals of the June 10, 1985, judgment and the November 18, 1985, judgment awarding attorney fees, both to the District Court of Appeals, Fourth District of the State of Florida in appellate Case Nos: 85-1625 and 85-2814.

40. There was a complete absence of probable cause for either the initiation or continued prosecution of the defendant Royal Saxon's lawsuit and appeals.

41. All of the defendants acted with malice in instituting defendant Royal Saxon's lawsuit and appeals against the plaintiff.

42. By instituting defendant Royal Saxon's lawsuit, all defendants sought to politically and socially isolate the plaintiff from the other members and residents of the Royal Saxon cooperative.

43. The individual defendants instituted the lawsuit in Case No: *82-800*, being the eviction lawsuit against the plaintiff with the intent of getting rid of the plaintiff Mildred Jaye and forcing her out of the Royal Saxon building.

44. All of the defendants sought to harass, humiliate, overburden or otherwise cause distress to the plaintiff Mildred Jaye by instituting the defendant Royal Saxon's Lawsuit in Case No: *82-800.*

45. All of the defendants undertook the wrongful acts willfully arid intentionally, or alternatively all of the defendants undertook their actions with reckless and wanton disregard of the rights of the plaintiff and the effects of their actions.

46. By reason of the facts herein set forth, the plaintiff has suffered grievously and has been brought to scandal, great humiliation, mental suffering and damage to tier reputation and to her integrity. She ha8 been shunted aside, ignored, harassed, intimidated, physically and verbally abused and deprived of her rights as a cooperative owner in the Royal Saxon, all as a result

of the actions and conduct of the defendant Royal Saxon, Inc., through its officers arid members of the board of directors all as a result of the actions and conduct of all of the defendants.

47. As a result of the actions and conduck of all of the defendants, the plaintiff was caused to employ legal counsel and to incur substantial expense and damages for legal representation, costs, expert witnesses end witnesses in her defense and was caused to attend depositions arid a trial for approximately twelve (12) days. Although she received a partial award of attorney fees, she has only recovered a portion *of* the legal fees and expenses, which she has paid or incurred.

48. All. of the defendants have acted with actual malice and were guilty of a wanton and outrageous disregard of the rights and feelings of the plaintiff Mildred Jaye and by reason thereof plaintiff is entitled to an award of punitive damages against all of the defendants.

WHEREFORE, plaintiff prays for judgment against all of the defendants, individual1y, severally arid jointly, for compensatory and punitive damages in excess of $100,000.00 plus prejudgment interest, for *costs* of this litigation and for trial by Jury on all issues so triable.

COUNT III

Plaintiff incorporatas paragraphs 1 through 11 in the General Allegations with full force and efficacy.

49. All of the defendants initiated defendant's lawsuit and continued defendant's lawsuit through appeal with a definite purpose of inflicting emotional distress upon the plaintiff. All of the defendant knew or with reckless disregard for the effect of their acts, should have knwwn, that such distress was certain or substantially certain to occur.

50. All of the defendants knew, or with reckless disregard for the effect of their acts and/or omiesions, should have known, that prior to the filing of defendant's lawsuit that defendant's lawsuit was without merit and that the crucial allegations of defendant'e laweuit were false.

51. All of the defendants knew, or with reckless disregard for the effect of their acts and/or omissions should have known, that because of defendant's wrongful filing of defendant's lawsuit, plaintiff would become an outcast in plaintiff's community; that plaintiff would suffer emotional distress: and plaintiff would incur financial and expenses and difficulties:

52. Plaintiff has suffered emotional distress and/or unwarranted intrusion into tier right to emotional tranquility.

WHEREFORE, plaintiff prays judgment in favor of plaintiff for compensatory and punitive damages in excess of $100,000.00 against all of the defendants, individually, jointly and severally, for prejudgment interest for costs of this litigation, and for trial by jury on all issues so triable.

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail to: JOHN 3. BULFIN, ESQ., P.O. Box 3918, West Palm Beach, FL 33402, and ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, West Palm Beach, FL 33401, this 29th day of November, 1989.

Respectfully,

/S/ MILDRED R. JAYE
MILDRED R. JAYE, Plaintiff

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

MILDRED R. JAYE, being first duly sworn deposes and says that she has read the foregoing complaint by her subscribed and that she knows the contents therein to be true, accept as to those matters stated upon information and belief and FIB to those matters she believes to be true.

/S/ MILDRED R. JAYE
MILDRED R. JAYE

SUBSCRIBED AND SWORN to before me this 29th day of November, 1989.

/S/ JACQUELINE F. GULYA
NOTARY PUBLIC

My Commission Expires:
February 24, 1990

Respectfully,

SMALL, SMALL & SMALL, P.A.

By /S/ MICHAEL B. SMALL
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ad/1971

XN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.

ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

This cause having come on to be heard on Plaintiff's, MILDRED R. JAYE, Motion to Amend Complaint, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Amend Complaint is hereby denied.

2. _____

DONE AND ORDERED in Chambers at Palm Beach County Courthouse, West Palm Beach, Florida, this ____ day of _____, 1989.

SIGNED AND DATE~

NOV 30 1989

_____
Circuit Court Judge EDWARD A. GARRISON

Copies Furnished to:

JOHN J. BULFIN, ESQ., P. O. Box 3918, W. Palm Beach, FL 33402

MICHAEL B. SMALL, ESQ., Paramount Center - Penthouse, 139 North County Road, Palm Beach, FL 33480

ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, Reflections Centre, W. Palm Beach, FL 33401

RECEIVED
DEC - 4 1989
SMALL, SMALL, SMALL, P.A.
ATTORNEYS AT LAW

ad/1971

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: CL 89-5760 AE

MILDRED R. JAYE,

Plaintiff,

vs.

ROYAL SAXON, INC.,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION FOR REHEARING OF FINAL SUMMARY JUDGMENT

This cause having come on to be heard on Plaintiff's, MILDRED R. JAYE, Motion for Rehearing of Final Summary Judgment, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Rehearing of Final Summary Judgment is hereby denied.

2. _____

_____

DONE AND ORDERED in Chambers at Palm Beach County Courthouse, West Palm Beach, Florida, this _____ day of _____, 1989.

_____
Circuit Court Judge

Copies Furnished to:

JOHN J. BULFIN, ESQ., P. O. Box 3918, W. Palm Beach, FL 33402

MICHAEL B. SMALL, ESQ., Paramount Center - Penthouse, 139 North County Road, Palm Beach, FL 33480

ANNE ZIMET, ESQ., 450 Australian Avenue South, Suite 720, Reflections Centre, W. Palm Beach, FL 33401

35

TURKEY CREEK, INC. a Florida corporation, and Norwood W. Hope, Appellants,

v.

Javier H. LONDONO, M.D., Charles A. Williams, Jr., Esquire and John Hoce, Appellees.

NO. 89-2123.

District Court of Appeal of Florida, First District.

Sept. 12, 1990.

Developer, which was previously sued by homeowners and which recovered costs in that action, brought action against homeowners for slander of title, malicious prosecution, tortious interference with contractual rights and with advantageous business relationship, and conspiracy. The Circuit Court for Alachua County, Benjamin M. Tench, J., dismissed all counts and developer appealed. The District Court of Appeal, Simmons, J., held that: (1) developer's claim for slander of title was not compulsory counterclaim to homeowners' previous suit; (2) developer's receipt of costs in homeowners' action did not preclude it from bringing malicious prosecution claim; and (3) developer stated claim for conspiracy and tortious interference with contractual rights and with advantageous business relationship.

Reversed.

1. **Set-Off and** Counterclaim ⇐60

Developer's claim for slander of title was not compulsory counterclaim to homeowners' earlier suit against developer seeking declaration of parties' rights and obligations under by-laws of housing development, inasmuch as there were substantial differences in issues between slander of title claim and previous declaratory judgment action and damages resulting from slander of title had not fully materialized at time that developer answered declaratory judgment complaint. West's F.S.A. RCP Rule 1.170(a).

2. Set-Off **and** Counterclaim ⇐60

Action is not compulsory counterclaim merely because it is relevant to earlier action.

3. Limitation **of Actions** ⇐55(4)

Cause of action for defamation accrues at time of publication.

4. **Damages** ⇐15

That developer had previously recovered costs at conclusion of earlier action brought against it by homeowners did not preclude developer from bringing malicious prosecution action against homeowners; developer could recover, in malicious prosecution action, damages for injuries such as harm to reputation, for which no recovery was had in previous action.

5. **Torts** ⇐26(1)

Allegations by developer that homeowners made numerous false statements to third parties regarding status of developer's title, with full knowledge of statements' falsity and with purpose of harming developer's economic interests, stated claim for tortious interference with contractual rights and with advantageous business relationship, and constituted facially sufficient claim that any privilege homeowners possessed was lost by their use of improper means.

6. **Conspiracy** ⇐18

Allegations by developer that homeowners conspired to interfere with developer's contractual rights and advantageous business relationships stated claim for civil conspiracy.

7. **Torts** ⇐16

In those circumstances in which there is qualified privilege to interfere with contractual rights, privilege carries with it obligation to employ means that are not improper.

8. **Constitutional Law** ⇐254(4)

That developer exercised authority in its operation of housing development did not render developer a "quasi-governmen-

tal entity" for purposes of finding state action.

See publication Words and Phrases for other judicial constructions and definitions.

Michael W. Jones of Michael W. Jones, P.A., Gainesville, for appellants.

John F. Roscow, III of Scruggs & Carmichael, P.A., Gainesville, for appellees.

NIMMONS, Judge.

Appellants challenge the trial court's rulings dismissing with prejudice all counts of their complaint.[1] We reverse as to all counts.

Appellant Turkey Creek is a Florida corporation whose primary business activity is development and sale of land in a planned unit development (PUD) known as Turkey Creek. The PUD is primarily residential in nature, and appellees are residents thereof. At the times material to this case, Turkey Creek owned a majority of the real property situated within the PUD. Appellant Norwood Hope is the president and majority shareholder of Turkey Creek, Inc. Turkey Creek operates its developments through homeowners' associations, each of which is governed by its "Declarations of Covenants, Conditions, and Restrictions," and its by-laws.

In late 1981 and early 1982, many dissatisfactions and disagreements developed between appellees and appellants regarding interpretation of the PUD's governing regulations and appellants' operation of the PUD. Appellees and other residents of the PUD met and communicated amongst themselves, and in January 1982 organized into an entity known as the "Turkey Creek Property Owners' Ad Hoc Committee."

In March 1982 appellees filed suit against appellants, seeking a declaratory judgment and damages in connection with the dispute over appellants' operation of the PUD. Appellants filed their answer in January 1984, and final judgment was entered for appellants in October 1984. Final judgment for costs was entered for appellants in March 1985.

Appellants subsequently brought suit against appellees for slander of title, malicious prosecution (for bringing the 1982 action referenced above), tortious interference with contractual rights, tortious interference with an advantageous business relationship, and conspiracy to interfere with appellants' contractual rights and business relationship. The action was based primarily upon allegations that, from early 1982 through May 1984, appellees publicly disseminated false assertions that land in the PUD was "in distress" and that title to appellant's property within the PUD was unmarketable and impaired. Among other things, appellees allegedly distributed this false information to local zoning officials with the result that rezoning sought by appellants was denied or delayed.

Turkey Creek alleged that it had a contractual relationship with Owens Illinois Development Corporation (OIDC), which afforded OIDC a series of options to purchase land within the project from appellant, with Turkey Creek receiving development rights for each property on which OIDC exercised an option. OIDC abandoned its relationship with appellants in May 1984, as a direct result of the complained of actions of appellees, which included the communication to OIDC of false information regarding appellants. The termination of this business relationship cost appellants an estimated $4,000,000 in expected future profits.

The trial court dismissed the slander of title claim on the ground that it is a compulsory counterclaim to the 1982 action. The court dismissed the malicious prosecution action on the ground that by obtaining a cost judgment in the earlier action appellants had elected their remedy and were therefore precluded from seeking further relief in a subsequent action. The court further found that the complaint failed to state a cause of action for tortious interfer-

1. The facts are taken primarily from the allegations of the complaint, which. for purposes of this appeal, are accepted as true.

ence with a contract and with an advantageous business relationship, and for civil conspiracy.[2]

[1] The trial court erred in concluding that appellants' claim for slander of title was a compulsory counterclaim to appellees' earlier suit. Rule 1.170(a) states in part:

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

In *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750 (1926), the court stated:

> Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as upon their logical relationship.

Federal Rule 13(a) is virtually identical to Rule 1.170(a), and is read broadly by the federal courts. *Pochiro v. Prudential Insurance Co. of America*, 827 F.2d 1246, 1252–53 (9th Cir.1987). "It has been said that courts should give the phrase 'transaction or occurrence that is the subject matter of the suit' a broad realistic interpretation in the interest of avoiding a multiplicity of suits." *Stone v. Pembroke Lakes Trailer Park, Inc.*, 268 So.2d 400, 402 (Fla. 4th DCA 1972)

It has been suggested that a claim is a compulsory counterclaim if any of the following questions can be answered in the affirmative:

(1) Are the issues of fact and law raised by the claim and counterclaim largely the Same?

(2) Would res judicata bar the subsequent suit on defendant's claim absent the compulsory counterclaim rule?

(3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?

(4) Is there any logical relation between the claim and the counterclaim?

City of Mascotte v. Florida Municipal Liability Self Insurers Program, 444 So.2d 965, 967 (Fla. 5th DCA 1983); *Hilton Casinos, Inc. v. First National Bank of South Miami*, 380 So.2d 1061, 1063 (Fla. 3d DCA 1980). The federal courts have used this test. 6 Wright & Miller, Federal Practice and Procedure § 1410, pp. 41 & 42; *Roberts v. National School of Radio and Television Broadcasting*, 374 F.Supp. 1266, 1270 (D.C.Ga.1974).

In *Neil v. South Florida Auto Painters, Inc.*, 397 So.2d 1160, 1164 n. 7 (Fla. 3d DCA 1981) the court questioned the utility and necessity of the first three tests, because to some extent they are redundant to concepts of collateral estoppel and res judicata and because, if the relationship between the original claim and the counterclaim satisfies any one of the first three tests, it necessarily satisfies the logical relationship

In *Neil*, the court addressed the question of how to apply the logical relationship test where none of the first three tests applies to establish the claim's nature as a compulsory counterclaim. The court found that Neil's claim was a compulsory counterclaim even though the first three tests were not met because the claim and the original claim, both arising out of a single confrontation between the parties, were "inextricably bound." The court embraced the following test:

> The test, in modern form, is set forth in *Revere Copper and Brass, Inc. v. Aetna Casualty and Surety Co.*, 426 F.2d 709, 715 (5th Cir.1970):
>
> ". . . a claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts

2. The claims for slander of title and malicious prosecution were dismissed with prejudice in a November 1987 order which dismissed the remaining counts with leave to amend. An appeal from that order was dismissed as an unauthorized appeal from a non-final order. The trial court subsequently dismissed with prejudice the Second Amended Complaint which reasserted the remaining counts. We review both of these orders of dismissal in this appeal.

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 original).

397 So.2d at 1164. The ***Neil*** court added that "stating the test is far easier than determining whether claims are or are not logically related." We agree.

Appellees' initial action against appellants concerned appellees' dissatisfaction with the manner in which appellants operated the **PUD,** and sought a declaration of the parties' rights and obligations under the by-laws of the PUD. Appellants' action against appellees, on the other hand, concerns numerous allegedly false statements made by appellees which were not directly connected with the declaratory judgment action.

With respect to the defamation claim as a possible compulsory counterclaim, the court stated in *Pochiro* that a defamation action may be barred as a compulsory counterclaim "[a]s long as the allegedly defamatory statements are sufficiently related to [the] subject matter of the original action ..." *Id.* at 1251. In *Harris* ***v. Steinem,*** 571 F.2d 119 (2d Cir.1978), Harris' 1975 suit against Steinem alleged fraud in connection with a 1972 stock sale, and Steinem's counterclaim alleged defamation based upon the suit and subsequent publicity.[3] The Second Circuit held that the counterclaim was not compulsory because the logical relationship between the initial claim and the counterclaim was "at best attenuated." *Id.* at **124.** In corning to this conclusion, the court relied partially upon the fact that Steinem's defamation claim raised several new issues, such as Steinem's status **as** a "public figure," and whether the allegedly defamatory statements were privileged.

We find that it is pertinent, although not dispositive, that the original claim was sufficiently distinct from the present slander action that a favorable result for appellees in the first action would not be inconsistent with a verdict in favor of appellants in the slander action. In *Pochiro,* the court relied heavily upon the fact that should Prudential, the original plaintiff, prevail in the original action, the collateral estoppel effect of that result would preclude the defamation action. In *Stone* ***v. Pembroke Lakes Trailer Park,*** *Inc.*, 268 So.2d 400, 402 (Fla. 4th DCA 1972) and the leading case of *Moore* ***v. New York Cotton Exchange, 270*** U.S. 593, 610, **46** S.Ct. 367, **371,** 70 L.Ed. 750 (1926) (quoted in *Stone*), the courts pointed out in finding the present suit to be a compulsory counterclaim that the latter suit needed only the failure of the first suit to establish a foundation therefor. In *Harris, supra,* the court found that the two claims were not logically related despite the court's suggestion that plaintiff Harris' success in the original claim would probably have defeated the counterclaim. *Harris* at 124.

[2] We acknowledge appellees' point that both the present slander action and the previous declaratory judgment action arise from the ongoing disagreement between the parties resulting from appellees' dissatisfaction over appellants' management of the PUD, and that both the declaratory action and the slander of title claim refer to the "marketability" of land in Turkey Creek. It does not follow, however, that an action is a compulsory counterclaim simply because it is relevant to the earlier action.

[3] The timing of the events in question is **also** significant. Rule 1.170(a) requires that compulsory counterclaims which have accrued by the time of the filing of the response must be raised in the original action. Appellees' declaratory action was filed in March 1982 and appellants' answer

3. Harris' complaint was based upon violation of federal statutes, while **the** counterclaim alleged **only state** law **claims and** therefore **did not assert any** independent **basis for federal jurisdiction.** After **Harris' suit was dismissed, the trial court dismissed the** counterclaim. This **dismissal was upheld on appeal on** the ground **that the defamation action** was **a** permissive **rather than compulsory** counterclaim.

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was filed in January 1984. A cause of action for defamation accrues at the time of publication. *Miceli v. Gilmac Developers, Inc.*, 467 So.2d 404 (Fla. 2d DCA 1985). The defamatory statements alleged in the instant case began in January 1982 and continued after the filing of the March 1982 complaint. In *Harris, supra,* the court acknowledged that Federal Rule 13(a) is to be "generously construed" but relied upon "the well-established narrow line of decisions involving counterclaims based solely on the filing of the main complaint and allegedly libelous publications thereafter." *Id.* at 125. In *Pochiro* the court distinguished *Harris* on the ground that some of the allegedly libelous statements in *Pochiro* had been made prior to the filing of the complaint, and pointed out that the fact that some of the statements may hare been made after the filing of the complaint did not change the court's conclusion. 827 F.2d at 1251, n. 9.

Since a large portion of the defamatory statements in the instant case was apparently made prior to January 1984, the slander of title action had technically "accrued" by January 1984. The alleged damages, however, including the loss of 84,000,000 in anticipated profits resulting from the May 1984 loss of the contract with OIDC, and reduced home sales in the PUD through 1985, continued well beyond January 1984. Accordingly, while appellants could have asserted their slander of title claim in January 1984, they had reason not to do so because the damages had not yet fully materialized and were not yet fully ascertainable.

The purpose of the compulsory counterclaim rule is to minimize litigation by preventing a multiplicity of suits, and "to achieve a just resolution in a single lawsuit of all disputes arising out of common matters." *Neil,* 397 So.2d at 1164. As pointed out in the discussion of the federal rule in *Harris,* the "flexible approach to Rule 13 Problems attempts *to* analyze whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Harris,* 571 F.2d at 123. In light of the substantial differences in issues between the instant claim and the 1982 declaratory action, and the fact that appellants' present assertion of slander of title and attendant damages had not fully materialized in January 1984, considerations of fairness and judicial economy argue against a finding that the claim should have been raised in January 1984 or waived.[4]

[4] In support of the trial court's ruling that appellants' action for malicious prosecution is barred, appellees rely upon *Cate v. Oldham,* 450 So.2d 224 (Fla.1984) and *Cypher v. Segal,* 501 So.2d 112 (Fla. 4th DCA 1987). In *Cute* the supreme court held that a public official sued in his official capacity could not bring a suit for malicious prosecution. The court engaged in a historical analysis and concluded that such an action was barred in light of the potential chilling effect upon citizens' exercise of their right to petition the government for redress of grievances. In *Cypher,* the court addressed the right of a public official, sued in his private capacity, to seek damages for malicious prosecution in a subsequent suit. The Fourth District held that where Cypher, the plaintiff in the malicious prosecution action, had previously recovered costs at the conclusion of the earlier action brought against him, he was precluded from later suing for further damages for malicious prosecution. The *Cypher* court quoted the following language from *Cate:*

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

4. There are sound policy reasons for not treating potential counterclaims as compulsory where they are not logically related. Where the defendant has not yet determined whether to assert at the time of the original suit a separate cause of action against the plaintiff, the possibility remains that the defendant will ultimately choose not to assert his action at all, a result which obviously serves the goal of judicial economy.

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precludes such an attempt at double recovery here.

Cypher, 501 So.2d at 114.

We disagree with the Fourth District's interpretation of *Cute*. We do not read *Cate* to preclude appellants' subsequent suit for damages which could not have been recovered in the original action, such as compensation for harm to reputation. No double recovery is involved where a plaintiff brings a malicious prosecution action for damages which were not recovered in the original action. In *Cute* the court went on to state:

> A government official sued only in his or her official capacity, and from whom no relief is sought which would run against his or her personal, as opposed to governmental behavior or finances, can claim no greater right to seek greater sanctions. He or she has personally suffered no loss which is not redressable through his or her application for redress in the suit in which he or she is originally sued. It is reasonable to compel such officials to seek such redress in the suit in which they are named defendants in their official capacity.

Id. at 227.

Election of remedies was not a factor in *Cate*, as the court held that the taxing of costs and fees in the original action was the public official's exclusive remedy. Additionally, while the court referred to the right to petition government for grievances against private parties, *Cute* at 225–226, the court in no way limited the right of a private party to sue for malicious prosecution. Requiring an election of remedies in the fashion of the *Cypher* court does not protect the right to petition, since the same remedies are available to a defendant who does not seek costs in the first action.

[5, 6] Additionally, we find that the trial court erred in ruling that the complaint failed to state a cause of action for tortious interference with contractual rights, tortious interference with an advantageous business relationship, and conspiracy. The court found that the complaint "fails to supply an essential element of the tort of interference, namely the absence of justification or privilege." The court further stated that appellees' legitimate interest in the well being of their community and the protection of their property rights grants them a privilege in their actions and statements.

[7] 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. *McCurdy v. Collis*, 508 So.2d 380, 382 (Fla. 1st DCA 1987). In those circumstances in which there is a qualified privilege, the privilege carries with it the obligation to employ means that are not improper. *Id.* at 384; *G.M. Brod & Company, Inc. v. U.S. Home Corporation*, 759 F.2d 1526, 1535 (11th Cir.1985) The complaint alleges that appellees made numerous false statements to third parties, with full knowledge of the statements' falsity and with the purpose of harming appellants' economic interests. Accepting the allegations as true and reading them in the light most favorable to appellants as we are required to do, *Cutler v. Board of Regents of State of Florida*, 459 So.2d 413, 414 (Fla. 1st DCA 1984), the complaint makes a facially sufficient claim that any privilege was lost by appellees' use of improper means. Since appellants also alleged that appellees conspired to interfere with appellants' contractual rights and advantageous business relationship, it follows that the claim for conspiracy also states a sufficient claim.

[8] Appellees argue, and the trial court apparently found, that appellants were obligated to meet some higher standard because all of appellees' actions were protected by the First Amendment of the United States Constitution, This rationale is based upon the contention that due to the authority which Turkey Creek exercised in its operation of the PUD, it should be considered a "quasi-governmental" entity. We reject this contention. All of the Parties to this action are private entities. Since no state action is involved, constitutional considerations do not come into play. See *Brook v. Watergate Mobile Home Park Associations*, 502 So.2d 1380 (Fla. 4th DCA 1987).

We therefore reverse and remand with directions to reinstate all counts. We acknowledge conflict with the holding of the Fourth District in *Cypher, supra.*

REVERSED.

SMITH and ALLEN, JJ., concur.

KEY NUMBER SYSTEM

Mary A. LESEKE, Appellant,

v.

Lisa Marie NUTARO and Snappy Car Rental, a foreign corporation, Appellees.

No. 89-1021.

District Court of Appeal of Florida, Fourth District.

fept. 19, 1990.

Rehearing Denied Oct. 29, 1990.

In automobile accident victim's negligence action, the Circuit Court, Broward County, Barbara Bridge, J., enforced settlement agreement by compelling victim to accept sum specified therein. Victim appealed. The District Court of Appeal, Richard H. Frank, Associate Judge, held that: (1) physician's report in connection with examination of victim's neck did not indicate "no problems at [designated cervical levels]," within meaning of settlement agreement and, thus, victim should not have been compelled to accept amount stated therein, and (2) settlement agreement, which committed only victim, was wholly lacking in consideration.

Reversed; order vacated; remanded.

1. Appeal and Error ⇐842(8)
Contracts ⇐175(1)

Interpretation or construction of contract is matter of law, not one of fact, and appellate court is not restricted in its ability to reassess meaning and effect of written agreement.

2. Compromise and Settlement ⇐11

Physician's report in connection with examination of automobile accident victim's neck did not indicate "no problems at [designated cervical levels]," within meaning of settlement agreement and, thus, victim should not have been compelled to accept amount stated therein; report stated that "* * * discomfort [in victim's neck] is infrequent, that is, 1–2 times per week, and is left low neck and radiates along both trapezius areas * * *."

3. Compromise and Settlement ⇐6(1)

Settlement agreement providing that "[I]f [physician] indicates the Plaintiff has a herniation of [designated cervical levels] the Defendants agree *to* re-evaluate the case. [I]f [physician] indicates no problems at [designated cervical levels] the Plaintiff will accept $40,000" was wholly lacking in consideration; only plaintiff **was** committed to term of agreement and defendants were free to take whatever evaluative action they chose, including none, had physician indicated that plaintiff had herniated discs at designated cervical levels.

Arnold R. Ginsberg of Horton, Perse & Ginsberg, and Jerold Hart, **P.A.,** Miami, for appellant.

Richard **A.** Sherman and Rosemary Wilder of Richard **A.** Sherman, P.A., Fort Lauderdale, for appellees.

FRANK, RICHARD H., Associate Judge.

Mary Leseke initiated a negligence action against Lisa Marie Nutaro and Snappy Car Rental as a result of an automobile-bicycle collision. Pursuant to an appropriate motion, the trial court ordered mediation. A mediation hearing was held and an agreement was reached which provided as follows:

> The Plaintiff shall be examined the week of January 30, 1989 by Dr. Paul Kramer. If Dr. Kramer indicates the Plaintiff has a herniation of C5–6 and C6–7 the Defen-

Courts ⇐202(5)

Probate adversary proceeding party's timely motion for rehearing suspended rendition of final order until motion was disposed of, for purposes of determining whether appeal was timely. West's F.S.A. Ch. 738, App. 1, FPR 5.025; West's F.S.A. RCP Rule 1.530; West's F.S.A. R.App.P. Rule 9.020(g).

Robert M. Brake, Coral Gables, for appellants.

Joseph H. Murphy, Jr., Key Largo, for appellees.

Before SCHWARTZ, C.J., and BASKIN and COPE, JJ.

ON MOTION TO DISMISS

COPE, Judge.

As the record before us indicates that the proceeding below was conducted as an adversary proceeding pursuant to Florida Probate Rule 5.025, it was governed by the Florida Rules of Civil Procedure. *Id.* 5.025(d)(2). Appellant's timely motion for rehearing was authorized under Rule 1.530, Florida Rules of Civil Procedure, and suspended rendition of the final order until the motion was disposed of. Fla.R.App.P. 9.020(g). The appeal is timely.

Contrary to appellees' assumption, the result would be the same in nonadversary proceedings. Since 1981, Florida Probate Rule 5.020(d) has authorized a motion for rehearing of any order or judgment. *Id.*; see *In re Florida Rules of Probate and Guardianship Procedure*, 387 So.2d 949 (Fla.1980); *In re Estate of Beeman*, 391 So.2d 276, 279 & n. 1 (Fla. 4th DCA 1980). A timely motion under Rule 5.020(d) suspends rendition of the order to which it is directed, Fla.R.App.P. 9.020(g). The authority relied on by appellee, *In re Estate of Crissey*, 286 So.2d 585 (Fla. 4th DCA 1973), was based entirely on the fact that the pre-1981 probate and guardianship rules did not authorize motions for rehearing. In view of the 1981 amendment, *Crissey* is no longer good law.

Motion to dismiss denied.

KEY NUMBER SYSTEM

Mildred R. JAYE, Appellant,

v.

ROYAL SAXON, INC., Appellee.

No. 89–3246.

District Court of Appeal of Florida, Fourth District.

Jan. 30, 1991.

Plaintiff brought malicious prosecution action. The Circuit Court, Palm Beach County, Edward A. Garrison, J., granted defendant's motion for summary judgment. Plaintiff appealed. The District Court of Appeal, Stone, J., held that election to tax fees and costs after successful defense of underlying action barred private party's action for malicious prosecution.

Judgment affirmed.

Warner, J., concurred specially.

Election of Remedies ⇐15

Election to tax costs and fees after successful defense of underlying action barred private party's action for malicious prosecution.

Michael B. Small of Small, Small & Small, P.A., Palm Beach, for appellant.

John J. Bulfin of Wiederhold, Moses & Bulfin, P.A., West Palm Beach, for appellee.

STONE, Judge.

This is an appeal from a final summary judgment for the defendant in an action for malicious prosecution. The trial court,

properly, applied this court's opinion in *Cypher* v. ***Segal,*** 501 So.2d 112 (Fla. 4th DCA 1987), in holding that the plaintiff in a malicious prosecution action, who has previously taxed fees and costs in a successfully defended underlying action, is barred by that election from seeking additional damages.

In ***Cypher,*** this court determined that this language in ***Cute v. Oldham, 450*** So.2d 224 (Fla.1984) was controlling:

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

Cypher at 114.

Although both ***Cate*** and Cypher involved acts of public officials, those cases were deemed controlling in ***River Bend*** Marine, ***Inc. v. Sailing Assoc., Inc.,*** 539 So.2d 507 (Fla. 4th DCA 1989), involving only private parties. We note that the First District, in ***Turkey Creek, Inc. v. Londono,*** 567 So.2d *943* (Fla. 1st **DCA** 1990), disagreed with this court's interpretation of the *Cate* language. Following ***Cypher,*** we affirm the judgment. However, as we deem the issue to be of great public importance we certify this question to the supreme court

> 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** AG TION?

DELL, J., concurs.

WARNER, J., concurs specially with opinion.

WARNER, Judge, concurring specially.

I concur because of the precedent of *Cypher v.* Segal and ***River Bend Marine, Inc. v. Sailing Assoc., Inc.*** cited by the majority, even though I disagree with *Cypher.* I fully concur in the certification of the question to the Supreme Court.

Eddie CARTER and Frank E. Johnson, Appellants,

v.

STATE of Florida, Appellee.

Nos. 89–2328, 89–2340.

District Court of Appeal of Florida, Fifth District.

Jan. 31, 1991.

Defendants were convicted in the Circuit Court, Orange County, Ted P. Coleman, J., of sexual battery and kidnapping. Defendants appealed. The 'District Court of Appeal, Cobb, J., held that victim injury points could not be assessed on sentencing guidelines score sheet for each of three sexual batteries committed against one victim during one episode.

Affirmed in part, reversed in part, and remanded.

Criminal Law ⇐1244

Victim injury points could not be assessed on sentencing guidelines score sheet for each of three sexual batteries committed against one victim during one episode. West's F.S.A. RCrP Rule 3.701, subd. d, par. 7.

James B. Gibson, Public Defender, and **Daniel** J. Schafer, Asst. Public Defender, Daytona Beach, for appellants.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James N. Charles, **Asst.** Atty. Gen., Daytona Beach, for appellee.

COBB, Judge.

We affirm the co
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AFFIRMED IN P
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DAUKSCH and W
concur.

Amador RIVEE

STATE of **F**

No.

District Court of
Fifth

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1. § 893.13(1)(a)(1),

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above mentioned was served by U.S. mail on John Bulfin, Esq., Rider, Wiederhold, Moses & Bulfin, P.A., Northbridge Centre, Suite 800, 515 North Flagler Drive, West Palm Beach, Florida 33402 and Marguerite H. Davis, Esq., 215 S. Monroe Street, Suite 400, Tallahassee, Florida 32301, this 2nd day of April, 1991.

SMALL, SMALL & SMALL, P.A.

BY _____

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Attorney for Appellant