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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TREATISE

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner readopts and incorporates her statement of the case and her statement of facts as contained in her initial brief. Petitioner disputes and contests the statement of the case and of the facts by respondent and amicus as they differ or vary from petitioner's Statement of the case and of the facts. Petitioner seeks the reversal of the decision (2-1) in this case by the District Court of Appeals, Fourth District of the State of Florida insofar as it extends Cate v. Oldham, 450 So.2d 224 (FL-1984) to private litigants and requires private litigants to elect to seek attorney fees and costs or to elect to file an action for malicious prosecution. Petitioner seeks the affirmation and ratification of the rule of law in Turkey Creek, Inc. v. Londono, 567 So.2d 943 (FL-1st DCA-1990), which does not extend Cate v. Oldham to private litigants as stating the correct rule of law in the State of Florida (emphasis added). Turkey Creek, Inc. v. Londono, is now pending before the Supreme Court.

SUMMARY OF THE ARGUMENT

Respondent and amicus argue that Cate v. Oldham should be extended to private litigants, forcing private litigants to elect as to whether to seek an award of attorney fees and/or costs or whether to elect to file a subsequent malicious prosecution action.

Respondent and amicus argue, without authority or reason, that public policy demands that the rule of law in Cate v. Oldham, which precludes public employees and public officials from initiating an action for malicious prosecution after successfully defending a wrongful underlying action and after receiving costs and/or attorney fees, should likewise apply to private litigants. Public policy does not demand that private litigants be treated the same as public litigants, otherwise there would be no need for sovereign immunity or for different treatment under the law of defamation, slander or libel.

Petitioner also argues that she would be denied equal protection under the law if she were treated differently than those private litigants who successfully defended a wrongful underlying action and brought a subsequent action for wrongful eviction, abuse of process or slander of title, for example. Respondent and amicus have totally disregarded the similarity of these types of subsequent actions to a subsequent action for malicious prosecution.

Petitioner argues that the law must allow her a more adequate remedy, than a mere partial award of attorney fees and costs.

ARGUMENT

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

Petitioner argues that she is not barred. Respondent and amicus argue that Cate v. Oldham extended to private litigants mandates an election.

Regretfully, neither respondent nor amicus speak to what is an obvious fallacy in their argument. "Assuming a legal requirement to make the election, when must the election be made; when does the election become binding; and when may the election be cancelled or rescinded, if at all?" Overwhelming appellate case law in the State of Florida requires that the request for and the authority for attorney fees must be included in the initial pleading from each party. For example, if the defendant in the underlying wrongful action seeks attorney fees in the event he prevails, he must include the prayer, far attorney fees, as well as the authority for the award of attorney fees, in his initial

responsive pleadings. Arguably, should he fail to do so, he may have waived his right to an award of attorney fees in the event he ultimately prevails Parham v. Price (486 So.2d 34 (FL-1st DCA-1986) aff'd **499** So.2d 830 (1986); Nour v. Allstate Pipe Supply Co., 487 So.3d 1204 (FL-1st DCA-1986); and James v. Smith, 537 So.2d 1074 (FL-5th DCA-1989). Assuming that the defending party in the underlying action has included a prayer for attorney fees and has recited the authority for the award of attorney fees should he prevail, has the defending party therefore made the election under respondent's and amicus' argument?

In appellate actions, a party seeking an award of attorney fees must file the appropriate motion pursuant to the provisions of Rule 9.400, FRAP, at or prior to the time of the filing of the reply brief. Overwhelming appellate case law in the State of Florida holds that a failure to timely file a motion for an award of appellate attorney fees will result in a denial of the motion. In the event that the motion for attorney fees has been timely filed, does that constitute an election under the respondent and amicus' argument?

Unless the parties stipulate otherwise, the proof, including testimony and evidence as to attorney fees is required at the time of the trial. If proof is presented on the issue of attorney fees by the defending party in the underlying action, has he made his election, even though the outcome of the underlying case is still not known. Argued further, if the defending party prevails in the underlying wrongful action, but does not receive

an "adequate" award of attorney fees, may the defending party in the underlying wrongful action reject the award of attorney fees? The respondent and the amicus offer no argument nor any reasoned response as to when, how and under what circumstances the election, which they contend is the basis of their argument, must be made.

Yet, respondent and amicus point to the award of $87,000.00 in attorney fees in the underlying wrongful action by the trial court in this case at bar, waiving the award as a "Red Flag" before this Supreme Court, as if to say "well the petitioner already received $87,000.00, what more could she possibly expect." Of course, neither respondent nor amicus, have disclosed to this court that both (2) of the underlying trial court actions were wrongfully initiated by the respondent and that the four (4) appeals were wrongfully initiated by the respondent. The respondent lost the two (2) underlying trial court actions and lost the four (4) appeals from the underlying trial court actions. The fact that petitioner did not receive an award of attorney fees in the consolidated appeal before the District Court of Appeals, Fourth District of Florida for appellate legal services valued at approximately $35,000.00 goes unmentioned by the respondent and amicus. Royal Saxon, Inc. v. Jaye, 536 So.2d 1046 (FL-4th DCA-1989).

The real, crux of respondent's and amicus' argument, however, is contained on pages 10 and 11, where they admit, that it is not the amount of the attorney fees, which could just as well have been $.87, or $870,000.00, that has any bearing, but the mere

fact that the election was made to seek attorney fees or costs is what prevents the prevailing defending party in the underlying wrongful action from maintaining an action for malicious prosecution. Respondent argues, that "It is the election of the remedy and not the amount recovered that is important" (Respondent's Brief, page 11), blatantly disregarding that a malicious prosecution action does not ripen until the underlying case is over and that a malicious prosecution action affords relief far in excess of simply a reimbursement of attorney fees and taxable costs (emphasis added).

Respondent and amicus completely ignore and fail to respond to petitioner's equal protection argument. Petitioner argued in her initial brief that she would be denied equal protection under the law if the Supreme Court were to extend the holding of Cate V. Oldham to private litigants, barring subsequent malicious prosecution actions, but still permitted slander of title, abuse of process and wrongful eviction actions, all of whose elements are particularly similar or identical to those of a malicious prosecution action.

Respondent and amicus also ignore and fail to respond to petitioner's argument that the award of attorney fees and/or costs, permitted by statute or contract, did not constitute a cause of action and do not contain the same elements as malicious prosecution, or arguably, slander of title, abuse of process or wrongful eviction. The award of attorney fees and/or costs to the prevailing party in the underlying action is authorized by statute

or contract, and has nothing to do with the mental pain and suffering, humiliation, economic damages, damage to reputation or embarrassment which the defending party may have suffered and has no remedy for redress other than in a subsequent malicious prosecution, slander of title, abuse of process or wrongful eviction action.

Respondent claims that the holding in Parker v. Langley, 93 Eng.Rep. 239 (K.B. 1714), which has been extended to mean that a successful defendant "could either tax costs and fees in the original action or . . . sue for malicious prosecution" is the correct interpretation and quote. However, a careful reading, evidences that the Parker v. Langley court held that "a successful defendant could either tax costs and damages . . . or . . . sue for malicious prosecution." Respondent claims that the distinction between ''fees" and "damages" is "a semantic argument". Not so - there is a world of difference between the definition and use of the word "fees" and "damages".

The word "fees" has been defined as ". . . items chargeable by law for services of an officer or a witness to a party'' or may be defined in its ordinary meaning as, ". . . a reward or wage given to a public officer for his trouble and labor for the execution of his office" FL Jur., Words and Phrases, page 303. While the word "damages" refers to "the monetary sum which the law awards as pecuniary compensation for an injury sustained as a consequence of a breach of contract or a tortious act" 9 FL Jur., Damages Section 2 and FL. Jur., Words and Phrases, page 205.

Petitioner argues that Turkey Creek, Inc. v. Londono, 567 So.2d 943 (FL-1st DCA-1990) correctly states the law in the State of Florida as to private litigants initiating subsequent actions after successfully defending the underlying wrongful action. Interestingly enough, as petitioner previously pointed out, other actions such as slander of title, wrongful eviction and abuse of process may be affected by the ruling in the instant case. The Turkey Creek case involved a subsequent action for slander of title and malicious prosecution brought out by the defending party who successfully defended the underlying wrongful action. The First District held that a developer who had been sued in the underlying case and who had received an award of costs in that action was not barred from initiating a subsequent action for slander of title or malicious prosecution, neither being compulsory counter-claims in the first action.

As a result, respondent's argument must fail. A subsequent action for malicious prosecution, slander of title, abuse of process or wrongful eviction is not "splitting a cause of action," because as reflected in Turkey Creek, the damages did not materialize until after the initial action was decided. Petitioner did not "elect to split her damages" as respondent argues. Neil v. South Florida Auto, 397 So.2d 1160 (FL-3rd DCA-1981).

Petitioner does not request this court to recede from its holding in Cate v. Oldham involving public employees, but requests this court not to extend the holding to private litigants to bar subsequent actions for malicious prosecution or for that matter to

extend to abuse of process, slander of title or wrongful eviction actions.

ARGUMENT

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

Petitioner respectfully readopts her argument contained in her initial brief as being responsive. Respondent argues that the trial court is within its jurisdiction to deny a motion to amend, if it appears "to be fruitless." Petitioner's motion to amend was anything but fruitless and should have been granted. It stated a valid cause of action for intentional infliction of emotional distress against the respondent and against individual directors and officers of respondent. Even Cypher v. Segal, 501 So.3d 112 (FL-4th DCA-1987), which continues to be bad law and misinterpreted, because Cypher was a police officer of the Town of Palm Beach, and was not a private litigant, did not hold that subsequent actions against any other person (including officers and directors of a corporation) would be barred.

The trial court erred in the instant action in denying petitioner's motion to amend her complaint to state a valid cause of action for intentional infliction of emotional distress and to add parties defendant.

CONCLUSION

The holding in Cate v. Oldham, which has been limited to the public sector, should not be extended to private litigants. Rather, the holding in Turkey Creek v. Londono should be ratified as the correct rule of law in Florida. To do otherwise would be to materially and significantly change historical actions of malicious prosecution, abuse of process, slander of title and wrongful eviction. Each of these actions do not ripen, nor do their respective elements of damage materialize, until the underlying action is concluded. There can therefore be no "splitting", nor can such actions be compulsory as part of the initial action. The mere award of all or some portion of attorney fees and/or costs or authorized by statute or contract in the initial action does not make the "wronged" party "whole", nor do they in and of themselves, constitute an award of damages. Cypher v. Segal, which involves a public official (police officer) and which was grounded upon the holding in Cate v. Oldham never should have been extended to private litigants, and used as precedent for Jaye v. Royal Saxon, Case No. 89-03246, District Court of Appeals Fourth District of Florida, decided on January 30, 1991. Both resulted in the perpetuation of bad law. As such, they should be reversed, overturned, receded from, or distinguished, so that they can no longer be considered as precedents.

Petitioner further concludes that her motion to amend her complaint while her motion for rehearing of the summary judgment was pending, should have been granted.

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 20th day of May, 1991.

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