IN THE SUPREME COURT OF **FLORIDA**

CASE NO. **80,250**

AUGUST URBANEK and SIDNEY KOHL, individually and **as** partners **in** the **Florida** general partnership known as THE 18TH HOLE DEVELOPERS,

Petitioners,

vs.

THE 18TH HOLE AT INVERRARY CONDOMINIUM ASSOCIATION, INC., ELI KUSHEL, LOUIS MEYERS, MEYER MORITH, IRENE PARKER **KUSNER,** improperly identified **as** IRENE PARKER, MARTIN KARZMAN, **BERNARD** KLEIN, and BEN COLTON,

Respondents.

On Petition for Discretionary Review From the District Court of Appeal of Florida, Fourth District

RESPONDENTS ELI KUSHEL, **ET** AL.'S
ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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INTRODUCTION

The Petitioners, August Urbanek and Sidney Kohl, individually, and as partners in the Florida general partnership known as The 18th Hole Developers, seek review of the Fourth District Court of Appeal's affirmance of a summary final judgment entered in favor of the Respondents, Eli Kushel, Louis Meyers, Meyer Morith, Irene Parker Kusner, improperly identified as Irene Parker, Martin Karzman, Bernard Klein, and Ben Colton.

The Petitioners invoke the **"conflict"** and "certified public importance" bases for this Court's exercise of subject matter jurisdiction. See, Art. V, Sections 3(b)(3) and 3(b)(4), Fla. Const. (1980). This Court has postponed its determination of the jurisdictional question pending the submission of the briefs on the merits by all parties.

The Petitioners, August Urbanek and Sidney Kohl, individually, and as partners in the Florida general partnership known as The 18th Hole Developers, will be referred to as the Petitioners, the Plaintiffs, or as the **"developers".**

The Respondents, Eli Kushel, Louis Meyers, Meyer Morith, Irene Parker Kusner, improperly identified as Irene Parker, Martin Karzman, Bernard Klein, and Ben Colton, will be referred to as the Respondents, the Defendants, or as the "directors".

The Condominium Association known as The 18th Hole at Inverrary Condominium Association, Inc., will be described by name or as the **"Association".**

References to the Record on Appeal will be designated by the letter "R".

STATEMENT OF THE CASE AND FACTS

The Respondents' Statement of the Case and Facts puts an inappropriate **"spin"** on the procedural and factual history giving rise to this case. To more accurately reflect this lawsuit's true facts and circumstances, the Respondents submit their own Statement of the Case and Facts.

In 1983, The 18th Hole at Inverrary Condominium Association, Inc. filed a lawsuit against August Urbanek, Sidney Kohl, and other general partners in the Florida general partnership known as The 18th Hole Developers. The dispute between these parties centered on the sufficiency of the design and construction of the common elements at The 18th Hole at Inverrary Condominium.

In 1988, the lawsuit between these parties was tried by The Honorable Otis Farrington, retired Circuit Court Judge in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. Judge Farrington found that The 18th Hole at Inverrary Condominium Association, Inc., as plaintiff, should take nothing in the action. As prevailing parties, Urbanek, Kohl, and their partners were found to be entitled to their taxable costs. The Court thereafter entered a final judgment to that effect. (R. 32-35).

Subsequent to the entry of that final judgment, Urbanek, Kohl, and their partners sought and secured a cost judgment in their favor against the association. (R. 42-43). Although the

partnership also sought to collect their attorney's fees through a motion pursuant to Section 57.105, Florida Statutes, the trial court denied that requested relief. (R. 41).

Urbanek and Kohl, on behalf of the partnership, thereafter instituted the litigation which gave rise to this appeal. Urbanek and Kohl sued the association, as well as its directors, Eli Kushel, Louis Meyers, Meyer Morith, Irene Parker Kusner, Martin Karzman, Bernard Klein, and Ben Colton, for malicious prosecution. The gravamen of the claim was that the association's prior litigation had been wrongly and maliciously pursued. (R. 1-6).

The various defendants in this latest litigation subsequently moved for summary final judgment. In particular, the directors argued that Urbanek and Kohl's pursuit of costs and attorney's fees in the prior litigation precluded the later malicious prosecution claim under Cate v. Oldham, 450 So.2d 224 (Fla. 1984), and its progeny. (R. 69-73).

After hearing argument on the directors' motion for summary final judgment, The Honorable James M. Reasbeck, Circuit Court Judge of the 17th Judicial Circuit in and for Broward County, Florida, granted the relief sought. (R. 80-82). In doing so, the trial judge made the following findings:

> In Cate v. Oldham, 450 So.2d 224 (Fla. 1984), the Supreme Court examined and held 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 those losses but they could not do both.

> There is no Florida decision or statute which is contrary to the common law rule. Therefore, a defendant who elects a cost judgment is precluded from obtaining double recovery. Cate at 227.
>
> Successful defendants at the conclusion of an initial lawsuit have a choice to either pursue an independent cause of action or to obtain a more limited relief by way of seeking a cost judgment. Cvsher v. Segal, 501 So.2d 112 (Fla. 4th DCA 1989). Once an election is made the party is barred from seeking additional damages. Cypher at 114.
>
> The purpose of the doctrine of election of remedies is to prevent a double recovery for the same wrong. Villeneuve v. Atlas Yacht Sales, Inc., 483 So.2d 67 (Fla. 4th DCA 1986).
>
> Accordingly, this Court finds that the Plaintiff in this action made an election to have a cost judgment entered in the original action. At common law, a successful defendant is not able to acquire a cost judgment and later sue for malicious prosecution. Therefore, based on the above case law, the Plaintiff is precluded from seeking additional damages and receiving a double recovery.

Urbanek and Kohl appealed to the District Court of Appeal of Florida, Fourth District, but that Court affirmed the trial court's reasoning and result. Urbanek v. The 18th Hole at Inverrary Condominium Assoc., Inc., 582 So.2d 154 (Fla. 4th DCA 1991). Following this court's decision in Cate and its progeny, the Fourth District reiterated that English common law controlled the instant situation and a successful defendant in initial litigation was required to choose between taxing costs in that original action or pursuing a malicious prosecution claim, but could not do both. In doing so, however, the Court

noted conflict with Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), rev. granted, 577 So.2d 1327 (Fla. 1991), and certified the following question to this court as one 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?

Urbanek and Kohl then invoked this Court's discretionary jurisdiction.

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ISSUE ON APPEAL

WHETHER A PARTY'S PURSUIT OF TAXABLE COSTS AND ATTORNEY'S FEES PURSUANT TO SECTION 57.105, FLORIDA STATUTES, IN AN UNDERLYING ACTION BARS A SUBSEQUENT MALICIOUS PROSECUTION ACTION WHICH NECESSARILY SEEKS THOSE SAME ITEMS AS DAMAGES? (RESTATED)

SUMMARY OF THE ARGUMENT

In their attempt to distinguish the indistinguishable, Urbanek and Kohl seek to differentiate this case under the guise of "dicta" and this Court's "misinterpretation" of Florida common law. The Petitioners' brief contains much that can only be described as difference without distinction. Sound jurisprudential rationale underlies prior treatment of this issue under an election of remedies analysis. Accordingly, this Court should affirm the ruling below as consistent with the well-developed body of law which requires litigants to choose between post-trial remedies for wrongfully instituted lawsuits and the subsequent pursuit of a malicious prosecution cause of action.

ARGUMENT

A PARTY'S PURSUIT OF TAXABLE COSTS AND ATTORNEY'S FEES PURSUANT TO SECTION 57. 05, FLORIDA STATUTES, IN AN UNDERLYING ACTION BARS A SUBSEQUENT MALICIOUS PROSECUTION ACTION WHICH NECESSARILY SEEKS THOSE SAME ITEMS AS DAMAGES. (RESTATED)

In Cate v. Oldham, 450 So.2d 224 (Fla. 1984), this court ruled that, if a party pursues post-trial relief for costs and/or attorney's fees from an opposing party, that moving party in the underlying case cannot thereafter sue in a subsequent proceeding under a malicious prosecution theory. In particular, this court stated:

> At common law, successful defendants could either tax costs and fees in the original action, or they could sue for malicious prosecution under 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.
>
> Cate, 450 So.2d at 227.

The Fourth District reaffirmed this rule of law and applied it in the case of Cypher V. Segal, 501 So.2d 112 Fla. 4th DCA 1987). In that case, the defendant, victorious in the underlying action and successful in recovering costs, proceeded to thereafter file a malicious prosecution action. Citing Cate v. Oldham, supra, the opposing party moved to dismiss. The original defendant attempted to distinguish Cate on the basis that Cate had involved an elected official who had no exposure

to personal finances. In Cypher, however, it was argued that the defendant had been sued for punitive damages and, therefore, did have a personal stake in the outcome.

The Fourth District, in discussing this difference (which is also raised by the Petitioners in this case), saw no distinction and reapplied the Cate rule of law in a fashion consistent with the plain and unequivocal language employed by this court. In particular, the Fourth District noted that whenever costs are taxed by one party against another, that party has elected his remedy and cannot pursue a malicious prosecution action:

> We conclude that the appellant had a choice at the conclusion of the initial suit to pursue an independent cause of action or to obtain more limited relief by way of seeking a cost judgment in that case. Once such an election is made and judgment entered thereon, the appellant was barred from seeking additional damages.
>
> Cypher, 501 So.2d at 114.

The Fourth District again reapplied this rule in River Bend Marine. Inc. v. Sailing Associates, Inc., 539 So.2d 507 (Fla. 4th DCA 1989), Jaye v. Royal Saxon, Inc., 573 So.2d 425 (Fla. 4th DCA 1991), and again in this lawsuit's companion case of Urbanek v. The 18th Hole at Inverrary Condominium Association, 582 So.2d 154 (Fla. 4th DCA 1991).

The treatment of this issue by this Court and the Fourth District is completely consistent with the general principles underlying election of remedies and prohibiting split causes of action. An election of remedies has been defined as the act of

choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts. An **election** of **remedies presupposes a** right to **elect.** It **is a** choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. In **its** more restricted sense, it is the adoption of one of two or more co-existent remedies, with the effect of precluding resort to the other. See, 1 Fla.Jur.2d, Actions, Section **146;** Barbe V. Villeneuve, 505 So.2d 1331, **1332-1333** (Fla. **1987).**

The concept of election, which is of Roman origin, is an application of the maxim that **"he** who seeks equity must do **equity,"** and that **"a** person shall not be **twice** vexed for **one** and the same **cause."** The doctrine has come **to** be regarded as an application of the doctrine of estoppel, on the theory that the one electing should not later be permitted to avail himself of an inconsistent course. The **doctrine** has also been viewed **as** part of the law of waiver. However, to operate as a waiver or estoppel, election must be between co-existent and inconsistent remedies. See, Fla.Jur.2d, Actions, Section 147.

The same concepts guide application of the rule against splitting causes of action. The rule against splitting **causes** of action requires that all damages sustained or accruing to one as a result of a single wrongful act **must** be claimed and recovered in one action or not at all. Gaynon V. Statum, 151 Fla. 793, 10 So.2d 432 (1942); Thermofin, Inc. V. Woodruff, 491

So.2d 344 (Fla. 4th DCA 1986). The rule is founded on the sound policy reason that the finality it establishes promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single incident, and is consistent with the absolute necessity of bringing litigation to an end. Schimmel v. Aetna Cas. & Sur. Co., 506 So.2d 1126 (Fla. 3d DCA 1987); McKibben v. Zamora, 358 So.2d 866 (Fla. 3d DCA 1978).

Both the election of remedies and split causes of action analyses support requiring a litigant to choose between post-trial relief and a subsequent malicious prosecution claim. Both "entitlements" to relief arise from the same set of facts. Even if a total overlap of damages may not exist, it cannot be disputed that a substantial identity of elements and damages apply to both kinds of relief. In short, the underlying basis for both a post-trial claim and a subsequent malicious prosecution lawsuit are sufficiently identical so as to require that litigant to pick one or the other - not both.

The courts of this state are already taxed beyond their resources by the volume of new lawsuits filed each year. Adoption of the analysis suggested by the Petitioners will only increase that load. Given this fact and the fact that the courts of this state have routinely frowned upon malicious prosecution actions, this Court should reject the Petitioners' invitations to further flood the courts and instead should continue application of a reasonable election rule that appropriately precludes vexation and harassment of unsuccessful

litigants. Any other rule would result in disputes between parties that never end. Duncan v. Germaine, 330 So.2d 479 (Fla. 4th DCA 1976) (courts have looked with disfavor on actions for malicious prosecution as placing a chilling effect on resort to the law and courts for the settling of grievances as an alternative to self-help).

The Petitioners rely most heavily on the First District's opinion in Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), cert. granted, 577 So.2d 1327 (1991), to support their position. In Londono, Turkey Creek, a land development company, and Norwood Hope had been sued by homeowners over the operation of a planned unit development known as Turkey Creek and had been successful in defending this action and in obtaining costs. Turkey Creek, Inc. and Hope thereafter brought suit against the homeowners for slander of title, malicious prosecution for bringing the earlier action, tortious interference with contractual rights, tortious interference with an advantageous business relationship, and conspiracy to interfere with Turkey Creek's contractual rights and business relationships. The trial court dismissed the malicious prosecution action on the ground that by obtaining a cost judgment in the earlier action, Turkey Creek and Hope had elected their remedy and were therefore precluded from seeking further relief in a subsequent action. The First District reversed the trial court's ruling, however, and reasoned that Cate v. Oldham held only that a public official sued in his

official capacity could not thereafter bring a malicious prosecution action.

The First District's interpretation of the holding in Cate v. Oldham is unwarrantedly restrictive. The Supreme Court in Cate gave as one of the bases for its ruling that at common law successful defendants could either tax costs and fees in the original action or could sue for malicious prosecution and, there being no Florida law to the contrary, common law precluded the action for malicious prosecution where the successful defendant elected to tax those costs and fees in the initial lawsuit. Further, contrary to the First District's opinion, this Court did specifically address the election of remedies issue in Cate, and that analysis was subsequently applied by the Fourth District in subsequent decisions, including the instant case. Accordingly, the Londono decision does not serve as particularly strong precedent to support the Petitioner's arguments.

In the instant case, the developers had the choice of either pursuing post-trial remedies for reimbursement of their attorney's fees and costs, or alternatively could have foregone these remedies and pursued a later malicious prosecution claim. The developers opted for the former and thereby passed on the latter. Florida law's requirement that litigants make a choice between these two avenues is supported by this Court's analysis in Cate and its progeny. This result is also supported by strong public policy considerations which promote finality and

stability in the law, avoid vexatious and multiple lawsuits arising out of a single incident, and is consistent with the need to bring litigation to an unmitigated conclusion. This Court should stay the course in its treatment of this issue, follow Cate's directive, and affirm, in all respects, the Fourth District's ruling below.

Even if this Court were to ultimately conclude that the Petitioners could pursue the instant malicious prosecution claim, the entry of a summary final judgment was nonetheless appropriate.[1] The Petitioners were unable to establish at least two of the six elements required for a malicious prosecution action. The elements of a malicious prosecution claim are as follows:

> (1) A legal proceeding commenced or continued against the Plaintiff (the Developers here);
>
> (2) The Defendant (Association) caused or commenced the proceeding (it should be noted that the Directors never caused or commenced any proceeding against the Petitioners);
>
> (3) The proceeding had a bona fide termination in the Petitioners' favor;
>
> (4) There was no probable cause for commencing the proceeding;
>
> (5) The Defendant acted with malice;
>
> (6) The Plaintiff suffered approximately caused damages.

[1] In doing so, this Court is asked to apply the well-settled "right for the wrong reason" analysis.

See, Della-Donna v. Nova University, Inc., 512 So.2d 1051 (Fla. 4th DCA 1987); Shidlowsky v. National Car Rental Systems, Inc., 344 So.2d 903 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 516 (Fla. 1978).

The bona fide termination element can be satisfied either by a favorable decision on the merits, or a bona fide determination of the proceedings. Weissman v. K-Mart Corp., 396 So.2d 1164 (Fla. 3d DCA 1981); Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3d DCA 1980). If the termination of the action is on technical grounds, or for procedural reasons, or for any other reason inconsistent with the guilt of the accused, it does not constitute a favorable termination. Union Oil of California Amsco Division v. Watson, 468 So.2d 349 (Fla. 3d DCA 1985). The basis of that rule is that a favorable termination exists where the termination is of such a nature as to indicate the innocence of the defendant. See, Union Oil, supra, at 353.

In order to determine whether the termination of the action, prior to a determination on the merits, tends to indicate the innocence of the defendant, one must look to whether the manner of termination was based on the merits of the case. Union Oil, supra, at 354. If, for example, the case was terminated upon considerations entirely apart from the merits, or the probable cause or prosecution, this is not a favorable or bona fide termination in favor of the plaintiff

prosecuting the malicious prosecution action. See, Della-Donna, supra, at 1055.

In Della-Donna, supra, all the defendants were awarded either summary judgments or partial summary judgments as to all counts of the complaint for malicious prosecution. In the initial action, Nova University had counterclaimed against Della-Donna and this counterclaim was voluntarily dismissed with prejudice based on the settlement between Nova University and Della-Donna. A counterclaim by Amlong, a Nova law student, was also dismissed for lack of standing. Subsequently, when Della-Donna sued Nova and Amlong for malicious prosecution, due to the termination of the counterclaims brought by them against him, summary judgments were entered in favor of Nova University and Amlong. The basis for these summary judgments was that Della-Donna could not prove that the original lawsuits brought by Nova University and Amlong against him had resulted in a bona fide termination in his favor. Della-Donna, supra, at page 1055; Davis v. McCrory Corp., 262 So.2d 207 (Fla. 2d DCA 1972).

In affirming the summary judgments in favor of the defendants in Della-Donna, supra, the Fourth District held that the failure of the plaintiff to prove any one of the required six elements was sufficient to defeat the cause of action for malicious prosecution, and because Della-Donna could not prove a bona fide termination, the summary judgments in favor of the

defendants were affirmed. See Della-Donna, supra, at page 1055.

The Court, in Della-Donna, further noted that the Nova lawsuit was terminated as a result of a settlement between Nova and Della-Donna and thus, there was never any judgment entered on the merits of the underlying lawsuit. As a result, Della-Donna could not establish a bona fide termination of the underlying lawsuit in his favor. As the Court pointed out, "a bona fide termination favorable to the plaintiff does not encompass a termination resulting from negotiation, settlement, or consent." Della-Donna, supra, at page 1055. Similarly, the lawsuit brought by Amlong had been dismissed for lack of standing which also did not constitute a bona fide termination in Della-Donna's favor and, therefore, it barred his subsequent claim for malicious prosecution against Amlong. See Della-Donna, supra, at page 1057.

In the instant case, the trial court entered a summary judgment finding that the settlement between the developers and the association barred the association's claim for negligent repairs against the developers. (R. 32-35). This was not a bona fide termination in favor of the developers that it had not performed negligent repairs. It only was a determination that the existence of the settlement agreement procedurally barred the association's action against the developer. Under the tests set forth in Union Oil, supra, and adopted in Della-Donna, supra, there was no question that a bona fide

termination in favor of the developers (Petitioners) did not exist in the present case. For this reason alone, the developers were unable to establish all elements of malicious prosecution and thus, the summary judgment in favor of the association, as well as the subsequent summary judgment in favor of the directors, were correctly entered.

Furthermore, the developers were also unable to prove the absence of probable cause, as a matter of law. The ruling by the trial judge in the first case expressly denied attorneys' fees to the developers, based on the bringing of a frivolous or non-meritorious lawsuit and, therefore, the lower court ruled, as a matter of law, that a meritorious claim was presented by the association in the initial lawsuit. Since a meritorious claim did exist in the lawsuit between the association and the developers, it is legally impossible for the developers to prove an absence of probable cause.

Of the six essential elements that the developers have to prove to succeed in their malicious prosecution claim against the association, the most significant is the requirement of showing a lack of probable cause. Not only did the developer fail to meet this burden, but the association and its directors firmly established that the association did, in fact, have probable cause to initiate the action against the developers. This was established by the initial trial court's ruling that the association had a meritorious claim against the developers.

This Court, in Goldstein v. Sabella, 88 So.2d 910 (Fla 1956), which was an analogous situation, stated that a trial in a court of common jurisdiction which results in a judgment of conviction, or a verdict for the plaintiff, is a sufficient legal determination of the existence of probable cause. Whenever a claimant obtains a verdict or judgment in his favor, the defendant cannot succeed in a malicious prosecution action against the claimant for maintaining the action because the verdict or judgment established the existence of probable cause, as a matter of law. This same rule applies in the present case where the developers brought a claim for attorneys' fees against the association on the sole basis that the association's lawsuit against the developers was totally frivolous and without any merit. By ruling in favor of the association, and entering an order in the association's favor, the trial judge established, as a matter of law, the existence of probable cause in the underlying lawsuit.

Even if the verdict or judgment is later changed upon reconsideration, or reversed on appeal, the rule still applies. See Goldstein, supra; Community National Bank of Bal Harbour v. Burt, 183 So.2d 731 (Fla. 3d DCA 1966); Fisher v. Maas Bros., Inc., 149 So.2d 910 (Fla. 2d DCA 1963). Thus, the mere existence of a verdict or judgment is sufficient to establish probable cause. This holds true in the present case where the initial trial court entered an order establishing probable

cause by finding that the association's claim against the developers was facially meritorious.

There are certain circumstances where neither a verdict nor a judgment is necessary to establish the existence of probable cause. For instance, where a magistrate binds over a defendant for trial, this is sufficient to establish probable cause to defeat a subsequent action for malicious prosecution, even if the defendant is ultimately acquitted. Gallucci v. Milavic, 100 So.2d 375 (Fla. 1958); Kern v. Modernage Furniture Corp., 125 So.2d 893 (Fla. 3d DCA 1961). These rules exist because probable cause to maintain an action is something less than a certainty of outcome in such an action. See Goldstein, supra, at page 911. Instead, probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. See Goldstein, supra, which cited Dunnavant v. State, 46 So.2d 871 (Fla. 1950); Thompson v. Taylor, 183 So.2d 16 (Fla. 1st DCA 1966) (failure to prove absence of probable cause precludes recovery from malicious prosecution).

Where, therefore, a neutral observer, for example a judge, is specifically charged with making such determinations, and does, in fact, formally decide that the plaintiff has a meritorious claim against a defendant, then, as a matter of law, the requirement of probable cause has clearly been satisfied. This is the basic point in Goldstein, supra, as

well as the other cases, that, when certain persons, other than the defendant, in a malicious prosecution action (i.e., a judge) have reviewed or considered the facts leading to the original prosecution, and these other persons then decide to let the original action go forward, probable cause to maintain the original action exists as a matter of law and any subsequent malicious prosecution action must be dismissed. See Gallucci, susra; Lewton v. Hower, 35 Fla. 58, 16 So. 616 (1895); Community National Bank, supra; Kern, supra; Fisher, supra; Gordon v. City of Belle Glade, 132 So.2d 449 (Fla. 2d DCA 1961); Calbeck v. Town of South Pasadena, 128 So.2d 138 (Fla. 2d DCA 1961); Padrevita v. City of Lake Worth, 367 So.2d 739 (Fla. 4th DCA 1979).

In the present case, a party, other than the developers, the lower court judge, reviewed and considered all the facts concerning the poor construction work done by the developer which was the basis of the claim by the association. The lower court judge, not only decided to let the original action go forward against the developers, but he ruled, as a matter of law, that the associations' actions were facially meritorious. As a matter of law, probable cause was established and a summary judgment in favor of the association was correctly entered on developer's subsequent claim for malicious prosecution. Based on the cases of Atlantic Cylinder Corp. v. Hether, 438 So.2d 922 (Fla. 1st DCA 1983), rev. denied, 447 So.2d 885 (Fla. 1984), and Red Carpet Corp. of Panama City

Beach v. B.K. Roberts, 443 So.2d 377 (Fla. 1st DCA 1983), and the fact that the lower court judge, by ruling on the association's motion for summary judgment first, established the law of the case, the summary judgment was correctly granted for the Respondents, who were the corporate directors of the association.

Where the parties are the same in the second suit as in the prior suit, but the cause of action is different, the doctrine of estoppel by judgment would be applicable. See Universal Construction Co. v. City of Fort Lauderdale, 68 So.2d 366 (Fla. 1953); Yovan V. Burdine's, 81 So.2d 555 (Fla. 1955). Estoppel by judgment exists when the parties are the same in both lawsuits even though the causes of action are different, if the issues raised in the second suit were actually presented and adjudicated in the former lawsuit. Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591 (Fla. 1956); Gordon v. Gordon, 59 So.2d 40 (Fla. 1952); Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956).

In the present case, the ruling, by the lower court judge, that the action was meritorious, was not appealed by the developers, and, therefore, was binding. Kassilaigue v. Herron, 38 F.2d 775 (5th Cir. 1950) (a judgment on the merits between the same parties is conclusive of any issue actually litigated and determined in a subsequent suit on another cause of action),

the first lawsuit. Seaboard Coast Line Railroad v. Cox, 338 So.2d 190 (Fla. 1976); Reesee v. Estate of Neely, 498 So.2d 1026 (Fla. 2d DCA 1986); Coplan Pipe & Supply Co., Inc. v. Central Bank Co., 362 So.2d 447 (Fla. 3d DCA 1979) [estoppel by judgment did not prevent subsequent lawsuit against original party where the issues are the same]. Anderson v. Trade Winds Enterprises Corp., 241 So.2d 174 (Fla. 4th DCA 1970).

In the instant case, the developers attempted to recover attorneys' fees in the original action against the association contending that the action was not meritorious pursuant to 557.105, F.S. The trial judge, who had presided at the trial, ruled that the action was meritorious. The developers did not appeal this ruling and, therefore, this ruling is binding on

CONCLUSION

Based upon the foregoing rationale and authority, the Respondents, Eli Kushel, Louis Meyers, Meyer Morith, Irene Parker Kusner, improperly identified as Irene Parker, Martin Karzman, Bernard Klein, and Ben Colton, respectfully request this Honorable Court to affirm, in all respects, the Fourth District Court of Appeal's disposition of this case below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mailed this 15th day of October, 1992, *to:* DANIEL L. HAVERMAN, ESQ., Green, Haverman & Ackerman, P.A., 315 S.E. 7th St., Ste. 200, Ft. Lauderdale, FL 33301; RICHARD A. SHERMAN, ESQ., 1777 S. Andrews Ave., Ste. 302, Ft. Lauderdale, FL 33316; and J. CAMERON STORY, 111, ESQ., Gunster, Yoakley & Stewart, P.A., P.O. Box 14636, Ft. Lauderdale, FL 33302.

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