w/app 0f 7

FILED
SID J. WHITE

SEP 16 1992

CLERK, SUPREME COURT:

By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

AUGUST URBANEK and SIDNEY KOHL, etc.,

Petitioners,

vs. case No. 80,250

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 THE STATE OF FLORIDA
FOURTH DISTRICT
Case No. 91-0969

PETITIONERS' INITIAL BRIEF ON THE MERITS

J. CAMERON STORY, III
Florida Bar No. 0254525
GUNSTER, YOAKLEY & STEWART, P.A.
Attorneys for Petitioners
Post Office Box 14636
Fort Lauderdale, Florida 33302
Telephone (305) 462-2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

Throughout this Brief, Petitioners, AUGUST URBANEK, SIDNEY KOHL and ROY J. McGLOTHIN, individually and as partners in the Florida General Partnership known as THE 18TH HOLE DEVELOPERS, will be referred to collectively either as "PETITIONERS" or "DEVELOPERS".

Respondents, ELI KUSHEL, LOUIS MEYERS, MEYER MORITH, IRENE PARKER KUSNER, identified in the ASSOCIATION's Minutes as IRENE PARKER, MARTIN KARZMAN, BERNARD KLEIN, and BEN COLTON, will be described either as "RESPONDENTS" or as the "DIRECTORS".

THE 18TH HOLE AT INVERRARY CONDOMINIUM ASSOCIATION, INC., will be described as the "ASSOCIATION".

Citations to the Record on Appeal will be indicated by "R. ____", with the appropriate page number inserted

The DEVELOPERS also have provided an Appendix to this Brief. Citations to same will be indicated by "App. ____", with the appropriate page number inserted.

This Petition for Discretionary Review contests the Summary Judgment granted to the individual directors of the ASSOCIATION, "upon the same grounds as set forth in [the Trial] Court's Order granting Defendant's [ASSOCIATION's] Motion for Summary Judgment dated June 4, 1990." Accordingly, the

Appendix, Record on Appeal and Argument on the merits necessarily will advert frequently to the proceedings in the trial court relating to the Association.

All emphasis on quoted material in this Brief has been supplied by the author, except where otherwise stated.

STATEMENT OF THE CASE AND FACTS

Because the Final Summary Judgment which is the subject of the present Petition occurred at the pleading stage, without reference to any discovery or factual verifications, the "facts" must be derived from the allegations contained in the DEVELOPER' Complaint, and the DIRECTORS' pleadings and Motion For Final Summary Judgment and the Exhibits thereto. The providing of a combined Statement of the Case and of the Facts appears, under these circumstances, to be both appropriate and expeditious.

Like every malicious prosecution action, the present case had its beginnings in a prior lawsuit ("underlying action"). Some discussion of the underlying action, therefore, is necessary here. In spite of the fact that the ASSOCIATION entered into a Settlement Agreement with the DEVELOPERS which expressly resolved all claims for damages from alleged defects in the design and construction of a condominium known as The 18th Hole At Inverrary ("18th Hole"), which settlement Agreement contained a mandatory arbitration clause, the DIRECTORS, on behalf of the ASSOCIATION, and with knowledge of the prior Settlement Agreement and its terms, decided to sue the DEVELOPERS in 1983 to recover damages for the very same alleged defects. (App. 1-6.)

Following a bench trial on the merits of the underlying

action, from May 2 through May 5, 1988, Retired Circuit Judge Otis Farrington entered a Final Judgment rejecting all of the **ASSOCIATION's** claims and expressly finding the **DEVELOPERS** to be entitled to their "taxable **costs"** in an amount to be determined at a subsequent hearing. **(App.** 32-35).

Thereafter, the **DEVELOPERS** did move for and obtain a Cost Judgment on June **24**, 1988, for only those "taxable **costs". (App. 40-41).**

At no point in the underlying action, however, did the **DEVELOPERS** have an opportunity to, nor did they ever attempt to recover their actual, reputational, or business damages caused by the bringing of the underlying action, including out of pocket expenses for items such as attorneys fees, travel and lodging, and other items not classified as "taxable **costs".**

There simply being no means available to recover these other items of damage in the underlying action, either by counterclaim, motion for attorneys fees, or otherwise, the DEVELOPERS chose to bring a malicious prosecution claim to attempt to make themselves whole.

The **DIRECTORS** initially met the DEVELOPERS' Complaint with a Motion to Dismiss **(App.** 36-38), which was denied.

While the **ASSOCIATION,** as co-defendant, filed an Answer and Affirmative Defenses **(App. 42-43),** the only other paper filed by the **DIRECTORS** in this action was an unverified and factually unsupported Motion for Summary Final Judgment which essentially rode on the coattails of the ASSOCIATION's Motion for Summary

Judgment (App. 44-48). The trial court granted the Motion by Order dated September 25, 1990 (App. 57), and entered a Final Summary Judgment thereon on March 4, 1991. (App. 58). The DEVELOPERS appealed this Final Summary Judgment, and the Fourth District Court of Appeal affirmed by Opinion dated July 1, 1992, on the strength of its prior Opinion in Urbanek v. The 18th Hole at Inverrary Condominium Association, 582 So.2d 154 (Fla. 4th DCA 1991) (App. 64-65). The Fourth District certified as a question of great public importance, the following:

> **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 Opinion which this Court is asked to review also conflicts directly and expressly with the holding of the First District Court of Appeal of Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990).

SUMMARY OF ARGUMENT

Where a successful litigant in an underlying action is not a government official and has no opportunity to be redressed in that underlying action, for the damages caused by the wrongful maintenance of the underlying action, there is no public policy, legal or equitable basis for holding that such a litigant is barred from being made whole in a subsequent malicious prosecution claim, merely by virtue of his obtaining

an award of "taxable costs" (not **"fees"** or other **"damages"**) in the underlying action. Such taxable costs are merely a limited and distinct category of costs, which are **so** minimal and so closely associated with the procedure governing the underlying action, rather than with the merits of a subsequent malicious prosecution claim, that they cannot equitably be permitted to bar the latter claim. Finally, there is no basis in any of the rules governing the doctrine of "election of remedies" for the barring of such a malicious prosecution claim under the facts of this case. The recovery of "taxable costs" in no way constitutes a complete remedy to PETITIONERS, nor would it in any way facilitate an inequitable double recovery.

ARGUMENT

THE DEVELOPERS' RECOVERY OF THEIR "TAXABLE COSTS" IN THE UNDERLYING ACTION, SHOULD NOT BE DEEMED TO CONSTITUTE *AN* "ELECTION OF REMEDIES" BARRING A SUBSEQUENT MALICIOUS PROSECUTION SUIT SEEKING TO RECOVER DAMAGES AND EXPENSES IMPOSSIBLE OF RECOVERY BY ANY MEANS IN THE UNDERLYING ACTION.

The DEVELOPERS seek discretionary review of the Fourth District Court of Appeal decision upholding the Final Summary Judgment entered in this cause in an effort to focus attention upon and, hopefully, influence the correction of an aberration in the law governing malicious prosecution. As frequently happens, certain appellate decisions, designed to accomplish perfectly laudable objectives in one area, include dicta which is relied upon as precedent by a subsequent court in deciding

an entirely distinct issue of law. Unfortunately, the result has been to steer the law of malicious prosecution drastically off course and bar recovery by litigants who have clearly suffered wrongs for which they have been given no opportunity to be made whole.

The DIRECTORS filed no answer in this case, but only followed up the ASSOCIATION's Answer and Motion For Summary Judgment with their own unverified Motion For Summary Judgment. (App. 44-48) (For some unexplained reason, the Court apparently also took judicial notice of the Cost Judgment, without ever having been asked to do so pursuant to Florida's Rules of Evidence or otherwise). From the foregoing state of the Record, it must be assumed on appeal that the underlying action was instituted without probable cause and terminated in the DEVELOPERS' favor. Such are the crucial elements for a malicious prosecution claim. Della-Donna v. Nova University, Inc., 512 So.2d 1051, 1055 (Fla. 4th DCA 1987).

Should litigants who have been thus wronged be barred under the doctrine of "election of remedies" from recovering the resulting damages merely by moving for and recovering "taxable costs" in the underlying action? Based upon the law governing "election of remedies" and that governing the recovery of attorneys' fees in the State of Florida, the answer is clearly "no."

An analysis of one of this Court's recent discussions of the law of "election of remedies" leads to the inescapable

conclusion that the doctrine has been misapplied in the area of malicious prosecution, in general, and to the present case, in particular. From Barbe v. Villeneuve, 505 So.2d 1331, 1332-1333 (Fla. 1987), the following rules emerge:

> The election of remedies doctrine is an application of the doctrine of estoppel and operates on the theory that a party electing one course of action should not later be allowed to avail himself of an incompatible course. Williams v. Robineau, 124 Fla. 422, 426, 168 So. 644, 646 (1936); Klondike, Inc. v. Blair, 211 So.2d 41, 42 (Fla. 4th DCA 1968). The purpose of the doctrine is to prevent a double recovery for the same wrong. United States v. Weiss Pollution Control Corp., 532 F.2d 1009, 1012 (5th Cir. 1976); Villeneuve, 483 So.2d at 69. Under Florida law, however, the election of remedies doctrine applies only where the remedies in question are coexistent and inconsistent. Williams, 124 Fla. at 426, 168 So. at 646, McCormick v. Bodeker, 119 Fla. 20, 23, 160 So. 483, 484 (1935); American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 122, 47 So. 942, 944 (1908); Klondike, Inc., 211 So.2d at 42-43; Cooley v. Rahilly, 200 So.2d 258, 259 (Fla. 4th DCA), cert. denied, 207 So.2d 690 (Fla. 1967).

The "election of remedies" decision from this Court, which is perhaps most applicable to the present case, is Security & Investment Corp. v. Droege, 529 So.2d 799, 802 (Fla. 4th DCA 1988). There, it was held that

> The doctrine of election of remedies is a technical rule of procedure or judicial administration, used by the courts to prevent double recoveries for a single wrong. 25 Am.Jur.2d Election of Remedies § 1 (1971). Application of the doctrine can serve as an instrument of injustice when an election of a remedy turns out to be unavailable, and yet it is held to bar pursuit of another remedy. Prior to imposing the doctrine, courts should carefully consider the facts of each case. 25 Am.Jur.2d Election of Remedies § 3. See Williams v. Robineau, 124 Fla. 422, 168 So. 644 (1936).

As will be shown below, the application of the doctrine of "election of remedies" to bar the DEVELOPERS' claim in this

case, works an extreme injustice. For this reason, the result below should be reversed.

The law of Florida regarding the recovery of attorneys fees would not seem to be a matter of serious dispute. Florida now follows, and with the exceptions noted below, always has followed the "American rule" regarding attorneys fees. This Court has articulated the "American rule" countless times, including the following statement in its decision of Codomo v. Emanuel, 91 So.2d 653, 655 (Fla. 1956):

> The right to recover attorneys fees as part of the cost did not exist at common law. It must be provided by statute or contract. Fraud or malice may modify the rule under circumstances. 14 Am.Jur. 38 § 63. See also 15 Am.Jur. 552, § 143.

This Court also has repeatedly applied the "American rule", holding that attorneys fees are not taxable as an element of costs unless specifically provided for by contract or statute. The decision of Citizens Federal Savings & Loan Association of St. Lucie County v. Loeb Rhoades, Hornblower & Co., 473 So.2d 679, 681 (Fla. 4th DCA 1984), relied directly upon Codomo, supra, in applying this "American rule".

The distinction between this "American rule" and the "English rule" is well known. Simply put, under the "English rule", attorneys fees are taxable as an element of costs, and costs follow the judgment. In other words, the prevailing party is entitled to tax both costs and fees at the conclusion of an action.

While the "common law" of England has traditionally

included attorneys fees as a part of costs to be taxed against the unsuccessful party, the "common law" in this country, and in Florida, in particular, has been quite to the contrary. Section 31 of the article on **"Costs"** in 12 Fla.Jur. 2d 1972, sets out the rule, as follows:

> [A]t common law there was no right to have attorneys fees per se or as part of costs, taxed against the unsuccessful party. In other words, the award of attorneys fees is in derogation of common law. Thus, except where equity may allow attorneys fees from a **fund** or estate, they may be recovered only when they are authorized by statute or agreement although they have been allowed where the relief prayed for is very similar to what would be the relief in an action in which the taxing of attorneys fees was specifically provided for by statute . . . .

Before turning to the Opinions more specifically drawn into question by this appeal, it is important to consider two more points. The DEVELOPERS never sought attorneys fees from the DIRECTORS in the underlying action, because no statute or contractual provision provided for an award of same. Such relief was simply not available to the DEVELOPERS by means of a direct motion, based upon the above quoted rules of law governing an award of attorneys fees in Florida.

While the co-defendants in the underlying action, the developers of the second phase of the 18th Hole ("Phase **II** Developers"), did make a motion for an award of their attorneys fees under Section 57.105, which motion was denied, neither the fact that the motion was filed, nor that it was denied **have** any bearing upon these PETITIONERS. First, these PETITIONERS did not join **in** the Phase II Developers' motion, and the finding

upon which the denial of that motion was predicated was entirely different from the standard which would govern an award of damages for malicious prosecution. "In order to find a complete absence of a justiciable issue of either law or fact, a trial court must find that the action was so devoid of merit both on the facts and the law as to be completely untenable." Allen v. Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), rev. den. 392 So.2d 1373 (Fla. 1980). This standard is completely distinct from the "lack of probable cause" standard governing malicious prosecution and, indeed, is almost insurmountable. It is probable that the DEVELOPERS would not have been barred from bringing a malicious prosecution claim, even if they unsuccessfully applied for attorneys fees under Section 57.105, Florida Statutes, in the underlying action. The standards of recovery are simply too far apart for a finding under one to be binding with respect to the other.

Furthermore, the DEVELOPERS could not have recovered any of their actual, reputational or business damages by way of a counterclaim in the underlying action, based upon the well settled rule that malicious prosecution may not be brought as a counterclaim when directed against the filing of some or all of the counts in a pending main action. Blue v. Weinstein, 381 So.2d 308, 311 (Fla. 3d DCA 1980); Bieley v. Glore Forgan, Inc., 316 So.2d 66, 67 (Fla. 3d DCA 1975). In view of the foregoing rules of law, there is no way that the DEVELOPERS could have even attempted, let-alone succeeded, in making

themselves whole in the underlying action.

Allowing the DEVELOPERS' malicious prosecution action to proceed to trial in this case would in no way threaten a "double recovery for the same wrong", nor are "the remedies in question . . . co-existent and inconsistent." As the above quoted material explains, the remedies being sought by the DEVELOPERS in the present malicious prosecution action were not available in the underlying action, and are of such a character that it would be unjust to prevent the DEVELOPERS from recovering same in their malicious prosecution claim.

This brings us to the dilemma which confronted the lower court in this case. The DIRECTORS filed an unverified Motion for Summary Judgment, unsupported by any affidavit or request for the taking of judicial notice by the trial court, but which asserted that, because the DEVELOPERS had obtained a judgment for their "taxable costs" in the underlying action, they had "elected their remedies" and were barred from suing for damages under a malicious prosecution theory. The DIRECTORS cited three decisions in support of their position - Cate v. Oldham, 450 So.2d 224 (Fla. 1984), Cypher v. Sesal, 501 So.2d 112 (Fla. 4th DCA 1987), and Riverbend Marine, Inc. v. Sailing Associates, Inc., 539 So.2d 507 (Fla. 4th DCA 1989). While two of the former decisions contained dicta which might appear on the surface to support the result reached by the trial court below, a more thorough analysis shows that they do not.

It is difficult to argue against the wisdom or desirability

of the public policy which Cate and Cypher seek to advance. The issue posited by the Federal Appellate Court to this Court in Cate was as follows:

> Under the common law of Florida, may a state official who has been sued in his official capacity for alleged negligence in the exercise of his official duties, maintain an action for malicious prosecution against plaintiffs in a negligence action?

Cate points out that the English courts and, subsequently, the pre-revolutionary war judges in this country, disfavored the allowing of malicious prosecution actions by government officials against the unsuccessful citizen-litigants, based upon the potential chilling effect which such actions would have upon the citizen's right to petition his fellow citizens for redress of grievances by the government. Cate concluded that "there simply is no historical basis for a state officer to retaliate with a malicious prosecution action when he has been sued in his official capacity", and refused to allow such a suit in a case before it. While the court properly relied upon the English common law in reaching this decision on the substantive issue, it went on to make an observation about the procedural issue of taxation of costs and its effects upon the malicious prosecution claim, which was both at variance with the law of Florida as stated in Codomo and the cases cited therein, and with the rules governing the law of "election of remedies." Cate strays from the mark when it states the following:

> 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. Parker v. Langley, 93 Eng. Rep at 297. There being no Florida decision or statute to the contrary, the common law precludes such an attempted double recovery here.

This statement was expressly directed at the effort by a government official who sued only in his or her official capacity, to sue at malicious prosecution, where he or she had suffered no personal loss which is not redressable to his or her application for relief in the suit in which he or she is originally sued. Cate found that "It is reasonable to compel such officials to seek such redress in the suit at which they are named defendants in their official capacity."

But, under the common law of Florida, a successful defendant mav not tax costs and fees in an original action, absent a statute or contract allowing same. Furthermore, there is no matter of public policy or equitable consideration which would operate to bar a private litigant from recovering the limited elements of "taxable costs" in an underlying action, while seeking to recover substantive losses for which such a litigant may not be redressed in the underlying action, by way of a subsequent suit for malicious prosecution. To the contrary, it would be inequitable to bar such a private litigant from being made whole, as a result of his recovery of the limited and distinct expenses qualifying as "taxable costs." Thus, the actual holding in Cate may be sound upon public policy grounds, but the dicta suggesting that a successful litigant can tax "fees" in the original action is

contrary to the unanimous authority in Florida. Furthermore, it should be deemed contrary to public policy, to the extent that deserving litigants are barred from being made whole, by way of a malicious prosecution suit, for elements of damage and loss for which there is no redress in the underlying action.

The Fourth District's subsequent decision in Cypher begins from the same premise as Cate - the desire to protect the citizen's right to petition the government for redress, then extends the erroneous dicta in Cate to a situation involving damages also suffered by the government official in his individual capacity. The court once again assumes that the "common law" permits the successful defendant to tax costs and fees in the original action or to sue for malicious prosecution on the basis of those losses. Cypher goes on to conclude that an appellant has "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 the judgment entered thereon, the appellant is barred from seeking additional damages." Cypher cites directly to the erroneous dicta in Cate as the basis for this holding. Hence we are confronted with the anomalous situation in which the trial court felt compelled to apply a rule governing procedure before the common law courts of England, in a jurisdiction where, in fact, the procedural rule on the same subject is exactly contrary to the English rule! This result is not supported by the authorities,

nor is it necessary from a public policy standpoint. More importantly, however, it is unjust from the standpoint of the injured litigant. How unfair to unexpectedly apply authority only directly governing suits by government officials against citizens, so as to bar malicious prosecution claims between private individuals!

In view of its recent decisions of Riverbend Marine, Inc. v. Sailing Associates, Inc., 539 So.2d 507 (Fla. 4th DCA 1989); Jave v. Royal Saxon, Inc., 573 So.2d 425 (Fla. 4th DCA 1991); and Urbanek v. The 18th Hole at Inverrary Condo. Assn. Inc., 582 So.2d 154 (Fla. 4th DCA 1991) (the companion case to this one), the Fourth District, in its Opinion herein, not unexpectedly adhered to its decision of Cypher v. Seqal, 501 So.2d 112 (Fla. 4th DCA 1987). The DEVELOPERS, however, would urge this Court to consider this issue, and, consistent with Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), and Judge Warner's special concurrence in Jaye, supra, determine that a successful defendant in an underlying action, who merely has sought taxable costs, should not thereby be barred from suing in malicious prosecution to recover damages, including attorneys' fees, which could not be recovered in the underlying action.

In expressing its disagreement with the Fourth District's Cypher opinion, the Turkey Creek court stated:

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

damages which were not recovered in the original action."

567 So.2d at 948. Turkey Creek proceeded to oberve that:

> 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 . . . . Cate . . . 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 defendant who does not seek costs in the first action.

Id. Clearly, Turkey Creek is much more consistent with the rule that "under Florida law . . . the election of remedies doctrine applies only where the remedies in question are co-existent and inconsistent. Barbe v. Villeneuve, 505 So.2d 1331, 1332 (Fla. 1987) (additional citations omitted).

CONCLUSION

This Court should take the opportunity to correct the course upon which the law of malicious prosecution has been steered, by recognizing the realities of the law in Florida governing the recovery of attorneys fees and of the other damages which may have been caused by malicious prosecution of an underlying action. The Court is respectfully requested to reverse the Opinion of the Fourth District Court of Appeal affirming the Final Summary Judgment appealed from herein, and remand this case for trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy of the foregoing was furnished ANTHONY A. BALASSO, Esquire, WALTON LANTAFF SCHROEDER & CARSON, Attorneys for Respondents, Post Office Box 14309, Fort Lauderdale, Florida 33302; RICHARD A. SHERMAN, Esquire, Counsel for Respondents, 1777 South Andrews Avenue, Suite 302, Fort Lauderdale, Florida 33316; and DANIEL L. HAVERMAN, Esquire, GREEN, HAVERMAN & ACKERMAN, Attorneys for Respondents, 315 Southeast 7th Street, Suite 200, Fort Lauderdale, Florida 33301, by mail September 14, 1992.

GUNSTER, YOAKLEY & STEWART, P.A.
Attorneys for Petitioners
Post Office Box 14636
Fort Lauderdale, Florida 33302
Telephone (305) 462-2000

By: _____
J. CAMERON STORY, III
Florida Bar No. 254525

387/1307