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 XUSHEL, LOUIS HEYERS, 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' REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Given the somewhat interesting but inaccurate "spin" RESPONDENTS/DIRECTORS have sought to put on the facts of this case, DEVELOPERS/PETITIONERS find it necessary to present an additional Statement of the Case in order to clarify certain misimpressions. Judge Reasbeck's Order on Defendant's Motion For Summary Judgment stated specifically as follows:

> [T]he Defendants' . . . Motion for Summary Judgment is granted upon the same srounds as set forth in this Court's Order . . . dated June 4, 1990.

The June 4, 1990 Order referred to above was the Order Granting Defendants' Motion for Summary Judgment in favor of the ASSOCIATION, the DIRECTORS' co-defendant. As this Court will see from a review of the June 4, 1990 Order, Judge Reasbeck granted Summary Judgment to the ASSOCIATION based solely upon the interpretation of Cate v. Oldham, 450 So.2d 224 (Fla. 1984), found in this Court's decision of Cypher v. Sesal, 501 So.2d 112 (Fla. 4th DCA 1987), and his determination that Appellants had elected their remedy under Villeneuve v. Atlas Yacht Sales, Inc., 483 So.2d 67 (Fla. 4th DCA 1986), by recovering their taxable costs at the conclusion of the underlying action.

Judge Reasbeck never reached the following conclusions:

1. That these Defendants ever sought attorneys' fees from the Association under either Section 57.105, Florida Statutes, or any other theory (as RESPONDENTS inaccurately and misleadingly "spin" in this Court's direction on Pages 3-4 of their Answer Brief.

2. That the denial of a Section 57.105 motion filed by a party other than these defendants would have any effect on these Defendants' malicious prosecution claim, let alone prevent them from establishing "lack of probable cause."

3. That there was no "bona fide termination" of the Association's action in the Defendants' favor, since Defendants prevailed on a "settlement agreement" rather than on the merits of the Association's claims.

These PETITIONERS challenge the RESPONDENTS either to provide this Court with some record bases for their inaccurate assertions or to recant them, so that this Court can have a better understanding of what actually occurred below. Their sole support for any of their bald misrepresentations is a Motion filed by certain quite differently situated co-defendants in the case below.

Furthermore, on Pages 3 and 4 of their "Statement of the Case and of the Facts", the DIRECTORS purport to tell this Court what "the facts were", again without any Record basis. These PETITIONERS already have won a trial before Circuit Court Judge Otis Farrington on the factual issues presented at Pages 3 and 4 of the Answer Brief, and, his findings on the subjects touched upon by the DIRECTORS in their Answer Brief, were rather different than the DIRECTORS would have this Court believe. This discussion, however, is academic, inasmuch as there was no evidence concerning any "defects" or any "repairs" before the trial court, or in the Record on Appeal. Accordingly, this Court should ignore or strike all of such

unsubstantiated arguments and representations from the Answer Brief, as prayed for in PETITIONERS' Motion to Strike.

ARGUMENT

SINCE THE DEVELOPERS NEVER SOUGHT OR WERE DENIED THEIR ATTORNEYS' FEES OR COMPENSATORY DAMAGES ON *ANY* GROUNDS, IN THE UNDERLYING ACTION, THEY HAVE NEITHER ELECTED THEIR REMEDIES NOR ARE THEY ESTOPPED COLLATERALLY FROM SEEKING THOSE ATTORNEYS' FEES IN THE PRESENT MALICIOUS PROSECUTION ACTION.

Two of the DIRECTORS' three points on appeal proceed upon facially erroneous grounds. As stated above, the record shows that the DEVELOPERS never moved for or sought an award of their attorneys' fees from the ASSOCIATION or the individual defendants, by any means.

The DIRECTORS baldly assert throughout their Answer Brief that the DEVELOPERS "moved for attorneys' fees [pursuant to FSA 57.1051 on the grounds that the original lawsuit was a claim that was not meritorious . . . ." and, accordingly, the DEVELOPERS have (1) elected their remedies; (2) are somehow collaterally estopped and/or estopped by judgment from seeking their damages at this time; and (3) cannot prove all of the elements of malicious prosecution, since the trial judge somehow ruled that the ASSOCIATION's claim **was** meritorious, thus establishing "probable cause."

It should be noted at the outset that nowhere in the record on appeal is it established as a matter of fact, that anyone moved for an award of attorneys' fees under Section 57.105. The only place in this record where the effort by the developers of Phase II (**not** these DEVELOPERS/PETITIONERS) to

obtain attorneys' fees is even suggested is in the copy of the Order on Defendants' Motion for Attorneys Fees which was attached to a Motion To Dismiss filed by the DIRECTORS in the underlying action. Such attachments to a Motion To Dismiss do not even constitute **"facts"** which can be relied upon by the movant, let alone the DIRECTORS.

Furthermore, even if the Court does bestow any dignity upon this paper, it is clear from a review of said **Order** that it in no way related to these DEVELOPERS/PETITIONERS. For numerous reasons, including the fact that these DEVELOPERS'/PETITIONERS' position differed from the position of the Phase 11 developers in significant respects, such a ruling is not binding upon the DEVELOPERS/PETITIONERS.

The very suggestion that there was no bona fide termination of the underlying action in favor of the DEVELOPERS/ PETITIONERS, is incredible! First of all, as has been stated above, the trial court did not rule upon that contention in the proceedings below. Indeed, it could not have done so on a Motion to Dismiss, and did not do so in granting the DIRECTORS' Motion For Summary Judgment.

Furthermore, the underlying action clearly **was** terminated in favor of the DEVELOPERS/PETITIONERS. There was no mere termination of the action on "technical grounds" or for "procedural reasons", but a clear finding by the trial court, following a full trial, that all of the claims of the Association, which were wrongfully **and** maliciously instigated by the DIRECTORS, were barred by virtue of the Settlement

Agreement upon which the DEVELOPERS/PETITIONERS predicated their defense.

Della-Donna v. Nova University, Inc., 512 So.2d 1051 (Fla. 4th DCA 1987), is patently distinguishable from the case at bar. In Della-Donna, the malicious prosecution plaintiff, first settled a number of claims in the underlying action (including a claim for defamation which was dismissed for lack of standing), then himself brought the malicious prosecution claim. In the present case, the DEVELOPERS/PETITIONERS settled the underlying action with the Association, then were sued by the Association, at the DIRECTORS' behest, upon exactly the same theories as were settled in the underlying action. Only after the DEVELOPERS defeated the spurious underlying action, did the DEVELOPERS/PETITIONERS file their action against the ASSOCIATION and the DIRECTORS for malicious prosecution. Hence, the present case has absolutely no similarity to Della-Donna, either factually, or with respect to the legal principles involved.

Finally, the DEVELOPERS/PETITIONERS never made any claim that the ASSOCIATION's action against it was "totally frivolous and without merit." Presumably, such a claim would have been made in contemplation of the language of Section 57.105, Florida Statutes. As was stated in Allen v. Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), rev. den. 392 So.2d 1373 (Fla. 1980):

> In order to find a complete absence of a justiciable issue of either law or fact under Section 57.105, a trial court must find that the action was so devoid of merit bath on the facts and the law as to be completely untenable.

Such a standard is a far cry from that which the DIRECTORS acknowledge to be the rule governing malicious prosecution actions ("No probable cause for commencing the [underlying] proceeding.")

The DEVELOPERS/PETITIONERS again urge the Court, consistent with Judge Warner's special concurrences in Jave v. Royal Sazon, Inc., 573 So.2d 425 (Fla. 4th DCA 1991) and Jackson v. Dusser, 16 F.L.W.D. 327 (Fla. 4th DCA 1991), to rule consistent with Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), that a successful defendant in an underlying action, who merely has moved to tax 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.

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, 1132 (Fla. 1987) (additional citations omitted).

In closing, the DEVELOPERS feel it necessary to address the arguments presented on pages 13-14 of the Answer Brief. The DEVELOPERS certainly do not argue that a finding that they had no malicious prosecution claim against the ASSOCIATION, would not also bar such a claim against the DIRECTORS. Any suggestion to the contrary in the Answer Brief can be ignored.

The DEVELOPERS do argue, however, that the individual

directors of a corporation can be personally liable, even where they committed a tort while performing acts within the scope of their employment or duties. The law of Florida is unanimous in imposing such personal tort liability. Orlovsky vs. solid Surf, Inc., 405 So.2d 1363, 1364 (Fla. 4th DCA 1981); Powerhouse. Inc. vs. Walton, 557 So.2d 186, 187 (Fla. 1st DCA 1990); Derf Cattle Comsany vs. Colpac International, Inc., 463 So.2d 430 (Fla. 3d DCA 1985); and Littman vs. Commercial Bank and Trust Comsanv, 425 So.2d 636, 640 (Fla. 3d DCA 1983).

The DIRECTORS' reliance upon the case of Olympian West Condominium Association, Inc. vs. Kramer, 427 So.2d 1039 (Fla. 3d DCA 1983), is totally misplaced. Olympian West held only that:

> Principals of [a] developer-builder who served, pursuant to the designation of the developer, as directors of the condominium association prior to assumption of control by the unit owners, are not personally liable in that latter capacity to the association for the existence of, or the failure to correct construction defects in the condominium building which are allegedly created by the developer itself.

In formulating this special rule for the hybrid situation involved, the Olympian West court expressly relied upon its interpretation of Section 718.303(1)(c), Florida Statutes (1981).

While the PETITIONERS would have been entitled to the protections of the Olympian West rule, in responding to a breach of fiduciary duty claim brought against them by the Association, based upon construction defect claims, the special exception has no application to the present claim by the

DEVELOPERS against the unit owner-elected DIRECTORS. To the contrary, the DIRECTORS may be personally responsible for torts which they committed against the DEVELOPERS in this case.

This "personal liability" issue is not properly before this Court at the present time, since it was not argued to or relied upon by Judge Reasbeck in granting the Summary Judgment presently on appeal. The issue will, however, be very much alive should this Court grant relief to the DEVELOPERS, or should the DEVELOPERS obtain such relief by way of further appellate proceedings.

CONCLUSION

In conclusion, the DIRECTORS have presented a number of erroneous grounds for affirmance, and this Court is urged to reverse the trial court and bring its position in line with the preferred application of the doctrine of election of remedies as found in Turkey Creek.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy of the foregoing was furnished G. BART BILLBROUGH, Esquire, WALTON LANTAFF SCHROEDER & CARSON, Attorneys for Appellees, Post Office Box 14309, Fort Lauderdale, Florida 33302; RICHARD A. SHERMAN, Esquire, Counsel for Appellees, 1777 South Andrews Avenue, Suite 302, Fort Lauderdale, Florida 33316; and DANIEL L. HAVERMAN, Esquire, GREEN, HAVERMAN & ACKERMAN, Attorneys for Appellees, 315

Southeast 7th Street, Suite 200, Fort Lauderdale, Florida 33301, by mail November 6, 1992.

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