067

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MILDRED JAYE,

Petitioner

v.

ROYAL SAXON, INC.

Respondent /

Case No. 91,652

4 DCA Case No. 97-1864

Palm Beach
L.T. Case No. CL 96-4916

FILED
SID J. WHITE
FEB 6 1997
SUPREME COURT
Deputy Clerk

ON CERTIFIED CONFLICT REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

APPELLANT'S INITIAL BRIEF

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Certificate of Interested Persons for Purposes of Recusal

1. Mildred Jaye (defendant/petitioner)
2. Edward A. Marod, Esq. of the firm of Edward A. Marod, P.A. (Counsel for /petitioner)
3. Royal Saxon, Inc., a Florida corporation not for profit (plaintiff/respondent)
4. Walton, Lantaff, Schroeder & Carson, P.A. (counsel for plaintiff/respondent)
5. Hon. Richard Wennet, Circuit Court Judge Fifteenth Judicial Circuit of Florida (trial judge)
6. Anne Zimet, Esq. (counsel for plaintiff/respondent)

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal of a decision rendered September 17, 1997 by the District Court of Appeal of Florida, Fourth District, in *Mildred Jaye, Petitioner v. Royal Saxon, Inc., Respondent,* 22 Fla. L. Weekly D2199 (Fla. 4th DCA Case No. 97-1864, Opinion Filed September 17, 1997). Appendix (hereinafter "A.") 1. A timely notice invoking this Court's jurisdiction was filed on October 14, 1997. A. 2.

> The decision of the court, *sub judice*, holds:
> We summarily dismiss the petition for writ of certiorari because the court lacks subject matter jurisdiction over the challenged order striking Petitioner's demand for jury trial. *See, Bared & Co., Inc. v. McGuire*, 670 So.2d 153, 156 (Fla. 4th DCA 1996); *Lindsey v. Sherman*, 402 So.2d 1349, 1349 [sic] (Fla. 4th DCA 1981). We also certify conflict with *Johnson Engineering, Inc. v. Pate*, 563 So.2d 1122 (Fla. 2d DCA 1990); *Quality Coffee Service, Inc. v. Tallahassee Coca-Cola Bottling Co.*, 474 So.2d 427 (Fla. 1st DCA 1985), and *Spring v. Ronel Refining, Inc.*, 421 So.2d 46 (Fla. 3rd DCA 1982).

App. 1.

This action (Palm Beach County Circuit Court Case No. CL 96-4916 AN, hereinafter "the 96 case") was filed on June 6, 1996 by Royal Saxon, Inc. ("RS") against Mildred Jaye ("Jaye") to collect a special assessment and foreclose the lien of those assessments. App. 5. After an agreed extension of time to plead, App. 46, on July 29, 1996 Jaye filed an Answer, Affirmative Defenses and Motion to Strike, App. 48, as well as a Motion to Transfer and Consolidate with Case No. CL 95-4773-AN ("the 95 case") in which jury trial had been demanded. The trial court, through Hon. James T. Carlisle, on August 22, 1996, granted the motion to transfer the 96 case and deferred ruling on the motion to consolidate, leaving that to the judge in the division to which the case was transferred. App. 53. After transfer, the Hon. Richard Wennet, denied consolidation of the 95 case and the 96 case for trial but granted consolidation for the purposes of discovery. App. 55.

Before the case was set for trial in Judge Wennet's division, but after Judge Wennet denied consolidation of the 96 case with the 95, in order to preserve her rights of setoff and her counterclaim in the 95 case in the event that the 96 case went to trial first, Jaye moved to amend her

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answer and defenses to add an additional defense and a counterclaim raising these same issues. App. 57. In the proposed amendment, Jaye included a demand for jury trial in the ad damnum clause of the proposed counterclaim. The trial court granted the motion to amend, but only to the extent of permitting the addition of the affirmative defense of setoff. *Id.* (transcript) App. 65 (order). There were no conditions imposed on the grant of leave to amend.

On December 13, 1996, Jaye served her Amended Answer and Affirmative Defenses and Demand for Jury Trial, including for the first time in the 96 case the affirmative defense of setoff for damages suffered by Jaye due to various breaches of statutes, contracts and injunction by RS. This defense injected into this case, for the first time, new issues of fact relating to Jaye's claim that she had suffered monetary damages as a result of wrongful conduct by RS. App. 66. Pursuant to *Adler v. Seligman of Florida, Inc.*, 492 So.2d 730, 733-34 (Fla. 4th DCA 1986) *rehearing denied*, Jaye included in the amended pleading a demand for jury trial. *Id.*

RS filed a motion to strike the affirmative defense on January 7, 1997. The motion to strike the affirmative defense was granted in part and denied in part. It was denied to the extent that the wording of the affirmative defense was limited to the precise wording which had been included in the draft which had been attached to the motion to amend, but granted to the extent that additional language had been added to explain the precise issues which were being claimed as the basis of the setoff claim. App. 73. After that ruling, Jaye filed a separate demand for jury trial, App. 74. RS then filed a motion to strike the demand for jury trial. App. 75. The motion to strike was heard on March 12, 1997, with the trial court requesting the submission of authorities with respect to the issue of the trial court's discretion in granting a demand for jury trial after a case had once been set for trial. The parties then submitted such authorities. App. 104 (Jaye's controlling authorities list with attachments) and App. 119 (RS's submission). After a long period of time in which the matter was under advisement, on April 30, 1997, Judge Wennet granted RS's Motion to Strike the Demand for Jury Trial, without stating the basis of the ruling in any way. App. 124.

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Jaye timely served a petition for certiorari with the Florida District Court of Appeal, Fourth District, seeking review of the order striking the demand for jury trial. This was done, notwithstanding the Fourth District's history of denying such petitions under the doctrine of *Lindsey v. Sherman*, 402 So.2d 1349 (Fla. 4th DCA 1981) and its progeny in the hope of obtaining a certification of conflict between the position of the Fourth District with respect to its subject matter jurisdiction to review orders relating to the denial of jury trials and the contrary position of its sister courts in the First, Second and Third Districts.[1] As noted above, the petition was summarily dismissed for lack of subject matter jurisdiction, but conflict was certified as prayed.

[1] Hope that conflict might be certified was provided by the decision in *AIG Life Insurance Company v. Boroughf*, 588 So.2d 342 (Fla. 4th DCA 1991), in which the District Court of Appeal, Fourth District, had previously certified the conflict.

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SUMMARY OF ARGUMENT

The right to trial by jury is a right guaranteed to all citizens by the Constitution of the State of Florida. Indeed, the right to trial by jury is a fundamental right which even predates the constitutions which now govern us. As such a right, its denial, alone, should suffice to present sufficient material injury throughout the balance of the proceedings to give rise to certiorari jurisdiction in the District Courts of Appeal to review orders striking demands for jury trials, or otherwise denying a party the right to a trial by jury where properly demanded.

Besides the fundamental harm presented by the denial of this constitutional right, a party improperly denied the right to trial by jury suffers other harms as well. These harms include the harm attendant upon "showing one's hand" with respect to how the documents and witnesses will be used at trial. The methods by which the evidence will be used can be powerful only once. If denied interlocutory review, these must be used at the first, non-jury trial, as a hedge against affirmance of the decision concerning the right to jury trial. If so used, and a jury trial is ordered, their value will no longer exist at the jury trial.

Furthermore, the cost to the witnesses, parties, lawyers and the courts associated with a second trial cannot be ignored. Where, as here, *de minimis* involvement by a District Court of Appeal can obviate many thousands of dollars of expense to the parties, the witnesses, the courts and the community, the court system's goals of just, speedy and economically adjudication cry for such review to be permitted.

At present, there is a division of authority between the First, Second and Third Districts, which permit certiorari review of orders striking demands for jury trial and the Fourth and Fifth Districts which do not. The fortuity of where one happens to file suit, or be sued, should not determine whether such an important and fundamental right may be denied without any possibility of interlocutory review.

Finally, since there is no practical difference between an order denying trial by jury and an order requiring arbitration, there is no good reason why Rule 9.130 does not contain a provision specifically permitting review of orders denying a demand for jury trial as a matter of right.

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ARGUMENT

I. WHETHER A PETITION FOR A WRIT OF CERTIORARI SEEKING REVIEW OF A TRIAL COURT ORDER STRIKING A DEMAND FOR JURY TRIAL IS WITHIN THE JURISDICTION OF A DISTRICT COURT OF APPEAL

The decision of the court, *sub judice*, holds:

> We summarily dismiss the petition for writ of certiorari because the court lacks subject matter jurisdiction over the challenged order striking Petitioner's demand for jury trial. *See, Bared & Co., Inc. v. McGuire*, 670 So.2d 153, 156 (Fla. 4th DCA 1996); *Lindsey v. Sherman*, 402 So.2d 1349, 1349 [sic] (Fla. 4th DCA 1981). We also certify conflict with *Johnson Engineering, Inc. v. Pate*, 563 So.2d 1122 (Fla. 2d DCA 1990); *Quality Coffee Service, Inc. v. Tallahassee Coca-Cola Bottling Co.*, 474 So.2d 427 (Fla. 1st DCA 1985), and *Spring v. Ronel Refining, Inc.*, 421 So.2d 46 (Fla. 3rd DCA 1982).

App. 1. As stated within its terms, this holding directly and expressly conflicts with the holdings in *Johnson Engineering, Inc. v. Pate*, 563 So.2d 1122 (Fla. 2d DCA 1990); *Quality Coffee Service, Inc. v. Tallahassee Coca-Cola Bottling Co.*, 474 So.2d 427 (Fla. 1st DCA 1985), and *Spring v. Ronel Refining, Inc.*, 421 So.2d 46 (Fla. 3rd DCA 1982).[2]

The reasoning of the Fourth District may be summarized as saying that the denial to a litigant of the constitutionally guaranteed right of a trial by jury does not present a situation which cannot be adequately remedied by reversal on plenary appeal followed by a new trial following the constitutionally mandated procedure. *Lindsey v. Sherman, supra*, [interlocutory order striking demand for jury trial can be rectified by plenary appeal]; *Bared & Co., Inc., v. McGuire, supra*, at 157, fn.3 [to us harm is not irreparable if it can be corrected on final appeal]. Thus, in the geographical area within the territorial jurisdiction of the Fourth District Court of Appeal, the denial of the constitutionally guaranteed right of trial by a jury is considered to be no more significant than the denial of a motion to dismiss a complaint for failure to state a cause of action. Since not made appealable as a matter of right under Fla. R. App. P. Rule 9.130, denials of jury trials to persons constitutionally

[2]None of these decisions has ever been reversed or disapproved by subsequent opinion of this Court.

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entitled to them cannot be reviewed until after a non-jury trial has been foisted upon them, and much of the advantage of a jury trial in the first instance lost.

The District Courts of Appeal for the First, Second and Third Districts analyze the issue somewhat differently. For instance, in *Sarasota-Manatee Airport Authority v. Alderman*, 238 So.2d 678 (Fla. 2d DCA 1970), the District Court of Appeal, Second District, held:

> This case illustrates how a basic right such as trial by jury can be litigated almost ancillary to the lesser problem of the appealability of an interlocutory order. We see no constitutional barrier to the grant of common law certiorari under our Florida Constitution, Article V, Section 5(3), where a clear departure from settled principle threatens to prolong litigation needlessly. See 5 Moore's Federal Practice s 39.13. We exercise this constitutional power sparingly, and only in the interest of expediting justice in clear cases. [emphasis added]

Id. at 679-80. Likewise, in *Spring v. Ronel Refining, Inc., supra*, after stating its agreement with the foregoing quote, the Third District Court of Appeal held:

> . . . the denial of the right to jury trial is more than the denial of a constitutional right; it is the denial of a fundamental right recognized prior to the adoption of a written constitution. The right to select the peers to which one's cause will be submitted is unique and indispensable to the adversary system. For this reason, we deem certiorari to be the appropriate remedy in this instance. . . . If we are accused of granting special dispensation by the review of this type order, then our critics can take solace in the fact that there will be few instances where litigants will present to us similar problems of such great consequence. [footnote omitted at ellipsis; emphasis added]

421 So.2d 46 at 47-48. The analysis of this issue by the First, Second and Third Districts gives the fundamental right of trial by jury the respect it deserves. The "knee-jerk" analysis of the Fourth District does not.

Although this Court has never spoken directly on the subject of the availability of interlocutory review of an order striking a demand for jury trial, it has, itself, taken jurisdiction to review such orders by common law certiorari. For instance, in *Wincast Associates, Inc., v.*

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Hickey, 342 So.2d 77 (Fla. 1977), this Court granted a petition for a writ of certiorari to review, and reverse, a decision of the Fourth District Court of Appeal which had affirmed a trial court's interlocutory order denying the petitioner's request for a jury trial. Thus, even this Court, with far more restricted rules for accepting jurisdiction than the District Courts, has in the past reviewed interlocutory orders concerning a denied demand for jury trial.

While it must be admitted that the case load of the appellate court system has increased since 1977, and that the jurisdiction of the Supreme Court has been restricted even further since then, there has been no change in the constitutional jurisdiction of the District Courts of Appeal in respect of its certiorari jurisdiction since that time. *Compare*, Constitution of the State of Florida, Article V, Section 4, ["A district court of appeal may issue writs of . . . certiorari "] *with*, Constitution (1968 Revision), Article V, Section 5 ["A district court of appeal may issue writs of . . . certiorari . . ."] Thus, it should be clear that the jurisdiction which existed to permit this Court and the Fourth District Court of Appeal to consider *Wincast Associates, Inc., v. Hickey, supra*, continues to exist today.

In *Martin-Johnson, Inc., v. Savage*, 509 So.2d 1097, 1099 (Fla. 1987), this Court explained:

> A non-final order . . . is reviewable by petition for certiorari only in limited circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal.

That is precisely the situation created by the wrongful denial of a demand for trial by jury in a civil case.

The denial of a demand for jury trial inflicts a tremendous harm on the person who demanded a trial by jury, which cannot be remedied on plenary appeal. The principal such harm, of course, is the denial of fundamental right to a trial by jury, which pre-dates even the adoption of our written constitutions, and which is unambiguously set forth in both the Florida Constitution and the Constitution of the United States. This harm to a constitutionally protected right, alone, should be

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sufficient to give the District Courts of Appeal jurisdiction for certiorari review. *Clear Channel Communications, Inc. v. Murray*, 636 So.2d 818 (Fla. 1st DCA 1994) [certiorari review of allegedly invalid prior restraint in violation of First Amendment right of free speech]; *Rho-Sigma, Inc. v. International Control and Lower Measures Corp.*, 691 So.2d 16 (Fla. 3rd DCA 1997) [certiorari review of denial of due process]; *Joseph v. State*, 642 So.2d 613 (Fla. 4th DCA 1994) [certiorari review of infringement on First Amendment right of freedom to express religion at trial]; *Saracusa v. State*, 528 So.2d 520 (Fla. 4th DCA 1988) [possible violations of Fourth and Fifth Amendment rights are *per se* sufficient irreparable harm to invoke certiorari jurisdiction].[3]

In addition, there is the not insubstantial harm that flows from being forced to "show one's hand" at the first, non-jury trial and the concomitant harm that a well-heeled opponent (like RS, here) can cause between the two trials and at the second one. Although pre-trial procedure has been regulated to the extent of requiring pre-trial disclosure of the identity of witnesses and documents that will be used at trial, the actual use of the documents and the related examination of the witnesses is never fully disclosed before trial. As the Justices of this Court know from their years of trial practice, once the actual use of documents at trial is disclosed, and once a devastating cross-examination has been used, it can never again be as powerful. This is so because opponents in litigation, at a second trial, are able to present their cases in such a way as to avoid the powerful cross, additional documents or witnesses suddenly appear explaining away the documents previously used, and clever lawyers devise attacks on the presentation which had never previously been considered. Thus, this type of advocacy is valuable only once. If forced to "spend" it at a non-jury trial, which must be done to hedge against the possibility that the right to a jury trial will not be upheld on appeal, a party has lost this value, and can never get it back again for the jury trial to which she was constitutionally entitled.

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[3] A harm which is a corollary to the first is the risk that, during a non-jury trial, the right to a trial by jury might inadvertently be waived.

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In this particular case, there is another harm related to the fact that the witnesses, including Jaye, are not young. Thus, if a jury trial is not granted with respect to the "first go 'round" of this case, there is a serious risk that neither Jaye nor the others will be around for the second.

Finally, there is the harm of the double inconvenience that will need to be suffered by the witnesses, the parties and their attorneys if the case must be tried twice and the harm related to prolonging the litigation needlessly. Notwithstanding the fact that the decisions are legion branding this "harm" as legally insufficient to support certiorari jurisdiction, this harm is real, and irreparable, and any court that ignores this in order to reduce its own caseload, or that of another court, has lost touch with reality and the principal goals of the justice system.

The principal goal of the justice system is to provide a just, speedy and inexpensive determination of disputes. That is why Rule 1.010 of the Florida Rules of Civil Procedure and Rule 2.010 of the Florida Rules of Judicial Administration both say that the rules are to be construed to secure just, speedy and inexpensive determinations. *See also* Fla.R.Crim.P. Rule 3.020; Florida Rules of Traffic Court, Rule 6.020; Fla.Sm.Cl.R. Rule 7.010(a); Fla.R.Juv.P. Rule 8.000; Fla.Fam.L.R.P. Rule 12.010(b)(1). The cost of a single trial, conducted efficiently, but with due regard for valuable rights of the parties at stake, is beyond the financial reach of most. *See, e.g.*, Matthews, Joseph M., "Is It Possible to Try a $100,000 Business Case to a Jury Without Bankrupting Yourself and Your Client?" *Florida Bar Journal*, Volume LXXI, Issue 9, p. 65 (October, 1997). Having two trials and a plenary appeal, accompanied by a serious risk of the inadvertent waiver of fundamental constitutional rights is neither as just, as speedy, nor as inexpensive as an expeditious certiorari proceeding followed by a single trial, properly configured, whether it be as a jury trial or as a non-jury one. While permitting a non-jury trial to be conducted, and denying any appeal until the conclusion of the case, might, will probably be more speedy than permitting certiorari review which affirms the trial court, if a party was entitled to trial by jury, the result will be horribly unjust, tremendously

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expensive, and causative of unconscionable delay. Haste, in this regard, certainly makes waste.

Under the Constitution of the State of Florida, "The right of by jury shall be secure to all and shall remain inviolate." Constitution, Article I, Section 22. Absent an affirmative act of waiver, where a party has timely demanded trial by jury as to an issue triable by a jury, the party is entitled to a trial by jury. *Remax East Realty, Inc., v. Goodco Properties*, 481 So.2d 1281 (Fla. 4th DCA 1986). This Court has held, with respect to this right:

> Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions. See U.S. Constitution, Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, s 22.

Hollywood, Inc. v. City of Hollywood, 321 So.2d 65, 71 (Fla. 1975). Thus, the importance of the right to trial by jury to the American system cannot be questioned.

Admittedly, the additional burden on an already overburdened judiciary, and even the community at large, from a jury trial, instead of a non-jury trial, cannot be questioned. Thus, the desire of that judiciary, and especially the trial judges "in the trenches," as it were, to dispense with jury trials where possible, is easy to understand. Where a party of limited resources clearly cannot afford to try a case twice, so that plenary appeal after the denial of the right to a trial by a jury seems unlikely, the temptation to err in favor of expediency must be nearly irresistible. The law demands that this temptation be resisted, and that the right to jury trial be given its fullest possible effect. However, in the Fourth and Fifth Districts, the current status of the law tells the judges on the front lines that, should they happen to succumb to that temptation, no higher court can look at what was done until after a party's limited resources have been spent at a non-jury trial, or an unjust settlement forced. This situation does not exist in the First, Second and Third Districts, where certiorari review of such decisions is available. This situation should not exist in the Fourth or Fifth Districts either.

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Even where a trial by jury is not timely demanded in connection with the filing of pleadings initially, the filing of an amended pleading which injects a new issue into the case revives the time for filing a demand for jury trial. *Hollywood, Inc. v. City of Hollywood, supra:*; *Adler v. Seligman of Florida, Inc.*, 492 So.2d 730, 733-34 (Fla. 4th DCA 1986) *rehearing denied. See also, Johnson Engineering, Inc. v. Pate*, 563 So.2d 1122 (Fla. 2d DCA 1990); *Shuffler v. Bascom Palmer Eye Institute*, 78 So.2d 418 (Fla. 3rd DCA 1985). In this case, Jaye filed an amended pleading which injected into the case, for the first time, new factual issues[4] relating to her claim for a setoff for damages suffered at the hands of RS, and, in that pleading, demanded a trial by jury. That pleading was attacked by motion to strike. However, after that motion was granted in part, the defense of setoff, injecting the new factual issues relating to her claim for setoff for damages, remained. In an abundance of caution, another demand for jury trial was filed within ten days after the order striking, in part, that defense. Therefore, under controlling authorities, Jaye timely demanded and clearly did not waive her right to jury trial on the issues injected by her affirmative defense of setoff.

The trial court's order cannot be supported on the grounds argued at the trial court, which were not incorporated into the trial court's order. The grounds argued by RS were (1) that jury trial was not permitted because the complaint seeks equitable relief by way of foreclosure of a lien, (2) because no new issues were injected by the defense of setoff, and (3) because granting of jury trial is discretionary with the trial court once the case has been set for trial without a jury. *See*, Notice of Supplemental Authority, App. 162.

The authority cited by RS for the proposition that jury trials are never available where equitable claims are asserted, *Norris v. Paps*, 615 So.2d 735 (Fla. 2d DCA 1993), does not so hold. In fact, that case expressly recognized that, where a legal defense (and legal counterclaim) were raised in defense of a mortgage foreclosure action, the defendant

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[4] It is presumed that a new issue is injected whenever an amendment is permitted, as an amendment would not be needed or permitted if a new issue were not being injected. *Adler, supra*, at 734, fn. 2.

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was entitled to a trial by jury of the entire case. The Fourth District has held that where both legal and equitable issues are presented, where a jury trial is demanded, it must be permitted. *Kreis v. Turtle Reef Condominium I, Inc.*, 614 So.2d 1215 (Fla. 4th DCA 1993). In this case the complaint presents legal issues along with the equitable issues of foreclosure, as it separately seeks a money judgment for allegedly unpaid assessments. Moreover, the added affirmative defense of setoff for damages suffered for breaches of contracts, injunctions and statutes also presents legal issues. Therefore, this argument by RS, *sub judice* is without merit.

Setoff is a concept which may best be understood when contrasted to the concept of recoupment. Recoupment is an affirmative defense which consists of reducing a plaintiff's claim in respect of partial performance by the defendant of the transaction in question. Setoff is an affirmative defense which consists of reducing a plaintiff's claim by the amounts due the defendant from the plaintiff in respect of other transactions between them. The Florida Fourth District Court of Appeal has held:

> Recoupment was a plea of common law origin arising from the same transaction which did not allow the recovery of an affirmative judgment; whereas setoff — a defense of statutory origin — could arise from a separate transaction and would permit recovery of an affirmative judgment. Modern rules of procedure have largely obliterated the historical distinctions.

Beach v. Great Western Bank, 670 So.2d 986, 997, fn. 6 (Fla. 4th DCA 1996) Recoupment is a defense which corresponds with the concept of a compulsory counterclaim, while setoff is a defense which corresponds with the concept of the permissive counterclaim. *Metropolitan Casualty Ins. Co. of New York v. Walker*, 151 Fla. 314, 9 So.2d 361, 362-63 (1942). *See also, Cherney v. Moody* 131 So.2d 866, 867-69 (Fla. 1st DCA 1982) *adopted Allie v. Ionata*, 503 So.2d 1237, 1239 (Fla. 1987) In this case, Jaye asserts that she has damage claims against Plaintiff arising from the matters asserted in her counterclaim in the suit with which the case, *sub judice*, was consolidated solely for the purposes of discovery. The cited authorities clearly establish that Jaye in the context of her affirmative defense of setoff may present evidence of ALL other claims she

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might have against Plaintiff, including those which might be barred by the statute of limitations if brought as a separate lawsuit.

As claims for damages arising from alleged breaches of duties owed under injunctions, contracts, and common law, such claims are clearly claims of the sort to which the right to trial by jury attaches. *Broward County v. La Rosa*, 505 So.2d 422, 424 (Fla. 1987) [inalienable right to jury trial attaches to claim for unliquidated damages]. No such claim was among the defenses originally served by Jaye in this case. This claim was injected by the amendment which added the claim of setoff. Therefore, the addition of the claim of setoff injected new claims to which the inalienable right of jury trial attached.

It is clear that the amendment of a pleading which does not inject a new, jury triable issue does not revive a party's right to demand a jury trial, and that any demand for jury trial after an amendment relates only to the issues raised by amendment. Thus, the question is whether an affirmative defense of setoff based upon claims of damages for alleged breaches of injunctions, contracts and statutes injects "new issues" where no such demand had been previously made. Jaye suggests that the law is clear that an affirmative defense of setoff, which seeks a reduction in the amount claimed due by virtue of damages suffered as the result of alleged torts and breaches of contract and court orders by the plaintiff, makes legal claims as to which the right to trial by jury attaches. *See, e.g., Johnson v. Kannwischer*, 477 So.2d 1011 (Fla. 1st DCA 1985). Further, the comparison of the sixth affirmative defense with the first five clearly reveals that the issues raised in the sixth defense were not previously raised in the first five.

Finally, it is fundamental that where a demand for jury trial is made within ten days of the last pleading on the issue as to which a jury trial is demanded, leave of court is not required. *Powell v. Southern Bell Telephone and Telegraph Company*, 448 So.2d 72, 74 (Fla. 3rd DCA 1984). Moreover, a court has no discretion to deny such a request where leave to amend was not expressly conditioned on the trial not being delayed by a request for a jury trial. *Johnson Engineering, Inc., supra.*

Thus, in this case, Jaye was clearly entitled to a trial by jury, at least with respect to her claim of setoff, based upon alleged breaches of

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contract, torts and violations of injunctions by RS. The trial court departed form the essential requirements of law in striking her demand for trial by jury. The Fourth District refused to review this clearly erroneous decision based upon its cynical view that being erroneously forced to a trial on the merits without a jury, in violation of one's fundamental constitutional rights, is something which can be remedied by a plenary appeal followed by a second trial with a jury. As it did in *Wincast Associates, inc., v. Hickey, supra*, this Court should reverse the decision of the Fourth District Court of Appeal.

Jaye submits that, when all is said and done, a decision denying a party's demand for jury trial, and instead ordering that party to trial to the court, is precisely analogous to an decision compelling arbitration over the objections of a party seeking a trial to the court or to a jury. There is a provision of Rule 9.130 which permits, as a matter of right, immediate interlocutory appeals from orders determining the entitlement of a party to arbitration. There is no good reason why there is not such a provision with respect to orders determining a party's right to trial by a jury.

CONCLUSION

Because the right to trial by jury is a fundamental constitutional right, which cannot be resuscitated with all of its vitality if denied for a first trial on the merits of a case, this Court should hold that the denial of a demand for trial by jury is a matter within the subject matter jurisdiction of the District Courts of Appeal when brought before them by petitions for writs of certiorari, quashing the decision below and its predecessors. In the alternative, this Court should issue an emergency rule amending Rule 9.130 to add as a matter subject to interlocutory appeal as a matter of right appeals from orders denying a party's demand for trial by jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Anne E. Zimet, Esq., Walton Lantaff Schroeder & Carson, P.A., 1645 Palm Beach Lakes Blvd., Suite 800, West Palm Beach, Florida 33401 and Hon. Richard Wennet, Palm Beach County

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Courthouse, West Palm Beach, Florida by U.S. Mail this 4th day of December, 1997.

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APPENDIX

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