IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 91,652

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MILDRED JAYE,

Petitioner,

vs.

ROYAL SAXON, INC.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS
(with incorporated appendix)

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PRELIMINARY STATEMENT

The petitioner sought review in the Fourth District Court of Appeal of an order striking her demand for jury trial. The Fourth District summarily dismissed the petition for writ of common law certiorari, but certified conflict with other district courts of appeal. Jave v. Saxon, 698 So.2d 940 (Fla. 4th DCA 1997). The conflict issue is whether a party make seek non-final review by writ of common law certiorari of an order denying a demand for jury trial.

The petitioner, Mildred Jaye, was the defendant/counter-claim plaintiff in the trial court. For ease in reference she will be referred to as the petitioner or by name.

The respondent, Royal Saxon, Inc., was the plaintiff/counter-claim defendant in the trial court. For ease in reference the corporation will be referred to as the respondent or by name.

Since this review comes from a petition for writ of common law certiorari, citations will be made to petitioner's appendix from the Fourth District by reference to "A" and the page number. References to respondent's supplemental appendix, incorporated in this brief, will be made by reference to "SA" and the page number.

STATEMENT OF THE CASE AND THE FACTS

The respondent, Royal Saxon, Inc., is a cooperative association located in Palm Beach County, Florida. Petitioner, Mildred Jaye, is a shareholder and a fee simple owner of a unit at the Royal Saxon cooperative complex. [1] Pursuant to Royal Saxon's cooperative documents, and Chapter 719, Florida Statutes, Royal Saxon is empowered to make and collect assessments for common expenses against the unit owners like Jaye.[2] (A. 1-4).

In mid 1995, Jaye failed to make assessment payments to Royal Saxon as they became due. Royal Saxon filed and recorded a statutory lien against Jaye's unit for the unpaid assessments. Jaye was provided with statutory notice of Royal Saxon's intent to foreclose its claim of lien. Royal Saxon then instituted suit against Jaye in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida to foreclose the lien. Put simply, Royal Saxon instituted a lien foreclosure action against Jaye pursuant to section 7 19.108, Florida Statutes. (A. 1-8).

As an alternative remedy, Royal Saxon had a second count in its complaint. Royal Saxon sought damages based on section 719.303, Florida Statutes, for Jaye's failure to comply with the cooperative documents, and the provisions of section 7 19.1 OS, Florida Statutes, by not making the required assessment payments. See Buddin v. Golden Bay Manor, Inc., 585 So.2d 435,436

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[1] The parties to this proceeding are not appellate, or litigation, novices. One court has stated "[t]o put it mildy, the 'landlord' and the 'tenant' did not get along at all. They were like oil and water; they did not mix." Royal Saxon. Inc. v. Jaye, 536 So.2d 1046 (Fla. 4th DCA 1989). See Jaye v. Royal Saxon, Inc., 544 So.2d 200 (Fla. 1989) (petition for review denied); Royal Saxon, Inc. v. Jave, 573 So.2d 425 (Fla. 4th DCA 1991), quashed, 609 So.2d 20 (Fla. 1992) (discussing malicious prosecution claim), remand, 609 So.2d 787 (Fla. 4th DCA 1993); Jaye v. Royal Saxon, Inc., 687 So.2d 978 (Fla. 4th DCA 1997) (supplementary proceedings).

[2] "The cooperative form of ownership of real property is recognized in chapter 719, Florida Statutes. A 'Cooperative' is a form of ownership of real property where legal title is enjoyed by unit shareholders owning a lease or other muniment of title or possession granted by the association. § 719.103(9) (a) - (c), Fla. Stat. (1989)." Buddin v. Golden Bay Manor, Inc., 585 So.2d 435,436 (Fla. 4th DCA 1991).

(Fla. 4th DCA 1991) ("The unit owners and the association are obligated to comply with the provisions of the Cooperative Act and the cooperative documents. § 719.303, Fla. Stat. (1989)."). Royal Saxon did not demand a jury trial for either of its counts. (A. 1-8).

Jaye answered the allegations of Royal Saxon's complaint and denied its material allegations. Jaye asserted five affirmative defenses: that Royal Saxon did not attach certain documents to its complaint as required by Florida Rule of Civil Procedure 1.130; a lien foreclosure action belongs in the equity jurisdiction of the court, and that Royal Saxon did not have clean hands; that the lien claim was based on an illegal assessment; that Royal Saxon was selectively enforcing a lien against Jaye; and that Jaye had tendered payment of the delinquent assessments. (A. 44-48).

Jaye did not demand a jury trial in her answer and affirmative defenses. Jaye's answer and affirmative defenses were served on July 29, 1996. (A. 44-48).

The lien foreclosure suit was not the only pending litigation between these two parties. Prior to instituting the lien foreclosure suit, Royal Saxon had sued Jaye for injunctive and damage relief. Royal Saxon had sued Jaye to gain access to her unit to repair her balcony. On numerous occasions, Jaye had refused access to Royal Saxon representatives when they attempted to inspect and repair Jaye's damaged balcony. Royal Saxon sought injunctive and damage relief for Jaye's refusal based on Chapter 719. (S.A. 1-7).

In that action Jaye asserted a counterclaim against Royal Saxon. The counterclaim alleged that Royal Saxon had interfered with Jaye's right to quite enjoyment, tenancy and privacy by (i) permitting the resident manager to look into Jaye's unit, (ii) permitting the resident manager to destroy Jaye's lock, (iii) permitting the resident manager to invade Jaye's premise by attempting to enter the unit and use a videotape camera, (iv) permitting the resident manager

to allow workman access to Jaye's unit, and (v) permitting the resident manager to break into Jaye's air conditioning closet. Jaye also alleged that Royal Saxon harassed her by (i) filing its lawsuit, (ii) refusing to respond to Jaye's requests for maintenance. Jaye also contended that Royal Saxon did not treat her equally by (i) refusing to respond to maintenance requests, (ii) refusing to repair or pay for damages to Jaye's unit, (iii) refusing to complete work on Jaye's unit. (S.A. 11-14).

Jaye moved to "transfer" and consolidate the two lawsuits. Royal Saxon's lawsuit was "transferred" to the judge handling Jaye's pending lawsuit, but the issue of consolidation was deferred on August 22, 1996. Royal **Saxon** filed a notice with the trial court that its action was at issue on August 26, 1 996.[3] (A. 49, 5 1, 55).

On September 24, 1996, Jaye moved to amend her answer, affirmative defenses and to add a counterclaim in the lien foreclosure suit. Jaye sought to add a sixth affirmative defense that **as** a result of Royal Saxon's actions, which were not specifically identified, Jaye had suffered damages. As a consequence, Jaye was "entitled to a set-off for her damages against any award which Plaintiff might obtain on its claim." Jaye attached her proposed additional affirmative defense to her motion. (A. 65-66, 77-81).

No where in the proposed amended additional affirmative defense or proposed counter claim did Jaye assert a demand for jury trial. This was the second time **that** Jaye had failed to assert a demand for jury trial in the responsive pleadings to the lien foreclosure case.

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[3] The trial judge who was originally assigned Royal Saxon's lien foreclosure suit erroneously set the matter for non-jury trial, despite the transfer order. However, this improvident setting is of no moment to the issues raised in this proceeding.

The issue of consolidation was brought before the trial judge who was now hearing both matters. He granted consolidation of the two cases for discovery only, and denied the request for a single trial on September 26, 1996. (A. 53).

Prior to Jaye's motion to amend being disposed of by the trial court, an order setting the lien foreclosure case for non-jury trial was issued on October 2 1, 1996. The lien foreclosure case was set for non-jury trial commencing June 2, 1997. (A. 82).

On November 21, 1996, the trial court heard Jaye's motion to amend affirmative defenses. At the outset of the hearing, Jaye conceded that "we have affirmative defense setoffs that we would like to add and we have a counterclaim that is similar to the claim for setoff containing the allegations that relate to the damage claims that Ms. Jave has against Royal Saxon, Inc. . . ." (emphasis supplied) (A. 85). In other words, Jaye conceded that her set-off "claim" in the lien foreclosure case was already at issue in her counterclaim in the original matter between the two parties. Jaye said nothing about a jury trial at the hearing. Jaye said nothing about submitting a proposed affirmative defense different than the one presented to the trial court and Royal Saxon.

The trial court rejected the counterclaim, but allowed Jaye to assert her proposed affirmative defense of "set-off." Jaye was then directed to file her amended affirmative defense within 10 days. (A. 91). Jaye filed her amended affirmative defense for set-off, but it looked nothing like the affirmative defense that had been presented to the trial court on her motion. Instead, with the exception of adding some minuscule facts, Jaye verbatim copied her denied counterclaim as her new affirmative defense. (A. 92, 77-81). In fact, the new affirmative defense was a near verbatim copy of Jaye's pending counterclaim against Royal Saxon. (S.A. 11-14).

In yet another attempt to end run the trial court's order, Jaye included, and for the first time ever in the lien foreclosure case, a demand for jury trial.

Jaye then moved to strike the non-jury trial setting purporting to invoke Florida Rule of Civil Procedure 1.430(b), which permits a party to demand a jury trial by serving a demand on the opposing party not later than 10 days after the service of the last pleading directed to such issue. (A. 99).

To put the posturing in context: Jaye failed to demand a jury trial in her original answer; moved to amend her affirmative defenses and assert a counterclaim, but failed to demand a jury trial in the proposed amended pleading; let the lien foreclosure case get set for non-jury trial before having the amendment motion heard; failed to apprize the trial court at the amendment hearing that she intended to assert a demand for jury trial; amended her affirmative defenses with a completely different defense than was presented to the trial court, and asserted a jury trial demand also not included in the proposed amended pleading; and then cried wolf in the form of a motion to strike non-jury trial setting.

Royal Saxon moved to strike the "retooled" affirmative defense for the obvious reason that Jaye's amended affirmative defense was nothing more than the rejected counterclaim, and that Jaye had already plead her "setoff" in the form of the counterclaim to Royal Saxon's balcony case. The trial court granted Royal Saxon's motion to strike the "retooled" affirmative defense, however Jaye was allowed to have her affirmative defense, as originally plead deemed filed. No appellate review of this order was sought. (A. 106, 109, 110). Several days later, Jaye filed a demand for jury trial.

Royal Saxon moved to strike the demand for jury trial because no demand was made in Jaye's proposed amended affirmative defense. Jaye had not been given permission by the trial

court to change anything about the amended affirmative defense other than to deem it filed as originally proposed. (A. 112).

The trial court granted Royal Saxon's motion to strike the demand for jury trial on April 30, 1997. (A. 161). Jaye filed a petition for writ of common law certiorari with the Fourth District Court of Appeal seeking review of the order striking her demand for a jury trial.

The Fourth District Court of Appeal dismissed the petition for writ of common law certiorari based on its long standing determination that such orders were not reviewable on a non-final basis. The Fourth District certified conflict with decisions from the First, Second and Third District Courts of Appeal. Jaye, 698 So.2d at 940.

Jaye filed a notice to invoke the discretionary jurisdiction of this Court, and subsequently filed a jurisdictional brief. This Court dispensed with a response brief on jurisdiction, deferred a determination on jurisdiction, and directed the parties to proceed to file briefs on the merits.

ISSUES ON REVIEW

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

SUMMARY OF THE ARGUMENT

The Fourth District has certified conflict with the First, Second and Third District Courts of Appeal on the issue of whether certiorari jurisdiction should lie to review atria1 court order determining a party's entitlement to jury trial. Certiorari review is an extraordinary remedy subject to a rigorous jurisdictional threshold.

An order determining a party's entitlement to jury trial does not meet the jurisdictional threshold for certiorari review. An order denying a jury trial does not subject the party to irreparable harm that cannot be cured by final appeal. The "harm" of delay or expense does not constitute irreparable harm to meet the jurisdictional threshold of certiorari review.

Certiorari review is not a replacement for the limited class of non-final orders which are subject to review based on Fla.R.App.P. 9.130. Certiorari review is a very limited exception to the general policy precluding review of non-final orders. This court has not authorized rule based non-final review of jury trial orders, and should not create a certiorari exception.

Jaye's petition for writ of common law certiorari to the Fourth District was untimely. Jaye did not seek review of an earlier order that effectively disposed of her jury trial demand. Accordingly, this Court can decline jurisdiction because Jaye did not seek timely review pursuant to Fla.R.App.P. 9.100(c).

Finally, if the Court is inclined to carve out a certiorari exception, it should remand this case to the Fourth District for disposition on the merits. On that score, Jaye is not entitled to certiorari on this record.

ARGUMENT

THIS COURT SHOULD NOT PERMIT CERTIORARI REVIEW IN THE DISTRICT COURTS OF APPEAL OF AN ORDER DETERMINING ENTITLEMENT TO A JURY TRIAL

Jaye would have this Court permit certiorari review every time a party's request for jury trial is denied by a trial court. Jaye has put no limitations on her request, meaning that any party in any case could demand a jury trial, whether they may be entitled to it or not, and then attempt certiorari review. This blanket request should be rejected out of hand.

Certiorari review is an extraordinary and limited remedy. An order determining a party's entitlement to jury trial does not meet thejurisdictional threshold for such review. In this case, not only does the order not meet the jurisdictional threshold for certiorari, but the petition was not timely filed. Finally, on the merits, should this Court conclude that review is warranted, it should remand the issue to the Fourth District Court of Appeal for an initial determination on the merits. Alternatively, Jaye is not entitled to certiorari review for both procedural and substantive reasons. For the following reasons, the Court should decline to accept jurisdiction of this certified conflict.

A. An order determining a party's entitlement to jury trial does not meet the jurisdictional threshold for certiorari review.

"District Courts of Appeal in Florida have jurisdiction to review certain non-final orders of trial courts by appeal, and at the same time, to review other non-final orders by separate certiorari jurisdiction." The Bared & Co., Inc. v. McGuire, 670 So.2d 153, 155 (Fla. 4th DCA 1996); see Fla.R.App.P. 9.030(b)(1)(B) (district courts shall review by appeal "non-final orders of the circuit courts as prescribed by rule 9.130."); Fla.R.App.P. 9.030(b)(2)(A) (parties may seek certiorari jurisdiction of district courts to review "non-final orders other than as prescribe

by rule 9.130."). The issue presented to this Court involves use of the district courts' certiorari jurisdiction.

In Martin-Johnson. Inc. v. Savage, 509 So.2d 1097, 1098 (Fla. 1987), this Court emphasized '"that common law certiorari is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." In discussing the non-final order rule, this Court referred to the Committee notes to the 1977 Revision of the Florida Appellate Rules:

> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory orders can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief. Fla.R.App.P. 9.130 (1977 Committee Notes) (emphasis supplied).

There is no question that orders determining a party's entitlement to a jury trial are not included in the list of non-final orders subject to interlocutory review. See Fla.R.App.P. 9.130. Despite intermediate appellate court decisions permitting certiorari review of orders denying entitlement to a jury trial, review of such orders was not, and has never been, included in the list of appealable interlocutory orders of Rule 9.130. See Sarasota-Manatee Airport Authority v. Alderman, 238 So.2d 678 (Fla. 2d DCA 1970). Despite substantive amendments in 1992 and 1996 adding new categories of appealable interlocutory orders, Rule 9.130 has never included review of the type of order involved in this case.

The importance of this should not be lost when the Court considers the result requested by Jaye. Before this Court opens the door to more interlocutory appellate review, it should

consider that this type of order has never warranted Rule review status. As this Court stated in Savage, certiorari review cannot be used to circumvent the language of Rule 9.130, and only the rare exceptions should be accorded the extraordinary relief of certiorari review. By not including this type of order as reviewable by Rule authorization, it can only be said that the instances when non-final review would be necessary are extremely rare, and certainly not "the rule."[4]

Florida case law firmly establishes that a certiorari petition must pass a three-prong test before an appellate court can grant relief from an erroneous interlocutory order. A petitioner must establish (1) a departure from the essential requirements of the law (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal. Martin-Johnson, Inc. v. Savage, 509 So.2d 1097, 1099 (Fla. 1987); Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646, 648 (Fla. 2d DCA 1995). In The Bared & Co., Inc. v. McGuire, 670 So.2d 153, 157 (Fla. 4th DCA 2996), the Fourth District stated that it would compress the three-pronged test into two, concluding that "harm is not irreparable if it can be corrected on final appeal." For purposes of this issue, the difference is semantic where there are two indispensable ingredients to common law certiorari: (1) irreparable injury to the petitioner that cannot be corrected on final appeal (2) caused by a departure from the essential requirements of law.[5]

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[4] "When recurring issues arises that do not fall within the narrow ambit of certiorari, the Supreme Court has the constitutional rule-making power to establish a right of non-final appeal if it determines such a pretrial procedure would be appropriate and cost-effective. Art. V, § 4(b)(1), Fla. Const.; Mandico [v. Taos Constr.. Inc., 605 So.2d 805 (Fla. 1992)]." Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646 (Fla. 2d DCA 1995).

[5] Parkway Bank, 658 So.2d at 648, correctly notes that the traditionally stated three prong test of certiorari grammatically places the description of the appellate court's standard of review on the merits before the two threshold tests used to determine jurisdiction. The departure from the essential requirements of law prong is really the appellate court's standard of review, to be

(continued.. .)

The very first consideration "underlying a petition for common law certiorari review of nonfinal orders in civil cases, is of necessity, an assessment of j urisdiction. Jurisdiction, in turn, depends on the absence of effective appellate review at the end of the case in the trial court." McGuire, 670 So.2d at 156; Parkway Bank, 658 So.2d at 649. If the petition cannot meet the two part jurisdictional threshold it must be dismissed.

The jurisdictional test for certiorari review is whether the nonfinal order creates material harm irreparable by post-judgment appeal. The petition for writ of common law certiorari must make clear at the outset that "the harm is incurable by final appeal." McGuire, 670 So.2d at 156-57; accord Sabol v. Bennett, 672 So.2d 93 (Fla. 3d DCA 1996).

The first question that must be answered in this proceeding is whether an order denying a request for jury trial meets thejurisdictional test for certiorari review. Stated differently, does an order denying a request for jury trial create material harm irreparable by post-judgment appeal? The analysis provided by the different district courts of appeal does not always answer this direct question.

The Fourth and Fifth District Courts of Appeal have determined that this type of order does not meet the jurisdictional test for certiorari because the order can be corrected on plenary appeal. Lindsey v. Sherman, 402 So.2d 1349 (Fla. 4th DCA 198 1) ("[E]ven if the order Lindsey seeks to have reviewed constitutes a departure from the essential requirements of law, such error can be rectified by plenary appeal pursuant to Florida Rule of Appellate Procedure 9.110."); Tucker v. Rudnianyn, 5 17 So.2d 785 (Fla. 5th DCA 1988) ("If the order is error it can be

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[5] (...continued)
addressed only after a determination of jurisdiction. See McGuire, 670 So.2d at 157.

corrected by appeal if petitioner loses the non-jury trial. The failure to grant a right of jury trial is not an order that cannot be completely remedied by plenary appeal.").

The Second and Third District Courts of Appeal seem to base their jurisdictional analysis upon a holding that if a party has a constitutional right to a jury trial, then they should be entitled to certiorari review if that right may not be exercised. Sarasota-Manatee Airport Authority v. Alderman, 238 So.2d 678, 679-80 (Fla. 2d DCA 1970); Spring v. Rondel Refining, Inc., 421 So.2d 46 (Fla. 3d DCA 1982) (right to select one's peers is unique and indispensable to adversary system). The Second District concluded that certiorari was allowable "where a clear departure from settled principles threatens to prolong litigation needlessly." Alderman, 238 So.2d at 679. The Third District recognized that it might be creating a special dispensation for this type of-review, but was willing to accept criticism for doing so by taking "solace in the fact that there will be few instances where litigants will present to us similar problems of great consequence." Spring, 421 So.2d at 48. Neither court explained how a party's right to a jury trial, if erroneously denied, could not be corrected in a plenary appeal.[6]

In her initial brief Jaye makes the same conclusion analysis that is applied by the Second and Third District: Jaye has a "constitutionally" protected right to a jury trial and therefor she would be irreparably harmed by not having her case heard by a jury. However, this analysis fails to meet the jurisdictional threshold for certiorari. The mere fact that a party has a "constitutional right" and must exercise that right in front of the potentially wrong fact finder does not ipso facto mean that irreparable harm occurs.

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[6] Although the First District Court of Appeal permits certiorari review of jury trial orders, unlike the other district courts, it has never cogently stated a jurisdictional reason for allowing such review.

The real complaint that Jaye makes is one of tactics and finance. Contrary to the authority cited in Jaye's initial brief, the "irreparable harm" that is not remedial by plenary appeal in this case has nothing to do with issues such as federal First amendment prior restraint affecting the public at large; due process notice to be heard and impartiality of a trial judge; or federal Fourth and Fifth amendment rights. See initial brief at 8. No, in this case, and it would seem in nearly every case involving civil litigants with disputes over commercial matters, the claim of irreparable harm involves nothing more than issues of cost, expense, and tactics.

The courts of this state have long held that financial concerns, while important, do not warrant extraordinary relief. As simply and succinctly stated by the Fourth District:

> Petitioner contends that he will not have a full, adequate and complete remedy after final judgment because he will have gone through a trial under the burden of the order complained of, incur substantial expenses for experts, etc., and because resolution of the issue now on appeal might preclude the necessity of a second trial. To paraphrase petitioner's argument, it would be expedient for this court to resolve the question now and save everyone a great deal of time and expense. On its face that is a very compelling argument! However, acceptance of such an argument would surely lead to a further inundation of the appellate courts of this state with petitions for certiorari in cases previously cognizable at law and would thereby create greater detriments than benefits to an already overloaded judicial system. One can hardly envision a case wherein the loser on an interlocutory motion would not feel an immediate appellate determine of the issue would facilitate the handling of the remainder of the case, and save time, effort and expense.

Siegel v. Abramowitz, 309 So.2d 234 (Fla. 4th DCA 1975); see Whiteside v. Johnson, 35 1 So.2d 759 (Fla. 2d DCA 1977) (although expense and delay may frequently accompany the type of permanent harm that justifies the issuance of a writ of certiorari, these considerations alone are insufficient to support the issuance of an extraordinary writ of certiorari); Pearlstein v. Maluncy, 500 So.2d 585 (Fla. 1986). The rationale of the Fourth District is every bit applicable to this

issue. The financial argument simply does not rise to the level of material harm that cannot be cured by plenary appeal.

On Jaye's argument that she may suffer irreparable harm because she will be required to "show her hand", that argument ignores all the parties who successfully present reversible errors to appellate courts where the result is a new trial. Appellate decisions are issued every week where an error in the proceedings is reversed and the appellate court remands for a new trial. See e.g. Kmart v. Kitchen, 697 So.2d 1200 (Fla. 1997); Y.H. Investments v. Godales, 690 So.2d 1273 (1997). While Royal Saxon does not belittle the trial and adversary process and the right of a party to present their case, Jaye's argument cannot seriously be elevated to the irreparable harm standard. Jaye seems to say that a great case will be down graded to a good case if it gets tried twice. Surely this cannot justify the extraordinary relief sought – the argument almost suggests that litigation by surprise should be the norm.[7]

Certiorari review is not accorded every litigant who complains about an adverse non-final ruling. It is an exceptional remedy that requires the district court to invoke its jurisdiction, as opposed to Rule authorized jurisdiction for non-final appeals.

To invoke the certiorari jurisdiction of the district court, a petitioner must show that she will suffer irreparable harm not remedial by plenary appeal. If this jurisdictional threshold is not met, the district court need not consider whether the lower court order departs from the essential requirements of law. An order determining a party's entitlement to a jury trial does not meet the

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[7] Jaye also suggests that irreparable harm could occur because a party, or perhaps more accurately their counsel, would waive some right in a trial proceeding, that could not later be recaptured. Since waiver requires a knowing and voluntarily relinquishment, it defies logic to argue that the waiver could occur accidently, as Jaye seemingly suggests. See American Somax Ventures v. Touma, 547 So.2d 1266, 1268 (Fla. 4th DCA 1989) ("Waiver is commonly defined as the intentional or voluntary relinquishment of a known right . . . .").

threshold jurisdictional test. An incorrect jury/non-jury determination is remedial by a plenary appeal, and the harm associated with an incorrect ruling is only one of a financial nature. This type of harm does not rise to the jurisdictional level required for certiorari relief. There is no jurisprudential reason to expand certiorari beyond its current limitations. This Court should decline to exercise its jurisdiction to review this certified conflict.

B. Jaye's Petition for Writ of Common Law Certiorari was untimely.

Royal Saxon believes that Jaye's petition for writ of common law certiorari was untimely. Jaye did not seek certiorari review of the disputed issue when it was first raised and disposed of by the trial court. For this reason, this Court can decline to accept jurisdiction of this case.

Jaye was given permission to amend her affirmative defenses on December 3, 1996. Although no mention was made of a jury trial either in the proposed amended affirmative defense, or the hearing on the motion to amend, Jaye included a demand for jury trial with her "retooled" affirmative defense.

Jaye then moved to strike the non-jury trial setting. At the hearing on Jaye's motion, Jaye specifically told the court that a demand for jury trial had been made in the improper amended affirmative defense. Royal Saxon requested the court to defer ruling on the motion to strike non-jury trial setting because Royal Saxon was going to file a motion to strike the improper affirmative defense.

Royal Saxon then moved to strike the "retooled" affirmative defense, and the trial court granted the motion, but deemed Jaye's original proposed affirmative defense filed as of February 14, 1997. The trial court's February 14, 1997, order had all the effect and impact of striking Jaye's demand for a jury trial, which was part and parcel of the improper amended affirmative

defense. There is no doubt that the "issue" of jury trial had been presented to the court, and the February 14, 1997, order disposed of Jaye's demand.

Propriety of the right to seek non-final review aside, Jaye was obligated to seek such certiorari review within 30 days of February 14, 1997. Jaye did not seek review of that order, which was the first time the court disposed of the-jury trial issue in this case. Jaye sought review of the subsequent order striking her separately filed demand for jury trial. Accordingly, Jaye's petition for writ of common law certiorari of the later order striking her demand for jury trial was untimely where the issue had already been disposed of by the trial court in the February 14 order striking her improper affirmative defense.

Florida Rule of Appellate Procedure 9.100(c) dictates that a petition for writ of common law certiorari must be filed within 30 days of rendition of the order to be reviewed. As succinctly stated by the Fourth District Court of Appeal:

> Any petition for writ of certiorari should have been filed after the first order denying the motion for protective order. Petitioner cannot evade the time requirements of Florida Rule of Appellate Procedure 9.1 00(c) by filing successive motions addressed to the same issue. We liken this to the filing of a motion for rehearing from a non-final order which does not toll rendition. See McGee v. McGee, 487 So.2d 412 (Fla. 4th DCA 1986).

Bensonhurst Drywall, Inc. v. Ledesma, 583 So.2d 1094 (Fla. 4thDCA 1991); see Princess Cruises, Inc. v. Edwards, 611 So.2d 598 (Fla. 2d DCA 1993). Certiorari review, if allowed at all, must be sought when an issue is first disposed of by the trial court.

Jaye announced to the trial court at the hearing on her motion to strike non-jury trial setting that she was attempting to assert a demand for jury trial. Royal Saxon recognized this improper attempt and advised the trial court that it would file a motion to strike the improper affirmative defense which raised the jury trial issue. The trial court subsequently struck the

affirmative defense which raised the jury trial issue. There is no doubt that Jaye was completely aware of her actions. She had asserted a jury trial issue which was disposed of by the trial court on February 14, 1997. Jaye was obligated to seek review of this order within 30 days of its rendition.

Instead, Jaye waited until the issue was brought to the trial court and disposed of a second time. Jayes' subsequent petition for writ of common law certiorari seeking review of the April 30, 1997 order was untimely. The issue disposed of by that order had already been addressed by the trial court. Jaye should not be permitted to evade the time requirements of Rule 9.1 00(c) by filing successive motions addressed to the same issue. Accordingly, her petition for writ of common law certiorari was untimely, and this Court should decline to exercise its jurisdiction to review this matter.

C. If the order denying Jaye's demand for jury trial is subject to certiorari review, the issue must first be disposed of by the Fourth District. Alternatively, Jaye is not entitled to a jury trial on her affirmative defense of "set-off '.

Should this Court create a new field of interlocutory appeals by permitting certiorari review of orders determining a party's entitlement to a jury trial in civil commercial cases, at a minimum this Court needs to remand this case to the Fourth District to address the petitioner's claim on the merits. Since the Fourth District dismissed the petition for lack of subject matter jurisdiction, that court should have the opportunity to address the petitioner's arguments concerning whether she is entitled to a jury trial.

Alternatively, if this Court chooses to address the merits of petitioner's case, it should conclude that she is not entitled to a jury trial on the affirmative defense of set off. This conclusion can be based both on the procedural posturing that petitioner engaged in, and a

substantive analysis that her set off claim is fully covered in the already pending "balcony" counterclaim.

Royal Saxon did not demand a jury trial in its lien foreclosure case, despite a count for monetary damages based on section 719.303, Florida Statutes. Likewise, Jaye did not request an jury trial in her answer and affirmative defenses.

When Jaye moved to amend her answer and affirmative defenses and also sought leave to add a counterclaim, no mention of a jury trial was made in the proposed amended pleading. After the case was set for non-jury trial, Jaye had her amendment motion heard by the trial court. At no time in that hearing did Jaye make mention that she was going to demand a jury trial on any of the amendment issues.

Only after being given leave to amend her affirmative defenses – with the counterclaim amendment being denied – did Jaye raise the issue of jury trial. Only then, and in the context of an affirmative defense that grossly exceeded what had been represented to the trial court and the parties as the amendment, did Jaye assert a demand for a jury trial.

In this procedural posture, Jaye has played games with the trial court and Royal Saxon. The simple fact of the matter is that Jaye twice waived a demand for a jury trial. It was not asserted in either Jaye's original answer or affirmative defenses, or the proposed amended affirmative defenses and proposed counterclaim.

Jaye now explains the posturing by asserting that her demand for jury trial was timely under the authority of Fla.R.Civ.P. 1.430(b). Jaye argues further that her amended affirmative defense of set off injected a new issue into the case thereby reviving the time for filing a demand for jury trial.

As to the former, Jaye would have the Court condone her conduct in seeking amendment of pleadings. The amendment that Jaye interjected in this case is a verbatim recitation of her counterclaim against Royal Saxon. The fact that Jaye did not demand a jury trial in her proposed amended pleading or counterclaim speaks volumes on what her true intentions were with regard to the jury trial issue in this lien foreclosure case. Jaye had no intention of making a demand for a jury trial to Royal Saxon's lien foreclosure case.

As to the latter, Royal Saxon need only point to Jaye's own pleadings to refute the argument that a new issue was raised. Jaye's affirmative defense of set-off (in its disallowed form) is a nearly verbatim recitation of Jaye's pending counterclaim in the "balcony" lawsuit. Jaye did not inject any new issues in the parties' litigation.

What is missing from the picture is Jaye availing herself of Rule 1.270(b). That rule permits the trial court "in furtherance of convenience or to avoid prejudice . . . to order a separate trial of any claim, . . . counterclaim, . . . or of any separate issue or of any number of claims . . . or issues." The application of the "set-off' issue could have been disposed of in a separate trial, which is in fact precisely what Jaye plead in the counterclaim against Royal Saxon that remains pending today. See Wincast Associates v. Hickey, 342 So.2d 77 (Fla. 1977) (if all facets of a dispute cannot be settled at one time due to a demand for a jury trial, the trial judge can still determine non-jury factual issues unrelated to the jury issues, and thereby limit the scope of the jury trial, in accordance with Rule 1.270(b)); Penmont Enters., Inc. v. Dysart, 340 So.2d 1285 (Fla. 3d DCA 1977) (a non-jury trial of foreclosure claim prior to jury trial of legal issues presented in counterclaim did not deprive defendant of legal right).

The jury trial issue in this case was a red herring whose sole purpose was to delay the lien foreclosure case. From Jaye's pleading waiver of a jury trial demand to Jaye's procedural

posturing, one can only conclude that the jury trial issue is a sham that neither addresses the substantive dispute between the parties, or is designed to advance the resolution of this case. See Southeast Aluminum Supply Corp. v. Plastics N. American, Inc., 413 So.2d 440 (Fla. 3d DCA 1982) (trial court did not abuse discretion in denying demand for a jury trial when leave to file amended pleading was conditioned on trial not being delayed by request for jury trial). In a nutshell, Jaye has failed to meet the "departure from the essential requirements of law" standard of review.

Almost as an afterthought, and at the end of her initial brief, Jaye makes the conclusion that an order determining a party's entitlement to arbitration is analogous to an order determining a party's entitlement to a jury trial. As Jaye argues, there should be certiorari review of jury trial orders because there is non-final Rule based review of arbitration orders. See Fla.R.App.P. 9.130 (a)(3)(C)(v). There is a world of difference between the two.

First, and as demonstrated infra, there is a significant distinction between the non-final order Rule and certiorari review. The two may be conterminous, but they are not interchangeable.

Second, the right of a party to invoke arbitration is always found in a statute or governing document. The same cannot be said for the right to a jury trial. In fact, the right to a jury trial is traditionally governed by common law. While there are modern statutes that mandate a jury trial, see section 760.07, Florida Statutes (employment discrimination), jury trial issues usually arise in disputes over whether the common law allowed for such disposition. See Art. I, § 22, Florida Constitution ("The right to jury trial by jury shall be secured to all and remain inviolate."); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937) (The right to jury trial is preserved in all cases in which such right was enjoyed at the time Florida's

Constitution became effective in 1845.). Whereas the issue of a party's entitlement to arbitration is usually found in black and white, the issue of entitlement to a jury trial is often in a gray area.

Third, once a party is required to proceed through arbitration, a completely different standard of review and reviewing court exists then from circuit court jury non-jury proceedings. See e.g. Chapter 682, Fla. Stat.; § 718.1255, Fla. Stat. As the court can see, the analogy that Jaye draws is inapposite. Arbitration non-final orders have nothing in common with jury trial orders.

Finally, Jaye concludes by asking this Court to follow its prior decision in Wincast Associates, Inc. v. Hickey, 342 So.2d 77 (Fla. 1977), where the Court granted a petition for writ of certiorari to the Fourth District Court of Appeal. The trial court had denied a request for jury trial, which was subsequently upheld by the Fourth District.

When Hickey was written, a party could seek certiorari review in this Court. It no longer has constitutional power to issue writs of common law certiorari. See Haines City Community Development v. Heggs, 658 So.2d 523,525 n.2 (Fla. 1995). Thus, the Court cannot accommodate Jaye's request to follow Hickey because this Court no longer issues writs of common law certiorari. Given the constitutional change in this Court's jurisdiction, the result should not be a disposition of the merits of Jaye's claim.

Hickey really stands for the proposition that a mixture of the two kinds of claims in the same case, regardless of the parties by whom or the sequence in which they are raised by their respective pleadings, cannot deprive either of the parties of a right to a jury trial of issues traditionally triable by jury as a matter of right. As we have demonstrated, Jaye has her "set-off' affirmative defense plead as a counterclaim in the related litigation between the parties. The suggestion that there is a "mixture" of legal and equitable claims in the lien foreclosure case is

not supported by the record, which demonstrates that Jaye has plead her set-off affirmative defense as a counterclaim, and demanded jury trial in that lawsuit.

From both a procedural and substantive analysis, this court should conclude that Jaye is not entitled to a jury trial in the lien foreclosure case.

CONCLUSION

Based on the foregoing argument and authority the respondent, Royal Saxon, Inc. respectfully requests that this Court decline to accept jurisdiction to review the certifiedconflict. Alternatively, the respondent respectfully requests that this Court hold that an order rejecting a demand for a jury trial is not subject to certiorari review.

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By _____
GEOFFREY B. MARKS
Fla. Bar No.: 714860

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of January, 1998 to: EDWARD A. MAROD, ESQUIRE, Attorney for Petitioner, Edward A. Marod, P.A., P.O. Office Box 3606, West Palm Beach, Florida 33402-3606 .

_____
GEOFFREY B. MARKS

GBM/bj
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA, CIVIL DIVISION

CASE NO. CL 95-4773 AN

ROYAL SAXON, INC.,

Plaintiff,

vs.

MILDRED R. JAYE,

Defendant .
_____/

AMENDED **COMPLAINT** SEEKING TEMPORARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES

ROYAL SAXON, INC. sues MILDRED R. JAYE, and states:

JURISDICTION AND VENUE

1. This is an action for Injunctive Relief and Damages pursuant to Section 719.303, Florida Statutes.

2. All events giving rise to the causes of action set forth herein took place and occurred in Palm Beach County, Florida.

PARTIES

3. Plaintiff, **ROYAL SAXON, INC.** (hereinafter referred to as **"PLAINTIFF"**), is a Florida corporation not for profit operating the Royal Saxon Cooperative Apartment Building pursuant to Chapter 719, Florida Statutes.

NO.

4. Defendant, MILDRED R. JAYE (hereinafter referred to as "DEFENDANT"), is a shareholder of PLAINTIFF and a "unit owner" as defined by §719.103, Florida Statutes, occupying cooperative apartment No. 208.

BACKGROUND

5. Section 719.104(1) provides as follows:

> RIGHT OF ACCESS TO UNITS. - The association has the irrevocable right of access to each unit from time to time during reasonable hours when necessary for the maintenance, repair, or replacement of any structural components of the building or any mechanical, electrical, or plumbing elements necessary to prevent damage to the building or to another unit.

6. The balconies adjacent to the apartments at Royal Saxon fell into disrepair and required the removal of certain portions of the concrete on the balconies in order to effect proper repairs. Many of the balcony repairs, including the balcony adjacent to the apartment of DEFENDANT, required portions of the concrete within the apartment to be removed in order to properly repair the balcony. Over the course of the last year, on numerous occasions, representatives of PLAINTIFF have attempted to gain access to the unit occupied by DEFENDANT in order to inspect the damaged balcony and to prepare for its necessary repairs. DEFENDANT has repeatedly refused to allow either PLAINTIFF's representatives, or representatives of the contractor engaged to repair the balconies to access her unit. PLAINTIFF notified

DEFENDANT on numerous occasions that it intended to **access** her unit without her **consent** consistent with its right of access in the event that she would not attempt to make reasonable accommodations for access to her unit. **DEFENDANT** continued to refuse access. On June 6, 1995, Shawn Holmgren, the Manager of the cooperative building, Anne E. Cooper, Secretary of the Board of Directors, and Jeffrey Hepburn, a Security Guard hired by **PLAINTIFF**, once again attempted to persuade **DEFENDANT** to allow them to gain access to her unit. During the effort of PLAINTIFF's representatives to gain access to **DEFENDANT's** unit, DEFENDANT physically assaulted and battered all three of PLAINTIFF's representatives, threw hot coffee at them and sprayed their faces with pepper spray. It was not until after filing and service of this lawsuit that DEFENDANT permitted **PLAINTIFF** and its contractor access to the apartment for purpose of completing the balcony repairs. However, due to her **prior** refusals and denials of access, **PLAINTIFF** has also incurred damage because of the additional expense that will be required to fully and properly repair the electrical wiring in the slab of **DEFENDANT's** balcony. The subject repair could not be done at the time the electrician was on the premises because DEFENDANT refused to permit access to her unit so that the electrical wiring could be fully and properly repaired.

7. **PLAINTIFF** will ***also*** require access to the apartment of *DEFENDANT* for the purpose of inspecting the balcony repair work

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recently completed, referenced in the preceding numbered paragraph, in order to enforce its claims under the two-year warranty for such repair. Without access to the apartments, PLAINTIFF will not be able to verify and report any defects which appear in the repairs.

8. Section 719.303, Florida Statutes, provides that owners such as DEFENDANT shall comply with the provisions of the cooperative act as well as the cooperative documents. Said section provides that an action for damages or for injunctive relief for failure to comply with the provisions of the act or the documents may be brought, and the prevailing party in such action is entitled to recover reasonable attorney's fees.

9. PLAINTIFF has retained the undersigned counsel to represent it in this action and is obligated to pay its attorneys a reasonable fee for their services.

COUNT I - INJUNCTIVE RELIEF

10. PLAINTIFF realleges and restates the allegations in numbered paragraphs 1 through 10 hereof and incorporates same by reference herein.

11. It is necessary that representatives of PLAINTIFF continue to access DEFENDANT's unit for the above-stated purposes.

12. DEFENDANT's refusal to permit representatives of *PLAINTIFF* to access her unit during reasonable hours for purposes of maintaining, repairing, and replacing portions of the structural

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components is a violation of Section 719.104, Florida Statutes, for which **PLAINTIFF** is entitled to temporary and permanent injunctive relief.

13. **PLAINTIFF** has suffered and will continue to suffer irreparable harm as a result of DEFENDANT's denials and refusals to permit access to her apartment for the foregoing purposes and PLAINTIFF does not have an adequate remedy at law.

WHEREFORE, PLAINTIFF prays that this Court enter judgment in its favor and against DEFENDANT for the following relief:

a.) That PLAINTIFF be granted a temporary and permanent injunction against DEFENDANT for the purpose of accessing her apartment in accordance with **Chapter 719, Florida Statutes, and** that the Injunction specifically provide that PLAINTIFF may call upon such appropriate Palm Beach County Law Enforcement Agencies to assist them in enforcing said Injunction.

b.) That PLAINTIFF recover its costs and attorney's fees incurred in connection with this action against DEFENDANT.

c.) That the Court award **PLAINTIFF** such other and further relief as it deems necessary and appropriate.

COUNT If - DAMAGES

14. PLAINTIFF **realleges** and restates the allegations in numbered paragraphs 1 through 4, 7, 9 and 10 hereof and incorporates same by reference herein,

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15. PLAINTIFF has been damaged as a result of the violations committed by DEFENDANT by virtue of the additional cost of the **security guard** required to assist in accessing the apartment for the purpose of the balcony repairs and for the cost of re-calling an electrician to properly and fully repair the electrical wiring **in the concrete** slab **of** the **balcony adjacent** *to DEFENDANT's* apartment.

WHEREFORE, Plaintiff ROYAL SAXON, INC. prays that the Court enter judgment in its favor and against Defendant **MILDRED R. JAYE** for damages, costs, and attorneys fees.

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IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY

ROYAL SAXON, INC.,

Plaintiff,

v. Case No. CL 95-4773 AN

MILDRED R. JAYE,

Defendant. /

ANSWER. AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF DEFENDANT

ANSWER

Defendant, Mildred Jaye, by her undersigned attorneys, answers the Amended Complaint Seeking Temporary [sic] and Permanent Injunctive Relief and Damages paragraph by paragraph and says:

1. It is admitted that Plaintiff attempts to state a cause of action for injunctive relief and damages pursuant to §719.303, Ma. Stat. (1993) but it is **denied** that Plaintiff has done so.

2. It is admitted that all actions of Plaintiff and Defendant alleged in the Amended Complaint, if they occurred at all, occurred in Palm Beach County, Florida.

3. It is admitted that Plaintiff is a Florida corporation not for profit charged with operating the Royal Saxon Cooperative Apartment Building in accordance with Chapter 719, Fla. Stat. (1993), but it is denied that Plaintiff is actually doing so.

4, It is admitted that Defendant resides in Unit 208 at the Royal Saxon Cooperative Apartment Building.

5. It is admitted that §719.104(1), Fla. Stat. (1993) provides what is set forth at page 2043 of the 1994 Supplement to Florida

Statutes 1993. published by the Florida Division of Statutory Revision. However, there already exists a final judgment between Plaintiff and Defendant establishing that Plaintiffs right to access to the premises occupied by Defendant is not unlimited, but. rather, is restricted to times reasonably agreed to between Plaintiff and Defendant.

6. The allegations of paragraph 6 are denied.

7. Defendant admits that Plaintiff has limited rights of access to her premises when it is necessary, as opposed to whenever the representatives of Plaintiff decide they wish to have access. The history of the relationship between Plaintiff and Defendant clearly demonstrates that Plaintiff does not wish to establish a right to access at reasonable times when necessary for proper purposes. Rather. what Plaintiff seeks is to continue its previous pattern of harassment of Defendant through indiscriminate access at all hours of the day or night for no reason whatsoever, while refusing to come into the premises when necessary for maintenance and the like.

8. It is admitted that §719.303, Fla. Stat. (1993) provides what is set forth at page 1224 of the Florida Statutes 1993. published by the Florida Division of Statutory Revision.

9. Defendant is without knowledge of the truth or falsity of the allegations of paragraph 9.

10. Defendant incorporates by reference her responses to paragraphs 1 through 9 in response to the allegations of paragraph 10, and notes that paragraph 10 of the Amended Complaint purports to incorporate by reference its own allegations.

11. Defendant denies that representatives **of Plaintiff** need any greater access to her premises than that which is now, and always has been, provided by Defendant.

12. Defendant denies the allegations of paragraph 12 of the Amended Complaint.

13. Defendant denfes the allegations of paragraph 13 of the Amended Complaint.

14. Defendant incorporates by reference her responses to paragraphs 1 through 4, 7, and 9 in response to the allegations of paragraph 14, and notes that paragraph 14 of the Amended Complaint purports to incorporate by reference the allegations of paragraph 10, **which purports** to incorporate **all** prior allegation as well as its own allegations.

15. Defendant denies the allegations of **paragraph 15** of the Amended Complaint.

16. All allegations of the Amended Complaint not expressly admitted are denied.

17. Defendant has engaged the undersigned attorneys to represent her in the defense of this action and is obligated to pay them a reasonable fee for their services, and to reimburse them for all costs advanced on her behalf in connection with the defense.

WHEREFORE Defendant prays the Court will dismiss this action **with** prejudice and, award Defendant the costs of this action and a reasonable attorney's fee.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The claims made in this action are barred by the judgments in Cases No. 79-5203-CA(L) 01 E and 82-800 CA(L) 01 E in the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County. Those judgments. *inter alia.* hold that Plaintiff is not entitled to a key to the premises of Defendant (thus implicitly establishing that Plaintiff's right of access is limited to times when Plaintiff and Defendant agree that access is necessary for a proper purpose), that Plaintiff is permanently enjoined from interfering with Defendant's right of quiet enjoyment, tenancy and privacy in her premises, that Plaintiff is permanently enjoined from harassing Defendant, and that Plaintiff is enjoined to enforce its By-Laws, Proprietary Lease, Rules and Regulations and the Florida Cooperative Law equally and uniformly among all of its tenants.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs claims are all barred by the equitable doctrine of unclean hands. As appears from the allegations of the counterclaim, the problems of which Plaintiff complains were all caused by Plaintiffs own wrongful conduct, including, without limitation, its repeated breaches of the injunctions previously entered against it in Cases No. 79-5203-CA(L) 0 1 E and 82-800 CA(L) 01 E in the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County.

COUNTERCLAIM

Defendant/Counterclaimant, Mildred Jaye, by her undersigned attorneys sues Plaintiff/Counterdefendant, Royal Saxon, Inc. and says:

1. This is a claim which Counterclaimant has against Counterdefendant which does not require for its adjudication the presence of other parties over whom the Court cannot obtain jurisdiction and is authorized as a counterclaim by Fla. R. Civ. P. Rule 1.170.

2. Counterclaimant is a shareholder of Counterdefendant and is the occupant of Unit 208 of the Royal Saxon Cooperative Apartment Building.

3. Counterdefendant is a Florida corporation not for profit charged with the management of the Royal Saxon Cooperative Apartment Building. Counterdefendant was also a party to two prior lawsuits with Counterclaimant which resulted in permanent injunction judgments against Counterdefendant.

4. Since the entry of the permanent injunction judgments against Counterdefendant, Counterdefendants has repeatedly engaged in acts in violation of the injunctions. in violation of Counterclaimant's rights under the documents governing the operation of the cooperative, in violation of the Proprietary Lease for the premises of Counterclaimant and in violation of the Florida Cooperative Law including, without limitation:

A. By interfering with Counterclaimant's right to quiet enjoyment, tenancy and privacy in her premises in many ways, including, without limitation:

i. Permitting **the resident manager of the building** to climb onto the balcony of Counterclaimant's premises and peer in through the windows;

ii. Permitting the resident manager of the building to destroy the lock on at least one of the doors to Counterclaimant's premises on the pretense of seeking access to those premises for workmen at a time when the workmen were already inside the premises and doing work:

iii. Permitting the resident manager of the building to invade the privacy of Counterclaimant's premises by attempting to enter the premises and videotape without the permission of Counterclaimant:

iv. Permitting the resident manager forcibly to attempt personally to obtain access to Counterclaimant's premises on the pretense of seeking access to those premises for workmen at a time when the workmen were already inside the premises and doing work:

v. Permitting the resident manager to break into the air conditioning closet to Counterclaimant's premises, destroying the lock thereof, for no reason whatsoever:

B. By harassing Counterclaimant's in many ways, including, without limitation:

i. **Filing this** frivolous lawsuit:

ii. Refusing to respond to Counterclaimant's legitimate requests for assistance and maintenance;

C. By failing to treat Counterclaimant equally with the other tenants in many ways, including, without limitation:

i. Refusing to respond to Counterclaimant's legitimate requests for assistance and maintenance while promptly responding to the requests of other tenants;

ii. Refusing to repair or to pay for the repair of the damages to Counterclaimant's premises caused by the work referred to in the Amended Complaint while promptly repairing or paying for the repairs to the premises of other tenants;

iii. Refusing to complete, or to make arrangements to complete, the work at the balcony to Counterclaimant's premises while promptly completing, or making arrangements to complete. the work at the premises of other tenants.

5. By virtue of the foregoing, Counterclaimant has suffered damages, including the cost of repairs, the diminution of the value of her tenancy, costs, attorney's fees and medical expenses as a direct and proximate result of the violations of judgments, of the law and of the contracts.

6. All conditions precedent to the relief demanded have been performed or have occurred.

7. Counterclaimant has engaged the undersigned attorneys to represent her in the prosecution of this counterclaim and is obligated to pay them a reasonable fee for their services, and to reimburse them for all costs advanced on her behalf in connection with the counterclaim.

WHEREFORE Counterclaimant demands trial by jury of all matters triable by a jury in this action, demands judgment against

Counterdefendant for compensatory damages in the amount determined by the jury, and demands the entry of an order of contempt and sanctions against Counterdefendant for its violation of the injunctions previously entered against it by this Court, together with the costs of this action, reasonable attorney's fees and such other and further relief as the Court deems appropriate in the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served upon Kenneth S. Direktor, Esquire, Becker & Poliakoff, P.A., 500 Australian Avenue South, 9th Floor, West Palm Beach, Florida 33401, by U.S. Mail this 16th day of October, 1995.

EDWARD A. MAROD, P.A.
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By: Edward A. Marod
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