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

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

APPELLANT'S REPLY BRIEF

Edward A. Marod, Esq.
Florida Bar No. 238961
Counsel for Appellant,
Mildred Jaye.

EDWARD A. MAROD, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606
(561) 832-0050

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)

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

TABLE OF CONTENTS

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

TABLE OF CITATIONS

CASES **PAGES**

OTHER AUTHORITIES **PAGES**

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

STATEMENT OF THE CASE AND OF THE FACTS

Appellant's Statement of the Case and of the Facts in Appellant's Initial Brief completely and accurately sets forth the facts relevant to this appeal. The Statement of the Case and of the Facts in Respondent's [sic] Brief on the Merits (hereinafter the "Answer Brief") largely restates Appellant's Statement of the Case and of the Facts, but contains several misstatements of fact. Since the principle issue before the court is the propriety *vel non* of District Court of Appeal certiorari review of orders striking demands for jury trial, these facts are not likely to be relevant to this Court's decision. However, they do reflect upon the impropriety of the action of the trial court in striking Appellant's demand for jury trial. This Court clearly has the power to rule upon the merits of petition for certiorari, and, if it elects to do so, these facts would be relevant to that decision. Therefore, they are here corrected.

First, at the bottom of page 4 of the Answer Brief, Appellee states with respect to Appellant's motion to amend her pleading in the trial court "No where [sic - nowhere] in the proposed amended additional affirmative defense or proposed counter claim [sic - counterclaim] did Jaye assert a demand for jury trial." This statement is false. As appears in the Appendix to the Initial Brief, (hereinafter "App." at page 94, the prayer for relief of the original proposed Amended Answer, Affirmative Defenses and Counterclaim contained a demand for trial by jury of all matters so triable by a jury in this action.

Second, because the first statement is false, the following sentence on the bottom of page 4 of the Answer Brief to the effect that 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" is also false.

Third, again because the first statement is false, Appellee falsely states in the third paragraph on page 6 of the Answer Brief that "Jaye . . . moved to amend her affirmative defenses and assert a counterclaim but failed to demand a jury trial in the proposed amended pleading."

Fourth, also in the third paragraph on Page 6 of the Answer Brief, Appellee states that "Jaye . . . let the lien foreclosure case get set for non-jury trial before having the amendment motion heard." While it

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

is true that the case was set for non-jury trial before Appellant was able to get a hearing on her motion to amend, Appellee fails to disclose facts which clearly show that it is unfair to say that Appellant "let" this occur. The case was first set for trial on the non-jury docket of Judge Carlisle by order dated September 4, 1996, [App. 86; Appendix to Reply Brief (hereinafter "App. II") p. 135] after his August 22, 1996 order [App. 53: App. II 132] transferring the case to the docket of Judge Wennet, pursuant to an August 26, 1996, notice for trial [App. 85; App. II 134] improperly served by Appellee while a motion to strike part of the Complaint [App. pp. 21-22] was pending. The case was then re-set on the non-jury trial docket of Judge Wennet by means of an order dated October 21, 1996, [App. II 165] without the filing of any timely notice for trial,[1] and while the case was not at issue because of the pendency of a motion to amend the answer and affirmative defenses.

Fifth, again because of its incomplete reading of the original proposed Amended Answer, Affirmative Defenses, Appellee asserts in the third paragraph on page 6 of the Answer Brief that Appellant "failed to apprize [sic - apprise] the trial court at the amendment hearing that she intended to assert a demand for jury trial." Clearly, the inclusion of the demand for jury trial in the proposed amended pleading apprised the trial court of Jaye's intentions in this regard. While it is true that counsel for Appellant did not say to the trial court at that hearing that jury trial was demanded in the proposed amended pleading, the trial court didn't ask, either.

Sixth, in that same paragraph, Appellee asserts that the amended pleading served by Appellant included a demand for jury trial not contained in the proposed amended pleading. As noted above, to the extent that the proposed amended pleading contained a demand for jury trial, this statement is false.

Appellee also raises an argument to the effect that the petition for writ of certiorari filed with the District Court of Appeal was untimely because it was not filed within thirty (30) days after the entry of an order

---

[1] No notice that the action was at issue other than the premature one served August 26, 1996, has ever been filed in the case.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

[Appendix to Initial Brief, p. 73] which Appellee contends was the first order as to which certiorari review might have been sought. In order fully to respond to this argument, the motion granted by the order, together with the transcript of the hearing which resulted in the order, are attached hereto as additional pages of the Appendix. The motion reveals that it did not address, whatsoever, the issue of Appellant's demand for jury trial. The transcript reveals that the words jury trial were mentioned only twice at the hearing, as incidental facts, and that the trial court's oral ruling did not mention the jury trial issue at all.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

SUMMARY OF ARGUMENT

Appellee fails meaningfully to address the central issue in this appeal, te., whether an order wrongfully striking a party's demand for jury trial creates "material injury to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." Because the denial of the right to a jury trial is the denial of a fundamentally protected right, predating even the Constitution of the State of Florida, and because the harms flowing from such an order are similar to the harms caused by orders of the types as to which interlocutory review is permitted by Fla.R.App.P. 9.130, an order striking a demand for jury trial clearly causes such harm.

Appellee's argument to the effect that Appellant's petition for writ of certiorari in the district court of appeal was untimely is factually flawed. The petition for review in this case was filed within thirty (30) days after the first order definitively terminating Appellant's right to trial by jury.

Appellee's argument that this Court should not decide the merits of the petition for writ of certiorari which is the subject of this appeal conflicts with its own argument that Appellant merely seeks delay by these proceedings. This Court has the power to make the decision pursuant to its inherent authority to decide all disputed issues in a case once it has jurisdiction, this case would be determined most expeditiously if this Court were to decide all issues before it.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

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

A. Appellee's Arguments on the Merits Fail to Address the Issue Whether an Order Striking a Demand for Jury Trial is Inflicts Material Injury to the Petitioner Through the Remainder of the Proceedings Below, Effectively Leaving No Adequate Remedy on Appeal

Appellee begins its argument by raising the specter of a flood of hundreds and thousands of totally unjustified demands for jury trial which Appellee predicts will follow a decision acknowledging that the several District Courts of Appeal have subject matter jurisdiction to review by certiorari orders improperly denying proper demands for jury trial. The factual underpinning of this prediction is not disclosed. Appellant suggests it can proceed only from an assumption that most, if not all, Florida lawyers are willing to make improper demands in pleadings whenever the existing law governing appellate practice would permit them to obtain appellate review whenever their frivolous demands are rejected at the trial court level. Were this necessary factual predicate true, the appellate courts would currently be facing a flood of interlocutory appeals of orders: (a) denying motions for change of venue filed by defendants sued in their own home towns: (b) denying motions to dismiss for lack of personal jurisdiction filed by Florida residents accused of causing injuries in Florida: and (c) denying demands for arbitration made in the absence of any contractual or statutory basis for arbitration. That no such floods have been experienced suggests Appellee's argument is without merit.[2]

Most of Appellee's arguments with respect to the elements necessary to invoke a District Court of Appeal's certiorari jurisdiction begs the question. Appellant does not deny the two or three element

---

[2] Appellant submits that the effect in the trial courts, if any, of an order sustaining Appellant's position will be greater caution on the part of trial judges in entering orders denying litigants their constitutionally guaranteed right to trial by jury.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach. FL 33402-3606

formulas devised by the several courts considering the subject. What Appellant questions is the determination by the District Court of Appeal, Fourth District, that the denial of a party's clear right to a jury trial is not a decision causing "material injury to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." *Martin-Johnson,* Inc., *v.* Savage, 509 So.2d 1097, 1099 (Fla. 1987). Appellant submits that both the Second and Third Districts have properly analyzed this issue, concluding that such an order does cause the material injury necessary to support certiorari review. Appellee never really addresses this issue. Instead, Appellee attacks Appellant's subsidiary arguments relating to time and expense, evading entirely the analysis of the decisions of the Second and Third Districts in *Sarasota-Manatee Airport Authority v. Alderman,* 238 So.2d 678 (Fla. 2d DCA 1970) and *Spring v. Ronel Refining, Inc.,* 421 So.2d 46 (Fla. 3rd DCA 1982).

Appellee makes quite a point of arguing that certiorari review of an order denying jury trial or striking a jury trial demand is improper because appeals from such orders are not permitted by Fla.R.App.P. 9.130. This argument, of course, is inapt because there would be no need to seek certiorari review of such orders if they were appealable under Rule 9.130. However, analysis by reference to Rule 9.130 might be helpful.

Appellee's argument seems to be that Rule 9.130 lists the types of order which this Court has determined always present sufficient "material injury to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal" to justify immediate interlocutory appellate review, without the necessity of a petition seeking to invoke the jurisdiction of the intermediate appellate courts. If that is the case, Appellant submits it follows that an order striking a demand for jury trial either ought to be on the Rule 9.130 list, or, at the very least, should be within the class of cases as to which certiorari review is at least available.

An order denying a party's motion to dismiss for improper venue presents no harm other than the financial harm of litigating in a distant and inappropriate forum. Thus, if the analysis were simply that the cost and expense of a second trial is insufficient to justify immediate review,

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

orders on motions to transfer venue would not be immediately appealable. Therefore, there must be something more to the analysis. Presumably, that something more is the fact that the legislature has seen fit to create a statutory venue privilege for Florida resident defendants, the benefits of which would be lost if a trial went forward in an inappropriate venue.

An order relating to personal jurisdiction also presents inconvenience and expense issues, while implicating statutory policies concerning jurisdiction and constitutional issues of due process for defendants. However, for plaintiffs, no due process issues are implicated, so interlocutory appeals of orders granting motions to dismiss for lack of personal jurisdiction can only be justified on the basis of the savings of the time and expense of an extra trial.

An order denying a party's demand for arbitration presents no harm other than the cost and expense of the trial which would occur before plenary review. However, the legislature has seen fit in the Florida Arbitration Act to express a statutory right to arbitration where provided by contract. The financial benefits of this right would be lost if an order denying arbitration were not immediately reviewable. Presumably, this is why this Court has put orders in respect of arbitration on the Rule 9.130 list.

Orders finding liability in favor of a party seeking affirmative relief invoke only the cost and expense of a trial on damages which might precede plenary review. Appellant can conceive of no issue other than this cost which would support immediate review of such orders.3

Orders relating to the certification of a class of plaintiffs, or the denial of certification, involve nothing but the additional expense of sending notices, processing returns of class member opt outs and obtaining court approval of settlements.

---

3 The existence of an order finding liability, if not appealable, might render a plaintiff intransigent in settlement. However, unless a settlement could be achieved before a decision on an interlocutory order finding liability, the intransigence would be even worse after a decision affirming liability.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

Thus, the pattern observable among the types of appeals permitted by Rule 9.130. seems to be that they involve either cost and expense prior to plenary appeal, or some combination of cost and expense with a legislatively or constitutionally protected interest of a party. Using such an analysis, interlocutory review of orders striking proper demands for jury trial is at least as desirable as any of the orders listed in the Rule.

The right to trial by jury is a right established by the Constitution of this State. As Judge Nesbitt held in *Spring v. Ronel Refining,* Inc., *supra,* it is a right which even predates the constitutions. It is a right which is deemed a fundamental right. It is a right which this Court has held to be sufficiently important that it has said:

> Where both legal and equitable issues are presented in a single case "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Beacon *Theatres,* Inc., *v. Westover,* 359 U.S. 500, 510-11, 79 S.Ct. 948, 956, 957, 3 L.Ed.2d 988 (1959) In such cases the jury trial must be accorded to the person requesting it even though the legal issues are incidental to the equitable issues. Dairy Queen, Inc., *v.* Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

Cenito v. Kovitch, 457 So.2d 1021, 1022 (Fla. 1984).[4] It is a right which predated the statutory right to arbitration. It is a right which is the very backbone of our judicial system. While it is listed after the right to free speech, the right of freedom of religion, and the right to due process of law in the Constitution of the State of Florida, it is contained with Article I, ahead of the articles establishing the legislative, executive and judicial branches of the government. Thus, Appellant submits that the improper denial of this right MUST be deemed to cause "material injury

---

[4] This Court has also 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).

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." When the parties and the court know that the case will be tried by a jury, everything in the case changes, from motion practice, to the quantity of discovery, to the nature of the discovery, to the offers made in settlement negotiations, It is simply disingenuous to argue that a denied RIGHT to jury trial in the first trial can ever be remedied by a second trial.

Clearly, the right to jury trial imposes great burdens on the judicial system by way of the cost of veniremen, the additional time spent in pretrial motions to limit evidence and eliminate claims, the additional time necessarily spent in sidebars at trial, and the additional litigation attendant to the drafting and finalization of jury instructions. Just as clearly, trial judges burdened with backbreaking caseloads have a strong motive to lessen that burden wherever possible. Where, as here, a particular motion presents an opportunity to lessen the burden on a trial judge through the expedient of eliminating the jury trial rights of a litigant with no fear of review, the temptation must be overwhelming, The only way to remove that temptation is to make it clear that an order striking a proper demand for jury trial is immediately reviewable, either under Rule 9.130 or by certiorari.

B. The Petition for Writ of Certiorari Was Not Untimely.

Appellee argues that the petition for writ of certiorari was untimely, as it was not filed within thirty (30) days after an order dated February 14, 1997. [App. 73] That order provided, in pertinent part, that 'The Sixth Affirmative Defense asserted in the proposed amended pleading submitted on September 24, 1996 is permitted, and that amendment shall be deemed filed as of the date of this Order." ***Id. The*** order said nothing about the court having considered the propriety *vel* non of a demand for jury trial. The court said nothing in the hearing on the motion to suggest that it was ruling on the propriety of the demand for jury trial. Most importantly, the motion which was granted by the order did not give notice that one of the issues to be argued was the propriety of the demand for jury trial. [App. II 125-26]. While a clever sophist might argue in retrospect that one might have divined from this set of facts that the February 14, 1997 order was a final adjudication of

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

the Appellant's claimed right to a trial by jury, in fact the gap in the logic is impossible to leap without the benefit of the order as to which the petition for certiorari review was directed.

Since the February 14, 1997 order specifically ruled that the amended pleading was to be deemed filed on that date, and since it is fundamental that a demand for jury trial may be made without leave of court within ten days of the last pleading on the issue as to which a jury trial is demanded, *Powell v. Southern Bell Telephone and Telegraph* Company, 448 So.2d 72, 74 (Fla. 3rd DCA 1984), there was not a sufficient indication in the record that the trial court had stricken the demand for jury trial with such finality as to justify the filing of a petition for writ of certiorari until the entry of the order of April 30, 1997. App. 124. Indeed, had the February 14 order disposed of the Appellant's right to jury trial, the trial court would never have entertained the submission of argument and authorities concerning the discretion of the trial court to deny a party its right to jury trial after an amendment to the pleadings. App. 104-23.

Bensonhurst Drywall, Inc., *v. Ledesma*, 583 So.2d 1094 (Fla. 4th DCA 1991) does not suggest the contrary. In that case a party made a motion for protective order directed to particular discovery and the motion was denied and never appealed in any way. The party then, later, filed substantially the same motion for protective order directed to a subpoena duces tecum, which was likewise denied. In that case it was obvious that the matter related to the discovery had been put before the trial court, fully considered and decided adversely to the party in question. That is not the case here, as the first order squarely deciding the issue was timely made the subject of a petition for certiorari.

Princess Cruises, Inc., v. Edwards, 611 So.2d 598 (Fla. 2d DCA 1993) is also inapposite, as it involved a petition for writ of certiorari directed to an interlocutory order which was filed more than thirty (30) days after the entry of the order sought to be reviewed. In that case, the party who failed to seek review in a timely way sought to justify its conduct by claiming that rendition of the order had been suspended by the filing a motion for rehearing. The court in that case properly found that motions for rehearing directed to interlocutory orders are not

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

authorized, so that the tolling provisions of Fla.R.App.P. 9.020(h) did not apply. There was no motion for rehearing here, and the petition for certiorari was directed to the first order of the trial court which properly could be viewed as disposing of Appellant's demand for jury trial.

Under the circumstances, Appellee's argument that Jaye's petition for writ of certiorari was untimely in the District Court of Appeal, Fourth District, should be rejected.

C. This Court Has The Authority to Decide the Merits of the Petition for Writ of Certiorari or to Remand to the District Court of Appeal in its Discretion

Appellant has continually indicated her intention and desire to have all of her disputes with the Appellee decided by a jury. When she filed her original answer and affirmative defenses, she had already filed her counterclaim and demand for jury trial in a companion case. Rather than duplicate her pleadings, she moved to have the two cases consolidated for trial.5 When the trial court erroneously denied her motion to consolidate the two cases for trial, in order to preserve her setoff counterclaims as defenses in the second suit and her right to trial by jury, she was compelled to seek amendment of her pleadings to raise them. In doing so, Appellant clearly understood that she could only have the issues tried once. When she did so, she demanded jury trial in her proposed amended pleading, part of which was permitted. When that pleading was finally settled, she again specifically demanded trial by jury of the new issues she had raised, which was her absolute right.

Since the Fourth District has never ruled on the merits of Appellant's claim that the trial court clearly departed from the essential requirements of law in striking her demand for jury trial, this Court would not depart from its normal procedures if it were to simply remand the case to that court for a decision of that issue. However, since the entire matter is now here before this Court, and since the issues with respect to the jury trial demand are relatively straightforward, it would not be a terrible imposition on the Court to decide the entire case before it pursuant to its inherent authority to dispose of all contested issues in

---

5 Had the trial court not erroneously denied consolidation of the two cases for trial, this issue would not be here now.

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

a case once it has jurisdiction. Kennedy *v. Kennedy*, 303 So.2d 629 (Fla. 1974) *rehearing den.* To do so would probably speed things up in this aging litigation. Appellee's argument that this Court should not decide the issue seems to conflict with its suggestion that Appellant seeks to delay the lien foreclosure *sub judice.*

Appellee's attempts to brand Appellant as involved in misrepresentation with respect to the nature of the amendment sought to be made to her pleadings are transparent. As clearly appears form the record, at the hearing at which amendment was sought, Appellant fully disclosed to the court that the affirmative defense of setoff which was sought to be added depended on the same facts as the counterclaim which was sought to be added. Thus, when the counterclaim was not permitted, in the interest of full disclosure, Appellant shifted the factual allegations which had previously been made only in the counterclaim to the body of the affirmative defense. Consistent with the adage that "no good deed goes unpunished" both the Appellee and the court reacted to this change as somehow violative of the order permitting the amendment. Frankly, counsel for the Appellant was shocked that this would be so.

Appellant does not suggest that the rules with respect to this Court's jurisdiction have not changed since the decision in *Wincast Associates, Inc. v. Hickey,* 342 So.2d 77 (Fla. 1977). Clearly they have. however, the jurisdiction of the District Courts of Appeal have not changed during that time, and the rules with respect to the certiorari jurisdiction of the District Courts of Appeal and this Court were the same when this Court still accepted review on certiorari. Thus, the fact that this Court accepted review in *Wincast* does suggest that this Court has, in the past, viewed the issue of the denial of a party's right to trial by jury significant enough to create a "material injury to the petitioner through the remainder of the proceedings below, effectively leaving no adequate remedy on appeal."

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

Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, FL 33402-3606

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 Geoffrey B. Marks, Esq., Cole, White & Billbrough, P.A., Pacific National Bank Building, 1390 Brickell Avenue, Third Floor, Miami, FL 33 13 1 this 2nd day of March, 1998.

EDWARD A. MAROD, P.A.
Counsel for Appellant,
Mildred Jaye.
Post Office Box 3606
West Palm Beach, FL 33402-3606
(561) 832-0050

By: Edward A Marod
Edward A. Marod, Esq.
Florida Bar No. 238961

Supreme Court of Florida Case No. 91,652

APPENDIX TO REPLY BRIEF