IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC07-1397

PRO-ART DENTAL LAB, INC.

Petitioner,

v.

V-STRATEGIC GROUP, LLC

Respondent.

RESPONDENT V-STRATEGIC GROUP, LLC'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

I. *The County Court Proceeding*

In this landlord-tenant action, Respondent V-Strategic Group, LLC ("V-Strategic"), as landlord, filed a complaint against Petitioner Pro-Art Dental Lab, Inc. ("Pro-Art"), as tenant, to recover possession of leased premises. (A-1-6). V-Strategic commenced the action in Broward County Court as a summary proceeding under Chapter 51, Florida Statutes. *Id*. Contrary to the provisions of Section 51.011(1), Florida Statutes (2006) -- which require that a defendant shall file an answer containing all defenses of law or fact within five (5) days of service of process -- Pro-Art filed only a motion to dismiss for lack of subject matter jurisdiction without timely filing an answer. (A-7-8).

The county court heard Pro-Art's motion to dismiss on Friday, April 28, 2006. (A-9-19). After fully considering Pro-Art's argument, the court concluded that it was properly vested with jurisdiction to hear the matter. *Id*. There being no other defenses pled, V-Strategic requested entry of default against Pro-Art based on its failure to file an answer or to raise any other defenses as contemplated by Section 51.011. *Id.* Solely as an accommodation to Pro-Art's counsel, the county court deferred ruling on V-Strategic's motion until the following Monday, May 1, 2006. *Id.* At no time during the hearing did Pro-Art request leave of court to amend its affirmative defenses. *Id*. After the hearing and without seeking leave of

court or other authority, Pro-Art filed what it called an answer and affirmative defenses. (A-20-22). At the subsequent hearing, the county court heard extended argument from counsel on the issue of the propriety of entering judgment based only on the defenses asserted in the motion to dismiss, where Pro-Art had attempted to assert additional defenses not previously raised. (A-23-48). The court ultimately entered final judgment in favor of V-Strategic, determining that Pro-Art's answer and affirmative defenses were untimely under Section 51.011. (A-49-51). Writ of Possession was issued and possession of the leased premises was restored to V-Strategic.

II. ***The Circuit Court Decision***

Pro-Art appealed the matter to the circuit court. The circuit court affirmed the county court's decision by written opinion. (A-52-54). Undertaking a thorough and careful analysis of Section 51.011, the circuit court held that the entry of final judgment was proper because:

> [Pro-Art's] only timely response to the complaint was a motion to dismiss for lack of subject matter jurisdiction. The motion did not contain any other defenses, nor did it contain a statement denying the allegations in the complaint. Section 51.011 is clear on its face -- defensives of law or fact shall be filed within 5 days after service . . . . In short, the statute contemplates that a party defending an action for recovery of leased premises shall have one opportunity to present all available defenses within 5 days from the date of service.

Id.

III. ***Certiorari Review in the Fourth District Court of Appeal***

Pro Art subsequently field a petition for writ of certiorari in the Fourth District Court of Appeal. On certiorari, the Fourth District denied Pro-Art's petition. (A-55-58). In so doing, the Court noted its narrow standard of review on second tier certiorari:

> The standard of review applicable to a petition for writ of certiorari filed from a decision [of] the circuit court rendered in its appellate capacity is whether the circuit court denied petitioner procedural due process and whether the circuit court applied the correct law, both expressions of ways in which the circuit court may have departed from the essential requirements of the law. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530-31 (Fla. 1995).

Id.

The Court went on to hold that the explicit language of Section 51.011 precluded Pro Art from filing an answer and affirmative defenses after the expiration of the mandatory five day time period:

> By its plain language, Section 51.011(1) requires defendants to file all defenses of law or fact in an answer within five days of being served. Thus, in a summary proceeding, a motion to dismiss does not toll the time to file an answer; the proper method of raising defenses usually asserted in a motion to dismiss is to incorporate them in an answer. By not filing its answer within five days of being served, the tenant in the instant case waived its additional defenses. Accordingly, after

> denying the tenant's motion to dismiss, the trial court properly accepted the allegations in the landlord's complaint as true and appropriately entered a final judgment for possession in favor of the landlord.

Id.

Pro Art moved for rehearing of the Order Denying the Petition. The Fourth District denied Pro-Art's motion for rehearing, but certified conflict with *Crocker v. Diland Corp.*, 593 So. 2d 1096 (Fla. 5th DCA 1992), which also involved untimely asserted defenses in a case governed by Chapter 51, Florida Statutes. (A-59-61). The opinion provided, in pertinent part that:

> If *Crocker* and rule 1.500(c) controlled the case, then we would be required to grant the writ; after the court disposed of its defensive motions, but before the entry of a default, Pro-Art filed an answer. *Crocker* allows an untimely answer, filed outside the time limits of Section 51.011, to preclude the entry of a default. However, we read Section 51.011 as allowing the entry of a default once the time to answer has expired and the court has disposed of timely-filed defensive motions.

(A-1).

In construing the interplay between Fla. R. Civ. P. 1.010 and Section 51.011 the Court held:

> Significantly, Florida Rule of Civil Procedure 1.010 states: 'The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed [by] the statutes governing the proceeding unless these rules [i.e. the rules of civil procedure] specifically provide to the contrary.' Chapter 51 is a special statutory proceeding under rule 1.010.

> Rule 1.500(c) allows a defendant to file an answer 'at any time before a default is entered.' *Crocker* applies this rule in a Chapter 51 case.
>
> Such an application of Rule 1.500(c) would allow, as a matter of routine, the filing of answers after five days of service of process. The practice *Crocker* condones contravenes the mandatory time limit of Section 51.011(1). Rule 1.500(c) does not say that it applies in Chapter 51 actions; it does not therefore 'specifically provide' a contrary time limit rule, as is required by rule 1.010 to modify the time for pleading contained in a special statutory proceeding. Therefore, Rule 1.500(c) does not apply to allow the filing of an untimely answer in a Chapter 51 proceeding, even one filed before the entry of a default.

Id.

IV. ***The Florida Supreme Court Action***

On July 26, 2007, Pro-Art filed a Notice to Invoke the Discretionary Jurisdiction of this Court asserting an express and direct conflict. (A-62-63). On September 14, 2007, after considering the jurisdictional briefs of the parties, this Court accepted jurisdiction of the case and set forth a briefing schedule on the merits. (A-64-65).

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly determined that a default final judgment was appropriately entered here where a tenant failed to file an answer and affirmative defenses within the five day mandatory time frame set forth in Chapter 51, Florida Statutes for the following reasons: (1) the statute governing a special statutory proceeding and not the Florida Rules of Civil Procedure apply to the form, content, procedure and time for pleading in a special statutory proceeding and (2) the purpose of a Chapter 51 summary proceeding would be frustrated by the application of the Florida Rules of Civil Procedure.

The instant landlord-tenant action, commenced under Chapter 51, constitutes a special statutory proceeding. Accordingly, the form, content, and procedure here are dictated by statute. Florida courts have determined that mandatory time limits prescribed by statute must be applied absent specific language to the contrary in the rules of civil procedure. Moreover, the purpose of an expedited summary procedure under Chapter 51 would be frustrated if a tenant was permitted to file an answer and affirmative defenses after the mandatory five day time period. Application of Fla. R. Civ. P. 1.500(c) in this context would require the courts to ignore the plain language of Chapter 51. For these reasons, among others, the Fourth District's Opinion Denying Writ of Certiorari and Opinion Denying Rehearing should be affirmed.

STANDARD OF REVIEW

Because the conflict issue requires this Court to engage in statutory interpretation, the appropriate standard of review is *de novo*. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007) (citing *Foundation Health v. Westside EKG Assocs.*, 944 So. 2d 188, 193-94 (Fla. 2006)).

ARGUMENT

POINT ONE

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT FLA. STAT. § 51.011 REQUIRES ENTRY OF DEFAULT AGAINST PRO-ART

A. The History of Summary Procedure Reflects That Its Purpose Is to Provide an Expedited Process for Resolution of Claims for Possession in Landlord-Tenant Disputes

At the outset, it is important to note that this is not an ordinary civil action; it is a summary proceeding falling within the ambit of Chapter 51, Florida Statutes. In order to address the issues raised in this matter, a brief review of the purpose and history of summary procedure is appropriate. As the Fourth District noted in its opinion on rehearing, "[t]he purpose of chapter 51 is to provide for an expedited procedure in certain actions and to avoid the protracted procedural dance that is allowed under the rules of civil procedure." *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 959 So. 2d 753, 757 (Fla. 4th DCA 2007).

Historically, summary procedure in landlord-tenant disputes has a longstanding tradition under Florida law. *See, e.g.*, *Fla. Athletic & Health Club v. Royce*, 33 So. 2d 222 (Fla. 1948). As the Florida Supreme Court held in *Royce*, the purpose of summary procedure is:

> to provide a summary legal remedy for restoring possession to prevent criminal disorder and breaches of the peace, which would likely ensue if no summary remedy existed, and the parties undertook to continue to resort to their own private common law means for enforcing their rights in such cases.

Id. at 224.

Notably, the United States Supreme Court has determined that the "objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant has ample historical explanation and support." *Lindsey v. Normet*, 405 U.S. 56, 72, 92 S. Ct. 862, 873 (1974). To that end, the Court has recognized the justification for summary procedure in the landlord-tenant arena:

> There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sales or rental to someone else. Many expenses of the landlord, continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute.

Id. at 405 U.S. 72-73, 92 S.Ct. 873-74.

The summary procedure adopted by the Florida Legislature in Chapter 51, Florida Statutes, provides an efficient means of resolving landlord tenant disputes within a much narrower window of time than a routine civil action. It is within this framework that this case must be analyzed.

B. The Florida Rules of Civil Procedure Do Not Apply to the Form, Content, Procedure and Time for Pleading in a Special Statutory Proceeding

Because this case was brought pursuant to Chapter 51, the rules regarding form and timing of filing pleadings are as directed by statute. Fla. R. Civ. P. 1.010 provides, in pertinent part, that:

> The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary.

Notably, the Authors' Comment to Rule 1.010 states that:

> The rules are by their terms clearly applicable to County Judge's courts, but, of course ***do not control*** probate proceedings, ***landlord and tenant proceedings***, or other special statutory proceedings in that court.
>
> ***
>
> ***Except where they conflict with statutory provisions***, the rules may serve as a useful guide for approved procedure even in courts, agencies or proceedings to which not expressly applicable.

(emphasis added).

This Court has made clear that statutes governing special statutory proceedings control in the absence of a contrary rule of civil procedure:

> [T]his Court has adopted Rule 1.010, Fla. R. Civ. P., which provides that the form content, procedure and time for pleadings in all statutory special proceedings . . . shall be prescribed by the statutes for such proceedings, unless the civil rules specifically provide to the contrary.

Gonzalez v. Badcock's Home Furnishing Cen., 343 So. 2d 7, 8 (Fla. 1977).

Even in the event of a conflict between a statute governing special proceedings and a rule of civil procedure, this Court has held that the statute controls. *See Harley v. Board of Public Instruction of Duval County*, 103 So. 2d 111 (Fla. 1958). In *Harley*, a circuit court dismissed a school teacher's petition for writ of certiorari in a special statutory proceeding on the basis that the petition was not filed within the ten day time frame set forth in the Duval County Teacher Tenure Act. On appeal, the school teacher argued that the sixty time period to file a petition provided in the Florida Rules of Civil Procedure took precedence over the statutory deadline. This Court rejected the school teacher's argument and affirmed the dismissal of the petition as untimely. In so doing, the Court held:

> This act, although it is a special statute, provides in the language of appellee, a 'new, specific and complete remedy and fully covers the subject matter of teacher tenure, including the employment, contracts, continuing contracts, suspension and dismissal of teachers.' It is evident that its terms control over those of the general statutes covering the county school system . . . and over the 1954 Rules, where a conflict exists, as here.

Id. at 112.

Although Florida's district courts of appeal have not directly addressed the interplay between Rule 1.010 and Chapter 51 proceedings, in analogous cases involving special statutory proceedings, courts have held that the time periods provided in the statute must be strictly construed. *See, e.g.*, *Dracon Constr., Inc. v. Fac. Constr. Manag., Inc.*, 828 So. 2d 1069, 1071 (Fla. 4th DCA 2002) (affirming order vacating liens where enforcement action or proper showing was not made within twenty day time period set forth by statute governing mechanic's liens); *Sturge v. LCS Dev. Corp*., 643 So. 2d 53, 54 (Fla. 3d DCA 1994) (granting certiorari with respect to denial of motion to discharge where lienor failed to strictly comply with statute); and *Matrix Constr. Corp. v. Mecca Constr*., 578 So. 2d 388, 389 (Fla. 3d DCA 1991) (granting certiorari where motion for enlargement of time had elapsed and no showing had been made as to why liens should not be discharged).

Although arising in the context of enforcement of a mechanic's lien, the Fourth District recognized that in special statutory proceedings, courts do not have the latitude to permit litigants to ignore the time periods set by statute that may be permitted under the rules of civil procedure: "[i]n a special statutory proceeding, such as one under Section 713.21(4), the trial court does not have the same discretion to bend time requirements that might be allowed under the rules of civil

procedure." *Dracon*, 828 So. 2d at 1071. In that case, because the enforcement action was not taken timely with respect to a mechanic's lien, the lien was vacated.

Here, Chapter 51 governs this special statutory proceeding. Fla. Stat. § 51.011 provides, in pertinent part, that ***"[a]ll*** defenses of law or fact ***shall*** be contained in defendant's answer which shall be filed within 5 days after service of process." (emphasis added). The statute leaves no room for interpretation. Simply put, "all" means "all." But if a definition is required, the word "all" is defined as "the whole amount or quantity; as much as possible; every member or individual component of; every." *Webster's Ninth New Collegiate Dictionary* 70 (9th ed. 1988). The requirement of Chapter 51 is mandatory. *See City of Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983) (holding that "[i]n statutory construction, the word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'"). The statute supersedes any rule of civil procedure to the contrary, including Fla. R . Civ. P. 1.500(c), which governs the entry of default judgments. Similar to *Dracon*, *Sturge* and *Matrix*, the time limits set forth in Chapter 51 must be applied absent specific language to the contrary in the rules of procedure. Pro-Art's failure to comply with the explicit five day time frame to answer in a summary proceeding under Chapter 51 must result in a default judgment in favor of V-Strategic. As in *Dracon*, the county court here did not have the same

discretion that it might have had in an ordinary civil action to disregard Pro-Art's failure to comply with the five day time frame for filing an answer. Simply stated, by virtue of Pro-Art's non-compliance, the county court was required to enter a default final judgment in V-Strategic's favor.

C. The Purpose of a Chapter 51 Summary Proceeding Would be Frustrated by Pro-Art's Suggested Application of Fla. R. Civ. P. 1.500(c)

In its Initial Brief on the Merits, Pro-Art contends that Fla. R. Civ. P. 1.500(c) controls, and, therefore, it should have been permitted to file an answer asserting new affirmative defenses after the expiration of the five day time period set forth in Chapter 51. Pro-Art's contention ignores the express language of Chapter 51. Moreover, its suggested application of Fla. R. Civ. P. 1.500(c) would frustrate the specific purpose of a summary proceeding in landlord-tenant cases under Chapter 51.

Pro Art cites *Traces Fashion Group, Inc. v. C&C Mgmt.*, Inc., 763 So. 2d 502 (Fla. 3d DCA 2000). *Traces* is distinguishable. In *Traces*, the plaintiff sued for replevin, breach of contract and unjust enrichment/quantum meruit. The plaintiff also moved for prejudgment writ of replevin under Fla. Stat. § 78.068, which was granted. *Id*. at 502. The defendant then filed its answer and affirmative defenses. *Id*. at 503. The plaintiff subsequently moved for summary judgment as to its complaint. Upon the plaintiff's motion and without trial, the trial court

summarily found in favor of plaintiff and awarded damages. *Id*. In so doing, the trial court incorrectly applied the deadlines pertaining to the prejudgment writ from Section 78.068(6). Reversing, the Third District concluded that the trial court misapplied the procedure for prejudgment writ to the summary judgment. *Id*. Because Chapter 78 "makes no provision for the [summary procedure of Section 78.068] to be used in adjudicating the ordinary replevin action," the Third District held that the rules of civil procedure, including Rule 1.510(c) requiring the motion be served at least twenty days before the hearing, applied. *Id.*

The facts at issue here are entirely different than those at issue in *Traces*. In *Traces*, the claims did not fall within the special statutory proceeding and, thus, because the statute did not contain any specific procedure to be followed, the rules of civil procedure applied. Here, there is no dispute that Section 51.011 controls the claims raised by V-Strategic in the underlying matter and sets forth the exact form, content and procedure to be followed in this case. That said, there is no basis to apply the rule of civil procedure. In fact, application of Rule 1.500(c), as Pro-Art argues, would only frustrate the purpose of Chapter 51.

Although no Florida court has directly addressed this issue, at least two courts outside this jurisdiction have made clear that general rules of civil procedure should not be used to frustrate the purpose of a statute governing a special

proceeding. *See, e.g.*, *Brusco v. Braun*, 199 A.D. 2d 27 (N.Y.A.D. 1 Dept. 1993) and *Weems v. McCloud*, 619 F.2d 1081 (11th Cir. 1980).

In *Brusco*, a case with virtually identical facts to this matter, the New York appellate court addressed whether the general rule of civil procedure requiring an inquest be conducted prior to entering a default judgment applied in a summary proceeding brought under statute, where the former tenant had failed to file an answer within the five day time period set by the legislature. The landlord had brought the action against a tenant seeking possession of the premises under New York's law governing landlord-tenant cases. 199 A.D. at 28. The Real Property and Proceedings Law ("RPAPL") at issue provided that in the event a tenant failed to answer within five days from the date of service, the court should render judgment in favor of the landlord. *Id*. at 29. A Civil Practice Law and Rule ("CPLR") governing general civil actions, however, provided that prior to the entry of a default judgment, a court was required to hold an inquest and hear testimony from the tenant. Based on this CPLR, the trial court denied the landlord's application for a default judgment. On appeal, the landlord argued that the RPAPL took precedence over the CPLR because the landlord-tenant dispute was, among other things, summary in nature. The appellate court agreed and reversed the trial court decision. In so doing, the court held that the statute controlled:

> Applying the rules of statutory construction to the conflicting provisions, it is clear that CPLR 3215 is

> inconsistent with, and thus superseded by, the provision of RPAPL 732 (citations omitted) . . . . Similarly had the Legislature intended CPLR 3215(b) to be applicable to summary proceedings, Section 1402 of the New York City Civil Court Act, governing entry of default judgments generally, would indicate as much. This provision goes to some length to state the rather obvious proposition that a summons endorsed complaint 'shall be deemed 'the summons and complaints' referred to in CPLR 3215(e). Conspicuously absent from CCA 1402 is any mention of the petition and notice of petition. Applying the principle *expressio unius est exclusio alterius*, the omission indicates that summary proceedings pursuant to the Real Property Actions and Proceedings Law are not intended to be embraced within its scope and are therefore not subject to the procedures set forth in CPLR 3215.

Id. at 31.

Significantly, the court rejected the same type of argument that Pro-Art makes here:

> Respondents, in their brief, urge that provisions governing default judgments entered in a plenary action brought in Civil Court afford discretion pursuant to CPLR 3215(e) to direct a plaintiff to give oral testimony before rendering judgment. Therefore, by analogy, they argue that such discretion should extend to the summary proceeding in question. However, thus argument overlooks the obvious fact that, in enacting article 7 of the RPAPL, the Legislature provided a comprehensive procedural statute governing, exclusively, summary proceedings for the recovery of possession of real property. Had the Legislature intended that these proceedings be subject to the rules governing other actions, it would not have found it necessary to draft a separate statute. What might be proper in other types of proceedings is immaterial, if not irrelevant, to one

> brought pursuant to the unique provisions of RPAPL 732, applicable only to nonpayment proceedings.

Id. at 33-34.

Similarly in *Weems*, the Eleventh Circuit analyzed a conflict between a statute governing the confirmation of a non-judicial sale -- a special statutory proceeding under Georgia law -- and the Federal Rules of Civil Procedure. Under Georgia law, a court must confirm a non-judicial sale before a creditor can sue a debtor for a deficiency resulting from the sale. *Id*. at 1085-86. The confirmation process is summary in nature and governed by statute. *Id*. at 1086. Under Georgia law, a debtor may raise certain defenses under the statute, but cannot assert counterclaims. *Id*. In *Weems*, the debtors attempted to raise counterclaims during the confirmation process, which were stricken by the trial court on grounds that they exceeded the scope of the Georgia statue. *Id*. at 1093. On appeal, the debtors argued that Fed. R. Civ. P. 13, which authorizes counterclaims, should apply. The Eleventh Circuit rejected the debtors' argument and affirmed the trial court order striking the counterclaims. In so doing the court noted that "the Federal Rules of Civil Procedure are frequently applied less strictly in special statutory proceedings, where strict application of the rules would frustrate the statutory purpose." *Id*. at 1094 (citations omitted). The Eleventh Circuit held that "the purpose of the Georgia confirmation proceeding would be frustrated by the strict application of Rule 13, permitting a debtor to delay the proceeding with assertions of

counterclaims." *Id.* at 1095. The court reasoned that the statute governing the special statutory proceeding governed because:

> [T]he Georgia confirmation proceeding is summary and limited in nature. It is carefully and expressly designed to provide an immediate judicial evaluation of the fairness of non-judicial sales. It is tailored to provide approval or disapproval of that limited issues, without the encumbrance of other disputes between the parties. To permit a debtor to assert counterclaims would convert the proceeding into a plenary trial between the parties, would eliminate its summary nature, and would deny the creditor his right to a quick approval of the sale. It would radically change the character and purpose of the special proceeding. It is for these reasons that we follow the reasoning of the cases cited above which refused to blindly follow the Federal Rules of Civil Procedure when to do so would frustrate the purpose, or destroy the summary nature, of a special, statutorily created cause of action.

Id. at 1096.

Here, it would similarly frustrate the purpose of Chapter 51 to permit a tenant to file answers and affirmative defenses outside the five day time period. As already discussed herein, Chapter 51 is intended to provide a mechanism for immediate resolution of landlord-tenant disputes involving recovery of possession of the premises. Application of Rule 1.500(c) as Pro-Art suggests, would destroy the summary nature of a Chapter 51 proceeding. As recognized by the Fourth District in its opinion denying rehearing, "[s]uch an application would allow, as a

matter of routine, the filing of answers after five days of service of process." *V-Strategic*, 959 So. 2d at 757.

Had the legislature intended for Rule 1.500(c) to apply, it could have provided as such in the statute itself. The legislature has devised a comprehensive summary procedure to address issues relating to the recovery of premises in landlord-tenant context. Section 51.011 requires the filing of all defenses of law or fact within five days of service of the complaint. It makes no reference whatsoever to Rule 1.500(c) nor does it provide any mechanism to permit a court to disregard the statutory language in the event that a tenant fails to file its answer within the five day time period. The mandatory nature of the five day time period leaves no discretion for a trial court to bend the rules. As in *Brusco*, if the legislature had intended the rules of civil procedure applicable in general civil actions to govern, it would not have found it necessary to draft a statute specifically governing summary proceedings.

POINT TWO

CROCKER CAN BE RECONCILED WITH THE FACTS AT ISSUE

Upon careful analysis, the decision of the Fifth District Court of Appeal in *Crocker* may be read as consistent with the decision of the Fourth District Court of Appeal. Both courts recognize that Florida's summary procedure, Chapter 51, Florida Statutes, permits only a single opportunity to raise defenses within the five

day period set forth in Section 51.011. The cases differ in result only because of the nature of the "defenses" asserted in the respective motions to dismiss. In *Crocker*, the defendant counterclaimed against the plaintiff for unlawful entry under Chapter 82, Florida Statutes and invoked the summary procedure under Section 51.011. *Crocker*, 593 So. 2d at 1098. The plaintiff filed a motion to dismiss the counterclaim, asserting failure to state a cause of action upon which relief could be granted, but did not file any answer. *Id*. The defendant contended that it was entitled to a default because the plaintiff had failed to file an answer setting forth all defenses of law or fact within five (5) days of service pursuant to Section 51.011. The lower tribunal denied the motion for default. On certiorari, the Fifth District Court of Appeal denied the petition, treating the motion to dismiss as a defective answer that precluded the entry of a default. The *Crocker* court did not permit the plaintiff a second bite at the apple. To the contrary, the court made clear that the only defenses that could be considered were those that were contained in the motion to dismiss:

> [T]he procedural scheme set forth in Section 51.011 seems straightforward. All defenses of law or fact must be filed in an answer within five days. There is no option to file certain defenses by motion as is authorized by Rule 1.140; *all* defenses (which would necessarily include defense of failure to state a cause of action, *see* Rule 1.140) *must* be filed within *five* days.

Id. at 1099.

The Fifth District explained that the plaintiff "was obliged to file all of its defenses, including failure to state a cause of action, within five days and by failing to do so was exposed to entry of a default." *Id.* at 1100. In that case, the plaintiff "barely met the requirement of Rule 1.500(c) to plead or otherwise defend before entry of the default," by filing a motion to dismiss asserting failure to state a cause of action. *Id.* In so doing, the court determined that:

> Although what was filed was denominated a "motion to dismiss," not an answer, it did contain the statement of a defense of law or fact. In essence, [the plaintiff] filed a defective answer . . . . Unless given leave to amend by the trial court, however, it would be that single statement of defenses on which [the plaintiff] would be obliged to defend at the expedited trial."

Id. (emphasis added).

Here, the sole timely "defense" asserted by way of Pro-Art's motion to dismiss was that the county court lacked jurisdiction to hear the case. After the county court correctly rejected this argument, there simply were no further defenses that had been timely asserted for which trial was necessary.

This matter and *Crocker* reinforce the essential principle in a summary proceeding that there is only one opportunity to assert all defenses of law and fact within five (5) days of service under Fla. Stat. § 51.011. Neither court would permit additional defenses after the five (5) day deadline. As such, *Crocker* can be reconciled with the Fourth District's holding that Section 51.011 requires the entry

of default once the time to answer has expired and the court has completely disposed of any defensive motions.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the Fourth District's Opinion Denying Writ of Certiorari and Opinion Denying Rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Cory W. Eichhorn

CERTIFICATE OF SERVICE

I certify that a copy of this Respondent's V-Strategic Group LLC's Brief on Jurisdiction was mailed on **David H. Charlip, Esq.**, CHARLIP LAW, LC, Harrison Executive Centre, 1930 Harrison Street, Suite 208, Hollywood, Florida, 33020, this _____ day of November, 2007.

_____
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