

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,471

CORAL RIDGE PROPERTIES, INC.  
and WESTINGHOUSE ELECTRIC  
CORPORATION,

Petitioners,

vs.

PLAYA DEL MAR ASSOCIATION,  
INC.,

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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## SUMMARY OF ARGUMENT

The Lower Court erroneously granted summary judgment in favor of the Petitioner on the issues of release and res judicata, both of which are affirmative defenses that the Petitioner failed to plead as required by Rule 1.110(d) of the Florida Rules of Civil Procedure. Petitioner would have this Court believe that Respondent's Complaint raised these issues of release and res judicata and, therefore, summary judgment is procedurally allowable before an answer is filed. Respondent did not raise the issues of release and res judicata. These were not issues in the record as framed by the pleadings.

There is absolutely no conflict within the Fourth District Court of Appeal or between the five Florida District Courts of Appeal. The Florida Rules of Civil Procedure and the decisions of the Appellate Courts of this State all hold that summary judgment cannot be granted upon affirmative defenses not at issue. At least one logical reason for such a rule is to allow the trial court to define the proper scope of discovery, which the trial court in this case failed to do because the defenses of release and res judicata were not framed as issues by the pleadings.

### ARGUMENT

Petitioners cite Rule 1.510 of the Florida Rules of Civil Procedure and underlines the phrase "at any time." Nevertheless, what actually should be highlighted is the phrase "any part thereof" which refers to "a claim, counterclaim, cross-claim or third party claim" or Complaint for Declaratory Judgment brought against that party. Rule 1.510 does not envision summary judgment upon affirmative defenses not pleaded.

Nevertheless, Petitioners state:

[This] decision is not only inconsistent with the rule itself, but it creates conflict with Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So. 2d 525 (Fla. 1st DCA 1962), holding that a defending party may make the motion at any time, setting out defenses by affidavit, and thus effect a speedy termination of the action.

This is a blatant untruth! Edgewater Drugs, Inc. held that a plaintiff can move for summary judgment upon the issues raised in its complaint before the defendant files an answer after twenty (20) days from commencement of the action. The affidavits referred to by Petitioners were not interpreted by the First District Court of Appeal as "setting out defenses" but rather were interpreted as admissions by the defendant against its interests. The Edgewater Drugs, Inc. Court stated:

On the other hand, no where in the record or briefs in this Appeal do we find even an indi-

cation that the Defendant-Appellant has any real defense on the merits of this action. In fact, its president in his affidavit admits that that corporation purchased from the Plaintiff the goods involved in this action.

Id. at 529.

Moreover, the issue in Edgewater Drugs, Inc. was not one concerning an affirmative defense but rather that of improper venue and failure to state a cause of action which according to the Florida Rules of Civil Procedure may be raised by motion as stated in Rule 1.140(b) of the Florida Rules of Civil Procedure.

The Fourth District Court of Appeals holding, in this case, that "it was error to enter judgment based upon 'release' when that affirmative defense had never been asserted in a pleading," is the law of this Court and the State of Florida. There is no Florida appellate decision to the contrary!

No doubt one of the reasons why this is the law is so the parties may know what discovery to conduct and the trial court can determine the legitimate scope of that discovery. The Respondent was denied any discovery (specifically conducting the depositions of those who drafted the release relied upon by Petitioners) relevant to the Petitioners' unpleaded affirmative defense of release and res judicata!

Essentially the trial court granted summary judgment in favor of Petitioners on the basis of a release that was never pleaded as an affirmative defense and upon which the trial court refused to allow the Respondent to conduct discovery.

If release and res judicata were valid defenses, why were they not pleaded and Respondent allowed discovery upon these defenses? If the Lower Court's grant of summary judgment is allowed to stand, answers to these questions will never be discovered. Answers which Respondent is entitled to seek but was denied.

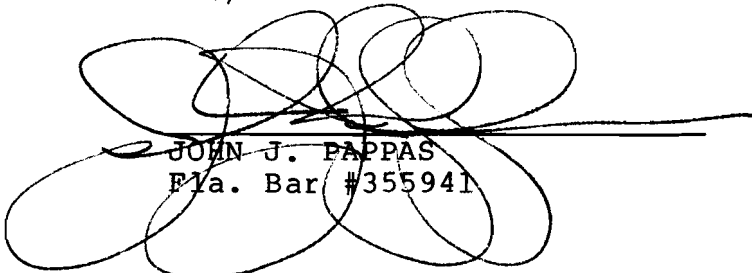
#### CONCLUSION

We agree that a defending party may move for summary judgment upon the issues raised in the pleadings without first answering the complaint. However, a defendant cannot move for summary judgment upon an affirmative defense or any other issue for that matter, that is not raised in the pleadings. There is absolutely no conflict among the District Courts concerning this issue: "It was error to enter judgment based upon 'release' when that affirmative defense has never been asserted in a pleading." The Petition should be denied with costs and attorney's fees cast against Petitioners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Playa del Mar Association, Inc.'s Request for Admissions to Florida Power & Light Company has been furnished by U.S. Mail to PAUL R. REGENSDORF, ESQ., Fleming, O'Bryan & Fleming, Post Office Box 7028, Ft. Lauderdale, FL 33338; ROBERT J. MANNE, ESQ., Becker, Poliakoff & Streitfeld, P.A., 6520 N. Andrews Avenue, Ft. Lauderdale, FL 33310; and JOHN R. HARGROVE, ESQ., Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, One Corporate Plaza, 18th Floor, 110 East Broward Boulevard, Ft. Lauderdale, Florida 33301 this 7<sup>th</sup> day of April, 1986.

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