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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

MILDRED R. JAYE,

Petitioner,

v.

CASE NO. : 77,570

ROYAL SAXON, INC.,

Respondent.

_____ /

**BRIEF OF AMICUS CURIAE
FLORIDA DEFENSE LAWYERS ASSOCIATION
(In support of position of Respondent
On Notice of Review From Decision of District
Court of Appeal, Fourth District)**

Submitted by

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STATEMENT OF THE CASE AND FACTS

Brief of Amicus Curiae, the Florida Defense Lawyers Association is filed with this **Court's** consent on behalf of Respondent, Royal Saxon, Inc., Defendant-below. Amicus adopts the statement of **the case** and facts contained in the brief of Respondent.

The facts underlying the initial controversies leading to the present malicious prosecution action are summarized in the Fourth District's earlier decision of Royal Saxon, Inc. v. Jaye, 536 So.2d 1046 (Fla. 4th DCA 1988). Briefly, Royal Saxon, Inc., a cooperative association **sued** Mildred Jaye, **an** owner of a cooperative apartment operated by Royal Saxon, to enforce specific rules and regulations of the cooperative association. Two years later, while that case was pending, Royal Saxon initiated an assessment for improvements which Jaye challenged **as** improper. Id. at 1047. **As** a result, Royal Saxon filed an action to evict Jaye. She defended and counterclaimed for retaliatory eviction, breach of fiduciary duty, mismanagement of the cooperative and selective and unequal enforcement of the rules and regulations, the by-laws and the proprietary lease of the cooperative. Id. at 1047. Both cases were consolidated and a twelve day **trial** was held which resulted in a directed verdict in Jaye's favor in the initial case and inconsistent verdicts by the jury. Id. at 1047. These inconsistent verdicts were resolved by the **trial** court's declaring Jaye the prevailing party. Id. The trial court awarded Jaye attorney's **fees** of **\$33,250** for the first case and \$54,125 for the assessment case, for a total of \$87,375. Id. The fourth district held that the **trial** court did not abuse its discretion in granting these fees. Id. at 1048. It expressly **remarked:**

The court below painstakingly supervised the inordinately long war between the litigants, and no useful purpose would be served here by renewing the battles

between them. ~~Far~~ too much judicial time and effort have been expended in these proceedings, and the **trial** court is to be commended for trying to make sense out of chaos.

Id. at 1047-48.

Subsequently, Mildred Jaye filed a malicious prosecution action against Royal Saxon in June, 1989, alleging that the two earlier actions brought against her by Royal Saxon were without probable cause and with malice. (A 1-6). Royal Saxon moved for summary judgment on the basis that Jaye is precluded from maintaining an action for malicious prosecution because she elected her remedy when she chose to ~~tax~~ attorneys **fees** and costs in the initial actions. (A 7-9). In its Summary Judgment in favor of Royal Saxon, the **trial** court found that Jaye had elected to ~~tax~~ costs and attorneys fees against Royal **Saxon** in the underlying cases and concluded that, as a matter of law, where a successful defendant chooses to ~~tax~~ costs or **fees** against an unsuccessful plaintiff, defendant is precluded from pursuing an action for malicious prosecution. (A 18-23),

The fourth district **affirmed** and held that a plaintiff in a malicious prosecution action, who has previously taxed fees and **costs** in a successfully defended underlying action, is barred by **that** election from seeking additional damages.

SUMMARY OF THE ARGUMENT

The District Court of Appeal, **Fourth** District, correctly concluded that summary judgment had been properly entered in favor of Respondent, Royal **Saxon, Inc.**, in a malicious prosecution action where Jaye, the successful defendant in the initial underlying action, elected to ~~tax~~ cost and attorney's **fees as** a part of the underlying action. A substantial **fee** in excess of \$87,000 was awarded to Jaye. This Court's decision in Cate v. Oldham, 450 So.2d 224 (Fla. 1984), holding that a successful defendant could either ~~tax~~ costs and **fees** in the original action or sue for malicious prosecution upon the basis of those losses, but can not do both, applies in the present case. This **Court** established that this was the common law rule. The common law has become a **part** of Florida statutory law, and, unless the legislature expressly and clearly abrogates the common law, this Court must follow that common law rule. No statute enacted by the legislature has clearly and specifically abrogated the common law rule which this Court acknowledged in Cate v. Oldham. The present decision of the district court should be approved.

ARGUMENT

CATE vs. OLDHAM, 450 SO.2D 224 (FLA. 1984), APPLIES TO PRIVATE LITIGANTS TO BAR A SUBSEQUENT ACTION FOR MALICIOUS PROSECUTION WHERE THE PLAINTIFF HAS PREVIOUSLY ELECTED TO TAX COSTS AND/OR FEES AFTER SUCCESSFULLY DEFENDING THE UNDERLYING ACTION.

This Court in Cate v. Oldham, 450 So.2d 224 (Fla. 1984) held that at common law successful defendants could either tax costs and fees in the original action or they could sue for malicious prosecution upon the basis of those losses, but they could not do both, and that, there being no Florida statute to the contrary, the common law rule precludes double recovery. This Court reliance on Parker v. Langley, 93 Eng. Rep, 293, 294-97 (K.B. 1714) for its pronouncement of the common law was not misplaced. Although Cate involved an action for malicious prosecution attempted to be brought by a public official against those who had sued him for wrongful death for not having prosecuted the estranged husband of the deceased, this court did not limit its rationale to suits for malicious prosecution brought by public officials.

The Fourth district in Cypher v. Segal, 501 So. 2d 112 (Fla.4th DCA 1987) applied the rationale of Cate v. Oldham, and held that even, though Cypher was not sued exclusively in his official capacity in the initial case, he was nevertheless barred from bringing a malicious prosecution action because of the election made by his attorney to tax costs in the first case. The fourth district held that Cypher had a choice at the conclusion of the initial suit to pursue an independent cause of action or to obtain more limited relief by way of seeking a cost judgment in the underlying case and that, once he made the election, he was barred from seeking additional damages. See also, River Bend Marine. Inc. v. Sailing Associates. Inc., 539 So.2d 507 (Fla.4th DCA 1989).

This court should apply its prior precedent set forth in Cate v. Oldham to the present facts and should approve the decision of the fourth district in the present case. **Petitioner** relies on decisions of **the** first district in Law Offices of Harold Silver v. Farmers Bank and Trust Co., 498 So.2d 984 (Fla.1st DCA 1987) and Turkey Creek, Inc. v. Londono, 567 So.2d 943 (Fla. 1st DCA 1990), in its attempt to dissuade this Court from applying its holding in Cate v. Oldham and the fourth district's holdings in Cypher v. Seaal and River Bend Marine, Inc. v. Sealing Associates, Inc. Law Offices of Harold Silver involved an action by a judgment creditor for malicious prosecution against a bank which had intervened in an execution proceeding against a judgment debtor. That case involved the issues of exclusive statutory remedy or res judicata. This decision does not address the issue of election of remedies because, it would appear, this was not raised as a defense in that case.

Turkey Creek, Inc. v. Londono, does, however, directly address the issue now before this Court and creates direct and express conflict with Cates v. Oldham and Cypher v. Segal. Due to this conflict, this court has accepted jurisdiction to review the first district's decision in Turkey Creek Inc. and has already scheduled that case for oral argument in September, 1991. Turkey Creek, a land development company, and Norwood Hope had been sued by homeowners over the operation of a planned unit development known as Turkey Creek and had been successful in defending this action and in obtaining costs. Turkey Creek, Inc., and Hope then brought suit against the homeowners for slander of title, malicious prosecution for bringing the earlier action, tortious interference with contractual rights, tortious interference with an advantageous business relationship, and conspiracy to interfere with Turkey Creek's contractual rights and business relationship. The trial court dismissed the malicious prosecution action on

the ground that by obtaining a cost judgment in the earlier action appellants had elected their remedy and were therefore precluded from seeking further relief in a subsequent action. The first district reasoned that Cate v. Oldham, merely held that a public official sued in his official capacity could not bring a malicious prosecution action.

The first district's interpretation of the holding in Cate v. Oldham is unwarrantedly restrictive. The Supreme Court in Cate gave as one of the bases for its ruling that at common law successful defendants could either tax costs and fees in the original action or could sue for malicious prosecution and, there being no Florida law to the contrary, common law precluded the action for malicious prosecution where the successful defendant elected to tax costs and fees in the initial action. Further, contrary to the first district's opinion, this Court did address election of remedies in Cate v. Oldham and the fourth district correctly so held in Cypher v. Segal.

In the present case, the record is uncontroverted that Jaye elected to tax costs and fees in the trial court and that she was awarded fees in excess of \$87,000. By making this election, consistent with the rationale of Cate v. Oldham, she precluded any right to bring an action for malicious prosecution. It is not significant what amount was recovered as fees and costs. What is important is that Jaye elected her remedy at the time of the initial suit. The result of this Court's decision in Cate v. Oldham should be to put an end to litigation particularly where one suit after another could result if an election of remedies was not held to be finally determinative. This is particularly true in the present case where the fourth district in its first decision described the controversy as "the inordinately long war between the litigants where no useful purpose would be serve by renewing the battles between them." The fourth district stated that far too

much judicial time and effort have been expended in these proceedings, and it commended the trial court for trying to make sense out of chaos.

The present decision of the fourth district court, decided on the authority of Cate v. Oldham and Cypher v. Segal, is consistent with pronouncements regarding judicial abhorrence of malicious prosecution actions which actions have the potential of causing endless litigation and pronouncements regarding the need for finality to judicial proceedings. Courts have looked with disfavor on actions for malicious prosecution as placing a chilling effect on resort to the law and courts for the settling of grievances as an alternative to self help. Duncan v. Germaine, 330 So.2d 479 (Fla. 4th DCA 1976). The result reached by the fourth district's decision is philosophically and legally sound and will put an end to unwarranted and unending litigation without eliminating the successful defendant's election of rights. Malicious prosecutions have historically been disfavored for their chilling effect on the prosecution of meritorious criminal and civil proceedings and because they continue, often with ill temper, finished litigation which ought to remain undisturbed. Prosser, The Law of Torts, (3rd ED. 1964) §113, p. 889.

In the present case, Mildred Jaye elected to tax her fees and costs in the underlying action. When recovery of fees and costs is made in the initial proceeding, a persuasive justification of a malicious prosecution action is eliminated.

As this Court explained in Cate v. Oldham, section 2.01, Florida Statutes, declares that the common and statute laws of England which are of a general nature, down to July 4, 1776, are in force in this state. The only exception provided is if the statute of common law is inconsistent with the United States Constitution or laws of the United States or Florida. Because there is no statutory law on this point, this Court examined the common law cause of action for

malicious prosecution and determined that at common law, a successful defendant could either ~~tax~~ costs and fees in the original action, or could sue for malicious prosecution.

The doctrine of separation of powers established in Article **11**, section 111, Florida Constitution, and imbedded in both the state and federal constitutions at the threshold of constitutional democracy in this country, precludes this Court from making statutory law. See Ponder v. Graham, 4 Fla. 23, 25 (1851). The matter of changing statutory law is not one to be indulged by the judiciary, but is solely a legislative function. Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938). The Common law, if not abrogated by a clear and explicit statute superseding the common law, is in full force and effect in this state. Wilson v. Renfro, 91 So.2d 857 (Fla. 1957); Bryan v. Landis, 106 Fla. 19, 142 So. 650 (1932). This Court has expressly held that courts are bound by the rule of **stare decisis** to follow the common law as it has been judicially declared in previously adjudicated cases. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). In Cate v. Oldham, this Court has declared what the common law is with regard to malicious prosecution actions and election of remedies. The legislature has enacted no statute which recedes with specificity from this common law rule of election of remedies which rule has by operation of section **2.01**, Florida Statutes, become the statutory law of this State. If the common law is to be **receded** from, the legislature must do so with exact specificity. This Court has recently reiterated that the presumption is that no change in the common law is intended by the legislature unless the statute is explicit and clear in that regard. Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990). None of the statutes relied upon by Petitioner in the present case clearly and explicitly change the common law involved in this **case**. Moreover, the statutes alluded to by petitioner do not and


cannot change the common law by implication. This Court has held that statutory abrogation by implication of the existing common law is not favored. Id. at 918.

To hold that Jaye, who elected to assess substantial attorneys fees and costs in the underlying proceeding, is entitled to bring an action for malicious prosecution, would be to rewrite the law. This in turn would constitute a violation of separation of powers. If this rule of election of remedies is to be changed, then such modification must be made by **the** legislature where the proposed change will be carefully considered by legislative committees **in** public hearings.

This Court should approve the fourth district's holding that Cate v. Oldham does apply to the present **case** and that the plaintiff in a malicious prosecution action, who has previously **taxed** fees and **costs** in a successfully defended underlying action, is barred by that election **from** seeking additional damages.

CONCLUSION

This Court should approve the decision of the District Court of Appeal, Fourth District, which affirms the trial court summary judgment in favor of Respondent, Royal Saxon, Inc.


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CERTIFICATE OF SERVICE

I HEREBY **CERTIFY** that a true and correct copy of the foregoing has been furnished by **U.S. mail to** Michael B. Small, Esquire, Paramount Center - Penthouse, 139 North County Road, Palm Beach, FL 33480, John Bulfin, Esquire, Wiederhold, Moses, Bulfin & Rubin, P.A., Northbridge Centre, Suite 800, 515 North Flagler Drive, West Palm Beach, Florida 33402, this 24th day of April, 1991.


MARGUERITE H. DAVIS