IN THE SUPREME COURT OF FLORIDA

FIRST INTERSTATE DEVELOPMENT CORPORATION, a Florida corporation, OCEAN WOODS, INC., a Florida corporation, THOMAS WASDIN, et al,

Defendants/Petitioners,

CASE NO. 67,848

CARLOS M. ABLANEDO, et al,

Plaintiffs/Respondents.

FILED
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RESPONDENTS' BRIEF ON JURISDICTION

APPEAL FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, FIFTH DISTRICT

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii,iii
PRELIMINARY STATEMENT	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ISSUE PRESENTED:	
WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN THIS CAUSE ON THE MERITS ON THE GROUNDS THAT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ESPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS ON THE SAME QUESTIONS OF LAW WITH THE DECISIONS OF ANOTHER COURT OF APPEALS OR THE SUPREME COURT	2
ARGUMENT:	
POINT ONE:	
DOES THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REVERSED THE TRIAL COURT STRIKING THE ISSUE OF PUNITIVE DAMAGES EXPRESSLY AND DIRECTLY CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL?	2
POINT II:	
DOES THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REMANDED THE CAUSE FOR A TRIAL ON THE ISSUE OF PUNITIVE DAMAGES ONLY EXPRESSLY AND DIRECTLY CONFLICT WITH PRIOR DECISIONS OF OTHER FLORIDA DISTRICT COURTS OF APPEAL?	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

CASE	PAGE
Adler v. Seligman of Florida, Inc., 438 So.2d 1063 (Fla. 4th DCA 1983)	8
Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982)	3, 6
Baynard v. Liberman, 139 So.2d 485 (Fla. 2d DCA 1962)	7, 8
Campbell v. Government-Employees Insurance Co., 306 So.2d 525 (Fla. 1974)	6
Como Oil Company, Inc. v. O'Laughlin, 466 So.2d 1061 (Fla. 1985)	3
DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3rd DCA 1970)	6, 7, 9
Florida Railway & Navigation Company v. Webster, 25 Fla. 394, 5 So. 714 (1889)	6
Gillette v. Stapleton, 336 So.2d 1226 (2nd DCA 1976)	7
Hartford Accident and Indemnity Co. v. Ocha, 472 So.2d 1338 (Fla. 4th DCA 1985)	9
Hutchens v. Weinberger, 452 So.2d 1024 (Fla. 4th DCA 1984)	4
Ingram v. Pettit, 340 So.2d 922 (Fla. 1976)	6
Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976)	1,6,7,8
Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981)	8
Schief v. LiveSupply, Inc., 431 So.2d 602 (Fla. 4th DCA 1983), pet. for rev. denied 440 So.2d 352 (Fla. 1983)	4, 5, 9
Tinker v. De Maria Porsche Audi, Inc., 459 So.2d 487 (Fla. 3rd DCA 1984)	5, 9
Tuel v. Hertz Corporation, 296 So.2d 597 (Fla. 3d DCA 1974)	4

Wackenhut Corp. v. Canty,
359 So.2d 430 (Fla. 1978)............................... 3

Walsh v. Alfidi,
448 So.2d 1084 (Fla. 1st DCA 1984)..................... 5, 9

White v. Burger King Corp.,
433 So.2d 540 (Fla. 4th DCA 1983)...................... 8

Winn & Lovett Grocery Co. v. Archer,
171 So. 214 (1936) 3

PRELIMINARY STATEMENT

The Appellee/Respondents herein were the Plaintiffs in the lower court and will be referred to herein as Plaintiffs.

The Appellant/Petitioners were the Defendants in the lower court and will be referred to herein as Defendants.

Reference is to the Appendix and page number by citing as follows: (A-__)

STATEMENT OF THE CASE

The trial of this case of fraud lasted from October 31, 1983 to November 9, 1983. At the conclusion of the trial, the jury found the Defendants defrauded the Plaintiffs and returned verdicts accordingly in favor of the Plaintiffs and against the Defendants, OCEAN WOODS, INC., FIRST INTERSTATE DEVELOPMENT CORPORATION and THOMAS E. WASDIN. The verdicts were reduced to final judgment December 30, 1983. On January 5, 1984, the Defendants filed their Notice of Appeal and the Fifth Disctrict Court of Appeals filed its opinion September 5, 1985. In its opinion the Fifth District Court of Appeals held that the trial court improperly struck the Plaintiffs' claim for punitive damages, affirmed the compensatory damages awarded the Plaintiffs, and in accord with its holding remanded the cause for a new trial on the issue of punitive damages only. (A-4) After a denial of the Defendants' Motion for Rehearing, the Mandate was forwarded to the Trial Court October 28, 1985. The Defendants filed their Petition for Review with the Fifth District Court of Appeals November 1, 1985.

SUMMARY OF ARGUMENT

As to Defendants' first arguement Plaintiff's would submit that the Fifth District's opinion in the instant case, which reversed the trial Court striking the Plaintiffs' prayer on the issue of punitive damages is not a basis for this Court's exercising its discretionary jurisdiction, since every Appellate Court in this State has held that in a claim for fraud, the issue

of punitive damages is not a threshold question for the Court to decide, but must be submitted to the jury in every case.

As to Defendants' second argument concerning the appropriateness of the Fifth District's reversing the trial Court's striking the Plaintiffs' prayer punitive damages and then remanding the cause for a new trial on the issue of punitive damages only, Plaintiffs would submit that because of this Court's holding in Lassiter v. International-Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), which established the principle of law that an award of punitive damages need not bear a reasonable relation to the actual or compensatory damages awarded, the cases cited in support of Defendant's position are no longer viable and the post-Lassiter decisions are not in conflict with each other. Thus there is no basis for this Court to exercise its discretionary jurisdiction.

ISSUE PRESENTED

WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN THIS CAUSE ON THE MERITS ON THE GROUNDS THAT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ESPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS ON THE SAME QUESTIONS OF LAW WITH THE DECISIONS OF ANOTHER COURT OF APPEALS OR THE SUPREME COURT.

ARGUMENT

POINT ONE

DOES THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REVERSED THE TRIAL COURT STRIKING THE ISSUE OF PUNITIVE DAMAGES EXPRESSLY AND DIRECTLY CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL?

Contrary to Defendant's contentions, Florida Appellate Courts are unanimous in holding that in actions involving **fraud**, the issue of punitive damages is not a threshold question to be determined initially by the trial court, but rather must **always** be presented to the jury for its consideration.

This principle was firmly established in Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 221 (Fla. 1936), a case heavily relied upon by the Defendants where this Court stated:

> ...Exemplary damages are given solely as a punishment where torts are committed with **fraud**, actual malice, or deliberate violence or oppression,... (emphasis supplied)

In Wackenhut Corp. v. Canty, 359 So.2d 430, 435 (Fla. 1978), another nonfraud case cited by the Defendants in support of their position, this Court in rendering its decision said the following:

> ...A legal basis for punitive damages exists where torts are committed in an outrageous manner or with **fraud**, malice, wantonness or oppression.... (emphasis added)

The exact language set out above is repeated in a more recent decision of this Court in Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982), another non-fraud case cited as support for Defendants' position.

Como Oil Company, Inc. v. O'Laughlin, 466 So.2d 1061 (Fla. 1985) is again another nonfraud case relied upon by the Defendants. This case merely holds what the Plaintiffs concede, that in a negligence case the issue of whether the acts of the tortfearor are sufficently outrageous to warrant submission of the question of

punitive damages to the jury is a threshold issue for the court to decide.

Defendants cite only one **fraud** case as authority for their position the issue of punitive damages is a threshold decision of the trial court, and that is Schief v. Live Supply, Inc., 431 So.2d 6Ø2 (Fla. 4th DCA 1983), pet. for rev. denied 44Ø So.2d 352 (Fla. 1983). (A-5). That case does not hold that the trial court in a case of fraud can strike a punitive damage claim. It merely holds it is error for the trial court to insert the word "fraud" in the standard punitive damage instruction, so as to mislead the jury to believe punitive damages should **always** be awarded in fraud cases. The Third District in Schief stated on page 6Ø3:

> ...Whether a fraudulent act is sufficiently outrageous so as to justify an award of punitive damages is a question for the jury....

Schief is one of the cases cited by the Fifth District below as authority in opposition to the Defendants' position under this point. (A-4) The Fourth Distict in Hutchens v. Weinberger, 452 So.2d 1Ø24, 1Ø25 (4th DCA 1984), interpreted Schief observing: (A-8).

> ...As we noted in **Schief**, whether the fraudulent act is sufficiently outrageous is a question for the jury....

The last case cited by Defendant's in support of their argument, is Tuel v. Hertz Corporation, 296 So.2d 597 (Fla. 3d DCA 1974), a standard automobile negligence case. Plaintiffs' do not disagree with the Defendants' argument that in a case of that nature the issue of punitive damages would be a threshold issue for

the judge to determine.

The whole question of whether punitive damages is a threshold issue for the trial court in fraud cases was put to rest in Walsh v. Alfidi, 448 So.2d 1084 (Fla. 1st DCA 1984) and the cases cited therein; page 1087 the First District states as follows: (A-13).

> ...Whether a fraudulent act is "sufficiently outrageous so as to justify an award of punitive damages is a question for the jury." **Schief v. Live Supply, Inc., supra**, at 603; **Tinker v. De Maria Porsche Audi, Inc.** (Fla. 3d DCA 1984) [9 FLW 398]....

In summary, the Florida Appellate Courts have held that fraudulent acts are, ipso facto, sufficient to warrant consideration, but not necessarily the assessment, by the jury of punitive damages so as to eliminate the need for any initial inquiry by the trial court as to the propriety of punitive damages.

POINT TWO

> DOES THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REMANDED THE CAUSE FOR A TRIAL ON THE ISSUE OF PUNITIVE DAMAGES ONLY EXPRESSLY AND DIRECTLY CONFLICT WITH PRIOR DECISIONS OF OTHER FLORIDA DISTRICT COURTS OF APPEAL?

Since the issue, of whether the court below erred in ordering a new trial soley on the question of punitive damages was first raised in Defendants' unsuccessful Motion for Rehearing and not addressed in their briefs they cannot assert it now as a basis for this Court to accept jurisdiction.

Even if timely presented, Defendant's position is

without merit since all the relevant cases cited by Defendants were decided prior to Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), which established the principle of law that an award of punitive damages need not bear a reasonable relation to the actual or compensatory damages awarded. (A-14). Lassiter was reaffirmed by this Court's decision in Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039, 1042-3 (Fla. 1982), where it was acknowledged: (A-35,38).

> ...We were right to disavow the rule that punitive damages must bear some reasonable relation to compensatory damages, **Lassiter v. International Union of Operating Engineers,** 349 So.2d 622 (Fla. 1976), because the amount of compensation for loss is an entirely separate matter from the amount of punitive damages. Punitive damages apply to wrongdoing, not covered by the criminal law, where the private injuries inflicted partake of public wrongs. They are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976); Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1974); Florida Railway & Navigation Company v. Webster, 25 Fla. 394, 5 So. 714 (1889)....

Since there is no necessary nexus between compensatory and punitive damages, it is not necessary to have both punitive and compensatory damages considered by the same jury. Of the cases cited by the Defendants, DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3rd DCA 1970) is one of only two cases which actually hold it is a better practice and procedure for one jury to determine both compensatory and punitive damages. However, as previously pointed out, this case was decided prior to Lassiter, supra, and in DuPuis the reversal initially was on

compensatory damages only. It was only upon a rehearing that the Court determined it would be better to order a new trial on all damages.

The wisdom of DuPuis and Gillette v. Stapleton, 336 So.2d 1226 (2nd DCA 1976), another pre-Lassiter case cited by Defendants, can only be understood when viewed in the light of the then existing law, which required some reasonable relationship between compensatory and puntive damages. The necessity of such a relationship made it seem reasonable to require one jury to consider compensatory and punitive damages. However, in light of Lassiter, Dupois and Gillette are anachronisms.

The other pre-Lassiter case cited by the Defendants, Baynard v. Liberman, 139 So.2d 485 (Fla. 2d DCA 1962), is actually no support for their position that the Fifth District should have reversed and ordered a new trial on both compensatory and punitive damages. If the case holds anything at all, it is that the Plaintiff's cross-appeal below should have failed in its entirety, since the Plaintiffs did not ask for a new trial on compensatory damages as well as punitive damages. Baynard indicates that if the plaintiffs there had wanted a new trial on punitive damages, it would have been necessary for them to have requested a new trial on compensatory as well as punitive damages, and because they failed to do so, their prayer for a trial soley on the issue of punitive damages was denied.

If the reasoning of Baynard was applied in the case sub judice, at most, the opinion below should be modified to an affirmance of the compensatory damages, and a denial of the

cross-appeal. However, Baynard, has no application to the case at bar, since after Lassiter, punitive and compensatory damages need not have any relationship to each other and thus can be independently determined by separate juries.

The first post-Lassiter case cited by the Defendants, White v. Burger King Corp., 433 So.2d 540 (4th DCA 1983) provides them little support. Though the Fourth Distrct did remand the case for trial on all issues, which included punitive damages, it is apparent from the decision the Fourth District felt punitive damages must be reconsidered in light of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), which dramatically changed the law on punitive damages as they related to that case, and was not rendered until after the trial of White. It was likewise necessary for the jury on remand to reconsider compensatory damages in White since the trial court erred in failing to properly instruct the jury on the Plaintiff's theory of damages.

Another post-Lassiter case cited by the Defendants, Adler v. Seligman of Florida, Inc., 438 So.2d 1063 (Fla. 4th DCA 1983), does not support defendants' position. This case merely states that under no circumstances is a jury to be instructed that they **must** bring back a punitive damage award. And that's true even in the face of an established liability for compensatory damages. The issue there was whether there is such a thing as a mandatory punitive damage award, and the Fourth District answered in the negative. A jury may very well decide not to award punitive

damages, even though the evidence would support such an award.

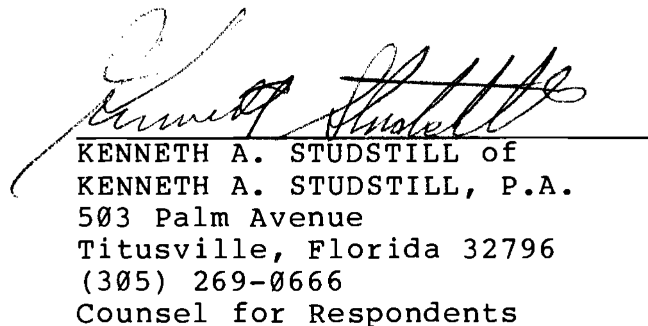
The questionable vitality of the cases cited by Defendants is further illustrated by the fact that Schief v. Live Supply, Inc., 431 So.2d 6Ø2 (Fla. 4th DCA 1983); (A-5) Walsh v. Alfidi, 448 So.2d 1Ø48 (Fla. 1st DCA 1984); (A-1Ø) and Tinker v. De Maria Porsche Audi, Inc., 459 So.2d 487 (Fla. 3rd DCA 1984), (A-21), all of which are cited in the opinion below, were remanded for a new trial exclusively on the issue of punitive damages. (A-4,6,13,27).

Tinker shows even the Third District no longer follows its own holding in DuPuis supra. In a more recent case, not involving fraud, Hartford Accident and Indemnity Co. v. Ocha, 472 So.2d 1338 (Fla. 4th DCA 1985) the court likewise remanded for a new trial only on the issue of punitive damages. (A-28,33).

CONCLUSION

The Supreme Court should not invoke its discretionary jurisdiction, because the opinion of the Fifth Disctrict Court of Appeals, when viewed in light of the most recent Supreme Court and District Court opinions presents no conflict.

Respectfully submitted,



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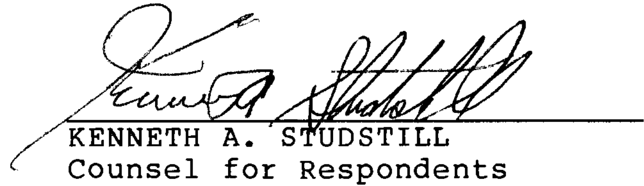
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5)copies of the foregoing Respondents' Brief on Jurisdiction was furnished by U.S. Mail to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32304 with a true and correct copy being furnished by hand delivery to John M. Starling, Esquire, Attorney for Petitioners, 509 Palm Avenue, Titusville, Florida 32781-0069, on this 18 day of November, 1985.



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