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SUPREME COURT OF FLORIDA

CASE NO. 74,183
4th DCA NO. 87-2743

PAUL G. LANE, et al,

Petitioners,

v.

THOMAS A. HEAD, ROBERT G. CURRIE, HERBERT SCHAFFER and LEMON BAY BREEZES DEVELOPMENT CORPORATION, a Florida corporation,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS.
THOMAS A. HEAD and ROBERT G. CURRIE

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SUMMARY OF THE CASE AND FACTS

Respondents believe it is necessary to expound on the Statement of Facts presented by Petitioner due to the additional matters being raised by Respondents.

In November of **1979**, Petitioner's derivative shareholder, LANE, owned a piece of vacant land in Englewood, Florida (hereinafter referred to as the "Lane Parcel") (TT-23, 26). Respondents, HEAD, CURRIE and SCHAFFER, considered purchasing an interest in that property and set about to investigate the Lane Parcel (TT-24-25). HEAD, was a general contractor; CURRIE was an architect; and SCHAFFER was an accountant. As part of his investigation of this investment opportunity, CURRIE obtained a survey and drew preliminary architectural plans (TT **280-281**). Further, LANE, HEAD, CURRIE and SCHAFFER met at the Planning and Zoning Office for Charlotte County and continued to Englewood, Florida, to view the Lane Parcel (TT *24-25*). While in Englewood, HEAD and CURRIE viewed a separate and distinct parcel of property owned by the Dunwody family (hereinafter referred to as the "Dunwody Parcel") (TT **287**). LANE, HEAD, CURRIE and SCHAFFER considered and discussed purchasing the Dunwody Parcel and to that end, made inquiries of James Thompson, a real estate broker (TT 36, 186, **289**, 331).

On November 20, **1979**, after returning from Englewood, the four individuals formed PINE CREEK DEVELOPMENT CORPORATION (hereinafter referred to as PINE CREEK), with the Lane Parcel as the specific

purpose and contemplation of the parties (TT *149-150, 189, 292, 364).* During this same time period, November and December of *1979,* these same four individuals continued to pursue the Dunwody Parcel, including meeting Attorney Dunwody as agent for the owners, drafting a Deposit Receipt Contract and speaking to the broker in the transaction, James Thompson (TT *41, 293-5).* In December, *1979,* a draft of a contract to purchase the Dunwody Parcel was prepared and HEAD, SCHAFFER, CURRIE and LANE individually were listed as purchaser (TT *41).* The draft included a purchase price of *$300,000.00,* which consisted of $60,000.00 down and a *$240,000.00* purchase money mortgage, with the buyers responsible for *$30,000.00* broker's commission (TT 105). Thompson and LANE, apparently acting in concert as salesmen, were to equally share the commission (TT *304, 334).* LANE, HEAD, CURRIE and SCHAFFER discussed the idea of deferring all or part of the commission to reduce the initial outlay of funds (TT *193, 370).* LANE specifically told HEAD, CURRIE and SCHAFFER that Thompson would not defer his one-half of the commission (TT *298).* However, shortly thereafter, HEAD was informed by Thompson that, in fact, it was LANE, and not Thompson, who was insisting on his one-half of the commission up front at closing (TT *298, 336-338).* HEAD discussed this with SCHAFFER and CURRIE and all three were outraged at the deception of their partner, LANE, and the decision was made to inform LANE that HEAD, CURRIE and SCHAFFER would not do business with LANE on either the Dunwody Parcel or the Lane Parcel (TT *209-211, 299, 375-379).* SCHAFFER was designated as the

person to advise LANE of this information since SCHAFFER was the first person to know LANE (TT *208, 375).* When SCHAFFER *so* advised LANE, LANE made no complaints, orally or in writing, to the HEAD, CURRIE or SCHAFFER, or to Attorney Dunwody, the agent for the sellers of the Dunwody Parcel (TT *219, 302,* 378-379). In fact, Dunwody personally spoke to LANE after LANE was out of the deal and LANE's comment was "I'm sharing in the commission...I'm not concerned" (TT 110).

In December of 1979, HEAD, CURRIE and SCHAFFER individually entered into a contract to purchase the Dunwody Parcel for *$300,000.00* and agreed to pay the *$30,000.00* commission up front at closing (TT *222-223, 303-304).* LANE was fully aware of this contract and made no complaints about the fact the contract was not in the name of PINE CREEK DEVELOPMENT CORPORATION or LANE. On December *19, 1979,* HEAD, SCHAFFER and CURRIE formed LEMON BAY BREEZES DEVELOPMENT CORPORATION (hereinafter "LEMON BAY") specifically to develop the Dunwody Parcel, and subsequently these Defendants assigned the Deposit Receipt Contract to the corporation, LEMON BAY.

Four months later in April of *1988,* LEMON BAY took title to the Dunwody Parcel, with HEAD, CURRIE and SCHAFFER signing personal guarantees on the *$240,000.00* purchase money mortgage (TT *244-245).* LANE received his $15,000.00commission (TT *303-304)* and LANE was thereafter fired by Thompson (TT *342).* LANE contributed no money to the closing and did not sign on any notes, etc. (TT *222-223).* On April *29, 1980,* LANE filed a suit against

Respondents, (TT 59), which was subsequently dismissed for lack of prosecution.

LEMON BAY, under the direction of Respondents, HEAD, CURRIE and SCHAFFER, proceeded to develop the Dunwody Parcel, and these individuals invested money into the project and took in other investors to help fund the project (TT *222, 304, 390).* Some eight months later, in December of *1980,* LANE, wearing the hat of a broker-salesman, approached SCHAFFER with an offer from a potential purchaser of the Dunwody Parcel (TT *385).* The offer acknowledged LEMON BAY as the seller and owner of the property and provided for a *$120,000.00* commission to LANE (TT *223-226).* Further, as part of this offer, LANE asked HEAD for a kickback if HEAD were to become the general contractor for the prospective purchasers (TT *225).* The offer acknowledged that LANE had received earnest money from the purchasers, but LANE could not substantiate receipt of said earnest money (TT *226).* For these and other reasons, the offer was rejected and LANE advised the three individual Respondents that if they did not accept this offer, LANE would file a Lis Pendens so that Respondents would be unable to sell the Dunwody Parcel (TT *226-227, 386-388).* In late December of *1980,* LANE sought a Lis Pendens on the property (TT *89, 251, 444).* Ultimately, the property was sold to Odyssey Development Corporation for *$1,250,000.00* in December of *1981* (TT *454, 458-459).*

The Petitioner brought this action as the minority shareholder of Pine Creek Development Corporation. The Respondents are the

only other shareholders of that corporation. Petitioner claimed the Respondents had purchased and developed the Dunwody property which land was to have been purchased and developed by Pine Creek. The trial court found that Respondents had usurped a corporate opportunity of Pine Creek and awarded Judgment against Respondents for $604,800.00 (Petitioner's Appendix A-4).

Acknowledging that Lane was the only party who benefited or could benefit from the Judgment, on February 25, 1988, the trial court entered an Order setting forth that payment of $223,604.00 to Lane and his attorneys would result in satisfaction of all the Judgments. (R. 1666) This amount represented twenty-five (25%) percent of the principal Judgment with interest, plus attorneys' fees awarded by the trial court on December 21, 1987. (Petitioner's Appendix 1 - 3, 7 - 8)

Throughout the Brief, Petitioner, LANE, will be referred to as LANE, Plaintiff or Petitioner. The Respondents, HEAD and CURRIE, will be collectively referred to as HEAD, Defendants or Respondents.

SUMMARY OF THE ARGUMENT

Since this court has found a conflict, it has jurisdiction to consider the entire case on the merits as though the decision was by direct appeal.

The Final Judgment for attorney's fees was not supported by Florida Statute §607.124(5) in that the derivative shareholder, LANE, was the only party to benefit from the litigation. Alternatively, the trial court's use of a multiplier and failure to abide by the fee agreement between Plaintiff and its attorney is not permitted by Florida law.

Petitioner failed to establish the necessary elements of a shareholder's derivative suit as Petitioner did not show that the purchase of the Dunwody property was a corporate opportunity and that any demand was made on the Respondents to act for the benefit of the corporation.

The Respondents presented substantial evidence supporting their affirmative defenses of laches and estoppel. The trial court's denial of those affirmative defenses was clearly against the substantial weight of the evidence.

For the foregoing reasons, the trial Court's judgments for damages and attorneys' fees must be reversed and the Fourth District Court of Appeals opinion allowing attorneys' fees must be reversed.

ISSUE I: THE PETITIONER IS NOT ENTITLED TO ATTORNEYS' FEES UNDER FLORIDA LAW

Petitioner's award of attorneys' fees as granted by the trial court and granted in part by the Fourth District Court of Appeals is based solely on Florida Statute §607.147(5). Respondents' initial position continues to be that Petitioner is not entitled to any attorneys' fees award under Florida Statute §607.147(5). Accordingly, the decision of the trial court should have been reversed by the Fourth District Court of Appeals and should be reversed by this court.

Florida Statute §607.147(5) provides as follows:

> If the action on behalf of the corporation is successful, in whole or in part, or if anything is received by the plaintiff or plaintiffs as the result of a judgment, compromise or settlement, the court may award the plaintiff or plaintiffs the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. The sub-section shall not apply to any Judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them. (Emphasis added.)

In United Parts, Inc. v. Tillis, 432 So.2d 674 (Fla. 5 DCA 1983), minority shareholders who were successful in their suit to compel the board of directors to purchase a proportionate number of shares as were purchased from a majority shareholder sought attorneys' fees under §607.147(5) (1981). The court held that the minority shareholders were not entitled to an award of attorneys' fees under the statute because they recovered nothing for the

corporation. Rather, the court held that the action benefited only the minority shareholders and under the last sentence of §607.147(5), those minority shareholders were not entitled to recovery of attorneys' fees.

It is the Respondents' position that the United Parts, Inc. rationale applies to the instant action. The only party benefiting from this entire lawsuit is Lane, the derivative shareholder. The only other shareholders in the corporation are the Respondents against whom the Judgment has been rendered. Petitioner and the trial court agreed that the total amount of the Judgment would result only in a twenty-five (25%) percent recovery to the minority shareholder, Lane.

Based upon Florida Statute §607.147(5), the Petitioner is not entitled to recovery of attorneys' fees as awarded by the trial court and reduced in part by the appellate court.

Assuming arguendo that this court believes Petitioner is entitled to attorneys' fees under the above noted statute, Respondents respectfully submit that the amount of attorneys' fees awarded was not determined in accordance with Florida law. Evidence was submitted that the Petitioner's trial counsel agreed in April of 1985 to receive an hourly fee of $100.00, whether or not the Plaintiff was successful. The fee agreement provided for a twenty-five (25%) percent contingency fee if the Plaintiff was successful. Clearly, the fee agreement between the attorney and his client was not a straight contingency fee agreement, as the attorney was guaranteed an hourly fee if he lost the case.

In Florida Patient's Compensation Fund v. Rowe, *472 So.2d 1145* (Fla. 1985), this court discussed the rationale behind the use of a multiplier. The use of a multiplier after the lodestar is calculated is strictly to compensate attorneys for the "risk" factor involved in pursuing a cause of action on a pure contingency fee basis. Obviously, an attorney who agrees to represent a client on this basis "assumes the risk" that he will obtain no compensation for his efforts if he loses. This is the sole justification for multiplying the basic "lodestar" amount which is presumed to represent a reasonable fee. As stated in Rowe:

> Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained". Id. at 1151. (Emphasis added.)

The court goes on as follows:

> Because the attorney working under a contingency fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services. When the prevailing counsel is employed on a contingency fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorneys' fee. Id. (Emphasis added.)

See also, Lake Tippecanoe Owners Association, Inc. v. Hanauer, *494 So.2d* 226 (Fla. 2 DCA 1986). The Rowe court emphasized that "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client". Id. The Rowe court concluded that "...the lodestar figure calculated by the court is entitled to enhancement by an appropriate contingency risk multiplier in the range of 1.5 to 3.0. When the trial court

determines that the success was more likely than not at the outset, the multiplier should be 1.5...". Id. (Emphasis added.)

The key words herein are "contingency risk" and a determination of the likelihood of success "at the outset". Clearly, the Rowe decision contemplated use of a multiplier only where there existed a straight contingency fee agreement from the outset of the litigation. Use of a multiplier is not permitted or justified in the instant case where an hourly fee was guaranteed from the outset. By Petitioner's own calculations, Petitioner's attorney was guaranteed $27,800.00, even if he had lost the case. Respondents simply fail to see what "risk" factor, if any, the attorney for Petitioner had assumed under these circumstances. If a multiplier is permitted herein, every attorney handling every conceivable kind of case in which contingency fees are permitted will also have a guaranteed hourly payment plan, as did Petitioner's attorney, in order to effect a double (or more) recovery of their billable hours. This would amount to highway robbery and transform the efforts of the courts to establish "reasonable" fees into the "excessive" fees they were attempting to eliminate.

The trial court's first decision on attorneys' fees limited fees to $37,500.00, the court's calculation of the maximum fee called for by the fee agreement between Petitioner and his attorney. (Petitioner's Appendix 5 - 6) The trial court reversed itself on December 21, 1987. (Petitioner's Appendix 7 - 8) In reaching its amended decision to use a multiplier of two

for the attorneys' fee award, the trial court reasoned that Rowe did not apply retroactively to limit the award of attorneys' fees to that amount agreed upon between the attorney and client, citing Tamayo v. Miami Childrens' Hospital, 511 So.2d 1091 (Fla. 3 DCA 1987), for this rule of law. This court subsequently quashed the Third District Court of Appeals' Tamayo decision and held that a court awarded fee must not exceed the fee agreement reached between the party and his client. Miami Childrens' Hospital v. Tamavo, 529 So.2d 667 (Fla. 1988). See also, Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989); Blanchard v. Bergeron, 3 FLW Fed. 5351 (Feb. 24, 1989); and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5 Cir. 1974).

In the instant action, Petitioner's maximum recovery was $151,200.00 (25% of $604,800.00). Accordingly, under the Petitioner's fee agreement, his attorneys would receive a maximum of $37,800.00 (25% of $151,200.00). Under Tamayo and Rowe, any award of attorneys' fees to Petitioner should be limited to $37,800.00. Accordingly, the decisions of the trial court and the Fourth District Court of Appeals, to the extent they permit a fee in excess of $37,800.00,are unsupported by Florida law. At a minimum, this court should reverse in part the Fourth District Court of Appeals opinion and order the trial court to award fees not in excess of $37,800.00.

Respondents' position on the Attorneys' Fee Judgment is also supported by the United States Supreme Court decisions in the case of Pennsylvania v. Delaware Valley Citizens Counsel, 106 S.Ct.

3088 (1986) and *479* U.S. *858, 107* S.Ct. *3078 (1987).* In the Delaware Valley decisions, the United States Supreme Court discusses at great length the "lodestar" calculation and the appropriate use of "multipliers" in awarding attorneys' fees, reviewing both the findings of the Third Circuit Court of Appeals and the court's own prior decisions regarding the "lodestar" method of calculation. The court reiterated its holding in Blum v. Stenson, *465* U.S. *886, 897* (1984), that:

> "when...the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed, to be the reasonable fee to which counsel is entitled." *406* S.Ct. at *3098.* (Emphasis added.)

The Supreme Court approved the Circuit Court's holding that "in all instances plaintiffs have the burden of establishing entitlement to the award claimed in any adjustment to the "lodestar". *106* S.Ct. at *3092.* The Circuit Court concluded that this was the rare case where the fee applicant offered specific evidence to show that the quality of the service rendered was superior to that one reasonably could expect in light of the hourly rate charged and that the success was "exceptional", and further approved the "use of 'contingency multipliers' to compensate...for the risk of not prevailing" because Delaware Valley "specifically identified the risk, inherent in this litigation in its Briefs...". *106* S.Ct. at *3094.* The Supreme Court nevertheless reversed the use of the multiplier in the case. The court reiterated its ruling in Blum, supra, that the "novelty and complexity of the issues", the "special skills and

experience of counsel", the "quality of representation'' and the "results obtained" from the litigation are presumed fully reflected in the lodestar amount, and thus, cannot serve as independent basis for increasing the basic fee award. 106 S.Ct. at **3098.** "Although upward adjustments of the lodestar figure are still permissible, such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." 106 S.Ct. at **3098.**

The conclusion of the Supreme Court, as follows, is unquestionably applicable to and dispositive of the trial court's use of a multiplier in the instant case, for all the reasons cited by the Supreme Court:

> In viewing the evidence submitted by Delaware Valley, to support its petition for attorney's fees, there is no indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation provided during Phase V of the litigation. Clearly, Delaware Valley was able to obtain counsel without any promise of award for extraordinary performance. Furthermore, Delaware Valley presented no specific evidence as to what made the results it obtained during this phase so "outstanding", nor did it provide any indication that the lodestar figure for this portion of the case was far below awards made in similar cases where the court found equally superior quality of performance. Finally, neither the District Court nor the Court of Appeals made detailed findings as to why the lodestar was unreasonable and in particular, as to why the quality of representation was not reflected in the product of reasonable number of hours times the reasonable hourly rate. In the absence of such evidence and such findings, we find no reason to increase the fee award in Phase V for the quality of representation. Id. at **3099 - 3100.** (Emphasis added.)

In summary, under the Rowe, Tamayo and Delaware Valley decisions, the Petitioner should not have been awarded fees in excess of **$37,800.00** agreed to by the attorney and client. Furthermore, a multiplier should not have been used by the trial court. The trial court's use of a multiplier in establishing the Judgment for attorneys' fees allowed a "unreasonable" fee. Since use of a multiplier is not supported by the law of this state, it was correctly reversed by the Fourth District Court of Appeals.

Petitioner's argument is centered on a concern that this court advance a "workable formula" to determine attorneys' fees. Obviously, Petitioner wants the court to support the Third District Court of Appeals decision allowing multipliers on contingency fee cases. See, First State Ins. Co. v. General Electric Credit, Auto Lease. Inc., **518** So.2d **927** (Fla. **3** DCA **1987).** Petitioner's conclusion is that a partial contingency fee should affect the size of the multiplier, but not the entitlement to such a factor.

As set forth supra, Respondents' position is that allowing multipliers in partial contingency fee cases would open the door to constant and expanded use of partial contingency fee agreements to guarantee maximum fees to attorneys. The emphasis should be on awarding "reasonable fees", not maximum fees. Use of multipliers does not insure awarding of reasonable fees. Multipliers operate only to give bonuses to attorneys by giving them two to three times a reasonable fee. While this has been approved for risky "all or nothing" contingency fee cases, it should not be expanded

to every other type case. Access to the court is not blocked since multipliers are permitted and reward attorneys for taking an all or nothing risk. Access to courts will not be broadened by allowing multipliers for partial contingency fee cases. The only benefit of such a move would be to attorneys clever enough to draft all former hourly fee cases as partial contingency fee cases so that they are guaranteed a reasonable fee and a "bonus" from application of a multiplier if they are eventually successful.

The position of the Academy of Florida Trial Lawyers is also not directed to awarding a "reasonable" fee. Like the Petitioner, the Academy fails to address the fact that the lodestar amount represents a reasonable fee. All the courts are empowered to do is set a reasonable fee. Both Petitioner and the Academy seek bonuses for attorneys under the contingency fee risk rationale. The Academy's formula is to multiply only the lodestar fee amount not already paid by the client on hourly bills. Respondents suggest this formula is unworkable and to easily manipulated by attorneys. All an attorney would have to do is tell his client not to pay until the conclusions of the case. That would allow multiplying of the full lodestar amount even though the attorney was guaranteed the hourly fee total.

ISSUE 11. PETITIONER FAILED TO ESTABLISH THE NECESSARY ELEMENTS OF A SHAREHOLDERS DERIVATIVE SUIT AND THE TRIAL COURT'S DECISION WAS AGAINST THE WEIGHT OF THE EVIDENCE

Since this court has accepted discretionary jurisdiction of this case, Respondents submit the following two additional issues for the court's review. Both issues were previously presented to the Fourth District Court of Appeals by Respondents. This court has the duty and responsibility to consider this case on the merits as if it were the original Appellate Court to hear the matter. See, Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Tvus v. Apalachicola N. R.R. Co., 130 So.2d 580 (Fla. 1961).

Clearly, under Florida law, a shareholder's derivative suit is brought to redress a wrong sustained by the corporation. See, Wolfe v. American Savings & Loan Assoc. of Florida, 539 So.2d 606 (Fla. 3 DCA 1989); Citizens National Bank v. Peters, 175 So.2d 54 (Fla. 2 DCA 1965); 8 Fla. Jur. 2d, "Business Relationships" 5361. When the loss claimed is only a loss to an individual shareholder, the action should be brought by that individual shareholder in his own right and not in the name of the corporation. Id. The facts of the case at bar clearly indicate that the derivative shareholder and three Defendants were the only shareholders of PINE CREEK DEVELOPMENT CORPORATION. The Final Judgment entered in this suit seeks recovery of $604,000.00 from three of the four shareholders of a corporation that never did any business, never opened any bank accounts, and never filed any tax returns.

Respondents' position is obvious - this action was brought by one shareholder to benefit only himself, not the corporation. It is not properly a shareholder's derivative suit and judgment should not have been entered for PINE CREEK DEVELOPMENT CORPORATION. Any other decision would ignore the reality of the situation. After entering the Final Judgment, the trial court acknowledged the situation by entering an Order setting forth that payment of twenty-five percent (25%) of the Judgment to LANE would result in satisfaction of the Judgment. (R. 1666) This finding alone requires a reversal of the Judgment for PINE CREEK.

Respondents' position is also supported by the language of Florida Statute §607.147(5), which deals with attorney's fees in shareholder's derivative suits. The statute specifically states that attorney fees are not to be applied where a judgment is rendered for the benefit of an injured shareholder only and limited to a recovery of the loss sustained by that shareholder. This statute recognizes that the corporation is not benefited under an action seeking recovery of the losses of the derivative shareholder. This is definitely comparable to the case at bar. No shareholder except for the derivative shareholder, LANE, would or could benefit from the court's judgment. The court's award of $360,000.00and interest to PINE CREEK DEVELOPMENT CORPORATION is clearly erroneous. Assuming arguendo that Respondents did not prove their affirmative defenses of estoppel and laches, the actual loss to anyone would be $90,000.00($360,000.00total profit to Respondents divided by twenty-five percent shares) to

LANE individu lly and he has chosen not to sue in his individ al capacity. For this lack of standing reason alone, the Final Judgment should be reversed. Additionally, the evidence presented by the Petitioner did not establish that the Respondents usurped a corporate opportunity. The Fourth District Court of Appeals' first decision on this case set forth the following definition of a corporation opportunity:

> "If there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest, or a reasonable expectancy, and by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself." Head v. Lane, 495 So.2d 821, 822 (Fla. 4 DCA 1986) [citing Uvanile v. Denoff, 495 So.2d 1177 (Fla. 4 DCA 1986), rev. dism. 504 So.2d 766 (Fla. 1987), and Farber v. Servan Land Co., Inc., 662 F.2d 371, 377 (5 Cir. 1981).]

Petitioner provided no evidence to the trial court which showed that PINE CREEK DEVELOPMENT CORPORATION had the financial ability to undertake the purchase of the Dunwody Parcel. In fact, the derivative shareholder, LANE, admitted as a treasurer of the corporation that it has never had a bank account or any assets. The Petitioner put on no evidence about efforts or ability to finance and raise the money needed for the Dunwody purchase. Additionally, LANE failed to produce or even offer his portion of the money needed to buy any property.

Furthermore, LANE failed to prove the requisite demand on the

corporation to vindicate its own rights and did not show that he had exhausted all his corporate remedies. See, Head v. Lane, supra. As stated in 8 Fla. Jur. 2d, "Business Relationships" §365:

> Before a court of equity will open its doors to minority shareholders...such shareholders must show that they have exhausted all remedies within the corporation and that there are no other means of redress.

See also, Dutch v. Gordon, 481 So.2d 1235 (Fla. 3 DCA 1985).

The facts show LANE had knowledge of the sale and knew he was not one of the buyers long before the closing. He also reviewed, acknowledged, and executed various contracts and documents indicating that the purchasers of the Dunwody property were individuals and not PINE CREEK. In fact, he indicated to the independent witnesses and the Respondents that he was satisfied with receiving his commission and never raised any complaint on behalf of PINE CREEK. While fruitless demands are not required as a prerequisite to instituting a shareholder's derivative suit, silence cannot be allowed from the derivative shareholder, especially where, as here, the silence personally benefits the derivative shareholder. This is an equity action and the derivative shareholder must not be allowed to take part wrongfully and silently in the act for which he later complains.

The Respondents respectfully submit that the Petitioner failed to establish a cause of action for a shareholder's derivative suit and the judgment of the trial court must, accordingly, be reversed.

ISSUE 111. THE AFFIRMATIVE DEFENSES OF ESTOPPEL AND LACHES WERE ESTABLISHED BY THE SUBSTANTIAL WEIGHT OF THE EVIDENCE

At the trial court level, the Respondents asserted the affirmative defenses of laches and estoppel. Respondents presented substantial competent evidence establishing these affirmative defenses. The trial judge's denial of these defenses was against the weight of the evidence and the law in Florida.

As set forth by the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, *337* U.S. *541* (1948), a shareholder who initiates a shareholder's derivative action is a "self-chosen representative and a volunteer champion" of the corporation and, as such, acts as a fiduciary in asserting the corporations' interest. The corporation is thus dependent upon his "diligence, wisdom and integrity". Id. at *549.*

Because of the equitable nature of a shareholder's derivative action and the fiduciary obligations of a shareholder bringing such a suit, it follows that a shareholder's conduct may bar him from questioning alleged wrongs done to the corporation through a shareholder's derivative action. See, 12 B. Fletcher, Cyclopedia of the Law of Private Corporations, *55658,* P. *308 (1984* Rev.). Specifically, it has been held in Horowitz v. United National Corporation, *324* So.2d *189* (Fla. *3* DCA 1975), cert. denied *336* So.2d *1182* (Fla. 1976), that a shareholder can be barred from relief in a shareholder's derivative action by the defenses of estoppel and laches. See, e.g., Redstone v. Redstone Lumber &

Supply Co., 133 So. 882 (Fla. 1931); 8 Fla. Jur. 2d, "Business Relationships" 5369.

The Doctrine of Estoppel applies to many forms of conduct. It has been observed that "the occasions for fashioning a remedy under the label of estoppel in order to prevent injustice are too numerous to count". Lambert v. Nationwide Mutual Fire Ins. Co., 456 So.2d 517, 518 (Fla. 1 DCA 1985). The essence of the doctrine, however, is that a person should not be permitted to unfairly assert, assume or maintain inconsistent positions. This principal is contained in various applications of the doctrine.

One such application of the Doctrine of Estoppel, often called equitable estoppel, is presented where a person attempts to change his position after representing a contrary position to another who reasonably relied upon the representation and who would suffer substantial injury if the inconsistent position were to be successfully asserted. See, State Dept. of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981); United Contractors, Inc. v. United Construction Corp., 187 So.2d 695, 702 (Fla. 2 DCA 1966). The representation may be by words or conduct and, where there is a duty to speak, failure to do so can be a representation relied upon by a party claiming estoppel. Pasco County v. Tampa Development Corp., 364 So.2d 850, 853 (Fla. 2 DCA 1978); Travelers Indemnity Co. v. Swanson, 662 F.2d 1098, 1102 (5th Cir. 1981). See also, 22 Fla. Jur. 2d, "Estoppel and Waiver", §41. Another form of estoppel occurs where a person attempts to repudiate the obligations and validity of a transaction after accepting the benefits resulting from it. This rule was recognized in Doyle v.

Tutan, 110 So.2d 42, 47 (Fla. 3 DCA 1959), where a party quoted with approval the following language contained in 19 Am. Jur., "Estoppel", §64:

> Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation or statute which he might have rejected or contested. The doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referable, when no fraud either actual or constructive is involved, to the principles of election or ratification rather than to those of equitable estoppel. The result produced, however, is clearly the same and the distinction is not usually made. Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction in so far as it imposes a liability or restriction upon him or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation.

See also, 22 Fla. Jur. 2d, "Estoppel and Waiver", 944.

Estoppel will also bar a person from passively looking on with knowledge that another person is expending money to purchase land under an erroneous opinion of title and then attempting to assert his claim and exercise his rights against the purchaser. Hensel v. Aurilio, 417 So.2d 1035, 1038 (Fla. 4 DCA 1982) [citing Coram v. Palmer, 63 Fla. 116, 58 So. 721, 722 (Fla. 1912)].

A recent case dealing with the issue of the actions of the derivative shareholder is Uvanile v. Denoff, supra. In that case, a minority shareholder, Denoff, sued the majority shareholder, Uvanile, for fraud. Denoff claimed that Uvanile had contracted with one of Uvanile's other companies to do work for the

corporation, when the corporation was capable of doing this work itself without the additional expense of hiring an outside contractor. The Fourth District Court of Appeals held that even assuming Uvanile breached his fiduciary duty to the corporation, "Denoff consented, although reluctantly, and cannot seek relief from it". **495** So.2d at **1198.** The court relied on this court's decision in Bird v. Lake Mabel Development Corporation, **150** So. **797** (Fla. **1933),** and held that Denoff's claim should not have been submitted to the jury. In the Bird decision, this court stated:

> "...In cases where shareholders have all assented to corporate action, and no rights of the state or creditors intervene, the Doctrine of Estoppel is fully applicable, and the plea of ultra vires in unavailing.
>
> The rule generally is that shareholders who participate in and assent to acts of corporations will not afterwards be heard to complain, but will be held estopped to question the validity of the proceedings." Id. at 708 [citing Cook on Corporations (6th Ed.) Vol. 1, **539;** Id. Vol. **2, 55730, 7351.**

When applied to the facts of the instant case, the above principals of law must result in a decision in favor of the Respondents and against the Petitioner. The court should note that the primary issue before the court is whether or not Respondents herein usurped a corporate opportunity which rightfully belonged to PINE CREEK DEVELOPMENT CORPORATION. In order to usurp a corporate opportunity, the Respondents must have taken advantage of a business opportunity, in this case the purchase of the Dunwody Parcel which they were obligated to first present to PINE CREEK. This obligation obviously arises from the

fact that the Respondents are officers of PINE CREEK and, therefore, have a fiduciary duty of good faith and loyalty to PINE CREEK, and fairness in all business transactions regarding PINE CREEK. Florida Statute *$607.124 (1983);* Independent Optical *Co.* of Winter Haven v. Elmore, *289* So.2d *24* (Fla. 2 DCA *1974);* Seesteedt v. Southern Laundry, 5 So.2d *859* (Fla. *1942).* If Respondents failed to present the opportunity to purchase the Dunwody Parcel to PINE CREEK and instead obtain a financial interest in the Dunwody Parcel, it may be argued that a breach of a fiduciary duty had occurred, and a corporate opportunity had been usurped. However, the uncontradicted evidence at trial reflects that the officers/directors of PINE CREEK consisted solely of Respondents and the derivative shareholder, LANE, and that all four of these parties were completely aware, not only of the opportunity to purchase the Dunwody Parcel, but of every detail of the financial transactions which were ultimately involved in said purchase. Thus, full and fair disclosure of every facet of the transaction at issue herein was indisputably made to PINE CREEK prior to Respondents' purchase of the said property on behalf of LEMON BAY. The fact that the derivative shareholder, LANE, actively functioned as a salesman in completing the transaction is irrefutable evidence of said disclosure in his regard. It is only logical to conclude that all shareholders chose not to avail themselves of the opportunity to purchase the Dunwody Parcel for PINE CREEK, and it is further logical to conclude that LANE's failure to assert an interest in Dunwody for

the benefit of PINE CREEK and his participation in selling Dunwody to LEMON BAY, with full knowledge that the sale was not to PINE CREEK, constitutes an express, or at the very least, an implicit, rejection of the opportunity for PINE CREEK to purchase the Dunwody Parcel. Therefore, as all officers/directors of PINE CREEK, including LANE, were fully aware of the opportunity to purchase the Dunwody property, and as all officers/directors including LANE, completed the sale of the Dunwody Parcel to LEMON BAY, LANE cannot now be heard to complain that Respondents usurped a corporate opportunity that rightfully belonged to PINE CREEK.

The facts clearly show that it was only after LANE received his $15,000.00commission on the Dunwody sale on April 29, 1980, that he raised any complaint, either on behalf of PINE CREEK or individually, regarding the sale. At that time, LANE filed a lawsuit against Respondents which was subsequently dismissed for failure to prosecute. Aside from the lawsuit, LANE did not complain in writing or verbally to the Respondents, Dunwody or Thompson, that Respondents were usurping a corporate opportunity. This is in spite of the fact that he knew from December of 1979 that the Respondents had signed a contract to purchase the Dunwody property in their individual names.

Even after filing a lawsuit, the facts show that LANE waited another eight months, until December of 1980, when he was to receive a potential $120,000.00commission for the resale of the Dunwody property to again threaten Respondents, this time with a Lis Pendens. This evidence clearly establishes the defenses of

laches and estoppel. LANE's active participation as a salesman in the Dunwody sale, combined with his failure to assert any interest on behalf of PINE CREEK in the property, must be construed, as a matter of law, to estop LANE from alleging any breach of fiduciary duty or usurpation of corporate opportunity by Respondents.

The record clearly shows that all officers/directors of PINE CREEK had rejected the opportunity to purchase the Dunwody property and, therefore, the Respondents were free to purchase that property on behalf of LEMON BAY. Once again, LANE's silence in conjunction with the Respondents' explicit rejection of the purchase for PINE CREEK freed Respondents of any potential conflict of interest with regard to their position as officers/directors of PINE CREEK. Respondents acted in reasonable reliance on LANE's silence and implicit ratification of the failure to seize the Dunwody property for PINE CREEK.

At all time relevant hereto, the Respondents acted in detrimental reliance on LANE's failure to act on behalf of PINE CREEK. The Respondents were justified in assuming no problem would arise from PINE CREEK as a result of their purchase of the Dunwody property for LEMON BAY. LANE's failure to speak up on behalf of PINE CREEK not only negates the usurping of a corporate opportunity, but additionally constitutes laches on LANE's part by such failure. See, Van Meter v. Kelsey, 91 So.2d 327 (Fla. 1956); 12 B. Fletcher Cyclopedia of the Law of Private Corporations, §5874, P. 313 (1984 Rev.). As stated by the court in Horowitz v. United National Corporation, supra:

> ...it is not mere delay that constitutes laches. Unreasonable delay in enforcing a right, coupled with disadvantage to another, are the elements of estoppel against the assertion of a right which is called laches. *324* So.2d at *190* [citing Marshall v. **C.S.** Young Construction **Co.**, *94* Fla. 11, *113 So. 565, 457* (1927)].

Furthermore, the estoppel defense is an essential element in this case because of the derivative shareholder's inconsistent functions with regard to the sale and purchase of the Dunwody property. The facts show that **LANE's** actions, standing alone, demonstrate that he himself breached his fiduciary duty to **PINE CREEK,** thereby precluding the shareholder's derivative action by LANE. **LANE's** assumption of contradictory and inconsistent positions regarding his role in the purchase, and later in regard to the sale of the Dunwody property estops him from asserting shareholder's rights because he personally profited as an individual in his capacity as an agent for the broker in the Dunwody property purchase. Therefore, he himself usurped a corporate opportunity and/or breached his duty of good faith and loyalty to **PINE CREEK** by receiving personal profit in the form of a commission, which he insisted on receiving "up front" and assuming a position in direct opposition to **PINE CREEK's** best interest. **LANE** clearly breached his fiduciary duty by functioning as a salesman if he was acting in his capacity as director and officer. Transactions are set aside as unfair due to a breach of fiduciary duty when a director/officer acts both on behalf of the corporation as well as individually. See, Tillis v. United Parts.

Inc., 395 So.2d 618 (Fla. 5 DCA 1981). He who has unclean hands cannot hear and be heard to complain. Therefore, due to the conflict of interest and breach of fiduciary duty, LANE is estopped from asserting this shareholder's derivative suit against the Respondents. On the other hand, if LANE was not functioning as a director/officer of PINE CREEK in the Dunwody sale, then he was obviously functioning as an individual, separate and apart from PINE CREEK, and therefore cannot be permitted to assert, after the fact, that he was functioning as a director/officer. As discussed supra, he is estopped from asserting inconsistent positions. *See,* State ex. rel. Watson v. Gray, *48* So.2d 84 (Fla. 1950).

If LANE was functioning in his individual capacity, then he cannot bring a shareholder's derivative suit on behalf of the corporation. Clearly a shareholder's derivative action is brought to enforce a corporate right and not to redress injury to LANE's individual interest as a stockholder. See, Alario v. Miller, 354 So.2d 925 (Fla. 2 DCA 1978).

This court is certainly well aware that it is its responsibility to consider whether there is substantial competent evidence to support the decision of the lower court and when the weight and competency of the evidence is clearly contrary to the findings of fact, it is the duty of this court to reverse. Shaw v. Shaw, 334 So.2d 13 (Fla. 1976), Beaty v. Miller, 480 So.2d 196 (Fla. 1 DCA 1985), Eig v. Ins. Co. of North America, 447 So.2d 377 (Fla. 3 DCA 1984). A careful review of the facts in this case

shows very clearly that the derivative shareholder, LANE, took part in the sale of the Dunwody property, received a commission of $15,000.00 on the sale, made no written complaint of any kind to the majority shareholders, Dunwody or Thompson, from the time he was told that SCHAFFER, CURRIE and HEAD would be the purchasers in December of 1979, through the conclusion of the closing in April of 1980, and told both the seller and realtor that it was "OK" because he would be getting a commission.

During the trial below, the judge stated that "John Dillinger could bring a derivative action on behalf of General Motors if he owns stock". (TT 216) Clearly, the trial judge is correct. Respondents' position merely is that Dillinger could not bring a shareholder's derivative suit for General Motors' directors stealing money from the General Motors safe if he himself acted as lookout for the heist! Respondents respectfully submit that the evidence presented established the affirmative defenses of estoppel and laches and that the trial judge's ruling to the contrary is not supported by substantial competent evidence. Accordingly, a reversal and judgment for the Respondents is mandated by the law of Florida.

CONCLUSION

In summary, this court should reverse the decision of the trial court and direct that a Judgment be entered in favor of the Respondents. Petitioner failed to establish the elements of a shareholder's derivative suit. Respondents presented substantial competent evidence to establish their affirmative defenses of estoppel and laches.

If this court affirms the liability issues addressed in the lower courts, then it should reverse any award of attorneys' fees to the Petitioner, as Petitioner has not established a basis for attorneys' fees under Florida Statute §607.147(5). If the court rules that a basis did exist for the attorneys' fees, the fee should be limited to $37,800.00,which represents a reasonable fee and the maximum fee Petitioner's attorney agreed to accept for litigating this case. In no event should a multiplier be awarded for the attorney who is guaranteed hourly fee remuneration of $27,800.00for prosecuting this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 29 day of September, 1989, to: Bruce Zeidel, Esquire, Gorman & Zeidel, P.A., Attorneys for Petitioner, 618 U.S. Highway One, North Palm Beach, Florida 33408; Herbert Schaffer, 355 Northwest 5th Avenue, Suite 1, Delray Beach, Florida 33444; and Gary Gerrard, Esquire, Haddad, Josephs & Jack, 1493 Sunset Drive, P. O. Box 345118, Coral Gables, Florida 33114

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