

SUPREME COURT OF FLORIDA

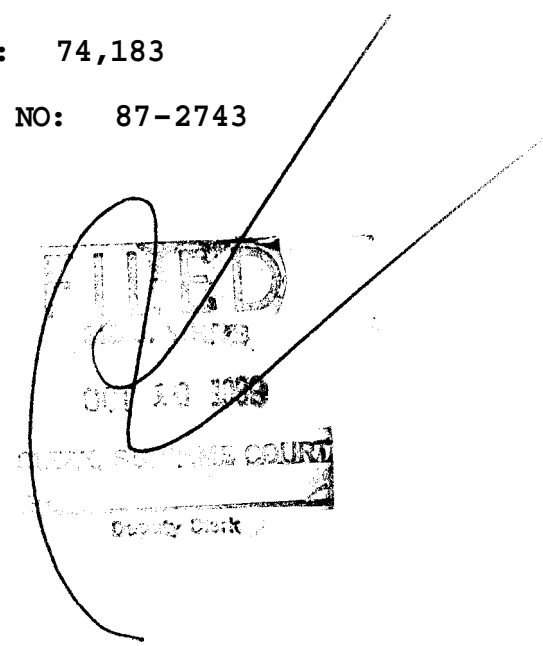
PAUL G. LANE, et al,
Petitioners,

CASE NO: 74,183

4th DCA NO: 87-2743

vs .

THOMAS A. HEAD, et al,
Respondents.



REPLY BRIEF OF PETITIONERS

Bruce Zeidel, Esq.
Gorman & Zeidel, P.A.
618 U.S. Highway One
North Palm Beach, FL 33408
(407) 842-0808
Attorneys for Petitioners

TABLE OF CONTENTS

	Page
Table of Citations	ii
Argument on Appeal	1
Points on Cross-Appeal	3
Cross-Appeal Argument	4
Conclusion	9
Certificate of Service	10

TABLE OF CITATIONS

	Page
ADOBE BRICK AND SUPPLY COMPANY vs. PORT ROYALE APARTMENTS, INC. 267 So2d 336 (3rd DCA 1972)	5
CONLEE CONSTRUCTION COMPANY vs. CAY CONSTRUCTION COMPANY 221 So2d 792 (4th DCA 1969)	6
FLORIDA PATIENTS COMPENSATION FUND vs. ROWE 472 So2d 1145 (Fla. 1985)	2
FUOTE vs. MAULE 143 So2d 563 (3rd DCA 1962)	5
GARDNER vs. PANAMA RAILROAD 342 US 29, 72 S.CP.12, 96 L.ED.31 (1961)	7
HOUGH vs. MENSES 95 So2d 410 (Fla. 1957)	6
LACROIX vs. HIGGINS 289 So2d 743 (4th DCA 1974)	4
SMITH vs. BRANCH 391 So2d 797 (2nd DCA 1980)	6
STATE DEPARTMENT OF REVENUE vs. ANDERSON 403 So2d 297 (Fla. 1981)	6
TOWER vs. MOSKOWITZ 262 So2d 276 (3rd DCA 1972)	6
UNITED PARTS, INC. vs. TILLIS 432 So2d 674 (5th DCA 1983)	1
VINCENT vs. LAWSON 272 So2d 162 (4th DCA 1973)	5

ARGUMENT ON APPEAL

The Respondents contend that the Petitioner is not entitled to attorney's fees because Section 607.147 (5), Florida Statutes, does not apply, citing the case of United Parts, Inc. vs. Tillis, 432 So2d 674 (5th DCA 1983).

Section 607.147 (5), Florida Statutes, provides if an action on behalf of a corporation is successful, the Court may award Plaintiff reasonable expenses, including reasonable attorney's fees. The action, in the present case, was a suit by a minority stockholder against the majority stockholders for the benefit of the corporation which resulted in recovering for the corporation monies rightfully due the corporation. Therefore, the Court was correct in awarding attorney's fees out of the funds recovered.

The United Parts, Inc. case is not applicable because it is clearly distinguishable from the facts of the present case. In United Parts, Inc., the majority stockholders voted to have the corporation repurchase a portion of their shares of stock at a profit to the majority stockholders, but excluded the minority stockholders from selling a portion of their shares of stock to the corporation. The minority stockholders filed a lawsuit to require the corporation to purchase their stock at the same profit margin as the corporation purchased the shares of stock of the majority stockholders. The minority stockholders were successful in requiring such a repurchase of their stock. The minority stockholders also attempted to recover attorney's fees, citing Section 607.147(5), Florida Statutes. The Court correctly held

that the only purpose of the minority stockholders' lawsuit was to force the corporation to purchase their stock and not to recover anything for the corporation and, therefore, the Court disallowed attorney's fees.

The Respondents next contend that the case of Florida Patients Compensation Fund vs. Rowe, 472 So2d 1145 (Fla. 1985), limits the Court awarded fees to an amount not to exceed the fee agreement between the attorney and his client. Therefore, the Respondents argue, since Paul Lane recovered \$151,200.00, the maximum the attorney's fees should be is 25% of \$151,200.00 or \$37,800.00. The fallacy in this argument is that the Plaintiff was not Paul Lane, but Pine Creek Development Corporation and it was Pine Creek Development Corporation that recovered the Judgment against the Respondents in the amount of \$604,800.00. (R-1454-1457). Paul Lane did not recover anything because the only Plaintiff was Pine Creek Development Corporation. When the lawsuit was filed, Paul Lane and Pine Creek Development Corporation were both Plaintiffs. However, the Defendants filed a motion requiring that the Plaintiffs elect to proceed as an individual claim of Paul Lane or as a claim of Pine Creek Development Corporation. (R-656). The election was made to prosecute this claim as Pine Creek Development Corporation as the only Plaintiff. (R-663). Therefore, the amount awarded as attorney's fees (\$83,400.00) was substantially less than 25% of the amount of the recovery and, as a result, does not violate the tenets of Florida Patients Compensation Fund vs. Rowe.

POINTS ON CROSS-APPEAL

POINT II

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

POINT III

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

CROSS-APPEAL ARGUMENT

The Respondents contend that the decision of the lower court should be reversed because the Petitioner failed to establish the necessary elements of a shareholder's derivative suit and there was not evidence to support the trial court's decision that the Respondent's had usurped a corporate opportunity. The trial court made detailed findings of fact that Pine Creek was incorporated for the purpose of purchasing property including the Dunwody property and the Defendants breached their fiduciary duty to Pine Creek by purchasing the Dunwody property for themselves. The Court also found the evidence failed to support Defendants' Affirmative Defenses. (R-1454-1457). These findings of fact were affirmed by the Fourth District Court of Appeal. The finding of fact should be affirmed when there is competent, substantial evidence that support the detailed findings of the trial judge. Lacroix vs. Higgins, 289 So2d 743 (4th DCA 1974).

The Respondents contend that this was not a valid stockholders derivative suit, that no corporate opportunity was usurped, that Pine Creek did not have the ability to undertake the opportunity and that the minority stockholder, Paul Lane, failed to make demand upon the corporation before instituting this litigation. The Respondents, in making these arguments, failed to take into account the fact that the trial court heard the testimony and resolved the conflicting testimony concerning the issue raised by the Respondents in favor of the Petitioner. The

weight of the evidence and the credibility of witnesses are questions to be determined by the trier of the fact and it is improper for the reviewing Court to substitute its judgment for that rendered below in respect to such matters. Fuote vs. Maule, 143 So2d 563 (3rd DCA 1962). Since the weight to be given is properly determined by the trier of fact, it is the function of the trier of fact to reconcile conflicting evidence, and to give credence to the evidence that the trier of fact deems believable. Vincent vs. Lawson, 272 So2d 162 (4th DCA 1973). Therefore, the mere fact there is conflicting evidence will not justify reversal. Adobe Brick and Supply Company vs. Port Royale Apartments, Inc., 267 So2d 336 (3rd DCA 1972).

There was evidence presented at trial to support the findings of the trial court that a corporate opportunity had been usurped by the Respondents rightfully belonging to Pine Creek. The minority stockholder, Paul Lane, testified that Schaffer, Head, Currie and himself incorporated Pine Creek to acquire and sell the Dunwody property (T-44). However, Schaffer, Head and Currie, without informing Lane, decided to seize the opportunity for themselves and, thereby, deprive Pine Creek of the opportunity to acquire the property. Paul Lane made numerous demands on the Respondents to inform him of their actions and to permit the corporation to purchase the property, but the Respondents ignored him. (T-42-66).

The Respondents raised as an issue that as a pre-requisite to filing suit, the minority stockholder, Paul Lane, should have

demand of the Respondents to institute a lawsuit against themselves before he was permitted to bring an action on behalf of the corporation against the Respondents. The trial court determined that such a demand was made and there was evidence to support such a finding of fact. Additionally, the law is clear that demand on the controlling stockholder of a corporation to bring an action against himself as a condition precedent to a stockholder derivative suit is excusable when demand obviously would be unavailing. Conlee Construction Company vs. Cay Construction Company, 221 So2d 792 (4th DCA 1969).

Turning now to the discussion of whether the findings of the trial court concerning lack of evidence support Respondents' Affirmative Defenses of estoppel and laches were justified. The elements of estoppel are: (1) A representation as to a material fact that is contrary to a latter asserted position; (2) Reliance on that representation; and (3) Change in position detrimental to the party claiming estoppel which was caused by the representation and his reliance thereon. State Department of Revenue vs. Anderson, 403 So2d 297 (Fla. 1981). The burden of proof of this Affirmative Defense is on the party raising the defense. Hough vs. Menses, 95 So2d 410 (Fla. 1957); Tower vs. Moskowitz, 262 So2d 276 (3rd DCA 1972). Moreover, the burden of proof for an equitable defenses is by very clear and positive evidence rather than merely by the greater weight of the evidence. Smith vs. Branch, 391 So2d 797 (2nd DCA 1980).

There was evidence in the record to support the trial court's

finding that the Respondents could not sustain the burden of proof for the Affirmative Defense of estoppel. The Respondents argue Pine Creek through Paul Lane never objected to their purchasing the property for themselves and they relied on Paul Lane's silence in acquiring the property. However, there is testimony in the record that Lane did object to the Respondents purchasing the property for themselves and excluding Pine Creek from making the purchase. (T-44-66). Moreover, there is testimony in the record that the Respondents did not take Lane's objections into consideration and did not rely on anything Lane said or did and decided to purchase the property, because they never felt Pine Creek had any right to participate in the purchase of the Dunwody property. (T-236-240; 319-321). There was also evidence in the record that there was not detrimental reliance by the Respondents because of anything Lane did or failed to do regarding the Respondents purchase of the Dunwody property. (T-319-321; 236-240; 462, 463, 243, 244).

Regarding the Affirmative Defenses of laches, there was, again, sufficient evidence to support the trial court's determination that the Respondents failed to sustain their burden of proof. The Respondents, in their Brief, failed to point to that portion of the record in which any evidence of laches is presented by the Respondents. Laches occurs when there has been such an inexcusable delay in seeking a remedy, that prejudice results to the party raising laches as a defense. Gardner vs. Panama Railroad, 342 US 29, 72 S.CP.12, 96 L.ED.31 (1961). There

was evidence in the record that Pine Creek promptly put the Respondents on notice that they were usurping a corporate opportunity. (T-44-46). Furthermore, Pine Creek sought a remedy against the Respondents action promptly. (T-242, 243). Additionally, the Respondents failed to present any evidence that they were prejudiced by the passage of time from the date of the injury to Pine Creek occurred to the date a claim was made against the Respondents.

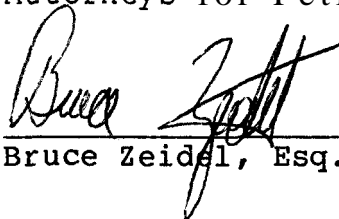
CONCLUSION

The decision of the Fourth District Court of Appeal which reversed the award of attorney's fees should be reversed. The case should be remanded for computation of attorney's fees consistent with this Court's opinion. The decision of the Fourth District Court of Appeal in all other respects should be affirmed because there is substantial competent evidence in the record to support the findings of the trial court that the Respondents usurped a corporate opportunity.

Respectfully Submitted,

Gorman & Zeidel, P.A.
Attorneys for Petitioners

By :



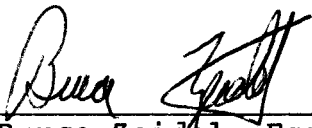
Bruce Zeidel, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: KAREN A. GAGLIANO, ESQ., Lavallo, Wochna, et al, 2600 North Military Trail, Fourth Floor, Boca Raton, FL 33431-0904, HERBERT SCHAFFER, 355 Northwest 5th Avenue, Suite 1, Delray Beach, FL 33444 and GARY GERRARD, ESQ., The Academy of Florida Trial Lawyers, Haddad, Josephs & Jack, P.O. Box 345118, 1493 Sunset Drive, Coral Gables, FL 33114, this 12 day of October, 1989.

GORMAN & ZEIDEL, P.A.
Attorneys for Petitioners
618 U.S. Highway One
North Palm Beach, FL 33408
(407) 842-0808

By:



Bruce Zeidel, Esq.
Fla. Bar No: 166269