SUPREME COURT
STATE OF FLORIDA

ROBERT T. BUTLER,

Petitioner,

vs.

HENRY YUSEM, BRIAN YUSEM, ANDREW CARLTON, et al.,

Respondents.
_____/

CASE NO.: SC07-2306
L.T. CASE NO.: 4D05-1250

JURISDICTIONAL BRIEF OF PETITIONER, ROBERT T. BUTLER

ON REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

JOHN BERANEK
Fla. Bar No. 0005419
Ausley & McMullen
227 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 – telephone
(850) 222-7560 – facsimile

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This is a jurisdictional brief by the Petitioner Butler who was the cross-appellant before the Fourth District Court of Appeal which issued an extensive opinion largely favorable to him. A copy of the opinion is attached. The opinion details many of the facts and legal issues. Before this Court, Butler seeks to affirm most of the rulings and raises only two limited conflict issues: (1) denial of prejudgment interest on attorney's fees and (2) denial of liability on the fraud and fiduciary duty claims based on a lack of due diligence or lack of justifiable reliance.

The case concerned a limited partnership in which Butler was a passive investor and the sole Limited Partner. The Limited Partnership Agreement reiterated long-standing Florida law stating that the general partners had a fiduciary duty to Butler. The partnership was created to purchase land and develop it with commercial office buildings. The General Partners and Henry Yusem misrepresented their commercial development experience and induced Butler to invest $400,000 as the only limited partner. They also induced him to sign $3.8 million in promissory notes to a bank which foreclosed when the project failed financially and the notes were not repaid by the General Partners. The FDIC eventually took over the foreclosure

suit in which Butler defended and settled the claims against him.

The Limited Partnership Agreement listed the three general partners with Butler as the one limited partner. Defendant Henry Yusem was the sole owner of the corporate general partner. Yusem signed a Guaranty and Indemnification Agreement which totally protected Butler from any and all losses or "attorney's fees" incurred in connection with the project. (Op. at 408). The Fourth District Court ruled that Butler incurred attorney's fees in the FDIC foreclosure action and that he was entitled to recover those fees from the defendants, along with his trial court fees. (Op. at 408, 413). However, the court denied prejudgment interest on all of these fees.

The buildings were not completed or leased on time resulting in various lawsuits involving the partnership. This also resulted in the separate FDIC foreclosure case, in which Butler settled the claims against him long before the 2005 judgment in this case. Butler settled by paying $1.72 million to the FDIC and assuming nearly $2 million in additional liability. Butler also incurred and paid over $800,000 in attorney's fees to the Akerman Senterfitt firm which represented him in the FDIC case. (Op. at 410).

Mr. Butler was actually represented over the years by three law firms in this partnership litigation. The trial court's

judgment found liability against all the defendants. It also found civil theft and treble damages based on thefts by one of the defendants. The court granted Butler his $400,000 initial investment but granted only minimal actual damages of $104,769.16, plus attorney's fees for two of three law firms which had represented him.

The trial court denied all attorney's fee claims growing out of the FDIC case. The Fourth District reversed holding that Butler was entitled to the attorney's fees in the FDIC foreclosure but also held that he was not entitled to prejudgment interest on the attorney's fees. (Op. at 413,414). Detailed documentary evidence was introduced on all of his previously incurred and paid attorney's fees. (Op. at 410).

On a different issue, the trial court held Butler had not exercised "due diligence" in discovering the fraudulent misrepresentations by the Yusems and thus his claims for fraudulent inducement and breach of fiduciary duty were denied. The Fourth District held that the judge wrongly used the words "due diligence" but really meant "justifiable reliance." Although recognizing that a lack of due diligence had not been pled, the District Court held that Butler, who was a limited partner, had a duty to discover the fraud and prove his own justified reliance. (Op. at 412).

SUMMARY OF ARGUMENT

The District Court's ruling denying prejudgment interest on attorney's fees conflicts with several cases. The ruling imposing a duty to discover fraud perpetrated by a general partner/fiduciary on a limited partner also conflicts with cases holding no such duty exists.

JURISDICTION

This Court has jurisdiction under Article V, § 3(b)(3). Although almost all of the Fourth District's opinion is favorable to Butler, the District Court ruled against Butler on the due diligence arguments and further denied prejudgment interest on all of the awards of his attorneys' fees. Butler respectfully submits that the Fourth District's stated decisions on prejudgment interest and fraud on a limited partner are in conflict with decisions by this Court and other District Courts. Thus the issues to be presented to this Court are restricted but are of importance, both financially and as a matter of statewide precedent. The Fourth District was correct in most of its ruling but it was in error on two points. Only these rulings need be reviewed and all of the rulings in favor of Butler should remain undisturbed.

ARGUMENT

I. THE FOURTH DISTRICT'S OPINION IS IN CONFLICT WITH DECISIONS BY THIS COURT AND THE DISTRICT COURTS ON THE ISSUE OF PREJUDGMENT INTEREST ON ATTORNEY'S FEES

The Fourth District dealt with Butler's right to prejudgment interest on his attorney's fees in the fifth issue. The court had already directly held that Butler incurred attorney's fees to the Akerman Senterfitt law firm in the FDIC foreclosure suit. These and other fees were incurred in litigation involving the partnership. Butler was entitled to the fees under both the Limited Partnership Agreement and the personal Guaranty signed by Yusem. Pursuant to the Guaranty, when Butler incurred the fees, Yusem owed them at that point in time as a matter of contract. The District Court expressly held that these attorney's fees were "contractually mandated." (Op. at 413)

The court held that Butler was entitled to prejudgment interest on all of his damages "except for those portions of the award addressing attorney's fees." (Op. at 414). The court stated its view that Butler "is not entitled to prejudgment interest on the portions of the damages award representing attorney's fees because the date of entitlement and the date of award are the same so there is no intervening time period during which interest accrued." (Op. at 414).

These holdings are in direct conflict with and are irreconcilable with Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985); Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So. 2d 929 (Fla. 1996) and Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1989).

The most clear conflict is with Inacio which states at p. 97:

> Under the terms of the fee agreement, Inacio became obligated to pay his attorneys a fee immediately upon recovery from State Farm when the claim was settled....The attorneys' right to receive the fee was fixed at that time, although the ultimate amount of the fee due them remained for later determination by the court. Since this event fixed the date of 'the loss' for purposes of assessing prejudgment interest even though the ultimate amount remained for determination...interest on the amount of the fees ultimately found to be reasonable and due should properly accrue from that date. (emphasis supplied)

Inacio's controlling facts are identical and the results of the two cases are irreconcilable. Butler had a contractual obligation to pay the Akerman Senterfitt firm and made that payment. It has now been determined that Butler was entitled to recover those attorney's fees, and the Fourth District's decision conflicts directly with Inacio because the Fourth District has denied prejudgment interest solely on attorney's fees. Substantial evidence was presented on when fees were

incurred to all three firms representing Butler. (Op. at 410). The precise amounts will be determined on the remand. (Op. at 413).

In Argonaut, this Court dealt with prejudgment interest and held:

> In short, when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss. (emphasis supplied)

Argonaut holds Florida has adopted the "loss theory" rather than the "penalty theory" on prejudgment interest and that prejudgment interest is merely another element of pecuniary damages. Straying from Argonaut, the Fourth District has singled out attorney's fees to be treated differently than any other form of pecuniary damages.

The 1996 Higley decision dealt with numerous conflicts among the district courts on entitlement to prejudgment interest on attorney's fees. Higley approves Inacio and holds again that prejudgment interest is applicable to incurred attorney's fees which are merely another part of a plaintiff's damages. Higley states: "Using the date of entitlement as the date of accrual serves as a deterrent to delay by the party who owes the attorney's fees." Higley makes clear that the important event on prejudgment interest is when a party sustains (incurs) a loss even though the exact amount of that loss must be determined by

a court later. This is precisely the situation presented here. Butler paid over $800,000 to the Akerman Senterfitt firm and proved this loss during this trial. The Fourth District has held that he was entitled to recover the attorney's fees but not entitled to prejudgment interest on those incurred fees paid out long before the judgment in this case.

II. THE OPINION IS IN CONFLICT WITH DECISIONS ON LIMITED PARTNERS AND DUE DILIGENCE AND JUSTIFIABLE RELIANCE.

The District Court's opinion states that the trial court ruled in favor of the defendants and against Butler on the fraudulent inducement and breach of fiduciary duty claims because, as stated by the trial judge, Butler had failed to exercise due diligence in discovering the fraudulent misrepresentations of the defendants. The District Court then rejects Butler's argument that this was erroneous as an unpled affirmative defense. The Court concluded that the trial judge did not really mean "due diligence" but instead meant that Butler had not proven his own "justifiable reliance." No matter which term (due diligence or justifiable reliance) is used, a conflict exists.

This was a limited partnership in which the partnership agreement itself and the case-law imposed a fiduciary duty on the general partners. Under Allie v. Ionata, 466 So. 2d 1108, 1110 (Fla. 5th DCA 1985), "constructive fraud is deemed to exit

where a duty under a confidential or fiduciary relationship has been abused." The Fourth District applied the requirement of proof of justifiable reliance against Butler where Butler was merely a limited partner and an investor. Under Florida law, Butler had no duty to investigate because he was a limited partner and was entitled to rely upon the representations of the fiduciaries who were the general partners. There is conflict with Allie and with the landmark Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980), decision where this Court concluded:

> We hold that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation unless he knows the representation to be false or its falsity is obvious to him.

At p.996, Besett also expressly affirms and holds that a fraudulent misrepresentation complaint need not allege that the plaintiff made any investigation. It if need not be alleged, it certainly need not be proven.

The Fourth District conflicted with these holdings by imposing a requirement of proof of justified reliance on Butler in this limited partnership. Making an investigation to prove his own justified reliance was not an element of the fraud or fiduciary duty claims by Butler as a limited partner. Conflict exists with Allie, Besett and with First Union National Bank v. Turney, 824 So. 2d 172, 188 (Fla. 1st DCA 2001), holding:

> In any transaction with a beneficiary, a fiduciary has an obligation to make full

> disclosure to the beneficiary of all material facts. Breaches of this duty of disclosure have been held to be fraud. See Donahue v. Davis, 68 So. 2d 163, 171 (Fla. 1953)."

Thus the Fourth District applied the law generally applicable to an arms-length transaction where there is no duty by a seller to make full disclosure instead of applying the law applicable to a limited partner having the protection of a fiduciary who had a duty to disclose all relevant facts. The contract stated the general partners were acting as fiduciaries. A limited partner is not in the position of an arms-length real estate purchaser and does not have an obligation to prove his reliance on a representation or misrepresentation was justified.

CONCLUSION

Jurisdiction should be accepted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 21st day of December, 2007.

John N. Buso
2161 Palm Beach Lakes Blvd.
Suite 301
West Palm Beach, FL 33409

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

/s/ John Beranek
JOHN BERANEK
Florida Bar No. 0005419
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
850/224-9115

H. MICHAEL EASLEY
Florida Bar No. 131485
Jones Foster Johnston & Stubbs, PA
Post Office Box 3475
West Palm Beach, FL 33402
561/659-3000
561/650-0469 (facsimile)

RICHARD H. WILLITS
Florida Bar No. 139888
2290 10th Avenue North, Ste. 404
Lake Worth, FL 33401
561/582-7600
561/588-8819 (facsimile)

ATTORNEYS FOR PETITIONER