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

AMENDED BRIEF ON THE MERITS BY PETITIONER, ROBERT T. BUTLER

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

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SUMMARY OF THE ARGUMENT

The Fourth District Court erred in holding the trial court misspoke and actually meant justifiable reliance instead of lack of due diligence. The court further erred in applying justifiable reliance against Mr. Butler because Butler (as a limited partner) had no duty to investigate the truth of the false representations by the general partner defendants.

The District Court further erred in refusing to impose prejudgment interest on attorney's fees incurred and paid by Butler which Butler was held to be entitled to in this litigation.

STANDARD OF REVIEW

Purely legal issues are presented and the standard of review is de novo.

STATEMENT OF THE CASE AND FACTS

This is a merits brief by the petitioner, Robert T. Butler, who was the plaintiff in the trial court and the cross-appellant in the Fourth District Court of Appeal. The parties are the plaintiff Butler and the defendants, Henry Yusem, Brian Yusem, Andrew Carlton and H.Y. (Wyncreek), Inc. The trial court entered a lengthy final judgment after a non-jury trial and the Fourth District Court of Appeal in its opinion of November 6, 2007,

reversed substantial parts of the trial court's decision. The Fourth District ruled almost entirely in favor of plaintiff Butler.

This litigation has spanned over 20 years and the details are all taken from the trial court's judgment at (R.V.8, 1593 and A. 1-24) and the Fourth District's opinion. The primary relevant documents between these parties were the Limited Partnership Agreement (LPA) and a Guaranty and Indemnification Agreement signed by Henry Yusem individually. The trial court's judgment and the LPA and the Guaranty are contained in an Appendix to this brief designated herein as (A. ____). The Fourth District's decision is designated as (Opinion at ___).

The case concerned a limited partnership in which Butler was the sole limited partner and sole passive investor. It was initially planned by Henry Yusem that he would be one of the general partners but at the last moment he had the LPA redrafted to substitute his own wholly owned corporation (H.Y. Wyncreek, Inc.) in his place. To induce Butler to contribute his $400,000 in cash and to sign the $3.8 million in promissory notes to the bank, Henry Yusem signed a personal Guaranty to repay Butler all of his losses and "attorney's fees" arising from or incurred in connection with the project. (Opinion at 408).

The general partners and Henry Yusem created the limited partnership for the purported purpose of buying real estate in

Broward County and building and developing it with two commercial office buildings which were to be fully and profitably rented out by the defendants to third parties. See: (A. LPA ¶ 2.4, 3.3, 3.4, 4.4, 6.3). What the defendants really had in mind was to commit a fraud on Butler.

The Limited Partnership Agreement (LPA) reiterated longstanding Florida law stating that the general partners had a fiduciary duty to Butler, the sole limited partner. (A. LPA ¶ 4.1). The general partners including Henry Yusem[1] as an alter-ego general partner, breached their fiduciary duty and misrepresented their commercial development experience. In fact, they had no such development experience and based on their misrepresentations, they induced Butler to sign the promissory notes and to contribute $400,000 as the only limited partner. Only a part of the $400,000 was used in the purchase of the land. The defendants also falsely induced Butler into signing $3.8 million dollars in promissory notes to the lending bank which was also used in the purchase of the land and was supposed to have been used in the building of the project. The buildings were not completed or profitably rented in compliance with the Limited Partnership Agreement. (Opinion at 409).

[1] The "H.Y." in the corporate name H.Y. (Wyncreek) Inc. stands for Henry Yusem who is the sole owner of the corporation and who conceded at trial that he was the alter-ego of the corporation. The trial court so found. Henry Yusem controlled the corporation and he signed the LPA as "president" of the Limited Partnership. Thus Henry Yusem had the same fiduciary duty to Butler which the other defendants had.

The Wyncreek project was a total financial failure due to the defendants' lack of expertise and fraudulent behavior. Andrew Carlton, with the cooperation and knowledge of Henry Yusem and Brian Yusem, stole money and when he was caught, he resigned and left the project. Carlton was found guilty of civil theft in this case under the 1985 version of the Civil Theft statute.

The defendants did not repay the bank notes they signed for $3.8 million on which they were obligated in the first instance. The lending bank filed foreclosure proceedings. Eventually the bank also had financial problems and the Federal Deposit Insurance Corporation (FDIC) took over the foreclosure suit which was removed to the Federal District Court. Butler had been joined as a defendant because he had also signed the $3.8 million in notes but Butler received none of the loan proceeds. All the loan proceeds went directly to the defendants who never accounted for the loans, never repaid them, and never had intended to repay them. The FDIC sued Butler on the notes. Butler spent over $800,000 on attorney's fees paid to one of the law firms (Akerman Senterfitt) defending him in the FDIC action. Butler eventually settled his FDIC case on the notes, which he and the defendants had signed, by paying $1.72 million to the FDIC and assuming an additional $2 million in obligations. (Opinion at 409).

As a result of the financial failure, fraud and breach of fiduciary duties, prolonged litigation between the parties on

multiple fronts occurred. The cases were all settled except for this the partnership litigation which was tried in July and August of 2004. The trial court awarded Butler his $400,000 initial contribution but granted only minimal actual damages over the $400,000 of $104,769.16, plus attorney's fees for only two of the three law firms which had represented Butler. The $800,00 Akerman Senterfitt fee was denied and prejudgment interest on all of Butler's damages was denied.

The Fourth District Court of Appeal reversed in favor of Butler on five out of the six issues raised by Butler on his cross-appeal. (Opinion at 412). The appeal by the partnership defendants was affirmed without comment. The Fourth District did not remand for a new trial. Butler did not seek a new trial and instead sought only additional damages based upon the evidence already presented and the factual findings already made. Thus the District Court agreed with Butler that a new trial was unnecessary. The trial court had found facts establishing liability on numerous grounds, including fraud, but improperly reduced Butler's damages by coming up with court-created erroneous defenses which, in addition, had not been pled. The court also awarded completely erroneous setoffs in favor of the defendants which also had not been pled. These court-created defenses were brought up by the trial judge for the first time after the trial was over.

Butler now seeks review before this Court on only the two issues on which the Fourth District ruled against him. All of the other issues written on by the District Court were correctly decided in favor of Butler.

The first of the two issues concerns the trial court's denial of proper damages by relying on the unpled and improper theory of due diligence against Butler's claims for fraudulent inducement, negligent misrepresentation, breach of fiduciary duty and breach of contract. Even though the trial court ruled in Butler's favor on the facts of these four claims, all proper damages due to Butler were denied. The District Court held that the trial court used the terms "due diligence" against Butler but that the trial court misspoke and really meant that Butler had not proven his own "justifiable reliance" on the misrepresentations made by the defendants and thus Butler had failed to establish one of the elements of his fraud claim. (Opinion at 412,413).

The District Court also addressed Butler's argument that the trial court had erred in denying all claims for prejudgment interest. The Fourth District generally reversed the trial court's denial of prejudgment interest on all damages but affirmed the ruling solely as to attorney's fees. The Fourth District singled out attorney's fees which Butler had previously incurred and paid and despite Butler's evidence of his payments

held that prejudgment interest could not be imposed as to attorney's fees.

Butler's Jurisdictional Brief of December 21, 2007, raised conflict as to the due diligence/justifiable reliance issue and conflict concerning the prejudgment interest issue. By order of May 19, 2008, this Court accepted jurisdiction and ordered briefs on the merits. This merits brief will deal only with the two issues on which review was sought.

Proceedings on Remand

Butler continues to maintain the same position he has taken from the beginning of this appeal concerning proceedings on remand. This case has now been in litigation for over 20 years and a new trial is not sought. Butler continues to seek solely the addition of certain damages which were incorrectly denied him based upon the facts already proven and found by the trial judge.

The Fourth District's opinion has already ordered that the matter be remanded solely for the purpose of increasing the amount of the appropriate damages. Substantial damages were improperly denied and this will be remedied based on the existing record in the trial court. For example, under the Fourth District's decision, Butler is now entitled to the $1.72 million the trial court found he spent in settling the FDIC case. Butler is entitled to the over $800,000 in attorney's fees he paid to the Akerman Senterfitt firm in defending the FDIC case. The

trial court's setoffs favoring the defendants were largely reversed and Butler is entitled to damages without the trial court's $250,000 setoff based on an alleged standstill agreement which claim had not been pled by the defendants. Butler is also entitled to prejudgment interest on all of his damages except for his attorney's fees.

The trial court's judgment was correct in the factual findings as a basis for liability against the defendants. However, the trial court substantially reduced the amount of damages Butler was legally entitled to by coming up with unpled and otherwise improper theories and defenses after the trial was completed. Thus, based on the facts already found and the appellate decision already entered, Butler now seeks a confined reversal solely on the two issues raised herein. The case should be remanded for imposition of all of the damages ordered by the Fourth District and for imposition of the additional damages which the trial court denied which were wrongly affirmed by the Fourth District.

ARGUMENT

I. THE FOURTH DISTRICT COURT ERRED IN HOLDING BUTLER'S CLAIMS FOR DAMAGES FOR (1) FRAUDULENT INDUCEMENT, (2) NEGLIGENT MISREPRESENTATION, (3) BREACH OF CONTRACT, AND (4) BREACH OF FIDUCIARY DUTY WERE BARRED AS TO SOME OF THE DEFENDANTS BASED ON A FAILURE TO SHOW JUSTIFIABLE RELIANCE OR DUE DILIGENCE.

The District Court listed the above four issues at page 412 of the opinion reciting that Butler argued the trial court erred in applying due diligence to defeat his four claims because due diligence was not pled as an affirmative defense and that it was thus waived. The trial court found facts supporting liability against the defendants on all four of these claims but denied any recovery of damages based solely on the erroneous and unpled lack of due diligence defense. The trial court relied on the terms "lack of due diligence" repeatedly. The words appear on pages 9,10,11,15 and 16 of the judgment.

The trial court listed the seven factual grounds for Butler's claims against the general partners based on fraud and breach of fiduciary duty. As quoted from the final judgment, the defendants' seven statements and omissions were:

> 1. The General Partners falsely told Butler orally and in writing on repeated occasions that they were expert commercial real estate developers.
>
> 2. The General Partners made false representations and warranties in the LPA

> that they had the expertise to develop and lease the two buildings within the time periods.
>
> 3. The General Partners falsely told Butler orally on repeated occasions that they had successfully developed and leased FAPC. (First American Professional Center).
>
> 4. The General Partners failed to disclose to Butler that they were in need of an infusion of cash on FAPC, and that they were going to use Butler's money to complete that project.
>
> 5. The General Partners promised in §4.1 of the LPA that they would only act with unanimous agreement.
>
> 6. Henry Yusem had no intention of indemnifying Butler when he signed the Guaranty dated July 23, 1985, wherein Henry Yusem guaranteed Butler against all losses incurred in connection with the actions of H.Y. (Wyncreek) Inc.
>
> 7. All defendants testified that they told Butler they needed his $400,000 for the purchase of the land, which was a $79,000 overstatement.

Although the trial court found Butler had proven the facts on these seven claims, the court then denied all proper damages resulting from the defendants' misrepresentations and stated:

> Butler cannot recover on his claims for fraudulent inducement because he failed to exercise due diligence. That lack of due diligence included putting various protective provisions in the LPA, but failing to follow-up on them...Butler had a conversation with an officer of the First American Bank. The purpose of the conversation was to verify the 'excellent' reputation of the defendants in construction and commercial development. However, Butler

> did not ask the right questions and therefore, did not obtain information that was available to him from the bank.

The trial court expressly found that prior to Carlton leaving the project, Brian Yusem told his father Henry Yusem that Carlton was stealing from the partnership. (A. 14). For the next eight months, Henry Yusem, Andrew Carlton and Brian Yusem conspired to continue to hide the thievery from Butler. The trial court found that the thefts actually continued during this period. (A. 15). Amazingly, the trial court so found but still did not allow any recovery for fraudulent inducement and limited the breach of fiduciary duty claim to Andrew Carlton and the one corporate defendant, H.Y. (Wyncreek) Inc. (A. 15).

Butler suggests that when several defendants have a fiduciary duty to an innocent limited partner, those defendants can not legally keep secret an ongoing pattern of fraud and theft by any one of the partners. When theft is intentionally kept secret by fiduciaries, the victim of the fraud should have no duty to discover it. All of the partners should be liable on this claim under a conspiracy theory. Nicholson v. Kellin, 481 So. 2d 931, 936 (Fla. 5th DCA 1986), holds that a conspiracy theory applies when multiple corporate employees and officers are guilty of misrepresentations.

On appeal Butler argued to the Fourth District that the lack of due diligence was an unpled affirmative defense and that the trial court erred in imposing it as a defense. Significantly,

Butler pointed out that the issue of due diligence only came up after the trial was completely over with. After the evidence had closed, Circuit Judge Lewis ordered the attorneys to appear before her at which point she, for the first time, orally told them of her court-created defense and intended rulings. The court stated it would deny relief on numerous claims based on the new and unpled theory of lack of due diligence. (Opinion at 12). Butler and his counsel did not even know such a defense was being considered. Butler was only able to move for rehearing on these issues which motion was summarily denied. (Opinion at 12).

The Fourth District addressed these arguments by Butler. The court ruled that "lack of due diligence" would have been an affirmative defense if pled and that such a defense would have been waived by the defendants. However, the court improperly concluded that Judge Lewis really "did not mean to say due diligence" despite her repeated use of the words. The District Court held that what Judge Lewis really meant was that Butler had not proven his own "justifiable reliance" on the false representations of the defendants and that justifiable reliance was an element of a cause of action for fraud in the inducement. The District Court stated that "a close reading" of the transcript showed that the trial court really meant "justifiable reliance."

We respectfully suggest this ruling (which has absolutely no record support) was also erroneous for a much more basic legal reason. As a limited partner Butler had absolutely no duty to exercise due diligence or to prove his own justifiable reliance on the false and misleading statements and fraudulent conduct of the defendants.

This was a limited partnership and the partnership agreement itself (A. LPA ¶ 4.1) and all of the relevant case-law imposed a fiduciary duty on the general partners. Indeed, under paragraph 5.1 of the LPA, Butler had no right to even participate in the management of the partnership.

Under Allie v. Ionata, 466 So. 2d 1108, 1110 (Fla. 5th DCA 1985), "constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused." The Fourth District applied the requirements of proof of justifiable reliance against Butler where Butler was merely a limited partner and a passive investor with no right to control the day-to-day operations of the limited partnership. Under Florida law, Butler had no duty to investigate because he was a limited partner and was entitled to rely on the representations of the fiduciaries who were the general partners. Allie directly so holds.

Further, the landmark Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980), decision by this Court concerning a real estate sale

addresses the question of whether Butler had any duty to investigate. Besett holds:

> 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.

Even in an arms-length transaction such as Besett, a fraudulent misrepresentation complaint need not even allege that the plaintiff made an investigation. Indeed, if no allegation of an investigation is necessary, then certainly a limited partner suing for fraud in the inducement and actual fraudulent conduct need not prove due diligence or justifiable reliance. The Besett ruling was discussed at length and reaffirmed in M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91 (Fla. 2002), which was also a real estate case.

The Fourth District has wrongly imposed a duty to prove justifiable reliance on Butler. Making an investigation to prove one's own justifiable reliance is simply not an element of the fraudulent inducement claim nor fiduciary duty claims by Butler who is suing as a limited partner. The law stated in Besett and Azam concerning an unsuspecting real estate purchaser is even more applicable and compelling when the plaintiff is a party to whom fiduciary duties are owed by the defendants. Besett and numerous cases following it point out that an inattentive or even

negligent buyer should be protected from "loss at the hands of a misrepresenter." Besett at 998.

In First Union National Bank v. Turney, 824 So. 2d 172, 188 (Fla. 1st DCA 2001), the court held:

> 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 no matter which label is used (due diligence or justifiable reliance), Butler was entitled to rely on the false representations which he proved and which the trial court found had been made by the defendants. Indeed, the Besett decision states at p. 997 that it is no defense that an offer to submit books and records for examination is rejected. Furthermore, a failure to ask for an available survey was not fatal to a claim for fraud in the case of Held v. Trafford Realty Company, 414 So. 2d 631 (Fla. 5th DCA 1982). Similarly, a failure to ask for books and records was not a defense to a fraud claim in Ton-Wil Enterprises v. T & J Losurdo, Inc., 440 So. 2d 621 (Fla. 1983). Further, a plaintiff's negligent investigation of a fraudulent representation did not bar a claim for fraud in the case of Nicholson v. Kellin, 481 So. 2d 931, 936 (Fla. 5th DCA 1986). Besett is again cited in Nicholson for the holding that "a recipient may rely on the truth of the representation even though

its falsity could have been ascertained had he made an investigation...."

We can only suggest that the Fourth District Court of Appeal has confused this limited partnership situation with the obligations between a buyer and a seller in a true arms-length real estate transaction. Under Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So. 2d 536 (Fla. 5th DCA 2003), the court points out that in an arms-length transaction there is no duty imposed on either party to act for the benefit or protection of the other party or to disclose facts that the other party could, "by its own diligence have discovered." When there is absolutely no fiduciary relationship, it can be asserted that the "non-disclosure of material facts in an arms-length transaction is not actionable misrepresentation..." However, here, as a matter of law Henry Yusem and the general partners were fiduciaries and had a fiduciary duty to be honest with Butler. As stated by the Fourth District "The project arose from the meeting of Yusem and Butler in 1985, at which time Yusem indicated that he was an expert commercial real estate developer." Further the LPA represented that the general partners had the expertise to develop the project on the time and on budget. (A. LPA ¶ 6.3). However at trial, Henry Yusem testified that he never intended that Butler should rely on his oral or written representations. He further stated that he did

not intend that Butler rely on his absolute written Guaranty assuring Butler that he would indemnify him for all loses including attorneys fees. Yusem lied about his experience and lied about his agreement to repay Butler for his losses and attorney's fees. Butler was under no obligation to do an independent investigation to ferret out these lies. The Fourth District Court of Appeal erred in imposing a duty of due diligence or justifiable reliance on Butler.

The District Court's ruling on this issue should be reversed and the matter remanded to the trial court with instructions to impose damages jointly and severally due to the fraudulent inducement and breach of fiduciary duty by the defendants.

II. THE FOURTH DISTRICT ERRED IN DENYING PREJUDGMENT INTEREST ON ATTORNEY'S FEES.

The trial court denied all prejudgment interest on all damage awards. On appeal the Fourth District Appeal reversed the prejudgment interest denial as to all damage awards except for attorney's fees which the court treated as some sort of special class of damages. The District Court affirmed the denial of prejudgment interest on attorney's fees.

The Fourth District first dealt with Butler's right to recover the attorney's fees he paid to the Akerman Senterfitt firm and thereafter considered his right to prejudgment interest

on these and other attorney's fees. The court first directly held that Butler incurred and paid attorney's fees to the Akerman Senterfitt law firm in the FDIC suit and was entitled to recover these fees to be awarded on the existing record on the remand. These and other fees were incurred in the litigation involving the partnership.

Butler was entitled to recover the fees he incurred and paid under both the Limited Partnership Agreement and under the personal Guaranty signed by Henry Yusem. The Partnership Agreement contained a prevailing party provision and under the Guaranty Butler's attorney's fees were specifically covered. (Opinion at 408). As soon as Butler incurred the fees to Akerman Senterfitt, defendants jointly and severally owed these fees to Butler at that point in time as a matter of contract.

The District Court expressly held:

> We conclude that the trial court erred by failing to award the Akerman Senterfitt attorney's fees to Butler where they were incurred on behalf of the partnership, he was determined to be the prevailing party in this case, and the fees were recoverable under both the partnership agreement and the guaranty.

The court then went on in the next issue to consider the trial court's denial of all prejudgment interest claims. The court generally held that Butler was entitled to prejudgment interest on all of his damages "except for those portions of the award addressing attorney's fees." (Opinion 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." (Opinion 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 actually made

that payment for services in the FDIC suit and for other services in the partnership litigation. It has now been determined that Butler was entitled to recover those attorney's fees from the defendants herein, 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 and noted by the Fourth District on when the fees were incurred and paid by Butler to the Akerman Senterfitt firm. (Opinion at 410). The precise amounts will be determined on the remand based on the evidence already presented and in the record. (Opinion 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)

The date of any plaintiff's out-of-pocket losses almost always occurs before the date of a verdict. 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 a plaintiff's 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 by this Court dealt with numerous conflicts among the different 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 element 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 may be uncertain and must be determined later by a court.

This is precisely the situation presented here. Butler paid over $800,000 to the Akerman Senterfitt firm and proved this previous loss during this trial. The Fourth District has held that he was entitled to recover these attorney's fees but not entitled to prejudgment interest on those incurred fees paid out long before the judgment in this case. The Fourth District Court of Appeal points out that Butler put in all the necessary proof on these paid fees. (Opinion at 413). The Fourth District's opinion remands for a determination of prejudgment interest on all of the other losses incurred by Butler but singles out his attorney's fees as the only category of damages on which prejudgment interest was properly denied. It is apparent that the court concluded that prejudgment interest on attorney's fees

is not merely another element in the plaintiff's damages. This view has been directly rejected by this Court's holding in Argonaut that prejudgment interest is merely another element in a plaintiff's pecuniary damages. This Court should reverse as to prejudgment interest.

CONCLUSION

The Court should reverse the Fourth District's rulings as to due diligence and justifiable reliance and further reverse the ruling as to prejudgment interest. The case is already subject to a remand where the trial court will impose additional damages pursuant to the Fourth District's opinion. That remand should go forward with the additional damages claims that were wrongly denied by the Fourth District along with the claim for prejudgment interest. The defendants should be held jointly and severally liable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 7th day of July, 2008.

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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

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