SUPREME COURT
STATE OF FLORIDA

ROBERT T. BUTLER,

Petitioner,

vs.

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

Respondents.
_____/

CASE NO.: SC09-1508
L.T. CASE NO.: 4D05-1250

BRIEF ON THE MERITS BY PETITIONER, ROBERT T. BUTLER

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

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SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in its opinion on remand by holding that the trial court's finding of a lack of due diligence "translated to" a lack of justifiable reliance. The District Court erroneously applied the tipsy coachman doctrine because Butler never had the opportunity to address the due diligence defense nor the justifiable reliance defense. Therefore, Butler was entitled to recover based on the facts already found by the trial court on his claims for fraudulent inducement and negligent misrepresentation.

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 Butler who was a limited partner who sustained financial damages when he relied upon the misrepresentations of the general partners, Henry Yusem, Bryan Yusem, Andrew Carlton and H.Y. (Wyncreek), Inc. defendants herein. The most important single document in the case was the Limited Partnership Agreement (LPA).

This is the second time the case has been before this Court. The prior decision by this Court in Butler v. Yusem, 3

So. 3d 1185 (Fla. 2009), reversed and remanded to the Fourth District Court of Appeal. The issues in this prior review proceeding were very limited and concerned primarily Butler's claims based on fraud in the inducement and prejudgment interest. This Court reversed on both issues. Butler v. Yusem, 1186-7.

The Fourth District Court issued its opinion on the remand in Yusem v. Butler, 10 So. 3d 1159 (Fla. 4th DCA 2009), and this decision on remand is now again before the Court. This Court accepted jurisdiction based on conflict by order of January 12, 2010.

In the prior 2009 decision herein, this Court remanded to the Fourth District Court with language concerning possible application of the tipsy coachman doctrine on the issue of justifiable reliance. Butler v. Yusem at 1186. In this decision, the Court initially incorporated the detailed facts from the Fourth District's opinion reported at Yusem v. Butler, 966 So. 2d 405 (Fla. 4th DCA 2007). The Court found that the Fourth District had erroneously held that Butler's claims for fraudulent inducement and negligent misrepresentation "were barred by a failure to show justifiable reliance." This Court specifically ruled that "the Fourth District erred by "recharacterizing" the trial court's ruling as a lack of justifiable reliance" instead of a lack of "due diligence" which

had been repeatedly stated and relied upon by the trial court without any pleading or other paper raising the issue. Butler v. Yusem at 1186.

The Butler v. Yusem opinion mentions the tipsy coachman doctrine and states:

> If the Fourth District concludes that it may rely on the tipsy coachman doctrine, the Fourth District must address Butler's claims individually to determine whether justifiable reliance applies to each claim.

The Court's opinion did not deal with the tipsy coachman doctrine in detail but instead cited two cases on the subject and provided a quotation in footnote 3 from Robertson v. State, 829 So. 2d 901 (Fla. 2002). The Fourth District was clearly instructed to follow this Court's case law on the tipsy coachman doctrine as stated in Robertson if the doctrine was found to be applicable at all.

The Fourth District has now issued its second opinion in Yusem v. Butler, 10 So. 3d 1159 (Fla. 4th DCA 2009), which affirms the trial court's denial of damages for fraudulent inducement and denial of damages for negligent misrepresentation. The opinion also followed this Court's direction to award Butler prejudgment interest on certain attorney's fees which had been wrongly denied by the trial court and wrongly affirmed by the Fourth District.

Butler again seeks review because the Fourth District's new decision is erroneous and conflicts with this Court's opinion in this very case and further conflicts with Robertson v. State, 829 So. 2d 901 (Fla. 2002).

Robertson directly holds that for an issue to be relied upon as an alternative ground for an affirmance under the tipsy coachman doctrine, the particular alternative ground must have been considered by the lower court and presented in such a fashion so that the party resisting the alternative ground had "an opportunity to present evidence or argument against" the issue. Robertson at 904, 906 and 907.

In this case, Butler never had an opportunity to argue against the imposition of the unpled lack of due diligence finding nor the unpled and unaddressed lack of justifiable reliance issue. Of course there were absolutely no findings in the trial court on justifiable reliance.

The duties of the general partners set out in the LPA were overwhelmingly violated. Fraud was committed in inducing Butler to invest in the venture as a limited partner and in breaching the contract and in keeping Carlton's civil theft a secret from Butler while it went on for months.

In spite of the overwhelming evidence, the trial judge refused to grant relief on these theories, and gave the following reasons:

> 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 supposed reasons, as a matter of law, do not show that Butler should have known that the defendants were falsely representing important facts to him regarding their poor financial situation and their lack of development experience and expertise. Butler's failure to ask a cooperating bank officer "the right questions" can not constitute a lack of justifiable reliance on the part of a limited partner who had no duty whatsoever to ferret out the fraudulent representations by the limited partners who had a fiduciary duty to him. Butler had no duty to find out the truth concerning these misrepresentations whether they were done intentionally or negligently. Butler also had no duty to cross-examine a third party bank officer.

It must also be recognized that the trial court expressly found that early in the project partner Bryan Yusem told partner Henry Yusem that partner Andrew Carlton was stealing money from the project. The trial judge further found that these three men then kept the continued thievery by Andrew Carlton a secret from

Butler for the next eight months until Butler commissioned an independent financial review. (R. Vol.8 p.1606,1607, Final Judgment).

ARGUMENT

THE DECISION ON REMAND BY THE FOURTH DISTRICT COURT OF APPEAL IS IN ERROR BECAUSE IT CONFLICTS WITH THIS COURT'S PRIOR OPINION IN THIS CASE AND WITH THIS COURT'S PRECEDENT RESTRICTING THE TIPSY COACHMAN DOCTRINE.

The defendants in this case have chosen not to participate in this litigation while the two appeals have progressed before this Court. Defendants had counsel in the Fourth District Court of Appeal but this attorney (Mr. John N. Buso) withdrew after he initially appearing before this Court. Counsel for Mr. Butler objected to the withdrawal of Mr. Buso but the Court granted his motion and gave the clients ample time to secure other counsel which they have never done. In this Court's prior opinion in Butler v. Yusem, 3 So. 2d 1185 (Fla. 2009), the Court listed all of the defendants/respondents as appearing pro se. The same situation prevails today.

The District Court's first opinion was generally favorable to Butler but surprisingly held that the trial court "misapplied the term 'due diligence' to express its conclusion that Butler did not justifiably rely...." (Yusem v. Butler, at p.412, 413). Based on this conclusion, the trial court was affirmed on several issues. This ruling by the Fourth District Court was

reversed by this Court and held to be in error. Footnote 2 of this Court's opinion specifically holds that the trial court obviously meant to say "due diligence" because the judge repeated it numerous times in a post-trial announcement of rulings and in the actual final the judgment.

After this Court's opinion and remand, the Fourth District's second opinion used the same reasoning on Butler's claims for (1) fraudulent inducement and (2) negligent misrepresentation as in its first opinion. Not surprisingly, the Fourth District reached the same result. Yusem v. Butler at 1160.

In reaching this same conclusion, the only actual change was the holding that the trial court's finding of lack of due diligence "translated to" a lack of justifiable reliance.

The Fourth District has now substituted the word "translated" in place of the words "misapplied the term." The new opinion states:

> ...it becomes clear that the trial court's reference to due diligence actually translated to Butler's failure to establish the element of justifiable reliance. We therefore affirm the trial court's decision that Butler did not prevail on these claims.

There is absolutely no meaningful legal difference between the Fourth District's first and second opinions on this issue. The District Court has now circumvented this Court's 2009 opinion herein. "Translated to" justifiable reliance means the

same thing as misspoke or "misapplied the term" and intended to say justifiable reliance.

The Fourth District's current opinion makes it clear that the defense of lack of due diligence was not pled and thus not ruled upon by the trial court in any manner under which Butler would have had the chance to respond. The same is true in regard to the unpled defense of lack of justifiable reliance. These issues were not raised and Butler never had an opportunity to respond and argue against them. If Butler did not know due diligence was being asserted against him he also did not know that some other legal theory with a similar name was being asserted.

Under the tipsy coachman doctrine, Butler would have had to have this opportunity to respond, but he was given none. These issues simply were not raised during the trial.

Butler had no idea that the defenses of due diligence or justifiable reliance were issues the trial court was considering. Only after this trial was over with did the trial court announce its repeated due diligence rulings in its final judgment and the trial court never mentioned justifiable reliance.

In addition, this Court's opinion specifically instructed the District Court to first decide whether the tipsy coachman doctrine applied and to then address each of Butler's four

claims individually. These claims were for fraudulent inducement, negligent misrepresentation, breach of fiduciary duty and breach of contract.

This Court's opinion at p.1186 specifically instructed the Fourth District:

> On remand, if the Fourth District concludes that it may rely on the tipsy coachman doctrine, the Fourth District must address Butler's claims individually to determine whether justifiable reliance applies to each claim.

Although the Fourth District has corrected its rulings on breach of contract and breach of fiduciary duty, it does not even mention the fraud and misrepresentation denials except to affirm these two trial court rulings under its new "translation" theory.

The Fourth District has failed to comply with this Court's instructions to deal with each of these claims individually in two ways.

First, it did not analyze whether or not the tipsy coachman rule should apply to Butler when he had no chance to deal with the issues at the trial court level. Second, the court failed to deal with each of these claims individually. Fraudulent inducement and negligent misrepresentation were not the same claims but the Fourth District has once again "lumped" them together in disregard of this Court's direction not to do so.

The new decision by the Fourth District does not analyze or make any findings whatsoever on the elements or requirements of the tipsy coachman doctrine. Although this Court directed compliance with the Robertson case, the Fourth District does not even recognize or cite the case in its new decision.

Robertson is a 2002 decision by this Court which resolved a conflict between the Third District's decision in Robertson v. State, 780 So. 2d 106 (Fla. 3d DCA 2001) and the First District decision in State Department of Revenue ex rel: Rochell v. Morris, 736 So. 2d 41 (Fla. 1st DCA 1999).

This Court's Robertson opinion states at page 904 that the conflict issue was: "when an appellate court may uphold a lower court ruling on an alternative ground not considered by the lower court." Robertson holds that the Third District erred in affirming on an alternative ground which had not been argued to the trial court. At page 908 this Court stated:

> Because the State never filed a notice of intent pursuant to section 90.404(2)(b) and because the State never indicated it intended to introduce this evidence as *Williams* rule evidence, the admissibility of the evidence in question was never litigated within the parameters of section 90.404(2)(a), Florida Statutes (1997). Because the matter was not at issue, defendant did not have an opportunity to present evidence or arguments against the admissibility of this evidence under the *Williams* rule.

After this analysis, the Robertson opinion concludes:

> In short, the record did not permit the Third District to affirm the trial court's admission of collateral crime evidence as *Williams* rule evidence. Thus, in so doing, the Third District improperly relied upon the 'tipsy coachman' doctrine to affirm the trial court's admission of this evidence.

In the case at bar, neither lack of due diligence nor lack of justifiable reliance were defenses raised in any proper manner before the trial court.

If Butler had known that due diligence or justifiable reliance were issues being asserted against him, he would have been entitled to make legal arguments on those issues, take discovery on them and present actual evidence on them. A motion for partial summary judgment would have probably been filed

In short, Butler had no idea that his own reliance on the misrepresentations was an issue which he had to address concerning his claims for fraud in the inducement and for negligent misrepresentation.

Frankly, we do not see how Butler's questions directed to a bank officer could have had anything whatsoever to do with some of the fraud and fiduciary duty claims. Some of these claims were based on facts which occurred long after Butler signed the initial LPA. There simply could be no proximate cause relationship and Butler was entitled to recover on the basis of fraudulent inducement and negligent misrepresentation.

As made clear in the Fourth District's previous opinion herein, the trial court found all of the facts in favor of

Butler and simply used these unpled defenses against Butler to defeat many of his claims.

Butler has never sought a new trial in the years this case has been in the appellate courts. Butler seeks solely a remand for the imposition of additional damages for fraudulent inducement and negligent misrepresentation. The facts are as previously found by the trial court. Through the District Court and this Court, Butler has consistently and repeatedly sought his full recovery, including fraud and misrepresentation damages, on the facts already found by the trial court as stated in the detailed judgment.

This case has now been in litigation for many years and it presents important policy and constitutional questions. Butler had a due process right to know what issues were being tried rather than finding out about them for the first time on appeal. The Fourth District's opinion of August 15, 2007, along with its opinion on remand of May 27, 2009, must now guide the circuit court in a complex proceeding imposing additional damages based on the established facts in the judgment.

This Court's own opinion is of course the controlling law but the Fourth District has now thoroughly confused the proceedings which will take place before the trial court. These last two claims should be correctly decided before proceedings on remand in the trial court begin.

Butler had No Duty to Discover the Fraud

As a limited partner to whom defendants owed fiduciary duties, Butler had absolutely no duty to ferret out the fraud or the negligent misrepresentations. The defendants did not argue that their fraud and misrepresentations were so obvious that Butler should have recognized that they were misleading him.

It was not up to the trial court to impose defenses and to protect defendants when they themselves did not raise these defenses. The court specifically applied lack of due diligence and repeated those words numerous times in the final judgment. It was not the proper function of the trial court to become an advocate for the defendants and to impose defenses without pleadings or notice that the issues were even being tried.

Application of this defense without notice was a violation of due process and prejudiced Butler. Due process requires notice and the opportunity to present evidence on the issues. Sanchez v. Brumm, 706 So. 2d 886, 887 (Fla. 3d DCA 1988). This is fundamental due process.

The trial court's statement that Butler had not followed up on some of the protective provisions in the LPA is of no legal significance due to the actual facts found by the trial court. Butler was not required to make a demand on the other partners before expecting performance by these partners in doing what they had promised to do. The LPA required financial reports and audits by the general partners on a specific time schedule.

These financial reports did not occur and Butler eventually performed his own audit which showed at least some of the civil theft by Carlton which had been kept secret by the other partners. (R. Vol.8 p.1606-1607). This constituted a civil theft conspiracy and active fraud. Carlton quit the project shortly after Butler's audit.

The formation of a limited partnership involves fiduciary duties not contemplated in a normal arms length real estate transaction. This duty existed during the negotiations which resulted in the limited partnership, and during the construction phase when Carlton was stealing money and both Yusems were keeping it secret from Butler. See Elk River Associates v. Huskin, 691 P.2d 1148 (Col. App. 1984); Lucas v. Abbot, 601 P.2d 1376 (Col. 1979); and Fitz-Gerald v. Hull, 237 SW2d 256 (Tex. 1951).

Here the LPA document itself provided in § 4.1 that the "General Partners" would manage the partnership and "act in a fiduciary capacity" and act only "pursuant to unanimous agreement." These provisions were grossly violated. In the LPA, Butler was also prohibited from engaging in management and he cold not "follow up" on enforcing the LPA as suggested in the judgment. The trial court found there were misrepresentations and all the defendants knew for months that money was being stolen.

Where there is a fiduciary duty, there is an affirmative duty to disclose relevant information. See Transpetrol Ltd. v. Radulovie, 764 So. 2d 878 (Fla. 4th DCA 2000). Even where there is no duty to disclose, if there has been a partial disclosure, the entire truth must be disclosed. See Vokes v. Arthur Murray, 212 So. 2d 906 (Fla. 2d DCA 1968).

A misrepresentation of past experience and expertise such as was present here constitutes fraudulent inducement and there was no duty to investigate the truth or falsity of that representation by Butler. See, e.g., Eastern Cement v. Halliburton, 600 So. 2d 469 (Fla. 4th DCA 1992). This means Butler did not have a duty to investigate and he certainly should not have been faulted because he "did not ask the right questions" from a third party banker. Lack of due diligence by Butler would not have been a legally valid defense, even if pled. Butler never had notice of the defense and never even had an opportunity to litigate the defense.

As to justified reliance, Butler did rely on the defendants' intentional and negligent misrepresentations. This reliance must be considered justifiable as a matter of law because a limited partner has no duty to investigate the truth of the representations by general partners with fiduciary duties to him.

The landmark case of Bessett v. Basnett, 389 So. 2d 995 (Fla. 1980) 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 fraud in Ton-Wil Enterprises v. T & J Losurdo, Inc., 440 So. 2d 621 (Fla. 2d DCA 1983).

Most importantly, a negligent investigation of the defendants' fraudulent representations did not bar a claim for fraud in the case of Nicholson v. Kellin, 481 So. 2d 931, 936 (Fla. 5th DCA 1986).

For all of the above reasons, whether or not Butler exercised due diligence and whether or not his reliance was justified were both irrelevant issues even if they had been raised, which they were not.

CONCLUSION

This Court should instruct the Fourth District Court of Appeal that the tipsy coachman doctrine can be employed only when the issue has been actually tried before the trial court. Under this circumstance Butler was entitled to a judgment for his damages on fraudulent inducement and negligent

misrepresentations based on the facts already found in the final judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 18th day of February, 2010.

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CERTIFICATE OF TYPE SIZE AND STYLE

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