

SUPREME COURT
STATE OF FLORIDA

ROBERT T. BUTLER,

Petitioner,

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

vs.

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

Respondents.

**JURISDICTIONAL BRIEF OF PETITIONER,
ROBERT T. BUTLER**

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

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STATEMENT OF THE CASE AND FACTS

This is a jurisdictional brief by the Petitioner, Robert Butler who was a limited partner who relied upon the representations of the general partners, defendants herein. Petitioner Butler asserts conflict jurisdiction pursuant to Article V, § 3(b)(3), of the Florida Constitution. This is the second time this case has been before this Court. The prior decision in Butler v. Yusem, 3 So. 2d 1185 (Fla. 2009), reversed and remanded to the Fourth District Court of Appeal. The Fourth District Court issued its opinion on the remand on May 27, 2009, and denied rehearing on June 11, 2009. The Butler Notice to Invoke this Court's jurisdiction was timely filed in the Fourth District Court of Appeal on August 7, 2009.

By its decision of February 26, 2009, this Court remanded to the Fourth District Court with directions concerning possible application of the tipsy coachman doctrine. 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 as repeatedly stated by the trial court. The opinion then 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.

This Court 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 Topsy Coachman Doctrine as stated in Robertson.

The Fourth District has now issued a further opinion entitled ON REMAND FROM SUPREME COURT OF FLORIDA. The opinion is dated May 27, 2009, with rehearing denied July 8, 2009.

Butler again seeks review because the Fourth District's new decision is erroneous and is in direct conflict with this Court's opinion in this very case and further in conflict with Robertson v. State, 829 So. 2d 901 (Fla. 2002), which 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 lack of justifiable reliance issue on which there were absolutely no findings in the trial court.

Thus, Butler respectfully requests that this Court accept jurisdiction based on direct conflict with this Court's own prior decision in this case and the precedent this Court cited as controlling concerning the tipsy coachman doctrine.

Jurisdiction is also sought based upon the expanding doctrine of the misapplication of this Court's precedent. This conflict jurisdiction doctrine is also relied upon in Robertson v. State. Misapplication of this Court's precedent as grounds for conflict jurisdiction is now accepted in jurisdictional determinations by this Court. Acensio v. State, 497 So. 2d 640 (Fla. 1986).

SUMMARY OF ARGUMENT

The Fourth District's opinion on remand is in conflict with this Court's decision remanding the case and with other decisions by this Court on the tipsy coachman doctrine. Important policy issues and constitutional issues warrant the Court's exercising its discretion in accepting jurisdiction.

ARGUMENT

WHETHER THE DECISION ON REMAND BY THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH THIS COURT'S OPINION IN THIS VERY CASE AND WITH THIS COURT'S PRECEDENT ON THE TIPSYP COACHMAN DOCTRINE.

After receipt of this Court's remand, the Fourth District issued a further opinion on remand but reached the same result on Butler's claims for fraudulent inducement and negligent misrepresentation. 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 District Court's first opinion 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). This ruling by the District Court was reversed and held to be in error. Footnote 2 of this Court's opinion specifically holds that the trial court meant to say "due diligence." This conclusion was based on this Court's review of the record.

The Fourth District has now substituted the word "translated" in place of "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 of Appeal has now attempted to circumvent the Court's opinion herein. "Translated to" justifiable reliance means the same thing as misspoke or "misapplied the term" and intended to say justifiable reliance.

This ruling constitutes both a conflict and a misapplication of this Court's precedent. 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. Exactly the same is true in regard to the unpled defense of lack of justifiable reliance. This issue was not raised and Butler never had an opportunity to respond or even argue against the unpled defense. In order to apply the tipsy coachman doctrine, Butler would have had to have this opportunity.

Butler had no idea that the defense of lack of due diligence was even an issue before the trial court and Butler also had no idea that the defense of lack of justifiable reliance was an issue before the trial court.

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. 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 rulings under its new "translation" theory. The Fourth District has failed to comply with this Court's instruction to deal with each of these claims individually. Fraudulent inducement and negligent misrepresentation are not the same claims but the Fourth District has once again "lumped" them together in disregard of this Court's instruction not to do so. See this Court's opinion p.1186.

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 the case in its new decision.

The new decision is in direct conflict with the Robertson decision. Robertson is a 2002 decision which resolved a conflict between the Third District's decision in Robertson v. State, 780 So. 2d 106 (Fla. 3d DCA 2001) and 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.

Neither lack of due diligence nor lack of justifiable reliance were pled as defenses nor raised in any manner before the trial court. Only after this trial was over with did the trial court issue its repeated due diligence ruling in its final judgment. Thus Butler did not have an opportunity to address these issues. The Fourth District has seriously misapplied this

Court's precedent on the tipsy coachman doctrine and is thus in conflict warranting this Court's acceptance of jurisdiction.

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. 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 on a complex proceeding on remand. 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.

Butler was a limited partner who unfortunately relied upon misrepresentations by the dishonest general partners who owed him a fiduciary duty. If jurisdiction is accepted Butler will present arguments that, as a limited partner, he had no duty to ferret out and discover the false or negligent representations by the general partners and that the theory of justifiable reliance should have had no application whatsoever to this case.

CONCLUSION

Butler respectfully requests that this Court exercise its discretion to accept jurisdiction and allow the filing of briefs on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 24th day of August, 2009.

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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.

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