



## Alerts

### Breach of Attorney's Fiduciary Duty to Client May Be Waived

July 3, 2013

*Lawyers for the Profession® Alert*

*Band v. Libby*, \_\_\_ So. 3d \_\_\_, 38 Fla. L. Weekly D1121, 2013 WL 2230271 (Fla. 2nd DCA 2013)

#### Brief Summary

Defendant attorney/developer (developer) invited plaintiff attorney/investor (investor) to invest in a luxury condominium development in the U.S. Virgin Islands. The developer had represented the investor over the prior eight years on various unrelated matters and had the investor execute waiver/disclosure letters. The investor sued the developer, alleging legal malpractice and other claims. After the trial, in which the jury was instructed on the defense of waiver and determined that a waiver had occurred, the trial court granted a judgment notwithstanding the verdict and a new trial to consider damages. The appellate court reversed and remanded, finding that a claim for breach of fiduciary duty could be waived.

#### Complete Summary

The developer invited the investor to invest in a luxury condominium development in the U.S. Virgin Islands ("the Project"). The developer had represented the investor over the prior eight years on various unrelated matters. The investor on two occasions received conflict waiver/disclosure letters relating to the Project, along with a copy of the partnership agreement. The investor executed and returned the conflict waiver/disclosures and set up a limited liability company, through which he would participate in the Project.

After several years and several demands for additional funds, the investor declined to pay his contribution to a capital call, thereby forfeiting his entire investment, which exceeded \$1 million. The investor and his company sued the developer and his law firm seeking recovery of the total investment. The second amended complaint alleged: (1) legal malpractice, (2) constructive fraud, and (3) breach of fiduciary duty/undue influence by the attorney in self-dealing with a client. The developer raised the affirmative defense of waiver, among others.

Before trial, all claims other than the constructive fraud claim and breach of fiduciary duty claim were either dismissed on summary judgment or settled, resulting in defendant law firm being dismissed from the litigation. At trial, the

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jury found in favor of the developer on the constructive fraud claim and in favor of the investor and his company on the breach of fiduciary duty claim. However, it also determined that the investor and his company had waived their claim for breach of fiduciary duty. Consequently, no damages were awarded.

The investor and his company moved for judgment notwithstanding the verdict. The court granted the motion, finding “that as a matter of law, there can be no waiver of a breach of fiduciary duty.” The court also determined that the jury’s finding was against the manifest weight of the evidence and that the jury should not have been instructed on the affirmative defense of waiver. Accordingly, the trial court awarded the investor and his company a new trial limited to the issue of damages on the breach of fiduciary duty claim.

Both sides appealed; however, the appellate court considered only the issue of whether a claim based on a breach of fiduciary duty may be waived. The court held that a claim based on the breach of a fiduciary duty, like any other claim, may be waived by actions or conduct warranting an inference that a known right has been relinquished. *Torres v. K-Site 500 Assoc.*, 632 So. 2d 110, 112 (Fla. 3d DCA 1994).

The court looked to *Keyes Co. v. Shea*, 372 So. 2d 493 (Fla. 4th DCA 1979), which involved a breach of fiduciary duty claim against appellants, a real estate broker and its salesman. In that case, the trial court denied appellants’ request for a jury instruction on their defense of waiver, which resulted in the jury returning a verdict against appellants. The appellate court reversed and remanded, finding that appellants were entitled to a jury instruction on their waiver defense because they had introduced some evidence in support of the defense. The court determined that if the jury found from the evidence that appellees paid the salesman’s commissions with full knowledge of the alleged wrongful acts, it would be within the jury’s province to find a waiver.

In the present case, the developer introduced some evidence in support of his waiver defense; therefore, he was entitled to have a jury instruction on that defense. The trial court erred in reversing its earlier ruling allowing the jury instruction on waiver and in ordering a new trial on damages resulting from the breach of fiduciary duty. Accordingly, the appellate court reversed the trial court’s decision to grant the investor a new trial on damages, and ordered the trial court to conduct further proceedings on the investor’s motion for new trial on the ground that the jury’s finding of waiver was against the manifest weight of the evidence. The appellate court instructed that if the trial court denied the motion, it must enter judgment in accordance with the jury verdict.

### **Significance of Opinion**

This case is significant because the appellate court recognized the affirmative defense of waiver against a breach of fiduciary duty claim directed at attorneys, and determined that “any” right to which a party was entitled could be waived by acts or conduct inferring a the relinquishment of a known right.

For more information, please contact [Terrence P. McAvoy](#).

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