0/a 6-3-87 orig.

SUPREME COURT OF FLORIDA

CASE NO: 69,398

DISTRICT COURT OF APPEAL CASE NO: 85-2759

ANGEL, COHEN AND ROGOVIN,

PETITIONER,

VS.

OBERON INVESTMENT, N.V., ETC.,

RESPONDENT.

REPLY BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER ANGEL, COHEN AND ROGOVIN

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INTRODUCTION

This brief is filed on behalf of the Florida Defense Lawyers Association as Amicus Curiae in support of the Petitioner, ANGEL, COHEN AND ROGOVIN. Petitioner ANGEL, COHEN AND ROGOVIN was the Defendant in the trial court legal malpractice action. Respondent OBERON INVESTMENTS, N.V. was the Plaintiff below. In this brief the parties will be referred to as Petitioner/Defendant and Respondent/Plaintiff as well as by name.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF CASE AND STATEMENT OF THE FACTS

The Florida Defense Lawyers Association accepts and adopts that statement of case and statement of the facts contained within the brief filed by Petitioner Angel, Cohen and Rogovin.

POINT ON APPEAL

WHETHER AN ATTORNEY OWES A DUTY, A BREACH OF WHICH WOULD BE NEGLIGENCE, TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY'S SERVICES AND WHOSE INTERESTS ARE ADVERSE TO THAT OF THE ATTORNEY'S CLIENT.

ARGUMENT

WHETHER AN ATTORNEY OWES A DUTY, A BREACH OF WHICH WOULD BE NEGLIGENCE, TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY' SERVICES AND WHOSE INTEREST ARE ADVERSE TO THAT OF THE ATTORNEY'S CLIENT.

Respondent's entire argument is predicated upon Petitioner having had knowledge that Treister was in a fiduciary relationship with Oberon. Respondent's conclusion that Petitioner was aware of the relationship between Treister and Oberon is totally unsupported by the record. Mr. Angel's deposition testimony suggests that he believed the relationship between Mr. Treister and Oberon to be less than a fiduciary relationship:

> Q. From - whether it's from your impression from anything said, can you give you us more specifically how he was involved? Can you tell us?
>
> A. To the best of my knowledge and I don't have any note to this, I believe that Mr. Treister was managing or operating this building for Oberon.
>
> (Respondent's brief page 7).

Somehow, from Mr. Angel's testimony that he believed that Mr. Treister was managing a building for Oberon, Respondent has taken a quantum leap, concluding that Mr. Angel was aware that Mr. Treister had a fiduciary relationship with Oberon. This conclusion is neither supported by the record nor justified.

Additionally, although Respondent sued Petitioner for

negligence, Respondent now appears to be arguing that Petitioner should be liable to Respondent not for negligence, but for fraud, as Petitioner purportedly assisted Treister in defrauding Respondent. "Cohen cannot assist Treister in defrauding Oberon when he knows that Treister is a fiduciary for Oberon and then claim that Oberon has been placed in an adverse position by his actions and those of Treister." (Respondent's brief pg 14). "Instead of disclosing to Oberon, Cohen, in fact, helps Treister defraud Oberon." (Respondent's brief pg 14). Although it does not appear from the record that Petitioner was aware of the fiduciary nature of the relationship between Treister and Oberon -- contrary to Respondent's assertions -- if such was the case, Respondent's cause of action against Petitioner would be for fraud, not negligence.

Unlike negligence actions, an action for fraud against an attorney does <u>not</u> require the plaintiff to establish privity in order to recover. While an attorney acting at the direction of his client and in a legal manner is not liable for the consequences of his client's actions, an attorney who acts illegally or beyond his employment in order to secure an unconscionable advantage for his client may be held liable in fraud. PICKARD v. MARITIME HOLDINGS CORPORATION, 161 SO.2d 239 (Fla. 3rd DCA 1964).

When the arguments upon which Respondent is relying are closely examined, it is apparent that Respondent is <u>not</u>

alleging that Petitioner was negligent in his performance of his legal duties, but rather that he acted fraudulently. Had Respondent been able to establish that Petitioner committed a fraud upon Respondent -- and had a claim to that effect been pled - - recovery would be allowed under existing law.

Non-clients who are injured by an attorney's wrongful acts normally do have a means for recovery, even absent a direct action against the attorney for professional malpractice. Frequently, as here, the injured party can sue the client for the client's wrong. Should the client's liability be attributable to the attorney, the client can in turn sue the attorney. In addition, however, the non-client who has been injured by an attorney's intentional acts may have a direct remedy against the attorney, in some form other than a negligence action, e.g., for fraud, misrepresentation, or some other intentional tort. Only in very rare circumstances, therefore, will a non-client be injured by an attorney's misconduct, and not be able to recover by some means other than a legal malpractice action against the attorney.

In those rare circumstances, exceptions to the privity requirement have properly been carved out. For example, intended beneficiaries of a negligently drafted will are routinely allowed to sue the negligent attorneys, even absent the existence of privity. McABEE v. EDWARDS, 340 So.2d 1167 (Fla. 4th DCA 1976). However, in most instances, the courts have properly refused to expand the exceptions to the privity

requirement. Those exceptions should not be broadened to encompass this case, as this is not truly an action for professional negligence. If Respondent was injured as it has claimed, existing theories provide a basis for recovery, independent of this otherwise inappropriate claim for legal malpractice. Respondent may recover from its fiduciary, Mr. Treister, and -- if the facts had warranted it -- might have brought some sort of intentional tort claim against Petitioner, rather than a negligence action.

Fortunately, the OBERON decision has not yet resulted in a wholesale abandonment of the privity requirement by the district courts of appeal of this state. Since the initial brief was filed in this appeal, the First District Court of Appeal has issued a decision reaffirming that privity is normally required in an action for legal malpractice. AMERICAN CREDIT CARD TELEPHONE COMPANY v. NATIONAL PAY TELEPHONE CORPORATION, Case No: BO-221, 12 FLW 817, First District Court of Appeal, opinion filed March 20, 1987.

In that case, American Credit Card Telephone Company (ACCT) filed suit against National Pay Telephone Corp. (NPT), two of its officers, Ross Scheer and Neil Rosenstein, its corporate counsel, Willkie Farr & Gallagher, and an associate of the firm, Mary P. Jaffe. In addition to counts for conspiracy, restraint of trade, malicious prosecution, defamation per se and per quod, tortious conspiracy to harass and defame, and investment in NPT of funds obtained through the

collection of unlawful debts in violation of the RICO statute, ACCT sued Willkie Farr and Gallagher for professional malpractice.

The Willkie Farr law firm had represented NPT during hearings before the Florida Public Service Commission (PSC). During 1985, both ACCT and NPT applied for authorization from the PSC to provide pay telephone service. NPT was authorized to provide telephone service on June 13, 1985, and in October, the PSC noticed a proposed agency action and granted authorization to ACCT. NPT, represented by Willkie Farr & Gallagher, filed a petition for a formal administrative hearing to contest the proposed authorization of ACCT. The PSC unanimously found that NPT was without standing to initiate a formal hearing, that there were no disputed issues of material facts so as to require a formal hearing, and that NPT's allegations regarding ACCT's purportedly unlawful activities were not properly brought before the PSC.

Although the opinion does not give the basis for the legal malpractice action, it suggests that ACCT sued Willkie Farr & Gallagher and Mary P. Jaffe for acts committed during their representation of NPT with regard to the proceedings before the PSC. ACCT relied on OBERON, arguing that there is no reason why attorneys should not be treated as other licensed and regulated professionals who are liable to third parties for damages caused by their professional malpractice. The court affirmed the dismissal, finding that ACCT had failed to allege

a duty owed them by WF & G and JAFFE and an attendant breach of that duty. The First District distinguished OBERON, noting that the OBERON court had specifically found a duty on the part of the attorney to act in a third party's best interest, despite the absence of privity which is ordinarily necessary to allow recovery in a legal malpractice action.

It is respectfully submitted that such tenuous distinctions should not be necessary. OBERON is simply bad law. In its wish to promote "morally correct" conduct by attorneys the Third District has dramatically changed the rules governing causes of action against attorneys.

While the District Court's motivation is commendable, the Florida Defense Lawyers Association does not believe that to put attorneys on notice that they must not allow their obligation as advocates to transcend their paramount obligation to avoid involvement in fraudulent schemes. That goal has already been accomplished -- attorneys can be sued by non-clients for fraud. Under the circumstances, the Florida Defense Lawyers Association believes that the OBERON decision represents an unnecessary and potentially dangerous erosion of the privity requirement which otherwise prevents negligence suits against attorneys by non-clients.

CONCLUSION

For the reasons that are expressed in their brief the Florida Defense Lawyers Association would respectfully submit that this Court should enter an order quashing the Third

District's decision below. This Court should issue an opinion which would make it clear that an attorney cannot be liable to a non-client except in those limited situations where the attorney is retained to perform a service for a specific and identifiable intended beneficiary. An attorney should not be liable to non-clients who do not fall within that limited category, and this Court should therefore remand this case with directions to enter judgment for the Petitioner, pursuant to the summary judgment that was originally entered by the trial court in this matter.

Respectfully submitted,

BY: ______________________
ROBERT M. KLEIN
DEBRA J. SNOW

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 17th day of April, 1987 to Shalle Stephen Fine, Esq., 46 S.W. 1st Street, Suite 201, Miami, Florida 33130 and Douglas H. Stein, Esq., Walton, Lantaff, Schroeder & Carson, 900 Alfred I. Dupont Building, 169 East Flagler Street, Miami, Florida 33131.

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