IN THE SUPREME COURT OF FLORIDA

CASE NO.: 69,393

ANGEL, COHEN and ROGOVIN,

Petitioner,

vs.

OBERON INVESTMENT, N. V., etc.,

Respondent.

_____/

ON WRIT OF CONFLICT CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S MAIN BRIEF

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STATEMENT OF THE CASE

This cause comes to this Court on Writ of Conflict Certiorari granted to the District Court of Appeal of Florida, Third District. Your Respondent here, Oberon Investment, N. V., was Appellant in the Third District Court of Appeal and was Plaintiff in the Circuit Court of the Eleventh Judicial Circuit. Cohen, Angel and Rogovin, a law partnership, was Defendant in the trial court, Appellee in the District Court of Appeal and is Petitioner here. The parties will be referred to in this brief by proper name or by standing here or below as appropriate. References to the record on appeal as filed in the Third District Court of Appeal and as drawn up to this Court by the Writ will be made by use of the symbol "R" with appropriate page number. The pagination will be that used in the record on appeal as filed in the Third District. The Florida Defense Bar Association has filed an amicus curiae brief in support of the Petitioners by leave of this Court and we will refer to that brief as the "amicus brief".

STATEMENT OF FACTS

Oberon Investment sued the Defendant law partnership, Cohen, Angel and Rogovin. The facts of the case, as pertinent to this proceeding, are set out in Count IV of the Complaint as amended as follows (captions and signatures omitted):

"15) Plaintiff, OBERON INVESTMENTS, N. V., a Netherlands Antilles corporation, sues the Defendants, COHEN, ANGEL and ROGOVIN, a partnership for the practice of law, located in Dade County, Florida, at all times material to the allegations of this Count.

16) There is located in Dade County, Florida, a parcel of real property legally described as:

> Tract "A", HELLER TRACT, according to the plat thereof, recorded in Plat Book 102, Page 9, of the Public Records of Dade County, Florida.

There is an office building on this tract known as the Heller Building which was constructed sometime prior to 1979.

17) In 1979, title to the aforedescribed parcel of real estate was in the name of Meson Investment, N. V., a Netherlands Antilles corporation. Meson Investments, N. V. was a wholly owned subsidiary of the Plaintiff in this case, OBERON INVESTMENTS, N. V.

18) Leonard Treister, the original Defendant in this case, was an attorney at law in practice in Dade County, Florida, in 1979 and 1980 and was the attorney and agent for the Plaintiff OBERON INVESTMENTS, N. V. and also for the corporation known as Meson Investments, N. V. at all times material to this Count.

19) On September 17, 1980, the Defendant TREISTER, as authorized agent of Meson executed a contract for the sale of the real property above-described for a purchase price of $4,800,000.00 to be paid all in

cash above existing mortgages and a purchase money mortgage in the amount of $600,000.00.

20) Thereafter, under date of October 3, 1980, the Defendant TREISTER caused OBERON, your Plaintiff, to enter into a contract for the sale of all of the Meson stock to a trustee for a purchase price of $4,000,000.00, including a $450,000.00 purchase money note. The trustee named in the contract is the Defendant, STANLEY ANGEL.

21) Thereafter, on October 24, 1980, the Defendant TREISTER caused the contract for the sale of the real property to be amended to reflect a purchase price of $4,350,000.00 or $450,000.00 less than the original contracted price.

22) The Defendant TREISTER then caused the contracts to be implemented, that is he affected Oberon's sale of all the Meson stock through the trustee at a price of $4,000,000.00, delivering the trustee's promissory note for 450,000.00 of the purchase price and he caused Meson to sell the real property which was its only asset for $4,350,000.00. He further caused Meson to lease back the property from the new purchaser under a lease.

23) The Defendant TREISTER did not inform OBERON of the terms of Meson's contract to sell the real property prior to or at the time of sale and pocketed the $350,000.00 differential between the prices without accounting to his principal and client therefore.

24) After the transactions described above, the Defendant TREISTER, as the agent of Meson and the Plaintiff, was in control of the premises and the leasehold revenues thereof which passed through his hands. At the time that the transactions were consummated, the $450,000.00 promissory note payable to your Plaintiff was to have been secured by collateral pledge of stock in Meson which the Defendant TREISTER had previously looted. The Defendant TREISTER did not even have the collateral pledge executed. The Defendant TREISTER proposed to your Plaintiff, after the note had been executed

and delivered, that he would be able to satisfy the note from the proceeds of the leasehold revenue. In fact, TREISTER did not satisfy the note but caused the proceeds of leasehold revenue to be delivered. The note is now in default.

25) The Defendant TREISTER retained the Defendant COHEN, ANGEL and ROGOVIN, by and through its partner, STANLEY ANGEL, as counsel in connection with the sale by OBERON of the stock of Meson Investments and in connection with the preparation of the documents therefore, and, additionally, upon information and belief, in connection with the preparation of the documents used in the closing of the transaction between Meson and the purchaser of the real property, which was Meson's only assets. The Defendant was, from the inception of their representation of TREISTER, aware of the transactions and should clearly have foreseen the damage to OBERON, your Plaintiff, which could have and, in fact, did result from the transaction. The Defendant was negligent in each of the following alternative respects:

a) First - in their preparation of the documents involved in the transaction; and

b) Secondly - in their failure to inform OBERON or cause them to be informed of the nature and extent of the transaction; and

c) Thirdly - in permitting the Defendant TREISTER to use the documents for the purpose of defrauding OBERON without supervision or control from the Defendant."

The deposition of Stanley Angel, a partner in the Defendant lawfirm, was taken and filed (R. 106 et seq). References to Mr. Angel's deposition will use the pagination of the deposition since the clerk did not separately paginate it:

"Q. You are an attorney by practice of Florida?
A. Yes.

Q. For how long?
A. Since 1957.

Q. Is it fair to say that during the time of your active practice, you specialized or a large portion of your practice, has been directed to real estate practice?
A. Yes.

Q. Involving fairly complicated real estate transactions?
A. Sometimes. (Deposition - Page 3)

Q. All right, Mr. Treister is also a lawyer; is that correct?
A. Yes.

Q. You indicsted that you have represented on a number of occasions. Approximately when did you first - I am just trying to get general parameters.
A. Sometimes between, I say, 1978 and 1980, I was involved in some real estate transactions representing he and one of his partners...

Q. Did those involve real estate transactions?
A. Yes.

Q. Real estate deals?
A. Yes. (Deposition - Page 4)

Q. Okay. Fine. Did there come a time when Mr. Treister approached you about a deal involving "the Heller Building"?
A. Yes.

Q. And the "Heller Building" is the office building on Biscayne Building which is the subject of this lawsuit?
A. Yes.

Q. Is it fair to say that would have been sometime in 1980, and feel free, yes, to refer to your file.
A. As best I can establish, the first time that Leonard Treister approached me about the "Heller Building" was in September of 1980. (Deposition - Page 5)

Q. In any event, Mr. Treister, I presume, called and told you he had some business to transact and came to your office.
A. That's correct.

Q. And at that time he informed you what the business was?
A. Yes.

Q. And would you give us, please, a substance of the conversation?
A. He wanted me to assist him in connection with the acquisition of the corporate stock of a corporation which owned fee simple title to the Heller Building. He wanted me to act as an attorney. He also wanted me to act as an agent for an undisclosed principal.

Q. You said as an agent for an undisclosed principal?
A. (Witness nods head affirmativley.)

Q. Would you elaborate on that?
A. He wanted me to take title in the transaction as trustee as though I were the principal.

Q. I see.
A. When in essence he was the principal . . .

Q. Did he tell you why he wanted you to take title as an undisclosed principal?
A. No, not really.

Q. Did you ask him why?
A. No, not really. In the course of our disucssions it became apparent that the transaction was one in which he was involved with the owner and I presume that he wanted someone to act as an agent so that his involvement in the transaction would not be readily apparent to the owner but it wasn't - I didn't come upon that information by virtue of specific conversation or specific inquiry.

Q. That is, however, the impression that you receive from discussions you had about the transaction.
A. Yes. (Deposition - Page 6 et seq.)

Q. I beg your pardon.
A. I was contracting with Oberon to buy the shares of stock in Meson that they owend.

Q. Right. Okay. You were doing that as your understanding was regardless of whether of it was expressed, implied or simply gathered from the conversation because Mr. Treister did not want it to become apparent to Oberon that, in fact, he was the principal acquiring the stocks?
A. I presume so.

Q. And you operated on that presumption throughout the transaction?
A. I don't know if I operated on a presumption. That's the way I conducted myself.

Q. Stanley, I am not trying to trick you or trap you or put words in your mouth. At the time of the initial meeting, was there any mention by Mr. Treister of a resale of the Heller Building, either through physical property or through a further transfer of stocks to another party, so-called flip-transaction?
A. I can't tell you if that discussion took place at the time of the initial transaction. My notes from my initial meeting with him does make reference to the flip-transaction.

Q. Is it fair to say that at some time you did become aware of the fact that there was a flip-transaction?
A. Yes.

Q. Would you tell us, for the record, what a flip-transaction is?
A. A flip-transaction whereby - when somebody acquires real property, he is able to divest himself of the real property in close proximity to the date of his acquisition, if not almost simultaneously. . .

Q. Did Mr. Treister tell you what the terms of the flip were?
A. I think so. I think at some time he showed me a copy of contract.

Q. For the sale of the property?
A. Yes.

Q. At that time then you knew that the contemplated sale was at a price in excess of the contemplated purchase?
A. Yes. (Deposition - Page 9 et seq.)

Q. You indicated earlier in your testimony that Mr. Treister- that you had gotten the impression that Mr. Treister was involved with Oberon, the owner in some way?
A. Uh huh.

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

Q. I see.
A. Prior to either of these transactions that he placed."

With the record in this posture, the cause came on for hearing on the Motion of Cohen, Angel and Rogovin for Summary Judgment, which was granted (R. 122) in an Order which did not set out any grounds . An appeal was taken from that Order to the District Court of Appeal of Florida, Third District, which entered the Opinion to which certiorari is here granted. A copy of that Opinion is attached to this brief as Exhibit A for the convenience of the Supreme Court of Florida.

QUESTIONS PRESENTED

The three questions raised by the Petitioner's brief will be restated and argued seriatim in the order raised by the Petitioner;

I. WHEN AN ATTORNEY, WHO IS ENGAGED IN DEFRAUDING HIS CLIENT HIRES ANOTHER ATTORNEY TO REPRESENT HIM AND HELP COVER AND CONCEAL THE TRANSACTION FROM THE CLIENT, IS THE SECOND ATTORNEY LIABLE TO THE CLIENT?

II. THE DEFENDANTS OWED A DUTY TO THE PLAINTIFF BECAUSE IT WAS CLEARLY FORESEEABLE THAT THE PLAINTIFF WOULD BE INJURED BY THE DEFENDANT'S ACTIONS.

III. IS SUMMARY JUDGMENT PROPER WHERE THE RECORD CLEARLY INDICATES THAT THE DEFENDANT DID NOT COMPORT WITH APPLICABLE STANDARD OF CARE?

ARGUMENT

I. WHEN AN ATTORNEY, WHO IS ENGAGED IN DEFRAUDING HIS CLIENT HIRES ANOTHER ATTORNEY TO REPRESENT HIM AND HELP COVER AND CONCEAL THE TRANSACTION FROM THE CLIENT, IS THE SECOND ATTORNEY LIABLE TO THE CLIENT?

On the unrebutted record, the Petitioners, Cohen, Angel and Rogovin, were a lawfirm practicing in Dade County, Florida at the time of the occurrences giving rise to this lawsuit. Mr. Angel was a partner in that lawfirm and was, in fact, a member of that lawfirm who acted for the firm and the transaction at bar here. Mr. Angel, an experienced real estate lawyer, was approached by Mr. Treister, another lawyer. At Mr. Treister's request, he acted as he says, "for an undisclosed principal" in the acquisition from Oberon of its stock in Meson Investments, Inc. Angel acted and prepared these documents knowing that Treister was, in fact, the real purchaser of the Meson stock. The reason for this is apparent. Cohen testified that he became aware that Treister was going to buy the stock in Meson for $4,000,000.00 and simultaneously in a flip-transaction sell the property which Meson owned to some third party for $4,800,00.00. Treister did not want his fiduciary beneficiary, who is Oberon, your Respondent, to know about this so that he could keep the undisclosed profit. He induced Cohen to act as a shield for him and to prepare all of the documents for the acquisition which Cohen did. The result was thatTreister was able to grab the undisclosed profit instead of accounting for it to his fuduciary beneficiary and client Oberon.

The Petitioner lawyers, like every other lawyer in Florida, were covered and governed by the Code of Professional Responsibility. The acts which are at bar in this case, occurred prior to January 1, 1987 and consequently will be governed by the Code of Professional Responsibility as it existed prior to that date. References in this brief will be to the Code of Professional Responsibility prior to January 1, 1987, except as otherwise specifically noted. The Code provides in its premable:

> "The disciplinary rules, unlike the ethical considerations, are mandatory in character. The disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the disciplinary rules should be fairly applied to all lawyers, regardless of the nature of their professional activities. The code makes no attempt to proscribe either disciplinary procedures or penalties for violation of a disciplinary rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guility of violating a disciplinary rule should be determined by the character of the offense and the attendant circumstances."

Further, the code goes on to provide in Disciplinary Rule 7-102 (B):

> "A lawyer who receives information clearly establishing that:
>
> 1. His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

In Florida, every lawyer is under an affirmative duty not only not to assist any one in perpetrating a fraud, but to reveal that fraud to any person who would be injured if the client refuses to do so. Angel had an affirmative duty under the Code of Professional Responsibility to notify Oberon of the fact that Treister was using him to conceal a substantial profit from Oberon who was Treister's fiduciary beneficiary. This was clear and had to be clear to Cohen under his own statements. His failure to comply with the minimum standard of conduct requred of lawyers is and must be negligence. Negligence as a matter of law is the failure to that which a reasonable man ought do under the circumstances. We suggest that it is beyond debate that a reasonable lawyer, under any circumstances, ought do what the canons command him to do at a minimum under pain of disciplinary penalty. It is, of course, and must have been clearly foreseeable to the Petitioners at the time that the person who would be injured and the only person (or in this case corporation) who would or could be injured by their negligence would be Oberon from whom the profit would be concealed. We respectfully suggest that virtually, as a matter of law, Oberon ought be entitled to recover under these circumstances. In the Opinion to which certiorari is here directed, the Third District Court of Appeal takes the position that a violation of the canons may be evidence of negligence. In doing so, they adopt the view relied in Fishman vs. Brooks, 487 N. E. 2d. 1377 (Mass. 1986). There, the Supreme Court of Massachusetts said:

"We add a brief comment about the relationship between the canons of ethics and an attorney's duty of care to his client. A violation of a canon of ethics or a disciplinary rule (citation omitted - ed) is not itself an actionable breach of duty to a client. (Citation omitted - ed) . . . As with statutes and regulaions, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence. (Citation omitted - ed)."

In like manner, Florida Courts have held that"

"Where a statute, though penal in character, plainly imposes a duty for the benefit of individuals, a right of action accrues to a person of such class injured through a breach of the duty."

Rosenberg vs. Ryder Leasing, 169 So.2 678 (3 DCA Fla. 1964).

Clearly, Oberon was in the class of persons intended to be protected by the fraud section of the disciplinary rule.

Even independently of the Code of Professional Responsibility, the Defendant was negligent and is liable to the Plaintiff. A great todo is made in both the Petitioner's brief and the amicus brief about the principle that an attorney ought not be liable for negligence to a party whose interests are adverse to those of the attorney's client.

We do not challenge this principle and, in fact, we agree with it both as comporting with the existing state of the law in virtually every jurisdiction and as consistent with the requirements of public policy. It is undisputed that an attorney ought be free to represent his own client without the spectre of liability to an adverse party for his negligence to that party

exerting a chilling effect on his representation.

That, however, does not apply to this case. In this case, the parties are not adverse. Oberon is not adverse to Mr. Treister, who is Oberon's agent, lawyer and fiduciary. Treister is not adverse to Oberon. Treister cannot make Oberon adverse without Oberon's knowledge by engaging Cohen to assist him in defrauding Oberon. 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.

Reduced to lowest terms, what happens is that Treister decides to defraud Oberon for whom he is a fiduciary. He hires Cohen as an attorney to assist him. Cohen is or ought be clearly aware of what is going forward. Instead of disclosing to Oberon, Cohen, in fact, helps Treister defraud Oberon. Cohen then asks that the Supreme Court of Florida sanctify these arrangements by declaring that Oberon was an aderse party to Treister and to Cohen.

In fact, the holding in this case is directly in line with the holdings of Florida Courts in analogous situations. In Lorraine vs. Grover, Ciment, et al, 467 So.^{2} 315 (3 DCA Fla. 1985), the beneficiary of a Will sued an attorney alleging negligent drafting of the Will. The District Court of Appeal held that such action would lie. Recognizing that generally one of the elements of a negligence action against an attorney was privity, requiring the attorney's employment by the Plaintiff,

the Court recognized that there are exceptions to the rule. The Court said:

> "Florida courts have recognized, however, that an attorney, preparing a Will, has a duty not only to the testator - client, but also to the testator's intended beneficiaries. In limited circumstances, therefore, an intended beneficiary under a Will may maintain a legal malpractice action against the attorney who prepared the Will, if through the attorney's negligence, a devise to that beneficiary fails. [Citations omitted - ed] Although it is generally stated that the action can be grounded in theories of either tort (negligence) or contract (third party beneficiary) the contractual theory is 'conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence'". [Citation omitted - ed]

The District Court goes on to point out (footnote 3) that proof of the element of privity generally establishes that the attorney owes a duty to the Plaintiff. The two principal justifications relied on for the retention of the privity requirement in legal malpractice actions are first - that to allow the liability without privity would deprive the parties to the contract of control of their own agreement, and, secondly that duty to the general public would impose a huge potential burden of liability on the contracting parties. Those reasons are totally inapposite in a situation such as the one at bar. In the case at bar, the Petitioners should have known that their actions would result in an injury to their client's fiduciary beneficiary. They clearly must have known that Treister could not be adverse to your Respondents here because Treister was your Respondent's fiduciary. We

suggest that when one lawyer assists another lawyer, or, in fact, assists any fiduciary or trustee, to do an injury to the cestui qui trust, the actions of the lawyer are negligent and if the injury to the cestui qui trust is foreseaable, then the injury is proximately caused by the negligence. That is the sum and substance of the reason why the beneficiary can sue the testator's lawyer for his negligence in drafting the Will. It is the reason why an attorney undertaking to represent the guardian of an incompetent can be held responsible to the ward; see Fickett vs. Superior Court of Pima County, 558 Pac. 2d 988 (1976).

In Lorraine, the Third District Court of Appeal relied on McAbee vs. Edwards, 340 So.[2] 1167 (4 DCA Fla. 1976) and the authorities for it. The Third District was correctly impressed with McAbee and its reasoning and presumably impressed with the significant portion of the Opinion of a California Court relied on in McAbee:

> "The duty thus recognized in Lucas stems from the attorney's undertaking to perform legal services for the client but reaches out to protect the intended beneficiary. We impose this duty because of the relationship between the attorney and that beneficiary; public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable."

Finally, we would call to this Court's attention Donald vs. Garry, 97 Cal. Rep. 191 (1971). There, a lawyer employed by a collection agency to bring an action to collect a debt owed to an individual was held liable to the individual when the proceeding was dismissed for lack of diligent prosecution because of the attorney's negligence. The Court reasoned that when the attorney undertook to render services for another, which he should have recognized as necessary for the protection of the property of a third person, who suffered harm by virtue of his negligence, he would be liable to that third person. The California Court further holds that an attorney may be liable for damage caused by his negligence to a person intended to be benefitted by his performance irrespective of any lack of privity of contract between the attorney and the party to be benefitted.

We respectfully suggest that in this case where an attorney undertakes to act and he knows that his actions will be detrimental to a third person and that third person is not adverse to the attorney's client, but is, in fact, the cestue qui trust of the client, then the attorney must be no liable to the cestui qui trust for his negligence.

This is not imposing liability to the general public. This is not imposing a chilling restraint on attorneys who have the duty to fight for their client's right against those of adverse parties. This is an affirmation in real terms of the fundamental principles that we seek to govern ourselves by.

II. THE DEFENDANTS OWED A DUTY TO THE PLAINTIFF BECAUSE IT WAS CLEARLY FORESEEABLE THAT THE PLAINTIFF WOULD BE INJURED BY THE DEFENDANT'S ACTIONS.

Apparently, the position which is taken by the Petitioner is that if Treister is a fiduciary for Oberon because he is an attorney, then Angel might be liable for helping Treister defraud Oberon; if, however, Treister is a fiduciary for Oberon because he is an agent, then Cohen is not liable for helping Treister defraud Oberon. We suggest that whenever an attorney becomes aware that his client is a fiduciary for someone else, then the attorney is on notice that there is a cestui qui trust in the background whose interests are real interests which will be affected by the fiduciary's actions. It is clearly foreseeable to any competent attorney that the actions of the fiduciary impact on the position of the cestui.

III. IS SUMMARY JUDGMENT PROPER WHERE THE RECORD CLEARLY INDICATES THAT THE DEFENDANT DID NOT COMPORT WITH APPLICABLE STANDARD OF CARE?

The Affidavit of Mr. Angel in the file constitutes the opinion of Mr. Angel. The actions of Mr. Angel, as demonstrated by his testimony, when measured against the standard prescribed by the Supreme Court of Florida in the Code of Professional Responsibility, are clearly directly contrary to that self-serving opinion.

CONCLUSION

We respectfully suggest and urge that the Opinion of the District Court is correct and is consistent with the law of Florida and consistent with the responsibilities of attorneys as prescribed by the Supreme Court of Florida. An attorney who assists another attorney to defraud a client ought be liable to the defrauded party. Similarly, an attorney who assists any fiduciary to defraud a cestui qui trust ought be liable to the cestui qui trust when he knows of the existence of the fiduciary relationship and knows, or ought to know, that the rights of the cestui will be impacted by the actions of the fiduciary. The Opinion ought be affirmed and the Writ discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Douglas H. Stein, Esq., Walton, Lantaff, et al., 900 DuPont Building, Miami, FL 33131 and Robert M. Klein, Esq., and Debra J. Snow, Esq., c/o Stephens, Lynn, et al., 9100 South Dadeland Boulevard, One Datran Center, Suite 1500, Miami, FL 33156 this 23 day of March, 1987.

SHALLE STEPHEN FINE