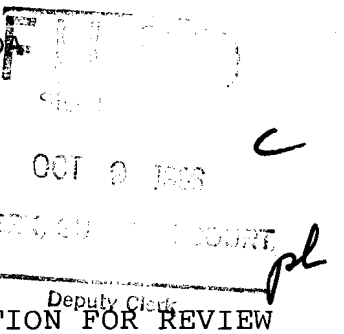
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,398



ANGEL, COHEN and ROGOVIN,	:	
	:	
Petitioner,	:	
	:	
vs.	:	ON PETITION FOR REVIEW
	:	FROM THE DISTRICT COURT
OBERON INVESTMENT, N.V., a Netherlands Antilles Corporation,	:	OF APPEAL, THIRD DISTRICT
	:	
Respondent.	:	
	:	

BRIEF OF PETITIONER ON JURISDICTION
(With Separate Appendix)

WALTON LANTAFF SCHROEDER & CARSON
By: DOUGLAS H. STEIN
Attorneys for Petitioner
900 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 379-6411

TABLE OF CONTENTS

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

TABLE OF AUTHORITIES

CASES — PAGE

STATUTES

TEXT

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

INTRODUCTION

This is a petition for discretionary review in an action for legal malpractice, wherein the Third District Court of Appeal adopted a balance of factors test which practically abolishes the rule that privity is required in a legal malpractice action. The test as adopted and applied is contrary to all Florida precedent and has been expressly rejected by other district courts of appeal.

The effect of the decision of the Third District Court of Appeal is far-reaching. Under the rule adopted, no attorney can represent a client without the possibility of a lawsuit being filed by someone, somewhere who has somehow been affected by the attorney's zealous representation of his client. The attorney's preoccupation or concern with the possibility of claims based on mere negligence, as distinct from fraud or misrepresentation, by anyone with whom his client might deal will prevent him from devoting his entire energies to his client's interest. The result is both an undue burden on the profession and a diminution in the quality of the legal services received by the client. Because the adoption of this new test collides with numerous long standing decisions in other district courts of appeal and the test as adopted has been misapplied to the facts of the instant case, petitioner urges this Court to accept jurisdiction to review the decision of the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS[1]

In its Amendment and Supplement to Complaint, respondent (plaintiff below) alleged that petitioner (defendant below) was negligent in the performance of its professional duties in regard to a sales transaction of the stock of a corporation. The sole asset of the corporation was a parcel of real estate known as the "Heller Building." (A.1-4) Plaintiff further alleged that defendant was retained by one Leonard Treister to act as counsel for him in connection with the sales transaction. (A.2) There is no allegation that defendant was hired by plaintiff nor is there any allegation that defendant knew of any relationship between Leonard Treister and plaintiff. The record is undisputed that defendant was employed by Leonard Treister to represent only Leonard Treister in the purchase of the stock and that defendant was neither employed by plaintiff nor employed to perform legal services for plaintiff in any manner. (A.5) It is further undisputed in the record that defendant had no knowledge of any relationship between Leonard Treister and plaintiff other than defendant's belief that Leonard Treister may have been managing the "Heller Building." (A.23)

Defendant was hired by Leonard Treister to perform two functions. First was to assist Leonard Treister in the acquisition of the stock of the corporation which owned fee

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[1]In this brief the letter "A" refers to Petitioner's appendix. All emphasis is added unless otherwise indicated.

simple title to the Heller Building. (A.12) Specifically, defendant was to prepare documentation in preparation for the closing of the sales transaction. (A.19) Defendant was not to attend the actual closing and in fact did not so attend. (A.19) Second, Stanley Angel, a principal in the defendant law firm, was to take title to the property as trustee for Leonard Treister. (A.12) Stanley Angel did take title as trustee and subsequently the property was conveyed to third parties.

In its Amendment and Supplement to Complaint, plaintiff alleged that defendant had been negligent in the performance of its professional duties. There was no cause of action alleged other than one in negligence. (A.1-4) In response to the Amendment and Supplement to Complaint, defendant filed a Motion for Final Summary Judgment accompanied by a memorandum of law and the affidavit of Stanley Angel. (A.32-40) In that motion, defendant asserted that it owed no duty to plaintiff, a breach of which would give rise to a cause of action for negligence. (A.32-33) Upon consideration of the Motion for Final Summary Judgment and the accompanying memorandum of law and affidavit, the trial court granted the motion and entered final summary judgment for defendant. (A.41)

Plaintiff appealed from the judgment entered in favor of defendant. The Third District Court of Appeal reversed the final summary judgment and held that a lawyer representing one side of a sales transaction may owe a duty to the other side of the sales transaction, a breach of which would constitute

negligence. (A.42-45) The Third District Court of Appeal denied defendant's Motion for Rehearing and in the Alternative for Certification. (A.46-50)

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal practically abolishes the rule that privity is required in a legal malpractice action. This decision directly conflicts with decisions of other district courts of appeal which have refused to relax the privity requirement beyond cases involving negligence in drafting a will. See Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (Fla. 2d DCA 1979); Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978); Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977).

Conflict additionally exists as the Third District Court of Appeal applied a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975).

In addition, conflict exists as the Third District Court of Appeal misapplied the law by relying on a decision which involves a situation materially at variance with the one under review. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980).

ARGUMENT

POINT INVOLVED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIRST, SECOND AND FOURTH DISTRICT COURTS OF APPEAL.

The decision of the Third District Court of Appeal in the instant case is in direct conflict with the decision of the Fourth District Court of Appeal in the case of Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977). In Adams the purchaser of real estate sued the seller's attorney for legal malpractice basing the complaint solely on negligence. The trial court dismissed the complaint for failing to allege a cause of action. The Fourth District affirmed the dismissal holding that the attorney was hired by the seller, owed his sole allegiance to the seller, and owed no duty to the purchaser. As in the instant case, there was no allegation of any intentional act on the part of the attorney.

In holding that no duty was owed, the Fourth District specifically considered the case of McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976), upon which the Third District based its holding in the instant case. In McAbee the beneficiary to a will sued the testator's attorney for negligence in drafting the will. The McAbee court recognized the generally accepted rule that privity is required to maintain a legal malpractice action. The court did however concur with the majority of jurisdictions which have held that the requirement of an attorney-client relationship be relaxed when a beneficiary to a will sues the testator's attorney for negligence in

drafting the will. The court held that the beneficiary stated a cause of action. In its Adams decision, the Fourth District distinguished McAbee stating "the lawyer in [McAbee] represented only one "side" of a transaction because there was only side. Here there are two sides, two interests to be protected and we cannot hold a lawyer responsible to all parties in a transaction unless it is alleged (and proved) he committed some non-negligent tort such as fraud or theft or the like." Adams v. Chenowith, supra at 231.

Thus in Adams, the Fourth District held that the attorney for one side of a sales transaction owes no duty to the other side. The court specifically held McAbee to be inapplicable in such a case. In direct conflict with the Adams holding, the Third District in the instant case held that the attorney for one side of a sales transaction may owe a duty to the other side. In so holding, the Third District specifically applied McAbee. Such is direct conflict sufficient to afford this Court jurisdiction of the instant case.

The Third District's opinion is also in direct conflict with the First District Court of Appeal's opinion in Drawdy v. Sapp, 265 So.2d 461 (Fla. 1st DCA 1978). In Drawdy it was held that a requisite element of proof in a suit against an attorney for negligence is the attorney's employment. The First District specifically construed McAbee and expressly declined to relax the privity requirement beyond cases involving a lawsuit by beneficiary to a will prepared by the testator's attorney. In the instant case, the Third District

specifically held McAbee applicable upon holding that a non-client could maintain a cause of action against an attorney for negligence in performing services other than drafting a will. Such holding is in direct conflict with Drawdy.

The Third District's opinion is also in direct conflict with the Second District Court of Appeal's opinion in Amey, Inc. v. Henderson, Franklin, Starnes, & Holt, P.A., 367 So.2d 633 (Fla. 2nd DCA 1979). In Amey the court held that privity was required to maintain a legal malpractice action. The court specifically held that where an attorney represents a different "side" to a transaction than that of the plaintiff, the plaintiff cannot possibly be a beneficiary to the attorney's professional services. Accordingly the court held McAbee to be inapplicable, and affirmed summary judgment in favor of the attorney. In the instant case, the Third District held McAbee to be applicable in a circumstance involving more than one side to a transaction and, as held in Amey, in which the plaintiff could not possibly be a beneficiary to the attorney's professional services. Such holding is in direct conflict with the Second District's opinion in Amey.

In addition to the foregoing, conflict exists as the Third District Court of Appeal applied a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975). As discussed previously, the facts of Adams v. Chenowith are practically indistinguishable and

substantially the same as those giving rise to the instant case. In Adams the Fourth District refused to apply the rule of law espoused in McAbee and found no duty owed. In the instant case the Third District specifically applied the rule of law espoused in McAbee and found that defendant may owe a duty to the opposing party in a sales transaction. Such was the application of a rule of law which in the instant case produced a result different than that reached in Adams, both cases involving substantially the same facts. Such constitutes conflict sufficient to afford this Court jurisdiction. Mancini v. State, supra.

In addition to the foregoing, conflict exists as the Third District Court of Appeal misapplied the law by relying on a decision which involves a situation materially at variance with the one under review. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). In the instant case the Third District relied on McAbee which recited California's balancing of factors test. McAbee v. Edwards, supra, citing, Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958). Under that test there are six factors to be balanced to determine whether any defendant owes a duty to third persons. McAbee v. Edwards, supra.

The Third District adopted this balancing of factors test as stated in McAbee, and held it applicable to the instant case. This created a conflict as McAbee involved a situation materially at variance with the one under review. A review of McAbee and other cases which have construed the balancing of

factors test, establishes beyond question that the test may give rise to a cause of action for a non-client but only if that non-client is an intended beneficiary of the attorney's services. Held v. Arant, 134 Cal. Rptr. 422 (Ct. App. 1977); Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (Ct. App. 1975); Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (Ct. App. 1971); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (Ct. App. 1976); Clagett v. Dacy, 420 A.2d 1285 (Md. App. 1980). As succinctly stated in one learned treatise, when applying the balancing of factors test "[t]he predominant inquiry, however, has generally resolved to one criterion: were the services intended to benefit the plaintiff." R. Mallen & V. Levit, Legal Malpractice § 80 at 157 (2d ed. 1981) (footnote omitted).

Practically every jurisdiction to address the issue, has held that the beneficiary to a will is an intended beneficiary of the professional services of the testator's attorney who drafts the will. Such was the case in McAbee. Such is not the case here. In the instant case, defendant represented the purchaser in a sales transaction and has been sued by the seller for negligence. As recognized in Amey and Adams, the professional services performed by defendant on behalf of his client could not possibly be intended to benefit the seller. Accordingly, the Third District misapplied the law by relying on McAbee, which involves a situation materially at variance with the one under review. Such creates a conflict which

affords this Court jurisdiction. Gibson v. Avis Rent-A-Car System, Inc., supra.

CONCLUSION

Petitioner respectfully urges that there is direct conflict between the decision of the Third District Court of Appeal in the case at bar and the decisions of other district courts of appeal cited herein. Petitioner respectfully prays that this Court exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal pursuant to Art. V, § 3(b)(3), Florida Constitution.

Respectfully submitted,

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Petitioner
900 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 379-6411

By: _____
DOUGLAS H. STEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to SHALLE STEPHEN FINE, ESQ., 46 S.W. 1st Street, Suite 201, Miami, Florida 33130 this 6th day of October, 1986.

_____
DOUGLAS H. STEIN

DHS5m/bj