O/A 6-3-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,398

FILED
SID J. WHITE
MAR 6 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

ANGEL, COHEN & ROGOVIN, :

Petitioner, :

vs. :

OBERON INVESTMENT, N.V. a Netherlands Antilles Corporation, :

Respondent. :

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS
(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

	PAGE
AUTHORITIES ----------	ii
STATEMENT OF THE CASE AND FACTS----------	1
SUMMARY OF THE ARGUMENT----------	4
LEGAL ARGUMENT ----------	8
I. 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----------	8
II. WHETHER SUMMARY JUDGMENT WAS PROPER AS THERE IS NO ISSUE OF FACT THAT THE SPECIFIC HARM ALLEGED BY PLAINTIFF WAS NOT FORESEEABLE BY DEFENDANT----------	32
III. WHETHER SUMMARY JUDGMENT WAS PROPER WHEN THE RECORD IS WITHOUT DISPUTE THAT DEFENDANT COMPORTED WITH THE APPLICABLE STANDARD OF CARE----------	34
CONCLUSION ----------	37
CERTIFICATE OF SERVICE ----------	38

AUTHORITIES

CASES — PAGE

Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977)---------- 18,19,20

Albright v. Burns, 206 N.J. Super. 625, 503 A.2d 386 (App. Div. 1986)---------- 5,22,23,24,25

Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (2d DCA), cert. denied, 376 So.2d 68 (Fla. 1979)---------- 16,19,20,28

Beecy v. Pucciarelli, 387 Mass. 589, 441 N.E.2d 1035 (1982)--------- 16

Bell v. Manning, 613 S.W.2d 335 (Tex. App. 1981)---------- 11,16

Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958)------- 12,13,14,20,27

Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978)---------- 11

Bush v. Rewald, 619 F.Supp. 585 (D.C. Hawaii 1985)---------- 12

Chicago Title Insurance Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978)------- 11,12

Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980)---------- 11,16

Crislip v. Holland, 401 So.2d 1115 (4th DCA), pet for rev. denied, 411 So.2d 380 (Fla. 1981)---------- 29

Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971)---------- 21

Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978)---------- 9,16

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

AUTHORITIES

CASES	PAGE
Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976)	12,13,21,22
First American Title Insurance Co., Inc. v. First Title Service Co., 457 So.2d 467 (Fla. 1984)	26,27,28
Flaherty v. Weinberg, 303 Md. 115, 492 A.2d 618 (1985)	11,20,21
Freeman v. Rubin, 318 So.2d 540 (Fla. 3d DCA 1975)	9
Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981)	16
Gans v. Mundy, 762 F.2d 338 (3d Cir. 1985), cert. denied, 106 S.Ct. 537 (9186)	36
Ginsburg v. Chastain, 12 F.L.W. 90 (Fla. 3d DCA Dec. 30, 1986)	9,17
Goodley v. Wank & Wank, Inc., 62 Cal. App.3d 389, 133 Cal. Rptr. 83 (1976)	30
Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal. Rptr. 375, 556 P.2d 737 (1976)	13,14,15
Guy v. Liederbach, 279 Pa.Super. 543, 421 A.2d 333 (1980), modified, 501 Pa. 47, 459 A.2d 744 (1983)	12
Hartford Accident and Indemnity Co. v. Rogers, 96 Nev. 576, 613 P.2d 1025 (1980)	11,14
Heyer v. Flaig, 70 Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969)	10,21,31
In Re: Estate of Schriver, 441 So.2d 1105 (Fla. 5th DCA 1983)	24
Kahn v. Post, 463 So.2d 348 (3d DCA), pet. for rev. denied, 472 So.2d 1181 (1985)	28

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

AUTHORITIES

CASES	PAGE
Landers v. Milton, 370 So.2d 368 (Fla. 1979)	35,37
Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A., 467 So.2d 315 (Fla. 3d DCA 1985)	9,10,16
Madrasatul-Watania, Inc. v. Halperin, 88 A.D.2d 503, 449 N.Y.S.2d 736 (1982)	16
Manner v. Goldstein Professional Association, 436 So.2d 431 (Fla. 3d DCA 1983)	35,36
Maryland Casualty Co. v. Price, 231 F. 397 (4th Cir. 1916)	8
McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976)	10,19,20
Mims v. Wardlaw, 176 Ga. App. 891, 338 S.E.2d 866 (1985)	36
Oberon Investments, N.V. v. Angel, Cohen & Rogovin, 492 So.2d 1113 (Fla. 3d DCA 1986)	3,15,26,33
Pelham v. Griesheimer, 92 Ill.2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96 (1982)	11,16
Quest v. Barge, 41 So.2d 158 (Fla. 1949)	15
Quinn v. Phipps, 93 Fla. 1157, 113 So. 419 (1927)	15
Safie Enterprises, Inc. v. Nationwide Mutual Fire Insurance Co., 146 Mich.App. 483, 381 N.W.2d 747 (1985)	11
Sims v. Helms, 345 So.2d 721 (Fla. 1977)	35
Smith v. Griffiths, 327 Pa.Super. 418, 476 A.2d 22 (1984)	16
Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983)	16

AUTHORITIES

CASES	PAGE
State v. Snyder, 136 Fla. 875, 187 So. 381 (Fla. 1939)	29
Stevens v. Jefferson, 436 So.2d 33 (Fla. 1983)	29
United States Savings Bank v. Pittman, 80 Fla. 423, 86 So. 567 (Fla. 1920)	30
Washington v. Firemen's Fund Insurance Co., 459 So.2d 1148 (Fla. 4th DCA 1984)	30
Willage v. Law Offices of Wallace and Breslow, P.A., 415 So.2d 767 (Fla. 3d DCA 1982)	36
Young v. Hecht, 3 Kan. App.2d 510, 597 P.2d 682 (1979)	11
TEXT	
Annot., 45 A.L.R.3d 1181 (1972)	8
Durfee, Third-Party Malpractice Claims Against Real Estate Lawyers, 13 Colo. Law. 996 (1984)	15
Haughey, Lawyer's Malpractice: A Comparative Appraisal, 48 Notre Dame L. 888 (1973)	32
Probert and Hendricks, Lawyer Malpractice: Duty Relationships Beyond Contracts, 55 Notre Dame L. 708 (1980)	28
Prosser, Law of Torts § 42 at 245 (1971)	29
R. Mallen & V. Levitt, Legal Malpractice (2d ed. 1981)	14,16
STATUTES	
§ 709.08 Fla. Stat. (1985)	24
CODES	
Florida Bar Code of Professional Responsibility (1986)	17

STATEMENT OF THE CASE AND FACTS[1]

In its Amendment and Supplement to Complaint, respondent, hereinafter referred to as plaintiff, alleged that petitioner, hereinafter referred to as defendant, was negligent in the performance of its professional duties in regard to a sales transaction of the stock of a corporation. There is absolutely no allegation that defendant engaged in any fraudulent or conspiratorial conduct. The sole asset of the corporation was a parcel of real estate known as the "Heller Building." (R.61-64) Plaintiff further alleged that defendant was retained by one Leonard Treister to act as counsel for him in connection with the sales transaction. (R.62) 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. (R.101) It is further undisputed in the record that defendant had no knowledge of any relationship between Leonard Treister and

---

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

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

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 simple title to the Heller Building. (A.7) Specifically, defendant was to prepare documentation in preparation for the closing of the sales transaction. (A.13-15) 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.7) 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. (R.61-64) 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. (R.83-88,100-04) 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. (R.83-84) In addition, defendant asserted that there was no factual dispute that it comported with the applicable standard of care in rendering

legal services incident to plaintiff's sale of the corporate stock. (R.103-04) In his affidavit, Stanley Angel stated:

> 11. I am an attorney licensed and authorized to practice law in the State of Florida and I have been so at all times since 1957.
>
> 12. It is my opinion that no attorney at Cohen, Angel & Rogovin, including myself, fell below the standard of care exercised by attorneys in the community in rendering the same or similar legal services to those legal services which I and my former law firm of Cohen, Angel & Rogovin rendered in regard to the transaction set forth herein.

(R.102) Plaintiff filed no counter-evidence in response to these attestations in the affidavit.

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. (R.122) 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. Oberon Investment, N.V. v. Angel, Cohen & Rogovin, 492 So.2d 1113 (Fla. 3d DCA 1986). (A. 27-30) The district court denied defendant's Motion for Rehearing and in the Alternative for Certification. (A. 31-34, 35)

SUMMARY OF THE ARGUMENT

Defendant has been sued for malpractice by a non-client for the negligent performance of professional services rendered to his client. The generally accepted rule is that an attorney can be liable for negligence in the performance of his professional duties to no one other than his client. In Florida, one limited exception to the privity rule has been recognized: a beneficiary to a will may maintain a cause of action in negligence against the testator's attorney for negligence in the preparation of the will. Although Florida courts have emphasized that this exception is to be a limited one, other jurisdictions have applied the limited exception to cases involving other types of intended beneficiaries of an attorney's professional services. No jurisdiction, however, has ever held that a non-client other than an intended beneficiary can maintain a cause of action in negligence against an attorney.

In the instant case, the district court adopted the balancing of factors theory developed by the California courts. No matter how those factors are balanced, however, an attorney never owes a duty to a non-client who is not an intended beneficiary of the attorney's professional services. Such was recognized by the California Supreme Court who developed the balancing of factors test.

The instant action is one in which plaintiff was not an intended beneficiary of defendant's professional services, and

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

was in fact an adverse party with adverse interests to defendant's client. Defendant represented one party to a sales transaction and has been sued by the other party for legal malpractice. Opposing parties to a sales transaction have adverse interests. No court in any jurisdiction has ever held that an attorney owes a duty to a party adverse to his client.

Each of the cases cited by the district court in support of its opinion are distinguishable from the instant case as being actions instituted by an intended beneficiary of the defendant attorney's professional services. In addition, the case most heavily relied on by the district court, Albright v. Burns, 206 N.J. Super. 625, 503 A.2d 386 (App. Div. 1986), suggested in dicta that an attorney owes a duty if it is foreseeable that the attorney's actions may cause harm to the plaintiff. This exact concept has been expressly rejected by this Court. It is basic hornbook law that foreseeability does not create a duty. The duty arises from the relationship between the plaintiff and defendant. The very nature of the attorney-client relationship mandates the rejection of any foreseeability test. The attorney-client relationship is a relation of the highest confidential character. When a client hires an attorney, he does so for his own benefit and those who the client intends that the professional services rendered should benefit. A client does not employ an attorney to act with due care towards all strangers who may rely on the professional services rendered. The imposition of a duty on

the attorney towards strangers, no matter how foreseeable, defiles the sanctity and confidentiality of the attorney-client relationship. In the instant case, as there is no dispute in the record that plaintiff was not the client of defendant nor was plaintiff an intended beneficiary of the professional services rendered by defendant, summary judgment in favor of defendant was proper.

In addition to the foregoing, if this Court is to adopt a foreseeability test as espoused by the Third District Court of Appeal, the decision of the district court must nevertheless be quashed. Despite erroneous statements made by the district court in its opinion in regard to factual findings, a review of the record reveals that there is no issue of fact that defendant had no knowledge of any fiduciary relationship between Leonard Treister and plaintiff. Pursuant to the district court's decision, absent that knowledge, harm to plaintiff could not have been foreseen and defendant owed no duty to plaintiff. Accordingly, summary judgment in favor of defendant was proper.

In addition to the foregoing, a review of the record reveals that there is no genuine issue of fact that defendant did not fall below the standard of care imposed upon attorneys in this community. In support of defendant's motion for summary judgment, defendant filed the affidavit of Stanley Angel who stated that it was his opinion that no attorney at the defendant COHEN, ANGEL, and ROGOVIN, fell below the

applicable standard of care in regard to the transactions alleged in the complaint. Plaintiff failed to controvert Stanley Angel's opinion by counter-affidavit or any other means. Once defendant tendered Stanley Angel's affidavit to support its motion, plaintiff had the burden of coming forward with counter-evidence sufficient to reveal a genuine issue. Plaintiff's failure to file counter-evidence in regard to the standard of care was a failure to create a factual dispute as to the applicable standard of care. Accordingly, summary judgment entered in favor of defendant was proper.

LEGAL ARGUMENT

I

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

Defendant respectfully submits that the decision and opinion of the Third District Court of Appeal in the instant case is adverse to long established law in the State of Florida. The decision conflicts with every of the jurisdictions throughout the country to address the issue at bar. The effect of the decision is that attorneys in this state can no longer offer their best representation to their clients without the possibility of a lawsuit being filed by a stranger to the attorney-client relationship who has somehow been affected by the attorney's zealous representation of his client.

The generally accepted rule is that an attorney can be liable for negligence in the performance of his professional duties to none other than his client. Annot., 45 A.L.R.3d 1181 (1972). Such has been the long established rule in Florida since the adoption of the tripartite test stated in Maryland Casualty Co. v. Price, 231 F. 397 (4th Cir. 1916). Under that test, a plaintiff suing an attorney for negligence in the performance of his professional duties must prove: (1) the attorney's employment by the plaintiff; (2) the attorney's

neglect of a reasonable duty owed to the plaintiff; and (3) that such negligence was the proximate cause of loss to the plaintiff. Ginsburg v. Chastain, 12 F.L.W. 90 (Fla. 3d DCA Dec. 30, 1986); Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A., 467 So.2d 315 (Fla. 3d DCA 1985); Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978); Freeman v. Rubin, 318 So.2d 540 (Fla. 3d DCA 1975). Proof of the first element is essential as it establishes that the attorney owed a duty to the plaintiff. Ginsburg v. Chastain, supra; Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A., supra. Thus the long established rule in Florida has been that privity must exist between the plaintiff and attorney in order to maintain a legal malpractice action sounding in negligence.

In the instant case, it is undisputed in the record that defendant was not hired by plaintiff. Defendant was hired by Leonard Treister to represent only Leonard Treister in the sales transaction. (R.101) Accordingly, pursuant to the general rule, defendant would owe no duty to plaintiff and, therefore, no cause of action in negligence could be maintained.

There is, however, one limited exception to the rule of privity which has been universally recognized throughout the various jurisdictions. The privity requirement is relaxed when a beneficiary to a will sues the testator's attorney for negligence in the preparation of the will. It is this limited exception which the district court distorted and expanded

beyond workable limits in order to find a duty owed in the instant case. As will be demonstrated, the instant case is neither one which falls within the limited exception nor one in which a duty can be imposed under any theory.

The will drafting exception to the privity requirement has been recognized in Florida. McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976); Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A., supra. The reason for carving out this limited exception to the privity rule is quite clear:

> When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries . . . In some ways, the beneficiary's interests loom greater than those of the client. After the later's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests.

McAbee v. Edwards, supra at 1169, citing, Heyer v. Flaig, 70 Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

Although the district courts in Florida have emphasized that the exception to the privity rule is narrowly limited to will drafting cases, Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A., supra, other jurisdictions have applied the limited exception to cases involving other types of intended beneficiaries of an attorney's professional services. No court to ever address the issue, however, has imposed a duty on an attorney (a breach of which would constitute negligence) to a non-client other than an intended beneficiary of the

attorney's professional services. As will be demonstrated, defendant owed no duty to plaintiff as plaintiff was neither defendant's client nor the intended beneficiary of services rendered to defendant's client.

There are two basic conceptual models employed to determine whether an attorney owes a duty to a non-client: (1) the balancing of factors theory, and (2) the third party beneficiary contract theory. The third party beneficiary contract theory contemplates that a third party beneficiary contract arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity. Thus a non-client may maintain an action against an attorney only if the agreement between the client and attorney contemplates that the non-client be benefited. Various jurisdictions have adopted this approach. See, e.g., Pelham v. Griesheimer, 92 Ill.2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96 (1982); Flaherty v. Weinberg, 303 Md. 115, 492 A.2d 618 (1985); Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980); Bell v. Manning, 613 S.W.2d 335 (Tex. App. 1981); Safie Enterprises, Inc. v. Nationwide Mutual Fire Insurance Co., 146 Mich. App. 483, 381 N.W.2d 747 (1985); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Hartford Accident and Indemnity Co. v. Rogers, 96 Nev. 576, 613 P.2d 1025 (1980); Young v. Hecht, 3 Kan. App.2d 510, 597 P.2d 682 (1979); Chicago Title Insurance

Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978); Bush v. Rewald, 619 F.Supp. 585 (D.C. Hawaii 1985).

It was the Supreme Court of California in Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958), to first recognize the second conceptual model: the balancing of factors test. Although Biakanja was an action against a notary rather than an attorney, the court's decision is noteworthy as holding that a beneficiary to a will could maintain a cause of action against the notary for negligent will drafting despite the lack of privity. Under this policy-based approach, the court balances various factors which are determinative of whether a defendant could be held liable to a third person not in privity:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Biakanja v. Irving, 320 P.2d at 19.

Of the jurisdictions which have recognized the limited exception to the privity requirement, a minority have adopted the balancing of factors test. See, e.g., Guy v. Liederbach, 279 Pa.Super. 543, 421 A.2d 333 (Pa. Super. 1980), modified, 501 Pa. 47, 459 A.2d 744 (1983); Fickett v. Superior Court, 27

Ariz. App. 793, 558 P.2d 988 (1976). Even though a policy-based approach, no court applying the balancing of factors test has ever held that a non-client other than an intended beneficiary can maintain a cause of action against an attorney for negligence. The Supreme Court of California, which was the court to conceive the balancing of factors test, laid to rest any question in regard to the application of the Biakanja factors when it unequivocally held in Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal. Rptr. 375, 556 P.2d 737 (1976), that only a non-client who was an intended beneficiary of the attorney's professional services can maintain a cause of action in negligence against the attorney. The court emphasized that even if the attorney's professional services are "intended to affect" the plaintiff, such is insufficient to maintain a cause of action. Mere intent to affect is not enough. The plaintiff must be a person "upon whom defendant's clients had any wish or obligation to confer a benefit in the transaction." The policy supporting such a holding is without dispute:

> To make an attorney liable for negligent confidential advise not only to the client who enters into a transaction in reliance upon the advise but also to the other parties to the transaction with whom the client deals at arms length would inject undesirable self-protective reservations into the attorney's counselling rule. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal would prevent him from devoting his entire energies to his client's interests.

> The result would be both an undue burden on the profession and a diminution in the quality of the legal services received by the client. (footnote and citations omitted).

Goodman v. Kennedy, 134 Cal. Rptr. at 381.

As recognized by the California court and each court to adopt the balancing of factors test, "the predominant inquiry, however has generally resolved to one criterion: were the services intended to benefit the plaintiff." R. Mallen & V. Levitt, Legal Malpractice § 80 at 157 (2d ed. 1981). Whether founded upon a theory of a third party beneficiary contract or upon a balancing of the Biakanja factors, "the determining question is did the attorney and his client intend the beneficiary to be the beneficiary of his services." R. Mallen & V. Levitt, Legal Malpractice, supra. Under either theory, "[n]o cases are cited, and we have found none, which allow recovery for a third party who is not an intended beneficiary." Hartford Accident and Indemnity Co., supra at 1027.

The instant action is one in which defendant represented one party to a sales transaction and has been sued by the other party for legal malpractice. Upon reversing the summary judgment entered in favor of defendant, the district court did not consider whether plaintiff was an intended beneficiary of the professional services rendered by defendant. Rather, upon applying the balancing of factors test, the district court found that defendant's actions were "intended to affect" plaintiff because the harm suffered by plaintiff might have

been foreseeable to defendant. The district court held that because the harm may have been foreseeable, defendant may have owed a duty to plaintiff. Oberon Investments, N.V. v. Angel, Cohen, and Rogovin, supra at 1115.

The district court has totally misconstrued the application of the balancing of factors test. Firstly, even if the words "intended to affect" are to be given literal meaning, the district court equated "foreseeability of affect" with those words. In no case, treatise or logical theorem, has foreseeability ever been equated with intent. Secondly, as explained in Goodman v. Kennedy, supra, by the very court to develop the balancing of factors test, mere intent to affect is insufficient to impose a duty. It must be intended by the attorney and the client that the professional services rendered to the client are to benefit the plaintiff. In the instant case, as plaintiff and defendant's client were opposing parties in a sales transaction, it is beyond question that plaintiff was not the intended beneficiary of defendant's professional services. Plaintiff was actually an adverse party with adverse interests to defendant's client.

Opposing parties to a sales transaction have adverse interests. See Quest v. Barge, 41 So.2d 158 (Fla. 1949); Quinn v. Phipps, 93 Fla. 1157, 113 So. 419 (1927). See also Durfee, Third-Party Malpractice Claims Against Real Estate Lawyers, 13 Colo. Law. 996 (1984). Because of the inherent

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

conflicts between the parties to a sales transaction, it has long been established in Florida that an attorney is not liable to third parties for negligence concerning an inter vivos transfer of property. Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., supra; Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983). See also Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (2d DCA), cert. denied 376 So.2d 68 (Fla. 1979); Drawdy v. Sapp, supra. This is the rule recognized by all jurisdictions to have addressed the issue. See, e.g., Madrasatul-Watania, Inc. v. Halperin, 88 A.D.2d 503, 449 N.Y.S.2d 736 (1982); Bell v. Manning, 631 S.W.2d 335 (Tex. App. 1981); Clagett v. Dacy, supra.

Underlying these rulings is the recognition that the client's interest is adverse rather than beneficial to the other party. Not surprisingly, all courts to address the issue have held that an attorney owes no duty to a party adverse to his client. See, e.g., Beecy v. Pucciarelli, 387 Mass. 589, 441 N.E.2d 1035 (1982); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); Smith v. Griffiths, 327 Pa.Super. 418, 476 A.2d 22 (1984); Pelham v. Griesheimer, supra. See generally Mallen & Levitt, Legal Malpractice, supra at § 554, 680-81. The existence of a duty to the other party would interfere with the undivided loyalty owed the client and would detract from achieving the most advantageous position for the client. To expand the concept of privity to

encompass persons other than intended beneficiaries would affect all future attorney-client relations by burdening an attorney's ethical obligations and independent judgment. Florida Bar Code of Professional Responsibility, Canons 5,7 (1986).

Despite the plethora of case law and policy considerations militating against the finding of a duty owed in such a case, the district court held that plaintiff could maintain a cause of action in negligence against defendant whose client's interests were adverse to plaintiff throughout the sales transactions. The district court's opinion is no less than an aberration in the jurisprudence of this country.[2] The decision is adverse to the decisions of every court in every jurisdiction which has addressed the issue.

---

[2]The anomalous nature of the opinion was clearly revealed when the Third District Court of Appeal issued its opinion in Ginsberg v. Chastain, 12 F.L.W. 90 (Fla. 3d DCA Dec. 30, 1986), a mere three months subsequent to the rendition of that court's decision in the instant case. In Ginsberg, one party to a contract sued the attorney for the opposing party to the contract for negligence in the performance of services in regard to contract negotiations. The court held that in order to maintain his action, the plaintiff had to sustain his burden of proving that he had employed the defendant. The court further held that the record was devoid of any evidence that an attorney-client relationship existed between the plaintiff and defendant and therefore no cause of action for negligence could be maintained. What is noteworthy about the Ginsberg case is that the same court to decide the instant case, when presented with the exact issue, held that absent privity there could be no cause of action maintained. The court made no application of or mention of the foreseeability test applied in the instant case. In fact, the court made

(Footnote Continued)

The exact issue presented here has been decided in Florida. In the case of Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977) an attorney represented the seller of real estate and prepared a closing statement. The closing statements contained errors which resulted in the buyer overpaying the seller at closing. The buyer, who was not represented by counsel at the closing, sued the attorney for negligence. Upon affirming the dismissal of the buyer's complaint, the court emphasized that the attorney was hired by the seller to be his attorney and not the buyer's. Upon holding that the buyer could not maintain a cause of action in negligence against the seller's attorney the court stated:

> The attorney's allegiance was solely to the sellers and there is no allegation the attorney intentionally misled anyone in the matter.
>
> * * *
>
> The duty, if any, was to the seller, his client, not the buyer.

Adams v. Chenowith, supra, at 231. Adams v. Chenowith is indistinguishable from the instant case. In the case at bar, defendant was hired by the buyer of the stock of a corporation (whose sole asset was a parcel of real estate) to render legal services to him during that transaction. The record is undisputed that defendant was not hired by the seller. Thus

---

(Footnote Continued)
absolutely no citation to or mention of the instant case throughout the entire Ginsberg decision.

defendant owed no duty to the seller a breach of would give rise to a cause of action for negligence. Adams v. Chenowith, supra.

In Adams v. Chenowith, supra, the court specifically rejected the argument that the case was one in which the intended beneficiary exception to the privity rule should apply. The court emphasized that the parties to a sales transaction have adverse interests. Such is wholly distinguishable from a case concerning intended beneficiaries of the client because in such a case, both the client and the intended beneficiary have the same interest:

> We have considered the case of McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976), and find it clearly distinguishable from this case. There the attorney owed a duty to a testatrix to make a will for the benefit of her daughter to whom this court held a duty was owed also. The lawyer in that case represented only one "side" of a transaction because there was only one 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.

In the subsequent case of Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., supra, the Second District Court of Appeal once again held that an attorney retained by one party to a sales transaction owes no duty to the opposing side. Upon approving Adams v. Chenowith, supra, the court recognized that when an attorney represents a different "side"

to a sales transaction than that of the plaintiff, the plaintiff cannot possibly be a beneficiary of the attorney's professional services. Accordingly the court held the limited exception to the privity rule to be inapplicable, and affirmed summary judgment in favor of the attorney.

In the instant case the district court failed to address the inherent conflict that its decision created with Adams v. Chenowith, supra, Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., supra, and the abundance of other cases cited in this brief. In support of its opinion, the district court did cite six cases. Each and every of those cases, however, involved actions by intended beneficiaries and are therefore wholly distinguishable from the instant case.

The first two cases, McAbee v. Edwards, supra and Biakanja v. Irving, supra, as previously discussed, were actions by beneficiaries to a will. Those cases need no further discussion in regard to their inapplicability to the instant case.

The district court also cited Flaherty v. Weinberg, 303 Md. 115, 492 A.2d 618 (1985). In that case, the purchasers of real estate sued the attorney for their mortgagee who had assured the purchasers that the survey of the property was accurate. Subsequently, it was discovered that the survey was not accurate and the suit ensued. The Court of Appeals of Maryland held that the plaintiffs could only state a cause of action by alleging that they were the intended beneficiaries

of the defendant. In so holding, the court stated "we think it clear that Maryland, as a general rule, adheres to the strict privity rule in attorney malpractice cases. The sole exception that we have recognized to this rule is the third party beneficiary theory." Flaherty v. Weinberg, supra, at 625.

The district court also cited Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971), in which the California Court of Appeal held that an attorney may be liable to an individual who hires a collection agency to collect a debt for him, when the attorney negligently represents the collection agency in collecting that debt. The court stated in that case, "[i]n the case at bench, the transaction which respondent's negligence occurred was intended primarily for the benefit of appellant. Respondent was retained to collect an account due him." Donald v. Garry, supra, at 192.

The district court also cited Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976) in which the court found that an attorney may be liable to the ward of a guardian for negligent representation of the guardian. The Court of Appeals of Arizona recognized the obvious fact that professional services rendered to a guardian are in fact for the benefit of the ward, when it stated "[w]e believe the following statement in Heyer v. Flaig, supra, as to an attorney's duty to an intended testamentary beneficiary is equally appropriate here: 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 the intended beneficiary . . . " Fickett v. Superior Court, supra, at 990.

The final case cited by the district court, and the case upon which the district court puts most reliance, is Albright v. Burns, 206 N.J. Super. 625, 503 A.2d 386 (App. Div. 1986). In that case, Bruch, a sickly man, executed a power of attorney in favor of his nephew, Burns. Burns consulted attorney Poe, and under the power granted to him by the power of attorney requested that Poe liquidate some of Bruch's stock and loan Burns proceeds on a promissory note. After Bruch died, an accounting of his estate revealed the outstanding promissory note and a beneficiary took exception. The court found that Poe owed a duty to Bruch. In so holding, however, the Superior Court of New Jersey specifically found that Poe's acceptance of employment from Burns "were acts evidencing his acceptance of professional engagement on behalf of Bruch's interest." Albright v. Burns, supra, at 389. In other words, as Burns was simply acting in his representative capacity of Bruch when he exercised his power of attorney, Poe's services were actually rendered for and on behalf of Bruch. Accordingly, an attorney-client relationship existed between Poe and Bruch.

The facts existing in Albright upon which the Court based its finding of an attorney-client relationship between Poe and Bruch are conspicuously absent from the instant case. Sans the power of attorney granted to Burns, Bruch would have been the only individual with the right to authorize the sale of the stock. In order to exercise Bruch's right to sell the stock, it was necessary that Burns exercise the power of attorney granted to him. Thus Burns' employment of Poe, was for the purpose of rendering professional services in regard to Burns' exercise of Bruch's right to sell the stock. Because it was Bruch's right which was being exercised, the court found Poe's employment to be on behalf of Bruch's interest.

The instant case is completely distinguishable from Albright. Here, although it is alleged that Leonard Treister was plaintiff's attorney, defendant was not employed by Leonard Treister to perform professional services in regard to Leonard Treister's exercise of any of plaintiff's rights. In order for Leonard Treister to purchase the Heller Building, it was not necessary for him to use his position as plaintiff's attorney to exercise any right held by plaintiff. Leonard Treister was not acting in his representative capacity of plaintiff when defendant was retained. Thus when Leonard Treister employed defendant such professional engagement was not on behalf of plaintiff's interest. Such is what distinguishes the instant case from Albright v. Burns, supra.

The fact that Burns was exercising a right held by Bruch at the time Poe rendered his professional services for Burns, not only supports the New Jersey court's finding of an attorney-client relationship between Poe and Bruch, but additionally illustrates that Bruch was the intended beneficiary of Burns' professional engagement of Poe. The exact type of power of attorney granted in Albright is recognized in Florida to be the equivalent of the establishment of a guardianship on behalf of the grantor. § 709.08 Fla. Stat. (1985). As stated in the case of In Re: Estate of Schriver, 441 So.2d 1105 (Fla. 5th DCA 1983);

> [The durable family power of attorney is] a means by which the family members could help a potentially disabled or incompetent person in handling that person's legal, business and property affairs. This law has the beneficial effect of avoiding the time, expense and embarrassment involved in having to establish guardianships for incompetent persons. (footnote omitted).

In Re: Estate of Schriver, supra, at 1106. Just as professional services performed for a guardian are intended to benefit the ward, the grantor of a power of attorney is the intended beneficiary of professional services performed for the holder of that power of attorney.

Thus as the foregoing demonstrates, each of the six cases cited by the district court in support of its decision were actions instituted by intended beneficiaries of the professional services provided. Accordingly, the rules in those cases have no application to the instant case where the action

was instituted by a person who had adverse interests to the attorney's client.

Despite that the holding of Albright v. Burns, supra, is wholly inapplicable to the instant case, the district court cited dicta of the New Jersey court when finding that defendant may owe a duty to plaintiff. The actual holding in Albright v. Burns, supra is that an attorney-client relationship exists between a plaintiff and an attorney where the attorney is employed by an agent of the plaintiff acting in his representative capacity on behalf of the plaintiff. The court further suggested in dicta that there are situations in which a finding of an attorney-client relationship is unnecessary to impose liability upon an attorney:

> Further, a member of the bar owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his professional capacity. We think it follows that privity should not be required between the attorney and one harmed by his breach of duty where the attorney had reason to foresee the specific harm which occurred. (citations omitted).

Albright v. Burns, supra at 389. It was this dicta that the Third District Court of Appeal relied upon in the instant case. The district court's opinion makes it perfectly clear that it did not find an attorney-client relationship, whether actual or implied, to exist between plaintiff and defendant. Rather the district court held that if the specific harm to plaintiff was foreseeable, defendant could be liable to

plaintiff for professional negligence despite the absence of an attorney-client relationship:

> In the present case, if Angel knew that Treister was a fiduciary for Oberon and knew of the potential conflict, then Angel had a duty to act in Oberon's best interest. The absence of privity will not bar recovery here, because the harm would have been foreseeable to the law firm if it had knowledge of the potential conflict. Since there are material facts in dispute over Treister's capacity as attorney for Oberon and the firm's knowledge, the summary judgment was error.

Oberon Investments, N.V. v. Angel, Cohen & Rogovin, 492 So.2d 1113, 1115 (Fla. 3d DCA 1986).

This exact concept, that mere foreseeability of harm is sufficient to impose a duty upon a professional towards a person not in privity, has been expressly rejected by this Court in First American Title Insurance Co., Inc. v. First Title Service Co., 457 So.2d 467 (Fla. 1984). In that case, a title abstracter was sued by a title insurer for professional negligence in failing to note the existence of a recorded judgment on an abstract. The complaint failed to allege any privity between the plaintiff and defendant. This Court expressly rejected the plaintiff's argument that an abstracter should be liable to all persons who might foreseeably rely on the negligently prepared abstract:

> To hold an abstracter liable to every stranger to the contract of employment who might happen to come to see and rely on the abstract would be like holding a title insurer liable to anyone who knows of the issuance of an insurance policy but who has not paid a premium. For the reasons

> stated we decline to expose abstracters to liability to any person who foreseeably relies on a negligently prepared abstract to his detriment.
>
> [It is only] when an abstract is prepared in the knowledge or under conditions in which an abstracter should reasonably expect that the employer is to provide it to third persons for purposes of inducing those persons to rely on the abstract as evidence of title, the abstracter's contractual duty to perform the service skillfully and diligently runs to the benefit of such known third parties.

First American Title Insurance Co., Inc. v. First Title Service Co., supra at 472.

As recognized by this Court, a third party who is known by the abstracter to be given a copy of the abstract by the abstracter's employer, is an intended beneficiary of the professional services performed by the abstracter. It is only when a third party is an intended beneficiary of the professional services of an abstracter that the abstracter may be liable to that third party for negligence. Upon using the exact language as recited in Biakanja v. Irving, supra at 19, this Court stated:

> Similarly, when an abstracter knows that his employer or customer is ordering the abstract for the use of a purchaser of the property, reliance on the abstract by the purchaser is "the end and aim of the transaction" . . . It clearly follows that the purchasers here, as intended and known beneficiaries of the contract for the abstract service, may recover damages from the abstract company for its negligent performance.

First American Title Insurance Co., Inc. v. First Title Service Co., supra at 473. These exact principles have been held applicable in a legal malpractice action based on an attorney's negligent preparation of an abstract. Kahn v. Post, 463 So.2d 348 (3d DCA), pet. for rev. denied, 472 So.2d 1181 (1985); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., supra. Thus the district court's reliance on the Albright dicta was misplaced. The district court's holding that an attorney may be liable for legal malpractice to a non-client merely because the harm to the non-client may be foreseeable has been specifically rejected in Florida. To impose a duty on an attorney owed to a non-client, that non-client must be an intended beneficiary of the attorney's professional services whether or not the harm to the non-client was foreseeable. "The decline of privity in this area does not import the ascendancy of foreseeability as a prime criterion of duty. Such accountability would burden lawyers far too heavily, reaching even into the day-to-day business of client counseling and otherwise routine matters." Probert and Hendricks, Lawyer Malpractice: Duty Relationships Beyond Contracts, 55 Notre Dame L. 708,709 (1980).

The rejection of foreseeability as the criterion upon which a duty is imposed on an attorney is in accordance with well established hornbook law. "Foreseeability" and "duty" are separate and distinct concepts. Foreseeability does not create a duty. A duty arises from the relationship between

the plaintiff and defendant. Prosser, Law of Torts § 42 at 245 (1971). Once a duty is established, the foreseeability of damage to the plaintiff merely determines whether the defendant will be liable to the plaintiff. As recognized by this Court:

> An action for negligence is predicated upon the existence of a legal duty owed by the defendant to protect the plaintiff from an unreasonable risk of harm. The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others.

Stevens v. Jefferson, 436 So.2d 33, 35 (Fla. 1983), citing, Crislip v. Holland, 401 So.2d 1115, 1117 (4th DCA), pet. for rev. denied, 411 So.2d 380 (Fla. 1981).

The application of a foreseeability test to determine whether a duty is owed cannot be more inappropriate than when it is applied to determine whether an attorney owes a duty to a non-client. The very nature of the attorney-client relationship mandates the rejection of the "foreseeability test" and the adoption of a test which restricts an attorney's liability to no others than clients and non-clients who are intended beneficiaries of the attorney's professional services. "The relation of attorney and client is one of the most important as well as the most sacred relations known to the law. It is indeed a relation affected by a very vital public interest which is predicated on trust and confidence." State v. Snyder, 136 Fla. 875, 187 So. 381, 382 (Fla. 1939). "[It] is a relation of the highest confidential character . . ."

United States Savings Bank v. Pittman, 80 Fla. 423, 86 So. 567, 568 (Fla. 1920). So high is the personal nature of legal services rendered to a client that a legal malpractice action is not assignable to a third party. Washington v. Firemen's Fund Insurance Co., 459 So.2d 1148 (Fla. 4th DCA 1984). Public policy dictates against an assignor, who has had no contact with the attorney and is a stranger to the attorney-client relationship, from prosecuting a malpractice action against the attorney. See Goodley v. Wank & Wank, Inc., 62 Cal. App.3d 389, 133 Cal. Rptr. 83 (1976).

When a client hires an attorney, he does so for his own benefit and those who the client intends that the professional services rendered should benefit. A client does not employ an attorney to act with due care towards all strangers who may rely on the professional services rendered. The imposition of a duty on an attorney towards intended beneficiaries is within the contemplation of the attorney's employment agreement. To fulfill his duty to his client, the attorney must act with due care towards the client's intended beneficiaries. As best stated by the California Supreme Court in a case involving will drafting:

> Although the duty accrues directly in favor of the intended beneficiary, the scope of the duty is determined by reference to the attorney-client context. Out of the agreement to provide legal services to a client, the prospective testator, arises the duty to act with due care as to the interests of the intended beneficiary. We do not mean to say that the attorney-client contract for legal services

> serves as the fundamental touchstone to fix the scope of this direct tort duty to the third party. The actual circumstances under which the attorney undertakes to perform his legal services, however, will bear on a judicial assessment of the care with which he performs his services.

Heyer v. Flaig, supra at 165.

The imposition of a duty on the attorney towards strangers, no matter how foreseeable, would defile the sanctity and confidentiality of the attorney-client relationship. The attorney's preoccupation with the possibility of claims made by strangers to the attorney-client relationship would prevent him from devoting his entire energies to his client's interests and thereby burden his ethical obligations. In the very instructive words of David O. Haughey which should not be ignored by any tribunal addressing the issue at bar:

> For most of the functions of an attorney the rule limiting his liability to his client is essential to the maintenance of the basic concept of the attorney-client relationship. In most situations the attorney is expected to faithfully represent the interest of his client-to the exclusion of any consideration of the effect such representation may have on third parties. He is expected generally to be the advocate of his client to advance the interest of his client to the maximum extent consistent with law and ethics. This role would be impaired considerably if non-clients could sue the attorney for damages arising from the attorney's acts on behalf of his client. Very often the very advantage derived by a client from the services of his attorney means a proportionate disadvantage to someone else. To open the gate to such claims would change the lawyer's basic role from advocate to a sort of informal judge or umpire, paid by one side of a

> dispute -- an entirely unacceptable role. Except in those isolated instances where the basic intent and purpose of the attorney's service is to create rights for specific third parties as in a will or trust, or to induce specific action on the part of third parties as is often the case with the lawyer's certificate, his liability should be limited strictly to his clients.

Haughey, Lawyer's Malpractice: a Comparative Appraisal, 48 Notre Dame L. 888, 896-97 (1973).

In the instant case it is undisputed in the record that plaintiff was not the client of defendant. Additionally, as an opposing party to defendant's client in a sales transaction, plaintiff was not the intended beneficiary of defendant's professional services rendered to his client. As plaintiff was a party with adverse interests to the client of defendant, defendant owed no duty to plaintiff (a breach of which would constitute negligence) and, therefore, summary judgment in favor of defendant was proper.

II

WHETHER SUMMARY JUDGMENT WAS PROPER AS THERE IS NO ISSUE OF FACT THAT THE SPECIFIC HARM ALLEGED BY PLAINTIFF WAS NOT FORESEEABLE BY DEFENDANT

In the event that this Court adopts the foreseeability test created by the Third District Court of Appeal, the decision of the district court must nevertheless be quashed. Summary judgment in favor of defendant was proper as there is no genuine issue of fact that the specific harm to plaintiff

was not foreseeable. The district court reversed summary judgment finding that plaintiff's complaint alleged that:

> Angel knew that Treister was an attorney for Oberon and Meson and knew of Treister's intention to secrete a profit from his clients.

Oberon Investments, N.V. v. Angel, Cohen and Rogovin, supra at 1114. The Court further stated:

> if Angel knew that Treister was a fiduciary for Oberon and knew of the potential conflict, then Angel had a duty to act in Oberon's best interest. The absence of privity will not bar recovery here, because the harm would have been foreseeable to the law firm if it had knowledge of the potential conflict. Since there are material facts in dispute over Treister's capacity as attorney for Oberon and the firm's knowledge, the summary judgment was error.

Oberon Investments, N.V. v. Angel, Cohen & Rogovin, supra at 1115.

Upon reading the above quoted portions of the district court's opinion, it becomes quite apparent that the district court overlooked and misapprehended certain points of fact in the record. Nowhere in plaintiff's amended complaint is it alleged that defendant knew that Treister was an attorney for Oberon. In fact, the only evidence in the record in regard to defendant's knowledge of Treister's employment as an attorney for Oberon, indisputably establishes that defendant had no knowledge of any attorney-client relationship between Leonard Treister and plaintiff. In his deposition filed with the trial court, Stanley Angel was asked:

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 knowledge and I don't have any note to this, I believe that Mr. Treister was managing or operating this building for Oberon.

(A.18).

The undisputed evidence in the record establishes that defendant had no knowledge of Treister's capacity as attorney for plaintiff. There is absolutely no allegation, evidence or inference which could support a finding that an issue exists as to defendant's knowledge. Pursuant to the court's decision, absent that knowledge, defendant owed no duty to plaintiff. As the undisputed facts reveal no duty owed, summary judgment in favor of defendant on the cause of action for negligence was proper.

III

WHETHER SUMMARY JUDGMENT WAS PROPER WHEN THE RECORD IS WITHOUT DISPUTE THAT DEFENDANT COMPORTED WITH THE APPLICABLE STANDARD OF CARE

Upon its motion for summary judgment, defendant established that there was no genuine issue of fact that it did not fall below the standard of care imposed upon attorneys in this

community. On August 13, 1985, Stanley Angel filed an affidavit with the trial court which stated that he is an attorney who has been licensed and authorized to practice law in the State of Florida since 1957. (R.101) He further stated that:

> It is my opinion that no attorney at Cohen, Angel and Rogovin, including myself, fell below the standard of care exercised by attorneys in this community in rendering the same or similar legal services which I and my law firm of Cohen, Angel and Rogovin rendered in regard to the transactions set forth herein.

(R.102) Plaintiff failed to controvert the above opinion by counter-affidavit or any other means. Once a movant for summary judgment has tendered competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. Landers v. Milton, 370 So.2d 368 (Fla. 1979). Plaintiff has failed to come forward with any counter-evidence. Thus the record contains no dispute that defendant did not fall below the applicable standard of care and defendant is therefore entitled to summary judgment in its favor.

The exact issue presented to this Court has been previously addressed in Florida. It is well settled that in an action for professional negligence, an uncontroverted affidavit filed on behalf of a defendant attesting that the defendant did not fall below the applicable standard of care is sufficient to warrant the entry of summary judgment in the defendant's favor. Sims v. Helms, 345 So.2d 721 (Fla. 1977). This rule is applicable in a legal malpractice action, Manner

v. Goldstein Professional Association, 436 So.2d 431 (Fla. 3d DCA 1983), even if the affidavit is that of the defendant attesting that he did not fall below the applicable standard of care. Willage v. Law Offices of Wallace and Breslow, P.A., 415 So.2d 767 (Fla. 3d DCA 1982).

This issue has also addressed by jurisdictions outside of Florida. The instant case is markedly similar to that of Gans v. Mundy, 762 F.2d 338 (3d Cir. 1985), cert. denied, 106 S.Ct. 537 (1986). In that case, the defendant was sued for legal malpractice. The defendant filed a motion for summary judgment and offered in support thereof its affidavit which averred that its conduct comported with the applicable standard of care. The plaintiff failed to file any counter-evidence regarding the standard of care. The court held that the plaintiff's failure to file counter-evidence in regard to the standard of care was a failure to create a factual dispute as to the applicable standard of care. Accordingly, the court affirmed the entry of summary judgment in favor of the defendant.

The instant case is also markedly similar to that of Mims v. Wardlaw, 176 Ga. App. 891, 338 S.E.2d 866 (1985). As in the Gans v. Mundy, supra case, the defendant was sued for legal malpractice and filed a motion for summary judgment offering in support thereof her own affidavit that she represented the plaintiff with requisite degree of skill and care.

The plaintiff failed to file any counter-evidence in regard to the standard of care. The court held that the plaintiff's failure to file counter-evidence in regard to the standard of care was a failure to create a factual dispute as to the applicable standard of care. Accordingly, the court affirmed the entry of summary judgment in favor of the defendant.

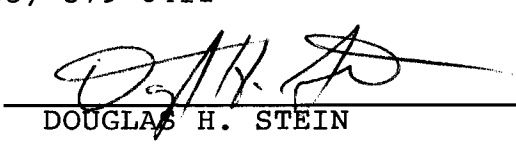
In the instant case plaintiff failed to file a counter-affidavit or any other counter-evidence in opposition to the affidavit filed by Stanley Angel. Accordingly, there is no issue that defendant comported with the applicable standard of care and summary judgment in favor of defendant was proper. Landers v. Milton, supra.

CONCLUSION

The Court should quash the decision of the Third District Court of Appeal, and remand the case with directions that the summary judgment entered by the Circuit Court be reinstated.

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 and ROBERT M. KLEIN, Stephens, Lynn, Chernay & Klein, One Datran Center, Suite 1500, 9100 South Dadeland Boulevard, Miami, Florida 33156 this 3rd day of March, 1987.

DOUGLAS H. STEIN

DHS12j/mkm

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