O/A 6-3-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,398

ANGEL, COHEN and ROGOVIN, :

Petitioner, :

vs. :

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

Respondent. :

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

REPLY BRIEF OF PETITIONER ON THE MERITS

add: H. Bart Billbrough to opinion

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RESPONSE TO STATEMENT OF THE FACTS

Defendant would simply state that the allegations of plaintiff's Complaint, as recited in its Statement of Facts, are not evidence which can create an issue of fact. The only evidence presented in the trial court and now in the record is the deposition and affidavit of Stanley Angel.[1]

ARGUMENT

I

WHETHER ALLEGATIONS OF FRAUD CAN CONSTITUTE A CAUSE OF ACTION FOR NEGLIGENCE WHEN THERE IS NO DUTY OWED, A BREACH OF WHICH WOULD CONSTITUTE NEGLIGENCE

Plaintiff has sued defendant for negligence and negligence only. The allegations of negligence are indeed unique. It is not alleged that defendant drew up documents which were unenforceable, containing errors, or otherwise negligently prepared. Plaintiff alleges that defendant's mere preparation of the documents, i.e., bringing the documents into existence, was negligent. As stated in the Amended Complaint:

> Defendant was negligent in each of the following alternative respects:
> (a) First - in their preparation of the documents involved in the transaction;
>
> (b) Secondly - in their failure to inform OBERON or cause them to be informed of the nature and extent of the

[1] In this brief the letter "R" refers to the record on appeal and the letter "A" refers to Petitioner's Appendix to (Footnote Continued)

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.

(R. 64). Plaintiff has specifically chosen to sue for negligence rather than fraud or conspiracy to commit fraud. Although plaintiff seeks to state a cause of action for negligence, in the Amended Complaint, in the District Court and presently in this Court, plaintiff argues that defendant committed fraud or conspiracy to commit fraud. The very nature of plaintiff's allegations is exhibited in its argument at page 14 of its Respondent's Main Brief which states that defendant "assisted" and "helped Treister defraud Oberon." Allegations of fraudulent conduct cannot support a cause of action for negligence when no duty is owed. Although a lack of privity may not preclude a cause of action for fraud, it does preclude a cause of action for negligence.[2] See Point I of Brief of Petitioner on the Merits.

The exact issue presented here was addressed in the markedly similar case of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). In that case the court held that an

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(Footnote Continued)
Brief of Petitioner on the Merits. All emphasis is added unless otherwise indicated.

[2]Defendant in no manner concedes that plaintiff has stated or could state a cause of action for fraud or that defendant was or could be liable for fraud.

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accountant could be held liable to third parties for fraud, however, due to the lack of privity with the accountant, the third parties could not state a cause of action for negligence. The court did note that the third parties were not intended beneficiaries of the defendant's professional services. Upon addressing why no duty was owed to the third parties, the court emphasized that the accounting industry could not sustain the burden of liability for negligence to all persons who might be affected by an accountant's work:

> If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminant amount for an indeterminant time to an indeterminant class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Ultramares Corp. v. Touche, supra at 444. The court stated those same concerns are applicable to lawyers and their potential liability to non-clients. Ultramares Corp. v. Touche, supra at 448.

The court did emphasize that although no cause of action for negligence may exist for lack of a duty owed, a cause of action for fraud may be sustained by one neither in privity with an accountant nor an intended beneficiary of the accountant's professional services: "Our holding does not emancipate accountants for the consequences of fraud." Ultramares Corp. v. Touche, supra, at 448. When a professional, or any person for that matter, intends to harm by

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fraudulent means, a person whether in privity or not, that professional can be held liable for damages consequent to his fraudulent act. No duty need be established between the plaintiff and defendant. It is the defendant's intent to harm the plaintiff which creates liability.

In the instant case, plaintiff chose to state a cause of action for negligence rather than one for fraud or conspiracy to commit fraud. The practical effect of any plaintiff's choice to allege negligence rather than fraud against a defendant-attorney is of great significance. Fraud is an intentional tort. Great American Insurance Co. v. Coppedge, 405 So.2d 732 (4th DCA 1981), pet. for rev. denied, 415 So.2d 1359 (Fla. 1982). Many, if not all, legal malpractice insurers do not provide coverage for intentional torts. In addition, the consequences of a Bar inquiry arising out of the factual circumstances surrounding the alleged acts of the attorney, may be far different for an attorney accused of committing an intentional tort rather than negligence.

Plaintiff's argument is premised on its contention that defendant knew of the fiduciary relationship between plaintiff and Leonard Treister. Such knowledge, argues plaintiff, is the basis upon which it can be determined whether defendant was "helping Treister defraud Oberon." As has been demonstrated, however, even if defendant did have such knowledge, such would be irrelevant to a determination of whether defendant could be liable for negligence. Although such knowledge

may be relevant to a cause of action sounding in fraud, it is wholly inconsequential in determining whether defendant owed a duty to plaintiff, a breach of which could constitute negligence.

In the event that this Court does determine that such knowledge may have some relevance, defendant would emphasize to this Court that the undisputed evidence in the record establishes that defendant had no knowledge of Leonard 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. Defendant would ardently encourage this Court to review plaintiff's own Statement of Facts. Even when viewed through a microscope, nowhere does that Statement even hint that defendant knew or should have known that Leonard Treister was plaintiff's attorney. Nowhere is that knowledge alleged in plaintiff's complaint, as recited at pages 2 through 4 of plaintiff's brief. The only evidence in the record in regard to defendant's knowledge of any relationship between plaintiff and Leonard Treister is Stanley Angel's deposition. At page 7 of plaintiff's brief, Stanley Angel's deposition is recited:

> 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. 23).

Surely Stanley Angel knew that Leonard Treister was a practicing attorney in the State of Florida. Nowhere, however, in the record is there evidence that Stanley Angel knew

that Leonard Treister was plaintiff's attorney. As exhibited by Stanley Angel's deposition, it is undisputed in the record that defendant had no knowledge that Leonard Treister was plaintiff's attorney. No lawyer owes a fiduciary obligation to those with whom he transacts his personal business simply because of the fact that he practices law as a profession. Defendant's only knowledge was that Leonard Treister owed no fiduciary obligation to plaintiff and was simply purchasing the stock from plaintiff for personal investment.

In the absence of a fiduciary obligation owed to a seller by a purchaser, there is absolutely no fraud involved when the purchaser "flips" the property purchased. Plaintiff has cited to no case law which indicates that a "flip" transaction is fraudulent. Defendant's extensive research has revealed no cases either within or outside of Florida which would indicate otherwise. There is nothing inherently fraudulent about a system based on capitalism allowing an individual to earn a profit. Absent the knowledge that a fiduciary relationship existed between plaintiff and Leonard Treister, defendant had no knowledge that Leonard Treister's "flip" transaction may have been fraudulent. Accordingly defendant owed no duty to plaintiff.

Plaintiff argues that defendant breached the applicable Code of Professional Responsibility and was therefore negligent. On page 12 of his brief, plaintiff states: "his [Stanley Angel's] failure to comply with the minimum standard

of conduct required of lawyers is and must be negligence." Plaintiff's statement conflicts with centuries of established jurisprudence which requires that there be a duty owed as a prerequisite to liability for a breach of the minimum standard of conduct. As best stated by Dean Prosser:

> But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:
>
> 1. A duty, or obligation . . .
>
> 2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant is negligent, but is not liable because he was under no duty to the plaintiff not to be.

Prosser, Law of Torts, § 30 at 143 (4th ed. 1971).

Thus, failure to meet the minimum standard of care does not create liability where the defendant, as in the instant case, owes no duty to the plaintiff. Plaintiff's argument that the Code of Professional Responsibility creates a duty was wholly rejected by the District Court in this case. Oberon Investments, N.V. v. Angel, Cohen and Rogovin, 492 So.2d 1113, 1114, n.2 (Fla. 3d DCA 1986). Not only does the specific language of the Code refute plaintiff's argument, each court which has been confronted with the argument that the code imposes a duty upon an attorney, a breach of which

gives rise to civil liability, has totally rejected the argument.

The Code itself states that the provisions therein do not impose standards for civil liability. In the preliminary statement to the Code as promulgated by the Florida Supreme Court, it could not be stated with any more clarity that:

> The Code makes no attempt to describe 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.

Florida Bar Code of Professional Responsibility Preliminary Statement (1980). This Court has emphasized that there is a clear distinction between a violation of the Code and simple negligence giving rise to a malpractice action. The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980). Thus, when promulgating the Code, it was the express intent of the Court to avoid imposing civil liability upon an attorney for the sole reason that he has violated the Code.

The exact issue presented to this Court has been addressed by numerous courts throughout the country. Each court to confront the issue has ruled that the Code raises no duty, a breach of which would give rise to a cause of action for negligence:

> 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 is not itself an actionable breach of a duty to a client.

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Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986). See also Bickel v. Mackie, 447 F.Supp. 1376 (N.D. Iowa 1978); Martin v. Trevino, 578 S.W.2d 763 (Tex. App. 1978); Sullivan v. Birmingham, 11 Mass. App. Ct. 338, 416 N.E.2d 528 (1981); Greening v. Klamen, 652 S.W.2d 730 (Mo. App. 1983). See also Hilt v. Bernstein, 75 Or. App. 502, 707 P.2d 88 (1985); Blanton v. Morgan, 681 S.W.2d 876 (Tex. App. 1984); Hashemi v. Shack, 609 F.Supp. 391 (S.D.N.Y. 1984); Brainard v. Brown, 458 N.Y.S.2d 735 (N.Y. App. 1983).

The above-cited authorities are all premised on the conclusion that the Code is designed to maintain the integrity of the legal profession. Its purpose is to regulate and discipline lawyers, protecting their clients only as an indirect result:

> While an attorney may be liable in damages to a person injured by his or her misconduct, that liability must be based on a recognized and independent cause of action and not on ethical violations. The Canons of Ethics and Disciplinary Rules provide standards of professional conduct of attorneys and not grounds for civil liability. (citations omitted).

Sullivan v. Birmingham, supra at 534. The remedy for a violation of the Code is a public one, not a private one:

> The duties set forth in the Code of Professional Responsibility establish the minimum level of competence required of attorneys for the protection of the public. A violation thereof will not give rise to a private cause of action.

Martin v. Trevino, supra at 770. That the Code creates no duty is especially so when, as in the instant case, the plaintiff is a non-client:

> Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client.

Bickel v. Mackie, supra at 1383. The Code creates no separate or additional duty for civil liability from that already established in the common law:

> The Code is designed to be adopted by appropriate agencies as a basis for disciplinary action. It is not our intention to limit the right of any individual to seek a remedy afforded by law. However, we do decline to enlarge upon any common law obligations of competence and fiduciary obligation that may exist, by imposing liability for the alleged negligent breach of Disciplinary Rules. Consequently we hold that the Disciplinary Rules alone do not form a basis for a cause of action in legal malpractice . . . (citations omitted).

Greening v. Klamen, supra at 734. As previously discussed in the Brief of Petitioner On The Merits, the common law imposes no duty upon defendant toward plaintiff.

Even those courts which hold that a violation of the Code "may be some evidence of the attorney's negligence" have never held that the Code creates a duty to a non-client. Fishman v. Brooks, supra. See also Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985); Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981); Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980). The cases decided by those courts were all

actions instituted by clients of the defendant-attorney. In such a case, it is not the Code which creates the duty owed, but the attorney-client relationship. Lorraine v. Grover, Ciment, Weinstein & Stauber, 467 So.2d 315 (Fla. 3d DCA 1980). In those cases, the courts utilized the Code as a a guide to determine the level of competency. The Code did not determine to whom a duty was owed.

In the instant action, plaintiff was neither a client of defendant nor the intended beneficiary of professional services rendered by defendant. Thus, no duty was owed by defendant to plaintiff. Allegations of fraudulent conduct cannot create such a duty. Accordingly, as no duty was owed, summary judgment in favor of defendant was proper.

II

WHETHER MERE FORESEEABILITY OF INJURY TO AN INDIVIDUAL ALONE CAN CREATE A DUTY OWED TO THAT INDIVIDUAL

Plaintiff's portrayal of defendant's argument at Point II of Petitioner's Brief on the Merits is an absolute distortion of defendant's actual argument. In that brief, defendant argued that the District Court completely manipulated the law of torts to fabricate a test whereby mere foreseeability of harm establishes a duty. That exact concept is adverse to all established jurisprudence, Prosser, Law of Torts, § 42 at 245 (4th ed. 1971), and has been specifically rejected by this Court. First American Title Insurance Co., Inc. v. First Title Service Co., 457 So.2d 467 (Fla. 1984). Defendant

further argued that if this Court sees fit to reject established law and adopt the foreseeability test fabricated by the District Court, there is no duty owed even under that test. The deposition of Stanley Angel is the only evidence in the record in regard to whether defendant had knowledge that Leonard Treister was the attorney of plaintiff. It is undisputed that defendant had no knowledge that Leonard Treister was plaintiff's attorney and to the best of Stanley Angel's knowledge, Leonard Treister was either managing or operating the Heller Building. (A. 18). As earlier discussed in Section I of this brief, absent a fiduciary obligation owed by Leonard Treister to plaintiff, the "flip" transaction was not fraudulent. Thus, absent defendant's knowledge of Leonard Treister's attorney-client relationship with plaintiff, defendant could not have known that Leonard Treister was defrauding plaintiff. Accordingly, injury to plaintiff was not foreseeable. Even under the District Court's foreseeability test, summary judgment in favor of defendant on the cause of action for negligence was proper.

III

WHETHER THE FAILURE OF A NON-MOVANT TO FILE COUNTER-EVIDENCE TO AN AFFIDAVIT FILED BY A MOVANT IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT IS A FAILURE TO REVEAL A GENUINE ISSUE WHICH MIGHT OTHERWISE PRECLUDE SUMMARY JUDGMENT

Plaintiff argues that the affidavit filed by Stanley Angel fails to resolve all issues in regard to defendant

meeting the applicable standard of care. Although plaintiff failed to file any counter-evidence to the affidavit, plaintiff now contends that the affidavit cannot support defendant's summary judgment as it is self-serving and contrary to the standard prescribed in the Code of Professional Responsibility.

First, as noted earlier in this brief, the minimum standard of conduct imposed upon an attorney is not determined by the Code of Professional Responsibility. In the preliminary statement to the Code as promulgated by this Court, it could not be stated with any more clarity that the Code does not "undertake to define standards for civil liability of lawyers for professional conduct." Florida Bar Code of Professional Responsibility Preliminary Statement (1980).

Second, as to the self-serving nature of the affidavit, defendant would note that an affidavit filed by a party in support of a motion for summary judgment is by its very nature self-serving. Illustrative of this very basic concept is the case of Page v. Staley, 226 So.2d 129 (Fla. 4th DCA 1969). In that case, the defendant was sued for slander. The defendant moved for summary judgment, accompanying his motion with his own affidavit attesting that he had never uttered the alleged statement. The plaintiff failed to file competent counter-evidence and summary judgment was entered in favor of the defendant. Despite the obviously self-serving nature of the affidavit, the court affirmed the summary judgment.

As the plaintiff did in Page v. Staley, supra, plaintiff in the instant case chose not to file any counter-evidence to defendant's affidavit. Plaintiff's failure to rebut the affidavit was a failure to create a genuine issue as to whether defendant met the applicable standard of care. As stated by this court:

> A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.

Landers v. Milton, 370 So.2d 368, 370 (Fla. 1979). Plaintiff's reliance on his pleadings was insufficient to counter-defendant's affidavit:

> It is not sufficient in defense of a motion for summary judgment to rely on the paper issues created by the pleadings, but it is incumbent upon the party moved against to submit evidence to rebut the motion for summary judgment and affidavits in support thereof or the court will presume that he had gone as far as he could and a summary judgment could be properly entered.

Hardcastle v. Mobley, 143 So.2d 715, 717 (Fla. 3d DCA 1962). See also, Ham v. Heintzelman's Ford, Inc., 256 So.2d 264 (Fla. 4th DCA 1971).

Plaintiff's reliance on his pleading and failure to rebut Stanley Angel's affidavit was a failure to create a genuine issue as to whether defendant met the applicable standard of

care. Therefore, summary judgment in favor of defendant was proper.

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,

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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 17th day of April, 1987.

_____
DOUGLAS H. STEIN

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