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IN THE SUPREME COURT OF FLORIDA

Case No. 70,777

Third District Court of Appeal
Case No. 86-1605

MARVIN I. MOSS,

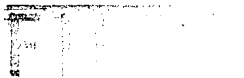
Petitioner,

vs.

ZAFIRIS, INC. a Florida corporation,

Respondent.

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



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BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES....................................ii-iii

INTRODUCTION..1-2

STATEMENT OF THE CASE AND FACTS.......................2-4

SUMMARY OF ARGUMENT...................................4

ARGUMENT..4-10

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

CONCLUSION..10

TABLE OF AUTHORITIES

CASES — PAGE(S)

Adams v. Chenowith, ...4, 5-6
349 So.2d 230 (Fla. 4th DCA 1977)

Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., ...4, 5, 6, 7
367 So.2d 633 (Fla. 2d DCA), cert. den., 376 So.2d 68 (Fla. 1979)

Amsler v. American Home Assurance Co., ...4, 5, 7-8
348 So.2d 68 (Fla. 4th DCA 1977)

Beecy v. Pucciarelli, ...9, 10
387 Mass. 589, 441 N.E.2d 1035 (1982)

Bickel v. Mackie, ...10
447 F.Supp. 1376, 1381 (N.D. Iowa), aff'd., 590 F.2d 341 (8th Cir. 1978)

Clagett v. Dacy, ...8, 9
420 A.2d 1285 (Md. App. 1980)

Drawdy v. Sapp, ...4, 5, 7
365 So.2d 461 (Fla. 1st DCA 1978)

Friedman v. Dozorc, ...9
412 Mich. 1, 312 N.W.2d 585 (1981)

Held v. Arant, ...8
134 Cal. Rptr. 442 (Ct. App. 1977)

Mancini v. State, ...4, 10
312 So.2d 732 (Fla. 1975)

McAbee v. Edwards, ...7, 9
340 So.2d 1167 (Fla. 4th DCA 1976)

CASES	PAGE(S)

<u>Norton v. Hines</u>, ...8, 9
49 Cal. App. 3d 917,
123 Cal. Rptr. 237 (Ct. App. 1975)

<u>Oberon Invs., N.V. v. Angel, Cohen & Rogovin</u>, ...2
492 So.2d 1113 (Fla. 3d DCA 1986),
<u>rev.</u> <u>granted</u>, No. 69, 398 (Fla. Feb. 2, 1987)

<u>Southworth v. Crevier</u>, ...4, 5, 6
438 So.2d 1011 (Fla. 4th DCA 1983)

<u>Stewart v. Sbarro</u>, ...8
142 N.J. Super. 581, 362 A.2d 581 (Ct. App. 1976)

<u>Ultramares Corp. v. Touche</u>, ...1
225 N.Y. 170, 179, 174 N.E. 441, 444 (1931)

OTHER AUTHORITIES

Art. V, Section 3(b)(3, Fla. Const......................5, 10

Fla.R.App.P. 9.030 (a)(2)(A)(iv).......................5

Rules 4-1.6, 4-1.7, Florida Rules of Professional
Conduct...9

INTRODUCTION

This is a petition for discretionary review, in an action for legal malpractice not involving the drafting of a will, from a decision of the Third District Court of Appeal wherein the Court ruled that: "[t]he mere lack of privity between an attorney and a third party will not insulate the attorney from liability to that party for his negligence or misrepresentations." (emphasis added). (A. 3). This holding is clearly contrary to Florida law.

The elimination of the privity requirement in attorney malpractice actions places an undue burden on the profession and raises the spectre of indeterminate liability, with the concomitant diminution in the quality of legal services. Without the privity limitation, lawyers will be subject "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 225 N.Y. 170, 179, 174 N.E. 441, 444 (1931). Moreover, by creating a duty in favor of an adversary of the attorney's client, which is the effect of the Third District Court of Appeal's ruling herein, an unacceptable conflict of interest is created which seriously hampers an attorney's effectiveness as counsel for his client.

As the holding by the Appellate Court in the instant action directly and expressly conflicts with many decisions of other district courts of appeal, Petitioner respectfully urges this Court to review the decision rendered by the Third District. This Court should note that the Third District Court of Appeal,

in support of its ruling, relied on its earlier decision of Oberon Invs. v. Angel, Cohen & Rogovin, 492 So.2d 1113 (Fla. 3d DCA 1986), rev. granted, No. 69, 398 (Fla. Feb. 2, 1987). The Court in Oberon, also an action for legal malpractice, adopted a balance of factors test which practically abolished the rule that privity is required in a legal malpractice cause. This Court granted discretionary review in Oberon and oral argument was held on June 3, 1987. Thus, acceptance of jurisdiction is cearly appropriate in the instant action as the opinion herein goes beyond the decision in Oberon and appears to totally eliminate the privity requirement in legal malpractice actions.

STATEMENT OF THE CASE AND FACTS

For purposes of this brief, the letter "A" will be used when referring to Petitioner's separately bound Appendix.

Respondent (Plaintiff in the lower court), alleged in its Third Amended Complaint that Petitioner (Defendant in the lower court) was liable to Respondent for fraud and negligent misrepresentation in connection with the purchase of a gas station business and option to purchase the real property on which the business was located. (A. 5-9). Respondent stated in its Complaint that it retained independent counsel, Scott Jay, to represent it with regard to the subject business transaction. (A. 6). (Scott Jay, originally a defendant in this action entered into a settlement with Respondent and is no longer a party to this cause). (A. 2). No where is it alleged that Petitioner represented Respondent, and it is uncontroverted that Petitioner at no time represented Respondent in the business

transaction involved herein. Petitioner only represented the owner of the gas station business, Sunbrust Petroleum, Inc. through its President, Jules Krasner. (A. 6, 8). Moreover, because ZAFIRIS and Krasner desired an expedited closing of the business transaction, Respondent's own attorney prepared most of the required documents. (A. 18, 21, 24, 26).

Respondent further alleged that Petitioner knew that his client did not own the real property in issue but he represented otherwise or negligently failed to disclose otherwise. (A. 7-9). In essence, Respondent's action is based on alleged nondisclosure of information. At no time did Respondent's counsel attempt to ascertain ownership of the property involved by conducting a title search. (A. 20, 22, 23). Nor did he ever ask Petitioner who owned the property. (A. 18, 19, 23).

Petitioner filed a Motion for Summary Judgment, with attachments, and maintained, inter alia, that he owed no duty to disclose the ownerhsip of the real property as there was no fiduciary relationship between Petitioner and Respondent. Therefore, there could be no cause of action for either fradulent concealment or negligent misrepresentation. (A. 27-50). Upon consideration of the Motion for Summary Judgment, the trial Court granted the Motion and entered Final Summary Judgment in favor of Petitioner. (A. 51).

Respondent appealed the Final Summary Judgment entered against it. The Third District Court of Appeal reversed the Final Summary Judgment basing its decision upon the rule that an attorney may be liable to a third party for fraud or negligent

misrepresentation even though privity is lacking. (A. 1-4). Petitioner then filed a Motion for Rehearing and/or Clarification, which was denied. (A. 53-55, 56).

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal abrogates the long-standing privity requirement in legal malpractice actions. This decision directly and expressly conflicts with decisions of other district courts of appeal which have declined to impose upon attorneys a duty of due care to non-clients beyond the will-drafting situation. See: Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (Fla. 2d DCA), cert. den., 376 So.2d 68 (Fla. 1979); Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978); Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977); Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977), cert. den., 358 So.2d 128 (Fla. 1978). Thus, this Court has jurisdiction to review the instant decision because the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by other district courts of appeal. Mancini v. State, 312 So.2d 732 (Fla. 1975).

ARGUMENT

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 Third District Court of Appeal's decision in the instant action directly and expressly conflicts with the following

decisions of other district courts of appeal: Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (Fla. 2d DCA), cert. den., 376 So.2d 68 (Fla. 1979); Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978); Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977); Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977), cert. den., 358 So.2d 128 (Fla. 1978). Therefore, jurisdiction to review the decision rendered herein is warranted. Art. V, Section 3(b)(3), Fla. Const., Fla. R. App. P. 9.030 (a)(2)(A)(iv).

In Southworth the buyers involved in a real estate transaction sued the seller's attorney for negligence after being awarded a summary judgment in an action on the note. The note involved therein was found to be deficient in its terms and thus unenforceable. The Fourth District held that there was no basis for liability against the seller's attorney. Therefore, the summary judgment granted in favor of the buyer in the legal malpractice action was reversed.

Similarly in Adams, the purchaser of real property, who was unrepresented in the transaction, sued the seller's attorney for negligence when the attorney incorrectly prepared a closing statement. The Court held that the attorney did not owe a duty to the buyer, therefore, he need not account to the buyer for his negligence. The Court pointed out that the attorney was hired by the seller as his attorney, and there were no allegations that the attorney represented both parties to the transaction. And, in fact, dual representation would have been

violative of the code of ethics. As there were two sides to the transaction, with two separate interests to be protected, the Court refused to hold the attorney responsible to both parties involved in the transaction. The Court concluded that the attorney's allegiance was solely to his client and, therefore, affirmed the dismissal of the Complaint.

In the present case, the business transaction herein also involves two sides, with two different interests that require protection. Moreover, the Respondent had independent counsel of its own choosing who was retained to protect it's interests. Thus, the Third District Court of Appeal's holding that an attorney for one side of a sales transaction owes a duty to the other side, even if represented by separate counsel, is in direct conflict with both Adams and Southworth.

The Second District Court of Appeal, in Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., supra, endorsed the holding of the court in Adams and also ruled that a lawyer owes a duty only to his client in a multi-sided transaction. Summary judgment in favor of the law firm was, thus, affirmed as privity was lacking. The court noted that in sales transactions of the kind involved therein often the buyer, non-client, relies on the expertise of the lender's lawyer. However, the court considered this to be a calculated risk, and if it proves to be unfounded, the buyer has no claim that the lawyer violated a duty owed to him. To rule differently would place the attorney in an untenable position as conflicting interests are involved. The instant decision of the Third District Court of Appeal places

Petitioner in this untenable position; and, thereby, is in direct conflict with Amey.

The opinion of the Third District also directly conflicts with the First District Court of Appeal's decision in Drawdy v. Sapp, supra. In Drawdy, the Court set forth the well-established elements that must be proved by a plaintiff in order to recover in a legal malpractice action. The attorney's employment is one of those elements.

The First District recognized the limited exception to the privity requirement in cases invovling will-drafting which had been adopted by the Fourth District in McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976). The Court, however, refused to further erode the privity doctrine and stated: "We know of no authority... holding that where both parties are represented by counsel, an error by the lawyer not representing the allegedly injured party will render him liable to that party." Drawdy v. Sapp, 365 So.2d at 462. Yet, the Third District herein held that a non-client who is represented by counsel has a cause of action for negligence against the other party's attorney for negligence in the performance of his legal duties beyond the drafting of a will.

There is also direct conflict between the instant decision of the Third District and Amsler v. American Home Assurance Co., supra. In Amsler, certain limited partners instituted a legal malpractice action against an attorney representing the limited partnership for failing to obtain their written consent prior to recording certain financing documents with respect to

partnership property. The plaintiffs contended that the attorney knew that their consent was required for secondary financing to be placed on partnership property, but recorded these financing documents although he knew their consent had not been obtained. There were no allegations that the attorney represented the limited partnership for the creation of the financing documents, plaintiffs only alleged that he knew of the transaction and delivered the documents for recording. The Fourth District affirmed the dismissal of the legal malpractice claim and held that no legal duty owing from the attorney to the limited partners was properly alleged. No action for professional negligence based on non-disclosure could be maintained by plaintiffs. The Third District has ruled in the instant case that an attorney may be liable for alleged negligent non-disclosure to a non-client. This holding is in direct conflict with the Fourth District's opinion in Amsler.

The traditional rule that an attorney's duty of diligence and care flows only to his client and that only his client can recover against him for a breach of that duty has been relaxed in certain limited circumstances. Courts have held that an attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity. See: 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); 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). The most well-accepted exception to the

privity requirement is found in the will-drafting situation where the beneficiary to a will is considered an intended beneficiary of the legal services of the testator's attorney who drafts the will. Therefore, a cause of action may be brought by the beneficiary against the attorney for drafting errors. McAbee v. Edwards, supra.

The instant case does not fall within the will-drafting exception. Rather, a sales transaction is involved with the two parties having separate and distinct interests. Even the courts applying this intended beneficiary exception have held that it is clear that a claimant in an adverse or conflicting position vis-a-vis the attorney's direct client cannot be considered an intended beneficiary. See: Norton v. Hines, 123 Cal. Rptr. at 240; Clagett v. Dacy, 420 A. 2d at 1288, 1289. These Courts have reasoned that creating a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client. Moreover, dual representation in such a situation would violate the Rules of Professional Conduct. Beecy v. Pucciarelli, 387 Mass. 589, 441 N.E. 2d 1035 (1982); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981). Rules 4-1.6, 4-1.7, Florida Rules of Professional Conduct.

Also, an attorney should not be held liable to his client's opponent for his professional negligence due to the very nature of the adversary system and the very duty that is owed to the client. Accordingly, a party with conflicting interests is precluded from relying on an adverse party's attorney. To

require an attorney to hold one duty to a client and another duty to another with adverse interests would create an irreconcilable conflict of interest. See: Beecy v. Pucciarelli, 441 N.E.2d at 1041, citing, Bickel v. Mackie, 447 F.Supp. 1376, 1381 (N.D. Iowa), aff'd, 590 F.2d 341 (8th Cir. 1978).

Petitioner was retained by the seller of the subject business, and not the purchaser whose interest was in conflict with that of his client. Petitioner could not have properly represented both parties. Furthermore, Respondent was represented by counsel, therefore, any reliance on Petitioner was unfounded. Thus, Petitioner cannot be held responsible to Respondent for alleged non-disclosure of information as privity was lacking. As the Third District Court of Appeal's decision holds otherwise and conflicts with a rule of law previously announced by other district courts of appeal on the same issue, jurisdiction is present. Mancini v. State, supra.

CONCLUSION

Petitioner respectfully prays that this Court exercise its discretionary jurisdiction to review the instant decision of the Third District Court of Appeal, pursuant to Art. V, Section 3(b)(3), Fla. Const., as there is direct conflict between said decision and decisions of other district courts of appeal.

Respectfully submitted,

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By: [signature]
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of June, 1987 to TERRY S. NELSON, ESQUIRE, Hoppe & Backmeyer, P.A., 810 Conconrd Building, 66 West Flagler Street, Miami, Florida 33130.

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