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IN THE SUPREME COURT OF FLORIDA

JUL 22 1987

Case No. _____
By _____
Third District Court of App
Case No. 86-1605

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MARVIN I. MOSS,
Petitioner,

vs.

ZAFIRIS, INC., a Florida
corporation,

Respondent.

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

CLERK DISTRICT COURT OF
APPEAL - THIRD DISTRICT

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FILED

REPLY BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

This is Zafirris, Inc.'s response to Marvin Moss' petition for discretionary review of a Third District Court of Appeal's decision reversing a summary judgment in this claim. The petitioner alleges that this is an action for legal malpractice, and that the Third District Court of Appeal has eliminated the "privity requirement" in such causes of action and that review should therefore be granted.

This is an incorrect statement of the case, and jurisdiction should be denied. This is not an action for legal malpractice, but rather one for fraud and misrepresentation. "Legal malpractice" has traditionally been defined as an attorney's breach of a legal duty to his client. As the petitioner's brief points out, under most circumstances privity is required in a legal malpractice claim. However, this is a cause of action for fraud and misrepresentation against an attorney not one for legal malpractice.

The petitioner's quotation of the Third District Court of Appeal's ruling in this case that "the 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" (A. 3) is, therefore, taken completely out of context. The Third District Court of Appeal clearly enunciated in the opening paragraph of its opinion that this is a claim for fraud and misrepresentation. The Court stated that the issue was whether there existed genuine issues of material fact upon "the

rule that an attorney may be liable to a third party for fraud or negligent misrepresentation". (A. 1).

The Third District Court of Appeal's ruling in this cause that an attorney may be liable to a third party for fraud and misrepresentation is clearly not contrary to Florida law. Furthermore, this ruling clearly does not conflict with the legal malpractice cases cited by the petitioner.

For purposes of this brief, the respondent will refer to the petitioner's appendix as the letter "A" as has been used in his brief.

STATEMENT OF THE CASE AND FACTS

In the original cause of action, the plaintiff alleged that Marvin Moss intentionally misrepresented that his client owned the real property upon which a gas station business was located in order to induce the plaintiff to purchase the business and property. After expending his life savings on the closing, Constantine Zafiris, the president of Zafiris, Inc., was evicted from the property by its true owners. In down payments and start-up costs, the plaintiff lost in excess of Eighty Thousand Dollars (\$80,000.00).

The Third District Court of Appeal found that there existed an issue of fact as to whether Marvin Moss intentionally misrepresented the ownership of the land to the plaintiff. (A. 3).

This cause of action is therefore not based upon "non-

disclosure of information" as the petitioner has alleged. This cause of action is based upon fraudulent disclosure of information. The petitioner's argument based upon privity is therefore incorrect. There is no privity requirement when an attorney directly engages in fraud, and Marvin Moss does not suggest otherwise. He merely attempts to change the nature of this cause of action in an attempt to create conflict with decisions of other District Courts of Appeal on this petition for review.

Whether or not Marvin Moss owed a duty to disclose the ownership of the real property is not at issue in this case. The issue is whether he in fact intentionally represented that his client owned the subject property for his own benefit, including that of Four Thousand Three Hundred thirty-five and 93/100 Dollars (\$4,335.93) in attorneys' fees for past and present services.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal does not conflict with any decision of another District Court of Appeal. It does not abrogate the long-standing privity requirement in legal malpractice actions. The petitioner has misquoted the Third District Court of Appeal's opinion, and taken it completely out of context.

This is not a traditional legal malpractice claim, but a claim for direct fraud and misrepresentation against an attorney. Privity is not required in this instance; see Amey, Inc. v.

Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (2nd DCA 1979); Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977). There is, therefore, no conflict and review should be denied.

ARGUMENT

The decision of the Third District Court of Appeal does not conflict with decisions of other Courts of Appeal. No case cited by the petitioner involves a cause of action for fraud and misrepresentation against an attorney. The petitioner cites only "legal malpractice" causes of action. He is correct that in cases of traditional legal malpractice privity is normally required. However, in this claim for fraud and misrepresentation, privity is clearly not the issue.

In Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977), the court upheld the privity requirement in a legal malpractice case, and stated they could not hold a lawyer responsible to all parties in a transaction "unless it is alleged (and proved) that he committed some non-negligent tort such as fraud or theft or the like", (at 231). In the instant cause of action, it is alleged, and found to be a question of fact by the Third District Court of Appeal, that Marvin Moss committed fraud.

This rule is, furthermore, also upheld by the Second District Court of Appeal in Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (2nd DCA 1979). There, after citing Adams v. Chenowith, the court stated "the law firm's obligation ran to its client. There is no suggestion that the

buyer was harmed by any type of fraudulent conduct", (at 635). In the instant case, there is clearly a suggestion that the buyer (Zafiris, Inc.) was harmed by fraudulent conduct.

Clearly, the very cases cited by the petitioner (Adams v. Chenowith, and Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., supra) indicate that privity is not a requirement in a claim for fraud and misrepresentation. The Third District Court of Appeal's ruling in this cause of action is therefore not in conflict with other decisions in this state.

The petitioner fails to recognize that this is a claim for fraud and misrepresentation. In doing so, he has taken the ruling of the Third District Court of Appeal completely out of context. The Court found a material issue of material fact existed with regard to Marvin Moss' representation of his client's ownership of the land. By Marvin Moss' own admission, he was aware that his client did not own the land. His representation that his client did own the land is, therefore, fraudulent. The case is clearly not one of non-disclosure of a material fact as the petitioner has attempted to make it.

The question, therefore, is not whether Marvin Moss had a duty to Zafiris, Inc. under the traditional rule in a legal malpractice claim, but whether he engaged in fraud for his own gain.

Neither the Third District Court of Appeal nor the plaintiff in this cause of action has attempted to create an exception to the general rule of privity in a legal malpractice claim, as the

petitioner has argued in his brief. That is simply not the issue in this claim for fraud and misrepresentation.

The petitioner next attempts to place the instant case under the facts of Oberon Invs., N.V. v. Angel, Cohen & Rogovin, 292 So.2d 1113 (Fla. 3rd DCA 1986), which is presently under review by this Court. However, again, this cause of action is clearly distinguishable from Oberon. The issue in Oberon is the duties of an attorney to third parties in a legal malpractice action. As has been repeatedly pointed out, this is not a legal malpractice action, but one for fraud and misrepresentation against an attorney.

CONCLUSION

Wherefore, the respondent respectfully requests that this Court deny its discretionary jurisdiction to review this cause of action.

Respectfully submitted,

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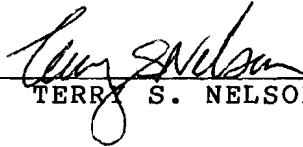
BY


TERRY S. NELSON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of July, 1987, to: DEBRA L. CHOLODEFSKY, of Zuckerman & Venditti, P.A., Attorneys for Petitioner, 10691 North Kendall Drive, Suite 206, Miami, FL 33176.

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