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IN THE SUPREME COURT OF FLORIDA
CASE NO. 70,777

THIRD DISTRICT COURT OF APPEAL
CASE NO. 86-1605

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MARVIN I. MOSS,

Petitioner,

vs.

ZAFIRIS, INC., a Florida corporation,

Respondent.

BRIEF OF PETITIONER, MARVIN I. MOSS, ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Zafiris wanted to buy a Shell service station business. He contacted the Shell Oil Company representative and was put in touch with Krasner. (R. 273-278) Zafiris and Krasner met on several occasions and negotiated the terms of the sale of this business. Zafiris testified that at one of the first meetings, Krasner also indicated he owned the real property on which the station was located, as well as the gas station business itself.

After Zafiris and Krasner had several meetings to settle the terms and price of this transaction, Zafiris contacted his own attorney, Jay, and asked Jay to represent him in this business deal. (R. 263, 286)

Defendant/Petitioner, Moss, was retained as Krasner's attorney in this transaction. (R. 302, 411) Moss had previously represented Krasner and had acted as his counsel in the lease of the property. It is uncontraverted that Moss was never retained to represent Zafiris or any interest of Zafiris in this arm's length business transaction and that he did not depend on Moss to prepare documents. (R. 360)

The symbol "R." refers to the Index to the Record on Appeal.

The deposition of Scot Jay could not be located by the clerk's office and therefore is referred to by the term "Depo.", and a copy is attached for the court's convenience.

Following these negotiations, Zafiris, Krasner and Jay met on December 20 or 21, 1982 to conclude the final details of the transaction, and facilitate document preparation so that a closing on this business deal could take place prior to Christmas. (Jay Depo., 30, 36) The next morning, at Krasner's request, Jay (Zafiris' attorney) telephoned Moss (Krasner's attorney) and advised him that a deal had been reached by their clients and that they desired a closing prior to the Christmas holidays. (Jay Depo., 40) Due to the time factor involved, Jay and Moss mutually agreed that Jay would prepare most of the required documents, even certain documents generally prepared by the seller's attorney. Jay prepared the Deposit Receipt and Contract for Sale and Purchase of Business and Business Lease, while Moss prepared a promissory note, security agreement, necessary UCC documents and a closing statement for the business. (Jay Depo., 41, 51, 75; R. 218, 238, 458)

During the telephone conversations between Jay and Moss, the question of ownership of the real property underlying the gas station was never discussed. Moss never made any statements or representations relating to the property's ownership. (Jay Depo., 41, 44, 65) More importantly, Jay never attempted to check the title to this real properly. (Jay Depo., 50) Jay, as attorney for the buyer of the business, never made any attempt to update the abstract or otherwise check title to this land. He simply made assumptions as to the ownership of the property. (Jay Depo., 64, 65) Jay testified that prior to the closing, he

never had any discussions with Moss concerning ownership of this real property, nor did Moss make any representations concerning that matter.

The closing took place on December 23, 1982. At the closing, there were no representations made by Moss as to the ownership of the real estate, nor did Moss give either Jay or Zafiris any instrument or document depicting ownership. (Jay Depo., 31, 64) Both Zafiris and Krasner executed the Deposit Receipt and Contract for Sale and Purchase of Business, which included an option to purchase the real property in question no sooner than thirty-six months from the date of the transaction, and the business lease. After these documents were executed and funds exchanged, Zafiris alleges he spoke with Moss concerning the ownership of the property. (R. 314-315) This was the first time he ever spoke directly to Moss. (R. 314-315)

Neither Zafiris nor Jay ever questioned Moss concerning ownership of this real property until January 1983. (R. 324; Jay Depo., 56, 57) When asked, Moss readily admitted that Krasner was not the owner of the property, but added that even prior to closing the deal with Zafiris, Krasner had been negotiating with the property owners to purchase this property and had, in fact, obtained financing. (Jay Depo., 57; R. 427-429) Further, in the early weeks of January 1983, after this matter came to light, Krasner offered to return all monies paid by Zafiris and terminate the business deal. Zafiris refused to

accept Krasner's offer to rescind the contract and instead chose to remain on the property and accept the benefits of this business transaction. (R. 374, 375)

Following the execution of the documents for the sale of this business, Zafiris totally failed to make any rent or mortgage payments to either Krasner or the land owners. His refusal resulted in an eviction and unlawful detainer action by the owners.

Thereafter, Zafiris sued: (1) his own attorney, Scott Jay, for negligence; (2) Krasner and Sunburst Petroleum Industries, Inc. for fraud and misrepresentation; (3) the owners of the real property for fraud, misrepresentation and conversion, and (4) the Defendant/Petitioner, Marvin Moss, for fraud and negligent misrepresentation. Zafiris has since settled his claim against his own attorney, Scott Jay.

After completing the necessary discovery, Moss filed a motion for summary final judgment on the grounds that (1) as counsel for an opposing party to a business transaction, he owed no duty to Zafiris and therefore had no liability under a negligence theory, and (2) the undisputed facts showed there was no fraudulent misrepresentation made to Zafiris. The trial court granted this motion and entered summary final judgment in favor of Moss. On appeal, the Third District Court of Appeal held: "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." (Emphasis added.)

SUMMARY OF ARGUMENT

Unquestionably, Moss' actions in connection with the sale of this gas station business were all performed in his capacity as counsel for the seller, Krasner. At no time did Moss represent Zafiris, the buyer, who had retained his own attorney, Scott Jay, to represent his interests. Although Zafiris attempts to avoid the settled law by characterizing his suit as simply a claim for negligence and fraudulent misrepresentation, the actions or inactions of Moss are inextricably bound to his position as the seller's attorney and cannot be severed from his professional posture in this case.

In deciding that the actions of an attorney in a business transaction may subject him to liability to the opposing attorney's client, the Third District Court of Appeal has taken an unprecedented step away from the privity requirement and has clearly departed from the well settled law of both this state and a majority of other states in this nation. Not only has the Third District's opinion abolished privity, or employment, as a requirement (which the Florida courts have traditionally imposed), this decision has also moved beyond the very narrow exceptions to the privity requirement which have been enunciated across the country. This court has recently reaffirmed and re-acknowledged the fact that Florida courts have "uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they share

privity of contract". Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192, 193 (Fla. 1987). As this court has noted, "the only instances in Florida where this rule of privity has been relaxed is where it was the apparent intent of the client to benefit a third party. The most obvious example of this is in the area of will drafting". Oberon, supra., 194.

In moving beyond the established exceptions to the privity requirement, the Moss court has imposed an impossible burden upon attorneys. Now, not only must an attorney loyally and zealously represent the interests of his client, he must also scrutinize his client's motive in performing a transaction and protect the interests of the other side. Fulfilling all of those duties while acting in accordance with the dictates of the code of professional responsibility is an almost impossible task.

In addition to placing an onerous burden upon attorneys, the Moss decision clearly magnifies an attorney's potential liability. Now, in practicing law, an attorney is open to lawsuits not only from his client and those non-clients whom he intends to benefit in the performance of his services, but also individuals who are in a clearly adversarial relationship. Such limitless liability will make the practice of law undesirable, if not impossible.

As the decision of the Third District Court of Appeal in Zafiris, Inc. v. Moss, 506 So.2d 27 (Fla. 3rd DCA 1987), represents not only a departure from existing case law, but also

an unprecedented and undesirable expansion of an attorney's responsibilities, the decision of the Third District Court of Appeal should be overruled. This court should therefore remand this case with directions to enter judgment for the Petitioner pursuant to the summary judgment that was originally entered by the trial court in this cause.

Not only must the claim against Moss for negligence fail, but the claim for alleged fraudulent misrepresentations by Moss to his client's adversary regarding the ownership of his client's real property must also fail. None of the essential elements of a fraudulent misrepresentation could be or were proven. The record indisputably establishes that Moss made no affirmative misrepresentations as to ownership to either Zafiris or his attorney, Jay, prior to or during the closing. Any alleged statements concerning this ownership occurred subsequent to the business transaction in issue. Secondly, there being no fiduciary relationship between Moss and Zafiris in this arm's length transaction, Moss was therefore under no duty to disclose any information relating to the property's ownership. Thirdly, even if it is assumed that alleged misrepresentations were made, these misrepresentations in no way operated to induce Zafiris to enter into the business transaction involved herein because they took place subsequent to the closing on the sale of the gas station. Fourthly, and again assuming arguendo that Moss made misrepresentations as to ownership, any reliance thereon would not have been justified because (a) there was no fiduciary or

confidential relationship existing between Moss and his client's adversary and (b) Zafiris was at all material times represented by counsel of his own choosing throughout the entire business transaction and who, in fact, prepared the pertinent documents for this transaction. Finally, Zafiris could not show that any damages he suffered resulted from reliance upon any statements of Moss.

ISSUES ON APPEAL

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 THOSE OF THE ATTORNEY'S CLIENT.

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ARGUMENT

I. AN ATTORNEY DOES NOT OWE A DUTY TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY'S SERVICES AND WHOSE INTERESTS ARE ADVERSE TO THOSE OF THE ATTORNEY'S CLIENT.

Despite Zafiris' continual protestations that this case should be viewed as a simple case for alleged negligence and fraudulent misrepresentation, the unavoidable fact remains that this is a suit against an attorney for actions taken in the course of his profession. The case must be viewed as a claim for legal malpractice no matter how Zafiris tries to disguise it.

In its decision in Zafiris, Inc. v. Moss, supra. the Third District Court of Appeal took an unprecedented step away from the privity requirement which Florida courts have enforced since the inception of legal malpractice actions. For years prior to this decision, all Florida courts, including the Third District, have required that the plaintiff in a legal malpractice action prove (1) the attorney's employment by the plaintiffs; (2) the

attorney's neglect of a reasonable duty owed to the plaintiffs; and (3) that such negligence was the proximate cause of loss to the plaintiffs. Angel, Cohen & Rogovin v. Oberon Investments, N.V., supra.; Lorraine v. Grover, Ciment, Weinstein & Stauber, 467 So.2d 315 (Fla. 3rd DCA 1985); Drawdy v. Sapp, 365 So.2d 461 (Fla. 1st DCA 1978); Adams, George & Wood v. Traveler's Insurance Co., 359 So.2d 457 (Fla. 3rd DCA 1978); Freeman v. Rubin, 318 So.2d 540 (Fla. 3rd DCA 1975); Weiner v. Moreno, 271 So.2d 217 (Fla. 3rd DCA 1973); Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983); Ginsberg v. Chastain, 501 So.2d 27 (Fla. 3rd DCA 1986).

The case of Oberon, supra., is factually similar and must govern the result in this cause. In the Oberon case, Attorney Treister was simultaneously representing Oberon in the sale of a wholly owned subsidiary to an undisclosed principal and arranging a second transaction to resell the property for a higher price. Oberon sued Triester and also sued the law firm who represented this attorney preparing the sale documents, asserting that the law firm should have foreseen the damage to the first seller/Oberon and therefore was negligent in preparing these documents or in failing to inform Oberon of the nature and extent of the concurrent transactions. The complaint also asserted that the law firm negligently permitted Triester to use these documents for the purpose of defrauding the initial seller. This court reiterated the uniform law of Florida that

the absence of privity between the law firm and the initial seller barred a negligence claim against the attorneys. As this court explained:

> If, as Respondent [the initial seller] alleges, the Petitioner [the law firm] knew of the conflict of interest between Treister and Respondent, it was equally apparent that the professional services rendered Treister were not to benefit Respondent. If, on the other hand, the Petitioner did not know of the conflicting interest of Treister and Respondent, Petitioner's only duty was to its client, Treister. Accordingly, even should the material facts in dispute be resolved in the Respondent's favor, they would not support its cause of action. The trial court correctly granted summary judgment. Oberon, supra. at 194.

This reasoning is equally applicable to the instant claim where the purchaser of a dealership agreement to operate a Shell service station is suing the seller's attorney on the grounds this adversary attorney should have informed him, as well as his own attorney, that he was purchasing only the dealership rights and not the underlying real property.

Much has been written about the narrow exception to the privity requirements for a negligence suit against an attorney. These cases all hold that where the plaintiff is an intended beneficiary of a will negligently drafted by the decedent's attorney, the attorney will be liable. Macabee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976). Liability has been found in those instances because wills are essentially drafted to benefit the beneficiaries, who are known to the attorney, and they should have a right of action. This is clearly not the case

here where the facts indisputably show the buyer and seller of a business were negotiating in an arm's length transaction and both had retained their own attorneys to represent their own interests. In every instance where this fact pattern has arisen in the courts of this state, the courts have held the attorney for one party has no liability under a negligence theory to a non-client. In the case of Southworth v. Crevier, supra., the buyers 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 buyer had defaulted under the terms of the note but prevailed in the underlying action because the note was improperly drafted and therefore unenforceable.) The Fourth District held that there was no basis for liability against the seller's attorney and reversed a summary judgment against the seller's attorney.

In the case of Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977), the purchaser of real property, who was unrepresented in the transaction, sued the seller's counsel for negligence when that attorney incorrectly prepared a closing statement. The court held that the attorney owed no duty to the buyer and therefore need not account to the buyer for his negligence. The court noted that the attorney was hired by the seller as his attorney and that there were no allegations the attorney represented both parties to the transaction. Further, a dual representation would have violated the code of ethics. Because there were two sides to the transaction with separate interests

to be protected, the court refused to hold the attorney responsible to both parties in the transaction. Because the attorney's allegiance was solely to his client, the court affirmed a dismissal of the complaint.

In the pending case, the business transaction under scrutiny involved two sides with separate and adversarial interests requiring protection. Further, buyer Zafiris had retained independent counsel of his own choosing to protect his interests. Thus, holding of the Third District Court of Appeals that an attorney for one side of a sales transaction owes a duty to the other side, even where there is an arm's length transaction and both parties are represented by separate counsel, is in direct conflict with both the Adams and Southworth cases.

In the case of Amey, Inc. v. Henderson, Franklin, Starns & Holt, P.A., 367 So.2d 633 (Fla. 2nd DCA, cert. den., 376 So.2d 68 (Fla. 1979), the court again stated that an attorney owes only a duty to his own client in a multi-sided transaction. The seller's attorney was therefore entitled to a summary final judgment because of the absence of privity with the buyer. The court went on to note that in sales transactions a non-client/ buyer often relies upon expertise of the lender's lawyer. The court said this is a calculated risk by the buyer and if it proves to be ill advised, the buyer has no claim that the lawyer violated any duty owed to him. Any contrary rule would place an attorney in an untenable conflict position.

Even in the Macabee v. Edwards, supra., case, where the privity doctrine was found to be inapplicable in a will drafting situation, the court 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." Id. at 462.

Even where an attorney is representing a limited partnership, he will not have liability to individual limited partners who have an adversarial interest. Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977).

In the case of Ginsberg v. Chastain, supra., the court again refused to impose liability upon an attorney for the negligent preparation of an agreement. In the Ginsberg case, the plaintiff did not retain the defendant attorney for preparation of the agreement; rather, the defendant attorney had been retained by the other party to the agreement. The court said that in the absence of an attorney/client relationship for the performance of legal services, the plaintiff could not state a cause of action.

Limiting an attorney's liability to the protection of his client's interests is a central tenet of our legal system. This is particularly true where the interests of the client and the non-client/plaintiff have not been identical but, on the contrary, have been antagonistic. To permit a non-client/plaintiff to successfully claim negligence by an attorney represented by his adversary would "deprive the parties to the

contract of control of their own agreement . . . and . . . would impose a huge potential burden of liability on the contracting parties". Lorraine, supra., at 117.

The Third District's decision in the instant case makes Moss, as counsel for the seller of the business, a watchdog of his client's conduct. This decision not only requires Moss to endeavor to represent his client fully, completely and competently in this transaction, it also effectively requires him to investigate, examine and judge the motives behind the transaction which he was asked to perform on behalf of his client.

The obligations imposed by the Third District's decision places an impossible burden upon an attorney: he must competently represent his client within the guidelines set forth by the code of professional responsibility while simultaneously protecting the interests of those persons with whom the client is dealing. These other individuals may be on opposite sides of the transaction or, as in the instant case, actually in an adversarial posture vis-a-vis the attorney's client. The duty which has been imposed by the Third District therefore puts the attorney between a rock and a hard place by requiring him to maneuvering between his own client and another individual whose interests may be in direct competition with those of his own client. This is a potentially impossible situation.

While attempting to balance the interests of one's own clients and concurrently examining that client's motivation and "moral correctness", an attorney comes perilously close to violating Disciplinary Rule 4-101 (which requires an attorney to preserve his client's confidences and secrets) and Ethical Consideration 5-1 (which requires an attorney to exercise his professional judgment within the bounds of the law, solely for his client's benefit and to remain free of compromising influences and loyalties). As the Code drafters noted, "Neither his personal interests, the interests of other clients, nor the desires of a third person should be permitted to dilute his loyalty to his client".

To create 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 own client. An attorney cannot comply with the Rules of Professional Conduct while placed in such a straightjacket. 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.

II. AN ATTORNEY DOES NOT OWE A DUTY OF DISCLOSURE OF FACTS AND CANNOT BE LIABLE FOR FRAUD TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY'S SERVICES AND WHOSE INTERESTS ARE ADVERSE TO THOSE OF THE ATTORNEY'S CLIENT.

The rationale behind the case law that has previously been cited in this brief is equally applicable to the remaining count of Zafiris' complaint. Additionally, the record indisputably shows that Zafiris did not establish the facts necessary to prevail on a claim for fraudulent misrepresentation. The essential elements of a fraudulent misrepresentation include: (1) a false statement concerning a specific material fact; (2) a showing that the representer knew or should have known that the representation was false; (3) an intent that the representer induced another to act on it; and (4) consequent injury to the party acting in justifiable reliance on the representation. Royal Typewriter Co. Div. of Litton Business Systems, Inc. v. Zerographic Supplies Corp., 719 Fed.2d 1092 (11th Cir. 1983); Hauben v. Harmon, 605 Fed.2d 920 (5th Cir. 1979); Jet Engine Support, Inc. v. Jet Research, Inc., 474 So.2d 337 (Fla. 3rd DCA 1985); Lance v. Wade, 457 So.2d 1008 (Fla. 1984). As the trial court correctly determined, Zafiris could not prove any of these elements and therefore could not recover on a theory of fraudulent misrepresentation.

First, the facts involved herein conclusively indicate that Moss at no time prior to or during the closing on the transaction in issue made any affirmative misrepresentations as to the ownership of the real property upon which the business was situated. Moss had no conversations with Zafiris prior to the closing of the deal. (R. 314-315) At the closing, no representations concerning ownership were made by any of the

parties present. (Jay Depo., 31, 50, 51, 64) Moss never prepared any instruments or documents depicting ownership, rather it was Zafiris' attorney, Jay, who was responsible for preparing the Deposit Receipt and Contract for Sale and Purchase of Business and the Business Lease. (Jay Depo., 31, 64) The only alleged conversation between Moss and Zafiris occurred subsequent to the closing after the documents had been prepared and executed and the checks exchanged. (R. 314-315; Jay Depo, 26)

Zafiris' attorney, Jay, stated that during his pre-closing telephone conversations with Moss, the ownership of the real estate involved herein was not discussed. (Jay Depo., 41) Jay further admitted Moss had merely <u>assumed</u> Krasner was the owner and that he never received any such representations from Moss. Thus, the record clearly establishes that there were never any affirmative misrepresentations concerning the ownership of the real property by Moss.

Second, while it is true that a knowing withholding of a material fact or the suppression of the truth may constitute fraud, a duty to reveal the material fact must be established for such a nondisclosure to constitute actionable fraud. Such a duty is determined by the relationship between the parties and exists only where the person making the representation is acting in a fiduciary capacity or where the other party does not have an equal opportunity to discover the material information. <u>Hauben v. Harmon</u>, <u>supra.</u> at 920; <u>In the Matter of Interair</u>

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Services, Inc., 44 B.R. 899 (M.D. Fla. 1984). This duty of disclosure does not exist where, as here, the parties are involved in adversarial or arm's length dealings and public records were readily available for review by Zafiris or his attorney. Where the parties are dealing at arm's length and the facts lie equally open to both parties, with equal opportunity of examination, mere nondisclosure is not fraudulent concealment. In the Matter of Interair Services, Inc., supra. at 903.

In the instant case, there was no fiduciary relationship between Moss and Zafiris. This was a classic, arm's length transaction with the information as to property ownership equally available to the buyer and/or his attorney; and, traditionally such information is gleaned and scrutinized by or on behalf of the buyer. No attempt was made to conceal said information, which was a matter of public record. There was no affirmative duty of disclosure imposed upon Moss as the attorney representing the seller of a business.

Third, although the record shows that Moss made no affirmative misrepresentations of the ownership of this property, even if it is assumed such statements were made, they could not and did not induce Zafiris to enter into the transaction. As previously noted, Moss only conversed with Zafiris' attorney, Jay, and not with Zafiris prior to the closing, and the ownership issue was not discussed. (Jay Depo., 40, 41; R. 458) It was not until after the closing, and the

transaction had been completed, did Moss ever speak with Zafiris. (R. 314, 315) Zafiris admitted that the transaction had taken place based upon terms that had been previously agreed upon prior to any alleged statements by Moss. Therefore, no inducement to enter into the transaction has been established by Zafiris.

Fourth, the person to whom the misrepresentation is made must have relied on it. This reliance placed on the representation by the other party must be justifiable under the circumstances. In other words, the party asserting the fraud must not only believe the representation to be true, but also must be so situated with respect to what is represented to have the right to depend on the truth of the representation made. In the Matter of Interair Services, Inc., supra.; Morris v. Ingraffia, 18 So.2d 1 (Fla. 1944). A misrepresentation must be in reference to some material matter unknown to the other party, either because he did not examine it, had no opportunity to become informed, or because his entire confidence was reposed in the representer. See: 27 Fla. Jur.2d, Fraud and Deceit, §49, 50, 51 and cases cited therein.

In this case, again assuming there had been a material misrepresentation and further assuming Zafiris had relied on such a misrepresentation, any reliance by Zafiris would have been unjustified. In the Matter of Interair Services, Inc., supra. at 903. The record indisputably establishes that there was no confidential or fiduciary relationship between Zafiris

and Moss. Further, Zafiris was represented by counsel of his choosing throughout the entire transaction. Zafiris' attorney prepared the majority of the documents that were ultimately executed, and the information regarding ownership of the real estate was readily available to Zafiris and/or his attorney prior to the closing date from the public records or other customary sources. Jay never inquired as to the true ownership of the property prior to the closing, nor did he even conduct a title search for the benefit of his client. (Jay Depo., 41, 50, 64, 65) Moreover, Jay admitted that he was traveling under <u>assumptions</u> he had made as to ownership. (Jay Depo., 64)

In the case of <u>Sherban v. Richardson</u>, 445 So.2d 1147 (Fla. 4th DCA 1984), the court did not find detrimental reliance on the part of a purchaser for a misidentification by the seller of his interest in certain stock. There the buyers' attorney reviewed all the documents defining the status of title before he prepared the purchase and sale agreement, which were ultimately executed by the parties, and again by both buyer and her attorney at the time of closing. The same result should occur here.

Finally, the damage element has not been met. Even if Zafiris relied on an alleged representations by Moss, Zafiris suffered no damage as a result of that reliance. Krasner and Sunburst Petroleum Industries, Inc. could well have obtained title to the real property prior to the time Zafiris could have ever exercised his option to purchase (i.e., not sooner than

thirty-six months from the date of the transaction). At the time of the closing, it is important to note that the real property was not being sold to Zafiris, and that only the business was being purchased. Moreover, the law is well settled that a misrepresentation must ordinarily relate to a past or existing fact to be the basis of a claim for relief sounding in fraud. A false statement amounting to a promise to do something in the future is not actionable fraud. This is true even if the representation was made to induce another to enter into the transaction. Sleight v. Sun & Surf Realty, Inc., 410 So.2d 998 (Fla. 3rd DCA 1982); 27 Fla. Jur.2d, Fraud and Deceit, §24 (1981).

One also cannot overlook the fact that within two weeks of the closing, Krasner offered to return all of Zafiris' money and terminate the business deal when Zafiris learned that Krasner was not the owner of the real property. Zafiris refused to accept Krasner's offer to rescind the business deal and chose to go on with the transaction and accept its benefits. (R. 374-375) He is now estopped from claiming injury and seeking damages against a third party to the transaction because he made this decision to remain in possession of the property and reap the rewards associated therewith.

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Because Zafiris has failed to prove every element for a cause of action for fraudulent misrepresentation (and a failure to prove even a single element would be fatal to his claim), the trial court correctly granted summary final judgment on this issue.

CONCLUSION

For the reasons set forth herein, it is respectfully suggested that the trial court correctly granted summary final judgment in favor of Marvin I. Moss on both counts of the Plaintiff/Respondent's complaint because of the absence of a fiduciary duty and the Plaintiff's failure to prove any of the essential elements to either cause of action set forth in the pleadings. It is further suggested that the Third District Court of Appeal erred in reversing this summary final judgment and remanding this cause for trial. Additionally, it is suggested that the decision of the Third District Court of Appeal directly and expressly conflicts with the well settled law of this state. It is respectfully requested that this Honorable Court quash the opinion of the Third District Court of Appeal and remand this cause to the trial court with directions to reinstate the summary final judgment in favor of Marvin I. Moss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed DECEMBER 16, 1987 to: TERRY S. NELSON, ESQ., Hoppe & Backmeyer, 810 Concord Building, 66 West Flagler Street, Miami, FL 33130.

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