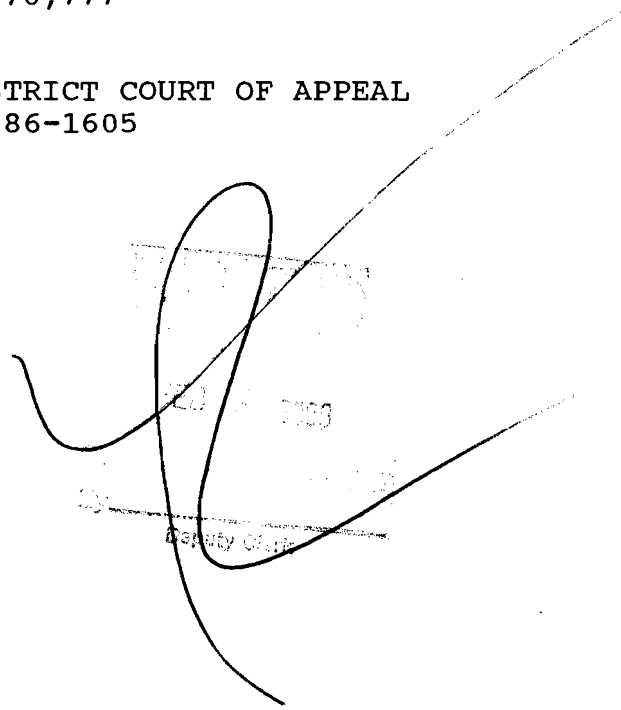
IN THE SUPREME COURT OF FLORIDA
CASE NO. 70,777

THIRD DISTRICT COURT OF APPEAL
CASE NO. 86-1605



MARVIN I. MOSS,

Petitioner,

vs.

ZAFIRIS, INC., a Florida corporation,

Respondent.

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

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ARGUMENT

There is absolutely no support in the record for Zafiris' contention that Moss acted fraudulently for his own gain. Moss was not a partner of his client, Krasner, in this business transaction and had no financial interest in the success or failure of the business venture.

The facts clearly show that the fraud allegations are nothing more than a paper issue made in an attempt to avoid the settled law that a non-client cannot recover from an attorney on a negligence theory. Florida law has uniformly held that a plaintiff cannot forestall the granting of a summary judgment by raising purely paper issues. Colon v. Laura, 389 S.2d 1070 (Fla. 3rd DCA 1980); Reflex N.V. v. UMET Trust, 336 S.2d 473 (Fla. 3rd DCA 1976); Florida Palm-Aire Corp. v. Delvin, 230 So.2d 26 (Fla. 4th DCA 1970). Because the prima facie evidence warranted summary judgment for Moss, the mere unsupported pleading of misrepresentation was correctly recognized by the trial court as being insufficient to raise any material issue to avoid summary judgment. Gary Brothers Construction Co. v. Florida Power & Light, 427 So.2d 318 (Fla. 5th DCA 1983).

It bears repeating that the record undisputedly establishes that the transaction contemplated between Zafiris and Krasner was solely for the purchase of a business (a Shell Oil franchise). There was no provision made in any of the sales document for a simultaneous sale of any real estate; the only document regarding any transfer of interest in the real property

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underlying this business was to give Zafiris an option to buy the real estate at some point in the future. There is nothing fraudulent in the fact that Krasner did not own the property at the time of the closing on the sale of the gas station franchise. The record shows Zafiris was in the process of negotiating to buy the land under the gas station, had in fact obtained financing for the purchase of this property, and would own it well in advance of the maturation of Zafiris' purchase option. (R. 427-429; Jay Depo. 57).

Zafiris acknowledges that he was represented by counsel of his own choosing throughout this transaction. He agrees that if his own attorney had thought ownership of the land was important to the closing of the franchise purchase, that his attorney had an independent obligation to check title. Zafiris admits his attorney was responsible for preparing the bulk of the closing documents on the franchise deal and even prepared documents normally drafted by the seller's attorney. Zafiris concedes that "if all things were equal, Marvin Moss would not owe a duty of disclosure". Zafiris then makes a quantum leap, unsupported by any fact or inference in the record, that Moss made affirmative misrepresentations to induce a closing of the franchise deal. The record shows that Moss' only pre-closing involvement was to speak by telephone with Zafiris' lawyer to confirm that Zafiris' lawyer, Jay, would prepare the documents. One certainly cannot seriously suggest that such

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innocuous activities constitute misrepresentation of ownership or an attempt to fraudulently induce the closing of the franchise transaction.

There is much touting by Zafiris that his attorney "took his fellow attorney's word" about the ownership of the property. This is only a smoke and mirrors argument. First, no sale of real estate was contemplated in this transaction. The fact that Zafiris and/or his attorney was content to do nothing more than call Bell Telephone Company and determine that the seller held the business license for the franchise is a concession that the parties contemplated only a sale of a business. Secondly, the argument overlooks the central fact that this sale of a gasoline franchise was a classic arms-length transaction. Had sale of the real estate underlying the business been included in the transaction, the facts concerning the ownership of the business and the underlying land were equally available to both parties by a simple and routine review of the abstract of title or a check of the courthouse property records. Zafiris has recognized that any obligation to search the real property records belonged to his own attorney; he has sued Jay for this alleged omission and that claim has been settled.

The cases cited by Moss have not been distinguished by Zafiris and are controlling. The case of Gold v. Wolkowitz, 430 So. 2d 556 (Fla. 3rd DCA 1983) cited by Zafiris is readily distinguishable for three reasons: First, the case involved a sale of real estate rather than only a sale of a gas station franchise. Secondly, the sellers in the Gold case submitted

fraudulently sworn affidavits reflecting no clouds on the title as an inducement to the sale. No such affidavits appear in this case. Thirdly, the record undisputedly establishes that there was no discussion between Moss and Zafiris' lawyer concerning the ownership of the property until after the time of the closing. (R. 324; Jay Depo. 56-57).

Moss again suggests that this case should be governed by the decision reached in the factually similar case of Angel, Cohen & Rogovin v. Oberon Investment N.V., 512 So.2d 192 (Fla. 1987). In that decision, this court said summary judgment is appropriate where an attorney renders professional services in favor of his client which are clearly not designed to benefit the opposition.

Again and again the courts of this State have said that in a multi-sided transaction an attorney only owes a duty to his own client, particularly where the various parties are represented by separate an independently retained counsel. These cases all hold that in the absence of an attorney/client relationship for the performance of legal services, the plaintiff cannot state a cause of action. See, for example: Southworth v. Crevier 438 So.2d 1011 (Fla. 4th DCA 1983).

Even if a claim for negligent and/or fraudulent misrepresentation could be stated against an attorney in the absence of privity, the record in this case clearly shows that the elements necessary to establish such a claim have not been proven. The record affirmatively shows that Moss had no dealings with Zafiris prior to closing and that Moss had no

pre-closing conversations with Zafiris' attorney concerning the ownership of the real estate. The fact Moss did not voluntarily disclose information regarding the property's ownership does not constitute fraud because the parties had an equal opportunity to discover such information. No statement by Moss served as an inducement to this transaction, because Zafiris admitted the transaction terms were agreed upon prior to any conversation with Moss. There could be no justifiable reliance on any statement by Moss because of the adversarial relationship between the parties.

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CONCLUSION

It is again 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 any fiduciary duty and the plaintiff's failure to prove any of the essential elements necessary to prove his claims. It is further suggested that the Third District Court of Appeal erred in reversing the summary final judgment and remanding this cause for trial. The basis for the Third District's decision directly and expressly conflicts with the 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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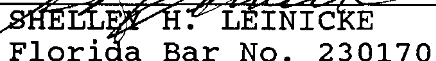
BY 
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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was furnished this 5th day of February, 1988 to TERRY S. NELSON, ESQUIRE, HOPPE, BACKMEYER & NELSON, 2nd Floor, Concord Building, 66 West Flagler Street, Miami, FL 33130.

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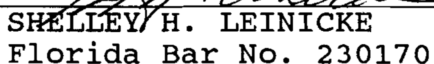
BY 

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