SUPREME COURT OF FLORIDA

FIRST FLORIDA BANK, N.A. etc.,

Petitioner,

vs.

MAX MITCHELL & COMPANY, P.A., et al.,

Respondents.

CASE NO. 74,034

AMICUS CURIAE BRIEF OF PANNELL KERR FORSTER IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT

Petitioner First Florida Bank, N.A. will be referred to as "First Florida Bank."

Respondent Max Mitchell & Company, P.A. will be referred to as "Max Mitchell."

C.M. Systems, Inc. will be referred to as "C.M. Systems."

Amicus curiae Pannell Kerr Forster will be referred to as "PKF."

Unless otherwise indicated, all emphasis is supplied by PKF.

STATEMENT OF THE CASE

PKF is an international accounting firm, and is the appellee in an appeal pending in the Fourth District Court of Appeal styled Vaughn Durham, et al. v. Pannell Kerr Forster, et al., case number **88-3012.** That case, as this one, involves the question of an accountant's liability to persons with whom the accountant is not in contractual privity. This Court has granted PKF leave to file a brief as amicus curiae in support of respondents' position on the question certified by the Second District Court of Appeal as being of great public importance:

> WHERE AN ACCOUNTANT FAILS TO EXERCISE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS OF HIS CLIENT AND WHERE THAT ACCOUNTANT PERSONALLY DELIVERS AND PRESENTS THE STATEMENTS TO A THIRD PARTY TO INDUCE THAT THIRD PARTY TO LOAN TO OR INVEST IN THE CLIENT, KNOWING THAT THE STATEMENTS WILL BE RELIED UPON BY THE THIRD PARTY IN LOANING TO OR INVESTING IN THE CLIENT, IS THE ACCOUNTANT LIABLE TO THE THIRD PARTY IN NEGLIGENCE FOR THE DAMAGES THE THIRD PARTY SUFFERS AS A RESULT OF THE ACCOUNTANT'S FAILURE TO USE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS, DESPITE A LACK OF PRIVITY BETWEEN THE ACCOUNTANT AND THE THIRD PARTY?

First Florida Bank, N.A. v. Max Mitchell & Co., **541** So.2d **155, 157** (Fla. 2d DCA **1989).**

SUMMARY OF ARGUMENT

Any retreat from the privity requirement as presently applied to accountants should redefine the scope of an accountant's liability for negligence to include only persons in contractual privity with the accountant and third party beneficiaries of accounting services contracts between the accountant and its clients. An accountant's liability should not be based on tort concepts of reasonable foreseeability.

First Florida Bank was neither in contractual privity with Max Mitchell nor a third party beneficiary of the accounting services contract between Max Mitchell and its client, C.M. Systems. Therefore, First Florida Bank has no cause of action for Max Mitchell's alleged negligence in auditing C.M. Systems, and the Second District Court of Appeal's decision should be affirmed.

ARGUMENT

FIRST FLORIDA BANK WAS NEITHER IN CONTRACTUAL PRIVITY WITH MAX MITCHELL NOR A THIRD PARTY BENEFICIARY OF THE ACCOUNTING SERVICES CONTRACT BETWEEN MAX MITCHELL AND ITS CLIENT, C.M. SYSTEMS, AND THUS FIRST FLORIDA BANK HAS NO CAUSE OF ACTION AGAINST MAX MITCHELL

The law in Florida as decided by the district courts of appeal "denies relief for a breach of due care by an accountant to third parties who are not in privity with that accountant, even though reliance by the third parties is known or anticipated." Gordon v. Etue, Wardlaw & Co., 511 So.2d 384, 389 (Fla. 1st DCA 1987). Simply stated, "an accountant is not liable to persons with whom there is no privity of contract." Id. Accord, First Florida Bank, N.A. v. Max Mitchell & Co., 541 So.2d 155 (Fla. 2d DCA 1989). The Gordon and First Florida Bank decisions follow a line of Florida cases that limit the scope of an accountant's liability to only those persons with whom the accountant is in contractual privity. E.g., Investment Corp. of Florida v. Buchman, 208 So.2d 291 (Fla. 2d DCA), cert. dismissed, 216 So.2d 748 (Fla. 1968); Mulligan v. Wallace, 349 So.2d 745 (Fla. 3d DCA 1977); Investors Tax Sheltered Real Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath, 370 So.2d 815 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 767 (Fla. 1980).

Petitioner does not contest the present state of the law in Florida on accountants' liability to third parties. Instead, petitioner proposes that this Court retreat from that law and apply to accountants the third party beneficiary principles applied by

this Court to abstractors and attorneys in First American Title Ins. Co. v. First Title Service Co. of the Florida Keys, 457 So.2d 467 (Fla. 1984), and Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987). Given the First American Title and Angel decisions, PKF believes that this Court may retreat from the privity requirement as presently applied to accountants. Any retreat, however, should stop at the law of third party beneficiaries.

In First American Title, a title insurer sued an abstractor for its negligent preparation of abstracts for the seller of two lots. The title insurer, relying on the abstracts, had issued owners' and mortgagees' title insurance policies to the buyers of the two lots and their lender. Although the complaint did not allege privity of contract between the title insurer and the abstractor, it did allege that when the abstractor prepared the abstracts it knew that the person relying on them would be a person other than the person ordering the abstracts.

This Court expressly rejected the petitioner's invitation to adopt a liability test for abstractors based on tort concepts of reasonable foreseeability: "[W]e decline to recognize an abstracter's liability in tort for negligence to any and all foreseeable injured parties." 457 So.2d at 468. According to this Court, the title insurer had a cause of action against the abstractor only "as a third-party beneficiary of the contract of employment of the abstracter." Id. This Court explained:

> While the policy arguments put forth by the petitioner . . . do not persuade us to adopt open-ended liability for negligence to any foreseeably relying persons, they do convince us

> that, when an abstract is prepared in the knowledge or under conditions in which an abstracter should reasonably expect that the employer is to provide it to third persons for purposes of inducing those persons to rely on the abstract as evidence of title, the abstracter's contractual duty to perform the service skillfully and diligently runs to the benefit of such known third parties. . . .
>
> . . .
>
> [W]hen an abstracter knows that his employer or customer is ordering the abstract for the use of a purchaser of the property, reliance on the abstract by the purchaser is "the end and aim of the transaction." We therefore hold that such a known third-party user is owed the same duty and is entitled to the same remedy as the one who ordered the abstract.
>
> . . .
>
> Where the abstracter knows, or should know, that his customer wants the abstract for the use of a prospective purchaser, and the prospect purchases the land relying on the abstract, the abstracter's duty of care runs . . . not only to his customer but to the purchaser.

Id. at 472-73.

Recently, this Court confirmed the strictly contractual nature of the cause of action against an abstractor allowed in First American Title: "In First American Title Insurance Co. we held that an abstracter's duty to an employer was contractual and declined on a negligence theory to extend the abstracter's liability to any and all who might foreseeably use and rely on the abstract.'' Erskine Florida Properties, Inc. v. First American Title Ins. Co. of St. Lucie County, Inc., 14 F.L.W. 271 (Fla. June 8, 1989).

In Anael, this Court considered the issue of attorneys' liability to persons not in contractual privity. There, the plaintiff sued a law firm alleging negligence in the preparation of

documents for a sale-purchase transaction in which the plaintiff sold property to the law firm's client. According to the plaintiff, the law firm knew of the plaintiff's involvement in the transaction as seller, and thus "should have foreseen the damage to [the plaintiff]." Observing that the plaintiff was not in contractual privity with the law firm nor a third party beneficiary of the legal services contract between the law firm and its client, this Court concluded that the plaintiff had no cause of action against the attorneys:

> 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. . . . 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 the area of will drafting. . . . Florida courts have refused to expand this exception to include incidental third-party beneficiaries. . . .
>
> In the instant case, [the plaintiff] was not the client of the [law firm] and thus lacked the requisite privity customarily required to maintain an action sounding in negligence against an attorney. Nor does the [plaintiff], as an incidental third-party beneficiary, fit within Florida's narrowly defined third-party beneficiary exception.

512 So.2d at 194. See also Moss v. Zafiris, Inc., 524 So.2d 1010, 1011 (Fla. 1988) (unless plaintiff has third party beneficiary standing, "lack of privity bars an action in negligence . . . against an attorney acting in his professional capacity for a client"); Arnold v. Carmichael, 524 So.2d 464, 466 n.1 (Fla. 1st DCA 1988) (negligence action against attorney can be maintained only if plaintiff is in privity with attorney or a third party

. beneficiary of contract between attorney and client); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633, 634 (Fla. 2d DCA), cert. denied, 376 So.2d 68 (Fla. 1979) (law firm not liable for negligence where plaintiff not in privity with law firm or "third party beneficiary of the contract between the [client] and the law firm"); McAbee v. Edwards, 340 So.2d 1167, 1169-70 (Fla. 4th DCA 1976) (attorneys are liable to their clients and to third party beneficiaries).

The United States Court of Appeals for the Eleventh Circuit recently opined: "[I]t seems clear that the principle of law . . . announced [in First American Title] would be extended to . . . audit contracts [between accountants and their clients] by the Florida courts." Seaboard Surety Co. v. Garrison, Webb & Stanaland, P.A., 823 F.2d 434, 436 (11th Cir. 1987). As this Court in First American Title, however, the Eleventh Circuit rejected the notion that accountants' scope of liability for negligence should be based on tort concepts of reasonable foreseeability:

> Seaboard Surety argues that although the Florida Supreme Court held that the plaintiffs in First American Title had "stated a cause of action as a third-party beneficiary of the contract," 457 So.2d at 468, the true nature of the cause of action created sounds in tort rather than contract principles. Seaboard Surety points out that the Florida Supreme Court cited Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) (per Cardozo, C.J.), and Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (per Cardozo, C.J.), with approval in its First American Title opinion. Seaboard Surety argues that the court's reliance upon these cases, which address tort actions for negligence, supports the conclusion that the cause of action created in First American Title has a tort basis.

. . .

> This argument fails for several reasons, all involving the essential contract nature of the Florida Supreme Court's decision in First American Title. First, . . . Seaboard Surety basically contends that the proper test for liability is not the existence of a contractual relationship between the parties, but rather the foreseeability of the plaintiff's reliance. But that argument was rejected by the Florida Supreme Court because all the cases cited in support of this erosion of contract theory involved bodily harm or injury caused by design defect. The privity doctrine had indeed been undermined in the area of products liability, the court explained, but not because reliance had now become the basic underpinning of contract law. The reason privity had lost its strength in the field of products liability was instead due to the need for the ultimate consumer to rely upon a distant manufacturer with whom no privity could ever be established for the safety and fitness of the product.
>
> The Florida Supreme Court also distinguished its decision from the result reached in A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). In A.R. Mover, the contractor was totally dependent upon the plans and specifications prepared by an architect or engineer and was unable to take steps independently to protect itself against the consequences of the negligence of the architect or engineer. First American Title, 457 So.2d at 471-72.
>
> Second, the [Florida Supreme] Court . . . expressly stated that these policy arguments "do not persuade us to adopt open-ended liability for negligence to any foreseeably relying persons." First American Title, 457 So.2d at 472.

Seaboard Surety, 823 F.2d at 436-37 (emphasis by court).

Thus, if this Court retreats from the present privity requirement, it should stop at the law of third party beneficiaries. It cannot, consistent with First American Title and Angel, redefine the scope of accountants' liability for

negligence in terms of reasonable foreseeability. Rather, accountants should be held liable only to persons in contractual privity and to third party beneficiaries. See Seaboard Surety, 823 F.2d at 436-37. Cf. Erskine Florida Properties, 14 F.L.W. at 271; Moss, 524 So.2d at 1011; Angel, 512 So.2d at 194; First American Title, 457 So.2d at 468-73; Arnold, 524 So.2d at 466 n.1; Amey, 367 So.2d at 634; McAbee, 340 So.2d at 1169-70.

In this regard, First Florida Bank would have a cause of action against Max Mitchell only if it were in contractual privity with Max Mitchell or a third party beneficiary of the accounting services contract between Max Mitchell and its client, C.M. Systems. As the Eleventh Circuit stated: "[A]ny third-party liability must be premised on a breach of the underlying contract between the defendant accountants and [their client]." Seaboard Surety, 823 F.2d at 436. See also First American Title, 457 So.2d at 468 (title insurer had cause of action against abstractor "as a third-party beneficiary of the contract of employment of the abstracter"); Arnold, 524 So.2d at 466 n.1 (absence of privity bars negligence claim against law firm unless plaintiff is a third party beneficiary "of the client's contract with the firm"); Amey, 367 So.2d at 634 (plaintiff had no cause of action against law firm where it was not in privity with firm "[or] a third party beneficiary of the contract between the [client] and the law firm").

Third party beneficiary standing is conferred only "[in] those situations where the provisions of the contract clearly show an intention primarily and directly to benefit the individual bringing

suit or to a class of persons to which he claims to belong as a third party beneficiary." Security Mutual Casualty Co. v. Pacura, 402 So.2d 1266, 1267 (Fla. 3d DCA 1981). Accord, American Surety Co. of New York v. Smith, 130 So. 440, 441-42 (Fla. 1930); Lesare v. Music & Worth Construction, Inc., 486 So.2d 1359, 1362 (Fla. 1st DCA 1986). "To qualify as an intended third-party beneficiary, it must be shown that the contracting parties intended to confer a direct and Primary benefit on the third party." Maryland Casualty Co. v. Department of General Services, 489 So.2d 54, 57 n.1 (Fla. 1st DCA), rev. dismissed, 494 So.2d 1151 (Fla. 1986). Only a primary beneficiary can sue as a third party beneficiary, American Surety, 130 So. at 441-42; Maryland Casualty, 489 So.2d at 57 n.1; Lesare, 486 So.2d at 1362; Security Mutual, 402 So.2d at 1267, and "an incidental beneficiary cannot." Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277, 279 (Fla. 1985). For example, in Ansel this Court held that as an "incidental third-party beneficiary," the plaintiff could not sue the law firm for negligence. Id. at 194. It did not "fit within Florida's narrowly defined third-party beneficiary exception." Id.

This critical distinction between primary and incidental beneficiaries has guided other courts in their consideration of accountants' liability to third parties. In Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 483 N.E.2d 110 (1985), the Court of Appeals of New York considered two cases, each involving accountants' liability to persons with whom the accountants were not in contractual privity.

In the first case, the plaintiffs alleged that the defendant accounting firm knew that the financial statements it prepared for its client would be utilized by the client to induce companies such as the plaintiffs to advance credit to the client; and that the accounting firm knew that the financial statements were actually being shown to the plaintiffs to induce them to extend credit to the client. New York's highest court, after analyzing the seminal case on accountants' liability, Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), and its progeny, held that the plaintiffs' allegations were insufficient to state a cause of action against the accounting firm. Credit Alliance, 483 N.E.2d at 119. The court explained that there was no allegation that the financial statements had been prepared primarily for the benefit of the third party plaintiffs:

> Though the complaint and supporting affidavit do allege that [the accounting firm] specifically knew . . . that plaintiffs were being shown the reports by [the client] in order to induce their reliance thereon, nevertheless, there is no adequate allegation of . . . a particular purpose for the reports' preparation. . . . While the allegations state that [the client] sought to induce plaintiffs to extend credit, no claim is made that [the accountins firm] was being employed to prepare the reports with that particular purpose in mind. . . . [Tlhere is no allegation that [the accountins firml . . . had specifically agreed with [its client] to prepare the report for plaintiffs' use.

Id.

Conversely, in the second case the plaintiff adequately alleged primary beneficiary status under the accounting services contract between the defendant accounting firm and its client, and thus stated a cause of action against the firm:

> By sharp contrast, in [the second case], the facts as alleged by [the plaintiff] clearly show . . . that a primary, if not the exclusive, end and aim of auditing [the] client . . . was to provide [the plaintiff] with the financial information it required.

Id. at 120.

The Court of Appeals of New York also used this primary beneficiary/incidental beneficiary analysis to distinguish Ultramares from Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922):

> In Ultramares, the accountants had prepared a certified balance sheet for their client to whom they provided 32 copies. The client, in turn, gave one to the plaintiff company. The latter, relying upon the misinformation contained in the balance sheet, made loans to the accountants' client who, only months later, was declared bankrupt. This court . . . refus[ed] to extend the accountants' liability for negligence to their client's lender, with whom they had no contractual privity. . . .
>
> The accountants' report was primarily intended as a convenient instrumentality for the client's use in developing its business. "[O]nly incidentally or collaterally" was it expected to assist those to whom the client "might exhibit it thereafter". (Id., at p. 183, 174 N.E. 441.) Under such circumstances, permitting recovery by parties such as the plaintiff company would have been to impose a duty upon accountants "enforce[able] by any member of an indeterminate class of creditors, present and prospective, known and unknown." (Id., at p. 184, 174 N.E. 441.)
>
> By sharp contrast, the facts underlying Glanzer bespoke an affirmative assumption of a duty of care to a specific party, for a specific purpose, regardless of whether there was a contractual relationship. There, a seller of beans employed the defendants who were engaged in business as public weighers. Pursuant to instructions, the weighers furnished one copy of the weight certificate to their employer, the seller, and another to the prospective buyer.

> In reliance upon the inaccurately certified weight, the buyer purchased beans from the seller and, thereby, suffered a loss.
>
> Explaining the imposition upon the weighers of a "noncontractual" duty of care to the buyer, this court held: "We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. The (buyer's] use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. [The seller] ordered, but [the buyer was] to use. The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. Thev sent a copy to the [buyer] for the very purpose of inducina action. . . .
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> The critical distinctions between the two cases were highlighted in Ultramares, where we explained: "In Glanzer v. Shepard . . . [the certificate of weight], which was made out in duplicate, one copy to the seller and the other to the buyer, recites that it was made by order of the former for the use of the latter . . . Here was something more than the rendition of a service in the expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the 'end and aim of the transaction.' . . . In a word, the service rendered by the defendant in Glanzer v. Shepard was primarily for the information of a third person, . . . and only incidentally for that of the formal promissee."

Credit Alliance, 483 N.E.2d at 116-17 (emphasis by court).

Here, First Florida Bank was neither in contractual privity with Max Mitchell nor a third party beneficiary of the accounting services contract between Max Mitchell and its client, C.M. Systems. In its complaint, First Florida Bank essentially alleges that "Max Mitchell . . . performed an audit of C.M. Systems, Inc.

for the fiscal year ended October 31, **1984,"** that Max Mitchell "failed to exercise reasonable care" in performing the audit, and that "the audited financial statements for C.M. Systems, Inc. for the period ended October 31, **1984** overstated assets, understated liabilities, and overstated net income." Complaint, ¶¶13-14. First Florida Bank does not allege that it was a primary third party beneficiary of the contract between Max Mitchell and its client, C.M. Systems, for auditing services. Complaint, ¶¶1-17. Ostensibly this is because the auditing services contract was entered into and performed "in **1984,"** long before First Florida Bank came into the picture (in April **1985)** as a prospective lender to C.M. Systems. Complaint, ¶5. Although Max Mitchell's alleged direct contact with and representations to First Florida Bank in April and May **1985,** subsequent to the execution and performance of the auditing services contract, raise the spectre of privity between Max Mitchell and First Florida Bank, that appears to have been foreclosed by the certified question as posed by the Second District Court of Appeal. First Florida Bank, 541 So.2d at 157.

CONCLUSION

The decision of the Second District Court of Appeal should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amicus Curiae Brief Of Pannell Kerr Forster In Support Of Respondents was served by mail this 20 day of June, 1989, upon each person listed on the attached Service List.

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