SUPREME COURT OF FLORIDA

FIRST FLORIDA BANK, N. A.
f/k/a FIRST NATIONAL BANK
OF FLORIDA,

Petitioner,

vs.

MAX MITCHELL & COMPANY, P.A.
and MAX W. MITCHELL,

Respondents.

Case No.: 74,034

DCA Case No.: 88-01128

PETITION FROM THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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INTRODUCTION

In the course of the Brief the following symbols will be used:

"R"	=	Record
"Bank"	=	First Florida Bank, N.A. f/k/a First National Bank of Florida, Petitioner, Appellant below, Plaintiff below
"C.M. Systems, Inc."	=	C.M. Systems
"Mitchell" or "Max Mitchell"	=	Mitchell or Max Mitchell Respondent, Appellee below, Defendant below
"Max Mitchell & Company, P.A."	=	Max Mitchell & Company, P.A. Respondent, Appellee below, Defendant below
"Hickman"	=	Steven Hickman, Vice President of First Florida Bank, N.A.

STATEMENT OF THE CASE

On May 22, 1986, the Bank filed this action in the Thirteenth Judicial Circuit. The Complaint contains three Counts against Max Mitchell and Max Mitchell & Company, P.A.: Count I for negligence; Count II for gross negligence; and Count III for fraud. The substance of the allegations were that Mitchell, an accountant, had negotiated a loan on behalf of his client C.M. Systems through the use of negligently audited financial statements on which the Bank had relied in extending credit to C.M. Systems. On August 7, 1987, Mitchell filed a Motion for Partial Summary Judgment on the negligence and gross negligence counts asserting that there was no privity between Mitchell and the Bank. (R.21) There were no affidavits filed in support of the motion. After a hearing on the Motion the Court entered an Order on December 16, 1987 granting the Summary Final Judgment as to Counts I and II of the Complaint based on Gordon V. Etue, Wardlaw & Co., P.A., 511 So.2d 384 (Fla. 1st D.C.A. 1987). (R.23-24) The Bank timely filed a Motion for Rehearing on December 28, 1987.(R.26-27) The Motion was heard on March 22, 1988 and the Court entered an Order denying the Motion for Rehearing on April 5, 1988.(R.32) Count III was dismissed on April 1, 1988.(R.31) On April 7, 1988, a Summary Final Judgment was entered pursuant to the Order Granting Summary Judgment.(R.33) Thereafter the Bank timely filed a Notice of Appeal on April 20, 1988 (R. 34). The parties submitted briefs to the Second District Court of Appeal which rendered its opinion on April 5, 1989 affirming the decision of the trial court and

certifying the following to this Court as a question 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?

STATEMENT OF THE FACTS

The Bank, Appellant, is a national banking corporation. Appellee Max Mitchell & Company, P.A., was a professional association engaged in the practice of public accountancy in the State of Florida and Appellee, Max W. Mitchell, was a Certified Public Accountant licensed to do business in the State of Florida who was President of Max Mitchell & Company, P. A. at all material times. The pertinent facts of this case are set forth in the record as follows (R. 1-6).

On or about April 3, 1985, Max W. Mitchell went to the principal office of the Bank in Tampa, Florida, and asked to see a Commercial Loan Officer for the purpose of negotiating a loan on behalf of his client C.M. Systems. Mitchell was introduced to Steven Hickman, a Vice President of the Bank. Mitchell advised Hickman that he was a Certified Public Accountant and asked whether the Bank would be interested in providing a line of credit to one of his clients, C.M. Systems, Inc., a General Contractor whose offices were in Holiday, Florida. Mitchell delivered to Hickman audited financial statements for C.M. Systems, Inc. for the fiscal years ended October 31, 1983 and October 31, 1984, which had been audited by Nielsen, Mitchell & Company in 1983 and Max Mitchell & Company, P. A. in 1984. Hickman advised Mitchell that he had another engagement and told Mitchell that he would call him and make arrangements to meet with him at a later date. Following the meeting with Mitchell on April 3, 1985, Hickman reviewed the audited financial statements of C.M. Systems, Inc.

which had been prepared and delivered to him by Max Mitchell. The October 31, 1984 audited statements indicated that C.M. Systems, Inc. had total assets of $3,474,336.00 and total liabilities of $1,296,823.00. It did not indicate that C.M. Systems, Inc. owed money to any bank.

After Hickman reviewed the audits of C.M. Systems performed by Max Mitchell he met with Michael J. Scarfia, president of C.M. Systems, Inc. and Mitchell at the offices of C.M. Systems on April 16, 1985. During that meeting Scarfia referred all questions concerning the financial condition of C.M. Systems to Max Mitchell. Mitchell stated that as of April 16, 1985, C.M. Systems was not indebted to any bank. At the conclusion of the meeting Mitchell asked Hickman to consider a $500,000.00 line of credit for C.M. Systems, Inc.

After April 16, 1985 and through and including May 23, 1985, Hickman had numerous discussions with Mitchell concerning various line items in Mitchell's audit of C.M. Systems, Inc. for the fiscal year ended October 31, 1984 and concerning the financial condition of C.M. Systems. Mitchell represented that he was thoroughly familiar with the financial condition of C.M. Systems including Terramar Mining Corporation. Mitchell represented that the principal owner of Terramar Mining Corporation was a trust of which Scarfia was trustee.

On May 23, 1985, Mitchell met with Hickman to further discuss the company's financial statements. Mitchell explained in detail the various projects that C.M. Systems, Inc. was engaged in. Hickman asked Mitchell for interim financial statements for the

period which ended on April 30, 1985 and Mitchell advised that they would not be available for several more weeks. Hickman asked Mitchell if there had been any material changes in the company's financial condition since October 31, 1984 and Mitchell said that he was not aware of any material changes.

On May 30, 1985, relying on the representations made to him by Max Mitchell and upon the information contained in the audited financial statements delivered to Hickman by Mitchell issued by Max Mitchell & Company, P. A., Hickman presented a request for a $500,000.00 unsecured line of credit to C.M. Systems to the Officers' Loan Committee of the Bank. The Officers' Loan Committee, after considering among other things the presentation of Hickman and the audit report issued by Max Mitchell & Company for October 31, 1984, approved the aforesaid loan request and on June 6, 1985, C.M. Systems, Inc. executed and delivered a promissory note in the amount of $500,000.00. Thereafter in July and August, 1985 C.M. Systems, Inc. borrowed the entire amount of the $500,000.00 credit line which it never repaid.

Subsequently the Bank discovered that Mitchell in his audits had failed to disclose among other things the following financial information of C.M. Systems for the fiscal year ended October 31, 1984:

(1) that C.M. Systems owed Citizens Federal Savings & Loan Association $100,000.00 on October 31, 1984;

(2) that C.M. Systems owed NCNB National Bank of Florida in excess of $150,000.00 on a loan secured by a condominium as of October 31, 1984;

(3) that C.M. Systems owed Bank of Holiday $500,000.00 on October 31, 1984;

(4) that by April and May of 1985 material changes had occurred in the balance sheet of C.M. Systems;

(5) that the credit line C.M. Systems had with NCNB was fully drawn and totalled $400,000.00 by May of 1985;

(6) that C.M. Systems had applied for a $200,000.00 credit line with Freedom Savings;

(7) that C. M. Systems had established a $400,000.00 credit line with Southeast Bank, N.A. in January of 1985;

(8) that Max W. Mitchell had a substantial ownership interest in Terramar Mining Company;

(9) that the audited financial statements for C.M. Systems for the period ended October 31, 1984 overstated assets, understated liabilities, and overstated net income.

C.M. Systems defaulted on its loan and the Bank filed this action for negligence, gross negligence and fraud against Max Mitchell and Max Mitchell & Co., P.A.

ISSUE PRESENTED ON APPEAL

Whether the District Court erred in affirming the trial court's order granting Mitchell's Motion for Summary Judgment on Counts I and II of the Complaint which were for negligence and gross negligence. The Second District Court of Appeal has certified the following as a question 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?

SUMMARY OF THE ARGUMENT

The Defendant Max Mitchell audited the financial statements of C.M. Systems for the years ended 1983 and 1984. He appeared at First Florida's offices on April 3, 1985 and acting in his capacity as an agent of his client, C.M. Systems, negotiated a loan to C.M. Systems from the Bank. The financial statements which Mitchell audited and which the Bank relied on in making the loan to C.M. Systems were negligently prepared in that among other things Mitchell's audits failed to disclose that the assets of C.M. Systems were overstated and that the liabilities were understated. Mitchell intended by delivering the financial statements of his client which he had audited to the Bank and negotiating a loan on behalf of his client with the Bank to have the Bank rely on those statements and his oral representations concerning the creditworthiness of C.M. Systems in extending credit to his client C.M. Systems.

The law as established by this Court permits actions by third parties even in the absence of privity for negligence and gross negligence when reliance was known or anticipated by the person who made the negligent misrepresentation or for whose benefit the service was performed. In First American Title Insurance Company, Inc. v. The First Title Service Company of the Florida Keys, Inc., 457 So.2d 467, 473 (Fla. 1984), this Court held that the purchaser of real property who had relied on an abstract prepared by the seller's abstractor had a cause of action "where the purchaser's

reliance was or should have been known to the abstractor." Likewise, in Angel, Cohen, and Rogovin v. Oberon Investment, N.B., 512 So.2d 192 (Fla. 1987), this Court held that privity was not required in a negligence action against an attorney when it was the "apparent intent of the client to benefit a third party". Id. at 194. Similarly in Miller v. Sullivan, 475 So.2d 1010 (Fla 1 D.C.A. 1975), the First District Court of Appeal held that the seller's realtor is responsible to the buyer even in the absence of privity for negligence misrepresentations about the size of a home.

The allegations of the complaint clearly establish that Mitchell delivered the financial statements of his client, C.M. Systems, which Mitchell had negligently audited to the Bank at his client's request and negotiated the loan on behalf of his client with the intention that the Bank would rely on the negligently prepared financial statements in making its decision to lend money to his client. The fear of "worldwide liability" for accountants as a professional group which was expressed in Gordon v. Etue, Wardlaw & Co., P.A., 511 So.2d 384 (Fla. 1st D.C.A. 1987) and Investment Corp. of Florida v. Buchman, 208 So.2d 291 (Fla. 2d D.C.A.) cert. dismissed, 216 So.2d 748 (Fla. 1968) and in the seminal case of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) is simply not present in this case. In this case, the court is not confronted with a factual situation in which audited financial statements are distributed to and relied upon by an indeterminable class of persons who might then make claims against the accountant for an indeterminate amount. In this case,

the decision before this Court is merely whether an accountant who undertakes to negotiate a loan on behalf of his client and uses financial statements which that accountant has negligently audited to induce the Bank to make a loan to his client should be held accountable for his negligence or gross negligence to the Bank which relied on those negligently prepared statements at his direct request. As stated, this Court has already held that abstractors and attorneys whose negligence harms intended beneficiaries of their clients are liable to the intended beneficiaries even in the absence of privity. The First District Court of Appeal reached the same result in holding realtors responsible to intended beneficiaries for negligent misrepresentations. To allow accountants to be beneficiaries of a different standard would create an unfair system of classification between professionals within this state without any rational basis. Moreover, an accountant's function in its role as auditor is to provide assurance to third parties that the financial statements prepared by the accountant's client and reviewed by the accountant accurately reflect the financial condition of the client. The auditor's function is not to present his client's case in the most favorable light like an attorney. As the United States Supreme Court pointed out in United States v. Arthur Young & Company, 465 U.S. 805 (1984), "the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as the investing

public". The Bank extended credit to Mitchell's client relying on Mitchell's direct assurance as auditor and as a third party watchdog that he had inspected the books and records of C.M. Systems and that the financial statements which he presented to the Bank accurately reflected the financial condition of C.M. Systems. By delivering the statements to the Bank and negotiating the loan, Mitchell induced the Bank to rely on the statements he audited. The Bank was clearly an intended beneficiary of the financial statements Mitchell audited for C.M. Systems and as an intended beneficiary the Bank has a claim against Mitchell for negligence and gross negligence regardless of whether it had contractual privity with him.

Finally, Florida law has always permitted an action against an accountant for gross negligence and the trial court's dismissal was inconsistent with existing law.

ARGUMENT

I

AN ACCOUNTANT WHO PREPARES AND DELIVERS NEGLIGENTLY AUDITED FINANCIAL STATEMENTS ON BEHALF OF HIS CLIENT TO AN INTENDED BENEFICIARY OF HIS CLIENT AND WHO NEGOTIATES A LOAN FOR HIS CLIENT USING THOSE NEGLIGENTLY AUDITED FINANCIAL STATEMENTS IS LIABLE TO THE INTENDED BENEFICIARY FOR FAILURE OF THE ACCOUNTANT TO EXERCISE REASONABLE CARE REGARDLESS OF WHETHER THE ACCOUNTANT HAS CONTRACTUAL PRIVITY WITH THE BENEFICIARY.

Mitchell, as agent of his client C.M. Systems, negotiated a loan on its behalf with the Bank by using financial statements which Mitchell had negligently audited which contained inaccurate financial information. Florida courts including this Court, have consistently held that parties which are intended beneficiaries have causes of action against parties who fail to exercise reasonable care in connection with the rendition of services for their benefit. In First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984), this Court in holding that an abstractor can be held liable for negligent preparation of an abstract stated:

> "Where the abstractor 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 abstractor's duty of care runs, as we have said, not only to his customer but to the purchaser. Moreover, others involved in the transaction through their relationship to the purchaser - such as lender-mortgagees, tenants and title insurers - will also be protected where the purchaser's reliance will be known or should have been known to the abstractor.

[Emphasis Added] Id. at 473.

This Court reached the same result in Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987), when the court acknowledged that the rule of privity in actions against attorneys had been relaxed "where it is the apparent intent of the client to benefit a third party". Id. at 194. In Angel, the court cited with approval the case of Lorraine v. Grover, Ciment, Weinstein, & Staubert, P.A., 467 So.2d 315 (Fla. 3d D.C.A. 1985). In Lorraine, the court recognized that an intended beneficiary of a will has a claim in negligence against the attorney if the attorney's negligence in drafting the will or having it properly executed directly results in a loss to the beneficiary. In such cases, the court recognized that it is not necessary for the beneficiary to be in contractual privity with the attorney. See also DeMaris v. Asti, 426 So.2d 1123 (Fla. 3d D.C.A. 1983) and McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th D.C.A. 1976). Realtors are also responsible in negligence for negligent misstatements concerning a home which the buyer ultimately purchased in reliance on the representations even though the buyer was not in contractual privity with the realtor. See Miller v. Sullivan, 475 So.2d 1010 (Fla. 1st D.C.A. 1985). Of course, engineers, architects, and manufacturers of defective products have long ago lost defenses to foreseeable users of products in tort claims based on contractual privity. See Audlane Lumber Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333, 335 (Fla. 2d D.C.A. 1964), A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), and West v. Caterpillar Tractor, 336 So.2d

80 (Fla. 1976). Accountants have historically occupied an exhalted position which has insulated them from claims for negligence to third parties. The underpinnings of this position go back to a title abstract case, Sickler v. Indian River Abstract & Guaranty Company, 142 Fla. 526, 195 So. 195 (Fla. 1940), in which this Court held that an abstractor was not liable to a purchaser of real property for his negligence in preparing the abstract. The foundation of that decision was based on the New York case of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). Ultramares held that a certified public accountant was not liable to a financial institution which lent money to a company in reliance upon the accountant's certified financial statement. In that case the loan was negotiated by the accountant's client without the knowledge of the accountant. The accountant never knew that the financial statements which he had audited would be used by the client to obtain a loan from the plaintiff, the Ultramares Corporation and the accountant was never involved in the loan negotiations between Ultramares Corporation and his client. The New York Court of Appeals was concerned about creating a liability for that accountant in unlimited amounts to parties that the accountant was not aware of for transactions that the accountant was not involved in. The Court of Appeals in Ultramares stated:

> If liability [to third parties] for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so expensive as to enkindle doubt whether a

flaw may exist in the implication of a duty that exposes to these consequences. [Citations omitted.]

This Court expressed precisely the same concern for abstractors when it overruled Sickler in First American Title Insurance Company, Inc. v. First Title Service Co. of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984).

The Second District Court of Appeals reluctantly held in Investment Corp. of Florida v. Buchman, 208 So.2d 291 (Fla. 2d D.C.A. 1968) that an accountant could not be held liable in negligence for the preparation of a certified financial statement it knew would be relied upon by a third party. The Second District Court of Appeals said that it had no choice in view of the decision of this Court in Sickler v. Indian River Abstract & Guaranty Company, 142 Fla. 526, 195 So.2d 195 (Fla. 1940). The First District Court of Appeal in Gordon v. Etue, Wardlaw & Co., P.A., 511 So.2d 384 (Fla. 1st D.C.A. 1987) reached the same conclusion based on Buchman but certified the question to this Court for review as a matter of great public importance. The case was not appealed and so the issue was not decided by this Court. The Second District Court of Appeal has now been confronted with similar facts in this case and while affirming based on Buchman has certified to this Court the question of whether an accountant can be liable to a known and intended beneficiary for its negligence in the absence of privity of contract. Based on this Court's rulings in First American Title and Angel, this Court should rule that there is a cause of action by an intended beneficiary against an accountant when the accountant presented

the negligently audited financial statements to the Bank and negotiated a loan with the Bank based on that negligently prepared information.

The concern of Justice Cardozo in the seminal decision in Ultramares that the accountant could be held liable in "an indeterminate amount for an indeterminate time to an indeterminate class" is simply not present in this case. Neither is the specter of worldwide liability for accountants present that concerned the First District Court of Appeal in Gordon. In the question certified to this Court and in this case, the accountant delivered the negligently prepared financial statements to the Bank with the express knowledge and intention that the Bank would rely on those financial statements and would grant a loan to the accountant's client based on the information contained in the financial statements that the accountant had audited. The accountant negotiated with the Bank directly, presented the information to the Bank directly, and answered all questions about the financial condition of his client. The facts are diametrically opposed to the facts outlined in Ultramares and therefore the concerns expressed in that case simply do not exist in this case. If this Court holds that First Florida has a claim against Mitchell for negligence in the absence of privity of contract, it will not expose accountants "to liability in an indeterminate amount for an indeterminate time to an indeterminate class". This Court will only expose accountants to liability to those persons that the accountant intended to rely on his audits. The damages the accountant would be responsible for is the amount of the loan

which the accountant knew at the time he negotiated the loan. By relaxing the privity requirement to permit claims by beneficiaries with whom the accountant directly negotiated, the accountant is only responsible to those parties to which it delivered the financial statements and to which it answered questions about the financial condition of their clients and to no one else. Such a holding would be consistent with this Court's holding in First American and Angel.

Such a holding would also be consistent with the holding of the Court of Appeals of New York in Ultramares which was explained by that court in European American Bank & Trust Company v. Strauqhs & Kaye, 65 N.Y. 2d 536, 483 N.E. 2d 110 (N.Y. 1985). In explaining Ultramares, the New York Court of Appeals in European American adopted the following three part test in determining whether accountants could be held liable to creditors in the absence of contractual privity for the issuance of inaccurate financial reports. The court stated:

> Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely: and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evidences the accountants' understanding of that party or parties' reliance.

483 N.E. 2d at 118.

In European American the court went on to explain that "while these criteria permit some flexibility in the application of the doctrine of privity to accountants' liability, they do not

represent a departure from the principles articulated in Ultramares, ... but, rather, they are intended to preserve the wisdom and policy set forth therein." Id. at 118. Ultramares as explained by European American would permit the causes of action for negligence and gross negligence asserted by First Florida against Mitchell. Mitchell knew the financial reports were to be used by the Bank for the purpose of lending money to his client since he personally delivered the financial statements to the Bank, negotiated the loan, and answered all questions the Bank had about the financial statements. Since Mitchell requested the loan on behalf of his client and delivered the financial statements to the Bank, it was clearly Mitchell's intent that the Bank rely on the financial statements in considering a loan to his client. The delivery of the statements to the Bank by Mitchell, his negotiation of the loan on behalf of his client, and his answers to inquiries by the Bank concerning the financial condition of this client clearly link Mitchell to the Bank within the meaning of European American.

Moreover, Section 552, Restatement (Second) of Torts, would also impose liability on Mitchell for his alleged negligence. That section states:

> **5552. Information Negligently Supplied for the Guidance of Others**
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Mitchell would clearly be liable in negligence even in the absence of privity of contract since he in the course of his employment as an accountant for his client negotiated the loan with the Bank on his client's behalf and in connection therewith supplied the Bank with financial statements that he had audited intending for the Bank to rely on that information.

Finally, it should be remembered that the auditor's work is performed not primarily for his client like a doctor or a lawyer. As the United States Supreme Court so aptly pointed out in United States v. Arthur Young & Company, 465 U.S. 805 (1984), the accountant represents a distinct role in society. An attorney is "a confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial

status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes allegiance to the corporation's creditors and stockholders, as well as the investing public."

The Bank certainly does not suggest that an accountant is a guarantor of the accuracy of information contained in certified financial statements. However, Banks should certainly be entitled to rely on statements delivered to them by accountants who request loans for their clients and have the right to expect that the accountant's examination is in accordance with the standard of care required in its profession. To hold otherwise would create a classification system between different professional groups which has no rational basis. The very purpose of an accountant auditing and certifying financial statements of its clients is to provide reassurance to creditors and stockholders that the accountant has performed an audit in accordance with required professional standards and that in the accountant's opinion the financial statements fairly present the financial condition of the company audited. A holding that an accountant is responsible for its negligence in preparation of audited financial statements to parties whom it knows and intends will rely on their work and statements merely recognizes the existing law as set forth in First American and Ultramares as explained in European American.

II

UNDER FLORIDA LAW A LENDER WHICH RELIED ON FINANCIAL STATEMENTS AUDITED BY A CERTIFIED PUBLIC ACCOUNTANT HAS A CAUSE OF ACTION FOR GROSS NEGLIGENCE AGAINST THE ACCOUNTANT FOR HIS GROSS NEGLIGENCE IN PERFORMING THE AUDITS REGARDLESS OF WHETHER THE BANK I8 IN PRIVITY WITH THE ACCOUNTANT

The trial court erred in granting summary judgment on Count II because under Florida law an action for gross negligence states a cause of action regardless of whether there is privity of contract.

The trial court entered summary judgment on Count II which was based on an action for gross negligence. It is clear under Florida law that privity of contract is not required in an action based on gross negligence. Canaveral Capital Corporation v. Bruce, 214 So.2d 505 (Fla. 3d D.C.A. 1968). In that case, the plaintiff alleged that a certified public accountant had been negligent in the preparation of a financial statement for lenders on which the plaintiff relied in making a loan. The issue was whether the verdict was against the manifest weight of the evidence. The court affirmed the trial court's denial of a motion for judgment notwithstanding a verdict and for new trial stating that "assuming negligence as alleged on the part of the accountant, his liability to a third party with whom he was not in privity (cites omitted) would require a showing on the part of the plaintiff third party that the accountant had been guilty of gross negligence...," [emphasis added] 214 So.2d at 505.

In addition, in Investors Tax Sheltered Real Estate Ltd. v. Laventhol, Krekstein, Horwath & Horwath, 370 So.2d 815 (Fla. 3d D.C.A. 1979) the Third District Court of Appeal held that the accounting firm could not be held liable to an investing enterprise with whom it was not in privity absent showing that accounting firm had been guilty of gross negligence.

In light of the foregoing case law, the court clearly erred in granting the Motion for Partial Summary Judgment as to Count II of the Complaint since all existing case law holds that there is a cause of action for gross negligence regardless of privity.

CONCLUSION

Accountants under Florida law should be treated the same as abstractors, realtors, and lawyers. Therefore, when an accountant delivers financial statements which he has audited on behalf of a client to a bank with the intention that the bank will rely on the financial statements and make a loan to his client, the accountant should be liable to the bank for his failure to exercise ordinary care in the audit of his client regardless of whether the accountant is in contractual privity with the bank. *Such* a ruling is consistent not only with the manner in which abstractors, realtors, and lawyers have been treated under Florida law but, in addition, is consistent with the Second Restatement of the Law of Torts and the decision of the Court of Appeals in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), as explained in European American Bank & Trust Company v. Straughs & Kaye, 483 N.E. 2d 110 (N.Y. 1985) which has in the past been relied on by

this Court in formulating Florida law. Count II of the Complaint stated a cause of action for gross negligence which has always been recognized even in the absence of privity. See Canaveral Capital Corporation v. Bruce, 214 So.2d 505 (Fla. 3d D.C.A. 1968) and Investors Tax Sheltered Real Estate Ltd. v. Laventhol, Krekstein, Horwath & Horwath, 370 So.2d 815 (Fla. 3d D.C.A. 1979). This Court should reverse the Summary Judgment entered against the Bank on Counts I and II of the Complaint and remand the case back to the Circuit Court for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant has been furnished by U. S. Mail to John N. Jenkins, Esq., The Bayshore Bldg., Suite 201 , 2907 Bay to Bay, Tampa, FL 33629-8154 this 18 day of May, 1989.

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