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SUPREME COURT OF FLORIDA

FILED
JUN 23 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

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 RESPONDENTS

JOHN N. JENKINS, ESQUIRE
DEBRA L. HINNERS, ESQUIRE
MARLOW, SHOFI, SMITH, HENNEN,
SMITH & JENKINS, P.A.
P.O. Box 10430
Tampa, FL 33679-0430
(813) 831-5599
Attorneys for Respondents
Fla. Bar Nos: 147552
602590

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OTHER CITATIONS

SYMBOLS

"R"	–	Record
"Bank"	–	First Florida Bank, N.A. f/k/a Firs National Bank of Florida, Petitioner, Appellant below, Plaintiff below
"C.M. Systems"	–	C.M. Systems, Inc.
"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

Respondents agree with the Petitioner's statement of the case, but will clarify the fact that Count III of the Complaint for intentional fraud was voluntarily dismissed by the Petitioner. (R. 31).

STATEMENT OF THE FACTS

To avoid redundancy, the Respondents will only point out the facts that it questions or disagrees with the Petitioner in its statement of the facts. The Respondents are without knowledge as to the precise information that Hickman presented to the Officers' Loan Committee of the Bank regarding C.M. Systems' request for credit. (R. 19). Moreover, the Respondents are without knowledge as to which information the Officers' Loan Committee considered in making their determination to approve C.M Systems' loan request. (R. 19).

The Respondents do not have any knowledge that C.M Systems borrowed the entire $500,000 credit line, which it allegedly never repaid. (R. 19). Moreover, the Respondents did not have any control or direction over the repayment of the loan. Additionally, the Respondents are without knowledge as to C.M Systems' alleged indebtedness to various financial institutions. (R. 19). Furthermore, the Respondents assume that the bank performed numerous credit checks that are available to financial institutions before establishing a $500,000 unsecured credit line for C.M Systems, and thus, the Respondents are without knowledge as to why any independent credit inquiry requested by the bank failed to disclose C.M Systems' alleged indebtedness to other financial institutions.

SUMMARY OF ARGUMENT

The trial court correctly entered a summary judgment in favor of the Respondents which was appropriately affirmed by the Second District Court of Appeal. Florida law provides that a third party in the absence of privity cannot bring an action in negligence or gross negligence against an accountant, even if reliance by a third party is known or anticipated. The privity standard prevents a morass of unlimited lawsuits against accountants by an infinite and undefined class of potential plaintiffs.

Any liability of the accountant for negligence is one that is bound by the contract, and is to be enforced by the contracting parties. The record evidence clearly establishes that the Petitioner is not an intended beneficiary. The record confirms that the primary and exclusive end and aim of the Respondents' audit of C.M. Systems was not to provide the Petitioner with financial information. Moreover, the auditing services contract between C.M. Systems and Respondents did not intend to confer a direct and substantial benefit upon the Petitioner.

The instant case is clearly distinguishable from products liability situations. In products liability cases the consumer has no other alternative but to rely on the manufacturer's assurance that the product is safe. However, the Petitioner has numerous alternatives, including a variety of independent credit inquiries that can be performed regarding potential borrowers.

The privity standard, the majority rule nationwide, remains sound and this court should not embrace the Restatement (Second)

of Torts §552 or the foreseeability standards. Furthermore, the Restatement standard would be inapplicable in the instant case because there is not any evidence that the purpose for the preparation of the 1983 and 1984 audited financial statements was to obtain credit from the Petitioner in 1985. Additionally, Florida has firmly rejected applying the broad standard of foseseeability.

The Petitioner has wholly failed to present any compelling reasons, either factual or legal to change existing Florida law. If tort reform is necessary regarding accountants' liability, it should be left to the Legislature to make any changes. This court should not embrace the Petitioner's attempt to expand Florida law to allow recovery for an infinite and undefined class, the ramifications would be catastrophic.

ARGUMENT

I. FLORIDA LAW SHOULD CONTINUE TO REQUIRE PRIVITY BEFORE A PARTY CAN BRING AN ACTION IN NEGLIGENCE AGAINST AN ACCOUNTANT, EVEN IF RELIANCE BY THAT PARTY IS KNOWN OR ANTICIPATED BY THE ACCOUNTANT

Consistently, Florida courts have held that a third party in the absence of privity cannot bring an action in negligence or gross negligence against an accountant, even if reliance by a third party is known or anticipated. The Second District Court of Appeal in Investment Corp. of Florida v. Buchman, 208 So.2d 291 (Fla. 2d DCA 1968), cert. dismissed, 216 So.2d 748 (Fla. 1968), held that in the absence of fraud, certified public accountants are not liable to a known third party for negligence in the preparation of a certified financial statement even when the certified public accountants had knowledge, at the time of the preparation, that the third party intended to rely on the statement. Id. at 293-94. The Buchman opinion is based on solid legal precedent including Sickler v. Indian River Abstract & Guarantv Co., 142 Fla. 528, 195 So.195 (Fla. 1940), State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (N.Y. 1938), and Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (N.Y. 1931).

In Sickler, which addressed the issue of liability of a title abstracter to third parties, this court found that an action against an abstracter to recover damages for negligence in making or certifying an abstract of title, does not sound in tort, but rather, must be based on contract principles. Sickler at 197. Furthermore, an abstracter's liability extends only to the person

employing him, or to one who is a party or privy to the contract of employment. Id. at 198. In the instant case, the record evidence clearly establishes that the Petitioner was not a party or privy to any contract between the Respondent and C.M. Systems. Contrary to the Petitioner's assertion, First American Title Insurance Co., Inc. v. First Title Service Co. of the Florida Kevs, Inc., 457 So.2d 467 (Fla. 1984), did not overrule Sickler. Rather, the First American court, relying on Sickler and Ultramares, held that an abstracter's liability to an injured third party only occurs with respect to the negligent performance of his or her contractual duty. [emphasis added] Id. at 471. Furthermore, the First American court declined to expose abstracters to liability to any person who foreseeably relies on a negligently prepared abstract to his detriment. Id. at 472.

The record in the instant case demonstrates that the Respondent and C.M. Systems did not contemplate that the Petitioner would be a third party beneficiary of any agreement between the two. Additionally, the record evidence clearly establishes that the 1983 and 1984 audited financial statements were completed long before C.M. Systems requested a line of credit from the Petitioner in April, 1985. Furthermore, there is not even an allegation in the record that the audited financial statements were prepared with the intention that the Petitioner would rely upon them. Thus, the record confirms that the end and aim of the audited financial statements was not to secure a line of credit from the Petitioner.

Justice Cardozo in Ultramares aptly stated regarding an

accountant's liability that:

> "If liability 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 a liability in an indeterminant amount for an indeterminant time to an indeterminant class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." Id. at 444.

In Ultramares, the defendants knew that in the usual course of business a balance sheet would be shown by the plaintiffs to banks, creditors, stockholders, purchasers or sellers, as the basis of financial dealings. Id. at 442. Even so, Justice Cardozo held that any liability of the accountant for negligence is one that is bound by the contract, and is to be enforced between the parties by whom the contract has been made. Id. at 448. As in Ultramares, the primary purpose of the audit in the instant case was for use by C.M Systems. The legal principles in Ultramares, as expressed by Justice Cardozo, are applicable to the instant case and should not be expanded as the Petitioner suggests. Following the Petitioner's argument to its conclusion results in unlimited liability for the accounting profession.

Justice Cardozo specifically distinguished Ultramares from Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (N.Y. 1922). In Glanzer, Justice Cardozo held that a public weigher owed a duty to a buyer who was furnished a copy of his weight certificate. Id. at 276. Glanzer is distinguishable from Ultramares in that the "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." Id. at 275. The transmission of the certificate was not one possibility among many. Ultramares at 445. In the instant case, third party use of the audited financial statements was not the end and aim of the transaction. The audited financial statements were not completed with the Petitioner in mind.

In State Street, the court relying on Ultramares, held that in the absence of a contractual relationship or its equivalent, accountants cannot be held liable for ordinary negligence in preparing a certified balance sheet even though they are aware that the balance sheet will be used to obtain credit. Id. at 418. In the instant case, there is a complete absence of any type of contractual relationship between the Petitioner and the Respondents, even though the Petitioner, without any factual or legal basis, boldly proclaims itself as an intended beneficiary. The principle that an accountant is not liable to persons with whom there is no contractual relationship is the common thread running through the aforementioned cases and is applicable to the instant case. See Gordon v. Etue, Wardlaw & Co., P.A, 511 So.2d 384 (Fla. 1st DCA 1987) (where the court held that an accountant is not liable to persons with whom there is no privity of contract). Interestingly, the Petitioner glosses over this very important issue.

The Petitioner relies on Canaveral Capital Corp. v. Bruce, 214 So.2d 505 (Fla. 3d DCA 1968) and Investors Tax Sheltered Real

Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath, 370 So.2d 815 (Fla. 3d DCA 1979), cert. dismissed, 381 So.2d 767 (Fla. 1980), to support their proposition that a lender has a cause of action for gross negligence against an accountant regardless of whether the bank is in privity with the accountant. However, both opinions rely on Buchman. In Buchman, the court cited State Street in which it was stated that "negligence if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability...". Buchman at 293. The Petitioner misinterprets the aforementioned cases. The opinions do not create a separate cause of action for gross negligence, but rather, express the fact that evidence of gross negligence is one method for a plaintiff to establish fraud.

The Petitioner cites Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987), for the proposition that the rule of privity in actions against attorneys has been relaxed where it is the apparent intent of the client to benefit a third party. The Angel court recognized that Florida courts have uniformally limited attorney's liability for negligence to clients with whom they share privity of contract. Id. at 194. Furthermore, the instance when the rule of privity has been relaxed is in the area of will drafting. Id. This is a very narrow exception which has been carved out by Florida courts. Moreover, the Angel Court found no reason to expand this limited exception. Id.

The Petitioner incorrectly expands the court's opinion in

Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So.2d 315 (Fla. 3d DCA 1985), another case involving will drafting. The Lorraine Court held that since no privity existed between the plaintiff and the attorney, no duty was owed to the plaintiff. Id. at 317. The Lorraine Court adhered to Florida law in that a Plaintiff must establish privity in a legal malpractice action. Id. at 318 n.6.

In DeMaris v. Asti, 426 So.2d 1153 (Fla. 3d DCA 1983), cited in orraine and by the Petitioner, the court aptly points out that the plaintiff, the testator's intended beneficiary, may maintain a malpractice action against the attorney on theories of either tort (negligence) or contract (third party beneficiaries). Id. at 1154. In the instant case, the petitioner is attempting to maintain a negligence action under the guise of an intended beneficiary.

The final case cited by the Petitioner relating to the preparation of a will is McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976), which was called into doubt by Amev, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633 (Fla. 2d DCA 1979). The Second District Court of Appeal in Amey held that even though the purchaser of real property had to pay the lender's law firm a fee for the examination of a title, this did not transform the buyer into a third party beneficiary of the contract between the bank and the law firm. Id. at 634. Clearly, will preparation cases are unique and distinct from the instant case. A testator-client has specific testamentary wishes regarding a

limited and defined class of intended beneficiaries. The Petitioner in the instant case is far removed from the required criteria for intended beneficiary status as contemplated by Florida courts. Furthermore, an intended beneficiary of a will is a determinant class at a determinant time, unlike the Petitioner.

The Petitioner's attempt to analogize the instant case to products liability cases is misplaced. E.g., West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976); A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973); Audlane Lumber & Builder Supply Co., Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333 (Fla. 2d DCA 1964). In First American, cited by the Petitioner in the instant case, the court found the petitioner's analogy to the products liability cases as unpersuasive. The First American court stated that:

> "The privity doctrine was gradually eliminated in that field because of a recognition that manufacturers and distributors release products into the commercial market place which the ultimate users and consumers thereof are in no position to test, examine, or evaluate for design, safety, or fitness. The ultimate purchaser relies on the manufacturer for assurance that the product is safe and the manufacturer knows of this reliance. The consumer has no other alternative but reliance on the manufacturer for the fitness of the product... We also believe that Petitioner's argument based on A.R. Mover, Inc. v. Graham is unpersuasive. Where a contractor is totally dependent on the plans and specifications prepared and supplied by an architect or engineer with supervisory authority over a project, the contractor is unable to take steps independently to protect itself against the consequences of the negligence of the architect or engineer. Although Mover applied products-liability tort principles to

negligent provision of professional services, we find a vast difference between that situation and this one." Id. at 471-72.[1]

In United States v. Arthur Youns & Co., 465 U.S. 805 (1984), cited by the Petitioner, the issue was whether the accrual workpapers prepared by a corporation's independent certified public accountant in the course of regular financial audits are protected from disclosure in response to an Internal Revenue Service summons issued under Section 7602 of the Internal Revenue Code. Id. at 807. Obviously, this case is not even remotely analogous to the instant case. Furthermore, in European American Bank & Trust Co. v. Straushs & Kaye, 65 N.Y.2d 536, 483 N.E.2d 110 (N.Y. 1985), the Petitioner refers to the 3-pronged test established by the court. However, in the instant case, the record evidences that the Respondents were not aware that the audited financial statements were to be used for any particular purpose or purposes. Additionally, the record confirms that the Respondents did not create the audited financial statements in the furtherance of which a known party or parties were intended to rely. Thus, the instant

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[1]This court in AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So.2d 180 (Fla. 1987), observed that First American limited liability to parties to the transaction of which the abstract was prepared. Id. at 181. Furthermore, the holding in Mover was limited due to the fact that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of a contract. Id. This court held in AFM Corp. that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses. Id. at 181-82. In the instant case, the record clearly indicates that there is not any form of a contractual relationship between the Petitioner and the Respondents.

case does not meet the criteria as set forth in Credit Alliance Corp. v. Arthur Anderson & Co., 65 N.Y.2d 536, 483 N.E.2d 110 (N.Y. 1985).[2] The facts in the instant case are contrary to the evidence in European American in that the accountant knew that the primary and exclusive end and aim of auditing his client was to provide European American Bank with the financial information it required. Id. at 120. See also White v. Guarente, 43 N.Y.2d 356, 372 N.E.2d 315 (N.Y. 1977) (accountants knew that a limited partner would have to rely upon the audit and tax returns of the partnership which was within the specific contemplation of the accounting retainer).

The Respondents are aware that several jurisdictions have questioned the holding in Ultramares, even so, Ultramares remains the majority rule. These opinions are clearly distinguishable from the instant case. For example, in Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968), unlike the instant case, the accountant had actually prepared the certified financial statements for the nonprivy party, with the "end and aim" of influencing the creditor to extend credit to the accountant's client. Id. at 86. The accountant prepared those statements knowing that the creditor had specifically requested them. Id. Furthermore, Ryan v. Kanne,

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[2] The test established by the court in Credit Alliance requires that certain prerequisites must be satisfied before accountants may be held liable in negligence to noncontractual parties: (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 evinces the accountants' understanding of that party or parties' reliance. Id. at 118.

170 N.W.2d 395 (Iowa 1969), is distinct from the instant case in that the accountants in Ryan during the course of preparing the balance sheet were advised that the purpose was to obtain additional capital or financing from the creditor. Id. at 399. The creditor even directed the accountant's work. Id. at 397. Both Rusch Factors and Ryan are inapplicable to the instant case because the Respondents neither prepared the audited financial statements at the request of the Petitioner nor did they prepare the audited financial statements for the purpose of obtaining credit from the Petitioner.

Similar to both Rusch Factors and Ryan, but far removed from the instant case and the principles established by Ultramares, is Larsen v. United Federal Savings & Loan Association of Des Moines, 300 N.W.2d 281 (Iowa 1981), where the court permitted recovery for a home buyer who actually paid for the accountant's appraisal, and was specifically designated on the appraisal itself as the one for whose benefit it was being prepared. Id. at 284. Additionally, in Seedkem, Inc. v. Safranek, 466 F. Supp. 340 (D. Neb. 1979), the evidence established that the accountant's own notes to the financial statements specifically identified the Plaintiff, recognizing it as a party in privy with the accountant's client, a principle creditor thereto, and responsible for the client's incorporation in the state. Id. at 343.

The factual situations in Rusch Factors, Ryan, Larsen, and Seedkem represent unique factual situations distinguishable from the instant case. The Petitioner has presented neither factual nor

legal reasons to compel this court to drift away from the holding in Ultramares and adopt the Restatement (Second) of Torts §552[3] as done by the preceding four courts.[4]

The Restatement (Second) of Torts §552, would be inapplicable to the instant case because the Respondents did not prepare the audited financial statements knowing that the information was intended for the Petitioner. The critical point in this case is what was the intention of the parties at the time when C.M. Systems engaged the Respondents to prepare the audited financial statements

[3]Section 552 of the Restatement (Second) of Torts states: (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 and their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon 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 whom 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, and any of the transactions in which it is intended to protect them.

[4]The courts in Aluma Craft Manufacturing Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. Ct. App. 1973) and Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408 (Tex. Ct. App. 1986), also relied on the Restatement (Second) of Torts $552. Again, these cases are clearly distinguishable from the instant case. In Aluma Craft, the accountant knew the audit would be utilized and relied upon by the Plaintiff, and furthermore, knew the audit was being performed for the purpose of determining the price the plaintiff would pay for the shares of stock. Id. at 379. Similarly, in Blue Bell, the accountant knew that the Plaintiff was one of a limited number of existing trade creditors who would be receiving copies of the financial statements. Id. at 413.

and the purpose for those audited financial statements. The Petitioner attempts to classify itself as an intended beneficiary without any evidence that the specific purpose for the preparation of the audited financial statements was to obtain credit from the Petitioner. This attempted classification is not supported by the record. Additionally, the Petitioner did not file any affidavits in opposition to the Respondents' Motion for Summary Judgment. Furthermore, an appellate court cannot reverse a trial court on the basis of facts which were not presented to the trial court, and therefore, are not part of the record on appeal. Patterson v. Weathers, 476 So.2d 1294 (Fla. 5th DCA 1985).

Certainly this court should not adopt the extreme approach of foreseeability regarding accountant liability. Both Citizens State Bank v. Timm, Schmidt & Co., 335 N.W.2d 361 (Wis. 1983) and International Mortgage Co. v. John P. Butler Accountancy Corp., 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (Cal. Ct. App. 1986), which applied a foreseeability approach are distinguishable from the instant case. The accountant in Citizens knew that the audited statement would be used by its client to receive a guaranteed loan through the Small Business Administration from the plaintiff. Id. at 362. Moreover, in International Mortgage the accountant was aware at the time of the audit that the client needed to maintain a specific level of net worth to qualify for Federal Housing Administration loans. Id. at 219. This court specifically rejected applying the broad standard of foreseeability in First American. Id. at 472.

The Supreme Court of Mississippi also applied the foreseeability standard in Touche Ross & Co. v. Commercial Union Insurance Co., 514 So.2d 315 (Miss. 1987), however, the Mississippi Legislature specifically removed the privity requirement. Id. at 321. Miss. Code Ann. §11-7-20 (Supp. 1986) reads, "in all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action." Id. Thus, any expansion to the already well-established privity requirement in Florida should be left to the Legislature. "A change so revolutionary, if expedient, must be wrought by legislation." Ultramares at 447.

Numerous jurisdictions still follow the majority rule of requiring privity as established in Ultramares and its progeny. For example, in Stephens Industries, Inc. v. Haskins & Sells, 438 F.2d 357 (10th Cir. 1971), the court held that third parties not in privity with an accountant, even though those who the accountant knew or should have known were relying on his audit, are entitled to recover from the accountant only for fraud. Id. at 359. The appellants in Stephens attempted to argue that the rule in Ultramares was too narrow and outdated. Additionally, the Appellants relied on Rusch Factors and Ryan. The court aptly stated that the appellant's argument was lacking the necessary substantive evidence to convince the court that Colorado would part company with the rule applied by the trial court. Id. at 360. The

appellants failed to carry the burden of establishing clear error. Id. Similarly, in the instant case, the Petitioner has failed to sufficiently set forth why this court should change existing Florida law.

The Fifth Circuit solidified Florida law in Nortek, Inc. v. Alexander Grant & Co., 532 F.2d 1013 (5th Cir. 1976), in which the court held that an auditing firm, which was hired by the seller to audit a company and prepare financial statements adequate for registration by the plaintiff as a perspective buyer, owed no legal duty to the plaintiff, in the absence of privity, and thus, the auditing firm could not be liable to the plaintiff on its claims in negligence and as a beneficiary of the auditing contract. Id. at 1015. The appellant in Nortek attempted to argue that Mover overruled the privity requirement set forth in Buchman and Sickler. Id. However, as the Fifth Circuit stressed, Mover relaxed the privity requirement only to the architect-general contractor relationship. Id. The same can be argued about First American, in that the court relaxed the privity requirement only to the abstracter-buyer association.

Other jurisdictions that still follow the privity standard include Shofstall v. Allied Van Lines, Inc., 455 F. Supp. 351 (N.D. Ill. 1978), where the court followed the general rule that an accountant is not liable for negligence in the preparation of a certified financial report to a third party not in privity with him. Id. at 359. Indiana law clearly requires privity. The Seventh Circuit in Toro Co. v. Krouse, Kern & Co., Inc., 827 F.2d

155 (7th Cir. 1987), held that an accounting firm and its individual accountants were not liable for alleged negligence to a creditor which allegedly relied upon audit reports in extending credit to the accountants' client. Id. at 161. See also Essex v. Ryan, 446 N.E.2d 368 (Ind. Ct. App. 1983) (in a negligence action against a surveyor, the court specifically rejected the Restatement (Second) of Torts §552 standard and stated that they were not convinced that economic benefits accruing to consumer plaintiffs would outweigh the hazards of potential liability which abolition of the privity requirement would impose upon providers of professional opinions); Wilson v. Palmer, 452 N.E.2d 426 (Ind. Ct. App. 1983) (where the court held that to prevail on the theory that the home buyer was a third party beneficiary of a contract between the vendor and the title company, the buyer, asserting breach of contract, was required to prove that the contract was intended to benefit him directly, that it must necessarily benefit him, and that the title company breach the agreement). Additionally, Georgia follows the privity standard as evidenced in MacNerland v. Barnes, 129 Ga. App. 367, 199 S.E.2d 564 (Ga. Ct. App. 1973). Relying on the majority rule of Ultramares and citing Buchman, the MacNerland Court held that an accountant is not liable for negligence in preparation and issuance of a financial statement to third parties not in privity, even though their reliance on such statement is known or could be anticipated. Id. at 566.

The rule of Ultramares still remains the law of New York. The court in William Iselin & Co., Inc. v. Landau, 71 N.Y.2d 420, 522

N.E.2d 21 (N.Y. 1988), held that an accounting firm was not liable to a lender for allegedly preparing negligent financial reports with respect to the borrower client because the lender failed to show that the accounting firm was employed by the borrower for the purpose of inducing the lender to extend credit to the borrower. Id. at 24. Additionally, it was not shown that the reports were prepared for the lender's use or according to the lender's requirements. Id. See also Westpac Banking Corp. v. Deschamps, 66 N.Y.2d 16, 484 N.E.2d 1351 (N.Y. 1985) (the non-contractual party must demonstrate a relationship with the accountants establishing privity); Aeronca, Inc. v. Gorin, 561 F. Supp. 370 (S.D.N.Y. 1983) (even though the accountant was aware that the financial statement would be used to obtain credit, he could be liable for negligently preparing and certifying that statement only to those who stand in privity with him, furthermore, the court declined to distinguish between existing and new creditors); O'Conner v. Ludlam, 92 F.2d 50 (2d Cir. 1937) (since there was no contractual duty between the plaintiffs and the defendants, liability could be imposed only for fraud). Just as New York continues to follow the privity standard, so should Florida.

The Petitioner has failed to present any compelling reasons why this court should modify well-established legal precedent. Both the trial court below and the Second District Court of Appeal correctly applied Florida law in that an accountant cannot be held liable in negligence to a third party in the absence of privity of contract, even though reliance is known or anticipated by the

accountant. The principles expressed by Justice Cardozo in Ultramares are still sound and Florida courts continue to rely on these principles as evidenced in Buchman, First American, and Gordon to name a few. Additionally, Ultramares remains the majority rule nationwide. The consequences of expanding Ultramares, as requested by the Petitioner, would expose accountants "to a liability in an indeterminant amount for an indeterminant time to an indeterminant class". Ultramares at 444. Justice Cardozo's caution is particularly relevant today given the increasing litigiousness of our society and the rising cost of malpractice insurance. Furthermore, financial institutions, such as the Petitioner, can readily spread losses throughout society by writing off bad loans as a cost of doing business. The record clearly evidences that there is not any compelling reasons to change existing Florida law.

II. THE RECORD EVIDENCE CLEARLY ESTABLISHES THAT THE PETITIONER IS NOT AN INTENDED BENEFICIARY

The Petitioner continuously refers to itself throughout its brief as an intended beneficiary without any factual or legal basis supporting such a proclamation. Whether a contract was intended for the benefit of a third party is based on the construction of the contract. Mover at 402. Furthermore, the intention of the parties is determined by the terms of the contract as a whole, construed in light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.

Id. The record clearly evidences that C.M. Systems and Respondents did not contemplate that the Petitioner would be a beneficiary of their auditing services contract. Moreover, the record confirms that the purpose of the **1983** and **1984** audited financial statements prepared by the Respondents for C.M. Systems was not for the Petitioner's benefit. As the Court held in Mulligan v Wallace, **349** So.2d **745** (Fla. 3rd **DCA, 1977),** the intent of the parties is paramount in determining questions of liability to third party beneficiaries. Id. at **746.**

The Petitioner attempts to include itself in the same class of beneficiaries referenced in Angel, Lorraine, DeMaris and McAbee. However, these cases are clearly distinguishable in that intended beneficiaries of a will are a limited, known class of beneficiaries determined by the testator at the inception of the will. The class of beneficiaries remains constant, differing from the instant case in which the Petitioner proposes a cause of action for an indeterminate class of alleged beneficiaries. Florida courts have refused to expand the exception in the will drafting cases to include incidental third party beneficiaries. Angel at **194.**

In summary, to qualify as a third party beneficiary it must be shown that the intent and purpose of the contracting parties were to confer a direct and substantial benefit upon the third party. State of Florida vs. Wesley Construction Co., **316** F. Supp. **490, 495** (S.D. Fla. **1970).** In the absence of a clear intent to benefit a third person, the third party does not have a cause of action. Id. See also American Empire Insurance Co. of South Dakota

vs. Fidelity and Deposit Co. of Maryland, 408 F.2d 72 (5th Cir. 1979) (contracting parties are presumed to act for themselves, and an intent to benefit third parties should be clearly expressed in the contract); Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277 (Fla. 1985) (where this court held that an incidental beneficiary cannot enforce the contract). Clearly, the Petitioner is not an intended beneficiary.

CONCLUSION

The question certified by the Second District Court of Appeal as being of great public importance should be answered in the negative. Furthermore, the trial court correctly entered a summary judgment in favor of the Respondents and the Second District Court of Appeal rightfully affirmedthe trial court's granting of summary judgment in favor of the Respondents, thus, accurately applying Florida law. Moreover, the Petitioner has completely failed to present any compelling reasons why this court should change or expand Florida law which remains sound. Thus, this court should affirm the summary judgment entered in favor of the Respondents by the trial court and affirmed by the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to ROBERT CLARK, ESQUIRE, P.O. Box **1531**, Tampa, FL **33601**; KENNETH R. HART, ESQUIRE, P.O. Box **391**, Tallahassee, FL **32302**; ALBERT0 A. MACIA, ESQUIRE, **1428** Brickell Avenue, Miami, FL **33131**; and GERALD F. RICHMAN, ESQUIRE, Courthouse Center, 26th Floor, **175** N.W. First Avenue, Miami, FL **33128-1817** and on this 26th day of June, **1989**.

JOHN N. JENKINS, ESQUIRE
DEBRA L. HINNERS, ESQUIRE
MARLOW, SHOFI, SMITH, HENNEN, SMITH & JENKINS, P.A.
P.O. Box **10430**
Tampa, FL **33679-0430**
(813) 831-5599
Attorneys for Respondents
Fla. Bar Nos: **147552**
602590

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