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SUPREME COURT OF FLORIDA

PANNELL KERR FORSTER,

Petitioner,

vs.

VAUGHN DURHAM, et al.,

Respondents.

FILED

SID J. WHITE

FEB 12 1990

CLERK, SUPREME COURT

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CASE NO.

75,529

Fourth District Court Of Appeal Case No. 88-3012

DISCRETIONARY REVIEW PROCEEDING
FROM FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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OTHER AUTHORIT

Art. V, §3(b)(3), Fla. Const.

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Fla. R. App. P. 9.120, Committee Notes

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Pannell Kerr Forster, invokes the discretionary jurisdiction of this Court to review the decision of the Fourth District Court of Appeal rendered January 24, 1990. A copy of that decision is included in the Appendix To Petitioner's Brief On Jurisdiction. A 1-7.1 Petitioner specifically invokes the conflict jurisdiction conferred by article V, section 3(b)(3) of the Florida Constitution.

In the decision below, the Fourth District considered whether the trial court erred in dismissing "a complaint sounding in negligence, gross negligence and breach of fiduciary duty filed by certain hotel/condominium unit-purchasers against the seller's retained accounting firm." A 1. Respondents, who had purchased units in a hotel/condominium (the Palm Court Hotel) owned by Palm Court, Inc., sued Palm Court, Inc.'s accountants - Petitioner - for alleged negligence in the preparation of accounting studies concerning the Palm Court Hotel. A 2-4. The trial court dismissed the complaint "because the accounting firm was not in privity with th(e) unit-purchasers," A 1, relying on Gordon v. Etue, Wardlaw & Co., 511 So.2d 384 (Fla. 1st DCA 1987). A 2. In Gordon, the First District held that "Florida law denies relief for a breach of due care by an accountant to third parties who are not in privity with that accountant. . . . [A]n accountant is not liable to persons with whom there is no privity of contract." 511 So.2d at 389.

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1The Appendix To Petitioner's Brief On Jurisdiction will be cited as "A (page number(s))."

Acknowledging this as the law in the First District, A 2-3, as well as in the Second District as per First Florida Bank, N.A. v. Max Mitchell & Co., 541 So.2d 155 (Fla. 2d DCA 1989), A 5-6, the Fourth District nevertheless decided that "we are not bound by the Gordon decision and, in fact, we disagree with it." A 3. Although Respondents' complaint against Petitioner does not allege privity of contract, A 3-4, the Fourth District held that it "state[s] a cause of action against the accountants." A 3. The court refused to "permit the accountants to successfully evade a [complaint] based on negligence because of lack of privity." A 7. Finally, the Fourth District admitted conflict:

We are aware that our holding apparently conflicts with the Gordon case out of the First District and the First Florida Bank decision out of the Second District. That latter opinion is now before the supreme court and presumably, the instant accountants can, likewise, obtain review.

A 7.

ISSUE

Whether This Court Has Jurisdiction To Review
The Decision Of The Fourth District Court Of
Appeal, And If So, Whether It Should Exercise
That Jurisdiction And Accept This Case For
Review

SUMMARY OF ARGUMENT

The Fourth District's decision expressly and directly conflicts with decisions of other district courts of appeal. Therefore, this Court has conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution.

Although this Court is presently reviewing First Florida Bank, the instant case involves important questions of law that will not be decided in First Florida Bank. Thus this Court should exercise its conflict jurisdiction and accept this case for review.

ARGUMENT

The Florida Constitution provides that the Supreme Court of Florida "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, §3(b)(3), Fla. Const. This Court has held that the "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the [district court's] decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). For example, in finding conflict jurisdiction in City of Miami v. Florida Literary Distrib. Corp., 486 So.2d 569 (Fla. 1986), an obscenity case, this Court stated:

Quite simply, the question is whether or not expert testimony is required to support a conclusion of prurience under contemporary community standards; Collins said no, Golden Dolphin and the instant case said yes. There is conflict.

Id. at 573.

Likewise, the First District in Gordon and the Second District in First Florida Bank held that absence of privity of contract bars an action against an accountant for negligent performance of accounting services. Gordon, 511 So.2d at 389; First Florida Bank, 541 So.2d at 155.² In its decision below,

²The Third District also has held that absence of privity of contract bars an action against an accountant for negligent performance of accounting services. Investors Tax Sheltered Real Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath, 370 So.2d 815, 817 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 767 (Fla. 1980).

the Fourth District held that it does not. A 1-7. Thus there is conflict jurisdiction under article V, section 3(b)(3).

In this regard, the Committee Notes to Florida Rule of Appellate Procedure 9.120 state that a petitioner may include in its brief on jurisdiction a statement on "why the Supreme Court should exercise its discretion and entertain the case on the merits." Fla. R. App. P. 9.120, Committee Notes. This Court should accept this case because it involves important questions of law that have not been decided by this Court - and will not be decided in First Florida Bank. Although this Court may decide the privity of contract issue as presented in First Florida Bank, this case will present that issue in a totally different light.

To begin with, the accounting studies in First Florida Bank were financial statements reflecting the "total assets" and "total indebtedness" of the accountant's client. 541 So.2d at 155. That is, they were statements of present (or past) financial condition. Id. Conversely, as the Fourth District's opinion shows, the accounting studies prepared by Petitioner were a "Market Demand Report" and a "Financial Forecast And Financial Projections," A 3, which merely "forecast(ed) the market demand and financial forecast for the hotel." A 4.

The significance of this distinction is that Florida law does not recognize a cause of action for an erroneous opinion of future events. For example, an action for fraudulent misrepresentation is allowed only if the alleged misrepresentation "relate(s) to a past or existing fact." Sleight v. Sun & Surf Realty, Inc., 410 So.2d 998, 999 (Fla. 3d

DCA 1982). "A mere opinion . . . will not serve as a fraudulent representation." A.S.J. Drugs, Inc. v. Berkowitz, 459 So.2d 348, 350 (Fla. 4th DCA 1984). "[A] prediction of future events cannot, standing alone, be a basis for fraud. . . . [I]t is not a representation, there is no right to rely on it, and it is not false when made." Cavic v. Grand Bahama Dev. Co., 701 F.2d 879, 883 (11th Cir. 1983).

Petitioner's market and financial forecasts for the hotel, therefore, cannot serve as a basis for recovery in fraud. See, e.g., Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1103 (11th Cir. 1983) (fraud action not allowed for misrepresentation that "financial projections . . . revealed that the leasing and rental . . . would result in a profitable enterprise"); Evans v. Gray, 215 So.2d 40, 41 (Fla. 3d DCA 1968), cert. denied, 222 So.2d 748 (Fla. 1969) (fraud action not allowed for misrepresentations of "value [of corporate assets] on a date in the future" and "the capacity of the corporation to produce in the future"). Cf. Butts v. Dragstrem, 349 So.2d 1205, 1206 (Fla. 1st DCA 1977), cert. denied, 361 So.2d 831 (Fla. 1978) ("misrepresentations as to past income - as opposed to probable future profits - are proper predicates for alleging fraud").

Thus we have the law of Florida saying that Petitioner's forecasts cannot support an action for fraudulent misrepresentation, and the Fourth District saying that they can support an action for negligent misrepresentation. Clearly, there are serious public policy implications when a misrepresentation, even if intentionally made, cannot support an

action for fraud; but when that same misrepresentation is negligently made, it exposes the speaker to liability. Because of this anomaly, this Court should accept this case for review.³

Moreover, if this Court accepts this case for review, Petitioner will be able to rely on the critical fact of record - not mentioned in the Fourth District's opinion - that Petitioner's accounting studies (which are part of Respondents' complaint against Petitioner) expressly state that they are "primarily designed for internal management planning purposes" at Palm Court, Inc. A 8-9.⁴ Under the law of third party beneficiaries, this express provision in the accounting services contract between Petitioner and its client, Palm Court, Inc., makes Palm Court, Inc. the primary beneficiary of the studies, and precludes any incidental beneficiaries (such as Respondents, who later allegedly relied on the studies) from suing Petitioner. See Metropolitan Life Ins. Co. v. McC Carson, 467 So.2d 277, 279

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³Another critical distinction between First Florida Bank and this case is that in First Florida Bank the accountant himself went to the bank, requested the bank to extend credit to his client, and delivered to the bank the financial statements of his client for the specific purpose of inducing the bank to extend credit. 541 So.2d at 155-56. That conduct constitutes privity, or certainly approaches privity. The facts as alleged in this case, however, are totally different, and present this Court with the opportunity to adjudicate the much more common scenario of an accountant who provides accounting services to a client, and subsequently third persons rely on the accountant's work product. A 2-4.

⁴Petitioner concedes that these record excerpts cannot be used to establish conflict jurisdiction. Reaves, 485 So.2d at 830. Conflict jurisdiction having been established, however, Petitioner respectfully requests that these parts of the record be considered by the Court in deciding whether to accept this case for review.

(Fla. 1985); American Surety Co. of N.Y. v. Smith, 130 So. 440, 441-42 (Fla. 1930). For example, in a recent case involving attorneys' liability to persons not in contractual privity, this Court held that "as an incidental third-party beneficiary," the plaintiff did not "fit within Florida's narrowly defined third-party beneficiary exception,!" and could not sue the defendant law firm for negligence. Angel, Cohen & Rogovin v. Oberon Inv., N.V., 512 So.2d 192, 194 (Fla. 1987).

Plainly, the Fourth District erred in not giving effect to the clear language in the contract between Petitioner and its client. With all due respect to the Fourth District, it would be an injustice to allow its decision to stand, as it effectively constitutes a rewriting of that contract - for the primary benefit of Respondents, a result completely at odds with the language in the contract.

CONCLUSION

This Court has conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution, and it should exercise that jurisdiction and accept this case for review.

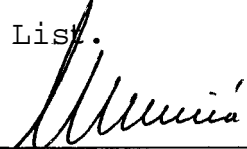
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petitioner's Brief On Jurisdiction was served by mail this 9th day of February, 1990, upon each person on the attached Service List.


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