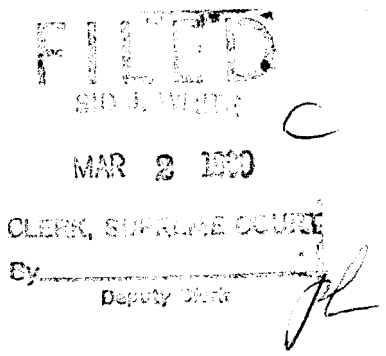
SUPREME COURT OF FLORIDA

CASE NO. 75,529



PANNELL KERR FORSTER,

Petitioner,

vs.

VAUGHN DURHAM, et al.,

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

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INTRODUCTION

This brief on jurisdiction is submitted by the respondents appellants below, a group of approximately 70 individuals who purchased one or more units in a securities offering known as the Palm Court Hotel. They will be referred to here as "the investors." The petitioner, Pannell Kerr Forster, will be referred to as "PKF." References to the appendix submitted with PKF's brief will be made with the symbol "A.", and references to the petitioner's brief on jurisdiction will be made with the symbol "PB."; each will be followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The investors purchased their interests in the Palm Court Hotel pursuant to a securities offering marketed by a Confidential Private Placement Memorandum. Respondent PKF, an accounting firm specializing in providing services to the hotel industry [A.2], prepared a "Market Demand Report" and a "Financial Forecast and Financial Projection" which were included as exhibits to the offering memorandum. [A.2]

As PKF explains [PB.1], this case came before the Fourth District Court of Appeal on an order dismissing the investors' complaint against PKF. The complaint sounded in negligence, gross negligence, and breach of fiduciary duty, and alleged PKF's actual knowledge that the financial data it had been hired to prepare would be circulated to prospective investors as an inducement to purchase hotel interests. As quoted in the Fourth District's opinion, the investors' complaint alleged that

> [a]t all times PKF had **actual knowledge** of the fact that the reports it was retained to prepare would be included in an Offering Memorandum that was to be used by PCI to market the Palm Court Securities. **[A.3,** e.s.]

Since it is axiomatic that the allegations of the complaint must be taken as true for purposes of a motion to dismiss, the Fourth District appropriately concluded that "the seller specifically employed [PKF] to prepare documents for distribution **...** for the express purpose of including the distribution to potential purchasers." [A.4, sic]

For purposes of the Fourth District's opinion, and thus for purposes of this Court's potential review, it hence must be taker; as fact that PKF had actual knowledge that its studies would be included in the offering memorandum for the Palm Court Hotel -- or, as the district court observed, that PKF's "report was part and parcel of the bait which, hook, line, and sinker, reeled in the investors." [A.7] PKF's attempts to distinguish this case on other record "facts"[1] are both inappropriate in its present procedural

[1] For example, at PB.8, PKF alludes to a supposedly "critical fact of record not mentioned in the Fourth District's **opinion."** First, of course, it is inappropriate to discuss any factual matters that do not appear on the face of the opinion in asserting this Court's conflict jurisdiction. Here, however, that otherwise minor infraction is made egregious by PKF's blatant misquote of the document it includes in its appendix at **8-9.** In an attempt tc portray the investors as only incidental rather than intended beneficiaries of its financial reports, PKF claims that the introduction to its report states expressly that it was **"primarily** designed for internal management planning **purposes."** [PB.8] What PKF neglects to mention is that the same paragraph goes on to state that its report **"may** also be used in its entirety in a private placement memorandum for the sale of investment units in The Palm Court, condominium hotel **...."** **[A.8]**

posture and, as even PKF itself concedes [PB.8, n. 4], irrelevant to this Court's determination of its conflict jurisdiction.

SUMMARY OF THE ARGUMENT

The present matter came before the Fourth District Court of Appeal on PKF's successful motion to dismiss the investor's counterclaim against it for negligence in the preparation of misleading financial statements which it disseminated to known third-party beneficiaries of its accounting services. In that posture, the Fourth District's opinion thus passes upon a single, discreet issue of law. The investors suggest that the resolution of that issue -- i.e., whether Florida will discard the privity bar in suits against accountants brought by intended beneficiaries of their work product, as it has done in those against attorneys, abstractors, and architects -- will likely be announced when this Court issues its opinion in First Florida Bank, N.A. v. Max Mitchell & Co., case number 74,034, in such a way that the outcome of the present matter will also be determined. Because First Florida Bank thus likely will control here, there is no reason for this Court to accept this matter for review as well.

The legal issues PKF claims [PB.6-9] distinguish this case from First Florida Bank all depend on what it asserts to be factual distinctions between the type of financial studies it prepared here and those present in the First Florida Bank situation. However, since this matter was decided by the Fourth District on a motion to dismiss, no such factual distinctions appear in the present record. Thus, even if this Court were to accept this matter for review,

those asserted issues will not be capable of determination in its present posture.

ARGUMENT

THIS CAUSE DOES NOT MERIT THIS COURT'S REVIEW AT THIS STAGE OF THE LITIGATION

Although PKF never specifically identifies the cases on which it relies for conflict, the Fourth District's opinion [A.7] facially acknowledges conflict with both Gordon V. Etue, Wardlaw & Co., 513 So.2d 384 (Fla. 1st DCA 1987) and First Florida Bank, N.A. V. Max Mitchell & Co., 541 So.2d 155 (Fla. 1st DCA 1989), both of which held that no cause of action exists in Florida against accountants by third parties in the absence of strict privity of contract. However, the latter case came before this Court last year upon certification by the Second District Court of Appeal as passing on a question of great pubic importance' and is presently pending as

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[2] Specifically, the Second District in First Florida framed the issue as follows:

> 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?

541 So.2d at 157.

case number 74,034; all briefs have been submitted, and oral argument was heard on December 5, 1989.[3] Because the opinion in that case in all probability will control the result here, the investors submit that no reason exists for this Court to accept this cause for review as well.

In tacit acknowledgment of that fact, PKF spends the bulk of its brief -- from pages 6 through 9, inclusive -- arguing that "this case will present [the privity issue] in a totally different light" than did First Florida Bank. [PB.6] PKF apparently has overlooked the admonishment of the Committee Notes to Florida Rule of Appellate Procedure 9.120, which caution that "[i]t is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue." Obviously, only a single, narrow legal issue is presented by this case's apparent conflict with Gordon and First Florida Bank -- namely, whether the abrogation of the privity bar in suits brought by intended beneficiaries of the work product of other professional groups like architects, see A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), abstractors, see First American, supra, and lawyers, see Angel. Cohen & Rosovin v. Oberon Investment. N.A., 512 So.2d 192 (Fla. 1987), will be extended to accountants as well. Since this Court's resolution of First Florida Bank will very likely answer that question, its decision will probably control the result

[3] Both sides in this dispute submitted briefs as amici curiae in support of their respective positions in First Florida and participated in oral argument before this Court.

here as well. The several issues PKF raises at pages 6 - 9 of its brief thus are not only inappropriate to discuss at this juncture, but will probably prove irrelevant as well.

Even if the issues PKF raises are not controlled by this Court's eventual decision in First Florida Bank, they are purely hypothetical at the present stage of this litigation. All of the supposedly distinguishing issues to which PKF points flow from its supposed explanation [PB.6] that its studies differ in nature from those prepared by the accountants in First Florida Bank. Patently, since this matter came before the Fourth District on a motion to dismiss the investors' counterclaim, there has been no factual determination whatever of the nature and scope of the studies PKF prepared here. Thus, all of the asserted legal distinctions between First Florida Bank and the present action to which PKF points arise only from supposed "facts" that are not present in this record.

Even assuming arsuendo that PKF's legal arguments are correct, then -- i.e., that Florida law recognizes no cause of action for an erroneous opinion of future events, etc. **[PB.6-8]** -- their asserted factual predicate is dehors the record in its present form, so those issues will be incapable of adjudication if this Court accepts this matter for review in its current posture. In other words, the issues to which PKF points necessarily must await a determination on the merits of the investors' presently-reinstated causes of action against PKF, or at least the rendition of findings by the trier of fact, to be cognizable here.

CONCLUSION

The investors acknowledge the Fourth District's statement that its holding conflicts with those of its sister courts in Gordon and First Florida Bank. [A.7] Nonetheless, the investors suggest that the sole legal issue presented by the present record -- namely, the existence of a cause of action against an accounting firm for disseminating negligently-prepared reports to known third parties -- will likely be controlled by this Court's opinion in the latter case, so that there is no need for this Court to accept this matter for review as well. To the extent that any of the legal issues PKF identifies [PB.6-9] may eventually prove to be distinctive, their discussion on the present record is and will remain premature and impossible of resolution until the trier of fact has adjudicated this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 1st day of March, 1990 to all persons on the attached service list.

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