

SUPREME COURT OF FLORIDA

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PANNELL KERR FORSTER,

Petitioner,

vs.

VAUGHN DURHAM, et al.,

Respondents.

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CASE NO. 75,529

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PETITIONER'S REPLY BRIEF

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## ARGUMENT

### I.

THIS COURT HAS JURISDICTION TO ADJUDICATE THE  
ISSUE ADDRESSED IN PETITIONER'S BRIEF ON THE  
MERITS

The Fourth District Court of Appeal's decision shows, on its face, that Respondents' counterclaim alleges that "PKF was retained by PCI [Palm Court, Inc.] to prepare a 'Market Demand Report' and a 'Financial Forecast and Financial Projections' relating to the Palm Court Hotel," A 553; in those reports, PKF "forecast[ed] the market demand and financial forecast for the hotel," A 554; and, PKF's forecasts "were grossly inaccurate." A 554. On the basis of these allegations, the Fourth District concluded: "[T]he purchasers' [Respondents'] pleading state[s] a cause of action against the accountants [PKF]." A 553.

The Fourth District's decision, therefore, states that an inaccurate economic forecast is actionable. A 553-554. Thus it expressly and directly conflicts with those decisions of this Court and other district courts of appeal that an inaccurate opinion of future economic events, not being a statement of a present or past fact, is not actionable. E.g., Oceanic Villas v. Godson, 4 So.2d 689, 690 (Fla. 1941); Butts v. Dragstrem, 349 So.2d 1205, 1206 (Fla. 1st DCA 1977), cert. denied, 361 So.2d 831 (Fla. 1978); Evans v. Gray, 215 So.2d 40, 41-42 (Fla. 3d DCA 1968), cert. denied, 222 So.2d 748 (Fla. 1969). ~~See also~~ Bower v. Selecman, 52 So.2d 680, 681 (Fla. 1951); Houchins v. Case, 189 So. 402, 404 (Fla. 1939); Williams v. McFadden, 1 So. 618, 620

(Fla. 1887); Sleight v. Sun & Surf Realty, 410 So.2d 998, 999 (Fla. 3d DCA 1982).<sup>1</sup>

Because of this express and direct conflict on the question of whether an inaccurate opinion of future economic events is actionable, this Court has conflict jurisdiction. See Art. V, §3(b)(3), Fla. Const. In Reaves v. State, 485 So.2d 829 (Fla. 1986), this Court explained that conflict jurisdiction of a question of law exists if the conflict appears "within the four corners of the decisions allegedly in conflict." Id. at 830 n.3. Here, the "four corners" of the Fourth District's decision is in direct conflict with the "four corners" of decisions of this Court and other district courts of appeal. Thus, regardless of whether the question of law presented by the conflict was raised below by the parties, it was raised by the Fourth District in its opinion. This Court, therefore, has jurisdiction to resolve that conflict under article V, section 3(b)(3) of the Florida Constitution. See e.g., Wainwright v. Taylor, 476 So.2d 669, 670 (Fla. 1985) ("Our concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law").

Moreover, contrary to Respondents' contention, the question of law posed in this proceeding was raised by Petitioner in the courts below. One of the stated grounds for PKF's motion to dismiss in the trial court was that Respondents' counterclaim

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'These cases are discussed in detail in Petitioner's Brief On The Merits. Contrary to Respondents' contention, they also are discussed in Petitioner's Brief On Jurisdiction.

does not allege that Respondents relied upon the PKF studies. A 34. Reliance, therefore, was raised in the trial court. A 34. Although the trial court granted PKF's motion to dismiss on other grounds, i.e., absence of privity, A 120-121, PKF raised the issue of reliance again in the Fourth District, arguing in its answer brief that because PKF's studies were opinions of future economic events, not statements of present or past fact, Respondents could not justifiably have relied on them, and any inaccuracy in the forecasts cannot support an action for misrepresentation. A 541-542. Significantly,<sup>2</sup> in their reply brief in the Fourth District, Respondents replied to PKF's argument not by claiming that PKF had not raised it in the trial court, but by addressing its merits. SA 3-4.<sup>3</sup> Plainly, the only party raising an issue here for the first time is Respondents.

Further, even if Petitioner did not raise the issue in the trial court, it nevertheless did raise it in the district court. Thus it has been preserved for review. Cf. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982) ("[S]ince [petitioner] failed to raise issue 6 before either the trial court or the district court, we decline to address that claim when presented for the first time to this Court") (emphasis added).

Moreover, regardless of whether the question of law presented here was raised below by Petitioner, it involves fundamental error, and thus can be raised and considered here for

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<sup>2</sup>But not mentioned in Respondents' Brief On The Merits.

<sup>3</sup>Petitioner's Supplemental Appendix will be cited as "SA (page number(s))."



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the first time. See Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970); Love v. Hannah, 72 So.2d 39, 43 (Fla. 1954). This Court has defined fundamental error as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford, 237 So.2d at 137. The Fourth District's ruling - that there exists a cause of action for inaccurate economic forecasts - not only is in conflict with decisions of this Court and other district courts of appeal, it "goes to the foundation" of this case and "goes to the merits of the cause of action" asserted by Respondents. Consequently the Fourth District's decision represents fundamental error, and is reviewable. See id.

II.

RESPONDENTS' COUNTERCLAIM DOES NOT STATE A  
CAUSE OF ACTION AGAINST PKF

Respondents contend that the cases relied on by Petitioner involve only claims for fraudulent misrepresentation, and do not apply to Respondents' allegations that PKF negligently forecasted the market conditions for, and financial performance of, the Palm Court Hotel. Respondents are wrong. To begin with, the law considers a negligent misrepresentation to be virtually identical to a fraudulent misrepresentation, the only difference being that a fraudulent misrepresentation requires scienter. E.g., Ostreyko v. B.C. Morton Org., 310 So.2d 316, 318 (Fla. 3d DCA 1975) (timeliness of complaint alleging negligent misrepresentation is to be determined under three year statute of limitation governing

fraud, since "a negligent misrepresentation is considered tantamount to actionable fraud").

Moreover, in Evans v. Gray, 215 So.2d 40 (Fla. 3d DCA 1968), cert. denied, 222 So.2d 748 (Fla. 1969), the amended complaint alleged that the defendants, sellers of the capital stock in a corporation, had "misrepresented" the value of the corporation's assets on a date in the future and the capacity of the corporation to produce aircraft in the future.<sup>4</sup> Because of the nature of these misrepresentations, the Third District Court of Appeal, relying on Bower v. Seleckman, 52 So.2d 680 (Fla. 1951), and Williams v. McFadden, 1 So. 618 (Fla. 1887), held that they are not actionable:

The amended complaint is ambiguous as to the representation of value of the assets of the corporation on June 30, 1966. The amended complaint is susceptible of the view that this representation was made in April, 1966, which would be a representation of value on a date in the future. Therefore, it is not an actionable representation. . . .

As to the capacity of the corporation to produce in the future, this is also a representation of future performance and not actionable.

Evans, 215 So.2d at 41 (emphasis added).

The Third District, therefore, in plain English, held that a "representation" of the future economic value or future economic performance of a business is not actionable. Id. The court did not limit its holding to fraudulent misrepresentations. Id. Applied to the allegations in Respondents' counterclaim against

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<sup>4</sup>The opinion does not indicate whether the misrepresentations alleged were the result of fraud or negligence.

PKF, this principle of law compels dismissal of the counterclaim. As in Evans, the defendant here is alleged to have inaccurately forecasted the future economic performance of a business. A 553-554. Therefore, as in Evans, the plaintiffs here do not have a cause of action.<sup>5</sup>

Respondents also attempt to distinguish Evans on the ground that "we are not dealing [here] with a case where a seller of a business is being sued based upon the allegation that he or she misrepresented the business' future earning capacity." Respondents' Brief On The Merits, p. 11. Technically, Respondents are correct - the defendant, PKF, was not the seller of the interests in the Palm Court Hotel. This, however, is a distinction without meaning. This case involves a lawsuit against the accountant for the seller of interests in a business, who allegedly rendered inaccurate market and financial forecasts for the business. A 45-47, 89-92, 240-296, 410-432. Respondents offer no justification, let alone case law, supporting a legal distinction between a seller of a business making an inaccurate economic forecast and the seller's accountant making the same inaccurate economic forecast. Each situation involves an inaccurate opinion of future economic events; regardless of who

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<sup>5</sup>At least in Evans the business was in operation at the time of the alleged misrepresentations of future asset value and future production. 215 So.2d at 42. Here, conversely, the Palm Court Hotel was not scheduled to open for business until four months after PKF prepared and released its market and financial forecasts. A 246, 302, 413. The hotel in fact did not open until almost six months later. A 15-16.

renders it, the opinion is inherently speculative in nature, and the recipient has no right to justifiable reliance.

Thus Respondents miss the point that it is the inherently speculative nature of an opinion of future economic events that renders the opinion not actionable. The rationale behind this rule is that the opinion "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). Cf. Retty v. Troy, 188 So.2d 568, 573 (Fla. 2d DCA 1966) ("One cannot recover damages caused by uncontrollable events").

Respondents also fail to meaningfully distinguish this case from those cases, cited by Petitioner, which involve fraudulent, as opposed to negligent, opinions of future economic events. Bower, 52 So.2d at 680; Oceanic Villas v. Godson, 4 So.2d 689 (Fla. 1941); Houchins v. Case, 189 So. 402 (Fla. 1939); Williams, 1 So. at 618; Sleight v. Sun & Surf Realty, 410 So.2d 998 (Fla. 3d DCA 1982); Butts v. Dragstrem, 349 So.2d 1205 (Fla. 1st DCA 1977), cert. denied, 361 So.2d 831 (Fla. 1978). Although Respondents state that they have "no quarrel" with the principle of law, enunciated in these cases, that disallows an action for a fraudulent opinion, Respondents' Brief On The Merits, p. 10, Respondents nevertheless suggest that the law should allow an action for a negligent opinion. The anomaly of this proposition is obvious: an inaccurate opinion of future economic events, if fraudulently made, would not expose the speaker to liability; but that same inaccurate opinion, negligently made, would render the

speaker liable. Certainly this state's jurisprudence does not treat negligence more harshly than fraud.

Respondents also err in attempting to distinguish the federal cases cited by Petitioner on the ground that they all involve allegations of fraudulent, not negligent, misrepresentations. In Nichols v. Merrill Lynch, Pierce, Fenner & Smith, 706 F.Supp. 1309 (M.D. Tenn. 1989), the court observed that the cause of action against the accounting firm was essentially one for negligence:

The gravamen of the SEC Rule 10b-5 claim against [the accounting firm] is that, in preparing estimates of future rental income for the PPM [private placement memorandum], these defendants relied upon assumed inflation rates that were much higher than the actual rate of inflation turned out to be. . . . [T]he complaint fails to allege scienter, a necessary element of a SEC Rule 10b-5 action. . . . The complaint makes sense only on the premise that the accountants should have known that reliance on the high inflation projections was unreasonable. Thus, the complaint in substance is one for negligence.

706 F.Supp. at 1327 (emphasis added). For reasons applicable to this case, the Nichols court concluded that the complaint failed to state a cause of action against the accounting firm:

[T]he PPM clearly states that

[t]he projected inflated average room rates could be materially different if significantly higher or lower rates of inflation are actually experienced. Since the actual rates of inflation cannot be predicted with any degree of certainty, no assurance is given that the projected average room rates will not vary materially from those shown above. . . .

PPM, 1-3.

For anyone who can read, this seems a clear warning that the forecast of rental income was highly speculative and in some measure contingent upon uncontrollable future events. To say nothing more, it certainly "bespeaks caution" in the language of the leading case of Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986), and this is enough to insulate defendant [accounting firm] from liability.

Nichols, 706 F.Supp. at 1327.

In addition to Nichols, other federal courts have refused to impose liability on accountants under the federal securities laws for inaccurate economic forecasts; especially where, as here, the accountant provided warnings and disclaimers as to the accuracy of the predictions. The fact that these other cases involve allegations of fraudulent, as opposed to negligent, misrepresentations does not render them inapposite. To the contrary, legal principles that serve to absolve from liability in the fraudulent misrepresentation context are compellingly applicable to negligent misrepresentations.

In Stevens v. Equidyne Extractive Indus., 694 F.Supp. 1057 (S.D.N.Y. 1988), an investor in a limited partnership sued the limited partnership's accounting firm on the ground that the accounting firm had made misrepresentations in the financial projections it prepared for the limited partnership. In the cover letter attached to each projection, however, the accounting firm had expressed warnings and disclaimers as to the accuracy of its projections, as follows:

There is no implication or inference, by the accountants, that the results of the [projections] can or will be achieved. . . .

The benefits set forth . . . could be significantly affected by adverse determinations by the Internal Revenue Service with respect to the deductibility of certain expenditures and the appropriate periods in which these expenditures may be deductible. Particular attention should be directed to the sections captioned "Risk Factors" and "Summary of Federal Income Tax Consequences."

Accordingly, we are not in a position to express any opinion on the aforementioned statements and do not express any opinion on them or the achievability of the results shown therein.

The court concluded that given the nature of the projections and the accounting firm's explicit warnings and disclaimers, the accounting firm could not be held liable for securities fraud, since "no liability attaches to an offering memorandum that purports to be speculative." *Id.* at 1063. The court explained:

These statements "bespeak caution" at least as much as those . . . in Luce. Not only do they set forth that they are based on supplied facts, but they additionally state that there is no implication that the results predicted can or will be achieved. Thus, [the accounting firm] cannot be held liable . . . , and the claim against it must be dismissed. . . .

. . .

Moreover, the nature of [the accounting firm's] projections are entirely speculative. . . . [R]eliance upon such speculative projections is unreasonable.

*Id.* at 1064, 1066. See also In re National Smelting, 722 F.Supp. 152, 171 (D.N.J. 1989); Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberq, 651 F.Supp. 877, 881 (D. Conn. 1986).

These federal accountant liability cases find their genesis in Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986), where the

Second Circuit Court of Appeals held:

Plaintiffs allege that the Offering Memorandum contained intentional misrepresentations as to the potential cash and tax benefits of the partnership. However, the Offering Memorandum made it quite clear that its projections of potential cash and tax benefits were "necessarily speculative in nature" and that "[n]o assurance [could] be given that these projections [would] be realized." Indeed, the Offering Memorandum warned prospective investors that "[a]ctual results may vary from the predictions and these variations may be material." We are not inclined to impose liability on the basis of statements that clearly "bespeak caution." Polin v. Conductron Corp., 552 F.2d 797, 806 n. 28 (8th Cir.), cert. denied, 434 U.S. 857 (1977) (quoted approvingly in Goldman v. Belden, 754 F.2d 1059, 1068 (2d Cir. 1985)).

~~Ence~~, 802 F.2d at 56 (emphasis added).

In this regard, it is significant that Respondents do not address the warnings and disclaimers in PKF's economic forecasts; they are substantively identical to those in Luce, Nichols, and Stevens. For example, the Market Demand Report states: "we have conducted a review of potential market demand for a proposed 66-unit hotel in Palm Beach, Florida"; "[t]he conclusions reached are based on our present knowledge and information with respect to the status of the hotel market in Palm Beach at the completion of our field work in January 1985, and updated research performed in May 1985"; "[a]s in all studies of this type the projected occupancies and average daily room rates are based upon competent and efficient management and presume no significant change in the market from that as set forth in this report"; "[o]ur study and estimates of future performance in the marketplace are based on the assumption that The Palm Court will be operated as a



luxurious hotel"; "[t]he commitment on the part of the sponsor and management to have the level of quality described to us, will determine whether the results in this report will be achievable." A 242, 254. Similarly, the Financial Forecast And Financial Projections states: "[w]e have no responsibility to update this report for events and circumstances occurring after the date of this report"; "[s]ome assumptions inevitably will not materialize, and unanticipated events and circumstances may occur subsequent to June 30, 1985, the date of this forecast"; "[t]herefore, the actual results achieved during the forecast period will vary from the forecast, and the variations may be material"; "[t]he forecasted statement should not be relied upon to indicate actual results"; "the tax and other consequences of owning and operating a Unit . . . cannot be predicted with any certainty, and there is no assurance that the . . . cash flow in the amount projected by the Sponsor from Hotel operations will ever be realized in any year or from year to year." A 411, 413-414. Given these warnings and disclaimers, Respondents could not justifiably have relied on PKF's economic forecasts. Therefore, any inaccuracies in the forecasts are not actionable.<sup>6</sup>

It is true, as Respondents assert, that a federal court may impose liability on an accountant for securities fraud if the accountant intentionally prepares and disseminates inaccurate economic forecasts for the purpose of misleading others. Isquith v. Middle S. Util., 847 F.2d 186, 203-04 (5th Cir. 1988). Cf.

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<sup>6</sup>The warnings and disclaimers in PKF's economic forecasts are detailed in Petitioner's Brief On The Merits, pp. 12-14.

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1047 (11th Cir. 1986). Liability is not imposed, however, for mere negligence in the preparation and dissemination of forecasts. Eisenberg v. Gagnon, 766 F.2d 770, 776 (3d Cir. 1985); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 137 (S.D.N.Y. 1989). "[W]hether liability is imposed depends on whether the predictive statement was 'false' when it was made." Isquith, 847 F.2d at 203 (emphasis added). The Second Circuit in Luce explained that "[allegations] relating to projections or expectations offered to induce investments must allege particular facts demonstrating the knowledge of defendants at the time that such statements were false." 802 F.2d at 57 (emphasis added). Accord, Kirby v. Cullinet Software, Inc., 721 F.Supp. 1444, 1449 (D. Mass. 1989).

Here, Respondents do not allege in their counterclaim that at the time PKF completed and released its market and financial forecasts on June 30, 1985, A 302, it knew they were wrong. A 45-48, 89-92. Respondents themselves admit in their brief: "No one has sued [PKF] for fraud based upon the allegation that the studies constituted a representation of existing fact which the accountants knew was incorrect at the time it was made." Respondents' Brief On The Merits, p. 11. Therefore, Respondents' allegations fail to meet the standard of liability imposed by the federal cases they cite.<sup>7</sup>

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<sup>7</sup> Respondents' failure to plead fraud also renders moot their argument that "a prediction of future events can be actionable in Florida as fraud when the speaker knows the prediction is false when made." Respondents' Brief On The Merits, p. 14. Although they cite no legal authority for this proposition, Respondents apparently are referring to the rule of law that a promise to  
(footnote continued)

Equally unsound is Respondents' argument based on the allegation in their counterclaim for gross negligence that "[p]rior to the time the Palm Court Offering was . . . consummated, PKF obtained actual knowledge of the fact that its 'Market Demand Report' and 'Financial Forecast and Financial Projections' were not reliable due to numerous changes in conditions that had occurred between the time the studies were completed and the fall of 1985." A 90. Respondents allege that although PKF later realized that its economic forecasts "would not come into fruition," A 90, it did not "modify its studies," and Respondents were damaged. A 91.

To begin with, in its forecasts, PKF explicitly stated: "We have no responsibility to update this report for events and circumstances occurring after the date of this report." A 411. Further, Respondents again ignore the critical fact that in its forecasts PKF explicitly warned against, and disclaimed, the accuracy of its economic predictions. PKF stated that its forecasts were mere "estimates" of the "potential" market and financial conditions for the "proposed" Palm Court Hotel; some of the assumptions on which its "estimates" were based "inevitably

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(footnote continued from previous page)  
perform an act in the future can be actionable as fraud if the promise is made with no intent to perform or with the specific intent not to perform. Steak House v. Barnett, 65 So.2d 736, 738 (Fla. 1953); Perry v. Cosgrove, 464 So.2d 664, 666 (Fla. 2d DCA 1985); Ebeling v. Voltz, 454 So.2d 783, 785 (Fla. 4th DCA 1984). This case, however, involves allegedly inaccurate predictions of future economic events, not broken promises by PKF to perform an act in the future. A 45-48, 89-92. Moreover, there is no allegation here that PKF knew its predictions were wrong at the time it completed and released them. A 45-48, 89-92.

will not materialize"; "the actual results achieved during the forecast period will vary from the forecast"; and consequently "[t]he forecasted statement should not be relied upon to indicate actual results." A 242, 254, 411, 413. Since these warnings and disclaimers were contained in PKF's economic forecasts, Respondents cannot contend that when they received the forecasts in late 1985, they were not informed of the forecasts' unreliability - the forecasts themselves stated that they were unreliable and should not be relied on.

In First Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990), this Court held that an accountant can be held liable to a person with whom there is no contractual privity only to the extent that there is "justifiable reliance" on the information supplied by the accountant. Id. at 12, quoting RESTATEMENT (SECOND) OF TORTS, §552 (1976). See also Bruce v. American Dev. Corp., 408 So.2d 857, 858 (Fla. 3d DCA 1982) ("For a complaint to state a cause of action for misrepresentation, there must be a right to rely"). Because of the inherently speculative nature of PKF's market and financial forecasts for the Palm Court Hotel, and because of the express warnings and disclaimers as to their accuracy, Respondents could not justifiably have relied on them. They were economic forecasts, predictions of future economic events - not statements of present or past fact. As a matter of law, therefore, they are not actionable, and PKF is not liable to Respondents.

CONCLUSION

Respondents' counterclaim fails to state an actionable claim against PKF. The decision of the Fourth District Court of Appeal should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petitioner's Reply Brief was served by mail this 9th day of July, 1990, on Michael A. Hanzman, Esq., Floyd, Pearson, Richman, Greer, Weil, Zack & Brumbaugh, Attorneys For Respondents, Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1817.

  
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