IN THE SUPREME COURT OF FLORIDA

Case No. 82,365

Allan Gee, as Official Liquidator
of Universal Casualty & Surety
Company, Ltd. (in Liquidation),

Petitioner,

v.

Seidman & Seidman, and
Binder Dijke Otte & Co.,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

On Discretionary Review from the District
Court of Appeal of Florida, Third District

Daniel S. Pearson
Lenore C. Smith
Holland & Knight
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
(305) 374-8500

Counsel for the Respondents

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SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction because the district court has certified a question that it did not "pass upon." The question certified is whether a liquidator should be permitted to recover "for losses suffered *by the company's customers and creditors*." But the district court expressly declined to pass upon this question because, as it said, the Liquidator[1] in this case had for his own strategic purposes elected *not* to seek recovery for the company's customers and creditors. Thus, the question certified is not one arising in the case, but rather an abstract question posed by an amicus curiae, which calls for an advisory opinion that this Court cannot issue. Moreover, the question the district court actually decided, while of interest to the litigants, is not one of great public importance, and conflicts with no Florida law. Thus this Court is without jurisdiction, and the petition for review should be dismissed.

Should the Court reach the merits, we note that the district court addressed and decided only one of five points we raised on appeal, and, since that point was completely dispositive of the case, it went no further. If the remaining points should ever need to be addressed and decided, the district court is the appropriate forum.

The single point the district court did decide was this: the defendant (Seidman) is not liable to this plaintiff (the Liquidator, avowedly standing in the shoes of an insolvent Cayman Islands insurance company, Universal Casualty & Surety Co. Ltd.) under the circumstances of this case. The district court did not decide that the Seidman accounting firm even if found to have performed a negligent audit could not be liable to some other potential plaintiff who might be able to show that the negligence caused it injury.

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[1]We will refer to the respondents collectively as "Seidman" and to the petitioner as "the Liquidator."

The district court's decision was soundly based on well-established legal precedents. First, Universal, the company on whose behalf the Liquidator sued Seidman, could not rely on the audit because the individual or individuals who dominated and controlled the company, having committed the fraud which led to the misstatement in the financial report, knew of the misstatement that the accountants' audit failed to uncover. Second, that being the case, the Liquidator cannot be said to have relied on the audit because the dominator's knowledge is imputed to the company and the company's knowledge imputed to the Liquidator. Third, if therefore, reliance on the audit cannot be established, any negligence in failing to uncover that which the dominator -- as company -- as Liquidator -- already knows cannot be said to have *caused* damage to this three-headed plaintiff.

The exception to this long-standing rule of imputation -- the so-called adverse interest exception -- comes into play only when it can be said that the dominator is acting adversely to the company when he commits his fraud. As the district court plainly understood, this exception was not applicable in this case where the company was in effect the alter ego of its dominator and used by him as an engine of theft, an instrument for the perpetration of the fraud. Although the Liquidator now intimates that the dominator's domination and control were a matter of dispute, the record and his concessions betray him.

The sum and substance of Seidman's "defense" in this case, then, was that the Liquidator simply could not prove reliance and thus causation, an element of his cause of action. This "defense" was not an affirmative one and Seidman had no burden to prove the Liquidator's lack of reliance or the lack of causation. The reference to "estoppel" in the district court's opinion is not a reference to some affirmative defense raised by Seidman, but simply a way of saying

that imputation was applicable and it prevented (in lay terms, "estopped") the Liquidator from proving his case.

Finally, there is not the slightest basis in the law to support the suggestion that some special rule immunizing insurance companies from imputation exists or should exist. It is preposterous to propose -- as the Liquidator does -- that this Court turn the law on its head to save him (a Cayman Islands Liquidator of a Cayman Islands insurance company who sued Seidman in Miami because it had an office there), when he, to prevent Seidman from defeating claims on behalf of or by reinsurers, elected to stand in the shoes of the company only, while those creditors abandoned their claims.

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION

This case is in this Court because the District Court of Appeal for the Third District certified a question as one of great public importance. When jurisdiction of this Court was then sought, this Court ordered briefs on the merits, cautioning -- perhaps routinely, but in this case, presciently -- that it had "postponed its decision on jurisdiction." That postponement, we submit, will prove to be prudent, because, as this Court will readily see, the Third District did not, as is required for this Court's jurisdiction, "*pass upon*" the question certified.[2]

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[2]The Florida Constitution provides that the Supreme Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, . . ." Art. V, § 3(b)(4), Fla. Const. The Florida Rules of Appellate Procedure provide that "[t]he discretionary jurisdiction of the supreme court may be sought to review . . . decisions of district courts of appeal that . . . pass upon a question certified to be of great public importance; . . ." Rule 9.030(a)(2)(A)(v), Fla. R. App. P.

The question certified is this:

> Whether the liquidator of a bankrupt company should be permitted to recover for losses suffered by the company's customers and creditors, against an auditor which negligently failed to discover the fraud of the company's manager, where the manager's fraudulent act was intended to and did benefit the company.

District Court Order dated October 28, 1993 (R. 2091-92).[3]

Yet, the decision of the Third District, far from passing upon the question of whether the Liquidator should be permitted to recover "for losses suffered *by the company's customers and creditors*," expressly held that it was *not* passing upon that question because at all times -- at trial and on appeal -- the Liquidator had for his own strategic purposes (in the district court's words, the Liquidator's "calculated tactic") elected not to seek recovery for the company's customers and creditors. As the district court explained:

> Reviewing the record below, at trial, the liquidator stated "the Liquidator brings *only* the claims of Universal itself . . . and is *not* seeking to bring the creditors[']claims himself." (emphases in original). Also, the liquidator's position on appeal, defending its award clearly stated again: "[t]he cause of action for artificial prolongation belongs to Universal itself, and exists separate and apart from any causes of action that might be brought by creditors." Further, the liquidator stated: "[t]he fact that it is insolvent, and thus its recovery from BDO Seidman will be used to retire its debts, does not . . . convert Universal's own cause of action against its accountants into a piggyback cause of action by a liquidator asserting creditors' claims." No doubt, neither error

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[3]We will refer to the record as "R.," the transcript of the trial as "T.," the Supplemental Record (filed with this Court by stipulation on December 8, 1993) as "SR," and the Petitioner's Initial Brief on the Merits as "Petitioner's Brief."

We have included in an appendix at the end of this brief a copy of the district court's order certifying the question (Appendix A) and a copy of the district court's decision, Seidman & Seidman v. Gee, 625 So. 2d 1 (Fla. 3d DCA 1992), which includes, at 3-4, the Opinion on Rehearing Denied (Appendix B).

> nor inadvertence led to the path chosen by the liquidator. The election made by the liquidator was thus a calculated tactic to avoid one or more obvious bars to recovery upon the theory that the action was brought on behalf of corporate creditors.

Seidman & Seidman v. Gee, 625 So. 2d 1, 4 (Fla. 3d DCA 1992).

There can be no dispute about what the district court said and that it very deliberately limited its holding to the facts of the case and the Liquidator's tactically chosen theory.[4] Indeed the opinion on rehearing changed nothing about the court's initial opinion and served the sole function of addressing the abstract concern of the amicus Florida's Department of Insurance[5] that if and when it, as a statutory liquidator of bankrupt companies, sought to recover losses

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[4]In the beginning, the Liquidator's suit was "in behalf of all creditors" of Universal. Informed by Seidman's motion for summary judgment that, among other things, the suit in behalf of creditors was in effect a class action which had not met class action procedural and due process requirements; that the Liquidator had no standing to sue for creditors and indeed, his position as intended preserver of the company's assets was antagonistic to creditors' claims; that creditors, not being in privity with Seidman, had no cause of action against the auditor; and that even if a cause of action for creditors existed, it was long since barred by the applicable statute of limitations -- the Liquidator disavowed that he was bringing the creditors' claims and assured the trial judge and Seidman that he was bringing only the claims of Universal. As the district court later correctly observed, the Liquidator's response was that he "brings *only* the claims of Universal itself . . . and is *not* seeking to bring the creditors[']claims himself . . . (emphases in original)." 625 So. 2d at 4.

When the district court observed that the Liquidator's election was "a calculated tactic to avoid one or more obvious bars to recovery upon the theory that the action was brought on behalf of corporate creditors," 625 So. 2d at 4, it likely also had in mind that although seventeen of Universal's creditors initially joined the Liquidator as plaintiffs (R. 35), fifteen of them took voluntary dismissals during discovery proceedings (R. 257-59, 266), the remaining two defected at the end of the Liquidator's case (T. 1695), and only the Liquidator's claim proceeded to verdict. Significantly, of the 17 plaintiffs, 16 had previously dismissed these same claims against Seidman in another court, so that the dismissals below operated as adjudication on the merits against those 16 plaintiffs. Fla. R. Civ. P. 1.420(a)(1).

[5]The Department of Insurance was given leave to appear in the case after the district court's initial decision and permitted to file a brief in support of rehearing.

allegedly suffered by the customers and creditors of such companies, the district court's decision would hinder or preclude these actions.

Thus it was apparently because of the amicus that the district court, having first decided the case on April 14, 1992, reheard the case, entertained oral argument from the Department of Insurance, and after fourteen months issued its August 17, 1993 Opinion on Rehearing Denied. It there specifically noted the Department's argument:

> The thrust of the argument made by the Department of Insurance is that because an insurance company liquidator does not merely stand in the shoes of a corporation but does, in effect, have "much larger shoes," representing the interests of "insureds, creditors and the public generally," the company's knowledge of the fraud perpetrated should have not been imputed to this liquidator and, accordingly, this court erred in issuing its opinion in the accounting firm's favor.

625 So. 2d at 4.

The district court went on to explain, as we have said, that the Department's hypothetical liquidator bears no resemblance to Mr. Gee, the liquidator in the present case, who had repeatedly disavowed representing anyone other than the corporate entity, Universal Casualty & Surety Company, Ltd. (Universal). It was for this reason, said the district court, that the argument of the amicus was simply beside the point of the case:

> [T]o accept the after-the-fact argument of amicus would unfairly change the theory of recovery upon which the case was tried and presented both in the trial court and before this court. Consequently, we do not reject the argument advanced by the amicus; it is only that it is inapplicable in the present case.

625 So. 2d at 4 (citations omitted).

Plainly then the district court did not "pass upon" the question it has certified, and, to that court's credit, it made no pretense about it and, indeed, avoided using the "pass upon" words in its certifying order.[6]

What was passed upon by the district court is that *these accountants* are not liable to *this plaintiff* under the circumstances of *this* case. That, quite obviously, does not mean that they are not liable to anyone -- but no one other than the Liquidator standing in the shoes of

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[6]This, we submit, was no mistake. Even as the entire Opinion on Rehearing Denied was devoted to meeting the Department's concern, so too the question certified addressed not the question passed upon in the case, but instead the abstract question posed by the Department. The irony of all of this is, of course, that although the district court told the Department that *its* question was not involved in the case, by certifying the question, the district court invited this Court to do what neither it nor this Court could do, that is, issue an advisory opinion. This Court should accept the wisdom of the district court's restraint, and not its invitation.

It is well understood in Florida and other jurisdictions that courts will not consider questions raised only by amici curiae having no effect on the parties and not presented by the case. See, e.g., Higbee v. Housing Authority, 143 Fla. 560, 197 So. 479, 485 (1940) (Supreme Court would not consider questions presented by amici curiae concerning constitutionality of act creating housing authorities to undertake slum clearance where there was no justiciable controversy involved in the record as propounded by amici curiae and counsel for parties to cause did not present the questions raised); State v. Bell, 385 A.2d 1094, 1096 (Vt. 1978) ("we may not consider the claim of [an amicus curiae] who has not demonstrated an injury to his legal rights"); Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 153 So. 2d 619 (Ala. 1963) ("[T]he [party on whose behalf the amicus appeared] was not a party to this suit, none of its rights are attempted to be determined by this suit, and if any of its rights are jeopardized, it is entitled to its day in court, when and if it is damaged and it seeks a remedy."); Long v. Odell, 372 P.2d 548, 550 (Wash. 1962) (en banc) ("It is . . . well established that appellate courts will not enter into the discussion of points raised only by amici curiae.") and authorities cited; McCleskey v. Zant, 499 U.S. 467, 523 n.10 (1991) ("It is well established . . . that this Court will not consider an argument advanced by amicus when that argument was not raised *or passed on* below and was not advanced in this Court by the party on whose behalf the argument is being raised.") (emphasis supplied). Compare Teague v. Lane, 489 U.S. 288 (1989) (addressing question of retroactivity of habeas petitioner's claim raised by amicus curiae but noting that question was threshold one requiring consideration in any event). See also Simons v. Jorg, 375 So. 2d 288, 289 (Fla. 1st DCA 1979) (motion for leave to appear as amicus denied where question amicus sought to address was not before court).

Universal is asserting their liability.[7] Having chosen to carry Universal's banner, the Liquidator was confronted by the district court's recognition that the fraud of Universal's undisputed dominator, Vishwa Shah, under very well-established legal principles, is imputed to the company and prevents it and its successor from maintaining the action. Nothing first impression; nothing radical; nothing exceptional; and nothing of great public importance about that.[8]

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[7]Cases from other jurisdictions cited for the proposition that certain other state statutes empower a receiver to pursue claims on behalf of creditors or other third parties are beside the point. See e.g. Corcoran v. Frank B. Hall & Co., 545 N.Y.S.2d 278 (App. Div. 1989) (New York statute); Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Pa. Commw. Ct. 1991) (Pennsylvania statute); Merin v. Yegen Holdings Corp. (In re Integrity Ins. Co.), 573 A.2d 928 (N.J. Super. Ct. App. Div. 1990) (New Jersey statute). These cases have nothing to do with Cayman Islands or even Florida law and certainly nothing to do with the case at hand where the Liquidator has denied that he is exercising any such power (R. 843.) If, as the Department of Insurance maintains, its shoes are bigger than the shoes of the companies *it* liquidates, but see § 631.141(2), Fla. Stat. (1993) ("the [Department of Insurance] is vested by operation of law with the . . . rights of action . . . *of the insurer*") (emphasis supplied); § 631.111(2), Fla. Stat. (1993) ("The order of liquidation shall authorize and direct the department to take immediate possession of all the property, assets, and estate, including, but not limited to . . . all rights of action . . . *belonging to the insurer* . . . . ") (emphasis supplied), we are confident that in some future case in which it is truly involved, the Department will make its position known. As the Supreme Court of Alabama once said to a similarly-situated amicus:

> [T]he Muscle Shoals Natural Gas Corporation was not a party to this suit, none of its rights are attempted to be determined by this suit, and if any of its rights are jeopardized, it is entitled to its day in court, when and if it is damaged and it seeks a remedy. This court will not decide a question presented by amicus curiae which was not presented by the parties to the cause, and will leave the question for decision when properly raised and presented.

Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 153 So. 2d 619, 628 (Ala. 1963).

[8]Had the district court certified the question it actually passed upon, then our argument here would be that the question has no public importance whatsoever. "Public importance" means exactly that -- of importance to the public, not just the litigants. "[I]t is of obvious importance that there should be developed consistent rules for limiting [discretionary review] to 'cases involving principles the settlement of which is of importance to the public, as distinguished from (continued...)

By the same token, while the district court's decision extinguishes *this* Liquidator's right of recovery because of the facts of this case, it does nothing -- or at least nothing that has not always been done -- to limit other liquidators' rights of recovery. And, if persons outside of the company can establish that they come within a group or class of persons to whom the auditors knew that their audits would be communicated, see First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9, 15 (Fla. 1990), then the district court's decision does nothing whatsoever to affect their right to sue and recover from the auditor. No such suit, however, was before the district court.

We fully understand that the fact of certification -- even an invalid one -- sets the jurisdictional wheels in motion. Rule 9.120(d) provides that "[i]f jurisdiction is invoked under rules 9.030(a)(2)(A)(v) or (a)(2)(A)(vi) (certifications by the district courts to the supreme

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[8](...continued)
that of the parties . . . .'" Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958), quoting Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). Accord Hastings v. Osius, 104 So. 2d 21, 22 (Fla. 1958) (same); Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958) (character common to all three instances justifying consideration of writ of certiorari is that "[t]hey deal with matters of concern beyond the interests of the immediate litigants").

The jurisdictional defect in the present case cannot be cured by restating the certified question. This Court will not, and cannot under the Florida Constitution, restate the certified question to address a question not passed upon, for were it to do so, it would simply be rendering an advisory opinion. While it has restated the certified question where, for example, the question does not conform with the facts of the case, Thomason v. State, 620 So. 2d 1234, 1235 (Fla. 1993), Williams v. State, 492 So. 2d 1051, 1052 (Fla. 1986); Fisher v. Shenandoah Gen. Const. Co., 498 So. 2d 882, 883 (Fla. 1986); Lawton v. Alpine Engineered Prods., Inc., 498 So. 2d 879, 880 (Fla. 1986), or the Court "see[s] the central issue before [it] differently than did the district court," Department of Transportation v. Fortune Fed. Sav. and Loan Ass'n, 532 So. 2d 1267, 1268 (Fla. 1988), or the certified question "contains language inconsistent with" established legal analysis, Riley v. State, 511 So. 2d 282, 283 (Fla. 1987), in these cases the question was not whether the district court had *passed upon* the question certified, but whether it had correctly formulated or articulated the question it *had* passed upon.

court), no briefs on jurisdiction shall be filed." But while a district court's statement that a question is of great public importance may be sufficient to foist tentative jurisdiction on the Supreme Court and act as the procedural device triggering the filing of briefs on the merits, the separate question whether a decision "passes upon" a particular question and, therefore, whether the Court should *retain* jurisdiction, is open to early challenge: "[T]here is authority for the proposition . . . that . . . a certificate would not cover or prevent inquiry *as to whether a decision actually involves or properly 'passes on' a particular question.*" Susco Car Rental Sys. v. Leonard, 112 So. 2d 832, 835 (Fla. 1959) (emphasis supplied). We make that challenge here and now.

In Revitz v. Baya, 355 So. 2d 1170 (Fla. 1977), the district court certified a question to this Court, even though it had noted in its decision that it had not decided the question. This Court held that it was without jurisdiction to consider it:

> Article V, Section 3(b)(3), Florida Constitution, provides, in pertinent part, that the Supreme Court "[m]ay review by certiorari any decision of a district court of appeal . . . that *passes upon* a question certified by a district court of appeal to be of great public interest . . .." (Emphasis supplied.)
>
> Since, sub judice, the District Court specifically found it unnecessary to pass upon the question now certified to this Court, we are without jurisdiction to consider and decide the question.

Id. at 1171, citing Duggan v. Tomlinson, 174 So. 2d 393, 394 (Fla. 1965) ("The constitutional provision . . . limits our certiorari review in these instances to those decisions of such district courts which pass upon a question certified by such courts to be of great public interest.").

In State v. Burgess, 326 So. 2d 441 (Fla. 1976), the district court certified the question "May one forcefully resist an unlawful arrest by a person whom he knows or has reason to know to be an authorized police officer?" This Court declined to answer because:

> The record shows Respondent was charged with resisting arrest with violence but submitted a nolo contendere plea to a lesser offense of resisting arrest without violence. Since the guilty plea was accepted by the court to a lesser offense, we deem it inappropriate to issue our opinion in response to the certified question relating to resisting arrest with violence.
>
> Accordingly, we respectfully decline to answer the question propounded by the District Court.

Id. at 441. See also Massie v. University of Florida, 570 So. 2d 963, 978 (Fla. 1st DCA 1990)[9] (Ervin, J., concurring) (certifying question not feasible where district court had not passed on question that would be appropriate for certification), citing Revitz v. Baya, 355 So. 2d 1170.[10]

The reason this Court declines to answer such questions is fundamental: an opinion issued on a question not decided by the district court and therefore having no effect on the actual controversy is the type of advisory opinion this Court has no authority to render. Sarasota-Fruitville Drainage District v. Certain Lands, 80 So. 2d 335, 336 (Fla. 1955) ("We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution . . . . [T]he Constitution of this State gives

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[9]Quashed on other grounds, 602 So.2d 516 (Fla. 1992).

[10]Cf. Davis v. Department of Health and Rehabilitative Services, 390 So. 2d 1194 (Fla. 1980) (where trial court specifically refrained from passing on constitutionality of statute, supreme court did not have jurisdiction; constitutional challenge must be to controlling statute and decision as to statute's validity necessary to determination of case).

this Court the right to issue advisory opinions only to the Governor of the State of Florida and then only concerning questions arising as to his powers and duties under the Constitution.");[11] Department of Admin. v. Horne, 325 So. 2d 405 (Fla. 1976) ("[i]t appearing that any opinion we render would be advisory only, this cause is hereby dismissed"). See Sandstrom v. Leader, 370 So. 2d 3, 6 (Fla. 1979) (court "constrained by fundamental principles of appellate review" to decline invitation to decide whether hypothetical acts would fall within proscriptions of statute); Dade County v. Philbrick, 162 So. 2d 266, 268 (Fla. 1964) (Certified question "must not be one presenting a pure abstract issue. It must be one indispensable to the disposition of the litigation before the Court . . ."); Evans v. Carroll, 104 So. 2d 375, 377-78 (Fla. 1958) (contentions that statute was unconstitutional constituted abstract issues not requiring disposition; constitutional questions posed were "merely colorable, unrelated to the particular facts involved, and therefore presented no substantial basis upon which appeal would lie").[12]

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[11]As the court in Schwarz v. Nourse, 390 So. 2d 389 (Fla. 4th DCA 1980) explained:

> The only provision in Florida law for advisory opinions is in Article IV, Section 1(c) of the Florida Constitution. This authorizes the Governor to request the opinion of the Justices of the Supreme Court as to the interpretation of any portion of the constitution upon any question affecting his exclusive powers and duties. *No other advisory opinions are authorized within the courts of Florida.*

Id. at 392 (emphasis supplied). Accord Interlachen Lakes Estates, Inc. v. Brooks, 341 So. 2d 993, 995 (Fla. 1976); Collins v. Horten, 111 So. 2d 746, 751 (Fla. 1st DCA 1959). Article IV, Section 1(c) of the Florida Constitution provides: "The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. . . ."

[12]See also Allen v. Martinez, 573 So. 2d 987, 989 (Fla. 1st DCA 1991) (court declined to render advisory opinion where issues were moot); Sabio v. Russell, 472 So. 2d 869 (Fla. 3d (continued...)

Before leaving the issue of jurisdiction we will make two more points. The first is that as this Court knows, its jurisdiction cannot be invoked merely because it might -- though we see no reason why it would -- disagree with the district court's decision. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975); Kincaid v. World Ins. Co., 157 So. 2d 517, 518 (Fla. 1963).

> On the contrary, in order to sanctify the decisions of the Courts of Appeal with an aspect of finality, so essential to prevent any imbalance in the several echelons of the appellate process, the jurisdiction of this Court to exercise certiorari powers and to set aside the decisions of the Courts of Appeal on the conflict theory was expressly limited by the Constitution itself. Ansin v. Thurston, Fla., 101 So. 2d 808.

Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960).

This court has repeatedly refused to become "a court of select errors," Mystan Marine Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976), and has continued to follow the teaching of Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958):

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a

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[12](...continued)
DCA 1985) (adjudication as to unconstitutionality of enactment constituted advisory opinion which courts were unauthorized to issue); Schwarz v. Nourse, 390 So. 2d 389, 392 (Fla. 4th DCA 1980) ("[C]ourts do not have the power to give legal advice or opinions. . . . The function of the courts should be limited to controversies between actual litigants."); Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) ("Courts of law are established for the sole purpose of deciding issues before them arising from litigated cases and should limit pronouncements of the law to those principles necessary for that purpose. They are not designed to render advisory opinions on abstract questions of law."), aff'd, 177 So. 2d 202 (Fla. 1965).

> supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Id. at 810 (citations omitted). Accord Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982); Jenkins v. State, 385 So. 2d 1356, 1357-58 (Fla. 1980). See also Whipple v. State, 431 So. 2d 1011, 1013-15 (Fla. 2d DCA 1983). As we will show, the petitioner's brief is for the most part a mere invitation to this Court to ignore its clearly defined jurisdictional limits.

Our second point is that there simply is no other basis for the exercise of jurisdiction. As we will show, the district court's decision is nothing more than a specific application of the longstanding and well-established propositions that a negligent wrongdoer will be liable for its negligence only when the party seeking relief is one to whom the wrongdoer owes a duty, only when there is causation, only when there is reliance, and only when the party seeking relief is not otherwise barred. In a word, the district court's decision conflicts with absolutely nothing except the petitioner's view that deep pockets -- imagined or real -- can be picked by anyone.

II.

INTRODUCTION TO THE MERITS

Before responding, once again, to the Liquidator's argument, we remind this Court that the district court addressed and decided only one of five points we raised on appeal. The district court went no further, since the single point it decided was completely dispositive of the case. Among the issues left unaddressed and undecided were Seidman's claims that if the Liquidator *were* allowed to assert the claims of Universal's creditors under the guise of an action by Universal, then (a) the Liquidator should have been required to prove as to each creditor that Seidman owed it a duty, that it relied on Seidman's audit reports, that the reliance was reasonable and that Seidman's alleged negligence, not something else, caused its loss; (b) Seidman should have had the right to depose and obtain document production and answers to interrogatories from creditors as if they were adverse parties to the action; (c) Seidman should have been permitted to raise appropriate affirmative defenses, such as lack of privity, comparative negligence or the statute of limitations, against each individual creditor; (d) as to at least 16 of the 17 creditors who dismissed their claims in this action, recovery was barred by the two-dismissal rule; and (e) the Liquidator should have been required to establish each creditor's damage by other than his own approval of the creditor's claim sanctified by an ex parte order of a Cayman Islands court. (Initial Brief of Appellants, Third District, SR22-SR37). Quite obviously, the Liquidator, who asks this Court to "reverse the decision of the Third District with directions that the case be remanded for reinstatement of the judgment," Petitioner's Brief at 50, has lost sight of the unaddressed and undecided points. If the remaining points should ever need to be addressed and decided, the district court is the appropriate forum.

See Florida Power and Light Co. v. Ahearn, 118 So. 2d 21, 23 (Fla. 1960) (where plaintiff's appeal to district court was based on three points and district court reversed on first point only and found consideration of other points not essential, proper court to consider remaining points was district court, and case would be remanded for further consideration of those points); Van Fleet v. Lindgren, 107 So. 2d 381, 383 (Fla. 1958) (where numerous other grounds for reversal were raised in district court but not decided, Supreme Court did not undertake to pass upon any other aspect of the case except the isolated point of law specifically discussed, and remanded case to district court to consider any and all other questions raised by appellants not previously considered in view of prior holding of that court); Olin's, Inc. v. Avis Rental Car Sys., 104 So. 2d 508, 511 (Fla. 1958) (decision of district court quashed and cause remanded to district court for consideration of other questions presented on interlocutory appeal which were not decided since, under view taken by district court on that appeal, it was unnecessary). Cf. United States v. Grey Bear, 863 F.2d 572, 573 (8th Cir. 1988) (on rehearing en banc, issues not determined in panel opinion referred back to a panel for disposition); Martin v. Heckler, 773 F.2d 1145, 1155 (11th Cir. 1985) ("it is . . . inefficient for the *en banc* court to rule on matters not ruled upon by the district court or a panel of the court . . ."). Having said this, we now respond.

The district court has twice agreed with the merits of our position, and indeed in its Opinion on Rehearing Denied it evinced little interest in the Liquidator's second attempt to persuade it otherwise, and simply used the occasion to assure the amicus, the Department of Insurance, that what the Department had raised as a concern was not decided in the case.

And the district court of appeal as a whole, in rejecting the Liquidator's motion for rehearing en banc, evinced no interest in his argument that the panel decision was of exceptional

or great importance even though the Liquidator paraded the horrible, as he again does here, that the panel decision made accountants immune from their own negligence.

Yet despite this history, the Liquidator continues to treat the district court as a mere rest stop on what he sees as his unobstructed path to the Supreme Court. We fully believe that his journey ended in the district court, but we will briefly, and for the third time, answer his arguments.

The Case and the District Court's Resolution of It

The Liquidator sued Seidman, Universal's former auditors, for negligence in their audit reports of Universal's financial statements for the years 1978 through 1981 (R. 35-44).[13] Although initially proceeding "in behalf of all creditors" of Universal (R. 35), the Liquidator, challenged by Seidman's motion for summary judgment, responded that "[t]he Liquidator brings only the claims of Universal itself . . . and . . . is not seeking to bring the creditors[']claims himself . . . " (R. 843) (emphasis in original). As the district court recognized, the Liquidator's position was a calculated litigation tactic.

The Liquidator's theory was that Seidman was negligent in failing to discover that Vishwa Shah ("Shah"), the individual who wholly dominated and controlled Universal (T. 1406, 1474, 1510-11), manufactured evidence of the existence from the outset of a $10 million certificate of deposit ("CD") in order to have his company accepted as a player in the

[13]The Liquidator originally alleged a number of theories, including negligence and fraud (R. 35-44). At the end of the trial, the Liquidator abandoned all claims except his claim for negligence (T. 3660). Nevertheless, the Liquidator persists, as he has done throughout this litigation, in glossing over the distinction between fraud and negligence in the hope that it will be overlooked by the Court. But while a participant in a fraud -- a colluder -- may not be entitled to the benefit of the rule of imputation, a negligent person is. See, e.g., FDIC v. Shrader & York, 991 F.2d 216, 226 (5th Cir. 1993).

international insurance market, and thereby deceive the business community (T. 194-96). Seidman sought to show that it acted reasonably in believing that the CD had existed as an asset of Universal for all or part of the period during which Seidman performed its audits and that the CD was removed by Shah only after Universal's business turned sour and it became apparent that the $10 million fund might be invaded to pay the debts of the company. The jury resolved this disagreement in favor of the Liquidator and the sufficiency of the evidence to support that resolution was not made an issue on the appeal.[14] Significant for purposes of the appeal was that all agreed that, as the Liquidator's theory itself showed, Seidman was a victim of, not a participant in, Shah's fraud.[15]

Since Seidman's negligence was purported to be its preparation of misleading audit reports, the Liquidator was required to affirmatively prove that Universal relied on the reports to its detriment. Of course, the Liquidator submitted no evidence that Universal, which itself

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[14]It can hardly be deemed a *concession* of Seidman's negligence, as the Liquidator continues to urge, that we chose not to contest on appeal the jury's resolution of a factual dispute. As any lawyer knows, the point would be doomed to failure unless there was no evidence to support the plaintiff's position, or, perhaps, the jury's verdict was so much against the greater weight of the evidence as to be assailable. Our many other points were far more critical.

[15]We will say it again. This difference between being a participant in the fraud and being negligent (even if, as the Liquidator likes to pejoratively call this negligence, "inept," "slothful," and "wrongful") distinguishes his banner case of Schacht v. Brown, and others he relies on. See Schacht v. Brown, 711 F.2d 1343, 1345 (7th Cir. 1982), cert. denied, 464 U.S. 1002 (1983) (accounting firm alleged to have "joined with . . . officers and directors in a multi-faceted, fraudulent scheme" to defraud the company); Tew v. Chase Manhattan Bank, 728 F. Supp. 1551, 1555 (S.D. Fla. 1990) (complaint alleged claims for fraud, aiding and abetting fraud and civil conspiracy to defraud against defendant bank); Foster v. Peat Marwick Main & Co., 587 A.2d 382, 384 (Pa. Commw. Ct. 1991) (complaint alleged that auditors "knowingly, intentionally, and recklessly [made] untrue statements"); Robertson v. White, 633 F. Supp. 954, 962 (W.D. Ark. 1986) (plaintiffs alleged that audit "was negligently and fraudulently misleading"); In re Huff, 109 B.R. 506, 508 (S.D. Fla. 1989) (defendant's "representations were fraudulent").

had induced the misleading representation, relied on anything whatsoever in Seidman's audit reports.

Had Universal itself sued Seidman, no one would seriously contend that Universal would be entitled to recover when the person who dominated and controlled it knowingly caused the misrepresented financial condition. Yet that is precisely what the Liquidator contended in the district court and continues to contend here. He says that because Shah acted adversely to Universal, neither his acts nor his knowledge should be imputed to Universal. In sum, the Liquidator argues that the adverse interest exception applies because Shah looted Universal. But a corporation which is insolvent from the outset cannot be looted; it can only be used as a mechanism to steal from others. There is no such thing as artificial prolongation ab initio. The Liquidator's argument is wrong because, as the district court correctly observed, the evidence is undisputed that Shah did not act adversely to Universal, a company activated by him for the purpose of enabling its ownership to profit from the fraud he practiced.[16]

It is thus surprising -- although at the same time helpful -- that the Liquidator has chosen to detail for this Court the story of Universal and Shah which, better than all that has thus far been said, shows that Universal served no legitimate purpose other than to enable Shah to commit and profit from his fraud. There is not the slightest indication that Universal was a functioning entity pre-Shah, or, viewing the evidence most favorably to the Liquidator, that it

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[16]The facts upon which the district court based its decision were the same facts the Liquidator undertook to prove at trial: that Shah engaged in a fraud, that Shah completely dominated and controlled the corporation, and that the amount of damages being sought for the alleged fraud was the money owed to outsiders. Under those undisputed facts Shah's knowledge is to be imputed to the corporation and there is no justifiable reliance. The district court made no findings of fact. It simply applied the law to facts shown by the Liquidator.

was ever solvent. But it is very clear that shortly after its formation Shah activated it as an engine of theft. (See, e.g., "brief chronology of Universal's corporate existence," Petitioner's Brief at 15-17). That being the case, Shah's fraud was surely on behalf of the corporation -- his alter ego and instrument for the perpetration of the fraud -- not against it. Here -- and in every Ponzi scheme -- where a corporation is the vehicle used for the receipt of funds, the corporation is illegitimate from infancy, there are no innocent victims within the corporation and its "artificial prolongation" does nothing more or less than allow the fraud against outsiders to continue, without the slightest damage to the corporation and, indeed, with benefit to it and its owner-dominator.

This, of course, was our point on appeal and at the heart of the district court's decision:

> As authority for its position that it should prevail on the facts of this case, appellant relies on the leading case of Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982), cert. denied, 459 U.S. 880 (1982). The central issue in Cenco was whether Seidman was entitled to use, through imputation, the fraud of Cenco's managers as a defense to an action against the corporation's auditors for failure to discover the wrongdoing of the corporation's managers. Cenco's management had fraudulently inflated the value of the corporation's inventories. Concluding that the corporation was estopped from bringing a claim against its auditors, the Cenco court held that an auditor may raise an imputation defense only where the fraud perpetrated by the management was committed on behalf of the corporation rather than in furtherance of the managers' own interests. The rationale is that the corporation is precluded from recovering on a claim for fraud where the corporation actually benefitted from the fraud. Rejecting the "extreme position" that an employee's fraud is always imputed to the corporation, the court held that the misconduct of the corporation's managers should be imputed to the corporation only where the acts are performed on behalf of the corporation.
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> > Fraud on behalf of the corporation is not the same thing as fraud against it. Fraud against the

> corporation usually hurts just the corporation; the stockholders are the principal if not the only victims; their equities vis-a-vis a careless or reckless auditor are therefore strong. But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud.
>
> Cenco, 686 F.2d at 456. Because the misconduct of the managers was performed on Cenco's behalf, the corporation was barred from shifting the responsibility for the fraud to the auditors.

625 So. 2d at 2 (parallel citations omitted).

The Liquidator contends that the district court should not have focused on the short-term effects of Shah's fraud in deciding that Universal was used as an engine of theft against outsiders. He says the proper focus should be on the long term, and that the long-term effect was to render Universal more insolvent. That argument makes no sense because in the long term, fraud on behalf of a corporation will always harm the corporation because no massive fraud can continue forever. That is why courts must look at the short term.[17] See Cenco, 686 F.2d at 456 ("[the detriment to the corporation] after the fraud is unmasked and the corporation is sued . . . is a question of damages, and is not before us"); Security Am. Corp. v. Schacht, No. 82-C-2132 (N.D. Ill. Jan. 31, 1983) (LEXIS, Genfed library, Dist. file) ("Whether liability

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[17]In his obviated jurisdictional brief the Liquidator suggested that in this respect the district court decision conflicts with Joel Strickland Enterprises, Inc. v. Atlantic Discount Co., Inc., 137 So. 2d 627 (Fla. 1st DCA 1962). Presumably recognizing the jurisdictional difficulties presented by the certified question, the Liquidator urges that the Court "may base jurisdiction on the express and direct conflicts which the Third District's decision creates with other Florida appellate decisions . . .," Petitioner's Brief at 45 n.2, referring the Court to his previously filed 10-page jurisdictional brief to which we had not responded when the Third District certified the question. We will dispel any notion of express and direct conflict right here by noting that the court in Joel Strickland never *considered* the issue of "short-term benefit." Thus the Liquidator's statement that Joel Strickland makes no short term/long term distinction, while true, is meaningless.

ultimately may fall on Security America, once the fraud has been unmasked, is not the relevant inquiry"); FDIC v. Deloitte & Touche, 834 F. Supp. 1129, 1140 (E.D. Ark. 1992) ("If the only facts supporting an adverse interest argument are that FirstSouth ultimately failed, and that controlling officers engaging in wrongful conduct continued to draw their salaries, the plaintiff's position will be a difficult one to maintain"); CEPA Consulting, Ltd. v. King Main Hurdman (In re Wedtech Sec. Litig.), 138 B.R. 5, 9 (S.D.N.Y. 1992) ("[t]he relevant issue is short term benefit or detriment to the corporation, not any detriment to the corporation resulting from the unmasking of the fraud").

Ernst & Young Comes Along

During the course of the briefing of this case in the district court and by the time that court first decided it on April 14, 1992, a Texas federal trial court entered a judgment for the accounting firm of Ernst & Young in a suit brought against it by the FDIC, as successor to Western Savings Association.[18] The likeness between this case and the Ernst & Young case was remarkable, the difference being that the FDIC was claiming from the accountants $560 million that the bank owed to depositors when it went under, while here the Liquidator had become the beneficiary of a $15.7 million judgment.

In Ernst & Young a man named Jarrett E. Woods, Jr. "[b]y all accounts . . . dominated and controlled Western [Savings Association]." 1991 WL 197111 at *1. When Western's financial stability became undermined by questionable lending practices, the Federal Home Loan

[18]FDIC v. Ernst & Young, No. Civ. A 3-90-0490-H, 1991 WL 197111 (N.D. Tex. Sept. 30, 1991).

Bank Board ordered an independent review of the classification of the loans and independent audits for 1984 and 1985. Western hired Ernst & Young to perform these tasks.

By September 1986 Western was placed in receivership, and nearly four years later the FDIC -- the ultimate assignee of the receiver's claims -- sued Ernst & Young and its predecessor Arthur Young & Company for $560 million in damages allegedly suffered by Western.

The gravamen of the FDIC's negligence claim was that "if the audits had been accurate Western would have stopped making the high risk loans that caused the $560 million in losses." Ernst & Young responded:

> [I]n order to prove causation, an essential element of a negligence claim, [the FDIC] must show detrimental reliance on the 1984 and 1985 audits. [Ernst & Young] contend[s] that [the FDIC] cannot make this showing because Woods, as sole stockholder, chairman of the board, and chief executive officer, knew the true state of Western's financial condition. Furthermore, because Woods' knowledge is attributable to Western, [the FDIC], as assignee of Western, is estopped from arguing that it relied on information it knew to be false.

1991 WL 197111 at *2.

The Texas federal court recognized the long-established rule that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation, except where it can be said the individual acts adversely to the corporation, that is, not on its behalf but against it. But the court concluded that since the only victims of the fraud were outsiders to the corporation -- depositors and creditors, Wood's fraudulent acts were on behalf of, not against, the corporation, and his knowledge was thus to be imputed to Western. It concluded that because Western, with full imputed knowledge of its financial condition, could not have relied on negligently-prepared audit reports, and because reliance is a necessary

component of the essential causation element of the claim of negligence, the FDIC -- as assignee of Western's claim, subject to all defenses that could be raised against Western -- could not prove its claim against Ernst & Young.

The Third District correctly observed that the Ernst & Young decision was based on "the long-established rule that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation," Seidman, 625 So. 2d at 2, and that:

> Because the corporation had knowledge of and benefitted from the fraud, . . . it could not claim to have relied on the auditor's reports. Without proof that the corporation relied on the audit report to its detriment, the FDIC was unable to establish that the accountant's negligence caused a corporate injury.

Id.

After the Third District's April 14, 1992 decision, the Fifth Circuit Court of Appeals affirmed the Texas federal trial court. In FDIC v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992), the court agreed with the trial court that the issue was one of reliance and thus causation, concluding that since the manager "was cognizant of the financial condition" of the corporation, the manager, and therefore the corporation, could not have justifiably relied on the audited financial information, and had no claim against its auditor. Id. at 170. It explained: "Because a corporation operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed the privity and knowledge of the organization, else it could always limit its liability . . . ." Id. at 171 (internal quotation marks and citations omitted).

We submit that these are the rules, the Third District properly followed them and, as the courts agree, there is simply nothing new about them. See, e.g., FDIC v. Shrader & York, 991 F.2d 216, 221-27 (5th Cir.), petition for cert. filed, No. 93-651 (Oct. 26, 1993); FDIC v.

Deloitte & Touche, 834 F. Supp. 1129, 1137-40 (E.D. Ark. 1992); FDIC v. Regier, Carr & Monroe, No. CIV-92-075-S, 1993 U.S. Dist. LEXIS 14546 (E.D. Okla. Aug. 17, 1992), aff'd, 996 F.2d 222 (10th Cir. 1993); CEPA Consulting, Ltd. v. King Main Hurdman (In re Wedtech Sec. Litig.), 138 B.R. 5, 9 (S.D.N.Y. 1992); Feltman v. Prudential Bache Sec., 122 B.R. 466, 474 n.9 (S.D. Fla. 1990); Security Am. Corp. v. Schacht, No. 82-C-2132 (N.D. Ill. Jan. 31, 1983).

III.

THE LIQUIDATOR MISREADS THE DISTRICT COURT'S DECISION

The Liquidator accuses the district court of "pervert[ing] equity into an instrument for furthering injustice." Petitioner's Brief at 42. He concocts this wishful brew from words like "estoppel" and "wrongdoing," and tops it off with the provocative suggestion that the "Third District handed the malpracticing auditors a get-out-of-jail-free card."[19] Petitioner's Brief at 25. Let us see what his concoction is really made of.

The essential ingredient with which the Liquidator begins is a sentence plucked from the district court's opinion: "A Cenco estoppel is applicable." Since the Cenco court never used the terms "estoppel" or "estopped," we must look to the district court's opinion to determine what *it* meant by a "Cenco estoppel."

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[19]The Liquidator has turned up the heat: his words are a stronger variation of his earlier accusations that the district court was letting the auditors "off scot-free." Motion for Rehearing and Certification (Third District), SR162; Petitioner's Brief at 2. Once more, the implication is that the wrongdoing is something other than negligence -- wrongdoing of the sort that would be deserving of harsh penalties.

It is evident from a reading of the district court's opinion that the statement "[a] Cenco estoppel is applicable" was part of the district court's discussion of the imputation issue, specifically, whether Shah's acts benefitted his company (and were thus to be imputed) or were adverse to his company (and thus not to be imputed). What the district court meant by a "Cenco estoppel" was clear from its earlier discussion of Cenco:

> The central issue in Cenco was whether Seidman was entitled to use, through imputation, the fraud of Cenco's managers as a defense to an action against the corporation's auditors for failure to discover the wrongdoing of the corporation's managers. Cenco's management had fraudulently inflated the value of the corporation's inventories. Concluding that the corporation *was estopped* from bringing a claim against its auditors, the Cenco court held that an auditor may raise an imputation defense only where the fraud perpetrated by the management was committed on behalf of the corporation rather than in furtherance of the managers' own interests.

625 So. 2d at 2 (emphasis supplied). Thus, the "estoppel" referred to by the district court is the estoppel of a corporation from complaining of acts of its management when those acts have benefitted the corporation. The district court simply held that Universal (and thus the Liquidator, standing in the shoes of Universal) could never prove the element of causation because Shah's knowledge was imputed to Universal; thus Universal already knew of the fraud and did not rely on Seidman's audits; and therefore Seidman's negligence could not possibly have caused Universal any harm. Thus Universal could not bring -- or in the district court's words, "was estopped from bringing" -- a claim against its auditors.

The Liquidator's effort to add flavor to his flawed mix by suggesting that Seidman raised the equitable defense of estoppel and thereby had the burden of proving it and failed to do so, is not only the first such effort, but is a tasteless one as well. As the Liquidator well knows,

Seidman never asserted "estoppel" as a defense to causation and reliance.[20] Seidman simply claimed that Universal could never prove reliance and, therefore, causation.[21] The so-called "Cenco estoppel" applied by the district court was simply its shorthand to describe that a company that benefits from the fraud of its controlling person will not be heard to complain any

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[20]The Liquidator claims that Seidman raised and presented various "*affirmative* defenses" solely on the basis of legal argument, and that "the most significant of Seidman's defenses for purposes of these review proceedings was an equitable defense of estoppel in which Seidman argued that misconduct by Shah should be imputed to Universal's Liquidator to defeat any recovery from BDO Seidman for its malpractice." Petitioner's Brief at 12-13 (emphasis supplied). To the extent the Liquidator is suggesting that Seidman raised an affirmative defense of equitable estoppel which it had the burden to prove, the Liquidator is wrong. The Liquidator's record references following his statements are telling. The first reference (R. 737, p. 24) is to Seidman's argument in its *motion for summary judgment* that Gee could not claim reliance if the principals of Universal "knew" the $10 million CD never existed. The second reference (R. 1088-89) is to a discussion of Cenco and Security America in Seidman's *motion for directed verdict*. An examination of the affirmative defenses themselves (R. 234-38) shows that Seidman never asserted imputation, much less estoppel, as an affirmative defense, but, as we have said, maintained that Universal could never prove reliance and, therefore, causation. Seidman's affirmative defenses were: (1) the plaintiffs lacked privity of contract; (2) Gee lacked standing to maintain the action on behalf of Universal; (3) Gee lacked standing to assert claims on behalf of creditors; (4) the statute of limitations barred the action; (5) Gee breached covenants not to sue; (6) plaintiffs were estopped from maintaining the action because Seidman relied on plaintiffs' representations that they would not commence the action until certain conditions were met (surely not to be confused with the estoppel the Liquidator is now urging); (7) the action violated the Uniform Insurers Liquidation Act; (8) the forum was inconvenient; (9) the order of the Grand Court of the Cayman Islands ("the Order"), from which Gee claimed to derive his authority to maintain the action, violated the public policy of Florida and the United States and Gee's authority should not be recognized in this country; (10) the Order did not authorize Gee to bring the action in the name of Universal's creditors or seek to recover damages based on claims belonging to those creditors; (11) Gee failed to satisfy conditions precedent contained in the Order; (12) the plaintiffs (then including creditors who later dismissed their claims) were comparatively negligent; and (13) some or all of the plaintiffs transacted business in Florida without authorization and were therefore barred from maintaining the action (R. 234-38).

[21]A claim based upon negligence in auditing requires causation, and causation requires justifiable reliance. See, e.g., FDIC v. Ernst & Young, 967 F.2d 166, 170 (5th Cir. 1992) ("a claim that reliance is not a component of causation strains credulity"); Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 964 (9th Cir. 1990) (a plaintiff must establish "the element of causation, in the sense of actual and justifiable reliance").

more than its controlling person could complain -- is "estopped" from doing so. Arguments regarding the requirements for a party claiming estoppel completely miss the mark, and the cases the Liquidator relies on simply do not apply.[22]

The Liquidator's final garnish -- that equity cannot aid "wrongdoers" -- having nothing to adhere to, becomes no more than a maxim in search of a case.

IV.

THE DISTRICT COURT'S DECISION IS SOUND LAW AND SOUND POLICY: THERE IS NO SUCH THING AS NEGLIGENCE IN THE AIR

The Liquidator claims that because the district court's decision relieves a negligent wrongdoer of responsibility for its negligence, it conflicts with Florida decisions holding that equity will not relieve wrongdoers from liability for their own negligence, and will not permit a wrong to go without a remedy (Petitioner's Brief at 42-45). He goes on to say:

> The Third District's decision strips the Liquidator of a recovery of $16 million dollars in losses the malpracticing auditors caused the company. The Liquidator's recovery represents funds held for the benefit of all lawful claimants. To dissipate that recovery via the

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[22]As the court stated in FDIC v. Deloitte & Touche, 834 F. Supp. 1129, 1143 n.21 (E.D. Ark. 1992):

> [FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992)] . . . is a decision about equitable estoppel. Its tone reflects the Ninth Circuit's assessment of the parties' ethical positions. The FDIC had done nothing wrong, whereas the law firm had (at least allegedly) breached fundamental professional duties. Those are appropriate concerns for a court "sitting in equity." In this case, however, Deloitte has not attempted to assert an equitable defense.

Neither did Seidman attempt to assert an equitable defense. It simply insisted that the Liquidator must, but could not, prove reliance and, therefore, causation.

> Third District's estoppel holding is to use equity to ensure that a wrong goes unremedied, a particularly inappropriate result in the context of a receivership, where funds have been recovered for ultimate distribution to innocent claimants.

Petitioner's Brief at 44 (footnote omitted).

The Liquidator's reference to "innocent claimants" is, of course, to the creditors of Universal -- a bunch of insurance companies who had reinsured Universal -- who, as we have said, either failed to seek to hold Seidman liable or long since abandoned such an undertaking. They are not Universal, the only party to whom a duty was owed, and in whose place the Liquidator sued. The district court's words bear repeating:

> [A]t trial, the liquidator stated "the Liquidator brings *only* the claims of Universal itself . . . and is *not* seeking to bring the creditors['] claims himself." (emphases in original). Also, the liquidator's position on appeal, defending its award clearly stated again: "[t]he cause of action for artificial prolongation belongs to Universal itself, and exists separate and apart from any causes of action that might be brought by creditors."

625 So. 2d at 4.

Thus the only party seeking to hold Seidman liable in this case was the Liquidator, suing on behalf of Universal, a company to which Seidman concededly owed a duty and could thus be said to be negligent. If there were any "innocent claimants" out there, no lack of care on Seidman's part had anything to do with them unless *they*, as plaintiffs, sought to make Seidman liable to them and unless *they* as plaintiffs proved that Seidman owed them a duty. As the Fifth Circuit observed in FDIC v. Ernst & Young, "the effect of the auditor's alleged negligence on third parties is legally irrelevant to the determination of the present case." 967 F.2d at 169.

There is hardly anything new or startling about this proposition.

> The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence . . . . A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Le Lievre v. Gould, 1 Q.B. 491, 497 (1893).[23] The existence of a duty is not then, as the Liquidator apparently thinks, something collateral to a cause of action for negligence, but is instead an indispensable element of the cause of action. Without a duty, "*actionable* negligence does not exist," Robertson v. Deak Perera (Miami), Inc., 396 So. 2d 749, 750 (Fla. 3d DCA) (emphasis supplied), rev. denied, 407 So. 2d 1105 (Fla. 1981).

It simply doesn't matter that "fault" is found, if there is no duty and thus no actionable negligence. Pieter Bakker Management, Inc. v. First Fed. Sav. and Loan Ass'n, 541 So. 2d 1334, 1336 (Fla. 3d DCA) rev. denied, 549 So. 2d 1014 (Fla. 1989); Seitz v. Surfside, Inc., 517 So. 2d 49, 50 (Fla. 3d DCA 1987), rev. denied, 525 So. 2d 880 (Fla. 1988); Rishel v. Eastern Airlines, Inc., 466 So. 2d 1136, 1138 (Fla. 3d DCA 1985). There is no such thing as negligence in the abstract: "Negligence in the air, so to speak, will not do." Pollock, Law of Torts 468 (13th ed. 1920).

So the only "claimant" presented in *this* case was Universal Casualty & Surety Company, Ltd.[24] As the district court quite correctly pointed out, Seidman was not liable to Universal,

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[23]A copy of this case can be found in the Supplemental Record at SR273.

[24]Of course, it makes absolutely no difference what the Liquidator intends to do with any money recovered from Seidman. Even if he wanted to distribute it to these reinsurance company creditors, the issue is who owns the claim that he elected to assert. The Liquidator said this himself, and the district court repeated it: "Further, the liquidator stated: '[t]he fact that it is (continued...)

because the fraud of Shah, Universal's undisputed controlling person,[25] was to be imputed to the company (and thus the Liquidator standing in the company's shoes) so as to prevent the company from proving the elements of its claim against Seidman.

The district court's decision is nothing more than a specific application of the longstanding propositions that a defendant will be liable for negligence only when there is causation, only when there is reliance, and only when the party seeking relief is not otherwise barred. If a suit is never brought by someone who may have a viable negligence claim against

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[24](...continued)
insolvent, and thus its recovery from BDO Seidman will be used to retire its debts, does not . . . convert Universal's own cause of action against its accountants into a piggyback cause of action by a liquidator asserting creditors' claims.'" 625 So. 2d at 4. We again remind the Court that the creditors abandoned their claims.

[25]Just as he did for the first time on appeal, the Liquidator once again tries to exempt himself from these established rules by suggesting that it's possible that Shah did not control Universal (Petitioner's Brief at 15, 21). This attempt must fall on deaf ears because the Liquidator conceded Shah's control in the trial court. The Liquidator's expert witness Douglas Carmichael testified unwaveringly that "Shah was the management" and that "[c]learly Shah had control" (T. 1406, 1474). No argument to the contrary was ever advanced; no testimony to the contrary was ever elicited. The minutes of the August 2, 1978 meeting of the directors of Universal reflect that it was then and there "resolved that Mr. Vishwa Shah the Chairman of the Company is to have the sole and total responsibility for the management of the company and in respect of the financial and investment management of the Company he is authorized to act without reference to the other Directors [sic]" (Defendants' Composite Exhibit RR [see Stipulation to Supplement and Correct the Record on Appeal filed in the district court, and accompanying Defendant's Trial Exhibits. R. 2070-78]; T. 3659). As the Liquidator's organizational chart of Universal put it, "Shah was management" (T. 1474; 1510-11).

The question is not whether there was a Llewellyn Jones identified in documents and workpapers as a "managing director," "chairman of various Universal meetings," "President of Universal" or the "individual in the Cayman Islands in charge of the operations." Petitioner's Brief at 21. Instead, the question is, and has always been, whether Shah dominated and controlled Universal so that Llewellyn Jones, no matter what or how many titles he might hold, was no more than a sycophant who made no difference. It is domination and control that count, not the existence of insignificant others.

a defendant, the inchoate plaintiff can recover nothing. As we have said, there is no negligence in the air. All that has happened in the present case is that the district court has declared that the suit of one plaintiff -- Universal, through its Liquidator -- fails because its elements cannot be proved. That is exactly what the appellate court held in FDIC v. Ernst & Young:

> Assuming, for the sake of argument, that Arthur Young negligently audited Western's books, we do not hold that [its successor Ernst & Young] can never be held liable for its negligence. Either Western's creditors or the FDIC on its own behalf may have a cause of action against [Ernst & Young]. Moreover, we are not holding that an auditor is never liable to a corporation when a corporation's employee or agent acts fraudulently on the corporation's behalf. We limit our holding narrowly to the facts of this case under Texas law--i.e. the FDIC, as assignee of a corporation with a dominating sole owner, sues an auditor for negligently performing an audit upon which neither the owner nor the corporation relied.

967 F.2d at 171-72. That is hardly a declaration of transactional immunity for accountants, and neither is the decision of the district court in this case.

The Liquidator's effort at emotional appeal is not only out of place here, but unconvincing as well. Traditional notions of legal responsibility do not vanish when the word "negligence" is uttered. Seidman has never suggested that it "can skip off scot-free" from negligence, but only that it is entitled to be sued by plaintiffs who have causes of action against it; entitled to raise all available defenses to those suits; and entitled to due process. That creditors may claim that they were damaged by the demise of Universal does not mean that they are ipso facto entitled to be compensated by Seidman. As is well illustrated by FDIC v. Ernst & Young, the law simply does not afford redress against a defendant of one's own choosing

even where innocent savings bank depositors and other creditors are alleged to have suffered $560 million in losses.[26]

CONCLUSION

First, because the District Court of Appeal for the Third District did not pass upon the question it certified, and because there is no other basis for invoking this Court's jurisdiction, the Liquidator's petition for review should be dismissed. Second, were the merits of the petition to be reached, this Court should approve the district court's decision because it is a correct and unremarkable application of well-established rules of law. The decision does nothing more than impute to Universal and thus the Liquidator (who for calculated litigation reasons elected to stand solely in Universal's shoes) the knowledge of Universal's fraudulent owner-dominator and from that conclude that the Liquidator's suit against Universal's former accountants must fail because reliance and thus causation could never be proved. The decision expressly goes no further than this, and it plainly has nothing to do with suits brought by liquidators on behalf of a company's creditors, rather than the company itself. Questions involving those hypothetical actions -- posed by the Department of Insurance, as amicus -- were not adjudicated in the district court and are not ripe for adjudication here.

Lastly -- as improbable as we believe it would be -- were this Court to disapprove the district court's decision, there remain to be addressed and decided other points on appeal which

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[26]This brings us quite naturally to the last gasp contention that there is a special exemption for insurance companies from rules of imputation. No case has recognized such an exemption, and there is no good reason that a Cayman Islands insurance company should have one. Any exemption from imputation given an insurance company in any case cited by the Liquidators arose not from the fortuitous fact that the company was an insurance company but instead from the fact, for example, that, unlike here, the defendant perpetrated a fraud or the insurance company's control person acted adversely to the company.

the district court, having decided a single dispositive point only, never reached. In this event and under these circumstances, this Court should remand the case to the district court, the appropriate forum for the resolution of the remaining points.

Respectfully submitted,

Holland & Knight
Counsel for the Respondents
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
(305) 374-8500

By: Daniel S. Pearson
Daniel S. Pearson, FBN 062079

By: Lenore C. Smith
Lenore C. Smith, FBN 848743

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondents' Brief on the Merits was mailed this 10th day of February, 1994 to:

Elizabeth K. Russo, Esq.
Russo, Talisman & Moylan, P.A.
2601 S. Bayshore Drive
Suite 2001
Coconut Grove, FL 33133

Edward A. Moss, Esq.
Anderson, Moss, Parks
& Sherouse, P.A.
2550 New World Tower
100 N. Biscayne Blvd.
Miami, Florida 33132

Helen Ann Hauser, Esq.
Dittmar & Hauser, P.A.
3250 Mary Street
Suite 400
Miami, Florida 33133

Michael R. Young, Esq.
Willkie, Farr & Gallagher
One Citicorp Center
153 E. 53rd Street
New York, NY 10022

Dennis K. Threadgill,
Chief Attorney
Division of Rehabilitation
and Liquidation
Florida Department of Insurance
P. O. Box 110
Tallahassee, FL 32302

Susan E. Martin, Esq.
General Counsel
National Association of
Insurance Commissioners
120 West 12th Street
Suite 1100
Kansas City, MO 64105

Daniel S. Pearson

Daniel S. Pearson

MIA-183302

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

OCTOBER 28, 1993

SEIDMAN & SEIDMAN and BINDER DIJKE OTTE & CO.,	**	
Appellants,	**	
vs.	**	CASE NOS. 91-345 91-1479
ALLAN GEE, as Official Liquidator of UNIVERSAL CASUALTY & SURETY COMPANY, LTD. (in Liquidation),	**	LOWER TRIBUNAL NO. 87-30876
Appellee.	**	

We certify the following question as one of great public importance:

> Whether the liquidator of a bankrupt company should be permitted to recover for losses suffered by the company's customers and creditors, against an auditor which negligently failed to discover the fraud of the company's manager, where the manager's fraudulent act was intended to and did benefit the company.

Appellants' motion to strike the amicus brief filed by the Department of Insurance on March 10, 1993 is denied. Appellants' motion to strike Gee's motion for certification as moot is denied. Appellee's motion to stay the mandate is granted.

NESBITT, FERGUSON and LEVY, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Patrice A. Talisman
Elizabeth Koebel Russo
Helen Ann Hauser
Michael R. Young
Susan E. Martin
Daniel S. Pearson
Harvey Ruvin
Hon. Milton Friedman

/jrm

SEIDMAN & SEIDMAN and Binder Dijke Otte & Co., Appellants,

v.

Allan GEE, as Official Liquidator of Universal Casualty & Surety Company, Ltd. (in Liquidation), Appellee.

Nos. 91-345, 91-1479.

District Court of Appeal of Florida, Third District.

April 14, 1992.

Opinion Denying Rehearing Aug. 17, 1993.

Corporation sued accounting firm on theory of artificial prolongation of corporation life owing to auditing negligence. The Circuit Court, Dade County, Milton Friedman, J., entered judgment on jury verdict for corporation, and accounting firm appealed. The District Court of Appeal held that, because corporation officer's fraud was intended to benefit corporation to detriment of outsiders, fraud would be imputed to corporation which was absolute defense to action against its accounting firm for negligent failure to discover the fraud.

Reversed and remanded with instructions.

Accountants ⇐10.1
Corporations ⇐423

Where it was shown, without dispute, that corporate officer's fraud was intended to and did benefit corporation to detriment of outsiders, fraud was imputed to corporation and was absolute defense to corporation's action against its accounting firm for negligent failure to discover fraud.

Holland & Knight, and Daniel S. Pearson and Lenore C. Smith, Miami, for appellants.

Anderson, Moss, Parks, Meyers & Sherouse, and Elizabeth K. Russo, Miami, for appellee.

Dennis K. Threadgill, Helen Ann Hauser, for Florida Department of Insurance, as amici curiae.

Michael R. Young, for American Institute of Certified Public Accountants, as amicus curiae.

Susan E. Martin, Michael Berry, for National Assoc. of Ins. Commissioners, as amici curiae.

Dittmar & Hauser and Helen Ann Hauser, for National Society of Ins. Receivers, as amicus curiae.

Before NESBITT, FERGUSON and LEVY, JJ.

PER CURIAM.

BDO Seidman, an accounting firm, contends, in this appeal from a $16 million adverse judgment, that it was entitled to a judgment as a matter of law in the client's action based on a theory of artificial prolongation of corporate life owing to auditing negligence, where the event that it should have, but failed to discover, was a fraud perpetrated by the corporate-client's controlling officer acting in furtherance of the corporation's purposes. We agree and reverse the judgment entered on a jury verdict.

Universal Casualty & Surety Co., Ltd., is an insurance and reinsurance company created in 1977 in the Cayman Islands. From 1978 until just prior to its liquidation in 1984, Universal was under the management and control of Vishwa Shah. In a scheme to inflate artificially the worth of the corporation, Vishwa Shah fraudulently represented that Universal was backed by a $10 million certificate of deposit. BDO Seidman, the accounting firm hired by Universal to provide audited financial reports for dissemination to prospective policy holders, negligently failed to discover that the $10 million CD was nonexistent. On the basis of Seidman's financial reports reflecting the $10 million asset, Universal obtained the licensing required for operation in the Caymans,[1] and solicited customers internationally.

1. When Universal first began operating in 1977, there was no requirement to obtain a license to transact insurance business. The Cayman Office of Superintendent of Insurance was created in 1980, and Universal was required to obtain a license in 1981.

In 1984, Universal collapsed following a market slump. The Cayman Superintendent of Insurance suspended Universal's license and appointed Allan Gee, as liquidator, to wind up the corporation's affairs. Gee, unable to locate Universal's chief asset, the $10 million CD, concluded that its existence was a fraud perpetrated by Vishwa Shah. Gee filed a lawsuit against BDO Seidman alleging that the accounting firm was negligent in failing to discover Shah's fraud. As damages, Gee sought $16,236,969—the value of all claims made against Universal in the liquidation proceedings. The essence of Gee's claim is that Seidman's negligent audit artificially prolonged Universal's corporate life past the point of insolvency, thereby allowing Universal to incur $16 million in debt to policyholders and creditors.

As authority for its position that it should prevail on the facts of this case, appellant relies on the leading case of *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), *cert. denied*, 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982). The central issue in *Cenco* was whether Seidman was entitled to use, through imputation, the fraud of Cenco's managers as a defense to an action against the corporation's auditors for failure to discover the wrongdoing of the corporation's managers. Cenco's management had fraudulently inflated the value of the corporation's inventories. Concluding that the corporation was estopped from bringing a claim against its auditors, the *Cenco* court held that an auditor may raise an imputation defense only where the fraud perpetrated by the management was committed on behalf of the corporation rather than in furtherance of the managers' own interests. The rationale is that the corporation is precluded from recovering on a claim for fraud where the corporation actually benefitted from the fraud. Rejecting the "extreme position" that an employee's fraud is always imputed to the corporation, the court held that the misconduct of the corporation's managers should be imputed to the corporation only where the acts are performed on behalf of the corporation.

> Fraud on behalf of the corporation is not the same thing as fraud against it. Fraud against the corporation usually hurts just the corporation; the stockholders are the principal if not the only victims; their equities vis-a-vis a careless or reckless auditor are therefore strong. But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud.

Cenco, 686 F.2d at 456. Because the misconduct of the managers was performed on Cenco's behalf, the corporation was barred from shifting the responsibility for the fraud to the auditors.

A similar result was reached recently in *Federal Deposit Ins. Corp. v. Ernst & Young*, No. Civ A. 3–90–0490–H, 60 U.S.L.W. 2235, 1991 WL 197111 (N.D.Tex. Sept. 30, 1991), which based its holding on the long-established rule that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation. On behalf of a corporation in receivership, Western Savings Association, the FDIC, filed a lawsuit against the corporation's former auditors for negligent failure to discover the questionable lending practices of Western's chief officer. The gravamen of the FDIC's negligence claim was that if the audits had been accurate, Western would have ceased making the high-risk loans that caused it to accumulate $560 million in losses. Summary judgment was granted the defendant accounting firm on the ground that the misconduct of the managing officer was imputed to the corporation. Two key factual determinations made were (1) fraudulent transactions conducted by the managing director created an appearance of rapid growth and significant gain in the corporation's net worth, and (2) victims of the fraud were outsiders to the corporation—its depositors and creditors—whose losses, essentially, were the corporation's gains. Because the corporation had knowledge of and benefitted from the fraud, the court reasoned, it could not claim to have relied on the auditor's reports. Without proof that the corporation relied on the audit report to its detriment, the FDIC was unable to establish that the accountant's negligence caused a corporate injury.

The *Ernst & Young* court acknowledged, however, that an exception to the imputation

rule exists where an individual is acting adversely to the corporation. In that situation, the officer's knowledge and conduct are not imputed to the corporation. *See also In re Investors Funding Corp.*, 523 F.Supp. 533 (S.D.N.Y.1980) (knowledge of corporate agent is imputed to his principal except where the agent is acting adversely to the principal).

We, similarly, distinguish this case from *Schacht v. Brown*, 711 F.2d 1343 (1983), relied on by the appellee. In *Schacht* the liquidator of an insurance company brought suit against the officers and directors of a parent corporation who looted the insurer of its most profitable business and whose fraudulent acts caused the insurer to continue in business past the point of insolvency. The *Schacht* court specifically declined to apply a *Cenco*-type analysis writing that, "The *Cenco* court limited its estoppel analysis to cases where 'the managers are not stealing ... but instead are turning the company into an engine of theft against outsiders.'" *Schacht*, 711 F.2d at 1347 (quoting *Cenco*, 686 F.2d at 454). By contrast, the illegal activities of the managing directors in *Schacht* inflicted "real damage" on the corporation by diminishing its assets and income, a result that was not beneficial to the corporation. *Schacht*, 711 F.2d at 1348. The wrongdoing of the directors, therefore, was not imputed to the corporation.

As in *Cenco* and *Ernst & Young*, the fraud committed by the managing director was not intended to loot the corporation, but instead was designed to turn the corporation into an "engine of theft" against outsiders—the policyholders. A *Cenco* estoppel is applicable. In representing that Universal was backed by a $10 million CD, Vishwa Shah was able to obtain a license to continue operating as an insurance company. Furthermore, it is undisputed that Universal solicited and successfully obtained policyholders based on the fraudulent representation that it had over $10 million in assets. It is a critical fact that Vishwa Shah's fraudulent act was committed for the benefit of the corporation.

Universal does not dispute the material facts, but argues that Shah's wrongful act was adverse to the corporation's interest because Universal eventually went into liquidation. We are not persuaded. The short-term/long-term benefit analysis was addressed in *Security America Corp. v. Schacht*, No. 82–C–2132, (N.D.Ill.1983). In that case, as here, the directors of the corporation fraudulently gave an inflated account of the company's assets. That misrepresentation created a short-term benefit to the corporation because "Security America had no assets except those it acquired along the way, pursuant to the fraudulent plan." *Id.*, slip op. at 2. In holding that as a matter of law the fraud of the directors was imputed to the corporation, the court wrote, "It is the short-term benefit or detriment to Security America that is important. Whether liability ultimately may fall on Security America, once the fraud has been unmasked, is not the relevant inquiry." *Id.*, slip op. at 2 n. 3. *Accord Cenco*, 686 F.2d at 456. Similarly, the ultimate financial demise of Universal Casualty & Surety Co. was not the determining issue in the case before us. Shah's fraudulent misrepresentation benefitted Universal as it was the prerequisite to the corporation's approval to continue in business, and was integral to its marketing program.

Where it is shown, without dispute, that a corporate officer's fraud intended to and did benefit the corporation, to the detriment of outsiders, the fraud is imputed to the corporation and is an absolute defense to the corporation's action against its accounting firm for negligent failure to discover the fraud. This holding follows the equitable principle that where a prejudicial situation results from a wrongful act of a third person, the decision must be against the party whose conduct made possible the wrongful act, unless the act of the third person is fraudulent. *See Gables Racing Ass'n, Inc. v. Persky*, 148 Fla. 627, 6 So.2d 257 (1941).

Reversed and remanded with instructions to enter a judgment for the appellant.

ON REHEARING DENIED

BDO Seidman, an accounting firm, contends in this appeal from a $16,000,000 adverse judgment, that it was entitled to a judgment as a matter of law in the client's action based on a theory of artificial prolongation of corporated life owing to auditing negligence where the event that it should have, but failed to discover, was a fraud

perpetrated by the corporate client's controlling officer acting in furtherance of the corporation's purpose. The case was tried in the lower court upon the theory that the cause of action was that of the corporation. The liquidator sought, as damages, the corporation's net deficit and the trial judge so instructed the jury. In this court's opinion rendered April 14, 1992, we agreed with the accounting firm's argument and reversed the judgment entered on a jury verdict. At page 1. During the time allotted for rehearing, the liquidator moved for rehearing. Also, motions for leave to participate as amicus curiae were filed by the National Association of Insurance Commissioners, the State of Florida, Department of Insurance, and the American Institute of Certified Public Accounts.

The thrust of the argument made by the Department of Insurance is that because an insurance company liquidator does not merely stand in the shoes of a corporation but does, in effect, have "much larger shoes," representing the interests of "insureds, creditors and the public generally," the company's knowledge of the fraud perpetrated should not have been imputed to this liquidator and, accordingly, this court erred in issuing its opinion in the accounting firm's favor. However, this was never the position of the liquidator who argued rather, that the corporation was "an entity separate and distinct from its former officer" and thus, on that basis, there should be no imputation.

Reviewing the record below, at trial, the liquidator stated "the Liquidator brings *only* the claims of Universal itself ... and is *not* seeking to bring the creditors['] claims himself." (emphases in original). Also, the liquidator's position on appeal, defending its award clearly stated again: "[t]he cause of action for artificial prolongation belongs to Universal itself, and exists separate and apart from any causes of action that might be brought by creditors." Further, the liquidator stated: "[t]he fact that it is insolvent, and thus its recovery from BDO Seidman will be used to retire its debts, does not ... convert Universal's own cause of action against its accountants into a piggyback cause of action by a liquidator asserting creditors' claims." No doubt, neither error nor inadvertence led to the path chosen by the liquidator. The election made by the liquidator was thus a calculated tactic to avoid one or more obvious bars to recovery upon the theory that the action was brought on behalf of corporate creditors.

Under the foregoing, to accept the after-the-fact argument of amicus would unfairly change the theory of recovery upon which the case was tried and presented both in the trial court and before this court. *Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd.*, 490 So.2d 60 (Fla. 3d DCA 1985); *see, e.g., Sarmiento v. State*, 371 So.2d 1047 (Fla. 3d DCA 1979), *approved*, 397 So.2d 643 (Fla.1981); *Cartee v. Florida Dept. of Health & Rehabilitative Servs.*, 354 So.2d 81 (Fla. 1st DCA 1977). Consequently, we do not reject the argument advanced by the amicus; it is only that it is inapplicable in the present case.

Accordingly, appellee's motion for rehearing, as well as the motions of amicus are denied.