IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,199

PHILIPPE H. MORANSAIS,

Petitioner,

v.

PAUL S. HEATHMAN, an individual, BROMWELL & CARRIER, INC., a Florida corporation, LENNON D. JORDAN, and J. LARRY SAULS,

Respondents.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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A R G U M E N T

I.

MORANSAIS IS A FORESEEABLE PARTY AS OPPOSED TO A THIRD PARTY BENEFICIARY THAT HAS BEEN DAMAGED BY THE NEGLIGENCE OF RESPONDENTS.

Respondents' arguments regarding the status of Moransais as a third party beneficiary are misplaced. Moransais is not a third party beneficiary to the contract but rather, an injured party within the circle of foreseeability as recognized by A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). Respondents knew that Moransais would rely upon their inspection report, which makes Moransais a foreseeable party damaged by Respondents' negligence. Florida courts have appliedthe same analysis to hold professionals liable for damages. See First Florida Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990); Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987); First Am. Title Ins. Co.v. First Title Serv. Co., 457 So.2d 467 (Fla. 1984); Mover, 285 So.2d at 397; Southland Constr., Inc. v. The Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994); Bav Garden Manor Condominium Assoc. v. James D. Marks Assoc., 576 So.2d 744 (Fla. 3d DCA 1991).

Respondents' third party beneficiary argument ignores the concept that professionals have a duty not to injure foreseeable parties as established by this Court in AFM Corp. v. Southern Bell Tel. and Tel. Co., 515 So.2d 180 (Fla. 1987):

> What distinguishes Moyer from the above cases, however, is that the plaintiff was not the beneficiary, of the underlying contract. In that case, we held a general contractor had a cause of action for the alleged negligent supervisory performance by an architect. In so holding, we expressly determined that the contractor was not a party to the contract

> with the architect, nor was he a third party beneficiary of the contract. We based our decision on the fact that the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract.

AFM, 515 So.2d at **181.**

The duty owed by Respondents to Moransais is not dependent upon privity of contract. The duty is dependent solely upon whether Moransais would be foreseeably injured by the negligent preparation and issuance of the residential inspection report.

II.

SOUTHLAND DID NOT EXTEND MOYER BEYOND ITS FACTS.

Respondents criticize the Fifth District Court of Appeal's decision in Southland as being "fatally flawed." (Respondents' Answer Brief [hereinafter "A.B."] 4). Respondents' criticism is premised upon the belief that the Southland Court extended Moyer beyond its facts contrary to this Court's holding in Casa Clara Condominium Assoc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. **1993).** Respondents' argument fails to acknowledge that it was Moyer and not Southland that established the liability of professionals to recipients of their services. On this score, Moyer held as follows:

> The nature of the professional's duty, the standard of care imposed, varies in different circumstances.... In every instance duty must be defined in terms of the circumstances and the theories advanced to sustain liability. In our view the extent of appellee's duty may best be defined by reference to the foreseeability of injury consequent upon breach of that duty.... To argue that it [a professional] is absolutely free of liability for negligence to known users or consumers of its

> work is **to** disregard the half century of negligence law popularly thought to have originated in MacPherson v. Buick Motor Co. *(citations omitted)* and explicitly recognized in this State in Matthews v. Lawnlite Co. *(citations omitted)*.

Mover, 285 So.2d at 400.

This description of a professional's duties, extinguishes Respondents' argument that the Southland holding is "without basis" as it relates to the liability of professionals for economic loss damages. (A.B. 7) The basis for the professional's duty is grounded in Mover.

III.

MORANSAIS' NEGLIGENCE CAUSE OF ACTION AGAINST RESPONDENTS IS SEPARATE AND DISTINCT FROM HIS BREACH OF CONTRACT ACTION AGAINST THE ENGINEERING FIRM.

Moransais has a negligence cause of action against Respondents, separate and distinct from a breach of contract action against the engineering firm. As argued in their Answer Brief, Moransais "seeks merely to layer a negligence cause of action against individual employee engineers in addition to a contract remedy against the engineering firm employer." (A.B. 8) In an effort to avoid individual liability, Respondents argue that the contract with the engineering firm limits Moransais to the recovery of contract damages. Respondents further assert that Moransais should have protected himself from the Respondents' negligence in his contract with the engineering firm. (A.B. 12) This assertion is without merit since Respondents were not parties to that contract. Contract remedies available to Moransais against the

engineering firm are simply not relevant to this appeal.[1]

Numerous other jurisdictions have held professionals accountable by recognizing a duty to exercise reasonable care and competence in obtaining or communicating correct information notwithstanding whether privity of contract exists.[2] Professionals should not be allowed to escape liability for their negligent acts.

IV.

THE ECONOMIC LOSS RULE DOES NOT APPLY TO AN ACTION AGAINST INDIVIDUAL PROFESSIONALS BASED ON PROFESSIONAL MALPRACTICE.

Respondents incorrectly contend that "courts of this state have repeatedly held the economic loss rule bars tort claims against professional architects and engineers," and cite to The

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[1] Even if there were direct privity of contract between Moransais and Respondents, their obligation to perform their services in a professionally competent manner is extra-contractual and not barred by the economic loss rule. See, e.g., Randolph v. Mitchell, 677 So.2d 976 (Fla. 5th DCA 1996), where the court found that the breach of an insurance agent's duty to exercise reasonableprofessionalcompliancewas extra-contractual, and existed independently of any contract.

[2] See, e.g., Agricultural Serv. Assoc. v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977); Robert & Co. Assoc. v. Rhodes-Havertv Partnership, 250 Ga. 680, 300 S.E. 2d 503 (1983); Rozny v. Marnul, 43 111. 2d 54, 250 N.E. 2d 656, (1969)("tort liability will henceforth be measured by the scope of the duty rather than the artificial concepts of privity"); Gulf Contracting v. Bibb County, 795 F.2d 980 (11th Cir. 1986) (general contractor had cause of action against architects and engineers for his economic losses due to their negligent failure to disclose subsurface debris despite the parties' lack of privity); Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 517 A.2d 336 (1986); Remeikis v. Boss & Phelps, Inc., 419 A.2d 986 (1980); Kornitz v. Earling & Hiller, Inc., 49 Wis. 2d 97, 181 N.W.2d 403 (1970).

Sandarac Assoc. v. Frizzell Architects, 609 So.2d 1349 (Fla. 2d DCA 1992), Spancrete, Inc. v. Ronald E. Frazier & Assoc., 630 So.2d 1197 (Fla. 3d DCA 1994), City of Tampa v. Thornton-Tomasetti, P.C., 646 So.2d 279 (Fla. 2d DCA 1994), and Florida Building Inspection Serv. v. The Arnold Corp., 660 So.2d 730 (Fla. 3d DCA 1995) to support this position. (A.B. 11) As discussed below, factual distinctions exist between these decisions and the instant appeal.

In Sandarac, the condominium association was not a foreseeable third party as opposed to the general contractor in Southland. In the case at bar, Moransais dealt directly with the engineering firm, which places him directly within the nexus of foreseeability as opposed to the condominium association which was described as an "eventual beneficiary" in Sandarac, 609 So.2d at 1354.

The Third District Court of Appeal in Spancrete recognized the duty of care owed by a supervising architect to a general contractor, as set forth in Moyer. In its limited analysis however, the Spancrete Court found that this duty of care did not extend to subcontractors, because a subcontractor is not a foreseeable party. Applying the same logic to the facts associated with the instant appeal would produce a different result since Moransais was a foreseeable party. Respondents knew that Moransais would rely on their professional opinion when deciding to purchase the residence.

It is significant to note that in City of Tampa, the Second District Court of Appeal stated in dicta that since the architects (as opposed to their engineering consultants) were answerable to the City for deficiencies in design or performance, the consultants

were not directly liable to the City. In reaching this decision, the Court recognized a factual distinction from Moyer and Southland by focusing upon the fact that the consultants were not in "close nexus" with the City. The Second District explained the significance of this distinction as follows:

> The facts of the present case differ substantially from Moyer and Southland. In the latter cases, an extremely close nexus existed between the plaintiff and the defendant. Here, a 'close nexus' did not exist between the City and the engineering consultants. Pursuant to the typical construction relationship, the consultants looked to the architects, not the City, for payment of compensation and expenses. The architects, not the consultants, agreed to draw the final plans and specifications and advise the City in their interpretation. The architects, not the consultants, were responsible for coordinating the work of design team members; thus, only the architects were answerable to the City for deficiencies in design or performance.

City of Tampa, 646 So.2d at 282. Although recognizing the exceptions to the economic loss rule based on the Restatement (Second) of Torts, §552, the court premised its holding on the fact that the plaintiff was neither a third party beneficiary **nor** a foreseeable party. Moransais, unlike the plaintiff in Florida Building Inspection Serv., was a foreseeable party and relied upon the judgment of engineers.

V.

RESPONDENTS VIOLATED A STATUTORY DUTY TO EXERCISE DUE CARE WHILE RENDERING THEIR PROFESSIONAL SERVICES.

When read in pari materia, §§471.001, 471.023(3) and 621.07, Florida Statutes, create a private cause of action against individ-

ual engineers.

The determination of whether a private cause of action exists depends on various considerations as set out in Restatement (Second) of Torts, §286. These considerations include whether the statute protects a class of persons, including the one whose interest is invaded; whether it protects the particular interest which is invaded; whether it protects that interest against the kind of harm which has resulted, and whether it protects that interest against the particular hazards from which harm results. Freehauf v. School Board of Seminole County, 623 So.2d 761 (Fla. 4th DCA), dism'd, 629 So.2d 132 (Fla. 1993).

Legislation regulating the engineering profession was enacted to protect citizens **of** this state from physical and economic injury which would result from engineering services performed by an incompetent engineer. §471.001, Fla. Stat. Moransais falls precisely within the class **of** persons the statute was intended to protect. He suffered economic injury at the hands of negligent engineers whom he justifiably relied upon to provide professional services.

VI.

FRAUD IN THE INDUCEMENT CASES ARE NOT APPLICABLE TO RESPONDENTS SINCE THEY ARE NOT IN DIRECT PRIVITY WITH MORANSAIC.

Respondents argue that economic loss damages, in a contractual setting, will only be recovered in limited instances where fraud in the inducement or intentional misrepresentation exists. Since no direct contract between Moransais and Respondents exists, there is

no need to analyze the line of cases that permit recovery of economic damages where the alleged tortious conduct is independent of a contractual breach.

CONCLUSION

This Court should resolve the conflict by holding that Southland is the correct statement of the law. The decision of the Second District Court of Appeal should be reversed to enable Moransais to recover damages arising from the negligent performance of engineering services provided by Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Reply Brief On the Merits was furnished by U.S. mail to: C. Geoffrey Vining, P.A., 230 S. Florida Avenue, Suite 501, Lakeland, FL 33801, and Mark N. Miller, Esq., Lane, Trohn, et al., One Lake Morton Drive, Lakeland, FL 33802-0003, Attorneys for Appellees, this 20 day of April, 1998.

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