Marinella Cummings, Respondent,
v.
Gerard Cummings, Appellant.

Supreme Court, Appellate Division, Second Department, New York

(November 20, 2000)

O'Donnell & McLaughlin (Sweetbaum & Sweetbaum, Lake Success, N.Y. [Marshall D. Sweetbaum] of counsel), for appellant.

Mintz & Gold, LLP, New York, N.Y. (Steven G. Mintz and Libby Harrison of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from a judgment of the Supreme Court, Richmond County (Mastro, J.), dated December 6, 1999, which, upon a jury verdict awarding the plaintiff damages in the sum of $2,802,583 (including $157,583 for past lost earnings, $725,000 for past pain and suffering, $720,000 for future lost earnings, and $1,200,000 for future pain and suffering), and upon the plaintiff's stipulation to reduce the verdict as to past lost earnings to the sum of $118,309.71 and future lost earnings to the sum of $445,680, is in favor of the plaintiff and against him.***342**

Ordered that the judgment is modified, on the facts and as an exercise of discretion, by deleting the provision thereof awarding the plaintiff damages for future pain and suffering and granting a new trial with respect thereto; as so modified, the judgment is affirmed, with costs to the defendant, unless, within 30 days after service upon her of a copy of this decision and order with notice of entry, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Richmond County, a written stipulation consenting to decrease the damages as to future pain and suffering from the sum of $1,200,000 to the sum of $500,000, and to entry of an amended judgment accordingly; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed, without costs or disbursements.

In the instant case, the testimony of the plaintiff's son established that the defendant's decedent had actual notice of the defect which caused the plaintiff's accident (*see,* Napolitano v Dhingra, 249 AD2d 523). Contrary to the defendant's contention, the testimony of the plaintiff's son was not incredible as a matter of law (*see,* *Prozeralik v Capital Cities Communications,* 82 NY2d 466, 473; *Gray v McParland,* 255 AD2d 359, 360).

In determining whether an assessment of damages is excessive, this Court must determine whether it deviates materially from what would be reasonable compensation (*see,* CPLR 5501 [c]; *Contorino v Florida Ob/Gyn Assn.,* 259 AD2d 460; *Chazon v Parkway Med. Group,* 168 AD2d 660). The award of damages for future pain and suffering is excessive to the extent indicated.

Altman, J. P., Friedmann, Krausman and Smith, JJ., concur.

N.Y.A.D.,2000.

Cummings v Cummings

95 N.Y.2d 479, 741 N.E.2d 506, 718 N.Y.S.2d 709, 2000 N.Y. Slip Op. 11125

Harold T. Parrott, Appellant,
v.
Coopers & Lybrand, L. L. P., Respondent.

Court of Appeals of New York

Argued November 14, 2000;

Decided December 14, 2000

Mintz & Gold, L.L.P., New York City (Steven G. Mintz and Lisabeth Harrison of counsel), for appellant.

Jones Hirsch Connors & Bull, P.C., New York City (Alan M. Gelb and Ilene D. Freier of counsel), and PricewaterhouseCoopers, L.L.P. (Steven Witzel of counsel), for respondent.

Vedder, Price, Kaufman & Kammholz, New York City (Dan L. Goldwasser of counsel), for New York State Society of Certified Public Accountants, amicus curiae.

I. The Court below erred in concluding that personal contact between the accounting firm and the injured plaintiff is required to establish the "functional equivalent" of privity under the criteria set forth in *Credit Alliance Corp. v Andersen & Co.* (65 NY2d 536 [1985]). (*Ultramares Corp. v Touche,* 255 NY 170; *White v Guarente,* 43 NY2d 356; *Glanzer v Shepard,* 233 NY 236; *Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695; *Huang v Sentinel Govt. Sec.,* 709 F Supp 1290; *Westpac Banking Corp. v Deschamps,* 66 NY2d 16; *Ossining Union Free School Dist. v Anderson LaRocca Anderson,* 73 NY2d 417; *European Am. Bank & Trust Co. v Strauhs & Kaye,* 65 NY2d 536; *Board of Mgrs. v Schuman, Lichtenstein, Claman & Efron,* 183 AD2d 488; *Kidd v Havens,* 171 AD2d 336.) II. Plaintiff has satisfied the *Credit Alliance* criteria for holding an accountant liable to a party not in privity. (*Seaver v Ransom,* 224 NY 233; *Dorking Genetics v United States,* 76 F3d 1261; *Iselin & Co. v Mann Judd Landau,* 71 NY2d 420; *Ultramares Corp. v Touche,* 255 NY 170; *Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536; *White v Guarente,* 43 NY2d 356; *LaSalle Natl. Bank v Duff & Phelps Credit Rating Co.,* 951 F Supp 1071; *In re Time Warner Inc. Sec. Litig.,* 794 F Supp 1252, 9 F3d 259, *cert denied sub nom. Ross v ZVI Trading Corp. Employees' Money Purchase Pension Plan & Trust,* 511 US 1017; *Kidd v Havens,* 171 AD2d 336; *Ossining Union Free School Dist. v Anderson LaRocca Anderson,* 73 NY2d 417.) III. Plaintiff's presale awareness of the inaccuracy of defendant's valuation does not defeat his claim for damages.

Jones Hirsch Connors & Bull, P. C., New York City (*Alan M. Gelb* and *Ilene D. Freier* of counsel), and *PricewaterhouseCoopers, L. L. P. (Steven Witzel* of counsel), for respondent.

I. *Credit Alliance* and not *Glanzer v Shepard* or *White v Guarente* states the test of a relationship equivalent to privity. (*Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536; *Ultramares Corp. v Touche,* 255 NY 170; *Westpac Banking Corp. v Deschamps,* 66 NY2d 16; *Iselin & Co. v Mann Judd Landau,* 71 NY2d 420; *Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695; *Ossining Union Free School Dist. v Anderson LaRocca Anderson,* 73 NY2d 417; *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377; *Glanzer v Shepard,* 233 NY 236; *White v Guarente,* 43 NY2d 356.) II. The duty ***481** of care does not arise out of claims of negligence. (*Iselin & Co. v Mann Judd Landau,* 71 NY2d 420; *Zuckerman v City of New York,* 49 NY2d 557; *Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695; *Dworman v Lee,* 83 AD2d 507, 56 NY2d 816; *Ultramares Corp. v Touche,* 255 NY 170.) III. Whether *Credit Alliance* or *White v Guarente* apply, appellant has satisfied neither. IV. *Credit Alliance* is not satisfied by a phrase from the Coopers & Lybrand (C&L) report. (*Ossining Union Free School Dist. v Anderson LaRocca Anderson,* 73 NY2d 417; *Ultramares Corp. v Touche,* 255 NY 170; *Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695; *Glanzer v Shepard,* 233 NY 236; *European Am. Bank & Trust Co. v Strauhs & Kaye,* 65 NY2d 536; *White v Guarente,* 43 NY2d 356; *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377; *Westpac Banking Corp. v Deschamps,* 66 NY2d 16; *Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536.) V. Appellant was not damaged by the C&L appraisal. (*Matter of Penn Cent. Corp. [Consolidated Rail Corp.],* 56 NY2d 120; *Matter of Dimson [Elghanayan],* 19 NY2d 316; *Rice v Ritz Assocs.,* 88 AD2d 513, 58 NY2d 923; *Hackett v Milbank, Tweed, Hadley & McCloy,* 86 NY2d 146; *Akins v Glens Falls City School Dist.,* 53 NY2d 325; *White v Guarente,* 73 NY2d 356.) VI. Appellant's second and third causes of action are unsupported in any event.

(*Rotanelli v Madden,* 172 AD2d 815; *General Elec. Capital Corp. v United States Trust Co.,* 238 AD2d 144; *IFD Constr. Corp. v Corddy Carpenter Dietz & Zack,* 253 AD2d 89.)

Vedder, Price, Kaufman & Kammholz, New York City (*Dan L. Goldwasser* of counsel), for New York State Society of Certified Public Accountants, *amicus curiae.*

I. The Court's ruling in *Credit Alliance* limited *White v Guarente* and *Glanzer v Shepard. (Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536; *Ultramares Corp. v Touche,* 255 NY 170; *Glanzer v Shepard,* 233 NY 236; *White v Guarente,* 43 NY2d 356; *Rusch Factors v Levin,* 284 F Supp 85; *Hochfelder v Ernst & Ernst,* 503 F2d 1100; *European Am. Bank & Trust Co. v Strauhs & Kaye,* 65 NY2d 536; *Westpac Banking Corp. v Deschamps,* 66 NY2d 16; *Iselin & Co. v Mann Judd Landau,* 71 NY2d 420; *Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695.) II. Parrott did not reasonably rely on Coopers' valuation. (*Hamilton Textiles v Estate of Mate,* 269 AD2d 214; *Home Mut. Ins. Co. v Broadway Bank & Trust Co.,* 53 NY2d 568; *Silver Assocs. v Baco Dev. Corp.,* 245 AD2d 96; *Rotanelli v Madden,* 172 AD2d 815, 79 NY2d 754; *88 Blue Corp. v Reiss Plaza Assocs.,* 183 AD2d 662.)***482**

OPINION OF THE COURT

Wesley, J.

This case requires us to examine, once again, the tripartite standard, set forth by this Court in *Credit Alliance Corp. v Andersen & Co.* (65 NY2d 536), for the functional equivalent of privity in a cause of action for negligent misrepresentation. We conclude, as did the Appellate Division, that plaintiff has not satisfied the test and his complaint must be dismissed.

Harold Parrott was employed by Pasadena Capital Corporation, a privately held investment advisor firm located in California. Pursuant to a January 1992 stock purchase agreement, Parrott purchased over 40,000 shares of the company's stock. The purchase agreement provided that, upon termination of Parrott's employment, the company would buy back these shares at a fair market value determined on a minority basis by an independent third-party appraisal conducted in connection with the company's employee stock ownership plan (ESOP). Coopers & Lybrand (C&L) had for several years been providing accounting services to Pasadena. Included among those services were valuation reports submitted twice annually that were used to determine the value of the stock for ESOP purposes. Each report was based on two methodologies: a discounted cash flow method, and a market comparable method relying on the stock values of similar companies publicly traded.

Parrott was terminated in May 1996. In September 1996, Pasadena notified Parrott that it was exercising its right to repurchase the stock, and explained that it was relying on the $78.21 per share valuation established by C&L in its most recent report of June 30, 1996. After unsuccessfully requesting a preliminary injunction in a Federal action challenging the stock repurchase, Parrott entered into a stipulation with Pasadena providing for a repurchase price of $3.9 million without prejudice to seek a higher price in litigation. The Federal District Court ultimately directed that the dispute be arbitrated pursuant to the stock purchase agreement. A final arbitration award rejected C&L's June 30, 1996 valuation of $78.21 per share and substituted an independent calculation of $122.50 per share. Pasadena paid Parrott the difference per share plus interest--nearly $2.5 million.

Parrott commenced this action against C&L, asserting claims for professional negligence, negligent misrepresentation, and aiding and abetting his employer's breach of fiduciary duty. ***483** Parrott argued that he reasonably relied on C&L's misrepresentations and omissions when he stipulated to the sale of the shares. Supreme Court denied C&L's motion for summary judgment and sanctions. The Appellate Division granted the motion for summary judgment, dismissing the complaint. While the Court unanimously concluded that Parrott's cause of action for aiding and abetting a breach of fiduciary duty lacked merit--a conclusion not challenged on this appeal--it divided on the privity issue. The majority held that Parrott did not establish a relationship with C&L approaching privity and that C&L's discharge of its contractual responsibilities was completely unrelated to any transaction under Parrott's stock purchase agreement. The dissenter noted that Parrott had to rely on C&L's valuation under the stock purchase agreement and that C&L must have been aware of this reliance given the small, identifiable class of employee stockholders. We now affirm.

In a thoughtful opinion, the Appellate Division comprehensively charted the course of our

jurisprudence in the third-party privity context. Thus, we begin our analysis, not with the history and development of the rule, but with our more recent cases.

We have reiterated time and again that "before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (*Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377, 382, *rearg denied* 81 NY2d 955 [citing *Ossining Union Free School Dist. v Anderson LaRocca Anderson,* 73 NY2d 417, 424; *Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536, *supra*]; *see also, State of California Pub. Employees' Retirement Sys. v Shearman & Sterling,* 95 NY2d 427, 434). We have explained that our decision to circumscribe liability in this area by privity of contract or its equivalent rests on "concern for the indeterminate nature of the risk" (*Ossining Union Free School Dist., supra,* 73 NY2d, at 424), and that "[s]uch a requirement is necessary in order to provide fair and manageable bounds to what otherwise could prove to be limitless liability" (*Prudential Ins. Co., supra,* 80 NY2d, at 382). Although this rule first developed in the context of accountant liability, it has applied equally in cases involving other professions (*see, e.g., Prudential Ins. Co.,* 80 NY2d 377, *supra* [lawyers]; *Ossining Union Free School Dist.,* 73 NY2d 417, *supra* [engineering consultants]).***484**

The Court has been cautious not to cast those who are called upon to make judgments under a contract of employment into liability to third parties absent a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance. Therefore, before liability may attach, the evidence must demonstrate "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (*Prudential Ins. Co., supra,* 80 NY2d, at 384 [citing *Credit Alliance Corp., supra,* 65 NY2d, at 551]). These "indicia, while distinct, are interrelated and collectively require a third party claiming harm to demonstrate a relationship or bond with the once-removed accountants" (*Security Pac. Bus. Credit v Peat Marwick Main & Co.,* 79 NY2d 695, 702-703, *rearg denied* 80 NY2d 918).

The evidence here is insufficient to establish a relationship so close as to approach that of privity. Parrott never met or communicated with C&L. C&L had been retained by Pasadena for several years to provide biannual valuations for Pasadena's use with respect to ESOPs generally. There is no indication that C&L knew the reports would be used in connection with Parrott's stock purchase agreement. C&L was not specifically made aware that Parrott owned company stock, or that the stock would be repurchased by the employer at a value fixed by the accounting firm. It is undisputed that there was no direct contact at any time between Parrott and C&L.

Nor did Parrott rely on the valuation statements in C&L's report. He never read or received defendant's report; none had been provided to him. In fact, from the outset he rejected C&L's valuation as inaccurate, noting that the estimated value should have been higher due to an anticipated sale of the company, and he successfully challenged it in an arbitration proceeding.

Finally, no conduct directly linked Parrott and C&L that would evince an understanding by C&L of any reliance on Parrott's part. Parrott relies on a single phrase appearing in a transmittal letter submitted by C&L in connection with the June 30, 1996 valuation which noted that the valuation was performed "for stock transactions involving employees of the Company." However, as previously outlined, there is no indication that C&L knew of Parrott's separate stock purchase agreement or that its valuations would be used to determine the repurchase price of shares pursuant to the termination provision ***485** of that agreement. Although Parrott may have been part of a limited and defined class of employees in this small closely held corporation, there is no evidence that C&L was informed that its valuation would be used for the purpose here (*cf., White v Guarente,* 43 NY2d 356 [the nature and purpose of the accountant's contract with the limited partnership made it clear that the accountant's services were specifically obtained to benefit the members of the partnership who were necessarily dependent upon the defendant accounting firm's audit to prepare their own tax returns]).

Moreover, we have previously rejected a rule "permitting recovery by any ' foreseeable' plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or

class of parties was actually known or foreseen" but the individual defendant's conduct did not link it to that third party (*Ossining Union Free School Dist.*, 73 NY2d 417, 425, *supra* [citing *Credit Alliance Corp.*, 65 NY2d 536, 553, n 11, *supra*]).

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question not answered upon the ground that it is unnecessary.

Chief Judge Kaye and Judges Smith, Levine, Ciparick and Rosenblatt concur.

Order affirmed, etc.*486

N.Y,2000.

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Briefs and Other Related Documents (Back to top)

- 2000 WL 34065156 (Appellate Brief) Brief of Amicus Curiae New York State Society of Certified Public Accountants (Oct. 24, 2000)

- 2000 WL 34065157 (Appellate Brief) Reply Brief for Plaintiff-Appellant (Oct. 13, 2000)

- 2000 WL 34065159 (Appellate Brief) Brief for Plaintiff-Appellant (Jun. 07, 2000)

- 2000 WL 34065158 (Appellate Brief) Brief of Defendant-Respondent Coopers & Lybrand L.L.P. (2000)

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