IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE ABSTRACT CORLPORATION
and CHELSEA TITLE AND
GUARANTY COMPANY,

Petitioners,

CASE NO. 63,971

v.

FERNANDEZ COMPANY,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent agrees with the statement of the case and of the facts in the Petitioner's brief with the following clarifications.

The Petitioners did not cross appeal the issue of the Trial Court's denial of their Motion to Dismiss based on lack of privity between them and the Respondent. This issue is therefore before this Court only because the Fifth District Court injected the privity issue into its decision. On that basis alone the Petitioners should receive no relief.

ISSUE

WHETHER A CAUSE OF ACTION CAN BE STATED UNDER FLORIDA LAW AGAINST AN ABSTRACTOR FOR THE NEGLIGENT PREPARATION OF AN ABSTRACT WHEN THE PLAINTIFF IS NOT IN PRIVITY WITH THE ABSTRACTOR?

ARGUMENT

The Petitioners' brief concludes with a statement that to eliminate privity as a prerequisite to suit against an abstractor will have a "...chilling effect upon abstract preparation...". Unless insulation from liability afforded abstractors is eliminated the preparation of abstracts will stop altogether.

First of all every attorney or title insuror will commit an act of negligence if they rely upon an abstract that has not been certified from the earliest public records to the present at their request for the purchaser they are protecting. Every abstract now in circulation is worthless. For each new transaction a complete recertification for the new purchaser will be necessary. The second effect could well be that title insurance issued only by companies with title plants would replace abstracts.

In view of the fact that this Court has waived oral argument the Respondent, Fernandez, can only conclude this Court is going to decide this case along with First American Title Insurance Company, Inc., v. First Title Service Company of the Florida Keys, Inc., Case No. 63,136, and rely on the arguments made in that case. Fernandez will therefor not undertake to merely repeat the arguments of the Petitioner in Case No. 63,136, but prefers instead to concentrate on the policy considerations it feels should control the Court's decision in this case.

Two of the great virtues of the common law are continuity and flexibility. If this Court is to allow foreseeably damaged plaintiffs to sue negligent abstractors regardless of privity, we should

first assess the effect such a decision would have on the continuity of our present law. Presently a person who is physically injured or suffers merely pecuniary damage need not prove he is in privity with the person whose negligence caused his injury in the area of products liability. A.R. Moyer v. Graham, 285 So2d 397 (Fla. 1973), West v. Caterpillar Tractor Co., Inc., 336 So2d 80 (Fla. 1976), and Simmons v. Owens, 363 So2d 142 (Fla. 1st DCA 1978).

The Moyer case is not even a real products liability case since it was the architect's plans and specifications that were negligently produced.

A plaintiff suffering physical injury because a physician misdiagnoses his patient and that patient infects the plaintiff need not prove privity with the physician. Gill v. Hartford Accident and Indemnity, 337 So2d 42 (Fla. 2nd DCA 1976).

Therefore, in three of the four possible combinations i.e. physicial and pecuniary injury from a product and physical injury from negligently supplying information no privity is necessary. The fourth possible combination is the case at bar i.e. pecuniary loss resulting from supplying information. What then makes this situation so different from the others so as to insulate the negligent party from liability? The Respondent submits there is no logical reason not to continue the elimination of the privity requirement.

This is especially true in the case of abstractor liability. The abstractor completely supervises the compilation of the

information he disseminates albeit in the form of a product. In almost every instance the only potential persons that can be harmed by the abstractor's negligence are persons not in privity with him. Therefore, the decision of the First District Court in Kovaleski v. Tallahassee Title Co., 363 So2d 1156 (Fla 1st DCA 1978), is a logical and foreseeable continuation of the evolution of Florida tort law.

The flexibility of the common law allows this Court to enunciate a new theory of law to take into consideration the modern world where the acquisition, accumulation and dissemination of information pervades both our business world and our private lives. Instead of trying to use warranty theories, corruption of the third party beneficiary principles or a products liability rationales; this Court can make a clear statement of Florida law. The Respondent urges the Court to adopt the Restatement of Torts 2d §552, as the law in Florida.

To ignore this principle is to deny that the common law can adapt to a changing world. To adopt a theory of recovery other than one grounded in tort is to add confusion and build inadequacy into the solution to the present fact situation.

The most comprehensive treatment of the exact issue before this Court now is contained in Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974), the case cited Kovaleski, supra. Michigan had already dispensed with the necessity of privity when the Williams case arose. Apparently Michigan had been struggling to fit into a theoretical framework the idea that a person who

negligently purveys information should be liable to all who are damaged by this negligence. The Court in Williams faced up to the issue once and for all stating that abstractors, laywers, doctors, architects, etc., would be held responsible for the foreseeable consequences of their negligent representations.

Other than an action for negligent misrepresentation the alternatives considered by the Court in Williams, supra, include only one other possible theoretical avenue for this Court to chose, that of creating liability upon the theory of third party beneficiary contracts. This would be only a corruption of contract law and in fact would provide no remedy in most situations. Usually there is not written contract when only information is purveyed. Rarely would the parties clearly intend and the purpose of the contract be to benefit a third person as is not required by contract law. First National Bank v. Perkins, 81 Fla 431 (1921). The question in situations as is presently before the Court is not who was intended to derive benefit but who was damaged.

The Petitioners argue that unlimited liability will result from the elimination of privity requirement. This simply is not true. It is hard to imagine that liability will extend beyond the last person in the chain of title who relied upon the abstract. This would certainly seem to be much less exposure than an architect has if a building collapses.

In summing up this argument the Respondent urges the Court to follow in its entirety the opinion of the Michigan Supreme Court in Williams v. Polgar, supra. This opinion is comprehensive and this brief could add nothing to it. The Respondent would also urge the Court to consider the arguments advanced by Urich & Milne, Abstracter's Liability and Beyond, The Florida Bar Journal, Vol. 53, No. 4, Pg. 210 (April 1979). As to the issue of just what constitutes negligence by an abstractor the Respondent's brief filed in the Fifth Dstrict Court fully covers this point.

CONCLUSION

The Respondent urges the Court to adopt Restatement of Torts 2nd § 552 as the law of this state. In addition, the Respondent urges the Court to adopt the opinion of the Michigan Supreme Court in Williams v. Polgar, supra, as the law in Florida as it applies specifically to abstractor's liability. The Court should therefore affirm the decision of the Fifth District of Appeal in this case.

Respectfully submitted,

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William A. Spence

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to W. C. HUTCHISON, JR., ESQUIRE, Post Office Drawer H, Sanford, Florida 32771, this 17th day of February, 1984.

Richard R Cook

RICHARD R. COOK, ESQUIRE