IN THE SUPREME COURT

OF THE STATE OF FLORIDA

THE ABSTRACT CORPORATION and
CHELSEA TITLE AND GUARANTY COMPANY,

Petitioners,

v. CASE NO. 63,971

FERNANDEZ COMPANY,

Respondent.

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND OF THE FACTS

For the purposes of this brief, "A" will relate to the appendix and "R" to the record.

This cause was initiated in the trial court by the filing of a third party complaint by Respondent, Fernandez Company, against Petitioners, The Abstract Corporation and Chelsea Title and Guaranty Company (R 1-9) alleging the negligent omission of seven deeds from abstracts prepared by Petitioners and upon which the non-privity Respondent relied to its injury. Petitioners filed a motion to dismiss relating to privity and reliance (R 16-17). The complaint was amended instanter relating to reliance and upon the answer and affirmative defenses of Petitioners (R 20-23) as amended (R 42-45) the cause was tried without jury. Petitioners admitted the omission of the seven deeds but denied that such omission was in fact negligent. The trial court found that such omission was not negligent and entered judgment in favor of Petitioners (R 96-97) (A-1).

From such judgment Respondent filed its notice of appeal (R 122). The Fifth District Court of Appeal reversed the trial court in Fernandez Company v. The Abstract Corporation and Chelsea Title and Guaranty Company, its case number 82-1021, reported as Fernandez Co. v. Birtley, 435 So.2d 280 (Fla. 5th DCA 1983) (A-3). The reversal by the Fifth District Court of Appeal directed itself to the trial court's finding of an absence of negligence and in

effect held that the omission was negligent. Since the appeal was perfected by Respondent as compared to Petitioners, the question of privity between the abstractor and the user was not raised on appeal. However, the Fifth District Court, apparently recognizing more skirmishing on the trial court level, addressed itself to the question of privity and followed the holding in Kovaleski v. Tallahassee Title Co., 363 So.2d 1156 (Fla. 1st DCA 1978), (A-10), in pointing out the conflicting position with First American Title Ins. Co. v. First Title Service Co., 423 So.2d 600 (Fla. 3d DCA 1982), (A-8), and the additional conflict with Sickler v. Indian River Abstract & Guaranty Co., 195 So. 195 (Fla. 1940), (A-17). From this conflict, this Court accepted discretionary jurisdiction in certiorari and this brief results.

ARGUMENT

The only expression of this Court relating to the liability of abstractors in the performance of their abstract function which existed prior to the acceptance of the discretionary jurisdiction of certiorari in First American Title Ins. Co. v. First Title Service Co., 423 So.2d 600 (Fla. 3d DCA 1982), was Sickler v. Indian River Abstract & Guaranty Co., 195 So. 195 (Fla. 1940). Sickler established the liability of abstractors for negligent performance in producing the abstract and based such liability upon contract as compared to tort thus making privity a necessary condition precedent to abstractors' liability for negligence. This remained the law until the First District decided Kovaleski v. Tallahassee Title Co., 363 So.2d 1156 (Fla. 1st DCA 1978), which adopted the foreseeability theory and authorized actions against abstractors based upon tort as compared to privity, the court reasoning that this Court's decision in A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), an architectural liability case, overruled Sickler. For some strange reason, Kovaleski was not brought to this Court based upon its conflict with Sickler. The Third District created a conflict by its decision in First American Title Ins. Co., supra, holding that privity was still a requirement for abstractors' liability and that Moyer did not overrule Sickler.

Obviously, we agree with the Third District. All of the cases relied on by this Court in Moyer related to architectural liability and dealt with situations where an element of direct

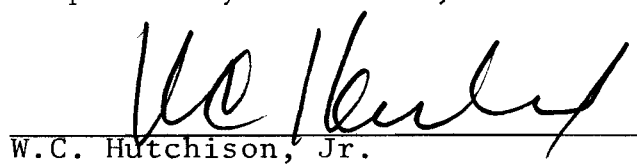
supervision or control by the architect was involved or where the architect knew that the plans would be utilized by a specific contractor or where the architect knew that the plans would be resold or utilized by others. In most cases, the plans of an architect are used one time in the construction of the structure contemplated by such plans. Any defect which would create liability to the architect manifests itself in the structure and when discovered is corrected. Thus, there is only a one-time liability to the architect whereas once an abstract is released by the abstractor it is not recoverable. It remains in the stream of commerce relating to the title to a given parcel of property without any foreseeability as to the numbers of hands through which it will pass and the future liability which could be created. This is particularly true in the issuance of title insurance policies based upon abstracts prepared by those with whom the title insuror is not in privity. All manner of mischief relating to titles, title examinations and the transfer of real property will result if the contractual requirement or privity requirement is eliminated as a basis for abstractor liability.

The First District in Chelsea Title & Guar. Co. v. Louis Briggs Const., Inc., 315 So.2d 229 (Fla. 1st DCA 1975), although stating that it did not decide that Moyer overruled Sickler nevertheless pointed out what should be considered material differences between the theory of abstractor liability and the theory of architectural liability, such as the abstractor warranting

his product forever, generation after generation, and the impact of title insuring as it relates to abstracts.

Moyer should be read in the light of the specific questions certified by the United States Court of Appeal and with the realization of the differences in architectural performance as compared to abstractor performance as was hereinbefore pointed out and as was demonstrated in the cases upon which Moyer was decided. To eliminate the privity requirement relating to an abstractor will undoubtedly have a chilling effect upon abstract preparation and dissemination.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to WILLIAM A. SPENCE, 730 S. Atlantic Avenue, Suite 103, Ormond Beach, FL 32074, and RICHARD R. COOK, 309 Oakridge Boulevard, Suite C, Daytona Beach, FL 32018, this 26th day of January, 1984.

W.C. Hutchison, Jr.