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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 73-110

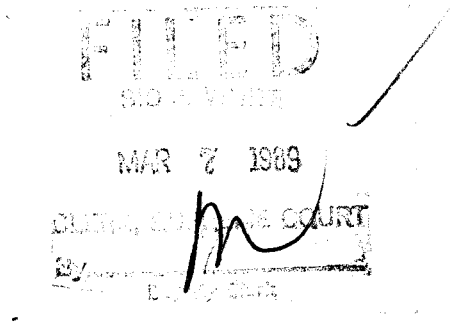
ERSKINE FLORIDA PROPERTIES, INC., a Florida corporation and R. JAMES ERSKINE,

Petitioners,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY OF ST. LUCIE COUNTY, INC. and FIRST AMERICAN TITLE COMPANY OF MARTIN COUNTY, INC.,

Respondents.



ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENTS' ANSWER BRIEF ON THE MERITS

Ralph P. Mangione, Esquire
Florida Bar No. 367354
TAUB & WILLIAMS, P.A.
Ashley Tower
100 South Ashley Drive
Suite 2100
Post Office Box 3430
Tampa, FL 33601
(813) 228-8000

Attorneys for respondents,
First American Title Insurance Company of St. Lucie County, Inc. and First American Title Company of Martin County, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND OF THE FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

THE DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT'S JUDGMENT ON THE GROUNDS THAT ERSKINE FAILED TO ESTABLISH A PRIMA FACIE CASE AND CARRY ITS BURDEN OF PROOF. 5

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF CITATIONS

Page

Amos v. Mosley
74 Fla. 555, 77 So. 619 (1917) 11

Atkins v. Humes
110 So.2d 663 (Fla. 1959) 9

Atlantic National Bank of Florida v. Vest
480 So.2d 1328 (Fla. 2d DCA 1985) 5

Dunham-Bush, Inc. v. Thermo Air Service, Inc.
351 So.2d 351 (Fla. 4th DCA 1977) 5

First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc.
457 So.2d 467 (Fla. 1984) 8, 9

Florida Power Corporation v. Tallid
332 So.2d 687 (Fla. 2nd DCA 1976) 5

Glazer v. Shepard
233 N.Y. 236, 135 N.E. 275 (1922) 9

Gleason v. Title Guarantee Company
317 F.2d 56 (5th Cir. 1963) 4, 5, 6, 7, 8, 9, 11

Green v. Loudermilk
146 So.2d 601 (Fla. 2nd DCA 1962) 3

Huff v. State
495 So.2d 145 (Fla. 1986) 10,11

Kovaleski v. Tallahassee Title Company
363 So.2d 1156 (Fla. 1st DCA 1978) 2, 4, 5, 7, 8, 9, 11

Lab v. Hall
200 So.2d 556 (Fla. 4th DCA 1967) 6

MacIntyre v. Greens Pool Service, Inc.
347 So.2d 1081 (Fla.3d DCA 1977) 6

McDaniels v. State
388 So.2d 259 (Fla. 5th DCA 1980) 11

Moore v. Choctawhatchee Electric Co-Op, Inc.
196 So.2d 788 (Fla.1st DCA 1967) 11

Olschefsky v. Fischer
123 So.2d 751 (Fla. 3d DCA 1960) 6

Sickler v. Indian River Abstract
and Guarantee Company
195 So. 195 (Fla.1940 ..... 8, 9

State ex rel. Florida Bar v. Oxford
127 So.2d 107 (Fla. 1961) 6

VTN Consolidated, Inc. v. Coastal
Engineering Associates, Inc.
341 So.2d 226 (Fla. 2nd DCA 1976),
cert. denied 345 So.2d 428 (Fla. 1977) 5

PRELIMINARY STATEMENT

Respondents, First American Title Insurance Company of St. Lucie, Inc. and First American Title Insurance Company of Martin County, Inc., will be referred to either by their proper names or collectively as either "Respondents" or "First American." Petitioners, Erskine Florida Properties, Inc. and R. James Erskine, will be referred to either by their proper names or collectively as "Petitioners" or "Erskine."

References to Petitioners' Appendix will be designated as "Pet.App.", followed by the appropriate page number of numbers. References to the Record on Appeal will be designated as "R.", followed by the appropriate page number or numbers.

STATEMENT OF THE CASE AND OF THE FACTS

Erskine's statement of the facts is essentially correct with the following exceptions and additions, all of which are contained in the opinion of the Fourth District Court of Appeal.

First, contrary to Erskine's assertion, First American did not fail to find Sherman's Notice of Claim of Interest in Land "because [First American] only made a partial, not a complete search." Rather, the notice of claim of interest in land was omitted from First American's abstract because this instrument was improperly indexed in the Public Records by the Clerk of the Court. Moreover, Erskine did not provide First American with the name "Sherman" to search. Rather, Erskine provided, and First American searched, the names "Saunders" and "Ocean Harbor."

The Fourth District Court of Appeals' opinion also correctly notes that Erskine filed a third party complaint against First American "seeking indemnification." See Pet.App. at 3 (emphasis added). In this regard, the Fourth District Court of Appeal, citing Kovaleski v. Tallahassee Title Company, 363 So.2d 1156 (Fla. 1st DCA 1978), held that "[a]n abstractor's duty to his employer is to use such care and skill as is exercised by persons engaged in similar occupations and under like circumstances. "See Pet.App. at 3-4. The Fourth District Court of Appeal continued:

> Experts, basing their opinions on the standard of care in St. Lucie County, should have at least answered questions such as the following:
>
> (1) Whether First American, using the standard techniques of an abstractor, should have discovered the improperly indexed notice of claim of interest;
>
> (2) Whether First American should have searched the unit number in addition to the names provided by Erskine in the direct and indirect indexes;
>
> (3) Whether First American should have search the Parcel ID index, even though it contained a disclaimer that it should not be solely relied upon for abstracting purposes;

(4) Whether other avenues were available in the courthouse which would have led to the discovery of an interest in unit 210B and which First American should have pursued; and

(5) Whether First American should have other in-house system(s) which would have led to the discovery of an interest in unit 210D. See Pet.App. at 4.

Thus, "[w]ithout expert testimony as to these and other pertinent questions, the trial court erred in making its own determination as to the applicable standard of care." See Pet.App. at 4. Since Erskine "failed to establish a prima facie case and carry its burden of proof," the Fourth District Court of Appeal properly reversed the final judgment. Id., citing Green v. Loudermilk, 146 So.2d 601 (Fla. 2nd DCA 1962).

SUMMARY OF ARGUMENT

Erskine's third party claim against First American was for indemnification. Since there was no contract providing for express indemnification, it could only be implied. Accordingly, Erskine's burden of proof was to show the existence of some duty and First American's breach of that duty, whether contractual or otherwise.

In this regard, Erskine was required to present evidence as to the prevailing standard of care among abstractors in St. Lucie County, Florida under similar circumstances. Since the applicable standard of care is not so obvious as to be one of common knowledge, or a matter of ordinary intelligence to the public at large, expert testimony was required to assist the trier of fact in determining the standard and whether it was breached.

The record is completely devoid of any competent, substantial evidence that the community did not condone the method of examination that First American employed in rendering its abstract of title or, indeed, if it is done any other way. As such, Erskine failed to establish that First American breached its duty to use such "care and skill as is exercised by persons engaged in similar occupations and under like circumstances." Kovaleski v. Tallahassee Title Company, 363 So.2d 1156, 1158 (Fla. 1st DCA 1978); Gleason v. Title Guarantee Company, 317 F.2d 56 (5th Cir. 1963).

The Fourth District Court of Appeal properly reversed the trial court's judgment and the decision under review should be affirmed.

ARGUMENT

THE DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT'S JUDGMENT ON THE GROUNDS THAT ERSKINE FAILED TO ESTABLISH A PRIMA FACIE CASE AND CARRY ITS BURDEN OF PROOF.

It is undisputed that Erskine filed a third party complaint against First American pursuant to Rule 1.180(a), Fla.R.Civ.P. (R. 337; 335-69). Accordingly, as a matter of law, Erskine's claim was one for indemnification and not, as Erskine persists, a claim "based on breach of contract as well as negligence." See Erskine's Initial Brief on the Merits at pp. 3 & 5. Indeed, it is well settled that the only type of claims available to a third party plaintiff such as Erskine are indemnification, contribution or subrogation. See, e.g., VTN Consolidated, Inc. v. Coastal Engineering Associates, Inc., 341 So.2d 226, 228 (Fla. 2nd DCA 1976), cert. denied, 345 So.2d 428 (Fla. 1977).

Moreover, since there was no contract providing for express indemnification it could only be implied. This being the case, Erskine was compelled to show the existence of a duty and the violation of that duty. See Atlantic National Bank of Florida v. Vest, 480 So.2d 1328 (Fla. 2nd DCA 1985); Dunham-Bush, Inc. v. Thermo Air Service, Inc., 351 So.2d 351 (Fla. 4th DCA 1977); Florida Power Corporation v. Tallid, 332 So.2d 687 (Fla. 2nd DCA 1976). In order to establish First American's duty, Erskine was required to present evidence as to the "care and skill . . . exercised by persons engaged in similar occupations and under like circumstances." See Kovaleski v. Tallahassee Title Company, 363 So.2d 1156, 1158 (Fla. 1st DCA 1978). See also Gleason v. Title Guarantee Company, 317 F.2d 56 (5th Cir. 1963) (title examiner's duty to plaintiff must be measured by

community standards of professional conduct prevailing in the locale at the time the title examiner did his work).[1]

In Gleason v. Title Guarantee Company, supra, a title company brought an action against a title examining attorney (the abstractor) for damages sustained when various mortgages guaranteed as first mortgages on the title examiner's certification of clear title proved to be subordinate to other mortgages. In defining the scope of the title examiner's duty to the plaintiff, the Fifth Circuit Court of Appeals held:

> [the title examiner's] duty to the plaintiff must be measured by the community standards of professional conduct prevailing in Brevard County at the time [the title examiner] did his work. . . . [i]f it is customary in the community for attorneys to conduct the type of title examination the defendant conducted and if a title insurer is willing to run the risk resulting from such examination, it can certainly do so. But in the record before us there is no evidence whatsoever that the community condoned the absence of a proper caveat to the certification which would indicate the time lag between the date of the attorney's last reliable information and the date of the certificate. Id. at 60. (emphasis added).

Similarly, in the instant case, Erskine wholly failed to establish the "standards of professional conduct prevailing [in St. Lucie County, Florida] at the time [First American] did [its] work." Gleason v. Title Guaranty Company, supra at 60. The record is completely devoid of any competent evidence whatsoever that the community did not

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1 Indeed, this method of determining the standard of care of professionals in Florida is well established. See, e.g., Lab v. Hall, 200 So.2d 556, 557 (Fla. 4th DCA 1967) (duty of a medical practitioner is to apply "the standard of those who are qualified by training and experience to perform similar services in the community"); Olschefsky v. Fischer, 123 So.2d 751 (Fla. 3d DCA 1960) (same); State ex rel. Florida Bar v. Oxford, 127 So.2d 107, (Fla. 1961) (where this Court declined to disbar or discipline a lawyer who had filed pleadings for both the opposing parties in 39 divorce suits, because "such action had been the practice in the locality where he practiced for many years.") (emphasis added); MacIntyre v. Greens Pool Service, Inc., 347 So.2d 1081, 1089 (Fla. 3d DCA 1977) (allegations of claim were unsupported by the record because there was "no showing that the duties alleged fall within the duties ordinarily assumed or placed upon an architect by custom and practice of the business community") (emphasis added).

"condone" the method of examination that First American employed in rendering its abstract of title or, indeed, that it is done any other way. Accordingly, Erskine wholly failed to establish that First American breached its duty to use such "care and skill as is exercised by persons engaged in similar occupations and under like circumstances" and the trial court's judgment was properly reversed. See Kovaleski v. Tallahassee Title Company, supra at 1158; Gleason v. Title Guarantee Company, supra at 60.

In fact, the only evidence in the record is that First American diligently searched the direct and indirect indexes contained in the Clerk's office. According to the unrebutted testimony of Judy Reeves, First American's title examiner:

> [t]here's nothing that is really any more reliable than the indexes. There are the tax rolls and a parcel ID index, but these are not really deemed reliable as far as chain searching on property. (R. 38).

In addition, Joyce McGraw, the supervisor of the Official Records for the Clerk of the Circuit Court, St. Lucie County, testified that the parcel ID index should not be relied upon for abstracting purposes. (R. 259). There simply exists no evidence in the record from which the trial court could have properly determined that First American breached its duty of care to Erskine.

Notwithstanding the absence of any competent evidence as to the standard of care to be applied, the trial court found that First American breached its duty "[b]ecause the title company chose to rely on a clerk's file index that only went to the grantor-grantee index." (R. 60). The trial court also held that First American breached its duty to Erskine because of its "failure to utilize all of the records in the Clerk's office and its failure to maintain tract books." (R. 678). However, as shown above, there was absolutely no evidence in the record that it is customary in St. Lucie County, Florida for abstractors to conduct this type of examination under the circumstances presented

here. See Kovaleski v. Tallahassee Title Company, supra at 1158; Gleason v. Title Guarantee Company, supra at 60.[2]

There being no evidence in the record to support this essential element of Erskine's cause of action, the final judgment against First American was properly reversed.

This is so notwithstanding this Court's previous decisions holding that an abstractor's liability sounds in contract, rather than tort. See First American Title Insurance Company v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984); Sickler v. Indian River Abstract Company, 195 So. 195 (Fla. 1940). Indeed, Erskine was still required to show, through substantial competent evidence, First American's negligent performance of its contractual duty. Id. at 472-3. Having failed to do so, the judgment was properly reversed.

Erskine's reliance on First American and Sickler for the proposition that "[s]ince the liability of an abstractor is in contract, rather than tort . . . the Fourth District erred in concluding that expert testimony was required on Erskine's claim against First American" is badly misplaced. Nor do these cases present any conflict with the instant decision under review.

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2 Moreover, the record is completely devoid of any competent evidence that, assuming First American had a duty to search the parcel ID index and maintain and keep tract books, its failure to do so caused Erskine any damages. Indeed, Erskine failed to introduce any evidence which would show, with any degree of certainty, that Sherman's Notice of Claim of Interest in Land was actually recorded in those sources, and thus would have been found if searched. Although the Clerk, Joyce McGraw, testified that the Notice of Claim of Interest in Land would have been picked up in the parcel ID index, there was no testimony that she ever looked in the parcel ID index to confirm that fact nor was the parcel ID index introduced into evidence. In fact, Ms. McGraw disclaimed any responsibility associated with the parcel ID index, noting that it was prepared and kept by the Property Appraiser's office. (R. 256-58).

First, both First American and Sickler, unlike the case at bar, involve claims for damages by third persons not in privity with the abstractor for the negligent preparation of an abstract. In fact, although this Court held that an abstractor is not liable in tort for negligence to all foreseeable third parties,

> [w]hen an abstract is prepared . . . under conditions in which an abstractor should reasonably expect that the employer is to provide it to third persons for purposes of inducing those persons to rely on the abstract as evidence of title, the abstractor's contractual duty to perform the services skillfully and diligently runs to the benefit of such known third parties. First American Title Insurance Company v. First Title Service Company of the Florida Keys, Inc., supra at 472 (emphasis added).

Moreover, this Court, quoting Glazer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) noted that:

> [w]e do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law . . . [w]e therefore hold that such a known third-party user is owed the same duty and is entitled to the same remedy as the one who ordered the abstract. It clearly follows that . . . [they] may recover damages from the abstract company for its negligent performance. Id. at 473 (emphasis added).

First American's "contractual duty" to its employer, Erskine, was to perform its services "skillfully and diligently." Id. at 472. In order to prove First American's "negligent performance" of this contractual duty, Erskine was first required to establish the applicable standard of care. Id. at 473. See Kovaleski v. Tallahassee Title Company, supra; Gleason v. Title Guarantee Company, supra. This, Erskine just failed to do.

Erskine's reliance on Atkins v. Humes, 110 So.2d 663 (Fla. 1959), for the proposition that "expert testimony is not always necessary in negligence cases, even those involving medical malpractice," is likewise misplaced if not misleading. Indeed,

Atkins v. Humes, and its progeny, represent the "exception to the general rule" requiring expert testimony in professional negligence cases where:

> [j]urors of ordinary intelligence, sense and judgment are . . . capable of reaching a conclusion, without the aid of expert testimony . . . [f]or example . . . that it is negligence to permit a wound to heal superficially with nearly half a yard of gauze deeply embedded in the flesh [cites]. Id. at 666.

Clearly, First American's duty to Erskine "to use such care and skill as is exercised by persons engaged in similar occupations and under like circumstances" is not so obvious or of such common knowledge as to be within the ordinary intelligence of laypersons. Rather, as the Fourth District Court of Appeal correctly noted, "[e]xperts, basing their opinions on the standard of care in St. Lucie County," should have at least answered the following questions:

> (1) Whether First American, using the standard techniques of an abstractor, should have discovered the improperly indexed notice of claim of interest;
>
> (2) Whether First American should have searched the unit number in addition to the names provided by Erskine in the direct and indirect indexes;
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> (4) Whether other avenues were available in the courthouse which would have led to the discovery of an interest in unit 210B and which First American should have pursued; and
>
> (5) Whether First American should have other in-house system(s) which would have led to the discovery of an interest in unit 210D. See Pet.App. at 4.

Moreover, "[w]ithout expert testimony as to these and other pertinent questions, the trial court erred in making its own determination as to the applicable standard of care." Pet.App. at 4. Indeed, as this Court held in Huff v. State, 495 So.2d 145, 151 (Fla. 1986):

> [t]he courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally. This does not mean knowledge which they individually possess by reason of personal investigation and research, but matters of common notoriety which because of such notoriety they share or should share in common with the public . . . however . . . [t]his power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Id., citing Amos v. Mosley, 74 Fla. 55, 77 So. 619 (1917).[3]

An "essential element" of Erskine's cause of action against First American is the finding of a breach by First American of its duty to use "such care and skill as are exercised by persons engaged in similar occupations and under like circumstances." Kovaleski v. Tallahassee Title Company, supra at 1158; Gleason v. Title Guaranty Company, supra at 60. Accordingly, it was blatant error for the trial court to find that First American breached its duty to Erskine without first receiving evidence as to that fact. Huff v. State, supra; McDaniels v. State, supra; Moore v. Choctawhatchee, supra.

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3 Likewise, in McDaniels v. State, 388 So.2d 259 (Fla. 5th DCA 1980) the Fifth District Court of Appeal reversed a conviction for possession of a short barreled shotgun because the state failed to produce any evidence as to the length of the shotgun barrel. Rather, the trial judge simply took judicial notice of how long a barrel must be so as not to violate the statute and that the subject shotgun barrel was shorter. In reversing the trial court, the Fifth District noted that barrel length is an "essential element" of possession of a short barreled shotgun and, that although "judicial notice may be taken of matters that are commonly known, [it] may not be used to dispense with proof of essential facts that are not judicially cognizable." Id. at 260, citing Amos v. Mosley, supra. Similarly, in Moore v. Choctawhatchee Electric Co-Operative, Inc., 196 So.2d 788 (Fla. 1st DCA 1967), the trial court held that the width of a clearing of trees and shrubbery to which an electric company was entitled under an unrecorded easement was 30 feet, as this was the "customary" clearing width. However, the easement only authorized cutting and trimming of trees and shrubbery "to the extent necessary to keep them clear of the electric lines." Id. at 790. In reversing a summary judgment in favor of the electric company because of the absence of proof of an essential fact in the defendant's case, the court held "[t]he fallacy of this argument is that proof of the necessary width of the right of way is absent in the record . . . [j]udicial notice has yet to fill the vacuum created by the failure of a party to prove an essential fact [to his cause of action]. Id. at 789.

The trial court's ruling that it "feels" a prudent abstractor should utilize all available facilities in order to render an accurate search was unsupported by any evidence. Nor is the standard of care attributable to abstractors in St. Lucie County under these circumstances a matter of such "notoriety" that the trial court could take judicial notice.

In summary, Erskine is asking this Court to legislate a universal standard of care applicable to all abstractors regardless of the particular circumstances or standards existing in their community. Such a ruling would extend the liability of abstractors by dispensing with the requirement that the plaintiff prove, through substantial competent evidence, that an abstractor was negligent in the performance of some duty.

The decision of the Fourth District Court of Appeals should be affirmed.

CONCLUSION

For each of the reasons set forth above, the opinion of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

Ralph P. Mangione, Esquire
Florida Bar No. 367354
TAUB & WILLIAMS, P.A.
Ashley Tower
100 South Ashley Drive
Suite 2100
Post Office Box 3430
Tampa, FL 33601
(813) 228-8000

Attorneys for respondents,
First American Title Insurance Company of St. Lucie County, Inc. and First American Title Company of Martin County, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry Klein, Esquire, Klein & Beranek, P.A., Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33501; William R. Scott, Esquire, Scott & Fogt, P. O. Box 2057, Stuart, FL 33495 and Harold G. Melville, Esquire, Neill, Griffin, Jefferies & Lloyd, P. O. Box 270, Fort Pierce, FL 33454-1270 this 6th day of March, 1989.

Ralph Mangione

Ralph P. Mangione, Esquire