Orig.

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 73,110

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

Petitioners,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY OF ST. LUCIE COUNTY, INC., et al,

Respondents.
_____/

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

PETITIONERS' BRIEF ON JURISDICTION

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PREFACE

The parties will be referred to as petitioner and respondent or by their proper names, Erskine and First American. The following symbol will be used:

A: Petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

The following facts are all contained in the opinion of the Fourth District.

Petitioner Erskine, prior to purchasing a condominium, contracted with First American to perform a title search. First American searched the title, but failed to find a deed to Sherman. Erskine purchased, and Sherman sued Erskine, who sought indemnity against First American. Sherman prevailed in his suit against Erskine, and the trial court found in favor of Erskine on his claim for indemnity against First American. The essence of the opinion of the Fourth District is:

> First American's search was based on documentation pertaining to unit 210B between August 4, 1982 and May 9, 1983. In conducting its search, First American searched only the names provided by Erskine ("Saunders" and "Ocean Harbor South") in the direct and indirect indexes. It did not search the unit number itself, nor did it run a search through the Parcel ID index. Based on its search, the abstract of title provided for appellee Erskine failed to identify Sherman's improperly indexed Notice of Claim of Interest in Land.

> Erskine subsequently sold unit 210B to Francis M. Hart for a net cash of $78,909.38. As a result of this sale, Sherman brought an action against Erskine Florida Properties, Inc. and R. James Erskine, seeking to impose a constructive trust on proceeds Erskine collected from the sale of the condominium unit to Hart. Erskine filed a third party complaint against appellants First American of Martin and St. Lucie Counties (First American) seeking indemnification for their negligence in preparing the title chain. The trial court severed First American from the action.
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> * * *
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> An 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. Kovaleski v. Tallahassee Title Co., 363 So.2d 1156 (Fla. 1st DCA 1978). In the instant case, there was no expert testimony presented as to what the community standard of care was in St. Lucie County at the time of preparing an abstract.
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> * * *
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> Without 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. Inasmuch as appellee failed to establish a prima facie case and carry its burden of proof the final judgment must be reversed.

The Fourth District reversed for entry of a directed verdict in favor of First American. Judge Letts filed a dissenting opinion.

ISSUE

DOES THE OPINION OF THE FOURTH DISTRICT CREATE CONFLICT?

SUMMARY OF ARGUMENT

The opinion of the Fourth District, holding that expert testimony is necessary to recover against an abstract or title insurance company with whom the plaintiff is in direct privity, conflicts with prior opinions of this court which hold that liability under these circumstances is contractual, not in tort. Sickler v. Indian River Abstract & Guaranty Company, 195 So. 195 (Fla. 1940), and First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys Inc., 457 So.2d 467 (Fla. 1984). This court should therefore review this case on the merits.

ARGUMENT

ISSUE

DOES THE OPINION OF THE FOURTH DISTRICT CREATE CONFLICT?

In its opinion the Fourth District recognized that petitioner Erskine contracted with First American to perform a title search on the condominium. The Fourth District also recognized that First American utilized only one of three

ways to search the condominium and, because of a mistake of the clerk, the one method used by First American did not reveal a deed.

The Fourth District reversed the judgment in favor of Erskine against First American for failure to properly search the title, because Erskine did not present expert testimony that First American fell below the community standard of care. Since expert testimony of this nature would only be necessary in a negligence case, this holding creates conflict with decisions of this court that these cases are contractual in nature. In Sickler v. Indian River Abstract & Guaranty Company, 195 So. 195 (Fla. 1940), this court stated on page 197:

> An abstracter is liable in damages for injuries resulting from wrongful or negligent errors, defects or omissions in an abstract prepared and furnished by him. It was settled in an early case, which has been followed in nearly all the decisions on this question, that his liability is not in tort, but is contractual, and must be based upon a breach of his express or implied contract with his customer or client to furnish him with a true and correct abstract.

The above language was quoted with approval by this court in First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys Inc., 457 So.2d 467 (Fla. 1984).

Petitioner Erskine did move for rehearing in the Fourth District and pointed out that this claim was grounded on breach of contract as well as negligence, citing the above cases (A 7-9). The motion for rehearing was denied.

CONCLUSION

The holding of the Fourth District that the liability of a title insurance company or an abstracter is in tort and must be based on expert testimony creates express and direct conflict with previous decisions of this court holding that the relationship is contractual. This court should review this case on the merits.

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By: 
LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 27TH day of September, 1988, to:

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