IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Petitioners,

vs.

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

Respondents.

CASE NO. 73,110

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

RESPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondents, First American Title Company of St. Lucie County, Inc. and First American Title 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 and Respondents' Appendix will be designated as "Pet.App." and "Resp.App.", respectively, followed by the appropriate page number or numbers.

STATEMENT OF THE CASE

This is a petition for discretionary review of an opinion of the Fourth District Court of Appeal rendered July 13, 1988, pursuant to Rules 9.030(a)(2)(A)(iv) and 9.120, Fla.R.App.P. Erskine filed a motion for rehearing on July 26, 1988 to which First American replied. See Resp.App. at 1-4. By order dated August 24, 1988, the Fourth District Court of Appeals denied Erskine's motion for rehearing. See Pet.App. at 10. The instant petition followed.

STATEMENT 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 a deed to Sherman." The instrument omitted from First American's abstract was Sherman's "Notice of Claim of Interest in Land." 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 Appeal's opinion also correctly notes that Erskine filed a third party complaint against First American "seeking indemnification for their negligence in preparing the title chain." 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." Id. 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 searched the parcel I.D. 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 210B. See Pet. Ex. 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 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. 2d DCA 1962).

SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal does not expressly and directly conflict with the decision of any other district court of appeal or the Supreme Court on the same questions of law. Rather, the Fourth District Court of Appeal was correct in ruling that Erskine failed to establish a prima facie case and carry its burden of proof at trial. Indeed, Erskine's one count complaint sought indemnification. Since there was no contract providing for express indemnification, it can only be implied. This being the case, Erskine was compelled to show the existence of a duty and the violation of that duty. Having failed to do so, Erskine failed to establish a prima facie case for indemnification and the judgment was properly reversed.

ARGUMENT

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT CREATE CONFLICT

Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., provides that the discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on the same question of law. In this regard, the test of this Court's jurisdiction is whether the appellate court has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision on the same point, thus generating confusion and instability among precedent. See Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). That is, the conflict must be such that if the latter decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter. Id.; Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). However, if the two cases are distinguishable on controlling factual elements, or if the points of law settled by the two cases are not the same, then no conflict can arise. See Kyle v. Kyle, supra; Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Florida Power and Light Company v. Bell, 113 So.2d 697 (Fla. 1959).

Erskines' argument that the Fourth District Court of Appeal's opinion in the instant case conflicts with the decisions of this Court in Sickler v. Indian River Abstract and Guaranty, 195 So. 195 (Fla. 1940) and First American Title Insurance Company, Inc. v. First Title Service Company of Florida Keyes, Inc., 457 So.2d 467 (Fla. 1984) in that it changes the scope of an abstractor's liability is without merit. The Fourth District Court of Appeal's decision neither expressly or directly conflicts with these decisions nor does it have the "effect of overruling" them. Rather, the decision is consistent with prior decisions relating to a plaintiff's burden of proof in establishing a cause of action for indemnification.

Indeed, as the Fourth District Court of Appeal observed, Erskine's one count complaint sought indemnification. 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 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. 2d DCA 1976). In this regard, 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 (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 the community standards of professional conduct prevailing in the locale at the time the title examiner did his work). Having failed to establish the "standard of professional conduct prevailing in St. Lucie County, Florida at the time First American did its work," and First American's breach of that standard, Erskine failed to carry its burden of proof and the final judgment was properly reversed.

CONCLUSION

The holding of the Fourth District Court of Appeal that Erskine failed to carry its burden of proof in establishing a cause of action for indemnification does not conflict with the previous decisions of this Court or the decisions of other district courts of appeal on the same question of law.

Erskines' petition for discretionary review should be denied.

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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, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, William R. Scott, Scott & Fogt, P.A., Post Office Box 2057, Stuart, Florida 33495-2057 and Harold G. Melville, Neill, Griffin, Jeffries & Lloyd, Post Office Box 1270, Ft. Pierce, Florida 33454-1270 this 21st day of October, 1988.

Ralph P. Mangione, Esquire