O/a 5-2-89

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.,
et al.,

Respondents.
_____/

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

PETITIONERS' BRIEF ON THE MERITS

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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:

R - Record.

ISSUE ON APPEAL

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT EXPERT TESTIMONY THAT A TITLE COMPANY BREACHED THE STANDARD OF CARE IN SEARCHING A TITLE WAS ESSENTIAL IN A SUIT AGAINST A TITLE COMPANY FOR FAILURE TO DISCOVER A RECORDED INSTRUMENT.

STATEMENT OF THE CASE AND FACTS

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

In 1971 a developer named Sotolongo conveyed a condominium unit to Sherman by warranty deed, but the warranty deed was never recorded. On March 17, 1983, Sherman executed a document entitled "Notice of Claim of Interest in Land," and had it recorded, however the Clerk of St. Lucie County failed to properly index this document. This error was corrected on July 16, 1984. In the meantime, however, Sotolongo quit-claimed the same condo to Saunders which deed was recorded on February 11, 1983. Saunders subsequently offered the unit for sale to Erskine, who first contracted with First American Title to perform a title search.

First American did not find the "Notice of Claim of Interest in Land," because it only made a partial, not a complete search.

On page 2 of its opinion the Fourth District described the manner in which First American searched the title as follows:

> 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 relied on the search and purchased the condo. He subsequently sold the condo to Hart for $78,909. Sherman then sued Erskine seeking to impose a constructive trust upon the proceeds Erskine collected from the sale to Hart, and Erskine filed a third party complaint against First American based on breach of contract and negligence (R 337, 353, 635).

Sherman prevailed on his claim against Erskine, and Erskine prevailed on his claim against First American in the trial court. First American appealed, and the Fourth District reversed on the ground that Erskine did not present expert testimony that First American fell below the community standard of care in preparing the abstract. The Fourth District reversed for entry of a judgment in favor of First American because of the lack of expert testimony. Judge Letts dissented.

Erskine moved for rehearing, pointing out that his claim was based on breach of contract as well as negligence, and that expert testimony was unnecessary to prove a breach of contract. The motion was denied and this court has granted review based on conflict.

SUMMARY OF ARGUMENT

Erskine purchased real estate from Saunders based on a title search performed by First American. First American missed a document reflecting actual ownership in Sherman. Sherman sued Erskine and Erskine sought indemnity for breach of contract and negligence from First American. Sherman prevailed against Erskine and Erskine prevailed against First American in the trial court, however the Fourth District reversed Erskine's judgment for indemnity against First American because there was no expert testimony presented as to the fact that First American fell below the community standard of care in searching titles. Since the liability of an abstracter is in contract, rather than tort, First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys Inc., 457 So.2d 467 (Fla. 1984), the Fourth District erred in concluding that expert testimony was required on Erskine's claim against First American. The opinion of the Fourth District should be reversed and the judgment of the trial court reinstated.

ARGUMENT

ISSUE ON APPEAL

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT EXPERT TESTIMONY THAT A TITLE COMPANY BREACHED THE STANDARD OF CARE IN SEARCHING A TITLE WAS ESSENTIAL IN A SUIT AGAINST A TITLE COMPANY FOR FAILURE TO DISCOVER A RECORDED INSTRUMENT.

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 Sherman's interest.

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 Co., 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).

The Fourth District mistakenly assumed in this case that the sole basis of the claim for indemnity by Erskine against First American was grounded in negligence, when in fact the indemnity claim was also grounded on breach of contract (R 337, 353, 635).

It is undisputed in the present case that First American failed to do what Erskine contracted with it to do. As is stated in 1 Am.Jur.2d, Abstract of Title, §§ 5, 6 (1962):

> ... the abstract should disclose everything material concerning the sources and conditions of the title to the property in question. It should disclose the full effect of every instrument which constitutes part of the vendors title, and include whatever concerns the source of that title and its conditions. ... .
>
> What is required is that the abstract disclose to an intended purchaser everything pertaining to the names and to the property in question, so far as appears from the record, that reasonably might affect such title, and thus put the purchaser on inquiry, in order that such purchaser may himself make the proper investigations as to the outside facts.

First American did not fulfill its contract, and there was no need for expert testimony reflecting a standard of care or that First American fell below it. This was not a medical malpractice case. This was a claim for indemnity, which is indistinguishable

from a hypothetical situation in which A employs a general contractor to build his home, and the general contractor subs out to X the general contractor's responsibility to install three air conditioning units. The sub only installs two units, and the owner sues the general for failing to fulfill his contract. The general has a claim for indemnity against the sub, and it is unnecessary for the general to prove that the sub fell below a standard of care in failing to do what he was required to do under his contract.

In the present case Erskine's third party claim against First American was for indemnity, in the event Erskine became liable to Sherman. The remedy of indemnity was described in Mims Crane Service, Inc. v. Insley Manufacturing Corp., 226 So.2d 836, 839 (Fla. 2d DCA 1969), as follows:

> The obligation to indemnify need not be based upon an express contract of indemnification but may arise out of implied contractual relations or out of liability imposed by law. The rule is stated in 41 Am.Jur.2d, Indemnity, § 2, p. 688:
>
> > "Although it has been said that the right to indemnity springs from a contract, express or implied, the modern cases note that contract furnishes too narrow a basis, and that principles of equity furnish a more satisfactory basis for indemnity. Thus, a right of indemnity has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join. The rule proposed in the Restatement of Restitution makes no specific reference to contract and appears to be based on principles of equity; it provides that a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another

> should have been discharged by the other, is entitled to indemnity from the other, unless the payor (indemnitee) is barred, by the wrongful nature of his conduct."

Neither breach of contract nor recovery based on indemnity require expert testimony. In fact, expert testimony is not always necessary in negligence cases, even those involving medical malpractice. Atkins v. Humes, 110 So.2d 663 (Fla. 1959). The Fourth District clearly erred in requiring expert testimony under the circumstances of this case.

Section 28.222(2), Florida Statutes (1983), requires the clerk to record all instruments in one general series of books called "official records" and to keep a register in which the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to it are to be entered at the time of filing. The statute further directs that the clerk maintain a general alphabetical index, direct and inverse, of instruments filed for record.

In spite of this statutory directive, First American searcher, Judy Reeves, testified that she was unfamiliar with the filing number index and had not utilized it in her search (R 39). St. Lucie Circuit Court Clerk Joyce McGraw testified that First American would have found Sherman's Notice of Claim if it had used the Parcel ID Index available in the clerk's office (R 256). Ms.

McGraw did state that she put a disclaimer on the Parcel ID Index in the clerk's office indicating it should not be solely relied on for abstracting purposes because the tax assessor's office and not her office prepares this index (R 257). In her experience, abstracters have used the Parcel ID Index as a double check (R 257). The Parcel ID Index and the Filing Number Index were available and should have been used to insure a thorough search of the public records on unit 210-B (R 256-258).

It is well established in Florida that an abstracter's duty is contractual, not in tort. Sickler v. Indian River Abstract & Guaranty Co., 195 So. 195 (Fla. 1940); First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys Inc., 457 So.2d 467 (Fla. 1984). The Fourth District's opinion requiring expert testimony as to the standard of care in the community, and a breach of such standard, is clearly erroneous.

CONCLUSION

The opinion of the Fourth District should be reversed.

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By 
LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished, by mail, this 10TH day of February, 1989, to:

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