O/a 5-2-89

6v

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' REPLY BRIEF ON THE MERITS

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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.

First American relies heavily on Kovaleski v. Tallahassee Title Company, 363 So.2d 1156 (Fla. 1st DCA 1978), however that case clearly supports Erskine's position. In that case the First District stated on page 1158:

> The general rule is that an abstracter is liable in damages to his employer for injury resulting from his wrongful or negligent errors in preparing an abstract of title and from defects or omissions in the abstract which he prepared and furnished. Sickler v. Indian River Abstract and Guaranty Co., 142 Fla. 528, 195 So. 195 (1940).... Moreover, the duty to his employer is to use such care and skill as are exercised by persons engaged in similar occupations and under like circumstances. 1 Fla.Jur.2d, Abstracts, § 4 (1977). The Sickler court also held that an abstracter does not render himself liable to every person who may be injured by reason of his negligence, rather liability exists only in favor of the person employing him or those in privity with him, hence there could be no remedy in tort against the abstracter, only in contract. 195 So. at 197. (Emphasis added)

Kovaleski involved a factual situation in which there was no privity between the plaintiff and the abstracter. The essence of the opinion in Kovaleski is that there can be liability, in the absence of privity, in tort, however the court said nothing which

would alter the Sickler rule that where there is privity the relationship is contractual. Even if Kovaleski had cast any doubt on the Sickler rule, this court subsequently again reaffirmed that where there is privity the liability is in contract. First American Title Insurance, Inc. v. First Title Service Company of the Florida Keys Inc., 457 So.2d 467 (Fla. 1984).

First American also relies heavily on Gleason v. Title Guarantee Company, 317 F.2d 56 (5th Cir. 1963), however that case involved a title company suing a lawyer for negligence. The language in the opinion quoted by First American on page six is in reference to the legal malpractice claim against the lawyer.

It is clear in Florida that the liability of an abstracter to a person in privity is contractual. First American has failed to cite one authority which would require expert testimony in a breach of contract case.

CONCLUSION

The opinion of the Fourth District should be reversed.

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By _____
LARRY KLEIN
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 24th day of March, 1989, to:

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