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IN THE SUPREME COURT OF FLORIDA

RICHARD GARDEN and DOROTHY
GARDEN, his Wife,

Petitioners,

-vs-

Case No. 78,156

J. SHERMAN FRIER d/b/a J.
SHERMAN FRIER & ASSOCIATES,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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Note: All Statutes cited are identical for the 1985, 1987, and 1989 editions of Official Florida Statutes.

PRELIMINARY STATEMENT

The Petitioners, RICHARD GARDEN and DOROTHY GARDEN, will be referred to herein as the "Petitioners". The Respondent, J. SHERMAN FRIER d/b/a J. SHERMAN FRIER & ASSOCIATES, will be referred to herein as the "Respondent".

The Circuit Court of the Third Judicial Circuit in and for Suwannee County, Florida, the Honorable L. ARTHUR LAWRENCE, JR. presiding, will be referred to herein as the "Trial Court".

References to the Record on Appeal will be designated with the use of Roman Numerals for the specific volume of the Record on Appeal, followed by Arabic Numerals to designate the specific page. For example, the designation (I. 12) will refer to Volume I, Page 12, of the Record on Appeal

References to the "Petitioner's Appendix" and "Respondent's Appendix" will be references to the Appendices filed by the respective parties to this cause.

STATEMENT OF THE FACTS AND CASE

Except as may be noted in the Argument portion of this Brief, the Respondent accepts the Statement of the Case and of the Facts set forth in the Petitioners' Initial Brief on the Merits.

CERTIFIED QUESTION

I.

FOR PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE
(Section 95.11 (4)(a), Florida Statutes), IS A LAND
SURVEYOR A PROFESSIONAL?

SUMMARY OF ARGUMENT

The Certified Question should be answered in the affirmative, and the opinion of the District Court of Appeal in this cause should be approved and affirmed.

In Pierce v. AALL Insurance, Inc., 531 So.2d 84 (Fla. 1988), this Court set forth its definition of a "profession", and then expressly identified the vocation of land surveying as being a profession within that definition for the purposes of Section 95.11(4)(a).

Contrary to the contention of the Petitioners, the inclusion of land surveying as a profession was neither "unfortunate", nor did the Pierce opinion contain an "erroneous statement of the minimum licensing requirements for land surveyors in Florida".

The definition of "profession" rendered by the Pierce court does not confine itself exclusively to vocations requiring, as a minimum standard, a college degree in the specific field. This is demonstrated by the language of the Court at the conclusion of its opinion when it said:

"Accordingly, we define a profession as a calling requiring, as a minimum for licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling." (At p. 88) (Emphasis added)

Analysis of the foregoing language, in the context of Section 472.013 (2), Florida Statutes and other provisions of Chapter 472, Florida Statutes, reveals that, of the various prerequisites or means for licensure as a land surveyor, each is the equivalent of the other. Thus, a prerequisite calling for something other than a

four-year university level degree in surveying is deemed to be the equivalent of, or "amounting to" the same specialized knowledge and academic preparation of at least a four-year university level degree in surveying.

CERTIFIED QUESTION

FOR THE PURPOSES OF THE PROFESSIONAL MALPRACTICE
STATUTE (Section 95.11 (4)(a), Florida Statutes), IS
A LAND SURVEYOR A PROFESSIONAL?

ARGUMENT

The Certified Question should be answered in the affirmative. Clearly, land surveyors are professionals, and thus should be included in those professions covered by the provisions of Section 95.11 (4)(a), Florida Statutes.

Directly on point is Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA, 1984). In Cristich, the plaintiff brought suit against a surveyor for damages sustained as a result of an erroneous survey provided by the defendant. The defendant interposed an affirmative defense, contending that the action was barred by Section 95.11 (4)(a), which provides for a two-year limitations period. The trial court entered Summary Judgment in favor of the defendant/surveyor, and the plaintiff appealed. In affirming, and after quoting the definition of "practice of land surveying" contained in Section 472.005, Florida Statutes (infra), the District Court said:

"This definition reveals that land surveying requires a great degree of specialized knowledge. This knowledge is generally derived from extensive academic preparation and indeed before one can sit for the surveyor's licensing exam in this state, he must either have graduated from a university surveying program and have at least two years experience in land surveying under a professional land surveyor, or have at least eight years experience under a land surveyor. See Section 472.013.

We conclude that the preparation of a survey, involving as it does such intricate knowledge of mathematics, geography and the physical sciences, is a "professional act". Therefore, it is encompassed

within section 95.11(4)(a), Florida Statutes. We recognize that the Fourth District, in Toledo Park Homes v. Grant, 447 So.2d 343 (Fla. 4th DCA 1984) has concluded otherwise." (At p. 79)

In Pierce v. AALL Insurance, Inc., 531 So.2d 84 (Fla. 1988), this Court addressed the issue of whether or not an insurance agent was a "professional" for the purpose of Section 95.11(4)(a). The Court answered in the negative saying:

"Therefore, for purposes of the professional malpractice statute of limitations, we define a profession as a vocation requiring, as a minimum standard, a college degree in the specific field. In other words, if, under the laws and administrative rules of this state, a person can only be licensed to practice an occupation upon completion of a four-year college degree in that field, then that occupation is a profession." (At p. 87)

After announcing the foregoing definition, the Pierce court proceeded to illustrate the various callings which it considered to be professions within the scope of Section 95.11(4)(a). Among other illustrations, this Court singled-out land surveyors and said:

"Similarly, a person cannot be licensed as a land surveyor in Florida unless he or she has graduated from a four-year university surveying program and worked for two years in land surveying under a licensed land surveyor. Section 472.013(2)(a), Fla.Stat. (1987). See Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA 1984)." (At p. 87)

In formulating the foregoing definition of "profession", the Pierce court did not exclude other vocations which do not require a four-year degree as a minimum standard for licensure. In other words, the definition is one of inclusion, not exclusion. This Court said that those vocations requiring as a minimum standard for licensure a four-year degree within the specific

field are to be considered "professions". The Court did not exclude from its definition those vocations which permit licensure by alternate means equivalent to a four-year degree.

At the conclusion of the Pierce decision, and immediately following its discussion of land surveying (supra) this Court carefully revised and expanded its earlier definition of "profession" by saying:

"Accordingly, we define a profession as a calling requiring, as a minimum for licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling." (At p. 88)
(Emphasis added)

In revising the definition as it did, this Court properly recognized that the minimum of specialized knowledge and academic preparation required of a profession could be acquired by other than a four-year degree...so long as that knowledge and preparation was deemed as the equivalent of, or "amounting to", a four-year university level degree in the field of study specifically related to that calling.

In including land surveying within the definition of "profession", the Pierce court made specific reference to Section 472.013 (2), Florida Statutes. This Section sets forth the prerequisites for licensure as a land surveyor in this State, and provides in relevant part that:

(2) An applicant shall be entitled to take the licensure examination to practice in the state as a land surveyor if the applicant is of good moral character and has satisfied one of the following requirements:

(a) The applicant is a graduate of an approved course of study in land surveying from a

college or university recognized by the board and has a specific experience record of 2 or more years as a subordinate to a professional land surveyor in the active practice of land surveying, which experience is of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the land surveying work performed...

(b) The applicant is a graduate of a 4-year course of study, other than in land surveying, at an accredited college or university and has a specific experience record of 6 or more years as a subordinate to a registered land surveyor in the active practice of land surveying, 5 years of which shall be of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the land surveying work performed. The course of study in disciplines other than land surveying shall have included not less than 32 semester hours of study or its academic equivalent, 25 semester hours of which shall be in land surveying subjects or in any combination of courses in civil engineering, land surveying, mathematics, photogrammetry, forestry, or land law and the physical sciences...

(c) The applicant has successfully completed a 32-semester-hour, or its academic equivalent, course of study in land surveying or in board-approved, land-survey-related courses at an accredited college or university and has a specific experience record of 6 or more years as a subordinate to a registered land surveyor, 5 years of which shall be in the active practice of land surveying of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the land surveying work performed...

(d) The applicant has successfully completed a high school education and has a specific experience record of 8 or more years as a subordinate to a land surveyor, 6 years of which shall be in the active practice of land surveying of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the land surveying work performed....

(e) The applicant has successfully completed a

specific experience record of not less than 10 years of active duty service in the military service of the United States with a Military Occupational Specialty classification of 82 and a minimum skill level of 40, or its current equivalent military designation, 7 years of which experience shall be in the active practice of land surveying of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the land surveying work performed."

Sub-Paragraph (a) provides that a person can meet the minimum prerequisites to become a licensed surveyor in this state by graduating from an approved course of study in land surveying from a college or university, coupled with two years of experience. The Pierce court alluded to this provision when it included land surveying within the definition of "profession".

The Petitioners contend that this Court was mistaken in including land surveying within its definition of "profession" because a person is not required to have a 4-year degree to become licensed as a land surveyor in this State. As the Petitioners have noted, Sub-Paragraphs (b) through (e) of Section 472.013 provide alternative means of meeting the minimum prerequisites for licensure as a land surveyor.

Significantly, Section 472.013 (2) makes no distinction between applicants based upon the method of meeting the minimum prerequisite qualifications. An applicant may qualify by meeting any one of the prerequisites. Section 472.013 does not distinguish between applicants who meet the minimum licensing requirements via Sub-Paragraph (a) from those who meet the requirements of Sub-Paragraphs (b) through (e).

By grouping the alternative minimum requirements for

licensure into one Sub-Section, and in failing to distinguish between applicants based upon the method by which an applicant meets those minimum requirements, the legislature has made it clear that the minimum requirements contained in Sub-Paragraphs (a) through (e) were equivalent to, or "amounted to" one another. Thus, the requirements contained in Sub-Paragraphs (b) through (e) are equivalent to or amounted to the four-year college degree requirement contained in Sub-Paragraph (a).

The Petitioners argue that, but for the instant case, the District Courts of Appeal have uniformly followed the first definition of "profession" set forth in Pierce (supra) in applying Section 95.11(4)(a). That definition reads:

"... we define a profession as a vocation requiring, as a minimum standard, a college degree in the specific field. In other words, if, under the laws and administrative rules of this state, a person can only be licensed to practice an occupation upon completion of a four-year college degree in that field, then that occupation is a profession." (At p. 87)

The Petitioners' contention is not correct, and an analysis of the authorities cited by the Petitioners provide absolutely no support for that contention.

In Pensacola Executive House Condominium Ass'n v. Baskerville - Donovan Eng'rs., Inc., 566 So.2d 850 (Fla. 1st DCA, 1990), the First District Court of Appeal obviously followed the revised or expanded version of this Court's definition of "profession" (i.e., specialized knowledge and academic preparation "amounting to" a four-year degree) in concluding that an engineer is a professional. Apparently, neither party found that pronouncement to be objectionable, or if so, this Court did not find such

objection to be noteworthy. In Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condominium Ass'n., 16 F.L.W. S440 (June 13, 1991) this Court was called upon to review the issue of privity as it related to the professional malpractice statute. The District Court's conclusion that engineering was a "profession" was left undisturbed.

In the instant case, the First District said that in deciding Pensacola Executive House (supra), it had relied upon the concluding paragraph provided in Pierce (supra). The District Court then said:

"Since the alternative licensing requirement under the laws of Florida for the profession of engineering is similar to the alternative licensing requirements for the profession of land surveying, we determine that land surveying is a profession for the purpose of the professional malpractice statute." (Opinion, p. 3)

Section 471.013, Florida Statutes, sets forth the prerequisites for taking the engineering examination. As the District Court noted, there is great similarity between Section 472.013 (pertaining to land surveyors) and Section 471.013 because each section provides alternate means by which a person may qualify for the examination in the respective profession. Among the alternative means provided by Section 471.013 (engineering) are: (1) a 4-year degree in engineering; (2) a 4-year degree in engineering technology; or (3) 10 years of active engineering work of a character indicating that the applicant is competent to be placed in responsible charge of engineering.

In Security First Federal Savings & Loan Ass'n v. Broom, et. al., 560 So.2d 304 (Fla. 1st DCA, 1990), the First District

quoted, and clearly followed the revised or expanded version of the definition in finding that an MAI was not a professional. Interestingly enough, Florida has no licensing requirements for an MAI, and there is no state regulation of MAI's. As a result, an MAI would not qualify as a "professional" under either definition advanced by the Pierce court because of the absence of "minimum (requirements) for licensing under the laws of Florida".

In First State Savings Bank v. Albright, et. al., 561 So.2d 1326 (Fla. 5th DCA, 1990), the Fifth District also relied upon the revised version of the definition when it said:

"For purposes of this statute of limitation, a "profession" is a calling requiring, as a minimum for licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling." (At. p. 1330) (Emphasis Added)

Lane v. Peat, Marwick, Mitchell, & Co., 540 So.2d 922 (Fla. 3rd DCA, 1989), simply stands for the proposition that accounting is a profession for purposes of the statute of limitations governing professional malpractice. However, Lane dealt with the commencement of the 2-year limitations period, and had nothing whatsoever to do with whether or not the 2-year limitation applied to the accounting profession.

In Coopers & Lybrand v. Archdiocese of Miami, 536 So.2d 278 (Fla. 3rd DCA, 1988), the Court alluded to Pierce (supra) in a footnote standing for the unremarkable proposition that accountants are professionals, and therefore, the measure of damages in an accounting malpractice action should be the same as in other professions. As with Lane (supra), this case had

absolutely nothing to do with whether or not the 2-year statute of limitations applied to the accounting profession.

Presumably, the Pierce court did not intend to exclude attorneys from the definition of "professional". Application of the first definition set forth in Pierce and advocated by the Petitioners (i.e, "four-year college degree in that field) would lead to that absurd result. This is so because the definition requires a "four-year college degree in a specific field", and there is no "four-year college degree" in the field of law. Current law school curriculum calls for a 3-year program leading to a degree in law. To be sure all accredited law schools require that applicants have a four-year college degree in some field. Thus, persons receiving a four-year degree in physical education, home economics, nuclear physics, political science, english, criminal justice, or any other field related or unrelated to law may qualify for admission to a 3-year program which leads to a degree in the field of law. Upon successful completion of law school, the graduate is still one year short of measuring up to the requirement that he or she complete "a four-year college degree in that field".

However, application of the revised definition of "profession" as set forth in Pierce, to-wit:

"... we define a profession as a calling requiring, as a minimum for licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling." (At p. 88) (Emphasis added)

demonstrates this Court's recognition that it is knowledge and

academic preparation ... not the four-year degree per se, which distinguishes the professions from other vocations. The revised definition also demonstrates this Court's recognition of the universally accepted proposition that both knowledge and academic preparation in a specific field can be acquired via means other than a four-year degree in that field. Finally, as the District Court suggested in its Opinion in the instant case, the revised definition reveals that this Court "may have contemplated that some "professions" would utilize alternative methods of qualifying which involve less than the required four-year course of study", so long as that those methods amounted to, or were the equivalent of, the four-year degree in a specific field.

The Court wisely left it to the legislature and the licensing authorities of this state to set the minimum requirements for licensing of the various vocations. In the case of land surveying, the legislature has established a four-year degree in surveying as a minimum requirement for licensure. However, the legislature also provided several alternative means of meeting the minimum requirement, and each such alternative is the equivalent of, or amounts to the four-year degree in surveying.

There are other reasons why land surveyors are, and should be included as "professionals" for purposes of the professional malpractice statute. One of these reasons pertains to the specialized education and academic preparation required of land surveyors. In Pierce (supra), this Court said:

"Education is the common factor among all vocations which are considered professions."

....

"It is this specialized education and academic preparation which we believe distinguishes a profession from other occupations. Without such education the term is rendered meaningless." (At. pp 87-88)

As was observed by the Court in Cristich (supra), Section 472.005(4), Florida Statutes provides insight into the highly specialized education and academic preparation necessary to engage in the practice of land surveying. That section provides:

(a) "Practice of land surveying" means, among other things, any professional service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence of the act of measuring, locating, establishing, or reestablishing lines, angles, elevations, natural and man-made features in the air, on the surface and immediate subsurface of the earth, within underground workings, and on the beds or surface of bodies of water, for the purpose of determining or establishing the facts of size, shape, topography, tidal datum planes, legal or geodetic location or relocation, and orientation of improved or unimproved real property and appurtenances thereto, including acreage and condominiums.

(b) The practice of land surveying shall also include, but not be limited to, photogrammetric control; the monumentation and remonumentation of property boundaries and subdivisions; the measurement of and preparation of plans showing existing improvements after construction; the layout of proposed improvements; the preparation of descriptions for use in legal instruments of conveyance of real property and property rights; the preparation of subdivision planning maps and record plats, as provided for in chapter 177; the determination of, but not the design of, grades and elevations of roads and land in connection with subdivisions or divisions of land; and the creation and perpetuation of alignments related to maps, record plats, field note records, reports, property descriptions, and plans and drawings that represent them.

From the foregoing, it can be seen that a great deal of specialized education and academic preparation is required of anyone who seeks licensure as a land surveyor in the State of Florida. In citing Cristich with approval, and in deeming land surveying to be a profession, the Pierce court was obviously and properly impressed by the highly specialized knowledge, education and academic preparation required of land surveyors...regardless of the route employed to achieve licensure...because the knowledge, education and academic preparation required of a licensed land surveyor amounted to or equalled a four-year degree within the field.

Section 472.013 (2), Florida Statutes, requires that an applicant for licensure as a land surveyor, as is the case with other "traditional" professions, must establish that he or she is of good moral character. Other, clearly "non-professional" vocations may have a similar requirement, however the minimum prerequisites for licensure in such vocations are distinguished from land surveying in that they require relatively little, if any, specialized education and academic preparation.

Section 472.018, Florida Statutes, in keeping with the modern notions of "professionalism", requires that land surveyors participate in a continuing education program, and must prove completion of at least 24 hours of continuing education during the preceeding two-year period in order to renew his or her license.

In addition to the foregoing, the provisions of Chapter 472, Florida Statutes, contain other references to the professional nature and quality of that calling. For example:

a. Section 472.005(3), Florida Statutes, defines "land surveyor" to include the term "professional land surveyor".

b. Section 472.005(4)(a), Florida Statutes provides that the "practice of land surveying"...means among other things, any professional services and work..."

c. Section 472.007, Florida Statutes creates a regulatory board designated as the Board of Professional Land Surveyors. In addition to its general governing role, the Board of Professional Land Surveyors is charged with the responsibility for conducting disciplinary proceedings against wayward members of the profession. See Section 472.033, Florida Statutes.

d. Section 472.021(1), Florida Statutes provides that no individual practicing land surveying shall "be relieved of responsibility for professional services performed by reason of his employment or relationship with a corporation or partnership".

e. Section 472.021(3), Florida Statutes provides that the fact that a registered land surveyor practices with a corporation or partnership does not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by him. That section also provides that corporations, shareholders, partners, etc. are "jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, officers, or partners while acting in a professional capacity".

For the foregoing reasons, this Court in Pierce, the Cristich court, and the First District in the instant case, correctly concluded that the vocation of land surveying is a

"profession" for the purposes of Section 95.11 (4)(a), Florida Statutes. For the same reasons, the Trial Court was correct, and did not err in entering Summary Judgment in favor of the Respondent.

The Petitioners have seen fit to quote from the concurring opinion written by Judge Zehmer of the District Court in the instant case, wherein Judge Zehmer said:

"In the meantime, however, the lawyer representing Mr. and Mrs. Garden in this case, having relied on a perfectly permissible construction of Pierce in filing his client's cause of action some 25 months after it apparently accrued, must now be faced with an after-the-fact determination by a court that he should have known better and should now notify his "professional malpractice" insurance carrier."

First of all, a review of the entire record reveals nothing that remotely suggests that the Petitioners or their lawyer "relied" upon Pierce in deciding when to file this action. If there had been any reliance upon or familiarity with Pierce, it would have been manifest that land surveyors are professionals and a 2-year statute of limitation applies.

Stricken

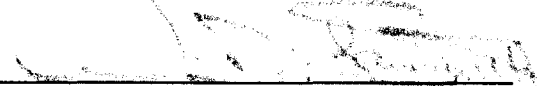
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CONCLUSION

The Certified Question should be answered in the affirmative. The decisions in Pierce v. AALL Insurance, Inc., 531 So.2d 84 (Fla. 1988), and Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA, 1984), together with the provisions of Chapter 472, Florida Statutes governing the licensure and regulation of the vocation, make it crystal clear that land surveying is a "profession" for the purposes of Section 95.11 (4)(a). This is so because land surveying is a calling requiring, as a minimum for licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling.

The Trial Court was correct in entering Summary Final Judgment in favor of the Respondent. The First District was correct in affirming the Summary Final Judgment and in certifying to this Court. This Court should answer the Certified Question in the affirmative and approve the opinion of the First District in the instant case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was furnished to MARTIN S. PAGE, Esquire, 228 East Duval Street, Lake City, Florida 32055, by Regular United States Mail this 12th day of September, A.D. 1991.

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