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Called 8-23-91 for app.

THE SUPREME COURT OF FLORIDA

CASE NO. 78,156

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
DOCKET NO. 90-02844

RICHARD GARDEN and DOROTHY GARDEN, his wife

Petitioners,

v.

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

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

MARTIN S. PAGE
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736
Attorney for Petitioners

TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Statement of the Case and of the Facts.....	1
Summary of Argument	5
Argument:	
Certified Question: FOR PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE (Section 95.11(4)(a), Fla. Stat.), IS A LAND SURVEYOR A PROFESSIONAL	9
Conclusion	17
Certificate of Service.....	18

STATEMENT OF THE CASE AND OF THE FACTS

This action before the Trial Court was one for damages resulting from the negligence of a Florida licensed land surveyor in performing a land survey of Petitioners' lands.

On June 27, 1989, Plaintiffs/Petitioners filed their Complaint against Defendant/Respondent, J. Sherman Frier d/b/a J. Sherman Frier & Associates (ROA, pages 1 through 4), alleging that the Respondent is a land surveyor licensed as such by the State of Florida and whom Petitioners employed to perform a survey of the relative elevations of two lots (#47 and #32) Petitioners has purchased in Suwannee County, Florida.

The determination of the elevations was necessary to demonstrate the land to be of a height above the lowest permitted elevation for location of a residence, as required by the County of Suwannee, as well as other state agencies.

Defendant performed the land survey and rendered a plat showing that Lot 47 was the higher lot and was above the lowest permitted elevation for purposes of erecting a residence. Upon reliance of the accuracy of Respondent's survey, Petitioners received a building permit and constructed their residence, water well, septic tank, garage and other appurtenant structures on Lot 47. Petitioners

later discovered that the survey performed by Respondent was inaccurate in that the true relative elevation of Lot 47 was some 10 feet lower than as represented by Respondent and below the elevation at which a residence could lawfully be located.

Petitioners alleged that as a result of the Respondent's negligence in incorrectly reporting the elevation of Lot 47, Petitioners were required to remove their home from Lot 47 to Lot 32, and re-establish the appurtenant structures, causing them to suffer damages attending such relocation.

Respondent filed his answer (ROA, pages 6 and 7), admitting the negligence and the other material allegations of Petitioners' cause of action, but denied the allegations concerning the resulting damages. Respondent's answer also set out two affirmative defenses: first, the Respondent had made the Petitioners whole and fully compensated them for any loss or damage incurred as a result of his negligence, and; secondly, that Petitioners' action is barred by Section 95.11(4)(a); Fla. Stat.

After filing his answer, Respondent filed Motion for Summary Judgment, with attached Affidavit (ROA, pages 8 through 14), based upon Section 95.11(4)(a), a two year

statute of limitations against "professional malpractice". Respondent's affidavit attached a letter to him from Petitioner, Richard Garden, dated May 25, 1987, by which that party indicated his supposition that Respondent's survey was in error and requesting that Respondent re-check his work, for Petitioner feared his residence may have been located in an area subject to flooding. Respondent contended that since Petitioners had cause to believe the error existed on May 25, 1987, but did not file this action until June 27, 1989, more than two years later, the action was barred by the two year statute of limitations of actions against Respondent, contending a licensed land surveyor is a "professional" under Section 95.11(4)(a).

At hearing held on the Respondent's motion, the only point presented for argument was whether that section applied to Respondent, limiting actions to two years, rather than the four year limitations provided by Section 95.11(3). That point turned on whether the Respondent, as a Florida licensed land surveyor, was a "professional" as that term is used in Section 95.11(4)(a).

On November 29, 1989, the Trial Court entered Summary Final Judgment in favor of Respondent (ROA, pages 15 and 16). Petitioners timely filed Motion for Rehearing (ROA,

pages 17 through 19), pointing out the Trial Court's misapplication of current case law on the point involved; however, the motion was denied by the Trial Court by it's order rendered August 17, 1990 (ROA, pages 20 and 21).

Appeal was timely prosecuted to the District Court of Appeal, First District. After considering briefs and oral argument, the First District Court affirmed the Trial Court's Summary Final Judgment, but, recognizing an ambiguity in the definition of a "professional" set forth in Pierce v. AALL Ins. Co., 531 So.2d 84 (Fla. 1988), as pertains to Section 95.11(4)(a), Fla. Stat., that Court certified to this Court the following question as one of great public importance:

> FOR THE PURPOSES OF PROFESSIONAL MALPRACTICE STATUTE IS A LAND SURVEYOR A PROFESSIONAL?

SUMMARY OF THE ARGUMENT

Prior to 1988, there was no case law defining the term "professional" as it is used in Section 95.11(4)(a), Fla. Stat., which designates a two year statute of limitations for professional malpractice (other than medical malpractice), rather than the usual four year limitation period for actions founded upon negligence as prescribed by Section 95.11(3)(a), Fla. Stat. The Courts (but more importantly the practicing Bar) were, therefore, left to their own devices in determining whether a particular vocation was a "professional" when an action against one practicing that vocation was brought for negligence occurring more than two years from the institution of the action. Understandably this led to conflict among the District Courts of Appeal as regards land surveyors licensed by the State of Florida: Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA, 1984) holding that a land surveyor was a "professional" and Toledo Park Homes v. Grant, 447 So.2d 343 (Fla. 4th DCA, 1984) holding that such vocation is not "professional" for purposes of Section 95.11(4)(a).

Then, in 1988, in a case involving the question of whether a licensed insurance agent is a "professional" under

Section 95.11(4)(a), the Florida Supreme Court attempted to establish the standard by which vocations were to be measured for purposes of determining the characterization of "professional" under that subsection. Pierce v. AALL Ins. Co. Inc., 531 So.2d 84 (Fla. 1988). It is clear from a reading of the Pierce decision that that Court earnestly wrestled with the problem created by the legislature's failure to define "professional" when it enacted subsection (4)(a). The Pierce Court's decision resulted in a very clear and unambiguous definition as follows:

> 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. (531 So.2d at page 87; emphasis supplied)

Applying that definition to the Respondent in this case would clearly require a reversal of the Trial Court's Summary Final Judgment and a negative response to the question certified to this Court by the First District Court of Appeal since, as will be demonstrated hereinafter, Chapter 472 (regulating licensing of land surveyors in Florida) does not require, as a minimum standard to licensing, a four-year college degree in land surveying.

However, two unfortunate "misstatements" appear in the Pierce decision which bring about the confusion which has brought the instant case to this Court. First in it's concluding comments the Pierce court's opinion states:

> 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 (531 So.2d at page 87; emphasis supplied).

This raises the question of whether the Pierce court was employing an "either/or" standard; that is, either a four-year college degree in the field of endeavor or specialized knowledge and academic preparation amounting to such a college degree.

Secondly, the Pierce opinion in reciting various examples of vocations requiring a college degree in the field of endeavor to be qualified for licensing purposes, erroneously stated that a land surveyor cannot be licensed in Florida unless he or she has graduated from a four-year university surveying program, citing Section 472.013(2), Florida Statutes, (1987), and Cristich v. Allen Engineering, Inc., supra. As stated above no provision of Chapter 472 requires, as a minimum standard for licensing, a four-year college degree in land surveying. This unfortunate dictum in the Pierce opinion was deferred to by the Trial Court in

determining to enter Summary Final Judgment against Petitioners and is mentioned by the First District Court in it's opinion affirming the Trial Court's final judgment.

An analysis of the Pierce decision and the provisions of Chapter 472 (specifically 472.013(2)), Fla. Stat., (1987) clearly indicates that the two "misstatements" recited above are just that, and that the principal definition (as well as the principle) of the Pierce decision dictates that the certified question be answered in the negative and that the Trial Court's Summary Final Judgment be reversed.

CERTIFIED QUESTION

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

ARGUMENT

No.

Chapter 472 of Florida Statutes, entitled "Land Surveying" sets forth all of the statutory regulations pertaining to licensure and the practice of land surveyors in the State of Florida. Section 472.013, Fla. Stat. (1985, 1987 and 1989) pertaining to the prerequisites necessary for an applicant to sit for the licensure examination in Florida, provides, as pertinent to the certified question, as follows:

> 472.013 Examinations, prerequisites.
>
> * * * * * * * * * * *
>
> (2) An applicant shall be entitled to take the licensure examination to practice in this 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 4 or more years as a subordinate to a professional land surveyor int he 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. The course of study in land

surveying shall have included not less than 32 semester hours of study, or its academic equivalent, in the science of land surveying or in board-approved, land-survey-related courses. Work experience acquired as a part of the education requirement shall not be construed as experience in responsible charge.

* * * * * * * * * * *

(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. (emphasis supplied)

From the portions emphasized in the above quoted statute it is patently clear that one having only a high school education (or certain military service and experience which may not have even included a high school education) may sit for the exam and, if successful, become a licensed land surveyor in Florida. The minimum standard is not the possession of a four-year college degree in land surveying.

In Pierce, the Florida Supreme Court first looked to the legislative history of Section 95.11(4)(a) for some assistance in determining what the legislature intended in the application of the term "professional". After reviewing the legislative committee records and other materials the court concluded:

> In essence, the sole evidence of legislative intent regarding the definition of the term "professional" is the statement of one legislator that the responsibility of defining terms should be shouldered by the judiciary. While it appears that the legislature may have intended to leave it's terms undefined, we suggest that the legislature begin proceedings aimed at clarifying this statute. (531 So.2d at page 86)

Examination by the Petitioners of legislative enactments from the adoption of 95.11(4)(a) (1975) through the 1991 legislative session fails to reveal that the legislature has honored the Pierce court's suggestion and has failed to enact any clarifying statement concerning that statute.

The court in Pierce then reviewed various alternate definitions that were proposed by the parties and the definition that had been applied by the Fifth District Court of Appeal who had certified the definition question to the Pierce court. The reasoning employed and the considerations given the various proposed definitions were commendably and thoroughly examined and discussed by the Pierce court in

it's decision. Those proffered definitions included the definition at common law, the definition as determined by Webster's Dictionary and the definition expressed by the Fifth District Court of Appeal. Those definitions were rejected by the Court for various reasons, but the following quoted portion of the Pierce opinion clearly demonstrates that the Court was seeking a definite, unambiguous bench mark standard to guide the Bar and the Bench in future applications of that limitations period to various vocations:

> Thus, while the common law definition of professional is too narrow, the dictionary definition adopted by the District Court is not narrow enough. Accordingly, we must draw a line somewhere in between. (531 So.2d at page 87)

The Court then recognized that education is the "common factor among all vocations which are considered professions." (531 So.2d at page 87). The Court then announced it's definition in the following unequivocal and unambiguous terms (and Petitioners humbly apologize for the redundancy):

> 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. (531 So.2d at page 87; emphasis supplied)

The application of the definition above quoted to the Respondent through Section 472.013(2), Fla.Stat., quoted above should amply demonstrate that the Respondent is not a professional entitled to the two year limitation period of Section 95.11(4)(a) and that the question certified by the First District Court should be answered in the negative.

But for the instant case, the District Courts of Appeal in this state have uniformly followed the above quoted definition in applying Section 95.11(4)(a). Coopers & Lybrand v. Archdiocese of Miami, 536 So.2d 278 (Fla. 3rd DCA, 1988) and Lane v. Peat, Marwick, Mitchell & Co., 540 So.2d 922 (Fla. 3rd DCA, 1989), holding that certified public accountants are "professionals" under Section 95.11(4)(a); First State Sav. v. Albright & Assoc., 561 So.2d 1326 (Fla. 5th DCA, 1990) following the well reasoned decision of the First District Court of Appeal in Security First Fed. S & L v. Broom, et al., 560 So.2d 304 (Fla. 1st DCA, 1990) holding that although an appraiser holding an "MAI" designation was one having undergone stringent and extended study and practice (including a four-year college degree, but in no defined field), nevertheless did not meet the minimum standard announced by the Pierce Court in that

it did not require a four-year university level degree "in the field of study specifically related to that calling" (1st DCA, 560 So.2d at pages 307-308).

Although Petitioners find no contradiction to the foregoing analysis in any other portions of the opinion in Pierce, it is unfortunate that the Pierce Court continued it's opinion by reciting, as dictum, that a land surveyor in Florida cannot become licensed as such unless he has graduated from a four-year university surveying program, citing Section 472.013(2)(a), Fla. Stat. (1987), and Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA, 1984), Petitioners have demonstrated the error in those comments.

It is also unfortunate that in the concluding paragraph to it's opinion the Pierce Court restated the definition as determined by it therein using the words "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" (531 So.2d at page 88).

It was the latter of these two "unfortunates" that led the First District Court of Appeal to hold that an engineer was a professional under the statute in question in it's

decision in Pensacola Executive House Condominium Ass'n. v. Baskerville-Donovan Eng'rs., Inc., 566 So.2d 850 (Fla. 1st DCA, 1990). Although Pensacola ultimately was decided by the instant Court, Petitioners' undersigned counsel is informed by one of the attorneys in that case that the case was resolved without this Court having to consider the question of the term "professional" under 95.11(4)(a).

It was a combination of these two "unfortunates" that led the First District Court to affirm the Trial Court in the instant case, the majority opinion recognizing the ambiguity stating "it appears that the Supreme Court in Pierce may have contemplated that some 'professions' would utilize alternative methods of qualifying which involved less then the required four-year course of study." The confusion created is further demonstrated by the following words of Judge Wolf in writing for the majority of that Court:

> While it is not entirely clear that the supreme court would expressly find land surveyors to be professionals within the meaning of the statute, we are affirming the Summary Final Judgment rendered below in light of the reference to land surveyors in Pierce and our recent decision in Pensacola....
>
> In Pensacola Executive House, this court relied on the concluding paragraph provided in Pierce and expressly held that an engineer is a professional for purposes of applying the statute. (16 F.L.W. at D1472)

The First District Court, however, has done a great service by certifying the question to this Court for resolution and for guidance in future applications of that special limitations statute. Petitioners would further adopt as argument for Petitioners' position herein the excellent concurring opinion written by Judge Zehmer of the First District in the instant case. Petitioners will take the liberty of concluding their argument by quoting from the last two sentences of Judge Zehmer's opinion (specially concurring):

> 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 (sic) 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. The combination of vagueness in the statute and the apparent ambiguity in the PIERCE opinion calls for a reversal by the supreme court on the facts of this case if there is any justice to be found in the judicial system. (16 F.L.W. at D1472; emphasis supplied)

CONCLUSION

The question certified should be answered in the negative, and this Court should enter it's Order quashing the decision of the District Court of Appeal, First District, and remanding this cause to that Court for entry of it's Order reversing the action of the Trial Court in entering Summary Final Judgment against Petitioners and directing further proceedings consistent therewith.

Respectfully submitted:

MARTIN S. PAGE
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioners' Initial Brief on the Merits has been furnished, by mail delivery, this 21st day of August, 1991, to WILLIAM R. SLAUGHTER, II, ESQUIRE, Slaughter and Slaughter, Post Office Box 906, Live Oak, Florida 32060.

MARTIN S. PAGE
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736
Attorney for Petitioners