

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1371
L.T. Case No. 2D17-4372

SHANE R. HAYSLIP, et al.,

Petitioners,

vs.

U.S. HOME CORPORATION,

Respondent.

AMICUS BRIEF OF THE FLORIDA LAND TITLE ASSOCIATION

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RECEIVED, 01/28/2021 01:47:31 PM, Clerk, Supreme Court

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IDENTITY AND INTEREST

The Florida Land Title Association (“FLTA”) is the largest trade association for title insurers and their policy issuing agents in the State of Florida; its members conduct title searches, examinations and closings and issue title insurance policies that protect against losses from title defects. The Florida title industry employs 10,534 Floridians and pays \$729,186,000 in wages, and in 2018, accounted for \$1.5 billion in premiums and insured the purchase and mortgaging of \$365 billion in real estate. Not counting financial and insurance activities, real estate (including construction, rental and leasing) accounted for 22.61% of Florida’s Gross Domestic Product in 2019,¹ and contributed \$ 240.3 billion to Florida’s economy. FLTA provides this information to the Court to explain the unique nature of title insurance and why the Court’s opinion in this case is of significant interest to the title industry.

¹ Bureau of Economic Analysis, U.S. Department of Commerce, <https://apps.bea.gov/regional/downloadzip.cfm> Download Table: SAGDP SIC tables: Annual GDP by State by SIC industry.

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Title insurance is not casualty insurance as it is statutorily required to be backward and not forward looking. Instead of seeking to predict future results or outcomes, title insurers assess risk by examining a historical title record. As a result, title insurance needs a clear title record and the predictable operation of recorded instruments to function properly.

Consistency under well-established rules of interpretation is the key to the operation of title insurance as this allows title insurers to assess risk based on factors found in a property's title record. If instruments are interpreted in an unpredictable fashion, then title insurers become casualty insurers, an outcome prohibited by Florida law.

QUESTION PRESENTED

The certified question presented by the Second District Court of Appeal reads as follows:

DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

The certified question does not sufficiently focus on the key question, i.e., when do covenants contained in recorded instruments “run with the land”? Providing a clear statement on this question will give guidance to the citizens of the state of Florida and the real estate industry. FLTA respectfully suggests a better analysis is that of *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958), that while a personal covenant typically benefits a third party, a covenant running with the land benefits the land and the present owner. Accordingly, the certified question should read:

DOES A COVENANT CONTAINED IN A PRIOR DEED WHICH PURPORTS TO LIMIT THE LEGAL REMEDIES OF A SUBSEQUENT PURCHASER OVER A CONSUMER DISPUTE RUN WITH THE LAND?

SUMMARY OF ARGUMENT

Title insurers need clear rules of interpretation to fulfill their statutory duties and to properly assist in the conveyancing of real estate interests. The “touch and concern” standard for determining whether an instrument runs with the land fails to provide the required certainty.

Some courts in Florida already employ a more appropriate standard by holding that whether a covenant runs with the land is determined by the burden the covenant imposes on and the benefits given to the land. In this analysis, benefits given to former users of the land are presumed to be collateral to the land and not running with the land. Policy decisions expanding the reach of those items running with the land are public policy decisions best left to the Florida Legislature; the question of whether an arbitration provision beneficial to former owners runs with the land is just such a decision.

In this case, the covenant runs to one former owner and not to succeeding and present property owners. As such, it appears the covenant in question is a personal covenant and not one running with the land.

ARGUMENT

I. TITLE INSURERS REQUIRE CERTAINTY

Title insurance is often misunderstood as forward-looking casualty insurance when in reality it is backward-looking:

Examination of record title or an abstract of the record title of real property is both an esoteric and a painstaking process. Evaluation of the status of title requires considerable expertise. It was for these reasons that the concept of title insurance was developed and similar reasoning has made the furnishing of title insurance a successful business. It is also appropriate to note that title insurance is not casualty insurance. A policy issues based upon the informed opinion of title examining experts employed by the company that title is in the condition expressed in the policy. As a matter of public policy a duty is imposed upon the title company to make a thorough and competent search of the record title. This duty is codified by statute in Florida.

Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc., 544 So. 2d 1070, 1072 (Fla. 4th DCA 1989) (citations omitted).

The duties of title insurers are succinctly set forth in Florida Statute § 627.784 (2020): “A title insurance policy or guarantee of title may not be issued without regard to the possible existence of adverse matters or defects of title.” As a result of this requirement, being able to determine the legal effect of recorded instruments is a duty and not merely an aspirational goal of title insurers.

Paramount in fulfilling that duty is the ability of title insurers to accurately ascertain the operation and legal effect of instruments, including which covenants do or do not run with the land. The “touch and concern” standard re-affirmed by the Second District Court of Appeal in *Hayslip v. U.S. Home Corp.*, 276 So. 3d 109 (Fla. 2d DCA 2020), rev. granted, *Hayslip v. U.S. Home Corp.*, 2020 WL 5949844 (Fla. October 8, 2020), for determining which covenants run with the land is antiquated and continues historical confusion in this area.

The “touch and concern” standard is ineffective because every recorded covenant, by definition, touches and concerns the land. “Touch and concern” has been described as “vague and confusing” and “perverse” by courts and commentators and has led the Restatement (Third) of Property to advocate the dropping of the standard. See Restatement (Third) of Property (Servitudes) § 3.2 (2000): “Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.” *Accord Davidson Bros. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 579 A.2d 288 (1990) (New Jersey Supreme Court abandons “touch and concern” test).

Nor is this an arcane issue of interest solely to title insurers. Covenants running with the land affect shopping centers, *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261 (Fla. 4th DCA 2007), railroad facilities, *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798, recreational leases, *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980), and utility service, *Shunk v. Palm Beach County*, 420 So. 2d 394 (Fla. 4th DCA 1982), among others. This question affects a large portion of real estate transactions in Florida.

The issue of which covenants run with the land has been examined at length by the Florida Legislature. For example, the chapters regarding condominiums under Florida Statutes § 718.101 (2020), cooperatives under Florida Statutes § 719.101 (2020), and homeowners' associations under Florida Statutes § 720.301 (2020) all contain provisions regarding restrictions that run with the land. And in the condominium context, the Florida Legislature answered the question of whether a mandatory arbitration provision can run with the land by enacting Florida Statute § 718.1255 (2020) which makes pre-suit arbitration mandatory prior to filing suit. This is an appropriate balancing of interests by the Florida Legislature.

II. FLORIDA COURTS HAVE EMPLOYED A STANDARD SUPERIOR TO “TOUCH AND CONCERN”

While FLTA is not advocating the Court abandon the “touch and concern” standard, Florida courts have employed a more precise standard for determining when covenants run with the land. The court in *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 310 (Fla. 2d DCA 1966), focused on the use of the real property and stated:

The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted. In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment thereof.

Using this standard, a grocery exclusive in a shopping center lease runs with the land, *Winn-Dixie Stores*, the payment of recreational assessments for land runs with the land, *Bessemer v. Gersten*, but a prior owner reserving the right to receive condemnation proceeds does not. *Caulk v. Orange County*, 661 So. 2d 932 (Fla. 5th DCA 1995).

III. REAL COVENANTS BENEFIT OR BURDEN THE LAND AND PERSONAL COVENANTS BENEFIT INDIVIDUALS

Analysis of the differences between real and personal covenants assists in understanding the “use and enjoyment” standard. This Court explained in *Palm Beach Cty. v. Cove Club Investors, Ltd.*, 734 So. 2d 379, 382 n. 4 (Fla. 1999):

Covenants are loosely defined as “promises in conveyances or other instruments pertaining to real estate.” 19 Fla. Jur.2d Deeds § 168 (1998). They are divided into two categories, real and personal, the differences in which are described as follows: “A personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties whereas a real covenant creates a servitude upon the reality for the benefit of another parcel of land. A real covenant binds the heirs and assigns of the original covenantor, while a person covenant does not.” Id. § 174, at 325. . . .

The Fifth District in *Caulk v. Orange County*, 661 at 934, reviewed condemnation awards paid to a previous owner and stated:

The covenant in Caulk's deed to Hibbard is incapable of running with the land. Although the covenant “concerns” the land, it does so only tangentially. Unlike covenants respecting mineral rights and crops, for example, which directly impact the use of the land, the covenant in the instant case has no effect whatever on the land. The only thing the covenant in the instant case really “touches” and “concerns” is the intangible personal property, namely cash, that may be paid by a condemnor.

There are, of course, exceptions to the rule requiring a benefit or burden for a covenant to run with land but those exceptions do not diminish the general rule as they are historical in nature and the result of the evolution of servitudes.

For example, covenants running with the land historically arose out of leases, see Restatement (Third) of Property 3.2, so it is understandable the covenants running with the land contained in leases are generally considered enforceable. Florida courts have generally upheld restrictive covenants in leases. See *Winn-Dixie Stores*, 964 So. 2d 261. But Florida courts do not extend the doctrine to remote third parties who do not have an interest in the land. See *Suniland Associates, Ltd. v. Wilbenka, Inc.*, 656 So. 2d 1356 (Fla. 3d DCA 1995) (agreement to assign rents and profits creates no interest in the property itself).

Easements arose from the same historical context but again, restrictive covenants contained in easements are subject to public policy limitations. See *Points v. Barnes*, 301 So. 2d 102 (Fla. 4th DCA 1974) (portions of restriction contained in easement void as against public policy).

And enforceability of a restrictive covenant diminishes when it seeks to benefit a prior owner for items only remotely connected to the property. As the Restatement (Third) of Property 3.2 states:

There is some authority that the burden of a covenant does not run with the land if the benefit is personal, usually applied in cases where the person seeking to enforce the covenant owns no land that would be benefited and does not appear to have any interest in enforcement other than seeking payment for release of the covenant. See, e.g., *Garland v. Rosenshein*, 649 N.E.2d 756 (Mass. 1995) (although we have expressed a willingness to reconsider common-law rules, this is not a case where they have no continuing force; covenant would have prevented burdened property from being developed with adjacent parcel covenantee had unsuccessfully sought to acquire).

The rule that the person seeking to enforce the covenant be part of the “use and enjoyment” of the land provides the certainty title insurers need in order to properly ascertain the operation of legal instruments affecting real property.

IV. FLTA OFFERS NO OPINION WHETHER AN ARBITRATION PROVISION BENEFITING REMOTE PARTIES RUNS WITH THE LAND

As the parties have pointed out, there are two public policy considerations in question in this case: the public policy of having disputes resolved through arbitration and the public policy of seeking to avoid burdens to real property when possible.

FLTA offers no opinion on this conflict other than to point out opposing public policy considerations affecting real estate have been effectively reconciled by the Florida Legislature in sections such as the Florida Condominium Act. This may be the better policy course.

And further analyzing the arbitration question raises an issue which reflects FLTA's concerns. This Court has reviewed the Florida Arbitration Act, Florida Statutes § 682.01 et seq. (2020), to determine when arbitration agreements are enforceable and stated in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 637 (Fla. 1999), there must be a written agreement between the parties to force an arbitration:

Under both federal statutory provisions and Florida's arbitration code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.

This highlights the concerns of the title insurance industry. An agreement to arbitrate that is not signed by the party to be charged is generally not enforceable, but the agreement in this case (which was not signed by the party to be charged) was held enforceable due to an amorphous concept that the arbitration agreement “touch[ed] and concern[ed]” and consequently ran with the land. This analysis squarely conflicts with the statutory duty of title insurers to assess clearly and accurately from the title record whether an instrument affects the quality of a parcel’s title. While FLTA does not seek to support either position in this case, the requirement to determine whether an arbitration agreement in a remote deed “runs with the land” forces title insurers to violate their statutory duty to avoid casualty insurance determinations.

CONCLUSION

FLTA does not seek to support either party in this appeal, but merely seeks to assist the Court with its expertise in this highly technical area of law and requests a clear rule for determining instruments which run with the land as the Court’s interpretation of the instruments in this case will impact FLTA and its members.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this brief is prepared and filed in compliance with Florida Rule of Appellate Procedure 9.045.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was served this 28th day of January, 2021 via electronic mail to JOSHUA E. BURNETT, ESQ., eservice@burnettlaw.com; C. DAVID HARPER, ESQ., charper@foley.com; LAWRENCE J. DOUGHERTY ESQ., ldougherty@foley.com; and DAVID GERSTEN, ESQ., dgersten@grsm.com.

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