

SUPREME COURT OF FLORIDA

BARRY I. HECHTMAN and
BRENDA HECHTMAN,

CASE NO.: SC00-2242
L.T. CASE NO.: 3D99-1597

Petitioners/Appellants,

vs.

NATIONS TITLE INSURANCE
OF NEW YORK, INC. and
COMMONWEALTH LAND TITLE
INSURANCE CO.,

Respondents/Appellees. /

**ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL**

**ANSWER BRIEF OF APPELLEE,
NATIONS TITLE INSURANCE OF NEW YORK, INC.**

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STATEMENT OF THE CASE AND OF THE FACTS

Appellee, NATIONS TITLE INSURANCE OF NEW YORK, INC., accepts the Statement of the Case and Facts submitted by the Appellants in their Initial Brief to this Court.

SUMMARY OF ARGUMENT

Much of the Appellants' Argument concerns issues of both fact and law which were not considered below, and therefore need not be considered by this Court at this stage of the proceedings. Moreover, to a large extent, the issues of fact raised for the first time in this appeal by the Appellants are completely irrelevant to the one issue before this Court, which is framed concisely by the question certified to this Court by the Third District Court of Appeals. That issue, quite simply, is whether an insurer is liable for the malfeasance of a "licensed title insurance agent" in cases where that agent is an attorney who is exempt from licensure under §626.8417, Fl.a Stat. Whether attorneys write 30% of the title insurance business in this state, 60% of that business, or 90% of that business is completely irrelevant to this rather straightforward issue of statutory construction.

The fact of the matter is that the subject statute contains plain, unambiguous language which, when considered in light of the legislature's determination to

exempt attorneys from licensure as title insurance agents, unequivocally renders §627.792, Fla. Stat., inapplicable to attorneys issuing title insurance in this state. As the Third District Court majority recognized, it is not the province of the judicial branch to go beyond the plain, unambiguous language of a statute in determining legislative intent. Furthermore, it is no more appropriate for a court to construe a legislative enactment in a manner inconsistent with its plain language merely because a court questions the wisdom of the enactment in question. Thus, in this case, although the Third District majority expressed sympathy with the Appellants' assertions about the wisdom of the enactment, the majority concluded, quite properly, that such considerations were irrelevant with respect to judicial consideration of an unambiguous legislative statement.

Finally, the Appellants raise, for the first time, an argument that the subject statute violates the equal protection clause of the Federal Constitution. This issue has not been properly preserved for appeal. This Constitutional argument is no more deserving of consideration for the first time before this Court than any other matter not properly raised in the trial court below, not to mention the Third District Court of Appeals. Appellants' Constitutional arguments, therefore, should not even be considered by this Court.

ARGUMENT

I. Appellants' factual assertions in the first section of its Brief are irrelevant, outside of the record, and not properly considered by this Court.

Appellants begin their Brief rather oddly, by asking this Court to take judicial notice of the amount of business that attorneys generate for title insurers in the state of Florida. These “facts” are outside of the record, are not a proper subject of judicial notice, and in any event are completely irrelevant to the issues at hand. This case is one of statutory construction, and construction of an unambiguous statute at that. Consideration of factual matters outside of the record, which are clearly intended to prejudice this Court, is utterly inappropriate. It is suggested that Section I of Appellants' Initial Brief be disregarded in its entirety.

II. Section II of Appellants' Initial Brief is equally irrelevant.

Section II of Appellants' Initial Brief provides the reader with an interesting analysis of the common law of the vicarious liability of a principal for its agent. While intriguing, the argument has nothing whatsoever to do with the statute quoted verbatim within Section II of the Initial Brief. In fact, the citation of the statute at issue in this appeal is the only relevant portion of the second section of Appellants' Initial Brief.

III. The plain, unambiguous language of the subject statute mandates a ruling in Appellee's favor.

This Court is referred to page 15 of the Initial Brief, which sets forth §627.792 in its entirety. The plain, unambiguous language of this statute supports the rulings of the trial court and the Third District majority in this case. Those decisions should be affirmed by this Court.

Both courts below concluded that the phrase “licensed title insurance agent” in the first sentence of that statute refers to title insurance agents licensed by the state of Florida in accordance with the licensure requirements set forth in §626.841, et seq. Since attorneys are exempt from these licensure requirements under §626.8417(4)(a), the lower courts concluded that attorneys exempt from the licensure requirements of Chapter 626 are not subject to the provisions of §627.792. Time tested rules of statutory construction overwhelmingly support this conclusion.

It is a fundamental tenet of statutory construction that courts should accord language used in a statute its plain and ordinary meaning, unless the specific words in question are defined by the statute or by the clear intent of the legislature. WFTV, Inc. v. Wilken, 675 So.2d 674, 677 (Fla. 4th DCA 1996). In this case, the statute does not define the word “license”, and the clear language of the statute is the best evidence

of the legislative intent.

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The word “license” has a well established meaning, particularly when it is used in a legislative enactment. Nevertheless, it is perfectly appropriate to refer to the dictionary to determine the plain and ordinary meaning of a particular word or phrase. WFTV, supra, at page 677. In this case, although the word “license” has a variety of meanings, the definition appearing first in Black’s Law Dictionary reads as follows:

License. The permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort. ¹

Thus, the plain, ordinary meaning of the word “license” is consistent with the construction of the subject statute asserted by Appellees, and accepted by the courts below.

Other long accepted rules of statutory construction lend additional support to this conclusion. The WFTV court held that the statutory term in question should not be read in isolation, but rather in context, and the statutory phrase being construed should be viewed in harmony with other interlocking statutes. (Ibid, at page 677). The court in Mitchell v. Department of Corrections, 675 So.2d. 162, 164 (Fla. 4th DCA 1996), reiterated that a court should construe related statutes in harmony with one

¹Black’s Law Dictionary, 5th Ed., at Page 829.

another. In the instant case, Chapter 626 of the Florida Statutes sets forth specific licensure requirements for title insurance agents, and specifically exempts attorneys from those licensure requirements. Thus, when considering the legislature's selection of the word "license" for use in §627.792, it is appropriate to consider the context in which it is used and the related statutes which also use the same word in the exact same context. In fact, when the legislature uses the same word on the same subject even in different chapters of the Florida Statutes, it is presumed to have intended the same meaning for those same words. State v. Robertson, 614 So.2d. 1155, 1156 (Fla. 4th DCA 1993)(J. Farmer, specially concurring). In his concurring opinion, Judge Farmer refers to a critical rule of statutory construction, and one particularly applicable in this case, namely that there is a presumption that the legislature enacts statutes with knowledge of other existing statutes, citing State v. Dunmann, 427 So.2d. 166 (Fla. 1983). Thus, it is presumed that at the time the legislature enacted §627.792, it was aware that Chapter 626 contained licensing requirements for title insurance agents, and was also aware that Chapter 626 exempted attorneys from those same licensure requirements. It is therefore presumed that the legislature knew what it was doing when it chose the word "license" in §627.792, and could easily have chosen different language if it intended to include attorneys in this statutory framework.

Since the words used in the statute are clear and unambiguous, this Court must

presume that the legislature meant what it said and need not refer to other rules of statutory construction to enforce the plain language of the statute. Hott Interiors, Inc.

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v. Fostock, 721 So.2d. 1236 (Fla. 4th DCA 1998), State v. Howard, 510 So.2d. 612 (Fla. 3rd DCA 1987). However, even if this Court were to refer to extrinsic evidence, the legislative history relied upon by the Appellee below (and attached hereto as Appendix A), suggests that the result would be the same. The legislative history clearly establishes that the legislature “knew what it was doing” when it imposed licensure requirements upon title insurance agents, and excluded attorneys from those same requirements.

Appellants, and the dissenting judge below, seem primarily concerned with the wisdom of the construction accepted by the majority below, and suggested by the Appellees herein. However, such considerations are simply beyond the scope of appropriate judicial review in this or any other case. It is not the function of the courts to engraft an exception onto a clear and unambiguous statutory provision. It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning. Heredia v. Allstate Insurance Co., 358 So.2d 1353, 1355 (Fla. 1978). “The court’s employment of perceived rationality and sensibleness as a guide to ascertaining legislative intent. . . is in contrast to a situation where there is a clear manifestation of legislative

intent which may not lead to what a court perceives to be a wise result.” Nationwide Property & Casualty Insurance Co. v. Marchesano, 482 So.2d 422, 426 (Fla. 2d DCA

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1986). Judicial interpretation of legislative intent in cases like this are controlled by the principal that a clear manifestation of legislative intent predominates over a logical perception of legislative wisdom. The doctrine of separation of powers which is, of course, an essential part of our constitutional form of government requires this conclusion. Pfeiffer v. City of Tampa, 470 So.2d 10, 12 (Fla. 2d DCA 1985). See also Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1980); Dubrian v. Allstate Indemnity Co., 538 So.2d 151 (Fla. 2d DCA 1989).

Appellants also place great weight upon the appearance of the word “licensed” in the second portion of §627.792. Appellants argue that the use of the word “licensed” in the second sentence of the statute in a context which is consistent with a construction of licensure by title insurance companies mandates the exact same construction in the first sentence of the statute. While facially appealing, when considered thoroughly, this argument must fail.

The second sentence of the statute surely contemplates “licensure” by title insurers of title insurance agents. In fact all title insurance agents are “licensed” by some title insurance company. Some are licensed by more than one company. Thus,

in cases where licensed title insurance agents commit some sort of fraud or defalcation, and those agents are “licensed” by more than one title insurance company, then the

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second sentence of the statute, regarding apportionment of damages among these companies, comes into play.

However, this same construction cannot be placed upon the word “licensed” as it is used in the first sentence of the statute. If it were, then the word “licensed” would have no meaning at all, since all title insurance agents are “licensed” by some title insurance company to issue title insurance. The word “licensed” in the first sentence of the statute would be rendered superfluous if Appellants’ construction were accepted by this Court. In simple fact, the only construction that both makes sense and is consistent with not only the plain language of the statute, but also the legislative history, is the construction accepted by both the trial court and the Third District majority, and asserted by Appellees herein.

On page 20 of the Initial Brief, Appellants argue that a statute must be read and interpreted in its entirety and must be so construed that it is meaningful in *all* its parts. (citations omitted) This Appellee could not agree more. The only way to give meaning to the word “licensed” in the first sentence of §627.792 is to construe that word as excluding attorneys from the coverage of the statute.

IV. Appellants' equal protection arguments were not properly preserved for appeal, and cannot be considered by this Court.

The last section of Appellants' Brief on the Merits raises, for the first time, an

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equal protection argument. This argument was not made to the trial court, or the Third District. Constitutional issues, like any other, are waived unless they are first presented in the trial court. Fleischer v. Fleischer, 586 So.2d 1253 (Fla. 4th DCA 1991). Thus,

since this issue was not properly preserved for appeal, it is not appropriately considered by this Court at this time.

Moreover, Appellants' argument is simply incorrect. As their own Complaint in this case reflects, Appellants have a number of remedies available to them against the title insurance companies in this case. They have already recovered under the title insurance policies issued by the Appellees. There remain claims of negligent hiring which are still pending in the trial court. To argue that to deny Appellants a remedy under §627.792 would somehow leave them without any claims at all against the title insurers in this case would be a stretch to say the least.

CONCLUSION

The plain, unambiguous language of §627.792 mandates an affirmance of the Third District's majority opinion. Moreover, a sensible reading of the statute is

consistent with that opinion. Finally, even if this Court were to question the wisdom of the subject statute, as the dissenting Judge did below, it would be an abuse of judicial discretion to override a clear legislative mandate on that basis alone. For all of these reasons, Appellee, NATIONS TITLE INSURANCE OF NEW YORK, INC.,

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would request that this Court enter an Order affirming the decision below.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent this ____ day of February, 2001 via U.S. Mail to Hendrik G. Milne, Esquire, Anthony V. Falzon, Esquire, ABALLI, MILNE, KALIL & GARRIGO, P.A., One Southeast Third Avenue, 1980 SunTrust International Center, Miami, Florida 33131 and Robert A. Cohen, Esquire, 200 South Biscayne Boulevard, Twentieth, Miami, Florida 33131.

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's Answer Brief is in conformance with the font standards and specifications as stated in Rule 9.210(a)(2), Fla. R. App. P.

Respectfully submitted,

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APPENDIX A