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LIABILITY OF ABSTRACTERS TO THIRD PARTIES
FOR OMISSIONS IN THE ABSTRACT

Where an abstracter has prepared a faulty abstract, it is generally held that he is liable to the person who contracted for the abstract,¹ to a third party who has been designated to the abstractor as the ultimate user,² and to the undisclosed principal of the purchaser of the abstract.³ However, where a third party in privity with the purchaser of the abstract but a stranger to the contract with the abstracter relies on the faulty abstract, such third party, in the absence of statutory authority, is almost universally denied recovery against the abstracter. This note deals with the remedies which such third party might have against the abstracter.

I. LIABILITY IN CONTRACT RATHER THAN IN TORT

The general rule is that an abstracter is liable in contract only, rather than in tort,⁴ and that his duty to prepare the abstract correctly extends only to those in privity with him.⁵ This doctrine first had its expression many years ago when the United States Supreme Court held that an attorney who erred in the preparation of an abstract was liable only in contract to his client, and, in the absence of fraud or collusion, was not liable to a third party not in privity who relied on the faulty abstract.⁶

This concept of liability only in contract flows from the fact that an abstracter's duty is one created solely by his contract of employment, and his failure to perform the duty created in this manner is solely a breach of contract. As the Iowa Supreme Court has pointed out in a leading case, not every breach of contract is a tort; only where the making of the contract raises a legal duty that is coincident with the contractual obligation (as in the case of a common carrier) does the breach of contract constitute a tort.⁷ The Florida Supreme Court in the

¹Russell v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212 (1893).

²Shine v. Nash Abstract & Investment Co., 217 Ala. 498, 117 So. 47 (1928).

³Young v. Lohr, 118 Iowa 624, 92 N. W. 684 (1902); Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075 (1915).

⁴National Savings Bank v. Ward, 100 U. S. 195 (1879); Abstract & Title Guaranty Co. v. Kigin, 21 Ala. App. 397, 108 So. 626 (1926).

⁵Thomas v. Guaranty Title & Trust Co., 81 Ohio St. 432, 91 N. E. 183 (1910).

⁶National Savings Bank v. Ward, 100 U. S. 195 (1879).

⁷Russell v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212 (1893). The

case of *Sickler v. Indian River Abstract Co.*⁸ adhered to the general rule of liability only in contract for the negligent preparation of an abstract, and applied the principle that the liability extends only to those in privity with the abstracter. While examination of some authorities shows that although a duty is contractual it may place one of the parties in such a position that he will have a duty of care to third parties, the breach of which duty would appear to be tortious,⁹ the courts have not applied this principle to benefit an injured third party who relied on an abstracter's faulty performance to his employer.

The logic and justice of denying recovery in tort have been questioned by some writers.¹⁰ One maintains that a duty to others to save them from harm from the speaker's words should not be limited to cases where physical peril will result from the misrepresentations, but should also include cases where the loss is purely pecuniary.¹¹ Another writer suggests that, instead of straining the law of contracts to find the third party to be a beneficiary of the contract between the abstracter and his employer,¹² it is more logical to employ the negligence formula, leaving for the jury the application of the ordinary negligence test of foreseeability.¹³ Certainly where it is known that the abstract will be used in making a sale, the vendee-third party is a member of a foreseeable class of persons who might rely on it. On principles of ordinary negligence, it is sufficient that the injured party be a member of a foreseeable class of persons who might suffer;¹⁴ however, in cases of negligent misrepresentation liability exists only if the specific party injured is foreseeable.¹⁵ To hold an abstracter liable in negligence to each and every person who might in the future rely on a negligently prepared abstract would render the business of examining titles so hazardous as to be socially undesirable as well as legally unsound.¹⁶

court stated that, where the duty is created solely by contract, the fact that the breach is caused by negligence does not change the cause of action to one of tort; it is merely the manner of accomplishing the breach. See PROSSER, HANDBOOK OF THE LAW OF TORTS 201 (1941).

⁸142 Fla. 528, 195 So. 195 (1940).

⁹PROSSER, *op. cit. supra* note 7, at 206, 207.

¹⁰Trusler, *Extension of Liability of Abstracters*, 18 MICH. L. REV. 127 (1919).

¹¹Note, 21 HARV. L. REV. 439 (1908).

¹²See *infra* for a discussion of liability under the third-party beneficiary doctrine.

¹³Recent Cases, 82 U. OF PA. L. REV. 876 (1934).

¹⁴*Palsgraf v. Long Island R. R.*, 248 N. Y. 339, 162 N. E. 99 (1928).

¹⁵*Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931).

¹⁶In the *Ultramares* case, the New York Court, speaking through Justice Cardozo,

II. LIABILITY ON THEORY OF VENDEE'S BEING THIRD PARTY BENEFICIARY

The third party may gain relief on the theory that he is the beneficiary of the contract between the abstracter and the vendor. However, in deciding what circumstances are necessary to establish the relying third party as a beneficiary, the courts have stated that the mere custom of vendors of procuring abstracts for presentation to the vendee is not sufficient.¹⁷ The Arizona Supreme Court in a recent case¹⁸ held that the abstracter who is to be bound on the third party beneficiary doctrine must know not only that a third party will rely but must know the identity of that third party,¹⁹ and to this the Florida Supreme Court in *Sickler v. Indian River Abstract Co.*²⁰ has agreed. The court in the Arizona case (cited by the Florida court in the Sickler case) gives no authority for its holding that in all events the identity of a specific third party beneficiary must be known to the abstracter. Since it is a general principle of the law of contracts that a beneficiary need not be specifically determined at the time of making the contract,²¹ this statement of the Arizona court to the contrary appears questionable.

III. RECOVERY IN DECEIT GROWING OUT OF CONSCIOUS IGNORANCE

One other means of relief to which the third party relying on the faulty abstract might resort exists where the negligence of the abstracter

held that defendants, an accounting firm, were not liable on a negligence count to third parties, not in privity with them, who relied on a faulty balance sheet. The opinion includes an excellent summary of New York law on the extent to which liability for negligent misrepresentation will be extended.

¹⁷Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1064; Peterson v. Gales, 191 Wis. 137, 210 N. W. 407 (1926).

¹⁸Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934).

¹⁹The Arizona Court cited *Anderson v. Spriesterbach*, 69 Wash. 393, 125 Pac. 166 (1912) and *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S. W. 896 (1890), in which cases the identity of the specific third party was known to the abstracter.

²⁰142 Fla. 528, 195 So. 195 (1940).

²¹Lawrence National Bank v. Rice, 82 F.2d 28 (C. C. A. 10th 1936); Ohio Casualty Insurance Co. v. Beckwith, 74 F.2d 75 (C. C. A. 5th 1935). In the *Beckwith* case, the court held that a third party beneficiary can recover on a contract if he can be identified, even if he was not known or did not know of the contract at the time of its execution. See 2 WILLISTON, CONTRACTS 1906, §378 (Rev. ed. 1936) to the effect that the beneficiary need not be determined at the time of making the contract. *Accord*, RESTATEMENT, CONTRACTS §139 (1932).

has been so gross as to imply a fraud. In *Ultramares Corp. v. Touche*²² Justice Cardozo stated a doctrine of liability in deceit growing out of conscious ignorance. In that case, the defendants were accountants who had prepared an incorrect balance sheet for an importing concern which, incidentally, was keeping a false set of books. On the strength of the balance sheet and the attached accountant's certificate that the balance sheet represented the true financial condition of the company, the importers borrowed from the plaintiff large sums of money which were never repaid. In a suit against the accountants the court dismissed the plaintiff's count based on negligence, saying that the accountants were not liable to a specific unforeseeable person who might rely on the balance sheet. But the court found that the plaintiff did have a cause of action in fraud. The false entries in the importer's accounts were so numerous and obvious that the jury might find that, had the accountants made the type of inspection that they held themselves out as having made, the falsity would have been uncovered. Since it was not uncovered, the reasonable inference was that, contrary to the statement on their certificate, the accountants did not have knowledge of the true financial condition of the importing firm although they held themselves out as having that knowledge. Thus there was a conscious ignorance, and, although the accountants might believe their statement to be correct, they had to their own knowledge no basis for such belief, and were not exonerated thereby from liability for the falsity of the statement.²³

That the abstracter might place himself in the same position as the accountants in the *Ultramares* case appears clear. If the abstracter certifies that he has examined the mortgage records of the county and has found no incumbrance, and he did, in fact, search but negligently overlooked by honest blunder a recorded mortgage, the *Ultramares* doctrine would afford no relief to the vendee third party not in privity who relied on the abstract. But if the abstracter makes the same certificate where he has, to his knowledge, failed to search the mortgage records, or made such a haphazard search that it could not be his honest belief that no mortgage record existed, then he is guilty of holding

²²*Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); See Recent Decisions, 19 CALIF. L. REV. 454 (1941), Comments, 16 CORN. L. Q. 419 (1931), Recent Important Decisions, 29 MICH. L. REV. (1931), Notes, 74 A. L. R. 1153 (1931).

²³See *Otis & Co. v. Grimes*, 97 Colo. 219, 48 P.2d 788 (1935); *Mulroy v. Wright*, 185 Minn. 84, 240 N. W. 116 (1931); *State Street Trust Co. v. Ernst*, 278 N. Y. 104, 15 N. E.2d 416 (1938).

himself out as having knowledge when knowledge he has none. In such a state of facts the *Ultramares* doctrine would afford the third party who relies upon the abstract, but is not in privity with the abstracter, the opportunity to recover in fraud for such conscious ignorance.

The existence of a fraudulent intent or an intent to deceive is a necessary element of the tort action of deceit.²⁴ The Florida Supreme Court has held that scienter is sufficiently made out if the representation is in such positive terms as to imply that the party making it had knowledge of its truth where, in fact, he had no knowledge of it and did not know whether it was true or not; the required intent to deceive in such cases is to be inferred from the facts in proof.²⁵

The difficulties that the third party might meet in proving the conscious ignorance of the abstracter are obvious. Whether the overlooking of a single incumbrance in the records is evidence of a mere honest blunder on the one hand (in which case the abstracter would not be liable to a third party not in privity) or of a conscious ignorance and recklessness on the other hand (in which case liability would exist to such third party) and whether the court should permit the case to go to the jury on this evidence alone are matters which the court must decide under the particular circumstances of the case. If the court feels that the overlooking of one entry in the records may appear so gross in the eyes of reasonable men as to constitute conscious ignorance, the evidence should go to the jury.

IV. CONCLUSION

As the law stands today, the third party, unknown to the abstracter, who relies to his loss on a faulty abstract is without remedy on either principles of negligence or the third party beneficiary doctrine as applied by the courts in cases involving abstracters. Although it is possible that such third party may hold the abstracter liable in fraud for conscious ignorance if such exists, the problems of proof may be overwhelming.

Because of these difficulties confronting the third party and the injustice that frequently results, the legislatures of several states have

²⁴ *Williams v. McFadden*, 23 Fla. 143, 1 So. 618 (1887); *Knelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098 (1905).

²⁵ *Upchurch v. Mizell*, 50 Fla. 456, 40 So. 29 (1905); *Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899); *Wheeler v. Baars*, 33 Fla. 696, 15 So. 584 (1894).