LIABILITY OF AN ATTORNEY FOR NEGLIGENCE IN TITLE EXAMINATION—FAILURE TO DISCLOSE INFORMATION TO THE CLIENT

I. INTRODUCTION

Generally it is well understood that an attorney is not liable for every mistake or error of judgment that may occur in practice,1 and it is equally understood that an attorney is not a guarantor of the titles he certifies.2 It is clear, however, that with regard to title search and examination, the lawyer has much less margin for mistakes than in other areas of practice, such as litigation.3 When an attorney is employed to examine and certify title to property, a high degree of duty is imposed on him to make a thorough search of the title. If he fails to properly conduct a title search he can be held liable for negligence.4 The test for negligence in title examination has become widely used and accepted by most courts. An attorney must exercise reasonable care in searching title, acting to the best of his knowledge and with the proper degree of skill in order to avoid liability.5 Therefore, though an attorney is not guaranteeing his opinions, courts expect the opinions to be supported by a reasonably skillful search. Exactly what is reasonable care, however, can obviously vary, and even if reasonable care is exercised in acquiring knowledge of encumbrances or other facts that may aid a

^{1.} National Savings Bank of The District of Columbia v. Ward, 100 U.S. 195 (1879); 29 AM. JUR. PROOF OF FACTS 1, Attorney's Malpractice: Negligence In Examining Title In Real Estate Transaction (1972); Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (N.Y. App. Div. 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (N.Y. 1897).

^{2.} Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (N.Y. App. Div. 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (N.Y. 1897); 7A C.J.S. Attorney and Client § 257 (1980); 7 Am. Jur. 2D Attorneys at Law § 207 (1980).

^{3.} See Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (N.Y. App. Div. 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (N.Y. 1897).

^{4.} National Savings Bank of The District of Columbia v. Ward, 100 U.S. 195; Annotation, Liability of an Attorney for Negligence in Connection with the Investigation or Certification of Title to Real Estate, 59 A.L.R. 3D 1176 (1974); Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp., 492 F. Supp. 933 (E.D. Ark. 1980), aff'd, 656 F.2d 381 (8th Cir. 1981).

^{5.} National Savings Bank of The District of Columbia v. Ward, 100 U.S. 195; 59 A.L.R. 3D 1176, *supra* note 4; 7A C.J.S. *Attorney and Client* § 257 (1980); 29 Am. Jur. PROOF OF FACTS 1, *supra* note 1.

client's decision, the attorney may still be liable for negligence in failing to disclose such facts.6

The most common negligence claims arising in title cases usually involve failing to discover encumbrances, but attorneys have also been held liable for errors in determining ownership of title, and failing to properly describe the amount or location of property. In a malpractice action, "the client must prove the attorney's employment and the creation of a duty to exercise his skill, the attorney's neglect of duty, that such negligence was the proximate cause of loss to the client, and the damages sustained." In title search cases this usually translates into the client being able to prove (1) unmarketable title; (2) that the defect would have been discovered in the exercise of reasonable and ordinary skill, care, knowledge and diligence; and (3) that the client suffered damage in reliance on the attorney's certificate.

II. RELATIONSHIP AND DUTY

Once the attorney has entered into employment with the client for a title search, the question that must be answered is exactly what is the duty owed and the relationship presented in exercising ordinary knowledge and skill? Courts have usually imposed a strong duty on attorneys in title cases. It appears that the reason for this is because the lay person generally knows little about searching title. Therefore, the relationship between attorney and client is an important one. In *Anderson v. Neal*, ¹⁰ the Supreme Court of Maine explained the relationship between attorney and client in title examination cases as follows:

The essence of the attorney-client relationship in title cases is the faith and trust which the client places in the representations of the attorney regarding the status of the title to the property he is about to purchase. The security of knowing that the title is good and the property is free of encumbrances is what the client purchases when he retains an attorney to search title for him.¹¹

This trust relationship indicated above seems to be a general theme in

^{6.} Owen v. Neely, 471 S.W.2d 705 (Ky. 1971).

^{7. 59} A.L.R. 3D, supra note 4, at 1179.

^{8. 29} Am. Jur. PROOF OF FACTS, supra note 1, at 4.

^{9.} Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774 (1940); Peters, Attorney Liability for Examination and Certification of Title to Real Estate, 12 COLO. LAW. 1091 (July 1983).

^{10. 428} A.2d 1189 (Me. 1981).

^{11.} Id. at 1192.

many negligence actions involving title searches, 12 and may explain why an attorney's duty is so high.

Once the relationship between attorney and client has been established, an attorney can be held liable for negligence if he fails to "discharge some duty which was fairly within the purview of his employment, . . ." and the client relied on the statements or omissions in the title certificate to his detriment. 13 The degree of duty owed, however, can vary depending on the court and the facts of each case. As mentioned previously, the test used by courts in most title negligence suits is one of reasonableness. The attorney must "exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise" when he undertakes a title search. 14 The Supreme Court of New Jersey in St. Pius X House of Retreats v. Camden Dioc., 15 stated very clearly the duty of an attorney under this standard as follows:

What constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform. More specifically, where the attorney represents the purchaser of realty and has been engaged to examine title, it has been said: "It is the duty of an attorney, who is employed to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the title. He is therefore liable for any injury that may result to his client from negligence in the performance of his duties — that is, from a failure to exercise ordinary care and skill in discovering in the records and reporting all the deeds, mortgages, judgments, &c., that affect the title in respect to which he is employed." 18

The duty an attorney owes therefore is not only to search title, but also to disclose what he finds as a result of the search. For example, in *Byrnes v. Palmer*, 17 it was stated that an attorney has the duty "to see

^{12.} See, e.g., St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 443 A.2d 1052 (1982).

^{13.} Home Federal Sav. & Loan Ass'n v. Spence, 259 Md. 575, 270 A.2d 820, 825 (1970).

^{14.} St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 443 A.2d 1052, 1060-61 (1982).

^{15.} Id.

^{16.} *Id.* at 443 A.2d 1061, (quoting Jacobsen v. Petersen, 91 N.J.L. 404, 103 A. 983 (N.J. Sup. Ct. 1918), *aff'd*, 92 N.J.L. 631, 105 A. 894 (N.J. 1918)).

^{17. 18} A.D. 1, 45 N.Y.S. 479 (N.Y. App. Div. 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (N.Y. 1897).

that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk, and is willing to accept it."¹⁸ It is important that the attorney disclose information revealed in a title search not only because courts impose such a duty, but also because disclosure is an affirmative defense to a negligence action based on improper title examination.¹⁹

III. KNOWLEDGE AND DISCLOSURE

Furthermore, liability for negligence may be more likely when an attorney has knowledge of a defect, yet still does not disclose it to his client. For example, in the principal case of *Owen v. Neely*, ²⁰ an attorney relied on an erroneous survey description in preparing a deed to property. The record description of the property was in conflict with the survey description, yet the attorney used the survey description in the deed, which resulted in damages to his client. The attorney had recognized the discrepancy but failed to inform his client, or to find out which description was correct. The court held that:

The average layman is not familiar with and ordinarily does not understand legal descriptions, and if his lawyer, accidentally or otherwise, receives information that should reasonably put him on notice of a defect we think it is his duty to investigate or report it to his client.²¹

Even though the attorney in the *Owen* case had placed a disclaimer in his title opinion, the court nevertheless emphasized the fact that he had notice of the conflicting descriptions in holding the attorney liable.

Likewise, in *Republic Oil Corp. v. Danziger*, ²² an attorney was retained to conduct a title search of property, and to discharge all encumbrances that were found. Before the closing of the sale the attorney discovered a perfected security interest in the property, but failed to either discharge it or disclose it to his client. The attorney stated that if his client had "known about the lien before the closing, 'it would have jeopardized the situation and not made it a workable situation.'"²³ The appellate court affirmed the trial court's granting of sum-

^{18.} Id. at 45 N.Y.S. 482.

^{19.} Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962), reh'g denied, 317 F.2d 56 (5th Cir. 1963).

^{20. 471} S.W.2d 705 (Ky. 1971).

^{21.} Id. at 708.

^{22. 9} Mass. App. Ct. 858, 400 N.E.2d 1315 (1980).

^{23.} Id. at 400 N.E. 2d 1317; see also Palmer v. Nissen, 256 F. Supp. 497 (S.D. Me.

mary judgment against the attorney.

In attempting to discover relevant matters worthy of disclosure in a title examination, the attorney also has the duty to in fact check the title, and cannot rely on what others may have told him. This is illustrated in *Gleason v. Title Guarantee Company*,²⁴ where an attorney telephoned an abstract company and relied on the information he received in preparing a title certification. The attorney had neither checked the public records, nor had he examined a written abstract, and the title later proved to be defective. The court found the attorney negligent even though it was customary in the community to inquire by telephone about the state of title from an abstract company. The court went on to state that "[a]II customs are not good customs, and lawyers have no prescriptive right to make knowingly false statements in the name of custom."²⁵

An additional example of this concept can be found in *Wlodarek* v. Thrift, 26 where a directed verdict in favor of an attorney was reversed when the court found that there may have been sufficient evidence to support allegations that the attorney was negligent in certifying title to property, which proved to be defective. The client alleged that the attorney did not make an actual title search, but instead merely relied on the word of the seller of the property in question. In reversing the lower court's verdict, the court stated that if the attorney had used reasonable care in searching the title, the defect would have been discovered.

Therefore, when employed to examine title to property, the attorney not only has a duty to disclose relevant defects, but also to actually make a reasonable search for such defects. Reliance on others, such as an abstract company, may not suffice since it is the attorney's ultimate obligation to certify the title.

IV. DISCLOSURE IN OTHER AREAS

Courts seem to be invoking a duty on attorneys to disclose knowledge of material facts not only in title cases, but others as well. In

^{1966) (}Where the court, applying Maine law, found an attorney liable when he improperly described a boundary line in a purchase agreement for the sale of property. The attorney knew the boundary lines that were to be included in the sale, but by failing to properly describe the line, the amount of property to be sold was overstated resulting in a defect of title as to a part of the property purchased).

^{24. 300} F.2d 813 (5th Cir. 1962), reh'g denied, 317 F.2d 56 (5th Cir. 1963).

^{25.} Id. at 300 F.2d 814.

^{26. 178} Md. 453, 13 A.2d 774 (1940).

Spector v. Marmelstein,²⁷ an attorney represented his client in several loan transactions. The client loaned money to a corporation that was in extreme financial difficulty. The attorney had been present in meetings with the corporation officers and knew before the client made the loans that there was not enough income generated by the corporation to pay already existing debts. Furthermore, the attorney knew that the same security his client obtained for the loan was already secured by another previous loan made by a third party. The lawyer never informed his client about the likely possibility the loan would not be repaid, or of the improper security on which the loan rested. In finding the attorney negligent, the court explained that:

A client is entitled to all the information helpful to his cause within his attorney's command. If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of action taken without benefit of the undisclosed material facts. Material facts are those which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct.²⁸

It is interesting to observe that title insurance companies have also recently been held liable for negligence in failing to disclose defects when they begin to structure defects as an attorney or abstractor would. In the past, title insurance companies were generally not subject to negligence actions for failure to discover and disclose a defect in title. This was because insurance companies were generally not employed to examine title, but only to indemnify against loss resulting from a defect.²⁹ Today, however, title insurance companies have increasingly been undertaking the duties of both attorney and insurer. Many insurance companies issue title commitments which specify defects, and then also issue the policy indemnifying against loss from the defects listed.³⁰ Some recent decisions have held that when these insurance companies schedule defects, they are undertaking the same duties

^{27. 361} F. Supp. 30 (S.D.N.Y. 1972), aff'd, 485 F.2d 474 (2nd Cir. 1972).

^{28.} Id. at 361 F. Supp. 39-40.

^{29.} Stone v. Lawyers Title Ins. Corp., 537 S.W.2d 55 (Tex. Civ. App. 1976), aff'd in part, rev'd in part, 554 S.W.2d 183 (Tex. 1977); see also Anderson v. Title Ins. Co., 103 Idaho 875, 655 P.2d 82 (1982).

^{30.} Shada v. Title & Trust Co. of Florida, 457 So. 2d 553 (Fla. Dist. Ct. App. 1984), petition for review denied, Title & Trust Co. of Florida v. Shada, 464 So. 2d 556 (Fla. 1985).

as attorneys and abstractors. Therefore, a duty of reasonable care will be imposed on the company, which if not exercised, will result in liability for negligence.³¹

V. CONCLUSION

The duty that has been placed on attorneys is obviously strong when the attorney knows of a material fact but does not disclose it to his client. Yet with regard to title examination cases, the duty can be even stronger in that the attorney should exercise reasonable care and skill both in discovering those material facts, and in disclosing them to his client.³² Of course an attorney is not a guarantor of title,³³ but as the above cases have indicated, the attorney is in effect guaranteeing that *he* has reasonably searched the title, and that all defects have been disclosed when he issues his certificate. If he has not taken such reasonable care he can be held liable. Unless there was contributory negligence,³⁴ or no reliance on the part of the client, the only two major defenses remaining for the attorney are that he disclosed the defect, or that the Statute of Limitations has run.³⁵ Even a disclaimer will not protect the attorney when he has reasonable grounds to suspect the existence of a defect not disclosed in his opinion.³⁶

Therefore, the best way for an attorney to avoid liability is to make a thorough search of the records, and disclose everything he finds of any materiality. Any less, and the attorney will be taking the risk of a possible malpractice action, a high risk in a litigious society.

Robert S. Frost

^{31.} Id.

^{32.} Owen v. Neely, 471 S.W.2d 705 (Ky. 1971); St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 443 A.2d 1052 (1982).

^{33.} Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (N.Y. App. Div. 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (N.Y. 1897); 7A C.J.S. Attorney and Client § 257 (1980).

^{34.} See 59 A.L.R. 3D 1176, supra note 4; 29 AM. JUR. PROOF OF FACTS 1, supra note 1; see also United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (N.C. Ct. App. 1982), review denied, 308 N.C. 194, 302 S.E.2d 248 (1983) (Where client was found to be contributively negligent having had notice of a deed of trust on property that was not disclosed in attorney's title search letter).

^{35. 59} A.L.R. 3D 1176, supra note 4, 29 Am. Jur. PROOF OF FACTS, supra note 1.

^{36.} Owen v. Neely, 471 S.W.2d 705 (Ky. 1971).