IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,017

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Petitioner,

vs

JERRY B. SCHREIBER,
as Personal Representative
of the Estate of THEADORES
WINLACK ROSS,

Respondent.

APPEAL FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA
THIRD DISTRICT, CASE NO. 80-1213

INITIAL BRIEF OF PETITIONER

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION

THERREL, BAISDEN, STANTON,
WOOD & SETLIN
Attorneys for Petitioner,
Chase Federal Savings
and Loan Association,
1111 Lincoln Road, Suite 600
Miami, Beach, Florida 33139
Phone: (305) 672-1921

and

FRANK R. GRAMLING
Attorney for Petitioner,
Chase Federal Savings
and Loan Association
7550 Red Road, Suite 203
South Miami, Florida 33143
Phone: (305) 665-4819

INDEX

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,017

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Petitioner,

vs

JERRY B. SCHREIBER,
as Personal Representative
of the Estate of THEADORES
WINLACK ROSS,

Respondent.

INITIAL BRIEF OF PETITIONER

PREFACE

Petitioner, CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION and LUIS PEREZ and GLADYS PEREZ, his wife, and PETER R. COURNOYER, were Defendants in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, and Appellees in the District Court of Appeal of Florida, Third District, and will be referred to herein as "CHASE", "PEREZ", and "COURNOYER". Respondent, JERRY B. SCHREIBER, as Personal Representative of the Estate of THEADORES WINLACK ROSS, was substituted for THEADORES W. ROSS, the Plaintiff in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, and the Appellant in the

District Court of Appeal of Florida, Third District, and will herein be referred to as "ROSS".

For the purposes of this brief, CHASE will use the symbol "R" to refer to the record on appeal, as prepared, the symbol "T-1" to refer to the transcript of the trial held on January 7, 1980, the symbol "T-2" to refer to the transcript of the trial held on February 11, 1980, and the symbol "A" to refer to the Appendix filed herewith.

STATEMENT OF THE CASE

On March 7, 1979 THEADORES W. ROSS filed a suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, General Jurisdiction Division. The case, assigned number 79-4132(04) sought the cancellation of the deeds from ROSS to COURNOYER, from COURNOYER to PEREZ, and the mortgage from PEREZ in favor of CHASE. The Complaint also sought the return of certain real property from the Defendant, COURNOYER (R:1-5). The Trial Court granted a Motion for Separate Trials, (R:230), and tried only the real property issued on January 7, 1980 and February 11, 1980. On March 4, 1980 the Trial Court entered its Final Judgment as to real property issue. (A:22&23;R:512&513).

The Plaintiff, THEADORES W. ROSS, filed a timely Motion for Rehearing (R:493-495), and the same was denied after argument of counsel, on May 12, 1980 (R:507). THEADORES W. ROSS filed her Notice of Appeal from the Trial Court's Final Judgment (R:508) seeking review by the District Court of Appeal of Florida, Third District.

On June 30, 1981, the Third District Court of Appeal, filed its opinion, in Case No. 80-1213, affirming the lower Court's Order per curiam (A:24-26). THEADORES W. ROSS, Appellant, filed a Motion for Rehearing En Banc and the Third District Court of Appeal entered an Order on July 27, 1981 granting the Motion for Rehearing En Banc, and vacating the Court's panel opinion dated June 30, 1981 (A:27).

On October 12, 1982, the Third District Court of Appeal filed its opinion on Motion for Rehearing En Banc confirming the granting of Appellant's Motion for Rehearing En Banc, vacating the panel decision, and adopting the dissenting panel's decision (A:25&26) as the opinion and decision of the District Court of Appeal of Florida, Third District (A:1-18). On October 12, 1982 the Court also certified to the Supreme Court of Florida that the decision of that Court in this cause passed upon a question of great public importance that is: What is the proper scope of review for District Courts of Appeal in granting Rehearings En Banc? (A:19)

On October 12, 1982 the Third District Court of Appeal also granted Appellant's Motion for Substitution of Proper Party and JERRY B. SCHREIBER, as Personal Representative of the estate of THEADORES WINLACK ROSS, was substituted as Appellant in this cause.

The Appellee, CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION filed a Motion for Rehearing on October 27, 1982 (A:20) which was denied on December 10, 1982. CHASE filed its Notice to Invoke the Discretionary Jurisdiction of the Supreme Court to review that decision which the District Court of Appeal certified to be of great public importance.

STATEMENT OF THE FACTS

THEADORES W. ROSS brought suit in Dade County Circuit Court against PETER R. COURNOYER, LUIS PEREZ and GLADYS PEREZ, his wife and CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, seeking the cancellation and rescission of Quit-Claim Deeds executed by ROSS in favor of COURNOYER, a Warranty Deed executed by COURNOYER in favor of PEREZ, who has been in possession of the property since 1977, and a mortgage indenture executed by PEREZ in favor of CHASE (R:1-5). All deeds and mortgages material hereto dealt with certain real property located in Dade County, Florida and more particularly described as:

> Lot 10, Block 21 of NAUTILUS EXTENSION THIRD according to the Plat thereof, as recorded in Plat Book 34 at Page 98 of the Public Records of Dade County, Florida.

The deeds and mortgages forming essential links in the chain of title to the above-described real property were introduced into evidence by ROSS and marked as Plaintiff's Composite 1. They consisted of:

> Warranty Deed dated April 11, 1952 between James F. Hines and Hazel K. Hines, his wife, grantors and THEODORES W. ROSS, grantee, reflecting consideration of "$10.00 and OVC";
>
> Quit-Claim Deed dated March 4, 1977 between THEODORES W. ROSS, grantor, and PETER R. COURNOYER, grantee, reflecting consideration of "$10.00 and other good and valuable consideration";

Mortgage Deed dated April 25, 1977 between PETER R. COURNOYER, mortgagor and SUN BANK OF MIAMI WEST, mortgagee reflecting consideration of "one dollar";

Corrective Quit-Claim Deed (Deed of Confirmation) dated August 19, 1977 between THEODORES W. ROSS, grantor and PETER R. COURNOYER, grantee, reflecting consideration of "Ten and No/100 ($10.00)" and "... love and affection";

Warranty Deed dated October 6, 1977 between PETER R. COURNOYER and JEAN M. COURNOYER, his wife, grantors and LUIS PEREZ and GLADYS PEREZ, his wife, grantees;

Mortgage Indenture dated October 6, 1977 between LUIS PEREZ and GLADYS PEREZ, his wife, mortgagors, and CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, mortgagee, reflecting consideration of "Thirty-Two Thousand and No/100 Dollars ($32,000.00)";

After a series of good-faith negotiations, between PEREZ and a realtor (T-2:48-50), a deposit-receipt contract was entered into on August 18, 1977 between PEREZ and COURNOYER, requiring a purchase price for the above-described property of Fifty Thousand Dollars ($50,000.00) (Plaintiff's Composite 3). During the negotiations it was evident that PEREZ had never met ROSS (T-2:50), had no idea of any potential title problems (T-2:51), and was purchasing an empty house (T-2:52,T-1:83) to live in (T-2:54).

At the time of closing, October 6, 1977, PEREZ borrowed Thirty-Two Thousand Dollars, secured by a mortgage, from CHASE, satisfied the Sun Bank first mortgage by payment of Ten Thousand Two Hundred Sixty-Three Dollars and 90/100 ($10,263.90) and thereby paid the full valuable consideration of Fifty Thousand

Dollars ($50,000.00) for the real property (T-2:82, Plaintiff's Composite 3), as required.

During the trial of the real property issue herein in February 1980, COURNOYER refused to answer any questions about either the first transaction with ROSS or the second transaction with PEREZ. (T-2:34-40). The attorney who had represented COURNOYER at the time of the closing, October 6, 1977, did testify as to the preparation of the corrective Quit-Claim deed (Deed of Confirmation) and its purpose to clear title to the subject property (T-2:66,68). He further stated his office policy of not reflecting consideration on a corrective deed. (T-2:66,68)

Following the trial on the issue as to real property, the Court found that there was no blood relationship between ROSS and COURNOYER, and that notwithstanding the recitations in the instruments, that there was no consideration for the execution of either of the Quit-Claim Deeds from ROSS to COURNOYER with the exception of love and affection. The Court found that PEREZ was a bona fide purchaser, having paid a valuable consideration, without notice of any infirmity. Finally, the Court held that a constructive trust arose by operation of law, equal in amount to the proceeds of the sale of the subject property: Fifty Thousand Dollars ($50,000.00), and ordered that ROSS recover the sum of Fifty Thousand Dollars ($50,000.00) plus interest in the amount of Nine Thousand Three Hundred Thirty-Three and 33/100 ($9,333.33), plus costs from COURNOYER (A:22&23).

ARGUMENT

POINT I

THE SCOPE OF REVIEW FOR DISTRICT COURTS OF APPEAL IN GRANTING REHEARING EN BANC AS STATED HEREIN, IS IMPROPER.

In the majority opinion below, [1] the Third District Court of Appeal is stating that the appropriate standard or scope of review is that "... decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of this Court." (A-2). A distinction is made between "uniformity" and the past prerequisite of "direct conflict". Ironically, the decision itself contains a decisional conflict between the majority and the plurality of the Third District Court of Appeal which reaches an opinion on the merits and then decides it should not have reviewed the case.[1] The Court has thus created the exact situation that it had previously sought to avoid by requiring intra-district decisional conflict as the only basis for an En Banc Rehearing.

Assuming the constitutionality of the En Banc Rule, Fla. R. App. P. 9.331, one would need to look to its origin and the intent of its creators, in order to grasp the scope of review which was intended. Under ART. V, § 4, Fla. Const.

---

1. As pointed out by Judge Nesbitt (A-5), the dissenting opinions have become the majority opinions herein as to the scope of review for granting Rehearings En Banc.

(1956), the Supreme Court had discretionary jurisdiction to review inter-district Court of Appeal decisions that conflicted with those of another district. Intra-district Court of Appeals' decisions that conflicted were resolved by the latter in time overruling the former. A subsequent change to the Florida Constitution authorized the Supreme Court to resolve both "inter" and "intra" district conflicts. The 1980 amendment to the Constitution of Florida eliminated the Supreme Court's authority to review intra-district conflicts and thereby created the necessity for a rule permitting the District Court to resolve its own intra-district conflicts:

> "The En Banc Rule (9.331) is an essential part of the philosophy of the constitutional scheme embodied in the new amendment because the Supreme Court no longer has jurisdiction under the amendment to review intra-district conflicts." In re: Rule 9.331 Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure 416 So. 2d 1127 (Fla. 1982), at 1128.

As the En Banc Rule merely authorizes the District Court to perform as the Supreme Court had previously, that is, to resolve intra-district conflicts, it would follow that the District Court would use the same scope of review as that previously used by the Supreme Court, "decisional conflict" vice "uniformity".

Chief Judge Hubbart, in his dissenting opinion, (A:10-16) traced the very life of Fla. R. App. P.9.331, from the creation of a commission on the Florida Appellate Court structure in

1978, through its initial recommendations, the Florida Supreme Court's Hearing and that Court's formal report to the Florida Legislature, and its subsequent modifications of the rule. CHASE adopts the same as if set forth herein in haec verba.

While Fla. R. App. P. 9.331 suggest that En Banc Hearings shall not be ordered unless they are necessary to maintain uniformity in intra-district decisions, the rule dictates that a litigant may only apply for an En Banc Hearing on the grounds that an intra-district conflict of decisions exists.

The Committee note to Fla. R. App. P. 9.331 provides in part that:

> "... The ground, maintenance of uniformity in the Court's decisions, is the equivalent of decisional conflict as developed by Supreme Court precedent in the exercise of its conflict certiorari jurisdiction..."

While each District Court of Appeal is free to adopt principles to ensure the consistency of law within its respective district, to avoid unnecessary and costly litigation, we may be guided by the decisional conflict rule previously adopted by the Third District Court of Appeal and the Fifth District Court of Appeal. Quest v Joseph, 392 So. 2d 256 (Fla. 3d DCA 1980) on Rehearing January 7, 1981; Finney v State, So. 2d (Fla. 3d DCA 1982) (en banc) Case No. 79-1936, opinion filed October 5, 1982) 7 FLW 2119, October 5, 1982; Rogers v State Farm Mutual Automobile Insurance Company, 390 So. 2d

138 (Fla. 5th DCA 1980).

The rule of thumb, or the scope of review, espoused by the plurality herein, by its terms, no longer requires a showing of an intra-district conflict. Rather it calls for speculation, is vague and ambiguous, and encourages the costly excessive use of the En Banc Hearing. This proceeding is extraordinary in nature and should be used sparingly. It is therefore suggested that the scope of review for District Courts of Appeal in granting Rehearings En Banc as stated herein by the plurality is improper.

Rehearings En Banc are only called for in the event of an intra-district conflict of decisions, and should not lie whenever it merely appears that intra-district decisions are so inconsistent and disharmonious that they would not have been rendered by the same panel of the Court.

POINT II

THE DISTRICT COURT OF APPEAL, IN GRANTING THE REHEARING EN BANC, IMPROPERLY APPLIED THE SCOPE OF REVIEW, TO THE FACTS OF THE CASE PRESENTED.

Regardless of which scope of review pursuant to Fla. R. App. P. 9.331 is applied, the plurality's "uniformity" or the majority's "direct conflict", the review is restricted to "intra" vice "inter" district decisions.

The majority of the panel of the Third District Court of Appeal, in the opinion of June 30, 1981 (A:24) affirmed, per curiam, the lower Court's decision on the precedent of

cases decided by the Florida Supreme Court and the District Court of Appeal of Florida, Fourth and Fifth Districts.

The dissenting opinion of that panel cited only one case decided by the Third District Court of Appeal, and if the en banc review was proper, then it follows that the intra-district decision creating a direct conflict or lack of uniformity must be Florida National Bank and Trust Co. at Miami v Havris, 366 So. 2d 491 (Fla. 3d DCA 1979). The facts of that case, however, are substantially different from the present case.

In Havris, supra, the Third District Court of Appeal resolved a dispute between the guardian of the original grantor and the original grantee. The Court, finding that there was no consideration flowing from grantee to grantor, cancelled the deed as to the immediate parties.

In the present case, the courts have attempted to resolve a dispute between the original grantor, ROSS, and a subsequent bona fide purchaser, PEREZ, who paid a valuable consideration to the original grantee, COURNOYER, (A-22).

The District Court of Appeal has misapplied the remedy available between ROSS and COURNOYER in the first transaction to the second transaction between COURNOYER and PEREZ and CHASE. Unlike the first transaction and HAVRIS, supra this second transaction in the present case, goes beyond recitals of consideration in a deed or deeds. PEREZ paid COURNOYER a valuable consideration, Fifty Thousand and No/100 ($50,000.00) and acquired a loan in the amount of Thirty Two Thousand and

No/100 ($32,000.00) secured by a first mortgage in favor of CHASE.

As between grantor and grantee, who are not related by blood or marriage, Havris, supra, would dictate that "love and affection" would not be adequate consideration flowing from the grantee to grantor and that a deed reciting only "love and affection", would therefore be invalid as to the immediate parties. This was the concern of the trial Court when it imposed a constructive trust in favor of the original grantor, ROSS, against the original grantee, COURNOYER, in the first transaction and awarded a money judgment against COURNOYER in an amount equal to the consideration received from the subsequent purchaser, PEREZ, in the second transaction.

As Havris, supra, is concerned only with the rights and remedies of the original grantor and grantee, in contra-distinction to the rights and remedies of the original grantor and a subsequent bona fide purchaser, here, it neither creates a "direct conflict", nor disrupts the "uniformity" of the Third District Court of Appeal's decisions.

The intent of the en banc process was to provide the litigants with a clear statement of the law within any given district, and the Supreme Court has recognized that in many instances factual circumstances are different and cases may be distinguishable on that basis. In re: Rule 9.33, supra.

The issue reviewed by the Third District Court of Appeal en banc, was not whether a deed given to a non-relative in return only for love and affection is without consideration and invalid, but whether such a deed would imply constructive notice, not from any facts ascertainable from the face of the deed, but specifically from facts not appearing therein, and therefore, the decision rendered was significantly beyond either scope of review pursuant to Fla. R. App. P. 9.331, as it neither created a direct conflict, nor disrupted the uniformity of decisions.

POINT III

THE DISTRICT COURT OF APPEAL'S EN BANC RULING CREATES INTRA-DISTRICT AND OTHER CONFLICTS CONTRARY TO THE INTENT OF FLA. R. APP. P. 9.331.

Initially, the plurality decision contained in the majority opinion entered by the Third District Court of Appeal en banc, creates an intra-district conflict with the Court's decision in Finney v State, supra, which is contra the intent of the en banc process which was to provide the litigants with a clear statement of the law within any given district. In re: Rule 9.331, supra.

Finney, supra, adopts the intra-district conflict of decision test vice the maintenance of "uniformity" as the sole basis of en banc review within the Third District Court of Appeal. It uses the criteria set forth in Nielson v City of Sarasota, 17 So. 2d 731 (Fla. 1960) which sets forth the predicate for decisional conflict. This was developed by Supreme Court precedent in the exercise of conflict certiorari jurisdiction, and the same standard would be the basis for an en banc proceeding, pursuant to Fla. R. App. P. 9.331.

The majority opinion entered by the Third District Court of Appeal en banc, itself, further creates conflict by ignoring the responsibility imposed by law upon an elderly grantor and the protection afforded by law to a bona fide purchaser. In the present case, the grantor, ROSS, twice

executed deeds in favor of the grantee, COURNOYER, and twice acknowledged considerationsflowing from the grantee. Even an elderly grantor is charged with the responsibility of informing herself as to the legal effect of the documents she is signing. McCoy v Love, 382 So. 2d 647 (Fla. 1980) Furthermore, by executing a second deed on August 19, 1977, ROSS reaffirmed her act of March 4, 1977 and should now be estopped from denying both, particularly to a third party. ROSS is also estopped from denying consideration, because a cash consideration was recited in both deeds (T-1:95). Campbell v Carruth, 32 Fla. 264, 13 So. 432 (1893); Daniel v Sherrill, 48 So. 2d 736 (Fla. 1950), 23 ALR 2 1410.

The Third District Court of Appeal's en banc opinion relies on Florida National Bank and Trust Company of Miami v Havris, supra, declaring that love and affection can constitute consideration only as to one who is related by blood or marital affinity. It then suggests that PEREZ was on notice as to a potential lack of consideration from the Quit-Claim Deeds between ROSS and COURNOYER, and that PEREZ had a duty to inquire. This theory ignores the protection afforded PEREZ under the Marketable Title Act, § 695.01, Fla. Stat. (1981) and assumes that a deed's validity rest on its stated consideration. This reasoning again creates additional conflicts as a deed without consideration is valid absent a finding of fraud or undue

influence and the validity of a deed does not depend on the real consideration being expressed therein. William v Kirby, 379 So. 2d 693 (2d DCA 1980); Mexican Crude Rubber Company v Ackley, 101 Fla. 552, 134 So. 585 (1930). Because consideration is not essential for the validity of a deed, it is neither required nor mentioned in § 689.01 Fla. Stat. (1981), the appropriate section which deals with the conveyances of real property,, and there is no duty on the part of a bona fide purchaser to inquire into the consideration given or that stated on the deed itself. See also 1 Florida Real Estate Transactions, (Boyer 1980) 11.01.

Further, the Supreme Court has held that the true owner of property is estopped to assert his title against a bona fide purchaser who relies upon the record and is without notice of the interest of the true owner. Hull v Maryland Casualty Co. 79 So. 2d (Fla. 1955). Here, the fee ownership of ROSS was removed from the record not once, but twice.

Finally, the Third District Court of Appeal's en banc opinion creates a conflict with the rule of law that as between two innocent parties, the party who's negligence contributes to the error, will bear the risk of loss, Niccolls v Jennings, 92 So. 2d 829 (Fla. 1957). And because rescission and cancellation are harsh remedies not favored by the Court,

a Court of equity will oridinarly rescind or cancel an instrument only for fraud, accident or mistake, none of which have been alleged or proven in the present case,

Reynolds v Reynolds, 312 So. 2d 538 (Fla. 2d DCA 1975), the remedy awarded to ROSS by the trial Court was the only appropriate equitable relief for all parties concerned.

CONCLUSION

The plurality's decision contained in the majority opinion calls for a scope of review beyond that conceived of by the drafters of Fla. R. App. P. 9.331 and in excess of the powers vested in the Supreme Court to resolve intra-district matters, from which this rule was derived. The plurality decision further introduces ambiguity and speculation by departing from the decisional conflict rule previously adopted. The majority opinion, regardless of the appropriate scope of review, has failed to recognize the obvious factual distinctions between the present case and the previous intra-district decision. Finally, it is respectfully submitted that the majority below should not be permitted the judicial luxury of upsetting the prior decisions entered, merely because they may disagree with the result of the case announced.

For the above reasons, and each of them, the Petitioner, CHASE, respectfully prays and concludes that the trial Court's ruling, which was affirmed by a panel of the Third District Court of Appeal, should be reaffirmed, that the panel decision should be reinstated and that the Order authroizing en En Banc Rehearing and the Opinion on Motion for Rehearing En Banc Granted, should be vacated,

Respectfully submitted,

THERREL, BAISDEN, STANTON,
WOOD & SETLIN
1111 Lincoln Road, Suite 600
Miami Beach, Florida 33139
Phone: (305) 672-1921

-and-

FRANK R. GRAMLING
7550 Red Road, Suite 203
South Miami, Florida 33143
Phone: (305) 665-4819

By: _____

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Petitioner Chase Federal Savings and Loan Asociation and the Appendix thereto was served by mail this 26th day of January, 1983, to: Joseph A. McGowan, Esquire, Suite 209, 19 West Flagler Street, Miami, Florida, 33130, Jerry B. Schreiber, Esquire, 207 Biscayne Bldg., 19 West Flagler Street, Miami, Florida, 33130, and John H. Duhig, Esquire, Suite 1133, CNB Building, 25 West Flagler Street, Miami, Florida, 33130.

Attorneys for Petitioner,
Chase Federal Savings and
Loan Association:

THERREL, BAISDEN, STANTON,
WOOD & SETLIN
1111 Lincoln Road, Suite 600
Miami Beach, Florida 33139
Phone: (305) 672-1921

and

FRANK R. GRAMLING
7550 Red Road, Suite 203
South Miami, Florida 33143
Phone: (305) 665-4819

By: