Supreme Court of Florida

No. 63,017

CHASE FEDERAL SAVINGS AND
LOAN ASSOCIATION, Petitioner,

vs.

JERRY B. SCHREIBER, etc., Respondent.

[July 26, 1984]

OVERTON, J.

This is a petition to review an en banc decision of the Third District Court of Appeal reported as Schreiber v. Chase Federal Savings & Loan Association, 422 So. 2d 911 (Fla. 3d DCA 1982), in which the members of the district court were in disagreement as to the standard to be used in determining when intra-district decisional conflict exists to allow the district court to sit en banc to harmonize its decisions. The district court certified the following question to be of great public importance:

> What is the proper scope of review for district courts of appeal in granting rehearings en banc?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question by holding that the district courts of appeal, in exercising their en banc power, are not limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We hold

that the district courts are free to develop their own concept of decisional uniformity.

The case which precipitated the certification of the question concerning the scope of en banc review involves the validity of a deed to a grantee, not related to the grantor by blood or marriage, in which the stated consideration was "love and affection." The specific issue is whether a deed which shows on its face that the consideration is "love and affection," but does not show on its face that the grantor and grantee are related by blood or marriage, places a subsequent grantee on notice that the deed may be void.

The uncontroverted facts reflect that Peter Cournoyer induced Theadores Ross, a lady ninety years of age, to transfer title in her home to him by a quitclaim deed which stated that "[t]his quitclaim deed is being given with the consideration being love and affection." The deed was recorded with the minimum amount of documentary stamps affixed. Cournoyer then sold the property to Luis and Gladys Perez for $50,000. The Perezes obtained the major portion of the purchase price from mortgage proceeds supplied by Chase Federal Savings and Loan Association. The Perezes proceeded to close the transaction without a lawyer, asserting that they were relying on Chase Federal and its lawyers in closing the transaction.

After Cournoyer sold the property to the Perezes, Ross sought to cancel her deed to Cournoyer, Cournoyer's deed to the Perezes, and the Perezes' mortgage to Chase Federal, on the ground that the original deed to Cournoyer was void for lack of consideration. The trial court found "there was no consideration for the execution of . . . [the deed to Cournoyer] with the exception of love and affection and therefore equitable title and interest in the subject property remained" in Ross. The trial court concluded, however, that "legal title did pass" from Cournoyer to the Perezes because the Perezes were "bona fide purchasers having paid a valuable consideration without notice of any infirmity, and therefore their title to the subject property

and interest in the subject property respectively shall stand." Finally, the trial court, holding that a constructive trust arose for the benefit of Ross in the proceeds of the sale received by Cournoyer in the sale to the Perezes, entered a judgment for Ross against Cournoyer in the amount of $50,000.

Ross appealed the trial court's denial of her claim for cancellation of the deeds and mortgage, asserting that the Perezes, as purchasers, and Chase Federal, as mortgage-holder, did not have valid interests in the property because there was notice on the face of the deed to Cournoyer that the consideration was legally insufficient. Therefore, Ross contended, the Perezes were not bona fide purchasers for value without notice and Chase Federal could not claim a valid mortgage on the property. In a per curiam opinion, a three-judge panel of the district court rejected Ross's argument and affirmed the trial court's order. Judge Schwartz dissented. A majority of the district court, however, granted Ross's motion for rehearing en banc. A majority of the en banc court considering the cause on the merits reversed the trial court, holding that under the district court's prior decision in Florida National Bank & Trust Co. v. Havris, 366 So. 2d 491 (Fla. 3d DCA 1979), a deed given to a non-relative in return for love and affection is invalid for lack of consideration. In so holding the district court found that the Perezes and Chase Federal were on notice to make inquiry concerning the propriety of Ross's deed to Cournoyer since the only consideration it reflected was "love and affection." The district court then remanded the cause with directions to cancel the deeds to Cournoyer and the Perezes and the mortgage to Chase Federal.

The district court sitting en banc was in disagreement as to the standard to apply to determine whether there was conflict between the decision of the initial three-judge panel of the district court in the instant case and the district court's previous decision in Havris. In the initial panel decision, as previously stated, the majority per curiam affirmed the trial

court, with Judge Schwartz writing a dissent. The dissent asserted that the majority failed to properly apply Havris. In Havris, an action was brought by the grantor to cancel a deed to the unrelated grantee on the ground that the deed was not supported by consideration, which was stated as love and affection. As noted, the district court held that "love and affection" did not constitute valid consideration where the conveyance was between persons unrelated by blood or marriage and that the deed was invalid. In the instant case, four judges of the en banc panel [Schwartz, Hendry, Pearson, and Jorgenson] believed that there was "a lack of uniformity" between Havris and the initial panel decision here. These judges believed that Florida Rule of Appellate Procedure 9.331 allowed the district court to sit en banc in this case in order "to maintain uniformity of decisions." Four other judges of the en banc panel [Nesbitt, Hubbart, Barkdull, and Baskin] believed that the district court had no authority to sit en banc in this case because the controlling facts in Havris and this case were not the same. According to these four judges, there was no direct conflict between Havris and this case under the standard used by the Supreme Court of Florida in exercising its conflict jurisdiction. These four judges concluded that they were obligated to follow the precedent established in Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960), which defined decisional conflict as

> (1) the announcement of a rule of law which conflicts with a rule previously announced by this [Florida Supreme] Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this [Florida Supreme] Court.

(Emphasis in original; emphasis added.) One judge of the en banc panel [Ferguson] agreed that Nielsen provided the correct standard to be used by the district courts in determining conflict for en banc purposes, but believed that under that

standard conflict existed between Havris and the initial panel decision in the instant case.

Judge Nesbitt, in a dissenting opinion concurred in by four other members of the court, expressed the view that since the en banc rule was established to resolve intra-district conflict which was formerly resolved by the Supreme Court, then the power exercised by the district courts to hear en banc proceedings must be the same as the standard adopted by the Florida Supreme Court in the exercise of its discretionary conflict jurisdiction. Judge Nesbitt further asserted that any change in the definition of conflict by broadening the present Florida Supreme Court standard would be unconstitutional. Judge Hubbart wrote a dissenting opinion in which he agreed with Judge Nesbitt and detailed the history of Florida's en banc rule.

We respectfully reject the interpretation that the district courts, in exercising their en banc powers, are limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We have held the en banc process to be constitutional and have stated that "[t]he district courts are free . . . to develop their own concept of decisional uniformity." In re Florida Rules of Appellate Procedure, Rule 9.331, 374 So. 2d 992, 994 (Fla. 1979), as modified in 377 So. 2d 700 (Fla. 1979), and as further modified in 416 So. 2d 1127 (Fla. 1982).

In holding the en banc process constitutional, we construed the "three judges shall consider each case" language of article V, section 4, as not restricting the district courts from hearing cases en banc. Our decision was consistent with the decision of the United States Supreme Court in Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941). In Textile Mills, the United States Supreme Court upheld the inherent authority of the Third Circuit Court of Appeals to establish a procedure for that court to sit en banc without authorization by existing rule, statute, or constitutional provision. See Hearing and Rehearing Cases En Banc,

14 F.R.D. 91 (3d Cir. 1953); Commissioner v. Textile Mills Securities Corp., 117 F.2d 62 (3d Cir. 1940). In construing the statutory provision establishing the federal circuit courts of appeals, the United States Supreme Court concluded that the proviso that there should be a circuit court of appeals in each circuit "which shall consist of three judges" did not prohibit an en banc process and that the court was not restricted to deciding cases with only three judges. In approving this en banc process, the United States Supreme Court commented that it was a means of "more effective judicial administration" and determined that "[c]onflicts within a circuit will be avoided. Finality of decisions in the circuit courts of appeals will be promoted." 314 U.S. at 335. It should also be noted that in a subsequent case the United States Supreme Court reaffirmed this view and held that the en banc process was an expression of the court's power rather than a party's right. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953). In Western, the Court held that although a litigant does not have a right to an en banc hearing, the litigant must be given an opportunity to request such a hearing.

The federal en banc process is broader than that provided in Florida Rule of Appellate Procedure 9.331 because, in addition to addressing issues of conflict, the federal process allows the courts of appeal to sit en banc to hear cases of "exceptional importance." When this Court adopted rule 9.331 in 1979, we decided that there was no need to authorize the en banc process in the district courts except for use in the settlement of intra-district conflict to help reduce the then-existing caseload of the Florida Supreme Court.

The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the courts' geographic boundaries, and develop predictability of the law within their jurisdiction. Consistency of decisions within each district is essential to the credibility of the district courts. There has been criticism of

intermediate appellate courts for their failure to speak with "a single voice of the law." Meador, An Appellate Court Dilemma and A Solution Through Subject Matter Organization, 16 U. Mich. J.L. Ref. 471, 474 (1983). As judges are added to Florida's district courts to meet expanding caseloads, the resulting increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation of Florida's district court judges among three-judge panels, the increased number of panel combinations compounds the problem. With a five-member court, the number of different panel combinations is ten. With a twelve-member court, however, the number of panel combinations is 220. The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. The process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction. We have previously said that

> [u]nder our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole. . . .
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> . . . We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. . . . Consistency of law within a district is essential to avoid unnecessary and costly litigation.

416 So. 2d at 1128. We expressly granted the district courts broad discretionary authority "to develop their own concept of decisional uniformity" to be able to fully carry out these expressed purposes. 374 So. 2d at 994. In regard to the original panel decision in the instant case and the district court's decision in Havris, we agree with Judge Schwartz that it

would be difficult for the legal profession to harmonize these decisions.

With regard to the merits of the instant case, we agree that, in accordance with the district court's decision in Havris, a deed given to a non-relative in return for "love and affection" is without consideration and is invalid. We further find that since the deed in issue from Ross to Cournoyer expressed on its face that it was for "love and affection" and did not indicate that the grantor and grantee were related by blood or marriage, the Perezes and Chase Federal were placed on constructive notice that the deed may have been invalid and they had the minimal duty to inquire as to whether such a relationship in fact existed between Ross and Cournoyer. See Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937); Sapp v. Warner, 105 Fla. 245, 141 So. 124 (1932); First Federal Savings and Loan Association v. Fisher, 60 So. 2d 496 (Fla. 1952); Leffler v. Smith, 388 So. 2d 261 (Fla. 5th DCA 1980), review denied, 397 So. 2d 778 (Fla. 1981).

Accordingly, we hold that the district court of appeal, in implementing the provisions of the en banc rule, has the authority to adopt the standard for conflict it believes necessary to harmonize the decisions of its court and avoid costly relitigation of similar issues in its jurisdiction. We approve the majority decision in the instant case to cancel the deeds to Cournoyer and the Perezes and the Chase Federal mortgage, and the remand for further proceedings.

It is so ordered.

McDONALD, EHRLICH and SHAW, JJ., Concur
ALDERMAN, J., Concurs in part and dissents in part with an opinion
BOYD, C.J., Dissents with an opinion
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., concurring in part, dissenting in part.

I concur with that portion of the majority opinion which defines the proper scope of review for district courts of appeal in granting rehearings en banc. I dissent, however, from this Court's resolution of the merits of this dispute and its approval of the district court's decision to cancel the deeds to Cournoyer and the Perezes and the Chase Federal mortgage. Rather, I concur with that portion of Chief Justice Boyd's dissenting opinion which addresses the merits of this case.

BOYD, C.J., dissenting.

I dissent to the majority opinion on numerous grounds. First, the so-called "en banc rule" establishes appellate tribunals not authorized by the constitution of Florida. Second, if we are to have en banc reconsideration of district court decisions in order to eliminate intra-district decisional conflict, the concept of conflict for such purpose should be the same as was applied to this Court's conflict certiorari jurisdiction prior to the 1980 constitutional amendment. Third, on the merits of the dispute over the property that Theodores Ross twice conveyed by deed to Peter Cournoyer, I believe that the trial court, the district court, the "en banc" tribunal, and this court have all applied incorrect statements of the law.

As I have pointed out on numerous occasions, Florida Rule of Appellate Procedure 9.331 has the effect of creating new courts. New courts may not be created by promulgation of a rule of procedure because article V, section 1 provides that only the courts created therein are recognized as courts. Article V, section 4(a) of the Florida Constitution provides: "Three judges shall consider each case and the concurrence of two shall be necessary to a decision." Three district court judges constitute the appellate court under article V, section 4(a). It is highly significant that the word "panel" does not appear in article V, section 4(a). See In re Rule 9.331, Determination of Causes By A District Court of Appeal En Banc, 388 So.2d 1235, 1236 (Fla. 1980)(Boyd, J., dissenting); In re Rule 9.331, Determination of Causes By A District Court of Appeal En Banc, 374 So.2d 992, 994 (Fla. 1979)(Boyd, J., dissenting); see also In re Rule 9.331, Determination of Causes By A District Court of Appeal En Banc, 377 So.2d 700 (Fla. 1979).

Assuming, however, as the majority of the Court has, that the constitutional problems have been properly resolved, I dissent also to the Court's ruling on the question presented by the certified question. Rule 9.331 was first promulgated prior to the 1980 constitutional amendment narrowing the Supreme Court's jurisdiction and withdrawing the power to review decisions on the ground of intra-district conflict. At that time

there was an understanding that the new rule would permit the district courts to resolve intra-district conflict as that concept has developed through the jurisdictional decisions of this Court. "Conflict" as used in the sense of certiorari jurisdictional conflict of decisions was stated to be the equivalent of the ground for seeking rehearing en banc. See In re Rule 9.331, 377 So.2d 700 (Fla. 1979)(Commentary at 701). Thus, when the 1980 amendment was adopted, there was an understanding that the new rule would dovetail nicely with the new constitutional provisions and would enable the district courts to take over the burden of eliminating intra-district conflict in the cases being shifted away from this Court. See In Re Rule 9.331, 416 So.2d 1127, 1127 (Fla. 1982).

The majority opinion broadens the scope of en banc rehearings beyond that originally envisioned. The concept of intra-district conflict should be strictly limited to have the same scope as did "conflict" for purposes of the exercise of this Court's jurisdiction prior to the 1980 amendment. We should adhere to this strict standard of conflict. Using this standard, I conclude that there was no conflict between the district court's original decision in this case and the case of Florida National Bank & Trust Co. v. Havris, 366 So.2d 491 (Fla. 3d DCA 1979). Therefore, there should have been no grant of an en banc rehearing.

I come now to the merits of the dispute giving rise to this litigation. In the first place, the basic premise of the argument made on behalf of the late Mrs. Ross, and accepted by the trial, appellate, en banc, and supreme courts, is erroneous as a matter of plain fact. That premise is that the deed did not recite a monetary consideration for the conveyance. Both the initial formally deficient deed and the later corrective deed executed by Mrs. Ross contained a recitation of monetary consideration. The fact that the latter instrument also contained a superfluous reference to "love and affection" did not render the deed invalid and was not sufficient to put a

subsequent purchaser for value on notice of any defect in the grantee's title for lack of a familial relationship between grantor and grantee.

It is said that in Florida a deed, because it operates to pass title under the Statute of Uses, must be supported by consideration in order to be effective. However, doubt has been cast on the accuracy of this statement of the law, one reason being that there is no mention of a requirement of consideration in the Florida conveyancing statutes. See §§ 689.01-.03, Fla. Stat. (1977). While a promise to convey land must, under essential principles of contract law, be supported by consideration, the preeminent scholar of Florida property law tells us that there is no good reason to require a deed, as a fully executed instrument, to be similarly supported. 1 R. Boyer, Florida Real Estate Transactions § 11.01 (1983). The same scholar also observes that the better rule under modern practice is that where a deed does not recite consideration, it should simply be presumed that a gift was intended. Id. at 180. He adds, however, that "Florida cases can be found to support almost any proposition in this area." Id. at 182 (footnote omitted).

I believe that we should clarify the law and hold that an owner of land has the right to convey it as a gift to anyone he chooses, except of course for conveyances in avoidance of debts or other legal obligations. For the courts to restrict the class of possible donees of deeds of gift to blood or marital relations burdens the power of alienation and impinges on personal rights of privacy and association. Reference to consideration in land conveyancing has become purely a matter of form, 6A R. Powell, The Law of Real Property § 888 (rev. ed. 1982), and we should recognize it as such.

But even if it be assumed that consideration is a requisite of the effectiveness of a deed to pass title, there is nevertheless no requirement that, in order to be effective, the deed must recite the consideration received, or that it recite consideration at all. See, e.g., Mexican Crude Rubber Co. v.

Ackley, 101 Fla. 552, 134 So. 585 (1930); Black v. Skinner Manufacturing Co., 53 Fla. 1090, 43 So. 919 (1907). Furthermore, when consideration is recited in a deed, such recitation is conclusive insofar as the effectiveness of the deed to pass title is concerned. See Florida Moss Products Co. v. City of Leesburg, 93 Fla. 656, 112 So. 572 (1927). A grantor who executes a deed reciting consideration is generally estopped to deny that there was consideration. Campbell v. Carruth, 32 Fla. 264, 13 So. 432 (1893). Because recitation of consideration is not strictly necessary, but only a preferred practice for marketability purposes, under the Court's holding any deed not revealing the consideration paid would necessarily require a prospective subsequent purchaser to inquire into the facts outside the title record in order to be sure that title in fact passed to the grantee. This holding imposes an intolerable burden on the free alienability and marketability of real property.

Boyer tells us that

> the role of consideration in suits for avoiding deeds is an ancillary one, and that the real issue in most cases is simply the attainment of an equitable result. Thus, no consideration, failure of consideration, or even inadequate consideration are circumstances to be considered along with others in deciding whether fraud, undue influence, violation of confidence or unconscionable advantage exists.

1 R. Boyer, Florida Real Estate Transactions § 1101 (1983)(footnote omitted). This observation is highly relevant to the present case because all the courts that have participated have appeared to be concerned about the inequitable enrichment of a so-called "con man" at the expense of an elderly lady and, now, her estate.

Contrary to the statement of the majority, the facts of the case are not "uncontroverted." The law provides remedies for the wrongful procurement of gifts by fraud, coercion, deceit, or undue influence. See, e.g., Williamson v. Kirby, 379 So.2d 693 (Fla. 2d DCA 1980); Majorana v. Constantine, 318 So.2d 185 (Fla. 2d DCA 1975). The law even provides certain presumptions and lightened burdens of proof in view of the difficulties of proof

of such matters as fraud and undue influence. Id. Before we call Mr. Cournoyer a "con man" we should be satisfied that the evidence supports such a finding.

It is axiomatic that a court's findings of fact must be based on evidence. It is equally axiomatic that evidence is only admissible if relevant to the issues framed by the pleadings. The complaint in this case sought cancellation of the deed on the ground that the only consideration was love and affection and the parties were not related. As I have argued above, this should not be enough. The complaint contains no clear, specific allegation of facts showing that the deed from Mrs. Ross to Mr. Cournoyer was procured by fraud, deceit, coercion, or undue influence. It is only pursuant to such an allegation that the lack of a valuable consideration for the conveyance becomes relevant.

Even assuming there had been proper allegations and proof sufficient to constitute grounds for equitable relief in favor of Mrs. Ross' estate and against Cournoyer, there would yet remain the question of whether the title and security interests of Mr. and Mrs. Perez and their lender, the respondent, should also fail in favor of the estate. This raises the issue of whether the Perezes were good faith purchasers for value without notice of the infirmity affecting the title of Cournoyer. The en banc district court and the majority of this Court take the view that the lack of recitation of monetary consideration in the deed from Mrs. Ross to Cournoyer was sufficient to put the Perezes on notice, or at least inquiry notice, of the invalidity of the deed to their grantor due to the lack of family connection. As I have already said, not only is this view belied by the document itself as shown in the record, it is also undermined by a proper understanding of the law of conveyancing. For relief to be granted the estate against the Perezes there must be an allegation and proof of some other factual basis for not recognizing their bona fide purchaser status.

If the Perezes and their lender had no notice of the purported defect in the title of Cournoyer, then the case would call for the application of the principle that "where one of two innocent parties must suffer through the act of a third person, the loss should fall upon the one whose conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss." Niccolls v. Jennings, 92 So.2d 829, 832-33 (Fla. 1957). Mrs. Ross not once but twice signed deeds of her property to Cournoyer. There was no evidence that she did not know what she was signing or that she did not intend to convey the land. An innocent subsequent purchaser's interest will be protected even when it is clear that the aggrieved grantor's execution of the deed of conveyance was procured by fraud and deceit. McCoy v. Love, 382 So.2d 647 (Fla. 1979).

To reiterate the basis of my dissent, I would hold that the original district court opinion, although it affirmed an erroneous trial court judgment, must stand because (1) the en banc rule is unconstitutional and because (2) the en banc rule was improperly invoked because there was no conflict. If there were a proper means for reaching the merits of the case, I would resolve it as outlined above.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Third District - Case No. 80-1213

Therrel, Baisden, Stanton, Wood and Setlin, Miami Beach, Florida; and Frank R. Gramling, South Miami, Florida,

for Petitioner

Jerry B. Schreiber and Joseph A. McGowan, Miami, Florida,

for Respondent