IN THE SUPREME COURT OF FLORIDA
CASE NO. 65,418

FIFTH DISTRICT COURT OF APPEAL
CASE NO. 83-425

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THEODORE L. WIECZORECK,

Petitioner,

vs.

H & H BUILDERS, INC.,

Respondent.

# ANSWER BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE AND THE FACTS

This action was filed on September 10, 1981. Service was effected on Defendant NELSON DAVIS on September 15, 1981. This Court entered its Final Judgment in favor of Plaintiff in the amount of $33,955.68 with costs of $169.25 on the 9th day of August, 1982. Execution was issued by the Clerk on August 25, 1982, and delivered into the hands of the Sheriff on August 27, 1982. The Execution was returned by the Sheriff NOT SATISFIED because the defendant had no tangible or intangible property on which to levy.

Plaintiff discovered that after this action had commenced and defendant had been served, he conveyed his residence to THEODORE L. WIECZORECK. Defendant remained in possession.

A rule to Show Cause was issued by this Court requiring Theodore L. Wieczoreck to show why he should not be made an impleaded third party and, if impleaded, be examined concerning the rights of the Plaintiff in the property conveyed to THEODORE L. WIECZORECK.

The hearing was held and the following facts were established:

1. After this action was filed and after service of process on Defendant, he conveyed the subject property to THEODORE L. WIECZORECK.

2. At the time of said conveyance, Defendant was heavily indebted and had judgments against him.

3. THEODORE L. WIECZORECK was a social friend of Defendant and also did work of Defendant individually and for various of his corporations.

4. WIECZORECK and Defendant valued the property at between $185,000 and $200,000.

5. After the conveyance - as indicated by the Sheriff's return of the Execution unsatisfied - Defendant had nothing remaining.

6. WIECZORECK paid <u>only</u> $23,400 for the property and did not even pay that to the debtor <u>but</u> to First Federal Savings and Loan Association of Fort Pierce.

7. The payment made by WIECZORECK was not enough to redeem from the first mortgage so the debtor also contributed approximately $20,000 to redeem.

8. Although WIECZORECK now says that he also agreed to pay outstanding judgments as of the date of the conveyance (this obligation is not imposed by the terms of the warranty deed), he had - at the date of hearing which was over a year from the conveyance - neither paid any of said judgments nor discussed said payment with any judgment creditors.

9. WIECZORECK indicated at the hearing that he was prepared to pay the ARMSTRONG judgment but admitted the imminent court proceedings in that case.

10. Since the conveyance in October, 1981, defendant NELSON DAVIS has remained in possession under a 90-day lease.

11. Said Defendant made no payment to WIECZORECK for the occupancy of said property but made only the payment to the mortgage company in the amount of $730 per month.

12. Defendant did not even make a payment for the taxes on the property.

13. On one occasion when WIECZORECK allegedly asked him to move Defendant refused and remained in possession.

14. It was not until after the deposition of WIECZORECK was taken in August, 1982, and after the proceeding impleading WIECZORECK was commenced, that the lease was "orally modified" increasing the rent.

15. Defendant was given a 90-day option to "repurchase" the property for the amount that WIECZORECK advanced plus an amount that it cost WIECZORECK to take his money out of the money market - a total of $24,000.

16. This option was orally extended at some time but was allegedly no longer in force at the time of the hearing.

On January 19, 1983, the trial court ruled that the conveyance was fraudulent and entered an order setting aside the conveyance and directing the Sheriff to levy on the interest of the Defendant that he conveyed to WIECZORECK. The Court also entered an order impleading WIECZORECK. A Motion for Rehearing was denied on February 24, 1983.

WIECZORECK appealed to the Fifth District Court of Appeal, which affirmed the trial court's ruling and certified a question of great public importance to the Florida Supreme Court.

## CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

IS IT NECESSARY TO ESTABLISH FRAUD IN ANY ACTION, WHETHER THE ACTION IS AT LAW OR IN EQUITY BY ONLY A PREPONDERANCE OR GREATER WEIGHT OF THE EVIDENCE AS OPPOSED TO A CLEAR AND CONVINCING STANDARD OF PROOF?

ARGUMENT

The preponderance or greater weight of the evidence standard constitutes the correct and current burden of proof in an action based on fraud. Rigot v. Bucci, 245 So.2d 51 (Fla. 1971); Watson Realty Corp. v. Quinn, 435 So.2d 950 (Fla. 1st DCA 1983); Rudy's Glass Construction Co. v. Robins, 427 So.2d 1051 (Fla. 3d DCA 1983); Sprayberry v. Sheffield Auto and Truck Service, Inc., 422 So.2d 1073 (Fla. 1st DCA 1982); Blaeser Development Corp. v. First Federal Savings and Loan Association of Martin County, 375 So.2d 1118 (Fla. 4th DCA 1979); Pelekis v. Florida Keys Boys Club, Inc., 358 So. 2d 849 (Fla. 3d DCA 1978); Pender v. Hatcher, 303 So.2d 427 (Fla. 2d DCA 1974).

The Florida Supreme Court and every District Court of Appeal in Florida have expressly stated the standard set forth above. In each of these cases, the central issue considered by the courts was the burden of proof in an action based on fraud.

The Appellant's contention that obiter dictum contained in the case of Canal Authority v. Ocala Manufacturing, Ice and Packing Co., 332 So.2d 321 (Fla. 1976) amounts to an overruling of all of the aforementioned decisions, is erroneous.

Canal Authority, supra, dealt with the statutory authority of a canal authority to seek aid from the Army Corps of Engineers to acquire land for use in construction of the cross Florida barge canal by means of federal eminent domain.

The Florida Supreme Court decided the case on this issue by holding that the canal authority acted within the scope of the law as established by the legislature.

In what can only be characterized as obiter dictum, the Court further stated,

> "Even assuming, arguendo, that appellant lacked the statutory authority to proceed as it did ... "
> "It is rudimentary that proof of fraud must be by clear and convincing evidence."

In support of this statement the Court cited to Middleton v. Plantation Homes, 71 So.2d 503 (Fla. 1954); and Graessle v. Schultz, 90 So.2d 37 (Fla. 1956), and completely overlooked its previous decision in Rigot, supra, which dealt solely with this issue.

How can one presume that the Court intended to overrule its earlier decision sub silentio? One simply cannot.

The Court's holding in Rigot, supra, was clear and unequivocal.

> "We hold that only a preponderance or greater weight of the evidence is required to establish fraud, whether the action is at law or in equity."

> "Those cases holding that allegations of fraud, in law or equity, must be proved by at least 'clear and convincing evidence,' or requiring any quantum of proof other than a preponderance or greater weight of the evidence are hereby overruled."

The burden of proof in an action based on fraud was the main issue in that case and the Court dealt with it expressly and purposely. It formed the basis for the opinion, unlike the Canal Authority case, supra.

Not only did the Florida Supreme Court specifically overrule all cases which held the burden of proof to be anything other than a preponderance or greater weight of the evidence, but it emphasized that there was no sound reason for any distinction between law and equity so far as the standard of proof was concerned, and the same standard, as announced by the Court, applied to both law and equity.

The Court's basis for this holding was that earlier separate procedures in the law and equity sides of the court had been merged by the adoption of R.C.P. Rule 1.040, and that both law and equity courts exercised concurrent jurisdiction in cases of fraud. This was a clear and rational decision based upon the current status of the law.

Subsequent to the Canal Authority case, supra, four District Courts of Appeal have ruled in accordance with the Court's decision in Rigot, supra, while the remaining District Court of Appeal has been silent.

In 1978, the Third District Court Appeal in Pelekis, supra, held the standard of proof in an action based on fraud to be the greater weight of the evidence. This case involved an attempt to vacate a final judgment quieting title to land due to an allegation of fraud.

The Court's holding was supported by the decisions in Pender, supra, and Rigot, supra, and comprised the major issue of the case.

In 1979 the Fourth District Court of Appeal issued a most crucial opinion in Blaeser, supra, in which the sole issue on appeal was whether fraud and deceit must be established by clear and convincing evidence or if the standard was one of "the greater weight of the evidence." The Court held the applicable test to be "greater weight of the evidence."

In so doing, the Court cited to the language of Rigot, supra, which seemed to settle this issue once and for all, but then addressed the "obiter dictum" in Canal Authority, supra.

This statement in Canal Authority, supra, concerning the burden of proof in an action based on fraud was held by the Fourth District Court of Appeal to be merely a "gratuitous" statement which "added nothing to the conclusion reached" in that case and was in fact the wrong standard of proof, and an embarrassing oversight.

To properly put the Blaeser decision, supra, in proper perspective, one must be aware that the learned and respected Judge Moore who authored the opinion was sitting with the Florida Supreme Court for the Canal Authority case, supra, and concurred in that decision.

Judge Moore was in the best possible position to say authoritatively whether the statement in the Canal Authority case, supra, was a mere oversight of the law as enunciated in Rigot, supra, or an intentional statement of law contrary to Rigot, supra.

Judge Moore stated in no uncertain terms that the Canal Authority language, supra, was in fact an oversight not intended by the Court and that the correct burden of proving fraud and deceit was by the greater weight of the evidence as spelled out in Rigot , supra.

In 1972, the First District Court of Appeal in Sprayberry, supra, addressed this same concern. Once again the central issue was whether the correct burden of proof in an action for fraud was a preponderance of the evidence standard or a clear and convincing standard. The court recognized that Canal Authority, supra, created a divergence of views. In its decision the Court stated:

> "We therefore conclude that this statement in Canal Authority is superfluous to that decision and agree with the Fourth District Court of Appeal that it is obiter dictum. Blaeser Development Corp. at 1118. Further, we will not presume that the Court intended to overrule its earlier decision sub silentio. Accordingly, we find that a preponderance or greater weight of the evidence standard applies and expressly recede from any decisions to the contrary."

Not only was the First District Court of Appeal following the law set out in Rigot, supra, but it was also expressly receding from its own earlier opinions to the contrary.

The First District Court of Appeal reiterated its decision in Sprayberry, supra as recently as August 3, 1983, in the case of Watson Realty Corp. v. Quinn, 435 So.2d 950 (Fla. 1st DCA 1983). Again the court held that in an action based on fraud, the burden of proof is that of a preponderance or greater weight of the evidence.

Also in 1983, the Third District Court of Appeal in Rudy's Glass Construction Co. v. Robins, 427 So.2d 1051 (Fla. 3d DCA 1983) again held that a preponderance or greater weight of the evidence is the standard of proof by which fraud is established.

Now in May of 1984, the Fifth District Court of Appeal has held that the preponderance of the evidence or a greater weight standard constitutes the correct and current burden of proof in an action based on fraud. Wieczoreck v. H & H Builders, Inc., ___ So.2d ____ (Fla. 5th DCA 1984).

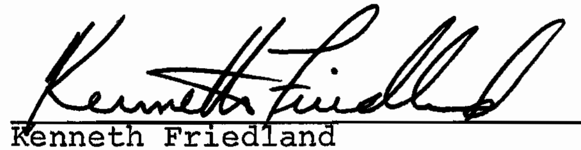
The court agreed with the First District Court of Appeal in Sprayberry, supra, and the Fourth District Court of Appeal in Blaeser, supra, in its finding that the Supreme Court's statement in Canal Authority, supra, was obiter dictum and not a correct statement of the law.

When the Fifth District Court of Appeal certified its question of great public importance, it was asking this Court to once and for all put to rest the troublesome language of Canal Authority, supra. This Court is being asked once again to restate the burden of proof in an action based on fraud. The standard of proof adopted by this Court in Rigot, supra, and every District Court of Appeal in this state is the correct standard and should be readopted by this Court, that is, a preponderance or greater weight of the evidence. Most certainly, it would be a step backward in modern jurisprudence to do otherwise.

Both the trial court and the Fifth District Court of Appeal have determined that fraud was proven in this case, and it is with great respect that this Court is asked to affirm these decisions.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by mail to CHARLES R. STEINBERG, ESQUIRE, RICE, STEINBERG & STUTIN, P.A., Suite 1420, Southeast Bank Building, 201 E. Pine Street, P. O. Box 1469, Orlando, Florida 32802, Attorney for Petitioner, this 18th day of July, 1984.



Kenneth Friedland