

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,418

Fifth District Court of
Appeal Case No. 83-425

THEODORE L. WIECZORECK,

Petitioner,

vs.

H & H BUILDERS, INC.,

Respondent.

FILED
SID J. WHITE
JUN 29 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE FACTS AND CASE

This is an action wherein the Respondent, H & H BUILDERS, INC., obtained a judgment in the trial court against one NELSON DAVIS, and thereafter attempted execution on any and all assets in his name. A Writ of Execution was returned by the Sheriff to the Respondent as unsatisfied, and thereafter, proceedings supplementary in aid of execution under Florida Statute §56.29 was invoked by the Respondent to collect said judgment. In accordance therewith, the Respondent caused a Rule to Show Cause to be issued by the trial court, served upon the Petitioner, ordering him to show cause why he should not be impleaded as a Third Party Defendant, and if impleaded, for examination of the Defendant and the impleaded Third Party in determination of the rights of the Plaintiff against the Defendant and Third Party Defendant as to the property of the Defendant which they have in their possession.

After a Motion to Dismiss brought by the Petitioner was denied, a hearing was held before the trial court on that issue, wherein the Petitioner was the only live witness. The only other testimony was by affidavit of a representative of the Respondent. Thereafter, the trial court simultaneously ruled that the Petitioner was impleaded as a Third Party, and furthermore, that the conveyance between the Petitioner and the original Defendant, NELSON DAVIS, was deemed a fraudulent conveyance, and therefore, void ab initio.

Appeal followed to the Fifth District Court of Appeal, who, after a lengthy opinion, affirmed the trial court, but in doing so, necessarily 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 as opposed to the standard utilizing clear and convincing evidence. The Court further certified as a question of great public importance to this Court the following:

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 A CONVINCING STANDARD OF
PROOF?

The discretionary jurisdiction thereafter was sought to review the decision of the Fifth District Court of Appeal pursuant to Florida Rule of Appellant Procedure, Rule 9.030(a)(2)(A)(v).

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 A CONVINCING STANDARD OF PROOF?

After reviewing all of the Florida Appellate Decisions considering the issues presented in this certified question, the Petitioner would agree that the holding in the Supreme Court case of Rigot v. Bucci, 245 So.2d 51 (Fla. 1971) and in Canal Authority v. Ocala Mfg. Ice & Packing Co., 332 So.2d 321 (Fla. 1976) are, as in the words of the Fourth District Court of Appeal in Blaeser Development Corp. v. First Federal Savings & Loan Association of Martin County, 375 So.2d 1118 (4th DCA 1979), "Simply irreconcilable." Nevertheless, this Court's opinion contained within Canal Authority, supra, is the last pronouncement of the State Supreme Court on a given subject or point, and therefore, should be controlling. See Eddings v. Davidson, 302 So.2d 155 (1st DCA 1974). The First District Court of Appeal also held that it is not the role of the District Court of Appeal to re-evaluate a decision of the Supreme Court. Goode v. State, 279 So.2d 352 (1st DCA 1973), as the Fifth District Court of Appeal apparently did in the instant matter.

The Fifth District Court of Appeal in the case at bar, following the lead of the Fourth District Court of Appeal in Blaeser, supra and First District Court of Appeal in Sprayberry v.

Sheffield Auto & Truck Service, 422 So.2d 1073 (Fla. 1st DCA 1982) dismissed the Supreme Court's opinion in Canal Authority, supra, as obiter dicta in an attempt to extinguish the precedential value of the opinion. Even if this is the case, which Petitioner does not, at this time, concede, the lower Court was incorrect in affirmance of the trial court and then certifying the above question as one of great public importance. As was held by this Court in the case of United States Steel Corp. v. Save Sandkey, Inc., 303 So.2d 9 (Fla. 1974) " . . . It is not the province of the District Court of Appeal to recede from decisions of this Court. A much better solution would be to follow the decisions of the Supreme Court and then certify the cause as being one of great public interest in order to facilitate a re-examination of the decision of this Court in question."

Finally, the District Courts of Appeal are no less firmly bound by Supreme Court precedent established peripherally than they are by those explicitly mandated. Fields v. Zinman, 394 So.2d 1133 (4th DCA 1981).

In any event, this Court now has an opportunity to revisit and reconsider the standard of proof which necessarily states the correct burden in an action based on fraud. More importantly, Petitioner asserts that a distinction should be made on the standard of proof necessary in equitable actions based on fraud as opposed to legal actions based on fraud for money damages only.

In the case sub judice, the Respondent sought equitable relief from the trial court by requesting that the deed, the instrument of conveyance of real property, between the Petitioner and NELSON DAVIS, be set aside as a fraud on it as a creditor of Mr. Davis. The lower Court obviously chose not to consider this factor when pronouncing its holding on the standard of proof necessary in fraudulent cases, however, it is law in the State of Florida that one seeking rescission or cancellation of an instrument has the burden of establishing his right to relief by clear and convincing evidence, Harris v. Harris, 260 So.2d 854 (1st DCA 1972). The facts of Harris are particularly relevant to this case, since the District Court of Appeal held that evidence supported conclusion that the Appellant had failed to carry the burden of proof required for imposition of a constructive trust upon parcels of land conveyed to husband's father and brother prior to separation, despite allegations of fraud and misrepresentation in procuring wife's signature on the deeds. (Emphasis added). Furthermore, the factual basis in this Court's opinion of the Rigot, supra, case did not involve a claim for equitable relief, but rather a claim at law based upon alleged fraud on the part of the Defendant, who induced the Plaintiff to enter into a publishing franchise for a magazine. Furthermore, this Court, in Rigot, supra, went beyond the necessity of ruling upon the burden of proof in law cases by also including in its holding the standard of proof necessary for equitable

actions. The Court justifies its holding that the standard of proof in both equitable and legal actions involving fraud is a greater weight of the evidence by pointing out that law and equity courts exercise concurrent jurisdiction in cases of fraud, and, therefore, there is no sound reason for any distinction between law and equity so far as the proof requisite to establish fraud is concerned. This, alone, does not seem to be a justifiable rationale to change the burden of proof involving allegations of fraud required in equitable actions, in light of the fact that there still exists equitable actions wherein the burden of proof is the clear and convincing standard. (See Harris, supra).

Petitioner respectfully suggests that the Ohio Supreme Court, in the case of Household Finance Corp. v. Altenberg, 214 N.E.2d 667 (Ohio 1966) has most correctly stated the application of the different standards of proof in cases of fraud wherein it held that "In an action for equitable relief, such as to set aside or reform a written contract, or to remove a cloud on the ground of fraud, it seems that clear and convincing evidence of a fraud is required, but in the ordinary action at law based on fraud only a preponderance is required." The Ohio Court further made this holding to stop the expansion of the clear and convincing rule to cases not equitable in nature. The Court intimated that persuasive practical considerations should also be considered to prevent the expansion of this rule to equitable actions, which would include the confusion created in a jury's mind of the proper definition for the term "clear and convincing."

This is important, since actions at law could be tried before juries, while pure actions at equity, such as foreclosures, are not.

CONCLUSION

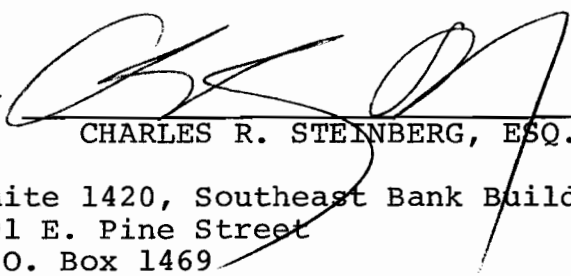
Petitioner respectfully requests that this Court take jurisdiction of this matter, answer the certified question of the Fifth District Court of Appeal in the negative and further establish a standard of proof in fraud cases which would recognize the necessity of different degrees of proof required for legal and equitable actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Charles M. Harris, Esq., P.O. Box 669, Titusville, Florida 32780 by U.S. Mail this 26th day of June 1984.

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