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IN THE

SUPREME COURT OF FLORIDA

RONALD GUY McINTOSH, et al.,

Petitioners,

78,152

vs. CASE NO.: 90-1036

L. H. HOUGH,

Respondent.

REVIEW OF CERTIFIED QUESTION
FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Others

PRELIMINARY STATEMENT

The Appellant will be referred to as "McIntosh". The Appellee will be referred to as "Hough". Les Miles Enterprises, Inc. will be referred to as "Les Miles". Gregory W. Johnson, P.A. will be referred to as "Gregory Johnson". All references to the record will be "R", all references to the transcript will be "T" and all references to the appendix will be "A", each to be followed by the page number.

STATEMENT OF THE CASE

This appeal arises from Hough's Complaint to quiet title of real property filed in St. Johns County, Florida, on August 14, 1985. (R-30) McIntosh filed his Answer and in his Third Affirmative Defense set forth that Hough engaged in fraud in conveying the property to his then ex-wife Louise T. Bailey and should be estopped and barred from any equitable remedies. (R-109) On August 15, 1989, Hough moved for summary judgment relying on Hough's filing of a Notice of Lis Pendens and the 5th District Court's ruling in Hough v. Stewart, 543 So.2d 1279 (5th DCA 1989) (R-376). The trial court, in its order entered October 4, 1989, denied Plaintiff's Motion for Summary Judgment on the basis that there were different parties involved in the suit in which the lis pendens was filed. (R-850) (A-2) The Defendants McIntosh, Les Miles and Johnson were not named and when Les Miles sought to intervene permission was denied by the court. Therefore, their claims were not adjudicated in that lawsuit.

On January 31, 1990, McIntosh filed a Motion for Summary Judgment setting forth the clean hands defense and equitable estoppel. (R-886) Hough filed a cross-motion for summary judgment. (R-901) The court heard argument and on April 30, 1990, entered Summary Final Judgment in favor of Hough and against McIntosh. (R-909, 923) (A-4-9) The trial Court denied

McIntosh's Motion for Summary Judgment on the basis that when Hough conspired to defraud his creditors and deeded the property to his ex-wife the only creditor adversely affected was Henry Communications and none of the Defendants herein. Therefore, the court concluded that McIntosh nor his predecessors in title could assert the unclean hands doctrine against Hough.

Defendant McIntosh timely filed a notice of his appeal seeking judicial review of the court's entry of the Summary Final Judgment in favor of Hough and against McIntosh on the issue of whether or not the unclean hands doctrine is a viable affirmative defense under the circumstances of this case. (R-917)

The appeal was argued before the Fifth District and on April 11, 1991, an opinion was issued. That opinion artfully set forth the course of events that led to the appeal and the issues faced by the Fifth District. The District Court made several specific findings which lead to its decision. First of all, it found that the lis pendens automatically expired on February 22, 1984, and was ineffective for any purpose when McIntosh took title to the one-half interest on March 1, 1984. Upon this finding the District Court reversed the summary judgment as it affects this interest in the property.

The next and most important finding of the opinion is that the unclean hands doctrine should apply under the facts of this case. The cases relied on by the trial court are inapplicable for the proposition stated. The District Court distinguished Miller v. Berry, 78 Fla. 98, 82 So. 764 (Fla. 1919) and Watkins v. Watkins, 166 So. 577, (Fla. 1936) and concluded that had this been an action filed by Hough to obtain the return of his property from McIntosh, McIntosh would prevail.

Finally, the Court discussed the effect of the lis pendens. It was the Fifth District's opinion that in this case the application of the lis pendens and the inability to intervene in the pending action yielded an unfair result. This prevented a subsequent purchaser from properly litigating a valid, dispositive defense against the fraudulent grantor. This caused the court to certify the following question:

> WHEN A PURCHASER FOR VALUE AFTER LIS PENDENS BUT WITHOUT ACTUAL NOTICE PURCHASES PROPERTY FROM THE FRAUDULENT GRANTEE AND IS THEN DENIED THE OPPORTUNITY TO INTERVENE IN THE PENDING ACTION, MAY HE RAISE EQUITABLE ESTOPPEL BY VIRTUE OF THE UNCLEAN HANDS DOCTRINE IN A SUBSEQUENT ACTION BROUGHT BY THE FRAUDULENT GRANTOR?

STATEMENT OF THE FACTS

A chronology of the events may be of assistance in describing the history of this case.

1. July 17, 1979, Henry Communications judgment of $45,000.00 plus costs entered against Hough in 78-777 CA, in and for St. Johns County, Florida. Hough sued Henry for breach of lease due to nonpayment. Henry counterclaimed against Hough for damages due to fraudulent representations of profits to be generated by the lease of the very property involved in this suit. (Gregory Johnson, Esquire represented Henry Communications) (R-389 p7-13)

2. July 23, 1979, Dissolution of Marriage filed by Hough in Baker County. Final Judgment of Dissolution of Marriage entered August 16, 1979.

3. August 17, 1979, Hough deeds the St. Johns County property to his then ex-wife Louise T. Bailey.

4. October 16, 1980, Louise T. Bailey deeds the property to T.B.F. Properties, Inc.

5. July 7, 1981, lis pendens filed in Duval County; a copy was recorded in St. Johns County.

6. July 21, 1981, Complaint filed in Duval County by Hough and Fred Hough against Louise T. Bailey and T.B.F. Properties, Inc.

7. December 24, 1981, T.B.F. Properties, Inc. deeds property to Les Miles subject to mortgages to T.B.F. Properties, Inc. ($25,625.00) and Gregory Johnson, ($25,625.00).

8. May 5, 1982, Gregory Johnson assigns mortgage to Jacksonville National Bank.

9. October 1, 1982, Warranty Deed from Les Miles, Inc. to Ronald Guy McIntosh for undivided one-half interest in the property for $25,000.00 cash to Les Miles and subject to mortgage of T.B.F. Properties, Inc. and Gregory Johnson.

10. March 21, 1983, Motion for Permission to Intervene filed by Les Miles in Duval County Case, Hough v. Bailey.

11. April 7, 1983, Motion for Permission to Intervene of Les Miles, denied.

12. January 19, 1984, verdict in favor of Hough requiring Bailey to convey deeds back to Hough.

13. March 1, 1984, Les Miles Quit Claim Deed of remaining one-half interest in property to McIntosh (consideration is forbearance of $20,000.00 loaned to Les Miles on January 6, 1983).

14. June 27, 1984, McIntosh pays off at discount ($18,000.00) T.B.F. Properties, Inc.'s mortgage.

Those are the dates, here is what happened.

Hough owned the property in St. Johns County which is the subject of this lawsuit. Hough and Louise T. Bailey were

married. Hough leased the property to Henry Communications. When Henry Communications did not pay, Hough sued. Henry Communications, through its attorney Gregory Johnson, counter-claimed alleging fraudulent misrepresentations by Hough. (R-389 p7-13). Henry Communications prevailed and won a judgment against Hough in the amount of $45,000.00. Hough and Louise T. Bailey conspired to avoid having this property and other properties owned by Hough levied upon to satisfy the Henry Communications judgment. To do this, they obtained a sham divorce and he conveyed the property to her by Warranty Deed. (R-886) It is undisputed that this was their intention. Hough admitted that the real property, including the property in question, was transferred to avoid execution. (R-389) (A-12). Further, Hough himself stated he had "soiled hands" with regard to the subject property. (R-389 p13, lines 19-23; pp. 14-15, lines 12-25 and line 1; pp. 32-33, lines 20-25 and line 1; (A-12-14, 16 & 17):

Page 13, lines 19 through 23

Q And why did you transfer the property to Ms. Bailey?

A To -- to hold -- to keep the judgment from being executed. This was the primary reasons for it. I transferred it to her.

Pages 14 through 15, lines 12 through 25 and line 1

Q How did you decide to transfer the property which is the subject of this

lawsuit to Ms. Bailey to keep it from being executed on? . . .

A How did I decide to do it? I decided to transfer the property to her, then we would get a divorce and after I worked the thing out we would get married again. That would give me time to raise the $50,000.00. . .

Q Was the transfer made as part of looking towards a divorce settlement?

A No.

Pages 32 through 33, lines 20 through 25 and line 1

Q And as part of that arrangement you all were going to get a divorce so that that would look like it was severing her from you and that this property would be severed then apparently on the record from you, is that correct?

A This is the way I picked up the soiled hands, yeah.

Deposition of L. H. Hough taken November 9, 1988. (R-389) (A-10).

Apparently, there was an agreement that at some point in time she would convey the property back to him. Presumably this would occur after he had resolved by appeal or otherwise satisfied the judgment held by Henry Communications against him. Gregory Johnson, attorney for Henry Communications found out about the sham divorce and the conveyance of the land and brought suit against Hough and Louise T. Bailey for fraud.

Page 21, lines 7 through 22

A I think when that -- I think you can understand it better -- at this point of the game Ms Bailey and I both were part of the lawsuit as far as the fraud part

> of the lawsuit about transferring the property, she become then a part of the property. They were going to sue us together for fraud is what it amount to, civil fraud, and then -- let's see. Fred was paid off the $52,000, it all boiled down that I was to get the property back at that point, that all of the provisions had been met, had been met at that time as soon as Fred received back the money.
>
> I know that sounds a little confusing but what it amounted to was she was just as guilty as I was at that stage of the game and she seen an opportunity to get out of it slick as a whistle by paying -- by me paying Fred in full.
>
> Deposition of L. H. Hough taken November 9, 1988. (R-389) (A-15).

Hough then borrowed the money from his brother Fred to post a supersedeas bond in the Henry Communications appeal.

Louise Bailey created T.B.F. Properties, Inc. and deeded the property from herself to T.B.F. Properties, Inc. Hough made demand upon Louise Bailey to return or re-convey the deed to him and she refused. Hough then filed a lis pendens and the lawsuit in Duval County against Louise Bailey and T.B.F. Properties to seek a recovery of the deeds. After the lis pendens and lawsuit were filed T.B.F. Properties deeded the properties to Les Miles and he in turn deeded an undivided one-half interest in the property to McIntosh. During the pendency of the Duval action, Les Miles filed a Motion to Intervene in the lawsuit alleging that he was then the record title holder to the property and had an interest in the dispute between Hough, Bailey and T.B.F. Properties, Inc. Les

Miles' Motion to Intervene was denied. Later Les Miles conveyed the remaining one-half interest to McIntosh.

After the Duval action was finally concluded and Louise Bailey was ordered to convey the property back to Hough, Ronald Guy "Buck" McIntosh was contacted and told he could pay off T.B.F.'s mortgage at a discount. On June 27, 1984, he took two cashier's checks of $9,000.00 each and paid off the T.B.F Properties mortgage.

On August 18, 1985, Hough filed his suit to quiet title against McIntosh, et al. in St. Johns County.

THE CERTIFIED QUESTION

> "When a purchaser for value after lis pendens but without actual notice purchases property from the fraudulent grantee and then is denied the opportunity to intervene in the pending action, may he raise equitable estoppel by virtue of the unclean hands doctrine in a subsequent action brought by the fraudulent grantor?"

This is the question certified by the Fifth District Court. Appellant would submit that the trial court, the Fifth District and anyone who reads the factual basis for Hough's position in this claim all agree that he should not prevail. It would be unfair and inequitable! It was the trial court's concern that Watkins v. Watkins and Miller v. Berry applied and therefore Hough had to prevail. The Fifth District's opinion clearly states that Hough should not prevail and that Miller v. Berry and Watkins v. Watkins were not applicable to the facts of this case. Nonetheless, the Fifth District's ruling seems to follow the holding of those cases. Appellant would submit that the Fifth District did not want to, nor should it have attempted to, overrule opinions of the Supreme Court. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). The proper procedure was to certify the question to this Court.

The certified question can best be analyzed and answered by separating it into two considerations. The first is what

effect does the existence of the lis pendens and the denial of Miles' Motion to Intervene have upon Miles and his successor McIntosh. The second question is whether Hough should be denied relief under the doctrine of equitable estoppel by virtue of the clean hands defense.

SUMMARY OF ARGUMENT

Issue One

WHETHER THE EXISTENCE OF THE LIS PENDENS AND THE DENIAL OF LES MILES' MOTION TO INTERVENE PREVENT APPELLANT FROM DEFENDING AGAINST THE FRAUDULENT GRANTOR'S SUIT TO QUIET TITLE.

The doctrine of equitable estoppel can and should be applied in this case to defeat the existence and effect of lis pendens. Failure to allow Miles to intervene defeated the purpose of the lis pendens, therefore Miles and his successor McIntosh should not be bound by the Duval County action. To allow the lis pendens and denial of intervention to defeat an otherwise valid defense would yield most inequitable results.

Issue Two

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE CLEAN HANDS DOCTRINE WAS NOT AVAILABLE AS AN AFFIRMATIVE DEFENSE TO RONALD GUY McINTOSH BECAUSE HE DID NOT HAVE ANY INTEREST IN THE REAL PROPERTY AT THE TIME OF THE CONVEYANCE TO DEFRAUD CREDITORS.

Equitable estoppel and in particular the clean hands doctrine apply to the actions of Hough in this case. Hough's actions and silence were intended to benefit himself and were relied upon by McIntosh and his predecessors in acquiring their interest in the property. Equity must preclude Hough from benefiting from his own wrongdoing.

ARGUMENT

ISSUE ONE

WHETHER THE EXISTENCE OF THE LIS PENDENS AND THE DENIAL OF LES MILES' MOTION TO INTERVENE PREVENT APPELLANT FROM DEFENDING AGAINST THE FRAUDULENT GRANTOR'S SUIT TO QUIET TITLE.

> No man can, on account of his own fraud and executing it, avoid his own deed by which an estate has passed. He is estopped from so doing. Cotton v. Williams, 1 Fla. 37 (1846).

It is McIntosh's position that the trial court erred in granting the summary judgment under the mistaken belief that the lis pendens somehow affected Appellant's right to argue that Hough should equitably be estopped because of his unclean hands. The Courts could not conceivably allow a lis pendens to prohibit a person from raising equitable defenses, especially when that person was not allowed to participate in the litigation subject to the lis pendens.

> "The purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation." Berkley Multi-Units, Inc. v. Linder, 464 So.2d 1356, 1357 (4th DCA 1985).

When a person who has an interest in property finds out by lis pendens or some other form of notice that the property

is involved in litigation, that person may then intervene to protect or defend his interest and the lis pendens or notice has served its purpose. If intervention is denied the person should not be bound by the results and should not forfeit a valid defense. The trial court specifically ruled that Miles and McIntosh were not bound by the judgment of the trial court in the Duval County action. (R-850) This is because they were not parties to the action and were not allowed to intervene. This finding of fact and ruling by the court was never challenged by Hough.

Another way of looking at the purpose of the lis pendens was stated in the Supreme Court decision of Intermediary Finance Corporation v. McKay, 111 So. 531 (Fla. 1927). The Fifth District Court's opinion cites McKay for the general description of what a lis pendens is and states:

> "The doctrine of lis pendens is grounded on the theory that the parties to the suit will not be permitted to withdraw or alienate the subject matter thereof pending litigation. The adoption of any other view would overthrow the whole doctrine." McKay at 532.

The McKay decision goes on to state that the purchaser pendente lite contended there were other and special reasons and equities in his favor so that he should have been permitted to intervene. The Court states:

> "If such special reasons or equities were shown to exist they might be considered;

> but we have examined the record carefully and they are not made to appear. No fraud is charged, and for all the record discloses he was a man sui juris. He may have made a bad bargain, but under the showing made here a court of equity can give him no relief." McKay at 532.

It is clear that the Supreme Court in 1927 recognized that under a proper showing in an equitable action, even in the face of a lis pendens, a purchaser pendente lite would be entitled to intervene and defend his interest in the subject matter of litigation. The Appellant would submit that the record clearly supports the equitable defense he wishes to raise and which would have been raised had the Motion to Intervene been granted. The Appellant would further submit that even though the Motion to Intervene was not granted, it is totally contrary to the logical implications of procedural law and equity for Hough to prevail. If part of the purpose of the lis pendens is to prevent parties to the suit from alienating the subject matter while the suit is pending there must be a remedy when a totally inequitable result would occur if that alienation was done. Bailey created T.B.F. Properties and conveyed to Les Miles after she knew about the lawsuit and after she knew about the lis pendens. Miles did not know of either; nor did McIntosh. Where Miles has a valid and strong defense which is supported by the record, he should have been allowed to intervene and try to defend his interest in the

property. While the general rule is that a purchaser pendente lite takes subject to the decree or judgment there must be a recognized means for relief when an inequitable result would occur. This is precisely what the court was suggesting McKay and what must occur in this case.

If Hough is allowed to prevail against McIntosh, the record titleholder, then the unclean hands doctrine in Florida is without meaning. As admitted by Hough, his hands are "soiled". In soiling his hands, Hough jeopardized his title to the subject property and should not now be heard to complain.

Another aspect of Hough's lack of entitlement to prevail is that when Les Miles sought to intervene in the Duval action Hough sat silent and in total disregard of the position that Les Miles and his successors would find themselves in should Hough prevail. "If a man is silent when he ought to speak, equity will bar him from speaking when conscience requires him to keep silent." Hennessy v. Hudson, 100 Fla. 967, 131 So. 315 (Fla. 1930)

Equity will not allow a party to wait until another has improved property so that it becomes valuable before asserting an equitable claim. Gables Racing Association v. Persky, 148 Fla. 627, 6 So.2d 257 (1941). This is essentially what Hough has done in this action by waiting until McIntosh had paid

considerable money into the purchase of the property, maintained the property, and watching its value increase substantially before bringing his action.

Several cases specifically deal with equitable estoppel and the basic concept as it relates to legal title to property.

> "Legal estoppel or estoppel by deed is defined as a bar which precludes a party to a deed and his privies from asserting as against others and their privies any right or title in derogation of the deed, or from denying the truth of any material fact asserted therein." Leffler v. Smith, 388 So.2d 261 (5th DCA 1980) citing Cook v. Katiba, 190 So.2d 309, 311 - 312 (Fla. 1966).

Cook v. Katiba, 190 So.2d 390 (Fla. 1966), Leffler v. Smith, 388 So.2d 261 (5th DCA 1980), Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961) and Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950). The Trustees v. Lobean case was a certified question which led this Court to reassert the concept that by equitable estoppel a party is prevented from setting up his legal title to land because through his acts, words or silence, he has led another to take a position in which the assertion of his legal title would be contrary to equity and good conscience. This basic concept is followed in the other decisions just mentioned and should be applied by this Court in this case.

The Courts of this State have long recognized that the powers of equity can overcome the procedural provisions of law to assure fairness and justice. In Doyle v. Tutan, 110 So.2d 42 (3d DCA 1959) it was recognized that the doctrine of equitable estoppel may be applied against a lis pendens. The appellant/complainant Doyle had purchased the property from Greer Enterprises, Inc. during the pendency of a suit against Greer by Charles B. Tutan as executor of the Estate of Lorna Higgins. The suit resulted in a decree holding that the estate was the owner. The appellant brought suit to avoid the effect of that decree, and to have herself declared to be the owner and to quiet her title. The court held that the complaint filed by the purchaser of property after a notice of lis pendens had been filed was sufficient to state a cause of action against the executor who benefited from the sale and then remained silent while the Plaintiff made monthly payments on the mortgage.

Although the facts are somewhat different there are many similarities and compelling features about Doyle which are significant in the instant case. In both cases, the wrongdoer knowingly stood by and permitted the purchase of the property from a third party represented as being the owner while he, the wrongdoer, was claiming ownership thereof through his lawsuit and did not reveal his position. Here McIntosh's

predecessor in title tried to intervene but was not allowed to do so. The results were the same. Similarly, in Doyle it was alleged that the wrongdoer continued in his silence for more than a year following the purchase of the property before making his demand to enforce his favorable decree against the appellant and that during that period the appellant made the monthly payments on the outstanding mortgage. The court set forth the principle that

> "If one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not there afterwards be permitted to exercise his legal right against such person." Doyle, citing Coram v. Palmer, 58 So. 721, 722 (Fla. 1912).

Estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction in so far as it imposes a liability or restriction on him, or, in other words, it precludes one who accepts the benefit from repudiating the accompanying or resulting obligation. One of the most important applications of the rule is to prevent a party from establishing a right or title in himself, under one . . . implication of a deed or other instrument, by ignoring or contradicting another . . . implication which is destructive or fatally repugnant. 19 Am. Jur. Estoppel §64

Shortly after the Doyle v. Tutan decision the Second District Court of Appeals decided Hallam v. Gladman, 132 So.2d 198 (2d DCA 1961). This case discussed the applicability of equitable estoppel relating to transfers of land and delay by the person then claiming title thereto. The court discussed the essential ingredients of equitable estoppel and found them to be:

> (1) Words and admissions, or conduct, acts, and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things. (2) In which the person so speaking, admitting, acting, and acquiescing did so willfully, culpably, or negligently. (3) By which such other person is or may be induced to act so as to change his own previous position injuriously. Hallam, at 209

The court interestingly noted that the plaintiff after the lapse of many years now spoke to assert a claim in what because of the defendant's efforts, expenditures and sacrifices had greatly increased in value. The reasoning of the court in upholding the trial court's ruling against the plaintiff was that

> with timely action by plaintiff, the attorney Wilson could have cast light upon many issues brought into controversy in this dispute . . . Instead, these matters were not asserted until Wilson was in his terminal illness. Hallam, at 209

If Les Miles had been allowed to intervene the parties' rights and obligations could have been decided long ago, certainly long before McIntosh paid considerable amounts of money on the mortgages.

More recently, and perhaps more to the point factually, is the decision of Hensel v. Aurilio, 417 So.2d 1035 (4th DCA 1982). In this decision the appellate court reversed an injunction requiring the buyer of property to remove portions of newly constructed buildings encroaching upon easement right of way to land owned by the property owner. The trial court after trial entered a Final Judgment holding, in essence that while the appellee's (property owner's) act of surreptitiously creating the easement was "sneaky and deceitful", the easement was nonetheless legal, valid and enforceable. The appellate court properly recognized that

> even if [they] were to find justification in the record for the trial court's finding that an easement existed, [they] could not condone its enforcement. This complaint sought equitable relief, indeed, the Final Judgment provided the kind of relief available only in equity . . . He did in fact execute an affidavit which tended to negate the existence of any easement.
>
> We therefore conclude that application of the doctrine of equitable estoppel would and here should preclude Appellee equitable relief (enforcement of an easement). . . In addition, we equate "sneaky and deceitful" with "unclean hands"; therefore, Appellee's efforts to

> enforce his easement in equity should have been frustrated by application of the clean hands doctrine. Equity will stay its hand where a party is guilty of conduct condemned by honest and reasonable men. Unscrupulous practices, overreaching, concealment, trickery or other unconscientous conduct are sufficient to bar relief. Hensel, at 1038

Likewise, in the instant case, the trial court and the District Court recognized fully that the plaintiffs' actions were "sneaky and deceitful", but believed the lis pendens somehow made Hough's request for reconveyance of the property appear legal, valid and enforceable. Following Hensel, even if a valid lis pendens existed, the trial court should not have condoned Hough's conduct. Instead, Hough should be precluded from enforcing, in equity, any alleged rights he claims to the subject property.

The purpose of the lis pendens is to put people on notice of the legal action pending concerning the property and to keep litigants to the property from devising the property pendente lite. Although Miles did not have knowledge of the lis pendens nor did its existence keep Louise Bailey from devising the property during the litigation if he had been allowed to intervene the clean hands defense would have been raised and Hough's fraudulent conduct exposed. The effect of the denial of Miles' Motion to Intervene defeated the purpose of the lis pendens.

The results reached in Doyle v. Tutan, Hallam v. Gladman and Hensel v. Aurilio are similar. In each case the losing party tried to take advantage of their own wrongdoing, but the court denied them relief when they sought equity. The facts of this case cry out for the same protection that only equity can bestow.

ISSUE TWO

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE CLEAN HANDS DOCTRINE WAS NOT AVAILABLE AS AN AFFIRMATIVE DEFENSE TO RONALD GUY McINTOSH BECAUSE HE DID NOT HAVE ANY INTEREST IN THE REAL PROPERTY AT THE TIME OF THE CONVEYANCE TO DEFRAUD CREDITORS.

In the case of Rinker Materials Corp. v. Palmer First Nat. Bank, 361 So.2d 156 (Fla. 1978), this Court delineated the essential elements of equitable estoppel.

> "As related to the party to be estopped, (they) are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to

> the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." Rinker at 157.

The Appellant would assert as to Hough, the party to be estopped, the three elements are met. As to Miles and his successor McIntosh the three elements of the party claiming the estoppel are met.

The trial court was mistakenly of the belief that the lis pendens and the Fifth District Court's ruling that it was valid was controlling on the issue of whether or not the affirmative defense of unclean hands could be raised by McIntosh. (R-909 p2) (T-34) As a result of this mistaken belief the trial court accepted Hough's position that McIntosh and Les Miles were not the creditors that Hough intended to defraud and therefore have no right to complain of his misconduct. Fortunately, the Fifth District recognized the inequitable results that would occur.

Hough seems to contend that, by filing the lis pendens and lawsuit to recover the deed back from his ex-wife, he somehow cleansed his hands of all the wrongdoings that they undertook when he deeded the property to her in the first place.

> "He cannot engage in such reprehensible conduct as the record discloses and then

> use the courts of this state to wash his dirty linen." Hennessy, supra, at 316.

If Les Miles would have been allowed to intervene in the Duval action, as he tried to do, the court could have properly resolved all the issues concerning Hough's equitable entitlement to recover the property. Of course, since Hough objected to the intervention Les Miles was not allowed to participate in that action. Accordingly, McIntosh's only opportunity for a determination of how Hough's misconduct affected McIntosh's rights to the property is the instant case.

The case of Miller v. Berry, 78 Fla. 98, 82 So. 764 (Fla. 1919), was relied upon by Hough in support of the court's granting summary judgment in his favor. Miller v. Berry is misconstrued by Hough and misapplied by the court. A close reading of Miller v. Berry reveals this error. Berry deeded to Miller to defraud his wife. Miller's already existing judgment creditors attempted to levy on the land. Berry sued to enjoin Miller and the creditors from levy and sale of the property. The issue before the Court in that case was what rights, if any, did the judgment creditors of Miller have. The Court found that the judgment creditors had no rights. There was a twofold reason for their holding. First, Miller never owned the property nor held any beneficial interest in

the property (the parties conceded this). Secondly, and more importantly, all the judgments against Miller existed before he acquired the deed in question. Credit was not extended nor any judgment recovered upon the faith of the record title in Miller. The Court felt that the position of the judgment creditors had been in no way affected by the transaction in question. Since no substantial right was acquired on the faith of or by reason of the record showing an interest in the judgment debtor, the Court felt Berry should not be prevented from getting back his property. In the instant case, however, there have been substantial rights and obligations acquired on the faith of and by reason of the record showing an interest in Louise Bailey and T.B.F. Properties. This is precisely the reason why Miller v. Berry does not apply to support the trial court's ruling in this case. Here credit was extended by the creation of mortgages on the property which Les Miles undertook to pay, mortgages that did not exist at the time Hough did his misdeeds. McIntosh has paid the mortgages, the taxes on the land, and has maintained the property. The value of the land has increased greatly. Substantial rights and liabilities were acquired on the faith of the title in T.B.F. Properties.

The Supreme Court in Miller went on to discuss as "dicta" the maxim, "He who comes into equity must come with clean

hands". The Miller Court noted that even though this defense was not raised by the Defendants it did not really apply. The Court felt that Berry was guilty of no misconduct against the then existing judgment creditors of Miller. The clean hands doctrine must apply and does apply here because Hough's misconduct is directly connected with the matter in litigation, that is his right to title to the property. His misconduct affects his equitable right asserted against McIntosh through his predecessor, Les Miles. In response to the court's observation that

> "a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject matter of the suit, and which prejudicially affect the rights of one against whom relief is sought." Miller, supra, at 765.

McIntosh would assert that the title to the property after Hough conveyed it to Bailey was involved in the subject matter of Hough v. Bailey and in this case, Hough v. McIntosh. McIntosh would also submit that the wrongs committed by Hough prejudicially affect the rights of McIntosh, the one against whom relief is sought.

Clearly the dicta in Miller v. Berry would support this Court in ruling that the clean hands doctrine should be applied against Hough.

Hough also relies upon the case of Watkins v. Watkins, 166 So. 577, (Fla. 1936). That case relies upon the decision of Kahn v. Wilkins, 36 Fla. 428, 18 So. 584 (Fla. 1895). The Watkins decision cited Kahn for the principle that a fraudulent conveyance between a fraudulent Grantor and Grantee is good as between the parties and vests title in the Grantee. Since there were no creditors involved in Watkins the Court found that the complainant who was the Grantee retained title which had already been vested. The Court further noted that the Watkins suit was to establish title already vested in the complainant as distinguished from one in which a reconveyance was sought. That is what Kahn sought to accomplish in his suit against Wilkins, a reconveyance of the goods which he had fraudulently transferred to Wilkins. Likewise, in this case, Hough seeks a reconveyance of the property now held by McIntosh.

In Kahn v. Wilkins, Kahn transferred his business to Wilkins to defraud his creditors. When Wilkins refused to deed the property back to him Kahn filed a complaint seeking reconveyance of the stock. Kahn's complaint was dismissed because it was clear from the evidence that the purpose of the conveyance was to defraud creditors. The Court recognized the established rule of law that:

> all deeds, conveyances, and bills of sale entered into for the purpose of

> defrauding creditors are valid between the parties, and such fraudulent conveyances vest title absolutely in the Grantees, and secure to them a perfect estate, except as to those persons actually defrauded by the transaction. Kahn, at 586.

The Court went on to state that, while the courts generally recognize the rule that a conveyance of property to defraud creditors is good as between the parties thereto, in its application some confusion has arisen over the distinction between executed and executory contracts, and to what extent a court will enforce obligations between the parties resulting from such a conveyance: "The questions suggested are not decided, as it is not necessary to pass on them here." Kahn at 587. It is clear that the decision in Kahn held only that the fraudulent conveyance was good between the Grantor and the Grantee. The Court did not go on to determine to what extent other persons would be affected. The Court did suggest, however, that:

> If Appellant sold and conveyed his stock of goods for the purpose of defrauding his creditors, he, of course, cannot be heard in a court of justice to question the sale. Kahn at 586.

The Watkins decision also cites Miller v. Berry; however, it misconstrues the Court's holding in that decision. It was the dicta in Miller v. Berry which is cited by the Watkins Court as the holding of the decision. The Miller v. Berry

decision, as set forth earlier in this argument, turned on the fact that there were no substantial rights acquired on the faith of or by reason of the record showing an interest in the property in the judgment debtor, Miller. Since there was no credit extended nor any judgments recovered upon the faith of the record title in Miller, there was no reason to keep Berry from showing the true facts concerning his misconduct in deeding the property to Miller.

The Miller v. Berry decision is more pertinent to this case than either Watkins or Kahn. In Miller the Court recognized that unless it could be shown that title was allowed to appear in Miller under such circumstances as to estop Berry from asserting title against Miller's judgment creditors, those creditors would have no rights. Here, however, unlike the judgment creditors of Miller, McIntosh and Les Miles, as a direct result of the fraudulent doings of Hough and Bailey, have acquired rights to their detriment by reason of the record showing an interest in the property prior to their acquisition of the same.

> "Generally, when one purchases property and causes title to be taken by another for the purpose of thwarting his creditors, a court of equity will not aid him in extricating himself from the situation he has created." Scott v. Sites, 41 So.2d 444 (Fla. 1949)

The cases submitted by Hough in support of his Motion for Summary Judgment are misplaced and do not address the real

issues of law involved in the facts of this case. The Watkins Court did, however, discuss generally the concept of estoppel which was part of the Court's concern in Miller v. Berry. The Court recognized that for estoppel to preclude the complainant, or someone in a similar position such as Hough has placed himself in this lawsuit, his conduct must have been fraudulent, believed in, relied on, and acted upon by the other party. Hough's deed to Bailey was fraudulent, it was believed in, relied upon and acted upon by Les Miles and his successor Appellant McIntosh.

The application of Miller and Watkins to the facts of this case would give the wrong emphasis to the common law doctrine of equitable estoppel by virtue of unclean hands and would not accurately reflect the meaning of the principle. There is no clear and distinct ruling that will guide the courts of this state or its citizens. Clearly, most of us understand what we believe to be the proper principle, that is, that one cannot deed away his property for his benefit (to defraud creditors) and later repudiate the deed and take back the property. This Court must clarify this issue and prevent Hough from accomplishing a most unjust and inequitable recovery of property which he gave away for the explicit purpose of deceit.

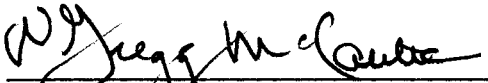
CONCLUSION

The trial court m sapplied the law relied upon by Hough. Even in the face of a lis pendens, a party seeking equity may be barred from relief because of the clean hands doctrine.

Hough and Bailey set into motion all of the transactions pertinent to this controversy. Hough took advantage of his fraudulent conveyance and now he wants the property back from McIntosh, the real titleholder. Equity must not allow Hough to benefit from his own "soiled hands".

Respectfully submitted,

MAHON, FARLEY, & McCAULIE, P.A.

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits filed by Ronald Guy McIntosh has been furnished TYRIE A. BOYER, ESQUIRE, 3030 Independent Life Building, Jacksonville, Florida, 32202; ROBERT T. HYDE, JR., ESQUIRE, 1300 Gulf Life Tower, Jacksonville, Florida, 32207; CARL D. DAWSON, ESQUIRE, 320 East Adams Street, Jacksonville, Florida, 32202; LAVINIA K. DIERKING, ESQUIRE, P. O. Box 1873, Orlando, Florida, 32802, and DAVID FEREBEE, ESQUIRE, 4655 Salisbury Road, Suite 390, Jacksonville, Florida, 32256, by mail, this 19 day of July, 1991.

ATTORNEY