SUPREME COURT OF FLORIDA

CASE NO.: 86,646

THIRD DCA CASE NO.: 94-0665
94-1586

BANCFLORIDA, a federal savings bank,

Petitioner,

vs.

ROBERT T. HAYWARD and DORA HAYWARD, his wife, et al.,

Respondents.
_____/

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases — Page

Rules

PRELIMINARY STATEMENT

This is an appeal by the Defendant, BANCFLORIDA which seeks review of the following question certified by the Third District Court of Appeal as being of great public importance:

> "Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?"

Moreover, BANCFLORIDA seeks review of the opinion of the Third District Court of Appeal filed on September 6, 1995 on the basis that it is in direct and express conflict with previous decisions of the Third District Court of Appeal and of this tribunal. Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Defendant/Petitioner, BANCFLORIDA, a federal savings bank, shall be referred to in this brief as "BANCFLORIDA". The Intervenor Plaintiffs/Respondents, ROBERT T. HAYWARD and DORA HAYWARD, his wife, et al. shall be collectively referred to in this brief as "the Contract Purchasers".

The Plaintiffs, SHORES CONTRACTORS, INC. and SHORES LAKESIDE, INC., shall be individually and collectively referred to herein as the "DEVELOPER". A non-party, American Newland Associates, a California general partnership, shall be referred to in this brief

as "American Newland."

All references to the record shall be designated ("R") All references to the Appendix served by BANCFLORIDA (R. 18) shall be designated ("A").

STATEMENT OF THE FACTS AND OF THE CASE

The DEVELOPER was in the business of developing and improving real property and building single family residences in various subdivision housing projects in Dade County, Florida. (A 11) These projects included the Oakwood, Shoreline and Lakeside developments. (A 11). American Newland owned the real property in these developments. The DEVELOPER held an option to acquire individual lots from American Newland. (A 6,7)

To develop these projects into single family homes, the DEVELOPER entered into an oral agreement with BANCFLORIDA to provide funds for the acquisition of the individual lots and for the construction of single family homes on those lots. (A 11) The credit arrangement was used by the DEVELOPER in two ways.

The first and most frequent method of lot acquisition and construction required that the DEVELOPER obtain a written purchase and sale agreement on a particular lot from a pre-qualified purchaser. Once this agreement was obtained, the DEVELOPER then

sought financing from BANCFLORIDA to both acquire the lot from American Newland and to fund construction of the residence. (A 6,7) After receiving confirmation that there was a contract on the lot, that a deposit had been received, and other conditions precedent had occurred, including the procurement of an end loan commitment and title commitment, BANCFLORIDA, in these instances, then provided an acquisition and construction loan to the DEVELOPER to be secured by a first mortgage on the lot. (A 8) A portion of the loan proceeds in each instance was then disbursed by BANCFLORIDA to the DEVELOPER to acquire the specific lot from the Seller, American Newland. (A8)

Eighteen (18) transactions which occurred in this fashion are the subject of this appeal. In each and every instance, BANCFLORIDA funds secured by a purchase money mortgage were paid to American Newland for the acquisition of the real property. (A 8)

On rare occasions, the DEVELOPER employed a second method of lot acquisition and construction. It purchased undeveloped subdivision lots from American Newland and held them in inventory. In these instances, the property was purchased from American Newland with funds the DEVELOPER borrowed from BANCFLORIDA. BANCFLORIDA simultaneously recorded a valid first purchase money mortgage on each parcel. (A 6,7) Thereafter, the DEVELOPER

eventually entered into a purchase and sale agreement with a purchaser which obligated the DEVELOPER to construct a home on the inventoried lot.

BANCFLORIDA then provided the DEVELOPER with the funds to build the home. A portion of the first advance from the construction loan proceeds was used to satisfy the previous BANCFLORIDA mortgage and a new first mortgage from the DEVELOPER to BANCFLORIDA was recorded. (A 8)

There were four (4) transactions which occurred in this fashion which are the subject of this appeal. In each instance, BANCFLORIDA disbursed funds from the construction loan proceeds to satisfy its previous purchase money mortgage and promptly recorded a substitute mortgage. (A 8)

Regardless of the method by which the property was acquired, pursuant to each purchase and sale agreement, a ten (10%) percent deposit was required of each Contract Purchaser. In many instances, further progress payments were made to the DEVELOPER by the Contract Purchasers after construction commenced. None of these funds were used to acquire the real property.

None of the twenty-two (22) residences in question were ever completed by the DEVELOPER. Consequently, the DEVELOPER failed and refused to close on the sale of the subject property to each

Contract Purchaser.

These failures, the DEVELOPER alleged, were the fault of BANCFLORIDA. (A 11) The DEVELOPER filed suit against BANCFLORIDA and others, alleging, inter alia, the breach of various construction loan agreements.[1]

In turn, BANCFLORIDA sought foreclosure of its mortgages on the properties owned by the DEVELOPER. Each of the lots under contract to the Contract Purchasers was subject to a BANCFLORIDA foreclosure claim. (A 10)

Later, the Contract Purchasers intervened. (A 24) Each Contract Purchaser claimed an equitable lien on the specific property described in their purchase and sale agreement. Each Contract Purchaser alleged an entitlement to an equitable lien to the extent of the deposits and progress payments paid to the DEVELOPER. Each Contract Purchaser claimed an equitable lien superior in time and dignity to the mortgage held by BANCFLORIDA which encumbered the same property. BANCFLORIDA responded, alleging, inter alia, the superiority of the purchase money mortgages based upon their special status accorded by Florida law. (A 14,16,18,20,22)

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[1]After a jury trial, Final Judgment was rendered in favor of BANCFLORIDA on all claims of the DEVELOPER.

By agreement of all parties, a Summary Final Judgment of Foreclosure was entered in September 1993 establishing the right of BANCFLORIDA to foreclose on each of 51 mortgaged properties owned by the DEVELOPER, including the 22 under contract to the Contract Purchasers. (A 23) Each of the foreclosed properties was sold at foreclosure sale and BANCFLORIDA was the successful purchaser. Each sale was the result of a credit bid by BANCFLORIDA against the amounts owed to it under the notes and mortgages it held on each of the parcels. (A 23)

By stipulation and agreement between BANCFLORIDA, the Contract Purchasers and the DEVELOPER, the properties were then sold in bulk by BANCFLORIDA to a third party and the net proceeds were deposited in an escrow account. (A 23) Each of the parties to that stipulation and agreement agreed that whatever lien or claim which each might have had against the real property will constitute a continuing lien against the sale proceeds, pending the ultimate determination of the entitlement and priority of the competing lien claims. (A 23)

The Contract Purchasers filed motions for summary judgment on the basis that their equitable lien claims were superior to the BANCFLORIDA mortgages. BANCFLORIDA insisted its mortgages were superior to the equitable lien claims on each residential lot. (A 8,9)

The trial court ruled that the loans from BANCFLORIDA to the DEVELOPER were not purchase money mortgages. (A 1) Thereafter, finding there was no issue of material fact, the court determined that based upon "all of the doctrines of equity", as a matter of law, the Contract Purchasers held equitable liens which were entitled to priority over the mortgages from the DEVELOPER to BANCFLORIDA. (A 1,2,3) From the orders granting the Contract Purchasers motions for summary judgment, BANCFLORIDA timely initiated two non-final appeals. The appeals were consolidated by the Third District Court of Appeal.

On Motion for Rehearing granted, the Third District Court of Appeal issued its opinion on September 6, 1995. (R. 28-37) In its decision, the court concluded that BANCFLORIDA was both a purchase money mortgagee and that it was a subsequent creditor with notice of the equitable claims of the Contract Purchasers against the properties. The court then discussed two decisions which, in its words, "epitomize the tension between the two theories": Carteret Sav. Bank v. Citibank Mtg. Corp., 632 So.2d 599 (Fla. 1994); and, Caribank v. Frankel, 525 So.2d 942 (Fla. 4th DCA, 1988). The appellate court noted that the priority of a purchase money mortgage may be subject to the equities of the particular

transaction and it held:

> "[W]e agree with the reasoning of Caribank that BancFlorida's actual knowledge of the contract purchasers' equitable liens against Shores, which arose before BancFlorida executed purchase money mortgage[s] to Shores as part of the construction loan, and indeed, at BancFlorida's insistence, gave the equitable liens priority over the purchase money mortgages."

The Third District of Appeal then certified the following question as being of great public importance:

> "Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?"

Thereafter, BANCFLORIDA timely filed its Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida. (R. 39-40). BANCFLORIDA petitioned this court to exercise its discretionary jurisdiction to review not only the question certified as being of great public importance, Fla.R.App.P 9.030(a)(2)(A)(v), but, also to review the entire decision upon the ground it directly and expressly conflicts with previous decisions not only of the Florida Supreme Court but of the Third District Court of Appeal as well. Fla.R.App.P 9.030(a)(2)(A)(iv). The Florida Supreme Court entered an order postponing its decision on

jurisdiction and set forth a briefing schedule. (R. 41).

SUMMARY OF THE ARGUMENT

Under Florida law, a purchase money mortgage is accorded a unique and special status. Purchase money mortgages are granted paramount priority on the property encumbered over any claims or liens which arise by or through the mortgagor. Accordingly, any claim or lien that the Contract Purchasers may have based upon purchase and sale agreements entered into with the mortgagor, the DEVELOPER, are inferior and subordinate to the purchase money mortgages of BANCFLORIDA. Whether BANCFLORIDA had actual or constructive notice of the purchase and sale agreements is irrelevant. In eighteen instances, the mortgage proceeds were utilized by the DEVELOPER to acquire the subject property from American Newland and a purchase money mortgage was simultaneously granted to BANCFLORIDA. In each such case, a valid first purchase money mortgage was created in favor of BANCFLORIDA, superior to the equitable lien claim of the respective Contract Purchasers to the extent the proceeds disbursed were used to acquire the properties and existing improvements.

Additionally, in four instances, at the time the Contract Purchasers entered into a purchase and sale agreement with the DEVELOPER, a valid first mortgage lien in favor of BANCFLORIDA was

of record and it put them on notice of the purchase money mortgage of BANCFLORIDA. BANCFLORIDA, by agreement with the DEVELOPER, then satisfied its own existing first mortgage lien on the subject property and recorded a new mortgage as part of the construction loan.

No intervening purchase and sale agreement can displace the rights of BANCFLORIDA to its first mortgage lien position where, as here, BANCFLORIDA satisfied the existing first mortgage lien and recorded a new mortgage securing the construction loan. Clearly, this disposition leaves these Contract Purchasers in no worse position than if the original mortgage lien of BANCFLORIDA had not been discharged. Under these circumstances, under Florida law, equity requires that BANCFLORIDA be subrogated to its rights under the satisfied mortgage.

ARGUMENT

I. A PURCHASE MONEY MORTGAGE HELD BY A LENDER WHICH REQUIRED A PRE-QUALIFIED CONTRACT PURCHASER BEFORE IT FINANCED THE ACQUISITION AND CONSTRUCTION LOAN SECURED BY THE MORTGAGE IS PRIOR AND SUPERIOR IN DIGNITY TO ANY EQUITABLE LIEN CLAIMED BY THE CONTRACT PURCHASER BUT ONLY AS TO THE AMOUNT OF THE PROCEEDS USED TO ACTUALLY ACQUIRE THE LAND AND EXISTING IMPROVEMENTS.

Under Florida law, as a general rule, when a purchaser or

creditor has actual or constructive knowledge of a prior unrecorded instrument, a person claiming through the unrecorded instrument has priority over the subsequent purchaser or creditor. Cases which apply the general rule are both longstanding and legion. See, e.g., Moyer v. Clark, 72 So.2d 905 (Fla. 1954). Thus, the recording act, Florida Statute 695.01, provides no protection to the property interest of a subsequent purchaser or creditor who has actual notice of an earlier unrecorded contract to convey, Krantz v. Donner, 285 So.2d 699 (Fla 4th DCA 1973), or, an unrecorded mortgage. Richmond v. Stockton, Whatley, Davin & Co., 430 So.2d 571 (Fla. 3rd DCA 1983).

However, as often happens, the cited general rule of law has several exceptions. One exception involves purchase money mortgages and it is dispositive of the legal issues here, requiring reversal of the ruling of the trial court and of the Third District Court of Appeal.

Florida law mandates purchase money mortgages take priority over any other prior or subsequent claims or liens which attach to the property through the mortgagor. Cheves v. First Nat. Bank, 83 So. 870 (Fla. 1920). Florida courts have consistently followed this precedent and have recognized purchase money mortgages as favored subjects of the law:

> "a purchase money mortgage, made simultaneously with the conveyance to the mortgagor, takes precedence over any lien arising through the mortgagor, even though the latter be prior in point of time."

Van Eepoel Real Estate v. Sarasota Milk Co., 129 So. 892, 897 (Fla. 1930) (emphasis supplied). See, National Title Ins. Co. v. Mercury Builders, 124 So.2d 132 (Fla. 3rd DCA 1960).

This exception has been applied to afford purchase money mortgage protection and priority over a myriad of prior claims and liens. A purchase money mortgage has been recognized to be senior to any claims of dower and homestead, Van Eepoel, supra., as well as prior judgment liens, Associates Discount Corp. v. Gomes, 338 So.2d 552 (Fla. 3rd DCA 1976), and prior welfare liens. County of Pinellas v. Clearwater Fed.Sav. & L. Assn., 214 So.2d 525 (Fla. 2d DCA 1968). In fact, a mortgage executed before a purchase money mortgage, but recorded after the purchase money mortgage, is subordinate, not superior, to the purchase money mortgage, Bruner v. Lamper, 555 So.2d 935 (Fla. 4th DCA 1990).[2]

However, purchase money mortgage protection applies only to the amount of the loan proceeds which were used to actually acquire

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[2]The opinion of the Third District Court of Appeal in this matter directly and expressly conflicts with the decisions in Cheves, Van Eepoel, Gomes, County of Pinellas and Bruner. Fla.R.App.P. 9.030(a)(2)(A)(iv).

the land and existing improvements. Carteret Sav. Bank v. Citibank Mortg., 632 So.2d 599 (Fla. 1994). Loan proceeds used for purposes other than acquisition of the property do not enjoy purchase money mortgage priority.

Therefore, under Florida law, to the extent any BANCFLORIDA mortgage proceeds were used on behalf of the DEVELOPER to pay American Newland to obtain title to a parcel, BANCFLORIDA has a purchase money mortgage which is superior to the equitable lien claim of the Contract Purchasers. The precise practice and procedure followed by BANCFLORIDA, the DEVELOPER and American Newland conclusively establishes the entitlement of the BANCFLORIDA mortgages to priority over the equitable lien claims of the Contract Purchasers.

Upon receipt of an executed but unrecorded purchase and sale agreement from a Contract Purchaser, the DEVELOPER would forward a copy of the contract and an end loan commitment to BANCFLORIDA. At the discretion of BANCFLORIDA, the DEVELOPER and BANCFLORIDA then entered into an acquisition and construction loan agreement, note, and mortgage. BANCFLORIDA was required to pay a predetermined purchase price to American Newland to have the specific lot released and titled in the name of the DEVELOPER. Monies were then placed into a trust account to be paid to American Newland in order

to have a deed issue from American Newland to the DEVELOPER. The BANCFLORIDA disbursements for lot acquisitions ranged from $25,515.00 to $44,887.50 per lot.

Simultaneously, the DEVELOPER, as mortgagor, and, BANCFLORIDA, as mortgagee, recorded a first mortgage lien upon the property. As such, each BANCFLORIDA purchase money mortgage is superior to all prior claims which arose through the mortgagor, the DEVELOPER, including but not limited to equitable lien claims arising out of each purchase and sale agreement of the Contract Purchasers which relate to the eighteen properties acquired by the DEVELOPER in this fashion.

Clearly the chief reason for this rule stems from the nature of a purchase money mortgage. Where a traditional purchase money mortgage is given by the seller and executed as part of the transaction wherein the property is conveyed to the buyer, the seller actually has a vendor's lien and the purchase money mortgage is merely a substitute which evidences and implements that lien. Van Eepoel, supra at 897. Indeed, if BANCFLORIDA had owned and optioned the sale of the real property instead of American Newland, yet, prior to any sale to the DEVELOPER, BANCFLORIDA insisted the DEVELOPER pre-sell the residence and secure an end loan commitment to ensure prompt payment of its purchase money mortgage, there can

be little doubt that any equitable lien claim of any Contract Purchaser would be subordinate and inferior to the vendor's lien of BANCFLORIDA.

The mere fact BANCFLORIDA was the mortgagee but not the seller does not in any way alter these priorities. Indeed, as long as the mortgage is executed in conjunction with the purchase and sale, it is a purchase money mortgage to the extent it secures the purchase price for the property even though the money was advanced by a third party. Sarmiento v. Stockton, Whatley, Davin & Co., 399 So.2d 1057 (Fla. 3rd DCA, 1981).

Moreover, the vendor's lien concept illustrates a fundamental flaw in the certified question. The Third District Court of Appeal presumed the purchaser had a prior equitable lien upon the property to be conveyed. However, at the time each of these eighteen purchase and sale agreements was executed, the DEVELOPER did not own the subject property but instead merely held an option to purchase, which under Florida law, creates no equitable interest or equitable remedy. Wolfe v. Doughtery, 137 So.717 (Fla. 1931). Without itself owning an equitable interest in the real property or even having an available equitable remedy, the DEVELOPER clearly could not convey an equitable interest to the Contract Purchasers or transfer to them an equitable remedy. In sum, the DEVELOPER had

no real property interest upon which an equitable "lien" could attach.

Respectfully, in addition to the misconception in the certified question, the opinion of the Third District Court of Appeal similarly suffers from three separate and distinct fundamental flaws (the "Opinion"). Each is an integral link in the chain of logic which lead to the incorrect result.

First, the Opinion erroneously expanded the very limited holding in Caribank. The decision in Caribank simply affirms the general rule that the recording act provides no protection to the property interest of a subsequent purchaser or creditor who has notice of an unrecorded conveyance or mortgage. Yet, the Opinion incorrectly states Caribank reasoned the purchase money mortgage exception to the recording act does not apply to an unrecorded conveyance by the mortgagor. To the contrary, importantly, the purchase money mortgage exception to the recording act was never raised, never argued and never discussed in Caribank. Accordingly, the Caribank court neither reasoned nor held that an equitable lien which arises from an unrecorded conveyance by the mortgagor takes priority over the lien of a purchase money mortgagee with knowledge of the conveyance.

Next, the Opinion seeks to distinguish the decision in

Carteret by incorrectly insisting Carteret did not deal with issues of lien priority. However, in fact, Carteret cited both Sarmiento, supra, and County of Pinellas, supra, for the proposition that "purchase money mortgages have priority over judgment liens previously entered against the purchaser". Moreover, the Opinion claimed that from a reading of the facts in the Carteret opinion, "it is not possible to determine whether Carteret had notice of the prior judgment". This erroneous conclusion is belied by the very recitation of the Carteret facts contained in the Opinion.

The Opinion noted that in its suit to foreclose a mortgage against some joint venturers, Carteret named additional lien holders including Citibank because the predecessor of Citibank held a "recorded judgment which predated Carteret's mortgage against one of the joint venturers". (e.s.) Pursuant to Florida law, Carteret indeed had notice of this prior 1987 recorded judgment at the time it entered into the 1988 mortgage with the joint venture. Sapp v. Warner, 141 So.124, 127 (Fla. 1932) (A subsequent creditor has constructive notice of the existence and contents of any document filed in the official record).

Finally, because it erroneously expanded the scope of the ruling in Caribank, the Opinion incorrectly surmises the Carteret court should have distinguished Caribank:

of the DEVELOPER should have revealed the existence of the option agreement with American Newland and the credit arrangements with BANCFLORIDA including but not limited to the requirement BANCFLORIDA imposed that it receive a valid first purchase money mortgage on the subject property as a condition of the acquisition loan.

In sum, a purchase money mortgage given to a mortgagor to simultaneously acquire the property encumbered is superior to any prior claim, conveyance, or lien created by the mortgagor. Here, the mortgagor, the DEVELOPER, created the equitable lien claims of the Contract Purchasers. The summary final judgments which determined the equitable lien claims have priority over the purchase money mortgages of BANCFLORIDA are clearly contrary to Florida law and accordingly, they must be reversed and the certified question answered in the negative.

II. BY VIRTUE OF THE DOCTRINES OF EQUITABLE SUBROGATION AND ESTOPPEL, BANCFLORIDA HAS THE ABSOLUTE RIGHT TO BE SUBROGATED TO THE PRIORITY IT HELD AS A FIRST MORTGAGEE IN EACH INSTANCE WHERE IT PAID OFF THAT DEBT WITH FUNDS FROM THE FIRST ADVANCE OF ITS CONSTRUCTION LOAN WITH THE DEVELOPER.

In four instances, Contract Purchasers entered into a purchase and sale agreement with the DEVELOPER after the DEVELOPER had

already acquired the specific property from the Seller, American Newland and each specific parcel was, at the time each contract was executed, already encumbered by a valid first purchase money mortgage lien in favor of BANCFLORIDA. Once BANCFLORIDA received the purchase and sale agreement, the end loan commitment and confirmation of the occurrence of other conditions precedent, it entered into a construction loan agreement with the DEVELOPER which required that the previous BANCFLORIDA mortgage be satisfied out of funds advanced under the new loan. Each construction loan agreement required a new first mortgage lien in favor of BANCFLORIDA to be placed on the subject property.

Upon satisfaction of the valid first purchase money mortgage, BANCFLORIDA was entitled to the priority established by the first BANCFLORIDA mortgage under the doctrines of estoppel and equitable subrogation. It was the intention of the DEVELOPER and BANCFLORIDA that BANCFLORIDA should have the same security it held under the acquisition loan, a valid first mortgage lien, when it satisfied each existing mortgage.

Under these circumstances, equity will not permit a competing or intervening lien to displace the priority "lost" by the satisfaction of a purchase money mortgage. In Schilling v. Bank of Sulphur Springs, 147 So. 218 (Fla. 1933), a third party purchase

money mortgage was utilized by the mortgagor to acquire certain property. Three years later, the purchase money mortgage matured and the mortgagor went to the Bank of Sulphur Springs in order to obtain a mortgage loan to satisfy the purchase money mortgage. At that time, there was a judgment lien against the mortgagor which predated the purchase money mortgage. The Bank of Sulphur Springs loaned money to the mortgagor to satisfy the original purchase money mortgage and recorded a new mortgage.

The Sulphur Springs court held that equity required the bank be subrogated to the rights of the original third party purchase money mortgagee. Equity, it was held, would not displace the purchase money mortgage, since this result would leave the holder of the judgment lien in no worse position than if the original purchase money lien had not been discharged. See also, Federal Land Bank of Columbia v. Godwin, 145 So. 883 (Fla. 1933) (New mortgage given by same mortgagee as renewal of old mortgage held to take priority over intervening mortgage). [3]

In summary, the doctrines of estoppel and equitable subrogation apply to place BANCFLORIDA in the shoes of the

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[3]As to the four purchase money mortgages created by the DEVELOPER and BANCFLORIDA in this manner, the Opinion expressly and directly conflicts with the holdings in Schilling and Godwin. Fla.R.App.P. 9.030(a)(2)(A)(iv).

satisfied lien creditor. The four purchase money mortgages of BANCFLORIDA were each satisfied with BANCFLORIDA funds based upon agreements with the DEVELOPER that BANCFLORIDA would have a first mortgage lien on the subject property. Each of the Contract Purchasers who entered into a purchase and sale agreement after the original BANCFLORIDA purchase money mortgage was placed on the subject property would be in no worse position in the event the doctrines are applied. Equity, indeed, mandates application of the doctrines in this instance to prevent an unjust forfeiture.

CONCLUSION

Under Florida law, a purchase money mortgage takes priority over any prior unrecorded claim or lien which arose through the mortgagor. This well settled exception to the general rule codified in the Florida recording act was not applied in this case.

BANCFLORIDA has a valid purchase money mortgage on eighteen lots upon which Contract Purchasers claim equitable liens. Each claims a lien through a purchase and sale agreement entered into with the DEVELOPER, the mortgagor. As such, each purchase money mortgage of BANCFLORIDA is superior in dignity to each of these eighteen equitable lien claims to the extent funds were advanced to acquire the properties.

Furthermore, BANCFLORIDA is entitled to be subrogated to its

original first mortgage lien position in those four instances where it satisfied its own first purchase money mortgage with funds advanced under a construction loan to the DEVELOPER which was secured by another BANCFLORIDA mortgage. Equity will not permit intervening Contract Purchasers to displace the acquired lien rights of BANCFLORIDA.

BANCFLORIDA respectfully requests this court exercise its discretionary jurisdiction, answer the certified question in the negative, and reverse the decision of the Third District Court of Appeal based on its conflict with Cheves, Van Eepoel, Gomes, County of Pinellas, and Bruner and its conflict with Shilling and Godwin.

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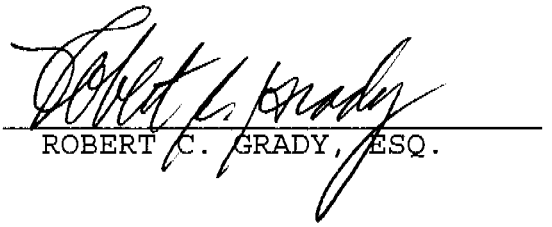
By: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 30th day of November, 1995, true and correct copies of the Initial Brief of the Merits were sent via U.S. mail to: Cynthia Byrne Hall, Sylverio & Hall, 44 West Flagler Street, Suite 2450; Miami, Florida 33130 and Glenn J. Holzberg, Esq., Two Datran Center, Suite 1209, 9130 South Dadeland Boulevard, Miami, Florida 33156.

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