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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1465
FED. T. NO. 2013-5098-5102

STEPHEN ROGERS, ET AL.,
appellants,

vs.

THE UNITED STATES OF AMERICA,
appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FEDERAL CIRCUIT

BRIEF OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR, AS *AMICUS CURIAE*

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IDENTITY OF INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally appear as *amicus curiae* to assist courts on issues related to our fields of practice.[1] Our Section has over 10,200 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the *amicus* committee of the Section, which is charged with preparing *amicus* briefs for the Section. In order to avoid even an

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[1] For example, see *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *North Carillon, LLC, v. CRC 603, LLC*, 135 So. 3d 274 (Fla. 2014); *Raborn v. Menotte*, 974 So. 2d 328 (Fla. 2008); *Chames v. DeMayo*, 972 So. 2d 850 (Fla.2007).

[2] Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

appearance of a conflict, Robert W. Goldman is the only co-chair participating in this case on behalf of the Section.

The Section's interest in this case stems from the Section's expertise and experience with Florida real estate law and the potential impact this case could have on fundamental principles of Florida real estate law.

SUMMARY OF ARGUMENT

The United States Circuit Court of Appeals, Federal Circuit, certified the following question to this Court:

> Assuming that a deed, on its face, conveys a strip of land in fee simple from a private party to a railroad corporation in exchange for stated consideration, does Fla. Stat. § 2241 (1892) (recodified at Fla. Stat. § 4354 (1920); Fla. Stat. § 6316 (1927); Fla. Stat. § 360.01 (1941)), state policy, or factual considerations—such as whether the railroad surveys property, or lays track and begins to operate trains prior to the conveyance of a deed—limit the railroad's interest in the property, regardless of the language of the deed?

There are no doubt pure eminent domain policy issues implicated in answering the certified question, which the Section believes are best addressed by the litigants and perhaps other friends of the Court. The Section's concern here is the potentially broader implications this Court's decision may have on real property jurisprudence. Indeed, the case has the potential to unsettle Florida law regarding the construction and enforcement of deeds if the Court generally

concludes that public policy or factual considerations limit an interest in land despite a deed's unambiguous language.

The following principles of Florida law are unbending and inveterate and stabilize Florida's real property law and the attendant commerce related to it.

Under Florida law, the intention of the parties recited in a deed governs the meaning of that deed. If there is no ambiguity in the language employed in a deed, then the intention of the parties must be ascertained from that language. In very limited circumstances, parol evidence may be employed to resolve an ambiguity in a deed. But, parol evidence may not be used to modify or otherwise change the meaning of the terms of a deed, including terms involving the nature of the interest conveyed and consideration. Further, parol evidence may not be used to create an ambiguity where none existed.

In addition, if a deed provides for valid consideration expressed as $1.00 or $10.00, the grantee of the deed is under no obligation to present parol evidence to demonstrate said consideration was valid and amounted to more than nominal consideration. If such parol evidence was required, then virtually every Florida property owner that obtained title through a statutory warranty deed referencing $1.00 or $10.00 consideration would have to prove via parol evidence that it was valid consideration and not nominal consideration.

If deeds are merely a starting point for the parties involved, then imagine the chaos. The concept of owning "good title" to property would be a misnomer and trap for the unwary. Mortgages offered after traditional title searches would simply be an entrée to future litigation over the meaning and validity of the underlying deeds, which in some instances could result in parol evidence literally interpreting and altering a warranty deed to have limited or no meaning at all.

ARGUMENT

I. Fundamental Principles Involving Deeds

Unambiguous deeds are not subject to interpretation by a court. *See Thompson v. Ruff*, 78 So. 489 (Fla. 1918); *Pathare v. Goolsby*, 602 So. 2d 1345, 1346 (Fla. 5th DCA 1992); *Saltzman v. Ahern*, 306 So. 2d 537, 539 (Fla. 1st DCA 1975); s*ee also Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla.1957) ("The test of the meaning and intention of the parties is the content of the written document."). Further, section 689.10, Florida Statutes (2014) provides:

> Where any real estate has heretofore been conveyed or granted or shall hereafter be conveyed or granted without there being used in the said deed or conveyance or grant any words of limitation, such as heirs or successors, or similar words, such conveyance or grant, whether heretofore made or hereafter made, shall be construed to vest the fee simple title or other whole estate or interest which the grantor had power to dispose of at that time in the real estate conveyed or granted, unless a contrary intention shall appear in the deed, conveyance or grant.

This law has been a part of our statutes since 1903. *See* Ch. 5145, §1, Laws of Fla. (1903).[3]

In very limited circumstances parol evidence may be used to assist a court in interpreting an ambiguous deed. Parol evidence is actually not a procedural rule of evidence, but is a matter of substantive law. Generally, the rule is that parol evidence may not be used to interpret or alter a written obligation such as a deed. The rule rests on a foundation of "experience and policy and is essential to the certainty and stability of written obligations." *Atkins v. Bianchi*, 162 So. 2d 694, 697 (Fla. 1st DCA 1964).

Where a deed does not contain or refer to a limitation on the use of real property, parol evidence is not admissible to impair the rights of the grantee or user of the property. *See Jackson v. Parker*, 15 So. 2d 451, 459 (Fla. 1943). That is true even if a separate contractual limitation or obligation may be proven through parol evidence. *Florida Moss Products Co. v. City of Leesburg*, 112 So. 572, 574-75 (Fla. 1927). Parol evidence may be used to establish the true character of consideration where a deed recites consideration of money "and other valuable consideration." Parol evidence, however, may **not** be used even in that instance to add terms to a deed that are inconsistent with the terms and obligations and interests recited in the deed, even though that parol evidence is part of the

[3] Title to real property passes upon delivery of the deed to the grantee and the grantee's acceptance of the deed. *See Parken v. Jafford*, 37 So. 567, 569 (1904).

consideration for the transaction resulting in the deed. 112 So. at 660-61. A good example of the interplay of consideration and the parol evidence rule may be found in *Mason v. Roser*, 588 So. 2d 622, 624 (Fla. 1st DCA 1991). In *Roser*, the recited consideration was "love and affection." Perhaps the court was unwilling to risk the potential, personal consequences of holding that "love and affection" is ambiguous. But, legally that holding was simply unnecessary:

> However, resolution of this issue does not require us to delve into that realm because whether the recited consideration is or is not ambiguous enough to permit parol evidence to test its character, "[w]hen the purpose and effect of parol evidence is to alter, impair or defeat the operation and effect of the deed, such evidence is not embraced within the exception ... admitting parol evidence for the purpose of showing the true consideration for a deed." *Florida Moss Products Co. v. City of Leesburg, supra.* Below, the testimony that Mrs. Reese did not possess love and affection for appellant was used to attack the recited consideration for the deed in question, thereby defeating its operation and legal effect. In admitting such testimony, we find that the trial court reversibly erred.[4]

If a deed can be construed, "[a] deed is to be construed most strongly against the grantor and most beneficially for the party to whom it is made. *Reid v. Barry*, 112 So. 846 (Fla. 1927). Where a deed permits more than one interpretation, the one most favorable to the grantee should be adopted. *Thompson v. Ruff*, 78 So. 489 (Fla. 1918); *Central and Southern Florida Flood Control Dist. V. Surrency*, 302

[4]A warranty deed reciting a dollar amount of any sum (only) as consideration is not ambiguous. *See* §§689.02, 689.03, Fla. Stat. (2013). In any event, consideration is no longer required in order to have a valid and effective deed. *Chase Federal Savings And Loan Assoc. v. Schreiber*, 479 So. 2d 90, 101-02 (Fla. 1985).

So. 2d 488, 490 (Fla. 2d DCA 1974); *Pathare v. Goolsby*, 602 So. 2d at 1346 (rule is based on the idea that the language in a deed is presumed to be chosen by the grantor and the grantor had the power to make the deed plain and intelligible).

The certified question may also implicate Florida's Marketable Record Title Act, chapter 712, Florida Statutes (2014) ("MRTA"). MRTA was intended to simplify and facilitate land title transactions "by allowing persons to rely on a record title . . . subject only to such limitations as appear in [the exceptions listed in] section 712.03." §712.10, Fla. Stat. (2014); *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1232 (Fla. 2004). MRTA is to be liberally construed to effectuate the purpose of the Act. §712.10, Fla. Stat. (2014).

For example, even if appellants retained fee title subject to an easement to the railroad or their original deed was somehow invalid as lacking consideration, the effect of MRTA may be to eliminate the appellants' entire interest. This result would come about under MRTA if there was an intervening deed or conveyance of the railroad property that has been of record for at least 30 years (a "Root of Title"), and no subsequent recorded instrument (a "muniment of title") recorded within the 30 years following the Root of Title recited the interests of appellants (the easement or invalidity for lack of consideration).[5]

[5] As a friend of the Court, the Section takes no position on the facts of the case or merits of the parties' positions.

There are a number of potentially applicable exceptions to MRTA contained in section 712.03, each of which must be evaluated based on a careful examination of the applicable real estate records. One exception merits special comment. Section 712.03(5) provides:

> Such marketable record title shall not affect or extinguish the following rights:
>
> (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. …

This exception does not appear to apply if the appellants are claiming they have a *fee interest* underlying the easement interest of the railroad. While this exception might prevent the railroad's interest (if it was an easement interest rather than a fee interest) from being extinguished by MRTA, it will not prevent the underlying fee interest (if any) from being eliminated.

II. The Consequences Of Altering Fundamental Principles Involving Deeds

The needed certainty in real property conveyances is underscored by the requirement that real property be conveyed through a written deed executed with proper formalities. §689.01, (Fla. Stat. (2014); *see Skinner Manufacturing Co., v. Wright*, 47 So. 931 (Fla. 1909) ("In this state a conveyance of the legal title to land is made by the execution of a deed…".).

The potential impact of eroding the above-stated legal principles cannot be over-stated. Indeed, for average Floridians, the purchase and sale of real property are the most important financial transactions of their lives. Commerce in Florida regularly involves the transfer of real property and the securitization of loans with real property. By some estimates, even during the recent difficult economic years, real estate related industries generated approximately 16% of Florida's Gross Domestic Product.[6]

All of these transactions involve the delivery and acceptance of deeds that, among other things, define the nature of the interest being transferred and the title to real property. The deed is paramount to insurers insuring title to property.

So, if deeds do not necessarily mean what they say, then when any Floridian, natural person or corporation, is asked whether he, she or it owns real property, the

[6] Regional Perspectives: Florida Economic Outlook, JP Morgan/Chase, page 3 (June 2, 2014) available online at https://www.chase.com/content/dam/chasecom/en/commercial-bank/documents/florida-economy.pdf.

answer (even looking directly at the words on the deed), would have to be "I do not know." Title to property could not be insured, at least not without a judicial declaration, which suggests an unwanted adaptation to an old saying: "No good deed goes unlitigated."

CONCLUSION

The parties to this litigation will no doubt make thoughtful arguments worthy of this Court's consideration. The Section, as a friend of the Court, only asks that those arguments be considered in light of the fundamental principles of real property law explained above. An argument that erodes any of these principles should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this motion was served by Florida e-portal on Mark F. (THOR) Hearne, II, thor@arentfox.com, counsel for appellants, and Lane N. McFadden, Lane.mcfadden@usdoj.gov, counsel for the United States of America, this 11th day of December, 2014.

/s/ Robert W. Goldman_____
Robert W. Goldman, FBN339180

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman_____
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