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SUPREME COURT OF FLORIDA

CASE NO. SC20-965

LENIN E. RIVAS,

Petitioner,

vs.

SHIU M. TSANG, ET AL.,

Respondent.

**ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
FROM THE FIFTH DISTRICT COURT OF APPEAL
CASE NO. 5D19-0965**

RESPONDENT GENEVIEVE L. TSANG'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Rules of Procedure

PREFACE

In this response brief, the following references are used:

"Respondent" refers to Respondent, Genevieve Tsang. Please note: Shui M. Tsang is deceased (date of death: November 26, 2017).

"Petitioner" refers to the Petitioner, Lenin Rivas.

"Third DCA" refers to the Third District Court of Appeal.

"Fifth DCA" refers to the Fifth District Court of Appeal.

"Lower Court Action" refers to Ninth Judicial Circuit Case No. 2015-CA-1038 (Osceola County); this Lower Court Action led to the Fifth DCA appeal that is the subject of this appeal.

"Jurisdiction Brief" refers to Petitioner's Jurisdictional Brief. Citations to the Jurisdiction Brief will be in the form of [J.B. at Page Number].

"Opinion" refers to the Fifth DCA's opinion in *Rivas v. Tsang*, dated April 24, 2020, in Case No. 5D19-0965. Citations to the Opinion will be in the form of [Opinion at Page Number].

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from the Fifth DCA's written Opinion, which Opinion affirmed a summary judgment in the Lower Court Action in favor of Respondent, quieting title to a parcel of real estate in her and against Petitioner. The Fifth DCA filed its Opinion on April 24, 2020.

Petitioner filed a Motion for Rehearing or Certification of Conflict. The Fifth DCA denied Petitioner's Motion on June 5, 2020, ruling, in part, there "is no conflict between the Court's Opinion and other reported decisions in which similar facts of knowledge and inaction are present." *Appendix.*

The facts of this case are established in the Fifth DCA's Opinion, a copy of which is included in the Appendix to Petitioner's Jurisdiction Brief. However, Petitioner includes in his Statement of Case and Facts impermissible argument. Specifically, Petitioner refers to the subject deed of conveyance as being "a 'wild deed' entirely outside of, and disconnected from, the lawful chain of title" and "void *ab initio*", determinations not made by the Fifth DCA in its Opinion. [J.B at 1, 2]. Petitioner also impermissibly argues that he was not obligated to file a Notice of Lis Pendens within any time period. [J.B. at 1].

"It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issues." Fla. R. App. P. 9.120(d) (committee notes, 1977 Amendment). The merits of the

Opinion are not before the Court and cannot be considered by the Court in determining whether it should invoke its discretionary jurisdiction.

JURISDICTION FOR CONFLICT REVIEW

This Court has held that to create conflict jurisdiction under Art. V, § 3(b)(3), Fla. Const., the "conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter." *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962), (*citing Ansin v. Thurston*, Fla., 101 So. 2d 808, 811 (Fla. 1958)). "The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court in the same point of law." *Kincaid v. World Ins. Co.*, 157 So. 2d 517, 517 (Fla. 1963).

To impart conflict jurisdiction, the cases "must be based practically on the same state of facts and announce antagonistic conclusions." *Ansin* at 811. Concomitantly, where cases are factually distinguishable, no conflict exists. "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." *Kyle*, 139 So. 2d at 887. In this determination, "the facts of the case are of the utmost importance." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

SUMMARY OF THE ARGUMENT

This Court does not have discretionary jurisdiction under Fla. R. App. 9.030(a)(2)(A)(iv), to review the Opinion because it does not expressly and directly conflict with the cases cited by Petitioner. The cases cited by Petitioner in his Jurisdiction Brief are facially distinguishable on their controlling factual elements and therefore no conflict arises.

Specifically, the cases cited by Petitioner do not contain the factual situation where a party is aware that a forged instrument is recorded in the public records and despite this knowledge, does nothing for an inexcusable period of time, during which time an innocent third party, in reliance on the validity of the instrument, purchases the property. It was on these particular facts that the Opinion was based. Because these particular and critical facts are absent in the cases cited by Petitioner, the cases are distinguishable and no conflict arises.

ARGUMENT

There is no conflict among Florida courts that estoppel can, under the right set of facts, be applied to defeat a claim to real property premised on a void instrument. Respondent has never argued that estoppel is applicable to all forged instruments; clear and convincing proof of the existence of the factual elements necessary to establish an estoppel is required[1]. In recognition of the utmost importance of such facts, this Court has pointed out that application of the doctrine of estoppel to a legally void deed is highly dependent on the particular facts of a case. In *Zofnas v. Holwell*, 234 So. 2d 1 (Fla. 1970), this Court wrote:

> Needless to say, not every deed executed by a married woman without the joinder of her husband will be made effective through the operation of the doctrine of estoppel. Each case must be weighed on its particular facts according to the legal and equitable principles involved. Whenever, as in the instant case, the facts cry out for equitable relief, it should be granted.

Id. at 3.

The facts supporting the application of estoppel are facially present in the Opinion and in those cases relied upon by the Fifth DCA in reaching its decision. As cited in the Opinion, in the circumstance where a litigant has sat on his hands and failed to timely make known his claim to the property, despite knowledge of the "erroneous opinion of title", the application of equitable relief is appropriate and he may be estopped from exercising his legal right to the property against a bona fide purchaser of the property. *Coram v. Palmer*, 58 So. 721, 722 (Fla. 1912). This holding is in accord with holdings in other cases where such particular facts are

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[1] The elements of estoppel are: (1) representation of a material fact by the party estopped to the party claiming the estoppel that is contrary to the fact later asserted by the estopped party; (2) reliance on that representation by the party claiming the estoppel; and (3) the party claiming the estoppel detrimentally changed their position due to such reliance. *Zurstrassen v. Stonier*, 786 So. 2d 65, 68-69 (Fla. 4th DCA 2001).

present. *See, Unity Banking & Saving Co. v. Bettman*, 217 U.S. 127, 135 (1910) (finding that while "the general rule" is that "[a]s against the true owner, a right of property cannot be acquired by means of a forged written instrument relating to such property," an exception to this general rule arises "where the owner by laches, or by culpable, gross negligence, *or by remaining silent when he should speak*, has induced another, proceeding with reasonable caution, to act with reference to the property, in the belief that the instrument was genuine, or would be so recognized by the owner" (emphasis added). *See also, Hallam v. Gladman*, 132 So. 2d 198, 209 (Fla. 2d DCA 1961) ("Insofar as it concerns the trial of title to land, equitable estoppel is a doctrine by which a person is precluded from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience"); *Nunes v. Allstate Investment Properties*, 69 So. 3d 988 (Fla. 4th DCA 2011) (affirming the trial court's grant of summary judgment in favor of the current owner of property against the victim of a forged deed who had waited more than a year to make known her claim to the property); *Zurstrassen v. Stonier*, 786 So. 2d 65, 68 (Fla. 4th DCA 2001) (holding "equitable estoppel principles apply, even to void deeds"); *Sunrise Savings & Loan Association of Fla. v. Giannetti*, 524 So. 2d 697, 700 (Fla. 4th DCA 1988) (party who negligently failed to discover forged satisfaction for over a year was estopped from challenging its validity after lender relied on satisfaction to their detriment); *Doyle v. Tutan*, 110 So. 2d 42 (Fla. 3d DCA 1959) (finding that a strong case for estoppel is made when a party, knowing of the sale of the property, was silent for more than a year before making known his claim, during such time the purchaser made monthly mortgage payments.).

The cases cited by Petitioner in the Jurisdiction Brief lack the factors of knowledge of the forged instrument and a lapse of time, coupled with the reliance on the validity of the instrument in the public records by an innocent third party purchaser. Because the cases cited by Petitioner are distinguishable in lacking the necessary factual elements to establish an estoppel, no conflict can arise.

Petitioner asserts two cases from this Court are in conflict with the Opinion, but an examination of the facts distinguishes both cases. Petitioner cites to *McCoy v. Love*, 382 So. 2d 647 (Fla. 1979) as creating conflict. The holding of *McCoy* is not in conflict because the *McCoy* case lacks the crucial facts of knowledge of the fraudulent deed and the lack of prompt action in response thereto. Rather, the facts recited in the *McCoy* opinion prove the opposite. Specifically, the *McCoy* opinion recites that plaintiff "remained ignorant of the [fraudulent deed] and subsequent transactions until October 1973 when she wanted to sell more of her mineral rights and a title search revealed them. She sued for cancellation of the deed." *Id.* at 648.

Similarly, in *Wright v. Blocker*, 198 So. 88 (1940), the opinion specifically recites that the plaintiffs had no knowledge of the forged deed until six months prior to the filing of the lawsuit to challenge the deed. *Wright* at 89. The *Wright* opinion is devoid of any indication that a third party purchased the property in that six-month period where the plaintiffs had knowledge of the recorded forged deed. Simply put, there were no facts that would support an estoppel argument by a bona fide purchaser who acquired the property subsequent to the plaintiffs' knowledge that the public records contained the forged deed[2].

Because the holdings in *McCoy v. Love* and *Wright v. Blocker* are not based on the same set of facts as the Opinion, jurisdiction is not conferred. The Opinion does not, on its face, collide with either of these prior opinions of this Court as is required for this Court's jurisdiction. *Kincaid v. World Ins. Co*., 157 So. 2d 517, 517 (Fla. 1963). Therefore, neither *McCoy v. Love* or *Wright v. Blocker* confer jurisdiction.

In his Jurisdiction Brief, Petitioner asserts that the Third DCA is also in conflict with the Fifth DCA. Petitioner cites three cases from the Third DCA to support this contention. An examination of all three cases demonstrates that each case is distinguishable due to the lack of the facts giving rise to an estoppel.

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[2] Although the facts in *Wright v Blocker* may not have supported the application of principals such as estoppel to a forged deed, the holding of the case did not foreclose it. The *Wright* Court held "...the *mere* recordation of a forged deed does not affect the title to land...", leaving open the possibility that additional facts beyond the "mere" recordation may affect title to property. *Wright* at 91. (emphasis added).

In holding that a later creditor was not entitled to rely on an earlier forged satisfaction of mortgage, the Third DCA in *Lloyd v. Chicago Title Insurance Co.*, 576 So. 2d 310 (Fla. 3d DCA 1990) specifically cited to the fact that the earlier mortgagee continued to receive their regular monthly mortgage payments following the recording of the forged satisfaction, and "…had no knowledge of the forged satisfaction…" *Id.* at 311.

Likewise, in the recently decided case of *Murphy v. Osorio*, 45 Fla. L. Weekly D 46 (Fla. 3d DCA 2020), the pivotal issues present in the instant case (i.e., Petitioner's knowledge of the forged instrument and delay of action) were simply not present in that case. Similarly, the facts of *1601 Bay LLC v. Wilmington Savings Fund Society, FSB*, 282 So. 3d 1027 (Fla. 3d DCA 2019), differ because in that case, unlike here, the lender was unaware of the forged satisfaction and continued to operate as if the mortgage remained outstanding by filing an assignment of mortgage in the public records. *Id.* at 1028. Because of the facts in the cases cited by Petitioner are completely and totally distinguishable from the facts in the instant case, there is no conflict to invoke the Court's discretionary jurisdiction.

Petitioner also alleges that there is internal inconsistency in the Fifth DCA, citing to that court's decision in *Moore v. Smith-Snagg*, 793 So. 2d 1000 (Fla. 5th DCA 2001) as being at odds with the Opinion herein. Intra-district conflict does not create jurisdiction. *Trustees of Internal Improvement Fund v. Wetstone*, 222 So.

2d 10, 12 (Fla. 1969) ("Conflicts of two decisions of the same District Court of Appeal cannot activate our conflict jurisdiction.")

CONCLUSION

For all of the aforementioned reasons, there is no basis upon which the Court should invoke its discretionary jurisdiction, and Respondent respectfully requests that this Court not accept jurisdiction.

Respectfully submitted on August 27, 2020.

*/s/ Nancy E. Brandt*______
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2020. I filed the foregoing via the Florida EPortal and served to: Jesus Irizarry, Esq., Irizarry Mendes, P.L at jim@irizarrymendez.com, Attorney for Petitioner; and Ronald N. Hand, Esq., Ronald N. Hand, P.A., at rmh@rhandpa.com, Attorney for Manuel Pagani.

*/s/ Nancy E. Brandt*______
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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

Pursuant to Rule 9.210(a)(2), this brief is submitted in Times New Roman 14-point font, which complies with the requirements of the Rule.

*/s/ Nancy E. Brandt*______
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