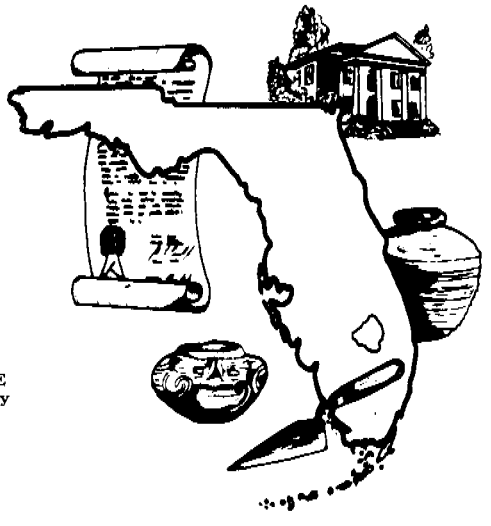
RESPONDENT'S BRIEF



STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History
and Records Management

IN THE SUPREME COURT OF FLORIDA

THE CITY OF DAYTONA BEACH, a municipal corporation organized and existing under the laws of the State of Florida; McMILLAN AND WRIGHT, INC., A Florida Corporation ; and HARRY DOAN,

Petitioners,

vs.

TONA-RAMA, INC., A Florida corporation; THE STATE OF FLORIDA BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND; J. DONALD JARRETT and ELMO D. JARRETT,

Respondents,

vs.

THE STATE OF FLORIDA,

Intervenor.

CASE NO. 43,352

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF RESPONDENTS, THE STATE OF FLORIDA AND THE FLORIDA BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

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INTRODUCTION

The Petitioners were the defendants below. In this brief the term "defendants" will refer to all of the petitioners unless otherwise specified. The term "the state" will refer to the STATE OF FLORIDA and the FLORIDA BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND. References to "the City Commission" will be to the Daytona Beach City Commission. The term "sky tower" refers to the structure which is described on page 5 of the petitioners' brief and the base of which is the subject of this action.

STATEMENT OF THE FACTS

ADDITIONS

The state makes the following additions to the petitioners-defendants' Statement of the Facts:

On June 18, 1969, more than a year prior to the beginning of construction on the sky tower, defendant HARRY DOAN appeared before a city commission meeting seeking a resolution authorizing erection of the tower. At the meeting, John Chew, City Attorney for defendant, City of Daytona Beach raised the question of whether long continued public use had resulted in a public easement. (R.31) The City Commission adopted Resolution No. 69-165 authorizing erection of the sky tower "subject to the matter being approved from a legal standpoint by our Legal Department." (R.110) Subsequently, on October 8, 1969, Mr. Chew requested an opinion from the Attorney General as to whether the public "through their long and continued use" had acquired an easement over the property on which the sky tower was intended to be constructed. (R.34,34) On October 20, 1969, Mr. Chew withdrew the request and substituted instead whether the City of Daytona Beach had control of the beach between high and low water marks and whether it could permit an addition to the pier. (R.223)

On October 22, 1969, defendant HARRY DOAN signed a letter to defendant City of Daytona Beach in which he agreed to retain and pay counsel to defend the city in the event that litigation

arose as a result of the city authorizing construction of the sky tower. (R.46) On the same day, the City Commission amended Resolution No. 69-165 by striking the words "subject to the matter being approved from a legal standpoint by our Legal Department." (R.114)

Process in this suit was served upon defendant DOAN on December 5, 1969. (R.436,437) Construction of the sky tower was not begun until December 11, 1969. (R.434,435)

CORRECTION

The state makes the following correction to the petitioners-defendants' Statement of the Facts:

James W. Apthorp and Earl Faircloth did not, as stated by the petitioners, inform the City Attorney that "the City of Daytona Beach had jurisdiction to regulate and license the observation tower . . . ." (Petitioners' brief, p.6) [e.s.] The letter from Apthorp simply stated that, on the basis of information provided to him by the City Attorney, it appeared that the sky tower was proposed to be constructed landward of the mean high water mark. Consequently, the letter concluded that the Trustees were "without authority to grant a permit for the proposed structure." (R.111) The letter also stated that "under the provisions of Chapter 23241, Laws of Florida 1945, authority for regulation of construction along the beach would be vested in the City of Daytona Beach." (R.111) [e.s.] The following day the letter from Earl Faircloth clarified

the Apthorp letter, pointing out that the city's authority was limited to the area between the high and low water mark. (R.112,113) Neither letter stated that the city had the jurisdiction to authorize construction of the sky tower in its present location. Neither letter took into consideration the question of prescriptive easement which the city attorney had removed from his question to the Attorney General. (R.223)

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE PUBLIC HAD ACQUIRED A PRESCRIPTIVE EASEMENT OVER THE LAND ON WHICH THE BASE OF THE SKY TOWER WAS CONSTRUCTED.

The defendants would have this court believe that the issues before the trial court were "distorted" and that the state's contentions were "radical." Nothing could be farther from the truth. Indeed, the defendant's effort to pin the "radical" label on the state (and presumably upon the trial court which ruled in the state's favor and the First District which affirmed the trial court) is ironic. In fact, the doctrine upon which the state expressly rested its case, and upon which the trial court and the First District ruled, is an ancient, well established, uniformly accepted common law doctrine which predates this country to say nothing of the defendant DOAN's sky tower and even his vintage pier. See 28 C.J.S., Easements, §6, p. 641. The evidence supporting the trial court's finding was clear, uncomplicated, unequivical and uncontradicted.

This court has recognized that the public can obtain a prescriptive easement Downing v. Bird, 100 So.2d 59 (Fla. 1958), and that it can do so over beach property. City of Miami Beach v. Undercliff Realty & Investment Co., 21 So.2d 781 (Fla. 1945); City of Miami Beach v. Miami Beach Improvement Co.,

14 So.2d 172 (Fla. 1943.) The defendants do not dispute this fact. To the contrary, they argue that the principles of law applicable in this case are no different "from those considerations and principles of law applicable to any other parcel of land regardless of what may constitute its boundary lines." (Brief of Petitioners, p.23) In both of the above cited cases, the court affirmed the findings of the triers of the facts that the evidence before them was insufficient to establish a prescriptive easement. The case at bar comes before this court in precisely the opposite posture. The trial court found that "there was no genuine issue as to the following material facts:

> "The land upon which said sky tower was constructed was, for more than twenty years prior to the sky tower construction, used openly, notoriously, continuously and uninterruptedly by the public as a throughfare, bathing beach, recreation area and playground and that said use was adverse or under claim of right.
>
> "The Plaintiffs in this cause have not been negligent or untimely in the assertion of their rights to the lands described in paragraph three of the State of Florida's cross complaint.
>
> "The Defendants in this cause did not have the right to rely on the statements contained in Exhibits A,B,C,D and E to its answer and defenses to the State of Florida's cross complaint [City Commission resolutions authorizing sky tower and letters from James Apthorp and Earl Faircloth] as authority for constructing the sky tower.
>
> "At the time of commencement of construction and of construction of defendant's sky tower all defendants were aware that public claim existed to the land upon which the sky tower was constructed.

> "Existance of the sky tower denies public use as a thoroughfare, bathing beach, recreation area and playground of all those lands upon which said sky tower is constructed." (R.571)

Based upon its findings, the trial court concluded that the plaintiffs were entitled to a judgment as a matter of law that:

> "The public had and has a prescriptive right to an easement for thoroughfare, bathing beach, recreation area and playground purposes over all lands upon which the said sky tower was constructed.
>
> "Existance of this prescriptive right necessarily precludes the authority of the defendant City of Daytona Beach to authorize any construction of any permanent structure in conflict with the public right.
>
> "The defenses of laches and estoppel are not available to any of the defendants in this cause." (R.578)

The evidence in the record is more than sufficient to support the findings of the trial court.

This court set out the requirements for acquiring a prescriptive easement in Downing v. Bird, supra at 64:

> "In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition, the use must be adverse, under claim of right and must either be with the knowledge of the owner or so open, notorious and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner."

In Downing the lower court had again found no prescriptive easement. In affirming, this court found that:

> "The evidence [in Bird] as to use by the public is vague and uncertain. The extent and frequency of use is not shown. There is nothing to show that the use was so continuous, uninterrupted, open and notorious as to impute to the owner of the lands that the public was exercising the privilege under a claim of right adverse to the owner." Downing v. Bird, supra at 66.

In contrast, the evidence in the case at bar was clear and definite and established all of the necessary elements of prescriptive easement.

William L. Kerris, a member of the Daytona Beach Advisory Board, (R,298) a resident of Daytona Beach since 1921 (R.286) and a lifeguard on the beach during the 1930's (R.290) testified that he has used the beach in issue "constantly" since 1921, (R.287,290,306,307) that he is on the beach in the area in issue "every week", (R.290,298) that he used the beach in the vicinity of the pier "to get in out of the sun", (R.291,292) "to lie around," for "sunbathing and moonbathing", (R.292) that the beach was used right up to the steps of the pier and the seawall, (R.293,294) that "everyone," "people in general, the public" used the beach over the years, (R.294) that his parents used the area when he was a child, (R.296) that he observed "many people" use the beach "from the middle twenties on", (R.297) that "people used to stay underneath the pier up there in the soft sand and lie around and stay in the shade," (R.297). He stated that "the whole beach as far as I am

concerned was there and it was there for our use." "Our use" he said meant "everyones." (R.297)

Robert P. Miller, the Public Defender for the Seventh Judicial Circuit and a thirty-eight year resident of Daytona Beach, (R.318) testified that he had been using the beach in question since before 1945 to the time of the hearing,(R.319,323) that he used all portions of the beach from the seawall to the water,(R.319) that he observed "literally hundreds of people, well into the thousands over a period of a day" using the beach during the period since 1945 for sunbathing, swimming, driving, walking, parking their cars and playing football, and that the most congested part of the beach was the area of the pier (R.320,323,324). He stated that he didn't think anyone ever told him he could or couldn't use the beach, that he used it because "it was the customary thing to do" and because "everybody did." He said he "definitely" felt he had a "right to use the beach." (R.321)

William M. Thames, an executive with General Electric Company, testified that he has been familiar with the subject beach area since about 1917,(R.341) that he used to fish and watch the races on the beach,(R.341,344) that the area in which the pier is located was the area which most of the people used,(R.344) that many people used the area over the years for swimming and surfing,(R.344,345) that he used the sandy area,(R.345) and that he observed other people sunbathing, camping and parking cars "all the way up to the abutment that

was man made." (R.346,347) Mr. Thames stated that the authority by which he used the beach was, "as a citizen and being public property." (R.348)

Testimony to the same effect was given by Karl H. Lutz, a twenty-five year resident of Daytona Beach and a police officer for 18 years in charge of controlling traffic on the beach, (R.332-336) and Russell Calvin Smith, Director of Public Service and City Engineer for the City of Daytona Beach. (R.353-356) In addition to the above testimony, the state introduced five affidavits attesting to the continuous use of the beach where the sky tower is located for a period of at least twenty-five years. (R.446,447,484,487,489)

The state's evidence was uncontradicted. The defendants' offered no evidence whatsoever to rebut the overwhelming testimony that the public had used the beach openly, notoriously and continuously under a claim of right for over twenty years. In fact, defendant HARRY DOAN admitted that the public drove under his pier and that people "frequently lie on blankets underneath the pier to get shade." (R.402)

The defendants now argue that the use of the subject beach was permissive. But the record is devoid of any evidence to support that position. They assert that "so long as the use of the owner's land by the public is consistent with the use thereof by the owner and is conducive to his own interest and profits, the use by the public is presumed permissive and is entirely lacking in the elements of adversity . . . ."

(Petitioners' brief, p.23) That is not an accurate statement of the law in Florida or elsewhere. While there is an initial presumption that use of another's land is permissive, it is uniformly recognized that once it has been shown that there has been an open, notorious and continuous use, the presumption of permissiveness is overcome and knowledge of adverse use under claim of right will be imputed to the owner. Hartman v. Blading's, Inc., 181 N.W.2d 466 (Minn. 1970); Moravek v. Ocsody, 456 S.W.2d 619 (Mo. 1970); DiLeo v. Pecksto Holding Corp., 109 N.E.2d 600 (N.Y. 1952); O'Connor v. Brodie, 454 P.2d 920 (Mont. 1969); Suggars v. Brake, 234 A.2d 752 (Md. 1967); Ward v. Stewart, 435 S.W.2d 73 (Ky. 1968); American Oil Co. v. Alexandrian, 154 N.E.2d 127 (Mass. 1958); Anderson v. Seret Harbor Farms, 228 P.2d 252 (Wash. 1955). This Court has recognized the general rule. In Downing v. Bird, supra, at 66 they held that the evidence was insufficient to establish an easement, pointing out that:

> "There is nothing to show that the use was so continuous, uninterrupted, open and notorious as to impute to the owner of the lands that the public was exercising the privilege under a claim of right adverse to the owner." [e.s.]

In the instant case, the record is replete with evidence that the use was not only open, notorious and continuous but under a claim of right. The witnesses testified that "everybody" used the beach because it was a "public beach" and they had a "right" to be there. It is apparent from the record that the

public did not seek or receive permission from anyone to use the beach and did not consider such permission necessary. It is equally apparent from the record that the use was such as to place the owners on notice of the fact that the public did not consider such permission necessary. This is the essence of the element of claim of right. In Anderson, supra, the court, having noted that there is an initial presumption of permissive use, discounted the same argument raised by the defendants in the case at bar:

> ". . . an engaging argument is made in the instant case that the use, being permissive in its inception, cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate, such as tearing down or ignoring 'No Trespassing' signs
> . . . .
>
> "The fallacy of the argument is this: just as soon as there is proof that the use of another's land has been open, notorious, hostile, continuous, uninterrupted, and for the required time, the presumption of a permissive use is spent; it disappears. The one claiming the easement has established a prima facie case. (It is not necessary to say that such proof 'creates a presumption that the use was adverse, unless otherwise explained,' although there is authority for it. See Northwest Cities Gas Co. v. Western Fuel Co., Inc., supra 13 Wash.2d at page 85, 123 P.2d at page 776.) It then becomes incumbent upon the one denying the existence of the easement to contravert the prima facie case."

The defendants argue that HARRY DOAN never objected to the public use and that it was conducive to his business. Neither fact is relevant since the public user need not be exclusive or detrimental to the owner. In Downing, supra, the Court made particular note of the fact that "with a prescriptive right the use may be in common with the owner or the public." Downing, supra at 65. The requisite adversity lies not in the fact that the use is inconsistent with the owner's pecuniary interest, but rather that the use is "such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment." Downing, supra at 64. Defendant DOAN's testimony that he never had any objection to the public's use of his property below the pier is not sufficient to show permissive use in the legal sense. It shows only acquiesance, a necessary element in prescriptive easement:

> "The very foundation of the establishment of a right to an easement by prescription is the acquiesence by the owner of the servient tenement in the acts relied upon to establish such prescriptive right. 17 Am.Jur., Easements, §66 . . . . It must be apparent, therefore, that 'acquiesence' and 'permission' as used in this connection are not synonomous. 'Acquiesence,' regardless of what it might mean otherwise, means when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. 'Permission' means more than mere acquiesence; it denotes the grant of a permission in fact or a license." Dozier v. Kempotick, 35 N.W.2d 696 at 699 (Minn. 1949).

See also Feldman v. Knapp, 250 P.2d 92 (Or. 1952).

It is noted that Mr. DOAN's testimony regarding the occasional ejectment of undesirables from dances in a dance hall perched on top of the pier and the existence of a gate and lock at the entrance to the pier is irrelevent. The top of the pier is not in issue in this case.

The facts in the case of Seaway Company v. Attorney General, 375 S.W.2d 923 (Tex.Civ.App. 1964) are strikingly similar to the facts in the case at bar. In Seaway as in the instant case:

> "Thousands of people were shown to have used the beach, not only for a drive but for camping and in connection with fishing, boating and swimming. Evidence shows they used it at will without asking permission and there is no evidence of any objection by owners." Seaway, supra at 938.

The court in Seaway held that the evidence was sufficient to support a finding of prescriptive easement as well as an implied dedication. In Seaway the defendant also claimed that the use was permissive. The court rejected the argument:

> "It is true that some of [the witnesses], particularly one of the owners of an interest . . . testified the land owners permitted the members of the public to use the beach, thus seeking to establish permissive use. It is significant however that there is no instance shown where any member of the public actually asked for permission or where the use by a member of the public was interfered with by a land owner." Seaway, supra at 935.

The description of the character of public use in Seaway is is an accurate description of public user as it is established in the record before this court:

> "The evidence may be accurately characterized as showing yearly, continuous and indiscriminate use by members of the general public, when they chose to do so, for the purposes above described with the members of the general public seeking no permission from the landowners or anyone else. Too, the record is devoid of any instance of the requirement of permission by any of the owners of the land or their representatives. All of appellees' witnesses testified they asked permission of no one and assumed they had a right to make the use of the beach that they did and never heard of anyone being required to obtain permission. The truth of the matter is that the use of the West Beach by the public generally for travel, for camping, for use in connection with swimming and fishing and picnicking has been so prevalent since the widespread use of automobiles, in about 1920, as to almost be the subject of judicial notice." Seaway, supra at 934.

In the instant case, as in Seaway, the public used the beach openly, continuously and indiscriminately without seeking or recognizing the need to seek permission from anyone. As in Seaway, the public user in Daytona Beach, particularly in the pier area, was so prevalent as to "almost be the subject of judicial notice." Despite this fact, neither defendant DOAN nor his predecessors ever made the slightest effort to communicate to the public the fact that their use was permissive.

In its well reasoned opinion of August 21, 1973, the First District Court of Appeal carefully analyzed the facts of the case and the applicable case law and affirmed. In its opinion on rehearing filed January 23, 1973, the court reaffirmed the trial court, but "clarified" its earlier opinion. The court

was primarily concerned with avoiding the appearance of having held, as did the Oregon Supreme Court in State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969), that all of the beaches in the state were impressed with a public easement. To that extent we believe that the Court's point was well taken. We agree with the District Court that "not all beaches or shorelines give rise to a prescriptive easement." Each case must be considered on its own facts to determine whether the strict criteria for the application of prescriptive easement has been met. In this case we agree with the trial court and the District Court that it has been met.

We are, however, concerned with one statement in the District Court's opinion of January 23 and we respectfully urge this court to clarify the issue lest it become precedent. The court stated:

> "It is only when the use during the prescribed period is so multitudinous that the facilities of local government agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches." (opinion of 1st D.C.A. filed January 23, 1973, p. 5).

The court's statement could be taken to add a new element to the prescriptive rights doctrine which is nowhere to be found in the long judicial history of the doctrine and which is not justified by logic. This court has recognized that "the public may acquire an easement in land separate and apart from

the rights of a city and in spite of the actions of a city." Downing v. Bird, supra at 61. [e.s.] The requirement as to the degree and character of use is that it be sufficient to place the owner on notice of the fact that the public user is under a claim of right. The fact that a public agency has policed and cared for the property as was done in the instant case (R. 257,258,262,263,333,334,335,358,359) is certainly a measure of evidence which supports the conclusion that the use was open, notorious and continuous. However, it is surely not necessary to that conclusion.

POINT II

THE TRIAL COURT CORRECTLY REFUSED TO APPLY THE DOCTRINE OF BALANCE OF CONVENIENCE

The defendants are not entitled to a balancing of convenience. They were placed on notice of the claim of prescriptive easement long before the first grain of sand was moved and were served with process in this case before the first inch of concrete was poured. The defendants elected to take a chance and proceed with construction fully cognizent of the risks involved. The defendants stipulated to the fact:

> "That subsequent to the application for a sky tower use and prior to the actual construction of the sky tower facility, Harry Doan, individually, and as President of McMillan and Wright, Inc., was fully aware of certain questions and objections that were being raised as to said sky tower use by the City Attorney, Assistant City Attorney, City Planner, minority members of the Planning Board and minority member of the City Commission of Daytona Beach, which questions included:
>
> c. The prescriptive rights of the public to the area of the Atlantic Ocean Beach involved." (R.231,232)

It has generally been held that the balance of convenience doctrine should not be applied where the defendant knowingly "takes a chance." Moyerman v. Glanzberg, 138 A.2d 681 (Pa. 1958); Armstrong v. Leverone, 136 A.71 (Conn. 1927); Morgan v. Veach, 139 P.2d 976 (Calif.2d D.C.A. 1943); Stewart v. Finkelstone, 92 N.E. 37 (Mass. 1910).

In Mogaas v. Smith, 206 P.2d 332 (Wash. 1949), the court held that the plaintiff had acquired title by adverse possession and affirmed a mandatory injunction requiring removal of a house which was built on the property. The court pointed out that the defendants "were notified as to [the plaintiff's] claim before doing any work on the strip in question and before setting in place the house which encroaches on that strip."

Ventresca v. Ventresca, 126 A.2d 515 (Pa. 1956) involved a garage encroachment of only one foot eight inches. The trial court applied the balance of convenience doctrine and refused to issue a mandatory injunction. The Supreme Court of Pennsylvania reversed and directed the issuance of a mandatory injunction to remove the garage, noting that "as soon as the garage foundation was commenced the plaintiff objected and told the defendant that he was violating the deed restriction." Ventresca, supra at 517. The court held that:

> "Where the defendant's act is tortious or in bad faith or where he intentionally takes a chance, injunctive relief should be granted." Ventresca, supra at 518.

In Peters v. Davis, 231 A.2d 748 (Pa. 1967), there was a 7.45 foot setback violation by the offending building. The chancellor ordered removal of that portion of the house which exceeded the setback limit. The lower court compared the relative injury to the parties and reversed the chancellor. The Supreme Court reversed the lower court and reinstated the chancellor's order that a portion of the building be removed.

The Supreme Court found that:

> "Despite Peters' announced intention to institute suit to compel Davis' compliance with the restrictions, Davis proceeded with the completion of the dwelling." Peters, supra at 750.

The court was particularly emphatic about the fact that:

> ". . . after being notified of his transgressions, he continued the violations even after this litigation was instituted." Ibid, 751 [emphasis by court.]

In Armstrong v. Leverone, 136 A. 71 (Conn. 1927), the trial court ordered the removal of a building which was constructed in violation of deed restrictions. The court rejected the defendant's argument that removal would inflict damage and loss upon him disproportionate to the damage to the plaintiff if the building remained. On appeal the Supreme Court of Connecticut affirmed. In addressing itself to the defendant's argument that the trial court should have applied the doctrine of comparative injury, the Supreme Court stated:

> "The record affords no persuasive basis for this claim. The situation, as disclosed by the public records, was clear and significant; the defendant had actual knowledge of the restrictions in the deeds to Fitzgerald; the court finds from evidence that, while he would be erecting the first structure for business purposes, he was warned that its use as a store would violate the restrictions. Within two months after the erection of this first structure the present action was brought, fully apprising the defendant of the plaintiff's claims. About a year thereafter the defendant removed the temporary building, erected the present permanent structure, and has every since continued to do business therein." Armstrong, supra at 75.

The Supreme Court quoted from the Massachusetts case of Stewart v. Finkelstone, supra to the effect that the defendant:

> "Took his chances as to the effect of his conduct with his eyes open to the results which might ensue * * * entrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity." Armstrong, supra at 76.

None of the above cases involved clearer instance of prior notice and intentional and reckless disregard for the consequences of the defendants conduct than does the case at bar.

The defendants cite a number of cases recognizing the general doctrine of comparative injury and balance of convenience. None of the cases cited by the defendants involved prior notice of the plaintiffs claim. In the first case cited by the defendants for instance, Johnson v. Killian, 27 So.2d 345 (Fla. 1946), neither of the parties were even aware of the encroachment until eight years after the structure was completed. It is particularly noteworthy that this court in Johnson made a point of recognizing the exception to the balance of convenient doctrine where the defendant has prior warning:

> "For instance, the Supreme Judicial Court of Massachusetts in Kershishian v. Johnson, 210 Mass. 135, 96 N.E. 56, 36 L.R.A., N.S. 402, held that a property owner was entitled to the writ where his neighbor had carelessly constructed a building without determining the true boundary line during a dispute as to its location and in the face of a warning that he must confine his building to his own land." Johnson v. Killian, supra at 346.

Two of the cases cited by the defendants, McDowell v. Trustees of the Internal Improvement Fund, 90 So.2d 715 (Fla. 1956) and Ortega v. Justiss, 175 So.2d 554 (1st D.C.A. 1965) emphasized that the determination of whether or not a mandatory injunction should issue and whether the doctrine of comparative injury should be applied is within the discretion of the trier of the facts.

The defendants argue that defendant DOAN waited until the city secured the opinion of the Attorney General and a letter of disclaimer from the Director of the Internal Improvement Fund and that this was evidence of "good faith, honest mistake," "the absence of bad faith, willfulness or wanton disregard of the rights of others." In reality, the sequence of events illustrate precisely the opposite. The record shows a pattern of bad faith, a wanton disregard for the rights of the public, and a willful effort to avoid obtaining a determination of the rights of the parties prior to beginning construction.

On June 18, 1969, defendant DOAN appeared at a City Commission meeting seeking approval of his tower. At that time, more than a year before construction of the tower began, City Attorney John Chew expressed his concern about the possibility of the public having acquired a prescriptive easement over defendant DOAN's beach property. (R.31) At the same meeting the City Commission passed Resolution No. 69-165 authorizing the erection of the sky tower, but providing:

> "That this resolution shall take effect immediately upon its adoption subject to the matter being approved from a a legal standpoint by our Legal Department." [e.s.] (R.37)

On October 8, 1969, City Attorney John Chew sent a letter to Attorney General Earl Faircloth in which he explained defendant DOAN's desire to build a sky tower and stated:

> "My question to your office may be stated in this way:
>
> Since the area surrounding the Pier structure has long been recognized as a public beach, and has been used by the public over a number of years, may individuals claim private ownership to this property, or rather may it be said that the State of Florida holds such property in trust for the public through their long and continued use?" (R.34,35)

On October 20, 1969, City Attorney Chew sent a second letter to Attorney General Faircloth in which he referred to his letter of October 8, 1969, withdrew his question regarding prescriptive rights, and stated:

> "The following question should be substituted for the original question:
>
> 'Does the City of Daytona Beach have control of the Atlantic Ocean Beach between the high water and low water marks, and may it permit an addition to the existing Atlantic Ocean pier in accordance with the enclosures forwarded to you?'" [e.s.] (R.223)

On October 21, 1969, the Attorney General responded to the second question affirmatively. (R.113) The following day, on October 22, 1969, two things took place at a meeting of the City Commission. Defendant HARRY DOAN signed a letter in which he agreed that, should litigation arise out of the granting of the application for his sky tower, he would retain competent

counsel to defend the City of Daytona Beach at no expense to the city. The city passed Resolution No. 69-307 in which they amended their original Resolution No. 69-165 by striking the words "subject to the matter being approved from a legal standpoint by our Legal Department." (R.37) The complaint was served upon defendant DOAN on December 5, 1969. Construction did not begin until December 11, 1969. (R.434,435) It is patently clear that the defendants engaged in a concerted effort to avoid permitting City Attorney Chew to resolve the problem of prescriptive easement prior to construction of the sky tower. It is unthinkable that a court of equity would permit the defendants to come in now and cry "honest mistake," "good faith," and disproportionate injury.

The trial court and the First District properly held that the defendants had no right to rely upon the letters from the Attorney General and the Director of the Internal Improvement Fund as authority for the construction of the sky tower. Besides the above described conduct of the defendants in obtaining the letters, the letters themselves clearly do not authorize construction of the sky tower in the area in which it was ultimately built. The letters clearly indicate only that the city had jurisdiction to regulate businesses "within the high and low water mark." [e.s.] (R.113) It is noteworthy that the Attorney General's response replied directly to the question posed by the city which was carefully limited to whether the city had control of the Atlantic Ocean Beach "between the high water and low water marks." [e.s.] (R.223)

In their answers and throughout this lawsuit the defendants have taken the position that the sky tower was constructed landward of the high water mark. Consequently, it was not even within the area discussed in the city's question and the Attorney General's answer.

Finally, exception is taken to the defendant's continual use of the figure $125,000.00 as the measure of his injury if the tower is removed. That figure represents defendant DOAN's estimate of his initial investment in the construction of the tower. (R.410) However, the tower has now been in operation for three years, including three Easter and three racing seasons which are the defendants "better periods." (R.410) The defendant estimated that he would recoup his $125,000.00 investment within four years. (R.409,410) Hence, by the defendants own computations his loss should he be required to remove the sky tower today would be substantially less than $125,000.00. In the application of the doctrine of balancing of conveniences the deprivation of substantial future benefit is not a consideration. Fairrington v. Dyke Water Company, 323 P.2d 1001 (Calif. 1958).

If this Court were to reverse the trial court and the First District and apply the doctrine of balance of convenience in this case it would be setting a dangerous precedent; a precedent that would encourage parties, in the face of full notice of another's claims, to seek "entrenchment behind considerable expenditures of money" in an effort to "shield

premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity." Armstrong v. Leverone, supra, at 76.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A SUMMARY JUDGMENT FOR THE PLAINTIFF

The trial court found that "the pleadings, depositions, and admissions on file, together with the affidavits show that there is no genuine issue" as to the material facts and that those facts required the rendering of a summary judgment for the plaintiffs. (R.571-574) The First District Court of Appeal concluded:

> "We have carefully considered the totality of the evidence which was before the trial court in its consideration of the motion for summary judgment filed by the respective parties. Although there appear several instances of disputed facts in the affidavits and depositions filed in this cause, such issues are more colorable than real and are not sufficiently substantial to create an issue hhich must necessarily be resolved by trial. The undisputed evidence supports the findings made by the trial court, and appellants failed to demonstrate that such findings are either eroneous or constitute an abuse of discretion." (Opinion of the First District Court of Appeal filed August 31, 1972).

The determination of whether or not there are material facts to be tried by a jury is discretionary and the trial court is accorded "reasonable latitude in determining whether there is in fact a case to be tried." Lewis v. Lewis, 73 So.2d 72 (Fla. 1954). In the case at bar, the trial court needed no latitude. The conclusion of the trial court and the First District Court of Appeal was inescapable.

In their brief the defendants discuss the importance of the issues before the court and some of the general principles of law relating to the granting of a summary judgment. However, they fail to cite a single disputed fact that required resolution by a jury prior to the trial court being able to resolve the legal issues. In Rood Co. v. Board of Public Instruction, 102 So.2d 139 (Fla. 1958), this court rejected the same argument now raised by the defendant:

> "Plaintiff has called our attention to cases holding that a summary final decree should never be entered as long as there remains undisposed of any dispute as to material facts. We recognize this rule and adhere to it. But as stated in City of Anna Maria v. Hackney, Fla. 1964, 75 So.2d 693, where every material fact essential to a final decree in favor of one party is either admitted by his adversary's pleadings or is established by a proper construction of all the pleadings, depositions, admissions and affidavits on file, a summary final decree should be entered."

This court clearly set out the burdens of the respective parties on a motion for a summary judgment in Harvey Building, Inc. v. Haley, 175 So.2d 780 (1965) the District Court had reversed a summary judgment for the defendant. In reversing the District Court, this court stated:

> ". . . in reversing the summary judgment the District Court held that 'a motion for summary judgment should not be granted if it could be inferred from the evidence that the plaintiff could prove at trial that the defendant was negligent.' By the petition for certiorari it is contended that the quoted holding collides directly with the decision of the Court of Appeal, Third District in Hardcastle v. Mobley, Fla. App. 143 So.2d 715.

> "In Hardcastle the loosing party in a summary judgment contended that he 'was entitled to an inference that he had other evidence which could be presented.' The Third District Court decided otherwise in holding that 'the party moved against by summary judgment * * * must come forth with facts contradicting those submitted by the movant and demonstrating a real issue between the parties.' Pritchard v. Peppercorn & Peppercorn Fla., 96 So.2d 769.
>
> "Obviously the Second and Third District Courts are in conflict on the points stated regarding the alleged burden of a movant to exclude every possible interest that the opposing party might have other evidence available to prove his case. We agree with Hardcastle that such a requirement is not a party of the burden imposed upon a summary judgment movant."

It is apparent that the Plaintiff more than met its burden in moving for a summary judgment in the trial court and that the defendant utterly failed to meet its burden in responding.

CONCLUSION

The state's case rests upon the traditional foundation of equitable relief; that the plaintiff has reasonably relied to its detriment upon the conduct of the defendants. For several decades the public has used the beach in question in the belief that it was a public beach and that they had a right to use it without the necessity of gaining permission from any private owner. They have used it in such fashion and with such frequency as to place the owners on notice of that belief. Yet the owners silently acquiesed in such use, never over the years making any effort to communicate to the public in any manner the fact that there were private owners who considered the public use permissive. The public, secure in the belief that it already belonged to them, made no effort to cause public officials to acquire the beach.

Suddenly concrete begins to cover the beach, and after forty or more years of unfettered public use and enjoyment, when the cost of acquisition has skyrocketed to a prohibitive level, the public right is challenged for the first time.

The defendants argue that we are dealing with only "225 to 230 square feet" of beach. We are dealing with much more than that. The public easement is being challenged. The state acted without delay to protect the public's rights and the defendant rushed to construct his sky tower with his "eyes open," fully aware of the public's claim. If under such

clearcut circumstances, the public's interest cannot be protected on this 230 square feet, then it cannot be protected on the next 230 square feet or the next 230 feet.

The public reasonably relied upon the defendant's conduct and acted diligently to protect its interest. It should not now be required to lose that interest in a unique and invaluable natural resource.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents was served by mail to J. LEWIS HALL, Esquire, Post Office Box 1228, Tallahassee, Florida 32302, GREZIK AND JOHNSON, 328 South Grandview Avenue, Daytona Beach, Florida, this 27th day of April, 1973.

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