IN THE SUPREME COURT OF FLORIDA

JOSEPH R. LAIRD, et al.,

Petitioners,

vs.

DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO. 64,642

RESPONDENT'S ANSWER BRIEF ON THE MERITS DEPARTMENT OF TRANSPORTATION

ELLA JANE P. DAVIS
Appellate and Trial Attorney
A. J. SPALLA
General Counsel
Department of Transportation
Haydon Burns Building, MS 58
605 Suwannee Street
Tallahassee, Florida 32301
904/488-6212

TABLE OF CONTENTS

CITATION OF AUTHORITIES

OTHER AUTHORITIES

FLORIDA STATUTES

PREFACE

Respondent adopts Petitioners' Preface, except that TR = Transcript Reference; R = Record Reference; PEX = Plaintiff/Petitioners' Exhibit; DEX = Defendant/Respondent's Exhibit. Appendix to Respondent's Brief is symbolized AR: page number.

STATEMENT OF THE CASE

Respondent adopts Petitioners' Statement of the Case.

STATEMENT OF THE FACTS

Due to certain omissions and conclusions of law insinuated into Petitioners' Statement of Facts, the Respondent State reluctantly amplifies and corrects the Statement of Facts as follows:

The instant case arose because the State exercised a reservation by 1944 tax deed of 100 feet either side of the centerline by widening Pembroke Road (now SR 824) west of SR 441 from an existing 35 feet either side of the centerline to 50 feet either side of the centerline. The State's construction is within the reservation of easement by 50 feet and constitutes a maximum 15 foot intrusion of Petitioner's claimed property.

Both parties rely on common root of title which is the January 17, 1944, Ray Johnson tax deed. [Although Petitioners Statement of Facts asserts that they do not rely on this common root of title, the tax deed appears in Petitioners' abstract of title at (PEX: 3; DEX: 1; Entry No. 48 of R: 990; TR: 57, 149, 990; AR: 3-5) and all Petitioners testified to being aware of the existence of the road itself and/or to reservations in their deeds, surveys or title opinions/insurance. (TR: 199-200, 213, 214, 220-221, 237, 243, 246, 252).]

Note also that two of the seven Petitioners had successfully sold their property after the road construction and prior to trial, but retained interest in the 15 feet

disputed herein (Minaya, TR: 205-208, 211-213; Byrem, TR: 216-217), and at least two Petitioners (Minaya, TR: 214; Falkowski, TR: 237) had surveys or deeds which recognized that their property was "subject to all restrictions, reservations and easements of record." Defendant/Respondent noticed for production at trial all title information of each Petitioner but these were not produced.

Validity of a state road being in existence east of SR 411 was denied in an earlier case, Millstone v. Department of Transportation, (unreported) (TR: 10-13; A: 4-5), but that is irrelevant to the validity of an existing state road at the present site which is based on other principles.

The State asserts a valid designation of the subject portion of Pembroke Road west of SR 411 also known as SR 7 and formerly known as SR 149 by Chapter 20472, Laws of Florida (1941). (DEX: 3; TR: 65; R: 1066-1068; AR: 6)

The evidence is uncontroverted that each and every Petitioner purchased his property knowing it abutted a paved road open to the public for travel and known as "Pembroke Road." It is further agreed by every witness, including surveyors for both sides, that west of Road 441, the centerline of Pembroke Road runs precisely along the Quarter Section Line of Section 23. (TR: 79-80; 114) The State does not deny that the Quarter Section Line is 268.5 feet north of the statutory designation, however, the State introduced plats of record spanning 1925 to the present showing that a

road open to the public named "Pembroke Road" has continuously existed within 10 feet of that Quarter Section Line. (DEX: 7; R: 1096-1103; TR: 190) Mr. Korn testified that the State would file no surveys with the clerk of the court on similar reservations until it exercised the easement but the plats filed by others constitute surveys. (DEX: 5; DEX: 10; R: 1079-1089, 1107; TR: 351, 355, 357)

The State also introduced a 1936 Broward County General Highway and Transportation Map, locating a road open to the public at precisely the Quarter Section Line of Section 23. The State concedes that the road at the Quarter Section Line of Section 23 on the 1936 map was not labeled with a number west of SR 441 (formerly 7) nor does the name "Pembroke Road" appear on the map, however, SR 394 appears on the map to be the number assigned east of SR 441 (formerly 7). This map, which may also be considered a survey, shows on its face that it was adopted and copyrighted by the State Road Department in 1940. (DEX: 2; R: 1065; TR: 60; AR: 7) The State Road Department was the predecessor-agency to Respondent, State Department of Transportation, and hereafter is referred to as "SRD".

Much of the testimony at trial hung on what a reasonably prudent surveyor would understand from the legislative designation of a "state road" in Paragraph 42 of Chapter 20472, Laws of Florida (1941), upon which the State relied for widening its road.

The Chapter 20472 road designation reads:

> "Begin at a point on State Road 149 approximately 1.5 miles north of the Dade-Broward County line, thence run west a distance of approximately 6.6 miles."
>
> "Section 1 - That the following named and described roads located in Broward County, Florida, as designated in paragraphs numberd 1 to 97, inclusive of both, of this section, be and each of such roads is hereby declared, designated and established as a State of Florida, with all rights and privileges of designated State Roads, each of said roads so declared, designated and established to be known by such number as the State Road Department shall, respectively thereto, to-wit:
>
> ". . . 42. Begin at a point of State Road 149 approximately 1.5 miles north of the Dade-Broward County line. Thence run west a distance of approximately 6.6 miles.
>
> ". . . Section 2. This Act shall take effect immediately upon becoming a law.
>
> "Approved by the Governor May 26, 1941.
>
> "Filed in Office Secretary of State May 27, 1941." (Emphasis supplied) (DEX: 3; R: 1065; TR: 60; AR: 6)

Expert surveyor witnesses for each side agreed that if the sections were normal sections, one mile wide by one mile long, then the above legislative designation description upon which the State relied, as drafted by the Legislature in 1941, using 1.5 miles north of the Dade-Broward County line as a Point of Beginning (POB), would fall exactly on the Quarter Section Line of Section 23. (TR: 122, 129; 341;

352) This is the point at which, so far as anybody is able to determine, the road in question is and always has existed. (TR: 352, 399-400) However, both surveyors agreed that the sections are irregular.

The surveyors differed only slightly thereafter. Mr. Berry, Petitioners' surveyor, testified that if 1.5 miles were used exactly, Pembroke Road is 268.5 feet north of the 1941 Chapter 20472 Point of Beginning. (TR: 122, 129)) However, the 1941 legislative designation description uses "approximately 1.5 miles" to find an existing road at the quarter section line on the ground, precisely where Pembroke Road has continuously been located until today. Mr. Korn, the State's expert who is also a surveyor, and Mr. Byrd, title witness for the State, testified that a surveyor, with reasonable certainty, could locate this existing road in this location on the Quarter Section Line using the Point of Beginning contained in the 1941 Chapter 20742 as "approximately 1.5 miles." (TR: 105-106, 341, 406-409) Petitioners' surveyor, Mr. Berry, interestingly testified that before he said there was not a state road existing in a certain location on a certain date, he would check with Mr. Korn to see what his state preserved records showed. (TR: 128-129)

Petitioners did not fully respond to the State's notice to produce title opinion/title insurance information at trial (TR: 200, 221-222, 252, 255), but expert title

examiner, Mr. Byrd, testified that within 500 feet of an exact 1.5 miles would be good enough for him to locate an existing state road so as to write an exception into a title policy for the State's reservation of easement. (TR: 409) The Petitioners' expert title examiner witness, Mr. Stern, concurred with Mr. Byrd (TR: 394-395) that there would be neither an insurable nor a marketable title to any of the properties held by Petitioners without either an exception for the State's reservation of easement or a release by the State, and he would protect himself by getting a release from the State. (TR: 146-147, 164-165; 169) Both experts relied in part on Uniform Title Note 30.05.02 and Uniform Title Standard 15.2. Both recognized that the Lawyers Title Guaranty Document (DEX: 6; TR: 176; R: 1090-1095; TR: 402-404) would preclude issuance of a title policy in Blocks 11 and 21, where all the Petitioners' properties are located without such an exception or release by the State. There has been no such release by the State. (TR: 171)

ARGUMENT

Point I

THE SUPREME COURT HAS JURISDICTION TO HEAR THIS CASE UNDER ARTICLE V OF THE FLORIDA CONSTITUTION SECTION 3(b)(4) (CERTIFIED QUESTION) AND SECTION 3(b)(3) (CONFLICT)

The question having been certified by the Fourth District Court of Appeal in its opinion (A: 1; AR: 29-31) Laird, et al. v. Division of Administration, State of Florida Department of Transportation, 439 So.2d 918 (4th DCA 1983), and Petitioners having timely filed a Notice of Discretionary Review, this court clearly has jurisdiction for review of the certified question.

Since this court has already accepted jurisdiction of the certified question, Respondent will not address the non-issue of conflict jurisdiction. The certified question is the only appropriate focus of this appellate review and of necessity is addressed directly in Point II, supra.

Point II

Petitioners characterization: THE ANSWER TO THE CERTIFIED QUESTION SHOULD BE "YES" AND THE DEED RESERVATION DOES NOT APPLY BECAUSE THERE WAS NO LEGAL OFFICIALLY CLASSIFIED ROAD EXISTING ON THE DATE OF DEED.

Question as certified: "WAS IT NECESSARY, UNDER THE STATUTORY SCHEME IN EXISTENCE PRIOR TO THE ISSUANCE OF THE 1944 DEED INVOLVED HEREIN, FOR THE STATE OF FLORIDA TO HAVE SURVEYED AND FIXED THE LINE OF A ROAD, AND FILED SUCH SURVEY WITH THE CLERK OF THE CIRCUIT COURT OF THE COUNTY WHERE THE ROAD WAS LOCATED, BEFORE THE ROAD IN QUESTION COULD BE OFFICIALLY CLASSIFIED AS A STATE ROAD?"

The question, as certified, should be answered in the negative. Alternatively, under the facts of the instant case and for the preservation of the title of all governmental entities and all private property holders similarly situated, this court should find substantial compliance with the statutory scheme sufficient to establish "a state road."

Public policy dictates that all title opinions to private property owners ought not to be invalidated nor should the State have all of its tax deed reservations jeopardized by Petitioners' self-serving construction of Section 341.28, Florida Statutes.

At the Fourth District Court of Appeal, the point of agreement between the parties was that <u>if</u> a state road existed in the critical geographic location <u>west</u> of Pembroke

Road on the date of the January 17, 1944 Ray Johnson tax deed, then the State's reservation of state road easement and exercise thereof is valid.

Having failed to prevail on a number of issues below,[1] Petitioners' final thrust on the certified question

---

[1]Petitioners take the position in their Statement of Facts (Petitioners' Brief, p. 5) that they all deraign title from all prior owners without regard to the January 17, 1944 Ray Johnson tax deed, then, contrawise, they cite authority under Argument on Points I-III that the language of the tax deed must, be construed in the grantee's favor (thus, in Petitioners' favor) so as to eliminate the State's valid reservation of easement. In the trial court, Plaintiffs suggested that the January 17, 1944 Ray Johnson tax deed, which contains the State's reservation of easement, conveyed only "color of title" and that a 1949 quitclaim from predecessors in interest, named George, to a successor in interest, Abrams (TR: 147-149), was necessary to convey title, but this is a red herring. The tax certificate and tax sale underlying the 1944 Ray Johnson tax deed were never attacked. Expert witnesses Stern (for Petitioners) and Byrd (for the State) concurred that the quitclaim conferred only what title the Georges might have had, which was probably none, and was only a precaution. (TR: 177-180) On its face, the amount paid for the quitclaim deed and the fact that it was not a warranty deed clearly indicate that it was meaningless to the instant case. See discussion of Section 197.406, Florida Statutes, and argument based on Dade County v. Little, infra.

Both expert title examiners (Stern and Byrd) suggested that Section 95.231, Florida Statutes [formerly Section 95.23(1)] could not run against the State. Further, twenty years from the 1944 Ray Johnson tax deed would run before twenty years from the 1949 George quitclaim deed so as to render the State's 1944 tax deed reservation inviolate and preclude the Plaintiffs from challenging it on the basis of the George deed. Even assuming Plaintiffs have some colorable title through the George quitclaim deed, Section 197.406(1), Florida Statutes, as applied to the Everglades Drainage District Deed by Section 197.406(2), Florida Statutes, precludes challenge to the Ray Johnson tax deed and bars and forecloses such claims where there has been a failure to assert the right within one year. Also, Sections 712.01, 712.02, and 712.03(5) of the Uniform Marketable Record Titles to Real Property Act, Florida Statutes, read together, preserve the State's easement or rights, interest, or servitude in the nature of an easement, because the tax deed containing the reservation has existed of record for thirty years or more. Plaintiffs' expert, Stern testified that the State's reservation would survive. (TR: 190-191) See further discussion, infra.

seems to be that the State, which had no affirmative burden of proof in the circuit court inverse condemnation case, did not affirmatively establish that there had been a separate, distinct recording with the Clerk of the Circuit Court of Broward County of a separate and distinct state-financed "survey" of this road prior to 1944. In the instant case, the State concedes it cannot meet that burden, but that is not the clear language of the statute, that is not how the statute has been previously interpreted, and the state has clearly shown substantial compliance with the statutory scheme.

In order for Petitioners to prevail, the court would have to read Section 341.28, Florida Statutes, to require that a state financed and conducted survey must be recorded after the legislative designation and prior to the tax deed. Section 341.28, Florida Statutes (1941), requires no such explicit timing, and the Fourth District Court declined to require it. (AR: 29-31)

Petitioners should be estopped to challenge a reservation of easement arising within the common root of title, but perversely, they deraign title by way of the Ray Johnson tax deed while refusing to recognize the State's reservation of easement contained therein. In Dade County v. Little, 115 So.2d at 19 (Fla. 3rd DCA 1959), the court stated the following:

> "On the other hand, the appellant contends that the appellees are

> estopped by reason of having accepted the benefits under the deed from the District and therefore, under the doctrine of estoppel by deed, cannot deny the reservation contained in the deed of their predecessors intitle. On this point, we conclude that appellant's contention is supported by logic and reason as well as the majority view throughout this country. The general rule found in 31 C.J.S. Estoppel Section 38f is:
>
> > 'The grantee in a deed will be concluded by recitals therein limiting the quantity or extent of the interest conveyed and making reservations in favor of the grantor or third person.'
>
> "A corollory of this rule is succcinctly expressed in 19 AM. Jr., Estoppel. Section 21:
>
> > 'Estoppel of the grantee of a deed viewed generally, is of the nature of equitable estoppel rather than technical estoppel by deed, since the estoppel is not predicated primarily on the execution of a formal written instrument which cannot be denied or rebutted, but rather on the inability of a person, in the eyes of the law, to acquiesce in, and enjoy the benefits of a transaction and at the same time reject the accompanying burdens a person cannot claim under the instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favor, and at the same time repudiate or contradict another which is counter or adverse to it."

However, if the court finds for any reason that Plaintiffs are not estopped to challenge the State's reservation of easement, then the history of the statute, of case law, and of the road itself, become pertinent.

Prior to issuance of the tax deed which is the root of title here, the Everglades Drainage District (and thus the State of Florida) had acquired fee simple ownership of all the land in question under Section 15(i), Chapter 20658, Laws of Florida, Acts of 1941. (AR: 8-11) Pursuant to Section 67, Chapter 14717, Laws of Florida, Acts of 1931, as amended by Section 11, Chapter 20658, Laws of Florida, Acts of 1941, with reference to the manner of selling said land, the Board of Commissioners of the Everglades Drainage District executed Deed No. 235, dated January 17, 1944, and recorded March 1, 1944 at Deed Book 437, Page 250, to one Ray Johnson, a predecessor in interest to Plaintiffs herein. (PEX: 3; DEX 1; Entry No. 48 of R: 990; TR: 57, 149; AR: 3-5) On its face, it shows that Mr. Johnson paid approximately ten cents an acre.

The definition of "state road" was apparently first enacted by the Legislature by Section 7, Chapter 9312 (No. 194), Laws of 1923. (AR: 12) It permitted designation of a state road either by the SRD (the State Department of Transportation's predecessor agency), or by the Legislature, and the location and fixing of the line and right of way by the SRD. This language defining a "state road" continued to be operative, as evidenced by Section 1654, CGL Laws of Florida, 1927. (AR: 13)

By Chapter 17307 (No. 536) HB 1039, Laws of Florida, (1935), the Legislature added a broader definition of "roads"

and provided for title to vest in the State in any road maintained for four years. This dedication was in addition to previous legislative designation and suggests that simply an enactment of the Legislature alone could create a "state road". (AR: 14-15)

At trial of the instant case, the State introduced plats of record spanning 1925 to the present showing that a road open to the public named "Pembroke Road" continuously existed within 10 feet of the Quarter Section Line. (DEX: 7; R: 1096-1103; TR: 190) These plats alone constitute surveys. Specifically, the 1954 Welwyn Subdivision Plat, upon which Plaintiffs base their title, also shows Pembroke Road in existence.[2]

The State of Florida also introduced a 1936 Broward County General Highway and Transportation Map locating a road open to the public existing at precisely the Quarter Section

---

[2]At the trial level, Petitioners attempted to counter the 40-plus years of plats recognizing a continuously existing road open to the public by emphasizing one plat which was "off" by about ten feet and by suggesting that omission from the 1954 Plat of Welwyn Subdivision of a clear additional showing of the State's reservation of easement constituted a waiver of the reservation. This latter suggestion was clearly unfounded because the County, or a commercial developer cannot waive the State's reservation, but more basically, easements were not required to be shown on plats recorded prior to amendment of Section 177.09, Florida Statutes, in 1977. (TR: 164-167,171)

Line of Section 23. The road portion involved in this action which is west of SR 441 (7) does not indicate a number but "394" appears on the easterly portion. This was adopted and copyrighted by SRT in 1940. (DEX: 2; R: 1065; TR: 60; AR: 7)

In 1941, the same year as the Chapter 20472 legislative designation of the road portion in question, the Legislature sought to redefine future designations of state roads by amending Section 1654, CGL Laws of Florida, 1939, [previously Section 7, Chapter 9312 (No. 194), Laws of Florida, 1923] (AR: 12), and codify it as Section 341.28, thus eliminating the option of the SRD unilaterally designating a "state road" without the Legislature. (See Volume III, Laws of 1941, showing annotation of what the modified statutory language was intended to accomplish. (AR: 16)

Section 341.28, Laws of 1941, provided, in pertinent part:

> "341.28. 'State road' and 'department' defined.- The term 'state road' used in this chapter shall be construed to mean any road or part of road which has been or may be established, declared, and designated by the legislature as a state road, and of which the location of the line and right of way has been surveyed and fixed upon by the department or its duly authorized engineers and representatives . . . "

Contrary to Petitioners' construction, the clear statutory language of Section 341.28 (1941) does not require that the survey ever be recorded; and does not state when the

survey is to be accomplished. Section 341.28 does not require that where a road's centerline has already been fixed by a series of recorded plats and on a State adopted highway map for a number of years, it must again be surveyed just because the Legislature designates it as a "state road".

In 1941, the Legislature enacted Chapter 20472 (No. 264) H.B. 765, Laws of Florida, 1941, which, in paragraph 42, designated Pembroke Road as follows:

> "Section 1 - That the following named and described roads located in Broward County, Florida, as designated in paragraphs numbered 1 to 97, inclusive of both, of this section, be and each of such roads is hereby declared, designated and established as a State of Florida, with all rights and privileges of designated State Roads, each of said roads so declared, designated and established to be known by such number as the State Road Department shall, respectively thereto, to-wit:
>
> ". . . 42. Begin at a point of State Road 149 approximately 1.5 miles north of the Dade-Broward County line. Thence run west a distance of approximately 6.6 miles.
>
> ". . . Section 2. This Act shall take effect immediately upon becoming a law.
>
> "Approved by the Governor May 26, 1941.
>
> "Filed in Office Secretary of State May 27, 1941." (Emphasis supplied) (DEX: 3; R: 1065; TR: 60; A: 6)

In Volume III, Helpful and Useful Matter, Florida Statutes, 1941, page number 307, under the heading, "Broward County," this particular road designated by Chapter 20472,

Laws of 1941, was indexed and the chapter number published. (AR: 17-18)

The SRD then published a list of the State Road System for Florida, Broward County, 1941, (DEX: 4; R: 1069-1078; TR: 73), showing and adopting this same described, designated state road as "Co. No. 6-42 (Rd. Indent. No. 72). The court can briefly scan both Chapter 20472 and the agency list to see how often legislative designations included the word, "approximately."

A general law of statutory construction requires courts to assume that the Legislature intended to enact an effective law, Overman v. State Board of Control, 62 So.2d 696 (Fla. 1953). To accept Petitioners' tortured explanation of why the Legislature must have meant the designated state road must be surveyed and the survey recorded subsequent to passage of Chapter 20472 (1941) (the designation relied on by the State), and before State exercise of the reservation of easement, the court would have to illogically assume that the Legislature meant more than it specifically set out in Section 341.28, Florida Statutes, and that the Legislature intended to designate a state road in 1941 by Chapter 20472 while at the same time rendering that very designation insufficient by Section 341.28, Florida Statutes, amended the same year. Such is not a recognized principle of statutory construction.

Further, Florida case law does not follow Petitioners' convoluted reasoning with regard to legislative designations, surveys, and road markings. Webb v. Hill, 75 So.2d 596 (Fla. 1954), concerns the sufficiency of the description in a map declaring, designating and establishing a certain state road. The Florida Supreme Court found the following description was sufficent:

> "Beginning at an intersection with State Road No. 10, at Wakulla Station, Wakulla County, Florida, and running in a generally northwesterly direction passing through the southern half of Section 2, Range 1 West, Township 3 South, to an intersection with State Road No. 19 at or near Bloxham in Leon County, Florida." (emphasis supplied)

Clearly, this honorable Court established in that case that the Legislature of the State of Florida is not held to the same standards in the designation of state roads that a private citizen might be in attempting to establish the sufficiency of a description in a deed. These are two separate and distinct matters.

The court in the Webb case clearly set forth the separate responsibilities and obligations of the Legislature and the SRD (now DOT) in the matter of establishing state roads. It was clearly shown therein, that it was the duty of the Legislature to establish general lines for a state road, and pursuant to Section 341.47, Florida Statutes, the SRD was to determine and fix lines and locations of such roads, and

it was specifically held that the designation as to the state road was not illegal and void because the portion of the road did not run in a beeline from the place of beginning to the place of ending and, even, that it did not run through the southerly portion of Section 2, Range 2 West, to Township 3 South, at an intersection with State Road 19 at or near Bloxham.

As set forth in the Webb case, the fact that a state road does not conform exactly to the legislative designation does not render the act null and void.

In the instant case, we have a road clearly open to the public in the same location pursuant to surveyed plats on a Quarter Section Line since 1925, shown on an Official Highway Map since 1936, which was adopted by the SRD in 1940, and designated in 1941 by the Legislature. The reservation of easement in the deed relied on was in 1944.

The legislative designation using the word "approximately" is like the bulk of other 1941 designations in Broward County. If Broward's sections were regular, 1.5 miles would fall exactly where this portion of Pembroke Road always has been and is today. As it is and because these sections are irregular, it is only 268.5 feet off and testimony indicates even this discrepancy is entirely reasonable. (TR: 341, 409)

Mr. Korn, a State Right-of-Way Administrator, title examiner, and registered land surveyor, explained how

accepted land surveyor treatises would enable a reasonably prudent surveyor to locate that existing portion of road on the ground with reasonable certainty in 1941 using the "approximately 1.5 miles" designation. (TR: 336-341) The treatises are not evidence, but the court may take judicial notice of their existence and of the state of the art, expertise, and custom of the trade of surveying that a man-made monument on the ground, such as an existing road, takes precedence over dimensions. (Excerpts from Clark, Land Surveying) (AR: 21-22)

Mr. Berry, Plaintiffs' surveyor, testified he never uses "approximately" but that he would contact Mr. Korn, representing the State, before he would render an opinion that a state road was not designated in a certain location. (TR: 128-129) Mr. Stern, expert title examiner, said "approximately" had meant "nearly, about, close to" to him and deferred to Mr. Korn before he would render a title opinion with clear title. (TR: 146-147; 164) Mr. Byrd, expert title examiner, said if a road was actually located within 500 feet of the legislative designation he would consider that the state road referred to in the legislative designation, that this was especially so if on a Quarter Section Line, and that he considered a reasonably prudent surveyor would have located that road with that designation with reasonable certainty. (TR: 406-409)

The State further invites the court's attention to the case of Orange County v. Fordham, 34 So.2d 438 (Fla. 1948), wherein the Florida Supreme Court recognized the discretionary power of the SRD to survey and locate the line or route of any state road or section of state road previously designated and established. In the Fordham case, the Supreme Court specifically held:

> "State roads designated by the Legislature fall into two general classifications: (1) existing state roads that at the time of designation by the Legislature had already been placed by the State Road Department in the State Road System for construction, maintenance, and improvement, (2) those not yet placed therein by the department for such purposes. To limit the road right-of-way reservations and deeds under the Murphy Act, as of 1937, Ch. 18296, to roads of the first class - those already taken over for construction, maintenance and improvement - as appellant contends, would defeat the solitary purpose of the reservation, which is to aid the future improvement of the road system."

Fordham further clearly states that the survey is to be done whenever in the judgment of the State Road Department it shall be determined to be practicable and to be in the best interests of the state. See Section 341.47, Florida Statutes.

Also upholding the concept that a survey by the State is discretionary as to time is Ahlheit v. State Road

Department, 114 So.2d 623 (Fla. 1st DCA 1959). Therein, the validity of a 100 foot reservation of state road right of way easement was also at issue. The parties stipulated that the road in question was an existing road used by the public at the time of the passage of the legislative designation, but therein the court found that under the laws of 1941,

> ". . . two conditions were necessary to exist at the time the state deed issued in order to make effective the reservation contained therein: (1) A road used by the public through or adjacent to state-owned lands conveyed by the state deed; (2) such public road must have been previously designated as a state road by the Legislature." (emphasis supplied)

Ahlheit adopts Fordham to the effect that a survey, etc., may not be necessary until state funds are to be committed for condemnation or construction. In the trial below, Mr. Korn testified the State would not survey until ready to widen. (DEX: 5; DEX: 10; R: 1079-1089; R: 1107; TR: 351, 355, 357)

Plaintiffs rely heavily on Enzian v. State Road Department, 165 So. 95 (Fla. 1936). Plaintiffs are correct in construing Enzian to hold that if SRD/DOT had constructed an entirely new road in a different physical location than the legislative description designation reservation, the new

road would not constitute a "state road". A similar pronouncement was made in Fordham and Ahlheit.[3]

In Enzian, the Florida Supreme Court affirmatively recognized that a Legislative designation by itself constitutes a temporary expedient until a right-of-way line can be surveyed and that the temporary nature should not defeat a valid easement.

See also Pirman v. Florida State Improvement Commission, 78 So.2d 718 (Fla. 1955), wherein this Court went so far as to state there was no constitutional requirement that the location of a legislatively designated road should be fixed and established even prior to validation or issuance of bonds for construction. In Pirman, the court even found without merit a contention that a legislative designation was so indefinite that the actual location could not be determined by a surveyor.

---

[3]In Millstone v. Department of Transportation, an unreported case upon which Plaintiffs harped throughout the trial (TR: 10-13), a similar disqualification occurred as to the east leg of Pembroke Road, on the other side of SR 441, which was dog-legged one mile off course from its original legislative designation. Because that case involves a different initial legislative designation location and a total relocation away from the initial legislative designation description of Chapter 10946, Laws of Florida, which apparently was never indexed in Volume III of the Laws of 1941 than is here at issue for the west side of Pembroke Road, Millstone is irrelevant to the validity of an existing state road at the present site in the case at bar. The present case is of course founded on other facts and principles and Millstone is mentioned only in anticipation of Petitioners' Reply Brief.

Boyer, Real Property, "Tax Titles"; Uniform Title Standard 15.2; and Lawyers Title Guaranty Fund Title Note 30.05.02, p. 622, all support the State's contention that a valid reservation of easement in the State cannot be overcome by Petitioners without a release by the State.

There has been no release by the State. (TR: 171)

As to Petitioners' contention that their payment of taxes indicates ownership, defendant concurs. Owners pay property taxes. Easement holders generally do not pay property taxes. Public entity holders of a reservation of public purpose road right-of-way easement certainly do not. It is unfortunate Petitioners deliberately failed to notify the Broward County Tax Assessor of the road-widening and did not reflect it in any deeds they conveyed because without such notification, the Tax Assessor could not reflect the change on his books. Since adverse possession cannot run against the sovereign state. Petitioners' payment of taxes has no relevancy to this case.

The language of Section 341.60, Florida Statutes, also suggests that legislative designation alone is enough to create a state road, but Petitioners' reliance on requirements of signing is misplaced. Sections 341.16, 341.24, 341.46, 341.47, and 341.65, Florida Statutes, speak for themselves as to under what circumstancaes DOT must "sign" and maintain a road. All are applicable to specific types of roads, highways, and systems and are discretionary

except where state funds for condemnation, construction, or maintenance are allocated or to be allocated, and are more relevant to the types of newly constructed or dedicated roads which are the subject of statutes beginning with Chapter 17307 (1935). Any significance of parts of Pembroke Road being numbered 42, 394, or 824 is moot. (TR: 363) (Title XXIV (1941), in its entirety is included in the Appendix) (AR: 23-28) None of these statutes have any relevance to Section 341.28 (1941), defining "state roads" for purposes of the instant tax deed reservation of easement.

Here, every Petitioner deraigns title through the tax deed containing reservations of 100 feet either side of the centerline to the State. Every Petitioner had notice that a road open to travel by the public abutted their property when they bought it. Some of the Petitioners herein also had notice of the 100 foot reservation by deed, survey or title opinion. (TR: 213, 214, 220, 221, 237, 243, 246, 252) The final DOT construction is within 50 feet either side of the centerline, well within 100 feet of the reservation of easement.

Point III

THE DECISION BELOW FAILS TO RESOLVE DOUBTS AND AMBIGUITIES IN FAVOR OF THE CONSTITUTIONAL RIGHTS OF PRIVATE PROPERTY OWNERS AND AGINAST THE TAKING OF PROPERTY BY THE STATE WITHOUT COMPENSATION.

The actual analysis by the majority of the Fourth District Court of Appeal was that:

> "While the statutes defining state roads for various purposes are somewhat ambiguous, we do not believe the trial court's conclusions are inconsistent with those provisions insofar as they, affect the issue of whether the state's interest in Pembroke Road was preserved by the 1944 deed. Cf: sections 320.01(7), 341.28, 341.47 and 341.60, Florida Statutes (1941) [Emphasis Supplied].

Attached in the Appendix are clear copies of each of the sections referred to in the majority opinion. It is respectfully submitted that there is no ambiguity among them in light of the legislative history discussed under Point II, supra. (AR: 32-35)

The appeal before the Fourth District Court of Appeal was an appeal from a Final Judgment wherein the circuit court, Judge Myette Burnstein, ruled that there had been no "taking" of the Plaintiffs/Appellants/Petitioners' real property in inverse condemnation because factually a state road had existed as represented by the State Defendant/Appellee/Respondent, because the State had validly

exercised a reservation of easement for road-widening purposes contained in a 1944 tax deed, and because all the Plaintiffs had actual or constructive knowledge of the reservation. (TR: 976-977; AR: 1-2)

The trier of facts' findings are presumed correct. Ross v. Department of Health and Rehabilitative Services, 347 So.2d 753 (Fla. 3rd DCA 1977); Herzog v. Herzog, 346 So.2d 56 (Fla. 1977); Strawgate v. Turner, 339 So.2d 1112 (Fla. 1976); Biscayne Mfg. Corp v. Sandav Corp., 323 So.2d 315 (Fla. 3rd DCA 1975).

Despite Petitioners' eloquent appeal against what they characterize as the injustice of the State's unconstitutional confiscation of private property, despite their lament of "what could any purchaser do?", the district court declined to upset all current title opinion pratice and many state road reservations on the basis of facts pretty well undisputed: the Petitioners knew of the State's reservation of easement. (TR: 213, 214, 220, 221, 237, 243, 246, 252) If Petitioners built on the State's reservation of easement, they did so at their own risk, but the record suggests that aside from Mr. Falkowski, no other Petitioners had any construction property loss as a result of the State's public purpose road-widening.

Despite Petitioners wishful thinking that all other property owners along the road-widening were compensated, the record refutes that conclusion. How much more unjust to

require the citizens of the State of Florida through their taxes, to now cough up money to pay for exercising an easement which was always rightfully theirs.

The learned judge below heard the factual witnesses and viewed the evidence. She weighed and considered the evidence of the expert witnesses for both sides. In this situation, as set out at length in the State's "Statement of Facts", supra, the experts did not necessarily disagree except on interpretation of the word "approximately" as set out in Chapter 20942 (1941), but given that minor disagreement, the trier of facts' resolution of conflicting evidence is presumed correct, The Zack Co. v. Cutchen Constr. Inc., 344 So.2d 942 (Fla. 3rd DCA 1977); Liberty Mutual Ins. Co. v. Furman, 341 So.2d 1056 (Fla. 3rd DCA 1977), and the appellate court may not properly re-evaluate the testimony, Monzon v. Monzon, 349 So.2d 195 (Fla. 3rd DCA 1977).

The Plaintiffs have simply not carried their burden to demonstrate on the record that the doubts or ambiguities are sufficient to provoke judicial error.

CONCLUSION

In a commendable overabundance of caution, the Fourth District Court has sought clarification of the 1941 statute upon certified question. The question should be answered in the negative.

Respectfully submitted,

ELLA JANE P. DAVIS
Trial and Appellate Attorney
A. J. SPALLA
General Counsel
Department of Transportation
Haydon Burns Building, MS 58
605 Suwannee Street
Tallahassee, Florida 32301
904/488-9425

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 17th day of November, 1981, to JAMES A. SCOTT, ESQUIRE, 2000 East Oakland Park Boulevard, Post Office Box 11402, Fort Lauderdale, Florida 33339.

Respectfully submitted,

ELLA JANE P. DAVIS