IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,642

JOSEPH R. LAIRD, ET AL.,

Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DIVISION OF ADMINISTRATION, ETC.,

Respondent.

PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONERS' BRIEF

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PETITIONERS' BRIEF

PREFACE

With the Court's permission we will refer to the Appellants/property owners as "Petitioners" and to Defendant/Appellee, Florida Department of Transportation as "the State" in this Brief. The symbol "TR" means Transcript Record and "Ex." refers to exhibit at trial unless otherwise stated. Page numbers refer to the page of the Record on Appeal.

STATEMENT OF THE CASE

The Trial Court ruled in favor of the State Transportation Department allowing the taking of a 15 foot strip of private property for a road widening without any compensation.

The property owners appealed. The Fourth District Court of Appeals affirmed the decision of the Trial Court in a split decision. The majority opinion, however, expressed uncertainty as to the issue and certified a question to the Supreme Court.

The Petitioners, have filed a Notice of Discretionary Review with this Court, based upon the Certified Question and Conflict Jurisdiction, and this Brief is filed by Petitioners in support thereof, as well as on the merits of the case. An appendix will be filed with this Brief and the symbol "A" will be used in reference thereto. A copy of the decision of the District Court of Appeal is included in the Appendix (A-1) and the decision is reported at 439 So.2d 918 (4th DCA, 1983).

STATEMENT OF FACTS

Petitioners are business property owners along a section of a road known as Pembroke Road in southwest Broward County. The dedicated right-of-way for this road has always been 35 feet each side of center, according to the plats of all subdivisions in the area. (See Plat, Ex. 3, P.990 Record, also TR.48-49).

All Petitioners purchased their property and established their businesses based on the plat of Welwyn Park. (See Deeds Ex. 4-11, P.991-1007). All surveys showed the Pembroke Road right-of-way at the time of the purchase to extend only 35 feet south of center. (See Ex. 4-B).

In 1975, the State Department of Transportation commenced a widening project on Pembroke Road. The project required an additional 15 feet of private property beyond the 35 foot dedicated right-of-way on the south side. The State negotiated and/or condemned and paid all other property owners along the road. (TR.51).

The State took 15 feet of Petitioners' property and refused any compensation (TR.372-373) to the owners, for the first time claiming Pembroke Road to have been a state road for the past 31 years and subject to an ancient road reservation for a 200 foot right-of-way.

The State bases its claim on the following:

(1) A 1941 Statute (Ex.1, P.981-988) attempting to designate state roads included:

> "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."

(2) A reservation in a Tax Deed from the Everglades Drainage District executed January 17, 1944 which stated:

> "... and also saving and reserving unto the State of Florida easement for state road right-of-way 200 feet wide lying equally on each side of the center line of any state road existing on the date of this deed through so much of any parts or herein described as is within 100 feet of said center line; ..." [Emphasis supplied] (Def. Ex.1, P. 1062-1064)

No road existed at the point designated by Statute in 1941 or in 1944. (TR.117). The location is in fact at least 268.5 feet south of the road in question here. (TR.122). No other statutory designation of the road in question has been located or produced and no statutory reference to "Pembroke Road" west of 441 exists. (TR.386-387).

The State admits that:

(1) It never maintained Pembroke Road as required by law for state roads (TR.376-96); and

(2) No survey was ever made or filed with the Clerk of the Circuit Court as required by law (TR.95); and

(3) No road marker was ever established or posted to number Pembroke Road as a state road until recently (TR.95); and

(4) The attempted designation is at least 268.5 feet or about one and one-half blocks to the south of the road in question; and

(5) The alleged easement can only be valid if the road in question was a legal state road on January 17, 1944. (TR.53); and

(6) The State's own survey notes show that the total dedicated right-of-way was always 70 feet (TR.48,49); and

(7) Highway maps prepared by the State Division of Transportation showed no designated state road in the area of Pembroke West of U.S. 441. (Pl. Exhibit #13).

Meanwhile, the Petitioners bought their property prior to the claim by the State and without any knowledge thereof. They have paid taxes continuously on all of their property including the 15 feet the State has taken. (TR.267-269, TR.195-248). Further, the tax assessments at no time reflected any easement reservation to the State, although all other easements are shown. (Ex. 12, P.1008-1023, TR.277).

Petitioners deraign their title from all prior owners without regard to the interloping Tax Deed in question. (TR.147-150). (See also Abstract of Title, Pl. Exhibit #3). All county reservations had been released in the past, but no state release was asked for or given. (TR.98).

Finally, the State's right-of-way, if the judgment is upheld, extends another 50 feet into the Petitioners' property, (TR.375) meaning that more than half of the 110 feet survey depth would belong to the State without any compensation to the owners.

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 District Court was obviously deeply divided on the issue in this case. One member of the panel felt that Florida Statutes clearly required that surveying and the other acts required by Florida Statute Section 341.28 (1941) be accomplished before a road officially becomes a state road and therefore Petitioners should be compensated. (See Dissent, Downey J., page 3 of Opinion). The other two members felt the Statutes were "somewhat ambiguous" and "sufficiently uncertain" that, while they let the Trial Court's decision stand, they certified the following question:

> "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 Supreme Court clearly has jurisdiction by virtue of the certified question under Article V Section 3(b)(4). Petitioners urge the Court to exercise its jurisdiction to settle the uncertainty expressed by the majority opinion, and the cloud on the express language of the applicable statutes.

This Court further has jurisdiction to hear this case because the decision expressly and directly conflicts with two

decisions of the Supreme Court on the same matter of law. (Article V Section 3(b)(3) Florida Constitution).

The Trial Court held that the road was an official state road even though the state had never surveyed and fixed the line of the road nor recorded the survey with the Clerk of the Circuit Court. The majority opinion of the District Court, while expressing doubt, allowed the decision to stand.

On the other hand, the Supreme Court in Enzian v. State Road Department, 165 So. 695 (1936), when faced with the same two legal requirements for an existing state road, held that until the department had clearly surveyed and fixed the location, no state road existed and the location could be changed at any time.

Again, in the case of Webb v. Hill, 75 So.2d 596 (1954), the Supreme Court held that a state road right-of-way would not be fixed until it was surveyed.

Clearly, these two Supreme Court rulings and the ruling by the Fourth District Court of Appeal in this case are expressly and directly in conflict on the same matter of law, which gives the Supreme Court jurisdiction to hear this matter.

It is respectfully submitted that the Court should clear up the confusion, ambiguities and uncertainties that affect not only the rights of Petitioners but other private property owners, as well as the state, and many road rights-of-way all over Florida.

POINT II

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 THE DEED.

If the Court will take jurisdiction and decide this case it should answer the certified question affirmatively based on the clear statutory definition of a state road.

In 1944 and prior thereto, the requirements for a legal state road were set forth in Florida Statutes Section 341.28, 1941:

> "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 of its duly authorized engineers and representatives." [Emphasis supplied]

Further, the statutes prescribed the filing of such survey with the Clerk of the Circuit Court.

There were two mandatory requirements to have a legal state road, i.e.: (1) designation by the legislature and (2) survey and fixing of the line and right-of-way. If either is not clearly established as of the date of the deed, the State's claim should fail. The certified question centers on the second requirement. However, if the Court takes jurisdiction to decide this case it will want to address all matters.

The deed reservation, upon which the state relies, clearly applies only to "any state road existing on the date of this deed". (January 17, 1944).

The basic rule of construction is that a grant in a deed is to be construed most strongly against the Grantor and most beneficially to the Grantee. F.E.C. Railroad Company vs. Worley, 41 Fla. 297, 38 So. 618 (1905).

Therefore, if the language of an exception or a reservation is ambiguous or doubtful, i.e., the term "state road existing on the date of this deed", then any doubt should be resolved against the Grantor and in favor of the Grantee. Fl. Am. Jur 2d, Deeds, Section 273. Applying this rule to the deed from the drainage district in question, any doubt should be resolved against the reservation. In other words, if there is doubt as to what was meant by "existing" or by "state road", then it should be resolved in favor of the Grantees.

Another rule is that there is a presumption that words employed in a deed were intended to be effective in accordance with their ordinary meaning. Saltzman vs. Ahern, 306 So.2d 537 (Fla. 1st DCA 1975).

What is the ordinary meaning of the words used in this deed reservation? Why was "state roads" used, if as the State contended in the Court below, it meant any road, anywhere in the area, whether it was a state road or not.

It seems clear that the language of the deed requires both a "state road" as defined by law, and that the road exists as a state road on the date of the deed in question. The Statute quoted above clearly requires both the designation of the road and the location of the right-of-way and the line by the Department. The State admits that it never located or surveyed this road until recently.

One case important to the issue raised by the certified question is Enzian v. State Road Dept., 122 Fla. 527, 165 So. 695 (1936) which involved a Marion County Road, and was decided under the same statutory requirements for an existing state road. The Court held that until the Department has clearly surveyed and fixed the location, no state road existed and the location could be changed at any time.

The State admits that it did not locate the line or survey the right-of-way prior to January 17, 1944. In fact, this was not done until 1975. Therefore, Pembroke Road was not an "existing state road" on the date of the deed and the reservation should not apply on this basis alone.

The case of Webb v. Hill, 75 So.2d 596 (Fla. 1954), upheld a 1937 designation which was specific but held that the Department did not have to build the road in a straight line but could deviate and that the road right-of-way would not be fixed until it was surveyed. This case and the Enzian case both support the proposition that no state road exists until the Department fixes the line, particularly, where no specific line is fixed by Statute, or where the line is in error.

This brings us to the designation requirement of the statute. The State's claim is also invalid because of the lack of clear statutory designation to justify no compensation for the taking of private property. The alleged designation is at least 268.5 feet or about one and one-half blocks to the south of "Pembroke Road".

Page after page of the transcript is devoted to speculation as to what was meant or intended by the 1941 designation statute. Surveyors discussed and speculated and the state engineers said "approximately" was sufficient and the property owners' surveyor testified that the errors of more than one foot in a mile would not be acceptable, and certainly not 268 feet. [See for example, the testimony of Maurice Berry, TR. 107-132].

Looking at the State's claim of proper designation in the best possible light, it is at least vague and ambiguous as to what the Statute means. If the 1941 legislature wanted to designate West Pembroke Road, why didn't it use the name? The State's Exhibit 7 shows that the name "Pembroke Road" appeared on plats in the area as early as 1925. The legislature could have referred to the east side which only two years before was attempted to be designated as State Road 394, (later thrown out as being vague), and tried to continue the road west of State Road 149 (now U. S. 441).

In any event, description errors in Statutes should not be corrected by later agency rule or Court interpretations as to what was or may have been intended. Little vs. Reo Hill Fisheries, 322 So.2d 557 (Fla. 1975).

It is respectfully submitted that the clear statutory definition of State road mandates an affirmative answer to the certified question. Further, no "officially classified state road" existed on the date of the deed because of lack of proper designation and/or failure to meet the survey and location requirements of the statutes.

POINT III

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

The District Court specifically recognized statutory ambiguities relating to Petitioners' property rights. It further found them to be "sufficiently uncertain" to require certification to this Court for resolution.

Article X, Section 6(a) of the Florida Constitution provides:

> "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." [Emphasis supplied]

Private property rights are the cornerstone of our free enterprise system. Any taking of private property must be strictly in accordance with the law and those laws must be strictly construed. Shavers v. Duval County, 73 So.2d 684 (Fla. 1954).

Further, the Courts have repeatedly stated that:

> "... all doubt should be resolved in favor of the Constitutional interdiction against the taking of private property without compensation." [Emphasis supplied] Alford v. Finch, 155 So.2d 790 (Fla. 1963).

In this case the State first asked that the Court disregard the description error in the Statute of about 270 feet as to the road's location and assume one of several possible interpretations of the designation statute.

Second, it asked to enforce a 37 year old reservation in a deed which requires an existing state road on the date of the reservation, and then asks that we torture a statutory construction to ignore other requirements of law for a state road such as survey and location of line and right-of-way by the Department. Section 341.28, Fla. Stat. (1941). (The subject of the certified question.)

Third, the State asks us to ignore the failure to ever post a sign or number the road, the failure to maintain the road, and the failure to take action that would put anyone on notice that it claimed the road to be a State Road.

We ask the Court to consider the injustice of the State's claim as illustrated by the following facts:

One of the Petitioners is Bill Falkowski who operates a Dry Cleaning business on Pembroke Road. He bought and built it without knowledge of the later claim by the State. Thusfar, the State has taken 50 feet of its alleged 100 foot right-of-way and in the process Mr. Falkowski has lost parking and his overhang

canopy. (TR. 48). If the State's claim to a 100 foot easement is upheld, more than half of his building and machinery would be subject to being taken and his business destroyed all without compensation.

A Statute which has the result of confiscating private property without compensation should be strictly construed against the confiscatory authority. Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954).

The District Court's opinion at least specifically recognized the doubt and ambiguity in the statutes as affecting Petitioners' private property rights. This doubt should have been resolved in Petitioners' favor and against the taking of private property without compensation. To do otherwise ignores the high constitutional status of private property.

It is respectfully submitted that these Petitioners should be entitled to compensation for the taking of their property.

CONCLUSION

Petitioners respectfully request that the Supreme Court take jurisdiction of this case, reverse the decision of the Fourth District Court of Appeals, and the judgment of the Circuit Court, and mandate that judgments and orders be entered to provide for compensation to Petitioners in the amounts to be determined appropriate.

Respectfully submitted this 9th day of January, 1984.

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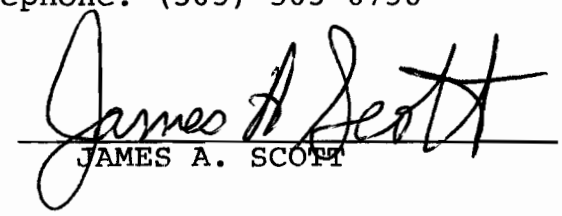
By: 
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioners was furnished by United States Mail to MARGARET RAY-KEMPER, ESQ., Attorney for Respondent, Haydon Burns Building, Tallahassee, Florida 32301, this 9th day of January, 1984.

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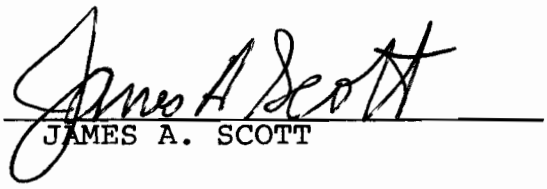
By: 
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