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

PETITIONER'S REPLY BRIEF

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TABLE OF CITATIONS

All citations cited in this Reply Brief of Petitioners were previously cited in Petitioners' Main Brief or Respondent's Answer Brief.

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_____/

REPLY BRIEF OF PETITIONERS

ARGUMENT

The Petitioners respectfully submit this reply to Respondent's Answer Brief.

The State's arguments under Point II ramble at length in an attempt to avoid the two main points of the case which are:

1. The reservation in the 1944 tax deed on which the State relies clearly applies only to "any state road existing on the date of this deed".

2. When the 1944 deed was executed, the law specifically defined a "state road" to be:

> "... any road ... 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 ..."

Further, Florida Statute §341.47 which was in effect in 1923 specifically required that:

> "... a map or plat of such survey and location, shall be filed in the clerk's office of each county ...". [Emphasis supplied.]

The plain language of the deed and the statutes are compelling. If the legislature did not intend for the specific requirements to be met, why were the requirements expressly set out in the language of the law? In the same way, if the drainage district intended that it would have the 200 feet easement on all state roads, whether existing on the date of the deed or not, why then would it specifically state: "any state roads existing on the date of this deed"?

Basic construction law, common sense and public policy would dictate that the intent of these statements is clear and should be followed. Thus, the Court should find that Pembroke Road was not a "State Road" on January 17, 1944.

The State contends that Petitioners had notice and should, therefore, lose their property without compensation. Does the State contend that they should have notice of an easement for a state road existing in 1944 where none existed; or of a statute describing a location a block and one-half away from Petitioners' property, particularly when the recorded plat showed only a 35 foot right-of-way? [See Appendix 2]

The State contends that because Pembroke Road has been a road "open to the public" since 1925, it is a "State Road." Certainly, this theory is preposterous. Nowhere in the statutory scheme or case law is it said that if a road is "open to the public", it is a "State Road". Further, the deed reservation says "state road existing", not "road open to public."

The record is clear and uncontroverted that no Petitioner had actual notice of the State's easement. The only debate is over constructive notice. We say such notice is impossible. The dedications on the plat show only a thirty-five (35) foot right-of-way. There were no signs designating the road as a "State Road". There was no state maintenance. There was no recorded survey or fixing of the road right-of-way by the State as required by law. Without knowledge that the road was in fact a "State Road", even in the 1970's let alone in 1944, the reservation in an ancient deed is meaningless and its inclusion in the abstracts is certainly not notice of an easement 200 feet wide, when all surveys and plats showed an easement thirty-five (35) feet from center line. (See Surveys, Appendix pages 7 and 8).

The further shallowness of the State's argument is revealed by the statement on page 4 of its brief that, "State Road 394 <u>appears</u> to be the number assigned <u>east</u> of 441". If the State cannot point out definitely the

number of a designation, how could a purchaser be said to have knowledge of a legally existing "State Road?"

The desperate argument of the State concerning estoppel is nothing but a smokescreen.

First, the Petitioners clearly deraigned their title from all former owners, quit-claim deeds having been executed by said owners to Petitioners' Predecessors in Title. [See TR. 147-150 and Abstract of Title, Pl. Exhibit #3.] In other words, if the Tax Deed containing the reservation had never existed, Petitioners have clear, fee simple title, and do not in any way need to rely on or "claim under" said deed. Thus, estoppel could never apply.

Second, the Tax Deed clearly did not convey either marketable or insurable title but only some color of title and was not a "murphy deed". [See for example Attorney Stern's discussion at TR. 146-150].

Third, Estoppel is totally irrelevant to this case and the certified question because the issue is the existence of a state road on the date of the deed and not a question of the validity of the deed. In other words, the interpretation and application of the reservation to bar compensation to Petitioners is before the Court and not the authority to make the reservation.

Accordingly, Dade County v. Little, is totally distinguishable and irrelevant as to Estoppel for the reasons set forth above. The State's footnoted citations

and arguments are equally irrelevant if no official state road existed on the date of the deed.

In short, the estoppel argument, ignored by the District Court, should be summarily dismissed as irrelevant to the case at this level.

We now turn to the many varied "shotgun" arguments and authorities of the State.

The question of whether a "State Road" existed prior to 1944 is clearly a question of law and not fact, and, therefore, presumptions accorded to any judgment of the trier of facts should be ruled out. Likewise, the question of knowledge in this case relates only to constructive notice which is also legal in nature rather than factual, and, therefore, not clothed with presumptions of correctness.

The State attempts to evade the statutory requirements by implying that the 1941 Statute (F.S. §341.28) was only for the future and not effective as to a 1941 road designation enacted in the same session. However, the Statute specifically states "which has been or may be established, declared and designated ...." Additionally, the same statute was in existence previously as Section 7, Chapter 9312, Laws of Florida 1923, and was specifically interpreted in Enzian v. State Road Dept., 122 Fla. 527, 165 So. 695 (1936).

The State argues that Enzian recognizes a legislative designation as a temporary expedient by

itself until a survey and location is made, and, therefore, it should not defeat a valid easement. The implications of this are ludicrous for this case. Are we to believe that 1941 to 1975 is to be considered a temporary expedient?

The Fordham case relied on by the State, followed the Enzian case in holding that a changing of a route did not constitute the creation of a new road.

Likewise, Ahlheit v. State Road Department, cited by Respondents, is distinguishable because of a lack of a definite designation in our case.

Pirman v. Florida State Improvement Commission, 78 So.2d 718 (1955), cited by the State, dealt only with validation of road bonds and held that the precise location of a bridge did not have to be fixed before bonds were issued, which has no application to the question here.

The Enzian case stated that both legislative designation and survey and location are necessary to establish a state road. Since both were lacking when the deed reservation was made, the Court should not enforce the reservation.

While failing to distinguish the foregoing cases, the State takes great pains to distinguish the Millstone case, which is similar to this case and involved the east portion of this road. Millstone v. State D.O.T. 69-6546 Bro. Circuit Court. The issues are similar enough that a

copy of the Final Judgment against the State is included in an Appendix. (See Appendix, page 1).

The State denies the similarity of the case and yet the judgment shows it to be almost identical to our case:

1. The easterly portion of the same road was involved in a widening project.

2. A Drainage District Deed contained the same reservations as here.

3. The State attempted a taking without compensation.

4. The designation by the legislature was at best vague and indefinite.

5. The State never maintained or designated by signs the portion of the road in question in either case.

In Millstone, the Court held the designation by the State to at least be susceptible to various interpretations and, therefore, too vague to justify enforcement of a reservation to take Plaintiffs' property without compensation. The same result would be appropriate here.

The State violates the plain language of the statute by arguing that the State can survey and fix the location and right-of-way anytime it desires, and that somehow the road then retroactively becomes a "State Road".

We say that, at best, the tortured interpretation of the State is only one of several and the doubts should be

resolved in favor of the property owners as in Millstone, supra.

Lastly, the State cites various Florida Statutes to bolster its theories concerning the "maintenance", "signing", and "surveying" of roads. The State cites Statutes §§341.16, 341.24, 341.46, 341.47, 341.65. These cites are incorrect in that all of these statute sections were repealed in 1955. Even when one finds the correct cites, the Statutes provide no support for the State's propositions that a survey can be done at any time and that the State must only sign and maintain roads under certain circumstances. For the Court's convenience, the correct cites are as follows:

§341.16	-	§§334.171, 335.02(1), 336.13(1), and 337.27
§341.24	-	§335.10
§341.46	-	§11.242
§341-47	-	§§335.02, 335.08
§341.64	-	§§335.08, 335.09(1)

CONCLUSION

The State's claim is invalid because:

1. Pembroke Road was not a State Road on the date of the tax deed, i.e., January 17, 1944:

A. Lack of a valid designation by the legislature in view of the 268.5 foot, or one and one-half block, deviation; and

B. Failure to show the existence of a legal State Road at the location of Petitioners' property in 1944 as specifically required by the Tax Deed reservation; and

C. Failure to meet the statutory requirements of Florida Statute §341.28, 1941 to be a "State Road" which included both designation by the legislation and fixing of the location and survey by department.

2. In condemnation proceedings, all doubts should be resolved in favor of property owners. The decision failed to resolve these doubts in favor of the constitutional prohibition against taking private property without compensation.

The certified question should be answered in the affirmative.

Petitioners respectfully ask the Court to answer the certified question affirmatively, reverse the decisions below, and order compensation to be determined for the taking of Petitioners' property.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners was furnished by United States Mail to ELLA JANE P. DAVIS, ESQ., Attorney for Respondent, Haydon Burns Building, Department of Transportation, MS 58, 605 Suwannee Street, Tallahassee, Florida 32301, this 22nd day of March, 1984.

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