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IN THE
SUPREME COURT OF FLORIDA
No. 66,372

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND,


Defendant-Appellant,

v.

SAND KEY ASSOCIATES, LIMITED,

Plaintiff-Appellee.

FILED
SID J. WELLS
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By
Chief Deputy Clerk



INITIAL BRIEF
OF DEFENDANT/APPELLANT

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STATEMENT OF THE CASE

Plaintiff/Appellee, Sand Key Associates, Limited, commenced this proceeding with a quiet title action in the Sixth Judicial Circuit. Appendix A,p.1. Defendant/Appellant, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (the state body that owns sovereignty state lands, hereinafter referred to as the State), defended on the basis of section 161.051, Florida Statutes. Appendix B,p.7. The circuit court, without resolving the disputed factual issues, entered an order designated "Final Partial Summary Judgment." Appendix E,p.21. The circuit court's order denied Sand Key's summary judgment motion, declared that section 161.051, Florida Statutes is constitutional, rejected Sand Key's proposed limiting interpretation of that section, and enjoined Sand Key from taking possession of the contested property until further order of the court. Appendix E,pp.22-23. (An amendment to the Complaint, creating a Count II, not included in the Appendix, was explicitly not addressed by the circuit court. Appendix E,p.22.)

The district court reversed the circuit court, adopted the narrow interpretation of section 161.051 sought by Sand Key, dissolved the circuit court's injunction, and certified to this court the following question as one of great public importance:

Pursuant to section 161.051, Florida Statutes (1981), is the state entitled to accreted land on only the upland owner of the improved property or to the accreted land of all upland littoral owners, whether or not they participated in or contributed to the improvement?

STATEMENT OF THE FACTS

Sand Key obtained on December 29, 1972 deed to a parcel of land in Pinellas county bordering on the mean high water mark of the Gulf of Mexico. Appendix D, pp.14-15. For several years prior to 1983 the beach on Sand Key's property has been gradually expanding seaward, and Sand Key has not taken any action to cause such expansion. Appendix D, pp.11,16-20. The cause of the expansion of the beach is in dispute. Appendix E, p.22¶8. The State contends that the beach expansion resulted from construction authorized pursuant to Chapter 161, Florida Statutes. Appendix B, p.8. Sand Key denies this. Appendix C, p.10. No trial on this disputed issue of fact was held because Sand Key took an immediate appeal from the circuit court's order.

SUMMARY OF ARGUMENT

Section 161.051, Florida Statutes, provides that additions and accretions to upland caused by shore protection measures on State sovereign land remain the property of the State. A natural reading of section 161.051 does not distinguish among uplands depending on the location of the land. By

interpreting section 161.051 to be limited to the particular owner directly landward of beach protection construction, the district court has given the section an unnatural and constricted meaning, in conflict with the statute's evident intent. The district court justified its narrow reading by asserting that section 161.051 was in derogation of the common law. Section 161.051 was enacted as part of the 1965 Beach and Shore Preservation Act, Chapter 65-408, Laws of Florida. Examination of Florida decisions prior to 1965 demonstrates that section 161.051 was not in derogation of the common law. Thus, there is no reason not to give the statute its natural meaning. Reversing the district court would also be in harmony with the important public policy reflected in the State's Save Our Coast Program.

ARGUMENT

THE DISTRICT COURT ERRED IN ITS CONSTRUCTION OF SECTION 161.051, FLORIDA STATUTES. PROPERLY CONSTRUED, SECTION 161.051 RETAINS OWNERSHIP IN THE STATE OF ALL LAND DEPOSITED ON ANY SOVEREIGN LANDS DUE TO CONSTRUCTION ON OTHER SOVEREIGN LANDS AUTHORIZED BY CHAPTER 161, FLORIDA STATUTES.

Section 161.051, Florida Statutes, was adopted by the Florida Legislature in 1965 as part of the Beach and Shore Preservation Act, Chapter 65-408, Laws of Florida. This act was intended to protect Florida's beaches and shores from erosion and storm damage. The 1965 act added state regulation to local beach protection programs already in place. See Chapter 161, Florida Statutes 1963; Chapter 65-408, Laws of Florida.

The lands of Florida on the Gulf of Mexico and on the Atlantic Ocean, as well as lands on internal navigable bodies of water, that are waterward of the mean (or ordinary) high water mark belong to the State by virtue of its statehood, and are referred to as sovereignty lands. Broward v. Mabry, 58 Fla. 398, 50 So. 826, 829-30 (1909). The 1965 Beach and Shore Preservation Act authorized construction of structures for shore protection on sovereignty lands by permit of the State. Chapter 65-408, section 1, (now section 161.041, Florida Statutes). In the part of the act at issue here, now found at section 161.051, Florida Statutes, the legislature stated:

[A]ny additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state . . .

Expansions of shore such as the land Sand Key seeks are caused by additions to the upland as referred to in the statute. Such additions take place on land that is owned by the State as sovereignty land prior to the shore expansion. In other words, the soil that is deposited, causing an expansion of shore, is deposited on submerged state land causing such land to emerge from the water. Thus, as the State reads section 161.051, additions and accretions to upland "remain" the property of the State, rather than "become" the property of the state, because that land already was the property of the State.

In the decision from which the State appeals, Appendix F, p.24, the Second District Court of Appeal gave section 161.051

a construction that in the State's view eliminated much of the section's effect. Section 161.051 states that "any" additions to upland caused by construction permitted under the act remain the property of the State. The section does not limit its effect to any particular owners of upland. The district court nonetheless held that section 161.051 is limited to additions only to the "upland owner of improved property." Appendix F,p.27. Since Chapter 161 regulates, and permits, construction for shore protection on sovereignty land, that is, land below the mean high water mark, not on privately owned upland (section 161.041), it is not absolutely clear what the district court meant by "improved property." A jetty, for example, may be built on offshore state land and that jetty may be intended to protect from erosion the beach of many upland owners. Apparently the district court intended to limit the effect of section 161.051 to land that is directly landward of the permitted construction.

The district court's interpretation of section 161.051 finds no support in the language of the statute itself. Nor is there an ambiguity in the statute's reference to "any" additions to upland caused by permitted construction. Rather, the district court explained its narrowing reading by stating that the statute was in derogation of the common law and must therefore be strictly construed. Appendix F,p.27. According to the district court, property owners whose land borders the high water mark of Florida's coastal waters have the littoral right to obtain title

to all future accretion to their land whether caused by natural or by artificial forces. (As the district court noted, littoral rights are the rights of owners of land fronting oceans and lakes. Riparian rights are the rights of owners of land on flowing streams.) The State contends that in 1965, when section 161.051 became law, it was not the law of this state that littoral owners obtained accretions caused by human intervention. Only natural accretion and reliction belonged to upland owners. If the judicial development of the law since 1965 has extended the doctrine of accretion and reliction to artificially caused land additions, then section 161.051 as originally intended must nonetheless remain a legislatively mandated exception.

The legislature may be presumed to be familiar with the reported decisions of Florida courts, but the district court below relied on only one precedent, its own decision in Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. 2nd DCA 1973) to demonstrate a common law right to artificial accretions. The 1973 Medeira decision was obviously not available to the 1965 legislature that passed section 161.051. The State's research has uncovered no Florida case prior to Medeira holding a littoral owner entitled to artificially caused accretion.

If anything, the precedents indicate the opposite. In Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), this Court considered a case of artificially caused reliction. Reliction is the gradual expansion of shore caused by receding water (as

opposed to accretion which is the deposit of additional soil). Accretion and reliction both have the effect of moving the high water mark toward the water. This Court held in Martin v. Busch that the upland owner takes title to bottom land uncovered by reliction only when the reliction is due to natural causes, not when land is reclaimed through government drainage operations. 112 So. at 287. Significantly, Justice Brown, concurring, referred to "[t]he riparian rights doctrine of accretion and reliction." 112 So. at 288. There is no reason for reliction rights to be limited to naturally caused reliction, and accretion to not be so limited. Justice Brown's reference to the one doctrine of accretion and reliction supports the State's contention that before Medeira accretion and reliction were treated the same, and upland owners had no right to artificially caused accretion.

In 1965, the Second District apparently shared this view. In Padgett v. Central and Southern Florida Flood Control District, 178 So.2d 900 (Fla. 2nd DCA 1965), the court observed:

Ordinarily, a riparian owner also becomes vested with title to such additional abutting soil or land as may gradually be formed or uncovered by the natural processes of accretion or reliction.

178 So.2d at 904 (emphasis added). See also Trustees v. Sutton, 206 So.2d 272 (Fla. 3rd DCA 1968):

In order to acquire land by accretion, there must be natural and actual continuity of accretion to the land of her riparian owner.

206 So.2d at 274 (emphasis added). Florida v. Contemporary Land Sales, Inc., 400 So.2d 488 (Fla. 5th DCA 1981):

Accretion is the extension of land area due to a gradual, natural and imperceptible build up of additional land by the accumulation of alluvium material.

400 So.2d at 491 (emphasis added).

In the decision below, the district court described its 1973 Medeira decision as having "applied" the common law rule that an upland owner has "a vested right to all accretion, whether naturally or artificially caused." Appendix F, p.26. In the Medeira decision itself, however, the district court relied on no Florida case for its holding, cited various non-Florida cases, went to great pains in its attempt to distinguish this Court's decision in Martin v. Busch, and engaged in explicit public policy analysis, balancing the interests of landowners and government. The State contends that if there had been a Florida common law rule granting artificially caused accretions to littoral or riparian owners in 1965, the Second District would not have had to give the extensive analysis contained in Medeira, analysis of the sort normally reserved for the making of new law.

The State also questions the district court's distinction in Medeira of Martin v. Busch. The court conceded that "at first blush," Martin v. Busch might appear to support a view different than that adopted in Medeira. 272 So.2d at 212. It did not, the court concluded, for two reasons. First, the Medeira court suggested, Martin v. Busch should be limited to new land

exposed by artificial efforts intended to reclaim new land. 272 So.2d at 212. This distinction of Martin v. Busch has since been rejected by the Fifth District in Florida v. Contemporary Land Sales, Inc., 400 So.2d 488 (Fla. 5th DCA 1981). This distinction would also be unavailing in the present case, at least in its current posture, because it may be established at trial that the beach erosion project the State asserts as the cause of the beach expansion here indeed was intended to cause additional sand to be deposited on the shore.

Second, the district court in Medeira distinguishes Martin v. Busch because the new land there was caused by reliction as opposed to accretion. The court gave no reason, however, why accretion should be treated differently than reliction. In fact, all of the policy reasons given by the district court for granting artificially caused accretion to the upland owner apply to the same extent to artificially caused reliction. It seems apparent that the district court in Medeira disagreed with this Court's ruling in Martin v. Busch, and simply chose not to follow it.


The Medeira court also addressed the effect of section 161.051, but held that it was not intended to be applied retroactively, and questioned its constitutionality. No suggestion was made that section 161.051 could be read so as to eliminate most of the situations in which it would apply, as the district court did in the decision below.

The thrust of the State's position is not that Medeira was wrongly decided, though it may well have been. Rather, our position is that when the legislature enacted section 161.051 in 1965, the section was not in derogation of the common law of this state. Thus, the district court's rationale for giving section 161.051 an unnatural and constricted meaning does not exist. Section 161.051 should be given its natural meaning. Soil deposits on sovereign land caused by beach erosion protection construction on other sovereign land should remain the property of the State, and not accrue to the benefit of adjacent upland owners.

The result the State seeks, in addition to implementing the intent of the 1965 legislature, is in harmony with compelling state policy in effect today. The State of Florida in recent years has spent millions of dollars buying up beaches and shores through the Save Our Coasts program. The State is putting forth a mammoth effort and is using huge amounts of public money to get what is left of Florida's coasts into public hands. The district court's decision, by creating a "common law" right, and then attempting to give it retroactive effect, has hampered the legitimate action of the legislature, and has made the State's Save Our Coast program that much more difficult. There is no adequate reason to place lands created on State sovereign lands pursuant to beach protection activities conducted on other State sovereign lands into private ownership.

CONCLUSION

The Second District Court of Appeal erred when it interpreted section 161.051, Florida Statutes, to be limited to additions and accretions to the upland directly landward of the permitted shore protection construction causing the additions and accretions. Additions and accretions to upland caused by Chapter 161 permitted beach protection activity remain the property of the State regardless of the location of the upland. Section 161.051, enacted in 1965, was not in derogation of the common law of Florida in 1965. This case should be remanded for trial on the disputed issue of whether the accretion to Sand Key's land was in fact caused by permitted construction pursuant to Chapter 161.




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Defendant/Appellant has been furnished by U.S. Mail to Richard J. Salem, Esquire, Post Office Box 3399, Tampa, Florida 33601 and William J. Kimpton, Esquire, 487 Mandalay Avenue, Clearwater Beach, Florida 33515, this 20th day of February, 1985.



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