66,372

IN THE

SUPREME COURT OF FLORIDA

NO. 66,372

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Defendant-Appellant,

v.

SAND KEY ASSOCIATES, LTD.,

Plaintiff-Appellee.

On Appeal from the Second District Court of Appeal

REPLY BRIEF

OF DEFENDANT/APPELLANT

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SUMMARY OF ARGUMENT

Appellee Sand Key has failed to refute the state's assertion that section 161.051, Fla. Stat. was not in derogation of the common law at the time of its enactment in 1965. Sand Key has cited no pre-1965 Florida case, and its argument that out-of-state cases created vested rights in Florida by virtue of section 2.01, Fla. Stat. is incorrect. Florida courts may look to other jurisdictions for guidance in formulating Florida law, but only the Florida legislature and Florida courts can create Florida law. The legislature acted in 1965 on an issue not yet addressed by Florida courts, and therefore the legislature's action was not in derogation of the common law. Viewed without the district court's erroneous assumption that section 161.051 is in derogation of the common law, the statute must be read to reserve to the state all beach additions caused by approved beach protection construction.

ARGUMENT

SECTION 161.051, FLORIDA STATUTES, IS NOT IN DEROGATION OF THE COMMON LAW, AND MUST BE GIVEN ITS NATURAL EFFECT, GRANTING TITLE TO THE STATE OF ALL BEACH ADDITIONS CAUSED BY CONSTRUCTION FOR SHORE PROTECTION

In its initial brief, the Board of Trustees of the Internal Improvement Trust Fund (the state) asserted that the district court erred in holding section 161.051, Fla. Stat. to be in derogation of the common law. A natural reading of section 161.051, we contended, vests in the State title to all beach additions brought about by approved beach restoration projects. Such vesting was not in derogation of the common law because when section 161.051 was enacted in the 1965 Beach and Shore Preservation Act, Ch. 65-408, Laws of Florida, there was no Florida common law rule granting artificially caused accretion to upland owners. No Florida court had directly addressed the issue of artificial accretion and this court had ruled that land created by the similiar process of reliction belongs to the state when the cause of reliction is artificial. Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). In 1965, there was no reason to believe that artificially caused accretion would be treated differently than artificially caused reliction. Indeed, in cases quoted in our initial brief at pp. 7-8, the rule granting upland owners title to lands created by accretion and reliction continued to be formulated in terms of new land created by natural processes. Given this background, the state contended, section 161.051 could not be said to be in derogation of any existing Florida common law rule.

In response Sand Key has not cited any Florida case dated prior to 1965. Instead, to show that Florida's common law in 1965 gave upland owners artificially caused accretion, Sand Key relies on section 2.01, Fla. Stat. That section declares English law as of July 4, 1776 in force in Florida to the extent such law is not inconsistent with acts of the Florida legislature. Sand Key does not cite any pre-1776 English law, but argues, based on Coleman v. Davis, 120 So.2d 56 (Fla. 1st DCA 1960), that Florida follows not only English courts but also "courts of the American States." Sand Key's Answer Brief, p. 16, quoting Coleman, 120 So.2d at 58. Thus, Sand Key seems to argue, St. Clair County v. Lovingston, 90 US (23 Wall.) 46 (1874) (which held artificial accretion to belong to the upland owner), though not adopted by any Florida court prior to 1965, was already the law of Florida by virtue of section 2.01, Fla. Stat.

The state denies that section 2.01 or Coleman had any such effect. While Coleman sanctions seeking the guidance of other states in the formulation of Florida law, this cannot mean that every decision in every other American jurisdiction automatically becomes the common law of Florida. Such a rule is not mandated by section 2.01, Fla. Stat., and would in any event be impossible because of conflicts among the various American courts.

On the question of ownership of artificially caused accretion, while the rule asserted by Sand Key is apparently the

majority rule in other states, there has long been at least one jurisdiction holding artificially caused accretion to belong to the state. In Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929), the California Court said:

> The right of the upland owner to additions to his land by alluvion, where land abuts upon the ocean. . . was thereupon affirmed . . . . In giving application to this rule, the authorities have consistently declared, in conformity with the common-law acceptation thereof, that, for the owner of the upland to be entitled to the accretions thereto, such accretions must have resulted from natural causes and have been of gradual and imperceptible formation. . . .Where, however, the accretions have resulted, not from natural causes, but from artificial means, such as the erection of a structure below the line of ordinary high water, there is made out a case of purpresture, or encroachment, and the deposit of alluvion caused by such structure does not inure to the benefit of the littoral or upland owner, but the right to recover possession thereof is in the state or its successor in interest, as the case may be.

275 P. at 791. See also Carpenter v. Santa Monica, 63 Cal.App.2d 772, 147 P.2d 964 (Calif. 1st DCA 1944):

> From these cases it must be accepted as settled in this state that accretion formed gradually and imperceptibly, but caused entirely by artificial means - that is by the works of man, such as wharves, groins, piers, etc. and by the dumping of material into the ocean - belong to the state, or its grantee, and do not belong to the upland owner.

147 P.2d at 964.

Our point is not that this Court should follow California law. Rather, the state contends that when the legislature acted in 1965 to reserve for the state accretions caused by approved beach preservation projects, the legislature was acting on a blank Florida slate. No Florida court had ruled artificially caused accretion to belong to upland owners, and there was not a universal rule outside Florida. Thus, it is not section 161.051 that must be construed in light of an existing common law rule. Rather, the rule subsequently adopted in Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. 2nd DCA 1973) must be construed in light of the prior statutory mandate of section 161.051.

The district court below did not attempt to give section 161.051 an interpretation based on the statutory language. The district court apparently believed that the statute as written unconstitutionally removed vested rights to artificially caused accretion.[1] The court below must have felt that a natural

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1/ Even if section 161.051 had removed vested rights, it is doubtful that Sand Key would have standing to make such an argument. Sand Key acquired its upland property in December of 1972. Appendix to Initial Brief, p. 1, paragraph 5. At that time, section 161.051 had been the law since 1965. The rights that Sand Key acquired in 1972 were those defined by the law in 1972. Thus, Sand Key never possessed a vested right to artificially caused accretion.

Even if Sand Key had had some sort of claim against the state for removal of its right to accretion, such claim would have been mature in 1972. By the time Sand Key brought this action in 1983, surely laches or the limitations contained in section 95.11 or 95.12 would bar any relief.

reading of section 161.051 gave the state the accretion Sand Key seeks; otherwise it would not have been necessary to consider the constitutional question. Because there actually were no vested rights to artificially caused accretion when the statute was enacted, the district court's reasoning must be rejected, and the statute may be given its natural reading.

Section 161.041 requires that any construction on state land below the mean high water line that is intended for shore protection take place only with a permit from the Department of Natural Resources. Section 161.051 provides that permitted projects are the property of the entity doing the permitted construction. The section goes on to state:

> No grant under this section shall affect title of the state to any lands below the mean high water-water mark, and any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed.

(emphasis added). The statute must be considered from the perspective of 1965, when the only Florida law on the ownership of artificially created land abutting waterfront property was Martin v. Busch, holding such land to belong to the state. Section 161.051 reserves to the state any land created by shore protection construction. There is no limitation based on the location of the accretion or on the identity of the upland owner to whose land the accretion attached. The statute gives the state "any additions or accretions." The only interpretation of section 161.051 that makes sense in the context of the law in

existence when section 161.051 was adopted is that all beach additions caused by section 161.041 permitted beach protection construction belong to the state and not to the upland owner.

CONCLUSION

The district court erred in giving section 161.051 a constricted reading, not based on the language of the statute. Properly interpreted, section 161.051 reserves to the state all additions to beaches caused by shore protection construction approved pursuant to section 161.041, Fla. Stat. This case should be remanded for trial of the issue, never decided in the courts below, of whether or not the land to which Sand Key seeks title was in fact created because of shore protection construction permitted by section 161.041.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been sent by U.S. Mail to RICHARD J. SALEM, Esquire, 111 Parker Street, Suite 301, Post Office Box 3399, Tampa, Florida 33601 this 22 day of April, 1985.

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