IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,385

TORTOISE ISLAND COMMUNITIES, INC. and TORTOISE ISLAND GROUP, LTD.,

Defendants/Petitioners,

vs.

THE MOORINGS ASSOCIATION, INC., Individually and THE MOORINGS ASSOCIATION, INC., a Class Representation,

Plaintiffs/Respondents.

_____/

PETITIONERS' BRIEF ON JURISDICTION

KERRY I. EVANDER, ESQUIRE
REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM, P.A.
Attorneys for Petitioners
1825 South Riverview Drive
Post Office Drawer 639
Melbourne, Florida 32901
(305) 724-4450

TABLE OF CONTENTS

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

TABLE OF CITATIONS

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

STATEMENT OF THE CASE AND FACTS

Respondents, The Moorings Association, Inc., individually and The Moorings Association, Inc., a class representation, filed an action seeking injunctive and declaratory relief against Petitioners, Tortoise Island Communities, Inc. and Tortoise Island Group, Ltd. Specifically, Respondents sought to enjoin Petitioners from filling in a certain canal known as The Moorings Cut, and to have the court declare that Respondents members had an easement for ingress and egress through such canal. (A copy of the Second Amended Complaint is set forth in Footnote 1 to Judge Cowart's dissenting opinion.) (A. 18-20)[1/]

Assuming the factual allegations of the Second Amended Complaint to be true for purposes of this appeal, Respondents' members purchased their respective Moorings Subdivision lots from T.O.L., Inc. (not a party to this action). (A. 18) The Moorings Subdivision is a residential subdivision located on the east side of a canal known as "The Great Canal." On the west side of such canal is an island, and immediately to the west of such island is the Banana River. In promoting the development of The Moorings, T.O.L., Inc., by and through its agents distributed sales brochures representing that T.O.L.,

---

1/ References to the Appendix attached hereto will be cited as "A._"

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

Inc. would construct a canal across the aforesaid island so as to provide easier access, by boat, from The Moorings Subdivision to the Banana River. (A. 18-19)

This "access" canal (The Moorings Cut) was constructed in 1967, and T.O.L., Inc. subsequently gave thirteen of Respondents' members documents specifically granting an easement in The Moorings Cut. Such easements were recorded in the Official Records of Brevard County, Florida. (A. 18-19)

T.O.L., Inc. is further alleged to have conveyed to Petitioners, at some unspecified date, the land on which such canal was located. (A.19) In 1975, the thirteen aforesaid easement holders filed an action to enjoin Petitioners from filling in the subject canal. This litigation was terminated in the first half of 1982. (A. 19) In July, 1982, Petitioners filled in portions of the canal. (A. 19) The remaining members of Respondents' class of approximately 200 homeowners now allege that they have (or should be found to have) easement rights to use the canal, for navigational purposes, to obtain easier access to the Banana River.

There are no allegations that Petitioners were a party to the representations made on behalf of T.O.L., Inc. or that Petitioners were even aware of such representations. However, Petitioners are alleged to have not been bona fide purchasers in that "the easement canal was open and visible." (A. 20)

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-1450

Finally, it is alleged that as a result of Petitioners' obstruction of the subject canal, that Respondents' members have been deprived of ingress and egress of their boats through the canal and have suffered a diminution in property value. (A. 19)

The trial court found that the Second Amended Complaint failed to state a cause of action and dismissed the cause with prejudice. The Fifth District Court of Appeal reversed, finding that the Second Amended Complaint sufficiently alleged an easement by implication. (A. 2)

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

ARGUMENT I

THE APPELLATE COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH CANELL v. ARCOLA HOUSING CORP., 65 So.2d 849 (Fla. 1953), AND JONITA, INC. v. LEWIS, 368 So.2d 114 (Fla. 1st DCA 1979), IN THAT THE RESPONDENTS ARE PERMITTED TO SEEK TO ENFORCE AN ORAL PROMISE TO GRANT AN EASEMENT.

In Canell v. Arcola Housing Corp., 65 So.2d 849 (Fla. 1953), the Plaintiffs brought an action for damages alleging that in order to induce Plaintiffs to purchase lots in its subdivision, the defendant-developer falsely represented that plaintiffs would have the right to use certain bathing beach facilities to be built within the subdivision. This Court affirmed the trial court's dismissal of the complaint finding that Plaintiff's claim was simply an attempt to enforce an oral promise to create an easement - a promise which was clearly within the statute of frauds.

> "The plaintiffs are relying upon a mere oral promise to create the easement, which is clearly within the terms of the statute of frauds and thus cannot be enforced directly or indirectly. . . . If the deed to plaintiffs did not mention the easement in the description of lands and property rights conveyed, or referred to a plat reflecting same, . . ., then to give any effect to oral promises in respect to other lands or rights therein would amount to an unauthorized reformation of the description in the deed." (Canell v. Arcola, supra, at 851.2/

2/ See also Jonita, Inc. v. Lewis, 368 So.2d 114 (Fla. 1st DCA 1979), where it was held that an easement could not be impressed on property orally or by sales brochures.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

The direct conflict between Canell and the majority decision was expressly noted by Judge Cowart in his dissenting opinion:

> "The Second Amended Complaint affirmatively shows on its face, as in Canell, that the claims asserted are predicated upon the alleged breach of oral promises to grant easements and any decision upholding it would violate the statute of frauds and directly conflict with Canell." (A. 14)

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

ARGUMENT II

THE APPELLATE COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH ROY v. VASTGOED, 404 So.2d 410 (Fla. 4th DCA 1981), AND WILLIAMS ISLAND COUNTRY CLUB, INC. v. SAN SIMEON AT THE CALIFORNIA CLUB, LTD., 454 So.2d 23 (Fla. 3d DCA 1984), IN THAT IT RECOGNIZES THE CREATION OF AN IMPLIED EASEMENT EVEN THOUGH THE EASEMENT IS NOT NECESSARY TO ACHIEVE THE BENEFICIAL USE AND ENJOYMENT OF THE DOMINANT TENEMENT.

The three elements required to establish an easement by implication are:

1. A unity of title between the dominant and servient estates and a subsequent separation;

2. that prior to the separation taking place, the use giving rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent and;

3. that the easement is necessary to achieve the beneficial use and enjoyment of the dominant tenement. Roy v. Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981); Dinkins v. Julian, 122 So.2d 620 (Fla. 2d DCA 1960).

In Roy, the Fourth District Court of Appeal found that as to the third element of an easement by implication, the term "necessity" was

> "to be understood as meaning that there exists no other reasonable mode of enjoying the dominant tenement without the easement." Roy v. Vastgoed, supra, at 413.

In Williams Island Country Club, Inc. v. San Simeon At The

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

California Club, Ltd., 454 So.2d 23 (Fla. 3d DCA 1984) (a case relied on the majority) the court similarly required a showing of "reasonable necessity" to support a claim for an easement by implication.

By contrast, the majority decision provides that the creation of an easement by implication

> "does not require an absolute, but only a reasonable, necessity, such as will contribute to the convenient enjoyment of property, other than mere temporary convenience." (A. 5) (Emphasis added)

Clearly, the majority decision's definition of "reasonable necessity" conflicts with that of other Florida district courts of appeal so as to justify this Court invoking its discretionary jurisdiction to resolve such conflict.

It should be noted that although the Second Amended Complaint alleges that Petitioners' obstruction of the canal reduces the value of Respondents' members' property, there was no allegation that the canal is necessary to the beneficial use and enjoyment of Respondents' members' property.[4/]

3/ In Williams, the Third District Court of Appeal stated:

> "Finally, the easement must be reasonably necessary for the use and benefit of the dominant tenement. . . . Strict necessity need not be shown. In this case a sufficient showing of need was made by establishing that without the golf cart easement, the dominant tenement could no longer be used as an eighteen hole golf course, its use at the time of severance of the servient tenement." Williams Island Country Club v. San Simeon, supra, at 25.

4/ Indeed, Respondents' members have, at most, suffered the "loss" of a navigational shortcut from their subdivision to the Banana River. There is no allegation that Respondents' members are without ingress or egress to their property, or even that they lack navigational access to the Banana River.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

ARGUMENT III

THE APPELLATE COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH LANCE v. WADE, 457 So.2d 1008 (Fla. 1984), AVILA SOUTH CONDOMINIUM ASSOCIATION, INC. v. KAPPA CORP., 347 So.2d 599 (Fla. 1977), AND OSCEOLA GROVES v. WILEY, 78 So.2d 700 (Fla. 1955), IN THAT IT PERMITS A CLASS ACTION SOUNDING IN MISREPRESENTATION.

In Lance v. Wade, 457 So.2d 1008 (Fla. 1984), this Court held that a class action based on fraud could not be maintained as "fraud claims on separate contracts are inherently diverse."[5/] As noted in Lance, each of the purported class members has his own separate contract, and factual determinations would have to be made as to each individual in the following respects:

a. The alleged representations made to such individuals;

b. whether such individual consideredthe representations to be material; and

c. the degree of reliance, if any, on such representations.

In the present case, the Respondents are, in fact, seeking to enforce a developer's alleged promise to grant each lot owner an easement in The Moorings Cut. As in Lance, the fact finder would have to determine the representations made to each purported class member,[6/] the materiality of such representations

---

5/ Lance v. Wade, supra, at 1011. See also Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977), and Osceola Groves v. Wiley, 78 So.2d 700 (Fla. 1955).

6/ Many of The Moorings Subdivision's homeowners are subsequent purchasers who may have received no representations whatsoever concerning The Moorings Cut.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

to each individual,[7] and the degree of reliance on such representations by each individual.[8]

Perhaps more significantly, the lower court would have to make a judicial determination as to whether the alleged easement was "reasonably necessary" to the beneficial enjoyment of an individual's lot. (As acknowledged in the Second Amended Complaint, some of Respondents' members have apparently never even utilized The Moorings Cut.)

As noted in Judge Cowart's dissenting opinion:

> "While this class action involves specific performance of an alleged promise made to many contract purchasers rather than a fraud action for money damages, the underlying rationale is identical (see Canell) and the majority opinion in this case is in direct conflict with the decisions in Lance v. Wade, supra, Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977), and Osceola Groves v. Wiley, 78 So.2d 700 (Fla. 1955)." (A. 17)

7/ The right to use The Moorings Cut would obviously have varying degress of importance to the individual homeowners. For example, it is alleged in Paragraph 1.(j) of the Second Amended Complaint that:

> "Since approximately 1967 when said canal was completed, most owners of residential lots in The Moorings having boats or marine vessels have utilized said canal for ingress and egress from The Moorings to the Banana River and the Intracoastal Waterway." (A. 15) (Emphasis added.)

8/ At least thirteen of the original homeowners would not have had to rely on the alleged oral representations and sales brochures of the original developer, as they re-received written, express easements which comported with the statute of frauds.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P. O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE, BOYD & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

CONCLUSION

WHEREFORE, Petitioners, Tortoise Island Communities, Inc. and Tortoise Island Group, Ltd., respectfully request this Court invoke its discretionary jurisdiction to review the decision rendered by the Fifth District Court of Appeal in the subject cause.

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Brief on Jurisdiction has been furnished by U.S. Mail to J. Daniel Ennis, Esquire, 261 Merritt Square, Merritt Island, Florida 32952, this 18th day of January, 1985.

REINMAN, HARRELL, SILBERHORN,
MOULE & GRAHAM, P.A.
Attorneys for Petitioners
1825 South Riverview Drive
Post Office Drawer 639
Melbourne, Florida 32901
(305) 724-4450

BY: Kerry I. Evander
KERRY I. EVANDER