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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,244
5DCA CASE NO. 93-386
L.T. CASE NO. CI 92-643

FILED
SID J. WHITE
MAR 2 1994
CLERK, SUPREME COURT
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WILLIAM W. SETON, JR., et ux.,

Petitioners,

vs.

EULA M. SWANN,

Respondent.

PETITIONERS'
AMENDED RULE 9.120(d), FLA.R.APP.P.,
BRIEF ON JURISDICTION

Respectfully submitted by

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Preliminary Statement

The Respondent, EULA M. SWANN, will hereafter be referred to as "Mrs. Swann."

The Petitioners, WILLIAM W. SETON, JR. and G. JEWEL SETON, will collectively be referred to as "the Setons." Petitioner, WILLIAM W. SETON, JR., will individually be referred to as "Bill Seton."

Mrs. Swann owns Lot 25. The Setons own Lot 24. Mrs. Swann's lot (Lot 25) is immediately to the south of the Seton's lot (Lot 24). Both are lakefront lots. Both are in Block A, Canterbury Terrace, according to the plat thereof recorded in Plat Book 1, Page 205, of the Public Records of Osceola County, Florida.

The part of Lot 25 on which the Seton's erected permanent improvements is hereafter referred to as "the encroachment area."

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Statement of the Case and Facts

For the purposes of this petition, Petitioners accept as accurate the following statement of the case and facts contained in the Fifth District Court of Appeals' decision below:

> "Swann and her now deceased husband acquired lot 25 in 1964. The Setons acquired the adjoining Lot 24 in 1982. The location of the boundary line between the two lots was erroneously shown on surveys prepared in 1959, 1972, 1976 and 1984. The Setons acquired from someone a copy of one of the erroneous surveys when they purchased Lot 24 and subsequently made improvements based upon the survey. In 1984 Swann learned of the Setons' plans to build a shed adjacent to the property line shown on the erroneous survey and protested. In order to keep the peace, the Setons commissioned a 1984 survey that mirrored the previous erroneous surveys and supported the Setons' belief that their backyard extended up to Swann's fence. The Setons built the improvements in reliance on the survey.
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> "Swann's fence had been constructed approximately along the boundary line depicted on the four erroneous surveys. She testified, however, that she had known her fence was erected inward of her property line. In 1970 she provided a copy of one of the erroneous surveys to the fence builders and instructed them to place the fence on her property line. They misplaced the newly constructed fence and Swann made them move it. Their second attempt was also incorrect, but, according to Swann, she did not make them correct it again, even though she was aware of the problem.
>
> "Apparently, nothing more was said about the boundary problem until it arose in 1992 when erosion caused Swann's seawall to collapse. It is not clear why this event caused the issue to be renewed, but presumably it arose from Swann's desire to run the new seawall to the true boundary lien between Lots 24 and 25. A new 1992 survey showed that the previous surveys relied upon by the Setons were incorrect. The parties stipulated that this new survey, and a 1951 survey that apparently had been rediscovered, were accurate and conformed to the subdivision plat."

Summary of Argument

Pursuant to Rule 9.030(2)(A)(iv), Fla.R.App.P., Petitioners invoke the discretionary jurisdiction of this court on the grounds

that the decision of the Fifth District Court of Appeals below expressly and directly conflicts with the decisions in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) and Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990) as to the interpretation of the Section 95.16, Florida Statutes.[1]

Without question, at trial herein the Seton's presented substantial competent evidence showing they met all the requirements for adversely possessing under Section 95.16 the "encroachment area" along their boundary with Swann, save arguably that they had no written document purporting to convey that strip of land to them. What they did have was the deed to their own lot, coupled with a survey showing the "encroachment area" as part of their lot, coupled with numerous permanent improvements made by them in that area, coupled with a good faith belief based on the erroneous survey that the "encroachment area" was theirs, coupled with Mrs. Swann's having sat back and allowed them to solely

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[1] In pertinent part, Section 95.16(2) states:

"(2) For the purpose of this section, property is deemed possessed in any of the following cases:

"(a) When it has been usually cultivated or improved.

"(b) When it has been protected by a substantial enclosure. All land protected by the enclosure must be included within the description of the property in the written instrument, judgment, or decree. If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed.

"(c) When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant.

"(d) ..." (emphasis supplied).

improve, maintain, and possess that area for ten straight years.

Under case law existing up until the Fifth District Court of Appeals' decision below, whether the Seton's ever held paper title to the "encroachment area" (i.e. a document that accurately described the "encroachment area" as being part of their Lot 24) would have been irrelevant to the question of whether under Section 95.16, they had sufficiently "possessed" the area for adverse possession purposes.[2]

Prior to the decision below, the key case on this issue was this Court's decision in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). While dealing with a fact situation addressing only one[3] of three ways under Section 95.16 by which a claimant could be deemed to have "possessed" property in dispute, that case was heretofore consistently interpreted to apply to all three methods of "possession" under Section 95.16(2). Therefore, based on Seddon, whether possession was by "enclosure,"[4] "cultivation or improvement,"[5] or "ordinary use of the occupant,"[6] it was unnecessary for a claimant under Section 95.16 to show he had "paper title" to the property in question in order for him to

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[2] See, Seddon v. Harpster, 403 So.2d 409 (Fla. 1981); Turner v. Valentine, 570 So.2d 1327, 1329 (Fla. 2d DCA 1990); Elizabethan Development, Inc. v. Magwood, 479 So.2d 251 (Fla. 2d DCA 1985); and, Bailey v. Hagler, 575 So.2d 679, 681 (Fla. 1st DCA 1991).

[3] "substantial enclosure" - Section 95.16(2)(b).

[4] Section 95.16(2)(b).

[5] Section 95.16(2)(a).

[6] Section 95.16(2)(c).

"adversely possess" that property.[7]

In 1987, the legislature changed the requirements of only one of the three methods of possession[8] of property under Section 95.16(2). In 1987 the legislature expressed that, where "possession" is claimed by "enclosure,"[9] only so much of the property enclosed that is accurately described on the instrument on which the claim is based could be "adversely possessed" for Section 95.16 purposes.

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[7] See, Turner v. Valentine, 570 So.2d 1327, 1329 (Fla. 2d DCA 1990):

> "Unlike Seddon, the facts presented in this case place this case not under subsection 2(b) but under subsection 2(c) of this statute:
>
> > "When, although not enclosed, it has been used for supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant." (the court's emphasis).
>
> "Despite this difference, Seddon is controlling authority for the proposition that absolutely accurate paper title is not necessary when making a claim for adverse possession regardless of the subsection under which the adverse possession claim is made." (emphasis supplied).

See, also, Bailey v. Hagler, 575 So.2d 679, 681 (Fla. 1st DCA 1991).

> "The first issue is whether there was sufficient evidence that title to the disputed property vested in Mrs. Bailey through adverse possession. One claiming title by virtue of adverse possession under color of title "does not have to have paper title accurately describing the disputed property as long as that area is contiguous to the described land and [meets one of the criteria enumerated at section 95.16(2)(a)-(d)]. Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981)." (emphasis supplied).

[8] Section 95.16(2)(b).

[9] Section 95.16(2)(b).

The legislature made no similar requirement or change with regard to "cultivation or improvement" or "ordinary use." As the old basic statutory construction principle goes: "Expressio unius est exclusio alterius."[10] Hence, if the legislature wished to make a similar limitation on adverse possession by "cultivation or improvement" or by "ordinary use," they could have similarly amended Sections 95.16(2)(a) and (c). They did not. Hence, it must be assumed they did not intend to limit possession under those sub-sections as they had under Section 96.16(2)(b).

Argument

Issue I. Whether the Fifth District Court of Appeals' decision below expressly and directly conflicts with the Second District Court of Appeals' decision in Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990).

The answer to this issue is clearly "yes," as shown from the following excerpt of the Fifth District Court of Appeals' decision below:

> "We are not unmindful of Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990), upon which the Setons rely. In Turner the district court affirmed the trial curt's application of the Seddon interpretation of section 95.16(2)(b) to section 95.16(2)(c). We disagree with Turner for the reasons stated above ..."

In the case of Turner v. Valentine, supra, the land was "possessed" not by a "substantial enclosure" under Section

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[10] 49 Fla.Jur.2d STATUTES Section 126 ("Expressio unius est exclusio alterius"):

"It is a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius."

95.16(2)(b), but as here by the "ordinary use of the occupant." Section 95.16(2)(c).

In the Turner case, as in the instant one, two neighbors were arguing over a disputed strip of land. The appellees had sued to quiet title by adverse possession under Section 95.16 to the strip of land. As here, the appellees in Turner had used the strip of land as part of their backyard for more than seven years prior to filing the action. They had not "substantially enclosed" the strip and the case was not decided by a construction and application of Section 95.16(2)(b).[11]

The strip of land had originally been platted as part of the appellants' property. It was originally separated by a creek from the appellees' property. The location of the creek moved from the time of the original plat. The movement of the creek caused a part of the appellants' property to become attached to the back of the appellees' property. The appellees never held a deed or other instrument describing the newly-attached strip as their property. They never paid taxes on it. The appellees were unaware of the movement of the creek from its original location and they, in good faith, believed the strip to be part of their backyard.

Applying Section 95.16(2)(c), the appellate court held that the trial court had correctly applied Section 95.16 in finding that the appellees had met the requirements of that statute in order to establish title by adverse possession:

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[11] "Consequently, while they did not enclose the disputed strip of land, at all times they used, improved and maintained it in a normal manner as a part of their backyard." Id., 570 So.2d at 1328.

"Unlike Seddon, the facts presented in the instant case place this case not under subsection 2(b), but under subsection 2(c) of this statute:

> "When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant. (the court's emphasis).

"Despite this difference, Seddon is controlling authority for the proposition that absolutely accurate paper title is not necessary when making a claim for adverse possession regardless of the subsection under which the adverse possession claim is made. The appellees have at least as colorable a title as that found sufficient in Seddon. Also, like Ms. Seddon, they have additionally fulfilled one of the four possible criteria of 95.16(2), in this case subsection 2(c), because the evidence is clear they have used the disputed strip for their own ordinary use as a backyard in their good faith belief that they owned the land. Finally, and unlike Ms. Seddon, they have proven their fulfillment of the statutory criteria for the necessary length of time. Therefore, the trial court correctly applied the law discussed in Seddon to the facts of this case.

"Affirmed."[12]

The facts of the instant case are almost identical to those of the Turner case. Neither the appellees in Turner nor the Seton's held a piece of paper describing the disputed strip of land as theirs. Neither "substantially enclosed" the disputed strip. Both, however, believed in good faith that the strip was theirs and, consequently, both possessed the disputed strip for more than seven years, using it "for the ordinary use of the occupant" as part of their back yards. For the same reasons Turner was affirmed on appeal, this case should have been affirmed on appeal.

Issue II. Whether the Fifth District Court of Appeals' decision below expressly and directly conflicts with the Florida Supreme Court's decision in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981).

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[12] Turner v. Valentine, supra, 570 So.2d at 1329.

If there is a question as to whether the Fifth District Court of Appeals' decision below "expressly and directly conflicts" with this Court's decision in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981), Petitioners would like to draw this Court's attention to what Shephard's and Florida Law Weekly say. (See, appendix hereto).

Florida Law Weekly lists Seddon as being "overruled" by the Fifth District's decision below. Shephards lists Seddon as being "questioned" by the Fifth District's decision below. "Questioned" is defined by Shephard's as, "Soundness of decision or reasoning in cited case questioned." Therefore, two very important commentators on Florida law seem to find a "conflict" between Seddon and the Fifth District's decision below.

As an aside, in the third paragraph from the end of his opinion, Judge Peterson expresses a bias in favor of the landowner who silently allows his land to be adversely possessed. This same bias is expressed by Justice Boyd in his dissent in the Seddon case. As is natural, these biases or presumptions color their interpretations of the subject statute. However, under the principle that statutes are to be construed with reference to appropriate principles of common law,[13] the common law doctrines of "boundary by acquiescence"[14] and "boundary by agreement"[15] punish the

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[13] 49 Fla.Jur.2d STATUTES Section 172 ("Common law and equity").

[14] 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 43 ("In general; acquiescence without an express agreement"):

> "It is a generally established rule reiterated in many cases that where owners of adjoining lands occupy their

landowner who knowingly acquiesces (as was the case here) in another's good faith possession, maintenance, and improvement of their property, especially where a fence line has been established and honored by both parties.[16] Interpreting Section 95.16 with

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respective premises up to a certain line which they mutually recognize and acquiesce in as the boundary line of their respective lands for a long period of time, usually the time prescribed by the statute of limitations, they and their grantees are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although such line may not be in fact the true one according to the descriptions in their deeds or other instruments of conveyance."

[15] 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 39 ("ESTABLISHMENT OF BOUNDARIES BY AGREEMENT OR ACTS OF PARTIES - BY PAROL AGREEMENT, In general."):

"It is well settled that an unascertained or disputed boundary line dividing the lands of adjoining owners may be permanently and irrevocably established by a parol agreement between the adjoining owners. Although title to real estate may not be transferred by oral agreement, where a boundary between adjoining lands is uncertain or disputed, the owners of such lands may orally agree upon a boundary line, and where the agreement is followed by actual occupation according to such line as the boundary, or by acquiescence and recognition by the parties to the agreement, the line is binding upon the parties and their successors in title. Such an agreement does not originate or create a line or pass title to real estate; it simply serves to fix the true location of a boundary line between contiguous lands about which there is dispute."

[16] 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 44 ("Improvements"):

"... Similarly, where an adjoining landowner is knowingly permitted to construct improvements in reliance upon a fence line as the true boundary, such fence line becomes the boundary by acquiescence, which is binding on the owner of the land upon which such improvements were made. [n. 97 Where defendant's predecessor had erected a fence in accord with his surveyor's instructions and failed to take any affirmative action to move the fence to a later-discovered true boundary and all parties with passive indifference permitted the plaintiff at great expense to construct a canal and road in

reference to those two common law doctrines, and since those two doctrines do not require "paper title," one would reach the interpretation of Section 95.16 reached in Seddon, Turner, and Bailey, and not the interpretation reached by Judge Peterson below.

Conclusion

The Second District Court of Appeals' interpretation and application of Section 95.16(2)(c) was correct in the Turner case, as was this Court in Seddon. The below decision by the Fifth District Court of Appeals was incorrect. This court should accept jurisdiction herein pursuant to Rule 9.030(2)(A)(iv), Fla.R.App.P., and reverse the District Court of Appeals' decision below with instructions that they affirm the trial court's decision below.

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reliance upon the boundary evidence by the fence line, such fence line became the boundary line by acquiescence, which was binding on the defendant. citing, Florida Ranchettes, Inc. v. Hull, 331 So.2d 348 (Fla. 1st DCA 1976).]."

See, also, 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 37 ("By location of fences"):

> "In cases of doubt and uncertainty as to the location of the true boundary line between adjoining lands, the division line may be fixed by the location of a fence pursuant to a boundary line agreement. Such agreement need not be expressed but may be impled under the circumstances, and the treating of an existing fence as the boundary line is frequently considered a circumstance to estop the parties from later questioning the boundary and claiming a different line.
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> "Acquiescence in the location of a fence as marking the true boundary line in dispute, coupled with occupancy of the strip in dispute, is generally regarded at least as evidence of the existence of an agreement, if not conclusive of that fact, and to preclude the party acquiescent from claiming beyond the boundary line as thus established."

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U.S. Mail / ~~hand~~ delivery to the following persons on this 1 day of March, 1994:

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Date: March 1, 1994

To: Clerk, Florida Supreme Court

From: Fred O'Neal

Regarding: Seton v. Swann, Case No. 83,244

Enclosures: - original and five copies of amended brief on jurisdiction

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Dear Clerk:

Enclosed please find an original and five copies of amended brief on jurisdiction. I am filing this amended brief because the original brief incorrectly includes the "conclusion" on page 11.

Sincerely,

Frederic B. O'Neal, Esq.

cc: Edward Brinson, Esq.
William Muntzing, Esq.