IN THE SUPREME COURT OF FLORIDA

CASE NO.: 83,244
5DCA CASE NO. 93-386
L.T. CASE NO. CI92-643

FILED
SID J. WHITE
MAR 17 1994
CLERK, SUPREME COURT
By ____ Chief Deputy Clerk

WILLIAM W. SETON, JR., et ux.,

Petitioners,

vs.

EULA M. SWANN,

Respondent.

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

Respectfully submitted by:

Edward Brinson, Esq.
Florida Bar No. 008790
BRINSON, SMITH, SMITH & STARR, P.A.
1201 West Emmett Street
P.O. Box 421549
Kissimmee, FL 34742-1549
(407) 847-5127

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."

TABLE OF CONTENTS

	Page
Preliminary Statement	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case and of the Facts	1
Summary of Argument	2
Argument	3
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).	3
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).	5
Conclusion	6
Certificate of Service	6

TABLE OF CITATIONS

Page

Florida Statutes

Section 95.16(1) 2, 5

Section 95.16(2) 5

Section 95.16(2)(c) 2, 4

Florida Cases

Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963) 3

Kyle v. Kyle, 139 So.2d 885 (Fla. 1962) 3

McDonald's Corp. v. Department of Transportation, State of Florida,
535 So.2d 323 (Fla. 2d DCA 1988) 3

Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) 2, 5

Eula M. Swann v. William M. Seton, Jr., et ux.,
18 Fla. L. Weekly D2627 (Dec. 3, 1993) 5

Turner v. Valentine, 570 So.2d. 1327 (Fla. 2d DCA 1990) 2, 3, 4

Florida Rules

Rule 9.030(2)(A)(iv), Fla.R.App.P. 3

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, EULA M. SWANN, is satisfied with the Statement of the Case and of the Facts in Petitioner's, "the Setons" Brief on Jurisdiction and does not choose to disagree with any part thereof. The Respondent, EULA M. SWANN, will use the identical symbols for Reference as were used in the Brief on Jurisdiction by the Petitioners, "the Setons".

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeals below does not expressly and directly conflict with ***Seddon v. Harpster,*** 403 So.2d 409 (Fla. 1981) or ***Turner v. Valentine,*** 570 So.2d. 1327 (Fla. 2d DCA 1990) as to the interpretation of Section 95.16(1) Florida Statutes.

The Seton's could not acquire title to their neighbor's platted lot when they did not intend to own or possess more than their deed described or on which they paid taxes. Their act of possession claimed under Section 95.16(2)(c) fails because they have not complied with Section 95.16(1) Florida Statutes. The two-step analyses as set forth in the decision of the Fifth District Court of Appeals below is in line with the realities of subdivision lots.

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 test of jurisdiction under Rule 9.030(2)(A)(iv), Fla. R. App. P., is not whether this court necessarily would have arrived at a conclusion different from that reached by the Fifth District Court, but whether the said District Court decision on its face so collides with a prior decision of this court, or of another district court on the same point, as to create an inconsistency or conflict among precedents. ***Kincaid v. World Insurance Company,*** 157 So.2d 517 (Fla. 1963). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision, ***Kyle v. Kyle,*** 139 So.2d 885 (Fla. 1962).

The instant case does not expressly and directly conflict with ***Turner v. Valentine,*** 570 So.2d. 1327 (Fla. 2d DCA 1990). Arguably, both cases deal with platted subdivision lots. However, the back lots in Turner, supra, were separated by an Act of God, i.e., the natural change of course of a stream, while in this case the issue arose because of an imprecisely located security fence, the mistaken act of a property owner. As the Court below points out, each party intended to occupy only the land conveyed by their respective deeds, regardless of any error in installation of the fence.

Conflicts between the District courts may arise because opinions of a sister court are merely persuasive authority which may or may not be followed when rendering a decision. ***McDonald's Corp. v. Department of Transportation, State of Florida,*** 535 So.2d 323 (Fla. 2d DCA 1988). The Fifth District Court of Appeals decision below was mindful of ***Turner v. Valentine, supra,*** but decided not to follow

that case. The "possession" under Section 95.16(2)(c) through the "ordinary use of the occupant" in ***Turner v. Valentine, supra,*** was created by an Act of God, the natural movement of a stream, creating a large rear yard. In the case below, the Setons moved over to Mrs. Swann's misplaced fence, an act created by a fence installer and home owner. The Court below's decision was not unmindful of ***Turner v. Valentine, supra,*** but decided the case in line with the realities of ownership of subdivision lots.

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).

It would be presumptuous for the Respondent, EULA M. SWANN to attempt a more scholarly distinction between the Fifth District Court of Appeals' decision below and ***Seddon v. Harpster,*** 403 So.2d 409 (Fla. 1981). Seddon, supra, dealt with rural land while the instant case deals with the realities of ownership of subdivision lots.

Applying the test stated in Issue I, ***Eula M. Swann v. William M. Seton, Jr., et ux.,*** 18 Fla. L. Weekly D2627 (Dec. 3, 1993) does not expressly and directly conflict with ***Seddon v. Harpster,*** 403 So.2d 409 (Fla. 1981). Swann, supra, clearly interprets Section 95.16(1), Florida Statutes (1991) dealing with title, while Seddon, supra, deals with Section 95.16(2), Florida Statutes (1991) as to possession. A claim of title is clearly required by Section 95.16(1) before considering possession under Section 95.16(2). The court decision below sets forth a two-step analysis for gaining adverse possession under color of title, and the Setons failed to meet the factual requirements of that analysis.

CONCLUSION

The well reasoned decision in _Swann_ does not conflict with _Turner_ or _Seddon._ It does not meet the test of expressly and directly conflicting with these decisions. This court should refuse to except jurisdiction and not require Mrs. Swann to defend this sound opinion of the Fifth District Court of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Frederic B. O'Neal, Esq., 800 North Ferncreek Avenue, Orlando, Florida 32803 and William Muntzing, Esq., Post Office Box 421966, Kissimmee, Florida 34742, by U.S. Mail this 15th day of March 1994.

BRINSON, SMITH, SMITH & STARR, P.A.
1201 West Emmett Street
P.O. Box 421549
Kissimmee, FL 34742-1549
(407) 847-5127

By: Edward Brinson
Edward Brinson
Florida Bar No. 008790
Attorneys for Respondent