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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

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

Petitioners,

vs.

EULA M. SWANN,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

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."

References to the record on appeal will be by abbreviation. For example, the abbreviation "R. 243-245" will be a reference to pages 243 through 245 of the record on appeal.

References to the transcript of the trial held below on December 18, 1992 will be by abbreviation. For example, the abbreviation "T. 23/15-22" will be a reference to lines 15 through 22 of page 23 of the trial transcript.

Reference to exhibits introduced at trial will be by abbreviation. For example, the abbreviation "DX-2" will be a reference to Defendant's Exhibit 2.

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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 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.
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> "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."

In 1992 Mrs. Swann sued the Seton's in ejectment.[1] She sought a court order compelling them to remove all the permanent

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[1] R. 144 - 148.

improvements they had made in the disputed area between their two houses. The Seton's raised various defenses.[2] First, they defended under the doctrine of adverse possession "with color of title" under Section 95.16. Second and third, they defended under allegations that there had been a boundary established between the two properties based on the doctrines of "boundary by acquiescence" and "boundary by agreement."

At trial 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 the Seton's did have was the following:
> a. a deed to their own lot,
> b. an erroneous survey showing the "encroachment area" as part of their lot,
> c. numerous permanent improvements made by them in that area,
> d. a good faith belief based on the erroneous survey that the "encroachment area" was theirs,
> e. with Mrs. Swann's having sat back and allowed them to solely improve, maintain, and possess that area for ten straight years.

Based on the above, the trial court found that the Seton's had met the requirements of Section 95.16(2)(c) adverse possession "with color of title."[3] The trial court denied Mrs. Swann's request for ejectment and entered judgment for the Seton's.[4] The trial never reached (because the trial court never needed to reach)

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[2] R. 158 - 161.

[3] T. 141/20 to 142/19.

[4] R. 217 - 218.

the questions of whether the defenses based on the doctrines of "boundary by acquiescence" or "boundary by agreement" applied under the facts of this case.

Mrs. Swann appealed.[5] The Fifth District Court of Appeals reversed stating that in order to seek adverse possession "with color of title," it was necessary for the possessor to have a written instrument accurately describing the property possessed as his. In reaching that decision, the Fifth District Court of Appeals' criticized and disagreed with this Court's opinion in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) and the Second District Court of Appeals' decision in Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990) regarding their interpretation of Section 95.16, Florida Statutes, and the requirement that the possessor have a written instrument accurately describing the property possessed.

The Seton's filed a petition with this Court asserting that conflict as the basis for this Court's jurisdiction. This court accepted jurisdiction on June 21, 1994. Pursuant to that acceptance of jurisdiction, this brief is being filed.

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[5] R. 223- 224.

Summary of Argument

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 whether Section 95.16, Florida Statutes, requires the written instrument on which a claim of adverse possession is based to accurately describe and include the land possessed.[6]

In pertinent part, Section 95.16 ("Real property actions; adverse possession under color of title") states the following:

> "(1) When the occupant ... entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included in the instrument, decree, or judgment, the property is held adversely. ...
> "(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).

Sub-section (1) is the "meat" of the statute. Sub-section (2) merely defines three different ways a person may "possess" a piece of property for "adverse possession" purposes.

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[6] As an aside, it also conflicts with language in Bailey v. Hagler, 575 So.2d 679, 681 (Fla. 1st DCA 1991).

The most logical and straightforward interpretation that can be given the language in the above statute is that, read in pari materia with the common law principles[7] applicable to "adverse possession," Sub-section (1) says the following: a person has sufficiently "adversely possessed" a strip of land "under color of title" if that person has openly, notoriously, exclusively, hostilely and continuously possessed that strip of land for more than 7 years in a "good faith" belief that he owns that strip of land based on a conveyance by a written instrument, decree, or judgment which he, again, in "good faith" believes includes that land.

The disagreement between the Fifth DCA and the other courts can be narrowed down to the question of which of the below two interpretative ways is the best way to read the last few words of the first sentence of sub-section (1):

> (a) "..., and has for 7 years been in continued possession of the property [which he, in good faith, believes to be] included in the instrument, decree, or judgment, ..."
>
> - or -
>
> (b) "..., and has for 7 years been in continued possession of the property [within the description of the property] included in the instrument, decree, or judgement, ..."

In Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) this Court, basically, adopted the former interpretation. Independant of one another, the First and Second District Courts of Appeals also adopted that interpretation:

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[7] See, 2 Fla.Jur.2d ADVERSE POSSESSION Section 7 ("Elements and Requisites - In general").

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

"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." Turner v. Valentine, 570 So.2d 1327, 1329 (Fla. 2d DCA 1990).

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.

The legislature made no similar requirement or change with regard to Sub-section (2)(a) ("cultivation or improvement") or Sub-section (2)(c) ("ordinary use"). As the old basic statutory construction principle goes: "Expressio unius est exclusio

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

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

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). More easily, they could have amended Sub-section (1) to say the following:

> "(1) When the occupant ... entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included [within the description of the property] in the instrument, decree, or judgment, the property is held adversely. [If only a portion of the land continually possessed is included within the description of the property in the written instrument, judgment or decree, only that portion is deemed possessed.] ..."

Such a change would have simply and effectively limited all three ways property may be possessed for adverse possession purposes. But, for whatever reason, the legislature did not. Hence, under the doctrine of "Expressio unius est exclusio alterius," it must be assumed the legislature did not intend to limit possession under Sub-sections (2)(a) and (2)(c) the same way it limited possession under Sub-section (2)(b).

Argument

Issue I. Whether the Fifth District Court of Appeals' interpretation of Section 95.16 or the interpretation given Section 95.16 by the Florida Supreme Court in Seddon v.Harpster, 403 So.2d 409 (Fla. 1981) and the other DCA's is more in line with actual wording

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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."

of the statute?

As explained in the "Summary of Argument," above, the interpretation given Section 95.16 by Seddon v.Harpster, 403 So.2d 409 (Fla. 1981), Bailey v. Hagler, 575 So.2d 679 (Fla. 1st DCA 1991), and Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990) is more in line with the actual wording of the statute.

As an aside, the facts of the case of Turner v. Valentine, supra, are remarkably close to those of the instant case. In the case of Turner v. Valentine, supra, the land was "possessed" not by a "substantial enclosure" under Section 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

[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.

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:

> "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:
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> > "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.
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> "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

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

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. The same rationale and policy purposes between affirming Turner call for the trial court's order to be affirmed here.

Issue II. Whether the 1987 change in Section 95.16(2)(b) also changed Sections 95.16(2)(a) and (c)?

As stated in the "Summary of Argument," if the legislature in 1987 wished to include in Sub-sections (2)(a) and (2)(c) the same change they made in (2)(b), they knew how to do it. The easiest way would be to modify Sub-section (1) as indicated in the "Summary of Argument," above, to-wit:

> "(1) When the occupant ... entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included [within the description of the property] in the instrument, decree, or judgment, the property is held adversely. [If only a portion of the land continually possessed is included within the description of the property in the written instrument, judgment or decree, only that portion is deemed possessed.] ..."

By choosing not to make such a change, the legislature in 1987 must have intended not to affect Sub-sections (2)(a) and (c).

Issue III. Whether the Fifth District Court of Appeals' interpretation of Section 95.16 or the interpretation of Section 95.16 by the Florida Supreme Court in Seddon v.Harpster, 403 So.2d 409 (Fla. 1981) and the other DCA's is more in line with common law principles?

In the third paragraph from the end of his opinion,[13] 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 as the sole dissenter in the Seddon case. As is natural, these biases or presumptions color their interpretations of the subject statute.

However, Judge Peterson's and Justice Boyd's biases in favor of a landowner who builds a fence in a location the landowner knows to be well inside the property line and who, then, silently sits by and knowingly acquiesces for over seven years in his neighbor's construction of expensive permanent improvements on a strip of land the neighbor in good faith believes to be his (based on an erroneous survey) and, then, springs to life to demand demolition of those longstanding improvements sitting on the other side of the landowner's fence on a strip of land the landowner will never use herself is contrary to many, many common law principles.

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[13] Swann v. Seton, supra, 629 So.2d 938:

> "The current version of section 95.16(2)(b) is more in line with the realities of ownership of subdivision lots where fences or other improvements are regularly constructed to promote security and privacy. The improvements often are not precisely located by installers and homeowners do not ordinarily incur the significant expense of purchasing a survey. If such errors in installation could result in the loss of title to portions of lots, many boundaries in a subdivision would eventually be altered from those shown by the plat. In the instant case, both of the parties were misled as to the exact location of the boundary line by the surveyors. Each intended to occupy only the land conveyed by their respective deeds. The continuing errors of the surveyors should not result in the loss or gain f property by either neighbor."

And, as a basic rule of statutory construction, "Statutes are to be construed with reference to appropriate principles of the common law. And, when possible, they should be so construed as to make them harmonize with existing law and not conflict with long settled principles."[14]

A couple of common law principles contradicting Judge Peterson and Justice Boyd's sympathies for the acquiescing landowner who "sits on his rights" for over seven years before objecting to permanent improvements erected on his property are the doctrines of "boundary by acquiescence"[15] and "boundary by agreement."[16]

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[14] 49 Fla.Jur.2d STATUTES Section 172 ("Common law and equity").

[15] 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 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."

[16] 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

Both those doctrines punish the 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.[17] If one attempted to "harmonize" Section 95.16 with

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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."

[17] 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 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.

"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

those common law doctrines, 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.

Also, as an aside, it is interesting to note the interplay of the opinions in Seddon and the earlier Florida Supreme Court opinion of Meyer v. Law, 287 So.2d 37 (Fla. 1973), overruled by Seddon. Justice Boyd wrote the majority opinion in the 4-3 decision in Meyer. Justice Adkins wrote the dissenting opinion in Meyer in which two other justices concurred. Eight years later, Justice Adkins wrote the majority opinion in Seddon. Justice Boyd wrote the sole dissenting opinion.

One thing that is interesting about those opinions are the rationales and policies behind the positions taken. For example, the facts of Meyer were very similar to the instant case. In his dissent in Meyer, Justice Adkins wrote the following:

> "The majority opinion seeks to enjoin the taking of land from a goodly and nature-loving man whose boundaries are unmarked by fences. Such a goal is indeed laudatory, but would require that the doctrine of adverse possession be totally abolished in this State - whether or not it was joined by the payment of taxes. Such a result would also work to the detriment of one such as the respondent in the case sub judice, a man who bought a section of land and diligently seeking to act properly obtained a survey of his land. Relying in good faith, on that survey, he placed a fence at what he honestly thought were the boundaries of his land. For seven long years, this man was allowed to believe that he was openly and notoriously tilling, improving, and fencing his own land. Under the rationale of the majority opinion, he was actually toiling for the benefit of his neighbor. Under the rationale of the statute, he acquired title by adverse

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fact, and to preclude the party acquiescent from claiming beyond the boundary line as thus established."

possession.

> "Neither neighbor is actually in the wrong; and, the best result would be that neither had to suffer. However, this is not possible within the limitations of land, and legislature has determined that, under the facts of the case sub judice, the man who had, through a good faith mistake, protected, enclosed, and improved the land in question for seven years without complaint of his neighbor should have the benefit of his toils. The majority opinion gives the land to the man who did not bother to check his boundaries for seven years to determine whether or not his land has been invaded.
>
> "This is not to suggest that the intentional fencing of surrounding land in an attempt to grab that which is not rightfully the property of the one so reaching would dictate a similar result. The exception to the color of title doctrine provided by Fla.Stat. Section 95.17(2), F.S.A., is such that it could apply only to good faith mistakes, because, otherwise, the adverse possessor could not be claiming the land under good title which he holds to the neighboring land. The burden of proving good faith error would be on the adverse possessor. However, under the facts of the case sub judice, especially the reliance on a survey for the setting of a boundary, I feel that the burden has been met."[18]

For his part, Justice Boyd, in his dissent in Seddon, clearly recognizes that the rationales and policies behind his position (and, consequently, the position taken by Judge Peterson, below) are inconsistent with longstanding common law principles:

> "I realize that what I'm saying flies in the face of hundreds of years of precedent. The law of adverse possession in this country developed from the common and statutory law of England. As far back as a century ago, the courts in this country held that a person could adversely possess mistakenly occupied land that was enclosed by an artificial or natural barrier." (citations omitted).

With all due respect to Justice Boyd and Judge Peterson, there is great wisdom behind the common law principles of "adverse possession," "boundary by acquiescence," and "boundary by agreement." A common thread of that wisdom is that, in each case,

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[18] Meyer v. Law, supra, 287 So.2d at 42-43.

neighbors by their actions and inactions have tacitly or expressly resolved their own disputes as to where the boundaries between their properties lay. The very essence of the civil side of the court system is dispute resolution. So many of its principles - estoppel, waiver, acquiescence, accord, acceptance of checks marked "paid in full" - are based on the premise that, if parties themselves treat a dispute as resolved, so will the courts. By analogy, this Court's recent decisions in Florida Power & Light Co. v. Westinghouse Electric Corp, 510 So.2d 899 (Fla. 1987) and AFM v. Southern Bell Telephone & Telegraph Co., 515 So.2d 180 (Fla. 1987) likewise put the burdens on individuals to define their own rights and obligations through contracting, i.e. that the courts won't come back in and upset and re-arrange what the parties have already arranged for themselves.

So it is with the doctrine of "adverse possession" and the facts of this case. From 1984 (the date of the erroneous survey) to 1992 (the date the suit was filed by Mrs. Swann), Mrs. Swann watched as the Seton's mistakenly built improvement after improvement on what she later testified she knew was her land - land on the other side of a fence she put in and which she likewise knew had been erroneously located according to one of the erroneous surveys. She did nothing. She sat on her rights. Then, after the Seton's had fully improved as part of their backyard land she had long since abandoned as being on the other side of her fence which she didn't mind was not located on the correct boundary, she sued to have their improvements removed - not because she in any way

intended to do anything with the strip of land involved, but just because she wanted to put the Seton's to the trouble of uprooting what they had built in good faith over the past eight years.

Whether one wants to call it estoppel or waiver or acquiescence or tacit agreement or adverse possession or whatever, Mrs. Swann should not now, after so many years, be allowed to reverse her position. Section 95.16 should likewise be construed in a manner consistent with all these common law principles. Seddon, Turner, and Bailey should be approved, and the decision below should be disapproved.

Conclusion

The Second District Court of Appeals' interpretation and application of Section 95.16(2)(c) was correct in the Turner case, as was the First District Court of Appeals' interpretation in Bailey, as was Justice Adkins' opinion in this Court's decision in Seddon. The below decision by the Fifth District Court of Appeals was incorrect, as was Justice Boyd's dissent in Seddon. This court should, therefore, reverse the District Court of Appeals' decision below with instructions that they affirm the trial court's decision below.

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 18 day of June, 1994:

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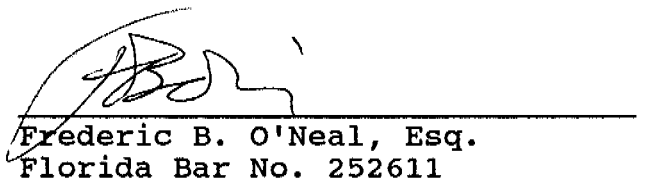

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