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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' REPLY 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."

The Amicus brief filed by Denis Hector and Joanna Lombard will be referred to as the "Amicus brief."

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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## Summary of Argument

There is some common ground in this appeal after all.

Both sides agree that interpretation of Sub-section 95.16(1) is the "meat" of this appeal. Both sides agree that Sub-section 95.16(2) only defines various ways that one may "possess" property for adverse possession purposes. On page 4 of her brief, Respondent states:

> "The Respondent agrees with Petitioners, that Sub-section (1) of Section 95.16 is the "meat" of the statute and that Sub-section (2) merely defines three different ways a person may "possess" a piece of property for "adverse possession" purposes under color of title."

Therefore, the key question is not how the 1987 amendment impacted Section 95.16 [since the 1987 amendment only amended one method of "possession" per Sub-section 95.16(2)(b)], but rather which interpretation of Sub-section 95.16(1) and its predecessor statutes is the better one - the interpretation given by Justice Adkins in both his majority opinion in Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) and his dissenting opinion in Meyer v. Law, 287 So.2d 37 (Fla. 1973) or the interpretation given by Justice Boyd in both his dissenting opinion in Seddon and his majority opinion in Meyer.

As for what the key question of this appeal is not, it is not, as Respondent and the Amicus brief argue, whether Justice Adkins' opinion in Seddon was "erroneous."[1] Nor is it whether the Seddon majority (composed of Justices Adkins, Alderman, McDonald and

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[1] See, page 2 of Respondent's brief.

Overton) "misinterpreted the legislature's intent."[2] Nor is the key question whether the interpretation given Sub-section 95.16(1) in Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990) is "bizarre and unwarranted."[3] Nor is it whether the opinion in Bailey v. Haggard, 575 So.2d 679 (Fla. 1st DCA 1991) is "simply poor drafting."[4]

None of the above is the key question of this appeal for the simple reason that both Justice Boyd's and Justice Adkins interpretations of Sub-section 95.16(1) are clearly valid, defensible interpretations of that statute.

The key question of this appeal, instead, is which of those two, valid, defensible interpretations of Sub-section 95.16(1) is the "better" interpretation in light of time-honored rules of statutory construction.

In that regard, one rule of statutory construction which Petitioner asks the Court to consider is the following:

> "Statutes are to be construed with reference to appropriate principles of the common law. And, when possible, they should

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[2] See, page 17 of the Amicus brief. As an aside and with regard to the question of legislative intent, the Amicus brief does an admirable job of trying to discern the legislative intent behind the 1987 amendment affecting Sub-section 95.16(2)(b), only. However, the Amicus brief is unfair to criticize Justice Adkins for allegedly not being concerned with the question of the legislature's intent. To the contrary, in his dissent in Meyer, Justice Adkins goes all the way back to 1939 to show how his interpretation of Sub-section 95.16(1) of requiring only "good faith" belief by the adverse possessor that he has paper title was exactly the change the legislature in 1945 intended to make. See, Meyer v. Law, 287 So.2d at 42.

[3] See, page 25 of the Amicus brief.

[4] See, page 22 of the Amicus brief.

be so construed as to make them harmonize with existing law and not conflict with long settled principles."[5]

It is without question that Justice Adkins' interpretation of Sub-section 95.16(1) is in harmony with the common law. It is equally without question that Justice Boyd's interpretation is not. Justice Boyd recognized this when he stated the following:

> "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).[6]

According to the common law doctrines of "boundary by acquiescence"[7] and "boundary by agreement,"[8] when choosing which of two innocents must suffer - a landowner (e.g. Respondent here) who knowingly acquiesces (as was the case here) in the good faith possession, maintenance, and improvement by another (e.g Petitioner here) of that landowner's property[9] - it is the party who knowingly

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[5] 49 Fla.Jur.2d STATUTES Section 172 ("Common law and equity").

[6] see, Seddon v. Harpster, 403 So.2d at 413.

[7] 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 43 ("In general; acquiescence without an express agreement").

[8] 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 39 ("ESTABLISHMENT OF BOUNDARIES BY AGREEMENT OR ACTS OF PARTIES - BY PAROL AGREEMENT, In general.").

[9] Especially where a fence line has been established and honored by both parties. 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 44 ("Improvements"); see, also, 1 Fla.Jur.2d ADJOINING LANDOWNERS Section 37 ("By location of fences").

sits on her rights who is the one who must "continue to suffer" in the circumstances of her own choosing by making permanent the state of affairs she has allowed to exist for more than seven years.[10]

Another rule of statutory construction which Petitioners ask this Court to consider is the rule that statutes should be construed so as to avoid injustice or unfairness.[11] Clearly, forcing Petitioners to uproot all the permanent improvements they have in good faith made over the years just so Respondent can have a feral strip of weeds on the other side of her fence makes no sense from any perspective of justice or fairness.[12]

A third rule of construction Petitioners ask this Court to consider is the rule that statutes must be construed so as to avoid unreasonable constructions.[13] To adopt Justice Boyd's strict interpretation means that an innocent occupier, like Petitioners here, can never claim title to a strip of land on which they have made improvements - no matter how innocent they are, no matter how

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[10] For some reason, the Amicus brief argues that Section 95.16 does away with these two common law doctrines. See, page 9. If such is the case, someone needs to let the authors of Florida Jurisprudence know that. Someone also needs to go back and overrule by name the 38 or so cases cited in Florida Jurisprudence which have recognized one or both of those doctrines.

[11] 49 Fla.Jur.2d STATUTES Section 184 ("Injustice or unfairness").

[12] As another aside, respondent makes no effort to argue the "justice" or "fairness" of the result she seeks to achieve by this litigation.

[13] 49 Fla.Jur.2d STATUTES Section 185 ("Logical and reasonable construction").

long they occupy the strip,[14] and no matter how egregious the animus, motivation, or actions and inactions of the landowner may be. It doesn't take a very fertile imagination to think up a parade of horribles of what might occur in the future if Justice Boyd's mechanical "no paper, no title by adverse possession" interpretation is to prevail.

In summary, while the legislature in 1987 clearly restricted one of three ways a would-be adverse possessor might claim "possession" under Sub-section 95.16(2), it did not supplant the better interpretation given to Sub-section 95.16(1) by Justice Adkins in his majority opinion in Seddon v. Harpster, supra.

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[14] Remember, if one in "good faith" believes one owns what turns out to be a piece of another's platted lot, but one pays taxes on one's own lot only, one can never gain title under Section 95.18 ("Real property actions; adverse possession without color of title"), Florida Statutes.

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## 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 of the statute?**

As explained in the "Summary of Argument," above, the interpretation given Sub-section 95.16(1) by Justice Adkins in his dissent in Meyer v. Law, 287 So.2d 37 (Fla. 1973) and in his majority opinion in Seddon v.Harpster, 403 So.2d 409 (Fla. 1981) and by the First District Court of Appeals Bailey v. Hagler, 575 So.2d 679 (Fla. 1st DCA 1991), and the Second District Court of Appeals in Turner v. Valentine, 570 So.2d 1327 (Fla. 2d DCA 1990) is more in line with the actual wording of the statute, as well as with basic rules of statutory construction.

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**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. By choosing not to make such a change, the legislature in 1987 must have intended not to affect Sub-sections (2)(a) and (c) and the general rule in Seddon as it applied to those two Sub-sections.[15]

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[15] See, 49 Fla.Jur.2d STATUTES Section 126 ("Expressio unius est exclusio alterius").

**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?**

As stated in the "Summary of Argument," common law principles and other rules of statutory construction are more in line with Justice Adkins' interpretation, than Justice Boyd's.

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## Conclusion

The "better" interpretation of Section 95.16 is the one found in the Second District Court of Appeals' decision in Turner, the First District Court of Appeals' decision in Bailey, and Justice Adkins' two opinions in this Court's decisions in Meyer and Seddon. This Court should, therefore, reverse the District Court of Appeals' decision below with instructions that they affirm the trial court's decision.

## 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 6 day of SEPTEMBER, 1994:

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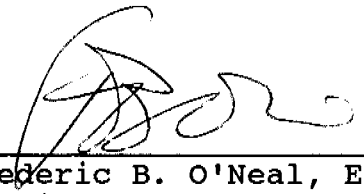

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