

SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

MAR 3 1998

H & F LAND, INC.,

Plaintiff/Appellant,

Case No. 92,299

vs.

District Court of  
Appeal, First District  
No. 97-01546

PANAMA CITY - BAY COUNTY  
AIRPORT AND INDUSTRIAL DISTRICT,

Defendant/Appellee.

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

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**INITIAL BRIEF OF PLAINTIFF/APPELLANT**

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AN APPEAL FROM AN ORDER OF THE FIRST DISTRICT COURT OF  
APPEAL WHICH PASSED UPON A QUESTION CERTIFIED TO BE OF  
GREAT PUBLIC IMPORTANCE

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TABLE OF CONTENTS

	<u>Page</u>
CITATIONS OF AUTHORITY	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
ISSUE PRESENTED	
A COMMON LAW WAY OF NECESSITY WHICH HAS NEVER BEEN ESTABLISHED CANNOT BE EXTINGUISHED BY THE MARKETABLE RECORD TITLE ACT.	
CONCLUSION	32
CERTIFICATE OF SERVICE	33

## CITATIONS OF AUTHORITY

	<u>Page</u>
<u>CASES</u>	
<u>American Bakeries Company v. Haines City</u> 131 Fla. 790; 180 So.524 (Fla. 1938)	10
<u>Behm v. Sacli</u> 560 So.2d 431 (Fla. 5th DCA 1990)	16
<u>Bell v. Cox</u> 642 So.2d 1381 (Fla. 5th DCA 1994)	14
<u>City of Miami v. St. Joe Paper Co.</u> 364 So.2d 439 (Fla. 1978), appeal dismissed, 441 U.S. 939 (1979)	22
<u>Clark v. City of Atlantic Beach</u> 124 So.2d 305 (Fla. 1st DCA 1960)	9
<u>Deseret Ranches of Florida, Inc. v. Bowman</u> 349 So.2d 155 (Fla. 1977)	14, 15
<u>Fox Investment v. Thomas</u> 431 So.2d 1021 (Fla. 2d DCA 1983)	20
<u>North Dade Water Co. v. Florida State Turnpike Authority</u> 114 So.2d 458 (Fla. 3d DCA 1959)	15, 16
<u>Parham v. Reddick</u> 537 So.2d 132 (Fla. 1st DCA 1988)	20
<u>Roy v. Euro-Holland Vastgoed, B. V.</u> 404 So.2d 410 (Fla. 4th DCA 1981)	11, 16, 17, 18
<u>Sapp v. General Development Corp.</u> 472 So.2d 544 (Fla. 2d DCA 1985)	14
<u>Weir v. Palm Beach County</u> 85 So.2d 865 (Fla. 1956)	27

<u>Westland Skating Center, Inc. v.</u>	27
<u>Gus Machado Buick, Inc.</u>	
542 So.2d 959 (Fla. 1989)	
<u>Whitten v. Progressive Casualty Insurance Company</u>	10
410 So.2d 501 (Fla. 1982)	

STATUTES

Florida Statutes

§ 197.572	28
§ 253.141	27
§ 695.01	21, 22
§ 704.01	6, 9, 11, 12, 13, 14, 15, 21, 22, 23, 28, 30
§ 704.05(1)	29
§ 712.03(4)	23
§ 712.05	25, 26
§ 712.08	25, 26
§ 712.10	10

OTHER AUTHORITIES

28 C.J.S., Easements, §45, p. 708	19
25 Am.Jur.2d, Easements & Licenses	
§34, pp. 447-448	16
§35, p. 449	18
§95, p. 501	18

INTRODUCTION

In this initial brief, Plaintiff/Appellant, H & F Land, Inc., will be referred to as "Plaintiff". Defendant/Appellee, Panama City-Bay County Airport and Industrial District, will be referred to as "Defendant". The record on appeal will be referred to as "R". The Appendix will be referred to as "A".

STATEMENT OF THE CASE AND FACTS

This is an appeal from an order of the First District Court of Appeal affirming a summary final judgment in favor of Defendant. (R. 69-75 and A. 1-7). Initially, Plaintiff filed an action in circuit court seeking declaration of a common law way of necessity across Defendant's land. Plaintiff's property is landlocked; Plaintiff has no access to its property except over Defendant's land. (R. 70, Lines 14-16 and A. 2, Lines 14-16). Defendant moved for summary judgment on the ground that Plaintiff's claim was barred by Chapter 712, Florida Statutes, the Marketable Record Title Act ("MRTA"). The circuit court held common law ways of necessity come within the scope of MRTA. (R. 71, Lines 4-5 and A. 3, Lines 4-5). The circuit court held no exception to MRTA is available to common law ways of necessity. (R. 75, Lines 6-8 and A. 7, Lines 6-8). After finding Plaintiff was entitled to a common law way of necessity, the circuit court held Plaintiff's way of necessity had been extinguished by MRTA as a matter of law. (R. 70, Lines 8-9, R. 75, Lines 10-11, A. 2, Lines 8-9, and A. 7, Lines 10-11).

Plaintiff appealed to the First District Court of Appeal, and the district court affirmed the summary judgment. (A. 8-10). The district court found the policies behind MRTA and the common law way of necessity in conflict and certified the following to be a question of great public importance:

Does the Marketable Record Title Act, Chapter 712, Florida Statutes, operate to extinguish an otherwise valid claim of a common law way of necessity when such claim was not asserted within 30 years?

This appeal followed. (A. 10). This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure.

The facts in this case are undisputed. (R. 70, Line 8 and A. 2, Line 81). The Plaintiff and Defendant derived title to their properties from a common source. (R. 70, Line 9 and A. 2, Line 9). When the common grantor conveyed the property to Defendant's predecessors in 1940, the grantor retained the landlocked property now owned by Plaintiff. (R. 70, Lines 9-11 and A. 2, Lines 9-11). In fact, it was the 1940 conveyance to Defendant's predecessors which caused Plaintiff's property to become landlocked. (R. 69, Lines 6-8 and A.

1, Lines 6-8). The 1940 conveyance is also Defendant's root of title for purposes of MRTA. (R. 70, Lines 18-19, R. 73, Lines 18-19, A. 5 and A. 2). Plaintiff's only access to its property is over Defendant's property. (R. 70, Lines 14-16 and A. 2).



### SUMMARY OF THE ARGUMENT

Plaintiff's property is landlocked, and Plaintiff's only access to its property is by a common law way of necessity which exists over Defendant's property. The Florida Supreme Court and the Florida Legislature recognize and embrace the long standing public policy that a landowner must have access to his land in order to prevent the loss of use of landlocked property. The common law way of necessity has been judicially and legislatively adopted to protect and further this public policy.

An unestablished common law way of necessity is not an interest in real property which the Marketable Record Title Act ("MRTA") will extinguish. Instead, it is an appurtenant right which may lie dormant through numerous transfers of title and yet pass with each transfer as appurtenant to the dominant estate. A subsequent grantee of the dominant estate is entitled to establish the way of necessity, even under a remote conveyance, whenever the use of such way becomes necessary to the use or enjoyment of the land. The right exists infinitely, even if never recorded or established.

If MRTA extinguishes a right to a common law way of necessity, MRTA's purpose is frustrated altogether. By the district court's order, MRTA renders title completely unmarketable in absolute contradiction to MRTA's express purposes. The district court's decision is illogical because it allows MRTA, even though its purposes are not furthered, to violate public policy.

When read in pari materia with Section 704.01, MRTA clearly does not extinguish an unestablished and unidentified common law way of necessity. The lower courts erred in holding MRTA extinguished Plaintiff's common law way of necessity over Defendant's property. Defendant was not entitled to judgment as a matter of law, and the district court's decision affirming the summary judgment in Defendant's favor must be reversed.

## ARGUMENT

### A COMMON LAW WAY OF NECESSITY WHICH HAS NEVER BEEN ESTABLISHED CANNOT BE EXTINGUISHED BY THE MARKETABLE RECORD TITLE ACT.

This appeal is from an order of the First District Court of Appeal which passed upon a question certified to be of great public importance. If this Court answers the certified question negatively, a significant public policy of this state will be preserved. If this Court answers the certified question affirmatively, a state statute will effectuate results which frustrate the statute's purposes and violate a significant public policy of this state.

Plaintiff owns a prime piece of real estate in Bay County, an undeveloped waterfront lot. Plaintiff's property is landlocked, and the sole access to the property is by a common law way of necessity over Defendant's property. If this Court reverses the district court's decision, Plaintiff will be able to use and enjoy its waterfront property as originally intended, and Defendant will yield to Plaintiff's necessity for

ingress and egress over a minimal portion of Defendant's property. Alternatively, if the district court's decision is affirmed, Defendant will not be affected, but Plaintiff's waterfront property will become a worthless, unmarketable, landlocked island, and Plaintiff will forever be prevented from utilizing its property.

Based upon public policy and statutory interpretation, the district court's decision must be reversed. The First District Court of Appeal found the Marketable Record Title Act ("MRTA") and the common law way of necessity in conflict and certified the following question to the Supreme Court:

Does the Marketable Record Title Act, Chapter 712, Florida Statutes, operate to extinguish an otherwise valid claim of a common law way of necessity when such claim was not asserted within 30 years?

Unquestionably, this Court's decision will have significant consequences on an immeasurable amount of undeveloped land in Florida. Should this Court rule MRTA extinguishes rights to common law ways of necessity, valuable land throughout Florida will be rendered worthless, landlocked islands.

The district court erred in affirming the summary

judgment in favor of Defendant. A summary judgment must be reversed if the moving party is not entitled to judgment as a matter of law. Clark v. City of Atlantic Beach, 124 So.2d 305 (Fla. 1st DCA 1960). Defendant was not entitled to a summary judgment because MRTA does not extinguish Plaintiff's right to a common law way of necessity.

Plaintiff's only access to its property is by a common law way of necessity which exists over Defendant's property. After finding Plaintiff had an otherwise valid right to a common law way of necessity over Defendant's property, the circuit court held MRTA had extinguished Plaintiff's right. By affirming the summary judgment in Defendant's favor, the district court effectively rendered Plaintiff's property landlocked causing a complete loss of use and enjoyment of the property.

The district court certified the question based upon an apparent conflict between two statutory provisions, Section 704.01 which codifies the common law way of necessity and Chapter 712 which is known as the Marketable Record Title Act. However, when read in pari materia, the two statutory provisions are not

inconsistent and can be harmoniously interpreted. American Bakeries Company v. Haines City, 131 Fla. 790; 180 So. 524 (Fla. 1938). Furthermore, because MRTA is in derogation of the common law, MRTA must be strictly construed. Whitten v. Progressive Casualty Insurance Company, 410 So.2d 501 (Fla. 1982). Section 712.10 provides that MRTA is to be interpreted liberally to further its purposes. However, no liberal interpretation of MRTA is compelled by Section 712.10 when the application of MRTA does not further its purposes. Reading the statutes in pari materia and construing MRTA strictly, MRTA does not extinguish an otherwise valid common law way of necessity which has never been asserted or established.

Whether MRTA will extinguish a common law way of necessity which has previously been used or established is beyond the scope of the appeal at bar. The issue before this Court is limited to a situation in which the right to a common law way of necessity exists but the easement itself has never been established. An unestablished right to a common law way of necessity must survive MRTA.

Florida courts have long recognized and preserved the fundamental principle that a landowner has a right to access his land by virtue of the common law way of necessity. Roy v. Euro-Holland Vastgoed, B. V., 404 So.2d 410 (Fla. 4th DCA 1981). A common law way of necessity is created when a conveyance from a common owner isolates a parcel of property from a public way. Id at 412. In such circumstance, the grantor impliedly grants or reserves a right to establish a way of ingress and egress over his property. Id. The property subject to the way of egress and ingress is the servient estate, and the property to which the way of ingress and egress attaches is the dominant estate. Id.

By adopting and codifying the common law way of necessity, the Legislature expressly recognized the compelling public policy supporting the preservation of access to landlocked property. Section 704.01, Fla.Stat. Section 704.01 provides the owner of landlocked property either a common law way of necessity or a statutory way of necessity. Section 704.01, Florida Statutes, reads as follows:

704.01. Common-law and statutory easements defined

and determined

(1) Implied grant of way of necessity.--The common-law rule of an implied grant of a way of necessity is hereby recognized, specifically adopted, and clarified. Such an implied grant exists where a person has heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over his land, or has heretofore retained or hereafter retains land which is inaccessible except over the land which he conveys. In such instances a right-of-way is presumed to have been granted or reserved. Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States; provided, however, that where there is a common source of title subsequent to the original grant from the state or United States, the right of the dominant tenement shall not be terminated if title of either the dominant or servient tenement has been or should be transferred for nonpayment of taxes either by foreclosure, reversion, or otherwise.

(2) Statutory way of necessity exclusive of common-law right.--Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress



or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, including, but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through, and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided that such easement shall be used only in an orderly and proper manner.

The plain language of Section 704.01 expresses the legislature's intent to retroactively protect a landowner's access to his or her property. The statute expressly applies to any conveyance of land, past or future, which landlocks property. The common law way of necessity is available where (i) a person has heretofore granted lands to which there is no accessible right-of-way except over his land, or (ii) a person has heretofore retained land which is inaccessible except over the land which he conveys. The statute expressly contemplates its applicability to any past conveyance

other than an original conveyance from Florida or the United States. Since Florida has been a state since 1845, the statute clearly contemplates applicability to conveyances which occurred more than a century ago.

Pursuant to Section 704.01, the owner of a landlocked parcel may be entitled to a common law way of necessity or a statutory way of necessity. "[A] landowner **always** has either a common law way of necessity or a statutory way of necessity, depending upon the status of his title, even though the precise location may be unknown." Sapp v. General Development Corp., 472 So.2d 544 at 546 (Fla. 2d DCA 1985) (*emphasis added*). While irrelevant to Plaintiff's entitlement to a common law way of necessity, the Court should recognize that, because the lands sub judice are within a municipality, a statutory way of necessity is not available to Plaintiff. Bell v. Cox, 642 So.2d 1381 (Fla. 5th DCA 1994).

The Florida Supreme Court embraced the fundamental policy against the loss of use of landlocked property in Deseret Ranches of Florida, Inc. v. Bowman, 349 So.2d 155 (Fla. 1977). In Deseret, the Florida Supreme Court

upheld the constitutionality of the statutory way of necessity created by Section 704.01, Florida Statutes. The Court emphasized the significant public policy of protecting the utilization of land and the policy against the loss of the use of landlocked property. According to the Court, "*the sensible utilization of land continues to be one of our most important goals.*" *Id.* at 156 (emphasis added). This important public policy will only be preserved and protected if this Court answers the certified question negatively.

Plaintiff acknowledges MRTA is a powerful act which extinguishes many different interests in property. However, MRTA has limits. There are certain rights which, due to their inherent nature, cannot be extinguished by MRTA. The common law way of necessity is one of those rights. Once the unique characteristics of a right to a common law way of necessity are understood, the reasons why MRTA does not apply to the common law way of necessity become apparent.

The common law way of necessity is a right appurtenant to the title of a dominant estate. North Dade Water Co. v. Florida State Turnpike Authority, 114

So.2d 458 (Fla. 3d DCA 1959). The appurtenant right passes with a transfer of the dominant estate even if the right is not specified in the instrument of transfer. Behm v. Saeli, 560 So.2d 431 (Fla. 5th DCA 1990). The successor to possession of a dominant estate is entitled to enjoy any rights appurtenant to the dominant estate. Id.

The right to a common law way of necessity passes with each transfer of a dominant estate and may be exercised at any time. Roy v. Euro-Holland Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981). The right to a common law way of necessity passes to remote grantees without limitation. Id. The Fourth District Court of Appeal cited 25 Am.Jur.2d, Easements and Licenses, § 34, pp. 447-448 for the law rule in Florida regarding the common law way of necessity:

A way of necessity is an easement founded on an implied grant or implied reservation. It arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is shut off from access to a road to the outer world by the land from which it is severed or by this land and the land of strangers. In such a situation there is an implied grant of a way across the grantor's remaining land to the part conveyed, or

conversely, an implied reservation of a way to the grantor's remaining land across the portion of the land conveyed. The order in which two parcels of land are conveyed makes no difference in determining whether there is a right of way by necessity appurtenant to either.

A way of necessity results from the application of the presumption that whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. Such a way is of common-law origin, and is presumed to have been intended by the parties. A way of necessity is also said to be supported by the rule of public policy that lands should not be rendered unfit for occupancy or successful cultivation. (Footnotes omitted.)

Roy v. Euro-Holland Vastgoed, 404 So.2d 410, 411 (Fla. 4th DCA 1981).

Additionally, the Fourth District Court of Appeal cited 25 Am.Jur.2d, Easements and Licenses, §35, p. 449 and §95, p. 501 for the law in Florida regarding the appurtenant nature of a common law way of necessity:

(I)f at one time there has been unity of title, the right to a way of necessity may lie dormant through several transfers of title and yet pass with each transfer as appurtenant to the dominant estate and be exercised at any time by the holder of title. (footnote omitted).

A way of necessity over remaining lands of the grantor, created by implied grant upon the severance of land, being appurtenant to the granted land, passes by each conveyance to subsequent grantees thereof. Hence, a subsequent grantee of land which is not used by the common owner at the time of the severance of the larger tract may, when the use of such way becomes necessary to the enjoyment of the land, claim it under the remote deed of severance. (footnote omitted).

Roy v. Euro-Holland Vastgoed, 404 So.2d 410, 412 (Fla. 4th DCA 1981). Because of its appurtenant nature, durability and survivability, the right to a common law way of necessity is distinct from those rights which are subject to extinguishment by MRTA.

While the right to a common law way of necessity may arise at the time the landlocked situation is created, the way itself does not have to be used or established during any time period. Typically, as in the case at bar, the right will lie dormant until such time as the use of the way becomes necessary for the enjoyment of the land. Because there is no need for access if the property is not used and enjoyed, it logically follows that the landowner will not establish the right until such time as he is ready, willing and able to use and

enjoy the property.

Inseverability is another characteristic of the common law way of necessity which makes it unique. As a right appurtenant to the dominant estate, a common law way of necessity cannot be severed from the dominant estate. 28 C.J.S., Easements, §45, p. 708. A landowner cannot convey his common law way of necessity to another while retaining the dominant estate for himself. Id. Reciprocally, if a landowner conveys the dominant estate to another, he cannot reserve or retain the common law way of necessity unto himself. Id. The way of necessity cannot be severed from the dominant estate because the dominant estate cannot be enjoyed or used without the way of necessity. Because MRTA does not provide for severance of a way of necessity from its dominant estate, MRTA cannot extinguish a common law way of necessity.

There are two ways to establish a common law way of necessity. The owners of the dominant and servient estates may agree as to the existence and location of the way of necessity. If the parties cannot agree, the owner of the dominant estate may seek a judicial determination of the existence and location of the way of necessity.

In either case, the location of the way of necessity will be unidentifiable until affirmatively established. MRTA does not extinguish rights which cannot even be located.

A common law way of necessity can be terminated by agreement between the parties or by operation of law. The Florida courts have recognized two methods by which a common law way of necessity will terminate by operation of law. First, a common law way of necessity terminates when the servient and dominant estates merge into common ownership. Fox Investments v. Thomas, 431 So.2d 1021 (Fla. 2d DCA 1983). Second, a common law way of necessity terminates when alternative access to a public way becomes available for the dominant estate. Parham v. Reddick, 537 So.2d 132 (Fla. 1st DCA 1988). Both recognized manners of termination of the right to a common law way of necessity occur because the necessity for access is eliminated. Because the right to a common law way of necessity exists until its necessity terminates, the common law way of necessity does not come within the purview of MRTA.

The right to a common law way of necessity is distinct from those rights subject to MRTA because the



right to a common law way of necessity is not subject to any recording requirements whatsoever. Neither case law nor Section 704.01 imposes any recording requirement whatsoever to preserve a right to a common law way of necessity. Using MRTA to impose a recordation requirement upon the common law way of necessity creates numerous practical problems. A way of necessity is never created on the face of a written conveyance; in fact, the failure to include access in an instrument of conveyance is what gives rise to the right to a common law way of necessity. Therefore, there is no recordable document which evinces the conveyance of the way of necessity. Creating a recordable document is impossible until such time as the way of necessity is established because the location of the way of necessity cannot be identified. Imposing a recording requirement to documents which do not exist and cannot be created lacks reason.

Additionally, the recording requirements of Section 695.01, Florida Statutes, do not apply to the common law way of necessity. Section 695.01 provides that an instrument of conveyance must be recorded to ensure that an interest in real property is good and effectual

against creditors or subsequent purchasers. Despite its apparent applicability to all interests in real property, Section 695.01 has never been applied to the common law way of necessity. As long as the instrument conveying the dominant estate is recorded, the common law way of necessity which is appurtenant to the dominant estate will be valid against subsequent bona fide purchasers, regardless of whether it is recorded. Section 704.01, Fla.Stat. (1997). Since the right to a common law way of necessity is not an "interest" subject to Section 695.01, the Court should not interpret the right to be an interest subject to MRTA.

If this Court answers the certified question affirmatively, no purpose of MRTA will be furthered. The purpose of MRTA is to extinguish old defects and stale claims, to enhance marketability, and to simplify title searches by shortening the period of search. City of Miami v. St. Joe Paper Co., 364 So.2d 439 (Fla. 1978), appeal dismissed, 441 U.S. 939 (1979). Functionally, MRTA identifies a root of title. A root of title is a written instrument or court proceeding which purports to convey title and which has been of record for at least

thirty years. With certain exceptions, matters of title, interest in land, claims and defects which occurred prior to the root of title are extinguished by MRTA. MRTA does not extinguish property interests arising subsequent to the root of title. Section 712.03(4), Fla.Stat.

None of MRTA's purposes is furthered by eliminating an otherwise valid right to a common law way of necessity which has never been asserted or established. MRTA seeks to eliminate old defects and stale claims upon property. A common law way of necessity is not a stale claim or an old defect upon property. By its inherent nature, the right to a common law way of necessity does not mature until the need therefor arises. No time limit is imposed upon a landowner's claim to a common law way of necessity. To the contrary, Section 704.01 clearly contemplates applicability to conveyances made more than one hundred years ago. Because the right to a common law way of necessity passes through infinite transfers of the dominant estate, it will never become a stale claim. Additionally, because the right to a common law way of necessity is created by statute and common law, the right is not a defect of title.

MRTA's purpose of rendering property marketable will not be achieved by eliminating a common law way of necessity. By extinguishing a common law way of necessity, MRTA would extinguish the entire corresponding dominant estate by rendering it landlocked and unmarketable. In such case, MRTA would function to indirectly extinguish a title which is not in competition with any other title. Such an illogical result is not consistent with MRTA's purpose. Unless this Court reverses the district court's decision, MRTA will serve to render unmarketable both Plaintiff's common law way of necessity and the dominant estate, contrary to MRTA's express purpose.

Furthermore, applying MRTA to eliminate a common law way of necessity fails to further MRTA's goal of simplifying and shortening title searches. Until established, the right to a common law way of necessity will never appear in a title search, no matter how far back a search is conducted. Only interests appearing on the faces of written instruments will appear in a title search, and a common law way of necessity is not revealed by a written instrument. Regardless of whether it has

existed for one year or one hundred years, the unestablished right to a common law way of necessity will never appear in a title search.

MRTA does not apply to any right which cannot be preserved by filing a notice pursuant to Section 712.05, Florida Statutes. The right to a common law way of necessity cannot be preserved by filing such a notice because the location of the way of necessity is unknown. When the servient estate remains intact, the inability to file a notice under MRTA is not so apparent. Presumably, a notice describing the entire servient estate could be filed. The difficulty arises when the servient estate is subdivided. In such case, the owner of the unestablished way of necessity cannot record a notice to preserve his interest in the subdivided servient estate because he does not know which portion of the subdivided tract carries the burden. If he were to file a notice against all the property, he would be subject to liability for filing a false claim under Section 712.08, Florida Statutes.

For example, assume A owns Blackacre and Whiteacre. In 1950, A conveys Blackacre to X. Because Blackacre is

completely surrounded by Whiteacre, X is entitled to a common law way of necessity over Whiteacre. Because X intends to hold the property for a future development, X does not immediately establish access to his property. In 1955, A subdivides and conveys Whiteacre to C, D and E. A makes no reference to X's access rights in the deeds of conveyance to C, D and E. In 1960, X files a notice of his claim pursuant to Section 712.05. X's notice encumbers all of Whiteacre. When C's contract to sell his property is unenforceable because he cannot convey clear title to his buyer, C sues X for filing a false claim pursuant to Section 712.08. When D's bank refuses to loan him money because the bank will not accept his mortgage with X's encumbrance, D sues X for filing a false claim pursuant to Section 712.08. If the Court determines the common law way of necessity exists across E's property, X will be liable to C and D for damages, costs and attorneys' fees. This concern raised in this scenario is complicated when the subdivision contemplated involves dozens or hundreds of subdivided parcels.

The Court should recognize that certain rights

cannot be extinguished by MRTA because of the unique nature of their existence. Other than the common law way of necessity, these rights include rights of lateral support, riparian rights and rights of surface water drainage. Each of these rights is appurtenant to a dominant estate and passes with a conveyance of the dominant estate, even if the right is not included in the instrument of conveyance. See generally Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956) (rights of lateral support); Westland Skating Center, Inc. v. Gus Machado Buick, Inc., 542 So.2d 959 (Fla. 1989) (rights of surface water drainage); Section 253.141, Fla. Stat. (1997) (riparian rights). None of these rights have ever been subjected to any recording requirements.

Unless this Court reverses the district court's decision, rights of lateral support, riparian rights and rights of surface water drainage will all be subject to extinguishment by MRTA. For example, a property owner, X, could seek to extinguish the right of his neighbor, Y, to lateral support. Y's right to lateral support is an appurtenant right which depends upon the conveyance whereby Y acquired his property, a conveyance which was

made prior to X's root of title. If the right to a common law way of necessity is a right subject to extinguishment by MRTA, Y's right of lateral support would also be extinguished by MRTA. Under the foregoing scenario, drainage rights and riparian rights are also subject to extinguishment by MRTA. Surely, MRTA was not intended to effectuate such results.

The Legislature recognizes a distinction between the common law way of necessity and other access easements and treats them differently. For example, the Legislature treats the common law way of necessity differently when a transfer of property is caused by nonpayment of taxes. Pursuant to Section 704.01, F.S., if either the dominant or servient estate of a common law way of necessity is transferred for nonpayment of taxes, the rights of the dominant estate survive the transfer. To the contrary, Section 197.572 provides that all other easements of ingress or egress will be extinguished when a transfer is caused by the nonpayment of taxes, unless the easement or right is in use or recorded. When property is transferred by a tax deed or similar manner, the common law way of necessity unconditionally survives



the transfer while other access easements do not.

Additionally, when directly addressing the effect of MRTA on easements, the Legislature did not include the right to a common law way of necessity as one of the specific easement rights that must be protected from extinguishment from MRTA. Section 704.05 (1), F.S. provides:

The rights and interests in land which are subject to being extinguished by marketable record title pursuant to the provisions of s. 712.04 shall include rights of entry or of an easement, given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of s. 712.03 or s. 712.04. However, the provisions of the section shall not apply to interests reserved or otherwise held by the state or any of its agencies, boards, or departments.

Section 704.05 further provides that any "any person claiming such a right of entry or easement may preserve and protect the same from extinguishment by the operation of this act by filing a notice in the form and in accordance with the procedures set forth in ss. 712.05 and 712.06." Because the Legislature has consistently recognized the common law way of necessity as a right

unique from any other easement or interest, the Court should assume that the Legislature did not intend for MRTA to extinguish the common law way of necessity.

Plaintiff's right is a non-exclusive way of access over Defendant's property. It does not compete with Defendant's title, but rather, it seeks to coexist with Defendant's title. To apply MRTA to this case would create an illogical result. If MRTA applies, Plaintiff's entire dominant estate, not just the way of necessity, will be effectively extinguished, even though the dominant estate, standing alone, clearly could not be extinguished by MRTA.

Section 704.01, Florida Statutes, and Chapter 712, Florida Statutes, must be read in *pari materia*. The well settled public policy of providing access to one's property mandates the interpretation that MRTA is inapplicable to an unestablished common law way of necessity. Due to the nature of its existence, an unestablished common law way of necessity is not an interest which MRTA can extinguish. MRTA does not extinguish Plaintiff's common law way of necessity over Defendant's property, and the order of the First District

Court of Appeal must be reversed.

CONCLUSION

Based upon the foregoing, and in particularly, upon the fundamental public policy against the loss of utilization of landlocked property, this Court should hold MRTA does not extinguish an unestablished common law way of necessity. This Court should answer the certified question negatively, reverse the district court's order and remand the cause for further proceedings.

Respectfully submitted this 2nd day of March, 1998.

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