SUPREME COURT OF FLORIDA

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.

REPLY BRIEF OF PLAINTIFF/APPELLANT

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

BRYANT & HIGBY, CHARTERED
ROWLETT W. BRYANT
FL Bar No. 0009820
CECILIA REDDING BOYD
FL Bar No. 0004030
833 Harrison Avenue
P. O. Drawer 860
Panama City, Florida 32402
850/763-1787

THOMAS SALE, JR., P. A.
FL Bar No. 069972
602 Harrison Avenue, Suite One
P. O. Box 426
Panama City, Florida 32402
850/763-7311
ATTORNEYS FOR PLAINTIFF/APPELLANT

TABLE OF CONTENTS

CITATIONS OF AUTHORITY

SUMMARY OF THE ARGUMENT

The right to a common law way of necessity exists because this Court and the Florida Legislature have adopted and preserved the fundamental principle that a landowner must have access to his property. The Marketable Record Title Act ("MRTA") must not be construed to debilitate this principle. MRTA must be construed in pari materia with Section 704.01, Florida Statutes, and this Court must conclude that MRTA does not extinguish an unestablished right to a common law way of necessity. The First District Court of Appeal erroneously found MRTA and Section 704.01 in conflict; if the Supreme Court reads the two statutory provisions in pari materia, the conclusion should be reached that the two statutory provisions are not in conflict at all.

The Court is faced with two alternatives. The Court may interpret MRTA in a manner which is consistent with its purposes, while also preserving the significant public policy against the loss of utilization of land. On the other hand, the Court may apply MRTA inconsistently with its purposes and nullify a significant public policy. Faced with such alternatives, this Court should answer the certified question in the

negative and protect the marketability and utilization of Appellant's dominant and servient estates.

MRTA clearly does not extinguish an unestablished and unidentified common law way of necessity. The district court erred in holding MRTA extinguished Appellant's common law way of necessity over Appellee's property. The district court's opinion which affirmed the summary judgment in Appellee'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.

Appellant owns a prime piece of real estate in Bay County, an undeveloped waterfront lot. Appellant's only access to its lot is by a common law way of necessity. If this Court disapproves the district court's order, Appellant will be able to use and enjoy its waterfront lot as originally intended, and Appellee will yield to Appellant's need for ingress and egress over a minimal portion of Appellee's property. On the other hand, if the district court's order is approved, Appellee will be insignificantly affected, but Appellant's waterfront lot will become a worthless, unmarketable, landlocked island, and Appellant will never be able to utilize its property.

In the answer brief, Appellee argues a liberal construction of the Marketable Record Title Act ("MRTA") supports the lower court's order. While Appellant agrees that MRTA is generally construed liberally, Appellant disagrees that MRTA should be liberally construed in this case. Section 712.10, Florida Statutes, should only be interpreted liberally to effect the purposes of MRTA. Where a liberal interpretation effects results contrary

to MRTA, such as in the case sub judice, a liberal interpretation should not be applied. In such event, MRTA must be construed strictly because it is a statute in derogation of the common law. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501, (Fla. 1982).

If MRTA and Section 704.01 are read in pari materia, this Court can preserve the policy against the loss of utilization of land while simultaneously furthering MRTA's purposes. If this Court holds MRTA does not extinguish the servient estate, the Court will allow MRTA to preserve the marketability of the dominant estate. What Appellant seeks is a "win-win" situation for Florida statutes. MRTA wins because it preserves the marketability of Appellant's property, and Section 704.10 wins because it preserves access to landlocked property.

Appellee suggests MRTA should be construed to impose a recording requirement to preserve the right to a common law way of necessity. Compelling, however, is the fact that no recording requirement has ever been imposed upon the right to a common law way of necessity. The unrecorded right continues for decades or centuries as long as the need for access exists. Furthermore, Appellee suggests an unrealistic and simplistic response

to the problems which would be created if a recording requirement were imposed to preserve a common law way of necessity. Appellee's suggestion fails to contemplate the inability of the owner of a dominant estate to control or predict the subdivision of a servient estate.

Appellee cites several cases in support of its position. The distinction between the instant case and every single case cited by Appellee is that the instant case is the only case in which, if MRTA is applicable, an entire fee simple estate is left landlocked and unmarketable. MRTA has never been applied to cause the complete loss of utilization of a parcel of property. Additionally, the cases cited by Appellee all involve rights which were clearly defined. MRTA has never extinguished a right which has not been located and defined.

Appellee's argument that Appellant has either been negligent in claiming its land or has abandoned its right to a common law way of necessity is not supported by Florida law. Because the right to a common law way of necessity does not have to be established within any period of time, to infer negligence because a landowner takes no action to establish a way of necessity within a

particular period of time lacks logic. The prudent landowner may equally assert his right to a common law way of necessity in a one year time period or in a one hundred year period because the right does not expire. Additionally, before an easement will be deemed abandoned, a clear affirmative intent to abandon must be demonstrated. Liebowitz v. City of Miami, 592 So.2d 1213 (Fla. 3d DCA 1992). No intent for abandonment has been demonstrated by Appellee.

Appellee's reliance upon Dixon v. Feaster, 448 So.2d 554 (Fla. 5th DCA 1984), is misplaced. While the Dixon court held that the right to a common law way of necessity may not be increased to accommodate the present needs of the dominant estate, the court recognized the survivability and appurtenant nature of the common law way of necessity. To the extent Appellee characterizes the Dixon opinion as critical of the common law way of necessity, such characterization directly contradicts the strong public policy against the loss of utilization of land, as embraced by the Florida Legislature and this Court.

Finally, Appellee's reliance upon Larson v. Hammonasset Fishing Association, 1996 WL 156014 (Conn.

Super.Ct.) is misplaced as well. Dicta from a Connecticut court has no precedential value for this Court. Additionally, the case cited does not reflect whether the common law way of necessity has been codified by the Connecticut Legislature or whether the Connecticut courts have recognized that the State has a strong public policy against the loss of utilization of land. In Florida, the legislative and judicial pronouncements regarding the importance of the common law way of necessity dictate a contrary result.

MRTA was enacted to render title marketable. Of the two potential results of this case, only one result furthers MRTA's purposes. If MRTA extinguishes the right to a common law way of necessity, Appellant will be prevented from utilizing the way of necessity and the corresponding dominant estate. Alternatively, if MRTA does not extinguish the right to a common law way of necessity, Appellant will have ingress and egress over a minimal portion of Appellee's property and will utilize the dominant estate as originally intended. When the burdens and benefits of the alternative results are examined, the result whereby Appellant's dominant estate remains marketable and functional is the result which

must be reached in order to further MRTA's purposes. The lower court erred in holding otherwise, and the opinion of the First District Court of Appeal must be disapproved and quashed.

CONCLUSION

Based upon the Initial Brief of Appellant, the Reply Brief of Appellant and 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 (i) answer the certified question in the negative, (ii) quash the opinion of the First District Court of Appeal and (iii) remand the cause for further proceedings.

Respectfully submitted this 6th day of April, 1998.

BRYANT & HIGBY, CHARTERED

BY: Cecilia Redding Boyd
ROWLETT W. BRYANT
FL Bar No. 0009820
CECILIA REDDING BOYD
FL Bar No. 0004030
833 Harrison Avenue
P. O. Drawer 860
Panama City, Florida 32402
850/763-1787

THOMAS SALE, JR., P. A.
FL Bar No. 069972
602 Harrison Avenue, Suite One
P. O. Box 426
Panama City, Florida 32402
850/763-7311

ATTORNEYS FOR PLAINTIFF/APPELLANT

SUPREME COURT OF FLORIDA

H & F LAND, INC.,

Plaintiff/Appellant,

Case No. 92,299

vs.

District Court of Appeal, 1st District No. 97-01546

PANAMA CITY - BAY COUNTY AIRPORT AND INDUSTRIAL DISTRICT,

Defendant/Appellee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner has been furnished by U. S. Mail and hand delivery on this 6th day of April, 1998, to Richard Smoak at P. O. Box 1006, Panama City, Florida 32402.

BRYANT & HIGBY, CHARTERED

BY: Cecilia Redding Boyd

CECILIA REDDING BOYD
FL Bar No. 0004030
833 Harrison Avenue
P. O. Box 860
Panama City, Florida 32402
850/763-1787
ATTORNEYS FOR PLAINTIFF/APPELLANT