IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 02-325

4DCA CASE NO. 01-3764
L.T. CASE NO. 98-9196 (18)

DALLAS G. PRICE and ANGELA F. PRICE, his wife

Plaintiffs/Petitioners,

vs.

AVERY L. TYLER and FLORENCE TYLER, et al.

Defendants/Respondents
_____/

PETITIONERS' BRIEF ON JURISDICTION IN SUPPORT OF NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW DECISION OF THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

Petitioners DALLAS G. PRICE and ANGELA F. PRICE will be referred to as "the PRICES".

Respondents AVERY L. TYLER and FLORENCE TYLER will be referred to as "the TYLERS".

Respondent AVERY L. TYLER will be individually referred to as "TYLER".

STATEMENT OF THE CASE AND FACTS[1]

This is a petition to invoke the discretionary jurisdiction of this Court pursuant to *Fla. R. App. P.* 9.030(a)(2)(A)(iv). The decision below (the "Decision"), dated June 19, 2002, became final for appellate purposes by the Fourth District's order denying the Petitioners' and Respondents' respective motions for rehearing entered July 26, 2002. Petitioners timely filed a notice to invoke the discretionary jurisdiction of this Court on August 26, 2002.

This property dispute between neighboring owners of a Marina Property (Parcel A) and a Mobile Home Property (Parcel B) concerns the rights and title to a 25' Easement and a Trapezoid-shaped parcel. In a recorded 1962 Agreement, Charles and Ruth Snyder, who owned both parcels, retained an Easement across the northernmost

[1] This statement recites the facts as contained in the Decision for jurisdictional purposes only. If this Court accepts jurisdiction, the PRICES will address the inaccuracy of certain factual findings in their brief on the merits.

25' feet of Parcel B (an access road) when they conveyed said parcel to the PRICES' predecessor in title, Marie Price. Contained on Parcel A, near the water line abutting Parcel B, was a Trapezoid-shaped tract. In the Agreement, the Snyders agreed that upon their sale of Parcel A, they would convey the Trapezoid-shaped tract to the owners of Parcel B. After the Snyder's 1975 sale of Parcel A (minus the Trapezoid) to the TYLERS, the Snyders failed to convey the Trapezoid to the then owners of Parcel B.

In 1984, although TYLER did not have title to the Trapezoid, he executed a "wild deed" to his company, Marine Service & Supply, Inc., that included the Trapezoid.

In 1989, Gustavo Passerelli purchased both Parcel A and Parcel B from the TYLERS, and Maria Price, respectively, subject to purchase money mortgages. When Passerelli defaulted on the respective mortgages, the TYLERS and Ms. Price[2] successfully foreclosed and received Certificates of Title. The Certificate of Title issued to the TYLERS mistakenly contained the Trapezoid-shaped parcel. In 1996, Ms Price sold PARCEL B to the PRICES. In 1998, Snyder conveyed the Trapezoid to the PRICES.

In this action, the PRICES sought to quiet title and a declaration terminating the

[2]Ms. Maria Price is the PRICES' predecessor in title.

25' Easement, alleging that it was personal to Snyder, and based on merger of the dominant and servient estates in Mr. Passerelli. The PRICES sought to quiet title to the Trapezoid. The TYLERS counterclaimed for declaratory relief that the Easement is perpetual, asserted a prescriptive easement, and to adverse possession over the Trapezoid, or alternatively to quiet title to the Trapezoid based upon the Certificate of Title acquired during the foreclosure action.

After a 2-day non-jury trial, the trial court entered a Final Judgment Quieting Title to both the 25' Easement and the Trapezoid in the PRICES. The trial court found the Easement extinguished after a merger of the dominant and servient estates in Mr. Passerelli. The court found that by virtue of the 1962 Agreement, the PRICES held equitable title to the Trapezoid, and reaffirmed the 1998 conveyance of legal title by Snyder. The trial court awarded attorney's fees to the PRICES as part of their damages in the quiet title action.

The Fourth District Court of Appeal reversed in part. The Decision affirmed the Judgment insofar as it quieted title to the Trapezoid in the PRICES, but reversed as to the finding the Easement had extinguished. The Fourth District held that there were two dominant estates, consisting of both Parcel A and the Trapezoid, and that merger did not occur because although he held equitable title, Mr. Passerelli never acquired legal title to the Trapezoid, a dominant estate. The court ordered entry of

a "judgment in favor of the Tylers declaring the continued existence of the 25 foot easement and their right to use it."

The Decision also reversed the award of attorney's fees. The Fourth District held that the award was barred by the PRICES' failure to plead attorney's fees prior to trial, and because attorney's fees were not awardable as damages in a quiet title action.

SUMMARY OF THE ARGUMENT

In allowing the easement to continue after its severance from the Trapezoid, the Decision conflicts with decisions of other district courts that hold an easement appurtenant to a dominant easement is adjunct to and cannot be severed from its dominant estate. *Palm Beach County v. Cove Club Investors, Ltd.* 734 So. 2d 379 (Fla. 1999); *Merriam v. First National Bank of Akron, Ohio,* 587 So. 2d 584 (Fla. 1st DCA 1991); *Behm v. Saeli*, 560 So. 2d 431 (Fla. 5th DCA 1990).

The Decision also conflicts with decisions of other district courts that hold that attorney's fees are awardable as compensatory damages in quiet title cases. *Saporito v. Madras*, 576 So. 2d 1342 (Fla. 5th DCA 1991); *Susman v. Schyler*, 329 So. 2d 30 (Fla. 3d DCA 1976). Because the attorneys' fees are not a separate independent damage, but rather part of the compensatory harm righted in quiet title actions, they need not be separately pled. The Court's Decision wrongfully extends *Stockman v.*

Downs, 573 So.2d 835 (Fla. 1991).

ARGUMENT

I. IN ALLOWING THE EASEMENT APPURTENANT TO CONTINUE EVEN AFTER ITS SEVERANCE FROM THE DOMINANT ESTATE, THE DECISION CONFLICTS WITH THE CASES THAT DEFINE AN APPURTENANT EASEMENT AS ONE THAT IS ADJUNCT TO A DOMINANT ESTATE.

Where an easement is appurtenant to land, it is adjunct and supported by a dominant estate. Where an easement is not appurtenant to a dominant estate, it is an easement in gross, or personal to the user.

In this case, the Appellate Court severed the dominant estate, the Trapezoid, from its appurtenant easement, the access road. Having severed the dominant estate from the easement, the Court awarded the right to use the easement to the TYLERS thereby creating an easement in gross. This conflicts with Florida law. The Decision conflicts with cases from this Court and other district courts that define an easement appurtenant as one that is adjunct to and supported by the dominant estate. *Palm Beach County v. Cove Club Investors, Ltd*. 734 So. 2d 379 (Fla. 1999); *Merriam v. First National Bank of Akron, Ohio,* 587 So. 2d 584 (Fla. 1st DCA 1991); *Behm v. Saeli*, 560 So. 2d 431 (Fla. 5th DCA 1990). The Decision's reasoning is flawed: If the easement continued even after its severance from the Trapezoid, its dominant estate,

then the easement was really an easement in gross[3] which long ago expired. Alternatively, if the easement was appurtenant to Parcel A only, allowing it to survive the severance of the Trapezoid mandated in the 1962 agreement, then the Appellate Court wrongfully reversed the Trial Court's extinguishment of the easement by merger.

The Trial Court's decision did not violate this fundamental tenet of Florida real property law and should have been affirmed. Jurisdiction is proper in this Court to address the Decision's restructuring of the easement in a manner that conflicts with Florida law.

II. THE DECISION'S DENIAL OF THE PRICES' ATTORNEY'S FEES CONFLICTS WITH CASES OF OTHER DISTRICTS PERMITTING AN AWARD OF ATTORNEY'S FEES AS DAMAGES IN A QUIET TITLE ACTION THAT SOUGHT TO CLEAR CLOUDS FROM TITLE.

The Fourth District reversed the award of attorney's fees to the PRICES, and concluded there was no entitlement because attorney's fees are not awardable in quiet title actions. This finding conflicts with *Saporito v. Madras*, 576 So. 2d 1342 (Fla. 5th DCA 1991), wherein the Fifth District acknowledged "the trend of decisions upholding an award of attorney's fees as damages in suits to quiet title or remove a cloud from title." (citations omitted). *See also Susman v. Schyler*, 328 So. 2d 30 (Fla. 3d DCA 1976)(acknowledging attorney's fees are recoverable as part of the costs of

[3]The creation of an easement in gross is consistent with the language in the 1962 agreement creating a "personal easement" in the Snyder's favor.

removing clouds from title).

Although the PRICES sued for declaratory relief, part of the relief sought was to quiet title in the Trapezoid in their favor and to remove clouds on title. On the face of the Decision, the Fourth District noted that in the years preceding the litigation, TYLER had issued a "wild deed" to the Trapezoid in favor of his company, Marine Service & Supply, Inc., when he had no such title to convey. The decision acknowledged that after TYLER's foreclosure of the Passerelli mortgage, the clerk of court issued a mistaken Certificate of Title to TYLER that included the Trapezoid. The Fourth District agreed that neither title was good title, and each cast a cloud on the PRICES' title to the Trapezoid.

Notwithstanding that the PRICES sued for declaratory relief, they obtained a judgment to quiet title, which removed the clouds cast upon their title by TYLER's "wild deed" and the certificate of title. According to *Susman* and *Saporito*, supra, the attorney's fees awarded to the PRICES as part of the costs of removing the clouds upon their title was appropriate, and discretionary review is in order.

In addition, the Decision inappropriately expands *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991), in holding that the PRICES' failure to plead attorney's fees was an impediment to their award. *Stockman* and its progeny require that attorney's fees be plead when they are sought pursuant to a contract or statute as ancillary damages.

Where, as here, attorney's fees are sought as part of the general damages, and general damages were plead, no further pleading is required.

CONCLUSION

In accordance with *Fla. R. App. P.* 9.030(a)(2)(A)(iv) and *Fla. Const. Art.* V §3(b)(3), this Court may exercise discretionary jurisdiction to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law".

The PRICES respectfully request that this court accept jurisdiction in this case based upon the express and direct conflict created by the Decision of the Fourth District Court of Appeal. This Court should accept jurisdiction to resolve the conflict and preserve uniformity of the law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ of September, 2002 to: THOMAS R. BOLF, ESQ., Ruden, McClosky, et.al., 200 East Broward Boulevard, 15th Floor, P.O. Box 1900, Ft. Lauderdale, FL 33302.

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CERTIFICATE OF FONT SIZE AND STYLE

Counsel for Petitioner hereby certifies that this brief was typed in Times New Roman 14- point font.

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