

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1685

HENRY H. BLANTON, as Trustee for
CAROLINE INVESTMENTS, INC.,
PROFIT SHARING PLAN,

Petitioner,

vs.

CITY OF PINELLAS PARK, FLORIDA,
YALE MOSK & CO., and YALE MOSK,
an individual,

Respondents.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NO. 2D02-1307

***AMICUS CURIAE* BRIEF OF REAL PROPERTY,
PROBATE & TRUST LAW SECTION OF THE
FLORIDA BAR IN SUPPORT OF PETITIONER
AND FILED WITH LEAVE OF COURT**

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INTRODUCTION

Your *Amicus Curiae* is The Real Property, Probate & Trust Law Section of the Florida Bar. The Section is comprised of over 7,000 Florida lawyers who principally practice in the areas of real estate and trust and estates law and who are dedicated to serving all Florida lawyers and the public in these fields of practice. The Section produces educational materials and seminars, drafts legislation, drafts rules of procedure, provides pro bono services and, on occasion, files *amicus* briefs on issues related to the Section's fields of practice.

The question certified as one of great public importance by the District Court of Appeal, Second District will impact an important issue of real property law. Hence, our interest in this case and our alignment with the Petitioner's position that the certified question should be answered in the negative.

SUMMARY OF ARGUMENT

The Second District read this Court's decision in H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 736 So.2d 1167 (Fla. 1999) too broadly. A careful reading of H & F Land indicates that this Court did not reach the issue of whether a statutory way of necessity under Section 704.01(2) of the Florida Statutes is subject to the provisions of the Marketable Record Title to Real Property Act ("MRTA"). H & F Land was limited to an analysis of the common law way of necessity, "recognized, specifically adopted and clarified" by statute in Section 704.01(1). In other words, it was that "statutory" provision, not the statutory way of necessity under Section 704.01(2), that the Court was referring to in its holding in H & F Land.

As this Court has found, statutory ways of necessity under Section 704.01(2) are predominantly for the benefit of the public rather than for the benefit of any particular private landowner. This public purpose is established in the very language of the statute, and Section 704.01(2) should be read and construed with MRTA to effectuate that stated purpose. Landlocked property which cannot be put to the productive uses enumerated in the statute does not benefit the public.

Unlike the common law rule of implied necessity codified in Section 704.01(1), a statutory way of necessity under Section 704.01(2) is a statutorily

created right separate and apart from an implied grant in the chain of title. It is for this reason that compensation, if requested, is required to be paid. MRTA should not be applied to extinguish this statutory right created predominantly for the benefit of the public.

If, for the sake of argument, MRTA were to be applied to statutory ways of necessity under Section 704.01(2), how would the thirty year clock under MRTA work? This question further illustrates why this Court should confirm that MRTA does not apply to statutory ways of necessity under Section 704.01(2).

ARGUMENT

I. The Second District Read H & F Land Too Broadly

The District Court of Appeal, Second District concluded that this Court previously addressed statutory ways of necessity and MRTA in H & F Land. The Second District certified the question presently before the Court because H & F “arose in the context of a common law way of necessity and the supreme court’s reference to statutory ways of necessity appears only in the stated holding” Blanton v. City of Pinellas Park, 854 So. 2d 729, 731 (Fla. 2d DCA 2003). It appears that the Second District read more into this Court’s stated holding than was intended.

As is clear from the certified question in H & F Land, the issue before the Court was whether MRTA operates to extinguish an otherwise valid claim of “a common law way of necessity.” H & F Land, 736 So. 2d at 1169. At the outset of the opinion, this Court expressly identified the issue before the Court and the particular statutory provision under review: “at issue today is the effect of MRTA on this way of necessity, now codified under the provisions of section 704.01(1), Florida Statutes (1995).” Id. at 1170 (footnote that quotes a portion of Section 704.01(1) omitted). Nowhere in the H & F Land opinion is there a reference to the

statutory way of necessity created by Section 704.01(2) or a discussion of that statutory provision.

The Second District stated that it was bound to conclude that the statutory way of necessity was time-barred under MRTA in light of this Court's holding in H & F Land that "statutory or common-law ways of necessity are subject to the provisions of [MRTA]." Blanton, 854 So. 2d at 731 (quoting H & F Land, 736 So.2d at 1170). The Second District's interpretation of this language is misplaced. The statutory provision that this Court stated it was addressing in H & F Land specifically provides that "the common law rule of an implied grant of a way of necessity is hereby recognized, specifically adopted, and clarified." § 704.01(1) Fla. Stat. (2002). One reading of this Court's reference to "*statutory* or common law ways of necessity" in the holding is that the Court was referring to the common law way of necessity specifically adopted and codified by way of statute in Section 704.01(1). In other words, the "statutory" reference in the Court's holding referred to the common law way of necessity codified by statute in Section 704.01(1) and *not* the statutory way of necessity created by Section 704.01(2).¹

Section 704.01(2) was never presented to the Court in H & F Land nor discussed at any point in its opinion. For this reason, it is respectfully submitted

¹ This conclusion is further supported by the Court's use of the disjunctive term "or," not "and."

that there was neither a holding nor dicta in H & F Land concerning the impact of MRTA on Section 704.01(2) .

II. Public Policy Favors Statutory Ways Of Necessity

In enacting Section 704.01(2), the legislature made clear that statutory ways of necessity are, “based on public policy, convenience, and necessity” As this Court stated in upholding the constitutionality of Section 704.01(2), statutory ways of necessity are “predominantly public and the benefit to the private landowner is incidental to the public purpose.” Deseret Ranches of Florida, Inc. v. Bowman, 439 So.2d 155, 156 (Fla. 1977). This Court recognized twenty-five years ago that as Florida continues to grow, efficient and effective use of its lands is in the public’s interest and “sensible utilization of land continues to be one of our most important goals.” Id. After reviewing the enumerated uses of land to which statutory ways of necessity apply, this Court stated “there is then a clear public purpose in providing means of access to such lands, so that they might be utilized in the enumerated ways. . . .” Id. at 156-57.

If the Second District’s decision is allowed to stand, it will result in the creation of landlocked, unproductive property that, among other things, will adversely impact the ad valorem tax base and frustrate the “sensible utilization of

land” in our State. This result would contravene the statutory purpose, previously recognized by this Court, to create statutory ways of necessity for the public good.

III. MRTA Should Not Apply To Statutory Ways Of Necessity

By its express terms, the common law way of necessity codified in Section 704.01(1) is based on a title interest in property that ties two specific pieces of property together. Section 704.01(1) expressly provides, “an implied grant arises only where a *unity of title* exists from a common source” §704.01(1) Fla. Stat. (2002) (emphasis added). Because the common law way of necessity is an implied grant within the chain of title arising from a common title source, no compensation is required.

A statutory way of necessity created by Section 704.01(2) is different. A statutory way of necessity may arise over different pieces of adjoining property depending upon the particular facts and circumstances. Because the statutory way of necessity is unrelated to an implied grant in the chain of title, compensation, if requested, is required either pursuant to voluntary agreement or judicial determination. See §§704.01(2), 704.04 Fla. Stat. (2002).

Consider the following hypothetical. Property owner X acquires a landlocked parcel that is and has always been vacant and in its native state. The landlocked parcel is adjoined by vacant parcels of land to the left and right, each of which abut

a public road. The parcel to the left is twice as wide as the parcel to the right. If in year one, X seeks to use her property for one of the enumerated statutory purposes, the statutory way of necessity would arise over the property to the right because that parcel provides the “nearest practical route” as required by the statute. §704.01(2) Fla. Stat. (2002).

Assume, however, that the enumerated use does not arise until year three. During the intervening two years, the property owner to the right mined his property so that there is now a huge pit filled with water between the landlocked property and the closer public road. In year three, the statutory way of necessity would arise over the property to the left. In other words, the statutory way of necessity would be on a different piece of property because at *that* point in time, under the particular facts and circumstances, the “nearest practical route” would be over the left parcel. This is so because passage over vacant land, even if a greater distance to the public road, is more practical than building a bridge. ²

This hypothetical illustrates several points. The statutory way of necessity has nothing to do with common grants. Indeed, the property over which the statutory way of necessity arises can change with time and the particular

² Indeed the legislature has indicated in Section 704.03 that the nearest practical route should be read to mean “without the use of bridge, ferry . . . or substantial fill.” See Perkins v. Smith, 794 So. 2d 647, 648 (Fla. 2d DCA 2001).

circumstances. Further, the statutory way of necessity arises with an enumerated use in the absence of any other method of access, not with a title transaction.

MRTA should have no application.

IV. If MRTA Were To Apply To Statutory Ways Of Necessity, When Would The Thirty Year Clock Begin To Run?

Pursuant to the terms of Section 704.01(2), the statutory way of necessity does not exist until one of the enumerated uses arises and there is no practicable route of egress or ingress to the landlocked property. Thus, the MRTA clock could not begin to run until the landlocked property is used or *desired to be used* for an enumerated purpose. For example, X, a landlocked owner of non-municipal property, does not use or desire to use the property for a dwelling until year 31 after purchase. In year 31, X desires to build a house to live in on the property. This is the first time X is eligible for a statutory way of necessity. Simply stated, the statutory way of necessity did not exist until that time. How could MRTA bar something that did not yet exist? ³

If, after the use by X arises, the owner of the property over which the statutory way of necessity is claimed and X cannot agree upon the conditions or terms of compensation if requested, either party or the board of county

³ If X then begins to use the statutory way of necessity, MRTA is inapplicable under Section 712.03(5).

commissioners may file suit in the circuit court to have these issues decided.

§704.04 Fla. Stat. (2002). In this situation, the way of necessity does not arise until the court completes its adjudication as the statute expressly provides: “the easement shall date from the time the award is paid.” Id.

As can be seen from the foregoing examples and the hypothetical discussed in Section III above, trying to apply MRTA and its thirty year clock to Section 704.01(2) does not work. The reason -- MRTA was not intended to apply to statutory ways of necessity under Section 704.01(2).

CONCLUSION

Landlocking property that is used or desired to be used for one of the enumerated purposes in Section 704.01(2) is not in the public interest. Protecting this public interest, and finding that statutory ways of necessity under Section 704.01(2) are outside the purview of MRTA, does not conflict with the purposes of MRTA.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus*

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for *Amicus Curiae*, the Real Property, Probate & Trust Law Section of the Florida Bar, certifies that this *Amicus* Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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