IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1685

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

Appellant,

vs.

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

Appellees.

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

PETITIONER/APPELLANT'S REPLY BRIEF ON THE MERITS

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Respondent Mosk's answer brief raises arguments more appropriate in a legislative rather than judicial forum. Reduced to its essence, Mosk argues that statutory ways of necessity are an unfair burden on a landlocked property owner's neighbors. But the Legislature had a choice. It could leave landlocked property owners without a remedy, which would result in property lying useless and fallow forever or provide a legislative solution that uses judicial supervision to reach a fair compromise by requiring the payment of fair value in return for access. The legislative intent to balance the interests of the neighboring landowners should be honored by refusing to extend MRTA beyond the realm of title claims.

Mosk Ignores the Distinction Between Statutory and Common Law Ways of Necessity

Mosk suggests that common law and statutory ways of necessity serve identical purposes and therefore MRTA should apply to each. As discussed extensively in Blanton's initial brief, however, Mosk ignores the critical distinction between the two ways of necessity. A common law way of necessity is a title interest created by an implied grant of title. Such an interest in title, like any other interest in title, is subject to MRTA. A statutory way of necessity is a legislative solution crafted for those who have *no* interest in title and therefore have no other means to gain access to what otherwise would be useless land.

Put another way, statutory ways of necessity come into play after statutes like MRTA have done their work and after other common law remedies have been exhausted. It is only at the point where no common law way of necessity exists

and when no other title interest can be claimed that the landlocked property owner has the right to claim the statutory way of necessity. *See Hancock v. Tipton,* 732 So. 2d 369 (Fla. 2d DCA 1999) (court can grant statutory way of necessity only if the landlocked owner has no common law right of access). A statute like MRTA that is designed to clean up title quite simply has no impact on a statutory remedy provided to those who have no title and no other remedy.

Perhaps the best analogy is to an eminent domain proceeding. A statutory way of necessity gives a private party the right, in exchange for fair compensation, to obtain an interest in property that would not otherwise exist. But this right is no more subject to MRTA than the state's right, when the need arises, to condemn land for public purposes.

This Case is Not About Sleeping on One's Rights

Appellees belabor in their answer brief that refusing to apply MRTA will encourage Blanton and others entitled to statutory ways of necessity to "sleep on their rights." Answer Brief at 22-23. But as this case demonstrates perfectly, this case is not about sleeping on one's rights. By the time Blanton purchased the property at issue, his land had been landlocked for well over 30 years. If anyone slept on his rights it was Blanton's predecessor. Moreover, what does one say to Blanton's successors in title, perhaps hundreds of years down the road, who still hold a useless piece of landlocked property. Have they slept on their rights as well? These owners will never have the opportunity to comply with MRTA. This cannot be what the Legislature intended when it said "based on public policy, convenience, and necessity, a statutory way of necessity…*exists* when…[land

becomes landlocked]" Section 704.01(2), Florida Statutes.

Numerous other courts have repeatedly emphasized the public policy behind preventing the accumulation of pockets of landlocked property, and the Legislature has done its best to balance the interests of all parties concerned by enacting Section 704.01(2). See *Deseret Ranches of Florida, Inc. v. Bowman*, 349 So. 2d 155, 156-57 (Fla. 1977) (Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow…There is a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways….). In fact, in *Sapp,* the Court held: "…a landlocked owner *always* has either a common law way of necessity or a statutory way of necessity…" *Id.* at 546.

In effect, the Legislature has workout out a compromise for all parties involved by requiring courts to grant statutory ways of necessity in exchange for reasonable compensation. This compromise not only solves the problem of landlocked land by allowing owners to access their properties, but does so in the fairest way by requiring the payment of reasonable value for its use.

Thus, the Legislature has already addressed Mosk's concern that neighbors not be allowed to wait while property is being developed and then "springing" a statutory claim for a way of necessity years later. The landlocked owner utilizes this strategy at severe risk. First, the court might decide based on the development that this route is no longer the nearest practicable route. *See* Section 704.01(2), Florida Statutes (landlocked property owner entitled to access "by means of the

nearest practical route, considering the use to which said lands are being put"). Even if the landlocked owner proves the right to a way of necessity over the now developed land, the reasonable price that must be paid will no doubt be impacted by the current state of land values. Put simply, there is no benefit to the landlocked owner to delay.

Perhaps most incredibly, Mosk muses that the statute would give landlocked owners the opportunity to engage in legal blackmail. The Legislature avoided this problem by requiring a judge to set the proper route and decide on reasonable compensation. Thus, the choice this Court faces is between a system where the landlocked owner is completely at the mercy of his neighbor, and the solution adopted by the Legislature where the landlocked owner and his neighbor have a judicial forum to ensure fair treatment to all concerned. The allegations in the complaint perfectly illustrate where the true potential for blackmail is. (R. 690 at ¶¶ 34-36).

In other words, the focus of this case is not about sleeping on one's rights, but is instead about whether this Court should recognize the legislature's carefully crafted compromise eliminating the problem of landlocked property while balancing the rights of the neighboring landowners.

A statutory way of necessity is not a "hidden" interest in title.

Appellees next focus on the fact that if MRTA does not apply to statutory ways of necessity, landowners will not know whether their land is burdened by a statutory way of necessity – that a statutory way of necessity will remain a hidden interest in property. Of course this is true, a*ll* statutory ways of necessity are

hidden – that is the point – they can arise at any time land becomes landlocked. A statutory way of necessity is not a claim against title, it arises out of circumstances that are always subject to change. A statutory way of necessity can't be bought, sold, or extinguished. It is created by present circumstances, it "exists" depending on the status of the surrounding lands, and is always subject to change. The need for a statutory way of necessity can suddenly disappear, but it can reappear at any time. For example, A can buy a piece of property, free of all interests, and then B's property next door can suddenly become landlocked. B may now have a statutory way of necessity across A's property, and there is nothing A could have done in a title search to anticipate that claim. The Legislature has decided, however, that B's right to access his or her land takes priority over A's desire to own his land free of encumbrances.

In light of that Legislative decision, there is nothing hidden about statutory ways of necessity. All landowners are alerted by Section 704.01(2) that, in Florida, they may have the benefit of, or be subject to, a statutory way of necessity under specific circumstances. The fact that this may result in a statutory way of necessity claim that may be impossible to predict or prevent is an argument for the Legislature. The Legislature recognized these interests by crafting a careful solution that protects the burdened landowner's rights by providing a judicial mechanism by which an unbiased third party can fairly determine (1) the need for the statutory way of necessity, (2) the least offensive location for the statutory way of necessity, and (3) a reasonable price for its use. In other words, despite the fact that statutory ways of necessity are inevitably "hidden" interests in land, the Legislature has fairly

balanced the rights of those involved through the enactment of Section 704.01(2).

Thus, a statutory way of necessity is hidden only in the same sense that a right of eminent domain is hidden. No property search can ever reveal whether a party may someday be subject to a statutory way of necessity any more than a property search could ever predict that the government may exercise its right of eminent domain. The point is, all are aware that these legislative rights exist and that these rights must be applied fairly by protecting the interest of both the landlocked property owner and his or her neighbors.

MRTA is Impossible to Apply Effectively to Statutory Ways of Necessity

Because a statutory way of necessity can exist at any time, it is impossible to apply MRTA effectively. It is much easier to apply MRTA to static rights like common law ways of necessity. Consider the equity in applying MRTA to a common law way of necessity - as soon as a landowner sells a piece of his property, rendering it landlocked, the buyer of that property has immediate notice that he is entitled to an implied right of access through the burdened land. The MRTA clock stocks ticking, and the beneficiary of the common law way of necessity is on notice and has ample opportunity to comply with the requirements of MRTA. This fits squarely within the purposes of MRTA, and does not unduly burden the landlocked owner.

Applying MRTA to statutory ways of necessity is much more sticky. When does the clock begin to run on a statutory way of necessity? Unlike a common law way of necessity, a statutory way of necessity can appear, disappear, and reappear depending on when the property is accessible and inaccessible. Does MRTA

begin to run at the first moment the property becomes landlocked? What if ten years from now there is no longer a need for a statutory way of necessity – is MRTA now tolled, or does the thirty year clock begin again once the property becomes landlocked again? MRTA and statutory ways of necessity are like apples and oranges, and trying to reconcile the two is like cramming a square peg into a round hole – it will only result in confusion and inconsistencies. Clearly, the only consistent way to determine the beginning date of a statutory way of necessity is to hold that a statutory way of necessity begins on the date that a Court declares its existence. *See Hunt v. Smith*, 137 So. 2d 232, 233-34 (Fla. 2d DCA 1962) ("Thus, it may been seen from the language of the statute that the statutory way of necessity exists only when the lands are being used or desired to be used for the purposes specified in the statute. One of the prerequisites to invoking the jurisdiction of the courts for a declaratory decree is that the declaration should deal with a present, ascertained or ascertainable state of facts."). This is the only way a court could even begin to reconcile MRTA with statutory ways of necessity and apply MRTA consistently.

The issue of MRTA's effect on statutory ways of necessity is properly before the Court at this time.

Lastly, it should be emphasized that despite Appellees' contentions, this issue is properly before this Court at this time. Because MRTA's effect on statutory ways of necessity was not at issue in *H&F Land , Inc. v. Panama City-Bay County Airport and Indus. Dist.*, 736 So. 2d 1167 (Fla. 1999), this Court did not have the benefit of any argument on the potential damaging effects of applying

MRTA to statutory ways of necessity. Therefore, this Court's isolated reference to MRTA's effect on statutory ways of necessity in *H&F Land* was *dicta*. *See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation*, 276 So. 2d 823 (Fla. 1973) (statements that are not essential to a decision are without force as precedent); *Dobson v. Crews*, 164 So. 2d 252 (Fla. 1st DCA 1964) (an expression beyond what is necessary to decide a narrow issue involved in an appeal is *obiter dictum*). *See also Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976) (described in detail in Blanton's Initial Brief at p. 16-17).

Now for the first time in this Court, this issue is being presented by parties who have a direct stake in the outcome of this Court's decision and who have thoroughly briefed the difficulties and ill-effects of applying MRTA to extinguish statutory ways of necessity. We respectfully suggest that the legislative intent behind Section 704.01(2) be honored and the decision below reversed.

CONCLUSION

For all the foregoing reasons, this Court should hold that MRTA does not extinguish statutory ways of necessity, reverse the decision below, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished via first class U.S. Mail on this _____ day of January, 2004 to the following:

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Appellant, Henry H. Blanton, certifies that this Reply 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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