Electronically Filed 05/13/2013 12:29:33 PM ET

RECEIVED, 5/13/2013 12:33:34, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC13-775

STATE OF FLORIDA DEPARTMENT OF
TRANSPORTATION AND SANTA ROSA COUNTY,

Petitioner,

vs.

CLIPPER BAY INVESTMENTS, LLC,

Respondent.

First District Court of Florida Case No. 1D11-5496
First Judicial Circuit Court Lower Case No. 08-1218-CA01-ORP

RESPONDENT'S ANSWER TO PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The Marketable Record Title Act ("MRTA") was enacted to simplify and facilitate land title transactions by allowing persons to rely on a record title subject only to the limitations in section 712.03, Florida Statutes. MRTA must be liberally construed "to effect (this) legislative purpose." § 712.10, Fla. Stat. (2008).

The limitation on marketable record title in section 712.03(5) protects "[r]ecorded or unrecorded easements or rights . . . in the nature of easements, rights-of-way and terminal facilities . . ." from being extinguished by marketable record title. § 712.03(5), Fla. Stat. (2008).[1] The First District Court of Appeal ("First District") held that: (1) this exception "applies to land held in fee for the purpose of right-of-way" and (2) that "FDOT failed to present competent, substantial evidence that the land at issue, which lies north of the Interstate 10 fence line, was held for the purpose of right-of-way." (Op., p. 20)[2].

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[1] FDOT refers to this limitation as a "use exception." This is a misnomer. Section 712.03(5) is a limitation on marketable record title that preserves "easements or rights, interest, or servitude in the nature of easements, rights-of-way and terminal facilities." § 712.03(5). This limitation or exception includes "use" language assuring that the use of any part of an easement or right-of-way preserves the entire easement or right-of-way.

[2] The First District Court of Appeal Opinion is the Appendix attached to Petitioner's Brief, referenced herein as "Op., p. __").

STATEMENT OF THE CASE AND FACTS

Supplementation of Florida Department of Transportation's ("FDOT") Statement of the Case and Facts is necessary.

In addressing Clipper Bay's argument that section 712.03(5) does not apply to rights-of-way in fee, the First District carefully reviewed *Fla. Dept. of Trans. v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992), *rev. denied*, 617 So. 2d 318 (Fla. 1993) and the "confusing" decision in *Water Control District of South Brevard v. Davidson*, 638 So. 2d 521 (Fla. 5th DCA 1994). (Op., p. 14). The First District used the "apparent conflict" in those two decisions as evidence that section 712.03(5) is ambiguous on the question of whether it applies to a right-of-way in fee. (Op., p. 15). The First District also found the limitation ambiguous because it had difficulty reconciling section 712.10's mandate to liberally construe MRTA to effect the legislative purpose with the First District's own "public policy" of assuring "that rights or easements once acquired for the use and benefit of the public are not easily lost or surrendered."[3]

Upon finding section 712.03(5)'s limitation ambiguous, the First District interpreted its purpose. (Op., pp. 15-16). It decided that this easement or right-of-way limitation "applies to land held in fee for the purpose of right-of-way." (Op., p. 20).

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[3] *City of Jacksonville v. Horn*, 496 So. 2d 204, 208 (Fla. 1st DCA 1986).

Having decided that section 712.03(5) applies to land held in fee for the purpose of right-of-way, the First District agreed with Clipper Bay that this exception did not apply because "FDOT failed to present competent, substantial evidence that the land at issue, which lies north of the Interstate 10 fence line, was held for the purpose of right-of-way."[4] (Op., pp. 17-20).

Significant to the jurisdictional question, the First District rejected "FDOT's argument that any land purchased in conjunction with a roadway project or any land owned by FDOT will automatically be protected as right-of-way under MRTA." (Op., p. 18).

SUMMARY OF ARGUMENT

Consistent with MRTA, the Fourth District in *Dardashti*, the Fifth District in *Davidson*, and now the First District below, have issued opinions assuring marketable record title is limited so that it does not "affect or extinguish" land encumbered or held for the purpose of right-of-way. § 712.03(5). Neither decision is in express and direct conflict with the other. This Court should deny review.

[4] This finding was based in part on the fact that the disputed land: (1) had never been used by FDOT since 1970; (2) was never "devoted to or required for use as a transportation facility"; (3) was outside of the limited access fencing that "had been widely accepted as FDOT's right-of-way line since prior to 1970;" and (4) would never be "utilized for right-of-way purposes in the reasonably foreseeable future." (Op., pp. 18-19).

The Fourth District's *Dardashti* decision and the First District's decision stand for the proposition that the section 712.03(5) limitation on marketable record title is limited to land encumbered or held for the purpose of a right-of-way. Obviously, limiting the right-of-way exception in MRTA to land that is part of a right-of-way (whether that right-of-way is a fee interest or in the nature of an easement) does not place a public right-of-way at risk.

Finding section 712.03(5) ambiguous, the First District's opinion makes it clear that this limitation on marketable record title includes land held in fee for the purpose of a right-of-way. Unsatisfied, FDOT wants more. As it did in *Dardashti*, FDOT wants *any* land it has purchased in conjunction with a roadway project or that it otherwise owns protected under section 712.03(5). As had the Fourth District, the First District properly rejected FDOT's quest. (Op., p. 18).

Without a right-of-way extending beyond its Interstate 10 ("I-10") fences, the argument that the First District's decision is in express and direct conflict with *Davidson* is without merit.

JURISDICTIONAL STATEMENT

This Court does not have discretion to exercise jurisdiction in this matter under Article V, § 3(b)(3), Florida Constitution or Florida Rule of Appellate Procedure 9.030(a)(2)(a)(iv) because the opinion below does not expressly and directly conflict with holdings of this Court or any other district court of appeal.

ARGUMENT

ISSUE I (RESTATED): DOES THE FIRST DISTRICT'S HOLDING THAT SECTION 712.03(5), FLORIDA STATUTES, APPLIES TO RIGHTS-OF-WAY HELD IN FEE FOR PURPOSES OF RIGHT-OF-WAY EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN *FLA. DEPT. OF TRANSP. v. DARDASHTI PROPERTIES*?

If the *Dardashti* opinion had held that section 712.03(5)'s limitation on marketable record title does not apply to land held in fee for the purposes of right-of-way, there would be express and direct conflict with the First District's holding. The Fourth District did not so hold. It simply held that "the 1917 deed (into Palm Beach County) did not create an easement or right-of-way." *Dardashti* at 122. Instead of being in conflict, these two decisions are consistent with each other and with MRTA.

In *Dardashti*, FDOT hoped to avoid the fact that only thirty nine feet of the fifty foot fee it acquired in 1989 was the land held for purposes of a right-of-way. It did so by arguing that the 1917 deed into Palm Beach County created the right-of-way. Rejecting this argument, the Fourth District held that "the 1917 deed did not create an easement or right-of-way . . . (instead), the County received fee title to the fifty foot parcel." *Id.* And, "[b]ecause the County did not have an easement or right-of-way over the fifty foot parcel, section 712.03(5) would not apply." *Id.*

at 123. This holding is not in express and direct conflict with the First District's holding.

Indeed, the Fourth District and the First District holdings are consistent with each other. Both holdings protect a property owner's marketable record title from FDOT's efforts to expand the section 712.03(5) limitation beyond land held for purposes of a right-of-way to include *any* land FDOT has purchased in conjunction with a roadway project or that it otherwise owns. (Op., p. 18).

In *Dardashti*, the Court found that the FDOT right-of-way was not created by the 1917 deed. From the stated facts, the County received a determinable fee interest in a fifty foot section of property, but the right-of–way it established was only thirty nine feet wide as depicted on the right-of-way map and plat recorded in 1956. It was this thirty nine foot right-of-way that the County conveyed the same year to the State Road Department. As such, the land held for purposes of right-of-way did not include the southern eleven feet. FDOT did not even acquire title to this additional eleven feet until 1989.

Similarly, FDOT's I-10 right-of-way does not encompass the entire fee that the State Road Department acquired in the 1960s to construct Interstate 10. As the First District found, the expert testimony was that the Interstate 10 fence line was the accepted right-of-way line. And, "FDOT failed to present competent,

substantial evidence that the land at issue, which lies north of the Interstate 10 fence line, was held for the purpose of right-of-way." (Op., p. 20).

The Fourth District's opinion does state that "it appears that both trial judges reasoned that subsection (5) did not apply to a right-of-way in fee." This is *obiter dicta*. The Fourth District did not adopt that reasoning in its holding. Instead, it simply stated that, "[a]s did Judge Carlisle, we hold that the 1917 deed did not create an easement or right-of-way." *Id.* at 122.

In summary, the First District's holding that section 712.03(5)'s limitation on marketable record title applies to rights-of-way held in fee for the purposes of right-of-way does not expressly and directly conflict with the Fourth District's decision in *Dardashti*. With no adverse affect to any right-of-way, both decisions simply declined FDOT's invitation to interpret the section 712.03(5) limitation so broadly that it would extend beyond the actual rights-of-way and impair the marketable record title to parcels others have acquired in good faith reliance on record title and the protection intended by MRTA.

> ISSUE II (RESTATED): DOES THE FIRST DISTRICT'S HOLDING THAT FDOT FAILED TO ESTABLISH THAT THE LAND AT ISSUE WAS HELD FOR PURPOSE OF RIGHT-OF-WAY EXPRESSLY AND DIRECTLY CONFLICT WITH THE FIFTH DISTRICT'S DECISION IN *WATER CONTROL DISTRICT OF SOUTH BREVARD v. DAVIDSON*?

FDOT asserts that the First District's determination that the I-10 transportation facility, its lease of the property north of the I-10 fence to Santa Rosa County, and the County build road thereon did not preserve its interest in its entire unified fee estate by operation of the section 712.03(5) use exception, expressly and directly conflicts with the Fifth District's *Davidson* decision.

First, the limitation on marketability in section 712.03(5) is not a "use exception." It is an easement or right-of-way exception that preserves the entire easement or right-of-way if a portion is used. *See* FN 1, *supra*. Second, FDOT failed to establish "that the land at issue was ever devoted to or required for part of its Interstate 10 right-of-way." (Op., p. 18). Thus, the predicate for its argument does not exist. *Arguendo*, assuming the predicate exists, there is no express and direct conflict with *Davidson*. That decision simply and properly assured that the Water Control District's right-of-way as depicted in the public records was not affected or extinguished.

CONCLUSION

The Court should deny review. The First District's opinion is not in direct and express conflict with *Dardashti* or *Davidson.*

Dated this 13th day of May 2013.

/s/William J. Dunaway
KENNETH B. BELL
WILLIAM J. DUNAWAY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been electronically filed and that a true and correct copy of the foregoing has been furnished to the following via electronic delivery, this 13th day of May 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response Brief has been submitted in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

Dated this 13th day of May 2013.

/s/William J. Dunaway
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