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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

CLIPPER BAY INVESTMENTS, LLC,

Respondent.

CASE NO. SC2013-775
LT CASE NO. 1D11-5496
08-1218-CA01-ORP

INITIAL BRIEF ON THE MERITS OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

On Review from the District Court of Appeal
First District, State of Florida

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PRELIMINARY STATEMENT

Clipper Bay Investments, LLC, the plaintiff/counter-defendant/appellant/cross-appellee below and respondent here, will be referred to as Clipper Bay. The Florida Department of Transportation, the defendant/counter-plaintiff/appellee/cross-appellant below and petitioner here, will be referred to as the Department. The Marketable Record Titles to Real Property Act, Chapter 712, Florida Statutes, will be referred to as MRTA.

Citations to the record on appeal will be indicated parenthetically as "R." with the appropriate volume and page numbers. Citations to the transcript of the non-jury trial conducted on May 16 and 17, 2011, will be indicated parenthetically as "T." with the appropriate court reporter's volume and page numbers. Citations to the Appendix accompanying this brief will be indicated parenthetically as "A." with the appropriate document and page numbers.

STATEMENT OF THE CASE

This case arises from an appeal and cross-appeal of a final judgment entered in a quiet title and ejectment action involving seven acres of land located north of the Department's Interstate 10 (I-10) fence line in Santa Rosa County. Clipper Bay Investments, LLC v. State of Florida Department of

Transportation and Santa Rosa County, Case No. 1D11-5496 (Fla. 1st DCA February 5, 2013), Slip Opinion pp. 1-3. (A.1 1-3) The Department's claim was based upon a single, recorded, 1965 conveyance that included the disputed property and other lands, which had been acquired for the construction of I-10. Id. at 3. (A.1 3) Clipper Bay's claim was based upon a 1970 conveyance (Clipper Bay's root of title as defined in MRTA) which also included the disputed parcel and other lands.[1] Id. (A.1 3)

The trial court quieted title to a portion of the disputed seven acres in each party.[2] (R.XI 2192-2202 (A.2)) On appeal Clipper Bay contended that the trial court erred in extinguishing only a portion of the Department's claim and the Department took the position that the exception contained in Section 712.03(5), Florida Statutes, precluded MRTA from extinguishing any portion of the Department's interest in the disputed lands. Clipper Bay, Slip Opinion, pp. 1-2. (A.1 1-2)

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[1] Typically, a pre-root interest will be extinguished by MRTA unless it is preserved by one or more of the exceptions to marketability the Legislature established in Section 712.03, Florida Statutes. The Section 712.03(1) exception for pre-root estates or interests disclosed by post-root muniments of title and the Section 712.03(5) exception for public easements and rights-of-way are at issue in this case.

[2] By order entered May 12, 2011, and confirmed by the Final Judgment, pursuant to agreement of the parties title to all lands in Block C of Escambia Shores, Unit No. 1, lying west of the southerly extension of the west boundary of Lot 442 was quieted in the Department. (R.IX 1691-1692; R.XI 2202) The trial court's action in this regard should be affirmed irrespective of the outcome of this appeal.

Department argued: (1) that no portion of its fee estate could be extinguished by operation of MRTA because the deed Clipper Bay relied on as its root of title failed to sufficiently describe the land which was conveyed to identify its location and boundaries; (2) that MRTA did not extinguish the Department's fee interest because a post-root muniment of title in Clipper Bay's chain of title specifically refers by an official record book and page to a recorded title transaction which confirmed the Department's estate; and (3) that the Section 712.03(5) exception preserved the entirety of the Department's estate.[3] (Answer/Cross-Initial Brief of Florida Department of Transportation, pp. 41-47; Cross-Reply Brief of Florida Department of Transportation, pp. 2-14) The lower court rejected the first two points without discussion and then proceeded to address the operation and application of the Section 712.03(5) exception. Clipper Bay, Slip Opinion, p. 2. (A.1 2)

With respect to the operation of Section 712.03(5), Clipper Bay looked to the Fourth District Court of Appeal's opinion in Florida Dep't of Transp. v. Dardashti Properties, 605 So. 2d 120 (Fla. 4th DCA 1992), rev. denied, 617 So. 2d 318 (Fla. 1993), which held that the Section 712.03(5) exception did not apply to

[3] For purposes of this Court's review, the Department does not dispute the sufficiency of the legal description in the conveyance Clipper Bay relies on for its root of title.

lands held in fee. Id. at 5. (A.1 5) Relying upon Dardashti, Clipper Bay argued that the trial court erred in extinguishing only a portion of the Department's pre-root claim because the Department acquired its lands in fee. Id. at 1-2, 5, 9. (A.1 1-2, 5, 9) Clipper Bay also took the position that the trial court misconstrued the Fifth District Court of Appeal's decision in Water Control District of South Brevard v. Davidson, 638 So. 2d 521 (Fla. 5th DCA 1994). Id. at 5-6. (A. 5-6) In that case the court applied the Section 712.03(5) exception to a fee estate to preserve the Water Control District's rights in lands that it had never used.

The Department urged the court not to follow Dardashti's narrow construction of Section 712.03(5) and argued that the exception precluded extinguishing any portion of its interest in the disputed lands and that the use of any portion of its fee estate as right-of-way preserved its interest in the entire estate. Id. at 2, 5, 9-10. (A.1 2, 5, 9-10)

The First District Court of Appeal rejected Dardashti's construction of Section 712.03(5) and concluded that the exception did in fact apply to rights-of-way held in fee by the Department. Id. at 15-17. (A.1 15-17) However, the court did not arrive at the result indicated by Davidson. Notwithstanding the fact that the Department had used a portion of its fee ownership to construct I-10 and had leased another portion to

Santa Rosa County to build a roadway, the court refused to apply Section 712.03(5) to preserve the Department's interest because the court was of the view that the Department had failed to present competent, substantial evidence that its I-10 right-of-way included the land claimed by Clipper Bay. Id. at 17-20. (A. 17-20)

The Department's Motion for Rehearing and Certification was denied on March 22, 2013, and the Department's Notice to Invoke Discretionary Jurisdiction was timely filed on April 15, 2013. By order entered July 16, 2013, this Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

Along with the general operative facts which appear in the Department's Statement of the Case, the following additional factual information is necessary for the Court's consideration of the lower court's refusal to apply the Section 712.03(5) exception to preserve the entirety of the Department's fee estate although portions of the fee estate had been used as right-of-way (Issue I, C.) and the lower court's rejection of the Section 712.03(1) exception as a basis for preserving the entire fee estate. (Issue II)

Turning first to Issue I, C., there is no dispute that the Department's fee estate, which includes the property in issue,

was established by a single conveyance (119/303 deed (A.6)). Nor is there any dispute that I-10 was built on a portion of that fee estate and that the Department leased another portion of the estate to Santa Rosa County for the construction of a county road. The following portions of the testimony of Eddie Rudd, Wayne Parker, John Franklin Jackson, and Keith Hodges are also relevant.

Eddie Rudd, the document supervisor in right-of-way mapping in the Department's Chipley office (T.II 255), testified that right-of-way maps are used to track property acquisition. (T.II 258-259) It is important that the right-of-way map be prepared before a deed is prepared because the map shows what is needed to be acquired for the project. (T.II 263) The legal descriptions for the conveyances are taken from the map. (T.II 263) Both the red and green areas on the right-of-way map (the Department's fee estate) (See R.X 1811, 1812; A.7) were considered right-of-way. (T.II 267) When referring to a right-of-way line for the borrow area he characterized the borrow area as part of I-10 and being all for the I-10 project. (T.II 273)

On cross-examination, Mr. Rudd testified that the right-of-way maps were prepared prior to the acquisition of the property to build I-10 and the Bay Bridge. (T.II 282) He referred to both the limited access area and borrow area on the right-of-way map as right-of-way because he and the Department's Chipley

office generally refer to "things" the Department owns for use of roads as right-of-way. (T.II 283) The maps are a projection of what the Department needs to do the project. (T.II 283) Mr. Rudd also testified that right-of-way needs are developed from the construction plans and that he did not make a distinction between what the Department owns in fee and what it uses and needs for right-of-way because right-of-way is what the Department requires for a roadway project. (T.II 290, 293) The 119/303 conveyance vested the Department with its right-of-way. (T.II 293) Mr. Rudd stated that he believed the borrow area was used for fill on the interstate. (T.II 291)

Clipper Bay's surveyor, Wayne Parker testified that when he surveys the boundary of a Department property, he would use the right-of-way maps and not the deeds because "y'all know where your right-of-way is and y'all make a drawing of it." (T.I 128) If there was a dispute between a right-of-way map and a deeded description, Mr. Parker would use the right-of-way maps to establish the right-of-way. (T.I 150)

John Franklin Jackson was Clipper Bay's title examiner expert witness. (T.I 157) Regarding the issue of whether the I-10 fence line comprised the right-of-way line for I-10, Mr. Jackson testified:

> there is no document of record that tells me that I would have to worry about where the right-of-way line of Interstate 10 is.

> Therefore the right-of-way line would be presumed to be the same one coming out of Jacksonville all the way where that fence line runs, all the way to the Escambia, I mean to the Escambia County line of Alabama. And I would have no reason, without a document of record to tell me, to believe or not believe that that was, in fact, the existing right-of-way line.

(T.I 175-176)

During cross-examination Mr. Jackson did, however, acknowledge that depending upon where the Department's north I-10 right-of-way line is located, there may be no overlapping property. (T.I 196-197) If the only thing of record he had was a deed, Mr. Jackson would rely upon a surveyor for the location of the right-of-way line. (T.I 197) Mr. Jackson had previously stated:

> Well, again, based on my experience in all the years I've done examination, that interstate line fence that runs from Jacksonville to over here to towards Mobile is the accepted northerly right-of-way line. And barring something that is on record that tells me oh, by the way, this is not your north right-of-way line, I would have no reason to believe it wasn't. I would check with the surveyor and say where do you know this north right-of-way line.

(T.I 197) Mr. Jackson testified that the I-10 fence had been in place as long as he could remember, but conceded that there may be some places along the interstate where there are no fences. (T.I 198-199)

Eddie Rudd testified that the right-of-way map sheet 7 (A.7 2) does not reflect the location of the I-10 fence line and that the location of the fence line doesn't matter to the Department. (T.II 275) Mr. Rudd explained: "[I]n general, the fences follow the right-of-way lines but not necessarily so. We have places where we move the fence or whatever. So, we put the fence where we need it to be." (T.II 275) "The fences are in relation to use for limited access right-of-way." (T.II 276)

On cross-examination Mr. Rudd testified that to his knowledge the I-10 fence line is not what the Department has established as its right-of-way. (T.II 284) The fence controls access onto the right-of-way (T.II 285), but the location of the fence doesn't matter because: "there are places where we've relocated fences and we've moved fences, not on the right-of-way line due to wetlands or something like that. So, the fences, we put the fence where it needs to be and it doesn't necessarily -- it's not necessarily on the right-of-way line itself." (T.II 286)

Clipper Bay's predecessor in title, Keith Hodges (T.III 314-315), testified that he was familiar with the location of I-10 by the fence line that ran south of his property and that by his survey, the fence line was his southern boundary. (T.III 320-321) Upon his inquiry concerning a portion of the I-10 fence line which, according to his survey, encroached on his

property, the Department indicated that it would not relocate the fence line because it claimed the land and the fence line was its right-of-way line. (T.III 322) He also asserted that the Department had not said anything to him about ownership of lands north of the I-10 fence line. (T.III 323)

The Department's argument in Issue II requires a showing that the instrument it is relying upon for purposes of the Section 712.03(1) exception to marketability is a muniment of title and that the instrument specifically refers by an official record book and page to a recorded title transaction which imposed, transferred, or continued the Department's interest. These showings involve the following matters of record.

The instrument the Department looks to for Section 712.03(1) purposes is the 1981 Trustee's Deed from Central Bank and Trust Company to Escambia Shores, Inc. (OR Book 545, Page 301)(R.XI 2092; A.4) The deed is included in Clipper Bay's chain of title set out in its Complaint (R.I 3,8), in its January 21, 2009, motion for summary final judgment (R.I 163, 166), and in the parties' Joint Stipulation as to Chains of Title. (R.II 357-358)

The deeds through which Clipper Bay acquired title to the lands in issue both contain references to Block C of Escambia Shores Unit 1 in their legal descriptions of the lands conveyed. (R.I 70-71, 80-82) The reference to Block C was not contained

in the 204/704 deed (root of title) legal description (R.VIII 1527; A.3) and that conveyance did not convey all the land making up Block C. (T.I 192; R.IX 1691-1692; R.X 1889) The first time Block C shows up in a legal description in Clipper Bay's chain of title is in the 1981 Trustee's Deed. (R.I 8, 166; R.II 357-358; R.XI 2092-2094; A.4) Block C is then referenced in the legal descriptions of all future conveyances in Clipper Bay's chain of title. (R.I 8-9)

The 1981 Trustee's Deed contained the recitation that the Bank was:

> ...acting in pursuance and by virtue of the powers in it vested by **a deed to CENTRAL PLAZA BANK AND TRUST COMPANY, as Trustee, from CENTRAL BANK AND TRUST COMPANY, dated the 14th day of September, 1965, recorded in Official Records Book 119, Page 16, Public Records of Santa Rosa County, Florida,** and a declaration of trust as to the premises conveyed, dated the 15th day of September, 1965, being LAND TRUST AGREEMENT #8051, and of every other power and authority to them granted thereunder....[Emphasis added]

(R.XI 2092; A.4)

The September 14, 1965 deed recorded in Official Record Book 119, Page 16 (119/16 deed), excepted from the conveyance a "prior conveyance to the State of Florida of the following property[.]" (R.XI 2096; A.5) The 119/16 deed then set out a detailed legal description of the lands that the Bank had conveyed to the Department only four months earlier. (R.XI 2096-

2098; A.5) This was the same legal description contained in the Bank's May 19, 1965 conveyance to the Department recorded at Official Record Book 119, Page 303 (119/303 deed), which had created and transferred the fee estate to the Department. (R.V 975-978; A.6)

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly concluded that the exception to marketability set out in Section 712.03(5), Florida Statutes, applies to public rights-of-way held in fee. The Dardashti court's contrary limited reading of the exception should be rejected because it would allow a publicly held fee interest to be extinguished by MRTA while a lesser non-possessory and possibly unrecorded interest would be preserved.

Construing the Section 712.03(5) exception to apply to public rights-of-way held in fee as well as those held as recorded or unrecorded easements or similar interests is consistent with the judicially mandated broad construction of the exception and would do no injustice to the liberal construction of MRTA required by the Legislature in Section 712.10, Florida Statutes.[4] Read together the language limiting

[4] Section 712.10, Florida Statutes, provides: "This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02

the scope of liberal construction in Section 712.10 and the provisions of the Section 712.03(5) exception express an unmistakable legislative intent to exclude publicly owned right-of-way from the operation of MRTA.

Moreover, when MRTA was enacted in 1963, the 1961 version of Chapter 334 defined "right-of-way" as land held by a public entity in either fee or an easement. When using the term "right-of-way in Section 712.03(5), Florida Statutes (1963), the Legislature, which presumptively passes statutes with the knowledge of prior existing statutes, clearly intended the exception to apply to public rights-of-way whether owned in fee or held as an easement.

While the First District Court of Appeal properly concluded that the Section 712.03(5) exception operated to protect public rights-of-way held in fee, the court erred in its refusal to apply the exception to preserve the entirety of the Department's fee estate on the basis of its determination that the Department failed to present competent, substantial evidence that the Land at issue was ever devoted to or required for part of its I-10 right-of-way. The lower court's focus on the "land at issue" instead of the Department's fee estate as a whole as a basis for its use analysis collides with both City of Jacksonville v.

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subject only to such limitations as appear in s. 712.03." [Emphasis added]

Horn, 496 So. 2d 204 (Fla. 1st DCA 1986) and Davidson where the courts concluded that any use of a portion of the public entity's interest would preserve the interest to its full width and length. The land at issue in this case was part of a tract acquired by the Department through a single conveyance for the I-10 project. The Department's construction of the I-10 facility on one portion of the tract and its lease of another portion of the tract to Santa Rosa County to construct a county road preserved the Department's entire fee estate under Section 712.03(5).

The First District Court of Appeal's Section 712.03(5) use analysis based on the land at issue rather the entire fee estate also led the court to the mistaken conclusion that the Department's right-of-way was limited to lands south of the I-10 fence line. When analyzed in terms of the Department's entire fee estate, as required by Horn and Davidson, competent substantial record evidence confirms that the Department's entire fee ownership was acquired for the I-10 project and that portions of the property were devoted to the actual construction of I-10 and a county road. Therefore, the Department's entire fee estate was preserved by operation of Section 712.03(5), Florida Statutes.

In addition to the Section 712.03(5) exception, the exception to marketability set out in Section 712.03(1), Florida

Statutes preserves the Department's entire fee estate because Clipper Bay's chain of title contains a specific reference to a recorded, pre-root instrument that excepted out lands previously conveyed to the State of Florida by the parties' common grantor. The First District Court of Appeal's rejection of this ground for preserving the Department's entire fee ownership should be set aside.

ARGUMENT

ISSUE I

THE LOWER COURT CORRECTLY CONCLUDED THAT THE EXCEPTION TO MARKETABILITY SET OUT IN SECTION 712.03(5), FLORIDA STATUTES, INCLUDED PUBLIC RIGHTS-OF-WAY HELD IN FEE. HOWEVER, THE LOWER COURT MISAPPLIED THE EXCEPTION WHEN IT CONCLUDED THAT THE DEPARTMENT'S USE OF ONE PORTION OF ITS FEE ESTATE TO CONSTRUCT INTERSTATE 10 AND ITS LEASE OF ANOTHER PORTION OF THE ESTATE TO SANTA ROSA COUNTY FOR THE CONSTRUCTION OF A COUNTY ROAD DID NOT OPERATE TO PRESERVE THE ENTIRETY OF THE DEPARTMENT'S FEE OWNERSHIP FROM BEING EXTINGUISHED UNDER MRTA.

MRTA has been characterized as landmark legislation fundamentally revamping Florida property law for the purpose of simplifying and facilitating land title transactions. H & F Land v. Panama City-Bay Co. Airport, 736 So. 2d 1167, 1171 (Fla. 1999), receded from on other grounds by Blanton v. City of Pinellas Park, 887 So. 2d 1224 (Fla. 2004). "MRTA was designed

to simplify conveyances of real property, stabilize titles, and give certainty to land ownership." Id. "It replaces the previously long required examination of an abstract of title (which may go back to Spanish land grants) with a shortcut method of examining title and it extinguishes stale claims and ancient defects of title." Davidson, 638 So. 2d at 525. "MRTA is a comprehensive act that contains elements of a curative act, a statute of limitations, and a recording act." Blanton, 887 So. 2d at 1228.

This Court further explained that:

> MRTA is based on the Model Marketable Title Act, which was proposed in 1960 with multiple objectives: (1) to limit title searches to recently recorded instruments only; (2) to clear old defects of record; (3) to establish perimeters within which marketability can be determined; (4) to reduce the number of quiet title actions; and (5) to reduce the costs of abstracts and closings....In its essence, the Model Act sought to accomplish these objectives by providing that when a person has a record title to land for a designated duration, claims and interests in the property that stem from transactions before that period are extinguished unless the claimant seasonably records a notice to preserve his interest....In much the same manner as the Model Act, MRTA's provisions contain a scheme to accomplish the same objective of stabilizing property law by clearing old defects from land titles, limiting the period of record search, and clearly defining marketability by extinguishing old interests of record not specifically claimed or reserved. [Citations omitted]

H & F Land, 736 So. 2d at 1171. To this end, Section 712.02, Florida Statutes, provides:

> Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except matters set forth as exceptions to marketability in s. 712.03.

This Court's discretionary jurisdiction was invoked on the basis of the lower court's construction and application of the exception to marketability set out in Section 712.03(5), Florida Statutes, which states, in pertinent part, that MRTA will not extinguish:

> (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of **a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.** [Emphasis added]

The lower court properly concluded that the Section 712.03(5) exception operated to protect rights-of-way held in fee. However, the court erred in its refusal to apply the exception to preserve the entirety of the Department's fee estate on the basis of its determination that the Department failed to present competent, substantial evidence that the disputed property was ever devoted to or required for part of its I-10 right-of-way.

A. Standard Of Review

This issue presents questions going to the construction and application of Section 712.03(5), Florida Statutes, as well as the validity of the lower court's evaluation of the record evidence under the competent, substantial evidence criterion.

Matters of statutory construction and application are governed by a *de novo* standard of review. Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013). Where, as here, a statute is unclear or ambiguous in its meaning, the Court must resort to traditional rules of statutory construction in an effort to resolve the ambiguity. Murray v. Mariner Health, 944 So. 2d 1051, 1060-1061 (Fla. 2008).

Likewise, the lower court's conclusion regarding satisfaction of the competent, substantial evidence standard[5] presents a question which this Court reviews *de novo* in the sense that the Court will, upon its review of the record, determine whether the lower court's conclusion was correct. See St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, Inc.,

[5] A trial court's factual findings are presumed correct and cannot be set aside unless they are not supported by competent substantial evidence. Bimonte v. Martin-Bimonte, 679 So. 2d 19 (Fla. 4th DCA 1996). Evidence is competent and substantial when the evidence relied upon to sustain the ultimate finding is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. A.D. v. State, 106 So. 3d 67, 72 (Fla. 2d DCA 2013) quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

967 So. 2d 794, 801 (Fla. 2007)(Based upon its review of the record this Court agreed with district court's conclusion that trial court's findings were supported by competent, substantial evidence.).

B. The First District Court Of Appeal Correctly Determined That The Section 712.03(5) Exception To Marketability Can Be Applied To Protect Public Rights-Of-Way Held In Fee.

Prior to the lower court's decision, judicial treatment of the Section 712.03(5) exception was lacking in uniformity and confusing at best. On one hand, the Fourth District Court of Appeal's Dardashti decision afforded the exception a decidedly narrow construction finding that it only operated to preserve rights-of-way held as easements and not those held in fee. On the other hand, the Fifth District Court of Appeal's decision in Davidson applied the exception to preserve a governmental entity's interest in lands it owned in fee.

In Dardashti, the land in dispute was contained in a recorded 1917 conveyance to Palm Beach County of a "right of way and easement in and over" a fifty-foot parcel of land for use as a public highway. Dardashti, 605 So. 2d at 121. A number of years later the County conveyed its interest in the land to the Department. Id. at 122. Dardashti subsequently claimed an eleven-foot strip of the land by operation of MRTA. Id. On

appeal, the Department argued that the Section 712.03(5) exception applied to defeat the MRTA claim. Id. at 12-123. The Fourth District rejected the Department's position holding that:

> the 1917 deed did not create an easement or right-of-way. Although the 1917 deed labeled the fifty foot parcel as a "right of way and easement," those words merely described the purpose for the conveyance. *See Robb v. Atlantic Coast Line R.R. Co.*, 117 So.2d 534, 537 (Fla. 2d DCA 1960)("fee [title] will pass by deed containing a clause or recital which is merely declaratory of the use contemplated of the land."). Although the 1917 deed provided that the land would revert if not used as a public highway, that provision merely created a covenant of the deed. *Id.* at 535-36. Whatever one chooses to call it, an ownership interest, a right-of-way in fee, or a determinable fee interest, we hold that the County received fee title to the fifty foot parcel.

Id. at 122. The court then concluded that the Section 712.03(5) exception would not apply because the County did not have an easement or right-of-way over the fifty-foot parcel. Id. at 123. As the lower court noted, the easement or rights-of-way exception would not, according to the Dardashti court, apply to land acquired in fee. Clipper Bay, Slip Opinion at 12 (A.1 12).

While not specifically construing the Section 712.03(5) exception in terms of the fee vs. easement dichotomy addressed in Dardashti, the Davidson court applied the exception to public lands held in fee. Davidson, 638 So. 2d at 525-526. The court employed the Section 712.03(5) exception to preserve the Water

Control District's interest in a portion of its fee ownership that had never been used by the District. Davidson, 638 so. 2d at 522, 525-526.

Looking to the facially divergent construction and application of Section 712.03(5) in Dardashti and Davidson, the lower court found Section 712.03(5) "ambiguous as to whether it can be applied to protect the public rights of land held in fee." Clipper Bay, Slip Opinion at 15-16 (A.1 15-16). In the course of its analysis the lower court observed that:

> The clear impart [sic] of Section 712.03(5) is to protect land utilized for easements or rights-of-way. This is consistent with the public policy identified in Horn "that rights or easements once acquired for the use and benefit of the public are not easily lost or surrendered." 496 So. 2d at 208.
>
> The focus, therefore, is the reason or purpose that the state holds the land in question rather than the manner in which title is actually held. Thus, it would make no sense to say that land which is being utilized for rights-of-way without any claim of fee title would be protected from the operation of MRTA while the same land utilized for the same purpose held in fee title would be subject to total forfeiture pursuant to MRTA. For instance, the original conveyance to FDOT of the fee title in the instant case included land presently lying beneath Interstate 10. While appellant is not claiming this land, if the exception in section 712.03(5) did not apply to land held in fee, then this land would be potentially subject to forfeiture pursuant to MRTA. Clearly, this could not be the legislative intent.

Id. at 16. (A.1 16)

The lower court also relied upon the definition of the term "right-of-way" contained in Section 334.03(22), Florida Statutes.[6] The court found the statutory definition significant because: "(1) it is legislative recognition that land utilized for right-of-way by the government may be held in fee title; (2) it indicates that many governmental rights-of-way may be held in fee title; and (3) it provides a definition that is lacking in section 712.03(5)." Id. at 16-17. (A.1 16-17)

Ultimately, the court correctly rejected Dardashti's narrow reading of the Section 712.03(5) exception and concluded that the exception can apply to protect the Department's rights-of-way held in fee. Id. at 17. (A.1 17) The lower court's construction of Section 712.03(5) should be upheld and afforded state-wide application for a number of reasons.

First, it is well settled that statutes, as a rule, will not be interpreted to yield an absurd result. Florida Dep't of Highway Safety and Motor Vehicles v. Hernandez, 74 So. 3d 1070,

[6] Section 334.03(22) defines "right-of-way" as "land in which the state, the department, a county, or a municipality **owns the fee** or has an easement devoted to or required for use as a transportation facility." [Emphasis added] A "transportation facility" is defined as: "any means for the transportation of people or property from place to place which is constructed, operated, or maintained in whole or in part from public funds. The term includes the property or property rights, both real and personal, which may have been or may be established by public bodies for the transportation of people or property from place to place." Section 334.03(31), Florida Statutes.

1079 (Fla. 2011). Favoring the Dardashti court's narrow construction of the Section 712.03(5) exception over the First District Court of Appeal's construction of the exception in this case would yield an absurd result.

The Fourth District Court of Appeal's reading of Section 712.03(5) in Dardashti would allow a publicly held fee interest to be extinguished by MRTA while a lesser non-possessory[7] and possibly unrecorded interest would be preserved. The facial unreasonableness of the Dardashti construction is substantiated by its practical effect. Statewide application of Section 712.03(5) as interpreted by the Dardashti court would not only place miles of state, county, and municipal rights-of-way held in fee at risk of being extinguished by MRTA, it would also have the potential, as noted by the lower court, of exposing public ownership of existing roads to the same risk.[8]

Second, while MRTA should be broadly construed to effect its ameliorative purposes, such a construction must occur within

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[7] An easement is an incorporeal, non-possessory interest in land which does not confer title to the land on which it is imposed. Wingate v. Wingate, 84 So. 3d 427, 429 (Fla. 1st DCA 2012).

[8] This would especially be the case where the governmental entity could not prove presumptive dedication of its claimed right-of-way pursuant to Section 95.361, Florida Statutes. See Chackal v. Staples, 991 So. 2d 949 (Fla. 4th DCA 2008)(County's claim of ownership of grassy area abutting roadway defeated by facts that there was no evidence indicating County maintained the disputed area and undisputed evidence showed the area was maintained by adjacent property owners).

the limitations imposed by the Legislature in Section 712.03. Section 712.10, Florida Statutes. Courts addressing the operation of Section 712.03(5) have recognized that construction of the statute necessarily compels consideration of the principle that rights or easements acquired for the use and benefit of the public are not easily lost or surrendered. Davidson, 638 So. 2d at 526; Horn, 496 So. 2d at 208. Accordingly, when ownership of public lands is in issue, the courts have held that Section 712.03(5) should be broadly construed as intended to protect public rights to the extent permissible under the law. Id.

Construing Section 712.03(5) to apply to public rights-of-way held in fee, as well as those held as recorded or unrecorded easements or similar interests, is consistent with a broad construction of the statutory exception and would do no injustice to the liberal construction of MRTA mandated by the Legislature in Section 712.10, Florida Statutes. Read together, the limiting language in Section 712.10 and the Section 712.03(5) exception express an unmistakable legislative intent to exclude publicly owned rights-of-way from the operation of MRTA. There is no rational basis for refusing to apply the exception to rights-of-way held in fee. A construction of the statute that would preserve a lesser non-possessory public interest but extinguish public fee ownership is illogical,

unreasonable, and essentially indefensible. See Dardashti, 605 So. 2d at 123 (Anstead, J. dissenting)("The net result of our affirmance is that the government is being required to buy its own property in order to widen a roadway.").

Third, the lower court properly understood the significance of the Section 334.03(22) definition of "right-of-way" as "land in which the state, the department, a county, or a municipality owns the fee..." Clipper Bay, Slip opinion at 16-17. (A.1 16-17) The court's reliance upon the definition to buttress its reading of Section 712.03(5) to apply to rights-of-way held in fee is consistent with, if not mandated by, the rule of construction requiring courts to presume that the Legislature passes statutes with the knowledge of prior existing statutes. Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 9 (Fla. 2004).

When MRTA was enacted in 1963,[9] the 1961 version of Chapter 334, like the current version, contained a definition of right-of-way which contemplated fee ownership. Section 334.03(15), Florida Statutes (1961), provided:

> "Right-of-way."---Land in which the state, the department, a county or a municipality **owns the fee** or has an easement devoted to or required for the use as a public road. [Emphasis added]

[9] H & F Land, Inc., 736 So. 2d at 1171.

Thus, when using the term "right-of-way" in Section 712.03(5), Florida Statutes (1963), the Legislature certainly intended that the exception would apply to public rights-of-way whether owned in fee or held as an easement.

The First District Court of Appeal correctly concluded that the 712.03(5) exception applies to public rights-of-way held in fee. This Court should uphold the lower court's construction of Section 712.03(5) and should disapprove the portion of the Dardashti opinion which limits the application of Section 712.03(5) to public rights-of-way held as an easement.[10]

C. The First District Court of Appeal Reversibly Erred In Failing To Apply The Section 712.03(5) Exception To Preserve The Entirety Of The Department's Fee Estate.

The Department acquired its fee simple estate by a warranty deed dated May 19, 1965, and recorded at Official Record Book 119, Page 303 (119/303 deed). (R.V 975-978; A.6) This land is depicted on the Department's right of way maps (Department Exhibits H and I; R.X 1811,1812; A.7) and consists of the areas shaded red and green. (T.II 279) In her disposition of this matter the trial court quieted title to the red or "limited

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[10] The result in Dardashti was also based upon the court's finding that the Department was estopped to assert its claim. Dardashti, 605 So. 2d at 123.

access" area in the Department and quieted title to the green or "borrow" area in Clipper Bay. Specifically, the trial court ruled:

> Here, FDOT does not dispute that it received its property in fee simple and that fee simple does not necessarily equate to "right of way." FDOT argues however that its boundary is contiguous with the entire right of way area to include both the limited access and "borrow area" borders as shown on their right of way maps and since they have used a portion of the right of way, that the entire portion should be exempt. The Court cannot agree with this proposition. The unrecorded right of way maps used by the DOT show only the limited access right of way lines and this Court finds that only a portion of the limited access right of way was used by FDOT in constructing the interstate and the portion that is excepted from MRTA is the whole of the limited access route to include the entire area south of the limited access right of way line that is included in the area known as Block C. The rest of the parcel is not exempted and since no claim of notice was timely filed, the portion that is North [sic] of the limited access right of way lines is quieted in Clipper Bay's favor.

(R.X 1888)

Following this ruling, the trial court granted Clipper Bay's quiet title petition in part and concluded that: "Clipper Bay is the owner of 'Block C' to the North [sic] of the limited access right of way line as shown on the unrecorded right of way map entered into evidence by FDOT and to the East [sic] of the property line as agreed to by the parties." (R.X 1889)

Similarly, the trial court granted the Department's counter-petition in part concluding that: "FDOT shall remain the owner of the land in 'Block C' south of the limited access right of way line as shown on the unrecorded right of way map entered into evidence by FDOT and West [sic] of the property line as agreed to by the parties prior to trial." (R.X 1889)

On appeal, the Department, relying on Horn and Davidson, argued that the trial court correctly quieted title in the Department to the limited access (red) area but reversibly erred in quieting title to the borrow (green) area in Clipper Bay. Although the lower court properly concluded that the Section 712.03(5) exception applied to public rights-of-way held in fee, it did not apply the exception to preserve the Department's entire fee estate notwithstanding the fact that one portion of the estate was used to construct I-10 and another portion was leased to Santa Rosa County for the construction of a county road.

The lower court's analysis leading to this result viewed the controlling consideration to be "whether FDOT demonstrated the **land at issue** was a part of its Interstate 10 right-of-way." [Emphasis added] Clipper Bay, Slip Opinion, p. 17. (A.1 17) Consistent with its phrasing of this dispositive inquiry, the First District Court of Appeal stated in various parts of its analysis:

> However, upon review of the record, we find FDOT failed to present competent, substantial evidence that the **land at issue** was ever devoted to or required for part of its Interstate 10 right-of-way. [Emphasis added]
>
> * * *
>
> Below, FDOT's witnesses testified that FDOT considered the entire parcel to be for the purpose of the Interstate 10 project, and that all of the land owned by FDOT was for the purpose of right-of-way. However, in its opinion, the trial court rejected this assertion, and rightly so. Such broad generalized testimony does not constitute evidence that the **land at issue** was ever "devoted to or required for" right-of-way purposes. [Section] 334.03(22), Fla. Stat. We reject 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. [Emphasis added]
>
> Here, it was uncontested that the **land at issue** had not been used by FDOT since Clipper Bay's predecessors in interest obtained title in 1970. Further, FDOT failed to present any evidence that the **land at issue** was ever "devoted to or required for use as a transportation facility," or that **the land** would be used for right-of-way purposes in the reasonably foreseeable future. [Emphasis added]

Id. at 18-19. (A.1 18-19) The lower court's focus on the "land at issue" instead of the Department's fee estate as a whole as a basis for its use analysis collides with Horn and Davidson and resulted in a skewed evaluation of the record evidence.

1. The First District Court Of Appeal Should Have Concluded That All Of The Department's Fee Estate Was Preserved Under Section 712.03(5).

Section 712.03(5) preserves "[r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and **the use of any part thereof shall except from the operation hereof the right to the entire use thereof.**" [Emphasis added] With respect to the emphasized language, the Horn court concluded that it was "reasonable to ascribe to the lawmakers the intent to preserve a public easement or right-of-way to its full *width*, notwithstanding the use of only a part of its width as designated by the **conveyance**, dedication, or other means **by which it was established.**" [Bold emphasis added] Horn, 496 So. 2d at 208.

There is no dispute that the Department's fee estate, which includes the land in issue, was established by a single conveyance (119/303 deed (A.6)). Nor is there any dispute that I-10 was built on a portion of that fee estate and that the Department leased another portion of the estate to Santa Rosa

County for the construction of a county road.[11] Under the Horn court's reading of Section 712.03(5), these uses of a portion of the Department's fee estate established by the 119/303 deed (A.6) should have preserved the Department's fee estate to its full width irrespective of whether the **land in issue** had been used for or devoted to right-of-way purposes or was intended to be put to that use in the foreseeable future.

The lower court's analysis and ultimate result is also at odds with Davidson. The disputed property in Davidson consisted of a 117-foot right-of-way for drainage and maintenance along the west side of a canal. Davidson, 638 So. 2d at 522. The property was dense and overgrown, had never been cultivated or improved, and had never been used by the Water Control District. Id. at 522-523. The trial court quieted title to the property in the complaining landowners. Id. at 522. The Fifth District Court of Appeal reversed holding in part:

> Since the District is a political subdivision of the State of Florida, the District's rights-of-way have not been extinguished under Florida law if at least part of the easement has been used. [Section] 712.03(5), Fla.Stat. (1991). Rights or easements acquired for the use and benefit of the public are not easily surrendered, and MRTA should be broadly construed to protect these rights to the extent possible under the law. *City of*

[11] The county road is located north of the I-10 fence line and passes through the land in issue. Clipper Bay, Slip Opinion, p.4. (A.1 4)

> *Jacksonville v. Horn*, 496 So.2d 204 (Fla. 1st DC 1986). [Footnote omitted]
>
> It is undisputed by the parties that the eastern portion of the rights-of-way were used by the District for maintenance of the area. The trial judge apparently considered the east and west rights-of-way as separate. But the original reservations refer to the canals and rights-of-way as *one*, not as two separate rights-of-way to each canal. Since the easements constitute a unified reservation, use of a part preserves the whole. [Section] 712.03(5), Fla.Stat. Hence, the rights-of-way have not been extinguished under MRTA. See *Florida Dept. of Transportation v. Dardashti Properties*, 605 So.2d 120 (Fla. 4th DCA 1992), *rev. denied*, 617 So.2d 318 (Fla. 1993). [Emphasis original]

Id. at 526-527.[12] The Fifth District Court of Appeal's application of the Section 712.03(5) exception was not dependent upon the past, present, or future use of the **disputed property** for right-of-way purposes. Instead the court looked to the fact that the disputed property was part of a unified reservation of both the east and west rights-of-way and concluded that the use of the eastern right-of-way preserved the whole.

The lower court should have arrived at the same result here. The land at issue in this case was part of a tract acquired by the Department through a single conveyance for the

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[12] Although the Davidson court referred to the right-of-way as an easement, it clearly applied Section 712.03(5) to preserve a fee interest. Earlier in its analysis the court had confirmed that the Water Control District had properly acquired title to the disputed property. Id. at 524. An easement is not a possessory interest and does not confer title. Wingate, 84 So. 3d 429.

I-10 project. The Department's construction of the I-10 facility on one portion of the tract and its lease of another portion of the tract to Santa Rosa County to construct a county road preserved the Department's entire fee estate under Section 712.03(5).

2. The Record Evidence Does Not Support The Lower Court's Conclusion That The Department's Right-Of-Way Was Limited To Lands South Of The I-10 Fence Line.

Initially, employment of its flawed analytical framework led the lower court into a misapprehension of the significance of the Department's lease to Santa Rosa County. The court noted that the Department had leased a part of the "contested land" to the County for construction of a county road. Clipper Bay, Slip Opinion, p. 19. (A.1 19) But rather than acknowledge that the lease was evidence of a qualifying use of a portion of the Department's fee estate according to Horn and Davidson, the court concluded: "While this evidence may support the county road being subject to the exception, it does not support FDOT's argument that the rest of the land was part of its Interstate 10 right-of-way." Id. (A.1 19) By its recorded lease to Santa Rosa County and concomitant retention of the underlying fee, the Department devoted a portion of the lands it had acquired in fee

to use as another transportation facility.[13] Pursuant to Horn and Davidson, the lease to Santa Rosa County, standing alone, constitutes sufficient use of the Department's fee estate to preserve the entire estate under Section 712.03(5).

With respect to the Department's 1965 right-of-way map (A.7), the lower court stated:

> FDOT entered into evidence its unrecorded 1965 right-of-way map that depicted a "limited access right of way" line located north of the Interstate 10 fence line, across the disputed seven acres. However, FDOT failed to present any testimony explaining the import of this map, or whether the land was actually utilized in the manner depicted by the map.

Clipper Bay, Slip Opinion, pp. 18-19. (A.1 18-19) Rather than a failure of proof, the record reflects that the Department put on testimony explaining the function of the right-of-way map and demonstrated through that testimony that its entire fee ownership was right-of-way acquired for the I-10 project.

Eddie Rudd, the document supervisor in right-of-way mapping in the Department's Chipley office (T.II 255), testified that right-of-way maps are used to track property acquisition. (T.II

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[13] The lower court's earlier finding that the Department failed to present evidence that the land at issue was ever devoted to or required for use as a transportation facility, Id. at 18 (A.1 18), cannot be squared with the court's recognition that the **Department** had leased a portion of that land to the county for the construction of a road which by definition is a transportation facility. See Section 334.03(31), Florida Statutes.

258-259) It is important that the right-of-way map be prepared before a deed is prepared because the map shows what is needed to be acquired for the project. (T.II 263) The legal descriptions for the conveyances are taken from the map. (T.II 263) Both the red and green areas on the right-of-way map (the Department's fee estate) (See R.X 1811, 1812; A.7) were considered right-of-way. (T.II 267) When referring to a right-of-way line for the borrow area he characterized the borrow area as part of I-10 and being all for the I-10 project. (T.II 273)

On cross-examination, Mr. Rudd testified that the right-of-way maps were prepared prior to the acquisition of the property to build I-10 and the Bay Bridge. (T.II 282) He referred to both the limited access area and borrow area on the right-of-way map as right-of-way because he and the Department's Chipley office generally refer to "things" the Department owns for use of roads as right-of-way. (T.II 283) The maps are a projection of what the Department needs to do the project. (T.II 283) Mr. Rudd also testified that right-of-way needs are developed from the construction plans and that he did not make a distinction between what the Department owns in fee and what it uses and needs for right-of-way because right-of-way is what the Department requires for a roadway project. (T.II 290, 293) The 119/303 conveyance vested the Department with its right-of-way.

(T.II 293) Mr. Rudd stated that he believed the borrow area was used for fill on the interstate. (T.II 291)

In addition to Mr. Rudd's testimony, Clipper Bay's surveyor, Wayne Parker confirmed the significance of right-of-way maps. According to Mr. Parker, to determine where the Department's right-of-way is located you would use the deeds and the right-of-way maps because the maps "will actually establish where the right-of-way is." (T.I 72) When Mr. Parker surveys the boundary of a Department property, he would use the right-of-way maps and not the deeds because "y'all [the Department] know where your right-of-way is and y'all [the Department] make a drawing of it." (T.I 128) If there was a dispute between a right-of-way map and a deeded description, Mr. Parker would use the right-of-way maps to establish the right-of-way. (T.I 150)

Continuing to labor under its belief that it was incumbent upon the Department to show that the disputed property was part of its I-10 right-of-way, the lower court put great store in testimony adduced by Clipper Bay concerning the location of the Department's I-10 fence line. The court concluded:

> The only other evidence presented on this issue was the testimony of Clipper Bay's expert witness, who testified the Interstate fence line had been widely accepted as FDOT's right-of-way line since prior to 1970. Additionally, Clipper Bay's predecessor in interest testified he

> contacted FDOT concerning the location of its right-of-way line, and FDOT insisted its right-of-way line was the Interstate 10 fence line. Therefore, the trial court's finding that a portion of the land at issue was part of FDOT's Interstate 10 right-of-way, and therefore excepted from MRTA was not supported by competent, substantial evidence.

Clipper Bay, Slip Opinion. p. 19. (A.1 19) It appears the court overlooked Mr. Rudd's testimony vis a vis that of Clipper Bay's expert witness, John Franklin Jackson, and Clipper Bay's predecessor in title, Keith Hodges, in its evaluation of the record evidence on this point.

John Franklin Jackson was Clipper Bay's title examiner expert witness. (T.I 157) Regarding the I-10 fence line comprising the right-of-way line for I-10, Mr. Jackson testified:

> there is no document of record that tells me that I would have to worry about where the right-of-way line of Interstate 10 is. Therefore the right-of-way line would be presumed to be the same one coming out of Jacksonville all the way where that fence line runs, all the way to the Escambia, I mean to the Escambia County line of Alabama. And I would have no reason, without a document of record to tell me, to believe or not believe that that was, in fact, the existing right-of-way line.

(T.I 175-176) During cross-examination Mr. Jackson did, however, acknowledge that depending upon where the Department's

north I-10 right-of-way line is located, there may be no overlapping property. (T.I 196-197)

If the only thing of record he had was a deed, Mr. Jackson would rely upon a surveyor for the location of the right-of-way line. (T.I 197) Mr. Jackson had previously stated:

> Well, again, based on my experience in all the years I've done examination, that interstate line fence that runs from Jacksonville to over here to towards Mobile is the accepted northerly right-of-way line. And barring something that is on record that tells me oh, by the way, this is not your north right-of-way line, I would have no reason to believe it wasn't. I would check with the surveyor and say where do you know this north right-of-way line.

(T.I 197) Mr. Jackson testified that the I-10 fence had been in place as long as he could remember, but conceded that there may be some places along the interstate where there are no fences. (T.I 198-199)

In rather stark contrast to Mr. Jackson's testimony, the Department's witness, Eddie Rudd testified that the right-of-way map sheet 7 (A.7 2) does not reflect the location of the I-10 fence line and that the location of the fence line doesn't matter to the Department. (T.II 275) Mr. Rudd explained: "[I]n general, the fences follow the right-of-way lines but not necessarily so. We have places where we move the fence or whatever. So, we put the fence where we need it to be." (T.II

275) "The fences are in relation to use for limited access right-of-way." (T.II 276)

On cross-examination Mr. Rudd testified that to his knowledge the I-10 fence line is not what the Department has established as its right-of-way. (T.II 284) The fence controls access onto the right-of-way (T.II 285), but the location of the fence doesn't matter because: "there are places where we've relocated fences and we've moved fences, not on the right-of-way line due to wetlands or something like that. So, the fences, we put the fence where it needs to be and it doesn't necessarily -- it's not necessarily on the right-of-way line itself." (T.II 286)

Clipper Bay's predecessor in title, Keith Hodges (T.III 314-315), shed little if any light regarding the existence of Department right-of-way north of the I-10 fence line. Mr. Hodges testified that he was familiar with the location of I-10 by the fence line that ran south of his property and that by his survey, the fence line was his southern boundary. (T.III 320-321) Upon his inquiry concerning a portion of the I-10 fence line which, according to his survey, encroached on his property, the Department indicated that it would not relocate the fence line because it claimed the land and the fence line was its right-of-way line. (T.III 322) He also asserted that the Department had not said anything to him about ownership of lands

north of the I-10 fence line. (T.III 323) Mr. Hodges never identified the individual or individuals he communicated with, much less showed that any such individual had the authority to speak on behalf of the Department regarding the particulars of its fee ownership. Nor did he testify that the Department had disavowed its ownership of any of the land north of the I-10 fence line.

When analyzed in terms of the Department's entire fee estate, as required by Horn and Davidson, competent substantial record evidence confirms that the Department's entire fee ownership was acquired for the I-10 project and that portions of the property were devoted to the actual construction of I-10 and a county road. Neither the location of the I-10 fence line nor the fact that a portion of the lands in dispute had not been devoted to any use whatsoever compel a conclusion that the Department's ownership of those lands was not preserved by operation of Section 712.03(5). The First District Court of Appeal's contrary conclusion should be set aside.

ISSUE II

MRTA CANNOT EXTINGUISH THE ENTIRETY OF THE DEPARTMENT'S FEE ESTATE BECAUSE A POST-ROOT MUNIMENT OF TITLE IN CLIPPER BAY'S CHAIN OF TITLE SPECIFICALLY REFERS BY AN OFFICIAL RECORD BOOK AND PAGE NUMBER TO A RECORDED PRE-ROOT TITLE TRANSACTION WHICH CONFIRMED THE DEPARTMENT'S ESTATE.

Section 712.03(1), Florida Statutes, provides that a marketable record title will not affect or extinguish:

> (1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

Relying on this exception, the Department contended at trial[14] and before the lower court that its fee estate was not extinguished by Section 712.02, Florida Statutes, because Clipper Bay's chain of title contains a specific reference to a recorded, pre-root instrument that excepted out lands previously conveyed to the State of Florida by the parties' common grantor.

[14] June 1, 2009, motion for summary judgment (R.IV 815-818); June 6, 2011, amended motion for rehearing. (R.XI 2087-2090)

The lower court rejected the Department's argument without discussion. Clipper Bay, Slip Opinion, p. 2. (A.1 2) The Department submits that in so ruling the lower court reversibly erred.[15]

A. Standard Of Review

This issue involves the application of Section 712.03(1), Florida Statutes. Disposition of the issue is governed by a *de novo* standard of review. In Re Guardianship of J.D.S., 864 So. 2d 534, 537 (Fla. 5th DCA 2004).

B. The 1981 Trustee's Deed From Central Bank And Trust Company To Escambia Shores, Inc., Is A Post-Root Muniment Of Title In Clipper Bay's Chain Of Title.

Initially, application of the Section 712.03(1) exception necessarily requires a determination that the instrument employed to invoke the exception is a muniment of title. A muniment of title is any documentary evidence upon which title is based. Cunningham v. Haley, 501 So. 2d 649, 652 (Fla. 5th DCA 1986). Muniments of title are deeds, wills, and court judgments through which a particular land title passes and upon

[15] Once the Court has accepted jurisdiction in order to resolve conflict, it may consider other issues decided by the court below which are properly raised and argued before this Court. Caufield v. Cantele, 837 So. 2d 371, 377 n. 5 (Fla. 2002).

which its validity depends. Id. They need not be recorded to be valid and they do more than merely affect title. Id. They must carry title and be a vital link in the chain of title. Id.

The instrument the Department looks to for Section 712.03(1) purposes is the 1981 Trustee's Deed from Central Bank and Trust Company to Escambia Shores, Inc.[16] (OR Book 545, Page 301)(R.XI 2092; A.4) The deed is included in Clipper Bay's chain of title set out in its Complaint (R.I 3,8), in its January 21, 2009, motion for summary final judgment (R.I 163, 166), and in the parties' Joint Stipulation as to Chains of Title. (R.II 357-358)

Moreover, the deeds through which Clipper Bay acquired title to the lands in issue both contain references to Block C of Escambia Shores Unit 1 in their legal descriptions of the lands conveyed. (R.I 70-71, 80-82) The reference to Block C was not contained in the 204/704 deed (root of title) legal description (R.VIII 1527; A.3) and that conveyance did not convey all the land making up Block C. (T.I 192; R.IX 1691-1692; R.X 1889) The first time Block C shows up in a legal description in Clipper Bay's chain of title is in the 1981 Trustee's Deed. (R.I 8, 166; R.II 357-358; R.XI 2092-2094; A.4) Block C is then referenced in the legal descriptions of all

[16] Clipper Bay characterizes this instrument as a post-conveyance, curative, quit claim deed. (R.XI 2118; Clipper Bay's Reply Brief and Answer Brief to Appellee/Cross-Appellant, p. 29)

future conveyances in Clipper Bay's chain of title. (R.I 8-9) Consequently, the 1981 Trustee's Deed is a deed through which Clipper Bay's title passed and upon which the validity of Clipper Bay's title depends; it carries title; and it is a vital link in Clipper Bay's Chain of title. The 1981 Trustee's Deed is a muniment of title as that term is employed in Section 712.03(1), Florida Statutes.

C. The 1981 Trustee's Deed Specifically Refers By An Official Record Book And Page To A Recorded Title Transaction Which Confirmed The Department's Estate.

Speaking to the interaction of Sections 712.02 and 712.03(1), Florida Statutes, the Fifth DCA observed that:

> It is the intent of sections 712.02(1) and 712.03(1), that easements and use restrictions and other estates, interests, and claims created prior to the root of title be extinguished by section 712.03(1) [sic], Florida Statutes, unless those matters are filed under section 712.05(1) or unless, as provided in section 712.03(1), after the date of the root of title, some muniment of title refers specifically (which specific reference must be by book and page of record or by name of a recorded plat [if the easements and use restrictions, etc., are shown on the recorded plat]) to a recorded title transaction which imposed, transferred, or continued such easement, use restrictions, estate, interest, or claim. [Bracketed material in quote original]

Cunningham v. Haley, 501 So. 2d 649, 652-653 (Fla. 5th DCA 1986). Accord Sunshine Vistas Homeowners Association v. Caruana, 623 So. 2d 490, 491 (Fla. 1993)("Thus, a thirty-one-year-old restriction is preserved if the root of title or a subsequent muniment contains a 'specific identification' to a recorded title transaction that imposed, transferred, or continued the restriction.").

Although Caruana and Cunningham involved setback restrictions on one hand and use restrictions on the other, neither case stands for the proposition that the Section 712.03(1) exception applies only to interests in the nature of an easement or use restriction. In fact, the Cunningham court, consistent with the statutory language, recognized the application of the exception to estates in land as well as use restrictions and the like. The court stated:

> It is the intent of sections 712.02(1) and 712.03(1), that easements and use restrictions and **other estates**, interests, and claims **created prior to the root of title** be extinguished by section 712.03(1) [sic], Florida Statutes, unless those matters are filed under section 712.05(1) or unless, as provided in section 712.03(1), after the date of the root of title, some muniment of title refers specifically (which specific reference must be by book and page of record or by name of a recorded plat [if the easements and use restrictions, etc., are shown on the recorded plat]) to a recorded title transaction which imposed, transferred, or continued such easement, use restrictions, **estate,** interest, or claim.

> [Bracketed material in quote original; emphasis added]

Cunningham, 501 So. 2d at 652-653.

The 1981 Trustee's Deed contained the recitation that the Bank was:

> ...acting in pursuance and by virtue of the powers in it vested by **a deed to CENTRAL PLAZA BANK AND TRUST COMPANY, as Trustee, from CENTRAL BANK AND TRUST COMPANY, dated the 14th day of September, 1965, recorded in Official Records Book 119, Page 16, Public Records of Santa Rosa County, Florida,** and a declaration of trust as to the premises conveyed, dated the 15th day of September, 1965, being LAND TRUST AGREEMENT #8051, and of every other power and authority to them granted thereunder....[Emphasis added]

(R.XI 2092; A. 3)

The September 14, 1965 deed recorded in Official Record Book 119, Page 16 (119/16 deed), excepted from the conveyance a "prior conveyance to the State of Florida of the following property[.]" (R.XI 2096; A.5) The 119/16 deed then set out a detailed legal description of the lands that the Bank had conveyed to the Department only four months earlier. (R.XI 2096-2098; A.5) This was the same legal description contained in the Bank's May 19, 1965 conveyance to the Department recorded at Official Record Book 119, Page 303 (119/303 deed), which had created and transferred the fee estate to the Department. (R.V 975-978; A.6)

By virtue of its reference to the 119/16 deed and the premises it conveyed (R.XI 2092), the 1981 Trustee's Deed recognized the existence of the Department's fee estate and should foreclose any suggestion that the fee estate was extinguished by operation of Section 712.02, Florida Statutes. The unequivocal detailed reference to the prior conveyance to the Department in the 119/16 deed disclosed with particularity the existence of the Department's fee estate and, at a minimum, served to continue it in the sense that there was no intention that all or any portion of the estate was being conveyed or otherwise compromised by the 1981 Trustee's Deed.

The Department's entire fee estate was not extinguished by MRTA because a post-root muniment of title in Clipper Bay's chain of title specifically refers by an official record book and page to a recorded title transaction which confirmed the Department's fee estate. Caruana; Cunningham; Section 712.03(1), Florida Statutes. The lower court's rejection of the Section 712.03(1) exception as a viable basis for preservation of the entirety of the Department's fee ownership should not be permitted to stand.

CONCLUSION

Based upon the foregoing argument and the authority cited herein the Court should affirm the portion of the First District Court of Appeal's opinion concluding that the exception to marketability set out in Section 712.03(5), Florida Statutes, applies to public rights-of-way held in fee and should disapprove the portion of the Fourth District Court of Appeal's opinion in Dardashti holding that the Section 712.03(5) exception cannot be applied to public rights-of-way held in fee. The Court should quash that portion of the First District Court of Appeal's decision concluding that the Department's entire fee ownership had not been preserved by operation of either the Section 712.03(1) or Section 712.03(5) exceptions to marketability and remand the cause with directions to affirm that portion of the Final Judgment quieting title to the limited access area on the right-of-way map in the Department, reverse only the portion of the Final Judgment quieting title to the borrow area depicted on the right-of-way map in Clipper Bay, and remand the cause to the trial court with directions to enter

final judgment quieting title to the entirety of the Department's fee estate acquired through the 119/303 deed in the Department.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email and U.S. Mail on this 27th day of August, 2013, to counsel for Respondent, KENNETH B. BELL, **ESQUIRE, and WILLIAM J. DUNAWAY, ESQUIRE,** Clark, Partington, Hart, Larry, Bond & Stackhouse, P.O. Box 13010, Pensacola, FL 32502, kenbell@cphlaw.com and wdunaway@cphlaw.com.

GREGORY G. COSTAS

CERTIFICATE OF TYPE COMPLIANCE

I HEREBY CERTIFY that a copy hereof has been furnished to the foregoing prepared using Courier New 12 point font.

GREGORY G. COSTAS