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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,	CASE NO. SC2013-775 LT CASE NO. 1D11-5496 08-1218-CA01-ORP

Petitioner,

vs.

CLIPPER BAY INVESTMENTS, LLC,

Respondent.

_____

REPLY 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 the Department's initial brief will be indicated parenthetically as "A." with the appropriate document and page numbers. Citations to Clipper Bay's answer brief will be indicated parenthetically as "AB." with the appropriate page numbers.

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, BUT 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.

Clipper Bay has come to the conclusion that the fee vs. easement dichotomy it relied upon below to assert the inapplicability of the Section 712.03(5), Florida Statutes, exception to marketability is, in its words, a "false dichotomy." (AB. 20 n. 3) Notwithstanding this rather profound epiphany, or perhaps in response to it, Clipper Bay now contends that: "Dardashti does not hold that Section 712.03(5) does not apply to rights-of-way in fee." (AB. 15; see also AB. 22-24, 28-29) While Clipper Bay's change of position on the fee vs. easement dichotomy is welcome, its attempt to ameliorate the impact of its altered view of the issue is not.

Clipper Bay's effort to recast the holding 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), to accommodate its new analytical paradigm is simply unavailing. The Dardashti court noted that both trial judges had concluded that Section 712.03(5) did not apply to rights-of-way held in fee; the court specifically held that the 1917 conveyance vested fee title in

Palm Beach County; and, the court affirmed with no indication that the trial judges were wrong in their conclusion that Section 712.03(5) did not apply to rights-of-way held in fee. Dardashti, 605 So. 2d at 122-123. Suffice it to say, this Court, when granting conflict review in this matter, evidently read Dardashti as holding that the Section 712.03(5) exception did not apply to rights-of-way held in fee; the First District Court of Appeal unequivocally read Dardashti as so holding (Slip Opinion pp. 12, 14; A.1 12, 14); and Clipper Bay did as well. Clipper Bay argued below:

> This plain meaning analysis of the easement of [sic] class of interests excepted by subsection (5) is entirely consistent with the Fourth District's opinion in *FDOT v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992), *rev. denied*, 617 So. 2d 318 (Fla. 1993). Affirming two circuit judges that [sic] had rejected the same argument FDOT made below in this case, the *Dardashti* Court **expressly held that the easement exception in subsection (5) does not apply to an estate interest such as a right-of-way in fee.** *See Dardashti*, 605 So. 2d at 122 (explaining how original deed labeling a parcel as a "right of way and easement" nonetheless passed fee title, rather than merely creating an easement or right of way). [Emphasis added]

(Clipper Bay's Initial Brief, Case No. 1D11-5496, pp. 30-31; see also pp. 32-34)

The Dardashti opinion stands in express and direct conflict with the First District Court of Appeal's opinion which rejected

the proposition that the Section 712.03(5) exception could not be applied to rights-of-way held by the Department in fee. For the reasons expressed in the Department's initial brief (IB. pp. 22-26), this Court should uphold the lower court's conclusion that Section 712.03(5) applies to public rights-of-way held in fee 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.

The First District Court of Appeal correctly concluded that the Section 712.03(5) exception is applicable to public rights-of-way held in fee. However, the court erred when it held that the exception would not operate to preserve the Department's interest in the property in dispute because the Department failed to present competent substantial evidence that the **land at issue** was ever devoted to or required for part of the Interstate 10 right-of-way. (Slip Opinion, p. 18; A.1 18) Unlike the Department (IB. 28-40), Clipper Bay embraces the lower court's focus on the land in dispute as opposed to the entire fee estate. However, Clipper Bay takes issue with the First District Court of Appeal's analysis because it was not restrictive enough to meet Clipper Bay's revamped construction of Section 712.03(5).

Abandoning the fee vs. easement dichotomy, Clipper Bay asserts that the Dardashti and lower court opinions remain in

conflict and that the "conflict question" has now become "whether or not this exception [Section 712.03(5)] applies to preserve (1) a competing fee estate the state holds 'for purposes of a right-of-way' (the decision below) or (2) an actual right-of-way, the location, length and width of which the state has properly established across another's fee or by dedication across its own." (AB. 15, 26) Clipper Bay suggests that this Court should resolve the "conflict question" by holding that Section 712.03(5) preserves a sufficiently established right-of-way on the property in dispute (whether an easement or fee estate) and not a competing fee estate simply held for purposes of a right-of-way. (AB. 16)

The construction of Section 712.03(5) advocated by Clipper Bay should be rejected because it is grounded upon the misreading of Dardashti addressed above; it is not supported by the statutory language; it relies upon a flawed understanding of the synergistic operation of the provisions of Section 335.02(2), Florida Statutes, vis a vis the definitions and platting requirements set out in Sections 177.011 through 177.121, Florida Statutes; and it collides with the opinions in City of Jacksonville v. Horn, 496 So. 2d 204 (Fla. 1st DCA 1986), and Water Control District of South Brevard v. Davidson, 638 So. 2d 521 (Fla. 5th DCA 1994).

Turning first to Section 712.03(5), the statute provides that marketable record title shall not affect or extinguish:

> 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.

None of the language quoted next above sets out as a requirement the necessity to establish, in any particular fashion, a right-of-way on the **land in dispute** in order to preserve an interest under Section 712.03(5). Indeed, Clipper Bay's assertion that the applicability of Section 712.03(5) is conditioned upon the establishment of a right-of-way on the land in dispute is entirely belied by Horn.

After noting that the right-of-way claimed by the city over the Horns' property had not been used for a period of more than 30 years prior to their acquisition of the property, the court stated: "It is therefore clear, from the above, that if the city is to prevail it must demonstrate from the record that the trial court overlooked proof of use of a portion of the Crystal Road easement **other than that portion now encompassed by the Horns' claim of ownership.**" [Emphasis added] Horn, 496 So. 2d 207. Furthermore, in interpreting Section 712.03(5), the Horn court stated that: "it is 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. The court did not limit its statement to the land in dispute but looked to the conveyance in its entirety.

Similarly, the Davidson court recognized that the Water Control District's easements for canals and rights-of-way were a unified reservation and that the use of a part of the reservation preserved the whole which included the portion that had never been used. Davidson, 638 So. 2d at 526. The Department's right-of-way interest in this case was established by a single recorded deed (A. 6) which conveyed the fee estate the Department acquired for use in the Interstate 10 project. There is no dispute that Interstate 10 was constructed on a portion of the land conveyed by the deed. Accordingly, this use of a portion of the Department's fee ownership not encompassed in the disputed property is sufficient, standing alone, to preserve the Department's entire interest under Horn as well as Davidson.

Clipper Bay observes that the Department did not record a right-of-way map encompassing the disputed property pursuant to Section 335.02(2), Florida Statutes, which provides that

"[r]ight-of-way maps used for the acquisition of real property rights and adopted by the department shall, upon completion of monumentation, be filed in accordance with chapter 177 in the office of the clerk of the circuit court in the appropriate county." (AB. 21) Clipper Bay then asserts that Chapter 335 dictates how the state is to establish its rights-of-way interests and that the Department never established a right-of-way across the disputed property in the manner required by Chapter 335. (AB. 22)

Section 335.02 contains no language providing that the Department's right-of-way interests are **established** by filing a right-of-way map. [1] This is not surprising in light of the fact that a Department right-of-way map is not a conveyance of a real property interest. The Department's right-of-way interest in this case was, however, established by the recorded 119/303 deed (A. 6) which conveyed the fee estate the Department acquired for the Interstate 10 project. Through its legal description, the conveyance established the location, the width, and the length of the Department's claimed interest.

[1] To the extent Clipper Bay is relying upon the definitions and formal platting requirements set out in Sections 177.011 through 177.121, Florida Statutes, its reliance is misplaced. Section 177.131, Florida Statutes addresses the filing of the Department's right-of-way maps and specifically provides that "[s]ections 177.011-177.121 of this part are not applicable to this section." Section 177.131(2), Florida Statutes.

Clipper Bay repeatedly buttresses its argument in favor of its new construction of Section 712.03(5) with references to this Court's statement that: "A core concern of MRTA was that there be no 'hidden' interests in property that could be asserted without limitation against a record property owner." H & F Land v. Panama City-Bay Co. Airport, 736 So. 2d 1167, 1172 (Fla. 1999), receded from on other grounds by Blanton v. City of Pinellas Park, 887 So. 2d 1224 (Fla. 2004). Clipper Bay has evidently overlooked the fact that the legislature backed off of this concern for a limited class of property interests when it enacted the Section 712.03(5) exception to marketability which applies to both recorded and **unrecorded** interests. As the Horn court noted: "It seems apparent also that the 'use' referred to in the statute need not in all cases be 'open, notorious, and visible,' since the statutory exception is broad enough to cover easements for underground pipes, cables, and other equipment or structures." Horn, 496 So. 2d at 209.

In any event the Department's interest in this case was not "hidden" in the sense that it was unrecorded. Instead, it was created by a recorded deed. Moreover, though the Department's use of the conveyed lands did not have to be, it was in fact open, notorious, and visible. Interstate 10 was built on a portion of the conveyed lands, another portion of the conveyed lands which included some of the land in dispute was conveyed to

Santa Rosa County for the construction of a county road, and portions of the lands were used for fill for the construction of Interstate 10. (T. II 291)

In further support of both its reading of Dardashti and its resulting analytical regimen, Clipper Bay notes that the legislature has taken no action to address the construction of Section 712.03(5) Clipper Bay now ascribes to the Dardashti court, and then argues that such legislative inaction amounts to approval of the construction. (AB. 28-29) Clipper Bay's reliance upon this legislative acquiescence principle does little to afford its new reading of Dardashti any augmented precedential value. The Legislature's silence in the twenty five plus years since Horn was decided and approximately eighteen years since the Davidson decision must, according to Clipper Bay's reasoning, be viewed as legislative acceptance of the broad construction of Section 712.03(5) mandated by Horn, and Davidson's application of the use exception to preserve the entirely unused portion of a right of way held in fee.

In apparent recognition that application of Davidson would produce the same result here, Clipper Bay suggests that Davidson is distinguishable because the land at issue in Davidson was unquestionably part of the land dedicated for use as right-of-way and the right-of-way was located on the disputed parcel; the disputed parcel was required for the drainage district's

roads(disputed property and related right-of-way was not for road use) and canals; and there was a judicially approved engineer's map that defined the location, length and width of the right-of-way. (AB. 32) In addition to the absence of any statutory or judicial requirement that a right-of-way must be established on the land in dispute, Clipper Bay overlooks the fact that like the unified reservation of canal and maintenance rights-of-way in Davidson, the Department's fee estate was a single tract acquired by a single recorded conveyance which identified the location, length and width of the Department's interest.

Even if Clipper Bay's assertion that the right-of-way must be established across the disputed parcel is accepted, the record in this case satisfies Clipper Bay's proposed requirement. There is no dispute that the Department, in November of 1987, leased a portion of its fee estate to Santa Rosa County for construction of a county road and that the County built a road that runs through the lands Clipper Bay claims. (R.I 193-199; T.I 177, T.II 299-303) This recorded lease[2], in addition to the construction of Interstate 10, established the Department's use of the disputed lands for

[2] Book 920, Page 06, Official Records of Santa Rosa County. (R.I 193)

right-of-way[3] sufficient to preserve the entirety of the Department's fee estate acquired for the Interstate 10 project. In the final analysis, the Section 712.03(5) exception to marketability applies to rights-of-way held in fee. The undisputed record evidence shows that through one conveyance the entirety of the Department's fee estate was acquired for the Interstate 10 project; that Interstate 10 was built on a portion of the estate; that fill for Interstate 10 was taken from the estate; and that an unused portion of the estate was leased to Santa Rosa County for the construction of a transportation facility. The lower court should have concluded that the entirety of the Department's fee estate was preserved by operation of Section 712.03(5), Florida Statutes.

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

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[3] 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." 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.**" [Emphasis added] Section 334.03(31), Florida Statutes.

TITLE SPECIFICALLY REFERS BY AN OFFICIAL RECORD BOOK AND PAGE NUMBER TO A RECORDED PRE-ROOT TITLE TRANSACTION WHICH CONFIRMED THE DEPARTMENT'S ESTATE.

In arguing that the 1981 Trustee's Deed (R.XI 2092; A. 3) is not a muniment of title Clipper Bay asserts that there is no competent substantial evidence that this deed "carries" any title or is otherwise a "vital link" in Clipper Bay's chain of title. (AB. 41-42) The record reflects the contrary. The deed is included every time Clipper Bay set out its chain of title in this matter. (R.I 3, 8, 163, 166; R.II 357-358). Additionally, as argued initially, 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.) 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)

Clipper Bay also contends that the 1965 deed referenced in the Trustee's Deed was not a recorded transaction which imposed,

transferred or continued the Department's estate because the 1965 deed has no "subject to" or any other language indicating that the estate being conveyed was subject to any easement, use restriction or other interest. (AB. 45) Clipper Bay discounts the provision in the deed which excepts lands previously conveyed to the Department as simply excluding prior conveyances to the State of certain described property. (AB. 45) Again, as argued initially, the 1965 deed set out a detailed legal description excepting the lands that the Bank had conveyed to the Department only four months earlier. (R.XI 2096; 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) The lower court should have concluded that the Department's entire fee estate was preserved by the Section 712.03(1), Florida Statutes, exception to marketability.

CONCLUSION

Based upon the argument advanced and the authority cited herein and in the Department's initial brief, 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 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 Reply Brief has been furnished by email on this 18th day of October, 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.

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CERTIFICATE OF TYPE COMPLIANCE

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

/s/ Gregory G. Costas
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