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Bonifay v. Garner, 445 So. 2d 597 (Fla. 1st DCA 1984)

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Real Property—ADVERSE POSSESSION, RIPARIAN RIGHTS, IMPLIED EASEMENTS: AN INTERRELATION OF ISSUES—*Bonifay v. Garner*, 445 So. 2d 597 (Fla. 1st DCA 1984)

I. INTRODUCTION

The ability to acquire property by adverse possession historically has been seen as a doctrine "very securely embedded" in the laws of Florida.[1] The policy of this doctrine, which allows a claimant to take title to land against the true owner, is not to punish those owners who have neglected to assert their rights, but to protect those who have, through good faith, continued in possession for the time specified by statute.[2] Adverse possession has its origins in the common law, along with the doctrine of prescription,[3] but is today largely dependent upon fulfillment of the statutory requirements found in sections 95.16 and 95.18, Florida Statutes.[4]The recent case of *Bonifay v. Garner*[5] highlights these statutory requirements. It is an instructive case not only for the guidelines it reveals regarding adverse possession, but also because it does so in the context of waterfront land shown on a plat but not designated as being a part of any of the platted lots. Another of the case's interesting features is that at the time of the litigation, the area of the lot in question had increased substantially from that shown on the plat through the process of accretion.[6] The case also involves

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1. Atlantic Coast Line R.R. v. Seward, 150 So. 257, 258 (Fla. 1933). In fact, the supreme court in Cowgill v. Hopkins, 52 So. 2d 343, 344 (Fla. 1951), viewed the ability to acquire property by adverse possession as "so academic that citations to support it would be superfluous." In more recent times, the old policies supporting the doctrine, e.g., encouraging the use of the greatest amount of land as possible, have succumbed to "new priorities." Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973). Today the preservation of land through nonuse is seen as an important goal. *See infra* notes 22-23 and accompanying text.

2. Osceola Fertilizer Co. v. Beville, 98 So. 354, 356 (Fla. 1923).

3. Although courts at times use the terms "adverse possession" and "prescription" interchangeably, the two doctrines differ in that adverse possession is a method of acquiring title based on exclusive possession, whereas a prescriptive right is an easement in common with the owner and possibly the public. Florida Power Corp. v. McNeely, 125 So. 2d 311, 315 (Fla. 2d DCA), *cert. denied*, 138 So. 2d 341 (Fla. 1961).

4. Bonifay v. Garner, 445 So. 2d 597, 601 (Fla. 1st DCA 1984).

5. 445 So. 2d 597 (Fla. 1st DCA 1984).

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> Accretion of land occurs in two ways: By *alluvion*, i.e., by the washing up of sand or soil, so as to form firm ground; or by *dereliction*, as when the sea shrinks below the usual watermark. The term "alluvion" is applied to deposit itself, while "accretion" denotes the act. However, the terms are frequently used synonymously. Land uncovered by gradual subsidence of water is not an "accretion" but a "reliction."

BLACK'S LAW DICTIONARY 19 (5th ed. 1979).

the issue of riparian rights and the existence of an implied easement of access to the water based on the plat. This Note discusses each of these concerns and analyzes how they interrelate. In *Bonifay*, Robert Garner, a lot owner in East Pensacola Heights, sought to quiet title to waterfront property situated across the street from the six contiguous lots he owned in the subdivision. Garner based his claim on a reference to riparian rights in his deed which had appeared in a valid chain of title going back to a 1908 deed from the East Pensacola City Company.[7] In the alternative, Garner claimed title to the waterfront property by adverse possession.[8]

Barry Bonifay, also a property owner in East Pensacola Heights, intervened in his own behalf and as a representative of a class consisting of lot owners in the subdivision. Bonifay claimed an implied easement of access to the water across the disputed property claimed by Garner. Bonifay based his assertion on the conveyance of his property with reference to an 1893 plat showing the disputed property as being part of an undesignated strip running north and south between the edge of the platted lots on the east and the waters of Bayou Texar, a navigable waterway, on the west.[9] The evidence showed that in 1908 a wagon trail existed along the undesignated strip adjacent to Garner's property. The wagon trail was eventually graded and paved by the county and officially designated as Bayou Boulevard.[10] The dispute in this case involved that portion of the undesignated strip between Bayou Boulevard and the water which lies across Bayou Boulevard from Garner's lots.[11] Several other portions of the undesignated strip had also been the subject of attempts to quiet title.[12]

The trial court held that Garner was entitled to quiet title in both his platted lots and in the disputed waterfront property

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7. 445 So. 2d at 600. Garner's ownership of the subdivision lots was not in dispute. The issue on appeal concerned his ownership of the property situated across the street from these subdivision lots. *Id.*

8. *Id.*

9. *Id.* at 599-600. East Pensacola City Company, a dissolved Florida corporation, C.H. Turner Construction Company, and Escambia Realty were also made parties to the suit. The City of Pensacola filed a supplemental brief. *Id.* at 600.

10. In City of Pensacola v. Walker, 167 So. 2d 634 (Fla. 1st DCA 1964), the court concluded that there was no public dedication of the undesignated strip except as to the right of way of Bayou Boulevard.

11. The land to which this Note refers as the "undesignated strip" is referred to as the "disputed strip" by the court.

12. *See Bonifay*, 445 So. 2d at 599 n.1.

across the street from those lots,[13] finding that the platted lots were adjacent to Bayou Texar. The court evidently felt that the reference to riparian rights by definition meant that the lots were adjacent to the water. On appeal, the First District Court of Appeal reversed this ruling. The court addressed the following questions:[14]

> (1) whether [Garner's] fee simple title to the waterfront property [could] be sustained, based on deeds to [Garner] and his [predecessors] referring to "riparian rights;" (2) whether [Garner] [had] obtained title to the waterfront property by adverse possession; and (3) whether [Bonifay and the other lot owners] [were] entitled to implied easements of access over the disputed property.[15]

II. Acquisition of Title By Adverse Possession

A. *The Burden of Proof*

In any action to quiet title, whether that action is based on adverse possession or on some other ground, the burden of proof is substantial. Under the dictate of the Florida Supreme Court, this burden requires the plaintiff to show "with clearness, accuracy and certainty" the validity of his title.[16] This is so because the quieting of title in one party will necessarily have an adverse effect on the interests of the other parties.[17] For example, in *Bonifay*, the quiet-

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13. *Id.* at 599. The final judgment from which Bonifay appealed read as follows:

> 1. That the deed from the developer who originally platted the property herein involved in this action, did convey Block 70, East Pensacola, according to map of J.E. Kauser drawn in 1893, together with any rights that they may have to the riparian rights belonging to any of the foregoing lots or blocks.
>
> 2. That [the] [l]ots . . . are adjacent to the shoreline of Bayou Texar and the grantees were the recipient[s] of the riparian rights contained in the deed . . . .
>
> . . . .
>
> 4. The description of the property set out in the complaint is a sufficient identification of the property . . . .

Id. at 599.

14. An implied easement of access can be extinguished by adverse possession. *Id.* at 603.

15. *Id.* at 600.

16. Brickell v. Trammell, 82 So. 221, 229 (Fla. 1919); *see also* Huckins v. Duval Co., 147 So. 2d 551, 552 (Fla. 1st DCA 1962), *cert. denied*, 155 So. 2d 150 (Fla. 1963); Culbertson v. Montanbault, 133 So. 2d 772, 774 (Fla. 2d DCA 1961). In Squires v. Rispler, 69 So. 2d 177 (Fla. 1954), the supreme court held that evidence that the plaintiff had taken possession, paid taxes on, and begun cultivation of the land in question failed to "measure up to the high degree of certainty, clarity and positiveness required in a case of this character." *Id.* at 178 (citations omitted).

17. Under Fla. Stat. § 65.041 (1983), however, a person who is not a party to the litigation is not bound by the action.

ing of title in Garner was based on acts of adverse possession which extinguished the easements of access claimed by Bonifay and the other lot owners in East Pensacola Heights. The justification for such a difficult burden flows from the possibility that the property may be quieted in the possessor as against the "true owner." Accordingly, at least one court has suggested that quiet title actions based on adverse possession must be proved with greater certainty than quiet title actions based on other grounds.[18]

This heightened burden may be a reflection of the increasing disfavor with which modern courts accord the acquisition of another's property based on possession, even when that possession is based on the good faith belief of the possessor that the property is his.[19] In *Meyer v. Law*,[20] Justice Boyd, writing for the majority, saw adverse possession as a concept that is "ancient and, perhaps, somewhat outdated . . . ."[21] Justice Boyd explained that the doctrine

> stems from a time when an ever-increasing use of land was to be, and was, encouraged. Today, however, faced, as we are, with problems of unchecked over-development, depletion of precious natural resources, and pollution of our environment, the policy reasons that once supported the idea of adverse possession may well be succumbing to new priorities. A man who owns some virgin land, who refrains from despoiling that land, . . . and who makes no greater use of that land than an occasional rejuvenating walk in the woods, can hardly be faulted in today's increasingly "modern" world.[22]

Justice Boyd goes on to explain that as a result of these new priorities, "Public policy and [the] stability of our society, . . . require strict compliance with the appropriate statutes by those seeking ownership through adverse possession."[23] Because the outcome of

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18. Culbertson v. Montanbault, 133 So. 2d 772, 774 (Fla. 2d DCA 1961).

19. *See* Genet v. City of Hollywood, 400 So. 2d 787 (Fla. 4th DCA 1981). The court, expounding on the burden of proof, stated that all the elements necessary to prove adverse possession "must be proved by clear and positive proof, and can not be established by loose, uncertain testimony which necessitates resort to mere conjecture." *Id.* at 788 (quoting Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958)).

20. 287 So. 2d 37 (Fla. 1973).

21. *Id* at 41.

22. *Id.*

23. *Id.* Justice Boyd elaborates on this view in his dissenting opinion in Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981). He explains that the original policies of adverse possession, i.e., that land should be put to its greatest possible use and that the possessor is imbued with a presumption of ownership, are no longer applicable to today's society.

the action results in the deprivation of real property, a commodity highly prized in today's society, or in the deprivation of some right related to that property (as in Bonifay's case), it is appropriate that this burden be so substantial.

In meeting this burden of high certainty, the plaintiff must also overcome the presumption of possession in favor of the legal title-holder. When one enters into possession of realty, he is presumed to do so subordinately to the title of the true owner—that is, with his permission.[24] The burden is on the claimant to overcome this presumption by showing that the possession was actually adverse to the true owner.[25] The term "adversity" means that the use made by the possessor is "inconsistent with and contrary to the use and rights of the owners of the property."[26] In addition, it must be shown that the possession was open,[27] notorious,[28] continuous and uninterrupted for the statutory period, with continuity being the essence of the doctrine.[29]

The Florida Statutes provide the framework within which a claimant may meet the burden of proof and acquire title to land by adverse possession. He may do so "under color of title," pursuant to section 95.16, or "without color of title," under section 95.18.[30]

B. Under Color of Title—Section 95.16

Color of title means "apparent or semblance of title as opposed to actual title."[31] The title need not be valid, but it must be based

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24. Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973). By definition, adverse possession cannot be permissive. Wiggins v. Lykes Bros., 97 So. 2d 273 (Fla. 1957).

25. *Meyer*, 287 So. 2d at 41; *see also Genet*, 400 So. 2d at 789. FLA. STAT. § 95.13 (1983) states:

> In every action to recover real property or its possession, the person establishing legal title to the property shall be presumed to have been possessed of it within the time prescribed by law. The occupation of the property by any other person shall be in subordination to the legal title unless the property was possessed adversely to the legal title for 7 years before the commencement of the action.

26. Birtley v. Fernandez Co., 392 So. 2d 291, 293 (Fla. 5th DCA 1981).

27. In Porter v. Lorene Inv. Co., 297 So. 2d 622, 624 (Fla. 1st DCA 1974), the court held that possession was open where it was recognized by various members of the community, including family members of the person claiming record title.

28. The court in Watrous v. Morrison, 14 So. 805 (Fla. 1894), stated that the possession must have such notoriety that it could be presumed the owner had knowledge of it. *Id.* at 811 (citing 1 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 262, 264 (2d ed. 1896)).

29. Culbertson v. Montanbault, 133 So. 2d 772, 774 (Fla. 2d DCA 1961) (citing Horton v. Smith-Richardson Inv. Co., 87 So. 905 (Fla. 1921)).

30. These are the only two means by which a claimant can obtain title by adverse possession in Florida. *Meyer*, 287 So. 2d at 40.

31. Carter v. Klugh, 310 So. 2d 358, 360 (Fla. 3d DCA 1975) (citing Moore v. Musa, 198

on a written instrument which purports to convey the property and which contains a legally sufficient description of the property.[32] A description is sufficient if it identifies the land with the degree of certainty necessary to ascertain the boundaries of the land.[33] Without a sufficient description, possession cannot be "under color of title."[34] Furthermore, the instrument must be accepted in "good faith and in the honest belief that it vests title in the claimant."[35]

The court in *Bonifay* regarded the issue of good faith as decisive in resolving Garner's claim of adverse possession. The 1908 deed from the East Pensacola City Company—the root of Garner's chain of title to his platted lots—did not contain a description of the waterfront property and, therefore, could not be used to establish adverse possession under color of title. However, as to three of the six lots owned by Garner, there existed a 1962 deed from Garner's mother to her brother which did contain a sufficient description of the waterfront property.[36] Bonifay pointed out that this deed was executed for minimum consideration and that the following day a deed containing the same legal description of the waterfront property was executed conveying the property back to Garner's mother (Garner's predecessor in title).

The court properly recognized these transactions as presenting the issue of whether there was good faith and an honest belief on the part of Garner that the title to the waterfront property was valid. Since the issue was not addressed by the trial court in its judgment, the district court remanded the case to the trial court so that it could take further evidence and resolve the issue of good faith as to these three lots. The district court reversed the ruling of the trial court regarding the waterfront property across from the three lots owned by Garner which did not contain a sufficient description of the waterfront property.[37]

1. *Proof of Possession*

In order to establish title by adverse possession under sections

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So. 2d 843 (Fla. 3d DCA 1967)).

32. *Bonifay*, 445 So. 2d at 601 (citing Mitchell v. Moore, 13 So. 2d 314 (Fla. 1943)).

33. Mitchell v. Moore, 13 So. 2d 314, 315 (Fla. 1943).

34. *Bonifay*, 445 So. 2d at 601.

35. *Id.* at 602 (citing Simpson v. Lindgren, 133 So. 2d 439 (Fla. 3d DCA 1961)).

36. 445 So. 2d at 602.

37. The trial court had ruled that Garner had title to the waterfront property across the street from all six of his platted lots. *Id.* at 599.

95.16 and 95.18, the occupant or those under whom he claims must have been in continued possession of the property for seven years. Section 95.16(2) provides that property is deemed possessed in any of the following cases:

> (a) When it has been usually cultivated or improved.
>
> (b) When it has been protected by a substantial enclosure. . . .
>
> (c) When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant.
>
> (d) When a known lot or single farm has been partly improved, the part that has not been cleared or enclosed according to the usual custom of the county is to be considered as occupied for the same length of time as the part improved or cultivated.[38]

The *Bonifay* court found that the evidence adduced at trial was sufficient to uphold a finding of possession in Garner and his mother. The evidence showed that Garner and his mother had exercised control over the waterfront property by fencing, improving, and maintaining it for the requisite period of time.[39]

2. *The Issue of Adversity*

In addition to stating the presumptions of possession, section 95.16 also provides that:

> When the occupant, or those under whom he claims, entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, . . . and has for 7 years been in continued possession of the property included in the instrument, . . . the property is held adversely.[40]

This language should not be deemed to create a presumption of adversity displacing the traditional concept of adversity which requires a claimant to prove that the possession was adverse, open and notorious, as those terms have been defined by the courts. In discussing the requirements of the two adverse possession statutes,

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38. FLA. STAT. § 95.16 (1983).
39. *Bonifay*, 445 So. 2d at 601; *see* FLA. STAT. § 95.16(2)(a), (b) (1983).
40. FLA. STAT. § 95.16 (1983).

the Florida Supreme Court, in *Meyer v. Law*,[41] included the requirement that a claimant show "open, continuous, actual possession, hostile to all who would challenge such possession."[42] It is well settled that an interpretation of a state statute by that state's highest court becomes an integral part of the statute.[43]

Thus, in Florida, a court must conclude that a claimant has made an affirmative showing of adverse, open and notorious use before finding that adverse possession exists. Simply showing that there has been possession (as defined by the statute) for seven years is not enough, particularly in light of the substantial burden of proof in an adverse possession proceeding.

It is not clear whether the court in *Bonifay* found that adversity had been shown or whether it even considered the issue. Its short discussion of the fact that Garner and his predecessors had fenced and improved the property went to the issue of possession rather than the issue of adversity.[44] Although appropriately argued, these two facts could have been used to show adversity. Perhaps the court implicitly felt that they did.

A better approach would be to *require* a claimant to explicitly prove those facts which show adversity as well as those that show possession. Such a requirement would be more commensurate with the high burden of proof traditionally associated with adverse possession claims.

C. Without Color of Title

If a party asserts ownership of land based on adverse possession but does so without a written instrument, his claim is said to be "without color of title."[45] Like section 95.16, section 95.18 also requires proof of continued possession for seven years. Section 95.18(2) is more restrictive than section 95.16 as to what constitutes possession and allows a finding of possession *only* "[w]hen it [property] has been protected by substantial enclosure," or "[w]hen it has been usually cultivated or improved."[46] In addition, a party claiming rights under section 95.18 must show that he "made a return of the property by proper legal description to the property appraiser of the county where it is located within [one]

41. 287 So. 2d 37, 40 (Fla. 1973).
42. *Id.* at 40.
43. Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933).
44. *Bonifay*, 445 So. 2d at 601.
45. FLA. STAT. § 95.18 (1983).
46. *Id.*

year after entering into possession and has subsequently paid all taxes . . . ."[47] In *Bonifay*, neither Garner nor his predecessors in title had paid taxes on the waterfront property; therefore, Garner could not rely on section 95.18.

The requirement of payment of taxes is designed as a notice mechanism. To acquire title by adverse possession, pursuant to section 95.16, the claimant must base his claim on a recorded instrument. The return of taxes under section 95.18 will become part of a public record. In either case, landowners will be able to check public records to ascertain whether someone is adversely claiming their property.[48] In years past, when public policy called for land to be used to the greatest extent possible, possession was deemed to put the owner on notice.[49] As Justice Boyd explained in his dissenting opinion in *Sedden v. Harpster*, "It is now much more common for persons to own land without actually possessing it. Now the payment of taxes is presumptively a more reliable indicia of ownership than possession. When an owner pays taxes on his land, he is publishing to the world, 'This is my land.' "[50]

III. A Review of Riparian Rights

One of the issues addressed by the court in *Bonifay* was whether Garner's claim to the waterfront property could be sustained based on a reference in his deed to riparian rights. After a description of the lots, the deed contained the language: *"Grantors hereby convey any right that they may have to the riparian, rights belonging to any of the foregoing lots or blocks."*[51] The Florida Statutes define riparian rights for taxing purposes as

> those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing and fishing . . . . Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach.[52]

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47. *Id.*
48. Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., dissenting).
49. *Id.*
50. *Id.*
51. *Bonifay*, 445 So. 2d at 601 (emphasis in original).
52. Fla. Stat. § 197.228(1) (1983).

The statute does not create riparian rights. These rights exist in Florida as a matter of constitutional right and property law and are not dependent on the statute which defines them for tax purposes. However, the statute does provide a convenient description of riparian rights and the necessary elements which constitute these rights.[53]

The landowner whose property abuts a navigable waterway does not *own* riparian rights, rather these rights inure to him because he owns the adjacent land.[54] The rights are appurtenant to the land and run with it. Therefore, a conveyance of the land entitles the grantee to the riparian rights "whether or not mentioned in the deed or lease of the upland."[55]

The grantor in *Bonifay* did mention riparian rights in the deed to the lots owned by Garner. However, for riparian rights to attach to a certain parcel of land, that land must be adjacent to a navigable waterway.[56] The trial court, which quieted title to the waterfront property in Garner, found that Garner's lots were "adjacent to the shoreline of Bayou Texar and the grantees were the recipients of the riparian rights contained in the deed. . . ."[57]

On appeal, the First District Court found that because the lots were not adjacent to Bayou Texar, no riparian rights existed in them.[58] The district court's findings were based on the 1893 Kauser plat of the subdivision which showed the undesignated strip of land between the edge of the lots and the water's edge. The existence of this strip, in the court's view, meant that none of the platted lots extended to the highwater mark of Bayou Texar; therefore, no riparian rights attached and none were conveyed. The court concluded:

> Thus, a purported conveyance of "riparian rights," independently of the underlying waterfront property, does not by implication or otherwise convey the waterfront property itself. Here, a conveyance of whatever riparian rights the grantors might have in the

53. Feller v. Eau Gallie Yacht Basin, Inc., 397 So. 2d 1155 (Fla. 5th DCA 1981).

54. In Florida, the test for navigability is "whether the waterway in its natural state can potentially provide for commercial use." Anderson v. Bell, 411 So. 2d 948, 949 (Fla. 1st DCA 1982).

55. FLA. STAT. § 197.228 (1983).

56. These rights also attach to land bordering bodies of water which are not navigable, such as lakes and ponds; however, these rights are referred to as littoral rights rather than riparian rights. *See* Gillilan v. Knighton, 420 So. 2d 924, 925 (Fla. 2d DCA 1982).

57. *Bonifay*, 445 So. 2d at 599.

58. *Id.* at 601.

> specified lots, which lots because of their location have no riparian rights, conveys no more than what the grantor has, to-wit: land without riparian rights.[59]

Although logical, the court's reasoning leaves unanswered the question of why the original grantor, the East Pensacola City Company, would attempt to convey riparian rights to property not adjacent to the water. The concept that property must abut a body of water to make the owner a riparian owner was firmly embedded in the common law when the lots were originally conveyed in 1908.[60] One explanation for the conveyance is that either the grantor did not have an understanding of the concept of riparian rights, or he intended that the lots extend to the water's edge, ignoring the obvious fact that the plat showed the undesignated strip between the water and the lots. Another possible explanation is that the strip was intended as a means of access to the water for lot owners in the subdivision. An easement over land adjacent to a body of water entitles the easement holder to the riparian rights attached to the land. This issue is discussed more fully below.

IV. Plat Creates Implied Easements of Access

In Florida, an easement may be created in three ways: by express grant, by prescription, or by implication.[61] The easement may be in gross, which means a personal interest in another's property exists that is not attached to other land. An easement may also be appurtenant, which means that an interest is attached to a superior right as a dominant estate.[62]

In *Bonifay*, Barry Bonifay asserted that as an owner of lots in the platted subdivision he had an implied easement of access to the waterfront.[63] He based his claim on *McCorquodale v. Keyton*,[64] in which the Florida Supreme Court held that when lots are sold with reference to a *recorded* plat or map, the purchasers "acquire by implied covenant a private easement in lands of the grantor other than those specifically deeded . . . ."[65] The purpose of the

59. *Id.*
60. *See* Axline v. Shaw, 17 So. 411 (Fla. 1895).
61. Wyatt v. Parker, 128 So. 2d 431, 433 (Fla. 2d DCA 1961).
62. North Dade Water Co. v. Florida State Turnpike Auth., 114 So. 2d 458, 461 (Fla. 2d DCA 1959).
63. *Bonifay*, 445 So. 2d at 603.
64. 63 So. 2d 906 (Fla. 1953).
65. *Bonifay*, 445 So. 2d at 603 (citing *McCorquodale*, 63 So. 2d at 910).

rule is "not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out in the plan indicated."[66]

McCorquodale concerned a developer of land who had recorded a plat which designated a portion of waterfront property bordering on the Gulf of Mexico as a park. The plaintiffs, purchasers of property in the subdivision, sought to enjoin the developer from constructing a building for commercial use on a portion of the park property. The court held that the plaintiffs' reliance, together with the fact that access to and use of a beach is an "extremely valuable right," acted to "bar the developer from denying the owners that which he led them to believe they had."[67] In essence, the rule is based on an estoppel theory, preventing a developer from making use of property inconsistent with the use indicated by the plat. The court added that the developer may convey fee simple title to the designated land, but that the land would be conveyed subject to rights of the owners of lots in the subdivision to use the land for its designated purposes.[68] A similar situation occurred in *Cartish v. Soper*,[69] in which the court ruled that a plat, which designated a portion of the subdivision as a "private parkway" extending to the water's edge, created a private easement of access for each of the subdivision lot owners, thus preventing the fee simple owner from planting shrubbery across the parkway. The fact that the easement was over land adjacent to a navigable body of water entitled the easement holders to the riparian rights attached to the land, including the right to build a dock.[70]

Based on the evidence presented in *Bonifay*, namely, the 1908 deed and the Kauser plat showing the unplatted strip along the water's edge, the First District Court concluded that Bonifay and the other lot owners had an implied easement of access across the property. However, the court pointed out that private easements are subject to extinguishment, leaving unanswered the issue of whether the actions of Garner and his predecessors in title of fencing the disputed strip had cut off the implied private easements. The rules governing the extinction of easements differ from the

66. *McCorquodale*, 63 So. 2d at 910 (quoting Lennig v. Ocean City Assoc., 7 A. 491, 493 (N.J. 1886)).

67. *McCorquodale*, 63 So. 2d at 909, 910.

68. *Id.* at 911.

69. 157 So. 2d 150 (Fla. 2d DCA 1963).

70. *Id.* at 154.

rules regarding the acquisition of title by adverse possession.[71] Therefore, a finding that Garner did not sufficiently prove adverse possession does not necessarily mean that private easements have not been extinguished. Easements may also be extinguished by abandonment, nonuse, or estoppel.[72] The court remanded the case to the trial court to obtain further evidence to determine whether the easements had in fact been extinguished.

The conveyance of lots with reference to a recorded plat may create *private* rights in the grantees to have areas described in the plat maintained for their designated uses, as discussed above. These rights are to be distinguished from *public* rights created by the plat through either an express grant or through the operation of the common law doctrine of dedication.

Common law dedication is a means by which an owner of an interest in land can transfer to the public either ownership or a privilege of use for a public purpose.[73] Dedication requires that there be (1) an intention to dedicate the property to public use, (2) acceptance by the public, and (3) "clear and unequivocal proof" of these facts.[74]

Ordinarily, a plat showing lots and blocks will indicate specific areas as streets, parks, or some other open area (e.g., a beach area). If the plat is filed and recorded, such actions constitute an offer of dedication.[75] The dedication does not become binding, however, until the offer of dedication has been accepted by the public. As stated by the court in *Sebolt v. State Road Department*,[76] "Acceptance may be made by formal resolution, by public user, or by acts clearly indicating acceptance." In *Sebolt*, the court ruled that the state, in causing a survey team to survey a right-of-way, accepted the offer of dedication.

The court in *Bonifay v. Garner* did not discuss the issue of dedication of the undesignated strip to the public, stating that the matter was not in dispute.[77] However, the court did discuss the issue in a subsequent case, *Bonifay v. Dickson*,[78] in which Dickson and a partner, asserting a claim of adverse possession, sought to

71. *Bonifay*, 445 So. 2d at 603.
72. *Id.*
73. *Bonifay v. Dickson*, 459 So. 2d 1089, 1093 (Fla. 1st DCA 1984).
74. *Id.* at 1093-94.
75. Indian Rocks Beach South Shore, Inc. v. Ewell, 59 So. 2d 647, 651 (Fla. 1952).
76. 176 So. 2d 590, 594 (Fla. 1st DCA), *cert. denied*, 183 So. 2d 211 (Fla. 1965).
77. *Bonifay*, 445 So. 2d at 600.
78. 459 So. 2d 1089 (Fla. 1st DCA 1984).

have title quieted along the same strip as Garner, although in a different parcel. Barry Bonifay again intervened and claimed an implied easement of access over the property to the water. The City of Pensacola also intervened claiming public rights-of-way over the property as extensions of two platted streets. The court concluded that an offer of dedication could be inferred from the filing of the plat showing named streets and from conveyances of lots with reference to the plat.[79] An ambiguity existed as to whether the developer also intended to dedicate the waterfront strip since it was not specifically dedicated as was, for example, the waterfront park in *McCorquodale*. By "[c]onstruing the plat as a whole and resolving any ambiguity regarding the extent of the dedication against the dedicator and in favor of the public," the court determined that the owner intended to dedicate the strip as well as the streets.[80]

Having found that an offer to dedicate the strip existed, the court next discussed the issue of whether the public had accepted the offer. The evidence showed that the county had paved and maintained a road along the edge of the lots and had later installed culverts under the road, Bayou Boulevard, and across the strip.[81] These acts were deemed sufficient to prove an acceptance of the entire strip.

The court was careful to point out that section 95.361, Florida Statutes,[82] which creates a presumption of dedication when a road has been maintained by public authorities for four continuous years, does not act to limit common law dedication.[83] Hence, it was not improper for the trial court to find that the acceptance encompassed the entire strip and not just the width of the road actually maintained. Acceptance under section 95.361 is more restrictive because that section vests fee title to the dedicated road in the public authority, whereas common law dedication gives only rights of easement.[84]

The most astounding aspect of *Bonifay v. Dickson* was the court's gratuitous observation that the owners of the platted lots along Bayou Boulevard also held fee title to whatever portions of

79. *Id.* at 1094 (citing City of Palmetto v. Katsch, 98 So. 352 (Fla. 1923)).

80. *Id.* at 1094 (citing Florida East Coast Ry. v. Worley, 38 So. 618 (Fla. 1905)).

81. *Bonifay*, 445 So. 2d at 1094. The subdivision was annexed by the City of Pensacola in 1953 and hence the city, rather than the county, was a party to the suit.

82. FLA. STAT. § 95.361 (1983).

83. *Dickson*, 459 So. 2d at 1095.

84. *Id.*

the undesignated strip lay directly across the street from their lots. The court's conclusion had no effect on the litigation in that case since the owners of the lots across from the disputed property were not seeking to quiet title in themselves. The court intended the statement as "a guide for future determinations regarding ownership of and easement interests in this and other similarly situated property."[85] The court's suggestion that owners of the platted lots along Bayou Boulevard are the "true owners" of the undesignated strip was based on *Burkart v. City of Ft. Lauderdale*,[86] in which the supreme court held that where the dedicated street runs along a navigable body of water, the abutting lot owners own title to the entire width of the dedicated land, as well as to the accretions along the street.[87] The general rule is that abutting lot owners own fee title to the middle of a dedicated street.[88] The rule changes when the street borders a body of water; in this situation, the lot owners have fee title to the entire width of the street. The court's reliance on *Burkart* was misplaced since the plat did not designate the strip as a street. Only if the *entire* strip shown on the plat had been dedicated as a street could the court's conclusion be justified. It makes more sense to construe the plat as creating an open beach area for use by the lot owners, as was the beach area in *McCorquodale*, or to construe the plat as an offer of dedication of the beach area to the public.

If one applies the court's analysis in *Burkart* to *Bonifay v. Garner*, then the fee title interest to the accretions which formed along the strip would be subject to the street easement, including riparian rights incident to that easement.

V. CONCLUSION

Bonifay unites several seemingly unrelated issues and illustrates how the resolution of one issue can change the outcome of the others. The case arises in a context likely to be familiar to Florida developers and landowners. A developer files a plat showing a beach area. The size of the area increases due to accretion. The area is used by lot owners as well as members of the general public. An abutting lot owner attempts to fence the area or prevent others from using it, claiming it as his own by title or by adverse posses-

85. *Id.* at 1096.
86. 168 So. 2d 65 (Fla. 1964).
87. *Id.* at 70.
88. *Dickson*, 459 So. 2d at 1095 (citing Burns v. McDaniel, 140 So. 314 (Fla. 1932)).

sion. The abutting landowner may even attempt to sell the land, as was the case in *Bonifay*. The landowner is then confronted with the issue of proving adverse possession or valid title. If he attempts to prove title by adverse possession, he must meet the stringent burden of proof required by that doctrine and must strictly adhere to the statutory requirements. He must also overcome mounting judicial disfavor shown toward the doctrine in recent times.

If the court makes a finding of adverse possession, that in turn will extinguish the private rights of easement across the property created by the plat in favor of purchasers of lots in the subdivision. However, adverse possession does not extinguish public rights of easement over the property; rather, the fee owner takes subject to those rights.

The holder of an easement is entitled to the riparian rights incident to lands bordering a navigable waterway. This is true whether the easement is public or private. Accretions formed along the edge of the property become the property of the fee owner, but are subject to the easement.

If the plat shows a street bordering the body of water, then the owners of lots bordering the street own fee title to the land under the entire width of the street as well as to accretions formed along the street. The public retains an easement over the street, as well as over the accretions, and possesses the riparian rights incident to that land, provided the requisite elements of common law dedication have been met.

Bonifay also vividly illustrates the need for clarity in subdivision plats. Every area of the plat should be specifically designated. Those areas not a part of the platted lots should be designated as reserved for lot owners or as an offer of dedication to the public. Purchasers of land not designated as a platted lot should be prepared to prove adverse possession or to show that a *Burkart* situation is present.

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