

IN THE SUPREME COURT OF THE STATE OF FLORIDA

**Richard M. and Jerilyn S. Saccocio,
Petitioners**

v.

**City of Plantation, Mayor Rae Carole Armstrong and John Doe
Respondents.**

Supreme Court Case No.: SC05-1299
Fourth District Court of Appeals Case No.: 4D04-3728
17th Judicial Circuit Case No.: 04-02879 CACE (18)

**BRIEF OF PETITIONERS (APPELLANTS AND PLAINTIFFS
BELOW) IN SUPPORT OF INVOKING THE
DISCRETIONARY JURISDICTION
OF THE SUPREME COURT OF FLORIDA**

Respectfully submitted by

Richard M. Saccocio
Attorney for Petitioners
100 SE 12th Street
Ft. Lauderdale, FL 33316
Tele: (954) 764-8003
Fl. Bar No 166770

July 30, 2005

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. LEGAL BURDEN TO INVOKE JURISDICTION.....	4
II. LEGAL ARGUMENT	4
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	10
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)	11
APPENDIX	A-1

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

	<u>Page</u>
<u>Downing V. Bird</u> , 100 So. 2d 57 (Fla. 1957)	3, 4, 5, 7
<u>FP&L. Gay Brothers Construction Co. v Florida Power and Light Company</u> , 427 So. 2d 318 (Fla. App. 5 Dist. 1983)	7
<u>Harris v. Baden</u> , 17 So. 2d 608 (Fla. 1944),	7

STATEMENT OF THE CASE AND FACTS

Petitioners are the Plaintiffs in the trial court proceedings, and the Appellants in the Fourth District Court of Appeal.

An easement by prescription of land behind the residence of the Petitioners has been pled in the trial court by the Petitioners and a motion for a preliminary injunction has been made. After a hearing, the motion was denied in an order and opinion issued by the trial court. The easement, if allowed, would only have the effect of preventing the Respondents from converting approximately half of the land in question to wetlands which then would be sold to developers as credits for destroying other wetlands. However, a much greater majority of the planned wetlands would not be affected.

Approximately one third of an acre behind the residence of the Petitioners as it abuts an existing canal legally belongs to the Respondents. The Petitioners have used and enjoyed the approximately one third of an acre for over twenty years and have continuously and solely maintained said land for over twenty years. Even the trial court agreed. Respondents plan to relocate the canal by taking approximately one half of the one third of an acre and converting it to wetlands for sale to developers.

The record is abundantly clear that Petitioners' use and enjoyment has been

with the knowledge of the Respondents and without their permission for the entire twenty years. After a hearing on the motion for a preliminary injunction the trial court denied the motion advancing that the Petitioners' use was not adverse or inconsistent with the Respondents' use. The trial court required that Petitioners' use include erection of no trespassing signs and the building of a structure on the land. The trial court concluded that Petitioners were not losing their backyard-only some of it

An appeal to the Fourth Judicial Circuit followed

On May 4, 2005, the Fourth Judicial Circuit denied the appeal without opinion only stating that the "The trial court's ruling that appellants failed to prove a substantial likelihood of success on the merits of their claim was correctly premised upon the lack of a showing of adverse or inconsistent use."(Appendix A) A timely request (on May 18, 2005) for rehearing and for a rehearing in banc followed. On June 24, these were denied without opinion. (Appendix B).

On July 22, Petitioners file a Notice to Invoke Discretionary Review and paid the filing fee. This brief is in support the Petitioners request to invoke the discretionary jurisdiction of this Court

SUMMARY OF ARGUMENT FOR INVOKING THE JURISDICTION OF THE COURT

Downing V. Bird, 100 So. 2d 57 (Fla. 1957) is the landmark case and controlling precedent regarding the requirements for establishing and showing of the creation of an easement by prescription. At the hearing on the motion for a preliminary injunction, Petitioners presented substantial evidence of their physical presence on the easement. The evidence was uncontroverted. The trial court, in an opinion denying Petitioners' motion for a preliminary injunction to prevent the taking of an easement held by Petitioners, held that Petitioners had not made the required showing that Petitioners' use was adverse or inconsistent with the use by Respondents. Downing v. Bird, supra held that adversity or inconsistent use must be such that an action for trespass or ejectment must lie by the legal owners of the easement.

On appeal the argument was made by Petitioners that their use was not with permission and was adverse to that of respondents, citing Downing V. Bird, supra. The Fourth District Court of Appeals, without opinion, stated that the holding of the trial court as to the adversity issue was correct (Appendix).

A request for rehearing on the adversity issue was requested along with a request for a hearing en banc was summarily denied (Appendix).

It is respectfully submitted that the uncontroverted showing by the Petitioners of their use was such that an action for trespass or ejection laid Thu, the Fourth District refused to follow the law as stated in Downing v. Bird, supra. This Court should therefore invoke its discretionary jurisdiction to require the lower courts to follow this Court's announcement of the law.

LEGAL ARGUMENT

STANDARD OF REVIEW

The sole issue in this Petition is whether the Fourth District Courts decision conflicts with the decision of the Supreme Court in Downing v. Bird, supra. Accordingly, the required showing is that of clear error.

LEGAL ARGUMENT IN SUPPORT OF PETITIONERS' REQUEST TO INVOKE THE SUPREME COURT'S DISCRETIONARY JURISDICTION

The law: It has honoured us; may we honour it.

Daniel Webster

If we lawyers cannot rely on president, we cannot serve the law. If lower courts do not follow president, we have a lawless judicial system. Certainly these are simple statements of the obvious, but they go to the core of justice in the United States and apply to this Petition.

In the present case, the law regarding easements by prescription, as announced by this Court in Downing V. Bird, 100 So. 2d 57 (Fla. 1957), has not been followed or applied.

Moreover and perhaps more egregious, when asked for an explanation as to why the law of Downing V. Bird, supra, was not followed and has been ignored, no explanation has been given. Such is the situation in the present case and the basis for requesting invoking jurisdiction by this Court.

In Downing v. Bird, supra, this Court set forth the basis for showing the existence of a prescriptive easement, namely:

In both rights [referring to easements by prescription and adverse possession] the use or possession must be:

inconsistent with the owner's use and enjoyment of his lands, and must not be a permissive use,

for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.

At the hearing on the motion for a preliminary injunction there was uncontroverted testimony that the Petitioners' use raised a right in Respondents for trespass or ejectment. Such testimony By Mr. Saccocio included:

I maintained that particular piece of property. I used that particular piece of property ever since I purchased the home. I play with my dog on

that particular piece of property. I fish from the canal on that particular piece of property. I have been on that particular piece of property a number of times. In short, I treated that particular piece of property as it was my own.

Evidence was presented that the Petitioners had at their own expense installed a sprinkler system on the land in question, had planted numerous trees, and had the grass regularly cut. Evidence was also presented by the Petitioners that the Respondents knew of the use and extent of the use by Petitioners but never did anything to stop the same.

Mr. Dallas, the next door neighbor of Petitioners, testified that he had never seen any golf course maintenance vehicles on the land in question. Mr. Dallas testified that he had seen Petitioner Mr. Saccocio “Mowing, digging, repairing, playing with your dog. Your son had a wedding there. Fishing...Basically anything you can do outside...” with respect to the land in question. Mr. Dallas testified that he has seen the sprinklers installed and repaired by Petitioners that extend to the edge of the canal and that he has seen the sprinklers on in operation. Mr. Dallas testified that he has seen Petitioner Saccocio work on the land in question “Millions of times” and that Petitioner Saccocio was outside constantly doing something.

Trespass comprises the unauthorized entrance of a person on another's

property. Harris v. Baden, 17 So. 2d 608 (Fla. 1944), at common law every entry upon another's land, except by consent, is trespass for which satisfaction exists. The operative words by the Supreme Court were "every entry upon another's land...is trespass for which satisfaction exists." Clearly, the Respondents and their grantors had many actions for trespass against the Petitioners during the 20 year period that the prescriptive easement was being created. The installation of the sprinkler system on the land in question is directly on point with the poles erected by FP&L. Gay Brothers Construction Co. v Florida Power and Light Company. supra.

Accordingly, the use by the Petitioners and their grantors and shown to the trial court more than satisfies the Supreme Court test for adversity as announced in Downing v. Bird, supra. This same argument was made to the Fourth District Court of Appeals. However, based on the above stated language by the Fourth Judicial Circuit, the argument was completely rejected by the Fourth District and in fact was not considered worthy of any comments in justification of the denial of the appeal by the Fourth Judicial Circuit. In short, the decision of the Fourth District is in direct conflict with Downing v. Bird, supra.

NATURE OF THE RELIEF SOUGHT

Petitioners respectfully request that this Court invoke its discretionary jurisdiction, issue an opinion that Petitioners' use was adverse or inconsistent with that of Respondents, and remand the case back to the Fourth Judicial Circuit with instructions to remand the case back to the trial court and issue an order consistent with the requested opinion.

CONCLUSION

In the scheme of things in today's world, and the workload of this Court, the matter involved in this Petition for invoking the Supreme Court's discretionary jurisdiction does not rank high. It merely comprises a taking of an easement from a single residential land owner by a municipal corporation. However, justice denied, regardless of its overall importance to today's societal issues, is a terrible thing. It is the bane of the legal system. Justice has been denied in this case. The law is clear in favor of the Petitioners and the Fourth District' decision is directly in conflict with the decision of this Court; but, the Courts below have not followed the law. The lower courts have "... not honoured it"

Richard M. Saccocio, P.A.

By: _____

Richard M. Saccocio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing
**“BRIEF OF PETITIONERS IN SUPPORT OF INVOKING THE
JURISDICTION OF THE COURT**

is being furnished, by first-class U. S. mail delivery, to:

Thomas R. Tatum
Brinkley, McNerney, et. al.
Suite 1900
200 East Las Olas Blvd.
Ft. Lauderdale, FL 33301

Joseph J. Huss
Krinzman, Huss & Lubetsky
515 East Las Olas Blvd.
Suite 1100
Ft. Lauderdale, FL 33301

On this 30th day of July, 2005.

Richard M. Saccocio
Florida Bar Number 166770

CERTIFICATE OF COMPLIANCE

I, Richard M. Saccocio, declare that the brief submitted concurrently herewith is in compliance with the font requirements and page requirements of Fla. R. App. P. 9.100(1). The Reply Brief of Appellants is 15 pages prepared using 14 point font, Times New Roman.

Richard M. Saccocio
Richard M. Saccocio, P.A.
Florida Bar Number 166770