

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC11-1294

District Court Case Nos.: 5D09-2183, 5D09-4378, 5D09-4379

ST. JOHNS COUNTY,

Petitioner,

vs.

ROBERT & LINNIE JORDAN, et al.,

Respondents.

On Review from the Fifth District Court of Appeal

RESPONDENTS' OPPOSITION BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The following facts are taken from the face of the Fifth District’s decision that Defendant/Petitioner St. Johns County seeks to have reviewed. *See Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) (“The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict.”). Though the County improperly relies on facts not appearing on the face of the Fifth District’s decision below, Plaintiffs/Respondents (hereinafter “Property Owners”) will not address those issues except to note the proper confines of this Court’s review.

The Property Owners sought a declaration below that the County has a duty to repair and maintain the public county road—Old A1A—that is adjacent to and provides the sole access to their properties. The Property Owners further asserted that that the County’s failure to maintain Old A1A resulted in a substantial diminishment of access to their properties, resulting in the Property Owners’ claim for inverse condemnation.

In support of their claim that the County has a duty to maintain its public roads in good order, the Property Owners’ relied on this Court’s decision in *State ex rel. White v MacGibbon*, 84 So. 91 (Fla. 1920), and the First District’s decision in *Ecological Development, Inc. v Walton County*, 558 So. 2d 1069 (Fla. 1st DCA 1990), both of which explicitly hold that counties have a continuous duty keep

their public roads “in good order.”

Relying on *Ecological Development* and *MacGibbon*, the Fifth District held:

We hold that the County has a duty to reasonably maintain Old A1A as long as it is a public road dedicated to the public use. We do not hold that the County has the duty to maintain the road in a particular manner or at a particular level of accessibility. However, the County’s discretion is not absolute. The County must provide a reasonable level of maintenance that affords meaningful access, unless or until the County formally abandons the road

Jordan v. St. Johns County, 36 Fla. L. Weekly D1095 (Fla. 5th DCA May 20, 2011). With regard to the Property Owner’s inverse condemnation claim, the Fifth District went on to hold:

In this case, the Appellants argue that the County has so failed in its duty to reasonably maintain and repair Old A1A that it has effectively abandoned it, thereby depriving them of access to their property without compensation. This is a cognizable claim. We conclude that governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.

Id.

The County now asserts that the Fifth District’s decision directly and expressly conflicts with the very decisions on which that court relied. According to the County, decisions such as *Ecological Development* and *MacGibbon* actually stand for the proposition that the County has absolute discretion in determining whether to maintain its public roads dedicated to public use, and that its decisions in that regard are absolutely immune from suit. The County is wrong. The decision below is in full accord with established Florida law, including the

precedent on which it relied. As there is no express and direct conflict, this Court should decline review.

SUMMARY OF THE ARGUMENT

The County seeks review of the decision below based on a purported express and direct conflict with several decisions, many of which were expressly relied on by the Fifth District. The Fifth District correctly applied this Court's established precedent in holding: that the County has a duty to maintain its public roads; that the maintenance of the road is an operational level decision, not immune from suit; and that an inverse condemnation claim can be grounded in the County's failure to act in the face of a duty to so act. There is no conflict and this Court should decline review.

ARGUMENT

- I. The Fifth District's Decision Does Not Expressly And Directly Conflict With *Ecological Development*; Indeed, The Decision Is In Accord With Established Florida Precedent Recognizing A County's Continuous Duty To Keep Its Public Roads "In Good Order."

It has long been recognized that Florida's counties have a duty to repair and properly maintain their public roads:

Under our statutes the boards of county commissioners are given plenary power and authority over the location, building, repairing, and keeping in order the public roads in their respective counties, *and it is made one of their continuous duties so to locate, build, repair, and keep said roads in good order.*

MacGibbon, 84 So. at 91 (emphasis added); *see also Ecological Development*, 558

So. 2d at 1071; *Hillsborough County v. Highway Eng'g & Constr. Co., Inc.*, 199 So. 499, 503 (Fla. 1941).

In construing what is now section 125.01, Florida Statutes, (governing the “Powers and duties” of Florida’s counties), the Florida Supreme Court in *MacGibbon* held that a county’s power and authority over public roads includes a corresponding *duty* to “repair[] and keep said roads in good order.” 84 So. at 91. This holding was the basis of this Court’s decision that a county was authorized to use public funds to obtain materials to build roads. *Id.* at 91-92; *see also Hillsborough County*, 199 So. at 503 (relying on *MacGibbon* to hold that a county is authorized to pay for the paving of a street because it had a public duty to maintain public roads in “good order”).

The First District in *Ecological Development* relied on *MacGibbon* in affirming the scope of a county’s duty under Florida law to keep its public roads in good order. 558 So.2d at 1071. In *Ecological Development*, a subdivision developer sued the county after the county voted to abandon its obligation to maintain the public roads servicing the subdivision, while retaining its claim to the rights-of-way as county roads for public use. *Id.* at 1070. According to the county, “the roads were not properly built, causing considerable maintenance problems,” leading to the county’s decision not to maintain the public roads. *Id.*

Citing *MacGibbon*, the First District explicitly held that a county has a

continuous duty to repair its public roads and keep those roads in “good order.” *Id.* at 1071. As the court stated: “We have not found . . . any authority for a county, after acceptance of a dedication of a road for public use, to disclaim any responsibility for maintenance of that road, *except by the abandonment procedure set forth in section 336.10, Florida Statutes (1979).*” *Id.* at 1070-71 (emphasis added).

The county, therefore, exceeded its authority by refusing to maintain the public road and, at the same time, refusing to properly abandon the road pursuant to Chapter 336. The reference to the abandonment procedures in Section 336.10, Florida Statutes, is particularly significant because, if a county votes to vacate and abandon a public road under the statute, it “becomes liable for compensation to those whose right of access has been taken away.” *Pinellas County v. Austin*, 323 So. 2d 6, 8 (Fla. 2d DCA 1975).

Ecological Development and *MacGibbon* make it clear that a county has a duty not just to repair and maintain its public roads, but to keep its roads in “good order.” Certainly “good order” implies a level of maintenance and repair that would at least preserve the right of public access. This must be so because a property owner whose land abuts a public road has a right of access, which cannot be taken away without compensation. *Pinellas County*, 323 So. 2d at 8.

In full accord with these established principles, the Fifth District below held

that the County has a duty to reasonably maintain Old A1A as long as it is a public road dedicated to the public use. *Jordan*, 36 Fla. L. Weekly D1095. The Fifth District went on to recognize that, although the County cannot be required to maintain the road in a particular manner or at a particular level of accessibility, the County's discretion is not absolute. *Id.*

The court held that “[t]he County must provide a reasonable level of maintenance that affords meaningful access, unless or until the County formally abandons the road.” *Id.* This holding gives meaning to the County's duty to maintain its public roads “in good order.” *MacGibbon*, 84 So. at 91; *Hillsborough County*, 199 So. at 503; *Ecological Development*, 558 So. 2d at 1071. This holding likewise dovetails with established Florida law holding that a property owner whose land abuts a public road has a right of access that cannot be taken without just compensation. *Pinellas County*, 323 So. 2d at 8.

In short, the decision below properly applied established Florida law, and there is no express and direct conflict with either *MacGibbon* or *Ecological Development*—the decisions on which it relies. This Court should decline review.

II. In Holding That The County Is Not Immune From Liability Based On A De Facto Abandonment Of Its Public Road, The Fifth District's Decision Is In Accord With Established Florida Law.

The County continues to assert that its decisions with regard to the repair and maintenance of its public roads must be left to its absolute discretion and are

not subject to review in any manner. As argued in the above section, the County's position is contrary to established Florida law. Moreover, the decisions on which the County relies neither support its position nor present an express and direct conflict with the Fifth District's decision below.

The County asserts that the Fifth District's decision directly and expressly conflicts with this Court's decisions in *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982), and *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985). These cases merely stand for the proposition that a county is immune from *tort* liability when exercising its planning level discretion to *build or upgrade* capital facilities such as buildings or roads. On the other hand, these cases expressly recognize that *repair and maintenance* of existing improvements such as roads is an operational activity for which there is no immunity from tort liability. *Neilson*, 419 So. 2d at 1078; *Trianon*, 468 So. 2d at 921.

In fact, this Court explicitly held that, "without substantially interfering with the governing powers of the coordinate branches, *courts can require . . . the necessary and proper maintenance of existing improvements.*" *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1086 (Fla. 1982) (emphasis added); *see also Capo v. State Dep't of Transp.*, 642 So. 2d 37, 39 (Fla. 3d 1994) ("the duty to properly maintain roads arises at the operational level of government," and

sovereign immunity does not apply).

The County entirely ignores this distinction between the decision to build or upgrade a capital facility (planning level decision) and the decision to maintain a capital facility (operational level decision). To the extent the analogy to tort law is applicable here, this Court's established precedent makes clear that maintenance decisions regarding a public road are operational level decisions for which sovereign immunity is inapplicable. The Fifth District's decision below fully accords with that precedent.

The County does not cite or address this Court's *Collom* decision or the Third District's *Capo* decision. Instead, the County relies on a quote from the Second District's decision in *Gargano v. Lee County Bd. of County Com'rs*, 921 So. 2d 661, 667 (Fla. 2d DCA 2006), for its argument that even maintenance decisions are political questions to which sovereign immunity applies. In *Gargano*, a resident was seeking an injunction to require the county to use toll money for the maintenance of the particular bridge. *Id.*

Gargano did not involve inverse condemnation, and there was no allegation that the plaintiff's access was substantially diminished as a result of the County's failure to maintain its public road. Not only is *Gargano* legally and factually distinguishable, but to the extent *Gargano* conflicts with *Collom*, *Collom* was controlling below. This Court should decline review.

III. Florida Law Is In Accord With The Fifth District's Holding That An Inverse Condemnation Claim Can Be Maintained Against A Governmental Entity Based On Its Failure To Act In The Face Of A Duty To So Act.

Without much discussion, the County asserts that the Fifth District's decision expressly and directly conflicts with this Court's decisions in *Rubano v. DOT*, 656 So. 2d 1264 (Fla. 1995), and *Palm Beach County v Tessler*, 538 So. 2d 846 (Fla. 1989), and the First District's decision in *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA 2009). None of those decisions, however, had any occasion to address the issue of whether a governmental entity's failure to act in the face of the duty to act can result in takings claim; each of the inverse condemnation claims in those cases was based on a governmental entity's affirmative act. There cannot be an express and direct conflict where the cited decisions did not address the factual and legal situation before the Fifth District.

In any event, this Court's precedent accords with the Fifth District's decision. In reaching its holding, this Court in *Rubano* stated that, "where a government agency, by its conduct or activities, has effectively taken private property without a formal exercise of the power of eminent domain, a cause of action for inverse condemnation will lie." 656 So. 2d at 1266 (citing *Schick v. Fla. Dep't of Agriculture*, 504 So. 2d 1318, 1319 (Fla. 1st DCA 1987)).

The citation to *Schick* is significant because, there, a state agency was held liable in inverse condemnation for the *negligent* conduct of a nematode eradication

program which polluted private wells. 504 So. 2d at 1321. The definition of negligence under Florida law includes the failure to act in the face of a duty to act. *See, e.g.*, Fla. Std. Jury Instr. (Civ.) 401.4 (“Negligence is . . . failing to do something that a reasonably careful person would do under like circumstances.”).

This Court’s decision in *Bailey Drainage Dist. v. Stark*, 526 So. 2d 678, 680 (Fla. 1988), similarly supports the decision below. In *Bailey*, this Court held that “the failure to properly maintain an existing traffic control device was an operational decision and suit could be filed against the governmental entity.” *Id.* Governmental liability was premised on a failure to act in the face of a duty to act.

The Fifth District’s decision below fully accords with this precedent. There is no express and direct conflict and this Court should decline review.

CONCLUSION

Having demonstrated that no express and direct conflict exists in this case, it remains only to note that the County appears to argue that the Court should exercise its jurisdiction based on the purportedly “important issues” decided by the Fifth District. Not only has the County failed to invoke this Court’s discretionary jurisdiction based on an issue of great public importance, but, as explained above, the Fifth District’s decision is nothing more than a straightforward application of established precedent. Based on the foregoing, the Property Owners respectfully request that the Court decline review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to all Counsel and Parties on the Attached Service List this 21st day of July, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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