SUPREME COURT OF FLORIDA

CASE NO.:

ST. JOHNS COUNTY,

Petitioner,

v.

ROBERT & LINNIE JORDAN, et al.,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

L.T. CASE NOS: 5D09-2183; 5D09-4378 & 5D09-4379

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

St. Johns County invokes this Court's conflict jurisdiction to determine whether the County has a particular duty to maintain County roadways in a certain manner and, if so, whether the scope of that duty is a question to be determined by a judge or jury or by the County itself based on its plenary powers. St. Johns County also invokes this Court's conflict jurisdiction to determine whether governmental inaction can be the basis for a claim for inverse condemnation.

Respondents are owners of real property located in Summer Haven Beach, a subdivision located on a barrier island just south of the Matanzas Inlet. The only regular vehicular access to Summer Haven is by a county-owned road known as Old A1A. Since the time of initial construction of Old A1A several decades ago, natural forces including hurricanes and tropical storms have repeatedly resulted in breaches and erosion of Old A1A to the extent that portions of the road are now inaccessible to regular vehicular traffic. It is undisputed that at the time the County acquired title to Old A1A from the State of Florida in October 1979, a fully paved driving surface did not exist over the entire length of Old A1A due to storm and erosion damage before the date of acquisition, and that Old A1A had been repeatedly breached and damaged by the ocean throughout its history.

In 2005, Respondents brought suit against St. Johns County based on the County's alleged failure to maintain the road. They sought a declaration that the

County has a duty to maintain Old A1A so as to provide access to Respondents' respective homes (Count I), and also brought a claim for inverse condemnation based on diminished access to Summer Haven as a result of the County's alleged failure to maintain Old A1A (Count III). It is undisputed that in the five years preceding suit, the County had spent on Old A1A more than 25 times the County average annual maintenance cost per mile. The trial court entered summary judgment in favor of the County as to all Counts. The owners then appealed.

On May 20, 2011, the Fifth District Court of Appeal affirmed summary judgment in favor of the County with the exception of Counts I and III, which the Court reversed and remanded to the trial court with further instructions.

In reversing Count I, the Court held that the County "must provide a reasonable level of maintenance that affords meaningful access [to Respondents' properties] unless or until the County formally abandons the road." (Op. 5.) The Court further held that summary judgment was premature because disputed issues of material fact remain regarding "the level of road maintenance the County has provided and the level of maintenance it should have provided." (Op. 6.) In reversing Count III, the Court held for the first time in Florida, and in conflict with this Court and District Courts of Appeal, that "governmental inaction – in the face of an affirmative duty to act – can support a claim for inverse condemnation." (Op. 6.)

SUMMARY OF THE ARGUMENT

This Court has jurisdiction because the decision below conflicts with decisions of other District Courts of Appeal and of this Court.[1] The Fifth District's holding that "the County has a duty to reasonably maintain Old A1A so as to provide meaningful access" directly and expressly conflicts with *Ecological Development, Inc. v. Walton County*, 558 So. 2d 1069 (Fla. 1st DCA 1990).

The Fifth District's referral of issues regarding the appropriate level of road maintenance to the finder of fact also directly and expressly conflicts with the holdings of *Gargano v. Lee County Board of County Commissioners*, 921 So. 2d 661 (Fla. 2d DCA 2006), *Trianon Park Condominium Association v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) and *Department of Transportation v. Neilson*, 419 So. 2d 1071 (Fla. 1982), which collectively hold that decisions regarding maintenance of roads are political questions not to be decided by the courts.

The holding below that governmental inaction can support a claim for inverse condemnation is in direct conflict with *Rubano v. Department of Transportation*, 656 So. 2d 1264 (Fla. 1995), *Palm Beach County v. Tessler*, 538 So. 2d 846 (Fla. 1989), and *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA

[1] Petitioner believes the Fifth District's holding regarding inverse condemnation also invokes this Court's discretionary jurisdiction pursuant to Fla. R. Civ. P. 9.030(a)(2)(A)(ii) in that it expressly construes the Takings Clause found in Art. X, § 6, Fla. Const. **to provide, for the first time in Florida law, that inaction can support a claim for inverse condemnation**.

2009), all of which hold that a taking occurs when governmental action (and not inaction) causes a loss of access to one's property. This case necessitates this Court's discretionary review because it involves significant issues facing state and local governments that are capable of repetition and require definitive rulings from Florida's highest Court to eliminate the conflicts of law that currently exist.

ARGUMENT

I. This Court has Conflict Jurisdiction

This Court has jurisdiction to review the decision of the Fifth District pursuant to Art. V, § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv), because the Fifth District's opinion expressly and directly conflicts with multiple decisions of other District Courts of Appeal and this Court.

A. The decision below conflicts with *Ecological Development, Inc. v. Walton County*, 558 So. 2d 1069 (Fla. 1st DCA 1990) as to the level of maintenance required and whether someone other than the County, i.e. a judge or jury, can make the determination of the level of maintenance required.

In its opinion, the Fifth District relied upon *Ecological Development, Inc. v. Walton County*, 558 So. 2d 1069 (Fla. 1st DCA 1990) as support for its holding that the County has a duty to "reasonably maintain Old A1A so as to provide meaningful access." In *Ecological Development*, the First District held that the appellant development corporation was entitled to a narrow declaration that Walton County had no authority to place a public road in a "no maintenance"

status. *Id.* at 1072. As part of its Opinion, the First District stated:

> **[A] county is not obligated, nor can it be compelled, to perform or provide for any particular construction or maintenance, except such as it voluntarily assumes to do.** This is far removed, however, from the notion advanced by appellee that it can accept established roadways within the county, undertake to maintain the same, and later by resolution or other official action (short of abandonment) relieve itself of all duties with respect to maintenance of such roads.

Id. at 1071 (emphasis added).

In the opinion below, the Fifth District Court of Appeal stated the following:

> We hold that the County has a duty to reasonably maintain Old A1A as long as it is a road dedicated to the public use. We do not hold that the County has a 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.** (Op. 5, (emphasis added)).

The Fifth District's determination that the County's discretion as to the amount of maintenance on Old A1A is not absolute, as well as the Court's requirement that the County "provide a reasonable level of maintenance that affords meaningful access" directly conflicts with the holding of *Ecological Development* that "**a county is not obligated, nor can it be compelled**, to perform or provide for any particular construction or maintenance, except as it voluntarily assumes to do." 558 So. 2d at 1071 (emphasis added). The decision of the Fifth District requiring that the County provide maintenance that affords meaningful access also directly conflicts with the **plenary** authority recognized in *Ecological*

Development and *State ex. rel. White v. MacGibbon*, 84 So. 91 (Fla. 1920), that allows the County, and not the courts, to dictate the level of maintenance and accessibility necessary.

B. The decision below directly and expressly conflicts with *Gargano v. Lee County Bd. of County Comm'rs.*, 921 So. 2d 661 (Fla. 2d DCA 2006), *Dep't of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982), and *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) and allows the judicial branch to impermissibly inject itself into political decisions regarding the maintenance of roadways, thereby violating the separation of powers doctrine.

In *Gargano*, the Second District Court of Appeal held that:

> **Decisions concerning the maintenance of and need to construct roadways, bridges, and other similar services are political questions outside the purview of the courts.** *See, e.g., Partridge v. St. Lucie County*, 539 So. 2d 462 (Fla. 1989). Even in the context of tort law, Florida has never recognized a duty, much less waived sovereign immunity, concerning such decisions. *See Trianon Park Condo. Ass'n. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) … we agree with the trial court that the Third Amended Complaint did not state a cause of action entitling Ms. Gargano or any other resident of Sanibel Island to any judicial review of the County Commission's decisions regarding maintenance or repair of the Sanibel Bridge.

921 So. 2d at 667 (emphasis added).

In *Neilson*, this Court held:

> The decision to build or change a road and all determinations inherent in such a decision are of the judgmental, planning level type. To hold otherwise would supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine.

419 So. 2d at 1077. In quashing the decision of the Second District, the *Neilson* court further stated:

> In effect, the district court held that once the decision is made to have roads intersect, it is for the jury to determine whether the road could have been designed better or whether traffic control devices are necessary. We disagree. *Id*. at 1074.

As with the Second District's opinion that was quashed by this Court's decision in *Neilson*, the Fifth District, in rendering the decision below, incorrectly concluded that having established the County has a duty to maintain Old A1A, it is for a jury or judge to resolve disputed issues regarding the level of road maintenance the County should have provided. The decision below directly and expressly conflicts with *Neilson* because it allows the judicial branch to substitute its judgment for the judgment of the County's elected officials in funding and maintenance decisions, as Old A1A faces continuing assaults from the ocean and recurring storms.

In 1985, this Court reiterated its *Neilson* holding, stating in *Trianon Park*:

> A governmental entity's decision not to build or modernize a particular improvement is a discretionary judgmental function **with which we have held that the Courts cannot interfere.**

468 So. 2d 920 (emphasis added).

The Fifth District's decision requiring the County to provide a reasonable level of maintenance that affords "meaningful access," even in the face of hurricanes and tropical storms, violates the separation of powers doctrine and

allows the judicial branch to substitute its judgment for that of the County as to the level of maintenance needed on Old A1A. That decision expressly and directly conflicts with *Gargano*, *Neilson* and *Trianon Park* and requires that the Court exercise its discretionary jurisdiction to resolve these conflicts.

C. The holding below that governmental inaction can support a claim for inverse condemnation conflicts with *Rubano v. Dep't of Transp.*, 656 So. 2d 1264 (Fla. 1995), *Palm Beach County v. Tessler*, 538 So. 2d 846 (Fla. 1989), and *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA 2009).

In reversing Count III of the Fourth Amended Complaint, this Court held that "governmental inaction – in the face of an affirmative duty to act – can support a claim for inverse condemnation." (Op. 6.) No Florida case has ever held that governmental inaction resulted in an inverse condemnation "taking." *See, e.g.*, *Rubano v. Dep't of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995) (stating that a taking may occur when governmental **action** causes a loss of access to one's property even though there is no physical appropriation of the property itself) and *Drake v. Walton County*, 6 So. 3d 717, 719 (Fla. 1st DCA 2009) (stating that as a matter of law the County's action of diverting water across property owner's land constituted a taking of private property for a public purpose, but that the case would have been in an entirely different posture if the hurricane itself had caused the flooding).

Even the case cited by the Fifth District in support of its holding requires

governmental action as a prerequisite to a claim for inverse condemnation. *See Palm Beach County v. Tessler*, 538 So. 2d 846, 849 (Fla. 1989) ("There is a right to be compensated through inverse condemnation when governmental **action** causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself.") (emphasis added).

The decision below finding that governmental **inaction** can support a claim for inverse condemnation is in direct conflict with *Rubano*, *Drake and Tessler*, which hold that a taking occurs when governmental action (as opposed to inaction) causes a loss of access to one's property.

II. This Court Should Exercise its Discretion to Review this Case

This Court should exercise its discretion to review this case because the decision construes and hugely expands the scope of the Florida constitutional "takings" provision, and the effects will be far reaching. As a result of the decision below, the State, all 67 counties, and all municipalities in Florida, will now be required to look to the courts to determine the level of maintenance that will provide "meaningful access" to residents' homes, whether or not the courts' determinations are in conflict with the decisions of elected officials responsible for the wise stewardship of taxpayer dollars. It is virtually certain that courts charged with this task will have varying opinions as to the appropriate level of maintenance or level of accessibility. The Fifth District Court's requirement that trial courts

determine whether roads have been reasonably maintained so as to allow for meaningful access allows for imposition of different standards of road maintenance, not only in different counties and municipalities throughout the State, but also within the same county or municipality. For example, a county found by one court to have provided a reasonable level of maintenance on a specific county road could provide the same maintenance to another road, only to have another court find that the county did not reasonably maintain the second road.

The need for this Court's discretionary review is magnified by the Court's reversal of summary judgment in Count III, in that it subjects all Florida governmental entities, to inverse condemnation lawsuits for alleged failures to properly maintain the many thousands of miles of Florida roadways and other public infrastructure, even if natural forces make it unreasonably difficult, or virtually impossible to maintain them to a certain level, and even in the face of ongoing financial constraints and political decisions to reduce public funding. This construction of the Takings Clause of the Florida Constitution as well as the repeated decisions regarding road maintenance to be made by state and local governments are important issues that necessitate this Court's discretionary review.

CONCLUSION

For the foregoing reasons, this Court has conflict jurisdiction and should exercise its discretion to grant review of this case.

Respectfully submitted this 27th day of June, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that a true and correct copy of Petitioner's Brief on Jurisdiction has been furnished via U. S. Mail this 27th day of June, 2011 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner's Brief on Jurisdiction was computer-generated using Times New Roman 14-point font and hereby complies with the font standards as required by Fla. R. App. P. 9.210 for computer-generated briefs.

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