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L.T. Case(s): 2D10-3781, 05-CA-00451

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## INTRODUCTION

Simply put, the instant case involves a municipality's common law and statutory right to require an electric utility to move its equipment from areas adjacent to a roadway, when the municipality deems it necessary in order to complete a road expansion or improvement project, and to require the subject utility to pay the costs of such relocation.

## STATEMENT OF THE CASE AND FACTS

After reviewing the Statement of the Case and Facts in Lee County Electric Cooperative, Inc.'s ("LCEC") Jurisdictional Brief ("LCEC's Brief" or simply "Brief") to this Court, the City of Cape Coral ("the City") exercises its option to restate the case and facts, because, in its Statement, LCEC grossly misstates the ruling of the Second District Court of Appeal ("2<sup>nd</sup> DCA").<sup>1</sup>

This Court need look no further than the 2<sup>nd</sup> DCA's recitation of the case and facts in its opinion. The opinion begins with the dispute in a nutshell, as follows:

Several years ago the City of Cape Coral began a construction project to rework an intersection. The plan required the expansion of an existing road into a public utility easement where Lee County Electric Cooperative ("LCEC") had placed its electric lines. Thus, LCEC was forced to relocate its lines to another public utility easement. The parties disagreed about which of them was responsible for shouldering the relocation expense, but they agreed that the City would file a declaratory judgment action to resolve the dispute (A. 1-2).

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<sup>1</sup> For the purposes of this brief, the City will use the appendix filed with LCEC's Brief containing the 2<sup>nd</sup> DCA's ruling.

The positions of the parties are well stated in the 2<sup>nd</sup> DCA's further historical background, as follows:

The public utility easement containing LCEC's electric lines came into being when Cape Coral was being planned in the 1960s. The developer's plats for the new community included a six-foot easement at the foot of virtually every property by stating: "The owners of this property do hereby dedicate EASEMENTS along each boundary of each home site for County drainage purposes, and for Public Utilities, said easements not to exceed six feet each side of said boundaries, unless otherwise shown." Before the subdivisions were built, LCEC began installing its electric lines and other equipment in these public utility easements (A. 2).

After Cape Coral was incorporated, LCEC and the City entered into a franchise agreement that granted LCEC the "right, privilege and franchise to construct, maintain and operate an electric utility in, over, upon, under and across present and future streets, alleys, avenues, easements for public utilities, highways, bridges, and other public places of the City of Cape Coral, Florida." In exchange, LCEC agreed to pay the City three percent of its revenues. The agreement was amended in 1986, but for our purposes the material terms were unchanged (A. 2-3).

The 2<sup>nd</sup> DCA then stated that "the agreement is the source of LCEC's right to continue using the public utility easements (A. 3)." The 2<sup>nd</sup> DCA then concluded its introduction of the facts and positions of the parties as follows:

As a preliminary matter, we note that this case does not involve the appropriation or destruction of LCEC's physical property, such as electric poles or lines. What has been taken, according to LCEC, is its right to run electric lines through a specific public utility easement.

LCEC maintains that this was a compensable property interest and that the City took it without paying compensation, contrary to the Fifth Amendment to the United States Constitution (as applied to the states by the Fourteenth Amendment) and article X, section 6, of the Florida Constitution (A. 3-4).

### STANDARDS OF REVIEW

In order to prevail at this jurisdictional stage of review by this Court, LCEC must show that the 2<sup>nd</sup> DCA's ruling "expressly and directly conflict[s] with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(iv); Fla. Const. Art. 5 § 3(b)(3).

As the Court is well aware, the Court's exercise of its discretionary jurisdiction (or "conflict jurisdiction") is limited in several ways. For example, the Court has found, "...[T]his Court's discretionary review jurisdiction can be invoked only from a district court decision 'that expressly addresses a question of law within the four corners of the opinion itself' by 'contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests.' [Citation omitted.] [Emphasis added.]" *Persaud v. State*, 838 So. 2d 529 (Fla. 2003).

Stated similarly, the Court has found, "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). "Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Id.* See, also,

*J.C. v. State*, 988 So. 2d 1202 (Fla. 3d DCA 2008) (“[I]t is neither appropriate nor proper for us to review a record to find conflict ...; the opinion itself must directly and expressly, on its face, conflict with another opinion.”). “The constitutional objectives can be achieved and the creation of the district courts justified only if we recognize that the primary function of this Court, particularly in the area of ‘conflicts’ here involved, is to stabilize the law by a review of decisions which form patently irreconcilable precedents. [Emphasis added.]” *Florida Power & Light Co. v. Bell*, 113 So. 2d 697 (Fla. 1959). “In other words, inherent or so called ‘implied’ conflict may no longer serve as a basis for this Court’s jurisdiction.” *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986).

### SUMMARY OF THE ARGUMENT

The cases cited by LCEC as supposedly in “conflict” are irrelevant and unrelated to the instant case. LCEC resorts to conclusory statements to try to show conflict and contradiction. In addition, to the extent there is any conflict, the alleged conflict can only be inferred from references to the record below. Therefore, the conflict does not meet the standard cited above in *Reaves*. In fact, LCEC has gone well outside the four corners of the 2<sup>nd</sup> DCA’s opinion in order to “manufacture” conflicts, and even then, the “conflicts” are far from express or direct. Also, LCEC ignores the legal force and effect of long-standing case and



statutory law, upon which the 2<sup>nd</sup> DCA relied in its opinion. As such, this Court lacks jurisdiction, and review must be denied.

### ARGUMENT

#### I. Why the instant case is not in conflict with *City of Jacksonville v. Shaffer*

In LCEC's Jurisdictional Brief ("LCEC's Brief") filed with this Court, LCEC asserts, *inter alia*, that the 2<sup>nd</sup> DCA's ruling conflicts with *City of Jacksonville v. Shaffer*, 144 So. 888 (Fla. 1932). Because the conflict, if there is any, must come from the four corners of the 2<sup>nd</sup> DCA opinion, the search for the existence (or non-existence) of conflict must begin (and end) with the opinion.

The 2<sup>nd</sup> DCA does not mention the *Shaffer* case, for good reason. The very beginning of the *Shaffer* opinion starts with this statement: "This was a condemnation suit brought by the city of Jacksonville to acquire by eminent domain a nonexclusive easement in the streets and alleys of a subdivision..." 144 So. at 889. The 2<sup>nd</sup> DCA's opinion is replete with a careful legal analysis of why LCEC does not have a compensable property interest in a public utility easement (A. 3-8). There is nowhere in LCEC's Brief or in the 2<sup>nd</sup> DCA's opinion to support a claim that the City was attempting to "condemn" any property by eminent domain or otherwise for purpose of obtaining a "nonexclusive easement." *Shaffer's* ultimate holding was the City of Jacksonville could not displace pre-existing water lines with its own water lines without compensating the owner of

the existing lines, particularly where the owner held exclusive rights. 144 So. at 891. In the instant case, the 2<sup>nd</sup> DCA fully understood that the case simply involved relocation costs for the movement of utilities from one public utility easement to an adjacent public utility easement (A. 1-2). Therefore, contrary to LCEC's claims, the instant case does not conflict with *Shaffer*.<sup>2</sup>

## II. Why the instant case is not in conflict with *Glessner v. Duval County*

LCEC also argues that the 2<sup>nd</sup> DCA's ruling is in conflict with *Glessner v. Duval County*, 203 So. 2d 330 (Fla. 1<sup>st</sup> DCA 1967). As in *Shaffer*, *Glessner* involved eminent domain proceedings. Again, there is no mention of *Glessner* in the 2<sup>nd</sup> DCA's ruling, because the case is inapplicable to the instant case. The court summarized the issue in the *Glessner* case at the beginning of the opinion: "The sole question...presented is whether the said defendant-owner may assert a claim in the eminent domain proceedings for damages to his business operated on lands adjacent to his said perpetual easement for access which was taken in these proceedings." 203 So. 2d at 331.

Again, LCEC's Brief does not assert that the City was, by eminent domain or otherwise, attempting to supplant LCEC's property rights in a public utility

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<sup>2</sup> In fact, the court in *Gulf Properties of Alabama, Inc. v. Southern Bell Tel. & Tel. Co.*, 346 So. 2d 1085 (Fla. 1<sup>st</sup> DCA 1977), refused to follow *Shaffer* on the issue of the exclusivity of property rights and the need to compensate utilities for any action which affects such rights. As such, *Gulf Properties* actually supports the City's position in some ways. Therefore, *Shaffer* is hardly a good example of precedent forming the basis for a conflicts challenge in this case.

easement merely by widening a road. The 2<sup>nd</sup> DCA's opinion makes clear the point that this dispute comes down to who pays for relocation costs, not whether the City may "take" LCEC's public utility easement without compensation (A. 3-8). There is no indication in LCEC's Brief or in the 2<sup>nd</sup> DCA's ruling that the City sought any easement in conflict with and contrary to LCEC's property interests. Instead, there is every indication that the City found it necessary to request the movement of the subject utilities to a location immediately adjacent to the existing public utility easement, thereby creating another easement for the benefit of LCEC and other public utilities (A. 7). Furthermore, the City provided this easement at its own cost (A. 6). Therefore, as in *Shaffer*, the instant case is inapposite and unrelated to *Glessner*, and *Glessner* should not be found to form the basis for any conflict with the instant case.

III. Why the instant case is not in conflict with *Division of Administration, Dept. of Transp. v. Ely*

Finally, LCEC believes the 2<sup>nd</sup> DCA's ruling conflicts with *Division of Administration, Dept. of Transp. v. Ely*, 351 So. 2d 66 (Fla. 3d DCA 1977), *reh. den.* This perhaps is the most confusing of LCEC's comparisons between the instant case and prior court decisions. Certainly, the 2<sup>nd</sup> DCA had no reason to mention it in its ruling. *Ely* involved an eminent domain proceeding, once again, contrary to the instant case. 351 So. 2d at 67.

The *Ely* court was faced with this unrelated question: Does a service and

easement agreement held by a private company to provide water and sewer service to owners of land create a property right which is compensable in an eminent domain proceeding? *Id.* at 68. The court held “[d]amages to a business located on land appropriated in an eminent domain proceeding do not constitute part of the constitutionally protected right of just compensation for the public taking of private land and are only compensable if allowed by statute.” *Id.*

If the City could identify any relation *Ely* has to the instant case, it might be able to argue why the cases do not conflict. The City, however, cannot find any plausible relationship between the cases; it is mystifying why LCEC even considered citing to it.

The instant case is a dispute between a city and a utility over the movement of equipment from one public easement to another (A. 1-2). The City did not commit any taking, despite LCEC’s biblical references to the contrary (A. 7-8). Brief, p. 7. The City did not condemn anything, through eminent domain or otherwise (A. 7). The City merely exercised its powers under case law and statute (A. 8-12). Simply stated, *Ely* is in a different realm of law.<sup>3</sup>

#### IV. Why this Court lacks discretionary jurisdiction over this case

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<sup>3</sup> Similar to *Shaffer*, *Ely* is an unreliable source for a conflicts challenge. The court in *K.E. Morris Alignment Service, Inc. v. Tampa-Hillsborough County Expressway Authority*, 414 So. 2d 299 (Fla. 2d DCA 1982), declined to follow *Ely* on the issue of business damages. Then, *K.E. Morris* was quashed by this Court in *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So. 2d 926 (Fla. 1983), *reh. den.* (1984) on that same issue.

The case involves a very particular project with a direct and substantial benefit to the public (A. 9). It involves the temporary, although admittedly inconvenient, impact on a public easement to achieve the public benefit (A. 12).

Undoubtedly, the project falls squarely under the power and authority of the City to complete its work at the cost of the utility, according to: (1) more than a century of directly applicable case law (particularly, *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U.S. 453 (1905), *Grand Trunk Western R. Co. v. City of South Bend*, 227 U.S. 544 (1913), *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia*, 464 U.S. 30 (1983), and *Anderson v. Fuller*, 41 So. 684 (Fla. 1906)); (2) learned and time-honored treatises (particularly, 4A *Nichols on Eminent Domain*, § 15.22 (J. Sackman rev. 3d ed. 1970), 12 E. McQuillin, *The Law of Municipal Corporations*, § 34.74a (3d ed. 1970) (now numbered as § 34.91), and 12 E. McQuillin, *Mun. Corp.*, § 34.92 (rev. 3d ed. 2010)); (3) an opinion of the Florida Attorney General (Op. Att’y Gen. Fla. 97-36 (1997)); (4) the franchise agreement by which the City allows LCEC to operate within the City’s public utility easements); and, perhaps most importantly, (5) State statute (particularly, § 337.403, Fla. Stat.) (A. 4-5, 8-12).

Within the four corners of the 2<sup>nd</sup> DCA’s opinion, it is abundantly clear that government has the sole obligation to serve the public and to provide critical

improvements to infrastructure (A. 4). Government cannot perform this obligation in a vacuum, where no other private or public interests are affected (A. 5). Government must rely on the cooperation and patience of the public and, yes, sometimes private interests are affected financially (A. 8). Yet, the vast majority of courts faced with this particular matter of government working in the public interest, in the way in which the City worked in this case, have found that the public interest prevails, despite the expectation that a public utility may need to pay the costs of that work (A. 8-12).

More than *Shaffer*, *Glassner*, *Ely*, or any of the other cases LCEC has cited in its Brief (none of which bear much, if any, legal resemblance to the instant case), the power and authority granted to local government through the courts and the legislature, particularly in the limited scope of moving utility equipment between public easements so a road may be widened, must be upheld.

### CONCLUSION

For the aforementioned reasons, the City respectfully requests that the Court deny LCEC's appeal based on review of the Court's discretionary jurisdiction.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that true and accurate copies of the foregoing were served on counsel of record for Appellant by electronic mail on this 5<sup>th</sup> day of August, 2014, at the following addresses:

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I certify that this Brief complies with the font requirements of Fla. R. App. P.  
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