IN THE SUPREME COURT
STATE OF FLORIDA

JOYCE G. MAINER, etc.
et al.,

Petitioners,

vs.

CANAL AUTHORITY OF THE
STATE OF FLORIDA, a body
corporate under the laws
of the State of Florida,
etc.

Respondent.

CASE NOS. 64,689
through 64,697

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The respondent, Canal Authority of the State of Florida, does not take issue with petitioners' statement of the case and facts except for this qualification. On pages 2 and 3 of their brief on jurisdiction, petitioners attribute certain findings of fact and conclusions of law to the trial court. The Canal Authority does not concede that such findings and conclusions were correct or supported by the evidence.

ARGUMENT ON JURISDICTION

I. THE DECISION BELOW DOES NOT CONFLICT WITH A PREVIOUS DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Petitioners argue that the Supreme Court has jurisdiction pursuant to Article V, section 3(b)(3), Florida Constitution, because the decision below conflicts expressly and directly with Canal Authority v. Ocala Mfg. Co., 365 So.2d 1060 (Fla. 1st DCA 1979), and Carlor Co., Inc. v. City of Miami, 62 So.2d 897 (Fla. 1953). A reading of these cases reveals no conflict whatsoever with the Fifth District's decision in Canal Authority of the State of Florida v. Mainer, ___ So.2d ___ (Fla. 5th DCA 1983).

In seeking to establish conflict jurisdiction, petitioners unfortunately resort to misstatement of the First District's holding in the Ocala Mfg. Co. case. On page 7 of their brief, petitioners state:

> The District Court of Appeal, First District, in the Ocala Mfg. Co. case, supra, held that where land was conveyed to the State Canal Authority upon the representation that adjoining land would be enhanced in value by the creation of a pool and construction of a canal and these were never completed, recission of contract and reconveyance of property was [sic] in order. (e.s.)

This is patently wrong. The quotation from petitioners' brief may summarize the opinion of the trial court (which is set forth in Ocala Mfg. Co.), but the First District's decision

neither adopted the opinion nor affirmed its reasoning. Rather, the court stated:

> Several questions are presented on this appeal by the Canal Authority and its supporting amicus, the Governor. Yet, from the appearance of the 46-page transcript of the final hearing before a trial judge who theretofore was unfamiliar with the case, the Canal Authority assumed its present adversary position only after the final judgment was entered. On several of the questions now extensively briefed by the Canal Authority and its supporting amicus, the Canal Authority was acquiescent or silent before the trial court. It is inappropriate that we disturb a judgment rendered in those circumstances. 365 So.2d 1062 (e.s.)

In this language the First District could not have held more clearly that it was compelled to affirm the judgment appealed because the Canal Authority did not contest the case at trial. The mere recitation of the grounds of the trial court's opinion does not create a jurisdictional conflict with the holding of the Fifth District in Mainer even if at variance. It is the rulings of the district courts which must conflict.

Building upon this distortion, petitioners further assert that the same essential facts that proved commission of constructive fraud to the First District in Ocala Mfg. Co. were rejected as such by the Fifth District in Mainer. Again, this ignores the fact that the First District did not affirm the merits of the trial court judgment in Ocala Mfg. Co. Moreover, as to the nine cases for which review is here sought, petitioners never alleged fraud or attempted to prove it. In fact, fraud is

not a basis for any of the trial court judgments (see pps. A-5 et seq., Petitioner's Appendix). Petitioners' statement of the case and facts (Brief, pps. 2,3) does not recite fraud as a basis of any trial court judgment. Fraud is mentioned in a passing way only in one.[1] The Fifth District's opinion in Mainer does not discuss constructive fraud, the reason being that petitioners never advanced an argument based on fraud until they reached the doorstep of the Supreme Court. Jurisdictional conflict cannot exist on the basis of arguments and rulings never made.

As an alternative interpretation of the First District's opinion in Ocala Mfg. Co., petitioners assert the First District held that failure of consideration or impossibility of performance required reconveyance of Canal Authority property. Once again, those were theories of the trial court, not the First District. The First District held that it could not disturb a final judgment in which the issues had not been contested at trial and were thus not preserved for appeal.[2]

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[1]In the Hasty-Greene case, property was donated to the Canal Authority in the vicinity of Rodman Pool. The pool was constructed and exists. The trial court found that failure to complete the canal project deprived plaintiff of benefits to remaining lands and unjustly enriched the Canal Authority such "constituting a constructive fraud." (Petitioners' Appendix, p. 68 ¶19) Failure of consideration, without more, has never been equated with fraud. Hinzelin v. Bailly, 155 Fla. 837, 22 So.2d 43 (1945). The trial court found no misrepresentation or other element of fraud in Hasty-Greene.

[2]The Fifth District perceived the rather obvious basis of the Ocala Mfg. Co. opinion in its ruling in the Canal Authority v. Harbond, 433 So.2d 1345 (Fla. 5th DCA 1983).

Turning next to the case of Carlor Co., Inc. v. City of Miami, 62 So.2d 897 (Fla. 1953), petitioners assert the Fifth District mistakenly relied on it because the cases at bar are based on "materially different facts." Petitioners contend the facts in Carlor are these:

1. Carlor involved a total taking of the condemnee's land as distinguished from the partial takings in the cases at bar.

2. The condemnor had the power to use the land taken for other purposes.

To be blunt, the "materially different facts" of Carlor are a product of petitioners' imagination. First, Carlor simply does not state whether the taking was partial or total. Second, the opinion does not discuss the source or scope of the City's power to condemn land for airport purposes. Whether it derived from a general power or a special and limited grant is a matter of speculation and conjecture at best.

What petitioners willfully overlook in arguing the inapplicability of Carlor is that the decision rests on principles of res judicata. As this court stated in Carlor:

> It is elementary that a condemnation judgment or award cannot be collaterally attacked except in cases of fraud or where it is void as for want of jurisdiction. As to such matters, res adjudicata applies. 62 So.2d 900 (e.s.)

Even if there were a basis for concluding the taking in Carlor was total rather than partial, that would not vitiate the

Fifth District's reliance on the decision. Carlor clearly holds that questions of the necessity for the taking, the quantity of land, compensation, benefits to land not taken etc. are decided in the original condemnation proceeding. See Carlor at 62 So.2d 901.

Carlor is also explicit on the unqualified right of the condemnor to maintain ownership of land taken in fee simple:

> It is likewise established law that there is no reversion where the fee simple title is taken and there is either a failure to use or a discontinuance of the use which compelled the taking. 62 So.2d at 900.

It matters not that the lands in question were taken for use in connection with the Cross-Florida Barge Canal just as the lands at issue in Carlor were taken for airport purposes. The Canal Authority is statutorily authorized to take and hold lands for other purposes including water management and flood control. See section 374.051(2), Fla. Stat. Moreover, under Chapter 374, Fla. Stat., the Canal Authority is no more than a corporate agent of the State of Florida. The state has the right to decide the ultimate disposition of Canal Authority lands if the project is legally terminated by Congress. With respect to the lands here in question, the legislature has directed that they be retained in public ownership for environmental, recreational and water

management purposes. See specifically section 253.781, Fla. Stat. See generally Chapter 79-167, Laws of Florida.[3]

The Fifth District's opinion in Mainer, supra, allowing the state to retain ownership of lands taken in fee simple, cannot conflict with Carlor no matter what sort of gloss is put on petitioner's imaginary "factual distinctions." As the Supreme Court noted in Carlor:

> . . . it is the duty of public officials to build and plan not only for the present but for the foreseeable future. . . . The hands of public officials should not be tied to the immediate neccessities of the present but they should be permitted, within reasonable limitations, to contemplate and plan for the future. 62 So.2d at 902,903.

The state is entitled to use the land in question for other purposes as Carlor clearly indicates, and petitioners' attempt to "tie the hands" of public officials has had all the judicial consideration to which it is entitled.

In a last gasp, petitioners Gay and Mainer (originally contested fee simple condemnations cases) contend they received

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[3]The Cross Florida Barge Canal is a federally authorized project and until it is legally terminated by Congress the state is bound by the applicable federal law. Canal Authority v. Ocala Mfg., etc., 332 So.2d 321, 324 (Fla. 1976). When the project is deauthorized, all fee titles vest in the Board of Trustees of the Internal Improvement Fund. See §374.001(2), Fla. Stat. (effective upon deauthorization). The lands in question may be transferred to the federal government for inclusion in the Ocala National Forest. See §253.781, Fla. Stat. (effective upon deauthorization).

the grant of a "right of access" to Eureka Pool as "additional consideration for their lands." (Petitioner's Brief at p. 10). Such a right of access is not consideration for the property taken because under section 73.071, Fla. Stat., condemnees are paid the full monetary value of the land actually taken. The access from remaining lands is gratuitous. This being so, the failure to construct Eureka Pool does not mean petitioners lost anything to which they were originally entitled as compensation. Moreover, even if such grant were consideration, the Fifth District's opinion cites ample authority to the effect that failure of consideration (which could be at most only partial) is no basis for revesting title absent proof of fraud. Nor is it, under Carlor, a basis for collaterally attacking a final judgment in condemnation. Tellingly, petitioners' argument on this point cites no authority with which the Fifth District's opinion conflicts and, hence, presents no basis for Supreme Court jurisdiction.

CONCLUSION

The Court should deny jurisdiction because no basis for it has been shown.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles R. Forman, Post Office Box 2944, Ocala, Florida 32678; and C. Ray Greene, 2600 Gulf Life Tower, Jacksonville, Florida 32207, this 26th day of January, 1984.

Louis F. Hubener
LOUIS F. HUBENER