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CLERK, SUPREME COURT

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IN THE SUPREME COURT
STATE OF FLORIDA

JOYCE G. MAINER, etc.
et al.,

Petitioners,

vs.

CASE NOS. 64,689
through 64,697

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

Respondent.

TO REVIEW DECISION OF
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
DOCKET NOS. 82-817, 82-818, 82-819, 82-821
82-823, 82-824, 82-825, 82-826 and 82-827

CORRECTED BRIEF OF PETITIONERS ON THE MERITS

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PRELIMINARY STATEMENT

The respondent, Canal Authority of the State of Florida, was the defendant in the trial court and is referred to in this brief as the "Canal Authority". The petitioners were plaintiffs in the trial court and are referred to individually by the last names of the plaintiffs or by the corporate names of the plaintiffs, e.g., Mainer, Hodges, Ocala Manufacturing, Astor West.

The following reference symbols are used:

[R] -- refers to the record.

[TR] -- refers to the transcript of the trial held
on December 17 and 18, 1981.

[Pl. Ex.] -- refers to an exhibit of the plaintiffs.

[Def. Ex.] -- refers to an exhibit of the defendant.

[A] -- refers to petitioners' Appendix to their
jurisdictional brief.

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STATEMENT OF THE CASE AND FACTS

The nine cases addressed in this brief all sought reacquisition of certain lands which had been taken by the Canal Authority in the late 1960's and early 1970's for the construction of the Cross-Florida Barge Canal. The cases which this Court has ordered consolidated on appeal are: (1) Joyce G. Mainer, etc., et ux. v. Canal Authority of the State of Florida, Case No. 64,689; (2) Walter R. Berman, etc. v. Canal Authority of the State of Florida, Case No. 64,690; (3) Francis S. Gay, et al. v. Canal Authority of the State of Florida, Case No. 64,691; (4) Kenneth T. Hodges, et ux. v. Canal Authority of the State of Florida, Case No. 64,692; (5) Silver Springs Shores, Inc. v. Canal Authority of the State of Florida, Case No. 64,693; (6) John H. Couse, et ux. v. Canal Authority of the State of Florida, Case No. 64,694; (7) Astor West, Inc. v. Canal Authority of the State of Florida, Case No. 64,695; (8) Hasty-Greene Investments, Inc. v. Canal Authority of the State of Florida, Case No. 64,696; and (9) James J. Griffitts, et ux. v. Canal Authority of the State of Florida, Case No. 64,697. Two related and consolidated final judgments were affirmed by the district court and are not a part of this appeal.¹

¹Hasty-Green Investments, Inc. v. Canal Authority of the State of Florida, Case No. 82-822; and Ocala Manufacturing Company v. Canal Authority of the State of Florida, Case No. 82-820.

All eleven cases were consolidated for the purpose of trial. The trial court entered a final judgment in each case ordering the Canal Authority to reconvey the subject lands to the petitioners. Thereafter, the Canal Authority filed a notice of appeal in each case to the District Court of Appeal of the State of Florida, Fifth District.

The district court of appeal consolidated the eleven cases on appeal. Based on the evidence reviewed the district court upheld the trial court's finding that the authority's plans to construct the canal project had been abandoned, but disagreed with the trial court's application of this finding to the law in each case, Canal Authority of State v. Mainer, 440 So.2d 1305, 1306 (Fla. 5th DCA 1983) (A 1-4), the easements involved in the two cases not appealed from were held to have been extinguished, with all rights reverting to the fee owners, Id. at 1300. The district court reached a different result regarding the nine cases before this court on appeal. It was held that the interest held by the Canal Authority in each of these cases was a "fee simple without any condition or reservation," Id. at 1306. On the basis of Carlors Company, Inc. v. City of Miami, 62 So.2d 89 (Fla. 1953) the final judgments of the circuit court were reversed and the Canal Authority was permitted to retain the petitioners' lands, Id. at 1306.

Petitioners herein desire a reversal of the decision of the district court of appeal and an affirmance of the final judgments of the trial court permitting them to reacquire interests in certain lands, the details of which are more particularly set forth infra.² Generally, the cases fall into four categories as follows:

1. Contested Condemnation: The former landowners seek to reacquire land to which the Canal Authority acquired fee simple title after contested condemnation proceedings. These include Silver Springs Shores, Inc., Couse, Gay, Mainer, and Berman.

2. Settlement After Institution of Condemnation Proceedings: In two cases, Astor West and Griffitts, the former landowners and the Canal Authority negotiated a purchase by which the Authority acquired fee simple title. The settlements were reached after the filing of the condemnation suit.

3. Negotiated Conveyance in Lieu of Condemnation: The former landowner, Hodges, seeks to reacquire land which the Canal Authority purchased in fee simple pursuant to negotiations in lieu of and under threat of condemnation.

4. Donation: The former landowner, Hasty-Greene, Inc., seeks to reacquire title to land which it donated in

² Most of the important facts of each case were agreed to by pretrial stipulation; Mainer R-25; Berman R-18; Gay R-37; Hodges R-25; Hasty-Greene R-31; Silver Springs R-159; Couse R-27; Astor West R-33; and Griffitts R-34.

fee simple to the Canal Authority in lieu of and under threat of condemnation.

The petitioners' grounds for reconveyance were frustration of purpose, the abandonment of the project, and the failure of their remaining lands to benefit by an increase in value attendant to completion of the project.

In the various final judgments, the trial court found that in each case the subject lands have not been used for canal project purposes and there is no present intention to use the subject lands for canal project purposes; the plans of the Canal Authority to construct the canal project have been frustrated and abandoned; there is no valid purpose for the canal authority to retain the subject property; the canal project construction has been terminated and abandoned; the Canal Authority, at the time of acquisition of the subject land, had represented to petitioners that their remaining lands would be "enhanced" by the completion of the project, and such enhancement was "considered" by the petitioners; and, therefore, a major part of the "consideration" for the acquisition has failed since the benefits of completion have not materialized (A 5-78). In addition, in Silver Springs Shores and Hodges, the trial court made the finding in paragraphs 14 and 18 that the

plans for the construction of the Eureka Pool have been terminated and abandoned (A 22-39).

Findings virtually the same as those above are set out in the Gay, Mainer and Berman final judgments in paragraphs 6, 14, 15, 18, 21, 22 and 23 (A 5-21, 40-49). These judgments also find that the need for the property in question was tied directly to the construction and flooding of the Eureka Pool and that such construction has been terminated and abandoned.

Paragraph 5 of the Gay and Mainer final judgments find that the fee taken in those cases was subject to the express reservation "...to the owners, their heirs, successors, grantees and assigns the right of access to the water's edge of the pool area from the owners' remaining lands..." (A 6, 14), (e.s.)

The trial court found in each final judgment that completion of the canal project as originally planned would have "enhanced" the value of each petitioner's remaining lands and concluded, as a matter of law, that without such enhancement there was a failure of consideration (A 5-78).

For instance, no one, including the Canal Authority's original appraiser, Levie Smith, even proposed that the remaining Gay family holdings (Gay and Mainer) would not have benefitted directly by the flooding of the Eureka pool to the planned forty foot level (See TR 207-210, Pl. Ex. 3C,

3D and 3K). The pertinent portions of the Gay appraisal prepared by Levie Smith as the basis of the Canal Authority's case in the original condemnation and stipulated into evidence herein, read:

7. EFFECT OF THE TAKING - (CONT'D)

(a) Highest and Most Profitable Use After the Taking - (Cont'd)

The subject, however, is a rather unique property when the effect of the proposed new improvement (the canal) is considered. The canal is about 800' from the "take" line at its closest point. This fact, coupled with State Road 40 frontage and proximity to Silver Run and Silver Springs, should enhance the property and make it desirable for a higher use, such as motel/marina - catering to tourists traveling by boat or auto.

8. VALUATION PROCEDURE

After the taking, the subject will be in a unique and advantageous position - having access to the river and the canal, with paved road frontage on a major highway crossing of the Oklawaha River and the Cross-State Barge Canal. In my opinion, the remainder lands will be more desirable after the taking than before. As a result, it will not be necessary to complete a "Before and After" estimate. Only the value of the part taken will be estimated. The value "Before", however, will be estimated to show the reasonableness of the value of the part taken. (Pl. Ex. 3D, TR 46; [e.s.]

The Gay and Mainer topographic maps depicting the forty foot contour level were likewise stipulated into evidence (Pl. Ex. 13A-13B, TR 112). This court is encouraged to consider those exhibits in light of the trial court's comments that it could almost take judicial notice of the anticipated benefits that have been lost. (TR 274).

The details more particular to each case are set forth below. The repurchase price is the amount the trial court has required the petitioners to pay to the Canal Authority for the land. The amount paid is the amount the Canal Authority originally paid for the acquisition.

CONTESTED CONDEMNATION

Silver Springs Shores, Inc. v. Canal Authority

Acreage taken-----	3,556.79 acres (fee simple)
Parent tract-----	11,550.8 acres
Amount paid-----	\$411,878.00
Acquisition by-----	Final judgment in condemnation entered entered in February 18, 1971
Appeal taken-----	No
Location-----	Eureka Pool
Acreage plaintiff seeks----	3,556.79 acres
Repurchase price-----	\$411,878.00

John H. Couse & Barnetta S. Couse v. Canal Authority

Acreage taken-----	24.0 acres (fee simple)
Parent tract-----	90 acres
Amount paid-----	\$15,000.00
Acquisition by-----	Final judgment in condemnation entered on January 17, 1967
Appeal taken-----	Yes. Rptd. at 194 So.2d 301; 197 So.2d 841; 209 So.2d 865
Location-----	Rodman Pool
Acreage plaintiffs seek----	24.0
Repurchase price-----	\$3,930.00

The trial court apparently offset the original \$15,000.00 paid by the Couses by the \$7,000.00 for the lost barbeque pit and river house and \$3,500.00 for trees later destroyed on the land taken.

Walter R. Berman, Trustee v. Canal Authority

Acreage taken----- 2.96 acres
Parent tract----- 16.97 acres
Amount paid----- \$2,475.00
Acquisition by----- Final judgment in condemnation
Appeal taken----- No
Location----- State Road 464 bridge on Eureka
Pool
Acreage plaintiff seeks---- .99 acres
Repurchase price----- \$828.00

The petitioner Berman purchased the remainder of the parent tract from the Shiskins (the original condemnees) in July of 1980, and then brought this action. The Shiskins also gave Berman a quitclaim deed to the .99 acre sought herein which was part of the 2.96 acres the Canal Authority acquired in fee simple.

Francis S. Gay & Catherine Gay v. Canal Authority

Acreage taken----- 86.67 acres (parcel 1) 6.8 acres
(parcel 2)
Interest taken----- Fee simple subject to right of
access to water's edge of pool
area from remaining lands
(parcel 1)
Parent tract----- 156.26 acres
Amount paid----- \$127,000.00
Acquisition by----- Final judgment in condemnation
Location----- Eureka Pool (parcel 1) State
Road 40 bridge (parcel 2)
Acreage plaintiffs seek---- 86.67 acres (parcel 1)
Repurchase price----- \$122,313.70

Joyce G. Mainer (formerly Joyce Elaine Gay) et. al. v.

Canal Authority

Acreage taken----- 48.90 acres (parcel 1)
2.25 acres (parcel 2)

Interest taken----- Fee simple subject to right of
access to water's edge of pool
area from owner's remaining
lands
Parent tract----- 170 acres
Amount paid----- \$75,900.00
Acquisition by----- Final judgment in condemnation
entered on February 2, 1969
Appeal taken----- No
Location----- Eureka Pool (parcel 1)
State Road 40 bridge (parcel 2)
Acreage plaintiffs seek---- 48.90 acres (parcel 1)
Repurchase price----- \$73,380.12

Joyce G. Mainer and the other petitioners inherited
the remainder (of the parent tract) from Lenore Gay, the
original condemnee.

SETTLEMENT AFTER INSTITUTION OF CONDEMNATION

James J. Griffitts and Leola Griffitts v. Canal Authority

Acreage taken----- 15.51 acres (fee simple); 3.66
acres (temporary detour easement
expired)
Parent tract----- 379 acres
Amount paid----- \$39,987.60 acres
Acquisition by----- Purchase price was negotiated
after condemnation suit filed
Appeal taken----- No
Purpose----- Widen State Road 484; relocate
portion of Seaboard Coastline
Railroad tracts near Dunnellon,
Florida
Acreage plaintiffs seek---- 15.51 acres
Repurchase price----- \$39,987.60

Astor West, Inc. v. Canal Authority

Acreage taken----- 3.10 acres (fee simple)
16.25 acres (temporary easement
now expired)
Parent tract----- 110 tract
Amount paid----- \$8,339.00 (fee simple)
Acquisition by----- Purchase price was negotiated
after condemnation suit filed

Appeal taken----- No
Purpose----- Relocation of Seaboard Coastline
Railroad tracks near Dunnellon,
Florida
Acreage plaintiff seeks---- 3.10 acres
Repurchase price----- \$9,300.00

NEGOTIATED CONVEYANCE IN LIEU OF CONDEMNATION

Kenneth T. Hodges & Alverna C. Hodges v. Canal Authority

Acreage taken----- 12.62 acres (fee simple)
Parent tract----- 20 acres
Amount paid----- \$1,600.00
Acquisition by----- Negotiated purchase in lieu of
and under threat of condemnation
Location----- Eureka Pool
Acreage plaintiffs seek---- 12.62 acres
Repurchase price----- \$1,600.00

DONATION - FEE SIMPLE

Hasty-Greene Investments, Inv. v. Canal Authority

Acreage acquired----- .38 acres (fee simple)
Parent tract----- None
Amount paid----- -0-
Acquisition by----- Donation (title conveyed July
21, 1966)
Location----- Rodman Pool
Acreage plaintiff seeks---- .38 acres
Repurchase price----- -0-

ARGUMENT

THE TRIAL COURT DID NOT ERR IN PERMITTING THE REACQUISITION BY THE FORMER OWNERS OF LANDS ACQUIRED BY THE CANAL AUTHORITY OF THE STATE OF FLORIDA FOR THE EXCLUSIVE PURPOSES OF CONSTRUCTING, OPERATING AND MAINTAINING THE CROSS-FLORIDA BARGE CANAL.

The Canal Authority was created by the Legislature of the State of Florida to construct the Cross-Florida Barge Canal. Chapter 16176, Laws of Florida (1933). The Authority was empowered to acquire lands only for the purposes of constructing, operating and maintaining the canal. Respondent was further empowered to tax six counties to pay for the necessary right-of-way. The legislature also provided that in the event any of the acquired lands were subsequently sold, the proceeds would be divided pro rata among the counties that were taxed to pay for them. It now appears that the lands are not going to be used for the restricted purposes of constructing, operating and maintaining the Cross-Florida Barge Canal. In fairness to petitioners and to the citizens of the six counties, petitioners must be permitted to repay the Canal Authority and reacquire their properties, the money repaid to the Authority refunded to the six counties and, finally, the lands returned to productive use and restored to the tax rolls of Marion County. The respondent has something it

does not need, for which it has paid less than full value because of the representations it made to the petitioners and the petitioners have not received and will not receive the benefit of their promised bargain. Under the circumstances, it is crystal clear that the lower court properly exercised equitable jurisdiction in accordance with Article 1, Section 21, of the Florida Constitution which states, "The Courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay."

This was not the first time this issue had appeared before the trial judge. Judge Sturgis was the trial judge who ordered the reconveyance of the lands of Ocala Manufacturing, Ice and Packing Company by the Canal Authority upon repayment of the purchase price for the same reasons as appear in these cases. The Canal Authority appealed and the Attorney General appeared as amicus in Canal Authority v. Ocala Mfg. Co., 365 So.2d 1060 (Fla. 1 DCA 1979). The judgment of Judge Sturgis was affirmed because it was supported by the evidence and the lands were reconveyed to Ocala Manufacturing, Ice and Packing Co. upon repayment of the price paid by the Canal Authority. Fundamental fairness dictates that the Petitioners receive the same treatment.

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, rescission of contract and reconveyance of property was in order.

In the instant cases, the Fifth District Court of Appeal held that the Canal Authority could retain its ownership of lands acquired in fee simple, even though the land was conveyed to or acquired by the Canal Authority upon the unfulfilled representation and promise that the adjoining lands of the petitioners would be enhanced in value by the creation of a pool and construction of a canal even though neither the creation of the pool or the construction of the canal was ever completed and even though the project has been abandoned. Canal Authority of State v. Mainer, 440 So.2d 1305 (Fla. 5th DCA 1983).

The facts in Ocala Mfg. Co., supra, are identical to the facts in the Hodges case (Case No. 64,692) except that the acreage involved and the amount of money involved is different. The facts in Ocala Mfg. Co., supra, are identical to the facts in Griffitts and Astor West (Case Nos. 64,697 and 64,695) except that railroad frontage instead of water frontage was involved, the purchase price was

negotiated after condemnation proceedings were filed, and the acreage involved and repurchase prices were different. The facts in the Ocala Mfg. Co., supra, are identical to the facts in the Mainer, Berman, Gay, Couse and Silver Springs Shores, Inc. (Case Nos. 64,689, 64,690, 64,691, 64,694 and 64,693) except that the lands were acquired through condemnation rather than by deed in lieu of condemnation, and the acreages involved and repurchase prices were different. The facts in Ocala Mfg. Co., supra, are identical to the facts in the Hasty-Greene Investments, Inc. (Case No. 64,696) except that Hasty-Greene donated the land and gave a deed in lieu of condemnation, the acreage was different, and there was no price to be paid to the Canal Authority for the reconveyance.

In all of the cases the lands were acquired by the Canal Authority either by donation in lieu of condemnation, sale in lieu of condemnation, negotiation while in condemnation, or by final judgment in condemnation, and a vital part of the consideration to be received by the owner in each instance was the anticipated increase in value of the owners' remaining lands upon the completion of the canal project which has now been abandoned. The District Court of Appeal, First District, held that the failure of the Canal Authority to construct the project and thereby enhance the owners' remaining lands, as promised, amounted to a

constructive fraud, or that there was a failure of consideration, or that there was impossibility of performance, any of which required reconveyance. Canal Authority v. Ocala Mfg. Co., supra.

In direct conflict with the First District, the Fifth District Court of Appeal held that the failure of the Canal Authority to complete the project, and thereby enhance the owners' remaining lands as promised, was irrelevant because extrinsic fraud was not proven and no reconveyance was required. Canal Authority of State v. Mainer, supra. at 1306. This decision was expressly based on the case of Carlor Co., Inc. v. City of Miami, 62 So.2d 897 (Fla. 1953). The Carlor case should not have been cited as controlling precedent because the instant cases, just like Canal Authority v. Ocala Mfg. Co., supra, contain facts materially different from those relied on in Carlor. Petitioners request this court to resolve this conflict by reversing the decision of the Fifth District Court of Appeal and reinstating the learned trial judge in accordance with Canal Authority v. Ocala Mfg. Co., supra.

The district court's decision is grounded in the premise that petitioners improperly attempted to collaterally attack final judgments in condemnation. Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953). In response, petitioners will show that the instant suits are not

collateral attacks. They were not based on that which was taken but, rather, on the legal rights emanating from the interests and estates that remained. A judicial determination of the nature of these interests and estates necessarily required consideration of the circumstances surrounding the prior actions and an interpretation of the original documents of conveyance. What was not required, however, was a relitigation, alteration or amendment of the prior actions and adjudications.

The Carlor Company, Inc. did collaterally attack a final judgment in condemnation. Carlor Co. v. City of Miami, supra, at 899. It had to! The company retained no legal or equitable interest or estate to form the basis of a subsequent suit. As a result, Carlor Company, Inc., filed suit to quiet title on the basis that the condemnation judgment was void. Carlor collaterally attacked the final judgment on the following grounds: (1) The Resolutions authorizing the taking contained insufficient descriptions; (2) the Resolutions did not specify a fee simple title; (3) the condemning authority should have been the Miami Port Authority; and (4) fraud permeated the proceedings. Id. at 899. These grounds would have required relitigation of the original case. Only fraud, if proved, would have warranted this. Having failed in its proof, the Supreme Court properly affirmed the summary final decree dismissing the amended complaint. Id. at 903.

The instant suits, unlike Carlors, sought a factual determination that a right of action for reacquisition of the interests taken had accrued. The original documents of conveyance were never challenged. Instead, petitioners' claims for equitable reacquisition looked to the occurrence of events after the original proceedings to precipitate and support their claims. Unlike Carlors these petitioners retained vested interests and estates which, when considered in light of the instant facts, mandated the trial court's just decisions.

In the Carlors case the fee simple title to the entire Carlors ownership was acquired by the City of Miami for use as an airport project. This is known as a total taking, since there was no remaining land there was no promised enhancement to Carlors which constituted a part of the full compensation paid. The taking was not a rights-of-way taking as in the case at bar. The petition in condemnation in the case at bar states that the Canal Authority was acquiring a fee simple title for rights-of-way. The construction plans showed that the lands were to be used as rights-of-way for a canal and a pool area and for no other purpose. In the Carlors case the landowner received full compensation for the lands taken since all of its lands were taken. In the case at bar a part of the full compensation was not and will not be delivered to petitioners; to wit:

waterfront on the Cross-Florida Barge Canal and the Eureka Pool. Thus, in the case at bar, Carlors is totally inapplicable.

Two types of interests survived the original condemnation proceedings: first, the rights emanating from the ownership of lands adjacent and contiguous to the rights-of-way taken which formed the subject matter of the prior actions; and, secondly, the rights of access granted in the Gay and Mainer Declarations of Taking.

There was substantial competent evidence to support the finding of the trial court that the Canal Authority's purpose in acquiring petitioners' lands have been frustrated and abandoned. Canal Authority of State v. Mainer, supra at 1306 (e.s.). Unlike the City of Miami in the Carlors case, the Canal Authority was limited to a single lawful purpose for acquiring lands, that being the construction, operation and maintenance of the Cross-Florida Barge Canal. Section 374.071, Florida Statutes (1969). As a result, there is no lawful basis for the retention of these lands where this purpose is frustrated and abandoned.

The Gay case is a good example of the inequity of the present situation. Ninety-three and forty-seven hundredths acres were taken from the families remaining homestead comprising one hundred fifty-six and twenty-six hundredths acres (R 57). Six and eight hundredths acres were taken for

the construction of the State Road 40 bridge and this is not involved in the present litigation. Eighty-six and sixty-seven hundredths acres were taken for the construction of the Eureka Pool by flooding to the forty foot contour level (R 101). At the original trial, respondent's appraiser, Levie Smith, did find severance damage (Pl. Ex. 3C, 3D at paragraph 7). In addition, Mr. Smith felt that the "rather unique" impact of the creation of the pool would "enhance" the remaining property (Pl. Ex. 3C, 3D; see Statement of Facts, *infra*). Thus, "the remainder of lands will be more desirable after the taking than before." (Pl. Ex. 3C, 3D; see Statement of Facts, *infra*). Based on this, the Gays were paid one hundred twenty-seven thousand dollars (\$127,000.00) for the part taken.

The consideration vested in their remainder has failed. The pool has not been built! The plans to build it have been abandoned! The promised benefits have not materialized and, in fairness to all, the Gays should be allowed to reacquire their homeplace on an equitable basis.

As additional consideration for their lands, in Gay and Mainer, the petitioners were granted an alienable and assignable right of access to the waters of the Eureka Pool. (Def. Ex. 7D, 7P, TR 227-228). By any logical construction of its terms, the grant was conditional on the existence of the pool. Through the failure to create the

pool subsequent to the Declaration of Taking, the grant has totally failed. This fact, coupled with the loss of benefits to the remainder, prove that a major portion of the consideration flowing to these petitioners has failed. This was the finding of the trial court (paragraph 23 of the Final Judgment, R 66-73). It is supported by substantial competent evidence and must be affirmed. Bell v. Jefferson, 414 So.2d 273 (Fla. 5th DCA 1982).

Having determined that the Canal Project has been abandoned, that there is no alternate lawful necessity or purpose for the retention by the Authority of petitioners' lands, and that the continuing consideration vested in their remaining interests has failed, appellees are entitled to reacquire their lands on an equitable basis. The People v. Hugh White, 11 Barb. 66 (N.Y. 1851); Sea Dade Industries, Inc. v. Florida Power & Light Co., 245 So.2d 209 (Fla. 1971) (concurring opinion of Justice Ervin).

The White case presents an excellent historical analysis of both the common law and constitutional basis for eminent domain. Further, it is a classic "red cow" case vis a vis the petitioners with lands fronting the Eureka Pool. To begin with, the power of eminent domain is grounded on two elements: a lawful necessity and full compensation. It is elementary that if either fails, the taking fails. Applied to a total taking by an authority with general

eminent domain powers, consideration of these issues is limited to the time of taking. Carlson v. City of Miami, supra; City of Miami v. Coconut Grove Marine Properties, Inc., 358 So.2d 1151 (Fla. 3d DCA 1978).³ The instant cases involve partial takings by the condemning authority with the power of eminent domain restricted to a single purpose. Thus the scope of inquiry is much broader. The People v. Hugh White, supra.

The White case involved a partial taking for the Erie Canal. In 1819 a portion of White's lands were taken for the canal and he was duly paid the appraised valuation. In 1842, the canal was constructed on an alternate route with the intention of never again using White's lands for canal purposes. White then brought suit to reacquire the property taken. The court upheld his right to do so on the following grounds: First, that the landowner retained a right of divestment which took effect on the expiration of the legal necessity which supported the taking and, secondly, that White could reacquire his property when the consideration given for it failed.

At the time the White case was decided, the Canal Board of New York was specifically limited to take only

³Both cases were total takings by condemning authorities possessing numerous alternate purposes for which the lands could have been taken and used.

those lands "necessary for the prosecution of the improvements intended" (construction, operation and maintenance of the Erie Canal) Id. at 28. Like the instant cases, White involved a partial taking. Like the instant cases, the canal's benefit to the owners' remaining interests permeated the "just compensation" valuation and, specifically like the Eureka Pool cases, a new canal alignment was chosen with the intention of never again using the land in question for canal purposes. In construing the applicable statutes calling for a "fee simple" title in the Canal Board, the Court said:

Is it not in fact a fee limited to the purposes for which it was created? The whole section, carefully examined, seems to imply such a limitation. The commissioners are only authorized to take possession of, and use such lands as are "necessary for the prosecution of the improvements intended" by the act; and it is only a fee simple of the premises "so appropriated" that is vested in the people of the state. The state has no right to take what is not necessary for the improvement. I see no reason why this restriction does not apply as well to the duration of the estate as to the extent of the actual occupation. When the canal is abandoned, the land taken can no longer be said to be "necessary to the prosecution of the improvement"; and it is only to the extent of the land "so appropriated" which is taken, appraised and paid for according to the previous provisions of the section, that the title is declared to vest in the state. Id. at 28.

Because of the Canal Authority's very specific and narrow authorized purposes, Florida should follow the same rule. the appellate courts have interpreted Chapter 374,

Florida Statutes, and have held that the Authority could not acquire by eminent domain any greater quantity or quality of estate than was necessary for the construction, operation and maintenance of the Cross-Florida Barge Canal. Canal Authority v. Litzell, 243 So.2d 135 (Fla. 1971); Canal Authority v. Miller, 243 So.2d 131 (Fla. 1970). The above cited cases construing Chapter 374, Florida Statutes, followed a general principal of law found in Miller v. Florida Inland Navigation District, 130 So.2d 615 (Fla. 1st DCA 1961). This restriction of purpose should apply to both the extent of occupation and the duration of the estate. The People v. Hugh White, supra.

Where a partial taking is involved and there exists no valid basis for the retention of the part taken, the land-owners' remaining rights must include the right to reacquire the property on an equitable basis. This result is buttressed by a construction of the documents of conveyance. What of the right of access granted in the Gay and Mainer Declarations of Taking (discussion, infra)? There is no Eureka Pool! There never will be one! Equity requires that this right be allowed to ripen into what the petitioners had before. Whether called a possibility of reverter or a limitation on the fee, the end result should provide for the equitable reacquisition of the property (see 24 U.Fla.L.Rev. 366, discussion at 367).

The compensation given in the White case included both the appraised value actually paid, together with the continuing benefits to the condemnee's remaining lands. When the continuing consideration failed, so did the just compensation principal upon which the taking was based. The Court said:

There is another ground upon which I think the plaintiffs' title can not be sustained. The defendant has not had just compensation for his land. Compensation was made to him on the supposition that he was to be benefited by the location of the canal on his premises, and it was only the damages, over and above such benefit, that were awarded to him. That benefit has now ceased, by the abandonment of the canal, and the compensation can no longer be regarded as justly made. Id. at 32 [e.s.].

Respondent has previously asserted that People v. White has been disregarded and impliedly overruled. This is not true. Instead, subsequent to White, New York enacted a law providing the specific remedy appellees are asserting: Upon the abandonment of a canal, the original owner (his heirs or assigns) owning adjoining lands is entitled to repurchase the lands taken by repaying the state the amount originally paid, Section 50, Chapter 317 (Laws of 1894, N.Y.). A 1900 Attorney General's Opinion interpreted this change to mean that the state retained title to abandoned canal properties, subject to the adjoining property owners' rights of reacquisition. 1900 Op.Att'y.Gen. N.W. 128-129 (January 26, 1900). Unfortunately, confusion has been

generated by the failure of later key decisions to mention the right of reacquisition in citing the Attorney General's Opinion. Crage v. City of Buffalo, 148 Misc. 298, 265 NYS 640; aff'd. 245 A.D. 906, 282 NYS 837; aff'd. 273 N.Y. 517, 6 N.E. 2d 607 (New York 1933). The basis for these later decisions was the codification of the common law principles announced in White. Since our legislature has not enacted a similar provision, this court should affirm the trial court's equitable application of the common law principles set forth in White, supra.

Respondent has also contended that Chapter 79-167, Laws of Florida, should be controlling in this litigation and that the trial court erred in permitting former landowners to reacquire their lands on an equitable basis. This argument is based upon a statute that was not in effect at the time of trial, is not in effect now and, in fact, may never take effect. The enabling clause of Chapter 79-167 reads as follows:

Section 16. This act shall take effect only upon deauthorization of the Cross-Florida Barge Canal Project by the United States Congress and shall take effect on the effective date of such deauthorization by the United States Congress, provided that Section 15 shall take effect on July 1, 1979.

This court should not overturn the considered judgment of the learned trial court on the basis of a statute that may never become effective.

Respondent has also argued that there is an adequate remedy at law and, therefore, the lower court erred in granting equitable relief. The Canal Authority contends that it should keep the land for which it has no use, should prevent it from reverting to the tax rolls of Marion County, that it should not get a refund of the purchase price and distribute it to the six counties who were taxed to pay for the land, and then, in addition, require the six counties to pay additional millions of tax dollars to petitioners as damages. It would be a travesty of justice if damages were paid to the petitioners rather than the re-vesting of their lands. When you look at the broad picture, there is no benefit to anyone in not permitting the equitable reacquisitions. On the other hand, by permitting these landowners to reacquire their lands and restore them to the tax rolls, everyone is put back in the same position as they were before and made whole. Petitioners' use of the monies has been more than offset by respondent's use and commercial exploitation of petitioners' lands. The purpose of our equity court is to right wrongs exactly as the lower court did in this case, where all parties are suffering damage. This is one of the few cases where the ruling of the trial court has benefited all parties and has hurt none of them.

CONCLUSION

In America no condemning authority should be allowed to retain or divert to another purpose lands acquired by it on the unfulfilled representation and promise that the lands would be used in a manner which would benefit the remaining lands of the owners unless it provides the promised benefits. Our courts should always require that our government treat its citizens with the same degree of fairness that the government expects from its citizens. Fundamental fairness requires that the owners should be allowed to regain the right-of-way acquired from them as usually happens when a highway or road is abandoned by a governmental authority.

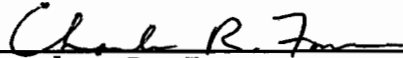
Boiled down to the simplest terms, the lower court held that from the evidence the lands involved were acquired for a single purpose, that the purpose was frustrated, that the petitioners received less than full compensation because the purpose was frustrated and the project abandoned, that retention of the lands by the Canal Authority deprives the citizens of Marion County of tax revenue therefrom and repayment of the taxes exacted from them for the construction, operation and maintenance of the canal, that the payment of additional compensation to the former owners because the canal has not been built would be unfair to the public and that the most beneficial solution to all concerned would be

to put the parties back into the same position they were before the acquisition of the lands by the Canal Authority.

The judgments of the trial judge in this case, who heard the live testimony from witnesses who were probably the persons most familiar with the Cross-Florida Barge Canal, who had the documentary evidence explained to him in detail, and whose prior judgment based upon similar evidence and the same legal principles was sustained by the First District Court of Appeal of the State of Florida, should once again be sustained by this court.

Respectfully submitted,

PICCIN, ATKINS, KREHL & FORMAN



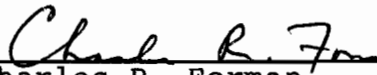
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to LOUIS F. HUBENER, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301, this 28th day of June, 1984.

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