IN THE SUPREME COURT OF FLORIDA

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FRENCHMAN, INC., etc.,

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Appellees.

CASE NO. 67,934

JURISDICTIONAL BRIEF OF APPELLEE DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

For the purposes of this brief, the following symbols will be utilized:

"PB" refers to Petitioner's Jurisdictional Brief

"A" refers to Respondent's Appendix.

The Respondent, Division of Administration, State of Florida, Department of Transportation will be refered to as "Department".

The Opinion of the Fourth District Court of Appeal filed August 7, 1985 shall be referred to as the "Frenchman opinion."

STATEMENT OF THE CASE

The Department accepts Petitioners Statement of the Case.

SUMMARY OF ARGUMENT

Indirect involvement of a constitutional provision is not sufficient to confer jurisdiction pursuant to Article V, §3(b)(3), Fla. Const. because the appellate court did not undertake to explain, define, or otherwise eliminate existing doubts of such constitutional provision.

The Frenchman opinion does not create express and direct conflict with any decision of another district court of appeal or of the Supreme Court on the same question of law. The Frenchman opinion held that Petitioner must establish severance damages before cost-to-cure testimony is admissible. Petitioner cites no cases in conflict with this question of law.

The Fourth District did not improperly assume the role of the jury in denying damages attributtable to noise, fumes and dust, and aesthetic loss. Rather, the court found that Petitioner fails to meet the legal threshold in establishing such damages.

Furthermore, the Frenchman opinion does not create conflict by misapplying the law and rejecting Petitioner's claim for drainage damages. The Fourth District's legal conclusion that Petitioner must establish that its drainage damages were a result of the taking before such damages are compensable does not conflict with the cases cited by Petitioner.

ARGUMENT

I. THE FRENCHMAN OPINION DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE FLORIDA CONSTITUTION SO AS TO CONFER JURISDICTION ON THE SUPREME COURT PURSUANT TO ART. V, §3(b)(3), FLA. CONST.

The thrust of Petitioner's argument is that the Frenchman opinion expressly construed the just compensation provision of Art. X, §6(a), Fla. Const. in finding Petitioner not entitled to damages for such effects as traffic visibility and noise, fumes and dust, and aesthetic loss.

Article V, §3(b)(3) requires that a decision construe a provision of the state constitution. In order to satisfy this requirement, the decision or order must not only specifically refer to the particular constitutional provision, Croteau v. State, 334 So.2d 577 (Fla. 1976) at 581, but the decision or order must also "actually construe, as distinguished from apply, a controlling provision of the Constitution." Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958) at 409. In Armstrong, supra, this Court went on to state:

> the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. (emphasis supplied)

Id. at 409. See also, Ogle v. Pepin, 273 So.2d 391 (Fla. 1973).

An examination of the decision below reveals that there has been no construction of a constitutional provision. The Fourth District reviewed the facts of this cause and merely applied a clear cut provision of the constitution. In rendering its decision, the court refers to Article X, §6(a) for the sole purpose of reiterating a "clear" constitutional requirement that "no private property shall be taken except for a public purpose and with full compensation therefore paid." (A: 2) After reviewing various decisions that also recognized this requirement, the court went on to state:

> Florida law permits damages for such effects as traffic visibility and noise, fumes and dust, and aesthetic loss only when there has been a physical invasion or trespass amounting to a taking, such as to substantially oust the owner or deny it the beneficial use of the property. See Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club, 352 So.2d 1177 (Fla. 4th DCA 1977), cert. denied, ___So.2d___ (Fla. 1978). As in Garden Club, this has not been shown to have occurred in the instant case. We note that, like Dreher Park in the authority cited, the seclusion of Frenchman's Creek golf course was already limited prior to the highway's widening. There was an unbuffered widened highway along another segment of its perimeter, and a railway just beyond the highway here involved. The golf course appears to have remained entirely playable after the taking and construction. (A: 6)

Contrary to Petitioner's argument, Frenchman does not set forth different standards for different property owners. Instead, the court in applying the holding of Division of Administration, State of Florida, Department of Transportation v. West Palm Beach Garden Club, 352 So.2d 1177 (4th DCA 1977), cert.

denied, ___So.2d ___ (Fla. 1978), found that Petitioner failed to demonstrate a substantial ouster attributable to the effects of traffic visibility and noise, fumes and dust, and aesthetic loss. The sentence from the opinion which Petitioner cites on page 2 of its brief is taken out of context and is nothing more than an illustration used by the court, not a constitutional interpretation.

To conclude, the Frenchman opinion determined that based upon the facts before the court, there was no compensation due for the damages alleged. This application, rather than construction, of the constitutional provision is insufficient to invoke this Court's jurisdiction under Article V, §3(b)(3).

II. THE FRENCHMAN OPINION DOES NOT CREATE ANY EXPRESS OR DIRECT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT AND OF OTHER DISTRICT COURTS OF APPEAL.

This Court has repeatedly held that in order to invoke conflict jurisdiction, the legal effect of a holding must create conflict with another district court or a decision of the Supreme Court. As this Court stated in Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962):

> The test of our jurisdiction is such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents.

The Petitioner has failed to reveal any prior conflicting decisions in this jurisdiction disposing of the points of law raised in Petitioner's brief.

A. Petitioner misreads the Frenchman opinion in stating that such opinion required the Petitioner to utilize specific methods in measuring damages.

The Frenchman opinion does not state that only certain methods of valuation may be utilized. Rather it states that a landowner must establish severance damages before presenting evidence on cost to cure which is in conformity with the only other two Florida cases addressing this point. See Mulkey v. Division of Administration, State of Florida, Department of Transportation, 448 So.2d. 1062 (Fla. 2nd DCA 1984); Hill v. Marion County, 238 So.2d 163 (Fla. 1st DCA 1970).

Moreover, although the court recognizes the customary approaches to valuation, i.e. comparable sales, income and cost, the court does not aver that these are the only methods of valuation. The court does state that:

> Here the owner's appraisal witness plausibly explained that he would not find usable comparable sales of golf courses, and the impact of the taking on income of the golf course could not be dependably determined until several years had elapsed...But the witness did not say why he failed to use the cost approach, and was unable to put a value on the damages to the remainder property resulting from the taking. (emphasis added)(A: 4)

The Petitioner's error was not that it failed to follow a particular method of valuation, but that it failed to establish any severance damages, in order to render cost to cure testimony admissible.

Petitioner's real argument is that his cost-to-cure damages are equivalent to severance damages or damages to the remainder of his property. Petitioner is merely attempting to reargue the merits of the case. Disagreement with a district court opinion is not sufficient to create jurisdiction upon this Court pursuant to Art. V, §3(b)(3), Fla. Const.; Kyle, supra.

B. The Frenchman opinion was predicated on legal grounds not a re-evaluation of the evidence.

In its attempt to create conflict, Petitioner urges that the court improperly assumed the role of the jury in ruling damages attributable to noise, fumes and dust, and aesthetic loss noncompensable under the proven factual situation. Petitioner cites several cases in support of this argument. However, a brief examination of these cases will belie the allegation of conflict.

Cripe v. Atlantic First National Bank of Daytona Beach, 422 So.2d 820 (Fla. 1982), is a case involving a representative suit to recover certain assets which donees had obtained from the decendent. After hearing the evidence, the trial court found for the defendant/donees, but made no findings of fact or conclusions of law. On appeal, the district court reversed concluding that the evidence gave rise to a presumption of undue influence which defendants failed to rebut. The Supreme Court held the appellate court to be in error, in that the determination of undue influence is the province of the trier of fact.

The remaining cases cited by Petitioner are cases in which the appellate court was in error in reversing the trial

court on issues which were within the province of the trier of fact, Marshall v. Johnson, 392 So.2d 249 (Fla. 1980); Helman v. Seaboard Coastline Railroad Co., 349 So.2d 1187 (Fla. 1977); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972), or were within the discretion of the trial judge and the appellate court failed to find any abuse of discretion. Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Shaw v. Shaw, 334 So.2d 12 (Fla. 1976).

The decision before this Court presently is in no way a violation of the rules set forth in the above cited cases. The Frenchman opinion, in detailing the factual surroundings of the case, does not conclude that the jury was in error. Rather, the legal conclusion is drawn that under this fact pattern, there was no substantial ouster because the property was still being used as a golf course, so damages due to traffic visibility and noise, fumes and dust, and aesthetic loss damages are noncompensable. This decision is in complete accord with the only Florida case on point - Garden Club, supra.

Thus, the Frenchman opinion does not controvert the jury's findings; nor does it purport to reevaluate the weight of the evidence, as in the cases cited by Petitioner. The instant opinion clearly follows Garden Club, supra, in setting out a legal threshold that the Petitioner failed to cross when asserting damages attributable to noise, fumes and dust, and aesthetic loss. This legal threshold presents no direct conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

C. The Frenchman opinion, in reflecting Petitioner's claim for drainage damages, does not create express and direct conflict.

The case Petitioner cites for conflict in this section of its brief is Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980), which held that jurisdiction may be conferred pursuant to Article V, §3(b)(3) if the appellate court misapplied the law by relying upon decisions which involve a situation materially at variance with the one under review. (PB: 8) However, the cases cited by the Fourth District were not a misapplication of the law. The Frenchman opinion cites to Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956); Paty v. Town of Palm Beach, 29 So.2d 367 (Fla. 1947); and Division of Administration, State Department of Transportation v. Hillsboro Association, 286 So.2d 568 (Fla. 4th DCA 1973), for the legal premise that "severance damages is that which is caused to the remainder by the taking and not that which is consequential from the manner in which the construction is performed." (A: 7) Also See §73.071(3)(b) Fla. Stat. (1983). This was precisely the issue before the appellate court and an examination of the cited cases will show that each case relied upon in Frenchman involved this issue.

Weir, supra, is an inverse condemnation case, which contrary to Petitioner's assertion, is a condemnation matter. In Weir, a landowner alleged a taking resulting from the widening of a highway which destroyed lateral support of land, causing a building to settle and crack. This court held that the right to lateral support applies only to land in its natural state, and,

therefore, although the landowner suffered damages such were not caused by the taking and were noncompensable in an eminent domain action.

Paty, supra, also is an inverse condemnation case. There, the Court held that construction under authority of statute which is performed without negligence was not compensable where damage suffered by the landowner due to a change in water current was not caused by a taking.

In Hillsboro, supra, the Fourth District Court of Appeal held that before the landowner could recover damages for loss of a seawall, he had to show that such loss was caused by the bridge construction on the parcel taken. The Court specifically found that there was no competent evidence that the construction of the bridge caused the ultimate loss of the seawall.

In the instant case, the Frenchman opinion specifically states that "it was not adequately shown to what extent these problems (drainage) were the result of the taking and the highway widening." (A: 7) The fact that Petitioner disagrees with the Fourth District's legal conclusion does not create conflict jurisdiction. Kyle, supra.

Petitioner's reliance upon Poe v. State Road Department, 127 So.2d 898 (Fla. 1st DCA 1961), as creating conflict with the instant case is also without merit. Poe expressly held that damages caused by the flow of water must result from the taking; a legal threshold that the Court found Petitioner had failed to cross.

Additionally, the instant case creates no conflict with Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974). First, no conflict is created when such prior case is from the court which rendered the purportedly conflicting case. Gilliam v. State, 267 So.2d 658 (Fla. 2nd DCA 1972) Also, the facts of Wye River, supra, are not similar to the instant case. The issue in Wye River, was whether complete plans and specifications were necessary to establish necessity, and if not, on what uses could the damages to the remainder be framed.

CONCLUSION

WHEREFORE, the Respondent, DEPARTMENT OF TRANSPORTATION, respectfully requests that the Petition for Writ of Certiorari be denied.

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 this 17th day of December, 1985 to PAUL A. TURK, JR., ESQUIRE, LEIGH E. DUNSTON, ESQUIRE, 777 So. Flagler Drive, Suite 500, West Palm Beach, Florida 33401-6194.

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