IN THE SUPREME COURT OF FLORIDA

Case No. 62,172

DCA Case No. 79-2306

BELVEDERE DEVELOPMENT CORPORATION and COLONNADES, INC.,

Petitioners,

vs.

DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION and PALM BEACH COUNTY,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioners, Belvedere Development Corporation and Colonnades, Inc., were defendants below. Respondents, Division of Administration, State of Florida Department of Transportation and Palm Beach County, were plaintiffs below.

Reference to the Record on Appeal will be by the symbol "R" followed by the appropriate page number. Reference to the trial transcript will be by the symbol "Tr" followed by the appropriate page number. Reference to the Appendix will be by the symbol "App" followed by the appropriate page number.

STATEMENT OF THE CASE

This cause commenced with a Complaint in Eminent Domain filed September 8, 1972 (R 334-349) seeking to acquire from defendants the fee simple absolute title (R 343) to certain lands adjoining and contiguous to Lake Worth in Palm Beach County, Florida (Tr 8, 18 and 66). The defendants filed answers to the complaint (R 353-369) on October 16, 1972, and, among other things, alleged that the lands sought to be acquired by plaintiffs were only a portion of defendants' lands and the taking thereof and the use to which they would be put would cause severance damages to the remaining adjoining lands of the defendants. Defendants further alleged that such

damages would be caused by restrictions upon defendants' ingress and egress to and from the remaining property, change in grade and that access to Lake Worth would be denied. By orders of the trial court, the undersigned attorneys were substituted as counsel as to Parcels 110 and 111 on September 22, 1976 (R 428-429). A jury trial was had in this matter commencing June 27, 1979, and a verdict returned June 29, 1979 (R 451-457). Final Judgment was entered pursuant to the verdict, on July 5, 1979 (R 458-466). These defendants filed their Motion for New Trial on July 6, 1979 (R 467-469) and the lower court denied such motion by its undated order which was filed October 31, 1979 (R 470). It is from this order that defendants took their appeal to the District Court of Appeal, Fourth District (R 471).

By its opinion of May 12, 1982, the Fourth District Court of Appeal affirmed the trial court (App 12) and certified the following question as being one of great public importance:

> DOES FLORIDA LAW PERMIT RIPARIAN (OR LITTORAL) RIGHTS TO BE SEPARATED FROM RIPARIAN LANDS?

On June 4, 1982, petitioners served their Notice To Invoke Discretionary Jurisdiction to this Court (App 19).

By invoking this Court's jurisdiction, the Court's scope of review is extended to the correctness of the entire opinion and judgment of the Fourth District Court of Appeal and not just the decision with respect to the question certified. Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963);

Zirin v. Charles Pfizer & Co., Inc., 128 So.2d 594 (Fla. 1961); Confederation of Canada Life Insurance Company v. Vega Y Arminan, 144 So.2d 805 (Fla. 1963); and Pan American Bank of Miami v. Alliegro, 149 So.2d 45 (Fla. 1963).

Accordingly, petitioners seek to have this Court review the correctness of the appellate court's ruling on all points raised on appeal.

STATEMENT OF THE FACTS

Parcels 110 and 111, which were the subject of the trial below, are two separate and distinct tracts of land. Parcel 110 is a 3' x 100' sliver of land taken from a parent tract lying on the south side of Blue Heron Boulevard, extending from Lake Drive to the east side of Lake Worth (Tr 65-66). The parent tract, out of which Parcel 110 was taken, contains some 54,758 square feet and is located on Singer Island in Riviera Beach, Palm Beach County, Florida; whereas the parent tract, out of which Parcel 111 was taken, contains some 24,585 square feet. Parcel 111 lies directly across Blue Heron Boulevard from Parcel 110 and it is a strip of land containing 390 square feet and being 3' x 130' along the east side of Lake Worth (Tr 225). Parcel 110 at the date of taking, December 4, 1972 (Tr 209) was improved with a motel and docks known as the Colonnades Yacht Club (Tr 88 and 210) and Parcel 111, as of the same date, was improved with a small motel and house (Tr 77).

Parcels 110 and 111 were acquired from these defendants in connection with the construction of the bridge over Lake Worth and the widening of Blue Heron Boulevard.

The jury trial commenced in this action June 27, 1979; and from the very outset, plaintiffs' counsel took positions contrary to law in his opening statement, i.e., ". . . the taking in this case will allow the owners of the remaining land to continue to use the bulkhead. . ." (Tr 21); ". . . there will be no impediment to continue to use the parcels. . ." (Tr 21); and ". . . there will be nothing constructed on it, no physical impediment on it. . ."(Tr 22).

Paragraph 4 of the complaint clearly states, "The estate or interest sought to be condemned by these proceedings is the fee simple absolute title" (R 343), the most complete estate known at real property law.

On May 31, 1979, plaintiffs filed a Motion In Limine to Amend Complaint and Alter Property Interest Acquired (App. 1-2 and Tr 32-41), which motion was denied by the lower court by its order of June 15, 1979 (App 3) pursuant to O'Sullivan v. City of Deerfield Beach, 232 So.2d 33 (Fla. 4 DCA 1970). This was an interesting trial tactic, to say the least, in view of the fact plaintiffs had owned Parcels 110 and 111 since December 4, 1972.

There was an unreported hearing before the lower court immediately prior to the commencement of the jury trial, which is clear from the transcript (Tr 2), dealing with the

issue of whether riparian rights can be enjoyed by an owner of non-riparian land; and the lower court ruled, as a matter of law, that they could despite a taking in fee simple absolute. The record reflects that the trial court's ruling changed defendants' theory of the case (Tr 29), which precipitated a motion for a mistrial, which was denied (Tr 41).

The record in this cause is replete with error which occasioned the filing of the most exhaustive Motion for New Trial (R 467-469) this writer has had occasion to file.

Over strenuous objection, the trial court permitted plaintiff's attorney, engineer and appraisal witness to make promissory representations to the effect that plaintiffs would make no use of the lands acquired despite their having been taken in fee simple (Tr 29-41, 48-51, 71-73 and 286-287) and that the lands could be used after the taking as if there had been no taking.

Plaintiffs' appraisal witness testified that he had seen an appraisal prepared by Earl Miller (Defendants' Exhibit A for identification) (Tr 115), that he had the benefit of that appraisal when he made his appraisal (Tr 116) and that he incorporated or included it in his appraisal (Tr 116). Despite this sworn testimony of the State's appraisal witness, the court refused to permit the Miller appraisal into evidence as an admission against interest (Tr 203).

In giving its jury instructions, the lower court made several errors and omissions, as more particularly

appears in a comparison between what was given (Tr 303-313) and what was requested (R 430-450). Objections or exceptions to the instructions given were duly made and noted (Tr 313-318).

During the trial and on the evening of June 23, 1979, the trial court had a communication with the jury regarding certain evidentiary matters outside the presence of either of the parties' attorneys and failed to even inform said attorneys of the question raised or the answer given. It was not until the morning of June 29, 1979, the attorneys were made aware of such dialogue, long after the trial judge had gone back to his home in Fort Lauderdale (Tr 322-332.) At the hearing on defendants' Motion for New Trial (R 477-499), the original trial judge acknowledged that he was embarassed about his ex parte communication with the jury (R 493) and that he really ought to grant the Motion for New Trial (R 494) but still denied it (R 493).

The lower court effectually coerced the jury into bringing back a quick verdict when it said, "If you don't arrive at a verdict rather promptly, we will have to decide what to do . . . We will not stay here an unreasonably long time. . . . We may have to separate and come back tomorrow morning. I hope we can reach it tonight." (Tr 312). Exception was taken to such comment by the court (Tr 313) by defendants' attorney, whereupon the lower court engaged in some dialogue with trial counsel.

Lastly, the trial court refused defendants' request to proffer into evidence the testimony of the landowners' appraisal witness bottomed upon a theory that they had in effect lost their riparian rights or they had been substantially impaired, thus converting waterfront land into non-waterfront land (Tr 260-265).

As could be expected, the jury failed to award severance damages for either parcel (R 451-457).

POINTS ON APPEAL

POINT NO. 1:

MAY RIPARIAN RIGHTS BE ENJOYED BY AN OWNER OF NON-RIPARIAN LANDS?

POINT NO. 2:

AT TRIAL, SHOULD PLAINTIFFS BE PERMITTED TO MAKE CERTAIN PROMISSORY REPRESENTATIONS THAT THEY WILL IN THE FUTURE DO OR REFRAIN FROM DOING CERTAIN THINGS THAT ARE NOT IN THE PLEADINGS NOR CONSTRUCTION PLANS OFFERED IN EVIDENCE?

POINT NO. 3:

WERE THE LOWER COURT'S COMMENTS TO THE JURY, "IF YOU DON'T ARRIVE AT A VERDICT RATHER PROMPTLY, WE WILL HAVE TO DECIDE WHAT TO DO . . . WE WILL NOT STAY HERE AN UNREASONABLY LONG TIME . . . WE MAY HAVE TO SEPARATE AND COME BACK TOMORROW MORNING. I HOPE WE CAN REACH IT TONIGHT" TANTAMOUNT TO AN "ALLEN" CHARGE?

POINT NO. 4:

WAS IT ERROR FOR THE LOWER COURT TO PERMIT AN APPRAISAL WITNESS TO TESTIFY WHEN HE ADMITTEDLY BASED HIS OPINION ON THAT OF ANOTHER APPRAISER OR, IN THE ALTERNATIVE, SHOULD THE LOWER COURT HAVE ADMITTED INTO EVIDENCE THE APPRAISAL OF THE OTHER APPRAISER AS AN ADMISSION AGAINST INTEREST?

POINT NO. 5:

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO REFUSE DEFENDANTS' PROFFER, WHICH CONSTITUTED THEIR ENTIRE THEORY OF THE CASE.

POINT NO. 6:

WHETHER THE LOWER COURT ERRED IN REFUSING OR FAILING TO GIVE A NUMBER OF DEFENDANTS' REQUESTED JURY INSTRUCTIONS AND IN SHOWING ITS PERSONAL FEELINGS REGARDING SEVERANCE DAMAGES.

POINT NO. 7:

WHETHER A LANDOWNER IN AN EMINENT DOMAIN TRIAL IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE TRIAL JUDGE RESPONDS TO A QUESTION ON THE EVIDENCE FROM THE JURY, DURING THE PERIOD OF ITS DELIBERTIONS, WITHOUT AFFORDING COUNSEL FOR THE CONDEMNORS OR CONDEMNEES AN OPPORTUNITY TO BE PRESENT AND OBJECT OR REQUEST ALTERNATIVE COURSES OF ACTION.

POINT NO. 1:

MAY RIPARIAN RIGHTS BE ENJOYED BY AN OWNER OF NON-RIPARIAN LAND?

ARGUMENT

By an Order of Taking entered by the lower court on November 14, 1973 (R 370-379) and the deposit pursuant thereto on December 4, 1972 (R 380-382), plaintiffs became the fee simple owners of the lands described as Parcels 110 and 111. By taking these lands in fee simple, defendants have been totally cut off from Lake Worth on Parcel 111 and partially cut off from Lake Worth in Parcel 110, notwithstanding plaintiffs' attempt to "reserve unto the defendant the rights to use and enjoy the riparian rights of and pertaining to said lands, including the rights to bulkhead and fill said lands as provided by law, which are not in conflict with the interests of the Florida Department of Transportation in the construction and maintenance of said public highway" (R 376-377) [My emphasis]. Such attempted reservations of riparian rights by plainitiffs in the legal descriptions attached to the Order of Taking are ineffective. For there to be riparian rights, the person or entity having such rights must own the lands bordering on navigable waters - no ownership, no riparian rights. Riparian rights are appurtenant to and are inseparable from the riparian land. Carmazi v. Board of County Commissioners of Dade County, 108 So.2d 318, 322 (Fla. 3 DCA 1959). The

Supreme Court of Michigan has made it quite clear in holding that the juxtaposition of a fee title between upland and water destroys riparian rights or transfers them to the interposing owner and further, the basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of the land with the water. Thompson v. Enz, 154 N.W.2d 473, 480 (Mich. 1967). These defendants no longer have actual contact with Lake Worth and, accordingly, they are no longer riparian owners capable of enjoying riparian rights which are appurtenant to the land.

As one authority on water law put it:

> "The source of riparian rights is ownership of dry land bordering or abutting on a navigable waterbody . . . riparian rights are an inherent aspect of upland ownership, and not severable from it." §§21.6 and 34.3, Maloney, Plager and Baldwin, Water Law and Administration, The Florida Experience, University of Florida Press, 1968.

When the plaintiffs obtained title to Parcels 110 and 111, they became the owners of the riparian rights appurtenant to such lands and they could not reserve unto defendants, no longer owners of the upland, riparian rights to Lake Worth.

> "The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitled the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland." 34 Fla.Jur., Waters, §126, et seq.

It is distressing to note the facility with which the appellate court has glossed over the apparent mandatory

provisions of §197.228(1), Florida Statutes (1981), which provide:

> "Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. . . ." [Emphasis supplied]

The appellate court opines that this is a taxation statute and, accordingly, has no applicability here. Petitioners fail to follow that logic nor do they follow the court's logic, contained in the footnote on page 4 of its opinion (App 15), that the foregoing statute may be a nullity. Is that to say that the State of Florida is now without a statutory definition of riparian rights? Petitioners agree with the concerns of Judge Hersey set out in his special concurring opinion (App 18).

Plaintiffs have attempted to separate Parcels 110 and 111 from their riparian rights and this cannot be done for the riparian rights repose in the owner of the upland, now the plaintiffs in this cause. "Riparian rights are appurtenant to the land and are inseparable therefrom", 34 Fla.Jur., Waters, §§134 and 136, nor are such rights appurtenant to land that has no water boundary. Axline v. Shaw, 17 So. 411 (Fla. 1895), and Marshall v. Hartman, 139 So. 441 (Fla. 1932).

Defendants' riparian rights having been taken, they must be paid constitutional full compensation, which includes a sum for the land taken together with any severance damages occasioned by the loss of their riparian rights. Kendry v. State Road Department, 213 So.2d 23 (Fla. 4 DCA 1968), and Thiesen v. Gulf, F & A Ry. Co., 78 So. 491 (Fla. 1918). See also Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1 DCA 1971), and Boynton v. Canal Authority, 265 So.2d 722 (Fla. 1 DCA 1972).

Plaintiffs, it is anticipated, will take the position that the reservation in the legal description cures defendants' problem; but even if such reservation is considered a grant of easement to defendants, the former upland owners have lost their riparian rights for:

> "The possession of land, in order to give rise to riparian or littoral rights, must be unitary in the sense that no part of the parcel is separated from the rest by intervening land in another possession. A private easement appurtenant affording access to a lake over another's land adjacent to the water does not make the grantee of the easement a littoral owner entitled to exercise littoral rights." 78 Am.Jur. 2d, Waters, §275.

Plaintiffs' appraiser took the position that defendants' remaining lands did not undergo severance damages because riparian rights were reserved unto them and such position was based upon a misconception or erroneous assumption of law. See Peebles v. Canal Authority, supra; Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1 DCA 1966);

Stubbs v. State Department of Transportation, 332 So.2d 155 (Fla. 1 DCA 1976); State, Department of Transportation v. Byrd, 254 So.2d 836 (Fla. 1 DCA 1971).

These landowners were entitled to assume the worst possible conditions and those which inflect the most serious damage the legal title acquired might imply. Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4 DCA 1974).

It is apparent that plaintiffs recognized the error of their ways when they attempted to mitigate their damages by filing a Motion In Limine to Amend Complaint (App 1-2 and Tr 32-41). Plaintiffs candidly admit in the motion aforesaid the lands in question were improvidently taken, but defendants did not ask to be brought into court by the harshest remedy known at law and they should not be precluded at trial from putting on the evidence upon which the trial court even refused to permit a proffer (Tr 260-265). The original judge was eminently correct in denying this eleventh-hour trial tactic to preclude the defendant landowners from receiving constitutional full compensation for their lands. The same appellate court from which this petition is taken considered a similar issue in O'Sullivan v. City of Deerfield Beach, 232 So.2d 33 (Fla. 4 DCA 1970), and said at page 35:

> ". . . It seems to be the legislative intendment that the making of the deposit would absolutely seal the transfer of title and right of possession in the condemnor to the end that it could not be undone by dismissal."

Nor, defendants would add, may it be undone by amendment to the complaint without permission of the owners. So what one judge, Timothy D. Poulton, refused to allow plaintiffs to do directly, another judge, Otis Farrington, permitted to be done indirectly, i.e., allowing plaintiffs to testify nothing would be done with the lands that had been taken in fee simple absolute. In passing, defendants would point out it was Judge Poulton who correctly refused to allow plaintiffs' trial tactic (App 3), Judge Poulton who received the verdict (Tr 322) and the judge who presided at all pre-trial hearings, but Judge Farrington presided at trial and denied defendants' Motion for New Trial (R 470).

By taking petitioners' property in fee simple absolute and the fact that no severance damages were awarded therfor, the firmly ingrained constitutional mandate that "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . .", F.S.A., Const. Art. 10, §6, has been violated.

There can be no question but what these landowners did not receive constitutional full compensation for the jury awarded no severance damages on either parcel. Had the trial been conducted properly, the jury as a matter of law would have had to return some severance damages. The only amounts awarded were for the lands and improvements taken.

The lands in question no longer front on navigable waters and they have, therefore, lost value over and above

the value of the actual taking. This proposition has been recognized by the Supreme Court of Florida in Thiesen v. Gulf & A Ry. Co., 78 So. 491, 506-507 (Fla. 1918):

> "The rights of a riparian owner are property rights which cannot be taken without just compensation. . . . The fronting of a lot upon a navigable stream or bay often constitutes its chief value. . . . The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity."

The State of Florida realized it had stubbed its toe and taken the lands in question improvidently by the filing of an eleventh-hour Motion In Limine, some seven years after the date of taking, seeking to mitigate its damages by attempting to change the estate taken. The original judge assigned to the case, who was not the trial judge, recognized this ploy and correctly denied the motion. Unfortunately, he did not try the case, for the State was ultimately permitted by the trial judge to do by indirection that which Judge Poulton had refused to permit the State to do directly.

On the question of the legality of the reservation of riparian rights unto the landowners, even if this Court is in accord with the trial court, it cannot be held that an estate or right has been reserved unto subsequent purchasers or parties in interest. The Order of Taking entered in this cause was tantamount to a conveyance or a deed; and it is not possible for a deed to effect the reservation of property

rights in third persons. Interestingly enough, third persons are now the record owners of the parent tracts out of which Parcels 110 and 111 were taken. Accordingly, in view of long standing and settled law, the present owners have no ripraian rights. "A grantor [defendant landowners] may reserve an estate or a right unto herself, but under the common law, that law yet unchanged, the grantor cannot reserve an estate or right for a third party - a 'stranger to the deed.'" Leffler v. Smith, 388 So.2d 261 (Fla. 5 DCA 1980), 23 Am.Jur. 2d, Deeds, §279 (1965); Annot., 88 A.L.R.2d 1199, 1203, §3 (1963).

By the trial court's ruling and the Order of Taking, title to the subsequent owners has been confused and slandered and the effect of such ruling is not good and title examiners will surely agree.

CONCLUSION

These defendants should have been permitted to claim severance damages for the loss of their riparian rights as a result of plaintiffs having taken in fee simple absolute their lands formerly contiguous to Lake Worth. By the taking, defendants' lands had, as a legal matter, been converted from waterfront to non-waterfront property; and it was error for the lower court to permit plaintiffs' witness to testify otherwise. Accordingly, defendants should be granted a new trial.

POINT NO. 2:

AT TRIAL, SHOULD PLAINTIFFS BE PERMITTED TO MAKE CERTAIN PROMISSORY REPRESENTATIONS THAT THEY WILL IN THE FUTURE DO OR REFRAIN FROM DOING CERTAIN THINGS THAT ARE NOT IN THE PLEADINGS NOR CONSTRUCTION PLANS OFFERED IN EVIDENCE.

ARGUMENT

In the case at bar, the plaintiffs were permitted to make certain promissory representations that they would or would not, in the future, do certain things that were not in the pleadings nor permissible in view of the estate acquired. However, it is well established that the damages caused by the project contemplated by the construction plans in existence at the date of valuation and the pleadings govern the evidence of valuation. Yoder v. Sarasota County, 81 So.2d 219 (Fla. 1955). There is no legal requirement for a condemnor to offer any evidence of construction plans but, when admitted, such plans provide a positive declaration of the manner in which the property will be used and the condemnor is bound thereby and the issues as to damages to the remainder are framed therein. The condemnee is entitled to assume the worst possible conditions and those which inflict the most serious damage the legal title acquired might imply. Central and Southern Florida Flood Control District v. Wye River Farms, 297 So.2d 323 (Fla. 4 DCA 1974).

In the case before the Court, certain representations of a promissory nature were introduced before the jury and

the appraiser for the plaintiffs based his estimate of full compensation on such promissory representations. The promissory representations were essentially based upon a merely permissive policy of the plaintiffs. No stipulation was entered into by the plaintiffs and the defendant owners as to future access other than shown on the construction plans. The test of admissibility is whether the evidence is of a promissory nature or is in the nature of a stipulation between the parties. In the case at bar, we have a unilateral representation by the condemnors that they will attempt to furnish adequate access to the owners' remaining property.

Once it is ascertained in a particular situation that what is really involved is merely promissory, the courts are well agreed that an unaccepted promise, promissory statement or declaration of future intentions, either negative or positive, by the condemnor as to what will be done or not done with respect to the property condemned, to that left untaken and the rights of the landowner in respects thereto, cannot affect either the character or the extent of the damages the condemnor must pay as full compensation. A condemnor cannot avail itself of what may aptly be termed a "conditional" condemnation, but must take whatever rights are sought to be appropriated absolutely, paying in full therefor, regardless of future intentions by itself. The rights acquired and not the intended use of those rights is the measure of the owner's award. St. Francis Levee Dist. v. Webb, 188 F. 67 (8 Cir. 1911);

United States v. 60,000 Square Feet of Land, 53 F.Supp. 767 (N.D. Cal., S.D. 1943); United States v. 25.88 Acres of Land, 62 F.Supp. 728 (E.D. New York 1945); East Bay Municipal Utility Dist. v. Lodi, 8 P.2d 532 (Cal. 3 DCA 1932); People v. Barnes, 47 P.2d 350 (Cal. 2 DCA 1935); Burlington & C.R. Co. v. Schweikart, 14 P. 329 (Colo. 1887); Great Western R. Co. v. Ackroyd, 98 P. 726 (Colo. 1908); Von Richthofen v. Bijou Irrig. Dist., 125 P. 495 (Colo. 1911); Chicago, M. & St. P.R. Co. v. Melville, 66 Ill. 329 (Ill. 1872); Chicago & A.R. Co. v. Springfield & N.W.R. Co., 67 Ill. 142 (Ill. 1873); Indianapolis & Cincinnati Traction Co. v. Wiles, 91 N.E. 161 (Ind. 1910); Evansville Terminal R. Co. v. Herdink, 92 N.E. 548 (Ind. 1910); Louisville & N.R. Co. v. Western Union Tel. Co., 111 N.E. 802 (Ind. 1916); DePenning v.Iowa Power & Light Co., 33 N.W. 2d 503 (Iowa 1948); Klopp v. Chicago M. & St. P.R. Co., 119 N.W. 373 (Iowa 1909); Old Colony R. Co. v. Miller, 125 Mass 1 (Mass. 1877); Drury v. Midland R. Co., 127 Mass. 571 (Mass. 1879); Ham v. Salem, 100 Mass. 350 (Mass. 1868); Howe v. Weymouth, 20 N.E. 316 (Mass. 1889); Barnes v. Peck, 187 N.E. 176 (Mass. 1933); Shell Pipe Line Corp. v. Woolfolk, 53 S.W.2d 917 (Mo. 1932); Little v. Loup River Public Power Dist., 36 N.W.2d 261 (Neb. 1948); Pierce v. Platte Valley Public Power & Irrig. Dist., 11 N.W.2d 813 (Neb. 1943); Coos Bay Logging Co. v. Barclay, 79 P.2d 672 (Oregon 1938); State ex rel Polson Logging Co. v. Superior Court, 119 P.2d 694 (Wash. 1941); State v. Smith, 171 P.2d 853 (Wash. 1946); Baltimore &

Ohio R. Co. v. Bonafield, 90 S.E. 868 (W.Va. 1916); Chesapeake & Ohio R. Co. v. Halstead, 7 W.Va. 301 (1874); Thompson v. Milwaukee & St. P. R. Co., 27 Wisc. 93 (1870); McCord v. Sylvester, 32 Wisc. 451 (1873); Milwaukee Electric P. & Light Co. v. Becker, 196 N.W. 575 (Wisc. 1923).

The condemnor must award compensation in money and it cannot in lieu thereof require the owner to accept certain privileges. Taber v. New York, Providence & B.R. Co., 67 A. 9 (R.I. 1907); Kentucky-Tennessee Light & Power Co. v. Beard, 277 S.W. 889 (Tenn. 1929); Re Barre Water Co., 48 A. 653 (Vt. 1900); Re New York, L & W R. Co.'s Petition, 2 NYS 478 (N.Y. 1888); South Carolina Power Co. v. Baker, 46 S.E.2d 278 (S.C. 1948); Perkins v. State, 150 S.W.2d 157 (Texas Civ.Ap. 1941).

The most lucid reasoning and statement of the generally accepted theory is found in Polson Logging Co. v. Superior Court, 119 P.2d 694 (Wash. 1941), where the court said:

> "The damages occasioned by the taking are established as of the time of taking. In the absence of agreement between the parties, the condemnor must take the rights which he seeks to appropriate absolutely and unconditionally, and he must make full compensation for what he takes. An unaccepted promise to do something in the future in case certain emergencies arise cannot affect the character or extent of the right acquired and cannot be considered as affecting the amount of damages to be awarded."

The specific reason that promissory statements of the condemnor cannot be properly considered or given effect in ascertaining a landowners's damages is that controlling

constitutional provisions require that damages in eminent domain proceedings be paid in money, in place of which promises, future intentions of the condemnor cannot be substituted. Burlington & C.R. Co. v. Schewikart, supra; Von Richthofen v. Bijou Irrig. Dist, supra; Indianapolis & Cincinnati Traction Co. v. Wiles, supra; State ex rel Polson Logging Co. v. Superior Court, supra; State v. Smith, supra; Cheasapeake & O.R. Co. v. Halstead, supra; Baltimore & O.R. Co. v. Bonafield, supra; Thompson v. Milwaukee & St. P.R. Co., supra; Milwaukee Electric P. & Light Co. v. Becker, supra; St. Francis Levee Dist. v. Webb, supra; Chesapeake & O.R. Co. v. Patton, 6 W.Va. 147 (1873); Houston Texas Gas and Oil Corp. v. Phillip A. Hoeffner, 132 So.2d 38 (Fla. 2 DCA 1961); Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1 DCA 1971).

Several courts, including the courts of Florida, have adverted to the theory that damages should not be paid piecemeal in an eminent domain proceeding. United States v. 60,000 Square Feet of Land, supra; Little v. Loup River Public Power Dist., supra; Thompson v. Milwaukee & St. P. R. Co., supra; Milwaukee Electric P. & Light Co. v. Becker, supra; Poe v. State Road Department, 127 So.2d 898 (Fla. 1 DCA 1961); Carlor v. City of Miami, 62 So.2d 897 (Fla. 1953) City of Jacksonville v. Bennett, 223 So.2d 61 (Fla. 1 DCA 1969); certiorari denied by the Supreme Court of Florida, September 29, 1969 (unreported).

The courts have consistently ruled that evidence should not be admitted as to promissory matters by the condemnor

unless the promissory matters are reduced to a written stipulation agreed to by ALL parties. 7 ALR 2d 365.

In other words, payment must be made for the rights which have been acquired, not for the more limited use to which the condemnor may intend to devote the property taken. The question is not -- How does the condemnor intend to use the property? -- but, rather, -- What right to use has been acquired? Various reasons have been given by the courts to support the above conclusion:

(1) Damages are payable in money and the condemnor cannot substitute promises to mitigate damages in lieu thereof.

(2) Damages may not be paid piecemeal and are payable once and for all.

(3) The constitution requires payment of full compensation.

It, therefore, appears that changes in construction promised to be made after the date of valuation cannot be admitted in evidence and the ascertainment of full compensation must be made in accordance with the construction plans in existence at the time of the date of valuation and that any such changes as contemplated by the plaintiffs are in the nature of promissory representations and are inadmissible in evidence.

Further, a public body may not be bound by the mouths of its employees and underlings for such body speaks only through its records and official acts, not through statements

or opinions of individual employees or officers. Beck v. Littlefield, 68 So.2d 889 (Fla. 1953).

CONCLUSION

The promissory representations made by counsel for the plaintiffs and their engineering and appraisal witnesses were without authority as the State nor any other public body speaks only through its official enactments and not out of the mouths of its underlings and employees. The official enactments pertinent to this case were: (1) the pleadings, (2) the resolution authorizing the taking, and (3) the construction plans, none of which limited completely the State's use of the lands acquired in fee simple absolute.

Accordingly, the Court erred in permitting the State to make these promissory representations and the defendants should be granted a new trial.

POINT NO. 3:

> WERE THE LOWER COURT'S COMMENTS TO THE JURY, "IF YOU DON'T ARRIVE AT A VERDICT RATHER PROMPTLY, WE WILL HAVE TO DECIDE WHAT TO DO . . . WE WILL NOT STAY HERE AN UNREASONABLY LONG TIME . . . WE MAY HAVE TO SEPARATE AND COME BACK TOMORROW MORNING. I HOPE WE CAN REACH IT TONIGHT: TANTAMOUNT TO AN "ALLEN" CHARGE?

ARGUMENT

Immediately prior to releasing the jury for its deliberation of a verdict, the trial court made the follow-

ing comments:

> "We are running on a tight time schedule here, getting pretty late. If you don't arrive at a verdict rather promptly, we will have to decide what to do, and I want to confer with the personnel as to what to do before we make that decision. We will not stay here an unreasonably long time, but we will be required for a room [sic] time before we separate if its impossible to arrive at a verdict. We may have to separate and come back tomorrow morning. I hope we can reach it tonight." (Tr 312)

Exception to the foregoing comment was taken by the undersigned (Tr 313), to which the lower court seemed to take offense (Tr 314). Judge Farrington, being from Fort Lauderdale, was in an apparent hurry to get back home and was not happy about having to come back to West Palm Beach the next day (Tr 318-321).

The reason defendants were opposed to the "quick verdict" comment given by the court is twofold. First, such comment tends to coerce and put undue pressure on a jury. Second, defendants' counsel felt a quick verdict would work against them for the substantial issues in the case were severance damages to both parcels. Had a quick verdict been returned as ordered by the lower court, it would have been apparent that little thought was given those issues for both sides were pretty much in agreement on the value of the part taken.

The trial of this cause ended about 5:15 p.m., June 28, 1980, and the court, by calling the jury out at 6:00 p.m., really was pressing for a quick verdict and making his opinion

of defendants' case apparent. Holding to his word, the trial judge called the jury out at 6:00 p.m. (Tr 320) and discharged them at 6:07 p.m. (Tr 321), never to return again until the hearing on defendants' Motion for New Trial. Judge Poulton received the verdict and had no knowledge of Judge Farrington's ex parte communications on the evidence with the jury (Tr 322-332).

The most succinct statement on the "Allen" charge this writer has found was made in Kosakoff v. State, 323 So.2d 28 (Fla. 4 DCA 1975). No matter how well intended the lower court may have been in this case, the reasoning of Kosakoff, supra applies, as follows on page 29 of the text:

> ". . . this case is a prime example of the inherent dangers involved in the giving of any jury instruction in the very informal and unstructured manner employed here. . . Informal instructions to the jury afford great opportunity for a chance comment either to misstate the applicable law or to leave room for possible minunderstanding by the jury. It was at least partially for this reason that the Standard Jury Instructions were developed and promulgated by the Supreme Court."

Here, it should be pointed out that the lower court even erred in giving the Standard Jury Instructions given in eminent domain cases as will be more fully developed in another point.

For further discussion on the ills of an "Allen" charge, see also Lee v. State, 239 So.2d 136 (Fla. 1 DCA 1970); Croft v. State, 158 So. 454 (Fla. 1935); Flynn v. State, 351

So.2d 377 (Fla. 4 DCA 1977); Van Note v. State, 366 So.2d 78 (Fla. 4 DCA 1978); and Lewis v. State, 369 So.2d 667 (Fla. 2 DCA 1979).

CONCLUSION

The "Allen" charge comments to the jury were calculated to coerce the jury into returning a quick verdict solely for the convenience of the trial court. Accordingly, defendants should be granted a new trial.

POINT NO. 4:

WAS IT ERROR FOR THE LOWER COURT TO PERMIT AN APPRAISAL WITNESS TO TESTIFY WHEN HE ADMITTEDLY BASED HIS OPINION ON THAT OF ANOTHER APPRAISER OR, IN THE ALTERNATIVE, SHOULD THE LOWER COURT HAVE ADMITTED INTO EVIDENCE THE APPRAISAL OF THE OTHER APPRAISER AS AN ADMISSION AGAINST INTEREST?

ARGUMENT

The record clearly reflects that the witness D'Agostino had seen an appraisal made of the subject property by one Earl Miller for the plaintiff (Tr 115 and Defendants' Exhibit A for identification), that the appraisal had been approved by plaintiffs' review appraiser (Tr 115), that Mr. D'Agostino had the benefit of the Earl Miller appraisal when he made his appraisal (Tr 116) and that he saw it, incorporated it and included some of the facts or information

in the Miller appraisal in his own appraisal (Tr 116).

It is a general rule of universal application that an expert cannot base his opinion on that of another. The reason for such rule is that a court and jury are unable to know how much of the opinion is based on actual facts, opinions, inferences or conclusions of the other expert whose opinion was adopted, incorporated or included in the adopting witnesses opinion or report. See 98 A.L.R. 1109.

That Earl Miller had been employed by the State of Florida to make appraisals for the Department of Transportation in this cause is uncontroverted (Tr 115 and Defendants' Exhibit A for identification). As a matter of fact, it clearly appears from Defendants' Exhibit A for identification that the appraisal was at least partly made on Department of Transportation forms. Accordingly, and as the Fourth District Court of Appeal has said:

> "A statement made by an employee of the defendant in the course of and relative to matters within the penumbra of his duties is a recognized exception to the hearsay rule and is admissible against his employer as an admission against interest. Gordon v. Hotel Seville, Fla. App. 1958, 105 So.2d 175." Thee v. Manor Pines Convalescent Center, Inc., 235 So.2d 64 (Fla. 4 DCA 1970).

CONCLUSION

The trial court should have either stricken the witness D'Agostino's testimony as having been an opinion based

upon the opinion of another or it should have allowed into evidence the appraisal report of Earl Miller as an admission against interest, the appraisal report having been made for the State of Florida, Department of Transportation, by an appraiser employed by one of the plaintiffs herein.

POINT NO. 5:

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO REFUSE DEFENDANTS' PROFFER, WHICH CONSTITUTED THEIR ENTIRE THEORY OF THE CASE.

ARGUMENT

At the outset of the trial, it was apparent there was a big disagreement as to the effect of taking the lands in question in fee simple absolute and attempting to reserve in the former upland owners riparian rights. Counsel for plaintiffs pointed out that the lower court had effectually defeated defendants' theory of the case by ruling that defendants retained their riparian rights despite having their uplands taken in fee simple absolute (Tr 2 and R 376-377).

After opening statements, during dialogue between the lower court and counsel for defendants regarding invocation of the "Rule", it was pointed out that the court, by its ruling on the question of riparian rights, had changed defendants' case drastically and that there was only an hour and fifteen to twenty minutes to do a great deal of work, i.e.

to have the appraisers change their assumptions on the law and revise their appraisals (Tr 29).

In order to preserve the point on appeal, defendants' counsel attempted to proffer, through the oral testimony of expert real estate appraisers, valuations of the parcels under the assumption that defendants' riparian rights had been taken (Tr 260-262). It is interesting to note counsel for plaintiffs did not oppose the proffer (Tr 262, line 5), as if his opposition should have had any bearing on defendants' right to make a proffer. This is the first time in this writer's rather extensive trial experience a proffer has been denied him; and by the denial herein, defendants were denied the opportunity of making a record on this point, which is error in its most basic form.

Rule 1.450(b), Florida Rules of Civil Procedure, makes it clear that defendants had a right to the proffer. The trial court, by its ruling, has precluded this court from determining the propriety of excluding the evidence in question. See Fla. Prac. and Proc., §22-10, 1978 Edition; Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Company v. Koltunovsky, 166 So.2d 462 (Fla. 3 DCA 1964), cert. den. 171 So.2d 390; Atlantic Coast Line R. Co. v. Shouse, 91 So. 90 (Fla. 1922); and Green v. Hood, 120 So.2d 223 (Fla. 2 DCA 1960).

Defendant's point here was succinctly stated by the

late Justice Terrell:

> ". . . it is generally better to let the jury have too much information rather than too little." Musleh v. Division of Administration, State of Florida Department of Transportation, 299 So.2d 101, 103 (Fla. 1 DCA 1974).

Accordingly, where there is doubt as to whether evidence is admissible, the better rule is to let the jury have such evidence. Certainly such rule is even more pertinent in deciding whether a party should be permitted a proffer.

CONCLUSION

The lower court erred in refusing to permit defendants to make a proffer of evidence which constituted their entire theory of the case and which ruling effectually precluded this court from determining the propriety of excluding the evidence in question. Accordingly, this court should remand the case for a new trial.

POINT NO. 6:

> WHETHER THE LOWER COURT ERRED IN REFUSING OR FAILING TO GIVE A NUMBER OF DEFENDANTS' REQUESTED JURY INSTRUCTIONS AND IN SHOWING ITS PERSONAL FEELINGS REGARDING SEVERANCE DAMAGES.

ARGUMENT

The problems defendants have with the instructions of the lower court appear in the trial transcript (Tr 265-267, 310-318 and R 467-469). It is apparent from the fore-

going excerpts from the trial transcript that the trial court gave plaintiffs' requested jury instructions and refused to give those requested by defendants. Had it not been for the undersigned (Tr 265, line 19), it is doubtful there would have even been a charge conference and the lower court was not happy about the suggestion of one (Tr 265, line 20).

At the outset, the body of law on jury instructions is so broad, specific citation of authority in support of defendants' position on this point may be unnecessary. Under all circumstances of this case and especially of this particular point, the instructions given, those refused and those confused may have misled or prejudiced the jury. 32 Fla.Jr. Trial, §220.

Defendants' two requested special jury instructions were refused flatly (Tr 265), which again effectually changed not only defendants' theory of the case but the estate or interest being acquired by plaintiffs contrary to O'Sullivan v. City of Deerfield Beach, supra, (Tr 33-41 and R 479).

Defendants' first requested special jury instruction (R 448) is taken from Central and Southern Florida Flood Control District v. Wye River Farms, Inc., supra, and is an accurate and applicable statement of the law based on the facts and evidence in this case. Defendants' requested first special jury instruction should have been given, and it was

prejudicial error for the lower court to refuse to give it.

Defendants' requested second special jury instruction (R 449) was based upon the law and argument in Point No. 1 and further citation of authority would be superfluous. Suffice it to say, if it was error in Point No. 1, it was error to refuse to give an instruction bottomed upon the same law.

Every time the lower court had the opportunity, it either questioned defendants' claim for severance damages or omitted an instruction on the issue. Further, and defendants recognize it is impossible to detect on the bare record, inflections in the voice of the trial judge made it apparent what he thought of defendants' claim of severance damages. Such voice inflections were brought to the trial court's attention (R 468 and 487). Objections or exceptions were taken at the end of the instructions but are not reported.

At the commencement of the trial and in its initial remarks to the venire, the trial court departed from the standard jury instructions by saying:

> "The issues to be determined by this jury is the amount to be paid to the land owners as full and fair compensation for the land taken, taken, [sic] plus damages to the remainder if they establish there were damages to the remainder" [Emphasis supplied) (Tr 8, line 25)

The lower court had already expressed its opinion of severance damages in an unfortunate, unreported proceeding, but there are sufficient examples of improper judicial

conduct throughout the transcript, not the least of which was:

> "It seems like it's a big waste of the public's money." (Tr 265, line 8).

Further indications of the trial judge's bent are as follows:

> ". . . and damage to the remaining lands, if any" [Emphasis supplied, court's voice inflection not evident] (Tr 13, line 15);
>
> "I can't see that you should be entitled to recover for some damage you didn't suffer" (Tr 36, line 14);
>
> ". . . the damage, if any, to the owner's remaining property caused by the taking" [Emphasis supplied, court's voice inflection not evident] (Tr 306, line 11).
>
> NOTE; At Tr 310, line 9, the lower court departed completely from standard instructions on an informal discourse:
>
> ". . . salvage [sic] damage, if any. That is the damage to the remainder by reason of the taking of the three foot strip, if you find there was any damage." (Tr 311, line 1) [Emphasis supplied; court's voice inflection not evident from transcript].
>
> ". . . salvage [sic] damages, if any . . ." (Tr 311, line 10) [Emphasis supplied, court's voice inflection not evident from transcript]

The informal instruction referred to above commenced at line 9, page 310 of the trial transcript and ran through line 3, page 313 of the transcript. These are the same ills the Fourth District Court of Appeal warned against in the giving of informal and unstructured comments to a jury in Kozakoff, supra.

Examples of omissions of instructions on the issue of severance damages are:

At line 19, page 304 of the trial transcript between the words, "taken, and the", the lower court omitted ". . . plus whatever damages result to the owner's remaining land because of the taking." See R 435, which is a direct quote of §10.3, Instruction No. 1 - Introductory: General Principles, Florida Eminent Domain Practice and Procedure, Third Edition.

Trial counsel for plaintiffs candidly admitted such language had been omitted from his requested jury instructions (Tr 315, line 16), which obviously was an intentional omission, an indication the lower court gave plaintiffs' requested jury instructions and another instance of the lower court's mishandling of the issue of severance damages. Defendants' attorney would be less than candid if he did not point out that this matter was possibly cured by the trial court's re-instruction commencing at line 6 of Tr 318. It should be noted, however, this was not done until after defendants' counsel made his exception or objection at line 20, Tr 314.

Another omission by the trial court on the issue of severance damages occurred at line 22, Tr 306. There, the court was in the process of giving §10.6, Instruction No. 4 - Severance Damages, Florida Eminent Domain Practice and Procedure, Third Edition, when after giving the first sentence in §10.6(3), supra (R 439), the court cut short

the instruction and went on to §10.7 (R 440). This had to be an intentional omission on the part of the trial court.

Also, at line 2, Tr 309, the trial court omitted the first two full paragraphs of §10.19, Instruction No. 9 - Concluding Instruction, Florida Eminent Domain Practice and Procedure, Third Edition.

Exceptions or objections to the trial court's instructions were taken or made (Tr 313-318), restated in the Motion for New Trial (R 467-479) and argued at the hearing on defendants' Motion for New Trial (R 477-498).

CONCLUSION

The totality of the error of the lower court in instructing the jury mandates the remand of this case for a new trial.

POINT NO. 7:

WHETHER A LANDOWNER IN AN EMINENT DOMAIN TRIAL IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE TRIAL JUDGE RESPONDS TO A QUESTION ON THE EVIDENCE FROM THE JURY, DURING THE PERIOD OF ITS DELIBERATIONS, WITHOUT AFFORDING COUNSEL FOR THE CONDEMNORS OR CONDEMNEES AN OPPORTUNITY TO BE PRESENT AND OBJECT OR REQUEST ALTERNATIVE COURSES OF ACTION.

ARGUMENT

During the evening of June 28, 1979, and after plaintiffs' and defendants' attorneys had left the courtroom,

the jury asked the trial judge about some evidentiary matters and he answered the question or questions without informing the attorneys of the communication, thus denying them an opportunity to object or make suggestions as to the form or substance of the trial judge's response (App 4-11). The attorneys of record did not learn of the communication between the judge and jury until the next morning when court was reconvened by the original judge. It was the court reporter who furnished information regarding the communication.

As our Supreme Court has said:

> "The power of eminent domain . . . is one of the most harsh proceedings known to the law . . . A strict construction will be given against the agency asserting the power." Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483, 485 (Fla. 1947)

Accordingly, it would seem to follow that if there is any doubt as to the propriety of the communication, such doubt should be resolved in favor of the defendants herein. It is beyond doubt the trial judge himself had serious reservations about his conduct in view of his comments at the hearing on defendants' Motion for New Trial, as follows:

> "I'm a little embarrassed about that, because I don't think it was handled as well as it could have been handled." (R 493, line 1)

In referring to defendants' Motion for New Trial, the lower court said:

> "I really ought to grant it. . . ." (R 494, line 3)

Paragraph 6 of defendants' Motion for New Trial (R 467-469) raises as grounds therefor the propriety of the court's comment to the jury outside the presence of the attorneys for the parties hereto and its failure to inform such attorneys that the jury had propounded a question to it and the fact that the court's answer to such question was incorrect.

The fact that such judicial conduct is improper and grounds for reversal is well supported by the law of this state; and in support thereof, a full annotation entitled "Right of Court to Instruct or to Communicate with Jury in Civil Cases in Absence of Counsel" appears at 84 ALR 220; and a pertinent part of such annotation indicates:

> ". . . it is a general rule that the giving of instructions to or communication by the trial judge with the jury in a civil case, either in open court or in the jury room, or in any other manner, when done in the absence of counsel, or at least when done without a reasonable effort to notify counsel, when it is practicable to secure the presence of the latter, is improper and irregular. . ."

Further, it has been said that ". . . communications between the judge and the jurors after the cause has been committed to them, and they have been charged by the court, are improper, unless they occur in open court in the presence of the defendant and his counsel. The rule applies in both civil and criminal proceedings. . . ." 32 Fla.Jur., Trial, §234.

In a criminal case, the Supreme Court of Florida

considered, in Ivory v. State, 351 So.2d 26 (Fla. 1977):

> ". . . whether a defendant in a criminal case is denied a fair trial and due process of law when the trial judge responds to a request from the jury, during the period of its deliberations, without affording the prosecutor, the defendant, or defendant's counsel an opportunity to be present and object or request alternative courses of action."

In Ivory, supra, the jury, after retiring to consider its verdict, sent from the jury room two notes requesting additional information and the trial court, without notifying the defendant, his attorney or the prosecutor, outside of their presence, ordered the bailiff to deliver certain documentary evidence requested by the jury. After learning of such action, the defendant filed a motion for a mistrial, which was denied by the court, and the defendant's conviction was affirmed by the Third District Court of Appeal. The Supreme Court held that such actions of the trial court were prejudicial and quashed the opinion of the District Court of Appeal and remanded the case. The Supreme Court went on to say at page 28 of Ivory, supra, that:

> "Any communication with a jury outside the presence of the prosecutor, the defendant and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless."

and announced its holding also at page 28 of Ivory, supra, as follows:

> "We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel present and

> having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make a full argument as to the reasons the jury's request should or should not be honored."

Here, the attorneys for the parties herein were deprived of the opportunity to place objections on the record or make argument at all in view of the fact that it was not until the following day that they were made aware of such prejudicial comment, whereupon motions for mistrial were made.

See also Ferreri v. State, 109 So.2d 578 (Fla. 2 DCA 1950); Caldwell v. State, 340 So.2d 490 (Fla. 2 DCA 1976); McNichols v. State, 296 So.2d 530 (Fla. 3 DCA 1974); Slinsky v. State, 232 So.2d 451 (Fla. 4 DCA 1970); Randolph v. State, 336 So.2d 673 (Fla. 2 DCA 1976); and Taylor v. State, 385 So.2d 149 (Fla. 3 DCA 1980).

CONCLUSION

On this particular point, it was error for the trial court to communicate with the jury after it had retired for its deliberations and after the parties' attorneys had retired from the courtroom for the evening. This court should remand the case for a new trial.

In general, the trial of this case was so fraught with error that the totality of it all cries out and the ends of justice, equity and due process mandate a new trial.

Respectfully submitted,

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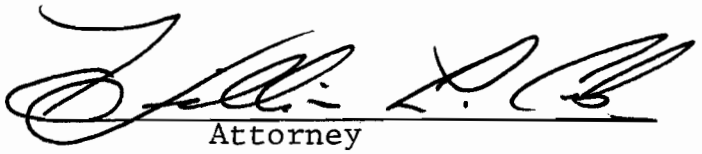
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished Alan E. DeSerio, Esquire, attorney for resondent, Legal Office, Department of Transportation, 305 Suwanee Street, Tallahassee, Florida 32301, by mail, this 18th day of June, 1982.


Attorney