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IN THE SUPREME COURT OF FLORIDA

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FRENCHMAN, INC.,

Petitioner,

vs.

DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO. 67,934

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

"R" refers to the Record on Appeal as submitted by the Clerk of the Circuit Court;

A" refers to the Appendix accompanying this brief.

STATEMENT OF CASE AND FACTS

Respondent, DIVISION OF ADMINISTRATION, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, accepts Petitioner's Statement of the Case and Facts with the following exception:

On Page 3 of its Initial Brief, Petitioner's statement that one of the grounds for the Fourth District Court of Appeal's reversal of the Final Judgment was that "Frenchman had employed an improper method of valuation in assessing damages to the remainder property" is incorrect. Rather, the opinion of the Fourth District Court of Appeal states that Frenchman failed to establish its severance damage claim. (A: 5).

SUMMARY OF ARGUMENT

At the trial below, Petitioner's only evidence of severance damages was based upon a cost to cure approach to valuation. However, the concept of cost to cure is merely a mitigation of severance damages - it does not establish severance damages. Thus Petitioner erred in failing to establish any severance damages before analyzing the cost to cure, not because it failed to follow any particular method of valuation.

Petitioner's alleged damages due to traffic visibility, noise, fumes and dust, and aesthetic loss are noncompensable in the instant cause because such "proximity damages" may only be recovered when a landowner has been substantially ousted or denied all beneficial use of the remaining property. The highest and best use of the property remains the same both before and after the taking.

Petitioner did not clearly show that the drainage problems were a result of the taking and the highway widening. To be recovered in an eminent domain proceeding, damages caused by the flow of water must result from the taking; a legal threshold that the District Court found Petitioner had failed to cross.

Attorney's fees at the trial court level should not be determined until the final outcome of the case.

ARGUMENT

POINT I.

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT PETITIONER MUST ESTABLISH SEVERANCE DAMAGES AS A PREDICATE TO THE ADMISSIBILITY OF COST TO CURE TESTIMONY.

The central issue in this appeal is whether in an eminent domain proceeding the cost to cure the damage to the remainder property may be utilized by the landowner to establish severance damages. It is a basic tenet in Florida eminent domain law that an owner is entitled to be compensated for damages to the remaining land caused by the taking. These damages are referred to as severance damages and "they are measured by the reduction in value of the remaining property." Kendry v. Division of Administration, State of Florida Department of Transportation, 366 So.2d 391, 393 (Fla. 1978); Mulkey v. Division of Administration, State of Florida Department of Transportation, 448 So.2d 1062, 1065 (Fla. 2nd DCA 1984); Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2nd DCA 1985). The general rule for calculating severance damages is the "before and after" rule which establishes severance damages as the difference between the value of the property before and after the taking. Canney, supra; Mulkey, supra.

The concept of "cost to cure" has developed in the field of eminent domain as a theory of mitigation of severance damages. As discussed in the leading treatise on eminent domain:

> Evidence of damage falls into two classes:
>
> (1) Evidence of the decrease in market value of the owner's land as it stands on account of the construction of the public work;
>
> (2) Evidence of the cost of restoring the injured property to the same relative position to the public work in which it stood before its construction.
>
> Inasmuch as the measure of damages is the decrease in market value of the land, and the trained judgment of the market in determining value would take into consideration the possibility of restoring the damaged property as far as possible to the same relative position in which it stood before the taking if the cost of such restoration would be less than the increase in market value which it would bring to the land, the condemnor is entitled to the adoption of the criterion of damage which produces the smaller result. Consequently, evidence of the cost of restoring the property as far as possible to its original relative position, when offered by the owner, is admissible only when there is also evidence that such cost is no greater in amount than the decrease in market value of the property if it is left as it stood. When the owner relies upon evidence of a decrease in market value of the property as it is left by the taking, the condemnor may show the cost of restoring the property to its former relative position. In any event, the condemnee is not entitled to the cost of restoration in addition to an award for the difference in the before and after value. 5, Nichols on Eminent Domain, 3rd Ed., Sec. 23.2; See also: 4A, Nichols on Eminent Domain, 3rd Ed., Sec. 14.04.

The noted predicate to the admission of such cost to cure evidence is that such cost must be no greater in amount than the decrease in market value of the property if it were left as it stood after the taking.

In City of Columbus v. Zanes, 201 N.E.2d 837 (Ohio Ct.App. 1971), the court provided the following as what it described as a "pointed and appropriate example of the operation of the 'cost to cure' rule":

> In the illustrative hypothetical, a difference in before-and-after value of $1,000 is suggested, but an expenditure of $100, would, it is assumed, restore the affected property to its former value. Clearly the damage done would be $100. Id. at 840.

This principle was first discussed in Florida in Hill v. Marion County, 238 So.2d 163 (Fla. 1st DCA 1970). Without passing upon the question of whether the rule quoted above from Nichols was the rule in Florida, the court went on to hold that the rule would not preclude the admission of cost to cure evidence offered by the owner:

> . . . because there was evidence before the jury that the decrease in the market value of the property was greater than the loss under the 'cost to cure approach' . . . ." Id. at 166.

In Hill the cost to cure testimony, in the amount of $9,627.15, was less than the $10,000 decrease in market value of the remainder testified to by the owner. Id. at 166.

Since the Hill decision was issued, a number of other Florida decisions reflect the frequent use of the cost to cure approach in eminent domain proceedings but do not discuss the issue presented in this cause. See: Rice v. City of Ft. Lauderdale, 281 So.2d 36 (Fla. 4th DCA 1973); Whitehead v.

Florida Power and Light Company, 318 So.2d 154 (Fla. 2nd DCA 1975); 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 July 18, 1978; Division of Administration, State of Florida Department of Transportation v. Saemann, 399 So.2d 359 (Fla. 4th DCA 1981).

However, in Mulkey v. Division of Administration, State of Florida Department of Transportation, 448 So.2d 1062 (Fla. 2nd DCA 1984), the court, after recognizing that severance damages are measured by the reduction in value of the remaining property went on to state that:

> . . . the courts have recognized that this general measurement of damages may be replaced by a cost-to-cure approach in instances where such cost is less than the decreased value of the remainder. Id. at 1065.

Also, in the recent case of Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2nd DCA 1985), the court categorized "cost to cure" as simply a method for reducing severance damages. The holding in Mulkey and Canney that severance damages must be established as a predicate to the admission of cost to cure testimony is generally accepted around the country. See Department of Transportation of State of Illinois v. Hsueh, 117 Ill.App.3d 945, 454 N.E.2d 360, 361-362 (Ill. App.Ct. 1983); Accurate Die Casting Company v. City of Cleveland, 442 N.E.2d 459, 465 (Ohio Ct.App. 1981); City of Columbus v. Farm Bureau Coop. Assn., 27 Ohio App.2d 197, 273

N.E.2d 888, 892 (Ohio Ct.App. 1971); Wakeman v. Commissioner of Transportation, 177 Conn. 432, 418 A.2d 78, 80-81 (Conn. 1979); State of New Jersey By The Commissioner of Transportation v. Sun Oil Company, 160 N.J. Super. 513, 390 A.2d 661, 671 (N.J. Super.Ct. 1978); State Highway and Transportation Commissioner v. Allmond, 257 S.E.2d 832, 836 (Va. 1979); Hewitt v. State, 54 A.D.2d 812, 388 N.Y.S.2d 680 (N.Y.App.Div. 1976); State of Utah v. Fox, 30 Utah 2d 194, 515 P.2d 450 (Utah 1973); Tunison v. Multnomah County, 445 P.2d 498, 499 (Oregon 1968); City of Tucson v. Farness, 19 Ariz.App. 458, 508 P.2d 345, 346-347 (Ariz. Ct.App. 1973). But see Runser v. City of Waterville, 355 A.2d 744 (Maine 1976), where the court, while recognizing the cost to cure concept and the required predicate, went on to sustain an award where the owner's appraisal witness did not express an opinion of the decrease in value of the remaining property. Id. at 750-751.

In the cause at hand, the owner was allowed, over objection, to claim damages in excess of $380,000. These "damages" were the cost estimates of what it would take, in the opinion of the owners' experts, to restore that portion of the golf course affected by the taking. This was allowed even though the owner failed to establish severance damages, that is "the reduction in value of the remaining property." Kendry, supra at 393. The burden of proof of such severance damages was clearly upon the landowner. City of Fort Lauderdale v. Casino Realty, Inc., 313 So.2d 649 (Fla. 1975); County of Volusia v. Niles, 445

So.2d 1043 (Fla. 5th DCA 1984); Division of Administration, State of Florida Department of Transportation v. Saemann, supra.

Of equal importance is the fact that even assuming Petitioner's remaining property has suffered a reduction in value, Petitioner has failed to establish that the proposed cost to cure was less than the reduction in value of the remaining property if it were left as it stood after the taking. This predicate is required before cost to cure testimony is to be considered.

Petitioner contents that the central premise of the cost to cure rule, that such cost must be less than the decrease in market value, was not violated since the "evidence was that the proposals to cure the damage...would not enhance the value of the property, nor could those proposals completely restore the property to the condition it was in prior to the taking." (Petitioner's Initial Brief, p. 13). However, the depositive question is not whether the cost to cure made the golf course itself any better than it was before the taking, but rather, whether the amount of the "cure" exceeds the decrease in market value. It is of little value to point out that witnesses opined the golf course was damaged, when those opinions are not converted to a monetary figure reflecting the decrease in market value. Not a single witness in the proceedings below testified that the $380,000 cost to cure was less than the decrease in market value caused by the taking. As such, the jury and the courts are left to speculate on the viability of Petitioner's

damage claim. The courts of this State have been quick to reject speculative evidence in an eminent domain proceeding. Yoder v. Sarasota County, 81 So.2d 219, 221 (Fla. 1955); Coral-Glade Co. v. Board of Public Instruction of Dade County, 122 So.2d 587 (Fla. 3rd DCA 1960).

In the instructions given by the trial court, the jury was specifically instructed that they should put the owner "in as good a position financially as he would have been if the property had not been taken." (R: 834). However, since the owner's financial loss caused by the taking was never quantified, the jury was left to speculate on the compensation due the Petitioner, contrary to established principles of law.

Petitioner's reliance on the decisions of Jacksonville Expressway Authority v. Hendry G. DuPree Co., 108 So.2d 289 (Fla. 1958), and Dade County v. General Waterworks Corp., 267 So.2d 633 (Fla. 1972), for the position that it was justified in departing from the general rules of property valuation are not justified in the instant cause. The situation in the cause at hand is clearly not comparable to the setting in DuPree or General Waterworks Corp.

In DuPree, the issue concerned the compensability of moving costs which would not be reflected in the traditional market value analysis of the real estate. Because the constitutional guarantee of full compensation requires a practical attempt to make the owner whole, departure from the fair market value concept was justified. To the same effect was

the decision of Dade County v. General Waterworks Corp., supra. In that case Dade County was attempting to acquire a complete water and sewer system. The issues did not involve the valuation of a parcel of real estate, but a much more complicated problem.

The burden of proof on the issue of severance damges was clearly on the owner. It was also its burden to justify a departure from the general standard of fair market value. In this cause there was no justification. Petitioner's own appraiser recognized that the proper method of valuation was to analyze the value of the property before and after the taking (R: 135), and also stated that any cost of curing damages should be less than the actual severance damage occuring. (R: 135) The witness acknowledged the three basic approaches to market valuation (comparable sale or market data approach; income approach; cost approach), but attempted to apply only one. In the one he did attempt to apply (comparable sales approach), the witness stated that he looked at sales of golf course properties but couldn't find one exactly like the one in the cause at hand. (R: 135) The witness failed to explain the noncomparable features of the sales he did look at and why, with proper adjustments, the sales could not have been utilized. Petitioner was required to meet this burden of proof before departing from the standard method of valuing property.

The witness' excuse for not utilizing the income approach was that sufficient time had not passed to determine if the income was affected by the taking even though two years had

already elapsed between the date of the taking (February 10, 1982) and the date of the trial (January, 1984). Also, the witness arrived at this conclusion even though he had made no attempt to examine the books of the golf course. (R: 156-157, 165). Once again the Petitioner failed to give a reasonable justification for departing from the general standard of property valuation. This argument would also discredit the use of the income approach in any eminent domain case, since it always involves an estimate of future loss of value to the property.

Finally, Petitioner's witness made no comment why he didn't attempt to utilize the "cost approach" to valuation. This approach is one of three recognized approaches to valuation. In McNayr v. Claughton, 198 So.2d 366 (Fla. 3rd DCA 1967) the court stated:

> The cost approach to value is:
>
> > [t]hat approach in appraisal analysis which is based on the proposition that the informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property. It is particularly applicable when the property being appraised involves relatively new improvements which represent the highest and best use of the land or when relatively unique or specialized improvements are located on the site and for which there exist no comparable properties on the market.
>
> The major steps in applying the cost approach are: 1) estimate the reproduction (or replacement) cost of the improvements as of the date of appraisal, 2) estimate the amount of depreciation present in the improvements, 3) deduct total depreciation from the estimated reproduction cost to arrive at an indicated value of the improvements as of the date of appraisal,

> and 4) add the estimated value of the land to the indicated improvement value to arrive at an indication of total market value. J.E. Eaton, Real Estate Valuation Litigation, Ch. 7, p. 101.

In summary, Petitioner's witness offered nothing to justify departure from the fair market value standard except unsubstantiated excuses. Petitioner failed to meet the burden of proof required for such a departure. To sustain the approach used by Petitioner's witness in this cause opens the door for a witness to take the witness stand and "claim," without any underlying support, he could not utilize the standard approaches to valuation and thus his alternative approach to valuation is justified.

The opinion of the Fourth District Court of Appeal was correct in disallowing such a flippant attitude toward property valuation. Contrary to Petitioner's assertion on page 17 of its Initial Brief, the District Court did not conclude that Petitioner was required to utilize a specific method of assessing severance damges. Rather, the District Court admonished Petitioner for its failure to justify a departure from the standard methods of real estate valuation and for its failure to establish through nonspeculative evidence that it had sustained severance damages.

POINT II.

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT DAMAGES DUE TO LOSS OF VIEW, PRIVACY, SECLUSION AND AESTHETICS ARE NONCOMPENSABLE.

Assuming that Petitioner had adequately shown damage to the remainder property, the damages claimed by Petitioner are not compensable under Florida eminent domain law. The damages emanating from the roadway, automobile visibility, noise, fumes, dust, loss of view, privacy and aesthetics, are compensable 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 Case Nos. 53,208 and 53,327 (July 18, 1978); Northcutt v. State Road Department, 209 So.2d 710 (Fla. 3d DCA 1968), affirmed 219 So.2d 687 (Fla. 1969).

In the Garden Club decision, the owner, Dreher Park, sought to claim as a compensable damage the cost of constructing a wall along the border of the park which would serve as a barrier from "sound, vibration, and light" emanating from the newly constructed roadway. Id. at 1179. The jury was instructed to award a sum sufficient to build the barrier wall if it found that the barrier was necessary to preserve the park and minimize the noise. Id. at 1180.

The Fourth District Court of Appeal reversed the severance damage award finding that:

> Mere highway noise as such, not coupled with a physical invasion or trespass, is not compensable in Florida. Id. at 1180.

In the absence of noise damage "that would be tantamount to a taking," so that the owner is "substantially ousted and deprived of all beneficial use," no compensation was due. Id. at 1180.

Applying this principle to Dreher Park, the court found "the record is completely devoid of suggestion that Dreher Park is no longer beneficially useful as a park because of the noise increase." Id. at 1180-1181.

The court then went on to note:

> Accordingly, the considerable increase in noise levels at Dreher Park caused by passing traffic on I-95 is no more of a "taking" than has been inflicted on countless tens of thousands of Florida residences (not to mention an abundance of parks and golf courses) whose occupants endure the consequences of endless traffic noise from adjacent arterial highways. (citation omitted). The damage to Dreher Park is no different in kind from that suffered by anyone else similarly situated. (citation omitted). (emphasis added)

Id. at 1181.

Using the same rationale, the court reversed the severance and cost to cure awards made in regard to the Science Museum, the Zoological Society and the neighboring municipal golf course, and went on to note that while the planetarium had suffered a diminution in viewing capacity due to the increase in light:

> ...we must again point out that there has been no physical invasion or trespass, and the diminution has not rendered the planetarium useless nor has the museum been substantially deprived of its beneficial use. There is no suggestion that the public will not continue to use the facility. All this being so, there is no "taking" as such, and accordingly, there can be no award.

Id. at 1180-1181.

Petitioner attempts to distinquish Garden Club from the instant cause. However, the owner's situation in this cause, after the taking, is identical to that of Dreher Park - the owner has not been substantially ousted nor denied all beneficial use of the remaining property. The highest and best use of the property remains the same both before and after the taking. (R: 154). Of the 36 hole golf course, only three of the holes were really thought to be affected by the taking. (R: 152). None of the playing area was removed and nothing has changed in terms of the way the course would be played. (R: 153). The golf course continued to be played after the taking. (R: 156).

As in the Garden Club decision, the owners have clearly failed to establish that the golf course is no longer useful. As such, the damages claimed for automobile visibility, noise, fumes, dust, and loss of aesthetics, also called "proximity damages," should have been struck as requested by the Department. (R: 149-151).

As a distinguishing feature, Petitioner claims that in this case the golf course was secluded from the adjacent roadway and further that the owner in the case at hand was merely

replacing a previously existing buffer. Petitioner states that in the Garden Club case such a factual setting did not exist. This representation is simply inaccurate.

When describing the boundary on the western side of the park, through which the planned I-95 right of way passed, the Fourth District Court of Appeal noted that there was no road existing in the before situation. Id. at 1178. The only thing immediately adjacent to the western boundary of the park was the "planned" right of way approximately 200 feet in width. There is nothing to indicate that before the road was built Dreher Park did not have the same seclusion and virgin land as the property in the cause at hand. In fact, it should be presumed that Dreher Park was more secluded on its western boundary than the property involved in this case, since no road at all existed in the before situation.

As such, Petitioner's attempts to distinguish this case factually from Garden Club are indeed illusory. Dreher Park was bounded by a large residential area. The P.U.D. (planned unit development) in this cause, of which the golf course is a part, calls for a total of 5,500 dwelling units and most of the multi-family units are adjacent to the golf course. Dreher Park was bisected by a two-lane roadway. The property in the cause at hand is bisected by Donald Ross Road, a two-lane facility that will require widening to four-lanes and a perimeter road also encompasses most of the golf course area. West of the 200 foot I-95 right of way adjacent to Dreher Park was the Seaboard

Airline Railroad tracks. In this cause, on the west side of the existing Alternate A1A is the Florida East Coast Railroad Tracks. Hardly a more factually similar case could be found for the application of the rationale laid down in Garden Club.

Additionally, the Fourth District correctly applied the law in Garden Club. The applicable provision in the 1968 Florida Constitution is Article X, Section 6(a):

> "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the Court and available to the owner."

Florida differs from many other states in that its Constitution does not provide full compensation to the property owner for "damage" to his property, but only for the "taking" thereof. Northcutt v. State Road Department, supra. Therefore, in order to examine the extent of compensation for damage, one must look to the applicable eminent domain statute in Florida. The right of a defendant to consequential damages is derived solely from the statutes and not the "full compensation" clause of the Constitution. State Road Department v. Abel Investment Company, 165 So.2d 832 (Fla. 2nd DCA 1964).

Section 73.071(3)(b), Fla. Stat. (1985) provides for compensation to the condemnee for "damages to the remainder caused by the taking. . ." Considering Florida's Constitutional provision which provides for "taking" compensation only and Florida's eminent domain statute which provides only for damages caused by the taking, the conclusion must be drawn that the

intent of both the Constitution's framers and the statutory authors was to exclude damage caused by use of the proposed public improvment. Expressio unius est exclusio alterius. 49 Fla. Jur. 2d, Statutes, §126.

The issue of whether consequential damage arising from the construction and use of a public project is compensable in a condemnation suit has been treated by at least three Florida courts. The Fourt District has held that severance damage is "the damage caused by the taking", and that compensable severance damage excludes that which is consequential as a result of the manner in which the construction is performed. Leeds v. City of Homestead, 407 So.2d 920 (Fla. 3rd DCA 1981); State of Florida Department of Transportation v. Hillsboro Association, Inc., 286 So.2d 578 (Fla. 4th DCA 1963); Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956); Paty v. Town of Palm Beach, 29 So.2d 363 (Fla. 1947).

In the City of Tampa v. Texas Company, 107 So.2d 216 (Fla. 2nd DCA 1958), the Second District Court of Appeal framed the question:

> "Whether or not, where the condemning authority takes a small part of a parcel of land and where such taking did not in itself cause any damage to the remainder of the parcel, the owner thereof should receive compensation because of the public work involved..."

Id. at 219. In a lengthy opinion, the court ultimately answered its question in the negative, requiring the condemnee to prove that damage to his remainder is derived from the property taken, not simply from the use of the condemned land.

For consequential damage such as that alleged by Petitioner, the proper remedy is an action in tort for nuisance. Hillsboro, supra at 579. It is respectfully submitted that it is not a judicial function carve out an area for compensation neither intended nor sanctioned by the legislature.

Petitioner also urges that the District Court erred in improperly assuming 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 this allegation.

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. This Court held the appellate court to be in error, in that the determination of undue influence was 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 either were within the province of the trier of fact, Marshall v. Johnson, 392 So.2d 249 (Fla. 1980); Helman v. Seaboard Coastline Railroad Company, 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 13 (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 District Court, 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, and therefore, 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 District Court 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 District Court clearly followed 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.

Additionally, the jury view of the property is important only in assisting the jury in determing the amount of compensation. Dade County v. Renedo, 147 So.2d 313 (Fla. 1962). Whether alleged damages are compensable is not a question for the jury.

POINT III.

THE TRIAL COURT WAS CORRECT IN POINTING OUT THAT THE EVIDENCE WAS UNCLEAR AS TO WHETHER FRENCHMAN WAS CLAIMING DAMAGES CAUSED BY THE TAKING OR FOR DAMAGES INCURRED AS A RESULT OF THE CONSTRUCTION.

At the valuation trial, Petitioner presented evidence of the cost to cure alleged drainage damages. However, not only did the Petitioner fail to establish severance damages prior to the admission of cost to cure testimony (discussed in Point I of this brief), but the Fourth District also held that Petitioner did not adequately show to "what extent these problems were the result of the taking and the highway widening." (A: 7)

In Florida eminent domain law, only those damages to the remainder caused by the taking are compensable. §73.071(3)(b), Fla. Stat. (1985). Consequential damages caused to the remainder by the manner in which the construction is performed are not compensable in a condemnation proceeding. Weir, supra; Paty, supra. As noted by the District Court, damages resulting from negligence or misconduct in performing construction are recoverable in a separate tort action. Hillsboro, supra; Leeds, supra.

Contrary to Petitioner's argument, the District Court expressly refused to classify Petitioner's drainage claim as either a result of the taking or a result of the manner of construction:

> In the instant case, to the extent the alleged drainage problem -- if such can

> be adequately shown -- is the result of the manner of construction rather than the taking, it should not be considered in determining severance damages. Common sense suggests that the taking as such could not cause any part of a drainage problem, but as we are not privy to all the facts and circumstances we decline to foreclose the contrary possibility. (A: 7)

Thus, the District Court was merely stating that Petitioner failed to adequately show from where its drainage claim came. The District Court openly admits that Petitioner's drainage claim could be caused by the taking, but that there is simply not enough factual testimony to substantiate such a claim.

The record amply supports this finding. The testimony of Petitioner's drainage expert does not clearly establish that the damages to be cured were caused by the taking. The witness only observed drainage problems on two occasions; both after abnormally heavy rainfalls and prior to the completion of the construction of the project. (R: 315, 334). This witness was also unable to testify as to the drainage problems incurred by the golf course prior to construction. Since he had not seen the extent of the ponding in the before situation, he could only speculate how much of the problem was caused by the taking and construction.

Thus, Petitioner failed to demonstrate that its drainage damages were caused by the take - a legal threshold Petitioner was required to cross in order that drainage damages be compensable.

Additionally, the District Court properly cited to Weir, supra; Paty, supra; and Hillsboro, supra, 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." Also see §73.071(3)(b) Fla. Stat. (1985). This was precisely the issue before the District Court since the record failed to adequately show the basis of Petitioner's damage claim.

POINT IV.

ATTORNEY'S FEES ARE AWARDABLE ONLY AT THE CONCLUSION OF AN EMINENT DOMAIN PROCEEDING.

The District Court properly reversed the award of attorney's fees since the award of attorney's fees in eminent domain proceedings prior to the conclusion of the entire proceedings is a clear departure from a clearly established principle of Florida eminent domain law. In Division of Administration, State of Florida Department of Transportation v. Decker, 450 So.2d 1220 (Fla. 2nd DCA 1984) the court reversed an award of attorney's fees. In Decker, a jury trial was held to establish the value of a perpetual easement which was originally taken. Subsequently, the Department amended its complaint to limit the duration of the easement which resulted in the necessity of another jury trial solely on the issue of the value of an easement of definite duration. After the first trial, but prior to the second, the trial court awarded the defendant's attorney's fees for services rendered in the first trial. In reversing the trial court, the Second District Court of Appeal stated:

> When this action is concluded, the trial court may then award attorney's fees to the defendants, pursuant to the guidelines in section 73.092. Clearly, the defendants have received considerable benefit from their attorneys' services. However, a determination of the extent of that benefit must wait until the conclusion of the proceedings.

Id. at 1223. Also see Division of Administration, State of Florida Department of Transportation v. Consolidated Tomaka Land Company, Inc., 448 So.2d 12, (Fla. 4th DCA 1984).

The instant cause is not concluded because it was remanded for retrial before a jury. Therefore, the District Court properly reversed the award of attorney's fees.

CONCLUSION

Upon consideration of the foregoing arguments and authorities cited herein, the Department respectfully requests that this Court enter its order affirming the decision of the Second District Court of Appeal which reversed the final judgment entered below, as well as the order awarding attorney fees and remand the cause for a new trial.

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 12th day of May, 1986, to PAUL A. TURK, JR., ESQUIRE, 1801 Australian Avenue South, Suite 100, West Palm Beach, Florida 33409-5265; and LEIGH DUNSTON, ESQUIRE, 777 South Flagler Drive, Suite 500, West Palm Beach, Florida 33401-6194.

Maxine F. Ferguson
MAXINE F. FERGUSON