IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER & LIGHT COMPANY, Appellant, vs. S. B. JENNINGS a/k/a BRYAN JENNINGS, JR., et al., Appellees.	CASE NO. 68,593 ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF FLORIDA RURAL ELECTRIC COOPERATIVES ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF POSITION OF APPELLANT

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PRELIMINARY STATEMENT

In this Brief, the parties will be referred to as follows:

Petitioner, FLORIDA POWER & LIGHT COMPANY-Appellant

Defendants, S. B. JENNINGS, GORDON R. SANDRIDGE, JR. and SOUTHSIDE PROPERTIES-Appellees

The following symbols will be used:

"R" for Record on Appeal. All references to the Record on Appeal shall be followed by a page number corresponding to the citation therefrom.

"OP" for citations to Opinion of the First District Court of Appeal in the instant action.

STATEMENT OF THE CASE AND FACTS

Florida Rural Electric Cooperatives Association, as Amicus Curiae accepts the Statement of the Case and Facts as set forth in Appellant's Initial Brief.

ISSUES PRESENTED ON APPEAL

I. WHETHER EVIDENCE OF FEAR MAY BE CONSIDERED BY THE JURY AS AN ELEMENT OF DAMAGE IN CONDEMNATION PROPERTY VALUATION PROCEEDINGS?

II. THE REAL IMPACT OF THE ADMISSIBILITY OF FEAR IN COMPUTING SEVERANCE DAMAGES IN EMINENT DOMAIN PROCEEDINGS, AND WHETHER THE REASONABLENESS OF SUCH FEAR IS PROPERLY A MATTER FOR THE JURY TO CONSIDER.

SUMMARY OF ARGUMENT

I.

Prior to FPL v. Jennings, testimony which was speculative and conjectural was inadmissible to prove the value of property in Florida. FPL v. Jennings, however, contravenes this principle by permitting opinion evidence of the existence of fear and its effect on the market value of property in determining severance damages. This unprecedented decision confuses the concept of severance damages with consequential damages, and extends the definition of the former beyond that which was intended by the legislature and the Florida Supreme Court. Moreover, FPL v. Jennings permits severance damages to be awarded on the basis of alleged property devaluation due to fear of transmission line forcefields, where this fear is based on adverse health effects which are not reasonably probable. The decision of the Court below violates the principle established by the United States Supreme Court in Olson v. U.S. by permitting valuation of property to be based upon fear of adverse health effects which are only within the realm of possibility.

II.

FPL v. Jennings greatly impacts upon all condemning authorities in the State of Florida, and threatens to severely curtail the respective abilities of these authorities to address critical statewide growth concerns. If the decision below is affirmed, condemning authorities will be faced with the

impossible task of budgeting to meet Florida's growth needs while, at the same time, setting aside enough funds to pay speculative severance damages for every right-of-way taken. Amicus submits that the public need for roads, electric transmission lines, gas lines, hospitals and landfills appreciably outweighs the individual property owner's need to have speculative damages awarded on the basis of fear.

The problem of budgetary impact is further exacerbated by the inflated jury awards which result from the trier of fact having to determine the reasonableness of the fear. Only as an alternative to complete reversal of FPL v. Jennings, Amicus adopts the fallback position asserted by Appellant in its Initial Brief: that if fear is to be considered at all, the issue of its reasonableness only serves to incite and inflame the jury, resulting in inflated awards, and is therefore not a proper matter for jury consideration.

ARGUMENT

I. WHETHER EVIDENCE OF FEAR MAY BE CONSIDERED BY THE JURY AS AN ELEMENT OF DAMAGE IN CONDEMNATION PROPERTY VALUATION PROCEEDINGS?

One of the basic rules of evidence in Florida is that testimony which is essentially speculative and conjectural is inadmissible to prove the value of property. Williams v. Simpson, 209 So.2d 262 (Fla. 1st DCA 1968); Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970). A jury verdict, based in whole or in part upon such testimony, is necessarily in derogation of the constitutional guarantee of "full compensation". Walters at 882.

In the case at bar, the First DCA has departed from the established rule of Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2nd DCA 1963). In Casey, the Second DCA squarely addressed the issue of the admissibility of the existence of fear and its effect on market value as a factor in condemnation of property for the construction of high voltage power lines. The Court held that the effect of an emotional response such as fear on the market value of remainder property was highly speculative and therefore inadmissible. See also Deramus v. Alabama Power Co., 265 So.2d 609 (Ala. 1972); Central Illinois Light Co. v. Nierstheimer, 185 N.E.2d 841 (Ill. 1962). The inadmissibility of such evidence has been the widely accepted rule of law for severance damages in eminent domain proceedings in Florida for the past 23 years.

In derogation of this established rule, the First DCA in FPL v. Jennings held: "Evidence of the existence of fear and its effect on market value may be admitted into evidence as a factor... to be considered by the trier of fact in a property valuation proceeding, so long as it is shown that the fear has a reasonable basis." (OP at 13). Even assuming that expert testimony establishes the reasonableness of fear in a given case, how does one quantify the effect of an emotional response such as fear on the market value of a parcel of real property?

In eminent domain proceedings, Florida courts have uniformly held that damages which are speculative cannot serve as a legal basis for recovery of compensation. Casey at 171; Northcutt v. State Road Department, 209 So.2d 710 (Fla. 3rd DCA 1968); Division of Administration, Florida Department of Transportation v. West Palm Beach Garden Club, 352 So.2d 1177 (Fla. 4th DCA 1977); Division of Administration, Florida Department of Transportation v. Frenchman, 476 So.2d 224 (Fla. 4th DCA 1985).

In Department of Administration v. Northcutt, property owners adjacent to land condemned by the Department of Transportation for road construction made damage claims similar to those asserted by the Appellees in the case at bar. The Department of Transportation in Northcutt condemned property for the construction of a federally financed interstate highway. 209 So.2d at 710. Similar to the claims of health hazards posed by electric forcefields extending onto the properties of the

Appellees in the instant case, the Northcutt property owners claimed "excessive shockwaves, vibrations, and noises" invaded their properties, impaired their health, and consequently depreciated the values of their land. Id. at 711. The Third DCA responded to the claims of the Northcutt property owners by stating that the noise, vibrations and shockwaves were damnum absque injuria and were therefore not compensable. Id. at 712.

Interestingly enough, 17 years later, the Fourth DCA was called upon to reassess the viability of the Northcutt principle. Frenchman, 476 So.2d at 224. In Frenchman, similar to the case at bar, there was a partial taking of a strip of property for a public use, and the damages to the remainder of that property were at issue. Id. at 226. Once again, damage to the value of the remaining property was claimed because of the invasion of noise, dust and exhaust fumes produced by automobiles using the roadway. Id. at 228. In response to this claim, the court was careful to note that Florida law permits damages for noise, fumes and dust only where there has been a physical invasion which amounts to a taking. Id. at 228; see also West Palm Beach Garden Club at 1180 (severance damages to remainder property based upon the invasion of highway noise denied). The court found that the interference of the noise, dust and exhaust fumes did not amount to a substantial deprivation of the property owner's beneficial use of its land. Consequently, the court held that it was error for the trial court to allow the jury to assess severance damages based upon

the claims of noise, dust and exhaust fumes. Id. at 229.

Severance damages, by definition are designed to compensate the aggrieved property owner for the "depreciation in market value of the remainder caused by the physical separation or severance of the part taken". Kendry v. Division of Administration, State Department of Transportation, 366 So.2d 391 (Fla. 1978); City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2nd DCA 1958); see 73.071(3)(b), Fla. Stat.. The Florida Supreme Court in Kendry noted that severance damages are distinguishable from consequential damages. Kendry at 394, n. 5. Consequential damages arise "by reason of the use to which the condemnor intends to put the part taken". Id.; City of Tampa at 219. The Court in Frenchman also stressed this distinction between severance damages an consequential damages. 476 So.2d at 227.

The instant court, on the other hand, seeks to blur this distinction by creating an entirely new category of consequential damages based on evidence of fear; yet the court purports to label such damages "severance" damages. The difference is not merely one of semantics. Rather, the instant Court seeks to introduce into the jurisprudence of Florida law the concept that consequential damages may be premised on something as indefinite and vague as fear. Moreover, the Court below muddies the waters even further by merging the concept of consequential damages with that of severance damages. The result is not a hybrid. The result is that severance damages are no longer

confined to the depreciation in market value caused by the severance of the part taken. Consequently, the definition of severance damages has been extended beyond that which was intended by the legislature and the Florida Supreme Court. 73.071(3)(b) Fla. Stat. (any damage caused to the remainder by the taking) (emphasis added); Kendry at 394, n. 5. (severance damages are comprised of the damage sustained by the severance of the land, not damage resulting from the use to which the condemned portion is put).

Prior to the decision below, the law of damages for eminent domain in Florida was consistent with that of Florida's jurisprudence generally. The Casey holding had, for 23 years, established Florida's abhorrence for the admission of speculative and conjectural testimony as a means of substantiating the value of real property. In other areas of law as well, Florida has demonstrated a similar abhorrence of speculative testimony to prove damages. For instance, in tort law, a claim of negligent infliction of emotional distress is generally recognized in Florida, but there must be an actual physical impact to claim this tort. Dunahoo v. Bess, 200 So. 541 (Fla. 1941); Estate of Harper v. Orlando Funeral Home, Inc., 366 So.2d 126 (Fla. 1st DCA 1979); Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982); American Fed. of Gov. Employees v. DeGrio, 454 So.2d 632 (Fla. 3rd DCA 1984). Even though the majority of jurisdictions now allow recovery for negligent infliction of emotional distress absent a physical impact, Florida courts continue to recognize

the need to limit this cause of action to persons physically impacted because damages would be too speculative otherwise. Dunahoo at 543. Florida has adhered to the position that a person who has not been impacted may not claim the tort for physical impact that has occurred to someone else. Champion at 349. In other words, a person who suffered trauma from fear alone has not suffered a cognizable damage at law.

Even in the wake of change in the laws of other jurisdictions, Florida has maintained its steadfast position that evidence of fear is too nebulous and speculative to be submitted to a jury as a compensible damage in an action for negligent infliction of emotional distress. Likewise, Florida needs to maintain its position that no compensation may be awarded for the diminution in the value of property resulting from the condemnation of land for an electric transmission line where the alleged diminution in value is due to the speculative fears of prospective purchasers. Casey at 171-2. Amicus submits that evidence of fear and the manner in which it may traumatize a person requires a very subjective analysis. Some people may be severely traumatized by a given fear, while others remain unaffected by the same kind of fear. In an action for negligent infliction of emotional distress, absent the physical impact rule, how would one quantify to a jury the effect of fear upon an individual? The answer of the Florida courts: it cannot be done. Dunahoo at 543; Champion at 349.

Similarly, how does one gauge the effect of fear on the market value of property adjacent to high voltage electric transmission lines? Market value is calculated on the basis of the amount which, "in all probability, would be arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy". Olson v. United States, 292 U.S. 246, 257 (1934). It is a highly subjective undertaking to claim that a potential buyer of a given parcel of land which adjoins high voltage lines will allow fear of the forcefield to affect him in the same manner as it may affect another potential buyer. cf. Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 775, 776, n. 10 (1982) (risk of health damage can be perceived differently by different people; property owners around nuclear reactor perceive greater risk than what is perceived by NRC and its staff). It is ludicrous to say that there is any kind uniform emotional response, or even a quantifiable emotional response to the forcefield issue that can be ascertained by property appraisers. In fact, some potential buyers may ignore the issue of forcefields entirely, especially in light of the expert testimony to the Court below that adverse effects were possible but remote.

In the instant case, the Court heard testimony from an epidemiologist about possible detrimental health effects from constant exposure to high voltage electromagnetic fields. Rebuttal testimony was given by an electrical engineer, stating that such adverse health effects were possible, but remote. A

professor of radiation and biology testified that his scientific experimentation reflected no adverse effects from exposure to the eletromagnetic forcefield generated by high voltage transmission lines. This conclusion is supported by the National Academy of Science, United States Environmental Protection Agency and the 1985 Florida Electric and Magnetic Fields Science Advisory Commission (T. 594, T. 627-629). In essence, the expert witnesses for both sides were only able to establish a possibility, however remote, of adverse health effects from constant exposure to high voltage electromagnetic fields.

The United States Supreme Court has, in eminent domain proceedings, held that:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value..." Olson at 257. (emphasis added).

Clearly, the expert testimony in the case at bar showed health hazards from exposure to high voltage transmission lines to be within the realm of possibility only. Expert testimony did not fairly show the health hazards to be reasonably probable. Therefore, what the court below did was to permit devaluation of property by admitting into evidence fear of occurrences which were not shown to be reasonably probable.

Fundamentally, the fair market value of the remainder

property in the instant case should have been "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy". Olson at 257. The fair market of the subject property in the instant case should not have been based on the amount which in any possibility could have been arrived at by fair negotiations with a prospective purchaser. However, this is precisely what the Court below permitted. FPL v. Jennings essentially allows speculation and conjecture to become a guide for the ascertainment of value of the remainder property.

Perhaps the First DCA was correct in its assessment that recent studies on the effect of electromagnetic fields have taken expert opinions out of the "realm of 'mere ignorance and fear'... proscribed in Casey". Based upon the testimony of the expert witnesses below, expert opinions have departed from the realm of ignorance and fear to enter the realm of supposition and remote possibility. Neither the acquisition of nor the promotion of cancer was shown to be reasonably probable for children and adults living in close proximity to high voltage electric transmission lines. Amicus submits that expert testimony in the case at bar failed to meet the "reasonably probable" test set forth in Olson v. United States. The fear of prospective purchasers attested to by property appraisers in the instant case, was based upon contingencies only within the realm of possibility. This fear was not founded upon health hazards shown to be reasonably probable, and therefore should not have been

considered as a factor affecting the market value of the remainder property.

II. THE REAL IMPACT OF THE ADMISSIBILITY OF FEAR IN COMPUTING SEVERANCE DAMAGES IN EMINENT DOMAIN PROCEEDINGS, AND WHETHER THE REASONABLENESS OF SUCH FEAR IS PROPERLY A MATTER FOR THE JURY TO CONSIDER.

The real impact of FPL v. Jennings must be understood. This is not a case singularly addressing the admissibility of fear of power lines on the market value of property subject to condemnation. Rather, FPL v. Jennings is a case with far-reaching impact. If the decision of the First DCA is affirmed, the State of Florida will face a critical budgetary and growth problem.

Florida already has nearly 12 million residents, with newcomers pouring in at the rate of nearly 1,000 per day. See "Florida, Battling History, Tries to Rein in Growth", N.Y. Times (July 15, 1986) at A22. State planners estimate $10,000 worth of public services is necessary to meet the needs of each newcomer intending to reside in Florida. Id. Thirty billion dollars is needed for roads, sewers, fire protection and other public improvements; a figure which is expected to double by the year 2000. Id.

All authorities with powers of condemnation including the Department of Transportation, counties, municipalities, boards, and special districts will be faced with the problem of trying to meet the growth needs of Florida, while calculating into their budgets something as nebulous and speculative as fear. The Department of Transportation is 10 years behind in its

construction of new roads to meet Florida's growth, and its budget already falls short of being able to meet those needs. Projections show that each day, the number of new residents coming into Florida require nearly 2 miles of new highway. See Florida Governor Bob Graham's 1985-1987 Biennial Budget Recommendations, p. viii. If the decision in FPL v. Jennings is affirmed by this Court, it will not be long before fear of noxious automobile fumes and the effect of such fear on property valuations will be admissible where the Department of Transportation condemns land for new road construction. This calls upon the Department of Transportation to perform the impossible: to calculate, as part of its yearly budget for right-of-ways and road construction, the depreciation in land values due to something as speculative as fear of noxious fumes or fear of traffic hazards. This was clearly recognized and addressed by the Third DCA in Northcutt:

> "It would be impossible to determine and prepare with any degree of accuracy, a reasonable budget for the construction of highways and access roads in the future in Florida. After the access roads and highway were constructed and in operation, each individual landowner adjacent thereto could seek damages from the state for a 'taking' of their property resulting from the increased noises, dust and vibrations, coming from the motor vehicles using the adjacent highway." 209 So.2d at 711.

At the local level throughout the State, affirmance of FPL v. Jennings would greatly inhibit the counties' ability to accommodate problems of solid waste disposal concomittant with

Florida's growth. Property owners adjacent to land which is condemned by a county for use as a landfill could claim that the remainder property values were reduced because of fear of emissions from, or leakage of chemicals stored on the site. Similarly, land condemned by a county for a hospital, or communicable disease treatment facility would also be suject to the same claims by landowners of property adjoining the site. Property owners adjacent to land which is condemned for construction of a gas line could also make a claim for severance damages based on depreciation in their land values due to fear of volatile nature of gas. Courts of other jurisdictions have already been confronted with such claims. In Truckline Gas Co. v. O'Bryan, 171 N.E.2d 45 (Ill. 1960), a right-of-way was taken for purposes of installing a buried gas pipeline. In response to a claim for severance damages, the Illinois Supreme Court held that fear of the presence of a buried gas pipeline was not a basis upon which to calculate severance damages. Id. at 46.

Clearly, there is enough scientific data to show that noxious fumes from automobiles, emissions and/or leakage of chemicals stored at landfill sites, communicable diseases, and volatile eruptions of liquid petroleum or natural gas can pose health hazards. Findings to substantiate this are even more readily available then the more recent studies positing potential health hazards from exposure to forcefields generated by high voltage electric transmission lines. If the instant decision is affirmed, the spillover effect of damage claims for the effect of

fear on market value of property will be astronomical. The already inelastic budgets of condemning authorities in Florida may be forced to become more responsive to calculating potential severance damage claims than to the assessment of Florida's growth needs and the building of a sound infrastructure. See also Metropolitan Edison at 776 (agencies could be forced to "expend considerable resources developing psychiatric expertise" and resources could be spread so thin that the agency could not do its job). Id. The concept of the public good will become secondary to the State's concern for its ability to answer for the kind of severance damages mandated by FPL v. Jennings. Amicus submits that the ability of counties, municipalities, utilities and electric cooperatives, special districts and the Department of Transportation to supply the necessary infrastructure to meet Florida's specific growth demands as well as meeting the public need generally will be severely hampered if FPL v. Jennings is not reversed. The decision in Casey remains sound both in principle and in application, and should remain the law of this State with regard to severance damages in eminent domain.

Alternatively, if fear of electric forcefields generated by high voltage transmission lines is held by this Court to be admissible to prove severance damages, then the issue of the reasonableness of this fear should be excluded from jury consideration. The very process of proving the reasonableness of

fear of forcefields is little more than a mechanism which affords the condemnee inflated jury awards for severance damages. As in the instant case, the jury heard testimony from an epidemiologist concerning incidents of cancer in children and adults living in close proximity to electric transmission lines. Although this testimony failed to establish any health hazards which were reasonably probable, the testimony itself was not without success in other regards. It is not merely coincidental that the jury heard testimony about incidents of cancer in children, and then awarded severance damages in an amount exceeding that which was proposed by Appellee's own property appraisers.

The reasonableness of the fear does not change its character as fear. See Metropolitan Edison at 778 (where the point of inquiry is a determination of factors which effect the environment, the severity of the harm caused by a given factor is not relevant; whether there is an effect is the key question, and the "gravity of the harm does not change its character") Id. Similarly, in the assessment of severance damages in eminent domain, the question is whether fear affects the market value of the remainder property. The question is not whether such fear is reasonable, and the jury should not have to assess the severity or lack thereof of the alleged harm involved.

CONCLUSION

FPL v. Jennings contravenes the intent of the legislature and the Florida Supreme Court by attempting to change the entire concept of severance damages under the law of eminent domain in Florida. Under this decision, severance damages will no longer be based upon the depreciation in market value of the remainder caused by the severance of the part taken. Rather, the First DCA seeks to establish as the law of Florida an unprecedented means of property valuation based upon speculation and conjecture. Such a precedent marks a dangerous departure from the established principles of damages law in Florida, and has a remarkably chilling effect on the abilities of condemning authorities to provide the necessary infrastructure for Florida's growth. Amicus therefore asks that the decision of the First DCA be reversed, and that Casey continue to be the law of Florida for severance damages in eminent domain proceedings.

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