IN THE SUPREME COURT OF FLORIDA

TEXACO, INC.,

Petitioner,

vs.

CASE NO. 71,914

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

For purposes of this brief the following shall apply:

The Respondent, Department of Transportation, shall be referred to as the "Department";

The Petitioner, Texaco, Inc., shall be referred to as "Texaco"; and

References to the Record on Appeal shall be indicated as (R:) followed by the appropriate page number.

STATEMENT OF CASE AND FACTS

The Department accepts Texaco's Statement of Case and Facts with the following exception and additions thereto:

The Department rejects the first sentence on page 3 of the Initial Brief as irrelevant and misleading. That Texaco sells products directly to the public at other sites is totally irrelevant to the issue presented in this cause which addresses solely Texaco's activities as to the subject property. In the instant cause it is undisputed that Texaco does not conduct the retail business located on the subject site. Rather, the only retail transactions are conducted by Mr. Magyar or his employees. (R: 212, 213, 224)

Under the various agreements executed between the dealer (Magyar) and Texaco, the dealer is obligated to pay for the gasoline when it is delivered by Texaco. (R: 227-9) This obligation is binding regardless of whether the dealer is able to sell any of the gasoline to the public. (R: 228, 229)

Also, the dealer and Texaco have no commonly-held assets. (R: 221) Each hold separate liability insurance policies. (R: 221) The dealer is not required to buy accessories from Texaco, such as tires and batteries. (R: 221) The rent paid by the dealer is based upon a fixed amount and is not dependent in any manner on the amount of gasoline sold. (R: 222) The only occupational license issued for a business at the subject site is in the name of the dealer. (R: 222) The only license Texaco possesses for the subject site is for advertising signs. (R: 222) The dealer is solely responsible for paying all sales taxes collected on the sale of gasoline

although Texaco collects the taxes from the dealer and remits them to the various agencies. (R: 223)[1]

The dealer, Stephen Magyar, claimed business damages in the instant proceedings pursuant to §73.071(3)(b), Florida Statutes. (R: 22-23)

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[1]Section 206.02(1)(e), Fla. Statutes states that the wholesaler "(i)s primarily liable under the gas tax laws of this state for the payment of motor fuel taxes."

SUMMARY OF ARGUMENT

Florida eminent domain law unequivocably holds that a business must be located, that is have a physical existence, on the remainder of the property taken to be able to recover business damages. Although Texaco may derive income from the sale of gasoline at the station site, Texaco did not establish that it owned a business physically located on the subject property.

Entitlement to business damages is a matter of legislative grace, not constitutional imperative. Texaco's argument to the contrary has been specifically rejected by this Court as recently as 1984. See Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Service, 444 So.2d 926 (Fla. 1984).

Allowing the recovery of business damages to those businesses physically located on adjoining property for ultimate retail sale by a retail business located on the adjoining property is not unequal treatment of persons in similar circumstances.

ARGUMENT

A LESSEE OF PROPERTY PARTIALLY TAKEN BY EMINENT DOMAIN IS NOT ENTITLED TO BUSINESS DAMAGES PURSUANT TO §73.071(3)b), FLORIDA STATUTES, WHEN THE LESSEE IS A WHOLESALE SUPPLIER OF PRODUCTS TO A SUBLESSEE WHO OPERATES A RETAIL BUSINESS ON THE PROPERTY.

Before any testimony of business damages may be presented to the jury, the business owner must specifically set forth the nature and extent of the special damages sought in his answer and the statutory predicates must be proven. State Road Department v. Peter, 165 So.2d 771 (Fla. 2nd DCA 1964). The statutory predicates as set forth in Section 73.071(3)(b) are:

1. less than the entire property is sought to be appropriated:
2. the action must be brought for acquisition of right of way;
3. the business must be an established business of more than five years standing;
4. the business must be owned by the party whose lands are being so taken;
5. the business must be located upon adjoining lands owned or held by the party whose land is being taken; and
6. the damages to the business must be caused by a denial of the use of the part taken.

Thus the issue of whether an established business was located upon adjoining land is a predicate which must be proven before the issue of compensability goes to the jury. It is for the court, not the jury to determine if the statutory predicates are met.

Texaco's contention that business damages should fall under the compensation clause of Art. X, Sec. 6, Florida Constitution (1968), is

patently without merit. This Court has repeatedly held that the right to business damages is a matter of legislative grace, not constitutional imperative. Tampa-Hillsborough, supra at 928. Behm v. Division of Admin., Department of Transportation, 383 So.2d 216 (Fla. 1980); Jamesson v. Downtown Development Authority, 322 So.2d 510 (Fla. 1975). Ironically, Texaco fails to cite to any of the above cases, and instead, cites to a lower appellate court case, City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2nd DCA 1958) cert. dismissed, 109 So.2d 169 (Fla. 1959) in boldly asserting that "not one court has bothered to provide a reasoned or well-founded basis for excluding business damages from the concept of full compensation". See I.B. at 30. In citing to Texas Co., supra, Texaco failed to include the entire cite, specifically that this Court dismissed certiorari. See 109 So.2d 169 (Fla. 1959). Presumably, had this Court felt that Texas Co., supra, was in conflict with its earlier decision in Myers, et al. v. City of Daytona Beach, 158 Fla. 859, 30 So.2d 354 (Fla. 1947), this Court would have resolved the conflict rather than dismissing certiorari.

Moreover, in Tampa-Hillsborough, supra at 928, this Court held:

> The power of eminent domain is an inherent feature of the sovereign authority of the state. Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964). The constitution limits this power by requiring that full compensation be paid to the owner for the property taken. Art. X, Section 6(a), Fla. Const. The payment of compensation for intangible losses and incidental or consequential damages, however, is not required by the constitution, but is granted or withheld simply as a matter of legislative grace. Jamesson v. Downtown Development Authority, 322 So.2d 510 (Fla. 1975). Business damages such as those sustained in the instant case fall in the category where compensation is not constitutionally required by depends on legislative authorization. City of Tampa v. Texas Co., 107 So.2d 216 (Fla.

2nd DCA 1958), cert. dismissed, 109 So.2d 169 (Fla. 1959).

As business damages are a matter of legislative grace, this Court compared them to a waiver of sovereign immunity. Consequently, when statutory construction is necessary, the business damage statute must be strictly construed in favor of the state. Additionally, this Court reforced the statutory language requiring a business to have a physical existence on the remainder property.

Applying the well-established principles announced by this Court to a factually similar case, the Second District Court of Appeal in State of Florida, Department of Transportation v. Standard Oil, Inc., 510 So.2d 324 (Fla. 2nd DCA 1987) denied business damages claimed by a wholesale gasoline distributor:

> Although Chevron's activities may have aided Witherington [the dealer] in selling fuel at retail and in turn enabled Chevron to sell more at wholesale, Chevron did not solicit, accept, or conduct its business, i.e., the wholesale sale of motor fuel, at the location in question and only delivered its product to Witherington at that location.

Id. at 326-7.

Likewise, in the instant case, Texaco had no business with a physical existence on the subject parcel. In fact, Texaco had even less of an interest than the oil company in Standard Oil, supra, in that Texaco did not even own the underlying fee to the service station. Texaco was only a distributor and did not solicit or sell any gasoline to customers at the station.

In both Standard Oil, supra, and the instant case, the Second District Court of Appeal was reaffirming its holding in Texas, Co., supra. In Texas

Co., supra, the court found that a landlord distributor could not recover business damages for loss of profits in supplying gasoline to its tenant at the condemned site:

> The defendants in this case are, of course, the owners of the involved land. They are also wholesalers of the petroleum products sold by their respective lessees in the businesses located on the involved premises. Therefore, the defendants are not in the wholesale business on such premises; their lessees are in the retail business on the premises. Any loss of profits are losses to the retail businesses. Defendants can no more claim this loss under Section 73.10, Fla. Stat. 1955, F.S.A., than could another landowner who happened to sell wholesale cosmetics to a drug store run by his lessee where a public improvement took some of the owner's land and also interfered with the drug store's business.

Id. at 226.

The fact that Texaco derives income based upon the sale of gasoline at this location does not establish that a business owned by Texaco is located on the subject property. Interpretating the words of Section 73.071 (3)(b), Florida Statutes, to allow business damages to all entities which derive income from the activities conducted on adjoining property would lead to absurd and unfair results which would not be consistent with the legislative intent to allow business damages to concerns having a "physical existence" at the location where the partial taking is alleged to have caused business damages. Tampa-Hillsborough, supra; Standard Oil, supra; Texas Co., supra. The legislature never intended to extend the recovery of business damages beyond the specific business operation actually located on the parcel.

Texaco goes to great lengths to distinguish itself from the normal wholesaler by claiming that its profits were "marketer" profits as opposed

to "wholesaler". This is nothing more than a semantics game. More fundamental is that the type of profit or business is not the controlling factor. The key is whether the profits earned result from direct sales to customers and other physical commercial activities conducted on the site. A wholesaler would be entitled to damages if it were conducting its wholesale business and generating its profits from activities on the condemned property (e.g., wholesale outlet, refinery, wholesale distribution center). However, here Texaco was only acting in the passive role as a distributor/wholesaler, had no employees located on the property, did not possess a license to do business at this location, did not sell gas to the public at this location, and hence, did not operate a business at this location.

Texaco's equal protection argument is also without merit. Since neither a suspect class nor a fundamental right is affected by the business damage statute, the rational basis test applies in evaluating Texaco's equal protection challenge. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), appeal dismissed, 450 U.S. 961 (1981). Under this test, equal protection is not violated so long as the statute applies equally to all members of the class and bears a reasonable relationship to some legitimate state interest. In enacting Section 73.071(3)(b), Florida Statutes, the legislature sought to compensate businesses located on the adjoining property for damages caused by the denial of the use of the property taken. The Second District Court's interpretation of the business damage statute distinguishing between businesses delivering a product to the adjoining property and businesses operating on the adjoining property does not create an invalid classification. Interpreting the words of Section 73.071(3)(b), Florida Statutes, to allow business damages to all entities which derive

income from the activities conducted on adjoining property would lead to absurd and unfair results which would not be consistent with the legislative intent to allow business damages to concerns having a "physical existence" at the location where the partial taking is alleged to have caused business damages. In response to Texaco's hypothetical examples, in determining whether a business is physically located on the adjoining property, one could look at the omnipresent Coca-Cola machine. Coca-Cola designs, builds and maintains the dispensing machine. Coco-Cola provides brightly lit, gawdy advertising. Coca-Cola also nationally advertises their product, sets the standards for selling their product and typically stocks the machine and excludes the present of a Pepsi machine. They also provide marketing expertise, and best of all, they make a profit on each can sold. However, Coca Cola's business is not located on the property.

The controlling feature here is the physical location of a business entity not the location of a business transaction as argued by Texaco. See Tampa-Hillsborough, supra. As noted by the court below:

> But we agree with the Department of Transportation that those different classifications bear a reasonable relationship to a legitimate state interest and that to disallow business damages to entities like Texaco which derive income from wholesale sales to a business located on property partially taken by eminent domain but which do not physically operate their wholesale businesses on the property is not an unreasonable, unconstitutional classification. See In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980); State v. Lee, 356 So.2d 276 (Fla. 1978). To adopt Texaco's contention could place Texaco in a classification like that of multitudes of wholesale suppliers and others only indirectly affected by an eminent domain taking, thereby opening the door to innumerable claims.

State of Florida, Department of Transportation v. Schatt and Texaco,Inc., 519 So.2d 708-9, (Fla. 2nd DCA 1988); (A: 2-3)

Texaco's hypothetical regarding the dealer-operator and the operator is not a valid example of unequal treatment. Equal protection is not violated because more damages are paid to the retailer who makes more profit than another due to his avoidance of middlemen. This argument focuses on the transaction and product being sold, rather than on the damages suffered by the business physically located on the adjoining property.

Texaco's discourse on the pricing structure of the oil industry, although informative, is irrelevant to the instant cause. The fact that oil is priced at four different levels does not establish Texaco as conducting a business at the subject property. Regardless of whether the business located on the adjoining property is that of the wholesaler, the marketer, the retailer, or the operator-dealer, business damages are compensable only as to the business physically located on the property. If the wholesale business site were physically located on the adjoining property, i.e. part of Texaco's distribution center was taken, business damages suffered by the wholesaler would be compensable. Likewise, if the marketer's business were physically located on the adjoining property, i.e. sales office, etc., business damages suffered by the marketer would be compensable. Consequently, there is no dissimilar treatment of persons under like circumstances and conditions, and therefore, no violation of equal protection.

In conclusion, Texaco, as lessee, is entitled to an apportionment of the value of the land taken and damages to the remainder as part of full compensation. Additionally, the Department is required to pay Stephen Magyar, the retailer, for business damages caused by the denial of the use of the part taken, provided the five year requirement of Section

73.071(3)(b), Florida Statutes, is met. However, the Department should not have to pay additional business damages to Texaco when Texaco does not operate a business physically located on the adjoining property. To allow such damages would be contrary to the legislative intent of Section 73.071(3)(b), Florida Statutes.

CONCLUSION

The Department requests this Court to affirm the decision below and answer the certified question in the negative.

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 on this 7th day of April, 1988 to S. CARY GAYLORD, ESQUIRE; S. W. MOORE, ESQUIRE; and ALAN E. DeSERIO, ESQUIRE, Brigham, Moore, Gaylord, Schuster & Sachs, 777 S. Harbour Island Boulevard, Suite 900, Tampa, Florida 33602.

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