IN THE SUPREME COURT OF
THE STATE OF FLORIDA

TEXACO, INC.,

Petitioner,

v.

CASE NO. 71,914

DEPARTMENT OF TRANSPORTATION
STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER TEXACO, INC.

(ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT)

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CITATION OF AUTHORITIES

Other Authorities:

Florida Statutes

STATEMENT OF CASE AND FACTS

While the DOT has supplemented the Statement of Case and Facts provided by Texaco's Initial Brief, DOT has only disputed the "first sentence of page three" of that brief. As such, this Court should accept as accurate all other representations contained in Texaco's Initial Brief, regarding Texaco's on-site activities.

QUESTION CERTIFIED

The District Court certified the following question to this Court as one of great public importance.

> IS A LESSEE OF PROPERTY PARTIALLY TAKEN BY EMINENT DOMAIN ENTITLED TO BUSINESS DAMAGES PURSUANT TO SECTION 73.071(3)(b), FLORIDA STATUES (1985), WHEN THE LESSEE IS A WHOLESALE SUPPLIER OF PRODUCTS TO A SUBLESSEE WHO OPERATES A RETAIL BUSINESS ON THE PROPERTY AND THE LESSEE ASSISTS ITS SUBLESSEE IN THAT RETAIL BUSINESS BY, FOR EXAMPLE, HAVING CONSTRUCTED THE BUILDING AND OTHER PHYSICAL IMPROVEMENTS USED BY THE RETAIL BUSINESS, ALLOWING THE BUSINESS TO BE OPERATED UNDER THE LESSEE'S NATIONALLY RECOGNIZED COMPANY NAME WITH LESSEE'S SIGNS AND TO USE THE LESSEE'S CREDIT CARD SERVICES, CONDUCTING SITE INSPECTIONS AT THE BUSINESS TO ENSURE COMPLIANCE WITH THE LESSEE'S STANDARDS, AND PAYING THE REAL ESTATE TAXES ON THE PROPERTY?

SUMMARY OF ARGUMENT

The trial court was correct in deciding factually and legally that Texaco was doing business at the Texaco service station, which is the subject of the instant condemnation action. This evidence

included: Texaco's use of the site as a service station for 15 years, with another 15 years remaining on the lease; Texaco's extensive control over the operation of the service station at the site; Texaco constructed all of the improvements and supplied the equipment necessary for operation of a service station; the only petroleum products that could be sold at the site were Texaco's; Texaco provided its trade name, signs and credit cards for use at the site; non-compliance with any of the Texaco operation standards or requirements would result in the loss of the right to act as Texaco's dealer at the site; Texaco paid all real estate taxes on the property and was responsible for collecting and remitting all sales taxes from the sale of fuel at the site.

Texaco not only had a "business" on site, which was destroyed by the DOT, but also had a "physical existence" on the condemned land and its adjoining remainder.

To deny compensation via the business damage statute on the grounds offered by the DOT would create an absurd result and be a clear denial of equal protection of the laws.

The use of the wholesale vs. retail comparison alone, in order to resolve the question of entitlement to business damages under Sec. 73.071(3)(b), Fla. Stat., denies the consideration of any factual evidence which would establish that a claimant is conducting "business" at the site or that the business location was a valuable asset to the claimant.

The use of the wholesale vs. retail comparison is contrary to the legislative intent in that: (1) no such distinction can be gleaned from the language used in the business damage statute, and

(2) no determination can be made as to whether the claimant has a substantial business interest in the location.

The certified question should be answered in the affirmative, the decision of the above district court quashed, and the judgment awarding damages to Texaco should be reinstated.

ARGUMENT

A. The Department of Transportation initially contends that the statutory predicate of Sec. 73.071(3)(b), Fla. Stat., must be established before submitting the issue of damages to the jury. Indeed, if, as in this cause, the condemnor challenges the owner's right to claim business damages, then the trial court can be placed in the position of being the fact-finder to determine if the statutory predicate has been met.

Of course, when a trial judge serves as a fact-finder, its findings arrive at the appellate court with a presumption of correctness. So long as there is substantial competent evidence to support the trial court's findings, then its findings will not be disturbed. An appellate court should not substitute its judgment for that of the trier of fact. Herzog v. Herzog, 346 So.2d 56 (Fla. 1977). But, that is exactly what the District Court did below and what the DOT hopes this Court will do now.

Since the DOT has accepted, as accurate, the facts provided in the initial brief, it cannot be denied that Texaco was conducting business at its service station site. By "business," we mean "the activity, the energy, the opportunities by which results are reached - a condition rather than fixed tangible objects from which

conditions arise." Division of Administration, State of Florida DOT v. Lake of the Woods, Inc., 404 So.2d 186 (Fla. 4th DCA 1981). Given this judicial definition of "business," which the DOT does not dispute or even comment upon, there can be no doubt that the evidence weighed by the trial court overwhelmingly supports the trial court's conclusion that Texaco was conducting an established business at the site. Consider the following:

- Who chose the site for a service station over 15 years ago? Texaco!

- By whose plans and specifications was the site improved for use as a service station? Texaco!

- Who constructed all of those improvements and installed the necessary equipment so that the site could function as a service station? Texaco!

- Who took the risk of a 15-year lease of the site, with options to renew for another 15 years? Texaco!

- Who specified, to minute detail, the standards of the service station site with regard to appearance, cleanliness, and servicibility of the equipment? Texaco!

- Who maintained regular on-site inspections to ensure compliance with the above? Texaco!

- Who specified, again to minute detail, the standards relating to the sale and storage of the petroleum products sold at the site? Texaco!

- Who maintained regular on-site inspections to insure compliance with the above standards? Texaco!

- Who had the authority to terminate the sub-lease agreement, as well as all of the other agreements relating to the operation of the state, for failure to comply with any of the standards established for operation of the station? Texaco!

- Who paid all real estate taxes on the site? Texaco!

- Who had the responsibility of collecting and remitting the sales tax for the products sold at the site? Texaco!

- Whose trade name, trademarks, brand names and signs were displayed at the site? Texaco's!

- Whose gasoline and other petroleum products were the only ones permitted to be sold at the site? Texaco's!

- Who authorized the acceptance of credit cards as a means of paying for the fuel products sold at the site? Texaco!

- Whose credit cards were they? Texaco's!

- Who had sole authority over the display and advertising of the fuel products sold at the site? Texaco!

- Who provided marking experts and other "specialty" automotive experts to assist in the marketing of petroleum products from the site? Texaco!

- Who is, by stipulation, losing $170,000.00 in profits as a result of the taking from the service station site? Texaco!

In light of "the activity, the energy, the capacity, [and] the opportunities by which results are reach," it defies reality to deny that Texaco is conducting business at the service station site! Texaco's "activity" and control over the business conducted at the site is far greater than that of the dealer, who literally does

nothing more than pump Texaco's fuel into the vehicles of the motoring public.

Rather than respond to the owner's claim by rebutting the factual foundation laid by the owner, the DOT rests its entire case on the wholesale-retail dichotomy. The DOT's "don't confuse me with the facts" presentation would deny inquiry into, or consideration of, the on-site activity conducted by an owner, such as Texaco.

The wholesale-retail argument should be rejected for several reasons. First, there is nothing found in the statutory language of Sec. 73.071(3)(b) that reveals a legislative intent to deny such claims. So long as the owner can establish factually that "business," as judicially defined, is being conducted on the site, then the claim cannot be denied. Using the labels suggested by the DOT ignores the facts, a practice which cannot be condoned.

The wholesale-retail ruse also requires the Court to disregard the legislative intent of the provision, as discerned by this Court in Tampa-Hillsborough County Expressway Authority v. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1984). In Morris, this Court recognized that the legislature, when enacting Sec. 73.071(3)(b), "recognized that a business location may be an asset of considerable value." Id. at 929. It was also stated that the legislature intended to "assure the existence of a substantial business interest in the location" by an owner claiming business damages. Id. at 929.

The wholesale-retail comparison would clearly defeat the statutory purpose because it disregards all activity at the business location by an owner such as Texaco. If the business location is an

asset of considerable value, and the legislative intent was to avoid the hardship that may result from a taking, are not the facts relating to the activity at the site a relevant consideration? Indeed they are!

Can the issue of whether the claimant has "a substantial business interest in the location" be determined by merely applying the wholesale-retail comparison? The answer is obviously no! The facts must be considered. Facts such as: Who has been demonstrated to have a past and continuing possessory interest in the site? Who constructed the improvements so that the specific type of business can be conducted at the site? Who imposed standards upon just about every aspect of the operation at the site? Who has the authority to terminate agreements, including a sub-lease of the site, for non-compliance with the standards set above? Who has prominently displayed its signs and trade name to solicit business to that particular site?

Once these inquiries are made, then, and only then, can the Court discern if the claimant has a "substantial business interest in the location." Only the most uninformed and uninquiring person could deny that Texaco has a substantial business interest in the site.

Considering the above, the DOT's Coca-Cola machine analogy must be rejected from the outset. An entity such as Coca-Cola has no "substantial business interest" at any particular location. So long as their machines are within reach of an electrical outlet, the purpose for placing the dispensing machine can be accomplished. By comparison, the activities conducted by Texaco are <u>site</u> <u>specific</u> and

are performed with the intent of conducting their business - the sale of fuel products to the motoring public - at that particular site. The business of selling fuel to the motoring public relies, to a great extent, on consumer loyalty. The entire purpose of the improvements at the site is to sell Texaco petroleum products at that site. As such, Texaco engages in an assortment of business activity, on-site, to ensure consumer satisfaction, which in term prompts the consumer to return to that particular site again. Unlike the soft-drink or candy machine, which can merely be picked up and moved to a new spot, the business of selling gasoline is closely tied to the site location.

Most important, however, is the fact that the provider of a soft-drink vending machine does not possess the requisite "ownership" interest in the site and therefore cannot qualify under the statutory provision. When a soft-drink or any other vending machine, is placed at a particular location, the vending machine itself is leased by the particular party desiring the presence of the vending machine. But the vending machine owner does not gain any "ownership" interest in the property site upon which the machine is placed.

By comparison, Texaco has been the "owner" of this particular site for over 15 years. Texaco would have continued its ownership for another 15 years but for the taking in this cause. The loss of the use of the part taken frustrated that intent and caused the closing of the business. This fact is unrebutted.

Texaco's business is selling fuel products to the motoring public. It accomplishes this through company run stations and

dealer run stations. In both situations, they exercise extensive control over the manner in which the station is operated. The only real difference is that at one station an employee pumps the gas, while at the other, a dealer pumps the gas. "Business," as defined under the law, is conducted at both sites, yet DOT would deny the owner business damages at the dealer-operated site because Texaco derives its profit in a different manner than it does from the company-run station. DOT asks this Court to ignore the facts, and look only to the profit structure to determine entitlement to business damages under the statute. This "ignorance is bliss" position should be rejected. The statute does not require such an interpretation. Common sense, fairness, and equal protection under the law mandate the rejection of DOT's position.

B. While the statute alone, as it currently exists, provides the owner in this cause with a sufficient basis for the claim of business damages, the claim is actually one of constitutional origin. The owner suggested in its initial brief that none of the business damage decisions has provided "a reasonable or well-founded basis for excluding business damages from the concept of full compensation." (Initial Brief at p. 30). DOT responded by merely citing this Court's decision of Morris Alignment, which does nothing more than reiterate the general rule: business damages are not part of full compensation. Again, however, there is no well-founded basis given supporting the exclusion of business damages from the concept of full compensation.

To say the losses are "intangible" or merely "consequential" is neither factually or legally accurate. Losses incurred by a

business are readily ascertainable and can be predicted accurately. In this cause, the DOT had no problem stipulating that the owner's loss, as a result of the taking, was $170,000.00. (R:191-193). The losses are real, tangible,[1] and capable of ascertainment by examining the history of the business and its income stream.

An attempt by an owner to claim business damages that were, in fact, speculative or without factual support can be dealt with, as are other evidentiary issues, by a motion to strike or directed verdict. The claim would also be the subject of cross-examination and expert witnesses offered in rebuttal. Assuming the claim passed the scrutiny of the trial judge, it would then be subject to the scrutiny of a jury, which would assess the claim under proper jury instructions.

The business damage claim in an eminent domain proceeding is not merely "consequential," or an indirect result of the taking of the owner's property. The damages, by statute, must result from the denial of the use of the part taken. Thus, the damages are a direct, rather than an indirect, consequence of the taking.

There is no reasonable basis for excluding business damages from the concept of full compensation. DOT has not provided a single reason for the exclusion other then stating "that's the way its always been." But, as reflected in Myers v. City of Daytona Beach, 158 Fla. 859, 30 So.2d 354 (Fla. 1947), the rule has not

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[1]Webster's Ninth New Collegiate Dictionary, defines "tangible" as "capable of being appraised at actual or approximate value."

always been one of exclusion.[2] Rather, as recognized in Myers, the business damage statute was enacted "pursuant to the constitution." Id. at 355. Nothing has occurred over the years which would justify the departure from the holding in Myers. Indeed, neither the DOT, nor any of the case precedent cited by DOT, have provided a reasonable basis for departing from Myers.

While it is not necessary for the resolution of the issue of Texaco's entitlement to business damages in this cause, it is requested that this Court recognize that constitutional basis in sustaining the owner's claim in this cause.

CONCLUSION

The District Court erred when it reweighed the evidence presented to the trial court on the issue of whether Texaco was engaged in "business" at its service station at the time of the taking. since the parties agreed to submit the factual issue of whether Texaco met the statutory predict to the trial court, the lower court's resolution of the issue was presumed correct. The trial court's ruling should not have been overturned in light of the substantial, competent, and unrebutted evidence presented.

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[2]See also: Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512 (1887), where, prior to the enactment of the business damage statute, the court recognized that damages due to the taking included "depreciation of the market or rental value of [the owner's] premises, and for annoyances to [the owner's] business or family occupation." Id. at 514.

The certified question should be answered in the affirmative and the decision of the District Court quashed. The final judgment of the trial court should be reinstated.

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 to Maxine Ferguson, Attorney, Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458, this 2nd day of May, 1988.

Alan E. DeSerio, Esquire