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SUPREME COURT OF FLORIDA

CASE NO: 82,~~121~~ 132

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Petitioner,

vs.

L. I. GEFEN,

Respondent.

ANSWER BRIEF OF RESPONDENT L. I. GEFEN

(ON REVIEW OF A QUESTION CERTIFIED BY THE
FIRST DISTRICT COURT OF APPEAL TO BE OF
GREAT PUBLIC IMPORTANCE)

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PRELIMINARY STATEMENT

The Florida Department of Transportation, the defendant/appellant below and petitioner here, will be referred to as the "DOT". L. I. Gefen, the plaintiff/appellee below and respondent here, will be referred to as "Gefen".

References to the record on appeal will be indicated parenthetically as "R" followed by the appropriate page numbers. References to the trial transcript dated December 10, 1990, will be indicated parenthetically as "T" followed by the appropriate page numbers. References to the Supplemental Record on Appeal will be indicated parenthetically as "SR" followed by the appropriate page numbers. References to the transcript of the hearing on the parties' motions for rehearing dated January 17, 1990 [sic] will be indicated parenthetically as "M" followed by the appropriate page numbers. References to the deposition of Carl L. Wilson will be indicated parenthetically as "Dep." followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

With the limited additions, Gefen accepts the DOT's Statement of the Case and Facts set forth in its Initial Brief.

The property in question was purchased as an investment (T-13) and it had been rented for automobile purposes continuously since its purchase in 1976 (T-13). The property has been vacant since September 30, 1989 (T-18) and because of that fact, the property is uninsurable (T-19).

The DOT conceded that ". . . once they get out of their property and onto the public streets that the public streets don't go the same place they used to . . ." (T-9) and that McCoys Creek Boulevard is a dedicated public road pursuant to Sec. 95.365, Florida Statutes (1991) (T-39, 57, 82).

The DOT's closure of the ingress and egress ramp at McCoys Creek Boulevard and I-95 in Jacksonville, Duval County, Florida killed access from I-95 to McCoys Creek Boulevard and access from McCoys Creek Boulevard to I-95. McCoys Creek Boulevard does nothing for access to the property after the barricading (T-41).

The subject site, prior to the actions of the DOT, was a "passerby capture traffic" site (T-54) and I-95 is a key to the success of the site (T-56). Further, no one will locate in this location without access to and from I-95 (T-

57).

The right-of-way acquisition for this particular project terminates at the north boundary of McCoys Creek Boulevard (T-72, 81) and there was no need to close McCoys Creek Boulevard because the limits of construction had stopped at the north boundary of McCoys Creek Boulevard.

McCoys Creek Boulevard was closed because it was part of a limited access facility (T-83), but the DOT had no title to the right-of-way for McCoys Creek Boulevard (T-82) and nothing in the record reflects that the DOT obtained permission of the City of Jacksonville to close the road or make it a limited access facility. McCoys Creek Boulevard is not part of the intrastate highway system, it is a city street. Hodges v. Jacksonville Transportation Authority, 353 So.2d 1211 (Fla. 1 DCA 1977) (no consent to construction of limited access facility as required by Sec. 338.01(1), Florida Statutes (1991)).

It was freely admitted that the DOT intends to take Gefen's property as part of the construction project for which McCoys Creek Boulevard was closed (SR 1-3, Dep. 7 and 9).

SUMMARY OF ARGUMENT

Succinctly put, if the DOT can do what it did in this case with impunity, then it can do the same thing at any ingress and egress ramp throughout the intrastate system where investors have cast their economic lot for the construction of shopping centers, service stations, motels, Stuckeys, et cetera. That simply won't wash. The old Fram Oil commercial slogan of "Pay me now or pay me later" does not apply here for if the owner cannot get paid now, she will never be paid.

ISSUE

WHETHER AN OWNER OF COMMERCIAL PROPERTY HAS SUFFERED A COMPENSABLE TAKING WHERE ACCESS TO AN INTERSTATE HIGHWAY BY MEANS OF A STREET FRONTING ON APPELLEE'S PROPERTY IS CLOSED, AND SAID CLOSING RESULTS IN SUBSTANTIALLY DIMINISHED ACCESS TO THE SUBJECT PROPERTY, ALTHOUGH NO ACCESS FROM ABUTTING STREETS HAS BEEN CLOSED.

ARGUMENT

As this writer argued in final argument at the trial of this inverse condemnation proceeding (T 88), the DOT did what it did when it did it. The facts are not in dispute and when applying the current law to the admitted facts, was there a compensable taking on September 11, 1989? If Gefen's property was not taken on September 11, 1989, there simply is no justice and equity in inverse condemnation and eminent domain proceedings in this state and the constitutional provision that "No private property shall be taken except for a public purpose and will full compensation therefor paid to each owner . . ." is without meaning. Article X, Section 6(a), Florida Constitution.

My personal belief and ideal is that the law is always practical and if that is a truism, some rather elementary reasoning and practicality dictates an affirmance in this case.

That the DOT intends to take all, if not a substantial portion, of the subject property is admitted (SR 1, 3 and Dep. 9). Imagine then this scenario: In 1995, the

DOT, in furtherance of its plans to extend the ramp improvement system along I-95 in the vicinity of the subject property south of McCoys Creek Boulevard, solicits bids for appraisals of various properties along the right-of-way of the southerly extension of the ramp system. Appraisers are selected and the one assigned to appraise the Gefen property makes his site inspection of the subject property. On inspection and investigation, the appraiser determines that the McCoys Creek Boulevard southbound I-95 entrance and exit ramps were barricaded and have been since September 11, 1989. Because of this fact, i.e., no I-95 ingress and egress, the subject location is no longer a "passerby captive traffic" site (T-54) and it has very little value. Needless to say, the date of taking and date of valuation must be when the "good faith" estimate of value is deposited into the trial court's registry pursuant to Chapter 74, Florida Statutes (1991). Accordingly, if the DOT's position is correct, it barricaded McCoys Creek Boulevard on September 11, 1989 with impunity and the owner has no remedy and when the property is taken in 1995, Gefen will be "fully compensated" by the payment of a sum of money much less than would have been indicated prior to the closure of McCoys Creek Boulevard. Is that practical, legal, constitutional or what this country is all about? I think not and it is trusted this Court will not countenance the cavalier attitude of the DOT by affirming the judgment of the lower court.

Gefen is constrained to point out to this Court the DOT's misplaced reliance on Jahoda v. State Road Department, 106 So.2d 870, 872 (Fla. 2 DCA 1958), in view of the Supreme Court's pronouncement in State of Florida Department of Transportation v. Stubbs, 285 So.2d 1, 4 (Fla. 1973). As a matter of act, Shepard's Florida Citations makes it appear that Jahoda, supra, has been overruled.

For similar reasons and especially verbiage which will be cited or referred to in Stubbs, supra, with a few minor exceptions, this brief will rely on more recent case law.

It is the same "tunnel vision" that so often plagues a bureaucracy which deems itself immune from judicial review, Knappen v. Division of Administration, State of Florida Department of Transportation, 352 So.2d 885 (Fla. 2 DCA 1977), cert. den. 364 So.2d 883 (Fla. 1978), that plagues the DOT here. The DOT simply cares less about the catastrophic effects its actions have had upon Gefen's property and the fact that if she cannot receive full compensation at this time, she never will not even when the DOT engages in its fait accompli.

In this particular setting, the case of Dade County v. Still, 377 So.2d 689 (Fla. 1979), seems to be on point and very persuasive. In Still, supra, in 1977 Dade County sought to acquire, through eminent domain proceedings, sufficient lands to widen and convert a two-lane road into four lanes.

Thirty-nine years prior, the county had passed an ordinance which set a minimum width of 70 feet for the street abutting the landowner's property. Thirteen years later, the ordinance was amended to expand the width of the road to 100 feet. The ordinances did not "take" the property. The county maintained that the purpose of the ordinances was to place the public on notice of the lands needed for future road extension, not unlike the "land banking" procedure in the Map of Reservation Statute struck down as unconstitutional in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990). In proffered testimony, the condemnor's real estate appraiser opined that the value of the subject properties would be substantially less if these ordinances were considered. The county assigned as error the lower court's ruling that the jury could not consider the effect of the ordinances on market value of the property then being acquired. The district court of appeal rejected that construction and affirmed the trial court on the strength of Miami v. Romer, 73 So.2d 285 (Fla. 1954), saying, "The principle must be adhered to that no action of the government can constitutionally deprive an individual of his property without full compensation for the taking.".

In agreeing with the district court in Still, supra, this Court observed that the appraisal evidence clearly reflected that the ordinances depressed the value of the property just as the barricading of McCoys Creek Boulevard

destroys the value of the Gefen land. The Still, supra, court went on to say at page 680:

> Since the owner received no compensation at the time the ordinance was passed, the county cannot now seek to have the owner's compensation reduced by reason of its own governmental action.

Without being a soothsayer, Gefen is confident that if the DOT prevails at this juncture, it will seek to have her compensation reduced when it exercises its power of eminent domain voluntarily by reason of its governmental action in closing McCoys Creek Boulevard.

As the court said in Still, supra, at page 690, and as this Court should hold:

> To hold as suggested by the county would in effect constitute a deprivation of property without full compensation for the land taken, and thus would violate Article X, Section 6(a), Florida Constitution.

That the subject facility is being built as a limited access facility is unquestioned (T 83). When I-95 was originally constructed and rights-of-way acquired, I-95 was a limited access facility with access afforded, granted and placed at McCoys Creek Boulevard and that is precisely why Gefen's predecessor in title, Exxon Corporation, built a full service station at the subject site. Now, in furtherance of its ramp system, the DOT completely denies effective access to the subject site by further limiting access and maintains it owes the owner nothing. Nonsense! The First District Court of Appeal seems to disagree with the DOT for in Benerofe v. State Road Department, 210 So.2d 28, 30 (Fla. 1 DCA 1968), in

the event that limited access is taken, it said:

> This does not mean, of course, that, if the appellant's right to ingress and egress is later taken or legally impaired, he would be remediless, for, in that eventuality, as the appellee's point out in their brief, the appellant would have a remedy 'by an injunction, by an inverse condemnation action, or some similar remedy'.

Gefen considers the actions of the DOT in this case to constitute a "regulatory taking" and the First District Court of Appeal has said:

> To succeed in a regulatory taking claim, a property owner must demonstrate . . . that it denies a substantial portion of the beneficial use of the property. Glisson v. Alachua County, 558 So.2d 1030, 1035 (Fla. 1 DCA 1990).

The Glisson court went on to say at page 1036:

> The test to be applied in considering a facial challenge is relatively straightforward, i.e., "[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economical viable use of his land . . . .'".

Can it reasonably be said that Gefen has not been denied economically viable use of her land when no reasonable use of her land remains after the DOT barricaded McCoys Creek Boulevard? She lost her tenant immediately (T 14); she has not been able to rent her property since the barricading; and the property is vacant and uninsurable (T 18, 19).

A portion of McCoys Creek Boulevard, by the actions of the DOT, was closed on September 11, 1989, no two ways about it. The First District Court of Appeal upheld a judgment of inverse condemnation which held that the closing of a portion of a road amounted to a taking which entitled the

owners to compensation. Santa Rosa County v. Wicks, 535 So.2d 349 (Fla. 1 DCA 1989). In Wicks, supra, the road had been dedicated to the public pursuant to Section 95.365, Florida Statutes (1991), just as has McCoys Creek Boulevard (T 8, 39, 82).

The case of Stubbs, supra, a case which was handled by the firm of which this writer was a member, began the process of liberalizing recovery in access cases and at page 2, the Court said:

> This is part of a gradual process of judicial liberalization of the concept of property so as to include the 'taking' of an incorporeal interest such as the acquisition of access rights resulting from condemnation proceedings. [emphasis added]

Stubbs, supra, and some of its progeny required an actual physical invasion of property before there could be compensation, but not since Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989). Nevertheless, the DOT, afflicted as usual with its "tunnel vision", still argued in Tessler, supra, no physical invasion or appropriation, no compensation. Having lost the taking argument in Tessler, supra, the DOT donned its "tunnel vision" once again and lost the taking argument in Joint Ventures, Inc.,supra.

It is apparent that the DOT has now recognized that a taking is no longer the sine qua non of compensation because it has not the temerity of making the argument here. What it has done is attempt to convert a taking of access case into a traffic flow case and completely gloss over the case of State

of Florida, Department of Transportation v. Lakewood Travel Park, Inc., 580 So.2d 230 (Fla. 4 DCA 1991), rev. den., Case No. 78,440 (Fla. December 10, 1991). As a matter of fact, when counsel for the DOT, the scrivener of DOT's initial brief here, was asked by a member of the panel of judges who heard oral argument in Gefen below if he could distinguish Lakewood, supra, his answer was "no".It is interesting to note how lightly the DOT disposes of Lakewood, supra, when this Court denied review. It is trusted this Court thoroughly considered the merits of the DOT's position and assertions when it sought the discretionary review of the Court in Lakewood, supra. The Lakewood case is good precedent for an affirmance of the instant case for if Mrs. Gefen is not paid now, she'll not be paid later.

This writer has not had the benefit of reading the DOT's brief in Lakewood, supra, but the Lakewood court said:

> According to its brief, the DOT perceives any evidence concerning access to any roads not abutting the property as irrelevant. Therefore, the DOT contends that, since the subject property did not actually abut the turnpike . . ., changes in those roads and approaches thereto regardless of their impact on access to particular private property are not to be considered in determining whether a property owner has suffered a compensable loss due to the public taking.

In a proverbial "red cow" case, the Lakewood, supra, court held that the position is too narrow. The DOT makes the same "tunnel vision" argument here and it should have the same result.

The DOT is of the opinion that since I-95 is a

limited access facility, Gefen's real property does not abut that highway and she has no right to access the facility.

At page 12 of its initial brief, the scrivener of the DOT's initial brief defines access and cites as authority for that definition Sec. 334.03(16), Florida Statutes (1991), which is the definition of "Person". Be that as it may, this writer has been unable to find a statutory definition of "abut". Nevertheless, by reading Chapters 334 and 335, Florida Statutes (1991) in pari materia, one should conclude that the Gefen property abuts I-95. Sec. 334.03(21), Florida Statutes (1991) says:

> The State Highway System consists of the following, which shall be facilities to which access is regulated:
>
> (a) The interstate system; . . .

Accordingly, I-95 is part of the State Highway System and access to it may be regulated in accordance with Sec. 335.181, Florida Statutes (1991). Further Sec. 335.181(2)(a) provides:

> Every owner of property which abuts a road in the State Highway System has a right to reasonable access to the State Highway System but may not have the right of a particular means of access. The right of access to a road on the State Highway System may be restricted if reasonable access may be provided pursuant to local regulations to another public road which abuts the property.

It is indeed clear from reading Sec. 334.03(12), Florida Statutes (1991), that the Gefen property abuts the State Highway System and if the DOT regulates access to the State Highway System as it has here and under the provisions of Sec. 335.181, Florida Statutes (1991), it does so at its

own risk for nothing in Sec. 335.181, Florida Statutes (1991), ". . . shall affect the right to full compensation under Sec. 6, Art. X of the State Constitution." Sec. 335.181(4).

There is an interesting discussion of a limited-access highway in J. Sackman, 3 Nichols on Eminent Domain (Rev. 3rd Ed.), Sec. 10.221[2], p. 397, as follows:

> It is a highway where ingress and egress may be had only at certain designated points which are to be determined by the highway authorities. . . . [I-95 and McCoys Creek Boulevard] Limited access highways are of no use, however, if the public is not provided reasonable means to enter and leave the highway system. It is imperative, therefore, that although the access be limited, reasonable access also be granted to those requiring use of the highway.

When I-95 was constructed, the requisite highway authorities designated McCoys Creek Boulevard to be one of those such points where reasonable means would be provided for the travelling public to enter and leave the highway system. That's precisely why Gefen's predecessor in title, Exxon Corporation, purchased the site and that's why Gefen cast her economic lot there in April 27, 1976 when she purchased the site from Exxon.

Despite the Policy Considerations argument of the DOT commencing at page 22 of its initial brief, sound logic, fundamental fairness and constitutional dictates do not mandate that individual property owners sacrifice their fiscal well being for the public at large.

This Court, I am sure, is familiar with the off-ramps at I-10 at Thomasville Road (319 North) in Tallahassee,

Leon County Florida, where the likes of Quincy's, Dixie Food Store, Shell Oil, Wendy's, Texaco, McDonalds and BP Oil have all located. Query: Would they have a cause of action if the DOT barricaded those ramps as it did at I-95 and McCoys Creek Boulevard in the instant case?

Clearly, the actions of the DOT in closing McCoys Creek Boulevard at I-95 in Duval County, Florida has constitutionally deprived Mrs. Gefen of her property without full compensation. Even when she ultimately prevails, she will still be out the monthly rental income she has lost for each and every month since September, 1989, now some 36 months.

Other jurisdictions have considered issues similar to Mrs. Gefen's problem and they have resolved these issues in a manner which would favor her position here.

In Gray v. South Carolina Department of Highways and Public Transportation, 427 S.E.2d 899 (S.C. App. 1992), an inverse condemnation case very similar to the subject case, the South Carolina Court of Appeals upheld a judgment in inverse condemnation. The Gray, supra, case arose when the South Carolina Department of Highways and Public Transportation closed the intersection of Grand Street and U. S. Highway 17 by-pass in Mt. Pleasant, South Carolina. For some eleven years prior to the closure of the intersection, Gray operated a successful service station on the west side of Grand Street where it intersected with U. S. 17 by-pass near

Store, Shell Oil, Wendy's, Texaco, McDonalds and BP Oil have all located. Query: Would they have a cause of action if the DOT barricaded those ramps as it did at I-95 and McCoys Creek Boulevard in the instant case?

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Mt. Pleasant. When the department closed the intersection in August, 1989, Gray and his customers were denied access to Grand Street as it ran in a southwesterly direction.

Upon the closure of the intersection and, it is suspected, in an attempt to appease or mitigate Gray's problems, new intersections to the east and west of Grand Street were opened as was a new configuration of roads, resulting in Grand Street being severed and that part to the north of U. S. 17 becoming a spur ending in a cul-de-sac where Gray's service station was located. Two issues were considered by the Court. First, whether there was a compensable taking of Gray's property and, secondly, whether the evidence supported the jury's award of damages.

As regards the issue of a taking, the state argued that the trial court should have granted its motion for directed verdict because it had a right to close the intersection in the exercise of its police power. A rather familiar position. In disposing of that argument, the court reasoned that most road improvements have safety as a purpose, but any suggestion that the goal of public safety made takings of property not compensable would be untenable.

In statutory provisions similar to Florida's, the state in Gray, supra, has the authority to regulate and prohibit access to controlled-access facilities and to eliminate and control the creation of intersections; but they do not provide that the state may regulate and prohibit access

and eliminate and control the creation of intersections without the payment of compensation if the action of the state constitutes a taking. Gray, supra, at page 901. See also Sec. 335.181(1)(2)(3)(4), Florida Statutes (1991).

In Gray, supra, the state also argued the physical invasion position which has been dispelled in Florida by Tessler, supra, but also argued by the Florida DOT in several appellate decisions. At that same juncture, as here, the South Carolina Department argued that Gray's real complaint was that he had lost business because the diversion of traffic makes the site unsuitable as a service station.

In citing from City of Rock Hill v. Cothran, at page 903 of Gray, supra, it was said:

> . . . it is undoubtedly true that if it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut on the part of the street vacated.

In addressing the question of special injury, the Cothran court said in essence that if the property was rendered useless for business purposes, then the taking would result in special injury. That Gefen's property was rendered useless for business purposes was abundantly supported by evidence in the Record on Appeal.

While Gray is from another jurisdiction, it is factually very similar and should be persuasive.

In Florida, in inverse condemnation actions, the trial court sits as both the trier of fact and law. Tessler, supra, at page 850. The operative fact question in the

instant case is, "Was Gefen deprived of reasonable access to her property?". Clearly, from the evidence, she was and she is, therefore, entitled to be compensated. See Sec. 335.181(2)(a) and County of Anoka v. Esmailzadeh, 498 N.W.2d 58 (Minn, App. 1993).

Indeed, the process of liberalizing recovery in access cases was begun in Stubbs, supra, by this Court; and that case is authority for the instruction of all juries when the issue of severance damages is before them, as follows:

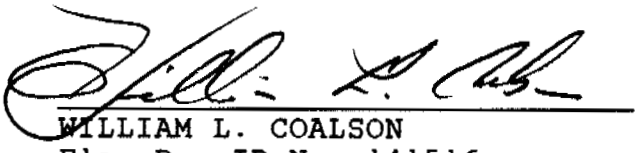
> . . . Damages to the remaining property of an owner are known as severance damages and may consist of the following:
>
> . . . .
>
> 4. Reduction in value of the owner's property because of a loss of access. Ease and facility of access to and from an existing street or highway constitute valuable property rights and an owner must be fully compensated for any destruction or substantial diminution of this access.

CONCLUSION

The acts of the DOT were reglatory in nature and, reasonable or not, they amount to a compensable taking., Joint Ventures, supra, because Mrs. Gefen has been denied any economically viable use of her land. Glisson, supra.

The DOT's position is untenable. The Federal and State Constitutions simply won't permit the DOT to specially damage the citizens of this state, as they have Mrs. Gefen, with impunity. In view of the peculiar circumstances of this case, if Mrs. Gefen cannot be permitted to be compensated now, she will never receive her constitutionally mandated full compensation. When the DOT takes her property, which it has sworn it will do, it will take the position the property is practically valueless. Why? Because that which gave it value in the first place, the on and off ramps at I-95 and McCoys Creek Boulevard, are gone as of the date of taking in futuro.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished Gregory G. Costas, Esquire, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0450, and Will J. Richardson, Esquire, P. O. Box 12669, Tallahassee, Florida 32317-2669, by mail, this September 7, 1993.

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