IN THE SUPREME COURT OF FLORIDA

IDA FINKELSTEIN, et al.,

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

DOCKET NO: 83,308

4th DCA: 92-2501

AMENDED BRIEF

of

PETITIONERS

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STATEMENT OF THE CASE AND FACTS

The central question in this eminent domain case has been certified by the Fourth District Court of Appeal as a matter of great public importance [A. 1].[1] The central issue is whether evidence of environmental contamination should be admitted in an eminent domain valuation trial. The parties agree that this is a question of first impression in Florida and that it is a matter of great public importance.

The case originated in Broward County, Florida, where the Respondent, Department of Transportation (hereinafter "DOT"), condemned an improved gas station site owned by Petitioners, Ida Finkelstein and Alice Fox, in connection with the I-595 project. At the time of taking, the site (parcel 269) was leased and operated by Petitioner, Tenneco Oil Company (hereinafter "Tenneco").[2]

Tenneco routinely monitors all of its service stations. Sometime before December 1988, Tenneco discovered petroleum groundwater contamination beneath the subject site and dutifully reported this to the Department of Environmental Regulation ("DER") pursuant to § 376.3071(9)(b) Fla.Stat. (Supp. 1988) [R. 11, 17]. Well in advance of the taking, DER determined Tenneco's site

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[1] Citations to the record on appeal will be indicated parenthetically by an "R" followed by the appropriate page number(s). "A" will reference the Appendix accompanying this Initial Brief.

[2] Finkelstein, Fox and Tenneco Oil Company will be collectively referred to as "owners."

to be eligible for the Early Detection Incentive Program ("EDI"), which ensured the owners state reimbursement for all reasonable remediation costs without admission of any liability for the presence of contamination. [R. 11, 17, 30-32, 415]. § 376.3071(9)(b) and (c) Fla.Stat. (1988 Supp). The owners' EDI remediation program was underway when DOT filed its condemnation petition in 1990. [R. 11, 17, 27].

Pursuant to a resolution authorizing the exercise of eminent domain [R. 398-401], DOT obtained an Order of Taking and title to the site in May, 1990. At the insistence of DOT counsel, the Order of Taking provided that the owners

> would be responsible for and hold the DOT harmless from any claims for environmental damages associated with contaminants, including petroleum products, determined to be present on or released, including by way of leak, discharge or seepage, from the subject property while Defendants were in possession [R. 397, 469].

As the new owner, DOT also became the beneficiary of the site's EDI eligibility and worked closely with DER in accordance with it.[3] [R. 22-24]. Prior to the June 1992 trial, DOT undertook "emergency procedures" to remediate the site solely due to DOT's own needs and the timetable for its construction project [R. 22-23, 35, 415].

Costs of DOT's remediation were not fully ascertainable by the time of trial, but DOT estimated the cost of its exigent clean-up was more than double the cost of a normal remediation. There was also uncertainty regarding the allocation of

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[3] EDI eligibility runs with the "site." § 376.3071 (9) Fla.Stat. (1989). Accordingly, when DOT acquired title to the subject site, it also acquired EDI eligibility for state funding of remediation costs.

of a normal remediation. There was also uncertainty regarding the allocation of that cost to the subject site, since the groundwater contamination beneath Tenneco's station was merged with a pollution "plume" from a former gas station across the street (the "Save On" site) [R. 17-19, 26-29, 478].

DOT moved *in limine* prior to trial, seeking the admission of evidence regarding the property's contamination and the costs incurred to clean it up, arguing that Tenneco was responsible for the cost of clean-up under Florida law and that contamination was relevant to value [R. 415-417]. The motion was argued at the outset of trial and denied by the trial judge [R. 10-20].

Essentially, DOT argued that remediation costs and contamination "stigma" were factors which would be given weight in normal negotiations to purchase the property [R. 12]. While DOT counsel said that the above-normal costs of DOT's clean-up were solely the result of the road construction schedule [R. 23], she nonetheless sought to introduce evidence of the DOT's exigent clean up cost in addition to "estimated" average costs for similar contamination [R. 20-37, 415-417]. Owners' counsel argued that the contamination was irrelevant because EDI indemnification was available to the site at the time the condemnation intervened and that the evidence was too speculative since the remedial cost, reimbursement, and allocation between the two sites were uncertain [R. 17-18]. The trial court agreed that the evidence was not relevant since state reimbursement was available at the date of taking and excluded evidence concerning contamination [R. 12, 14, 31].

DOT was then permitted to proffer the testimony of three engineering witnesses regarding the contamination and its remediation [R. 22-36]. Later in the trial, DOT proffered a portion of its appraiser's testimony and a portion of its cross of the owners' appraiser regarding the contamination. Significantly, nothing in DOT's proffer established that Tenneco was responsible for presence of the contamination.

Owners' counsel objected to all DOT's proffers and was sustained. DOT's appraiser would have testified that the contamination reduced the market value of the site by at least 20-25% due to increased costs and stigma [R. 137-138]. The owner's appraiser, over DOT's objection, valued the property as though clean despite his knowledge that it was contaminated [R. 197-198, 226-227]. The owner's appraiser justified this position on the basis the site qualified for a clean-up program which would not have cost the owner anything [R. 226]. At trial, the parties stipulated to the value of improvements taken at $350,000 [R. 105]. On the issue of land value, DOT's appraiser testified to a "clean" value of $300,000 [R. 103, 105], and the owners' appraiser testified to his opinion of $567,000 [R. 233]. Thus, the testimony on full compensation ranged from $650,000 to $917,000. The jury's verdict awarded $525,000 for land taken, for a total of $875,000 when combined with the stipulated value of improvements [R.353-354]. Final judgment on the verdict was rendered July 27, 1992 [R. 437-439], and DOT appealed [R. 441-442].

The Fourth District Court of Appeal reversed and remanded, finding error

in the trial court's exclusion of all the proffered contamination evidence, including remediation cost and stigma. In essence, the Fourth District held that contamination was a property characteristic affecting value which should have gone before the jury and that the case was tried on an improper factual basis. D.O.T. v. Finkelstein, 629 So. 2d 932 (Fla. 4th DCA 1994).

Upon the owners' subsequent motion, the Fourth District certified this question as a matter of great public importance. [A. 1].

SUMMARY OF THE ARGUMENT

Since the issue of whether contamination should be admissible in an eminent domain jury trial is one of first impression in Florida and there is limited national precedent, the Court must navigate some relatively uncharted legal waters. But, like constellations to the mariner, traditional principles of full compensation can lead to the right destination, away from disaster.

Contaminating eminent domain valuation with evidence of pollution would lead to disaster, for condemnees and the public interest. Environmental scandal would overtake the appropriate issues of full compensation, potentially reducing the value received by innocent landowners and leaving them with no recourse. Eminent domain proceedings would short circuit the established administrative mechanisim for environmental assessment and clean-up. Without prior agency determination, juries would engage in pure speculation about the existence of contaminants, the extent of contamination, the liability for contamination, the method of clean up, the cost of clean up, the time of clean up, use of the property during clean up, and any resulting effect on market value. The parties truly responsible for contamination may not even be before the court. Lay juries, rather than expert agencies, would be resolving highly technical environmental and engineering questions with no power to enforce their findings. Condemnees could suffer a setoff from the value of their property, only to remain as legally liable as they were before the taking -- a classic double jeopardy. Valuation would improperly be determined under the influence of condemning authority

projects and the true market reaction to contamination would be obscured, since standard contract provisions for indemnity or escrow are not possible.

All this could befall landowners with no corresponding benefit to the public. Addressing contamination through eminent domain proceedings would not bring any finality to the issue, but rather, would spawn more litigation. Programs and agencies established to handle environmental issues would not be utilized efficiently. Most of all, the policy of recovering cost of clean-up from the true polluters would not be meaningfully advanced. Existing common law and statutory remedies for environmental contamination are not only adequate, but more accurate and effective, in assigning liability.

The polestar of full compensation is the principle of "making the owner whole." That is, putting the condemnee in the same financial position after the taking as he was before, as though the condemnation never happened. While this can often be accomplished by determining market value, there are instances where paying market value will not do constitutional justice. Accordingly, market value is a tool, but not an exclusive standard, in measuring full compensation.

It is not at all uncommon for courts to filter actual market value from juries in order to preserve constitutional full compensation for the owner. The rules of evidence in eminent domain and general jurisprudence often condone legal "fictions" in furtherance of a fair trial. For instance, eminent domain juries are kept ignorant of realities such as decreases in market value due to the threat of condemnation, enhancement in value due to the condemnor's project,

encumbrances on the property, sentimental value to the owner, zoned rights of way, and many others. Even when contamination can be established as a reality, it should likewise be kept from eminent domain juries due its high potential for prejudice to full compensation.

The trial court's exclusion of contamination evidence should be affirmed in principle and especially under the facts of this case, where EDI reimbursement was assured to the owner as of the date of taking. The financial reality (to which the owners should be restored) is that they owned property which could continue in operation while being remediated at no expense to them. They did not have to sell the property until it was clean and destigmatized or to any one willing to pay less than full "clean" value because of the EDI indemnity. Under these circumstances, contamination was arguably irrelevant to just compensation since the vested indemnity rights in place logically lead to valuing the property as though clean. At best, contamination would only confuse and prejudice the jury.

Even without EDI eligibility, the potential relevance of such information is far outweighed by the potential prejudice to the right of full compensation, particularly because of the inherent speculation involved and strong public aversion to environmental contamination.

If contamination is to be addressed through eminent domain proceedings, alternatives to blanket admission at the valuation trial are necessary to prevent substantial erosion of the constitutional right to full compensation. If to be addressed by jury trial, the issues of full compensation and environmental liability

should be bifurcated so that the prejudice of contamination will not poison the jury's view on straight valuation. A significant advantage to this is that the condemnor could take property, pay for it, and a separate jury could hear the environmental liability issues once regulatory agency determinations are complete. Perhaps the proper defendants (other than the condemnee) could be joined in the bifurcated contamination proceeding, which would advance the public policies of properly assigning environmental liability and bringing finality to decisions.

Alternatively, the issue of contamination could be addressed by the court through apportionment procedures pursuant to § 73.101 (Fla. Stat. 1993) and the use of escrows for clean-up. Apportionment could also take place after agency determinations of action required, reducing speculation.

At the bare minimum, the Court should establish evidentiary thresholds whereby contamination evidence would not be admissible in an eminent domain jury trial without first establishing a *prima facie* case before the court.

Total exclusion from eminent domain proceedings is the better rule. The trial court ruling should accordingly be affirmed.

ARGUMENT

I. EVIDENCE OF CONTAMINATION SHOULD BE INADMISSIBLE IN EMINENT DOMAIN VALUATION TRIALS.

Contamination issues simply do not belong in an eminent domain valuation trial, and particularly not in the one at bar. Not only are eminent domain valuation trials ill-equipped to deal with environmental liability, but inclusion of contamination evidence would be tantamount to making a legislatively unauthorized environmental liability claim within in a condemnation proceeding, since its inevitable effect is a setoff against the value of the property taken.

The sole purpose of an eminent domain valuation trial is to determine full compensation pursuant to Art. X, § 6, Fla. Const.. Sec. 73.071(3), Florida Statutes (1993). Environmental liability claims necessarily involve the extraneous determinations of the existence, extent, required remediation (if any), method of remediation, fault, and liability for contamination. These extra issues are clearly outside the proper scope of an eminent domain trial, but they are inherent to any attempt to introduce contamination into valuation.

Undue speculation is also inherent in any attempt to offset eminent domain compensation for contamination. An eminent domain jury could only speculate about the existence, extent, action required, method of clean-up, and associated costs without prior determinations by the appropriate regulatory agency regarding the extent of any contamination and its remediation, if any, which might be required. Even if these facts could be ascertained with reasonable certainty prior

to valuation trial, a jury lacks the expertise to fully analyze the highly technical nature of environmental contamination.

The problem is even more pronounced when the liability for contamination is unclear,[4] as eminent domain valuation cannot be based on the presumed outcome of future litigation. Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966); Woodmansee v. Rhode Island, 609 A.2d 952 (R.I. 1992). Nor can compensation be limited by presuming what an agency will do. Broward County v. Patel, ___ So.2d ___ (Fla. 1994) (19 Fla.L.Weekly S269).

The Florida legislature has established programs and agencies to deal with contamination and the assignment of liability for it.[5] A very apparent theme in Florida's statutory scheme is "cost recovery" -- the concept of recovering costs from the actual polluters after clean-up is completed. §376.303(4), §376.307(5) and (7), §376.3071(7)(a), §403.121, §403.14. (Fla.Stat. 1993). This scheme would be muddled, if not downright thwarted, should condemnation cases become vehicles for addressing environmental contamination.

Furthermore, an owner's administrative due process rights would arguably infringed upon should condemnation be permitted to interrupt the regulatory

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[4] This is true in the instant case. There is no indication that Tenneco was at fault for the contamination. As of the date of taking, contamination was found only in the groundwater beneath the site. This tends to exonerate Tenneco from liability, since the contaminant plume may have originated offsite.

[5] Legislatively, the Department of Environmental Protection, formerly the Department of Environmental Regulation, has been assigned the responsibility to address contamination and cleanup. §403.061, §376.30(3), §376.303 (Fla. Stat. 1993).

agency determination of his rights and obligations. For instance, owners of allegedly contaminated properties are not automatically required to remediate contamination when detected, but rather, may qualify for a "monitoring only" determination or a determination that "no futher action" is required. Fla. Admin. Code R. 17-770.600(5) and (6), 17-770.630(3) and (4). Yet, if contamination is admissible at a valuation trial before exhaustion of the administrative process, it is quite conceivable that a landowner would suffer a reduction in his compensation because the condemnor detected a trace of pollutant, only to later learn that no action was required by the regulatory agency. The same prejudice could result regarding the method of remediation ultimately required by the agency, since the expense of clean up programs varies significantly.

In this context arises the additional constitutional concern that the complexity and public resentment of environmental contamination would overshadow the appropriate issue of just compensation for the taking of property. Juries might punitively value condemned property, often without full understanding of the facts.

If a landowner must exhaust administrative remedies before seeking compensation from the government through inverse condemnation, why should the government be able to reduce compensation without the same requirement? See Martinez v. Bolding, 570 So. 2d 1369 (Fla. 1st DCA 1990), rev. den. 581 So. 2d 163 (Fla. 1991). Even more perplexing, if a landowner has availed himself of his administrative remedies, as Tenneco had in obtaining EDI eligibility, why

should DOT be allowed to effectively deprive him of that vested administrative right by introducing evidence of actual or average clean up costs?

An eminent domain jury trial cannot possibly achieve the purposes of cost recovery claims. Only those with current interests in the property taken are made parties to an eminent domain case, so potentially responsible parties (former owners, adjacent owners, illegal dumpers) are not before the court and their liabilities cannot be adjudicated as they would be in a cost recovery action. §73.021(4). Further, an eminent domain judgment may only fix the value of property taken. It may not enforce clean-up. For instance, when the jury finds that an engineering cure is necessary to mitigate damages to remaining property, the court cannot mandate implementation of the cure since it was only a way to measure compensation. Canney v. City of St. Petersburg, 466 So. 2d 1193 (Fla. 2d DCA 1985); Mulkey v. Division of Administration, Department of Transportation, 448 So. 2d 1062 (Fla. 2d DCA 1984).

Bringing contamination evidence (*de facto* liability claims) into the valuation trial would also be legislatively unauthorized. Eminent domain proceedings are prescribed by statutes which are to be strictly construed against condemnors. Tosohatchee Game Preserve, Inc. v. Central and Southern Flood Control District, 265 So.2d 681 (Fla. 1972). The eminent domain code (Chapters 73, 74 Fla.Stat. (1993)) does not authorize the inclusion of other causes of action. § 73.021(1) Fla.Stat. (1993) states, "those having the right to exercise the power of eminent domain may file a petition *therefor*." Cf. Department of Transportation v. Fina Oil

& Chemical Co., 390 S.E.2d 99, 100 (Ga. Ct. App. 1990) (holding that an eminent domain proceeding could not include a condemnee's counterclaim for unauthorized use of the remainder because the action was statutorily restricted to the propriety of the condemnation and the value of land taken); E & R Leasing Co. v. City of Cape Girardeau, 851 S.W.2d 78, 79 (Mo. Ct. App. 1993) (per curiam) (holding that a counterclaim to quiet title was impermissible because it was not within statutory procedure and because the only question was the compensation to be paid for the property). Even if statutorily permitted, additional claims regarding contamination would have to be authorized by resolution. The resolution attached to the petition in the case at bar did not authorize DOT to seek reimbursement for environmental clean-up or to establish any other related claim [R. 398-401]. Tosohatchee, supra.

B. Admission of contamination evidence would thwart the purpose of full compensation.

The guiding light for determination of full compensation is "that the owner shall be made whole so far as possible and practicable." Jacksonville Expressway Authority v. Dupree, 108 So. 2d 289 (Fla. 1959); Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); State Road Department v. Chicone 158 So. 2d 753 (Fla. 1963). This must be achieved by reference to the state of affairs that would have existed absent any eminent domain proceeding whatsoever. Florida Department of Revenue v. Orange County, 620 So. 2d 991 (Fla. 1993). In other words, the condemnee should be placed in the same financial position after the

taking as he was before the taking. Department of Transportation, Division of Administration v. Jirik, 498 So. 2d 1253 (Fla. 1986); §11.3 *Florida Eminent Domain Practice and Procedure*, 4th Ed., Standard Jury Instructions.

Bearing in mind that upon condemnation, money compensation becomes the substitute for the land, Chicone, supra at 756, City of St. Petersburg v. Division of Administration, Department of Transportation, 293 So. 2d 781 (Fla. 2d DCA 1974), one may easily understand how admitting evidence of contamination at the valuation trial would not leave the owner in the same financial position. Assuming a property is contaminated, the owner holds property of a certain market value and has certain legal liabilities for the contamination. If that same property is condemned and compensation paid as though clean, the owner is still in the same financial position. He has the money instead of the land plus the same legal liabilities as before. Conversely, if the property is valued as though unclean (with a setoff for cost of clean-up), the condemnee is not left in the same financial position. He would have less than the normal value of the property and yet still have the same legal liabilities as before. Thus, admission of contamination evidence into condemnation valuation would risk that an owner will not be made financially whole and would thwart full compensation.

This is especially true in the case at bar. The subject site was EDI eligible at the date of taking, meaning Tenneco had the right to either have the state clean-up at no cost to Tenneco or clean-up by Tenneco with reimbursement from the state §376.3071 (Fla.Stat. 1988) [R. 11]. Since Tenneco had the luxury of time

it could have sought DER approval of any remediation plan before implementation to ensure full reimbursement. Tenneco could have continued profitable operation of the site during remediation [R. 37]. This eligibility would have inured to any buyer since eligibility runs with the site. § 376.3071 Fla. Stat. (1988). Simply stated, Tenneco and any potential market buyer was fully indemnified for the contamination. In economic terms, the site was "financially" clean. The trial judge correctly perceived this and ruled the proffered evidence inadmissible for lack of relevance [R. 12-14]. He correctly permitted the property to be valued as though clean and should be affirmed given the above stated principles of full compensation.

At trial, DOT contended that the court's exlusionary ruling made the appraisers testify "to a fiction that it's clean property." In reversing, the Fourth District echoed this contention, finding that the trial improperly proceeded "on an alleged factual basis which was known to be untrue" and reasoning that "the trier of fact should consider any factor which impacts upon the market value of the property." The tone of the opinion conveys a certain degree of astonishment: "how can it be said that such a characteristic is irrelevant as Tenneco claimed and the court ruled below?" Finkelstein, 629 So. 2d at 933-994.

Upon further reflection, however, there should be no surprise at the trial court's ruling for it is not only common, but essential, that certain evidence be excluded from eminent domain valuation despite its realism. Courts have had to adopt working rules in order to do substantial justice in eminent domain

proceedings, U.S v. Fuller, 409 U.S. 488, 93 S.Ct.801, 35 L.Ed.2d 16 (1973), at 804, and this has often meant departure from actual market value on the date of taking for the sake of making the owner whole:

> Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement. Dupree, supra at 291.

See also Department of Agriculture and Consumer Services v. Mid-Florida Growers, 570 So. 2d 892 (Fla. 1990); Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So. 2d 687 (Fla. 1st DCA 1959).

The following are some examples of common legal "fictions" permitted in eminent domain valuation to guarantee full compensation, even though the real facts would be pertinent to a potential buyer:

- Actual market value is inadmissible if a result of the threat of condemnation or project influence. State Road Department v. Chicone 158 So. 2d 753 (Fla. 1963), § 73.071(5); Langston v. City of Miami Beach, 242 So. 2d 481 (Fla. 3d DCA 1971).

- Under the "undivided fee rule," the jury is never told if there is a large lien, mortgage, or uneconomic lease encumbering the property. Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954); Carter v. State Road Dept., 189 So. 2d 793 (Fla. 1966) at 796.

- Actual zoning on the date of taking may be excluded if a result of governmental collusion to reduce value. Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 100 So. 2d 67 (Fla. 1st DCA 1958), 108 So. 2d 74 (Fla. 1st DCA 1958), 116 So. 2d 762 (Fla. 1959).

- Full value must be paid for land taken in a road widening, even if it is already zoned for right of way at the time of the taking. South Miami Hospital Foundation v. Dade County, 371 So. 2d 1067 (Fla. 3rd DCA 1979) cert. den. 383 So. 2d 1192; Dade County v. Still, 377 So. 2d 689 (Fla.

1979).

- The condemnor must pay something for the part taken, even if the value of the owner's property is the same before and after the taking. City of Ft. Lauderdale v. Casino Realty, 313 So.2d 649 (Fla. 1975).

- Compensation and damages are determined as of the date of value, even though the effect of construction may occur much later. § 74.061 (Fla.Stat. 1993).

- Watermelon seedlings may be valued as though full grown. County v. T & H Associates, Ltd., 395 So. 2d 557 (Fla. 2d DCA 1981).

- Actual market value during a temporary recession is disregarded. *Nichols on Eminent Domain*, §12.B.06[1].

- The true sentimental value of property to the condemnee is inadmissible.

- Condemnors get no purchase credit for general enhancements to actual value resulting from their projects. § 73.071 (4), Jahoda v. State Road Department, 106 So. 2d 870 (Fla. 2d DCA 1958), mod. 285 So. 2d 4.

- Actual offers to purchase condemned property are not admissible. Orlando-Orange County Expressway Authority v. Diversified Services, 283 So. 2d 876 (Fla. 4th DCA 1973).

- Actual sales to condemning authorities are generally not admissible. City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2d DCA 1958), *cert. disch.* 109 So.2d 169.

All of the examples listed above relate to facts that are significant to real value. But, they are either irrelevant to full compensation or their probative worth is outweighed by the risk of unfair prejudice. §90.403 (Fla. Stat. 1993). The danger of misuse by the jury is simply too great. A rule of law that contamination evidence is inadmissible should be added to the list.

Promotion of legal "fiction" is not unique to eminent domain. The rules of evidence, generally, are all about suppressing reality in furtherance of public

policy. To preserve a fair trial, prior wrongs or convictions are not admissible to prove a defendant is the sort of person who might have committed a crime, even though this is just the sort of information any one would look to in daily life to assess guilt or innocence. To encourage correction of dangerous conditions, subsequent remedial measures are inadmissible to prove negligence, even though common sense suspects that a safe structure would not need repair. All the legal fictions permitted by the rules of evidence are too numerous to catalogue here, but these examples serve to illustrate that the trial court's ruling below was not at all radical.

On the contrary, the trial court's exclusion of the proffered evidence was in line with established Florida caselaw to the effect that just compensation may not be reduced as a result of the condemnor's actions or the influence of its project. Chicone; Langston; Still; South Miami Hospital Foundation; Tallahassee Bank & Trust Co., supra; § 73.071(5) (Fla.Stat.1993). In the case at bar, both the cost of remediation and alleged market "stigma" flowed directly from the public project and were thus properly excluded.

It goes without saying that the extra costs associated with DOT's "emergency" clean up measures were a *sole result of the project* and highly prejudicial. Why such evidence was even proffered escapes the writer, but DOT's intent to put that inflammatory information before the jury was clear despite faint disclaimers to the contrary [R. 415-417, 20-37]. Even the proffered "average" cost of remediation was a product of the taking, since that was a cost the owners or

a private buyer would *never* have to bear.

The alleged market "stigma" is also a result of the project. While it may be true that DOT did not cause the contamination, it is equally true that DOT's taking forced the sale of the subject property while "dirty." The actual market value at that point was solely a function of the timing of DOT's taking. Because condemnation is a forced sale from unwilling sellers, full compensation "must be determined by reference to the state of affairs that would have existed absent any condemnation proceeding whatsoever, i.e., the owners retaining ownership." Florida Department of Revenue v. Orange County, 620 So. 2d 991 (Fla. 1993). The owners here would have had a certifiably clean site to offer on the market within a reasonably foreseeable time after the date of condemnation (in May, 1990). The happenstance of DOT's project should not deprive them of the economic position they otherwise would have enjoyed. This extends to condemnation of any contaminated site since that state is *temporary*.

If, as DOT alleged, there is no market for contaminated properties while dirty [R. 13], they should be viewed as though in a partial state of development and valued as though the clean-up is complete. Cf. Lee County v. T & H Associates, 395 So. 2d 557 (Fla. 2d DCA 1981); Department of Agriculture and Consumer Services v. Polk, 568 So. 2d 35 (1990) at 42-43. This is in harmony with the principle that compensation should be based on the highest and best use to which property might be put in the reasonably foreseeable future. State Road Dept. v.Chicone, 158 So. 2d 753 (Fla. 1963). See for instance, Carvel

Corporation v. Department of Transportation, 473 So. 2d 48 (Fla. 4th DCA 1985) (held proper to value condemned property for commercial/residential use even though the existing zoning is agricultural).

Herein lies the key distinction between this case and Florida Power & Light Co. v.Jennings, 518 So. 2d 895 (Fla. 1987), upon which DOT and the Fourth District Court so heavily relied. DOT oversimplifies Jennings by first equating public fear of powerlines with alleged market resistance to contamination, and then claiming admissibility without regard to the context of the Jennings rule. The public fear held admissible in Jennings regarded a *permanent* condition created by the condemnor's taking (permanent powerline easement). The permanent aspect of the condition in Jennings renders it fundamentally distinguishable from the temporary nature of contamination, as discussed above. Furthermore, the spirit of Jennings was to prevent an influence of the condemnor's project from reducing full compensation to the owner. *Id.* at 897. Application of that central principle supports the owners' position in this case.

It is also worthy of note that Jennings disallowed highly emotional, inflammatory evidence (regarding health risks) which would tend to "obfuscate the issue of full compensation" and transform the proceedings into an action for injuries to persons. The Court noted that if such injuries occur, they would have to be redressed in a separate action since an eminent domain proceeding was

not the proper forum.[6] Jennings actually supports the owners' contention that *de facto* environmental liability claims have no place in these proceedings.

In addition to this procedural flaw, DOT's *de facto* claim for a market "stigma" discount is substantively inappropriate, in that DOT seeks to recover through an eminent domain what it could not recover in an appropriate action. An action pursuant to Chapter 376 (Fla.Stat. 1993) is limited to recovery of clean up costs, and loss in market value due to contamination is not compensable. Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 137 (Fla. 2d DCA 1993). This also appears to be true when diminution in property value due to fears of pollution is sought through common law nuisance. Adkins v. Thomas Solvent Co. 487 N.W.2d 715 (Mich. 1992). Any argument that this rule of law is the very reason DOT must obtain the stigma discount upon acquisition ("*caveat emptor*") takes undue advantage of the *forced* conversion brought about by eminent domain.

Out-of-state caselaw on the valuation of contaminated properties in eminent domain proceedings is sparse, so the emergence of even one opinion is relatively significant. Only two contamination/condemnation cases were put before the Fourth District: Department of Health v. Hecla Mining Co. 781 P.2d 122 (Colo. App. 1989) and Redevelopment Agency v. Thrifty Oil Co. 5 Cal.Rptr.2d 687 (Cal.App. 2d Dist. 1992). Neither Hecla or Thrifty Oil apply to the case and

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[6] Specifically, the Court reasoned that a cause of action for personal injury was not appropriate in eminent domain, an in rem proceeding. This would hold true for environmental liability actions which sound in tort (public nuisance, private nuisance, strict liability, etc.).

question at bar. Hecla dealt with the issue of whether an owner was entitled to value enhancement resulting from state clean-up of his property where the land was condemned for the sole purpose of clean-up under the Uranium Mill Tailings Radiation Control Act. Florida allows permits such "project" enhancement. Department of Transportation v. Nalven, 455 So.2d 301 (Fla. 1984). Thrifty Oil Co. expressly did not address the propriety of admitting contamination into an eminent domain case since that issue was not preserved below. Thrifty's own expert had testified to a discount for contamination, and therefore the appellate court refused to consider a contention that it was not properly before the jury. Thrifty Oil Co., 5 Cal. Rptr. 2d. 689 (note 9). Had the court ruled upon that contention, Thrifty Oil Co. would still be factually distinguishable in that the owner had acknowledged fault for the contamination and there was no eligibility for reimbursement.

The court which rendered Hecla receded from that opinion by its ruling in Department of Health v. The Mill 868 P.2d 1099 (Colo.App. 1993). The Mill also contains factual distinctions, but its proposition that condemned property should be valued as though uncontaminated when there is a government program in place to fund decontamination is instructive in the case at bar, given the EDI eligibility of the Tenneco's site.

The only other case found by the owners is a Connecticut trial court opinion which provides a thoughtful analysis of the very issues presented here. Murphy

v. Town of Waterford, 1992 W.L. 170588 (Conn. Super. Ct. 1992).[7] Murphy involved the total condemnation of a former gas station site. Both parties submitted their appraisals to a trial referee according to Connecticut procedure. The owner appealed the finding of the referee, and in the interim, contamination was found on site. There was no proof that the present owner was responsible for pollution. The condemnor spent $4,000 to clean the site and sought a setoff in that amount on appeal to the trial court, contending that the remedial cost would have been considered by buyers and sellers. The trial judge refused to allow deduction of clean-up costs from the owner's land value for several reasons: the existence of other statutory remedies for recovery of costs available to the condemnor; the involuntary nature of condemnation which forces an owner to sell while property is in a contaminated state; the absence of proof that the condemnee was responsible for the contamination; and the equitable nature of condemnation proceedings. The Murphy court correctly understood and applied the principles of full compensation, as did the trial judge here.

C. Addressing environmental contamination through eminent domain valuation is against sound public policy.

The public has an interest in full compensation (as every landowner is a potential condemnee), judicial economy, finality of decisions, and environmental clean-up at the expense of actual polluters. None of these interests are advanced

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[7] A copy of Murphy is included in the Appendix since it is currently available only on *Westlaw.*

by addressing contamination through eminent domain proceedings.

As stated above, admission of contamination evidence thwarts constitutional full compensation at trial. The propriety of this pales even more when post-trial effects on the condemnee are considered. Landowners could suffer discounted compensation in condemnation without corresponding collateral estoppel protection in any subsequent environmental enforcement proceedings -- a classic double jeopardy. Despite losing title to their property, condemnees remain potentially liable for contamination under common law and statutory causes of action. §376.308 (Fla. Stat. 1993); 42 U.S.C. §9607. Since the issues and parties in these other actions would not be identical to those from the condemnation suit, the condemnee could not raise a bar, and perhaps not even a partial avoidance, even though the matters arose out of the same essential facts. Mobil Oil Co. v. Shevin, 354 So. 2d 372 (Fla. 1978); Trucking Employees of North Jersey Welfare Fund Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984); Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989); State of Florida Department of Transportation v. Gary, 513 So. 2d 1338 (Fla. 1st DCA 1987). Quite conceivably, condemnees could pay for the same liability twice, regardless of fault!

Rather than advancing judicial economy and finality, the combination of contamination and condemnation would spawn more litigation and require further judicial action to effect clean-up. Since all the potentially responsible parties are not before the court, an innocent landowner would have to separately pursue the liable party to recover the amount of any eminent domain setoff. In that event,

how would that landowner prove the exact amount he had already contributed toward his potential liability in the jury's verdict? Or, as stated, the condemnee could still be joined as a potentially responsible party in a subsequent cost recovery action and have to defend all over again. This would be unfair even to a condemnee who had been the actual polluter. It would be a grave injustice to a condemnee who is later proven to be innocent of the contamination!

If condemning authorities were to become liable for clean-up without recourse by virtue of acquiring needed land, then it might be conscionable to raise the specter of contamination at the valuation trial. But this could not be further from the case. DOT enjoys statutory immunity from environmental liability when it acquires property by condemnation. § 337.27(6) (Fla.Stat. 1989). 42 U.S.C. §9601(20)(D) and (35)(A). Condemnors have an array of statutory and common law remedies available to them for redress of remediation costs, should they inherit contamination problems. For example, condemnors may bring actions under Chapter 376, Florida Statutes (particularly §376.313) and common law indemnification, negligence, and/or strict liability are available. They may also seek contribution under CERCLA, 42 U.S.C. §9601 et seq. The actual polluters could be joined as parties and the issue resolved once and for all.

DOT was further protected in the instant case by the Tenneco site's EDI eligibility and an indemnity clause from the owners (hold harmless provision in the Order of Taking). This being so, DOT had no legitimate interest in admitting contamination at trial, but rather sought to unconstitutionally cheapen acquisition.

The trial judge's refusal to allow this should be affirmed.

II. IF CONTAMINATION MUST BE ADDRESSED THROUGH EMINENT DOMAIN, PROCEDURAL AND EVIDENTIARY SAFEGUARDS ARE NECESSARY TO PROTECT AGAINST EROSION OF FULL COMPENSATION.

If environmental contamination is deemed an appropriate part of eminent domain proceedings, this Court should establish uniform procedures and evidence standards for the guidance of condemnors and condemnees.

Because of the complexity of environmental issues, bifurcation of contamination and valuation issues might serve to avoid punitive valuation or confusion by the eminent domain jury and would result in an identifiable discount for appellate or subsequent cost recovery purposes. A helpful discussion of bifurcation is found in Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989).

Alternatively, contamination could be addressed through apportionment pursuant to § 73.101 (Fla.Stat. 1993), likening it to an encumbrance, City of St. Petersburg v. Division of Administration, Department of Transportation, 293 So. 2d 781 (Fla. 2d DCA 1974); or an incorporeal interest in the property due to the statutory causes of action. Pinellas County v. Brown, 450 So. 2d 240 (Fla. 2d DCA 1984).

Though not of precedential authority, the case of Hennepin County Regional Railroad Authority v. CMC Real Estate Corporation et al., Case No: CD 2139, District Court, Fourth Judicial District, is of interest as an example of one court's resolution of a condemnation case involving admittedly contaminated

property. The Hennepin Court had the jury determine market value as though clean and established an escrow fund for clean up. The landowner did not deny its liability, but merely disputed the estimated cost of cleanup. (This approach does not remedy situations where a landowner's liability is not clear, but it does alleviate speculation about the cost of remediation where liability may be admitted.) A copy of the trial court's order is provided in the appendix.

At a minimum, evidentiary thresholds similar to ones required for admitting evidence of probability of rezoning or probability of variance should be required before presentation of contamination evidence to an eminent domain jury. Tallahassee Bank & Trust Co., supra; Broward County v. Patel, supra. A condemnor should be required to prove, *prima facie*, that contamination exists, that action would be required by the governing agency, that the condemnee is liable, what remediation method would be approved, and the associated costs. Of course, since contamination would be related to value for the taking, the condemnor should bear the burden of proof. City of Ft. Lauderdale v. Casino Realty.

CONCLUSION

Based on the foregoing, the opinion of the Fourth District Court in State of Florida Department of Transportation v. Finkelstein, 629 So. 2d 932 (Fla. 4th DCA 1994) should be reversed, and the trial court's ruling that evidence of environmental contamination was inadmissible at trial should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioners' Amended Brief has been sent by U.S. mail to Gregory C. Costas, Esquire, 605 Suwanee Street, MS 58, Tallahassee, Florida 32399-0458, this 7th day of July, 1994.

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