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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

REPLY BRIEF

of

PETITIONERS

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PRELIMINARY STATEMENT

Ida Finkelstein, Alice Fox, and Tenneco Oil Company, defendants/appellees below and Petitioners here, will be referred to as the "Owners." The Florida Department of Transportation, petitioner/appellant below and respondent here, will be referred to as the "Department" or "DOT."

Citations to the record on appeal will be indicated by an "R" followed by the pertinent page numbers. Citations to the Owners' initial brief will be indicated by "OB" and the referenced page numbers, while citations to the Department's brief on the merits will be indicated by "DB" with referenced page numbers. Unless otherwise stated, all emphasis with italics is supplied.

ARGUMENT

The portrayal of the Owners' position in the Department's brief is inaccurate in very significant respects. First, the Department's recapitulation of the Owners' contentions [DB: 8, 18] omits any mention of the owners' due process argument [OB: 6, 11-13]. The infringement upon the administrative due process rights of condemnee-landowners caused by admission of contamination evidence at trial is one of the Owners' main objections to the Fourth District's ruling in Finkelstein.[1] This objection is even more significant to the case at bar in light of the recent, indistinguishable Illinois decision, Department of Transportation v. Parr, 633 N.E.2d 19 (Ill.App. Ct. 1994).

The Parr court was "called upon to determine whether environmental remediation costs are admissible in eminent domain proceedings to determine fair market value." *Id.* at 21. In connection with a bridge project, the Illinois Department of Transportation (IDOT) condemned the Parr's property and valued it at a negative $100,000.00 and later at zero due to alleged contamination (previously unknown to the Parr's). IDOT sought to admit the cost of cleanup at the valuation trial, contending that remediation costs "are a factor adversely affecting the property's value." *Id.* at 21. The court rejected that contention, holding that remediation costs were **not** admissible because (1) such costs, without proof of contaminated condition, do not affect the value of property and (2) *even if* contamination is proven to exist, admission of such costs "would violate

[1] Reported at 629 So.2d 932 (Fla. 4th DCA 1993).

the procedural due process rights of the owners of condemned property." *Id.* at 22, 23.

Integral to the Parr court's holding was its finding that admission of contamination costs at an eminent domain trial would deprive the condemnee of procedural safeguards, rights and defenses provided by the Illinois Environmental Protection Act (comparable to Florida environmental laws) [OB: 11-12] and that admission would permit IDOT to circumvent procedures established by the legislature. *Id.* at 22. By its holding, the Parr court demonstrated that the constitutional rights of condemnees are paramount to the condemnor's interest in determining "market value" and that condemnors must to resort to the legislative mechanisms outside the context of eminent domain proceedings when addressing remediation costs. This is precisely what the Owners have contended in the case at bar.

The sound public policy of the Parr rule is further demonstrated in its explication of the operative environmental act. The court noted ways in which the Environmental Protection Act was superior to the Eminent Domain Act for handling of environmental issues, such as the expertise of decision-makers and the ability to implead potentially responsible third parties. *Id.* at 22. In this regard, Parr gives credence to similar policy considerations raised by the Owners here. [OB: 6-7, 24-26].

In the context of Parr, it is easy to recognize another inaccuracy in the Department's characterization of the Owners' basis for advocating exclusion of

contamination evidence. Trying to recast the Owners' contention in the mold of City of Olathe v. Stott, 861 P.2d 1287, 1292 (Kan. 1993) (where a condemnee unsuccessfully argued that contamination evidence should have been excluded from eminent domain proceedings because a specific Storage Tank Act *preempted* eminent domain provisions), the Department argues "the thrust of their argument lies in their belief that the environmental legislation set out in Chapter 376 provides the exclusive remedy for matters arising from petroleum hydrocarbon contamination..." [DB: 8, 19].[2] Not so. What the Owners *have* argued is the exclusivity of eminent domain proceedings [OB: 13-14], a contention also supported by Parr:

> The Eminent Domain Act by itself neither allows for third-party actions nor addresses potential liability under the Environmental Protection Act. Parr, at p. 23.

The Florida eminent domain provisions are similar in their restrictive nature. See Chapter 73 and 74, Florida Statutes. The provisions do not authorize third-party proceedings nor do they authorize a determination of contamination liability as part of the proceedings. These statutory provisions are to be strictly construed against the governmental entity seeking to utilize such provisions. Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947).

The Department also inaccurately claims that the Owners' misapprehend

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[2] There is substantial legal difference between the policy argument against circumvention of a legislatively established framework and "exclusive remedy" analysis contained in Olathe.

the purpose behind the admission of remediation costs [DB: 9, 18-21]. Now claiming that the contamination/remediation testimony was intended solely to provide a backdrop for the DOT appraiser's ultimate discount of 20-25%, the Department denies that "it has ever been the Department's position that it was entitled to a mathematical set-off of the costs of remediation against any potential compensation awarded" [DB: 19]. Record statements by DOT trial counsel belie this posturing, such as the following grounds for DOT's motion in limine to admit contamination evidence:

> 4. That under Florida law, Tenneco should bear responsibility for the reasonable clean-up costs.
>
> 5. That a buyer in the market would take into consideration the contamination issue in determining the value of the property to be purchased.
>
> 6. That the Petitioner believes that in the absence of an agreement from Tenneco to assume responsibility for such costs, the introduction of the evidence of contamination and costs incurred to clean-up the property are relevant to the valuation process. [R: 417]

Or, such as the following statement at trial:

> These are not DOT costs, Judge, these are costs to anybody in the market place who would be dealing with a piece of property like this, an average piece of property, oil service station property, with the extent of contamination that this site had would cost two hundred and fifty to $350,000, just to clean it up, not to devise the plan, just to clean it up. [R: 29-30].

It is readily apparent from these statements that DOT sought a setoff under the

guise of "factors affecting market value." Any doubt about that can be resolved in light of the gross contradiction inherent in the attempt to introduce DOT's exigent clean-up costs which would have *never* been a consideration of a hypothetical private buyer on the date of taking [R: 20-37; OB: 3, 19-20].

The Department's current argument that it is not entitled to a mathematical set-off actually supports the trial judge's exclusion of the remediation evidence for lack of relevancy [R: 12, 14, 31]. If the only possible purpose of its introduction was to probe how contamination might affect the mind of a potential buyer, the trial judge did not abuse his discretion in excluding the evidence given the EDI eligibility that ran with the subject site. [R: 12, 14, 31].

The Department's other responses to the Owners' brief are unpersuasive. In particular, the Department's attempt to dismiss the public policy issues raised in the Owners brief by its claim that "the admission of such evidence...does not supplant the environmental regulatory scheme set out in Chapter 376, nor does it operate to determine liability for the contamination in the first place" [DB: 22] ignores the **practical effect** of admission evidence of contamination on the landowners' compensation. While environmental liability may not be officially at issue in the pleadings, the inseparable, practical consequence of admitting evidence of contamination in an eminent domain valuation trial is to hold the condemnee liable, without the procedural safeguards discussed in Parr, and without **any** future legal recourse or defense [see OB: 6-8, 25-26]. Whether by dollar-for-dollar set-off for remediation costs *or* by lessened market value due to

the risk of incurring those costs, the contamination evidence would serve to tax the effects of contamination **solely** against the owner at the time of the taking. The current owner suffers all of the consequences of "liability" while being denied even minimal due process afforded by existing environmental legislation specifically enacted to address such situations.

The Department also sweepingly discounts the Owners' argument that market stigma should be inadmissible as an effect of project influence by postulating that "stigma" is permanent [OB: 19-20; DB 9, 20].[3] This presumed axiom is also used to undermine the Owners' distinction of Florida Power & Light v. Jennings, 518 So.2d 895 (Fla. 1987) [OB: 21]. Common sense dictates that post-remediation stigma, if any, would dissipate over time. Thus, the timing of condemnation not only forces a condemnee to sell while his property is "dirty" but also while supposedly stigmatized.

The Department wields Jennings for the proposition that, if contamination evidence is admissible, the condemnor should not have to prove that remedial action would be required, the method which would be approved, or associated costs, relying on Jennings' exclusion of the scientific basis underlying the fear of powerlines. This argument overlooks the obvious factual differences between Jennings and subsurface conditions. The powerlines in Jennings were obvious. Their existence needed no proof. Nor did the fact that (under the laws of physics)

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[3] There was nothing in the record to establish that stigma and market perceived risk are permanent.

electro-magnetic fields are created by transmission of high voltage. No due process concerns were at play. By contrast, underground contamination is not readily apparent, and the need to remediate does not automatically arise. Remediation is a creature of administrative process which varies. Without that level of predicate proof, the payment of full compensation would be subject to mere unsubstantiated rumors. The possibility that proving these underlying facts would obfuscate valuation issues in contravention of Jennings demonstrates the awkwardness of trying to emulate environmental due process within an eminent domain proceeding.

Finally, the Department mistakenly asserts that Olathe, 861 P.2d at 1287, and Redevelopment Agency v. Thrifty Oil Co., 5 Cal.Rptr.2d 687 (Cal.Ct.App. 1992), are consistent with the Florida interpretation of "full compensation" as expressed in Jennings and Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So. 2d 288 (Fla. 1959). [DB: 14-15]. Here, the Department seeks to turn the constitutional shield over owners espoused in Jennings and Dupree , which guarantees that the owner be made **"whole,"** into a double-edged sword which whimsically cuts both ways, sometimes to gouge "full compensation." A holistic reading of Jennings and Dupree reminds that the Florida concept of "full compensation" is appropriately geared to favor the landowner. DuPree calls for admission of "all facts and circumstances which bear a reasonable relationship to *the loss occasioned by the owner* ..." 108 So.2d at 291. It emphasizes that "fair market value" is less important than "a *practical* attempt to make the owner

whole." *Id.* at 292. Similarly, Jennings shielded condemnees from inadequate compensation, ensuring that the permanent effect of the condemnor's project was fully compensated in severance damages. With the exception of Finkelstein, neither DuPree or Jennings has ever been cited in derogation of full compensation. So, in the context of Florida law, Olathe and Thrifty Oil Co. represent departures from the notion of full compensation.

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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioners' Reply 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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