SUPREME COURT OF FLORIDA

L. N. MURRAY,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Defendant.

CASE NO.: 87,378

District Court of Appeal,
1st District - No. 94-3068

BRIEF OF PETITIONER

Certified Question
of the
District Court of Appeal
First District

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DESIGNATION OF THE PARTIES AND REFERENCES TO THE RECORD

The Petitioner, L. N. MURRAY, the Defendant-owner of the property acquired, will be referred to herein as MURRAY.

The Respondent, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, will be referred to herein as DEPARTMENT.

References to the Record on Appeal will be (R. ___ ___). References to the transcript of the trial court proceedings will be (Tr. _____). References to Appendix to Petitioner's Brief will be (A. _____).

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QUESTION PRESENTED

Expert testimony of business damages, where the business is not totally destroyed, may be predicated upon the depreciating effect of the taking on the sales of the business.

Certified Question

IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(b), FLORIDA STATUTES, CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS? IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b), BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?

STATEMENT OF THE CASE AND FACTS

This case is before The Supreme Court of Florida upon the Petition of L. N. Murray, Appellee before the District Court of Appeal, First District, to accept jurisdiction upon the Certified Question of the aforesaid District Court in its opinion filed January 19, 1996.

The appeal to the District Court is from a Final Judgment (R. 1563-1567) in an Eminent Domain proceeding covering the acquisition of approximately 5,000 square feet (Parcels 102/702) of a restaurant parking facility for the purpose of expansion of State Road 200 (U.S. 301) in Callahan, Nassau County, Florida.

The taking was 17 feet in depth, resulting in a change in elevation from the prior road pavement (T. 461) and also resulting in a loss of 26 parking spaces utilized in the restaurant operation, know as the Western Sizzlin, owned by MURRAY and which had been in operation in its present configuration since 1985 (T. 462; Def's. Exh. 4).

The entire ownership of MURRAY included three separate and distinct contiguous parcels, with an aggregate frontage of 275 feet on State Road 200 (U. S. 301).

The three parcels consisted of a commercial office building (9,766 S.F.), a restaurant (47,097 S.F.) and a vacant parcel, designated on the exhibit as "excess property" (6,130 S.F.). Prior to the taking, the commercial office building had 16 marked parking spaces. The restaurant facility had 64 marked parking spaces (T. 466). The vacant area was paved, but was not striped

for parking (Def's. Exhs. 1 and 3 on proffer; T. 255). The restaurant parking, prior to the taking, was sufficient to handle the restaurant's 180 seating capacity (T. 596), being "grandfathered in" as non-conforming under the Building Code of the City of Callahan (T. 240).

The taking impacted the front two (2) tiers of restaurant parking, consisting of 26 spaces (Def's. Exh. 4; T. 461-462). Totally eliminated by the taking were 13 spaces in the first tier of parking fronting State Road 200.

In addition to the loss of the front tier parking, the City of Callahan Code required a further set-back from the new right of way line of the Department, making it impossible to effectively utilize the second tier of parking (T. 468) consisting of 13 spaces. This set-back caused a narrowed travel lane providing access into the second tier of parking and the resulting inability to utilize angle parking which existed prior to the taking. The result was a total loss of 26 spaces (Def's. Exh. 4; T. 462).

Ward Koutnik, with extensive experience in parking engineering and planning, qualified as an expert witness in the field of parking and transportation (T. 453-454), testified on behalf of MURRAY that as a result of the taking, the entire parking layout for the restaurant had to be re-vamped in order to salvage as much of the parking as possible within the original remainder restaurant parking area (T. 462).

Koutnik demonstrated that while 26 of the 64 existing angle spaces were impacted by the taking, it was possible to re-design

for 48 vertical spaces, resulting in a net loss of 16 spaces (T. 467).

Craig Fetherman, C.P.A., having been certified in Florida for 22 years and having limited his accounting practice to eminent domain litigation for the last 5 or 6 years, was qualified to express an opinion of business damages (T. 651).

Fetherman testified that business damages in an eminent domain action, where the business is "damaged", as is the situation in the subject proceeding (T. 653), as opposed to being "destroyed", is based on a "deprivation appraisal" which, relying on other professional authoritative resources (T. 656), is where "an owner of the business or an asset has been deprived of part of that asset" (T. 656). In the subject proceeding, it was the net loss of 16 parking spaces which reduced customers during peak periods and which in turn resulted in a partial loss of sales; to wit, a reduced profit making capacity (T. 699).

He further stated, in relating this methodology to the subject proceedings that:

> "What that means is the business and the owner of the business is also deprived of customers and sales that would use those parking places and the related profits.
>
> "The objective in deprivation appraisal is to attempt to calculate the damages in such a manner that the owner is restored to the same economic position he or she was prior to the deprivation. That's what I've done." (T. 657).

Fetherman added that in order to project the business loss, due to the deprivation of parking spaces, it was necessary to

analyze the trend in sales of the restaurant to determine its future outlook. This was done by reviewing tax returns of the business for the last five (5) years (T. 659) which showed a legitimate "tax loss", but which assisted in the ultimate determination of business damages due to a partial loss in sales (T. 662).

Fetherman pointed out that a "tax loss", shown by a federal tax return, may legitimately show a loss in the business operation for tax purposes (T. 663), but this does not mean that the business is a loosing enterprise. This was demonstrated, as an example, by the fact that MURRAY'S sons, who operated the business, were receiving salaries and other benefits from the business (T. 665). MURRAY himself did not derive any compensation from the business (T. 688).

Since this was a damage to the business and not a total destruction of the business, Fetherman stated that the objective, in the business damage calculation, was to determine a "lost profit base" which "is the number on which the percentage can be calculated to arrive at an annual loss" due to loss of parking (T. 692-693). In a case where there is not a total destruction of the business, that is the profit which is subject to loss and is derived by reducing gross profit by sales driven expenses or "variable expenses" (T. 670, 699), including that portion of supplies, wages, laundry and cleaning, payroll taxes, group workers' compensation insurance (T. 700-701) which relate proportionately, but only, to the lost sales. All other expenses are

"fixed" and remain the same regardless of the total sales (T. 671-693).

This annual loss, computed at $20,946 per year, was then capitalized at twenty percent (20%) to arrive at a business damage of $105,000 (T. 681).

Jack Meeks, C.P.A. testified as a business damage expert for the DEPARTMENT, and acknowledged that business damages should be awarded so that the owner is no better or worse off after the taking than before (T. 771).

Meeks contended that the subject business was unhealthy before the taking; therefore, there could be no business damages based on lost net profits. His definition of "unhealthy" was that the business was either losing money or doesn't have a sufficient income stream to justify the assets employed in the business (T. 774). This conclusion was based solely on the "tax loss" shown by federal tax returns (T. 774, 777).

Because of this, it was his conclusion that the business had no value, should be liquidated (T. 807) and that, therefore, there was no business damage except for the time it takes to liquidate the restaurant assets (T. 784). He acknowledged, however, that the business had been operating for seven years; that MURRAY'S sons were deriving annual compensation and other benefits from the business and that the business was not for sale. He also acknowledged that the business was not in the process of being liquidated and that MURRAY had not declared bankruptcy in the business (T. 807).

SUMMARY OF THE ARGUMENT

Section 73.071(3)(b), F. S., specifically allows for the recovery of "the probable damages to such business which the denial of the use of the property so taken may reasonably cause". Business damages are predicated on the reduced profit-making capacity of the business caused by the taking and the testimony of the expert business damage witness Fetherman was consistent with this basic principle, particularly where the business, as here, was simply "damaged" by the taking as opposed to being totally "destroyed".

Fetherman, contrary to the contention of the DEPARTMENT, did not use a "lost profit" methodology in determining his opinion as to damages to the restaurant business. Instead, his conclusion was based on a deprivation appraisal which is predicated on lost sales due only to the taking and the expenses incurred solely in connection with said lost sales, characterized as "variable expenses" thereby producing a lost profit due only because of the partial taking. Since the business is not destroyed by the taking, all other "fixed" expenses remained constant and were, therefore, inapplicable to the damage computation. Using this method, loss profits are determined with reasonable certainty.

The broad statutory language of §73.071(3)(b), F. S. does not warrant a restrictive interpretation which only permits recovery of business damages upon proof of loss of "net profits". Matthews v. State of Florida, Department of Transportation, 324 So. 2d 664, 666 (Fla. 4th DCA 1975). Proof of the depreciating

effect the taking will have (1) on the gross income of the business, or (2) on its goodwill, or (3) on the going concern value of the business or (4) other business losses are each a valid basis for the calculation of business damages in an eminent domain proceeding. City of Tampa v. Texas Co., 107 So. 2d 216 (Fla. 2nd DCA 1958); Matthews, supra. Additionally, business damages "in the nature of lost profits attributable to the reduced profit making capacity of the business" caused by such a taking are likewise recoverable. Mulkey v. State of Florida, Department of Transportation, 448 So. 2d 1062 (Fla. 2nd DCA 1984); LeSuer v. State Road Department, 231 So. 2d 265, 267 (Fla. 1st DCA 1970).

A business need not, necessarily, earn a profit to be entitled to recover business damages; even a business losing money may be entitled to receive business damages. Matthews, supra; Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

Given the clear provisions of §73.071(3)(b), F. S., an expert's choice of a particular methodology in calculating business damages, as set forth above, is competent and fully admissible, subject only to argument as to the credibility of the expert witness and the weight to be afforded the expert's testimony by the trier of fact. Matthews, supra at 667.

ARGUMENT

Expert testimony of business damages, where the business is not totally destroyed, may be predicated upon the depreciating effect of the taking on the sales of the business.

CERTIFIED QUESTION

IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(b), FLORIDA STATUTES, CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS? IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNAIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b), BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?

The basis for the resolution of this issue lies in the clear, broad legislative license of §73.071(3)(b), F. S. A business owner is entitled to recover:

> . . . the probable damages to such business which the denial of the use of the property so taken may reasonably cause. (Emphasis added.)

In Matthews, supra, the court stated that compensation for business damages in Florida is entirely a creature of statute and recognized that:

> "The legislature did not define or otherwise elaborate upon what constitutes "business damages", but there is absolutely no indication that it intended this statute to be construed as allowing business damages for lost profits only. The statutory language . . . simply does not warrant this restrictive interpretation."

The court in Matthews also recognized, as other Florida courts have stated, that business damages include loss of profits

"and other business losses" City of Tampa v. Texas Co., supra, and that another relevant measure of business damages may be an analysis of the gross income of a business.

More importantly, the Matthews court emphasized that competent evidence establishing business damages, based on various methodologies, is admissible and the appropriate subject of argument between condemnors and condemnees, which "goes to the weight of the evidence rather than to its competence", 324 So. 2d at 667.

Finally, Matthews recognized that a small business which operates for many years and sustains those who work for it, may suffer business damages, notwithstanding that such damages cannot readily be demonstrated by conventional accounting methods, 324 So. 2d at 668. In the subject proceeding, the business was supporting both of MURRAY'S sons (T. 666) which was MURRAY'S choice. Further, reliance cannot be placed solely on the federal tax return to demonstrate the viability or non-viability of the business. As pointed out, for example, it can be advantageous for a small business to legitimately show a "tax loss", as was the case here, caused by depreciation and interest each of which did not involve any "cash dollars". This was particularly true for 1992 which is the year Fetherman primarily relied on in determining the earning capacity of the business (T. 662-663).

In Mulkey, supra, the court reiterated the analysis of business damages in Matthews and LeSuer, supra, finding that business damages "are in the nature of lost profits, attributable

to the reduced profit making capacity of the business caused by the taking", 448 So. 2d at 1066.

The following jury instruction, given in the subject proceeding (T. 924-925), was edited by the Florida Bar Continuing Education Committee, and found at page 297, Florida Eminent Domain Practice and Procedure, Fourth Edition, is widely and routinely acknowledged by the trial courts of this state as an appropriate business damage instruction:

> The (business owner) is entitled to be paid for the business loss, if any, to his business located on the remaining land if this loss is caused by the denial of the use of the property taken. In making this determination you should determine the probable damages to the business that the denial of the use of the property taken may reasonably cause . . . Business damages are not limited to loss of profits but also may include the depreciating effect the taking will have on the gross income of the business or on its good will or the going concern value of the business. (Emphasis added.)

This instruction, which tracts §73.071(3)(b), F. S., and the analysis of the statute in Matthews, has never been challenged nor was an exception taken by the DEPARTMENT in the subject proceeding to this charge (T. 818-839).

The statutory language of §73.071(3)(b), F. S., is not ambiguous. It authorizes a broad basis for the recovery of business damages, i.e., "the probable damages to such business which the denial of the use of the property so taken may reasonably cause". Therefore, this broad definition of the rights of business owners to claim probable damages must be strictly enforced. Juries are fully competent to consider all such

testimony, the argument of counsel as to witness credibility and the weight to be attributed to such expert testimony.

The total thrust of the majority opinion of the First District is that business damages must be measured solely by a determination of "lost net profits". However, as pointed out in State of Florida, Department of Transportation v. Manoli, 645 So. 2d 1093 (Fla. 4th DCA 1994), the Court reiterated the principles set forth in Matthews, supra, that since the legislative did not define "business damages", "lost profits" is not the only way to prove business damages.

In the subject proceeding, the witness Fetherman, based on authoritative accounting sources, used an accepted method known as the deprivation analysis of determining business damages. The objective is not to estimate likely market place effects but to restore the property owner to his economic status before the depreciation (T. 656-657).

Thus, Fetherman determined that the taking of a net of 16 parking spaces reduced customers and/or sales during peak restaurant operation only. After deducting only the "variable expenses" relating to these lost sales, this becomes the resulting number on which the percentage can be calculated to arrive at an annual loss (T. 672). The next step is to multiply the loss percent times the annual loss and thereupon capitalize to reduce back to a present day total loss which in this case was $105,000 (T. 669-681).

This methodology is particularly applicable where the

business is "damaged" by the taking as opposed to a total "destruction". It focuses on the probable damages the taking will reasonably cause, as expressly required by §73.071(3)(b), F. S. and by analyzing the depreciating effect the taking will have on the gross income of the business or MURRAY'S ability to enjoy the level of sales the business had enjoyed prior to the taking. As stated in Matthews, Mulkey and LeSuer, supra, this method employs an analysis of the "lost profit making capacity of the business caused by the taking".

Further, this procedure was consistent with the jury charge as to business damages, to which the DEPARTMENT took no exception.

Fetherman's expert opinion of business damage was competent evidence which differed from the analysis of the DEPARTMENT'S business damage expert. But as stated in Matthews, supra, at 324 So. 2d 667, his opinion was limited solely to the loss of sales caused only by the taking with a deduction of relevant costs; thus, there could be no "windfall" to MURRAY, as suggested by the DEPARTMENT. Further, Fetherman was subject to full and intense cross examination and argument regarding the credibility of his analysis.

As stated previously, none of the contractual net lost profit valuation cases cited by the DEPARTMENT involved governmental exercise of the power of eminent domain. Eminent domain involves a compelled deprivation of property rights, governed by a specific statute which sets forth recoverable damages in this

very unique area of the law, which has been described as "one of the most harsh proceedings known to the law". Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947). An owner is simply not required to limit his analysis of the probable damages the taking will reasonable cause to his business to "net profit" losses, particularly where the fixed expenses, such as advertising, depreciation, insurance, utilities and managerial salaries will remain substantially the same after the taking as before.

In Manoli, supra, the parties stipulated that the partial taking precipitated the total destruction of the service station business involved. There, the court cited with approval its previous decision in Matthews that a lost profit analysis is not the only acceptable method of proving business damages.

The Manoli decision is inapplicable to the case at bar because it clearly only applies to situations in which business damages are calculated based on a net profit loss of a totally destroyed business where, because of the taking, everything stops. In the instant case, Fetherman based his opinion on another acceptable method of calculating business damages in an eminent domain proceeding, i.e., the depreciating effect of the taking on only those sales of a going business which are lost due to the taking, as adjusted (T. 699-701). Not only did Fetherman in the subject proceeding not do a "net profit loss" analysis, as was done in Manoli, it would have been totally improper and inequitable to utilize such a procedure under the factors here

present. The DEPARTMENT cannot escape liability for business damages by attempting to utilize as support a decision, such as Manoli, with totally different facts which are not applicable here.

Within this context, the broad basis for business damages, as set forth by §73.071(3)(b), F. S., not only allows the method used by Fetherman, but mandates the procedure employed. Thus, the dissenting opinion of the First District accurately states, the issue here and how the question certified to this Court should be resolved. (A. 1).

CONCLUSION

LeSuer, Matthews and Mulkey, supra, clearly support the methodology used by the business damage expert for MURRAY, and is consistent with the strict interpretation of §73.071(3)(b), F. S. which includes the probable damages - - - which the denial of the use of the property so taken may reasonably cause. As pointed out in these decisions, the "reduced profit making capacity of the business caused by the taking" is totally supported by the "deprivation of sales" method used by the expert witness. MURRAY'S business was not totally destroyed, which would have required a "net profit loss" calculation, but he did suffer a partial business loss which was properly calculated. the trial court was correct in allowing the jury, after hearing the evidence from both sides, to determine the issue of business damages, based on the jury charge to which the DEPARTMENT took no exception.

The decision of the First District should, therefore, be reversed and Final Judgement entered by the Trial Court should be affirmed.

Dated this 15th day of March, 1996.

Respectfully submitted,

FOERSTER, ISAAC AND YERKES, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to MARIANNE A. TRUSSELL, ESQUIRE, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0485, by U.S. Mail this 15th day of March, 1996.

Attorney

SUPREME COURT OF FLORIDA

L. N. MURRAY,

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STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Defendant.

CASE NO.: 87,378

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APPENDIX TO

BRIEF OF PETITIONER

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604-A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

STATE, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

L. N. MURRAY, ET UX, ET AL.,

Appellee.

CASE NO. 94-3068

CORRECTED P.6
MAILED 2/1/96
BY AM

Opinion filed January 19, 1996.

An appeal from the Circuit Court for Nassau County. Robert M. Foster, Judge.

Thornton J. Williams, General Counsel, Marianne A. Trussell, Assistant General Counsel, Department of Transportation, Tallahassee, for Appellant.

David W. Foerster of Foerster, Isaac, and Yerkes, Jacksonville, for Appellees.

PER CURIAM.

Pursuant to an eminent domain proceeding, the Department of Transportation took a portion of appellees' restaurant parking lot for the expansion of a state road, and the jury awarded appellees both severance and business damages. The Department raises two issues on appeal regarding these two types of damage. We affirm on the first issue and reverse as to the second issue.

The Department first contends that the trial court erred by denying the admission of expert testimony of a cost-to-cure the effect of the partial taking of the restaurant's parking lot. Section 73.071(3), Florida Statutes, authorizes an award of severance damages for a taking of less than the whole of a business property. "The cost of effecting physical changes or modifications in the premises necessitated by a taking are in the nature of damages to the remainder or severance damages, not business damages." LeSuer v. State Road Dep't, 231 So. 2d 265, 268 (Fla. 1st DCA 1970).

In the instant case, the Department sought to present a mitigating "cost-to-cure" proposal demonstrating that the remaining property could be restored to its original utility and value. The Department proffered expert witness testimony that thirteen spaces would be taken, but a complete cure was available that effectively negated severance damages. Five spaces could be added to the end of the existing parking bays, and eight spaces could be created by striping a paved area on the east side of the restaurant that was used for overflow parking during peak business periods. After hearing the Department's proffer, the trial court disallowed that part of the cure testimony relating to the striping and use of the paved area for eight parking spaces. The decision was based on the court's erroneous belief that a previous judge's ruling disallowing this testimony on the issue was the law of the case. Keathley v. Larson, 348 So. 2d 382, 384 (Fla. 2d DCA 1977), cert. denied, 358

So. 2d 131 ("[W]here one judge has made an interlocutory order in the case, and for some reason is properly removed from the case and another judge properly assigned . . ., the successor judge can vacate that prior interlocutory order while the case is still pending and has not yet gone to final judgment."). We affirm the exclusion of this part of the cure testimony for another reason.

In both State Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971), disapproved in part on other grounds, Broward County v. Patel, 641 So. 2d 40 (Fla. 1994), and Williams v. State Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991), disapproved in part on other grounds, Broward County v. Patel, 641 So. 2d 40 (Fla. 1994), the Department took part of the parking lot of each business through an eminent domain proceeding, and in both cases the cure testimony presented by the Department was determined by this court to be inadmissible as a matter of law because in developing its proposed cures the Department failed to account for valuation factors compensable as severance damages.

In the instant case, the Department ignores the fact that the area it proposes to stripe as replacement for spaces taken already is used for overflow parking. As a result, the expert's opinion ignores the reduction in value of the restaurant business with a smaller parking area available for customer use or a lesser area for parking expansion in the unstriped parking area. The testimony was therefore inadmissible as a matter of law as it was in Byrd, supra, and on this basis we affirm the court's exclusion of part of

the cost-to-cure proposal.

The second issue presented is whether appellees' expert witness testimony on business damages was insufficient as a matter of law. The allowance of business damages under section 73.071(3), Florida Statutes, is a legislative grant and is not constitutionally required. Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926 (Fla. 1983). "[A]ny ambiguity in section 73.071(3)(b) should be construed against the claim of business damages, and such damages should be awarded only when such an award appears clearly consistent with legislative intent." Id. at 929. The property owner in an eminent domain proceeding has the burden of proof on this issue. City of Fort Lauderdale v. Casino Realty, Inc., 313 So. 2d 649 (Fla. 1975).

Section 73.071 does not define "business damages," but this court has stated that business damages "are more in the nature of lost profits attributable to the reduced profit-making capacity of the business caused by a taking of a portion of the realty or improvements thereon." LeSuer v. State Road Dep't, 231 So. 2d 265, 268 (Fla. 1st DCA 1970). Business damages, however, are not limited to lost profits. See Matthews v. Division of Admin., Dep't of Transp., 324 So. 2d 664, 668 (Fla. 4th DCA 1975)("[P]articularly, where a business is totally destroyed, there are business losses beyond profit losses, attached to moving or selling equipment and loss of goodwill. . . .").

In the instant case, Appellees' expert witness testified that

he conducted a "deprivation appraisal" of the future lost profits of the restaurant stemming from the net loss of restaurant parking spaces after the taking. He determined the gross profits during peak periods, deducted certain "variable expenses," determined an annual lost profit figure, and then capitalized this figure to arrive at total lost profits. Fixed expenses, such as advertising, depreciation, insurance, utilities, and Appellees' salaries were purposefully excluded from the analysis. The Department argues that despite the appellation given it, the above is a lost profit analysis. Fixed expenses are incurred regardless of any loss of available parking and are a necessary factor of the lost profit analysis. We agree.

In State Department of Transportation v. Manoli, 645 So. 2d 1093 (Fla. 4th DCA 1994), the court ruled that in calculating business damages using lost profits, wages of the owner who operated the service station should be deducted in the analysis. If the owner is not receiving a wage, then a calculation of the reasonable value of the owner's services must be made. The court held that the expert testimony was inadmissible because it was based on a misconception of the law.

A party seeking lost future profits must prove the amount of lost profits with reasonable certainty. Forest's Mens Shop v. Schmidt, 536 So. 2d 334 (Fla. 4th DCA 1988). A determination of lost profits must deduct operating expenses and costs and the actual salary paid to supervisors or the reasonable value of same.

Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc., 619 So. 2d 6 (Fla. 5th DCA 1993). In addition, a lost profit computation must consider fixed expenses, such as overhead. Pahokee Housing Auth., Inc. v. South Florida Sanitation Co., 478 So. 2d 1107 (Fla. 4th DCA 1107), review denied, 491 So. 2d 280 (1986).

In the instant case, the expert's lost profit analysis did not account for fixed expenses. Such testimony is inadmissible as a matter of law and should have been stricken. See Manoli, supra. We therefore reverse on this issue. We certify the following question, however, as being one of great public importance:

> IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(b), FLORIDA STATUTES, CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS? IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b), BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?

Appellees' motion to dismiss is denied. The cause is affirmed in part and reversed in part and remanded for new trial in accordance with this opinion.

ERVIN and MINER, JJ., concur, and BENTON, J., ~~dissents with opinion~~. concurs in part and dissents in part with opinion.

BENTON, J., concurring and dissenting.

I would affirm the judgment entered by the trial court in its entirety. Together with evidence of the facts on which it was based, a certified pubic accountant's testimony was received explicating a "deprivation appraisal" he did in order to ascertain the effect of anticipated losses in sales on gross profits and so on the value of the restaurant as an enterprise. In my view, this evidence was sufficient to support the portion of the judgment the court today reverses.

The jury had to decide what the taking of parking places would do to the restaurant's value as a business. Mr. Fetherman, the certified public accountant, testified that the value of a going business depends on its profitability, then explained his estimate of the effect on profits (or losses) sixteen fewer parking places would have. There was evidence that the Department of Transportation took sixteen--or 25%--of sixty-four parking places. After estimating "lost profits" on an annual basis, the accountant "capitalized" the recurring shortfall he predicted, in this way valuing at $105,000 the reduction in the "profit-making capacity of the business caused by a taking of," LeSuer v. State Road Dep't, 231 So. 2d 265, 268 (Fla. 1st DCA 1970), a quarter of its parking places.

During most of the restaurant's hours of operation, he concluded, lost parking places would have no effect because they would have been vacant anyway. The jury was free to find, however,

that, as the accountant testified, less parking will mean less revenue at peak hours--hours during which (before the taking) the parking lot filled (or almost filled)--periods in which 35.1% of the restaurant's sales occurred. Multiplying the percentages, the accountant arrived at a percentage of sales the loss of parking spaces would likely occasion--8.8%. Corresponding to this diminution in revenue, certain expenses will also decrease, according to the testimony, including the cost of food the restaurant would otherwise have served.

On the assumption that variable costs varied directly with sales--an assumption not questioned on appeal, the accountant calculated historical variable costs as a percentage of historical sales (23.3%), and multiplied this percentage by a weighted average sales figure similarly based on historical data ($701,428). Multiplying the result ($163,443) by the percentage of sales projected to be lost (8.8%) yields a figure ($14,382.98) representing the projected diminution in variable costs associated with the projected loss of sales.

The accountant also reduced the $701,428 sales figure by deducting the cost of goods sold ($299,965) to arrive at gross profits ($401,463). Multiplying gross profits by the percentage of sales projected to be lost (8.8%) yields a figure ($35,328.74) representing the amount against which the projected diminution in variable costs associated with the projected loss of sales must be offset in order to determine the effect on profits: a drop of

$20,946 was projected. (Mr. Fetherman reached this result by taking the offset before multiplying by the percentage of sales projected to be lost.)

As long as there is reason to believe an enterprise will remain viable, a "lost profits analysis" is appropriate even though tax accounting shows losses. If losses instead of profits occur both before and after the loss in revenue, the significance of the change (increase) in losses is comparable to the significance of the change (reduction) in profits, when a loss of revenue diminishes profits. Here tax losses have not prevented family members from taking substantial salaries, and the jury had ample evidence from which to conclude that the restaurant would stay in business.

The majority opinion seems to misapply to the present case decisions in cases where the parties litigated the amount of future profits closing a business down altogether would cause. Projecting lost profits in such cases does indeed require deducting projected expenses of all kinds--fixed and variable--from projected revenues. Net profits which will cease completely when the business closes are appropriate indicators of the magnitude of profit-making capacity that will be lost with the business's demise.

Here, however, certain expenses, including capital costs, insurance, certain taxes, advertising, utilities, and certain employees' (including family members') salaries, will be incurred whether or not revenue falls off as projected, or so the jury was

free to find. In the present case, if Mr. Fetherman had calculated fixed costs and deducted them from gross profits, net profits could have been determined, but the difference in net profits attributable to the projected loss in sales would have been the same as the projected $20,946 difference in gross profits. Appellee's expert properly excluded fixed costs from his differential analysis, on the assumption that fixed costs would be incurred after the taking just as before.