IN THE SUPREME COURT OF FLORIDA

DOROTHY MURPHY et al.,

Petitioners,

vs. Case No. 93,551

FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

BARBARA'S CREATIVE JEWELRY, INC., etc., et al.,

Petitioners,

vs. Case No. 93,554

FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

INITIAL BRIEF OF PETITIONERS

Dorothy Murphy, Maring Bookkeeping Service Inc., Halycon Yacht, Inc., Jeff Newman d/b/a Jeff's Dirt Diggers, and Nails by Michelle Inc.

On Review from the District Court of Appeal,
Fourth District,
State of Florida

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PRELIMINARY STATEMENT

Throughout this brief, the Petitioners will be referred to collectively as "Petitioners," or "owners". The Respondent, Florida Department of Transportation, will be referred to as the "Department" or "DOT."

Because this matter originated as an appeal of a non-final order, the record is primarily located in the appendix to the Department's Initial Brief to the Fourth District Court of Appeal. Citations to that portion of the record will be indicated by the reference (A. #). Citations to the Department's Initial Brief below will be indicated as (B. #.) Citations to the original record (other than in the appendix) will be indicated by the reference (R. #). Citations to the supplemental record will be indicated by (S. #). References to the appendix of this brief will be indicated by the reference (Appendix hereto tab #).

All emphasis in quotations is supplied unless indicated otherwise.

Section 337.27(2) Fla.Stat. (1997) authorizes the taking of entire tracts of land, even though only a part is actually needed, where a whole taking will be less costly than a partial taking. Throughout this brief, the type of whole taking authorized by § 337.27(2) Fla. Stat. will be referred to as an "excess condemnation" or "economic whole taking." Also, in this context, the portion of a tract not physically needed for public use will be referred to as the "excess" or "remainder" property.

STATEMENT OF THE CASE AND FACTS[1]

This case is before the Court as a result of the District Court of Appeal, 4th District, certifying the following as a question of great public importance:

> Where condemnation under section 337.27(2), Florida Statutes, is requested, and the property owner disputes the relative values of a whole take over a partial take, may a trial court deny a quick taking under section 74.031, Florida Statutes, and defer the question of the extent of the take until a jury determines the value of both a whole take and a partial take of the property?

State of Florida, Department of Transportation v. Barbara's Creative Jewelry, Inc., 23 Fla. L. Weekly D1532, 1533 (Fla. 4th DCA 1998).

This condemnation proceeding began in December of 1995, when DOT filed its Petition in Eminent Domain utilizing the "slow-take" procedures set forth in Ch. 73, Fla. Stat. (1998), to acquire, *in toto*, an improved commercial property in Davie, Florida, for the widening of Griffin Road. (A. 1-14).

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[1] For the sake of brevity, Petitioners, Dorothy Murphy, Maring Bookkeeping Service, Inc., Halcyon Yacht Inc., Jeff Newman d/b/a Jeff's Dirt Diggers and Nails by Michelle, Inc. have adopted a joint statement of the case and facts with their co-Petitioners, Cabrera and Barbara's Creative Jewelry Inc. This statement of the case and facts is identical to the statement in their co-Petitioners' Initial Brief, but is repeated here for the Court's ease of reference.

In its Petition, DOT asserted that it only needed the northern half of the owners' property in order to construct its road project. (A. 4, 7-9). The balance of the property, DOT asserted, was being condemned under authority of § 337.27(2), Fla. Stat. (1998),[2] ostensibly to save public funds by reducing acquisition costs. DOT admitted that it had no engineering need for this southern half of the property. (A. 1, 12; B. 3, 17, 23).

Even though DOT's consultants had determined that the building on the property, severed by the road widening, could be repaired (A. 419-420; B. 3-4, 8-9), DOT right-of-

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[2] Section 337.27(2), Fla. Stat. (1995), originally codified as § 337.27(3), Fla. Stat. (1985), reads:

> "In the acquisition of lands and property, the department may acquire an entire lot, block, or tract of land *if, by doing so, the acquisition costs to the department will be equal to or less than the cost of acquiring a portion of the property*. This subsection shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the state of property acquisition is a public purpose and that, without this limitation, the viability of many public projects will be threatened." *Id.* (emphasis added).

way administrators believed that DOT's acquisition costs would be less if it took more - that is, all - of the property. (A. 489-498; B. at pp. 3-4, 11). This apparent anomaly was due to DOT's belief that the business damages it might have to pay in a "partial taking",[3] plus the cost of the property taken and severance damages to the real estate, would exceed the value of the entire property. (*Id.*).

Defendant, Barbara, a jeweler, is located in the northern portion of the building on land that DOT needs to widen the road (the "road parcel"). Petitioners, Cabrera and Maring, accountants, and Petitioners Murphy, Halcyon, Newman and Michelle, are located in the southern portion of the building in the area that DOT does not need for the road, but seeks to acquire purportedly to reduce its acquisition costs (the "remainder"). (A. 414-415, 417, 441). All Petitioners also have the right to use common areas located on both the road parcel and the remainder. (A. 579-580).

By January 18, 1996, all Petitioners had filed timely answers demanding trial by jury, asserting claims for compensation (including business damages), and raising affirmative defenses to the taking of their property. (A. 15-59). Anticipating that DOT might attempt to convert the lawsuit from a "slow-take" under Chapter 73 to a "quick-take" under Chapter 74, all Petitioners also filed demands for hearing on their defenses to

[3] Business damages are allowed by statute in a taking by DOT for a road widening if the business has been at the location of the taking for more than 5 years and the taking leaves part of the business premises. If all of the business premises are taken there is no entitlement to business damages. § 73.071(3)(b), Fla. Stat. (1995).

the taking, pursuant to § 74.051, Fla. Stat. (1998). (*Id.*).

This precaution was warranted. On January 29, 1996, DOT did convert the case into a "quick-take" proceeding by serving the Petitioners with its declaration of taking pursuant to Chapter 74 of the Florida Statutes. This chapter, entitled "Proceedings Supplemental to Eminent Domain", establishes the process to be followed for taking possession and title in advance of final judgment. (R. 37-38).

About eight months later, on September 17, 1996, a non-evidentiary hearing was held before the circuit judge, Hon. John Frusciante. At this hearing, the attorneys for the parties stated their positions regarding the appropriate procedure and sequence of events to be employed to resolve the issues that had been joined, specifically, DOT's request to "quick-take" possession and title to the entire property. (A. 167-267). Following extensive argument of counsel, Judge Frusciante determined that he wanted to preview the evidence that the parties intended to present to the jury regarding compensation and damages due for the taking. His purpose in doing this was to determine if a legitimate dispute existed as to whether acquisition costs for taking the entire property would be more, or less, than taking just the road parcel. (A. 192-198, 203-218, 226-232).

On October 23 and November 1, 1996, Judge Frusciante conducted evidentiary hearings at which the parties presented their witnesses regarding compensation due for the taking and resulting damages under each scenario. (A. 301-649). After hearing all of the evidence,[4] as well as argument of counsel, Judge Frusciante determined that the

[4] Judge Frusciante based his ruling on the evidence presented to him, stating:

Petitioners had established that a legitimate dispute existed regarding whether a partial or a total taking would result in higher acquisition costs to the DOT.[5] Consequently,

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> I have determined by this [evidentiary] hearing, that there are legitimate concerns for the jury. (A. 642).

Accordingly, the judge's order provided:

> The Petitioner, Department of Transportation, determined that the acquisition costs for the entire tract will be less than the acquisition costs for that portion of the property it needs to physically construct its road. Petitioner presented evidence in support of that determination. The Court finds that Petitioner neither proceeded in bad faith nor abused its discretion in making its determination.
>
> The Defendants [owners], however, presented a viable position that the acquisition costs of the entire tract will not be equal to or less than the acquisition costs for that portion of the property which Petitioner needs to physically construct its road.
>
> The Court finds that where, as here, the property owner objects to the total taking of her property on the basis that the acquisition costs of the total taking will be equal to or less than the acquisition costs of a partial taking, and where the acquisition costs involve, as they do here, elements of compensation, the Court cannot substitute its judgment for the judgment of the jury. (A. 163-164).

[5] Although there are several ways Judge Frusciante could have reached this result, two views of the evidence clearly support his conclusion. In a *total* taking, the cost of acquisition could be $368,534, Dorothy Murphy's (the property owner) testimony for the value of the land and building ($300,000), plus Richard Cohen's (Barbara's fixture appraiser) testimony for the value of fixtures ($68,534); these figures are not duplicative. (A. 540-541, 556-558, 565-572; B. 12-13). On the other hand, compensation in a *partial* taking, excluding business damages, could be as little as $334,600, Ed Riley's (DOT's appraiser) testimony for the value of the property taken, together with severance damages ($186,600), plus the low range of Laura Tindall's

exercising the discretion granted to him by § 74.051(2), Fla. Stat. (1995),[6] he denied, on February 11, 1997, DOT's request for an order of taking on the entire property until this threshold question could be determined by a jury. (A. 163, ¶3, 642, 645, 647).

Judge Frusciante's ruling, however, was not absolute.[7] (A.160-164).

(defendant's business damage expert) testimony as to all business damages ($148,000). (A. 110-143, 580-582; B. 9, 13). In actuality, however, the award of business damages could be zero, resulting in the potential that a *partial* taking could cost DOT only $186,000. *See*, Behm v. Dep't of Transportation, 336 So.2d 579 (Fla. 1976); Department of Transportation v. Decker, 408 So.2d 1056 (Fla. 2nd DCA 1982).

[6] § 74.052(2), Fla. Stat. (1998), provides, in relevant part:

> If a hearing is requested, the court shall make such order as it deems proper, securing to all parties the rights to which they may be entitled, not inconsistent with the provisions of this section.

[7] The actual holding of the trial court was:

> Accordingly, the Petitioner's motion for entry of an order of taking on the entire property is denied.
> As to that portion of the property which Petitioner alleges is necessary to physically construct its road (Exhibit "A"), the Court finds that the taking of the property described in Exhibit "A" is necessary for a proper public purpose; however, the Court does not grant an order of taking as to that portion of the property since Petitioner has not requested that this Court enter an order of taking as to that portion of the property at this time. Should Petitioner elect to make such a request, this order is without prejudice and, upon appropriate motion and hearing, the Court will enter such an order of taking.
>
> This order is without prejudice to Petitioner to renew its motion for an order of taking on the entire property after there has been a jury determination or a stipulation among the parties as to the elements of compensation to be paid.

Done and Ordered in Chambers, Ft. Lauderdale, Broward County, Florida this [11th] day of February, 1997.

First, Judge Frusciante only denied the advance taking of possession and title with regard to that portion of the property that the DOT admitted it did not need, but was attempting to acquire in order to avoid paying the Petitioners' business damage claims. (A. 4, ¶4, 164, ¶¶1,2; B. 17, 23). Regarding that part of the property that DOT *did* need in order to widen the road, Judge Frusciante ruled that DOT, upon application, *would* be granted title and possession in advance of jury trial and final judgment. (A. 164, ¶2).

Second, Judge Frusciante expressly reserved ruling on DOT's request that it be permitted to condemn the remainder, pending a jury determination of the compensation due under the two alternatives, partial or total taking, so that he might properly apply § 337.27(2), to the facts of this case (A. 164, ¶ 3).

Rather than request an accelerated date for trial by jury under § 73.071(1), Fla. Stat. (1998), DOT sought appellate review of Judge Frusciante's non-final order.

While the case was pending before the District Court, DOT requested that jurisdiction be relinquished to the trial court so that it could proceed with a partial taking of the road parcel only. (S. 1.) The District Court granted DOT's motion on March 3, 1998, and on April 2, 1998, the Circuit Court entered an order of taking for the road parcel. On April 7, 1998, DOT deposited its good faith estimate of value for the partial taking into the Circuit Court registry and thereby acquired title to the road parcel (S. 8); simultaneously, all claims for compensation made by Barbara, Cabrera and the other

Petitioners became vested.[8]

On June 24, 1998, the District Court, Warner, J., with Dell, J., concurring, rendered its opinion reversing the trial court, remanding and directing that the trial court ". . . enter an order of taking effective upon the posting of a good faith estimate of value of the property." Barbara's Creative, 23 Fla. L. Weekly at D1533.

Judge Polen dissented, explaining he was of the opinion that the trial judge had properly exercised his discretion with regard to the matter presented. *Id.* at D1534.

The majority, on its own motion, certified the question as one of great public importance and ". . . capable of repetition, yet evading review," even though moot with respect to the present case due to the intervening partial order of taking entered on April 2, 1998, referred to above. *Id.* at D1534, n.1.

It is from this order and opinion that the Petitioners in consolidated Case Nos. 93,551 and 93,554 seek review by this Court.

[8] *See,* § 74.061, Fla. Stat. (1998); O'Sullivan v. City of Deerfield Beach, 232 So.2d 33 (Fla. 4th DCA 1970); Department of Transportation v. NationsBank, 4 Fla. L. Weekly C262 (Fla. 13th Cir. Ct. Sept. 27, 1996).

SUMMARY OF THE ARGUMENT

This case presents a question of great public importance regarding due process for economic whole takings in Florida. Though the intent of the excess condemnation statute (§ 337.27 (2), Fla. Stat.) has been upheld by this Court as a valid public purpose, this is the first case on the appellate level to address its practical application. The certified question calls for procedural precedent on the issue of whether landowners are entitled to a jury trial on compensation prior to a court's application of the statutory criteria for excess condemnation. Resolution of this question will bring much needed uniformity to the process of economic whole takings across the state.

The parties do not dispute that § 337.27(2) authorizes excess condemnation upon the condition that the costs of a partial taking will exceed the costs of a whole taking. But, they dispute the procedure for determining whether that factual condition precedent has been met.

The owners, trial court, and dissenting opinion below maintain that since conclusive findings of compensation are solely within the province of the jury and since the statute authorizes excess condemnation only where the cost of a partial taking actually exceeds the cost of a whole taking, the only way to satisfy the public purpose criteria of the statute is to obtain a jury verdict establishing the relative amounts of compensation, enabling the court to then apply the statutory criteria with the certainty required by the statute.

This level of certainty is no mere statutory technicality. Owners have fundamental

due process rights not to have private property taken "except for a public purpose," guaranteed by Art. X, § 6, Fla. Const., and not to be "deprived of . . . property without due process of law" as guaranteed by Art. I, § 9, Fla. Const.. Thus, they are constitutionally entitled to the conclusiveness of a jury verdict before having to surrender property which is admittedly not needed for a public project.

The Department maintains that the determination of the predicate comparative costs is one for the condemning agency, subject only to the same limited judicial review afforded to administrative determinations of public purpose and necessity at order of taking hearings. For this proposition, the Department has advanced two alluring but incorrect arguments, to which the majority below fell prey. First, the Department over simplistically argues that, since the statute describes a public purpose, any issue related to it must fall within the ambit of agency discretion. Second, the Department sounds the false alarm that requiring jury trials in advance of orders of taking would preclude the use of "quick taking" procedures for excess condemnations.

Both the Department and the majority opinion strain to avoid the fact that the excess condemnation statute created a mixed question of fact and law, and left determination of the factual condition precedent squarely within the province of the jury. Their overly broad notion of "public purpose" has forced the illogical holding that issues of acquisition cost are not issues of compensation and has wrought a repeal of the right to jury trial by strained implication.

Their "quick taking" rationale is similarly without merit. Jury trials and "quick

takings" are not mutually exclusive, either legally or practically. "Quick takings" are by definition transfers of title and possession to the government in advance of final judgment, not in advance of jury trial, so there is no legal basis for any purported inconsistency. Furthermore, the time and cost required to present contested compensation issues to a jury should not be significantly different than that required to competently present the same dispute at a "bench trial." The use of summary judgment procedures available to the Department, in addition to the statutory preference given to trial of eminent domain cases ahead of all other civil matters, should prevent any undue delay in obtaining the jury determinations necessary to a timely application of § 337.27(2).

Even if affording jury trial for legitimate disputes were to cause nominal increases in cost or delay, they would be well justified in light of the constitutional due process rights at stake and the need to insure against valuation mistakes which would defeat the very purpose of the statute. Denying the due process which yields conclusive findings of compensation can lead to the ironic result of acquiring unnecessary property at *greater* public expense because of inaccurate pre-suit estimates. Judicial deference to condemnors' "discretion" in the area of compensation also lends itself to draconian negotiation tactics where, out of their zeal to save dollars and aware of their legal leverage, condemnors may pressure owners to accept less than fair market value in order to retain ownership of their remainder, which is almost certain to be lost under the "abuse of discretion" standard.

For good reason, compensation has always been left to the neutral determination of the judicial branch, and juries in particular, unlike matters of pure public purpose and engineering necessity which are uniquely within agency expertise (like whether and how to build a road). The excess condemnation statute did not alter that constitutional balance one bit, and this Court should not perpetuate any interpretation which does.

ARGUMENT

1. The certified question should be answered in the affirmative because the enactment of § 337.27(2) Fla. Stat. (1997) did not alter the right of owners to jury trial on issues of compensation.

Until the relatively recent advent of "economic whole takings," condemnation of private property was limited to the quantity of land *physically* necessary for public purposes.[9] The 1984 enactment of § 337.27(2), Fla. Stat. (1997) and its parallel provisions[10] radically departed from this old maxim by authorizing, for the first time in Florida, acquisition of admittedly *unnecessary* property for the purpose of saving acquisition costs.[11] The statute states, in pertinent part:

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[9] Even after the doctrine of "public purpose" was expanded from actual public use to include private use which serves a public purpose, the land taken still had to be physically necessary to the planned use. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981) in which land was taken for use by a private corporation (General Motors) but was still physically necessary to building its plant.

[10] See § 166.401(2), Fla. Stat. (1998) and § 127.01(b), Fla. Stat. (1998).

[11] That is, taking a whole tract to avoid the business and severance damages

> In the acquisition of lands and property, the department may acquire an entire lot, block, or tract of land if, by doing so, the acquisition costs to the department will be equal or less than the cost of acquiring a portion of the property.

While this means of saving acquisition costs was upheld as a valid public purpose, *vel non*, in Department of Transportation v. Fortune Federal Savings & Loan Assoc., 532 So.2d 1267 (Fla. 1988), there has been no appellate-level guidance concerning the procedure for application of § 337.27(2) prior to the Fourth District's decision in this case, wherein the majority acknowledges the need for this Court to establish the "necessary corollary of Fortune Federal." State of Florida, Department of Transportation v. Barbara's Creative Jewelry, Inc., 23 Fla. L. Weekly D1532, 1533 (Fla. 4th DCA 1998).

The specific procedural question certified is:

> Where condemnation under section 337.27(2), Florida Statutes, is requested, and the property owner disputes the relative values of a whole take over a partial take, may a trial court deny a quick taking under section 74.031, Florida Statutes, and defer the question of the extent of the take until a jury determines the value of both a whole take and a partial take of the property? (*Id.* at 1533.)

Stated otherwise, the question presented is whether owners have the right to jury trial on compensation issues when the government seeks excess condemnation of their property. Its resolution is necessary to bring uniform due process to excess condemnation proceedings state wide.

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payable in a partial taking.

Since the enactment of § 337.27(2), some trial courts have denied the right to jury trial on compensation issues prior to granting an order of taking, while others have refused to grant excess condemnation until after jury trial. (For example, compare the majority opinion below to D.O.T. vs Burger King Corporation, et al., 5 Fla. L. Weekly Supp. 158 (Fla. 13th Cir. Ct., Dec. 22, 1994).[12] This lack of uniformity has resulted in disparate levels of due process for landowners, uncertainty for condemnors in their acquisition schedules, and frustration of the legislative intent behind the adoption of economic whole takings in Florida resulting from valuation errors made in haste.

Conditional Public Purpose - A Mixed Question of Fact and Law.

Since correct answers are rarely reached absent correct premises, it important to preface further argument with an obvious, but important principle: the public purpose adopted in § 337.27(2) and approved in Fortune Federal is ***conditional.*** Section 337.27(2) authorizes excess condemnation **only** where acquiring an entire tract will be less costly than acquiring just the necessary part. In other words, the statute established a factual condition precedent to its new brand of public purpose. That is, there may only be excess condemnation upon a finding that compensation for a whole tract will be less than or equal to compensation for a partial taking. As routinely occurs in the law, § 337.27 (2) presents a mixed question of fact (compensation) and law (public purpose),

[12] The need for a uniform procedure prompted the Fourth District to discuss the merits of the case, and ultimately certify the question, despite its mootness *vis a vis* these Petitioners and the Department, given of the Department's election to pursue a partial taking during the pendency of the appeal. *See* note 8, *supra*, and accompanying text.

where the answer to the factual question is determinative of the legal one.

The parties do not dispute that this factual condition precedent exists, but they dispute the procedure by which it must be established: by jury trial or by the court with great deference to the condemning authority's estimates?

"Will" means <u>will</u>, which means jury trial.

The answer to this important procedural question lies in the legislature's use of the unequivocal term **"will"** to describe the *extent* to which the excess condemnation condition must be established, that is, conclusively. The legislature did not authorize excess condemnation where the department "estimates" that a whole taking would be less costly. Nor did it authorize such takings upon a prima facie showing that a whole taking "would" be less costly. The term "will" has no other meaning than to indicate an occurrence which is certain,[13] and under long-established Florida law which §337.27(2) did not alter, the only method to determine compensation with certainty in Florida is by jury verdict. § 73.071, Fla. Stat. (1997).[14]

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[13] *Black's Law Dictionary*, Fifth Edition (1979), defines "will" as "an auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty."

[14] The right to a jury trial on compensation in eminent domain cases has been a feature of Florida law since at least 1892, having been originally codified in sections 1550 and 1551 of the Revised Statutes of the State of Florida in 1892. The Florida legislature has continuously provided the right since that time, for over a century. §§ 1550, 1551 Revised Statutes (1892); Ch.5017, § 6, Laws of Fla (1901); §73.10 Fla.Stat. (1963); §73.071(1)(1995). The current codification of the right is § 73.071 Fla.Stat. (1997). which states, in pertinent part:

(1) When the action is at issue, and only upon notice and hearing to set the

cause for trial, **the court shall impanel a jury** of 12 persons as soon as practical considering the reasonable necessities of the court and of the parties, and giving preference to the trial of eminent domain cases over other civil actions, **and submit the issue of compensation to them for determination,** which issue shall be tried in the same manner as other issues of fact are tried in the circuit courts.

* * *

(3) The **jury shall determine** solely the amount of **compensation** to be paid which shall include:

(a) The **value of the property** sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any **damages to remainder** caused by the taking, including, . . . the probable **damages to such businesses** which the denial of the use of the property so taken may reasonably cause; . . . .

* * *

(7) If the jury cannot agree on a verdict the court shall discharge the, impanel a new jury, and proceed with the trial.

That juries are the arbiters of compensation is well illustrated by cases upholding the right of juries to depart from the compensation estimates of the parties in arriving at their verdict. *See*: Behm v. Dept. of Transportation, 336 So.2d 579 (Fla. 1976) (jury verdict on value of land taken may be anywhere within the range of testimony); Dept. of Transportation v. Decker, 408 So.2d 1056 (Fla. 2d DCA 1982) (jury not bound by testimony on business damages); and Hollywood v. Jarkesy, 343 So.2d 886 (Fla. 4th DCA 1977) (jury may properly differ with only expert presented on severance damages).

Thus, the excess condemnation statute clearly contemplates submission of the predicate compensation issues to a jury prior to a court's application of the statutory criteria for excess condemnation, a bifurcated procedure common in the application of many Florida statutes.

Florida juries are often called upon to determine relevant facts prior to a court's application of a legal standard, even where all that remains for the court is a straightforward mathematical calculation. For example, jury verdicts are necessary precursors to the application of setoff statutes,[15] comparative negligence statutes,[16] and habitual offender sentencing statutes,[17] among others.

Even when the bifurcation of issue fact and law issues is not so clear, where non-jury and jury issues are related, or even "indistinguishable," the right to jury trial prevails. *See* Adams v. Citizens Bank of Brevard, 248 So.2d 682 (Fla. 4th DCA 1971); Chenery v. Crans, 497 So.2d 267 (Fla. 2d DCA 1986); Marshall v. Sprecher, 559 So.2d 1280 (Fla. 2d DCA 1990).

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[15] *See, e.g.,* Wells v. Tallahassee Memorial Medical Center, 659 So.2d 249 (Fla. 1995).

[16] *See, e.g.,* Ridley v. Safety Kleen Corp., 693 So.2d 934 (Fla. 1996).

[17] *See, e.g.,* Roulhac v. State, 648 So.2d 203 (Fla. 1st DCA 1994).

Rather than recognize the common bifurcation of jury and non-jury issues, the majority below fell victim to the Department's self-serving spin on caselaw granting wide discretion to agencies in areas unrelated to compensation (like whether and how to build a road). The Department overextends those cases to argue that because the statute defines a public purpose, all issues pertaining to it are public purpose matters within the Department's discretion. This gross oversimplification forced the majority's illogical holding that issues of acquisition cost are not issues of compensation[18] and prompted the dissent to characterize the majority's holding as "contrary to the plain language of section 337.27(2)." 23 Fla. L. Weekly at 1533.

What legislators intended.

It is well settled that:

> If the language of a statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what judges might think that the legislators intended or should have intended.

Tropical Coach Line Inc. vs. Carter, 121 So.2d 779, 782 (Fla. 1960). Likewise, courts may not amend statutes duly passed by the legislature and are required to enforce them according to their plain terms. Florida East Coast Railway v. City of Miami, 372 So.2d 152, 156 (Fla. 3d DCA 1979) *citing inter alia*, Tropical Coach Line. Adherence to the literal terms of statutory law is especially mandatory in the context of eminent domain

[18] In the majority's own words, "[w]hile appellees claim that the cost of acquisition is a compensation issue, we disagree in the context of § 337.27 and conclude that it is an issue of necessity and public purpose." 23 Fla. L. Weekly at 1533.

where strict construction of legislative authority must be given *against* the agency asserting the power. City of Ocala v. Nye, 608 So.2d 15, 17 (Fla. 1992). In stark contrast to these principles is the majority opinion, which apparently indulged in "what judges think legislators should have intended" rather than in the clear language of § 337.27(2) and the strict construction of condemnation power to which owners are entitled.

"Will" means "will," not "might" or "may." Until a jury verdict is rendered, what acquisition costs "will" be in Florida is legally impossible to ascertain, and therefore, the condition precedent to excess condemnation is incapable of being met. There is no basis in the language of the statute for the majority's holding otherwise.

Repealing the right to trial by mere implication.

Even assuming, *arguendo,* § 337.27(2) was ambiguous, there is still no basis for the majority's holding in the rules of statutory construction. In fact, the majority opinion violates many of them, including (perhaps most glaringly) the rule against repeal of jury trial rights by implication. Merely from the "context" of the statute's public purpose, the majority *inferred* a major shift in the law — that compensation, which had always been left to the neutral determination of the judicial branch (and juries in particular), was now to be primarily within the "discretion" of condemning agencies, subject only to limited judicial interference.

It has long been recognized that the right to jury trial cannot be taken away by mere implication. Calhoun v. Baden, 15 So.2d 444 (Fla. 1943); Davis v. Smith, 227

So.2d 342 (Fla. 4th DCA 1969), *dissent adopted by* Smith v. Davis, 231 So.2d 517 (Fla. 1970); Hollywood Inc. v. City of Hollywood, 321 So.2d 65, 71 (Fla. 1975) ("questions concerning the right to jury trial should be resolved, if possible, in favor of jury trial"); *see also* Gundlach v. City of Hollywood, 425 So.2d 569, 570 (Fla. 4th DCA 1982) and Allen v. Estate of Dutton, 394 So.2d 132, 135 (Fla. 5th DCA 1980). Yet, the majority did just that, and more.

The procedure advocated by the majority would not only change the trier of compensation from jury to judge, but would drastically alter established standards and burdens of proof. Instead of compensation being decided by the "greater weight of the evidence" at a jury trial, condemnors' estimates of compensation would be ratified by the court absent "abuse of discretion" or "bad faith" at a hearing. Instead of the evidentiary burdens being evenly borne by condemnor and condemnee,[19] the burden to show abuse of discretion or bad faith would be entirely upon the owner.[20]

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[19] *See* City of Ft. Lauderdale v. Casino Realty, Inc., 313 So.2d 649 (Fla. 1975).

[20] The odds of an owner meeting this newly implied burden to show abuse of discretion on a valuation issue are long indeed, considering the that "fair market value" is discretionary by nature and routinely subject to varying opinions among equally qualified real estate experts.

Nothing in § 337.27 or its legislative history[21] remotely suggests the legislature intended this drastic change.[22] Yet, in the absence of the slightest whisper about it, the majority has divined a legislative intent to repeal a century-old right to jury trial on

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[21] *See* Legislative History of 337.27(2) Fla.Stat. (1995) in: Laws of Florida, 1984, Vol. I, Part 2, PP. 1743-1746 (Chapter 84-319); *Joint Legislative Management Committee, History of Legislation*, 1984, P. 197 (Senate Section, S.B. 569); *Senate Committee on Transportation, Bill Action Report on Proposed Committee Bill No. 3* (DOT Proposal 7a, b & c - Right of Way), dated March 5, 1984; Senate Bill 569; Undated, unsigned document entitled "Keypoints" - CS/SB 569; and *Senate Committee on Appropriations, Staff Analysis of CS/SB 569* dated May 21, 1984. (These legislative materials are located in the Appendix hereto at tab 1. The Fourth District Court of Appeal took judicial notice of them, and therefore, they are properly before this Court.)

[22] The legislature did not, as it could have, expressly make compensation excess condemnations a matter of administrative determination, subject to limited judicial review. *Compare* Dept. Of Agric. & Consumer Services v. Bonnano, 568 So.2d 24 (Fla. 1990) (holding there was no right to jury trial for determining compensation for destroyed citrus trees because the legislature had specifically provided an alternate procedure for administrative determination with a direct right of appeal to the District Court.)

compensation in the context of economic whole takings, where the constitutional right to own property is even more at stake than in regular condemnations!

In support of its implied repeal, the majority attempts analogy to judicial review of a condemnor's good faith estimate of value at orders of taking hearings,[23] citing that as precedent for judicial deference to condemnors on issues of compensation.[24] This analogy falls critically short, however, because the good faith estimate of value is not conclusive of full compensation and is completely without prejudice to the parties ultimate valuation positions before the jury. By contrast, the granting of an excess condemnation by the court without jury trial constitutes a conclusive finding of compensation as to any partial taking (including severance damage which is clearly an element of full compensation) not to mention its conclusiveness as to the owner's right to retain the remainder property itself.[25] It cannot be revisited by a jury later. For this

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[23] *See* §§ 74.031 and 74.051 Fla. Stat. (1997).

[24] *See* majority opinion, 23 Fla. L. Weekly at D1533, citing Pierpont v. Lee County, 23 Fla. L. Weekly S133 (Fla. Mar. 12, 1998). The majority cites Pierpont for its notation that the good faith estimate of value approved by the court at an order of taking is a not a finding of compensation. From that, the majority extrapolates that court review of the comparative cost issue is not a finding of compensation, and therefore, not in conflict with the right to jury trial on compensation issues. But the majority has overlooked the rationale behind that notation in Pierpont ─ a court's review of the good faith estimate for abuse of discretion is not a finding of compensation *because* it is not conclusive on the issue and is without prejudice to the jury's determination. *See* Shannon Properties, Inc. v. Tampa-Hillsborough County Expressway Auth., 605 So.2d 594 (Fla. 2d DCA 1992); F.E.C vs. Broward County, 421 So.2d 681, 684 (Fla. 4th DCA 1982.)

[25] This illustrates the fallacy of the majority's statement that "[I]f DOT is wrong about the difference in value between a partial and a whole taking, then the

reason, the majority's implicit consolation that landowners are still entitled to a jury trial on compensation for a whole taking after an excess condemnation is granted[26] offers no real comfort.

Creating disharmony where it did not exist.

The majority's opinion defies another basic rule of statutory construction - to harmonize statutes where possible. Courts have an obligation to interpret related statutes in a way which gives effect to each, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments. Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249, 250 (Fla. 1987). Statutes relating to the same subject are regarded *in pari materia* and should be construed together so as to preserve the force of each without destroying their evident intent. Alachua County v. Powers, 351 So.2d 32, 39-41 (Fla. 1977). If different provisions "may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should be each given the effect designed for them." State v. Dunmann, 427 So.2d 166, 168 (Fla. 1983). In denying owners compensation jury trials in advance of excess condemnation, the majority failed to give Chapters 73, 74 and § 337.27 the effects designed for them.

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property owner and tenants have lost only business damages, which are only a matter of legislative grace and not a right." 23 Fla. L. Weekly at D1533.

[26] 23 Fla. L. Weekly at D1533.

In both "slow" takings (described in Chapter 73, Florida Statutes) and "quick takings" (defined by Chapter 74) there can be no conclusive determination of compensation without jury trial:

- Section 73.071 places all elements of compensation within the province of the jury;
- Section 74.061 confirms that in "quick take" proceedings "[c]ompensation shall be determined in accordance with the provisions of Chapter 73 . . .";
- Section 74.021 specifies that "the right to take possession and title in advance of final judgment[27] shall not be construed as abrogating any right . . . conferred by laws of the state under which condemnation proceedings may be conducted."[28]

Thus, compensation in any eminent domain proceeding, quick or slow, is conclusively determined by juries.

The legislature is presumed to have been fully aware of this when it subsequently enacted the excess condemnation statute. With that awareness, not only did the legislature leave jury trial provisions of Chapters 73 and 74 completely unaltered, it chose the definitive word "will" to indicate that conclusiveness as to cost would be prerequisite to excess condemnation. Had the majority carefully read these statutes *in pari materia*, it might have reached the correct conclusion that the legislature

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[27] Note from this section that the legal distinctive of a "quick taking" is that a condemnor may obtain possession and title prior to *final judgment*, not necessarily prior to jury trial. Thus, "quick" takings and economic whole takings are not mutually exclusive, as discussed further *infra*.

[28] *See also* Div. of Admin. State Dept. of Transportation v. Grossman, 536 So.2d 1181, 1183 (Fla. 3rd DCA 1989).

intentionally left the right to trial on compensation issues fully intact.

The order may have changed, but not the method of determination.

In the usual condemnation case, where no excess condemnation is sought, the issues of public purpose and necessity are determined before the issues of compensation even arise. While § 337.27(2) reversed that traditional order of discussion by making compensation issues predicate to its public purpose, it did not alter the method of determining these issues. Compensation issues must be determined before the public purpose of excess condemnation can be triggered, but they are still for the jury to decide. The determination of public purpose, still ultimately for the court, must await the jury's verdict in order for the court to apply the statute with the certainty required by the statute and by due process. In the parlance of the dissent, "the cart must come before the horse."[29]

II. Answering the certified question in the affirmative would both preserve the due process rights of owners and ensure fulfillment of legislative intent.

The due process rights at stake.

The question presented here is not merely one of technical statutory construction. At stake are the constitutional due process rights to retain private ownership of property unless a valid public purpose exists (pursuant to Art. X, § 6, Fla. Const.) and to have property taken according to law (pursuant to Art. I, § 9, Fla.Const.), which here includes the right to jury trial on compensation issues by virtue of § 73.071 Fla. Stat. (1997).

[29] According to the strained logic of majority, the cart and the horse are now one and the same thing.

Because the zeal to reduce acquisition costs creates a tendency to downplay individual constitutional rights, this Court's admonition in Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So.2d 289, 293 (Fla. 1958) bears repeating here:

> The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the *greatest* concern to the Courts. . . .

The fundamental right to retain private ownership in the absence of an authorized public purpose derives from the first of two constitutional limits on the power of eminent domain: not only must there be full compensation, but there must initially be no taking at all unless for a valid public purpose. Thus, even a fully compensated taking of private property is *unconstitutional* if it is not for an authorized public purpose. As one commentator has written in the *Nichols* treatise:

> A taking of property by eminent domain for a use which is not public is such a violation of the basic and essential features of constitutional government that it amounts to a taking without due process of law. . . .

Julius L. Sachman and Patrick Rohan, *Nichols on Eminent Domain*, 4.1 at 4-38 (Rev. 3d ed 1997).

Emphasis upon this basic constitutional point is warranted since both the Department and the majority have so carelessly overlooked it. They rationalize that, if the preliminary costs estimates are proven wrong by a subsequent jury verdict on compensation for the whole, the owner has only lost business damages which are a

matter of legislative grace, not of constitutional guarantee.[30] As discussed previously, in that scenario the owner will have lost (along with business damages) constitutionally guaranteed severance damages, not mention the private property itself, which is highly protected under the constitution. Perhaps a Florida trial judge who wrestled with this issue put it best:

> If the Court were to determine at the order of taking hearing, that the acquisition costs of a "partial" taking exceeded the value of a "whole" taking, and then later the jury, in the trial of the cause, made a determination contrary to the preliminary finding of the Court, **irreparable harm** would occur, resulting in the violation of the defendant's constitutional right to substantive and procedural due process in the taking of its property.

D.O.T. vs Burger King Corporation, et al., 5 Fla. L. Weekly Supp. 158 (Fla. 13th Cir. Ct., Dec. 22, 1994).

The lack of due process resulting from the lack of a conclusive determination of

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[30] Although *entitlement* to business damages is by legislative grace, the legislature has left determination of their amount to juries. § 73.071(3)(b), Fla. Stat. (1997). The limitation on business damages wrought by § 337.27(2) did not remove determination of those damages from the province of the jury. Under Chapter 73, Florida Statutes, the amount of those damages are no less within the jury's province than other elements of full compensation. *See also*: Tampa-Hillsborough County Expressway Auth. V. Casiano-Torres, 659 So.2d 1125 (Fla. 2d DCA 1995); Bryant v. Div. Admin. State. Dept. Transp., 355 So.2d 841 (Fla. 1st DCA 1988).

predicate values was also recognized by the dissent in this case, wherein Judge Polen observes that such a result "would demonstrate the lack of public purpose served by the prior condemnation of the entire parcel" and that "[c]ondemnation in the absence of a valid public purpose violates due process." 23 Fla. L. Weekly at 1534.

Procedural due process deriving from Art. I, § 9, Fla.Const. and § 73.071 additionally secures the right to jury trial on all issues of compensation. It hardly needs argument that due process of law means to afford the procedure established by law. Even though the statutory language involved here is plain, it is worthy of note, again, that owners are entitled to strict construction of laws concerning condemnation procedure because eminent domain has long been recognized as "one of the most harsh proceedings known to the law." Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483, 485 (Fla. 1975); Div. of Admin. State Dept. of Transportation v. Grossman, 536 So.2d 1181, 1183 (Fla. 3rd DCA 1989), quoting from Baycol Inc. v. Downtown Dev. Auth., 315 So.2d 451, 455 (Fla. 1975). That strict construction is sorely lacking in the majority opinion, which strains to avoid the clear right to trial set forth in the eminent domain code with unsupported leaps of logic in holding issues of cost are not issues of compensation.

The Department and majority have relied on Lakeland v. Bunch, 293 So.2d 66 (Fla. 1974) to suggest that an order of taking hearing affords owners sufficient due process on all the issues pertaining to whether an economic whole taking is authorized. 23 Fla. L. Weekly 1533. Though Bunch held that order of taking hearings under

Chapter 74 provide sufficient due process, it should be limited to its facts which significantly differ from the ones presented by § 337.27 takings.

Having been decided a decade before enactment of § 337.27, Bunch could not have even contemplated the special procedural questions presented in excess condemnations. The issues before the court in Bunch were ones of traditional public purpose and necessity (like whether and how to build a road), and therefore, the only issues were whether the project itself constituted a valid purpose and whether the owner's land was necessary for its construction. Admittedly, those issues of necessity and public purpose, *vel non*, have always been for the court.

A review of the cases cited in support of the Bunch holding illustrates this. None of them approved conclusive determinations of value by the court, but rather, they all pertained to physical necessity issues (site selection, route selection, design, need for parking, need for drainage, quality of estate, etc.) which have always been the province of the court, with great deference to condemnors because of their superior engineering expertise. Or, the cases addressed public purpose issues totally unrelated to compensation (such as the assertion of predominant private purpose, insufficient construction plans, lack of prerequisite permits, etc.)

When closely read, there is nothing in Bunch which contravenes the numerous cases holding that the court may not make conclusive determinations of value. *See* note 24 *supra.* Furthermore, the policy behind judicial deference to agency determinations of public purpose, *vel non,* and engineering necessity is absent for compensation issues, for

which the agency has no superior expertise and in which it has a direct pecuniary interest.[31]

[31] More neutral proceedings are warranted when compensation is at issue. *See* U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), stating, in the context of forfeiture, that:

> The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding.

Since courts are to construe statutes in harmony with the constitution,[32] there can be no room for construction of § 337.27 other than to require jury trial in advance of an order of taking so that conclusive findings of compensation are made prior to allowing a whole taking. Without that certainty, owners would be denied constitutional due process in their right to retain private property absent contemporaneous existence of a public purpose.

Putting legislative intent at risk.

The Department and majority are misled in the notion that affording the due process of jury trial would frustrate the legislative intent of § 337.27. Aside from the factual inaccuracy of this, discussed *infra* in section III, it is logically unsound, for jury trial is the very thing that will ensure the fulfillment of the legislative intent. As noted by the dissent, without jury trial there is a significant risk that the Court's preliminary findings on value would differ from a jury's. There could be no greater frustration of legislative intent than for an agency to condemn unneeded property at a *greater* expense than condemning only the necessary part.

The risk of error is especially high under the rubric suggested by the Department and majority. They advocate that the highest level of judicial deference (abuse of discretion or bad faith standard of review) be given to the Department's in-house, pre-suit determination of compensation. What is at issue in an order of taking hearing is whether the Department's resolution to condemn is properly authorized. Necessarily then,

[32] Yet another rule of construction breached by the majority opinion. *See*

DOT's administrative determinations of value leading up to its resolution to seek excess condemnation are made pre-suit, without the benefit of mandatory discovery. Unless actual business records are gratuitously (and arguably foolishly) provided by the condemnee pre-suit, the Department is left to use of industry standards or worse conjecture.

While, as in this case, the Department may supplement its findings with actual discovery once condemnation proceedings begin, the decision to pursue an economic whole taking has already been made. If the majority is affirmed, there will be even less incentive for the Department to supplement its pre-suit information, since its original estimate would be entitled to such great deference.

Ensuring legislative intent.

Fla. Dept. Of Education v. Glasser, 238 So.2d 401, 404 (Fla. 1991).

Without the benefit of a jury trial on predicate factual issues, the legislative intent of § 337.27 could also be frustrated by the inability of condemnors to elect a whole taking[33] if the jury proves their estimate of partial taking damages was too low. In that scenario, the savings intended by the statute would be completely unavailable. This risk is illustrated by the number of times DOT has already been denied the ability to convert to a whole taking because it had rushed to obtain an order of taking pre-trial.[34] Submission of the issues to the jury prior to election would prevent this problem and would be entirely proper.[35]

Similarly, a jury trial on predicate issues of compensation would allow owners to intelligently elect *their* remedies. Because § 337.27(2) permits excess takings only when they are equal or less expensive than partial ones, it effectively creates a "cap" on

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[33] Assuming, of course, proper pleading in the alternative.

[34] *See, e.g.* D.O.T. v. Robbins and Robbins, Inc., 5 Fla. L. Weekly Supp. 223 (7th Judicial Circuit 1997); D.O.T. v. Nationsbank of Florida N.A., 4 Fla. L. Weekly Supp. 262 (13th Judicial Circuit 1996); D.O.T. v. Merit Petroleum Co., 3 Fla. L. Weekly Supp. 552 (20th Judicial Circuit 1995).

[35] It is completely appropriate to present juries with alternative issues for determination so that claimants may intelligently elect their remedies. Goldstein v. Serio, 556 So.2d 1338 (Fla. 4th DCA 1990) *rev. den.* 576 So.2d 291 (Fla. 1991).

business and severance damages at the value of a whole taking. If an owner waives any claim for partial taking damages in excess of that cap, the public purpose authorized by the statute vanishes, and as noted above, the owner would then have a due process right to retain private ownership of the remainder. Without jury trial to establish the relative compensation, however, owners could not intelligently elect this remedy.

The better course, for all concerned, is to await the findings of a neutral jury, rendered after full discovery by the parties. This procedure not only protects the due process rights of owners but protects the public by ensuring the purposes of § 337.27 are actually met.

III. Answering the certified question in the affirmative will not unduly prejudice condemnors in the pursuit of economic whole takings.

The majority opinion and the wording of the certified question present a false choice between quick takings under Chapter 74 and economic whole takings authorized by § 337.27(2). Because they are not mutually exclusive, the real decision for this Court is how to utilize the provisions of both.

As previously discussed, there is no legal incompatibility between quick takings and economic whole takings. The majority was persuaded, however, that the requirement of a predicate jury trial would practically preclude the use of § 337.27(2) because of the time and expense required for jury trial. This Court should not be so misled, for the following reasons.

First, the expense of presenting the issues of comparative compensation to a jury

are virtually the same as competently presenting them to the court. The same type and number of witnesses would be required in either proceeding. As illustrated by this case, it was necessary for DOT to present the testimony of its civil and transportation engineers, an MAI appraiser, and business damage accountant to explain its estimates of comparative cost to the court at the order of taking hearing. The owners retained corresponding witnesses to rebut DOT's estimates for the hearing. 23 Fla. L. Weekly at 1532. The same amount of proof would presumably have been marshaled by the parties had the matter been heard by a jury. Thus, the majority's concern that submitting the issues to the jury would require each side "to prepare two cases instead of one"[36] overlooks that economic whole takings require that dual presentation anyway.

In fact, the procedure advocated by the majority necessitates two valuation proceedings: one before the trial court and another before the jury (where the parties may completely take different positions!). The procedure urged by the dissent and these Petitioners is more efficient because it would entail only one valuation proceeding where compensation issues are determined once and for all.

Second, confirming the right to jury trial does not necessarily mean a jury trial will take place in every excess condemnation case. DOT could initially use the rules of civil procedure, particularly its provisions for summary judgment, to dispense with the need for jury trial in cases where an owner cannot legitimately dispute that excess condemnation criteria will be met:

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[36] *See*, 23 Fla. L. Weekly at 1534. at note 2.

> Where a movant for summary judgment . . . offers sufficient evidence to support its claim of the nonexistence of a genuine issue of material fact, the opposing party . . . must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented. If he fails, summary judgment may be entered against him.

Fleming v. Peoples First Financial Savings & Loan, 667 So.2d 273 (Fla. 1st DCA 1995) *rev. den.* 669 So.2d 250 (Fla. 1996). Proper use of summary judgment "separates the fisherman from the baitcutter."[37]

Third, even when jury trials are necessary to resolve legitimate disputes, § 73.071 (1), Fla. Stat. (1997) requires courts to give "preference to the trial of eminent domain cases over other civil actions," (which the legislature is also presumed to have known when enacting § 337.27). Prudent use of this provision by DOT would greatly lessen the potential that time constraints would frustrate the use of § 337.27(2) for road projects. Once this Court establishes a uniform "procedural corollary" for excess condemnations, DOT will be able to plan accordingly for the required procedure. For example, if this Court rules in favor of the right to jury trial, DOT will know to begin its acquisition process sooner.

With proper planning and use of the rules, the additional cost and time needed for jury trial should be nominal at most. Whatever nominal increase in cost or delay there might be in resolving legitimate disputes by jury trial, however, would be justified in light of the constitutional due process rights at stake and the importance of *actually* saving

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[37] Aquarius Condominium Assoc. v. Markham, 442 So.2d 423, 424 (Fla. 4th DCA 1983).

acquisition costs.

IV. Answering the certified question in the affirmative would prevent undue prejudice to owners facing excess condemnation.

Confirming the right to jury trial on predicate compensation issues through an affirmative answer to the certified question would also protect owners from draconian negotiation tactics which are otherwise likely to arise if agency cost estimates are practically invulnerable to challenge.

Under the majority's view, agency determinations of the relative costs of partial and whole takings are entitled to great deference from the courts. Facing that, owners who desire to keep their remainder property may be forced to accept even less than the market value of the whole property (which, under the statute, is the minimum they should receive for a partial take) in exchange for a condemnor's agreement not to pursue a virtually assured whole taking in court.

For example, the Department could condition its agreement to forbear from a economic whole taking upon the owner's acceptance of the *Department's* estimate of the whole value, which is likely to be low under the statutory scheme where proof that the whole is less expensive than the partial is the standard. Or worse, the Department might further condition its forbearance on the owner's acceptance of an even lesser figure, reduced by the amount the Department estimates it could have recouped upon resale of the remainder to some one else, to match its estimated "net" acquisition cost of a whole taking!

These examples of the potential prejudice to owners facing excess condemnation

are not at all inconceivable. In fact, the *State of Florida Department of Transportation Right of Way Procedures Manual* in effect at the time these proceedings commenced *requires* that the cost/benefit analysis to be performed by the Department prior to beginning negotiations with a property owner on an economic whole taking include a *deduction* from the estimated value of the whole for "the amount the district is likely to receive from the sale of the remainder property not needed to construct the facility..."[38] So, in other words, without the protection of a neutral jury trial, an owner desirous of retaining the portion of his private property not needed for public construction is exposed to the real possibility of having to accept less than any judicially cognizable standard of just compensation, in essence, paying for property which he or she already owns in order to keep it.

This illustration of the practical impact of the majority's opinion clearly underscores the need to reverse it and the importance of answering the certified question in the affirmative.

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[38] *See* Chapter 7, Section 3 of the *State of Florida Department of Transportation Right of Way Procedures Manual,* entitled "Good Faith Negotiations for Acquiring Property," particularly subsection IV (B)(2), dated December 15, 1995, a copy of which is located in the Appendix hereto at tab 2. The Fourth District Court of Appeal took judicial notice of this portion of the manual, so it is properly before this Court. (Counsel for the Department also has no objection to its inclusion in the appendix hereto.)

CONCLUSION

Because the only way to ensure both due process *and* fulfillment of legislative intent is to obtain a jury determination of predicate compensation issues prior to application of § 337.27(2) to either grant or deny excess condemnation, the answer to the certified question should be in the affirmative, holding that a trial court may "defer the question of the extent of the take until a jury determines the value of both a whole take and a partial take of the property." Accordingly, the decision of the Fourth District Court should be reversed and the ruling of the Circuit Court re-instated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Initial Brief has been furnished by U.S. Mail this 17th day of December, 1998 to: Marianne A. Trussell, Esquire, Deputy General Counsel, State of Florida Department of Transportation, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0458 and Mark S. Ulmer, Esquire, Attorney for Petitioners Barbara's Creative Jewelry, Inc. & Cabrera Accounting Service, 11900 Biscayne Boulevard, Suite #612, Miami, Florida 33181.

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