IN THE SUPREME COURT OF FLORIDA

BARBARA'S CREATIVE JEWELRY, INC.
a Florida corporation, et al.

Petitioners,

vs.

CONSOLIDATED CASE
NOS. 93,551 and 93,554

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Respondent.
_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, TO INITIAL BRIEF OF BARBARA'S AND CABRERA, CASE NO. 93,554

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 97-918

Pamela S. Leslie
General Counsel
MARIANNE A. TRUSSELL
Deputy General Counsel
FLORIDA BAR NO. 437166
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458

Phone: (850) 414-5265

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PRELIMINARY STATEMENT

In these consolidated cases, the Petitioners are the defendant property owner and tenants below which are represented by two different attorneys. Mark Ulmer represents the tenants Barbara's Creative Jewelry, Inc., and Cabrera Accounting Service. Amy Brigham Boulris represents Dorothy Murphy, the property owner and tenant, and tenants, Nails by Michelle, Halcyon Yachts, Jeff Newman, d/b/a Jeff's Dirt Diggers, and Maring Bookkeeping Service, Inc. For the purposes of this Answer Brief, Petitioner, Dorothy Murphy, the owner of the subject real property and one of the tenants will be referred to as the "property owner." The remaining Petitioners, the tenants, will be referred to collectively as the "tenants" "petitioners," or individually by the first word in the tenant's business name. Respondent, State of Florida, Department of Transportation, will be referred to as the "Department."

Citations to the record below, the appendix to the Department's Initial Brief, will be in the form of (A.) followed by the appropriate page number(s). Citations to the Supplemental Record, accepted by this Court in its order granting the motion to supplement the record, will be in the form of (SR.) followed by the appropriate page number(s). Citations to the Appendix to this

Answer Brief will be in the form of (AA.) followed by the appropriate page number(s). Citations to Barbara's Initial Brief to this Court will be in the form of (BIB.) followed by the appropriate page number(s).

CERTIFIED QUESTION PRESENTED

> 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?

STATEMENT OF THE CASE AND FACTS

For the most part, the Department agrees with the statement of the case and facts presented by Petitioners Barbara's and Cabrera. To acquire a better understanding of what occurred at the trial court, the Court should refer to the statement of the case and facts presented in the Department's Initial Brief below.

However, Petitioners' statement of the case and facts, which is to be a fairly neutral presentation of the facts, is fraught with improper argument. This is evidenced by the plethora of citations in the numerous and lengthy footnotes. See, e.g., footnotes 4 and 7. The Department neither agrees with nor adopts such portions. This Court should disregard or strike the improper, argumentative portions of the statement of the case and facts. See, Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829, 830 (Fla. 1st DCA 1989) (appellant directed to file an "amended brief which deletes all legal argument contained in the statement of the case and facts").

SUMMARY OF THE ARGUMENT

In this case, the Department utilized the provisions of Section 337.27(2), Florida Statutes, to acquire an entire parcel in a Chapter 74, Florida Statutes, quick taking eminent domain proceeding, where only a portion of the property was needed for the actual construction of a road widening project. The trial court denied the Department's request for an order of taking for the entire parcel notwithstanding that it had established that the "acquisition costs [of acquiring the entire parcel] to the department will be equal to or less than the cost of acquiring a portion of the property." § 337.27(2), Fla. Stat. On appeal, the majority agreed with the Department, concluding that "[i]n order to obtain the condemnation of property, the condemning authority must show only that there is a reasonable necessity for condemnation of the property. Once this is shown the burden passes to the landowner to either concede the necessity or show bad faith or an abuse of discretion as to the exercise of eminent domain." State, Dep't of Transp. v. Barbara's Creative Jewelry, Inc., 23 Fla. L. Weekly D1523, 1524 (Fla. 4th DCA June 24, 1998).

The majority opinion also recognized that "the only compensation issue submitted to the jury is the value of whatever

property the court determines is part of the taking characterized by the trial court." Id. To submit the cost of the acquisition to the jury, the majority concluded, "would delegate the determination of the public purpose justification for the condemnation to the jury, which is something that we have consistently said is solely a question for the court." Id.

Moreover, business damages are a matter of legislative grace and not a constitutional right and, thus, their elimination by the acquisition of an entire parcel is not forbidden because what the legislature giveth in one statute it can taketh away in another. Contrary to the petitioners' argument, the landowner (which in this case also operates a small business on the property) has, in fact, lost nothing but business damages. In a partial taking, the landowner receives the value of the land taken and severance damages, if any, to the remainder. In a whole taking, the landowner receives the value of the land taken, i.e., the value of the part needed for the project and the value of the remainder. Just as a party's desire not to have its property taken is not sufficient to defeat an order of taking, so too is a party's desire to receive severance damages instead of the value of a remainder insufficient to defeat a order of taking for a statutory whole take. See Wilton v. St. Johns County, 123 So. 527, 98 Fla. 26

(1929).

The dissenting opinion, advocated by the petitioners in this case, would allow all issues to be decided by a jury, including whether the entire parcel could be acquired under Section 337.27(2), Florida Statutes. Under this method, at the conclusion of the jury trial, the trial judge would declare, based upon the jury's numbers, whether the entire parcel, or just a portion, could be acquired. Barbara's, 23 Fla. L. Weekly at D1533-1534. If a whole taking is awarded, no business damages will be awarded, only after the expense of attorneys and experts to prepare for and present a jury trial has been incurred. The result will be taxable costs which could exceed the savings, thus defeating the purpose and intent of the statute and Fortune Federal.

The question certified by the Fourth District should be answered in the negative and the majority opinion should be affirmed.

ARGUMENT

I. THE LOWER TRIBUNAL PROPERLY CONCLUDED THAT ISSUES OF THE COMPARATIVE COST OF ACQUIRING AN ENTIRE PARCEL AS OPPOSED TO A PARTIAL TAKING ARE ISSUES INVOLVING THE NECESSITY OF THE TAKING TO BE DETERMINED BY THE TRIAL COURT RATHER THAN ISSUES OF COMPENSATION TO BE DETERMINED BY A JURY
[Restated by Respondent/Addressing Points A-D]

In this case, the Department sought to acquire an entire parcel upon which sits a small, 35 year old, 2,500 square foot one-story office building containing several small businesses operated by the respondents below and petitioners herein. (A. 319, 403; AA. 4) It is undisputed that the amount of property required by the Department for construction of this project, the widening of Griffin Road in Broward County, would necessitate partial demolition of the existing building leaving only about 860 square feet of the building. (A. 174; AA. 4[1])

According to the Department's appraisals, it would not be economically feasible to raze a portion of the building and rebuild the portion left as a smaller building. (A. 174-178) The cost to rebuild the building, i.e., cost to cure, would be $70,000. (A. 178) If the building were demolished, the remainder property would

[1]The orange line depicts the partial taking line and parcel 136 is the property subject to this proceeding.

be worth $35,000 (A.178) The resulting determination was that a partial take would cost $195,000 and a whole take would cost $217,000. (A. 179) Since business damages would result from a partial taking, if the cost of the partial taking plus business damages exceeded $217,000, the Department could take the entire property under Section 337.27(2), Florida Statutes. An accountant was retained to estimate the potential business damages resulting from a partial taking based upon industry standards because, at that point, no petition had been filed and no business records were available to the Department. (A. 176-178) A subsequent analysis using the parties' actual business records confirmed the industry standard figures. (A. 177) Having determined that the cost of the partial taking plus business damages would exceed the cost of acquiring the entire parcel, the Department filed an eminent domain petition for the entire parcel as a quick take under Chapter 74, Florida Statutes[2]. (A. 1-14, 175, 392-394)

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[2]Under Section 74.021, Florida Statutes, the Department has the right to initiate quick taking proceedings to secure the title to property necessary for the construction of public projects. This is accomplished by the filing of a declaration of taking together with a good faith estimate of value, based on a valid appraisal, of the property sought to be taken. After service on the defendants, if a hearing is requested, the court may determine, among other matters, whether the Department is properly exercising its delegated authority and determine whether the amount to be deposited is a good faith estimate of value of the property to be taken. See §§ 74.031 and 74.051, Fla. Stat.

At the order of taking hearing and at each of the hearings to follow, the trial judge struggled with the issue of whether the Department could proceed to acquire the entire parcel as a quick take proceeding. He eventually held a non-evidentiary hearing and two evidentiary hearings on the issue. The trial judge ultimately declined to acknowledge that the issues of the comparative cost of acquiring the whole parcel as opposed to the partial taking are issues involving the necessity of the taking and not issues of compensation. He did recognize, however, the dilemma presented by trying to resolve the issue as a compensation issue:

> I wanted to hear today, have somebody come in and tell me the State is wrong and this is what the -- their experts are wrong and these experts are right and they're going to tell you the truth now, Judge. . . I don't think I'm going to get that . . . You [tenants] may be arguing for the lowest possible figure today, but tomorrow you're going to do away with your total cross examination of these [Department] witnesses and you're going to be, not only adding to it -- I mean, accepted it, you're going to be adding to it. Go the opposite direction. I don't think that's right, folks. I just don't think that's what we're looking for. We're looking for some honest to goodness beliefs that, hey, the State is wrong with their estimates. It's not A, it should be B. (A. 511-512)

This is only one of the reasons why the Fourth District properly determined that the issue cannot be one of compensation.

In order to acquire property through eminent domain, the

condemning authority must show only that there is a reasonable necessity for the acquisition and its good faith estimate of value. Central & S. Florida Flood Control Dist. v. Wye River Farms, 297 So. 2d 323 (Fla. 4th DCA 1974). Once the condemning authority has offered "some evidence showing the reasonable necessity for the taking . . . [its] discretion should not be disturbed absent a showing of bad faith or abuse of discretion." Broward County v. Steele, 537 So. 2d 650, 651 (Fla. 4th DCA 1989). "[U]nless a condemning authority acts illegally, in bad faith, or abuses its discretion, its selection of land for condemnation will not be overruled by a court; a court may not substitute its judgment for that of a governmental body acting within the scope of its lawful authority." Canal Auth. v. Miller, 243 So. 2d 131, 133 (Fla. 1970) (citations omitted).

"[I]n order to insure the property rights of the citizens of the state against abuse of a condemning authority's power it is imperative that the *necessity* for the exercise of the eminent domain power be ascertained and established. This is ultimately a judicial question to be decided in a court of competent jurisdiction." Id. at 133 (citations omitted, emphasis in original). As this Court has stated in Miller and elsewhere:

> the word "necessity" should be construed to mean a reasonable and not an absolute

> necessity. Once such a reasonable necessity is shown, the exercise of the condemning authority's discretion should not be disturbed in the absence of bad faith or gross abuse of discretion. The question of "necessity" thus boils down to two separate and distinct phases. Initially the condemning authority is obligated by statute to show a reasonable necessity for the condemnation. Once this is shown the landowner must then either concede necessity or be prepared to show bad faith as an affirmative defense . . . .

Id. at 134. See also, Lakeland v. Bunch, 293 So. 2d 66, 69-70 (Fla. 1974); Canal Auth. v. Litzel, 243 So. 2d 135 (Fla. 1970). Barbara's suggests that the majority is wrong because it bases its decision on an improper term "reasonable necessity." (BIB. 23) "Reasonable necessity" is the term used by this Court in Miller in describing the condemning authority's burden of presenting "some evidence showing reasonable necessity for taking." Miller, 537 So. 2d at 134. See also, Steele, 537 So. 2d at 651-652. The majority opinion has neither confused nor improperly “distilled” terms as Barbara's suggests. (BIB. 23) The necessity for the exercise of the power of eminent domain must be ascertained and established. This is ultimately a judicial question to be decided by the court. Miller, 243 So. 2d at 133. This is not a procedural question subject to an abuse of discretion standard of review suggested by

Barbara's.[3] (BIB. 29-30) Contrary to Barbara's citation to Miller, this Court does not discuss the distinction, if any, between "public purpose" and "public necessity" and uses neither of those terms in its opinion. (BIB. 23)

Counsel for Barbara's also suggests error by the majority due to its use of the words "show" and "proved." (BIB. 15, n. 12)

> DOT presented evidence showing that the cost of a partial taking, with the necessity of rebuilding the premises and the business damages, would be almost $178,000 more than the cost of taking the whole parcel.

Barbara's, 23 Fla. L. Weekly at D1532. While Black's Law Dictionary defines show as "[t]o make apparent or clear by evidence, to prove," it was not incumbent upon the Department to "prove, that a partial taking 'would be' $178,000 more than a total taking." (BIB. 16, n.12) Black's Law Dictionary 1379 (6th ed. 1990).

This Court has recognized that there may be two or more reasonable alternatives as to the amount and location of land to be condemned. Miller, 243 So. 2d at 133; Litzel, 243 So. 2d at 138. However, when the condemning authority makes its selection in such cases, unless it has "act[ed] illegally, in bad faith, or abuse[d] its discretion, its selection of land for condemnation will not be

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[3]See also pages 26-27, infra.

overruled by a court; a court is not authorized to substitute its judgment for that of a governmental body acting within the scope of its lawful authority." Miller, 243 So. 2d at 133 (citation omitted). The Department does not have to prove or show how much more the partial taking will be. The statute says the whole can be taken even when the cost is equal to the cost of acquiring the partial. The Department had only to show that the statutory threshold had been met, and it did just that.

In fact, the statutory threshold was established not only by the Department's expert, but also by the tenants' expert. (A. 581-582, 568-300) Experts rarely waiver in their opinions, let alone testify as to ranges of potential damages. Nevertheless, in an attempt to avoid proving up the Department's case, the tenants' expert provided a range of potential business damages to be suffered by each tenant. (A. 581-582, 268-300) The low number was an attempt to avoid the whole take; the high number would be for the jury after a whole take is denied. However, even the "low" business damage figures presented by the tenants' expert established that when added to the cost of the partial taking, the statutory criteria for a whole take had been met (A. 581-582, 268-

300)[4]

The majority opinion provides the proper analysis and result. In Miller the parties disputed the quality of title needed for the project. Although the Canal Authority stipulated that only an easement was necessary, the Army Corps of Engineers later requested fee simple be obtained. Miller, 243 So. 2d at 134. The trial court dismissed the canal authority's motion for a supplemental order to obtain fee simple with leave to present testimony showing necessity. Id. at 135. Rather than present additional testimony, the canal authority filed its notice of appeal, the First District affirmed, and this Court granted certiorari based upon a perceived possible conflict. Id. After further review, this Court determined the record revealed an absence of any real conflict and the writ was discharged. Id.

In Litzel, the companion case to Miller, this Court addressed the same "necessity" issue, but with a different outcome. Litzel, 243 So. 2d 135. On similar facts, the canal authority in Litzel introduced testimony from the Corps of Engineers explaining its reasons for requesting that fee simple be obtained and the trial

[4]Industry standards established business damages of $172,500, the Department's expert testified to $211,000 based upon the tenants' records, and the tenants' expert at deposition said the low end of business damages resulting from a partial taking would be $159,780. (A. 453-455, 581-582, 268-300)

court granted the taking of fee simple title. Id. at 136-137. Nevertheless, the First District quashed the trial court's order and this Court reviewed the issue on certiorari. In addressing the issue, this Court stated: "When a condemning authority is faced with choosing one of many alternatives it exercises a sound *discretion* in making the choice. The very fact that there is a *choice* shows that no alternative can be absolutely necessary." Id. at 137 (emphasis in original).

In reversing the district court and upholding the trial court's order of taking fee simple, this Court did not weigh the two alternatives, i.e., whether an easement or fee simple title was appropriate or who presented the better case or the better evidence. Rather, this Court reviewed the record to determine whether Litzel had established that the canal authority acted in bad faith or abused its discretion. Id. at 138. This is so because once evidence establishing some reasonable necessity for the taking is presented, it is irrelevant to the issue of whether an order of taking should be entered that a property owner also presents "evidence that the interest [the property owner] preferred [to be taken] was reasonable." Alachua County v. Wagner, 581 So. 2d 948, 950 (Fla. 1st DCA 1991). That is precisely the case here, as the tenants would prefer only a portion of the property be taken in

order to claim business damages. The Department believed a substantial savings could be realized and provided evidence of the fact that Section 337.27(2), Florida Statutes, and Fortune Federal support its position that a whole take could and should be allowed. Department of Transp. v. Fortune Federal Savings & Loan Ass'n, 532 So. 2d 1267 (Fla. 1988).

As recognized by the majority below in this case, a jury determines only matters of compensation:

> [I]t is clear that the judge must determine issues involving what property is to be taken in a condemnation before the matter reaches the jury. These matters are issues of necessity and public purpose which are determined by the judge. While appellees claim that the cost of acquisition is a compensation issue, we disagree in the context of section 337.27 and conclude that it is an issue of necessity and public purpose.

State, Dep't of Transp v. Barbara's Creative Jewelry, Inc., 23 Fla. L. Weekly D1532, 1533 (Fla. 4th DCA June 24, 1998). The court continued: "[t]o do that [present the cost issue to the jury] would delegate the determination of the public purpose justification for the condemnation to the jury, which is something that we have consistently said is solely a question for the court." Id.

Recognizing that its resolution of this issue "may affect" condemnation proceedings across the entire state, the Fourth District deemed it a "question of great public importance, and one

whose answer is necessitated as a necessary corollary of *Fortune Federal*" and certified the question. Id. at 1533. In its Initial Brief, Barbara's incorrectly states that the majority has said that its ruling will "alter condemnation proceedings statewide." (BIB. 12) That is an inaccurate representation of the majority's opinion. The majority concludes with the support of a plethora of authority that Florida law supports the procedure it advocates but recognizes that the result "**may affect** condemnation proceedings across the entire state." Id. (emphasis added).

The only way condemnation proceedings could be altered by the majority opinion is that the Department will actually be able to acquire Section 337.27(2), Florida Statutes, whole takes in the context of a Chapter 74, Florida Statutes, quick take. Counsel for Barbara's claims that trial courts and practitioners alike have had little difficulty utilizing Section 337.27(2), Florida Statutes, and points to the paucity of reported opinions as evidence of that fact. (BIB. 12) In reality, the Department is often reluctant to utilize Section 337.27(2), Florida Statutes, in cases where the Department cannot wait for the conclusion of a slow take process because it must certify the project, issue bonds, or let the project; or because federal funds will be jeopardized by the delay. The majority of, if not all, eminent domain proceedings filed by

the Department utilize the quick take provisions of Chapter 74, Florida Statutes. Previously, when a trial judge denied a Section 337.27(2), Florida Statutes, whole take, the Department would simply accept an order of taking for the partial and pay the ransom, i.e., substantial business damages. That is why there are relatively few reported cases involving Section 337.27(2), Florida Statutes, not because, as counsel for Barbara's suggests, everyone understands and accepts his theory of how the process should work. (BIB. 12, n.9)

An opportunity was presented in this case to apply a Section 337.27(2), Florida Statutes, whole take to a quick take proceeding. Since the Department determined it had enough time in this case to attempt a Section 337.27(2), Florida Statutes, whole take as a quick take, and conclude the appeal which would inevitably follow, the Department filed a petition and proceeded to acquire the entire parcel under Chapter 74. Barbara's seems to criticize the Department for filing under Chapter 73 and then converting to a Chapter 74 proceeding. This acquisition began as a slow take because the Department has no authority, procedural or otherwise, to obtain business records from tenants. In fact, obtaining such records is typically a long, hard fought, arduous battle because counsel and their clients, business owners and tenants, ignore

discovery requests and thereby create yet another delay tactic to ward off attempts at Section 337.27(2), Florida Statutes, whole takes, knowing the Department is production driven and can ill-afford delay.

Although the Department anticipated delays in receiving business records, it never anticipated the trial court's extended deliberations and struggle for the "truth." (A. 512) The trial court's order was appealed, expedited disposition was granted, and briefs were filed in the Fourth District. However, time was running out and the project and the Department's funding came into serious jeopardy. As a result, the Department filed an emergency motion requesting the Fourth District relinquish jurisdiction to the trial court for the entry of an order of taking for the portion of the property required for the construction without prejudice to the pending appeal or the Department's position. (AA. 3, n.1; SR. 1) The petitioners responded to the Department's motion; the Fourth District granted the motion and relinquished jurisdiction to the trial court, which entered an order for the partial taking upon which the requisite deposit was made. (SR. 2-10) Barbara's suggests that in this case the relief granted by the majority's opinion, i.e., a whole take, is a nullity because of footnote 1:

> While this case was pending in our court, the DOT moved to relinquish jurisdiction to pursue

> a partial taking rather than lose funding associated with the project. We granted the relinquishment. Although appellees suggest the issue is now moot, we issue this opinion because the issue is capable of repetition, yet evading review. (AA. 3)(BIB. 11, 32)

The Fourth District did not conclude that the issue is moot, it merely repeated the tenants' position. In addition, the majority at footnote 3 also noted that the trial court under such circumstances should have granted a partial taking. (AA. 3, n. 1) Although the trial court offered to grant the Department a partial taking, the Department declined in order to best preserve and present the issue to higher authority. The majority never intended that the relief provided by its opinion, an order of taking for the entire parcel, could not be achieved in this case. If that is what the majority had intended, it would have said so. It did not. Recognizing the dilemma in which business tenants have placed the Department and the error in the trial court's analysis, the Fourth District issued its opinion, which is the correct analysis, and granted the relief authorized and warranted by these facts to the Department.

Barbara's also suggests that the opinion below is wrong because the majority failed to construe Section 337.27, Florida Statutes, against the Department, citing Nye v. City of Ocala, 559 So. 2d 360 (Fla. 5th DCA 1990), quashed and remanded, 608 So. 2d 15

(Fla. 1992). (BIB. 20) In Nye, the City of Ocala sought to condemn an entire parcel when only part of it was needed for a road widening project. Id. The Fifth District reversed the trial court, finding that, unlike the Department and counties, municipalities had not been granted the authority to take more property than actually needed for the public purpose. Id. at 361. In doing so, the court noted that "powers of eminent domain are to be strictly construed . . . ." Id. That long recognized principle fails to establish error in this case.

Contrary to Barbara's position otherwise, by utilizing Section 337.27(2), Florida Statutes, the tenants are, in fact, losing only business damages. Business damages are a matter of legislative grace and not a matter of right and, thus, their elimination is not of constitutional proportion. § 73.07(3)(b), Fla. Stat. (1997); Fortune Federal, 532 So. 2d 1267; Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv. Inc., 444 So. 2d 926 (Fla. 1983). In K.E. Morris Alignment, this Court held that "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." K.E. Morris Alignment, 444 So. 2d at 928-929.

Barbara's disagrees and argues that there is something

inherently wrong with the majority opinion and, consequently, with Fortune Federal because the remainder property enjoys constitutional protection and can be taken without the requisite public purpose. (BIB. 13, n.10)[5] However, the statute specifically provides for the taking of the remainder and this Court has said that the public purpose is saving acquisition costs. Fortune Federal, 532 So. 2d 1267. Before the statute and Fortune Federal, the property owner would be entitled to recover any severance damage to the remainder occasioned by the taking. After the statute and Fortune Federal, the property owner is entitled recover the fair market value of the remainder and any improvements thereon. In both instances, the property owner is compensated for what is taken or damaged.

Although Barbara's is merely a tenant, the argument is made on behalf of the property owner, Murphy, that she should be allowed to choose whether to accept taking compensation or damage compensation. Under the statute and Fortune Federal there is no such right to choose and there has been no unconstitutional taking without compensation or without the requisite public purpose.

[5]Barbara's correctly notes that tenants are considered owners in eminent domain proceedings. (BIB. 14, n.11) However, Barbara's and Cabrera are not owners and do not have standing to challenge the Department's actions as they relate to compensation for the remainder.

Wilton v. St. Johns County, 123 So. 527, 98 Fla. 26 (1929). Just as a party's desire not to have its property taken is not sufficient to defeat an order of taking, so too is a party's desire to receive severance damages (or business damages) instead of the value of a remainder insufficient to defeat a whole taking under Section 337.27(2), Florida Statutes.

The statute provides the public purpose and Florida taxpayers provide the compensation. Although tenants are considered owners in eminent domain proceedings, they are not owners entitled to severance damages or compensation for an acquired remainder, because they have no interest in the underlying real property. Because neither Barbara's nor Cabrera has an ownership interest in the real property (other than a leasehold interest), they lack standing to challenge any alleged potential loss of severance damages as a result of Section 337.27(2), Florida Statutes, or the majority opinion.

II. PRESENTING THE ISSUE TO A JURY TO DETERMINE WHETHER THE ACQUISITION COSTS OF A WHOLE TAKE WILL BE EQUAL TO OR LESS THAN THE COST OF ACQUIRING A PORTION OF THE PROPERTY DEFEATS THE PURPOSE AND INTENT OF SECTION 337.27(2) AND CHAPTERS 73 AND 74, FLORIDA STATUTES.
[Restated by Respondent/Addressing Points E-H]

Judge Polen in his dissent, and Barbara's and Cabrera in their initial brief, would leave it to the discretion of the trial judge to decide whether and how to present to the jury the issue of whether the Department can rely upon Section 337.27(2), Florida Statutes. (BIB. 19-33) In their opinion, only when the parties agree that the acquisition costs of the whole are equal to or less than the cost of the partial, can the statute operate as intended - to reduce the costs of acquisition and thereby save taxpayer monies. This cannot be what was envisioned by the legislature when it enacted Section 337.27(2), Florida Statutes, or by this Court when it decided Department of Transp. v. Fortune Federal Savings & Loan Ass'n, 532 So. 2d 1267 (Fla. 1988).

At first blush, the dissent's proposal sounds logical and almost workable. However, the entire purpose of the statute, Fortune Federal, and this case, is to save taxpayer dollars by eliminating business damages that would be occasioned by a partial taking. To leave the issue to be decided by the jury and not the

trial judge will result in taxable costs which could exceed the savings, thus defeating the purpose and intent of the statute and Fortune Federal.

Section 73.091, Florida Statutes, provides that a condemning authority must pay all reasonable costs of the proceeding, including but not limited to, attorney's fees and appraisal fees, and when business damages are compensable, a reasonable accountant's fee. Costs reasonably and necessarily expended in connection with condemnation actions include investigation, research, preparation, and presentation of the case at the trial level. Volusia County v. Pickens, 435 So. 2d 247, 248 (Fla. 5th DCA 1983), rev. denied, 443 So. 2d 980 (Fla. 1983). While Florida courts have held that unnecessary duplication of costs will not be countenanced, it is not unheard of in eminent domain proceedings for attorneys and experts to recover more than their clients. See, e.g., Dade County v. Brigham, 47 So. 2d 602-605 (Fla. 1950); Carter v. City of St. Cloud, 598 So. 2d 179, 1891 (Fla. 5th DCA 1992); Department of Transp. v. Winter Park Golf Club, Inc., 687 So. 2d 970 (Fla. 5th DCA 1997)(property owner recovers $1,500, attorneys recover $61,145, and expert recovers $27,862.50).

The alternative to this result would be to disallow recovery of those costs from the Department. Under this alternative

business owners/tenants would incur attorney and expert expenses associated with a jury trial only to discover at its conclusion that those expenses will not be paid by the condemning authority.

Under Section 73.091, Florida Statutes, so long as business damages are "compensable," the condemning authority is responsible for the tenant/business owner's cost of proving them up. This Court recognized in Brigham that while just compensation includes "the expenses of establishing the fair value of the property . . . in some cases [expenses] could conceivably exceed such value." Brigham, 47 So. 2d at 604-605. Because business damages are of statutory and not constitutional genesis, their elimination does not rise to a taking without just compensation. Fortune Federal, 532 So. 2d 1267. As this Court held: "There is no constitutional right to business damages. As the district court noted, business damages are a matter of legislative grace. The legislature may award them in one statute and take them away in another. Fortune has no vested right to those damages." Id. at 1270. In fact, Florida remains among a small minority of states allowing compensation for damages to a business occasioned by a taking. State Road Dep't v. Abel Inv. Co., 165 So. 2d 832 (Fla. 2d DCA 1964); 7A Patrick J. Rohan and Melvin A. Reskin, Nichols on Eminent Domain § 9A.04[4][c][I] (3d ed. 1995).

Thus, it follows that the elimination of expenses incurred to establish business damages would, likewise, not violate the constitution. However, under the procedure envisioned by the dissent and the petitioners, tenants would be required by the court to incur the expenses, only to be told at the conclusion of the trial that neither their business damages nor their expenses were recoverable, notwithstanding the language of Section 73.091, Florida Statutes.

Counsel for Barbara's half-heartedly suggests, by the mere citation to two cases, that Section 74.061, Florida Statutes, vests a tenant's right to business damages at the time a condemnor makes its good faith deposit. Therefore, it is argued, the Department cannot effectuate a whole take because the trial court has now entered an order of taking for the partial. The express language and intent of Sections 73.071(3)(b) (the business damage statute), 74.061, and 337.27(2), Florida Statutes, and the dictates of, inter alia, K. E. Morris Alignment and Fortune Federal, refute the position that a tenant or business owner's right to business damages vests when the good faith deposit is made. K. E. Morris Alignment, 444 So. 2d at 928-929 (Fla. 1983); Fortune Federal, 532 So. 2d 1267. A careful reading of Section 74.061, Florida Statutes, reveals that upon deposit of the good faith estimate of value, only

two rights vest: 1) "the title or interest specified in the petition shall vest in the petitioner" and 2) "the right to compensation for the same shall vest in the persons entitled thereto." § 74.061, Fla. Stat. (emphasis added). The right to compensation "for the same" is a direct reference to only the land condemned.

No good faith deposit is required for any alleged business damage claim and, therefore, no right thereto can vest upon deposit of the good faith estimate of the value of the land, or at any other time. The statute is devoid of any reference to any right to business damages or that any such non-existent right vests upon making of the good faith deposit, and no such inference can be drawn from the words chosen. Florida courts are bound to give effect to the clear words the legislature has chosen in a statute. Holmes v. Blazer Financial Servs., Inc., 369 So. 2d 987 (Fla. 4th DCA 1979). See, also, Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973) (there can be no more reliable an indication of legislative intent than the specific statutory words selected).

If the legislature had intended to create a vested right to business damages upon making of the good faith deposit, it could have said so as long ago as 1965 when the provisions of both

Sections 73.071(3)(b) (the business damage statute) and 74.061 ("vesting of title or interest sought"), Florida Statutes, were amended. Ch. 65-369 at 1275, 1281-1282, Laws of Florida. Thereafter, the legislature had numerous additional opportunities to do so and continued to choose not to create a vested right to compensation for business damages as it had to the compensation for the lands taken. See, e.g., Ch. 67-277, s. 1, at 800, Laws of Florida; Ch. 70-284, at 888, 889, Laws of Florida. The legislature's failure to even mention business damages in the statute, or include such language on the numerous occasions the statute was amended, further supports the Department's position that the legislature did not grant or intend to grant to tenants or business owners a vested right to business damages and the statute cannot be fairly read to create such a right. Holmes, 369 So. 2d at 987.

O'Sullivan v. City of Deerfield Beach, 232 So. 2d 33 (Fla. 4th DCA 1970), upon which Barbara's relies, does not address or resolve this issue. (BIB. 29) In O'Sullivan, the issue was whether a condemnor can voluntarily dismiss its petition after deposit of the good faith estimate. Id. This case bears no factual or legal relationship to the case at bar or its outcome. Likewise, Nationsbank is not on point. State, Dep't of Transp. v.

Nationsbank of Florida, N.A., 4 Fla. L. Weekly Supp. 262 (Fla. 13th Cir. Ct. Sept. 6, 1996). In Nationsbank, the Department's supplemental petition in eminent domain attempting to add a second count to acquire the remainder after depositing the good faith estimate was dismissed. That is not the case here, and the trial court's refusal to allow amendment of an eminent domain petition is not authority for the petitioners' position in this case.

In Fortune Federal, this Court distinguished the right to business damages from the requirement of full compensation, concluding:

> There is no constitutional right to business damages. As the District court noted, business damages are a matter of legislative grace. The legislature may award them in one statute and take them away in another. **Fortune has no vested right to those damages.**

Fortune Federal, 532 So. 2d at 1270 (emphasis added). It is evident from Fortune Federal that the only reasonable construction is that the right of compensation which vests in a property owner under Section 74.061, Florida Statutes, is the constitutional right to full compensation for the land taken. That right does not include business damages.

Other courts have reached similar conclusions. In State Road Dep't v. Abel Inv. Co., 165 So. 2d 832 (Fla. 2d DCA 1964), the trial court ordered the Department to amend its petition to reflect

business damages. On certiorari, quashing the trial court's order, the Second District held:

> [the rights] prescribed by Chapter 74, Florida Statutes, F.S.A., relate to the direct interest and rights of the condemnee in or as related to the land, and not the consequential effect on condemnees' business located on the land.

Id. at 833.

The First District Court of Appeal addressed Section 74.061, Florida Statutes, in a slightly different context, with an analogous result. Division of Admin., State Dep't of Transp. v. Pink Pussy Cat, Inc., 314 So. 2d 192 (Fla. 1st DCA 1975). There, the issue was whether the trial court improperly awarded interest on the amount awarded by the jury for business damages. Id. In reversing the trial court's order awarding interest, the court noted that business damages "not being a part of the good faith estimate required by law, are not a part of that sum referred to in Florida Statutes § 74.061 . . . ." Id. at 193. Business damages "are not a part of the sum referred to" in Section 74.061, Florida Statutes, for the purpose of calculating interest, or for the purpose of establishing entitlement thereto by the mere filing of an eminent domain petition or upon deposit of the good faith estimate of value by a condemning authority.

Therefore, unlike compensation for the property acquired, a

condemnee is not entitled to a good faith deposit of money for potential business damages, statutory interest on a business damage award, or a vested right to a business damage claim. Behm v. Div. of Admin. Dep't of Transp., 383 So. 2d 216 (Fla. 1980); Abel, 165 So. 2d 832; Pink Pussy Cat, 314 So. 2d 192. If there is a "right" to business damages and such "right" vests upon making of the good faith deposit, the foregoing opinions and the various courts' disparate treatment of constitutionally guaranteed compensation versus compensation for consequential damages would be unnecessary and meaningless.

Barbara's also suggests that the procedure for acquiring a Section 337.27(2), Florida Statutes, whole take lies in Chapter 74, Florida Statutes, and, therefore, the Fourth District should have reviewed the trial court's decision under an abuse of discretion standard. (BIB. 29-31) Barbara's equates a decision that the statutory requirements for a Section 337.27(2), Florida Statutes, whole take have been met with procedural aspects of a trial such as denying continuances, changing venue, and denying an amendment to a petition. (BIB. 29) The issue of meeting the requirements for a statutory whole take is not procedural. Moreover, under the "procedure" envisioned by the dissent and advocated by Barbara's, a jury would decide issues consistently held to be solely questions

for the court. Barbara's, 23 Fla. L. Weekly at D1533.

Petitioners also present a so-called hypothetical situation while claiming "most of which is established in the record of the case now before this Court" to prove their point. (BIB. 26-27) In their hypothetical, a CPA "assumes. . . that a partial taking will destroy all of the businesses located on the property." (BIB. 26) This is not an assumption a CPA would either have to make or did make in this case because there is no requirement that the Department show that any or all of the businesses will be destroyed in order to effectuate a Section 337.27(2), Florida Statutes, whole take. Then, the hypothetical suggests the CPA "makes an educated guess based on industry norms." (BIB. 26) This type of preliminary assessment of the Department's ability to meet the requirements of Section 337.27(2), Florida Statutes, is necessary because the Department is afforded no mechanism or authority to determine the nature and extent of potential business damages prior to the filing of an eminent domain petition. (A. 306-307) In fact, business owners and operators routinely ignore and outright hinder discovery requests for business records. Knowing that the Department is production driven, delay in producing information which would enable the Department to determine if it met the statutory requirements for a whole take often results in the

Department "giving up" its effort to do a Section 337.27(2), Florida Statutes, whole take in order to meet a production schedule, obtain funding, or let the contract for the project.

Unless the Department can rely on industry standards or such standards supported by discovery or supplement its petition to convert the taking from a partial to a whole take after an order of taking for a partial has been entered, Section 337.27(2), Florida Statutes, is inoperable. Until some other procedure for providing business records is established, the Department must rely on industry standards which, in this case were affirmed by a CPA once the tenants eventually provided business records.

CONCLUSION

Based upon the foregoing arguments and the authorities cited, the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, respectfully requests that the majority opinion of the Fourth District Court of Appeal be affirmed and the certified question answered in the negative.

Respectfully submitted,

MARIANNE A. TRUSSELL
Deputy General Counsel
FLORIDA BAR NO. 437166
Department of Transportation
605 Suwannee Street, MS - 58
Tallahassee, Florida 32399-0458
Telephone: (850) 414-5265

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 19th day of January, 1999, to **MARK S. ULMER, ESQUIRE**, Attorneys for Barbara's Creative Jewelry, Inc., and Cabrera Accounting Service, 11900 Biscayne Blvd. Suite 612, Miami, Florida 33181 and **AMY BRIGHAM BOULRIS, ESQUIRE**, Brigham, Moore, Gaylord, Schuster & Merlin, Attorneys for Dorothy Murphy, et al., 203 S.W. 13th Street, Miami, Florida 33130.

MARIANNE A. TRUSSELL

IN THE SUPREME COURT OF FLORIDA

BARBARA'S CREATIVE JEWELRY, INC.
a Florida corporation, et al.

Petitioners,

vs. CONSOLIDATED CASE
NOS. 93,551 and 93,554

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Respondent.
_____/

APPENDIX TO ANSWER BRIEF ON THE MERITS OF RESPONDENT,
STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION TO
INITIAL BRIEF OF BARBARA'S AND CABRERA, CASE NO. 93,554

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 97-918

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