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 OF RESPONDENT, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, TO INITIAL BRIEF OF MURPHY, ET ALS, CASE NO. 93,551

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

CERTIFICATE OF TYPE AND SIZE. 2

CERTIFIED QUESTION PRESENTED 3

STATEMENT OF THE CASE AND FACTS 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT

I. NEITHER A NEGATIVE ANSWER TO THE CERTIFIED QUESTION NOR THE MAJORITY OPINION DEPRIVES PROPERTY OWNERS OF THEIR RIGHT TO A JURY TRIAL ON THE ISSUE OF COMPENSATION FOR PROPERTY TAKEN IN EMINENT DOMAIN [Responding to Points I-II] 8

II. A PROPERTY OWNER'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY THE PROCEDURE APPROVED BY THE MAJORITY OPINION AND ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE 15

III. ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE WILL RESULT IN THE DECIMATION OF THE PURPOSE AND INTENT OF SECTION 337.27(2), FLORIDA STATUTES, TO SAVE ACQUISITION COSTS IN ORDER TO PROVIDE THE EVER EXPANDING PUBLIC NEED FOR INCREASED FOR AND IMPROVED TRANSPORTATION FACILITIES 23

IV. THE DEPARTMENT'S RIGHT OF WAY PROCEDURE MANUAL DOES NOT ALTER THE PAYMENT OF FULL COMPENSATION TO PROPERTY OWNERS AND NO UNDUE PREJUDICE TO PROPERTY OWNERS WILL RESULT FROM THE UTILIZATION OF SECTION 337.27(2), FLORIDA STATUTES, IN THE MANNER AFFIRMED BY THE MAJORITY OPINION AND IN ANSWERING THE

CERTIFIED QUESTION IN THE NEGATIVE 25

CONCLUSION 26

CERTIFICATE OF SERVICE 27

APPENDIX 28

TABLE OF AUTHORITIES

CASES PAGE

Behm v. Dep't of Transp.,
336 So. 2d 579 (Fla. 1976) 9

Canal Auth. of Florida v. Miller,
243 So. 2d 131 (Fla. 1970) 10

City of Lakeland v. Bunch,
293 So. 2d 66 (Fla. 1974) 18, 19

Department of Transp. v. Burger King Corp.,
5 Fla L. Weekly Supp. 158
(Fla. 13th Cir. Ct., Dec. 22, 1994) 12

Department of Transp. v. Decker,
408 So. 2d 1056 (Fla. 2d DCA 1982) 9, 10

Department of Transp. v. Fortune Federal
Savings & Loan Assoc.,
532 So. 2d 1267 (Fla. 1988) 7, 15, 16, 20, 24

Department of Transp. v. Merit Petroleum Co.,
3 Fla. L. Weekly Supp. 552
(Fla. 20th Cir. Ct. Nov. 28, 1995) 12

Department of Transp. v. Robbins & Robbins, Inc.,
5 Fla. L. Weekly Supp. 223
(Fla. 7th Cir. Ct. Dec. 14, 1997) 12

Department of Transp. v. Robbins & Robbins, Inc.,
700 So. 2d 782 (Fla. 5th DCA 1997) 12

Gregory v. Indian River County,
610 So. 2d 547 (Fla. 1st DCA 1992) 9

Jacksonville Expressway Auth. v.
Henry G. DuPree Co.,
108 So. 2d 289 (Fla. 1958) 15

Martin v. Dep't of Transp.,
716 So.2d 769 (Fla. 1998) 12

Pasco County v. Franzel,
569 So.2d 877 (Fla. 2d DCA 1990) 10

School Bd. of Broward County v. Viele,
459 So.2d 354 (Fla. 4th DCA 1984) 10

Spafford v. Brevard County,
92 Fla. 617, 110 So. 451 (1926) 9

State, Dep't of Transp. v. Barbara's
Creative Jewelry, Inc.,
23 Fla. L. Weekly D1523, 1524
(Fla. 4th DCA June 24, 1998) 5, 7, 23

Williams v. Winn-Dixie Stores, Inc.,
548 So. 2d 829 (Fla. 1st DCA 1989) 4

Wilton v. St. Johns County,
123 So. 527, 98 Fla. 26 (1929) 6, 9

FLORIDA STATUTES

Chapter 73, Florida Statutes 13, 14

Chapter 74, Florida Statutes 5, 11-14, 23

§ 337.27(2), Fla. Stat. . 3, 5, 7, 8, 11-15, 19, 21-23, 25, 26

§ 337.271(1), Fla. Stat. 25

§ 337.271(5), Fla. Stat. (1998) 13

§ 73.071(3)(b), Fla. Stat. (1998) 8, 9, 13

§ 73.091(1), Fla. Stat. 19-21

§ 73.092, Fla. Stat. 21

§ 74.031, Fla. Stat. 3

OTHER AUTHORITIES

Article X, Section 6(a), Florida Constitution 8, 9

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 "Murphy" or the "property owner." Murphy and those tenants represented by Ms. Boulris will, also, be collectively referred to as the "Murphy petitioners." The tenants will be referred to collectively as the "tenants," or, when specifically necessitated by the context of the sentence, 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 the Appendix to the Initial Brief of Murphy will be in the form of (AAA.) followed by the appropriate page number(s). Citations to Murphy's Initial Brief to this Court will be in the form of (MIB.) followed by the appropriate page number(s). Citations to the Initial Brief of Petitioners Barbara's and Cabrera to this Court will be in the form of (BIB.) followed by the appropriate page number(s).

CERTIFICATE OF TYPE AND SIZE

Undersigned counsel hereby certifies that this brief is typed in Courier 12 point.

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

The statement of the case and facts presented by the Murphy petitioners is admittedly identical to the statement of the case and facts presented in the initial brief of petitioners Barbara's and Cabrera. In response, the Department reiterates that, for the most part, it agrees with the statement of the case and facts. However, to achieve 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.

As indicated in the Department's answer brief, the statement of the case and facts in the initial brief of Barbara's and Cabrera, now repeated by Murphy, although required 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. As such, 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

This case presents the interaction between Section 337.27(2), Florida Statutes, authorizing the Department to acquire an entire lot, tract, or parcel in eminent domain where only a portion of the property is needed for the actual construction of a road widening project, and Chapter 74, Florida Statutes, authorizing the "quick taking" of property in eminent domain. The issue to be decided is whether the determination of how much property is to be acquired, i.e., a portion of the parcel or the entire parcel, is an issue of public purpose and necessity for the trial court to decide, as concluded by the majority opinion below, or is an issue of compensation to be decided by a jury.

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, would allow all issues to be decided by a jury, thus abdicating to the jury the issue of whether the entire parcel can 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 various awards, e.g., value of the patrol, value of the whole, severance damages, business damages, numbers, whether the entire parcel, or just a portion, could be acquired. Barbara's, 23 Fla. L. Weekly at D1533-1534. If the criteria for a whole taking are established, no business damages will be awarded, but the substantial expense of attorneys and experts to prepare for and present a jury trial will have been incurred. Whole take or partial, 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. NEITHER A NEGATIVE ANSWER TO THE CERTIFIED QUESTION NOR THE MAJORITY OPINION DEPRIVES PROPERTY OWNERS OF THEIR RIGHT TO A JURY TRIAL ON THE ISSUE OF COMPENSATION FOR PROPERTY TAKEN IN EMINENT DOMAIN

[Responding to Points I-II]

Article X, Section 6(a) of the Florida Constitution provides:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

Under a Section 337.27(2), Florida Statutes, whole take, neither Murphy, the property owner, nor any other property owner is subject to having private property "taken except for a public purpose and with full compensation therefor paid . . . . " If what is to be acquired is a portion of the property, the property owner will receive full compensation for the property taken in an amount determined by a jury. If there is damage to the remainder, the jury will also determine what damages, if any, caused by the taking, should be awarded. § 73.071(3)(b), Fla. Stat. (1998). If there are improvements on the property acquired, the owner will receive compensation therefor. Similarly, if what is to be acquired is the entire parcel, whether pursuant to Section 337.27(2), Florida Statutes, or otherwise, the jury will determine the value

of the entire parcel.

Under the procedure approved by the majority opinion, there is no violation of the requirement that a jury shall determine the value of the property sought to be appropriated and damages to the remainder. § 73.071(3), Fla. Stat. (1998). The jury will determine the value of what is acquired, not what can be acquired. Florida law requires juries to value land taken within the range of testimony presented, but does not bind them to any testimony on business damages. See Behm v. Dep't of Transp., 336 So. 2d 579 (Fla. 1976); Department of Transp. v. Decker, 408 So. 2d 1056 (Fla. 2d DCA 1982). However, Florida law does not allow juries or property owners to decide the type of compensation to be awarded.

In her initial brief, Murphy seems to argue that she has a right to choose whether she is to receive the value of the entire parcel or the value of part of the parcel plus severance damages. (MIB. 2-23) No such right can be found and the only authority offered for this claim is Article X Section 6(a), Florida Constitution, which says no such thing. Like Murphy, the trial judge improperly focused on her desire to keep, and the tenants to remain on, the remainder. (A. 638-639) A party's desire not to have its property taken is not sufficient to defeat an order of taking. See Wilton v. St. Johns County, 123 So. 527, 98 Fla. 26 (Fla.

1929). It is well established that a landowner cannot object to the taking of his/her property under the power of eminent domain "merely because some other location might have been [selected] or some other property obtained which would have been suitable for purpose." Id. at 535 (citing Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926)). See also Gregory v. Indian River County, 610 So. 2d 547 (Fla. 1st DCA 1992).

The reasonableness of the exercise of the power of eminent domain and the reasonable necessity for taking the land are matters that have traditionally been resolved in circuit court. Barbara's, 23 Fla. L. Weekly; Canal Auth. of Florida v. Miller, 243 So. 2d 131 (Fla. 1970); Pasco County v. Franzel, 569 So. 2d 877 (Fla. 2d DCA 1990); School Bd. of Broward County v. Viele, 459 So. 2d 354 (Fla. 4th DCA 1984), rev. denied, 467 So. 2d 1000 (Fla. 1985). Whether there were other satisfactory alternatives for the use of the remainder by Murphy is not the issue.

Florida courts have held that a condemning authority need only offer some evidence showing a reasonable necessity for the taking. State Dep't of Transp. v. Young, 539 So. 2d 596, 597 (Fla. 2d DCA 1989); Broward County v. Steele, 537 So. 2d 650, 651-652 (Fla. 4th DCA 1989). Private property may be taken for public use only when it is reasonably necessary for such use. Whether any necessity

exists for taking particular property under the power of eminent domain is ultimately a judicial question. Young, 539 So. 2d at 597; Steele, 537 So. 2d at 651-652. There has been no finding by the trial judge that necessity was not established in this case.

In this case, the Department sought to acquire Murphy's entire parcel upon which sits a small 35 year old, 2,500 square foot one-story office building from which several small businesses operated, 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 the Griffin Road widening project in Broward County would necessitate demolition of a major portion of the existing building leaving only about 860 square feet of the building. (A. 174; AA. 4)

The Department established that 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 be worth $35,000. (A. 178) The Department's appraisers concluded that it would not be economically feasible to bisect the building and rebuild the portion left on the remainder as a smaller building. (A. 174-178) As a result, it was determined that a partial take would cost $195,000 and a whole take would cost $217,000. (A. 179) Because business damages would result from a partial taking, if the

cost of the partial taking plus business damages equaled or exceeded $217,000, the Department could take the entire property under Section 337.27(2), Florida Statutes.[1]

Circuit court judges across the state disparately treat eminent domain petitions utilizing both Section 337.27(2), Florida Statutes, and Chapter 74, Florida Statutes. Thus, the Department is frequently reluctant to utilize Section 337.27(2), Florida Statutes, in cases where it cannot wait for the conclusion of the slow take process because the Department must certify the project, issue bonds, or let the project; or because federal funds will be jeopardized by delay. Because it is necessarily production oriented, the majority, 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

---

[1]In their initial brief, the Murphy petitioners alternate between claiming that a whole take under the statute is authorized "**only** where acquiring an entire tract will be less costly than acquiring just the necessary part" and that "compensation for a whole tract will be less than or equal to compensation for a partial taking." (MIB. 16 emphasis in original) Only the latter statement is correct. The statute authorizes acquisition of 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." § 337.27(2), Fla. Stat. (1998).

order of taking for the partial and pay the ransom, i.e., substantial business damages. See, e.g., Department of Transp. v. Burger King Corp., 5 Fla. L. Weekly Supp. 158 (Fla. 13th Cir. Ct., Dec. 22, 1994), cited at (MIB. 15). In other cases, the Department would begin by filing a petition for a partial taking. Then, when business records were finally obtained from the business owners/operators/tenants containing information sufficient to establish the Section 337.27(2), Florida Statutes, criteria, the Department would attempt to file an amended petition for a whole take. See, e.g., Department of Transp. v. Merit Petroleum Co., 3 Fla. L. Weekly Supp. 552 (Fla. 20th Cir. Ct. Nov. 28, 1995)[2] and Department of Transp. v. Robbins & Robbins, Inc., 5 Fla. L. Weekly Supp. 223 (Fla. 7th Cir. Ct. Dec. 14, 1997)[3]. Such attempts to rely on the statute have been unsuccessful.

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.

---

[2]The Second District Court of Appeal per curiam affirmed.

[3]Although issues of attorneys' fees and fees awarded to attorneys testifying at fee hearings in this case were subsequently resolved favorable to the Department, this issue was not addressed. Department of Transp. v. Robbins & Robbins, Inc., 700 So. 2d 782 (Fla. 5th DCA 1997) Martin v. Dep't of Transp.,716 So.2d 769 (Fla. 1998)(dismissing petition in Robbins for discretionary review based upon conflict).

Thus, the Department saw this case as an opportunity and filed a petition and proceeded to acquire the entire parcel as a Chapter 74 quick take. The Department originally filed for a whole take under Chapter 73 and then converted to a Chapter 74 proceeding. It was necessary to begin this acquisition 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 business owners and tenants and their counsel alike delay and ignore discovery requests to ward off attempts at Section 337.27(2), Florida Statutes, whole takes, knowing the Department is production driven and can ill-afford delay. Counsel for the Murphy petitioners admits as much when she acknowledges the benefit of dilatory tactics, noting the Department's difficulty in determining whether the statutory criteria have been met

> [u]nless 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. (MIB. 31 emphasis added)

There is nothing more meticulously guarded than business records prior to an order for a partial taking and attempts to legislate their production to condemning authorities have little or

no effect because there is no consequence for non-production.[4] Without documents, business owners/operators hope that condemning authorities will be unable to utilize Section 337.27(2), Florida Statutes. As established in this case, however, records may be unnecessary, as even industry standards have proved to be an accurate and reliable source to establish Section 337.27(2), Florida Statutes, criteria.

The procedure advocated by the Department and approved by the majority opinion does not change the law or result in a disharmonization of the requirements of Chapter 73 or Chapter 74. Public purpose and necessity are determined before the issues of compensation for that which is determined is to be appropriated are resolved.

[4] Section 337.271(5), Florida Statutes (1998), provides, in part "If the business owner intends to claim business damages pursuant to S. 73.071(3)(b), he or she may, . . . submit to the department a complete estimate of business damages to the property. . . . [and] shall also permit the department to copy and examine, at the owner's convenience, such of the owner's business records as the department determines to be necessary for it to arrive at an estimate of business damages."

II. A PROPERTY OWNER'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY THE PROCEDURE APPROVED BY THE MAJORITY OPINION AND ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE

The legislature has said and this Court has affirmed that

> 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.

§ 337.27(2), Fla. Stat. (1995) (emphasis added); Department of Transp. v. Fortune Federal Savings & Loan Assoc., 532 So. 2d 1267 (Fla. 1988). Neither this

statutory authority, this Court's affirmation of its constitutionality, nor the majority opinion in this case deprives the property owner or the tenants of their due process rights or their right to a jury trial to determine the amount of compensation due for the property that is actually acquired.

The legislature has specifically acknowledged the reality that rising costs of acquisition are a threat to many public projects. Citing to the concurring opinion in Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958), the Murphy petitioners decry the Department position and the majority opinion as "zeal to reduce acquisition costs creat[ing] a tendency to downplay individual constitutional rights." (MIB. 26) In DuPree the issue was $10,000, in relocation costs to which the property owner claimed it was entitled when a partial taking necessitated vacation of the entire parcel. Id. at 292. This Court noted that "[t]he theory and spirit of such a guarantee [of full or just compensation] require a practical attempt to make the owner whole."

Id. It cannot be said that the property owner is not made whole by the procedure approved by the majority opinion in this case. If the entire parcel is taken, compensation is paid for the entire parcel and the property owner is "made whole." Nevertheless, the property owner attempts to elevate to a constitutional guarantee, her desire to choose how she is to be made whole.

Addressing the guarantee of full compensation, this Court in Fortune Federal specifically held:

> It should be recognized that the full compensation demanded by our state constitution requires only that the condemning authority compensate the property owner for the full market value of the property taken. It is only by the will of the legislature that business damages may be awarded in certain situations which are properly limited by the legislature. In other words, the legislature has created a right to business damages, so it may also limit that right. 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. Therefore, it can hardly be said that the forfeiting of business damages requires Fortune to shoulder the burden of financing a public project.

Fortune Federal, 532 So. 2d at 1270. This must also be the case for severance damages. There is no vested right to severance damages simply because it would result in more compensation to the

property owner. All that is constitutionally required is that the property owner be fully compensated "for the full market value of the property taken." Id. This Court continued

> The term "public purpose" does not mean simply that the land is used for a specific public function, i.e. a road or other right of way. Rather, the concept of public purpose must be read more broadly to include projects which benefit the state in a tangible, foreseeable way. We believe that the purpose of cutting acquisition costs to expand the financial base for further public projects constitutes a valid public purpose under this definition. . . . we believe that our decision is supported by the legislature's recognition of the need to reduce the costs of financing the vast growth this state will endure over the next several years.

Id.

The Department established, no less than three times, that the acquisition cost of the partial plus business damages would exceed the cost of the whole parcel; by reliance on industry standards, as confirmed by the tenants' own records, and as testified to by the Department's expert before the trial court. 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) In an obvious 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.[5] 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) Industry standards established business damages of $172,500, the Department's expert testified to business damage of $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) With a difference of only $22,000 between a partial taking (without business damages) and a whole taking, the Department's conclusion that the entire parcel was necessary for a public use and for the public purpose of eliminating acquisition costs is well supported by both sides to this dispute. (A. 179-180, 202) Moreover, this testimony considers only business damages and not the additional costs of the acquisition such as attorney's fees, appraisal fees, and accountant fees which amount to thousands, often hundreds of thousands, of dollars.

---

[5] The trial judge pondered this tactic and was duly concerned that the truth could never be found. (A. 511-515) The Murphy petitioners advocate and apparently see no problem with advocating different positions, one before the trial court and one before a jury. (MIB. 34)

Due process has not been violated by the procedure affirmed by the majority opinion. In his special concurring opinion in Bunch, Justice Ervin noted:

> Of course, the trial judge in order to satisfy himself of the necessity for the taking, may require further showing of necessity by the condemnor than the resolution of the taking and the presumption of regularity and good faith created thereby. Moreover, the trial judge determines all questions of law, including the legal sufficiency of the showing of necessity. If after the prima facie showing of the condemnor of necessity the condemnee comes forward with competent evidence which prima facie supports his defenses, e.g., fraud, or bad faith as to necessity it then becomes incumbent upon the condemnor to introduce competent evidence in rebuttal in addition to the condemnation resolution.
>
> All questions concerning necessity of the taking are decided by the trial judge *in limine*; the jury's functions in an eminent domain case being restricted to determination of the compensation to be awarded for the land or interest taken.

City of Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974). While Section 337.27(2), Florida Statutes, was not enacted at the time this Court decided Bunch, the principles regarding the role of the trial judge and the legal question of necessity are no less pertinent or applicable. It cannot be said that the trial court could not conclude that the Department had made a sufficient showing of necessity. In fact, the trial judge made no such

finding. In addition, there it is undisputed there has been no showing of fraud or bad faith.

Requiring a jury trial in advance of an order of taking for an entire parcel under Section 337.27(2), Florida Statutes, defeats the purpose and legislative intent of “limit[ing] the rising costs to the state of property acquisition” which it declared to be ”a public purpose . . . without [which] the viability of many public projects will be threatened." § 337.27(2), Fla. Stat. (1998). 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. § 73.091(1), Fla. Stat. 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). 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, 604-605 (Fla. 1950)("the expenses of establishing the fair value of the property . . . in some cases could conceivably exceed such value."); 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).

On the other hand, Section 73.091(1), Florida Statutes, also provides that only if business damages are "compensable," is the condemning authority responsible for the costs of proving them up. 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 has held: "There is no constitutional right to business damages. . . 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, the parties would be required to try before a jury the issue of business damages. When the jury's

conclusion results in a value of the whole being equal to or less than the value of the part plus business damages, as a matter of law, the business damages are not compensable. § 337.27(2), Fla. Stat. Thus, if a jury trial is required in advance of an order of taking as suggested by the petitioners, the condemning authority would be obligated to pay substantial fees and costs to the tenants' experts and attorneys defeating the very purpose of Section 337.27(2), Florida Statutes. On the other hand, while the tenants could be entitled to their fees and costs incurred under the first part of Section 73.091(1), Florida Statutes (1998)[6], because business damages were determined to be noncompensable, those costs may not be recoverable under the second part of Section 73.091(1), Florida Statutes.[7]

If recovery is disallowed, 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. Because business damages are not constitutionally mandated, this result would not be

[6]"The petitioner shall pay attorney's fees as provided in s. 73.092 as well as all reasonable costs incurred in the defense of the proceedings in the circuit court . . . ." § 73.091(1), Fla. Stat.

[7]"and when business damages are compensable, a reasonable accountant's fee, to be assessed by that Court." § 73.091(1), Fla. Stat.

constitutionally infirm. Conversely, if recovery of such fees and costs is allowed, both the purpose and intent of Section 337.27(2), Florida Statutes, are violated and the statute results in no savings to taxpayers and, as envisioned by the legislature, increased project costs will surely threaten the viability of many public projects, the very result sought to be avoided or at least reduced by the statute.

III. ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE WILL RESULT IN THE DECIMATION OF THE PURPOSE AND INTENT OF SECTION 337.27(2), FLORIDA STATUTES, TO SAVE ACQUISITION COSTS IN ORDER TO PROVIDE THE EVER EXPANDING PUBLIC NEED FOR INCREASED AND IMPROVED TRANSPORTATION FACILITIES

The certified question and the majority opinion do not, as petitioners claim, present a "false choice between quick takings under Chapter 74 and economic whole takings authorized by § 337.27(2)." (MIB. 33) The petitioners argue that the provisions of Chapter 74 and Section 337.27(2), Florida Statutes, can be harmonized by authorizing that a petition can be filed for an entire parcel, an order of taking can be granted for the part actually required for the project, a jury trial can be held on all valuation issues, and the trial court can sort out the legal result after the verdict is rendered. Under this scenario, a jury will be determining "the issue of necessity and public purpose" which "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." State, Dep't of Transp. v. Barbara's Creative Jewelry, Inc., 23 Fla. L. Weekly D1532, 1533 (Fla. 4th DCA June 24, 1998).

Moreover, as detailed above in the Department's response to Point II, the statutory requirements and the practical aspects of

who will ultimately be responsible for the substantial costs of a failed attempt to defeat a Section 337.27(2), Florida Statutes, whole take, must be considered. Once considered, it must be concluded that they support the correctness of the majority opinion in this case.

The suggestion that answering the certified question in the negative and allowing juries to decide the issue of the necessity of a whole take will "not necessarily mean a jury trial will take place in every excess condemnation case" is disingenuous at best. (MIB. 34) It is suggested that under the procedure advocated by the dissent and the petitioners, the Department can rely on the rules of civil procedure and move 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." (MIB. 34-35) Only in those rare and exceptional cases like Fortune Federal where the bank was forced to admit that the estimated $2 million in business damages made the cost of the partial taking more expensive than a whole take, will there be such a concession or an opportunity to obtain summary judgment. No self-respecting business owner or member of the eminent domain bar representing property owners would ever allow the facts or expert testimony to establish that there is no genuine issue of material fact regarding the amount of business damages incurred as the result of a partial

taking. Because the statute provides for a separate attorney's fee for proving up business damages, there is double incentive to try the issue.

IV. THE DEPARTMENT'S RIGHT OF WAY PROCEDURE MANUAL DOES NOT ALTER THE PAYMENT OF FULL COMPENSATION TO PROPERTY OWNERS AND NO UNDUE PREJUDICE TO PROPERTY OWNERS WILL RESULT FROM THE UTILIZATION OF SECTION 337.27(2), FLORIDA STATUTES, IN THE MANNER AFFIRMED BY THE MAJORITY OPINION AND IN ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE

By this issue, the Murphy petitioners direct this Court's attention to a requirement in the Department's Right of Way Procedures Manual that in determining and justifying acquisition of an entire parcel, consideration must be given to "the amount the district [the Department] is likely to receive from the sale of the remainder property not needed to construct the facility." (MIB. 36-37) They argue that this consideration somehow prejudices property owners and circumvents the constitutional requirement that property owners receive full compensation for their property actually acquired. This issue is a red herring.

To support this non-issue, the Murphy petitioners once again rely on the property owner's desire to retain the remainder, which is not pertinent to the analysis. From that point, they argue that because the Department's procedures require consideration by Department personnel of such factors as relocation costs, costs of marketing the remainder, costs of managing the remainder, and the amount likely to be received from the sale of the remainder, the property owner subject to a whole take is somehow forced to accept

less than constitutionally guaranteed. There is no basis for this argument.

The Department is required by Section 337.271(1), Florida Statutes, to "negotiate in good faith with the owner of a parcel to be acquired and shall attempt to arrive at an agreed amount of compensation to be paid for the parcel." The Department's internal procedures to ensure compliance with Florida law and the requirements of the Federal Highway Administration to justify settlements, do not alter property owners' rights to compensation nor subject property owners to any undue influence or prejudice. To the extent that this issue is raised to suggest that the Department's procedures portend improper tactics on the part of the Department, it is unsubstantiated.

CONCLUSION

The issue in this case is whether a whole take pursuant to Section 337.27(2), Florida Statutes, constitutes issues of public purpose, necessity, and what property is part of the taking, which Florida courts have consistently said are solely questions for the court or whether a whole take can be effectuated under the statute constitutes an issue of compensation which must be determined by as jury. As held by the majority opinion, public purpose, necessity, and what property can be acquired are traditionally questions for

the court. Because reliance on the statute results in the property owner losing nothing to which it is constitutionally entitled, i.e., only business damages are lost, and a jury determines the value of whatever property the trial court determines can be acquired, the opinion of the majority should 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 11th day of February, 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 DOROTHY MURPHY, et als., CASE NO. 93,551

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

INDEX TO THE APPENDIX

DOCUMENT	PAGE
Department of Transp v. Barbara's Creative Jewelry, 23 Fla. L. Weekly D1532 (Fla. 4th DCA June 24, 1998)	A. 1-3
Photograph of Parcel Showing Partial Taking Line	A. 4