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.

REPLY 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

Amy Brigham Boulris
Florida Bar No. 0772836
BRIGHAM, MOORE, GAYLORD,
SCHUSTER MERLIN & TOBIN
Attorneys for Petitioners,
Dorothy Murphy, et al.
203 S.W. 13th Street
Miami, Florida 33130

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PRELIMINARY STATEMENT

As in the Initial 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."

References to the Owners Initial Brief will be indicated as [I.B. p. #], and references to the Department's Answer Brief will be noted as [A.B. p. #]. All emphasis in quotations is supplied unless indicated otherwise.

Certificate of Type and Size

The undersigned author certifies that the typeface used in this brief is CG Times, 13 point.

ARGUMENT

1. The Owners' argument is not about choosing a "type of compensation" — it is about keeping their land and their right to jury trial.

The Department's Answer Brief reflects an agency "in denial." Rather than fairly addressing the due process issues raised by the Owners, the Department strains to avoid the Owners' arguments by changing them into something they never were and by refusing to acknowledge the underlying constitutional principle, as though denying its existence often enough will make it go away.

The Owners have argued that their due process right not to have private property taken except for a valid public purpose necessitates a jury trial on compensation prior to application of the § 337.27(2) criteria for excess condemnation, since § 337.27(2) did not repeal the longstanding right to jury trial on compensation issues and since a jury's verdict is the only way to resolve legitimate disputes on value with the required certainty. [I.B. pp.14-33].

In response, the Department argues that, with the elimination of business damages as a constitutional concern, the only thing at stake is whether the owner receives severance damages to the remainder or the value of the remainder as compensation. [A.B. p. 6]. Building on this abstract obfuscation, the Department then grossly mischaracterizes the Owners' argument as a mere "desire to choose" the "type of compensation" which they are to receive. [A.B. pp. 9-22].

The Owners' have never asserted a preference for a certain type of compensation. To the contrary, they have objected to the taking of their land! This case is not

about the forfeiture of business or severance damages. It is about the basic constitutional right to retain private ownership until a valid public purpose is established.

The Department seems unable to acknowledge this basic principle, as it argues throughout its brief that, so long as the Owners are compensated in the end, it matters not how much property is taken from them.[1] The Department goes so far as to claim that the

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[1] For example, the Department's brief states:

> It cannot be said 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.
>
> * * * *

Owners' desire to retain their remainder property "is not pertinent to the analysis." [A.B. p.25].[2]

An owner's desire to retain private ownership is pertinent and appropriate where there is an alleged absence of public purpose. Ultimately compensating a taking which does not satisfy the conditions of public purpose cannot render it constitutional. [See I.B. 26-28]. In *Wilton v. St. Johns County*, 123 So. 527, 98 Fla. 26 (Fla. 1929), upon which the Department relies in its Answer Brief, the owner challenged whether the taking

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> All that is constitutionally required is that the property owner be compensated 'for the full market value of the property taken.' [A.B. pp. 16-17].

[2] In support of this contention, the Department cites several Florida cases out of their context for the proposition "that an owner's desire not to have property taken is not sufficient to defeat an order of taking." [A.B. 9-10]. It is important to note that the cases upon which the Department relies each dealt with questions of *engineering* necessity such as the quantity or quality of estate needed for construction, site selection or route selection. They did not deal with the constitutional due process objection presented here, nor did they deal with valuation issues. They all involved challenges to the design or location of the project. For discussion of why such cases are not determinative of the issues presented in the certified question here, see the Owners' Initial Brief, pp. 28-30.

sought was for public use. The Court stated:

> The Legislature cannot, under the guise of the exercise of the vast public and sovereign power of eminent domain which can only be exerted for a public purpose, take without his consent one citizen's property and give it to another for his mere private use, even though compensation be paid. [citations omitted]. To do so would also come in conflict with the Fourteenth Amendment to the Federal Constitution, as a deprivation of property without due process of law.

The Answer Brief simply fails to address the Owners' main arguments concerning the conditional public purpose of § 337.27(2) as a mixed question of fact and law, and the concurrent statutory right to jury trial. The Department's complete avoidance of these due process - related arguments signals the weakness of its position.

II. This is not about fees and costs.

The Department also argues that the fees and costs required to provide a jury trial on compensation prior to the application of the § 337.27 (2) criteria would defeat the cost-saving purpose of the statute. There is no statistical record support for this assertion if intended as factual. There is no logical support for it as argument.

Virtually, the same legal effect and expert testimony will be necessary to dispute the relative compensation for whole or partial takings, whether the issue be tried to the court at an order of taking or to a jury. The record in this case illustrates this well. [See I.B. 33-34]. Furthermore, one comprehensive trial of compensation issues is certainly more cost-efficient than a disputed evidentiary hearing ("bench trial") on relative compensation and another compensation jury trial, as advocated by DOT.

This Court should not be distracted from the important due process issues presented by DOT's attempt to sound false alarms about the cost of providing that due process.

III. This is not about the lawyers.

The Department unfortunately also attempts to distract from the due process issues here by casting unwarranted aspersions on the eminent domain bar. The Answer Brief implies that owners' counsel engage in improper dilatory tactics [A.B. p. 13],[3] that they stand to gain more than their clients [A.B. p. 20], and that they would subvert the facts in response to any attempt by DOT to obtain a summary judgment on compensation issues because of an extra fee incentive to prove business damages.[4] [A.B. p. 24].

These disparaging allusions are, of course, unsupported in the record. More importantly, they are a sign of the Department's desperation.

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[3] The Department makes this characterization of counsel for these Petitioners in response to a comment in the Initial Brief which was directed to *volunteering* business information *pre-suit* which is not mandatory and which might be adverse the a client's interest. Lawfully guarding a client's interest is not a "dilatory tactic." The difficulty in obtaining business records of which the Department complains could be remedied by better advance planning on its part. The Department could file suit earlier (with an authorizing resolution stating its good faith belief regarding relative compensation), plead partial and excess condemnations in the alternative, and obtain the necessary discovery in advance of any hearing or trial.

[4] This latter argument seems inconsistent with DOT's suggestion that an owner might not recover attorneys fees for a business damage claim which, after trial, became unrecoverable by the application of § 337.27 (2). [A.B. 21-24].

IV. The Owners' concerns about negotiation tactics in the absence of jury trial are not unsubstantiated.

The Department argues that the Owners' concern about negotiation tactics, expressed at pages 36-37 of the Initial Brief, is a "red herring" and is "unsubstantiated." [A.B. 25-26]. The Department cites its legal obligation to "negotiate in good faith" and claims that its internal procedures ensure compliance, as if to say the Department "would never do such a thing."

That deducting the resale value of the remainder from the value of the whole in negotiating with an owner facing an economic whole taking is part of the Department's negotiations *manual* should speak for itself.[5] But, given the question of great public importance presented here, the Owners cannot allow Department's denial to go unrebutted. Accordingly, the Owners have filed a Motion to Supplement the Record and to Take Judicial Notice concurrently with this brief to bring to this Court's attention documentation that this tactic has been used by condemnor's including the Department.

[5] Given the legislative intent to cap partial taking damages at the "value of the whole," the minimum amount that an owner should have to accept in order to stave off an economic whole taking is the Department's estimate of the "value of the whole." Yet, the DOT's manual suggests that in negotiating with an owner facing an economic whole taking, the Department should deduct further from the "value of the whole" for an amount it estimates it could have resold the remainder to a third party.

CONCLUSION

Given the foregoing and the arguments in Petitioners' Initial Brief, this Court should answer the certified question in the affirmative, holding that 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." The decision of the Fourth District Court should be reversed and the ruling of the Circuit Court re-instated.

Respectfully Submitted,

BRIGHAM, MOORE, GAYLORD,
SCHUSTER MERLIN & TOBIN
Attorneys for Petitioners,
Dorothy Murphy, et al.
203 S.W. 13th Street
Miami, Florida 33130

By:_____
Amy Brigham Boulris
Fla. Bar No. 0772836

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply Brief has been furnished by U.S. Mail this 5th day of April 1999 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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Amy Brigham Boulris