IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v. CASE NO. SC06-333

CAUSEWAY VISTA, INC.,

Respondent.
_____/

REPLY BRIEF ON THE MERITS OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

FROM
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA
CASE NO. 2D04-4371

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PRELIMINARY STATEMENT

Causeway Vista, Inc., a defendant and appellant below and respondent here, will be referred to as Causeway Vista. The State of Florida, Department of Transportation, the petitioner/condemning authority and appellee below and petitioner here, will be referred to as the Department.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page and volume number(s). Citations to the order of taking transcript will be indicated parenthetically as "T." with the appropriate page number(s). Citations to the trial transcripts, which commenced on July 12, 2004, will be indicated parenthetically as "TT." with the appropriate court reporter's volume and page number(s). Citations to Causeway Vista's answer brief on the merits will be indicated parenthetically as "AB." with the appropriate page number(s).

ARGUMENT

ISSUE

> CAUSEWAY VISTA'S FAILURE TO OBJECT PRIOR TO THE DISCHARGE OF THE JURY SHOULD HAVE BARRED APPELLATE REVIEW OF ITS CLAIM THAT THE JURY'S ZERO VERDICT FOR SEVERANCE DAMAGES WAS IMPERMISSIBLY BELOW THE RANGE OF THE TESTIMONY ADDUCED AT TRIAL.

Although Causeway Vista failed to object to the severance damages zero verdict prior to the discharge of the jury, the Second DCA reached the merits of Causeway Vista's claim and reversed the cause for a new trial on severance damages on the strength of its determination that the verdict was inadequate and not inconsistent. Relying primarily upon opinions arising from personal injury and products liability cases, Causeway Vista urges the Court to uphold the lower court's decision. Causeway Vista's position is not well taken because it is based upon a misapprehension of the scope of the relief the Department is seeking and it overlooks a fundamental distinction between personal injury and products liability cases on the one hand and eminent domain cases on the other.

Early in its argument Causeway Vista asserts that:

> The rule the Department wants -- that any alleged inconsistency with evidence must be raised before the jury is discharged -- would mean that counsel would have to ask

> the court to detain the jury while he or she revisited all the evidence in the trial that may have been inconsistent with the verdict. In a lengthy trial, this could take hours. Otherwise, every manifest weight argument, as well as many other arguments, would be deemed waived.

(AB. 10)

The foregoing assertion demonstrates that Causeway Vista is laboring under the mistaken assumption that the Department is urging the establishment of a new rule of law that would be applied across the board in civil actions of any nature. This not the case. The Department is instead requesting this Court to apply the bright-line rule for eminent domain proceedings set out in State, Dep't of Transp. v. Denmark, 366 So. 2d 476, 477 (Fla. 4th DCA 1979), almost 30 years ago. The Denmark rule simply requires an objection, prior to the discharge of the jury, to preserve for review a claim that all, or a particular element of, a jury verdict in an **eminent domain** action is not within the range of testimony adduced at trial.

Application of the Denmark rule is limited solely to eminent domain cases by virtue of the unique requirement that a jury verdict cannot be lower than the lowest nor higher than the highest value testified to by any witness. This unparalleled aspect of eminent domain law was identified with certainty in Behm v. Div. of Admin., State Dep't of Transp., 336 So. 2d 579,

581 (Fla. 1976), where this Court referred to its prior decisions in Meyers v. City of Daytona Beach, 30 So. 2d 354 (Fla. 1947), and Dade County v. Renedo, 147 So. 2d 313 (Fla. 1962), and stated:

> These decisions established a rule of law in condemnation proceedings requiring that "the jury verdict must be not less than the lowest estimates nor more than the highest." *Dade County v. Renedo, supra* at 316. **This rule was necessitated by the uniqueness of condemnation proceedings,** and is expressed in instructions to the jury as "your verdict shall not be less than the lowest value testified to by any witness nor shall it be higher than the highest value testified to by any witness." [Emphasis added]

Behm, 336 So. 2d at 581.[1] Citing to Behm, the lower court correctly observed:

> **Because of the uniqueness of condemnation proceedings, certain rules concerning damage awards exist for these types of cases that do not apply in other types of civil actions.** [Emphasis added] As to the amount of damages a jury may properly award in a condemnation case, the supreme court has explained the law as follows:
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> > The law of this state requires a condemning authority to establish what it believes to be just compensation for

[1] The jury in this case, like any other eminent domain jury, was instructed that: "Your verdict must be based on a careful consideration of all the evidence and these legal instructions that I have given you, and it may not be less than the lowest value nor more than the highest value testified to by any witness in this proceeding." [Emphasis deleted] Causeway Vista, 918 So. 2d at 354.

> the land taken. The condemning authority thus admits damages in this amount, and requires the jury to find that amount as the minimum award. The property owner on the other hand may rebut that evidence and, moreover, may come forward with evidence of additional elements of damages as provided by statute. The maximum total amount of compensation presented in evidence for each element of damage by the property owner establishes the maximum amount of compensation. By the proper application of the rule adversaries admit the value of the property interest taken is neither less nor more than their respective claims.
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> *Behm v. Div. of Admin., State Dep't of Transp.*, 336 So. 2d 579, 581-82 (Fla. 1976).

Causeway Vista v. State, Dep't of Transp., 918 So. 2d 352, 354-355 (Fla. 2d DCA 2005). This unique rule of law and attendant jury instruction not only render Causeway Vista's reliance on the substantive rules of law set out in non-eminent domain authority misplaced,[2] they also demonstrate that the premise forming the basis for Causeway Vista's policy arguments is fatally flawed.

The recurrent theme in Causeway Vista's policy arguments is the proposition that application of the Denmark rule would place

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[2] While the substantive rules established in non-eminent domain cases are not applicable here because of this distinction, the policy considerations articulated in those decisions which disfavor the re-litigation of cases on the basis of error that could have been easily corrected certainly are.

upon counsel the onerous burden of reviewing all the evidence in the case in the time available between the announcement of the verdict and the discharge of the jury. (AB. 10, 16-17, 23) This might be a viable consideration in personal injury or products liability cases where complex issues of liability and damages are routinely interwoven. But in eminent domain actions, rather than a complete review of all of the evidence, counsel for either party need only recall the amount testified to by his witnesses for the damages at issue and the value of the taking and the corresponding bottom line numbers testified to by the opposition's witnesses. If the verdict returned by the jury does not fall on or between those two numbers, then Denmark requires a timely objection from the aggrieved party so that the easily corrected error may be remedied while the jury is still present or, failing that, the claim is preserved for review.[3]

Here, the record reflects that counsel for Causeway Vista declined the opportunity to poll the jury (TT.XI 1557) and had

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[3] Rejection of the Denmark rule and upholding the result reached below would have a ramification which Causeway Vista may not have considered. If the result urged by Causeway Vista is applied with an even hand, then a condemning authority confronted with a verdict in excess of the range of the testimony would have the option of remaining silent and securing a new trial in front of a new jury which might be inclined to afford the condemnor a more favorable verdict. Causeway Vista has come forward with no compelling reason to create a rule of law that would promote such conduct.

approximately four minutes, rather than scant seconds, to ascertain if the severance damages zero verdict was within the range of the testimony. (TT.XI 1556-1559)[4] Nevertheless, Causeway Vista contends that it would be unfair to require its counsel to remember that the Department's expert conceded nominal severance damages of no more than $100 in light of the Department's opposition to Causeway Vista's motion for new trial on the ground that there were no severance damages. (AB. 17) Causeway Vista evidently overlooked the fact that its counsel secured that concession and dollar figure in his cross-examination of the expert. (TT.VI 670-671) Trial counsel for Causeway Vista knew that his expert set the top of the range for severance damages at $14,000. He also knew that his cross-examination of the Department's expert yielded a concession that there were at least nominal severance damages in the amount of $100, and he knew the jury was given the "range of testimony" instruction. The jury returned a zero verdict for severance damages. Under those circumstances Causeway Vista cannot be seriously suggesting that a complex, protracted analysis would have been an indispensable precursor to a timely objection.

Perhaps in tacit recognition that the Denmark rule should

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[4] In its Statement of the Case and Facts Causeway Vista mistakenly indicated that the proceedings were concluded at

control disposition of this case, Causeway Vista challenges the soundness of the Denmark opinion arguing that:

> The Department quotes language from the *Denmark* decision, saying the situation there "is similar" to that in *Lindquist v. Covert*, 279 So. 2d 44 (Fla. 4th DCA 1973)(IB 11). However, the facts in *Lindquist* show the verdict there again reflected a facial inconsistency. Thus, whatever the *Denmark* opinion may have meant by saying it was "similar," the inadequate verdict in *Denmark* differed materially from the facially inconsistent verdicts in *Lindquist* or *Hendelman*.

(AB. 8) In so arguing, Causeway Vista has ignored the fact that Denmark and Lindquist v. Covert, 279 So. 2d 44 (Fla. 4th DCA 1973), are indeed similar because they both involved situations where obvious error "could have been corrected in virtually no time at all by a resubmission of the cause to the jury" had a timely objection been forthcoming. Linduist, 279 So. 2d at 45; Denmark, 366 So. 2d at 478.

Causeway Vista also takes issue with the Department's reliance upon the policy considerations underlying the contemporaneous objection rule as expressed by this Court in Murphy v. International Robotic Systems, 766 So. 2d 1010 (Fla. 2000), and argues that:

> Objecting to a discrete piece of evidence or comment involves a different analytical process than attempting to determine if some

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4:43pm (AB. 3) instead of 4:33pm. (TT.XI 1559)

> aspect of the multiple questions a jury determines may conflict in some respect with evidence that has been submitted over the course of a multi-day or multi-week trial. The purpose of the contemporaneous objection rule would not be served by applying it to prevent a party from receiving a fair trial when counsel has only a few seconds to react to a jury verdict before the jury was discharged.

(AB. 23)

As pointed out above, the Denmark rule does in fact oblige counsel to object to a discrete event. The jury's verdict will either be within or without the range of testimony adduced at trial for the land taken and any associated damages. Expecting counsel for the complaining party to lodge a timely objection when the verdict is not within the range of the testimony involves arguably less analysis and is certainly no more burdensome than the requirement for a contemporaneous objection to the admission of hearsay or to improper closing argument. Consequently, the policy considerations residing in the contemporaneous objection rule are particularly apposite to, and counsel strongly in favor of, the uniform application of the Denmark rule in eminent domain proceedings.

As a final point Causeway Vista appears to be suggesting that the Department's position in this matter represents a "dog eat dog" or "win at any cost" approach to litigation. (AB. 24)

Causeway Vista’s suggestion takes on a rather hollow ring given its apparent election to remain silent in the face of obvious, easily correctable error.

CONCLUSION

Causeway Vista has advanced no compelling argument for affording it relief from the obligation to have timely objected to readily discernible error which could have been easily remedied by re-instruction and re-submission of the severance damages issue to the original jury.

Accordingly, the lower court's decision should be quashed and the cause remanded with directions to affirm the final judgment in its entirety and vacate the court's December 14, 2005, order granting Causeway Vista's motion for appellate attorney's fees.[5]

Respectfully submitted,

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[5] Inasmuch as Causeway Vista was the appellant below, affirmance of the final judgment precludes an award of appellate attorney's fees. § 73.131(2), Fla. Stat. (2005).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this _____ day of August, 2006, to **RAYMOND T. ELLIGETT, JR. ESQUIRE,** Schropp, Buell & Elligett, P.A., 3003 W. Azeele Street, Suite 100, Tampa, Florida 33609, counsel for CAUSEWAY VISTA, INC.; **DAVID W. HOLLOWAY, ESQUIRE**, Tileston, Simon & Holloway, P.A., 215 Imperial Boulevard, Suite B-1, Lakeland, Florida 33803, counsel for CAUSEWAY VISTA, INC.; **LUCY JULIA HAWRSK**, 3700 Dana Shores, Tampa, Florida 33634, representative for the ESTATE OF JOHN HAWRSK, DECEASED; and **JAMES L. ESTES, JR., ESQUIRE**, Senior Corporate Counsel, TECO Energy, Inc., Post Office Box 111, Tampa, Florida 33601, counsel for TECO ENERGY, INC.

_____
GREGORY G. COSTAS

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing has been prepared using Courier New 12 point font.

_____
GREGORY G. COSTAS