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IN THE SUPREME COURT
STATE OF FLORIDA

FILED
THOMAS D. HALL
MAY 14 2001
CLERK, SUPREME COURT
BY_____

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

CASE NO. SC01-1014

ARMADILLO PARTNERS, INC.,

Respondent.
_____/

JURISDICTIONAL BRIEF OF PETITIONER
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR REVIEW OF A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA, CASE NO. 4D99-3275

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PRELIMINARY STATEMENT

The State of Florida, Department of Transportation, the Appellee below and Petitioner here, will be referred to as the Department. Armadillo Partners, Inc., the Appellant below and Respondent here, will be referred to as Armadillo.

Citations to the Appendix hereto will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

In its decision of February 14, 2001, the Fourth District Court of Appeal reversed the final judgment of $817,450.00 rendered in an eminent domain action and remanded for a new trial. The Department of Transportation had condemned a portion of a shopping center at the intersection of Griffin Road and Davis Road in Broward County. The taking included a portion of the parking lot, which reduced the number of parking spaces from 140 to 67. In order to analyze the impact of the taking to calculate severance damages, the Department proposed a cure plan that would add back 32 parking spaces by eliminating portions of the existing sidewalk and arbor area. This cure did not eliminate all damages.

The Department's appraiser placed a before value of $1,954,600 on the property and an after value of $1,491,600. The calculation of the after value assumed the Department's cure was

in place. He concluded the market value of the land taken was $154,000, leaving $308,400 as severance damages. He then added in the cost of constructing the proposed cure, $102,800, to arrive at his final conclusion of compensation of $565,800. In using the income approach to calculate the severance damages, the appraiser focused on income streams of comparable properties to reflect the parking changes.

The Fourth District held that the trial court erred in admitting into evidence the Department's cure plan, because the Department failed to revise its construction plans to construct the driveways at the locations shown in the proposed cure. The Department had presented an engineer witness to testify the driveways could be constructed in a place different than was detailed in the plans.

The Fourth District held that the trial court erred in failing to exclude the appraisal testimony presented by the Department's appraiser. The court said the testimony should have been stricken because the appraiser failed to consider the arbor area in his before calculations of value, failed to account for the fact the arbor area was converted to parking in the proposed cure, and failed to consider the value of the permanent improvements lost as a result of the proposed cure. The court held the testimony should have been stricken, even though on cross-examination, the appraiser maintained that loss of the

arbor area would be reflected in the reduced rental income in the after situation.

The Department's timely Motion for Rehearing and/or for Clarification was denied on April 4, 2001. The Department's Notice to Invoke Jurisdiction was filed on May 3, 2001.

SUMMARY OF THE ARGUMENT

Issue I: The opinion below expressly and directly conflicts with this Court's decision in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), because the lower court has substituted a cost-to-cure analysis for a before and after analysis of market value. This Court held that proposed physical changes for a proposed cure should only be considered as one of many factors in calculating market value, and that the cost of a proposed cure should not be considered as a separate item of damage.

Contrary to this Court's decision in *Patel*, the lower court is requiring the Department to change its construction plans to partially implement a proposed cure before the cure plan may even be admitted into evidence and considered by the jury in assessing the market value of the remainder. This Court held in *Patel* that neither party had a duty to mitigate or cure anything, thus it is possible and perhaps probable that the cure will never be implemented or built.

Issue II: The opinion below improperly focuses on only one

factor allegedly not considered by the Department's appraiser in holding that his testimony was incompetent and inadmissible, rather than allowing the jury to consider this factor in assessing the weight given the testimony. This holding is in express and direct conflict with the decisions of the Second District in *State Road Department v. Falcon, Inc.*, 157 So. 2d 563 (Fla. 2d DCA 1963) and *Rochelle v. State Road Department*, 196 So. 2d 477 (Fla. 2d DCA 1967).

ARGUMENT

The Department seeks review of the Fourth District's opinion under this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(2)(A)(iv). It is well settled that this Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district. *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). The lower court's decision herein is in express and direct conflict with a rule of law expressed in this Court's decision in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), and in express and direct conflict with the Second District's decisions in *State Road Department v. Falcon, Inc.*, 157 So. 2d 563 (Fla. 2d DCA 1963) and

Rochelle v. State Road Department, 196 So. 2d 477 (Fla. 2d DCA 1967).

ISSUE I

THE LOWER COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *BROWARD COUNTY v. PATEL*

The Fourth District, relying on *Mulkey v. Department of Transportation*, 445 So. 2d 1062, 1065 (Fla. 2d DCA 1984), says that the general "before and after" rule of determining severance damages and full compensation has been replaced by an alternative "cost-to-cure" approach. The court has missed the explicit holding to the contrary in this Court's decision in *Patel* and misapplied the rule set forth therein that proposed cures are used in calculating the fair market value of the remaining property after the taking and are not to be used for separate damage calculations.

In *Patel*, this Court said that the cost of a proposed cure is not an alternative method for calculating severance damages, but is just one factor to be considered in assessing the market value of the remainder. This Court said:

> Likewise, the value of future improvements that may be probable also will factor into the equation when a knowledgeable buyer determines fair-market price. We stress that the availability of a future "cure" or "mitigation of damages"-or more accurately, the probability that lost value can be restored to the property by contingent future actions in spite of the taking - is relevant *only* to the extent it may have an

impact upon fair market value as of the moment of the taking, and not otherwise.

Id. at 43.

The Fourth District's reliance on *Department of Transportation v. Byrd*, 254 So. 2d 836 (Fla. 1st DCA 1971), *disapproved in Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), to bolster its opinion brings it in direct conflict with this Court in *Patel*, because *Patel* essentially overrules the district court in *Byrd*. There is only one issue in *Byrd* and *Patel* redirected the errant analysis in *Byrd*.

The key to assessing severance damages is to determine the fair market value of the remaining property, considering the probability that physical changes (cure) can be accomplished to lessen the impact of the taking, considering the cost of the proposed physical changes, and considering the loss of any property displaced by the proposed cure. *Id.* at 43-44. This "after" fair market value is then subtracted from the "before" value to calculate severance damages. Awarding the cost of a cure is <u>not</u> a substitute for determining the market value before the taking and determining the market value of the remainder with due consideration given all factors affecting value.

In footnote 7 in *Patel*, this Court warned about considering the cost to cure as a substitute for calculating severance damages:

When admitting evidence of future contingencies,

> however, the trial court must ensure that the finder of fact does not mistakenly assume that their cost or value can be considered apart from the effect on market value ....
>
> ...To prevent juror confusion, the trial court and the parties may wish to see that testimony as to future costs and values is not given in the form of contingent future dollar amounts, but only in terms of the effect on the property's value as of the moment of taking.

Id. at 43-44, n.7.

In its decision, the Fourth District held the Department could not rely on a proposed cure in assessing severance damages unless the Department changed its construction plans for implementation of the cure. Again, the lower court has misapplied *Patel*. In *Patel*, this court said "neither party has an obligation to cure or mitigate anything." *Id.* at 43, n.6. Proposed cures are just that - proposed or contingent future actions. The proposed cures are only one of many factors a knowledgeable buyer would consider in calculating market price.

The assessment of market value is analyzed on the basis of contingencies, not certainties. The property owner, as well as the condemning authority, may offer evidence of proposed cures. By requiring the Department to change its construction plans to accommodate the Department's own cure, the Fourth District has allocated all risk to the Department. To construct driveway connections at a location to service the Department's proposed cure, a cure which may never be implemented, could destroy the landowner's proposed use of the property. If the owner's

proposed cure required different driveway locations, it could not be considered by the jury. The Fourth District's decision could lead to the unfair scenario spelled out by this Court in *Patel*, that the future contingency cure would never be considered at all by the jury, thereby increasing the jury award, but also giving the landowner a windfall if a cure is then implemented at some point in the future. This result would be avoided had the Fourth District followed this Court's decision in *Patel*.

ISSUE II

THE LOWER COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISIONS IN *STATE ROAD DEPARTMENT v. FALCON, INC.* AND *ROCHELLE v. STATE ROAD DEPARTMENT*

The Fourth District held that the trial court erred by not striking the testimony of the Department's appraiser because there was no testimony he considered the arbor area in "any of the before value calculations or that any comparable sales included amenities such as those areas" (A: 2) and because he "gave no independent consideration to the loss of the Arbor Area." (A: 2) The Fourth District said his testimony was inadmissible, even though it was acknowledged the appraiser testified on cross-examination that "the loss of the Arbor Area would be reflected in the reduced rentals." (A: 2)

This holding expressly and directly conflicts with the holding in *State Road Department v. Falcon, Inc.*, 157 So. 2d 563,

in which the Second District held that the failure of an otherwise competent expert witness to consider one of numerous factors involved in assessing compensation in an eminent domain trial goes not to his competency or to the competency of the testimony, but only to the weight of the testimony. *Falcon, Inc.*, 157 So. 2d at 566.

The Fourth District has improperly zeroed in on only one of many factors relating to severance damages and found the appraiser's testimony and explanation on cross-examination to be unacceptable, thus rendering the testimony a misapplication of law. This conflicts with the Second District's conclusion in *Falcon, Inc.* that this is not an admissibility issue, but a jury issue concerning the weight given the testimony.

It also conflicts with the Second District's holding in *Rochelle*, 196 So. 2d at 479, concerning an appraiser's competency:

> It is our view that the method of evaluation used by an appraiser-expert witness is not a matter relating to the competency of his testimony to be ruled upon by the trial Judge unless the method used by the witness is so totally inadequate or improper that adoption of the method would require departing from all common sense and reason or would require adoption of an entirely new and totally unauthenticated formula in the field of appraising.

These issues are to be left for the consideration of the jury and not to be excluded as misapplications of law.

CONCLUSION

The Department requests that this Court exercise its discretionary jurisdiction in this case to resolve the conflicts between the Fourth District's opinion and the decisions of this Court and the Second District Court of Appeal.

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Jurisdictional Brief of Appellee, State of Florida, Department of Transportation, has been furnished by U.S. Mail to Geoffrey L. Jones, Esquire, Jeck, Harris, Jones, LLP, 1061 East Indiantown Road, Suite 400, Jupiter, Florida 33477, on May 14, 2001.

Robert I. Scanlan

Robert I. Scanlan

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that Courier New 12-point, non-proportionately spaced type is used in this brief.

Robert I. Scanlan

Robert I. Scanlan

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ARMADILLO PARTNERS, INC.,

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APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2001

ARMADILLO PARTNERS, INC.,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Appellee.

CASE NOS. 4D99-3275 and 4D00-745

Opinion filed February 14, 2001

Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englander Henning, Judge; L.T. Case No. CACE 97-4339 03.

Geoffrey L. Jones of Jeck, Harris & Jones, LLP, Jupiter, for appellant.

Pamela S. Leslie, General Counsel, and Vance W. Kidder, Assistant General Counsel, Department of Transportation, Tallahassee, for appellee.

WARNER, C.J.

In this appeal from a final judgment awarding appellant taking and severance damages in a condemnation case, appellant argues that the court erred in admitting testimony on severance damages by appellee's appraiser which was based upon a misconception of the law of severance damages; that the court erred in permitting evidence of a cure which was contrary to the condemnor's plans and specifications; and that certain comparable sales prices were admitted improperly. We reverse because the expert testimony on severance damages misconstrued applicable law.

Armadillo Square, the property at issue in this case, is a shopping center located at the intersection of Griffin Road and Davie Road in Broward County. One of its features is an "Arbor Area" located in front of some of the businesses. This area includes landscaping, irrigation, grass, arbor structures, fences, and latticework. The property also contained 140 parking spaces for its restaurant, office, and retail space. In connection with an expansion of the intersection, the Department of Transportation ("DOT") condemned part of the parking lot, resulting in a reduction of parking spaces to 67. Therefore, in addition to the taking of property, there was severance damage to the remainder due to the loss of parking.

In order to mitigate appellant's loss, the DOT proposed a "cure" that would eliminate portions of the sidewalk and the Arbor Area, moving the parking area closer to the building and increasing the available parking to 99 spaces. At trial, the DOT appraiser, Mr. Gallion, testified to the value of both the taking and severance damages. Severance damages, as a general rule, "are the difference between the value of the property before and after the taking." *See Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985). However, this general measure may be replaced by a cost-to-cure approach where the cost is less than the decreased value of the remainder. *See Mulkey v. Dep't of Transp.*, 448 So. 2d 1062, 1065 (Fla. 2d DCA 1984).

Gallion calculated appellant's damages by first establishing that the market value of the property prior to the condemnation was $1,954,600. The appraised value of the property taken was $154,600. He then determined the after value of the property based upon the DOT's proposed cure. Using an income approach based on reduced rental values, the after value was $1,491,600. The difference between the before value and the after value with the cure was thus $463,000. By subtracting the $154,600 value of the taken parcel, he arrived at $308,400 as the severance damages. To that figure, he added the cost of effecting the

DOT's cure of $102,800, to come up with a damage amount of $565,800. He testified that the loss of value to the remainder was due solely to the loss of parking, and his analysis of the income streams of comparable properties all focus on the changes in parking requirements. He gave no independent consideration to the loss of the Arbor Area. When cross-examined, he maintained that the loss of the Arbor Area would be reflected in the reduced rentals. There was no testimony that he considered the Arbor Area in any of the before value calculations or that any comparable sales included amenities such as those areas. Appellant objected to his testimony and moved to strike it as a misconstruction of the law of severance damages. We agree.

In a consistent line of cases, Florida courts have held that where property outside the parcel taken is converted to parking to effect a cure of severance damages, the loss of that property must be taken into account in determining severance damages. In *State, Department of Transportation v. Byrd*, 254 So. 2d 836 (Fla. 1st DCA 1971), *disapproved in part on other grounds by Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), the DOT condemned a strip along a motel, reducing its parking. The DOT expert contended that the property owner suffered no severance damages because the motel could convert a shuffleboard court to parking spaces. The trial court refused to admit the expert's testimony, and the district court affirmed, stating:

> It is clear to us that appellees sustained severance damages to the remainder of the land by virtue of the taking. Hence, the proffered testimony by which the State's expert attempted to voice his opinion that relocation of the parking spaces onto the remainder served to negate severance damages was properly excluded by the trial court. As observed by the trial court's order excluding the proffered testimony, the state appraiser's estimate of damages sustained by appellees is impermissibly based on a premise which would require destruction by the property owners of property which is outside the area of taking as a means of theoretical mitigation of damages.

Id. at 837.

Similarly, in *Williams v. State, Department of Transportation*, 579 So. 2d 226, 228 (Fla. 1st DCA 1991), *disapproved in part on other grounds by Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), the DOT's expert testified to a cost-to-cure as an alternative to severance damages. The expert first determined that $177,000 in severance damages resulted from a loss of parking due to the taking. He then determined that another portion of the remaining property could be converted to parking at a cost of $24,000. The value of the converted property was $48,000, for a total cost-to-cure of $72,000. The appellate court concluded that the expert's opinion determining that the cost-to-cure was less than the severance damages ignored the effects of the cure on the remaining property, including the fact that the new parking area would provide less parking spaces than the original, that the parking would further intrude on property outside the taking, and that the new parking area would prevent further expansion of the business on the site.

Although in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), the supreme court overruled both *Williams* and *Byrd* on another issue, *Patel* continues the *Byrd* and *Williams* interpretation of the law of severance damages with respect to the consideration of the effect of cost-to-cure on the remaining property. The court determined that it was error to reduce severance damages by awarding nothing for lost property value and other costs associated with converting other areas of a condemnee's land to replace lost parking areas. That the holdings of *Williams* and *Byrd* set forth above are still good law is also made evident by *State, Department of Transportation v. Murray*, 670 So. 2d 977 (Fla. 1st DCA 1996), *quashed on other grounds*, 687 So. 2d 825 (Fla. 1997), another case involving loss of parking on the remainder parcel due to the taking. In that case

also, the DOT's expert failed to account for the valuation factors compensable as severance damages. Specifically, the DOT ignored the fact that the place it proposed to add parking spaces was already designated for overflow parking. Thus, the property was left with less parking than it had before.

Reviewing the instant case, it is apparent that the DOT's appraiser did not consider the factors necessary under the case law for severance damages. Gallion calculated the before/after values by valuing the after property as though the cure had been made. But, in doing so, he still failed to account for the fact that the Arbor Area was converted to parking, just as was done in *Byrd, Williams, Patel*, and *Murray*. It is apparent from his figures as well as his testimony that no provision in his valuation was made for the loss of the Arbor Area itself. His focus was strictly on the valuation as affected by the loss of parking which reduced rent. Even if its only value was aesthetic, such value can be included in severance damages. *See Hubschman v. Bd. of County Comm'rs of Collier County*, 610 So. 2d 691, 692 (Fla. 2d DCA 1992). Further, he did not even consider the value of the permanent improvements lost as a result of the conversion of the Arbor Area, such as the sprinkler system, the decorative brick wall, and the landscaping on the site. Because the expert's testimony was based upon a misconception of law, the testimony should have been excluded. *See Byrd,* 254 So. 2d at 836. We therefore reverse and remand for a new trial.

We must also reverse as to the second issue. Over appellant's objection, the trial court permitted the testimony regarding the DOT's proposed cure to the remainder property. In order to complete the proposed cure, new driveways needed to be connected to the revamped Griffin and Davie roads. The DOT cure plan contemplated that these driveways would be constructed within the planned temporary construction easements. However, because of South Florida Water Management District regulations, the driveways could not be constructed there. The court permitted an engineer to testify that permanent driveways could be constructed in a place different than was called for in the plans. In *Belvedere Development Corp. v. Department of Transportation, Division of Administration.*, 476 So. 2d 649, 653 (Fla. 1985), the court said:

> The second point raised by the petitioners is whether the state should have been permitted at trial to make certain promissory representations that they would or would not do certain things in the future which were not in the pleadings or construction plans offered in evidence. The petitioners assert that the damages caused by a project as contemplated by the construction plans in existence on the date of valuation and the pleadings govern the evidence of valuation and that representations of a purely promissory or speculative nature should not affect either the character or the extent of the damages the condemnor must pay as full compensation. We agree. When evidence in the form of plans and specifications is properly admitted for the purpose of providing a declaration of the manner in which the condemned property will be utilized, the Department should be bound by this evidence.

While the DOT argues that the evidence was only offered to show a potential cure, which does not have to be part of the plans, it cannot be permitted to rely on a cure inconsistent with its own plans and whose implementation may be speculative at best and would require the use and appropriation of property to effect the cure different from that taken under the plans. At the very least, just as in testimony regarding the possibility of affecting a cure with a variance, the evidence should show that there is a reasonable probability that the plans' changes are feasible, meet all necessary statutes, ordinances, codes, and regulations, and that the Department intends to construct the driveways at those locations. *Cf. Patel,* 641 So. 2d at 42-3. The trial court thus erred in admitting the testimony regarding a plan for a cure

inconsistent with the plans in evidence.

As to the final claim of error, the trial court acted within its discretion in admitting the comparable sales information.

For the foregoing reasons, we reverse the final judgment and remand for a new trial.

HAZOURI, J., and BARKDULL, THOMAS H., Associate Judge, concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.