IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1014
(FOURTH DISTRICT COURT OF APPEAL CASE NO. 4D99-3275)

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

ARMADILLO PARTNERS, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PREFACE

Petitioner is the State of Florida Department of Transportation ("Department"). The opinion under review, Armadillo Partners, Inc. v. Department of Transportation, 780 So. 2d 234 (Fla. 4th DCA 2001), is referenced in this brief as the "district court decision" and by the page numbers where it appears in the appendix to the Department's jurisdictional brief (the "Department's Brief"), i.e. A: 1 is the first page of the opinion.

TABLE OF CITATIONS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The district court decision does not expressly and directly conflict with the decisions cited by the Department. The Department's interpretation of the Broward County v. Patel decision is flawed; the district court decision does not conflict with the holding in Patel. There is no conflict with the State Road Department v. Falcon, Inc. and Rochelle v. State Road Department decisions because the Falcon holding is not analogous to the district court decision and the Rochelle holding is consistent with the district court decision.

ARGUMENT

THE DEPARTMENT HAS FAILED TO DEMONSTRATE A BASIS FOR JURISDICTION BECAUSE NO CONFLICT EXISTS BETWEEN THE DISTRICT COURT DECISION AND THE CITED DECISIONS

As a jurisdictional prerequisite, the Department must demonstrate that the district court decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3 (b) (3), Fla. Const. A review of the district court decision and the decisions cited by the Department demonstrates that the requisite conflict does not exist.

ISSUE I: Broward County v. Patel

A. The Alleged Severance Damages Analysis Conflict

The Department asserts that the district court decision expressly and directly conflicts with Broward County v. Patel, 641 So. 2d 40 (Fla. 1994), because the

district court replaced a before and after severance damages analysis with a cost-to-cure analysis. Department's Brief, at 3, 5. Specifically, the Department states:

> The Fourth District, relying on *Mulkey v. Department of Transportation*, 445 [sic] 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* . . . .

Department's Brief, at 5 (the correct citation is Mulkey v. Department of Transportation, 448 So. 2d 1062 (Fla. 2d DCA 1984)).

The Department misinterprets both the Patel decision and the district court decision. In addressing severance damages, the district court stated that "[s]everance damages, as a general rule, 'are the difference between the value of the property before and after the taking'". District Court decision, at A: 1 (citation omitted). The district court then stated that this general rule "may be replaced by a cost-to-cure approach where the cost is less than the decreased value of the remainder." Id. (citation to Mulkey v. Department of Transportation omitted). The foregoing is established law and does not constitute a departure from precedent or an express and direct conflict with the Patel decision. See Department of Transportation v. Frenchman, Inc., 476 So. 2d 224, 227 (Fla. 4th DCA 1985), review dismissed, 495 So. 2d 750 (Fla. 1986)("We think this is a correct statement of the law of this state as in the majority of American jurisdictions.")

In addition, the alleged "replacement" of a before and after analysis with a cost-to-cure analysis is not the basis of the district court decision. The district court addressed these analyses in describing the Department's appraiser's testimony and his use of the before and after and cost-to-cure analyses. District Court decision, at A: 1-2. The district court faulted the appraiser not for his use of a particular analysis but because "no provision in his valuation was made for the loss of the Arbor Area", i.e. the property appropriated assuming the Department's cure was put into place. District Court decision, at A: 3.

The Patel decision concerns primarily the manner in which severance damages may be lessened by future actions, such as the potential variances at issue in that case. The Department argues that Patel stated 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." Department's Brief, at 5. The Department argues that Patel held that "the cost of a proposed cure should not be considered as a separate item of damage." Department's Brief, at 3. The Department misinterprets the Patel decision. The Patel decision does not contain the "explicit holding" attributed to it by the Department "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." Department's Brief, at 5.

The Patel decision actually holds that if the finder of fact determines a reasonable probability exists that future contingencies, such as a variance, will occur, "the finder then must separately determine the actual fair market value of the property on the day it was taken, together with severance damages and other costs." Id. (emphasis supplied). Severance damages would include precisely the compensation that the appraiser in this case failed to include in his opinion. The Department fails to acknowledge that the amount the appraiser failed to include in his opinion in this case was not the cost of a proposed cure but rather compensation for property that would be appropriated as part of the Department's proposed cure.

In support of its position, the Department cites to the Patel decision where the Court stated that the probability that lost value can be restored to the property by contingent future actions is relevant only as to its impact on the property's fair market value at the time of taking. Patel, 641 So. 2d at 44; Department's Brief, at 5-6. The Court made that statement in addressing how fair market value is determined when considering the probability of rezoning or variance, a process that the Court identified as "the only issue in this phase of the proceedings." Patel, 641 So. 2d at 43 (emphasis supplied). The Department also misconstrues the Patel decision in confusing a discussion of contingent future action, such as a variance, with cost-to-cure. Department's Brief, at 6-7. The section of the Patel decision cited in the Department's brief at that location is again referring to an evaluation of

future contingencies, and not to eliminating cost-to-cure as part of a property owner's damages. 641 So. 2d at 43.

The Patel decision did not hold that a property owner should not be compensated for the value of property appropriated assuming a cure were put into place, the specific issue addressed by the district court in this case. To the contrary, the Court in Patel held that it was error if the condemnor's evidence did not provide compensation for the property value associated with replacing lost parking as part of a cure:

> [I]t is obvious that the fact finder below . . . awarded the condemnees nothing for the lost property value and other costs associated with converting other areas of their land to replace lost parking and thereby reduce severance damages. This also was error.

Id. at 44. In the case under review, the Department's appraiser similarly failed to provide for any damages for the loss of the value of the property appropriated by the Department's proposed cure.

Finally, the Department's position that "the cost of a proposed cure should not be considered as a separate item of damage" contradicts the methodology employed by its appraiser. District Court decision, at A: 1-2. The Department's appraiser determined compensation by calculating the difference between the property's before value and the after value assuming the Department's cure was in place, subtracting the value of the land taken, and then adding "the cost of constructing the proposed cure, $102,800, to arrive at his final conclusion of

compensation." Department's Brief, at 2. The Department's appraiser calculated as damages the cost of constructing the proposed cure but the Department now contends that the cost of a proposed cure should not be considered as a separate item of damage. Regardless of the inconsistencies in the Department's position, the Department's interpretation of the Patel decision is flawed and no conflict exists.

B. The Alleged Construction Plans Conflict

The Department states that the district court decision, in an express and direct conflict with the Patel decision, "requir[es] the Department to change its construction plans to partially implement a proposed cure before the cure plan may even be admitted into evidence." Department's Brief, at 3. This statement is inaccurate. The Court in Patel never mentioned, let alone discussed, construction plans. Even assuming, arguendo, that the district court decision made such a ruling, any conflict with the Patel decision would be, at most, only an implicit conflict as opposed to the express and direct conflict required by the Florida Constitution to provide jurisdiction. Art. V, § 3 (b) (3), Fla. Const.

Nevertheless, the district court decision does not require the Department to change its construction plans as a prerequisite to introducing a cure involving driveway locations that differ from those locations shown in the Department's construction plans. The district court decision requires either that the

Department's proposed cure is consistent with its construction plans or, assuming the cure were implemented, that the evidence show "a reasonable probability that the plan's changes [i.e. the change in driveway locations] are feasible, meet all necessary statutes, ordinances, codes, and regulations, and that the Department intends to construct the driveways at those locations." District Court decision, at A: 3 (bracketed language supplied). As the district court noted and as the Department argued, the Department's cure evidence "was only offered to show a potential cure, which does not have to be part of the plans . . . ." Id. (emphasis supplied). The district court decision simply provides that the Department cannot propose a cure, a component of which, i.e. the construction of driveway entrances, has been provided for neither as part of the cure nor as part of the construction plans themselves. Again, no conflict with the Patel decision exists.

ISSUE II: Rochelle v. State Road Department and State Road Department v. Falcon, Inc.

The Department contends that the district court decision expressly and directly conflicts with 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). The Falcon decision holds that an appraiser's failure to consider one transaction in arriving at a value opinion goes to weight as opposed to admissibility. The Rochelle decision holds that an appraiser's testimony should

not be excluded because of the methodology employed unless the methodology is inadequate or improper.

The district court found that the Department's appraiser failed to provide compensation to the property owner for the appropriation of property required if the Department's cure were put in place. Accordingly, the Falcon decision is not analogous. The case under review is not one in which the appraiser did not consider a particular transaction in reaching his opinion on severance damages. Instead, the appraiser failed to provide any compensation for the property appropriated in the context of the Department's proposed cure, as has been found improper in Broward County v. Patel, 641 So. 2d 40, 44 (Fla. 1994)(awarding condemnees nothing for lost property value associated with converting other property to replace lost parking was error).

Such a failure to provide compensation for property appropriated in a cure is a misconception of the law that requires a court to exclude that testimony. Williams v. Department of Transportation, 579 So. 2d 226, 229 (Fla. 1st DCA 1991)("Where the testimony of an appraiser is based on a misconception of the law resulting in a lower valuation of damages than if he had correctly applied the law, such testimony should be excluded."); Department of Transportation v. Byrd, 254 So. 2d 836, 837 (Fla. 1st DCA 1971)("Where the testimony of an appraiser is based

on a misconception of the law, the testimony should be excluded.")[1]. See also Department of Transportation v. Murray, 670 So. 2d 977, 979 (Fla. 1st DCA 1996), decision quashed on other grounds, 687 So. 2d 825 (Fla. 1997)(testimony inadmissible as matter of law and properly excluded because Department's witness ignored reduction in value of property resulting from Department's cure). The district court in the case under review found the appraiser's testimony to be improper because it was based on a misconception of Florida law concerning severance damages. District Court decision, at A: 3.

The district court decision also does not conflict with the Rochelle decision. The Rochelle decision is consistent in holding that exclusion is appropriate if the methodology is improper. As shown, the Department's appraiser's testimony was improper since it was based on a misconception of the law and, thus, should have been excluded.

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[1] Both the Williams and Byrd decisions were cited in the Patel decision. This Court "disapproved" of those decisions "solely to the extent they may be viewed as inconsistent with [the Patel] opinion." Patel, 641 So. 2d at 45. The Court did so solely because the Fourth District Court of Appeal, in reliance on those decisions, had reversed the trial court for allowing evidence concerning the variances at issue in the Patel case. See Patel, 641 So. 2d at 42.

CONCLUSION

In summary, no express or direct conflict with the cited decisions exists.

The Court should deny discretionary review for lack of jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Marianne A. Trussell, Esq., Deputy General Counsel, Department of Transportation, Haydon Burns Building, M.S. 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458, and Robert I. Scanlan, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol – PL-01, Tallahassee, Florida 32399-1050, this 30th day of May, 2001.

Geoffrey L. Jones

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing respondent's brief on jurisdiction contains Times New Roman 14-point font and complies with the font requirements contained within Rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

Geoffrey L. Jones