

IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

CASE NO. SC01-1014
Lower Tribunal No. 4D99-3275

ARMADILLO PARTNERS, INC.,

Respondent.

_____ /

REPLY 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." Manheim Remarketing Limited Partnership d/b/a/ Florida Auto Auction of Orlando and Florida Auto Auction of Orlando, Inc. will be referred to as "Amicus."

Citations to the transcript will be by volume and page number and take the form of (Tr. Vol.: page).

Citations to Petitioner's Initial Brief will be indicated parenthetically as "IB" with the appropriate page number(s).

Citations to Respondent's Answer Brief will be indicated parenthetically as "AB" with the appropriate page number(s).

ARGUMENT

The issue in eminent domain proceedings is to determine what is full compensation for both the property taken and for damages to the remaining property. *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 898 (Fla. 1987). "These 'damages to the remainder' are called 'severance damages' and are measured by the reduction in value of the remaining property." *Kendry v. Division of Admin., Dep't of Transp.*, 366 So. 2d 391, 393 (Fla. 1978). The bedrock standard for determining the value of property in eminent domain is the fair actual market value of the property at the time of the lawful appropriation. *Sunday v. Louisville & N.R. Co.*, 62 Fla. 395, 57 So. 351 (Fla. 1912).

Armadillo and Amicus argue that the Department is asking this Court to abandon precedent by reversing the decision of the Fourth District. To the contrary, the Department is asking this Court to reaffirm the bedrock principles of market value as set forth in the precedent of this Court. In discussing the

enhancement that can be used to offset severance damages in *Daniels v. State Road Dep't*, 170 So. 2d 846, 854 (Fla. 1964), this Court said, "[t]he question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood." (emphasis added)

In *Department of Transp. v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984), this Court applied the fair market standard, "[i]n holding that a property owner is entitled to full compensation based on the fair market value at the time of taking including increased value due to anticipation of the project...." (emphasis added) In *Jennings*, this Court held, "that any factor, including public fear, which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert's valuation opinion." (emphasis added) *Jennings*, 518 So. 2d at 899. Again, in *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 925 (Fla. 1995), this Court decided that "evidence of contamination is relevant to market valuation and is admissible upon an adequate factual predicate." (emphasis added)

The common theme of each of these cases is that compensation is based on the market value of the property. The only

exceptions to this market value principle in valuing land are the valuation of publicly-owned property, special use properties, or public service corporations. See *Dade County v. General Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972); *Division of Admin., Dep't of Transp. v. West Palm Beach Garden Club*, 352 So. 2d 1177, 1179-80 (Fla. 4th DCA 1977), *cert. denied*, 362 So. 2d 1057 (Fla. 1978)

Broward County v. Patel, 641 So. 2d 40 (Fla. 1994), is just this Court's extension of this market value concept to the partial taking situation in which a physical modification or "cure" can be considered in order to ameliorate the effects of the taking.

Armadillo argues that *Patel* did not address physical changes to the property in the after take situation, but was only discussing the variance issue. (AB: 13) Armadillo has missed the entire point of *Patel*. The trial judge in *Patel* had allowed the jury to consider the probability of obtaining variances in order to reconstruct the parking. The Fourth District held that this was improper. If the only issue in the case had been variances, a simple reversal and reinstatement of the verdict was in order. However, this Court did not approve of the method of compensation used by the trial court and jury and attempted to set out the appropriate method of determining

market value of the remainder. *Patel*, 641 So. 2d at 42.

The *Patel* trial court had calculated the severance damages by determining the value of the land before the taking, subtracting the value after the taking, and then further subtracting the alleged added value that could be created by improvements made possible by future variances. *Patel*, 641 So. 2d at 42. This Court made it explicitly clear that the only issue is determining the price a knowledgeable buyer and seller would negotiate for the remainder. The availability of a potential cure plan for the remainder is "relevant *only* to the extent it may have an impact upon fair market value as of the moment of taking, and not otherwise." *Id.* at 43. Determining market value is the bedrock of this Court's decision in *Patel*.

Contrary to the assertion of Armadillo that the Department argued *Patel* abandoned a constitutional element of compensation by disregarding damages resulting from property appropriated (AB: 10), *Patel* would require the costs of physical modifications and the nature of those physical modifications be factored into the knowledgeable buyer equation for assessing the market price of the remainder.

By requiring that the cost to construct a cure, the risk of obtaining any permits and variances needed to construct a cure, and the change in use of portions of the property to accommodate

the cure be considered as relevant factors in the equation which a knowledgeable buyer would consider in determining market price for the remaining land, this Court is just applying the basic principle set forth in *Jennings* and the other cases. Any factor which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert's valuation opinion. *Jennings*, 518 So. 2d at 895.

This Court laid out a good road map for assessing full compensation in the partial taking situation. In analyzing the market value of the remaining property, the appraiser must consider those same factors a knowledgeable buyer would consider:

1. Can this property be rezoned to make it more valuable, and what is the probability of success in rezoning?
2. Will this property require future physical modifications to restore its highest and best use?
3. What is the cost of these possible physical modifications?
4. Will a variance be required for constructing the modifications and what is the probability of obtaining a variance?
5. What risks are associated with obtaining permits and approvals to accomplish changes to the property?
6. What would be the value of the property with these future improvements?
7. What is the impact of physical modifications on the area used for constructing the modifications?

Upon consideration of these factors and any other factor affecting market value, the appraiser will determine the market value of the remaining property as of the date of taking.

Armadillo and Amicus are asking this Court to abandon this market value standard to adopt a hybrid, "sum of the parts standard." Armadillo and Amicus argue that the value of the property used to build any cure must be set out as a separate item of compensation. This Court should reject this approach and maintain the market value approach set forth in *Patel*. This separate compensation argument ignores the very language of this Court's directions in *Patel*. This Court said that "any loss to [condemnee] by virtue of the appropriation of other areas of their property to provide parking should be taken into account in determining fair market value on the day of the taking." *Patel*, 641 So. 2d at 44, n. 8 (emphasis added).

There is no obligation or duty of the owner to implement any cure for the property. The money awarded represents the injury sustained by the landowner. *Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985). There could be several cure scenarios that could better the property. So there is no dictation of a specific use of the remainder or dedication to the public of the land as Amicus argues in pages 7 to 10 of its brief.

Department of Transp. v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971), *disapproved in part*, *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), offers the perfect factual situation to examine

the *Patel* approach against the approach offered by *Armadillo* and *Amicus*. In *Byrd*, the widening of Highway A1A in Daytona Beach, Florida, required the taking of a strip of property from Gloria Byrd's motel that was used for parking. The cure proposed by the Department was to take out a shuffleboard court and use that area to construct replacement parking.

Under the *Patel* approach, the owner would first be paid the market value of the land and improvements taken, and then the severance damages would be determined by calculating the loss of market value in the remaining lands. In assessing the market value of the remainder motel as a functional unit, the appraiser would first determine if the remaining parking is sufficient for the highest and best use of a motel. If parking is not sufficient, the appraiser, as would any knowledgeable buyer of the remainder, would assess how this parking could be replaced on site, would determine the cost of making these physical modifications to the site, would assess the risk of obtaining permits for the site, and finally would determine if this remainder of the motel would sell for the same price without shuffleboard courts, with a smaller site, and with the number of parking spaces which could physically be accommodated on the remaining site. The appraiser would determine a market price for the remainder with all of these considerations factored into

the equation.

Severance damages would then be calculated as follows:

Market value of the whole property on date of valuation
Minus: Market value of land and improvements taken
Equals: Value of remainder as part of the whole
Minus: Market value of remainder on date of valuation
Equals: Severance damages

The concept of *Patel* is the jury must determine, with the assistance of expert testimony, the price that would be paid for the remainder by a knowledgeable buyer willing but not obliged to buy, to a knowledgeable owner willing but not obliged to sell, in light of all facts and circumstances that could affect the value of a piece of property. As this Court noted in *Patel*, “[o]bviously a knowledgeable buyer would offer less value for property that may require significant future expenses” *Patel*, 641 So. 2d at 43. If the owner is compensated the market value of the land and improvements taken and the loss of market value from what the owner could sell the remaining property on the open market, then the owner is made whole.

Armadillo and Amicus want this Court to require an additional line to the severance damage equation to pay for the land used to construct the cure and the improvements displaced by the cure, even though these factors should be part of the equation in determining the cure’s impact on market value. They are asking that severance

damages equal:

Market value of whole property on date of valuation
Minus: Market value of land and improvements taken
Equals: Value of remainder as part of whole
Minus: Market value of remainder on date of valuation
Equals: Severance damages
Plus: Value of land and improvements displaced by cure
Equals: compensation

If the owner sold the remainder for market value on the date of valuation after being paid market value for land and improvements taken and severance damages for the loss in value to the remainder, the Armadillo/Amicus formula would give the owner additional profit in his pocket over and above market value. This is not full compensation. It is full compensation plus. This is not making the owner whole. This is making the owner better off than before. This is not full compensation as provided by the Florida Constitution.

Mr. Gallion testified concerning the comparable rental properties used to value the remainder and noted the properties did not meet parking codes, did not have amenities similar to the arbor area, did not have landscaping, and were right next to the street. That's why he concluded the rent for the property would drop from \$13.85 per square foot to \$11.50 per square foot. (Tr. IV: 556) The loss of the arbor was factored into his market value analysis of the remaining property. To add a separate value for these improvements to the severance damage that results

from the loss in market value would constitute double compensation.

The reliance of Amicus and Armadillo on *State Dep't of Transp. v. Murray*, 670 So. 2d 977 (Fla. 1st DCA 1996), *quashed* 687 So. 2d 825 (Fla. 1997), to support their positions is also misplaced. The First District's opinion was *quashed* and this Court "declined to review the court's decision with respect to this issue [cost to cure proposal]." *Murray v. Dep't of Transp.*, 687 So. 2d 825, 826 (Fla. 1997). *Murray* provides no precedential value on the issues presented in this case.

The dollar amount of loss in market value of a remainder is an issue of fact and not a question of law. The Fourth District in this case and the First District in *Williams v. State Dep't of Transp.*, 579 So. 2d 226 (Fla. 1st DCA 1991), *disapproved in part*, *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), appear to conclude that severance damages must be found for specific items or the appraiser has misconceived the law. The courts have converted factual issues into legal issues.

In *Williams*, the Department's appraiser concluded severance damages were limited to the cost of the cure and the value of the land on which the cure was implemented. He specifically concluded there were no severance damages over and above these costs. *Williams*, 579 So. 2d at 228-29. The First District said

his conclusion was wrong as a matter of law because his opinion ignores "the fact that the new parking area would not provide as much space for parking," ignores "the fact that the new parking area would intrude into Williams' service area," ignores the impact of rear parking on customers, and ignores the fact the new parking area would "prevent further expansion of the business on that site." *Id.* at 229. Even if each of these factual conclusions were correct, how can the appellate court then reach the factual conclusion that this causes more loss of value than the \$72,000 already testified to by the appraiser? Not only did the court make the factual conclusion, it said this was a legal requirement. This approach collides with the opinions of the Second District in *State Road Dep't v. Falcon, Inc.*, 157 So. 2d 563 (Fla. 2d DCA 1963), and *Rochelle v. State Road Dep't*, 196 So. 2d 477 (Fla. 2d DCA 1967), by usurping the role of the jury.

In this case, the Fourth District's conclusion that no dollar damage for the arbor area was included in Mr. Gallion's \$308,400 severance damage is not only wrong as a matter of fact, (IB: 26-28, 29-31), but the court has also raised a factual issue to the level of a question of law. Whether or not the arbor area contributes extra value to the property is an issue of fact for the jury, based on the testimony. This issue was thoroughly pursued in cross-examination. The Fourth District's disagreement

with Mr. Gallion's conclusion, should not raise the issue to a misconception of law.

This Court has steadfastly maintained that compensation in an eminent domain case is by the Florida Constitution committed for final determination by the jury. *Behm v. Div. of Admin., State Dep't of Transp.*, 336 So. 2d 579, 582 (Fla. 1976). In *Behm*, this Court said that an expert's opinion is only as good as the reasons on which it is based. It is for that reason that the jury has the right to accept opinion testimony in whole or part, to reject expert opinion in whole or part, or to give the testimony the weight deemed appropriate, based on their own knowledge and experience.

It may be an error of law to fail to consider the required factors in assessing market value, but it is not a misconception of law to consider most of the appropriate factors and conclude as a matter of fact that no severance damages exist. What a remainder property will sell for in the market place is a question of fact, based on opinion testimony. It would be virtually impossible for this Court to spell out all the factors that an appraiser must consider in arriving at an opinion of value.

A court could always say, here is one other factor that should have been considered. *Byrd, Williams, and Armadillo*

raised this alleged omitted consideration to the level of competency of the testimony, rather than leaving the weight of such alleged omissions, if brought out on cross-examination, to the consideration of the jury. This was error.

Mr. Gallion used two appraisal approaches to value the remainder, the comparable sales approach and the income approach. (Tr. III: 417-420) He did not limit his analysis to the income approach. Armadillo might have been able to legitimately argue in its Answer Brief that Mr. Gallion limited his consideration of severance damage to lost parking, if most of counsel's cross-examination were ignored. The record does not support this position. Prior to the repeatedly cited 100% loss of parking answer, Mr. Gallion said he increased the capitalization rate in his income analysis of market value because "the quality of the center has been changed negatively," making it a riskier investment. (Tr. IV: 518) He testified that the loss of rent was due to all consequences, reduced parking, changed configuration, reduced setback, and lower elevation. (Tr. IV: 532-533) The loss of aesthetics was considered in his comparable sales approach also. (Tr. IV: 547, 556, 564-570) It is disingenuous to continue to assert that Mr. Gallion only said 100% of the rent reduction was attributable to loss of parking. (AB: 18) See also (Tr. IV: 543-548, 556-559).

Armadillo argues that Mr. Gallion "failed to recognize the significance of the appropriation of the Arbor Area." (AB: 19) This is nothing more than comment on the weight that should be given Mr. Gallion's opinion that the Arbor Area contributes no value to the real estate. (Tr. IV: 556-557) This certainly fails to evidence a misconception of law.

Armadillo argues at page 19 of the Answer Brief that Mr. Gallion employed improper methodology because he answered a hypothetical question that no severance damages would result if there were no reduction in rent. First, Armadillo ignores the actual answer to the question, that damages would include "possibly the cost to cure aspect of re-establishing the parking and the driveways." (Tr. IV: 500) In other words, if the physical modifications could completely cure the loss of use of the remainder, severance damages could be limited to the cost of implementing the cure. Second, there were severance damages over and above the cost to cure testified to by both appraisers. This is hypothetical argument, not based on the facts, with no legs to stand on.

The parties agreed at trial to set out the costs of cure as a separate item of damage on the verdict form. This did not follow this Court's direction in *Patel* that "the trial court must ensure that the finder of fact does not mistakenly assume that

their [future contingencies] cost or value can be considered apart from the effect on market value." *Patel*, 641 So. 2d at 43, n.7. Since the parties agreed, this cannot be a reason for reversal of the verdict. Because the Fourth District improperly held that Mr. Gallion's testimony should have been stricken, reversal of the Fourth District's decision does require reinstatement of the judgment.

Armadillo agrees that no contemporaneous objection was made before the admission of the Department's cure plan. (AB: 39) Armadillo concedes no objection to the cure plan was made during the testimony of any of the Department's engineer or architect witnesses, but was first made at the conclusion of Mr. Gallion's appraisal testimony. (AB: 39) Armadillo cites *Jackson v. State*, 451 So. 2d 458 (Fla. 1984), as precedent for waiving the contemporaneous objection rule.

This Court reiterated in *Jackson* that a contemporaneous objection is required to preserve an issue for appellate review. The objection must be both timely and sufficiently specific to apprise the trial judge of the putative error. *Id.* at 461. This Court noted that an objection need not always be made at the moment an examination enters impermissible areas, so long as the objection is made within several questions of the beginning of the impermissible line of questioning of that same witness. *Id.*

at 461. Nothing in *Jackson* supports Armadillo's proposition that the objection may come several witnesses later. This is not contemporaneous. Thus, the point is not preserved for review.

The Fourth District held and Armadillo continues to assert that this Court's decision in *Belvedere Development Corp. v. Dep't of Transp., Div. Of Admin.*, 476 So. 2d 649 (Fla. 1985), prevents the Department from admitting a cure plan inconsistent with the roadway construction plans in evidence. *Armadillo Partners, Inc. v. State Dep't of Transp.*, 780 So. 2d 234, 237 (Fla. 4th DCA 2001) (AB: 31-39) There is no disagreement with the fact that the construction plans admitted into evidence bind the Department as to the use to be made of the part taken. *Belvedere*, 476 So. 2d at 649. However, nothing in the plans or the testimony in this case would prevent relocation of driveways by the owner pursuant to a driveway connection permit change under Section 335.1825, Florida Statutes (2000).

The cure plan is a proposed future modification by the owner, not the Department. The Department's testimony concerning the cost to cure included money to relocate the driveways. (Tr. II: 265; III: 313-316) To address the risk of obtaining the revised driveway permit, the Department presented the testimony of Mr. Green to bind the Department in permitting the driveways

in the future. (Tr. II: 120) This eliminated all risk concerning whether the driveway connections meet statutes, ordinances, codes, and regulations. No contrary testimony was presented, and the jury was bound by this testimony.

CONCLUSION

The trial judge did not abuse her discretion in admitting the Department's cure plan or the Department's appraisal testimony by Mr. Gallion. The decision below should be quashed and the final judgment should be reinstated.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE COMPLIANCE

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

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Reply Brief of Petitioner, 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; and Mark Leavitt, Esquire, Wilson, Leavitt & Small, 437 N. Magnolia Avenue, Orlando, Florida 32801-1524, on November _____, 2001.

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