IN THE SUPREME COURT
STATE OF FLORIDA

SYSTEM COMPONENTS CORPORATION,

Petitioner,

v. CASE NO. SC08-1507

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA
CASE NO. 5D06-2864

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PRELIMINARY STATEMENT

System Components Corporation, the defendant/appellant below and petitioner here, will be referred to as System Components. The State of Florida, Department of Transportation, the petitioner/appellee below and respondent here, will be referred to as the Department.

Citations to the Record on Appeal will be indicated parenthetically as "R." with the appropriate volume and page number(s). Citations to the trial transcripts contained at Volumes 23 through 38 of the Record on Appeal will be indicated parenthetically as "R." with the appropriate volume number and court reporter's page number(s). Citations to System Components' initial brief on the merits will be indicated parenthetically as "IB." with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

System Components states that: "The Fifth District found that the Trial Court failed to follow binding precedent, but expressly disagreed with the Fourth District." (IB. ix) By way of clarification, after noting the trial court had undertaken to distinguish the Fourth DCA's decision in State, Department of Transportation v. Tire Centers, 895 So. 2d 1110 (Fla. 4th DCA 2005), the Fifth DCA stated: "We remind the trial court that it is bound to follow the decisional law of other district courts of appeal where there is no contrary precedent in this court." System Components Corp. v. Dep't of Transp., 985 So. 2d 687, 689 n. 3 (Fla. 5th DCA 2008).

The remainder of System Components' Statement of Case and Facts (IB. vii-ix) is accurate though incomplete. Accordingly, the Department submits the following additional information.

System Components' business appraiser, Paul Baumann, testified to a long term, post-taking, growth rate of 5% for the business. (R.32 1193)

Neither System Components' principal nor its personnel called to testify could identify any specific loss of sales or customers attributable to the relocation. (R.28 698; R.33 1313; R.35 1533-1534, 1546)

SUMMARY OF ARGUMENT

System Components urges this Court to adopt the reasoning and holding of the Fourth DCA's decision in Tire Centers contending initially that the Fifth DCA erred in not applying the parent tract concept to an award of business damages. The Department argues that the Fourth DCA misread controlling authority when it accepted the business owner's argument that Mulkey v. Division of Admin., State of Florida, 448 So. 2d 1062 (Fla. 2d DCA 1984), prohibited business damages from being mitigated by the use of land outside of the parent tract. There is no dispute that this is indeed the rule with regard to severance damages. However, a close reading of Mulkey reveals that this rule was not applied to exclude a proposed cure or mitigation of business damages based upon the relocation of the subject business to another site. Although the parent tract concept has been employed in making the site-specific threshold determination of entitlement to business damages, it is not applicable to the determination of the quantum of damages.

System Components next asserts that the Fifth DCA erred in concluding that System Components would receive a windfall if it was awarded the wipe-out value of its business as mandated by the Tire Centers decision. The Department argues that System Components never disavowed the fact that there was a $1 million spread between the total wipe-out value of its business and the relocation damages figures established by the jury. Instead,

System Components advances a number of contentions which do not specifically address the windfall issue.

First, System Components appears to be asserting that a condemning authority cannot be heard to complain about the business owner receiving a windfall because Section 73.071(3)(b), Florida Statutes, creates a windfall for the condemnor in those instances where business damages are not recoverable. This assertion is not viable because recovery of business damages under any set of circumstances is purely a matter of legislative grace and the fact that the condemning authority is not compelled by the Legislature to pay that which it was not constitutionally required to pay in the first place does not create a windfall for the condemning authority.

Second, System Components contends that the Fifth DCA's decision arbitrarily assumes the success of the relocated business because the business's value cannot reliably be determined after a few months at a new location. This line of argument lacks merit because it overlooks the fact that System Components' business appraiser employed an assumption that the business had successfully relocated when he testified to a post-taking, long term growth rate of 5%; because there is nothing in Section 73.071(3)(b) indicating that the four or five year standing requirement was intended to assure a reliable calculation of the pre-taking value of the business; and because System Components' business appraiser

evaluated the risks associated with the relocation of the business and did not indicate that his post-taking value of the business was unreliable due to the fact that the business had been in operation at the new location for only a few months.

Third, System Components suggests that there is an irreconcilable conflict between the Fifth DCA's upholding the admission of evidence of an off-site cure and its recognition that a business owner has no duty to mitigate. There is no conflict because the Fifth DCA's observation that a business owner may not have a duty to mitigate business damages by reestablishing the business off-site recognizes the well-settled principle that a cure is simply a measure of damages and the business owner is not obligated to actually put the proposed cure into effect.

Fourth, System Components asserts that the Fifth DCA's decision seems to indicate that a qualified business owner does not have to mitigate off-site, and can simply elect to receive the value of the business. Nothing in the Fifth DCA's decision can be read as an invitation to a business owner to forego relocation of his business in the hope that the jury would award him the wipe-out value of the business. A business owner employing that strategy would assume the risk that evidence of a cure based upon a relocation of the business would be admitted into evidence with the jury properly left to decide whether to award the cost to cure or the full value of the business depending upon its view of the reasonableness of

the proposed relocation.

Fifth, System Components claims that the Fifth DCA's decision created issues regarding the timing of trial and the appropriate evidence to determine business damages when a business relocates. These concerns have no bearing upon the proper construction of the statute with respect to the evidentiary issue in this case. Here the evidence found to have been properly admitted was based upon the actual damages arising from an accomplished relocation of the business prior to trial.

For its final point, System Components claims that the Tire Centers court exercised judicial restraint and left amendment of Section 73.071(3)(b), Florida Statutes to the Legislature. The Department argues that rather than avoid judicial amendment of Section 73.071(3)(b), Florida Statutes, the Fourth DCA impermissibly read a limitation on the admission of mitigation evidence into a statute that was silent on the issue. The Fourth DCA's interpretation not only failed to afford Section 73.071(3)(b) the requisite strict construction against an award of business damages, it also violated the well-established principle that courts are not at liberty to add words to a statute that were not placed there by the Legislature.

ARGUMENT

ISSUE

HAVING AFFORDED SECTION 73.071(3)(b), FLORIDA STATUTES, THE REQUISITE STRICT CONSTRUCTION AGAINST AN AWARD OF BUSINESS DAMAGES AND HAVING REFUSED TO READ AN EVIDENTIARY PROSCRIPTION INTO THE STATUTE WHERE NONE EXISTED, THE FIFTH DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE STATUTE DID NOT BAR THE ADMISSION OF EVIDENCE OF OFF-SITE MITIGATION OF BUSINESS DAMAGES.

[Restated by Respondent]

System Components urges this Court to reject the Fifth DCA's construction of Section 73.071(3)(b), Florida Statutes, and approve the interpretive result reached by the Fourth DCA in Tire Centers, because the Fifth DCA erred in not applying the parent tract concept to an award of business damages (IB. 6-9); because the Fifth DCA erred in concluding that System Components would receive a windfall if it was awarded the wipe-out value of its business as mandated by the Tire Centers decision (IB. 9-15); and because the Tire Centers court properly exercised judicial restraint and left amendment of Section 73.071(3)(b), Florida Statutes to the Legislature. (IB. 16-19) This Court should disapprove the Fourth DCA's Tire Centers decision because it is predicated upon an impermissible construction of Section 73.071(3)(b), Florida Statutes, and a misapprehension of relevant authority.

A. Standard Of Review And General Principles.

The Department agrees that disposition of this matter should be governed by a *de novo* standard of review.

Business damages are recoverable only where a partial taking occurs and are not required to be paid by either the Florida or United States Constitutions. Dep't of Transp. v. Rogers, 705 So. 2d 584, 587 (Fla. 5th DCA 1997); State, Dep't of Transp. v. Manoli, 645 So. 2d 1093, 1094 (Fla. 4th DCA 1994). The right to recover business damages did not exist at common law, is entirely a matter of legislative grace, and is a form of relief which a number of jurisdictions do not provide. Rogers, 705 So. 2d at 587; Manoli, 645 So. 2d at 1094; Matthews v. Division of Admin., Dep't of Transp., 324 So. 2d 664, 666 (Fla. 4th DCA 1975). In Florida, this legislative grant of a property right, which is set out in Section 73.071(3)(b), Florida Statutes, is strictly construed in favor of the state and against the claim of business damages. Tampa-Hillsborough County v. K.E. Morris Align., 444 So. 2d 926, 928-929 (Fla. 1983); Rogers, 705 So. 2d at 587; Manoli, 645 So. 2d at 1094.

Although severance damages and business damages are both described in Section 73.071(3)(b), Florida Statutes, and are interrelated concepts, they are not identical. Blockbuster Video v. State, Dep't of Transp., 714 So. 2d 1222, 1224 (Fla. 2d DCA 1998). Severance damages occur when there is a partial taking of

the landowner's property and consist of any damages to the remainder caused by the taking. § 73.071(3)(b), Fla. Stat. For example, they can include the cost of effecting physical changes or modifications in the premises necessitated by a taking. LeSuer v. State Road Dep't, 231 So. 2d 265, 268 (Fla. 1st DCA 1970). Unlike business damages, severance damages are an element of constitutionally mandated full compensation in an eminent domain proceeding and are not a statutory claim. Blockbuster Video, 714 So. 2d at 1224; Rogers, 705 So. 2d at 587.

While the Legislature did not define or otherwise elaborate upon the constituent elements of business damages, Matthews, 324 So. 2d at 666, they are generally viewed as being in the nature of lost profits attributable to the reduced profit-making capacity of the business caused by the taking of a portion of the realty or the improvements thereon. Manoli, 645 So. 2d at 1094. In cases where, as here, an established business is totally destroyed by a taking of the business's adjacent property, business damages may include lost profits, costs attached to moving and selling equipment, and loss of goodwill.[1] Mulkey, 448 So. 2d at 1066.

[1] The term goodwill has been defined as an intangible asset that cannot be separated from the tangible asset. Rogers, 705 So. 2d at 588, n.6. It represents the expectation of continued public patronage and inheres to the value of a going business. Id. Goodwill is an element responsible for the profit of a business and is all that goes with a business in excess of its mere capital and physical value. Id. The chief elements of goodwill are community of place and community of time, with patronage that attaches to the name and location. Id.

B. The Parent Tract Concept Is Inapplicable To A Determination Of The Quantum Of Business Damages Awarded To A Qualifying Business.

System Components contends that the Fourth DCA's construction of Section 73.071(3)(b), Florida Statutes, which would bar the admission of off-site mitigation evidence in the resolution of business damages claims, should be upheld because the court's decision properly restricts business damage issues to the parent tract. (IB. 6-9) System Components points to the Fourth DCA's reliance upon Mulkey and K.E. Morris Align., and suggests that the Tire Centers result was consistent with, if not mandated by, these decisions. System Components is mistaken.

The Fourth DCA misread controlling authority when it accepted the business owner's argument that Mulkey prohibited business damages from being mitigated by the use of land outside of the parent tract. Tire Centers, 895 So. 2d at 1113. Mulkey is the leading decision cited for the proposition that mitigation evidence based upon an off-site cure is not admissible. There is no dispute that this is indeed the rule with regard to severance damages. However, a close reading of Mulkey reveals that this rule was not applied to exclude a proposed cure or mitigation of business damages based upon the relocation of the subject business to another site.

In Mulkey, the landowners leased a portion of their property to Munford, Inc., who constructed and operated a convenience store on its leased portion of the property. Mulkey, 448 So. 2d at 1064. The remaining portion of the landowners' property remained vacant and unimproved except for a small area which contained a billboard which was not at issue in the case. Id. The partial taking included a portion of the landowners' unimproved property as well as a portion of Munford's improved leasehold. Id. The landowners sought full compensation for the actual taking and severance damages to the remainder. Id. Munford sought full compensation for damages to its leasehold and business damages. Id.

With respect to the severance damages claim, the Department's appraiser relied upon a cure which treated the vacant and leased property as one tract and provided for the restoration of lost parking on the vacant tract. Id. He based his opinion of severance damages upon the costs to effectuate this cure, $36,300. Id. The landowners' appraiser did not treat the vacant and improved parcels as one unified tract and was of the opinion that severance damages to the vacant lot amounted to $14,000, and to $52,060 for the leased portion. Mulkey, 448 So. 2d at 1065.

Turning next to Munford's business damages claim, its CPA examined Munford's profit and loss statements and concluded that Munford had incurred $186,994, in business damages. Id. The Department's CPA, in rebuttal, presented three projections of

business damages. Id. The first option envisioned relocation of parking on a newly paved parking area on the vacant lot and a resultant damage figure in the amount of $4,691. Id. The second option provided for relocation of the parking on the unimproved, unpaved vacant lot which yielded damages in the amount of $14,798. Id. The third, and most significant option for purposes of the instant case, involved **relocation of the store to another site** and the loss of profits for six months for a total damage figure in the amount of $12,856. Id.

The jury verdict came in on the Department's numbers and awarded $36,300, in severance damages and $14,798, in business damages. Id. On appeal, the landowners and Munford first claimed that the trial judge erred in allowing the jury to consider the Department's cost to cure method of calculating **severance damages** because the method treated the leased property and vacant property as one unit. Id.

Concerning this issue, the parties agreed to the application of the parent tract concept (physical contiguity, unity of ownership, and unity of use) to determine whether the leased premises and the vacant lot were a single tract for the purposes of computing severance damages. Id. They also agreed that the vacant lot and leased property shared physical contiguity and unity of ownership. Mulkey, 448 So. 2d at 1065-1066. However, the landowners and Munford contended there was no unity of use and the

Department argued the contrary looking to the fact that patrons of the convenience store had continuously parked in the vacant lot. Mulkey, 448 So. 2d at 1066. The court rejected the Department's position and vacated the severance damages award ruling:

> The evidence presented at trial only indicated that patrons of the convenience store occasionally parked at will on the vacant lot. There is no indication that the southerly lot was intended to be used as a parking lot for the convenience store or that Munford held a legally recognized interest in the vacant lot. Based on these facts, the northerly and southerly parcels were not a single parcel for purposes of an award of severance damages as a matter of law.

Id.

The second point on appeal consisted of Munford's claim that the trial court erred in allowing the jury to consider portions of the Department's expert business damages testimony because it was based upon a theory of mitigation which involved use of the vacant lot for parking by Munford. Id. Munford apparently did not challenge on appeal that portion of the Department's expert's testimony based upon the proposed relocation of the store to another site. Mulkey, 448 So. 2d at 1066-1067.

The court reversed the business damages award on the grounds that the expert's valuations were based upon Munford's use of a parcel it had no legal interest in and that restoration of the lost parking was in the nature of severance damages. Specifically, the court held:

> Two of the expert's three options were based on a theory of mitigation which involved relocation of the business's parking onto the vacant lot. While we agree that a condemnee has a duty to mitigate his losses, we find that the expert's valuations involved a misconception of the law, as the two valuations were based on the ability of Munford to use a specific parcel of land outside the property over which it held a leasehold interest. *See generally Nichols, supra,* [Section] 14.04 (cost of restoration to original condition not appropriate as mitigating factor of severance damages where restoration necessitates going outside the remaining portion of the tract). In addition, we note that the cost of effecting physical changes or modifications in the premises necessitated by a taking are in the nature of severance damages, not business damages. *LeSuer, supra,* at 267.

Mulkey, 448 So. 2d at 1067.

Munford did not challenge, and the court did not address, the admissibility of the Department's business damages rebuttal testimony which relied upon the proposed relocation of the affected business to another site. Inasmuch as this testimony was not challenged on appeal and was not addressed by the appellate court, its admission into evidence stands.[2] Moreover, the principles applied to the excluded cures do not preclude consideration of relocation to an entirely different site. The excluded cures involved the use of property which the business owner had no legal

[2] In light of this circumstance, System Components is mistaken in its assertion that the Fifth DCA's decision is "the first time in Florida's eminent domain law, factors away from and unrelated to the parent tract and the date of taking are admissible." (IB. 9)

interest in. The relocation option obviously contemplated the purchase or lease of an appropriate site. One simply does not relocate one's business to a piece of land without having a legal interest in the land that would permit such a relocation to take place.

The Fourth DCA's erroneous reading of Mulkey was in part driven by its mistaken belief that the parent tract concept barred the admission of off-site cure/mitigation evidence. The concept has been employed in making the threshold determination of entitlement to business damages. See Dep't of Transp. v. Sun Island Boats, 510 So. 2d 603, 605 (Fla. 3d DCA 1987). But see Blockbuster Video, 714 So. 2d at 1224 ("Parent tract" may be a useful concept when assessing constitutional damages at the time of taking, but we are unconvinced that there is any statutory requirement that a business's "parent tract" must remain unchanged for the five years preceding the taking to allow for business damages). However, the court's reference to the parent tract rule and its stated understanding that the taking of the specific property at issue is the sole focus of business damages under Section 73.071(3)(b)[3], indicates that it may have misconstrued the role the statutory requirement that a business be in existence on the remainder for a specified period plays in the disposition of business damages claims.

[3] Tire Centers, 895 So. 2d at 1113.

This requirement goes to the threshold issue of entitlement to business damages and not the determination of the quantum of damages. As this Court stated in K.E. Morris Align.:

> To assure the existence of a substantial business interest in the location as a prerequisite to an award of business damages, the legislature included the requirement of five years of operation at the location. The requirement of "more than 5 years' standing," seen in the light of the legislative purpose, obviously refers to the length of time the business has operated *at the location* where business damages are claimed to have been incurred due to condemnation of adjoining land. [Emphasis original]

K.E. Morris Align., 444 So. 2d at 929. This location-specific standing requirement does not preclude the admission of mitigation evidence based upon continued operation of the business at a new location.

Moreover, the evidentiary bar established by Tire Centers collides with that court's earlier decision in Matthews. Concerning the impact upon goodwill resulting from the total destruction of a business as opposed to the reduction of its profit-making capacity, the Matthews court stated:

> That distinction, i.e., the difference between merely reducing the profit-making capacity of a business and totally destroying it, is an important one. Where an established business is able to continue in operation at the identical location, albeit with diminished volume, it can be fairly argued that the "effect of the taking" does not seriously diminish customer goodwill or the value of the business equipment. On the other hand, common experience teaches us that where the "effect

> of the taking" is to totally destroy an established neighborhood-retail business, there is, or at least well may be, a substantial loss on the value of the business equipment and the value of customer goodwill. As is recognized in McCormick, Damages, [Section] 132, at 537 (1935), **the condemnee "loses good will ... to the extent that his patronage cannot be transferred to a new location.** In the case of retail stores and other businesses, where customers are dealt with directly, good will is to a substantial degree attached to the old place." [Emphasis added]

Matthews, 324 So. 2d at 667.

The above-emphasized language demonstrates that in cases where a partial taking has destroyed a business, the Fourth DCA contemplated that the condemning authority would have the opportunity to rebut the owner's claim based upon a total wipe-out of the business by showing that some, if not all, of the business's goodwill had been transferred to a new location. If a condemnee loses goodwill only to the extent that his patronage cannot be transferred to a new location, then it necessarily must follow that evidence establishing how much patronage may have been transferred to the new location should be admissible to enable the fact-finder to determine the proper quantum of damages attributable to the loss of goodwill. Contrary to Tire Centers, the Fourth DCA's prior decision in Matthews confirms that the introduction of off-site mitigation evidence to rebut a business damages claim is proper.

In addition to its misreading of Mulkey, the Fourth DCA

grounded its faulty construction of Section 73.071(3)(b) upon the fact that the statute was silent with regard to the mitigation of business damages by way of an off-site cure. The court reasoned:

> Mulkey clearly acknowledges a duty to mitigate. On the other hand, that duty only extends to mitigation of the remaining property. Eminent domain law focuses only on the land taken, notwithstanding that in a case such as this a substantial portion of lost goodwill may possibly be recaptured by way of a nearby relocation. As such, the taking of the specific property at issue is the sole focus of business damages under section 73.071(3)(b). **If the legislature had intended business damages to be subject to mitigation by an off-site cure, it could have easily done so.** Consequently, we find that the trial court did not err by excluding any consideration of business damages by way of an off-site cure.

Tire Centers, 895 So. 2d at 1113.

Similar reasoning was rejected by this Court in K.E. Morris Align. because it did not afford the business damages statute strict construction in favor of the State. The Court stated:

> But in reasoning that "[i]f the legislature had intended the requirement that the business be located on the adjacent land for five years, it could have used plain language to so provide," 414 So.2d at 300, the district court construed the statute as though there existed a presumption in favor of the claimant.

K.E. Morris Align., 444 So. 2d at 929.

Below, the trial judge correctly noted that Section 73.071(3)(b), Florida Statutes, does not address mitigation of business damages much less express any limitation in that regard.

(R.3 506) By, as the trial judge put it, "straining to find an unmentioned prohibition against mitigation by 'off-site' cure in a statute that plainly does not address mitigation," (R.3 508) the Fourth DCA, impermissibly construed the statute as though a presumption existed in favor of the business damages claimant. This result runs afoul of, and cannot be reconciled with, the rule of law set out in K.E. Morris Align. See also Hooper v. State Road Department, 105 So. 2d 515 (Fla. 2d DCA 1958)(Second DCA rejected trial court's construction of business damages statute which added a requirement that the owner as well as the affected business must have been at the subject location for the preceding five years).[4]

The Tire Centers result, can find no support in any express provision of Section 73.071(3)(b), Florida Statutes, this Court's decision in K.E. Morris Align., or the Second DCA's decision in Mulkey.

C. Application Of The Tire Centers Analysis To This Case Would Have Resulted In System Components Receiving A Windfall In Excess Of One Million Dollars.

In its discussion of the purpose underlying the business damages legislation, the Fourth DCA specifically acknowledged that

[4] The Fourth DCA's reading of an evidentiary bar into Section 73.071(3)(b) is also precluded by the well-established tenet of statutory construction that courts are not at liberty to add words to a statute that were not placed there by the Legislature. See Lawnwood Medical Center, Inc. v. Randall Seeger, M.D., 990 So. 2d 503, 512 (Fla. 2008).

"business damages are not intended to be a windfall for the business owner." Tire Centers, 895 So. 2d at 1112. But, as the Fifth DCA concluded, application of the Tire Centers analysis to the case at bar:

> would mean that a fully functioning business would receive a windfall of over a million dollars for damages it did not suffer. Rather than recover its business damages, it would recover something else, a form of compensation for the taking of part of its property measured by the full value of the business, as though it had ceased to exist. We conclude that this is not what section 73.071 says or intends.

System Components, 985 So. 2d at 689-690. While never disavowing the fact that there was indeed a $1 million spread between the total wipe-out value of its business and the relocation damages figures established by the jury, System Components ostensibly challenges the Fifth DCA's conclusion on the basis of a number of contentions which do not specifically address the windfall issue. (IB. 9-15)

Initially, System Components appears to be asserting that a condemning authority cannot be heard to complain about the business owner receiving a windfall because Section 73.071(3)(b), Florida Statutes, creates a windfall for the condemnor in some instances. After noting that business damages are not recoverable when there is a whole taking of the property or the business has not satisfied the four or five year standing requirement, System Components suggests that a windfall is created for the condemning authority at

the business owner's expense when business damages are not recoverable in either of these situations. (IB. 10-11)

This assertion is not viable. Recovery of business damages under any set of circumstances is purely a matter of legislative grace and is not tied to a vested property right grounded in a constitutional imperative. When business damages are not recoverable due to a whole taking of the property or the business's failure to satisfy the standing requirement, the fact that the condemning authority is not compelled by the Legislature to pay that which it was not constitutionally required to pay in the first place does not create a windfall for the condemning authority.

System Components next contends that the Fifth DCA's decision "arbitrarily assumes that a relocated business would in fact be successful in its new location because there exists no statutory framework or standards to measure same." (IB. 12) Building on this premise, System Components argues that:

> It is important to note that the legislature has provided a minimum amount of time for a business to operate before it qualifies to claim business damages. Depending upon the year of the taking, this requirement is either for four or five year's operation at its existing location to assure that the business's value can be reliably determined. The legislature's choice to enact no similar requirement for post taking damages analysis supports the Tire Centers' Court's ruling. Certainly, one cannot reliably determine a business's value after only a few months at a new location.

(IB. 13) This line of argument should be rejected for a number of reasons.

First, System Components has evidently overlooked the fact that its business appraiser, Paul Baumann, readily employed the assumption that the business would be viable in its new location when he testified to a long term growth rate of 5% after the taking. (R.32 1193) The validity of Mr. Baumann's apparent assumption in this regard was borne out by the fact that neither System Components' principal nor any of its personnel called to testify could identify a specific loss of sales or customers attributable to the relocation. (R.28 698; R.33 1313; R.35 1533-1534, 1546)

Second, there is nothing in the language of Section 73.071(3)(b), Florida Statutes, indicating that the statutory requirement for an established business of either four or five years standing was intended to assure a **reliable** calculation of the pre-taking value of the business. Instead, as this Court stated in K.E. Morris Align., the legislative purpose was to assure the existence of a substantial business interest in the location as a prerequisite to an award of business damages. K.E. Morris Align., 444 So. 2d at 929.

Third, System Components' business appraiser had no articulated difficulty in evaluating the risks associated with the relocation and concluding that the post-taking value of System Components was

$1,971,934. (R.32 1138-1141) At no point in his testimony did Mr. Baumann suggest that this number was not reliable because the business had been in operation at the new location for only a few months.

System Components further claims that "despite permitting evidence of an off-site cure, the Fifth District decision seems to follow prior case law in holding that a business owner has no duty to mitigate" and that these portions of the decision cannot be reconciled. (IB. 14) Actually, the Fifth DCA recognized that the Tire Centers court "may be correct that there is no 'duty to mitigate' business damages by reestablishing the business off-site when a partial taking destroy's a business's location." System Components, 985 So. 2d at 692. The court then provided the reconciliation System Components believes to be lacking when it went on to explain:

> But that is not the issue. The question presented here is what the statute intends to allow in terms of probable damages to the business that loss of the use of the condemned property may reasonably cause. **We are unable to find in section 73.071(3)(b), the "on-site" limitation identified by the *Tire Centers* court.** In calculating severance damages for the remainder of the partially taken property, it makes sense that any cure be limited to the parcel itself. But business damages are different. The statute speaks of "damage or destruction" to an established business attributable to the loss of use of the portion of the property taken. Although the statute does not require relocation or a damage calculation based on what damages would be if

> the business were to hypothetically relocate, if a business *does* elect to relocate and to continue in existence, the business can only recover its *damages* - - i.e. the amount of harm to its business resulting from the taking of its location. **Where, as here, the business has elected to continue in business in a different location, the business should be fully compensated for all damages done to the business caused by the taking, but it should not be compensated based on the fiction that it has been entirely lost.** [Bold emphasis added; footnote omitted]

System Components, 985 So. 2d at 692-693.

Additionally, the Fifth DCA's observation that a business owner may not have a duty to mitigate business damages by reestablishing the business off-site recognizes that a cure is a measure of damages and the business owner is not obligated to actually put the proposed cure into effect. This well-settled principle was clearly articulated in the context of severance damages by the Second DCA:

> The general rule for calculating severance damages is the "before-and-after" rule under which the severance damages are the difference between the value of the property before and after the taking....There is an exception to this general rule in cases where the injury to the remainder can be "cured" at a cost which is less than the severance damages calculated on a before-and-after basis....The cost-to-cure basis was simply a method for reducing the severance damages which the City would otherwise have to pay on a before-and-after basis. In either case, the money represented the injury sustained by the landowner. Even though the severance damages were estimated on a cost-to-cure basis, Canney [the landowner] was not obligated to use this money to tear down the City's part of the house and to put a new front on the remaining

structure. [Citations omitted]

Canney v. City of St. Petersburg, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985).

System Components is also of the opinion that the Fifth DCA's decision "seems to say that a qualified business owner does not have to mitigate off-site, and can simply elect to receive the full value of the business." (IB. 14) The Fifth DCA specifically said that: "Although the statute does not require relocation or a damage calculation based on what damages would be if the business were to hypothetically relocate, if a business *does* elect to relocate and to continue in existence, the business can only recover its *damages* - - i.e. the amount of harm to its business resulting from the taking of its location." [Emphasis original] System Components, 985 So. 2d at 692. Nothing in this statement can be read as an invitation to a business owner to forego relocation of his business in the hope that the jury would award him the wipe-out value of the business.

A business owner employing that strategy would assume the risk that evidence of a cure based upon a relocation of the business would be admitted into evidence with the jury properly left to decide whether to award the cost to cure or the full value of the business depending upon its view of the reasonableness of the proposed relocation. Admission of such evidence is not precluded by any provision of Section 73.071(3)(b), Florida Statutes, and

Mulkey serves as a constant reminder that relocation evidence of this sort has been admitted into evidence and its admission has gone unchallenged on appeal.

System Components next suggests that the Fifth DCA's decision creates issues regarding the timing of trial and the appropriate evidence to determine business damages when a business relocates, and then argues that:

> Clearly, none of this is contemplated nor covered by [Section] 73.071(3)(b), Fla. Stat.. Moreover, the Fifth District's opinion does not contemplate the potential failure of the business at its new location.

(IB. 15) These concerns have no bearing upon the construction of the statute with respect to the evidentiary issue in this case. Here the evidence found to have been properly admitted was based upon the actual damages arising from an accomplished relocation of the business.

Moreover, Section 73.071(3)(b), Florida Statutes', silence with respect to specific evidentiary issues and the timing of the business damages portion of a valuation proceeding does not militate in favor of reading a non-existent evidentiary bar into the statute. This same statutory silence exists with respect to evidentiary issues attending the determination of the full wipe-out value of the business, yet System Components has not been heard to contend that business damages evidence based upon that determination should be excluded.

Likewise, System Components' timing concerns based upon the absence of a good faith deposit for business damages are not well founded. In those instances where a business owner is paid the full wipe-out value of the business but still intends to relocate, operating funds at the new location remain a concern. In most, if not all, cases the Department will have acquired the property under the quick taking provisions of Chapter 74, Florida Statutes, which means that the business owner will have vacated the premises and relocated long before its business damages claim has been reduced to judgment.

Finally, there was no need for the Fifth DCA to have considered the potential failure of System Components' business at its new location. As pointed out above, System Components' business appraiser projected a 5% long term future growth rate at the new location and there was no evidence that any sales or customers had been lost as a result of the relocation. In situations where the business owner believes that the continued viability of the business at the proposed new location may be in doubt, evidence tending to establish that fact could be presented to the jury in support of a claim that the business owner should receive the wipe-out value of the business.

D. The Fifth DCA Avoided Judicial Amendment of Section 73.071(3)(b), Florida Statutes, Through Its Refusal To Read An Evidentiary Bar Into The Statute.

It is ironic that System Components claims the Department is advocating circumvention of the legislative process and judicial amendment of Section 73.071(3)(b), Florida Statutes, by virtue of its urging the Court to uphold the Fifth DCA's decision in this case. (IB. 16) The Fifth DCA refused to impose an evidentiary bar where none had been provided by the Legislature. The Tire Centers court, on the other hand, impermissibly read a limitation on the admission of mitigation evidence into a statute that was, and is, silent on the issue. See, Lawnwood Medical Center, Inc., 990 So. 2d at 512 (Courts are not at liberty to add words to a statute that were not placed there by the Legislature).[5]

That action is particularly egregious in light of the fact that the Legislature, in the eminent domain field, has demonstrated its ability to provide for an evidentiary bar when it desires to do so. In quick take proceedings, Section 74.081, Florida Statutes provides: "Neither the declaration of taking, nor the amount of the deposit, shall be admissible in evidence in any action." Section 73.071(3)(b), Florida Statutes, contains no such proscription

[5] Also, as previously argued, the Fourth DCA's interpretation of Section 73.071(3)(b) failed to afford the statute the requisite strict construction against an award of business damages contrary to the rule of law set out by this Court in K.E. Morris Align.

concerning evidence of the off-site cure/mitigation of business damages. If there is a complaint to be made about legislation by judicial fiat, it cannot properly be lodged against the Fifth DCA.

To bolster its claim, System Components refers to a portion of the Department's answer brief filed below and states that the Department has not chosen to seek legislative amendment or clarification of Section 73.071(3)(b) and "admits that it does not view its chances for legislation supporting its position as favorable." (IB. 16) System Components' characterization of the Department's argument is not entirely accurate. The Department's remarks were addressed to the 2006 Session in the following context:

> In support of its position System Components looks to an observation made by the Department's District Five General Counsel and Right-of-Way Manager (IB 13) and a February 2006 statement of the Department's Secretary quoted in a report issued by the Florida Office of Program Policy Analysis & Government Accountability (OPPAGA). (IB 14) System Components' reliance upon these statements is misplaced.
>
> System Components believes that these statements are some sort of "smoking gun" evidence that the Department has failed to introduce legislation or persuade the Legislature to limit or restrict business damages. (IB 13-14) System Components has evidently overlooked the fact that prior to the 2006 Session condemning authorities throughout the country were dealing with their respective states' legislative responses to the United Supreme Court's [sic] decision in Kelo v. City of New London, Conn., 545 U.S. 469

> (2005). It was highly unlikely that proposed legislation favorable to the Department would have been warmly received in the 2006 Session.

(Answer Brief, pp. 23-24)

Harkening back to prior argument, System Components concludes with the familiar assertion that the Fifth DCA's decision generates many unanswered questions regarding off-site mitigation which would require determinations by the courts that should best be left to the Legislature, to-wit: Would a business owner have to borrow money to effectuate a move? How far would a business owner have to move? What if a like property is not available? What is the proper analysis in terms of additional time to relocate and re-establish the business? (IB. 17-19)

These questions demonstrate that System Components is laboring under a fundamental misapprehension of the scope of the Fifth DCA's decision in this case. The evidence the Fifth DCA determined to have been properly admitted was derived from an accomplished relocation of System Components' business and not a cure based upon a potential relocation. Here, System Components did borrow money and that was factored into the business damages calculation. (R.32 1139-1141) Here, System Components had found a new site and the jury was informed that the site was 11 miles from the former location. (R. 730) Here, timing associated with the relocation and reestablishment of System Components' business was not an issue because the business had been moved and was operating by the time

of trial. (R.27 500-501)

But even if the Fifth DCA's decision is read to permit the introduction of mitigation evidence based upon a proposed rather than an actual relocation, the answers to System Components' questions still lie in expert testimony, not legislative enactments. For example, the proposed relocation cure admitted in Mulkey addressed System Components' timing concerns by providing Munford compensation for loss of profits for six months. Mulkey, 448 So. 2d at 1065. Evidently, the compensation for lost profits was intended to cover down time resulting from the move and reestablishment of the business.

Similarly, expert testimony would address the anticipated costs of borrowed capital and the effects a new debt structure would have on the viability of the business; the likelihood that an appropriate replacement property would be available; and the impact, if any, upon the business resulting from a change in location. Just as the jury is tasked with evaluating the reasonableness of a proposed on-site cure of business damages without any particular legislative guidance, it would be the ultimate arbiter of the reasonableness of a proposed business damages cure based upon the relocation of the business. If the jury determined that the business was destroyed by the taking and could not successfully be moved to a new location, then it could award the business owner compensation based upon the destruction of

the business.

No legislative action was required to enable the jury to evaluate the reasonableness of a proposed on-site cure and none is necessary to facilitate the jury's evaluation of a proposed off-site cure.

CONCLUSION

Here, the Fifth DCA refused to read an evidentiary bar into a statute where none had been provided by the Legislature. System Components has not, and indeed cannot, come forward with any compelling reason for rejecting the Fifth DCA's disposition of this case and endorsing the Fourth DCA's judicial amendment of Section 73.071(3)(b), Florida Statutes.

Accordingly, the Court should approve the Fifth DCA's decision in System Components and disapprove the Fourth DCA's decision in Tire Centers.

Respectfully submitted,

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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 November, 2008, to counsel for Petitioner, Marty Smith, Esquire, and Ann Melinda Craggs, Esquire, Bond, Arnett, Phelan, Smith & Craggs, P.A., Post Office Box 2405, Ocala, Florida 34478-2405.

_____
GREGORY G. COSTAS

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that a copy hereof has been furnished to the foregoing has been prepared using Courier New 12 point font.

_____
GREGORY G. COSTAS

IN THE SUPREME COURT
STATE OF FLORIDA

SYSTEM COMPONENTS CORPORATION,

Petitioner,

v. CASE NO. SC08-1507

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

APPENDIX TO
ANSWER BRIEF ON THE MERITS OF RESPONDENT,
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA
CASE NO. 5D06-2864

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INDEX TO APPENDIX

TAB