IN THE SUPREME COURT,
STATE OF FLORIDA

SYSTEM COMPONENTS CORPORATION,

Appellant,

v. CASE NO. SC08-1507

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

Appellee.
_____/

REPLY BRIEF OF APPELLANT, SYSTEM COMPONENTS CORPORATION

ON APPEAL FROM THE
FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE NO. 5D-06-2864

MARTY SMITH
FLA. BAR NO. 438952
ANN MELINDA CRAGGS
FLA. BAR NO. 0896837
BOND, ARNETT, PHELAN,
SMITH & CRAGGS, P.A.
P.O. BOX 2405
OCALA, FL 34478-2405
(352) 622-1188

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES, continued **PAGE**

STATUTES:

Florida:

OTHER AUTHORITIES:

ARGUMENT

I. FDOT SEEKS JUDICIAL MODIFICATION OF CONDEMNATION BUSINESS DAMAGES, EVEN THOUGH CONDEMNATION BUSINESS DAMAGES ARE CREATED AND DEFINED BY THE LEGISLATURE

The question presented by this case is the measure of damages for condemnation business damages, pursuant to §73.071(3)(b), Fla. Stat. (2003). System Components Corporation, the business owner, and FDOT, the condemnor, both recognize that business damages are established by the Florida Legislature. Matthews v. Division of Administration, State Department of Transportation, 324 So. 2d 664 (Fla. 4th DCA 1976). In this appeal, System Components agrees with the Fourth District Court of Appeal that the measure of these business damages should be controlled by the legislature. State Department of Transportation v. Tire Centers, LLC, 895 So. 2d 1110 (Fla. 4th DCA 2005). However, FDOT seeks to have this Court redefine the measure of damages as the Fifth District Court of Appeal did in the instant case below. System Components Corporation v. Department of Transportation, 985 So. 2d 687 (Fla. 5th DCA 2008).

As FDOT points out, not all States provide for business damages in condemnation cases, and there is no constitutional requirement that they do so. However, Florida has provided for the recovery of condemnation business damages since 1933 when Chapter 15927, Laws of Florida, was enacted. Florida

Eminent Domain Practice and Procedure, §9.46 (7th ed. 2008). By doing so, the Legislature has recognized that a business has value separate and apart from the value of its real property, and has provided protection to valuable business rights and interests. In fact, by protecting this property right, the Legislature has seen fit to allocate more of the burdens and costs associated with public works projects from the condemnee to the public who benefit from the project.

This appeal raises an additional "allocation" question–that is, the allocation of risks. Simply put, FDOT's position in the instant case places the risks associated with a business relocation wholly on the condemnee whose business can no longer remain at its current site because of an eminent domain taking. It is beyond dispute that location is a key factor in the success of a business. It is also without question that some types of businesses rely more on location than others.

Candidly, location is probably more important to a restaurant or a convenience store than it is a wholesale company like System Components. However, capital structure and overhead are likewise important to the success of a business. Both of these realities are adversely affected by a forced relocation.

Further, as set forth in Appellant's Initial Brief, the Fourth District Court of Appeal followed long-standing and well-established eminent domain law in holding that evidence of an off-site cure is inadmissible, and that the proper

measure of damages where a business could not continue its operations at the same location is the total value of the business, pursuant to §73.071(3)(b), Fla. Stat. (2003). Tire Centers, Id. Tire Centers followed this Court's ruling in Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, 444 So. 2d 926 (Fla. 1983), in applying the Parent Tract Rule. That is, eminent domain damages are determined by looking only at the parent tract, and not property apart from the parent tract. This concept applies to both business damage cases as well as severance damage cases.

More importantly, Tire Centers follows Mulkey v. Florida Department of Transportation, 448 So. 2d 1062 (Fla. 2nd DCA 1984) in holding that evidence of off-site cure is inadmissible and cannot be utilized to determine damages pursuant to §73.071(3)(b), Fla. Stat. (2003). FDOT's Answer Brief goes to great length to argue that Mulkey has been misinterpreted and misapplied. (Ans. Brief, p. 10-15). While FDOT attempts to distinguish Mulkey, FDOT can point to no case that accepts their argument that the Mulkey court would have allowed the third option of off-site cure to determine business damages. In effect, FDOT is arguing that while the Mulkey court disallowed evidence of a cure on adjacent property outside the control of the condemnee, they would have allowed evidence of a cure away

from the parent tract. This argument defies logic, and has not been accepted in the twenty plus years since Mulkey.

Despite FDOT's argument to the contrary, Mulkey has stood for the proposition that evidence of an off-site cure is inadmissible in a business damages condemnation case since 1984. In fact, the Florida Bar Eminent Domain manual relies on Mulkey in stating:

> The condemnor cannot present testimony that would require an owner to go outside the premises to effect the cure. An appraisal based on that premise should be stricken. Florida Eminent Domain Practice and Procedure, §9.24 (4th ed. 1988), currently included in §9.42 (7th ed. 2008).

Moreover, the Legislature amended the eminent domain statutes in 1999. Ch. 99-385, Laws of Florida. Specifically, the Legislature added provisions regarding presuit requirements for business damage claimants, added provisions to encourage presuit resolution, and prohibited the condemning authority from utilizing a total take to eliminate business damages and reduce its costs where the condemning authority did not actually need the entire tract. Id., See: Paul D. Bain, 1999 Amendments to Florida's Eminent Domain Statute, The Florida Bar Journal, Nov. 1999, at 68; See Also: Department of Transportation v. Fortune Federal Savings & Loan, 532 So. 2d 1267 (Fla. 1988).

It is equally important to note that the Legislature did not change the rule announced in Mulkey when it amended the Statute in 1999. The Legislature is presumed to know the state of the law when it amends a Statute, such that it can be reasonably presumed the legislature accepted Mulkey. 2A Sutherland Statutory Construction §45:12 (7th ed.); Preston v. Health Care and Retirement Corporation of America, 785 So. 2d 570, 572 (Fla. 4th DCA 2001). In fact, FDOT has not sought legislative change, even following Tire Centers.

Moreover, the 1999 Amendments to the business damage statutes provide further support that evidence of off-site cure is not a factor in determining business damages. Specifically, §73.015, Fla. Stat. was amended to require a business owner seeking business damages to provide "a good faith written offer as a prerequisite to maintaining a claim for business damages". Chapter 99-385, Laws of Florida. In fact, such written offer has to be provided to the condemning authority within 180 days of receiving notice from the condemning authority. Id. This places the initial burden of making an offer on the condemnee, not the condemnor.

More importantly, the business owner's offer "must include an explanation of the nature, extent and amount of such damage, and must be prepared by the owner, certified public accountant or a business damage expert familiar with the

nature of the operation of the owner's business." §73.015(2)(c)1., Fla. Stat. In addition, the business owner has to also provide the condemnor with copies of the owner's business records that substantiate the good faith offer to settle the business damage claim.

Then, the term "business records" is defined to include "but is not limited to, copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim". §73.015(2)(c)2., Fla. Stat. (emphasis supplied).

It is important to note that the information required by statute is the type of information utilized by business valuation experts and certified public accountants to determine the value of a business. It is not the type of information that would be utilized in determining a relocation or mitigation claim. That is, the required business records are all historical in nature, and not based on estimates or other information that would show mitigated or relocation damages.

If the legislature had intended business damages to be based on a potential off-site cure, they easily could have required the business owner to provide relocation information as part of its business damage claim submission. That is, the legislature could have easily required business owners to provide moving cost estimates, costs associated with renting an alternate facility, costs associated with buying similar property and so on. Of course, none of this was required by the Legislature within Chapter 73.

II. FDOT MISCONSTRUES EXPERT TESTIMONY IN ARGUING THAT SYSTEM COMPONENTS WOULD RECEIVE A WINDFALL

Next, FDOT contends that System Components would receive an unanticipated and unearned "windfall" if Tire Centers is followed. In fact, the Fifth District, in its decision below, states:

> Application of the analysis in Tire Centers would mean that a fully functioning business would receive a windfall of over a million dollars for damages it did not suffer. System Components, 985 So. 2d at 659 (Fla. 5th DCA 2008).

However, condemnation damages are a far cry from winning a lottery jackpot. Instead, System Components took on substantial risks, debt and expense in relocating its business, admittedly with the hope of preserving some of its business value.

FDOT contends that System Components will receive this great windfall, in part because it says that System Component's business damage expert testified to a consistent, long-term growth rate of five percent after the relocation. Unfortunately, this misconstrues the testimony, and contorts the meaning of "long-term growth rate."

Paul Bauman, C.P.A., testified on behalf of System Components as its business damage expert. Gary Gerson, C.P.A., testified on behalf of FDOT as its business damage expert. Both experts utilized the "Build Up Capital" method of calculating the value of System Components, and also utilized the same methodology in projecting the longer term impact of the relocation of the business. (V. 32, p. 1115: 19 through p. 1125: 1-13; p. 1138: 1 through p. 1141: 1-23; V. 36, p. 1606: 10 through p. 1610: 1-17). The Build Up Capital model combines a number of components in order to estimate a reasonable rate of return for a potential investor looking to invest in a specific business. (V. 32, p. 1115: 19 through p. 1125: 1-13; p. 1138: 1 through p. 1141: 1-23; V. 36, p. 1606: 10 through p. 1610: 1-17). From this Build Up Capital rate, the expert then can determine the value of the business. (V. 32, p. 1115: 19 through p. 1125: 1-13; p. 1138: 1 through p. 1141: 1-23; V. 36, p. 1606: 10 through p. 1610: 1-17).

Long term growth rate is one of the components of the Build Up Capital rate. (V. 32, p. 1124: 3-9, p. 1125: 22-24; V. 37, p. 1669: 15-17). However, long term growth rate is not specific to a particular business and instead is based on the expert's estimation of the long term rate of inflation and the long term population growth. (V. 32, p. 1122: 4 through p. 1125: 1-11). Thus, long term growth rate is not dependent upon the individual business's performance or projected performance, and is but one component of the business valuation model.

In the instant case, Paul Bauman concluded that the long term growth rate would be five percent, by considering the long term inflation rate and projected population growth in Florida. (V. 32, p. 1124: 3-9, p. 1125: 22-24). On the other hand, Gary Gerson used an inflation rate of 2.2%, but failed to include any long term population increase as part of his analysis. (V. 36, p. 1609: 13-16; V. 37, p. 1669: 15-17, p. 1671: 5-10).

FDOT misconstrues the significance of long term growth rate in contending that this means System Components would do just as well in the future. In fact, Paul Bauman specifically testified that the company would be more risky in the future because of the fact that it had to borrow substantial money in order to move. (V. 32, p. 1140: 1-4, p. 1214: 22-25, p. 1215: 1-8) Further, the jury verdict shows that System Components incurred expenses of almost $900,000.00+ in order to

relocate. (R. 2262-2265). In order to obtain this capital, the owners of System Components had to borrow the money, and place a second mortgage on their house to obtain the necessary financing. (V. 29, p. 812:3-13, p. 845:1-15).

As stated in System Component's Initial Brief, there is no good faith deposit for business damages. (I. Brief p.14). That is, a business such as System Components that chooses to relocate has to do so at its own expense, perhaps with some hope of recovery from its condemnation action. However, as illustrated in the instant case, after nearly four and one-half years, this case has yet to be resolved.

FDOT further argues that the condemnee should utilize money received from the good faith deposit for its real estate. However, this argument ignores the real world. For instance, in the instant case, System Components had a mortgage on its real property, such that its lender received all of the proceeds of the good faith deposit. (V. 28, p. 688: 9-22, V. 29, p. 805: 5-23). Moreover, condemned businesses who lease their business premises, and are also entitled to business damages pursuant to §73.071(3)(b), Fla. Stat. (2003), have the right to the real property deposit, and therefore would receive nothing.

III. NOTWITHSTANDING THE FIFTH DISTRICT COURT OF APPEAL'S RECOGNITION THAT THERE IS NO DUTY ON A CONDEMNEE TO MITIGATE OFF-SITE, FDOT SEEKS TO HAVE THIS COURT IMPOSE SUCH A DUTY AND IGNORES THE DIFFICULTIES THAT WILL BE CREATED BY SUCH A HOLDING.

In its decision below, the Fifth District Court of Appeal correctly recognized there is no duty to relocate on the part of a business owner who can no longer continue in business on the remainder of the condemned property. System Components, at 692 (Fla. 5th DCA 2008). While FDOT's Answer Brief recognizes this holding, FDOT then subtly tries to reimpose such a duty by arguing Tire Centers incorrectly imposed "an evidentiary bar" to preclude evidence of a potential off-site cure. Thus, FDOT contends they should be able to introduce evidence of off-site cure, regardless of whether the business owner chooses to relocate.

At the outset, this holding is not an issue in this appeal. Rather, the specific issue before this Court involves System Components, a business that chose to relocate, despite the significant expense and risks associated with doing so. Moreover, the fundamental issue in both Tire Centers and System Components was not whether an evidentiary bar prevented introduction of evidence of off-site cure; rather, the real issue is the appropriate measure of damages when a business can no longer continue on its existing location because of the condemnation.

More importantly, the position asserted by FDOT illustrates some of the difficulties that will be faced by future courts and future condemnees if FDOT's argument is accepted. Mitigation is a concept founded on fairness and equity, and is not without limitations. In fact, these limitations on mitigation show that it will be difficult to apply in condemnation cases.

For instance, there are limits on how far a Plaintiff must go to mitigate damages. "Damages which the Plaintiff might have avoided with reasonable effort without undue risk, expense, burden, or humiliation will be considered as either as not having been caused by the Defendant's wrong or as not being chargeable against the Defendant." 24 Williston on Contracts, Sec. 64:27, "Mitigation of Damages" (4th Edition), *citing* Restatement (2nd) of Contracts, Sec. 350(1).

Further, it is a question of fact as to what constitutes a "reasonable" effort, or for that matter, an undue risk or expense. Williston, Id. Williston further states that almost any risk of considerable loss to the injured person if she or he attempts to mitigate damages should be considered undue and "the expenditure must be small and the loss saved thereby certain and great in comparison" Williston, Id.

In 22 Am Jur 2nd Damages §347, this rule is stated slightly differently:

> The efforts required of an injured party to prevent or lessen damages may include a reasonable expenditure of money, which may be recovered as part of damages. The injured party is not, however, required to incur substantial expense: the doctrine does not apply if

> expense is so large as to make the requirement impracticable. If the injured person is without the necessary funds, he or she may be excused from making the expenditure. The Defendant is required to show that the injured party had the ability to pay the expenses of minimizing the damages.

These requirements for mitigation of damages have been applied in Florida cases, and in Federal cases applying Florida law. In Nyquist v. Randall, 819 Fed.2d 1014 (11th Cir. 1987), the Court considered the duty to mitigate damages as defined by §672.715, Fla. Stat. Specifically, in Nyquist, the Court held that buyers had met their duty to cover, and thus mitigated their damages, even though they did not purchase "cover" goods to meet their contractual needs. Specifically, the Court found that they were financially unable to do so, which eliminated their obligations to cover, and precluded a defense based upon failure to mitigate damages.

Thus, a plaintiff is not required to make costly repairs in order to prevent further damage from occurring, regardless of whether such repairs could be covered by insurance or whether the plaintiff is wealthy and could afford such repairs. Thompson v. Florida Drum Company, 651 So. 2d 180 (Fla. 1st DCA 1995). As the Court stated, "extraordinary" efforts on the part of a plaintiff to mitigate are not required. Id. at 182, *citing* Hilsenroth v. Kessler, 446 So. 2d 147 (Fla. 3rd DCA 1984).

CONCLUSION

All of these issues clearly point out that changes sought by FDOT are more suitable for legislation. Further, it is important to note that this case only involves one business, and the decision will affect all types of businesses throughout the State of Florida. In the legislative process, input can be taken from both condemning authorities and all types of business owners. Otherwise, business owners will be in a state of limbo for years to come, as Florida's courts wrestle with questions and difficulties created by offsite mitigation.

Respectfully Submitted,

Marty Smith, Esquire
Florida Bar No. 438952
Ann Melinda Craggs, Esquire
Florida Bar No. 0896837
BOND, ARNETT, PHELAN,
SMITH & CRAGGS, P.A.
Post Office Box 2405
Ocala, Florida 34478
(352) 622-1188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT has been furnished by regular U.S. Mail to Alexis M. Yarbrough and Gregory G. Costas, Esquire, 605 Suwannee Street, Tallahassee, Florida 32399-6544; and M. Stephen Turner, Esquire, and Robert J. Witmeyer, Esquire, 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301; this ___ day of December, 2008.

By: _____

Marty Smith, Esquire
Florida Bar No. 438952
Ann Melinda Craggs, Esquire
Florida Bar No. 0896837
BOND, ARNETT, PHELAN,
SMITH & CRAGGS, P.A.
Post Office Box 2405
Ocala, Florida 34478
(352) 622-1188

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that REPLY BRIEF OF APPELLANT has been prepared using Times New Roman 14 point font.

By: _____

Marty Smith, Esquire
Florida Bar No. 438952
Ann Melinda Craggs, Esquire
Florida Bar No. 0896837
BOND, ARNETT, PHELAN,
SMITH & CRAGGS, P.A.
Post Office Box 2405
Ocala, Florida 34478
(352) 622-1188