

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.

_____ /

INITIAL BRIEF OF PETITIONER
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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

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PRELIMINARY STATEMENT

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

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

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

STATEMENT OF THE CASE AND FACTS

This case began with the filing of an eminent domain petition by the Florida Department of Transportation on March 21, 1997, seeking to acquire land from Armadillo Partners, Inc. (R: 1-17) By order of taking on June 3, 1997, the Department acquired Parcel 122, consisting of 16,229 square feet of property in fee simple, and acquired Parcel 715, a 3,899 square foot temporary construction easement. (R: 145-153) Title to this property passed to the Department on June 19, 1997, when a deposit of \$866,725.00 was made into the court registry. (R: 203)

The Department's roadway project involved the widening of Griffin Road to six lanes and making other improvements to the Davie Road intersection. Parcel 122 included the taking of a nine foot wide strip along Davie Road to construct a seven foot sidewalk and retaining wall and the taking of a 46 foot wide strip along Griffin Road to build 36 feet of new pavement, a sidewalk, curb and gutter, and gravity wall.(Tr. II: 108-109) Parcel 715, the temporary construction easement, was acquired for the temporary use of the Department to tie in and harmonize the existing driveways and to allow room for the Department to build a retaining wall. (Tr. II: 111)

The trial was held in Broward County between July 12, 1999

and July 22, 1999 before Judge Patti Englander Henning. The issues tried before the jury were the value of land and improvements taken, the amount of cost to cure, the amount of severance damages, and value of lost fixtures. On July 22, 1999, the jury rendered a verdict of \$807,150 as compensation for Parcel 122 and \$10,300 for Parcel 715. (R: 504-507) Final judgment was entered September 24, 1999. (R: 541-546)

The property of Armadillo was a neighborhood shopping center, known as Armadillo Square, located at the corner of Griffin Road and Davie Road in the City of Davie. The shopping center had various office, retail, and restaurant tenants. (Tr. VI: 1019, 1028-1029)

Armadillo Square was on a 2.3 acre (100,972 sq. ft.) tract at the corner of Griffin and Davie Roads. (Tr. III: 382) The buildings contain 26,013 square feet (Tr. III: 397) with three driveways, 21 parking spaces in the rear, and 119 spaces in front. The taking eliminated 49 parking spaces in the front of the building. (Tr. II: 239-241) The real estate appraisers for both parties agreed that the center could not continue to operate and the buildings would lose all value as a result of the taking, if nothing were done to renovate the property. If nothing were done to the site, both appraisers agreed the value of the remaining property would be limited to the value of the

raw land, less the cost to demolish the buildings. (Tr. III: 358; VI: 942)

Since the taking destroyed most of the value of the center, both parties considered what physical alterations needed to be made to the remaining site for it to remain in operation and retain some market value. (Tr. III: 360, VI:944) The Department assembled a team of professionals - Messrs. Kerr, Tinter, Cartaya, Stacer, and Gallion - to assess the damage to the remainder and to develop a plan to minimize the damages. (Tr. II: 149, 168, 241-242, 269-272, V: 860) As John Hagan, Armadillos' appraisal witness testified, the crux of the assignment was to figure out what type of alterations needed to be made by the owner, so the property could continue to operate and provide maximum value to the remainder property. (Tr. VI: 899-900) The trial became a battle of "cure plans".

Prior to the Department beginning its testimony, several exhibits were admitted into evidence. (Tr. II: 101) Armadillo raised objections to the Department's Exhibits 6 and 8, which presented the Department's cure plan and alterations to the remaining property. The objection was based on the presumption that the plan was contingent on variances being obtained from the City of Davie to permit construction and the Department was unable to present evidence that those variances could be

obtained within a reasonable probability. (Tr. II: 101-103) However, Armadillo agreed the two exhibits could be used in connection with the testimony of Douglas Green, the Department's engineer witness. (Tr. II: 104)

Douglas Green, the Department's engineer witness, was presented as the first witness to introduce the right of way maps and construction plans, to describe the project, and to describe the project's impact on Armadillo's property. (Tr. II: 107-109, 114) A resolution had been introduced authorizing Mr. Green to bind the Department on design and construction issues, including driveway connections. See DOT Exhibit 1. (App. 4) Mr. Green testified the purpose of the temporary construction easement on the owner's land was to provide work room for the Department to tie in and harmonize existing driveways and provide room to build retaining walls. Mr. Green testified that the temporary construction easements the Department acquired were not of sufficient depth to allow the Department to grade the driveway reconnections to the desirable design slope. (Tr. II: 112-113)

Without objection, Mr. Green then presented the Department's cure plan through DOT Exhibit 6. (App. 6) DOT Exhibit 6 showed the new roadway and proposed site alterations on the remainder through computer graphics superimposed on an aerial photograph.

The exhibit showed the proposed driveway locations, parking re-arrangements, and landscaping. (Tr. II: 117) Mr. Green testified that the Department would permit the owner to relocate and construct the new driveways at the revised locations should the owner select the Department's cure plan for the remainder property. (Tr. II: 119-120) No motion was made by Armadillo to strike this testimony at its conclusion. (Tr. II: 136)

The next Department witness was Leigh Kerr, a planning consultant, who was presented to testify regarding the variances to the city code needed to implement the Department's cure plan and the probability of obtaining the necessary variances from the City of Davie. Before he took the stand, Armadillo's counsel stated he wanted to preserve an objection to his testimony "on the basis of his inability to establish a reasonable probability that the variances would be granted." (Tr. II: 136-137) Mr. Kerr testified that he had analyzed the history of variances granted by the City of Davie and presented two exhibits to summarize the record. (Tr. II: 141-146) DOT Exhibit 9, admitted without objection, presented a summary of variance actions concerning parking, landscaping, and setback ordinances from 1992 through 1997. This chart reflected that over 94% of those variances requests were granted. (Tr. II:144-145) DOT Exhibit 10, admitted without objection, gave a summary

of variance actions by the City of Davie specific to the Griffin Road project. (Tr. II: 146)

Mr. Kerr opined that the Department's cure plan depicted in DOT Exhibit 6 would require three variances from the City of Davie from parking, open space, and setback code regulations. (Tr. II: 149-153) Based on his discussions with city staff, the variance history, and analysis of the code, Mr. Kerr concluded, without any contemporaneous objection, that there was a reasonable probability the city would approve the plan and grant the needed variances. (Tr. II: 162) At the conclusion of his testimony, there was no motion to strike Mr. Kerr's testimony by Armadillo's counsel (Tr. II: 233)

The designer of the Department's plan, Alan Tinter, a transportation engineer, next explained the proposed plan for the remainder set forth in DOT Exhibit 6. He testified the taking eliminated 49 spaces, but the revisions proposed to the remainder site would put 76 spaces in front and leave the 21 spaces in the rear, for a total of 97 spaces. (Tr. II: 239-241) The parking increase was obtained by shifting the parking closer to the building, reducing the sidewalk from 25 feet wide to 16 feet in width to accommodate the new parking, moving a driveway, and correcting the driveway slope to the acceptable slope. (Tr. II: 262-264) Located on this area to be reconstructed is a

sidewalk with brick pavers, planted areas, landscaping, irrigation system, and two wooden arbor structures. (Tr. IV: 549-555)

Mr. Tinter agreed that if the owner constructed this plan, it could not fit within the existing temporary construction easements acquired by the Department, which were designed for the existing driveways. (Tr. II: 265) Mr. Tinter also advised the cost estimator for the cure plan to include the cost of driveway grading in his estimate. (Tr. II: 264-265) There was no motion to strike any of this testimony at its conclusion. (Tr. II: 295)

Without objection, Mario Cartaya, the Department's architect witness, then testified the Department's cure plan as depicted on DOT Exhibit 6 would cost \$62,620. The estimate included the cost to remove asphalt, lay new asphalt, add concrete curbing, plant four trees and ground cover, extend irrigation sprinklers, remove 20 light poles and replace only seven, demolish sidewalk, correct the drainage, and replace signs. (Tr. III: 312-316)

The appraisers for both parties took the same approach to the appraisal problem. Both experienced appraisers appraised the property as it was on July 19, 1997, appraised the property remaining if nothing were done after the take, both looked at ways to restore value to the remaining property through physical

alterations, and both estimated the value of the remaining property, assuming proposed cures to the remainder. (Tr. III: 354; VI: 899-900)

Mr. Gallion, the Department's appraiser, used both the comparable sales approach and income approach to value the property. (Tr. III: 371) Based on vacant land sales, he concluded the raw land had a market value of \$7.50/square foot. (Tr. III: 379) To arrive at the market value of the whole tract before the taking, he looked for sales of properties with buildings in the range of 12,000 - 50,000 square feet, since the subject building was approximately 26,000 square feet, and looked for sales of properties built between 1970 - 1990, since the subject building was built in 1986. (Tr. III: 339, 379)

After analyzing and comparing the sales of five comparable improved properties, Mr. Gallion found they reflected a range of \$60 - \$68 per square foot of building. Using \$65/square foot as his opinion of value for the 26,013 square foot building, he concluded the property was worth \$1,690,800 under a market approach in the before situation. (Tr. III: 387-398) One thing he noted in his comparisons of the sale properties to the subject was that it was the leasable area that was important, not the gross area. He did not consider the courtyard, breezeway, and meter rooms as part of his leasable area

calculation for the subject. (Tr. III: 389)

Mr. Gallion used the five comparable sales as comparable rental properties to derive a gross market rent of \$13.85/square foot for the building in the before situation. (Tr. III: 399) After deducting expenses from the gross income projected on market rent, net income was shown to be \$217,466, to which he applied a capitalization rate of 12%. Under this income approach, the market value of the property was calculated as \$1,812,200. (Tr. III: 399-402) In reconciling the market approach and income approach, Mr. Gallion concluded the property had a market value of \$1,750,000, excluding fixtures, on the date of taking. (Tr. III: 403)

Because Mr. Gallion concluded the remainder could not operate without substantial physical alterations, he testified the site was only worth the value of the raw land, less the cost of demolition, if nothing were done. (Tr. III: 355) As a result, Mr. Gallion analyzed the market value of the remainder under two different cure scenarios. (Tr. III: 360) He first looked at a cut and reface scenario, which would remove 7,000 square feet of the building and restore up to a total of 105 parking spaces. He concluded this scenario would reduce the value of the remainder by \$440,000, after spending \$200,000 to implement the cure. (Tr. III: 365-366) When compared with the

Department's cure plan of leaving the buildings with reduced parking, which resulted in \$380,000 in severance damages, he concluded the cut and reface plan would mitigate \$260,000 less in damages. (Tr. III: 366)

In trying to find comparable sale properties to value the remainder if the Department cure plan were implemented, Mr. Gallion found many properties up and down Davie Road with similar characteristics that failed to meet the parking code and rented in the range of \$8-\$12/square foot of building. He settled on a comparable sales analysis with three comparable sales of improved properties with similar circumstances. (Tr. III: 416-417) DOT Exhibit 21 was photos of these after value sales, showing the surrounding neighborhoods, roads, and features of the buildings. (Tr. III: 424) Using this sales approach, his analysis reflected the market value of the remainder dropped to \$50/square foot of building, compared to the before value of \$65/square foot. (Tr. III: 416-417)

The comparative rental properties in his after take study reflected a reduced rental income of \$11.50/square foot of building, compared to the before take rent of \$13.85/square foot. (Tr. III: 416) In doing the income calculations, Mr. Gallion said income would drop, but expenses would remain the same, and he raised his capitalization rate to 13%. (Tr. III:

418) He testified he raised the capitalization rate to reflect that the quality of the center had changed negatively and the risk of operation was higher. (Tr. IV: 518) The market approach resulted in the conclusion of value of \$1,300,700 for the cured remainder and the income approach resulted in an after value of \$1,287,000. His final conclusion of value for the remaining land was \$1,287,000, excluding fixtures. (Tr. III: 420)

Mr. Gallion's final conclusion of compensation was as follows:

Parcel 122:	Land Taken	\$121,700
	Improvements taken	32,900
	Severance damages	308,400
	Cost to cure	<u>164,300</u>
		\$627,300
	Parcel 715	<u>10,300</u>
	Total Compensation	\$637,600

(Tr. III: 347-349, IV: 532)

Mr. Gallion underwent an extensive cross-examination by Armadillo's counsel. (Tr. III: 426 - IV: 580) During the course of this testimony, Mr. Gallion testified the loss of rent is "due to all consequences that are involved in the acquisition and what's going to be left." (Tr. IV: 532-533) He detailed these factors as the reduced parking, the changed configuration, a building just a few feet off the sidewalk, and the increase in elevation of the road. He testified that the primary reason for

reduced rent for the remaining buildings is the lost parking.
(Tr. IV: 531-536)

Counsel for Armadillo pressed Mr. Gallion to say that his opinion included no compensation for the lost nine feet of sidewalk that would be replaced with parking in the Department's retrofit plan. (Tr. IV: 541-544, 556) Mr. Gallion did not agree. Mr. Gallion testified the compensation was included in the lost rents, which reduced the market value. (Tr. IV: 543-545) He stated there would be no added value and no added utility with regard to the lower rent if the sidewalk were left in place. (Tr. IV: 545)

Counsel then zeroed in on the arbor area which would be removed and replaced by a parking lot if the Department's plan were built by the owner. (Tr. IV: 556) Counsel asked Mr. Gallion to admit that he had not considered the removal of the arbor, along with irrigation, planter, and concrete pavers in his compensation. Again, Mr. Gallion disagreed:

A. I would demonstrate that my answer to that, by showing a picture of the rent comps in the immediate neighborhood that rent for twelve dollars a square foot with no landscaping, right on the street, no parking in front, no arbors, none of that and that was how I concluded the rent of eleven and a half dollars for this property, which will no longer have an arbor, no longer have the brick pavers or those landscaping strips, I believe on that basis, I have compensated for the loss of that in the proposed cure.

A.. . . As I said, I compared this property to the

properties -- look at the pictures, they're not very attractive and

that's how I judge the rent for this property and these are neighborhood properties.

(Tr. IV: 556)

Mr. Gallion concluded that the amenity of the arbor seating area, "if there is some value to it, I would say it would be business value, which is not part of the real estate." (Tr. IV: 557)

At the conclusion of Mr. Gallion's testimony, counsel for Armadillo moved to strike his testimony for the failure to appraise the nine foot strip of property, including the arbor, that would be reconfigured if the owner built the Department's cure. (Tr. IV: 591) He further moved to strike Mr. Gallion's testimony and Mr. Tinter's testimony because the proposed cure would be built off the temporary construction easement being taken by the Department. Counsel argued the land and improvements within the proposed reconstruction area must be specifically appraised and a value assigned to determine severance. (Tr. IV: 591-592) The motion was denied. (Tr. IV: 596)

Armadillo countered the Department's cure testimony with two attacks. Armadillo attacked the viability of the Department's plan and then presented an alternative plan. It first presented

the testimony of Michele Mellgren, planning consultant and former Director of Planning Services for the City of Davie, to opine that the Department's plan would not be approved by the City of Davie. (Tr. IV: 596-597) She testified that she reviewed 110 variance applications between 1994 and 1998 for the city, and she would not have approved the Department's plan because of the lost parking and reduced open space. (Tr. V: 635-642)

Armadillo presented the testimony of John Donaldson, a traffic and transportation engineer. (Tr. V: 779) Mr. Donaldson testified the Department's plan would not work because of the reduced parking, possible flooding problems, and sight distance problems with the driveway. (Tr. V: 779, 784, 792, 819-821) He presented the Armadillo cure plan which would cut off part of the building, reconfigure parking to obtain 99 spaces, and close one of the Griffin Road driveways. The Armadillo plan would not touch the arbor area. (Tr. V: 790-791, 823) He also testified the Department's proposed cure plan could not be constructed within the temporary construction easements. (Tr. V: 794)

In the middle of Mr. Donaldson's testimony, counsel for Armadillo moved to strike the testimony of all of the Department's witnesses concerning the Department's cure plan, since it "incorporates a cure on the property owner's property

to which the Department has no right whatsoever and has provided no compensation whatsoever in the context of this action.” (Tr. V: 805-806) This is the first motion to strike the Department’s cure plan. The motion was denied. (Tr. V: 808)

After Mr. Donaldson’s testimony, counsel for Armadillo again moved to strike the Department’s cure plan for not complying with ordinances and not presenting adequate testimony that reasonable probability exists that variances would be obtained. (Tr. VI: 880-881) The court deferred ruling, but later denied the motion. (Tr. VI: 881, VII: 1156)

Armadillo’s appraiser, John Hagan, testified the site had a market value of \$2,546,000 before the taking and \$1,325,000 after the taking. (Tr. VI: 903) In the before value analysis, he placed a value of \$10.00/square foot on the raw land. (Tr. VI: 908) He used three appraisal approaches, finding a market value of \$2,554,000 under the cost approach, \$2,474,000 using the income approach, and \$2,414,000 using the comparable sales approach. (Tr. VI: 901, 909, 914, 925) He reconciled the three approaches for a before take market value of \$2,450,000 for the land and buildings. (Tr. VI: 925)

Mr. Hagan also testified the remaining property could not operate without some physical retrofit. (Tr. VI: 942) If no cure were done, his opinion of severance damages was \$1,396,000.

(Tr. VI: 943) In testing the feasibility of the Armadillo cure plan, which cuts off 7,200 square feet of the building, he analyzed the market value of the remaining property as if reconfigured with this cure. (Tr. VI: 944) He applied the same square foot values, the same rental income rate, and the same capitalization rate in the valuation of the cured site as in the before valuation, applying these same rates to the reduced size of the land and building. (Tr. VI: 948) He also included in his comparison the value of fixtures within the areas of the building that would be razed in the Armadillo cure. (Tr. VI: 926) His conclusion of after value cured was \$1,750,000, from which the cost to cure of \$425,000 was subtracted, for an "as is" value of \$1,325,000 after the taking. (Tr. VI: 949-951)

Mr. Hagan's final conclusion of compensation was as follows:

Parcel 122:	Land taken	\$ 162,000
	Improvements taken	45,000
	Value of fixtures lost	96,600
	Cost to cure	425,000
	Severance damages	<u>493,000</u>
		\$1,221,600
Parcel 715:		<u>\$ 13,400</u>
Total Compensation		\$1,235,000

(Tr. VI: 952-953)

At the conclusion of all the testimony, Armadillo moved to strike the Department's cure plan as too speculative and because it could not be constructed within the temporary easement. (Tr.

VI: 1131-1137) The court found there was sufficient testimony on the reasonable probability for the jury to consider the proposed modification plan and denied the motions to strike. (Tr. VII: 1156) Armadillo renewed its motion to strike Mr. Gallion's testimony for ignoring certain factors and for not appraising land and improvements on the owner's remainder that would be used to implement the cure. The court again denied the motion. (Tr. VII: 1156-1175)

After closing arguments and jury instructions, the jury rendered the following verdict:

Parcel 122:	
Land and improvements taken	\$180,000
Severance damages	308,400
Costs to cure	318,750
Fixtures	-0-
Parcel 715:	<u>10,300</u>
Total	\$817,450

(Tr. VIII: 1301-1302) Judgment was entered on the verdict on September 24, 1999, (R: 541-546) from which Armadillo took an appeal to the Fourth District Court of Appeal.

On February 14, 2001, the Fourth District Court of Appeal reversed the final judgment on two grounds. The court held that Mr. Gallion's testimony should have been stricken because "no provision in his valuation was made for the loss of the Arbor Area itself", Mr. Gallion focused strictly on lost parking, and

"he did not even consider the value of the permanent improvements lost as a result of conversion of the Arbor Area, such as the sprinkler system, the decorative brick wall, and the landscaping on site." This was considered a misconception of law. *Armadillo Partners, Inc. v. State Dep't of Transp.*, 780 So. 2d 234, 236 (Fla. 4th DCA 2001) (App. 1-4)

The second ground for reversal was the trial court's error in admitting the Department's cure plan which is inconsistent with roadway construction plans in evidence. The court held that the Department cannot rely on a cure inconsistent with its own construction plans and whose implementation may be speculative at best and would require the use and appropriation of property to build the cure different from that taken under the plans. *Armadillo*, 780 So. 2d at 287. This Court has accepted jurisdiction to review this ruling.

SUMMARY OF ARGUMENT

The controlling precedent for the calculation of severance damages in an eminent domain trial in situations where site modifications or "cure" plans are considered in valuing the remainder property is set forth in this Court's decision in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994). This Court rejected the "cost to cure" method as a "substitution"

compensation method in *Patel*, and retained the "before and after" analysis to ascertain any change in market value of the overall remainder as a result of the taking. The Fourth District erred by adopting the "cost to cure" approach as a substitution for the before and after approach to assessing fair market value.

The Fourth District erred in concluding that the Department's appraisal testimony should have been stricken because the appraiser failed to consider and give separate value to an area of improvements (the arbor area) that would be displaced by the Department's proposed physical alterations to the remainder property to partially restore its utility and value. This Court held in *Patel* that potential future physical changes for a proposed cure should only be considered as one of many factors in calculating market value, and that the cost of a proposed cure should not be considered as a separate item of damage.

The Department's appraiser properly performed a before and after appraisal, giving full consideration to a couple of possible cure scenarios for the site. His after analysis did consider the loss of arbor area, loss of parking, and the loss of aesthetic character to the site. He did not believe the arbor area even contributed real estate value to the site. The

Fourth District disagreed and said his appraisal was a misapplication of the law for its failure to place a value on the arbor area, which would be displaced by parking in the Department's cure plan.

The appellate court's disagreement with the opinion of the Department's appraiser is an improper substitution of the court's judgment on the facts and an usurpation of the jury's role to weigh the evidence. Even if it were assumed the Department's appraiser failed to consider this one factor in his analysis, this failure does not go to his competency, but only to the weight of his testimony.

The Fourth District also erred in ruling that the Department's cure plan should be stricken because it could not be constructed within the area of land taken by the Department and because the Department failed to alter its construction plans to accommodate the cure plan. This Court held in *Patel* that neither party had a duty to mitigate or cure anything, because it is likely the cure may never even be constructed. The cure plan is just a hypothetical plan that a willing buyer may consider in assessing the market price for a remainder property.

To require the Department to implement its proposed cure plan for the remainder by constructing driveways at the

locations necessary to construct the Department's plan, shifts the entire burden of risk to the government. The Fourth District's ruling violates *Patel*, and could lead to the very fact scenario that this Court's decision was designed to avoid. If the cure plans cannot be considered unless the construction plans are altered to accommodate the Department's cure plan, the future contingency cure would never be considered by the jury, thereby increasing severance damages, but also giving the landowner a windfall if a cure is then implemented some time in the future.

The trial judge did not abuse her discretion in allowing the cure plan to be admitted into evidence and allowing the Department's appraiser to consider the cure plan in his appraisal. The decision of the Fourth District should be quashed and the final judgment should be reinstated.

ARGUMENT

ISSUE I

**THE APPELLATE COURT ERRED IN RESURRECTING
BYRD AND APPLYING IT TO THE FACTS
OF THIS CASE CONTRARY TO THE CONTROLLING**

PRECEDENT OF BROWARD COUNTY V. PATEL

Full compensation for taking private property for a public purpose when less than the entire property is taken, consists of both the value of the property taken and severance damages to the remainder caused by the taking. See §73.071(3)(a)(b), Fla. Stat. 2000; *City of Hollywood v. Jarkesy*, 343 So. 2d 886 (Fla. 4th DCA 1977). 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. *Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985). The controlling precedent for the calculation of severance damages in an eminent domain trial, using the "before and after" approach, is now set forth in this Court's decision in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994).

An exception to the "before and after" rule developed in Florida case law recognizes a "cost to cure" analysis when the injury to the remainder could be "cured" at a cost less than the severance damages. *Canney*, 466 So. 2d at 1196. This "cure" generally entails physical changes that could be made to the remaining property to lessen the impact of the taking on the property. The cost of these physical changes or modifications in the premises on the remainder has been recognized as

severance damages. *LeSuer v. State Road Dep't*, 231 So. 2d 265, 268 (Fla. 1st DCA 1970).

In its opinion in this case, the Fourth District adopted this "cost-to-cure" approach as a substitution for the "before and after" analysis of market value, citing *Mulkey v. Dep't of Transp.*, 448 So. 2d 1062, 1065 (Fla. 2nd DCA 1984). *Armadillo*, 780 So. at 235. This was a restatement of its conclusion in *Division of Admin., Dep't of Transp. v. Frenchman, Inc.*, 476 So. 2d 224, 227 (Fla. 4th DCA 1985), *rev. dismissed*, 495 So. 2d 750 (Fla. 1986).

However, this Court has already rejected the "cost to cure" method as a "substitution" compensation method in *Patel*, and retained the "before and after" analysis to ascertain any change in market value of the remainder as a result of the taking. *Patel*, 641 So. 2d at 43. This Court held that potential future physical changes for a proposed cure should only be considered as one of many factors in calculating market value, and that the cost of a proposed cure should not be considered as a separate item of damage.¹ This Court said:

Likewise, the value of future improvements that may be probable also will factor into the equation when a

¹In this case the parties agreed on a verdict form which did isolate the cost of cure as a separate damage line item on the verdict form. (Tr. VI: 1111)

knowledgeable buyer determines fair-market price. We stress that the availability of a future "cure" or "mitigation of damages"-or more accurately, the probability that lost value can be restored to the property by contingent future actions in spite of the taking - is relevant *only* to the extent it may have an impact upon fair market value as of the moment of the taking, and not otherwise.

Patel, 641 So. 2d at 43.

The Fourth District said the Department's appraiser, Mr. Gallion, should have been stricken because he did not consider all "factors necessary under the case law for severance damages." *Armadillo*, 780 So. 2d at 236. The court said the appraiser's testimony was based on a misconception of law, because he failed to account for the area converted from a sidewalk and arbor area to parking, failed to provide for this loss in his valuation, and failed to consider the value of the permanent improvements displaced if the cure were constructed. (App. 3) The court's analysis is wrong as a matter of law and is not supported by the evidence.

Since this case involves the application of principles of law to resolve the conflicts with this Court's decision in *Patel*, this standard of review is *de novo*. *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984).

The Fourth District supports its legal analysis with *Department of Transp. v. Byrd*, 254 So. 2d 836 (Fla. 1st DCA

1971), *disapproved in part in Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994); *Williams v. State, Dep't of Transp.*, 579 So. 2d 226 (Fla. 1st DCA 1991), *disapproved in part in Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994); and *State Dep't of Transp. v. Murray*, 670 So. 2d 977 (Fla. 1st DCA 1996), *quashed* 687 So. 2d 825 (Fla. 1997). The appellate court fails to acknowledge that *Patel* essentially overrules the district court in *Byrd*. There is only one issue in *Byrd*. The *Byrd* court held that the Department's appraiser was properly excluded because he was attempting a theoretical total cure of severance damages in saying lost parking could be replaced on portions of the property outside the taking line currently being used as a shuffleboard court for the motel. The court seemed to reject the cure plan because it would "require destruction" of property not taken. *Byrd*, 254 So. 2d at 837. Under this Court's decision in *Patel*, this testimony would be allowed, so long as the appraiser takes into account the cost of the cure and the appropriation of other areas of the property *in determining the fair market value of the remaining property*. That is the crux of *Patel*.

Unfortunately, the *Byrd* decision has been interpreted to require the condemning authority to include a separate item of

damage to pay for the land on the remainder which would be utilized to construct a cure, in addition to calculating any loss in value resulting from the taking. Under this approach, the condemning authority has to pay for land which may never be used for a cure and which remains in the ownership of the landowner. The Fourth District cites this as one of the misconceptions of law committed by the Department's appraiser, because he did not have a separate item of damage to compensate for improvements in the area which might be renovated to replace parking. This is error. If the severance damage analysis concludes that there is a loss of value to the remainder and then separate compensation is paid for improvements in the remainder, it results in double compensation.

The leading treatise on eminent domain cautions that the "cost to cure" analysis does not create individual rights to damage:

It must be cautioned that costs to cure while admissible for the purpose of establishing just compensation do not create individual rights to damage, but are merely evidence of the effect of the taking upon market value and therefore upon diminution in value of the remainder.

4A, Julius L. Sackman, *Nichols on Eminent Domain*, §14A.04[2], 14A-99 (rev. 3d ed. 2001).

This Court echoes this principle in *Patel*. There is no

question that the loss to an owner by virtue of appropriation of remaining property to implement a cure must be taken into consideration as it affects market value, but not as a separate item of damage. As this Court noted in footnote 8 to *Patel*:

...any loss to them by virtue of the appropriation of other areas of their property to provide for parking should be taken into account in determining fair market value on the day of the taking, along with associated reasonable costs.

Patel, 641 So. 2d at 44 n. 8. This Court repeats a number of times in its decision, that the only issue is market value, which is the price that would be paid by a knowledgeable buyer willing but not obliged to sell, in light of the probability of what future improvements may be constructed and in light of the probability variances may be obtained to make those improvements. *Patel*, 641 So. 2d at 43. The appraisal testimony of Mr. Gallion meets this *Patel* standard of evidence.

Mr. Gallion argued during his testimony that this loss is compensated when less attractive sales properties are used in the sales comparison approach and reduced rent and a higher capitalization rate are used in the income approach, resulting in reduced value for the property's remaining improvements. (Tr. IV: 541-546, 556.)

The appraisers for both parties tackled the appraisal problem in the same manner. They first determined the market

value of the property as of the date of value and the value of the property and improvements taken. They then looked at the market value of the property after the taking without considering any physical modifications that might be done to help restore its utility or value. Both appraisers concluded that the buildings lost all value and the value of the remaining property was limited to land value only, if no modifications were done. (Tr. III: 354-355, VI: 899-900)

Both appraisers then looked to see what physical modifications could be made to the site potentially to restore its use and possibly restore its value. Using the various cure plans, they valued the property in the after condition as if the modifications had been accomplished. Both appraisers appraised the market value of the property as a whole in the before situation and appraised the market value of the remainder as a whole. Both appraisers concluded that the remainder site could not be fully restored in value and the property would be reduced in market value with any of the cure plans that may be implemented. Both appraisers found severance damages in addition to the costs to cure the site. (Tr. III: 355-366; VI: 942-953)

Mr. Gallion examined two proposed cure plans for the site. One would entail cutting off 7,000 sq. ft. of building and

replacing some of the parking and the other plan would leave the buildings in place, but cut into the existing 25 foot sidewalk to add parking. Neither of these scenarios would bring the number of parking spaces back to the pre-take numbers. Mr. Gallion concluded that the cut and reface plan would result in \$440,000 in severance damage after spending \$200,000 to implement the cure. He felt the better approach to appraising the remainder was to restore as much of the parking lot as possible without losing building lease space. He concluded this would mitigate more potential severance damages. (Tr. III: 354-366)

The Fourth District found that no provision was made in Mr. Gallion's evaluation to account for the loss of the arbor area, nor to consider the value of the improvements lost if the sidewalk were cut back to accommodate more parking. Unlike the appraisers in *Byrd, Williams, and Murray*, Mr. Gallion did in fact consider the impact on market value of the lost parking and the loss of improvements that would occur if the cure were constructed on the remainder. The resulting assessment of market value is of the entire site, without attributing value to the different individual features of the property.

By its holding that Mr. Gallion's testimony should be stricken for misapplying the law, the Fourth District is

rejecting the Patel "before and after approach" to valuation and doing nothing more than disagreeing with Mr. Gallion's reasoning and usurping the jury's role of assessing the weight and credibility of the evidence.

In performing the before and after analysis, Mr. Gallion was careful to consider the physical and aesthetic characteristics of the property before and after the taking. As part of his comparable sales approach, in looking for sales of improved properties for his comparable sales, he took "into account the condition and style of the building." (Tr. III: 387) The leasable building area was the important comparative factor in his analysis. Even though the property had a courtyard and breezeway, he did not include them in his leasable area calculation for the subject property. (Tr. III: 389)

In looking for comparable sales of properties in the after situation, he found many properties up and down Davie Road that did not meet code, yet were operating. This told him there was a market for properties in similar situations to Armadillo in the after situation. His comparison sales considered the changes in the property and the aesthetic differences. Using three of these sales to make the comparison to the remainder, he reduced his value per square foot of building from \$65/sq.ft. to \$50/sq.ft. This reflected a reduced overall value to the

property under the sales comparison approach of \$1,300,700, down from the \$1,690,000 overall property valuation from sales compared in the before take condition. (Tr. III: 416-420)

His rental value in the income approach study of the remainder was reduced from \$13.85/sq.ft. of building to \$11.50/sq.ft., and he raised the capitalization rate from 12% to 13%. (Tr. III: 417-420) He raised the cap rate because "the quality of the center has been changed negatively." (Tr. IV: 518) Using this income approach, the overall value of the property dropped from to \$1,287,000 from \$1,812,200. (Tr. III: 420)

Based on the analysis using these two approaches, he concluded the value in the after situation, if cured, would be \$1,287,000, as compared to \$1,750,000 in the before situation.

A closer look at these overall values will reveal that the loss of improvements is reflected in his opinion. The fair market value of \$1,750,000 on the date of taking would be allocated \$757,290 to land (100,972 sq. ft. @ \$7.50/sq. ft.) and \$992,710 to buildings and site improvements. With an after value of \$1,287,000, value would be allocated \$635,572 to land (84,743 sq. ft. @ \$7.50/sq. ft.) and \$651,428 to buildings and site improvements. Deducting the value of improvements taken

from the allocation to buildings and site improvements in the after situation, show the remaining building and site improvements have lost \$308,382 in market value (\$992,710 - \$651,428 - \$32,900 improvements taken = \$308,382), even though the buildings would remain on the site. So the Fourth District is incorrect in stating the improvements lost in the cure have been ignored because a separate item of damage has not been allocated in his overall market value for the remainder.

The Fourth District says that no provision was made for loss of the arbor area. First of all, Mr. Gallion did not believe the arbor area contributed value to the real estate. This is apparent from the following questioning:

Q. And isn't it correct as well, Mr. Gallion, that the function of an arbor as a waiting area or additional seating area, that is a factor in connection with a piece of property that can be appraised as well?

A. I'm not so sure that does that, I think, part of one thing is the aesthetic thing, it doesn't provide any protection. If you were dining in the evening, there's no protection of it, with regards to this is a waiting area, waiting to have a drink and go inside or whatever, I'm not sure; and if there is some value to it, I would

say it would be business value, which is not a part of the real estate.

(Tr. IV: 556-557)

It is the appraiser's job to render opinions of value, based on the factors the appraiser feels contribute to the market

value of the property. The Fourth District obviously disagrees with this reasoning and believes the arbor area contributes value to the real estate. To equate this disagreement with Mr. Gallion's reasoning as a misconception of law is improperly substituting the court's judgment on the facts and usurping the fact finder's role. See *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976).

During cross-examination, Armadillo's counsel asked if it were not correct that Mr. Gallion had not taken into consideration the removal of the arbor, the irrigation system, and planter area. Mr. Gallion disagrees and demonstrates that he did consider these factors:

A. I would demonstrate that my answer to that, by showing a picture of the rent comps in the immediate neighborhood that rent for twelve dollars a square foot with no landscaping, right on the street, no parking in front, no arbors, none of that and that was how I concluded the rent of eleven and a half dollars for this property, which will no longer have an arbor, no longer have the brick pavers or those landscaping strips, I believe on that basis, I have compensated for the loss of that in the proposed cure.

Q. Mr. Gallion, isn't it correct that the aesthetic or the appearance of a property is a factor that can be appraised?

A. That's right, the more attractive as to a limit, the more rent. As I said, I compared this property to the properties -- look at the pictures, they're not very attractive and that's how I judge the rent for this property and these are neighborhood properties.

(Tr. IV: 555-556)

Mr. Gallion concludes his testimony concerning aesthetic damage with this observation:

We look at it from the economic standpoint and certainly the landscaping is an amenity that adds to the value of the property that translates into higher rent, to the rent.

Then you compare that with property that doesn't have that like amenity and is less attractive, you could suspect that the rent will be less; and so, so a combination of the less attractive property as a consequence is trying to get back as much parking and as consequently the rents were reduced. . . . the value is reduced.

(Tr. IV: 559)

In *Rochelle v. State Road Dep't*, 196 So. 2d 477, 479 (Fla. 2d DCA 1967), the court held the method of evaluation used by an appraiser expert witness is not a matter of relating to the competency of his testimony to be ruled upon by the trial judge unless the method used by the witness is so totally inadequate or improper that adoption of the method would require departing from all common sense and reason or would require adoption of an entirely new and totally unauthenticated formula in the field of appraising. Both appraisers in this case used the same method of determining fair market value and full compensation.

The Fourth District has improperly zeroed in on only one of many factors of an appraiser's evaluation relating to severance damages and found the appraiser's testimony and explanation on

cross-examination to be unacceptable, labeling the testimony a misapplication of law. The failure of an otherwise competent expert witness to consider one of numerous factors involved in assessing compensation goes not to his competency or the competency of the testimony, but only to the weight of the testimony. *State Road Dep't v. Falcon, Inc.*, 157 So. 2d 563, 566 (Fla. 2d DCA 1963) This is not an admissibility issue, but a jury issue concerning the weight given the testimony.

Mr. Gallion's testimony shows that he has considered all of the factors this Court required in *Patel*. The Fourth District may not have agreed with the explanations, but this does not render the testimony inadmissible. These issues are to be left for the consideration of the jury and not to be excluded as misapplications of law.

ISSUE II

**THE APPELLATE COURT ERRED IN HOLDING THAT
THE DEPARTMENT MUST CHANGE ITS CONSTRUCTION
PLANS TO IMPLEMENT A CURE PLAN BEFORE THE
PLAN
MAY BE ADMITTED FOR THE APPRAISER TO
CONSIDER
IN ASSESSING THE MARKET VALUE OF THE
REMAINDER**

In *Patel v. Broward County*, 613 So. 2d 582 (Fla. 4th DCA 1993), the Fourth District held that the government could not submit evidence that the severance damages may be cured or

lessened by alterations to the owner's property, when those alterations require the grant of a variance from the appropriate governmental entity having zoning jurisdiction over the property. This Court quashed that decision. *Broward County v. Patel*, 641 So. 2d (Fla. 1994).

Now the Fourth District has held that the government cannot submit evidence that severance damages may be lessened by alterations to the owner's property, unless the government alters its construction plans to construct driveways at the locations needed to implement the government's proposed cure for the property. The court even goes so far to say the Department's cure plan cannot be admitted if it requires "the use and appropriation of property" outside the land taken to effect the cure. *Armadillo*, 780 So. 2d at 237. (App. 3) This Fourth District's decision must be quashed also as inconsistent with *Patel*.

The court has misunderstood the fact that the cure plan will always be constructed by the owner on property owned by him and it will not be constructed on the Department's land. This decision also runs counter to this Court's holding that probable future improvements would be a factor considered by a knowledgeable buyer in determining fair-market price and a future "cure" is a relevant factor to be considered as an impact

upon fair market value. See *Patel*, 641 So. 2d at 43.

The Fourth District has entirely missed the point that a cure plan is a future contingency that may or may not ever be constructed. Proposed cures are just that - proposed or contingent future actions which an owner may take to restore utility and value to his remaining property. It is because the market place would consider these contingencies in deriving a price for the property in its after-take condition, that cure plans become a relevant consideration for the jury. This Court has confirmed that the knowledgeable buyer would consider the value of future improvements and consider the amount of these future contingent expenses in determining the fair market price. See *Patel*, 641 So. 2d at 43.

The proposed cures are only one of many factors a knowledgeable buyer would consider in calculating market price of the remainder property. Contrary to this Court's decision in *Patel*, the Fourth District is requiring the Department to change its construction plans to partially implement a proposed cure before the cure plan may even be admitted into evidence and considered by the appraiser or jury in assessing the market value of the remainder. This Court held in *Patel* that neither party had a duty to mitigate or cure anything, because it is possible, and perhaps probable, that the cure will never be

implemented or built. *Patel*, 641 So. 2d at 43 n. 6.

The key issue for consideration for the jury in this phase of the proceedings is the price that would be paid by a knowledgeable buyer, willing but not obliged to buy, to a knowledgeable owner, willing but not obliged to sell, in light of future contingent improvements that could be made to the property and in light of the probability these improvements can be permitted. If competent testimony is presented, it is for the jury to decide whether the proposed renovations can be properly permitted and constructed and what risk there is that the permits or any variances needed to obtain the permits, can or cannot be obtained.

In this case, there was no risk that the new driveway locations could not be permitted, because Mr. Green, the Department's engineer witness, bound the Department in his testimony, by saying the Department would allow the new driveway locations. (Tr:II:120) DOT Exhibit 1 was a resolution authorizing Mr. Green to so bind the Department by his testimony. (App. 4)

The Department's construction plans typically reconstruct the driveway connections at their current locations. (Tr. II: 111, 265) Both parties may propose remodeling plans for the site that require relocation or alteration to the location of

the current driveways. To require the government to implement its proposed cure plan for the remainder by constructing driveways at the locations necessary to construct the government's alterations, shifts the entire burden of risk to the government.

To construct driveway connections at a location to service the Department's proposed cure, a cure which may never be implemented, could destroy the landowner's current or proposed use of the property. Under the Fourth District's holding, if the owner's existing use is interrupted by the government changing the driveway locations to accommodate the government's proposed cure, the owner could allege severance damages would increase from loss of utility of the property. If both parties are bound by the construction plans and the road plans are changed to place driveways at a location different from what is needed to build the owner's proposed cure, then the owner's plan would be inadmissible and could never be considered by the appraisers or the jury as a mitigation of severance damages.

The Fourth District's decision could lead to the exact unfair scenario spelled out by this Court in *Patel*, that the future contingency cure would never be considered at all by the jury, thereby increasing the severance damages and possible jury award, but also giving the landowner a windfall if a cure is

then implemented by the owner at some point in the future.

This concept runs counter to this Court's opinion in *Patel*, which is based on the premise that future contingencies and the risks associated with those contingencies be factored into the analysis under a knowledgeable buyer standard. In agreeing on a market price, a knowledgeable buyer would take into account the risks that the building permits can or cannot be obtained, the risk that driveway permits can or cannot be obtained, or the risk that the construction costs may or may not be accurate. The appraisers must make this same analysis in placing a market value on the property.

This concept is recognized in the appraisal practice. In *Real Estate Valuation in Litigation*, the risk assessment is discussed:

An appraiser who uses the cost to cure method to estimate a proper adjustment must take care to include all the costs that will be incurred. The appraiser must remember that the property is being appraised in its uncured condition. Thus a purchaser of the property in the after situation will acquire it recognizing the need to cure the damage and incur the direct costs of correction. In addition, the typical purchaser will demand an incentive to purchase the damaged parcel. Many appraisers make the mistake of not considering this incentive, or *entrepreneur's profit*, in estimating a cost to cure adjustment.

J.D. Eaton, *Real Estate Valuation In Litigation*, 296 (2d ed. 1995)

The viability of a cure plan and the risk of obtaining government permits and approvals for the plan are questions of fact. Parties should be free to propose various plans of future construction that could lessen the impact of the taking on the property and the opposing parties should be allowed to rebut, contradict, or impeach that testimony. The Fourth District has unfairly tied the government's hands by requiring construction plans be altered to accommodate any proposed cure.

The Fourth District states the Department's cure plan was admitted over objection. *Armadillo*, 780 So. 2d at 236. It is true that Armadillo objected to the Department's cure plan, but not on the grounds that the Department had to construct the driveways as

proposed in the cure.² Prior to presentation of the Department's case, Armadillo objected to the testimony concerning the cure plan, because it did not believe the Department had met the initial burden of showing the necessary variances would be granted in order to obtain permits to do the construction. (Tr. II: 102-104)

However, Armadillo's counsel agreed the Department's engineering witness, Douglas Green, could expose the jury to the cure plan, (Tr. II: 104) and he so testified without objection (Tr. II: 116-120). Before the Department's land planner, Leigh Kerr, took the stand, there was an objection to his testimony on the grounds of inability to establish reasonable probability that variances would be granted (Tr. II: 136). Yet no objection was voiced to DOT Exhibits 9 and 10 reflecting six years of variance history and variances granted along the Griffin Road project. In particular, no contemporaneous objection was voiced when Mr. Kerr was asked and testified there was a reasonable probability the plan would approve the plan and variances (Tr. II: 162) and no motion to strike was made at the conclusion of his testimony. (Tr. II: 234) Alan Tinter, the Department's

² The Department did not raise the waiver of objection in its answer brief below, but did raise the issue in its motion for rehearing, since the court said the cure plan was admitted over objection.

transportation engineer, testified to development of the cure plan and the features of the plan without objection (Tr. II: 239-243) and without a motion to strike his testimony. (Tr. II: 292) Finally, Mario Cartaya, architect, testified to the cost of the Department's cure plan without objection and without a motion to strike. (Tr. III: 311-317)

The failure to object to admission of this testimony would not preserve the issue for review. The motions in limine and general objections before the testimony are not sufficient. The specific testimony must be objected to when asked at trial or the error is waived. *Parry v. Nationwide Mut. Fire Ins. Co.*, 407 So. 2d 936, 937 (Fla. 5th DCA 1981)

The first objection to the Department's cure plan on the grounds used by the Fourth District to reverse the judgment, was made by a motion to strike, but it was not made until after the Department had rested its case and Armadillo's fourth witness, John Donaldson, was testifying. (Tr. V: 806) The grounds stated in the motion to strike were that the Department's cure plan driveways could not be constructed within the temporary construction easements acquired by the Department. The motion was renewed at the end of the trial. (Tr. VI: 1136-1140) These objections were too late to preserve the point for review. See *Wicoma Inv. Co. v. Pridgeon*, 188 So. 597, 599 (Fla. 1939); *Platt*

v. Rowand, 45 So. 32, 34 (Fla. 1907).

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. The award of attorney's fees to Armadillo for the appeal to the Fourth District Court of Appeal should also be reversed, since the quashing of the appellate opinion would have the effect of affirming the judgment of the trial court. See § 73.131(2), Fla. Stat. (2000).

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Initial 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, on October 1, 2001.

Robert I. Scanlan

CERTIFICATE OF TYPEFACE COMPLIANCE

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

Robert I. Scanlan

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.

_____ /

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

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