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Systems Components Corp. V. Department of Transportation

SC08-1507

SYSTEMS COMPONENTS CORPORATION v. DEPARTMENT OF TRANSPORTATION

>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN.

ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION, AND
YOU SHALL BE HEARD.

GOD SAVE THIS UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO
THIS SESSION OF THE FLORIDA
SUPREME COURT.

WE WOULD LIKE TO ACKNOWLEDGE
SOME VISITORS WE HAVE HERE
TODAY.

LEADERSHIP BARTOW WITH FORMER
JUSTICE STEVE GRIMES.
WELCOME.

THE FIRST ARGUMENT TODAY, FIRST
CASE ON OUR CALENDAR IS SYSTEMS
COMPONENTS VERSUS DEPARTMENT OF
TRANSPORTATION.

ARE YOU READY TO PROCEED?

>> MAY IT PLEASE THE COURT.

MY NAME IS MARTY SMITH.

TOGETHER WITH MY PARTNER ANN
MELINDA CRAGGS, I REPRESENT
SYSTEMS COMPONENTS, THE APPELLANT
TODAY.

I ALSO HAVE WITH ME THE KIRKLANDS,
THE OWNERS OF SYSTEMS
COMPONENTS.

THIS CASES COMES BEFORE YOU ON
CONFLICT BETWEEN THE FOURTH
DISTRICT COURT OF APPEALS IN
TIRE CENTERS AND FIFTH DISTRICT
COURT OF APPEALS IN THE INSTANT
CASE.

>> NOW THE FOURTH DISTRICT
OPINION REALLY DOESN'T CONTAIN

A GREAT DEAL OF REASONING.
IT SEEMS TO SAY THE STATUTE
DOESN'T REALLY ADDRESS THIS, SO
THEREFORE, THIS IS THE WAY
WE'RE GOING TO APPROACH IT.
NOW, AND THE FIFTH DCA SEEMS TO
GO INTO A RATHER LENGTHY,
EXPLANATION AND REASONING.
WHY IS THE FIFTH DISTRICT
INCORRECT, AND THE WHAT IS
INHERENT IN FOURTH DISTRICT
OPINION OTHER THAN IT IS NOT
REALLY EXPLAINED SO WE'RE NOT
GOING TO GO THERE?

>> YOUR HONOR, THE FOURTH
DISTRICT COURT FOLLOWED
LONGSTANDING CASE LAW AND THE
STATUTE IN DETERMINING THAT THE
PARENT TRACT RULE APPLIED.
THAT IS IN EMINENT DOMAIN
ACTION ONLY THE PARENT TRACT IS
LOOKED AT.
FOR INSTANCE IF ITS IS REAL
ESTATE DAMAGES, LANDOWNER CAN'T
PRESENT EVIDENCE OR CAN'T ARGUE
IT WOULD COST ME SUCH AND SUCH
TO YOU BUY REPLACEMENT
PROPERTY.
ONLY THE PARENT TRACT IS AT ISSUE.
THAT ALSO APPLIES TO BUSINESS
DAMAGES.

>> WHAT CASE SAID THAT APPLIED
TO BUSINESS DAMAGES OTHER THAN
THE TIRE CASE FROM THE FOURTH
DISTRICT?
BECAUSE IT SEEMS TO ME
HISTORICALLY THAT HAS APPLIED
TO SEVERANCE DAMAGES.
WHICH IS DIFFERENT DAMAGES FROM
BUSINESS DAMAGES.

>> MORRIS CASE IS FOUNDATION OF
THAT AND THAT IS WHAT THE
FOURTH DISTRICT RELIED UPON.
THE FIFTH DISTRICT COURT OF
APPEAL LOOKED AT SYSTEM
COMPONENTS, IN PART BASED ITS
DECISION ON THEIR DETERMINATION
AS THEY STATED, THAT SYSTEM
COMPONENTS WOULD OTHERWISE
RECEIVE A WINDFALL OF OVER ONE
MILLION DOLLARS.
AND OF COURSE WHEN YOU HEAR
THE WORD WINDFALL, IT IS
INFLAMMATORY TERM.

WE SEE IT A LOT OF TIME IN
OPINION PAGES IN THE NEWSPAPER
TALKING ABOUT VARIOUS
LEGISLATION, VARIOUS MATTERS.
IS DEFINED AS BEING
UNANTICIPATE BENEFIT USUALLY IN
THE FORM OF A PROFIT, NOT
CAUSES BY THE RECIPIENT.
AND IT IS EASY TO ATTACH THAT
LABEL AS THE FIFTH DISTRICT
COURT DID HERE AND UTILIZE THAT
AS ITS RATIONALE.

BUT THE FOURTH DISTRICT COURT
ACTUALLY I THINK SAID IT BETTER
WHEN THEY SAID, ADDRESSING THIS
POTENTIAL WINDFALL,
NOTWITHSTANDING THAT A
SUBSTANTIAL PORTION OF LOST
GOODWILL MAY POSSIBLY BE
RECAPTURED.

IN OTHER WORDS, BUSINESSES ARE
NOW BEING RELOCATED SOMEWHERE
DISTANT FROM WHERE THEY WERE
AND DIFFICULT TO TELL WHETHER
THERE ARE THERE ARE GOING TO BE
SUCCESSFULL OR NOT.

>> DO YOU PERCEIVE THE FIFTH
DCA OPINION AS NOT ALLOWING FOR
THAT AS THOUGH IT IS GOING TO
BE BASED ON SPECULATION OR FACT?

>> YOUR HONOR, THE DIFFICULTY
WITH THAT REALLY COMES FROM I
THINK THE FACT THAT THE
STATUTORY SCHEME FOR EMINENT
MAIN FOCUSES ONLY ON THE DATE
OF TAKING.

AND EVIDENCE PAST THE DATE OF
TAKING IS NOT ADMISSIBLE.
NOW, CERTAIN EVIDENCE MAY BE AS
FAR AS ACTUAL COSTS BUT IN
CALCULATING BUSINESS DAMAGES IN
THE SYSTEM COMPONENTS CASE, THE
EXPERTS WERE LIMITED TO THEIR
ANALYSIS AS OF THAT DATE OF
TAKING.

IN FACT IN SYSTEM COMPONENTS,
SYSTEM COMPONENTS BUSINESS
DAMAGE EXPERT TESTIFIED THAT
THE ACTUAL RESULTS AFTER 2004,
AFTER THE DATE OF TAKING WERE
WORSE THAN ANTICIPATED.
THAT WOULD HAVE IN FACT LED
TO A HIGHER AMOUNT OF DAMAGES.

>> ON THE DAY OF --

>> TO ME, THAT'S SORT OF BRINGING UP A DIFFERENT ISSUE WHICH IS, WHETHER THE DAMAGES THAT YOU WERE AWARDED WERE INADEQUATE BECAUSE YOU COULDN'T SHOW SOMETHING SUBSEQUENT. SEE MY PROBLEM WITH YOUR POSITION IS ONE THAT REALLY STEMS FROM, WHETHER YOU'RE LOOKING AT CONTRACTUAL DAMAGES OR ALMOST ANY OTHER KIND OF A LAWSUIT, THE IDEA OF MITIGATING A LOSS IS SORT OF INHERENT IN OUR JURISPRUDENCE AND PREVENTING A DOUBLE RECOVERY. AND TO ME THE LOGIC OF THE FIFTH DISTRICT OPINION IS THAT TO ACCEPT YOUR POSITION AND THE FOURTH DISTRICTS IT WOULD BE, THE DAMAGES WILL BE EXACTLY THE WHETHER THE, WHETHER THE BUSINESS IS ENTIRELY DESTROYED AND NOT ABLE TO START UP, OR WHETHER IT IS ABLE TO START UP. SO THAT'S, ISN'T THAT THE FIRST HURDLE THAT WE HAVE TO GET OVER, WHICH IS WE'RE CREATING A FALSE CONSTRUCT BY NOT ALLOWING THE JURY TO KNOW THAT THE RELOCATION TOOK PLACE? WHETHER THE DAMAGES THEN ARE, YOU KNOW, YOU DON'T KNOW YOUR BUSINESS IS GOING TO BE SUCCESSFUL AND ALL THOSE OTHER THINGS. THOSE GO INTO WHAT I THINK JUSTICE LEWIS IS SAYING, SOMETHING SPECULATIVE VERSUS PROBABLE AND I'M VERY SYMPATHETIC TO THAT. BUT THE NOTION THAT THE JURY HEARS NOTHING ABOUT THE FACT THAT THE BUSINESS RELOCATED SEEMS CONTRARY TO ALL OF OUR OTHER JURISPRUDENCE IN AREAS WHERE WE ARE LOOKING AT TRYING TO MAKE A PLAINTIFF WHOLE.

>> JUSTICE PARIENTE, YOU'RE CORRECT THAT OTHER CONTRACTUAL MATTERS AND THROUGHOUT OUR JURISPRUDENCE THERE IS THIS NOTION OF MITIGATION FOUND IN THE COMMON LAW WHICH IS REALLY BASIS OR WAS THE BASIS OF DOT'S

ARGUMENT HERE.

A COUPLE OF DISTINCT DIFFERENCES IN THAT MITIGATION AND THE MITIGATION IN THIS PARTICULAR CASE.

ONE AS THAT MITIGATION AS I INDICATED BEFORE IS NOT TIED TO ARTIFICIAL DEADLINE OR ARTIFICIAL DATE SUCH AS DAVID OF TAKING.

MORE IMPORTANTLY COURTS APPLIED MITIGATION IN CONTRACTS AND ELSEWHERE, SAID CONCEPT OF REASONABLENESS AND IT IS NOT REASONABLE FOR THE PARTY AGAINST WHO MITIGATION IS BEING APPLIED, IN THIS CASE, SYSTEM COMPONENTS, TO HAVE TO DO THINGS LIKE BORROW MONEY. HERE SYSTEMS COMPONENTS HAD TO BORROW HUNDREDS OF THOUSANDS OF DOLLARS TO MAKE THAT MOVE.

>> THAT IS ACTUAL COST, RIGHT? THAT IS MATTER OF COMPUTATION, NOT CONCEPT.

>> IN PART PERHAPS SO BUT THIS CASE HAS BEEN GOING ON FOR SOME 4 1/2 YEARS WITHOUT ULTIMATE RESOLUTION.

IN ORDER TO OBTAIN THAT MONEY, THEY HAD TO RESTRUCTURE THEIR BUSINESS.

THEY HAD TO, THE OWNERS HAD TO TAKE OUT A SECOND MORTGAGE ON THEIR HOUSE.

>> WELL, AGAIN THAT IS MATTER OF COMPUTATION.

BUT IT SEEMS TO ME IN THIS CASE THERE IS LOST PROFITS, AND THEN THAT AMOUNT IS COMPUTED. THEN YOU LOOK TO SEE WHAT WAS ACTUALLY GAINED.

IT WOULD SEEM TO BE A WINDFALL IF YOU SAY YOU'RE ENTITLED TO EXPECTATION OF PROFITS BUT YET YOU ACTUALLY REALIZED THOSE PROFITS BY CONTINUING TO OPERATE, WHY WOULD WE AWARD DAMAGES WHEN THOSE DAMAGES ARE NOT IN FACT REALIZED?

>> I THINK THIS COURT HAS SAID BEFORE IN SOME CASES THAT WE ADDED IN OUR SUPPLEMENTAL BRIEF OR NOTICE OF SUPPLEMENTAL

AUTHORITY, THAT, IF
LEGISLATION CREATES A WINDFALL
IT IS THE DUTY OF LEGISLATURE TO
FIX IT.

>> ISN'T THE POINT HERE WHEN
THE LEGISLATURE USES THE WORD
DAMAGES, THAT HAS TO BE USED
IN THE CONTEXT THAT THE CONCEPT
OF DAMAGES HAS BEEN USED
PREVIOUSLY.

I MEAN THE LEGISLATURE
UNDERSTANDS THE TERM, AND THE
CONTEXT IN WHICH IT HAS
PREVIOUSLY BEEN USED AND
DAMAGES, MITIGATION, IS PART OF
THE WHOLE CONCEPT.

I MEAN YOU'VE GOT TO LOOK
AT MITIGATION.

AGAIN THERE ARE LIMITATIONS ON
WHAT PEOPLE ARE REQUIRED TO DO
IN MITIGATION, BUT YOU DON'T
HAVE A CONCEPT OF DAMAGES THAT
IS DIVORCED FROM THE CONCEPT OF
MITIGATION.

>> YOUR HONOR, THEY USE THE
TERM BOTH DAMAGES, DAMAGES AND
OR DESTROY A BUSINESS.

IN THIS CASE THE BUSINESS AT
THAT LOCATION WAS IN FACT --

>> BUT YOU WENT, TALKED BEFORE
ABOUT THE DAMAGES AS A TAKING.

AS I UNDERSTAND THIS, ONCE THE
PROPERTY WAS TAKEN, YOUR CLIENT
ENTERED INTO A LEASE WITH THE
DEPARTMENT OF TRANSPORTATION TO
IN FACT STAY AT THE LOCATION
WHERE THE BUSINESS WAS
ORIGINALLY, IS THAT CORRECT?

>> FOR A FEW MONTHS THEY DID,
YOUR HONOR. THEN --

>> THEN THEY RENTED SOME SPACE?

>> CORRECT, YOUR HONOR.

>> THEN THEY BUILT, FOUND SOME
PROPERTY, AND BUILT A NEW
BUILDING, CORRECT?

>> RIGHT.

>> AND THEN, THE DAMAGES THAT
WERE ACTUALLY GIVEN WERE
INCLUDED, LOSS OF VALUE DUE TO
ALTERED CAPITAL STRUCTURE,
WHICH IS THEIR INCREASED DEBT
YOU TALKED ABOUT EARLIER,
CORRECT?

>> CORRECT.

>> THEY WERE ALSO GIVEN MOVING EXPENSES AND RENT THAT THEY HAD TO PAY DURING THIS TIME, IS THAT CORRECT?

>> THEY WERE GIVEN SOME FACTOR THAT RENT, CORRECT.

>> AND THEY HAD, GOT THE COST OF BUYING REPLACEMENT PROPERTY?

>> YOUR HONOR, THEY DID NOT GET THE COST OF REPLACEMENT PROPERTY.

WHAT THEY GOT WAS THE GOOD FAITH DEPOSIT.

WE SETTLED ON VALUE OF THEIR REAL ESTATE.

MAY I SAY THAT WAS NOT SUFFICIENT FOR THEM TO BUY ADDITIONAL PROPERTY BECAUSE OF THE ECONOMY IN THE MARKET.

>> WAS THE ADDITIONAL AMOUNTS PRESENTED DURING TRIAL?

>> NO, YOUR HONOR, IT WAS NOT.

>> AND WAS THERE SOME REASON IT WAS NOT?

>> BECAUSE OF THE FACT THAT IT'S AGAIN LIMITED TO THE PARENT TRACT TO THOSE, THE DAMAGES FOR THE REAL ESTATE WE COULD NOT PRESENT THE COST OF THE REPLACEMENT PROPERTY.

IN FACT, THEY HAD --

>> YOU DIDN'T GET THE COST OF BUILDING, YOUR NEW BUILDING?

>> THE COST OF BUILDING THE NEW BUILDING WAS RELATED BACK TO THE OLD BUILDING THAT THEY HAD. THE DEPARTMENT TRANSPORTATION ACTUALLY CRITICIZED THE CHOICES THEY MADE IN THAT TO POINT SAYING ARGUING AT TRIAL THEY SHOULD HAVE ARGUE, SHOULD HAVE LITIGATED WITH THE DEVELOPER OVER THE RESTRICTIVE COVENANTS IN ORDER TO BUILD IT CHEAPER. BUT IT HAD TO BE FACTORED.

>> DID THEY GET SOME DAMAGES FOR THEIR LOSS OF PRODUCTIVITY?

>> THAT WAS FACTORED INTO THE ANALYSIS.

AGAIN BASED ON PROJECTIONS AS OF THE DATE OF TAKING BUT DID NOT TAKE INTO ACCOUNT THE ACTUAL LOSSES THAT OCCURRED.

>> SO MY QUESTION TO YOU IS,

OTHER THAN WANTING THE VALUE OF A BUSINESS THAT WOULD HAVE BEEN DESTROYED BUT WAS NOT DESTROYED, WHAT OTHER ELEMENT OF DAMAGES THAT YOUR CLIENT SUFFERED THAT WAS NOT INCLUDED IN THE AWARD THAT WAS GIVEN? IF WE'RE TAKING OFF THE TABLE YOUR, YOUR IDEA THAT HE SHOULD HAVE BEEN GIVEN DAMAGES FOR A DESTROYED BUILDING, A DESTROYED BUSINESS THAT WAS NOT DESTROYED, WHAT OTHER ELEMENT WAS NOT INCLUDED?

>> YOUR HONOR, BECAUSE OF THE CONSTRAINTS ON THIS BEING AS OF THE DATE OF TAKING I CAN'T REALLY SAY THAT THERE WERE ANY OTHER DAMAGES THAT THEY DID NOT GET.

>> LET'S LOOK AT IT PAST THAT. BECAUSE CERTAINLY, IF WE LOOK AT THIS AS TO WHAT YOU ACTUALLY DO AFTER THAT DATE, THEN IT SEEMS TO ME THAT WE MAY BE BACK TO THE QUESTION OF WHAT IS THE EVIDENCE THAT'S PERMISSIBLE IF THAT'S GOING TO BE THE RULE OF LAW.

SO WHAT IS IT THAT IS AFTER THAT DATE?

YOU KEEP ANSWERING WITH REFERENCE TO THAT DATE.

WERE YOU PRECLUDED AND DENIED THEN RECOVERY FOR THINGS THAT HAPPENED AFTER THAT DATE?

>> WE, THIS, ONE OF THE INTERESTING THINGS WITH THIS CASE AND ONE OF THE PROBLEMS THAT WE FORESEE WITH THE FIFTH DISTRICT COURT OF APPEAL DECISION OF COURSE IS THERE WERE NO JURY INSTRUCTIONS GOING INTO THIS CASE.

WE HAD THE TRIAL COURT SORT OF PRONOUNCEMENTS AT HEARINGS WHAT GOING TO BE ALLOWED AND WHAT WAS NOT GOING TO BE ALLOWED.

>> CERTAINLY YOU HAD INTERROGATORY VERDICT TO TWO THINGS, CORRECT, AND THAT SORT OF PROTECTED GENERALLY WHAT YOUR CONCERNS WERE?

>> CORRECT.

IT WAS BUSINESS DAMAGES AS OF DATE OF TAKING AND THAT'S WHAT WE WERE TOLD.

THE STATUTE ACTUALLY SAYS THAT. IN 73.0712, IT SAYS THAT DAMAGES WILL BE ASSESSED AS OF THE, EXCUSE ME, THE EARLIER OF THE DATE TITLE TRANSFERS OR THE DATE OF TRIAL.

WELL UNDER THE QUICK TAKE PROCEDURES UNDER CHAPTER 74, TITLE TRANSFERS WITH GOOD FAITH DEPOSIT BEING MADE WHICH TOOK PLACE TWO YEARS BEFORE THE TRIAL.

>> BUT ISN'T THIS, I GUESS WE FEEL LIKE WE'RE GOING AROUND IN CIRCLES BECAUSE WE WANT, I THINK EVERYBODY WANTS FAIRNESS, AT LEAST I HOPE THAT'S WHAT WE WANT IN A COURT OF JUSTICING JUSTICE.

IT MIGHT BE AN UNJUST APPLICATION OF THE STATUTE IF YOU WERE, IF THERE IS THIS ARTIFICIAL DATE AND DAMAGES THAT YOU TRULY SUFFERED THAT YOU CAN NOT PRESENT.

THEN WE'VE CREATED ANOTHER ARTIFICIAL CONSTRUCT.

I GO BACK TO THE FIRST QUESTION I ASKED ABOUT WHAT IS WRONG WITH THE IDEA THAT IF YOUR BUSINESS ISN'T DESTROYED, THAT IS NOT THE SOLE MEASURE OF YOUR DAMAGES?

AND I'M NOT SURE, THE ONLY THING YOU'VE RESPONDED, WELL, BECAUSE THEY SET UP THIS ARTIFICIAL DATE OF THE DATE OF TAKING, WE CAN'T FULLY DEVELOP OUR DAMAGES.

BUT THEN YOU SAID, WELL, IT IS NOT IN THE RECORD WHAT THOSE OTHER DAMAGES WOULD BE, SO, THAT'S NOT, THAT'S A CONCERN THAT WE MIGHT HAVE HAVE ADDRESS BUT HOW DO WE, WE CAN'T FIX THAT IN CASE IF THERE IS NO OTHER INDICATION IN THE RECORD ABOUT WHAT YOU DIDN'T RECOVER THAT YOU SHOULD HAVE RECOVERED.

>> YOUR HONOR, SPECIFICALLY LET ME RESPOND TO WHAT ELSE THERE WOULD BE OR WHAT ELSE WOULD HAVE TO BE CONSIDERED OR SHOULD BE CONSIDERED AND IN FACT I SUBMIT, IF THIS COURT ADOPTS A FIFTH DISTRICT COURT OF APPEAL DECISION IN THIS CASE, THESE ARE GOING TO BE ISSUES THAT ARE GOING TO BE HAVE TO BE DECIDED BY FUTURE COURTS AS THIS OVERALL CONCEPT OF MITIGATION IS DEVELOPED.

ONE OF THOSE IS AGAIN REASONABLENESS.

REASONABLENESS OF THE MOVE.

REASONABLENESS OF THE RELOCATION.

REASONABLENESS OF THE COST.

THIS WILL QUESTION OF BORED MONEY.

HOW MUCH MONEY DO THEY HAVE TO BORROW AND UNDER WHAT CIRCUMSTANCES.

WHAT HAPPENS AS IT WAS HERE, SYSTEM COMPONENTS BANKER SUGGESTED VERY STRONGLY THEY ADD ON SOME ADDITIONAL ELEMENTS TO THEIR BUSINESS.

AGAIN --

>> SO ARE YOU SUGGESTING THEN THAT, THAT WHAT THEY HAD TO DO IN THIS CASE WAS NOT REASONABLE?

I MEAN THEY WENT OUT AND FOUND A NEW LOCATION, REBUILT THE BUILDING, AND ARE YOU SAYING THAT THEY COULD HAVE PUT ON EVIDENCE THAT THIS WAS NOT REASONABLE AND THIS WAS BEYOND WHAT SHOULD HAVE HAD TO DO TO MITIGATE?

>> YOUR HONOR, YES.

THEY COULD HAVE PUT THAT EVIDENCE ON.

I TRIED THE CASE AND YOU KNOW, MADE THE DECISION OR, THE DECISION, MADE THE DECISION THAT WE REALLY COULDN'T TRY THE CASE BASED ON REASONABLENESS.

WHEN WE WENT TO TRIAL IN THIS CASE, THERE WERE NO JURY INSTRUCTIONS YET AGREED TO AND THIS QUESTION OF WHETHER THE

JURY WOULD EVEN CONSIDER REASONABLENESS AND UNDER WHAT CIRCUMSTANCES WAS STILL SUBJECT TO ARGUMENT.

>> WE ARE NOT DEALING HERE WITH A CONSTITUTIONAL QUESTION, CORRECT?

>> CORRECT.

THIS IS STATUTORY QUESTION.

>> ALL RIGHT.

SO, WE ARE REALLY GOING BACK TO THIS IS ACTUALLY A STATUTORY CONSTRUCTION QUESTION OF WHAT THE LEGISLATURE HAS DETERMINED SHOULD BE THE MEASURE OF DAMAGES?

>> THAT'S CORRECT, YOUR HONOR.

>> AND THE LEGISLATURE SAID THAT THE MEASURE OF DAMAGES, WHEN THE PROPERTY IS TAKEN IS THE VALUE OF THE PROPERTY AND THERE IS NO DUTY TO RELOCATE. WE WOULDN'T BE HERE?

>> CORRECT.

WELL, I THINK THEY DON'T MENTION RELOCATION.

THEY DO NOT MENTION MITIGATION IN THE STATUTE ANYWHERE.

AND IN FACT, --

>> BUT DOES THE STATUTE REALLY SAY THAT ANY TIME YOU HAVE A PARTIAL TAKING OF A BUSINESS, THAT THE MEASURE OF DAMAGES IS THE DESTRUCTION OF THE BUSINESS?

OR DO THEY SAY DAMAGES, OR DESTRUCTION OF THE BUSINESS?

>> THEY SAY DAMAGE OR DESTROY THE BUSINESS AT THE LOCATION WHERE IT IS.

IF I MAY POINT OUT, 73.015, WHICH IS THE PRE, ESTABLISHES THE PREREQUISITES TO A BUSINESS MAKING A DAMAGE IT ENUMERATES THE BUSINESS RECORD.

SAYS THE BUSINESS, IF IT WANTS TO MAKE A BUSINESS DAMAGE CLAIM IT HAS GOT A CERTAIN PERIOD OF TIME TO MAKE THAT CLAIM.

HAS TO SUBMIT THAT TO THE CONDEMNING AUTHORITY. IT HAS TO INCLUDE BUSINESS RECORDS.

THE BUSINESS RECORDS THAT ARE ENUMERATED THERE ARE THINGS

LIKE TAX RETURNS, SALES TAX INFORMATION, PROFIT AND LOSS STATEMENTS.

THEY'RE ALL HISTORICAL DOCUMENTS, ALL HISTORICAL DATA, NONE OF WHICH, AND IT IS NOT MENTIONED IN THE STATUTE AT ALL, ANYTHING ABOUT PERSPECTIVE RELOCATION, POSSIBILITIES OF MITIGATION, ANYTHING LIKE THAT. NOW THAT STATUTE IS PERMISSIVE. THEY COULD, IF THEY WANTED TO SUBMIT THAT.

BUT IF YOU LOOK ALSO, AT 73.155, WHICH IS THE CONFIDENTIALITY PROVISION FOR THOSE BUSINESS RECORDS, IN OTHER WORDS, STATUTE SAYS SPECIFICALLY THAT CERTAIN BUSINESS RECORDS ARE GOING TO BE KEPTAL NOT SUBJECT TO FLORIDA'S PUBLIC RECORD LAW. KEPT CONFIDENTIAL.

IT AGAIN ENUMERATES THOSE SAME DOCUMENTS.

IT SOMEBODY WAS GOING TO TRY TO SUBMIT RELOCATION INFORMATION, TELL THEIR COMPETITORS POTENTIALLY GOING, THAT INFORMATION WOULD NOT BE CONFIDENTIAL.

THERE IS NOWHERE IN THAT LEGISLATION, NOWHERE IN CHAPTER 73 THAT DEALS WITH MITIGATION, RELOCATION OR ANY OF THE LIKE.

>> -- IN YOUR COMPUTATION OF DAMAGES THAT GOODWILL IS NOT INCLUDED AND SHOULD NOT BE INCLUDED IN YOUR CASE?

>> CORRECT.

GOODWILL, THE GOODWILL VALUE OF THE BUSINESS IS NOT INCLUDED IN THOSE COMPUTATIONS.

THERE IS ARGUABLY I GUESS, A COMPONENT OF GOODWILL IN THE LOST BUSINESS, FUTURE LOST BUSINESS ASPECT.

>> WHAT WE'RE TALKING ABOUT HERE IN YOUR CASE, ARE COSTS ASSOCIATED WITH THIS AND THE LOST PROFITS?

THERE IS NOT A SEPARATE COMPONENT FOR GOODWILL? YOU DIDN'T PUT ON A SEPARATE

NUMBER OF FOR GOODWILL IN YOUR DAMAGES CASE.

SO WE'RE NOT TALKING ABOUT THAT, CORRECT?

>> CORRECT, YOUR HONOR.

>> YOU'RE WELL INTO YOUR REBUTTAL IF YOU WANT TO SAVE?

>> I WOULD, YOUR HONOR.

THANK YOU.

>> MAY IT PLEASE THE COURT.

I'M GREGORY COSTAS, COUNSEL FOR RESPONDENT FLORIDA DEPARTMENT OF TRANSPORTATION.

SEATING WITH ME AT COUNSEL TABLE.

ALEXIS YARBOROUGH, GENERAL COUNSEL FOR THE DEPARTMENT.

>> IF YOU WOULD SPEAK INTO THE MIKE.

>> HAVE A QUESTION

TO MAKE SURE WHAT IS THE POSITION OF THE STATE IS ON THIS.

IT IS THE POSITION OF THE STATE THAT THIS MITIGATION APPROACH APPLIES ONLY IF THE CONDEMNEE ACTUALLY ATTEMPTS TO RELOCATE A BUSINESS, IS THAT A FAIR STATEMENT?

>> YES, YOUR HONOR. ON THE FACTS OF THIS CASE IS --

>> IF IN THIS CASE THE CONDEMNEE HAD NOT, HAD NOT RE-ESTABLISHED A BUSINESS, WE'RE NOT TALKING ABOUT THEORETICAL OR HYPOTHETICAL AND THAT'S NOT THE STATE'S POSITION, AM I TO UNDERSTAND THAT?

>> WELL IT'S NOT ON THE FACTS OF THIS CASE BECAUSE THE BUSINESS ACTUALLY RELOCATED. TO THE BE STATE'S POSITION.

>> I UNDERSTAND.

>> FUNDAMENTALLY NO DIFFERENCE.

>> SO YOU'RE ADVOCATING THEN, SO IN ALL CASES THIS IS NOW GOING TO BE PART OF THE TRIAL, THE HYPOTHETICAL OF PROFITS AND LOSSES OR WHATEVER HAPPENS EVEN ON A HYPOTHETICAL, RELOCATION?

>> NO, YOUR HONOR.

THAT QUESTION CAME INTO PLAY WHEN THEY MADE THE SUGGESTION

THAT, IN, JUST LOST MY TRAIN OF THOUGHT.

ANYWAY, IT WAS IN RESPONSE TO A SUGGESTION IN THE INITIAL INITIAL BRIEF, OH, WHERE THEY SAID THE BUSINESS OWNER UNDER THE FIFTH DCA OPINION COULD SIMPLY SIT BACK AND ELECT --

>> RIGHT.
>> TO TAKE DESTROYED VALUE OF THE BUSINESS RATHER THAN TRY TO RELOCATE.

>> EXACTLY.
>> OUR RESPONSE TO THAT SUGGESTION, WAS IF THEY DID THAT, THEY MIGHT BE RUNNING RISK THE CONDEMNING AUTHORITY WOULD BE PERMITTED TO PUT ON EVIDENCE OF --

>> THEN I'VE GOT A PROBLEM. WE'VE GOT A PROBLEM WITH THAT. THEN WHAT YOU'RE SAYING IS THE STATE IS GOING TO FORCE SOMEONE TO GO ESTABLISH A BUSINESS, WHETHER WE KNOW IT IS GOING TO WORK OR NOT, AND THEN THEY'RE GOING TO SUSTAIN MITIGATION AND REDUCTION ON HYPOTHETICAL AND SPECULATIVE NUMBERS OF EXPERTS?

>> ALL THESE BUSINESS DAMAGES CASES, YOUR HONOR, A LOT OF THE TESTIMONY IS BASED ON PROJECTIONS --

>> WELL IT IS BASED ON HISTORY AT A LOCATION AND THOSE KINDS OF THINGS.

IT IS BASED ON SOUND ECONOMIC EXPERT TESTIMONY, ACCOUNTING PRINCIPLES AND THOSE KINDS OF THINGS.

>> WHAT I HAVE TO LOOK AT THEM EACH ON CASE-BY-CASE BASIS? DAMAGES ARE VERY FACTUALLY INTENSE SO YOU WOULD HAVE TO LOOK AT THEM INDIVIDUALLY?

>> EMINENT DOMAIN IS VERY FACT-SPECIFIC, YES, SIR. BUT AGAIN TO ANSWER YOUR QUESTION, YOUR HONOR, THE FACTS HERE, AS YOU HAD A SITUATION WHERE A BUSINESS ACTUALLY LOCATED AND THE ISSUE THAT WAS BEFORE THE COURT AND ISSUE THAT WAS LITIGATED WAS, YOU KNOW,

WAS IT APPROPRIATE FOR THAT INFORMATION TO BE PRESENTED TO THE JURY SO THEY COULD DETERMINE WHETHER OR NOT THE RELOCATION WAS REASONABLE. AND THAT'S ESSENTIALLY WHERE WE'RE AT.

>> OKAY.

DO YOU --

>> WHAT DOES THAT MEAN, WHETHER THE, AND I'M CONCERNED ABOUT THE ASSERTION THAT HE WAS LIMITED TO THE DATE OF THE TAKING.

I MEAN THE WHOLE IDEA IS YOU COME TO TRIAL AND WHAT IF, AT THE TIME OF THE TRIAL, THOUGH HE HAD MAYBE, THE BUSINESS HAD THRIVED FOR A SHORT PERIOD OF TIME, THAT, IN FACT, BECAUSE THAT LOCATION WAS NOT AS IDEAL AS THE OTHER LOCATION, THAT THE BUSINESS FLOUNDERED?

IS THERE UNDER THE STATUTE, ARE THEY IN FACT LIMITED TO WHERE, TO THE DATE OF THE TAKING IN ORDER TO ESTABLISH WHETHER THE RELOCATION WAS SUCCESS IN MITIGATING DAMAGES OR NOT?

>> THE DATE OF THE TAKING IS USED TO ESTABLISH THE BEFORE VALUE OF THE BUSINESS AND THE AFTER VALUE OF THE BUSINESS AS OF THE TAKING.

NOW THIS QUESTION ABOUT IF --

>> HOW DO YOU DO THAT IF THE RELOCATION OCCURS, DOESN'T THE RELOCATION OCCUR AFTER THE TAKING?

>> YES, MA'AM.

>> RIGHT?

>> IN MOST INSTANCES --

>> I UNDERSTAND.

THEN AREN'T THEY, THEN YOU ARE INTRODUCING DAMAGES OF, OR EXPENSES THAT OCCURRED AFTER THE DATE OF TAKING AS BOTH AS ELEMENTS OF DAMAGES AND IF IT, EVERYTHING WENT WELL AND THE BUSINESS THRIVES, TO SHOW THAT EVERYTHING WAS GOING JUST LIKE IT WAS BEFORE?

OR, NO, IT WASN'T GOING JUST LIKE IT WAS BEFORE?

IS THAT, DOES THE JURY GET TO HEAR THAT?

>> YES, WOULD BE APPROPRIATE. HAD THEY HAD THAT INFORMATION IN THIS CASE, THEY BENEFITED UP ANDING FOR A YEAR, AND THEY'RE HAVING TREMENDOUS LOSS, THEN THEIR EXPERT IS PROJECTING THAT THE BUSINESS IS ULTIMATELY GOING TO FAIL, THEN I THINK THAT WOULD BE APPROPRIATE.

>> I MEAN THE HEIGHT OF WHATEVER, SOMEBODY TRIES TO RELOCATE, IT DOESN'T WORK, AND THE TESTIMONY IS IT DOESN'T WORK BECAUSE THEY WERE, YOU KNOW WHERE THEY WERE WAS THE BEST LOCATION THEY COULD BE, YOU'RE SAYING NO THEY WOULD NOT BE SO LIMITED?

>> NO. I THINK THE MULKEY COURT ANSWERED THAT WHEN THEY SENT THE CASE BACK FOR RETRIAL. IF I CAN QUOTE FROM THE DECISION.

>> WHICH COURT?

>> MULKEY, SECOND DISTRICT COURT OF APPEALS IN MULKEY VERSUS DIVISION OF ADMINISTRATION.

448 SO2d 1067.

I'M SORRY, READING FROM PAGE 1067.

UNDER HEADNOTE 6 THE COURT SAID, A NEW TRIAL ON THIS MATTER WILL OCCUR YEARS AFTER THE ACTUAL TAKING.

AS A RESULT, MANY OF THE BUSINESS DAMAGE FIGURES THAT WERE ESTIMATED AT TRIAL HAVE UNDOUBTLY BEEN REALIZED.

IN AN EFFORT TO AWARD FULL COMPENSATION, WE BELIEVE IT IS APPROPRIATE TO CONSIDER ACTUAL LOSS AND DAMAGE FIGURES IF THEY EXIST ON RETRIAL.

SO I THINK THE ANSWER --

>> AND YOU AGREE.

SO YOU DON'T THINK THERE IS THIS ARTIFICIAL DEADLINE IN ORDER TO ESTABLISH THE DAMAGES?

>> NOT IN TERMS OF WHEN YOU'RE TALKING ABOUT A RELOCATED BUSINESS.

>> WHAT ABOUT THIS ISSUE, ESPECIALLY IN THIS DOWNTURNED ECONOMY, THAT SOMEBODY, IS MAKING A CHOICE TOMORROW AS TO WHETHER RELOCATE OR NOT? AND, YOU KNOW, THEY CAN'T GET ANY LOANS FROM A BANK. YOU KNOW, THEY, REALIZE THEY HAVE GOT TO LIQUIDATE ASSETS? DOES THE LEGISLATURE, DO ANTICIPATE THEY HAVE TO, THE BUSINESS OWNER IN ORDER TO TRY TO MAKE A GO OF IT, BECAUSE THAT'S WHAT THEY WOULD RATHER DO, HAS TO FRONT ALL THESE COSTS? OR IS THIS SOMETHING JUST LIKE WHEN THERE IS A TAKING MONEY IS THINGS I GUESS GO PRETTY QUICKLY, HOW DOES THAT WORK? I MEAN THEY HAVE TO BE OUT ALL THAT MONEY ALL THOSE YEARS WITHOUT ANY INTERIM COMPENSATION?

>> TYPICALLY IN THESE CASES BECAUSE OF THE QUICK-TAKE PROCEEDING, THE CONDEMNING AUTHORITY WILL HAVE POSSESSION OF THE PROPERTY LONG BEFORE THE MATTER PROCEEDS TO VALUATION TRIAL.

SO IN THOSE INSTANCES IF THE BUSINESS IS GOING TO BE RELOCATE THERE ARE GOING TO BE SITUATIONS WHERE THEY'RE GOING TO HAVE TO COME OUT-OF-POCKET. THERE MAY BE SOME ASSISTANCE AVAILABLE IN TERMS OF RELOCATION BENEFITS THAT COME UNDER THE AGENCY THROUGH FEDERAL PROGRAMS.

HOW MUCH OF THAT, I CAN'T SAY SPECIFICALLY IN THIS CASE BUT THEY ARE STILL GOING TO HAVE TO COME OUT-OF-POCKET FOR EXPENSES.

>> DO THEY HAVE ACCESS TO THE MONEY THAT IS PUT INTO THE REGISTRY AT THE COURT AT THE TIME OF THE TAKING?

>> YES, MA'AM, THEY CAN DRAW DOWN DEPOSIT AS SOON AS IT IS PUT IN THERE BECAUSE THAT PASSES TITLE TO THE DEPARTMENT.

>> DO THEY GET INTEREST ON MONIES THEY HAVE HAD TO PUT

OUT?

IS THAT A PART OF THE DAMAGES?

>> I WOULD THINK THAT WOULD PROBABLY BE PART OF IT.

THAT WOULD BE MY REACTION TO THAT.

BEAR IN MIND THE EXPERT IN THIS CASE TESTIFIED TO THE REARRANGEMENT OF THE DEBT STRUCTURE, AND THE VIEWED THAT AS A RISK FACTOR AND ALSO INABILITY TO MAYBE ACCESS ADDITIONAL CAPITAL MARKETS BECAUSE OF THE DEGREE OF DEBT THAT HAD BEEN INCURRED.

>> YOUR EXPERT TESTIFIED.

>> THEIR EXPERT TESTIFIED.

>> FROM YOUR POINT OF VIEW THERE WASN'T ARTIFICIAL LIMITATION THEN ON, ONCE THE JUDGE SAID, I WAS GOING TO ALLOW EVIDENCE OF THE RELOCATION, THERE WASN'T ANY ARTIFICIAL LIMITATION ON WHAT THEIR EXPERT COULD TESTIFY TO?

>> ABSOLUTELY NOT.

HE CAME IN WITH EVERYTHING THAT HE THOUGHT AFFECTED CONTINUED VIABILITY OF BUSINESS.

>> -- CONFLICT, ALLEGED CONFLICT ON THIS, THE FIFTH DCA CASE THAT WE'RE UP ON REVIEW HERE IS DEALING IN LOST PROFITS. AND THAT'S WHAT WE'RE TALKING ABOUT, MITIGATION OF LOST PROFITS OF THIS BUSINESS AND THAT'S WHAT THAT ISSUE.

IN THE FOURTH DCA CASE TALKED ABOUT GOODWILL.

SEEMS TO ME THOSE THINGS ARE DIFFERENT. SO I'M STRUGGLING IN FINDING WHERE THE CONFLICT IN THESE TWO CASES ARE.

>> I THINK WHEN IT WAS PHRASED IN FRONT OF THE FOURTH DCA, GOODWILL WAS ONE OF THE FACTORS OF RECOVERY PUT OUT.

BUT, USUALLY BUSINESS DAMAGE CASES, YOU HAVE A WHOLE HOST OF THINGS THAT ARE RECOVERABLE. NOT JUST, LIMITED TO LOST PROFITS.

THAT IS ONE ASPECT OF BUSINESS

DAMAGES, LOSS OF GOODWILL AND OTHER LOSSES INVOLVED IN AND MOVING OF EQUIPMENT.

>> FIFTH DCA CASE WE ARE TALKING ABOUT NOT GOODWILL AT ALL.

WE'RE TALKING ABOUT LOST PROFITS AS THEY SAID.

DO YOU AGREE WITH HIS ESTIMATE?

>> NOT NECESSARILY, I THINK YOU'RE TALKING ABOUT A LOSS OF GOODWILL MIGHT BE REFLECTED IN THE DIFFERENCE, IN THE BEFORE AND AFTER VALUE OF THE BUSINESS.

BECAUSE YOU HAD A REDUCTION OF SOME 4 TO 500,000 IN THE BEFORE AND AFTER VALUES.

AND THOSE DIFFERENCES YOU CAN ATTRIBUTE THAT TO SOME LOSS OF GOODWILL.

>> WAS THERE ANY EXPERT TESTIMONY IN THIS CASE THAT PUT A VALUE ON GOODWILL?

>> THERE IS NOTHING TO PUT VALUE ON IT BUT THERE IS STRONG INDICATION IN THE RECORD GOODWILL WAS NOT LOST BECAUSE NEITHER THE OWNER OR PERSON CALLED TO TESTIFY POINT TO LOSS OF ANY SALES TO CUSTOMERS.

>> MY QUESTION IS THOUGH, IF THERE IS NO AMOUNT POSTED ON GOODWILL IN THIS FIFTH DCA CASE BEFORE US BUT THE FOURTH DCA EXPRESSLY WHAT THEY DEALT WITH, GOODWILL, THERE IS NOTHING IN THAT OPINION THAT TALKS ABOUT LOST PROFITS.

WHAT WE'RE REALLY LOOKING AT IN THESE TWO CASE, TWO SEPARATE, THE MITIGATION OF GOODWILL IN THE FOURTH DCA CASE AS COMPARED TO MITIGATION OF LOST PROFITS IN THIS FIFTH DCA CASE.

AREN'T THOSE DIFFERENT?

>> I DON'T THINK SO, NOT WHEN YOU GET TO FUNDAMENTALLY WHAT THE COURTS DID.

ESSENTIALLY, THE FOURTH DISTRICT COURT OF APPEAL LOOKED AT THIS STATUTE.

IT WAS ABSOLUTELY SILENT ON MITIGATION IRRESPECTIVE WHETHER

YOU'RE TALKING ABOUT LOSS OF GOODWILL, LOSS OF PROFITS OR WHAT HAVE YOU AND SAID --

>> -- GOODWILL.

>> BUT SAID, MITIGATION EVIDENCE IS NOT GOING TO BE ADMITTED THE WAY WE READ THIS STATUTE.

THIS IS A STATUTE THAT IS ABSOLUTELY SILENT ON THE ISSUE OF MITIGATION.

THE FIFTH DISTRICT COURT OF APPEAL THEN ON THE OTHER HAND, LOOKS AT THIS AND SAYS THE STATUTE'S SILENT ON MITIGATION, SO THERE IS NO EVIDENTIARY BAR TO OFFSET MITIGATION EVIDENCE COMING IN. I THINK YOU HAVE A PROFOUND CONFLICT THERE.

>> WELL, ACCEPTING, IF YOU WERE TO ACCEPT MY READING OF THE FOURTH DCA, THAT IT DEALS WITH GOODWILL, NOT LOST PROFITS, IS THERE THREE RED DIFFERENCE BETWEEN MITIGATION OF GOODWILL, WHETHER THAT SHOULD BE REQUIRED, AS COMPARED TO MITIGATION OF LOT OF DAMAGES?

>> I DON'T BELIEVE SO, YOUR HONOR.

BECAUSE YOU'RE GOING TO ACCOMPLISH THE SAME TYPE OF MITIGATION WHEN YOU MOVE THE BUSINESS.

WHETHER IT WILL PUT YOU BACK IN THE POSITION OF ABLE TO RETAIN YOUR PROFIT-ING CAPACITY OR WHETHER IT'S GOING TO ENABLE YOU TO KEEP A PORTION OF YOUR GOODWILL, YOU'RE STILL TALKING ABOUT AN EFFORT TO MITIGATE A LOSS AND THAT'S WHAT PUT THESE TWO OPINIONS DIAMETRICALLY OPPOSED TO ONE ANOTHER.

>> GOODWILL IS ATTRIBUTABLE TO LOCATION.

IF GOODWILL ATTRIBUTABLE TO THE LOCATION, ARE YOU SAYING YOU OUGHT TO BE ABLE TO MITIGATE THAT LOSS BY ESTABLISHING A NEW LOCATION

AND THAT OUGHT TO BE A MITIGATION DAMAGES? I THINK THAT'S WHAT THE FOURTH DCA CASE IS

REALLY ALL ABOUT.

>> WHETHER THE COURT DEFINES GOODWILL, HARKENING BACK TO THE FOURTH DCA'S DECISION IN THE MATTHEWS, WHERE THEY ACTUALLY TALK SPECIFICALLY ABOUT GOODWILL.

THEY'RE SAYING GOODWILL, TO THE EXTENT THAT IT IS TRANSFERABLE TO THE NEW LOCATION, IS NOT LOST.

NOW WHERE YOUR DAMAGE WOULD COME IN HOW MUCH OF THAT GOODWILL ACTUALLY TRANSFERRED TO THE NEW LOCATION.

BUT I WOULD THINK EVEN THE MATTHEWS DECISION IS PRETTY SOLID EVIDENCE THAT MITIGATION OF DAMAGES IS AN APPROPRIATE CONSIDERATION IN BUSINESS DAMAGES CASES.

>> FOR ALL TYPES OF --

>> I THINK SO.

YOU'RE TALKING ABOUT ONE ASPECT OF THE ENTIRE CONSTITUENT BODY OF DAMAGES IN HERE AND I DON'T THINK THERE IS REALLY A FUNDAMENTAL DIFFERENCE WHEN YOU'RE THINKING OF MITIGATION.

>> IF THERE'S A TOTAL TAKING OF THE PROPERTY, BUSINESS DAMAGES ARE NOT AWARDBLE, IS THAT CORRECT?

>> THAT'S CORRECT.

>> AND THAT'S BECAUSE THE LEGISLATURE HAS SAID SO?

>> YES, MA'AM.

>> SO THEY HAVE MADE THIS ARTIFICIAL DISTINCTION BETWEEN PARTIAL TAKING AND TOTAL TAKING, THE LEGISLATURE HAS?

>> YES, MA'AM.

THEY HAVE MADE THAT DECISION.

>> SO WE GO BACK AGAIN, WHAT WE'RE REALLY, DEALING HERE IS NOT COMMON LAW DAMAGES, CONTRACTUAL DAMAGES. SAY THERE WAS BREACH OF A LEASE AND SOMEBODY WAS KICKED OFF THE PROPERTY.

WHAT WE'RE DEALING WITH IS WHAT THE LEGISLATURE MEANT WHEN IT USED, THE TERM, DAMAGES AND WHETHER THEY WERE INTENDING

DAMAGES TO BE USED IN ITS ORDINARY SENSE?

IS THAT CORRECT?

>> YES, MA'AM.

>> AND THAT WAY, ANY ELEMENT THAT WOULD BE RECOGNIZED AS DAMAGES, AND ANY OTHER KIND OF COMMON LAW CASE, WOULD BE THE DISPLACED TENANT OR OWNER OF THE PROPERTY WOULD BE ALLOWED TO PRESENT IN THIS CASE, THIS KIND OF CASE, CORRECT?

THERE IS NO OTHER, NO DIFFERENCES THEN IN THE WAY THE DAMAGES WOULD BE PRESENTED. IF THERE IS GOODWILL LOST THEY CAN PRESENT THAT.

IF THERE IS DECREASE IN VALUATION THEY CAN PRESENT THAT.

ALL OF THE MOVING EXPENSES. ANYTHING, COST OF THE MONEY TO BORROW,

ALL OF THAT IS COMEPENSABLE?

>> THAT WOULD BE SUBSUMED IN THEIR ARGUMENT.

ESSENTIALLY WHAT YOU PROBABLY IN THAT SCENARIO YOU'RE TALKING ABOUT YOU WILL HAVE THE BUSINESS OWNER SAYING, WELL, I'M ENTITLED TO FULL WIPEOUT VALUE OF MY BUSINESS.

BECAUSE YOU DESTROYED MY BUSINESS AND I CAN'T RELOCATE FOR ANY NUMBER OF REASONS. THEN YOU HAVE THE CONDEMNING AUTHORITY YOU HAVE, IF IT IS A SITUATION -- I'M GETTING INTO PROPOSED.

LET'S DEAL WITH ACTUAL.

>> I THINK HONESTLY YOU'RE GOING, IN THIS CASE, BASED I REALLY SHARE JUSTICE LEWIS'S CONCERN.

I HAVE NO PROBLEM IN TALKING ABOUT ACTUAL OCCURRENCES, THAT IS, OWNER OR THE TENANT WHO DECIDES TO RELOCATE.

WHICH IS WHAT HAPPENED.

BUT THE OWNER WHO DECIDES, YOU DESTROYED MY BUSINESS, I'M 65 YEARS OLD.

THE, YOU KNOW, LOOK WHAT IS GOING ON IN THE ECONOMY, I

DON'T HAVE THE ENERGY TO RELOCATE.

I'M NOT DOING IT.

I DON'T SEE HOW, WHERE IN THE STATUTE OR WHERE YOU WOULD ARGUE, OR COULD ARGUE LEGALLY THAT THE DOT COULD PUT ON EVIDENCE THAT SHOULD HAVE RELOCATED?

>> THE ONLY BASIS FOR MAKING THAT ARGUMENT WHEN YOU LOOK IN THE MULKEY

DECISION, THERE WERE THREE PROPOSED CURES PRESENTED AND ADMITTED INTO EVIDENCE IN THAT CASE.

TWO OF THE CURES OF BUSINESS DAMAGES IN THAT CASE INVOLVED USING ADJACENT PROPERTY TO RE-ESTABLISH PARKING.

THE THIRD PROPOSED CURE INVOLVED RELOCATION TO AN ENTIRELY DIFFERENT SITE.

NOW THE FIRST TWO PROPOSED CURES WERE FOUND TO BE INADMISSIBLE BECAUSE THEY WERE BASED ON THE ASSUMPTION THAT THE BUSINESS OWNER HAD THE RIGHT TO USE THE ADJACENT PROPERTY TO RE-ESTABLISH THE LOST PARKING, WHEN IN FACT THE BUSINESS OWNER HAD NO LEGAL INTEREST IN PROPERTY AND COULDN'T USE IT.

THE THIRD PROPOSED CURE, THE LOCATION NECESSARILY IS GOING TO ASSUME THAT THE RELOCATED BUSINESS WILL ACQUIRE BY LEASE OR PURCHASE AN APPROPRIATE SITE TO RELOCATE AND THAT PROBABLY EXPLAINS WHY THAT PARTICULAR PROPOSED CURE WAS NOT CHALLENGED ON APPEAL BY THE LANDOWNER, AND WHY WE HAVE NOTHING IN THE MULKEY DECISION SAYING THAT A PROPOSED OFF-SITE RELOCATION IS INADMISSIBLE. THE COURT NEVER ADDRESSED THAT ISSUE.

>> BUT I THINK THE QUESTION REALLY IS MORE OF, WE CAN'T REALLY FORCE PEOPLE -- IS THE DEPARTMENT REALLY ADVOCATING WE WOULD HAVE TO FORCE PEOPLE TO

TRY TO RELOCATE EVEN IF THEY MAKE THE DECISION THAT, LOOK, I DON'T WANT TO DO THAT IN THIS KIND OF MARKET, IN THIS KIND OF ECONOMY?

>> OH, ABSOLUTELY NOT. THE REASON GOING BACK I HAVE TO REALIZE THAT -- THE COST TO CURE IS TERM WE KEEP THROWING AROUND HERE.

COST TO CURE IS REALLY A MEASURE OF DAMAGES.

NOBODY IS UNDER AN OBLIGATION TO EFFECT A CURE.

SO IN OTHER WORDS, IF YOU CAME IN THE PROPOSED RELOCATION SCENARIO AND SAID, WELL, THERE'S A SITE THREE BLOCKS AWAY FROM THIS BUSINESS.

IT IS AVAILABLE FOR X-NUMBER OF DOLLARS.

YOU CAN RELOCATE THE BUSINESS THERE.

HERE'S HOW YOU WOULD EFFECT THE CURE THAT YOU'RE CLAIMING DESTROYED YOUR BUSINESS.

THEN, IF THE JURY FOUND THAT TO BE A REASONABLE OPTION, THEN THE AMOUNT OF DAMAGES WOULD ACTUALLY BE WHAT IT COST TO RELOCATE WHATEVER DOWN TIME FOR LOST PROFITS.

AND THAT SORT OF THING AS OPPOSED TO THE FULL WIPE OUT VALUE OF THE BUSINESS.

>> THAT WOULD BE, THAT'S ANOTHER --

>> THAT IS FOR, THAT'S ANOTHER DAY, YOUR HONOR.

>> BUT THAT WOULD BE, IN THAT SITUATION THE BURDEN OF SHOWING THAT WOULD BE ON THE DEPARTMENT OF TRANSPORTATION, WOULDN'T IT?

>> ABSOLUTELY.

THE JURY WILL BE ULTIMATE ARBITER OF REASONABLENESS OF THE CURE.

AND IF THE JURY DECIDES THAT A CURE WAS REASONABLY AVAILABLE AS THEY DID IN THIS CASE, THERE WAS A QUESTION ON THE VERDICT FORM, THEY WERE ASKED, WAS THE A CURE REASONABLY AVAILABLE TO SYSTEMS COMPONENTS, THEY SAID

YES.

IF THE JURY WERE TO DECIDE IT WAS REASONABLY AVAILABLE THEY WOULD AWARD DAMAGES BASED ON RELOCATION RATHER THAN A WIPE OUT OF THE BUSINESS BUT THAT DOESN'T MEAN THAT THE BUSINESS OWNERS THAT TO TAKE THAT MONEY RELOCATE HIS BUSINESS AND RELOCATE HIS BUSINESS.

HE CAN POCKET THE MONEY AND GO OUT OF BUSINESS.

ALL THAT IS MEASURE OF DAMAGES.

WE'RE NOT TELLING PEOPLE TO GO OUT AND ABSOLUTELY RELOCATE THEIR BUSINESS.

ALL WE'RE TALKING ABOUT IS THE DAMAGES THEY'RE ENTITLED TO.

THAT IS BETTER EXPLAIN I BELIEVE IN KENNY VERSUS ST. PETERSBURG.

THAT DECISION TALKED ABOUT VERSUS SEVERANCE DAMAGES.

>> THAT IS THE PROBLEM WE GET INTO.

YOU HAVE TO BE CAREFUL NOT TO COMPARE APPLES AND ORANGES.

WE'RE NOT TALKING ABOUT SEVERANCE DAMAGES HERE.

>> ABSOLUTELY.

BUT TO THE EXTENT THAT CASE HOLDS THAT NOBODY'S REQUIRED TO PUT A CURE INTO EFFECT I THINK

THAT IS GENERALLY WELL APPLICABLE WHETHER YOU'RE TALKING SEVERANCE DAMAGES OR BUSINESS DAMAGES.

>> THAT MAY BE BUT THINK WE'RE RUNNING REALLY INTO SOME REAL DANGEROUS LAND IF WE START TRYING TO TRANSPOSE SEVERANCE DAMAGES WITH THESE OTHER TYPES OF DAMAGES WE'RE TALKING ABOUT.

I THINK THE THEY'RE FAR DIFFERENT, AREN'T THEY.

>> ABSOLUTELY.

I AGREE, YOUR HONOR.

>> BE CAREFUL.

>> WE HAVE TO BE VERY CAREFUL WHEN WE'RE TALKING ABOUT THEM.

I'M USING THAT AS A WAY TO

EXPLAIN CONCEPT COST TO CURE.

SO UNDER THOSE CIRCUMSTANCES WE WOULD NOT BE SAYING THAT THE

BUSINESS OWNER WOULD HAVE TO GO OUT AND RELOCATE ITS BUSINESS. IT WILL ONLY EFFECT HOW MUCH IN WAY OF DAMAGES HE WOULD BE ENTITLED TO RECOVER. WITH THAT I SEE I'M OUT OF TIME.

I RESPECTFULLY REQUEST THE COURT TO AFFIRM THE DECISION OF FIFTH DISTRICT COURT OF APPEAL AND DISAPPROVE THE FOURTH DISTRICT COURT OF APPEAL DECISION IN TIRE CENTERS. THANK YOU.

>> THANK YOU.

I BELIEVE YOU HAVE A LITTLE TIME LEFT.

>> I'D LIKE TO FOLLOW UP ON JUSTICE LEWIS AND JUSTICE PARIENTE'S QUESTIONS AND COMMENTS WHETHER THERE IS DUTY OR EVIDENCE OF RELOCATION CAN COME IN REGARDLESS WHETHER THE BUSINESS CHOOSES TO RELOCATE. ONE OF THE THINGS EVERYONE WOULD DESIRE IS CLEAR AND IMPLEMENTABLE STANDARD. CERTAINLY THE TIRE CENTERS DECISION GIVES US THAT. RIGHT, WRONG, INDIFFERENT, IT IS A CLEAR-CUT, UNDERSTANDABLE STANDARD.

WHEN WE WENT TO TRIAL IN THIS CASE THAT WAS THE PRECEDENT.

>> WHETHER YOU'RE RELOCATE OR NOT, THE MEASURE OF DAMAGE FOR BUSINESS DAMAGES IS DESTRUCTION OF THE BUSINESS?

>> CORRECT.

THE DIFFICULTY OF COURSE IN ADVISING A BUSINESS IS QUESTION OF HOW MUCH RISK DO THEY HAVE TO TAKE.

WHEN DO THEY HAVE TO RELOCATE. CERTAINLY SYSTEMS COMPONENTS DECISIONS WOULD HAVE BEEN LOOT DIFFERENT, YOU MENTIONED 65-YEAR-OLD OWNERS.

THEY WORTH HAVE DECIDED THINGS DIFFERENTLY HAD THIS STANDARD BEEN THERE.

A LOT OF OTHER QUESTIONS ARE RAISED BY DEPARTMENT'S POSITION HERE AND BY THIS FIFTH DISTRICT

COURT OF APPEALS DECISION THAT ARE GOING TO REQUIRE, IF IT IS GOING TO BE COURT-MADE LAW, THAT WILL REQUIRE THIS COURT AND FLORIDA'S APPELLATE COURTS TO DECIDE CASE AFTER CASE AS WE REALLY FLESH THIS OUT ISN'T IT THOUGH, AND IT'S BEEN A WHILE SINCE I WAS IN THE BUSINESS OF TRYING CASES BUT THE WHOLE IDEA OF WHAT ARE DAMAGE, WHAT ARE, YOU KNOW, WHAT'S REASONABLE, WHAT'S NOT REASONABLE, BUSINESS EXPERTS THAT IS LIKE, THAT IS PART OF EVERY BUSINESS CASE. I MEAN, WHAT IS, TELL ME WHAT IS UNIQUE IN TERMS OF THE WHAT THE JURISPRUDENCE SHOULD BE IN THIS CASE UNLESS THE LEGISLATURE MADE IT UNIQUE?

>> THE, THE FIRST ELEMENT OF THAT IS THE ARTIFICIAL DATE. AND I DO BEG TO DIFFER WITH MR.^COSTAS ON THAT POINT.

>> HE WOULD SEEM TO BE CONCEDED IS THAT WOULD CERTAINLY HELP YOU IN THE FUTURE TO SAY YOU GET DAMAGES LIKE UP UNTIL THE TIME OF TRIAL.

>> IT WAS NOT PART OF THIS CASE BECAUSE 73.0712 SAYS SPECIFICALLY AMOUNT OF SUCH COMPENSATION, TALKING ABOUT THE BOTH SEVERANCE DAMAGES REAL ESTATE DAMAGES AND BUSINESS DAMAGES SHALL BE DETERMINED AS OF DATE OF TRIAL OR DATE UPON WHICH TITLE PASSES WHICHEVER OCCURS FIRST.

HERE THAT WAS --

>> I AM CONCERNED THAT IN THIS INSTANCE THAT YOU SOMEHOW WERE PROHIBITED FROM PRESENTING EVIDENCE OF FACT, UP TO THE POINT THAT THE JURY WAS ASKED TO MAKE A DECISION. AND IF SO, IS THAT CORRECT? WERE YOU SOMEHOW, OR YOUR CLIENT, WAS UNABLE TO PRESENT EVIDENCE THAT SHOULD HAVE GONE INTO THIS, WHAT YOU'RE REFERRING TO AS A NEW MODEL CALCULATION?

>> AT LEAST THE JUDGE'S

PRELIMINARY RULINGS IN THE CASE WHICH ULTIMATELY BECAME PART THE JURY INSTRUCTIONS. THESE WERE BEING FORMULATED BECAUSE THERE WERE NO STANDARDS.

>> I UNDERSTAND.

>> BEING FORMULATED AS TRIAL WAS GOING ON.

IT WAS LIMITED TO DATE OF TAKING ANALYSIS.

NOW AGAIN CERTAIN COSTS WERE ALLOWED POSTTAKING --

>> BUT NOT A FULL ANALYSIS POST TAKING? IS THAT WHAT YOU'RE SAYING?

NOT A FALL ANALYSIS OF POST TAKING OF SOME ELEMENTS.

>> THE STATUTE PROVIDES FIVE YEARS GOING IN IN OTHER WORDS TO QUALIFY CLAIM OF BUSINESS DAMAGES DO YOU GO FIVE YEARS AFTERWARDS WHAT THOSE DAMAGES ACTUALLY ARE?

THAT'S ANOTHER QUESTION THAT IS GOING TO HAVE TO BE DECIDED BY THE COURTS.

HOW FAR POSTTAKING DO YOU GO?

THERE IS NO GOOD FAITH POSIT FOR THESE BUSINESS DAMAGES.

THERE IS NO GOOD FAITH DEPOSIT FOR RELOCATION EXPENSES OR ANY OF THIS.

IN FACT --

>> YOU AGREE YOU COULD BE COMPENSATED THOSE PLUS INTEREST FROM THE DATE EXPENDED?

>> WE DID NOT GET INTEREST.

>> WHY WOULD THAT NOT BE?

>> MY RECOLLECTION, AGAIN, YOUR HONOR, THIS WAS TWO YEARS AGO, INTEREST WAS NOT AWARDBLE IN THESE EMMEANT DOMAIN BUSINESS DAMAGES.

>> AGAIN, TO ME THAT IS A SPECIFIC DISCRETE ISSUE THAT SHOULD BE EITHER RAISED ON APPEAL, AS THAT, AS CLAIM OF ERROR, NOT WIPING THE WHOLE NOTION YOU CAN'T LOOK WHAT HAPPENED AFTER THEY TOOK YOUR, YOU KNOW, YOUR BUSINESS THAT YOU RELOCATED AND THE JURY SHOULD KNOW THAT.

>> YOUR HONOR, THERE WERE A LOT

OF ISSUES THAT COULD HAVE BEEN
PART OF THIS OF COURSE BECAUSE
THIS CASE, THE TRIAL COURT'S
DECISION OR RULING DISAGREED
WITH TIRE CENTERS FROM THE VERY
OUT.

>> ITSELF ANOTHER ISSUE.

>> WE BROUGHT ONLY SINGLE
ISSUE.

>> WITH THAT YOU HAVE USED YOUR
TIME.

>> I UNDERSTAND THAT.

AND THANK YOU FOR YOUR
INDULGENCE.

>> THANK YOU VERY MUCH.