

## A LAST WORD ON RECENT DEVELOPMENTS

### “GOODBYE TO ALL THAT”\*: EMINENT DOMAIN COMPENSATION WHEN A PROPOSED CURE CONTEMPLATES THE USE OR DESTRUCTION OF PROPERTY OUTSIDE THE AREA OF TAKING

Geoffrey L. Jones\*\*

In *Department of Transportation v. Armadillo Partners, Inc. (Armadillo II)*,<sup>1</sup> the Florida Supreme Court held that evidence of costs to cure in eminent domain actions, while admissible to establish just compensation, should not be a component of a property owner's compensation and are not damages but should be considered merely in evaluating the effect of the taking on the remainder property's market value.<sup>2</sup> In doing so, the Court found that costs to cure are admissible only if tied to the cure's effect on the remainder's fair market value.<sup>3</sup> In focusing on the proof offered by the condemnor's appraisal expert in the case, the Court also held that an expert's challenged method of evaluation “should ordinarily be treated as an issue of weight, not admissibility.”<sup>4</sup> The Court's holding applies even when the expert's opinion contravenes the law of severance damages, which provides that

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\* With acknowledgement to the late Robert Graves and his classic autobiographical work of the same title concerning World War I.

\*\* © 2005, Geoffrey L. Jones. All rights reserved. B.A., Grove City College, 1981; J.D., The Dickinson School of Law of the Pennsylvania State University, 1987.

The author is a partner in the law firm of Jeck, Harris & Jones, LLP, and practices commercial litigation.

1. 849 So. 2d 279 (Fla. 2003), *rev'g*, 780 So. 2d 234 (Fla. 4th Dist. App. 2001) (*Armadillo I*).

2. *Id.* at 285. The term “cure” refers to a way in which the damage caused by the partial taking can be minimized through improvements made to the remaining property. *Id.* at 281–282.

3. *Id.* at 285.

4. *Id.* at 286–287.

full compensation for a taking should include both “the value of the portion being appropriated and any damage to the remainder caused by the taking.”<sup>5</sup>

In deciding *Armadillo II*, the Court rejected years of precedent that addressed the effect of proposed cures on areas outside of the area taken.<sup>6</sup> More important, because *Armadillo II* concerns expert testimony in general, the decision may encourage experts to ignore established law because doing so affects only the weight, as opposed to the admissibility, of their testimony. By rejecting the long-standing and broadly applicable rule that permits trial courts to exclude expert testimony when it contravenes established law, *Armadillo II* may mislead juries and lead to erroneous and inequitable jury verdicts.

### I. THE FACTUAL BACKGROUND

The underlying case began with the Department of Transportation's condemnation of property for a road-widening project in Davie, Florida.<sup>7</sup> The Department acquired land and improvements from commercial property improved with a multi-tenant commercial center owned by Armadillo Partners, Inc.<sup>8</sup> The center, known as Armadillo Square, was located on a major corner in downtown Davie and had various office, retail, and restaurant tenants in the two buildings on the property.<sup>9</sup> The property taken was adjacent to the roadway and consisted of land, part of Armadillo Square's parking lot, landscaping, and related improvements.<sup>10</sup>

The major issue at trial was which of the parties' two proposed cures would mitigate severance damages caused by the taking.<sup>11</sup> Both the Department and Armadillo agreed that, without a cure, severance damages would be far greater, primarily because

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5. *Id.* at 282–283 (quoting *Div. of Admin. v. Frenchman, Inc.*, 476 So. 2d 224, 226 (Fla. 4th Dist. App. 1985)).

6. *Id.* at 290. For a discussion of cases that the *Armadillo II* Court rejected, see *infra* part III.

7. *Armadillo II*, 849 So. 2d at 281.

8. *Id.*

9. *Id.*

10. *Armadillo I*, 780 So. 2d at 235.

11. *Armadillo II*, 849 So. 2d at 281–282.

of the loss of parking area.<sup>12</sup> Before the taking, the Armadillo property had 140 parking spaces; however, after the taking, without a cure, the Armadillo property would have only sixty-seven spaces.<sup>13</sup> Both cure proposals involved a loss in parking at Armadillo Square, but not as much loss as if no cure was made.<sup>14</sup>

The Department's proposed cure involved reconfiguring Armadillo Square's parking lot and required that the parking area be shifted nine feet to the east.<sup>15</sup> In shifting the parking area, the Department's proposed cure eliminated approximately 9 feet by 180 feet of an area in front of the building that consisted of a sidewalk with pavers, planted areas, landscaping, an irrigation system, a grassy area, and two wooden arbor structures.<sup>16</sup> The Department's proposed cure would provide for ninety-seven parking spaces.<sup>17</sup>

Armadillo's proposed cure involved removing the north end of the building and reducing the amount of tenant space to alleviate the need for as many parking spaces, to provide a sloped driveway and buffer area between the building and the widened and raised roadway, to add parking where the building had been removed, and to provide a means of circulating from the west parking area to the east parking area.<sup>18</sup> Armadillo's proposed cure did not involve the elimination of the arbor area and would have resulted in ninety-nine parking spaces on the property.<sup>19</sup>

The Department's appraiser testified that severance damages could be calculated by adding together two amounts.<sup>20</sup> The first was the "cost to cure," which the Department contended would allow for the reconfiguration, movement, and construction of the parking areas.<sup>21</sup> The second was the amount of loss in the value of

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12. *Id.* at 281.

13. *Armadillo I*, 780 So. 2d at 235.

14. *Armadillo II*, 849 So. 2d at 282.

15. *Id.*

16. *See id.* at 286 n. 5 (quoting an expert witness's testimony regarding the valuation of the property). Each arbor structure consisted of wood fences, posts, lattice work and a trellis, together with landscaping within the arbors, which the appellate court and Supreme Court referred to as the "arbor area." *Id.* at 283–287; *Armadillo I*, 780 So.2d at 235–236.

17. *Armadillo II*, 849 So. 2d at 282.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

the shopping center after implementation of the Department's proposed cure.<sup>22</sup> The Department's appraiser testified that the loss in value of the overall property, after the taking and the implementation of the Department's proposed cure, was wholly a result of the loss of rental income attributable to reduced parking spaces at the property.<sup>23</sup>

After testifying that the loss in value was wholly because of the loss of rental income attributed to the reduction in parking, the Department's appraiser testified that his reduction in rent calculations considered the loss of the arbor area.<sup>24</sup> He also testified that he assigned no value to the arbor area and did not provide any separately identified compensation to Armadillo for the loss of the arbor area in the Department's proposed cure.<sup>25</sup> He did not provide any damage amount or valuation and did not compensate Armadillo for any of the improvements in the arbor area to be appropriated in the Department's proposed cure, or for the fact that the property owner and its tenants would not be able to use such areas in another manner unassociated with the taking or for future expansion, other than to the extent he considered that the appropriation would result in reduced rental income at the shopping center.<sup>26</sup> Despite Armadillo's motions to strike his testimony, the trial court denied the motions and permitted the jury to consider the appraiser's testimony in determining the value of the taken land and the amount of severance damages.<sup>27</sup>

## II. THE APPELLATE DECISIONS

Armadillo appealed to the Fourth District Court of Appeal, which reversed the final judgment.<sup>28</sup> The district court held that the testimony of the Department's appraiser should have been stricken because his testimony was based on a misconception of the law of severance damages.<sup>29</sup> The district court held that "no provision in his valuation was made for the loss of the [a]rbor

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22. *Id.*

23. *Armadillo I*, 780 So. 2d at 235.

24. *Id.*

25. *Armadillo II*, 849 So. 2d at 286 n. 5.

26. *Id.*

27. *Armadillo I*, 780 So. 2d at 235, 236.

28. *Id.* at 236.

29. *Id.*

[a]rea itself,” that the testimony focused strictly on lost parking, and that he failed to “consider the value of the permanent improvements lost as a result of conversion of the [a]rbor [a]rea.”<sup>30</sup>

In a four-to-three decision, the Florida Supreme Court reversed the district court’s decision.<sup>31</sup> In addressing the manner in which evidence of cost to cure relates to compensation, the Court stated as follows:

Indeed, as a leading authority in the field of eminent domain has cautioned, “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 the market value and therefore upon diminution in value of the remainder.” Thus, “cost to cure and other elements resultant from the taking are only admissible on the issue of just compensation if they are tied to their effect upon fair market value.”<sup>32</sup>

We agree with this explanation of severance damages and the use of cost to cure proposals in determining the fair market value of the remaining property after a partial taking. In doing so, we reject any suggestion that a property owner is entitled to additional compensation as a taking when the government’s cure proposal includes a change in use of a portion of the remaining property. Of course, there is no actual additional taking and the change in use is simply an economic proposal to maintain or improve the value of the remaining property.<sup>33</sup>

In reaching its decision, the Court disapproved precedent consisting of a line of cases from the First District Court of Appeal that had been followed for over thirty years.<sup>34</sup>

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30. *Id.*

31. *Armadillo II*, 849 So. 2d at 290.

32. *Id.* at 285 (quoting *Nichols on Eminent Domain* 4A vol. 42, § 14A.04[2], 14A–99, 14A–101 (rev. 3d ed., Matthew Bender & Co., Inc. 2001)) (internal citations omitted).

33. *Id.*

34. *Id.* at 290 (disapproving of *Dept. of Transp. v. Murray*, 670 So. 2d 977, 979 (Fla. 1st Dist. App. 1996) (holding an expert’s testimony inadmissible as a matter of law and properly excluded because the Department’s witness ignored the reduction in value of property resulting from Department’s cure); *Williams v. Dept. of Transp.*, 579 So. 2d 226, 229 (Fla. 1st Dist. App. 1991), *overruled*, *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994); *Dept. of Transp. v. Byrd*, 254 So. 2d 836, 837 (Fla. 1st Dist. App. 1971) (stating that “Where the testimony of an appraiser is based on a misconception of the law, the testimony should be

In its holding concerning expert testimony, the Court initially found that the Department's expert incorporated into his rental-loss opinion the loss of the arbor area.<sup>35</sup> The Court went on to state that it agreed with a line of decisions from the Second District Court of Appeal that held that the appraiser's method of evaluation goes to the weight of the matter, as opposed to its admissibility.<sup>36</sup> In concluding its discussion of the expert's testimony, however, the Court held that "even had [the Department's] expert failed to include the arbor area in his valuation of severance damages, . . . this exclusion would have gone to the weight, not the admissibility of his testimony."<sup>37</sup>

Justice Lewis, joined by Justice Wells and Justice Shaw, dissented; Justice Lewis wrote that he did so

to express [his] concern that the standard for the admissibility of expert opinion testimony propounded by the majority eviscerates the long-standing and broadly applicable rule that specifically excludes expert testimony when it contravenes established law. The decision to cast off this important evidentiary control will, in [his] view, foster misleading, as opposed to illuminating, expert testimony to the detriment of the justice system. The potential derogatory impact of the majority's decision cannot be understated given the ever-increasing number of cases that involve veritable seas of dense, sometimes arcane, and often conflicting expert testimony. . . . Another protection, firmly rooted in Florida juris-

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excluded").

35. *Armadillo II*, 849 So. 2d at 286.

36. *Id.* at 286–287.

37. *Id.* at 288. This "even-if" statement appears somewhat curious at first reading because the Court stated that the expert indeed had considered the arbor area in his valuation methodology, and then quoted from his cross-examination in support of that position. *Id.* at 286 n. 5. The reason for the majority's statement becomes clear, however, upon reading the dissent:

Ample record evidence shows, however, that the *entirety* of the expert's rent reduction calculation was based on the lost parking, that he assigned no value to the arbor area, and that he did not factor into his calculation the loss of the property owner's ability to make other uses of that area. . . . In my view, the record on this point is clear—the department's expert entirely failed to account for the value of the arbor area in reaching his conclusions regarding severance damages.

*Id.* at 292–293 (Lewis, J., dissenting) (emphasis in original). The majority did not reconcile its "even-if" statement in *Armadillo II* with its statement in *Patel* that awarding condemnments nothing for lost property value associated with converting other areas of their property to replace lost parking was error. *Patel*, 641 So. 2d at 44.

prudence prior to the Court's decision in the instant case, is that expert opinion testimony is properly excluded when it runs contrary to established law. Indeed, it is difficult to conceive of evidence fraught with more potential to mislead factfinders than legally erroneous expert testimony.<sup>38</sup>

Justice Lewis concluded his dissent by explaining the majority's error and expressing his concern that the ruling may have far-reaching impact

[b]y eliminating the loss of the arbor area as an element of damages, the expert's opinion contravenes the law of severance damages, which provides that "full compensation" for a taking includes "both the value of the portion being appropriated and any damage to the remainder caused by the taking." The majority does not purport to alter this rule of law, yet vitiates it by allowing an expert—with the heightened influence his position engenders—to pick and choose among compensable elements of recovery and present his assessment as "full compensation." The result in the instant case is the uncompensated loss of real property.<sup>39</sup>

### III. THE LEGAL BACKGROUND

#### A. Eminent Domain Precedent

The Court's opinion in *Armadillo II* rejected thirty years of precedent set forth by the First District Court of Appeal in *Department of Transportation v. Byrd*,<sup>40</sup> *Williams v. Department of Transportation*,<sup>41</sup> and *Department of Transportation v. Murray*.<sup>42</sup> In the 1971 *Byrd* decision, the Department sought to prove that a motel owner had not suffered any severance damages to the remaining property because the parking spaces lost by virtue of the taking could be replaced in an area where the property owner had a shuffleboard court.<sup>43</sup> The district court agreed that the trial court properly excluded the testimony because the testimony was

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38. *Armadillo II*, 849 So. 2d at 290, 291 (Lewis, J., dissenting).

39. *Id.* at 293 (Lewis, J., dissenting) (quoting *Frenchman*, 476 So. 2d at 226).

40. 254 So. 2d 836.

41. 579 So. 2d 226.

42. 670 So. 2d 977.

43. 254 So. 2d at 836.

based on a misconception of the law concerning severance damages.<sup>44</sup> The district court stated the following:

The expert's opinion ignores the reality of the missing shuffleboard court or if the same were to be rebuilt on yet another portion of appellees' property, the expert ignores the reduction in value of a motel with smaller grounds for its guests to enjoy or perhaps lesser area for expansion.<sup>45</sup>

In *Williams*, the property owner used the area of the taking for employee and customer parking.<sup>46</sup> The condemnor's appraiser testified that the lost parking could be replaced by constructing a new parking lot at the rear of the property.<sup>47</sup> The appraiser testified that construction costs of the new, rear parking lot would be \$24,000 and added that amount to the property owner's proposed compensation.<sup>48</sup> The appraiser also appraised the area where the new parking lot was to be constructed and determined that the property owner was entitled to additional compensation of \$48,000.<sup>49</sup> The appraiser then opined that compensation to the property owner of the total of \$24,000 and \$48,000 would fully restore the property owner and no severance damages would be incurred because all damages and effects to the remainder would be cured by the \$72,000 in compensation.<sup>50</sup> The Department's appraiser in *Williams*, however, failed to consider the effect on the property of appropriating another part of the property for a new parking area and changing the use to which it could be put thereafter.<sup>51</sup>

The district court in *Williams* stated as follows:

[The Department's appraiser's] opinion ignores the fact that the new parking area would not provide as much space for parking as *Williams* had before the taking, ignores the fact that the new parking area would intrude into *Williams*'s service area, ignores the impact that rear parking for cus-

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44. *Id.* at 837.

45. *Id.* at 836–837.

46. 579 So. 2d at 228.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 228, 229.

51. *Id.* at 229.



tomers might have on the value of the property as a business site, and ignores the fact that the new parking area would prevent further expansion of the business on that site. All of these items were appropriate for consideration as severance damages under the *Byrd* decision and should have been considered in the formulation of [the appraiser's] opinion. Where the testimony of an appraiser is based on a misconception of the law resulting in a lower valuation of damages than if he had correctly applied the law, such testimony should be excluded. Because [the appraiser] failed to consider any aspect of the impact of these required changes in the use of the property in determining the total damage resulting from the taking, the trial court committed reversible error in denying Williams's motion to strike his testimony.<sup>52</sup>

Despite the precedent that *Byrd* established in 1971, the *Armadillo II* Court decided to bid farewell to this line of authority.<sup>53</sup> Thus, using the reasoning in the *Armadillo II* decision and applying it to the facts in *Byrd* and *Williams*, different and lesser compensation would result than compensation actually awarded following thirty-year precedent.<sup>54</sup> If the Department's appraiser determined that the remainder would have the same rental or income stream after using the shuffleboard area in *Byrd* for a new parking lot or the rear of the *Williams* property for a new parking lot, the property owners in those cases would not have been entitled to any compensation for the appropriation of those areas.<sup>55</sup> Of course, the property owner would still be entitled to less severance damages when considering a cure that uses part of the property outside the area of the taking because the purpose of a proposed cure is to reduce damage to the property that otherwise would be inflicted as a result of the taking.

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52. *Id.*; see also *Murray*, 670 So. 2d at 979 (holding part of the Department's cure inadmissible as a matter of law and properly excluded because the Department's witness "ignore[d] the reduction in value of the restaurant business [caused by a] smaller parking area available for customer use" or smaller area available for expansion).

53. *Armadillo II*, 849 So. 2d at 290.

54. See *id.* at 283–285 (discussing *Byrd* and *Williams*).

55. See *id.* at 283 (summarizing the facts in *Byrd* and *Williams*).

## B. Expert Testimony Precedent

The *Byrd*, *Williams*, and *Murray* decisions were not the only decisions addressed in *Armadillo II* concerning the exclusion of expert testimony when the testimony is challenged on the ground that the expert failed to incorporate established law.<sup>56</sup> The Florida Supreme Court found that the Department's appraiser's testimony did not contravene the law of severance damages.<sup>57</sup> The Court stated that the appraiser had considered the loss of the arbor area, although the Court later stated that, even if he had failed to consider the arbor area, the issue was one of weight as opposed to admissibility.<sup>58</sup> In doing so, the Court cited as persuasive two Second District Court of Appeal decisions, *Road Department v. Falcon, Inc.*<sup>59</sup> and *Rochelle v. Road Department*.<sup>60</sup> The *Falcon* decision held that an appraiser's failure to consider one transaction in arriving at a value opinion goes to weight as opposed to admissibility.<sup>61</sup> The *Rochelle* decision held that an appraiser's testimony should not be excluded because of the methodology employed unless the methodology is inadequate or improper.<sup>62</sup> The Court in *Armadillo II* held that even if the Department's expert did not value the arbor area when calculating severance damages, the result is analogous to the *Falcon* decision.<sup>63</sup> Thus, the Court equated testimony in which an appraiser does not consider a particular transaction in reaching an opinion on severance damages with testimony in which an appraiser, for whatever reason, does not consider a matter that should have been factored into a property owner's compensation.<sup>64</sup>

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56. For an in-depth discussion of other cases discussed in *Armadillo II*, see *infra* notes 59–64 and accompanying text.

57. *Armadillo II*, 849 So. 2d at 289.

58. *Id.* at 288.

59. 157 So. 2d 563 (Fla. 2d Dist. App. 1963).

60. 196 So. 2d 477 (Fla. 2d Dist. App. 1967).

61. 157 So. 2d at 566.

62. 196 So. 2d at 479.

63. 849 So. 2d at 288.

64. See *id.* at 287, 288 (comparing *Falcon's* proposition with *Armadillo II*). In accordance with the *Armadillo II* decision, the present manner in which an arbor area in another taking context should be factored into a property owner's compensation is through its effect on fair market value. *Id.* at 288. The Court has held that even if an expert's testimony on severance damages does not do so, whether through oversight or intent, that testimony should be admitted for consideration by a jury. *Id.* at 288, 289.

#### IV. THE RAMIFICATIONS

By operation of the appellate process, decisions that incorporate interpretations of the *Armadillo II* decision have yet to be published at the time this Article was prepared. Nonetheless, ramifications from the decision likely were felt immediately following the issuance of the decision in 2003 in the context of eminent domain actions. The itemization of damages and compensation utilized by both the Department's and the property owner's appraisers no longer appear valid as a result of the *Armadillo II* decision and its impact on costs to cure and the relationship of those costs to fair market value of the remainder.<sup>65</sup> Ultimately, the amounts incorporated into costs to cure may be the same, but the manner in which they are presented to juries has changed.<sup>66</sup>

Unquestionably, the Court's decision in *Armadillo II* as it relates to expert testimony, whether in the context of eminent domain compensation or otherwise, has placed an additional onus on trial attorneys to hammer away at any expert whose testimony fails to recognize established elements of compensation or rules of law.<sup>67</sup> Because the standard placed on trial courts to exclude expert testimony is now so high, attorneys will rarely be in a position to exclude an expert's testimony.<sup>68</sup> Instead, attorneys will be faced with the burden, both through argument and proof offered by their own experts, of demonstrating the weakness of the incomplete testimony and the self-serving reasons behind a party's failure to ensure that its expert considered all applicable factors and law.<sup>69</sup> In this era when courts continue to express dismay at the level of professionalism displayed in the courtroom, it is un-

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65. *See id.* at 281–284 (recounting the itemization of damages and compensation utilized by both Department's and property owner's appraisers in the underlying *Armadillo I* case).

66. *See id.* at 287, 288 (stating that failure to properly consider one of many factors should not preclude an expert's opinion from the jury's consideration).

67. *See id.* (recognizing that an expert's opinion is subject to impeachment).

68. *Id.* As the Court stated in *Armadillo II*, the way in which an appraiser or expert evaluates a matter is unrelated to his competency “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.” 849 So. 2d at 287 (quoting *Rochelle*, 196 So. 2d at 479).

69. *See id.* at 287–288 (finding the Department's expert testimony was relevant to the issue of damages and was material to the Department's case, and was thus properly admitted).

fortunate that trial courts have been limited in their ability to exclude expert testimony and, by doing so, sanction parties who offer expert testimony that intentionally excludes factors that legally and legitimately should be considered.<sup>70</sup>

Time will tell whether the concerns expressed in Justice Lewis's dissent in *Armadillo II* concerning the decision's impact on expert testimony outside the eminent domain context prove true.<sup>71</sup> Whether expert testimony ultimately subject to consideration by juries in Florida becomes less reliable in the future, either intentionally or through sloppy preparation, will likely become clear as months and years pass.

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70. *See id.* at 290 (Lewis, J., dissenting) (commenting that the Court's decision in *Armadillo II* will likely precipitate misleading expert testimony).

71. *Id.* Justice Lewis expressed his concerns with the Court's decision in *Armadillo II* as follows:

While this case serves as a prime example of the impact of admitting legally erroneous expert testimony and incomplete damage assessments in the field of eminent domain, I must underscore the harm that may ensue should such a rule leach out into other bodies of law. Contrary to assisting the trier of fact, such testimony will mislead factfinders, resulting in erroneous and inequitable jury verdicts. In my view, the majority's decision constitutes an unjustified and unwise break with controlling precedent that will serve to undermine the interests of justice in this state.

*Id.* at 293.