IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-1612

JOSEPH R. REDNER,

Petitioner

vs.

THE CITY OF TAMPA, FLORIDA

Respondent.

APPEAL FROM FINAL ORDER OF THE
SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S FIRST AMENDED JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

In this Brief, the Respondent, City of Tampa, will be referred to as the "City"; and the Petitioner, Joseph R. Redner, will be referred to as "Redner.

Citations to the record on appeal will be made by the letter "R", followed by the volume number and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On April 18, 1994 Redner filed a "Complaint for Declaratory and Injunctive Relief, Damages and for Attorney's Fees and Petition for Writ of Certiorari" (R1-1-194); and, on May 2, 1994, Redner filed a "First Amended Complaint for Declaratory and Injunctive Relief, Damages and for Attorney's Fees and for Petition for Writ of Certiorari." (R2-310-40). In neither the Complaint, nor the First Amended Complaint, did Redner plead special damages relative to any claim against the City. Indeed, the Complaint and the First Amended Complaint are conspicuously bereft of any claim for damages against the City except that, in the count denominated attorney's fees (Count VII in the original Complaint and Count VIII in the Amended Complaint), Redner also requested "such other compensation or relief as may be just and proper." (R1-23; R2-288.)

On May 23, 1994 the City filed an Answer and Affirmative Defenses to the First Amended Complaint. (R3-403-418.)

On April 20, 1999 Redner filed a Motion for Summary Judgment (R3-561-604); and on November 9, 1999 the trial court entered an "Order Granting Summary Final Judgment on Issue of Due Process and Reinstatement of Wet Zoning." (R4-724-729.) It is significant to note that the trial court’s Order of November 9, 1999 did not make any determination as to Redner’s entitlement to damages and the

trial court retained jurisdiction over the issue of damages. (R4-729.)

On December 6, 2000 the Second District Court of Appeal, in Case No. 2D00-1053, issued a per curiam affirmance of the trial court's Order of November 9, 1999.

On July 31, 2001 the trial court granted leave to the City to file an Amended Answer and Affirmative Defenses (R5-865); and on August 9, 2001 the City filed its First Amended Answer and Affirmative Defenses wherein the City asserted, inter alia, that "the Amended Complaint fails to state a cause of action for damages or declaratory relief." (R5-869.) No Reply was ever filed by Redner to the City's First Amended Answer and Affirmative Defenses.

On December 5, 2001 the City served Motions in Limine on Redner's counsel wherein the City addressed a few issues including the issue of damages and, in that regard, the City argued that:

> The case of Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) defines the measure of damages in cases involving temporary deprivations or 'takings' of property. In that case, the owner's compensable interest was held to be the return on the portion of fair market value that is lost as a result of the regulatory restriction. The Court defined this interest as '...the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and

> its fair market value with the restriction.' See Id. at 271. The Court went on to point out that to award additional compensation for lost profits and increased costs of development would be to award double recovery since the relevant fair market values reflect a market estimation of future profits and development costs. This measure of recovery applies to temporary deprivations of property both for due process and 5th Amendment taking purposes.
>
> Accordingly, any evidence adduced to show loss of profits or increased development costs by the Plaintiff is not only irrelevant, but will be prejudicial to the Defendant because the jury may be led to believe these items are compensable and include them in a verdict against the City. Wherefore, City respectfully requests an order granting this Motion in Limine and ordering that the Plaintiff...refrain from mentioning, alluding or referring to any evidence to prove lost profits or increased development costs.

(R7-1270-1271.)

At a hearing held before the trial court, on December 7, 2001, the trial court denied the City's Motion in Limine as it related to the issue of damages. (R9-1563-1581.)

On December 10, 2001 the jury trial proceeded during which a number of witnesses testified including Redner. Redner testified that he was unable to successfully lease the premises during the period of the reversion to dry status (R10-248-249), however, Redner did acknowledge that presumably someone could have utilized the premises, without wet zoning, to operate a restaurant. (R10-258-259.) Redner also testified that he was able to remodel and

convert the premises to his office and that, as a result of utilizing the premises for his office, he was able to rent another facility to the Internal Revenue Service which he had previously used as his office. (R10-T249-250, 259-260.) Redner also acknowledged, moreover, that the building he rented to the Internal Revenue Service was an attractive lease for him. (R10-T260.)

During the course of the trial, the City's expert - Lee Pallardy - also testified concerning the premises and Mr. Pallardy concluded that, as of the beginning of 1993, the value of the premises with the liquor license was approximately $315,000.00 and that, as of the beginning of 1993, the value of the premises without the liquor license was approximately $295,000.00, a difference of approximately $20,000.00; and that, in applying a 10% rate of return to the $20,000.00 over an eight year period (the approximate period during which the premises was reverted to dry status), and in discounting that amount to present value, he would arrive at a figure of $10,700.00 as the value of any loss sustained by Redner as a result of the reversion of the premises to dry status. (R11-T496, 500-501.)

On December 10, 2001 the City submitted a proposed jury instruction to the trial court relative to the calculation of compensatory damages which provided as follows:

DEFENDANT'S JURY INSTRUCTION NO. 15.
(Calculation of Damages.)

> Plaintiff, Joseph Redner, claims that he incurred an injury or damage as a result of the City's reversion of wet zoning at the property located at 2605 West Kennedy Boulevard. The Court has restored wet zoning to the property owned by Mr. Redner, and therefore, the loss of wet zoning was temporary, not permanent. In calculating damages in the case of a temporary, regulatory deprivation or 'taking', the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. Accordingly, in this case, if you find that the City of Tampa is liable for damages for Joseph Redner, Mr. Redner's damages should be the market rate return, computed over the period of the temporary taking, on the difference between the property's fair market value with wet zoning and its fair market value without wet zoning at the time of the taking.
>
> You should not award additional compensation for lost profits or increased costs of development because the relevant fair market values by definition reflect a market estimation of future profits and development costs with respect to this property.

(R8-1332.) The trial court rejected the City's proposed instruction No. 15; and the trial court embraced the jury instruction proposed by Redner (Plaintiff's Instruction No. 4)[1]

[1] Redner's proposed jury instruction relative to the issue of calculating compensatory damages, which was originally submitted as "Plaintiffs' Instruction No. 4" and was subsequently adopted in Jury Instruction No. 10 albeit without reference to the authorities cited by Redner, identified three authorities in support of his position including Wheeler v. City of Pleasant Grove, supra. (R8-1350.)

relative to the calculation of compensatory damages. (R11-T349-363.)

On December 11, 2001 the trial court instructed the jury that "As to the claim against the City of Tampa, the Plaintiff in this action seeks damages under Section 1983, Title 42, of the United States Code." (R12-T637.) The trial court, moreover, went on to issue the following jury instruction relative to the issue of the calculation of compensatory damages:

> In determining an award of compensatory damages, you can consider the Plaintiff's investment backed expectations, that is, what did the Plaintiff hope to obtain by investing in and acquiring the property in question.
>
> The measure of compensatory damages can be determined as the loss in income producing potential suffered over that period of time during which the Plaintiff's civil rights were deprived.

(R12-T643.)

On December 11, 2001 the jury returned a verdict against the City in the amount of $493,256.15. (R12-T650.)

On January 8, 2002 the City timely filed a Notice of Appeal (R8-1441-1443); and, on March 28, 2003, the Second District Court of Appeal issued its opinion reversing the final judgment and remanding for a new trial. In reaching that conclusion the Court stated in relevant part:

> Although the land with the improperly imposed dry zoning would generate less income than if the

property were zoned wet, there was no claim that the dry zoned property was without any value whatsoever nor that it could not produce some income. Accordingly, the proper measure of damages is the reduction in the income producing potential, not the amount of all income lost while the property sat vacant for a period of time. This reduction in income producing potential is measured by subtracting the annual income potential of the property as zoned dry from the annual income potential of the property as zoned wet, multiplied by the number of years the property was improperly zoned. See Wheeler, 833 F.2d 267.

The annual income potential would be the expected percentage of return on investment multiplied by the fair market value of the property. For example, if the fair market value of the property zoned dry is $250,000 and the expected percentage of return on the investment is ten percent, the annual income producing potential for the dry property is $25,000. If the fair market value of the property when zoned wet is $300,000, then the annual income producing potential for the wet property is $30,000. The annual loss in income producing potential due to the improper zoning would be $5,000 and the total loss would be eight times that amount, or $40,000.

Although Redner presented evidence of other costs he incurred, those expenses are not recoverable. See Wheeler, 833 F.2d at 270. Specifically, Redner is not entitled to lost income from a lease agreement that had been conditioned on the restoration of the wet zoning; to the costs he incurred for taxes, utilities, and insurance on the property during the temporary taking; or to engineering, architectural, and construction costs incurred remodeling the premises for his personal use as an office building.

The large dollar amount of the verdict against the City, $493,256.15, reflects that the jury improperly awarded the total of Redner's loss of rental income under the lease agreement calculated over the time of the taking and a significant

> portion of the costs of maintaining and developing the property. The trial court's instruction on damages failed to properly instruct the jury as to the appropriate award of damages. Accordingly, we reverse the final judgment and remand for a new trial.

City of Tampa v. Redner, 852 So.2d 270, 272 (Fla. 2d DCA 2003)(footnote omitted) (emphasis supplied).

SUMMARY OF ARGUMENT

The only basis on which Petitioner seeks to invoke discretionary jurisdiction of this Court is based upon an alleged express direct conflict with the decision in Dade County v. General Water Works Corporation, 267 So.2d 633 (Fla. 1972). In the case sub judice, however, there is no express conflict with a decision of the Florida Supreme Court or another district court of appeal.

ARGUMENT

I. THERE IS NO EXPRESS CONFLICT WITH A DECISION OF THE FLORIDA SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL

As set forth in the treatise Florida Appellate Practice, by Philip J. Padavano, (2003 edition):

> The supreme court has discretionary jurisdiction only if the decision of the district court expressly conflicts with a decision of the supreme court or another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate decisions.

Id. at § 3.10. In the case at bar, the stringent requirements associated with discretionary jurisdiction cannot be satisfied. The Second District Court of Appeal's reliance on the decision in Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) is well founded. In Wheeler, which is one of the authorities that Redner himself favorably cited to support his proposed jury instruction, the Eleventh Circuit stated in relevant part:

> The landowner's compensable interest . . . is the return on the portion of fair market value that is lost as the result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. Under this approach, the landowner recovers what he lost. To award any affected party additional compensation for lost profits or increased costs of development would be to award double recovery: the relevant fair market values by definition reflect a market estimation of

> future profits and development costs with respect to the particular property at issue.

833 F.2d at 271 (citations omitted) (footnote omitted) (emphasis supplied). Subsequently, in Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351-1352 (11th Cir. 1990), the Eleventh Circuit applied this formula in calculating the compensatory damages.

The decision in Wheeler does not expressly conflict with any decision of the Florida Supreme Court or another district court of appeal. The case of Dade County v. General Water Works Corporation, 267 So.2d 633 (Fla. 1972), which is cited by Redner, is factually distinguishable and is not inconsistent with the legal principles articulated in Wheeler or in the case sub judice. Moreover, in Department of Agriculture & Consumer Services v. Mid Florida Growers, Inc., 570 So.2d 892, 899 (Fla. 1990), the Florida Supreme Court, in addressing the issues of full compensation, stated in relevant part:

> We conclude that the trial court erred in permitting the alleged component of full compensation to be presented to the jury and that the damages awarded by the jury for lost or retarded production of new stock are therefore not sustainable... The constitutional right to receive full compensation under eminent domain is not a right to receive general damages. [Emphasis supplied].[2]

[2] The Florida Supreme Court further favorably cited the district court for the proposition that "The claim for lost production is a claim for consequential business damages. It is well established that 'the right to business damages is a matter of legislative grace,

The decision in Department of Agriculture & Consumer Services is particularly apposite for the reason that the complaint therein did not seek damages for lost production until after a bench trial on liability, 570 So.2d at 901 n.5; and the Court held that "because this measure of compensation was not alleged in the complaint ... this measure of compensation should not have been presented to the jury. Id. At 901. (Emphasis supplied.) Similarly, in the case at bar, the Complaint and First Amended Complaint are also bereft of any claim for damages relative to loss in income producing potential;[3] and it was error for trial judge to instruct the jury that "The measure of compensatory damages can be determined as the loss in income producing potential...."

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not constitutional imperative'." 570 So.2d at 899 (quoting 541 So.2d at 1250-51) (footnotes omitted) (emphasis supplied). See also Sasnett v. Tampa Electric Co., 513 So.2d 157, 159 (Fla. 2d DCA 1987)wherein the court held that "Business damages and lost profits do not constitute a part of the constitutionally protected concept of 'just' or 'full' compensation since they are intangibles which generally are not property in the constitutional sense."

[3] Section 73.071(3)(b), Fla. Stat. (2002), which is the statute allowing business damages in an eminent domain case, requires that "any person claiming the right to recover such special damages shall set forth in his or her written defenses the nature and extent of such damages. . . ." Id. This statutory requirement was not satisfied in the case sub judice. In contrast, in Dade County v. General Water Works, supra, "the proceedings [were] still in the pleading stage." 267 So.2d at 639. The case law interpreting § 73.071(3)(b) has held that the statute must be strictly construed in favor of the state and against the claimant. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Services, Inc., 444 So.2d 926, 928 (Fla. 1983).

CONCLUSION

In the absence of any express conflict with a decision of the Florida Supreme Court or another district court of appeal, it is respectfully submitted that this Court does not have discretionary jurisdiction to review the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished via first class mail on this 8th day of October, 2003 to Luke Lirot, Esq., 112 East Street, Suite B, Tampa, Florida 33602 and Grayden M. Dough, Esq., 2605 W. Kennedy Boulevard, Tampa, FL 33609.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the within Brief complies with the requirements of Fla. R. App. P. 9.110 and 9.210.

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Jerry M. Gewirtz
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