IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No.: 5D16-4049

DARDEN RESTAURANTS, INC., and GMRI, INC.,

Appellant,

v.

RICK SINGH, as Orange County Property Appraiser, and LEON BIEGALSKI, as Executive Director of the Florida Department of Revenue,

Appellees.

On appeal from the Ninth Judicial Circuit in and for Orange County, Florida

_____/

APPELLEE, RICK SINGH'S, AMENDED ANSWER BRIEF

KENNETH P. HAZOURI, B.C.S.
Board Certified in Appellate Practice
Florida Bar Number 019800
Primary e-mail: khazouri@dsklawgroup.com
Secondary e-mail: lquezada@dsklawgroup.com
deBeaubien, Simmons, Knight,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
Orlando, Florida 32801
Telephone: (407) 422-2454
Attorneys for Appellee, Rick Singh

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Administrative Rules

Rules of Appellate Procedure

Treatises

Preliminary Statement

This brief refers to Defendants/Appellants, Darden Restaurants, Inc., and GMRI, Inc., collectively as "Darden"; Plaintiff/Appellee, Rick Singh, as Orange County Property Appraiser, as "OCPA"; Defendant/Appellee, Leon Bielgalski, as Executive Director of the Florida Department of Revenue as ("DOR"); and the tangible personal property at issue in the consolidated cases as "Darden's TPP" or the "Subject TPP." Record cites are designated with a parenthetical referencing "R." and the record page number(s) for the cited document, whether located in the original record, the first supplemental record, or the second supplemental record. Cites to Darden's Initial Brief, DOR's Answer Brief, and the Amici Curiae Briefs are in parentheticals with the following abbreviations: "I.B." = Initial Brief; "DOR" = DOR's Answer Brief; "F.C.C." = Amicus Brief of Florida Chamber of Commerce; "U.S.C.C." = Amicus Brief of United States Chamber of Commerce.

Supplemental Statement of Case and Facts

Darden's Initial Brief inadequately describes and, in certain significant respects, mischaracterizes the trial evidence and the Final Judgment's rulings. Darden also omits any reference to the motion for involuntary judgment as a matter of law it made under section 194.301, Florida Statutes ("§ 194.301"), at the close of OCPA's evidence, which Darden failed to renew at the end of its case in chief

and trial. These deficiencies are material to the Court's resolution of this appeal. DOR's decision to participate in this appeal also requires an explanation of its lack of participation in the trial court. Accordingly, OCPA hereby provides its own supplemental Statement of the Case and Facts.

OCPA filed these consolidated actions pursuant to section 194.036, Florida Statutes ("§ 194.036"), after the Orange County Value Adjustment Board ("VAB") reduced OCPA's 2013 and 2014 just valuations of Darden's TPP from $29,033,332 to $20,503,172, and from $27,424,505 to $17,265,000, respectively. (R. 12 & 2924) Pursuant to § 194.036(2), OCPA had the burden of proving its claims by a preponderance of the evidence. OCPA neither requested nor received a presumption of correctness for its valuations of Darden's TPP from the trial court.

Singh named DOR as a nominal defendant in the cases pursuant to section 194.181(5), Florida Statutes. (R. 12-13, 2924-25) DOR later moved to be excused from all pre-trial obligations and the trial. (R. 50-52) To obtain that relief, DOR represented to the court that this case does not involve DOR or "implicate any statute, constitutional provision, or administrative rule of the DOR." (R. 51) With Singh's acquiescence, the court granted DOR's motion. (R. 74-75) DOR then did not participate in the pre-trial proceedings, trial, or post-trial proceedings.

This case's central dispute is the just valuation of Darden's TPP for ad valorem tax purposes -- an inherently factual issue. OCPA's lead trial witness was

Brett Thayer, who over his 25+ years with OCPA has valued "tens of thousands" commercial TPP accounts. (R. 1147-54)

Mr. Thayer testified that OCPA used a mass appraisal cost approach to value Darden's TPP. (R. 1162, 1201) Under this methodology, OCPA calculates the TPP assets' "replacement cost new," and then depreciates the replacement cost down to the assets' fair market value based on their effective age (*i.e.*, the older the asset, the higher the depreciation, and the lower its value). (S.R. 1163) OCPA's mass appraisal cost approach is expressly authorized by Supreme Court precedent (*see infra* pp. 22-25) and the DOR's *Standard Measures of Value: Tangible Personal Property* (the "*Standard Measures*"), which were admitted at trial. (R. 3202)

Mr. Thayer explained each step in OCPA's mass appraisal cost approach. (R. 1164-1209) He described how OCPA considered each of the factors set forth in section 193.011, Florida Statutes ("§ 193.011"), when valuing Darden's TPP. (R. 1203-08) Mr. Thayer also discussed the *Standard Measures*' provisions providing guidance on how to account for functional and economic (a/k/a external) obsolescence in a mass appraisal cost approach by "look[ing] to the market" for evidence of obsolescence impairing the TPP's value. (R. 1190-91, 3242) OCPA admitted substantial, competent evidence proving that its mass appraisal cost approach fully complies with this provision. (R. 1182 – 96)

As Mr. Thayer explained, OCPA annually assigns a useful life (*e.g.*, four,

six, ten years, etc.) to each TPP-asset class listed in its Life Assignment Guide. (R. 1182-83) OCPA also annually prepares its Present Worth Table listing "percent good" figures for each useful-life category, which decline each year as the assets grow older and suffer more depreciation.[1] (R. 1172-90, 3316, 3326) Crucially, assets assigned a shorter useful life depreciate, and, therefore, decline in value, more rapidly than assets assigned a longer useful life. (R. 1186-90, 3316, 3326)

Mr. Thayer testified that as a result of its continuous monitoring of the TPP market for obsolescense, OCPA "constantly" makes adjustments to its annual Life Assignment Guides. (R. 1186) Every adjustment involved OCPA moving the asset class from a longer to a shorter life. (R. 1186 – 90) Those adjustments result in a more rapid decrease in the assets' percent good, a more rapid increase in their depreciation, and, concomitantly, a more rapid decrease in the assets' just value over time. (R. 1186 – 90) This evidence proves that OCPA considered and accounted for any functional and economic obsolescence impairing the value of Darden's TPP that OCPA identified when examining the TPP market.

Ronny Cardell also testified in OCPA's case-in-chief. (R. 1463) Mr. Cardell worked in OCPA's TPP department for 30+ continuous years until his retirement shortly before trial. (R. 1463-66) In his final ten years, Mr. Cardell supervised

[1] "Percent good" is the inverse of depreciation. For example, an asset that is 70% "percent good" has depreciated by 30% from replacement cost new. (R. 1171)

OCPA's field appraisers, who constantly research the TPP market and interact with taxpayers regarding TPP-valuation issues. (R. 1471-1477)

Mr. Cardell detailed numerous actions taken by OCPA's field department to look for signs of functional or economic obsolescence in the TPP market. These include, and are not limited to: a) talking to taxpayers who report their TPP is suffering from obsolescence and reviewing information provided by them; b) reviewing and researching taxpayers' evidence in support of their VAB petitions claiming value impairment due to obsolescence; c) constantly researching the TPP market on the internet and through interviews with manufacturers and used equipment dealers; d) attending onsite inspections of TPP; and e) preparing written studies of the TPP market referred to as "market studies." (R. 1474-86)

Like Mr. Thayer, Mr. Cardell explained OCPA's movement of asset classes from longer to shorter useful lives upon determining the adjustment is necessary to account for functional or economic obsolescence observed in the market. (R. 1491 – 96) He described specific changes to OCPA's Life Assignment Guide and other adjustments OCPA has made based on concerns raised, and information provided by, taxpayers regarding functional and economic obsolescence. (R. 1486-1496)

Darden's cross-examination of Mr. Cardell focused on OCPA's market studies. (R. 1621 - 68) Mr. Cardell addressed Darden's concerns and explained that when properly analyzed, the studies' data supports their conclusions, with which

he agreed. (R. 1621 - 68) Mr. Cardell also estimated that OCPA's 2013 and 2014 market studies comprised a mere 10% of OCPA's research of the TPP market within its mass appraisal cost approach during those years.[2] (R. 1496-97)

Following OCPA's case-in-chief, Darden moved for involuntary dismissal based on the following arguments made by its counsel under § 194.301:

> [T]he Defendant moves for an involuntarily [sic] dismissal at this time, and the grounds are as follows. The burden of proof is set forth, as I've said, in section 194.301, Florida Statutes. The burden is to show that -- the burden is to establish that the assessments set by the Value Adjustment Board do not represent just value. And that must be done with evidence that cumulatively meets the requirements of the assessment statute and professionally accepted appraisal practices.
>
> Although, the Plaintiff did offer the opinion of Mr. Thayer that the just value is in excess of the Value Adjustment Board's assessments, there was no testimony or evidence that the Property Appraiser's original assessments comported to professionally accepted appraisal practices. As I said earlier this morning, this part of the statute is akin to the standard of care expert in a negligence case.
>
> To meet this standard, it was incumbent on the Plaintiff to offer competent testimony from an expert witness to establish just what the professionally accepted appraisal practices are for valuing tangible personal property. Mr. Thayer never spoke to that point, neither did Mr. Cardell. There is zero evidence in the record on that issue by the Plaintiff.

[2] The Florida Chamber falsely states that "OCPA's priority is unhampered reliance on [its] computer." (F.C.C., p. 19) This baseless, *ad hominem* attack is directly contrary to all of the above-described evidence of OCPA's human interaction with, and adjustments to, its mass appraisal cost approach.

> So without that evidence in the record, the plaintiff has not put on a prima facie case for relief and we would ask that the Court grant the Motion for Involuntary Dismissal.

(R. 1742-43; emphasis supplied) Darden is making these same arguments in this appeal. The trial court denied Darden's motion. (R. 1763) Critically, Darden failed to renew its motion following the close of its evidence or at the end of trial.

Following trial, the court entered the Final Judgment for OCPA. (R. 859-877) Section II. of the judgment discusses the standards governing the court's adjudication of the case and ends by clearly stating: "As the Plaintiff and party initiating these actions, OCPA bears the burden of proof." (R. 863)

Section III.A. of the judgment details OCPA's evidence in support of its just valuations of Darden's TPP. (R. 863-66) This section discusses the testimony of Messrs. Thayer and Cardell and ends with the following summary:

> 21. In sum, OCPA calculated its 2013 and 2014 fair-market valuations of Darden's TPP by using a Mass Appraisal Cost Approach that complies with the DOR's *Standard Measures* and § 193.011, and which the Florida Supreme Court has approved for valuing property like Darden's TPP for ad valorem tax purposes. After considering all of the evidence, the Court finds that OCPA's $29,033,332 and $27,424,505 fair market valuations of Darden's TPP for 2013 and 2014, respectively, <u>are very reliable and credible.</u> (R. 866; emphasis supplied)

Certain subject matters <u>not</u> included in the Final Judgment's discussion of OCPA's evidence are also important for this appeal. In particular, Section III.A. does not reference any supposed "value in use" valuation methodology. (R. 863-

66) Moreover, Section III.A.'s only reference to the judgment in *Wal-Mart Stores, Inc. v. Crapo*, 97-CA-4728 (Fla. 8th Cir Ct. 2001) ("*Crapo*") is a "*Cf.*" cite in a footnote, which supports the trial court's factual finding that OCPA's market studies "are not material" to its valuations of Darden's TPP. (R. 865-66)

Next, Section III.B. of the Final Judgment discusses Darden's competing evidence in support of its proposed valuations of the Subject TPP. (R. 863-73) As stated therein, Lazaro Seijo of Landmapp was Darden's only trial witness to offer an opinion of value. (R. 866) The judgment also explains that he used a sales comparison approach to value the vast majority of Darden's TPP. (R. 866-67).

The judgment then details a litany of problems with Mr. Seijo's testimony, which cast tremendous doubt on the credibility and reliability of his valuation opinions. (R. 867-873) Indeed, the trial court explained that Mr. Seijo violated perhaps the most fundamental tenet of the sales-comparison approach -- failing to ensure that the comparable sales (actually internet sales listings) he used to value Darden's TPP are "arms-length transactions," as defined in Florida Administrative Code Rule 12D-1.002(2) and Florida common law. (R. 867-69)

Other significant problems with Mr. Seijo's methodology and opinions detailed in the judgment include: a) his use of only one or two sales listings (*i.e.*, "comps") to value the majority of Darden's TPP, which violated professionally accepted appraisal practices according to Darden's own expert, Tammy Blackburn;

b) his failure to adjust his comps to account for differences in quality and condition between them and Darden's TPP; c) his valuation of Darden's computer assets by simply lifting estimated values from the Web site usedprice.com, instead of performing his own value analysis on them; d) his failure to provide any comps or methodology to support his values of Darden's alarm system, artwork and decor, window treatments, and signage; e) obvious problems with his valuation of Darden's solar-power system; and f) his repeated impeachment on cross examination with his prior inconsistent statements. (R. 869-873)

The trial court also identified another problem with Mr. Seijo's value opinions. It noted his testimony "that Darden's use of the Subject TPP to operate its business on the Valuation Dates was irrelevant to his valuation methodology." (R. 869) With reference thereto, the court explained that Mr. Seijo's methodology violated 193.011(2), which "lists 'the present use of the property' as a relevant consideration for valuing TPP for ad valorem tax purposes." (R. 869) In support of this conclusion, the court quoted the ruling in *Crapo* that is the focus of Darden's argument in Section I.B. of its Initial Brief. (R. 869) (I.B., pp. 22-29) Thus, the court relied on that ruling when assessing Mr. Seijo's valuation methodology, <u>not</u> when analyzing, or even discussing, OCPA's valuation methodology or evidence.

The trial court set forth its "Findings of Ultimate Fact" in Section IV. of the Final Judgment. (R. 874-75) There, the court made the purely factual finding that

OCPA's proved "by at least a preponderance of the evidence" that its "$29,033,332 and $27,424,505 valuations of Darden's TPP represent its just and fair market value for 2013 and 2014, respectively, pursuant to Article VII, § 4." (R. 875) This finding establishes that: a) OCPA bore the burden of proving its case by a preponderance of the evidence; and b) after considering and weighing the parties' competing evidence, the court found that OCPA met that burden and was entitled to a judgment reinstating its 2013 and 2014 just valuations of Darden's TPP.

Summary of Argument

The Final Judgment must be affirmed because substantial, competent evidence supports the trial court's factual findings that OCPA's valuations of Darden's TPP represent its just value and are more "reliable and credible" than Darden's proposed valuations. Darden's entire brief is a futile exercise in trying to escape this inescapable conclusion.

Darden repeatedly argues that the trial court violated § 194.301. Darden, however, waived all of its arguments under this statute by failing to renew its motion for involuntary dismissal at the close of its evidence and the end of trial. Recognizing this fact, Darden has based nearly all of its arguments on rulings that the trial court literally did not make, and which are not, therefore, in the record.

First, Darden claims that the trial court violated § 194.301 by approving OCPA's utilization of a so called "value in use" methodology to value Darden's

TPP. The trial court made no such ruling in the Final Judgment or otherwise.

Second, Darden argues that § 194.301 required OCPA to call an expert witness from the "private sector" to opine that OCPA used "professionally accepted appraisal practices" to value Darden's TPP. Any such testimony would, however, constitute improper bolstering of an expert in clear violation of section 90.706, Florida Statutes ("§ 90.706"). OCPA proved its use of professionally accepted appraisal practices to value Darden's TPP with detailed evidence describing its mass appraisal cost approach, which has been long approved by the Florida Supreme Court and fully complied with the professionally accepted appraisal practices set forth in the *Standard Measures*.

Third, Darden and its amici curiae falsely assert that the trial court accorded a presumption of correctness to OCPA's valuations in violation of § 194.301. This assertion is quite remarkable since: a) OCPA never requested a presumption of correctness for its valuations; b) the trial court never accorded them a presumption of correctness; and c) the Final Judgment clearly states that OCPA was required to prove, and did prove, its case by a preponderance of the evidence.

Fourth, Darden claims OCPA took the position at trial that Darden's property does not suffer from any functional or economic obsolescence. This claim is utterly false. OCPA's position at trial was that its mass appraisal cost approach accounted for any functional or economic obsolescence impairing the value of

Darden's TPP, not that it was unimpaired by any such obsolescence. The Final Judgment makes this exact ruling.

Fifth, Darden rehashes an argument it first raised weeks after the trial. Even though Darden reported its alarm system, window treatments, music system, and solar power system as TPP assets in its TPP tax returns, Darden argued in a post-trial motion for rehearing that those assets were really not TPP and were instead part of the real property. The trial court summarily rejected Darden's prejudicially tardy and meritless arguments. This Court should do the same.

Finally, Darden incorrectly asserts that OCPA's valuations of Darden's TPP are based on its market studies, and the trial court erred by approving them. Contrary to this assertion, OCPA's market studies were only a minor component of the mass appraisal cost approach it used to value Darden's TPP, and the trial court ruled they were not material to OCPA's ultimate valuations of Darden's TPP.

After not participating below, DOR now seeks to act as an appellant and argue that the Final Judgment contains an incorrect ruling involving the *Standard Measures* and section 195.032, Florida Statutes ("§ 195.032"). DOR did not, however, preserve its arguments for review, and they are prohibited by the doctrine of estoppel against inconsistent positions. On the merits, DOR's arguments violate fundamental rules of statutory construction and are based on unsubstantiated conjecture regarding subject ruling's supposed effect on future events.

Standard of Review

This case was tried before the court, which after hearing and weighing the evidence found that OCPA's "valuations of Darden's TPP represent its just and fair market value for 2013 and 2014." This factual finding, and those related to it, come to the Court clothed with a presumption of correctness, and they must be affirmed if there is any substantial, competent evidence supporting them. *RH Resorts, Ltd. v. Donegan*, 881 So. 2d 1152, 1154 (Fla. 5th DCA 2004). In an appeal following the trial of a property-tax case, this Court expressly held that "[t]he findings of the trial court as to disputed facts cannot be overturned by this court." *Love PGI Partners, LP v. Schultz*, 706 So. 2d 887, 890 (Fla. 5th DCA 1998).

Darden knows it cannot prevail under this standard of review. Accordingly, Darden strives to convince this Court that the appeal really concerns legal errors subject to *de novo* review. Indeed, the first sentence of Darden's "Legal Argument" proclaims -- with more than a hint of desperation -- "[t]his is not an appeal about the weighing of evidence." (I.B., p. 21) So long as we are quoting Shakespeare,[3] Darden "doth protest too much, methinks." William Shakespeare,

[3] While fun, Darden's analogy to King Richard, III, is also seriously flawed. (I.B., p. 26) The king seeks to acquire a horse and would, therefore, be the buyer in the proposed sale transaction. On the other hand, Darden owns its TPP and would be the seller in its hypothetical sale. Moreover, since the king so desperately needs a horse he would give up his entire kingdom for one, the horse vendor can clearly

Hamlet, act 3, sc. 2.

Darden repeatedly cites *Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012) in support of its proffered *de novo* standard of review. (I.B., pp. 21, 37) *Rippy* involved an order granting a motion to dismiss the plaintiff's complaint. We are not here on a motion to dismiss. As was the case in *RH Resorts* and *Love PGI*, we are here following the trial of a factual dispute in the field of ad valorem taxation. Those opinions set forth the standard of review governing this appeal.

Argument

I. THE TRIAL COURT'S FACTUAL FINDINGS THAT OCPA'S VALUATIONS OF DARDEN'S TPP REPRESENT ITS JUST VALUE AND ARE MORE RELIABLE AND CREDIBLE THAN MR. SEIJO'S OPPOSING VALUATIONS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

Regardless of Darden's various arguments on (real or contrived) sub-issues in this case, it is indisputable that following the parties' admission of competing trial evidence, the trial court found, *inter alia*, that "OCPA proved by at least a preponderance of the evidence" that: a) OCPA's mass appraisal cost approach "is considerably more reliable and credible than" Darden and Mr. Seijo's valuation

---

take advantage of the exigencies of the king's situation. By definition, therefore, the horse sale (like Mr. Seijo's comps) is not an arms-length transaction appropriate for valuing property under Florida law, including F.A.C. Rule 12D-1.002(2). Darden, on the other hand, is under no duress to sell its TPP.

methodology; and b) OCPA's $29,033,332 and $27,424,505 valuations of Darden's TPP represent its just and fair market value for 2013 and 2014, respectively. . . ." (R. 874-75) Nothing argued by Darden, its amici curiae, or DOR can alter the conclusion that these dispositive factual findings are supported by substantial, competent evidence. Accordingly, the Final Judgment for OCPA based on them must be affirmed under *RH Resorts* and *Love PGI*.

II. DARDEN WAIVED ITS ARGUMENTS UNDER § 194.301 BY FAILING TO RENEW ITS MOTION FOR INVOLUNTARY DISMISSAL AT TRIAL, AND DARDEN HAS, THEREFORE, ATTEMPTED TO BASE THOSE ARGUMENTS ON NON-EXISTENT RULINGS.

By Darden's own admission, all of its arguments are grounded in its assertion that the trial court violated § 194.301. (I.B., p. 21) Darden, however, failed to preserve its arguments under § 194.301 for review. As such, Darden has attempted to base those arguments on non-existent trial court rulings.

A. Darden waived its arguments under § 194.301 by failing to renew its motion for involuntary dismissal at the close of Darden's case-in-chief and the end of trial.

Despite basing its entire appeal on the argument that the trial court erred in its application of § 194.301, Darden does not identify a single reference to this statute in the Final Judgment, much less any ruling therein based on it. This is because the Final Judgment contains no such ruling.

As quoted above, Darden moved for an involuntary dismissal at the close of OCPA's case-in-chief based on the same arguments under § 194.301 Darden is making in this appeal. *See supra* pp. 6-7. For example, Darden's trial counsel argued that "there was no testimony or evidence that the Property Appraiser's original assessments comported to professionally accepted appraisal practices." Darden's Initial Brief proposes language for a hypothetical appellate opinion making a favorable ruling on this identical argument. (I.B., p. 18)

The trial court's denial of Darden's motion for involuntary dismissal perfectly "tees up" Darden's appellate arguments under § 194.301. Yet, Darden's Initial Brief does not even mention that motion, much less argue for a reversal based on the trial court's denial of it. Why is this? Darden has waived its arguments under § 194.301 by failing to renew its motion for involuntary dismissal at the close of its own case-in-chief or the end of trial. *Plaza Builders, Inc. v. Regis*, 502 So. 2d 918, 922 (Fla. 2d DCA 1986); *Honda Motor Co., Ltd. v. Marcus*, 440 So. 2d 373, 375 (Fla. 4th DCA 1983).

It is axiomatic that an appellant cannot obtain a reversal of a non-existent ruling. *French v. Department of Children and Families*, 920 So. 2d 671, 676-77 (Fla. 5th DCA 2006); *Fleming v. Peoples First Financial Sav. and Loan Ass'n*, 667 So. 2d 273, 274 (Fla. 1st DCA 1995)(citing P. Padovano, *Florida Appellate Practice* § 5.2 at 70 (West 1988)). The only ruling that could have supported

Darden's current arguments under § 194.301 is the trial court's denial of its motion for involuntary dismissal at trial. Darden, however, failed to preserve that ruling for review, and its Initial Brief does not raise it as grounds for reversal. The Court should, therefore, facially reject all of Darden's arguments under § 194.301 because there is no preserved ruling to support them.

B. Contrary to Darden's arguments, the Final Judgment does not rule that OCPA utilized a "value in use" standard to value Darden's TPP, and the judgment quotes the ruling in *Crapo* challenged by Darden when analyzing Mr. Seijo's valuation methodology, not any evidence presented by OCPA in its case-in-chief.

Section I.B. of the Initial Brief argues that the Final Judgment violated § 194.301 by approving OCPA's utilization of a so-called "value in use" methodology to value Darden's TPP, as do Darden's amici curiae. (I.B., pp. 22-29, F.C.C., pp. 13-20, U.S.C.C., 14-19) However, the Final Judgment's discussion of OCPA's evidence in its case-in-chief, including its description of OCPA's valuation methodology, is devoid of any reference to OCPA's utilization of a "value in use" standard. (R. 863-66) As such, this argument is a prime example of Darden's futile attempts to obtain a reversal based on non-existent, "phantom" rulings. *See supra French* and *Fleming*, p. 16.

Furthermore, Darden attempted to admit evidence vaguely (and incorrectly) suggesting that OCPA had used a so-called "value in use" methodology to value

the Subject TPP through one of its experts, Tammy Blackburn. (R. 2131-33) On cross examination, however, Ms. Blackburn was forced to admit that: a) she was asserting OCPA had used a "value in use" methodology called "fair market value in continued use with assumed earnings"; and b) this particular valuation methodology involves consideration of the taxpayer's business earnings. (R. 2358-62) OCPA presented no evidence suggesting that it used any such methodology to value Darden's TPP. On rebuttal, Mr. Thayer unequivocally testified that OCPA did not do so. (R. 2730-32) This further explains the absence of any finding in the Final Judgment that OCPA utilized a so-called "value in use" methodology to value Darden's TPP.

Section I.B. of Darden's Initial Brief does challenge one ruling that actually exists in the Final Judgment, which is the following language from *Crapo*:

> Quite obviously, there would be no willing seller that would sell relatively new property for ten cents on the dollar, especially when it had recently been installed in an ongoing business. The fact that there is a "market" in used equipment totally fails to take into consideration the reality of the way businesses are run. Ongoing operations such as Wal-Mart simply do not sell equipment that has a remaining useful life to the owner.

(R. 869 quoting *Crapo*, 97-CA-4728 at * 4.) While somewhat unclear, Darden appears to assert that the judgment's adoption of this ruling somehow suggests that OCPA utilized a "value in use" methodology to value Darden's TPP. Darden's

amici curiae also attack this ruling. (F.C.C., pp. 14-17; U.S.C.C., p. 13)

Contrary to those arguments, the Final Judgment's discussion of *Crapo*'s above-quoted ruling applies exclusively to Mr. Seijo's, not OCPA's, valuation methodology. The Florida Chamber correctly recognizes this fact by quoting the judgment's language introducing the *Crapo* ruling, which begins by stating "Mr. Seijo also testified that. . . ." (F.C.C., p. 14) The trial court's application of *Crapo* to Mr. Seijo's valuation methodology does not somehow demonstrate that OCPA utilized a supposed "value in use" valuation methodology to value Darden's TPP.

Moreover, Mr. Seijo's violation of *Crapo* is just one of many material problems with his valuation opinions identified by the trial court. *See supra* pp. 8-9. The trial court was authorized to reject Mr. Seijo's opinions based on any one of those problems alone, including his repeated impeachment, or simply because the court found them not to be credible. *See, e.g.*, *Corbett v. Wilson*, 48 So. 3d 131, 134 (Fla. 5th DCA 2010).

It is worth noting that both *Crapo*'s above-quoted ruling, and the trial court's application of it to Mr. Seijo's grossly defective valuation methodology, are imminently correct. Indeed, the Florida Supreme Court has expressly adopted a portion of *Crapo* and praised its "comprehensive analysis" of TPP-valuation issues. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85, 91 (Fla. 2002).

Section 193.011(2) compels consideration of "the present use of the

property" when valuing TPP for ad valorem tax purposes. § 193.011(2), Fla. Stat. (2016). The Florida Supreme Court has also instructed property appraisers "to consider all of the factors [the seller and buyer] would regard as important in fixing the price of the property" when valuing it for ad valorem tax purposes. *Southern Bell Tel. & Tel. Co. v. Dade County*, 275 So. 2d 4, 8 (Fla. 1973). As explained in *Crapo*, a company that is using an asset to operate its business is obviously going to consider its present use and need for the asset when fixing its selling price.

Darden is presently using the Subject TPP to operate its business and, as stated in *Crapo,* is clearly not prepared to sell it at fire-sale prices. On the contrary, the assets Mr. Seijo used in his appraisals were being liquidated on the internet and are not, therefore, appropriate for valuing TPP. *See Hillsborough County v. Knight & Wall Co.*, 14 So. 2d 703, 705 (Fla. 1943); *Southern Bell*, 275 So. 2d at 6; *Florida East Coast Ry. Co. v. Department of Revenue*, 620 So. 2d 1051, 1058-59 (Fla. 1st DCA 1993). Thus, the trial court correctly ruled that Mr. Seijo's valuation methodology violates both § 193.011(2) and *Crapo*.

Hillsborough is particularly germane to these issues. The opinion involved valuation of TPP owned by an operating hardware store. 14 So. 2d at 703-04. The Court explained that in order to properly value those assets, one must consider: a) all of the circumstances that may affect their selling price "were it placed upon the market to be sold <u>by the owner</u>"; and b) "all of the influencing factors going to

make up [the assets'] intrinsic value." *Id.* at 705 (emphasis supplied). The Court also held that even though there was "obviously" a market for the hardware, its value should not be measured "by what it could be sold for in bulk, or for that matter, article by article, to one purchaser." *Id.*

Hillsborough establishes both the correctness of *Crapo*'s above-quoted ruling and the trial court's reliance on it when assessing Mr. Seijo's opinions. Both *Hillsborough* and *Crapo* explain that if an owner of TPP assets is presently using them to operate its business, this fact is relevant to the valuation analysis because it will obviously affect the price at which the owner is willing to sell to the assets. Like *Crapo*, *Hillsborough* confirms that when an asset's owner is using it to operate a business, the price the asset would bring in a liquidation or fire sale is not indicative of its just value. Thus, Mr. Seijo's use the internet liquidation "market" to value Darden's TPP is improper under both *Hillsborough* and *Crapo*.

Darden also appears to suggest that one of OCPA's interrogatory answers shows that it improperly considered Darden's present use of the Subject TPP as a component of its "intrinsic value." (I.B., p. 11) Contrary to Darden's argument, the answer is entirely consistent with *Hillsborough*'s holding that "the process of valuation must comprehend not only one, but all of the influencing factors going to make up intrinsic value." (emphasis supplied) Regardless, the interrogatory answer is merely one piece of evidence that the trial court was authorized to accept or

reject in its entirety. *See, e.g.*, *Durousseau v. State*, 55 So. 3d 543, 556 (Fla. 2010).

In sum, the Final Judgment contains no ruling that OCPA utilized a "value in use" methodology to value Darden's TPP. Darden's arguments based on an imaginary "value in use" standard and *Crapo* cannot alter the inescapable fact that OCPA admitted substantial, competent evidence supporting the trial court's factual finding that OCPA's valuations of Darden's TPP represent its just value.

III. DARDEN'S ARGUMENTS UNDER § 194.301 ARE CONTRARY TO FLORIDA LAW, AND DARDEN AND ITS AMICI CURIAE HAVE FALSELY ASSERTED THAT THE TRIAL COURT ACCORDED A PRESUMPTION OF CORRECTNESS TO OCPA'S VALUATIONS.

Assuming *arguendo* Darden had preserved its arguments under § 194.301 (it unequivocally did not), they are nonetheless meritless. Messrs. Thayer and Cardell gave detailed expert testimony and presented documentary evidence explaining that OCPA valued Darden's TPP with a mass appraisal cost approach that is fully compliant with, and long accepted by, Florida law. The evidence also proved that most, if not all, of Florida's county property appraisers use a mass appraisal cost approach to value TPP, while none use a sales-comparison approach like the one employed by Mr. Seijo. (R. 1444 & 1449)

Despite this substantial, competent evidence, Darden argues that § 194.301 required OCPA to bring in an "independent" expert witness with "private sector experience" to utter the magic words that OCPA complied with "professionally

accepted appraisal practices." (I.B., p. 11) In other words, Darden advocates for a rule requiring property appraisers to bolster their experts' valuation opinions in a manner constituting "fundamental" and "clear" error under § 90.706. *See, e.g., Phillip Morris, Inc. v. Janoff*, 901 So. 2d 141, 144 (Fla. 3rd DCA 2004); *Carver v. Orange County*, 444 So. 2d 452, 454 (Fla. 5th DCA 1983). For this reason and those explained below, Darden is clearly incorrect.

A. OCPA's mass appraisal cost approach has been expressly approved by the Florida Supreme Court and fully complies with Florida law.

Contrary to Darden's arguments, OCPA presented prima facie evidence of its use of "professionally accepted appraisal practices" to value Darden's TPP for purposes of § 194.301 or otherwise by admitting evidence of OCPA's mass appraisal cost approach -- a valuation methodology long accepted under, and in full compliance with, Florida law. Twenty years ago, the Florida Supreme Court held that the cost approach is "one of three well-recognized approaches to determining the value of tangible personal property" for ad valorem tax purposes. *Havill v. Scripps Howard Cable Co.*, 742 So. 2d 210, 212 (Fla. 1998). In so doing, the Court explained that "[t]he cost approach simply values the original, reproduction or replacement cost of the property, less an allowance for depreciation." *Id.* at 213.

Four years later, the Supreme Court considered county property appraisers' use of a mass appraisal cost approach to value Wal-Mart's TPP, which would

include furniture, fixtures, equipment, and computers like those owned by Darden. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85 (Fla. 2002). The Court described the trial court proceedings, which included a non-jury trial, as follows:

> The tangible personal property supervisor in Mazourek's office used a mass appraisal cost approach to determine the assessment amount. . . .
>
> The trial court concluded that Mazourek properly considered all factors enumerated in section 193.011 and that the mass appraisal cost approach method was appropriate in this case.

Id. at 87. In the course of quashing this court's intervening decision and affirming the trial court's entry of judgment for the property appraisers, the Court held:

> The cost approach can be applied to almost all types of personal property. Its application is especially well suited to the valuation of machinery and equipment, for which it is possible to identify make and model (model number) of the item, year acquired, and total acquisition costs including freight, installation, taxes, and fees.

Id. at 89 - 90 (quoting International Ass'n of Assessing Officers, *Property Assessment Valuation* 360 (2d ed.1996) (emphasis removed)). Thus, *Mazourek* expressly approved property appraisers' use of a mass appraisal cost approach to value basic assets like Darden's TPP for ad valorem tax purposes.

Like the property appraisers in *Mazourek*, OCPA used a mass appraisal cost approach to value Darden's TPP. Like the trial court in *Mazourek*, the court below heard, considered, and weighed the parties' competing trial evidence regarding the appropriate appraisal practices for valuing Darden's TPP, and then ruled in

OCPA's favor. In so doing, the trial court made the purely factual findings that: a) "OCPA's $29,033,332 and $27,424,505 fair market valuations of Darden's TPP for 2013 and 2014, respectively, are very reliable and credible"; and b) "the Mass Appraisal Cost Approach used by OCPA to value Darden's TPP is considerably more reliable and credible than" Mr. Seijo's valuation methodologies. (R. 874-75) Under *Scripps Howard* and *Mazourek*, the trial court was unquestionably authorized to make these findings, and the mass appraisal cost approach OCPA used to value Darden's TPP is clearly a "professionally accepted appraisal practice" for purposes of § 194.301.

Additionally, § 195.032 requires DOR to "establish and promulgate" the *Standard Measures*, which cannot be "inconsistent with those standards provided by law, to be used by property appraisers in all counties. . . ." § 195.032, Fla. Stat. (2012). This statute also commands that the *Standard Measures* "shall assist the property appraiser in the valuation of property and be deemed prima facie correct . . . ." *Id.* The *Standard Measures*' introduction explains that they "help achieve equity in the mass appraisal of tangible personal property through uniform application of valuation guidelines," and further the "Florida Constitution's mandate[] that general law regulations be prescribed to secure a just valuation of all property for ad valorem taxation." (R. 3204)

Both *Scripps Howard* and *Mazourek* quoted and relied upon the *Standard*

Measures in reaching their decisions. *Scripps Howard*, 742 So. 2d at 213-14; *Mazourek*, 831 So. 2d at 89. In *Scripps Howard*, the Court explained that the *Standard Measures* "strongly discourage[d]" the property appraiser's income approach and, based on that language, concluded, that the appraiser's methodology was invalid. 742 So. 2d at 214. Conversely, in *Mazourek* the Court found that the property appraisers' mass appraisal cost approach complied with the *Standard Measures* and was, therefore, an appropriate appraisal practice for valuing Wal-Mart's TPP. 831 So. 2d at 88-90.

As detailed above, OCPA's trial evidence proves that the mass appraisal cost approach OCPA used to value Darden's TPP is authorized by, and fully complied with, the *Standard Measures*. *See supra* pp. 3-5. Pursuant to § 195.032's mandate that the appraisal practices set forth in the *Standard Measures* shall be deemed "prima facie correct," and the Supreme Court's adoption of the *Standard Measures* in *Scripps Howard* and *Mazourek*, this substantial, competent evidence further establishes OCPA's use of "professionally accepted appraisal practices" to value Darden's TPP for purposes of § 194.301 or otherwise.

Darden's argument to the contrary is belied by the admissions of its own amicus curiae, the Florida Chamber. Its brief expressly concedes that under the 2009 amendment to § 194.301, OCPA's valuations of Darden's TPP "would not be reduced" if they are based on a "sound methodology." (F.C.C., p. 10, n. 4)

Pursuant to *Scripps Howard*, *Mazourek*, the *Standard Measures*, and § 195.032, OCPA's mass appraisal cost approach is a "sound methodology."

The Florida Chamber also states that OCPA must "adhere to the standards of [its] profession . . . in the daily discharge of [its] duties; it does not spring to life only when an assessment is challenged." (F.C.C., p. 11). Exactly. OCPA does not have, nor does it need, an expert witness from the "private sector" standing over its representatives' shoulders to ensure they use professionally accepted appraisal practices when valuing the thousands of TPP accounts in Orange County.

Darden had every opportunity to prove that OCPA did not use professionally accepted appraisal practices when valuing the Subject TPP. Indeed, Darden's expert witnesses, Jerome Weinert and Tammy Blackburn, devoted their entire testimony to that failed endeavor. (R. 1848-1948, 2114-2266, 2302-74) The trial court rejected Darden's position and found that OCPA's valuations are "considerably more reliable and credible" than Mr. Seijo's, and represent the just value of Darden's TPP. Those factual findings cannot be disturbed in this appeal.

B. <u>The trial court did not accord a presumption of correctness to OCPA's valuations of Darden's TPP, which renders Darden's additional arguments under § 194.301 factually baseless and irrelevant.</u>

Section III.B. of Darden's Initial Brief raises a different line of argument under § 194.301. (I.B., pp. 37-41) There, Darden asserts that the trial court

accorded OCPA's valuations a presumption of correctness in violation of § 194.301. Darden's amici curiae make this same incorrect assertion. The U.S. Chamber even states that it is "simply absurd" to "return to the good old days" of when a taxpayer had to prove the "imperial" property appraiser's valuations were not supported by "any reasonable hypothesis." (U.S.C.C., pp. 10-11)

What is "simply absurd" is Darden's and its amici curiae's false assertion that the trial court applied the "no reasonable hypothesis" burden of proof in this case, or otherwise accorded a presumption of correctness to OCPA's valuations of Darden's TPP. This is yet another example of their attempt to impermissibly obtain a reversal based on a non-existent ruling. *See supra French* and *Fleming*, p. 16. The Final Judgment does not state that OCPA's valuations are presumed correct. OCPA never asked the trial court to make that ruling, and the court did not do so.

Indeed, Darden initiates its argument by stating that the Final Judgment "fails to recite . . . [that] the Property Appraiser was not entitled to a presumption of correctness." (I.B., p. 38-39; emphasis supplied) In other words, Darden argues that the absence of language in the Final Judgment expressly stating that the trial court did not accord a presumption of correctness to OCPA's valuations, necessarily means the trial court did so. In addition to being utterly devoid of logic, this argument directly conflicts with the Final Judgment's express rulings that OCPA bore the burden of proof on its claims and proved the trial court's factual

findings by a preponderance of evidence. (R. 863, 874)

Darden attempts to support its baseless "ruling-by-omission" argument by noting that the Final Judgment is "replete" with language describing the significant problems with Mr. Seijo's testimony. (I.B, p. 38) This makes no sense. The trial court's listing of the myriad problems with Mr. Seijo's valuations of Darden's TPP does not even arguably suggest that the court somehow accorded a presumption of correctness to OCPA's opposing and independent valuations.

Darden eventually identifies two actual rulings in the Final Judgment that it claims demonstrate the trial court's according of a presumption of correctness to OCPA's valuations. These are the judgment's restatement of the following general principles of ad valorem tax law: a) "'The property appraiser's determination of assessment value is an exercise of administrative discretion within the officer's field of expertise.'" (R. 862 quoting *Mazourek*, 831 So. 2d at 89); and b) "'The particular method of valuation, and weight to be given to each factor in § 193.011, is left to the discretion of the' property appraiser." (R. 863 quoting *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989)) (I.B. p. 39) The Florida Chamber also claims these holdings are "no longer correct" under the 2009 amendment to § 194.301. (F.C.C., p. 11)

Preliminarily, their argument once again suffers from a fatal defect in logic. The trial court's recognition of property appraisers' general discretion and

expertise in valuing property for ad valorem purposes does not equate to a ruling that OCPA's specific valuations of Darden's TPP are presumed correct.

More importantly, Darden and its amici curiae urge this Court to adopt a clearly unconstitutional interpretation of § 194.301 by arguing that its 2009 amendment abrogated the above-quoted holdings from *Mazourek* and *Bystrom*. As explained by the Florida Supreme Court when discussing these same holdings:

> Under Florida's Constitution and this Court's case law the particular method of valuation and the weight to be given the factors set out in section 193.011 are left to the discretion of the appraiser. *See Bystrom*, 543 So. 2d at 216–17. The "[d]etermination of just value inherently and necessarily requires the exercise of appraisal judgment and broad discretion by Florida property appraisers." *Dep't of Revenue v. Ford*, 438 So. 2d 798, 802 (Fla.1983) (quoting trial court's judgment). Thus, "[t]he property appraiser's determination of assessment value [is] an exercise of administrative discretion within the officer's field of expertise." *Mazourek v. Wal–Mart Stores, Inc.*, 831 So. 2d 85, 89 (Fla. 2002) (quoting *Blake v. Xerox Corp.*, 447 So. 2d 1348, 1350 (Fla.1984)).

Florida Dept. of Revenue v. Howard, 916 So. 2d 640, 643 (Fla. 2005)(emphasis supplied). *Howard* later reiterates that property appraisers have "broad discretion to determine just value in accord with article VII, section 4" of the Constitution. *Id.*

As explained in *Howard*, the Florida Constitution grants property appraisers their broad discretion in valuing property for ad valorem tax purposes. The legislature cannot abrogate that constitutionally derived discretion by amending § 194.301 or otherwise. Thus, the above-quoted holdings of *Mazourek* and *Bystrom*

remain good law.

Even assuming *arguendo* they had been legislatively abrogated (they have not), this would not alter the instant case's outcome. The trial court's specific factual findings that OCPA's valuations represent the just value of Darden's TPP, and are "considerably more reliable and credible" than Mr. Seijo's valuations, are supported by substantial, competent evidence. An incorrect statement of a general principle of law cannot alter this inescapable conclusion.

At any rate, the trial court did not accord OCPA's valuations of Darden's TPP a presumption of correctness in the Final Judgment or otherwise. As such, Darden's and its amici curiae's entire discussion of the presumption of correctness, including its (actual or purported) treatment under the 2009 amendment to § 194.301, is contrary to the record, factually incorrect, and irrelevant to this appeal.

IV. OCPA'S MASS APPRAISAL COST APPROACH ACCOUNTED FOR ANY FUNCTIONAL OR ECONOMIC OBSOLESCENCE IMPAIRING THE VALUE OF DARDEN'S TPP.

Darden's argument in Section II.B. of the Initial Brief also conflicts with the trial-court record and suffers from fatal gaps in logic. (I.B., pp. 30-36) Without any record cite, Darden incorrectly asserts that OCPA took the position at trial that "Darden's property does not suffer from functional or economic obsolescence." (I.B., p. 31) Based on that assertion, Darden argues that OCPA was required to

prove the absence of functional and economic obsolescence and failed to do so. (I.B., p. 30) Once again, Darden's argument has no foundation in the record.

It is wholly dependent on three indispensable prerequisites. First, OCPA must have claimed that "Darden's property does not suffer from functional or economic obsolescence." Second, OCPA must have failed to admit any evidence that its valuation methodology accounted for functional or economic obsolescence impairing the value of Darden's TPP. Third, the trial court must have ruled that the value of Darden's TPP was not impaired by any functional or economic obsolescence. Not a single one of these required events occurred below.

First, OCPA never took the position that "Darden's property does not suffer from functional or economic obsolescence." Instead, OCPA asserted that its Mass appraisal cost approach, and its resulting valuations, accounted for any functional or economic obsolescence impairing the value of Darden's TPP.

Second, OCPA admitted plenty of substantial, competent, evidence to support this position, including the testimony of Messrs. Thayer and Cardell explaining: a) OCPA's continuous examination of the TPP market for functional or economic obsolescence that may be impairing asset values; and b) OCPA's movement of asset categories from longer to shorter useful lives in order to account for functional or economic obsolescence impairing those assets' value.

Mr. Thayer also testified that OCPA valued Darden's computer assets (the

largest category of Darden's TPP) using a negatively trended four-year useful life. (R. 1179-80) Trending, sometimes called indexing, is used to calculate the assets' replacement cost new by accounting for inflation or, in the case of negative trending, deflation in the price of new assets. (R. 1166-67) By negatively trending the replacement cost new of Darden's computer assets, OCPA accounted for the functional obsolescence suffered by them as better technologies are brought to market and prices go down. (R. 1179-80)

Third, the trial court did not rule that the value of Darden's TPP was unimpaired by functional or economic obsolescence. On the contrary, the Final Judgment clearly states that "there is no or, at best, clearly insufficient evidence for this Court to conclude that Darden's TPP was impaired by any functional or economic obsolescence that is not already accounted for in OCPA's 2013 and 2014 valuations of Darden's TPP." (R. 873-74; emphasis supplied) Darden is once again trying to impermissibly obtain a reversal based on a non-existent ruling.

At trial, Darden asserted that the difference between OCPA's (higher) and Mr. Seijo's (lower) valuations of Darden's TPP equals, *ipso facto*, functional or economic obsolescence not captured by OCPA's valuations. OCPA's opposing position was that the difference between OCPA's and Mr. Seijo's valuations was caused by significant defects in Mr. Seijo's valuation methodology, which caused him to tremendously undervalue Darden's TPP. After hearing, considering, and

weighing the parties' competing evidence, the trial court resolved this factual dispute in OCPA's favor. That factual finding cannot be disturbed on appeal.

V. THE TRIAL COURT HAD DISCRETION TO SUMMARILY DENY DARDEN'S POST-TRIAL MOTION FOR REHEARING, WHICH ARGUED FOR THE FIRST TIME THAT ASSETS DARDEN REPORTED IN ITS TPP TAX RETURNS ARE NOT REALLY TPP.

Fifteen days after the trial court rendered its Final Judgment, Darden filed a Motion for Rehearing raising, for the first time, the arguments Darden now makes in Section III.C. of its Initial Brief. (I.B., pp. 41-45) Specifically, Darden argued that its alarm system, window treatments, music system, and solar power system are not TPP and are instead part of the real property. (R. 891 - 93) Up until this post-trial point in time, Darden had always taken the opposite position.

This dates back to Darden's filing of its 2013 and 2014 TPP tax returns, which list the alarm system, window treatments, music system, and solar power system as TPP assets. (R. 3005, 3010, 3014, 3019-20, 3026, 3032, 3043, 3055, 3096-97, 3104, 3110, 3114, 3117, 3122, 3124-25, 3128, 3137-38, 3141, 3144, 3147-48, 3150-51, 3155, 3160, 3163, 3171, 3187) Since Darden reported these assets as TPP (and had Mr. Seijo value them as such), OCPA did not consider them when valuing the real property improved with Darden's Restaurant Support Center. Thus, Darden seeks to have these assets escape taxation altogether as either TPP or real property.

Darden reasserted its position in an Amended Motion for Rehearing and supporting affidavit of its representative, Warren Lombardy. (R. 908 - 15) Since OCPA did not receive his affidavit until after trial, OCPA could not perform discovery, or cross examine Mr. Lombardy, on his testimony therein. The trial court denied Darden's Amended Motion for Rehearing without a hearing. (R. 995-96) This Court should impose a similar fate on Darden's current arguments.

A. The trial court clearly had discretion to summarily deny Darden's Amended Motion for Rehearing, and, therefore, that ruling should be summarily affirmed.

"Rehearing is not intended as a device to present additional evidence that was available, although not presented, at the original trial." *Allard v. Al-Nayem Intern., Inc.*, 59 So. 3d 198, 202 (Fla. 2d DCA 2011). As such, the trial court had broad discretion to summarily deny Darden's Amended Motion for Rehearing and reject Mr. Lombardy's affidavit raising untimely, post-trial arguments. *See, e.g., Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 381 So. 2d 1164 (Fla. 5th DCA 1980), *affd. Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 413 So. 2d 1 (Fla. 1982); *Lennertz v. Dorsey*, 421 So. 2d 820, 821 (Fla. 4th DCA 1982). Moreover, Darden's motion and affidavit materially prejudiced OCPA by denying it discovery and cross examination on the issues raised therein. Under these circumstances, this Court should affirm the trial court's denial of Darden's

Amended Motion for Rehearing without reaching the merits of Darden's related appellate arguments. *See, e.g., Coffman*, 381 So. 2d at 1167.

B. Darden's arguments are meritless.

Should the Court examine the merits of Darden's arguments, it will find there are none. The alarm system, window treatments, music system, and solar power system all fall squarely within the definition of "tangible personal property" set forth in section 192.011(11)(d), Florida Statutes ("§ 192.011(11)(d)"): "all goods, chattels, and other articles of value . . . capable of manual possession and whose chief value is intrinsic to the article itself." Demonstrating the breadth of this definition, one district court has held that electricity is tangible personal property under § 192.011(11)(d). *Davis v. Gulf Power Corp.*, 799 So. 2d 298, 300 (Fla. 1st DCA 2001). Electricity is far less a "good," "chattle," or "article" "capable of manual possession" than Darden's window treatments and alarm system, music system, and solar system.

Regarding the latter asset, in 2016 the legislature placed a proposed amendment to Florida's Constitution on the ballot, which would authorize the exemption of the "assessed value of solar devices or renewable energy source devices subject to tangible personal property tax from ad valorem taxation." (R. 985; emphasis supplied) Thus, the legislature considers solar-power systems like

Darden's to be TPP.

Darden argues that the definition of a real estate "fixture" set forth in the Appraisal Institute's *Dictionary of Real Estate Appraisal* "begins and ends" the analysis. (I.B., p. 42) This definition is hearsay from a treatise and would have never been admitted into evidence at trial. *E.g.*, *Duss v. Garcia*, 80 So. 3d 358, 364 (Fla. 1st DCA 2012). The definition is also meaningless because it defines "fixtures" as items that are "regarded in law as part of the real estate." (I.B., p. 42; emphasis supplied) In other words, Darden's alarm system, window treatments, music system, and solar power system are exactly what Florida law says they are -- tangible personal property under the definition set forth in § 192.011(11)(d).

Darden next offers *Houdaille Industries, Inc. v. Markham*, 440 So. 2d 59 (Fla. 4th DCA 1983), which does not even reference § 192.011(11)(d). (I.B., pp. 42-43) Moreover, the assets at issue in *Houdaille* were "interior walls, marble flooring, carpeting, pipes, ducts, electrical wiring, central air conditioning, ceilings, and an internal stairway." *Id.* at 60, n. 1. These are obviously very different from Darden's alarm system, window treatments, and music, alarm, and solar power systems. For these reasons, *Houdaille* is irrelevant.

So are Darden's last two authorities, *Rally's Hamburgers, Inc. v. State, Dept. of Transp.*, 697 So. 2d 535 (Fla. 1st DCA 1997) and *Sweeting v. Hammons*, 521 So. 2d 226 (Fla. 3d DCA 1988), neither of which even involve ad valorem

taxation. They are eminent-domain cases addressing the issue of whether certain equipment constituted "trade fixtures" for which the owners could receive compensation in the takings. *Rally's*, 697 So. 2d at 537; *Sweeting*, 521 So. 2d at 228-29. Those issues have nothing to do with this case.

Finally, Darden's arguments in opposition to the findings in Paragraph 27(e) of the Final Judgment regarding Mr. Seijo's valuations of Darden's music system are grossly incorrect. (I.B., pp. 44-45) Darden again claims that the trial court's identification of problems with Mr. Seijo's valuation of the system somehow means that the court accepted OCPA's independent and competing valuations "without any requirements of proof" from OCPA. The court's finding that Mr. Seijo's valuations of the music system lack credibility does not somehow suggest that OCPA failed to present evidence in support of its own valuations.

Without any record citation, Darden then argues that the trial court committed "clear" error by "transforming $1,600 worth of unaffixed musical equipment into over $1 million of TPP." (I.B., pp. 44-45) The obvious defect in Darden's reasoning is that it assumes -- with zero evidentiary support -- that Mr. Seijo correctly identified all of the TPP comprising the music system when he listed merely a few pieces of audio equipment, which he valued at $1,600. Darden's 2013 TPP Tax Return reports the music system's original installed cost as $1,066,055. (R. 3020) Thus, to accept Darden's argument one must

unfathomably conclude that of the $1,066,055 Darden paid for its music system, a mere $1,600, or 0.15 percent of the total, was spent on audio equipment.

It is far more likely that in his carelessness, Mr. Seijo failed to identify the vast majority of the TPP comprising the music system. After considering the testimony and related evidence, the trial court made this exact finding. (R. 872)

VI. OCPA'S VALUATIONS OF DARDEN'S TPP ARE NOT BASED ON ITS MARKET STUDIES.

Darden's final argument is, once again, based on non-existent facts and rulings. Section III.D. of the Initial Brief asserts that OCPA used its market studies as the sole basis for valuing Darden's TPP, and the trial court approved that valuation methodology. (I.B, pp. 45-47) Neither of these assertions is correct.

OCPA valued Darden's TPP with a mass appraisal cost approach that complies with Florida law. There is not a scintilla of evidence to support Darden's incorrect assertion that OCPA based its valuation of the Subject TPP on the market studies. On the contrary, Mr. Cardell testified that the studies comprised only 10% of OCPA's overall research of the TPP market. The entire body of that research is, in turn, just one component of OCPA's mass appraisal cost approach. Thus, Darden's assertion that OCPA's valuations are "premised" or otherwise based on the market studies is contrary to the uncontradicted trial evidence.

Consistent with this fact, the trial court did not rule that OCPA based its

valuation of Darden's TPP on the market studies, much less that it was proper for OCPA to do so. In fact, the Final Judgment makes essentially the opposite finding that "any real or perceived problems with OCPA's 2013 and 2014 market studies were not material to OCPA's 2013 and 2014 valuations of Darden's TPP." (R. 865-66; emphasis supplied) This ruling irrefutably proves the inaccuracy of Darden's assertion that the trial court accepted OCPA's market studies as an appropriate methodology for valuing the Subject TPP.

Another portion of Darden's arguments regarding OCPA's market studies is truly extraordinary. Darden claims that the studies cannot be used to value Darden's TPP (they were not) because: a) the studies were based on "listing prices only [and OCPA] did nothing to confirm that any actual sales occurred or that any purchasers agreed to pay the itemized listing price"; b) OCPA "made no effort to contact either the listing party or the prospective purchaser"; c) OCPA "never requested any purchase and sale agreement"; and d) OCPA did not "confirm an arms-length transaction or a qualified sale." (I.B., p. 46) These arguments are extraordinary because the Final Judgment finds that the sales-comparison approach Mr. Seijo used to value Darden's TPP suffers from these same problems. (R. 866 - 71) The difference is that OCPA's market studies were a miniscule part of its valuation methodology and, as the trial court found, were not material to OCPA's valuations of Darden's TPP. On the other hand, Mr. Seijo's sales-comparison

approach was the entire basis for Darden's proffered valuations. Darden has now conceded that Mr. Seijo's valuation methodology is materially defective. This concession further confirms the need to affirm the Final Judgment.

VII. DOR HAS WAIVED, AND IS ESTOPPED FROM MAKING, ITS ARGUMENTS IN THIS APPEAL, WHICH ARE NONETHELESS WITHOUT MERIT.

After choosing not to participate in the trial and related proceedings, DOR has filed a brief herein asserting that the trial court committed error. DOR claims the court erred by ruling in the Final Judgment that OCPA's valuations of Darden's TPP are deemed prima facie correct under § 195.032 because OCPA's valuation methodology complied with DOR's own *Standard Measures*. (DOR, pp. 1-2) DOR's arguments are both prohibited and meritless.

A. DOR did not preserve its arguments for review and is estopped from making them.

Since it was a party below, DOR was automatically made an appellee when Darden filed this appeal. Fla. R. App. P. 9.020(g)(2). As an appellee, the *Tipsy Coachman* doctrine authorized DOR to make arguments with a record foundation in support of the trial court's rulings, despite DOR's nonparticipation in the trial court proceedings. *See, e.g., Dade County School Bd. v. Radio Station WQBA,* 731 So. 2d 638, 645 (Fla. 1999). DOR cannot, however, act as an appellant and argue that the trial court committed error because DOR did not make any argument, or

secure any ruling, below to preserve the purported error for review. *E.g.*, *Parlier v. Eagle-Picher Industries, Inc.*, 622 So. 2d 479, 481 (Fla. 5th DCA 1993); *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134 (Fla. 1989).

Nor can DOR's arguments be characterized as a confession of error by an appellee. Appellees are only authorized to confess their "own errors" in the trial court. *Evans v. Green*, 195 So. 413, 414 (Fla. 1939). Since DOR did not participate below, DOR did not cause the trial court to commit any error to which DOR may now confess. Moreover, DOR was a defendant below, and the ruling DOR seeks to challenge herein was made in favor of the plaintiff, OCPA. DOR obviously cannot confess error in relation to a ruling made for the opposing party.

DOR's arguments are also prohibited by the doctrine of estoppel against inconsistent positions. This doctrine "provides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position, especially if it is prejudicial to the party who acquiesced in the former position." *McCurdy v. Collis*, 508 So. 2d 380, 384 (Fla. 1st DCA 1987).

At DOR's request and with OCPA's acquiescence, the trial court relieved DOR of spending the time, effort, and expense it took to prepare for and complete the trial. In order to procure that relief, DOR represented to the court that this valuation dispute is only between Darden and OCPA and does not "implicate any statute, constitutional provision, or administrative rule of the DOR." (R. 51) In

complete contradiction, DOR now seeks to argue that the trial court committed error. Had DOR participated below, the trial court and OCPA could have considered, responded to, and, if appropriate, adopted or adjusted to DOR's positions. Having denied them that opportunity, DOR now seeks to argue for the first time that the court committed error after the case has been tried and the record set without DOR's participation. This is exactly the type of highly prejudicial conduct that is prohibited by the doctrine of estoppel against inconsistent positions. The Court should summarily reject DOR's arguments thereunder.

B. DOR's arguments violate fundamentals rules of statutory construction, are based on a faulty premise, engage in baseless conjecture, and are unsupported by any legal precedent.

Section 195.032 states that "[t]he standard measures of value shall assist the property appraiser in the valuation of property and be deemed prima facie correct, but shall not be deemed to establish the just value of any property." (emphasis supplied) This sentence's use of the emphasized word "shall" commands that the methodologies for valuing TPP set forth in the legislatively mandated *Standard Measures* are "deemed prima facie correct." *See, e.g., Concerned Citizens of Putnam County for Responsive Government, Inc. v. St. Johns Water Management District*, 622 So. 2d 520, 523 (Fla. 1993).

Based on the trial court's factual finding that OCPA's mass appraisal cost approach complied with the *Standard Measures*, OCPA's valuation methodology

is deemed "prima facie correct" under § 195.032's plain language. Clearly, OCPA's resulting valuations of Darden's TPP, which are derived directly from its "prima facie correct" methodology, may also be deemed "prima facie correct." This is the reasonable and obvious implication of § 195.032's plain language, which cannot be artificially limited to exclude this conclusion. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). To do so would be an abrogation of legislative power. *Id.*

This is the result for which DOR advocates. In pursuit of it, DOR claims that even though the legislature requires DOR to promulgate the *Standard Measures* for use by all property appraisers when valuing TPP, the *Standard Measures* should somehow be wholly "disconnect[ed]" from a determination of whether the property appraisers' TPP valuations are correct. (DOR, p. 6) In other words, DOR asserts that a legislatively mandated tool provided to all property appraisers for valuing TPP, which is designed to help achieve equity and uniformity in TPP valuation, should have no relevance in a TPP valuation dispute like this one. Courts "are duty-bound to avoid [such] an absurd, illogical or unreasonable construction of a statute." *Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 295 (Fla. 5th DCA 2016).

DOR's proposed construction also impermissibly renders meaningless § 195.032's phrase deeming the *Standard Measures* "prima facie correct." *See*, *e.g.*,

Quarantello v. Leroy, 977 So. 2d 648, 652 (Fla. 5th DCA 2008). DOR offers no interpretation of this phrase and instead simply ignores it. While doing so, DOR focuses on the sentence's ending phrase stating that the *Standard Measures* "shall not be deemed to establish the just value of any property." (DOR, pp. 6-7) These two phrases are, however, easily harmonized in a manner giving them both meaning and effect, as is required when interpreting § 195.032. *Id.* at 651-52.

Evidence proving that a valuation of TPP is "prima facie correct" is an entirely different matter from evidence that would "establish the just value" of TPP. "Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted." *Miami-Dade County v. Reyes*, 772 So. 2d 24, 29 (Fla. 3d DCA 2000). Under § 195.032, OCPA's proof of its compliance with the *Standard Measures* was merely prima facie evidence that OCPA's methodology and valuations are correct. Darden had every opportunity to prove otherwise. On the contrary, if OCPA's compliance with the *Standard Measures* "establish[ed] the just value" of Darden's TPP, this would amount to an irrefutable presumption that OCPA's methodology and valuations are correct. The purpose of § 195.032's phrase stating that the *Standard Measures* "shall not be deemed to establish the just value of any property" is to prohibit such an impermissible result.

OCPA neither requested nor received an irrefutable presumption regarding the correctness of its valuations. Moreover, Darden's counsel expressly argued that

the purpose of § 195.032's phrase stating that the *Standard Measures* "shall not be deemed to establish the just value of any property" is to prohibit such an irrefutable presumption. (R. 1213-14) Thus, even if this interpretation were incorrect (it is not), the doctrine of invited error prohibits Darden and DOR from advocating for a different interpretation herein. *See Alexander v. Quail Pointe II Condominium*, 170 So. 3d 817, 822 (Fla. 5th DCA 2015).

DOR cites various statutes and Rule 12D-51.002 for the proposition that the *Standard Measures* do not establish a "determinative legal standard." (DOR, pp. 4-7) The entire premise of DOR's argument is defective. "Prima facie evidence does not amount to a legal presumption." *Miami-Dade County*, 772 So. 2d at 29. The *Standard Measures*, and OCPA's compliance with them, are evidentiary facts the trial court considered in the course of making its factual finding that OCPA's valuations of Darden's TPP represent its just value. The trial court did not use the *Standard Measures* as a "determinative legal standard."

DOR's list of the supposed consequences of converting the *Standard Measures* into a "determinative legal standard" (which did not occur here) is most generously described as highly questionable. (DOR, pp. 4-7) DOR claims this would somehow "impede" its ability to update the *Standard Measures*, waste public resources, and impair Florida's property tax system. (DOR, pp. 6-7) In an effort to explain this supposed cause-and-effect relationship, DOR asserts that

"interested parties would immediately perceive each sentence in the [*Standard Measures*] as a legal standard, with attendant intense legal disagreement over the content and meaning." (DOR, p. 7) This unsupported prediction of future occurrences is not grounded in reality or experience.

Section 195.032 imposes a legislative mandate on DOR to prepare the *Standard Measures*. To comply with that mandate, DOR simply needs to prepare *Standard Measures* setting forth valid and professionally accepted appraisal practices. If DOR believes it would be appropriate and helpful for carrying out that mandate, DOR should allow "interested parties" to provide input on updates and revisions to the *Standard Measures*. This is accountability to the public, not a waste of resources or an impediment to preparing the *Standard Measures*.

Once DOR has promulgated, revised, or updated the *Standard Measures*, § 195.032 deems them "prima facie correct." The "interested parties" in a TPP valuation dispute are then free to assert compliance or non-compliance with the *Standard Measures* in support of their respective positions, as did the parties in *Scripps-Howard* and *Mazourek*. *See supra* pp. 23-24. The litigants may also assert that appraisal practices different from those set forth in the *Standard Measures* are more appropriate for valuing the specific TPP assets at issue in the case. These are factual assertions, and the *Standard Measures* do not require courts to make any particular decisions on them pursuant to a "determinative legal standard."

These litigation dynamics have been occurring for decades in ad valorem tax cases with no break down in the tax system. DOR's criticisms of, and repeated efforts to diminish, the same *Standard Measures* DOR itself has promulgated is highly curious. One expects such arguments from a taxpayer seeking to reduce its tax liability, not from the agency responsible for promulgating and maintaining the *Standard Measures*. Given all of the material defects in DOR's arguments regarding the *Standard Measures*' application in this valuation dispute, it is not surprising that DOR cannot cite even a single precedent in support of them. In addition to being untimely and unpreserved, DOR's arguments are meritless.

Even assuming *arguendo* they were correct, DOR's arguments cannot alter the trial court's ultimate factual findings that OCPA's valuations are more credible and reliable than Darden's proposed valuations and represent the just value of Darden's TPP. As such, the Final Judgment should be affirmed regardless of those arguments' validity.

Conclusion

For all of the foregoing reasons, OCPA respectfully requests the Court to affirm the Final Judgment.

Certificate of Service

I HEREBY CERTIFY that a copy of this brief was furnished by e-mail on this 21st day of May, 2018, to all persons listed in the Service List below.

Certificate of Compliance with Font Requirements

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Kenneth P. Hazouri
KENNETH P. HAZOURI, B.C.S.
Board Certified in Appellate Practice
Florida Bar Number 019800
Primary e-mail: khazouri@dsklawgroup.com
Secondary e-mail: lquezada@dsklawgroup.com
deBeaubien, Simmons, Knight,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
Orlando, Florida 32801
Telephone: (407) 422-2454
Attorneys for Appellee, Rick Singh

SERVICE LIST

Nicholas A. Shannin, Esquire
Board Certified in Appellate Practice
Florida Bar No. 0009570
Email: service@shanninlaw.com
Shannin Law Firm, P.A.
214 East Lucerne Circle, Suite 200
Orlando, Florida 32801
Telephone: (407) 985-22224
Appellate Counsel for Appellants, Darden Restaurants, Inc. and GMRI, Inc.

Robert E.V. Kelley, Jr., Esquire
Email: rob.kelley@hwhlaw.com
relitrevk@hwhlaw.com
Hill, Ward & Henderson, P.A.
101 East Kennedy Boulevard, Suite 3700
Tampa, Florida 33601
Telephone: (813) 221-3900
Appellate Counsel for Appellants, Darden Restaurants, Inc. and GMRI, Inc.

Robert P. Elson, Esquire
Email: robert.elson@myfloridalegal.com
Office of the Attorney General
Revenue Litigation Bureau
PL-01, The Capitol
Tallahassee, Florida 32399-1050
Counsel for Florida Department of Revenue

Robert S. Goldman, Esquire
Email: rgoldman@deanmead.com
jherzfeldt@deanmead.com
Dean, Mead & Dunbar
215 South Monroe Street, Suite 815
Tallahassee, Florida 32301
Counsel for Amicus Curiae, Florida Chamber of Commerce, Inc.

Chris W. Altenbernd, Esquire
Email: caltenbernd@bankerlopez.com
service@caltenbernd@bankerlopez.com
amercado@bankerlopez.com
Banker, Lopez, Gassler. P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, Florida 33602
Counsel for Amicus Curiae, The Chamber of Commerce of the United States of America, the Restaurant Law Center, and the Florida Restaurant & Lodging Association

Loren E. Levy, Esquire
Email: service.levylaw@comcast.net
geri.smith@comcast.net
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308
Counsel for Amicus Curiae, The Property Appraisers' Association of Florida, Inc.

Gaylord A. Wood, Jr., Esquire
Email: pleadings@woodstuartpa.com
rain@woodstuartpa.com
Wood & Stuart, P.A.
Post Office Box 1987
Bunnell, Florida 32110-1987
Counsel for Amicus Curiae, Larry Bartlett, as Volusia County Property Appraiser

Joseph H. Lang, Jr., Esquire
CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Boulevard, Suite 1000
Tampa, FL 33607
Telephone: (813) 223-7000
Facsimile: (813) 229-4133
jlang@carltonfields.com

kathompson@carltonfields.com
tpaecf@cfdom.net
Counsel for Amicus Curiae, The Chamber of Commerce of the United States of America, the Restaurant Law Center, and the Florida Restaurant & Lodging Association