

IN THE SUPREME COURT
STATE OF FLORIDA

FRANCIS W. CLARK, SR., etc.
et al.,

Petitioner,

vs.

CASE NO. 69,306

CITY OF ST. PETERSBURG, a
municipal corporation,

Respondent

APPLICATION FOR DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF
FLORIDA

ANSWER BRIEF OF RESPONDENT
ON THE MERITS

CITY ATTORNEYS OFFICE
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ATTORNEYS FOR RESPONDENT

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PREFACE

For the purposes of this brief Wallace Salley, Charlie C. Jones, Charlie Byrd, William Brown, Theodis Wright and Calvin Hicks, Jr., as successor trustees of Masonic Lodge No. 109 will be collectively referred to as "Petitioner". Although named in the caption, Clark, White, Haley and O. Sanford Jasper, who were parties in the trial court, are not really involved in the appeal.

SUMMARY

The Second District Court of Appeals did not err in denying Petitioner's motion for attorney's fees because the motion was insufficient in that it specified no grounds upon which recovery was sought and it was accompanied by no supporting affidavits or other evidence upon which the appellate court could determine and assess a reasonable fee. The decision of the district court to deny the motion does not conflict with the decision of this court that a condemnee may be entitled to an attorney's fee even though the condemnor prevails on appeal.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL DID NOT ERR IN DENYING PETITIONER'S MOTION FOR ATTORNEY'S FEES

Although this Court decided in Denmark v. State of Florida Department of Transportation, 389 So. 2d 201 (1980) that the condemnee was entitled to appellate attorney's fees even though the condemnor prevailed on its appeal, that decision is not dispositive of the issue here. The Second District Court of Appeal was not in error when it denied the Petitioner's Motion for Attorney's Fees.

Rule 9.400 (b), Fla. R. App. P., provides:

A motion for attorney's fees may be served not later than the time for the service of the reply brief and shall state the grounds for which recovery is sought. The assessment of attorneys fees may be remanded to the lower tribunal. If attorneys fees are assessed by the Court, the lower tribunal may enforce payment. (emphasis added)

Cases interpreting the Rule have held that failure to comply with the Rule by stating "grounds upon which recovery is sought" warrant denial of a motion for attorneys fees. Dooley v. Culver, 370 So. 2d 1154 (Fla. 4th DCA 1978); Lehigh Corporation v. Byrd, 397 So. 2d 1202 (Fla. 1st DCA 1981). Since the petitioner's motion for attorney's fees in the Second District Court of Appeal specified no grounds, the court was justified in denying the motion.

It may be argued that Petitioner's motion for attorney's fees did not have to comply with Rule 9.400 because, win or lose, an award of attorney's fees is

mandatory in condemnation cases. See Behm v. Division of Administration, Department of Transportation, 288 So. 2d 476 (Fla. 1974). Even assuming, arguendo, that were so, surely the District Court was entitled to something more than the superficial motion filed here by the Petitioner if it was expected to assess his fee as he demands. Supporting affidavits of other attorneys setting forth their opinion as to the value of the attorney's services would seem necessary if the appellate court was expected to assess fees, and no such affidavits were filed with the cursory motion of the Petitioner.

By denying the Petitioner's motion for attorney's fees, the Second District Court of Appeal would not seem to preclude the Petitioner from obtaining the fees to which he claims entitlement under Denmark, supra, so there is no conflict between the decisions. In State Road Department of Florida v. Hancock, 250 So. 2d 307 (1971), the Second District Court declined to assess costs and fees where they had denied certiorari to a condemnor to review a discovery order, but on appeal of an order of the lower court assessing fees for the certiorari proceeding, the District Court affirmed the order saying:

The trial judge did right. He followed the mandate of the statute [73.131] in accordance with the procedure approved by this court. After this mandate goes down, he will again determine how much the petitioner must pay for these proceedings.

Likewise, after the mandate went down in the case sub

judice, the Second District Court presumably expected that the trial court, following Hancock, would assess fees for the appeal.

In the case of City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3rd DCA 1971) the Court held that where the Supreme Court of Florida had denied a condemnee's motion for attorney's fees "without prejudice to apply for fees below" the trial court properly awarded those fees for services in the Supreme Court. The Second District Court's order denying petitioner's motion for attorney's fees is also without prejudice and seems to allow the Petitioner to apply for his fees in the lower court.

By appealing the Second District Court of Appeal's denial of his motion for attorney's fees rather than filing a sufficient motion in the district court or applying in the lower court upon remand for such fees, Petitioner places the Respondent in the statutory "Catch 22" of paying additional attorney's fees for the appeal to this Court when Respondent never objected in the first place to Petitioner's motion or to his entitlement to attorney's fees in the district court. This is a corruption of the intent of the statute providing that the condemnor must pay the condemnee's attorney's fees, the purpose of which is to permit the landowner to contest the valuations by the condemning authority properly, and at the same time be fully reimbursed. Hodges v. Division of Administration, State Department of Transportation, 323 So. 2d 275 (Fla. 2d DCA

1975).

This Court should find no conflict jurisdiction, or, if jurisdiction is found, the district court's order should be affirmed.


CONCLUSION

While the Petitioner well may be entitled to an attorney's fee for his services on an appeal where he did not prevail, the Second District Court of Appeals was not required to grant his motion for such a fee when the motion was insufficient under the appellate rule and Petitioner did not afford the court a basis upon which to assess a reasonable fee. No direct and express conflict exist between the decision of the Second District and Denmark, supra. The order of the district court should stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail this *24th* day of *March*, 1987, to H. REX OWEN, ESQUIRE, 157 Central Avenue, St. Petersburg, FL 33701.

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