IN THE SUPREME COURT OF FLORIDA

MARJORIE SCHICK and ROBERT SCHICK,
BUCK HULL and DOT HULL SHAW,

Plaintiffs/Appellees/Petitioners,

vs. CASE NO. 77,906

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Defendant/Appellant/Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

On Discretionary Appeal from the First District Court of Appeal of Florida in Case No. 90-1921 Regarding an Appeal from the Second Judicial Circuit, for Leon County, Florida in Case No. 85-2477

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STATEMENT OF THE CASE AND FACTS

The Case

In this appeal, Petitioners' counsel seeks this Court's reversal of the First District's reversal in Schick IV (Department of Agriculture and Consumer Services v. Schick, 16 F.L.W. D1217 (Fla. 1st DCA Case No. 90-1921). April 29, 1991), of the trial court's final order which applied a 2.5 Rowe[1] risk multiplier--in a $198,000 inverse condemnation case--to a $120,000 lodestar amount ($150 per hour x 800 hours) for an attorney fee award against the Department totalling $300,000!

The Facts

The Respondent Department disagrees with the following characterization by Petitioners' counsel in the statement of the case and facts of her Initial Brief regarding the First District's decisions in both Schick III and Schick IV, respectively Department of Agriculture v. Schick, 553 So. 2d 360 (Fla. 1st DCA 1989) and 16 F.L.W. D1217 (Fla. 1st DCA Case No. 91-1921. April 29, 1991):

> The First DCA in [Schick III] rejected the Department's contention and held that risk multipliers were appropriate so long as the trial judge makes sufficient written findings per Rowe to justify their application. At pg. 3 of Initial Brief.

And,

> The Department's appeal [in Schick IV] again raised the identical issue previously (and unsuccessfully) raised

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[1] Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

> in its prior appeal [in Schick III] i.e. that risk multipliers are never awardable in inverse condemnation cases. Ibid. at pg. 6.

Rather, what the district court actually said in Schick III is:

> On remand, the trial court may determine that a contingency risk factor should be applied ...even though the fees are awarded pursuant to a statute. See Inacio v. State Farm & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1989). Frequently a fee awardable pursuant to Section 73.091 would not appropriately include a contingency risk factor. However, under certain circumstances such as perhaps in the instant case where entitlement to a fee under 73.091 did not vest until appellees overcame the hurtle [sic] of showing inverse condemnation, application of a contingency risk factor can be upheld if adequate reasons for such an award are set forth. (First emphasis the court's; second emphasis added.) At page 362. (R 522-523)

And, what the district court actually said in Schick IV is:

> [W]e held [in Schick III] that the trial court erred in awarding attorney's fees that included a Rowe risk multiplier without making specific findings to support the application of the multiplier. Id. at 362. Although the Department additionally argued [in Schick III] that the trial court erred in even applying a contingency risk multiplier to the fees awarded under Chapter 73 Florida Statutes, this court [in Schick III] apparently [emphasis added] rejected that argument [quoting the immediately above-quoted language from Schick III regarding "may determine" and "perhaps in the instant case"].

In fact, the Schick III court did not pass upon whether a risk multiplier is applicable to an attorney's fee award under Section 73.091, Florida Statutes (1989), in an inverse condemnation case; rather, the Schick III court said "perhaps" it may be.

And, in fact, a Department issue in Schick IV, that risk multipliers are never awardable in inverse condemnation cases, admittedly was raised in Schick III but refutably was not "unsuccessfully" raised; rather as set forth above, the Schick III court did not answer such question but, instead, said that "perhaps [a contingency risk multiplier may be applied] in the instant case...."

...may be applied perhaps....

And,

...apparently rejected....

Further, the Department disagrees with the impression Petitioners' counsel creates by the statement, "This case has been in the court system since 1985." Initial Brief, pg. 6. Counsel has been representing Petitioners, and is seeking attorney's fees therefor, since June 5, 1984. (R 372)

* * * *

The Committee Note to Rule 9.210, Florida Rules of Appellate Procedure, regarding Briefs, provides in pertinent part:

> Parties are encouraged to place every fact utilized in the argument section of the brief in the statement of facts.

Accordingly, the Department includes the following additional facts, omitted from Petitioners' counsel's Initial Brief.

As a result of Petitioners' counsel's efforts, Petitioners' recovery totalled $198,000 for their properties in their inverse condemnation (excluding pre- and post-judgment interest). (R 401)

As the result of the trial court's application of a 2.5 Rowe risk multiplier, Petitioners' counsel's attorney fee award against the Department was increased from $120,000 to $300,000! (The $120,000 "lodestar" is the product of $150 per hour multiplied times 800 hours. R 567.)

Repeatedly, throughout the pleadings below--starting with the prayer for relief (R 14) in the Initial Complaint filed August 12, 1985--and including the Petitioners' counsel's motion for attorney's fees in Schick III (R 521) and in Schick IV, Petitioners' counsel has only sought attorney's fees below (the 800 hours) "pursuant to Section 73.091.

And, Petitioners' counsel never even invoked application of a Rowe risk multiplier until after the trial court had already ordered entitlement to attorney's fees on April 2, 1988 (R 292) almost three years after she initially filed suit.

SUMMARY OF ARGUMENT

Thesis

> [I]t will not ordinarily be reasonable to spend as much legal time on a caseas the amount of money in dispute. The lawyer could not reasonably charge the client that much, and the fee could not be justified simply because someone else is required to pay it. At pg. S239.

Overton, J.; In Re Estate of Lester Platt, 16 F.L.W. S237 (Fla. Case No. 74,793. April 4, 1991).

Yet, in this inverse condemnation case below--where Petitioners recovered $198,000 for their properties (excluding pre-and post-judgment interest)--the trial court applied a 2.5 Rowe risk multiplier and assessed an attorney's fee award for Petitioner's counsel and against the Department of $300,000!

Now, Petitioners' counsel appeals from the First District's Schick IV reversal of the trial court's $180,000 "windfall"[2] to her:

$300,000	Rowe-Enhanced Fee ($120,000 x 2.5 multiplier)
-120,000	Section 73.092 Fee ($150 hr. x 800 hrs.)
$180,000	"Windfall" Fee

Therefore,

APPLICATION OF A ROWE RISK MULTIPLIER TO ENHANCE THE ATTORNEY'S FEE AWARD IN PETITIONERS' INVERSE CONDEMNATION CASE FROM $120,000 TO $300,000 WOULD BE INAPPROPRIATE.

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[2] Lane v. Head, 566 So. 2d 508 (Fla. 1990: "The policy underlying Rowe does not authorize a windfall for lawyers." At pg. 511. (Emphasis added.)

Point One

The Legislature has adopted specific criteria in Section 73.092 for the Judiciary to apply when assessing a "reasonable" fee, which the Legislature guarantees by Section 73.091 for the attorneys of property owners whose taking claims are successful.

The Section 73.092 criteria are the only criteria which may be used.

Section 73.092 does not include or contemplate either a risk multiplier or whether the fee is contingent rather than fixed.

Therefore, a contingency risk multiplier cannot be used by the Judiciary when it assesses and awards a "reasonable" attorney's fee under 73.091.

Furthermore, nor should a risk multiplier be applied for the reason that section 73.091 assures that successful property owners are made whole (as constitutionally required) by guaranteeing payment of attorneys' fees so that their taking recoveries are not diminished. And, Section 73.092 assures that the attorneys will be compensated fairly, by the factors of a competitive hourly rate multiplied by the hours required.

So, here, a jump from $120,000 to $300,000 for 800 hours would be inappropriate as well as outside the statutorily prescribed factors.

Point Two

The whole purpose of Rowe was to encourage legal representation for those who would not otherwise have it.

To effect that purpose, the Rowe court created as an incentive the application of a "risk multiplier" to the rate-times-hours attorney fee.

Below, however, Rowe's incentive-encouragement was not relied upon.

These Petitioners retained their attorney in June 1984, a year before Rowe was decided in May and August 1985.

Consequently, Rowe could not have been an incentive in this case, to either Petitioners or their attorney.

Point Three

Even if Rowe had in fact been incentive for Petitioners, Petitioners' counsel's $120,000 fee should not be enhanced to $300,000 for the reason that she waived application of a risk multiplier by not pleading it.

Rather, Petitioners' counsel pled for fees only "pursuant to Section 73.091" for over three years.

Then, not until eight months after the trial court had ordered her entitled to an attorney's fee, and not until the evidentiary hearing on the amount to be awarded, did Petitioners' counsel seek application for the very first time of a risk multiplier to her 800+ hours of time!

Respectfully, such conduct warrants application of a risk divider, not multiplier.

Point Four

Even if this Court were to answer the certified question in the affirmative, since Petitioners' attorney was retained end commenced representing Petitioners a year before Rowe was decided, application of a risk multiplier cannot inure in this case.

Point Five

Even if this Court were to answer the certified question in the affirmative and even if it were to hold that such inures to the benefit of Petitioners' counsel despite the fact that she was retained and commenced representing Petitioners before Rowe was decided, a risk multiplier should not be applied continuously throughout all 800 hours since only 331 hours were "risky."

The First District's decision in Schick I, that Petitioners' complaint did state a cause of action in inverse condemnation, was tantamount to "an order of taking," i.e., the Department was liable. Thereafter, only the amounts for damages remained to be established.

That decision was March 18, 1987. And, Petitioners' counsel had expended 331 hours.

Thus, if this Court should decide to apply Rowe here, then respectfully it should modify Rowe so that its risk multiplier is not applied to all 800 hours of Petitioners' counsel's time, but is applied to only the "risky" 331 hours which had accrued before Schick I was decided.

ARGUMENT

POINT ONE

IN AWARDING A REASONABLE ATTORNEY'S FEE PURSUANT TO SECTION 73.091, FLORIDA STATUTES, THE JUDICIARY MAY NOT UTILIZE ANY FACTOR OTHER THAN THE SPECIFIC CRITERIA SET OUT BY THE LEGISLATURE IN SECTION 73.092, FLORIDA STATUTES

> Statutes authorizing the assessment of fees against the non-prevailing party have traditionally been strictly construed on the ground that they are in derogation of common law. (Citations omitted.)

So opined the First District in Schick IV, now here on appeal. Slip Op. at pg. 5.

Here, Petitioners' counsel seeks an award of attorney's fees pursuant to Chapter 73, Florida Statutes (1989).

Therein, the Legislature authorizes the Judiciary to assess an attorney's fee award in eminent domain cases, including inverse condemnation cases as here. But, the Legislature authorizes the Judiciary to assess only a "reasonable attorney's fee." Section 73.091, F.S. (1989).

And, in doing so the Legislature has limited what the circuit court is entitled to consider when making such assessment and awarding such fees. S. 73.092, F.S.

The Legislature has specified the only factors which the Judiciary shall consider: Subsections 73.092(1) through (6), Florida Statutes (1989). (Accord, Section 73.092(7), regarding offers of judgment: "attorney's fees...shall be determined in accordance with subsection (1)....")

The First District in Schick IV--here on appeal--held:

> We are of the view that if a statute exists, as here [Sections 73.092(1)-(6)], in which the legislature has set forth specific criteria that must be considered by a tribunal when deciding a reasonable award of an attorney's fee, [then only] that specific statute controls--not Rowe--and if the statute does not contemplate the use of additional factors, such as multipliers, then those factors cannot be considered in determining the award.(Emphasis added.) Ibid.

In Rowe, itself, this Court said:

> We find that an award of attorney's fees to the prevailing party is "a matter of substantive law properly under the aegis of the legislature...." At page 1149. (Emphasis added.)

And, earlier therein, this Court said:

> [T]his Court, along with the majority of other jurisdictions in this country...adopt[ed] ...the "American Rule" that attorney fees may be awarded by a court only when authorized [either] by statute or by agreement of the parties. At page 1138. (Emphasis added.)

But since the fee-shifting statute in Rowe (Section 768.26) did not contain specific factors, understandably this Court had to go elsewhere for criteria (which did include whether the fee was fixed or contingent) to consider as guides in determining a reasonable fee in Rowe.

But, here, where the fee-shifting statute (Section 73.092) does contain specific factors (which do not include the type of fee arrangement), this Court not only does not have to go elsewhere for guides to determine a reasonable fee, respectfully

it may not go elsewhere: this Court is legislatively limited to Section 73.092.

Thus, only the "statutory elements" of Section 73.092 may be considered by the Judiciary in determining attorney's fees. Accord, City of Orlando v. Kensington, 16 F.L.W. D1392 (Fla. 5th DCA Case No. 90-1503. May 23, 1991).

Risk Multiplier Is Not Included In Section 73.092 Factors

Unlike some other so-called fee-shifting statutes--e.g., workers' compensation, Section 440.34(1)(h), F.S.--the six factors in the applicable statute at bar, Section 73.092, do not include consideration of a multiplier even if the nature of the fee arrangement between the client and his attorney is contingent.

And, the legislatively prescribed Section 73.092 factors also do not include mention of the Rules of Professional Conduct, Paragraph 4-1.5(B)(8) of which allows consideration for the nature of the fee.

Thus, Rowe's "contingency risk factor"--the so-called "multiplier"--cannot apply in cases arising under Chapter 73, including this instant appeal.

Risk Multiplier Is Not Contemplated By Section 73.092 Factors

Furthermore, Section 73.092 does not contemplate (in any of the specific criteria set forth in its six factors) the application of a multiplier in eminent domain (including inverse condemnation) cases.

Why?

Rowe, itself, explicitly provides:

> The "novelty and difficulty of the question involved" should normally be reflected by the number of hours reasonably expended on the litigation. At page 1150. (Emphasis added.)

In neither of the Department's successful appeals in Schick III and Schick IV did the Department question the trial court's having credited Petitioners' counsel with 800 hours,

--even though such 800 hours could not have been, contrary to Rowe, "reasonably expended in the litigation" since only 2% of it was (R. 650 (Tr.68); Lines 20-24);

--and, even though such 800 hours had to have been, according to factor Subsection (6) of controlling Section 73.092, "reasonably required adequately to represent the client." (Emphasis added.)

Rather, what the Department raised in Schick III and Schick IV and continues to raise here in Schick V is the issue: that under Section 73.092 no risk multiplier can apply as a matter of law. (Not to mention the 2.5 multiplier applied at trial below, which raised to $300,000 from $120,000 the attorney fee award for 800 hours and which had the effect of raising the hourly rate from $150 to $375!)

Respectfully, application of a risk multiplier here must not and cannot be condoned in light of the controlling statute: Section 73.092 neither includes nor contemplates any multiplier.

* * * * *

And, Section 73.092 does not include or contemplate any use of a multiplier for good reason.

In its recent case In re Estate of Lester Platt, supra, this Court stated:

> The contingency risk factor ["multiplier"]... was created to compensate attorneys for those cases where there was a risk of nonpayment. At page 240.

It is important to note that the risk multiplier was judicially created (by Rowe), rather than legislatively created (by statute); that this judicially created risk multiplier was created to compensate attorneys, rather than to compensate their clients, where there was a risk of nonpayment; and, that the risk of nonpayment relates to attorney's fees, rather than to the clients' damages.

Juxtaposed to the Supreme Court's purpose for its creation of the multiplier, the Court in Platt also stated the Legislature's purpose for having provided for awards of attorney's fees in eminent domain cases:

> [t]o assure that the property owner is made whole when the condemning authority takes the owner's property. Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958). Ibid.

The Department respectfully submits that since Rowe's risk multiplier only attaches to successful litigants, there is no reason for it to apply to a property owner whose inverse condemnation case has been successful because the pertinent statute (Chapter 73, Florida Statutes) not only makes him whole by paying just compensation for his property but by also paying a reasonable fee to his attorney.

Recently, Justice Overton, who authored both Rowe and Quanstrom [Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 1884 (Fla. 1990)], also authored the Court's decision in Platt, supra, and said:

> [I]t will not ordinarily be reasonable to spend as much legal time on a case as the amount of money in a dispute. The lawyer could not reasonably charge the client that much, and the fee could not be justified simply because someone else is required to pay it. At pg. S239.

Yet, the sole subject of this appeal is Petitioners' counsel's request that this Court approve a 2.5 Rowe risk multiplier and an attorney's fee award for herself against the Department of $300,000 in her clients' $198,000 inverse case.

Here, Petitioners' counsel appeals from the First District's Schick IV reversal of the trial court's $180,000 "windfall" attorney fee to her:

$300,000	Rowe-Enhanced Fee ($120,000 x 2.5 multiplier)
-120,000	Section 73.092 Fee ($150 hr. x 800 hrs.)
$180,000	"Windfall" Fee

POINT TWO

THE PURPOSE FOR CREATION OF ROWE'S RISK MULTIPLIER--TO ATTRACT COUNSEL FOR THOSE WHO WOULD BE UNREPRESENTED OTHERWISE--IS NOT PRESENT HERE

Rowe's whole raison d'etre is an incentive to encourage legal representation of persons who could not afford it--by authorizing the use of a risk multiplier to enhance attorney fee awards if they win.

Rowe, itself, emphasizes that the degree of enhancement must be calculated "at the outset," i.e. at the beginning of such incentive-encouraged legal representation. At page 1151.

Respectfully, the very reasons for Section 73.091 (pursuant to which Petitioners' attorney affirmatively, repeatedly, and exclusively moved for attorney's fees) and for Section 73.092 (pursuant to which the Legislature enumerated the factors, and the only factors, which "the court shall consider" when determining a reasonable attorney's fee under Section 73.091) were and are to provide a statutory incentive to encourage representation in taking cases--an incentive to encourage landowners as well as an incentive to encourage their prospective attorneys.

How?

By guaranteeing not only "a reasonable attorney's fee" if the attorney prevails on behalf of his or her landowner client, but by further guaranteeing that that "reasonable attorney's fee" award will not diminish the client's recovery.

Why should the Judiciary ignore these explicit statutory incentives in order to apply a statutorily unauthorized judicial incentive?

With all due respect, without a Rowe risk multiplier as an incentive, the Petitioner-landowners here were able to attract and retain their attorney to represent them.

Here, fee-shifting Section 73.091 was incentive enough for both the Petitioners themselves and their attorney.

Below, in Petitioners' motion for trial attorney's fees filed October 12, 1989, their attorney stated that she "has been the sole attorney for ... Plaintiffs since 1984." (R 370, para. 1)

And, the enumeration of the billable hours attached to that motion reflects that Petitioners' counsel began representing her clients on June 5, 1984.

Thus, the "outset" of this case was then: June 1984.

The Florida Supreme Court's first opinion in Rowe was not issued until May 2, 1985, almost a year after the outset of Petitioners' counsel's representation of her clients in this case. For that pre-Rowe period, she billed 155.25 hours. (R 372-374)

On August 16, 1985, this Court's decision denying rehearing in Rowe was rendered. By then Petitioners' attorney had billed 31.75 more hours (R 374-376), for a total of 187 hours from the outset of the time she began representing

Petitioners in this case until Rowe became final.

Thus, it is factually impossible for Rowe's risk multiplier to have been an incentive by which the Petitioner-landowners here attracted their attorney. The decision in Rowe was not rendered until virtually a year after Petitioners retained their counsel in this case!

Respectfully, Rowe's rendition in 1985 belies the sworn testimony of Petitioners' attorney at the evidentiary hearing on attorney's fees March 2, 1990 (after the Schick III court's remand in December, 1989).

> Petitioners' Counsel: So without a substantial risk multiplier as an incentive it's pretty doubtful that they [my clients, the Petitioners] would have been able to attract an attorney [me in 1984], particularly one with a high level of specialization in this type of law. (R 597)

It can hardly be argued such self-serving testimony is competent, substantial evidence that absent the incentive of a Rowe risk multiplier Petitioners would not have been represented.

Rather, since representation of Petitioners by their attorney admittedly began in 1984 and, thus, pre-dated Rowe by virtually a year, such is irrefutable record evidence of the fact that a Rowe risk multiplier not only was not an incentive but could not have been an incentive to either Petitioners or their counsel "at the outset" of such representation as Rowe, itself, requires.

Axiomatically, Rowe was not incentive for legal representation of Petitioners by their counsel back in 1984 (when their relationship in this case admittedly first began) for the reason that Rowe could not have been an incentive for such representation because Rowe was not decided until virtually a year later!

POINT THREE

EVEN WERE THE PURPOSE FOR ROWE PRESENT HERE, PETITIONERS' COUNSEL REQUESTED A RISK MULTIPLIER TOO LATE

This Court's recent decision in Stockman v. Downs, 16 F.L.W. S160 (Fla. Case No. 75,635. January 31, 1991), holds that attorney's fees authorized by statute or contract cannot be recovered by a prevailing party who does not timely plead for them.

> [A] claim for attorney's fees, whether based or statute or contract, must be pled. The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. 40 Fla. Jur. 2d Pleadings s. 2 (1982). Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives. The existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him. Accordingly, we hold that a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim. (Emphasis added.

For more than three years after filing this case, Petitioners' counsel pled entitlement to attorney's fees only "pursuant to Section 73.091, Florida Statutes" (R 1; 42; 201) and never mentioned Rowe and its risk multiplier.

Not until months after the trial court's April 12, 1988 order entitling Petitioners' counsel to an attorney's fee (R

292), did she request for the first time an application of a Rowe risk multiplier, and then not until the motion hearing itself in December 1988. (R 521)

Respectfully, in addition to not being entitled to application of a risk multiplier because Petitioners' counsel only sought attorney's fees "pursuant to Section 73.091," neither is she entitled to any application of a risk multiplier because she did not request such application until too late: not until after the trial court had already ruled that she was entitled to an attorney's fee.

Should attorney's fees to which Petitioner's counsel was ordered entitled by the trial court's order of April 12, 1988 and to which her pleadings sought award thereof only pursuant to Section 73.091, be enhanced by such omitted Rowe risk multiplier and after such entitlement order?

In light of this Court's decision is Stockman v. Downs, supra: "no;" she has waived.

POINT FOUR

EVEN IF THE CERTIFIED QUESTION WERE TO BE ANSWERED IN THE AFFIRMATIVE, APPLICATION OF A RISK MULTIPLIER CANNOT INURE TO THE BENEFIT OF PETITIONERS' ATTORNEY WHOSE REPRESENTATION COMMENCED PRE-Rowe

Even if the First District's decision here appealed from -- that in inverse condemnation cases a Rowe risk multiplier is not applicable to an attorney fee award made by the trial court pursuant to the six (6) legislatively prescribed factors in Section 73.092--is reversed by an affirmative answer to the certified question, this Petitioners' counsel's attorney fee award below cannot be entitled to the benefit of such a reversal due to the fact that she began her representation of the Petitioners virtually a year before Rowe was even decided.

As a consequence of that fact, Rowe cannot be applicable to any portion of this case because, by its very terms, Rowe's purpose is to encourage (by a risk multiplier) representation of those who otherwise would not have it.

Such purpose for a Rowe risk multiplier is underlined in the instant case by the trial court's final judgment (R 552-558), which ultimately gave rise to this appeal:

> Without a substantial risk multiplier as an incentive, it is doubtful that these land-owners could have attracted an attorney, specialization in environmental law, to represent them in this matter. (R 557)

With all due respect, the prospect that a Rowe risk multiplier would be applied if Petitioners succeeded at trial

could not have been as a matter of law and was not as a matter of fact an incentive sub judice because these landowner Petitioners had already attracted and had already retained their attorney to represent them in this matter almost a year before Rowe was ever decided: they hired her in June, 1984 (R 372), and Rowe was not decided until May 2, 1985 (with rehearing denied August 16).

Consequently, Rowe could not have been an incentive here for the reason that it was not even extant when these Petitioners' counsel was retained to represent them.

Accordingly, an affirmative answer to the instant certified question cannot inure to the benefit of Petitioners' counsel, who began representing her clients in this case virtually a year before Rowe was decided.

POINT FIVE

EVEN IF THE CERTIFIED QUESTION WERE TO BE ANSWERED IN THE AFFIRMATIVE AND SUCH ANSWER WERE HELD TO INURE TO THE BENEFIT OF PETITIONERS' ATTORNEY DESPITE WHOSE REPRESENTATION COMMENCED PRE-ROWE, A RISK MULTIPLIER SHOULD NOT APPLY CONTINUOUSLY "FROM THE OUTSET"

> The award of attorney's fees in condemnation proceedings is governed by provisions of Section[s] 73.091-.092, Florida Statutes, rather than Rowe. (Emphasis added.)

Division of Administration v. Ruslan, Inc., 497 So. 2d 1348 (Fla. 4th DCA 1986) at 1349, cited to and relied upon in What An Idea, Inc. v. Sitko, 505 So. 2d 497 (Fla. 1st DCA 1987), review denied sub nom. 513 So. 2d 1064 (Fla. 1987).

But, in the event this Court concludes that risk multipliers are applicable to enhance Petitioners' counsel's $120,000 lodestar here

-- even despite the fact that the Legislature has not included a risk multiplier in Section 73.092 with those factors which it has explicitly enumerated that the Judiciary shall consider when determining the amount of the "reasonable fee," which by Section 73.091 the Legislature authorizes the Judiciary to award;

-- even despite the fact that the purpose for Rowe's risk multiplier--to encourage representation which would otherwise not occur--was not an incentive for these Petitioners to bring this suit or for their attorney to agree to represent them, as evidenced by the fact that Petitioners' counsel's representation of her clients in this case preceded Rowe by virtually a year;

-- even despite the fact that Petitioners' pleadings sought attorney fees only "pursuant to Section 73.091" without any mention of Rowe and did not even invoke Rowe until three years after suit had been

filed (which included causes of action in addition to inverse condemnation) and eight months after the trial court had entered its order entitling Petitioners to partial summary judgment on their inverse condemnation counts;

-- and, even despite the fact that since Petitioners' counsel's representation of her clients here preceded Rowe so that Rowe cannot apply either as a matter of law or as a matter of fact and, therefore, should bar Petitioners' counsel from any benefit of an affirmative answer by this Court to the certified question,

the Department respectfully submits that any application of a Rowe risk multiplier in this case should be delimited by the effect of the following additional fact: on March 18, 1987 the First District's decision in Schick I was rendered, which reversed the trial court's dismissal of Petitioners' complaint.

On that date, the Schick I Court held that Petitioners' allegation--that they were deprived of the use of their water wells due to contamination from the Department's use of EDB--was "sufficient to state a cause of action for inverse condemnation." 504 So. 2d at 1318.

Respectfully, that decision had the same legal effect as --and is analogous to--an "order of taking": the Department's obligation to pay the Petitioners full and just compensation and to pay a "reasonable" attorney's fee to the Petitioners' counsel.

Consequently, it was impossible from that date on for the Department to successfully dispute liability regarding the Petitioners' inverse condemnation claims.

That 1987 decision established the Department's liability: that decision obligated the Department to pay Petitioners' taking claims in whatever damage amounts were subsequently established: ultimately, $198,000 (plus pre- and post-judgment interest).

Thus, as a consequence of the Schick I court's March 18, 1987 decision, the Department submits that a Rowe risk multiplier should not apply to any of the hours expended thereafter by Petitioners' attorney, after March 18, 1987.

So, if Rowe applies at all--in the event that the Court does not accept any of the Department's contentions in Points One through Four above--it would be unfair for a risk multiplier to be applied to any hours expended on the inverse condemnation counts of Petitioners' suit after March 18, 1987, the date that the Judiciary accepted the validity of Petitioners' inverse condemnation taking claims.

Enhanced Fees Below

From a review of the time sheets attached to Petitioners' counsel's motion for attorney's fee below, their counsel expended 331.25 hours (R 372 through 2/26/87 on R 380) to establish to the Schick I court's satisfaction the validity of Petitioners' inverse condemnation causes of action against the Department.

Thus, the maximum amount of attorney's fees if entitled to enhancement by an application of a contingent risk multiplier would be $124,125:

331 -- enhanceable hours below
x$150 -- rate per hour
$49,650 -- fee for enhanceable hours before enhancement
x 2.5 -- risk multiplier
$124,125 -- fee for enhanceable hours, if enhanced

Unenhanced Fees Below

Since this enhanced amount represents 331 hours and it is undisputed that Petitioners' counsel expended a total of 800 hours below, she is also entitled to a $70,350 fee for 469 unhanceable hours:

800 -- total hours
- 331 -- enhanceable hours
469 -- unenhanceable hours
x$150 -- rate
$70,350 -- fee for unenhanceable hours

Total Fee Below; Enhanced and Unenhanced

Thus, the maximum attorney's fee entitlement--even with a risk multiplier--for 800 lower court hours would total $194,475:

$124,125 -- fee for 331 enhanced hours
+ 70,350 -- fee for 469 unenhanced hours
$194,475 -- total fee for 800 total hours

* * *

Although Rowe can be read to say that if a case is contingent "at the outset," then the risk multiplier which attaches at that time continues to apply throughout the case, the Department respectfully submits that that reading of Rowe should be modified here.

Not only is the instant case a Chapter 73 eminent domain/inverse condemnation case (unlike Rowe's professional

malpractice/negligence case), with legislatively enumerated specific factors in Section 73.092 to be used as the only factors in determining the "reasonable attorney's fee" authorized in Section 73.091, but this Court's recent decision in Quanstrom is also instructive here.

Quanstrom virtually precludes any application of a Rowe risk multiplier in eminent domain cases because the contingency risk multiplier factor is not consistent with either the fee-shifting purpose of Section 73.091 or with the factors listed in Section 73.092.

Indeed, this Court in Quanstrom said:

> We emphasize that the criteria and factors utilized in these cases [presumably any case where risk multipliers might still be applied] must be consistent with the purpose of the fee-authorizing statute or rule. In this category the Legislature may be very specific in setting the criteria that can be considered. At page 834. (Emphasis added.)

And, in this Court's first Rowe-type decision post-Quanstrom, Lane v. Head, supra, Justice Kogan, writing for the Court, said: "The policy underlying Rowe does not authorize a windfall for lawyers."

So, if Rowe applies at all, then respectfully it should apply only in part: only to the hours expended prior to the Schick I court's March 18, 1987 decision, which held that Petitioners had stated a cause of action in inverse condemnation. That decision had the same legal effect as an "order of taking;" and, therefore, no contingency risk remained thereafter--to either Petitioner-landowners or to their attorney.

CONCLUSION

The Department has shown by the facts here and an analysis of the pertinent case law as to the facts, that an application of a Rowe risk multiplier in this inverse condemnation case to enhance an already statutorily guaranteed reasonable attorney's fee award--from $120,000 to $300,000 for trial (and from $3,150 to $6,300 for appeal)--would be improper. Respectfully, the First District's Schick IV decision appealed from here should be affirmed: the $120,000 (and $3,150) lodestar amount(s) computed under Section 73.092 is(are) not entitled to any risk multiplier enhancement.

* * * *

Alternatively, even if the certified question is answered affirmatively, it cannot inure to the benefit of Petitioners' counsel for the reason that her clients retained her a year prior to this Court's decision in Rowe so that Rowe was not an incentive to represent Petitioners.

* * * *

And finally, even if the answer to the certified question is that Rowe nevertheless applies and that such answer can inure to the benefit of Petitioners' counsel, then respectfully it should apply only in part and not unabatedly "from the outset," for the reason that only the first 331 hours (of 821 total compensable hours) were "risky" hours; for after the appellate court's decision in Schick I, Petitioners' counsel was assured of a "reasonable" attorney's fee by Section 73.091 in accordance with the specific provisions of Section 73.092--but not to a "windfall."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was served on Randall E. Denker, 3425 Woodley Road, Tallahassee, Florida 32312, by ~~United States Mail~~ hand this 17th day of June, 1991.

ATTORNEY