047
appx 3

BEFORE THE FLORIDA SUPREME COURT

FILED
SID J. WHITE
MAY 28 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MARJORIE AND ROBERT SCHICK, BUCK HULL and DOT HULL SHAW

Plaintiffs/Appellees/ Petitioners

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Defendants/Appellants/ Respondents

CASE NO: 77,906

PETITIONERS' INITIAL BRIEF

On appeal from the First District Court of Appeal as a Question of Great Public Importance - Case No: 90-1921

Randall E. Denker
Lehrman and Denker
3425 Woodley Road
Tallahassee, Fl. 32312
(904) 893-6753
Attorney for Petitioners
Bar No. 273082

TABLE OF CONTENTS

cases: TABLE OF CITATIONS pages:

Statutes, rules, miscellaneous sources:

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

For years, the Department of Agriculture had a mandatory on-going program of funmigating orange groves with EDB (ethylene dibromide).(R.43). In 1983, the State discovered EDB in the wells of landowners in rural Orange County. The Department it turned out had been applying EDB at a rate of approximately 3½ times the amount allowed by state and federal law and in violation of the manufacturer's warning label.(R.43) EDB is a known potent mutagen and a suspected human carcinogen.(R.43)

The landowners were immediately warned not to drink the water, not to bathe in it, not to cook with it and not to even launder clothing with it. At the time of discovery, Robert and Marjorie Schick had 14.67 ppb EDB in their water,700 times the amount allowed by law.(R.44;§17-22.104(1)(g),F.A.C.(1983)repealed.) EDB has since been banned (R.43).

The landowners' homes became unsaleable and uninhabitable and they were forced to abandon them.(R.42-57). The Schick family, along with the other families involved in this lawsuit, filed a lawsuit against the Department of Agriculture. One of the theories under which relief was sought was inverse condemnation. (R.1-14; 42-57).

The circuit court initially dismissed the action for "failure to state a cause of action." (R.61). The First DCA reversed and remanded for a trial on the merits. Schick v . Department of Agriculture, 504 So.2d 1318(Fla. 1st DCA 1987). The Department appealed to the Supreme Court for review but

certiorari was denied. Department of Agriculture v Schick, Case No. 70,388, Supreme Court 1987).

The case went back to the circuit court for a trial on the merits. The circuit judge found that a taking had occurred (R.401-402). The Department filed an interlocutory appeal based upon the frivolous notion that no taking could be upheld because the Department does not have statutory taking powers (R.322). Plaintiffs moved for sanctions on the frivolous appeal and moved to dismiss. The Department eventually withdrew the interlocutory appeal but waited until all the briefs had been filed. Department of Agriculture v. Schick , Case No. 88-1181 (First DCA 1988).

Thereafter, the trial court entered a final judgment awarding the Plaintiff/landowners a total of $326,700. with 12% interest to date of payment.(R. 401-402) The Department flatly and without legal justification refused to pay the landowners a penny of their judgment. Finally, Plaintiffs were forced to file a mandamus action against the Department and Doyle Conner, as commissioner of the Department,to compel payment of a lawful judgment. The mandamus suit endured for nearly a year.(R.409-428; R.445-480).One working day before the trial, the Department signed an agreement to pay the landowners their money. With the accruing interest, the Plaintiff ended up with almost $400,000.

The circuit court awarded the Plaintiffs' attorney a fee of 800 hours at $150./hour with a risk-multiplier of 2.5. The court also awarded Plaintiffs' attorney 21 hours at $150./ hour with a risk-multiplier of 2.0 for the appeal.(R.437-438).

The Department decided to appeal the award of attorney's fees, arguing that risk-multipliers were never appropriate in inverse condemnation cases.(R.494). The First DCA in Department of Agriculture v Schick, 553 So.2d 360 (Fla. 1st DCA 1989), 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. Since the trial court had failed to make written factual findings, the First DCA remanded the cause back to the trial court for an evidentiary hearing and the entry of written findings per Rowe.

Thereafter, an evidentiary hearing was held. The trial court reinstated its original attorney's fee award but this time the trial court entered extremely detailed written findings (R.552-558). It should be noted that Standard Guaranty v Quan - strom, infra, was already in existence at the time the trial court held its remanded evidentiary hearing and the trial court was aware of the decision because Petitioners' attorney (not the Department) had brought the then-new case to the court's attention.(R.556;page 6 of transcript of evidentiary hearing).

Among the trial court's many factual findings were the following:

> The court finds that this case raised several novel and unique issues of law. This case raised the question of whether a landowner could recover under a theory of inverse condemnation as a result of pollution in underground waters. This was a case of first impression in Florida. The appellate court in Schick v Department of Agriculture, 504 So.2d 1318 (Fla. 1st DCA 1987) recognized the uniqueness of the central issue raised in this case, as well. In fact,

this court originally dismissed the inverse condemnation suit for "failing to state a cause of action." The only other Florida case dealing with the issue of inverse condemnation based on pollution of underground waters was Village of Tequesta v Jupiter Inlet Corporation, [cite omitted] and that case was decided against the landowners. Therefore, this court is of the opinion that this case carried with it a high degree of risk for the attorney at the outset.

Unlike the typical condemnation case filed pursuant to Ch. 73, where the attorney is compensated regardless of the outcome, this case was an all-or-nothing case. The attorney testified that she had no other fee arrangements with her clients and that if she failed to prevail, she would recover nothing for her many years of legal service. Because of the uniqueness and complexity of the case, the attorney assumed a very substantial risk of non-payment. Case law, at the time she undertook to represent these clients, was either non-existent or against her. The landowners' attorney was not on a contingency fee with her clients nor was she working on an hourly rate basis.

This case was legally and procedurally complicated. Although the case was filed in 1985, Plaintiffs' attorney has been representing these landowners since 1984. At the time this court entered its order on attorney's fees, there had been two appeals to the DCA (there have since been two more)*, a certiorari appeal to the Supreme Court, an attempted removal to federal court, a hearing on liability and a hearing on damages. Because of the uniqueness and complexity of the issues raised, the amounts of damages involved and the number of clients represented, it was a significant gamble on the part of the attorney from the outset. It was also apparent, at the outset, that the litigation would be lengthy and time-consuming. The condemnees' attorney testified that often she spent whole days only working on this case and that she was forced to turn down paying

---

*Since the judge signed the above opinion, there have been two more appeals: one to the First DCA and the instant one, in addition to the "two more appeals" referenced in his order.

cases at one time because the instant litigation had become so time-consuming.

The attorney for the landowners is a partner in a 3-person firm. She is the only one in the firm who practices environmental law. She worked on this case by herself and with no assistance from any co-counsel.

The attorney for the landowners achieved an excellent result for her clients. The court awarded the full amount of the compensation requested by her appraiser with the exception of some minor relocation costs...

The court has compared the monetary award granted in this case with awards granted in other inverse condemnation cases, such as State v Gables-by-the-Sea, Inc. , 374 So.2d 582 (Fla. 3d DCA 1979). Although the award in Gables was pre-Rowe and therefore computed by different formula, it is significant to note that in that case (which did not differ significantly from the instant one in terms of subject matter, complexity, time spent,etc.) the attorneys were awarded a fee of $800,000. in 1978 dollars. The award in Gables, which is nearly triple the instant award of fees, was upheld. In light of Gables, and other similar cases, the court finds that its original award of fees was reasonable and well within accepted norms in the legal community.

The court has had years to observe both the quality and quantity of work performed by the attorney and has found her to have been diligent and skilled in the handling of this matter for her clients.

The clients would not have had the resources to hire an attorney at an hourly rate. If they had been on a contingency fee, they would not have received the full compensation for their land guaranteed by the Constitution. Without a substantial risk multiplier as an incentive, it is doubtful that these landowners could have attracted an attorney, particularly one with a high level of specialization in environmental law, to represent them on this matter. In fact, the evidence shows that (even with the statutory guarantee of attorney's fees under Chapter 73, Florida Statutes), these same landowners spent a great deal of time trying to find a knowledgeable attorney who was willing to help them. It is known that at least two attorneys

passed over the case prior to their obtaining the services of their current attorney.

The circuit court also awarded the Plaintiffs 40 hours of compensation for supplemental attorney's fees (R.559-560) and 37 hours of attorney's fees for the appeal resulting in the remand.(R. 550-551). The court also awarded costs to Plaintiffs. (R. 550-551-559-560).

The Department once again appealed the attorney's fees to the First DCA.(R. 568-569). The Department's appeal again raised the identical issue previously (and unsuccessfully) raised in its prior appeal i.e. that risk multipliers are never awardable in inverse condemnation cases. The First DCA acknowledged that ordinarily res judicata would act to bar such an appellate argument and the Department would be bound by the law of the case. However, the court, on a split decision (dissent by Judge Wolfe) reversed its earlier decision based upon the Supreme Court's intervening decision in Standard Guaranty Insurance Co. v. Quanstrom,555 So.2d 828 (Fla. 1990).

The First DCA simultaneously remanded the cause back to the circuit court for the entry of a new attorney's fee award pursuant to Chapter 73,Florida Statutes (instead of Rowe) and certified the issue as one of "great public importance" to the Florida Supreme Court.

This appeal ensued. To date, Petitioners' attorney has not been paid even one penny of attorney's fees for the inverse condemnation claim, not even the undisputed portions of the attorney's fees! This case has been in the court system since 1985.

SUMMARY OF ARGUMENT

Quanstrom is not inconsistent with Schick III. because Quanstrom only applies to intentional statutory condemnations and not to inverse condemnations. The Supreme Court's decision in Quanstrom was intended only to apply to those condemnation cases where the fee-authorizing statute (§73.092,F.S.) guarantees an attorney fee regardless of the outcome of the case and not to inverse condemnation where the attorney recovers no fee at all unless he prevails.

The First DCA in Schick III. had no difficulty recognizing the inherent dissimilarities between condemnation and inverse condemnation the first time the issue came before them despite the existence of cases such as Division of Administration v Ruslan, infra, which held that risk multipliers were never awardable in condemnation cases. Ruslan is a far more restrictive decision than Quanstrom's decision, which concedes that risk multipliers are sometimes awardable in eminent domain cases under "extraordinary" circumstances."

Even if Quanstrom does somehow supersede Schick III., the First DCA still should have upheld its original decision in Schick III. because the trial judge made sufficient factual findings which would have justified the application of risk multipliers under Quanstrom principles . Quanstrom held that under "truly special circumstances" fee enhancers are appropriate and that courts must remain flexible in computing such fees.

Both the trial court and the First District Court of Appeal recognized the extraordinary nature of the instant case. The trial court called the case "complex", "unique", "time-consuming", "a significant gamble on the part of the attorney", and "unlike the typical condemnation case."

The First District Court of Appeal held:(inter alia)

> This was no ordinary case. It concerned novel and unique issues.

As such, the instant case would fit snugly within the exception carved out by Quanstrom that allows trial courts to apply risk multipliers whenever an eminent domain case presents "truly special circumstances."

Additionally, the First DCA erred by departing from the law of the case. As Judge Wolfe stated in his dissent, there were insufficient grounds for allowing the Department to raise previously settled questions of law.

A. QUANSTROM IS NOT INCONSISTENT WITH SCHICK III. BECAUSE QUANSTROM APPLIES ONLY TO INTENTIONAL STATUTORY CONDEMNATION AND NOT TO INVERSE CONDEMNATION

In the Supreme Court case of Standard Guaranty Insurance Co. v Quanstrom, 555 So. 2d 828 (Fla.1990), this court delinated three categories of cases for the purposes of setting reasonable attorney's fees. In the third category, the court included "family law, eminent domain and estate and trust proceedings." No mention is made of inverse condemnation. This is significant.

A failure to mention inverse condemnation may be taken as an intent to exclude it. Although the rule of "expressio unius est exclusio alterius" is intended to govern the decoding of statutory meaning, it is perhaps helpful in looking at the intent of judicial meaning, as well. The general principle is that the mention of one thing implies the exclusion of another. Likewise, the statutory construction rule of ejusdem generis (use of general words will be interpreted to include only things specifically enumerated) may also be helpful. Statutes §128, Fla. Jur. 2d (1978). Petitioners would argue that Quanstrom did not mention "inverse condemnation" by name because the court did not intend to include it.

Inverse condemnation is an extremely different creature than regular condemnation. Chapter 73, Florida Statutes does not mention inverse condemnation by name. Chapter 73 was originally promulgated by the legislature to encompass condemnations by state and local governments for roads, railroad lines, canals,

telephones, telegraph lines and other public necessities. The statute itself states that it is addressing itself to "those [entities] having the right to exercise the power of eminent domain."

The instant case is not a statutory eminent domain; it is a constitutional inverse condemnation case. The Department of Agriculture has no statutory condemnation powers and is not per se a condemning authority. The Department became an inverse condemnor because a court determined that its acts deprived private landowners of their constitutional right to use and enjoy their land.

Similarly, the landowners' attorney has no automatic right to reimbursement for attorney's fees under Chapter 73, Florida Statutes. Plaintiffs/Petitioners' attorney took on this case knowing full well that if she did not prevail on her clients' "taking" claim, she would recover nothing. Unlike the usual run-of-the-mill condemnation case where the condemning authority initiates the proceeding and the landowners' attorney is paid regardless of the outcome, in an inverse condemnation suit, the landowner initiates the lawsuit, and, if unsuccessful, the attorney recovers nothing. It is therefore obvious that statutory condemnation cases (involving absolutely no fee risk) and inverse condemnation cases (involving total fee risk) are two very different beasts.

A close reading of Quanstrom shows that the Supreme Court was addressing itself to statutory condemnations and not

constitutional inverse condemnation cases. In Quanstrom at 835, the court describes the purposes of the fee-authorizing statute (§73.092,F.S.) by stating that:

> ... the purpose of the award of attorney's fees is to assure that the property owner is made whole when the condemning authority takes the owner's property... In these cases, the attorney is assured of a fee when the action commences.

It is clear from this quotation that this court was addressing itself only to statutory condemnations not inverse condemnations. As mentioned above, the Department of Agriculture is not a "condemning authority". More importantly, the court could not possibly have been addressing inverse condemnation because in inverse condemnation cases the attorney most definitely is not "assured of a fee when the action commences."

The Supreme Court was obviously only addressing statutory condemnations and not inverse condemnations. As such, Quanstrom does not apply to the instant case and is certainly not in conflict with Schick III.

The First DCA's initial well-reasoned opinion in Schick III. should not have been overruled. Schick III., like Quanstrom, only made risk multipliers permissible not mandatory.[1]

---

1. There was ample precedent upon which the First DCA could have upheld its prior decision. The legal proposition set forth in Quanstrom that a trial court may sometimes go beyond the factors set forth in a fee-setting statute in extraordinary cases is not entirely new. For example, appellate courts have upheld the validity of going beyond the factors set forth in fee-setting statutes in a number of cases where extraordinary circumstances were present. These cases include: Inacio v State Farm Fire and Casualty Co., 550 So.2d 92(Fla. 1st DCA 1989);Rivers v SCA Services of Florida,Inc., 488 So.2d 873 (Fla. 1st DCA 1989); State v Gables-by-the-Sea,Inc., 374 So. 2d 582(Fla. 3d DCA 1979)[the latter being a pre-Rowe inverse case.]

The First DCA's initial opinion in Schick III. also harmonizes with Traveler's Indemnity v Sotolongo, 513 So. 2d 1884 (Fla. 3d DCA 1987) which was approved by this court in Quanstrom.

As a general rule, courts should attempt to harmonize decisions wherever possible. The case of Division of Administration v Ruslan, 497 So.2d 1348(Fla. 4th DCA 1986) was in effect at the time the First DCA decided Schick III. Ruslan held that risk multipliers were not appropriate in eminent domain cases. This is a much harsher position than the one taken by this court in Quanstrom which leaves the door open on the question by holding that risk multipliers may be appropriate in eminent domain cases in "extraordinary " circumstances. Yet, despite Ruslan and its rigid prohibition on fee enhancers in eminent domain cases, the First DCA recognized that inverse condemnation is a wholly different type of litigation and allowed risk multipliers to attach. It is peculiar that the First DCA was able to make that distinction on the first go-round and harmonize Ruslan, a potentially much more conflictive case. Yet, on the second go-round, the lower appellate court seemed unwilling to make the identical separation between condemnation and inverse condemnation cases even though Quanstrom's holding was less restrictive than Ruslan's.

In sum, the First DCA's radical departure from its own previous opinion was unwarranted and this is doubly true in view of the fact that the Department was allowed to raise issues that should have been barred by res judicata.

B. EVEN IF QUANSTROM DISPLACES SCHICK III., THE TRIAL JUDGE STILL MADE SUFFICIENT FACTUAL FINDINGS WHICH WOULD JUSTIFY THE APPLICATION OF RISK-MULTIPLIERS UNDER QUANSTROM PRINCIPLES

In the Supreme Court's opinion in Quanstrom, the court held:

> Under ordinary circumstances, a contingency fee multiplier is not justified [in eminent domain] ... although the basic lodestar method of computing a reasonable attorney's fee may be an appropriate starting point...
>
> We emphasize that the principles to be utilized in computing these fees must be flexible to enable the courts to consider rare and extraordinary cases with truly special circumstances. Quanstrom at 835.

In short, the Supreme Court did not forbid the use of Rowe[3] multipliers in condemnation cases but merely declared that "truly special circumstances" would have to be demonstrated to justify their imposition. Agreeing with Traveler's Indemnity Co. v Sotolongo, supra, this court held that risk multipliers (in appropriate cases) are permissible but not mandatory.

The holding in Quanstrom is not in conflict with the holding in Schick III. because the latter case similarly held that the trial judge was permitted to consider Rowe factors but was not required to consider them. The First DCA in Schick III. gave the trial judge the discretion to consider Rowe factors and he exercised that discretion.

Since Quanstrom does not spell out with any specificity what types of eminent domain cases are to be considered "truly special" enough to merit Rowe enhancement, this court may need

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

to answer that question. It is Petitioners' humble but fervent belief that if this case does not qualify as "truly special", then no case ever can or will meet Quanstrom's criterion.

To begin with, this is an inverse condemnation case. That fact, standing alone and without more, already creates an extraordinary circumstance. Inverse condemnation cases are, by definition, risky and uncertain. However, in this case (now in its seventh year!) there were innumerable other extraordinary factors. Even the First DCA acknowledged the extraordinary nature of this case:

> This was no ordinary case; it concerned novel and unique issues, it was a case of first impression regarding whether a landowner could recover damages under a theory of inverse condemnation as a result of the Department's pollution of underground waters beneath appellant's property. It required three appeals to this court, as well as certiorari proceedings to the Supreme Court, before a taking was found.

Moreover, the First DCA, in framing the issue for certification, included this conclusory phrase:

> ... it is clearly apparent that it was initially highly uncertain whether the claimants would prevail on the threshold issue of a taking.

As Judge Wolfe points out in his dissent, the trial court found:

> This court finds that this case raised several novel and very unique issues of law... This court is of the opinion that this case carried with it a high degree of risk for the attorney at the outset.
>
> The attorney testified... that if she failed to prevail, she would recover nothing for her many years of legal service. Because of the uniqueness and complexity of the case, the attorney assumed a very substantial risk of non-payment.

The trial judge also made factual findings that:

1) Case law was non-existent or directly against the attorney at the time of commencement of the suit.

2) The case was legally and procedurally complicated.

3) The case was extraordinarily time-consuming .

4) The attorney had to devote so much time to the case that she was required to forfeit paying clients at one point.

5) The attorney exhibited a high degree of skill in the handling of the case.

6) The clients would have had a difficult time obtaining counsel with expertise in environmental law without substantial incentives such as those offered by Rowe.

Judge Wolfe concludes in his dissent:

> I believe that these findings are supported by competent substantial evidence and comply with the previous mandate of this court in Schick III. and the requirement of Quanstrom, as explained in Platt,[4] for eludication of adequate reasons which justify application of a contingency risk factor to a fee award pursuant to section 73.091,Florida Statutes (1987). I would therefore uphold the decision of the trial court in this matter.

The majority justices in Schick IV. (the case at bar) do not dispute the trial judge's findings, nor do they dispute Judge Wolfe's characterization of those findings apparently. However, although the majority acknowledged that Quanstrom allows risk multipliers in extraordinary eminent domain cases, they made no attempt to define what those "extraordinary circum-

---

4. In re Estate of Platt, 16 F.L.W. S237 (Fla. April 4'th,1991).

stances might be and whether the instant facts met the threshold criteria for "exceptionality."

In dicta, the First DCA opined that even if the statute (§73.092,F.S.) does contemplate the use of multipliers in "extraordinary circumstances", the trial court could only consider the six factors in the statute and not the contingent nature of the fee:

> It would seem from our reading of Quanstrom, however, that any unusual circumstances justifying the application of a risk multiplier would pertain only to the six factors specified under § 73.092.

Petitioners would respond to this notion by asserting that the trial judge's consideration of the contingent nature of the fee was, at worst, harmless error because the trial judge found so many other independent bases for his award which fulfill the requirements of §73.092,Fla. Stats. (1987.)

Therefore, the First DCA should have upheld the trial court's award of risk-multipliers and its failure to do so was reversible error.

CONCLUSION

The Court is asked to reverse the the First DCA's decision and to adopt Judge Wolfe's dissent, restoring the risk multipliers to Petitioners' attorney's fees.

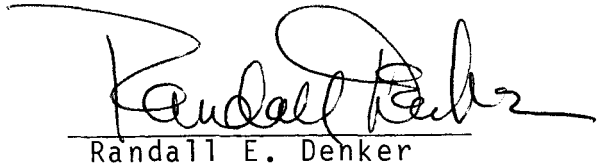
Further, the court is asked to reinstate the Petitioners' cross-appeal which was made moot by the First DCA's reversal of its earlier decision.

Respectfully submitted,

Randall E. Denker
Lehrman and Denker
3425 Woodley Road
Tallahassee, Fl. 32312
(904) 893-6753

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Initial Brief was ~~sent~~ hand-delivered by U.S. Mail to Clinton Coulter, Department of Agriculture, Mayo Building, Room 513, Tallahassee, Florida 32399-0800 on this 28th day of May, 1991.



Randall E. Denker