OA 11-5-97

IN THE SUPREME COURT
STATE OF FLORIDA

PETER F. PIERPONT and MARY J. PIERPONT, Husband and Wife,

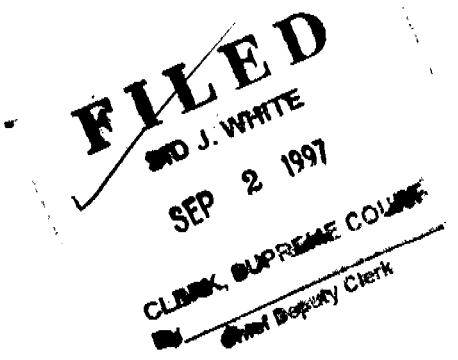
Petitioners,

vs.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

Supreme Court Case Nos. 90,357
CONSOLIDATED 90,573
90,775



RESPONDENT, LEE COUNTY'S, ANSWER BRIEF

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INTRODUCTION

For the sake of brevity, Petitioners, PETER F. PIERPONT and MARY J. PIERPONT will be referred to as "PIERPONT"; A&G INVESTMENTS will be referred to as "A&G"; BARNETT BANKS, INC. will be referred to as "BARNETT"; and collectively they will be referred to as "Petitioners".

References to the respective records will be as follows: Pierpont R.___;. A&G R.___; and; Barnett R.___.

STATEMENT OF THE CASES AND FACTS

In order to construct the Midpoint Bridge Project, a new major east/west transportation arterial including a bridge spanning the Caloosahatchee River, three overpasses and miles of four lane road, LEE COUNTY had to acquire hundreds of parcels of land. Included in the parcels acquired were a vacant residential lot owned by PIERPONT, a commercial center owned by A&G and a bank site owned by BARNETT. Unable to purchase these parcels voluntarily, LEE COUNTY condemned each of these parcels as whole takes.

PIERPONT

In November, 1994, the Lee County Board of County Commissioners adopted a resolution of necessity directing the Lee County Attorney's Office to acquire the necessary land for the Midpoint Bridge Project. (Pierpont R.7) This direction was followed by Board action on December 7, 1994 authorizing offers not to exceed 20% over the highest appraised value to acquire the needed land. (Pierpont R. 54). As directed, on January 5, 1995, the County Attorney instituted a "quick take" by filing a Petition in Eminent Domain (Pierpont R.l) and a Declaration of Taking (Pierpont R.2) to acquire the PIERPONT parcel. An Order of Taking was entered on March 7, 1995 (Pierpont R.16) and the good faith estimate of $69,000 was deposited.

On April 3, 1995, Attorney William Powell made his appearance in this action by filing an answer on behalf of PIERPONT (Pierpont R.20). On April 19, 1995, LEE COUNTY, through its County Attorney, made a written offer to PIERPONT, through

their attorney, to acquire the property for $82,800 (Pierpont R.55). This offer was refused and the case subsequently settled for $87,500 (Pierpont R.23).

No written offers other than the April 19, 1995 offer were made to PIERPONT. Nor did PIERPONT make an offer judgment pursuant to Section 73.032, Fla. Stat. (1995). Attorney Powell moved to tax attorney fees pursuant to Section 73.092(1), Fla. Stat. (1995), which provides that "the court in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client." "Benefit" is defined in Section 73.092(1)(a), Fla. Stat. (1995) as:

> "the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired."

The benefit claimed by Attorney Powell was $18,500, which is the difference between the $69,000 good faith estimate of value and $87,500, the amount of the settlement. Thirty-three percent (33%) of $18,500 is $6,105.00. LEE COUNTY asserted the benefit was $4,700 which is the difference between the first written offer of $82,800 made after Attorney Powell was hired and the $87,500 settlement amount, Thirty-three percent (33%) of $4,700 yields a fee award of $1,551 .00.

Before the trial court, PIERPONT argued that the good faith estimate of value was the first written offer under Section 73.092(1) and thus was the benchmark from which benefit must be measured. At no point before the trial court did PIERPONT challenge Section 73.092 as unconstitutional. Moreover, PIERPONT argued the

COUNTY'S offer contained in the April 19, 1995 letter was invalid, and hence not a bona fide offer, because it was an unlawful delegation of legislative power and the product of a violation of the Section 286.011, Fla. Stat. (1995), Florida's "Sunshine Law". The trial court reluctantly agreed and awarded $6,105.00 in attorney's fees. (Pierpont R.45).

The Second District Court of Appeal reversed, holding Section 73.092 required the calculation of attorney fees in this case be based on the difference between the final judgment amount and the amount of LEE COUNTY'S first written offer conveyed in the April 19, 1995 letter. Observing that Section 73.092 used "written offer" and made no mention of the good faith estimate of value, that a good faith estimate of value is not required unless a "quick take" is sought and that the good faith estimate is not binding on the condemning authority, the Second District concluded that the legislature did not intend to equate the statutorily mandated good faith estimate contained in and required by Section 74.031 with the "written offer" contained in Section 73.092.

Additionally, the Second District rejected PIERPONTS' Sunshine Law argument.

A&G INVESTMENTS

A petition in eminent domain was filed November 29, 1994 to acquire the whole parcel owned by A&G (A&G R.l). A Declaration of Taking and Estimate of Value was filed with the Petition in accordance with Section 74.031, Fla. Stat. (1995) stating that LEE COUNTY'S estimate of value for the property was $725,000. (A&G R.11). On January 17, 1995, LEE COUNTY made a written offer to A&G to acquire the property for $836,000 (A&G R.57). This offer was refused and the eminent domain proceedings

continued and an Order of Taking was entered March 17, 1995. (A&G R. 12). LEE COUNTY deposited its good faith estimate and title to the property vested in LEE COUNTY,

On June 2, 1995, LEE COUNTY served A&G with an Offer of Judgment in the amount of $836,000 (A&G R.58). A&G accepted this offer (A&G R.28) and a Stipulated Final Judgment in the amount of $836,000 was entered. (A&G R.31).

A&G filed a motion to tax attorney fees pursuant to Section 73.092(1), Fla. Stat. (1995) claiming entitlement to an attorney fees of $36,630, which is thirty-three (33%) percent of $111,000 - the difference between LEE COUNTY'S estimate of $725,000 and the $836,000 final judgment. Additionally, A&G claimed $11,287.50 in attorney fees for apportioning the $836,000 judgment.

At the hearing, LEE COUNTY stipulated to the award of $11,287.50 in attorney fees to A&G, but opposed any award of attorney fees based upon benefit since the difference between LEE COUNTY'S written offer of $836,000 and the final judgment of $836,000 was $0.00. At no point before the trial court did A&G challenge Section 73.092 as unconstitutional or assert the first written offer by LEE COUNTY was invalid as violative of the Sunshine Law, or the product of an unlawful delegation of authority.

The trial court ruled as a matter of law the estimate of value was a "written offer" under Section 73.092, Fla. Stat. (1995) and entered an order taxing attorney fees of $11,287.50 plus $36,630 based on benefit. (A&G R.55).

On appeal, the Second District Court of Appeal reversed citing the Pierpont decision which held the estimate of value was not a "written offer" under Section 73.092, Fla. Stat. (1995).

BARNETT BANKS

The petition to condemn the whole parcel owned by BARNETT was filed November 18, 1994 (Barnett R.1.), along with a Declaration of Taking and Estimate of Value of $960,000. (Barnett R.12). A written offer of $1 ,OOO,OOO was made by LEE COUNTY to BARNETT December 13,1994. (Barnett R.55). This offer was rejected and a stipulated order of taking was entered on January 12, 1995. (Barnett R.17). A final judgment of $1,060,000 was entered August 17, 1995. (Barnett R.24).

BARNETT filed a motion to tax attorney fees pursuant to Section 73.092(1), Fla. Stat. (1995) claiming a fee of $33,000 - which is thirty-three (33%) percent of the $100,000 difference between the $960,000 estimate of value and the $1,060,000 judgment. LEE COUNTY asserted $19,800 is the appropriate fee under Section 73.092(1), since $19,800 is thirty-three (33%) percent of $60,000, which was the difference between the $1 ,000,000 written offer and the $1,060,000 final judgment. BARNETT did not challenge Section 73.092 as unconstitutional or assert that the first written offer was invalid as violative of the Sunshine Law.

The trial court ruled as a matter of law the estimate of value was a "written offer" and awarded attorney fees of $33,000. (Barnett R.107).

On appeal, the Second District Court of Appeal reversed citing Pierpont.

SUMMARY OF ARGUMENT

Petitioners argue, contrary to rules of statutory construction, that this court should disregard the plain, clear and obvious meaning and legislative intent of Section 73.092 and instead judicially amend the instant statute because of a personal dissatisfaction with the award of attorney fees as mandated under the statute. However, an analysis of the legislative history and intent establishes a clear purpose in the statue to create risks and consequences for parties who take unreasonable positions or attempt to abuse the eminent domain process. Moreover, when, as is in the present case, the language of the statute is plain and unambiguous, there is no reason to resort to rules of statutory construction and this Court must not create new laws to fit the Petitioner's personal wishes. In following the plain application of the statute and legislative intent the Second District Court of Appeals correctly determined the appropriate attorney fees under the statute.

There has been no showing that Section 73.092, as applied according to its plain language and intent, denied any of the Petitioners full compensation. Moreover, before the trial court, each Petitioner claimed entitlement to an attorney fee calculated pursuant to Section 73.092(1). Petitioners cannot seek the benefit of Section 73.092(1) when it suits them then challenge the statute as unconstitutional for the first time on appeal.

PIERPONT'S arguments that LEE COUNTY'S first written offer was not binding because it was the product of a violation of the Sunshine Law and an unlawful delegation of legislative authority were properly rejected by the Second District. The

Board, at duly noticed public meetings, directed the County Attorney to acquire PIERPONT'S land and make a written offer not to exceed 20% of appraised value. The County Attorney did just that. No meetings or negotiations occurred outside the Sunshine and the County Attorney did not exceed the limited authority expressly delegated by the County Commission.

ARGUMENT

Petitioners do not challenge the constitutionality of Section 73.092, Fla. Stat. (1995). Rather, Petitioners argue, under constitutional pretense, for a judicial amendment of the statute because they are dissatisfied with the amounts of the attorney fees awardable pursuant to a plain application of the statute. Contrary to the assertions of Petitioner, under the plain application of Section 73.092 as upheld in Pierpont, PIERPONT is entitled to a fee award of $1,551.00; A&G is entitled to a fee award of $11,287.50 and BARNETT is entitled to a fee award of $19,800.00.[1]

In 1994, the Florida Legislature amended Chapter 73, Florida Statutes, relating to the calculation of eminent domain attorney fees. Section 73.092, Fla. Stat. (1995) effective October 1, 1994, states in pertinent pat-t:

> (1) Except as otherwise provided in this section, the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client.
>
> (a) As used in this section the term "benefit" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits musts be measured from the first written offer after the attorney is hired.

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[1] Additionally, each Petitioner was awarded appellate attorney fees by the Second District even though they led the trial court to the errors which necessitated the appeals in which LEE COUNTY prevailed. For example, it defies logic and justice that A&G can lead the trial court to erroneously award $36,630 in attorney fees based on benefit when the correct amount is $0, necessitate an appeal to correct the error and then receive an award of appellate attorney fees to correct the error invited by A&G.

Additionally, attorney fees based on benefit shall be awarded based on a sliding scale of thirty-three (33%) percent of any benefit up to $250,000, twenty-five (25%) percent of benefit between $250,000 and $1 ,000,000 and twenty (20%) percent of benefit over $1 ,000,000. Section 73.032, Fla. Stat. (1995) was amended to permit property owners, when the amount in dispute is less than $100,000, to make an offer of judgment to the condemnor. If the award is equal to or greater than the offer of judgment, attorney fees are calculated not solely upon the benefit obtained, but by also using the traditional lodestar criteria in Section 73.092(2), Fla. Stat. (1995).

Prior to the amendments, which became effective October 1, 1994, there was no disincentive for property owners to reasonably evaluate their claims. On the contrary, the then-existing law encouraged unnecessary litigation and expense. A property owner could force litigation without regard to the expense of attorney fees and costs because most, if not all, of this expense would be paid for by public funds regardless of the outcome.

Chapter 73, as amended, creates risks and consequences for parties that take unreasonable positions and try to abuse the eminent domain process. If a condemnor makes an unreasonable first offer, the consequence is an attorney fee award commensurate with benefit. The larger the benefit, the larger the fee the condemnor must pay. If a condemnor makes an offer, and the amount in dispute is under $100,000, the property owner can make an offer of judgment to the condemnor pursuant to Section 73.032, Fla. Stat. (1995). Should the property owner obtain an award equal to or in excess of the amount of the offer of judgment, the attorney fee

shall be calculated using the benefit obtained and the traditional lodestar criteria in Section 73.092 (2), Fla. Stat. (1995). If a property owner takes an unreasonable position in response to a reasonable offer, the risk assumed is an award of attorney fees commensurate with the little or no benefit ultimately obtained.

THE SECOND DISTRICT CORRECTLY REJECTED PETITIONER'S ARGUMENTS TO JUDICIALLY AMEND SECTION 73.092, FLA. STAT. (1995).

Section 73.092 plainly states that the benchmark for the determination of "benefit" is a "written offer". It does not state "written offer or good faith estimate of value". Nowhere in Section 73.092, or anywhere else in Chapter 73, do the words "good faith estimate of value" appear. There is a significant legal distinction between an offer and an estimate of value which will be shown below. This legal distinction was not lost upon the Florida legislature or the Second District. The Second District correctly rejected Petitioners' arguments to sanction a judicial amendment of Section 73.092 to make the good faith estimate of value, rather than the written offer as stated by the legislature, the benchmark for determining "benefit".

1. The Rules of Statutory Construction Do Not Authorize Judicial Amendment of Statutes.

Petitioners improperly invoke rules of statutory construction to amend Section 73.092(1) to justify higher attorney fee awards for themselves. A correct application of the rules of statutory construction require Petitioners' argument to fail.

The cardinal principle of statutory construction is to determine legislative intent. Consequently, if the language of the statute is plain and unambiguous, there is no reason to resort to the rules of statutory construction State v. Eaan, 287 So.2d 1 (Fla. 1973). Moreover, Courts interpret and apply the laws but do not make them and may not assume the prerogative of judicially legislating. Hancock v. Board of Public Instruction of Charlotte Countv, 158 So.2d 519 (Fla. 1963). It is not the function of a court to construe a statute to produce a result it deems more appropriate when the language of the statute is clear. Pfieffer v. Citv of Tampa, 470 So.2d IO (Fla. 2d. DCA 1985). Nor is it the function of a court to supply omissions of the legislature. Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976).

Statutory construction requires courts determine legislative intent from the plain language of the statute. It is assumed the legislature knew the meaning of the words used and expressed its intent by the use of the words found in the statute. S.R.G. Corp. v. Dept of Revenue, 365 So.2d 687 (Fla. 1978). As succinctly stated in 49 Fla. Jur. 2d, Statues §135, p. 178:

> "Technical words and phrases that have acquired a peculiar and appropriate meaning in law cannot be presumed to have been used by the legislature in a loose popular sense. To the contrary, they have been presumed to have been used according to their legal meaning. They will ordinarily be interpreted not in their popular, but in their fixed legal sense and with regard to the limitations the law attaches to them. Where legal terms are used in a statute, unless a plainly contrary intention is shown, they must receive their technical meaning". (Footnotes omitted).

An additional, basic rule of statutory construction is the mention of one thing in a statute implies the exclusion of another. Thaver v. State, 335 So.2d 815 (Fla. 1976).

Section 73.092 provides attorney fees shall be determined "solely on the benefits achieved for the client" with "benefit" defined as the difference between the "first written offer" and the amount of the final judgment or settlement. Section 73.092 plainly states that "benefit" is to be measured from the "first written offer". The plain language of the statute is "written offer". This language does not lend itself to any other interpretation. Equally significant is the fact that nowhere in Section 73.092 do the words "good faith estimate" appear. Had the legislature intended to measure benefits from the "good faith estimate" it could have done so quite easily by simply inserting those three words. It did not. On the contrary, the statute expressly says "offer" and implicitly excludes "good faith estimate" as the benchmark from which to measure benefits. The word "offer" has a specific, legal meaning.

The legislature is assumed to know the meaning of the word "offer" and to have used it according to its legal meaning and not its loose, popular meaning as argued by Petitioners. Further support for this assumption is found in the various statutes cited by Petitioners.

Numerous regulatory statutes were cited by Petitioners in which the legislature defined "offer" for use in the context of those statutes. The definitions of "offer" in those statutes were substantially broader than the legal meaning of the word. If as Petitioners argue, the loose, more expansive definition of "offer" was intended by the legislature in Section 73.092, why did the legislature deem it necessary to provide an expansive

definition of "offer" in the statutes cited by Petitioners? Why did not the legislature just use "offer" in those statutes without including a definition? Because it wished to broaden the definition of "offer" from its legal meaning for use in the context of those statutes.

The legislature used "offer" with its legal meaning in Section 73.092 for a reason. Despite Petitioners vigorous arguments that the good faith estimate constitutes a binding obligation of the condemnor, until the condemnor deposits money in accordance with the order of taking, there is no taking of property, and hence, no obligation of the condemnor to pay compensation. The only way a condemnor could be obligated to pay compensation to a landowner prior to the taking of property is to be contractually obligated to do so. The only way a contract can be formed between a condemnor and a landowner to purchase real property is by acceptance of a written offer, The word "offer" has a specific legal meaning in the law of contracts and real property, not a loose, expansive meaning as argued by Petitioners.

Section 73.092 unequivocally states that the benchmark for the determination of "benefit" is a "written offer". It is hornbook law that an "offer" is a proposal to do a thing or pay an amount that creates a power of acceptance in the offeree which, upon acceptance creates a binding contractual obligation.[2] A good faith estimate of value is just that - an estimate of value. Nothing more.

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[2] BARNETTS' own expert witness, Attorney Hume, provided the same definition of "offer" (Barnett R. 45-46).

Petitioners argue for a judicial "interpretation" of Section 73.092 that will legally empower property owners to unilaterally transform an estimate of value into a binding offer. Not only would such a rule of law be contrary to the law of eminent domain, and the established law of contracts and real property, it would transfer the authority to decide whether to proceed with an eminent domain proceeding from the public body to the property owner contrary to the public policy of this statute.

Neither the estimate of value as stated in Declaration of Taking nor the amount which is deposited pursuant to the Order of Taking have the effect of establishing the minimum compensation due the owner. Bainbridae v. State Road Dept., 139 So.2d 714 (Fla 1st DCA 1962). The Declaration of Taking cannot be construed as an offer since the condemning authority is not bound by its estimate of value and is free to contest the issue of full compensation by presenting testimony of a lower or higher value to a jury. Jacksonville Exaresswav Authoritv v. Bennett, 158 So.2d 821 (Fla 1st DCA 1964).[3] Likewise, the good faith estimate of value and withdrawal of deposit does not bind the owner. Shannon Properties, Inc. v. Tampa-Hillsborouah County Expressway Authority, 605 So.2d 594 (Fla 2d DCA 1992); Florida East Coast Railway Company v. Broward County, 421 So.2d 681 (Fla. 4th DCA 1982).

Since the good faith estimate of value is not binding upon the condemnor and does not establish the minimum compensation due the owner, it cannot be seriously

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[3] Since the estimate of value is not binding on the condemnor, how can a property owner unilaterally make it so by declaring it an "offer" and accepting it?

suggested that it constitutes an offer. Accordingly, the owners' withdrawal of the deposit or failure to contest the estimate of value does not constitute a binding "acceptance" of the good faith estimate of value. If the estimate of value is an offer as argued by Petitioners, the withdrawal of the estimate of value by Petitioners was a final "acceptance" of the condemnor's "offer" vitiating the need for a trial or any discussion of attorney's fees.

Contrary to Petitioners' assertion, the good faith estimate of value is not the condemnors' opinion of full compensation. It is an estimate of value. Full compensation is a matter which the condemnor, like the owner, has a right to have determined by a jury. It is not uncommon for a condemnor to have two appraisals for one parcel. See for example Section 125.355(1)(b), Fla. Stat. (1995). Nor is it uncommon to have a different opinion of value at the trial - either higher or lower than the estimate - due to discovery of additional facts relating to a parcel's value or additional comparable sales that were transacted after the initial appraisal(s).

Petitioners' argument that the good faith estimate of value or its deposit constitutes a binding offer is also contrary to the purposes and terms of Chapter 74, Florida Statues. For example, Section 74.071 provides the condemnor is entitled to judgment against the owner for any excess should the final judgment be less than the good faith deposit that was withdrawn. Additionally, Section 74.051 (b) requires a nonpublic condemning authority to deposit the estimate of value. If the deposit of the good faith estimate of value constitutes an offer, then every time a nonpublic condemnor condemns property it is assured of paying at least twice its good

faith estimate of value. Section 74.051 (c) provides that the Order of Taking shall become effective and title passes to the condemning authority upon the deposit of the good faith estimate. If the condemnor does not make the deposit, title does not pass and the Order of Taking is void. [4] Petitioners' interpretation renders Section 74.051 (c) inoperative since an owner can "accept" the good faith estimate and thereby bind the condemning authority to purchase the property at the good faith estimate. That is simply not the law and for good reason.

A public body must retain discretion to proceed with or abandon eminent domain proceedings. Until funds are deposited pursuant to an order of taking, there is no taking of property and Article X, Section 6 of the Florida Constitution does not compel compensation unless and until there is a takina of property. A public body may elect to abandon an eminent domain proceeding for a variety of reasons - including failure of funding, denial of permits, discovery of previously unknown conditions on the property or the abandonment of the project for which the property was to be acquired. Under Petitioners' argument, a property owner can "accept" the estimate of value thereby obligating the public body to buy the property even though the public body did not intend to be bound by the estimate.

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[4] This section is consistent with case law that a condemning authority may prosecute a "slow take" condemnation through jury verdict and abandon the proceeding at any time prior to taking possession or paying compensation with the condemnor being liable only for the owner's fees and costs. Conner v. State Road Dept. of Florida, 66 So.2d 257 (Fla. 1953)

Secondly, as a matter of contract law, an opinion of value is not an offer. For example, LEE COUNTY obtained an appraisal of Blackacre that showed a value of $1,000,000. LEE COUNTY states to Blackacre's owner "We estimate Blackacre is worth $1,000,000." Blackacre's owner says "I accept." Was an offer made which upon acceptance creates a binding obligation? No. The same result obtains in quick take condemnation proceedings. An estimate of value does not constitute a binding proposal to pay that amount. For Petitioners to argue that LEE COUNTY would gladly pay its appraised value for property needed for public projects is simplistic, presumptuous and irrelevant. It is simplistic because it ignores the reality in eminent domain that appraisals are the product of opinion which may vary greatly between equally qualified appraisers. LEE COUNTY is aware of this having acquired over 500 parcels for the Midpoint Bridge Project alone. It is presumptuous for Petitioners to declare that LEE COUNTY intended to offer the estimate of value particularly in light of the written offers in these cases which evince an intention by LEE COUNTY to offer more than the estimate of value for each of these parcels. It is irrelevant because LEE COUNTY expressed its intent by making clear written offers to Petitioners and there is no need for speculation as to what LEE COUNTY would voluntarily offer to acquire these parcels.

The Second District correctly rejected Petitioners' arguments for a judicial amendment of Section 73.092 under the guise of "statutory interpretation" and this Court must do the same. Petitioners seek to add substance to this argument by characterizing the issue as one of constitutional dimensions. However, the

constitutionality of a statute may be passed upon by the Court only as it applied in the determination of a particular case before the Court. Snedeker v. Vernmar. Ltd., 151 So.2d 439 (Fla. 1963). Petitioners' argument is that application of Section 73.092, according to its plain and clear language, to a hypothetical case that may never arise, may violate the full compensation clause. As this Court stated in Fieldhouse v. Public Health Trust. Etc., 374 So.2d 476,478 (Fla. 1979):

> "It is not our duty to envision theoretical combinations of factors which, if present, might render a statute unconstitutional. Rather, it is our responsibility to examine the facts as they exist and resolve all doubts as to the validity of a statute in favor of its constitutionality."

There is no showing that PIERPONT'S fee award of $1,551 .00; A&G's fee award of $11,287.50 or BARNETT'S fee award of $19,800.00 work to deny these parties of full compensation. All that is shown in these cases is Petitioners' wish for an "interpretation" of Section 73.092 which will afford them a larger attorney fee award than a plain reading of Section 73.092 provides. Moreover, Section 73.092(1) is not the sole method of calculating attorney fees. Section 73.032 authorizes offers of judgments and if the final award is equal to or greater than the offer of judgment, attorney fees are calculated using the criteria in Section 73.092(2). For reasons known only to Petitioners, Petitioners elected not to avail themselves of the opportunity to make offers of judgment. The Petitioners failed to utilize this opportunity that was available does not mean the application of Section 73.092 in these cased denied them full compensation.

Petitioners argue that the estimate of value be judicially declared a "written offer" to purchase property because Chapter 73 does not provide a time period within which a condemnor must make a written offer and, theoretically, a condemnor could wait until trial to make its written offer. This argument overlooks Section 74.031, which provides the declaration of taking, in which the estimate of value shall be made a part of, may be filed "at any time prior to the entry of final judgment". Accordingly, there is no requirement that the estimate of value be filed at any time as long as it is prior to final judgment. Moreover, there is no requirement that an estimate of value even be filed in "slow take" proceedings under Chapter 73.

Petitioners argue a condemnor theoretically could wait until the eve of trial to make its first offer. This extreme example is improbable for several reasons. First, Section 73.092 applies only to attorney fees, it does not affect a condemnor's liability for all other expert witness fees and litigation costs. These costs are often substantial. Not only is the condemnor financially liable for its own expert witness fees and litigation expenses, it must also pay the owners' fees and costs. The only way for a condemnor to limit or avoid this double burden is to settle the case early on or to make an proposal for settlement, which must be in writing, pursuant to Rule 1.442 Florida Rules of Civil Procedure; Section 73.032, Fla. Stat. (1995).[5]

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[5] A&G refused the first written offer of $836,000. A&G did accept LEE COUNTY'S $836,000 offer of judgment. Interestingly, the validity of the offer of judgment is not questioned by A&G but the validity of the first written offer is.

Secondly, mediation is almost universally required before condemnation cases are set for trial. If a case is not settled in mediation, the mediation conference will generate settlement offers.

Thirdly, Petitioners' argument assumes condemning authority's wish to try all of these cases to a jury. In addition to the cost of trying these cases, like all other cases tried to a jury, condemnation cases carry the risk of adverse verdicts. Both factors enter into a condemnor's decision on what to offer an owner for the property. None of these factors enter into the determination of the estimate of value. That condemning authorities will settle most of the cases is borne out by the facts of the cases before this Court. All were settled without a jury trial even being set. In none of these cases did LEE COUNTY offer the estimate of value. On the contrary, the amounts of the written offers were substantially greater than the estimates of value. Petitioners are unhappy with the determination of "benefit" in these cases based upon a plain and correct application of Section 73.092 and argue for an "interpretation" contrary to the statute's plain language that will afford them a larger "benefit" and, hence, larger attorney fees. Petitioners' arguments for such an "interpretation" imply that a plain reading of the statute will permit condemnor chicanery and bad faith to deprive landowners of their right to full compensation. However, contrary to this implication, the reason the benefit in these cases were smaller than Petitioners would like is not because LEE COUNTY engaged in unreasonable conduct toward Petitioners, but because LEE COUNTY was reasonable in making its first written offers to Petitioners. Petitioner's arguments about

condemnor bad faith in a hypothetical case scenario does not comport with the reality of this case or of condemnation practice in general.

WHEN THE LEGISLATURE SPECIFICALLY STATES THE CRITERIA TO BE CONSIDERED IN AWARDING ATTORNEY'S FEES THE TRIAL COURT IS BOUND TO USE THE ENUMERATED CRITERIA.

Petitioners suggest Section 73.092 is an unconstitutional encroachment by the legislature into the province of the judiciary. This is a curious position for Petitioners to take since they did not challenge the constitutionality of Section 73.092 before the trial court. On the contrary, Petitioners sought and obtained fee awards of $36,630 (A&G); $33,000 (BARNETT) and $6,105 (PIERPONT) under Section 73.092(1) and vigorously defended these awards before the Second District.

Petitioners' argument has been previously rejected by this Court in Schick v. Department of Agriculture and Consumer Services, 599 So.2d 641 (Fla. 1992), the Fifth District Court of Appeal in Seminole County v. Clayton, 665 So. 2d 363 (Fla. 5th DCA 1995) and most recently in Seminole County v. Rollingwood Apartments. Ltd., 21 Fla. L.Weekly D1407 (Fla. 5th DCA June 14, 1996). As this Court unequivocally held in Schick, supra., where a statute exists which sets forth specific criteria for the court to consider in determining an award of attorney fees, the statute controls and only the statutory criteria may be applied.

The full compensation mandate of the Constitution obligates the condemnor to pay the landowner's attorney fee when his/her property is taken without payment of full

compensation. Schick, supra. There are two components to this legal premise: (I) a taking of property; and (2) the non-payment of full compensation.

Under the first component, there is no obligation to pay attorney fees, or any other monetary compensation for that matter, unless there has been a taking of property. If there is no taking of property, there is no obligation to pay full compensation. In the context of an eminent domain action, until the deposit is made there is no taking and, hence, no constitutional obligation to pay attorney fees or compensation."

The condemnor could voluntarily dismiss the action prior to deposit or proceed through an order of taking hearing and decline to deposit the funds without any constitutional liability for compensation. It is not the filing of the eminent domain action, the filing of the declaration of taking and estimate of value or even entry of an order of taking that triggers the constitutional mandate of full compensation. Rather, it is the deposit of the funds pursuant to the order of taking when property is "taken" and full compensation required. The filing of a good faith estimate of value does nothing to alter this. This further illustrates the error of Petitioners' argument that the good faith estimate is an "offer" and should be the benchmark for measuring benefits.

The Constitution does not prohibit the taking of private property for public use. It prohibits the taking of private property for public use without payment of full

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[6] Section 73.092, Fla. Stat. (1995) provides a broader statutory entitlement to attorney fees which has been construed to require the condemnor pay a landowner's attorney fees should the condemnor voluntarily abandon the proceeding.

compensation. Petitioners' argue that if the attorney fee awarded in an eminent domain case were zero, this would be a per se violation of the full compensation clause. This argument misreads the full compensation clause. For example, in the A&G case, full compensation was determined to be $836,000 (A&G R.31). LEE COUNTY had offered $836,000 to A&G and A&G refused. LEE COUNTY subsequently offered $836,000 to A&G in the form of an offer of judgment. This time, A&G accepted. There is no difference between the first written offer, the offer of judgment and the final judgment. A&G was offered full compensation by LEE COUNTY and belatedly accepted LEE COUNTY'S offer. There was no "benefit" achieved by A&G's attorney. The fact that A&G chose to be represented by counsel does not obligate LEE COUNTY to pay any more than full compensation - $836,000. The fact that A&G's attorney fee award was $11,287.50, or even if it were $0.00, does not mean A&G was denied full compensation.

Suppose, A&G refused LEE COUNTY'S offers of $836,000, the matter is tried and a verdict of $836,000 is returned. Would A&G be denied full compensation in this instance if LEE COUNTY did not have to pay A&G's attorney fees? No. The full compensation clause does not guarantee risk-free or cost-free litigation for a landowner. As the First District noted in Crialer v. State Dept. of Transp., 535 So.2d 329, 331 (Fla. 1st DCA 1988):

> "...that because a landowner may refuse the offer and pursue greater pecuniary gain does not mean the condemnor.. . denied the landowner full compensation."

A landowner may elect to pursue greater pecuniary gain than the amount offered by the condemnor. When the result of this pursuit is $0.00, full compensation does not obligate the public to pay a landowner's attorney fees for an unsuccessful attempt to obtain more than full compensation. The cost of this unnecessary and unproductive litigation should be borne by the litigant, not the public.

THE SECOND DISTRICT CORRECTLY REJECTED PIERPONTS' BELATED CHALLENGE TO LEE COUNTY'S FIRST WRITTEN OFFER AS VIOLATIVE OF THE SUNSHINE LAW AND A PRODUCT OF UNLAWFUL DELEGATION OF AUTHORITY

Petitioners argue that the first written offer made in these cases were not valid offers because they were the products of unlawful delegation of authority and violative of the Sunshine Law. For the reasons that follow, these arguments are improper and unfounded.

The question certified as one of great public importance in Lee County v. Barnett Banks Inc. was:

> Whether the condemning authority's good faith estimate of value can be considered an 'offer' for the calculation of attorney's fees under Section 73.092, Florida Statutes (Supp. 1994)?

Pierpont and A&G were consolidated with Barnett on the basis that this question was common to all three cases since A&G and Barnett relied and cited the Pierpont holding that the good faith estimate of value was not a "written offer" under Section 73.092.

Furthermore, there was no Sunshine Law issue before the Second District in either the A&C or Barnett cases. There was no issue regarding delegation of authority in the A&C case. In addition to not being a common issues, it is improper to raise issues for the first time on appeal. Commission on Ethics v. Barker, 677 So.2d 254 (Fla. 1996). In an overabundance of caution, LEE COUNTY will respond to the arguments raised regarding the first written offer to PIERPONT.

The Board of County Commissioners is the legislative governing body of Lee County. In addition to enacting laws, the Board's functions include establishing policy to be implemented by the County Administrator and the County Attorney as well as appropriating funds for various county purposes. In this case, the Board determined to construct the Midpoint Bridge Project. Funds were appropriated by the Board to acquire the land necessary for this project. The Board determined which parcels were needed and "authorized and directed" the County Attorney, by resolution dated November 22, 1994 (Pierpont R. 7) "to commence and prosecute any and all proceedings necessary" to acquire these parcels. At a duly noticed and recorded public meeting, the Board directed the County Attorney to make written offers, not to exceed 20% over Lee County's appraised value, to acquire the needed parcels. (Pierpont R.54) In accordance with the Board's direction, and authorization, written offers were made including one of $82,800 to PIERPONT. (Pierpont R.55)

To avoid the first written offer of $82,800 and thereby increase the amount of attorney fees claimed, PIERPONT argues the offer is invalid and not binding on LEE COUNTY. PIERPONT did not object in any way to the validity of the offer of $82,800

when they received it. The only indication of dissatisfaction by PIERPONT with LEE COUNTY'S offer was as to the amount.

The Sunshine Law requires a public meeting between two or more public officials at which official action is taken and that such a meeting be advertised and minutes recorded. PIERPONT argues that the County Attorney violated the Sunshine Law by not advertising; conducting a public meeting and recording minutes thereof when he wrote the letter offering $82,800 as authorized by the County Commission" However, the Sunshine Law does not require actions by individual public officials or employees to be conducted after notice in a public forum. Nor does the Sunshine Law or any other law of Florida prohibit a governing body from delegating any discretion, judgment or decision-making authority to its employees and staff.

Every business day public employees of the State, counties, cities and independent districts exercise discretion, judgment and decision-making authority. These decisions, ranging from the purchase of paper clips to computers to employing or terminating personnel, are made by individual public employees, without notice and public meetings. Millions of dollars of goods and services are contracted for and purchased on behalf of government entities by non-elected personnel without notice and public hearings. Do these action violate the Sunshine Law? Of course not. Government could not function if the governing body had to approve at a duly noticed public hearing every purchasing decision. The Sunshine Law applied to meetings of public officials at which official action is to be taken.

PIERPONT cites Section 286.011, Fla. Stat. (1995), case law and Attorney General Opinions for the rule requiring all meetings at which a government entity, or individual delegated authority on behalf of the government entity, at which official acts are to be taken, comply with the Sunshine Law. However, there was no meeting in this case. It would be ridiculous to imagine that the Sunshine Law would require a public employee, who has authority to purchase goods on behalf of the government, to give public notice so that at a designated time and place, the public can observe the employee while he deliberates whether to order plastic or metal paper clips. Nor were there any negotiations. On the contrary, all that was done was the communication, in writing, of an offer to acquire PIERPONTS' parcel for 20% over the appraised value.

LEE COUNTY accepts the general rule that government attorneys cannot unilaterally bind or obligate their clients and the authorities cited by PIERPONT in support of this proposition. However, contrary to the authorities cited, in this case, LEE COUNTY'S attorney was authorized, by action of the County Commission at a duly noticed public meeting and as memorialized by a resolution adopted by the Board, to acquire the needed parcels at a price not to exceed 20% over the appraised value.

The County Attorney was not delegated any policy-based decision-making function. The Board decided to construct the Midpoint Bridge Project, acquire all parcels needed for the project, appropriated funds for land acquisition, directed the County Attorney to acquire the parcels and adopted the policy to offer up to 20% over appraised value for each parcel. The County Attorney implemented the policy of the Board and acquired the land as directed. There was never any discretion delegated to

the County Attorney whether or not LEE COUNTY should pay for the needed land - that is a constitutional mandate.

Petitioners argue the offers contained in the letters on behalf of LEE COUNTY signed by the County Attorney are invalid because they violate the Sunshine Law and were based on an unlawful delegation of authority. Petitioners have no such concerns with the Declaration of Taking and Estimate of Value signed by the same attorney on behalf of LEE COUNTY. On the contrary, Petitioners insist the estimate of value is binding on LEE COUNTY.

CONCLUSION

The decision of the Second District Court of Appeal should be affirmed and the certified question answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Respondent, Lee County's, Answer Brief has been furnished on this 29th day of August, 1997, by Regular U.S. Mail to:

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