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IN THE SUPREME COURT OF FLORIDA

PETER F. PIERPONT etc. et al.,

Petitioners,

v.

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

Respondent.

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

A PETITION FOR DISCRETIONARY REVIEW
OF THREE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL
RENDERED IN CASE NOS. 95-04657,96-00552, AND 96-01360

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This is a consolidated proceeding for discretionary review of three decisions of the Second District Court of Appeal concerning the issue of attorneys' fees in eminent domain cases. This Initial Brief on the Merits is submitted on behalf of the Petitioners, PETER F. PIERPONT and MARY J. PIERPONT, Husband and Wife, A & G INVESTMENTS, a Florida general partnership, and BARNETT BANKS, INC., and they will be referred to collectively herein as "the Landowners" and individually by name. The Respondent, LEE COUNTY, a political subdivision of the State of Florida, was the condemner in the eminent-domain actions, and will be referred to as " the County" or " Lee County."

There are three Records before the Court, since the instant proceeding is a consolidation of three cases. Accordingly, reference to the respective Records will be indicated by " R" followed by the shortened case name and the pertinent page number(s). There is also an Appendix to this Initial Brief on the merits containing the three Second District decisions, and reference to the Appendix will be indicated by " APP" followed by the pertinent page number(s).

STATEMENT OF THE CASE & FACTS

This proceeding is a consolidation of three cases arising from decisions of the Second District Court of Appeal.[1] All three cases involve the proper interpretation of Section 73.092 of the Florida Statutes as amended in 1994, and this statute concerns the award of attorneys' fees in eminent-domain actions. The procedural setting of the three cases is rather unusual, and can be described as follows:

Pierpont, 693 So.2d 994 (Fla. 2nd DCA 1997)

The lead case of the three is the 2-1 Pierpont decision. In Pierpont the majority opinion (authored by Judge Campbell) noted that the principal issue was the proper application of Section 73.092, which states that in eminent-domain actions a trial court "shall award attorney's fees based solely on the benefits achieved for the client." (APP 1) The term " benefits" is defined by the statute to be the difference between the judgment or settlement amount and the first " written offer" made by the condemner.[2] So under the statute, the attorney's fee is calculated solely as a percentage of the difference between the judgment/settlement amount and the first "written offer" made by the condemner. There is no definition of "written offer" in the statute, and this is the seed of the dispute in all three of these cases.

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[1]The three cases were consolidated by this Court's Order of 11 July 1997.

[2]Prior to 1994 the statute required the court to give " greatest weight" to the benefit achieved, and prior to 1990 benefit was only one of six factors to be considered. So the importance of benefit has steadily increased to where it is now the ***only*** factor. Nevertheless, the definition of " benefit" has been unchanged since 1990, so the shifting in emphasis has not been accompanied by any alteration in the definition of the term.

In Pierpont (as well as the other two cases) there was no disagreement as to the judgment/settlement amount, i.e., the top number in the benefit calculation. In Pierpont this top number was $87,500, the amount of the Stipulated Judgment. (R Pierpont 23-26)

The dispute in Pierpont (and the other two cases) centered around the term "written offer," i.e., the lower number in the calculation. In Pierpont the trial court held that the good-faith estimate of $69,000 made by the County in its declaration of taking was a "written offer" under the statute, and therefore used the good-faith estimate as the bottom number in the calculation of benefits and hence attorney's fees. (R Pierpont 12-13,45-46) This resulted in an attorney's fee award of $6,105, which was 33% of the difference between the County's good-faith estimate of $69,000 and the Stipulated Final Judgment amount of $87,500. (R Pierpont 12-13,23-26,45-46)

The Pierpont majority disagreed with the trial court's assessment, and held that the Legislature did not intend the good-faith estimate to be considered a "written offer" under the statute. (APP 2) There were two stated reasons for the holding: first, that a good-faith estimate of value does not comport with the Black's Law Dictionary definition of the term "offer", and second, that the case law shows that good-faith estimates are not to be considered evidence in eminent-domain cases. The majority recognized by its "but see" reference to a fifth district case that another district court had applied the statute differently.[3] (APP 3)

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[3]Since the Pierpont majority rendered its opinion there has been an additional fifth district case construing the good-faith estimate as an offer, as well as a first district case. This will be discussed below.

The Pierpont majority held that the first "written offer" made by the County within the meaning of the statute was the letter from the assistant county attorney sent to the Pierponts' counsel three months after the proceedings were initiated, offering to settle the matter for $82,800, a sum considerably greater than the County's good-faith estimate. (APP 1-2)

The Pierpont majority also rejected the Landowners' contention that the letter offer was not a valid and binding offer because the County had not complied with the Sunshine Law in formulating the offer. The rejection was based on two conclusions by the majority: first, that the County's pre-suit authorization to its attorney to buy property authorized the settlement offer, and was not a delegation of decision-making authority to a staff person; and second, that the Landowners "are without standing to raise the bona fides of the offer since they never sought to challenge the authority of the county attorney to make the offer until the issue on attorney's fees arose." (APP 3)

Judge Blue dissented from the majority's decision "because I believe that the good faith estimate of value should operate as an offer" under the statute. (APP 3) Judge Blue said that the constitutional considerations at play in the awardation of attorneys' fees in eminent-domain actions compelled the conclusion that a good-faith estimate is an "offer" under the statute, otherwise a landowner could be deprived of his constitutional right to fees by the machinations of the condemning authority. Judge Blue also observed that the fifth district had seemingly held contrary to the majority in a decision that will be discussed below. (APP 3)

The end result of the majority's holding in Pierpont is that the attorneys' fee award for the Pierponts' attorney will be reduced from $6,105 to $1,551, i.e., 33% of the difference between the Stipulated Final Judgment amount ($87,500) and the settlement offer made by the County in the midst of litigation ($82,800). So for the seven months of legal representation rendered to the Pierponts by their counsel, with this representation resulting in the County paying $18,500 more than the original good-faith estimate, a fee of $1,551 will be awarded under the majority's holding.

A & G Investments, 693 So.2d 999 (Fla.2nd DCA 1997)

The same trial judge presiding in the Pierpont case decided two other fee disputes using the same rationale, and Lee County appealed these cases also. Less than a month after Pierpont was decided, the Second District rendered its decision in A & G Investments. The brief Opinion noted that the issue as to the interpretation of Section 73.092 had recently been determined in Pierpont, and thus reversed on the basis of Pierpont and remanded for proceedings "consistent with that opinion." (APP 6)

The facts of A &G Investments reveal an even bleaker fee award than in Pierpont. In A & G the County's good-faith estimate was $725,000. (R A&G Inv. 11) After litigation was initiated the County offered to settle for $836,000. A & G accepted this offer, and a Stipulated Final Judgment in that amount was accordingly entered. (R A & G Inv. 31-34)

The end result of the Second District's holding in A & G Investments is that the Landowner's counsel will receive ***no*** attorney's fees under the statute! This is because the Landowner accepted what the Second District has held to be the County's first offer,

which was the offer made during litigation and that was some $111,000 more than the County's good-faith estimate. So even though the Landowner had to hire an attorney to defend the litigation, and even though the presence of that attorney resulted in compensation that was some $111,000 more than the County's good-faith estimate, no fee award will be allowed for these services under the Second District's holding.

Barnett Banks, ___ So.2d ___ (Fla.2nd DCA 1997)[4]

The final act of the trilogy was the Barnett Banks case, where the Second District again reversed a fee award on the basis of its previous Pierpont decision. (APP 7-8) In Barnett Banks the good-faith estimate was $960,000. (R Bar.Bnk. 12) After litigation was initiated the County offered $1 million, and the case ultimately settled for $1,060,000. (R Bar.Bnk. 24,55-56) The trial court held the benefit to be $100,000, i.e., the difference between the good-faith estimate and the Stipulated Final Judgment. But under the Second District's holding the benefit will only be $60,000, i.e., the difference between the litigation offer and the settlement amount. So under the Second District's holding the attorney's fee will be reduced from $33,000 to slightly less than $20,000.

On rehearing in Barnett Banks the following question was certified to this Court as being one of great public importance:

> 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)?

(APP 8)

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[4]As of this writing no Southern Second is available for the Barnett Banks decision. However, it can be found at 22 FLW D631 & D1283 (on rehearing), and at 1997 WL 106821.

SUMMARY OF ARGUMENT

The unique, constitutional nature of attorney's fees in eminent-domain cases requires this Court, it is respectfully submitted, to reject the Pierpont interpretation of the 1994 changes to the statute. The Pierpont interpretation would result in a landowner receiving less than full compensation in most cases, and would thus be unconstitutional. This Court can avoid the constitutional issue by rejecting the Pierpont interpretation.

The good-faith estimate is an "offer" within the common definition of that term. The dictionary and other Florida Statutes define an "offer" as an expression of how much a party is willing to pay for something. The legal setting of the good-faith estimate shows that this is exactly what it is—an expression by the condemning authority of what it would be willing to pay for the property. Construing the good-faith estimate as an offer as the trial court did has the added benefit of encouraging good faith by both the condemning authority and the landowner. It is therefore respectfully submitted that this Court should reject the Pierpont majority's interpretation of the statute as ill-advised, and hold instead that a good-faith estimate of value is an "offer" within the meaning of the statute and the constitutional guarantee of full compensation.

It is ironic that the Pierpont majority found the letter offers from the assistant county attorney to be "offers" within the meaning of the statute, since these letter offers had far less probity than the good-faith estimates. There are several reasons these letter offers were not binding upon the County. The county commission by its actions of 7 December 1994 authorized the county attorney to attempt to purchase property prior to

litigation, and did ***not*** authorize the county attorney to settle pending litigation. If the county commission had attempted to delegate its power to settle to the county attorney, the attempt would have been invalid and therefore the actions of the assistant county attorney would not have been binding upon the County. Such an attempted delegation would have also been in violation of the Sunshine Law, and thus invalid for a second reason.

So the bottom line is that the letter offers made by the assistant county attorney were not "offers" within the meaning of the Pierpont majority's own definition of the statutory term, since they were not binding upon the County. It is the Landowners' fervent belief that the County's good-faith estimates of value were "offers" under the statute, and that this Court will so hold because of the constitutional factors at play. But even if the Pierpont majority were correct that the good-faith estimates were not "offers" because they were not binding in the strict contractual sense, the inescapable fact is that the County's letter offers were not binding either.

So if this Court were to accept the definition of the Pierpont majority, it would be left to answer the uncomfortable question that was left unanswered by the Pierpont majority—what happens if there is no offer? It is submitted that the best answer to this question is that the good-faith estimate is an offer, hence the question does not need to be answered. But if this Court feels compelled to answer the difficult question, it is respectfully submitted that the condemner should suffer from its failure to make an offer, and that "zero" should be the bottom number in the benefit equation.

ARGUMENT

I. THE PIERPONT MAJORITY ERRONEOUSLY INTERPRETED SECTION 73.092 IN AN UNCONSTITUTIONAL MANNER.

In 1994 the Legislature significantly changed Section 73.092, the statute dealing with attorney's fees in eminent-domain cases. The instant cases were initiated shortly after this effective date of the change (1 October 1994). The statute now provides that the trial court "shall award attorney's fees based solely on the benefits achieved for the client." Prior to 1994 the statute said the court should give "greatest weight" to the benefits in awarding a fee, but did not require that the fee be set solely on the basis of the benefit.

Section 73.092 sets forth a definition of "benefits" to be used in the calculation of attorney's fees:

> [T]he term "benefits" 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 must be measured from the first written offer after the attorney is hired.**
>
> (Emphasis added.)

So "benefit" is the difference between the first offer made by the condemner and the judgment/settlement amount, and the fee is to be awarded ***solely*** on this basis.[5]

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[5]It was previously held that it was error to base an attorney's fee award solely on benefit. See, e.g., Ferran Eng. v. Di-Bar Elect., 590 So.2d 1104 (Fla.5th DCA 1991). The viability of such cases after the 1994 change in the statute is open to speculation. Also on the list of unanswered questions is the continuing viability of this Court's holding in Stand Guar. Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) that no fee multiplier is necessary in an eminent-domain case because "the attorney is assured of a fee when the action commences." This is no longer true, at least in the view of the Pierpont majority.

The trial court held in these cases that the condemner's good-faith estimate of value was an "offer" within the meaning of the statute, but the Pierpont majority rejected this construction. It is respectfully submitted that a review of the total legal setting in which attorney's fees are awarded in eminent-domain actions will convince this Court that the Pierpont dissent and the trial court were correct in their interpretation of the statute, and that the Pierpont majority was wrong.

A. Attorney's fees in eminent domain cases have a unique, constitutional stature that place them within the province of the judiciary rather than the legislature.

Any time a court is called upon to interpret a statute, the legal context of the statute must necessarily be considered. Attorney's fees in eminent-domain cases occupy a unique position of constitutional dimension in Florida, and an understanding of this distinctiveness is important in the interpretation of Section 73.092 after the 1994 amendments.

1. The "full compensation" due a landowner under the Florida Constitution includes attorney's fees.

Attorney's fees are a part of the constitutional right to "full compensation." In Schick v. Dept. of Agriculture, 586 So.2d 452,453 (Fla. 1st DCA 1991) Judge Zehmer said, "Full compensation within the meaning of that constitutional provision [Art. X,§ 6] includes the payment of attorney's fees necessary to enforce the condemnee's rights." Judge Zehmer based his pronouncement upon a long line of decisions from this Court and the other district courts. Dade County v. Brigham, 47 So.2d 602,604-05 (Fla. 1950)(fees required by both the constitution and "sound morals"); Orange State Oil Co. v. Jacksonville Exp. Authority, 143 So.2d 892,896 (Fla. 1st DCA 1962)(attorney's fees

mandated by "just compensation guarantee of the Constitution"); Toxohatchee Game Preserve v. Cen. & S. Flood Control Dist., 265 So.2d 681 (Fla. 1972); DOT v. Ben Hill Griffin, Inc., 636 So.2d 825,826 (Fla.2d DCA 1994)("The purpose of the fees provision is to satisfy the state constitutional requirement that a property owner receive full compensation for the taking of private property."); Seminole County v. Butler, 676 So.2d 451 (Fla. 5th DCA 1996) ("Full compensation within the meaning of our constitution includes the payment of attorney's fees . . . . "). The constitutional dimensions of the statute were not acknowledged in Pierpont, and this is the fatal flaw in the holding.

2. The determination of full compensation is a judicial function rather than a legislative one.

A second concept that is related to the constitutional stature of attorney's fees in eminent-domain cases is that the determination of full compensation is a judicial function, and the legislature may not diminish by statute the compensation constitutionally due a landowner. The leading case on this subject is Daniels v. State Road Dept., 170 So.2d 846,851 (Fla. 1964), where this Court said:

> It is well settled that the determination of what is just compensation for the taking of private property for public use "is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection."

See also Behm v. DOT, 383 So.2d 216,217 (Fla. 1980); State Plant Board v. Smith, 110 So.2d 401,407 (Fla. 1959); State Road Dept. v. Wingfield, 101 So.2d 184,186 (lst DCA 1958). The legislature may state a policy concerning the payment of full compensation, and the courts will give it credence if this can be constitutionally done. In Daniels v. State Road Dept., supra at 853, this Court observed:

> Our conclusion in this respect is, then, that the Legislature may declare its policy with respect to the compensation that should be made in taking private property for public use; and that these declarations, while not conclusive or binding, are persuasive and will be upheld unless clearly contrary to the judicial view of the matter.

So the legislature may voice a public policy on the issue of full compensation, but it may not handcuff the judiciary in its primary role of determining what "full compensation" is under the Constitution. See also Dept. of Consumer Services v. Bonanno, 568 So.2d 24 (Fla. 1990); Crigler v. DOT, 535 So.2d 329 (Fla. lst DCA 1988)(offer-of-judgment statute constitutional because it does not deny "reasonable" attorney's fees); Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986)(statute creating irrebuttable presumption as to appropriate amount of attorney's fees in criminal case [also guaranteed by the constitution] invalid); 10 Fla.Jur.2d Constitutional Law §150 (1979)(legislature may regulate constitutional remedy, but may not revoke or change it, or place undue burden upon it); Homer v. State ex rel. Stewart, 28 So.2d 586,588 (Fla. 1947)(ditto). So in the final analysis the issue of full compensation is for judicial determination, and the legislature may not create irrebutable presumptions that result in a landowner receiving less than full compensation.[6] Thus a statute pertaining to full compensation is not to be applied by

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[6]One of the ironies of this statute is that its irrebutable presumption will often produce ***more*** than full compensation, and will result in a landowner being over-compensated. That is why the statute has been attacked by condemning authorities. See Seminole County v. Coral Gables Fed. Savings & Loan Assoc., 691 So.2d 614, (Fla. 5th DCA 1997). But the legislature may by statute award more than full compensation to landowners if it sees fit to do so, and such generosity cannot be attacked by condemning authorities. Daniels v. State Road Dept., supra at 853 So this statute has bad policy ramifications from everyone's standpoint, though the constitutional issues are only at play from the landowners' side of the statute.

rote. It is the judiciary's primary function to determine full compensation, and any legislative incursion into this constitutional arena is to be received by the courts as advisory only. This is a second basic concept that was not considered by the Pierpont majority.

It can be seen from the foregoing that in considering how the 1994 version of Section 73.092 should be interpreted, there are larger issues at play than just the literal meaning of the words in the statute. The Pierpont majority, it is respectfully submitted, did not consider these concepts in its interpretation of the statute. Though the Landowners are confident that the literal meaning of the language employed by the legislature supports the trial court's holding (and not that of the Pierpont majority), the scope of the analysis should not be confined to the literal words of the legislative enactment. The Constitution is supreme over the laws of the legislature, and the Constitution mandates that a landowner be paid a reasonable attorney's fee. By enacting laws regulating full compensation the legislature is entering a field that is constitutionally preserved for the judiciary. This is the context in which the proper interpretation of the 1994 version of Section 73.092 must be determined.

B. The applicable rules of construction favor the trial court's interpretation of the statute and not that of the Pierpont majority.

The so-called "American Rule" prevailing in non-eminent domain cases requires a strict interpretation of a statute calling for attorney's fees. This is not the rule that applies in eminent-domain cases. There are in fact several rules of construction that require that an eminent-domain fee statute be interpreted in just the opposite fashion, i.e., in the manner most favorable to the landowner seeking fees.

1. Statutes affecting constitutional rights must be interpreted so as not to restrict those rights, and eminent domain statutes must be construed in favor of the landowner whose property is being taken by the force of government.

Statutes affecting constitutional rights must be given a construction in favor of the individual enjoying that right, and should be construed against the restriction of the constitutional right. Peavy-Wilson Lumber Co. v. Brevard County, 81 So.2d 483,485 (Fla. 1947); 75 Am.Jur.2d Statutes § 283 (1974). Also, eminent domain statutes must be strictly construed in favor of the landowner, since their ultimate goal is to deprive the landowner of his property for the public benefit. Marvin v. Housing Authority, 180 So. 145,152 (Fla. 1938).

2. Statutes should be construed in a manner that preserves their constitutionality.

But perhaps the most important rule of statutory construction for the instant case is the rule set forth in Vildibill v. Johnson, 492 So.2d 1047, 1050 (Fla. 1986). There this Court said, "If a statute may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the Constitution." Similarly, in Firestone v. News-Press Pub. Co., 538 So.2d 457,459 (Fla. 1989) this Court said, "Whenever possible, a statute should be construed so as not to conflict with the constitution." A host of cases have held similarly. See e.g., Arthur Young & Co. v. Mariner Corp., 630 So.2d 1199,1205 (Fla.4th DCA 1994)("Where a statute is susceptible to two interpretations, we should construe it to avoid an unconstitutional result."); State v. Cuda, 622 So.2d 502,505 (Fla.5th DCA 1993)("It is the duty of this court when reasonably possible to construe a statute to avoid a conflict with the federal and state constitutions.").

There are essentially two choices as to how the 1994 version of Section 73.092 can be interpreted. There are some attendant problems with both interpretations; with all deference to the Florida Legislature, the language used in the statute is unfortunate in several key respects. But it is submitted that the interpretation adopted by the trial court is less problematic than the Pierpont majority's interpretation, and the trial court's interpretation avoids one fatal pitfall that is inherent in the Pierpont majority's approach (as pointed out by Judge Blue in his dissent). The Pierpont majority's interpretation would result in a landowner being denied attorney's fees simply because of the whim and caprice of the statutory language and the actions of the condemning authority, even though such fees would otherwise be deserved and would be awardable under the extant judicial pronouncements on the subject. The Pierpont majority declined to consider the constitutional implications of its holding, and as Judge Blue pointed out in his dissent, this is a fatal flaw in the majority's analysis.

C. The Pierpont majority's interpretation of the 1994 version of Section 73.092 is not supported by the language employed in the statute and leads to an unconstitutional result.

Of course the problem with Section 73.092 is that it does not state what an "offer" is in calculating the benefits upon which a fee is to be awarded. Even though the definition of benefits has been in the statute since 1990, that definition was never of critical importance, since benefit was only one of the factors to be considered in setting fees. But now that benefit is ostensibly the only factor to be considered, the definition of "offer" is of critical importance.

1. Does an "offer" as used in the statute mean a binding offer soliciting an acceptance in the contractual sense?

The Pierpont majority apparently accepted the County's argument that the term "offer" in the statute means an offer in the contractual sense, i.e., a binding proposal that creates a contract upon acceptance.[7]

So let's first consider the argument that the County made below and will undoubtedly make again that the term "offer" in the statute means a binding proposal in the contractual sense. The County's strict definition would perhaps be valid in the law of contracts, and indeed the County spoke in its briefs below of a "contractual obligation." But the statute says absolutely nothing about contracts or contractual obligations.

If the man on the street were asked the meaning of "offer", he would likely not give a definition such as the County suggests. The dictionary meaning of the term, taken from the American Heritage Dictionary of the English Language (1995 elect. ed.), is as follows:

> **1.** To present for acceptance or rejection; proffer: *offered me a drink.* **2. a.** To put forward for consideration; propose: *offer an opinion.* **b.** To present in order to meet a need or satisfy a requirement: *offered new statistics in order to facilitate the decision-making process.* **3. a.** To present for sale. **b.** To provide; furnish: *a hotel that offers conference facilities.* **4.** To propose as payment; bid. **5.** To present as an act of worship: *offer up prayers.* **6.** To exhibit readiness or desire to do; volunteer: *offered to carry the packages.* **7.** To put up; mount: *partisans who offered strong resistance to the invaders.* **8.** To threaten: *offered to leave without them if they didn't hurry.* **9.** To produce or introduce on the stage: *The repertory group is offering two new plays this season.*

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[7]This cannot be assumed with certainty, however, because as will be seen below, the dictionary definition of "offer" quoted by the Pierpont majority does not jibe with the contractual interpretation of the term and does not support the majority's conclusion that a good-faith estimate is not an "offer" within the meaning of the statute.

It can be seen that the common definitions of the term does not match the County's strict definition. The dictionary definition can be paraphrased as "an expression of what someone is willing to pay," or "to present or put forward for consideration." Isn't that what a good-faith estimate is in the context of an eminent domain action?

> 2. The condemning authority's good-faith estimate is its expression of what it will pay the landowner as the full compensation he is entitled to under the Constitution.

Again, context is important. Section 74.031 requires the condemning authority to make a "good faith estimate of value" in its declaration of taking. The case law confirms the obvious—that the good-faith estimate is the condemning authority's opinion as to the "full compensation" due the landowner under the Constitution. State Road Dept. v. Abel Inv. Co., 165 So.2d 832,833 (Fla.2d DCA 1964). So indeed the good-faith estimate is the condemner's expression of how much it is willing to pay for the property.

Viewing the matter in the context of a real-world situation shows that the good-faith estimate of value is indeed an "offer", i.e., an expression of what the condemning authority is willing to pay. Let's assume that a condemning authority makes a good-faith estimate that the property is worth $100,000; let's further assume that the landowner reviews the estimate and recognizes that it does reflect the full compensation to which he is entitled by the Constitution. If the landowner informed the condemning authority that he would accept the $100,000 estimate, wouldn't the condemning authority gladly pay the amount of the estimate? Of course it would! The landowner would be getting the full compensation to which he is constitutionally entitled, and the condemning authority would be paying the amount that it is constitutionally required to pay. The proceedings

would be concluded as quickly and as cheaply as possible. It would be a good deal for everybody involved.

So the good-faith estimate of value is certainly an "offer" in the normal sense of that term—it's an expression by the condemning authority of the amount it would be willing to pay for the property. To interpret a good-faith estimate as anything other than the amount the condemning authority would be willing to pay would make a mockery of the statutory procedure and the Constitution. Isn't a "good faith estimate" tantamount to saying that the condemning authority would pay the amount of the estimate as "full compensation"? The statute requires a condemning authority to make a ***good-faith*** estimate of the full compensation to which the landowner is entitled; the Constitution requires the condemning authority to pay full compensation; the Constitution requires the condemning authority to pay litigation costs for determining the issue of full compensation. Under these circumstances, why would the condemning authority ever not gladly pay the good-faith estimate of value, if the landowner is willing to accept it? So the good-faith estimate is an expression by the condemning authority of the amount it would pay for the property in satisfaction of its constitutional obligation to pay full compensation. This, it is submitted, is an offer within the meaning of the statute.

3. The definitions of "offer" contained in other chapters of the Florida Statutes are akin to the dictionary definition and contrary to the strict contractual definition.

Though Section 73.092 does not define the term "offer", there are several statutory definitions of the term in other portions of the Florida Statutes. In the Land Sales Practices Act "offer" is defined as "every inducement, solicitation, or attempt to encourage

a person to acquire any interest in subdivided lands, if undertaken for gain or profit." § 498.005(10), Fla. Stat. (1997). The term is defined in the chapter dealing with lodging and restaurants as "any solicitation, advertisement, inducement, or other method or attempt to encourage any person to become a purchaser. § 509.502(9), Fla. Stat. (1997). The term is defined in the chapter dealing with securities transactions as "any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, or an investment or interest in an investment, for value." § 517.021(12), Fla. Stat. (1997). The term is defined in the chapter dealing with timeshare plans as "the solicitation, advertisement, or inducement, or any other method or attempt, to encourage any person to acquire the opportunity to participate in a timeshare plan." § 721.05(22), Fla. Stat. (1995). The term is defined in the chapter dealing with mobile home parks as "any solicitation by the park owner to the general public." § 723.071(3)(b), Fla. Stat. (1995). None of these definitions requires that the offer create a binding contractual obligation. So where the legislature has defined "offer", the definitions are much the same as the dictionary definition, and are not the strict, legalistic definition advocated by the County.

4. The **Black's** definition of "offer" cited by the **Pierpont** majority does not support its interpretation of Section 73.092.

The Pierpont majority quotes a definition of "offer" from Black's Law Dictionary on the apparent assumption that this definition supports its conclusion that an "offer" within the meaning of the statute must be binding in the strict contractual sense. (APP 2) But the majority overlooks the fact that the very definition quoted from Black's does not support its conclusion. Black's says an offer is "[a] proposal to do a thing or pay an

amount . . . a manifestation of willingness to enter into a bargain . . . ." There is nothing in this definition that says an offer must be binding in the strict contractual sense, or that a good-faith estimate cannot be considered an "offer" within the definition. In fact, the Black's definition of offer is practically the same as that found in a general dictionary.

Viewing the matter in the context of a real-world situation shows that the good-faith estimate of value is indeed an "offer" within the Black's definition, i.e., an expression of what the condemning authority is willing to pay for the property. If the good-faith estimate is really a good-faith estimate, then it is indeed the condemner's expression of what it would pay for the property. That is all the Black's definition requires, and it is respectfully submitted that the Pierpont majority has overlooked this fact.

5. It does not follow from the fact that the good-faith estimate is inadmissible at trial that it should not be considered an "offer" under Section 73.092.

A second reason given by the Pierpont majority for holding that a good-faith estimate is not an offer is because the good-faith estimate is "non-binding". Again, this erroneously presupposes that the statute requires that the term is defined in the strict contractual sense. As shown above, there is nothing requiring the term to be interpreted in this way.

The Pierpont majority quoted from Jacksonville Expressway Auth. v. Bennett, 158 So.2d 821 (Fla.1st DCA 1963) in support of its observation that a good-faith estimate is non-binding, and then said that the good-faith estimate "has no relationship to the 'written offer' contemplated by the legislature in enacting section 73.092." The Jacksonville Expressway case held that the good-faith estimate could not be introduced

into evidence at ***the jury trial*** on full compensation, since this would deprive the ***landowner*** of his ***constitutional right*** to have full compensation determined by a jury of his peers. But the Pierpont majority overlooked the expressed rationale of Jacksonville Expressway, and that rationale shows that there is no impediment to considering a good-faith estimate to be an "offer" at a fee hearing. At the beginning of the same paragraph from which the majority quotes, the First District explained its holding as follows:

> Proceedings under Chapter 74, Florida Statutes, F.S.A., entitled "Proceedings Supplemental to Eminent Domain," are exclusively in aid of and ancillary to statutory, constitutional, and common-law principles governing the exercise of the power of eminent domain and do not supplant the latter in any particular. **There is no device by which the condemning authority can avoid its constitutional obligation to provide "full compensation" to the owner** for the property appropriated **as "ascertained by a jury of twelve men in a court of competent jurisdiction**, as shall be prescribed by law," as required by Section 29, Article XVI, of our Constitution. **Our courts have consistently interpreted this constitutional provision and the law as enacted pursuant thereto in such manner as to afford the property owner the highest measure of protection under the law**, and the same concept is applicable to the interest of the public.
>
> (Emphasis added, citations omitted.)

So the First District held that the condemner could not use its own good-faith estimate at trial to boot-strap its damage figure, since to do so would detract from the landowner's constitutional right to have full compensation determined by the jury. To allow the condemner to boot strap on its good-faith estimate would, in the words of the First District, be in derogation of the "highest measure of protection under the law" to which a landowner is entitled. The condemner has no corresponding "right" not to have its

good-faith estimate used at a fee hearing, and the Pierpont majority misapprehended the rationale of Jacksonville Expressway in this respect.[8]

The Pierpont majority has taken a concept that was formulated as a shield for the landowner and put it in the condemner's hands as a sword. The good-faith estimate is not admissible at the jury trial, nor is it conclusive as to the full compensation to which the landowner is entitled, since this would deprive the ***landowner*** of his constitutional right to have full compensation determined by a jury. But the good-faith estimate is, at the very least, evidence of what the condemning authority would have paid as full compensation when the declaration of taking was filed.

Indeed, in Behm v. DOT, 292 So.2d 437,440 (Fla.4th DCA 1974) the Fourth District held that a condemning authority's opinion of value supported by an expert's opinion "is a confession that the damages are at least in this sum . . . [and] the condemner would be estopped to urge otherwise." Of course the good-faith estimate is also the condemning authority's opinion of full compensation, and by statute it must be supported by an expert's opinion. So wouldn't the logic of the Behm case mean that, at the very least, at a fee hearing on the condemning authority's good-faith estimate would be a binding "confession" of how much it would have paid for the property when suit was filed? It is impossible to conclude otherwise upon consideration of the constitutional rights and statutory duties at play, and it is respectfully submitted that the Pierpont majority has overlooked this point.

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[8]Judge Blue in his Pierpont dissent also noted the majority's misapplication of the Jacksonville Expressway holding.

6. The strict, contractual definition of "offer" would allow the condemning authority to determine in large part when the landowner would be entitled to attorney's fees, and could deny a landowner attorney's fees even though unquestionably entitled to such fees.

Perhaps the best way to see the fallacy of the Pierpont majority's interpretation of the statute is to explore the ramifications of that interpretation. If the good-faith estimate of value is not an "offer" within the meaning of Section 73.092, then the County can decide when—and if—an offer is to be made at all. The statute does not specify when an offer must be made, or even if an offer must be made. Let's first deal with extreme examples.

What if the condemning authority makes no offer at all?[9] There is nothing in Section 73.092 requiring the condemner to make an offer. It would seem under the Pierpont holding that there would be no attorney's fees in this instance, since there would be no "benefit" and hence no attorney's fees! Or perhaps the offer would be construed to be "zero", since the condemner did not make any offer. One of the chief virtues of the Landowners' interpretation of the statute is that by construing the good-faith estimate as an offer, in practical effect an offer will be deemed to have been made in most cases.

Let's take another example. Let's assume that the declaration-of-taking amount is $100,000. A jury trial is conducted, and things don't go well for the condemning authority. While the jury is out, the condemner could make an "offer" of $1 million. The landowner would then have to take the offer, in which case he or she would be entitled to no attorney's fees whatsoever, since the difference between the settlement and the offer

[9]There is indeed an issue in these cases as to whether an "offer" was made even under the County's strict definition of the term. This issue is discussed under Point II.

would be zero; or, if the offer was refused and the jury came back with a verdict of $1 million or less, the landowner would still not be entitled to attorney's fees because the difference between the verdict and the offer would be zero.

But the examples do not have to be extreme or unusual for the landowner to be denied his constitutional right to attorney's fees under the Pierpont majority's reading of the statute. Let's suppose the declaration-of-taking amount is $100,000. The landowner hires an attorney, who engages appraisers and other experts, and builds a convincing case that the property is really worth $1 million. A trial date is set. The condemner conducts discovery of the landowner's position, and it too is convinced that the property is really worth $1 million. It then makes an "offer" of $1 million to the landowner on the eve of trial. The landowner's attorney has an ethical duty to advise the landowner to take the offer, since this is how much the property is really worth. By accepting the offer the landowner is entitled to zero attorney's fees (under the Pierpont view of the statute), since the difference between the offer and the settlement would be zero. Yet beyond doubt the attorney's fees were reasonably incurred by the landowner, and the attorney's work resulted in the condemning authority paying ten times its good-faith estimate.

The foregoing example is not far-fetched. In fact, it is essentially what happens in many cases, including the cases presently before this Court.[10] If the Pierpont view of the

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[10]In fact, in the A & G case this hypothetical became reality. The good-faith estimate was $725,000, and then after litigation was initiated the County made a realistic offer of $836,000 that was accepted. Even though an attorney had been properly retained, and even though his services resulted in a larger award to the landowner, the end result will be that the landowner will get ***zero*** attorney's fees. This cannot be right, and certainly cannot be constitutional.

statute were to prevail, and the declaration-of-taking amount were not to be considered an offer, a condemning authority could simply wait until the eve of trial to make a realistic offer and thereby deprive the landowner of well-earned, reasonably-incurred attorney's fees. This could not be what the legislature intended with its 1994 changes to Section 73.092. But even if it did, such a statute would be an unconstitutional limitation upon full compensation mandated by the Florida Constitution, and would be an unauthorized encroachment upon the judiciary's right to determine what is "full compensation" under the Constitution. These constitutional problems only arise under the Pierpont majority's interpretation of the statute; they can be avoided by accepting the trial court's interpretation. Let's now turn to that interpretation.

D. Interpreting the declaration-of-taking amount as an "offer" under the statute renders the statute constitutional and is consonant with the statutory language.

The Pierpont majority holding in the nutshell is that the good-faith estimate of value is not an "offer" because it is not binding in the contractual sense. The Pierpont majority did not consider the constitutional implications of its holding and did not abide by the rule of statutory construction that a statute should be interpreted in the manner, where possible, that best preserves its constitutionality. It has been argued above that there is nothing inherent in the term "offer" that requires that it be binding in the contractual sense. This issue will be explored again below. But first let's examine the legal nature of the good-faith estimate of value that must be included in the declaration of taking.

1. The trial court's interpretation of the statute will encourage condemning authorities to make their "good faith estimates" with real good faith, and will also discourage landowners to settle eminent-domain cases at their inception.

There is presently no downside risk for a condemning authority that low-balls its good faith estimate. This perhaps explains why the condemning authority in these cases resists the notion that its good-faith estimate should be the benchmark for the determination of "benefits" and hence attorney's fees. The worst that can happen when a condemning authority gives a low estimate, and this happens only rarely, is that the trial court will require a condemner to deposit more than its estimate. But since the larger amount should have been put up in the first instance, there is little practical inducement, other than the variable trait of "conscience", for a condemner to accurately estimate the landowner's full compensation.

Yet the good-faith estimate occurs at an extremely critical stage of an eminent-domain proceeding, i.e., at the point where the property is actually taken from the landowner by the force of government. A low-ball number can do much at this critical juncture to antagonize a landowner and harden positions. In order for eminent-domain cases to settle for reasonable amounts to the ultimate benefit of the tax-paying public, everyone involved in the process—including the condemning authority—must be realistic and operate in good faith. Interpreting the good-faith estimate as an "offer" under the statute encourages realism, and encourages the condemning authority to make a serious estimate as to the full compensation to which the landowner is constitutionally entitled.

If the condemning authority makes a serious good-faith estimate, there is every reason to think that the majority of cases will be settled early in the proceedings.

Interpreting the good-faith estimate as an "offer" encourages the condemning authority to make a realistic offer. At the same time, construing the good-faith estimate as an "offer" discourages the landowner from litigating the case needlessly. If the estimate is not accepted, and if the jury ultimately returns a verdict equal to or less than the estimate, the landowner will not get any attorney's fees.

So construing the good-faith estimate as an "offer" under the statute sends the right message to both the landowner and the condemning authority, and does exactly what the 1994 amendments to the statute were intended to do—encourage expeditious and reasonable settlements. Interpreting the good-faith estimate as an "offer" under the statute is thus consistent with the legislature's intent in making the 1994 change. The Pierpont majority's interpretation, on the other hand, promotes cynicism as to "good faith" estimates, not to mention the constitutional problems discussed above. It is therefore submitted that public-policy grounds favor the trial court's interpretation of the statute, and not that of the Pierpont majority.

2. Construing the good-faith estimate as an "offer" under the statute avoids the logical incongruity of the **Pierpont** holding.

The basic theory of Section 73.092 is that attorney's fees should be based solely on the "benefit" achieved by the landowner. As an abstract proposition, what is "benefit"? It is the difference between the full compensation the landowner achieves by jury verdict or settlement as a result of litigation, and what the condemning authority would have paid as "full compensation" without the necessity of litigation. So if the condemning authority says full compensation is $900,000 and the landowner says it is $1 million, and the jury

finds that it is $1 million, then the benefit is $100,000. However, if the jury finds that full compensation is $900,000 or less, then there is no benefit. So the statute is intended to force the condemner and the landowner to carefully assess early-on in the proceeding what "full compensation" is in the particular instance, and the party that misjudges full compensation suffers the consequences. The Pierpont majority holds in essence that a good-faith estimate does not reflect the full compensation the landowner could have gotten before the litigation cranked up, because the estimate is not a contractually binding "offer".

So the inescapable implication of the Pierpont holding is that a condemner's good-faith estimate of full compensation does not really reflect the full compensation the landowner is entitled at the time the estimate is filed. Yet this is exactly what a good-faith estimate is supposed to be! How can a condemner say that the full compensation a landowner could have gotten at the inception of the litigation was greater than its good-faith estimate? Such an argument impugns the good-faith of the estimate, or viewed another way, the good-faith estimate impeaches the argument. If the estimate of full compensation is made in good faith, then it would be an admission impeaching the County's later argument that the landowner could have gotten a greater amount without litigation. If the estimate is not made in good faith, then it is in violation of the statute.

So the effect of the Pierpont holding is to denigrate, or at least lessen the importance of, the condemner's good-faith estimate of value. On the other hand, construing the good-faith estimate as the condemner's expression of what it would pay for the property as full compensation—which is exactly what a good-faith estimate is supposed

to be—meets the letter of Section 73.092, is within the spirit of the statute in that it encourages realistic assessments of value by both the condemner and condemnee, and supports the public-policy objective of ensuring that the condemner's good-faith estimate will really be made in good faith.

E. Several cases have come to the common-sense conclusion that a good-faith estimate is an "offer" under the statute.

The case law on what should be considered an "offer" under the statute is scarce. But there are several recent cases, decided both before and after Pierpont, that hold a good-faith estimate to be an "offer" in the calculation of benefit under Section 73.092.

Both the majority and dissent in Pierpont acknowledged that the fifth district has construed the good-faith estimate as the "offer" under the statute in Seminole County v. Rollingwood Apts., 678 So.2d 370 (Fla.5th DCA 1996). There the trial court awarded a fee based in part on the benefit achieved. The case settled for $625,000, and the county "deposited $172,200 as its good faith estimate of value for these parcels." The fifth district agreed that the benefit was $452,800, representing the difference between the settlement and "the ***initial offer/good faith deposit***." The court reversed the fee award for other reasons not relevant to this case, but the important point for present purposes is that the court held that the "first written offer" under Section 73.092 was the good-faith estimate.

There is a later fifth district decision, rendered after the instant cases were decided, that also explicitly holds that the good-faith estimate is a written offer under the statute. In Seminole County v. Cumberland Farms, 688 So.2d 372 (Fla.5th DCA 1997) the court noted that the good-faith estimate was $132,100, and that the case was settled for

$265,000. In a footnote the court explained that the benefit under the statute was $132,900, and explained the calculation as follows:

"Benefit" Calculation	
Settlement Amount	$265,000
Written offer by county	**$132,100**
Difference (benefit)	$132,900

So once again the court held that the good-faith estimate was a "written offer" within the meaning of the statute. See also Seminole County v. Delco, 676 So.2d 451 (Fla.5th DCA 1996)(court accepted determination that the good-faith estimate was the "written offer").

Recently in City of Jacksonville v. Tresca, 22 FLW D1159 (Fla.1st DCA op. filed 6 May 1997) the city's good-faith estimate was $50,000, and the judgment amount was $182,000. The trial court held that an "option to purchase" in the amount of $107,000 negotiated by the city prior to the declaration of taking was the "offer" under the statute from which benefit and hence attorney's fees would be calculated. The first district disagreed, accepting the landowner's argument that the good-faith estimate of $50,000 was the first "offer" under the statute. In a footnote the first district did observe that the city had not argued that the good-faith estimate could not be an "offer", hence it was unnecessary to reach the issue of whether it would agree with Pierpont. But the point is that in still another instance it was assumed by all concerned, on the sheer common sense of the situation, that a good-faith estimate was indeed an "offer" under the statute.

So the foregoing cases are contrary to the Pierpont holding that a good-faith estimate is ***not*** an offer under the statute. These cases, it is submitted, apply a common-sense construction to an unfortunate statute so as to preserve its constitutionality and

make the best out of a bad job. The Pierpont majority, on the other hand, interprets the statute in a vacuum and arrives at a forced interpretation and an unconstitutional result.

F. Summation of Point I

The unique, constitutional nature of attorney's fees in eminent domain cases requires this Court, it is respectfully submitted, to reject the Pierpont interpretation of the statute. The Pierpont interpretation would result in a landowner receiving less than full compensation in most cases, and would thus be unconstitutional. This Court can avoid the constitutional issue by rejecting the Pierpont interpretation.

The good-faith estimate is an "offer" within the common definition of that term. The dictionary and other Florida statutes define an "offer" as an expression of how much a party is willing to pay for something. Construing the good-faith estimate as an offer as the trial court has done has the added benefit of encouraging good faith by both the condemning authority and the landowner. It is therefore respectfully submitted that this Court should reject the Pierpont majority's interpretation of the statute as ill-advised, and hold instead that a good-faith estimate of value is an "offer" within the meaning of the statute and the constitutional guarantee of full compensation.

II. THE SO-CALLED "OFFERS" MADE IN THESE CASES AFTER LITIGATION WAS INITIATED WERE NOT BINDING UPON THE COUNTY, AND THEREFORE DID NOT SATISFY THE PIERPONT MAJORITY'S OWN DEFINITION OF THE TERM.

As mentioned above, there is nothing in Section 73.092 requiring a condemning authority to make an offer, even though the calculation of benefit and hence attorney's

fees is dependent upon such an offer being made. Construing the good-faith estimate as an offer does much to ameliorate this deficiency in the statute, since good-faith estimates are submitted in most cases.[11] In the three cases presently before the Court the condemner did make good-faith estimates of value. But since the Pierpont majority declined to consider these good-faith estimates as "offers" under the statute, it of necessity had to decide what "offers", if any, had been made by the County.

The Landowners argued in the proceedings below that the so-called "offers" advocated by the County were not legitimate and binding, even accepting **arguendo** the County's restrictive definition of the term. If the Pierpont majority agreed with the Landowners, then the court would have had to go to the next step and consider the uncomfortable question of what would be the consequence if ***no*** legitimate offer were made by the condemning authority. The Pierpont majority avoided this issue by finding that the letter offers made by the assistant county attorney were indeed binding upon the County itself, hence it was these offers that formed the lower number in the benefit calculation. This finding, it is submitted, was contrary to the Florida Constitution, the Florida statutes on the subject, and Florida law as announced by this Court.

A. The county commission did not authorize the assistant county attorney to settle pending litigation.

In all three of these cases the "offer" made by the County was actually made by an assistant county attorney in the form of letters to the Landowners' counsel. It was

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[11]Good faith estimates must be submitted where the quick-taking method is used, and condemners often (but not always) chose to use this method.

undisputed below that these letter offers made by the assistant county attorney in his letter offers had not been specifically approved by the county commission, either before the so-called offers were made or afterwards.

The County argued that the county commission had granted its assistant county attorney the power to make binding offers on its behalf by virtue of a Resolution adopted at a county commission meeting. At the commission meeting of 7 December 1994 the following request by the county attorney was approved:

> Request Board to authorize the County Attorney and County Lands **to make written offers to acquire property** needed for Midpoint Bridge Project. This is an attempt **to acquire needed property without filing condemnation actions**.

(Emphasis added; R Bar.Bnk. 89)

The county commission adopted a Resolution the same day authorizing the county attorney to offer up to 20% more than value assigned by its appraisers in order "to acquire needed property without filing condemnation actions . . . ." (R Pierpont 53) So the county attorney was authorized to make offers to purchase of up to 20% greater than its appraisals in order to acquire the property without the necessity of litigation. Neither the minutes nor the Resolution say anything about authorizing the county attorney to settle pending litigation.

In ***none*** of the three cases before this Court did the county attorney make an offer to purchase the property before litigation was initiated, as he was authorized to do by the county commission's actions of 7 December 1994. Indeed, two of the three cases were initiated before 7 December 1994, so it would have been impossible to use the authoriza-

tion before litigation was initiated. (R A&G Inv. 1; R Bar.Bnk. 1) In the third case the Petition was filed shortly after the county commission meeting, but no offer was made by the county attorney before filing suit. (R Pierpont 1) So none of the offers to settle pending litigation were within the ambit of the authorization given by the commission. This matter was not disclosed or discussed by the Pierpont majority. It is therefore impossible to find, as the Pierpont majority did, that the settlement offers made by the assistant county attorney were authorized by the actions of the county commission on 7 December 1994.

B. The county commission could not have authorized the assistant county attorney to settle pending lawsuits on its behalf, even if it had tried to.

Nor would the actions of the assistant county attorney have been binding upon the County, even if the county commission had attempted to authorize him to settle pending litigation. Issues concerning the power of government attorneys to bind governmental entities rarely arise, since the entities almost invariably ratify the acts of their attorneys. See, e.g., Ramsey v. City of Kissimmee, supra at 477; Op.Att'y.Gen.Fla. 079-78 (1979). But here the County is contending that the letter offers from the assistant county attorney were "binding offers" in the contractual sense. Besides the fact that these offers to settle were not within the authorization granted by the county commission on 7 December 1994, there is a second reason that the letter offers were not binding in the strict contractual sense—a governmental entity cannot delegate its power to enter into a binding settlement to a non-elected, administrative official.

In Op.Att'y.Gen.Fla. 78-95 (1978) the issue before the Attorney General was whether a binding obligation was created when the clerk of the circuit court entered into an insurance contract on behalf of the county. The opinion acknowledged that the county commission had directed the clerk to negotiate insurance coverage, and said that the issue was "whether or not the board of county commissioners was empowered to delegate to the clerk of the circuit court the authority to contract for insurance." The opinion first set forth the general rule:

> **As a general rule, the governing body of a county may not delegate its powers involving the exercise of judgment or discretion**. 20 CJS Counties § 89. **Furthermore, the board of county commissioners must make its contracts by official action and as a board**. 20 CJS Counties § 175; see also Kirkland v. State, 97 So. 502,508 (Fla. 1923). Thus, **it is readily evident that no single officer has the power to bind the county by contract unless expressly authorized to do so by law**; likewise, a county officer has only such power to contract as has been conferred upon him by law. McQuillin Municipal Corporations § 29.15; see also At.Gen.Op. 068-6 . . . .
>
> (Emphasis added.)

The Attorney General then found that under Chapter 125 "the county commission is empowered to enter into contractual obligations to carry out any of its enumerated or implied powers . . . Thus, it is clear that, under state law, the board of county commissioners is the agency which is authorized to act for or on behalf of the county."

The Attorney General also stated in the opinion that the pertinent statutes do not authorize the clerk or anyone other than the county commissioners to negotiate an insurance contract on behalf of the county, and the fact that the board of county commissioners may have verbally directed the clerk to negotiate and enter into an

insurance contract is irrelevant; the clerk possesses only such authority as had been delegated to him by law or the constitution. Furthermore, the long-standing custom or practice of the clerk to enter into such contracts for the county does not serve to enlarge the powers and authority of the clerk. So a county commission cannot delegate the power to contract to a county official, unless that county official is empowered by state law or the constitution to exercise such power. See also Crandon v. Hazlett., 26 So.2d 638 (Fla. 1946); Santa Rosa County v. Gulf Power Co., 635 So.2d 96,102 (Fla. lst DCA 1994); Davis v. Keen, 192 So. 200,202 (Fla. 1939); Op.Atty.Gen.Fla. 079-78 (1979).

The Attorney General has specifically held in another opinion that a county may not delegate its power to settle lawsuits, which is a form of contracting, to a county official. In Op.Atty.Gen.Fla. 79-198 (1979) the Attorney General first noted that "[a]s a general rule claims against the county are subject to compromise, and the governing body impliedly possesses the necessary power and discretion. . . to settle suits or claims against the county." The Attorney General went on to hold that the county commission could not delegate its authority to settle tort claims to insurance adjusters. The Attorney General said that a county can employ agents to recommend settlements, and that under the doctrine of ratification, a county can even ratify a settlement negotiated by its agent; however, the agent cannot contractually bind the county by his actions.

A review of the law pertaining to the authority of government lawyers confirms that the assistant county attorney who penned the offers in these cases had no authority to bind the County. In Annot., "Powers of City, Town or County or their Officials to Compromise a Claim," 15 ALR2d 1359, 1389 (1951) the author states, "A law officer of a

municipal corporation has as a general rule no authority to compromise a claim or a pending action, in the absence of statutory authorization." See also Fruchtl v. Foley, 84 So.2d 906,908 (Fla. 1956); 56 Am.Jur.2d Municipal Corp. § 812 (1971); 315 McQuillin Municipal Corp. § 12.52.05 (1990).

Nowhere does the Florida Constitution or the Florida Statutes give a county attorney the power to enter into a binding settlement on behalf of a county in pending litigation. So the general rule set forth above has full applicability in Florida. This is demonstrated vividly by a recent eminent-domain case,

In Broward County v. Conner, 660 So.2d 288 (Fla.4th DCA 1995) the county brought suit to condemn the landowner's property. The landowner's attorney and the county's attorney then entered into a settlement agreement. The county later reneged on the agreement. The trial court held that the settlement was valid, and required the county to comply with it. The Fourth District reversed on appeal for several reasons. Pertinent to the instant case, Judge Klein remarked that the Government in the Sunshine Law requires settlement agreements to be approved by the county commission at a public meeting:

> In the present case, the trial court has essentially determined that the county entered **into a contract by virtue of the actions of its attorneys, without formal action by the county commission at a meeting** as required by the statute. **If the county could not have entered into this contract without action taken at a meeting, it necessarily follows that the actions of the county's attorneys could not bind the county** to specific performance of a contract in the absence of proper commission approval.
>
> (Emphasis added.)

So a settlement reached by attorneys is not contractually binding for two reasons: first, a county commission may not delegate its power to contract to a non-elected functionary, and second, the attempt to exercise such power by the attorney would circumvent the Sunshine Law and remove the public scrutiny from the process that has been decreed by the legislature and the Constitution.

C. The letter offers made by the assistant county attorney violated the Sunshine Law and were therefore not binding upon the county in the contractual sense.

The Conner case highlights another reason why the letter offers were not binding upon the County. When a government board delegates its collegial power to an administrative official, it removes the formulation of that decision from the public scrutiny mandated by the Sunshine Law. The Pierpont majority seemingly authorizes this procedure. If a government board could avoid the Sunshine Law by merely delegating its discretionary power to administrators, then in time more and more powers will be delegated to administrative officials. It is the county commission that has the power to contract, i.e. the power to extend binding offers and settle lawsuits in a binding manner, not the county attorney.

Section 286.011 of the Sunshine Law provides, "[N]o resolution, rule, or formal action shall be considered binding except as taken or made at such meeting."[12] So the letter offers made by the assistant county attorney were not binding upon the County, since they were not formulated at a public meeting as required by the Sunshine Law. It

[12]The Sunshine Law was elevated to constitutional status when the Declaration of Rights was amended in 1992 to include language almost identical to the statute. Art. I, § 24, Fla.Const.

is the county commission that has the power to settle lawsuits, and it must exercise this power at a public meeting. This power cannot be exercised by the County's lawyer. The Conner case so held, and there are additional authorities standing for the same proposition.

In Op.Att'y.Gen.Fla. 95-06 (1995) several questions were presented as to the scope and authority of a city's attorney and others to act on its behalf in the settling of lawsuits and the purchasing of property. The Attorney General first noted that the Sunshine Law "is construed liberally by this office and the courts to give effect to its public purpose." See also Wood v. Marston, 442 So.2d 934 (Fla. 1983). In the same vein, any exemptions or exceptions "must be read strictly with a view toward protecting the interests of the public." The Attorney General then spoke at length to Section 286.011(8), the exception to the Sunshine Law that may be invoked to discuss litigation strategy and the settlement of lawsuits.

The Attorney General noted that "a line of cases has developed in Florida expressing the position of the courts that government entities may not carry out decision-making functions outside the Sunshine Law by delegating such authority." The Attorney General went on to state,

> Thus, **the delegation by a public body of its authority to act** in the formulation, preparation, and promulgation of plans or, in the instant case, contracts, on which the entire body itself may foreseeably act, **will subject the person or persons to whom such authority is delegated to the Sunshine Law.**
>
> (Emphasis added.)

Perhaps most to the point for present purposes, the Attorney General said:

> **[I]f the designee is authorized**, either formally or informally, **to exercise any decision-making authority on behalf of the council,** i.e., to reject or approve certain contract provisions or terms, **that person would be acting on behalf of the council or the board and any such meeting are subject to § 286.011**, Florida Statutes.
>
> (Emphasis added.)

So the Sunshine Law may not be avoided or disregarded by simply delegating the powers of the county commission to its attorney.

The case law relied upon by the Attorney General bears out his conclusions. In IDS Properties, Inc. v. Town of Palm Beach, 279 So.2d 353,356 (Fla.4th DCA 1973) the court said:

> It is axiomatic that public officials cannot do indirectly what they are prevented from doing directly. **Those to whom public officials delegate de facto authority to act on their behalf** in the formulation, preparation and promulgation of plans on which foreseeable action will be taken by such public officials **stand in the shoes of such public officials insofar as the application of the Government in the Sunshine Law is concerned.**
>
> (Emphasis added.)

See also Jones v. Tanzler, 238 So.2d 91,93 (Fla. 1970); News-Press Publishing Co. v. Carlson, 410 So.2d 546 (Fla.2nd DCA 1982); Op.Att'y.Gen.Fla. 74-294 (1974). So the delegation of power does not negate or avoid the Sunshine Law.

The point can be seen empirically by considering Section 286.011(8) of the Sunshine Law. That subsection allows a governmental entity to meet privately with its attorney, in very limited and carefully-prescribed circumstances, to discuss the settlement of pending lawsuits. The subsection implicitly confirms that the county commission must itself settle pending lawsuits and that this must normally be done at a public meeting.

Here the County avoided the rigorous procedure of Section 286.011(8) by simply delegating settlement authority to its attorney (assuming **arguendo** that such a delegation resulted from the county commission's actions of 7 December 1994). If such a delegation were valid as the Pierpont majority has held that it was, Section 286.011(8) and the rest of the Sunshine Law would be eviscerated in the settlement context. The county commission could avoid the whole process by simply delegating settlement authority to its attorney with general parameters. The courts of the state have struck down a number of less transparent end-runs around the Sunshine Law. Yet here the Pierpont majority seemingly endorsed the procedure. So the logic of the Pierpont majority is at odds with the Sunshine Law in general and Section 286.011(8) in particular.

The County successfully argued below that the county commission by its actions on 7 December 1994 delegated to the county attorney complete authority to settle pending lawsuits within the 20% parameter.[13] It has been argued above that the authority granted by the county commission was to purchase property before litigation was initiated, and not to settle pending lawsuits. It has been further argued that the county commission could not delegate its power to settle pending suits to the county attorney, even if it had tried to. But even ignoring these hurdles, the fact remains that even if the county commission

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[13]There was no proof produced in the trial court that the county attorney did indeed settle the cases within 20% of the appraisal values, since no proof was produced as to what the pre-litigation appraisal values of these parcels were. The Pierpont majority apparently assumed, however, that the appraisal values were the ***good faith estimates***, since good-faith estimates must be accompanied by appraisals. § 74.031, Fla.Stat. (1995). So ironically, the Pierpont majority was willing to consider the good-faith estimates as "evidence" when this suited its purposes, but not when it supported the trial court's holding.

had attempted to delegate its power and even if this delegation were valid, the letter offers of the assistant county attorney would still not have been binding upon the County because they were not formulated in the Sunshine

D. The Pierpont majority misapprehended the concept of "standing" under the Sunshine Law.

The Pierpont majority stated in the penultimate paragraph of its Opinion that the Landowners lacked "standing" to raise the Sunshine Law issue. This is perhaps the most far-reaching holding in the Pierpont decision, since it could seriously curtail the Sunshine Law. It can be seen from the discussion above that the letter offers made by the assistant county attorney were not binding upon the County for several reasons in addition to the Sunshine Law violation, so even if the Pierpont majority were right about the standing issue, its conclusion that the letter offers were binding upon the County would still be erroneous. But it is submitted that the Pierpont pronouncements concerning standing under the Sunshine Law are deleterious to the constitutional and public-policy objectives upon which the Law is based, and are therefore in need of correction by this Court.

In Jamlynn Inv. v. San Marco Residences, 544 So.2d 1080,1082 (Fla.2nd DCA 1989) the court said, "[O]ne has standing where there is a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." Certainly the Landowners have been affected by the outcome of the resolution of the Sunshine Law issue. It is difficult to ascertain who could have a more direct stake in the outcome of the litigation concerning the validity of the County's actions. This is especially so considering the broad standing under the Sunshine Law, which does not even require a showing of

direct injury to the party questioning the governmental action. Godheim v. City of Tampa, 426 So.2d 1084 (Fla.2nd DCA 1983). Conversely, if the Landowners do not have standing, who would? It is difficult to see how a newspaper could challenge the validity of such action if the party directly affected by the action cannot.

The Pierpont majority based its conclusion that the Landowners did not have standing upon the observation that they "never sought to challenge the authority of the county attorney to make the offer until the issue of attorneys' fees arose." (APP 3) It is difficult to see the connection between the jurisdictional concept of standing and the seemingly unrelated issue of when the governmental action was questioned. The attorney's fees hearings occurred within months of the supposed offers made by the assistant county attorney. There could be no statute-of-limitations problem, and none was alleged by the County. Further, government actions taken in violation of the Sunshine Law are void **ab initio**. Port Everglades Auth. v. I.L.A., 652 So.2d 1169 (Fla.4th DCA 1995); Monroe County v. Pigeon Key Hist. Park, 647 So.2d 857 (Fla.3rd DCA 1994); Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974). So it would appear that there would be no limitation period whatsoever upon Sunshine Law violations. But whether this is so or not, certainly the Landowners did not tarry in these cases. They raised the issue at the very first instance the County attempted to apply the improper action to them, and this was within months of the actual violations by the County. So the timing of this action, it is submitted, has nothing to do with standing, and the majority opinion imposes a stifling qualification upon the Sunshine Law that is not supported by the statutes or the cases, and is in fact antithetical to the purpose of the Sunshine Law.

E. Summation of Point II

The county commission by its actions of 7 December 1994 authorized the county attorney to purchase property prior to litigation, and did **not** authorize the county attorney to settle pending litigation. If the county commission had attempted to delegate its power to settle to the county attorney, the attempt would have been invalid and therefore not binding upon the County. Such an attempted delegation would have also been in violation of the Sunshine Law, and thus invalid for a second reason.

So the bottom line is that the letter offers made by the assistant county attorney were not "offers" within the meaning of the Pierpont majority's own definition of the statutory term, since they were not binding upon the County. It is the Landowners' fervent belief that the County's good-faith estimates of value were "offers" under the statute, and that this Court will so hold because of the constitutional factors at play. But even if the Pierpont majority were correct that the good-faith estimates were not "offers" because they were not binding in the strict contractual sense, the inescapable fact would be that the County's letter offers were not binding either.

So this Court would be left to answer the uncomfortable question that was not answered by the Pierpont majority. What happens if there is no offer? It is submitted that the best answer is that the good-faith estimate is an offer, hence the question does not need to be answered. But if this Court feels compelled to answer the difficult question, it is respectfully submitted that the condemner should suffer from its failure to make an offer, and that "zero" should be the bottom number in the benefit equation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Second District's decisions in these cases should be quashed, and that the question certified in Barnett Banks should be answered in the affirmative.

Respectfully submitted,

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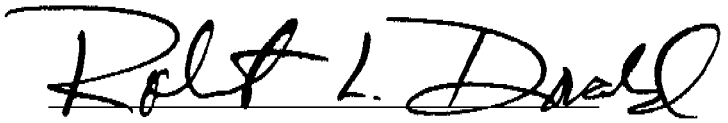
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petitioners' Initial Brief on the Merits has been furnished by regular U.S. Mail to John J. Renner, Assistant County Attorney, OFFICE OF THE COUNTY ATTORNEY, 2115 Second Street Fort Myers, FL 33901, on this 8th day of August, 1997.



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