IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondent.

Supreme Court Case No. 90,357

A PETITION FOR DISCRETIONARY RE VIE W OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL RENDERED IN CASE NO. 95-04657

PETITIONERS" JURISDICTIONAL BRIEF

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None.

INTRODUCTION

This is a proceeding for discretionary review of the decision of the Second District Court of Appeal concerning the issue of attorneys' fees in an eminent domain case. This Jurisdictional Brief is submitted on behalf of the Petitioners, PETER F. PIERPONT and MARY J. PIERPONT, who will be referred to herein as "the Landowners." The Respondent, LEE COUNTY, a political subdivision of the State of Florida, was the condemner in the eminent-domain action, and will be referred to as "the County" or "Lee County." There is an Appendix to this Jurisdictional Brief, and reference to it will be indicated by "APP" followed by the pertinent page number or numbers.

STATEMENT OF THE CASE & FACTS

The principal issue addressed in the second district's 2-1 decision is the proper application of Section 73.092 of the Florida Statutes. The statute governs the award of attorneys' fees in eminent domain actions, and says that a trial court "shall award attorney's fees based solely on the benefits achieved for the client." The term "benefits" is defined to be the difference between the judgment or settlement amount and the first "written offer" made by the condemner. So under the statute, the attorneys' fee is calculated solely as a percentage of the difference between the judgment/settlement amount and the first "written offer" made by the condemner.'

In the instant case there was no dispute as to the judgment/settlement amount, i.e., the top number in the benefit calculation. Rather, the dispute centered around the term "written offer," i.e., the lower number in the calculation. The trial court held that the good-faith estimate 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 attorneys' fees.

The second district's majority opinion 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) The majority recognized by its "but see" reference to a fifth district case that another district court had applied the statute differently. (APP 3)

The majority decision 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 Landowners'

'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. However, the definition of "benefit" has been unchanged since 1990, So the shifting in emphasis has not affected how the term is to be interpreted, since the statutory definition has remained unchanged; however, the shifting in emphasis does increase the importance of the definition, since benefit is now the ***only*** determiner of the fee.

counsel three months after the proceedings were initiated, offering to settle the matter for a sum considerably greater than the County's good-faith estimate. (APP 1-2) The 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. The rejection was based on two conclusions by the majority: first, that the County's pre-suit authorization to its attorney to buy property "not to exceed 20% over the highest appraised valued obtained by Lee County" 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) The dissent held 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.* The dissent also observed that the fifth district had seemingly held contrary to the majority in a decision that will be discussed below, (APP 3)

The Landowners filed a Motion for Rehearing (APP 5-25), but it was denied. (APP 26) This timely petition for discretionary review followed.[3]

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[2]The dissent observed that under the majority's holding the condemner could simply wait until well into the litigation to make its first offer, and even though this offer was much greater than the good-faith estimate, the landowner would be deprived of his constitutional right to fees that were legitimately incurred in obtaining full compensation. (APP 4)

[3]It should be noted that the second district has relied upon its holding in the instant case to reverse two other attorneys' fees awards, and copies of these decisions are included in the Appendix. (APP 27-28) This Court will be asked to assume jurisdiction in the two subsequent cases under the principle of Jollie v. State, 405 So.2D 418 (Fla. 1981).

SUMMARY OF ARGUMENT

Several jurisdictional bases are evoked by the second district's decision. The majority opinion expressly affects a class of constitutional or state officers, since it speaks to the duties and obligations of a county commission under both Section 73.092 and the Sunshine Law (as well as their constitutional counterparts). The second basis for this Court's discretionary jurisdiction is that the majority decision conflicts with: 1) the fifth district decisions holding that a good-faith estimate is a written offer under the statute; 2) with this Court's decisions holding that fees are constitutionally "assured" in eminent-domain actions; 3) with the decisions holding that the setting of fees in an eminent-domain action is a judicial function that may not be usurped "directly or indirectly" by the legislature; and 4) with the Conner decision from the fourth district, where it was held that the settlement of an eminent-domain case was not binding upon the county because it was not approved at a noticed, public meeting. The final basis for this Court's jurisdiction is that the majority opinion construes two provisions of the Florida Constitution, i.e., those 1) requiring the payment of full compensation and 2) requiring that all public decisions of a county commission will be made in the Sunshine.

ARGUMENT

This case is unique in that it involves the duties and obligations of public officials arising from two constitutional provisions and two enabling statutes. Attorney's fees are a component of the landowner's entitlement to "full compensation" under Article X, Section 6 of the Florida Constitution. The Sunshine Law has now been memorialized in Article I, Section 24 of the Florida Constitution. The application of the statutes in question in deciding the duties and obligations of local-government officials is therefore imbued with constitutional considerations.

A. The majority decision expressly affects a class of constitutional or state officers.

This Court has discretion to review a decision that "expressly affects a class of constitutional or state officers."[4] In Spradley v. State, 293 So.2d 697 (Fla. 1974) this Court set forth the jurisdictional parameters of such discretionary review:

> To vest this Court with certiorari jurisdiction, **a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.** This may be a decision in a case in which the class, or some of its members, is directly involved as a party, It may also be in a case in which no member of the class is a party . . . .
>
> (Emphasis added.[5])

So jurisdiction would exist in the instant case if the second district's decision directly affects the "powers, duties, validity, formation, termination or regulation" of county commissions.

The second district's decision certainly meets this criterion. It affects the constitutional duty of local government bodies to pay full compensation for property taken, and it affects their powers and duties in making written offers in eminent-domain cases. Much the same this is true of the portion of the majority decision dealing with the Sunshine Law. The majority held that the county commission could delegate its power to settle lawsuits to its attorney, and this holding affects the powers and duties of a county commission. The majority decision also holds that the Sunshine Law was not offended by this procedure, and this is still another pronouncement that affects the powers and duties of county commissions.

The few decisions on this jurisdictional provision support jurisdiction in the instant case. In Tyson v. Lanier, 156 So.2d 833 (Fla. 1963) the trial court interpreted a statute relating to the taxation

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[4]This Court has held that county commissions are "constitutional officers" within the meaning of the constitutional provision. Pinellas County v. Nelson, 362 So.2d 279 (Fla. 1978).

[5]Henceforth it should be assumed that all emphasis has been added unless otherwise noted.

of agricultural lands. The district court reversed in a 2-1 decision, interpreting the statute differently than the trial court did. This Court acknowledged that the interpretation of the statute had constitutional implications (just as in the instant case), and held that this was just the sort of case that was appropriate for Supreme Court review. Justice Terre11 said that jurisdiction under the provision was "clear", because the interpretation of the statute affected the powers and duties of county tax assessors. The same of course is true in the instant case. Here the second district split 2-1 on the interpretation of a statute with constitutional implications. Here too the second district's majority decision affects the powers and duties of county commissions. See also Behr v. Beil, 665 So.2d 1055 (Fla. 1996)(jurisdiction under this provision from district court decision requiring public defenders to act as standby counsel in criminal cases). So it is respectfully submitted that this Court has jurisdiction to review the second district's majority decision.

B. The majority decision expressly and directly conflicts with decisions from other district courts of appeal and this Court.

This Court's decisions show that conflict can be demonstrated in either of two ways: first, conflict exists where a rule of law is announced that is contrary to the rule of law set forth in another decision; or second, conflict exists where the same rule of law is applied to similar facts in two cases and different results are reached, See. e.g., Mancini v. State, 3 12 So.2D 732 (Fla. 1975). Both types of conflict are presented by the Second District's majority opinion.

1. The fifth district decisions.

Both the majority and dissent acknowledge that the fifth district has construed the good-faith estimate as the "written 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 fifth district reversed the fee award as being too great, 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 case was 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	**-$132,000**
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").

So the fifth district's holdings that the condemner's good-faith estimate was a "written offer" under the statute is diametrically opposed to the majority decision in the instant case. If the second district's logic were applied to the facts of the fifth district cases, the results would have been different. In the final analysis this is the best test for whether conflict exists, and the application of this test shows that there is express conflict that gives this Court jurisdiction.

2. This Court's Quanstrom and Platt decisions.

It is well accepted that attorneys' fees in eminent domain cases are constitutionally compelled by the full-compensation clause of the Constitution. The real detriment of the second district's

interpretation of Section 73.092 is that it will allow condemners in many instances to avoid paying the attorney' fees required by the Constitution. If the good-faith estimate is not a "written offer," and since the statute puts no time limit upon when (or if) the condemner must make an offer, the following scenario is almost certain to occur in the wake of the second district's holding: the condemner could wait until the case is tried and the landowner has made his best case (with the aid of counsel); and then while the jury is out the condemner could, for the first time, offer what the property is worth. The landowner would have no choice but to accept this offer (and in fact counsel would have an ethical obligation to advise his/her client to take it); but under the second district's holding the landowner would be entitled to no ***attorneys fees*** for the perhaps years of litigation he was forced into by the condemner's actions. In this scenario the landowner would be denied attorneys' fees not because they were undeserved, but simply because of the machinations of the condemner made possible by the second district's interpretation of the statute. This is the unconstitutional ramification of the second district's holding, and the reason the trial court and the dissent interpreted the statute to mean that a good-faith estimate is a written offer.

In several important decision on attorneys fees this Court has held that a landowner is ***constitutionally guaranteed*** an attorneys' fee in an eminent-domain proceeding, and thus there is no reason to allow a multiplier that would be applicable if a fee were not guaranteed. In Standard Guar. Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) this Court said:

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

This Court said the same thing in In re Estate of Platt, 586 So.2d 328 (Fla. 1991). Yet the majority opinion in the instant case interprets Section 73.092 in such a way that a landowner would ***not*** be

"assured" of an attorneys' fee in an eminent-domain action.[6] The second district's majority decision therefore expressly conflicts with this Court's statements in Quanstrom and Platt.

3. The cases holding that the legislature may not conclusively establish the amount of attorneys' fees in eminent-domain cases.

In Dept. of Ag. & Cons. Services v. Bonanno, 568 So.2D 24 (Fla. 1990) this Court said, "It is true that the legislature may not set conclusive values for property taken for a public purpose because the determination of just compensation is a judicial function." The Court went on to hold that the statute in question did not violate the principle, since it provided that the presumptive value "may be rebutted." The Court noted in footnote 5 that the presumptive attorneys' fees established by the statute was also saved by similar statutory language allowing the presumptive fee to be rebutted by the landowner. But here the second district has interpreted Section 73.092 to establish ***an irrebutable*** presumption of attorney's fees (and hence full compensation) in a eminent-domain action. So the second district's decision flies in the face of this Court's pronouncement in Bonanno.

In Crigler v, DOT, 535 So.2D 329 (Fla.lst DCA 1988) the court said, "[I]t is true that attorney's fees are part of the full compensation guaranteed by the constitution. Further, the Legislature may not diminish the concept of full compensation as defined by the courts." Here the second district's interpretation of the statute allows the legislature "to diminish the concept of full compensation," i.e., attorneys' fees, and thus conflicts with Crigler.

4. The Conner decision

In Broward County v. Conner, 660 So.2D 288 (Fla.4th DCA 1995) a settlement was reached by the attorneys for the county and landowner in an eminent-domain action. The county then refused

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[6]This fear is made real in one of the cases that were reversed by the second district on the basis of the majority decision. In Lee County v. A & G Investments the result of the second district's interpretation of the statute will be that the landowner will not receive attorney's fees. (APP 15,27)

to perform the settlement, and the issue for the fourth district was whether the county should be required to. Judge Klein said that if the county had entered into a binding settlement with the landowner, it would have had to have done so at a noticed public meeting, and "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." Here the second district, under very similar circumstances, held that the Sunshine Law was ***not*** violated. So there is express conflict between the majority's decision and the Conner decision.

*C. **The majority decision expressly construes two provisions of the Florida Constitution.***

There are two other types of cases that can support this Court's discretionary jurisdiction, those being cases that expressly declare valid a state statute or those that expressly construe a provision of the Constitution. The second district's majority decision does not expressly declare valid a state statute; rather, it is the Landowners' belief that the majority interprets the statute in such a way as to make it invalid. But in any event, this Court does not have jurisdiction on this basis.

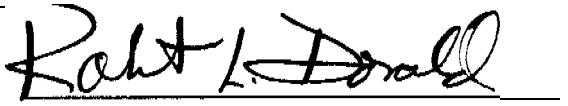
But this Court does have discretionary jurisdiction, it is submitted, because of the unique constitutional angle of this case. It is clear that Section 73.092 was enacted by the legislature in fulfillment of a landowner's right to full compensation under the Constitution. See, e.g., Crigler v. FDOT, supra; FDOT v. Ben Hill Griffin, Inc., 636 So.2d 825 (Fla.2nd DCA 1994). Section 286.011 is coextensive with the constitutional Sunshine Law found in Article I, Section 24. In Monroe County v. Pigeon Key Hist. Park, 647 So.2d 857 (Fla.3rd DCA 1994) the court noted that the statute and constitutional provision were "virtually identical," therefore "we find no reason to construe the [constitutional] amendment differently than the Supreme Court has construed the statute." In Law & Info. Services v. Riviera Beach, 670 So.2d 1014 (Fla.4th DCA 1996) the court said, "[W]e see no reason to construe the constitutional provision differently from the statute."

So the two statutes interpreted by the second district majority opinion are unique, in that these statutes directly enable corresponding provisions of the Florida Constitution. In a real and palpable sense an interpretation of Section 73.092 construes a provision of the Florida Constitution, since the statute enables the constitutional provision. Similarly, an interpretation of Section 286.011 construes the constitutional Sunshine Law provision. Because of these unique circumstances, the second district's majority opinion construes two provisions of the Florida Constitution, and therefore creates still another basis for this Court to exercise its discretionary jurisdiction.

CONCLUSION

It is submitted that this Court does have discretionary jurisdiction under Article V, Section 3 of the Constitution to review the second district's majority decision, and it is therefore respectfully submitted that this Court should exercise that jurisdiction.

Respectfully submitted,



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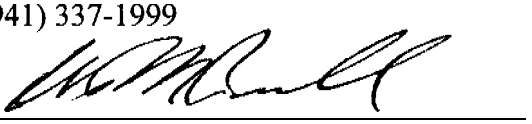

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petitioners' Jurisdictional Brief has been furnished by regular United States Mail to John J. Renner, Assistant County Attorney, OFFICE OF THE COUNTY ATTORNEY, P. 0. Box 398, Fort Myers, FL 33902, on this 24th day of April, 1997.

Robert L. Donald

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

v.

Peter F. PIERPONT and Mary J. Pierpont, Appellees.

No. 95-04657.

District Court of Appeal of Florida,
Second District.
Jan. 24, 1997.

Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge.

James G. Yaeger, Lee County Attorney, and John J. Renner, Assistant County Attorney, Fort Myers, for Appellant.

William M. Powell of William M. Powell, P.A., Cape Coral, for Appellees.

CAMPBELL, Acting Chief Judge.

**1 Appellant, Lee County, challenges the amount of attorney's fees awarded appellees, Peter F. Pierpont and Mary J. Pierpont, in an eminent domain action. We reverse and remand for a recalculation of the attorney's fees to be awarded.

The principal issue in this appeal involves the application of section 73.092, Florida Statutes (Supp.1994), to the circumstances of this case. By its terms, section 73.092, as amended in 1994, applies to all actions filed after October 1, 1994. It is, therefore, applicable to this case.

The pertinent parts of section 73.092 provide as follows:

73.092 Attorney's fees.--

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 "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.

The history of this case shows that on November 2, 1994, the Lee County Board of County Commissioners adopted a resolution of necessity directing the county attorney to commence eminent domain proceedings to acquire the necessary rights-of-way for the construction of the Mid-Point Bridge to cross the Caloosahatchee River to connect Cape Coral and Fort Myers. At its meeting on December 7, 1994, the county commission gave specific authority to the county attorney to make written offers not to exceed twenty percent over the highest appraised value to acquire the properties needed for the Mid-Point Bridge project.

On January 5, 1995, the county attorney filed a petition in eminent domain to acquire the property needed for the Mid-Point Bridge project, including the property of appellees (Parcel No. 115). Simultaneously with the filing of the eminent domain petition, the county attorney also filed, pursuant to section 74.031, Florida Statutes (1993), a Declaration of Taking and Estimate of Value. The good faith estimate of value contained within the declaration of taking for appellees' Parcel No. 115 was $69,000. An order of taking was rendered on March 10, 1995, and the good faith estimate of $69,000 was deposited into the registry of the court.

On April 3, 1995, appellees, through their attorney, filed an answer to the Petition in Eminent Domain in which they admitted as true all the allegations of the petition, denying only the good faith estimate of value contained within the declaration of taking. By letter dated April 19, 1995, the county attorney communicated to appellees' attorney as follows:

Dear Bill:

I have received your answer filed on behalf of Mr. and Mrs. Pierpont. From this point on, I will communicate only with you as the representative of Mr. and Mrs. Pierpont.

**2 The 1995 appraisal establishes a $69,000.00 value for the parcel. I am authorized to offer the sum of $82,800.00 as full compensation for the taking of Parcel 115. No further offers will be made and no further negotiations will be entertained. If this sum is unacceptable to your clients, I will set the case for trial. Please advise whether your clients will accept $82,800.00 as full compensation prior to May 15, 1995 at which time the offer will expire.

The $82,800 offer contained in the county attorney's letter was not accepted, and the record discloses that no challenge was made during the proceedings to the authority of the county attorney to make the offer.

The case was ultimately settled by a stipulated fmal judgment rendered on September 8, 1995, in which the parties agreed that appellees would receive $87,500 as full compensation for their property.

The dispute as to the amount of attorney's fees awarded appellees arises over whether the section 73.092 statutory benefits achieved for appellees by their attorney should be calculated based on the difference between the final judgment amount of $87,500 and the county attorney's offer of $82,800, or the difference between the final judgment of $87,500 and the good faith estimate of the declaration of taking of $69,000. We conclude that the intent of section 73.092 as to the proper measure of the "benefits achieved" requires that the calculation be based on the difference between the final judgment amount and the amount contained in the offer by the county attorney in his letter of April 19, 1995. We make this conclusion because we do not perceive it to have been the legislature's intent to equate the statutorily mandated "good faith estimate of value" required by section 74.031 with the "written offer" contemplated in section 73.092. If that was the intent, section 73.092 should have made reference to the good faith estimate contained in and required by section 74.031. It does not. On the contrary, section 73.092 uses the specific term "written offer. " The good faith estimate is not a "written offer. " In fact, the good faith estimate is not even required or a part of a proceeding in eminent domain ***unless*** the condemning authority desires to acquire possession of and title to the property prior to entry of final judgment. See §§ 74.011--74.071, Fla.Stat. (1993).

An "offer" has been defined as follows:

> A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act. A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement, Second, Contracts, § 24. A promise; a commitment to do or refrain from doing some specified thing in the future. An act on the part of one person whereby that person gives to another the legal power of creating the obligation called contract. ***McCarty v. Verson Allsteel Press Co.,*** 44 Ill.Dec. 570, 576, 89 Ill.App.3d 498, 411 N.E.2d 936, 942. The offer creates a power of acceptance permitting the offeree by accepting the offer to transform the offeror's promise into a contractual obligation.

3 See Black's Law Dictionary 1081 (6th ed. 1991). If the "good faith estimate" of chapter 74 was to be considered an "offer," as Judge Blue urges in his dissent, a property owner could immediately file an acceptance of the "good faith estimate" and under the theory of offer and acceptance the condemnor would be bound by the "good faith estimate. " Such does not appear to us to be the law, however, in regard to a "good faith estimate. " The court in ***Jacksonville Expressway Authority v. Bennett,* 158 So.2d 821, 827 (Fla. 1st DCA 1963), addressed the non-binding effect of the good faith estimate and said:

> Upon appropriate pleadings and procedures the condemning authority is entitled to have its own estimate as well as that of the court-appointed appraisers amended or corrected to speak the truth. It is also entitled at the jury trial under Chapter 73, irrespective of the amount stated by such estimate or appraisal, to adduce evidence on the issue of compensation to be made to the owner for the taking of his property, even as the owner is entitled to do so. In fine, the guiding light of every proceeding in eminent domain or ancillary thereto is to secure to the owner of the property taken full compensation--to make him whole--nothing less, nothing more.

The issue was also spoken to ***in Florida East Coast Railway Co. v. Broward County,*** 421 So.2d 681, 684 (Fla. 4th DCA 1982), wherein the court stated:

In determining the sufficiency of appraisal evidence at a taking hearing, the issue is whether the estimate of value was made in good faith and was based upon a valid appraisal. § 74.031, Fla. Stat. (198 1) , ***Valleybrook Developers, Inc. v.*** Gulf ***Power Co., 272*** So.2d 167 (Fla. 1st DCA 1973). The estimate of value, when deposited into the court registry, secures the landowner in his right to obtain full compensation for the property rights taken. §§ 74.051(2) and 73.071, Fla.Stat. (1981). The estimate does not establish the value of the property rights and a court's determination that the estimate was made in good faith based upon a valid appraisal is not a finding of just compensation. Rather, after the condemning authority takes possession and title pursuant to a "quick taking" proceeding (Chapter 74), if compensation or severance damages are in issue, a jury is empaneled to make a determination of value. § 73.071, Fla.Stat. (1981).

See also Shannon Properties, Inc. v. Tampa-Hillsborough County Expressway Auth., 605 So.2d 594 (Fla. 2d DCA 1992).

In short, we conclude that the "good faith estimate" of value contained within a declaration of taking pursuant to Proceedings Supplemental to Eminent Domain contained in chapter 74 has no relationship to the "written offer" contemplated by the legislature in enacting section 73.092. But see ***Seminole County v. Rollingwood Apartments, Ltd.,*** 678 So.2d 370 (Fla. 5th DCA 1996).

**4 Finally, appellees, both in the trial court and here, have crafted a rather cunning argument built around an alleged violation of the Sunshine Law, section 286.011, Florida Statutes (1993), by the county attorney in his letter offer of April 19, 1995. In short, appellees argue that because the county commission did not specify a particular dollar figure that the county attorney could offer to the landowners, the commission's specific authorization for the county attorney to make written offers to the property owners "not to exceed 20% over the highest appraised value obtained by Lee County" left such discretion in the county attorney that he violated the Sunshine Law by not holding a public meeting before making his offer. We reject that argument as being without substance. The county commission specifically authorized the county attorney to settle the cases for the appraised value plus twenty percent. His letter of April 19, 1995, did exactly that. He offered to settle for $82,800, which was twenty percent over the appraised value of $69,000. Moreover, we also conclude that appellees 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.

We, therefore, reverse the order of the trial court and direct on remand that appellees' attorney's fee award based on benefits achieved be determined based upon the difference between the county attorney's offer of $82,800 and the final judgment amount of $87,500.

PARKER, J., concurs.

BLUE, J., dissents with opinion.

BLUE, Judge, dissenting.

I respectfully dissent because I believe that the good faith estimate of value should operate as an offer once the trial court has ordered deposit in the court registry and title has vested in the condemning authority. It appears that the Fifth District has taken this position without discussion. ***See Seminole County v. Rollingwood Apartments, Ltd., 678*** So.2d 370 (Fla. 5th DCA 1996) (stating without discussion that the trial court calculated the benefit achieved by comparing the amount of the final judgment and the "initial offer/good faith deposit"). This construction of the statute supports the legislative intent of calculating fees based solely on the benefits achieved. Accordingly, I would affirm.

To determine if the good faith estimate is an offer, one can consider whether the good faith estimate is an amount that can be accepted by the landowner to settle the litigation. That is, may the landowner agree that the good faith estimate is a sufficient amount of money for the land being condemned, accept that amount in exchange for the land, and thereby end any controversy? If this is not the law, it should be. Unfortunately, I can find no direct precedent to support this last conclusion.

On the other hand, there appears to be no binding precedent that prevents a landowner from accepting the good faith estimate in full settlement once the trial court has ordered the deposit into the court registry and title has vested in the condemning authority. At this point, the right to compensation

vests in the landowner under section 74.061, Florida Statutes, and a condemning authority cannot dismiss the action without the landowner's consent. ***O'Sullivan v. City of Deerfield Beach,*** 232 So.2d 33 (Fla. 4th DCA 1970).

5 The majority opinion finds comfort in ***Jacksonville Expressway Authority v. Bennett,* 158 So.2d 821 (Fla. 1st DCA 1964). A careful reading of this case does not support the proposition that a landowner is precluded from accepting the good faith estimate as full payment for land taken. ***Bennett*** was the fourth appeal in an eminent domain action. ***See Jacksonville Expressway Authority v. Bennett,*** 124 So.2d 307 (Fla. 1st DCA 1960); ***Bennett v. Jacksonville Expressway Authority,*** 13 1 So.2d 740 (Fla. 1961); and ***Jacksonville Expressway Authority v. Bennett,*** 149 So.2d 74 (Fla. 1st DCA 1963). These cases stand for the proposition that the good faith estimate is not binding on the condemning authority's position at trial. This holding does not persuade me on the issue at hand because offers are seldom admissible or binding on a party's position at trial. See, e.g., § 45.061 (offers of settlement); § 73.032 (offers of judgment in eminent domain actions); § 768.79 (offer of judgment).

A landowner should be able to rely on the good faith estimate and accept that amount in full settlement for the land taken. I find no reason to expect that this holding would present a roadblock to a fair and efficient exercise of eminent domain powers. If condemning authorities make the estimate in good faith, as they are required to do, they have estimated what they would be willing to pay for the property. Using this written estimate to calculate attorney's fees will only encourage condemning authorities to make realistic estimates. Property owners can then have confidence in accepting the offers without incurring unnecessary legal expenses that drive up the cost of acquiring the land and that are ultimately paid by the taxpayers. In addition, I can envision cases where the condemning authority makes no other written offer, but has filed a declaration of taking with a good faith estimate of value. If the estimate did not provide a starting point for the fee award, the fees might be calculated as a percentage of the total settlement or judgment, thus driving up the costs associated with eminent domain proceedings. ***See Department of Natural Resources v. Gables-ByThe-Sea, Inc., 374*** So.2d 582 (Fla. 3d DCA 1979) (approving fee award under earlier version of statute, noting that the attorney had achieved a benefit measured by the ultimate recovery because the condemning authority made a zero offer). Alternatively, the condemning authority could argue that the property owner should be denied attorney's fees because without a written offer there is no measurable benefit.

Finally, I am concerned that the majority opinion could eventually work to deprive landowners of their constitutionally guaranteed right to full compensation, which includes a right to attorney's fees. ***See Schick v. Florida Dept. of Agric. & Consumer Servs.,*** 586 So.2d 452 (Fla. 1st DCA 1991) (full compensation includes attorney's fees), ***review dismissed,*** 595 So.2d 556 (Fla. 1992). In the usual case, a landowner facing the loss of land through eminent domain would consult an attorney. The attorney would then retain an appraiser to provide an independent evaluation. If the condemning authority made the "first written offer," at or near the landowner's appraisal, but far above its previously stated good faith estimate, the attorney would have achieved a benefit for the landowner, but not a benefit which would qualify for an award of fees. A few such forays would soon result in a decline in the number of attorneys willing to represent those facing the loss of property to the state or representation would be undertaken only if the landowner agreed to pay fees from the recovery. Either scenario would result in less than full compensation for those persons having land taken by eminent domain.

**6. Fairness and logic requires that the value placed upon land by the condemning authority at the time it takes legal title to land should be a starting point for a determination of the benefits achieved. Accordingly, I would hold that the estimate of value once deposited in the court registry constitutes a written offer for calculation of fees when examined in the statutory context for quick takings.

IN THE DISTRICT COURT OF APPEAL
OF THE SECOND DISTRICT OF FLORIDA

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

Appellant,

v.

PETER F. PIERPONT and MARY J. PTERPONT,

Appellees,

2nd DCA Case No. 95-04657

APPELLEES" MOTION FOR REHEARING EN BANC, REHEARING, CLARIFICATION OR CERTIFICATION

The Appellees, PETER F. PIERPONT and MARY J. PIERPONT, ask this Court, pursuant to Florida Rules of Appellate Procedure 9,330 and .33 1, to grant a rehearing en banc, rehearing, clarification, or to certify its decision to the Supreme Court of Florida as involving an issue of great public importance, for the following reasons:

This Court rendered its decision in this case on 24 January 1997. The majority decision (authored by Judge Campbell with Judge Parker concurring) contains two essential holdings. First and most importantly, that a good-faith estimate cannot be construed as an "offer" under Section 73.092(2) of the Florida Statutes. The majority opinion then states that the first valid "offer" made by the County was in the correspondence of the assistant county attorney dated 19 April 1995, and that this letter offer was valid because a) the County Commission "specifically authorized" the settlement of the

lawsuit and b) the Pierponts "are without standing to raise the bona fides of the offer [under the Sunshine Law] since they never sought to challenge the authority of the county attorney to make the offer until the issue on attorney's fees arose."

Judge Blue's dissent contends that constitutional considerations, as well as "fairness and logic," require that the good faith estimate be construed as an "offer" under Section 73.092 and thus be the baseline for the setting of attorneys' fees. The dissent's position on the first issue made it unnecessary to address the validity of the letter offer made by the County, hence the dissent does not address the second issue.

REHEARING EN BANC

Rule 9.331 states that a rehearing en banc is appropriate when the case is of "exceptional importance" or where such a hearing is necessary "to maintain the uniformity in the court's decisions." It will be shown below that both reasons for en banc consideration are present in this case.

1. There are two other cases pending in this Court that involve the first issue of whether a good-faith estimate is an "offer" within the meaning of Section 73,092. Both of these other cases have been orally argued and are ripe for decision. The first is Lee County v. A&G Inv., 2nd DCA Case No. 96-00552, and it was argued on 6 November 1996 to a panel composed of Judges Campbell, Threadgill and Lazzara. The second is Lee County v. Barnett Banks. Inc., 2nd DCA Case No. 96-01360, and it was argued on 10 December 1996 to a panel composed of Judges Altenbernd, Fulmer and Blue. In both of these cases the respective panels entered orders taking judicial notice of the other case,

as well as the instant case, So the panels in the two other cases have recognized that there is a common link in the three cases.

2. Of the three judges composing the panel in the instant case, Judge Campbell is on one of the other panels and Judge Blue is on another. There is no other overlap in the three cases. So the first issue discussed in the instant decision is presently pending before seven of the judges of this Court, simply by virtue of the three cases involving this issue, Only three of the seven have spoken in the opinion rendered in the instant case-Judges Campbell and Parker have voted with the condemnor's position, and Judge Blue has voted with the condemnee's. Judges Threadgill, Lazzara, Altenbernd and Fulmer have not yet weighed in, nor have any of the other judges of this Court that are not on any of the three panels.

A. Rehearing en banc will ensure the uniformity of this Court's decisions.

3, In Lobo v. Fla. Parole & Probation Comm., 433 So.2d 622,624 (Fla.4th DCA 1983)(en banc) the fourth district held that it was appropriate to consider a case en banc because of the pendency of other cases involving the same issue:

> Our opinion is issued en banc pursuant to Florida Rule of Appellate Procedure 9.331, **because there are presently pending several other similar and undecided cases pending before various panels of this court. These cases all present the same legal issue and en banc consideration herein will effect a uniform result in each matter.**
>
> (Emphasis added.)

This is exactly the situation here, and the pendency of the other two cases is therefore a compelling reason to rehear this case en banc.

4. The practicalities of the situation further dictate that this case be reheard en banc. In Zabrani v. Cowart, 502 So.2d 1257,1259 (Fla.3rd DCA 1986) Judge Hubbart in his dissent disclosed the horrors that can occur on rehearing when several cases involving the same issue are pending in the court at the same time. If the first case is not resolved by en banc consideration, then if the subsequent panels do not agree with the initial panel, the subsequent pending cases must be resolved en banc. See also Wood v. Fraser, 677 So.2d 15,18 (Fla.2nd DCA 1996). So the place to have the en banc consideration, according to Judge Hubbart, is in the first case. As a practical matter en banc consideration in the later cases may be improper or at least inadvisable if the first case is under review by the Supreme Court of Florida, since the effect of overruling the first case by en banc consideration in the later cases would be to undercut Supreme Court jurisdiction derived from the first case.' The solution to this conundrum, according to Judge Hubbart, is to have a rehearing en banc of the first case.

5. A rehearing in the first case when several are pending involving the same issue also gives proper deference to the Court as a whole. By virtue of the constitutional amendments making district courts of appeal courts of final appellate jurisdiction, the concept of a district court has changed in a subtle way that is quite pertinent to the instant case, In Chase Federal Savings & Loan Assoc. v. Schreiber, 479 So.2d 90,91 (Fla. 1985) the question presented to the Supreme Court was whether there needs to be "express and

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'The likelihood of Supreme Court review is present in this case. The majority opinion acknowledges by its "but see" reference that the fifth district has expressed a contrary view (the dissent makes the same observation), and this panel will be asked below (in the alternative) to certify its decision to the Supreme Court.

direct conflict" among intra-district decisions in order to justify rehearings en banc under Rule 9.331. In other words, the issue was whether intra-district conflict must be of the same magnitude necessary to support the inter-district conflict that would justify Supreme Court review. The Supreme Court answered the question in the negative, holding that "the district courts of appeal, in exercising their en banc power, are not limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction [and] the district courts are free to develop their own concepts of decisional uniformity." Justice Boyd then explained how the en banc process fits into the concept of how district courts of appeal are to operate:

> The en banc process provides a means for Florida's district **courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole.** The process provides an important forum for each court **to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction.** We have, said that "[u]nder our appellate structural scheme, **each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole . . . .**"
>
> (Emphasis added, citations omitted.)

In In re Rule 9.331, 416 So.2D 1127 (Fla. 1982) Justice Overton also noted that district courts are not merely groups of three-judge panels, and observed that the collegiality of the district courts is an essential component of the concept that district courts are to have final appellate jurisdiction rather than being intermediate stops along the appellate path.

6. If the two-judge majority opinion in the instant case were not subjected to en banc consideration, then the panels in the two subsequent cases would be bound to follow

that decision by the doctrine of **stare decisis.** Thus two judges of this Court could effectively override the other two panels, even though the same issue was pending before all three panels at the same time. If one of the other two panels had rendered its decision first, the circumstances would be the opposite. This is not the collegiality to which the Supreme Court alluded in the cases set forth above. It therefore makes eminent good sense for the Court to rehear the case en banc. The case law has recognized that en banc consideration is appropriate, and the collegiality inherent in this Court's structure requires that the judges on the other panels (as well as those not on the other panels) be given an equal opportunity to speak to the common issue. The Appellee/Landowners therefore respectfully ask this Court to rehear this case en banc.

B. This case should be reheard en banc because it involves an issue of exceptional importance.

7. The second basis for rehearing en banc is that a panel decision involves issues of "exceptional importance." In In re DJS, 563 So.2D 655 (Fla.lst DCA 1990)(fn. 2) the court held that the exceptional importance basis for en banc rehearing arises in "(1) cases that may affect larger numbers of persons, and (2) cases that interpret fundamental legal or constitutional rights," Both grounds are present in the instant case. See also Marr v. State, 470 So.2D 703,715 (Fla.1st DCA 1985).

8. The majority opinion will certainly affect a large number of persons. Indeed, it will affect any landowner in this state whose property is condemned. The pervasiveness of the issue is shown by the fact that there are several other cases pending before this Court involving the same issue (and more on the way), and that the fifth district has also

grappled with it. Virtually any condemnation action in Florida will feel the effect of the majority's decision.

9. The In re DJS decision also says that rehearing en banc should be granted when the decision "interpret[s] fundamental legal or constitutional rights." As Judge Blue points out in his dissent, there is a ***constitutional right*** to reasonable attorneys' fees in eminent-domain cases. The majority opinion does not dispute the constitutional nature of the issue nor even mention it, but it is well established in the decisional law of Florida. See, e.g., Schick v. Dent. of Agriculture, 586 So.2D 452 (Fla.lst DCA 1991); DOT v. Ben Hill Griffin, 636 So.2D 825 (Fla.2nd DCA 1994); Seminole Countv v. Butler, 676 So.2D 45 1 (Fla.5th DCA 1996).

10. So this Court's interpretation of Section 73.092 is worthy of en banc consideration as an issue of exceptional importance for two reasons: it will affect those landowners who are brought into court by condemning authorities, and it will effect a fundamental, constitutional right.

11. The second issue discussed in the majority's opinion should also be recalled, since the majority's resolution of the Sunshine Law issue may have an even more pervasive effect than its disposition of the first issue. The majority opinion holds that the Appellee/Landowners did not have "standing" to raise the Sunshine Law issue, since they did not challenge the action until the attorney's fees hearing several months later. The majority does not cite any authority for this holding, and it seems to be at odds with established law (more on this below) granting broad standing in Sunshine Law cases; but at the very least this Court has imposed a rigorous standing requirement upon Sunshine

Law challenges, and seemingly imposed rigorous (though unspecified) time requirements also. If the Appellee/Landowners did not have standing to attack the action that the majority opinion holds was binding upon them, it is difficult to see who would have such standing. Certainly a newspaper would not. So the majority opinion's pronouncement concerning "standing" in Sunshine Law cases is of exceptional importance to many persons of this state, and it certainly implicates important, fundamental rights.

12. The majority also seems to approve by implication the delegation of discretionary authority by the County Commission to the county attorney to settle cases, and this is at odds with Florida law that does not permit a government board to delegate its discretionary powers to administrative officials. At the very least such a delegation avoids the scrutiny inherent in the Sunshine Law, and thus makes a pronouncement of exceptional importance worthy of consideration en banc.

13, Pursuant to Rule 9.331, we, the undersigned counsel, express a belief, based upon our reasoned and studied professional judgment as set forth in the preceding paragraphs, that the panel decision is of exceptional importance and should be reconsidered en banc.

/s/ Robert L. Donald
Robert L. Donald

/s/ William M Powell
William M. Powell

WHEREFORE, the Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully ask this Court to grant a rehearing en banc.

REHEARING

The Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully suggest that the majority opinion overlooks the following legal and factual issues:

A. The constitutional, judicial nature of attorneys' fees in eminent-domain cases.

1. A landowner whose property is involuntarily taken in an eminent-domain suit is entitled to a reasonable attorneys' fee as part of his constitutional right to full compensation. The majority opinion overlooks the fact that constitutional issues are at stake, that Section 73.092 is inferior to the constitutional rights of the landowner and must therefore be interpreted in light of the constitutional considerations.

2. The majority opinion also overlooks the fact that the determination of the reasonable attorneys' fees due a landowner in an eminent-domain action is a ***judicial*** function and not a legislative one. In Daniels v. State Road Dept., 170 So.2D 846,851 (Fla. 1964) the Supreme 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."
>
> (Citations omitted.)

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 Dent. v. Wingfield, 10 1 So.2D 184,186 (1 st DCA 1958). The legislature may state a policy concerning the payment of full compensation, and the courts will honor it if this can be constitutionally done. Daniels v. State Road

Dept., supra at 853. it is for the courts to decide what "full compensation" is, and the legislature cannot usurp this function. So the interpretation of a statute pertaining to "full compensation" is fraught with considerations over-and-above the literal language of the statute.

3. The majority opinion, it is respectfully submitted, has overlooked the fact that the issue is not only what the statute says, but whether, even assuming that it says what the majority opinion says it says, the statute is a valid exercise of legislative authority over a constitutional right that is to be determined by the judiciary. The need to consider this second question could have been avoided by holding that a good-faith estimate is an offer under Section 73.092; but having concluded to the contrary, it is incumbent upon the majority, it is respectfully submitted, to consider the ***constitutionality*** of its interpretation.

4. The majority's interpretation of the statute allows-indeed encourages-the following to happen: a condemnor could make no offer in a case until the jury is deliberating, and then finally offer what the property is worth. The landowner would thereby be deprived of attorneys' fees, even though he would plainly be entitled to such fees under existing judicial precedent. The majority opinion, it is respectfully submitted, has overlooked or misapprehended the constitutional implications of its holding.

5. Nor is it necessary to consult hypothetical to raise the constitutional issue. In the instant case the County made no "offer" as the majority defines the term before litigation was initiated. When litigation was initiated the County made a good-faith estimate of $69,000, The Landowners retained an attorney, and eight months later settled with the Landowners for $87,500. Construing Section 73.092 as this Court has done, the

Landowners will receive an attorneys' fee of only $1,551 for eight months of legal work involving a parcel of property worth $87,500. Is this a constitutional result? This Court never answers the question, and overlooks the fact that this is even a question.

6. The other cases pending before this Court make the point even plainer. In Lee County v. A&G Inv., 2nd DCA Case No. 96-0552 the County made no pre-litigation offer (as the majority has defined the term), and its offer made after litigation was accepted. So if the majority opinion in the instant case is applied to Lee County v. A&G Inv. as will likely be the case unless rehearing or rehearing en banc is granted, the landowner will get *zero* attorneys' fees! So even though no pre-litigation offer was made, and the landowner rightfully hired an attorney, and that attorney negotiated a settlement with the County, the landowner will get no attorneys' fees. Is this a constitutional result?

7. This Court can avoid the constitutional issue by interpreting the good-faith estimate as an "offer" under Section 73.092. In Vildibill v. Johnson, 492 So.2d 1047,1050 (Fla. 1986) the Supreme 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." It is respectfully suggested that the majority has overlooked the constitutional issue, and rehearing should therefore be granted to consider the constitutional ramifications of how the statute should be interpreted,

B. The Black's definition of "offer" cited by the majority does not support the majority's interpretation of Section 73.092.

8. The majority opinion 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. 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, Black's definition of offer is practically the same as that found in a general dictionary.[2]

9. 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. 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. SRD v. Abel Inv. Co., 165 So.2D 832 (Fla.2d DCA 1964). If the good-faith estimate is really a good-faith estimate, then it is indeed the condemnor'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 majority has overlooked this fact.

C. 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.

10. The majority opinion quotes from Jacksonville Expressway Auth. v. Bennett, 158 So.2D 82 1 (Fla. 1 st DCA 1963) in support of its conclusion that good-faith estimate "has

[2]In the two other pending cases the Landowners utilized the definition found in American Heritage Dictionary (1995 elect. ed,), which defines the term essentially the same as Black's.

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 majority opinion overlooks the expressed rationale of Tacksonville Exnresswav, 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 court held that the condemnor 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. The condemnor has no corresponding "right" not to have its good-faith estimate used at a fee hearing, and the majority opinion has misapprehended Tacksonville Exnresswav in this respect.

11. 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 court 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 condemnor would be estopped to urge otherwise." Of course the good-faith estimate is also the condemnor'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 at the very least that at a fee hearing on the condemnor'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 majority has overlooked this point.

D. The County Commission did not (and could not) "specifically authorize" the county attorney "to settle the cases."

12. The majority opinion states in its penultimate paragraph that the County Commission "specifically authorized" the county attorney "to settle the cases." This statement, it is respectfully submitted, is factually inaccurate. The County Commission authorized the county attorney "to acquire needed property without filing condemnation actions." The County Commission did not authorize the county attorney to settle pending

condemnation actions, and certainly did not "specifically authorize" such action as the majority states in its opinion.

13. If the County Commission had attempted to grant the county attorney discretion to settle pending lawsuits without board approval, such delegation would have been invalid. In Fla.Atty.Gen.Op. 079-198 the Attorney General specifically opined that a county commission may not delegate authority to settle lawsuits to administrative officials. This is in keeping with the general rule that "the governing body of a county may not delegate its powers involving the exercise of judgment and discretion." Fla.Atty.Gen.Op. 078-95. See also Annot., "Powers of City, Town or County or their Officials to Compromise a Claim," 15 ALR2d 1359 (195 1); Fruchtl v. Folev, 84 So.2D 906,908 (Fla. 1956); 56 Am.Jur.2d Municipal Corp. § 812 (1971).

14. The issue of whether an administrative official can be delegated the authority to settle a lawsuit rarely arises, since the consummation of the settlement removes the issue. But here there was no consummation of the alleged offer contained in the assistant county attorney's letter of 19 April 1995. So the question, under the majority's holding, is whether that was a "binding" offer upon the County that would also be a binding offer under Section 73.092. It was not, as the foregoing authorities show. It is respectfully submitted that the majority has overlooked or misapprehended this point.

E. The majority opinion has misapplied the Sunshine Law.

15. The attempted delegation of power to the county attorney is also invalid for another, related reason. When a government board delegates its collegial power to an administrative official, it removes the formulation of that decision fi-om the public scrutiny

mandated by the Sunshine Law. The majority opinion 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 commissioners that have the power to contract, i.e. the power to extend binding offers and settle lawsuits in a binding manner, not the county attorney.

16. A case that directly deals with this concept is Broward County v. Conner, 660 So.2d 288 (Fla.4th DCA 1995). There the county brought an eminent domain action to acquire the landowner's property, The county attorney and landowner settled the case while the litigation was pending. The trial court entered an order enforcing the settlement, and the county appealed. The fourth district reversed "because enforcement of the agreement would violate the Statute of Frauds and the Government in the Sunshine Law." Judge Klein quoted Section 286.011(1) and said that if the county had entered into a contract with the landowner it would have had to do so at a noticed public meeting, and "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." 660 So.2d at 290. In the instant case there was no approval of the "contract", i.e., the offer made by the assistant county attorney. The attempt to delegate discretionary purchasing power to a county attorney certainly cannot be construed as binding approval of the contractual terms of an offer that had not yet even been formulated. So the purported settlement offer tendered by the assistant county attorney has suborned the intent of the Sunshine Law that the approval of contract terms be made in the Sunshine. The majority,

it is respectfully submitted, has overlooked or misapprehended the broad scope of the Sunshine Law.

F. The majority opinion has misapprehended the concept of "standing" under the Sunshine Law.

17. The majority opinion also states in its penultimate paragraph that the Appellee/Landowners lack "standing" to raise the Sunshine Law issue. In Jamlynn Inv. v. San Marco Residences, 544 So.2D 1080,1082 (Fla.2nd DCA 1989) this 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 Appellee/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 issue. 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. Telem v. City of Tampa, 426 So.2D 1084,1088 (Fla.2nd DCA 1983). Conversely, if the Appellee/Landowners do not have standing, who would? It is difficult to fashion a method by which a newspaper could challenge the validity of the delegation of authority under the Sunshine Law if the party directly affected by the action cannot. It is respectfully submitted that the majority opinion has overlooked this point.

18. The majority opinion bases its conclusion that the Appellee/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." It is difficult to see the connection between the jurisdictional concept of standing and the

seemingly unrelated issue of when the governmental action is questioned, The attorneys' fees hearing occurred within months of the supposed offer made in the letter of 19 April 1995. There could be no statute of limitations problem, and none is alleged. 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- v. Pigeon Kev Hist. Park, 647 So.2D 857 (Fla.3rd DCA 1994); Palm Beach v. Gradison, 296 So.2D 4'73 (Fla. 1974). So it would appear that there would be no limitation whatsoever upon when such fundamental violations could be attacked. But whether this is so or not, certainly the Appellee/Landowners did not tarry in the instant case. 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 violation 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. It is respectfully submitted that the majority has overlooked or misapprehended this point.

WHEREFORE, the Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully ask this Court to grant a rehearing for the reasons set forth above.

CLARIFICATION

The Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully ask this Court to clarify the majority decision in the following respects:

1. The majority opinion does not consider the constitutional issues underlying the interpretation of this statute, and has not considered that its interpretation of the statute

could unconstitutionally deprive the Appellee/Landowners of the full compensation to which they are entitled under the Florida Constitution.

2. It has been suggested above that this Court should grant a rehearing to consider the constitutional issues. As an alternative, if rehearing is not granted, it is respectfully submitted that this Court should clarify its decision to state that the issue of whether the application of the statute as interpreted by the majority will, under the circumstances of this case, result in the Appellee/Landowners receiving less than a reasonable attorneys' fee and thus less than full compensation as mandated by the Constitution.

WHEREFORE, the Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully ask this Court to clarify its decision to specify that the constitutional issue can be considered by the trial court upon remand.

CERTIFICATION

The Appellees, PETER F. PTERPONT and MARY J. PIERPONT, respectfully ask this Court to certify its decision to the Supreme Court of Florida for the following reasons:

1. The fact that panel decision was split 2-1 on an issue of first impression in this district certainly militates in favor of ultimate resolution by a higher arbiter.

2. Additionally, both the majority opinion and the dissent note that the fifth district has applied a contrary interpretation of Section 73.092.[3] This is an additional reason to certify the issue to the Supreme Court of Florida.

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[3]In addition to the case cited by the majority and dissent, there is a another fifth district case holding the same thing. Seminole County v. Delco Oil, 676 So.2D 451 (Fla.5th DCA 1996).

3. This request for certification is in the alternative to the Appellee/Landowners' request for en banc rehearing, The reasons cited above in the Motion for Rehearing en Banc as to why the majority opinion is of "exceptional importance" likewise support the conclusion that the panel decision is of "great public importance" worthy of the Supreme Court's ultimate resolution: the decision will effect directly or indirectly the great majority of condemnation actions brought by local governments in this state, will dictate how, when and if offers are made in eminent-domain cases, and the decision will impact on fundamental, constitutional rights. It is respectfully submitted that these are just the type of issues that should be decided by the Supreme Court of Florida upon certification from the district courts.

4. As to the first issue addressed in the majority opinion, the Appellee/Landowners respectfully suggest that the following certification should be made:

> CAN THE CONDEMNING AUTHORITY'S GOOD-FAITH ESTIMATE OF VALUE BE CONSIDERED AN "OFFER" FOR THE CALCULATION OF ATTORNEYS' FEES UNDER SECTION 73.092 OF THE FLORIDA STATUTES?

5. As to the second issue addressed in the majority opinion, the Appellee/Landowners respectfully suggest that the following certification should be made:

> IS THERE A STANDING REQUIREMENT THAT WOULD PROHIBIT A PARTY FROM CONTESTING AN ALLEGED SUNSHINE-LAW VIOLATION DERIVING FROM AN ATTEMPTED DELEGATION OF DISCRETIONARY POWERS TO AN ADMINISTRATIVE OFFICIAL?

WHEREFORE, the Appellees, PETER F. PIERPONT and MARY J. PIERPONT, respectfully ask this Court to certify its decision to the Supreme Court of Florida.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellees' Motion for Rehearing en Banc, Rehearing, Clarification or Certification has been furnished by hand delivery to John J. Renner, Assistant County Attorney, of THE LEE COUNTY ATTORNEY'S OFFICE, PO. Box 398, Fort Myers, FL 33902-0398, this 10th day of February, 1997.

Respectfully submitted,

/s/ Robert L. Donald

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IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 13, 1997

RECEIVED
MAR 17 1997

LEE COUNTY, a political subdivision, etc.,

Appellant(s),

v.

PETER F. PIERPONT and MARY J. PIERPONT,

Appellee(s).

Case No. 95-04657

BY ORDER OF THE COURT:

Counsel for appellee having filed a motion for rehearing en banc, rehearing, clarification or certification in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: John J. Renner, Esq.
William M. Powell, Esq.
Robert L. Donald, Esq.

/PM

DISTRICT COURT OF APPEAL SECOND DISTRICT STATE OF FLORIDA

LEE COUNTY, a political subdivision of the State of Florida, Appellant,
v.
A & G INVESTMENTS, a Florida general partnership, Appellee.

No. **96-00552.**

District Court of Appeal of Florida, Second District.

Feb. 26, 1997.

Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge.

James G. Yaeger, Lee County Attorney, Fort Myers, for Appellant.

Stephen E. Dalton of Pavese, Garner, **Haverfield,** Dalton, Harrison **& Jenson,** Fort Myers, and Robert L. Donald of Law Office of Robert L. Donald, Fort Myers, for Appellee.

PER CURIAM.

***1** The issue in this case has recently been decided in favor of the **appellant.** See Lee County v. Pierpont, 22 **Fla.** L. Weekly D274, --- **So.2d** ---- (Fla. 2d DCA Jan. 24, 1997). We therefore reverse and remand for proceedings consistent with that opinion.

Reversed and remanded.

THRBADGILL, C.J., CAMPBELL and LAZZARA, JJ., concur.

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

v.

BARNETT BANKS, INC., Appellee.

No. 96-01360.

District Court of Appeal of Florida, Second District.

March. 12, 1997.

The Circuit Court, Lee County, R. Wallace Pack, J., awarded bank attorney fees and expert witness fee in eminent domain action. County appealed. The District Court of Appeal, Blue, J., held that bank was not entitled to expert witness fee award.

Reversed and remanded.

[1] EMINENT DOMAIN ⚿265(3)
148k265(3)
Bank was not entitled to expert witness fee award in eminent domain action when witness' testimony consisted only of his opinion as to legal interpretation of statute, which was not proper subject for expert testimony.

[2] EVIDENCE ⚿506
157k506
Expert testimony concerning question of law is not admissible.

[3] EVIDENCE ⚿506
157k506
Statutory construction is legal determination to be made by trial judge, with assistance of counsels' legal arguments, not by way of expert opinion.

James G. Yaeger, Lee County Attorney, and John J. **Renner,** Assistant County Attorney, Fort Myers, for Appellant.

Michael J. Ciccarone of Goldberg, Goldstein & Buckley, P.A., Fort Myers, and Robert L. Donald of Law Office of R.L. Donald, Fort Myers, for Appellee.

BLUE, Judge.

***1 Lee County** appeals **the** award of attorney's fees **and costs in this** eminent domain case. The primary issue in this case was recently decided in favor of the appellant. See Lee County v. Pierpont, 22 Fla. L. Weekly D274, --- **So.2d** ---- **(Fla.** 2d DCA Jan. 24, 1997). Accordingly, we reverse.

[1][2][3] We also reverse **the** $400 expert witness fee award. Bamett Bank called Mr. Hume to testify as an expert witness on the question of attorney's fees. Mr. Hume's testimony consisted only of his opinion as to the legal interpretation of section 73.092, Florida Statutes (Supp. 1994). We reverse the award, not because Mr. Hume was wrong, see Pierpont, but because his testimony was not a proper subject for expert testimony. Expert testimony is not admissible concerning a question of law. Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of "expert opinion." See Edward J. Seibert v. **Bayport** Beach and Tennis Club **Ass'n,** Inc., 573 **So.2d** 889 (Fla. 2d DCA **1990),** review denied, 583 **So.2d** 1034 (Fla.1991); Devin v. City of Hollywood, 351 **So.2d** 1022 (Fla. **4th** DCA 1976).

Accordingly, we reverse the award of attorney's fees and the expert **witness** fee, and remand for an award of attorney's fees in accordance with Pierpont.

ALTENBERND, A.C.J., and FULMER, J., concur.

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