015

FILED
SID J. WHITE
MAY 20 1997
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioners,

vs.

Supreme Court Case No. 90,357

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

Respondent.
_______________________________/

RESPONDENT LEE COUNTY'S ANSWER BRIEF ON JURISDICTION

JAMES G. YAEGER
LEE COUNTY ATTORNEY
2115 Second Street
Post Office Box 398
Fort Myers, Florida 33902
(941) 335-2236

By: John J. Renner
Assistant County Attorney
Florida Bar No. 373435

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases:

Page

Armstrona v. City of Tampa, 106 So.2d 407 (Fla. 1958) 9

Broward Countv v. Conner, 660 So.2d, 288 (Fla. 4th DCA 1995)
rev. denied 669 So.2d 250 8

Crialer v. State, Dept. of Trans., 535 So.2d 329 (Fla. 1 st DCA 1988) 7

Dept. of Aar. & Consumer Serv. v. Bonanno, 568 So.2d 24 (Fla. 1990) 7

Dykman v. State, 294 So.2d 633 (Fla. 1973) . . . . , ... 9

In re Estate of Platt, 586 So.2d 328 (Fla. 1991). 6, 7

N & L Auto Parts Company v. Doman, 117 So.2d 410 (Fla. 1960) 5

Niemann v. Niemann, 312 So.2d 733 (Fla. 1975) 5

Ogle v. Pepin, 273 So.2d 391 (Fla. 1973) . . . . , ... 9

Pinellas County v. Nelson, 362 So.2d 279 (Fla. 1978) 3, 4

Rojas v. State, 288 So.2d 234, 236 (Fla. 1973) cert. denied 419 US 851 9

Seminole County v. Butler, 676 So.2d 451 (Fla. 5th DCA 1996)
rev. denied 686 So.2d 581 . . . . . . , ... 6

Seminole Countv v. Clayton, 665 So.2d 363 (Fla. 5th DCA 1995) . . . . , . , ... , . , . 6

Seminole County v. Coral Gables Federal Savinas and Loan Association,
22 F.L.W. 994 (Fla. 5th DCA April 18, 1997) 5

Seminole County v. Cumberland Farms. Inc., 688 So.2d 372 (Fla. 5th DCA 1997) . . . 6

Seminole County v Delco Oil. Inc., 669 So.2d 1162 (Fla. 5th DCA 1996)
rev. denied 682 So.2d 1100 . . . . , ... , ... 6

Seminole County v. Rollinawood Apts. Ltd., 678 So.2d 370 (Fla. 5th DCA 1996)
rev. denied 686 So.2d 581 . . . , ... 6

Standard Guar. Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) 6, 7

Williams v. Duggan, 153 So.2d 726 (Fla. 1963) 5

Statutes:

Section73.092, Fla. Stat. (Supp. 1992) 2

Section 73.092, Fla. Stat. (Supp. 1993) 6

Section73.092, Fla. Stat.(Supp. 1994) 1, 2, 5, 7, 8

Section 286.011, Fla. Stat. (1995) 4

Others:

Article V, Section 3(b)(3), Florida Constitution (1968) 3, 4, 8, 9

Article I, Section 24, Florida Constitution (1968) 4

Fla. R. App. P. 9.030(a)(2)(A)(ii) 8, 9

STATEMENT OF THE CASE AND FACTS[1]

On November 2, 1994, the Board of County Commissioners adopted a Resolution of Necessity directing the County Attorney to initiate eminent domain proceedings to acquire the necessary right-of-way for construction of the Midpoint Bridge Project. On December 7, 1994, at a duly noticed public meeting, the County Commission gave specific authority to the County Attorney to make written offers not to exceed twenty (20%) percent over the highest appraised value to acquire the properties needed for the project. The eminent domain proceeding to acquire the lot owned by PETER F. and MARY J. PIERPONT was initiated January 5, 1995. With the Petition in Eminent Domain, LEE COUNTY filed a Declaration of Taking and Estimate of Value. The good faith estimate of value for the PIERPONT'S parcel was $69,000.00. An Order of Taking was entered and the good faith estimate was deposited in the Court Registry.

Attorney William M. Powell appeared in this case on behalf of the PIERPONTS through the filing of an Answer April 3, 1995. On April 18, 1995, LEE COUNTY made a written offer of $82,800.00 to the PIERPONTS. The issue of full compensation was settled for $87,500.00.

Attorney Powell moved to tax attorney fees against LEE COUNTY pursuant to Section 73.092, Fla. Stat. (Supp. 1994). Under this statute, attorney fees are to be awarded solely based upon a percentage of the "benefit" achieved for the client. In this case, the percentage was thirty-three (33%) percent. "Benefit" is defined in the statute as the difference between the final judgment or settlement and the last written offer made by

---

[1]The facts stated herein are restated from the decision of the Second District Court of Appeal.

the condemning authority before the defendant hires an attorney or, if no written offer is made before the defendant hires an attorney, the first written offer after the attorney is hired.

The trial court ruled that the "first written offer" under Section 73.092, Fla. Stat. (Supp. 1994) was not the written offer of $82,800.00 from LEE COUNTY to the PIERPONTS, but the good faith estimate of value included in the eminent domain pleadings. Accordingly, the trial court entered an Order Taxing Attorney Fees against LEE COUNTY in the amount of $6,106.00 - thirty-three (33%) percent of the difference between the good faith estimate of $69,000.00 and settlement of $87,500.00.

The principal issue for determination by the Second District Court of Appeal was the application of Section 73.092, Fla. Stat. (Supp. 1994) to the facts of this case to determine the correct amount of attorney's fees taxable against LEE COUNTY. The Second District concluded that the correct application of Section 73.092, Fla. Stat. (Supp. 1992) requires a determination of "benefit" based upon the written offer and the Final Judgment and it was not the legislature's intent to equate the good faith estimate of value with the written offer contemplated in Section 73.092. The Second District also rejected PIERPONT'S argument that the written offer was invalid as a violation of the Sunshine Law.

The Second District awarded PIERPONT'S appellate attorney fees and denied PIERPONT'S motions for rehearing, rehearing en banc, clarification and certification.

SUMMARY OF ARGUMENT

The decision of the Second District applied Section 73.092, Fla. Stat. (Supp. 1994) to the facts of this case and merely announced as a rule of law that the statute shall be

applied according to the plain and unambiguous language used by the legislature. The Second District also rejected Petitioners' argument that the written offer authorized by the county commission at a duly held public meeting was violative of the Sunshine Law. The decision did not announce a rule of law in conflict with a decision of this court or another district court. Nor did the decision construe any constitutional provisions. Finally, the Second District's decision did not expressly affect a class of constitutional or state officers.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

Petitioner argues that the Court has jurisdiction to review the Second District decision on the basis it "expressly affects a class of constitutional or state officers" since it directly affects the "powers, duties, validity, formation, termination or regulation" of county commissions. Petitioner cites Pinellas Countv v. Nelson, 362 So.2d 279 (Fla. 1978) asserting that this Court "held that county commissions are 'constitutional officers' . ." within the meaning of Article V, Section 3(b)(3), Florida Constitution (1968).

Contrary to Petitioners' assertion, this Court did not hold that county commissions were "constitutional officers" within the meaning of Article V, Section 3(b)(3) in Pinellas County v. Nelson, supra. That case involved a dispute between the Pinellas County Commission and the Supervisor of Elections of Pinellas County over the latter's budget request. This Court took jurisdiction because the decision of the District Court would affect a class of constitutional officers. LEE COUNTY submits that the class of constitution officers affected was Supervisors of Elections, not county commissions as claimed by

Petitioners, which served as the basis for jurisdiction in Nelson, supra. The rationale for this reading of Nelson, supra. being a county commission is a collegial body. While individual county commissioners may be "constitutional officers", the county commission is a collegial body, not an "officer,"

Likewise, Petitioners' arguments that the Second District's decision deals with the full compensation clause and the Sunshine Law and, therefore, will affect "constitutional and state officers" is erroneous for the same reason.

Both Article I, Section 24 and Section 286.01 1, Fla. Stat. (1995) apply to meetings of public collegial bodies. By definition, they do not apply to individual constitutional or state officers. No power or duty of any constitutional or state officer would be directly affected by the Second District's decision relating to Petitioners' Sunshine Law argument.

The power of eminent domain is vested in the state and delegated by the state legislature to numerous governmental bodies. The power of eminent domain is not vested in, nor delegated to, individual constitutional or state officers. Thus, while the Second District's decision may apply to the determination of attorney fees governmental bodies may be required to pay, it will not affect the powers or duties of constitutional or state officers.

THE DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF A DISTRICT COURT OF APPEAL OR THIS COURT.

Pursuant to Article V, Section 3(b)(3), this court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law.

This express and direct conflict on the same question of law requires an irreconcilable conflict of decisions, Williams v. Duaaan, 153 So.2d 726 (Fla. 1963). As noted in Niemann v. Niemann, 312 So.2d 733 (Fla. 1975), it is conflict of decisions rather than conflict in opinions which provides the basis for jurisdiction. The inquiry in this case is whether the Second District's decision announced a principle of law in conflict with a principle of law announced by the Fifth District or this Court. N & L Auto Parts Company v. Doman, 117 So.2d 410 (Fla. 1960).

1. The decisions of the Fifth District Court of Appeal do not expressly and directly conflict with the decision of the Second District Court of Appeal.

Petitioners cite three (3) cases from the Fifth District and state to this Court that the Fifth District "explicitly" held that the good faith estimate of value is a written offer under Section 73.092 Fla. Stat. (Supp. 1994). In fact, there are five (5) recent cases from the Fifth District regarding eminent domain attorney's fees and in none of these cases has the Fifth District held that the good faith estimate of value is a "written offer" for purposes of determining "benefit" pursuant to Section 73.092 Fla. Stat. (Supp. 1994). On the contrary, the most recent Fifth District decision, Seminole County v. Coral Gables Federal Savings and Loan Association, 22 F.L.W. 994 (Fla. 5th DCA April 18, 1997), held Section 73.092 Fla. Stat. (Supp. 1994) constitutional and upheld an award of attorney fees based upon thirty-three (33%) percent of the "benefit" which was determined as the difference between the written offer and the amount of the settlement. This is entirely consistent with the decision of the Second District which Petitioners seek to have reviewed on the basis on conflict.

In Seminole County v. Clayton, 665 So.2d 363 (Fla. 5th DCA 1995), Seminole County v. Delco Oil. Inc., 669 So.2d 1162 (Fla. 5th DCA 1996), Seminole County v. Butler, 676 So.2d 451 (Fla. 5th DCA 1996), Seminole County v. Rollinawood Apartments Ltd., 678 So.2d 370 (Fla. 5th DCA 1996) and Seminole County v. Cumberland Farms. Inc., 688 So.2d 372 (Fla. 5th DCA 1997) the Fifth District reversed awards of attorney fees on the basis the trial court failed to calculate the fee in accordance with Section 73.092 Fla. Stat. (1993). In each of these cases the Fifth District spoke about the methodology employed in the trial court and how percentages of "benefit" were added to the calculations. In not one of these cases did the Fifth District announce as a principle of law that the good faith estimate of value was a "written offer" under 73.092. The principle of law announced in each case was the trial court's methodology in calculating the fee was not in compliance with Section 73.092. In each case, the trial court's award of fees calculated using "benefit" was reversed. Since the trial court's methodology was erroneous and reversed for noncompliance with Section 73.092 Fla. Stat. (1993) there was no need for the Fifth District to concern itself with whether "benefit" is to be determined with reference to the written offer or good faith estimate of value. If it was improper to employ "benefit" to calculate the fee as the trial court did, how "benefit" was determined was irrelevant in the context of these cases.

2. The decision of the Second District does not conflict with this Court's decisions in Quanstrom and Platt.

Petitioners argue the Second Districts decision directly and expressly conflicts with this Courts decisions in Standard Guar. Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990)

and In re Estate of Platt, 586 So.2d 328 (Fla. 1991). According to Petitioners, Quanstrom and Platt held that attorney's fees are guaranteed in eminent domain cases regardless of the lack of merit to the landowner's claims or outcome of the case. That is not the rule of law announced in Quanstrom or Platt. Moreover, what Petitioners are trying to do is challenge the constitutionality of Section 73.092 Fla. Stat. (Supp. 1994) when they did not raise this issue before either the trial court or the Second District. Petitioners argue that Quanstrom and Platt assure an award of attorney's fees in eminent domain cases as a matter of full compensation, therefore, if the benefit is zero and Section 73.092 Fla. Stat. (Supp. 1994) requires a fee award of $0 based upon a percentage of the benefit, Section 73.092 is unconstitutional. This argument is flawed in two regards. First, Quanstrom and Platt did not hold that full compensation requires an award of attorney fees in every eminent domain case. Secondly, the full compensation clause guarantees full compensation and nothing more. Thus, if a condemnor offered full compensation to the landowner but the landowner refuses and unsuccessfully pursues pecuniary gain in excess of full compensation, the public is not obligated under full compensation to pay the landowner's attorney fees. Crigler v. State, Dept. of Trans., 535 So.2d 329 (Fla. 1st DCA 1988) is not in conflict with the Second District's decision and refutes Petitioner's argument that full compensation requires payment of attorneys' fees in all eminent domain cases.

Likewise, Petitioners citation to Dept. of Agr. & Consumer Serv. v. Bonanno, 568 So.2d 24 (Fla. 1990) to support the argument that Section 73.092 Fla. Stat. (Supp. 1994) is an unconstitutional usurpation of a judicial function is inappropriate since Petitioners never challenged the constitutionality of Section 73.092 before the trial court or the Second

District. On the contrary, the fee award to Petitioners which they sought to protect before the Second District was made pursuant to Section 73.092 Fla. Stat. (Supp. 1994).

Petitioners' attempt to establish conflict between the Second District's decision and Broward County v. Conner, 660 So.2d, 288 (Fla. 4th DCA 1995) must also fail. In Conner, a landowner sought to convert settlement negotiations with Broward County's lawyers into a contract binding upon Broward County and enforceable by specific performance. After holding the agreement was not enforceable because it violates the statute of frauds, the Fourth District noted that such an agreement would violate the Sunshine Law because it was entered into "in the absence of proper commission approval" Conner, supra. at 290. The Court noted that the trial court determined the county entered into a contract by virtue of the actions of its attorneys without formal action by the county commission at a public meeting. The Second District's decision is consistent with the Conner decision and not in conflict. In our case, as the Second District noted, the county commission, at public meetings, specifically authorized the County Attorney to acquire this property and to make written offers not to exceed twenty (20%) percent of the highest appraised value. Unlike Conner, this case did not involve any contracts or offers not authorized by the county commission at a duly held public meeting.

THE DECISION OF THE SECOND DISTRICT DID NOT CONSTRUE A PROVISION OF THE FLORIDA CONSTITUTION.

In order for Petitioner to properly invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Florida Constitution, and Rule 9.030(a)(2)(A)(ii) of the Florida Rules of Appellate Procedure, they must establish that the decision of the

Second District Court of Appeal expressly construed a provision of the State or Federal Constitution. This they did not and cannot do, because the District Court did not expressly construe any constitutional provision.

Both Article V, Section 3(b)(3), Fla. Const. (1968) and Fla. R. App. P. 9.030(a)(2)(A)(ii) require that the District Court decision "expressly construe" a constitutional provision. Even prior to the amendment of Article V and the adoption of Fla. R. App. P. 9.030(a)(2)(A)(ii) in 1980, the notion that Supreme Court jurisdiction may be based upon an "inherent" construction of a constitutional provision was rejected. Oale v. Pepin, 273 So.2d 391 (Fla. 1973); Dvkman v. State, 294 So.2d 633 (Fla. 1973). As this Court stated in Armstrona v. Citv of Tampa, 106 So.2d 407 (Fla. 1958) and again in Olge, supra at 392, a decision does not construe a constitutional provision unless it undertakes:

> ". . . to explain, define, or otherwise eliminate existing doubts arising from the language of terms of the constitutional provision."

"Construction" of the Constitution contemplates an interpretation of the meaning of the language of a constitutional provision and there is no express construction of a constitutional provision if the lower court merely applied a recognized, clear-cut provision of the Constitution to the facts. Armstronq, supra.

> "Jurisdiction does not arise by virtue of the applicability of plain and unambiguous constitutional provisions to a given state of facts."

Armstronq, supra at 410. This Court emphatically pointed out this distinction again in Roias v. State, 288 So.2d 234, 236 (Fla. 1973):

> "Applying is not synonymous with construing; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is." (Emphasis in original.)

A review of the Second District Court of Appeal's opinion shows that the court did not expressly construe any constitutional provision. Nowhere in the opinion does the court undertake to explain, define, or interpret any language or terms of the State Constitution. A cursory review of the decision reveals that there was no interpretation of the meaning of any constitutional provision.

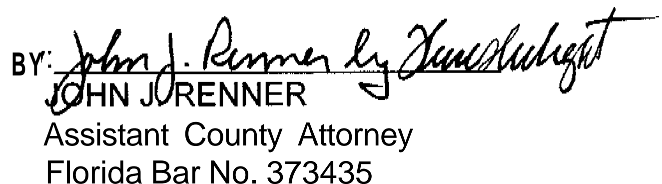
CONCLUSION

Petitioner's attempt to invoke this Court's discretionary jurisdiction under various grounds must be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief has been furnished by U.S. Mail upon WILLIAM M. POWELL, ESQ., Gulfcoast Professional Center, 2002 Del Prado Boulevard, Cape Coral, Florida 33990 and ROBERT L. DONALD, 1375 Jackson Street, Suite 402, Fort Myers, Florida 33901-2841 this 19th day of May, 1997.

JAMES G. YAEGER
LEE COUNTY ATTORNEY
2115 Second Street
Post Office Box 398
Fort Myers, Florida 33902
(941) **335-2236**



BY: JOHN J. RENNER
Assistant County Attorney
Florida Bar No. 373435