ORIGINAL

11-5-97

IN THE SUPREME COURT OF FLORIDA

PETER F. PIERPONT etc. et al.,

Petitioners,

V.

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

Respondent.

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

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

PETITIONERS" REPLY BRIEF ON THE MERITS

William M. Powell ✓ 2
Fla. Bar No. 343994
Co-Counsel for Petitioners Pierpont
WILLIAM M. POWELL, P.A.
2002 Del Prado Blvd., Suite 105
Cape Coral, FL 33990
(941) 458-0220

Robert L. Donald ✓ 1
Fla. Bar No. 218219
Co-Counsel for all Petitioners
LAW OFFICE OF ROBERT L. DONALD
1375 Jackson Street, Suite 402
Fort Myers, FL 33901-2841
(941) 337-1999

Stephen E. Dalton ✓ 3
Fla. Bar No. 107663
Co-Counsel for Petitioner A & G Inv.
PAVESE, GARNER, HAVERFIELD,
DALTON, HARRISON &JENSEN
1833 Hendry Street
P.O. Drawer 1507
Fort Myers, FL 33902-1507
(941) 334-2 195

Michael J. Ciccarone ✓ 4
Fla. Bar No. 437646
Co-Counsel for Petitioner Barnett Banks
GOLDBERG, GOLDSTEIN & BUCKLEY, P.A.
15 15 Broadway
P.O. Drawer 2366
Fort Myers, FL 33902-2366
(941) 334-1146

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INTRODUCTION

The same form of appellation used in the Petitioners' Initial Brief on Jurisdiction will be used herein. Similarly, the three Records on Appeal will be referred to in the same manner as in the Initial Brief.

REPLY ARGUMENT

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

A. Attorney's fees in eminent-domain cases have a unique, constitutional stature.

It was pointed out in the Initial Brief that the context of a statute is essential to its interpretation. The County does not disagree with this precept in its Answer Brief; rather, it simply ignores this basic point. Similarly, it was pointed out that the full-compensation clause of the Florida Constitution requires the payment of the attorney's fees incurred by a landowner in defending the action initiated by the condemner, and that the separation-of powers doctrine is a second constitutional angle to the interpretation of the statute. Cases from this Court and others were cited in support of both of these constitutional propositions. None of these cases are discussed or even mentioned in the County's Answer Brief. In fact, the very concept that attorney's fees in an eminent-domain action are constitutionally compelled is completely ignored by the County, just as it was by the Piersont majority.

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

The County does not mention nor dispute the rule of construction holding that eminent-domain statutes must be construed in favor of a landowner whose property is being involuntarily taken. Similarly, the County does not mention nor dispute what was termed in the Initial Brief as "the most important rule" for the instant case, i.e., that a statute that can be construed in several ways should be construed in the manner that

preserves its constitutionality. Often the weakness of a party's position is shown more by what he declines to discuss rather than what he does discuss. There is much in this case that the County refuses to discuss.

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

The County contends on page 11 of its Answer Brief that the Landowners are asking this Court to "judicially amend" the statute. This contention is false for two reasons. First, it is a judicial function, ***not*** a legislative one, to determine attorney's fees in an eminent-domain action. So rather than the judiciary stepping on the toes of the legislature, just the opposite is more nearly the case. The real issue is whether this Court's toes are smarting from legislative encroachment, and not vice versa.

The second fallacy in the County's argument is that it appears to be the County-not. the Landowners-who is trying to amend the statute by judicial interpretation. The County speaks repeatedly in its Answer Brief about a "binding" offer under the statute. But the modifier "binding" is not found anywhere in the statute! It is certainly true that the statute is in need of repair in a number of respects; but the Landowners' construction of the statute makes the best out of a bad situation, preserves the statute's constitutionality, and does less offense to the literal words of the statute than does the County's interpretation. Of course the problem with Section 73.092 is that it does not define what an "offer" is in calculating the benefits upon which a fee is to be awarded. Though the County's argument presupposes that the definition of "offer" favors its

position, it never states where this definition comes from. It says there is a "legal meaning" of the term, but never states where this definition can be found. (Ans.Brf., p. 14) It says it's "hornbook law," but then cites no hornbook or any other authority.

So the County assumes a strict, contractual definition of the term "offer" without any legal support for such a definition in the context of this particular statute.' This statute does not regulate contracts or refer to the law of contracts. It was pointed out in the Landowners' Initial Brief that the dictionary definition of the term is basically "an expression of what someone is willing to pay," or "to present or put forward for consideration." The County does not discuss the general, dictionary definition of the term, but instead seems to concede that this definition, which it calls the "loose, popular meaning," supports the Landowners' position. (Ans.Brf., p. 13)

Yet the County also advocates in another section of its Answer Brief that legislative intent is to be determined from "the plain language of the statute." (Ans.Brf., p. 12) A number of cases have held that the place from which to derive the meaning of "the plain language of the statute" is from the dictionary! In Hernando County v. PSC, 685 So.2D 48,52 (Fla. 1 st DCA 1996) the First District said, "The plain ordinary meaning of words [in a statute] **may be ascertained by reference to a dictionary."** (Emphasis in original.) The foundation for this rule is this Court's decisions in Green v. State, 604 So.2D 471,473 (Fla. 1992) and Gardner v. **Tohnson, 451** So.2D 477,478 (Fla. 1983). See also WFTV v.

'The County makes its assumption patent on page 18 of its Answer Brief where it states, "**[A]s a matter of contract** law, an opinion of value is not an offer." (Emphasis added.) But the statutes makes no reference to contract law, nor is the word ""offer" preceded by the modifier "'binding" as the County would have this Court read into the statute.

Wilken, 675 So.2D 674,677 (Fla. 4th DCA 1996); Hamilton v. State, 645 So.2D 555 (Fla. 2d DCA 1994). So uniting the County's own concepts yields a result contrary to its position. The general, dictionary definition of the term favors the Landowners' interpretation and preserves the constitutionality of the statute. Unless the County can show that somehow a strict, contractual definition of the term is required in the context of an eminent-domain action, and then show that this does not yield an unconstitutional result, the opinion of the Pierpont majority is in error.

The County says that it could not be legally compelled to settle the case on the basis of the good-faith estimate, hence its good-faith estimate is not a "binding" offer. But the statute says nothing about a "binding" offer. The County's argument implies into the statute a term that is peculiar to contract law, with no indication in the statute itself that such an implication was contemplated or appropriate.

It was pointed out in the Initial Brief that there are some five statutory definitions of "offer" in the Florida Statutes, and all of these definitions are consistent with the general, dictionary definition of the term that favors the trial court's interpretation of Section 73.092. The County responds by pointing out the obvious, that none of these statutes deal with eminent domain. That's certainly true, since Chapter 73 does not define the term. Hut it is also true that the County cannot point to any definition supporting its position. And the fact that the term is defined in five different places in the Florida Statutes in five different legal contexts in essentially the same rnanner as that advocated by the Landowners is strong indication that the common-sense definition is in keeping with the legislative concept of what. the term should mean.

It was pointed out in the Initial Brief that the statute does not state when a condemning authority has to make an offer, or even if it has to make an offer. Thus the condemner can control the whole process, and this creates logistical opportunities for a condemner to manipulate the process so as to deprive a landowner of his constitutional right to full compensation. The County responds that it is rarely to its benefit to settle cases at or near trial, and that condemning authorities can be trusted to act in good faith. This is not always so. Sec. e.g., Hartleb v. DOT, 677 So.2D 336,337 (Fla.4th DCA 1996)(Klein specially concurring); Killearn Proaerties. Inc. v. City of Tallahassee, 366 So.2D 172,181 (Fla.lst DCA 1979). The County has said nothing to dispel the possibility that a condemning authority will not make a formal, "binding" offer until trial in a contentious case, and then if it is losing the case in the eyes of the jury, make an offer at that point. The statute as interpreted by the Second District sanctions this method, thus seemingly making such a strategy legal, effective, and ethical.

D. Interpreting the good-faith-estimate amount as an "offer" renders the statute constitutional and is consonant with the statuto y language.

It was pointed out in the Initial Brief that treating the good-faith estimate as an offer under the statute has several positive public-policy ramifications, and not treating it as an offer has several negative ramifications. The County does not say much about the public-policy ramifications in its Answer Brief. The County does, however, confirm one of the main points made by the Landowners, i.e., that a good-faith estimate of value (which is supposed to be the condemner's "good faith" estimate of the full compensation

to which the landowner is entitled under the Constitution) is often a low-ball number that the condemning authority does not take seriously. The County says on page 18 of its Answer Brief that it is "presumptuous" of the Landowners to assume that good-faith estimates evince the amount the condemning authority would pay, since in each of these three cases the County actually offered more for the property after the condemnation action was initiated and the Landowners had hired counsel. If the good-faith estimate is not the number the County feels is the full compensation to which a landowner is entitled, then what is it? Isn't the County impugning the good faith of its "good faith" estimate?

The County notes at several points in its Answer Brief that the Landowners did not make offers of judgment under Section 73.032. The County does not develop any argument in this regard, but in another portion of its Answer Brief it quotes an offer-of-judgment case, Crigler v. DOT, 535 So.2D 329 (Fla. 1"' DCA 1988), so this avenue bears exploring. Section 73.032 allows a landowner to make an offer of judgment only if the offer- is less than $100,000, So an offer- of judgment could not have been made in two out of three of these cases. It is also hard to see what an offer-of-judgment has to do with the interpretation of Section 73.092. In Crigler, which dealt with an offer-of-judgment statute that no longer exists, the First District first acknowledged that "it is true that attorney's fees are part of the full compensation guaranteed by the constitution." 535 So.2D at 33 1. But then said that a landowner is entitled to only a reasonable attorney's fee, and attorney's fees incurred after an offer ofjudgment that meets or exceeds the ultimate verdict are not "reasonable". This is not the situation here. Could it be argued that a landowner's fees incurred in convincing the condemning authority to pay considerably

more than its good faith estimate are unreasonable? Of course not. So the logic of Crigler shows that here the fees in the instant cases were reasonably incurred, i.e., they resulted in the condemner paying more than it was initially prepared to pay, and thus were constitutionally compelled.

The offer-of-judgment comparison also emphasizes another fatal weakness in the Piernont majority's interpretation of Section 73.092. The offer-of-judgment statute sets up a fair procedure that both a landowner and condemner can use (at least in cases involving less than $1 00,000), and this procedure cannot be unfairly manipulated by either the landowner or condemner. But the Pierpont majority's interpretation of Section 73.092 allows the condemner to decide if and when it. will make an offer, and this unbridled discretion can be exercised to deny a landowner his reasonably-incurred attorney's fees. So the consideration of the offer-of-judgment statute only confirms the error of the Pierpont majority's interpretation of Section 73.092.

The County's only other venture into policy considerations is its contention on pages 16 and 17 that construing a good-faith estimate as an offer would make the good-faith estimate "binding" and thus screw up the statutory scheme governing good-faith estimates. This contention is faulty for several reasons. First, the acceptance of the Landowners' argument (and that of Judge Blue in his Piernont dissent) would not change the law pertaining to good-faith estimates directly or by implication. Rather, the acceptance of the Landowners' argument would actually put starch in the statutory scheme and put good faith in the "good faith" estimates. Second, the County is making the unsupported assumption that the statute requires that the offer be "binding" in the

strict contractual sense, and that to accept the Landowners' argument would make the good-faith estimate contractually binding. The word "binding" is not in the statute, and the Landowners certainly do not suggest that it should be inserted by judicial action.

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

In the Initial Brief four recent cases were cited in which the respective appellate courts held that a good-faith estimate was an offer in the calculation of attorney's fees under Section 73.092. The County in its Answer Brief has not discussed these cases, nor disputed that they do indeed support the Landowners' position. So the established fact is that the few decisions that have spoken to this issue, albeit indirectly, have agreed with the position of the Landowners and the Pierpont dissent. There are no decisions from other districts agreeing with the Pierpont rnajority.

The County says on page 22 of its Answer Brief that the Landowners' argument "has been previously rejected" by this Court in Schick v. Dent. of Ag. & Consumer Affairs, 599 SO.2D 641 (Fla. 1992), and by the Fifth District, in two other cases. Tellingly, the County does not discuss these cases, disclose their facts, nor quote from them. It is also surprising that. neither the Pieraont majority or dissent mentioned these cases, if indeed they are as controlling as the County says they are. Even a cursory review of these cases shows that they do not support the County's argument.

The Schick case was decided by this Court in 1992, before the 1994 changes were made to the statute. In fact it was the 1987 version of the statute that was in question in Schick, and at that time the statute specifically said that a fee could ***not*** be calculated as a

percentage of benefit. 599 So.2D at 642 (fn. 5). The issue in Schick was whether a plaintiff in an inverse-condemnation case was entitled to a contingency-risk multiplier in the calculation of his attorney's fees. The trial court granted the multiplier fee before this Court rendered its decision in Standard Guar. Ins. Co. v. Quanstrom, 555 So.2D 828 (Fla. 1990). In Quanstrom this Court had held that a multiplier is not appropriate in eminent domain and other cases (such as probate and trust cases) where the fee is required by statute, because "the attorney is assured of a fee when the action commences." In Schick the First District reversed on the basis of Quanstrom, but certified the issue to this Court. This Court held that Quanstrom controlled, and that a multiplier was inappropriate.' So Schick dealt with the appropriateness of rnultipliers in the calculation of attorney's fees, and did not speak to the issue of how the term "offer" should be interpreted in Section 73.092. In fact, at the time the term "offer" was not even in Section 73.092.

The two Fifth District cases cited by the County are equally inapposite. In Seminole Countv v. Clayton, 665 So.2D 363 (Fla.5th DCA 1995) the trial court granted a substantial fee based on the hourly rate, but then added a kicker based on "benefit". The Fifth District reversed, holding that the fee was duplicative and thus unreasonable. The opinion does not mention any good-faith estimate, and it cannot even be ascertained if a good-faith estimate was made. So the Court did not hold directly or indirectly that the good-faith estimate could not be considered an offer under the statute.

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[2]As noted in the Landowners' Initial Brief (fn. 5 on p. S), the rationale of Quanstrom has been undermined by the Pierpont majority's decision, because under its holding a landowner in an eminent-domain proceeding is no longer assured of a fee when the case is initiated.

The third and final case cited by the County is Seminole Countv v. Rollingwood Apts., 678 So.2D 370 (Fla.5th DCA 1996). It is odd that the County would cite this case in support of its position, since Rollingwood is one of the four cases cited by the Landowners where appellate courts have considered good-faith estimates to be "offers" under the statute! (In.Brf., p. 28) Also, both the Pierpont majority and dissent noted that the Fifth District's holding in Rollingwood was contrary to the holding of the Pierpont majority. 693 So.2D at 997. The details of Rollingwood only confirm this. 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.***" So the court explicitly held that the good-faith estimate was the "first written offer" under the statue. This holding is consistent with the Fifth District's later holding in Seminole Countv v. Cumberland Farms, 688 So.2D 372 (Fla.5th DCA 1997), where the court again held that the good-faith estimate was the "written offer by the county" under the statute. So the County can find no solace in Rollingwood or any of the other cases it mentions.

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

The County contends that this second issue is outside the scope of the certified question presented in the Barnett Banks case. However, it is well accepted that when a

question is certified to this Court, "we may review the district court's decision for any error." Leisure Resorts. Inc. v. Frank 1. Roonev. Inc., 654 So.2D 911,912 (Fla. 1995); see also Ocean Trail Assoc. v. Mead, 650 So.2D 4,6 (Fla. 1994) So this Court has jurisdiction to consider this second issue."

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

It was pointed out in the Initial Brief that the county commission only authorized the county attorney to make offers to acquire property prior to litigation so that litigation would not be necessary. The county commission did not authorize the county attorney to settle pending litigation. The County on page 26 of its Answer Brief notes that the county commission authorized the county attorney to make offers to acquire property, but fails to mention the second part of the Commission's directive, that being that the authorization was to be exercised "to acquire needed property without filing condemnation actions." So there is no direct authorization to settle pending litigation, nor is it possible to construe the plain words of the commission's directive as implying the delegation of such authority. The fact that the County avoids even discussing the second half of the commission's directive only confirms that it cannot explain the language in a manner consistent with its argument.

It is also interesting to juxtapose the County's attitude toward interpreting the county commission's directive and the County's attitude concerning the interpretation of

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[3]It should also be recalled that there are independent bases for review of this second issue, viz., 1) conflict with several decisions from this Court and other district courts, and 2) the fact that this second issue affects a class of constitutional officers. See Pierpont Jd. Brief, p.p. 4-5,8-9.

Section 73.092. The County has advocated a strict, contractual and technical interpretation of Section 73.092. But when it. comes to interpreting the county commission's directive and the Sunshine Law, the County adopts an expansive attitude and ignores the literal language for what it perceives to be the proper policy objectives. What the County cannot mask is that the directive from the county commission simply did not authorize the county attorney to settle pending litigation.

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

The County, in order to convince this Court that its settlement offer was "binding" (consistent with its argument on the first Point), must at the minimum show this Court. that it was within the county commission's authority to delegate its power to settle lawsuits to the county attorney. It was argued under the previous subsection that the county commission did not attempt to delegate its authority to settle pending suits. But an equally troubling question is whether the county commission could have delegated its authority, even if it had tried to.

The County presents no legal argument under this subsection, but does argue empirically that the County must function through its employees, and that the county commission can't be expected to buy paperclips. But of course this comparison misses the point. If the County wanted to extend a binding offer to enter into a contract to buy paperclips, such an offer would have to be extended by the county commission. When the County (through its employees) obtains materials such as paperclips it is liable in **quantum meruit,** and it often ratifies the contracts entered into by its subordinates after-the-fact by

simply paying the bill. See, e.g., Ramsey v. Citv of Kissimmee, 190 So. 474 (Fla. 1939)(discussing both **quantum meruit** and ratification); 1979 Op.Atty.Gen.Fla. 079-78. But this is not the issue here. The county attorney cannot make an offer that would be ***binding*** upon the County in the contractual sense to buy paper-clips, just as he cannot extend an offer to settle a lawsuit that would be binding upon the County in the contractual sense that the County advocates.

The County in its Answer Brief does not discuss any of the authorities standing for the proposition that a local government may not delegate its authority to settle lawsuits to their attorneys. But perhaps the most glaring omission from the County's Answer Brief is its failure to discuss or even mention Broward County v. Conner, 660 So.2D ***288*** (Fla.4th DCA 1995). There the Fourth District held under circumstances quite similar to the instant ones that a county attorney could not enter into a binding settlement on behalf of the county. The County's failure to discuss this case, or any of the others, only confirms that the county commission could not have delegated binding contractual power to the county attorney, even if it had attempted to do so.

C. The letter offers violated the Sunshine Law and were therefore not binding upon the County in the contractual sense.

It was pointed out in the Initial Brief that a second reason the county commission could not delegate its power to the county attorney was that such a procedure would violate the Sunshine Law. The Conner case in fact held that a settlement made by the county's attorney was not binding because of the violation of the Sunshine Law. So once again the County's failure to mention Conner or attempt to distinguish it is telling.

The County says at page 27 of its Answer Brief that "the Sunshine Law does not prohibit "a governing body from delegating any discretion, judgment or decision-making authority to its employees and staff." This is a surprising statement. In Op.Att'y.Gen.Fla. 95-06 (1995) the Attorney General said that "a line of cases has developed in Florida expressing the position of the courts that government entities may not carry out decision-making functions outside the Sunshine Law by delegating such authority." The Opinion went on to state that even if the governing body can legitimately delegate some power, such a delegation "will subject the person or persons to whom such authority is delegated to the Sunshine Law." In IDS Properties, Inc. v. Town of Palm Beach, 279 So.2D 353,356 (Fla.4th DCA 1973) the court said, "Those to whom public officials delegate de facto authority to act on their behalf. . . stand in the shoes of such public officials insofar as the application of the Government in the Sunshine Law is concerned." Here the county attorney admittedly did not comply with the Sunshine Law. So there is abundant authority, unrefuted by the County in its Answer Brief, that a local government body may not avoid the Sunshine Law by delegating its powers to staff.

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

The County says almost nothing about the Piernont majority's severe limitation of "standing" in Sunshine Law cases. It was pointed out in the Initial Brief that standing is very broad under the Sunshine Law, and these Landowners would fit even the strictest standing test. The Piernont majority cited nothing in support of its anomalous holding, and the County has not offered any support in its Answer Brief.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petitioners' Reply Brief on the Merits has been furnished by regular U.S. Mail to John J. Renner, Assistant County Attorney, OFFICE OF THE COUNTY ATTORNEY, 2115 Second Street Fort Myers, FL 33901, on this 18th day of September, 1997.

Respectfully submitted,

Robert L. Donald

William M. Powell
Fla. Bar No. 343994
Co-Counsel for Petitioners Pierpont
WILLIAM M. POWELL, P.A.
2002 Del Prado Blvd., Suite 105
Cape Coral, FL 33990
(94 1) 458-220

Robert L. Donald
Fla. Bar No. 2 182 19
Co-Counsel for Petitioners
LAW OFFICE OF ROBERT L. DONALD
1375 Jackson Street, Suite 402
Fort Myers, FL 33901-2841
(941) 337-1999

Stephen E. Dalton
Fla. Bar No. 107663
Co-Counsel for Petitioner A & G Inv.
PAVESE, GARNER, HAVERFIELD,
DALTON, HARRISON &JENSEN
1833 Hendry Street
P. 0. Drawer 1507
Fort Myers, FL 33902-1507
(941) 334-2195

Michael J. Ciccarone
Fla. Bar No. 437646
Co-Counsel for Petitioner Barnett Banks
GOLDBERG, GOLDSTEIN & BUCKLEY, P.A.
1515 Broadway
P. 0. Drawer 2366
Fort Myers, FL 33902-2366
(941) 334-1146