OA 6-1-98

IN THE SUPREME COURT OF FLORIDA

RICHARD KEITH MARTIN, ROBERT DOUGLAS MARTIN, MARTIN COMPANIES, OF DAYTONA BEACH, MARTIN ASPHALT COMPANY, AND MARTIN PAVING COMPANY,

Petitioners,

vs. CASE NO. 92,046

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

ANSWER BRIEF ON THE MERITS OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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QUESTION PRESENTED

Whether the District Court of Appeal, Fifth District, erred in denying a fee to an attorney testifying as an expert witness regarding the amount of attorneys' fees a property owner's attorneys should recover from the Department of Transportation in an eminent domain proceeding.

PRELIMINARY STATEMENT

Richard Keith Martin, Robert Douglas Martin, Martin Companies, of Daytona Beach, Martin Asphalt Company, and Martin Paving Company, respondents/appellees below and petitioners herein, will be referred to collectively and for consistency with Petitioner's Initial Brief as "Martin Paving."

The STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION petitioner/appellant below, and respondent herein, will be referred to as the "Department."

Citations to the Appendix to the Department's Answer Brief, which includes a copy of the opinion of the Fifth District Court of Appeal, will be in form of (A.) followed by the appropriate page number(s). Citations to Martin Paving's Initial Brief will be in the form of (IB.) followed by the appropriate page numbers(s).

STATEMENT OF THE CASE AND FACTS

For the most part, the Department does not object to the "Statement of the Facts and of the Case" as presented by counsel for Martin Paving. (IB. 1-6) However, the Department does object to the fact that many of the facts presented are irrelevant to the narrow issue upon which Martin Paving has sought review. For example, Martin Paving complains that the appellate court initially denied its motion for appellate attorneys fees, a decision it later reversed. (IB. 4)(A. 1) Yet, Martin Paving's attorneys fail to reveal that their own expert, the one they claim the Department should pay, testified that they and their paralegals should be paid hourly rates higher than actually charged their clients. (A. 8-9) While the trial court awarded hourly rates that exceeded the rates actually charged by the attorneys, the appellate court properly reversed the award. (A. 12) In addition, the Department objects to the fact that many of the statements are not followed by citations to the record in violation of the Florida Rules of Appellate Procedure and established case law construing the rules[1].

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[1]Briefs in violation of this rule are subject to being stricken. In Williams, the First District Court of Appeal reviewed appellant's initial brief which was objected to because, inter alia, it contained inadequate record citations. Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829-830 (Fla. 1st DCA 1989). There, the first three pages of appellant's statement of the case and facts contained "not one reference to the record." Id. The court struck the brief and ordered the appellant to make "pinpoint citations to the record on appeal to substantiate each statement made in the brief." Id. at 830.

The Department also objects to Martin Paving's creating and arguing a new issue for review. This case is before this Court on the claim of Martin Paving that, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court has the discretion to exercise its jurisdiction because a narrow portion of the decision "of [the] district court[] of appeal . . . **expressly and directly conflict[s]** with a decision of . . . the supreme court **on the same question of law.**" (emphasis supplied). Therefore, the Department objects to any and all statements in Martin Paving's "Statement of the Facts and of the Case" and in its argument addressing any issue beyond the issue presented in its Notice of Appeal (sic) that "Appellees appeal only that portion of the decision that denies the recovery of fees incurred by an attorney testifying as an expert witness in a proceeding to establish reasonable fees and costs in the eminent domain proceedings below." (A. 1)

The Department is fully aware that this Court has previously said that "[h]aving accepted jurisdiction to answer [a] certified question, we may review the entire record for error." Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4 (Fla. 1994)(citing Lawrence v. Florida East Coast Ry., 346 So. 2d 1012 (Fla. 1997)). However, because there has been no question certified to this Court, it is the Department's position that the different procedural posture of this case requires a different result. In addition, Martin Paving has made a conscious and considered determination and choice of the issue upon which it would seek

review based upon conflict jurisdiction, and jurisdiction of this Court was predicated and argued by Martin Paving's attorneys on only one narrow issue. (A. 1) Thus, Martin Paving is limited in its review by this Court to the one and only issue identified in its Notice of Appeal (sic) and argued in its Jurisdictional Brief, whether the District Court of Appeal's denial of a fee to "an attorney testifying as an expert witness in a proceeding to establish reasonable fees and costs in [an] eminent domain proceeding" conflicts with this Court's opinion in Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985). (A. 1-2) Martin Paving has waived any right it may have had to establish jurisdiction with this Court to have additional issues decided. Any other issues are not properly before this Court and are improperly argued by Martin Paving's attorneys.

SUMMARY OF THE ARGUMENT

Only one issue is before this Court on the basis of conflict jurisdiction: "Appellees appeal only that portion of the decision that denies the recovery of fees incurred by an attorney testifying as an expert witness in a proceeding to establish reasonable fees and costs in the eminent domain proceedings below." (A. 1) The inclusion of argument by Martin Paving's attorneys that the District Court of Appeal, Fifth District, also erred in failing to award them for 9 hours they spent preparing for the hearing to determine the amount of their fee is not properly before this Court and the right to claim error in this holding has been waived by Martin Paving.

This is an eminent domain proceeding and the more specific, and more generous, provisions of Section 73.091, Florida Statutes (1993), apply over the more general provisions of Section 92.231, Florida Statutes (1993), in determining whether an attorney is entitled to a fee for the time spent in preparation for and in giving testimony as to the amount of attorneys' fees a property owner's attorneys should receive. Section 92.231, Florida Statutes (1993), is not controlling and the District Court of Appeal properly vacated the trial court's award. Cheshire v. State Road Dep't, 186 So. 2d 790 (Fla. 4th DCA 1966).

Without waiving its position that the issue of whether Martin Paving's attorneys are entitled to an additional nine hours of compensation for the time spent preparing for the hearing to

determine how much they should be compensated by the Department is not properly before the Court for review, the Department states that this issue has been long decided against Martin Paving's attorneys in non-eminent domain cases and most recently in several cases decided by the District Court of Appeal, Fifth District. See, e.g., State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1992); Department of Transp. v. Winter Park Golf Club, Inc., 687 So. 2d 970 (Fla. 5th DCA 1997); Seminole County v. Butler, 676 So. 2d 451 (Fla. 5th DCA 1996); Higley South, Inc. v. Quality Engineered Installation, Inc., 632 So. 2d 615 (Fla. 2d DCA 1994), quashed on other grounds, 670 So. 2d 929(Fla. 1996), disapproved on other grounds, Turnberry Assoc. v. Service Station Aid, Inc., 651 So. 2d 1173 (Fla. 1995). This Court has said in Dade County v. Brigham and Tosohatchee Game Preserve, that the constitutional guarantee of full compensation requires compensation for all costs, including attorneys' fees, a property owner incurs in establshing the fair value of his or her property. Dade County v. Brigham, 47 So. 2d 602, 604-605 (Fla. 1950); Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control Dist., 265 So. 2d 681 (Fla. 1972). However, neither the time spent litigating the amount of attorneys' fees to be paid or the time spent by an attorney justifying the amount are costs of establishing the fair value of the property and the guarantee of full compensation to a property owner is not tantamount to a constitutional right of eminent domain attorneys to receive a fee.

The opinion of the District Court of Appeal, Fifth District, should be affirmed in all respects.

ARGUMENT

I. NEITHER CHAPTER 73 OR 74, FLORIDA STATUTES, NOR FULL COMPENSATION REQUIRES A CONDEMNING AUTHORITY TO PAY A FEE TO AN EXPERT TESTIFYING AS TO THE AMOUNT OF ATTORNEYS' FEES TO BE AWARDED TO A PROPERTY OWNER'S ATTORNEY AND SECTION 92.231, FLORIDA STATUTES (1993), CANNOT IMPOSE AND WAS NOT CONTEMPLATED TO IMPOSE LIABILITY UPON CONDEMNING AUTHORITIES FOR SUCH A COST

In their continuing quest for more and greater fees, attorneys in eminent domain proceedings argue that Chapters 73 and 74, Florida Statutes, control various fee and cost issues when such provisions result in the greatest benefit to them and, often in the same case, argue that other non-eminent domain statutes and rules of civil procedure control when greater benefits result from those provisions. The general principle of statutory construction posits that when two statutes conflict, a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. Department of HRS v. American Healthcorp, Inc., 471 So. 2d 1312 (Fla. 1st DCA 1985), approved 488 So. 2d 824 (Fla. 1986). The more specific and more generous statute, Section 73.091, Florida Statutes, provides:

> Except as provided in s. 73.091, the petitioner shall pay all reasonable costs of the proceedings in the circuit court, including, but not limited to, a reasonable attorney's fee, reasonable appraisal fees . . . to be assessed by that court.

In this case, the attorneys for Martin Paving argue that the more general statute, 92.231, Florida Statutes (1993), applies and

that the trial court had the discretion to award a reasonable fee to an attorney testifying as to the amount of attorneys' fees Martin Paving's attorneys should receive. Section 92.231, Florida Statutes (1993), is not controlling and the District Court of Appeal properly vacated the trial court's award.

As revealed by even the most cursory review of the annotations to 92.231, Florida Statutes (1993), formerly 90.23, Florida Statutes, it is apparent that its provisions are not applicable to eminent domain proceedings. In fact, only two eminent domain cases citing to that statute can be located. In reviewing an expert witness fee, not a fee to an attorney testifying as to the reasonableness of attorneys' fees, the Fourth District Court of Appeal in Cheshire reviewed the history of the statute as well as the eminent domain statutes and came to the conclusion that "F.S.A. s 90.231 is not controlling." Cheshire v. State Road Dep't, 186 So. 2d 790 (Fla. 4th DCA 1966). Originally enacted, Section 90.231, Florida Statutes (1949), specifically stated that it "shall not apply to any condemnation suit. . . ." Cheshire, 186 So. 2d at 792. The statute remained unchanged until 1959, leaving Florida with "no statute with respect to expert witness fees in condemnation proceedings." Id.

Awarding a fee nevertheless, the court found that expert witness fees in condemnation proceedings were not dependent on Section 90.231, Florida Statutes, but that Dade County v. Brigham controlled. Id. (citing Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950)). Thus, the court held that the trial court should

"determine the reasonableness of the appraiser's fee and, to the extent that such fee is found to be **reasonable and necessarily incurred in a defense of the suit**, to award said sum to the defendants. The allowance of such fee, however, is not a matter of right as to the amount submitted or charged, but such fee should be allowed in such amount as is reasonable and necessary." Id. (emphasis added). It is clear that Section 92.231, Florida Statutes was never intended to apply to eminent domain proceedings whose participants are now more amply protected by Chapters 73 and 74.

The only other eminent domain case citing to 92.231, Florida Statutes, is State Road Dep't v. Outlaw, 148 So. 2d 741 (Fla. 1st DCA 1963). There, the court held that an appraiser who had appraised numerous parcels in a single condemnation suit was not entitled to be paid as an expert witness for parcels about which he had not testified. Id.

It is no coincidence that these two cases, the only eminent domain cases citing to Section 92.231, Florida Statutes (1993), are neither discussed nor analyzed by Martin Paving in its Initial Brief. Rather, counsel for Martin Paving relies on cases of marriage dissolution (Murphy v. Tallardy, Travieso v. Travieso[2]), estates (Straus v. Morton F. Plant Hospital Foundation, Inc.,

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[2]Murphy v. Tallardy, 422 So. 2d 1098 (Fla. 4th DCA 1982); Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985).

Stokus v. Phillips, In Re Estate of McQueen, College v. Bourne[3]), insurance benefits claims (White v. Johnson[4]), workers compensation (Crittenden Orange Blossom Fruit v. Stone, Robert & Co. v. Zabawczuk[5]), quieting title (Old Plantation Corp. v. Maule Industries, Inc.[6]), and consumer protection (B & L Motors, Inc. v. Bignotti[7]).

In Travieso, this Court said an expert witness fee pursuant to Section 92.231, Florida Statutes, "at the discretion of the trial court may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees. We do not hold that such expert witness fees must be awarded in all cases." Travieso, 474 So. 2d at 1185-1186. It appears that the position of Martin Paving's attorneys is that because the Fifth District Court of Appeal in this case did not specifically find that the trial court had abused its discretion in awarding such an expert witness attorney fee in

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[3] Straus v. Morton F. Plant Hosp. Found., Inc., 478 So. 2d 472 (Fla. 2d DCA 1985); Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995); In Re Estate of McQueen, 699 So. 2d 747 (Fla. 1st DCA 1997); College v. Bourne, 670 So. 2d 1118 (Fla. 5th DCA 1996). In Straus an attorney's expert fee was sought under Section 92.231, Florida Statutes; in McQueen and Bourne the attorneys' expert witness fee was sought under the probate code.

[4] White v. Johnson, 59 So. 2d 532 (Fla. 1952).

[5] Crittenden Orange Blossom Fruit v. Stone, 514 So. 2d 351 (Fla. 1987); Robert & Co. Assoc. v. Zabawczuk, 200 So. 2d 802 (Fla. 1967). Expert attorney fees sought under Section 440.34(1), Florida Statutes (1987), denied.

[6] Old Plantation Corp. v. Maule Industries, Inc., 68 So. 2d 180 (Fla. 1953).

[7] B & L Motors, Inc. v. Bignotti, 427 So. 2d 1070 (Fla. 2d DCA 1983), decided prior to Travieso, the cost of an expert witness as to reasonable attorneys' fees was denied.

the first place, the court could not deny their expert attorney witness a fee. The Department does not read Travieso as so holding.

No one benefits from the ruling sought by Martin Paving's attorneys but the attorneys. The reality of the outcome of the rule of law Martin Paving's attorneys proffers is inescapable, both attorneys, the one representing the client, and the one justifying the fee sought, benefit not once, but twice. First, the expert attorney witness will benefit through the award of an expert witness fee for testifying and the original attorney gets the high fee testified to as "reasonable." Then, the expert witness attorney benefits in the next case when he/she will represent some other client and will be awarded a large fee for that representation. To add insult to injury, some other eminent domain attorney (or the original attorney in the prior case) will testify that the fee sought is high, but the attorney is worth it, and will also get paid for saying so.[8] As recognized in Ziontz, "it is quixotic to expect the lawyer witnesses who actually testify at fee hearings to do anything but justify the fee claimed, for if they do not they simply would not be called to testify . . . Hence, the obsession to justify hours and rates now seems to riddle the fee process with an air of mendacity." Ziontz v. Ocean Trail Unit Owners Ass'n, Inc., 663 So. 2d 1334, 1337 (Fla. 4th DCA 1993).

[8]As aptly stated by Judge Farmer in Ziontz, "lawyers in general profit from the patina of authority given to one's own fees by a court award of a similar one." Ziontz v. Ocean Trail Unit Owners Ass'n, Inc., 663 So. 2d 1334, 1335, 1337 (Fla. 4th DCA 1993).

Nevertheless, eminent domain attorneys proclaim that payment for every minute of their time must be paid in order to make a living and that such payment is an obligation of the Department for which the taxpaying public must pay. They have to be wrong.

Counsel for Martin Paving bemoan their plight and the plight of their fellow eminent domain lawyers to maintain their livelihoods if they cannot recover fees for everything they do. (MB. 13) If ever there was an area of law that lucratively sustains its practitioners, it is the field of eminent domain. While Judge Altenbernd has said that his dissent in A.G.W.S. might not go so far, the Department reads his comments as implying the recovery of attorneys' fees in eminent domain proceedings amounts to a full employment act for attorneys. Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52, 58-59 (Fla. 2d DCA 1992), quashed 640 So. 2d 54 (Fla. 1994)(adopting the reasoning of Judge Altenbernd's dissent).

What has happened to professionalism? Is there nothing we as individuals and as lawyers can do without the expectation of being paid? Fortunately, most courts and attorneys believe we can and do things as lawyers for which we seek no monetary reward: "[g]enerally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable fees." Travieso, 474 So. 2d at 1186.[9] The B & L Motors court viewed lawyering as a profession,

[9]Although it may be within the trial court's discretion to award a fee to an expert witness as a cost under Section 92.231, Florida Statutes, this Court went on to say that, it should be done only in an unusual case, and that it was specifically, "not hold[ing] that such expert witness fees must be awarded in all

not a business, and, like this Court, noted that "as a matter of professional courtesy, attorneys testify for their fellow lawyers without charge." B & L Motors, 427 So. 2d at 1074. This is not so in eminent domain actions. In fact, according to Martin Paving's attorneys, it is "unrealistic to expect attorneys to sacrifice time away from servicing their clients to testify as expert witnesses for other attorneys who are often their competition." (IB. 13)

The Fourth District Court of Appeal has been similarly concerned and frustrated with what it described as attorneys' "fee virus," noting:

> As our decision in Miller makes clear, in the area of attorney's fees, courts have special responsibilities to the public to supervise the amount of awards. Notwithstanding our ordinary deference to the factual findings of trial judges, we are obligated to insure as part of the review process that an award of fees has **both the appearance and substance of justice.**

Ziontz, 663 So. 2d at 1335 (emphasis supplied). This is particularly true in eminent domain cases where the taxpaying public will pay the bill. Does the public perceive justice has been served when Section 92.231, Florida Statutes (1993), says a witness fee of $10 per hour may be awarded and an attorney is paid $250 an hour for testifying for his or her friends? "[T]he existence of such evidence [of experts opining as to the reasonableness of fees] does not require [the court] to abandon [its] own expertise, much less [its] common sense." Miller v.

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cases." Travieso, 474 So. 2d at 1186. This is not an unusual case.

First American Bank & Trust, 607 So. 2d 483, 485 (Fla. 4th DCA 1992).

This practice of imposing fees upon fees and making the taxpaying public pay must stop. In Butler, the Fifth District Court of Appeal "disapprove[d] the [trial court's] decision to compensate an attorney from public funds for the work he performed in collecting rent from [the property owner's] tenants." Butler, 676 So. 2d at 455. In this case, that same court disapproved additional compensation to Martin Paving's lawyers for the time they spent to determine how much they should be paid[10] and disapproved a fee to their attorney expert for his testimony justifying their fee. (A. 11-12) So, too, should this Court disapprove the decision of the trial court in this case and uphold the decision below that an attorney testifying to justify his fellow attorney's fee should not be compensated from public funds.

[10]As indicated above, Martin Paving did not raise this as an issue or as grounds upon which the jurisdiction of this Court is predicated.

II. FULL COMPENSATION DOES NOT REQUIRE AND, THUS, A CONDEMNING AUTHORITY IS NOT RESPONSIBLE TO PAY FEES TO A PROPERTY OWNER'S ATTORNEY TO ARGUE OVER HOW MUCH WILL BE PAID FOR THE SERVICES RENDERED OR TO AN EXPERT TESTIFYING TO JUSTIFY THE AMOUNT OF ATTORNEYS' FEES TO BE AWARDED

Without waiving its previously stated position that Martin Paving's attorneys have waived any right they may have had to expand the issues to be decided by this Court, the Department addresses the issue of whether the appellate court erred in vacating the "9 hours awarded [by the trial court] . . . for preparing for the attorney's fee hearing." (MB. 3) (A. 11)[11]

On numerous occasions this Court and other Florida courts have said that attorneys' fees incurred to collect or determine the amount of those fees are not recoverable. State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1992); Department of Transp. v. Winter Park Golf Club, Inc., 687 So. 2d 970 (Fla. 5th DCA 1997); Seminole County v. Butler, 676 So. 2d 451 (Fla. 5th DCA 1996); Higley South, Inc. v. Quality Engineered Installation, Inc., 632 So. 2d 615 (Fla. 2d DCA 1994), quashed on other grounds, 670 So. 2d 929 (Fla. 1996); U.S. Security Ins. Co. v. Cole, 579 So. 2d 153 (Fla. 2d DCA 1991); B & L Motors v. Bignotti, 427 So. 2d 1070 (Fla. 2d DCA 1983) disapproved on other grounds, Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985).

This Court has said that it cannot be said that a property owner has received "just compensation for his property if he is

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[11]See note 1, supra.

compelled to pay out of his own pocket the expenses of establishing the fair value of the property. . . . Neither fees incurred to determine how much the attorneys should be awarded nor an attorney's expert fee to substantiate how much they should be paid is an expense incurred to establish the 'fair value of the property.'" Dade County v. Brigham, 47 So. 2d at 604-605. Similarly, this Court's reliance on its prior interpretation of Section 73.131(2), Florida Statutes, in Tosohatchee, reiterates the Court's position that full compensation contemplates payment of all reasonable costs including a reasonable attorneys' fee. Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control Dist., 265 So. 2d 681 (Fla. 1972). However, the guarantee of full compensation is not tantamount to a constitutional right of eminent domain attorneys to receive a fee. In fact, just the other day, this Court said it is not constrained by the constitution from interpreting Section 73.092(1), Florida Statutes (1993), to limit attorneys' recovery of fees in eminent domain proceedings. Pierpont v. Lee County, 23 Fla. L. Weekly S133 (Fla. March 12, 1998).

The law in eminent domain actions must surely be the same as in other areas i.e., attorneys' fees incurred to collect or determine the amount of those fees are not recoverable. Winter Park Golf, 687 So. 2d 970; Butler, 676 So. 2d 451. "Whether an attorney is entitled to recover fees in connection with an attorney's efforts to obtain fees depends on the specific issue involved and whether the work inures to the benefit of the attorney

or to the benefit of the client. . . time spent litigating the correct amount of fees to be awarded is not compensable because the client has no interest in the issue of the amount of fees." Butler, 676 So. 2d at 455 (citing to Palma[12]). The court in B & L Motors, 427 So. 2d 1070, also noted that case law construing other statutes providing for attorneys' fees has held fees for an attorney's work to recover fees are not recoverable when the client is not obligated to the attorney for that work.

It has been suggested, however, that under certain circumstances a condemnee may be "entitled to include in the calculation of compensable [attorney] hours the time spent to recover fees." Seminole County v. Delco Oil, Inc., 669 So. 2d 1162, 1164, n.2 (Fla. 5th DCA 1996). Two months later, the court held "time spent litigating the correct amount of fees to be awarded is not compensable. . . ." Butler, 676 So. 2d at 455 (citing Palma).

In both Butler and Delco, the court recognized a distinction between non-eminent domain cases like Palma where determination of the amount of the fee inures solely to the benefit of the attorney and those rare eminent domain cases "where . . . the client is

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[12] Palma, 629 So. 2d 830 (Fla. 1993). In Palma, after several appearances before this Court, the question of whether attorneys should be awarded fees for time spent litigating the issue of entitlement to, versus the amount of, fees under Section 627.428(1), Florida Statutes (1983), was finally decided. Although the issue presented was "when does a dispute relating to attorney's fees fall within the scope of Section 627.428," this Court's analysis and conclusion that attorney's fees could not be awarded for "litigating the **amount** of attorney's fees," are instructive in deciding this case. Id. at 833 (emphasis in original).

contractually committed to pay a higher fee." Delco, 669 So. 2d at 1165, n2. Martin Paving's attorneys complain the appellate court ignored the fact that "Martin Paving had already paid GH&R [its attorneys]," suggesting that because Martin Paving has already paid their bill, this Court must require reimbursement from the Department. (IB. 3) However, even if the attorneys expected their client to pay additional monies if awarded less than the contracted fee, courts are not bound by a fee agreement in awarding a reasonable statutory fee. Delco, 669 So. 2d at 1168.

As ably stated by the Fifth District Court of Appeal:

> To allow a fee contract between eminent domain counsel and his client to control the amount of fee to be awarded and to allow the reasonableness of such a contract fee to be buttressed by the testimony of other eminent domain counsel that such fees are "customary" drives an already tortured procedure into the realm of the absurd. The 1990 amendments plainly indicate the legislature did not intend the fee agreement to affect the fee award; the legislation expressly contemplated that a landowner might opt to contract to pay a fee greater than the fee awarded. § 73.092(5), Fla. Stat. (1993). A fee agreement between an eminent domain counsel and his client is certainly appropriate to govern a variety of aspects of the relationship but it cannot govern the determination of what constitutes a "reasonable fee." That must derive from weighing the statutory factors. At most, the fee agreement serves to limit the fee.

Delco, 669 So. 2d at 1168 (citing City of Orlando v. Kensington, Ltd., 580 So. 2d 830, 831-832 (Fla. 5th DCA 1991)). Martin Paving's attorneys are not entitled to additional fees for the time spent litigating the amount of their fees.

Likewise, the attorney expert testifying as to the reasonableness of the attorneys' fee is not recoverable as a cost of this eminent domain action. The purpose of Section 73.091, Florida Statutes, in accordance with Article X, Section 6 of the Florida Constitution, is to ensure full compensation. Property owners argue and this Court has agreed that full compensation has been denied if property owners are "compelled to pay out of [their] own pocket the **expenses of establishing the fair value of the property**." Brigham, 47 So. 2d at 604-605 (emphasis supplied). The attorney expert's fee is not an expense of establishing the fair value of Martin Paving's property. In addition, there is no evidence that the owner is obligated to pay the costs incurred in this case, and expert fees are costs. Full compensation is neither offended nor denied by the Department's position or the appellate court's holding that the taxpayers of Florida should not have to pay a fee to a lawyer to testify how much another lawyer should be paid.

The cost, if any, of an expert's testimony to support an attorney's fee is not an expense of establishing the fair value of the property. Rather, it is a cost of the attorney's doing business, a cost of litigating the amount of attorney's fees which "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment [or full compensation]." Palma, 629 So. 2d at 833; Butler, 676 So. 2d at 455. Thus, an expert's fee for testifying on behalf of a property owner's attorneys is not compensable from a condemnor.

Neither the Constitution nor Florida law requires a condemning authority pay for time spent by lawyers to argue over how much they should receive (as opposed to how much the property owner should receive as fair value for the property) and then pay again for the time spent by another lawyer to figure out how to justify the fee.

III. THE CONSTITUTION DOES NOT REQUIRE ATTORNEYS FOR PROPERTY OWNERS BE ON EQUAL FOOTING WITH THE DEPARTMENT

Martin Paving's attorneys begin this portion of their argument by claiming "Florida courts have long recognized that the ability to litigate the issue of full compensation on an equal footing with a condemning authority is basic to due process." (IB. 20) While they cite to Dade County v. Brigham, 47 So. 2d 602, they ignore this Court's comments that a property owner "cannot be said to have received 'just compensation' for his property if he is compelled to pay out of his own pocket. **The expenses of establishing the fair value of the property . . . .**" Brigham, 47 So. 2d at 605. Award of a fee to an attorney testifying about the amount of attorneys' fees to be paid is not an expense Martin Paving incurred in establishing the fair value of its property. It is an expense Martin Paving's attorneys incurred to establish how much money they would receive from the Department. The fact that the Department was able to present the testimony of Jim Anderson, an eminent domain attorney, on the subject does not put Martin Paving's attorneys on unequal footing. In fact, it is rare indeed to find an eminent domain attorney willing to testify on behalf of the Department because they are testifying against their fellow attorneys and, in essence, against their own fees for representing a property owner in the next case.

CONCLUSION

Based upon the foregoing argument and the authorities cited, this Court should affirm the opinion of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 18th day of March, 1998, to **GORDON H. HARRIS, ESQUIRE**, **KENT L. HIPP, ESQUIRE**, and **G. ROBERTSON DILG, ESQUIRE**, Gray, Harris & Robinson, P.A., counsel for Petitioners, P. O. Box 3068, 201 E. Pine Street, Suite 1200, Orlando, Florida 32802-3608.

MARIANNE A. TRUSSELL

IN THE SUPREME COURT OF FLORIDA

RICHARD KEITH MARTIN, ROBERT DOUGLAS MARTIN, MARTIN COMPANIES, OF DAYTONA BEACH, MARTIN ASPHALT COMPANY, AND MARTIN PAVING COMPANY,

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vs. CASE NO. 92,046

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ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

APPENDIX TO THE ANSWER BRIEF ON THE MERITS OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

CASE NO: 96-02163
L.T. CASE NO: 94-31471-CI

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Appellant,

vs.

ROBBINS AND ROBBINS, INC.,
et al.,

Appellees.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that RICHARD KEITH MARTIN, ROBERT DOUGLAS MARTIN, MARTIN COMPANIES OF DAYTONA BEACH, MARTIN ASPHALT COMPANY and MARTIN PAVING COMPANY, Appellees, appeal to the Supreme Court of Florida the decision of this Court dated November 17, 1997 in the above matter. Appellees appeal only that portion of the decision that denies the recovery of fees incurred by an attorney testifying as an expert witness in a proceeding to establish reasonable fees and costs in the eminent domain proceedings below. A conformed copy of that decision is attached as Exhibit "A." That portion of the decision is within the discretionary appeal jurisdiction of the Florida Supreme Court in that the denial of said fees is in direct conflict with the Florida Supreme Court's decision in

Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985), which held that a trial court has discretion to tax as costs the fees incurred by an attorney testifying as an expert witness at a fee hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 11th day of December, 1997 to Marianne A. Trussell, Esquire, Assistant General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0458.

Gordon H. Harris, Esquire
Kent L. Hipp, Esquire
G. Robertson Dilg, Esquire
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 3068
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Florida Bar No: 879630
Florida Bar No: 362281

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Appellant,

v. Case No. 96-2163

ROBBINS AND ROBBINS, Inc.,
et al.,

Appellee.
_____/

DATE: November 17, 1997

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING AS TO ORDER ON ATTORNEYS' FEES, filed October 28, 1997, is granted. Upon consideration thereof, it is

ORDERED that the October 20, 1997, Order of this Court denying Appellees' Motion for Attorneys' Fees is vacated and withdrawn. Moreover, it is

ORDERED that Appellees' Motion For Attorney's Fees, filed October 22, 1996, is granted and the above-styled cause is hereby remanded to the Circuit Court for Volusia County, Florida, pursuant to Fla.R.App.P. 9.400(b) to determine and assess reasonable attorney's fees for this appeal. Further, it is

ORDERED that Appellees' AMENDED MOTION FOR REHEARING AS TO CONDEMNEES' ATTORNEY'S AND EXPERT WITNESS FEES IN EMINENT DOMAIN PROCEEDINGS BEFORE THE TRIAL COURT, filed October 31, 1997, is denied. Upon consideration thereof, Appellees' MOTION FOR REHEARING AS TO CONDEMNEES' ATTORNEY'S AND EXPERT WITNESS FEES IN EMINENT DOMAIN PROCEEDINGS BEFORE THE TRIAL COURT, filed October 30, 1997, is moot.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

Exhibit "A"

cc: Clerk of the Court, Volusia County (94-31471-CICI)
Gordon Harris, Esq. and G. Robertson Dilg, Esq.
Marianne Trussell, Esq.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1997

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Appellant,

v.

ROBBINS AND ROBBINS, INC., et al,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 96-2163

Opinion Filed October 17, 1997

Appeal from the Circuit Court
for Volusia County,
Patrick G. Kennedy, Judge.

Pamela S. Leslie, General Counsel and
Marianne A. Trussell, Assistant General Counsel,
Tallahassee, for Appellant.

Gordon H. Harris, Kent L. Hipp, and
G. Robertson Dilg of Gray, Harris & Robinson,
P.A., Orlando, for Appellee.

THOMPSON, J.

The Department of Transportation ("DOT") appeals the final order awarding Richard Keith Martin, Robert Douglas Martin, Martin Companies of Daytona Beach, and Martin Asphalt Company (collectively "the condemnee"), $110,000 for attorneys'

fees and $1,950.50 for expert witness fees in this condemnation case. The DOT argues that the trial court erred because it failed to calculate the attorneys' fees in conformity with sections 73.091 and 73.092, Florida Statutes (1993)[1], and this court's rulings.

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[1] (1) In assessing attorney's fees in eminent domain proceedings, the court shall give the greatest weight to the benefits resulting to the client from the services rendered.

> (a) As used in this section, the term "benefits" means the difference 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.
>
> 1. In determining attorney's fees in prelitigation negotiations, benefits do not include amounts awarded for business damages unless the business owner provided financial records to the condemning authority, upon written request, prior to litigation.
>
> 2. In determining attorney's fees subsequent to the filing of litigation, if financial records are not provided to the condemning authority prior to litigation, benefits for amounts awarded for business damages must be based on the first written offer made by the condemning authority within 120 days after the filing of the eminent domain action. If the condemning authority makes no written offer to the defendant for business damages within 120 days after the filing of the eminent domain action, benefits for amounts awarded for business damages must be based on the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hired an attorney.
>
> (b) The court may also consider nonmonetary benefits

Further, the DOT argues that the trial court erred by awarding attorneys' fees for time spent litigating the issue of attorneys' fees and by awarding fees for the experts who testified at the fee hearing. We agree and we reverse.

This case arose out of the widening of Nova Road in Volusia County and the DOT's taking of approximately 62 parking spaces, about a half acre, from the

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which the attorney obtains for the client.

(2) In assessing attorney's fees in eminent domain proceedings, the court shall give secondary consideration to:

(a) The novelty, difficulty, and importance of the question involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

* * *

(4) In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner were not responsible for the payment of fees and costs.

condemnee's property. The DOT made the condemnee an initial offer in March 1994[2] of $106,200, the condemnee's counter offer was more than $1,000,000, and the parties settled after mediation for $500,000. Issues involved were a cure of the parking situation, the need for drainage, title to part of the property, and related engineering matters. All parties agree that the case was complex and complicated. The trial court wrote in its order that "the condemnee's attorney was required to coordinate and lead a team of experts including an appraiser, a traffic engineer, a land planner/civil engineer, a hydrologist, a certified public accountant and a surveyor."

After a contested hearing on the issue of attorneys' fees, during which experts testified for the condemnee and for the DOT, the trial court found that the reasonable and necessary time expended by the firm was 306 total hours. Of the 306 hours, the total attorney time for the condemnation was 174.4 hours, the total paralegal time was 122.7 hours, and the total time for the attorney who represented the attorneys at the fee hearing was 9 hours. The trial court found that the hourly rate for the attorneys and the

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[2] The eminent domain case was filed on June 30, 1994. Therefore, section 73.091(1), Florida Statutes (Supp. 1994), does not apply. It applies only to actions filed after October 1, 1994. For actions filed after October 1, 1994, the legislature determined that attorney's fees should be based upon a specific percentage of the "benefit" obtained after negotiations. Where the legislature sets forth criteria, only the criteria may be considered. See Seminole County v. Coral Gables Federal Sav. and Loan Ass'n, 691 So. 2d 614 (Fla. 5th DCA 1997) (citing Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Division of Admin., State Dept. of Transp. v. Ruslan, Inc., 497 So. 2d 1348 (Fla. 4th DCA 1986)). Here, the court was required to follow the 1993 version of the statute.

paralegals who worked on the case was reasonable. The trial court established a lodestar of $51,980.50, and then adjusted the lodestar upward to arrive at an attorney's fee of $110,000. In its order, the trial court noted the "most impressive benefit" of $393,000 obtained by the attorneys, the improvement to the property which allowed the condemnee to stay on the property and continue its business, and the protracted litigation. The court also awarded an expert witness fee of $1,956.50. We detail the errors in calculating the fee.

CALCULATION OF ATTORNEYS' FEES

First, the trial court awarded an hourly rate in excess of what the attorneys requested in their direct testimony. The firm of Gray, Harris, and Robinson represented the condemnee and spent 297 hours in the litigation, including attorney and paralegal time. Kent Hipp testified concerning the attorneys' fees billed in the case by the firm. Gordon Harris, lead attorney in the firm, billed at $300 per hour, Fred Leonhardt billed at $240 per hour, G. Robertson Dilg billed at $200 per hour, Kent Hipp billed at $175 per hour, and the paralegals billed at $75 per hour. For this case, Harris billed 52.3 hours, Dilg 20.8 hours, Hipp 92.1 hours and Leonhardt 9.2 hours, for a total attorney time of 174.4 hours. The expert testified that he thought a reasonable hourly rate for Dilg was $225 rather than $200, that Hipp was worth $200 instead of $175 per hour, and that one of the paralegals was worth $85 instead of $75 per hour. Using these figures, the expert obtained a base lodestar of $50,508. Citing Kuhnlein v. Department

of Revenue, 662 So. 2d 309 (Fla. 1995), the expert explained that he used a multiplier to obtain a fee of $109,795. The multiplier was based upon the complexity of the case and the results obtained. The trial court's order set hourly fees for Harris at $300, Leonhardt at $240, Dilg at $225, Hipp at $220, and the paralegals at $75 to obtain a lodestar-rate of $51,980.50. The trial judge then approximately doubled the lodestar.

In Seminole County v. Delco Oil, Inc., 669 So. 2d 1162 (Fla. 5th DCA), rev. denied, 682 So. 2d 1100 (Fla. 1996), and Seminole County v. Clayton, 665 So. 2d 363 (Fla. 5th DCA 1995), this court disapproved the method used by the trial court to calculate attorneys' fees. Here, as best we can tell from the order, the trial court simply established the lodestar and then doubled it. The trial court wrote:

> The Court has calculated this attorney's fee by considering the several statutory factors and adjusting them upward by the benefits resulting to the respondents from the services rendered by their counsel.

The trial court adopted the expert's contingency risk multiplier when it doubled the lodestar amount. This created an improper "double-decker" award based upon the theory that attorney's fees in eminent domain cases are contingent. They are not. See In re Estate of Platt, 586 So. 2d 328, 335 (Fla. 1991); Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Schick v. Department of Agriculture and Consumer Services, 599 So. 2d 641 (Fla. 1992). The correct procedure to establish a fee

consistent with section 73.092 is for the trial court to consider the various factors set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), modified, Standard Guaranty Insurance Company v. Quanstrom, 555 So. 2d 828 (Fla. 1990), except that the benefits obtained should be weighed most heavily. Delco Oil, Inc., 669 So. 2d at 1167, citing In re Estate of Platt, 586 So. 2d 328, 335 (Fla. 1991). Once the lodestar-like secondary statutory factors are determined, the court should consider the benefit obtained to adjust the lodestar up or down. Here the trial court adjusted the attorneys' fees upward to get a lodestar then doubled the fees. The procedure did not follow the statute or the case law of this district.

PARALEGAL FEES

Second, the trial court improperly included the paralegal hours as part of the attorneys' hours to get a "blended" effective hourly rate. The trial court counted the paralegal hours and attorneys' hours to obtain the lodestar. Instead of separately awarding paralegal time, ordinarily billed at $75 per hour, the trial court mixed paralegal and attorney time, then awarded the firm more than $300 per hour for paralegal time. The seeming effect of this method, since the attorneys conceded at oral argument that they would not pay the paralegals the higher fee, was to reduce the effective hourly attorneys' fees rate to a rate lower than it actually was. Although the condemnee argues that we adopted this method of calculating attorneys' fees in Florida Inland Navigation District v. Humphrys, 616 So. 2d 494 (Fla. 5th DCA 1993), we do not read that case

to support his theory. While the trial court is required by section 57.104 to consider time expended by legal assistants when awarding attorney's fees in eminent domain proceedings, Whitlow v. South Georgia Natural Gas Company, 650 So. 2d 637 (Fla. 1st DCA 1995), this court has never held that paralegal time can be "blended" with attorney time to set a reasonable attorney rate. Further, it is not logical to use a paralegal to help on a client's case because it is cheaper for the client, then seek to recoup the paralegal time at an attorney rate from the condemning authority. Coupling that with the admission that the paralegal would not reap the benefit of this windfall shows that this "blending" is simply another method to increase the attorneys' fees in the case. Upon remand, the trial court will separate out the paralegal time of 122.7 hours and, if appropriate for compensation, multiply the number of paralegal hours by the hourly rate of $75.

FEES FOR LITIGATING ATTORNEY FEES

Finally, the trial court should disallow the 9 hours awarded to the condemnee's attorney for preparing for the attorney's fee hearing and the fee for the expert's testimony at the hearing. Time spent litigating a fee amount is not compensable since the condemnee has no interest in the amount of the fee, the benefit of which inures solely to its attorney. Therefore, the condemning authority should not bear the costs involved in proving the amount of the fee. Department of Transp. v. Winter Park Golf Club, Inc., 687 So. 2d 970 (Fla. 5th DCA 1997). The condemnee is only entitled to

fees that are reasonable, Delco, and the condemning authority is not required to pay any more than a reasonable fee, City of Orlando v. Kensington, Ltd., 580 So. 2d 830 (Fla. 5th DCA 1991). Since DOT is required to pay a reasonable fee, the condemnee in this case, whose attorney receives the fee, has no interest in the amount of the fee from DOT. State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993).

CONCLUSION

We reverse the award of attorney fees. Upon remand the trial court should set the lodestar amount based upon the testimony as to the number of hours spent by each attorney multiplied by their reasonable hourly rates and then determine any adjustment based upon the benefit obtained. The number of attorneys' hours spent in the case should not include the paralegal time or the 9 hours spent preparing for the fee hearing. If the trial court determines that paralegal fees are reasonable and compensable, fees should be awarded at the $75 per hour rate. There should be no award of fees for the expert witness.

REVERSED with directions.

DAUKSCH and HARRIS, JJ., concur.