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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.

DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA,

Respondent.

CASE NO: 92,046

PETITIONERS' INITIAL BRIEF

On Review from the District Court of Appeal,
Fifth District, State of Florida
Case No. 96-02163

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PRELIMINARY STATEMENT

Petitioners, RICHARD KEITH MARTIN, ROBERT DOUGLAS MARTIN, MARTIN COMPANIES OF DAYTONA BEACH, MARTIN ASPHALT COMPANY and MARTIN PAVING COMPANY, were the Respondents before the trial court and the Appellees below. They will be referred to in this brief collectively as "Martin Paving." Respondent, DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, was the Petitioner before the trial court and the Appellant below and will be referred to in this brief as "FDOT."

Citations to the Record will be cited as "R- " followed by the appropriate page number. Citations to the Transcript of Proceedings of the June 26, 1996 Hearing on Martin Paving's Motion to Award Attorneys' Fees will be cited as "Tr.- " followed by the appropriate page number.

STATEMENT OF THE FACTS AND OF THE CASE

On March 24, 1994, FDOT offered Martin Paving $106,200 for the taking of a portion of its property along Nova Road in Volusia County, Florida. Tr.-9, 16-17; R-132-161. Two years later, on May 15, 1996, FDOT agreed to pay almost five times its original offer for the taking and, on June 4, 1996, a Final Judgment for $500,000 was entered in favor of Martin Paving. R-184-187.

Under a written fee agreement between Martin Paving and its counsel, Gray, Harris & Robinson, P.A. ("GH&R"), GH&R was entitled to retain ten percent of the initial offer plus 25 percent of any betterment it obtained for its representation. Tr.-35. Martin Paving was to be reimbursed all fees retained up to the full amount of any attorneys' fees awarded by the court. The award of $500,000 entitled GH&R to a fee of $109,795 (Tr.-71), which sum was paid by Martin Paving (Tr.-36).

Upon entry of the award, GH&R, acting pursuant to § 73.092, Fla. Stat. (1993), filed a Motion for Award of Attorneys' Fees and Costs and Expert Fees (R-194-342). The Motion was heard on June 26, 1996. At the hearing, Gordon H. Harris, lead counsel for GH&R, testified as to the services GH&R had provided in representing Martin Paving. Attorney James M. Spoonhour, acting as an expert witness, then rendered an opinion as to what would be a reasonable attorneys' fee. Spoonhour is a shareholder in the firm, Lowndes, Drosdick, Doster, Kantor & Reed of Orlando, Florida. He has practiced almost exclusively in the field of eminent domain since 1976. Tr.-42-43. Spoonhour is also on the Eminent Domain Committee of the Florida Bar. Tr.-43. In opposition to Spoonhour's testimony, FDOT presented the testimony of its own expert

witness, attorney James W. Anderson, who also has practiced in the field of eminent domain since 1976, both for FDOT and with a private law firm in Tallahassee. Tr.-79-81.

In his testimony, Spoonhour discussed each of the factors that must be considered by a court under § 73.092, Fla. Stat. (1993). He first testified that he considered $50,508 an appropriate lodestar figure for the services provided by GH&R. Following his interpretation of directives given by the District Court of Appeal, Fifth District, in Dep't. of Transp., State of Florida v. Morris, 674 So. 2d 926 (Fla. 5th DCA 1996); and Seminole County v. Delco, Inc., 669 So. 2d 1162 (Fla. 5th DCA) rev. den., 682 So. 2d 1100 (1996), Spoonhour then made upward adjustments to his lodestar figure, based upon his consideration of each of the § 73.092 factors. From those calculations, Spoonhour derived an indicated attorneys' fee of $116,168.

Spoonhour next checked his indicated figure by reviewing a number of other methods used in determining reasonable attorneys' fees. He calculated that, had § 73.092, Fla. Stat., as it was subsequently amended on October 1, 1994, been in effect, FDOT would have been required under that statute to pay Martin Paving an attorneys' fee of $118,400. Spoonhour further considered that, were the case treated as a fee-shifting case under this Court's decision in Kuhnlein v. Dep't. of Revenue, 662 So. 2d 309 (Fla. 1995), Martin Paving would have been entitled to a multiplier of 2.5, which would have rendered an attorneys' fee of $126,270. He also recognized that GH&R had actually received $109,795 as payment for its services. Based on those and other considerations, Spoonhour testified that, in his opinion, $110,000 would be a reasonable attorneys' fee. FDOT's witness, Anderson, testified that, despite having

increased FDOT's initial offer by almost five-fold, Martin Paving should be entitled to recover no more than a lodestar attorneys' fee of $49,500. Tr.-93.

On July 8, 1996, the trial court entered an Order on Award of Attorneys' Fees and Costs, in which it fully reviewed the requirements of § 73.092, Fla. Stat. (1993), and awarded $110,000 for attorneys' fees. The award was based on a finding that 306 hours were reasonably expended by GH&R, including 9 hours incurred in seeking to recover attorneys' fees. The trial court also awarded $1,950 as a reasonable fee for the services of Martin Paving's attorneys' fee expert witness, James Spoonhour.

FDOT thereafter appealed the Order on Award of Attorneys' Fees and Costs to the District Court of Appeal, Fifth District. On October 17, 1997, the district court reversed. Department of Transp., State of Florida v. Robbins & Robbins, Inc., 700 So. 2d 782 (Fla. 5th DCA 1997). The district court opined that the trial court had simply "adjusted the attorneys' fees upward to get a lodestar and then doubled the fees" and held that such a procedure "did not follow the statute or the case law of this district." The court further held that "the trial court should disallow the 9 hours awarded to the condemnee's attorney for preparing for the attorney's fee hearing." Ignoring the fact that Martin Paving had already paid GH&R (Tr.-36), the district court further held that, "[t]ime 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." Thus, the court concluded that FDOT should not bear the costs Martin Paving incurred in seeking to recover reasonable attorneys' fees. Finally, the court held, without giving

any reason for its holding, that there should be no award of fees for Martin Paving's expert witness, James Spoonhour.[1]

On October 30, 1997, Martin Paving filed an Amended Motion for Rehearing as to Condemnees' Attorney's and Expert Witness Fees in Eminent Domain Proceedings Before the Trial Court. In its Motion, Martin Paving pointed out that the district court had overlooked the fact that the trial court was not simply doubling the lodestar, but was instead using a lodestar figure and increasing that amount by a specific dollar amount based upon the results obtained by GH&R and other factors the court was required to consider under § 73.092, Fla. Stat. (1993).

Martin Paving also pointed out that in denying it fees for the 9 hours its attorneys spent in seeking to recover reasonable attorneys' fees, the district court overlooked the fact that Martin Paving had already paid GH&R $109,795 and would be reimbursed up to that sum from the court award for such fees. Thus, contrary to the district court's assertion, Martin Paving not only had a direct interest in the amount of the fee awarded, it had the only interest in up to $109,795 of whatever sum the trial court might award. Martin Paving further noted that the district court had overlooked the fact that

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[1] The court also held that, in determining reasonable attorneys' fees, paralegal time should not be "blended" with attorneys' time to set a reasonable attorney rate. (R.-188-193). By separate order of October 20, 1997, the district court even denied Martin Paving attorneys' fees incurred in the appellate proceedings. That order, however, was vacated when Martin Paving filed a Motion for Rehearing as to Order on Attorneys' Fees, in which it pointed out that under § 73.131(2), Fla. Stat. (1995), FDOT was required to "pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the lower court shall be affirmed." (emphasis added).

§ 73.091(1), Fla. Stat. (1993), requires a taking authority to "pay all reasonable costs of the proceedings in the circuit court, including, but not limited to, a reasonable attorney's fee, reasonable appraisal fees, and, when business damages are compensable, a reasonable accountant's fee." Martin Paving asserted that under § 73.092, the Florida Legislature had provided extensive directions to trial courts for determining reasonable attorneys' fees, thus making it apparent that the Legislature considered the determination of attorneys' fees to be one of the basic proceedings involved in any eminent domain litigation. Because the determination of attorneys' fees is a "proceeding" in a circuit court, Martin Paving asserted that the trial court was required to award all attorneys' fees and costs reasonably incurred therein.

Martin Paving also pointed out that in summarily reversing the trial court's determination to tax as costs a reasonable fee for attorney James Spoonhour's testimony as an expert witness at the fee hearing, the district court overlooked the law as set forth by this Court in Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985). In that decision, this Court held that expert witness fees may be taxed, in the trial court's discretion, as costs for a lawyer who testifies as an expert as to reasonable attorneys' fees. Because the district court did not find that the trial court abused its discretion in awarding an expert witness fee, Martin Paving contended that the district court was required under Travieso to affirm the fee awarded.

Finally, Martin Paving asserted that it is particularly appropriate to award fees to an attorney testifying as an expert witness as to reasonable attorneys' fees in an eminent domain proceeding, since: (1) § 73.091, Fla. Stat. (1993) requires the award of

fees for all expert witnesses reasonably retained by a condemnee; (2) condemnees are required to provide the testimony of an attorney, acting as an expert witness, to assist a court in determining a reasonable fee; (3) the testimony of an expert witness attorney is particularly necessary in eminent domain proceedings where the basic factors that must be considered in awarding attorneys' fees are set forth by statute; and (4) under fundamental principles of fairness inherent in any eminent domain proceeding, Martin Paving was entitled to have the benefit of an attorney testifying as an expert witness so that it might stand on an equal footing with the FDOT, who had retained the services of an expert witness attorney to dispute Martin Paving's claim for attorneys' fees.

On November 17, 1997, the district court denied Martin Paving's Amended Motion for Rehearing. On December 11, 1997, Martin Paving filed a Notice to Invoke this Court's discretionary jurisdiction based on a conflict between the district court's decision and the decision of this Court in Travieso, 474 So. 2d at 1184, as well as the decisions of the District Court of Appeal, Second District in Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995) and Straus v. Morton F. Plant Hosp. Foundation, Inc., 478 So. 2d 472 (Fla. 2d DCA 1985).

SUMMARY OF THE ARGUMENT

The District Court of Appeal, Fifth District held, as a matter of law, that a trial court in an eminent domain proceeding cannot award fees for services rendered either by an attorney representing a condemnee or by an attorney who testifies as an expert witness in a hearing to determine reasonable attorneys' fees. The decision of the

district court, as to an attorney testifying as an expert witness, is in direct contravention of this Court's opinion in Travieso, 474 So. 2d at 1184, in which this Court, citing § 92.231, Fla. Stat., held that "expert witness fees, at the discretion of the trial court, may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorneys' fees." The decision of the district court is also at variance with decisions of the District Court of Appeal, Second District holding that when, as in the instant case, an attorney testifying as an expert witness expects to be compensated for his testimony, an award of such fees is not even discretionary, but mandatory. Stokus, 651 So. 2d at 1244; Straus, 478 So. 2d at 472.

The opinion of the district court was not based upon the trial court having abused its discretion in any way in awarding an expert witness fee. Instead, it was based on an erroneous conclusion that no fees may be awarded for litigating attorneys' fees in an eminent domain proceeding, whether for the attorneys representing the condemnee or for other attorneys testifying on behalf of the condemnee. According to the district court, such fees are not compensable "since the condemnee has no interest in the amount of the fee, the benefit of which inures solely to its attorney." In reaching that opinion, the district court not only ignored this court's opinion in Travieso, it also ignored the directives of § 73.091(1), Fla. Stat., which require the petitioner in an eminent domain proceeding to pay all attorneys' fees and costs, including those of expert witnesses "incurred in the defense of the proceedings in the circuit court." The district court also ignored the fact that Martin Paving had a direct interest in the fee hearing because it had already paid GH&R $109,795, which would only be reimbursed up to the

amount of attorneys' fees awarded by the trial court. Finally, the district court ignored the fact that it is particularly appropriate to award fees for litigating attorneys' fees in the instant eminent domain proceedings. A property owner, like Martin Paving, is entitled under the Florida Constitution to be placed on an equal footing with the taking authority, who in this case was represented by counsel and had the benefit of an attorney testifying as an expert witness. Otherwise, Martin Paving cannot be assured of being made whole for the taking.

ARGUMENTS OF LAW

I. UNDER § 92.231, FLA. STAT. (1993), THE TRIAL COURT HAD DISCRETION TO AWARD A REASONABLE FEE FOR AN ATTORNEY TESTIFYING AS AN EXPERT WITNESS AS TO REASONABLE ATTORNEYS' FEES.

Section 92.231, Fla. Stat. (1993), provides:

> (1) the term "expert witness" as used herein shall apply to any witness who offers himself in the trial of any civil action as an expert witness. . . and who is permitted by the court to qualify and testify as such, upon any matter pending before any court.
>
> (2) any expert . . . witness who shall have testified in any cause shall be allowed a witness fee . . . in the amount of $10 per hour or such amount as the trial judge may deem reasonable, and the same shall be taxed as costs. (emphasis added).

In Travieso, 474 So. 2d at 1185, this Court held that under § 92.231, Fla. Stat., the language of which has remained unchanged since that time, an expert witness fee may be taxed as costs when an attorney testifies as an expert as to reasonable attorneys' fees. There is no reason for this Court to now recede from that decision,

particularly for a proceeding in eminent domain where a condemnee has both a statutory and a constitutional right to recover expert witness fees.

In Murphy v. Tallardy, 422 So. 2d 1098 (Fla. 4th DCA 1982), which was approved by this Court in Travieso, 474 So. 2d at 1185, the court affirmed a trial judge's taxation of an expert witness fee for an attorney who testified as to reasonable attorneys' fees. In supporting its decision, the appellate court reasoned as follows:

> We concede that an argument is made in Mills [v. Aronovitz, 404 So. 2d 138 (Fla. 3d DCA 1981)] for not allowing expert witness fees to lawyers who testify to the value of a litigant's attorney's fees for the reason that it will increase the cost of litigation when the courts should be striving to minimize such costs. While we agree with those sentiments, we would suggest that eliminating expert witness fees entirely would most certainly accomplish that end to an even greater degree. But, of course, that is not a practical solution. However, neither is it practical nor justified to single out lawyers as experts who should not be paid for their expert testimony. It does not suffice, we believe, to say that the issues that they testify in support of are collateral or minor and not the real heart of the case. The statutory authority for taxation of such fees says nothing about allowing expert witness fees if the expert is called to support main issues as opposed to collateral issues; it simply provides for compensation for experts called to prove up the various aspects of the case. . . .

Murphy, 422 So. 2d at 1100.

In Travieso, 474 So. 2d at 1185-1186, this Court approved the decision in Murphy and further held as follows:

> We hold that pursuant to section 92.231, expert witness fees, 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.

Subsequently this Court characterized its decision in Travieso as authorizing "the taxing of expert witness fees for lawyers who testify as experts regarding reasonable attorney's fees in ordinary civil actions." Crittenden Orange Blossom Fruit v. Stone, 514 So. 2d 351, 352 (Fla. 1987).

This Court's holding in Travieso has been expanded by the District Court of Appeal, Second District, to make the award of such expert fees mandatory when, as in the instant case, the attorney testifying as an expert witness expects to be compensated for his or her testimony. Straus, 478 So. 2d at 472. See also, Stokus, 651 So. 2d at 1244. This Court's holding in Travieso has also been applied in a number of other contexts. See, In Re: Estate of McQueen, 699 So. 2d 747, 751-752 (Fla. 1st DCA 1997)(probate); College v. Bourne, 670 So. 2d 1118, 1121, n.6 (Fla. 5th DCA 1996)(probate); DeBiasi v. S & S Builders, Inc., 593 So. 2d 314 (Fla. 4th DCA 1992)(mechanics lien); Tallahassee Memorial Regional Medical Center v. Poole, 547 So. 2d 1258 (Fla. 1st DCA 1989)(wrongful death); B & H Const. v. Tallahassee Com. College, 542 So. 2d 382, 391-392 (Fla. 1st DCA 1989)(contract) ; Tuerk v. Allstate Ins. Co., 458 So. 2d 504 (Fla. 3d DCA 1986)(insurance benefits).

Case law provides no support for the district court's holding in the instant case. The only decision which raises any question about Martin Paving's right to recover fees for Spoonhour's testimony is Robert & Co. Associates v. Zabawczuk, 200 So. 2d 802 (Fla. 1967). In Zabawczuk, this Court, without considering the applicability of § 92.231, Fla. Stat., asked whether a fee could be awarded under § 440.31 of Florida's original Workmen's Compensation Act to an expert witness testifying as to a reasonable

attorneys' fee. In interpreting the Act, this Court found that § 440.31, which permits the award of a fee for an expert witness, was never intended to cover the award of fees to attorneys appearing as expert witnesses on behalf of attorneys who claim counsel fees payable under the Act.

As this Court subsequently recognized in Travieso, 474 So. 2d at 1185, the construction it gave the workers' compensation statute in Zabawczuk was a narrow construction designed "to effectuate the purpose of that act as evidenced by its history." As this Court further recognized, its narrow construction of § 440.31, Fla. Stat., "does not logically nor reasonably require such a construction of § 92.231." Id.

The Florida Workmen's Compensation Act, as it was originally passed, "was pitched on the theory that the claimant could litigate his own cause." Murphy, 422 So. 2d at 1100 (citing Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968). As Chapter 440 was written at the time of the Zabawczuk decision, the Workmen's Compensation Division of the Florida Industrial Commission was required to award a reasonable attorneys' fee only if the employer unsuccessfully resisted payment of compensation demanded and the injured employee retained an attorney in a successful prosecution of his claim. If a court was required to hold any proceedings to review a claim, the court was permitted, in its discretion, to allow or increase the attorneys' fees approved by the Commission. Thus, unlike proceedings in eminent domain, courts considering workers' compensation claims were not even required to award attorneys' fees and no guidelines were provided for determining reasonable fees, as attorneys were generally not retained for such proceedings.

In Crittenden, 514 So. 2d 352-353, this Court reaffirmed its holding in Zabawczak, finding that "today's worker's compensation law retains and even places renewed emphasis upon the pre-1979 self-executing concept." To reinforce that conclusion, this Court proceeded to hold that an attorneys' fee could be awarded by the deputy commissioner in worker's compensation cases "without the necessity of an affidavit or the testimony of an expert witness concerning the amount of the fee," or even a hearing on the issue. Id. at 353.

Unlike the Florida Workmen's Compensation Act, Chapter 73 was never "pitched on the theory that a claimant could litigate his own cause." On the contrary, it has always been recognized that a defendant in an eminent domain proceeding will have to be assisted by counsel and valuation experts and that the fees for such assistance must be borne by the taking authority. Attorneys' fees are, in fact, so integral to eminent domain proceedings that prior to 1963, a reasonable attorneys' fee was assessed by the jury. See § 73.16, Fla. Stat. (1961); Chapter 63-281, Laws of Florida.

In construing a statute like § 92.231, Fla. Stat., this Court has long recognized that respect for the rule of stare decisis impels it to follow its own precedents, particularly when arguments to change are not overwhelming. Old Plantation Corp. v. Maule Industries, Inc., 68 So. 2d 180 (Fla. 1953). Once this Court has construed or interpreted a statute, it is bound by that decision. Halifax Drainage Dist. of Volusia County v. State, 185 So. 123, 126 (Fla. 1938). This is particularly true where, as in the instant case, the Florida Legislature has failed to amend a statute after it has been construed by this Court. See White v. Johnson, 59 So. 2d 532 (Fla. 1952); Johnson v.

State, 91 So. 2d 185, 187 (Fla. 1956). Under such circumstances, it is assumed that failure by the Legislature to amend amounts to acceptance or approval of the construction rendered in the earlier case. White, 59 So. 2d at 533.

This Court's decision in Travieso was rendered in 1985, over twelve years ago. In the interim, the Legislature has chosen not to change a single letter of the applicable provisions of § 92.231, Fla. Stat., thus giving its tacit approval to the holding in Travieso. There is no reason now to recede from that decision.

If attorneys are called upon to testify as expert witnesses, they should be accorded the same rights accorded all other expert witnesses. In B & L Motors, Inc v. Bignotti, 427 So. 2d 1070 (Fla. 2d DCA 1983), the court held that attorneys should not be allowed fees for testifying as expert witnesses as to reasonable attorneys' fees because the "practice of law is not a business," but a profession. According to the court, attorneys, therefore, should testify for their fellow attorneys without charge as a matter of professional courtesy. In making that assertion, the court ignored the reality of modern law practice. As with all other professionals, an attorney's livelihood depends upon his or her ability to generate clients, provide services to those clients and receive a reasonable fee for those services. 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. Moreover, it is unfair to prohibit attorneys who provide such testimony from recovering a reasonable fee for their services. As a professional, an attorney is as entitled under § 92.231, Fla. Stat. as any other expert witness to recover a reasonable fee for his or her services in testifying as to a reasonable attorneys' fee.

In the area of eminent domain, issues concerning reasonable attorneys' fees are routinely resolved through the intervention of third party attorneys. Such attorneys review the litigation files, discuss the case with the attorneys on both sides, form an opinion as to a reasonable fee and assist in reaching a fee acceptable to both parties. There is no forum for recovering for such services. They are provided from one professional to another in the interest of avoiding unnecessary litigation. If, however, no agreement can be reached and judicial proceedings are required to determine an appropriate fee, there is no reason why an attorney who testifies as an expert witness as to reasonable fees should not be paid for his or her services.

In Travieso, this Court expressly rejected the holding in B & L Motors and, instead, permitted the award of fees to attorneys testifying as expert witnesses as to reasonable attorneys' fees. The district court has provided no reason for receding from that decision. On the contrary, as this Court has recognized, "the greatest good will be achieved and the greatest stability in the law maintained by adhering to the weight of authority instead of plowing new ground." Old Plantation, 68 So. 2d at 183.

II. UNDER §§ 73.091 AND 73.092, FLA. STAT. (1993), THE TRIAL COURT WAS REQUIRED TO AWARD A REASONABLE FEE BOTH FOR THE ATTORNEYS REPRESENTING MARTIN PAVING AND FOR THE ATTORNEY TESTIFYING AS AN EXPERT WITNESS AT THE FEE HEARING, BECAUSE SUCH A HEARING IS A PROCEEDING IN AN EMINENT DOMAIN ACTION.

A condemnor's obligation to pay fees in an eminent domain proceeding is governed by § 73.091 and § 73.092, Fla. Stat. Section 73.091 provides as follows: "The petitioner shall pay attorneys' fees as provided in s. 73.092 as well as all

reasonable costs incurred in the defense of the proceedings in the circuit court, including but not limited to reasonable appraisal fees and, when business damages are compensable, a reasonable accountant's fee to be assessed by that court." (emphasis added). Section 73.092, Fla. Stat. mandates that a court award attorneys' fees incurred in eminent domain proceedings and sets forth express directives for making such an award.

Because James Spoonhour's fees for testifying as to reasonable attorneys' fees were not only reasonable, but required, those fees must be recognized as within the compass of § 73.091, Fla. Stat. Because a hearing to determine reasonable fees must be recognized as a "proceeding in the circuit court," FDOT must be required to pay all reasonable fees of both Spoonhour and GH&R[2] in preparing for and participating in the fee hearing.

Section 73.091(1) specifically references the right to recover the fees of appraisers and accountants, but it further indicates that costs are not to be limited to

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[2] As in the instant case, courts have to date ignored the mandate of § 73.091, Fla. Stat., as to attorneys' fees. In Dep't. of Transp. v. Winter Park Golf Club, Inc., 687 So. 2d 970 (Fla. 5th DCA), for example, the district court held that it was error to award an attorneys' fee for time spent litigating the correct amount of the fee to be awarded. As sole support for its decision, the district court cited this Court's decision in State Farm Fire and Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993). That case held that under § 627.428, Fla. Stat. (1993), which concerns insurance contracts, fees could be awarded for litigating entitlement to, but not the amount of, attorneys' fees. In contrast to Chapter 73, nothing in Chapter 627 mandates the paying of all attorneys' fees incurred in "the proceedings in the circuit court." Unless a proceeding to award attorneys' fees can somehow be designated as something other than a proceeding in a circuit court, all attorneys' fees incurred in any such eminent domain proceeding must be paid by the taking authority.

experts in just those areas. In fact, courts have recognized that under § 73.091, an owner is entitled to recover costs of such expert witnesses as are necessary to enable him to compete on even terms with the condemning authority. See Dade County v. Renedo, 147 So. 2d 313 (Fla. 1962). Courts have also recognized that, since condemning authorities are able to provide expert witnesses, if the defendant in a condemnation proceeding is to be assured of full compensation, he should have the same tools available to him in a defense of that right. Cheshire v. State Road Dep't., 186 So. 2d 790 (Fla. 4th DCA) cert. den., 192 So. 2d 493 (1966). Thus, courts have recognized that fees may be awarded for appraisers, engineers, accountants and marketing experts. See Garber v. State Dep't. of Transp., 687 So. 2d 2 (Fla. 1st DCA 1996). So long as the expenditure of fees for expert witnesses is reasonably and necessarily incurred in relation to a proper issue in a case, such fees have been held recoverable by Florida courts. See Leeds v. City of Homestead, 407 So. 2d 920 (Fla. 3d DCA 1981); Hodges v. Div. of Admin., Dep't. of Transp., 323 So. 2d 275 (Fla. 2d DCA 1975); Cheshire, 186 So. 2d at 791.

There can be no question but that Spoonhour's fees were reasonably and necessarily incurred. It is well settled that "the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of the fee." Crittenden, 514 So. 2d at 352-353. See also Schwartz, Gold & Cohen, P.A. v. Streicher, 549 So. 2d 1044 (Fla. 4th DCA 1989); Clark v. Squire, Sanders & Dempsey, 495 So. 2d 264 (Fla. 3d DCA 1986). In Lyle v. Lyle, 167 So. 2d 256, 257 (Fla. 2d DCA), cert. den., 172 So. 2d 601 (1964), the court asserted bluntly that "the self serving nature

of the testimony given by the attorney who performs the services precludes the court from making an award based solely on his testimony."

Thus, if Martin Paving wished to be reimbursed for the fees it paid GH&R, it had to retain an attorney to testify as to reasonable attorneys' fees. Although the cases cited above dealt with causes of action other than ones in eminent domain, there is no reason why they should not apply equally to condemnation proceedings. In fact, the testimony of an attorney is particularly needed in an eminent domain fee hearing where § 73.092 provides a list of factors a trial court must consider in awarding a reasonable attorney's fee. Unless the trial court itself has experience in eminent domain, which is not always the case, it is vital that an attorney testify to provide a basis for the attorneys' fees being sought by a condemnee. Since the testimony of attorneys acting as expert witnesses in eminent domain fee hearings is both necessary and desirable, there is no basis for discriminating against attorneys by denying them fees that must be awarded all other expert witnesses assisting condemnees in eminent domain proceedings.

In enacting § 73.091, Fla. Stat. (1993), the Florida Legislature required courts to award all costs, including experts' fees "incurred in the defense of the proceedings in the circuit court." In enacting § 73.092, Fla. Stat. (1993), the Legislature expressly mandated courts "in eminent domain proceedings" to award attorney's fees. Whether the quoted phrase means in an overall eminent domain proceeding or in a proceeding to award fees, it is clear the Legislature recognized that attorneys' fee hearings were "proceedings" before the circuit court in eminent domain litigation. Indeed, the very purpose of § 73.092 is to establish guidelines for the circuit court proceedings by which

attorneys' fees are awarded. Under those guidelines, the circuit court is required to review detailed records and to consider specific criteria, giving greater weight to benefits than to the other criteria. Moreover, as with any factual determination, the amount of an attorneys' fee must be proved in a judicial proceeding and allowed by a court in its discretion. See, Thoni v. Thoni, 179 So. 2d 420 (Fla. 3d DCA 1965); Lyle, 117 So. 2d at 257.

The term "proceeding" is recognized as broader than the word "action." A proceeding includes all possible steps in an action from its institution to the execution of judgment, but more particularly, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object. 1 Fla. Jur. 2d. Actions § 2(1977). A proceeding has also been defined as some act or acts done in furtherance of the enforcement of an existing right, real or imaginary. See Coca-Cola Co. v. Atlanta, 110 S.E. 730 (1922), cert. den. 259 U.S. 581 (1922). Under those definitions, Martin Paving's motion to enforce its right to recover reasonable attorneys' fees and the hearing thereon must be recognized as "proceedings in the circuit court."

In Orange State Oil Co. v. Jacksonville Expressway Auth., 143 So. 2d 892 (Fla. 1st DCA 1962), the court recognized that the "proceedings" contemplated by Chapter 73 extend beyond the entry of an award for a taking. According to that court, proceedings relating to eminent domain "are to be conducted in two stages." Id. at 895.

> The first stage encompasses the various steps to be taken down to and including the trial and rendition of verdict. The second stage of the proceedings contemplates a hearing by

> the court after entry of judgment for the purpose of determining the rights and interests of the various parties claiming an interest in the property condemned and apportioning the award among them. The foregoing procedure is followed by a section of the statute relating to costs of the proceedings. This section provides that "all costs of proceedings shall be paid by the petitioner . . . ."
>
> It is noted from the above quoted section of the statute that the legislature has provided for all costs of eminent domain proceedings to be paid by the petitioner. This provision is all inclusive, and contains no exceptions as to costs incurred after trial. It applies to all such necessary costs as may be incurred by the parties in procuring a final adjudication of their rights, irrespective of whether such costs are incurred during the first or second stage of the proceedings contemplated by this statute.
>
> The Constitution provides that private property may not be appropriated for public use without the payment of just compensation. The judicial history of eminent domain proceedings clearly indicates that the courts have been ever vigilant to fully protect the interests of persons whose property is taken through eminent domain proceedings. It has been held that under the just compensation guarantee of the Constitution the law will not permit the amount awarded an owner to be diminished by the requirement that he bear the cost of employing expert witnesses required to testify in his behalf at trial. The same rule is applicable to other costs reasonably incurred by owners in defense of this type action. All such fees and costs must be borne by the petitioner.

Id. at 895-896.

Although the decision in Orange State related to apportionment proceedings, a proceeding to award a reasonable attorneys' fee constitutes an equally integral part of the post judgment stage of any eminent domain litigation. As such, all fees and costs incurred by the condemnee therein must be borne by the condemnor.

III. UNDER THE FLORIDA CONSTITUTION, THE TRIAL COURT MUST AWARD EXPERT WITNESS AND ATTORNEYS' FEES INCURRED IN AN ATTORNEYS' FEE HEARING SO AS TO PLACE A CONDEMNEE ON AN EQUAL FOOTING WITH THE CONDEMNOR.

It is particularly appropriate that a condemning authority be required to pay all fees incurred in an eminent domain proceeding to determine reasonable attorneys' fees. 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. As noted by the Florida Supreme Court in Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950):

> The plight of the landowner in this situation is well stated by the New York Court in Re Water Supply in City of New York, 125 App. Div. 219, 109 N.Y.S. 652, 654, as follows: He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the Legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right.

In the instant case, FDOT was represented by a competent attorney, who employed another attorney, James W. Anderson, to testify as an expert witness on behalf of FDOT. Anderson worked in the litigation section of FDOT from 1976 until 1988. Tr.-80. During his last four or five years with FDOT, he was the chief litigation attorney. Upon leaving the Department, he took a position with a private law firm, where he continued to handle eminent domain cases. Tr.-81. If Martin Paving was to be

able to litigate the issue of what attorneys' fee it should be awarded for GH&R's representation, it likewise needed the assistance both of competent counsel and an attorney acting as an expert witness with experience at least equal to that of Mr. Anderson. Without such assistance, Martin Paving would not be in a position to compete on an equal footing with FDOT at the hearing.

CONCLUSION

Under § 92.231, Fla. Stat., as interpreted by this Court in Travieso, 474 So. 2d at 1184, the trial court had discretion to award a reasonable fee for attorney James Spoonhour's testimony as an expert witness as to an award of reasonable attorneys' fees. Under § 72.091(1), Fla. Stat. and the Florida Constitution, the trial court was required to award fees both to Spoonhour and to GH&R for representing Martin Paving at the fee hearing. For all the above reasons the decision of the District Court of Appeal, Fifth District should be reversed and the trial court's Order of July 8, 1996 should be reinstated as to GH&R's attorneys' fees and James Spoonhour's expert witness fee awarded for the hearing of June 26, 1996.

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 Federal Express this 26th day of February, 1998 to Marianne A. Trussell, Esquire, Assistant General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0458.

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