

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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

Appellants,

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Appellee.

CASE NO:

FILED

CLERK OF SUPREME COURT

DEC 23 1997

CLERK OF SUPREME COURT
By: *[Signature]*
Clerk of Deputy Clerk

92,046

APPELLANTS' JURISDICTIONAL BRIEF

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

Gordon H. Harris, Esquire
Kent L. Hipp, Esquire
G. Robertson Dilg, Esquire
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 3068
Orlando, Florida 32802-3068
Phone: (407)843-8880
Florida Bar No: 094513
Florida Bar No: 879630
Florida Bar No: 362281
Attorneys for the Appellants

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PRELIMINARY STATEMENT

Appellants, RICHARD KEITH MARTIN, ROBERT DOUGLAS MARTIN, MARTIN COMPANIES OF DAYTONA BEACH, MARTIN ASPHALT COMPANY and MARTIN PAVING COMPANY, were the Respondents below. They will be referred to in this brief collectively as "Martin Paving." Appellee, DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, was the Petitioner 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

This case concerns an eminent domain proceeding in which FDOT took a portion of property owned by Martin Paving in Volusia County, Florida. FDOT had originally offered to settle the matter for \$106,200 (Tr-9-10) but ultimately paid Martin Paving \$500,000 for the taking. Thereafter, a hearing was held on June 26, 1996, to determine the reasonable attorneys' fees and costs that should be awarded Martin Paving for its defense of the case. R-1-131.

Following the hearing, the trial court entered an Order On Award of Attorneys' Fees And Costs. R-188-193. In that order, the trial court included an award of expert witness fees for James Spoonhour, Esquire, who testified as an expert witness in support of Martin Paving's request for attorneys' fees. The trial court's order stated as follows:

The Court finds that a reasonable fee for the services of James Spoonhour is \$1,950 based upon 6.5 hours reasonably expended at \$300 per hour in preparation for and testifying on the attorney's fee issue in this cause.

FDOT thereafter appealed the award to the District Court of Appeal, Fifth District. In defending the above award, Martin Paving specifically brought to the appellate court's attention this Court decision in Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985). In that decision, this Court held that under §92.231, Fla. Stat., "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." By order of October 14, 1997, however, the district court reversed the trial judge's order and specifically directed: "There should be no

award of fees for the expert witness." The district court's decision was in no way based upon the trial court having abused its discretion. It was rather a directive that no such fees shall be awarded.

Martin Paving thereafter filed an Amended Motion for Rehearing in which it reminded the district court of the law as set forth by this Court in Travieso. Martin Paving also argued that the district court had improperly eliminated the discretion this Court accorded trial judges to award expert witness fees for a lawyer who testifies as an expert witness as to reasonable attorneys' fees. Nevertheless, on November 17, 1997, the district court denied Martin Paving's Motion for Rehearing. Martin Paving timely appealed that decision.

SUMMARY OF THE ARGUMENT

The District Court of Appeal, Fifth District has held, as a matter of law, that a trial court in an eminent domain proceeding cannot award as costs fees incurred by a lawyer who testifies as an expert witness as to reasonable attorneys' fees. The decision of the district court cannot, however, be reconciled with the previous decision of this Court 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." Thus, Martin Paving contends that the decision of the district court expressly and directly conflicts with the previous decision of this Court.

The district court's decision is also in conflict with 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). In those decisions, the District Court of Appeal, Second District, held that when, as here, the testifying attorney expects to be compensated for his testimony, an award of such fees is not even discretionary, but mandatory.

JURISDICTIONAL STATEMENT

ARGUMENT

The decision of the District Court of Appeal, Fifth District, in this case expressly and directly conflicts with the decision of this Court in Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985). In Travieso, this Court expressly recognized that a trial court has discretion to award expert witness fees to any lawyer who testifies as an expert as to reasonable attorneys' fees. That decision was based on §92.231, Fla. Stat., which provides that any witness who offers himself or herself in the trial of any civil action as an expert witness "shall be allowed a witness fee" and gives the trial court discretion to award such amount as he or she "may deem reasonable." The decision of the district court expressly and directly conflicts with this Court's decision.

This Court's decision in Travieso was subsequently applied by the District Court of Appeal, Second District and interpreted to hold that when, as in the instant case, the testifying attorney expects to be compensated for his testimony, an award of such fees is not discretionary, but mandatory. Stokus, 651 So. 2d at 1244; Straus, 478 So. 2d at

472. Thus, the decision of the district court expressly and directly conflicts with those decisions, as well as with this Court's decision in Travieso.

The decision is also in direct conflict with the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, which provides that a reasonable sum should be paid expert witnesses for testimony at trial.

Neither Travieso nor the Statewide Uniform Guidelines provides any exemption for attorneys testifying in eminent domain proceedings. In fact, the award of fees for attorneys testifying as to reasonable attorneys' fees is particularly appropriate in an eminent domain proceeding where a property owner is entitled, under the Florida Constitution, to be made whole, which includes receiving reasonable fees for the defense of any such action. Dade County v. Brigham, 47 So. 2d 602, 604-605 (Fla. 1950).

The mandate of the Florida Constitution that a property owner shall be made whole in an eminent domain proceeding is codified as §73.091(1), Fla. Stat. However, to be made whole by receiving reimbursement for legal fees, it is necessary for a defendant in an eminent domain proceeding to provide expert testimony to assist the court in establishing a reasonable fee. See, 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). Under §73.092, Fla. Stat. (1993), the trial court is specifically required to consider such factors as the monetary and nonmonetary benefits obtained, the novelty, difficulty and importance of the questions involved, the skill employed by the attorney, the responsibility incurred and fulfilled by the attorney, the attorney's time and

labor reasonably required to represent the client in relation to the benefits resulting to the client and the fee customarily charged for legal services of a comparable or similar nature. Only an attorney skilled in eminent domain proceedings can offer expert testimony on such issues. There is no reason his or her testimony, unlike that of any other expert witness, should be given without compensation.

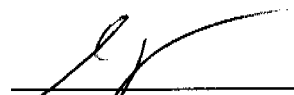
CONCLUSION

To recover the reasonable attorneys' fees to which it was entitled, both by the Florida Constitution and by § 73.091(1), Fla. Stat., Martin Paving was required to obtain the services of an attorney to testify as an expert witness as to reasonable attorneys' fees. By denying the trial court discretion to award that attorney for his services, the District Court of Appeal, Fifth District, directly violated the holding of this Court in Travieso, the provisions of the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and the mandate of the Florida Constitution as interpreted by this Court in Brigham. It also placed itself in direct conflict with the decisions of the District Court of Appeal, Second District in Stokus, 651 So. 2d at 1244 and Straus, 478 So. 2d at 472.

Pursuant to 9.030(a)(2)(A)(iv), Fla. R. App. P., this Court has discretionary jurisdiction to review the decision below. For all of the above reasons Martin Paving

respectfully requests this Court to exercise that jurisdiction to consider the merits of
Martin Paving's argument.

Respectfully submitted,



Gordon H. Harris, Esquire
Kent L. Hipp, Esquire
G. Robertson Dilg, Esquire
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 3068
Orlando, Florida 32802-3068
Phone: (407)843-8880
Florida Bar No: 094513
Florida Bar No: 879630
Florida Bar No: 362281
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 19th 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
Orlando, Florida 32802-3068
Phone: (407)843-8880
Florida Bar No: 094513
Florida Bar No: 879630
Florida Bar No: 362281
Attorneys for Appellants

cmiller\briefts\martin.sca