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

JURISDICTIONAL BRIEF OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

Pamela S. Leslie
General Counsel
MARIANNE A. TRUSSELL
Deputy General Counsel
FLORIDA BAR NO. 437166
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458
Phone: (850) 414-5265

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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 as "MARTIN."

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

Citations to the opinion of the Fifth District Court of Appeal attached hereto as the appendix will be in form of (A.) followed by the appropriate page number(s). Citations to Martin's Jurisdictional Brief will be in the form of (JB.) followed by the appropriate page numbers(s).

STATEMENT OF THE CASE AND FACTS

Martin, which owned property subject to an eminent domain proceeding initiated in connection with the reconstruction of Nova Road[1] in Volusia County, seeks extraordinary review of a portion of the reversal by the District Court of Appeal, Fifth District, of an order awarding attorney's fees and expert fees claiming conflict with Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985); Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995); and Straus v. Morton F. Plant Hosp. Found., Inc., 478 So. 2d 472 (Fla. 2d DCA 1985). (JB. 1-2)

Below, the issues of compensation to Martin were settled at mediation for $500,000 for a difference of $393,800 from the last written offer. Attorneys' fees were sought, a hearing was held, and the trial court entered an order awarding an attorneys' fee of $110,000 ($51,980.50 lodestar based upon 306 hours, adjusted "upwards" resulting in the exact fee testified to by the owner's expert witness). (A. 1) The trial court also awarded $1,956.50 to James Spoonhour for testifying on behalf of Martin's attorneys as to the amount of fees they should receive. (A. 1) The Department timely appealed and the Fifth District Court remanded for reduction of the award to the attorneys and vacated the award to the attorneys' expert. On December 11, 1997, Martin filed a "Notice of Appeal" seeking review of that portion of the opinion regarding the fee to the expert pursuant to this Court's conflict jurisdiction.

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[1]Coincidentally, the landowner was awarded the construction contract for the Nova Road project.

SUMMARY OF THE ARGUMENT

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court has the discretion to exercise its jurisdiction "to review . . . decisions of district courts of appeal that . . . **expressly and directly conflict** with a decision of . . . the supreme court **on the same question of law.**" (emphasis supplied). The parameters of this "express and direct conflict," that such conflict must appear within the four corners of the majority decision, are well established. Department of Health & Rehabilitative Servs. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)); Kincaid v. World Ins. Co., 157 So. 2d 517, 518 (Fla. 1963).

The majority opinion is faithful to this Court's decision in Travieso, a dissolution proceeding, and the district court of appeal opinions in Stokus and Straus, probate matters. Travieso, 474 So. 2d 1184; Stokus, 651 So. 2d 1244; and Straus, 478 So. 2d 472. The petition fails to show that the district court's opinion directly and expressly conflicts with any of the cases relied upon and, thus, fails to establish jurisdiction in this Court. The petition should be denied.

JURISDICTIONAL ARGUMENT

THE PETITION FAILS TO ESTABLISH JURISDICTION BECAUSE THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH TRAVIESO OR OTHER DECISIONS CONSTRUING TRAVIESO ON THE SAME QUESTION OF LAW

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court has the discretion to exercise its jurisdiction "to review . . . decisions of district courts of appeal that . . . **expressly and directly conflict** with a decision of . . . the supreme court **on the same question of law.**" (emphasis supplied). The narrow parameters of this Court's conflict jurisdiction that "express and direct conflict, i.e., [conflict which] must appear within the four corners of the majority decision," are well established. National Adoption, 498 So. 2d at 889; Kincaid, 157 So. 2d at 518.

To establish jurisdiction, Martin must assert and establish the express and direct conflict resulting from the four corners of the opinion, which is a simple and straightforward application of the law regarding attorney's fees in eminent domain proceedings:

> 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 a

> 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). (A. 2)

The opinion is entirely faithful to this Court's majority opinion in Travieso and its holding:

> 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.** Generally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable attorney's fees. This traditionally has been a matter of professional courtesy. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. **Only in the exceptional case where the time required for preparation and testifying is burdensome, should the attorney expect compensation.**

Travieso, 474 So. 2d at 1186 (emphasis added).

The district court's opinion inherently recognizes the principles of this Court's majority opinion in Travieso and applies them to the law regarding eminent domain proceedings. The opinion in this case does not conflict with the majority in Travieso, the result is merely different because the facts are different, the law of eminent domain is different from general civil litigation, and differing facts require different results.

Similarly, there is no direct and express conflict with Stokus or Straus, both of which are probate matters. In both cases, the Second District Court of Appeal construed this Court's opinion in Travieso to mean that a trial court has no discretion in the award

of an expert attorney fee if "the testifying attorney expects to be compensated for his testimony." Stokus, 651 So. 2d at 1246; Straus, 478 So. 2d at 473. That court's dictum is neither binding on other district courts, nor relevant to the facts or the law applied by the district court in this case. Clearly no conflict is created by the district court's opinion in this case and those comments.

By their references to this Court's opinion in Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950), Martin's attorneys appear to suggest that it also requires a different result from that reached by the district court. It does not. Martin's attorneys claim that a fee to an attorney testifying on behalf of an attorney at a hearing to determine the **amount** of the attorney's fee (not to the issue of entitlement, because entitlement is rarely, if ever, an issue in an eminent domain proceeding) is required in an eminent domain proceeding because "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." (JB. 4) The purpose of Section 73.091, Florida Statutes, in accordance with Article X, Section 6 of the Florida Constitution, is to ensure "just compensation" to the property owner. Contrary to Martin's attorneys' assertion otherwise, the fee awarded to the attorney expert in this case had absolutely nothing to do with the "defense of [the eminent domain] action."

Attorneys' fees are awardable pursuant to Section 73.091, Florida Statutes, and Brigham "because it cannot be said that [a property owner] has 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 604-605(emphasis added). Mr. Spoonhour was testifying on behalf of Martin's attorneys and his opinion had nothing whatsoever to do with establishing the fair value of Martin's property.

The cost, if any, of an expert's testimony to support an attorney's fee is not an expense incurred to establish 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 just compensation]." State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830, 833 (Fla. 1993); Seminole County v. Butler, 676 So. 2d 451, 455 (Fla. 5th DCA 1996). This Court recognized in Palma that even a party's attorney is not entitled to additional fees for time spent litigating the amount of fees to be awarded, as opposed to entitlement:

> However, we do not agree with the district court below that attorney's fees may be awarded for litigating the amount of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment.

Palma, 629 So. 2d at 833.

Thus, the district court's opinion is entirely faithful to Travieso and Palma because if the attorneys themselves are not entitled to additional fees for determining the amount of money

they will receive, there is no entitlement to a fee for an expert who testifies on behalf of the attorneys. Neither the Constitution, the statute, nor any of the cases cited by Martin as being in direct and express conflict with the district court's opinion in this case meet the threshold for establishing jurisdiction with this Court. None of those authorities requires a condemning authority to 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 other lawyers to figure out how to justify the fee.

In fact, the comment by Martin's attorneys that "only an attorney skilled in eminent domain proceedings can offer expert testimony . . . [Therefore] [t]here is no reason his or her testimony, unlike that of any other expert witness, should be given without compensation" (JB. 5) flies in the face of everything this Court has ever said about attorneys and the fact they should testify as "a matter of professional courtesy." Travieso, 474 So. 2d at 1187. Or, as more strongly stated by Justice Ehrlich: "I would nonetheless hope that these professional courtesies that over the years lawyers traditionally extended to each other in this area do not go the way of the five cent cigar and the nickel Baby Ruth and Hershey bar." Id. at 1187. The district court recognizes those principles and by its opinion applies them and supports this Court's opinion in Travieso.

CONCLUSION

Because Martin's petition fails to establish the direct and express conflict required to establish jurisdiction, it should be rejected.

Respectfully submitted,

MARIANNE A. TRUSSELL
Deputy General Counsel
FLORIDA BAR NO. 437166
Department of Transportation
605 Suwannee Street, MS - 58
Tallahassee, Florida 32399-0458
(850) 414-5265

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 29th day of December, 1997, 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,

Petitioners,

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STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

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

APPENDIX TO JURISDICTIONAL BRIEF OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

Attorney's fees—Eminent domain—Trial court erred in condemnation proceedings by failing to calculate attorney's fees awarded to condemnees in conformance with statutory requirements—Error to adopt expert's contingency risk multiplier in doubling lodestar amount based on theory that attorney's fees in eminent domain cases are contingent, where they are not—On remand, trial court should set lodestar based upon testimony as to number of hours spent by each attorney multiplied by reasonable hourly rates and then determine any adjustment based upon benefit obtained—Error to include paralegal hours as part of attorneys' hours to get "blended" effective hourly rate—On remand, trial court to separate out paralegal time and, if appropriate for compensation, multiply number of paralegal hours by lower hourly rate—Time spent litigating fee amount not compensable since condemnee has no interest in amount of fee, the benefit of which inures solely to attorney

DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, Appellant, v. ROBBINS AND ROBBINS, INC., et al., Appellee. 5th District. Case No. 96-2163. Opinion filed October 17, 1997. Appeal from the Circuit Court for Volusia County, Patrick G. Kennedy, Judge. Counsel: 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. 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 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 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 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.)

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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 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.

[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.

* * *

Criminal law—Trial court exceeded authority by entering post conviction order requiring Department of Corrections to allow visitation between inmate and minor child during inmate's incarceration—Statutory provision permitting trial court to grant permission for special visitation where visiting was restricted by court order did not apply in case where trial court was not eliminating restriction that it had earlier imposed

HARRY K. SINGLETARY, JR., SECRETARY FOR THE FLORIDA DEPARTMENT OF CORRECTIONS, Appellant, v. IAN BULLARD, Appellee. 5th District. Case No. 97-0584. Opinion filed October 17, 1997. Nonfinal Appeal from the Circuit Court for Volusia County, R. Michael Hutcheson, Judge. Counsel: Maryellen McDonald, Assistant General Counsel, Department of Corrections, Tallahassee, for Appellant. Ian Bullard, Jasper, *pro se*.

(ANTOON, J.) The issue in this case is whether the trial court exceeded its authority when it ordered the Department of Corrections (DOC) to allow visitation between an inmate and his minor child during the inmate's incarceration. The trial court lacked the authority to enter such an order, and therefore, we must reverse.

Ian Bullard was convicted of two counts of lewd and lascivious assault upon a child, in violation of chapter 800, Florida Statutes (1995). He was sentenced to two concurrent terms of ninety-six months in prison followed by four years' probation. After sentencing, Bullard sent the trial court a letter requesting that the court allow him visitation with his seven-year-old daughter during his incarceration. Without notice to DOC, the trial court entered an order directing that the "Department of Corrections shall allow [Bullard] to have visitation in the state prison system with his natural daughter . . . within reasonable restrictions placed on prisoners regarding visits by minor children."

DOC challenges this order, arguing that postsentencing decisions involving inmate visitation lie solely with DOC. In support of this argument, DOC asserts that, by enacting section 944.09(1)(n), Florida Statutes (1995), the legislature granted DOC exclusive rule-making authority regarding visitation hours and privileges. Bullard responds by arguing that the newly enacted subsection (n) of section 944.09(1) controls the instant case:

> 944.09 Rules of the department; offenders, probationers, and parolees.
>
> (1) The department shall adopt rules governing the administration of the correctional system and the operation of the department, which rules shall relate to:
>
> * * *
>
> (n) Visiting hours and privileges. The rules shall provide that any inmate with a current or prior conviction for any offense contained in chapter . . . 800 . . . for committing or attempting to commit . . . a sex act on, in the presence of, or against a child under the age of 16 years, shall not be allowed visitation with anyone under the age of 18 years, unless special visitation is approved by the superintendent. The authorization for special visitation shall be based on extenuating circumstances that serve the interest of the children. *If visiting is restricted by court order, permission for special visitation may be granted only by the judge issuing the order.*

§ 944.09(1)(n), Fla. Stat. (Supp. 1996) (emphasis added). Bullard maintains that subsection (n) authorizes the trial court to order DOC to allow him visitation with his daughter. We disagree. In so ruling, we adopt the reasoning set forth in *Singletary v. Benton*, 693 So. 2d 1119 (Fla. 4th DCA 1997).[1]

In *Benton*, the fourth district aptly explained the scope of the 1996 amendment:

> There is no case law interpreting the 1996 amendment, but the plain language of section 944.09(1)(n) permits the court to grant special visitation only where visitation had been restricted by the court. . . .[A]ll this really amounts to is that the court may lift a