OA 6-1-98 017

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' REPLY BRIEF

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENTS OF LAW 2

I. UNDER § 92.231, FLA. STAT. (1993), THE TRIAL COURT PROPERLY EXERCISED ITS RIGHT TO AWARD A FEE FOR AN ATTORNEY WHO TESTIFIED AS AN EXPERT WITNESS IN AN ATTORNEYS' FEE HEARING. 2

II. THE TRIAL COURT HAD AN OBLIGATION UNDER § 73.091, FLA. STAT. (1993), TO AWARD ATTORNEYS' FEES AS WELL AS EXPERT WITNESS FEES INCURRED IN THE FEE HEARING 7

CONCLUSION 13

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page

STATE CASES

Cheshire v. State Road Department,
186 So. 2d 790 (Fla. 4th DCA 1966) 2

Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950) . . 3, 4, 5, 10, 11

Lawrence v. Florida East Coast Railway Co.,
346 So. 2d 1012 (Fla. 1977) 10

Ocean Trail Unit Owners Association, Inc. v. Mead,
650 So. 2d 4 (Fla. 1994) 9

State Farm Fire & Casualty Co. v. Palma,
629 So. 2d 830 (Fla. 1992) 8

State Road Department v. Outlaw,
148 So. 2d 741 (Fla. 1st DCA 1983), cited by 7

Travieso v. Travieso, 474 So. 2d 1164 (Fla. 1985) . . 2, 4, 13

MISCELLANEOUS

§ 72.091(1), Fla. Stat. (1993) 13

§ 73.16, Fla Stat. (1941) 5

§ 73.091, Fla. Stat., (1955) 3

§ 73.091, Fla. Stat. (1993) 3, 4, 6, 7, 8, 9, 10

§ 73.092, Fla. Stat. (1993) 7, 8, 9

§ 90.231, Fla. Stat. 3, 4, 6

§ 92.231, Fla. Stat. (1993) 2, 3, 4, 7, 13

§ 92.231, Fla. Stat. (1995) 3

§ 93.091, Fla. Stat. (1993) 2

§ 627.428(1), Fla. Stat. (1983) 9

Page

OTHER

Ch. 59-201, Laws of Florida 5, 6

Ch. 87-148, Laws of Florida 7

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. Citations to FDOT's Answer Brief will be cited as "AB-" followed by the appropriate page number. Citations to Martin Paving's Initial Brief will be cited as "IB-" followed by the appropriate page number.

ARGUMENTS OF LAW

Under § 92.231, Fla. Stat. (1993), a trial court has the right in its discretion to award a fee to any expert witness who testifies before any court on any matter. Travieso v. Travieso, 474 So. 2d 1164 (Fla. 1985). Under § 93.091, Fla. Stat. (1993), a taking authority has an obligation to pay all costs, including attorneys' and expert witness fees, incurred by any defendant, in any eminent domain proceeding. The trial court recognized its obligations under § 93.091 and its right under § 92.231, by awarding a reasonable fee for the time spent by Martin Paving's attorneys and its expert witness attorney in seeking reasonable attorneys' fees. The District Court of Appeal, Fifth District, had no basis in law for arbitrarily reversing that award. Accordingly, the decision of the district court must be reversed and the trial court's award as to fees and costs incurred in the fee hearing of June 26, 1996, must be reinstated.

I. UNDER § 92.231, FLA. STAT. (1993), THE TRIAL COURT PROPERLY EXERCISED ITS RIGHT TO AWARD A FEE FOR AN ATTORNEY WHO TESTIFIED AS AN EXPERT WITNESS IN AN ATTORNEYS' FEE HEARING.

In its Answer Brief, FDOT attempts to argue that § 92.231, Fla. Stat. (1993), is not applicable to eminent domain proceedings. As the sole support for that contention, FDOT cites Cheshire v. State Road Dep't., 186 So 2d 790 (Fla. 4th DCA 1966). In that case, the court correctly recognized that expert witness

fees in condemnation proceedings were not "dependant" on § 92.231 (then § 90.231). That is, of course, a correct statement. Under § 92.231, Fla. Stat. (1993), an expert witness is entitled to recover a witness fee only in the event that witness offers himself or herself in the trial of any civil action as an expert witness and is permitted by the court to qualify and, in fact, testify as such upon any matter pending before any court. Pursuant to § 73.091, Fla. Stat. (1993) as well as the Florida Constitution, as interpreted by this Court in Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950), however, a defendant in a condemnation proceeding is entitled to recover all reasonable costs "incurred in the defense of the proceedings in the circuit court, including but not limited to reasonable appraisal fees . . . . " Thus, in a condemnation proceeding, a defendant is entitled to recover the experts' fees, whether or not those experts actually testify at trial. Accordingly, § 73.091, Fla. Stat., (1955) is broader than and not dependant upon § 92.231, Fla. Stat. (1995).

That does not mean, however, that a trial court lacks discretion to award an expert witness fee under § 92.231, Fla. Stat. (1993) in an eminent domain proceeding. As FDOT correctly notes, that section, as originally enacted, specifically stated that it was not to apply to any condemnation suit. When the statute was amended in 1959, however, that qualification was

deleted. Moreover, the statute was amended to define expert witness as "any witness" who offers himself in the trial of "any civil action" and is permitted by the court to qualify and testify as such upon "any matter pending before any court." Given that express language applying to any expert in any civil action on any matter before any court in any cause, there can be no basis for FDOT's argument that "any matter pending before any court," does not include a fee hearing in a condemnation action before a circuit court.

In Travieso, 474 So. 2d at 1164, this Court specifically held 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 witness to reasonable attorneys fees." Although Travieso concerned a divorce proceeding, nothing in the language used by this Court limited its opinion to divorce proceeding and courts have used that reasoning to award attorneys' fees under § 92.231, Fla. Stat. (1993), in cases other than divorce proceedings. See IB. - 10.

In fact, FDOT has totally misstated the relationship between § 92.231, Fla. Stat. (1993) and § 73.091, Fla. Stat. (1993). In Brigham, 47 So. 2d at 602, this Court reviewed the award of a fee for an expert witness appraiser who had testified on behalf of property owners in an eminent domain proceeding. At that time, § 92.231 (then § 90.231) contained a proviso that it was not to

apply "to any condemnation suit filed in behalf of any state, county, municipal agency, or other body having the right of eminent domain." At the same time, there was no provision within Florida's eminent domain law (Chapter 73) expressly providing for the payment of expert witness fees. There was simply the general provision of then § 73.16, requiring the condemnor to pay "all costs of proceedings, including a reasonable attorneys' fee." Nevertheless, this Court in Brigham held as follows:

> . . . Section 73.16, Florida Statutes 1941, F.S.A., which provides "All costs of proceedings shall be paid by the petitioner, including a reasonable attorney's fee * * * " should be construed in the light of Section 12 of our Declaration of Rights, F.S.A., which declares that private property shall not be taken "without just compensation." (Italics supplied.) When so construed the language "All cost of proceedings * * *" must be held, in a proper case, to include fees of expert witnesses for the defendants. The allowance or disallowance of such fees should a matter for the trial judge to decide in the exercise of sound judicial discretion.

Id. at 604.

Following Brigham, the Florida Legislature acted on two fronts to broaden the right of expert witnesses to be paid a reasonable fee in eminent domain proceedings. First, by enactment of Chapter 59-201, Laws of Florida, the Legislature removed the language prohibiting the award of fees to expert witnesses testifying in condemnation proceedings. In purposely removing that language, the Legislature could only have intended

for the benefits of § 92.231, Fla. Stat. to be extended into the area of eminent domain. In fact, the court in Cheshire expressly recognized this to be true. In analyzing that statute, the court found that the restriction against awarding expert fees in eminent domain proceedings "remained until eliminated by Laws of Florida, Chapter 59-201." (emphasis added). The court then proceeded to state: "[t]hus, until 1959 Florida had no statute with respect to expert witness fees in condemnation proceedings." By use of the word "until," the court obviously recognized that after 1959, Florida did, in fact, have a statute with respect to expert witness fees in condemnation proceedings, which could only have been § 92.231 or its predecessor statute, § 90.231.

The court in Cheshire in no way rejected the application of § 90.231 to an expert witness testifying in an eminent domain proceeding. It simply recognized that that statute could not be construed to deny the award of a reasonable fee for an appraiser simply because he did not testify. Instead, Dade County v. Brigham, which permitted an award under such circumstances, remained controlling. To eliminate any question on the matter, in 1987, the Florida Legislature enacted the present § 73.091, which expressly provides that the petitioner in an eminent domain proceeding is required to pay "all reasonable costs incurred in the defense of the proceedings in the circuit court," which is to include, but not be limited to, reasonable appraisal fees and,

when business damages are compensable, a reasonable accountant's fee. Ch. 87-148, Laws of Florida. There is no provision in § 73.091 that either the appraiser or accountant must have testified. The decision in State Road Dep't. v. Outlaw, 148 So. 2d 741 (Fla. 1st DCA 1983), cited by FDOT, has no application to the instant case, as it involved an appraiser who, unlike the attorney in the instant case, had not testified and, thus, was clearly not entitled to an award under § 92.231, Fla. Stat. That decision was also rendered before § 73.091 was amended to clearly provide for an appraiser's fee, whether or not the appraiser testified.

II. THE TRIAL COURT HAD AN OBLIGATION UNDER § 73.091, FLA. STAT. (1993), TO AWARD ATTORNEYS' FEES AS WELL AS EXPERT WITNESS FEES INCURRED IN THE FEE HEARING.

Even if § 92.231, Fla. Stat. (1993) were interpreted to be inapplicable to eminent domain proceedings, despite its express language to the contrary, an attorney testifying as an expert witness at a fee hearing in an eminent domain proceeding would still be entitled to an expert witness fee under § 73.091, Fla. Stat. (1993). That statute mandates as follows:

> The petitioner [in an eminent domain proceeding] 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 73.091, thus, directs the award of both expert witness fees and attorneys' fees incurred in any proceeding before the court. The language is mandatory. It applies to both expert witnesses and attorneys.

At no time does FDOT ever attempt to deny that a fee hearing is a proceeding in a circuit court. So long as a fee hearing is a proceeding in a circuit court, as it obviously is, then under § 73.091, all costs incurred by Martin Paving during the attorneys' fee hearing must be awarded. Such costs must include the fees incurred both by its attorneys, as well as James Spoonhour, who testified as an attorneys' fee expert witness at the fee hearing, the sole purpose of which was to award attorneys' fees as mandated by § 73.092, Fla. Stat. (1993).

It is interesting to note that when FDOT attacks the applicability of § 92.231 to the instant appeal, it asserts that the eminent domain statutory provisions are controlling. When FDOT argues against Martin Paving's right to recover expert witness fees under Chapter 73, however, it ignores the specific provisions of that statute and, instead, relies primarily on this Court's decision in State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1992), and other non-eminent domain proceedings. The only eminent domain decisions upon which FDOT relies are those of the District Court of Appeal, Fifth District, which, in its zeal to restrict the award of attorneys' fees in eminent

domain proceedings have improperly applied Palma. In Palma, this Court determined that under § 627.428(1), Fla. Stat. (1983), attorneys' fees could be awarded for time spent litigating the issue of entitlement to but not the amount of attorneys' fees. Palma has no application to the instant case because there is no provision in § 627.428 or elsewhere in Chapter 627 which requires a party to pay "all reasonable costs incurred in the defense of the proceedings in the circuit court." Nevertheless, the District Court of Appeal, Fifth District, in a number of decisions has seized upon that language to deny attorneys' fees and now, apparently, even expert witness fees incurred in a hearing to establish reasonable attorneys' fees. In so doing, the court has ignored the dictates of § 73.092.

FDOT is correct in stating that Martin Paving did not cite as a basis for its appeal the district court's erroneous denial of fees for the nine hours GH&R incurred in the attorneys' fee hearing. There were no grounds for appealing that issue, as no district court has yet applied § 73.091 or refused to apply that statute to award attorneys' fees incurred in attorneys' fee hearings in eminent domain proceedings. Thus, there was no conflict and no basis for this Court to assume jurisdiction.

Now that this Court has accepted jurisdiction, however, it has the right to review the entire record for error. See Ocean Trail Unit Owners Ass'n., Inc. v. Mead, 650 So. 2d 4 (Fla. 1994);

Lawrence v. Florida East Coast Ry. Co., 346 So. 2d 1012 (Fla. 1977). Even if Martin Paving were deemed to have waived the right to recover fees for the nine hours its attorneys incurred in seeking reasonable attorneys' fees because it could not initially appeal that issue, this Court should still speak to the issue, as this is an issue that will recur. Moreover, under § 73.091, expert witness and attorneys' fees are both mandated in any eminent domain proceeding. If an expert witness fee must be awarded an attorney testifying as to reasonable attorneys' fees, so too must fees be awarded for the attorney representing the defendant in such a proceeding.

FDOT's emotional appeals to this Court are unfounded. There is no evidence whatsoever that FDOT has a more difficult time obtaining attorneys to testify as expert witnesses on its behalf in fee hearings than do property owners. FDOT routinely hires and pays attorneys to provide such testimony, as it did in this case. There is no evidence that, having been hired by FDOT, they are any more or less honest than attorneys retained by property owners for the same purpose.

What is true, however, is that this Court has recognized that in our adversarial system of justice, a property owner is entitled to stand on an equal footing with the condemnor in obtaining full compensation for the taking of property. See Brigham, 47 So. 2d at 604. This Court has also recognized that

if full compensation is to be obtained, any award for such must include the cost of all attorneys and expert witnesses who assist the property owner.

To obtain the full measure of compensation for the services of expert witnesses and attorneys, fee hearings are lamentably necessary on occasion. When they do occur, the property owner cannot be assured of full compensation unless he or she is permitted to stand on an equal footing with the taking authority, who comes to court, as did FDOT in the instant case, with an expert it has retained to support its contention of reasonable fees. As this Court concluded in Brigham, it "is unreasonable to say that . . . a defendant [in an eminent domain proceeding] must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket." Id. at 604.

As individuals bound by their code of ethics, attorneys have an obligation to be truthful in opinions they present to the court, irrespective of FDOT's skepticism. When they differ, a court proceeding is the only way to resolve such differences, with the court having the burden of hearing and weighing the testimony of expert witness attorneys on both sides and ultimately determining what constitutes reasonable attorneys's fees. Only by permitting both sides to be equally represented at such hearings can the award of reasonable fees be assured. It

would be manifestly unfair for property owners who, as taxpayers, have to bear the burden of arming FDOT with paid attorneys to question fees sought in eminent domain proceedings, to then be denied the testimony of such witnesses when their own property is taken.

CONCLUSION

In Travieso, 474 So. 2d at 1184, this Court held that a trial count has discretion under § 92.231, Fla. Stat. (1993) to award a reasonable fee for an attorney testifying as an expert witness as to an award of reasonable attorneys' fees. Under § 72.091(1), Fla. Stat. (1993) and the Florida Constitution, the trial court was required to award both the fees of expert witness, James Spoonhour, and those incurred by GH&R in representing Martin Paving at the June 26, 1996 fee hearing. The trial court, therefore, properly awarded attorneys' fees and an expert witness fee for time incurred as part of the fee hearing. In reversing that award, the District Court of Appeal, Fifth District, disregarded this Court's ruling in Travieso and ignored the dictates of § 72.091(1), Fla. Stat. (1993).

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 9th day of April, 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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