IN THE SUPREME COURT OF FLORIDA

GUS BOULIS,

Petitioner,

vs.

Case No. 93,229

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

REVIEW OF A QUESTION CERTIFIED BY THE
FIFTH DISTRICT COURT OF APPEAL
DCA CASE NO. 97-321

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Petitioner argues that the Court should address the merits of the certified question because the lower court's decision is inconstant with existing authority, is a case of first impression and presents an issue of great public importance.

Alternatively, Petitioner argues that the certified question should be answered in the positive because there is no necessity for statutory authority to grant prejudgment interest for prejudgment, out of pocket payments and because Chapter 71 affords payment of all costs arising out of eminent domain litigation.

Finally, the United States and Florida Constitutions require full compensation following a taking under eminent domain. Full compensation encompasses the value of the property as well as costs reasonably related to the litigation arising out of the taking. Full compensation includes prejudgment interest, and should include such interest for prejudgment, out-of–pocket payments made by the litigant to prosecute his case on equal footing with the Department.

ARGUMENT

ISSUE I

THE COURT HAS JURISDICTION TO HEAR THIS CONTROVERSY AS THE ISSUES ARE UNIQUE AND AFFECT A BASIC PROPERTY RIGHT OF THE CITIZENS OF THE STATE OF FLORIDA.

Respondent requests the Court deny the certification on the basis that the jurisdiction is permissive. This argument can me made about almost all of the requests for review to the Court. Petitioner submits that while jurisdiction is permissive, the issues are clearly within the preview of this Court and, as such, should be heard.

Examination of the cases certified to the Court under the grant of jurisdiction reveals no pattern as to the types of questions certified. Carraway v. Revell, 116 So. 2d 16 (Fla. 1959). Nonetheless, exercise of certiorari jurisdiction under this authority is especially appropriate where a District Court of Appeal decision in question is one of first impression that involves no decisional conflict. Duggan v. Tomlinson, 174 So. 2d 393 (Fla. 1965) and is one which the three judge District panel felt was one that called for review by this Court.

Petitioner submits that this is a case of first impression, particularly as it applies to condemnation matters. As stated more fully in Petitioner's initial Brief, the issues address the authority for a trial court to award prejudgment interest on costs incurred prior to the date of judgment.

While there is decisional conflict as to an entitlement of prejudgment interest generally, there is no conflict as to an entitlement of prejudgment interest on prejudgment, out-of-pocket expenditures by an inverse condemnation plaintiff in

his attempt to receive full compensation. In fact, there are no cases addressing this issue. Therefore, a review of the District Court's decision is appropriate.

Alternatively, the Court should review the District Court's decision as the issues addressed below go to the bedrock of the decisional law. Specifically, as stated more fully in the initial brief:

> "Freedom to own and hold property is a valued and guarded right under our government. Full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guarantee is that the owner shall be made whole as far as possible and practicable." Dade County v. Brigham et. al, 47 So. 2d 602, 604 (Fla. 1950).

This Court in the past has protected the right to "full compensation" and made the Petitioner whole. This construct of "full compensation" should include prejudgment interest. Therefore, a review of the District Court's decision is appropriate.

The Court should review the Fifth District Court's decision as it presents a case of first impression. In addition, this issue effects the basic property rights guaranteed to Florida citizens through the Constitution, including a right to full compensation in an eminent domain action. A right that is being exercised every day of the year by condemning authorities against citizens of this State who are being deprived of this recompense because of a gap in this legal doctrine. As such, the Court has the authority and duty to address this question of great public importance.

ISSUE II

THERE IS NO REQUIREMENT FOR STATUTORY AUTHORITY AS A CONDITION PRECEDENT TO AN AWARD OF PREJUDGMENT INTEREST ON COSTS IN AN EMINENT DOMAIN CASE.

A constitutional guarantee of full compensation does not require specific statutory authority to allow an award of prejudgment interest on costs.

Respondent argues that specific statutory authority is required for prejudgment interest against a governmental agency and cites to cases addressing state warrants, State v. Family Bank of Hallandale, 623 So. 2d 474 (Fla. 1993); interest on the value of the property in a condemnation proceeding, Division of Admin., Etc. v. Shepard, 382 So. 2d 45 (Fla. 2nd DCA 1979), Division of Administration, Etc. v. Tsalickis, 372 So. 2d 500 (Fla. 4th DCA 1979); and business damages, Division of Admin., Dept. of Tr. v. Pink Pussy Cat, Inc., 314 So. 2d 192 (Fla. 1st DCA 1975). None of these cases addressed the issue of costs or interest to be applied to those costs. Additionally, none have an underlying constitutional right to compensation. Thus, they are factually distinguishable and not pertinent to the issues under appeal.

Respondent's primary authority states that "... governmental entities are not liable for interest on their debts unless a statute or contract calls for it." Family Bank, at 479. Notwithstanding Respondent's reliance, this Court qualified that broad statement when it went on to state that a "[w]aiver of such immunity occurs when the Legislature specifically authorizes suit against a governmental agency without limitation as to interest..." Id.

The Legislature has allowed for suit against governmental agencies, more specifically, the Florida Department of Transportation. See generally, Chapter 73, Florida Statutes. There are no stated limitations within Chapter 73 which to prevent the imposition of interest. In fact, Florida Statutes §73.091 (1987) states in pertinent part, "The petitioner *shall pay all reasonable costs* of the proceedings..."

Italics added. In that this Court has determined that the "cost of money," i.e. interest, is "reasonable," it necessarily follows that the legislature meant to include such interest in those costs. This is an appropriate reading of the constitutional mandate which states that "[n]o private property shall be taken except ... with full compensation therefor paid to each owner ... " Florida Constitution, Art. 10 §6.

The full compensation clause of the Florida Constitution "requires the court to take into account all the facts and circumstances bearing a reasonable relationship to the loss occasioned an owner by virtue of his property being taken by the state." Stewart v. City of Key West, 429 So. 2d 784 (Fla. 3rd DCA 1983), citing Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958). This is equally the case in an inverse condemnation proceeding, Stewart, citing Flatt v. City of Brooksville, 368 So. 2d 631 (Fla. 2nd DCA 1979), and needs no enabling legislation to be effective. Id. Full compensation includes prejudgment interest. Id.

In sum, there are no statutory prohibitions against awarding prejudgment interest in eminent domain proceedings. Citing to Justice Pariente's opinion in Miller v. TransFlorida Bank, 656 So. 2d 1364 (Fla. 4th DCA 1995), the court can allow prejudgment interest on costs that are fixed prior to the date of the judgment. Id., at 1371. In the case at bar, Petitioner paid his costs prior to the date of judgment, therefore, interest should accrue.

ISSUE III

THE TRIAL COURT IS REQUIRED TO AWARD PREJUDGMENT INTEREST FOR COSTS INCURRED BY A DEFENDANT OWNER IN AN EMINENT DOMAIN PROCEEDING PRIOR TO THE DATE OF JUDGMENT.

The FDOT argues that any claim for prejudgment interest on the entire amount paid should be rejected out of hand for lack of authority. The Department's admonition is poorly placed, as it seeks to misdirect this Court's attention to entitlement and away from the loss. Respondent cites no cases that would permit ignoring this distinction.

"Full compensation" in an eminent domain proceeding is a measure of the pecuniary damages suffered by the condemnee. Under Florida Statutes §73.091 (1994), a condemning authority is required to pay "attorneys fees ... as well as all reasonable costs incurred in the defense of the proceedings."

As stated more fully in Petitioner's initial brief, Florida allows a recovery for losses, Becker Holding Corporation v. Becker, 78 F. 3d 514, 516 (11th Cir. 1996), including prejudgment interest following a compensatory recovery by a successful plaintiff. More topically, prejudgment interest has been awarded where a plaintiff paid medical bills, Mason v. Reiter, 564 So. 2d 142 (Fla. 3rd DCA 1990), or would have been awarded had the bills been paid. Alvarado v. Rice, 614 So. 2d 498 (Fla. 1993).

The Alvarado plaintiff was denied prejudgment interest because she had not paid the medical bills, or was charged interest on the balance due and owing. Id., at 499. As this Court stated, **actual payments**, prior to entry of judgment, are losses of a vested property right upon which prejudgment interest should be awarded. Alvarado, at 500.

There should be no difference that the actual payments are for medical expenses or when, as here, a litigant client pays for the services of his experts, so long as both are made prior to the entry of judgment. Further, in those instances where a litigant cannot pay expert bills when due, he is charged interest on the outstanding balance up to the date of satisfying the bill. How is equity served by paying the expert's interest charge through a post-judgment interest award, yet denying prejudgment interest to a fiscally responsible litigant who pays his bills in a prompt manner.

In a detailed concurring opinion, Justice Pariente, in Miller v. TransFlorida Bank, 656 So. 2d 1364 (Fla. 4th DCA 1995), stated that when a client has been billed for and pays expenses as incurred the client has suffered an out-of-pocket, pecuniary loss within the meaning of Argonaut Ins. Co. v. May Plumbing Co. 474 So. 2d 212 (Fla. 1985), and for which he must be made whole. Id., at 1371. Justice Pariente then cites Alvarado for authority that when the litigant has already paid those expenses, prejudgment interest should accrue. Id.

In an attempt to persuade this Court to uphold the Fifth District's opinion, Respondent proffers State v. Brouwer's Flowers, Inc., 600 So. 2d 1269 (Fla. 2nd DCA 1992), for the proposition that there is "no statutory authority for entitlement to interest on attorneys' fees in eminent domain cases before the trial court's determination of the amount of the attorneys' fees." Id.

In Brouwer's, all dates for which interest was sought followed a stipulated judgment. Respondent fails to point out that for said dates, **the amount of attorneys' fee was not as yet determined**. The Brouwer's Court struggled with this concept and felt it had no logical basis upon which to award interest on a fee with the amount not yet fixed.

Brouwers' predates the Quality decision. Quality Engineered Inst., v. Higley South, 670 So. 2d 929 (Fla. 1996). Recalling that this Court allowed prejudgment

interest in Quality, the Brouwer's analysis would clearly have been different. When confronted with this issue this Court stated in footnote 1, "For example, if the party owing the fees believes reasonable fees to be $10,000 and the party entitled to the fees demands $15,000, the party owing the fees can stop interest accruing on the $10,000 by tendering payment of the $10,000. ". Petitioner submits that this deals directly with the problem that the Brouwer Court had and punctuated this conclusion with the pronouncement that "the burden of nonpayment is fairly placed on the party" who has the obligation to pay the fees, Quality, at 931, from the date of accrual. Id. In light of the facts at bar, i.e. out-of-pocket payment of costs prior to judgment, Brouwer's has no application to the instant analysis of prejudgment interest

Respondent also suggests that Petitioner's reliance upon Quality Engineered Inst. v. Higley South, citation omitted, is misplaced as it does not permit an award of prejudgment interest. However, this Court clearly stated that the party responsible for paying fees shall be liable for interest. Id., at 931. Further, interest shall accrue from the date entitlement is fixed. Id.

The Quality Court did not reserve ruling for any accrual prior to the date of judgment, as Respondent would clearly prefer. Quite the contrary, Justice Wells and this Court envisioned that interest accruing before the amount of the award is fixed. Id., at 931.

Respondent sidesteps these obvious points and shifts to Lee v. Wells Fargo Armored Services, 707 So. 2d 700 (Fla. 1998), for another argument that this Court will not permit the award of prejudgment interest. Lee is driven by Chapter 440, Florida Statutes, a complex and comprehensive law set up to be self actuating. Id., at 702. Acknowledging the strict statutory construction, this Court stated, "... an attorney fee cannot be paid until it is approved ..." Id. Thus, an extension of Quality was denied as to awards arising out of Chapter 440. Id.

Respondent ignores that the legislative intent of worker's compensation system is to bypass the tort system and be self actuating. Condemnation, on the other hand is a mix of constitutionally guaranteed property rights and statutes derived from those rights.

Lee does, however, help point out the boundaries of Quality. Specifically, Lee focused on the time of fee payment. As the Court noted, the system is statutorily created to simplify employers' insurance responsibilities. Lee, at 702. Thus, the payment of fees will never occur before judgment. Unlike Lee, Quality addressed fee payment before judgment. Thus, Quality is properly not influenced by Lee.

The Fifth District in Boulis v. Department of Transportation, et al., 709 So. 2d. 206 (Fla. 5th DCA 1998), certified the issue due to the obvious inequities in the manner by which trial courts grants prejudgment interest in eminent domain proceedings. In light of the factual distinction between cases relied upon by Petitioner and Respondent, Justice Pariente's insightful concurring opinion, and the Stewart, citation withheld, opinion, this court should grant prejudgment interest awarded for any litigation costs which became fixed prior to the date the court determines the amount. More specifically, this Court should remand this matter to the trial court to award prejudgment interest for Petitioner's prejudgment, out-of-pocket payments.

CONCLUSION

From the moment Petitioner incurred the obligation to pay litigation costs, these costs became legally vested. Here, he not only incurred the debt, but he also paid the amounts due before judgment was rendered.

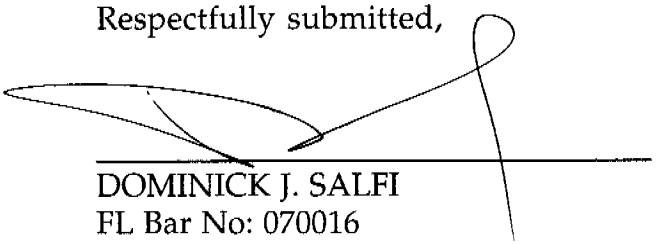
Faced with such a factual scenario, this Court must determine its authority to review the underlying District Court opinion. This case comes to the Court by way of the lower court's certification. This case comes to the Court as a case of first impression. Additionally, this case comes to the Court due to the important constitutional issues to be addressed. The Court, therefore, should exercise its jurisdiction and resolve these issues.

Faced with such a factual scenario, the Court must determine if statutory authority is a condition precedent to an award of prejudgment interest in a condemnation case and if so if Chapter 73 and the case law arising from it require payment of all costs of litigation in eminent domain proceedings includes the cost of money. There are no specific prohibitions to an award of prejudgment interest in an eminent domain proceeding. More particularly, there are no specific statutory prohibitions to an award of prejudgment interest for prejudgment, out-of-pocket payments by the Petitioner. Therefore, the requisite statutory authority is contained within Chapter 73.

Faced with such a factual scenario, the Court must determine if prejudgment interest can be awarded to Petitioner for his prejudgment, out-of-pocket payments for litigation costs. Traditionally, Florida court's have recognized a constitutional right for defendant, property owners to be fully compensated following eminent domain actions. Full compensation includes the property itself, interest on that property, costs of the proceedings and prejudgment interest on those costs. Thus,

the Court should remand this matter back to the trial court with instructions to determine the prejudgment costs paid by Petitioner, and award interest on that sum.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies hereof were furnished by U. S. Mail to Pamela S. Leslie, General Counsel and Gregory C. Costas, Assistant General Counsel, Department of Transportation, 605 Suwannee Street, Tallahassee, FL 32399-0458 and Edgar M. Dunn, Esquire, Post Office Drawer 2600, Daytona Beach, FL 32115-2600 this 2nd day of September, 1998.

Attorney for Petitioner, Gus Boulis