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IN THE SUPREME COURT OF FLORIDA

ROBERT HARTLEB, Petitioner, vs. STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, Respondent.	*	CASE NO.: 93,352 District Court of Appeal, 4th District - **m** 97-1892

AN APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
ON AN OPINION CERTIFIED TO BE IN CONFLICT WITH
AN OPINION OF THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER

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PREFACE

The Petitioner, ROBERT HARTLEB, along with COLONIAL AUTO SALES, INC., BROWARD COUNTY BOARD OF COUNTY COMMISSIONERS, TOWN OF DAVIE and TEBBE (G.F.) & SONS, MECHANICAL CONTRACTORS, INC. were the Defendants in a proceeding before the Honorable Harry G. Hinckley, Jr., Circuit Judge of the 17th Judicial Circuit, Broward County, Florida filed on August 2, 1988. The Appellee, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION was the Petitioner. HARTLEB was the Appellant and DOT was the Appellee in the proceedings before the Fourth DCA.

In this brief, the parties will be referred to as they appeared in the trial court with the Respondent, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION being referred to as "DOT", the Petitioner, ROBERT HARTLEB being referred to as "HARTLEB", the Defendant COLONIAL AUTO SALES, INC., as "COLONIAL", the Defendant TEBBE (G.F.) & SONS, MECHANICAL CONTRACTORS, INC. as "TEBBE", the Defendant TOWN OF DAVIE being referred to as "DAVIE" and the Defendant BROWARD COUNTY BOARD OF COUNTY COMMISSIONERS as "COUNTY".

This appeal which involves the attorneys fee due HARTLEB and his attorney is before the Court on the certified conflict between

the 4th DCA's opinion filed May 27, 1998 and the 5th DCA's opinion in Altamonte Hitch and Trailer Service, Inc. v. U-Haul Company of Eastern Florida, 483 So.2d 852 (Fla. 5th DCA, 1986).

The symbol "R" will used to designate pages 1-1,880 of Volume 1-9 and pages 1881-2103 of Volume 16-17 of the amended Record on Appeal, followed by the applicable page number(s) in brackets. The symbol "RV" will be used to designate the transcripts of the proceedings following page 1,880 of Volume 9 and before page 1881 of Volume 16 which were before the Honorable Harry G. Hinckley, Jr., Circuit Judge followed by the Record on Appeal Volume (10-15), followed by the letter “T” for the January, 1992 jury trial proceedings or the first letter of the month of the hearing for all other proceedings followed by a slash (/), and the applicable page number(s) in brackets. Thus, the transcripts of Volumes 10-15 will be identified as follows:

1) RV10S/1-30: transcript of November 9, 1992 proceedings
2) RV10T/1-199: jury trial proceedings transcript
3) RV11T/200-434: jury trial proceedings transcript
4) RV12T/435-554: jury trial proceedings transcript
5) RV12M/1-178: transcript of May 20, 1992 proceedings
6) RV13M/1-94: transcript of March 25, 1992 proceedings
7) RV13D/1-53: transcript of December 5, 1994 proceedings
8) RV13J/1-10: partial transcript of 7/19/94 proceedings
9) RV13F/1-26: transcript of February 1, 1995 proceedings
10) RV14S/1-172: transcript of 9/14/92 proceedings

11) RV14N/1-91: partial transcript of November 25, 1996 proceedings (1:30 P.M. - 3:30 P.M.)

12) RV15N/1-68: partial transcript of November 25, 1996 proceedings (commencing at 10:00 A.M.)

13) RV15A/1-30: transcript of April 28, 1997 proceedings

The symbol "A" will be used to designate the appendix to this Brief followed by the applicable page number(s) in brackets.

All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On August 2, 1988, DOT, filed its Petition in the Broward County Circuit Court to Condemn Certain Property in Davie, Broward County, Florida, identified as Parcel 104, owned by HARTLEB and subject to unrecorded leases in favor of COLONIAL and TEBBE [R 1-9]. In addition, COUNTY and DAVIE were named as having an interest in Parcel 104 [R 4]. DOT's estimate of value for Parcel 104 was $49,000.00 [R 13-14].

Initially, HARTLEB retained James Richardson as his attorney [RV 20-21; RV14N/44] and on December 28, 1990, Douglas Bell began his representation of HARTLEB [R 57-58;1814].

On December 10, 1990, DOT mailed its Offer of Judgment in the amount of $60,100 to all interested parties including HARTLEB [R 1464-1465].

Prior to the jury trial, depositions of HARTLEB, the DOT's expert witnesses, HARTLEB's expert witnesses and other potential witnesses were attended by Douglas Bell [R 85-89, 99-103, 104-106, 107-111, 142-144, 153-157, 158-372, 376-380, 392-393, 394-398, 400-460]. There were no depositions taken in this proceeding prior to Douglas Bell's representation. Also, prior to the jury trial, the DOT filed motions in limine as to the value of improvements on the North 40 feet of Parcel 104 [R 76-83] and as to the proposed cure for drainage facilities on Parcel 104 [R 147-150]. The trial court granted the Motion in Limine as to the value of the improvements on the North 15 feet of Parcel 104 and deferred ruling on the balance

of the north 40 feet [R 140]. The Motion in Limine as to the drainage improvements was granted [R 391].

The jury trial to determine the value of Parcel 104 including improvements thereon commenced on January 13, 1992 [RV 10T/1-71; R 550-669; RV10T/71-199; RV 11T/200-434; RV 12T/435-554; R 797-919] and resulted in a jury verdict on January 22, 1992 in the amount of $57,375 [R 482-483].

At the jury trial [R 552-668], Carroll Sanders, the DOT's expert witness as to the design of the improvements on Parcel 104 testified that due to a difference of approximately 3 feet between the elevation shown on the contract drawings at the south line of Parcel 104 and the actual elevation at this line, that the plans for the proposed improvements within Parcel 104 were going to be revised to move the sidewalk close to the roadway so that the driveway connection could be made within the right-of-way [R 589-596; 635-641; 650-652]. The validity and effect of an agreement between Hartleb Enterprises, Inc. and DAVIE was a significant issue in the DOT's Motion in Limine and during the jury trial. This agreement was testified to at length during the jury trial by DOT and HARTLEB's witnesses [RV10T/122-144; RV 11T/315-338].

Following deliberations, the jury brought in its verdict, which found that the compensation to be paid for the land is $51,000.00, the compensation for the value of the improvements, if any, is $6,375.00 and compensation to be paid for severance damages, cost to cure, if any, is zero for a total of $57,375.00 [R

916; R 482-483].

At a hearing held on May 20, 1992 [RV 12M/1-178], the verdict was initially supplemented with pre-judgment interest in the total amount of $2,612.25, said amount being included in the trial court's Partial Final Judgment of $59,987.25 [R 1060-1065]. The pre-judgment interest amount was subsequently increased, by adding $984.50 in interest for the period of January 29, 1991 through January 22, 1992, to a total of $3,596.75 on October 1, 1992 and as stated in the trial court's October 1, 1992 order, the total compensation awarded for Parcel 104 and Final Judgment of Condemnation was $60,971.75 subject to further proceedings for apportionment [R 1357-1360]. At the May 20, 1992 hearing, the DOT objected to the award of interest due to DOT's claim that HARTLEB and his lessee were utilizing Parcel 104 for the sale of motor vehicles and thus DOT had not taken possession of Parcel 104 [RV 12M/13-66]. The trial judge denied DOT's arguments to reduce interest [RV 12M/64-65].

The hearing before the trial court on COLONIAL's December 2, 1991 Motion for Apportionment [R135-136] commenced on September 14, 1992 [RV 14S/1-172], was continued to July 18, 1994 and was completed on July 19, 1994 [RV 13J/1-10]. During this three day hearing, COLONIAL's property appraiser testified that COLONIAL's leasehold interest in the verdict amount was $30,000 [RV 14S/137]. The trial court apportioned the $57,375.00 jury verdict amount by giving a value to COLONIAL's lease of $6,830 or 11.90% of the jury

verdict [R 1394], and the balance of $50,545.00 to HARTLEB. [RV 13J/3] At the conclusion of the hearing on the Motion for Apportionment, counsel for COLONIAL claimed that COLONIAL was entitled to 12% interest on the amount awarded to COLONIAL from October 21, 1988 to the date of payment [RV 13J/8]. On September 19, 1994, the trial court entered its order on COLONIAL's Motion for Apportionment, said order apportioning $53,630.77 to HARTLEB and $7,246.80 to COLONIAL [R 1392-1396]. These amounts which were based on the Final Judgment amount of $60,971.75 do not include $94.18 which was paid to COUNTY on May 11, 1989. [R 45]. See order filed May 2, 1989 [R 42-44].

Subsequently, COLONIAL filed a Motion to Assess additional interest [R 1371-1372] and Motion to Award Value of improvements as found by the jury to COLONIAL [R 1398]. Both of these motions were denied [R 1397-1398].

On November 4, 1994, HARTLEB filed his Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs [R 1403-1461].

On November 10, 1994, DOT filed its Offer of Judgment dated December 10, 1990 in the amount of $60,100 [R 1462-1465]. Subsequently, HARTLEB filed his Motion to Strike Offer of Judgment [R 1478-1516] and DOT filed a Motion in Limine or, Alternatively, Motion to Strike HARTLEB's Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs [R 1955-1959].

On December 5, 1994, a hearing was held on HARTLEB's Motion

for Order Awarding Attorney's Fees, etc., HARTLEB's Motion to Strike Offer of Judgment, DOT's Motion in Limine and DOT's alternative Motion to Strike [RV 13D/1-53]. At this hearing, the trial court denied HARTLEB's Motion to Strike Offer of Judgment, granted DOT's Motion in Limine and granted DOT's alternative Motion to Strike HARTLEB's Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs [RV 13D/41-52]. Since the Offer of Judgment expired on January 14, 1991 without being accepted, the trial court's order precluded HARTLEB from receiving payment for attorney's fees, paralegal fees, expert witness fees and costs incurred after January 14, 1991 including those incurred for the apportionment proceedings [RV 13D/47-48]. However, DOT's counsel offered to pay for six hours of attorney's fees [RV 13D/43].

Subsequent to the December 5, 1994 hearing, HARTLEB filed his Motion for Rehearing and/or Reconsideration of the Court's December 5, 1994 rulings [R 1971-2099].

At a hearing held on February 1, 1995, [RV 13F/1-36] the trial court over HARTLEB's objections entered an order prepared by DOT's attorney which denied HARTLEB's Motion to Strike Offer of Judgment, and granted the DOT's Motion in Limine, or, Alternatively, Motion to Strike. This order stated that HARTLEB and his attorney were not entitled to attorney's fees, paralegal fees, expert witness fees or costs which were incurred after January 14, 1991 [R 1551-1552]. At this hearing, the trial judge granted HARTLEB's Motion

for Rehearing and/or Reconsideration [R 1971-2099] and as reheard, denied same and also denied HARTLEB's Alternative Motion for Court to Enter Order with Specific Findings [R 1553-1555].

The trial court's February 1, 1995 orders were appealed to the Fourth District Court of Appeal [R 1556-1557].

On June 5, 1996, the 4th DCA rendered its opinion reversing the February 1, 1995 trial court orders and remanded this proceeding back to the trial court to strike the DOT's offer of judgment and to award HARTLEB, attorney's fees and costs incurred after the offer of judgment had expired Hartleb v. State, Department of Transportation, 677 So.2d 336, (Fla. 4th DCA, 1996) reh/rec den [A 2-3]. On June 5, 1996, the 4th DCA also entered its order granting HARTLEB's Motion for Attorney's Fees as the result of the appeal. [R 1579] [A 4].

Subsequently, the DOT filed a Motion for Rehearing/ Reconsideration of the June 5, 1996 4th DCA opinion reversing the trial court's orders [A 5-8]. HARTLEB filed a reply in opposition to the Motion for Rehearing [A 9-11] and on August 20, 1996 the 4th DCA denied DOT's Motion for Rehearing/Reconsideration [A 12].

After the 4th DCA opinion was rendered, HARTLEB filed his Supplemental Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs [R 1580-1612], first amendment to supplemental motion [R 1617-1628], Notice of Filing Exhibit to Supplemental Motion [R1629-1631], Notice of Filing Revised exhibit to Supplemental Motion [R1632-1638], Affidavit of Costs [R 1639-

1640], Second Amendment to the Supplemental Motion [R1641-1648] and Notice of Filing Affidavit of Attorney's Fees [R 1652-1654].

On November 25, 1996 a hearing was held before the trial court on HARTLEB's Motion and Supplemental Motion for Order Awarding Attorney's Fees, Paralegal Fees and Costs [RV 15N/1-68, RV 14N/1-91].

At this hearing, HARTLEB's attorney, Douglas R. Bell, presented and introduced into evidence detailed time records for the time spent representing HARTLEB from December 28, 1990 through November 25, 1996 [R 1811-1866]. A chart stating the breakdown of this time was introduced into evidence as HARTLEB's Exhibit "2" [RV 14N/49][R 1813][A 13-14]. Detailed time sheets for the time spent by Douglas R. Bell [Exhibit "3"], Ellen Feld [Exhibit "4"], Charles Forman [Exhibit "5"] and Douglas R. Bell's Paralegal, Lisa Erwin [Exhibit "6"], were subsequently introduced into evidence as HARTLEB's Exhibits "3-6" [RV 14N/49][R 1814-1866]. The time spent by Tom Bolf through December 5, 1994 was included on HARTLEB's Exhibit "1" [R 1812]. Inadvertently the time spent by Lisa Erwin which was submitted as Exhibit "6" included a second copy of Ellen Feld's time instead of Lisa Erwin's time. The correct time spent by Lisa Erwin is included in the foregoing motions and amendments and is stated on HARTLEB's Exhibit "2" [RV 14N/49][R1813] [A 13-14].

Tom Bolf, a member of the Florida Bar, after being declared an expert by the Court [RV 15N/19-20], testified that he had reviewed

Douglas Bell's file of this proceeding to determine what would be a reasonable fee based on all the circumstances involved, the appropriate case law and that he had undertaken that analysis and gone through it [RV 15N/20]. Tom Bolf testified that there were rare and unique issues presented in this proceeding, five of which were outside of what you would consider typical or normal issues that would be faced in a condemnation case. These included 1) a change of plans by the DOT in the middle of the trial, 2) a dispute involving an agreement with the Town of Davie as to HARTLEB's entitlement to payment for improvements within an area of either 15 feet or 40 feet and this issue included the authenticity of documents, 3) the applicability of the Offer of Judgment filed by DOT, 4) the issue as to interest on the condemnation award which spawned two appeals and 5) the issue on apportionment of the trial proceeds [RV 15N/20-23].

Tom Bolf stated that the interest issue included argument by DOT that possession of the taken area had been retained by the tenants and therefore, HARTLEB was not entitled to interest during that time frame, that because the case had been continued DOT's position was that interest should not have been running during that time frame, that these were unique issues which were important because of the Offer of Judgment and there was not a lot of case law on those issues. Tom Bolf also stated that there were environmental issues in this case. In closing, Tom Bolf stated that those were issues that were unique in this case and are different than

the typical run of the mill condemnation matter. Tom Bolf stated his understanding that the jury trial was six days and that the apportionment hearings took three days [RV 15N/22-25].

Tom Bolf when asked his opinion as to benefits received by HARTLEB as part of Douglas Bell's representation stated that they included a straight monetary increase in the amount of $8,375, elimination of the cost to cure which was the result of the DOT changing its plans with a benefit being in the range of $33,500 to $58,400, the elimination of exposure to attorney's fees and costs as the result of the offer of judgment and the benefit for avoiding exposure to attorney's fees of approximately $160,000, elimination of exposure to expert witness fees and costs of approximately $80,000, benefits received in the apportionment claim of approximately $44,000 as the result of reduction from $30,000 to $6,800 in the amount requested by the tenant (COLONIAL) and elimination of exposure for interest on the amount claimed by COLONIAL. Tom Bolf's final analysis was that if Douglas Bell had been totally unsuccessful HARTLEB would have ended up consistent with the apportionment relief requested by the tenant and DOT Offer of Judgment, that HARTLEB would have only ended up with $5,700, exposure of approximately $240,000 in fees and costs and property cure expenses to implement the cure of another $33,000 with a total exposure of approximately $270,000. Tom Bolf stated that as a result of being able to prevail on a number of the issues and the Offer of Judgment and HARTLEB netting $51,600, there was a swing of

approximately $320,000. Based on this, Tom Bolf was of the opinion that there was a significant amount of benefit incurred in this case and a significant exposure to HARTLEB that was eliminated as a result of Douglas Bell's efforts [RV 15N/25-29]. Tom Bolf also stated that the above opinion only included Douglas Bell's time through December 5, 1994 which was the date of the first hearing on these attorney's fees [RV 15N/39].

Tom Bolf further stated that there were 32 depositions taken in this cause, excluding those relative to attorney's fees and stated that it would be normal for an attorney to file a motion for rehearing or motion for new trial if he were not satisfied with the trial outcome [RV 15N/30-31].

In closing, Tom Bolf acknowledged that he had gone through and analyzed each of the six statutory factors and had evaluated the case to determine his opinion of a reasonable attorney's fee to adequately represent HARTLEB. Tom Bolf's opinion after giving his opinion of time and fees for various aspects of this proceeding, deleting three-quarters of the first appeal and reducing portions of the time by 20%, was that Douglas Bell should be compensated for a total of 1,049 hours at $225 per hour or $236,025. Ellen Feld for 106 hours at $150 per hour or $15,900, Charles Forman for 17 hours at $275 per hour or $4,675 and Lisa Erwin for 115 hours at $75 per hour or $8,625 for a total of $267,395 (actual total is $267,225) [RV 15N/32-48; 59]. An issue was raised as to the amount of this total which was spent trying to collect fees and costs to which Tom

Bolf stated that based on his conversation with Douglas Bell it was approximately 100 hours [RV 15N/62].

Following a break, the hearing continued during the afternoon of November 25, 1996 [RV 14N/1-91]. DOT's expert witness on attorney's fees, Arnold M. Weiner, testified as to his opinion on HARTLEB's attorney's fees [RV 15N/3-42]. When asked if he was familiar with the fee issues and concerns of this case, Arnold Weiner stated that he familiarized himself sufficiently to form an opinion satisfactory to himself as to fees that should be awarded pursuant to the statute that was in effect in 1990 [RV 14N/7]. Arnold Weiner testified that the first thing he did was formulate an opinion by doing a benefits calculation, that there was a total benefit of $9,275 and that the portion which went to Colonial was approximately $7,745 [RV 14N/7-8]. Arnold Weiner testified that he looked at what the maximum benefit could possibly be in his opinion and that the amount actually at risk for the trial was $48,600 [RV 14N/8-9]. Arnold Weiner then testified that he considered the effectiveness of the representation and that with $48,600 at risk and $9,275 awarded by the jury as far as the jury award was concerned, Douglas Bell's efforts were 19% effective [RV 14N/9]. Arnold Weiner then testified that he considered the traditional methods that have been employed by himself and his colleagues in applying the 1990 statute [RV 14N/9-10] and with the first method obtained a figure of $3,846 for a fee. Arnold Weiner testified that Douglas Bell entered the case after it was very well along

very shortly before the actual offer of judgment, that in his opinion the amount of time reasonably required to complete the engagement including apportionment was 175 total hours and that this was the time to bring the case to trial from the point Douglas Bell took the case over and his efforts started. Arnold Weiner further broke this time down to 5.5 hours to review the file sufficiently to meet with experts defining issues and doing research, 25 hours for hiring and meeting experts, 25 hours for defining legal issues and strategy, 50 hours for research, factual and legal, 50 hours for trial and trial preparation and 15 hours for apportionment [RV 14N/9-11]. Arnold Weiner then testified that one of the last considerations was an estimate of the difficulty involved in the case and that based on $150 per hour times 175 hours, he came up with a reasonable fee of $26,250 based on the six criteria set forth in the statute [RV 14N/11-12].

Regarding the appellate portion Arnold Weiner stated that he gave Charles Forman $250 per hour times 17 hours or $4,250 and for the appeal and reply 45 hours at $175 per hour or $7,875 for a total of $12,125 for the appeal and stated that the total fee in his opinion should be $38,375 [RV 14N/11-13]. During cross-examination Arnold Weiner stated, ".....I'm supposed to determine the reasonable hours in a hypothetical situation...." [RV 14N/19], that the case was not complicated enough to require the number of depositions that were either noticed or taken, that he did not recall how many times Mr. Hinton's deposition was scheduled, that

while the trial was a six-day trial he assumed it would take two days of trial time, that Douglas Bell was not entitled to time for making and responding to motions, that the case was ineffectively tried, that he did not read the transcript of the trial, that the interest issue was insignificant, that the Offer of Judgment did not put HARTLEB at significant risk, that if HARTLEB did not prevail in the Offer of Judgment he would not be responsible for attorney's fees and costs and that he would not have filed a Motion for Judgment notwithstanding the verdict or Motion for New Trial after the trial. When asked whether a change of plans that was done in the middle of trial is normal, Arnold Weiner stated, “It happens all the time,” and then after referring to the appellate court opinion, stated it doesn't happen often but he's seen it happen, that the changed plans would probably affect the Offer of Judgment and that he would need more facts to answer the question. Arnold Weiner stated that it was beyond him why it took three days to handle the apportionment proceeding, that he did not read the trial transcript of the apportionment proceeding, that he did not recall if COLONIAL was asking for interest and that COLONIAL got $3,745 out of $9,275.

When asked if he attributed any time in his analysis to the Motion to Strike DOT's Offer of Judgment, Arnold Weiner stated that he attributed his time to what the statute requires to be expended to adequately represent the client and that HARTLEB is entitled to representation equal to or almost close to that which is provided

to the DOT. Arnold Weiner stated that because the sidewalk was relocated, HARTLEB did not lose access and he did not know how that saved the DOT any money. In closing Arnold Weiner stated that he had the ability to do the analysis of what it would take to dispose of this case based on what he knew [RV 14N/14-42].

HARTLEB then testified that he did not initiate the condemnation proceedings with DOT, that the property in 1988 when the taking began was used as a car lot, that COLONIAL was the lessee on the property, that after DOT approached him to acquire the property he retained Jim Richardson as his attorney and that he had no fee arrangement with Mr. Richardson regarding attorney's fees. HARTLEB then testified that he retained Douglas Bell and his arrangement regarding attorney's fees and costs was that the State would pay for it, that there was an explanation as to the Offer of Judgment and that if he did not prevail that he would be responsible for attorney's fees and costs and told Douglas Bell to proceed. HARTLEB testified that he had already paid $40,000 toward costs and fees in this case as partial payment and that he expected to get reimbursed after the Court made its ruling. HARTLEB testified that the benefits he received as the result of Douglas Bell's representation included a road he could get in and out of without a three foot drop-off as the original plan had shown, that his drainage is still maintained to the north and he was satisfied with Douglas Bell's representation [RV 14N/42-46].

Douglas Bell testified that he was a registered professional

engineer with the State of Florida, that he graduated from the University of Florida with a degree in Civil Engineering, graduated from Nova Law School, was admitted to the Florida Bar in 1978 and has practiced law and has done some engineering since then. Douglas Bell further testified that in the course of his practice, he had been involved in four or five condemnation proceedings and that the fees have ranged from a minimum of $200 per hour to over $1,000 per hour. A breakdown of the time spent representing HARTLEB was then introduced into evidence [RV 14N/49; R 1812-1866]. Douglas Bell further testified that as the result of his representation of HARTLEB, he had to turn down other cases, and that at the jury trial the DOT had two attorney's present including the DOT's chief attorney through the six day trial. Douglas Bell stated that of the 32 depositions, a number were taken prior to trial, some were taken after trial, that three depositions were taken and scheduled by DOT after the trial as a result of the interest issue and that a major issue was the interest issue [RV 14N/47-52].

Douglas Bell stated that at the apportionment proceeding, COLONIAL's expert witness testified that COLONIAL should receive $30,000 and in a post-trial motion COLONIAL's attorney argued that COLONIAL should have received another $20,000 of interest. The Court awarded $6,800 to COLONIAL which was a significant savings and benefit to HARTLEB. Douglas Bell testified that had the Offer of Judgment been enforced that he would have received payment for six hours of time as stated at the December 5, 1994 hearing by

DOT's attorney Linda Nelson. Douglas Bell testified that all costs incurred in this matter requested for reimbursement by HARTLEB were incurred after his representation and no experts were retained prior to his representation, that the experts retained by the DOT were retained after he began his representation which was after the Offer of Judgment was entered. Douglas Bell testified that the first appeal resulted in the DOT's cross-appeal having to do with the interest issue being unsuccessful, that the DOT created the interest issue and that HARTLEB should not have caved in because of the small amount [RV 14N/47-56].

Oral argument as to HARTLEB and his attorneys entitlement to attorney's fees and amount then followed [RV 14N/69-87]. Following oral argument, the trial Court determined that 300 hours of time was spent or well spent with regards to this litigation and that were reasonable and necessary at $225 per hour or $67,500 for Douglas Bell, 50 hours at $150 per hour or $7,500 for Ellen Feld, 10 hours at $200 per hour for $2,000 for Charles Forman and for Lisa Erwin (Paralegal) 50 hours at $75 per hour for $3,750 and court costs in the amount of $2,281.61. The Court further determined that Tom Bolf's fees for testifying should be 10 hours at $250 per hour for $2,500 [RV 14N/88-90]. Regarding HARTLEB's request for pre-judgment interest, the Court stated that that should only come from date of Judgment [RV 14N/90].

On December 23, 1996, the trial court entered its Final Order Taxing Attorney's Fees and Costs against the Petitioner in the

amount of $80,500 for attorney's fees, $2,500 for Thomas Bolf's expert witness fees and $2,281.61 for litigation expenses for a total amount of $85,531.61 with interest to begin to accrue on the date of entry of this order [R 2102-2103][A 15-16]. {This order was appealed to the 4th DCA and is the subject of this appeal.}

Subsequently, HARTLEB filed his Motion for Rehearing, Reconsideration and/or Clarification of the Court's Final Order Taxing Attorney's Fees and Costs against the Petitioner [R 1657-1726] and also filed his Memorandum of Law in Support of Said Motion [R 1727-1798]. A hearing was held on this motion on April 28, 1997 [RV 15A/1-30].

Following argument by counsel for HARTLEB and DOT, the trial court denied HARTLEB's Motion [RV 15A/28] and the Court's April 28, 1997 order denying HARTLEB's Motion was entered by the trial Court [R 1799-1800][A 17-18]. This order which was also appealed to the 4th DCA is the subject of this appeal.

The trial court's December 23, 1996 and April 28, 1997 orders were appealed to the 4th DCA on May 27, 1997 [R 1806-1810].

On May 27, 1998, the 4th DCA rendered its opinion affirming the trial court's December 23, 1996 order taxing attorney's fees and costs [A 1]. The 4th DCA in this opinion found that apportionment of the attorney's fees award is not required among each stage of the proceeding, including pre-trial and trial proceedings, the first appeal in this case, and the current appeal before the 4th DCA. The 4th DCA then certified conflict to the extent that

Altamonte Hitch and Trailer Service, Inc. v. U-Haul Company of Eastern Florida, 483 So.2d 852 (Fla. 5th DCA, 1986) [A 19-20] may be interpreted as requiring such apportionment.

The 4th DCA's opinion also stated:

> "The trial court made specific findings to support the award regarding the number of hours reasonably expended and the reasonable hourly rate for this litigation and multiplied these numbers in arriving at the fee award. Such findings are sufficient in the absence of an adjustment to the 'lodestar' which the trial court implicitly concluded was not justified...."

The 4th DCA's opinion concluded by finding no error in the trial court's refusal to grant interest on the attorney's fees award from the date the entitlement to fees was first determined.

The 4th DCA's May 27, 1998 opinion was appealed to the Florida Supreme Court on June 23, 1998 by invoking the Supreme Court's discretionary jurisdiction since the 4th DCA's opinion was certified to be in direct conflict with a decision of the 5th DCA.

To assist the Court in this appeal, the following is a chronology of applicable events and pleadings which led up to this appeal.

1. 8/2/88 Petition to Condemn Subject Property (Parcel 104) filed by DOT [R 1-9]
2. 8/24/88 HARTLEB files answer to DOT’s Petition. [R 20-21]
3. 8/24/88 COLONIAL files answer to DOT’s Petition [R 22-23]
4. 10/7/88 Order of Taking entered by the Court for Parcel 104. [R 24-25]
5. 6/9/89 COUNTY dropped as Defendant to this proceeding [R 46-47]

6. 12/10/90 Offer of Judgment in the amount of $60,100 mailed to all interested parties [R 1464-1465]

7. 1/11/91 Douglas R. Bell files Notice of Appearance as attorney for HARTLEB [R 57-58]

8. 1/29/91 Order entered by Court granting HARTLEB's Motion for Continuance and also tolling interest as of date of order [R 65-66]

9. 12/2/91 COLONIAL serves Motion for Apportionment. [R 135-136]

10. 12/6/91 Trial court enters order granting DOT's Motion in Limine as to North 15 feet of Parcel 104 and reserves jurisdiction as to balance of the North 40 feet of Parcel 104 [R 140]

11. 1/6/92 Order entered granting DOT's 12/18/91 Motion in Limine regarding drainage facilities [R 391].

12. 1/13/92-1/22/92 Jury trial held before trial court, the Honorable Harry G. Hinckley, Jr., presiding. [RV 10T/1-71; R 550-669; RV 10T/71-199; RV 11T/200-434; RV 12T/435-554; R 797-919]

13. 1/22/92 Jury verdict of $57,375 entered [R 482-483]

14. 2/3/92 HARTLEB files Motion for Directed Verdict as to Agreement between Hartleb Enterprises, Inc. and Town of Davie [R 509-523]

15. 2/3/92 HARTLEB files Motion for Judgment notwithstanding the Verdict of the Jury rendered 1/22/92 and/or in the Alternative Motion for New Trial [R 532-549]

16. 3/19/92 HARTLEB files Motion to Assess Interest and to

		Supplement Verdict with Interest [R 738-796]
17.	4/20/92	Order entered denying HARTLEB's Motion for Directed Verdict [R 1039-1040]
18.	4/20/92	Order entered denying HARTLEB's Motion for Judgment Notwithstanding Verdict of Jury Rendered 1/22/92 and/or Motion for New Trial [R 1041-1042]
19.	5/20/92	Hearing held on HARTLEB's Motion to Assess Interest and DOT's Motion for Entry of Partial Final Judgment [RV 12M/1-178]
20.	5/20/92	Order entered on HARTLEB’s Motion to Assess Interest and to Supplement Verdict with Interest [R 1056-1059]
21.	5/20/92	Final Judgment of condemnation titled “Partial Final Judgment” entered by trial court subject to further proceedings for apportionment [R 1060-1065]
22.	6/1/92	HARTLEB files Motion to Alter or Amend Partial Final Judgment dated 5/20/92 and Motion for Rehearing [R 1066-1094]
23.	9/14/92	First day of hearing held before trial court on COLONIAL’s Motion for Apportionment [RV 14S/1-172]
24.	10/1/92	Trial Court enters its order granting HARTLEB’s Motion to Alter or Amend Partial Final Judgment dated May 20, 1992 and/or Motion for Rehearing [R 1357-1360]. This order amended the Partial Final Judgment dated May 20, 1992 by adding additional interest to the judgment amount [R 1060-1065]

25. 11/2/92 HARTLEB files Notice of Appeal as to jury verdict, Partial Final Judgment and order amending Partial Final Judgment [R 1362-1363] 4th DCA Case **m** 92-03191

26. 11/16/92 DOT files Notice of Cross-Appeal [R 1367-1368]

27. 7/18/94-7/19/94 Continuation of hearing on Motion for Apportionment. [See partial transcript at RV 13J/1-10]

28. 7/27/94 COLONIAL files Motion for Assessment and Award of Pre-judgment Interest [R 1371-1372]

29. 9/19/94 Order entered on COLONIAL’s Motion for Apportionment, said pleading titled “Order on Defendant COLONIAL’s Motion for Apportionment and Final Judgment” [R 1392-1396]

30. 11/4/94 HARTLEB files Motion for Order Awarding Attorneys Fees, Paralegal Fees, Expert Witness Fees and Costs [R 1403-1461]

31. 11/10/94 DOT files Offer of Judgment dated 12/10/90 [R 1462-1465]

32. 11/23/94 HARTLEB files Motion to Strike DOT’s Offer of Judgment [R 1478-1516]

33. 11/23/94 DOT files Motion in Limine or Alternatively Motion to Strike Defendant HARTLEB’s Motion for Order Awarding Attorney’s Fees, Paralegal Fees, Expert Witness Fees and Costs [R 1955-1970]

34. 12/5/94 Hearing held on HARTLEB’s Motion for Order Awarding Attorney's Fees, etc., HARTLEB's Motion to Strike Offer of Judgment, DOT’s Motion in Limine and DOT’s

		Alternative Motion to Strike [RV 13D/1-53]
35.	12/5/94	Trial court grants DOT's motions and denied HARTLEB's Motion to Strike.
36.	1/18/95	HARTLEB files Motion for Rehearing and/or Reconsideration of court's 12/5/94 rulings
37.	2/1/95	Hearing held on HARTLEB's Motion for Rehearing and/or Reconsideration of Court's 12/5/94 rulings and/or Alternative Motion for Court to Enter Order with Specific Findings [RV 13F/1-36]
38.	2/1/95	Trial court enters order denying Hartleb's Motion to Strike Offer of Judgment and granting DOT's Motion in Limine, etc.[R 1551-1552]
39.	2/1/95	Trial court enters Order granting Defendant HARTLEB's Motion for Rehearing and/or Reconsideration and as reheard denying same and also denying HARTLEB's Alternative Motion for Court to Enter Order with Specific Findings [R 1553-1555]
40.	2/24/95	HARTLEB files Notice of Appeal as to the trial court's orders entered on February 1, 1995 [R 1556-1557] 4th DCA Case **m** 95-0667
41.	6/5/96	4th DCA opinion rendered on HARTLEB's 2/24/95 appeal, which remanded this proceeding to the trial court to enter an order striking the DOT's offer of judgment and awarding attorney's fees and costs to HARTLEB and his attorney. Hartleb v. State, Department of Transportation, 677 So.2d 336, (Fla.

4th DCA, 1996) reh/rec den [R 1587-1588][A 2-3]

42. 6/5/96 Order entered by 4th DCA granting HARTLEB's motion for appellate attorney's fees [R 1579] [A 4]

43. 6/19/96 DOT files Motion for Rehearing/Reconsideration of 4th DCA's 6/5/96 opinion [A 5-8]

44. 8/20/96 DOT's Motion for Rehearing/Reconsideration denied by 4th DCA [R 1622][A 9]

45. 8/29/96 HARTLEB files Supplemental Motion for Order Awarding Attorney's Fees, etc. [R 1580-1612]

46. 11/25/96 Hearing held before trial court on HARTLEB's Motion and Supplemental Motion for Order Awarding Attorney's Fees, Paralegal Fees and Costs [RV15N/1-68; RV14N/1-91]

47. 12/23/96 Final Order Taxing Attorney's Fees and Costs Against Petitioner (DOT) entered by trial court [R 2102-2103][A 15-16]. [This order was appealed to the 4th DCA and is the subject of this appeal]

48. 12/23/96 HARTLEB files Motion for Rehearing, Reconsideration and/or Clarification of the Court's 12/23/96 order [R 1657-1726]

49. 4/28/97 Order entered denying as reheard HARTLEB' Motion for Rehearing, Reconsideration and/or Clarification [R 1799-1800][A 17-18]. [This order was also appealed to the 4th DCA and is the subject of this appeal]

50. 5/27/97 HARTLEB files Notice of Appeal as to trial court's orders entered on 12/23/96 and 4/28/97 [R 1806-

1810]

51. 5/27/98 4th DCA opinion rendered on HARTLEB's May 27, 1997 appeal, said order affirming the trial court's December 23, 1996 order taxing attorney's fees and costs and certifying conflict with 5th DCA as to apportionment of the attorney's fee award among each stage of the proceedings [A 1].

52. 6/23/98 HARTLEB files Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court

This appeal follows.

SUMMARY OF ARGUMENT

Douglas Bell's representation consisted of five distinctly separate proceedings to-wit: (1) Pretrial and jury trial, (2) non-apportionment and non-appeal related post-trial proceedings, (3) first appeal, (4) apportionment proceedings and (5) the second appeal. The trial court should be required to apportion the time awarded for attorney's fees among these separate proceedings or at a minimum between the appellate work and trial work. The 4th DCA in its May 27, 1998 opinion which affirmed the trial court's order taxing attorney's fees and costs certified conflict with the 5th DCA's opinion in Altamonte Hitch and Trailer Service, Inc. v. U-Haul Company of Eastern Florida, 483 So.2d 852 (Fla. 5th DCA, 1986) to the extent that said case may be interpreted as requiring such apportionment. This apportionment is required to properly review and evaluate the attorney's fees awarded in this proceeding.

In addition, the trial court should be required to determine a basic lodestar fee along with a breakdown of attorney's fees for the various components of this proceeding including a determination of attorney's fees through and including the December 5, 1994 hearing on HARTLEB's original Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs wherein the trial court's ruling resulted in HARTLEB only being entitled to attorney's fees for the time prior to the expiration of the Offer of Judgment or prior to January 14, 1991.

Tom Bolf's opinion as to the unusual issues involved in this

proceeding and his clear understanding of the issues faced by Douglas Bell and HARTLEB should be given substantial weight. Arnold Weiner's opinion, which was based on a hypothetical case and Chapter 73 Fla.Stat. (1990) and which did not give any credit to the substantial benefits received by HARTLEB should be given little or no weight.

A review of the record will support Douglas Bell's argument that he obtained substantial benefits for HARTLEB, that the trial court judge abused his discretion in his determination of attorney's fees and paralegal fees and that compensation for attorney's fees and paralegal fees should be substantially higher than that which was awarded by the trial court.

DOT having chosen to complicate this case and having virtually unlimited resources and manpower to limit the property owner's compensation for his property should not be rewarded by not having to pay Douglas Bell's reasonable and necessary attorney's fees to adequately represent HARTLEB in this proceeding.

The trial court judge having abused his discretion and the amount of attorney's fees awarded HARTLEB pursuant to the factors of Section 73.092, Fla.Stat. (1987) being inadequate, the court is requested to remand this case to the trial court with directions to increase and re-evaluate the attorney's fees awarded HARTLEB for reasonable, necessary and adequate representation of HARTLEB, to also determine a lodestar fee for each of the various proceedings in this matter and to determine the amount of attorney's fees due

HARTLEB through the December 5, 1994 hearing on HARTLEB's Motion for Order Awarding Attorney's Fees, etc.

In addition, HARTLEB and his attorney are entitled to statutory interest pursuant to Section 55.03, Fla.Stat. on all attorney's fees and costs which were incurred prior to the December 5, 1994 hearing. The case of Department of Transportation v. Brouwer's Flowers, Inc., 600 So.2d 1260 (Fla. 2nd DCA, 1992) relied on by DOT and the 4th DCA to deny prejudgment interest is distinguishable in that HARTLEB's actual entitlement to attorney's fees was vested on May 20, 1992 and HARTLEB would have been awarded attorney's fees and costs on December 5, 1994, but for DOT's invalid (subsequently stricken) Offer of Judgment being used as justification by the trial court and 4th DCA in failing to award said attorney's fees and costs. DOT as the prevailing party should not be rewarded by its own wrongful actions. See also Quality Engineered Installation, Inc. v. Higley South, Inc.,670 So.2d 929 (Fla. 1996) wherein the Florida Supreme Court held that interest on attorney's fees accrues from the date entitlement to attorney's fees is fixed through court determination even though amount of award has not yet been determined. Thus, this court is requested to remand this case to the trial court with directions to award HARTLEB pre-judgment interest from December 5, 1994 on the amounts awarded by the trial court's October 18, 1996 and December 23, 1996 orders or as may be modified by subsequent increase in attorney's fees.

POINT I ON APPEAL ARGUMENT

THE APPELLATE COURT ERRED BY FAILING TO REQUIRE THE TRIAL COURT TO APPORTION THE TIME SPENT BY HARTLEB'S ATTORNEY IN THIS PROCEEDING FOR EACH ASPECT OF THIS CASE; TO-WIT: PRETRIAL AND JURY TRIAL, POST TRIAL, APPEALS AND APPORTIONMENT PROCEEDINGS. THE APPELLATE COURT CERTIFIED CONFLICT WITH ALTAMONTE HITCH AND TRAILER SERVICES, INC. v. U-HAUL COMPANY OF EASTERN FLORIDA, 483 SO.2D 852 (FLA 5TH DCA, 1986) TO THE EXTENT THAT SAID CASE MAY BE INTERPRETED AS REQUIRING SUCH APPORTIONMENT.

The proceedings in this case consisted of five distinctly separate proceedings, to-wit: (1) pretrial and jury trial (2) non-apportionment and non-appeal related post trial proceedings; (3) first appeal (4) apportionment proceedings and (5) the second appeal. The post trial proceedings included but were not limited to the determination of interest on the jury award and argument relating to the offer of judgment filed by DOT which was the subject matter of the second appeal.

For the 4th DCA and the Supreme Court to properly review the attorney's fees awarded by the trial court, it is necessary for the trial court to have apportioned and distinguished between the amounts awarded for the various proceedings including appellate work and trial work.

In addition, HARTLEB is requesting in Point IV of this appeal, prejudgment interest for attorney's fees which were necessary for representation of HARTLEB for the period of time prior to December 5, 1994 which was the date that the first hearing on attorney's fees was scheduled and which was the subject matter of the second appeal in this proceeding. To determine the correct amount of

interest, the trial court must make a determination as to the reasonable fee to which HARTLEB's attorney is entitled to through December 5, 1994.

The 4th DCA in finding that apportionment among each stage of the proceeding is not required, certified conflict with Altamonte Hitch and Trailer Services, Inc. v. U-Haul Company of Eastern Florida, 483 So.2d 852 (Fla. 5th DCA, 1986) to the extent that said case may be interpreted as requiring such apportionment. The appellate court in Altamonte Hitch held that, "We can undertake no meaningful review of the sums awarded because the lower court failed to stipulate in its order what amounts awarded pertained to appellate fees and costs as opposed to trial fees and cost." at 854. The 5th DCA remanded the cause to the trial court for the purpose of apportioning the attorney's fees and costs awarded between appellate and trial work.

This court is requested to resolve the conflict between the 4th DCA and 5th DCA by remanding this case to the 4th DCA and/or trial court to apportion the attorney's fees awarded among each of the various components of this proceeding and to also include a determination of attorney's fees through and including the December 5, 1994 hearing for the purpose of determining pre-judgment interest on said amount as will be argued in Point IV of this appeal.

POINT II ON APPEAL ARGUMENT

THE APPELLATE COURT ERRED BY FAILING TO REQUIRE THE TRIAL COURT TO DETERMINE THE LODESTAR FEE FOR TIME SPENT BY HARTLEB'S ATTORNEY IN THIS PROCEEDING WHICH MUST BE BASED ON THE SIX (6) FACTORS STATED IN §73.092 FLA.STAT. (1987)

Florida case law provides that an order awarding attorney's fees to a property owner in eminent domain proceedings must expressly determine the number of hours reasonably expended on litigation, a reasonable hourly rate for type of litigation involved and multiply those factors to determine the basic lodestar fee. Lee County v. Tohari, 582 So.2d 104 (Fla. 2nd DCA, 1991). The trial Court's December 23, 1996 order does not state the lodestar fee. See also Seminole County v. Cumberland Farms, Inc., 688 So.2d 372 (Fla. 5th DCA, 1997) reh den.

The court is also referred to Seminole County v. Delco Oil, Inc., 669 So.2d 1162 (Fla. 5th DCA, 1996) wherein the appellate court in applying the provisions of Section 73.092, Fla.Stat. (1993) stated that the trial court should have used the lodestar as the basis for the fee and then expressly set forth the number of hours reasonably expended in the litigation and the reasonable hourly rate. The court then stated that the benefit obtained should have then been used to adjust the lodestar up or down by a specific dollar amount.

See also Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) reh den as further support for requiring the trial court to determine a lodestar fee for at a minimum, pre-trial and trial, post trial, apportionment and appellate proceedings.

Solid Waste Authority of Palm Beach County v. Parker, 622 So. 2d 1010 (Fla. 4th DCA, 1993) which is based on Chapter 73, Fla.Stat. (1989) and which is applicable to this proceeding also provides for the determination of the lodestar fee as an appropriate starting point to determine a reasonable attorney's fee.

The 4th DCA in its opinion stated that the trial court made specific findings to support the award regarding the number of hours reasonably expended and the reasonably hourly rate for this ligation and multiplied these numbers in arriving at the fee award. The 4th DCA went on to state that such findings are sufficient in absence of an adjustment to the "lodestar", which the trial court implicitly concluded was not justified.

Contrary to the 4th DCA's opinion, the trial court did not make specific findings to support the attorney's fees award and has merely arrived at a number of hours without any basis or justification of same. See Lee County v. Tohari, supra. which held that:

> "In the exceptional case in which an adjustment to the lodestar fee is authorized based on the result obtained, the trial court is required to make express findings to justify its decision...For purposes of appellate review, the trial court 'should indicate that it has considered the relationship between the amount of the fee award and the extent of success'..." 582 So.2d at 105

The trial court having not provided any findings as to benefits obtained for HARTLEB by Douglas Bell or for any of the other five factors stated in §73.092 Fla. Stat. (1987), this case should be remanded to the trial court for determination of the lodestar fee for at a minimum, pretrial and trial, post trial,

apportionment and appellate proceedings and also for the court to make specific findings regarding the number of hours reasonably expended for each portion of this case.

POINT III ON APPEAL ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING HARTLEB AND HIS ATTORNEY INADEQUATE COMPENSATION FOR LEGAL REPRESENTATION WHICH WAS REASONABLY NECESSARY TO ADEQUATELY REPRESENT HARTLEB IN THIS PROCEEDING. THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER WHICH CANNOT BE MEANINGFULLY REVIEWED WITHOUT A DETERMINATION OF THE TIME SPENT BY HARTLEB'S ATTORNEY FOR EACH ASPECT OF THIS CASE.

Notwithstanding that the trial court's award of attorney's fees comes before the 4th DCA and the Supreme Court with the presumption of correctness, based on the time reasonably necessary to adequately represent HARTLEB, as a result of the unusual issues encountered by HARTLEB's attorney, the trial court has abused its discretion in the award of attorney's fees in this proceeding.

"The power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political unit or agency, a strict construction must be given against the agency asserting the power..." Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451, 455 (Fla., 1975) reh den.

"While the time a lawyer spends on a given case is only one factor to be considered in setting his fee, it must be given considerable weight because as has often been said in justifying the size of attorney's fees, 'a lawyer's time is his stock in trade'..." Manatee County v. Harbor Adventures, Inc., 305 So.2d 299, 301 (Fla. 2d DCA, 1974). This case also held that: "...It is very much in the public interest that lawyers be fairly compensated in order to maintain independence and integrity of the Bar..."

Douglas Bell having been first retained by HARTLEB on December 28, 1990, through November 25, 1996 devoted over 1,300 hours in representing the interest of HARTLEB in the condemnation proceeding initiated by the DOT for which HARTLEB received substantial benefits which would not have been realized except for the effort of his attorney, Douglas Bell. Notwithstanding Douglas Bell's representation over a period of almost six years, the trial court only awarded payment for 300 hours of his time. Following testimony, presentation and acceptance of exhibits and argument of counsel for both parties, the trial court stated that reasonable and necessary attorney's fees and amounts were as follows:

PERSON	HOURS	HOURLY RATE	DOLLAR AMOUNT
DOUGLAS BELL	300.00	$225.00	$67,500.00
ELLEN FELD	50.00	$150.00	$7,500.00
CHARLES FORMAN	10.00	$200.00	$2,000.00
PARALEGAL	50.00	$75.00	$3,750.00
		TOTAL	$80,750.00

Based on time exhibits 1-6 submitted into evidence at the November 25, 1996 trial court hearing , the effective hourly rate awarded Douglas Bell and his staff for the attorney's fees awarded by the trial court is as follows:

PERSON	HOURS	EFFECTIVE $/HOURLY RATE	DOLLAR RESULT
DOUGLAS BELL	1,387.83	$48.64	$67,500.00
ELLEN FELD	122.17	$61.39	$7,500.00
CHARLES FORMAN	17.3	$115.60	$2,000.00
PARALEGAL	137.75	$27.22	$3,750.00
		TOTAL	$80,750.00

Art. X, §6, Fla. Const. provides that the HARTLEB is entitled to full compensation as the result of the taking of his property by the DOT.

Florida case law defines full compensation within the meaning of this constitutional provision to include payment of attorney's fees necessary to enforce the condemnee's rights. Schick v. Florida Department of Agriculture and Consumer Services, 586 So. 2d 452 (Fla. 1st DCA, 1991) reh den.

Douglas Bell's time necessary to reasonably and adequately enforce HARTLEB's rights and as stated in the time sheet exhibits introduced into evidence by HARTLEB was far in excess of the 300 hours awarded by the trial Court.

It is submitted that the effective hourly rate of less than $50 per hour for Douglas Bell's time in this proceeding is unreasonable and an abuse of discretion in and of itself. See Jenkins v. Escambia County, 614 So.2d 1207 (Fla. 1st DCA, 1993) wherein the 1st DCA reversed the trial Court's order which ordered attorney's fees at the rate of $22.27 per hour.

Since the eminent domain proceedings in this case were filed

by the DOT in August, 1988, the provisions of Chapter 73, Fla.Stat. (1987) are applicable.

Arnold Weiner, the DOT's expert witness stated three times during his testimony that the Chapter 73, Fla.Stat. (1990) was applicable to this proceeding.

There are two distinct differences between Chapter 73, Fla.Stat. (1990) and Chapter 73, Fla.Stat. (1987).

In assessing attorney's fees in eminent domain proceedings, §73.092(6) Fla.Stat. (1987) provides that the Court shall consider the attorney's time and labor reasonably required adequately to represent the client. §73.092(2)(e) Fla.Stat. (1990) added the modifier “in relation to the benefits resulting to the client.” §73.092(1) Fla.Stat. (1990) also states that, “In assessing attorneys' fees in eminent domain proceedings the court shall give the greatest weight to benefits resulting to the client from the services rendered and then lists under §73.092(2)(a)-(e) Fla.Stat. (1990), five additional factors all of which are to be given secondary consideration in the determination of fees. Except for §73.092(2)(e) Fla.Stat. (1990) which was modified as stated above, these same five additional factors are stated in §73.092(2)-(6) Fla.Stat.(1987) as being given equal weight with the “benefits resulting to the client” factor.

§73.092(1)(a) Fla.Stat. (1990) defines the term “benefits” and provides additional guidelines for the applicability of benefits in determining attorney's fees. §73.092 Fla.Stat. (1987) does not

define “benefits”.

§73.092 Fla. Stat. (1987) states the following regarding assessment of attorney's fees in eminent domain proceedings:

> “73.092 - Attorney's Fees - in assessing attorney's fees in eminent domain proceedings, the court shall consider:
>
> (1) Benefits resulting to the client from the services rendered. However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.
> (2) The novelty, difficulty and importance of the questions involved.
> (3) The skill employed by the attorney in conducting the cause.
> (4) The amount of money involved.
> (5) The responsibility incurred and fulfilled by the attorney.
> (6) The attorney's time and labor reasonably required adequately to represent the client.”

Since Chapter 73, Fla.Stat. (1987) contains neither the requirement that the court shall give the greatest weight to benefits resulting to the client from services rendered, nor the requirement that the attorney's time and labor is to be evaluated in relation to the benefits resulting to the client, the testimony of Arnold Weiner, which emphasized benefits which in his opinion were minimal and which was based on Chapter 73, Fla.Stat. (1990), must be disregarded.

Tom Bolf during his testimony on behalf of Douglas Bell and HARTLEB was extremely familiar with the proceedings in this matter, provided the trial court with a detailed analysis of his opinion regarding attorney's fees and also stated his opinion regarding the many unusual issues which Douglas Bell encountered in representing HARTLEB against the DOT. Tom Bolf's testimony regarding reasonable

and necessary fees which Douglas Bell should be entitled to is as follows:

PERSON	REASONABLE AND NECESSARY HOURS	REASONABLE HOURLY RATE	DOLLAR AMOUNT
DOUGLAS BELL	1,049	$225.00	$236,025.00
ELLEN FELD	106	$150.00	$15,900.00
CHARLES FORMAN	17	$275.00	$4,675.00
PARALEGAL	115	$75.00	$8,625.00
		TOTAL	$267,225.00

Included in the time required by HARTLEB's attorney which were reasonable and necessary to enforce the rights of HARTLEB in this proceeding, is the time spent having to argue the motions and proceedings arising out of the Offer of Judgment filed by DOT and as acknowledged by the 4th DCA in its opinion in the second appeal, the DOT's substantial changes in the construction plans and design which decreased the scope of the proposed taking after the Offer of Judgment had expired. See Hartleb v. State, Department of Transportation, 677 So.2d 336 (Fla. 4th DCA, 1996) reh/rec den. wherein the 4th DCA stated:

> "In any event, we also reverse because the department made substantial changes in the construction plans and design, correcting a major problem in elevations, which decreased the scope of the proposed taking after the offer expired ...."
>
> * * * *
>
> "Simply equity and requirements of fair dealing mandate that the department not benefit from making a pre-trial offer of judgment evaluated in relation to one set of damages and then argue at trial, for a substantially lessened damage award occasioned by the changed plans. We can discern no reason to reward the department for

> submitting an insufficient offer under the statute, and then de facto correcting it through a reduction in the scope of the taking. Such an outcome is certainly contrary to the public policy established in the legislative scheme governing the award of attorney's fees."

The concurring opinion by Judge Klein stated as follows:

> "... I cannot understand how the D.O.T. could possible take the position that an offer of judgment, made prior to the D.O.T. making substantial changes to construction plans and thereby decreasing the owner's damages, could possibly remain in effect. Nor do I understand how the D.O.T. could think that it could prevail where the offer made no reference to the apportionment between the owner and the tenant. The D.O.T.'s decision to take this position, which required the owner to bring this appeal, not only wasted the time of counsel employed by the D.O.T. but also made the state responsible for paying the owner's attorney's fees for this appeal. See §73.131, Fla. Stat. (1987).

In addition to the Offer of Judgment issues, the following issues which were not normal and customary, required the legal representation of Douglas Bell by HARTLEB:

(1) Determination of compensation for improvements in the North 15 feet of Parcel 104 versus the North 40 feet as the result of a 1985 agreement between DAVIE and Hartleb Enterprises, Inc., the owner of Parcel 104 in 1985. It was the DOT's argument that HARTLEB was entitled to zero compensation for the improvements for which the jury awarded $6,375. To reasonably and adequately represent HARTLEB, this issue required the taking of depositions of DAVIE's employees to obtain testimony and evidence regarding the agreement which included revisions to the legal description stated in the Exhibit to the agreement from that which was provided to DAVIE by HARTLEB and that which was recorded by DAVIE.

(2) The construction plans submitted by the DOT provided that the drainage culvert which drained HARTLEB's property was to be removed. This culvert was later replaced by DOT. By replacing the culvert, savings of $18,150 was realized by DOT which was the estimated cost to provide drainage of HARTLEB's remaining property, if the culvert had not been replaced.

(3) Revisions to the construction plans included a northerly relocation of a proposed sidewalk by approximately 40 feet to eliminate an approximately three foot drop-off at HARTLEB's new North property line. This eliminated the requirement for construction of a driveway ramp on HARTLEB's property and resulted in savings to DOT of approximately $33,500.

4) Determination of prejudgment interest on the jury award in excess of DOT's good faith deposit.

5) Apportionment proceedings involving determination of portion of jury award due the Lessee COLONIAL, wherein COLONIAL was requesting in excess of 83% of the jury award including prejudgment interest from October 21, 1988 through July 19, 1994.

In Hodges v. Department of Transportation, 323 So.2d 275 (Fla 2d DCA, 1975), the 2nd DCA held that the purpose of the statute [(§ 73.091, Fla.Stat. (1973)] requiring condemning authority to pay all reasonable costs and attorney's fees is to permit owner to contest value placed on his property by condemning authority and at the same time come out whole. This case further provides that a property owner is entitled to be paid legal fees for efforts which

were unsuccessful during the proceeding.

In Canal Authority v. Ocala Manufacturing Ice and Packing Company, 253 So.2d 495 (Fla. 1st DCA, 1971), reh den, the 1st DCA held that the award of attorney's fees was grossly inadequate in light of the evidence and that the trial court abused its discretion. DOT, as did its expert witness, Arnold Weiner, based its argument on a benefit to HARTLEB of between $3,000 and $9,000. The facts of the HARTLEB case as found in the trial court testimony, transcripts and exhibits, can in no way be interpreted or analyzed to come to the conclusion that HARTLEB only received a benefit of between $3,000 and $9,000. Any analysis of the benefits received by HARTLEB which does not take into consideration non-monetary benefits received by HARTLEB and their appropriate importance is a misconception of law. See Broward County v. La Pointe, 685 So.2d 889 (Fla. 4th DCA, 1996) reh and cert den (1997) which interpreted §73.092(1), Fla.Stat.(1989) which is unchanged from §73.092(1), Fla.Stat.(1987), wherein the 4th DCA in acknowledging that one of the factors the court was required to consider in assessing attorney's fees was the "benefits resulting to the client for the services rendered" held:

> "...A proper gauge of benefits is not based solely on a yardstick comparison of raw numbers but on a realistic evaluation of the economic ramifications to the landowner of all provisions of the original offer." at 892

Thus, the 4th DCA has acknowledged the requirement of taking into consideration HARTLEB's non-monetary benefits, benefits from

defeating COLONIAL's apportionment claim and benefit from payment of costs which would not have been paid had the Offer of Judgment not been stricken, for the proper application of benefits in the determination of a reasonable attorney's fee.

Even assuming that the benefit achieved for HARTLEB was only between $3,000 and $9,000, this minimal amount was primarily the result of DOT making substantial changes in the construction plans and design by correcting a major problem in elevations which decreased the scope of the proposed taking after the offer of judgment had expired. The 4th DCA in the second appeal arising out of this proceeding recognized the unfair and contrary to public policy tactics of DOT. Hartleb, supra

Mr. Weiner, in his analysis of the almost six years of effort put forth by Douglas Bell, has chosen to ignore the unusual issues in this case and the tactics of DOT by proceeding on the assumption that this case was a typical non-controversial with normal issues type of case. This is evident by Mr. Weiner's testimony that "I'm telling you what my opinion is for disposing of this case. You remember I'm supposed to determine the reasonable hours in a hypothetical situation." [RV14N/19] Representation of HARTLEB by Douglas Bell was not a hypothetical situation, it was a real situation with all the issues and unfair dealing and tactics created by DOT and COLONIAL having to be addressed and defended against by Douglas Bell in his representation of HARTLEB.

The requirement of simple equity and fair dealing applies to

the award of attorney's fees wherein DOT should not benefit by changing the plans to reduce the damages awarded to HARTLEB and then argue that HARTLEB's attorney obtained minimal benefits and thus is entitled to minimal attorney's fees. Furthermore, the trial court having not provided any findings as to the benefits obtained by Douglas Bell or any of the other five factors stated in §73.092, Fla.Stat. (1987) has abused its discretion in the determination of attorney's fees awarded to HARTLEB and his attorney.

Had HARTLEB not had Douglas Bell's representation in this proceeding and had DOT and COLONIAL prevailed on all issues, HARTLEB would have not received compensation of $6,375 for the value of improvements on Parcel 104, HARTLEB would not have received interest on the amounts received in excess of the original deposit by DOT for the entire period of time between the date of taking and entry of the Partial Final Judgment, HARTLEB would have had no drainage available for his remaining property and HARTLEB would have had a three foot drop-off at his new property line. Had COLONIAL prevailed in the apportionment proceedings wherein COLONIAL was requesting $30,000 plus interest which could have exceeded $20,000 plus the value of improvements, HARTLEB would have been left with no money, no drainage for or access to his property plus he would have been responsible for payment of all of his costs and attorney's fees (except for six hours) incurred in this proceeding.

DOT appears to be of the opinion that it can create a problem

such as the approximate three foot difference in elevation at HARTLEB's property line, submit an unrealistic offer of judgment, then modify the plans and correct the problem during the jury trial, thus resulting in DOT's being able to reduce its obligation to less than the Offer of Judgment, rendering the property owner at the mercy of DOT's whims regarding damage to his or her property and ability to be compensated for attorneys' fees, costs and expenses incurred in protecting his constitutional right to full compensation.

The trial court having erred and abused its discretion by failing to properly evaluate the statutory factors in its determination of HARTLEB's and Douglas Bell's attorney's fees, this court should either make its own determination of reasonable attorney's fees or remand this matter to the 4th DCA and/or trial court for said determination.

POINT IV ON APPEAL ARGUMENT

SINCE HARTLEB AND HIS ATTORNEY SHOULD HAVE BEEN AWARDED ATTORNEY'S FEES AND COSTS ON DECEMBER 5, 1994, THE APPELLATE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO REQUIRE THE TRIAL COURT TO AWARD PREJUDGMENT INTEREST ON ATTORNEY'S FEES AND COSTS, SUBSEQUENTLY AWARDED HARTLEB, SAID PREJUDGMENT INTEREST TO COMMENCE ON DECEMBER 5, 1994.

On December 5, 1994, HARTLEB and his attorney Douglas Bell scheduled a hearing before the trial court on HARTLEB's Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs. After filing this Motion and Notice of Hearing on said motion, the DOT filed its Offer of Judgment and Motion to Strike HARTLEB's Motion for Order Awarding Attorney's Fees, etc., HARTLEB subsequently filed a Motion to Strike the DOT's Offer of Judgment. All of these motions were scheduled for December 5, 1994 before the trial court.

At the hearing of December 5, 1994, the trial court denied HARTLEB's Motion to Strike DOT's Offer of Judgment and granted DOT's Motion to Strike HARTLEB's Motion for Order Awarding Attorney's Fees as to attorney's fees and costs to which HARTLEB was entitled to for the period of time subsequent to the expiration of the Offer of Judgment or January 14, 1991. On February 1, 1995, the trial court entered its order striking HARTLEB's Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs for events occurring after January 14, 1991 and denying HARTLEB's Motion to Strike DOT's Offer of Judgment. This order also reserved for a later hearing the determination of the amount

of attorney's fees, paralegal fees, expert witness fees and costs incurred by HARTLEB which will be paid by DOT.

At the December 5, 1994 hearing, DOT offered to pay HARTLEB and his attorney for a total of six hours. The court rather than entering an order on these attorney's fees deferred taking testimony as to attorney's fees and costs pending the outcome of an appeal by HARTLEB.

The 4th DCA reversed the trial court's February 1, 1995 order striking HARTLEB's motion for order awarding attorney's fees, and directed the trial court to strike the DOT's Offer of Judgment and to award HARTLEB and Douglas Bell attorney's fees incurred throughout the entire trial period including the appeal which was taken from said February 1, 1995 orders. Hartleb v. State, Department of Transportation, 677 So.2d 336 (Fla. 4th DCA, 1996) reh/rec den.

Subsequently, on December 23, 1996 the trial court entered its order taxing attorney's fees and costs against DOT. This order also stated, "Concerning the defense (HARTLEB's) motion for interest, that any interest which may be awardable would begin to accrue on the date of entry of this order" or December 23, 1996.

On appeal, the 4th DCA affirmed the trial court's December 23, 1996 interest order on the basis of Department of Transportation v. Brouwer's Flowers, Inc., 600 So.2d 1260 (Fla. 2nd DCA, 1992) which held that there is "no statutory authority for entitlement to interest on attorney's fees in eminent domain cases before the

trial court's determination of attorney's fees." The 4th DCA went on to state that the "cases cited by appellant"(HARTLEB) are distinguishable in that they do not involve eminent domain proceedings.

Brouwer's, supra is distinguishable in that the prejudgment interest which the property owner's attorney was incorrectly awarded was for the period of time between a stipulated Final Judgment dated June 5, 1989 and the June, 1991 date that the trial court entered its order setting attorney's fees and costs. In Brouwer's, the attorney did not file his motion for attorney's fees until March 8, 1991, the hearing on this motion was originally set in April, 1991 and then continued until June at the request of the attorney. Following the date of award in June, 1991, the attorney would be entitled to interest on all amounts awarded.

As in Brouwer's, the Partial Final Judgment entered by the HARTLEB trial court on May 20, 1992 reserved jurisdiction for the purpose of determining a reasonable attorney's fee for the Defendant's attorney and costs necessarily expended. Thus, as of May 20, 1992, HARTLEB and his attorney's entitlement to attorney's fees and costs became vested. However, HARTLEB and his attorney are not requesting prejudgment interest from the original date of entitlement, but from the hearing date of December 5, 1994 when their Motion for Order Awarding Attorney's Fees, Paralegal Fees, Expert Witness Fees and Costs was scheduled to be heard by the trial court and but for DOT's wrongfully filed Offer of Judgment,

the trial court on December 5, 1994 would have entered an order awarding attorney's fees and costs to HARTLEB and his attorney.

It is submitted that the trial court should first be directed to make a determination as to the reasonable and necessary attorney's fees and paralegal fees to which HARTLEB was entitled to as of the December 5, 1994 hearing, since had the trial court properly stricken the Offer of Judgment on December 5, 1994, an order would have been entered by the trial court awarding said attorney's fees and costs as of December 5, 1994 to which HARTLEB would be entitled to post judgment interest on. Also, during the period of time following December 5, 1994, DOT has had the use of the monies subsequently awarded to HARTLEB for attorney's fees, paralegal fees, costs and expert witness fees.

As support for an order directing the trial court to award interest on these amounts, the court is referred to Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.2d 929 (Fla., 1996) wherein the Florida Supreme Court held that interest on attorney's fee award accrues from the date entitlement to attorney's fees is fixed through agreement, arbitration award or court determination, even though amount of award has not yet been determined. The Florida Supreme Court cited the case of Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985) which quoted the decision of the First District Court of Appeal which stated that, “For us to rule to the contrary would be to penalize the prevailing party, Ignacio, for State Farm's delay in paying the

attorney's fees found due after their concession of liability upon settlement of the underlining claims; it would reward State Farm for continuing to contest Ignacio's reimbursement of attorney's fees by allowing State Farm interest-free use of the money for more than a year. Such a result would be inconsistent with the intent and purpose of statutory provisions allowing attorney's fees to the prevailing party."

There have been numerous cases since Quality Engineered Installation, Inc., all of which held that pre or post-judgment interest on an award of attorney's fees and costs started to accrue on date that trial court determined that Plaintiff was entitled to award of attorney's fees and costs even though actual amount to be awarded was not determined until a later date. Included in these cases is Bailey v. Leatherman, 668 So.2d 232 (Fla. 3rd DCA, 1996) reh den. wherein the appellate court held that the plaintiff should not be penalized because the defendant appealed the trial court's order finding that Plaintiff was entitled to an award of attorney's fees and costs. The court in Bailey cited the case of Fischbach & Moore, Inc. v. McBro, 619 So.2d 324 (Fla. 3d DCA, 1993) wherein the court had held that post-judgment interest on an award of attorney's fees and costs starts to accrue from the date the trial court finds that the party was entitled to such an award even thought the amount was not determined until a later date and stated that the court reasoned that a "prevailing party should not be penalized when a non-prevailing party decides to contest entitlement to

attorney's fees." Fischbach, 619 So. 2d at 325. In the case before the court, HARTLEB filed an appeal as the result of the actions of DOT and subsequently prevailed on appeal. Thus, HARTLEB as the prevailing party should not be penalized as the result of DOT's contesting HARTLEB's entitlement to attorney's fees and costs.

The court is also referred to Wiederhold v. Wiederhold, 696 So.2d, 923 (Fla. 4th DCA, 1997) wherein the trial court on remand did not award pre-judgment interest on its ultimate award of attorney's fees for the wife as required by Quality Engineered Installation, Inc. The 4th DCA reversed and remanded with direction to award same from the date on which the trial court signed the order determining the wife was entitled to reasonable fees. It is again submitted that on December 5, 1994, the trial court should have awarded attorney's fees and costs to HARTLEB and thus HARTLEB is entitled to pre-judgment interest from December 5, 1994 until the date the orders awarding fees and costs were entered.

It is requested that this matter be remanded to the 4th DCA and/or trial court for a determination of interest on the cost amounts and attorney's fees to which HARTLEB is entitled to as of December 5, 1994 until October 18, 1996 for costs awarded on said date and until December 23, 1996 for all other costs and attorney's fees awarded on said date which represent costs and attorney's fees up to and including December 5, 1994 at the statutory rate provided by applicable versions of §55.03, Fla. Stat.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this matter be remanded to the 4th DCA and/or trial court with directions to apportion the attorney's fees and make a determination as to the lodestar fee for attorney's fees due HARTLEB and his attorneys for each of the various proceedings in this matter, to-wit: pre-trial and trial proceedings, post-trial proceedings, apportionment proceedings and appellate proceedings.

HARTLEB also requests that this court find that the trial court judge abused his discretion in the amount of attorney's fees awarded HARTLEB and his attorneys and to direct the trial court and/or 4th DCA to increase and redetermine attorney's fees which were reasonably necessary to reasonably and adequately represent HARTLEB in this proceeding.

In addition, this Court is requested to remand this case to the 4th DCA and/or trial court with directions to enter an order awarding HARTLEB pre-judgment interest from December 5, 1994 on the compensation awarded HARTLEB and his attorneys for costs and attorney's fees due as of December 5, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief has been furnished by U.S. Mail to Marianne A. Trussell, Assistant General Counsel for the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458 this ___ day of August, 1998.

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