IN THE FLORIDA SUPREME COURT

ROBERT HARTLEB,

Petitioner,

vs. CASE NO. 93,352

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

AMENDED ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE COURT OF APPEAL, FOURTH DISTRICT
CASE NO. 97-1892

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PRELIMINARY STATEMENT

Robert Hartleb, defendant/appellant below and petitioner herein, shall be referred to in this brief as "Hartleb." Counsel for Mr. Hartleb, Douglas Bell, the real party in interest to this appeal, will be referred to as "Mr. Bell." The State of Florida, Department of Transportation, petitioner/appellee below and respondent herein, shall be referred to as the "Department."

Citations to the Record on Appeal shall be in the form of (R.), followed by the appropriate number(s). References to the transcript of the November 25, 1996, hearing on Mr. Bell's Motion and Supplemental Motion for Order Awarding Attorney's Fees, Paralegal Fees and Costs attorneys fees, the motion from which the order herein is appealed, located at Record Volume 15, shall be in for form of (T.) followed by the appropriate volume and page number(s). Citations to Hartleb’s Initial Brief shall be in the form of (IB.) followed by the appropriate page number(s). Citations to the Appendix to Hartleb’s Initial Brief shall in the form of (A) followed by the appropriate page number(s). Citations

to the Appendix to this Answer Brief shall be in the form of (AA.) followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The Department agrees in part with the typically overly lengthy Statement of the Case and Facts (24 pages of a 47 page brief) presented in the Initial Brief.

Simply, this is an appeal from the affirmance by the District Court of Appeal, Fourth District of a trial court's award of attorney's fees to Mr. Bell, for his representation of Hartleb, a property owner, in an eminent domain proceeding and two appeals[1]. (R17. 2101-2103) At a four hour hearing on Mr. Bell's motion to tax costs and attorney's fees on November 25, 1996, the trial court heard argument of counsel, took testimony of various witnesses, and reviewed countless time records, supplements, motions, amended motions, and time summaries. (R15.) Subsequent to entry of the trial court's order on the motion dated December 23, 1996, counsel for Hartleb filed a motion for rehearing upon which a hearing was held on April 28, 1997. (R9. 1657-1798; R15.) The trial court, after allowing counsel substantial leeway to argue matters beyond the legal parameters of a motion for rehearing[2], denied the motion.

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[1]Because Mr. Bell was unsuccessful in the first appeal, he was not entitled to recover fees or costs for that appeal, and the trial court allowed only minimal time reasonably expended on the Department's cross appeal. See § 73.131(2), Fla. Stat. (1989). Similarly, Mr. Bell's award as it relates to the second appeal has been affirmed. See footnote 4, infra.

[2]Florida Rule of Civil Procedure 1.530 (a) provides that "[o]n a motion for a rehearing of matters heard without a jury including

(R15.) (R9. 1799-1800)

At the November 25, 1996, hearing, Mr. Bell testified that a reasonable attorney's fee to him would be $345,638.75. (T1. 14) Thomas Bolf, testifying on behalf of Mr. Bell, stated that while the time expended by Mr. Bell should be reduced, it was his opinion that in this case where there was a "straight monetary increase [over the deposit] of $8,375,"[3] and a reasonable fee would be $265,225. (R9. 60)

Arnold Weiner, an experienced eminent domain attorney in the Ft. Lauderdale area, testified that Mr. Bell's practice, by his own admission, is only 10 percent litigation and due to his litigation inexperience and the fact that this may have been his first and only eminent domain case, the time expended on the case was excessive. (T2. 13) Mr. Weiner also explained that Mr. Bell was not the original attorney in the case and began representation of

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summary judgments, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment." No suggestion was made that additional testimony should be taken. Florida Rule of Appellate Procedure 9.330(a) provides that "[a] motion for rehearing shall state with particularity the points of law or fact that the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order." The motion in this case failed to meet the criteria of either rule.

[3]This increase over the good faith estimate was reduced during an apportionment trial to approximately $3,000, although the witnesses and the trial judge variously describe this ultimate benefit as anywhere between $3,000 and $9,000. Mr. Bolf's testimony that avoidance of $160,000 in attorney's fees is also a benefit to the client is without any factual or legal basis because the client was not obligated to Mr. Bell to pay those fees. (T2. 44)

Hartleb some time in late 1990. (T2. 59) Based upon his experience, it was his opinion from the point at which Mr. Bell began representing Hartleb, the case should have been handled in approximately 175 hours. (T2. 15-32) In addition, according to Mr. Weiner, the case did not represent issues significant enough to warrant a three day trial, particularly when the result was a $9,275 jury award over the initial deposit which was significantly reduced after a three day apportionment trial, resulting in an ultimate benefit of approximately $3,000. (T2. 15-32; n.3, supra.)

After due consideration to the numerous motions, documents, time records, expert testimony, and legal argument, and careful consideration of all of the statutory factors, an order was entered reflecting the trial court's first hand knowledge and experience of all of Mr. Bell's efforts in the case. (A15-16) Based upon the evidence presented and the criteria of Section 73.092, Florida Statutes, the trial court properly awarded a fee of $80,750 for 300 hours of work at the rate of $225 per hour for Mr. Bell's time, $150 per hour for his associate's time, $75 per hour for paralegal time, and $200 per hour for 10 hours of Mr. Forman's time in preparing for and presenting oral argument at the second appeal.[4]

On appeal to the Fourth District Mr. Bell argued, as he has to

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[4]Mr. Bell's Motion for Review of the order as it pertains to Mr. Forman's fee and certain transcript costs, was granted and the order was affirmed by the Fourth District Court of Appeal on July 23, 1997. Mr. Bell's Motion for Attorney's Fees for that effort was also denied.

this Court, that the award by the trial court was too low, that the award should have been apportioned among various stages of the case, i.e., pre-trial, trial, post trial, appeals, and apportionment proceeding, and that prejudgment interest should have been awarded on his fee. (A1) The Fourth District concluded the trial court's determinations had been within its "discretion and should not be disturbed on appeal. . . ." (A1) Specifically, the appellate court also held "[w]e find that such apportionment [among the various stages of the case] is not required, and to the extent that Altamonte Hitch & Trailer Serv., Inc. v. U-Haul Co. of Eastern Florida, 483 So. 2d 852 (Fla. 5th DCA 1986) may be interpreted as requiring such apportionment, we certify conflict. We also find no error in the trial court's refusal to grant interest on the attorney's fee award from the date the entitlement to fees was first determined." (citing Department of Transp. v. Brouwer's Flowers, Inc., 600 So. 2d 1260 (Fla. 2d DCA 1992)). (A1)

This appeal comes to this Court solely on the basis of the uncertainty of the Fourth District Court of Appeal as to whether it may have created conflict with the opinion in Altamonte Hitch.

SUMMARY OF THE AGREEMENT

This Court should not address the merits of the certified conflict question because the Fourth District's decision is consistent with Altamonte Hitch & Trailer Serv., Inc. v. U-Haul Co. of Eastern Florida, 483 So. 2d 852 (Fla. 5th DCA 1986), and the question does not present an issue of great public importance.

Alternatively, this Court should answer the question, finding there is no conflict and that trial courts are not, in all cases, required to apportion an attorney's fee award among the various stages of a case, i.e., pre-trial, trial, post-trial, apportionment, and appeals. In Altamonte Hitch, Judge Sharp, writing for the court, stated that "[t]he difficulty in this case, as well as in the case of the motion made pursuant to Rule 9.400, is that we can undertake no meaningful review of the sums awarded because the lower court failed to stipulate in its order what amounts awarded pertain to appellate fees and costs as opposed to trial fees and costs." Id. at 854.

Because of the differences in the cases and the records provided, the Fourth District in this case, unlike the Fifth District in Altamonte Hitch, had no difficulty in determining the reasonableness of the fee. Altamonte Hitch does not require apportionment of an attorney's fee where the reviewing court is otherwise capable of providing meaningful review of the order

appealed. Moreover, Altamonte Hitch is limited to its facts and does not mention, let alone require, the type of apportionment among various stages of the litigation as sought by Mr. Bell.

This Court has previously said that "[h]aving accepted jurisdiction to answer [a] certified question, we may review the entire record for error." Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4 (Fla. 1994)(citing Lawrence v. Florida East Coast Ry., 346 So. 2d 1012 (Fla. 1977)). However, because there has been only a question of potential conflict on a very narrow issue, and not a question of great public interest, certified to this Court, it is the Department's position that the different procedural posture of this case requires a different result. Thus, even if this Court determines that it should exercise its discretionary jurisdiction and answer the conflict issue posed by the Fourth District, all other issues raised in the Initial Brief are not properly before this Court and are improperly argued.

Without waiver of the Department's position that this Court has no jurisdiction over the other issues raised in the Initial Brief, if this Court determines that it has jurisdiction and decides to exercise that jurisdiction to address the remaining points raised in the Initial Brief, this Court should affirm the opinion of the Fourth District Court of Appeal. The record in this case fails to establish an abuse of discretion in the calculation and award of Mr. Bell's fees and fails to establish that the denial

of prejudgment interest on the attorney's fee award is an erroneous application of existing law. Florida East Coast Ry., 171 So. 2d 873 (Fla. 1965); Department of Transp. v Brouwer's Flowers, Inc., 600 So. 2d 1260 (Fla. 2d DCA 1991); State, Dep't of Transp. v. Interstate Hotels Corp., 709 So. 2d 1387 (Fla. 3d DCA 1998)[5]; Lee v. Wells Fargo Armored Servs., 707 So. 2d 700 (Fla. 1998).

[5]The question of this Court's jurisdiction to address conflict where the appellate court followed Brouwer's Flowers and disallowed prejudgment interest on an attorney's fee award is pending before this Court awaiting a decision on jurisdiction in 97807 Canada Ltd/Ltee. v. Dep't of Transp., case no. 93,358. A similar issue of prejudgment interest on a cost award also calling Brouwer's Flowers into play, Boulis v. Dep't of Transp., 709 So. 2d 206 (Fla. 5th DCA 1998), is before this Court in Boulis v. Dep't of Transp., case no. 93,229.

ARGUMENT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO DECIDE THE MERITS OF THE QUESTION CERTIFIED AS A POTENTIAL CONFLICT BECAUSE THE LOWER COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ALTAMONTE HITCH & TRAILER SERV., INC. V. U-HAUL CO. OF EASTERN FLORIDA, 483 So. 2d 852 (Fla. 5th DCA 1986)

Pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv), this Court has the discretion to exercise its jurisdiction "to review . . . decisions of district courts of appeal that . . . expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." The narrow parameters of this Court's conflict jurisdiction that "express and direct conflict, i.e., [conflict which] must appear within the four corners of the majority decision," are well established. Department of Health & Rehabilitative Servs. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888 (Fla. 1986); Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla. 1963).

The opinion that in this case apportionment of an attorney's fee among various stages of the litigation and appeals is not necessary and the Fourth District's overly cautious statement certifying conflict to the extent that Altamonte Hitch "may be interpreted" as requiring otherwise, do not create the direct and express conflict with Altamonte Hitch, 483 So. 2d 852, required for

jurisdiction to be established in this Court. In Altamonte Hitch, Judge Sharp, writing for the court, said:

> The difficulty in this case, as well as in the case of the motion made pursuant to Rule 9.400, is that we can undertake no meaningful review of the sums awarded because the lower court failed to stipulate in its order what amounts awarded pertain to appellate fees and costs as opposed to trial fees and costs. Appellants are entitled to have these matters intelligently reviewed and this remedy should not be foreclosed to them because of the form of the order.

Id. at 853. It is clear from this record and the opinion that the Fourth District experienced no such difficulty in this case and that in its opinion it was more than capable of providing meaningful review based upon the record and the form of the trial court's order.

While Hartleb's notice does not articulate his perceived basis for this Court's jurisdiction, it does exaggerate the Fourth District's characterization of the lower court's perception of potential conflict. The notice to invoke this Court's jurisdiction states that the "decision is certified to be in direct conflict with decisions of other District Courts of Appeal." That is not what the Fourth District held and cannot be fairly implied from the opinion. The jurisdiction of this Court is, in fact, predicated on Article V, Section 3(b)(4) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), by virtue of the Fourth District's hesitant statement that "to the extent that

Altamonte Hitch . . . may be interpreted as requiring such apportionment [of an attorney's fee between appellate work and trial work] we certify conflict." (A1) By Order entered July 6, 1998, this Court postponed its decision on jurisdiction and provided for the service of briefs on the merits.

While it is well settled that this Court will not revisit the issue of whether a question certified by a district court of appeal is in fact one of great public interest, Susco Car Rental System of Florida v. Leonard, 112 So. 2d 832, 834-835 (Fla. 1959), the certification does not bind this Court to address the merits of the question. Stein v. Darby, 134 So. 2d 232, 237 (Fla. 1961). This Court noted that its jurisdiction in cases of perceived public interest is that it "*may* review by certiorari any decision of a district court of appeal * * * that passes (*upon a question certified by the district court of appeal to be of great public interest*)." Susco, 112 So. 2d at 834 (emphasis in original). Certification is plainly a condition precedent to any review based upon a discretionary ground.

Addressing the certification of a question to be of great public importance, this Court held:

> it is plain that the certificate is necessary to invest this court with the power to adjudicate a question a district court considers of such moment but it does not follow that this court is unalterably bound to decide the question for the pivotal auxiliary verb "may" which the court took the pains to italicize, denotes sanction or authority; it

> should not be construed as "shall" compelling this court to decide the merits of the question. Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596.

Stein, 134 So. 2d at 237. Similarly, Article V, Section 3(b)(4), of the current Florida Constitution provides that this Court "**[m]ay** review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." (emphasis supplied) Inasmuch as this Court has postponed its decision on jurisdiction, the Department believes that it would be appropriate to submit that this Court should not exercise its discretionary jurisdiction to decide the merits of the certified conflict.

To establish jurisdiction based upon conflict, there must be an express and direct conflict resulting from the four corners of the opinion. Despite the wording of Hartleb's Notice to Invoke Discretionary Jurisdiction, i.e., the "decision is certified to be in conflict with decisions of other District Courts of Appeals," only one case, Altamonte Hitch, is purported to be in conflict with the opinion in the instant case. However, a careful reading of Altamonte Hitch reveals that there is no conflict because it does not require all appellate courts to reject all trial court orders awarding attorney's fees that do not apportion the award between appellate work and trial work. Rather, Altamonte Hitch merely notes the obvious, that when an appellate court determines it is unable to provide meaningful review of a trial court's award of an

attorney's fees, the matter should be remanded for inclusion of the requisite detail. The opinion in this case does not conflict with Altamonte Hitch, the result is merely different because the facts are different and the record is different. Differing facts require different results. The Altamonte Hitch court recognized that fact by acknowledging that its opinion is limited due to the "difficulty with this case . . . ." Altamonte Hitch, 483 So. 2d at 583 (emphasis added).

As such, this Court should deny the petition because no conflict and, thus, no jurisdiction exists.

II. ALTERNATIVELY, THE LOWER COURT PROPERLY CONCLUDED THAT UNDER THE FACTS OF THIS CASE IT WAS NOT REQUIRED TO REMAND THE CAUSE TO THE TRIAL COURT TO APPORTION AN ATTORNEY'S FEE AWARD AMONG VARIOUS STAGES OF THE LITIGATION AND APPEALS (Responding to Point I)

As previously stated in Point I, above, Altamonte Hitch merely reminds trial courts that when an appellate court is unable to provide meaningful review of their orders awarding attorney's fees, they will be remanded for the requisite detail. The Fourth District's opinion in this case does not conflict with Altamonte Hitch; the result is merely different because the facts are different and the record is different. Differing facts require different results. There is no conflict between the determination of the Fifth District that in Altamonte Hitch that court felt it could not perform meaningful review of a trial court's award of attorney's fees without apportionment by the trial court between appellate work and trial work and the Fourth District's opinion that in Hartleb it could. The Altamonte Hitch opinion is based upon its facts and its record. The opinion in this case is based upon its facts and its record. The results differ but do not conflict.

The Fourth District's affirmance of the trial court's award is proper and supported by the record. A trial court's award of attorney's fees and costs comes before a reviewing court clothed

with a presumption of correctness and Florida courts have consistently held that only where a clear abuse of discretion has been demonstrated will an award of attorney's fees be disturbed. Florida East Coast Ry. Co. v. Martin County, 171 So. 2d 873 (Fla. 1965); Division of Admin., State, Dep't of Transp. v. Condominium Int'l, 317 So. 2d 811 (Fla. 3d DCA 1975); Ocala Manufacturing, Ice & Packing Co. v. Canal Auth., 301 So. 2d 495 (Fla. 1st DCA 1974); City of Miami Beach v. Liflans Corp., 259 So. 2d 515 (Fla. 3d DCA 1972); Canal Auth. v. Ocala Manufacturing, Ice & Packing Co., 253 So. 2d 495 (Fla. 1st DCA 1971); City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d DCA 1971). It logically follows that the reviewing court is in the best position to make an independent determination whether, based upon the record presented, it is capable, or incapable, of providing the parties with meaningful review of the trial court's ruling. That determination having been made by the Fourth District in this case should not be disturbed by this Court.

In addition to arguing that Altamonte Hitch requires apportionment between appellate work and trial work in all cases, Mr. Bell argues that it also requires apportionment among the various stages of trial work. It does not. Altamonte Hitch addresses the deficiency in a trial court's order awarding an attorney's fee which in the opinion of the Fifth District rendered meaningful review of the attorney's work performed on appellate

proceedings versus trial work, impossible. However, the opinion neither mentions nor addresses apportionment among the various components of trial work. Undersigned counsel can locate no authority for such a requirement and none of the cases relied upon by Mr. Bell stands for the result he advocates. According to Mr. Bell, "Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) reh. den. . . . support[s] [a] require[ment] [that] the trial court . . . determine a lodestar fee for at a minimum, pre-trial and trial, post-trial, apportionment and appellate proceedings." (IB. 28) It does not. This Court in Rowe said that in determining a reasonable fee:

> The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained."

Id. at 1151. The trial court in this case followed this Court's directives and determined a lodestar fee. This Court went on to say:

> In adjusting the fee based upon the success of the litigation, the court should indicate that it has considered the relationship between the amount of the fee awarded and the extent of success.
>
> In determining the hourly rate, the number of hours reasonably expended, and the appropriateness of the reduction or enhancement factors, the trial court must set

forth specific findings.

Id. In this case the trial court specifically found the number of hours reasonably expended to accomplish the result achieved and a reasonable hourly rate for Mr. Bell and members of his firm. (A15-16) The result is the lodestar amount. Id. No adjustment to reduce or enhance the lodestar was warranted and, thus, no further findings are required. Id.

Section 73.092, Florida Statutes, and the plethora of case law interpreting it, require only that a reasonable fee be awarded. A requirement that such fee should be apportioned to reflect the reasonable number of hours reasonably expended on the various components required of a case going to trial would be overly burdensome to trial judges who are already required to digest and analyze reams of documents and hours of testimony.

As such, this Court should deny Hartleb's petition because no conflict, and no jurisdiction exists. Alternatively, the petition should be denied on the merits because there is no authority for the proposition that no appellate court can provide meaningful review of attorney's fee awards unless the amount awarded is apportioned by the trial court between appellate and trial work. That determination is best left to the independent judgment of reviewing courts.

III. SHOULD THIS COURT DECIDE TO EXERCISE ITS DISCRETIONARY JURISDICTION, THE ONLY ISSUE TO BE DECIDED IS THE ISSUE OF APPORTIONMENT OF AN ATTORNEY'S FEE AWARD AND THE REMAINING ISSUES RAISED IN THE INITIAL BRIEF ARE NOT PROPERLY BEFORE THIS COURT OR, ALTERNATIVELY, WERE PROPERLY DECIDED BY THE TRIAL COURT AND SHOULD BE AFFIRMED ON APPEAL (Responding to Points II, III, and IV)

The Department objects to Mr. Bell creating and arguing new issues for review. This case is before this Court based upon the somewhat skeptical belief of the Fourth District that its opinion may be interpreted as having created conflict. Thus, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court's jurisdiction, if any, is discretionary to review a narrow portion of the decision that is determined to "**expressly and directly conflict** with a decision of another district court of appeal **on the same question of law**." (emphasis supplied). Therefore, the Department objects to any and all statements in Mr. Bell's "Statement of the Facts and Case" and in his arguments addressing any issue beyond the issue noted as potentially conflicting with Altamonte Hitch.

The Department recognizes that this Court has previously said that "[h]aving accepted jurisdiction to answer [a] certified question, we may review the entire record for error." Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4 (Fla. 1994)(citing Lawrence v. Florida East Coast Ry., 346 So. 2d 1012 (Fla. 1977)). However, because the only question certified to this Court is based

upon an uncertain pronouncement of conflict on the issue of apportionment of an attorney's fee award between appellate work and trial work, it is the Department's position that the different procedural posture of this case requires a different result. There is no basis for jurisdiction upon which this Court could review the additional issues raised in the Initial Brief.

Without waiver of its position that the issue of the reasonableness of the amount of attorney's fee awarded and prejudgment interest on the award are not properly before this Court, the Department responds to Points II, III, and IV of the Initial Brief.

On review, a trial court's award of attorney's fees and costs is clothed with a presumption of correctness and Florida courts have consistently held that only where a clear abuse of discretion has been demonstrated will an award of attorney's fees be disturbed. Florida East Coast Ry. Co. v. Martin County, 171 So. 2d 873 (Fla. 1965); Division of Admin., State, Dep't of Transp. v. Condominium Int'l, 317 So. 2d 811 (Fla. 3d DCA 1975); Ocala Manufacturing, Ice & Packing Co. v. Canal Auth., 301 So. 2d 495 (Fla. 1st DCA 1974); City of Miami Beach v. Liflans Corp., 259 So. 2d 515 (Fla. 3d DCA 1972); Canal Auth. v. Ocala Manufacturing, Ice & Packing Co., 253 So. 2d 495 (Fla. 1st DCA 1971); City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d DCA 1971).

Mr. Bell would have this Court reassess the Fourth District's

assessment of its ability to review the record and the amount awarded to him for his representation of Hartleb, because the amount of fees awarded is "inadequate." (IB. 30) The trial court's determination of the number of hours reasonably spent on the matter and reasonable hourly rates to be awarded to Mr. Bell and others in his firm are not questions of law and are not reviewable under a de novo standard of review. Whigum v. Heilig-Meyers Furniture, Inc., 682 So. 2d 643 (Fla. 1st DCA 1996) (pure issues of law must be resolved by the de novo standard of review); Newell v. Prudential Ins. Co., 904 F.2d 644 (11th Cir. 1990) (trial court's rulings on conclusions of law are subject to de novo review). Rather, the trial court's award is based on questions of fact best determined by the trial court. Moreover, Mr. Bell's characterization of the errors of the trial court and the Fourth District as failures to properly apply the statutory fee factors of Section 73.092, Florida Statutes (1987), cannot convert the question presented to this Court as one involving a misapplication of the law. The law was properly applied to the individual, particular facts of this case and the resulting order is reviewable under an abuse of discretion standard.

Upon the extensive record presented to the trial court and reviewed by the Fourth District, it cannot be said that there has been any abuse of discretion in awarding an $80,750 fee in this eminent domain case that resulted in a benefit to Hartleb of only

$3,000 or $9,000. (n.3, supra) A lodestar fee determines a reasonable rate which is multiplied by a reasonable number of hours expended on the case. Rowe, 472 So. 2d at 1151. An adjustment upward or downward as described in Rowe and Seminole County v. Delco Oil, Inc., 669 So. 2d 1162 (Fla. 5th DCA 1996), is not mandated, but if awarded is to be supported by specific findings. Rowe, 472 So. 2d at 1151. From this record the trial court's failure to award additional fees as an upward adjustment for an exemplary result is not error and not an inadvertent omission. In addition, there is no basis in law for an award beyond what is reasonable based upon the statutory factors of Section 73.092, Florida Statutes, and the trial court's duty is to review the record and determine a reasonable fee.

There is no doubt that the fee in this case is guided by Section 73.092, Florida Statutes. Upon consideration of the statutory criteria, the determination of the amount of an award of attorney's fees is largely left to the discretion of the trier of fact taking into consideration the services performed, the responsibility incurred, the nature of the services, the skill and time required, the circumstances under which the services rendered, the customary charges for like services, the amount involved, and the importance and results of the litigation. It has also been said that in estimating the value of an attorney's services, the trial judge may consider the attorney's "skill, experience,

professional reputation, and even his amount of business . . . ." Condominium Int'l, 317 So. 2d at 814.

The statute requires the trial judge to consider both the "benefits resulting to the client from the services rendered" and "[t]he attorney's time and labor reasonably required adequately to represent the client." § 73.092, Fla. Stat. (1987). Mr. Bell necessarily attempts to divert attention from the fact that he spent an inordinate amount of time to achieve a minimal benefit. (T2. 15-32) Fully aware of this fact and more, the trial judge's award accurately reflects his knowledge of the statutory factors and his first hand familiarity with the services performed, the skill and experience in eminent domain cases of Mr. Bell and others in his firm, the work reflected in pleadings in the court file, the handling of the trial, and the manner in which the case was handled throughout its existence. No abuse of discretion has been shown.

In the Fourth District, Mr. Bell argued that the "amount of fees awarded . . . pursuant to the factors of Section 73.092, Fla. Stat, (1987) is inadequate." Thus, Mr. Bell argued not that the trial court abused its discretion or improperly applied the statutory factors, but that upon application of the factors, the resulting fee is less than he would like. Mr. Bell now argues that the trial court failed to properly apply the statutory factors and asks this Court to redetermine a reasonable fee or direct the trial judge to redetermine his award. (IB. 40)

The fact that the trial court's order does not state that consideration has been given to the statutory factors is not fatal to its propriety. The trial judge heard over four hours of argument and expert testimony and reviewed hundreds if not thousands of pages of documents and time records in order to reach his conclusion. It has long been said that trial courts are in the best position to weigh the evidence, judge the credibility of witnesses, and assess the time, skills, and services of the attorneys appearing before it. It is the trial judge who has the only first hand knowledge of Mr. Bell's abilities, how the case was handled, how many hours were actually required to accomplish the result obtained and the resulting order is to be viewed as an accurate reflection of those efforts. Where there is competent substantial evidence to sustain the actions of a trial court, an appellate court cannot substitute its opinion on the evidence, but must indulge every fact and inference in support of the trial court's judgment. Smiley v. Greyhound Lines, Inc., 704 So. 2d 204 (Fla. 5th DCA 1998). Because there is competent substantial evidence in the record to support the trial court's order, which has been confirmed and affirmed by the Fourth District, there is no basis for a redetermination of the fee award by this Court or by the trial court.

The trial court and the Fourth District also properly refused to award prejudgment interest on Mr. Bell’s attorney's fee award.

It is well established that "the immunity of a state[6] from suit is absolute and unqualified . . . ." Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 326 (1925)(quoting 25 R.C.L. pp 413, 414, and cases cited; 33 C. J. 397). The state may not be sued without its consent given by general law as provided in the constitution. Id.; State Road Dep't v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1941)(holding that if the state could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked); Southern Drainage Dist. v. State, 93 Fla. 672, 112 So. 561 (1927). Because immunity of the sovereign is absolute, so-called waiver of immunity statutes must be clear and unequivocal and are to be strictly construed. Spangler v. Florida State Turnpike Auth., 106 So. 2d 421 (Fla. 1958). The prevailing and obvious reason for immunity of the sovereign is to protect "the public against profligate encroachments on the public treasury." Id. at 424. The trial court and the Fourth District properly recognized that an order awarding prejudgment interest in this case would violate the principle of immunity of the sovereign and constitute an unauthorized encroachment on public funds.

Sovereign immunity has been applied in numerous instances to protect public coffers from unwarranted and unauthorized

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[6]This general rule is applicable not only to "the state" as such, but also to state agencies. Corneal v. State Plant Board, 101 So. 2d 371 (Fla. 1958)(citations omitted).

intrusions. For example, it has been extended to preclude the state as a litigant from being subject to the costs of litigation for which a private litigant may be liable. Corneal v. State Plant Board, 101 So. 2d 371 (Fla. 1958)("The general rule is that in suits where the state is a party in its own courts, it is not liable for costs in the absence of an express statute creating such liability. * * * We have no such statute in this state."); State v. Colonial Acceptance, Inc., 80 So. 2d 681 (Fla. 1955). In Corneal, this Court held:

> We find no statute in this state that either expressly or by necessary implication authorizes the taxation of costs against the State Plant Board in a suit like this, where the Board is defending its regulatory measures adopted pursuant to legislative authority. So, despite the fact that the claim of the appellants makes a strong appeal to our sense of justice and fairness, their only remedy would seem to be an application to the Legislature for reimbursement by way of a Relief Bill. And it well may be that when this matter is brought to the attention of the Legislature, it will give serious consideration to the passage of a general law providing for such relief to all future litigants in a similar situation as has been done in a number of other states.

Corneal, 101 So. 2d at 372. In eminent domain proceedings the state as a condemning authority must pay a property owner's reasonable costs and attorney's fees because the legislature has clearly and unequivocally mandated that it do so. § 73.091, Fla. Stat. (1997).

It has also been said that the "[s]tate is not liable to pay

interest on its debts, unless its consent to do so has been manifested by an act of its legislature or by a lawful contract of its executive officers." Treadway v. Terrell, 158 So. 512, 517 (Fla. 1935). In Treadway, the state road department sought to restrain a board of arbitration from entering a judgment against it which included "interest on the net amount of [the] award from the date on which such amount should have been paid for work done under [the] contract . . . ." Id. at 517. This Court went on to hold:

> There is no provision in the Constitution or in the statutes of the state expressing the immunity of the state from liability for interest payments not assented to. Such immunity is an attribute of sovereignty and is implied by law for the benefit of the state; and the immunity may be waived in any way that is manifested or authorized by statute, as justice may require to conserve the welfare and honor of the state.
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> * * * *
>
> Where statutory authority to sue a state is given, the implied immunity of the state from payment of interest upon obligations of the sovereign state may be waived or the payment of such interest may be impliedly authorized or assented to by the state; and interest may be awarded on such implied statutory authority when the nature of claims on which suits may be maintained and the object designed in permitting suits against the state or its agencies warrant it.

Id. at 517-518. Thus, without specific assent to liability by constitution or statute, the state is immune from interest payments on its obligations. Id. However, this Court concluded, a general law which authorizes suits against the state on any or all

liabilities that may arise against the state, may, by its intention ("intendment"), authorize claims for interest as a legal incident of the claim. Id. at 518.

In this case, there is no contract and there has been no general manifestation by the legislature that interest upon an obligation to pay attorney's fees has been authorized. Liability for interest, in eminent domain proceedings or otherwise, can be imposed against the state only as provided for by statute, which must be clear and unequivocal. Spangler, 106 So. 2d at 424; Treadway, 158 So. at 517; Peeler v. Duval County, 70 So. 2d 354, 356 (Fla. 1954). In Peeler, this Court, reviewing a trial court's award of interest from the date of surrender of possession of property in an eminent domain proceeding to the date of payment into the court registry, held:

> The **question of interest** in this case is **controlled entirely by statute**. The State of Florida and the counties of the State, which are **arms of the sovereign, are not required to pay interest except as provided by statute**.

Peeler, 70 So. 2d at 355 (emphasis added).

In 1952, Section 74.06, Florida Statutes (1952), provided that property owners were not entitled to interest on monies paid into the court registry by condemning authorities. Id. at 356. Today, Section 74.061, Florida Statutes (1998), provides that interest is to be paid to property owners "at the same rate as provided in all circuit court judgments from the date of surrender of possession to

the date of payment on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking." There is no other provision in either Chapter 73 or Chapter 74 authorizing an award of interest in an eminent domain proceeding.

The legislature has expressed its intention that interest be paid only to property owners in eminent domain proceedings and, even then, only under specific limited circumstances. This strict limitation on payment of interest has been upheld by several Florida courts and interest on other awards to property owners denied. Division of Admin., Dep't of Transp. v. Tsalickis, 372 So. 2d 500 (Fla. 4th DCA 1979); Division of Admin., Dep't of Transp. v. Shepard, 382 So. 2d 45 (Fla. 2d DCA 1979), cert. denied 388 So. 2d 1118 (Fla. 1980). In Tsalickis the court held that no interest was awardable on an amount provided for in a stipulated final judgment. Similarly, while interest on a business damage award might accrue to the property owner, it has also been disallowed. Division of Admin., Dep't of Transp. v. Pink Pussy Cat, Inc., 314 So. 2d 192 (Fla. 1st DCA 1975).

While property owners have been consistently denied interest on various aspects of their awards in eminent domain proceedings, the issue of interest to someone other than a property owner in an eminent domain case has been addressed only twice. State, Dep't of Transp. v. Brouwer's Flowers, Inc., 600 So. 2d 1260 (Fla. 2d DCA

1992); Interstate Hotels, 23 Fla. L. Weekly D1304[7] (reversal of a trial court's award of prejudgment interest in contravention of the dictates of Brouwer's Flowers). In Brouwer's Flowers, the issue of attorney's fees was reserved in the 1989 stipulated final judgment entered into by the parties. In June 1991, the trial court entered an order awarding attorney's fees and costs. Brouwer's Flowers, 600 So. 2d at 1261. That order also "awarded interest on attorney's fees from . . . the date of the stipulated judgment except for fees incurred after that date." Id. The prejudgment interest award of $6,032.95 was reversed and remanded because the appellate court could "find no statutory authority for entitlement to interest on attorney's fees in eminent domain cases." Id.; accord, Interstate Hotels; see, also, Peeler, 70 So. 2d at 355.

The Second District's remand in Brouwer's Flowers for deletion of the prejudgment interest award is consistent with the long line of cases noted above acknowledging a court's inability to impose liability against the state without the specific legislative authority to do so. The legislature's intent that interest be paid by the state in eminent domain proceedings has been limited to a very narrow circumstance, i.e., to a **property owner** on the difference between the jury verdict and the amount of the good faith deposit. § 74.061, Fla. Stat. (1997). As repeatedly stated by the courts of this state, the State of Florida is not required

[7]See footnote 5, supra.

to pay interest except as provided by statute. See, e.g., Peeler, 70 So. 2d at 355.

As in Brouwer's Flowers and Interstate Hotels, it is the attorney who seeks interest on the fee award, not the property owner. Typically, the property owner in an eminent domain case has no interest in the fee award and there is no evidence in this case that Hartleb has any interest in Mr. Bell's fee. If full compensation is intended to make the property owner "whole so far as possible and practicable," no loss has been occasioned by the property owner for which this interest award would justly compensate. Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950) (quoting Inland Waterway Dev. Co. v. City of Jacksonville, 38 So. 2d 676, 678 (Fla. 1948)). There is no statute authorizing interest to be awarded by the trial court and Mr. Bell's position to the contrary is without basis in the law.

In support of his position that the trial court erred in failing to award interest on his fee, Mr. Bell refers this Court to Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So. 2d 929 (Fla. 1996). In Quality Engineered, this Court opined that where the date of entitlement to attorney's fees is fixed through agreement, arbitration, or court determination, private parties may be liable for interest on attorney's fees from the date of entitlement. Id. Quality Engineered and all of the other cases relied upon by the attorneys in Interstate Hotels, and by Mr. Bell

in this case, are inapposite to the facts and the law in this case and have no relevance to the issue of whether prejudgment interest can be awarded against an agency of the state where no specific legislative authority has been granted to do so. As noted by the Interstate Hotels court, "[e]ven if, as we hold it is not, prejudgment interest could be awarded under some circumstances, it was unavailable on the facts of this case under the holding of Lee v. Wells Fargo Armored Servs., 707 So. 2d 700 (Fla. 1998)." Interstate Hotels, 709 So. 2d 700, n.1. This Court in Wells Fargo was presented with the following question to be of great public importance:

> Does the court's decision in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929 (Fla. 1996), extend to permit the accrual of prejudgment interest on attorney's fees, authorized pursuant to the Workers' Compensation Law, from the date entitlement to the fee is determined, when an amount for same has not yet been established?

Wells Fargo, 707 So. 2d at 701.

This Court, answering the question in the negative and approving the decision below agreed with the First District that in Section 440.34(1), Florida Statutes, "the legislature intended to preclude the payment of attorney fees in workers' compensation cases until the amount for the fees is established by final order." Id. As in workers' compensation cases, an attorney's fee in an eminent domain case cannot be paid unless it is agreed to or until it is determined by the court to be reasonable. Under the version

of Section 73.092, applicable to this case, the amount of attorney's fee is neither automatic nor a rote calculation. It is to be assessed after due consideration of the statutory factors. Thus, in eminent domain cases a reasonable fee is determined by the trial judge after an evidentiary hearing. As this Court said in Wells Fargo,

> there is no statutory authorization for payment of the fee until the reasonableness of the amount is approved by the JCC. It naturally follows that there is no entitlement to interest on attorney fees in a worker's compensation case until the amount of the fee has been approved by the JCC.

Id. at 702. Thus, even if statutory authority existed to award interest on Mr. Bell's fee award, which it does not, there could be no such entitlement to interest until the reasonable amount is determined by the trial court.

The legislature has limited its consent to suit and waiver of sovereign immunity to the payment of interest to property owners on that portion of a condemnation award that exceeds the good faith deposit. § 74.061, Fla. Stat. (1997). In the absence of a similar statute clearly and unequivocally providing that interest be paid on attorney fee awards, such a liability cannot be imposed against the Department. See, e.g., Corneal, 101 So. 2d 371. The refusal of the trial court and the Fourth District to award prejudgment interest against the Department was proper and must be affirmed. Brouwer’s Flowers, Inc., 600 So. 2d 1260; Interstate Hotels, 23

Fla. L. Weekly D1304.

CONCLUSION

Based upon the foregoing arguments and the authorities cited, this Court should reject the suggestion of jurisdiction and deny the petition to invoke discretionary review. Alternatively, this Court should affirm the opinion of the Fourth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 14th day of October, 1998, to **DOUGLAS R. BELL, ESQUIRE**, Cumberland Building, Suite 601, 800 E. Broward Blvd., Fort Lauderdale, Florida 33301.

CERTIFICATE OF SIZE AND STYLE OF TYPE

I certify that the font used in this brief is 12-point Courier, a font that is not proportionately spaced.

MARIANNE A. TRUSSELL

IN THE FLORIDA SUPREME COURT

ROBERT HARTLEB,

Petitioner,

vs. CASE NO. 93,352

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

APPENDIX TO AMENDED ANSWER BRIEF OF RESPONDENT
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE COURT OF APPEAL, FOURTH DISTRICT
CASE NO. 97-1892

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