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

AMENDED REPLY BRIEF OF PETITIONER

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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.

Notwithstanding that Fla.R.App.P. 9.120(d) specifically states that when jurisdiction is invoked under Fla.R.App.P. 9.030(a)(2)(A)(vi), no briefs on jurisdiction shall be filed, the DOT has proceeded to allocate a substantial portion of its Answer Brief arguing about this Courts jurisdiction based on the 4th DCA's certification of conflict and also as to other aspects of this case. Also, this Courts order of September 4, 1994 directed that after the Petitioners Brief on the merits is served that the Respondents Brief on the merits shall be served.

DOT is apparently under a misconception of the rule of appellate procedure under which this appeal has been taken in that DOT refers to Fla.R.App.P. 9.030(a)(2)(A)(iv) which applies to non-certified decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal or the Supreme Court on the same question of law. This is more than apparent in that the cases cited by DOT are neither based on a certified question nor are they certified to be in direct conflict with decisions of other District Courts of Appeal. It is also submitted that this Court has discretion to hear this appeal even if there is actually no conflict.

In conferring jurisdiction on the Supreme Court, Art.V § 3(b)(4), Fla.Const. states that the supreme court:

> "(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."

Since this Court has jurisdiction to review all issues of a case certified to be of great public importance, Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961); In Re the Adoption of Baby E.A.W.G.W.B., v. J.S.W., et ux., et al., 658 So.2d 961 (Fla. 1995), there should be no issue that when this Court has jurisdiction based on certified conflict, this Court has jurisdiction to review issues of this case other than the certified conflict.

The DOT's argument that there is no conflict with Altamonte Hitch and Trailer Services, Inc. v. U-Haul Co. of Eastern Florida, 483 So.2d 852 (Fla. 5th DCA 1986) is likewise erroneous. The similarity of Altamonte Hitch with this case include the following: 1) The trial court Order awarding attorney's fees and costs did not distinguish between amounts awarded for appellate work and trial work. 2) On the previous appeal to the District Court of Appeal, the District Court of Appeal granted appellants motion for attorney's fees for appellate work, and directed the trial court to assess the amount subject to review by the District Court of Appeal; 3) a timely motion for review pursuant to Fla.R.App.P. 9.400(c) was filed. 4) The District Court of Appeal denied the

motion for review. Since Altamonte Hitch required the trial court to apportion attorney's fees between trial work and appellate work and the 4th DCA in the case on appeal did not require apportionment between trial work and appellate work, there is clearly conflict between the 4th DCA and 5th DCA which must be resolved by this Court.

DOT has also in its jurisdictional argument attempted to confuse this Court by taking words in Altamonte Hitch out of context by assigning meanings or intent which are simply wrong. DOT attempts to interpret Altamonte Hitch to be limited to a situation where the Appellate Court determines it is unable to provide meaningful review of a trial courts award of an attorney's fee and that the opinion is limited due to the difficulty with this (Altamonte Hitch) case. This interpretation stretches the imagination since the 5th DCA in Altamonte Hitch clearly states that the difficulty with the case is due to the trial courts failure to apportion attorney's fees and costs between the trial and appellate work and that meaningful review can not be had without the apportionment.

As previously stated, this Court is requested to resolve the conflict with this case and Altamonte Hitch by remanding this case to the 4th DCA and/or trial court to apportion the attorney's fees between the trial work and appellate work, to require a further breakdown of the various components of the proceedings and to 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 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).

As previously stated, due to jurisdiction before this Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) and Art.V, § 3(b)(4), Fla.Const. this Court has jurisdiction to review the entire record for errors involved in this case. Ocean Trail Unit Owners Ass'n,Inc. v. Mead, 650 So.2d 4 (Fla. 1994). Contrary to DOT's argument, there is no authority to support their position that this Court has no jurisdiction to review the additional issues raised in HARTLEB's initial brief before this Court.

As further support for remanding this case to the trial court for a determination of the lodestar fee for pre-trial, trial, post trial, apportionment and appellate proceedings and for the Court to make specific findings regarding the number of hours reasonably expended for each portion of this case, the Court is referred to Holm v. Sharp, 715 So.2d 1159 (Fla. 5th DCA 1998), Kelly v. Tworoger, 705 So.2d 670 (Fla. 4th DCA 1998) and Rodriguez v. Campbell, 1998 WL 670253 (Fla.App.4 Dist.)all of which held that when determining attorney's fees, the trial court is required to set forth specific findings in regard to the number of hours reasonably expended on the litigation.

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.

Contrary to DOT's argument, in determining benefits received by a property owner, the court must take into consideration that the legislature has included non-monetary benefits in subsequent versions of § 73.092, Fla.Stat. beginning in 1990. See also Broward County v. LaPointe, 685 So.2d 889 (Fla. 4th DCA 1996) reh and cert den (1997).

DOT, as did Mr. Weiner, for some reason has also ignored or given no weight to the substantial benefits HARTLEB received as a result of the efforts of Douglas Bell in the apportionment proceedings wherein had COLONIAL been successful in its argument, HARTLEB would have been left with less than $6,000 of the $60,971.75 partial final judgment amount which was awarded for HARTLEB's property including interest thereon.

Mr. Weiner, by acknowledging that he has read neither the transcript of the jury trial proceedings nor the apportionment proceedings cannot give any credible testimony regarding reasonable attorney's fees in any meaningful context. His testimony also confirms that he did not take into consideration the actual number of hours spent by Douglas Bell in his representation of HARTLEB.

Mr. Weiner's testimony by emphasizing the alleged minimal

benefit received by HARTLEB has based his opinion with substantial emphasis or weight given to the minimal benefit which he has calculated, as required by § 73.092 Fla.Stat. (1990). Since this is not how attorney's fees are to be determined under § 73.092, Fla.Stat.(1987), Mr. Weiner's testimony must be disregarded and any reliance by the trial court on Mr. Weiner's testimony and misconception of law is an abuse of discretion.

DOT argues that Douglas Bell is attempting to divert the Court's attention from the fact that he spent an inordinate amount of time to achieve a minimal benefit. A review of the record substantiates the fact that a substantial amount of the time which was spent in representing HARTLEB was the result of the attempts of DOT to reduce its statutorily and constitutionally mandated obligation to pay HARTLEB for the property taken from HARTLEB and to put as many obstacles as possible to HARTLEB's obtaining full and just compensation for his property. It is also interesting to note that DOT in its Answer Brief has completely ignored the 4th DCA opinion in the second appeal that admonished DOT as a result of their unfair tactics. Hartleb v. State, Department of Transportation, 677 So.2d 336 (Fla. 4th DCA 1996), reh/rec den.

If DOT was so concerned about saving the State money, then why would DOT put up such a fight over improvements amounting to less than $10,000 in the taken area. Also, why would DOT be so concerned about interest claimed by HARTLEB of less than $3,000. Based on DOT's argument, Douglas Bell is not entitled to compensation for the extra effort required to defend and argue

against DOT's Offer of Judgment or to re-evaluate the damages during the trial with his expert witnesses as the result of DOT's having prepared plans which were modified by DOT during the trial.

The trial court has also abused its discretion by not making specific findings as to how it determined the number of hours reasonably expended in this litigation by Douglas Bell. See Holm, Supra; Kelly, Supra and Rodriguez, Supra, all of which required the trial court to make specific findings as to the number of hours reasonably expended in its determination of attorney's fees. See also, Lee County v. Tohari, 582 So.2d 104 (Fla. 2d DCA 1991).

DOT in its statement of the facts and argument erroneously states the extent of the trial courts review of the time records, pleadings and documents submitted for review at the November 25, 1996 hearing. At this hearing, the trial court judge specifically stated that he did not have time to review all of the time records and motions which were before the trial court. [RV 15N/6, RV 15N/8]

DOT states that HARTLEB had no obligation for payment of attorney's fees and costs. This is contrary to HARTLEB's testimony on November 25, 1996 that if Douglas Bell did not prevail on having the offer of judgment stricken that he (HARTLEB) would be responsible for attorney's fees and costs. HARTLEB also testified that he had paid about $40,000.00 in costs and fees in this case and expected to get reimbursed after the trial court made its ruling. [RV 14N/45]

The trial court having erred and abused its discretion by failing to properly evaluate the statutory factors and in its

determination of the amount 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 Appellate Court 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.

During the trial court hearing of November 25, 1996, DOT did not at any time put forth any authority which would negate HARTLEB and Douglas Bell's entitlement to pre-judgment interest on the attorney's fee and costs award from December 5, 1994. The DOT in its Answer Brief filed with the 4th DCA for the first time raised the issue of the State's sovereign immunity from suit in an effort to avoid its obligation to pay interest on the attorney's fees and costs which should have been awarded on December 5, 1994. Since the DOT raised this issue for the first time on appeal and cannot do so, it has waived its right to argue sovereign immunity. See De La Cova v. State, 355 So.2d 1227 (Fla. 3d DCA 1978) which held that an argument made for the first time on appeal ought not to be considered unless it amounts to fundamental error.

Notwithstanding DOT's sovereign immunity argument, there are numerous exceptions to this general rule. In the case of State Road Department v. Tharp, 146 Fla. 745, 1 So.2d 868 (Fla. 1941) the

Florida Supreme Court affirmed the property owner's right to sue and held that:

> "If a state agency can deliberately trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved of making restitution on the plea of nonliability of the state for suit, then the constitutional guarantee of the right to own and dispose of property becomes nothing more than the tinkling of empty words...."

This case also held that,

> "There is no theory in right and justice why the judgment below should not be affirmed. In the administration of constitutional guarantees, the state cannot afford to be other than square and generous. To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of nonsuability of the state is too anomalous and out of step with the spirit and letter of the law to claim protection under the constitution."

In the case before this Court, by its own wrongful actions, DOT has delayed the award of attorney's fees and costs and is now seeking to hide behind the general rule of sovereign immunity. The DOT should not be allowed to benefit from its own actions in causing the delay in HARTLEB and Douglas Bell's obtaining a court order awarding that to which they were entitled on December 5, 1994.

DOT argues that the prevailing and obvious reason for immunity of the sovereign is to protect "the public against profligate *(recklessly, wasteful, extravagant)* encroachments on the public treasury" and that an order awarding pre-judgment interest would violate the

principal of immunity of the sovereign and constitute an unauthorized encroachment on public funds. It was the DOT which sued HARTLEB, not HARTLEB suing DOT. The DOT has created the problem by refusing to acknowledge its responsibility for payment of attorney's fees and costs by putting one obstacle after another to HARTLEB and Douglas Bell's right to full compensation. It appears that the DOT with its unlimited resources and manpower is of the opinion that it can waste the court's time by creating one issue after another in an effort to avoid its obligation for full and just compensation and then merely hide behind the protection of sovereign immunity when its tactics fail. I would doubt that this onerous position of the DOT is contemplated by the sovereign immunity rule.

The case of Treadway v. Terrell, 158 So.2d 512 (Fla. 1935) cited by the DOT supports the argument of HARTLEB and his attorney that immunity may be waived as justice may require to conserve the welfare and honor of the state. The Florida Supreme Court went on to state:

> "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 statute; 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." Treadway at 518.

There is a long line of cases acknowledging the waiver of sovereign immunity as to pre-judgment interest. In Broward County

v. Finlayson, 533 So.2d 817 (Fla. 4th DCA 1988), clarif denied wherein the 4th DCA held that county emergency medical technicians who were wrongfully denied overtime pay, were entitled to pre-judgment interest, the appellate court stated that:

> "We have come a long way from the days when the sovereign could do no wrong and could not be sued without its consent. In Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1985) our Supreme Court held that the defense of sovereign immunity is not supportable in a breach of contract action. Moreover, "The principal is established in Florida that where the state (or any of its subdivisions) can sue or be sued, the state (or subdivision) is impliedly liable for any interest on a claim against it." [Dade County v. American Re-Insurance Co., 467 So.2d 414, 418 (Fla. 3d DCA 1985)]. In Broward County v. Sattler, 400 So.2d 1031, 1033 (Fla. 4th DCA 1981), this very court opined that liability for interest, "may be implied from statutory authorization to sue a government entity....despite the absence of a specific authorizing statute or contract."

In Finlayson, the 4th DCA cited Flack v. Graham, 461 So.2d 82 (Fla. 1984) and noted that, "the Flack court made it clear that its decision to disallow interest was based on the fact that the sovereign had not inequitably withheld the monies sued upon and was an innocent victim." The 4th DCA also cited the 1st DCA case of Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432 (Fla. 1st DCA 1988) which "recognized that where the state waives immunity to bring an employment contract action, it also impliedly waives immunity from payment of interest from wrongfully withholding of money." The 4th DCA in quoting Flack, held that,

> "As we see it, fundamental fairness suggests that where the sovereign is liable for a debt

> because of a wrongful act, it is not improper to award pre-judgment interest." Interest should only be denied 'when its exaction would be inequitable.'" Flack, 461 So.2d at 84 Finlayson, supra at 818

On conflict review by the Supreme Court, the award of pre-judgment interest was approved. Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990).

Since it was DOT's wrongful actions that resulted in HARTLEB and Douglas Bell not obtaining an award of attorney's fees and costs on December 5, 1994, HARTLEB and Douglas Bell are the innocent victims of the DOT's actions, and since the exaction of interest is not inequitable, the state has impliedly waived immunity from payment of pre-judgment interest on the monies awarded HARTLEB and Douglas Bell for attorney's fees and costs. See also State v. Family Bank of Hallandale, 623 So.2d 474 (Fla. 1993) reh den; Public Health Trust of Dade County v. State, Department of Management Services, Division of State Employees' Insurance, 629 So.2d 189 (Fla. 3d DCA 1993), reh den; Interamerican Engineers and Constructors Corporation v. Palm Beach County Housing Authority, 629 So.2d 879 (Fla. 4th DCA 1993) reh and clarif den. (1994) and City of Cooper City v. PCH Corp., 496 So.2d 843 (Fla. 4th DCA 1986) reh den.

DOT argues that § 74.061, Fla.Stat. (1998) [should be 1987] is the only provision in either Chapter 73 or Chapter 74 authorizing an award of interest in an eminent domain proceeding. This statement fails to recognize that post-judgment interest is applicable to monies awarded in DOT proceedings pursuant to §

55.03, Fla.Stat. (1987). Thus, as stated above, had the court properly awarded attorney's fees and costs on December 5, 1994, HARTLEB and Douglas Bell would have been entitled to interest thereon. See also Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.2d 929 (Fla. 1996).

The claim of HARTLEB for pre-judgment interest being in the nature of post-judgment interest had the court made its determination of attorney's fees and costs on December 5, 1994, supports HARTLEB and Douglas Bell's argument that they are entitled to interest for costs and attorney's fees from December 5, 1994 until the date of the award.

The DOT relies heavily on State, Department of Transportation v. Brouwer's Flowers, Inc., 600 So.2d 1260 (Fla. 2d DCA 1992), reh den. As stated in HARTLEB's original brief, Brouwer's Flowers, Inc. can be distinguished since HARTLEB and Douglas Bell are not requesting interest on attorney's fees and costs from the date to which they had a vested entitlement on May 1, 1992, but are requesting interest from December 5, 1994, the date that HARTLEB's attorney's fees and costs should have been determined by the trial court.

In the recently decided case of State, Department of Transportation v. Interstate Hotels Corp., 709 So.2d 1397 (Fla. 3rd DCA 1998), the facts which the trial court based its award of attorney's fees on are not stated. Thus, Interstate Hotels Corp. should not be relied on as authority to deny HARTLEB's entitlement to prejudgment interest. Boulis v. Department of Transportation,

709 So.2d 206 (Fla. 5th DCA 1998) which is also on appeal before this Court in Boulis v. Department of Transportation, Case **m** 93,229 is distinguishable in that prejudgment interest is being requested from the time the costs were incurred to the date said costs were awarded and has nothing to do with a delay in the trial court making said award due to DOT's wrongful filing of an invalid offer of judgment as in HARTLEB's 2nd appeal.

The claims of HARTLEB and Douglas Bell are liquidated for the purposes of pre-judgment interest since the amount of the damages or claims can be computed by simple calculation and the claim is fixed as of a prior date. Dade County v. American Re-Insurance Company, 467 So.2d 414, 419 (Fla. 3d DCA 1985).

At the December 5, 1994 hearing, HARTLEB and Douglas Bell were ready to proceed with presenting witnesses and testimony regarding the attorney's fees, paralegal fees and costs which they were entitled to. Had DOT not filed its Offer of Judgment, the trial court would have heard the testimony and evidence and rendered an opinion as to attorney's fees and costs. After the trial court found that Douglas Bell was entitled to attorney's fees only for the time spent prior to the expiration of the Offer of Judgment or prior to January 14, 1991, Douglas Bell requested the court that he be allowed to proffer testimony and present evidence as to the attorney's fees, paralegal fees and costs to which he and HARTLEB were entitled. The trial judge refused to allow this testimony and indicated that he wanted to wait until the appellate court issued an opinion as to his rulings in this proceeding. Thus, had it not

been for DOT's wrongfully filed Offer of Judgment and the trial court's erroneous ruling on the Offer of Judgment, the amount of attorney's fees and costs due HARTLEB and Douglas Bell would have been determined on December 5, 1994 following which they would have been entitled to interest thereon. DOT has had the use of the monies subsequently awarded HARTLEB and Douglas Bell and should not be permitted to avoid paying interest as the result of DOT's actions which have subsequently been determined to be contrary to public policy, Hartleb, Supra @ 337.

It is submitted that the above cases and argument support HARTLEB and Douglas Bell's position that they are entitled to interest on the amount awarded by the court for attorney's fees and costs from December 5, 1994 and that this matter should be remanded to the trial court for determination of said interest.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court: 1) Resolve the conflict between the 4th DCA and 5th DCA and to direct the 4th DCA and/or trial court to apportion the attorney's fees awarded to HARTLEB and Douglas Bell between the trial court proceedings and appellate court proceedings.

2) Remand this case with directions to 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.

3) Find that the trial court judge abused his discretion

and/or was under a misconception of law in the amount of attorney's fees awarded, direct the trial court and/or the 4th DCA to make specific findings and to increase and redetermine attorney's fees which were reasonably necessary to reasonably and adequately represent HARTLEB in this proceeding.

4) Remand this case with directions to enter an order awarding 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 Petitioner's Amended Reply 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 9th day of December, 1998.

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