

SUPREME COURT OF FLORIDA

CASE NO. SC00-1764
Lower Tribunal No.: 3D99-2230

CITY NATIONAL BANK OF FLORIDA, :
formerly known as CITY NATIONAL :
BANK OF MIAMI, as Trustee under :
certain Trust Agreement dated November 21, :
1985, and known as Trust Number 5005110, :
et al, :

Petitioner, :

vs. :

MIAMI-DADE COUNTY, formerly known :
as DADE COUNTY, a political subdivision :
of the State of Florida, :

Respondent. :

:

PETITIONERS' INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellant, City National Bank of Florida, certifies that the following persons and entities have or may have an interest in the outcome of this case.

City National Bank of Florida

Dade County

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Thomas R. Bolf, Esq.

Thomas Goldstein, Esq.

Joan Webb

Dr. Lloyd Moriber

Charles Putman

John Hagan

Ronald Baker

Donald Moore

John R. Moreland

James A. Horland, Esq.

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PREFACE

The Findings of Fact, Conclusions of Law, and Final Judgment Awarding Attorneys' Fees, Experts' Fees and Costs, dated July 29, 1999 (R. 653), shall be referred to as "Findings" or "Findings of Fact".

The term "Property Owners" refers to the Defendants/Appellees, City National Bank of Florida, as Trustee, and the beneficiaries of the Trust, Dr. Lloyd Moriber and Mrs. Joan Webb.

The term "Subject Property" refers to the property subject to the condemnation herein, approximately a ten (10) acre tract at the southwest corner of N.W. 27th Avenue and N.W. 207th Street, near Pro Player Stadium, f/k/a Joe Robbie Stadium.

The transcript from the July 7, 1999 hearing on the Defendants' Motion to Tax Attorneys' Fees, Costs, and Experts' Fees (Volume V, Record on Appeal), will be cited to as "Tr. at ____".

The opinion in the first appeal in this cause will be referred to as City National I (*City National Bank of Florida v. Dade County*, 715 So.2d 350 (Fla. 3d DCA 1998), *rev. denied*, 727 So.2d 904 (Fla. 1998)).

The decision being appealed herein will be referred to as City National II (*Miami-Dade County v. City National Bank of Florida*, 761 So.2d 368 (Fla. 3d DCA 2000), *rev. granted*, SC00-1764).

STATEMENT OF THE CASE AND FACTS

Dade County condemned approximately a quarter acre of the Property Owners' land, located caddy corner to Joe Robbie Stadium. The taking reduced the Property Owners' commercial frontage on the major thoroughfare (27th Avenue) from 610 feet to 494 feet. *City National I*, 715 So.2d at 351. Both Dade County's appraiser, and the Property Owners' experts, agreed that the highest and best use of the property was for development of commercial out parcels along 27th Avenue. Tr. at 23, 95, 106-107. Both Dade County's appraiser, and the Property Owners' experts, agreed that the market for out parcels in Dade County demanded a minimum width of 150 feet per parcel. Tr. at 26. Dade County's appraiser concluded that out parcels of less than 150 feet existed in Dade County, and concluded the decrease in frontage for the expected out parcels did not devalue the subject property. Tr. at 25. The Property Owners' experts concluded that shrinking the out parcels to less than 125 feet each was not commercially feasible, and that instead the remaining frontage on 27th Avenue should be divided into three out parcels of a commercially acceptable 165 feet of frontage each. Tr. at 26-29. Because this reduced the number of potential out parcels for the Subject Property from four to three, and because out parcels are more valuable than the balance of the Subject Property, the Property Owners suggested that one out parcel be located to front on the side street, 207th Street. *Id.* While frontage on 207th

Street is less valuable than frontage on the much busier 27th Avenue, retaining four out parcels of acceptable width was perceived by the Property Owners' experts to be less damaging to the Subject Property. *Id.*

To assist the process of analyzing and presenting the foregoing information, the Property Owners' experts used a site plan that had been developed by the Property Owners when Dade County rezoned the Subject Property. Tr. at 20. This site plan reflected four out parcels along 27th Avenue. Tr. at 28. The site plan was reviewed by Dade County Staff in conjunction with the rezoning. Tr. at 22. The Dade County Building and Zoning Department sent the Property Owners a letter stating that if any changes to the site plan were made, that it would need to be resubmitted for approval. Tr. at 22; 97-98, R. 211. The site plan received a sign off by Dade County's Fire Department, and was the basis for a Water and Sewer Agreement between the Property Owners and Dade County's Utilities Department. Tr. at 22; R. 291, Leoncio Proffer, at Tab J (water and sewer agreement) and Tab H (fire department sign off); Moriber Proffer, R. 229, at ¶6.

The Property Owners provided their appraisal, which included the work product of the other experts as summarized above, to Dade County far in advance of trial. R. 512. The experts were deposed and therein reviewed their analysis and conclusions with Dade County's counsel. *Id.* The case proceeded to trial, with no action being

taken by Dade County to exclude the Property Owners' theory of their case, or to preclude the use of the site plans. Tr. at 34. On the morning of the trial, Dade County *ore tenus* moved *in limine* to exclude the site plans. *Id.* The trial judge denied the county's motion, and the case proceeded to trial. Tr. at 35. Information was elicited from the County's first witness, a Dade County engineer, very shortly into his examination that caused a mistrial. (Findings at ¶7; Tr. at 35-37).

After the mistrial, the Property Owners' counsel prepared twice more for trial, one of which was not reached on the calendar, and the other which was tried. Tr. at 37. In anticipation of the second trial, Dade County filed a motion *in limine* to exclude the site plans as too speculative. The trial court granted the motion, and this action was affirmed on appeal. Tr. at 37; *City National I*. The Property Owners' case was premised on demonstrating the problems created for the Subject Property by the loss of frontage, and the inability to use the site plans to show the impact on the out parcels made the Property Owners' claim for severance damages of approximately \$100,000 not viable. *City National I*, 715 So.2d at 352. The respective appraisers agreed on the valuation of the land taken of \$93,600, and judgment was entered for this amount. R. 412.

The Property Owners prosecuted their motion for attorneys' fees and experts' fees. R. 498. After a lengthy hearing, the trial court entered a nine page Findings of

Fact, Conclusions of Law, and Final Judgment Awarding Attorneys' Fees, Experts' Fees and Costs. Therein, the trial court found that the number of hours reflected on the invoices of the experts and attorneys in this cause accurately reflected the time required to perform the services referenced in said invoices. (Findings at ¶1) The County presented no testimony or other evidence to the contrary, and in its Opening Statement at the fee hearing, acknowledged that it was not challenging the number of hours devoted for these services. (*Id.* Tr. at 14, 19). The trial court deemed the testimony and the invoices from the experts and attorneys to be credible. (Findings at ¶1).

The trial court concluded that the hourly rates reflected in the invoices of the experts were reasonable hourly rates. (Findings at ¶ 2) Each of the experts are very experienced professionals, each possessing over twenty (20) years of experience in their field. (*Id.*; Tr. at 88, 121, 123, 127, 133). The County did not present any contrary evidence, and in its Opening Statement, it acknowledged that it was not challenging the hourly rates of the experts. (Findings at ¶2; Tr. at 14, 19). The trial court also found that the hourly rates charged by counsel were reasonable, and the County presented no evidence to the contrary. *Id.* Lead counsel for the Defendants, Thomas R. Bolf, had fifteen (15) years of experience, is AV rated, and is a partner with the state-wide law firm of Ruden, McClosky, Smith, Schuster and Russell; the

trial court ruled \$250.00 per hour was a reasonable rate for his services. (Findings at ¶2; Tr. at Exh. A) James Horland is a thirty-three (33) year attorney, and his hourly rate of \$225.00 was found to be reasonable. (Findings at ¶2; Tr. at 83).

The trial court ruled that the monetary benefit in this cause was zero (0). The trial court further found two non-monetary benefits: as testified without rebuttal, by transportation engineer Donald Moore, counsel and the experts were able to obtain a design change in the construction plans, which moved a bus loading bay, which created access for the subject property on 207th Street. (Tr. at 118) In addition, as a result of the mistrial, counsel was successful in having an Offer of Judgment from Dade County withdrawn; otherwise, the clients would have been responsible for the fees and costs for the period after the first trial resulted in a mistrial. (Tr. at 160) The invoices of the experts and counsel reflected that their time thereafter totaled approximately \$30,000. (R. 498; Findings at ¶3).

The trial court concluded (Findings at ¶4) that pursuing the severance damage claim herein was reasonable and justified under the circumstances, for the following reasons:

1.

(a) At the initial trial, which resulted in a mistrial, Judge Robert Kaye,

after hearing DADE COUNTY'S Motion in Limine on this issue, ruled that the site plans and other documentation would be admissible at the trial. (Tr. at 35)

(b) DADE COUNTY did not move to exclude this severance damage claim until the day of the trial, and it was incumbent upon counsel for the Defendants to prepare in anticipation of presenting the evidence at trial. Indeed, if counsel did not prepare for the presentation of this evidence, and (as occurred herein), the Court did not exclude the evidence, counsel would have placed his client at a severe disadvantage. (Tr. at 34-35)

(c) Defendant's counsel had a reasonable basis for believing that the evidence would be admissible, based upon *Partyka v. D.O.T.*, 606 So. 2d 495 (Fla. 4th DCA 1992), which reversed a trial court for excluding site plans, as "[t]he excluded plans were perhaps the clearest form of evidence available to demonstrate the remaining property's utility before and after the taking." *Id.* at 496. The *Partyka* case, coupled with the trial court's initial ruling that the site plans would be admissible, demonstrates a reasonable basis for Defendant's counsel in pursuing this claim. (Tr. at 50-54).

(d) The County's appraiser concluded in his 1992 appraisal, prior to Defendant's employing condemnation counsel, that: "1. The site's location across from the stadium and the race track make it suitable for development with service stations and fast food restaurants," and "therefore, it is our opinion that the highest and best use of the site as of the appraisal date was to remain vacant for the short term and then to be developed with a combination of service stations and/or restaurants, with a retail store component if sufficient market demand exists," and "at the time the site is developed for commercial purposes, it is likely that it would be developed in a manner similar to that indicated by the owners, that is, retail strip stores across the rear of the site and three or four out-parcels along the 27th Avenue frontage." (Gallaher Appraisal at 19-20, Tr. at. 23-26, 106-107).

(e) The Property Owners/clients consistently maintained that the highest and best use of the property was consistent with the site plans at issue, and given the evidence and law available to counsel, counsel could not disregard the client's position. (Tr. at 23-24). The trial court noted that, although the County insisted the client's plans did not

include a gas station at the corner, at the hearing at least four (4) separate site plans were presented, which were drafted prior to the condemnation, in which all reflected gas pumps at the corner site. (Tr. at 104)

(f) Each of the experts that testified had significant experience in condemnation matters, including condemnation matters which affected gas stations and gas station sites; each of the witnesses testified that the type of services they performed in this matter were consistent with the types of services they performed in other similar cases, both on behalf of the property owners, and on behalf of condemning authorities, and that in those cases in which the experts have been retained on behalf of the property owners, that the condemning authority undertakes the same type of analysis as those conducted herein. This testimony was un rebutted. (Tr. at 91, 121, 131-132, 137-138)

(g) The County did not present any expert testimony that the services provided by the experts herein were inappropriate or unnecessary. (Findings at ¶4)

Through mediation, the attorney time on the claim was 157.2 hours; an

additional 137.6 hours were incurred between the mediation and the first trial (anticipated to be four days); an additional 69.1 hours were devoted in anticipation of the second trial (not reached), and 46.8 additional hours through the actual second trial. (Tr. at Exh. A).

The only expert witness on attorneys' fees testified that \$96,945 was the appropriate fee, and that pursuing the severance damages was reasonable and properly done. (Tr. at 47, 65) Each of the trial experts testified to the amount of their respective invoices. The trial court awarded \$50,000, or approximately forty percent (40%) lower than the overall request, for the experts (except the appraiser and surveyor, who were essentially paid in full). For attorneys' fees, the trial court awarded \$75,000, or approximately seventy percent (70%) of the invoiced amount of \$106,991.50. Collectively, the court awarded approximately 68.5% of the requested attorneys' fees and experts' fees.

Dade County appealed the fees judgment. The Third District Court of Appeal reversed, and concluded that none of the experts should be paid for their services, except the appraiser should be paid \$1500. *City National II*, 761 So.2d at 370. The factual basis for the \$1500 appraisal fee is not specified; the appellate court opined that sum is a reasonable fee to verify or challenge the County's

appraisal. The attorneys' fee award was reversed, with directions upon remand to award nothing for any time devoted to the severance damage issue. *Id.*

The appellate court noted that it had affirmed the exclusion of the site plans as being speculative, and stated:

[I]n light of our previous holding [exclusion of site plan because of its speculative and conjectural nature], we now find that the fees incurred by Property Owner in preparing the failed severance damages claim should not have been included in the calculation of either expert witness fees or attorneys' fees.

Id. The rationale or precedent for this finding is not enunciated.

The appellate opinion did not reference the trial court's Findings of Fact, or indicate these Findings of Fact were unsupported by substantial competent evidence. Dade County did not assert that the Findings of Fact were unsupported by substantial competent evidence in its brief below (instead, the County contended that the severance damage claim should not have been pursued, as such a claim was predictably not recoverable; *Init. Br.* at 18, and that the trial court did not place enough emphasis on the benefits obtained in assessing attorneys' fees, *Init. Br.* at 11). The appellate opinion did not state the standard of review it applied. The appellate opinion contains no case citations, other than its opinion from the first appeal in this cause. Motions for rehearing, rehearing en banc, and for certification of conflict, were denied.

R. 681.

The Property Owners timely sought certiorari jurisdiction of this Court based on a conflict between the district courts of appeal, and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The trial court specifically found that pursuing the severance damage claim herein was reasonable and justified under the circumstances. The trial court cited the following: (1) The *Partyka* decision reversed a trial court for excluding site plans, and expressly held that "[t]he excluded plans were perhaps the clearest form of evidence available to demonstrate the remaining property's utility before and after the taking"; (2) Prior to the instant suit even being filed, the County's own appraiser, in his appraisal, utilized the same site plan for the same purpose of analyzing severance damages caused to the out parcels; and (3) In this 1993 lawsuit, the County did not contest the use of the subject plans until the morning of the 1996 trial, when its *ore tenus* motion was denied; this case proceeded to trial with the plans being ruled admissible.

These facts, and the four additional findings specifically cited by the trial court, demonstrate that utilizing the historical development plans for analyzing severance damages herein was reasonable. These findings are supported by substantial competent evidence. The County presented no witnesses to support its claim that the services provided were unnecessary, and the County did not challenge the hours or rates of the professionals involved. The Property Owners presented five experts to

support their position that the services provided herein were appropriate.

Whether the Property Owners were reasonable in pursuing their theory of the case is a question of fact. The trial court specifically found: “While Dade County may disagree with the Defendants’ theory of their case, this Court cannot conclude that it was unreasonable for the Defendants to pursue that theory, even if it was ultimately unsuccessful.” (Findings at ¶5). This factual conclusion is supported by substantial competent evidence. The trial court’s decision comes to the appellate court clothed with a presumption of correctness, and the appellate court cannot substitute its opinion for the trial court’s opinion, based on the limited information in a cold record.

Property owners have a constitutional and statutory right to be compensated for the fees incurred in defending a condemnation action. The instant appellate opinion effectively makes the entitlement to an award of fees, including experts’ fees, to be contingent upon the outcome. This holding is unprecedented, and is diametrically contrary to Florida Statute Section 73.091, which mandates that condemning authorities are responsible for paying all reasonable fees incurred by the property owner. No contingency applies.

The instant appellate opinion is very harmful to condemnees. An unsuccessful

claim arguably translates into no fees or costs for the services devoted to that claim. The condemnee now does not know if it can pursue claims that have a valid basis, for fear that the claim will be ultimately rejected. A small business person simply cannot afford the risk, however small, of funding of thousands of dollars of costs, with no certainty that the condemnor is responsible for at least the reasonable fees incurred.

The \$1500 award to the appraiser has no factual basis. The appellate opinion states that the appraiser simply should have spent a few hours reviewing the County's appraisal. This is unsupported by any evidence.

ARGUMENT

I. WHETHER THE TRIAL COURT’S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING APPROXIMATELY 70% OF THE PROPERTY OWNERS’ ATTORNEYS’ FEE REQUEST, WHERE DADE COUNTY DID NOT CONTEST THE NUMBER OF HOURS OR HOURLY RATES, PRESENTED NO CONTRARY WITNESSES, AND THE PROPERTY OWNERS’ THEORY OF THE CASE WAS DEEMED ADMISSIBLE IN THE FIRST TRIAL OF THIS CAUSE.

The “appellate function is to examine the record and determine if there is substantial competent evidence in the record to support the trial court’s exercise of discretion in the amounts allowed for attorney’s fees and costs.” *City of Sunrise v. West Broward Utilities, Inc.*, 311 So.2d 175 (Fla. 4th DCA), *cert. denied*, 325 So.2d 10 (Fla. 1975)(cited with approval, *KCL Associates v. Islamorada Realty, Inc.*, 563 So.2d 112 (Fla. 3d DCA 1990)). *See also City of Miami Beach v. Belle Isle Apartment Corp.*, 177 So.2d 884 (Fla. 3d DCA 1965), *cert. denied*, 188 So.2d 819 (Fla. 1966) (“There was substantial competent evidence in the record that the attorney fees and expert witness fees were reasonable and within the limits of the testimony submitted.” *Id.* at 887).

Dade County asserts that the Property Owners should not have pursued its theory of severance damages. The Property Owners, for their argument on this point, adopt the trial court's conclusions:

The Court finds that pursuing the severance damage claim herein was reasonable and justified under the circumstances, for the following reasons:

- a. At the initial trial, which resulted in a mistrial, Judge Robert Kaye, after hearing DADE COUNTY'S Motion in Limine on this issue, ruled that the site plans and other documentation would be admissible at the trial.
- b. DADE COUNTY did not move to exclude this severance damage claim until the day of the trial, and it was incumbent upon counsel for the Defendants to prepare in anticipation of presenting the evidence at trial. Indeed, if counsel did not prepare for the presentation of this evidence, and (as occurred herein), the Court did not exclude the evidence, counsel would have placed his client at a severe disadvantage.
- c. Defendant's counsel had a reasonable basis for believing that the evidence would be admissible, based upon *Partyka v. D.O.T.*, 606 So. 2d 495 (Fla. 4th DCA 1992), which reversed a trial court for excluding site plans, as "[t]he excluded plans were perhaps the clearest form of evidence available to demonstrate the remaining property's utility before and after the taking." *Id.* at 496. The Partyka case, coupled with the trial court's initial ruling that the site plans would be admissible, demonstrates a reasonable basis for Defendant's counsel in pursuing this claim.
- d. The County's appraiser concluded in his 1992 appraisal, prior to Defendant's employing condemnation counsel, that: "1. The site's location across from the stadium and the race track make it suitable for development with service stations and fast food

restaurants." And "therefore, it is our opinion that the highest and best use of the site as of the appraisal date was to remain vacant for the short term and then to be developed with a combination of service stations and/or restaurants, with a retail store component if sufficient market demand exists." And "at the time the site is developed for commercial purposes, it is likely that it would be developed in a manner similar to that indicated by the owners, that is, retail strip stores across the rear of the site and three or four out-parcels along the 27th Avenue frontage." (Gallaher Appraisal at 19-20).

(e) The property owner/clients consistently maintained that the highest and best use of the property was consistent with the site plans at issue, and given the evidence and law available to counsel, counsel could not disregard the client's position. As an aside, although the County insists the client's plans do not include a gas station at the corner, the Court would note that at the hearing, at least four (4) separate site plans were presented, which were drafted prior to the condemnation, in which all reflected gas pumps at the corner site.

(f) Each of the experts that testified had significant experience in condemnation matters, including condemnation matters which affected gas stations and gas station sites; each of the witnesses testified that the type of services they performed in this matter were consistent with the types of services they performed in other similar cases, both on behalf of the property owners, and on behalf of condemning authorities, and that in those cases in which the experts have been retained on behalf of the property owners, that the condemning authority undertakes the same type of analysis as those conducted herein. This testimony was un rebutted.

(g) The County did not present any expert testimony that the services provided by the experts herein were inappropriate or unnecessary, although counsel for the County did so argue in writing.

(Findings at pp. 2-4, ¶4)(emphasis supplied).

The County has not demonstrated any error in the trial court's conclusion that “While Dade County may disagree with the Defendants’ theory of their case, this Court cannot conclude that it was unreasonable for the Defendants to pursue that theory, even if it was ultimately unsuccessful.” (Findings at ¶5). This conclusion is supported by substantial competent evidence:

It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test ... is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court’s right to reject “inherently incredible and improbable testimony or evidence,” it is not the prerogative of an appellate court, upon *de novo* consideration of the record, to substitute its judgment for that of the trial court.

Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976).

The Third District’s decision implies that if an attorney does not prevail on an issue, then the trial court would be within its discretion to award no attorneys’ fees or costs. No authority is cited for this contention. This position is inconsistent with the attorneys’ fee statute (Section 73.092, Florida Statutes (1993)), which mandates the court consider many other factors, in addition to results obtained. The County’s position is also inconsistent with the many appellate decisions which state that a lodestar amount is to be determined, and then adjusted as necessary for results obtained. *See, e.g., DOT v. Skidmore*, 720 So.2d 1125, 1129 (Fla. 4th DCA 1998).

Contrary to the Third District's opinion, *Hodges v. Division of Administration, State Dept. of Transp.*, 323 So.2d 275 (Fla. 2d DCA 1975) specifically authorizes fees and costs where zero compensation is awarded. *Hodges* involved facts similar to the subject case. In *Hodges*, the Defendants argued that they were entitled to business damages. The trial court ultimately ruled that the Defendants did not satisfy the requirement that the business have operated for five continuous years prior to the date of taking and, therefore, excluded all testimony on the business damages. The trial court thereafter refused to tax costs for the Defendants' expert witnesses who were relevant to the business damage claim, and also refused to award attorneys' fees for the time spent on the business damage issue. The appellate court reversed, and held:

Fla. Stat. §73.091 (1973) requires the condemning authority to pay all reasonable costs and attorneys' fees incurred by the property owner. The purpose of this statute is to permit the owner to contest the value placed on his property by the condemning authority and at the same time come out whole. In *City of Miami Beach v. Liflans Corporation*, Fla.App. 3d, 1972, 259 So. 2d 515, the Court held that the property owner in a condemnation action was entitled to an award of attorneys' fees even though the jury returned a verdict of zero compensation. Here, the question of business damages was close, and the issue was only resolved at the trial of the case. In fact, the Department's motion for summary judgment on this issue had been denied just a few days before the trial period. Under the circumstances, it was reasonable for the Hodges' to line up expert witnesses to testify on business damages and to have their attorneys make the preparations necessary to try to recover these damages.

Id. at 277 (emphasis added). The Appellate Court therefore reversed the trial court, and "remanded to tax the reasonable costs of expert witnesses relating to the attempted proof of business damages and to award reasonable attorneys' fees. . .including their services on the issue of business damages." *Id.*

The trial court in the present case correctly concluded: "As in *Hodges*, the instant issue 'was close' and 'was only resolved at the trial'. As in *Hodges*, the condemning authority's motion to strike this claim was denied shortly before trial (actually, the morning of the trial in the present case)." (Findings at ¶10). In addition, the trial court herein specifically concluded that there were benefits achieved for the client, the first being the securing of access into the site from 207th Street, and the second being the withdrawal of the offer of judgment. These benefits are substantial. Having access to a 10-acre site from two different streets is very important. The avoidance of the offer of judgment resulted in a \$30,000 savings to the clients. (Findings at ¶3).

The reasoning of *Hodges* is sound. If the denial of fees and costs in a condemnation case is ever constitutionally appropriate, a case which is close, and which is resolved adversely at the last moment, is not such a case. The present case does not present the setting for this Court to establish an exception to the entitlement

to fees and costs. Property Owners should be permitted to prosecute their claims, without the chilling effect of potential liability for fees and costs. Property owners are thrust unwillingly into a lawsuit against the government. Their property is being taken away from them, and the constitution guarantees them full compensation. Absent a frivolous claim, akin to the standards of Florida Statutes Section 57.105, property owners' efforts to recover their constitutionally guaranteed compensation should not be barred, in practical effect, by the prospect of liability for the reasonable fees incurred in that pursuit.

¹ *Cf. Leeds v. City of Homestead*, 407 So.2d 920 (Fla. 3d DCA 1981)(*claim was predictably not recoverable*). See *City of Miami Beach v. Liflans Corp.* 259 So.2d 515 (Fla. 3d DCA 1972).

In the present case, not only was the claim close, and not decided until the eve of trial, but in fact the claim was upheld before trial. In addition, prior to any of the Property Owners' professionals being hired, the County's own appraiser used the methodology the County now asserts is plainly inappropriate. In light of that

¹ Condemnors are not helpless to insulate themselves from perceived invalid claims. Timely motions in limine or summary judgment motions can terminate purportedly inappropriate claims. If a condemnor believes a property owner's claim is without merit, it can extend an offer of judgment to terminate its responsibility for fees and costs. Fla. Stat. § 73.032 (1993). If the condemnor opts to forego these remedies, the courts should not step in to create a remedy for the condemnor.

set of circumstances, to suggest that the Property Owners have pursued a frivolous claim, and somehow waived their constitutional and statutory rights to payment of their fees and costs, borders on the draconian.

With great frequency, condemnation cases involve property owners and business owners of limited means. The prospect of having to pay only thousands, let alone tens of thousands, of dollars to prosecute a constitutional claim for compensation will absolutely cause many of those persons to forego their constitutional rights. The condemnation statutes are specifically geared towards reimbursing condemnees, to avoid the consequence of condemnees foregoing their claims because they cannot afford to pursue them.

Condemnors will use *City National II* to assert that if a claim is unsuccessful, then the condemnee is not entitled to have their fees and costs paid. After all, a reading of *City National I* and *City National II* makes clear that (a) the condemnees had at least a colorable claim, as the trial court initially denied the County's request to strike the claim, and only because of a mistrial did the case not proceed to verdict under that setting; (b) that the condemnees had at least a colorable claim, as another case, *Partyka*, addressed very similar issues, and reached an opposite conclusion, and the appellate court strained to distinguish and

not declare a conflict with *Partyka*; and (c) that the condemnees had at least a colorable claim, as the County's own expert used much the same analysis as that which was ultimately ruled too speculative. In other words, even if it is a very close case, and there exists case law supporting your position, and the other side adopts (nay, institutes) the same analysis, if you do not win, you are responsible for the fees and costs. This truly converts the government's responsibility for payment of fees into a contingency.

2

Such a conclusion cannot be squared with the requirement of Section 73.091, Florida Statutes, which requires that "all reasonable costs of the proceedings" be paid, or with the constitutional principles as enunciated in *Brigham*:

'Freedom to own and hold property is a valued and guarded right under our government. Full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable.

'The courts should not be blind to the realities of the condemnation process. Any excuse which the Court might have for disclaiming knowledge of just what goes on, is entirely removed by the fact that the Court itself views the trial and proceedings and has personal knowledge

² This Court has ruled that condemnation cases are not contingency cases, in holding that a multiplier in determining attorneys' fees in condemnation cases is not proper. *Schick v. Dep't of Agriculture and Consumer Services*, 599 So.2d 641, 643 (Fla. 1992). The condemnation statutes specifically recognize that even if a property owner does not prevail, they are paid reasonable attorneys fees. See Fla. Stat. § 73.131(2) (attorney's fees on appeal).

of all such matters. The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings prepared by expert draftsmen.

'The court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifications, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like services of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket.

'Can the County contend that such high priced evidentiary items are not a part of the 'costs of the proceedings' when they themselves by presentation of the same in their case, make them a part of the proceedings in their behalf?'

Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value.

Dade County v. Brigham, 47 So.2d 602, 604-05 (Fla. 1950)

As the court noted in *DOT v. Skidmore*, 720 So.2d 1125, 1128 (Fla. 4th DCA 1998), the condemnation fee statute “does not contain any methodology for making the fee calculation.”. There is no “hard-line formula for calculating fees in eminent

domain cases” *Id.* at 1129. The trial court herein applied the correct law, and considered the appropriate factors, in reducing the fee request by approximately 30%. Dade County, having presented no expert fee testimony, and having acknowledged that it was not challenging the number of hours or rates charged, cannot complain about this substantial reduction in fees.

The trial court’s order comes to the appellate court clothed with a presumption of correctness, and will be disturbed only if the trial court’s broad discretion in resolving detailed matters such as the fees involved herein has been abused.

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980)(quoting with approval *Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942)).

In balancing the equities herein, the trial judge exercised his discretion, and reduced the attorneys’ fee award by thirty percent (30%). The present order is not arbitrary or fanciful, and it cannot be said that no reasonable man would take the view adopted by the trial court. No abuse of discretion is present.

II. WHETHER THE TRIAL COURT’S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT REDUCING THE PROPERTY OWNERS’ EXPERTS’ FEES REQUEST BY MORE THAN 40%, WHEN DADE COUNTY DID NOT CONTEST THE NUMBER OF HOURS OR HOURLY RATES, PRESENTED NO CONTRARY WITNESSES, AND THE PROPERTY OWNERS’ THEORY OF THE CASE WAS DEEMED ADMISSIBLE IN THE FIRST TRIAL OF THIS CAUSE.

Because of the substantial overlap between this issue, and the first issue, Appellees incorporate their argument from the first issue.

The County implies that the damages sought herein were “predictably not recoverable,” citing *Leeds v. City of Homestead*, 407 So.2d 920 (Fla. 3d DCA 1981). This is a question of fact upon which the trial court disagreed with the County, and the trial court supported its conclusion by seven specific findings. These findings are supported by substantial competent evidence. Indeed, the *Leeds* court specifically stated that the question of the relevancy of the challenged services therein was not close, and further noted that the issue of whether the trial court should have awarded fees on the issue was within the trial court’s discretion. *Leeds*, 407 So.2d at 922, fn. 3. *Leeds* is also distinguished, as the condemnor therein had taken the “position throughout the proceedings ... that the damages sought to be proved by Leeds

through his expert were not recoverable.” *Leeds*, 407 So.2d at 921, fn. 2. In contrast, the challenge to the compensability of the instant Property Owners’ claim was not raised until the morning of trial, and the County’s own expert had used the same methodology as the Property Owners’ experts herein, albeit concluding the analysis disclosed no damages. *Leeds* confirmed that “it is not essential to the recovery of such fees that the landowner succeed in recovering the damages which the expert’s testimony establishes”, citing *Hodges* and *Liflans*. *Leeds*, 407 So.2d at 921.

In contrast to the County’s position that the damages sought herein were “predictably not recoverable”, the damages sought herein were specifically ruled to be recoverable when this case first went to trial. The County’s position, which it now asserts is plain and obvious, was rejected by the trial court. Only after a mistrial occasioned by the County, and subsequent hearings in this cause, did the damages become not recoverable. Except for the mistrial, this case would have been tried with the use of the contested site plans, and then this case would have proceeded to appeal with the site plans having been admitted into evidence. In this very different procedural posture, one wonders whether the Third District would have reached the same conclusion, given the deference provided trial courts in the admission of evidence.

If Dade County wanted to assert that counsel and the experts should have

realized their claim was inappropriate, then it was incumbent upon the County to present testimony to that effect. It did not. The County could not call its own appraiser to testify that the Property Owners' method of analysis was improper, as the County's appraiser also reviewed the site plan to assess the impact caused by the taking on the out parcels. The attorneys' fee expert who testified at the fee hearing opined that it was reasonable for the Property Owners' counsel to expect the site plans would be admitted, and the witness further stated that he had approached cases in the same manner as the Property Owners herein many times before. (Tr. at 65-67)

The engineers, land planner, and other experts testified that the type of services they performed in this case were consistent with the types of services they performed in other similar cases, both on behalf of the property owners, and on behalf of condemning authorities, and that in those cases in which the experts have been retained on behalf of the property owners, that the condemning authority undertakes the same type of analysis as those conducted herein. This testimony was unrebutted. Each of these experts that testified had significant experience in condemnation matters, including condemnation matters which affected gas stations and gas station sites.

The Third District gave no credence to the experts' testimony, and gave no credence to the trial court's findings. The Third District cannot ignore the trial court's Findings of Fact

on this issue, unless they are not supported by substantial competent evidence. Neither Dade County, nor the Third District, asserted that the trial court's Findings of Fact were not supported by substantial competent evidence.

The Third District's holding is contrary to the constitutional mandates summarized in *Dade County v. Brigham*, 47 So.2d 602 (Fla. 1950). The rationale of *Brigham* still stands. A separate and independent basis for the required payment of experts' fees is the mandate of Florida Statutes Section 73.091. The statute does not restrict experts' fees to only services rendered on those claims that are ultimately successful, nor should it. Experts often provide services on a wide range of issues, some of which evolve into compensation issues, and some of which are restricted to merely understanding and explaining the road project to the property owner. For instance, an engineer needs to review the plans, which are uniformly quite extensive for a road project, to advise the property owner, counsel, and the other experts about the nature of the project, and the expected impact upon the property. There is no "success" aspect to this work; it simply must be done. These efforts may disclose issues of concern, which may translate into compensation issues, but regardless of compensation, an understanding of the project, from a source independent from the government, is essential. The Third District herein, on rehearing, refused to award any fees for these services.

Likewise, a land planner has to take the information generated by the engineer, and

analyze the impacts of the road project on the existing or potential development of the property. For instance, an expanded road often triggers set back problems, and a property owner is entitled to know what development issues are created by the taking. No “success” factor applies to this work; it simply must be done, to understand the impact of the taking, and to let the clients know of the impact of the project upon their property.

If concerns are identified by the engineer or land planner that will impact the property, then the appraiser has to determine if these concerns negatively impact on value. Typically, the appraiser compares properties without such constraints, with properties that share the new constraints imposed on the subject property, to see if the constraints affect value. If no impact on value is identified for certain of the problems, then no further action is taken. However, the property owner is entitled to know the answer to these questions, and the government is obligated to pay a reasonable fee for these services, even though there is no “success” aspect to the efforts.

If these efforts disclose the taking will negatively impact the property, then the experts have to develop the information to demonstrate the damage, and make that information understandable to lay people. In non-litigation settings, the experts often rely simply on their experience when providing counsel to a client. In litigation, the experts are faced with having to support each of their conclusions, knowing that an experienced condemnation attorney will

challenge their conclusions. This is quite similar to the difference between an attorney advising the client what the law is, compared to having to be prepared to argue that law in court against an adversary. Even when the answer is quite clear, the case law has to be compiled and updated, and the exceptions or challenges anticipated to be raised by the opposition must be analyzed and appropriate responses thought out. Thus, the experts' fees are typically higher in litigation matters, due to the need to fully document their position, and to attempt to anticipate and respond to the opposition's positions.

It is the rare condemnation case when the jury accepts every aspect of one side's position. Instead, each side tends to "win" and "lose" portions of their arguments. Section 73.091 does not suggest that the experts' fees should be pro-rated, based on the "success" achieved at trial. No case law suggests that an appraiser's fee or an engineer's fee is premised in any part on the results of the trial. The experts do the work necessary to understand, develop, and explain the case. From there, the results are outside their control. If the government believes some of the work was unnecessary or inappropriate, then the available avenue is to negotiate a decrease in the fee, or to have the trial court consider the government's position in assessing the fee. If the trial court agrees, then the fees are reduced.

Transforming the statutory standards and process into a contingency fee is extremely inappropriate and burdensome upon the property owner who is thrust unwillingly into being

condemned by the government. If the choice foisted upon condemnees is to risk substantial financial exposure as a cost to obtaining their constitutionally mandated full compensation, or instead to accept the government's offer, invariably a substantial portion of the condemnees will forego their constitutional right. Even for those who accept the challenge, at the end of the day, unless their claims are entirely successful, under the decision appealed herein, a portion of the fees would still be their burden. Per the rationale of *Brigham*, the owners would then have received less than full compensation, as the compensation award would be reduced by payments to experts to achieve that award.

These real world ramifications are not intended, or even intimated, by Florida Statute Section 73.091, which clearly makes the government responsible for "all reasonable costs of the proceedings", with no reference to results obtained. As a matter of statutory construction, the omission of a "results" factor in the payment of experts' fees, and its inclusion in determining a reasonable attorneys' fee, makes clear that results were not to be considered in determining the experts' fees. *See, e.g., Young v. Progressive Southeastern Insurance Co.*, 753 So.2d 80 (Fla. 2000).

The mere fact that Dade County won the first appeal in this case does not mean the Property Owners' position was without merit. Under the then-existing case law and other circumstances presented herein, the Property Owners properly sought severance damages.

Whether pursuing this claim was reasonable was a question of fact. The trial court specifically concluded that pursuing the claim was reasonable, and cited seven supporting grounds for that conclusion. In balancing the equities of this case, the trial judge exercised his discretion, and awarded the appraiser and surveyor their invoiced amounts, and paid the balance of the experts 60% of their invoiced amounts. This is a substantial discount, and given the issues and facts presented herein, the County has established no error against the County in this exercise of discretion. There is substantial competent evidence in the record to support the trial court's exercise of discretion in the amounts allowed for experts' fees.

Lastly, the Third District unilaterally reduced the appraiser's fee from \$17,992.50 to \$1,500. No basis in the record exists for this action. No testimony was elicited that \$1,500 was a reasonable fee. No testimony was elicited that the appropriate activity for a property owner's appraiser is limited to reviewing the government's appraisal. Appraisers are required to conduct their own analysis before opining as to value. The Third District's ruling on the appraiser's fee is unsupported by any competent evidence.

CONCLUSION

Dade County posits that it was unreasonable for counsel and the experts to do the work done in this case. Dade County presented no evidence or testimony to support that position. In contrast, Dade County's own appraiser used the same methodology as the Property Owners' experts. Five expert witnesses all testified that the work performed herein was appropriate, and was the ordinary and typical work performed in condemnation cases. The trial court specifically found that the testimony of these witnesses was credible. The trial court specifically found that it was reasonable to do the work done here.

There is substantial competent evidence in the record to support the trial court's exercise of discretion in the amounts allowed for attorneys' fees and experts' fees. The decision of the trial court should be affirmed, no error having been demonstrated by Dade County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas Goldstein, Esq, Assistant County Attorney, Attorney for Appellant, Miami-Dade County, Suite 2810, Metro Dade Center, 111 N.W. First Street, Miami, Florida 33128-1993, this ____ day of March, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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