

ORIGINAL

IN THE FLORIDA SUPREME COURT

Case No. SC00-1764

FILED
THOMAS D. HALL
AUG 24 2000
CLERK, SUPREME COURT
BY KT

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,

Third District Court of Appeal
Case No. 99-2230

Petitioner,

vs.

DADE COUNTY, a political subdivision
of the State of Florida,

Respondent,

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review from the Third District Court of Appeal

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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.

Ruden, McClosky, Smith, Schuster & Russell, P.A.

City National Bank of Florida

Thomas R. Bolf, Esq.

James **A.** Horland, Esq.

Dade County

Thomas Goldstein, **Esq,**

Joan Webb

Dr. Lloyd Moriber

John Hagan

Donald Moore

Zook, Moore and Associates

Ronald Baker

MDM Engineering

Charles Putman

John R. Moreland

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PREFACE

This is a petition to invoke the discretionary jurisdiction of the Supreme Court pursuant to Art. V, § 3(b)(3), Fla. Const., Fla. R. App. P. 9.030(a)(2)(A)(iv) and Fla R. App. P. 9.120.

Petitioner, CITY NATIONAL **BANK** OF FLORIDA, As Trustee, will be referred to herein as “the Property Owners.”

Respondent, DADE COUNTY, will be referred to herein as “Dade County.”

The Appendix to this Brief is separated by numbered tabs. The Appendix will be cited as “App. #” with page designation where appropriate.

The Opinion of the Third District Court of Appeal, a copy of which is contained in the Appendix at tab 1, will be referred to as “Opin. at XX.”

The trial court’s order from which Dade County instituted the appeal, a copy of which is contained in the Appendix at tab 2, will be referred to as “Findings at XX”

SIZE AND STYLE OF TYPE

Undersigned counsel certifies that the following size and style of type is used in this brief, Times New Roman, 14 pt.

STATEMENT OF THE FACTS AND CASE

In a nine (9) page order, the trial court awarded \$75,000 in attorneys fees for the services of Ruden, McClosky, Smith, Schuster & Russell, P.A., and \$68,731.76 for various experts' fees. (**App. 2**). The appellate court reversed, awarding \$1,500 in experts' fees, and ordering that the attorneys' fees award "should be significantly reduced" upon remand, "without any consideration of the time spent by Property Owner's counsel in preparing for the recovery of severance damages." (App. 1; Opin. at 4-5)

At the trial court, the Property Owners had sought severance damages due to the changed **size** and shape of their property due to the condemnation, and had utilized a site **plan** developed by the Property Owners to demonstrate the impact upon their property. The site plan was admitted into evidence by the trial court at the first trial, but following a mistrial, the trial court ruled that the site plan could not be utilized for purposes of demonstrating severance damages. This ruling was affirmed on appeal, *City National Bank of Florida v. Dade County*, 715 So.2d 350 (Fla. 3d **DCA** 1998).

In ruling on the fees and costs incurred at the trial level, the trial court concluded (**App. 2**; Findings at ¶4) that pursuing the severance damage claim herein was reasonable and justified under the circumstances, for the following seven (7) 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."

(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. 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,

(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. (App. 2; Findings at ¶4, emphasis added)

The trial court further found that “[w]hile 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.” (App. 2; Findings at ¶5).

Dade County appealed the award of attorneys’ and experts’ fees. The appellate court ruled that “the trial court erred by including in its calculations those fees and costs which related to Property Owner’s failed severance damages claim.” (App. 1;

Opin. at 3-4) The appellate court did not conclude the trial court's findings of facts were unsupported by substantial competent evidence, and indeed did not reference those findings. The appellate court cited no case law or statutory law to support its ruling.

The Property Owners sought rehearing, certification of conflict, and certification of question of great public importance, which were denied. (App. 3) This Brief on Jurisdiction seeking discretionary review timely followed.

SUMMARY OF ARGUMENT

The instant opinion held that “fees and costs which related to Property Owner’s failed severance damages claim” are not recoverable. This holding is in direct conflict with *Hodges v. Division of Administration, State Dept. of Transp.*, 323 So.2d 275 (Fla. 2d DCA 1975) and *City of Miami Beach v. Liflans Corporation*, 259 So.2d 515 (Fla. 3d DCA), *cert. denied*, 267 So.2d 83 (Fla. 1972), each of which held that fees and costs are proper even when the compensation claim is unsuccessful.

The instant decision places a significant chilling effect on property owners’ constitutional rights to full compensation. Even where there is a reasonable basis for pursuing a claim, the property owners are at risk that the experts’ fees will not be taxable. Inevitably, property owners will opt to forego their constitutional rights, to avoid the exposure for the costs associated with pursuing those rights. This is inconsistent with our long established constitutional and statutory framework to protect property rights.

ARGUMENT

The law in Florida has long been that attorneys' fees and costs are awardable in condemnation actions, even if the underlying claim is ultimately unsuccessful. In *Hodges v. Division of Administration, State Dept. of Trump.*, 323 So.2d 275 (Fla. 2d DCA 1975), 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 5 15, 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. [REDACTED], 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 *Hodges* 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),” (App. 2; Findings at ¶10). See also *City of Miami Beach v. Liflans Corporation*, 259 So. 2d 5 15 (Fla. 3d DCA), *cert. denied*, 267 So.2d 83 (Fla. 1972)(property owner in a condemnation action is entitled to an award of attorneys’ fees even though the jury returned a verdict of zero compensation).

Without reference to the decisions cited above, and without reference to the trial court’s lengthy findings concluding **that** it was appropriate to pursue this severance damage claim, the instant appellate decision held that “the trial court erred by including in its calculations those fees and costs which related to Property Owner’s failed severance damages claim.” (App. 1; Opin. at 3-4)

The subject decision stands for the dangerous proposition that property owners are not entitled to their experts' fees and costs unless they are successful in their claims. This is contrary to Florida Statute Section 73.09 1, and inevitably will result in property owners opting to not assert their constitutional rights for fear of being saddled with extensive unreimbursed fees and costs. Our constitutional and statutory framework is designed to allow the property owners to contest the government's valuation, and at the same time to come out financially whole. **Hodges, 323** So.2d at **277; Dade County v. Brigham, 47** So.2d 602,604 (Fla. 1950). The present opinion is a serious erosion of constitutionally mandated property rights which must be rectified. *Hodges* and *Liflans* expressly hold that attorneys' fees and experts' fees are compensable in condemnation matters, even if the claim is ultimately unsuccessful. The instant decision is in direct conflict to these long established cases.

CONCLUSION

For the foregoing reasons, Petitioner requests this court accept jurisdiction of this matter to resolve the conflict between the District Courts of Appeal on this important issue with constitutional implications.

Respectfully submitted,

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By:  _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished by U.S. Mail to Thomas Goldstein, Esq, Attorney for Respondent, Assistant County Attorney, Dade County, Suite 2810, Metro Dade Center, 111 N.W. First Street, Miami, Florida 33128-1993, this 23rd day of August, 2000

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