**IN THE SUPREME COURT**

**OF THE STATE OF FLORIDA**

PAUL J. BARCO,

Petitioner,

v.

THE SCHOOL BOARD OF PINELLAS COUNTY,

Respondent.
_____/

Case No. SC07-261

DCA Case No. 2D05-4915

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# JURISDICTIONAL BRIEF OF RESPONDENT, THE SCHOOL BOARD OF PINELLAS COUNTY

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Rules**

## INTRODUCTION

The Respondent, The School Board of Pinellas County, shall be referred to as "The School Board"; the Petitioner shall be referred to as "Barco." References to Petitioner's Jurisdictional Brief shall appear as "(JB p. ____)." References to the two volumes and supplemental volume of the record below shall appear as: "(R. Vol. ___ [or Supp.] p. ___)." All emphasis is supplied unless otherwise noted.

## STATEMENT OF THE CASE AND FACTS

This is an eminent domain case, in which the School Board filed a petition in the Pinellas County Circuit Court to acquire Petitioner's single, vacant lot in order to build an expansion for an elementary school in St. Petersburg. (R. Vol. I pp. 1-12, 116-130).

Following the trial court's entry of an Order of Taking, a mediation conference was held on February 17, 2004, which resulted in a settlement agreement as to the value of the property. (R. Vol. II pp. 228-230). However, the remaining issues of Barco's entitlement to his attorney's fees, expert's fees, costs, and expenses were specifically excluded from the parties' mediated agreement. (R. Vol. II p. 228). Nevertheless, Barco contended that his costs and some of his attorney's fees were required to be included within the School Board's settlement payment. Barco then filed a

"Motion to Enforce Settlement, With Request for Interest, Attorneys Fees, and Costs" on November 15, 2004. (JB p. 3). The matter came before the trial court at a hearing held on December 2, 2004, at which time the trial court, at Barco's counsel's urging, entered its Final Judgment in the case. (R. Vol. II pp. 233-236).

The Final Judgment encompassed payment by the School Board for the vacant lot's settled value as well as payment of $6,851.53 for Barco's attorney's fees. (R. Vol. II p. 234). On the issue of taxable costs, the Final Judgment concluded that the trial court would "reserve[] jurisdiction for determination of any and all issues associated with determining reasonable costs, INTEREST, AND ADDITIONAL ATTORNEYS' FEES pursuant to Section 73.092(2), Florida Statutes." (R. Vol. II p. 236). The trial court apparently expected Barco to file a timely post-judgment motion to address these remaining determinations when it stated at the conclusion of the December 2nd hearing: "They [Barco's counsel] are going to make a written motion as to what issues the Court needs to determine and set it for a hearing. Isn't that fair enough?" To which, counsel for Barco responded: "Yes, sir." (R. Supp. p. 325).

Yet, it would be another three and a half months before Barco finally filed his Motion to Tax Costs on March 22, 2005. (JB p. 4, n.3). A hearing

on Barco's Motion to Tax Costs was held on August 22, 2005, at the conclusion of which the trial judge ruled that Barco's request to tax costs against the School Board—filed more than thirty days after the December 2nd Final Judgment—was indeed untimely under Fla R. Civ. P. 1.525. (R. Supp. p. 298). On September 7, 2005, the trial court entered its Order Denying Motion to Tax Costs. (R. Vol. II p. 256) (hereafter, the "Order"). In denying Petitioner's motion, the Order cited three cases: *Gulf Landings Association v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003); *Swann v. Dinan*, 884 So. 2d 398 (Fla. 2d DCA 2004); and *Clampitt v. Britts*, 897 So. 2d 557 (Fla. 2d DCA 2005).

The Second District Court of Appeal affirmed the trial court's Order on January 19, 2007, and certified conflict between the districts with its decision in *Swann v. Dinan*, 884 So. 2d 398 (Fla. 2d DCA 2004) based upon "the initial version of Florida Rule of Civil Procedure 1.525." 2007 WL 120588.[1] By "initial version," it is clear the Second District was referring to

[1] The Second District made no mention of the *Gulf Landings* or the *Clampitt* decisions in its ruling. The cases it certified conflict with were *Martin Daytona Corp. v. Strickland Const. Services*, 941 So. 2d 1220, 1225-1226 (Fla. 5th DCA 2006); *Byrne-Henry v. Hertz Corp.*, 927 So. 2d 66, 68 (Fla. 3d DCA 2006); *Swift v. Wilcox*, 924 So. 2d 885, 887 (Fla. 4th DCA 2006); and *Norris v. Treadwell*, 907 So. 2d 1217, 1218-19 (Fla. 1st DCA 2005), *review dismissed*, 934 So. 2d 1207 (Fla. 2006).

the version of the rule prior to January 1, 2006, the version that existed before the rule's amendment by the Florida Supreme Court.

Admitting his failure to timely file a post-judgment motion, Petitioner now requests further review from this Court to determine whether a different, pre-judgment motion could have satisfied the prior version of Rule 1.525. (JB at p. 4).

## SUMMARY OF ARGUMENT

The version of Rule 1.525 Petitioner would ask this Court to construe ceased to exist as of January 1, 2006. It is therefore completely appropriate for this Court to decline to resolve the conflict certified here, just as it did in *Norris v. Treadwell*, 934 So. 2d 1207 (Fla. 2006). Barco cites no reason for the Court to reach a different conclusion than the one it reached in *Norris*. Furthermore, Petitioner's failure to timely file a cost motion after the entry of the Final Judgment must be viewed in light of the long-standing precedent in the Second District requiring timely post-judgment filings and his counsel's statement to the trial court affirming he would file such a motion.

## ARGUMENT

Petitioner's Jurisdictional Brief revolves around what he perceives are the merits of his case on appeal. While the School Board vehemently disagrees with Petitioner's assertions, for purposes of this Brief, the

Respondent will focus on the issue Petitioner has largely ignored: that is, whether this Court should or should not accept jurisdiction of this case. As will be shown below, there is no reason for it do so.

## I. THE CONFLICT BETWEEN THE DISTRICTS IS MOOT IN LIGHT OF RULE 1.525'S AMENDMENT.

Petitioner asks this Court to resolve conflict in the application of a former version of Rule 1.525, Florida Rules of Civil Procedure.[2] In his briefs and arguments before the Second District (but, notably, not in his Jurisdictional Brief), Barco went to great lengths to point out that Rule 1.525's language had been amended. That amendment, effective January 1, 2006, substituted the word, "within" for the phrase, "no later than." Thus, with respect to judgments entered after January 1st of 2006, the new rule reads: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment…"

In essence, then, Petitioner asks this Court to expend time and resources to resolve a conflict regarding a version of a procedural rule that is no longer operative. Every one of the cases certified in conflict involved the prior version of Rule 1.525. The prevailing legal issue this Court would be

[2] Rule 1.525 (2005) read as follows: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal."

called upon to resolve is, therefore, moot. *Cf. Arbalaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999) (denying all writs petitions for moratorium of death penalty until capital collateral regional counsel divisions received adequate funding because Legislature had subsequently amended structure and funding of divisions).

This Court recognized as much when it dismissed the very same certified conflict just last year. *See Norris v. Treadwell,* 934 So. 2d 1207 (Fla. 2006). In so doing, the Court stated:

> We initially accepted jurisdiction to review Norris v. Treadwell, 907 So. 2d 1217 (Fla. 1st DCA 2005), a decision by the First District Court of Appeal certifying conflict with the Second District Court of Appeal's decision in Swann v. Dinan, 884 So. 2d 398 (Fla. 2d DCA 2004). See art. V, § 3(b)(4), Fla. Const. We recognize that Florida Rule of Civil Procedure 1.525 was amended effective January 1, 2006…[W]e therefore exercise our discretion and discharge jurisdiction.

Petitioner offers no reason or justification for the Court to now reach a contrary conclusion under the facts of this case. There is none. The mere certification of a conflict between districts does not limit this Court's discretion to reject jurisdiction over such a case. *See* Fla. R. App. P. 9.030(a)(2); *District Board of Trustees v. Morgan*, 918 So. 2d 273 (Fla. 2005); *Baker v. State*, 863 So. 2d 293 (Fla. 2003). Accordingly, the Court should decline to accept jurisdiction of this case.

## II. PETITIONER CANNOT MANUFACTURE CONFLICT WITH CASES DECIDED BEFORE RULE 1.525'S ADOPTION.

Petitioner's Second Point in his Jurisdictional Brief calls upon this Court to take jurisdiction of this case to resolve a "conflict" between the *Barco* decision itself and *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950) and *Jacksonville Expressway Authority v. Dupree*, 108 So. 2d 289 (Fla. 1959). Both of these cases were decided more than forty years before Rule 1.525 was even adopted. Perhaps recognizing as much, Barco instead posits that the denial of his untimely motion to tax costs "conflicts" with his right of full compensation in an eminent domain proceeding. (JB at p. 9).

Putting aside the glaring, but unanswered, question of how conflict can exist between an as-yet unpublished opinion and two cases decided decades before Rule 1.525 was adopted, Petitioner's underlying legal premise is flawed: this Court has always been free to establish procedural rules that govern the exercise of substantive rights and remedies. *See* Fla. R. Civ. P. 1.010 ("These rules apply to <u>all</u> actions of a civil nature and all special statutory proceedings in the circuit courts…"); *State v. J.A., Jr.* 367 So. 2d 702, 703 (Fla. 2d DCA 1979) ("Substantive law prescribes duties and rights under our system of government… Procedural law concerns the means and methods to apply and enforce those duties and rights, and the supreme court determines procedural law through the promulgation of

rules."). Here as well, there is no basis or reason for this Court to accept jurisdiction over this case.

## III. PETITIONER'S FAILURE OCCURRED AFTER *SWANN V. DINAN* AND *LYN V. LYN*; HE IGNORED WELL-SETTLED LAW AT HIS OWN PERIL.

Ultimately, Petitioner will ask the Court to resolve the conflict over the former version of Rule 1.525 by quashing precedent in the Second District. It must be noted that Petitioner's failure—that is, his failure to timely file a motion to tax costs within 30 days after the December 2nd judgment—arose nearly three months after *Swann* had been issued and several months after *Lyn v. Lyn* had been published. 884 So. 2d 181 (Fla. 2d DCA 2004) (holding that motion for attorneys' fees filed prior to entry of judgment did not comply with Rule 1.525). Indeed, a bevy of precedent already existed in the Second District admonishing litigants to strictly comply with Rule 1.525. *See Gulf Landings Association, Inc. v. Hershberger*, 845 So. 2d 344, 346 (Fla. 2d DCA 2003) ("[i]t is no longer sufficient for a trial court to 'reserve jurisdiction' with a final judgment… Special rules for such circumstances would simply return the courts to an era in which the time for the filing of these motions would again be uncertain."); *Diaz v. Bowen*, 832 So. 2d 200, 201 (Fla. 2d DCA 2002) ("To recover fees and costs, a party must file a posttrial pleading and supporting proof."). To

permit Petitioner to willfully ignore the precedent in his district by invoking the discretionary review of this Court would be wholly improper. *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444, 447 (Fla. 3d DCA 2006) (holding that where unresolved conflict remained between districts regarding work product standard, appellate court was bound by the precedent of its own district).

## IV. THE CASE SUB JUDICE IS DISTINGUISHABLE FROM THE CASES CERTIFIED TO BE IN CONFLICT.

It remains only to note a distinguishing feature of the case sub judice should place it beyond the purview of further discretionary review by this Court. Barco's counsel expressly affirmed, in open court, that Barco would file a subsequent motion to resolve the cost entitlement issue now under appeal. *See supra* p. 2. He cannot now be heard to argue that his prior motion should have sufficed in light of this statement to the trial judge—all the more so, since none of the cases certified to be in conflict had such a singularly unique representation made by counsel. For this reason as well, the Court should decline jurisdiction over this case. *Cf. Safeco Insurance Co. of America v. Albriza*, 365 So. 2d 804, 805 (Fla. 4th DCA 1978) (finding no error in jury instruction, noting that appellant's counsel had stated his agreement in court to the version of the instruction under appeal).

## CONCLUSION

Petitioner failed to show any reason for this Court to accept jurisdiction over this case. For all the reasons above, the Court should decline to exercise its discretionary jurisdiction and deny Petitioner's Motion for Appellate Attorneys' Fees & Costs.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to Samuel R. Mandelbaum, Esq., of MANDELBAUM, FITZSIMMONS, HEWITT & METZGER, P.A., P.O. Box 3373, Tampa, Florida, 33601, on this 2nd day of March 2007.

## CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that Respondent's foregoing Brief complies with the font requirements set forth under Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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