IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

PAUL J. BARCO,

Petitioner-Appellant,

vs.

THE SCHOOL BOARD OF PINELLAS COUNTY,

Respondent-Appellee.
_____/

Sup. Ct. Case No. SC 07-261

2ND DCA Appeal No. 2D05-4915

Upon Review of Certified Question of Direct Conflict from the Second District Court of Appeal

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JURISDICTIONAL BRIEF OF PETITIONER-APPELLANT

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STATEMENT ON JURISDICTION

This petition stems from an eminent domain action filed by Respondent School Board for Pinellas County ("School Board") in the Pinellas Circuit, which sought condemnation of Petitioner Paul J. Barco's ("Mr. Barco") residential property. The trial court order under review is an order denying Mr. Barco's motion for taxable costs and appraiser fees under F.S. §73.091, which motion had been filed 17 days *before* entry of final judgment. On January 19, 2007, the Second District affirmed the costs denial under Fla.R.Civ.P.1.525 upon its earlier precedent of Swann v. Dinan, 884 So.2d 398 (Fla.2d DCA, 2004) (motions for costs and fees are untimely when filed *before* filing of final judgment).

However, the Second District certified "direct conflict" of its decision below and Swann with those of all four other district courts which hold to the contrary—Martin Daytona v. Strickland, 941 So.2d 1220 (Fla.5th DCA 2006) (Rule 1.525 sets "an *outside deadline* for serving a motion for attorneys' fees and costs, and that motions served *prior to* entry of the judgment were *timely*"); Byrne-Henry v. Hertz, 927 So.2d 66 (Fla. 3d DCA 2006); Swift v. Wilcox, 924 So.2d 885 (Fla. 4th DCA 2006) ("we hold that Rule 1.525 establishes the *latest point* at which a prevailing party may serve a motion for fees and costs"); and Norris v. Treadwell, 907 So.2d 1217 (Fla.1st DCA 2005). This petition is filed under this Court's jurisdiction from Fla.Const.Art.V §3(b)(3) and Fla.R.App.P. 9.030(a)(2)(A).

STATEMENT OF THE CASE & FACTS

In March 2003, the School Board filed a Petition in Eminent Domain against Mr. Barco, seeking to condemn his residential property in South St. Petersburg for expansion of a school parking lot. Its Declaration of Taking stated a "good faith estimate of the value of [the property], based upon a valid appraisal, is $14,000." In his Answer requesting a jury trial, costs, attorneys & expert fees, Mr. Barco denied the public need for a taking of his property and challenged the School Board's estimate of value as a bad faith offer.

At a hearing on October 9, 2003 Mr. Barco stipulated to the taking, but announced his intentions to contest the School Board's low valuation of his property and to present his own valuation experts at trial. The circuit court ordered the parties to mediation.

At mediation on February 17, 2004, the parties subscribed to a "Mediated Settlement Agreement" for the School Board to pay Mr. Barco a $31,612.50 value for his property, and stipulated the court would retain jurisdiction for his attorneys fees, expert's fees, costs and expenses. The agreement was contingent on School Board ratification within 30 days, which approval was timely provided.

On July 13, 2004 Mr. Barco's counsel forwarded to School Board counsel per F.S.§73.091 a detailed, itemized list of his incurred costs totaling $12,351.21,

attaching invoices for experts, court reporters, governmental documents, service of process, property tax and appraiser time records.[1]

Nine months after mediation the School Board had still not paid Mr. Barco his agreed compensation, nor any attorneys fees, costs or expert fees. Hence, on November 15, 2004, Mr. Barco filed a "Motion to Enforce Settlement, with Request for Interest, Attorneys Fees & Costs." In the motion he sought an order awarding the agreed $31,612.50 property value, $6,851.53 for attorneys fees (also as stipulated per F.S.§73.092), but requested the court to award "the sum of $12,321.21 for taxable costs [and expert fees] pursuant to F.S. §73.091, together with all interest at the statutory rate from commencing February 17, 2004."

At a December 2, 2004 hearing on Mr.Barco's November 15th motions, the trial judge was troubled he hadn't been compensated as agreed ten months earlier.[2] Over objections of School Board counsel, the court ordered "his money be paid in 10 days." When Barco's counsel requested costs, interest and additional attorneys fees for enforcement, the judge deferred those issues for later consideration**:**

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[1] F.S.§ 73.091(2) provides that at least 30 days prior to a hearing to assess costs, the condemnee's attorney shall submit to the condemning authority all defense expert witnesses' complete time records, fee agreements and costs incurred.

[2] Judge Beach commented— "Well, what is the problem here ... It's an easy case. $31,612.50. It's been approved by the School Board;" "Let's go ahead and pay him;" "Well, let's pay them everything you can agree to and reserve the rest of the stuff so he can get his money;" "Pay him the money, reserve on the rest of the stuff, period" (R323); "He's entitled to the money, right" (R321-336).

> "MR. MANDELBAUM [Barco's counsel]: We do have costs, like court reporter bills and experts.
>
> THE COURT: That will be taken up at a later date.
>
> MR. MANDELBAUM: We have all agreed to have that hearing held sometime next year.
>
> MR. JACOBS [School Board's counsel]: That's correct."

Concluding the December 2, 2004 hearing, Judge Beach entered a "Final Judgment with Disbursement Orders to Clerk," awarding $31,612.50 for the property and $6,851.53 for attorneys fees per F.S.§73.092(1). The judgment included a "reservation of jurisdiction" clause for "determining reasonable costs, interest and additional attorneys fees pursuant to Section 73.092(2), Florida Statutes."

Months thereafter, on March 22, 2005, Mr. Barco filed a *renewed* motion for costs of $12,411.21 per F.S.§73.091, reiterating his prior motion of November 15, 2004.[3] At a later August 22, 2005 hearing before a new judge, (Walt Logan), School Board counsel objected to any costs, contending the motion was "untimely" filed under Rule 1.525. Responding, Mr. Barco noted his motion for costs was originally and timely filed in November 2004 (17 days *before* entry of judgment) and presented to Judge Beach at the December 2, 2004 hearing when judgment was entered. Alternatively, he also made three *ore tenus* motions for enlargement of time per Rule 1.090, to show extraordinary circumstances and/or excusable neglect.

[3] The renewed motion for costs was identical to the original costs motion, with the addition of a $60 court reporter bill for covering the 12-2-04 enforcement hearing.

Notwithstanding, Judge Logan denied costs as untimely and the *ore tenus* motions as well. Thereafter, on September 7, 2005 Judge Logan entered an Order Denying Motion to Tax Costs "for failure to comply with the requirements of Florida Rule of Civil Procedure 1.525," citing *Swann v. Dinan,* 884 So.2d at 339.

On October 6, 2005, Mr. Barco filed his timely Notice of Appeal to the Second District from the order denying costs. Subsequently, on January 19, 2007, the Second District affirmed the order denying costs on the authority of *Swann v. Dinan,* but certified the question as a "direct conflict" with the contrary decisions of Florida's four other district courts.

SUMMARY OF ARGUMENTS

1. As Petitioner had served his original November 15, 2004 motion for costs totaling $12,351.21 just 17 days before the filing of the judgment and presented the motion for determination at the hearing at which the judgment was entered, the costs motion was timely filed "no later than" 30 days after judgment. The Second DCA's decision affirming the denial of costs as untimely, following its lone stance from Swann v. Dinan, is in "direct conflict" with the unified positions of the four other districts holding that Rule 1.525 merely sets "an *outside deadline* for serving a motion for attorneys' fees and costs, and that motions served *prior to* entry of the judgment were *timely*." Martin Daytona, 941 So.2d at 1225; Byrne-Henry, 927 So.2d at 68; Swift, 924 So.2d at 888; and Norris, 907 So.2d at 1218.

2. Since the 1950s in Dade County v. Brigham, 47 So.2d at 604-5 and in Jacksonville Expy. Auth. v. DuPree, 108 So.2d at 292, this Court emphasized that property owners are constitutionally guaranteed awards of costs and expert fees in condemnation actions as components of full and just compensation. Limiting or abrogating the mandate with fluctuating judicial rules, inconsistent decisions and unclear standards, as the Second District did here, directly conflicts with this Court's decisions and offends property rights assured by the Florida constitution.

ARGUMENTS:
POINT I

THE SECOND DISTRICT'S DECISION *SUB JUDICE* AND IN *Swann v. Dinan*, 884 So.2d 398 (Fla.2d DCA, 2004), HOLDING THAT MOTIONS FOR COSTS ARE UNTIMELY UNDER RULE 1.525 WHEN FILED *PRIOR TO* FILING OF JUDGMENT, DIRECTLY CONFLICT WITH THE DECISIONS OF ALL FOUR OTHER DISTRICT COURTS WHICH HAVE UNIFORMLY HELD THAT RULE 1.525 ONLY ESTABLISHES THE *LATEST POINT* AT WHICH A PARTY MAY FILE A MOTION FOR FEES AND/OR COSTS, AND THAT SUCH MOTIONS SERVED *PRIOR TO* ENTRY OF JUDGMENT ARE TIMELY.

Prior to 2000, motions for fees and costs had to be filed within a "reasonable time" after final judgment. Norris, 907 So.2d at 1218. In 2000, to eliminate the uncertainty of timeliness, this Court adopted Rule 1.525 to establish a time for serving motions for fees & costs. Amendments to Florida Rules of Civil Pro., 773 So.2d 1098 (Fla.2000). Rule 1.525 initially provided that a motion shall be served

"*within 30 days* after filing of the judgment." The initial rule, though, "still caused confusion." Martin Daytona, 941 So.2d at 1225. To "alleviate the confusion" on whether this constituted an outside deadline or a narrow 30-day window of opportunity, the rule was amended in 2005 "to provide that the motion should be served *no later than* 30 days after the judgment." Martin Daytona, 941 So.2d at 1226; Amendments to the Fla. Rules of Civil Pro., 917 So.2d 176, 187 (Fla. 2005).

Regarding the timeliness of a motion for costs and/or fees served *before* filing of a judgment, the First, Third, Fourth and Fifth Districts have all held that both the initial and clarified versions of Rule 1.525 deem pre-judgment motions as timely, as long as served no later than 30-days after entry of judgment. The Fifth District in Martin Daytona, 941 So.2d at 1225, recently held that rule 1.525 sets "an *outside deadline* for serving a motion for attorneys' fees and costs, and that motions served *prior to* entry of the judgment were *timely*." This followed the position of the Third District in Byrne-Henry, 927 So.2d at 68. And inn Norris, 907 So.2d at 1218-9, the First District held that Rule 1.525 "establishes the *latest point* at which a prevailing party may serve a motion for fees and costs," which was followed by the Fourth District in Swift, 924 So.2d at 888.

Conversely, the Second DCA in Swann, followed in this case, that the initial version of rule 1.525 provides only a short "window of opportunity" between filing of a judgment and 30 days thereafter to serve a motion for costs. 917 So.2d at 399.

Mr. Barco served his original motion for costs of $12,351.21 on November 15, 2004, 17 days *before* entry of judgment. By virtue of the mediation agreement executed by the parties on February 17, 2004, he was entitled to seek costs and appraiser fees in his original motion. From the pronouncements of the four other district courts on this issue, the filing of Mr. Barco's November 15, 2004 motion for costs of $12,351.21 was well within the "outside deadline," and indeed timely.

Hence, the Second District's opinions directly conflict with all four other district courts, and this Court should grant review to resolve the confusion.

POINT II

IN AN EMINENT DOMAIN CASE UNDER F.S.§73.091, THE SECOND DISTRICT'S DECISION *SUB JUDICE* EXPRESSLY AND DIRECTLY CONFLICTS WITH THE LANDMARK DECISIONS OF THIS COURT IN *Dade County v. Brigham*, 47 So.2d 602 (Fla. 1950) and *Jacksonville Expressway Authority v. DuPree*, 108 So.2d 289 (Fla.1959), WHICH HOLD THAT PROPERTY OWNERS ARE CONSTITUTIONALLY GUARANTEED REASONABLE COSTS & EXPERT EXPENSES AS ESSENTIAL ELEMENTS OF JUST COMPENSATION FOR CONDEMNATION DAMAGES.

In the landmark case of Dade County v. Brigham, 47 So.2d 602, 604-5 (Fla. 1950), this Court emphasized that an award to a property owner of costs and expert fees is *constitutionally guaranteed* in a condemnation action**:**

> "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.

* * *

> Section 73.16, 1941, F.S.A., which provides "All costs of proceedings shall be paid by the petitioner, including a reasonable attorney's fee * * *" should be construed in the light of Section 12 of our Declaration of Rights, F.S.A., which declares that private property shall not be taken "without *just* compensation." When so construed the language "All costs of proceedings * * *" must be held, in a proper case, to include fees of expert witnesses for the defendants. The allowance or disallowance of such fees should be a matter for the trial judge to decide in the exercise of sound judicial discretion.
>
> 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.

See also: Jacksonville Exp. Auth. v. DuPree, 108 So.2d 289, 292 (Fla. 1959) (Theory and spirit of constitutional guaranty of full or just compensation for appropriation of private property requires practical attempt to make owner whole, and "person who is put to expense through no desire or fault of his own *can only be made whole when his reasonable expenses are included in the compensation*;"

With the trial court having not yet considered or awarded Mr. Barco's motion for costs and expert fees as full and just compensation, the Second District's decision affirming the denial of costs for "untimeliness" directly conflicts with this Court's mandates of Brigham and DuPree. This Court should grant review to reassert that the constitutional guaranty of full compensation for appropriation of private property is not subject to fluctuating judicial rules, inconsistent decisions and unclear standards which abrogate these organic rights.

CONCLUSION

For the foregoing reasons, this Court has "conflict" jurisdiction to review the Second District decision below, and should do so, in order to reconcile direct conflicts between the Second District's lone stance and the unified position of the four other districts on the issue of whether a motion for costs and/or attorneys fees, served *prior to* the filing of a judgment, is timely; and to reiterate this Court's prior enunciations that reasonable costs are constitutionally guaranteed in eminent domain proceedings as part of full and just compensation.

CERTIFICATE OF COMPLIANCE ON FONT SIZE

I HEREBY CERTIFY that this brief complies with the type-volume limits set forth in Fla.R.App.P. 9.210(a), consisting of Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Matthew C. Lucas, Esq., Bricklemyer Smolker & Bolves, 500 E. Kennedy Blvd., Suite 200, Tampa, FL 33602, this ___ day of February, 2007.

Respectfully Submitted,

_____

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APPENDIX

TO
PETITIONER'S JURISDICTIONAL BRIEF

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Appendix 1 - Second DCA Opinion in Barco v. School Board of Pinellas County, _____ So.2d _____ (Case No. 2D05-4915, Opinion filed January 19, 2007)

BARCO v. SCHOOL BD. OF PINELLAS CO., 2D05-4915 (Fla.App. 2 Dist. 1-19-2007)

PAUL J. BARCO, Appellant, v. SCHOOL BOARD OF PINELLAS COUNTY, Appellee.

No. 2D05-4915.

District Court of Appeal of Florida, Second District.

Opinion filed January 19, 2007.

Appeal from the Circuit Court for Pinellas County; Walt Logan, Judge.

Samuel R. Mandelbaum of Mandelbaum, Fitzsimmons & Hewitt, P.A., Tampa, for Appellant.

Matthew C. Lucas and Brian A. Bolves of Bricklemyer Smolker & Bolves, P.A., Tampa, for Appellee.

PER CURIAM.

Paul J. Barco appeals the trial court's order that denied his motion to tax costs. The trial court denied the motion because it was not served within "30 days after the filing of the judgment" in accordance with the initial version of Florida Rule of Civil Procedure 1.525. We affirm the trial court's order. See Swann v. Dinan, 884 So. 2d 398, 399 (Fla. 2d DCA 2004). However, we certify direct conflict with the following decisions: Martin Daytona Corp. v. Strickland Construction Services, 941 So. 2d 1220, 1225-26 (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).

Affirmed; conflict certified.

ALTENBERND, STRINGER, and WALLACE, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED