IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PAUL J. BARCO,

Petitioner, Case No. SC07-261

v. DCA Case No. 2D05-4915

THE SCHOOL BOARD OF PINELLAS COUNTY,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT, THE SCHOOL BOARD OF PINELLAS COUNTY

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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 Initial Brief shall appear as "(IB 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 a single, vacant lot that belonged to Barco. (R. Vol. I pp. 1-12, 116-130; Supp. p. 305). The School Board required this vacant lot in order to build a needed expansion for Melrose Elementary School in St. Petersburg. (R. Vol. I pp. 1-12, 116-130.). The underlying proceedings and negotiations between the School Board and Barco were neither remarkable nor, for the most part, particularly relevant to this appeal. A cursory review of the case and facts leading up to the judgment and order under appeal will provide the Court with a sufficient understanding of the issues now in dispute.

On October 9, 2003, after Barco withdrew his initial objections to the School Board's amended condemnation petition, the trial court entered an

Order of Taking, and the parties were ordered to mediate the remaining issue of compensation for the property acquired. (R. Vol. I pp. 164-177). A mediation conference was then held on February 17, 2004, which resulted in a settlement agreement as to the value of the property the School Board acquired. (R. Vol. II pp. 228-230).[1] 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).

A subsequent dispute arose between the parties as to whether or not Barco's costs (and the amount of those costs) and some of his attorney's fees were required to be included within the School Board's settlement payment under the mediation agreement. Barco then filed a "Motion to Enforce Settlement, With Request for Interest, Attorneys Fees, and Costs" on November 15, 2004. (R. Vol. II pp. 224-226). 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; IB pp. 8-9). 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 pursuant to Florida Statute

[1] The parties settled the valuation of the vacant lot at $31,612.50. (R. Vol. II p. 228).

Section 73.092(1). (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).

It seems clear the trial judge expected Barco to file a subsequent (and, presumably, timely) motion to address these remaining determinations, as the following exchange from the December 2nd hearing illustrates:

> MR. JACOBS [counsel for the School Board]: I would ask for clarification on what point we are reserving. Because, your Honor, we're here today, and all the parties—
>
> THE COURT: They 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?
>
> MR. GAINES [counsel for Barco]: 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. (R. Vol. II pp. 248-250).[2]

[2] Petitioner now calls this filing his "*renewed* Motion to Tax Costs," (IB at p. 10), even though the motion was not so named, and sought different relief and additional costs beyond what had been requested in Barco's prior Motion to Enforce Settlement Agreement. *Compare* R Vol. II pp. 248-250 *with* R. Vol. II pp. 224-226. *See also* IB at p. 10. The principal cost item Barco seeks to recover on appeal relates to his expert property appraiser, Dennis Noto. R. Vol II p. 249.

Petitioner does not dispute the date he filed his motion or the length of time that had elapsed between the motion's filing and the entry of the Final Judgment. *Id*.

A hearing on Barco's Motion to Tax Costs was held on August 22, 2005. (R. Supp. pp. 282-299). During that hearing, the School Board objected to Barco's Motion on the ground that it had been filed more than thirty days after the entry of the Final Judgment in violation of Florida Rule of Civil Procedure 1.525. (R. Supp. pp. 285-288). Although counsel for Barco indicated "surprise" that the School Board would object to the Motion as being untimely (and continues to press this point even now), Barco's counsel proceeded to present many of the same arguments and even case authority to the trial court as he now advances on appeal. (R. Supp. pp. 289-292, 295-296).[3] At the conclusion of the hearing, the trial judge ruled that Barco's request to tax costs against the School Board was indeed untimely under Rule 1.525, noting that the Second District's pronouncements regarding the rule were "[a] line that's been drawn." (R. Supp. p. 298). The court also denied Barco's *ore tenus* motion for an extension of time to file a

[3] Contrary to what was intimated in the Initial Brief, Brian Bolves, Esq., counsel for the School Board, did inform Barco's counsel, long before Barco had even filed his motion to tax costs, that any motion Barco would file would be considered untimely and unenforceable as far as the School Board was concerned. (R. Supp. pp. 285, 292). Prompted by those conversations, Barco then filed his Motion to Tax Costs on March 22nd. *Id.*

fee and cost motion. (R. Supp. p. 296). At no time has Barco ever filed or served a written motion for an extension of time.

Thereafter, on September 7, 2005, the trial court entered its Order Denying Motion to Tax Costs. (R. Vol. II p. 256) (hereafter, the "Order"). The Order reads, in pertinent part:

> Defendants' Motion to Tax Costs is hereby denied for failure to comply with the requirements of Florida Rule of Civil Procedure 1.525. Gulf Landings Association v. Hershberger, 845 So. 2d 344 (Fla. 2nd DCA 2003); Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004) and Clampitt v. Britts, 897 So. 2d 557 (Fla. 2nd DCA 2005).

Id.

By way of a summary, then, an overview of the notable events and dates underlying this appeal would appear as follows:

December 2, 2004	**Final Judgment entered; Barco's counsel affirms that Barco will file a subsequent motion to address "what issues the Court needs to determine"**
March 22, 2005	**Motion to Tax Costs filed by Barco**
September 7, 2005	**Order Denying Motion to Tax Costs entered**

As is readily apparent, the two operative dates here—December 2, 2004, and March 22, 2005—stand a hundred and ten days apart.

Barco appealed the Order to the Second District Court of Appeal. (R. Vol. II pp. 257-258). The Second District affirmed the Order in *Barco v. School Board of Pinellas County*, 946 So. 2d 1244 (Fla. 2d DCA 2007), but certified conflict between the districts, holding:

> 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).

By order entered on April 17, 2007, this Court accepted discretionary jurisdiction over this case.

STANDARD OF REVIEW

The interpretation of the Rules of Civil Procedure is a question of law subject to de novo review. *Smith v. Smith*, 902 So. 2d 859, 861 (Fla. 1st DCA 2005). The issue of whether or not a trial court properly denied a motion for extension of time under Fla. R. Civ. P. 1.090(b)(2) (Petitioner's fourth point on appeal) is subject to review for abuse of discretion. *Id.*; *Clampitt v. Britts*, 897 So. 2d 557, 558 (Fla. 2d DCA 2005).

SUMMARY OF ARGUMENT

Petitioner asks this Court to engraft new language in an old procedural rule. Because the initial version of Rule 1.525 required filing of Barco's cost motion "within 30 days after filing of the judgment," and a judgment was entered in this case on December 2, 2004, Petitioner had thirty days after that date to file his motion to tax costs. Having admittedly failed to timely serve his Motion to Tax Costs after the filing of the Final Judgment, Barco would turn the Court's attention away from that failure and the plain language of Rule 1.525 in order to transform his Motion to Enforce Settlement Agreement (filed weeks before the entry of the Final Judgment and based on a settlement agreement that specifically excluded recovery of costs) into a timely, post-judgment motion. The Court should decline Petitioner's invitation to rewrite the former version of Rule 1.525, continue to apply that rule in a "bright line" manner, and resolve the conflict among the districts in line with the Second District's well-reasoned holdings in *Swann v. Dinan, Lyn v. Lyn*, and *Italiano v. Italiano.*

Contrary to Petitioner's contention, since the action at bar is a "civil action," it remains subject to all of the rules of civil procedure. There is no basis or justification to dispense with Rule 1.525's requirements simply because this is an eminent domain case. Moreover, Barco's prior ignorance

of this rule was not excusable neglect as a matter of law. The decision in *Swann v. Dinan* and the trial court's Order should therefore be affirmed.

ARGUMENT

The version of Rule 1.525 Petitioner would ask this Court to construe ceased to exist as of January 1, 2006. The initial version of Rule 1.525 referenced by the *Barco* court below—the only version applicable to this appeal—reads 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.

For ease of reference, the version of the rule quoted above shall be referred to as "Rule 1.525." To the extent reference is made to the version of the rule as amended January 1, 2006, that version shall be referred to as "Rule 1.525 (2006)."

I. THE SECOND DISTRICT'S APPLICATION OF FLA. R. CIV. P. 1.525 PROPERLY REFLECTS THE RULE'S INTENT.

For the past five years, the Second District has properly applied a "bright line" interpretation of Rule 1.525. *See 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."); *Gulf Landings Association, Inc. v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003) (trial court's reservation

of jurisdiction is insufficient to satisfy Rule 1.525); *Lyn v. Lyn*, 884 So. 2d 181, 183 (Fla. 2d DCA 2004) (notwithstanding prematurely filed motion to tax fees, the requirement for a timely, postjudgment motion "[c]annot be relieved at the expense of the plain language of the rule and the rule's intent to create predictability and consistency in postjudgment requests for attorneys' fees."); *Swann v. Dinan*, 884 So. 2d 398 (Fla. 2d DCA 2004) (motion served after return of jury verdict but before entry of final judgment was improper); *Clampitt v. Britts*, 897 So. 2d 557 (Fla. 2d DCA 2005) (reservation of jurisdiction does not toll Rule 1.525's deadline); *Italiano v. Italiano*, 920 So. 2d 694 (Fla. 2d DCA 2006) (motion for temporary attorneys' fees and costs filed before entry of judgment was insufficient even when coupled with untimely postjudgment motion); *Gulf Shores, L.L.C. v. Riverwood Community Development District*, 927 So. 2d 246 (Fla. 2d DCA 2006) (even where parties stipulated to entitlement of fees, failure to timely file a motion after dismissal barred recovery of fees and costs).

This bevy of precedent reflects the sensible—and indeed, the most obvious—interpretation of Rule 1.525: that "after" a judgment is entered, a party must file an appropriate motion "within thirty days." A clear starting point coupled with a clear deadline in which to file fee motions was needed to remedy the confusion that existed before the rule's adoption. *Shipley v.*

Bellair Group, Inc., 759 So. 2d 28, 30 (Fla. 2d DCA 2000) ("The uncertainty created by this case law suggests that a rule of procedure concerning such motions might be appropriate."); Scott D. Makar, *Post-Judgment Motions for Attorneys' Fees: Time for a Bright-Line Rule*, 71 FLA. B. J. 14, 19 (Feb. 1997). The clarity this Court sought is achieved under the Second District's construction: litigants know precisely when the deadline begins to run and how long that deadline will last.

In the cited conflict now before this Court, the sole issue is whether or not Rule 1.525 permits a cost motion to be filed both "before" and "after" the entry of a judgment. Compare *Swann v. Dinan*, 884 So.2d 398, 399 (Fla. 2d DCA 2004) (motion filed six days after jury verdict but before entry of final judgment failed to comply with Rule 1.525) with *Martin Daytona Corp. v. Strickland Const. Services*, 941 So. 2d 1220, 1225 (Fla. 5th DCA 2006) (holding, without analysis, that fee motions "served prior to, or within thirty days after, rendition of the final judgment are timely under the rule."); *Byrne-Henry v. Hertz Corp.*, 927 So. 2d 66, 68 (Fla. 3d DCA 2006) (motion filed after oral dismissal but before service of written dismissal sufficiently met the "intent" of Rule 1.525); *Swift v. Wilcox*, 924 So. 2d 885, 887 (Fla. 4th DCA 2006) (holding that a party may file a fee motion before the entry of a judgment); *Norris v. Treadwell*, 907 So. 2d 1217, 1218 (holding that a party

may file a fee motion "as soon as entitlement is established"). As shown below, the Second District's interpretation stands alone as the correct one.

A. This Court's *Saia Motor* Decision Affirmed the Second District's Bright-Line Construction of Rule 1.525.

This Court has held that Rule 1.525 should be interpreted in a bright-line manner. *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598 (Fla. 2006). *Saia Motor* is particularly noteworthy because the Court was confronted with the same factual scenario as the conflict *sub judice*. The plaintiff in that case, seeking recovery of an estate's attorneys' fees in a wrongful death action, had timely filed a fee and cost motion after the entry of the trial court's original judgment (which was later vacated), but before the entry of the amended final, operative judgment. *Id.* at 601, n. 4. For whatever reason, the plaintiff failed to timely file a fee and cost motion within thirty days after the entry of the amended final judgment. *Id.* at 599.

Rejecting the plaintiff's argument that it had complied with the rule, this Court adopted the Second District's interpretation of Rule 1.525 (2001), overruling both the Third and Fourth District's contrary holdings:

> When we adopted rule 1.525, effective January 1, 2001, we established a bright-line time requirement for motions for costs and attorney fees which the Rules of Civil Procedure had not previously contained. Judge Altenbernd correctly made this point stating, in *Diaz v. Bowen*, 832 So.2d 200, 201 (Fla. 2d DCA 2002), that "[r]ule 1.525 was created to establish a bright-line rule to resolve the uncertainty surrounding the timing of

> these posttrial motions," and in *Gulf Landings*, 845 So.2d at 346, "It is no longer enough for parties to plead a basis for fees in their pretrial pleadings." We agree.

Id. at 600.

Petitioner's interpretation of Rule 1.525 would have this Court retreat from its holding last year by allowing unwritten exceptions to the rule's bright-line operation. Just as a reservation of jurisdiction within a judgment will not toll Rule 1.525's deadline, neither should a pre-judgment filing obfuscate the rule's plain requirement of a post-judgment motion.

B. Petitioner's Interpretation of Rule 1.525 Would Graft New Language Into the Text of the Rule.

A plain reading of the text of the rule compels the interpretation employed by the Second District.

> It is well-settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction. "The cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning." The same applies to rules of procedure. In addition, a court may refer to a dictionary to ascertain the plain and ordinary meaning. The goal is to "strictly construe provisions to create rules that are clear-cut and easy to apply."

Metcalfe v. Lee, 952 So. 2d 624, 627-628 (Fla. 4th DCA 2007) (internal citations omitted). Only where ambiguity exists should a court proceed to employ rules of construction. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1230 (Fla. 2004). As this Court reasoned in *Wilson v. Salamon*, a rule

of civil procedure can and should be interpreted in a "bright-line" fashion "that is easy to apply and relieves the trial court and litigants of the burden of determining and guessing…" 923 So. 2d 363, 368 (Fla. 2005).

Curiously, while Petitioner expends three pages of his brief discussing various committee member remarks and comments in connection with the 2006 amendment to Rule 1.525 (IB at pp. 20-22), Barco all but ignores the actual language of Rule 1.525 (2001). Turning to that language, the rule utilizes a common, well-understood word to trigger the running of its deadline: "after." "Any party… shall serve a motion within 30 days after filing of the judgment…" The word "after" has been defined to mean "Later, succeeding, subsequent to… Subsequent in time to," BLACK'S LAW DICTIONARY (6th Ed. 1990) p. 61, while the word "shall" is uniformly understood to be a mandatory directive. *Ulico Cas. Co. v. Roger Kennedy Constr., Inc.*, 821 So. 2d 452, 453 (Fla. 1st DCA 2002) (Rule 1.525's use of the word "shall" connotes a mandatory application). Thus, the rule clearly and unequivocally mandates a post-judgment motion—one that is served "after" the filing of a judgment.

Neither Petitioner, nor indeed any of the courts of the cases in conflict, have ever suggested these words or the phrase in which they are included are ambiguous, vague, or unclear. As a matter of law, then, there is

no justification for the Court to resort to committee correspondence that may be on the internet to glean the plain meaning of the rule. *Modder v. Am. Nat. Life Ins. Co. of Texas*, 688 So. 2d 330, 333 (Fla. 1997).

Nevertheless, Petitioner urges this Court to "construe" this unambiguous rule to permit filings both before and after the filing of a judgment. Had it been, as suggested by Petitioner (and by the appellate court in *Byrne-Henry*), the "intent" behind the rule's adoption to provide such an expansive, moving target, Rule 1.525 could have easily been drafted to read as follows: "Any party… shall serve a motion within 30 days before or after filing of the judgment…" That, however, is not the rule that litigants throughout this State proceeded under for five years.[4]

With all respect to the courts in *Swift*, *Martin Daytona*, *Byrne-Henry*, and *Norris*, it does not appear that any of them reconciled their rulings with the plain language of Rule 1.525. How can a pre-judgment motion satisfy a rule that explicitly requires service "after" the filing of a judgment? This question remains unanswered in every district but the Second. Judge

[4] Nor, apparently, was it the law in Florida even before the adoption of Rule 1.525. *See Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991) ("Proof of attorney's fees may be presented after final judgment, upon motion within a reasonable time."); *Martin Daytona*, 941 So. 2d at 1225 ("Prior to that time [of the rule's adoption], the courts generally required that any such motion be filed and served within a reasonable time after the judgment is entered.").

Altenbernd of the Second District, however, correctly seized upon the absurdity such a construction presents: "In light of this language, we decline to create the ambiguity that would undoubtedly flow from the concept of a premature postjudgment motion." *Lyn*, 884 So. 2d at 184. Petitioner urges this Court to imbue precisely the same ambiguity into Rule 1.525 (2001).

Only the Fourth District, in *Swift v. Wilcox*, made any attempt to justify the allowance of pre-judgment fee and cost motions with the language of Rule 1.525 itself. There, the court found that the rule's use of the preposition "within" served as an open-ended beginning point of the rule's filing requirement; thus, employing the court's reasoning, any motion filed at any time before the entry of a judgment can satisfy the rule's strictures. 924 So. 2d at 887.

However, the Fourth District's manipulation of this lone word is belied by a far more sensible construction: "within" simply modifies the term "30 days"—so, somewhere "within" the window of thirty days, one is required to serve the motion. That window of time is fixed to a temporal event: "after the entry of a judgment." Or, as the dissent in *Norris* analyzed it:

> The wording of rule 1.525 refers explicitly to the "filing of the judgment." The rule also uses "within," and not "before," connoting a closed period of thirty days. For example, two dictionary definitions of "within" are "[i]nside the limits or

> extent of in time, degree, or distance"; and "[i]nside the fixed limits of; not beyond." *Am. Heritage Dictionary* (2d college ed. 1985). The consequence of the majority's approach is that it revives the "reasonable time" problem, with trial courts now being faced with determining what is a reasonable time *before* the judgment.

907 So. 2d at 1220.

The *Norris* dissent's warning—that allowing pre-judgment fee motions will necessarily revive the original "reasonable time" problem Rule 1.525 was enacted to solve—is amply illustrated by the very cases in conflict with the Second District. Already a disagreement lurks among the First, Third, Fourth, and Fifth districts as to precisely how long before entry of a judgment one can serve a fee motion. The court in *Swift* would hold that a party can file a fee motion at any time before a judgment is entered, while the majority in *Norris* would limit it to whenever "entitlement" to fees and costs is established (which leaves unanswered yet further questions of what judicial acts, rulings, or occurrences will constitute "entitlement," or whether entitlement to certain fees but not others would trigger the rule). The Fifth District, following its *Martin Daytona* decision would appear to align itself with the Fourth District's *Swift* holding in this regard, while the Third District's *Byrne-Henry* decision could arguably be interpreted to support either position. It is clear these cases would bring the bench and bar full circle: we will once again be left to determine a "reasonable time" for pre-

judgment fee and cost motions under Rule 1.525 (2001). *Cf. Metcalfe*, 952 So. 2d at 628 ("The goal is to 'strictly construe provisions to create rules that are clear-cut and easy to apply.'").

More than that, the interpretation espoused by Petitioner (and adopted by the courts in *Swift*, *Martin Daytona*, *Byrne-Henry*, and *Norris*) violates several fundamental rules of construction. First and foremost, it tortures the actual language in the rule itself. In fact, it eviscerates the effect of the phrase, "after filing of the judgment" from the rule's text—this phrase becomes superfluous if cost motions may be filed before a judgment. *Kolie v. State*, 934 So. 2d 1226, 1231 (Fla. 2006) (provisions of a statute must be construed so that part is not rendered superfluous).

Secondly, as a preposition, the rule's use of the word, "within," only modifies the particular phrase to which it relates—"thirty days." *Ward v. State*, 936 So. 2d 1143 (Fla. 3d DCA 2006) (interpreting Jimmy Ryce Act, applying "last antecedent" grammatical rule of construction, which prohibits extending relative and qualifying words, phrases, and clauses to others more remote than the words immediately preceding), *see also Jacksonville Shipyards, Inc. v. Jacksonville Electric Authority*, 419 So. 2d 1092, 1094 (Fla. 1982) (in bond validation challenge, extent of city's pledge of non-ad valorem revenues under joint agreement was expressly limited by

preposition, "of JEA [Jacksonville Electric Authority]"). Yet, the *Swift* court stretched the single preposition "within" to alter the plain meaning of the entire rule! Furthermore, the expression of the one starting point for the deadline to file of fee motions—after entry of a judgment—necessarily excludes all other potential starting points. *Compare Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898 (Fla. 1996) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another.") *with Swift*, 924 So. 2d at 887 (absence of an express "earliest time" for filing fee motions should be construed to permit inclusion of pre-judgment fee motions).

For all of these reasons, this Court should continue its bright-line adherence to Rule 1.525 and quash the decisions in conflict with *Swan v. Dinan*.[5]

C. At the Time He Filed His Motion to Enforce Settlement Agreement, Petitioner Was Not Entitled to the Recovery of Any Costs.

[5] Petitioner's remaining argument in his First Point on appeal—that his pre-judgment motion should be likened to a premature notice of appeal—can be easily dispensed. A notice of appeal is a necessary, jurisdictional act. *State v. Blaney*, 722 So. 2d 220 (Fla. 5th DCA 1998). Courts rightly accept premature appellate notices to protect a litigant's access to the courts. Fee and cost motions, on the other hand, arise only when one has already litigated his case through a judgment or dismissal, and are, therefore, properly regulated by rules of civil procedure such as Rule 1.525.

It remains only to note that Barco's pre-judgment motion was critically flawed in another regard: he was not yet entitled to recover any of his expert's costs under the very mediated settlement agreement he sought to enforce. Again, Barco asks this Court to treat his Motion to Enforce Settlement Agreement (filed on November 15, 2004) as a timely filed post-judgment motion to tax costs in order to allow his recovery of an expert appraiser's costs in the underlying action. IB at pp. 22-26. But the mediated settlement agreement Barco sought to "enforce" in November of 2004 (and now relies upon on appeal) specifically excluded "attorney's fees, expert's fees, costs and expenses." (R. Vol. II, p. 228). Moreover, Barco had no legal right to recover his expert's fees and costs until the entire eminent domain proceedings had concluded. *Cf. Fla. Dept. of Transp. v. Decker*, 450 So. 2d 1220 (Fla. 2d DCA 1984) (reversing trial court's award of attorney's fees prior to conclusion of the condemnation proceedings).

The parties' mediated settlement agreement left several issues for the trial court to resolve—including the amount and propriety of attorney's fees, expert's fees, costs and expenses. Petitioner cannot be heard to argue, then, that his pre-judgment motion relating to an agreement that excluded costs can somehow be transformed into a properly filed post-judgment motion to tax costs.

II. EMINENT DOMAIN CASES ARE GOVERNED BY RULE 1.525 LIKE ALL OTHER CIVIL CASES.

As his second point on appeal, Petitioner urges the Court to consider the underlying statute in this case, Florida Statute section 73.091, which provided the basis of his entitlement to fees and costs. IB pp. 27-29. Barco argues this Court should treat eminent domain cases differently than other civil disputes. Or, as Barco puts it: "The constitutional mandate of reimbursement of cost [*sic*], expert fees and/or interest as 'full compensation' in eminent domain cases… cannot be abrogated or abridged by vague, confusing court rules or vacillating judicial decisions." IB p. 29.

None of the cases in the conflict certified to this Court made any mention of eminent domain proceedings; indeed, the case at bar is the only one that even arose in the context of an eminent domain action. Petitioner's second point, then, is completely beyond the scope of this Court's review. Regardless, it is an argument that holds no merit.

The mere fact that fees and costs are provided (or even mandated) by a legislative enactment does not obviate the requirement that a party comply with Florida's procedural rules. FLA. R. CIV. P. 1.010 ("These rules apply to all 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, and the legislature is responsible for enacting such law. 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."). *See also Florida East Coast Railway v. Martin County*, 171 So. 2d 873, 883 (Fla. 1965) (holding that costs in eminent domain proceedings should be determined "exactly as costs are assessed in all other actions.").

Indeed, in several of the cases where the appellate court strictly enforced Rule 1.525's deadline, a Florida statute directed the recovery of attorney's fees and costs. *See, e.g., ZC Ins. Co. v. Brooks*, --- So. 2d ---, 2007 WL 911843 (Fla. 4th DCA March 28, 2007) (insured requested fees as prevailing party in declaratory action against insurer; entitlement provided under Fla. Stat. § 627.428); *Swann*, 884 So. 2d at 398 (prevailing party sought fees and costs pursuant to a rejected proposal for settlement, Fla. Stat. § 768.79); *Gulf Landings*, 845 So. 2d at 344 (party sought fees pursuant to recorded property restrictions and Fla. Stat. § 720.305).

Nor are Rule 1.525's requirements (or the Second District's pronouncements about them) in any way "confusing," "vague," or "oscillating." Rule 1.525 establishes a set thirty-day filing deadline that begins to run from a point certain. Litigants have one month from the date a

judgment is filed to serve their fee and cost motions. The consistent application the Second District has given that rule provides the very clarity and procedural simplification for which the rule was enacted in the first place.

III. PETITIONER'S CONTENTION THAT THE FINAL JUDGMENT HE OBTAINED WAS NOT A "FINAL ORDER" WOULD ONLY MATTER IF RULE 1.525 REQUIRED A FINAL ORDER.

Petitioner makes a rather startling contention in his third point on appeal. Apparently, the Final Judgment that Barco drafted as a "final judgment," presented as such, and obtained from the trial court on December 2, 2004, was not really a final judgment—indeed, it "was actually not a final order," according to Petitioner. (IB at p. 32). Thus, Barco contends, Rule 1.525's thirty-day deadline never began to run.

Here as well, Petitioner hopes to modify the words of the rule to justify his failure to timely file his cost motion. If Rule 1.525 had been drafted to require a "final order" before the filing of a fee motion, Barco's argument might have merit. But that is not the rule under review. *Lyn*, 884 So. 2d at 184, n. 3 ("We note that rule 1.525 refers to a "judgment" and not a "final judgment" or a "final order.").[6] Since the Final Judgment was very

[6] Petitioner's underlying assertion that the Final Judgment was not a final order, as irrelevant as it otherwise may be, is also circumspect under Florida

clearly a "judgment," Barco was required to file his cost motion within thirty days after its entry.

IV. PETITIONER'S REMAINING POINTS ARE NOT THE SUBJECT OF ANY CONFLICT AMONG THE DISTRICTS, NOR DO THEY JUSTIFY DISTURBING THE TRIAL COURT'S RULINGS AFFIRMED BY THE SECOND DISTRICT.

A. Petitioner's Counsel Agreed with the Trial Judge that He Would File a Post-Judgment Fee Motion; Nothing in the Record Excuses His Failure to Do So.

In his fourth point on appeal, Petitioner begins by arguing, for the first time in this litigation, that a phantom "stipulation" was reached whereby his failure to comply with Rule 1.525 was purportedly waived by agreement of counsel during a hearing on December 2, 2004. Putting aside the fact that no such stipulation was ever reached, it is quite telling that Barco has never raised this "stipulation" issue before: not to the trial court at the August 22, 2005, hearing, not in his appeal before the Second District, not within his jurisdictional briefing before this Court. As such, it is completely improper to raise it here for the first time. *Sunset Harbour Condominium Ass'n, Inc. v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("[i]t is not appropriate for a

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law. *Caldwell v. Finochi*, 909 So. 2d 976, 978-979 (Fla. 2d DCA 2005) ("[t]he order on the Former Wife's petition for modification is a final order because it disposed of all the issues except for the ancillary issue of the amount of attorney's fees."); *Lyn*, 884 So. 2d at 184 (judgment reserving "ancillary issues" of attorneys' fees and request to modify shared parenting provision was a final order).

party to raise an issue for the first time on appeal.") (*citing Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638 (Fla.1999); *Dober v. Worrell,* 401 So.2d 1322 (Fla.1981)).

Putting that aside, the passing remarks Petitioner cites from the record only concerned the parties' understanding that the trial court would later "hold a hearing" in order to consider the matter of fees and costs. No one even mentioned Rule 1.525, or the deadline for Barco to file his motion, or the possibility of extending that deadline. *Cf. Travelers Ins. Co. v. VES Service Co.*, 576 So. 2d 1349, 1350 (Fla. 1st DCA 1991) ("A stipulation... must be carefully examined to determine whether the language used actually discloses a clear, positive, and definite stipulated fact."); *Southern Heritage Hardwood Flooring, Inc. v. Sunstate Import Export, Inc.*, --- So. 2d ---, 2007 WL 704043 (Fla. 2d DCA 2007) (review of record showed no stipulation was ever reached).

Quite the contrary, it was Petitioner's counsel who affirmed in open court during the December 2, 2004, hearing that Barco would file a post-judgment motion:

> MR. JACOBS [counsel for the School Board]: I would ask for clarification on what point we are reserving. Because, your Honor, we're here today, and all the parties—

> THE COURT: They 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?
>
> MR. GAINES [counsel for Barco]: Yes, sir.

(R. Supp. p. 325).

The trial court directed Barco to "make a written motion" now that a final judgment was being entered. Barco's counsel indicated he would do so. Yet, Barco continues to argue now that he need not have complied with this representation (or the time strictures of Rule 1.525) because the motion he served weeks before this hearing should still have sufficed—notwithstanding the statement his counsel made to the trial judge. None of the cases certified to be in conflict concerning pre-judgment fee motions had such a singularly unique representation made by counsel. Barco's attorney affirmed that he would file a separate motion after the entry of the judgment. For this reason alone, the Court should simply affirm the trial court's Order outright based on the representation (and subsequent failure) of Barco's counsel. *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).

B. Barco Never Proffered Any Facts to Establish His Neglect ("Excusable" or Otherwise) for the Trial Court to Consider.

In the second sub-part of his fourth point on appeal, Barco attempts to invoke Florida Rule of Civil Procedure 1.090(b)(2). That rule reads:

> When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion… (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect, but it may not extend the time for making a motion for new trial, for rehearing, or to alter or amend a judgment; making a motion for relief from a judgment under rule 1.540(b); taking an appeal or filing a petition for certiorari; or making a motion for a directed verdict.

To his credit, Barco does not contend that he ever actually filed a motion for enlargement of time within the thirty days allotted under Rule 1.525. In fact, Barco never filed a motion for an extension at all.[7] Nor does Petitioner seriously argue that there was ever any "excusable neglect" on his part. Instead, Barco places the blame squarely on the shoulders of the School Board's attorneys—for not informing him that he was required to comply with the rules of civil procedure. IB at p. 36.

Having admittedly failed to file his Motion to Tax Costs within 30 days after the entry of the Final Judgment he had obtained, it was incumbent

[7] According to Petitioner, he made three *ore tenus* motions to extend the deadline, all during the August 22, 2005, hearing, some eight and a half months after the December 2nd Final Judgment was entered. IB at p. 36.

upon Barco to demonstrate some fact or circumstance that would excuse this failure. At a minimum, Rule 1.090(b)(2) contemplates some proffer of evidence by the moving party. However, from a review of the transcript in the record and the arguments in his Initial Brief, it is plain that Barco's admitted neglect in this case was entirely the result of his failure to recognize the operative language of Rule 1.525. Indeed, Barco never attempts to describe any facts that would justify his late filing other than to admit he was unaware that it was an issue at all.

Florida courts take a narrow view of what circumstances will constitute "excusable neglect" for purposes of extending Rule 1.525's deadline. In *Lyn*, the Second District adopted the Fifth District Court of Appeal's interpretation of "excusable neglect" under Rule 1.090 to hold:

> In general, excusable neglect cannot be based upon an attorney's misunderstanding or ignorance of the law, but instead must relate to a breakdown in mechanical or operational practices or procedures within the attorney's office. [] Here the Wife's oversight was simply a matter of her counsel's misunderstanding or lack of knowledge of the requirements of rule 1.525.

Lyn, 884 So. 2d at 185 (Fla. 2d DCA 2004) (*citing Carter v. Lake County*, 840 So. 2d 1153, 1158 n. 6 (Fla. 5th DCA 2003)), *see also Spencer v. Barrow*, 752 So. 2d 135, 138 (Fla. 2d DCA 2000) ("Inadvertence or mistake of counsel or ignorance of the rules does not constitute excusable neglect.").

Affirming a trial court's decision to strike an untimely fee motion served pursuant to Fla. R. Civ. P. 1.442, the Third District succinctly stated:

> There is no rule or case law which excuses the Defendant's obligation simply because the Court has the right to reserve jurisdiction to award fees if it acts within the thirty (30) days of the verdict. In other words, the Defendant had the ability to comply with the law and simply failed to do so.

Kendall Country Estate, Inc. v. Pierson, 826 So. 2d 1002, 1004 (Fla. 3d DCA 2001).

Barco's claimed prejudice—that he was unaware of the School Board's "untimeliness defense"—can only arise because Barco either misunderstood or was unaware of Rule 1.525's strictures and his obligations under the law. But, as *Lyn*, *Carter*, and *Spencer* instruct, ignorance of the rule is not "excusable neglect" justifying an enlargement of time. Barco was fully capable of complying with the rule. He does not suggest otherwise. For the trial court to have simply ignored Barco's failure (for no demonstrable reason) would turn Rule 1.525 on its head.

Petitioner nevertheless suggests that the trial court committed reversible error by denying his request "to file and/or present a detailed motion to enlarge time." IB. at p. 37. When or where, exactly, the trial court actually denied this request, is not apparent from the record or from Barco's Initial Brief. Also absent from Petitioner's argument in this regard

is any indication that Barco ever proffered what evidence or facts he intended to present that would have shown his "excusable neglect." *Contra State, Dept. of Transportation v. Southtrust Bank*, 886 So. 2d 393 (Fla. 1st DCA 2004) (extension granted under Rule 1.090 upon filing of written motion accompanied by secretary's affidavit demonstrating support staff filing error). Nor did Barco proffer anything with the trial court (or the Second District Court of Appeal) that might have revealed some excusable neglect at any time after the August 22, 2005, hearing. Even now, in his appeal before the Florida Supreme Court, one is left to wonder just what Barco contends the "neglect" was (other than his failure to recognize the thirty-day deadline of Rule 1.525). There being none, the trial court correctly exercised its discretion to deny Barco's *ore tenus* requests for an enlargement of time under Rule 1.090.

Nothing within the cases cited by Barco, *Wentworth v. Johnson*, 845 So. 2d 296 (Fla. 5th DCA 2003) or *Verysell-Holding LLC v. Tsukanov*, 866 So. 2d 114 (Fla. 3d DCA 2004) would support overruling that exercise of discretion. In *Wentworth*, the trial judge mistakenly concluded that Rule 1.525's passage had removed all discretion to consider extending its deadline, even when requested pursuant to Rule 1.090. *Id.* at 297. In the case at bar, however, the trial court never held that it could not consider

Barco's *ore tenus* motion for an extension of time. Rather, the court weighed the circumstances presented by Barco's attorneys and rightly construed them in line with Florida jurisprudence as being insufficient to warrant an extension under Rule 1.090. (R. Supp. pp. 295-296).

The *Verysell* opinion is completely inapposite. That case did not even involve Rule 1.525, but instead concerned the application and timeliness of filing a motion for forum non conveniens under Fla. R. Civ. P. 1.061(g). 866 So. 2d at 114. The appellate court affirmed the dismissal of the action, but based its holding solely on the fact that a trial court is free to consider a forum non conveniens issue *sua sponte*, regardless of the filing (or timeliness) of a motion. *Id.* at 116 ("Based on our disposition of the above issue, we do not need to address whether the trial court abused its discretion by granting the defendants' ore tenus motion for enlargement of time…").

In sum, Petitioner asks the Court to stray beyond the issues (and, indeed, the rule of civil procedure) actually certified to be in conflict. He has offered nothing for this Court to consider that would support overruling the trial court's exercise of discretion in denying his ore tenus request for enlargement of time. For this reason as well, the trial court's Order should be affirmed.

CONCLUSION

For all of the reasons set forth above and in Respondent's Jurisdictional Brief, the Court should resolve the certified conflict in favor of the Second District Court of Appeal, affirm the decisions in *Barco v. School Board of Pinellas County*, 946 So. 2d 1244 (Fla. 2d DCA 2007) and *Swann v. Dinan*, 884 So.2d 398, 399 (Fla. 2d DCA 2004), and affirm the trial court's Order denying Petitioner's Motion to Tax Costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail and Facsimile to Samuel R. Mandelbaum, Esq., of MANDELBAUM, FITZSIMMONS, HEWITT & METZGER, P.A., P.O. Box 3373, Tampa, Florida, 33601, Facsimile: (813) 221-8558, on this __29__ day of May 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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