IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

PAUL J. BARCO,

Petitioner,

vs.

THE SCHOOL BOARD OF
PINELLAS COUNTY,

Respondent.
_____/

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

INITIAL MERIT BRIEF OF PETITIONER

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INTRODUCTION

This appeal arises from an eminent domain action filed by Respondent School Board for Pinellas County ("School Board") in the Sixth Judicial Circuit for condemnation of Petitioner Paul Barco's ("Mr. Barco") residential property (R1-12). Under review is an order denying Mr. Barco's motion for taxable costs and appraiser fees per F.S. §73.091 as "untimely," which motion was filed 17 days *before* entry of a judgment. The Second DCA later affirmed the denial of his costs as "untimely" filed under the initial version of Fla.R.Civ.P. 1.525 in Barco v. School Board, 946 So.2d 1244 (Fla.2nd DCA, 2007), citing its precedent of Swann v. Dinan, 884 So.2d 398 (Fla.2d DCA, 2004) (motions for costs and fees untimely when filed *before* filing of final judgment). Barco and Swann were certified by the Second DCA as directly conflicting with all four other district courts which uniformly hold "that motions served *prior to* entry of the judgment were *timely*." [1]

The Record on Appeal herein contains **3 volumes** numbered in consecutive order, comprised of two volumes of pleadings, attachments and other documents (*Volumes 1 and 2*), and a third volume containing transcripts of hearings (*Supplemental Volume*). References in this brief to citations from the record are designated by the letter **"R,"** followed by the particular record page number.

[1] Martin Daytona v. Strickland, 941 So.2d 1220 (Fla.5th DCA 2006); Byrne-Henry v. Hertz, 927 So.2d 66 (Fla. 3d DCA 2006); Swift v. Wilcox, 924 So.2d 885 (Fla. 4th DCA 2006); and Norris v. Treadwell, 907 So.2d 1217 (Fla.1st DCA 2005).

STATEMENT OF THE CASE & FACTS

In March 2003, the School Board filed its petition in eminent domain to take Mr. Barco's residential property adjacent to the Melrose Elementary School in South St. Petersburg, which property was owned by his family for almost a century (R1-12, 316). Two years earlier, on October 22, 2001, the School Board approved a resolution *inter alia* to proceed with the condemnation of the Barco property to facilitate construction of a new parent pick-up lane and staff/parent parking lot for the Melrose Elementary School (R6-11). According to the School Board's 2003 petition, it needed to condemn Mr. Barco's property since the U.S. District Court had ordered the School Board to either construct three new elementary schools or replace existing facilities in South Pinellas County for "the public purpose of eliminating the vestiges of discrimination from the dual school system formerly operated in Pinellas County" (R3-5). Along with its petition, the School Board filed a Declaration of Taking per F.S.§ 74.031 with a "good faith estimate of the value of [the Barco property], based upon a valid appraisal, is $14,000" (R13).

Mr. Barco thereafter filed his Answer and Defenses on May 15, 2003 which denied condemnation was necessary and also contested the validity of the appraisal upon which estimated value of $14,000 was based. His Answer alleged the School Board had abused its discretion and acted in bad faith by: (a) "failing to negotiate in good faith for the acquisition of the property prior to the filing of this action;"

(b) "artificially depressing the true market value of the Barco property by causing the structure formerly existing on the site to become the target of unjustified code enforcement actions by the local municipal authority which ultimately resulted in the demolition of the family homestead and substantially reduced the amount of compensation which [the School Board] would otherwise have to have paid for the acquisition of this property;" (c) "failing to adequately consider alternative sites or site plans;" (d) "attempting to condemn more property than is actually necessary;" (e) "through its premature announcement of the project and it pre-condemnation activities, has caused blight and the artificial depression of market value of properties within the project area and the surrounding neighborhoods, resulting in an estimate which is well below actual market value, [and entitling Barco] to full compensation based on the value of his property . . . but for the actions of [the School Board], including valuation of the structure formerly on site" (R47-48). For relief in his Answer, Mr. Barco requested "attorneys fees, expert costs and such other costs and expenses as the Court allows;" for the court to deny the School Board's efforts to condemn his property; and alternatively, to empanel a jury to determine full compensation for the taking (R48-49).

In coming months, both parties conducted a significant amount of discovery through interrogatories, requests for production and depositions (R78-103). The Order of Taking hearing was scheduled for October 9, 2003 (R110).

However, at the "taking hearing" of October 9, 2003 before Pinellas Circuit Judge John Lenderman, Mr. Barco withdrew his objections to the School Board's taking (R164-165). His counsel withdrew opposition, explaining his view that the School Board had virtually unbridled discretion as a condemning authority, and his property was in the front line of the proposed parking expansion area (R307).

At that October 2003 hearing, School Board counsel asserted that "Mr. Barco had been offered a number of times the appraised value of the property," which were not accepted; According to the School Board's counsel, Barco's "counter-offers were so far in excess that the School Board declined those offers and we reached an impasse" (R304-5). School Board counsel further mentioned that its expert real estate appraiser, Mr. Churuti (sic), would have opined that day the Barco property "is worth $14,000" (R305). Notwithstanding, it was noted at that hearing that the agreed taking order is "completely without prejudice" to determining the amount of full compensation for Mr. Barco, contesting Churuti's (sic) appraisal and offering his own appraisal as to value (R306). In response, Mr. Barco's counsel questioned whether the School Board had actually made a diligent effort in engaging in negotiations in good faith with Mr. Barco (R308). For this reason, Mr. Barco's counsel advised the trial court that his client was contesting the School Board's valuation of his property, seeking his own experts on valuation, and requesting a jury trial on valuation (R309).

At the conclusion of the October 9, 2003 hearing, Judge Lenderman ordered the parties to mediation before the end of February 2004, and to set discovery timetables as well (R309-311; 208-209).

Mediation proceeded as scheduled on February 17, 2004; There the parties reached a resolution on the value of the Barco property, subject only to the final approval of the School Board Authority (R228-232). According to the parties' signed "Mediated Settlement Agreement," the School Board agreed to pay Barco the value of $31,612.50 for his property, exclusive of attorney's fees, expert fees, costs and expenses (R228). The Court would retain jurisdiction, the parties agreed, "solely as to the matter of [Barco's] attorneys fees, expert's fees, costs and expenses" (R228). Counsel for the School Board and Mr. Barco would, the agreement provided, "jointly submit to the court for signature a mutually approved form of final disposition of this matter as soon as practical hereafter" (R228).

The compensation was to be paid to Mr. Barco within 30 days of receipt of the final disposition from the Court (R228). If the School Board Authority's approval was not received by March 10, 2004, the agreement further provided for the settlement to be null and void (R229). The mediator forwarded the Mediation Results Report to the Court, advising a result of a "Full Settlement, subject to school board authority approval by March 10, 2004" (R231-232). Fortunately the settlement was duly approved by the School Board as provided (R321-322).

Thereafter, on July 13, 2004, Mr. Barco's counsel forwarded a detailed and itemized list of his costs incurred in the case totaling $12,351.21 per F.S. §73.091 [2] (R264-280). Attached to his list was a stack of invoices including the time records for Mr. Barco's real estate appraisal experts, numerous court reporters and transcripts, governmental document charges, service of process and prorated property tax (R264-280).

However, by nine months after the February 2004 mediation, Mr. Barco had still not received payment of $31,612.50 for his property taken the year before by the School Board in October 2003, nor had he received any sums for attorney's fees, expert fees and/or costs (R317-318, 225). Accordingly, on November 15, 2004, Mr. Barco filed a "Motion to Enforce Settlement, with Request for Interest, Attorneys Fees & Costs" (R224-226). In addition to the parties' final and binding settlement for the taking of his property for $31,612.50, Mr. Barco's motion advised that the parties had reached a post-mediation settlement of $6,851.53 for his attorneys fees (R224). As grounds for enforcement, Mr. Barco stated: "To date, despite numerous demands, the Plaintiff has failed to tender the stipulated

[2] F.S.§ 73.091(2) provides: "At least 30 days prior to a hearing to assess costs under this section, the condemnee's attorney shall submit to the condemning authority for each expert witness complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred, and a copy of any fee agreement which may exist between the expert and the condemnee or the condemnee's attorney."

settlements as agreed above;" "Although the [School Board] had ascented to such agreement to settle, it has wrongfully refused to conclude the settlement" (R225). Regarding costs and appraiser fees, Mr. Barco asserted in his motion of November 15, 2004**:**

> "5. In this proceeding the Plaintiff and his counsel expended the sum of $12,321.21 for taxable costs pursuant to F.S. § 73.091.
>
> 6. Notwithstanding, the parties are unable to agree to the amount of an award for taxable costs to Defendant pursuant to F.S. § 73.091, and submit the issue to this Court for resolution." (R225).

For relief, Mr. Barco requested entry of a judgment for the agreed $31,612.50 value of his property, $6,851**.**53 for his attorneys fees per F.S.§73.092, and "the sum of $12,321.21 for taxable costs pursuant to F.S. § 73.091, together with all interest at the statutory rate from commencing February 17, 2004" (R225).

Seventeen (17) days after his motion for costs was filed, on December 2, 2004 (almost 10 months post-mediation), a hearing was held on Mr. Barco's motions before Senior Pinellas Judge Robert Beach (R315-337). Mr. Barco's attorney advised Judge Beach of the settlement conditions reached at mediation, that "the School Board had approved the settlement going way back" and that "Mr. Barco has never received a dime yet, and it's going on 10 months" (R316-317). Noting he "really needs to be paid," his counsel urged the trial court "to force the School Board to pay Mr. Barco" who's been "without his property for over a year now" (R317-318). His attorney mentioned that the School Board's former counsel

David Corey had been attempting to finalize things, although they hadn't gotten anything done since attorney Corey departed from his law firm (Bricklemeyer, Smolker & Bolves, P.A.) in July 2004 (R318). Maintaining "the School Board is in breach of the settlement agreement," Mr. Barco's counsel urged the court to enter judgment on this settlement (R318). In addition, Mr. Barco requested *additional* attorney's fees and costs for services in connection with prosecuting the motion to enforce [3] (R319).

The School Board's latest and new counsel, Greg Jacobs, Esq., responded at the hearing that the "problem" causing the delay was that the owners (i.e. Mr. Barco) "have insisted that costs be included as part of the settlement final judgment," although the settlement stipulation provided for the court to determine those costs (R322). Notwithstanding, acknowledging "we're not disputing attorneys fees," attorney Jacobs did "agree to attorneys fees" of $6,851.53 for past services (R322-4, 331).

In granting Mr. Barco's motion to enforce, Judge Beach repeatedly directed the School Board to "go ahead and pay him" (R322, 323, 325, 329, 332, 335): "I am ordering his money be paid in 10 days" (R329, 333). The court was

[3] Fla.R.Civ.P. 1.730(c) states with regard to a settlement reached at mediation—"[i]n the event of any breach or failure to perform under the agreement, the court upon motion may impose sanctions, including costs, attorneys' fees, or other appropriate remedies. . . ."

concerned about the fact that "this man is not getting the use of his money, and he should get it" (R325).

Mr. Barco's counsel noted that the parties are reserving jurisdiction on the issues of costs, prejudgment interest and attorneys fees (R334). Regarding costs, he pointed out**:**

> "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." (R334).

Granting Mr. Barco's motion to enforce at the December 2, 2004 hearing, Judge Beach entered a "Final Judgment with Disbursement Orders to Clerk" as drafted by School Board counsel (R233-236). In the judgment the court awarded the agreed property value of $31,612.50 to Mr. Barco in full satisfaction of his claims for the taking, *exclusive* of all costs and attorneys fees; $6,851**.**53 for his attorneys fees per F.S.§73.092(1); and, confirming the order of taking for the public purpose of expansion of a public school (R233-236). The judgment included a "reservation of jurisdiction" clause**:**

> "11. The Court reserves jurisdiction for determination of any and all issues associated with determining reasonable costs, interest and additional attorney's fees pursuant to Section 73.092(2), Florida Statutes." [R236].

Three months later, on March 22, 2005, Mr. Barco filed his *renewed* Motion to Tax Costs, reiterating his original motion per F.S.§73.091 (R248-250). [4] The costs sought were for the same $12,321.21 as requested in his initial "Motion to Enforce Settlement, with Request for Interest, Attorneys Fees & Costs" filed on November 15, 2004 (R224-226), except for the addition of a single $60 court reporter bill for covering the December 2nd enforcement hearing (R249).

On August 22, 2005, a hearing was later held on Mr. Barco's motion for costs before Judge Walt Logan (R282-298). Learning from speaking with School Board counsel that "everything would be contested," Mr. Barco's attorney suggested they initially present the testimony of defense appraisal expert (R285).

School Board counsel immediately objected based on the "untimely filing of the motion to tax costs pursuant to Rule 1.525," asserting a motion "must be filed within 30 days of entry of the final judgment." According to the School Board counsel, the motion for costs was filed about three months after the final judgment, before that having mentioned to Mr. Barco's attorney**:** "I haven't seen your motion yet" (R285). Notwithstanding, the School Board's counsel admittedly never filed a motion to strike the motion for costs, insisting there "is no requirement in the rule that we move to strike" (R294).

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[4] Actually Mr. Barco's original motion for those same taxable costs of $12,321.21 (except for the subsequently-incurred $60 court reporter bill) was initially filed per F.S. § 73.091 on November 15, 2004, 17 days before entry of judgment (R225).

To the contrary, Mr. Barco's counsel responded that he "didn't realize this [untimeliness argument] was an issue until this morning [of the hearing]," asserting that his initial, earlier request for costs was timely (R288). The original motion for costs (of $12,351.21) per F.S.§73.091, Mr. Barco's counsel pointed out, was contained in paragraphs 5 and 6 of the November 15, 2004 motion to enforce settlement and occasioned due to "all kinds of delay and obfuscation" (R288-289). In any event, Mr. Barco's counsel advised the court, "Judge Beach could have granted [Mr. Barco's] motion for costs in the amount of $12,351.21" since Mr. Barco presented those costs already at the prior hearing of December, 2004 (R296-7).

As the August 2005 hearing proceeded, Mr. Barco's counsel made 3 separate ore tenus motions for enlargement of time per Rule 1.090 (R291, 292, 295). If the court required a written motion, he requested additional time to file a motion to enlarge demonstrating extraordinary circumstances and excusable neglect (R295-6). However, Judge Logan denied the motions to enlarge, believing they had to be written (R295-6). The court also denied the motion for costs as untimely (R296).

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" (R256).

A month later, on October 6, 2005, Barco filed his timely Notice of Appeal to the Second DCA from the order denying costs and expert fees (R257-258).

Subsequently, on January 19, 2007, the Second District affirmed the denial of costs for untimeliness, Barco, 946 So.2d at 1244, citing Swann, 884 So.2d at 398 (motions for costs & fees are untimely when filed *before* final judgment). However, in this case the Second DCA certified "direct conflict" of its decisions with those of all four other districts holding otherwise— Martin Daytona, 941 So.2d at 1225 (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*"); *accord*, Byrne-Henry, 927 So.2d at 68; Swift, 924 So.2d at 887; and Norris, 907 So.2d at 1218.

Also on January 19, 2007, the Second District filed an order denying Appellant's motion for attorneys fees and costs on appeal that had been requested per F.S. §73.091, §73.092 and §73.131(2).[5]

[5] F.S.§73.091 provides: "The petitioner [condemnor] shall pay attorney's fees as provided in s. 73.092 as well as all reasonable costs incurred in the defense of the proceedings in the circuit court, including, but not limited to, reasonable appraisal fees . . .;" Moreover, F.S.§73.131(2) states: "The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the lower court shall be affirmed." "Attorney's fees incurred in litigating entitlement to recover costs are authorized by Section 73.092 . . . because a post-judgment costs hearing is included within 'other supplemental proceedings' contemplated by that provision." State DOT v. Lockhart, 909 So.2d 590, 592 (Fla.5th DCA, 2005); Amoco v. DOT, 765 So.2d 111 (Fla.1st DCA, 2000); Bay III v. DOT, 873 So.2d 625 (Fla.2nd DCA, 2004) (reversal of order denying attorneys fees and costs of experts during post-trial proceedings); Enterprising v. DOT, 882 So.2d 1014 (Fla.2nd DCA, 2004).

SUMMARY OF ARGUMENTS

1. Florida's four district courts have correctly held that under both the initial and revised Rule 1.525 motions for costs filed before judgment are timely, as the rule 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*." The Second District's lone stance to the contrary is repugnant to expressed rule-drafting intent and the plain meaning of words. Even if Petitioner's motion was prematurely served, it ripened and matured upon entry of final judgment as do prematurely-filed notices of appeal.

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.

3. As the December 2, 2004 judgment left unresolved substantial components of compensation to the Petitioner and significant judicial labor remaining, said judgment was not a "final order" but rather only a preliminary order. Accordingly, any time-bar of Rule 1.525 was inapplicable here.

4. Even if Petitioner's motions for costs were arguably untimely, the trial court erred in failing to enlarge the Petitioner's time to serve a motion. The party's mutual agreement and stipulation to defer ruling and reserve jurisdiction on cost to a later hearing was a valid enlargement of time. Moreover, the trial judge wrongfully denied Petitioner's three *ore tenus* motions to expand time to file his motion for costs under the misimpression that written motions are mandatory under Rule 1.090(b).

ARGUMENTS:

POINT I

THE SECOND DISTRICT IN BARCO AND SWANN HAS ERRONEOUSLY CONSTRUED THE INITIAL VERSION OF RULE 1.525 AS CREATING ONLY A NARROW 30-DAY "WINDOW OF OPPORTUNITY" FOR SERVING MOTIONS FOR COSTS & FEES, SINCE *BOTH* THE INITIAL AND REVISED VERSIONS OF RULE 1.525 ESTABLISH ONLY THE *LATEST POINT* AT WHICH A PARTY MAY SERVE A MOTION FOR COSTS AND/OR FEES, AND MOTIONS SERVED *PRIOR TO* ENTRY OF JUDGMENT ARE INDEED TIMELY.

Until 2000, a party needed to only file a motion for costs and attorneys fees "'within a reasonable time,' notwithstanding that the litigation of the main claim may have been concluded with finality." Stockman v. Downs, 573 So.2d 835, 837 (Fla. 1991); Martin Daytona, 941 So.2d at 1225; Norris, 907 So.2d at 1218. Up to that time there was "no rule governing the timing or content of such a motion for fees and costs." Shipley v. Belleair, 759 So.2d 28, 29 (Fla. 2000). The lack of certainty on this point led to inconsistencies and unreasonable delays as to what a "reasonable" time period is for filing such motion. Shipley, 759 So.2d at 30. As characterized in Martin Daytona, 941 So.2d at 1225**:** "the reasonable time rule was vague and produced inconsistent results in similar cases." *See also*: Carter v. Lake City, 840 So.2d 1153 (Fla. 5th DCA, 2003).

Accordingly, on October 5, 2000 this Court adopted Florida Rule of Civil Procedure 1.525 for "establishing the time for serving motions for attorneys' fees and costs." Amendments to Florida Rules of Civil Procedure, 773 So.2d 1098 (Fla.2000). The initial version of that rule, effective January 1, 2001, provides**:** "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion ***within 30 days after*** *filing of the judgment.*" Rule 1.525 was adopted "to eliminate the reasonable time rule and establish a time requirement to serve motions for costs and attorney's fees." Martin Daytona, 941 So.2d at 1225.

However, "requiring the motion to be served **within 30 days** still caused confusion because it was *difficult to discern* whether the language constituted a *deadline* or a *narrow window of opportunity*." Martin Daytona, 941 So.2d at 1225 (Emphasis added). "[I]n order to alleviate the confusion" on whether this constituted an outside deadline or a narrow 30-day window of opportunity, on December 15, 2005, the rule "was amended effective January 1, 2006 to provide that the motion should be served *no later than* 30 days after the judgment." Martin Daytona, 941 So.2d at 1226; The revision of Amendments to the Fla. Rules of Civil Procedure, 917 So.2d 176, 186 (Fla. 2005) sets forth**:**

> Rule 1.525. MOTIONS FOR COSTS & ATTORNEYS' FEES
>
> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion ~~within~~ no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Hence, this Court changed the language of Rule 1.525 from "*within* 30 days" after judgment over to "*no later than* 30 days" after judgment. *See*: In re Amendment, 917 So.2d at 186.

(a) The Second DCA is the Lone District Viewing Rule 1.525 as Having a Very Narrow "Window of Opportunity" to File —

Four of Florida's five district courts of appeal have all uniformly held that the initial version of Rule 1.525 sets only the "latest point" for serving a motion (i.e. beyond 30 days from time judgment filed), and that *pre*-judgment motions are indeed timely and proper. For example, 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 (motion for costs *timely* where served two days *before* service of notice of voluntary dismissal). And in Norris, 907 So.2d at 1218-9, the First District held that Rule 1.525 merely "establishes *the latest point* at which a prevailing party may serve a motion for fees and costs" (motion for costs and fees *timely filed* after announcement of jury verdict but *before judgment* was filed). Similarly, the Fourth District in Swift, 924 So.2d at 888, found a motion for attorneys fees "served *before* entry of a final judgment" to be *timely*.

Conversely, the Second DCA in Swann held the initial version of rule 1.525 provides only a very short "window of opportunity" between filing of a judgment and 30 days thereafter to serve a motion for costs. 917 So.2d at 399. In Swann, Ms. Dinan filed her motion for fees and costs after a favorable jury verdict was announced but before a final judgment was actually filed. For this reason, the Second DCA vacated a previously-awarded $17,483 judgment for fees and costs since it was "untimely filed" by Ms. Dinan *before* judgment.

In this case, Mr. Barco served his original motion for costs of $12,351.21 on November 15, 2004 (R224-226), only 17 days *before* entry of judgment enforcing the parties' settlement agreed to 10 months earlier. After mediation but months before the enforcement hearing at which judgment was entered, Mr. Barco's counsel forwarded per F.S.§73.091 on July 13, 2004 a detailed, itemized list of his costs incurred in the case totaling $12,351.21.[6] Attached to the itemized list was a stack of invoices including the time records for Mr. Barco's real estate appraisal experts, numerous court reporters and transcripts, governmental document charges, service of process and prorated property tax (R264-280).

[6] F.S.§ 73.091(2) provides: "At least 30 days prior to a hearing to assess costs under this section, the condemnee's attorney shall submit to the condemning authority for each expert witness complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred, and a copy of any fee agreement which may exist between the expert and the condemnee or the condemnee's attorney."

By following Swann in denying Mr. Barco's costs, the Second DCA had seriously misconstrued both the initial and revised versions of Rule 1.525. As soundly reasoned by Florida's four other district courts on this issue, the filing of Mr. Barco's November 15, 2004 initial motion for costs of $12,351.21 was well within the "outside deadline," and indeed timely.

(b) Traditional Principles of Judicial Construction and Drafting Committee Intent Readily Support the Conclusion that Pre-Judgment Motions are Timely —

In interpreting the meaning and intent of a rule of procedure or evidence it's appropriate to resort to a drafting committees' notes, memoranda and/or commentaries. For example, in Tampa Bay Shipbuilding v. Cedar Shipping, 320 F.3d 1213, 1217-1218, 1222-1223 (11th Cir., 2003), the Eleventh Circuit in a Florida-based case discussed the utilization of advisory committee notes as well as a memorandum from the an Advisory Committee to the Chair of the Standing Committee on Rules of Practice & Procedure to interpret an amendment. Similarly, in Wilson v. Salamon, 923 So.2d 363, 365 (Fla. 2005), this Court looked to a civil procedure committee note to a rules revision in construing Fla.R.Civ.Pro. 1.420(e), citing "the underlying purpose of committee notes, which is to avoid confusion over the purpose of the rule."

A careful review of this Court's on-line record archives for Rules Cases reveals the expressed intentions of the original drafters of Rule 1.525 and the Civil

Procedure Rules Committee history. Those records clearly reflect that the *initial* version of Rule 1.525 (2000) established only an "*outside* date or deadline" for service of motions for costs & fees, and it was never the Committee's intent to prescribe "a *beginning* date for filing of motions." Specifically, in his submitted Comments to this Court on the 2005 revisions to the Small Claims Rule (per the "*no later than* 30 days" change), Bruce Berman, former Chair of the 2000 Civil Procedure Rules Committee that had drafted the *initial* Rule 1.525,[7] stated—

> "The undersigned, a 20-year member and former two-term chair of the Civil Procedure Rules committee, who served on the Committee when it proposed the 2000 amendment to add the new rule 1.525, believes that the Committee's intent in making such proposal, as well as the Court's intent in its decision to adopt the new rule were both premised upon the value of prescribing an *outside* date or deadline, after which no such motion could be entertained. Just as the 'reasonable time' limitation prescribed a deadline, although an uncertain one, this new rule defined that deadline in terms over which presumably no one could argue. In so doing, the Court could avert collateral litigation over what is or is not 'reasonable' under the prior standard established under the pre-*Sun Harbor* case law. And by defining a deadline in reasonable proximity to judgment, the Court could also define an end to post-judgment litigation (the ostensible purpose of the prior, albeit less definitive, limitation).
>
> The undersigned does not believe, however, that, in better defining the deadline for post-judgment determination of fees and costs, it was ever the intent of either the Committee or this Court, to prescribe a *beginning date* for filing of motions for such relief. Nor does the undersigned believe that it was ever the intent of the Committee or of this Court to prohibit or nullify a motion filed too early, with the effect

[7] See: *In re Amendments to Fla. Small Claims Rules*, No. SC05-146; "RESPONSE AND COMMENT OF BRUCE BERMAN ON RECOMMENDATION TO TWO-YEAR CYCLE OF SMALL CLAIMS RULES COMMITTEE FOR NEW RULE 7.175" (pages 2-3), docketed February 9, 2005.

> of depriving a part of its rights to seek fees. Yet, the language of Rule 1.525 as adopted ('within 30 days after filing of the judgment') has caused courts applying the rule, albeit reluctantly, to reject as untimely motions filed before filing of judgment, with the effect of depriving parties of the right to recover fees and costs altogether. *See, e.g. Lyn v. Lyn*, 884 So.2d 181(Fla.2d DCA, 2004); *Swann v. Dinan*, 884 So.2d 398 (Fla.2d DCA, 2004). Respectfully, such outcome serves no purpose."

A week later, February 18, 2005, Judge Pauline Drayton, Chair of the Small Claims Rules Committee, filed a Response agreeing with former committee chair Berman's above Comment as well as the language change from "within 30 days after filing of the judgment" to "no later than 30 days." Chair Drayton commented**:** "The change would better reflect the intent of the committee" [8]

The following month, on March 29, 2005, Robert N. Clarke, Jr., then-present Chair of the Civil Procedure Rules Committee, filed on behalf of the civil rules committee a similar Comment *"agreeing with"* former chairman Berman's above response to the proposed rule-change of Rule 1.525**:** [9]

> "Robert N. Clarke, Jr., Chair of the Civil Procedure Rules Committee of the Florida Bar, submits this comment agreeing with the response and comment of Bruce J. Berman dated February 8, 2005, regarding proposed new Fla.Sm.Cl.R. 7.175. On page 6 of Mr. Berman's response and comment, he suggests changing the language of not only

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[8] See**:** *In re Amendments to Fla. Small Claims Rules*, No. SC05-146; "RESPONSE OF SMALL CLAIMS RULES COMMITTEE TO COMMENT OF BRUCE J. BERMAN REGARDING PROPOSED NEW RULE 7.175;" (pages 1-2), (by Hon. Pauline Drayton), docketed February 18, 2005.

[9] See**:** *In re Amendments to Fla. Small Claims Rules*, No. SC05-146; "COMMENT OF CIVIL PROCEDURE RULES COMMITTEE IN RESPONSE TO COMMENT OF BRUCE BERMAN REGARDING PROPOSED NEW RULE 7.175" (page 1), (by Robert N. Clarke, Jr.), docketed March 29, 2005

> proposed Fla. Sm.Cl.R. 7.175, but also of the existing Fla.R.Civ.P. 1.525. The Civil Procedure Rules Committee agrees that the language of both rules should be changed from "… within 30 days after the filing of the judgment …" to "no later than 30 days after filing of the judgment …" In fact, the Civil Procedure Rules Committee has already approved in concept, by a vote of 35-1, to propose that change in the next two-year-cycle report. It the Court approves Mr. Berman's suggested change to Rule 7.175, it is the recommendation of the Civil Procedure Rules Committee that rule 1.525 also be changed at this time. The change would better reflect the original intent of the Civil Procedure Rules Committee.

Interestingly, in construing pre-judgment motions as timely, the First and Fourth Districts thoughtfully resorted to traditional principles of rule interpretation, equity and judicial policy in reaching their conclusions.

The First DCA in Norris, 907 So.2d at 1218, for example, noted that it had "*examined* the law prior to the adoption of Rule 1.525." In doing so, it observed that "the primary evil to be addressed by the supreme court's adoption of Rule 1.525 was the uncertainty created by excessive tardiness in the filing of motions for fees and costs. Decisions in which the courts found a motion untimely under the 'reasonable time' standard generally note prejudice or unfair surprise." *See also*: Swift, 924 So.2d at 887. In this regard, the First District in Norris pointed out, it "found no cases where an appellate court applied the 'reasonable time' standard to a motion served *before* entry of judgment, and found prejudice or unfair surprise to a party, so as to conclude the motion was untimely. *In fact, it is hard to imagine a situation where a motion for fees and costs, filed after an*

adverse jury verdict, but before filing the judgment, could ever be prejudicial or cause unfair surprise to the losing party." 907 So.2d at 1218.

Moreover, the Fourth DCA in Swift, 924 So.2d at 887, perceptively observed that the language of Rule 1.525 ("within 30 days") "*does not specify the earliest time* when a motion for costs and attorney's fees may be filed." And by simply resorting to the plain definition of "within" cited in BLACK'S LAW DICTIONARY, the Fourth DCA concluded that pre-judgment filings are timely:

> This interpretation is consistent with the language of the rule, which provides that the motion must be served "*within* 30 days after filing of the judgment." Fla.R.Civ.P. 1.525 (Italics supplied). "When used relative to time," the preposition "within" has been defined as meaning "any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than." BLACK'S LAW DICTIONARY 1437 (5th ed. 1979).

Considering the conscientious assessments made by the above panelists and the expressed intentions of drafting committee leadership of *both* the initial and revised versions of Rule 1.525, there can be little doubt on what the rule means—that motions for costs served *before* entry of the judgment are indeed timely.

***(c) Even if Petitioner's Motion was Prematurely Filed, It Ripened & Matured Upon Filing of the Judgment* —**

Mr. Barco filed his original motion for costs per F.S.§73.091 on November 15, 2004 for $12,351.21 (R225). At the December 2, 2004 hearing 17 days later on enforcement of settlement before Judge Robert Beach, Mr. Barco's counsel

attempted to present those costs for determination, which Judge Beach deferred to a "later" hearing (R334). Upon entry of "final judgment" that day (December 2, 2004), the parties had already stipulated to reserve jurisdiction and defer the hearing on costs, interest and additional attorney's fees for enforcement to "sometime next year" (R334). And at the later hearing of August 22, 2005 when Mr. Barco attempted to present those same costs of $12,351.21 to Judge Walt Logan (R282-298), his motion for costs was denied as "untimely" following the School Board's assertion of the Second District's aberrant Swann decision (R294). In denying Mr. Barco's pre-judgment motion for costs, Judge Logan failed to recognize that the motion for costs had "ripened" and "matured" by law upon the filing of the judgment 17 days later.

This situation is analogous to the filing of a notice of appeal, which must be timely filed under Fla.R.App.P. 9.110(b) with the clerk of the trial court, on or before the 30th day subsequent to the rendition of the final judgment appealed from. Even though notices of appeal are deemed "jurisdictional" pleadings, filing such notice *prior to entry of judgment* does not affect the viability, propriety or timeliness. It makes no sense to treat a motion for costs more strictly that a notice of appeal.

For example, in State v. Blaney, 722 So.2d 220 (Fla.5th DCA, 1998), a notice of appeal was filed after oral pronouncement of judgment, but before filing of the

final judgment. In expressly finding that the prematurely filed notice of appeal "ripens" upon filing of judgment, the court held:

> "[W]e also hold that a notice of appeal which is prematurely filed shall not be subject to dismissal. Rather, such a notice of appeal shall exist in a state of limbo until judgment in the respective civil or criminal case is rendered. *At the time of rendition, the notice of appeal shall mature and shall vest jurisdiction in the appellate court.*
>
> Thus, a notice of appeal which is filed after the oral pronouncement of judgment and/or sentence, but before rendition thereof, is not to be dismissed on the grounds that it is premature. This rule shall apply to such situations as when the defendant filed his notice of appeal . . . After oral pronouncement of judgment, but before the judgment is reduced to writing and signed."

See also: Cole v. State, 714 So.2d 479, 488 n. 12 (Fla.2d DCA, 1998) (appeal of conviction and sentence premature because they had not been rendered by the filing of a signed written order; but appellate jurisdiction vested once the order was rendered); Pevsner v. Frederick, 656 So.2d 262, 263 n.1 (Fla. 4th DCA, 1995) (even if issue not yet ripe when certiorari petition was filed, defect was cured when the trial court entered the order).

The court in Blaney, 722 So.2d at 222, discussed the paramount concern for Florida courts to decide cases on the merits and avoid technicalities**:** "Treating the state's notice of appeal as prematurely filed but subsequently matured is in accord with the well-settled law of Florida that appellate proceedings, 'like other judicial proceedings should be determined on their merits, instead of upon irrelevant technicalities;" "our supreme court has determined that non-jurisdictional and non-

prejudicial defects in the notice or other steps in the appellate process are not grounds for dismissal." 722 So.2d at 222.

As Mr. Barco had served his initial motion for costs of $12,321.21 only 17 days before judgment was filed and presented it to the court on the day of the judgment's filing, Judge Logan had erroneously denied his motion for "untimeliness." Rather, the judge should have deemed Mr. Barco's initial motion as "matured" upon the filing of the judgment 17 days later on December 2, 2004.

Hence, the trial court erred in denying Mr. Barco's motion for costs as untimely. This Court should reverse the denial of costs with instructions for the trial court to determine and award a proper amount of costs per F.S.§73.091.

POINT II

IN AN EMINENT DOMAIN CASE UNDER F.S.§73.091, PROPERTY OWNERS ARE CONSTITUTIONALLY GUARANTEED REASONABLE COSTS, EXPERT EXPENSES AND INTEREST AS ESSENTIAL ELEMENTS OF "JUST COMPENSATION" FOR DAMAGES, WHICH CANNOT BE ABROGATED BY FLUCTUATING JUDICIAL RULES, INCONSISTENT COURT OPINIONS, PROCEDURAL TECHNICALITIES AND UNCLEAR, CONFUSING STANDARDS.

As stressed by this Court in its landmark decision of Dade County v. Brigham, 47 So.2d 602, 604-5 (Fla. 1950), an award to a property owner of costs and expert fees is *constitutionally guaranteed* in an eminent domain 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*;"

The courts of Florida continue to comply with the constitutional mandate. *See*: Seminole County v. Chandrinos, 816 So.2d 1241 (Fla.5th DCA, 2003) ("the condemning authority is required to pay all reasonable and necessary costs incurred in the defense of an eminent domain proceeding, including expert fees"); Golf Course v. DOT, 816 So.2d 236, 237 (Fla.2nd DCA, 2002) ("section 73.091, F.S. **obligates** [a condemning authority] to pay . . . all reasonable costs in the defense of the proceedings"); Grinaker v. Pinellas County, 328 So.2d 880 (Fla.2nd DCA, 1976) ("a property owner whose land is taken from him . . . does not receive 'just' or 'full' compensation if he is required to pay such expert witnesses from the monies received for the value of his land");

Payment of interest to the property owner is also constitutional guaranteed. This Court in Behm v. DOA, 383 So.2d 216, 218 (Fla. 1980) held:

> "Interest, therefore, must be determined in accordance with section 74.061. By enacting that section, the legislature provided that interest is a part of the "full compensation" required by article X, section 6, Florida Constitution, to be paid in eminent domain proceedings. It is well settled that the determination of full compensation is a judicial function."

The interest due a property owner includes *pre*-judgment interest. *See*: Lee County v. Sager, 595 So.2d 177 (Fla.2nd DCA, 1992) ("Pre-judgment interest is an integral part of 'full compensation' in eminent domain proceedings.") As Mr. Barco's residential property was "taken" by the School Board in October 2003 and not paid for until 14 months later in December 2004 when the trial court finally enforced payment, he's constitutionally entitled to substantial interest for the earlier taking.

The constitutional mandate of reimbursement of cost, expert fees and/or interest as "full compensation" in eminent domain cases as required by F.S.§ 73.091 cannot be abrogated or abridged by vague, confusing court rules or vacillating judicial decisions.[10] With the trial court having not yet considered or awarded Mr. Barco's claims for costs, expert fees or interest as full and just compensation, the Second District's decision affirming the denial of constitutionally-mandated costs for "untimeliness" is unconstitutional and subject to being set aside.

[10] The only time limitation of F.S.§ 73.091 requires that a condemnee submit all time and expert cost records to the condemning authority for each expert witness, at least 30 days prior to a hearing to assess costs (paragraph 2). There is no 30-day time period from a judgment in that statute to file a costs motion.

POINT III

AS THE DECEMBER 2, 2004 JUDGMENT WAS *NOT A FINAL ORDER*, RULE 1.525 CANNOT BE INVOKED AS A TIME-BAR OR LIMITATION SINCE ESSENTIAL, CONSTITUTIONALLY-GUARANTEED COMPONENTS OF COMPENSATION WERE LEFT UNRESOLVED FOR FURTHER JUDICIAL DETERMINATION.

At the December 2, 2004 hearing for enforcement of the parties' agreed settlement, the trial judge focused on compelling the School Board to pay Mr. Barco the agreed $31,612.50 value of his property within 10 days, and to defer other issues to a "later" hearing on costs, expert fees, interest and additional attorneys fees (R315-337). School Board counsel provided his draft of the "Final Judgment" (R325), which was entered by the trial judge at the conclusion of the December 2nd hearing (R336).

Twelve days later, on December 13, 2004, the judge entered an Order on Defendant's Motion to Enforce Settlement, purporting to "retain jurisdiction" to later determine Mr. Barco's request for costs, interest and additional attorneys fees (R241). By no stretch of the imagination did the December hearing and judgment finally resolve all constitutionally-mandated elements of damages and "full compensation." Those decisions relied upon by the School Board to establish the time-bar effect of Rule 1.525 are incompatible with the situation here of constitutional mandates since those decisions merely involve "ancillary" or "incidental" fee & costs awards.

In any event, Rule 1.525 can not pose a time-bar here since the order entered on December 2, 2004 (i.e. "Final Judgment") was actually not a final order. "A judgment or order is final when it adjudicates the merits of the case, disposes of the pending action, and leaves nothing further to be done by the trial court." Hallock v. Holiday, 885 So.2d 459, 461 (Fla.3d DCA, 2004); McGurn v. Scott, 596 So.2d 1042, 1043 (Fla. 1992) (judgment is final only "when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment.").

In this regard, an order is not final and/or appealable where a party still has "unresolved claims" against another party, and the order does not dispose of the entire case against that party. Dalola v. Barber 757 So.2d 1215, 1216 (Fla.5th DCA, 2000). An appeal from an order is premature and should not be resolved until a final disposition is made to all claims. Dalola, *supra*, at 1217; Walters v. Ocean Gate, 925 So.2d 440, 441 (Fla.5th DCA, 2006). Even where a seemingly 'final judgment' reserves jurisdiction to later determine a certain substantive issue but leaves it unresolved, that order is "merely a preliminary order in a proceeding that will eventually culminate in a subsequent final order." T.H. v. DCF, 736 So.2d 126 (Fla.1st DCA, 1999). "An order which thus leaves open a question for judicial determination is *not a final order*." T.H., at 127.

As the subject December 2, 2004 "Final Judgment" was not really "final," the 30-day time-bar effect of Rule 1.525 was inapplicable. *See*: Dalola, 757 So.2d at 1217; T.H., 736 So.2d at 127. Since Mr. Barco's motion for costs, expert fees and interest is still ripe but unresolved, this Court should reverse and remand to the trial court for determination of an amount of costs.

POINT IV

EVEN IF, *ARGUENDO*, PETITIONER'S INITIAL AND/OR RENEWED MOTIONS FOR COSTS & EXPERT EXPENSES WERE "UNTIMELY," THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR ENLARGEMENT OF TIME SINCE— (a) THE PARTIES HAD PREVIOUSLY STIPULATED TO DEFER HEARING AND RESERVE JURISDICTION FOR THE COURT'S RULING ON COSTS (ETC.), AND, (b) IN DENYING PETITIONER'S THREE *ORE TENUS* MOTIONS FOR ENLARGEMENT OF TIME TO FILE A WRITTEN MOTION FOR ENLARGEMENT, THE TRIAL COURT MISAPPREHENDED THAT THE ENLARGEMENT RULE MANDATES A WRITTEN MOTION.

At the hearing on Mr. Barco's motion for costs on August 22, 2005 before Judge Logan (R282-298), his counsel noted that from speaking with one of the School Board's counsel (Brian Bolves, Esq.) he had just learned that everything sought for costs would be contested (R285). Immediately the School Board's counsel voiced his objection to any costs due to the "untimely filing of the motion to tax costs pursuant to Rule 1.525," which "must be filed within 30 days of entry of the final judgment" (R285). Mr. Barco's counsel responded that he "didn't realize this [untimeliness argument] was an issue until this morning," also pointing to his initial earlier request for costs that was timely (R288). Admittedly, the School Board's counsel never filed a motion to strike the motion for costs, insisting there "is no requirement in the rule that we move to strike" (R294).

***(a) The Parties' Stipulation to Continue the Hearing and Reserve Jurisdiction on Costs & Expert Fees to a "Later" Hearing was an Agreed Extension to Determine Costs* —**

It's well settled that the parties to a case can mutually agree and stipulate *to override* the 30-day period of Rule 1.525, as had happened in the case below. As recognized by the court in Lyn v. Lyn, 884 So.2d 181, 185 (Fla.2d DCA, 2004)**:**

> "Although we decline to create exceptions to the procedure announced in rule 1.525, we recognize that these procedures can be overridden by a **stipulation** between the parties or by an order extending the time for filing a motion pursuant to rule 1.090(b)."

The Fourth District similarly gave effect to the parties' stipulation in Wilkinson v. Wilkinson, 874 So.2d 1291 (Fla.4th DCA, 2004), which effect of such mutual stipulation is to enlarge time to file a costs motion**:**

> "Florida Rule of Civil Procedure 1.525 requires that a motion seeking costs and attorney's fees be served within thirty days after the filing of the judgment. Here, however, the trial court accepted the parties' **stipulation** for the reservation of jurisdiction to address fees and costs at a *future hearing*. The action of the trial court in this regard was tantamount to an enlargement of time under Fla.R.Civ.Pro.1.090(b), and, consequently, the husband's motion was not untimely."

Not paid for almost ten months, Mr. Barco filed his motion to enforce settlement on November 15, 2004, and moved therein for "the sum of $12,321.21 for taxable costs pursuant to F.S. §73.091,[11] together with all interest at the statutory rate from February 17, 2004" (R224-225). As mentioned, the trial judge's focus at

[11] Four months earlier, Mr. Barco's counsel forwarded a detailed, itemized list of his costs and supporting invoices totaling $12,351 per F.S. §73.091(2) (R264-280).

the December 2nd hearing was to force the School Board to *immediately* pay Mr. Barco for his property taken the year before, and continue the hearing on all other unresolved pending claims including costs, interest and other items. The parties expressly agreed to "reserve jurisdiction" to consider the unresolved issues for a later hearing (R334)**:**

> "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 counsel]: That's correct." (R334).

As Mr. Barco's counsel had already filed his detailed costs motion and had timely submitted all invoices (R225;264-280), the record contains no agreement requiring Mr. Barco to re-file *within 30 days* a duplicative motion for these same costs and expert expenses which were already the subject of his earlier motion. In any event, the parties' express agreement to postpone the hearing for a "later" date (R334) effectively overrode and extended the procedures of Rule 1.525 pursuant to Rule 1.090(b). Lyn, 884 So.2d at 185; Wilkinson, 874 So.2d at 1291.

(b) The Trial Judge Erroneously Denied Petitioner's Three (3) Ore Tenus Motions for Enlargement of Time to File a Written Motion for Enlargement Under the Misapprehension that Rule 1.090(b) Mandates a Written Motion—

Even if, *arguendo*, the parties' stipulation to defer the motion for costs for a "later" hearing and their agree "reservation of jurisdiction" clause did not procedurally enlarge the time under Rule 1.090(b) to allow a party to file the motion, it's well settled that a party has a right to present "excusable neglect" as grounds for extension of the 30-day period under rule 1.090(b). State DOT v. Southtrust, 886 So.2d 393 (Fla. 1st DCA, 2004) (excusable neglect when legal secretary failed to file motion through "oversight"); Wentworth v. Johnson, 845 So.2d 296 (Fla.5th DCA, 2003) (order denying untimely motion for fees reversed to allow movant to present motion to enlarge procedural time period); *c.f.* Verysell v. Tsukanov, 866 So.2d 114, 115 (Fla.3rd DCA, 2004) (trial court properly granted ore tenus motion for enlargement of time to file motion based upon counsel's "mistaken belief" of trial court's intended procedures for case).

Mr. Barco's counsel responded that he "didn't realize this [untimeliness argument] was an issue until this morning," also pointing out that there was the earlier first request for costs that was timely (R288). Alternatively, during the hearing Mr. Barco's counsel made three ore tenus motions for enlargement of time pursuant to Rule 1.090 (R291, 292, 295). In the event the trial court was requiring a

written motion, Mr. Barco's counsel asked for additional time to file a motion for enlargement to be able to demonstrate extraordinary circumstances and excusable neglect (R295-296).

Judge Logan denied the request for a Rule 1.090(b) motion for enlargement of time, citing that DOT v. SouthTrust Bank, 886 So.2d 393 (Fla.1st DCA, 2004) "talks about a written motion" under that rule (R295-296). In any event, the trial judge announced he was ruling in favor of the School Board, essentially denying costs as well as any enlargement of time or even an opportunity to file a written motion (R296). 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" (R256).

Under these circumstances, the trial judge erroneously denied Mr. Barco's request to file and/or present a detailed motion to enlarge time per rule 1.090(b). Wentworth, 845 So.2d at 300; (movant should be allowed to present motion to enlarge 30-day procedural time period for filing fee motion); Verysell, 866 So.2d at 115 (Fla.3rd DCA, 2004) (ore tenus motion for enlargement of time is appropriate). This Court should vacate the denial of costs and remand to allow presentation of a rule 1.090(b) motion.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner Paul J. Barco respectfully requests this Honorable Court to resolve the inter-district conflict by disapproving the Second District's lone stance and to follow the unified position of the four other districts that pre-judgment motion for costs are timely and proper; and to otherwise **reverse** the trial court's "Order Denying Motion to Tax Costs" and remand to the trial court with instructions to award and determine an amount of costs and other relief due Petitioner per F.S. Section 73.091.

Respectfully Submitted,

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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 May, 2007.

_____

ATTORNEY