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

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE & FACTS

Petitioner Barco shall rely on the statement of case and facts appearing in his initial merits brief. However, he takes exception to the School Board's rendition of case and facts as not faithfully adhering to the record below.

The School Board erroneously asserts that the "underlying proceedings and negotiations between [it] and Barco were *neither remarkable* nor, for the most part, *particularly relevant* to this appeal" (Respondent's brief, p.1). Quite the contrary, the record reveals a pattern of dilatory conduct, breach and extreme hardball tactics on the part of the School Board throughout the proceeding below**.**

For example, when filing its Declaration of Taking and suit for Mr. Barco's property in March 2003, the School Board filed its "Good Faith Estimate of Value" upon appraisal for only $14,000 (R13). However, after 11 months of the rigorous litigation revealed by the record, the School Board agreed at court-ordered mediation in February 2004 that the property actually had a much higher value of $31,612 (R228). Thus, the School Board had initially presented its offer well below any reasonable valuation.

Even 10 months following the mediated settlement the School Board hadn't yet paid the agreed sum. Mr. Barco necessarily filed his motions to enforce settlement, for costs of $12,351.21, statutory interest, attorneys fees & sanctions for breach—all noticed for hearing on December 2, 2004(R224-6). At that hearing

Judge Beach *granted* enforcement, repeatedly admonishing the School Board to quickly pay Mr. Barco within 10 days (R321-333).[1] Defiantly, School Board counsel objected to the court's pay deadline, which the court *overruled* (R333).

Nor was the issue of Mr. Barco's "entitlement" to expert fees and costs "excluded" from the mediated agreement (Respondent's brief, p. 2), as the School Board had expressly stipulated in the settlement to "reserve jurisdiction" on costs, expert fees *and* interest for the court to decide (R233-236). "Entitlement" to expert fees and costs was never a real or serious issue below (due to constitutional & statutory mandates), only the *amount* of costs to be determined by the trial court.[2]

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[1] Angered throughout the hearing by the School Board's ten-month delay, the trial judge repeated— "Well, what is the problem here . . . It's an easy case. $31,612.50**.** It's been approved by the School Board" (R321); "Let's go ahead and pay him" (R322); "Well, let's pay them everything you can agree to and reserve the rest of the stuff so he can get his money" (R322-3); "Pay him the money, reserve on the rest of the stuff, period" (R323); "He's entitled to the money, right" (R324); "I'm saying pay what everybody agrees to" (R324); "But it's holding up his money, and that is what I want him to get" (R324); "Let's just give Mr. Barco his money and reserve jurisdiction on the rest" (R325); "But this man is not getting the use of his money, and he should get it" (R325); "I am ordering his money be paid in 10 days" (R329); "This guy is still waiting for his money" (R330); "All I want is for this man to get his money so he can do with it as he pleases" (R332); "So I am just ordering he get paid, period" (R332); "Ten days is fine. All they have to do is sit down and write a check" (R333); "I want this man to get his money, and he shouldn't be a pawn in this duel" (R335); "He ought to get his money and get out of here" (R335); "All I have to do is make sure this man gets his money and reserve on other issues" (R336).

[2] Costs and expert fees are constitutionally mandated as part of "full compensation" to property owners in eminent domain cases per Florida Constitution Article X, Section 6 *and* F.S. §73.091, as discussed in more detail in Point II of this appeal.

Contrary to the School Board's claim that it was "clear" at the December 2nd hearing that the trial judge "expected" Mr. Barco to file a "*presumably timely*" motion addressing the remaining determinations (Resp. brief, p.3), the record actually shows that the only reason the judge ever asked Mr. Barco to file a written motion was to satisfy the request of School Board counsel for "clarification" of those remaining claims for determination (R325). In any event, the judge never required Mr. Barco to file the "clarification" motion within any particular or 30-day period (R325). Significantly, Mr. Barco already filed his motion for costs and expert fees of $12,321.31 on November 15, 2004, seventeen days *before* the December 2nd hearing at which a judgment for some claims was entered (R225). He previously served notice for his costs to be adjudicated at that hearing (R227).

The School Board argues on page 3 of its brief that Mr. Barco's March 2005 renewed motion "sought different relief and additional costs" from what was requested in his original motion served 11-15-04. Actually, that motion (filed only per the School Board's urgings for "clarification," R325), requests those same taxable costs of $12,321.21 as originally claimed in the November 15th motion and itemized before that in Mr. Barco's letter to School Board counsel on July 13, 2004 per §73.091(2) (R264-280). The renewed motion merely adds a *single* subsequently-incurred $60 court reporter bill for covering the December 2nd hearing.

Without written support, School Board counsel claims he "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" (Respondent's brief, p.4 note 3). Mr. Barco has always disputed these gratuitous, unsupported comments. To the contrary, after School Board counsel asserted *for the first time* his time-bar defense at the August 22, 2005 hearing, Mr. Barco's counsel responded that he "didn't realize this [untimeliness argument] was an issue until this morning," pointing to his earlier pre-judgment request for costs that was "timely" (R288).[3] Responding at the hearing to the judge's comment that the School Board's cited cases "seem to require action *after the final judgment*" (R292), Mr. Barco's counsel reiterated: "Well again, your honor, I didn't realize this morning that was an issue" (R292). As the School Board failed to file a motion to strike or provide any written advance notice of its "untimeliness" objection, Mr. Barco had not appreciated the need for a written Rule 1.090(b) motion for enlargement of time.

Regarding the judgment, the School Board erroneously characterizes it as "the Final Judgment *that Barco drafted*" (Resp. brief, pp.2, 22). The record

[3] That original motion for costs of $12,351.21 per F.S.§73.091, Mr. Barco pointed out, was contained in his November 15, 2004 motion to enforce settlement and occasioned due to "all kinds of delay and obfuscation" (R288-289). Significantly, *just two months before* that August 22nd hearing the First DCA held in Norris v. Treadwell, 907 So.2d 1217, 1218-9 (Fla.1st DCA 2005), *review dismissed*, 934 So.2d 1207 (Fla. 2006), that motions for costs and fees served *before* filing of judgment, as here, are indeed timely.

actually reveals that *School Board counsel* had actually prepared and "submitted" the judgment for entry at the December 2nd hearing (R325,334,336).

On page 7 of its brief, the School Board misstates that Mr. Barco had "*admittedly failed* to *timely serve* his motion to tax costs," asserting that "Barco's prior *ignorance* of this rule was not excusable neglect." To the contrary, there's no record support of any such "admission," and only two months before the August 22nd costs hearing the court in Norris ruled that motions for costs and fees served *before* filing of judgment, as Mr. Barco had served on November 15, 2004, are indeed timely. 907 So.2d at 1218-9.

Lastly, on page 5, the School Board inexcusably *omits* from its "overview of the notable events" several key items which underscore the timeliness of Mr. Barco's motion for costs preceding entry of the December 2, 2004 judgment—First, on July 13, 2004, as required by F.S. §73.091(2), Mr. Barco submitted to the School Board as condemning authority a list of costs, invoices and expert time records (R264-280); Second, on November 15, 2004 he served his *original* motion for costs for $12,351.21 per F.S.§73.091 (R224-6), together with a notice of hearing on his costs motion scheduled for December 2, 2004 (R227); and, Third, while briefly presented at that hearing, the issues of costs, statutory interest and other Rule 1.730(c) sanctions for breach of mediation agreement were deferred by agreement of all parties to a "hearing held sometime next year" (R334).

ARGUMENTS IN REPLY:

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.

As a starting point, the School Board contends that the *initial* version of Rule 1.525 *"ceased to exist* on January 1, 2006" (Resp. brief, p.8), essentially suggesting the *amended* version of the rule adopted by this Court on that date created a major substantive change allowing *pre*-judgment motions. However, in Landing Group of Tampa v. Kifner, 951 So.2d 1014 note 3 (Fla.5th DCA, 2007), the court recently found that both the initial *and* amended versions of Rule 1.525 have the "s*ame* meaning," i.e. *pre*-judgment motions for costs are indeed timely**:**

> "The 2005 version of Rule 1.525 provided that "[a]ny 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." (Emphasis added). This court interpreted the 2005 version of Rule 1.525 to mean that the thirty-day mark established a deadline for serving motions for attorney's fees and costs, and that motions for attorney's fees and costs filed *before* the judgment were timely. *Martin Daytona. v. Strickland*, 941 So.2d 1220, 1225 (Fla.5th DCA 2006). In other words, this court interpreted the **2005 [initial] version** of the rule **to have the *same meaning*** as the **2006 [amended] version** of the rule." (Brackets and emphasis added)

The School Board praises "clarity" of the Second DCA's lone stance on this issue, contending that "litigants *know precisely* when the deadline begins to run…" (Resp. brief, p.10). This naïve position squarely conflicts with the reality and problems of an erratic process as litigants and their counsel often don't know when a judge signs a judgment and/or the clerk has actually "filed" it until long after the fact As a practical matter, entry of a proposed final judgment may be delayed by a judge or a judicial assistant due to administrative circumstances; the forwarding of an entered judgment from the judge's chambers to the clerk's office may be delayed; backlogs in a court clerk's office may further delay the filing of the judgment; and the clerk's physical entry of the filing on the court's on-line docket may be delayed beyond that.

The School Board relies on this Court's decision in Saia Motor Freight v. Reid, 930 So.2d 598 (Fla. 2006), maintaining it's the "same factual scenario" as this case. However, Saia was a wrongful death claim resulting in a jury verdict of $1.8 million. This Court's decision focused *solely* on the propriety of claimants' *first and only* "prevailing party" motion for costs filed on March 17, 2003, more than 30 days *after* entry of a first amended final judgment on January 2, 2003.[4]

[4] Pursuant to an Offer of Settlement and Rule 1.442, the claimants in Saia had *previously* filed *two* "timely" motions for attorneys fees & costs pursuant to F.S. §768.79 within 30 days following the initial and amended judgments. 930 So.2d at 601 note 4. However, the Third District had reversed and vacated those fees and costs awarded under F.S. §768.79, finding the Offer of Settlement was *invalid*

930 So.2d at 599. Saia did not concern, as here, a *pre*-judgment motion for costs served per F.S.§73.091 (the eminent domain costs provision), an enforced mediated settlement agreement, nor, a preliminary but incomplete award of only certain elements of damages for the taking of property. Thus, the School Board's effort to analogize Saia's cost situation to this one is untenable.

According to the School Board, Rule 1.525 "clearly and unequivocally mandates a post-judgment motion—one that is served 'after' the filing of a judgment" (Resp. brief, p.13). The "interpretations" of Florida's four district courts,[5] the School Board contends, "*tortures* the actual language in the rule itself" (Resp. brief, p.17). These views plainly offend those Comments on file in this Court from committee chairpersons involved in drafting the initial and amended versions of the rule—i.e. those versions were "both premised upon the value of prescribing an *outside* date or deadline," and it was *never* "the intent of either the [civil procedure rules-drafting] committee or this Court to prescribe a *beginning date for filing* motions for such relief" (See SUPPLEMENTAL APPENDIX, *infra*, at A2-3, 7, 9). They also conflict with the astute observations made last year in Swift

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because it was not submitted jointly by the co-personal representatives. 930 So.2d at 599 note 2**;** *See also*: Saia v. Reid, 888 So.2d 102, 103-4 (Fla. 3d DCA, 2004). This Court's later review concerned just a single *post*-judgment "prevailing party" motion for costs served 2½ months following the *latest* judgment.930 So.2d at 599.

[5] 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).

v. Wilcox, 924 So.2d 885, 887 (Fla.4th DCA, 2006), that the plain 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," as well as the legal definition of "within" in BLACK'S LAW DICTIONARY as meaning "*any time before*." 924 So.2d at 887.

Despite the School Board's adamant denial the rule is ambiguous, vague or unclear (Resp. brief, p.13), the court in Martin Daytona, 941 So.2d at 1225, recently found that initial Rule 1.525 has "caused confusion" and "was difficult to discern." And last year, in James, *Moving for Attorneys Fees & Costs*, FLORIDA BAR JOURNAL (January 2006) at p. 22, the author surveyed "numerous appellate opinions" and observed that "Rule 1.525 during its short lifetime . . . which was designed to create predictability and stability with regard to attorneys fees, has *created nothing but headaches* for litigators and judges across the state."

In any event, the School Board maintains that Mr. Barco was "not entitled" to claim his costs when he filed his original November 15th, 2004 motion for costs per F.S. §73.091 (Resp. brief, p.18-9). Notwithstanding, the mediation agreement jointly signed *nine months earlier* (and quickly authorized by the entire School Board, R321-2) readily gave Mr. Barco the right to present his costs and attorneys fees claims to the court (R228). Based upon that November 15th motion the School Board even *stipulated* to his attorneys fee award per F.S.§73.091 (R322-4,331). Certainly Mr. Barco had a right to file his costs motion as well in November 2004.

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.

According to the School Board, this second point shouldn't even be considered since it "is completely beyond the scope of this Court's review" (Resp. brief,p.20). The argument contravenes this Court's edict in Schreiber v. Rowe, 814 So.2d 396, 398 (Fla., 2002)**:** "Given our jurisdiction on the certified conflict, we have jurisdiction over all of the issues presented in this case;" Murray v. Regier, 872 So.2d 217, 223 note 5 (Fla.2002) ("Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, *we have jurisdiction over all issues*").

In any event, the School Board insists that despite clear constitutional and legislative mandates for costs and expert fees, Mr. Barco is nonetheless "required" to strictly comply with Rule 1.525 (Resp. brief, p.20-1). In doing so, it plainly ignores that FLORIDA CONSTITUTION, Article X, Section 6, provides**:** "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner …;" "By statute, a landowner whose property is condemned is *entitled to recover attorney's fees and costs*, as well as the value of

the property that is taken." Seminole Co. v. Chandrinos, 816 So.2d 1241(Fla.5th DCA, 2003). Under F.S. §73.091, an award of costs and expert fees is mandatory.[6]

The stipulated "Final Judgment" awarded Mr. Barco his attorneys fees per F.S. §§73.091, and deemed him entitled to "*reasonable* costs" (R233-236); at the December 2nd hearing the parties "all agreed to have that [costs] hearing held sometimes next year" (R334). *c.f.*: Chamizo v. Forman, 933 So.2d 1240 (Fla.3rd DCA, 2006) (motion filed past 30 days after judgment was timely, where order held party entitled to fees and only "reserved jurisdiction" to determine *amount*).

The School Board's insistence on rigid, unrelenting rule enforcement offends a basic premise**:** "Procedural rules should be given a construction calculated to further justice, *not to frustrate it.*" Eastwood v. Hall, 258 So.2d 269, 271 (Fla.2d DCA, 1972); *See also*: Mills v. Martinez, 909 So.2d 340,343 (Fla.5th DCA, 2005) ("When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties."). Full compensation for condemnation cannot constitutionally be abrogated by vague, confusing court rules or vacillating judicial decisions.

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6 F.S. §73.091 governs the award of costs in eminent domain cases— "The petitioner 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 and, when business damages are compensable, a reasonable accountant's fee, to be assessed by that court."

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.

The School Board insists that neither the initial or amended rule 1.525 actually requires a "final" judgment (Resp.brief, p.22), citing Lyn v. Lyn, 884 So.2d 181, 184 (Fla.2d DCA, 2004) (judgment reserving "*ancillary* issues" of attorneys fees was a final order). However, the court even conceded in Lyn— "It is *not entirely clear* that these terms are interchangeable in the context of the rule." To read Rule 1.525 as applying to *any* judgment, whether final, partial, preliminary and/or non-final, is to untenably create further confusion, ambiguity and default.

Contrary to the School Board's suggestion that costs are an "*ancillary* issue" (Resp.brief, pp.22-23, note 6), in condemnation cases costs are a component of constitutionally-mandated "full compensation". In vacating an award of fees without prejudice for lack of a "final" judgment, the court in Rollins v. Wilson, 923 So.2d 516, 520 (Fla.2nd DCA, 2005) held:

> "Where, as in this case, a trial court enters an order *reserving jurisdiction* to determine an *element of a party's damages*, it has not disposed of all material issues in controversy. Accordingly, an order containing such a reservation is not a final order."

Hence, the December 2nd judgment was only preliminary and *not* final; Mr. Barco did not have any 30-day limit to file a subsequent motion for costs. Rollins, at 520.

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.

Prior to the December 2, 2004 hearing at which judgment was entered, per F.S.§73.091 Mr. Barco had already served his list of costs and expert time records (R264-280), his November 15, 2004 motion for costs of $12,321.31 (R225) and his Notice of Hearing for his costs to be adjudicated at the December hearing (R227). While his costs motion was presented at the December hearing, the court deferred consideration to a later hearing due to apparent time constraints**:**

> "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).

Labeling it a "phantom stipulation," the School Board was indeed a party to an agreement to *continue* the hearing of the previously-served motion for costs. *See*: Lyn v. Lyn, 884 So.2d 181, 185 (Fla.2^{d} DCA, 2004) **("**we recognize that these

procedures [of Rule 1.525] can be overridden by a stipulation between the parties"); Wilkinson v. Wilkinson, 874 So.2d 1291 (Fla.4th DCA, 2004) ("the trial court accepted the parties' stipulation for the reservation of jurisdiction to address fees and costs at a *future hearing*"). The School Board cannot reverse its position.

According to the School Board, Rule 1.090 "contemplates some sort of proffer." While the rule has no such provision, the August 22, 2005 hearing transcript shows the lack of any opportunity or court request for a "proffer" (R282-299). In response to Mr. Barco's *ore tenus* motion and/or for additional time to file a written motion, the judge cited a case that "talks about a *written* motion" for enlargement, but promptly announced he was "going to rule in favor of the county's objection" to costs (R295-6).

By summarily denying Mr. Barco's motion for costs, the trial court effectively denied his motion for enlargement as well, and erred as a matter of law in not entertaining the *ore tenus* motions. *See*: 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). This Court should vacate the denial of costs and remand for presentation of a rule 1.090(b) motion.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner Barco respectfully requests this Honorable Court to disapprove the Second District's Barco and Swann opinions, and affirm the four other districts in finding that pre-judgment motions for costs are timely and proper; and to **reverse** the "Order Denying Motion to Tax Costs" and remand to the trial court for determination of 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 June, 2007.

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ATTORNEY