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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1007

JOSEPH B. DOERR TRUST,
and MINISTRY SYSTEMS, INC.,

Petitioners,

vs.

CENTRAL FLORIDA
EXPRESSWAY AUTHORITY, etc.,

Respondent.

On discretionary review of a decision of the Fifth District Court of Appeal, certifying a question of great public importance

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ANSWER BRIEF

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STATEMENT OF THE CASE

This is an attorneys' fee dispute in an eminent domain case, which has twice been before the Fifth District Court of Appeal, and is now before this Court on a certified question of great public importance. Petitioners Joseph B. Doerr Trust and Ministry Systems, Inc. [hereinafter "Landowners"] seek discretionary review of a decision awarding attorney's fees under section 73.092(1), Florida Statutes. On its face, the case presents the issue foreshadowed in *Pierpont v. Lee County,* 710 So. 2d 958 (Fla. 1998), where this Court recognized that the legislature may enact provisions governing the award of attorney's fees in eminent domain cases, *id.* at 960, but left open the possibility that under certain circumstances the statutory fee could be unconstitutional as applied. *Id.* at 961. The Landowners here make that argument, contending that the statutory fee is unreasonably low and does not provide full compensation under article X, section 6, Florida Constitution. The condemning authority, Respondent, Central Florida Expressway Authority (formerly known as Orlando/Orange County Expressway Authority) [hereinafter "Expressway Authority"], disagrees.

The Court accepted jurisdiction on July 8, 2014. However, as discussed below, the Expressway Authority challenges that decision to accept jurisdiction. This is our first opportunity to do so, because jurisdiction was invoked *solely* under

article V, § 3(b)(4), Fla. Const., and no jurisdictional briefs were required. *See* Fla. R. App. P. 9.120(d).

In the first appeal, *Orlando/Orange County Expressway Auth. v. Tuscan Ridge*, *LLC*, 84 So. 3d 410 (Fla. 5th DCA 2012) ("*OOCEA I*"), the Fifth District reversed a $816,000 fee judgment that had been entered under section 73.092(2), Florida Statutes, which prescribes a list of factors to be considered when making a fee award not governed by subsection (1) of the statute. *OOCEA I* held that the fees should have been computed under subsection (1), which prescribes a benefits-based fee. But the district court remanded for consideration of the Landowners' argument that section 73.092(1) is unconstitutional as applied, an argument that had not been necessary to reach in the prior trial court proceeding.

On remand from *OOCEA I*, the trial court, the Honorable Reginald Whitehead, Circuit Judge for the Ninth Judicial Circuit, found the Expressway Authority primarily responsible for "excessive litigation" that had increased the fees incurred. Finding that full compensation required a fee based on a $350 hourly rate, the court declared section 73.092(1) unconstitutional as applied to the facts of this case, and again awarded the Landowners $816,000, plus interest. (R. 2420-24) (Feb. 27, 2013 Final Order). The Expressway Authority appealed, arguing that no "excessive litigation" had occurred and that even if it had, that was not a basis to declare the applicable fee statute unconstitutional.

The Fifth District again reversed, remanding for entry of judgment in the amount authorized by section 73.092(1): $227,652.25. *See Orlando/Orange Cnty. Expressway v. Tuscan Ridge,* 137 So. 3d 1154 (Fla. 5th DCA 2014) (*OOCEA II*), *review granted,* SC14-1007, 2014 WL 3385586 (July 8, 2014).

In its opinion, the district court did not expressly decide the disputed issue of whether the Expressway Authority had engaged in "excessive litigation," but rather, "assuming" it was so, found that the Landowners should have utilized various rules and procedures during the course of the litigation to address such conduct, rather than seeking after-the-fact to declare the benefits-based fee statute unconstitutional as applied. *See OOCEA II,* 137 So. 3d at 1156-57. The only conclusion as to the constitutional issue was contained in two sentences:

> Here, the statutory, benefits-based formula results in a $227,652.25 fee which amounts to a blended hourly fee for attorney and paralegal time of approximately $87. This fee does not appear patently unconstitutional. *See Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 931 (Fla. 2002) (fee of $50 per hour for services in capital appeal not unconstitutional).

Id. at 1156.

The remainder of the opinion discussed and criticized the fact that, if "excessive litigation" had gone on, the Landowners had sought no relief in the trial court, instead seeking to declare the benefits-based fee statute unconstitutional as applied, in order to recover a larger lodestar fee:

> [A]ppellees did not seek sanctions that might have been available. Nor did Appellees avail themselves of the option of promulgating requests for admissions directed to the expert's opinions, in which case it could have recovered additional fees for proving or disproving matters not admitted. *See* Fla. R. Civ. P. 1.380(c) (authorizing recovery of suit expenses, including attorney's fees, for failure to admit matters in response to requests for admissions).
>
> *If, in fact, Appellant had engaged in "excessive litigation" tactics* that required Appellees' attorneys to spend additional time litigating this case, statutory and procedural mechanisms were in place to deal with that situation. Appellees' attorneys did not avail themselves of those mechanisms. Instead, rather than targeting the specific purported misbehavior, quantifying the resulting expenses to Appellees and seeking additional fees for these *purportedly abusive tactics*, Appellees successfully convinced the trial court to scrap the entire fee formula as unconstitutional in favor of a fee based on reconstructed hours. *This approach—and the resulting fee of $816,000—was error.*

OOCEA II, 137 So. 3d at 1156-57 (emphasis supplied).

Thus, reversing the judgment for the second time, the Fifth District certified the following question of great public importance:

> IN AN EMINENT DOMAIN PROCEEDING, WHEN THE CONDEMNING AUTHORITY ENGAGES IN LITIGATION TACTICS CAUSING EXCESSIVE LITIGATION AND THE APPLICATION OF THE STATUTORY FEE FORMULA RESULTS IN A FEE THAT COMPENSATES THE LANDOWNER'S ATTORNEYS AT A LOWER–THAN–MARKET FEE, WHEN MEASURED BY THE TIME INVOLVED, IS THE STATUTORY FEE DEEMED UNCONSTITUTIONAL AS APPLIED, ENTITLING THE LANDOWNER TO PURSUE A FEE UNDER SECTION 73.092(2)?

Id. at 1157.

STATEMENT OF THE FACTS

The Expressway Authority required the Landowners' property, identified as Parcel 406, for the construction of the John Land Apopka Expressway. In January 2005, Petitioner Joseph B. Doerr, as Trustee, retained experienced eminent domain counsel, the firm of Fixel, Maguire & Willis. (R. 499). The firm's fee agreement stated that it would accept the "statutorily calculated Attorneys' fee." *Id.* Doerr later executed a second agreement, providing that counsel would receive, in addition, 2% of the condemnation proceeds if the total recovery exceeded $5 million. (R. 500).

Pursuant to sections 73.015 and 73.0511, Florida Statutes, the Expressway Authority tendered its first written offer to Doerr in the amount of $4,914,221.(R. 522-532). The offer was more than $600,000 above the property's appraised value, as an incentive to enter into an early agreement in lieu of prolonged litigation. (R. 522-32; R. 1606, 1634). But the offer was not accepted.

Subsequently, Doerr recorded a quitclaim deed in which it had earlier conveyed a 15% interest in Parcel 406 to Ministry Systems, Inc. (R.1335-36). Ministry Systems, Inc. also retained Fixel, Maguire & Willis. (R. 463). Their fee agreement also provided that the firm would accept the "statutorily calculated Attorneys' fee," and, in addition, 2% of the Landowner's recovery if it exceeded $5 million. *Id.*

Unable to negotiate a settlement with the Landowners (*see* § 73.015, Fla. Stat.), the Expressway Authority filed suit. After the order of taking hearing, each party retained experts for trial. The Landowners listed eight experts; the Expressway Authority listed four. (R. 58-63).

The Landowners' experts included three appraisers, three engineers, an economist, and a land planner. *Id.* Their efforts contributed to the litigation costs. For example, in the February 2, 2009 Final Judgment on the Amount of Expert Fees and Costs, the trial court noted that their primary appraiser, James Ward, "prepared multiple appraisals of the subject property, when his first report, by his own admission, was a valid and sufficient appraisal report. There was no need for Mr. Ward to incur the many thousands of dollars he incurred in drafting another appraisal report . . . . Additionally, Mr. Ward . . . [was] not credible on these matters." (R. 455, ¶¶ 2-3) (noting that Ward billed over 16 hours per day, and on one occasion, almost 23 hours).

The Expressway Authority's four experts included two valuation witnesses, an appraiser and an economist experienced in eminent domain matters, Dr. Henry Fishkind. (R. 61-63). Dr. Fishkind valued the property based on information provided by experts on both sides of the case. *See* R. 2076-81 (Oct. 3, 2012 Fishkind Affidavit) (proffered when his testimony was excluded) (R. 2487-90). His analysis utilized the maximum merchantable floor space that could reasonably be

achieved on the site, among other data, and estimated the value of the property. *Id*. The Landowners' moved to strike Dr. Fishkind as a witness prior to trial. (R.338-45). The motion was initially denied, but on the eve of trial the court struck Dr. Fishkind, without explanation. *See* R. 1515.

After trial, the jury returned a verdict valuing the property at $5,744,830 (R. 346-347). Judgment was entered on the verdict (R. 348-52), establishing that the Landowners' counsel had obtained for their clients a "benefit" in the amount of $832,000— the difference between the first written offer and the verdict. Thus, the attorneys' fees award under the schedule contained in section 73.092(1) was $227,652.25. And, the Landowners' counsel had contracted for an additional 2% "bonus" from their clients, an additional $117,861.

The trial court conducted a hearing on attorneys' fees. *See* R. 809-1019; 1469-1991. The court found section 73.092(1) inapplicable due to the form of the first offer, and, as an alternative method of determining fees, applied the factors discussed in subsections (2) and (3). Thus, the constitutionality of subsection (1) was not at issue. In fact, the court precluded testimony on the applicability of subsection (1). (R. 2416-18; 1727-28; 1347-48).

The evidence at the hearing revealed that over 2000 of the 2700 hours claimed by Landowners' counsel were not documented in contemporaneously maintained time records, but were reconstructed after trial (R. 1466). Nonetheless,

the trial court awarded attorneys' fees in the amount of $816,000 for the valuation phase. (R. 1465-68) (Sept. 14, 2010 Final Judgment on the Amount of Attorney's Fees). As noted in the Statement of the Case, that judgment was reversed and remanded, with directions that the constitutional question be addressed. *See OOCEA I,* 84 So. 3d at 410.

On remand, the Landowners argued that the statutory fee was unconstitutionally low due to alleged excessive litigation by the Expressway Authority and that this excessive litigation primarily consisted of using Dr. Fishkind as an expert witness and not withdrawing him as a witness during the litigation. (R. 2002-04)

The Expressway Authority initiated discovery and prepared to introduce evidence relevant to the constitutional question. (R. 2039-70). Specifically, the Expressway Authority sought to call Dr. Fishkind, because his role in the case was at the center of the Landowners' claim of "excessive litigation." (R. 2076-81). The Expressway Authority also attempted to present evidence that Fixel, Maguire & Willis had profited substantially from its eminent domain practice, even after the enactment of section 73.092(1), to counter the argument that awarding the statutory fee in this one case would endanger landowners' ability to obtain counsel in eminent domain matters. (R. 2039-70; R. 2473-83). But the Landowners sought to preclude the evidentiary presentation (R. 2088-91), and the court precluded the

Expressway Authority from presenting any evidence pertaining to the constitutional claim. (R. 2416-18, 2476-82). Thus, the hearing was limited to oral argument. (R. 2484-2581).

Based solely on the existing record, the trial court found that section 73.092(1) was unconstitutional as applied, relying on the conclusion that the Expressway Authority "was primarily responsible for the excessive litigation because of its decision to use Fishkind." (R. 2423). The court again awarded $816,000, based on the factors in subsections (2) and (3). (R. 2420-25) (noting that the amount permitted under section 73.092(1) was paid in 2012).

The Expressway Authority again appealed, arguing that the fee awarded was in the nature of a sanction, although no sanctions proceedings had been brought, and that "excessive litigation" was not a basis to invalidate a fee statute. As set forth fully in the Statement of the Case, *supra,* the Fifth District again reversed. *OOCEA II,* 137 So. 3d at 114. The district court held that even assuming the Expressway Authority had caused the alleged excessive litigation, it was error to "scrap the entire fee formula as unconstitutional in favor of a fee based on reconstructed hours." *OOCEA II,* 137 So. 3d at 1156-57.

The petition for discretionary review followed, and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

1. The Court should re-evaluate its decision to accept jurisdiction, and should find that jurisdiction was improvidently granted, for two reasons. First, the district court did not "pass upon" the certified question, which is dependent upon the premise that a condemning authority engaged in litigation tactics that caused excessive litigation. That was a disputed issue, but the district court *finessed* the issue by "assuming" it to be so, and rendering a decision based on that assumption. Where the district court does not pass upon the certified question, this Court has no jurisdiction under article V, section 3(b)(4), Florida Constitution, and the case must be dismissed. *See Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007).

Alternatively, if discretionary jurisdiction exists under article V, section 3(b)(4) or even under article V, section 3(b)(3) (which was not asserted by Petitioners), the Court should decline to exercise it. The underlying facts giving rise to the fee dispute in this eminent domain case, and which drove the district court to conclude that the statutory fee was *not* unconstitutional as applied, are unique to this litigation and highly fact-specific. The question certified is pertinent solely to these parties and does not have "great public importance." Thus, jurisdiction should be discharged and the case dismissed.

2. On the merits, the certified question should be answered in the negative and the district court decision should be approved, and, because the substantial fee computed according to section 73.092(1), Florida Statutes—$227,652.25—is not so low as to be unreasonable or confiscatory of counsel's time, and thus not so low as to render the statute unconstitutional as applied. The constitutional right to receive full compensation when private property is taken in eminent domain (art. X, § 6, Fla. Const.), guarantees a reasonable attorney's fee, not necessarily a fee that equates to a lodestar fee computed at an attorney's market rate. If the market rate lodestar were the benchmark, a substantial number of cases would reject the schedule contained in section 73.092(1), yet *no case* before the trial court in this case has declared the statute unconstitutional as applied. On this record, the district court properly reversed, and this Court should approve that decision.

Eminent domain counsel representing landowners may occasionally reap a windfall in a benefits-based statutory scheme, but alternatively the computation may result in a less-than-market-rate fee in some cases, as here. We do not doubt that some hypothetical case may fall so low on the spectrum of fees as to fail the "reasonableness" test, but in this case the Landowners' counsel were paid a substantial amount by the condemning authority, *and* contracted with their clients for a 2% bonus. Indisputably, the Landowners received a reasonable fee under the

statute, and thus received the full compensation guaranteed by the Florida Constitution.

Moreover, the record does not support a finding that the Expressway Authority engaged in any "excessive litigation" or "improper" litigation, warranting a departure from the fee statute that would be in the nature of a sanction. That factual dispute was briefed in the district court, but never decided there. This Court can decide this case even without the benefit of the district court's view by simply answering the somewhat hypothetical certified question in the negative. But for completeness, we discuss why the notion that the Expressway Authority engaged in "litigation tactics causing excessive litigation"—never decided by the district court—is not supported by substantial competent evidence. This was a big case with a big dispute about the valuation of the property to be taken, and the parties both engaged numerous experts and sought to prove their case. The fact that the relatively modest benefits achieved through the jury verdict made those efforts appear "excessive" in retrospect is not a legitimate based to declare the Legislature's statutory fee schedule unconstitutional as applied. Eminent domain counsel must choose to litigate knowing that their goal is to achieve a benefit for the client, greater than the condemning authority's offer to settle. Here, the statutory fee based on the benefits achieved, while not market rate, was substantial and not unreasonable.

ARGUMENT

I. Jurisdiction was improvidently granted.

In a July 8, 2014 Order, this Court accepted jurisdiction based on the Fifth District's certified question of great public importance:

> IN AN EMINENT DOMAIN PROCEEDING, WHEN THE CONDEMNING AUTHORITY ENGAGES IN LITIGATION TACTICS CAUSING EXCESSIVE LITIGATION AND THE APPLICATION OF THE STATUTORY FEE FORMULA RESULTS IN A FEE THAT COMPENSATES THE LANDOWNER'S ATTORNEYS AT A LOWER-THAN-MARKET FEE, WHEN MEASURED BY THE TIME INVOLVED, IS THE STATUTORY FEE DEEMED UNCONSTI-TUTIONAL AS APPLIED, ENTITLING THE LANDOWNER TO PURSUE A FEE UNDER SECTION 73.092(2)?

The Court has discretionary jurisdiction under article V, section 3(b)(4), Florida Constitution, to review "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance. . . ." We first demonstrate that jurisdiction does not exist because the district court did not "pass upon" one of the premises of the certified question, *i.e.*, whether the condemning authority engaged in litigation tactics causing excessive litigation. Indeed, the Landowners have gone even further, arguing in their motion for rehearing in the district court (at p. 7) that "This court *failed to address the key*

constitutional issue in this case." (emphasis supplied). If that is correct, this Court has no jurisdiction.

Indeed, the initial brief says very little about the district court decision, instead focusing on the trial court's ruling, naming the trial court in the argumentative point heading, and even stating in the summary of argument that "This Court is urged to uphold that [trial court] determination." (Init. Br. 7.). But this Court's jurisdiction is based on the *district court's* decision, and here, the district court did not "pass upon" the certified question, so jurisdiction is lacking.

Secondly, we show that even if discretionary jurisdiction exists, the Court should decline to exercise it, because the certified question pertains to a narrow, fact-based issue, not an issue of great public importance.

A. This Court does not have jurisdiction because the district court did not "pass upon" the certified question.

This Court has said that in order for it to have discretionary jurisdiction based on a certified question, it is "*essential* that the district court of appeal *pass upon* the question certified by it to be of great public importance." *Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007) (emphasis supplied). Where the district court has not passed upon the certified question, jurisdiction has been discharged. *Id*. at n. 1 (citing *Pirelli*

Armstrong Tire Corp. v. Jensen, 777 So. 2d 973 (Fla. 2001); *Salgat v. State*, 652 So. 2d 815 (Fla.1995); *Gee v. Seidman & Seidman*, 653 So. 2d 384 (Fla.1995)).

Here, as noted above, the Landowners argued in their district court motion for rehearing (p. 7), that "This court *failed to address the key constitutional issue* in this case." (emphasis supplied). Further, the Landowner's argued that "This court's invocation of statutory and procedural remedies for sanctioning the O/CEA for its excessive litigation, rather than upholding the trial court's determination that the statute is unconstitutional as applied, *does not address* the facts of this case." *Id.* at 8-9 (emphasis supplied). Finally, the Landowners' motion for rehearing posited several constitutional questions that were left unanswered by the district court decision:

> This court does not address the following constitutional questions its opinion raised:
>
> • How is the opinion issued by this court not going to encourage condemning authorities from engaging in more unconstitutional, excessive (i.e., "dog eat dog") litigation?
>
> • As between the condemning authority and the property owner who should bear the financial burden of the excessive litigation caused by the government?
>
> • If the condemning authority engages in excessive litigation, how is the property owner going to be able to compete with the condemnor on a level playing field, unless the property owner has the financial resources to do so, and thereby subverting the constitutional guarantee of full compensation?

Landowners' Motion for Rehearing (Case 5D13-1164), p. 8.

Their attempt to seek discretionary review in this Court must therefore fail, because if the district court did not pass upon the "key constitutional question" and did not address the facts of the case, as Petitioners have argued, article V, section 3(b)(4) does not provide a basis for jurisdiction.

In addition, the premise of the certified question is that the condemning authority has engaged in litigation tactics causing excessive litigation. The trial court made that finding (R. 2423), which the Expressway Authority challenged in its district court Initial Brief (pp. 23-27) and its Reply Brief (pp. 7-12). But the district court decision *never squarely addressed whether the Expressway Authority had caused "excessive" litigation*, instead assuming for purposes of its analysis that the trial court was correct. *See* 137 So. 3d at 1156 ("Even assuming that the additional time was unnecessary or abusive. . . ."); *id.* ("If, in fact, Appellant had engage in 'excessive litigation tactics . . .").[1]

Thus, under *Floridians for a Level Playing Field, supra,* because the trial court did not "pass upon" the essential premise of the certified question, this Court has no jurisdiction under article V, section 3(b)(4), Florida Constitution, and the case should be dismissed.

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[1] In this Court, the Initial Brief (pp. 14-26) argues extensively that the Expressway Authority engaged in excessive litigation and misconduct. Although that issue was never reached by the district court, we disagree, and respond in the Argument, *infra.*

B. The certified question is narrow, fact-based, and not of great public importance.

Unless the Court intends to hold that section 73.092(1) is invalid unless it results in a statutory fee that equals a lodestar fee—a conclusion that would eviscerate the statute—the certified question can only be answered by examining *this* record, the fees sought in *this* case, the fees awarded in *this* case, and the standards for determining whether a statutory fee is unconstitutional as applied. As phrased, the certified question could never result in a decisive opinion with statewide application, because whether a benefits-based statutory fee under section 73.092(1) is so low as to be unconstitutional as applied would depend upon the total fee, and the variance between the computed hourly rate of the statutory fee and the undefined "market rate," which will vary with the particular facts of each case. In sum, *every subsequent eminent domain fee case will be different than this one.* Conceivably, some statutory fees might be less than market rate, but not so low as to render the statute unconstitutional, whereas others could be so low that then denied landowners' counsel full compensation. But that determination will be fact-specific in each case, undermining the notion that this case presents any question of great public importance warranting further review of the district court's decision.

Any other construction of the certified question would require this Court to interpret it as this alternative:

IS SECTION 73.092(1), FLORIDA STATUTES, UNCONSTITUTIONAL EVERY TIME THE STATUTORY FEE IS LESS THAN A MARKET RATE FEE?

However, that question has already been answered in the negative. *See Pierpont v. Lee Cnty.,* 710 So. 2d 958 (Fla. 1998), where this Court had "no hesitation in saying that the legislature may enact reasonable provisions to govern the award of attorneys' fees in condemnation actions." *Id.* at 960; *see also*, *Seminole Cnty. v. Coral Gables Fed. Sav*., 691 So. 2d 614, 615 (Fla. 5th DCA 1997) ("it is within the power of the legislature to require that attorneys' fees be set as a percentage of the benefit"). And even the district court in this case recognized that when benefits-based fees apply, "there is *never a guarantee* that the effective hourly compensation will equate to the market rate. Conversely, a benefits-based fee might yield a substantial hourly fee." *OOCEA II,* 137 So. 3d at 1156 (emphasis supplied). Plainly, the concept of a "benefits achieved" fee that is below the market rate lodestar fee is not unconstitutional on its face.

Because the Legislature has determined in section 73.092(1) that in eminent domain cases landowners' attorneys are entitled to a "benefits achieved" fee according to a rate schedule, which may exceed or be less than the attorney's ordinary hourly rate and lodestar fee, Petitioners are really only seeking to determine whether the statutory fee is unconstitutional in *this case*. Thus, the "as

applied" challenge to the statute is quintessentially not a question of great public importance, but a narrow, fact-based question that applies only to a single case.

The only cases in which this Court accepted jurisdiction when a certified question involved an "as applied" challenge are distinguishable. In *State v. Mark Marks, P.A.*, 698 So. 2d 553 (Fla. 1997), the question was whether an insurance fraud statute was unconstitutionally vague "as applied to attorneys in the representation of their clients." Thus, the challenge was applicable to a class of persons (attorneys), and was not based on the unique facts presented in any given case. And in *Department of Revenue v. General American Transportation Corp.*, 521 So. 2d 112 (Fla. 1988), the question about ad valorem taxation of private line railroad cars impacted an entire industry, not just an individual.

Because the question is unlikely to address a recurring issue, the Petitioners' "as applied" constitutional challenge to their statutory fee is ill-fitted to the concept of "great public importance," and does not require a decision from this Court to resolve any uncertainty in the law or to guide future courts and litigants. Moreover, the total fee awarded in this case ($227,652.25) and the computed blended hourly rate ($87) are not so low as to fall within the category of cases where a fee has been deemed confiscatory of a lawyer's time. That furthers the conclusion that jurisdiction was improvidently granted. *Compare, Zelman v. Justice Admin. Comm'n*, 78 So. 3d 105 (Fla. 1st DCA 2012) ($13 per hour award to appointed

criminal defense counsel was too low), *with Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925 (Fla. 2002) ($50 flat rate for appellate attorneys' fees not confiscatory in a capital case requiring 550 hours of time)*; see also Lasley v. Palm Beach Cnty.*, 595 So. 2d 1056, 1057 (Fla. 4th DCA 1992) (denial of any fees for work performed by special public defender after original fee award was confiscatory of attorney's time).The original acceptance of jurisdiction (by five Justices) should be revisited by the full Court, and retracted.

In similar circumstances, where a district court has certified a question of great public importance but the issue is, in fact, narrow and not of general importance, the Court has withdrawn its original decision to accept jurisdiction and dismissed cases on the ground that jurisdiction was improvidently granted, even after full briefing. *See State v. Brooks,* 788 So. 2d 247 (Fla. 2001) (dismissing petition for review where the certified question "addresses a narrow question based on the unique facts"); *Dade Cnty. Prop. Appraiser v. Lisboa,* 737 So. 2d 1078 (Fla. 1999) (dismissing because "the legal question in this case does not present an issue of 'great public importance,'" but instead "requires consideration of a narrow issue with very unique facts"); and *State v. Sowell,* 734 So. 2d 421 (Fla. 1999) (dismissing petition because "the actual legal question deals with an extremely narrow principle of law" and "does not present an issue of 'great public importance'"). This is such a case.

The challenged statute, section 73.092(1), Florida Statutes, prescribes that "except as otherwise provided . . . the court, in eminent domain proceedings, *shall* award attorney's fees based *solely* on the *benefits achieved* for the client." (emphasis supplied). The statute provides a fee schedule, varying the percentage to be paid as fees, depending on the amount of the benefit achieved for the landowner. *See* § 73.092(1)(c), Fla. Stat. (*see infra,* p. 25).

Using that formula, Petitioners were awarded $227,652.25, which amounts to a blended hourly fee for attorney and paralegal time of $87. *OOCEA II,* 137 So. 3d at 156. Noting that where benefits-based fees are utilized, "there is never a guarantee that the effective hourly compensation will equate to the market rate" (*id.*), the district court said the fee in this case "does not appear patently unconstitutional." *Id.*

The district court further discussed that the landowner's counsel took no steps during the course of the litigation to streamline their time expended, or to seek sanctions if they thought they were being subjected to "excessive litigation," instead seeking to throw out the entire statutory scheme. The district court implied that more appropriate steps could have been taken along the way, if necessary:

> *If,* in fact, Appellant had engaged in 'excessive litigation' tactics that required Appellees' attorneys to spend additional time litigating this case, statutory and procedural mechanisms were in place to deal with that situation. Appellees' attorneys did not avail themselves of those mechanisms. Instead, rather than targeting the

> specific purported misbehavior, quantifying the resulting expenses to Appellees and seeking additional fees for these purportedly abusive tactics, Appellees successfully convinced the trial court to scrap the entire fee formula as unconstitutional in favor of a fee based on reconstructed hours. This approach—and the resulting fee of $816,000—was error.

OOCEA II, 137 So. 3d at 1156-57 (emphasis supplied).

Thus, without deciding the disputed issue of whether the Expressway Authority caused excessive litigation, the certified question asks *generally* whether section 73.092(1), Florida Statutes, which dictates the "benefits achieved" formula for computing fees in an eminent domain case, is rendered unconstitutional *as applied* where a condemning authority causes "excessive litigation" and the landowner's attorneys obtain a "lower-than-market fee." But by definition, an "as applied" challenge to a statute is a fact-dependent question, and not a question of great *public* importance. Thus, the Court should find that jurisdiction was improvidently granted, and should dismiss this case.

C. <u>If jurisdiction exists otherwise, it should not be exercised</u>.

We recognize that in addition to having jurisdiction to review decisions that pass upon a question of great public importance, this Court also has jurisdiction to review "any decision of a district court of appeal that expressly declares valid a state statute or that expressly construes a provision of the state of federal

constitution. . . .” Art. V, § 3(b)(3), Fla. Const. Arguably, that provision could provide jurisdiction to review *OOCEA II*, which concluded that the benefits-based fee in this case “does not appear patently unconstitutional.” 137 So. 3d at 1156.

However, such jurisdiction is discretionary, not mandatory, and for the reasons discussed above, even if jurisdiction exists, the Court should revisit its decision to accept the case, and should dismiss the case because jurisdiction was improvidently granted. The district court decision makes only passing reference to the constitutional issues, and is primarily based on the court’s view that the Landowners bypassed the opportunity to seek relief for perceived “excessive litigation” during the pendency of the case, instead seeking to be excused from the attorneys’ fee schedule in section 73.092(1) with an after-the-fact argument that the statute is unconstitutional as applied. 137 So. 3d at 1156-57 (“This approach—and the resulting fee of $816,000—was error.”). In sum, because the facts of this case are unique, and unlikely to be repeated, the district court remand adequately resolves the matter, and this Court should decline review and dismiss this case.

Alternatively, if the Court retains jurisdiction, in Point II below, we address the merits and urge the Court to approve the decision of the district court.

II. The benefits-based fee under section 73.092(1), Fla. Stat. ($227,652.25) is not so low as to render the statute unconstitutional as applied, regardless of the parties' litigation conduct.

A. Standard of review

We agree with the Landowners (Init. Br. 8) that the standard of review of a decision determining the constitutionality of a state statute is *de novo. See Graham v. Haridopolos,* 108 So. 3d 597, 603 (Fla. 2013). Also important is the principle that "'statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.'" *Id.* (quoting *Crist v. Fla. Ass'n of Crim. Def. Lawyers, Inc.,* 978 So. 2d 134, 139 (Fla. 2008)).

We also agree that an appellate court reviews factual findings to see if they are supported with substantial competent evidence in the record. (Init. Br. 8).

B. The statutory fee is reasonable.

We begin with a point of agreement: property owners are entitled to reasonable attorney's fees in eminent domain proceedings. *See* Art. X § 6, Fla. Const. (providing for "full compensation" to property owners in eminent domain proceedings); *JEA v. Williams*, 978 So. 2d 842, 845 (Fla 1st DCA 2008) ("A landowner's constitutional right to full compensation for property taken by the government includes the right to a reasonable fee for the landowner's counsel") (citing *Tosohatchee Game Pres., Inc. v. Cent. & S. Fla. Flood Control Dist*., 265 So. 2d 861 (Fla. 1972)).

In section 73.092, Florida Statutes, the Legislature has prescribed the methods for awarding fees in eminent domain cases. The statute does not provide for a lodestar fee (reasonable time vs. reasonable hourly rate). Instead, it provides that with certain exceptions not applicable here, that "the court, in eminent domain proceedings, *shall* award attorney's fees based *solely on the benefits achieved for the client*." (emphasis supplied). "Benefits" is further defined by the statute:

> [T]he term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

§ 73.092(1)(a), Fla. Stat. Subsection (b) further provides for consideration of nonmonetary benefits, and subsection (c) prescribes a sliding schedule for the computation of fees, with the percentage diminishing as the benefit increases:

> (c) Attorney's fees based on benefits achieved shall be awarded in accordance with the following schedule:
>
> 1. Thirty-three percent of any benefit up to $250,000; plus
>
> 2. Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus
>
> 3. Twenty percent of any portion of the benefit exceeding $1 million.

§ 73.092(1)(c), Fla. Stat.

No court has ever held that *any* benefits-based statutory fee that is less than a lodestar fee is *per se* unreasonable and unconstitutional. To take that position would render section 73.092(1) a nullity.

To the contrary, it is well settled that the benefits based fee structure described above is constitutional. The Fifth District has said that "it is within the power of the legislature to require that attorneys' fees be set as a percentage of the benefit." *Seminole Cnty. v. Coral Gables Fed. Sav.*, 691 So. 2d 614, 615 (Fla. 5th DCA 1997) (rejecting a constitutional challenge to a prior version of the statute). Similarly, in *Pierpont v. Lee County,* 710 So. 2d 958, 960 (Fla. 1998), this Court had "no hesitation in saying that the legislature may enact reasonable provisions to govern the award of attorney's fees in condemnation actions." *Pierpont* approved attorney's fees in the amounts of $0, $1,551, and $19,800. 710 So. 2d at 959. Plainly, Florida courts have for many years applied section 73.092(1) and have awarded attorney's fees in eminent domain cases based on the benefits obtained. While there is "never a guarantee that the effective hourly compensation will equate to market rate," *OOCEA II*, 137 So. 3d at 1156, the fact that it may be higher or lower than market rate has never before been the basis to hold the statute unconstitutional.

In this case, the district court did no analysis of the constitutional claim, merely summarily concluding that the $227,652.25 fee did not appear "patently

unconstitutional." *OOCEA II,* 137 So. 3d at 1156. That figure represented a blended rate, merging attorney time and paralegal time. But when attorney time was separated out, it averaged $113 per hour. (R. 986). Certainly that is within the range of reasonableness, and not sufficiently confiscatory of counsel's time to render the fee statute unconstitutional.

In *Pierpont v. Lee County*, 710 So. 2d 958 (Fla. 1998), this Court acknowledged that the statutory fee might be unconstitutional as applied in certain circumstances. *Id.* at 961 and n. 2. But the simple fact that the litigation continued longer than Landowners' counsel anticipated does not fall within the narrow exceptions envisioned in *Pierpont.* Were it so, a condemning authority would be hamstrung from zealously litigating its interests, even where the disputes to be litigated were good faith disagreements.

This case does not come close to being a test case for what fee might be unreasonably low under section 73.092(1), because $227,652.25, reflecting a $113 hourly rate, is a substantial sum. The case involved the total taking of commercial property, and there were no disputes as to highest and best use, severance damages, business damages, apportionment issues, or any of the other cumbersome issues often arising in eminent domain matters. (R. 1603-04; R. 1967-70). After a jury trial, the Landowners obtained a verdict below the midpoint of the appraised values at trial, for a total amount $830,609 over the Expressway Authority's first offer.

(R. 346; R. 409; R. 691; R. 844). On that record, the district court readily concluded that the fee was not patently unconstitutional, and this Court should approve that conclusion. In contrast, the Landowners' seek a fee award ($816,000) that virtually equals the benefits achieved for the Landowners ($830,609). (R. 2424). *That* result appears facially unreasonable, particularly where the Landowners' counsel admittedly failed to maintain contemporaneous time records for 2000 hours of the 2700 hours claimed, instead relying on reconstructed time records prepared after trial. (R. 908-13; 1465).

What little precedent exists suggests that the statutory fee in this case is reasonable and therefore constitutional. *See Pierpont v. Lee Cnty.,* 710 So.2d 958, 959 (Fla. 1998); *cf. Sheppard & White, P.A. v. City of Jacksonville,* 827 So. 2d 925, 931 (Fla. 2002) (upholding appellate fees of $50 per hour in a capital case). Moreover, this is not at all a case where the fee is so low that it may be deemed confiscatory and would threaten the right to obtain representation in eminent domain cases, thereby making the fee unconstitutional. Although not squarely on point, cases in other legal contexts are instructive.

For example, in *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), at issue was the statutory attorneys' fee for representing a defendant in a capital murder case. The fee totaled $3,500, which represented $14 per hour for the attorney's 248 hours invested in the case. In departing from the statutory fee, this

Court held that in cases involving unusual or extraordinary circumstances, inflexibly imposed maximum fees would interfere with the defendant's Sixth Amendment right to counsel. *Id.* at 1112. Here, the Landowners' constitutional right to "full compensation" including a reasonable fee might also be denied if counsel were awarded a $14 per hour rate. But that is not this case.

Also instructive is *Hillsborough County v. Scruggs*, 545 So. 2d 910 (Fla. 2d DCA 1989), where the statutory attorneys' fee in a parental rights proceeding was $1,000. *Id.* *Scruggs* found that the trial court did not err when it granted a fee award of $2,000, approximately $40 per hour. *Id.* at 913. However, before allowing the increased fee, the Court had to come to the specific conclusion that the $1,000 fee "would be 'out of line with reality' and would materially impair the court's inherent function to provide effective counsel, when constitutionally required, to the indigent." *Id.*

The fee in this case is not out of line with reality. And the fact that the hourly rate extrapolated from the statutory percentage fee may be less than counsel's ordinary hourly rate is immaterial. *See generally Hillsborough Cnty. v. Unterberger*, 534 So. 2d 838, 842 (Fla. 2d DCA 1988) (stating that in a criminal case it is not "unconstitutional to compensate an attorney at a rate that he or she believes will not cover the overhead or at a rate that he or she believes is not in line with his or her experience or reputation in the community.") In eminent domain,

as in other areas of law, there is no statutory or constitutional guarantee that the landowner's attorney will be paid any particular amount, or even the same sum as the condemnor's counsel is paid. *Cf. Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 935 (Fla. 2002) (quoting *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985)) for the proposition that there is no requirement "that a State *must* purchase for the indigent defendant all the assistance that his wealthier counterpart might buy."); *Hillsborough Cnty. v. Unterberger*, 534 So. 2d 838 (Fla. 2d DCA 1988). There is inherent risk to counsel under the eminent domain fee statute, but the Florida Constitution only guarantees a reasonable fee as an element of full compensation, not a market rate fee. *See OOCEA II,* 137 So. 3d at 1155; *Tosohatchee Game Preserve, Inc. v. Cent. & S. Fla. Flood Control Dist*., 265 So. 2d 681 (Fla. 1972); art. X, § 6, Fla. Const. The $227,652.25 fee in this case satisfies that standard.

C. The Expressway Authority did not engage in any conduct that would render the statutory fee unconstitutional as applied.

1. *The record does not support a finding of "excessive litigation tactics."*

If "excessive litigation" is to be the basis for an attorney's fee, it would be in the nature of a sanction, and this is *not* a sanctions case.[2] In deciding what fees were due to the Landowners under the applicable eminent domain statutes, the trial court simply viewed the case through the retrospectoscope and concluded that the Expressway Authority's litigation strategy was "excessive," thus warranting a fee far in excess of what section 73.092(1) would permit. But there is no record evidence nor any judicial findings about cumulative motion practice, excessive or abusive discovery, or any other evidence of the "dog eat dog" litigation suggested by the Landowners. (*See* Init. Br. 7, 25).

As the district court noted, the trial court "identified two specific observations to support its conclusion that [the Expressway Authority] had 'excessively litigated.'" *OOCEA II,* 137 So. 3d at 1156. The first was that the Expressway Authority spent twice as much time as did Landowners' counsel deposing the opposing experts. *Id.* The second was the Expressway Authority's

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[2] The term has been used in various sanctions cases. *See generally, Hallac v. Hallac,* 88 So. 3d 253, 259 (Fla. 4th DCA 2012); *Jankowski v. Dey*, 64 So. 3d 183, 185 (Fla. 2d DCA 2011); *Shniderman v. Fitness Innovations & Technologies, Inc*., 994 So. 2d 508, 513 (Fla. 4th DCA 2008).

decision to use an expert witness regarding a new theory late in the case. *Id.* But both observations may be explained, and neither justifies departing from the benefits-based fee statute.

As to the time expended on depositions, it is relevant that the Landowners had double the number of witnesses and multiple appraisal reports, necessarily requiring more time. (R. 229-33; 309-12). As to the decision to utilize an economist expert (Dr. Fishkind), the facts of this case supported that approach. Because the Landowners sought millions of dollars more than the Expressway Authority's appraised value, the condemning authority had a duty to protect public funds, and its counsel had a duty to zealously represent the Expressway Authority's interests. They retained two valuation witnesses, an appraiser and Dr. Fishkind, who was also retained to provide market analysis of comparable sales used by the appraisers. (R. 61-63).

It is not unreasonable to use two valuation experts where millions of dollars are in dispute. Dr. Fishkind had participated in eminent domain litigation previously. *See Davis v. South Fla. Water Mgmt. Dist.*, 715 So. 2d 996 (Fla. 4th DCA 1998) (affirming the trial court's decision to allow Dr. Fishkind to testify as to the same type of testimony he proposed to give in this case). In this case, where each side had agreed that the highest and best use of the property consisted of developing the property with commercial lots, Dr. Fishkind prepared a summary

report, using a discounted cash flow analysis to identify how much a developer would likely pay for the subject property. (R. 2285-90).

While Dr. Fishkind's presence in the case no doubt resulted in time expended by the attorneys on both sides, as would any expert witness, the record does not show that his role was unusual, extraordinary, or improper. In fact, the Landowners also retained an economist. (R. 309-12). And, the court initially rejected the Landowners' attempt to preclude Dr. Fishkind's testimony (R. 77-87; R. 222), not ruling his testimony inadmissible until the eve of trial.

Remarkably, Landowners' counsel claim to have spent at least 1350 hours devoted to Dr. Fishkind's role in the case, out of 2,700 attorney hours claimed in total. (R. 866-67). But instead of questioning that expenditure of time, the trial court deemed the Expressway Authority's litigation strategy to be excessive. Thus, the district court reasonably questioned why the Landowners' counsel failed to utilize any available rules or procedures that could have addressed allegedly "excessive litigation" while it was occurring, instead choosing to seek to declare the benefits-based fee statute unconstitutional as applied. The district court correctly concluded that the Landowners' failure to address the perceived problem earlier in the case was "error." 137 So. 3d at 1157.

2. The record does not support the argument that there was litigation misconduct.

The Landowners contend that the Expressway Authority engaged in "misconduct" through its use of Dr. Fishkind. (Init. Br. 20-25). That argument has no merit, and even the trial court refused to go that far. In particular, the Landowners claim that the Expressway Authority should have known that Dr. Fishkind's conclusions were inaccurate, based on a plan prepared by an engineering consultant, Mr. Weinstein, and that Dr. Fishkind should have been withdrawn as a witness. *See id*. But that argument is wrong, is cobbled together by taking statements out of context, and should not persuade this Court.

The Initial Brief cites an internal memorandum prepared by the Expressway Authority's counsel and a site plan prepared Weinstein, and portrays them as evidence that the Expressway Authority knew or should have known that Dr. Fishkind's opinion of value was inaccurate. *See id*. However, neither of these documents, properly viewed, support that conclusion.

The memorandum Landowners reference in their argument is dated August 25, 2009, and it provides that "the site development plans and corresponding date are generally reasonable." *See* Petitioners' Corrected Appendix, pp. 56-47. It also states, in sum and substance, that the comparable sales used by the appraisers may be better than the subject property because they may be able to yield more floor area than the subject property and that the appraisers may be *overvaluing* the

property by 20%. *Id*. Thus, a fair reading of the memorandum is that the Expressway Authority's experts were being generous in their valuation of the property.

Similarly, Weinstein's site plan does not prove that the Expressway Authority engaged in any misconduct. While Weinstein's plan indicates that more developable area could be achieved on the site, it shows that to do so one would have to lay out the lots in a bizarre manner, requiring *cul de sacs* at the driveway entry points, "unusual and undesirable . . . building configurations and building placement relative to the roadways . . . [T]he site [in the drawing] would have access, circulation, and visibility issues that may prevent it from being a viable commercial site." (R. 2076-81) (Oct. 3, 2012 Fishkind Affidavit). As such, no developer would develop the site in this manner to achieve extra floor area of limited value. Thus, the drawing actually supported the conclusions of the Expressway Authority's trial experts.

Further, implicit in Dr. Fishkind's analysis is that the lot layout be practical and merchantable. (R. 2076-81). But the Weinstein drawing is neither practical nor merchantable. *Id.* Accordingly, when Dr. Fishkind did see the Weinstein drawing, Fishkind did not revise his conclusions. *Id.* at 2079 ("This document does not in any way change my opinion. . . ."). Nor would it have affected his opinion had he seen it earlier. *Id.* at 2076-81. Indeed, Dr. Fishkind did see

multiple other expert drawings used in the case, showing estimates even greater than Weinstein's figure, but that they did not cause Dr. Fishkind to change his opinion. (R. 1834). Contrary to the Landowners' arguments, the Weinstein drawing was immaterial.

When the documents Landowners have focused on are viewed in the correct context, their "misconduct" argument is refuted. Neither the district court nor the trial court found misconduct, and the Landowners' effort to make that factual argument anew in this Court is misplaced.

D. Even if excessive litigation had caused Landowners' attorneys to incur additional time, the $227,652.25 fee would not be unconstitutionally low.

Assuming *arguendo* that the Expressway Authority litigated this case in a manner that could be deemed "excessive," and assuming *arguendo* that the Landowners bear no responsibility for their failure to address the perceived problem during the course of the case, the certified question basically asks if the statutory fee should be deemed unconstitutional due to the excessive litigation because it fails to yield a market-rate hourly fee. The answer is no.

As explained above, article X, section 6, of the Florida Constitution guarantees full compensation to a landowner in an eminent domain case, and a reasonable attorney's fee is a component of full compensation. A reasonable fee is necessary to ensure that condemnees can secure adequate legal representation to

enforce their rights without having to dip into their own funds, thereby effectively reducing their compensation, in order to secure such representation. We agree with that principle. *See Seminole Cnty. v. Butler*, 676 So. 2d 451, 454 (Fla. 5th DCA 1996); *Schick v. Fla. Dep't of Agric. and Consumer Servs*., 586 So. 2d 452, 453 (Fla. 1st DCA 1991).

What the Landowners seek here would dramatically alter this constitutional standard, requiring that the fee also equal a market-rate based fee in cases where there is "excessive litigation" by the condemning authority. That standard would invite a constitutional challenge to section 73.092(1) in every case where the statutory fee is below the market-rate fee, and would effectively negate the statute in those cases. This Court should answer the certified question in the negative.

Further, section 73.092, in one form or another, has been the law in Florida since 1976, providing for a form of benefits-based fee. The soundness of that statutory approach to fees in eminent domain cases is well established, as is the reality that some fees computed under the statute will exceed counsel's normal hourly rate, while others may not reach it. But no court (other than the trial court in this case) has ever held the statute unconstitutional as applied, simply because it resulted in a lower-than-market-rate fee, and even here, the trial court offered no real constitutional analysis, instead preferring to award a higher fee as a reward for the Landowners' counsel's substantial investment of time in defending the case:

> This Court's conclusion that it was reasonable for Doerr to have incurred 2,200 attorney hours, and 400 paralegal hours, and the Court's determination that a reasonable fee is $816,000, remains valid and applicable to the facts and circumstances of this case, based upon a property owner's constitutional right to full compensation. This is especially true since it was OOCEA that was primarily responsible for the excessive litigation because of its decision to use Fishkind.

(R. 2423) (Final Order) (Mar. 1, 2013). That was error, and the district court properly reversed.

In its order, the district court recognized that there are proper ways to deal with excessive litigation, short of declaring the fee statute unconstitutional as applied. *OOCEA II,* 137 So. 3d at 1156. Those avenues include sanctions and rules governing discovery. *Id.* If the Landowners thought sanctions were in order, they could have expressly sought sanctions, but they did not. If more information was required of Dr. Fishkind or other witnesses, they could have better utilized discovery devices. But foregoing those approaches and seeking to invalidate the governing fee statute was not the correct approach, as the district court held.

The Landowners contend that the district court's suggested remedy "is not applicable" for the "misconduct" they allege. (Init. Br. 26). In particular, they claim that they could not timely seek relief because they learned of the "misconduct," the decision to proceed with Dr. Fishkind after allegedly finding out that he was wrong, until "well after the valuation phase of the case." (Init. Br. 30).

Nonetheless, if they believed the Expressway Authority's litigation conduct was improper or sanctionable, the Landowners could have made that assertion even post-trial in an appropriate motion seeking that relief. But they failed to take that route. Indeed, if the Expressway Authority's litigation conduct would not support an award of sanctions, as the Landowners appear to concede (Init. Br. 28-29), then the litigation itself was not unreasonable, and the concomitant reasonable fee would be that permitted by section 73.092(1).

A court's decision to declare the fee statute unconstitutional should be limited to situations where it is so plainly confiscatory of counsel's time, or so injurious to the ability of landowners to secure counsel, that reasonable minds could not differ. *See Seminole Cnty.*, 676 So. 2d at 454; *Schick* , 586 So. 2d at 453. This is not such a case, because there is no record evidence that either circumstance exists—either that the statutory fee threatens future landowners' ability to obtain counsel, or that it is confiscatory of counsel's time. Absent any evidence to the contrary, the more obvious conclusion to be drawn from the facts in this case is that many lawyers would welcome a $227,652.25 fee in a case such as this.

CONCLUSION

For the foregoing reasons, the Court should reconsider its order accepting jurisdiction, hold that jurisdiction was improvidently granted, and dismiss this case. Alternatively, the Court should answer the certified question in the negative, and approve the decision of the Fifth District Court of Appeal, holding that the benefits-based fee under section 73.092(1), although lower than market rate, was not unconstitutional as applied to the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer Brief was electronically filed through the Florida e-filing portal, and served on the parties listed below, by e-mail service this __24th___ day of October, 2014:

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I HEREBY CERTIFY that this Brief is prepared in compliance with Fla. R. App. P. 9.210, and is in Times New Roman 14-point font.

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