Filing # 17863343 Electronically Filed 09/04/2014 04:02:13 PM

RECEIVED, 9/4/2014 16:03:46, John A. Tomasino, Clerk, Supreme Court

---

SUPREME COURT OF THE STATE OF FLORIDA

JOSEPH B. DOERR,
Trustee, et al.,

Petitioners/Appellees,

vs.

CENTRAL FLORIDA EXPRESSWAY AUTHORITY,
a body politic and corporate, and an agency of the State, under the laws of the state of Florida,

Respondent/Appellant.

CASE NO. : SC14-1007
Lower Tribunal Nos.: 5D13-1164
2006-CA-00625-O

INITIAL BRIEF

On Petition (Certified Question) From the Fifth District Court of Appeal
Reversing a Final Order of the Circuit Court
For the Ninth Judicial Circuit, in and for
Orange County, Florida

CRAIG B. WILLIS
JOE W. FIXEL
FIXEL & WILLIS
211 S. Gadsden Street
Tallahassee, Florida 32301
(850) 681-1800

MAJOR B. HARDING
AUSLEY & MCMULLEN, P.A.
Post Office Box 391
Tallahassee, Florida 32301
(850) 425-5341

Counsel for Petitioners/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

PRELIMINARY STATEMENT

The Petitioners/Appellees, Joseph B. Doerr, Trustee of the Joseph B. Doerr Revocable Living Trust, dated September 9, 1994, will be referred to as "Doerr," and Ministry Systems, Inc., will be referred to as "Ministry Systems." The Respondent/Appellant, Central Florida Expressway Authority, will be referred to as the "Expressway Authority." Citations to the Record on Appeal will be made by using the letter "R," followed by the volume and page number.

STATEMENT OF THE CASE

This Court's jurisdiction was invoked on the basis of a certified question from the Fifth District Court of Appeal, and accepted an order, dated July 8, 2014. The certified question was stated as follows:

> **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 attorney 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) [Florida Statutes]?**

The question was certified as one of great public importance and made at the conclusion of the decision reversing the trial court's final order which had found that the eminent domain attorney fee statute, Section 73.092(1), *Fla. Stat.*, was unconstitutional as applied to the facts and circumstances of this case.

The appeal to the Fifth District Court of Appeal, taken by the Expressway Authority, was a second appeal from the trial court's final order awarding reasonable attorney's fees. In the first appeal, the Fifth District Court of Appeal decided that the trial court was incorrect in having determined that the Expressway Authority's first written offer, made subject to apportionment among multiple property owners, was "insufficiently certain" to make a benefit-based attorney fee determination. *Orlando/Orange County Expressway Authority v. Tuscan Ridge*, 84 So.3d 410 (Fla. 5th DCA 2012). The Fifth District, however, remanded the case for the trial court to consider the "Landowners' argument that applying Section 73.092(1), *Fla. Stat.*, to limit the fees sought in this case denies them their constitutional right to full compensation, because the condemning authority caused 'excessive litigation.'" *Id.* at 418-19.

On remand, the trial court found that the Expressway Authority had excessively litigated the case to a significant degree, and that the application of the benefit-based attorney fee formula set forth in Section 73.092(1), *Fla. Stat.*, constituted a denial of full compensation, as required by Article X, Section 6, *Florida Constitution*. The trial court's conclusion was based on the finding that the application of the benefit-based formula did not result in a reasonable attorney fee, which is an essential component of full compensation. The Fifth District again reversed the trial court's final order on the second appeal, but certified to this Court its question of great public importance.

Orlando/Orange County Expressway Authority v. Tuscan Ridge, 137 So.3d 1154 (Fla. 5th DCA 2014).

STATEMENT OF THE FACTS

In August of 2006, the Orlando/Orange County Expressway Authority (now the Central Florida Expressway Authority) filed an eminent domain lawsuit to acquire a 9.81 acre tract of land (Parcel 406), owned by Doerr and Ministry Systems. (R1:103) The Expressway Authority made an initial written offer to the property owners to acquire Parcel 406 that was $600,000 in excess of its appraisal of the market value of the property. Ostensibly, the stated reason for a so-called "incentive" offer is to encourage an early settlement to avoid litigation costs. As a practical matter, this first offer from the outset eliminated nearly $200,000 of attorney fees which would otherwise have benn paid pursuant to the benefit-based formula of Section 73.092(1), *Fla. Stat.* The Expressway Authority then proceeded to litigate the case using a much lower valuation and the jury verdict of full compensation exceeded the highest offer ever tendered to the property owners. (R2:346)

After the owners refused the initial offer, suit was filed, and the cause was scheduled for a jury trial in early 2007. (R1:55-57) Although both real estate appraisers for the property owners and the Expressway Authority concluded that the highest and best use for valuing the parcel was as vacant commercial property, the

Expressway Authority decided to insert into the litigation an economist to develop a hypothetical development analysis for the valuation of the property. This decision spawned much of the unnecessary and significant excessive litigation in the case. (R14:2421-22)

Despite the Expressway Authority's attorneys being informed by another of its experts that its economist was relying on erroneous information, which was serving as a primary foundation for his valuation conclusion, the Expressway Authority and its attorneys failed to inform the economist of his error and aggressively sought to continue to use him as a valuation witness at the jury trial. In fact, even after the trial court finally decided to strike this economist on the eve of trial, the Expressway Authority made further efforts to have the trial judge change his mind about this ruling during the trial.

Although the trial judge found that the excessive litigation was primarily caused by the Expressway Authority's aggressive litigation strategy to insert its economist into this eminent domain proceeding, he concluded that there were other actions taken by the Expressway Authority that also contributed to the excessive litigation. (R14:2422)

The trial judge, who presided over this eminent domain case throughout the trial court proceedings, during the lengthy pre-trial discovery phase, the seven-day trial, two and a half days of post-trial cost hearings, a four day attorney fee hearing and a post-remand constitutional fee hearing, found as a matter of fact that the Expressway

Authority had caused significant excessive litigation in the case. (R14:2421); *Orlando/Orange County Expressway Authority v. Tuscan Ridge*, 137 So.3d 1154 (Fla. 5th DCA 2014)

Accordingly, the trial judge in his final order concluded that it was reasonable, upholding the property owners' constitutional right, for their attorneys to have expended 2,200 hours of attorney time and 400 hours of paralegal time on behalf of the property owners in order to litigate with the Expressway Authority on an equal footing in this case. (R14:2424-25)

In coming to his conclusions, the trial judge took into account that the attorneys representing the Expressway Authority expended 2,888 attorney hours and 1,005 paralegal hours on the valuation phase of the case, while causing significant excessive litigation, for which they were paid $672,000.00 for their time billed on a monthly basis. *Orlando/Orange County Expressway Authority v. Tuscan Ridge*, 84 So.3d 410, f.n. 5 (Fla. 5th DCA 2012).

The trial judge also took into consideration that the Expressway Authority's own expert attorney fee witness testified that a benefit-based statutory fee would not constitute a reasonable attorney fee, as required by the constitution, for the amount of litigation required of the property owners' attorneys in this case. (R14:2422)

SUMMARY OF ARGUMENT

Article X, Section 6(a), *Florida Constitution*, guarantees that property owners will be paid full compensation for the taking of their property for a public purpose. The Expressway Authority concedes, as the courts of this State have consistently ruled, that entitlement to reasonable attorney's fees in eminent domain proceedings is a component of full compensation under the Florida Constitution. The reason for this entitlement is that property owners must be able to litigate on an equal footing with the condemning authority in order to fulfill the guarantee of Article X, Section 6(a).

If the condemning authority can use its unlimited taxing resources to excessively litigate a case, then only if the property owner's attorney is entitled to expend a reasonably comparable amount of resources to meet that challenge, will the constitutional guarantee be satisfied. When the condemning authority is the cause of significant excessive litigation, which results in the amount of time the property owner's attorney would ordinarily spend on a case to be greatly increased, the property owner's attorney must be enabled to recover a reasonable attorney fee based on those increased number of hours necessary to competently litigate the case. In that circumstance it is constitutionally impermissible to limit the landowner's attorney fee by a statutory cap that does not take into consideration a significantly increased number of property owner attorney hours caused by the condemning authority and a reasonable hourly rate applied to those hours.

Furthermore, a condemning authority that engages in "dog eat dog" or "win at any cost" litigation should not be rewarded for that inappropriate conduct. Because such a litigation strategy violates the constitutional guarantee, the landowner must be enabled to recover a reasonable attorney fee pursuant to the constitution and not capped by a fixed benefit-based statutory formula.

The benefit-based statute was enacted to curtail excessive litigation on the part of the property owners; it did not vitiate the constitutional guarantee that protects property owners from excessive litigation on the part of condemning authorities and ensures the payment of a constitutionally required reasonable attorney fee when the condemning authority, not the property owner, causes significant excessive litigation.

In sum, the condemning authority, not a property owner or a property owner's attorney, should bear the cost of time reasonably spent by that property owner's attorney as a result of the condemning authority having caused significant excessive litigation to resolve full compensation. In this case the trial court, as the finder of fact, concluded that the condemning authority should bear that cost, and required the Expressway Authority to pay a reasonable attorney fee as required by the Florida Constitution. This Court is urged to uphold that determination.

STANDARD OF REVIEW

The standard of review for the determination that Section 73.092(1), *Fla. Stat.*, was unconstitutional as applied is de novo. *Crist v. Fla. Association of Crim. Defense Lawyers*, 978 So.2d 134 (Fla. 2008); and *Fla. Dep't of Revenue v. City of Gainesville*, 918 So.2d 250 (Fla. 2005). The trial court's findings of fact underpinning and supporting its determination that the statute was unconstitutional as applied is subject to a substantial competent evidence standard of review. *Luscomb v Liberty Mutual Insurance Co.*, 967 So.2d 379 (Fla. 3rd DCA 2007)

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DECLARED SECTION 73.092(1), *FLA. STAT.*, UNCONSTITUTIONAL AS APPLIED WHEN THE CONDEMNING AUTHORITY CAUSED EXCESSIVE LITIGATION TO SUCH AN EXTENT THAT A BENEFIT-BASED ATTORNEY FEE WAS NOT A REASONABLE ATTORNEY FEE.

A. Award of a Reasonable Attorney Fee is a Necessary Component of the Constitutional Guarantee of Full Compensation.

Florida courts have historically interpreted the language of Article X, §6(a), *Florida Constitution*, to require that full compensation be paid for the taking of private property for a public purpose. *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289 (Fla. 1959); *Dade County v. Brigham*, 47 So.2d 602 (Fla. 1950).

The courts of this State have also consistently held that entitlement to a **reasonable** attorney fee is a necessary component of 'full compensation" under the Florida Constitution. *Jacksonville Expressway Authority v. Henry G. Du Pree Co., supra*; *Tosohatchee Game Preserve, Inc. v. Central and Southern Florida Flood Control District,* 265 So.2d 681 (Fla. 1972); *JEA v. Williams,* 978 So.2d 842 (Fla. 1st DCA 2008); and *Seminole County v. Butler,* 676 So.2d 451 (Fla. 5th DCA 1996).

In fact, both the Expressway Authority and the Fifth District Court of Appeal in the decision below conceded that an award of reasonable attorney's fees is a component of "full compensation." *Orlando/Orange County Expressway Authority v. Tuscan Ridge*, 137 So.3d 1154 (Fla. 5th DCA 2014). The question presented is whether, under the facts and circumstance of this case, the benefit-based statutory attorney fee constitutes a "reasonable attorney fee" under the Florida Constitution.

The underlying constitutional policy consideration for the necessity of an award of reasonable attorney's fees in eminent domain cases is to a great extent self-evident. "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." *Dade County v. Brigham*, 47 So.2d 602, 604 (Fla. 1950) (quoting the trial court). Only if the property owner is enabled to litigate with the condemning authority and dispute the value of the property on an equal footing will the promise of full compensation be fulfilled. *Id.*

B. Legislative Authority vis-a-vis Judicial Responsibility.

A number of judicial decisions have discussed the respective roles of the legislative and judicial branches of government concerning the determination of what constitutes a reasonable attorney fee in eminent domain proceedings and how that determination is to be properly made. Early on the Florida Supreme Court in *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289, at 294 (Fla. 1959), although noting that "no statute is needed to implement the organic law which provides for 'full' and 'just' compensation" in eminent domain cases, deemed it incumbent upon the judiciary to interpret the provisions of a statute in order to ensure the implementation of the constitutional guarantee.

Prior to the enactment in 1994 of the benefit-based attorney fee statute under review in this case, Florida courts generally have been deferential to legislative efforts to establish criteria for the determination of what constitutes a reasonable attorney fee. In *Schick v. Department of Agriculture and Consumer Services*, 599 So.2d 641, 643 (Fla. 1992), this Court, considering whether a contingency risk multiplier should be applied in an inverse condemnation case in the determination of a reasonable attorney fee, stated, "[w]e agree that where the legislature has set forth specific criteria for determining **reasonable** attorney's fees to be awarded pursuant to a fee-authorizing statute, the trial judge is bound to use only the enumerated criteria." (e.s.)

The *Schick* Court, referring back to the analysis set forth in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990), in regard to eminent domain actions, concluded that ordinarily a contingency fee multiplier is not justified, but "the basic lodestar method of computing a reasonable attorney's fee may be an appropriate starting point." *Schick,* 599 So.2d at 643. What was being analyzed is a judicial process to determine a **reasonable** attorney fee using legislatively supplied criteria.

See also, *In re Estate of Platt*, 586 So.2d 328, at 335 (Fla. 1991) (determining a reasonable hourly rate for a particular type of legal service and the number of hours that reasonably should be expended in providing those services is an appropriate starting point for computing a reasonable fee in eminent domain" actions).

In these cases the deference given to legislative enactments was to specific statutorily provided criteria to be considered in determining a reasonable attorney fee utilizing a lodestar approach. In 1994, the Legislature enacted a statute that in effect repealed the lodestar approach to the determination of attorney fees in eminent domain proceedings.[1] Chapter 94-162, Laws of Florida, codified in Section 73.092(1), *Fla. Stat.* This new statutory approach required, in general, the award of attorney's fees in eminent domain proceedings to be made solely on the basis of benefits achieved for the land owner. The attorney fee is awarded by multiplying a percentage amount times the

[1]An exception was provided for this new fee approach when "assessing attorney's fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings" where a benefit-based analysis is not available.

benefit, "which 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." *Id.*

This type of contingency attorney fee obviously can potentially bear very little causative relationship to what would be considered a reasonable attorney fee. A benefit-based fee has no direct relationship to the nature and extent of legal services necessary to place a landowner on an equal footing with the condemning authority in the litigation. The new statutory approach was ostensibly enacted as a result of governmental concern about the prior law, which utilizing a lodestar approach, "encouraged protracted litigation and unnecessary expense . . . ." *Pierpont v. Lee County*, 710 So.2d 958 (Fla. 1998). Not addressed in the new statutory enactment is how to deal with the converse potential abuse of a condemning authority causing significant excessive and "protracted litigation and unnecessary expense," as was found by the presiding trial judge to have occurred in this case. (R14:2420-25)

When the new benefit-based statutorily determined attorney fee was reviewed by this Court in *Pierpont*, the deference shown to legislative enactments in determining what constitutes a reasonable attorney fee, given the facts and circumstances of that particular case, gave way to an acceptance "that the Legislature may enact reasonable provisions to govern the award of attorney's fees in condemnation actions." *Pierpont v. Lee County*, 710 So.2d at 960. However, no such deference has ever been given to a

benefit-based, contingency fee which fails to constitute a reasonable fee due to significant excessive litigation caused by a condemning authority.

The particular issue on appeal in the *Pierpont* decision was whether the "good-faith estimate of value" is the equivalent of a written offer for purposes of determining the benefit achieved. While 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" (710 So.2d at 960), the Court did anticipate that there could be circumstances in which the application of statute could violate the constitutional requirement that a property owner is entitled to be on an equal footing and the attorney receive a reasonable fee for the legal services necessary to contest the value of full compensation. "[W]e do not foreclose the possibility that under certain circumstances section 73.092 could be unconstitutional as applied." 710 So.2d at 961.

See also, *Teeter v. Department of Transportation*, 713 So.2d 1090, at 1092 (Fla. 5th DCA 1998), in which while constitutional issues were not raised, Judge Sharp, in a specially concurring opinion, used the occasion to comment on the potential constitutional problem posed by subsection (1) of the statute. "[S]ubsection (1) recovery, which is premised on the benefits received in the litigation by the owner, is likewise limiting. Th[is] subsection[] seem[s] to conflict with constitutional requirements that a condemnee be justly compensated in taking cases, including attorneys fees".

Thus, while the judiciary continues to pay proper deference to legislative enactments concerning the determination of attorney's fees in eminent domain proceedings (whether in accepting criteria to be used in determining a reasonable attorney fee or in the general acceptance of a benefit-based, contingent fee), there remains an abiding constitutional concern in ensuring that the attorney fee awarded in any individual case is a reasonable fee given the particular facts and circumstance of that case, especially where there has been a finding that the condemning authority caused significant excessive litigation.

C. The Expressway Authority Excessively Litigated this Case.

The trial judge in this case presided over the entire pre-trial proceedings, including numerous hearings on multiple motions, a seven-day jury trial, and over two years of post-trial supplemental proceedings. The trial court heard four days of evidentiary testimony from both parties in post-trial hearings concerning the manner this case was litigated and what should constitute a reasonable attorney fee under the Florida Constitution. (R14:2420)

The trial court found that there was significant excessive litigation in this case and that the Expressway Authority caused that significant excessive litigation. Because of the extent of the excessive litigation caused by the Expressway Authority and the necessity of the attorneys for Doerr and Ministry Systems to adequately represent them on an equal footing with the condemning authority, the trial court ruled that the

benefit-based subsection of the fee statute was unconstitutional as applied. The trial court then applied the criteria set forth in subsection (2) §73.092, *Fla. Stat.*, to determine a reasonable attorney fee to be awarded under the facts and circumstances of this case. (R14: 2420-25)

The trial court's findings of fact should be reviewed under the substantial competent evidence standard. *Luscomb v. Liberty Mutual Insurance Co.*, 967 So.2d 379 (Fla. 3d DCA 2007). An appellate court's function is not to reweigh the evidence; its role is to review the record to determine if it contains competent substantial evidence to support the conclusions of the trier of fact. *Lipton v. First Union National Bank,* 941 So.2d 1256 (Fla. 4th DCA 2007); *Stevens v. Cricket Club Condominium, Inc.*, 784 So.2d 517 (Fla. 3d DCA 2001); *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So.2d 492 (Fla. 2d DCA 1993). On appellate review, the findings of fact of the trial court are presumed to be correct. *Lipton v. First Union Bank, supra*; *Stevens v. Cricket Club Condominium, Inc., supra; Citibank, N.A. v. Julien J. Studley, Inc.*, 580 So.2d 784 (Fla. 3rd DCA 1991).

The Florida Supreme Court in *Shaw v. Shaw*, 334 So.2d 13, at 16 (Fla. 1976) concluded as follows:

> It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test . . . is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable

> testimony or evidence," . . . it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court.

The overwhelming evidence in the record of this case is, and trial judge as the finder of fact concluded, that the Expressway Authority caused the significant excessive litigation and thereby "greatly increased the number of hours" required to litigate the case. (R14:2422) The key remaining question is who should bear the cost of that excessive litigation: the condemning authority that caused the significant excessive litigation or the property owner or the property owner's attorney who stood up to contest the valuation of the property that was taken?

In addressing that question, the trial judge found as follows:

> The Court concludes that in this case there was a clear pattern of OOCEA [Expressway Authority] causing excessive litigation. Early on in these proceedings, after the Order of Taking was entered in August of 2006, OOCEA made a decision to aggressively litigate this case to the potential detriment of Doerr's right to full compensation. Previously, the parties had agreed as to the highest and best use of the property, each side had a real estate appraiser to value the property as though vacant, and had agreed to try the case in early 2007. OOCEA retained an economist, Henry Fishkind. OOCEA then submitted Fishkind's report in late November of 2006.
>
> In his November 2006 report, Fishkind employed an economic development approach to value the Doerr property based upon a hypothetical redevelopment of the property, although the property had been appraised by both parties' property appraisers as though vacant. Using the development approach, Fishkind made 16 assumptions (e.g., the maximum square footage of buildings that could be built on the Doerr property; the cost of constructing such buildings; rental rates for buildings; vacancy rates for such buildings; insurance costs for such

> buildings; utility costs for such buildings; and real estate taxes for such buildings). The most important assumption was that 56,800 square feet of improvements was the maximum amount of building space that could be built on the property. Fishkind relied on other sources as well in making his assumptions which formed the predicate underlying his analysis.
>
> To competently represent Doerr, it was necessary for Doerr's attorneys to determine and then rebut any faulty assumption of Fishkind. In order to do so it was necessary for Doerr to retain additional expert witnesses and request further services of previously retained experts to challenge Fishkind's faulty assumptions. Challenging Fishkind's assumptions greatly increased the number of hours Doerr's attorneys spent on the case.
>
> (R14: 2421-22)

The property owners' best efforts to have Fishkind stricken as an improper witness throughout the pre-trial period in order to avoid all the unnecessary excessive litigation caused by his presence were vigorously contested by the Expressway Authority. (R14:2422) Unfortunately, Fishkind was not stricken until the eve of trial in February of 2008, after unnecessarily causing many hundreds of hours of excessive litigation for over a year. The Expressway Authority did not take an appeal from the trial court's ruling excluding Fishkind as a witness in this case.

The trial judge also found:

> Although Fishkind was the primary reason this case was excessively litigated, there were other actions taken by [the Expressway Authority] that reveal a pattern of behavior by [the Expressway Authority] causing excessive litigation.
>
> (R14:2422)

Moreover, Mr. Ken Bishop, who served as the Expressway Authority' chief trial counsel, conceded that the case reasonably should have required only approximately 640 hours of his law firm's time to adequately represent the Expressway Authority in an eminent domain case of this nature. (R10:1656-57) He had no credible explanation why it required the attorneys representing the Expressway Authority to incur 2,888 hours of attorney time and over a 1,000 paralegal hours for the valuation proceedings alone. The Expressway Authority paid its attorneys a total of $672,000.00 for the valuation proceedings alone, $150,000.00 for the cost phase of the case, and an unknown amount to contest the property owners' entitlement to reasonable attorney's fees in the valuation proceeding only. (R10:1657-58); *Orlando/Orange County Expressway Authority v. Tuscan Ridge*, 84 So.3d 410, f.n. 5 (Fla. 5th DCA 2012). For the post-trial litigation over the issue of attorney's fees, the property owners' attorneys are not entitled to be paid any attorney's fees by the Expressway Authority under existing case law.

Mr. Bishop had no explanation why it was necessary for the Expressway Authority to hire a second law firm and have another lawyer from out of town litigate against the property owners in the same case; nor did Mr. Bishop know how much time the second law firm had in the case or how much it was paid. (R10:1641) Throughout the trial the Expressway Authority had three attorneys and at least one paralegal in

attendance, including two attorneys from one law firm and one from the second law firm. (R10:1655)

The Expressway Authority listed 315 exhibits, consisting of thousands of pages of documents for the valuation trial of a whole taking of a commercial property, appraised as vacant. (R5:690) Only 24 of those exhibits were actually introduced into evidence at trial. (R5:690). The Expressway Authority spent nearly $100,000 on an expert consultant, who was never listed as a witness, just to prepare exhibits and provide assistance to its attorneys in litigation support. (R5:699)

Mr. Thomas Callan, an attorney fee witness for the Expressway Authority in post-trial proceedings, acknowledged that the Expressway Authority spent an excessive amount of time deposing witnesses in the case. (R14:2423)

In fact, Mr. Callan, the Expressway Authority's own expert witness, testified that an attorney fee computed under Section 73.092(1), *Fla. Stat.,* would not be a reasonable fee for the work reasonably performed by the attorneys on behalf of Doerr and Ministry Systems in this case. (R15:1738)

The trial court had received more than adequate substantial competent evidence, during the course of the pre-trial, trial and post-trial proceedings upon which to base his finding that the Expressway Authority caused significant excessive litigation in this case.

D. Misconduct on the Part of the Expressway Authority.

There was clear evidence of misconduct on the part of the Expressway Authority in this case which contributed to the significant excessive litigation caused by the Expressway Authority. The attorneys for the Expressway Authority were informed early in the litigation that one of its expert witnesses, Dr. Henry Fishkind, was relying on an erroneous assumption that was essential to his value conclusion. The attorneys for the Expressway Authority continued to advocate that Fishkind should be allowed to testify without disclosing to Fishkind or the trial court this error. This misconduct was not discovered (and could not have been discovered) until after the valuation trial, during the post-trial litigation over the property owners' attorney's fees.

The duty of an attorney representing a governmental agency in upholding standards of professional responsibility both to the Court and to the opposing party is even higher than the standards for litigation between private parties. As this Court stated in *Shell v. State Road Department*, 135 So.2d 857, at 861 (Fla. 1961):

> It must be borne in mind that in a condemnation proceeding the property of the land owner is subject to taking by the condemnor without the owner's consent. The condemnee is a party through no fault or volition of his own. Our [Constitution] makes it incumbent upon the condemnor to award 'just' compensation for the taking. In view of this constitutional mandate, the awarding of compensation which is 'just' should be the care of the condemning authority as well as that of the party whose land is being taken.
>
> Unlike litigation between private parties condemnation by any governmental authority should not be a matter of 'dog eat dog' or 'win at any cost'. Such attitude and procedure would be decidedly unfair to the

> property owner. He would be at a disadvantage in every instance for the reason that the government has unlimited resources created by its inexhaustible power of taxation.

After the instant case was initially anticipated to be tried in early 2007, and after both parties had agreed that the property should be appraised as though vacant commercial property and each had a real estate appraiser to value the property, the Expressway Authority's attorneys decided to insert Dr. Henry Fishkind into the litigation for valuation purposes. (R8:1283 & R10:1611)

Fishkind performed an economic development analysis of the Doerr and Ministry System property, assuming that the vacant property was fully developed and was generating a stream of rental income. The analysis was undertaken to determine if a developer would be willing to buy the property at the appraised value conclusion of the Expressway Authority's real estate appraiser. Fishkind concluded, based upon a number of development cost and rental income assumptions, that a developer would be willing buy the property at the Expressway Authority's value conclusion and still make a minimally acceptable profit on the purchase and development of the property. In Fishkind's words the Expressway Authority's view of the subject property's market value is the highest amount that "a developer would just be able to meet their required return on [the] investment." (R 2 of 2: Exhibit 34, page 2) Because the purchase price, development costs and anticipated rental income stream resulted in a minimally acceptable profit percentage for a prospective purchaser at the Expressway Authority's

appraised amount, implicit is the conclusion that the property owners' real estate appraiser's opinion of market value was too high.

The economic development analysis performed by Fishkind was obviously sophisticated and corroborated the Expressway Authority's real estate appraiser's opinion of market value. Unfortunately for the Expressway Authority, the most important factual predicate underpinning Fishkind's analysis and supporting his value conclusion was erroneous. The Expressway Authority's attorneys were aware of this problem and decided to not disclose this error to Fishkind. (R 2 of 2, Exhibit 30)

Fishkind testified at his deposition taken on May 22, 2007, that his opinion of value was premised on what he thought GAI [one of the Expressway Authority's engineering consultants] had determined to be "the largest footprint that could be built" for the subject property. This is known as the maximum building potential. Section 2.1 of Fishkind's report stated: "GAI provided the most aggressive projection for building development and that was adopted here [in his report]." Section 2.2 of his report provides: "Table 1 presents the sizing for the Project based on analysis by GAI and the cost to construct the maximum square footages GAI estimated." (R7:1034)

The amount of maximum building space used by Fishkind was 56,800 square feet, and it was at this number that his analysis supported the Expressway Authority's real estate appraisal. Fishkind agreed during his deposition that if the maximum allowable building square footage was higher than the number he adopted from the

GAI report, then his ultimate conclusion as to the market value of the subject property would go up. (R7:1034-1035) If Fishkind was required to increase his economic valuation of the subject property, based upon an accurate estimate of the maximum building potential, then his opinion would no longer support and would have been in conflict with the Expressway Authority's real estate appraiser's valuation of the property.

Who knew about Fishkind's critical mistake and when did they know it? In November of 2006, just prior to the time Fishkind produced his valuation report the Expressway Authority's attorneys had learned that GAI had **not**, in fact, determined the maximum building potential for the subject property. (Record 2 of 2: Respondents' Exhibit 30)

In a memorandum to the file, on November 10, 2006, Edgar Lopez, one of the Expressway Authority's litigation attorneys, stated that he spoke with Jack Weinstein (who was a site development engineer) that day. (Record 2 of 2: Exhibit 30) Mr. Weinstein informed Mr. Lopez that the GAI report (relied upon by Fishkind for his analysis) did "**not** actually examine the site's development potential in terms of the maximum square feet of development that one can attain on the subject." (Id.) Mr. Lopez also reported in the memorandum that Weinstein "would be willing to come up with what a site plan for the subject might look like and give us an idea of the maximum square feet of building space that the site can yield." (Id.)

After Fishkind had produced his report (11/30/06), which relied on the GAI report that did "**not** actually examine the site's development potential in terms of the maximum square feet of development," Weinstein produced a site plan in early 2007 based on maximum building potential. Weinstein's site plan in early 2007 was significantly greater in terms of the building square footage than the GAI report that was erroneously relied upon by Fishkind (67,500 s.f. versus the 56,800 s.f. used in the GAI site plan). (Record 2 of 2: Exhibit 31) This discrepancy was not surprising because (unknown to Fishkind) GAI had never intended for its report to be relied upon as the maximum building potential. (R4:642)

The particular amount of the discrepancy, and whether the specific plan proposed by Weinstein was a good plan, is not what is most significant about this fact. What is most important is that the Expressway Authority's attorneys had been informed by Weinstein that Fishkind was relying on an erroneous factual predicate and had produced his valuation analysis and report based on that erroneous factual predicate.

What did the Expressway Authority attorneys do about this disclosure to them that their expert economist was relying on erroneous information, and what was their duty in this regard as attorneys for a condemning authority taking private property? Was this error disclosed by the Expressway Authority to Fishkind so that he could reconsider his analysis in light of an accurate and reliable factual predicate? Did the

Expressway Authority withdraw him as an expert witness because his conclusions were faulty and should not be used for property valuation purposes?

The Expressway Authority took neither of these prudent and responsible steps, which would have prevented many hundreds of hours of litigation. Instead, the Expressway Authority engaged in "dog eat dog" litigation and did not disclose to Fishkind his error, cancelled the previously scheduled deposition of Weinstein (set for January 8, 2007 – R2 of 2: Exhibit 32), did not subsequently list Weinstein as an expert witness, and never disclosed to anyone (until a year and a half after the valuation trial in February, 2008, when ordered to do so by the trial court) the Weinstein site plan or the Lopez memorandum.

How do we know that the Expressway Authority failed to inform Fishkind that his analysis was flawed and that his value conclusion was unreliable? As stated previously, Fishkind testified at his deposition, later in May of 2007, that he was relying upon the GAI report for what he thought the GAI engineer working for the Expressway Authority had determined to be "the largest footprint that could built" on the subject property. (R7:1034) The Expressway Authority obviously had not informed Fishkind of his misapprehension about this factual predicate.

Because the Fishkind report had already been produced to the property owners, the only correction that could have appropriately been made would be to increase the maximum building square footage variable. In effect, if the Expressway Authority had

taken this step in this litigation, Fishkind's valuation would have supported the Doerr's and Ministry System's position as to property valuation, rather than the Expressway Authority's position. However, the Expressway Authority turned away from the concept of "the awarding of compensation which is 'just,'" as contemplated by this Court in *Shell v. State Road Department*, 135 So.2d at 861, and instead chose to use its vast resources to excessively litigate against the property owners in a "win at any cost" manner.

E. The District Court of Appeal's Suggested Alternative Remedy is not Applicable.

The district court of appeal suggested that Doerr and Ministry Systems should have sought sanctions against the Expressway Authority for excessive litigation, rather than seeking a reasonable attorney fee as mandated by the constitution, as other property owners and their attorneys have properly done in this state for more than a half century. *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289 (Fla. 1959); *Tosohatchee Game Preserve, Inc. v. Central and Southern Florida Flood Control District,* 265 So.2d 681 (Fla. 1972); and *JEA v. Williams,* 978 So.2d 842 (Fla. 1st DCA 2008). The district court of appeal's suggestion is based both on a misunderstanding of the facts of the case and a misapprehension or mistaken interpretation as to the availability of sanction fees in this particular litigation. Such a suggestion is also based upon the flawed idea that there is a practical and constitutional equivalence between a party's ability to seek and secure a remedy through moving for

sanctions and a property owner exercising a constitutional right to have a trial court order a condemning authority to pay a reasonable attorney fee.

The district court of appeal did not understand that the Expressway Authority's misconduct - in failing to inform Fishkind that he was relying upon what the Expressway Authority had been informed was an erroneous predicate information for his analysis and conclusions - was not discovered until over a year and a half after the valuation trial (and could not have been discovered before then) when the trial court ordered disclosure of the Expressway Authority's attorneys' records as part of the post-trial attorney fee proceedings. Thus, during the course of the litigation when the excessive litigation was occurring, Doerr and Ministry Systems had no knowledge of the misconduct (nor the ability to gain that knowledge).

The district court of appeal stated in its decision: "Apparently, the expert (Fishkind) based his opinions on false factual assumptions, ultimately resulting in a successful effort by Appellees to have the testimony excluded before trial." *Orlando/Orange County Expressway v. Tuscan Ridge*, 137 So.3d 1154 (Fla. 5th DCA 2014). The district court was mistaken. Actually, the trial court excluded Fishkind for some other, unannounced, reason. The property owners had argued several other bases for the exclusion of Fishkind, but the misconduct concerning his reliance on what the Expressway Authority knew to be erroneous predicate information was unknown to the property owners during and for a long time after the valuation trial.

This misapprehension of the facts on the part of the district court of appeal underpins that court's mistaken reliance upon (and as a practical matter relatively rarely granted) procedural sanctions as a potential alternative remedy for the Expressway Authority's significant excessive litigation in this case. Section 57.105(2), *Fla. Stat.*, cited by the district court of appeal, provides a potential award of sanction attorney's fees in certain circumstances where it is timely proven the opposing party filed a pleading, made a discovery response, or asserted a claim or defense "primarily for the purpose of **unreasonable delay**, the court shall award damages to the moving party for its reasonable expenses incurred in **obtaining the order**, which may include attorney's fees and other loss resulting from the improper delay." (e.s.)

This statute is not pertinent to the facts and circumstances of this case. As a general proposition sanction fees are available in cases in which the opposing party is not otherwise responsible for the moving party's attorney's fees. Such is not the case in eminent domain proceedings in which there is a constitutional right to reasonable attorney's fees. There is no case law for the proposition that "excessive litigation" equates to "unreasonable delay." Also, there was no motion to obtain or grounds to assert that the use of Fishkind as a potential witness was for purposes of "unreasonable delay."

Furthermore, the fact of the Expressway Authority's misconduct in failing to inform Fishkind of his error regarding the assumption as to the maximum building

potential for the subject property was not discoverable until the post-trial proceedings when the trial judge was in the process of his determination to award a reasonable attorney fee for the amount of litigation (which includes the excessive litigation or any "unreasonable delay," if such existed) involved in the eminent domain valuation trial.

Seeking sanction fees at the post-trial juncture for fees incurred during the valuation trial would have been duplicative in light of the trial court's previous ruling that the property owners' attorneys were entitled to reasonable attorney's fees because of the defective offer. If anything, sanction fees potentially would have been available during the post-trial litigation over the amount of the reasonable attorney fees for discovery issues. Attorney's fees are not ordinarily available in eminent domain cases for post-trial litigation over the amount of the attorney's fees. See, *Teeter v. Department of Transportation*, 713 So.2d 1090, 1092 (Fla. 5th DCA 1998); and *Department of Transportation v. Robbins & Robbins, Inc.*, 700 So.2d 782, 785 (Fla. 5th DCA 1997).

Similarly, the use of Rule 1.380(c), Fla.R.Civ.P., was not available. Again, the erroneous information relied upon by Fishkind was not revealed until post-trial. Paragraph (c) of Rule 1.380 provides: "If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.370 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may file a motion for an order requiring the

other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees." There was no reasonably anticipated admission to request or document to be verified that would have revealed the Expressway Authority's failure to inform its expert, Fishkind, of his false premise until the misconduct was discovered well after the valuation phase of the case.

Accordingly, the district court's suggestion as to the use of these supposedly readily available and purportedly applicable statutory and procedural remedies to address the Expressway Authority's abusive litigation tactics is premised upon a mistaken understanding of the facts in this case.

Moreover, the possible availability of a sanction penalty does not provide a substantive equivalent alternative remedy for the property owners' constitutional right for their attorney to receive a reasonable attorney fee in cases in which the trial judge has found that the condemning authority caused significant excessive litigation.

F. Constitutional Considerations.

A corollary question to the one certified by the district court of appeal that this Court should consider is when there is significant excessive litigation that is caused by the condemning authority, who should bear the cost of that excessive litigation: the condemning authority or the property owner or the property owner's attorney? The trial court made a determination, based upon competent, substantial evidence that the Expressway Authority should bear that cost because it caused significant excessive

litigation in this case. Because of that excessive litigation the statutory, benefit-based fee did not constitute a reasonable attorney fee, as mandated by the Florida Constitution.

Both the Expressway Authority and the district court of appeal have acknowledged that the Florida Constitution requiring full compensation to be paid for the taking of private property includes the entitlement to "reasonable attorney's fees in eminent domain proceedings." *Orlando/Orange County Expressway v. Tuscan Ridge*, 137 So.3d 1154 (Fla. 5th DCA 2014)

The Expressway Authority incurred a total of 2,888 attorney and 1,005 paralegal hours in prosecuting this eminent domain action, compared to the 2,200 attorney and 400 paralegal hours the trial court found to be reasonable on behalf of Doerr and Ministry Systems. (Record 2 of 2: Respondent's Exhibit 5) Limiting attorney's fees to $227,652, as suggested by the Expressway Authority, based on Section 73.092(1), *Fla. Stat.*, equates to only 650 hours, at $350 an hour (which the trial court found to be a reasonable hourly rate). There is no evidence that Doerr and Ministry Systems could have litigated on an equal footing if they were limited to only 650 hours while the Expressway Authority was free to use its unlimited resources to expend 2,888 attorney hours in the litigation.

It follows that if the condemning authority chooses to litigate excessively forcing the property owners to extensively respond to protect their interests, which

occurred in this particular case, calculating attorney's fees based on subsection (1) of Section 73.092, *Fla. Stat.*, cannot pass constitutional muster.

However, without appropriate analysis or explanation the district court arrived at the conclusion that the benefit-based fee "does not appear patently unconstitutional." *Id.* at 1155. This conclusion was reached by comparison to the imputed hourly rate in other areas of the law, such as criminal defense or personal injury law, for which the constitutional standards for recovery are entirely different. This is in stark contrast with the manner in which reasonable attorney fees in eminent domain cases should be determined. The court ostensibly relied on the decision of *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925 (Fla. 2002) in support of its conclusion that the statutory, benefit-based fee in this case is not "patently unconstitutional." That case makes it clear that its holding does not apply to eminent domain cases.

In *Sheppard & White*, *supra,* the attorney representing an indigent defendant in a capital case contended that an attorney fee of $40 an hour was confiscatory of his time and effort. *Id.* at 928-29. In *Sheppard & White*, there was no cap set on the total amount of the fee, only the hourly rate; counsel could incur as many hours as were reasonably necessary to competently represent the defendant. The Florida Supreme Court concluded that the hourly rate was constitutionally permissible because it was set by the chief judge, "after consideration of the compensation rates prevailing in the judicial circuit" and after "being advised of the community rates for similar

representation." *Id. 929-30.* Thus, the holding was that the hourly rate under consideration was reasonable.

In the present case there was a statutory cap on the total amount of the fee, regardless of the number of hours that were necessary to adequately defend the property owners against the significant excessive litigation of the condemning authority. In this case the presiding trial judge "after considering the hourly rates prevailing in the judicial circuit" and "being advised of the community rates for similar representation" concluded that $350 an hour was a reasonable hourly rate for the attorneys' legal services in the eminent domain proceeding. (R14:2425) In fact, the Expressway Authority's own expert witness testified that $350 an hour was a reasonable hourly rate, and the award of a fee based on the statutory benefit-capped formula would not result in a constitutionally permissable reasonable attorney fee. (R15:1738) Unlike *Sheppard*, there was no evidence presented in this case that $87 an hour was a reasonable hourly rate.

It is vitally important to remember that this Court, in response to the contention that the hourly rate set by the chief judge in the *Sheppard & White* case was unreasonably low, stated as follows:

> However, to simply **compare** the hourly rate applicable to conflict counsel in **capital cases** to the hourly rate recognized as prevailing in areas such as **eminent domain** or family law litigation is, at this time, to engage in the fruitless task of comparing the proverbial "**apples to oranges**." *Id.* at 935. (Emphasis added)

The constitutional guarantees for the two areas of the law are decidedly different, and the community prevailing standard hourly rates are entirely different as well. The warning articulated by this Court in a previous statutory cap criminal law case is instructive. In *White v. Board of County Commissioners of Pinellas County,* 537 So.2d 1376, at 1380 (Fla. 1989), the supreme court in striking down a statutory capped amount in a capital case stated:

> The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored. It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit. As a result, there is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant. A spectre is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled . . . .

This point is no less well-taken in eminent domain proceedings in which for many years in this State, this Court has upheld the constitutional principle that property owners' right to full compensation must, out of necessity, include an award of reasonable attorney fees. *Tosohatchee Game Preserve, Inc. v. Central & S. Flood Control Dist.*, 265 So.2d 681 (Fla. 1972); *JEA v. Williams*, 978 So.2d 842 (Fla. 1st DCA 2008).

The district court of appeal's approach, to the question of whether an attorney fee awarded pursuant to the benefit-based statute would be reasonable in an eminent

domain case in which the condemning authority caused significant excessive litigation, fails to provide trial courts with an objective standard or methodology to determine whether the constitutional standard is satisfied.

In Florida, historically, as we have seen prior to the enactment of the benefit-based statute in 1994, the determination of a reasonable attorney fee was accomplished by the trial courts on a lodestar basis. The analysis consisted of "determining a reasonable hourly rate for a particular type of legal service and the number of hours that reasonably should be expended in providing those services . . . ." *Schick v. Department of Agriculture and Consumer Services*, 599 So.2d 641, 643 (Fla. 1992).

Florida courts acquiesced to the Legislature's authority to enact specific criteria for determining how a **reasonable** attorney's fee is to be awarded pursuant to a fee-authorizing statute. *Schick,* 599 So.2d at 643. The criteria in *Schick* provided guidance to the trial court in determining a reasonable hourly rate and an appropriate number of hours required to provide the legal services based on the facts and circumstances of that particular case. It must be noted that a reasonable attorney fee is a necessary component of the constitution and does not require a "fee-authorizing statute" to be implemented.

The statutory change enacted by the Legislature in 1994 established a contingent, benefit-based determination for awarding attorney fees in eminent domain proceedings that does not necessarily bear any direct relationship or connection to a

determination of what constitutes a reasonable hourly rate and an appropriate number of hours required to represent the interests of the land owner given the facts and circumstances of the particular case. The fee might be greatly in excess of what the condemning authority might advocate, or the court might conclude, is a reasonable attorney fee. See *Seminole v. Coral Gables Federal Savings and Loan Association*, 691 So.2d 614 (Fla. 5th DCA 1994). Alternatively, the attorney fee could be very inadequate given the facts and circumstances of the particular case.

An attorney fee in an eminent domain case that exceeds the amount that might be considered reasonable is not of constitutional consequence. See, *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964) (". . . [the] Legislature, may of course impose upon itself, and upon those to whom it delegates the right of eminent domain, an obligation to pay more than what the courts might consider a 'just compensation.'" See also, *Dep't of Agric. & Consumer Services v. Lopez-Brignoni*, 114 So.3d 1138, at 1142 (Fla. 3rd DCA 2013) ("If the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount." (Quoting *Dep't of Agric. & Consumer Services v. Bogorf*, 35 So.3d 84 (Fla. 4th DCA 2010)); and *Seminole County v. Coral Gables Federal Savings & Loan Association,* 691 So.2d 614 (Fla. 5th DCA 1997).

Although it appears to be a matter of precedential law in this State that the Legislature has the authority to enact a benefit-based attorney fee statute in eminent

domain proceedings (*Pierpont v. Lee County*, 710 So.2d 958 (Fla. 1998)), this does not mean the courts can abdicate their responsibility to ensure that property owners receive a reasonable attorney fee for the legal services provided based on the facts and circumstances of a particular case where the condemning authority has been found by the trial court to have caused significant excessive litigation. 710 So.2d at 961.

In a case in which the condemning authority has caused significant excessive litigation, should not the condemning authority bear the financial consequences of those actions, not the property owners or their attorneys?

The attorneys for the property owners in this case fulfilled their professional responsibilities to their clients and fought for their clients' constitutional property rights and related financial interests to the conclusion of the case. As the trial court has found, and as the Expressway Authority's own expert attorney fee witness has testified, the attorneys who represented Doerr and Ministry Systems in this case do not receive a reasonable attorney fee if they are awarded a fee pursuant to Section 73.092(1), *Fla. Stat.* (R10:1738)

Moreover, if the district court of appeal's decision is not quashed, basic law firm economics will dictate that similar time consuming legal services to property owners in this State in the future will simply not be available at no cost to those property owners confronted with overzealous condemning authorities subjecting property owners to significant excessive litigation. As this Court has long recognized, a "win at any cost"

attitude will result in these condemning authorities having an unacceptable advantage "in every instance," because most property owners cannot afford to litigate against the government with its "unlimited resources," and the few who can afford to litigate will end up with less than full compensation after paying their attorneys. *Shell v. State Road Department*, 135 So.2d 857, 861 (Fla. 1961). For more than a half century this predictable outcome has been strongly discouraged by this Court. *Id.*

CONCLUSION

The trial court's determination that the Expressway Authority caused significant excessive litigation is based upon competent, substantial evidence. The trial court's ruling that Section 73.092(1), *Fla. Stat.*, is unconstitutional as applied to the facts and circumstances of this case should be affirmed.

This Court should answer the certified question in the affirmative, quash the decision of the district court of appeal, and remand the case back to the trial court for enforcement of the final order awarding reasonable attorney fees.

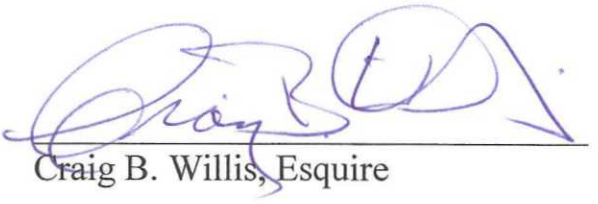
Respectfully submitted this 4th day of September, 2014.

Craig B. Willis, Esquire
Florida Bar No. 257656
Joe W. Fixel, Esquire
Florida Bar No. 192026
FIXEL & WILLIS
211 S. Gadsden Street
Tallahassee, FL 32301
cwillis@fla-eminentdomain.com
Telephone: (850) 681-1800
and
Major B. Harding, Esquire
Florida Bar No. 33657
Ausley & McMullen, P.A.
Post Office Box 391
Tallahassee, FL 32301
mharding@ausley.com

Attorneys for Petitioners/Appellees

CERTIFICATE OF SERVICE

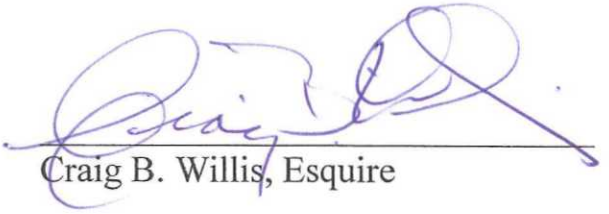
I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Court and was furnished by email to Richard N. Milian, Esquire, rmilian@broadandcassel.com, and Beverly A. Pohl, Esquire, bpohl@broadandcassel.com, on this 4th day of September, 2014.



Craig B. Willis, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2), Fla.R.App.P.



Craig B. Willis, Esquire