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SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. : SC14-1007

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

Petitioners/Appellees,

vs.

CENTRAL FLORIDA
EXPRESSWAY AUTHORITY, etc.,

Respondent/Appellant.

REPLY 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

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INTRODUCTION

The parties in this case agree that Florida law has long recognized that a constitutionally required component of full compensation in eminent domain cases is the condemning authority's payment of ***reasonable*** attorney's fees to the property owner. (*See,* Initial Brief at 6; Answer Brief at 24, 36-37.) The parties also agree that the application of *Florida Statutes* §73.092(1)'s benefit-based, percentage formula for calculating property owners' attorney's fees in an eminent domain cases can, under certain circumstances, be constitutionally impermissible. (*See* Initial Brief at 6; Answer Brief at 27, 38-39.)

The dispute between the parties, and the question of great public importance presented, involves an issue of constitutional concern as to when those circumstances are present. The Petitioner property owners, Joseph B. Doerr Trust and Ministry Systems, Inc. ["Property Owners"], assert that the constitution must prevail when the well-recognized rationale underpinning the constitutional guarantee of the payment of reasonable attorneys' fees is compromised. This rationale supports the proposition that property owners in eminent domain cases are constitutionally guaranteed the right to litigate on equal footing with the condemning authority without being subjected to "dog eat dog" or "win at any cost" excessive litigation. *See Dade v. Brigham*, 47 So.2d 602, 604 (Fla. 1950); *Shell v. State Road Department*, 135 So.2d 857 (Fla. 1961).

The Central Florida Expressway Authority ["Expressway Authority"] asserts to the contrary that the benefit-based attorney's fees statute must be applied without ***constitutional*** concern when a condemning authority excessively litigates a case. The

Expressway Authority's argument, which prevailed on the Fifth District Court of Appeals (but not on the trial court), impairs Florida constitutional law. Instead of the constitution protecting property owners from excessive litigation caused by a condemning authority, the Expressway Authority's argument and the district court's holding conclude that the constitutional guarantee has no application to this type of abuse. The Property Owners assert that for over half a century, Florida constitutional law has not turned such a blind eye to the concerns of a property owner faced with a condemning authority's excessive litigation. The Property Owners respectfully request that this Court uphold this well-established Florida constitutional principle in this appeal.

ARGUMENT

I. THIS COURT CORRECTLY ACCEPTED JURISDICTION

A. The District Court "Pass[ed] Upon" the Certified Question.

The Expressway Authority begins its Answer Brief by asserting that the Fifth District Court of Appeal failed to rule upon or "pass upon" the question certified of great public importance and that the district court "*finessed*" the factual issue of whether the Expressway Authority "engaged in litigation tactics that caused excessive litigation." (Answer Brief, p.19)

The district court's assumption of the trial court's factual determination that the Expressway Authority excessively litigated the case is based upon the fundamental principle that if there is competent, substantial evidence to support the trial court's

ruling, the appellate court cannot reverse for lack of evidence. If the district court had concluded that there was an insufficient factual basis to support the trial court's constitutional ruling, then it would have reversed the final order on those grounds and it would have been unnecessary to address the constitutional issue. *See In re N. James Turner*, 76 So.3d 898, 901 (Fla. 2011) (A court will not rule on a constitutional question, if the case can be decided on non-constitutional grounds).

In spite of the trial court's factual determination that the Expressway Authority caused significant excessive litigation (which the district court did not disturb), the district court decided that the trial court's legal rationale for "scrap[ing] the entire fee formula as unconstitutional" was erroneous. *Orlando/Orange County Expressway Authority v. Tuscan Ridge, LLC*, 137 So.3d 1154, 1156-57. (Fla. 5th DCA 2014).

Even though the district court reached this legal conclusion and then certified the question as one of great public importance, the Expressway Authority argues that the district court did not even address the certified question. The Expressway Authority's position is incorrect; the district court addressed the certified legal question and ruled on it as a matter of law. *Orlando/Orange County Expressway Authority*, 137 So.3d at 1156-57.

Beyond being inaccurate, the Expressway Authority's jurisdictional argument is also based on inapposite case law. For example, in the primary case cited by the Expressway Authority, *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So.2d 832 (Fla. 2007), this Court rescinded its jurisdiction

because there was a tie, not a majority of judges, who certified the question of great public importance. In this case, the entire panel certified the question without a dissenting vote. *See also, Pirelli Armstrong Tire Corp. v. Jensen*, 777 So.2d 973 (Fla. 2001) (question certified was a different issue than the one decided by the district court); *Gee v. Seidman & Seidman*, 653 So.2d 384 (Fla. 1995) (question certified did not reflect the issue actually ruled upon by the district court).

The Expressway Authority further incorrectly contends (Answer Brief, p.15) that the Property Owners argued in their Motion for Rehearing that the district court failed to address the key constitutional issue in this case because the Property Owners asked the following questions:

- 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 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?

These questions were part of the **argument** as to why *Florida Statutes* §73.092(1) was unconstitutional as applied, not the constitutional issue itself. The constitutional issue was: If a condemning authority causes significant excessive litigation does this constitute a circumstance that can require the payment of attorney's

fees in excess of the statutory benefit-based cap? The district court answered this question in the negative. The Property Owners assert that this Court, unlike the district court, should answer this constitutional question by affirming the well-established Florida constitutional principle that property owners must be placed on an equal footing with the condemning authority.

B. The Certified Question Involves an Issue of State-Wide Application and Importance.

Upholding the foregoing constitutional principle is of state-wide importance. If the district court's decision is left intact, condemning authorities and their attorneys will be enabled to misuse their resources to the detriment of property owners whose property is involuntarily taken. As a result, the constitutional guarantee of full compensation will become a hollow promise. Many years ago, this Court concluded that the Florida 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." *Shell v. State Road Department*, 135 So.2d 857, 861 (Fla. 1961).

In a chilling portent of the type of situation presented in this case, this Court in the *Shell* decision, at 861, warned:

> 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.

It was only through the effort of the attorneys in this case that the property owners were successful in receiving more than a million dollars additional compensation over the Expressway Authority's first offer and substantially more than was ever offered during the litigation.[1] If property owners' attorneys no longer have the assurance of receiving a reasonable fee in eminent domain cases, even when the condemning authority causes significant excessive litigation, then the constitutional guarantee of full compensation will be compromised. Faced with protracted litigation, attorneys will be forced to seek fees from their clients. Only the few property owners with sufficient financial resources will have the ability to litigate on an equal footing with a condemning authority that puts property owners to the expense of unnecessary, lengthy, and costly litigation. And even those few will not end up with "full compensation," as a result of having to pay for the substantial extra legal services caused by the condemning authority's excessive litigation.

Despite these statewide implications, the Expressway Authority contends that the certified question does not present an issue of great public importance because it is fact specific to this case. That argument is without merit. While every appellate decision that examines the question of whether a statute is unconstitutional as applied

[1] The Answer Brief mentions that the Property Owners agreed to pay their attorneys a 2% bonus for the recovery in this case. What the Expressway Authority neglects to inform this Court is that this contractual bonus was refunded to the property owners in compliance with *Florida Statutes* §73.092(5) after the trial court awarded a reasonable fee.

is based upon the particular facts of that case, the district court's ruling has wider applicability. The district court's opinion concludes that a condemning authority's excessive litigation cannot be the legal basis for finding the benefit-based fee statute unconstitutional as applied to the facts of any Florida eminent domain case. *See Orlando/Orange County Expressway Authority*, 137 So.3d at 1156-57 (holding that the trial court's "approach" of "scrapping the entire fee formula as unconstitutional" was "error").

The broadness of the district court's holding is not the only reason this appeal has statewide applicability. As previously discussed in the Initial Brief, the enactment of *Florida Statutes* §73.092(1), was in large part a legislative effort to address criticism leveled by condemning authorities that some private property owner attorneys could potentially misuse the constitutional guarantee of reasonable attorney fees by over-litigating eminent domain cases. The benefit-based formula provides an incentive to private property owners' attorneys to efficiently process eminent domain cases and to conservatively manage their time spent litigating. **There is no incentive** for private attorneys representing private property owners to excessively litigate an eminent domain case, as they will not be paid more for engendering unnecessary and lengthy litigation. However, **there is incentive** for private law firms to excessively litigate when retained on an hourly basis by **a condemning authority**, as occurred here.

Only the constitutional guarantee of "full compensation" affording property owners and their attorneys the right to litigate with condemning authorities on an

"equal footing" provides the counter-protection against the abuse of condemning authorities aggressively over-litigating a case to the financial detriment of property owners and their attorneys. This principle is at the heart of the constitutional concerns raised by Doerr and Ministry Systems in this case, and this concern supports the Property Owners' assertion that this appeal has statewide application and importance that merits consideration by this Court.[2]

II. THE TRIAL COURT CORRECTLY RULED *FLORIDA STATUTES* SECTION 73.092(1), WAS UNCONSTITUTIONAL AS APPLIED.

A. The Trial Court's Determination that the Expressway Authority Excessively Litigated the Case is Supported by Competent, Substantial Evidence.

The Expressway Authority agrees that the standard of review for the trial court's determination that it caused excessive litigation is competent, substantial evidence. (Answer Brief, p. 24) As stated in the Initial Brief, the trial judge who presided throughout the lengthy pre-trial, trial and post-trial proceedings was in the best position to determine whether the Expressway Authority excessively litigated this matter. The trial judge concluded that the Expressway Authority did just that, and the district court did not reverse the trial judge holding on this basis.

[2] This Court has similarly accepted jurisdiction on the basis of a certified question in a number of cases in which a statute was found to be unconstitutional as applied. *See, e.g., Maas v. Olive*, 992 So.2d 196 (Fla. 2008); *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986). The Expressway Authority's representation that this Court has only accepted jurisdiction in two such instances (*State v. Marks, P.A.*, 698 So.2d 553 (Fla. 1997) and *Department of Revenue v. General American Transportation Corp.*, 521 So.2d 112 (Fla. 1988)) is incorrect.

Nevertheless, the Expressway Authority attempts to persuade this Court that the only evidence supporting a finding of excess litigation was: (1) its decision to interject an economist into a vacant, commercial property valuation case and (2) the amount of time spent deposing experts. (Answer Brief, p. 31-32) The record, however, is replete with additional evidence that the Expressway Authority excessively litigated the case, including the finding that the insertion of the economist directly caused a number of other experts to be added to the litigation. Moreover, its own chief trial counsel, Ken Bishop, had no credible explanation for why it was necessary for the Expressway Authority lawyers to have spent more than four times the 640 hours (2,888 hours) he concluded should have been spent on the case. (R10:1656-57)

Additionally, the Expressway Authority's **own expert** witness at the attorney fee hearing, Mr. Thomas Callan, concluded the **Expressway Authority excessively litigated the case**. (R14:2423). Mr. Callan also was of the opinion that a benefit-based fee calculated under §73.092(1), *Fla. Stat.*, would not result in a reasonable attorney fee for the legal services provided to Doerr and Ministry Systems. (R15:1738)

In spite of this admission, the trial court's unequivocal findings, and the district court's failure to determine any insufficiency of those findings, a substantial portion of the Expressway Authority's Answer Brief is spent attempting to retry the trial court's findings of facts. This attempt relies upon points which were either considered by the trial court or belatedly created evidence proffered by the Expressway Authority and

properly precluded by the trial court two years after the conclusion of the four day evidentiary hearing on attorneys' fees.

With respect to the Expressway Authority's attempt to rely upon the properly precluded evidence, the Expressway Authority ignores that the constitutional issue was noticed before the trial court's hearing, and briefed and tried during the evidentiary hearing, without the Expressway Authority offering the precluded evidence. (R2:355-57; R4:570-582; R9:1457-1464; R10:1761-63) The trial court correctly responded to the Expressway Authority's newly generated evidence for what it was – an untimely effort to evade the Expressway Authority's financial liability for having caused unnecessary, excessive litigation. Moreover, the district court, after reviewing the briefs, did not rely upon this argument of the Expressway Authority as a basis for its decision, and therefore, it is not relevant to this appeal.

B. The Expressway Authority Failed to Address Its Misconduct.

The misconduct committed by the Expressway Authority is set forth in detail in the Initial Brief (pages 20-26). The Expressway Authority's attorneys were informed by their engineer consultant, Mr. Weinstein, that their expert economist, Dr. Henry Fishkind, was relying on an erroneous factual premise that the maximum square footage for building space attainable for the subject property was 56,800 square feet and failed to inform him of his error. There is no record evidence that the Expressway Authority ever informed Fishkind of his mistake, or that Fishkind's report was ever amended to address this error in spite of Fishkind conceding during his pre-trial

deposition that the value of the property would increase if the maximum square footage increased. (R7:1034-35)

The Expressway Authority continues to disregard this fact in its Answer Brief. Instead, it obfuscates the issue of its misconduct by suggesting that a site plan prepared by Mr. Weinstein was not a "merchantable" site plan. Doerr Trust and Ministry System have never argued that Mr. Weinstein's plan was a good plan or a bad plan; rather they have argued that the Expressway Authority sought to have evidence admitted it knew had no basis in fact (*i.e.*, Fishkind's 56,800 square feet assumption as the maximum building potential had no factual foundation).

C. Reasonable Attorney Fees Mandated by the Florida Constitution Should be Awarded When the Condemning Authority Excessively Litigates a Case.

The Expressway Authority contends that the benefit-based statutory fee in this case is not so shockingly low as to require the trial court to award a reasonable lodestar attorney fee. In making this argument, the Expressway Authority attempts to create a distinction between a "reasonable attorney fee," and the concept the district court characterized in its certified question as a "market fee." (Answer Brief, p. 37)

The Legislature has the authority to provide "criteria to be considered" by the courts in "determining reasonable attorney's fees." *Schick v. Dep't of Agric. & Consumer Services,* 599 So.2d 641, 643 (Fla. 1992). The Expressway Authority argues that a constitutionally permissible attorney's fee does not always equate to a "market rate" fee, and that part of the risks of undertaking representation of property

owners in eminent domain proceedings is the risk that the attorney fee will be less than the attorney's ordinary fee.

It is true that the benefit-based statutory fee sometimes will be less than the market-rate fee in some eminent domain cases. But there is no precedent that the risks assumed should include the risk that the condemning authority will no longer be held accountable for violating its constitutional duty to **not** be the cause of "dog eat dog" or "win at any cost" litigation. To the contrary, it is inconsistent with the constitutional mandate of full compensation to allow the benefit-based statute to be applied under such circumstances. *Shell v. State Road Dep't.* 135 So.2d 857 (Fla. 1961).

Moreover, when the Legislature enacted *Florida Statutes* §73.092(1), it intended to provide incentive to the property owner's attorney to efficiently litigate eminent domain cases and a disincentive to over-litigate it. There was no legislative intent to provide the condemning authority with a license to overzealously and excessively litigate eminent domain cases to the detriment of property owners.

The Expressway Authority further expands its argument by asserting that if *Florida Statutes* §73.092(1) is found unconstitutional in this case, then a constitutional challenge will be forthcoming "in every case where the statutory fee is below the market-rate fee . . . ." (Answer Brief, p.37) The Expressway Authority's policy argument is misguided. This Court's decision in this case will not impact eminent domain cases that are litigated in a normal, non-excessive manner. Whether a benefit-based formula could be unconstitutional as applied in a case litigated in a normal, non-

excessive manner is a decision for another day. This appeal will only impact those eminent domain cases that are excessively litigated by condemning authorities contrary to the well-established constitutional principles protecting property owners in Florida.

Leaving intact the district court's decision to reverse the trial court's ruling will serve as an invitation to condemning authorities to use this type of excessive litigation as a tactic to the disadvantage of property owners whose right to litigate on equal footing with the condemning authority will be compromised. In its opinion, the district court did not explain why it disregarded the constitutional principle of equal footing or how it reached the conclusion that the benefit-based fee "did not appear patently unconstitutional." *Orlando/Orange County Expressway v. Tuscan Ridge,LLC*, 137 So.3d 1154 (Fla. 5th DCA 2014). The only clue to its reasoning is its citation to and apparent reliance upon *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925 (Fla. 2002), in which this Court concluded that $50 per hour for legal services in a capital appeal is not unconstitutional.

The district court's reliance on *Sheppard* is misplaced in several regards. First, the cap in *Sheppard* was on the hourly rate, **not** the total number of hours necessarily incurred or the total fee that could be obtained. This Court properly distinguished *Sheppard* from its earlier decision in *White v. Board of County Commissioners of Pinellas County*, 537 So.2d 681 (Fla. 1989) when it held that, "[w]e cannot agree [with the contention that the hourly rate was too low] because here, unlike the circumstances presented in *White*, we are concerned **not** with an amount of compensation set by the

Legislature in 'a one size fits all' manner but, rather, with a rate that has been determined by the chief judge of the circuit **after consideration of the rates prevailing in the judicial circuit.**" *Sheppard*, 827 So.2d at 929.[3] Second, this Court stated further that its decision did not apply to eminent domain cases because it would be like comparing apples to oranges. *Id.* at 925.

In the present case, the trial judge, after consideration of the rates prevailing in the community for eminent domain services (which included supportive testimony by the Expressway Authority's **own expert fee witness**, Thomas Callan), concluded that $350 an hour was a reasonable hourly rate to be applied to the legal services provided in this case. (R14:2424) No contrary evidence was presented.

Based upon this factual record, the trial judge, who presided over this case and witnessed, first-hand, the Expressway Authority's unnecessary, excessive litigation, ruled that application of *Florida Statutes* 73.092(1) ran afoul of Florida's constitutional guarantee of full compensation, including the payment of reasonable attorney's fees for the work required to put the Property Owners on equal footing with the Expressway Authority. In making this ruling, the trial court upheld the well-established constitutional principle that discourages condemning authorities from engaging in "dog eat dog" and "win at any cost" litigation.

[3] Numerous other Florida appellate courts have held similarly to *White* by ruling that attorney's fees caps that fail to take into consideration the total number of hours necessary to adequately represent clients are unconstitutional as applied. *See Mass v. Olive*, 992 So.2d 196 (Fla. 2008); *Remeta v. State of Florida*, 559 So.2d 1132 (Fla. 1986); *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986).

CONCLUSION

For the reasons set forth in this brief and the Property Owners' Initial Brief, the district court's reversal of the trial court's ruling erodes the constitutional protection of equal footing. The certified question of great importance before this Court is whether that well-established constitutional principle of protecting private property owners from over-zealous condemning authorities will be upheld or will *Florida Statutes* §73.092(1) be blindly applied in a manner that encourages the protracted litigation the statute's enactment sought to prevent.

The Property Owners respectfully request that the Court uphold the Florida constitutional principle allowing property owners to litigate on equal footing with condemning authorities when they are subjected to excessive litigation by reversing the district court's decision, affirming the trial court's ruling, and answering the certified question of public importance in the affirmative by holding that *Florida Statutes* §73.092(1) is unconstitutional as applied in this case.

Respectfully submitted this 17th day of December, 2014.

/s/ Craig B. Willis

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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 17th day of December, 2014.

/s/ Craig B. Willis

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.

/s/ Craig B. Willis

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Craig B. Willis, Esquire