

>> ALL RISE.

HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD DRAW NEAR, GIVE ATTENTION YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME COURT.

THE FIRST CASE ON THE DOCKET THIS MORNING IS THE CASE OF JOSEPH DOERR TRUST VERSUS CENTRAL FLORIDA EXPRESSWAY COUNSEL.

>> MAY IT PLEASE THE COURT.

MY NAME IS CRAIG WILLIS.

WITH ME IS MAJOR HARDING ON BEHALF OF PETITIONERS, DOERR TRUST SYSTEMS.

THIS IS EMINENT DOMAIN CASE WHICH THE TRIAL COURT CONCLUDED THE CONDEMNING AUTHORITY EXCESSIVELY LITIGATED THE CASE THAT THE BENEFIT BASE STATUTE, SUBSECTION ONE OF 7309.2 WOULD NOT CONSTITUTE REASONABLE ATTORNEY'S FEE AS REQUIRED BY THE FLORIDA CONSTITUTION, AND THEREFORE DECLARED THAT STATUTE UNCONSTITUTIONAL AS APPLIED AND, AWARDED A REASONABLE ATTORNEY FEE PURSUANT TO THE CRITERIA PROVIDED IN SUBSECTION TWO OF THE STATUTE.

>> I WOULD LIKE TO ASK QUESTIONS ABOUT THE EXCESSIVE LITIGATION ISSUE.

SINCE THIS WOULD BE NOT JUST ABOUT THIS CASE BUT CASES GOING FORWARD.

AT WHAT POINT WOULD THE DETERMINATION THAT THE CASE WAS BEING EXCESSIVELY LITIGATED BE

MADE?

AND IS THAT A, IS THERE, SHOULD THERE BE STANDARDS AS TO WHAT EXCESSIVE LITIGATION WOULD BE? THAT'S SORT OF MY CONCERN AS FAR AS THE WORKABILITY OF THAT PHRASE, EXCESSIVE LITIGATION.

>> RIGHT.

>> AND I REALIZE HERE, THIS IS A SORT OF THE PROBLEM, BECAUSE WE'RE, MAYBE WE DON'T DECIDE THAT BECAUSE THE ISSUE, EXCESSIVE LITIGATION, AS I UNDERSTAND, WE'RE NOT GOING TO DECIDE WHETHER IT WAS IN FACT EXCESSIVELY LITIGATED BY ACCEPT THAT.

AND IF THAT'S, IF YOU DON'T WANT TO TALK ABOUT THAT ISSUE, I UNDERSTAND BUT I'M CONCERNED ABOUT THE WORKABILITY OF THAT.

>> YOUR HONOR, THERE ARE VERY FEW CASES IN, OF EMINENT DOMAIN CASES, NUMBER ONE, THAT GET INTO LITIGATION.

NUMBER TWO, THERE ARE EVEN FEWER THAT GO TO TRIAL.

IN TERMS OF THAT CONCEPT, THE TRIAL JUDGE IS THE PERSON THAT'S BEST SITUATED TO MAKE THAT DETERMINATION ON A CASE-BY-CASE BASIS.

>> I GUESS WHAT I WOULD BE CONCERNED ABOUT, AND THIS IS WHAT THE FIFTH DISTRICT WAS TALKING ABOUT WITH SANCTIONS, IS THAT AT THE FIRST TIME THAT THE, THAT SOMETHING IS GOING ON WHERE IT IS APPARENT IT GOES FROM BEING VIGOROUSLY DEFENDED OR, WHATEVER SIDE I GUESS THE CONDEMNING AUTHORITY IS ON, TO THE POINT OF EXCESSIVENESS, SHOULD THE JUDGE BE MADE AWARE THAT THAT IS HAPPENING SO THAT WE DON'T ENCOURAGE, AND AGAIN, I'M NOT SAYING ANY BAD MOTIVE FOR THE ATTORNEY FOR THE LANDOWNER.

>> RIGHT.

>> BUT IF YOU THINK THAT YOU'RE GOING TO GET ALL OF YOUR FEES IF YOU CAN CLAIM EXCESSIVE LITIGATION, ISN'T THERE INCENTIVE TO ACTUALLY ON THE OTHER SIDE?

>> ABSOLUTELY NOT, YOUR HONOR. THE BENEFIT BASED STATUTE PROVIDES AN INCENTIVE TO PROPERTY OWNERS TO QUICKLY AND EFFICIENTLY TRY THE CASE, TO SETTLE THE CASE BECAUSE PRESUMPTIVELY THE STATUTE IS VALID AND IT'S ONLY GOING TO BE IN THE RARE SITUATION WHERE THE CONSTITUTION PROVIDES THIS COUNTER MEASURE TO PROTECT PROPERTY OWNERS PROPERTY RIGHTS IN THIS STATE WHERE THERE IS THE SITUATION WHERE THE LITIGATION SPINS OUT OF CONTROL DUE TO THE EXCESSIVE--

>> IN THIS CASE THE JURY VERDICT THAT WAS, THE JURY AWARDED WHAT, ABOUT \$800,000 MORE THAN WHAT THE EXPRESSWAY AUTHORITY HAD OFFERED, CORRECT?

>> THAT'S CORRECT.

>> AND SO NOW WE'RE AT A SITUATION WHERE WE'RE NOW ASKING FOR, ATTORNEYS FEES IN THE AMOUNT BASICALLY OF WHAT THE DIFFERENCE IN THE PRICE OF THE PROPERTY WAS, CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> AND SO, ON A BENEFIT BASED FEE, IT SEEMS TO ME THAT, I'M A LITTLE CONCERNED THAT THE FEE IS NOW EQUAL TO WHAT THE BENEFIT WAS BECAUSE THEY ALREADY HAD THE 4 MILLION PLUS DOLLARS, CORRECT?

>> THAT'S RIGHT, YOUR HONOR, THAT WAS THE OFFER.

>> THE AUTHORITY HAD TO PUT THAT SOMEPLACE.

THEN YOU FIGURE OUT HOW MUCH MORE THE LAND IS ACTUALLY WORTH.

>> RIGHT.

>> SO NOW WE'RE AT A POINT WHERE THE VALUE, THE ADDITIONAL VALUE

IS BASICALLY THE SAME AS THE ATTORNEYS FEES.

>> WELL, THAT'S QUITE FREQUENT IN A LOT OF CASES.

IN FACT IN A CASE WHERE YOU DON'T PREPAY, YOU PAY ATTORNEY FEE AND YOU DON'T GET ANY AWARD.

THE QUESTION THE ATTORNEY FEE MATCHING THE BENEFIT OR APPROXIMATE CLOSE TO IT, IF THIS CASE HAD BEEN TRIED

APPROPRIATELY ACCORDING TO ALL THE WITNESSES IN THE CASE, IT WOULD HAVE BEEN ONE-FOURTH OF THE HOURS TO TRY TO CASE.

THEREFORE THAT BENEFIT-BASED STATUTE WOULD HAVE PROVIDED AN APPROPRIATE AND REASONABLE ATTORNEY FEE AS REQUIRED BY THE CONSTITUTION.

IT IS ONLY THROUGH THE--

>> THE OFFER WAS MADE IN 2006 AND THIS CASE WENT TO TRIAL IN 2008.

>> THAT'S CORRECT.

>> AND DURING THAT PERIOD, IS THAT INORDINATE PERIOD OF TIME BETWEEN, THAT HAPPENS IN THESE KINDS OF CASES?

I MEAN--

>> ONCE THE CASE WENT INTO SUIT WHAT HAPPENED IS WHEN THE EXPRESSWAY AUTHORITY INTRODUCED AN EXPERT WITNESS, AN ECONOMIST, THAT REQUIRED A NUMBER OF NEW WITNESSES TO BE ADDED TO THE WITNESS, THE CASE HAD TO BE CONTINUED, AND YES, THERE WAS A DELAY AS A RESULT OF THAT INTRODUCTION OF NEW WITNESSES INTO THE CASE.

>> IS THAT UNUSUAL IN THESE KINDS EVER CASES?

>> I WOULD SAY IT IS BECAUSE USUALLY YOU DON'T HAVE THE NECESSITY OF HAVING THAT DELAY FOR A PERIOD OF TIME.

NOW, IN THE STATE OF FLORIDA, IN ORDER TO GET A JURY TRIAL DATE IT IS ALREADY GOING TO BE A

SIGNIFICANT DELAY OF NINE MONTHS, SOMETIMES UP TO A YEAR AFTER THE CASE IS PUT INTO SUIT BEFORE YOU CAN GET A TRIAL DATE. BUT THE YEAR, THE YEAR-AND-A-HALF DELAY IN ITSELF DID NOT NECESSITATE THE EXCESSIVE LITIGATION THAT WAS UNDERTAKEN BY THE EXPRESSWAY AUTHORITY.

THE CASE COULD HAVE LANE DORMANT OR OTHER THINGS DONE DURING THAT PERIOD OF TIME.

WHAT OUR FIRM WAS REQUIRED TO DO WAS INVEST 2700 OF OUR ATTORNEY HOURS ON A SMALL THREE-MAN FIRM TO DEAL WITH ALL OF THE LITIGATION AND THE EXCESSIVE LITIGATION ON THE PART OF THE EXPRESSWAY AUTHORITY.

>>-- HOW DO THEY FEEL ABOUT THE EXPRESSWAY AUTHORITY?

>> I'M SORRY, YOUR HONOR.

>> HOW WAS THE-- [INAUDIBLE]

>> HOW MANY WHAT?

>> HOURS.

>> HOURS.

THE EXPRESSWAY AUTHORITY BILLED 2888 HOURS AND OVER 1000 PARALEGAL HOURS IN THIS CASE. WE HAD INVOICES AND TIME SHEETS FOR 2700 HOURS, ALMOST 200 HOURS LESS THAN THE EXPRESSWAY AUTHORITY.

APPARENTLY BECAUSE THE JUDGE, THE TRIAL JUDGE FELT LIKE THERE WAS SOME CONCERN ABOUT THE RECONSTRUCTED HOURS BY MY LAW PARTNER IN THE CASE.

HE REDUCED OUR HOURS FOR REACHING THE REASONABLE ATTORNEY FEE OF SOME 500 HOURS WHICH IS NOT AN INSIGNIFICANT REDUCTION OF OUR TIME IN THE CASE.

>> I WANT, AND I UNDERSTAND YOUR POINT AND I'M VERY CONCERNS ME THAT YOU'VE GOT THE POWER OF THE STATE TAKING YOUR PROPERTY AND THEN THEY HAVE ALL THE RESOURCES.

YOU KNOW, WE'VE, IN DEATH PENALTY CASES OF COURSE WE SEE THE STATE HAVING UNLIMITED RESOURCES AND WE'VE SAID REASONABLE ATTORNEYS FEES COULD BE PRETTY LOW PER HOUR. THIS, THE ISSUE THAT THE FEE HAS TO BE THE \$350 AN HOUR--

>> I CAN ADDRESS THAT ISSUE, YOUR HONOR.

I CAN ADDRESS THE ISSUE AND A CONCERN.

>> OKAY.

>> I THOUGHT THE ALL THE WITNESSES EVEN THE GOVERNMENT'S WITNESSES AGREED WITH THAT AMOUNT?

>> THAT'S CORRECT, YOUR HONOR.

>> THERE WAS NO DISPUTE AS THE HOURLY RATE.

WHILE WE MAY SIT HERE FROM THE OUTSIDE AND SAY, WE THINK THAT'S A LITTLE HIGH.

>> RIGHT.

>> THAT IS NOT PART OF THIS CASE, IS IT?

>> THAT WAS, THAT WAS THE TRIAL COURT EVIDENCE.

THAT'S THE PROBLEM THE EXPRESSWAY AUTHORITY HAS THEIR OWN WITNESSES TESTIFIED TO THAT. THEIR OWN WITNESS TESTIFIED A BENEFIT-BASED FEE IN THIS--

BASED FEE IN THIS CASE WOULD NOT CONSTITUTE A REASONABLE ATTORNEY'S FEE.

>> THAT COULD HAPPEN IN MANY CASES T COULD BE BECAUSE OF THE STRATEGY THAT IS EMPLOYED, DEFENSE, WHATEVER IT IS, YOU MAY NOT, WHEN YOU GET WHATEVER PERCENTAGE, RIGHT, YOU MAY NOT, PEOPLE DO CONTINGENT FEES ALL THE TIME AND SOMETIMES, DON'T LOOK AT THE HOURLY.

SOMETIMES IT IS REALLY GOOD PER HOUR AND SOMETIMES IT'S NOT.

>> I AGREE WITH THAT.

>> THE ISSUE OF BEING ENTITLED TO \$350 AN HOUR.

>> RIGHT.

>> IS NOT THE ISSUE, CORRECT?

>> THAT'S CORRECT.

YOU'RE CORRECT THAT THE BENEFIT MAY VARY ACCORDING TO THE SIZE OF THE, THE RANGE, IN FACT THE JURY'S IS INSTRUCTED TO AWARD A AREA BETWEEN VALUES.

THE RISK FOR A PROPERTY OWNER IS A RISK THAT HE UNDERSTANDS.

IT IS NOT A RISK THAT THE GOVERNMENT'S GOING TO ABUSE ITS PRIVILEGE OF HAVING THE STATUTE IN PLACE THAT THE LEGISLATURE PUT IN PLACE IN ORDER TO ADDRESS EXCESSIVE LITIGATION ON THE PART OF PROPERTY OWNERS.

>> ARE YOU PROHIBITED FROM ENTERING INTO SEPARATE FEE AGREEMENT WITH THE LANDOWNER?

>> PROHIBITED?

NO, YOUR HONOR.

IN FACT THAT WAS INVOLVED IN THIS CASE BUT--

>> WHAT WAS THAT?

>> THAT WAS A 2% PERCENTAGE OVER A \$5 MILLION AWARD IF IT WAS ACHIEVED.

BUT WHEN THE TRIAL JUDGE AWARDED A REASONABLE ATTORNEY FEE PURSUANT TO SUBSECTION TWO PROVIDED IN PROVISION IN 73.092, THAT MONEY WAS REFUNDED BACK TO THE PROPERTY OWNER BECAUSE THE PROPERTY OWNER'S RIGHTS OF FULL COMPENSATION ARE THE ISSUE IN THESE CASES.

THE DISTRICT COURT IN THIS CASE REFERENCED AND RELIED ON ONLY ONE OPINION, THE SHEPARD AND WHITE VERSUS CITY OF JACKSONVILLE, WHICH JUDGE LEWIS AUTHORED ON A UNANIMOUS SUPREME COURT DECISION.

IN THAT CASE THE REASON THAT \$50 AN HOUR WAS UPHELD WAS BECAUSE IT WAS BASED UPON THE CHIEF TRIAL COUNSEL HEARING TESTIMONY FROM THE COMMUNITY AND THAT WAS A REASONABLE

COMMUNITY-BASED FEE THAT  
INDIGENT CRIMINAL DEFENDANT  
WOULD BE ABLE TO SECURE  
COMPETENT COUNSEL TO REPRESENT  
HIM IN THE CASE.

AS JUDGE LEWIS PREVIOUSLY  
POINTED OUT IN THIS CASE THE  
ONLY EVIDENCE, INCLUDING THE  
EVIDENCE EDUCED AND HEARD BY THE  
TRIAL COURT FROM BOTH THE PRETTY  
OWNER EXPERTS AND AS WELL AS THE  
EXPRESSWAY AUTHORITY'S EXPERT  
WITNESSES THAT WAS THAT \$350 AN  
HOUR WAS A REASONABLE HOURLY  
RATE TO APPLY IN THIS CASE.

>> COULD YOU, THERE APPEARS TO  
BE A COUPLE OF AREAS THAT  
PRODUCED THIS, WHAT WE HAVE  
CALLED THE EXCESSIVE ASPECT.  
ONE WAS THE TIME IN DEPOSITION  
WHICH WE, WE UNDERSTAND THAT YOU  
DEPOSE WITNESSES AND THAT IS  
WHATEVER TIME IT TAKES IT TAKES.  
WHAT ABOUT THE WITNESS?  
WAS THERE SOMETHING PARTICULAR  
MR. FISHBAIN I THINK THE NAME  
WAS?

>> YES.

>> DR. FISHKIND.

>> KIND.

>> HE WAS INTERJECTED INTO THE  
LITIGATION EVEN THOUGH IT WAS A  
VACANT COMMERCIAL TRACT OF LAND  
TO COME UP WITH A DEVELOPMENT  
ECONOMIC VIEW OF A DISCOUNTED  
CASH FLOW ANALYSIS FOR VACANT  
TRACT PROPERTY WHICH WE  
CONTESTED VIGOROUSLY HAVING HIM  
IN THE CASE AND TRIED TO GET HIM  
OUT OF THE CASE FOR OVER A YEAR  
TO CUT DOWN ON THE LITIGATION  
BECAUSE IT WAS INAPPROPRIATE  
THAT HE WAS, HE WAS IN THE CASE  
AT ALL.

BECAUSE WHEN YOU DO A  
SUBDIVISION LOT ANALYSIS IT IS  
SUPPOSED TO BE THE SALE OF THE  
VACANT SUBDIVISION SO THAT YOU  
DON'T HAVE LAYER UPON LAYER OF  
SPECULATIVE THEORIES ABOUT WHAT,



HOW MUCH BUILDING COULD BE BUILT ON THE PROPERTY, HOW MUCH RENTS TO BE ACHIEVED, THE VACANCY RATE AND SO ON, SO FORTH.

HE HAD THIS ELABORATE, FULLY DEVELOPED ECONOMIC DEVELOPMENT HYPOTHESIS THAT REQUIRED US TO GO OUT AND HIRE ANOTHER ECONOMIST AND A COUPLE OF OTHER APPRAISERS TO TRY TO REBUT HIS POSITIONS IN THIS CASE.

>> HOW MUCH OF A REDUCTION WAS THE BOTTOM LINE FOR HIS TESTIMONY WITH REGARD TO THE PROPERTY VALUATION?

>> THE INCREASED LITIGATION?

>> NO, NO.

IN THE VALUATION ON THE PROPERTY.

HE HAD TO COME UP WITH SOME TYPE AFTER VALUATION BASED UPON THESE OTHER NUMBERS.

>> YES.

HIS VALUATION WAS IN ACCORD WITH THE EXPRESSWAY AUTHORITY'S STEVE MATONIS'S OPINION OF VALUE.

HE CAME IN RIGHT, RIGHT ON THE SAME NUMBER AS THE APPROPRIATE AMOUNT THAT SHOULD BE PAID FOR THE PROPERTY.

>> THAT THE STATE ALREADY OFFERED?

>> THAT THE STATE HAD ALREADY OFFERED, RIGHT, AS PART OF THE APPRAISAL REPORT.

WE'RE ASKING--

>> I'M NOT QUITE CLEAR WHAT HAPPENED TO THAT EXPERT'S EVALUATION AND TESTIMONY. WAS IT THROWN OUT?

>> IT WAS STRUCK ON THE FRIDAY BEFORE THE MONDAY START OF THE TRIAL.

THE TRIAL, THIS EMINENT DOMAIN CASE--

>> STRUCK ON WHAT BASIS?

>> IT WAS-- THE JUDGE DID NOT ANNOUNCE THE BASIS.

WHAT HE SAID DURING THE TRIAL, HE READ ANOTHER DECISION WHICH

DR. FISHKIND WAS ALLOWED TO TESTIFY AND HE WAS EXERCISING HIS DISCRETION IN THE CONTROL OF WITNESSES.

OTHER THAN THAT HE DID NOT STATE WHAT THE REASON FOR, BUT THERE WERE A NUMBER OF REASONS WHY HE SHOULD HAVE BEEN STRICKEN.

AND THE, THE OTHER POINT THAT I WOULD LIKE TO MAKE WITH DR. FISHKIND, IN TERMS OF THE SANCTION ALTERNATIVE REMEDY IS, THE DISTRICT COURT MISUNDERSTOOD THE TIMING WHEN WE FOUND OUT DR. FISHKIND, THAT THE EXPRESSWAY AUTHORITY'S ATTORNEYS HAD BEEN INFORMED THAT DR. FISHKIND WAS BASING HIS ANALYSIS ON A FALSE ASSUMPTION. WE DID NOT FIND THAT DATE OUT EVEN THOUGH IT WAS, THE DATE ON THE MEMO IS 2009, WE DID NOT FIND THAT OUT UNTIL THAT YEAR. THEY HAD BEEN INFORMED OF THAT FACT BACK IN 2006, WHEN DR. FISHKIND'S REPORT FINALLY CAME OUT.

THEY WERE AWARE OF THAT. THEY WERE AWARE THAT DR. FISHKIND WAS BASING HIS REPORT ON A FALSE FACTUAL PREMISE.

AND WENT FORWARD, VIGOROUSLY, TRYING TO USE HIM THROUGHOUT THE TRIAL, THE PRETRIAL PHASE.

AND, OBJECTED TO OUR BASIS FOR HAVING HIM STRICKEN AS A WITNESS WHICH, KIND OF GOES TO THE SANCTION ARGUMENT THAT THE DISTRICT COURT OF APPEAL.

THE SANCTION ALTERNATIVE THAT THE DISTRICT COURT OF APPEAL CAME UP WITH, IS NOT VIABLE IN THIS CASE.

SANCTIONS HAVE DIFFERENT SCOPE OF APPLICATION THAN THEY DO FOR REASONABLE COMPENSATION.

SANCTIONS--

>> YOU'RE INTO YOUR REBUTTAL TIME.

YOU'RE WELCOME TO KEEP TALKING  
BUT--

>> THANK YOU, YOUR HONOR.  
WE ASK THAT THIS COURT AFFIRM  
THE TRIAL COURT'S FINDING AND  
REVERSE THE DISTRICT COURT OF  
APPEAL.

THANK YOU.

>> MAY IT PLEASE THE COURT.  
GOOD MORNING, YOUR HONORS.  
MY NAME IS RICHARD MILIAN, WITH  
THE LAW FIRM OF BROAD AND  
CASSEL, I'M HERE ON BEHALF OF  
THE EXPRESSWAY AUTHORITY, THE  
CONDEMNING AUTHORITY IN THIS  
CASE.

THE CASE IS ON APPEAL REGARDING  
ATTORNEY'S FEE IN EMINENT DOMAIN  
CASE.

THE STATUTE AT ISSUE IS 73.092.  
THE STATUTE PROVIDES THE COURT  
IN EMINENT DOMAIN PROCEEDING  
SHALL AWARD ATTORNEYS FEES BASED  
SOLELY ON BENEFITS FOR THE  
CLIENT.

BASED ON JURY VERDICT, BENEFIT  
OBTAINED, THE AWARD FOR ATTORNEY  
TOES \$227,652.

THE TRIAL COURT DID NOT USE THE  
STATUTORY ATTORNEY'S FEE BUT  
INSTEAD RULED THE STATUTE WOULD  
BE UNCONSTITUTIONAL AS APPLIED  
IN THIS CASE AND AWARDED FEES OF  
\$816,000 AND THAT IS BASED ON A  
BETTERMENT OF \$832,000.

SO THE ATTORNEY'S FEE IN THIS  
CASE IS VERY CLOSE TO THE ENTIRE  
BETTERMENT.

THE EXPRESSWAY AUTHORITY  
APPEALED THAT RULING.

THE FIFTH DCA RULED THAT THE  
STATUTORY FEE WAS APPROPRIATE.  
IT WASN'T--

>> LET ME ASK YOU.  
HOW DOES THE TRIAL COURT, THE  
816,000 IN ATTORNEYS FEES WAS  
BASED ON \$350 AN HOUR?

>> YES, YOUR HONOR.

>> AND HOW MANY HOURS DID THE  
TRIAL COURT AWARD?

>> I BELIEVE THAT THAT AWARD, IT IS IN THE DCA OPINION BUT I THINK IT IS 2400 HOURS? 2200 HOURS.

>> THEY DID REDUCE THE NUMBER OF HOURS THAT HAD ACTUALLY BEEN CLAIMED?

>> YES, YOUR HONOR.

YES, YOUR HONOR.

THERE WAS A SMALL REDUCTION BECAUSE THE HOURS WERE NOT KEPT CONTEMPORANEOUSLY DURING THE TRIAL.

SINCE IT IS NORMALLY A BENEFIT STATUTE, LANDOWNER COUNSEL DON'T ALWAYS KEEP TIME RECORDS WHICH THINK FIRM DID NOT.

SO THE ENTIRE TWO OR THREE YEARS OF LITIGATION WAS RECONSTRUCTED. THE COURT FELT THERE WAS A QUESTION ABOUT THAT.

SO HE DIDN'T AWARD ALL OF THE HOURS.

>> AS YOU TELL ME, WHAT THE RECORD SHOWS ABOUT HOW MUCH THE EXPRESSWAY AUTHORITY SPENT IN THIS CASE?

TOTAL.

AND, IF THAT'S, IF THE RECORD DON'T SHOW THAT, COULD THE TOTAL AMOUNT THAT WAS MADE, COULD YOU TELL ME THAT?

>> THE TOTAL AMOUNT MEANING ATTORNEYS FEES AND EXPERT COSTS OR JUST ATTORNEYS FEES?

>> GIVE ME BOTH.

>> THE ATTORNEYS FEES, AND THERE IS DIFFERENT LEVELS OF THIS, IN, THERE IS DIFFERENT PARAMETERS AND DIFFERENT THINGS THAT WOULD BE INCLUDED IN THAT.

FOR EXAMPLE, THE CONDEMNING AUTHORITY HAS TO PAY ATTORNEYS FEES FOR THE LANDOWNER.

SO THEY HAVE THEIR ATTORNEY FEES WHICH I BELIEVE THE RECORD IS THAT AT THE TRIAL COURT LEVEL, THROUGH THE JURY VERDICT IT WAS 600 SOMETHING THOUSAND.

I DON'T KNOW THE EXACT AMOUNT.

I THINK IT WAS 680.  
BUT THERE WAS 600 SOMETHING  
THOUSAND THAT THE EXPRESSWAY  
AUTHORITY SPENT ON ITS  
ATTORNEYS.

IN ADDITION THEY HAD TO PAY THE  
LANDOWNERS ATTORNEYS WHICH WE'RE  
ARGUING B THEY HAD TO PAY THE  
ATTORNEYS NOT ONLY TRIAL COURT  
LEVEL BUT ALL THROUGH THIS  
LITIGATION OF ATTORNEYS FEES.  
THERE ARE THE TOTAL WHICH IS  
MUCH DIFFERENT.

I DON'T KNOW THAT NUMBER.  
I DON'T THINK THAT NUMBER HAS  
EVER BEEN IN THE RECORD THAT I  
HAVE EVER SEEN.

>> COULD YOU TELL ME WHAT THE  
LAND OWNER'S POSITION WAS WITH  
RESPECT TO THE VALUE OF THE  
PROPERTY?

HOW MUCH WERE THEY CLAIMING?

>> OVER \$7 MILLION.

>> OKAY SO WHAT'S THE SPREAD?

>> ABOUT THREE MILLION.

GIVE OR TAKE.

SO THE TRIAL COURT, OR THE DCA  
RULED THAT THE STATUTE WAS NOT  
UNCONSTITUTIONAL AS APPLIED BUT  
ISSUED A CERTIFIED QUESTION.  
AND WE WOULD ARGUE TO THIS  
COURT, THAT THE DCA'S OPINION  
THAT THE STATUTORY FEE SHOULD BE  
USED SHOULD BE UPHELD BY THIS  
COURT FOR THREE REASONS.

I'D LIKE TO TRY TO GET THROUGH  
ALL THREE OF THEM IF I CAN.  
THE FIRST IS, WE QUESTION  
WHETHER THIS TRIAL, WHETHER THIS  
COURT HAS JURISDICTION OVER THIS  
APPEAL.

AND THE REASON WE SAY THAT IS,  
THE FLORIDA CONSTITUTION CLEARLY  
GIVES THE COURT WITH AUTHORITY  
TO THEIR DISCRETION TO HAVE  
CERTIFIED QUESTIONS OF GREAT  
PUBLIC IMPORTANCE.

THE CONSTITUTION ALSO REQUIRES  
THAT IN ORDER TO ACCEPT THOSE  
QUESTIONS, THE CONSTITUTION SAYS

THE SUPREME COURT MAY REVIEW ANY DECISION OF A DISTRICT COURT OF APPEAL THAT PASSES UPON A CERTIFIED QUESTION BY IT TO GREAT PUBLIC IMPORTANCE.

SO THE FUNDAMENTAL ISSUE IS, THE DISTRICT COURT OF APPEAL HAS TO PASS ON THE QUESTION.

NOW THIS COURT HAS RULED IN MANY INSTANCES THAT IT IS A COURT OF LIMITED JURISDICTION.

IT IS ALSO RULED IN MANY INSTANCES, THAT IN ORDER TO ACCEPT A CERTIFIED QUESTION, THE DCA MUST PASS ON THAT QUESTION.

WELL IN THIS CASE THE FUNDAMENTAL ISSUE IS WHETHER THE EXPRESSWAY AUTHORITY CAUSED EXCESSIVE LITIGATION, HENCE A MARKET RATE FEE THE JUDGE CAN THEN USE HOURLY RATE STATUTE.

>> WELL, ISN'T ALSO A PART OF THAT, IF THE FEE, AS INCURRED, IS NOT PAID, THAT IT IS UNCONSTITUTIONAL ON ITS FACE? ISN'T THAT INHERENT IN PART OF THAT QUESTION?

>> WHAT I'M ARGUING, IS, THAT THE THRESHOLD ISSUE--

>> WHAT YOU'RE SAYING YOU DON'T WANT US TO HAVE JURISDICTION, YOU WILL MAKE THAT ARGUMENT.

I UNDERSTAND THAT.

THE QUESTION IS THOUGH, IN RULING ON THIS ATTORNEY'S FEE ISSUE YOU EITHER HAVE THE STATUTE, IT'S VALID AND IT LIMITS OR IT IS UNCONSTITUTIONAL AS APPLIED.

THE TRIAL JUDGE WOULD USE SOMETHING ELSE.

ISN'T IT?

>> WELL I AGREE WITH THAT COMMENT.

I'M NOT SURE I'M FOLLOWING THE QUESTION BECAUSE TO ME--

>> QUESTION IS YOU'RE SAYING THEY DIDN'T RULE ON THE QUESTION.

I'M SAYING IT SEEMS TO ME OR I'M

QUESTIONING, IT SEEMS TO ME THAT THEY DID WHEN THEY SAID THEY REVERSED THE TRIAL JUDGE WHO HAD HELD THAT IT WAS UNCONSTITUTIONAL AS APPLIED. AND AWARDED, AND QUASHED THE FEE.

>> WELL, WHAT I THINK THEY NEVER REACHED WAS, WHETHER THERE HAD BEEN EXCESSIVE LITIGATION.

I THINK THE TRIAL-- THE DCA SAID THERE WERE TWO INSTANCES IN THE TRIAL COURT'S ORDER THAT SAID THERE WAS EXCESSIVE LITIGATION AND THEY SAY--

>> DID THEY ACTUALLY ACCEPT THAT IN THEIR DISCUSSION OF, IN THIS CASE?

DIDN'T THEY SORT OF ACCEPT THAT THERE HAD IN FACT BEEN EXCESSIVE LITIGATION?

>> WELL THEY POINTED TO TWO EXAMPLES.

ONE WAS THE DEPOSITION HOURS. EVEN ASSUMING THAT ADDITIONAL TIME HAD BEEN UNNECESSARILY ABUSIVE THE APPELLEE'S NEVER SOUGHT SANCTIONS.

THEY TALKED ABOUT HANK FISHKIND, THE OTHER WITNESS, IF IN FACT APPELLANT ENDING GAUGED IN EXCESSIVE LITIGATION ACTIONS SPENT ADDITIONAL TIME, STATUTORY PROCEDURE MECHANISM WERE IN PLACE.

IN MY VIEW OF THE DCA'S RULE, AND I READ IT MANY TIMES, THEY DON'T EVER SAY THAT THEY BELIEVE THE TRIAL COURT DID, THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO ESTABLISH THERE WAS EXCESSIVE LITIGATION.

THEY--

>> WHY DOES THAT COME INTO OUR JURISDICTION?

WHAT THE DISTRICT COURT DID THERE IS NOT A BIT UNUSUAL IN THE WAY A COURTS ANALYZE QUESTIONS THAT THEY'RE PRESENTED WITH.

THEY WILL SAY EVEN ASSUMING THIS, WE CONCLUDE THAT THERE IS NOT A CONSTITUTIONAL VIOLATION. THAT SEEMS LIKE THAT THAT CONCLUSION, GIVEN THE ASSUMPTION THEY MADE AND THEN THE CONCLUSION THEY MADE ABOUT THE WHETHER IT WAS UNCONSTITUTIONAL AS APPLIED, WHETHER THE STATUTE WAS UNCONSTITUTIONAL AS APPLIED, GIVEN THAT ASSUMPTION, PRESENTS A LEGAL QUESTION THAT THEY DECIDED, WHICH WE CAN REVIEW. I DON'T UNDERSTAND WHY THAT'S NOT, THAT IS KIND OF, KIND OF A COMMON THING IN APPELLATE PRACTICE.

>> YES, YOUR HONOR.

SO, AND ONE COULD ARGUE THAT THE CERTIFIED QUESTION IN OF ITSELF MEANS THAT THEY HAVE REACH AD RULING BUT IN OUR REVIEW OF THE RECORD WE DO NOT SEE THAT THE DISTRICT COURT OF APPEAL HAS EVER SAID THERE IS SUBSTANTIAL MATERIAL EVIDENCE THAT THERE WAS EXCESSIVE LITIGATION.

THE SECOND ARGUMENT I WOULD LIKE TO MAKE TO THIS COURT IS THAT THE FEE SHOULD BE UPHELD BECAUSE IT IS NOT AN UNREASONABLE FEE.

>> WAIT A MINUTE.

WHAT WAS THE EVIDENCE FROM YOUR WITNESS AT TRIAL AS TO THE FEE THAT WAS REASONABLE AND NECESSARY FEE IN THIS LITIGATION?

>> WELL, THAT IS AN INTERESTING QUESTION.

WHAT THEY ARE TALKING ABOUT IS--

>> I'M JUST ASKING A QUESTION FIRST.

WHAT DID YOUR WITNESS SAY?

>> WELL WE HAD TWO DIFFERENT WITNESSES.

I WOULD LIKE TO SAY THIS, I THINK HE SAID THAT THE, ONE WITNESS SAID IT WOULD BE 500, SOMEWHERE IN THE 500,000.



ONE WITNESS SAID SOMEWHERE IN THE 300,000.

I WOULD LIKE TO SAY THIS SO THE RECORD IS CLEAR.

AT THE FEE HEARING, WE FIRST ASKED OUR WITNESS, AND THAT'S THE WITNESS THEY'RE TALKING ABOUT, TOM CALL LEN, WE TRIED TO ASK HIM WHETHER A FEE WOULD BE APPROPRIATE UNDER SUBSECTION ONE.

AND THEY OBJECTED.

IN FACT THEIR EXACT OBJECTION WAS, YOUR HONOR, THAT IS WATER UNDER THE BRIDGE IN THAT THE COURT ALREADY RULED THAT SUBSECTION ONE IS NOT APPLICABLE BECAUSE THE FIRST OFFER WASN'T VALID.

THE, AT THE TIME WE HAD FEE HEARING THE TRIAL COURT ENTERED AN ORDER THAT SAID SUBSECTION ONE WAS NOT GOING TO BE USE BECAUSE THE FIRST OFFER WAS NOT VALID WHICH WENT UP ON APPEAL AND WAS REVERSED.

HE ALREADY MADE THAT RULING WHEN WE TRIED TO ASK OUR WITNESSES WOULD SUBSECTION ONE WOULD BE REASONABLE FEE IN THIS CASE. THEY OBJECTED WORDS WERE, THIS IS WATER UNDER THE BRIDGE AND TRIAL COURT SUSTAINED THEM. THE INSTRUCTION WAS, WHAT IS YOUR OPINION OF A REASONABLE FEE IF YOU, HAVE TO USE SUBSECTION TWO.

SO OUR WITNESSES DID HAVE AN OPINION ABOUT THE VALUE OF REASONABLE FEE UNDER SUBSECTION TWO BUT IT WAS, THE QUESTION WAS, THEY WERE GIVEN PARAMETERS WHICH YOU CAN'T TALK ABOUT SUBSECTION ONE.

>> THAT IS REASONABLE VALUE, IN THE ABSTRACT.

>> IF YOU WERE GOING TO USE SUBSECTION TWO.

>> ASSUMING NO STATUTE AT ALL, LOOKING AT A PROBLEM AND A

LAWYER OR GROUP OF LAWYERS  
HANDLING THAT PROBLEM, AS I,  
THAT WAS WHAT A REASONABLE FEE  
WOULD BE IN THIS COMMUNITY FOR  
THIS KIND OF A CASE.

>> YES, THAT WAS THE TESTIMONY.

>> OKAY.

THAT WAS THEIR TESTIMONY.

>> YES, SIR.

>> THEN THE NEXT QUESTION IS,  
WHAT DO YOU DO WITH THE  
STATUTES?

THAT'S WHY WE'RE HERE TODAY,  
RIGHT.

>> THAT'S RIGHT.

>> SO I MEAN THE TESTIMONY WAS  
IS THAT, THAT IT WAS A  
REASONABLE FEE, THE AMOUNT IN  
THE TRIAL COURT BY BOTH YOUR  
WITNESS AND THEIR WITNESSES.

>> WELL, THERE WERE VARIOUS  
WITNESSES.

ONE OF OUR WITNESS WAS IN THE  
300,000.

ONE WAS IN THE 500,000.

THEIRS WAS NORTH OF 800,000.

>> HOURLY RATE.

>> ON THE HOURLY RATE?

I THINK THAT THOSE GRAVITATED  
AROUND MID 3 HUNDREDS, 350.

>> RIGHT.

THAT IS WHAT WE'RE TALKING  
ABOUT.

>> NO ATTORNEY IS GOING TO SAY  
WHO IS AN EMINENT DOMAIN  
ATTORNEY, LIKE IN CAPITAL,  
\$50 AN HOUR IS A REASONABLE FEE  
BUT DID THEY APPORTION THE FEE  
AMOUNT, AND BETWEEN WHAT WAS THE  
LITIGATION, THE JURY TRIAL  
LITIGATION, WHICH WOULD BE THE  
REQUIRED WHETHER THERE WAS  
EXCESSIVE LITIGATION OR NOT, AND  
THE ADDITIONAL FEE FOR THE  
TAKING TWICE AS LONG I GUESS IN  
DEPOSITIONS, WHICH IS ALWAYS,  
SORT OF AN INTERESTING THING TO  
ME BECAUSE ALL OF US WHO ARE  
TRIAL LAWYERS SAT IN OVERLY-LONG  
DEPOSITIONS AND WOULD HAVE LOVE

TO GET ADDITIONAL MONEY FOR  
SITTING THERE FOR TWO DAYS.  
SO WAS IT, WAS IT APPORTIONED?

>> NO, YOUR HONOR.

>> BUT THAT'S NOT, YOU KNOW, BUT  
NOBODY HAS, HAS THAT BEEN RAISED  
AS A SEPARATE ISSUE, THAT THE  
FEE AMOUNT, IF IT'S GOING TO BE  
UNCONSTITUTIONAL AS APPLIED IS  
GOING TO BE AS TO THE AMOUNT  
THAT WAS EXCESSIVE, NOT JUST FOR  
THE ENTIRE LITIGATION?

>> WELL WE BELIEVE, YES.

WE BELIEVE--

>> YES, WHAT, IT HAS BEEN  
RAISED?

>> NO, IT HAS NOT BEEN RAISED.

>> SO THAT IS AN INTERESTING  
QUESTION BUT IT'S NOT--

>> IT HAS BEEN RAISED IN THIS  
SENSE.

WE HAVE ARGUED AND THE DCA RULED  
THAT IF YOU HAVE EXCESSIVE  
LITIGATION, IF YOU TAKE THAT AS  
A GIVEN, IF YOU HAVE EXCESSIVE  
LITIGATION, THEN THE CORRECT  
REMEDY FOR THAT IS NOT TO IGNORE  
THE STATUTE.

YOU STILL AWARD FROM THE STATUTE  
BUT YOU AWARD SOME SORT OF  
SANCTION.

FOR EXAMPLE IN THIS CASE THE DCA  
CITED 597.105-B SAID YOU CAN  
AWARD SANCTIONS FOR UNREASONABLE  
DELAY.

THEY ARGUED THAT, WELL, THE  
REASON DCA FOCUSED ON  
UNREASONABLE DELAY BECAUSE THEY  
ARGUED INTRODUCTION OF FISHKIND  
CAUSED TRIAL TO BE MOVED.

IF YOU LOOK AT 57.105-A.

COURT SHALL AWARD REASONABLE  
ATTORNEY'S FEE OR DEFENSE LOSING  
PARTY'S ATTORNEY OR SHOULD HAVE  
KNOWN THAT THE CLAIM OR DEFENSE  
WAS NOT SUPPORTED BY THE  
MATERIAL FACTS NECESSARY TO  
ESTABLISH THE CLAIM.

THAT IS EXACTLY WHAT THEY'RE  
ARGUING IN THIS CASE.

THEY ARE ARGUING THAT WE INTRODUCED FISHKIND AND WE KNEW OR SHOULD HAVE KNOWN HE BASED HIS OPINION ON A MAXIMUM SQUARE FOOT BUILDING THAT YOU COULD PUT ON THIS PROPERTY AND THAT OPINION WAS WRONG.

THAT HE USED SOME OTHER EXPERT'S OPINION AND IT WAS WRONG AND WE KNEW OR SHOULD HAVE KNOWN THAT. SO WHAT WE'VE ALWAYS ARGUED IS, LOOK, IF YOU THINK THAT THERE IS EXCESSIVE LITIGATION, THE FEE IS THE FEE UNDER THE STATUTE. THERE IS NOTHING UNREASONABLE ABOUT A QUARTER OF A MILLION DOLLARS.

SO, IF YOU THINK THAT THERE HAS BEEN SOMETHING ELSE THAT GOES ON, 10 WHAT YOU SHOULD DO, IS MOVE FOR SANCTIONS.

EITHER 57.105 OR THIS COURT RULED NUMEROUS TIMES THAT A COURT HAS INHERENT POWER TO AWARD ATTORNEY FEES FOR CONDUCT. >> YOU MAY BE THE FIRST LAWYER I EVER HEARD THAT ARGUED THAT YOU OUGHT TO BE SANCTIONED.

>> I UNDERSTAND.

I UNDERSTAND.

THE POINT IS THAT WE DO NOT BELIEVE THE STATUTE IS INVALID BECAUSE SOMEONE THINKS THERE IS EXCESSIVE LITIGATION.

>> WHAT DOES EXCESSIVE LITIGATION MEAN?

BECAUSE WE JUST NOW TALKING ABOUT BAD FAITH.

IS IT EQUIVALENT TO, THAT, AND AGAIN, THIS IS YOUR FIRM.

I DON'T KNOW WHO LITIGATED IT BELOW.

WAS IT YOU BELOW?

>> NO.

>> A LITTLE EASIER TO TALK ABOUT.

>> A LITTLE EASIER.

>> NO LONGER, IS THAT IT CONNOTES THAT IT WAS DONE IN BAD FAITH BECAUSE YOU KNOW, WHAT WE

HAVE HERE IS LANDOWNERS GETTING PROPERTY THAT THE GOVERNMENT WANTS, THE STATE WANTS, THE AUTHORITY WANTS.

AND THEY'RE, THEY HAVE A RIGHT TO HAVE THEIR ATTORNEY COMPENSATED AND THE PRESUMPTION IS, UNDER THE FIRST SECTION OF THE STATUTE THAT A PERCENTAGE OF BENEFITS WILL BE A REASONABLE FEE.

AND AGAIN, I UNDERSTAND THAT EVERY TIME, SOMETIMES IT WILL BE, YOU DON'T USUALLY CHECK, DOES IT EQUATE TO A THOUSAND DOLLARS AN HOUR OR \$200 AN HOUR OR SOMETIMES \$100 AND HOUR. YOU TAKE THAT RISK BECAUSE IT IS BENEFITS.

SO I'M CONCERNED FOR BOTH SIDES. WHAT IS THE POINT AT WHICH SOMETHING THAT'S LITIGATED PROFESSIONALLY BECOMES EXCESSIVE?

AND IT SEEMS TO ME AT THE VERY LEAST, THAT RATHER THAN TRY TO FIT IT INTO 57.105 OR SANCTION RULE THAT DOESN'T QUITE FIT, IT WOULD SEEM THAT AS TO THE EXCESSIVE LITIGATION DEFINED AS BAD FAITH LITIGATION, THAT IT WOULD BE UNCONSTITUTIONAL AS APPLIED, THAT THEY WOULD BE ENTITLED TO FULL FEE FOR THAT PORTION OF THE LITIGATION THAT'S FOUND TO BE DONE IN BAD FAITH, WHICH WOULD BE PRESUMABLY HERE THE TAKING TWICE AS LONG IN DEPOSITIONS, AGAIN, BECAUSE IF THE AUTHORITY ISN'T TRYING TO REIN YOU GUYS IN, THEY HAVE TO SATE THERE TWO OR THREE DAYS FOR DEPOSITIONS.

THAT IS NOT PROPER.

THAT'S NOT IN GOOD FAITH. THE SECOND PART BEING, THE EXPERT, WHICH APPARENTLY AGAIN, THE JUDGE MADE FINDINGS THAT WAS NOT HIS ASSUMPTIONS WERE INAPPROPRIATE.

NOW I DON'T KNOW WHAT FEE--  
WOULD THE RECORD SHOW WHAT THAT  
FEE WOULD BE?

WOULD BE THE AMOUNT, THE  
BENEFITS SECURED PLUS THAT  
AMOUNT THAT WAS THE EXCESSIVE  
LITIGATION?

>> NO.

IN FACT THE DCA ASKED THAT  
QUESTION.

WELL WHAT IS THE AMOUNT OF HOURS  
THAT IS FOR THE EXCESSIVE  
LITIGATION?

THERE IS NOTHING IN THE RECORD  
ABOUT THAT.

>> BUT THAT COULD BE DETERMINED,  
CORRECT?

>> IT COULD BE.

>> PRESUMABLY IT IS LESS THAN  
800,000.

>> IF THE COURT HAS INHERENT  
POWER TO AWARD ATTORNEYS FEES  
FOR BAD FAITH WHICH THIS COURT  
HAS RULED BUT IT HAS DUE PROCESS  
REQUIREMENTS YOU HAVE TO HAVE  
NOTICE, AN EVIDENTIARY HEARING,  
THE HOURS COMMENSURATE WITH THE  
BAD FAITH, MEANING AWARD IS  
COMMENSURATE WITH THE BAD FAITH.  
THAT IS EXACTLY WHAT YOU'RE  
DOING.

>> ISN'T THERE A DIFFERENCE  
BETWEEN SANCTIONS FOR LAWYERS  
WHO ENGAGE IN CONDUCT THAT IS  
JUST WRONG UNDER THE STATUTE AND  
THEN IN OTHER WAY, EVEN FOR  
DISCOVERY SANCTIONABLE ATTORNEYS  
FEES AND IN THE CONDUCT THAT, ON  
YOUR SIDE, IF YOU ENGAGE IN  
DISCOVERY AND OTHER THINGS AND  
LEGAL THEORIES THAT YOU BELIEVE  
ARE APPROPRIATE, AT THE TIME,  
AND YOU ENGAGED IN THAT, AND IT  
CAUSES EXTENSIVE LITIGATION,  
THAT IN THE END TURNS OUT TO BE  
MORE THAN IT SHOULD HAVE BEEN,  
IT DOES SEEM THOSE ARE TWO  
SEPARATE STANDARDS BEING APPLIED  
AS TO POTENTIAL SANCTIONS AND  
THOSE THAT ARE, HAVE ENGAGED IN

ATTORNEYS FEES THAT HAVE BEEN INCURRED THAT REALLY SHOULDN'T HAVE BEEN.

AREN'T THOSE TWO DIFFERENT THINGS?

>> TO ME, IN ORDER, IF YOU SAID THAT WELL, A CONDEMNING AUTHORITY ACTED IN BAD FAITH AND HENCE WE'RE GOING TO AWARD ATTORNEY FEES OR ALLOW A TRIAL COURT TO AWARD SUBSECTION TWO ATTORNEYS FEES YOU WOULD GET INTO THE SAME ANALYSIS WHICH IS, WELL, DID THEY ACT IN BAD FAITH? YOU HAVE TO GIVE THEM NOTICE OF THAT.

ED THAT WE NEVER EVEN ALLOWED AN EVIDENTIARY HEARING OF BAD FAITH.

>> WHAT I'M SAY SOMETHING MORE CLEARLY.

THE STANDARDS IN 57.105 ARTICULATED BY THE LEGISLATURE SEEMS MAY BE DIFFERENT THAN THE CONSTITUTIONAL STANDARD OF A TAKING OF PROPERTY THAT SOMEBODY'S ENTITLED TO DEFEND.

>> WELL, IN 57.105 MAY BE BUT THIS COURT, THIS VERY COURT IN MOAKLEY VERSUS SMALLWOOD, ESTABLISHED THAT A COURT HAS INHERENT AUTHORITY TO AWARD ATTORNEYS FEES FOR BAD FAITH LITIGATION BUT YOU HAVE STANDARDS.

THE STANDARDS ARE, THAT YOU GIVE NOTICE, THAT YOU ALLOW EVIDENTIARY HEARING, THAT YOU MAKE SPECIFIC FINDINGS AS TO WHAT THE BAD FAITH IS.

THAT THE AWARD IS THE THEN COMMENSURATE WITH THE NUMBER OF HOURS THAT THAT BAD FAITH CAUSED.

ONCE YOU HAVE THE DUE PROCESS REQUIREMENT YOU CAN GO THROUGH AND DO ALL OF THIS.

WE ALWAYS SAID THAT IS EXACTLY WHAT SHOULD APPLY IN THIS CASE.

>> THE FACTS IN THAT CASE, THAT

A PARTY HAS ADEQUATE DOCUMENTS,  
DIDN'T THE JUDGE RULING IS IN  
THAT CASE?

THAT THEY KNEW EXACTLY THEY  
COULD NOT PREVAIL BUT YET THEY  
BROUGHT A WITNESS DOWN FROM,  
LAUDERDALE OR MIAMI DOWN TO  
KEY WEST?

JUST NOT THE SAME.

HERE IT WOULD SEEM TO ME, AND  
CONVINCE ME WHERE I'M WRONG  
HERE, IS THAT YOU COULD HAVE  
LISTED 20 WITNESSES AND SAYING,  
I'M THE GREATEST EMINENT DOMAIN  
LAWYER THAT EVER LIVED AND I'M  
GOING TO SHOW YOU HOW THIS THING  
OUGHT TO BE LITIGATED AND DO SO  
IN GOOD FAITH THAT YOU'RE A  
BRIGHT LAWYER.

YOU'RE GOING TO PUT ALL THESE  
THINGS FORWARD BUT AT THE END OF  
THE DAY IT WASN'T.

AND THAT YOU LOSE.

AND IT SEEMS TO ME THAT JUSTICE  
POLSTON IS REALLY HIT IT RIGHT  
ON THE HEAD, THAT DOESN'T MEAN  
YOU'RE NECESSARILY A MEAN,  
NASTY, IN BAD FAITH PERSON.

BUT IT DOES MEAN YOU GENERATED  
MORE WORK THAN A NORMAL EMINENT  
DOMAIN CASE WOULD HAVE RECEIVED.  
AND THAT SEEMS TO BE ALL WE'RE  
TALKING ABOUT HERE, THAT AND THE  
WITNESSES CONFIRMED THAT AS TO  
THE NUMBER OF HOURS EXPENDED.  
ISN'T THAT WHAT THOSE WITNESSES  
CONFIRMED AT HEARING?

>> NO.

>> THEY DID NOT?

SAYING THAT IS REASONABLE NUMBER  
OF HOURS?

THE TRIAL COURT DIDN'T REQUIRE  
THE WITNESS TO COME UP WITH THAT  
TESTIMONY?

>> IN EVERY EMINENT DOMAIN CASE,  
IF YOU ASK AN EXPERT WITNESS  
WHAT A STATUTORY VERSUS WHAT  
IS REASONABLE FEE ON HOURLY RATE  
STATUTE, IT ALWAYS COULD BE VERY  
DIFFERENT THIS EVERY SINGLE



CASE.

IT'S A VERY DIFFERENT--

>> I KNOW IT COULD BE BUT THERE,  
EMINENT DOMAIN IS SO UNIQUE  
THERE IS NO REASONABLE RANGE  
WHAT YOU'RE LOOKING AT  
PROPERTIES AND THEORIES AND  
NUMBER OF WITNESSES AND FAIR  
MARKET VALUES AND DIFFERENT WAYS  
TO VALUE IT, IT IS SO UNIQUE  
THAT THERE IS NEVER, EVER, IN  
FLORIDA A NORMAL EMINENT  
DOMAIN-TYPE CASE.

THAT YOU EXPERTS COULD SAY,  
YEAH, THAT'S WHAT A REASONABLE  
CASES.

NO?

>> WELL I THINK IF YOU ARE, IF  
YOU ARE LOOKING AT SUBSECTION  
TWO, THEN YES YOU COULD--

>> THAT'S NOT MY QUESTION.  
I ASKED THE QUESTION.

>> I'M SORRY.

>> I'M TRYING TO UNDERSTAND.

MAYBE I'M WRONG.

MAYBE EMINENT DOMAIN IS SO MISS  
CALL THAT EVERYONE-- MYSTICAL,  
THAT THEY ARE SO DIFFERENT THAT  
THERE IS NO NORMAL EMINENT  
DOMAIN CASE.

IS THAT WHAT YOU'RE TELL MOOING?

>> I THINK EACH CASE, A  
REASONABLE FEE IN EACH CASE  
HOURLY WAGE WOULD VARY GREATLY.

>> THANK YOU, SIR.

>> THANK YOU.

>> JUST A COUPLE OF COMMENTS.

>> COULD I ASK YOU THE QUESTION?  
IS THERE A NORMAL EMINENT DOMAIN  
CASE?

IS THERE, WHAT IS REASONABLE FOR  
EMINENT DOMAIN WORK, YOU KNOW?  
WHEN YOU TRY CASES--

>> AMOUNT OF TIME TO TRY IT TO  
VERDICT?

>> YEAH.

HOW MUCH TIME IS NORMALLY  
EXPENDED IN DEPOSING EXPERTS,  
HOW MUCH TIME IS USUALLY USED  
IN--

>> A FEW HUNDRED HOURS, YOUR HONOR.  
NOT THOUSANDS OF HOURS.  
>> WELL, BUT MY POINT BEING, IS THERE, IS THIS SO UNUSUAL IN EMINENT DOMAIN THAT THERE IS NO USUAL?  
THAT EVERYONE IS ABSOLUTELY AND 100%--  
>> NO.  
I WOULD NOT SAY THAT AT ALL.  
>> SO YOU THINK THERE IS SOMETHING THAT IS A NORMAL EMINENT DOMAIN CASE?  
>> ABSOLUTELY.  
>> TYPES OF INSTANCES TYPES OF HOURS, TYPES OF TESTIMONY?  
>> ABSOLUTELY.  
MOST EMINENT DOMAIN CASES TAKE FOUR OR FIVE DAYS TO TRY.  
THIS ONE TOOK SEVEN, THAT WAS WITH THE EXCLUSION OF THE ECONOMIST ON EACH OF TRIAL WHICH WOULD MADE THE CASE GO FOR TWO WEEKS OR MORE.  
>> BUT DID YOU GET THE, THE \$800,000 FEE, IS THAT ON EVERY HOUR THAT WAS EXPENDED FROM THE GET-GO?  
OR DID THE JUDGE MAKE THE DETERMINATION ABOUT WHAT WAS, YOU KNOW, SAY IF IT WENT FROM A NORMAL CASE IS FIVE DAYS, THIS WAS SEVEN DAYS.  
DEPOSITION, A NORMAL DEPOSITION IS A DAY.  
THIS DEPOSITION TOOK A WEEK?  
>> HE DID NOT GET INTO THAT, INTO THE BRIER PATCH, THE TREES THAT CLOSELY.  
WHAT HE DID DO--  
>> BUT THAT'S NOT REALLY-- THEN THEY'RE BEING, THEY'RE BEING SANCTIONED, EVEN THOUGH THEY'RE NOT SANCTIONABLE BEHAVIOR FOR THE ENTIRE LITIGATION.  
I DON'T REALLY GET THAT.  
>> THE JUDGE CUT US 500 HOURS, YOUR HONOR.  
>> BUT YOU'VE BEEN DOING EMINENT

DOMAIN FOR--  
>> A LONG TIME.  
>> OKAY.  
AND YOU DON'T NORMALLY KEEP  
RECORD--  
>> I KEEP RECORDS.  
>> OKAY.  
THEY SAID--  
>> THERE WAS ONE ATTORNEY THAT  
DID NOT KEEP RECORDS THAT  
RECONSTRUCTED HIS HOURS.  
I KEPT METICULOUS DAILY RECORDS.  
>> SO OVER THE YEARS, WHEN YOU  
GET BENEFITS OBTAINED, HAVE YOU  
HAD SITUATIONS WHERE YOU FIND  
THAT YOU REALLY HAD PRETTY GOOD  
FEE ON THAT WHERE IT MAY HAVE  
AMOUNTED TO MORE THAN \$350 AN  
HOUR?  
>> SOMETIMES ABOVE.  
SOMETIMES BELOW.  
>> CAN YOU ACCEPT THAT?  
>> BUT THE PROBLEM IS--  
>> IS THAT CORRECT, THAT YOU  
ACCEPT THAT THE BENEFITS  
SOMETIMES PER HOUR MAY BE JUST  
LIKE IN ANY CONTINGENT FEE CASE  
IS VERY GENEROUS AND SOMETIMES  
IT'S NOT SO GENEROUS?  
>> THIS, IN A CONTINGENCY FEE  
CASE, SOMETIMES THERE IS NO FEE  
AT ALL.  
>> NO FEE AT ALL.  
>> NO FEE AT ALL.  
>> HERE YOU GET SOMETHING.  
>> IN EMINENT DOMAIN CASE, THE  
VAST MAJORITY OF CASES ARE  
SETTLED PRESUIT.  
SO IT NEVER GOES TO VERDICT.  
WHAT HAPPENS IS, EVERYBODY  
AGREES TO WHAT THE FEE SHOULD  
BE.  
>> SO YOU GET A--  
>> SOMETIMES WE GET PAID ON  
HOURLY BASIS BECAUSE OF THE  
PROBLEMS WITH THE STATUTE.  
SOMETIMES--  
>> WHY ISN'T THE CASE HERE THAT  
THE REMEDY THAT THE TRIAL COURT  
IMPOSED FOR WHAT IT VIEWED AS

THE, THE FACT THAT THE STATUTE WAS UNCONSTITUTIONAL AS APPLIED IN THESE CIRCUMSTANCE, GOES BEYOND THE PROBLEM, THE CONSTITUTIONAL PROBLEM?

I THINK THAT IS THE POINT THAT JUSTICE PARIENTE IS GETTING AT. THAT THE REMEDY HERE JUST KIND OF REVERTING TO THE MARKET-BASED FEE GOES BEYOND THE CONSTITUTIONAL PROBLEM THAT YOU HAVE RAISED WITH THE APPLICATION OF THE STATUTE?

WHY ISN'T THAT THE CASE?

>> CONSTITUTIONAL PROBLEM IS FULL COMPENSATION AND FULL COMPENSATION HAS BEEN INTERPRETED FOR 60 YEARS TO MEAN THAT ATTORNEY REPRESENTING A PROPERTY OWNER IN THIS STATE SHOULD BE ON A EQUAL FOOTING WITH THE GOVERNMENT.

AND BE PAID A REASONABLE FEE.

>> THEN THAT WOULD BE EVERY CASE WHERE YOUR FEE ENDS UP BEING LESS THAN \$350 AN HOUR, YOU OUGHT TO THEN, IT IS UNCONSTITUTIONAL AND YOU OUGHT TO BE ABLE-- BUT THAT IS WHAT FOLLOWS, DOESN'T IT?

>> NO, YOUR HONOR BECAUSE THE VAST MAJORITY OF CASES ARE SETTLED WITH AGREEMENT BETWEEN ALL OF THE PARTIES.

ONLY WHEN THE CONDEMNING AUTHORITY FORCES THE PROPERTY OWNER TO GO TO THE MAT AND ABUSES ITS GOVERNMENTAL AUTHORITY THIS COURT-- YOU DON'T MEAN REALLY THAT THE.

>> YOU DON'T MEAN THAT THE GOVERNMENT DOESN'T HAVE A RIGHT TO GO TO JURY TRIAL IF THEY THINK-- YOU WERE ASKING FOR \$7 MILLION.

THEY OFFERED FOUR.

>> YOU ONLY GOT-- YOU GOT FIVE.

>> EVEN CHIEF TRIAL COUNSEL IN THIS CASE SAID ONLY TAKEN 640 HOURS.

THEY HAD NO EXPLANATION WHY THEY SPENT 2000 .

>> THAT IS BETWEEN BROAD AND CAN SELL AND AUTHORITY WHETHER THEY BILKED THE GOVERNMENT BY 2700 HOURS.

>> THEY DRAGGED THE PROPERTY OWNER THROUGH THAT.

THE ONLY WAY THE PROPERTY OWNER COULD GET THE VERDICT IS TO TRY THE CASE.

THEY NEVER OFFERED OUR PROPERTY, OUR CLIENTS THIS AMOUNT OF MONEY.

THE ONLY WAY THAT WE COULD SECURE FULL COMPENSATION FOR OUR CLIENT WAS TO TAKE IT ALL THE WAY TO THE VERDICT.

MOST OF THE CASES ARE TRIED WITH THE AGREEMENT OF COUNSEL.

AND I BELIEVE MY TIME IS UP.

BUT I APPRECIATE THE COURT'S CONSIDERATION OF THIS CASE AND WE ASK THAT THE COURT AFFIRM THE TRIAL COURT'S DECISION IN THIS CASE AND REVERSE THE DISTRICT COURT OF APPEAL.

THANK YOU VERY MUCH.