

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

CASE NO. 3D08-2819

**STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
on behalf of the BOARD OF TRUSTEES
OF THE INTERNAL IMPROVEMENT
FUND,**

Appellant,

vs.

**EVERETT G. WEST, et al., R. FURMAN
RICHARDSON, and UNCIA TRADING
CORPORATION,**

Appellees.

L.T. Case No. CA-P-95-165

MOTION TO CORRECT THE RECORD

Appellees respectfully move for an order allowing correction of the record on appeal pursuant to rule 9.200(f)(1). In support of the motion, appellees state:

1. After the record in this case was prepared, appellant filed a “Motion to Supplement the Record and for Extension of Time to File Initial Brief.” Appellant’s motion sought an order allowing it to supplement the record with transcripts and exhibits from depositions of two expert witnesses, Donald Craig and Robert Gallaher, on October 16 and 17, 2007, respectively.

2. Appellant’s motion was granted and the transcripts of the depositions have been made part of the record at Vol. XVII: 2206-2340 and Vol. XVIII: 2341-2526

3. Appellant’s statement of facts includes several references to these documents, and Part II of appellant’s initial brief consists almost entirely of references to them.

4. When consulted regarding said motion, appellees’ counsel cautioned appellant that appellees did not believe they had been introduced into evidence or considered by the trial court.

5. Following receipt of the initial brief and a thorough review of the record, appellees determined that the deposition transcripts and exhibits were not made part of the record. They are excerpted in appellant’s motion in limine, or “ROGO Motion,” at RX: 1503-1521.

6. Appellant's motion to supplement the record with the two transcripts did not cite any record support for its request. Appellant only referred to its "ROGO motion," stating:

The ROGO Motion relies heavily on the October 16 and 17, 2007, depositions of Mr. Craig and Mr. Gallaher in urging the trial court to strike the appraisals of both parties. Although the motion contains verbatim quotes from Mr. Craig's and Mr. Gallaher's depositions, it also contains information from those depositions that are in narrative form.

....

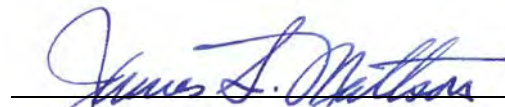
Appellant would *prefer* to cite to those sections of Mr. Craig and Mr. Gallaher's depositions to support its factual contentions rather than to cite to the narrative of counsel who prepared the ROGO motion. This procedure will remove any doubt as to the facts advanced in appellant's brief and provide appellees with a full record of what was said during the depositions should appellees take issue with the facts advanced by appellant.


RX: 1504 [Emphasis added.].

7. It appears that appellant knew these depositions were not part of the record. The stated rationale that appellees could also pore over these non-record transcripts to rebut appellant's non-record statements is an insufficient ground, if there is one, to go outside the record on appeal.

8. It was not possible to contact appellant's counsel when this motion was prepared, as counsel had explained that he would be going on vacation April 25, 2009. Appellees' counsel will send this motion by e-mail to appellant's counsel, as well as by mail.

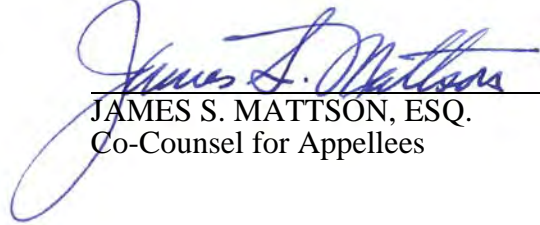
Wherefore, appellees respectfully move for an order correcting the record to reflect that the transcripts of the depositions of Donald Craig and Robert Gallaher are not part of the record.


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CERTIFICATE OF SERVICE

I certify I served a copy of the foregoing by first class mail, postage prepaid, on **J. A. Spejenkowski, Esquire.**, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, with a courtesy copy by email, this 27th day of April 2009.



JAMES S. MATTSON, ESQ.
Co-Counsel for Appellees