

**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 SUPPLEMENT THE RECORD

Appellees respectfully move the court for an order allowing them to supplement the record on appeal pursuant to rule 9.200(f)(2). In support of the motion, appellees state:

I. TRANSCRIPTS OF DEPOSITIONS OF SWIFT AND SORENSEN

1. When the record in this case was prepared, appellees overlooked the fact that transcripts of the depositions of former County Commissioners Edwin Swift and Kenneth Sorensen, accepted in evidence at the second of three hearings on appellees' condemnation blight motion in limine, were inadvertently omitted from the record.

2. Both depositions were filed with the clerk of the lower court during the hearing, and were considered by the trial judge. They were placed in evidence in the closing minutes of the hearing. The following colloquy took place with the court, appellant's counsel Paul Lehrman, and appellees' co-counsels James Mattson and Andrew Tobin (*see* RXVI: 158-159).

[RXVI: 158, Line 20] MR. MATTSON: The defendants have no live witnesses. We do have two depositioned that we are going to read in but as Mr. Lehrman suggested we could just submit them and refer to them.

THE COURT: Did you intend for the court to read them outside of the presence of the attorneys?

[RXVI: 159] MR. LEHRMAN: You can read them as far as I'm concerned, whenever it is convenient.

MR. TOBIN: They are very short depositions, judge. I could read them to you. I have highlighted some portions of it. ...

THE COURT: Why don't we just save that for your closing argument. I will read these depositions outside of the presence of the attorneys on my own time if there is no objection.

MR. MATTSON: They are very brief.

MR. TOBIN: Then I will go and ask the court to accept the deposition of Kenneth Sorensen and have it marked and the deposition of Edwin O. Swift. Both originals have been tendered to the clerk.

THE COURT: Any objection by the state?

MR. LEHRMAN: No, sir.

THE COURT: Does that conclude the presentation by the defense of their evidence?

MR. MATTSON: Yes, it does.

3. Furthermore, the lower court's "Order Granting Defendants' Motion in Limine on the Issue of Condemnation Blight," entered April 9, 2007, states, on page 3:

The court admitted the deposition testimony of two unavailable witnesses for Condemnees, former County Commissioners Edwin O. Swift (Commissioner from 1982 through 1986), and Ken Sorensen (Commissioner from 1980 through 1984), and one unavailable witness for the State, Nancy Linnan, Esq. Ms. Linnan was an Assistant Secretary of the Florida Department of Community Affairs from May 1983 until late November 1984.

4. The depositions are necessary in this case to support appellees' defense of the lower court's order granting appellees' motion in limine on condemnation blight, as they were utilized and referenced by the court in its April 9, 2007, condemnation blight order.

II. TRANSCRIPT OF THIRD OF THREE HEARINGS ON APPELLEES' CONDEMNATION BLIGHT MOTION IN LIMINE

5. Appellees were also unaware, until last week, that the transcript of the third hearing on the condemnation blight motion in limine was not filed with the lower court. The transcripts of the first and second hearings were filed by appellant and are in record Vol. XVI.


6. Appellees have confirmed that appellant ordered the missing transcript on March 27, 2007, and that appellant's counsel has the transcript in his possession.

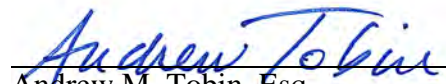
7. The transcript of the third hearing is necessary to appellee's argument supporting the lower court's condemnation blight order. At the end of the second hearing – which *is* in the record – the lower court would not allow appellee's major sources of state involvement in the blight on North Key Largo into evidence. Between the second and third hearings, appellees filed a motion to reconsider that ruling, RVIII: 1286-1301, as the state had admitted during discovery that 27 of the 39 documents were genuine. The court admitted the 27 documents, and took judicial notice of a 28th, during the January 31, 2007, hearing.

8. As authority for this motion, appellees rely on rule 9.200(f)(2), which provides in material part that “no proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given.” According to this rule, the court must allow the moving party an opportunity to supplement the record. *Starks v. Starks*, 423 So. 2d 452 (Fla. 1st DCA 1982); *Brice v. State*, 419 So. 2d 749 (Fla. 2d DCA 1982)

9. Appellees contacted appellant's counsel on April 21, 2009, to determine whether he had any objections to this motion. Appellant's counsel stated that he did object.

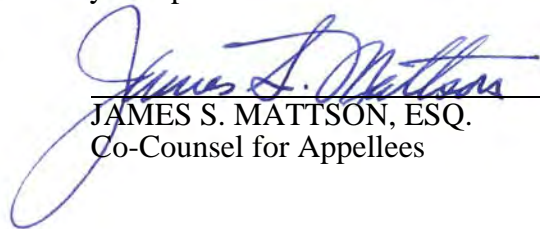
Wherefore, appellees respectfully move for an order allowing them to supplement the record on appeal by including the two omitted depositions and the omitted transcript.


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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, Esq.**, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, with a courtesy copy by email, this 27th day of April 2009.


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