No. ________

In The
Supreme Court of the United States

WILLIAM A. LIVINGSTON, for himself
and all others similarly situated,

Petitioner,

v.

PAT FRANK, as the Clerk of the Circuit Court of
Hillsborough County, Florida and the CITY OF TAMPA,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Florida**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida's eminent domain statutes provide a "quick-take" mechanism that permits the government to forcibly take immediate title and possession of private property the moment it deposits an amount specified in an Order of Taking into the court registry. A Florida statute gave clerks of the court the discretion to invest quick-take deposits and mandated that 90% of the interest earned on the deposits be paid to the condemning government authority. Here, the Hillsborough County Clerk of Court elected to invest the money deposited by the City of Tampa to immediately take title to Petitioner Livingston's land and paid 90% of the interest actually earned on the deposit to the City, all of which occurred without Livingston's knowledge. A Florida trial court ruled that even though the deposit effected an immediate transfer of title to the City, the registry funds did not belong to Livingston until final judgment. For that reason, the trial court concluded that paying the City the interest earned on the registry funds was not a taking under the United States and Florida Constitutions. The appellate court affirmed in a written opinion holding that eminent domain deposits are not private property until the money leaves the registry. The Supreme Court of Florida declined review. Livingston seeks to invoke the discretionary jurisdiction of the Supreme Court to review the appellate court's decision.

QUESTION PRESENTED – Continued

The question presented is:

Are eminent domain funds deposited by the government into a court registry to take immediate possession and title to land prior to final judgment private property entitled to Fifth Amendment protection as set out in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163, 164 (1980), such that an unconstitutional taking of a protected property interest occurs when the clerk distributes 90% of the interest earned to the government rather than to the ultimate owner of the deposit?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

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William A. Livingston, (hereinafter, "Livingston"), respectfully petitions for a writ of certiorari to review the decision of the Florida Second District Court of Appeal.

OPINIONS BELOW

The Florida Supreme Court's decision declining to review *Livingston v. Frank*, 150 So. 3d 239 (Fla. 2d DCA 2014), is reported at No. SC14-2333, 2015 WL 2248455, and is reproduced in Petitioner's Appendix ("Pet. App.") at A. The opinion of the Florida Second District Court of Appeal is reproduced in Pet. App. at B. The opinion of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, is reported at 11-CA-09728, 2012 WL 5387613, and is reproduced in Pet. App. at C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Livingston filed a lawsuit for inverse condemnation and declaratory and injunctive relief in the Florida state court challenging both the government's appropriation of the interest that accrued on Livingston's quick-take deposit and the statute authorizing that appropriation as violating the Fifth Amendment of the United States Constitution. The Florida trial court entered final summary judgment

against Livingston, and the Florida Second District Court of Appeal affirmed that decision in an opinion dated July 30, 2014. The Florida Supreme Court denied discretionary review of the Second District's decision in an opinion dated May 13, 2015. On July 29, 2015, Justice Clarence Thomas granted Petitioner's application to extend the time within which to file the petition to October 9, 2015. *Livingston v. Pat Frank*, No. 15A106.

CONSTITUTIONAL PROVISION AND STATUTES AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation."

* * *

Florida Statutes section 74.051(4) (2008) provides:[1]

[1] Petitioner sued under section 74.051(3) 2007. In 2008, without changing the content of the statute, the Legislature renumbered it to section 74.051(4). Consistent with the numbering used in the opinion, Petitioner will refer to the statute as subsection (4). The last sentence of section 74.051(4) was amended effective July 1, 2013, to provide: "Ninety percent of the interest earned shall be allocated in accordance with the ultimate ownership in the deposit." *See* ch. 13-23, §§ 1, 2, at 220-21, Laws of Fla.

> The court may fix the time within which and the terms upon which the defendants shall be required to surrender possession to the petitioner, which time of possession shall be upon deposit for those defendants failing to file a request for hearing as provided herein. The order of taking shall not become effective unless the deposit of the required sum is made in the registry of the court. If the deposit is not made within 20 days from the date of the order of taking, the order shall be void and of no further effect. The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. Ninety percent of the interest earned shall be paid to the petitioner.

* * *

Florida Statutes section 74.061 (2007) provides as follows:

> Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the said lands shall be deemed to be condemned and taken for the use of the petitioner, and the right to compensation for the same shall vest in the persons entitled thereto. Compensation shall be determined in accordance with the provisions of chapter 73, except that interest shall be allowed at the same rate as provided in all circuit court judgments from the date of surrender of possession to the

date of payment on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking.

STATEMENT OF THE CASE

I. The City of Tampa takes immediate title and possession of Livingston's land by depositing funds into the court registry.

In 2007, Livingston was an owner of three parcels of real property the City of Tampa wanted for a road project. Pet. App. B:3. The City filed an eminent domain action and, in order to take immediate title to Livingston's property prior to final judgment, the City pursued a quick-take under Chapter 74 of the Florida Statutes. Pet. App. B:3-4.

Under the Florida statutory framework, the City was required to appraise Livingston's property to establish a good-faith estimate of its value and disclose that amount in its quick-take Petition. Fla. Stat. § 74.031 (2008). Pet. App. B:4. The court then entered an Order of Taking authorizing the City to immediately take title to Livingston's real property by depositing the amount of the good-faith estimate into the court registry. Pet. App. B:4. The City deposited the amount specified in the Order of Taking to consummate the taking, and as provided by section 74.061, title to Livingston's property immediately vested in the City and the right to compensation immediately vested in Livingston. Pet. App. B:4.

II. Unbeknownst to Livingston, the Clerk invests the registry deposit and pays the City ninety percent of the interest earned on it.

Florida Statute section 74.051(4) (2008), authorizes, but does not require, clerks of court "to invest [eminent domain registry] deposits so as to earn the highest interest obtainable" in a federally insured account. Under the statute, ninety percent of the interest earned "shall be paid" to the condemning authority. § 74.051(4). After the City took title to Livingston's private property, without notice to Livingston and entirely off the judicial record, the Clerk chose to invest Livingston's deposit. Pet. App. B:5; D:1-2. (Stipulation in Case Management Order). Again without notice to Livingston and without his knowledge, the Clerk later paid the City of Tampa 90% of the interest earned on the deposit the City had made to immediately obtain Livingston's property. Pet. App. D:1-2; E:2.

When the City deposited money intended for Livingston as just compensation for the immediate taking of his land, the money was immediately Livingston's private property. And when the Clerk paid the interest it earned on that deposit to the City, rather than to Livingston, a distinct taking of a protected property interest occurred. That is because the interest earned from investing the registry funds was not part of establishing or paying just compensation for Livingston's land in the quick-take proceedings. The only interest Livingston was entitled to

receive as part of just compensation for the quick-taking of his land was prejudgment interest on the amount the City ultimately paid in excess of its good-faith deposit. § 74.061. Livingston was not entitled to prejudgment interest on the amount of the deposit. § 74.061. Not knowing that the Clerk had invested the deposit or that the City had collected the interest and financially benefitted from it, Livingston stipulated to the amount of compensation due under the statute for the taking of his land. A final judgment was entered for that amount. Livingston discovered the taking of the investment interest only after the final judgment was entered in the quick-take proceeding.

III. Livingston sues to recover the investment interest taken by the City but the trial and appellate courts rule that Livingston did not own the deposit paid to gain immediate title to his land.

As noted, Livingston had no notice or knowledge that the Clerk had earned interest on his deposit or that 90% of that interest had been paid to the City until after the final judgment was entered in the quick-take action. Pet. App. D:1-2; E:2. Livingston then filed this lawsuit on behalf of himself and all others similarly situated against the City and the Clerk for inverse condemnation and declaratory relief. He challenged the constitutionality of the statute instructing clerks to pay to condemning authorities 90% of interest earned on quick-take

deposits and sought to recover the interest taken from him under that provision.[2]

The City and the Clerk moved for summary judgment arguing that quick-take registry deposits are public funds. The trial court granted the motion, finding that Livingston had no property interest in the deposit. In the trial court's view, the deposit did not constitute payment made to consummate a taking. Instead, the deposit merely "secure[d] Plaintiff's right to obtain full compensation." Pet. App. C:9. Under the trial court's rationale, the City owned Livingston's land, the money deposited to acquire it, and the interest generated by the Clerk on that money until final judgment.

The trial court acknowledged this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which held that money deposited into a court registry and the interest generated on it is private property belonging to the "ultimate owner" of the deposit. *Id.* at 162. But rather than apply *Webb's* and its framework for assessing the constitutionality of government appropriation of interest earned on registry deposits, the trial court attempted to distinguish it to rule against Livingston.

[2] Livingston did not challenge that portion of section 74.051(4) which authorized the Clerk to retain 10% of the interest. Livingston challenged only that portion of the statute that required the Clerk to transfer the investment interest earned to the City as condemning authority.

The Florida statute at issue in *Webb's* is similar to the one in this case. It authorized clerks of court to invest registry deposits and, if invested, to keep the interest earned on them. *Webb's* at 156, n.1. The ultimate owners of the deposits sued on the ground that appropriation of the investment interest was an unconstitutional taking. The Florida Supreme Court ruled in favor of the government, holding that principal deposited into a court's registry is "considered 'public money' from the time [it is] deposited in the general registry to the time [it leaves] the account." *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952 (Fla. 1979), *rev'd*, 449 U.S. 155 (1980). This Court rejected the Florida Supreme Court's "public funds" ruling, holding that the deposit was made for the "ultimate benefit of Webb's creditors, not for the benefit of the court, and not for the benefit of the county." *Webb's*, 449 U.S. at 161. Both the principal and the investment interest were the private property of the ultimate owners. *Id.* The fact that the exact amount of each creditor's recovery was uncertain, or that the creditors had no right to the deposited funds until their recovery was fixed, did not delay the creditors' ownership of the deposited funds. *Id.* at 161, 162.

In this case, the trial court's only explanation for distinguishing *Webb's* was that the City used "public funds" to make the eminent domain deposit to complete the taking of Livingston's land. For that reason, the trial court theorized, the money remained "public funds" until final judgment. Pet. App. C:9-10. Under

Webb's, however, the source of the funds does not determine ownership. Rather, ownership of registry funds that are relinquished to the court's control flows to the person for whose benefit the deposit was made, the ultimate owner.

Without any consideration of *Webb's*, the appellate court in this case affirmed the trial court, holding that no second taking occurred because quick-take eminent domain "deposit funds are not the personal property of the property owner while those funds remain on deposit." Pet. App. B:13. Significantly, neither the trial court nor the appellate court applied the reasoning or purpose of the "ultimate owner" test set forth in *Webb's* as it would relate to quick-take deposits – i.e., that registry deposits are private property protected by the Fifth Amendment when they are made for the ultimate benefit of private citizens and "not for the benefit of the court" and "not for the benefit of the [government]." *Webb's* at 161. Nor did the trial or appellate court consider the unique constitutional significance of quick-take deposits: That they are paid to consummate an immediate taking of private property.

Based on its holding that there was no second taking of private property when the Clerk paid the investment interest to the City, the Florida appellate court also concluded that Livingston's entitlement to

the interest was barred by *res judicata*.[3] The Supreme Court of Florida declined to review the Second District's decision. Pet. App. A:1. *See Livingston v. Frank*, No. SC14-2333, 2015 WL 2248455.

Livingston now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important question of federal law decided below.

[3] The *res judicata* holding hinges on the court's failure to recognize investment interest as separate private property protected by the Takings Clause. In addition, the court misunderstood that the investment interest earned by the Clerk after the first taking was not at issue in the quick-take and could not result in "double dipping" as the court feared. Pet. App. B:10. As shown, the only interest Livingston was entitled to receive as part of just compensation for his land was prejudgment statutory interest on any amount that *exceeded* the City's good-faith deposit. § 74.061. Livingston was not entitled to prejudgment interest on the amount of the deposit. *Id*. Further, the Clerk was not a party to the eminent domain action, and the investment interest was created by the Clerk in a separate transaction after the pleadings in the quick-take were closed.

REASONS FOR GRANTING THE PETITION

THE REFUSAL OF THE FLORIDA APPELLATE AND SUPREME COURT TO APPLY *WEBB'S* TO UNCONSTITUTIONAL TAKINGS OF INTEREST EARNED ON QUICK-TAKE REGISTRY DEPOSITS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

In *Webb's* this Court held that registry deposits and the interest generated on them are private property belonging to the ultimate owner of the deposited funds that cannot be taken by the government without compensation. The Florida appellate court's decision in this case carves out an enormous exception to *Webb's.* It holds that quick-take registry deposits made to effect an immediate taking of property prior to final judgment are excluded from the Fifth Amendment's protection of private property. Under the Florida court's rationale, the government – having already exacted a forcible taking of private land – can also appropriate the interest earned on the money they were required to deposit to consummate the taking.

Quick-take deposits made to a court registry to immediately obtain title to private property implicate an even greater need for constitutional protection than the interpleader funds discussed in *Webb's*. Yet the opinion of the Florida court strips property owners of *Webb's* protection and the guarantee of the Takings Clause that governments are barred "from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

A. Florida's statutory quick-take procedure permits the government to take immediate title to property upon deposit of a good-faith estimate of value, and provides for an immediate vesting of the right to just compensation.

Florida's Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and *available to the owner.*" Art. X, § 6(a) Fla. Const. (emphasis added). Florida Statutes Chapter 74 then provides the mechanism for effectuating a taking prior to final judgment within the parameters established by the constitution.

A quick-taking is initiated when the government files a petition that identifies the property it seeks and establishes a good-faith estimate of the property's value. § 74.031. Property not identified cannot be unilaterally taken by the government in the proceeding. § 74.031. After the pleadings are closed, the court enters an order of taking specifying the amount the government must deposit in order to consummate the

closing so as to "fully secure and fully compensate" the owner for the taking. § 74.051(2). The amount deposited cannot be less than the government's good-faith estimate of the value of the property. § 74.051(2). The government has 20 days from the order of taking to decide if it wants to complete the transaction by depositing the amount required by the court. § 74.051(4). "Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the right to compensation shall vest in the persons entitled thereto." § 74.061.

Under *Kirby Forest Industries v. United States*, 467 U.S. 1, 10 (1984), prejudgment interest *must* be paid on an entire eminent domain award *unless* a payment of compensation coincides with the taking. This is why section 74.061 provides for prejudgment interest as part of just compensation *only on the amount a verdict for full compensation exceeds a quick-take deposit.* The statutory framework excludes the amount deposited precisely because it is paid – and therefore immediately private – thereby confirming that quick-take deposits must be considered the private property of the ultimate owner. Any other interpretation, like the courts' interpretations below, is inconsistent with the statutory framework and *Kirby.*

B. Quick-take registry funds are deposited for the ultimate benefit of property owners and under *Webb's* and *Phipps* these deposits and any interest earned by investing them are private property protected by the Takings Clause.

The Takings Clause protects property rights established under state law. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010). As described above, Florida state law establishes an immediate private property interest in quick-take registry deposits. *Webb's*, in turn, holds that registry deposits are private property belonging to the ultimate owner of those funds – even if the proper allocation of those funds is undetermined at the time of the deposit. *Webb's* at 163, 164.

In concluding that registry funds are protected private property under Florida law, *Webb's* relied on the Florida Supreme Court's opinion in *Phipps v. Watson*, 147 So. 234, 235 (Fla. 1933). *Webb's* at 160. Under *Phipps*, ownership of Florida registry deposits turns "on whether or not [the deposit] was paid in under order or sanction of the court or was recognized by the court to be a fund in *custodia legis* subject to protection and disbursement solely by order of the court." The *Phipps* court held that:

> [t]he rule is well settled that, when a party litigant, pursuant to court order, pays into the registry of the court as an unconditional tender a sum of money which he contends is due by him to his adversary litigant in a

> cause pending between them, the title to the sum passes irrevocably to the adversary though he does not accept it until the conclusion of the litigation or at some other time. If subsequent to payment into court or recognition by the court the sum is lost or stolen, the loss must fall on the litigant to whom title passes or for whose benefit it was tendered. The tender in other words becomes a fund in custodia legis subject to the order of the court or the pleasure of the depositee.

Phipps at 551, 552 (internal citations omitted). As noted above, quick-take deposits are made pursuant to orders of taking and are thus undeniably paid under order of the court. Once deposited, the court, rather than the government, has control of the funds.

The *Phipps* rule of immediate transfer applies with particular force here, where the Florida Constitution provides explicit protection for property owners who immediately and forcibly lose their property by virtue of the deposit. *See* Art. X, § 6(a), Fla. Const. (requiring eminent domain deposits to be "*available*" to the property owner). In contrast, the appellate opinion below relegates eminent domain registry deposits to a status subordinate to other deposits such as interpleader funds, classifying quick-take deposits as mere "security for performance" or the functional equivalent of a surety bond. Pet. App. B:12-13, n.7.

Florida quick-take deposits are undeniably private property under *Phipps* and *Webb's*. Like

interpleader funds, quick-take funds are deposited for the ultimate benefit of private property owners, not for the benefit of the government. The fact that the exact amount of a property owner's recovery may be uncertain, or that he may not receive disbursement until property taxes or some other obligation is paid, has no impact on his or her ultimate ownership of the deposited funds. *See Webb's* at 161, 162.

Webb's also makes clear that interest earned on private registry deposits "follows the deposit and is to be allocated to those who are ultimately to be owners of that principal." *Webb's* at 162 (citations omitted). Said differently, any interest earned is property separate from the principal and is independently afforded constitutional protection. As *Webb's* explains,

> [t]he earnings of a fund are incidents of ownership of the fund itself, and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 164. As ultimate owner of the quick-take deposit, Livingston unequivocally had a constitutionally protected property interest in the investment interest earned by the Clerk pursuant to section 74.051(4). The government's appropriation of the investment interest resulted in a separate taking of this distinct property interest.

The Florida appellate court's failure to recognize Livingston's immediate property interest in the quick-take registry funds led it to also conflate the taking of the interest earned on the funds with the initial taking of Livingston's real property. That conflation led to the court's alternative holding that Livingston's claim for the investment interest was somehow a part of the initial quick-take proceedings and so barred by *res judicata*. The court's alternative analysis not only overlooks the constitutional significance of the quick-take deposit as an immediate payment for the taking (as set forth under Florida law and consistent with *Kirby*, 467 U.S. at 10), it also misapprehends the Florida statutory scheme. As noted, the Florida statutory scheme provided for *no award of interest* on the amount of the deposit. § 74.061. Under *Kirby* and as discussed, the statutory quick-take scheme is permissible only because it provides for immediate private ownership of the eminent domain registry deposit made in exchange for the taking.

A ruling so rooted in disregard for established principles of law merits review by this Court, particularly where the opinion bears the earmarks of a taking itself. Whereas quick-take deposits were previously private property under state law and this Court's precedent, the Florida court has recharacterized these deposits as "public funds." *See Webb's* at 164 ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing

the principal as 'public money' because it is held temporarily by the court. . . ."). *See also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713-14 (2010) ("The Takings Clause. . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ('nor shall private property *be taken*')"). It is critical for this Court to correct the Florida court's misclassification of eminent domain deposits to make clear that these registry deposits, and the interest earned on them, are private property protected by *Webb's* and the Takings Clause.

C. The Florida court's decision holding that the quick-take funds were public property not only conflicts with *Webb's*, it is inconsistent with Florida's statutory quick-take scheme.

This Court's precedent makes clear that when the government forcibly takes property, it must do one of two things to make the property owner whole: (1) provide for an award of prejudgment interest on all amounts due to the property owner so that the property owner is fully compensated from the date of the taking; or (2) make payment contemporaneous with the taking, in which case no prejudgment interest would be required. *Kirby Forest Industries v. United States*, 467 U.S. 1, 10 (1984) (internal citations omitted). Because Florida's statutory scheme provides for consummation of quick-takings immediately upon a quick-take deposit being made and

provides for pre-judgment interest only on any amount ultimately awarded *in excess* of the deposit, the statutory scheme is constitutional only if the deposit constitutes *payment* to the property owner at the time of the taking.

In Florida's quick-take context, that deposits must constitute *payment* to property owners is precisely what Article X, Section 6(a) of the Florida Constitution and the statutory framework require. Quick-take deposits must be "*available*" to property owners under Article X, Section 6(a), and are therefore considered paid contemporaneous with takings. Although section 74.061 does not provide for a landowner to receive prejudgment interest on the deposit, the statutory scheme remains constitutionally sound under *Kirby* because the deposit is paid to the property owner upon deposit.

Additionally, quick-take deposits constitute payment contemporaneous with takings of private property under this Court's precedent. In *Kirby*, the Court determined that depositing money into the court's registry in a federal straight-taking constitutes *payment to the property owner contemporaneous with the taking* so that no pre-judgment interest is required. *Id.* at 8-9. The legal effect of depositing compensation into a court's registry in a federal straight-take is indistinguishable from the effect of Florida quick-take deposits. In both proceedings condemning authorities effectuate and consummate takings by making a deposit of an amount established by order of the court. *Kirby* at 4, §74.061; *see also*

United States v. Dunnington, 13 S. Ct. 79 (1892) (holding that money deposited to immediately acquire title to private property in federal condemnation proceedings discharges government's duty to owners by depositing amount specified in order: "The money when deposited, becomes in law the property of the party entitled to it, and subject to the disposal of the court.").

The Florida court's holding that quick-take deposits are not private is inconsistent with the statutory framework which, in section 74.061, provides for a simultaneous exchange of title to private property and the money deposited to compensate for it. The statutory framework also treats the funds as paid upon deposit by not allowing an award of prejudgment statutory interest of that amount consistent with *Kirby*. Under the Florida court's interpretation that the deposited funds are public and not immediately paid to the property owner, *Kirby* would require statutory interest to be paid on the entire award. If the court's interpretation stands, the failure of Florida law to provide statutory interest on deposits is unconstitutional under the Fifth Amendment. Clear direction from this Court that quick-take deposits are private property will prevent future and unnecessary challenges to a statutory framework that is, but for the opinion, constitutional under *Kirby*.

D. The Florida court's opinion creates a constitutional predicament with implications throughout and beyond Florida that merits this Court's review.

The opinion below also conflicts with decisions from other states that properly followed *Webb's* or otherwise concluded that deposits made to consummate quick-takings belong to property owners immediately upon deposit. *See Moldon v. County of Clark*, 188 P.3d 76, 80-81 (Nev. 2008) (holding that under a similar Nevada statutory scheme, property owners had property interest in deposited quick-take funds); *In re Town of Greenburgh v. Commissioner of Finance*, 419 N.E.2d 871 (N.Y. 1981), *affirming per curiam for the reasons stated in In re Town of Greenburgh v. Commissioner of Finance*, 70 A.D.2d 409 (N.Y. App. Div. 1979) (analyzing virtually identical New York statutory framework and holding property owner owned interest earned on quick-take deposit because ownership of interest follows ownership of the principal); *Mississippi State Highway Comm'n v. Owen*, 310 So. 2d 920, 922 (Miss. 1975) (holding that when government deposited quick-take funds with clerk, it had no further control of funds and no right to withdraw them; only landowner could have obtained and used money); *State by State Highway Comm'r v. Seaway, Inc.*, 217 A.2d 313, 317-18 (N.J. 1966) (recognizing that deposit fulfills constitutional obligation of making just compensation and is private property, and that delay in payment requires interest); *Fine v. City of Minneapolis*, 391 N.W.2d 853,

856 (Minn. 1986) (holding mandates of Minnesota Constitution satisfied by deposit of approved appraisal value with court: "As a practical matter, the deposit by the city of the . . . approved appraisal value and the owners' immediate entitlement to those funds obviates an award of interest on the deposited monies."); *Morton Grove Park Dist. v. Am. Nat. Bank & Trust Co.*, 399 N.E.2d 1295, 1299-300 (Ill. 1980) (interest earned on eminent domain deposit belonged to property owner; distinguishing investment interest earned on deposit from claim for pre-judgment interest on deposit). *See also Camden I Condo., Inc. v. Dunkle*, 805 F.2d 1532, 1534-35 (11th Cir. 1986) (analyzing predecessor version of section 74.051 to determine whether *Webb's* should be retroactively applied and stating "each clerk who elected to collect interest assumed the risk that these statutes would ultimately be found unconstitutional.").

Accepting review in this case and overturning the Florida appellate court's decision will resolve the conflict the decision creates with other state supreme courts and the precedents of this Court. This Court has recognized that providing government officials with an incentive and "inherent pressure" to delay payment or distribution of registry deposits to those who are rightly entitled to them, by permitting the government to earn and keep the interest on those deposits, poses an unacceptable risk to the property owners. *Webb's* at 162. This risk is particularly ominous in quick-take proceedings where condemning authorities immediately obtain title to private land

and are not prejudiced by delaying distribution of compensation to property owners.

Despite this Court's precedent, Florida has demonstrated a persistent interest in incentivizing governments to delay distribution of eminent domain registry deposits to the profit of the government and detriment of property owners. Following *Webb's* reversal of the Florida Supreme Court, the Florida legislature quickly amended the statute at issue in *Webb's*, section 28.33, to comply with the Court's decision. But the same scheme of mandating government appropriation of interest earned on eminent domain deposits persisted in section 74.051(4) for more than thirty years. The Florida legislature recently amended section 74.051(4),[4] but only after a trial court in a related case against the State of Florida's transportation agency entered an order finding the statute unconstitutional. That change is likely ephemeral because the same Florida appellate court in this case ruled against the property owner there, applying the same analysis it applied in this case; and the Florida Supreme Court recently denied review. *See Florida Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015), *rev. denied*, No. SC15-474, 2015 WL 5683074 (Fla. Sept. 28, 2015).

In addition to this case and *Mallards Cove*, at least three other related cases seek compensation for government appropriation of investment interest

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[4] *See* ch. 13-23, §§ 1, 2, at 220-21, Laws of Fla.

under the Florida statute in effect before the 2013 amendment. *See Resource Conservation Holdings, LLC v. Green, et al.*, No. 11CA-2616 (Twentieth Judicial Cir., Lee County, Fla.); *Bowein v. Brock*, No. 10-4367-CA (Twentieth Judicial Cir., Collier County, Fla.); and *HCH Development, LLC v. Gardner*, No. 07-CA-12819, Div. 33 (Ninth Judicial Cir., Orange County, Fla.).

CONCLUSION

Florida's stubborn refusal to respect the private nature of quick-take registry deposits persists. The opinion is nothing short of a judicial taking. It creates confusion among the states concerning whether quick-take deposits and the interest earned on them are somehow excluded from Fifth Amendment protection. In the absence of clear guidance from the United States Supreme Court, Florida's courts appear unwilling to appreciate or properly apply the protections provided by this Court's precedents and the Takings Clause of the United States Constitution. If the Florida court's decision is allowed to stand, thousands of property owners will be denied compensation for the uncompensated takings of their investment interest. The Florida Legislature would be free to resume mandating exaction of eminent domain interest in quick-take proceedings, and other state legislatures could follow suit. It is critical for this Court to address and remedy the Florida appellate

court's deviation from this Court's precedent and established principles of federal constitutional takings law.

Respectfully submitted,

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APPENDIX A

Supreme Court of Florida

WEDNESDAY, MAY 13, 2015

CASE NO.: SC14-2333
Lower Tribunal No(s).: 2D12-5616;
292011CA009728A001HC

WILLIAM A. LIVINGSTON	vs.	PAT FRANK, ETC., ET AL.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

[SEAL]

cd
Served:

CRISTINA MARIE MARTIN
STUART CRAIG MARKMAN
JACKSON HARRISON BOWMAN, IV
CHRISTA COLLINS
KRISTIN ANN NORSE
KENNETH BRADLEY BELL
DALE KENT BOHNER
MARY HOPE KEATING
HON. JAMES M. BARTON, II, JUDGE
HON. PAT FRANK, CLERK
HON. JAMES BIRKHOLD, CLERK
JERRY MARTIN GEWIRTZ
DAVID P. ACKERMAN
DAVID MICHAEL CALDEVILLA
KENNETH VAN WILSON
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APPENDIX B

150 So.3d 239
District Court of Appeal of Florida,
Second District.

William A. LIVINGSTON, for himself and all
others similarly situated, Appellant,
v.
Pat FRANK, as Clerk of the Circuit Court of
Hillsborough County, and City of Tampa, Appellees.

No. 2D12-5616. | July 30, 2014. |
Rehearing Denied Nov. 3, 2014.

Attorneys and Law Firms

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David M. Caldevilla, Vivian Arenas-Battles, and Michael P. Bray of de la Parte & Gilbert, Tampa; and Dale K. Bohner, Legal Counsel, Office of the Clerk of the Court, Tampa, for Appellee Pat Frank, as Clerk of the Circuit Court of Hillsborough County.

James H. Shimberg, Jr., City Attorney, Jerry M. Gewirtz, Chief Assistant City Attorney, and Allison W. Singer, Assistant City Attorney, Tampa, for Appellee City of Tampa.

Opinion

CASANUEVA, Judge.

William A. Livingston, for himself and all others similarly situated (Mr. Livingston), seeks review of an order granting final summary judgment in favor of Pat Frank, as Clerk of the Circuit Court of Hillsborough County (the Clerk), and the City of Tampa (the City). Pursuant to the order, the trial court determined that Mr. Livingston had "no property interest in the interest" earned on deposit funds held in the court registry pursuant to quick-take eminent domain proceedings[1] in two consolidated cases, and the Clerk and the City were thus entitled to summary judgment.

The instant appeal is not an appeal of the quick-take eminent domain proceedings. As explained in this opinion, those consolidated cases were filed in 2007 and settled between Mr. Livingston and the City in 2008.[2] As a portion of his full compensation in those eminent domain proceedings, Mr. Livingston may have been entitled to the fair market value of the property on the day that title vested in the City plus legal interest until the parties reached a settlement.

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[1] Chapter 74, Florida Statutes (2007).

[2] Although we refer only to Mr. Livingston, the eminent domain proceedings applied to all the defendants whose properties were the subject of the 2007 takings. The takings involved three parcels of property and occurred pursuant to two consolidated cases. We refer to Mr. Livingston throughout as the purported class representative and for clarity of reference.

We do not reach that issue today because Mr. Livingston settled those cases. Under res judicata, he was not entitled to file a second lawsuit seeking a payment of interest as a portion of his right to full compensation under Article X, section 6(a) of the Florida Constitution.

In the case on appeal, which was filed in 2011, Mr. Livingston argues that the funds placed on deposit with the Clerk during the eminent domain proceedings pursuant to section 74.051, Florida Statutes (2007), became his property when title to the real property vested in the City pursuant to section 74.061. Under this theory, he argues that he is entitled to all legal interest accruing on those funds while they were on deposit with the Clerk and that a second taking resulted from the Clerk's payment of that interest to the City. Because those deposit funds did not become Mr. Livingston's property until the Clerk transferred them to Mr. Livingston, we hold there was no second taking, and his right to any interest as a portion of the settlement of the eminent domain cases simply needed to be resolved in those proceedings. Accordingly, we affirm the final summary judgment in favor of the Clerk and the City.

I. BACKGROUND

In 2007, the City began eminent domain proceedings for a road project for which it needed three parcels of property belonging to Mr. Livingston. The

City availed itself of the abbreviated quick-take proceedings of chapter 74, Florida Statutes (2007).

Pursuant to the quick-take procedure, specified public bodies are entitled to take possession and title to property in advance of a final judgment by filing a condemnation petition and declaration of taking and depositing a good faith estimate of the value of the land into the registry of the court. § 74.031. Upon a finding that the petitioner is entitled to possession of the property prior to a final judgment, the trial court enters an order allowing the taking and directing the petitioner "to deposit in the registry of the court such sum of money as will fully secure and fully compensate the persons entitled to compensation as ultimately determined by the final judgment." § 74.051(2). Upon making the deposit, the petitioner is vested with title and takes possession of the property and, in exchange, the right to full compensation for the property vests in the property owner. § 74.061. The matter of full compensation is then determined in accordance with the provisions of chapter 73, Florida Statutes (2007), which provides for the empanelling of a jury to make a final determination of value. §§ 74.061, 73.071.

After filing declarations of taking in accordance with the provisions of chapter 74, the City deposited funds into the court's registry, representing its good faith estimate of the value of each parcel. The Clerk chose to deposit these quick-take deposit funds into an interest bearing account, as was the Clerk's sole prerogative pursuant to section 74.051(4). Section

74.051(4) stated in pertinent part: "The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. Ninety percent of the interest earned shall be paid to the petitioner."[3]

In January 2008, pursuant to stipulated orders of taking and disbursement of funds, the Clerk distributed a portion of the deposit funds to the county tax collector for unpaid ad valorem taxes due on Mr. Livingston's parcels and disbursed the remaining principal to the trust account of Mr. Livingston's lawyer. The Clerk retained ten percent of the interest earned on the deposit funds as authorized by section 28.33, Florida Statutes (2007), and section 74.051(4), and transferred the remaining ninety percent of the earned interest to the City, as authorized by section 74.051(4).

Mr. Livingston and the City agreed to mediate the issue of full compensation rather than submitting it to a jury, and the parties entered into a full settlement agreement in April 2008. Pursuant to the settlement agreement, the parties submitted joint motions for entry of stipulated final judgments as to each parcel, providing for an agreed amount of "full

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[3] The last sentence of section 74.051(4) has since been amended, effective July 1, 2013, to provide: "Ninety percent of the interest earned shall be allocated in accordance with the ultimate ownership in the deposit." *See* ch. 13-23, §§ 1, 2, at 220-21, Laws of Fla.

compensation" to be paid. The stipulated final judgments stated in pertinent part: "The City will pay to [Mr. Livingston] [the agreed sums] in full settlement of claims for compensation from [the City] whatsoever, including statutory interest, if any, but excluding attorney's fees and costs. . . . There shall be no further award to [Mr. Livingston] in this matter."[4] After these final judgments were rendered, no appeal or other motions or orders regarding the eminent domain proceedings were filed until 2011.

II. CASE ON APPEAL

In 2011, Mr. Livingston filed a new two-count class action suit against the Clerk and the City after allegedly becoming aware for the first time that the Clerk had earned interest on the quick-take deposit funds and had disbursed ninety percent of that earned interest to the City. In this new lawsuit, Mr. Livingston alleged that he was entitled to interest on the deposit funds because, at the moment the City deposited the funds, the City and he were deemed to have exchanged the possessory rights to the parcels and the deposit funds. He further alleged that the investment interest on the deposit funds was his "constitutional private property," and that this private property was unlawfully taken by the Clerk and

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[4] Specifically, the City was to pay the sum of $80,000 for parcels 192/792, and the sum of $43,500 for parcel 196, less the City's previous deposits of $41,250 for parcels 192/792 and $20,150 for parcel 196.

the City to produce general revenue for the City when the Clerk paid ninety percent of that interest to the City. Thus, he further argued, the Clerk and the City had jointly and severally committed a per se taking of his private property and must therefore disgorge all investment interest.[5]

The first count of Mr. Livingston's complaint sought a declaration that the portion of section 74.051(4) directing the Clerk to pay the condemning authority ninety percent of all interest earned on quick-take deposit funds constituted a taking of private property in violation of the Takings Clause of the United States and Florida Constitutions.[6] The second count was for inverse condemnation based on the allegedly unconstitutional taking of that ninety percent of the interest earned.

The Clerk and the City filed answers, asserted affirmative defenses, moved for summary judgment on both counts, and adopted each other's motions. The allegedly dispositive issues the motions for summary judgment raised were that Mr. Livingston lacked standing; that his claims were barred by res judicata, collateral estoppel, settlement, and/or compromise; that his claims were barred by Florida Rule of Civil Procedure 1.540; that the Clerk's actions were authorized by sections 28.33 and/or 74.061; that Mr.

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[5] Mr. Livingston does not dispute the Clerk's entitlement to ten percent of the interest as a statutory fee.

[6] U.S. Const. amend. V; art. X, § 6, Fla. Const.

Livingston's interest claim exceeded the limits of section 74.061 and was barred by sovereign immunity; and that the Clerk could not be sued for inverse condemnation. Mr. Livingston replied to the summary judgment motions but did not file his own competing motion for summary judgment.

The trial court entered a detailed order granting the motions for summary judgment, concluding that Mr. Livingston did not have title to or any right to use the deposited money during the period of time in which the money was on deposit in the court registry and accruing interest. Therefore, the court concluded, Mr. Livingston had no property interest in the interest he sought to recover by his suit. When the final summary judgments were rendered, Mr. Livingston timely appealed the trial court's ruling. We review the final summary judgments de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla.2000).

III. DISCUSSION

A. The Issue of Full Compensation is Res Judicata

The record demonstrates that Mr. Livingston pleaded entitlement to interest in the eminent domain proceedings, asserting in his answers to the City's taking actions that he was "entitled to and claims interest at the lawful rate on the amount of full compensation ultimately awarded by a jury from the date of taking to the date of payment." He further

demanded that "such interest be included in the final judgment entered by this Court." The proceedings to acquire Mr. Livingston's real property, including the determination of full compensation, were resolved in 2008 by the entry of stipulated final judgments as to each parcel, following mediation between the parties. Each final judgment provided the stipulated amount to be paid to Mr. Livingston by the City "in full settlement of claims for compensation from Petitioner whatsoever."

Under the doctrine of res judicata,

> "[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action."

Kimbrell v. Paige, 448 So. 2d 1009, 1012 (Fla. 1984) (quoting *Wade v. Clower*, 94 Fla. 817, 114 So. 548, 552 (1927) (citations omitted)). The court, therefore, must "look not only to the claims actually litigated in the first suit, but also to 'every other matter which the parties might have litigated and had determined, within the issues as [framed] by the pleadings or as incident to or essentially connected with the subject matter of the first litigation.'" *AMEC Civil, LLC v. Dep't of Transp.*, 41 So. 3d 235, 239 (Fla. 1st DCA 2010) (alteration in original) (quoting *Zikofsky v.*

Mktg. 10, Inc., 904 So. 2d 520, 523 (Fla. 4th DCA 2005)).

"The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone. The finality of it once the parties have set down their agreement in writing is critical." *Sponga v. Warro*, 698 So. 2d 621, 625 (Fla. 5th DCA 1997). Further, "[w]here a controversy has been resolved by settlement agreement, there is no longer an actual or present need for a declaration as to the constitutionality of statutes or rules as applied to the consenting parties, and the trial court lacks jurisdiction to grant declaratory relief." *Fla. Dep't of Ins. v. Guarantee Trust Life Ins. Co.*, 812 So. 2d 459, 461 (Fla. 1st DCA 2002); *see also State v. Fla. Consumer Action Network*, 830 So. 2d 148 (Fla. 1st DCA 2002).

The pleadings in the Livingston eminent domain actions identified the issue of interest as a component of full compensation, and the parties later stipulated to the amount due as "full compensation," including statutory interest. While the constitution guarantees full compensation, it does not provide for double dipping or amounts in excess of full compensation. Thus, both entitlement to interest and the amount of interest were to be determined in the "full compensation" cases; that is, the eminent domain proceedings. Otherwise, in theory, Mr. Livingston could acquire not one but two interest payments on the same monies used to pay, in part, full compensation. The stipulated final judgments make no mention of entitlement to

the interest earned on the deposit funds, and Mr. Livingston is precluded by the finality of those proceedings from making a claim on such deposits, constitutional or otherwise. *See Kimbrell*, 448 So. 2d at 1012; *AMEC Civil*, 41 So. 3d at 239; *Fla. Dep't of Ins.*, 812 So. 2d at 461.

Because the eminent domain cases and the matter of full compensation owed to Mr. Livingston from the City were fully resolved by the stipulated final judgments entered in the 2007 takings cases, Mr. Livingston cannot now argue he was also entitled to the interest generated by the quick-take deposit funds deposited pursuant to those 2007 takings. We hold such a claim is barred by res judicata.

B. No Second Taking Occurred Because the Deposit was not Mr. Livingston's Property.

We now address Mr. Livingston's argument that a second taking resulted from the Clerk's investment of the quick-take deposit funds and the payment of that investment interest to the City, entitling Mr. Livingston to full compensation under the Takings Clause. The provision in section 74.051(4) directing payment of interest to the condemning authority could be a taking under the Takings Clause of the two constitutions or a matter of inverse condemnation only if the deposit belonged to Mr. Livingston at the time the interest accrued. For the reasons explained below, Mr. Livingston's argument fails on that point.

Under Florida's quick-take statutory scheme, once the condemning authority makes the deposit, two acts occur simultaneously. First, the condemning authority acquires title to the condemned property, and, second, the property owner's entitlement to full compensation under the respective constitutional provisions vests. § 74.061. It is the right to full compensation that vests, not a right to the specific funds, although common practice regularly releases the funds to the property owner.

Often those funds are only a partial payment, later supplemented by attorney's fees, costs, and interest. There is no statutory requirement that compels the property owner to immediately receive the deposit monies. Indeed, if the property owner takes possession of the deposit and the ultimate outcome of the eminent domain proceeding is an award less than the deposit, a monetary judgment is entered against the property owner for the excess. *See* § 74.071. Thus, there may be good reason for the property owner to await financial satisfaction until the conclusion of the takings case. Similarly, there is no statute that forbids the condemning authority from using other funds to effectuate payment of full compensation.[7]

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[7] The quick-take deposit serves a similar function to that of a surety bond, ensuring the condemning authority's performance of a complete taking, and, should the condemning authority fail to make full compensation, guaranteeing payment of at least

(Continued on following page)

For these reasons, we hold that the deposit funds are not the personal property of the property owner while those funds remain on deposit. Thus, there can be no second taking, whether against the Clerk or the City, under either the United States Constitution or the Florida Constitution. As previously held, the making of the deposit vests in the property owner an entitlement to be paid full compensation by the condemning authority, not an entitlement to those specific funds placed in deposit.

IV. CONCLUSION

Mr. Livingston attempts to challenge the constitutionality of actions taken in separate eminent domain proceedings that were fully and finally resolved pursuant to stipulated final judgments. The matter of full compensation was fully resolved in the initial takings cases, and no further proceeding may be undertaken against the City as it is barred by the doctrine of res judicata. Further, we reject the assertion that a second taking resulted from the Clerk's investment of the quick-take deposit funds or the payment of that investment interest to the City and, as such, no separate cause of action is available against either the City or the Clerk. Accordingly, we affirm the summary judgment entered in favor of the City and the Clerk.

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part of the full compensation due. In short, it provides security for performance.

Affirmed.

ALTENBERND and WALLACE, JJ., Concur.

All Citations

150 So.3d 239, 39 Fla. L. Weekly D1577

APPENDIX C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

WILLIAM A. LIVINGSTON,
for himself and all others
similarly situated,

Plaintiffs,

vs.

CASE NO.: 11-CA-09728

DIVISION: C

PAT FRANK, CLERK OF
THE CIRCUIT COURT
OF HILLSBOROUGH
COUNTY, and THE CITY
OF TAMPA, FLORIDA,

Defendants.
______________________________/

ORDER GRANTING FINAL SUMMARY JUDGMENT AND FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on June 13, 2012, on Motions for Summary Judgment filed by Defendants City of Tampa (the "City") and Pat Frank, in her capacity as Clerk of the Circuit Court of Hillsborough County (the "Clerk"); Plaintiff William A. Livingston's Opposition to Defendants' Motions for Summary Judgment; and the Replies to Plaintiff's Opposition filed by the City and the Clerk. Having considered the Motions and the court file, the arguments

of counsel, and being otherwise duly advised in the premises, the Court hereby finds as follows:

FACTS AND PROCEDURAL HISTORY

1) The following material facts are not in dispute. In October 2007, the City instituted an eminent domain proceeding and filed a declaration of taking under the provisions of Chapter 74, Florida Statutes (2008), seeking to acquire several parcels of land, including Parcels 192, 792, and 196 owned by Plaintiff.

2) On December 18, 2007, upon the parties' Joint Motions and Stipulations for Entry of Orders of Taking and Disbursement of Funds, the court entered two Stipulated Orders of Taking and Disbursement of Funds (the "Stipulated Orders of Taking") – one for Parcels 192/792 and another for Parcel 196. The relevant provisions of the Stipulated Orders of Taking are substantially identical, except for the amounts the City was required to deposit into the registry of the court. The Stipulated Orders of Taking both include the following provisions:

> The **CITY** shall make its deposit into the Registry of the Court within **twenty (20) days** of the entry of this Stipulated Order of Taking, and upon the deposit and without further notice or order of the Court, the **CITY** shall be entitled to immediate possession of [the Parcel], and all right, title and interest as to [the Parcel] . . . shall vest in and with the **CITY**;

> Upon the deposit . . . and without further notice or order of this Court, the Clerk of the Circuit Court shall forthwith pay to the Tax Collector of Hillsborough County, the amount of prorated taxes due as of the date of deposit as to [the Parcel] from the deposit and upon payment this suit shall stand dismissed as to the Tax Collector of Hillsborough County. . . .
>
> Upon the deposit . . . and without further notice or order of this Court, the Clerk of the Circuit Court shall disburse the [amount deposited by the City], less any and all pro-rated ad valorem taxes due and owing to the Hillsborough County Tax Collector, to Gray Robinson, P.A., Trust Account, for proper distribution. . . .

3) The City made the requisite deposits on January 2, 2008. According to the Affidavit of Jack B. Brooks – the Clerk's Director of CCC (Clerk of the Circuit Court) Accounting, who is responsible for managing all deposits into and payments out of the court registry account – the court registry account in effect in 2008 was an interest bearing account.

4) The Stipulated Orders of Taking did not specify the amount of ad valorem taxes due and owing to Hillsborough County. The Tax Collector subsequently provided the Clerk with the amount due for Parcel 196 on January 23, 2008, and for Parcels 192/792 on January 24th. On January 24th, the Clerk paid the prorated taxes due to Hillsborough County for Parcel 196 and disbursed the remainder of the

deposit for Parcel 196 to GrayRobinson. On January 25th, the Clerk paid the prorated taxes due for Parcels 192/792 and disbursed the remainder of the City's deposit to GrayRobinson.

5) Pursuant to section. F.S.§ 28.33, the Clerk retained 10% of the interest earned on the funds deposited by the City "as income of the office of the clerk and as a reasonable investment management fee."[1] The Clerk then paid the remaining 90% of the interest to the City in accordance with F.S. § 74.051(4),[2] which states, in part:

> The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. *Ninety percent of the interest earned shall be paid to the petitioner.*

6) In March 2008, the parties held a mediation conference at which a full settlement agreement was reached. Shortly thereafter, the parties submitted to the court Joint Motions for Entry of Stipulated Final Judgment as to each parcel owned by Plaintiff. On April 4, 2008, the court entered two Stipulated Final Judgments, which provided that the City will pay to

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[1] Plaintiff does not challenge the 10% investment management fee retained by the Clerk.

[2] Prior to June 30, 2008, subsection (4) of section 74,051 was numbered as subsection (3).

Plaintiff the sum of $80,000 for Parcels 192/792 and the sum of $43,500 for Parcel 196, less the City's previous deposits, "in full settlement of claims for compensation from [the City] whatsoever, including statutory interest, if any . . . . [and t]here shall be no further award to [Plaintiff] in this matter."

7) On August 4, 2011, Plaintiff filed a Class Action Complaint against the City and the Clerk (collectively, the "Defendants").[3] In Count I of the Complaint, Plaintiff seeks a declaration that the portion of F.S.§ 74.051(4) requiring the Clerk to pay the condemning authority 90% of all interest earned on eminent domain registry deposits constitutes a taking of private property in violation of the state and federal constitutions. In Count II, Plaintiff asserts a claim for inverse condemnation based on the alleged unconstitutional taking of 90% of the interest earned on the money deposited by the City pursuant to the Stipulated Orders of Taking.

8) Defendants now move for summary judgment on both Counts. The City argues that Plaintiffs claims are barred by the doctrine of settlement and compromise and Florida Rule of Civil Procedure 1.540. The Clerk adopts the City's arguments, and further asserts the following additional grounds for summary judgment: res judicata, collateral estoppel,

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[3] There is at least one similar action pending in another circuit. *See*, *Brock v Bowein*, 2012 Fla. App. LEXIS 18059 (Fla. 2d DCA opinion filed October 17, 2012).

and/or waiver; the Clerk's actions were authorized by law; sovereign immunity; the Clerk cannot be sued for inverse condemnation; and qualified immunity. Finally, the Clerk argues that Plaintiff did not own the funds and had no legal right to receive any interest earned on the funds while on deposit in the court registry account.

STANDARD OF REVIEW

9) Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "While summary judgments should be cautiously entered, where the material facts are not in dispute and the moving party is entitled to a judgment as a matter of law, it is the court's duty to enter summary judgment." *Castellano v. Raynor*, 725 So. 2d 1197, 1199 (Fla. 2d DCA 1999).

DISCUSSION

10) "The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Santa Rosa County v. Administration Commn., Div. of Admin. Hearings*, 661 So. 2d 1190, 1192-93 (Fla. 1995) (citing *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)). A party seeking declaratory relief must show that

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law.

Santa Rosa County, 661 So. 2d at 1192 (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952).

11) The Florida Constitution states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a) (1968). "[A] cause of action for inverse condemnation will lie against a government agency, which by its conduct or activities, has taken private property without a formal exercise of the power of eminent domain." *Schick v. Florida Dept. of Agric.*, 504 So. 2d 1318, 1319 (Fla. 1st DCA 1987).

12) Counts I and II of the Complaint are based on Plaintiff's allegation that the ownership of funds deposited into the court registry in quick-take proceedings vests in the owner of the property being taken "at the very moment" the deposit is made by the condemning authority. Plaintiff argues that,

because he owned the deposits on the day they were made by the City, he also owned the interest earned by the Clerk's investment of the deposits, citing as authority the decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), in which the United States Supreme Court held that "the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."

13) If Plaintiff's allegation regarding the ownership of the funds at the time of deposit were true, then the Court would agree that Plaintiff's Complaint provides a sufficient basis to invoke entitlement to a declaration as to the constitutionality of F.S. § 74.051(4).

14) The Court finds that, as a matter of law, title to the money deposited into the court registry by a condemning authority in a quick-take proceeding does not transfer to the landowner upon the making of the deposit into the registry of the court. Under Florida law,

> [w]here one is not defending against a claim but is seeking affirmative relief to which, as a condition precedent, it is essential that he tender an amount due, the payment of the money tendered into court does not transfer the title to the other party, but it remains in the one making the tender subject to the final outcome of the suit.

Masser v. London Operating Co., 145 So. 72, 76 (Fla. 1932) (quoting 26 R.C.L. 658); *see also First States Investors 3300, LLC v. Pheil*, 52 So. 3d 845, 849 (Fla. 2d DCA 2011).

Here, the City instituted a quick-take eminent domain proceeding against Plaintiff's property and, as authorized by the provisions of Chapter 74, sought to acquire possession and title prior to final judgment. As a condition precedent to obtaining the requested relief, the City was required to secure Plaintiff's right to obtain full compensation by depositing into the registry of the court the sums of money stated in the Stipulated Orders of Taking. Fla. Stat. § 74.051(2). The final outcome of the parties' dispute over the amount of compensation due to Plaintiff for the taking of his property was conclusively determined by the Stipulated Final Judgments entered by the court on April 4, 2008. Therefore, the Court finds that the title to the money deposited into the registry to secure Plaintiff's right to compensation remained in the City until April 4th, 2008.

15) The Court finds that prior to April 4th, 2008, Plaintiff merely had a right to use the deposited money subject to the Stipulated Orders of Taking, which required the Clerk to pay the ad valorem taxes due and owing to the Hillsborough County Tax Collector before disbursing any portion of the deposited money to Plaintiff. As noted above, the Clerk paid the taxes due for Parcel 196 and for Parcels 172/792 on January 24th and 25th, 2008, respectively. On the same day the taxes were paid, the Clerk disbursed

the remaining balance of each deposit to Plaintiff. Plaintiff's right to use the money did not arise until after the money had ceased to accrue interest.

16) Because Plaintiff did not have title to or any right to use the deposited money during the period of time in which the money was on deposit in the court registry account and accruing interest, Plaintiff has no property interest in the interest Plaintiff seeks to recover by this suit. Defendants are therefore entitled to summary judgment as to Counts I and II as a matter of law. Based on the foregoing conclusion, it is not necessary to address the other arguments raised by the Motions.

It is hereby **ORDERED AND ADJUDGED** as follows:

a) The Clerk's and the City's Motions for Summary Judgment are **GRANTED**;

b) Plaintiff William A. Livingston shall take nothing by this action, and Defendant's Pat Frank, Clerk of the Circuit Court of Hillsborough County and the City of Tampa, Florida shall go hence without day.

c) The Court reserves jurisdiction to consider the issues, if any, of attorney's fees and costs.

DONE AND ORDERED, in Chambers in Tampa, Hillsborough County, Florida, this 30th day of October, 2012.

/s/ James M. Barton
HON. JAMES M. BARTON, II
CIRCUIT JUDGE

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APPENDIX D

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CIVIL DIVISION

WILLIAM A. LIVINGSTON, for himself and all others similarly situated,

Plaintiffs,

vs.

PAT FRANK, CLERK OF THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, and the CITY OF TAMPA, FLORIDA,

Defendants. /

Class Representation

Case No.: 11-009728
Division C

CASE MANAGEMENT ORDER

THIS MATTER came before the Court on April 3, 2012, concerning the motions for case management filed by Defendant Pat Frank, Clerk of the Circuit Court (the "Clerk") and Plaintiff William A. Livingston. The Court having considered the motions, the arguments of counsel, and the record, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Clerk has stipulated for the limited purposes of its motion for summary judgment that (a)

the Clerk did not give the Plaintiff written notice that the Clerk invested the eminent domain registry deposit made by the City of Tampa on or about January 2, 2008, so as to earn investment interest; (b) the Clerk did not give the Plaintiff written notice that investment interest was earned on the eminent domain registry deposit made by the City of Tampa; (c) the Clerk did not give the Plaintiff written notice that the Clerk transferred 90% of the investment interest earned on the eminent domain registry deposit to the City of Tampa; (d) the Clerk did not give the Plaintiff written notice that the City of Tampa received and retained 90-percent portion of the investment interest earned on the Registry Deposit; and (e) the Clerk is presently unaware of any evidence that the Clerk gave any other form of notice or direct information to the Plaintiff concerning these facts. This stipulation is without prejudice to the Clerk's ability to present contrary evidence which may be revealed by ongoing discovery and other investigations.

2. A 2-hour hearing shall be conducted on the Defendants' pending motions for summary judgment, on June 13 2012 at 3:00 p.m.

3. Plaintiff shall file and serve by regular U.S. Mail and email its responses to the Defendants' motions for summary judgment by 5:00 p.m. on May 29, 2012.

4. Defendants shall file and serve by regular U.S. Mail and email their reply memoranda, in

support of their motions for summary judgment, by 5:00 p.m. on June 8, 2012.

5. Plaintiff's motion to compel and the Defendants' motions for protective order are held in abeyance until after the motions for summary judgment are heard.

DONE AND ORDERED, in chambers, in Tampa, Hillsborough County, Florida, this ___ day of ______, 20___.

CONFORMED COPY

APR 12 2012

JAMES M. BARTON II
CIRCUIT JUDGE

____
Honorable James M. Barton, II
Circuit Court Judge

Conformed copies to: All counsel of record

APPENDIX E

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT AND FOR HILLSBOROUGH CITY OF TAMPA, FLORIDA

WILLIAM A. LIVINGSTON, for Himself and all others similarly situated,

Plaintiff,

vs.

PAT FRANK, CLERK OF THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, and the CITY OF TAMPA, FLORIDA,

Defendants.
______________________________/

Case No.: 11-CA-09728

CLASS REPRESENTATION

AFFIDAVIT OF WILLIAM A. LIVINGSTON

1. My name is William A. Livingston.

2. I am the named Class Plaintiff in the Class Action suit that is on-going against Defendants, the Clerk of the Circuit Court of Hillsborough County and the City of Tampa, Florida. The Case Number is 11-CA-09728: Division C.

3. I was an owner of property that the City of Tampa condemned in 2007 in the Thirteenth Judicial Circuit under the style of City of Tampa v. Reed, et al., which included me as a Respondent, and is known by the Case Number of 07-014236: Division I. I was an owner of Parcels 192/792, and 196.

4. I was unaware that the Clerk chose to invest the eminent domain registry deposit that was made by the City of Tampa in the Reed case for Parcels 192/792, and 196. Neither the Clerk nor the City of Tampa provided me with notice that the eminent domain registry deposit was being invested.

5. I was unaware that the Clerk earned interest from the investment of the referenced eminent domain registry deposit. Neither the Clerk nor the City of Tampa provided me with notice that interest was earned from the investment of the eminent domain registry deposit.

6. I was unaware that the Clerk paid 90 percent of the interest earned on the investment of the eminent domain registry deposit to the City of Tampa. Neither the Clerk nor the City of Tampa provided me with notice that such a transfer occurred.

7. Neither the Clerk nor the City of Tampa provided me with notice that the City of Tampa received and accepted the 90-percent portion of the interest earned from the investment of the eminent domain registry deposit.

8. I did not know until after the case was settled and the Stipulated Final Judgment was entered that any of the above-referenced events concerning the investment of the eminent domain registry deposit occurred. No notice was provided to me by either the Clerk or the City of Tampa, at any time and by any means, that any of the above-referenced events occurred.

/s/ William A. Livingston
William A. Livingston

STATE OF FLORIDA

COUNTY OF Hillsborough

The foregoing instrument was acknowledged before me this 30th day of May, 2012, by William A. Livingston, who is personally known to me or has produced Driver's license as identification, and who did take an oath.

NOTARY PUBLIC
/s/ Jessica Gullo

Printed Name: Jessica Gullo
State of Florida at Large (Seal)

Commission No.: EE102259
My commission expires: 06-12-15

[SEAL] Notary Public State of Florida
Jessica Gullo
My Commission EE102259
Expires 06/12/2015