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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of others similarly situated, .. Appellants/Respondents,

v.

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants Of Whom City of Greenville and Mayor Knox H. White are the Respondents/Appellants,...Respondents/Appellants.

RESPONDENTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS

May 28, 2013

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STATEMENT OF THE CASE

The Circuit Court awarded the South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and Robert M. Lloyd (collectively SCPIF) attorneys' fees and costs pursuant to SCRCP 54, S.C. Code Ann. § 15-77-300 from the City of Greenville, SC ("City"), for legal services through June 19, 2008, when the City dated .29 acres of the roughly 3 1/2 acres of encroachment. R. pp. 17-25; pp. 95-101. SCPIF filed a Motion for Reconsideration, requesting attorneys' fees and costs through February 16, 2009, when the City recorded the deed transferring the remainder of the 3 1/2 acres, thereby fully ending the purpresture. R. pp. 213-214. The Circuit Court denied SCPIF's Motion for Reconsideration. The City also filed a Motion for Reconsideration, asking that no fees be awarded. The Circuit Court also denied the City's Motion.

On appeal, the City again contends that the Circuit Court should not have awarded SCPIF any fees at all. SCPIF submits this Respondents' Brief to address the City's arguments.

STATEMENT OF FACTS

The Consent Order ending this case in the Circuit Court summarizes the facts.

1. On March 24, 2008, Plaintiffs filed a Complaint alleging that for many years the Defendant Cliffs at Glassy, Inc. ("Cliffs") had trespassed on land owned by the Defendant City of Greenville ("City").
2. On June 19, 2008, the City by its deed conveyed its title to .29 acres of land described therein to the Defendant Cliffs. This deed was recorded June 24, 2008, Greenville County Deed Book 2329 on pages 817-20.
3. On January 30, 2009, this Court entered an Order and Judgment.
4. On February 12, 2009, Plaintiffs moved to Alter or Amend the Order and Judgment.
5. On February 13, 2009, the City by its deed quitclaimed its title to additional land described therein to the Defendant Cliffs. The Quitclaim deed was recorded February 16, 2009 at the Greenville County Deed Book 2353, on pages 1209-11.
6. The deed referenced in paragraph 5 supplemented the deed referenced in paragraph 2, ended the City's ownership of the subject land, and thereby ended the trespass on the subject land by the Defendant Cliffs.
7. On February 17, 2009, Cliffs filed a Memorandum in Response to the Plaintiffs' Motion to Alter or Amend.
8. On February 25, 2009, Plaintiffs filed a Reply Memorandum.
9. When the City disposed of its ownership of the land being trespassed upon, the trespass ended, and this case became moot.

R. pp. 29-34.

At the hearing on attorneys' fees, SCPIF gave a detailed account of the timeline of events to the Court, to which the City added, but did not object:

> Factually, it starts in 2003, when the Cliffs development built a road on property owned by the City for use as the watershed area for the water system. And there is a valley up there. And the Cliffs simply decided to build a road around that valley, instead of building a bridge across it. And the historical line starts at the top of Corbin Mountain and runs south 20 degrees east. And we've called that the Wizwall [phonetic] line.

But in 2003, the city became aware that the Cliffs had built a road across the land owned by the city as part of the watershed area. Now, it is not a part of the geographic watershed. It's on the other side of the crest of the mountain. But it's still owned by the city as part of the watershed.

The City submitted an affidavit recently to Mr. McKinney saying that they began discussions with the Cliffs in 2003 or shortly thereafter, maybe 2004. But they talked to him for five years. And Mr. Sloan learned of the purpresture. And it's an old common law term for a continuous invasion of public property by private interests.

He learned of the purpresture and he –

THE COURT: Wait a minute. Hold on a second. Can you spell that?

MR. CARPENTER: P-U-R-P-R-E-S-T-U-R-E.

THE COURT: And, just for my own benefit, orient me, Mr. Carpenter. If I'm driving up from Greenville towards Saluda on that road and the watershed lake is on my right, where are you talking about?

MR. CARPENTER: All right. The way I can tell you how to get there is if you were going up 25, and then you go in – you pass Panther Mountain. If you go into Panther Mountain, then you go winding back all the way back in there, which is now the Cliffs at Panther Mountain.

THE COURT: Okay.

MR. CARPENTER: And the property line runs to the west of where that road makes the big horse shoe turn. So their road trespassed – or was a purpresture on land owned by the City.

Now, it would have been expensive for them to build a bridge across that gully – it's a steep place, it's a gully – to make sure they stayed on their own property. I wasn't there and don't know what the thinking process was. But, rather than do that, they simply built a road across land owned by the City.

Now the City discovered that in 2003. And they were talking to them for five years. Mr. Sloan filed suit in 2008, and said he wanted the Court to have the City figure out where the boundary line was, put up two markers, and put up a fence to establish their ownership of that property. And he wanted – we sued the Cliffs, too, to say you can no longer trespass here. You can't you know invade this property owned by the City. So that's what we asked for. And we filed suit in March.

In April, they cut a deal. And the deal was the Cliffs would convey .29 acres to the City – I'm sorry, the City would convey .29 acres to the Cliffs.

The Cliffs would convey .05 acres where a fire tower was up on the mountain. And there would be some cash exchanged, $100,000 to the City. And then the Nature Conservancy had been given an easement on all property owned by the City for the watershed 10 or 15 years earlier. And the Nature Conservancy got a certain sum of money as well as part of this deal.

So we went forward. We had a hearing in October. And, in the hearing, we started looking at all the maps that were drawn by the surveyor for the Cliffs, a man named Mr. Lindsay. And we looked at different maps that had been recorded. And different maps drew the same line several different ways at several different angles, several different locations, and several different geographic bearings. And they were all recorded in the Register of Deeds Office, and all purporting to be the same boundary line.

And one of those showed that the .29 acres that was part of the deal in June was only a small part of the entire purpresture. And we pointed this out to Judge Few at the end of the hearing. And he said, well, I'll tell you what, you go get your factual information, and you bring it back to me, but I'm inclined to say the case is moot. They've conveyed the .29 acres. They've – you know, they've made a deal. They've paid the money. I'm inclined to say it's moot. But if you go get factual information, you can bring it back to me and then we'll deal with it at that time.

So Mr. Sloan went and hired a surveyor who was experienced in surveying up in the rough and rural areas of the mountains. And we all went up there and we traipsed around the property. And we looked for geographic markers on the ground. And I say "we," the surveyors did it and I went along for the ride, basically.

They found [point] 155, which was the historical geographic crest of Corbin Mountain that was part of a survey in 2000. And they took a bearing south 20 degrees east. And they found a rock, which was probably the standing stone.

They found old maps, one of them called the Wizwall map by Mr. Wizwall 75, 80 years ago. And that was his bearing for this property line. And they found subsequent maps, and subsequent surveys, all of which used the bearing that was on the Wizwall map, which we call the Wizwall line.

So we found all this stuff. We found where the line was supposed to be. They found barbed wire, which was along the line that was – they said was manufactured in the 1800's. Other evidence – you know, there was evidence of a barbed wire fence that shows the historical property line. So they found all of these records on maps and on the ground that said the

Wizwall line was the appropriate line. And therefore, the several different lines drawn by Mr. Lindsay were wrong.

THE COURT: Who is this surveyor?

MR. CARPENTER: This is the Cliffs surveyor.

THE COURT: What's his name?

MR. CARPENTER: Lindsay.

THE COURT No, no. The one you – Mr. Sloan hired.

MR. CARPENTER: Wizwall – oh – Who was it we hired. It's the guy out on Stone Avenue.

THE COURT: Freeland?

MR. EDWARD SLOAN: Freeland.

MR. CARPENTER: Yes, Freeland.

THE COURT: Okay.

MR. CARPENTER: So we found the physical markings on the ground, the point at the top of the mountain, the rock down at the other end of the line, barbed wire along where the line was supposed to be, and other surveys that made reference to that rock at the end of the line. And we found good evidence that that was the appropriate line. And the ones Mr. Lindsay had drawn were wrong. And they did the calculations and came up with the conclusion that an additional 3.2 acres made up the difference between the line drawn by Mr. Lindsay and the Wizwall line. He had kind of a pie-shaped piece of property there.

THE COURT: How many acres?

MR. CARPENTER: Sir?

THE COURT: How many acres did you say?

MR. CARPENTER: 3.2 additional.

THE COURT: Okay.

MR. CARPENTER: On top of the .29. So roughly three and a half acres, instead of .29.

So one of the complicating factors was that the Cliffs had sold some of this property for residential lots. So we presented this information to the

> Court in the form of a surveyor's report. And the Defendants drafted an order for the judge to sign. The Judge signed it sometime in January. We made a motion – we made a Rule 59 objection to the order setting out all the factual problems between the order, as signed by Judge Few, and the facts found on the ground and in the other survey by Mr. Freeland.
>
> So, a few days after that, the City and the Cliffs entered into another agreement, which was a – they called it a boundary line agreement, quit claim, and release. And they did that on February 13, 2009. So after they entered into the second agreement, which in effect conveyed the other 3.2 acres to the Cliffs for no additional consideration, we basically, came to the conclusion that that resolved the purpresture, the ongoing trespass. Eventually we entered into a consent order that said the order entered into in January – the order signed by the judge in January is revoked, and the case is dismissed on grounds of mootness. The purpresture had been resolved.

R. pp. 337- 344 (Transcript of October 26, 2011 hearing, pp. 4-11). Counsel for Cliffs added facts to this account but did not object to it. R. pp. 351-357 (Transcript of October 26, 2011 hearing, pp. 18-24). After hearing this account, the Court concluded the hearing by advising, "Well, I thank you for your arguments. I am going to review the file in light of what I heard here today, and let you know my decision, hopefully in the next two weeks. Thank you." R. p. 358 (Transcript, p. 25, ll. 22-25).

On November 23, 2011, the Court entered a formal order awarding fees to SCPIF. The Order cites findings of fact supporting the award of attorneys' fees:

> 2. On June 19, 2008, the City by its deed conveyed its title to .29 acres of land described therein to the Defendant Cliffs. This deed was recorded June 24, 2008, Greenville County Deed Book 2329 on pages 817-20. On June 24, 2008, the City received $100,000 from Cliffs as part of the consideration.
>
> 3. On February 13, 2009, the City by its deed quitclaimed its title to additional land described therein to the Defendant Cliffs. The Quitclaim deed was recorded February 16, 2009 at the Greenville County Deed Book 2353, on pages 1209-11.
>
> 4 The deeds referenced above ended the City's ownership of the subject land, and thereby ended the trespass on the subject land by the Defendant Cliffs.

* * *

14. Likewise, in the case at bar, Mr. Sloan and SCPIF are prevailing parties. For several years, The Cliffs at Glassy, Inc. had encroached upon City-owned land, committing a purpresture. Defendants did not know the location of its property line, and failed to exercise reasonable care to discover it.

15. Plaintiffs established that Defendant City had failed to repel a purpresture and remedy the situation for several years. Plaintiffs' lawsuit obtained the relief sought, "a unilateral change in position by the agency" ending the purpresture, and Plaintiffs prevailed. *Sloan v. Friends of the Hunley*, 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011).

16. Second, Defendant City acted without substantial justification in pressing its claims in this lawsuit. Courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). Defendant City did not have a reasonable basis in law and fact. Defendants did not know the location of its property line, and failed to exercise reasonable care to discover it. Defendants were not "substantially justified" in pressing their claims in this lawsuit.

17. Finally, no special circumstances make an award of fees unjust. Plaintiffs funded this litigation with their resources. . . . Plaintiff's action benefitted the City by prompting $100,000 in income from the sale.

18. Under these circumstances, the defense of these matters was not substantially justified. Plaintiffs established that Defendant City had failed to repel a purpresture, and remedy the situation for years. Accordingly, Plaintiffs meet the qualifications for an award of attorneys' fees under S.C. Code § 15-77-300.

R. pp. 34-42 (Order Granting Attorneys Fees and Costs pursuant to S.C. Code Ann. § 15-77-300, entered November 23, 2011 ("Fees Order") (emphasis added). The Order awarding fees up through June 19, 2008 when the City deeded the .29 acres, but not through February 16, 2009 when the City deeded the remainder of the 3.5 acres.

ARGUMENT

The award of attorneys' fees is discretionary with the Circuit Court. *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (1990). SCPIF meets the three elements for an award of attorney's fees under this statute.

> In any civil action brought by . . . any party who is contesting state action, . . . the court may allow the ***prevailing party*** to recover ***reasonable attorney's fees to be taxed as court costs*** against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

S.C. Code Ann. § 15-77-300. A plaintiff must prove three elements to claim attorney's fees: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002).

I. SCPIF IS A PREVAILING PARTY.

For eight years, The Cliffs at Glassy, Inc. had encroached upon City-owned land, committing a purpresture. A purpresture is an ongoing trespass on public real estate.

> A purpresture is well defined in the case of *Southeastern Pipe-Line Co. v. Garrett*, 192 Ga. 817, 16 S.E.2d 753, 760, where it is said:
>
>> A "purpresture" as defined at common law, and recognized in this and other States, is "when one encroacheth and makes that serviceable to himself which belongs to many," as "when there is a house builded or an inclosure made of any part of the King's demesne, or of a highway, or a common street, or public water, or such like things," or by "digging a ditch or making a hedge across (a highway), or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's subjects."

In the case of *George W. Armbruster, Jr., Inc. v. City of Wildwood, D. C.*, 41 F.2d 823, 828, it was said:

> A form of public nuisance of which cognizance has been taken by the courts of equity in England and in this country is called "purpresture," which is defined to be 'an encroachment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or of enjoyment, and encroachment upon navigable streams.

Sloan v. City of Greenville, 235 S.C. 277, 284, 111 S.E.2d 573, 576-77 (1959).

Only after SCPIF filed suit did the City end the purpresture by divesting its ownership of the land encroached upon. SCPIF filed this action requesting an injunction requiring the City to end the eight-year encroachment. R. pp. 47-50 (Complaint filed March 24, 2008). On April 23, 2008, the City answered that it intended to take certain action in response to the Complaint. R. pp. 51-545. On April 28, 2008, the City enacted an ordinance enabling the City to dispose of a part of its land encroached upon. R. pp. 92-98 (Ordinance 2008-33, enacted April 28, 2008, Exhibit J to the Complaint). June 19, 2008, by a deed recorded in Book 2329 at Page 817, the City divested title to about a quarter acre in the eastern part of its land encroached upon. R. pp. 95-107. By this divestiture, the City slightly reduced the extent of, but did not eliminate, the encroachment.

On February 13, 2009, (the day after SCPIF filed the only survey commissioned in this case) by donation, the City divested itself of the remainder of its land encroached upon, by deed recorded in Book DE2353 at Page 1209-1211. R. pp. 129-131 (Exhibit to Plaintiffs' Reply Memorandum in Support of Motion to Alter or Amend the Judgment, filed February 25, 2009). Thereby, SCPIF's lawsuit accomplished its objective of ending

the purpresture and SCPIF prevailed. The case remains before the Court until the Court formally concludes it.

Sloan v. Friends of the Hunley addresses the issue of who is a prevailing party for the award of attorneys' fees. *Id.* 393 S.C. 152, 711 S.E.2d 895 (2011). The case developed this way: Sloan requested documents from the Friends of the Hunley ("FOTH") under FOIA. FOTH responded that it was not a "public body," was not subject to FOIA, and would not produce the documents. Sloan filed suit requesting injunctive relief for the production of the documents, and declaratory judgment that FOTH was a "public body" under FOIA. FOTH then produced the documents, but continued to maintain that it was not a "public body" subject to FOIA. Other persons requested other documents, but FOTH maintained that it was not a "public body" and refused their requests. FOTH contested this action all the way to the South Carolina Supreme Court.

Shortly before oral argument, FOTH wrote to the Court and announced that it would no longer contest whether FOTH was a "public body." The Supreme Court pressed defense counsel in oral argument asking whether FOTH was indeed a "public body" under FOIA. Defense counsel then conceded that FOTH was indeed a "public body." After the concession, the Court found the FOIA claim moot. *Sloan v. Friends of the Hunley,* 369 S.C. 20, 29, 630 S.E.2d 474, 479 (2005).

Sloan filed a motion for attorneys' fees under FOIA. The Circuit Court ruled that Sloan was entitled to attorneys' fees. Defendants again appealed to the Supreme Court arguing that Sloan was not a "prevailing party" under § 30-4-100(b) and disputing the time for which attorneys' fees should be awarded.

Historically, the Supreme Court had held that a prevailing party is "one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Id., citing Heath v. County of Aiken*, 302 S.C. 178, 182–83, 394 S.E. 2d 709, 711 (1990) (alteration in original) (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)).

In *Sloan*, the Supreme Court ruled:

> Under the facts of this case, we find that ***Sloan is the prevailing party*** under section 30-4-100(b). When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.

Sloan v. Friends of the Hunley, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) (emphasis added), *citing Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions.").

The Court explained its ruling:

> Here, Sloan's complaint prompted Friends to do what a series of FOIA letter-requests could not accomplish—produce the requested documents. Accordingly, ***Sloan prevailed and is entitled to an award of attorney's fees.***
>
> * * *
>
> ***We affirm the trial court's finding that Sloan is a prevailing party*** under FOIA and is thus entitled to an award of his attorney's fees. We reverse the award of fees beyond the time Friends produced the requested documents and modify Sloan's attorney's fees award to $6,467.50.

Id., 393 S.C. 152, 158, 711 S.E.2d 895, 898 (2011) (emphasis added)

In this ruling, the Supreme Court held for the ***first time*** that a litigant can be a prevailing party and that fees can be awarded in the absence of an actual court ruling for the plaintiff. The Court was persuaded by the Montana Supreme Court's ruling *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 878 (Mont. 2006). A newspaper had been denied unredacted public documents from the City of Havre and sued to acquire them. The City eventually produced the documents and moved to dismiss the newspaper's action for mootness. The Court granted the City's motion, and the newspaper moved for fees. As in this case, the City opposed the motion because the Court had awarded judgment to the City based on mootness. The Court nevertheless awarded fees.

> Although Havre correctly observes that the Newspaper did not technically "prevail" in its action in the District Court, the court granted summary judgment in favor of Havre precisely because Havre mooted the case by providing the Newspaper with unredacted copies of the Reports. Absent Havre's conduct, the case would not have become moot. In mooting the case, ***Havre provided the Newspaper with the very relief it sought to procure through litigation; thus, the Newspaper has prevailed in substance, albeit without court intervention.*** Given these circumstances, we will consider the Newspaper to be the prevailing party with respect to its request for unredacted copies of the Reports. ***Otherwise, a similarly situated party could, after extensive litigation, at the eleventh hour, and facing imminent defeat, simply moot a case in order to dodge this fee-shifting statute.***

Id. (emphasis added).

Similarly, the Court was persuaded by the District Court of Montana's ruling that when a party seeks an injunction under FOIA, if the relief sought is obtained "'via . . . unilateral change in position by the agency,' he is entitled to fees under the federal FOIA statute." *Id. citing Wildlands CPR v. U.S. Forest Serv.,* 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008).

Furthermore, the Court agreed with the courts of the State of Washington: "'[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act.'" *Id. citing Spokane Research & Def. Fund v. City of Spokane*, 117 P.3d 1117, 1125 (Wash. 2005) (*en banc*) (alteration in original) *quoting Coal. on Gov't Spying v. King County Dep't of Pub. Safety,* 801 P.2d 1009, 1013 (Wash. Ct. App. 1990). The Supreme Court reasoned that FOTH would not have produced the requested documents if Mr. Sloan had not filed suit and therefore FOTH could not avoid attorneys' fees simply because no court had adjudicated its status as a "public body." Such a result would "undercut the policy behind the act." *Id.*

Likewise, in the case at bar, SCPIF is the prevailing party because the City deeded the encroached upon property not only after SCPIF filed suit, but after SCPIF commissioned a survey and identified the property. SCPIF's lawsuit obtained the relief sought, "a unilateral change in position by the agency" ending the purpresture, and SCPIF prevailed. *Sloan v. Friends of the Hunley,* 393 S.C. 152, 711 S.E.2d 895 (2011). The City in the case at bar did exactly the same thing: it mooted the action for declaratory judgment in the eleventh hour in an effort to dodge South Carolina's fee-shifting statute. The purpresture had existed for eight years and was resolved only after several months of litigation and a survey identifying the property, both filed by SCPIF. Under these circumstances, the SCPIF prevailed.

II. THE CITY ACTED WITHOUT SUBSTANTIAL JUSTIFICATION.

Second, the City acted without substantial justification in pressing its claims in this lawsuit rather than repelling the encroachment or otherwise ending the purpresture

when SCPIF first filed this action. In analyzing this element, courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue,* 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). The City did not have a reasonable basis in law and fact for many months. The City never attempted to ascertain the location of its property line, and failed to exercise reasonable care to discover it. The City inaccurately argued that the land in question had been sold and that no purpresture existed. Several months later, the City conveyed the remainder of the land encroached upon only after SCPIF finally paid to identify the property by commissioning and filing a survey. The failure to even attempt to identify the boundaries of the City's property demonstrates that the City was not "substantially justified" in pressing its claims in this lawsuit.

III. NO SPECIAL CIRCUMSTANCES MAKE AN AWARD OF FEES UNJUST.

Finally, no special circumstances make an award of fees unjust. SCPIF funded this litigation with its resources. The State benefits when civic-minded citizens bring such actions. "It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds." *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139. The Court continued, "Citizens should be encouraged to bring suits like these." *Id.* SCPIF's action benefitted the City by prompting $100,000 in income from the sale.

In this case, the defense of these matters was not substantially justified. The City vigorously contested this action at every turn and refused to identify its own property, yet

SCPIF identified the City's property for it and established that the City had failed to repel a purpresture for eight years, and to remedy the situation over many months of litigation. Accordingly, SCPIF meets the qualifications for an award of attorneys' fees under S.C. Code Ann. § 15-77-300.

IV. SCPIF IS ENTITLED TO RECOVER COSTS IN THIS MATTER.

Attorneys for SCPIF are entitled to recover costs in this matter.

> In every civil action commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party as prescribed in §§ 15-37-20, 15-37-60, 15-37-70, and 15-37-120 to 15-37-160, and Chapter 21 of Title 8, Article 3 of Chapter 11 of Title 14, Chapter 19 of Title 14, Article 7 of Chapter 23 of Title 14, Chapter 19 of Title 19, Chapter 7 of Title 22, Article 3 of Chapter 9 of Title 22, and Article 1 of Chapter 19 of Title 23, ***such costs to be allowed as of course*** to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. ***In cases in chancery the same rule as to costs shall prevail*** unless otherwise ordered by the court.

S.C. Code Ann. § 15-37-10 (emphasis added). Accordingly, SCPIF should be awarded costs.

V. SCPIF'S ACTUAL ATTORNEYS FEES AND COSTS ARE REASONABLE.

This case presented a substantial financial risk for SCPIF. The City and the public benefited from this litigation. SCPIF's counsel's affidavit documented that SCPIF incurred $39,816.60 in attorneys' fees and $8,970.00 in surveyor costs pursuing this matter. R. pp 132-165. (Fee Affidavit and Exhibits to Fee Affidavit). Ending the purpresture brought $100,000 into the City coffers, benefitting the City citizens and taxpayers.

R. pp. 95-103. Accordingly, SCPIF's actual attorneys' fees and costs were reasonable, and SCPIF is entitled to an award of attorneys' fees and costs.

"There are six factors for the trial court to consider when determining an award of attorneys fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) *citing Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). "Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors." *Id. citing Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427.

First, as to the nature, extent and difficulty of the case, the City's failed to remedy the purpresture had existed for eight years until SCPIF brought this action. SCPIF spent significant time, effort and money to engage a land surveyor because the City failed to have its own survey performed and failed properly to defend the real property owned by the City.

Second, as to the time necessarily devoted to the case, SCPIF spent significant time in gathering evidence and engaged land surveyors, and researched deeds to prove the extent of the purpresture.

Third, SCPIF's counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia*, *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee,* 371 S.C. 495,

640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005), *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, SCPIF counsel did not work on a contingency fee, but rather SCPIF paid these fees as they accrued. SCPIF should be reimbursed for their fees and expenses.

Fifth, SCPIF obtained beneficial results. The City divested the property only after litigation had begun. The City did not fully end the purpresture until after many months of litigation and after Plaintiffs had incurred several thousand dollars in surveying costs. Ending the purpresture was the SCPIF's objective. Furthermore, SCPIF's litigation benefits every citizen of the City by requiring that City not tolerate encroachments.

Sixth, as to the customary legal fees for similar services, SCPIF has presented Counsel's affidavit supported by detailed time records showing that SCPIF incurred attorneys' fees and costs. SCPIF respectfully suggests that based upon Counsel's affidavit and the court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable and modest. In fact, Counsel have discounted their normal rates due to the public interest nature of this litigation. The Court should find that SCPIF's actual attorneys' fees and costs were reasonable, and that SCPIF is entitled to a full award of attorney's fees and costs.

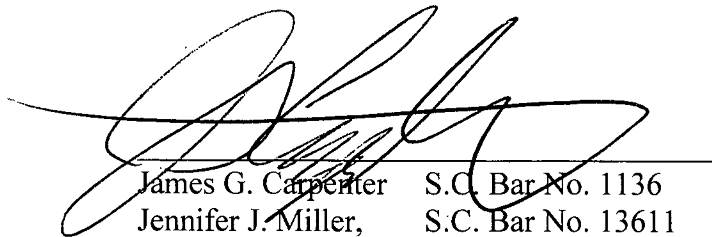
VI. THE CIRCUIT COURT ABUSED ITS DISCRETION BY CUTTING OFF FEES BEFORE THE CITY ENDED THE PURPRESTURE.

In SCPIF's Appellants' Brief and Reply Brief, SCPIF argued that because the purpresture was not ended until the City and the Cliffs signed and recorded their Boundary Line Agreement, Quitclaim, and Release February 16, 2009, SCPIF's attorneys' fees should likewise continue to accrue at least until that date.

CONCLUSION

In the case at bar, SCPIF prevailed. The City was not substantially justified in pressing its claims. No other factors make an award of attorneys' fees unjust. Therefore, the Circuit Court was justified in its award of attorneys' fees and costs from the City.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
MAY 30 2013
SC Court of Appeals

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of others similarly situated, .. Appellants/Respondents,

v.

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants Of Whom City of Greenville and Mayor Knox H. White are the Respondents/Appellants,...Respondents/Appellants.

PROOF OF SERVICE

The undersigned attorney hereby certifies that she caused to be served the Final Briefs and Record on Appeal upon counsel for the Respondents by hand delivery, postage prepaid this Tuesday, May 28, 2013, addressed as follows:

Kathleen Kempe
City Attorney's Office
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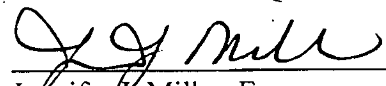
Greenville, SC 29602
February 11, 2013



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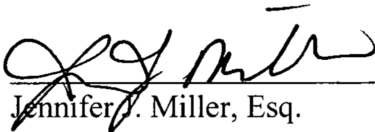
Certificate of Counsel

Appellant/Respondent certifies that as required by SCACR 211, the Final Respondent's Brief of Appellant-Respondent is identical to the brief previously served under Rule 208 except for references to the record and correction of typographical errors and misspellings.



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