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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Opinion 5010 (S.C. Ct. App. filed July 25, 2012)

The South Carolina Department of Transportation Respondent,

vs.

Janell P. Revels and R.J. Poston, Jr. Landowners,

and

John Doe and Mary Roe, representing all unknown persons having or
claiming to have any right, title or interest in or to, or lien on the lands
described herein, including all unknown heirs of Reamer J. Poston, Sr.
a/k/a R.J. Poston, Sr. deceased Unknown Claimants

Of Whom Janell P. Revels and R.J. Poston, Jr. are Petitioners

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

Respondent believes that the sole issue on appeal is as follows:

Whether, as a statute shifting fees to the losing party, S.C. Code Ann. § 28-2-510(B) requires that attorney fee awards be calculated on the basis of a “lodestar” formula being a reasonable hourly rate times a reasonable number of hours expended by counsel in accordance with Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008)?

STATEMENT OF THE CASE

Respondent would add to Petitioners’ statement the facts that the trial judge awarded Petitioners their costs plus attorney fees based upon a rate of \$300 per hour or \$16,290. Petitioners seek fees of one-third of the recovery over the amount the verdict exceeded Respondent’s offer for a fee award of \$28,233.33. This amount equates to \$519.95 per hour. Otherwise, Respondent has no objections to Petitioner’s Statement of the Case.

ARGUMENT

I. The cases cited as authority for contingency-fee recovery predate Layman v. State which is the governing law.

Petitioners cite three opinions of the Court of Appeals they claim justify an award of fees on a percentage-of-the-recovery basis: SCDOT v. Willie T. Hucks (Ct. App. Unpublished Opinion No. 03-UP-114 filed February 13, 2003); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 161, 503 S.E.2d 483, 489 (Ct. App. 1998); and Vick v. S.C.

Dept. of Transportation, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). None of these opinions serve as precedent for an award of fees based upon the percentage of recovery method for the simple reason that they pre-date Layman, which was a comprehensive review of the law regarding fee awards and prohibits absolutely contingency-fee-based awards where fees are shifted by statute.

Hucks was an unpublished decision of the Court of Appeals. Under Rule 220(a), SCACR, unpublished opinions have no precedential value. In any event, neither Hucks, Global Protection Corp., nor Vick stand for the proposition Petitioners urge—that courts should award fees in the amount of the contingency-fee contract between the plaintiff and his attorney. Rather, those courts only analyzed the contingency fee as one of the six factors required to be reviewed to find the lodestar. The ultimate holding in each case was a reasonable fee based upon the lodestar analysis under Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).¹

II. Code section 28-2-510 is not distinguishable from the operative language of section 15-77-300 and is controlled by Layman.

In Section II of their brief, Petitioners argue that the condemnation fee statute, S.C. Code Ann. §28-2-510(B), is significantly different in its language from the “state action” attorney fee statute, S.C. Code Ann. §15-77-300, that was construed in Layman v. State, supra. Therefore, according to Petitioners, the Court should rule that the former allows contingency fee recoveries in spite of the language in Layman that the lodestar method be used where fees are recoverable under a fee-shifting statute.

¹ This is not to say that we agree with the reasoning in those cases. Fee shifting statutes such as the one at bar generally provide for an award of costs to the party, not his attorney. In negotiating a contingency fee contract, a party is able to shift the risk of not prevailing to the attorney. The party bears no risk. Therefore, the fourth factor “contingency of compensation” should be used to reduce and not increase the fee indicated by the other five factors.

We note at the outset that Petitioners' argument is based on an anachronism. They claim that the difference involves language in the latter statute not appearing in the condemnation fee statute, to wit: that the fees to be allowed must be limited to a reasonable time at a reasonable rate. Petitioners' Brief, page 3. This language does not appear in the version of the Code §15-77-300 interpreted by the Court in Layman. Rather, it was added by the General Assembly post-Layman. See, Act 125, 2010 S.C. Acts 1104.² That section, S.C. Code §15-77-300 (Rev. 2006) refers only to "reasonable attorney's fees. This is not significantly different from the phrase, "reasonable litigation expenses" contained in S.C. Code Ann. §28-2-510(B).

In any event, as this Court explained in Layman, the significant language in the State action statute is that it requires "presentation of an itemized accounting of the attorney's fees." 376 S.C. at 454, 658 S.E.2d at 330-31. The condemnation fees statute requires "an itemized statement...stating the fee charged, the basis therefore, the actual time expended." S.C. Code §28-2-510(B)(1). The language of the two statutes are not significantly different. Layman applies to both.

Also, in this section (page 5), Petitioners mention their constitutional argument that the Court refused to certify. To the extent the Court may consider it, we offer the following rebuttal.

The takings clauses of the United States and South Carolina constitutions are prohibitory only. They prevent the government from taking private property for public use until just compensation has been made and paid. They are merely a limitation on the

² As we discuss *infra*, in enacting Act 125, the Legislature expressly rejected an amendment to allow contingency fees in condemnations. S. 186 (May 20, 2009).

use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. United States v. Jones, 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015 (1883); Parrish v. Town of Yorkville, 79 S.E. 635 (S.C. 1913). The constitutions mandate just compensation but do not define it or mandate how it shall be made. Rather, that decision is left to the legislature which may delegate its power of eminent domain to state agencies and prescribe the manner in which just compensation is to be ascertained. Smith v. City of Greenville, 229 S.C. 252, 98 S.E.2d 639 (1956); Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545 (1918); Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301, 303 (1918). Thus, in Wilson, it was held that the General Assembly was fully within its constitutional power to allow by statute the offset of benefits against damages in one class of takings, *i.e.* those for purely public purposes, and deny it in others, *i.e.* takings by quasi-public corporations.

The South Carolina General Assembly has defined just compensation in S.C. Code Ann. §28-2-370 (Rev. 2007), succinctly, as the value of the property taken and the diminution in value of a landowner's remaining property reduced by the benefits to the property's value resulting from the public works. A separate section of the Eminent Domain Procedures Act, S.C. Code Ann. §28-2-510 (Rev. 2007), enacted in 1987, provides a limited exception to the "American Rule" that all parties to litigation bear their own expenses. That Code section expressly states that the relief provided in "[i]n addition" to the compensation for the land.

It is well settled that it is for the General Assembly to determine when and under what circumstances the State may be sued. S.C. Code Const., art. XVII, §2. Even when legislative action is taken, statutes enacted in derogation of sovereign immunity must be

strictly construed. Washington v. Whitaker, 317 S.C. 108, 127, 451 S.E.2d 894, 906 (1994); accord, Unisys v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001). The “American Rule” that each party to a lawsuit bear its own costs is of long-standing application in the common law. Statutes in derogation of the common law are to be strictly construed as well. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000). The American Rule pre-dates both the 14th amendment to the United States constitution and the addition of the takings clause to the South Carolina constitution in 1868 by decades. See Arcambel v. Wiseman, 3 U.S. 306, 3 Dall. 306, 1 L.Ed. 613, 1798 WL 896 (1789). If a comprehensive exception to that rule had been intended for eminent domain actions in general, it would certainly have been addressed before now.

III. Layman applies to this case because it involves the shifting of attorney fees by statute.

In section III of their argument, Petitioners argue that it was error for the Court of Appeals to hold that Layman controlled this case because, in doing so, it allowed Layman to overrule S.C. Code Ann. §28-2-510. According to Petitioners, this violates the Eminent Domain Procedure Act’s declaration that it is the exclusive procedure for condemnation in South Carolina. S.C. Code Ann. §28-2-210. Petitioners argue that Layman only applies to S.C. Code Ann. §15-77-300. However, while the Eminent Domain Procedure Act provides the exclusive procedures for condemnations and prevails over the Rules of Civil Procedure, it is nevertheless a fee-shifting statute of the type Layman declared to be governed by the lodestar analysis to determine a reasonable hourly rate times a reasonable number of hours expended.

As this Court noted in Layman, 376 S.C. at 452, 658 S.E.2d at 329, a percentage-of-the-recovery formula may be appropriate in what are called “common fund” cases where the plaintiffs sue to create, recover, or preserve a common fund for themselves and others in the class. In such cases, the recovery itself is often treated as the measure of success. The recovery comes from the fund itself. Percentage-of-the-recovery is justified because plaintiff has worked for himself as well as others of the class. Id This method is intended to insure that others in the class bear their fair share of the expenses referred to as “fee sharing” or “fee spreading.” Id., citing Petition of Crum. Johnson v. Williams, 196 S.C 528, 531, 14 S.E.2d 21, 23 (1941).

The Layman Court held that the common fund methodology is wholly inappropriate under a fee-shifting statute. The former involves court jurisdiction over a common fund and the equitable distribution of expenses among the benefitted parties. The latter shifts responsibility for the fees entirely to the losing party.

IV. Plaintiffs’ contract with their attorney does not govern the award of reasonable fees.

In their section IV, plaintiffs argue that instead of basing the award on the determination made under the lodestar method of calculation, the trial court should have simply determined whether the amount they agreed to pay their attorney was reasonable or unreasonable. This is *contra* to the holding of Jackson v. Speed, supra, that the contract between the client and his counsel does not control the determination of a reasonable hourly rate. The State is not a party to that contract and to give a plaintiff and his counsel control over the award would allow one party to unilaterally determine the amount of a claim against the State. *C.f.*, S.C. Code Ann., Const., art. XVII, §2 (Rev.

2009) (“The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.”) In fact, an amendment to permit contingency fees in condemnation cases was rejected by the General Assembly in 2009. *Compare*, S.186 (May 20, 2009) *with* Act No. 125, 2010 S.C. Acts 1104, amending S.C. Code Ann. §15-77-300.

The purpose of fee-shifting statutes in general is to enable a party mistreated by the government to hire an attorney to vindicate his rights when he may lack the wherewithal to do so by assuring that attorney that he will be paid for prevailing in a meritorious case. As the United States Supreme Court said in a lead case on this issue:

A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a “reasonable” fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a “reasonable fee,” the purpose behind the fee-shifting statute has been satisfied.

Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (Delaware Valley I).

V. This Court’s holding on fees in Kiriakides v. School District of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009), did not endorse the use of contingency-fee agreements in fee-shifting.

Petitioner’s argue in this section that this Court’s rejection in Kiriakides, *supra*, of the School District’s argument that no fees were due since the condemnation was

withdrawn and the plaintiff owed no fees to his attorney because the agreement was contingent on a monetary recovery, means that the Court adopted the plaintiff's fee agreement. It did not. The Court simply found, in accordance with its pre-existing jurisprudence that the contract did not control and the landowner was entitled to reasonable fees as allowed by statute where a condemnation is withdrawn. The Court also noted that the School District did not challenge the amount of the fees.

The fact that the Eminent Domain Procedure Act contains a definition of "litigation expenses," S.C. Code Ann. §28-2-30(14) (Rev. 2007), does not alter the principle that the inquiry into the reasonableness of the rate and number of hours of the attorney fee element of those expenses must proceed under the analysis contained in Jackson v. Speed, supra.

Finally, in this section, Petitioners again advance the constitutional argument upon which *certiorari* was not granted, *i.e.* that failure to award them fees in the amount they demand unconstitutionally denies them just compensation. As noted by the Court of Appeals and our argument above, this issue was not raised and ruled upon by the trial court. Thus it is not preserved for this Court's review. To the extent the Court will consider it, we rely on our discussion in section II above.

VI. The decisions of other state courts are not binding on this Court.

Petitioners cite numerous decisions of other states they claim have endorsed contingency fee arrangement as a basis for fee shifting. In South Carolina, the decisions of other state courts may be interesting in the elucidation of the provision of their laws but are not binding on the courts of this State which must depend on the findings of our

own courts. Manning v. Gossette Mills, 192 S.C. 262, 6 S.E.2d 256 (1939). Those cases appear, in any event, to be various formulations of the lodestar factors followed by South Carolina and the federal courts.

VII. The Michigan, Oklahoma, and Wisconsin rules Petitioners cite are based on law peculiar to those states and do not apply in South Carolina.

In section VII, Petitioners cite decisions from courts in Michigan, Oklahoma, and Wisconsin in support of an argument that South Carolina law should be interpreted the same way. The Michigan case Petitioners discuss, Michigan Dept. of Transp. v. Randolph, 610 N.W. 2d 892 (Mich. 2000), was decided under a statute peculiar to that state that provides a formula referencing 1/3 of the agency's written offer. Such legislative language does not exist in South Carolina.

The Oklahoma case Petitioners cite, Oklahoma DOT v. Allied Tower Co., 136 P.2d 718 (Okla. 2006), is inapposite. In that case, the Oklahoma Court of Civil Appeals reviewed a particular state statute, 27 Okla. Stat. Ann. §11, that required reimbursement of attorney fees "actually incurred". It was this language that the court termed a "contractual obligation" rule that is reimbursable to provide the landowner with full compensation for property "subjected to the government's eminent domain powers." The South Carolina statute, S.C. Code Ann. §28-2-510 (B), speaks only to reasonable litigation expenses. The Code section applies only to cases where the verdict is closer to the testimony of the landowner than to that of the government and gives the court the discretion to deny or reduce any requested award where the landowner is found to have protracted the proceedings or where the government is substantially justified in its litigating position. It is not automatically applied as in Oklahoma.

Although the Wisconsin case appellants cite, Village of Sherwood v. Steinberg, 496 N.W.2d 57 (Wis. 1993), offers some support for their arguments, the reasoning of that state's case law has been followed by no other U.S. jurisdiction. Of the other cases appellants cite, City of Sioux Falls v. Kelley, 513 N.W.2d 97 (S.D. 1994), actually supports our arguments herein. The court noted that where the fee is in addition to the award, there exists no safeguard or incentive for the landowner to arrange for reasonable attorney fees as would be the case if the fee were paid by the landowner out of the award or recovery. Id. at 111. Hoffman v. Town of Malta, 592 N.Y.S.2d 503 (N.Y App. Div. 1993), was decided under New York law which permits awards of fees actually incurred by condemnees. Prucka v. Papio Natural Resources Dist., 292 N.W.2d 293 (Neb. 1980), was decided under Nebraska law which allows courts to consider the actual terms of the contingency fee contract as one factor in determining fee awards. City of Wichita v. Chapman, 521 P.2d 589 (Kan. 1974), held that the trial court did not unduly rely on the contingent fee contract since he had discretion to find a reasonable award based upon his own experience and actually found less than the contingency amount.

Finally, we would note that the well-developed case law in the federal courts rejects consideration of contingency fee engagements for any purpose in determining a reasonable fee because that factor would duplicate other considerations in determining the lodestar. In City of Burlington v. Dague, 505 U.S. 557, 562-63 112 S.Ct. 2638, 2641, 120 L.Ed.2d 449 (1992), Justice Scalia wrote for the Court,

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar-either in the higher

number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. [Citation omitted] Taking account of it again through lodestar enhancement amounts to double counting. [Citation omitted]

Further on, the Court noted that permitting an enhancement for contingency would always result in an increase in the award but never a reduction:

Contingent enhancement is a feature inherent in the contingent fee-model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent fee model to increase a fee award but not reduce it.

Id., 505 U.S. at 566, 112 S.Ct. at 2643.

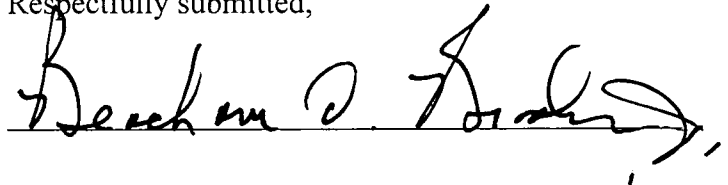
VIII. Petitioners' conclusion again raises their unpreserved constitutional argument.

In their conclusion, Petitioners state that because the case involved a forced taking of land, their fee request must be awarded lest they be unconstitutionally denied just compensation. As noted above, this argument should not be considered.

CONCLUSION

The Court of Appeals and the Circuit Court correctly construed the relevant law regarding fee awards permitted by statute in derogation of the American Rule regarding attorney fees. The statute in question adequately protects both the condemnee and the taxpayer. Petitioners have provided no compelling reason to abandon well settled precedent in this area. The judgments below should be affirmed.

Respectfully submitted,



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APPEAL FROM MARION COUNTY
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Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

Opinion 5010 (S.C. Ct. App. filed July 25, 2012)

The South Carolina Department of Transportation Respondent,

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Janell P. Revels and R.J. Poston, Jr. Landowners,

and

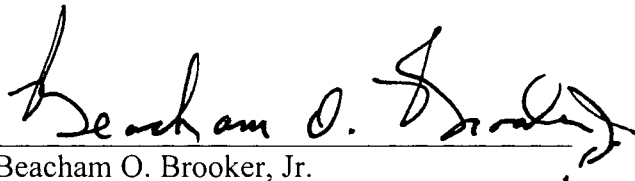
John Doe and Mary Roe, representing all unknown persons having or
claiming to have any right, title or interest in or to, or lien on the lands
described herein, including all unknown heirs of Reamer J. Poston, Sr.,
a/k/a R.J. Poston, Sr., deceased Unknown Claimants,

Of Whom Janell P. Revels and R.J. Poston, Jr. are Petitioners.

PROOF OF SERVICE

I certify that I have served the BRIEF OF RESPONDENT on the Appellants by
depositing a copy in the Unites States Mail, postage prepaid, on June 30, 2014, addressed to its
attorneys of record as follows:

GENE McCAIN CONNELL, JR.
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