

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County
Court of Common Pleas

Michael G. Nettles, Presiding Judge

Opinion No. 5010 (S.C. Ct. App. Filed July 25, 2012)

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

REPLY BRIEF OF PETITIONERS

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Attorney for Petitioners

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ARGUMENT

The Petitioner offers the following additional arguments in reply to the Brief of the Respondent.

I. Layman v. State does not govern attorneys' fees in condemnation cases.

Respondent argues that *Layman* is the dispositive decision regarding attorney's fees in condemnation cases. However, Respondent does not address S.C. Code § 28-2-510(B)(1) which allows for reasonable "litigation expenses". Litigation expenses are defined in S.C. Code § 28-2-30(14) as follows:

The reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of a Condemnation Notice, including, but not limited to, reasonable attorney's fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises.

The key in the Eminent Domain Procedure Act is that attorney's fees must be reasonable. The Act is silent as to whether or not attorney's fees may be paid on a contingent basis or an hourly basis. The Act only provides that the attorney's fees be reasonable which allows for both types of fees.

Petitioner points to the case of *South Carolina Department of Transportation v. Thompson*, 357 S.C. 101, 590 S.E.2d 511 (S.C.App. 2003). In that case, the landowner received a jury verdict of \$38,000.00. The trial court awarded the landowner attorney's fees of \$13,159.36 which is more than one-third of the actual verdict. While the issue in the case was not the attorney's fees, the point is that a contingency fee was awarded.

Further, as has been stated in Petitioner's main Brief, the courts of this state have consistently allowed for contingent attorney's fees in condemnation cases if they are reasonable. See *Vick v. South Carolina Department of Transportation*, 347 S.C. 470, 556

S.E.2d 693 (Ct.App. 2001). (“To the extent SCDOT asserts the attorney’s fees are excessive because they exceed the amount that would be due on an hourly basis, this issue also was not preserved for the same reasons discussed above. In any event, the award was not error.”) (556 S.E.2d at 694) (Jury Verdict of \$134,261.52 - Attorney’s fees awarded by the court \$41,425.00 (one-third)).

Finally, it should be noted that this Court has also discussed litigation expenses in *Kiriakides v. School District of Greenville*, 382 S.C. 8, 675 S.E.2d 439 (2009). In *Kiriakides*, the Court granted the Plaintiff a reasonable attorney’s fee even though he was operating under a contingent fee agreement. The Court noted that a reasonable attorney’s fee was appropriate under the Eminent Domain Procedure Act. Thus, the test under the Eminent Domain Procedure Act is not whether the fee is on an hourly basis, but whether it is reasonable; and if the fee is reasonable, the court is obliged to approve it.

II. The South Carolina Eminent Domain Procedure Act is unique.

As has been pointed out previously, S.C. Code Ann. § 15-77-300 has entirely different language than the Eminent Domain Procedure Act in regard to litigation fees. In S.C. Code Ann. § 15-77-300, the General Assembly specifically limited the recovery of attorney’s fees to “a reasonable time expended at a reasonable rate.” This language is not in the Eminent Domain Procedure Act and thus it was error to find that *Layman* controlled especially in light of this court’s opinion in *Kiriakides* in which it noted:

The provisions of the Act are unique and thus the commencement of the condemnation action cannot be measured in terms of regular civil proceedings. 675 S.E.2d at 446.

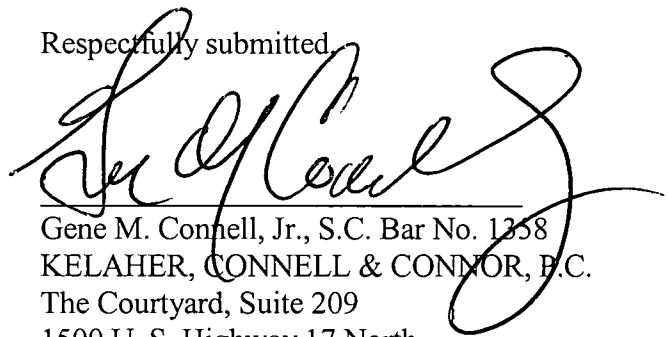
Finally, SCDOT argues that the General Assembly had an opportunity to allow for a contingent attorney’s fee in the Eminent Domain Procedure Act and declined to do so.

Petitioner points out that the General Assembly did not amend S.C. Code Ann. § 28-2-510(B) in regard to litigation expenses, but instead chose to leave them as they have always been and to let the circuit court decide what a reasonable attorney's fee was in a particular case. Accordingly, the fact that the legislature rejected an amendment is of no consequence.

CONCLUSION

S.C. Code Ann § 28-2-510 has different statutory language than S.C. Code Ann. § 15-77-300. As a result *Layman* does not apply. This Court has repeatedly held that the Eminent Domain Procedure Act is unique and cannot be measured in terms of regular civil procedure. S.C. Code Ann. § 28-2-30(14) defines litigation expenses as “the reasonable fees.” Thus, the Court of Appeals was erroneous in holding that attorney’s fees in condemnation actions could only be awarded on an hourly basis. Accordingly, Petitioner requests this Court reverse the Court of Appeals and remand this for a new hearing on the attorney’s fee issue to decide whether or not Petitioner’s attorney’s fees were reasonable as provided for in the Eminent Domain Procedure Act.

Respectfully submitted,



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July 10, 2014
Surfside Beach, South Carolina

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes
and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys
at Law, and that she has served the **Reply Brief of Petitioner** on the Respondent, through
attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid,
to:

Beacham O. Brooker, Jr., Esquire
South Carolina Department of Transportation
P. O. Box 191
Columbia, SC 29202-0791

DATE OF MAILING: July 10, 2014

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 10 day of July, 2014.

Sharon M. Tyler
Notary Public for South Carolina
My Commission Expires: 2-25-19