

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Case Number: 2009-CP-08-3890

RECEIVED

JUL 07 2014

SC Court of Appeals

South Carolina Department of Transportation,.....Appellant,

vs.

RICS5, LLC.....Respondent,

and

Worsley Operating Corporation, a North Carolina Corporation, Lessee, and Berkeley County
Treasurer's Office, Lien Holder..... Other Condemnees.

PETITION FOR REHEARING

Appellant, the South Carolina Department of Transportation, respectfully moves the Court under Rule 240, SCACR, to rehear and reconsider its opinion filed June 25, 2014, in this case. The grounds for our motion are that 1) The Court misinterpreted the governing statute in affirming the trial court's award of fees where the litigating position of the Department was substantially justified; 2) With respect to our argument that special circumstances exist to make an award unjust, the Court incorrectly held that our argument was not raised and ruled upon by the trial judge; and 3) Regarding our appeal of the amount of fees, the trial judge did not follow the rules set out in Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), but held that the contract between Respondent and its attorney controlled the amount of fees.

I. The Court's rejection of our arguments on the sole ground that the decision to award fees is entirely within the discretion of the trial judge ignores the fact that the lower court made errors of law constituting an abuse of discretion.

In rejecting both of our arguments regarding the substantial justification of Appellant's litigating position and that the trial court failed to make the proper analysis in determining the amount of fees, this Court relied on the grounds that those decisions are within the discretion of the trial judge. However, the Court overlooked our contention that in exercising its discretion, the trial judge failed to properly interpret and apply the governing law. This is an abuse of discretion that this Court should reverse. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. Layman v. State, 376 S.S. 434, 444, 658 S.E.2d 320, 325 (2008); Video Gaming Consultants, Inc. v. S.C. Dep't. of Revenue, 358 S.C.647, 595 S.E.2d 890 (Ct. App. 2004).

Section 510(B)(1), Title 28, S.C. Code Ann. (Rev. 2007), provides that the court may reduce or refuse a fee petition if it finds the litigating position of the government was substantially justified or that special circumstances make an award unjust. The meaning of "substantially justified" has been extensively reviewed and interpreted by both State and federal courts with respect to fee shifting statutes establishing its meaning as "justified to a degree that would satisfy a reasonable person." Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990), citing Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). The trial judge based his decision to award fees solely upon the finding that the Landowner herein was a prevailing party under the particular definition of that term contained in S.C. Code Ann. §28-2-510(B)(2). That conclusion is evidenced by his Order referencing S.C. Dep't. of Transp. v. Revels, 399 S.C. 423, 731 S.E.2d 897 (Ct. App. 2012), for the proposition that attorney fees are "consistently allowed" because §28-2-510 (B) "shifts the source of the prevailing party's attorneys' fees to the losing party." The court's discussion of the substantially

justified question consisted of simply repeating his findings in the main case. The reasonable person standard was ignored. The substantial justification standard should not be read to raise the presumption that the government was not substantially justified simply because it lost the case. 69 A.L.R. Fed 130. This represents a failure to accord meaning to all parts of the governing statute and, thus, an error of law. Sloan Construction Company, Inc. v. Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011).

With regard to the determination of the amount of fees, our argument is grounded on whether the fee award made was reasonable. As our Supreme Court has held, the interpretation of a statute is a question of law that the Court reviews *de novo*. Layman v. State, *supra*. Our argument in this regard is that the trial court violated the principle contained in Jackson v. Speed, *supra*, as well as all of the relevant State and federal case law in this area, that the contract between the client and his attorney does not control the award of fees. Rather, that determination is made from scratch applying the six factors outlined in Jackson, *supra*. The objective is to find a reasonable fee sufficient to induce a capable attorney to undertake representation in a meritorious case. Perdue v. Kenny A., 559 U.S 542, 130 S.Ct. 1662, 1672, 176 L.Ed. 494 (2010). Here, the trial judge simply averaged the rates submitted by the two attorneys for the Landowner and multiplied that amount by the number of hours worked. He then “adopted” the affidavit of another local non-disinterested attorney that those rates were reasonable. This constituted an error of law in failing to follow well settled precedent regarding the meaning of “reasonable” in this context. It was, thus, an abuse of discretion requiring reversal.

II. Appellant’s “Special Circumstances” argument was raised and ruled upon below.

Contrary to this Court’s rejection of our argument on issue preservation grounds, the status of the Respondent herein as a large, well-capitalized, national public corporation is a

special circumstance that should have caused the trial court to reject the fee request outright. This issue was discussed at the hearing on the Landowner's petition before the trial judge in Moncks Corner on October 2, 2012. R.p. 152-53. The essence of our argument is that, because the objective of fee-shifting statutes is to allow a party to obtain counsel who otherwise could not do so, fees should not be awarded where it is clear that a party does not need that public support in order to hire adequate counsel to represent it. It is clear here that the landowner, a subsidiary of Realty Income Inc. (NYSE "O") did not need such an inducement to convince a large statewide law firm to represent it. The court awarded fees anyway, thereby ruling against our argument. We continue to maintain that this language of the statute should have been applied and ignoring it was an error of law.

III. The Department's litigating position was substantially justified making an award of fees against it unjust.

The core of the trial court's rulings is that our expert witnesses were not credible in that they did not utilize the income approach to valuation capitalizing the contract rent under the landowner's lease. As our witnesses explained and we explained before the trial court and this Court, the reason this was not done is the rent was not reached in an arm's length transaction between the landowner and its tenant, Worsley Operating Corporation. Additionally, it was far above the market rate. Rather, based upon the testimony of Respondent's officer, that rent was based upon a percentage of a purchase price he assigned to this particular property unilaterally without negotiation with the tenant. For its part the tenant had no incentive or reason to protest the value because a rental rate of return of 8.9% of the purchase price for 75 stores was spread across those properties. A high rent on the Moncks Corner store in question would necessarily be offset by a lower rent elsewhere.

Our appraisal experts utilized all approaches to value including the income approach utilizing market rents. Their analysis was in accord with the standards set forth in the Uniform Standards of Professional Appraisal Standards and Advisory Opinions, the Appraisal Foundation (2005). Their conclusions were further supported by Respondent's testimony that a similar store property nearby had traded for \$444,000 versus the \$900,000 value he placed upon the property at bar.

IV. The fees awarded were excessive.

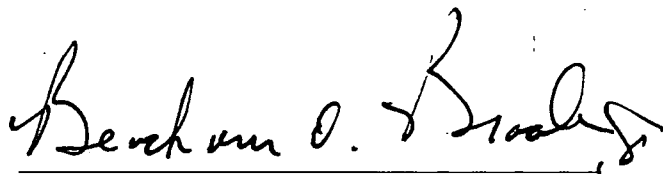
As noted above, the trial court accepted the rates submitted by the Respondent's attorneys then averaged them, multiplied them by the number of hours expended on the case and declared the resulting product to be reasonable. One attorney charged \$382 per hour; the other \$310 per hour; and the rate the court found reasonable was the average of \$346 per hour. There was no evidence presented by Respondent that this constitutes the lodestar, being the amount an individual would need to pay to obtain competent legal representation in Moncks Corner, South Carolina. Indeed, the only evidence of that fact was the Department's affidavit of Mr. West as to \$250 per hour. The trial court's decision to let the contract between the client and its attorneys was an error of law.

V. Conclusion.

The Court should rehear this appeal and reverse the award of fees.

July 7, 2014.

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY

Robert E. Watson, Circuit Court Judge

Appellate Case No. 2013-000394

Case No. 2009-CP-08-3890

South Carolina Department of Transportation Appellant,

vs.

RI CS5, LLC Respondent,

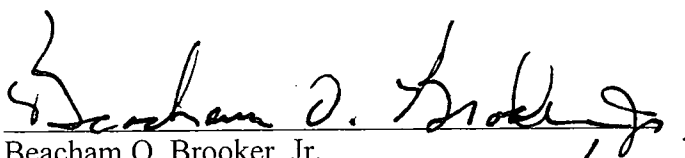
and

Worsley Operating Corporation, a North Carolina Corporation, Lessee, and Berkeley County
Treasurer's Office, Lienholder Other Condemnees.

PROOF OF SERVICE

I certify that I have served the PETITION FOR REHEARING on the Respondent by depositing a copy of it in the United States Mail, postage prepaid on July 7, 2014, addressed to its attorneys of record, Paul A. Dominick and Jeffrey S. Tibbals, as follows:

Paul A. Dominick, Esquire
Jeffrey S. Tibbals, Esquire
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July 7, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: South Carolina Department of Transportation vs. RI CS5, LLC, et al
Appellate Case No. 2013-0000394
Case No. 2009-CP-08-3890

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Brief of Appellant and a Proof of Service for same in the captioned matter.

I am this date serving counsel for the Respondent with this pleading according the Proof of Service.

Sincerely,

Beacham O. Brooker, Jr.
Assistant Chief Counsel

BOB:jmt

Enclosures

cc: Paul A. Dominick, Esquire
Jeffrey S. Tibbals, Esquire
John S. West, Esquire

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