

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY

Robert E. Watson, Circuit Court Judge

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SEP 10 2014

Opinion No. 2014-UP-248, Filed June 23, 2014

S.C. Supreme Court

South Carolina Department of Transportation.....Petitioner,

vs.

RI CS5, LLC Respondent,

and

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

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

South Carolina Department of Transportation, Appellant,

v.

RI CS5, LLC, Respondent,

and

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

Appellate Case No. 2013-000394

Appeal From Berkeley County
Robert E. Watson, Master-in-Equity

Unpublished Opinion No. 2014-UP-248
Heard May 7, 2014 – Filed June 25, 2014

AFFIRMED

Beacham O. Brooker, Jr., of the South Carolina
Department of Transportation, of Columbia, and John
Samuel West, of the West Law Firm, of Moncks Corner,
both for Appellant.

Paul A. Dominick and Jeffrey Scott Tibbals, Sr., both of
Nexsen Pruet, LLC, of Charleston, for Respondent.

PER CURIAM: In this condemnation action, the South Carolina Department of Transportation ("Condemnor") appeals the circuit court's award of litigation expenses to RI CS5, LLC ("Landowner") as the prevailing party, arguing the master-in-equity erred in (1) interpreting the provisions of section 28-2-510(B)(1) of the South Carolina Code (Supp. 2013) when awarding litigation expenses to Landowner; (2) declining to reduce the award of litigation expenses based upon Condemnor's position being "substantially justified"; (3) declining to reduce the award of litigation expenses based upon "special circumstances"; and (4) determining the hourly rate for the Landowner's attorney's fees was reasonable. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Condemnor's argument regarding the master-in-equity's interpretation of section 28-2-510(B)(1): *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 320-21, 731 S.E.2d 869, 873 (2012) ("Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute." (quoting *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010))); § 28-2-510(B)(1) ("The court, *in its discretion*, *may* reduce the amount to be awarded pursuant to this section, or deny an award, . . . to the extent the court finds that the position of the [C]ondemnor was substantially justified or that special circumstances make an award unjust." (emphasis added)); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute.").

2. As to Condemnor's argument regarding its position being "substantially justified": § 28-2-510(B)(1) ("The court, *in its discretion*, *may* reduce the amount to be awarded pursuant to this section, or deny an award, . . . to the extent the court finds that the position of the [C]ondemnor was substantially justified" (emphasis added)); *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("The decision to award or deny attorneys' fees under a

state statute will not be disturbed on appeal absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the [master-in-equity] are either controlled by an error of law or are based on unsupported factual conclusions.").

3. As to Condemnor's argument regarding "special circumstances": *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to *and ruled on* by the [master-in-equity]." (emphasis added)); *id.* at 24, 602 S.E.2d at 780 ("A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.").

4. As to Condemnor's argument regarding the reasonableness of Landowner's attorney's fees: *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (holding the following six factors should be considered when determining a reasonable attorney's fee: "(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."); *Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445 ("[T]he specific amount of attorney[s] fees awarded pursuant to a statute authorizing reasonable attorney[s] fees is left to the discretion of the [master-in-equity] and will not be disturbed absent an abuse of discretion.").

AFFIRMED.

WILLIAMS, KONDUROS, and LOCKEMY, JJ., concur.

The South Carolina Court of Appeals

South Carolina Department of Transportation, Appellant,

v.

RI CS5, LLC, Respondent,

and

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

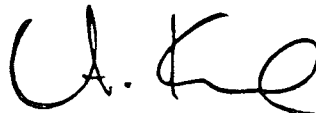
Appellate Case No. 2013-000394

ORDER

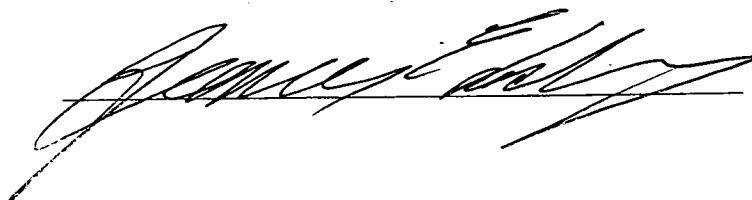
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED

August 25, 2014

cc:

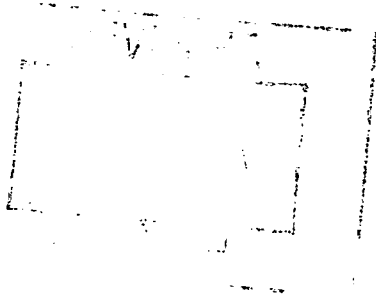
John Samuel West, Esquire

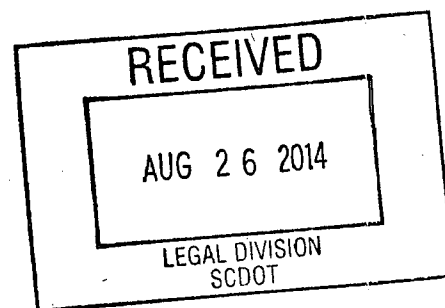
Paul A. Dominick, Esquire

Jeffrey Scott Tibbals, Sr., Esquire

Beacham O. Brooker, Jr., Esquire

The Honorable Robert E. Watson





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AUG 26 2014

LEGAL DIVISION
SCDOT

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.

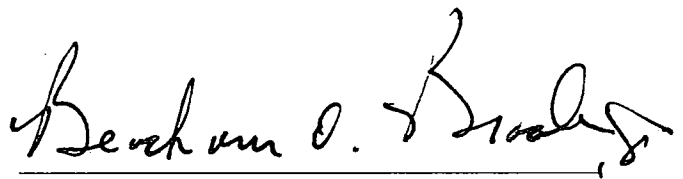
As noted above, the trial court accepted the rates submitted by the Respondent's attorneys then averaged them, multiplied them by the number of hours expended on the case and declared the resulting product to be reasonable. One attorney charged \$382 per hour; the other \$310 per hour; and the rate the 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

Appeal from the Circuit Court of Berkeley County, South Carolina

The Honorable Robert E. Watson, Master-in-Equity

Appellate Case No. 2013-000394

Case No. 2009-CP-08-3890

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

v.

RI CS5, LLC Respondent.

And

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

**APPENDIX TO THE RECORD ON APPEAL
VOLUME 1 OF 1
(PAGES 189-198)**

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INDEX

I. MOTIONS AND MEMORANDUM

1. Proposed Order on Final Determination


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ATTORNEYS FOR RESPONDENT
RI CS5, LLC

December 12, 2013

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road / Route U.S. 17A

File 8.165B

Item

Project STP-UR08(007)

PIN 32502

South Carolina Department of Transportation,

Condemnor,

Vs.

RI CS5, LLC,

Landowner(s),

and

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

Other Condemnee(s).

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-08-3890

CONDEMNATION ORDER

BACKGROUND

This condemnation case came before me for hearing on the merits at the Berkeley County Courthouse on December 14, 2011 pursuant to Consent Order of Reference With Finality.

Present at hearing were John S. West and J. Camden West, attorneys for the South Carolina Department of Transportation (Condemnor) and Paul A. Dominick and Jeffrey S. Tibbals, attorneys for RI CS5, LLC (Landowner), along with various witnesses.

FINDINGS OF SALIENT FACTS

From the record and proceedings herein, from stipulations of counsel, from the testimony of witnesses in open court and from the various exhibits admitted in evidence, I find from a clear preponderance of the evidence the following salient facts:

1. Condemnor is an agency of the State of South Carolina.
2. Condemnor is responsible for planning, construction, maintenance and operation of the state highway system. It coordinates all state and federal programs relating to highways in this state.
3. The U.S. Highway 17-A widening project in Berkeley County is being administered by Condemnor.
4. Tract No. 244 is a site designated in the U.S. Highway 17-A widening project. It is the subject matter of this case. It is a 0.391 acre lot located at the intersection of U.S. Highway 17-A and Old Whitesville Road, south of Moncks Corner. It was the site of an operating Scotchman convenience store. (Condemnor's Ex. 6). The acquisition by Condemnor was a total taking.
5. Landowner owned Tract No. 244 on December 1, 2009.
6. Condemnor initiated this case by the filing of a Condemnation Notice and Tender of Payment and related documents on December 1, 2009. Landowner did not challenge Condemnor's condemnation action or its right to condemn.
7. The tendered amount was \$201,000.00.

8. At the request of the Landowner, Condemnor agreed to a 100% draw down of the tendered amount which was paid over to the Landowner.
9. All documents produced by the parties in the course of discovery were deemed authentic. All relevant documents of record were deemed authentic and admissible.
10. Landowner's corporate witness was Michael Robert Pfeiffer. He is Executive Vice President and General Counsel for Realty Income Corporation, which is the sole managing member of RI CS5, LLC.
11. Mr. Pfeiffer is familiar with all relevant corporate transactions before and after December 1, 2009. He was authorized to speak to the corporate positions of the Landowner.
12. Realty Income Corporation purchased a portfolio of 75 Worsley convenience store sites located in North and South Carolina in March of 2008 for \$65,535,000.00. The portfolio purchase included 65 fee sites and 10 ground leased sites. (Landowner's Ex. 10 and 13/ Condemnor's Exhibit 10).
13. Included in the Worsley portfolio was Store #82 which is Tract No. 244. (Landowner's Ex. 13).
14. The allocated purchase price for Store #82 was \$1,150,000.00. The applicable cap rate for the transaction was 8.89%. (Landowner's Ex. 1).
15. Contemporaneously with the portfolio closing was the assignment of membership interest of WF Intermediate Real Estate, LLC by VP C-Store Real Estate Holding Corporation to RI CS5, LLC. (Landowner's Ex. 4).
16. WF Intermediate Real Estate, LLC was the predecessor in title to Tract No. 244.

17. Landowner entered into a Land and Building Lease Agreement dated March 27, 2008 with Worsley Operating Corporation. The premises covered by the lease was Worsley Store #82, 1445 Live Oak Drive, Moncks Corner, South Carolina. (Landowner's Ex. 7).

18. The initial term of the lease was twenty (20) years with two ten (10) year renewal options.

19. Base monthly rent at the inception of the lease was \$8,517.16.

20. Upon the filing of the Condemnation Notice and Tender of Payment the lease was terminated by the parties to the lease. (Condemnor's Ex. 10).

21. Mr. Pfeiffer's opinion of the value of the property acquired by condemnation is \$1,150,000.00.

22. Prior to the portfolio purchase of the Worsley stores by Realty Income Corporation, extensive due diligence was conducted by Janet Windman on Store #82 on behalf of Realty Income Corporation. She rendered her report dated November 28, 2007. Her report is silent as to any inquiry regarding the U.S. Highway 17-A widening project. (Condemnor's Ex. 10).

23. The U.S. Highway 17-A project was publicized by SCDOT. Public information meetings were held including a well attended public meeting on March 20, 2007. (Condemnor's Ex. 3).

24. A RI CS5, LLC transaction report generated on March 27, 2008 and updated January 25, 2010 characterizes the portfolio purchase of the Worsley stores as a "sale-leaseback". (Condemnor's Ex. 10).

25. A letter from Realty Income Corporation dated November 20, 2007 to Sun Capital Partners Group IV, Inc. describes "sale-leaseback financing". (Condemnor's Ex. 1).

26. Thomas F. Hartnett was qualified and testified for the Landowner as its real estate valuation expert. He performed an appraisal and issued his report to Landowner's counsel under his cover letter dated June 25, 2009. (Landowner's Ex. 6).

27. Mr. Hartnett testified he arrived at his opinion of value base after he "coalesced" various approaches. He used the sales comparison approach. He did a direct capitalization approach which he characterized as the income approach. He then valued the going concern. The valuations he derived from three approaches were then blended. Mr. Hartnett did not recall having ever appraised a sale-leaseback property. He did not do any analysis of market rent for convenience stores.

28. Mr. Hartnett's testimony was that the coalesced value of the subject property is \$900,000.00.

29. Charles Crider was qualified and testified as the first real estate valuation expert for the Condemnor.

30. He performed an initial appraisal of Tract No. 244 and issued what he described as an "offer" report to Condemnor. (Condemnor's Ex. 11). He later performed an updated "through the date of take" appraisal and issued a second report to Condemnor. (Condemnor's Ex. 12).

31. Mr. Crider testified regarding the methodologies he utilized in arriving at his opinion of value for the subject. He testified about the significance in his opinion of the "sale-leaseback" arrangement between Landowner and the Worsley Operating Corporation. He quoted from the Dictionary of Real Estate Appraisal, Third Edition, page 318 which defines sale-leaseback as...*"a financing arrangement in which real property is*

sold by its owner/user who simultaneously leases the property from the buyer for continued use. Under this arrangement, the seller receives cash from the transaction and the buyer is assured a tenant and thus a fixed return on investment."

32. Mr. Crider is of the opinion that the rent provided in the lease is not market rent because it is a component of a financing instrument which was intended to produce a fixed return on investment of 8.89%.

33. He valued the subject property based on gross profit multiplier between 2.8 and 3, producing a value of the property as a going concern of \$1,150,000.00.

34. He testified that the going concern value includes real property, personal property and the intangibles of business. He then utilized the cost approach, less depreciation to separate out the real estate and personal property. He testified that whatever is left is the value of the business.

35. Mr. Crider testified that in his opinion the value of the real property on the date of acquisition was \$201,000.00; the value of personal property was \$198,750.00 and the value of the business was \$750,000.00.

36. David Graydon was qualified and testified as Condemnor's second real estate evaluation expert.

37. Mr. Graydon performed an appraisal of the subject and issued his report to Condemnor under his cover letter dated November 2, 2010. (Condemnor's Ex. 14).

38. Mr. Graydon testified about the methodologies he utilized in arriving at his opinion of value on the subject property. He broke down his opinion of value into several component parts. He attributed a going concern value of \$1,100,000.00. He attributed \$351,000.00 to real property and \$190,000.00 to personal property. The business value in his opinion is \$559,000.00.

39. Mr. Graydon used three approaches to arrive at his opinion of value. He used a sales comparison approach using a gross revenue multiplier. He used an income capitalization approach to value the subject as a going concern. He then used the cost approach to value the real and personal property.

40. Mr. Graydon testified that the lease equates to a rental rate of \$55 per square foot. In his opinion, that figure is considerably higher than prevailing market rent for convenience stores. He believes that rental rate may be inflated because it contains going concern or business value.

41. All witnesses were credible, experienced and highly qualified professionals. Each brought in to the courtroom his own background, perspective and well reasoned opinions.

42. After careful consideration of the testimony of each witness and their work product and opinions, I attribute and assign equal weight to the testimony of each witness on the ultimate issue of value.

CONCLUSIONS OF LAW

I conclude as a matter of law as follows:

1. The parties and the subject matter are properly before this Court for adjudication.
2. The pleadings and proceedings are adequate, complete and proper.
3. Venue is proper.
4. This action was commenced by the Condemnor pursuant to the *South Carolina Eminent Domain Procedures Act*, S.C. Code Ann. § 28-2-30 et seq.

5. Landowner did not commence proceedings to challenge Condemnor's right to condemn within thirty days of service of the Condemnation Notice.
6. Just compensation is the issue before the Court.
7. In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered. S.C. Code Ann. § 28-2-370.
8. Because this matter involves a total taking and because there are no benefits to the Landowner, the value of the property is just compensation.
9. Private property shall not be taken for public use without just compensation. S.C. Constitution. Article I, § 13.
10. Landowner has the burden of proving damages. *Rice v. South Carolina Department of Highways and Public Transportation*, 277 S.C. 495, 289 S. E. 2d 645 (1982).
11. The actual value of the land taken means the market value of the land. *South Carolina State Highway Department v. Bolt*, 242 S.C. 411, 131 S. E. 2d 264 (1963).
12. Business, loss of profits, loss of rent or inconvenience in carrying on business which results from the taking of realty by the State under its power of eminent domain is not to be considered as an independent element of damage. *Bolt, infra*. 18 *Am. Jur. Eminent Domain*, Section 259 at 899-901.
13. As the trier of fact it is my responsibility to set a price on the land taken.

14. A guide for setting the price is fair market value. Fair market value is the price for which a willing buyer would pay and a willing seller would accept in the ordinary course of business when neither is compelled to act. In determining fair market value I must not consider speculative or imaginary damages to property. I must confine compensation only to those elements that actually have some bearing upon the market value as of the date of taking. *South Carolina Highway Department v. Hines*, 234 S.C. 254, 107 S. E. 2d 643 (1953).

15. Each expert witness conducted some measure of blending of appraisal approaches to arrive at their respective opinions of value. This is reasonable. Likewise, I consider a blending of their opinions of value to be a fair and reasonable approach to my determination of just compensation. This is particularly reasonable and proper when I consider the wide gap between the lowest figure testified and the highest figure testified to.

16. I also considered the opinion of value of the subject by the Landowner. It should also be blended into my calculation of just compensation.

17. In so doing I have accounted for the existence and the totality of circumstances surrounding the lease on a determination of value. I consider the lease to have some bearing on the value of the subject property. However, it is only one of a variety of factors bearing on my determination of value.

18. The aggregate total of all four values testified at trial was \$2,602,000.00. When blended, giving equal weight to each testified value and divided by four, the figure derived, which I deem to be the actual value of the property as of December 1, 2009 is \$650,500.00.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Landowner RI CS5, LLC be and it hereby is awarded and granted judgment from the South Carolina Department of Transportation in the sum of Six Hundred Fifty Thousand Five Hundred (\$650,500.00) Dollars as just compensation for the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment amount shall be offset and credit given to the Condemnor in the sum of Two Hundred One Thousand (\$201,000.00) Dollars on account of the draw down;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that interest shall accrue on the judgment amount from December 1, 2009 as provided by statute, consideration being given for the draw down credit.

AND IT IS SO ORDERED.

ROBERT E. WATSON
Master-in-Equity, Berkeley County

_____, 2012
Moncks Corner, SC

THE STATE OF SOUTH CAROLINA

In the 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.

RECORD ON APPEAL

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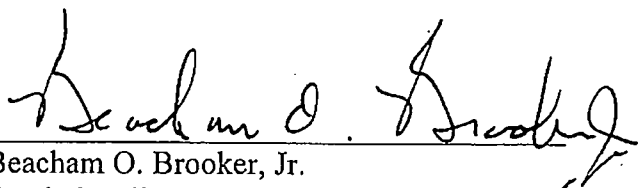
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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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August 1, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

IN THE CIRCUIT COURT

South Carolina Department of Transportation,

Condemnor,

vs.

RI CS5, LLC,

Landowner(s).

and

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

Other Condemnee(s).

Case No. 2009-CP-08-3890

ORDER GRANTING LANDOWNER'S
APPLICATION FOR AWARD
OF REASONABLE LITIGATION
EXPENSES

2013 FEB 24 PM 1:18
FILED
CLERK OF COURT
BERKELEY COUNTY, SC
MARY P. BROOKS

STATEMENT OF THE CASE

THIS MATTER is before the Court on an Application for Award of Reasonable Litigation Expenses filed by Landowner, RI CS5, LLC (hereinafter "Landowner"). The Court conducted a hearing on October 2, 2012, which was attended by counsel for all parties, to determine if the prevailing party, Landowner, is entitled to reasonable litigation expenses, pursuant to S.C. Code § 28-2-510, associated with certain real property in Berkeley County, South Carolina located at 1445 South Live Oak Drive, Moncks Corner, South Carolina (the "Property"), condemned by the South Carolina Department of Transportation (the "Condemnor") on December 1, 2009. The Court, having fully considered the record and

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submissions by the parties, finds that Landowner is entitled to an award of reasonable litigation expenses. Accordingly, for the reasons set forth below, the Court awards Landowner reasonable litigation expenses of one hundred and twenty-six thousand, seven hundred and thirty dollars and eighty-two cents (\$126,730.82).

FINDINGS OF FACT

The Final Order and Judgment (hereinafter "Final Order") of the Court in this matter was entered on May 15, 2012. The Final Order contained Stipulations of Fact, Findings of Fact and Conclusions of Law. The Final Order is hereby incorporated herein as a part of this Order Granting Landowner's Application for Award of Reasonable Litigation Expenses.

In addition to the Findings of Fact contained in the Final Order, the Court makes the following additional Findings of Fact. The Final Order awarded the Landowner nine hundred thousand dollars (\$900,000.00) as just compensation for its property. Such amount is closer to the highest valuation of the property that was attested to at trial on behalf of the Landowner, one million, one hundred and fifty thousand dollars (\$1,150,000.00), than it is to the highest valuation of the property that was attested to at trial on behalf of the Condemnor, three hundred and fifty-one thousand dollars (\$351,000.00).

The Affidavit of Richard D. Bybee, along with the Affidavit and Supplemental Affidavit of Jeffrey S. Tibbals were offered in support of Landowner's Application for Award of Reasonable Litigation Expenses. These Affidavits and the exhibits hereto, are adopted by the Court as Factual Findings in this case. Among other things, these Affidavits establish that this case involved a relatively novel issue of law in South Carolina and involved complex transactions and difficult valuation issues, requiring an analysis beyond a simple sales comparison approach to determine market value. In addition, the case was vigorously contested

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by Condemnior's counsel, involved multiple expert witnesses and was document intensive, necessitating the Landowner's lawyers and paralegals to spend over three hundred twenty-nine hours on the matter over a time period of approximately three years. Co-lead counsel Paul A. Dominick and Jeffrey S. Tibbals enjoy a high professional standing, are well respected within the South Carolina Bar, have thirty-three years and thirteen years of experience, respectively, are well-versed in real estate matters, and practice with, Nexsen Pruet, LLC, a well-established and distinguished law firm. The hourly rates charged by Nexsen Pruet, LLC's attorneys and staff are consistent with rates charged by attorneys in the Tri-County area, including Berkeley County, for similar services. Mr. Dominick's combined hourly rate was three hundred and eighty-three dollars (\$383.00) an hour and Mr. Tibbals combined hourly rate was three hundred and ten dollars (\$310.00) an hour, for an average of three hundred and forty-six dollars (\$346.00) an hour. In addition, Nexsen Pruet, LLC obtained beneficial results for the landowner. In defending the prosecution of this matter the Landowner incurred one hundred and twenty-six thousand, seven hundred and thirty dollars and eighty-two cents (\$126,730.82) in attorneys' fees and costs, including expert witness fees.

CONCLUSIONS OF LAW

Based on the record presented, the Court finds that the Landowner, having prevailed in the above-captioned action, is entitled to an award of reasonable litigation expenses, including attorneys' fees and other costs of litigation expended course of litigation pursuant to S.C. Code § 28-2-510 (B)(1)(Rev. 2007).

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1. Under South Carolina law, reasonable litigation expenses should be awarded to prevailing parties in condemnation cases

In South Carolina, S.C. Code § 28-2-510 (B)(1)(Rev. 2007) governs fee awards and litigation expenses for a prevailing party in condemnation actions. A party is considered to prevail under the statute when "the compensation awarded for the property, exclusive of interest, is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor." S.C. Code § 28-2-510 (B)(2)(Rev. 2007). This allows landowners who are successful in condemnation actions not to have their awards depleted by legal fees necessary to obtain the awards. Although there is no dispute that Landowner was the "prevailing party" in this case, the amount of the award relative to the highest valuations presented by the Condemnor and Landowner establish Landowner as the prevailing party.

Condemnor has argued that its legal position was substantially justified and, thus, Landowner should be precluded from recovering its litigation expenses. With respect to the South Carolina statute at issue, whether the Condemnor's position was "substantially justified" is only a factor that may be applied by the trial court, "in its discretion," to reduce an award of litigation expenses. The "substantially justified" provision is not a bar to the recovery of litigation expenses under S.C. Code § 28-2-510 (B)(1)(Rev. 2007), rather, it is one of many factors relating to the amount of the award that the court may consider.

While the South Carolina appellate courts have not yet interpreted the meaning of "substantially justified" under S.C. Code § 28-2-510, there are numerous South Carolina appellate cases that discuss the landowner's right to attorneys' fees when the landowner is the prevailing party. South Carolina case law has consistently allowed attorneys' fees to the

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prevailing party in condemnation actions. The S.C. Court of Appeals, in the recent decision of *South Carolina Department of Transportation v. Janell P. Revels, et. al.* S.C. Court of appeals Opinion No. 5010, filed July 25, 2012, found that S.C. Code § 28-2-510 shifts the source of the prevailing party's attorneys' fees to the losing party. Considering both South Carolina statutory and case law, this Court finds that the Landowner, as the prevailing party, is entitled to reasonable litigation expenses.

2. The Condemnor's litigating position was not substantially justified

The litigating position of the Condemnor was not substantially justified because none of the final opinions of value proffered by Condemnor took the existing lease and rental income into consideration. The Condemnor based its litigating position on no fewer than three appraisals, two by Charles Crider, and one by David Graydon. The findings of this Court directly contradict the Condemnor's assertion that its position was "substantially justified." This Court, in its Final Order dated May 15, 2012, determined that the testimony of Charles Crider was "unreliable" and of "little, if any, value" because it was based on the "erroneous assumption that the Landowner and the tenant, Worsley Operation Corporation, were related entities." (Final Order and Judgment dated May 15, 2012, p. 7, 8). This Court further noted that there "is no evidence to support Mr. Crider's position that the Landowner and Worsley Operating Corporation were the same entity." *Id.* at 8. The opinions of Mr. Graydon were also flawed because they were based upon the replacement cost approach and not the income capitalization approach. Mr. Graydon "admitted on cross-examination that where real property is purchased for investment for a stream of income, the most appropriate appraisal method is the income capitalization approach. Tr. At p. 218, 1. 19-24" *Id.* at 9.

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Condemnor's refusal to acknowledge the value of the lease stood in contradiction to both Condemnor's own appraisal policies and existing law. Condemnor's own Right of Way Appraisal Manual states that the income capitalization approach must be demonstrated when appraising investment property. Condemnor's refusal to include the value of the lease in its just compensation analysis flew in the face of S.C. Code § 28-2-340(5), which provides for the admissibility of information regarding leases and rents in determining just compensation. Condemnor's reliance on unreliable and unsubstantiated appraisals, their failure to comply with their own guidelines and their failure to comply with South Carolina law leads this Court to form the opinion that their litigating position was not reasonable in fact or in law and, thus, could not be "substantially justified." Notwithstanding the mounting evidence favoring the position that the lease was relevant to just compensation, the Condemnor refused to acknowledge that the lease had any value throughout the case, and during the trial. By the time that Condemnor conceded that the lease held compensable value, the vast majority of attorneys' fees and costs had been spent.

3. The submitted evidence supports that the fees and costs, including expert witness fees were reasonable in defending the prosecution of this action

In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the South Carolina Supreme Court held that the following six factors should be considered when determining a reasonable attorneys' fee: "(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." *Id.* at 308, 486 S.E.2d at 760.

This Court believes that the amount of litigation expenses requested by Landowner is reasonable when considering the *Jackson* factors. The Court finds that this was a complex

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case that was further complicated by the Condemnor's aggressive course of litigation and involved discovery, mediation and trial. Further, the Condemnor's unjustified legal position, in combination with Condemnor's multiple appraisals, increased the work required of Landowner's counsel. Landowner's counsel, Mr. Dominick and Mr. Tibbals, enjoy excellent reputations among the legal community in South Carolina as well as the law firm of Nexsen Pruet, LLC. In addition, the aforementioned attorneys were successful in achieving an excellent result. While Nexsen Pruet, LLC is a statewide law firm, the hourly rates of its attorneys and staff are consistent with the customarily charged rates with the Tri-County area which includes Berkeley County. Based on the submissions of the parties, this Court believes that three hundred and fifty dollars (\$350.00) an hour is a reasonable and customary rate for handling a matter of this type and complexity within the Charleston tri-county area, including Berkeley County. Condemnor's counsel has not submitted an independent affidavit to the contrary. After a review of the detailed billing records provided by Landowner's counsel, the Court finds that the legal work was divided between Landowner's counsel in a reasonable manner. Although Mr. Dominick's combined hourly rate was three hundred and eighty-three dollars (\$383.00) an hour, this is offset by Mr. Tibbals combined hourly rate of three hundred and ten dollars (\$310.00) an hour, for an average of three hundred and forty-six dollars (\$346.00) an hour. The substantial amount at stake in this case reasonably warrants having two experienced attorneys, a senior partner and a junior partner, at trial. Considering all of the foregoing facts in light of the *Jackson* factors, the litigation expenses requested by Landowner are reasonable.

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CONCLUSION

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT

The Condemnor shall pay to the Landowner an amount of one hundred and twenty-six thousand, seven hundred and thirty dollars and eighty-two cents (\$126,730.82), comprising reasonable litigation expenses including fees, costs and expert witnesses in defending the prosecution of this action in accordance with S.C. Code § 28-2-510.

AND IT IS SO ORDERED.

Robert E. Watson
The Honorable Robert E. Watson

February 4, 2013
Mark E. Connor, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

vs.

RI CS5, LLC,

Landowner(s).

and

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

Other Condemnee(s).

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

FINAL ORDER AND JUDGMENT

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2012 MAY 17 PM 2:09

FILED

JUDGE:

DATE OF TRIAL:

ATTORNEYS FOR CONDEMNOR:

ATTORNEY FOR LANDOWNER:

The Honorable Robert E. Watson

December 14, 2011

John S. West

Paul A. Dominick

Jeffrey S. Tibbals

STATEMENT OF THE CASE

THIS MATTER came before the Court on December 14, 2011 for a final hearing on the merits to determine just compensation to RI CS5, LLC for certain real property in Berkeley County, South Carolina located at 1445 South Live Oak Drive, Moncks Corner, South Carolina (the "Property"), condemned by the South Carolina Department of Transportation (the

"Condemnor") on December 1, 2009 pursuant to The South Carolina Eminent Domain Procedure Act, SC Code § 28-2-10 *et seq.*

STIPULATIONS OF FACT

Prior to trial, the parties stipulated to the following facts, which now form part of the record of the case:

1. South Carolina Department of Transportation (SCDOT) is an agency of the State of South Carolina.
2. SCDOT is responsible for planning, construction, maintenance and operation of the state highway system. It coordinates all state and federal programs relating to highways in this state.
3. The US Highway 17-A widening project ("Project") in Berkeley County is being administered by SCDOT.
4. Tract No. 244 is a site designated in the Project.
5. Tract No. 244 was owned by RI CS5, LLC on December 1, 2009.
6. SCDOT initiated this case by the filing of a Condemnation Notice and Tender of Payment and related documents on December 1, 2009.
7. The tender amount was \$201,000.00 which was not accepted by RI CS5, LLC.
8. At the request of RI CS5, LLC, SCDOT agreed to a 100% draw down of the tender amount and the same was paid over to RI CS5, LLC.
9. All documents produced by the parties in the course of discovery shall be deemed authentic. All relevant instruments of record are deemed authentic and admissible.

FINDINGS OF FACT

Landowner RI CS5, LLC is a wholly-owned subsidiary of Realty Income, a publicly owned Real Estate Investment Trust based in Escondido, California (the "Landowner"). Tr. at p. 22, l. 11-17; p. 6, l. 19-21; p. 9, l. 15-25. Realty Income acquires real property for long-term investment, leased to national or regional corporate tenants. Tr. at p. 8, l. 12 – p. 9, l. 25. The income generated from the leases is used to pay a monthly dividend to approximately 90,000

public shareholders. *Id.* Known as "The Monthly Dividend Company," Realty Income has paid dividends to shareholders every month since 1969. *Id.* The dividends paid have consistently increased over time, even during the real estate and financial market turmoil of 2008-2009. Tr. at p. 17, l. 23 – p. 18, l. 9.

Michael R. Pfeiffer testified at trial on behalf of the Landowner. Mr. Pfeiffer is Executive Vice President, General Counsel, and Corporate Secretary of Realty Income, the Landowner's parent corporation. Tr. at p. 7, l. 4-7. Mr. Pfeiffer is an attorney licensed to practice in California and Florida (inactive status) and holds a real estate brokerage license in California. Tr. at p. 7, l. 12-21. Among other duties and responsibilities, Mr. Pfeiffer oversees all real property acquisitions made by Realty Income. Tr. at p. 7, l. 22 - p. 8, l. 11. Final determinations on the suitability of real property investment opportunities are made by Realty Income's Investment Committee, which consists of five individuals, including Mr. Pfeiffer. Tr. at p. 11, l. 5-12.

Realty Income bases real property acquisition decisions upon three underlying criteria, which Mr. Pfeiffer referred to as a "three-legged stool". Tr. at p. 11, l. 13 – p. 12, l. 8. The first criterion is the creditworthiness of the tenant, because the stable receipt of rents is vital to Realty Income's business. Tr. at p. 12, l. 9-17. The second factor is the real estate attributes of the real property, which include demographics, traffic, neighboring properties, nearby property listings for sale, rent comparables, and environmental conditions. Tr. at p. 12, l. 18 - p. 13, l. 24. In connection with Realty Income's due diligence regarding real estate attributes, a representative of Realty Income physically inspects every potential acquisition in person, on site. *Id.* The third element of Realty Income's analysis is the profitability of the tenant's business at the property. Tr. at p. 15, l. 8-23. Cash flow of the underlying business is important to ensure that even if a

tenant faces financial distress or bankruptcy, the tenant will elect to affirm and retain the lease on a profitable location. *Id.*

Realty Income purchased the Property on March 27, 2008 for a purchase price of \$1,150,000, Tr. at p. 30, l. 19-25, as part of a \$65,535,000 transaction involving a portfolio of convenience store properties formerly owned by Worsley Companies, Inc. and its affiliates. Tr. at p. 23, l. 5 – p. 24, l. 17.; Tr. at p. 29, l. 11-17. A private equity firm named Sun Capital Partners, Inc. (“Sun Capital”) based in Boca Raton, Florida had proposed to purchase certain convenience stores owned by Worsley, and to sell the associated real property convenience store sites to Realty Income, which would then lease the properties back to the operating company, Worsley Operating Corporation, then owned by Sun Capital through its subsidiary Village Pantries Holding Corp. Tr. at p. 23, l. 5 – p. 24, l. 17; Condemnor’s Exhibit 10 at p. 1-3.

Realty Income performed its standard due diligence on the Property prior to purchase, and determined that the Property satisfied its acquisition criteria. Tr. at p. 26, l. 11 – p. 28, l. 12; Landowner’s Exhibit 2. The purchase transaction was consummated in the following manner. On March 27, 2008, Realty Income paid a purchase price of \$65,350,000 for the entire Worsley real estate portfolio. Tr. at p. 29, l. 2-20; Landowner’s Exhibit 10. The purchase price for the Property paid by Realty Income was \$1,150,000. Tr. at p. 30, l. 7-25; Landowner’s Exhibit 1. This \$1,150,000 purchase price was determined on a property-specific basis. Tr. at p. 31, l. 19 – p. 33, l. 3. Furthermore, the purchase and sale of the Property constituted an arms-length transaction between a willing buyer and a willing seller. Tr. p. 33, l. 4-7. Mr. Pfeiffer testified that the Landowner’s opinion of value of the Property as of December 1, 2009 was \$1,150,000. Tr. at p. 34, l. 6-9.

The real property in the Worsley portfolio was held by seven separate limited liability companies at the time of the March 27, 2008 closing. Tr. at p. 34, l. 10 – p. 35, l. 6. The individual limited liability company that owned the Property prior to the closing was WF Intermediate Real Estate, LLC, having taken title from the Walter Cecil Worsley, Jr. Revocable Trust, by its Successor Trustees Walter Cecil Worsley, III and James W. Narron by Special Warranty Deed on March 20, 2008. See Landowner's Exhibit 6 at Addendum. Realty Income assumed the membership interests in each of the seven limited liability companies, including WF Intermediate Real Estate, LLC, and consolidated them into one limited liability company, the Landowner. Tr. at p. 34, l. 10 – p. 35, l. 6; Landowner's Exhibits 3, 4, and 5. Neither Realty Income nor the Landowner acquired any interest in the business operations of the convenience stores – only the real property. *Id.* In fact, the Landowner provided undisputed testimony that, as a Real Estate Investment Trust, Realty Income is prohibited from having an ownership interest in any operating company. Tr. at p. 35, l. 7-21.

After the closing, the Landowner leased the Property to Worsley Operating Corporation (then owned by Sun Capital and its subsidiaries) pursuant to that certain Land and Building Lease Agreement dated March 27, 2008 (the "Lease"). Tr. at p. 40, l. 22 – p. 41, l. 8; Landowner's Exhibit 7. Base monthly rent under the Lease was \$8,517.67, which increased annually based upon CPI, the Consumer Price Index. Tr. at p. 41, l. 16-25; Landowner's Exhibit 7. The rent under the Lease was not dependent upon the income generated by store operations, and the Lease was freely assignable by the Landowner. Tr. at p. 42, l. 4-19; Landowner's Exhibit 7. The tenant's obligations under the Lease were guaranteed by Village Pantries Holding Corp., which promised to pay regardless of the profitability of the convenience store. Tr. at p.

45, l. -- p. 46, l. 3; Landowner's Exhibit 9. There has been no default for failure to pay rent on any of the properties in the Worsley portfolio. Tr. p. 45, l. 18 -- p. 46, l. 4.

Thomas F. Hartnett testified as an expert witness for the Landowner. Mr. Hartnett, a real estate appraiser with more than fifty years of experience, testified as to his determination of fair market value for the Property. The final opinion of value provided by Mr. Hartnett was \$900,000. Tr. at p. 108, l. 6 -- p. 109, l. 12; Landowner's Exhibit 6. Mr. Hartnett conducted an analysis of fair market value upon three separate approaches. First, Mr. Hartnett used a sales comparison approach resulting in a value of \$444,500. Second, Mr. Hartnett utilized the direct capitalization approach, considering the Lease, which resulted in a value of \$1,067,000. Third, Mr. Hartnett performed a going concern analysis, resulting in a value of \$1,185,000. See Landowner's Exhibit 6.

Mr. Hartnett testified that he discounted the sales comparison approach because most convenience stores are bought and sold on the basis of going concern value. Tr. at p. 146, l. 1-20. However, Mr. Hartnett testified that because this case involved separate owners of the business and the realty, he placed the most weight on the income capitalization approach, because the Property would be bought and sold in the market on the basis of the income from the Lease. Tr. at p. 146, l. 21 - p. 47, l. 8; Tr. at p. 119, l. 10 -- p. 120, l. 5. Mr. Hartnett testified that because in this case, the Landowner has no interest in the business operations, he used the going concern approach "merely as an indicator of value to see how closely it would check and support the value indicated by the capitalization approach." Tr. at p. 112, l. 2-11. Mr. Hartnett testified that based upon his research, convenience store rent is highly variable depending upon the location and creditworthiness of an operator. He testified that the rent under the Lease is not "out of line" with market rent. Tr. p. 117, l. 6 -- p. 119, l. 1.

Charles F. Crider, a real estate appraiser, testified as an expert witness for the Condemnor. Mr. Crider proffered an opinion of fair market value for the Property of \$201,000.¹ Mr. Crider opined that the Lease provided no indication of the fair market value of the Property “due to the incestuous nature of the entities.” Condemnor’s Exhibit 12 at p. 39. Mr. Crider testified that the Landowner and Worsley Operating Corporation, the tenant, “are the same entity, for purposes of the sale and merger and creation of the Lease. There’s no distinction between those two.” Tr. at p. 175, l. 1 – p. 176, l. 6.

I find Mr. Crider’s testimony to be of little, if any, value for a number of reasons. First, Mr. Crider based his opinions regarding the relevance of the Lease upon the erroneous assumption that the Landowner and the tenant, Worsley Operating Corporation, were related entities. This assumption has no support in the record and, in fact, is thoroughly refuted by the evidence. The chain of title presented in the record plainly demonstrates that Worsley Operating Corporation never owned the Property. Title transferred from the Walter Cecil Worsley, Jr. Revocable Trust to WF Intermediate Realty, LLC. The Landowner then acquired all membership interest in WF Intermediate Realty, LLC, and the latter merged into the Landowner. See Landowner’s Exhibit 3. Mr. Crider’s confusion was evident when he testified, “Worsley would not have been merged into and agreed to the Lease were it not for the fact that they received over \$1 million.” Tr. p.175, l.2 – p.176, l.6. The evidence shows no merger of Worsley Operating Corporation with the Landowner. Rather, only those seven limited liability companies

¹ Both Mr. Crider’s original appraisal report and updated report, Condemnor’s Exhibits 11 and 12, respectively, set forth a value of \$197,703 for the taking, reflecting a small remainder interest of the Landowner. However, the decision by Condemnor to make a total acquisition was made on or before December 1, 2009, a fact overlooked by Crider in his updated November 22, 2011 report nearly two years later.

which owned real property, Worsley Operating Corporation not among them, merged with the Landowner. Landowner's Exhibit 3; Tr. at p. 196, l. 16 – p. 197, l. 3.

There is no evidence to support Mr. Crider's contention that the Landowner and Worsley Operating Corporation were the same entity. Mr. Crider appeared to overlook the fact that Sun Capital through its subsidiaries purchased the convenience store operations and became the owners of Worsley Operating Corporation. The Condemnor offered no evidence of any common ownership between the Landowner, Sun Capital, or Worsley Operating Corporation. In fact, Mr. Pfeiffer offered unrefuted testimony to the contrary. Tr. at p. 25, l. 20 – p. 26, l. 10; p. 226, l. 9 – 228, l. 4. The only document advanced by Mr. Crider to assert that the Lease was between related parties was part of an Offering Memorandum created prior to the Landowner's purchase of the Property. Tr. at p. 228, l. 11 – p. 229, l. 22.

Mr. Crider's mistaken assumptions regarding the nature of the transaction render his opinions unreliable. For example, his faulty premise that the landlord and tenant were the same entity served as his justification to exclude the Lease from his analysis of the fair market value of the Property. As discussed in further detail below, I find that the Lease must be considered in determining the fair market value of the Property. In addition, Mr. Crider's erroneous factual analysis led him to wholly ignore the distinction between the Landowner and the owner of the business operations. Mr. Crider expounded upon his preferred methodology for valuation of convenience stores, which involves a multiple of the store's gross profits. Tr. p. 168, l. 18 – p. 169, l. 21. However, this approach overlooks the fact that the owner of the real property and the operator of the store in this case are separate and distinct entities. The Landowner had no convenience store "going concern" to sell, only the real property accompanied by the Lease.

Mr. Crider provided additional ill-founded opinions. For example, Mr. Crider testified that the Lease was actually a mortgage, and therefore not reflective of market rent. Tr. at p. 177, l. 4—p. 178, l. 20. However, Mr. Crider admitted on cross-examination that that he performed no analysis of market rent. Tr. at p. 183, 15-24. Finally, Mr. Crider also erroneously testified that personal property was bought by the Landowner and leased from the Landowner to the tenant, Tr. at p. 177, l. 17-24; p. 190, l. 17-24, when the record and the Lease prove the contrary. See Landowner's Exhibit 7 at p. 1, defining the "Premises" as the "Land and Improvements" defined in Exhibit "A" to the Lease, together with the Storage Tank System.

David Graydon also testified as an expert appraisal witness for the Condemnor. Unlike Mr. Crider, Mr. Graydon made a determination of the value of the Leased Fee Estate, or the value of the Lease to the landlord/owner, in the amount of \$924,000. Mr. Graydon testified that his opinion of the fair market value of the Property as of December 1, 2009, the date of the taking, was \$351,000 for the real property, \$190,000 for the personal property, and a business value of \$559,000 for a total "going concern" value of \$1,100,000. Mr. Graydon's final opinion of fair market value was \$351,000, an amount that does not include or take into consideration his opinion of \$924,000 in value for the Leased Fee Estate. Mr. Graydon's final opinion of value is based upon the replacement cost approach, but he admitted on cross-examination that where real property is purchased for investment for a stream of income, the most appropriate appraisal method is the income capitalization approach. Tr. at p. 218, l. 19-24.

Mr. Graydon gave no justification for excluding the value of the Leased Fee Estate, other than his opinion that the Lease contained a higher than typical market rental rate, and therefore it appeared to him that the rent "may contain the going concern or the business value". Tr. at p. 212, l. 17 – p. 213, l. 13. However, Mr. Graydon admitted on cross-examination that his stated

value of \$924,000 for the Leased Fee Estate took into consideration his opinion that the rent seemed high, and any sale-leaseback concerns. Tr. at p. 216, l. 2 – p. 217, l. 14. Further, Mr. Graydon admitted that he performed no analysis regarding the creditworthiness of the tenant or guarantor, factors that could increase the value of the Leased Fee Estate. Tr. at p. 219, l. 4 – p. 220, l. 14.

Mr. Graydon testified that he had a copy of the Lease and was familiar with its terms when he performed his appraisal. Tr. at p. 215 l.15 – 25. The Lease is in the record as Landowner's Exhibit 7, and its terms speak for themselves. The Lease conveys a leasehold interest in the real property and improvements only. Notably, the Lease does not include assets belonging to the convenience store business, such as personal property, equipment, inventory, and goodwill. See Landowner's Exhibit 7. Of course, this is because the Landowner did not own these elements of the business – they were owned by the tenant Worsley Operating Corporation and its parent companies, Village Pantries Holding Corp. and Sun Capital. Therefore, any suggestion by Mr. Graydon that the rent includes payment for business assets such as those identified above runs contrary to the express terms of the Lease, and the realities of the split ownership of real property and operations.

CONCLUSIONS OF LAW

The primary legal issue to be decided is whether to take the value of the Lease into consideration in determining the fair market value of the Property, and consequently the just compensation to be awarded to the Landowner.

1. The Value of the Lease Must Be Considered in Determining the Fair Market Value of the Property

South Carolina law requires consideration of rental income in determining the fair market value of the real property condemned. The South Carolina eminent domain statute squarely

addresses the issue. The statute, at S.C. Code § 28-2-340(5), permits as admissible "evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to the property . . ." Information regarding leases and rents is admissible because it is fundamentally relevant to the market value of real property, especially investment property.

Condemnor has made two primary arguments as to why the Lease should not be considered. First, the Condemnor takes the position that considering the income generated from the Lease is tantamount to including the going concern value of the convenience store operations. Second, the Condemnor characterizes the Lease as a related-party transaction that strips it of any relevance in determining the fair market value of the Property. I address each argument in turn.

a. Compensation for "Going Concern" Value Is Not an Issue in this Case

The Condemnor cites South Carolina jurisprudence holding that the going concern value of the business must not be considered in determining just compensation. *See South Carolina State Highway Dep't v. Bolt*, 242 S.C. 411, 131 S.E.2d 264 (1963). The Condemnor's reliance upon *Bolt* and its progeny is misplaced in this case. The undisputed facts establish that the Landowner does not have any ownership interest in the operations of the convenience store located on the Property. The Landowner owned only the real estate, while the business operations were owned by Worsley Operating Corporation. Thus, the Condemnor did not take any "going concern" from the Landowner -- the Landowner owned no "going concern" business to lose. The separation of the real property and the business operations distinguishes this case from *Bolt*, and other South Carolina cases excluding the going concern value, where the owner of the real property and the business were one and the same.

The Court of Appeals in *Gray v. South Carolina Department of Highways and Public Transportation*, 311 S.C. 144, 427 S.E.2d 899 (Ct.App. 1992),² correctly affirmed the generally accepted rule and stated as follows:

The general rule is that the value of a business being conducted upon property condemned may not be a component of the market value of the property. *Bolt, supra*. However, the fact that a business is being conducted on the property should be considered in determining the value of the real estate, if in fact the business enhances the property's value. *Id.* Thus, while it is permissible to utilize the capitalization of earning method, it is the earnings from the property that must be capitalized, not the earnings from the business. See, *J. Sackman, 5 Nichols on Eminent Domain*, § 19.01, p. 19-8 (under the income approach, an appraiser calculates the economic rent the property will command in the open market, deducts normal operating expenses to arrive at net operating income and then capitalizes the net operating income by a rate of return to arrive at an opinion of fair market value).

Gray, 311 S.C. at 153, 427 S.E.2d at 904 (emphasis added).

In a recent case decided by the North Carolina Court of Appeals, the parties took positions similar to those at issue here. In *City of Charlotte v. Hurlahe*, 178 N.C.App. 144 (2006), the condemning City argued that it was improper for a jury to consider the landowner's loss of income generated through use of the property as a parking lot. The North Carolina Court of Appeals acknowledged that lost business profits are generally not compensable, however the Court took care to distinguish profits generated from the property itself as opposed to profits generated from a business operated on the property.

Plaintiff correctly states that "[l]oss of profits are not elements of recoverable damages in an award for a taking under the power of eminent domain." *Dept. of Trans. v. Byrum*, 82 N.C.App. 96, 99, 345 S.E.2d 416, 418 (1986) (citation omitted). Thus, for example, if identical adjoining stores were taken in the condemnation of a shopping center, the owners of these two stores should be entitled to the same amount in damages, even if one owner ran a profitable fine jewelry business, while the other operated a failing shoe repair shop.

² Overruled by, *Hardin v. South Carolina Dep't of Transp.*, 371 S.C. 598, 607-08, 641 S.E.2d 437, 442-44 (2007), in its holding that the closing of an abutting road to a property constitutes some degree of compensable taking, but not on any valuation issue.

However, "rental income ... has long been an accepted consideration in arriving at fair market value of the property at the time of the taking." *Byrum*, 82 N.C.App. at 100, 345 S.E.2d at 419 (distinguishing the income from rental of campground spaces from the profits of a restaurant and game room located in the campground). Thus, "[w]hen rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking." *Kirkman v. Highway Commission*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962) (citation omitted).

City of Charlotte v. Hurlahe, 178 N.C. App. 144, 149-50, 631 S.E.2d 28, 31-32 (2006).

Jurisprudence from other jurisdictions is in accord with the view that rental income must be factored into the value of real property taken by power of eminent domain. See, e.g., *Lamar Advantage Holding Co., Inc. v. Arkansas State Highway Com'n*, 369 Ark. 295, 253 S.W.3d 914 (2007) (quoting *North Little Rock Urban Renewal Agency v. Van Bibber*, 252 Ark. 1248, 483 S.W.2d 223 (1972) ("Capitalization of income is a recognized method of arriving at the fair market value of real estate used to produce rental income, in determining just compensation in eminent domain cases. We have long held evidence of rental value to be admissible as a factor to be considered in determining just compensation."); *People v. Dunn*, 46 Cal.2d 639, 297 P.2d 964 (1956) ("it is the general rule that income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property."); *Gray & Gregory v. GTE South Inc.*, 261 Va. 67, 540 S.E.2d 498 (2001) ("Evidence of the amount of rental income generated by real property subject to a taking is a relevant factor that the commissioners are entitled to consider when establishing the fair market value of that property."))

The *Gray* decision directly resolves the issue before me, and I am bound to follow the decisions of the South Carolina Court of Appeals. The *Gray* decision establishes that South Carolina adheres to the generally accepted view that rental income from a lease should be

considered in determining fair market value, and thus, just compensation to a landowner, in an eminent domain proceeding. The Landowner in this case has lost the income generated by the Property, the sole purpose for which the Landowner acquired it. The Landowner had no interest in the convenience store business, and the rental payments were not contingent upon any amount of income generated by the store. Therefore, because the income to the Landowner derived from the Property itself, rather than any business, the going concern exception is inapplicable, and the Lease must factor heavily in the just compensation analysis.

b. The Evidence Does Not Support the Condemnor's Position that the Lease Is a Related-Party Sham

The second argument advanced by the Condemnor urging that this Court ignore the Lease generating income for the Property as an indicator of value is an alleged "incestuous" relationship between the Landowner and the tenant, Worsley Operating Corporation. The Condemnor asserts that the Lease is a sham, or alternatively, that the Lease is only a mortgage in disguise. I find that neither contention has merit.

First, as discussed extensively above, I find no evidence of any common ownership between the Landowner and the tenant Worsley Operating Corporation. A visual depiction of the transaction and chain of title, attached as Appendix A to this Final Order and Judgment, makes this point clear. Second, I conclude that the Lease is not a mortgage. As elicited during the cross-examination of Mr. Crider, at the end of the term of a mortgage, title remains in the name of the party in possession, the owner, and the mortgagee's interest in the property vanishes. Tr. at p. 188, l. 3 – 21. At the end of the term of a lease, it is the party in possession whose property rights are extinguished, and the landlord retains the remainder interest, to use or to lease again as it sees fit. *Id.*

Finally, even if the Lease is a product of a sale-leaseback arrangement, such a finding does not render the Lease immaterial in determining the fair market value of the Property. Rather, it is a factor to be considered in determining whether or not the rent is a fair market rent. *See, e.g.,* Condemnor Exhibit No. 14 at p. 102 ("The subject's rental history is analyzed and the rental data of six similar convenience stores in South Carolina is analyzed to establish the relation of contract rent to market rent . . . The value of the leased fee state is \$924,000.") Mr. Graydon opined that the rent paid under the Lease is above-market, but he testified that he considered this factor, and the sale-leaseback arrangement, in making a final determination of the value of the Leased Fee Estate in the amount of \$924,000. Therefore, even accepting the Condemnor's premise as valid, and discounting the value of the income stream accordingly, the Condemnor's own expert appraiser has presented evidence that the value of the Lease to the Landowner is no less than \$924,000. This income stream is precisely what the Landowner has lost as a result of the condemnation.

Therefore, this Court holds that the Lease must be considered in the valuation of the Property.

FINAL DETERMINATION OF JUST COMPENSATION

Having determined that the Lease must be considered, I find that the only opinions of the value of the Property in evidence which incorporate the income generated from the Lease are as follows:

1. The Landowner's testimony and opinion of value in the amount of \$1,150,000, the March 27, 2008 purchase price.
2. Mr. Hartnett's testimony and opinion of value in the amount of \$900,000.

3. Mr. Graydon's testimony and opinion of value of the Leased Fee Estate in the amount of \$924,000.00.

The Condemnor did not challenge Mr. Hartnett's calculations under the income capitalization approach. In fact, the Condemnor's own expert, David Graydon, used an income capitalization approach to value the Leased Fee Estate at \$924,000. Further, Mr. Graydon testified that his \$924,000 valuation took into account that the lease arrangement appeared to be a sale-leaseback and that the rent appeared to be above-market to Graydon. Tr. At p. 216, 1.2 – p. 217, 1.14. The Condemnor presented no evidence of the fair market value of the Property if the income from the Lease is to be included in the valuation. The Condemnor's proffered opinions of value, \$201,000 and \$351,000, reflect only the raw land, without factoring in the existence of the business on the Property, much less the valuable Lease and the rental income it produced.

Having carefully considered all of the evidence, I find that the fair market value of the Property, and the amount of just compensation due to the Landowner, is \$900,000.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT

The Condemnor shall pay to the Landowner an amount of \$900,000, comprising the total amount of just compensation less the drawdown of \$201,000 paid to the Landowner previously; and

The Condemnor shall pay interest on the award of just compensation, less the drawdown, at a rate of eight percent per year from December 1, 2009 in accordance with SC Code § 28-2-420; and

An application for attorneys' fees may be made by either party within fifteen days of the entry of this Final Judgment and Order in accordance with SC Code § 28-2-510;

AND IT IS SO ORDERED.

Robert E. Watson

The Honorable Robert E. Watson

8/15, 2012

Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

vs.

RI CS5, LLC,

Landowner(s).

and

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

Other Condemnee(s).

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

**LANDOWNER'S APPLICATION FOR
AWARD OF REASONABLE
LITIGATION EXPENSES**

Having prevailed in the above-captioned action, the Landowner, RI CS5, LLC petitions the Court, pursuant to S.C. Code § 28-2-510, for an award of reasonable litigation expenses, including attorneys' fees and other costs of litigation expended in the course of the above-captioned action. The Landowner is entitled to such an award based on its recovery of \$900,000 as just compensation for its property. Such amount is closer to the highest valuation of the property that was attested to at trial on behalf of the Landowner (\$1,150,000) than it is to the highest valuation of the property that was attested to at trial on behalf of the Condemnor (\$351,000). The Landowner incurred \$114,068.82 in attorneys' fees and costs, including expert witness fees, in the prosecution of this action and seeks recovery of same. This Application is

based on the record of the proceeding, the applicable law, and the itemized statements of litigation expenses including fees and costs attached hereto as Exhibits A, B, and C to the accompanying Affidavit of Jeffrey S. Tibbals, which are incorporated herein. This Application is made within fifteen (15) days after entry of the Final Order and Judgment on May 17, 2012, in accordance with S.C. Code § 28-2-510.



Paul S. Dominick, Esquire
Jeffrey S. Tibbals, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
PO Box 486
Charleston, South Carolina (29402)
843-577-9440

ATTORNEYS FOR LANDOWNER RI CS5, LLC

June 1, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

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Carolina Corporation, Lessee, and Berkeley
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Other Condemnee(s).

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

**AFFIDAVIT OF
JEFFREY S. TIBBALS**

PERSONALLY APPEARED before me, Jeffrey S. Tibbals, who being first duly sworn does state as follows:

1. I am one of the attorneys for the Landowner, RI CS5, LLC and its sole member Realty Income Corporation ("Landowner"), in the above-captioned action practicing with the firm of Nexsen Pruet, LLC ("Nexsen Pruet").

2. Landowner retained Nexsen Pruet as counsel with respect to the condemnation of the subject property on or around April 28, 2009.

3. Undersigned counsel is informed and believes that this Court must consider six factors in determining what constitutes reasonable attorneys' fees: (i) the nature, extent and difficulty of services rendered; (ii) the time and labor necessarily devoted to the case; (iii) the professional standing of counsel; (iv) the contingency of compensation; (v) the fee customarily charged in the locality of similar legal services; and (vi) the beneficial results obtained.

4. With respect to the first factor, the nature, extent and difficulty of services rendered, this case involved a relatively novel issue of law in South Carolina jurisprudence regarding the effect of a lease upon real property in the determination of just compensation. The

case involved complex transactions and difficult valuation issues, requiring an analysis far beyond a simple sales comparison approach to determine market value. The case was vigorously contested by able and esteemed counsel on behalf of Condemnor. Condemnor relied upon two separate appraisers as expert witnesses, with two separate appraisals. The case was also document intensive with Landowner producing over 1400 pages of documents. The amount in dispute was significant, totaling several hundred thousand dollars.

5. With respect to the time and labor necessarily devoted to the case, Landowner's lawyers and paralegals spent three hundred twenty-nine hours on the matter over a time period of approximately three years. The time spent and tasks performed were necessary and appropriate for the complexity of issues involved and the size of the amount in dispute.

6. With respect to the third factor, co-lead counsel Paul A. Dominick and Jeffrey S. Tibbals enjoy a high professional standing, are well respected within the South Carolina Bar, have 33 and 13 years of experience, respectively, are well-versed in real estate matters, and practice with a well-established and distinguished law firm.

7. The fourth factor is not an issue, because the compensation was not contingent, but rather, earned, billed and collected on an hourly basis.

8. Regarding the fifth factor, the fee customarily charged in the locality for similar services, undersigned counsel is informed and believes that many attorneys in the area represent landowners in condemnation cases on a contingency fee basis, with the fee measured as a percentage of the difference between the amount originally offered by the condemnor and the amount ultimately received as just compensation. Had Nexsen Pruet negotiated a contingency fee arrangement in this case, the fee would have been approximately \$233,000, representing one-third of the difference between \$900,000 and \$201,000. Nexsen Pruet's fees are less than half of this customary fee. Additionally, the hourly rates charged by Nexsen Pruet's attorneys and staff are consistent with the rates charged by attorneys in the Tri-County area for similar services.

9. With respect to the sixth and final factor, Nexsen Pruet obtained beneficial results for the Landowner in this case. Although the Landowner did not receive the full value to which it believed it was entitled, the award of \$900,000 significantly exceeds the offer of \$201,000 tendered by Condemnor prior to Nexsen Pruet's involvement.

10. I have personal knowledge of and access to the records kept by Nexsen Pruet regarding the fees and expenses incurred on behalf of the Landowner in the above captioned condemnation action.

11. As of May 18, 2012 attorneys' fees in the total sum of one hundred two thousand nineteen and 50/100 (\$102,019.50) Dollars have been charged to Landowner per the detailed statements attached as Exhibit "A" and incorporated herein. Landowner has actually paid \$101,451.90, with the remainder only recently or not yet billed.

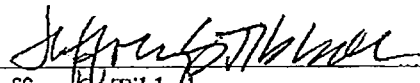
12. As of May 18, 2012 other litigation expenditures in the total sum of twelve thousand forty-nine and 32/100 (\$12,049.32) dollars have been charged to and paid by Landowner as indicated in Exhibit "B" and Exhibit "C" hereto. The bulk of these expenses are expert fees of Thomas F. Hartnett, totaling \$7,855.00 for an appraisal and time spent preparing

for and providing testimony at the trial of this matter. As shown in Exhibit "C", a \$5,200.00 invoice from Mr. Hartnett was paid directly by Landowner, and a second invoice in the amount of \$2,655.00 was paid by Nexsen Pruet and charged to and paid by Landowner. The remainder of the costs, shown in Exhibit "B", were paid by Nexsen Pruet as advanced expenses, then charged to and paid by Landowner.

13. For the reasons set forth in this Affidavit, the sums set forth above, as detailed in Exhibit "A," are reasonable litigation expenses to which Landowner is entitled pursuant to S.C. Code Ann. § 28-2-510 (1976 as amended).

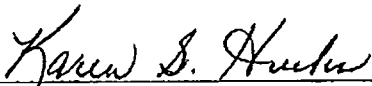
14. The reasonable litigation expenses in this matter have been computed as of May 18, 2012, and total \$114,068.82.

FURTHER AFFIANT SAYETH NOT.



Jeffrey S. Tibbals

SWORN TO and subscribed before me
this 1st day of June, 2012.



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 02-24-13

EXHIBIT "A"

<u>Date</u>	<u>Initials</u>	<u>Name / Invoice Number</u>	<u>Description</u>	<u>Hours</u>	<u>Amount</u>
4/20/2009	149	PAUL DOMINICK	REVIEW DOCUMENTS.	0.7	252.00
5/28/2009		Invoice=53309207		0.7	252.00
4/21/2009	149	PAUL DOMINICK	REVIEW DOCUMENTS; TELEPHONE CONFERENCE WITH	4.1	1,476.00
5/28/2009		Invoice=53309207	MS. KING CONCERNING FACTS AND STRATEGY.	4.1	1,476.00
4/24/2009	149	PAUL DOMINICK	WORK ON CONDEMNATION ISSUES.	1	360.00
5/28/2009		Invoice=53309207		1	360.00
4/28/2009	486	SARA JOYNER	PREPARATION OF AFFIDAVIT OF NAME CHANGE FOR	0.4	68.00
5/28/2009		Invoice=53309207	PAUL DOMINICK.	0.4	68.00
4/30/2009	149	PAUL DOMINICK	WORK ON MERGER FILING.	0.6	216.00
5/28/2009		Invoice=53309207		0.6	216.00
5/8/2009	149	PAUL DOMINICK	UPDATE CLIENT ON STATUS; TELEPHONE CONFERENCE	0.7	252.00
5/28/2009		Invoice=53309207	WITH MR. HARTNETT CONCERNING APPRAISAL.	0.7	252.00
5/12/2009	149	PAUL DOMINICK	ATTEMPTS TO CONTACT APPRAISER.	0.3	108.00
5/28/2009		Invoice=53309207		0.3	108.00
5/13/2009	149	PAUL DOMINICK	UPDATE TO CLIENT.	0.3	108.00
5/28/2009		Invoice=53309207		0.3	108.00
6/18/2009	149	PAUL DOMINICK	UPDATE STATUS; CONTACT WITH RIGHT OF WAY	0.6	216.00
7/29/2009		Invoice=53318933	AGENT.	0.6	216.00
6/23/2009	149	PAUL DOMINICK	TELEPHONE CALL WITH RIGHT-OF-WAY AGENT	0.3	108.00
7/29/2009		Invoice=53318933	CONCERNING APPRAISAL AND STATUS.	0.3	108.00
6/26/2009	149	PAUL DOMINICK	TELEPHONE CALL WITH MR. HARTNETT CONCERNING	0.3	108.00
7/29/2009		Invoice=53318933	APPRAISAL.	0.3	108.00
6/30/2009	149	PAUL DOMINICK	REVIEW APPRAISAL; COMMUNICATIONS WITH CLIENT	1.2	432.00
7/29/2009		Invoice=53318933	CONCERNING THE SAME.	1.2	432.00
7/1/2009	149	PAUL DOMINICK	REVIEW APPRAISALS AND PREPARE FOR CONFERENCE	1.3	468.00
7/29/2009		Invoice=53318933	CALL; CONFERENCE CALL WITH CLIENT.	1.3	468.00
7/16/2009	149	PAUL DOMINICK	REVIEW NEW OFFER; FORWARD TO CLIENT;	0.9	324.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
7/29/2009		Invoice=53318933	TELEPHONE CONFERENCE WITH MR. HARTNETT CONCERNING APPRAISAL.	0.9	324.00
7/27/2009	149	PAUL DOMINICK	REVIEW LEASE AND CORRESPONDENCE FROM MR.	0.7	252.00
8/28/2009		Invoice=53323436	WESTBURY.	0.7	252.00
7/28/2009	149	PAUL DOMINICK	CALLS TO MR. WESTBURY.	0.3	108.00
8/28/2009		Invoice=53323436		0.3	108.00
7/30/2009	149	PAUL DOMINICK	WORK ON VALUATION ISSUES; EXCHANGE MESSAGES	0.7	252.00
8/28/2009		Invoice=53323436	WITH MR. WESTBURY CONCERNING WORSLEY RELOCATION EXPENSES.	0.7	252.00
8/7/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MS. ONATE	0.8	288.00
8/28/2009		Invoice=53323436	CONCERNING STATUS; REVIEW DOCUMENTS.	0.8	288.00
8/18/2009	149	PAUL DOMINICK	CORRESPONDENCE WITH MR. WESTBURY CONCERNING	0.4	144.00
8/28/2009		Invoice=53323436	MEETING.	0.4	144.00
9/3/2009	149	PAUL DOMINICK	REVIEW CORRESPONDENCE FROM MR. WESTBURY;	0.6	216.00
9/25/2009		Invoice=53328033	RESPOND TO THE SAME.	0.6	216.00
9/11/2009	451	KIMBERLY TAYLOR	MEETING WITH ATTORNEY DOMINICK RE	0.3	46.50
9/25/2009		Invoice=53328033	INVESTIGATION TO BE PERFORMED WITH REGARD TO KNOWLEDGE OF CONDEMNATION BY MR. WORSLEY.	0.3	46.50
9/11/2009	149	PAUL DOMINICK	CONFERENCE WITH MS. TAYLOR CONCERNING SCDOT	0.3	108.00
9/25/2009		Invoice=53328033	TIMELINE.	0.3	108.00
9/14/2009	451	KIMBERLY TAYLOR	ANALYZE FILE RE FAMILIARITY WITH THE FACTS;	2.3	356.50
9/25/2009		Invoice=53328033	PREPARE TIMELINE OF EVENTS; CORRESPONDENCE TO SUSIE ONATE RE PERTINENT DATES.	2.3	356.50
9/15/2009	451	KIMBERLY TAYLOR	NUMEROUS TELEPHONE CALLS TO SC DEPARTMENT OF	2.8	434.00
9/25/2009		Invoice=53328033	REVENUE AND RESEARCH ONLINE RE OBTAINING LIST OF OFFICERS FILED WITH ANNUAL REPORT OF WF INTERMEDIATE REAL ESTATE TO SEE IF ANY ONE OF THEM ATTENDED PUBLIC INFORMATION MEETING; RESEARCH INTERNET RE ANY INFORMATION ON WF INTERMEDIATE REAL ESTATE TRYING TO FIND LIST	2.8	434.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
			OF EMPLOYEES; RESEARCH POST AND COURIER AND BERKELEY INDEPENDENT NEWSPAPERS RE PUBLIC NOTICES POSTED BY SCDOT RE PUBLIC INFORMATION MEETING; TELEPHONE CALL TO POST AND COURIER RE SAME; SEVERAL E-MAILS TO AND FROM SUSIE ONATE RE PERTINENT DATES AND DOCUMENTS SHE OBTAINED FROM SC DOT; RECEIPT AND REVIEW OF NUMEROUS DOCUMENTS SENT BY MS. ORNATE; FINALIZE TIMELINE.		
9/16/2009	451	KIMBERLY TAYLOR	MEMO TO ATTORNEY DOMINICK RE EVENTS LEADING	0.3	46.50
9/25/2009		Invoice=53328033	UP TO FIRST CONTACT WITH MR. WORSLEY RE WIDENING HIGHWAY 17.	0.3	46.50
9/16/2009	149	PAUL DOMINICK	WORK ON APPRAISAL ISSUES; WORK ON TIMELINE;	1	360.00
9/25/2009		Invoice=53328033	E-MAILS TO SCDOT.	1	360.00
9/17/2009	149	PAUL DOMINICK	CONFERENCE CALL WITH MS. KING AND MS. ONATE	1.3	468.00
9/25/2009		Invoice=53328033	CONCERNING STATUS AND STRATEGY; REVIEW TIMELINE AND CONTACT SCDOT.	1.3	468.00
9/18/2009	149	PAUL DOMINICK	COMMUNICATIONS WITH SCDOT AND CLIENT.	0.6	216.00
9/25/2009		Invoice=53328033		0.6	216.00
9/23/2009	149	PAUL DOMINICK	REVIEW CAP RATE INFORMATION AND PROPOSED	0.8	288.00
10/29/2009		Invoice=53334132	COMPARABLES; CONFERENCE WITH MS. KING AND MS. ONATE CONCERNING STATUS AND STRATEGY.	0.8	288.00
9/28/2009	149	PAUL DOMINICK	WORK ON DRAW DOWN.	0.3	108.00
10/29/2009		Invoice=53334132		0.3	108.00
9/30/2009	149	PAUL DOMINICK	WORK ON EXPENSE REIMBURSEMENT ISSUE; SET UP	0.6	216.00
10/29/2009		Invoice=53334132	MEETING WITH SCDOT.	0.6	216.00
10/1/2009	149	PAUL DOMINICK	WORK ON APPRAISAL ISSUES.	0.4	144.00
10/29/2009		Invoice=53334132		0.4	144.00
10/6/2009	149	PAUL DOMINICK	MEETING WITH MARK WESTBURY CONCERNING MOVING	1.1	396.00
10/29/2009		Invoice=53334132	EXPENSES; REVIEW FILE MATERIALS RELATING TO ITEMS TO MOVE.	1.1	396.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
10/14/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH CLIENT CONCERNING	0.8	288.00
10/29/2009		Invoice=53334132	APPRAISAL ISSUES; WORK ON VALUATION ISSUES.	0.8	288.00
10/19/2009	149	PAUL DOMINICK	WORK ON APPRAISAL AND RELOCATION ISSUES.	0.7	252.00
11/24/2009		Invoice=53337740		0.7	252.00
10/28/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MS. KING CONCERNING	0.4	144.00
11/24/2009		Invoice=53337740	APPRAISAL AND STATUS; REVIEW APPRAISAL.	0.4	144.00
11/4/2009	149	PAUL DOMINICK	WORK ON APPRAISAL ISSUES.	1.5	540.00
11/24/2009		Invoice=53337740		1.5	540.00
11/5/2009	149	PAUL DOMINICK	REVIEW APPRAISAL; MEETING WITH MR. HARTNETT	1.5	540.00
11/24/2009		Invoice=53337740	TO DISCUSS THE SAME; TELEPHONE CONFERENCE WITH MS. KING AND MS. ONATE CONCERNING STATUS.	1.5	540.00
11/20/2009	149	PAUL DOMINICK	CALL TO MR. HARTNETT; COMMUNICATE WITH CLIENT	0.4	144.00
12/30/2009		Invoice=53342688	CONCERNING APPRAISAL.	0.4	144.00
11/23/2009	149	PAUL DOMINICK	WORK ON CONDEMNATION DAMAGES ISSUES; CALL TO	0.7	252.00
12/30/2009		Invoice=53342688	APPRAISER.	0.7	252.00
11/24/2009	149	PAUL DOMINICK	WORK ON CONDEMNATION ISSUES; TELEPHONE	2.5	900.00
12/30/2009		Invoice=53342688	CONFERENCE WITH WORSLEY REPRESENTATIVE; TELEPHONE CONFERENCE WITH APPRAISER; TELEPHONE CONFERENCE WITH MS. ONATE.	2.5	900.00
11/25/2009	149	PAUL DOMINICK	WORK WITH WORSLEY AND CLIENT ON RELOCATION	0.5	180.00
12/30/2009		Invoice=53342688	ISSUES.	0.5	180.00
11/30/2009	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES.	0.5	180.00
12/30/2009		Invoice=53342688		0.5	180.00
12/2/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH OPPOSING COUNSEL	0.3	108.00
12/30/2009		Invoice=53342688	CONCERNING STATUS AND ACCEPTANCE OF SERVICE.	0.3	108.00
12/3/2009	149	PAUL DOMINICK	REVIEW CORRESPONDENCE FROM OPPOSING COUNSEL.	0.3	108.00
12/30/2009		Invoice=53342688		0.3	108.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/4/2009	149	PAUL DOMINICK	WORK ON CONDEMNATION AND RELOCATION ISSUES.	1	360.00
12/30/2009		Invoice=53342688		1	360.00
12/7/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MS. ONATE	1	360.00
12/30/2009		Invoice=53342688	CONCERNING STATUS; REVIEW DOCUMENTS; TELEPHONE CONFERENCE WITH MR. WEST CONCERNING CHECK AND ACCEPTANCE OF SERVICE.	1	360.00
12/10/2009	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES AND REISSUE OF	0.7	252.00
12/30/2009		Invoice=53342688	CHECK.	0.7	252.00
12/15/2009	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES; TELEPHONE	0.8	288.00
12/30/2009		Invoice=53342688	CONFERENCE WITH MS. ONATE CONCERNING THE SAME.	0.8	288.00
12/16/2009	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MR. WEST CONCERNING	1.2	432.00
12/30/2009		Invoice=53342688	RELOCATION EXPENSES; TELEPHONE CONFERENCE WITH MR. ONATE CONCERNING THE SAME; FAX INFORMATION TO MR. WEST.	1.2	432.00
1/4/2010	149	PAUL DOMINICK	E-MAILS TO MS. ONATE AND MARK WESTBURY.	0.4	148.00
1/22/2010		Invoice=53346396		0.4	148.00
1/5/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MR. WESTBURY	0.4	148.00
1/22/2010		Invoice=53346396	CONCERNING RELOCATION EXPENSES; E-MAIL TO CLIENT CONCERNING THE SAME.	0.4	148.00
1/6/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MS. ONATE	1.7	629.00
1/22/2010		Invoice=53346396	CONCERNING STATUS; CALL TO OPPOSING COUNSEL; DRAFT RESPONSE TO CONDEMNATION NOTICE; TELEPHONE CONFERENCE WITH COUNSEL FOR WORSLEY.	1.7	629.00
1/13/2010	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES.	1	370.00
1/22/2010		Invoice=53346396		1	370.00
1/14/2010	149	PAUL DOMINICK	WORK ON CONDEMNATION ISSUES.	1.5	555.00
1/22/2010		Invoice=53346396		1.5	555.00
1/15/2010	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES.	0.8	296.00
1/22/2010		Invoice=53346396		0.8	296.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
1/19/2010	149	PAUL DOMINICK	REVIEW AND FORWARD E-MAIL TO MS. ONATE.	0.3	111.00
2/26/2010		Invoice=53352473		0.3	111.00
1/20/2010	149	PAUL DOMINICK	WORK ON RELOCATION ISSUES.	0.5	185.00
2/26/2010		Invoice=53352473		0.5	185.00
1/29/2010	149	PAUL DOMINICK	WORK ON INSURANCE ISSUE; TELEPHONE CONFERENCE	0.8	296.00
2/26/2010		Invoice=53352473	WITH MS. ONATE CONCERNING THE SAME; CALL TO OPPOSING COUNSEL; E-MAIL TO CLIENT; CALL FROM MR. WEST CONCERNING RELEASE OF CHECK; CONTACT CLIENT CONCERNING THE SAME.	0.8	296.00
3/5/2010	149	PAUL DOMINICK	WORK ON ADDITIONAL INFORMATION FOR NEW	0.5	185.00
5/28/2010		Invoice=53367597	APPRAISAL; COMMUNICATE WITH CLIENT CONCERNING THE SAME.	0.5	185.00
3/10/2010	149	PAUL DOMINICK	WORK ON CONDEMNATION ISSUES.	0.4	148.00
5/28/2010		Invoice=53367597		0.4	148.00
3/12/2010	149	PAUL DOMINICK	WORK ON ISSUES RELATING TO APPROVAL TO TAKE	0.5	185.00
5/28/2010		Invoice=53367597	DOWN CONDEMNATION PROCEEDS.	0.5	185.00
4/14/2010	149	PAUL DOMINICK	E-MAIL TO MARK WESTBURY CONCERNING PAYMENT	0.3	111.00
5/28/2010		Invoice=53367597	FOR THE TANKS.	0.3	111.00
4/19/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MR. WEST CONCERNING	0.7	259.00
5/28/2010		Invoice=53367597	CHECK; CONFERENCE CALL WITH CLIENTS CONCERNING STATUS.	0.7	259.00
4/21/2010	149	PAUL DOMINICK	DRAFT CORRESPONDENCE TO CLIENT CONCERNING	1	370.00
5/28/2010		Invoice=53367597	CURRENT ASSESSMENT OF THE CASE; ANSWER E-MAIL QUESTIONS.	1	370.00
4/22/2010	149	PAUL DOMINICK	WORK ON LETTER FOR CLIENT; E-MAILS CONCERNING	1	370.00
5/28/2010		Invoice=53367597	THE SAME.	1	370.00
4/26/2010	149	PAUL DOMINICK	CALL TO MR. PHINNEY CONCERNING DRAWDOWN.	0.2	74.00
5/28/2010		Invoice=53367597		0.2	74.00
5/7/2010	149	PAUL DOMINICK	REVIEW DISCOVERY; OBTAIN EXTENSION; FORWARD	0.7	266.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
5/28/2010		Invoice=53367597	DISCOVERY TO MS. ONATE.	0.7	259.00
6/11/2010	149	PAUL DOMINICK	WORK ON ISSUE CONCERNING COMPENSATION FOR	0.3	114.00
9/9/2010		Invoice=53383187	TANKS.	0.3	114.00
7/9/2010	149	PAUL DOMINICK	WORK ON TANK TRANSFER ISSUES; E-MAILS TO DOT	0.7	266.00
9/9/2010		Invoice=53383187	AND CLIENT.	0.7	266.00
7/30/2010	149	PAUL DOMINICK	CORRESPONDENCE CONCERNING COMPENSATION FOR	0.4	152.00
9/9/2010		Invoice=53383187	UNDERGROUND STORAGE TANKS.	0.4	152.00
9/3/2010	483	NEYLE JERVEY	RECEIVE/REVIEW MEMO FROM PAUL DOMINICK;	0.4	60.00
10/29/2010		Invoice=53390892	RESEARCH DEED ON BERKELEY COUNTY WEB-SITE AND FORWARD COPY TO PAUL DOMINICK.	0.4	60.00
9/7/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MR. WEST CONCERNING	0.5	190.00
10/29/2010		Invoice=53390892	VALUATION AND MEDIATION ISSUES.	0.5	190.00
10/4/2010	149	PAUL DOMINICK	REVIEW AND FORWARD INFORMATION TO MR. WEST.	0.3	114.00
10/29/2010		Invoice=53390892		0.3	114.00
10/5/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH OPPOSING COUNSEL	0.8	304.00
10/29/2010		Invoice=53390892	CONCERNING FINANCIAL INFORMATION; FORWARD LEASE AND APPRAISALS TO OPPOSING COUNSEL.	0.8	304.00
10/18/2010	149	PAUL DOMINICK	REVIEW INFORMATION CONCERNING MEDIATION;	0.6	228.00
10/29/2010		Invoice=53390892	REVIEW SALE OF NEARBY PROPERTY.	0.6	228.00
10/27/2010	149	PAUL DOMINICK	WORK ON MEDIATION ISSUES.	0.7	266.00
1/31/2011		Invoice=53404470		0.7	266.00
10/28/2010	149	PAUL DOMINICK	WORK ON MEDIATION AND TAX ISSUES.	1.5	570.00
1/31/2011		Invoice=53404470	CORRESPONDENCE TO MEDIATOR; DISCUSSIONS WITH OPPOSING COUNSEL.	1.5	570.00
11/1/2010	149	PAUL DOMINICK	CONFERENCE CALL WITH MS. KING AND MS. ONATE	1.5	570.00
1/31/2011		Invoice=53404470	CONCERNING MEDICATION; E-MAIL TO MR. PAYNE CONCERNING COMPARABLE SALE; REVIEW MATERIALS FOR MEDIATION.	1.5	570.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
11/5/2010	149	PAUL DOMINICK	REVIEW NEW APPRAISAL; COMMUNICATIONS WITH	2.5	950.00
1/31/2011		Invoice=53404470	CLIENTS CONCERNING THE SAME; PREPARE FOR MEDIATION.	2.5	950.00
11/8/2010	149	PAUL DOMINICK	PREPARE FOR AND ATTEND MEDIATION; E-MAIL TO	6	2,280.00
1/31/2011		Invoice=53404470	CLIENT CONCERNING STATUS.	6	2,280.00
11/9/2010	149	PAUL DOMINICK	TELEPHONE CONFERENCE WITH MS. KING CONCERNING	1.5	570.00
1/31/2011		Invoice=53404470	STATUS AND STRATEGY; REVIEW CASE LAW ON LEASE VALUATIONS; EMAIL TO OPPOSING COUNSEL AND MEDIATOR CONCERNING CASE LAW AND STATUS.	1.5	570.00
12/8/2010	306	JEFFREY TIBBALS	CONFERENCE WITH PAUL DOMINICK REGARDING	0.5	140.00
1/31/2011		Invoice=53404470	OVERVIEW OF CONDEMNATION MATTER.	0.5	155.00
12/8/2010	306	JEFFREY TIBBALS	REVIEW PAUL DOMINICK ANALYSIS OF INCOME/CAP	0.6	168.00
1/31/2011		Invoice=53404470	RATE VALUATION AND REVIEW AND CONSIDER BOLT AND GRAY CASE OPINIONS.	0.6	186.00
12/8/2010	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING	0.6	228.00
1/31/2011		Invoice=53404470	DISCOVERY AND TRIAL PREPARATION; E-MAIL TO MS. ONATE CONCERNING THE SAME. DEFAULT	0.6	228.00
12/9/2010	306	JEFFREY TIBBALS	REVIEW AND CONSIDER ENTIRE FILE INCLUDING	3.4	952.00
1/31/2011		Invoice=53404470	CORRESPONDENCE, LEASE, DOT AND HARTNETT APPRAISALS, PLEADINGS, DISCOVERY REQUESTS FROM PLAINTIFF CONDEMNOR.	3.4	1,054.00
12/9/2010	306	JEFFREY TIBBALS	DRAFT INTERROGATORIES AND REQUESTS FOR	1.3	364.00
1/31/2011		Invoice=53404470	PRODUCTION OF DOCUMENTS.	1.3	403.00
12/9/2010	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	28.00
1/31/2011		Invoice=53404470	REGARDING DISCOVERY ISSUES.	0.1	31.00
12/9/2010	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	56.00
1/31/2011		Invoice=53404470	DISCOVERY ISSUES, SCHEDULING.	0.2	62.00
12/10/2010	306	JEFFREY TIBBALS	DRAFT OBJECTIONS AND ANSWERS TO	2.1	588.00
1/31/2011		Invoice=53404470	INTERROGATORIES.	2.1	651.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/10/2010	306	JEFFREY TIBBALS	DRAFT OBJECTIONS AND RESPONSES TO REQUESTS	0.7	196.00
1/31/2011		Invoice=53404470	FOR PRODUCTION.	0.7	217.00
12/10/2010	306	JEFFREY TIBBALS	REVISE AND AMEND INTERROGATORIES.	0.4	112.00
1/31/2011		Invoice=53404470		0.4	124.00
12/10/2010	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.5	140.00
1/31/2011		Invoice=53404470	REGARDING RESPONSES TO DISCOVERY REQUESTS.	0.5	155.00
12/10/2010	306	JEFFREY TIBBALS	CONSIDER DISCOVERY STRATEGY, WITNESSES AND	0.5	140.00
1/31/2011		Invoice=53404470	DEPOSITIONS.	0.5	155.00
12/10/2010	306	JEFFREY TIBBALS	REVISE AND AMEND REQUESTS FOR PRODUCTION.	0.3	84.00
1/31/2011		Invoice=53404470		0.3	93.00
12/10/2010	306	JEFFREY TIBBALS	DRAFT LETTER TO JOHN WEST SERVING DISCOVERY	0.2	56.00
1/31/2011		Invoice=53404470	REQUESTS.	0.2	62.00
12/10/2010	413	DENISE LECLERC	PARTICIPATE IN CONFERENCE CALL WITH ATTORNEY	0.8	128.00
1/31/2011		Invoice=53404470	TIBBALS AND SUSIE ONATE REGARDING DISCOVERY RESPONSES TO OPPOSING COUNSEL AND ITEMS NEEDED FOR DOCUMENT PRODUCTION; MEET AND BRIEFLY ADDRESS CASE WITH ATTORNEY TIBBALS PRIOR TO CONFERENCE CALL.	0.8	136.00
12/16/2010	306	JEFFREY TIBBALS	REVIEW REVISED ANSWERS TO INTERROGATORIES	0.3	84.00
1/31/2011		Invoice=53404470	FROM SUSI ONATE.	0.3	93.00
12/17/2010	413	DENISE LECLERC	REVIEW E-MAIL FROM COUNSEL REGARDING	0.1	16.00
1/31/2011		Invoice=53404470	DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	0.1	17.00
12/17/2010	306	JEFFREY TIBBALS	EMAIL CORRESPONDENCE WITH SUSIE ONATE0.1		28.00
1/31/2011		Invoice=53404470	REGARDING REVISION TO INTERROGATORIES	0.1	31.00
12/17/2010	306	JEFFREY TIBBALS	REVIEW REVISED INTERROGATORY ANSWER	0.3	84.00
1/31/2011		Invoice=53404470		0.3	93.00
12/21/2010	306	JEFFREY TIBBALS	TELEPHONE CALL WITH LAURA KING, SUSIE ONATE	0.2	62.00
1/31/2011		Invoice=53404470	REGARDING DISCOVERY ISSUES	0.2	62.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/21/2010	306	JEFFREY TIBBALS	REVISE AND AMEND INTERROGATORY ANSWERS	0.3	93.00
1/31/2011		Invoice=53404470		0.3	93.00
1/4/2011	413	DENISE LECLERC	IDENTIFY, OBTAIN AND PREPARE DISCOVERY	1.9	323.00
1/31/2011		Invoice=53404470	DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL AND E-MAILS TO COUNSEL REGARDING SAME.	1.9	323.00
1/5/2011	413	DENISE LECLERC	WORK ON ELECTRONICALLY INDEXING AND	4.8	816.00
1/31/2011		Invoice=53404470	IDENTIFYING DEFENDANT'S DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	4.8	816.00
1/6/2011	413	DENISE LECLERC	REVIEW AND RESPOND TO E-MAIL WITH COUNSEL	0.1	17.00
1/31/2011		Invoice=53404470	REGARDING STATUS OF DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	0.1	17.00
1/6/2011	413	DENISE LECLERC	BRIEFLY ADDRESS STATUS OF CLIENT DOCUMENTS	0.2	34.00
1/31/2011		Invoice=53404470	FOR PRODUCTION WITH ATTORNEY TIBBALS.	0.2	34.00
1/6/2011	413	DENISE LECLERC	CONTINUE TO WORK ON CLIENT DISCOVERY	2.2	374.00
1/31/2011		Invoice=53404470	DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL INCLUDING REDACTING AND IDENTIFY PRIVILEGE DOCUMENTS.	2.2	374.00
1/6/2011	306	JEFFREY TIBBALS	BEGIN INITIAL REVIEW OF PRODUCTION DOCUMENTS;	4.2	1,302.00
1/31/2011		Invoice=53404470	CONSIDER PRIVILEGE ISSUES.	4.2	1,302.00
1/6/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.1	31.00
1/31/2011		Invoice=53404470	REGARDING STATUS OF DOCUMENT REVIEW.	0.1	31.00
1/8/2011	306	JEFFREY TIBBALS	CONTINUE REVIEW OF DOCUMENTS TO BE PRODUCED	2.7	837.00
1/31/2011		Invoice=53404470	AND CONSIDER PRIVILEGE ISSUES	2.7	837.00
1/10/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
1/31/2011		Invoice=53404470	REGARDING STATUS OF DOCUMENTS.	0.1	31.00
1/12/2011	306	JEFFREY TIBBALS	FURTHER REVISE AND AMEND INTERROGATORY	0.7	217.00
1/31/2011		Invoice=53404470	RESPONSES.	0.7	217.00
1/12/2011	306	JEFFREY TIBBALS	REVIEW LIST OF PRIVILEGE ISSUES/DOCUMENT	0.4	124.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
1/31/2011		Invoice=53404470	QUESTIONS.	0.4	124.00
1/12/2011	413	DENISE LECLERC	CONTINUE TO IDENTIFY DOCUMENTS RECEIVED IN	2.2	374.00
3/14/2011		Invoice=53412578	PRODUCTION FOR PRODUCTION TO OPPOSING COUNSEL AND WORK ON PRIVILEGE LOG OF DOCUMENTS.	2.2	374.00
1/13/2011	413	DENISE LECLERC	CONTINUE TO ELECTRONICALLY PREPARE AND INDEX	1.7	289.00
3/14/2011		Invoice=53412578	DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	1.7	289.00
1/13/2011	413	DENISE LECLERC	REVIEW AND RESPOND TO E-MAILS WITH COUNSEL	0.2	34.00
3/14/2011		Invoice=53412578	REGARDING STATUS OF DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	0.2	34.00
1/13/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.2	62.00
1/31/2011		Invoice=53404470	REGARDING DOCUMENT PRODUCTION ISSUES, BEN FOX DOCUMENTS.	0.2	62.00
1/14/2011	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM SUSIE ONATE	0.3	93.00
1/31/2011		Invoice=53404470	REGARDING BEN FOX DOCUMENTS.	0.3	93.00
1/18/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH LAURA KING, SUSIE	1.2	372.00
3/14/2011		Invoice=53412578	ONATE REGARDING DISCOVERY AND PRIVILEGE ISSUES.	1.2	372.00
1/18/2011	413	DENISE LECLERC	OBTAIN AND PREPARE SUPPLEMENTAL DOCUMENTS	0.7	119.00
3/14/2011		Invoice=53412578	PRODUCED BY CLIENT FOR FUTURE DISCOVERY PRODUCTION AND IN PREPARATION FOR CONFERENCE CALL WITH CLIENT.	0.7	119.00
1/18/2011	413	DENISE LECLERC	CONFERENCE CALL WITH JEFF TIBBALS, LAURA KING	1.5	255.00
1/31/2011		Invoice=53404470	AND SUSIE ONATE REGARDING DISCOVERY DOCUMENT PRODUCTION AND PRIVILEGED DOCUMENTS.	1.5	255.00
1/19/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER WORSLEY OFFERING MEMO;	0.9	279.00
3/14/2011		Invoice=53412578	CONSIDER PRIVILEGE/CONFIDENTIALITY ISSUES.	0.9	279.00
1/20/2011	413	DENISE LECLERC	CONTINUE TO IDENTIFY AND PREPARE DISCOVERY	0.9	153.00
3/14/2011		Invoice=53412578	DOCUMENTS FOR DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	0.9	153.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
1/24/2011	413	DENISE LECLERC	CONTINUE TO IDENTIFY DISCOVERY DOCUMENTS FOR	1.2	204.00
3/14/2011		Invoice=53412578	PRODUCTION TO OPPOSING COUNSEL.	1.2	204.00
1/25/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.00
3/14/2011		Invoice=53412578	DISCOVERY ISSUES.	0.1	31.00
1/25/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH LAURA KING	0.1	31.00
3/14/2011		Invoice=53412578	REGARDING STATUS.	0.1	31.00
1/26/2011	413	DENISE LECLERC	DRAFT CONFIDENTIALITY ORDER AND CONTINUE TO	1.6	272.00
3/14/2011		Invoice=53412578	PREPARE CONFIDENTIAL DOCUMENTS FOR PRODUCTION.	1.6	272.00
2/2/2011	413	DENISE LECLERC	REVIEW E-MAIL CORRESPONDENCE FROM COUNSEL	0.2	34.00
3/14/2011		Invoice=53412578	REGARDING STATUS OF DISCOVERY RESPONSES AND DOCUMENTS FOR PRODUCTION.	0.2	34.00
2/2/2011	413	DENISE LECLERC	CONTINUE TO WORK ON IDENTIFYING DISCOVERY	5.4	918.00
3/14/2011		Invoice=53412578	DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL INCLUDING CONFIDENTIAL DOCUMENTS AND REDACTION THEREOF; CONFIRMING PRIVILEGED DOCUMENTS AND FINALIZING PRIVILEGE LOG; FINALIZING RI CSS'S ANSWERS TO SCDOT'S FIRST INTERROGATORIES TO LANDOWNER AND RESPONSES TO REQUEST FOR PRODUCTION; CONTINUE TO ELECTRONICALLY INDEX SAME FOR PRODUCTION THEREOF.	5.4	918.00
2/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
3/14/2011		Invoice=53412578	REGARDING SCHEDULING ORDER, CONFIDENTIALITY ORDER.	0.2	62.00
2/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
3/14/2011		Invoice=53412578	REGARDING OFFERING MEMORANDUM.	0.1	31.00
2/2/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING	0.1	31.00
3/14/2011		Invoice=53412578	UPCOMING STATUS CONFERENCE, SCHEDULING ORDER.	0.1	31.00
2/2/2011	306	JEFFREY TIBBALS	DRAFT CONSENT AMENDED SCHEDULING ORDER.	0.4	124.00
3/14/2011		Invoice=53412578		0.4	124.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
2/3/2011	413	DENISE LECLERC	CONTINUE AND FINISH WORKING ON IDENTIFYING	5.6	952.00
3/14/2011		Invoice=53412578	DISCOVERY DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL INCLUDING CONFIDENTIAL DOCUMENTS AND REDACTION THEREOF; CONFIRMING PRIVILEGED DOCUMENTS AND FINALIZING PRIVILEGE LOG; FINALIZING RI CSS'S ANSWERS TO SCDOT'S FIRST INTERROGATORIES TO LANDOWNER AND RESPONSES TO REQUEST FOR PRODUCTION; FINALIZE CONFIDENTIAL LOG FOR PRODUCTION TO OPPOSING COUNSEL; CONTINUE AND FINISH ELECTRONICALLY INDEXING SAME FOR PRODUCTION THEREOF.	5.6	952.00
2/3/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
3/14/2011		Invoice=53412578	REGARDING SCHEDULING ORDER.	0.2	62.00
2/3/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.00
3/14/2011		Invoice=53412578	STATUS.	0.1	31.00
2/4/2011	413	DENISE LECLERC	REVIEW E-MAIL CORRESPONDENCE FROM COUNSEL	0.1	17.00
3/14/2011		Invoice=53412578	REGARDING DISCOVERY RESPONSES FOR SERVICE ON SCDOT.	0.1	17.00
2/4/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
3/14/2011		Invoice=53412578	REGARDING CONSENT AMENDED SCHEDULING ORDER.	0.1	31.00
2/4/2011	306	JEFFREY TIBBALS	FINAL REVIEW AND REVISIONS TO ANSWERS TO	0.8	248.00
3/14/2011		Invoice=53412578	INTERROGATORIES AND RESPONSES TO REQUESTS FOR PRODUCTION.	0.8	248.00
2/8/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JEFF PAYNE	0.1	31.00
3/14/2011		Invoice=53412578	REGARDING CONSENT ORDERS.	0.1	31.00
2/8/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JEFF PAYNE, JOHN	0.1	31.00
3/14/2011		Invoice=53412578	WEST REGARDING CONSENT ORDERS.	0.1	31.00
2/8/2011	413	DENISE LECLERC	REVIEW E-MAIL CORRESPONDENCE FROM COUNSEL	0.1	17.00
3/14/2011		Invoice=53412578	REGARDING PROPOSED SCHEDULING ORDER AND CONFIDENTIALITY ORDER.	0.1	17.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
2/10/2011	413	DENISE LECLERC	REVIEW E-MAIL CORRESPONDENCE FROM COUNSEL	0.1	17.00
3/14/2011		Invoice=53412578	REGARDING STATUS OF CONFIDENTIALITY ORDER SUBMITTED TO OPPOSING COUNSEL.	0.1	17.00
2/10/2011	413	DENISE LECLERC	ELECTRONICALLY PREPARE CD OF CONFIDENTIAL	0.2	34.00
3/14/2011		Invoice=53412578	DOCUMENTS FOR PRODUCTION TO OPPOSING COUNSEL.	0.2	34.00
2/11/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO JUDGE HARRINGTON REGARDING	0.1	31.00
3/14/2011		Invoice=53412578	CONSENT SCHEDULING ORDER.	0.1	31.00
2/22/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
5/4/2011		Invoice=53419697	VARIOUS DISCOVERY ISSUES, REFERENCE TO MASTER.	0.2	62.00
2/22/2011	306	JEFFREY TIBBALS	CONSIDER TRIAL STRATEGY.	0.2	62.00
5/4/2011		Invoice=53419697		0.2	62.00
2/23/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
5/4/2011		Invoice=53419697	REGARDING CONFIDENTIALITY ORDER.	0.1	31.00
2/23/2011	306	JEFFREY TIBBALS	DRAFT E-MAIL MEMO TO LAURA KING REGARDING	0.4	124.00
5/4/2011		Invoice=53419697	BENCH TRIAL, ORDER OF REFERENCE, JUDGE WATSON.	0.4	124.00
2/23/2011	149	PAUL DOMINICK	WORK ON CASE STRATEGY; REVIEW MEMO ON	0.6	240.00
5/4/2011		Invoice=53419697	REFERENCE TO THE MASTER IN EQUITY.	0.6	240.00
2/24/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
5/4/2011		Invoice=53419697	REGARDING REFERENCE TO MASTER.	0.1	31.00
2/24/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
5/4/2011		Invoice=53419697	REGARDING REFERENCE TO MASTER.	0.2	62.00
2/25/2011	306	JEFFREY TIBBALS	CONSIDER TRIAL STRATEGY, DISCOVERY,	0.6	186.00
5/4/2011		Invoice=53419697	DEPOSITIONS.	0.6	186.00
3/1/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
5/4/2011		Invoice=53419697	REGARDING CONSENT ORDER OF REFERENCE.	0.1	31.00
3/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JEFF PAYNE	0.2	62.00
5/4/2011		Invoice=53419697	REGARDING CONSENT ORDER OF REFERENCE.	0.2	62.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
3/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
5/4/2011		Invoice=53419697	REGARDING CONSENT ORDER OF REFERENCE.	0.2	62.00
3/3/2011	306	JEFFREY TIBBALS	REVISE PROPOSED CONSENT ORDER OF REFERENCE.	0.2	62.00
5/4/2011		Invoice=53419697		0.2	62.00
3/7/2011	306	JEFFREY TIBBALS	CONSIDER ORDER OF REFERENCE/DIRECT APPEAL TO	0.2	62.00
5/4/2011		Invoice=53419697	SOUTH CAROLINA SUPREME COURT.	0.2	62.00
3/8/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.5	155.00
5/4/2011		Invoice=53419697	REGARDING MASTER APPEALS ISSUES; TELEPHONE CONFERENCE WITH PAUL DOMINICK REGARDING APPEALS ISSUES; CONSIDER STRATEGY.	0.5	155.00
3/9/2011	306	JEFFREY TIBBALS	FURTHER CONSIDER DIRECT APPEAL ISSUE; CONDUCT	1.6	496.00
5/4/2011		Invoice=53419697	LEGAL RESEARCH REGARDING SUPREME COURT JURISDICTION; E-MAIL CORRESPONDENCE WITH JOHN WEST; REVISE AND AMEND CONSENT ORDER OF REFERENCE.	1.6	496.00
3/9/2011	127	STEPHEN GROVES	READ AND REVIEW E-MAIL CORRESPONDENCE FROM	0.2	76.00
5/4/2011		Invoice=53419697	ATTORNEY TIBBALS RE: CONCERNS WITH OPPOSITION'S REQUEST FOR ANY APPEAL FROM MASTER-IN-EQUITY BE DIRECTLY TO SOUTH CAROLINA SUPREME COURT.	0.2	76.00
3/9/2011	127	STEPHEN GROVES	RESEARCHING APPELLATE ISSUES VIS-A-VIS	0.7	266.00
5/4/2011		Invoice=53419697	REQUEST FOR ANY APPEAL FROM MASTER-IN-EQUITY BE DIRECTLY TO SOUTH CAROLINA SUPREME COURT	0.7	266.00
3/9/2011	127	STEPHEN GROVES	E-MAIL CORRESPONDENCE TO ATTORNEY TIBBALS RE:	0.7	266.00
5/4/2011		Invoice=53419697	CONFIRMATION THAT ANY APPEAL FROM MASTER-IN-EQUITY WILL NORMALLY BE DIRECTLY TO THE SOUTH CAROLINA COURT OF APPEALS INSTEAD OF TO THE SOUTH CAROLINA SUPREME COURT	0.7	266.00
3/10/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST, JEFF	0.1	31.00
5/4/2011		Invoice=53419697	PAYNE REGARDING CONSENT ORDER OF REFERENCE.	0.1	31.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
3/10/2011	306	JEFFREY TIBBALS	PREPARE MOTION COVER SHEET AND DRAFT LETTER	0.2	62.00
5/4/2011		Invoice=53419697	TO JUDGE HARRINGTON REGARDING CONSENT	0.2	62.00
			CONFIDENTIALITY ORDER		
3/11/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO JOHN WEST ENCLOSING SIGNED	0.1	31.00
5/4/2011		Invoice=53419697	CONSENT ORDER OF REFERENCE.	0.1	31.00
3/17/2011	413	DENISE LECLERC	BRIEFLY ADDRESS STATUS OF CASE WITH ATTORNEY	0.1	17.00
5/4/2011		Invoice=53419697	TIBBALS.	0.1	17.00
3/17/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING	0.1	31.00
5/4/2011		Invoice=53419697	SCHEDULING ORDER ISSUES.	0.1	31.00
3/18/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING STATUS,	0.1	31.00
5/4/2011		Invoice=53419697	SCHEDULING ORDER.	0.1	31.00
3/22/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO CLERK OF COURT FILING CONSENT	0.1	31.00
5/4/2011		Invoice=53419697	CONFIDENTIALITY ORDER.	0.1	31.00
3/22/2011	306	JEFFREY TIBBALS	REVIEW EXECUTED CONFIDENTIALITY ORDER.	0.1	31.00
5/4/2011		Invoice=53419697		0.1	31.00
3/24/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO JUDGE HARRINGTON REGARDING	0.2	62.00
5/4/2011		Invoice=53419697	CONSENT ORDER CONFIDENTIALITY.,	0.2	62.00
3/28/2011	306	JEFFREY TIBBALS	DRAFT STATUS REPORT TO SUSIE ONATE.	0.5	155.00
5/4/2011		Invoice=53419697		0.5	155.00
3/28/2011	306	JEFFREY TIBBALS	REVIEW CONSENT ORDER OF REFERENCE AND LETTER	0.2	62.00
5/4/2011		Invoice=53419697	FROM JOHN WEST.	0.2	62.00
3/29/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
5/4/2011		Invoice=53419697	REGARDING MIKE PFEIFFER TRIAL AVAILABLE	0.1	31.00
			SCHEDULE.		
3/29/2011	306	JEFFREY TIBBALS	REVIEW FILED CONSENT CONFIDENTIALITY ORDER.	0.1	31.00
5/4/2011		Invoice=53419697		0.1	31.00
4/8/2011	306	JEFFREY TIBBALS	WORK ON DISCOVERY PLANNING, STRATEGY	0.5	155.00
5/4/2011		Invoice=53419697		0.5	155.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
4/12/2011	413	DENISE LECLERC	BRIEFLY DISCUSS CASE ISSUES AND DOCUMENTS	0.2	34.00
5/4/2011		Invoice=53419697	PRODUCTION WITH ATTORNEY TIBBALS.	0.2	34.00
4/12/2011	413	DENISE LECLERC	CHECK ON STATUS OF CONFIDENTIAL DOCUMENT	0.3	51.00
5/4/2011		Invoice=53419697	PRODUCTION TO OPPOSING COUNSEL AND CONFIRM ALL CONFIDENTIAL DOCUMENTS AND LOG PRODUCED IN THEIR ENTIRETY.	0.3	51.00
4/26/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
5/31/2011		Invoice=53423659	REGARDING STATUS.	0.1	31.00
4/26/2011	306	JEFFREY TIBBALS	WORK ON DISCOVERY ISSUES AND STATUS	0.2	62.00
5/31/2011		Invoice=53423659	CONFERENCE WITH JUDGE WATSON.	0.2	62.00
4/26/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST, AMANDA	0.2	62.00
5/31/2011		Invoice=53423659	WILLIAMSON REGARDING STATUS CONFERENCE.	0.2	62.00
4/26/2011	413	DENISE LECLERC	TWO TELEPHONE CALLS WITH JOHN WEST, ESQUIRE	0.2	34.00
5/31/2011		Invoice=53423659	REGARDING STATUS OF PROPOSED STATUS CONFERENCE WITH JUDGE WATSON AND OVERDUE DISCOVERY RESPONSES.	0.2	34.00
4/26/2011	413	DENISE LECLERC	TWO TELEPHONE CALLS WITH AMANDA AT JUDGE	0.2	34.00
5/31/2011		Invoice=53423659	WATSON'S OFFICE REGARDING PROPOSED DATES FOR STATUS CONFERENCE AND FINAL ARRANGEMENTS CONFIRMING SAME.	0.2	34.00
4/26/2011	413	DENISE LECLERC	TELEPHONE CALL WITH JEFFREY PAYNE'S ASSISTANT	0.2	34.00
5/31/2011		Invoice=53423659	REGARDING PROPOSED DATES FOR STATUS CONFERENCE WITH JUDGE WATSON.	0.2	34.00
4/26/2011	413	DENISE LECLERC	REVIEW AND RESPOND TO E-MAILS WITH COUNSEL	0.2	34.00
5/31/2011		Invoice=53423659	REGARDING STATUS OF STATUS CONFERENCE AND OVERDUE DISCOVERY RESPONSES FROM COUNSEL FOR SCDOT.	0.2	34.00
4/28/2011	306	JEFFREY TIBBALS	REVIEW ROSTER NOTICE.	0.1	31.00
5/31/2011		Invoice=53423659		0.1	31.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
4/29/2011	413	DENISE LECLERC	REVIEW AND RECEIPT OF BERKELEY COUNTY	0.1	17.00
5/31/2011		Invoice=53423659	FORECLOSURE ROSTER REGARDING STATUS OF HEARING IN CASE SCHEDULED ON 5/3/11.	0.1	17.00
5/2/2011	306	JEFFREY TIBBALS	PREPARE FOR STATUS CONFERENCE WITH JUDGE	0.5	155.00
5/31/2011		Invoice=53423659	WATSON.	0.5	155.00
5/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JEFF PAYNE	0.1	31.00
5/31/2011		Invoice=53423659	REGARDING WORSLEY.	0.1	31.00
5/3/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
5/31/2011		Invoice=53423659	REGARDING STATUS CONFERENCE.	0.1	31.00
5/3/2011	306	JEFFREY TIBBALS	STATUS CONFERENCE WITH JUDGE WATSON, JOHN	0.3	93.00
5/31/2011		Invoice=53423659	WEST, JEFF PAYNE.	0.3	93.00
5/3/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
5/31/2011		Invoice=53423659	DISCOVERY, WITNESS ISSUES.	0.2	62.00
5/3/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
5/31/2011		Invoice=53423659	REGARDING STATUS CONFERENCE.	0.1	31.00
5/9/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER ANSWER TO INTERROGATORIES	0.8	248.00
5/31/2011		Invoice=53423659	AND RESPONSES TO REQUESTS FOR PRODUCTION; CONSIDER ADDITIONAL REQUESTS.	0.8	248.00
5/12/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.4	124.00
5/31/2011		Invoice=53423659	REGARDING DISCOVERY RESPONSES FROM SCDOT; CONSIDER DISCOVERY STRATEGY	0.4	124.00
5/18/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.3	93.00
7/15/2011		Invoice=53431760	REGARDING TRIAL DATE, STATUS OF VARIOUS ISSUES.	0.3	93.00
5/19/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.00
7/15/2011		Invoice=53431760	TRIAL DATE.	0.1	31.00
5/19/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL DATE.	0.1	31.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
5/19/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL DATE.	0.1	31.00
5/20/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL DATE.	0.1	31.00
5/24/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
7/15/2011		Invoice=53431760	TRIAL DATE, DISCOVERY ISSUES.	0.2	62.00
5/24/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL DATE.	0.1	31.00
6/1/2011	306	JEFFREY TIBBALS	WORK ON SUPPLEMENTAL DISCOVERY REQUESTS.	0.3	93.00
7/15/2011		Invoice=53431760		0.3	93.00
6/1/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JANET RUGHEIMER OF	0.2	62.00
7/15/2011		Invoice=53431760	HARTNETT REALTY REGARDING HARTNETT SURGERY, GRAYDON APPRAISAL.	0.2	62.00
6/1/2011	306	JEFFREY TIBBALS	CONDUCT LEGAL RESEARCH REGARDING PREJUDGMENT	0.8	248.00
7/15/2011		Invoice=53431760	INTEREST IN CONDEMNATION CASES; REVIEW AND CONSIDER FAULKENBERRY CASE, RELEVANT STATUTE.	0.8	248.00
6/1/2011	306	JEFFREY TIBBALS	CONDUCT LEGAL RESEARCH REGARDING ATTORNEYS	0.7	217.00
7/15/2011		Invoice=53431760	FEES AWARDS IN CONDEMNATION CASES.	0.7	217.00
6/1/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO SUSIE ONATE REGARDING	0.1	31.00
7/15/2011		Invoice=53431760	STATUS.	0.1	31.00
6/1/2011	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING STATUS	0.3	120.00
7/15/2011		Invoice=53431760	AND TRIAL.	0.3	120.00
6/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING GRAYDON APPRAISAL.	0.1	31.00
6/2/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO SUSIE ONATE REGARDING	0.1	31.00
7/15/2011		Invoice=53431760	STATUS.	0.1	31.00
6/7/2011	306	JEFFREY TIBBALS	DRAFT SUPPLEMENTAL INTERROGATORIES AND	0.3	93.00
7/15/2011		Invoice=53431760	REQUESTS FOR PRODUCTION.	0.3	93.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
6/7/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.3	93.00
7/15/2011		Invoice=53431760	REGARDING VARIOUS DISCOVERY AND CASE STRATEGY ISSUES.	0.3	93.00
6/7/2011	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM SUSIE ONATE	0.2	62.00
7/15/2011		Invoice=53431760	REGARDING ADDITIONAL DISCOVERY ISSUES.	0.2	62.00
6/15/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING CASE STATUS.	0.1	31.00
6/15/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JANET RUGHEIMER	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TOMMY HARTNETT STATUS.	0.1	31.00
6/15/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
7/15/2011		Invoice=53431760	TOMMY HARTNETT SURGERY, TRIAL DATES.	0.2	62.00
6/15/2011	306	JEFFREY TIBBALS	FURTHER E-MAIL CORRESPONDENCE WITH JOHN WEST,	0.1	31.00
7/15/2011		Invoice=53431760	AMANDA WILLIAMSON REGARDING STATUS.	0.1	31.00
6/16/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH AMANDA WILLIAMSON	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL SCHEDULING.	0.1	31.00
6/16/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL SCHEDULING.	0.1	31.00
6/16/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING TRIAL SCHEDULING.	0.1	31.00
6/17/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
7/15/2011		Invoice=53431760	REGARDING SEPTEMBER TRIAL DATES.	0.1	31.00
6/17/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST, AMANDA	0.2	62.00
7/15/2011		Invoice=53431760	WILLIAMSON REGARDING SEPTEMBER TRIAL DATES.	0.2	62.00
6/20/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER,	0.2	62.00
8/3/2011		Invoice=53433819	SUSIE ONATE REGARDING TRIAL AVAILABILITY.	0.2	62.00
6/27/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH AMANDA WILLIAMSON,	0.1	31.00
8/3/2011		Invoice=53433819	JOHN WEST REGARDING SEPTEMBER, OCTOBER TRIAL	0.1	31.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
6/27/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
8/3/2011		Invoice=53433819	REGARDING POTENTIAL NOVEMBER TRIAL DATE.	0.1	31.00
6/27/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
8/3/2011		Invoice=53433819	REGARDING POTENTIAL NOVEMBER TRIAL DATE.	0.1	31.00
6/28/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
8/3/2011		Invoice=53433819	REGARDING TRIAL DATE.	0.1	31.00
6/28/2011	306	JEFFREY TIBBALS	CONSIDER TRIAL SCHEDULING.	0.1	31.00
8/3/2011		Invoice=53433819		0.1	31.00
6/28/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH PAUL DOMINICK	0.2	62.00
8/3/2011		Invoice=53433819	REGARDING TRIAL STRATEGY.	0.2	62.00
6/28/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH AMANDA WILLIAMSON,	0.1	31.00
8/3/2011		Invoice=53433819	JOHN WEST REGARDING TRIAL.	0.1	31.00
6/28/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
8/3/2011		Invoice=53433819	REGARDING TRIAL	0.1	31.00
6/29/2011	306	JEFFREY TIBBALS	VARIOUS E-MAIL CORRESPONDENCE WITH JOHN WEST,	0.5	155.00
8/3/2011		Invoice=53433819	AMANDA WILLIAMSON, SUSIE ONATE, JANET RUGHEIMER REGARDING TRIAL DATE.	0.5	155.00
7/11/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST, AMANDA	0.3	93.00
8/3/2011		Invoice=53433819	WILLIAMSON, JANET RUGHEIMER, SUSIE ONATE REGARDING TRIAL DATES.	0.3	93.00
7/18/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING TRIAL DATES	0.1	31.00
7/19/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE, JOHN	0.2	62.00
10/31/2011		Invoice=53447580	WEST, AMANDA WILLIAMSON, JANET RUGHEIMER REGARDING TRIAL DATES.	0.2	62.00
9/1/2011	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING LEGAL	0.8	320.00
10/31/2011		Invoice=53447580	ISSUES AND TRIAL STRATEGY; REVIEW DISCOVERY	0.8	320.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
			AND CORRESPONDENCE TO OPPOSING COUNSEL.		
9/1/2011	306	JEFFREY TIBBALS	CONSIDER ISSUE OF DISCOVERY REQUESTS	0.2	62.00
10/31/2011		Invoice=53447580	REGARDING GRAYDON APPRAISAL.	0.2	62.00
9/1/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER GRAYDON APPRAISAL.	0.7	217.00
10/31/2011		Invoice=53447580		0.7	217.00
9/1/2011	306	JEFFREY TIBBALS	REVISE AND AMEND SECOND SET OF	0.3	93.00
10/31/2011		Invoice=53447580	INTERROGATORIES.	0.3	93.00
9/1/2011	306	JEFFREY TIBBALS	CONSIDER ISSUES RELATING TO PREJUDGMENT	0.9	279.00
10/31/2011		Invoice=53447580	INTEREST AND ATTORNEYS FEES; REVIEW CASES REGARDING PLEADING REQUIREMENTS.	0.9	279.00
9/1/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO JOHN WEST REGARDING SECOND	0.4	124.00
10/31/2011		Invoice=53447580	INTERROGATORIES, DISCOVERY ISSUES, PREJUDGMENT INTEREST AND FEES.	0.4	124.00
9/1/2011	306	JEFFREY TIBBALS	DRAFT E-MAIL MEMO TO SUSIE ONATE REGARDING	0.2	62.00
10/31/2011		Invoice=53447580	DISCOVERY ISSUES.	0.2	62.00
9/1/2011	306	JEFFREY TIBBALS	CONSIDER CHARLES CRIDER APPRAISAL, POTENTIAL	0.2	62.00
10/31/2011		Invoice=53447580	EXPERT TESTIMONY.	0.2	62.00
9/1/2011	306	JEFFREY TIBBALS	MEET WITH PAUL DOMINICK REGARDING STRATEGY.	0.3	93.00
10/31/2011		Invoice=53447580		0.3	93.00
9/7/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.3	93.00
10/31/2011		Invoice=53447580	DOCUMENT PRODUCTION, SETTLEMENT ISSUES.	0.3	93.00
9/8/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DOCUMENT PRODUCTION.	0.1	31.00
9/9/2011	149	PAUL DOMINICK	WORK ON TRIAL ISSUES.	0.6	240.00
10/31/2011		Invoice=53447580		0.6	240.00
9/21/2011	306	JEFFREY TIBBALS	DISCOVERY PLANNING AND STRATEGY.	0.5	155.00
10/31/2011		Invoice=53447580		0.5	155.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
9/22/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
10/31/2011		Invoice=53447580	REGARDING DOCUMENT PRODUCTION.	0.2	62.00
9/23/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
10/31/2011		Invoice=53447580	REGARDING DOCUMENT REVIEW.	0.2	62.00
9/28/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING DOCUMENT REVIEW.	0.1	31.00
10/4/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING SCDOT DOCUMENT REVIEW.	0.1	31.00
10/4/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.00
10/31/2011		Invoice=53447580	DOCUMENT REVIEW.	0.1	31.00
10/5/2011	306	JEFFREY TIBBALS	TRAVEL TO AND FROM COLUMBIA, SC AND MEET WITH	4.5	1,395.00
10/31/2011		Invoice=53447580	JOHN WEST REGARDING DOCUMENTS PRODUCED BY SCDOT.	4.5	1,395.00
10/10/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING DOCUMENT PRODUCTION, DEPOSITIONS.	0.1	31.00
10/18/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
10/31/2011		Invoice=53447580	REGARDING SCDOT EXPERT DEPOSITION DATES.	0.1	31.00
10/19/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH TOMMY HARTNETT	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING EXPERT ISSUES.	0.2	62.00
10/19/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JANET RUGHEIMER	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING MEETING, HARTNETT DEPOSITION.	0.1	31.00
10/19/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING MEETING TO PREPARE FOR DEPOSITIONS.	0.1	31.00
10/19/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
12/8/2011		Invoice=53452251	DEPOSITIONS, DISCOVERY.	0.2	62.00
10/20/2011	306	JEFFREY TIBBALS	CONFERENCE WITH PAUL DOMINICK REGARDING	0.2	62.00
12/8/2011		Invoice=53452251	HARTNETT MEETING, EXPERT ISSUES, TRIAL	0.2	62.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
			STRATEGY.		
10/26/2011	306	JEFFREY TIBBALS	CONSIDER EXPERT ISSUES, TRIAL STRATEGY.	0.3	93.00
12/8/2011		Invoice=53452251		0.3	93.00
10/31/2011	306	JEFFREY TIBBALS	CONSIDER DISCOVERY AND DEPOSITION ISSUES.	0.2	62.00
12/8/2011		Invoice=53452251		0.2	62.00
10/31/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.3	93.00
12/8/2011		Invoice=53452251	REGARDING MEETING WITH HARTNETT.	0.3	93.00
10/31/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING DEPOSITION DATES.	0.2	62.00
10/31/2011	306	JEFFREY TIBBALS	REVISE AND AMEND DEPOSITION NOTICES AND	0.6	186.00
12/8/2011		Invoice=53452251	SUBPOENAS; DRAFT DOCUMENT REQUESTS TO EXPERTS.	0.6	186.00
10/31/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO JOHN WEST REGARDING NOTICE OF	0.1	31.00
12/8/2011		Invoice=53452251	DEPOSITIONS.	0.1	31.00
10/31/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO CHARLES CRIDER.	0.1	31.00
12/8/2011		Invoice=53452251		0.1	31.00
10/31/2011	306	JEFFREY TIBBALS	DRAFT LETTER TO DAVE GRAYDON.	0.1	31.00
12/8/2011		Invoice=53452251		0.1	31.00
11/1/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING NOVEMBER 15 HARTNETT DEPOSITION.	0.1	31.00
11/1/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING NOVEMBER 15 HARTNETT DEPOSITION.	0.1	31.00
11/2/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING SCDOT DOCUMENTS.	0.2	62.00
11/3/2011	306	JEFFREY TIBBALS	MEET WITH TOMMY HARTNETT REGARDING	1	310.00
12/8/2011		Invoice=53452251	PREPARATION FOR DEPOSITION AND PREPARATION	1	310.00
			FRO CRIDER AND GRAYDON DEPOSITIONS.		
11/7/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/8/2011		Invoice=53452251	REGARDING TRIAL DATE.	0.1	31.00
11/7/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING HARTNETT FILES.	0.1	31.00
11/7/2011	413	DENISE LECLERC	TELEPHONE CALL WITH JUDGE WATSON'S OFFICE	0.2	34.00
12/8/2011		Invoice=53452251	REGARDING STATUS OF PROPOSED TRIAL DATES AND CONFIRM OF SAME.	0.2	34.00
11/7/2011	413	DENISE LECLERC	E-MAIL CORRESPONDENCE WITH COUNSEL REGARDING	0.1	17.00
12/8/2011		Invoice=53452251	CONFIRMATION OF TRIAL DATES OF 12/14/11 THROUGH 12/15/11 WITH JUDGE WATSON.	0.1	17.00
11/8/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING EXPERT DOCUMENTS.	0.1	31.00
11/8/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER SCDOT DOCUMENT PRODUCTION.	1.6	496.00
12/8/2011		Invoice=53452251		1.6	496.00
11/9/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING EXPERT FILES.	0.1	31.00
11/11/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING CRIDER AND GRAYDON FILES.	0.2	62.00
11/14/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER DOCUMENTS PRODUCED BY	1.3	403.00
12/8/2011		Invoice=53452251	CHARLES CRIDER.	1.3	403.00
11/14/2011	306	JEFFREY TIBBALS	PREPARE FOR TOMMY HARTNETT DEPOSITION.	0.8	248.00
12/8/2011		Invoice=53452251		0.8	248.00
11/14/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING CRIDER FILE.	0.2	62.00
11/15/2011	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS AND MR. HARTNETT	0.6	240.00
12/8/2011		Invoice=53452251	CONCERNING DEPOSITION AND TRIAL TESTIMONY.	0.6	240.00
11/15/2011	306	JEFFREY TIBBALS	APPEAR FOR AND DEFEND DEPOSITION OF TOMMY	1	310.00
12/8/2011		Invoice=53452251	HARTNETT.	1	310.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
11/15/2011	306	JEFFREY TIBBALS	MEET WITH PAUL DOMINICK AND TOMMY HARTNETT TO	0.5	155.00
12/8/2011		Invoice=53452251	DISCUSS DEPOSITION AND STRATEGY.	0.6	186.00
11/15/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING GRAYDON FILE.	0.2	62.00
11/16/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER ROUGH DRAFTS OF HARTNETT	0.7	217.00
12/8/2011		Invoice=53452251	DEPOSITION TRANSCRIPT.	0.7	217.00
11/16/2011	306	JEFFREY TIBBALS	CONSIDER TRIAL STRATEGY.	0.3	93.00
12/8/2011		Invoice=53452251		0.3	93.00
11/16/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING GRAYDON FILE.	0.1	31.00
11/16/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
12/8/2011		Invoice=53452251	REGARDING EXPERT DEPOSITIONS.	0.1	31.00
11/17/2011	306	JEFFREY TIBBALS	TWO TELEPHONE CONFERENCES WITH JANET	0.2	62.00
12/8/2011		Invoice=53452251	RUGHEIMER REGARDING DEPARTMENT OF TRANSPORTATION MANUAL, USPAP.	0.2	62.00
11/17/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
12/8/2011		Invoice=53452251	REGARDING GRAYDON FILES.	0.2	62.00
11/17/2011	306	JEFFREY TIBBALS	CONFERENCE WITH PAUL DOMINICK REGARDING TRIAL	0.2	62.00
12/8/2011		Invoice=53452251	STRATEGY.	0.2	62.00
11/17/2011	306	JEFFREY TIBBALS	RESEARCH REGARDING SCDOT APPRAISER MANUAL.	0.2	62.00
12/8/2011		Invoice=53452251		0.2	62.00
11/17/2011	306	JEFFREY TIBBALS	REVIEW INTERROGATORY ANSWERS, NOTES,	1.7	527.00
12/8/2011		Invoice=53452251	CORRESPONDENCE AND SELECTED APPELLATE OPINIONS IN PREPARATION FOR CRIDER AND GRAYDON DEPOSITIONS.	1.7	527.00
11/17/2011	306	JEFFREY TIBBALS	VISIT TO TOMMY HARTNETT TO PICK UP USPAP.	0.3	93.00
12/8/2011		Invoice=53452251		0.3	93.00
11/17/2011	306	JEFFREY TIBBALS	TRAVEL TO GREENVILLE FOR CRIDER AND GRAYDON	3.4	1,054.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/8/2011		Invoice=53452251	DEPOSITIONS.	3.4	1,054.00
11/17/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.4	0.00
12/8/2011		Invoice=53452251	REGARDING HARTNETT DEPOSITION, TRIAL STRATEGY.: NO CHARGE	0.4	0.00
11/17/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER USPAP.	1.1	341.00
12/8/2011		Invoice=53452251		1.1	341.00
11/17/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER SCDOT APPRAISER MANUAL.	0.8	248.00
12/8/2011		Invoice=53452251		0.8	248.00
11/17/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER DOCUMENTS PRODUCED BY	0.7	217.00
12/8/2011		Invoice=53452251	GRAYDON.	0.7	217.00
11/17/2011	306	JEFFREY TIBBALS	REVIEW AND ANALYSIS OF GRAYDON APPRAISAL.	1.2	372.00
12/8/2011		Invoice=53452251		1.2	372.00
11/17/2011	306	JEFFREY TIBBALS	WORK ON DEPOSITION QUESTIONS FOR CRIDER AND	1.3	403.00
12/8/2011		Invoice=53452251	GRAYDON.	1.3	403.00
11/18/2011	306	JEFFREY TIBBALS	REVIEW AND ANALYSIS OF CRIDER APPRAISAL.	0.9	279.00
12/8/2011		Invoice=53452251		0.9	279.00
11/18/2011	306	JEFFREY TIBBALS	REVIEW DOCUMENTS PRODUCED BY CRIDER.	0.5	155.00
12/8/2011		Invoice=53452251		0.5	155.00
11/18/2011	306	JEFFREY TIBBALS	OUTLINE QUESTIONS FOR CRIDER.	0.6	186.00
12/8/2011		Invoice=53452251		0.6	186.00
11/18/2011	306	JEFFREY TIBBALS	MEET WITH JOHN WEST PRIOR TO DEPOSITION.	0.2	62.00
12/8/2011		Invoice=53452251		0.2	62.00
11/18/2011	306	JEFFREY TIBBALS	TAKE CRIDER DEPOSITION.	1.8	558.00
12/8/2011		Invoice=53452251		1.8	558.00
11/18/2011	306	JEFFREY TIBBALS	FURTHER PREPARE FOR GRAYDON DEPOSITION.	0.7	217.00
12/8/2011		Invoice=53452251		0.7	217.00
11/18/2011	306	JEFFREY TIBBALS	TAKE GRAYDON DEPOSITION.	1.2	372.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/8/2011		Invoice=53452251		1.2	372.00
11/18/2011	306	JEFFREY TIBBALS	RETURN TRAVEL FROM GREENVILLE TO CHARLESTON.	3.4	1,054.00
12/8/2011		Invoice=53452251		3.4	1,054.00
11/18/2011	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING	0.7	280.00
12/8/2011		Invoice=53452251	DEPOSITION.	0.7	280.00
11/21/2011	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING STATUS	0.4	160.00
1/5/2012		Invoice=53456383	AND TRIAL STRATEGY.	0.4	160.00
11/21/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER ROUGH DEPOSITION	1.2	372.00
1/5/2012		Invoice=53456383	TRANSCRIPTS.	1.2	372.00
11/22/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING CHARLES CRIDER SUPPLEMENTAL REPORT	0.1	31.00
			AND DEPOSITION.		
11/22/2011	306	JEFFREY TIBBALS	CONFERENCE WITH PAUL DOMINICK REGARDING	0.3	93.00
1/5/2012		Invoice=53456383	DEPOSITIONS, TRIAL STRATEGY.	0.3	93.00
11/28/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING STATUS CALL, DEPOSITION OF CRIDER	0.1	31.00
			AND GRAYDON.		
11/28/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING ROUGH TRANSCRIPTS OF DEPOSITIONS.	0.1	31.00
11/28/2011	306	JEFFREY TIBBALS	PREPARE FOR AND PARTICIPATE IN STATUS	0.7	217.00
1/5/2012		Invoice=53456383	CONFERENCE CALL WITH CLIENT REPRESENTATIVES.	0.7	217.00
11/28/2011	306	JEFFREY TIBBALS	CONSIDER TESTIMONY SUBJECTS FOR MIKE PFEIFFER.	0.3	93.00
1/5/2012		Invoice=53456383		0.3	93.00
11/28/2011	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM BILL	0.2	62.00
1/5/2012		Invoice=53456383	ROBERTS AND DEPOSITION EXHIBITS.	0.2	62.00
11/28/2011	413	DENISE LECLERC	E-MAIL CORRESPONDENCE WITH COUNSEL REGARDING	0.1	17.00
1/5/2012		Invoice=53456383	ELECTRONIC DEPOSITION EXHIBITS FOR GRAYDON	0.1	17.00
			AND CRIDER'S DEPOSITIONS.		

Date	Initials	Name / Invoice Number	Description	Hours	Amount
11/29/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING SCDOT APPRAISAL MANUAL.	0.1	31.00
11/29/2011	306	JEFFREY TIBBALS	REVIEW AND IDENTIFY RELEVANT PORTIONS OF SCDOT	0.3	93.00
1/5/2012		Invoice=53456383	APPRAISAL MANUAL; E-MAIL CORRESPONDENCE WITH SUSIE ONATE REGARDING SAME.	0.3	93.00
11/29/2011	306	JEFFREY TIBBALS	TELEPHONE CALL FROM JOHN WEST REGARDING	0.1	31.00
1/5/2012		Invoice=53456383	CRIDER DEPOSITION.	0.1	31.00
11/29/2011	306	JEFFREY TIBBALS	REVIEW PRODUCED DOCUMENTS AND WORK ON DIRECT	1.4	434.00
1/5/2012		Invoice=53456383	EXAMINATION QUESTIONS FOR MIKE PFEIFFER.	1.4	434.00
11/30/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.00
1/5/2012		Invoice=53456383	CRIDER UPDATED APPRAISAL.	0.1	31.00
12/1/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER CHARLES CRIDER UPDATED	1.6	496.00
1/5/2012		Invoice=53456383	APPRAISAL REPORT.	1.6	496.00
12/1/2011	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING CRIDER	0.1	31.00
1/5/2012		Invoice=53456383	UPDATED REPORT.	0.1	31.00
12/1/2011	306	JEFFREY TIBBALS	CONTINUE REVIEW OF DOCUMENTS AND WORK ON	1.8	558.00
1/5/2012		Invoice=53456383	TESTIMONY OUTLINE FOR MIKE PFEIFFER.	1.8	558.00
12/1/2011	306	JEFFREY TIBBALS	CONSIDER STRATEGY ON CRIDER UPDATED APPRAISAL.	0.2	62.00
1/5/2012		Invoice=53456383		0.2	62.00
12/1/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	62.00
1/5/2012		Invoice=53456383	CRIDER, TRIAL ISSUES.	0.2	62.00
12/5/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JANET RUGHEIMER,	0.2	62.00
1/5/2012		Invoice=53456383	TOMMY HARTNETT REGARDING TRIAL PREPARATIONS.	0.2	62.00
12/5/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JANET RUGHEIMER	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING CHARLES CRIDER UPDATED APPRAISAL.	0.1	31.00
12/5/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING CRIDER UPDATED APPRAISAL.	0.2	62.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/5/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING SUPPLEMENTAL DISCOVERY REQUESTS.	0.1	31.00
12/5/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.3	93.00
1/5/2012		Invoice=53456383	TRIAL ISSUES, POTENTIAL SETTLEMENT.	0.3	93.00
12/5/2011	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM JOHN WEST	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING SETTLEMENT OFFER.	0.1	31.00
12/5/2011	306	JEFFREY TIBBALS	CONSIDER SETTLEMENT STRATEGY.	0.2	62.00
1/5/2012		Invoice=53456383		0.2	62.00
12/5/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING APPRAISAL OF MT. PLEASANT CONVENIENCE STORE.	0.2	62.00
12/6/2011	306	JEFFREY TIBBALS	REVIEW FINAL DEPOSITION TRANSCRIPTS FOR	1.2	372.00
1/5/2012		Invoice=53456383	CRIDER AND GRAYDON.	1.2	372.00
12/7/2011	306	JEFFREY TIBBALS	REVIEW SCDOT RESPONSES TO SUPPLEMENTAL	0.2	62.00
1/5/2012		Invoice=53456383	DISCOVERY REQUESTS.	0.2	62.00
12/7/2011	306	JEFFREY TIBBALS	CONSIDER POTENTIAL WORSLEY TESTIMONY.	0.3	93.00
1/5/2012		Invoice=53456383		0.3	93.00
12/7/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER APPRAISAL OF MT. PLEASANT	0.4	124.00
1/5/2012		Invoice=53456383	CONVENIENCE STORE.	0.4	124.00
12/7/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING REJECTION OF SCDOT SETTLEMENT OFFER.	0.2	62.00
12/7/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.00
1/5/2012		Invoice=53456383	REGARDING WORSLEY NOT PARTICIPATING.	0.1	31.00
12/7/2011	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM JOHN WEST,	0.1	31.00
1/5/2012		Invoice=53456383	JEFF PAYNE REGARDING WORSLEY.	0.1	31.00
12/8/2011	149	PAUL DOMINICK	TRIAL PREPARATION; PHONE CONFERENCE WITH	2	800.00
1/5/2012		Invoice=53456383	CLIENT AND REPRESENTATIVES.	2	800.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/8/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER CONFIDENTIAL DOCUMENTS	1.8	558.00
1/5/2012		Invoice=53456383	PRODUCED IN PREPARATION FOR CONFERENCE CALL WITH MIKE PFEIFFER AND LAURA KING AND SUSIE ONATE.	1.8	558.00
12/8/2011	306	JEFFREY TIBBALS	REVIEW AND CONSIDER PROPOSED STIPULATIONS	0.5	155.00
1/5/2012		Invoice=53456383	FROM JOHN WEST.	0.5	155.00
12/8/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH MIKE PFEIFFER,	1.2	372.00
1/5/2012		Invoice=53456383	LAURA KING, SUSIE ONATE, PAUL DOMINICK REGARDING PFEIFFER TRIAL TESTIMONY.	1.2	372.00
12/9/2011	306	JEFFREY TIBBALS	REVIEW REVISED STIPULATIONS.	0.2	62.00
1/5/2012		Invoice=53456383		0.2	62.00
12/9/2011	306	JEFFREY TIBBALS	REVIEW GUARANTOR UNDERWRITING REPORT	0.4	124.00
1/5/2012		Invoice=53456383	REGARDING CREDIT WORTHINESS OF VILLAGE PANTRY.	0.4	124.00
12/9/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH CLIENTS REGARDING	0.1	31.00
1/5/2012		Invoice=53456383	ANALYSIS OF STIPULATIONS.	0.1	31.00
12/9/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.5	155.00
1/5/2012		Invoice=53456383	STIPULATIONS, TRIAL ISSUES.	0.5	155.00
12/9/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING MT. PLEASANT STORE APPRAISAL.	0.2	62.00
12/11/2011	149	PAUL DOMINICK	PREPARE FOR TRIAL.	2.8	1,120.00
1/5/2012		Invoice=53456383		2.8	1,120.00
12/11/2011	306	JEFFREY TIBBALS	PREPARE FOR TRIAL; REVIEW ALL DOCUMENTS	4.2	1,302.00
1/5/2012		Invoice=53456383	PRODUCED; CONSIDER EXHIBITS; REVIEW DEPOSITION TRANSCRIPTS; CONSIDER TRIAL THEMES.	4.2	1,302.00
12/12/2011	306	JEFFREY TIBBALS	CONTINUE TRIAL PREPARATION WORK; CONDUCT	7.3	2,263.00
1/5/2012		Invoice=53456383	RESEARCH REGARDING OTHER SCDOT CASES INVOLVING LEASES; CONDUCT RESEARCH REGARDING CHARLES CRIDER, DAVE GRAYDON; REVISE AND AMEND MIKE PFEIFFER DIRECT EXAMINATION OUTLINE; WORK ON	7.3	2,263.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
			GRAYDON CROSS-EXAMINATION QUESTIONS; WORK ON STRATEGY FOR CRIDER; REVIEW AND CONSIDER EMINENT DOMAIN STATUTORY PROVISIONS; REVIEW ALL DOCUMENTS IN NOTEBOOKS SENT BY SUSIE ONATE; FURTHER WORK ON EXHIBIT SELECTION; E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER REGARDING REVISED DIRECT EXAMINATION OUTLINE; CONDUCT LEGAL RESEARCH REGARDING CASES IN OTHER JURISDICTIONS, CIRCUMSTANCES WHERE LEASE IS CONSIDERED IN JUST COMPENSATION.		
12/12/2011	149	PAUL DOMINICK	MEET WITH MR. HARTNETT; TRIAL PREPARATION.	3	1,200.00
1/5/2012		Invoice=53456383		3	1,200.00
12/13/2011	413	DENISE LECLERC	REVIEW DOCUMENTS PRODUCED BY REALTY INCOME TO OPPOSING COUNSEL TO DATE TO CONFIRM NO ADDITIONAL DOCUMENTS NEED TO BE PRODUCED BEFORE IDENTIFYING TRIAL EXHIBITS TO COURT.	0.9	153.00
1/5/2012		Invoice=53456383		0.9	153.00
12/13/2011	413	DENISE LECLERC	ASSIST ATTORNEY TIBBALS WITH TRIAL PREPARATION; IDENTIFY AND PREPARE EXHIBITS FOR TRIAL INCLUDING PREPARING WITNESS LIST AND DISCUSSING FINAL TRIAL EXHIBITS WITH ATTORNEY TIBBALS.	3.7	629.00
1/5/2012		Invoice=53456383		3.7	629.00
12/13/2011	306	JEFFREY TIBBALS	DRAFT PRE-TRIAL MEMORANDUM; REVISE AND AMEND PRE-TRIAL MEMORANDUM; WORK ON EXHIBITS; WORK ON GRAYDON CROSS-EXAMINATION; WORK ON PFEIFFER DIRECT EXAMINATION; OUTLINE OPENING STATEMENT; CONSIDER AMENDMENT TO LEASE AND CONDEMNATION AGREEMENT; REVIEW AND CONSIDER CONDEMNOR'S PRE-TRIAL MEMORANDUM AND ATTACHED CASES; TELEPHONE CONFERENCE WITH, E-MAIL CORRESPONDENCE WITH JOHN WEST REGARDING LEASE AMENDMENT; WORK ON TOMMY HARTNETT ISSUES; CONSIDER MARKET RENT ISSUE; REVIEW SECTIONS FROM TREATISE ON CONDEMNATION REGARDING INCOME FROM PROPERTY VS. INCOME FROM BUSINESS; TELEPHONE CONFERENCE WITH JOHN WEST REGARDING TRIAL, EVIDENCE, EXHIBIT ISSUES.	8.7	2,697.00
1/5/2012		Invoice=53456383		8.7	2,697.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
12/13/2011	149	PAUL DOMINICK	TRIAL PREPARATION.	7.5	3,000.00
1/5/2012		Invoice=53456383		7.5	3,000.00
12/14/2011	149	PAUL DOMINICK	PREPARE FOR AND ATTEND TRIAL.	10	4,000.00
1/5/2012		Invoice=53456383		10	4,000.00
12/14/2011	413	DENISE LECLERC	COMMUNICATIONS WITH ATTORNEY TIBBALS	0.2	34.00
1/5/2012		Invoice=53456383	REGARDING DOCUMENTS PRODUCED BY REALTY INCOME TO OPPOSING COUNSEL.	0.2	34.00
12/14/2011	413	DENISE LECLERC	REVIEW REALTY INCOME'S ORIGINAL DOCUMENT	0.9	153.00
1/5/2012		Invoice=53456383	PRODUCTION TO OBTAIN KEY DOCUMENTS DOCUMENTS PERTAINING TO PUBLIC MEETING BY BERKELEY COUNTY CONCERNING THE PROPOSED WIDENING OF HWY 17A IN BERKELEY COUNTY AS REQUESTED BY ATTORNEY TIBBALS AND PROVIDE DIRECTION FOR HAND DELIVERY OF DOCUMENTS AT TRIAL.	0.9	153.00
12/14/2011	306	JEFFREY TIBBALS	PRACTICE AND REFINE OPENING ARGUMENT; TRAVEL	10.1	3,131.00
1/5/2012		Invoice=53456383	FROM CHARLESTON TO MONCK'S CORNER FOR TRIAL; TRY CASE; TRAVEL FROM MONCK'S CORNER TO CHARLESTON.	10.1	3,131.00
12/15/2011	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING TRIAL, POTENTIAL SETTLEMENT.	0.2	62.00
12/15/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH SUSIE ONATE	0.2	62.00
1/5/2012		Invoice=53456383	REGARDING INTEREST ACCRUAL AND TRIAL RESULTS.	0.2	62.00
12/19/2011	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH TOMMY HARTNETT	0.1	31.50
1/5/2012		Invoice=53456383	REGARDING TRIAL.	0.1	31.50
1/3/2012	306	JEFFREY TIBBALS	INITIAL REVIEW OF TRIAL TRANSCRIPT.	0.8	252.00
1/30/2012		Invoice=53459979		0.8	252.00
1/3/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER,	0.2	63.00
1/30/2012		Invoice=53459979	LAURA KING, SUSI ONATE REGARDING POTENTIAL SETTLEMENT DEMAND.	0.2	63.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
2/29/2012		Invoice=53465038	POTENTIAL SETTLEMENT WITH SCDOT.	0.2	63.00
1/19/2012	306	JEFFREY TIBBALS	DRAFT STATUS E-MAIL MEMO TO CLIENT.	0.4	126.00
2/29/2012		Invoice=53465038		0.4	126.00
1/20/2012	306	JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM MIKE	0.3	94.50
2/29/2012		Invoice=53465038	PFEIFFER AND CONSIDER SETTLEMENT STRATEGY; FURTHER E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER REGARDING SAME.	0.3	94.50
1/24/2012	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING	0.1	31.50
2/29/2012		Invoice=53465038	SETTLEMENT STATUS.	0.1	31.50
1/24/2012	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.2	63.00
2/29/2012		Invoice=53465038	SETTLEMENT ISSUES.	0.2	63.00
1/24/2012	306	JEFFREY TIBBALS	DRAFT E-MAIL MEMO TO MIKE PFEIFFER REGARDING	0.2	63.00
2/29/2012		Invoice=53465038	STATUS OF SETTLEMENT DISCUSSIONS.	0.2	63.00
1/24/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER	0.2	63.00
2/29/2012		Invoice=53465038	REGARDING STRATEGY.	0.2	63.00
1/31/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.50
2/29/2012		Invoice=53465038	REGARDING STATUS.	0.1	31.50
2/1/2012	306	JEFFREY TIBBALS	REVIEW AND CONSIDER TRIAL TRANSCRIPT, BEGIN	2.1	661.50
2/29/2012		Invoice=53465038	OUTLINING KEY ISSUES FOR PROPOSED FINAL ORDER	2.1	661.50
2/9/2012	306	JEFFREY TIBBALS	RESEARCH STANDARD OF REVIEW AT TRIAL COURT	1.4	441.00
2/29/2012		Invoice=53465038	LEVEL AND ON APPEAL IN EMINENT DOMAIN CASES.	1.4	441.00
2/13/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH SUSIE ONATE	0.2	63.00
2/29/2012		Invoice=53465038	REGARDING CASE STATUS.	0.2	63.00
2/15/2012	306	JEFFREY TIBBALS	BEGIN DRAFTING PROPOSED ORDER.	3.1	976.50
2/29/2012		Invoice=53465038		3.1	976.50
2/15/2012	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING	0.3	126.00
2/29/2012		Invoice=53465038	PROPOSED ORDER.	0.3	126.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
2/16/2012	306	JEFFREY TIBBALS	REVIEW AND CONSIDER ALL SOUTH CAROLINA	1.3	409.50
2/29/2012		Invoice=53465038	EMINENT DOMAIN/JUST COMPENSATION CASES PRESENTED TO JUDGE WATSON BY CONDEMNOR IN ITS PRE-TRIAL MEMORANDUM	1.3	409.50
2/16/2012	306	JEFFREY TIBBALS	CONTINUE DRAFTING PROPOSED FINAL ORDER AND	2.1	661.50
2/29/2012		Invoice=53465038	JUDGMENT	2.1	661.50
2/16/2012	306	JEFFREY TIBBALS	MAKE VARIOUS CALCULATIONS REGARDING MIDPOINT	0.8	252.00
2/29/2012		Invoice=53465038	AND POTENTIAL AWARD, AND HOW IT MIGHT AFFECT DRAFTING OF PROPOSED ORDER, CONFER WITH PAUL DOMINICK REGARDING SAME	0.8	252.00
2/17/2012	306	JEFFREY TIBBALS	REVISE AND AMEND PROPOSED ORDER	2.8	882.00
2/29/2012		Invoice=53465038		2.8	882.00
2/17/2012	306	JEFFREY TIBBALS	CONDUCT LEGAL RESEARCH REGARDING OTHER	3.7	1,165.50
2/29/2012		Invoice=53465038	JURISDICTIONS' TREATMENT OF EXISTING LEASE VALUE TO LANDLORD IN CONDEMNATION; REVIEW NUMEROUS CASES.	3.7	1,165.50
2/17/2012	306	JEFFREY TIBBALS	REVIEW AND CONSIDER TREATISE ON LEASE	0.6	189.00
2/29/2012		Invoice=53465038	VALUATION ISSUES	0.6	189.00
2/20/2012	149	PAUL DOMINICK	WORK ON DRAFT PROPOSED ORDER; CONFERENCE WITH	1.2	504.00
3/30/2012		Invoice=53469611	MR. TIBBALS CONCERNING THE SAME.	1.2	504.00
2/21/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	63.00
3/30/2012		Invoice=53469611	REGARDING PROPOSED ORDERS, ORIGINAL EXHIBITS.	0.2	63.00
2/22/2012	306	JEFFREY TIBBALS	REVIEW MIKE PFEIFFER REVISIONS TO PROPOSED	0.2	63.00
3/30/2012		Invoice=53469611	ORDER; E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER AND LAURA KING REGARDING SAME.	0.2	63.00
2/27/2012	306	JEFFREY TIBBALS	REVISE AND AMEND PROPOSED ORDER IN ACCORDANCE	1.3	409.50
3/30/2012		Invoice=53469611	WITH COMMENTS FROM PAUL DOMINICK AND MIKE PFEIFFER.	1.3	409.50
2/28/2012	306	JEFFREY TIBBALS	CONTINUE WORK ON PROPOSED ORDER; REVISE,	6.7	2,110.50
3/30/2012		Invoice=53469611	AMEND, AND RESTRUCTURE; REVIEW TRIAL	6.7	2,110.50

Date	Initials	Name / Invoice Number	Description	Hours	Amount
			EXHIBITS, ESPECIALLY THOSE RELATING TO TRANSACTION AND GRAYDON OPINIONS; MEET WITH PAUL DOMINICK REGARDING VARIOUS ISSUES ON ORDER; SKETCH NEW FLOW CHART; E-MAIL CORRESPONDENCE WITH CLIENTS REGARDING REVISED DRAFT.		
2/29/2012	450	ERIC JAMES	PREPARE FLOW CHART EXHIBIT	0.6	102.00
3/30/2012		Invoice=53469611		0.6	102.00
2/29/2012	306	JEFFREY TIBBALS	WORK ON FLOW CHART.	1.2	378.00
3/30/2012		Invoice=53469611		1.2	378.00
2/29/2012	306	JEFFREY TIBBALS	CONSIDER CONFIDENTIALITY OF CERTAIN TRIAL EXHIBITS; REVIEW AND CONSIDER CONFIDENTIALITY ORDER; E-MAIL CORRESPONDENCE WITH LAURA KING REGARDING CONFIDENTIALITY OF DOCUMENTS.	0.7	220.50
3/30/2012		Invoice=53469611		0.7	220.50
2/29/2012	149	PAUL DOMINICK	WORK ON PROPOSED ORDER AND CHART.	0.6	252.00
3/30/2012		Invoice=53469611		0.6	252.00
3/1/2012	450	ERIC JAMES	REVISE AND PREPARE FLOW CHART EXHIBIT.	0.6	102.00
3/30/2012		Invoice=53469611		0.6	102.00
3/1/2012	149	PAUL DOMINICK	CONFERENCE WITH MR. TIBBALS CONCERNING PROPOSED ORDER.	0.3	126.00
3/30/2012		Invoice=53469611		0.3	126.00
3/1/2012	413	DENISE LECLERC	COMMUNICATIONS WITH COURT REGARDING PROCEDURES AND DIRECTION FOR SEALING TRIAL EXHIBITS.	0.3	54.00
3/30/2012		Invoice=53469611		0.3	54.00
3/1/2012	413	DENISE LECLERC	COMMUNICATIONS WITH COUNSEL REGARDING PROCEDURES FOR FILING TRIAL EXHIBITS.	0.2	36.00
3/30/2012		Invoice=53469611		0.2	36.00
3/1/2012	306	JEFFREY TIBBALS	REVISE AND AMEND FLOW CHART.	0.6	189.00
3/30/2012		Invoice=53469611		0.6	189.00
3/1/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER AND LAURA KING REGARDING FLOW CHART.	0.2	63.00
3/30/2012		Invoice=53469611		0.2	63.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
3/1/2012	306	JEFFREY TIBBALS	CONSIDER ISSUE OF DATING TRANSACTIONS.	0.1	31.50
3/30/2012		Invoice=53469611		0.1	31.50
3/1/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH LAURA KING AND	0.4	126.00
3/30/2012		Invoice=53469611	MIKE PFEIFFER REGARDING VILLAGE PANTRY TRANSACTION.	0.4	126.00
3/1/2012	306	JEFFREY TIBBALS	TELEPHONE CALL TO JOHN WEST REGARDING	0.1	31.50
3/30/2012		Invoice=53469611	PROPOSED ORDERS.	0.1	31.50
3/2/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER AND	0.1	31.50
3/30/2012		Invoice=53469611	LAURA KING REGARDING STATUS CONFERENCE WITH JUDGE.	0.1	31.50
3/2/2012	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING	0.1	31.50
3/30/2012		Invoice=53469611	STATUS CONFERENCE WITH JUDGE WATSON.	0.1	31.50
3/2/2012	306	JEFFREY TIBBALS	CONSIDER ISSUES REGARDING CONFIDENTIALITY	0.6	189.00
3/30/2012		Invoice=53469611	ORDER, FILING DOCUMENTS UNDER SEAL; REVIEW AND CONSIDER EXECUTED CONSENT CONFIDENTIALITY ORDER.	0.6	189.00
3/2/2012	413	DENISE LECLERC	COMMUNICATIONS WITH COURT REGARDING FOLLOW UP	0.6	108.00
3/30/2012		Invoice=53469611	TO SEALING TRIAL EXHIBITS AND STATUS CONFERENCE CALL WITH JUDGE WATSON; COMMUNICATIONS WITH COUNSEL REGARDING	0.6	108.00
3/5/2012	306	JEFFREY TIBBALS	PREPARE FOR CONFERENCE CALL WITH JUDGE WATSON.	0.2	63.00
3/30/2012		Invoice=53469611		0.2	63.00
3/5/2012	306	JEFFREY TIBBALS	REVIEW AND CONSIDER SOUTH CAROLINA RULE OF	0.3	94.50
3/30/2012		Invoice=53469611	CIVIL PROCEDURE RULE 41.1 REGARDING FILING DOCUMENTS UNDER SEAL	0.3	94.50
3/5/2012	306	JEFFREY TIBBALS	CONFERENCE WITH JOHN WEST REGARDING STATUS	0.1	31.50
3/30/2012		Invoice=53469611	CONFERENCE.	0.1	31.50
3/5/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH CLIENTS REGARDING	0.2	63.00
3/30/2012		Invoice=53469611	RULE 41.1 AND RESULTS OF STATUS CONFERENCE.	0.2	63.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
3/5/2012	306	JEFFREY TIBBALS	PARTICIPATE IN STATUS CONFERENCE WITH JUDGE	0.1	31.50
3/30/2012		Invoice=53469611	WATSON.	0.1	31.50
3/5/2012	306	JEFFREY TIBBALS	FINAL REVIEW AND EDITS TO PROPOSED ORDER.	0.7	220.50
3/30/2012		Invoice=53469611		0.7	220.50
3/5/2012	306	JEFFREY TIBBALS	REVIEW AND CONSIDER SCDOT'S PROPOSED ORDER.	0.9	283.50
3/30/2012		Invoice=53469611		0.9	283.50
3/5/2012	306	JEFFREY TIBBALS	CONSIDER STRATEGY.	0.3	94.50
3/30/2012		Invoice=53469611		0.3	94.50
3/6/2012	149	PAUL DOMINICK	REVIEW SCDOT PROPOSED ORDER; EMAIL TO CLIENT.	0.6	252.00
3/30/2012		Invoice=53469611		0.6	252.00
3/6/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER	0.6	189.00
3/30/2012		Invoice=53469611	REGARDING STRATEGY REGARDING PROPOSED ORDERS; REVIEW E-MAIL CORRESPONDENCE FROM PAUL DOMINICK REGARDING SAME.	0.6	189.00
3/6/2012	306	JEFFREY TIBBALS	REVIEW ISSUE OF PREVAILING PARTY ATTORNEY'S	0.3	94.50
3/30/2012		Invoice=53469611	FEES.	0.3	94.50
3/7/2012	413	DENISE LECLERC	DRAFT CONSENT ORDER TO SEAL RECORD FOR	1.4	252.00
3/30/2012		Invoice=53469611	SUBMITTING TO COURT; COMMUNICATIONS WITH COUNSEL REGARDING SAME.	1.4	252.00
3/9/2012	306	JEFFREY TIBBALS	WORK ON CONSENT ORDER TO FILE EXHIBITS UNDER	1.2	378.00
3/30/2012		Invoice=53469611	SEAL; CONSIDER RULE 41.1 FACTORS AND REVIEW CONFIDENTIAL EXHIBITS; E-MAIL CORRESPONDENCE WITH LAURA KING REGARDING RULE 41.1 FACTORS.	1.2	378.00
3/12/2012	306	JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH LAURA KING	0.2	63.00
3/30/2012		Invoice=53469611	REGARDING FACTORS RELATING TO SEALING TRIAL EXHIBITS.	0.2	63.00
3/15/2012	306	JEFFREY TIBBALS	CONTINUE TO DRAFT, REVISE AND AMEND CONSENT	0.7	220.50
3/30/2012		Invoice=53469611	ORDER SEALING EXHIBITS.	0.7	220.50

Date	Initials	Name / Invoice Number	Description	Hours	Amount
3/16/2012	306	JEFFREY TIBBALS	REVISE AND AMEND CONSENT ORDER SEALING TRIAL	0.5	157.50
3/30/2012		Invoice=53469611	EXHIBITS.	0.5	157.50
3/16/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH LAURA KING	0.1	31.50
3/30/2012		Invoice=53469611	REGARDING SAME.	0.1	31.50
3/26/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.2	63.00
			REGARDING CONSENT ORDER SEALING DOCUMENTS.		
3/30/2012	306	JEFFREY TIBBALS	REVIEW CORRESPONDENCE FROM JOHN WEST WITH	0.1	31.50
			ENCLOSED SIGNED CONSENT ORDER FILING EXHIBITS		
			UNDER SEAL.		
3/30/2012	306	JEFFREY TIBBALS	DRAFT LETTER TO JUDGE WATSON REGARDING	0.1	31.50
			CONSENT ORDER.		
4/16/2012	306	JEFFREY TIBBALS	CONDUCT LEGAL RESEARCH REGARDING RECENT EMINENT	1.3	409.50
			DOMAIN CASES POTENTIALLY ON POINT REGARDING		
			LEASE ISSUE.		
5/1/2012	306	JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER	0.1	31.50
			REGARDING STATUS OF FINAL ORDER.		
		UNBILLED TOTALS: WORK:	5 records	1.8	567.00
		UNBILLED TOTALS: BILL:		1.8	567.00
		BILLED TOTALS: WORK:	447 records	327.3	101,136.50
		BILLED TOTALS: BILL:		327.2	101,452.50
		GRAND TOTALS: WORK:	452 records	329.1	101,703.50
		GRAND TOTALS: BILL:		329	102,019.50

EXHIBIT "B"

CostCode	LedgerCode	Worked Amount	Billed Amount	Description
H005	HCOST	\$13.00	\$13.00	RECORDING FEES
Subtotal H005		\$13.00	\$13.00	RECORDING FEES
H006	HCOST	\$50.00	\$50.00	FILING FEES
Subtotal H006		\$50.00	\$50.00	FILING FEES
H009	HCOST2	\$499.90	\$499.90	TRAVEL EXPENSE
Subtotal H009		\$499.90	\$499.90	TRAVEL EXPENSE
H010	HCOST2	\$83.85	\$83.85	DEPOSITION EXPENSES
Subtotal H010		\$83.85	\$83.85	DEPOSITION EXPENSES
H025	HCOST2	\$525.00	\$525.00	CONDEMNOR EXPERT FEES
Subtotal H025		\$525.00	\$525.00	CONDEMNOR EXPERT FEES
H030	HCOST2	\$57.46	\$57.46	MEETING EXPENSES
Subtotal H030		\$57.46	\$57.46	MEETING EXPENSES
H036	HCOST2	\$1,302.45	\$1,302.45	COURT TRANSCRIPTS
Subtotal H036		\$1,302.45	\$1,302.45	COURT TRANSCRIPTS
H037	HCOST	\$2,655.00	\$2,655.00	EXPERT WITNESS FEE
Subtotal H037		\$2,655.00	\$2,655.00	EXPERT WITNESS FEE
H048	HCOST2	\$894.21	\$894.21	MEDIATION
Subtotal H048		\$894.21	\$894.21	MEDIATION
S001	SCOST	\$10.08	\$10.08	COMMUNICATION CHARGES
Subtotal S001		\$10.08	\$10.08	COMMUNICATION CHARGES
S002	SCOST	\$44.20	\$44.20	POSTAGE
Subtotal S002		\$44.20	\$44.20	POSTAGE
S003	SCOST	\$481.60	\$481.60	COPIES
Subtotal S003		\$481.60	\$481.60	COPIES
S022	SCOST	\$56.50	\$56.50	COURIER SERVICES
Subtotal S022		\$56.50	\$56.50	COURIER SERVICES
S028	SCOST	\$143.90	\$143.90	WESTLAW RESEARCH
Subtotal S028		\$143.90	\$143.90	WESTLAW RESEARCH
S040	SCOST	\$0.70	\$0.70	COLOR COPIES
Subtotal S040		\$0.70	\$0.70	COLOR COPIES

S056	SCOST	\$31.47	\$31.47	EXPRESS PACKAGE DELIVERY
Subtotal S056		\$31.47	\$31.47	EXPRESS PACKAGE DELIVERY

TOTAL		\$6,849.32	\$6,849.32	
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EXHIBIT "C"

HARTNETT REALTY COMPANY, INC.

Real Estate Appraisers & Counselors

Established 1947

134 Meeting Street, Suite 120 Charleston, South Carolina 29401
Telephone 843.723-7222 Fax 843.723-9403

email: janel@hcrncrealty.com

Bill To:

Paul A. Dominick, Esquire
Nexsen Pruett
205 King Street
Charleston, SC 29401

PAST DUE
10/19/09

INVOICE DATE: 6/25/09

Invoice #: TFH2009-094-Dominick

Date	Description	Charge	Paid	Balance Due
5/19/09	Appraisal of "before" and "after" values 1455 South Live Oak Dr. Moncks Corner, Berkeley County, SC	\$ 5,200.00		\$ 5,200.00
	TMS#: 161-11-00-055			
Total Amount Due:				\$ 5,200.00

Make Checks Payable to:

Hartnett Realty Company, Inc.
Federal Tax ID: 57-0771517

PLEASE Remit or
Advise -

Invoice Number	Date	Reference	Gross Amount	Discount	Net
TFH2009094	10/14/2009	APPRSR FEEL TAKING	5,200.00	0.00	5,200.00
Payor: REALTY INCOME CORPORATION Payee: HARTNETT REALTY COMPANY, INC.			Date 10/14/2009	Check No. 043666	Check Amount \$5,200.00

Retain this statement for your records

REALTY INCOME CORPORATION
600 LA TERRAZA BLVD
ESCONDIDO, CA 92025

WELLS FARGO BANK, N.A.
SAN FRANCISCO, CA

11-24
1210

Date
10/14/2009

Check No.
043666

Check Amount
\$5,200.00

Five Thousand, Two Hundred AND 00/100 Dollars

Pay to the order of:

HARTNETT REALTY COMPANY, INC.

134 MEETING ST #101
CHARLESTON, SC 29401

Paul M. Menn

Requires 2 signatures if over \$10,000.00

⑆0 3661⑆ ⑆121000248⑆ 4945008738⑆

HARTNETT REALTY COMPANY, INC.
Real Estate Appraisers & Counselors
Established 1947

134 Meeting Street, Suite 120
Telephone 843-723-7222, Fax 843-723-9403

Charleston, South Carolina 29401
email: www.hartnettrealty.com

Bill to:

RI CSS, LLC
C/O Paul A. Dominick, Esquire
Nexsen Pruet
205 King Street
Charleston, South Carolina 29401

INVOICE DATE: 12/21/11 **FILE#:** TFH2009-094-DOMINICK

DATE	Description	Charge	Paid	Balance Due
12/21/2011	Meetings with Attorneys, Review of			
	Depositions of other appraisers.			
	Appearance at trial and testimony of			
	Thomas F. Hartnett			
	9 Hours @ \$ 295.00	\$ 2,655.00	-0-	\$ 2,655.00
Total Due:				\$ 2,655.00

Federal Tax ID: 57-0771517

STATE OF SOUTH CAROLINA

County of Berkeley

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

v.

RI CS5, LLC,

Landowner(s)

and

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

Other Condemnee(s).

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

Condemnor's Return to Landowner's
Application for Award of Reasonable
Litigation Expenses

The condemnor, the South Carolina Department of Transportation ("SCDOT" or the "Department") respectfully submits this return to the Landowner's petition for costs. The Landowner requested that the Court award it fees for two attorneys, paralegal time other costs and expert witness fees totaling \$114,068.82.

The Department requests that the Court deny the same on the grounds that the litigating position of the Department was substantially justified. In the alternative, the condemnor asks that, should the Court determine that fees costs should be taxed against the State, that it reduce the award on the grounds that the Landowner's request is excessive.

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- I. No costs should be awarded because the litigating position of SCDOT was substantially justified within the meaning of that term in S.C. Code §28-2-510.

The law governing fee awards in condemnations is contained in S.C. Code Ann. §28-2-510 (B)(1)(Rev. 2007). That Code section is part of the S.C. Eminent Domain Procedure Act enacted in 1987. The section provides that the court on application from a prevailing party may award fees and costs as part of the condemnation judgment. "Prevails" is defined as compensation awarded that is at least as close to the highest valuation testified to on behalf of the landowner as the highest amount testified to on behalf of the condemnor. The section goes on to say that,

The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny the award, to the extent that the landowner, during the course of the action, engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust. (emphasis added).

The "substantially justified" language above mirrors that in the main federal fee-shifting statute involving the government, the Equal Access to Justice Act, 28 U.S.C.A. § 2412.¹ That statute, enacted in 1980, provides in part,

(d)(1) ...a court shall award to a prevailing party other than the United States fees and expenses...unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust.

There is no appellate case law in South Carolina defining the meaning of "substantially justified." However, there is an abundance of legislative history and case law interpretations of

¹ Both the federal and the South Carolina statutes negate the "American Rule" that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000). Further, statutes waiving the state's immunity from suit being in derogation of sovereignty must be strictly construed and the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.

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the federal statute. In lieu of a lengthy string cite, we refer the Court to the annotation at 69 A.L.R. Fed. 130 ("What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees under the Equal Access to Justice Act, (28 U.S.C.A. § 2412(d)(1)(A).")

With regard to the legislative history, the annotation refers to the House Judiciary Committee Report which states that the substantial justification test is essentially one of reasonableness. Thus, no award is intended where the government can show that its case had a reasonable basis in both law and in fact. The Report explains that 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, and indicates that the standard does not require the government to establish that its decision to litigate was based on a substantial probability of prevailing. 69 A.L.R. Fed 130.

Regarding the federal case law, Am. Jur. Fed. has a good summary:

To be substantially justified means, of course, more than merely undeserving of sanctions for frivolousness. However, a position can be justified even though it is not correct and can be substantially (that is, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. It must have enough foundation in law and fact that a reasonable person could think it correct; in other words, such position must be sufficiently colorable to engender "genuine dispute." 32 Am. Jur. 2d Federal Courts, §260.

Trial of this case, as most condemnation cases, involved the testimony of expert appraisal witnesses as to their opinions of the value of the property condemned. Mr. Thomas F. Hartnett testified for the landowner. Messrs. Charles F. Crider and David Ray Graydon, Jr. testified for the condemnor. Each was qualified as an expert to testify as to their opinion on the real estate valuation. The law and rules governing such testimony are contained in case law and in certain

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published appraisal standards of the appraisal industry, primarily the publication Uniform Standards of Professional Appraisal Practice and Advisory Opinions, the Appraisal Foundation (2005) ("USPAP"). With regard to the case law,

It must be remembered that in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment.

4 Sackman, Nichols on Eminent Domain, §12.01, p. 12-31; Standard Oil Co. of New Jersey v. Southern Pac. Co., 268 U.S. 146, 156, 45 S.Ct. 465, 467, 69 L.Ed. 890 (1925).

Nichols states,

All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.

Irrespective of the method adopted for the ascertainment of such value, it is incumbent on the condemnor to endeavor to reach a result that is truly "just compensation," that is, fair to the public as well as to the owner of the property taken. 4 Sackman, Nichols on Eminent Domain, §12.01, pp. 12-1 – 12-7.

USPAP recognizes a number of valid approaches to determining value. The most relevant with regard to commercial real property are the cost approach, the sales comparables approach, and the income approach. After analyzing each, the appraiser then applies his judgment as to which approach to accord the greater weight and which approaches to discount or disregard. See, generally, USPAP, Standard 1.

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Mr. Hartnett testified that his analysis indicated a value for the property under the sales comparable approach as \$444,500. However, in his reconciliation of the values, he gave greater weight to the capitalization of income approach using the existing lease and discounting the capitalized rent for certain reasons. His opinion was that the property was worth \$900,000. Tr. p. 110.

On the other hand, Messrs. Crider and Graydon, also using their respective professional judgments gave their testimony for the condemnor, discounted the income approach relying more heavily instead the sales comparable approach. Their stated reasons for doing so included their view that the actual rent was not arrived at in a true arms-length transaction and was much higher than the comparable rents for convenience stores locally. The condemnor's appraisers believed that the lease rent was above market. Mr. Hartnett acknowledged on cross examination that he did not do an analysis of market rent in conducting his appraisal. The opinions of the condemnor's appraisers have ample support in the record.

Michael Robert Pfeiffer, executive vice president of the landowner's parent company, Realty Income Corporation, testified at trial as to the background of his company's acquisition of the real estate and the process followed for valuing it and determining rental rates. At some point in 2008, a company, Sun Capital, approached Realty Income concerning its desire to purchase 75 convenience stores owned and operated the Worsley Companies. Not desiring to own the real estate but only the operating business, Sun asked Realty Income to purchase the land and improvements and lease it back to them. Tr. p. 24-29. Realty Income then closed on a purchase of all the properties of Worsley for \$65,350,000. Then Realty Income allocated the total purchase price among the properties with the result that it valued the Moncks Corner store at \$1.15 million. Tr. p. 32-33. Realty Income then determined that it required a rate of return of

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8.9% and applied that percentage to the allocated values of each of the stores. Tr. p. 41 and 69. The result was that the rent set for the store at issue was \$8,517.67 per month to be increased periodically per the CPI. Tr. p. 41.

The point of the foregoing is that, although the global purchase price of all the Worsley properties was reached between the buyer and seller in an arms-length transaction, and Worsley/Sun assented to the overall rental rate of return on all of the properties, the actual rental for the Moncks corner store was set unilaterally and arbitrarily by the owner, landowner, Realty Income for their subsidiary RI CS 5. Moreover, Worsley or Sun had no incentive or reason to protest the rental rate on the Moncks Corner store because a high rental there would necessarily result in a lower rental for another property. In other words, the individual store rents were not a concern of the lessee companies because their focus was on the overall rent on all of the properties based upon the global purchase price.

Given the foregoing, the condemnor's appraisers were substantially justified in discounting or even disregarding the actual rent for the Moncks Corner store. Clearly a reasonable person could think that this view is correct. The landowner should not be awarded its attorneys' fees and costs solely because the Court agreed with its theory of the case and not with the State's.

- II. Should the Court find an award of fees warranted, Petitioner's request should be reduced in that it far exceeds a reasonable lodestar amount under the law and guidelines regarding fee shifting in litigation.**

In its petition and the supporting affidavit of Jeffrey S. Tibbals, petitioner seeks \$114,068.82 in attorneys' fees and costs from the Department. As justification, Mr. Tibbals avers, *inter alia*, that the case involved a relatively novel issue of law in South Carolina; that a

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large amount of time (329 hours) was spent on the case; that the two attorneys representing the landowner have 33 and 13 years of experience respectively and are entitled to recover their billing rates of \$400 and \$310 per hour plus \$155 per hour for a paralegal and \$7,855 for their appraiser, Mr. Hartnett; and that the fees requested are typical for the Tri-county area.

The amounts actually billed and paid by parties prevailing against the State do not determine a reasonable fee for awards under fee-shifting statutes. Rather, courts use a "lodestar" approach, i.e. a reasonable rate times a reasonable number of hours.

When determining the reasonableness of attorney's fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate. See Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995) (this Court affirmed a trial court's award of an amount greater than that due the plaintiffs [sic] attorney under a contingency fee contract); Columbia (S.C.) Teachers Federal Credit Union v. Newsome, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990) (affirming an award of attorney's fees based upon an hourly rate even though agreement with client was contingency-based); see also, Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983) (the court should not automatically adopt the contingent fee or contractual arrangement; instead, the fee awarded may be more or less than that provided by the lawyer-client contract); Lanier v. Moore-Handley, Inc., 575 So.2d 83 (Ala. 1991) (a fee arrangement between the client and his attorney is not conclusive evidence of a reasonable attorney fee; therefore, the court affirmed an award which exceeded the agreed upon hourly rate). Instead, the court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Blumberg, supra. Further, on appeal, an award for attorneys will be affirmed so long as sufficient evidence in the record supports each factor. Id. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E. 2d 750, 759-60 (1997).

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

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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). Thus, while Realty Income, a NYSE-listed corporation may have the wherewithal and deem it prudent to retain two experienced attorneys and agree to pay as much as \$400.00 per hour to one of them, clearly such an arrangement is not necessary for the typical condemnee in Berkeley County to obtain counsel. See affidavit of trial counsel John S. West.

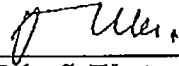
Contrary to petitioner's assertions, the issues in this suit were not novel or complex. Rather, the case was a routine condemnation case involving well settled valuation approaches. All appraisals of retail, whether for condemnations, bank loans, or other purposes analyze the income approach to value.

Conclusion

For the foregoing reasons, the Court should deny petitioners request for fees and expenses. To the extent the Court deems an award justified, it should reduce the amount requested to an award at a rate and number of hours that is the least amount necessary to enable a landowner to hire counsel in Berkeley County.

sgw

Respectfully submitted,



John S. West
P.O. Box 1869
Moncks Corner, South Carolina 29461
(843) 761-5626
(843-761-5627 (fax)
Jwestlaw@Homesc.com
Attorney for Respondent, SCDOT

June 25th, 2012
Moncks Corner, SC



AFFIDAVIT OF JOHN S. WEST

Personally appeared before me John S. West, who being duly sworn deposes and says:

1. I am a practicing attorney in Moncks Corner, Berkeley County, South Carolina. My firm name is John S. West, LLC. I was admitted to practice in this State in 1982.
2. I am the attorney of record for the South Carolina Department of Transportation ("SCDOT") in an action captioned South Carolina Department of Transportation, Condemnor, versus RI CS5, LLC, Landowner et al, Case No. 2009-CP-08-3890.
3. Since 2005 I have been an associate counsel for SCDOT concentrating on condemnation work in Berkeley, Dorchester, Georgetown and Horry counties.
4. I am also City Attorney for Moncks Corner.
5. From 1990 to 2004 I was employed by the South Carolina Public Service Authority (Santee Cooper) in various positions in the Legal Department, including my last position prior to retiring from state service as Executive Vice President and Chief Legal Officer.
6. Santee Cooper is a major public corporation with the power of eminent domain which it exercises principally in connection with the acquisition of rights of way for its electric and water facilities.
7. From 1990 to 2004 I was in charge of rights of way acquisitions by condemnation for Santee Cooper.
8. Prior to 1990 I was engaged in the private practice of law in Moncks Corner. My practice included condemnation work for public bodies and landowners.
9. Over the past thirty years I would estimate that I have been directly involved in over 300 condemnation suits.
10. For private legal work I currently charge \$250.00 per hour. For SCDOT work I charge \$150.00 per hour based on a directive of the South Carolina Attorney General's Office dated June 13, 2011, copy attached and marked Exhibit "A".
11. I am familiar with the rates charged by lawyers in Berkeley County. Fees average between \$150.00 and \$250.00 per hour.

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12. In the present litigation I expended approximately 100 hours to the case. I did not charge paralegal time or associate time.
13. I prepared pleadings, engaged in all aspects of discovery, participated in mediation, researched the law on matters relevant to the case, negotiated a possible settlement and tried the case.
14. Based on my experience, the total fees sought by counsel for the Landowner, portions of which were calculated on a combined hourly rate of \$710.00 per hour, are not reasonable and justified in a Berkeley County condemnation case.

FURTHER AFFIANT SAYETH NOT

J. West
JOHN S. WEST

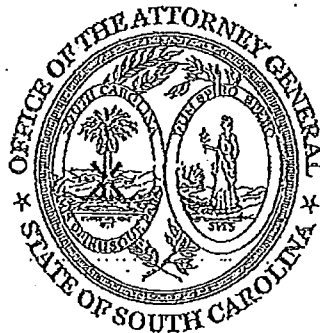
Sworn to and subscribed before me
This 25th day of June, 2012

Priscilla C. West
Notary Public for South Carolina
My Commission expires 6.22.15



2 of 2/jw

EXHIBIT "A"



ALAN WILSON
ATTORNEY GENERAL

June 13, 2011

Ms. Linda C. McDonald, Chief Counsel
South Carolina Department
of Transportation
P.O. Box 191
Columbia, South Carolina 29202

RE: Form 1 – Request for Authorization to Employ Associate Counsel

Dear Ms. McDonald:

For attorneys hired after July 1, 2008, the following billable hourly rate are applicable to engagement of counsel on and after that date:

Attorneys with 10 or more years of experience	up to \$150.00 per hour
Attorneys with 6 – 9 years of experience	up to \$110.00 per hour
Attorneys with 3 – 5 years of experience	up to \$90.00 per hour
Attorneys with up to 3 years of experience	up to \$80.00 per hour

I am enclosing a copy of a revised Form 1 which can be used to facilitate the approval of attorneys' fees under the rate structure adopted by the Attorney General's Office. As you know, the Comptroller's Office will not authorize the payment of attorneys' fees on any matter unless a Form 1 has been approved by the Attorney General's Office. It is the responsibility of the agency seeking the approval of rates to certify the years of experience of each attorney for whom approval of a rate is requested. Years of experience are to be indicated as of the date of submission of the Form 1.

Please pass this information on to any others at your agency who may have a need to know. Should you have any questions about rates or the revised Form 1, please contact me at 803.734.3705.

Sincerely yours,

T. Stephen Lynch
Deputy Attorney General

TSL/jre
Enclosure

CERTIFICATE OF MAILING

I, Priscilla C. West, an employee with the law firm of John S. West, LLC, do hereby certify that I have mailed a copy of Condemnor's Return To Landowner's Application for Award of Reasonable Litigation Expenses and our Certificate of Mailing in the foregoing action upon the recipient, below this 25th day of June, 2012, by placing a copy of same in the United States Mail, postage prepaid and return address clearly indicated, addressed as follows:

Jeffrey S. Tibbals, Esq.
Nexsen Pruet, LLC
PO Box 486
Charleston, SC 29402

Priscilla C. West
Priscilla C. West

Moncks Corner, South Carolina
June 25, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE CIRCUIT COURT

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

vs.

RI CS5, LLC,

Landowner(s).

and

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

Other Condemnee(s).

Case No. 2009-CP-08-3890

**REPLY BRIEF IN FURTHER
SUPPORT OF LANDOWNER'S
APPLICATION FOR REASONABLE
LITIGATION EXPENSES**

INTRODUCTION

Landowner RI-CS5, LLC ("Landowner") files this Reply Brief in Further Support of Landowner's Application for Reasonable Litigation Expenses to respond to the objections stated in South Carolina Department of Transportation's ("Condemnor") Return to the Application.

In its Return, Condemnor first asserts that this Court should award no fees or costs to Landowner, the prevailing party in this case pursuant to S.C. Code § 28-2-510, because, Condemnor argues, its position was "substantially justified". Condemnor also takes issue with the staffing and hourly rates of Landowner's counsel. Neither argument has merit, and this Court should grant the Application in full.

ARGUMENT

I. CONDEMNOR'S RELIANCE ON THE FEDERAL EQUAL ACCESS TO JUDGMENT ACT IS MISPLACED.

Condemnor argues that this Court should wholly reject Landowner's fee application on the basis that Condemnor's position was "substantially justified". However, Condemnor bases this position on legal interpretation of the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d)(1)(A). Landowner is seeking fees under S.C. Code § 28-2-510, not the Equal Access to Justice Act. In South Carolina, just compensation for a prevailing party includes litigation expenses. This allows landowners who are successful in condemnation actions to not have their awards depleted by the legal fees necessary to obtain the awards. A federal act with some similar language is no reason to deny this Landowner just compensation where the State has taken Landowner's property. Under Condemnor's interpretation of the South Carolina statute, all the SCDOT has to do to avoid paying legal fees is to submit a reasonable appraisal. This would render meaningless the definition of a prevailing party. There is no legal precedent in South Carolina for the adoption of such an extreme position.

Condemnor fails to examine the context of the federal statute as compared to S.C. Code § 28-2-510. The federal Equal Access to Justice Act (the "EAJA") permits the recovery of attorneys' fees and costs unless the court finds that the position of the United States was substantially justified . . ." Thus, an award of attorneys' fees under the EAJA depends entirely upon whether the federal government can show substantial justification. Much of the federal case law discussing "substantial justification" does not address the issue within the context of a condemnation proceeding, and pre-dates the 1985 amendment of the statute that added the definition of a prevailing party in condemnation cases.

With respect to the South Carolina statute at issue, whether the Condemnor's position was "substantially justified" is only a factor that may be applied by the trial court, "in its discretion", to reduce an award of litigation expenses. Viewing the statutes in their proper context, it is clear that the "substantially justified" provision is not a bar to the recovery of litigation expenses under S.C. Code § 28-2-510, as it would be under 28 U.S.C.A. § 2412(d)(1)(A). Rather, this Court may consider whether Condemnor's position was "substantially justified" as one of a number of factors relating to the amount of the award.

In addition, the South Carolina appellate courts have not yet interpreted the meaning of "substantially justified" under S.C. Code § 28-2-510. Nevertheless, there are numerous South Carolina appellate cases discussing the landowner's right to attorneys' fees when landowner is the prevailing party. In the very recent decision of *South Carolina Department of Transportation v. Janell P. Revels, et.al.*, S.C. Court of Appeals Opinion No. 5010, filed July 25, 2012, the South Carolina Court of Appeals found that S.C. Code § 28-2-510 shifts the source of the prevailing party's attorneys' fees to the losing party. (A copy of *Revels* is attached hereto as Exhibit 1.) In *Revels*, the Court of Appeals found that while SCDOT offered \$40,300 for the property, the jury awarded \$125,000 to the Landowner. Thus, in a case where the offer and final judgment were much closer than in the case before this Court, the Landowner prevailed and was entitled to reasonable litigation expenses. Therefore, the main thrust of Condemnor's argument consists of speculation as to how the provision might be applied by the South Carolina Supreme Court when South Carolina case law has consistently allowed attorneys' fees to the prevailing party in condemnation actions. Regardless, in this case, Condemnor's position was not substantially justified.

II. ASSUMING SUBSTANTIAL JUSTIFICATION IS AN ISSUE IN THIS NON-JURY CASE, THE CONDEMNOR'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

In this case, Condemnor presented no fewer than three appraisals, two by Charles Crider, and one by David Graydon. None of the final opinions of value proffered by Condemnor took the existing lease and rental income into consideration. This is not a case of a runaway jury, or a finding without reason. This was a non-jury action where this Court made detailed findings of fact and conclusions of law. In its Final Order And Judgment, this Court found that the final opinions of value in these appraisals were not justified. Below are examples of findings by the Court that are directly contrary to Condemnor's argument that its position was substantially justified:

"I find Mr. Crider's testimony to be little, if any, value for a number of reasons. First, Mr. Crider based his opinions regarding the relevance of the Lease upon the erroneous assumption that the Landowner and the tenant, Worsley Operation Corporation, were related entities. This assumption has no support in the record and, in fact, is thoroughly refuted by the evidence." (Final Order And Judgment dated May 15, 2012, p. 7)

"There is no evidence to support Mr. Crider's contention that the Landowner and Worsley Operating Corporation were the same entity." *Id.* At 8

"Mr. Crider's mistaken assumptions regarding the nature of the transaction render his opinions unreliable. For example, his faulty premise that the landlord and tenant were the same entity served as his justification to exclude the Lease from his analysis of the fair market value of the Property. As discussed in further detail below, I find that the Lease must be considered in determining the fair market value of the Property. In addition, Mr. Crider's erroneous factual analysis led him to wholly ignore the distinction between the Landowner and the owner of the business operations." *Id.*

"Mr. Crider provided additional ill-founded opinions. For example, Mr. Crider testified that the Lease was actually a mortgage, and therefore not reflective of market rent. Tr. at p. 177, 1. 4-p. 178, 1. 20. However, Mr. Crider admitted on cross-examination that he performed no analysis of market rent. Tr. at p. 183, 15-24. Finally, Mr. Crider also erroneously testified that personal property was bought by the Landowner and leased from the Landowner to the tenant, Tr. at p. 177, 1. 17-24; p. 190, 1. 17-24, when the record and the Lease prove the contrary. See Landowner's Exhibit 7 at p. 1, defining the "Premises" as the "Land and Improvements" defined in Exhibit "A" to the Lease, together with the Storage Tank System." *Id.* At 9

"Mr. Graydon's final opinion of value is based upon the replacement cost approach, but he admitted on cross-examination that where real property is purchased for investment for a stream of income, the most appropriate appraisal method is the income capitalization approach. Tr. at p. 218, l. 19-24." *Id.*

Mr. Graydon gave no justification for excluding the value of the Leased Fee Estate, other than his opinion that the Lease contained a higher than typical market rental rate, and therefore it appeared to him that the rent "may contain the going concern or the business value." *Id.*

"The primary legal issue to be decided is whether to take the value of the Lease into consideration in determining the fair market value of the Property, and consequently the just compensation to be awarded to the Landowner." *Id.* At 10 ...The Condemnor's reliance upon *Bolt* and its progeny is misplaced in this case. The undisputed facts establish that the Landowner does not have any ownership interest in the operations of the convenience store located on the Property. The Landowner owned only the real estate, while the business operations were owned by Worsley Operating Corporation. Thus, the Condemnor did not take any "going concern" from the Landowner – the Landowner owned no "going concern" business to lose. The separation of the real property and the business operations distinguishes this case from *Bolt*, and other South Carolina cases excluding the going concern value, where the owner of the real property and the business were one and the same. *Id.* at 11

Condemnor's refusal to acknowledge the value of the lease stood in defiant contradiction to both Condemnor's own appraisal policies and existing law. Condemnor's own Right of Way Appraisal Manual states that the income capitalization approach must be demonstrated when appraising investment property. Condemnor blatantly flouted its own guidelines in this case by choosing to ignore the value provided by the lease. Moreover, Condemnor's refusal to include the value of the lease in its just compensation analysis flew in the face of S.C. Code § 28-2-340(5), which provides for the admissibility of information regarding leases and rents in determining just compensation. Thus, even under Condemnor's proposed standard, its position was not reasonable in fact or in law, and this Court has so ruled.

Additionally, Condemnor stubbornly refused to acknowledge that the lease had any value throughout the case, and during trial. The first time that Condemnor finally admitted that the

lease increased the value of the real estate came when Condemnor submitted its proposed order. Condemnor's proposed order, at paragraph 17 of the Conclusions of Law section, stated "I consider the lease to have some bearing on the value of the subject property." Until that point, Condemnor had steadfastly denied that the lease was relevant to just compensation. More importantly, by the time that Condemnor finally recognized that the lease held compensable value, the vast majority of attorneys' fees and costs had been spent. Over a hundred thousand dollars in fees and costs was necessary to finally convince Condemnor that its position was ill-founded. Because it was not reasonable to refuse to consider the lease, Condemnor's position was not substantially justified, even under its chosen standard.

III. LANDOWNER'S REQUESTED FEES ARE REASONABLE.

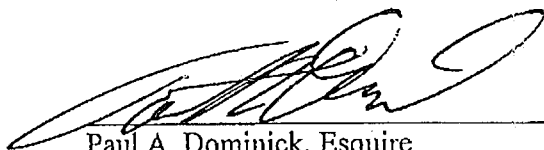
In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the South Carolina Supreme Court held that the following six factors should be considered when determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services,; *Id.* At 308, 486 S.E.2d at 760.

As detailed in the Affidavit of Richard S. Bybee, which is attached hereto as Exhibit 2 and submitted to the Court in support of Landowner's Application For Reasonable Litigation Expenses, the *Jackson* factors have been satisfied. Additionally, the Affidavit of Jeffrey S. Tibbals submitted with Landowner's Application for Reasonable Litigation Expenses and Supplemental Affidavit of Jeffrey S. Tibbals, attached hereto as Exhibit 3, support Landowner's claim for litigation expenses. Therefore, this Court should overrule these objections relating to the amount of the fee paid by the Landowner.

CONCLUSION

Landowner did not ask the Condemnor to purchase its property. The property was taken by condemnation. The highest value Condemnor placed on the property was substantially lower than what Landowner paid for the property about one year before the condemnation, and was substantially lower than the award of this Court. Landowner's long, hard legal battle for just compensation was costly, but successful. Without an appropriate award of legal fees and costs, Landowner's award for the value of the property taken will be greatly diminished and not the "just compensation" a prevailing party is allowed to recover under South Carolina law.

For the foregoing reasons, Landowner's Application for Reasonable Litigation Expenses should be granted in full. As indicated by affidavits of Landowner's counsel, the total fees equal \$114,681.50 and the costs of litigation equal \$12,049.32, for a total of \$126,730.82 in reasonable litigation expenses.



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August 3, 2012
Charleston, South Carolina

EXHIBIT 1

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

South Carolina Department of Transportation,
Respondent,

v.

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 are,
Appellants.

Appellate Case No. 2010-158646

Appeal From Marion County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5010
Heard March 14, 2012 – Filed July 25, 2012

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor,
P.C., of Surfside Beach, for Appellants.

Beacham O. Brooker, Jr., of the South Carolina
Department of Transportation, of Columbia, for
Respondent.

LOCKEMY, J.: In this appeal from a condemnation action, Janell P. Revels and R.J. Poston, Jr. (the Appellants) argue the circuit court erred in finding they were entitled to attorney's fees based on an hourly rate rather than a contingency fee agreement. We affirm.

FACTS/PROCEDURAL BACKGROUND

On August 6, 2007, the South Carolina Department of Transportation (SCDOT) served the Appellants with a notice of condemnation.¹ SCDOT subsequently offered the Appellants \$40,300 for their property. In June 2009, the case proceeded to a jury trial where the Appellants prevailed and were awarded \$125,000.

On June 23, 2009, the Appellants filed an application for attorney's fees and costs pursuant to section 28-2-510(B)(1) of the South Carolina Code (2007). The Appellants sought \$28,233.33 in attorney's fees and \$6,643.91 in costs pursuant to a contingency fee agreement with their attorney. The agreement provided that the Appellants' attorney agreed to represent them on a contingency fee basis of one-third of the gross amount collected over SCDOT's offer of \$40,300. During a hearing before the circuit court, the Appellants argued the court should determine whether the requested contingent attorney's fees were reasonable based on the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). SCDOT argued the contingency fee agreement should not be considered, but rather fees should be calculated based upon the lodestar analysis set forth in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

In a March 1, 2010 order, the circuit court determined attorney's fees should be based on an hourly rate rather than on the contingency fee agreement between the Appellants and their attorney. Citing the six *Jackson* factors, the circuit court determined Appellants' attorney was entitled to compensation at the rate of \$300 per hour for a total of \$16,290.² The circuit court subsequently denied the Appellants' motion for reconsideration. In its order denying the Appellants'

¹ According to the Appellants' brief, the condemnation notice provided that SCDOT was acquiring .314 acres of the Appellants' property for the construction of the U.S. Highway 378 relocation.

² The circuit court also awarded the Appellants \$6,643.91 in costs. The costs awarded are not at issue in this appeal.

motion, the court found the *Jackson* factors were not applicable. The court also found the Appellants' request for a determination that its contingency fee agreement was reasonable was not applicable in light of *Layman*. This appeal followed.

STANDARD OF REVIEW

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. School Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.*

LAW/ANALYSIS

Layman v. State

The Appellants argue the circuit court erred in relying on *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). We disagree.³

"Under the 'American Rule,' the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees." *Layman*, 376 S.C. at 451, 658 S.E.2d at 329. South Carolina and other jurisdictions "recognize numerous exceptions to this rule, including the award of attorneys' fees pursuant to a statute." *Id.* at 451-52, 658 S.E.2d at 329. "A statutory award of attorneys' fees is typically authorized under what is known as a fee-shifting statute, which permits a prevailing party to recover attorneys' fees from the losing party." *Id.* at 452, 658 S.E.2d at 329.

³ The Appellants also argue they are entitled to attorney's fees based upon their contingency fee agreement in order to satisfy the "just compensation" to which they are entitled under the South Carolina Constitution. Because the Appellants failed to raise this argument to the circuit court, it is not preserved for our review. See *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (holding issues must be raised to and ruled upon by the circuit court to be preserved for appellate review).

In *Layman*, participants in the Teachers and Employee Retention Incentive (TERI) brought a class action suit against the State and the South Carolina Retirement System alleging breach of contract as a result of the State collecting retirement contributions from their paychecks. 376 S.C. at 441, 658 S.E.2d at 323-24. The plaintiffs argued the court's instructions to consider the "benefit to all old TERI participants" in awarding attorney's fees made the determination of a reasonable award analogous to cases in which attorney's fees were awarded from a common fund. *Layman*, 376 S.C. at 453, 658 S.E.2d at 330. The plaintiffs argued that even though the applicable state action statute, section 15-77-300 of the South Carolina Code (Supp. 2011), shifts the source of attorney's fees to the State, the court should find that the circuit judge properly awarded attorney's fees based on the percentage-of-the-recovery approach typically utilized when the source of attorney's fees is spread among the beneficiaries of a common fund. *Id.*

Our supreme court disagreed with the plaintiffs, holding "that because the state action statute shifts the source of the prevailing party's attorneys' fees to the losing party, an award of fees based on a percentage of the prevailing party's recovery is improper." *Id.* at 455, 658 S.E.2d at 331. The court noted:

[U]tilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees. Although both sources are exceptions to the general rule that each party is responsible for the party's own attorneys' fees, the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party. This Court certainly acknowledges that a percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants. However, where, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a fee-spreading theory.

Id. at 453-454, 658 S.E.2d at 330. The court found a lodestar analysis was the proper method for determining an award of reasonable attorneys' fees under the state action statute. *Id.* at 457, 658 S.E.2d at 332. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Id.*

Here, the Appellants argue *Layman* is not applicable because the state action statute at issue in *Layman*, section 15-77-300, is not at issue in the present case. They contend the Eminent Domain Procedure Act⁴ (the Act) provides the proper procedure for determining reasonable litigation expenses. SCDOT argues the analysis in *Layman* is not limited to section 15-77-300, but also applies to the Act.

The Act provides the procedural guidelines for determining just compensation with regards to the exercise of the power of eminent domain. Pursuant to the Act, a landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his "reasonable litigation expenses." S.C. Code Ann. § 28-2-510(B)(1) (2007). "Litigation expenses" are defined in the Act as

the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the 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.

S.C. Code Ann. § 28-2-30(14) (2007). In any application for attorney's fees under the Act, the landowner

shall show that [he] has prevailed, state the amount sought, and include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.

⁴ S.C. Code Ann. §§ 28-2-10 to -510 (2007).

S.C. Code Ann. § 28-2-510(B)(1) (2007). The court can, in its discretion, reduce or deny the amount to be awarded if it determines the landowner "engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust." *Id.*

We find *Layman* is controlling in this case. Here, section 28-2-510, like section 15-77-300, shifts the source of the prevailing party's attorney's fees to the losing party, the State. According to *Layman*, it is improper to award a percentage-of-the-recovery as fees under a statute that shifts the source of attorney's fees to the losing party. Furthermore, as the court explained in *Layman*, it is improper to award a percentage-of-the-recovery under a statute that explicitly requires an attorney to state his hours. The *Layman* court found:

[A]n award based on a percentage of the TERI plaintiffs' recovery is inconsistent with the express terms of the statutory scheme. Although the state action statute neither requires that attorneys' fees be awarded based on an hourly rate, nor places a numerical cap on attorneys' fees, we find it significant that the statute provides that attorneys' fees assessed to the state agency may only be paid 'upon presentation of an itemized accounting of the attorney's fees.' S.C. Code Ann. § 15-77-330 (2005). In our opinion, the requirement of an 'itemized accounting' squarely contradicts the utilization of the percentage-of-the-recovery method in awarding attorneys' fees under the statute.

376 S.C. at 454, 658 S.E.2d at 330-31. Like section 15-77-300, section 28-2-510(B)(1) requires the presentation of an itemized statement from an attorney detailing his fee, hours, and expenses. As the *Layman* court found, this requirement "squarely contradicts" the percentage-of-the-recovery approach.

We also note the United States District Court for the District of South Carolina recently discussed *Layman* in *Sauders v. South Carolina Public Service Authority*, 2011 WL 1236163 (D.S.C. 2011). In *Sauders*, the District Court found the plaintiffs' contingency fee agreement was merely one of many factors to be taken into consideration in determining the reasonable amount of attorneys' fees due to the plaintiffs arising out of their inverse condemnation claims pursuant to section

28-11-30 of the South Carolina Code (Supp. 2011).⁵ Citing *Layman*, the *Sauders* court gave "enhanced consideration" to the actual amount of work performed, the customary legal fees for similar services, and the benefit obtained for all plaintiffs. *Sauders*, 2011 WL 1236163 at 7. The District Court noted that "[e]mphasizing these criteria remains consistent with awarding fees pursuant to a fee-shifting statute." *Id.*

Accordingly, we find the circuit court did not err in relying on *Layman*.

Jackson v. Speed

The Appellants argue the circuit court erred in failing to determine whether the requested attorney's fees were reasonable pursuant to *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). We disagree.

In *Jackson*, our supreme court held that "[w]hen determining the reasonableness of attorney's fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate." 326 S.C. at 308, 486 S.E.2d at 759. The court held the following six factors should be considered when determining a reasonable attorney's fee: "(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." *Id.* at 308, 486 S.E.2d at 760.

Here, the circuit court, in its order, stated

I have taken into consideration the following items in reaching a decision in this matter:

- a) Major extent and difficulty of the case;
- b) Time necessarily devoted to the case;
- c) Professional standing of counsel;
- d) Contingency of compensation; and
- e) Beneficial results obtained.

⁵ Section 28-11-30 deals with reimbursement for property owners for certain expenses under the relocation assistance chapter. S.C. Code Ann. § 28-11-30 (Supp. 2011).

Based on the factors set forth above, I do find that [the Appellants are] entitled to an award of attorney's fees but that the attorney's fees should be based on an hourly rate rather than on a contingency fee agreement between [the Appellants'] attorney and his client[s].

In their motion for reconsideration, the Appellants argued the circuit court's ruling did not address any of the *Jackson* factors the court must consider in awarding attorney's fees. Subsequently, in its order denying the Appellants' motion for reconsideration, the circuit court found the *Jackson* factors were not applicable. The court further stated that the Appellants' "request for attorney's fees and whether or not a contingent attorney fee under S.C. Code Ann. § 28-2-510(B) are reasonable are not applicable in light of the *Layman* decision."

On appeal, the Appellants contend that although the circuit court cited the six *Jackson* factors in its order, it relied on the factors "only in determining the lodestar multiplier" and did not rule whether the Appellants' agreed upon contingency fee was reasonable under the Act. Relying on *Vick v. South Carolina Department of Transportation*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001), the Appellants argue the circuit court should have first determined whether the requested attorney's fees were reasonable in accordance with the *Jackson* factors.

In *Vick*, a property owner brought an inverse condemnation action against SCDOT, alleging damage to a private road. 347 S.C. at 475, 556 S.E.2d at 696. After a finding by the master-in-equity that the road was privately owned and had not been dedicated to the public, the circuit court entered judgment on the jury verdict and awarded Vick, the property owner, attorney's fees pursuant to section 28-2-510(A). *Id.* at 476, 556 S.E.2d at 696. After the trial, Vick's attorney submitted an affidavit stating that he had worked for Vick in the past at an hourly rate of \$130, but in this case the fee agreement called for a one-third contingency fee. *Id.* at 483, n.6, 556 S.E.2d at 700, n.6. Vick's attorney stated that he spent 137.2 hours on this matter, plus 59.1 hours by an associate, and 7.7 hours of paralegal time. *Id.* The circuit court awarded Vick \$41,425.00 in attorney's fees. *Id.* SCDOT appealed and this court found that "[t]o the extent SCDOT asserts the attorney fees are excessive because they exceed the amount that would be due on an hourly basis, this issue also was not preserved In any event, the award was not error." *Id.* at 483, 556 S.E.2d at 700. Based upon the *Jackson* factors, this court found that the "circuit judge's order in this case shows that he considered these factors in determining a figure he believed constituted reasonable compensation." *Id.* at 484, 556 S.E.2d at 701.

Here, the circuit court was not required to first make a determination regarding the reasonableness of the contingency fee agreement. The South Carolina District Court recently analyzed *Vick* in *Sauders*. The *Sauders* court held that although this court's language in *Vick* concerning the amount of reasonable attorney's fees was dicta because the issue was not preserved for appeal, the discussion in *Vick* was relevant to determining the method of attorney's fees. 2011 WL 1236163 at 5. The District Court found *Vick* "demonstrates that after analyzing the six factors a court should consider in determining a reasonable attorney's fee, a court could conclude that a reasonable attorney's fee under the circumstances of the particular case is an amount close to or equal to the contingency fee contract." *Id.* However, the District Court noted "*Vick* does not hold that the contingency fee contract controls the determination of what is a reasonable attorney's fee in an inverse condemnation action." *Id.* The District Court noted that "South Carolina law specifically rejects the notion that a contingency fee contract controls a court's determination of reasonable attorneys' fees due to a plaintiff pursuant to a statute mandating the award of attorney's fees." *Id.*

Accordingly, in light of *Layman* and *Sauders*, we find the circuit court was not required to first determine the reasonableness of the Appellants' contingency fee agreement.

Consideration of Fee Agreement

Relying on *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009), the Appellants argue a contingency fee agreement between a landowner and his attorney must be considered by the court when determining reasonable attorney's fees. The Appellants contend it is contradictory for SCDOT to argue the circuit court should not consider the Appellants' contingency fee agreement when, in *Kiriakides*, the condemnor argued the contingency fee agreement between the condemnee and his attorney controlled. Because the Appellants failed to raise this argument to the circuit court, it is not preserved for our review. *See Pye*, 369 S.C. at 564, 633 S.E.2d at 510 (holding issues must be raised to and ruled upon by the circuit court to be preserved for appellate review).

CONCLUSION

Based on the foregoing, we affirm the circuit court.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

vs.

RI CSS, LLC,

Landowner(s).

and

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

Other Condemnee(s).

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

**AFFIDAVIT OF
RICHARD D. BYBEE**

PERSONALLY APPEARED before me, Richard D. Bybee, who being first duly sworn does state as follows:

1. My name is Richard Bybee. I am over twenty-one years of age and competent in all respects to testify about the matters herein.

2. I am a partner in the firm of Smith, Bundy, Bybee & Barnett, located in Mount Pleasant, South Carolina. The firm focuses on many real estate related areas of practice, including eminent domain. I have been with the firm since 1989.

3. I have practiced law for over 30 years. I served as Assistant Attorney General for the South Carolina Attorney General from 1977 to 1982.

4. From 1983 to 1989, I served as Deputy Chief Counsel for the South Carolina Department of Highways and Public Transportation. In that capacity, I was involved in eminent domain matters throughout the State of South Carolina.

5. Since 1989, my private practice has involved representation of landowners, including landowners in Berkeley County, and condemning authorities in eminent domain matters. I have been involved in all aspects of such matters, including trial and appeals.



6. I am a member of the South Carolina Bar, and admitted to practice before the U.S. Supreme Court, U.S. Fourth Circuit Court of Appeals, and the U.S. District Court for the District of South Carolina.

7. Mr. Dominick and Mr. Tibbals have earned and enjoy excellent reputations among the legal community in South Carolina. The law firm of Nexsen Pruet, LLC also enjoys a reputation of providing excellent legal representation.

8. I have reviewed the Landowner's Application for Award of Reasonable Litigation Expenses, the Affidavit and Supplemental Affidavit of Jeffrey S. Tibbals, with Exhibits (including billing records of Nexsen Pruet, LLC), Condemnor's Return to Landowner's Application for Award of Reasonable Litigation Expenses, and the Final Order and Judgment in this matter.

9. Based upon my experience, a reasonable and customary rate for handling a matter of this complexity in Charleston tri-county area, including Berkeley County, would be \$350 per hour. Although Mr. Dominick's combined hourly rate was \$382 an hour, this is offset by Mr. Tibbals' combined rate of \$310 per hour, for an average rate of \$346 per hour. Thus, it is my opinion that rates charged by Nexsen Pruet, LLC are reasonable.

10. The division of labor between Mr. Dominick and Mr. Tibbals was reasonable for a case such as this one. It appears most of Mr. Dominick's involvement was up to and through mediation, while Mr. Tibbals handled discovery and most of the trial preparation. Considering the evidence being presented and the substantial amount at stake in the case, having two experienced attorneys, a senior partner and a junior partner, at trial was reasonable.

11. This was a complex case that was aggressively litigated by Condemnor. Condemnor presented two experts and three appraisals to support the offer to Landowner. Additionally, Condemnor asserted that the market value of the lease on the property could not be considered in determining just compensation. This unjustified legal position, in combination with Condemnor's multiple appraisals increased the work required of Landowner's counsel to successfully prosecute Landowner's claim for just compensation. Landowner's counsel was successful in achieving an excellent result.

12. Considering the complexity and substantial nature of the matter, discovery, mediation, trial, and the result achieved, the amount of time devoted to asserting the Landowner's claim for compensation was reasonable and appropriate.

FURTHER AFFIANT SAYETH NOT.


RICHARD D. BYBEE

SWORN TO and subscribed before me
this 1st day of August, 2012.

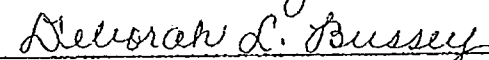

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3.9.19

EXHIBIT 3

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE CIRCUIT COURT

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

South Carolina Department of Transportation,

Condemnor,

vs.

RI CS5, LLC,

Landowner(s).

and

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

Other Condemnee(s).

Case No. 2009-CP-08-3890

**SUPPLEMENTAL AFFIDAVIT OF
JEFFREY S. TIBBALS**

PERSONALLY APPEARED before me, Jeffrey S. Tibbals, who being first duly sworn does state as follows:

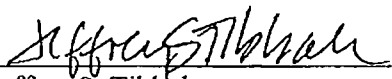
1. I am one of the attorneys for the Landowner, RI CS5, LLC and its sole member Realty Income Corporation ("Landowner"), in the above-captioned action practicing with the firm of Nexsen Pruet, LLC ("Nexsen Pruet").

2. This Supplemental Affidavit supplements and updates my previous Affidavit dated June 1, 2012 filed in support of Landowner's Application for Award of Reasonable Litigation Expenses of even date.

3. The table attached as Exhibit A hereto shows the time spent, amount charged, and average billable rate of each of the timekeepers who worked on this matter. Because Nexsen Pruet, LLC's involvement in this matter began on or around April 28, 2009, certain timekeeper rates were adjusted over the years in accordance with the firm's normal business practices.

4. Since May 18, 2012, additional attorneys' fees and costs in this matter have accrued in an amount totaling \$13,401.78, as shown on the attached Exhibit B.

FURTHER AFFIANT SAYETH NOT.



Jeffrey S. Tibbals

SWORN TO and subscribed before me
this 2nd day of August, 2012.



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 02-24-13

EXHIBIT "A"

Matter Timekeeper Summary - Amount Worked

<u>Number</u>	<u>Name</u>	<u>Title</u>	<u>Worked</u> <u>Amount</u>	<u>Hours</u> <u>Worked</u>	<u>Combined</u> <u>Rate *</u>
149	Dominick, Paul	Partner	44,000.00	115.30	\$ 382.00
127	Groves, Stephen	Partner	608.00	1.60	\$ 380.00
450	James, Eric	Paralegal	204.00	1.20	\$ 170.00
483	Jervy, Neyle	Paralegal	60.00	0.40	\$ 150.00
486	Joyner, Sara	Paralegal	68.00	0.40	\$ 170.00
413	Leclerc, Denise	Paralegal	7,625.00	44.60	\$ 170.00
451	Taylor, Kimberly	Paralegal	883.50	5.70	\$ 155.00
306	Tibbals, Jeffrey	Partner	61,233.00	198.00	\$ 310.00
Total			114,681.50	367.20	

* Dominick and Tibbals Combined Rates are rounded up.

EXHIBIT “B”

Cost Summary - Unbilled



Matter Description WF INTERMEDIATE REAL ESTATE, LLC VS. SCDOT AND **Matter Number** 038854-00002
Client Name REALTY INCOME CORPORATION **Client Number** 038854

01 - 08 - 2012 - New Period		0812	01/12-08/12		LTD		
Description	Currency	Amount	Billable Amount	Amount	Billable Amount	Amount	Billable Amount
<u>FILING FEES</u>	USD	0.00	0.00	25.00	25.00	25.00	25.00
<u>COMMUNICATION CHARGES</u>	USD	0.00	0.00	1.02	1.02	1.02	1.02
<u>POSTAGE</u>	USD	0.00	0.00	6.30	6.30	6.30	6.30
<u>COPIES</u>	USD	0.20	0.20	60.60	60.60	60.60	60.60
<u>COURIER SERVICES</u>	USD	0.00	0.00	40.50	40.50	40.50	40.50
<u>WESTLAW RESEARCH</u>	USD	0.00	0.00	14.36	14.36	14.36	14.36
Total		0.20	0.20	147.78	147.78	147.78	147.78

Matter Timekeeper Summary - Unbilled Fees



Matter Description WF INTERMEDIATE REAL ESTATE, LLC VS. SCDOT AND

Currency USD

Matter Number 038854-00002

Number	Name	Title	Worked Hours	Worked Amount	Billable Hours	Billable Amount
<u>0149</u>	DOMINICK, PAUL	PARTNER	15.40	6,468.00	15.40	6,468.00
<u>0306</u>	TIBBALS, JEFFREY	PARTNER	23.00	7,245.00	20.00	6,300.00
<u>0413</u>	LECLERC, DENISE	PARALEGAL	2.70	486.00	2.70	486.00
			41.10	14,199.00	38.10	13,254.00

Date	Initials	Name / Invoice Number	Description	Hours	Amount
5/21/2012		306 JEFFREY TIBBALS	REVIEW FINAL ORDER AND JUDGMENT SIGNED BY JUDGE WATSON.	0.3	94.50
5/21/2012		306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER, LAURA KING, SUSIE ONATE AND PAUL DOMINICK REGARDING ORDER.	0.1	31.50
5/21/2012		306 JEFFREY TIBBALS	CONSIDER DEADLINE FOR ATTORNEY FEES APPLICATION.	0.1	31.50
5/28/2012		306 JEFFREY TIBBALS	REVIEW AND CONSIDER EMINENT DOMAIN STATUTE REGARDING APPLICATION FOR AWARD OF LITIGATION EXPENSES.	0.3	94.50
5/30/2012		306 JEFFREY TIBBALS	REVIEW AND CONSIDER SIX FACTOR TEST FOR REASONABLE ATTORNEYS FEES UNDER SOUTH CAROLINA LAW.	0.4	126.00
5/30/2012		413 DENISE LECLERC	DRAFT PETITION FOR AWARD OF ATTORNEY FEES AND COST, AFFIDAVIT OF JEFFREY TIBBALS FOR ATTORNEY'S FEES, LETTER TO BERKELEY COUNTY REGARDING PETITION FOR AWARE OF COSTS; RESEARCH AND PREPARE EXHIBITS FOR FEES AND COSTS; COMMUNICATIONS WITH COUNSEL REGARDING SAME.	2.7	486.00
5/31/2012 billed amt.		306 JEFFREY TIBBALS	WORK ON ATTORNEY FEES ISSUE; REVISE AND AMEND APPLICATION FOR REASONABLE LITIGATION EXPENSES, REVISE AND AMEND AFFIDAVIT IN SUPPORT OF ATTORNEYS FEES; REVIEW ALL BILLING ENTRIES; WORK ON COMPILATION OF EXPENSES AND FOLLOW UP WITH TOMMY HARTNETT'S OFFICE REGARDING CHARGES/PAYMENTS.	2.3	724.50

6/1/2012 billed amt	306 JEFFREY TIBBALS	FURTHER REVISE AND AMEND APPLICATION FOR ATTORNEYS' FEES; REVISE AND AMEND AFFIDAVITS; REVIEW AND CONSIDER TIMEKEEPING AND COST RECORDS; REVIEW HARTNETT INVOICES AND CONSIDER SAME; FURTHER REVISE AND AMEND AFFIDAVIT; REVISE AND AMEND COST SPREADSHEET; DRAFT LETTER TO CLERK OF COURT REGARDING LANDOWNER'S APPLICATION FOR AWARD OF REASONABLE LITIGATION EXPENSES AND THE AFFIDAVIT.	3.9 3.9	1,228.50
6/1/2012	149 PAUL DOMINICK	REVIEW AND REVISE MOTION AND AFFIDAVIT FOR ATTORNEYS FEES; CONFERENCE WITH MR. TIBBALS CONCERNING THE SAME.	0.4	168.00
6/5/2012	306 JEFFREY TIBBALS	DRAFT LETTER TO JUDGE WATSON REGARDING CONSENT ORDER PERMITTING TRIAL EXHIBITS TO BE FILED UNDER SEAL.	0.2	63.00
6/5/2012	306 JEFFREY TIBBALS	REVISE AND AMEND LETTER TO JUDGE WATSON.	0.1	31.50
6/6/2012	149 PAUL DOMINICK	WORK ON LEGAL FEE ISSUES.	0.4	168.00
6/6/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST REGARDING RETURN TO APPLICATION FOR REASONABLE LITIGATION EXPENSES.	0.1	31.50
6/6/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING TRIAL, FEE APPLICATION.	0.3	94.50
6/6/2012	306 JEFFREY TIBBALS	DRAFT E-MAIL MEMO TO CLIENT REGARDING SCDOT POSITION ON FEE APPLICATION.	0.2	63.00
6/6/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST	0.1	31.50

		REGARDING TIMING OF RETURNS.		
6/6/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY, POTENTIAL APPEALS ISSUES.	0.2	63.00
6/7/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH DARCEA MONTGOMERY OF JUDGE WATSON'S OFFICE REGARDING ORDER PERMITTING EXHIBITS TO BE FILED UNDER SEAL.	0.1	31.50
6/7/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH DARCEA MONTGOMERY REGARDING SEAL ORDER.	0.1	31.50
6/11/2012	149 PAUL DOMINICK	TELEPHONE DISCUSSION WITH MR. BYBEE CONCERNING AFFIDAVIT RELATING TO REASONABLENESS OF LEGAL FEES; CONFERENCE WITH MR. TIBBALS CONCERNING SAME.	0.6	252.00
6/12/2012	306 JEFFREY TIBBALS	REVIEW SIGNED ORDER REGARDING EXHIBITS UNDER SEAL, CONSIDER PROCEDURES.	0.2	63.00
6/15/2012	306 JEFFREY TIBBALS	CONSIDER STATUS OF FILING DOCUMENTS UNDER SEAL; REVIEW COURT PROCEDURES REGARDING SAME.	0.5	157.50
6/26/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING CONDEMNOR'S RETURN TO FEE APPLICATION.	0.2	63.00
6/26/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH MIKE PFEIFFER REGARDING STRATEGY FOR RESPONSE ON SCDOT'S OBJECTION TO FEES.	0.1	31.50
6/26/2012	306 JEFFREY TIBBALS	REVIEW AND CONSIDER SCDOT RETURN TO APPLICATION FOR FEES AND E-MAIL CORRESPONDENCE WITH CLIENT REPRESENTATIVES REGARDING SAME.	0.6	189.00

6/27/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JUDGE WATSON, JOHN WEST REGARDING SCDOT'S RETURN TO APPLICATION FOR FEES, POTENTIAL RESOLUTION AND PLANNED SCHEDULE.	0.4	126.00
6/27/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY FOR RATIONAL RESPONSE TO STATED OBJECTIONS TO FEES BY SCDOT AND E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER REGARDING SAME.	0.5	157.50
7/2/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH MIKE PFEIFFER REGARDING ADJUSTMENTS TO FEES, CALCULATIONS, STRATEGY FOR NEGOTIATIONS WITH SCDOT.	0.1	31.50
7/2/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY AND CALCULATIONS.	0.2	63.00
7/2/2012	306 JEFFREY TIBBALS	DRAFT, REVIEW AND AMEND E-MAIL CORRESPONDENCE WITH JOHN WEST REGARDING OFFER TO SETTLE ON FEE APPLICATION.	0.5	157.50
7/6/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST REGARDING SCDOT POSITION ON APPLICATION FOR ATTORNEY FEES.	0.1	31.50
7/6/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING APPLICATION FOR ATTORNEY FEES.	0.2	63.00
7/6/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER, PAUL DOMINICK REGARDING ATTORNEY FEES, REPLY AFFIDAVIT.	0.2	63.00
7/9/2012	306 JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM JOHN WEST REGARDING COUNTEROFFER FOR ATTORNEYS FEES.	0.1	31.50

7/9/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY ON FEE RECOVERY.	0.2	63.00
7/9/2012	306 JEFFREY TIBBALS	DRAFT E-MAIL MEMO TO MIKE PFEIFFER REGARDING FEES.	0.2	63.00
7/9/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST REGARDING PAYMENT OF JUDGMENT.	0.1	31.50
7/9/2012	149 PAUL DOMINICK	WORK ON ATTORNEYS' FEE ISSUES.	0.5	210.00
7/10/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH MIKE PFEIFFER REGARDING SCDOT OFFER ON ATTORNEYS FEES.	0.1	31.50
7/10/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY REGARDING FEE RECOVERY.	0.2	63.00
7/16/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH MIKE PFEIFFER REGARDING COUNTEROFFER TO SCDOT AND CONSIDER SAME.	0.3	94.50
7/16/2012	306 JEFFREY TIBBALS	REVIEW CALCULATIONS AND DRAFT E-MAIL MEMO TO JOHN WEST REGARDING COUNTEROFFER.	0.3	94.50
7/18/2012	149 PAUL DOMINICK	WORK ON LEGAL FEE ISSUES.	0.3	126.00
7/18/2012	306 JEFFREY TIBBALS	CONSIDER STRATEGY FOR FEE SETTLEMENT.	0.2	63.00
7/23/2012	306 JEFFREY TIBBALS	CONDUCT LEGAL RESEARCH REGARDING SUBSTANTIALLY JUSTIFIED STANDARD UNDER FEDERAL EQUAL ACCESS TO JUSTICE ACT AND SOUTH CAROLINA CODE § 15-77-300.	1.8	567.00
7/23/2012	306 JEFFREY TIBBALS	DRAFT, REVISE AND AMEND REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION FOR REASONABLE LITIGATION EXPENSES.	4.1	1,291.50

7/23/2012	149 PAUL DOMINICK	CALL TO MR. BYBEE CONCERNING AFFIDAVIT; CONFERENCE WITH MR. TIBBALS.	0.3	126.00
7/24/2012	149 PAUL DOMINICK	RESEARCH RELATED TO ATTORNEYS' FEES.	1	420.00
7/24/2012	306 JEFFREY TIBBALS	REVISE AND AMEND REPLY BRIEF IN SUPPORT OF ATTORNEYS FEES.	1.2	378.00
7/24/2012	306 JEFFREY TIBBALS	TELEPHONE CONFERENCE WITH JOHN WEST REGARDING FEE ISSUE.	0.1	31.50
7/24/2012	306 JEFFREY TIBBALS	E-MAIL CORRESPONDENCE WITH JOHN WEST, JUDGE WATSON REGARDING AGREED UPON EXTENSION FOR REPLY ON FEE APPLICATION.	0.1	31.50
7/25/2012	306 JEFFREY TIBBALS	REVIEW E-MAIL CORRESPONDENCE FROM JUDGE WATSON REGARDING FEE APPLICATION.	0.1	31.50
7/26/2012	149 PAUL DOMINICK	EMAIL EXPERT; TELEPHONE DISCUSSION WITH MR. BYBEE CONCERNING AFFIDAVIT; WORK ON AFFIDAVIT.	1.2	504.00
7/30/2012	149 PAUL DOMINICK	DRAFT AFFIDAVIT OF MR. BYBEE; REVIEW MOTION AND BRIEF.	2.5	1,050.00
7/31/2012	149 PAUL DOMINICK	REVIEW NEW CASE; FORWARD TO CLIENT; WORK ON SUPPLEMENTAL BRIEF AND AFFIDAVIT OF MR. BYBEE; TELEPHONE DISCUSSION WITH MR. BYBEE.	3.2	1,344.00
8/1/2012	149 PAUL DOMINICK	TELEPHONE DISCUSSION WITH MR. BYBEE CONCERNING HIS CHANGES TO THE AFFIDAVIT; CONFERENCE WITH MR. TIBBALS CONCERNING SUPPLEMENT AFFIDAVIT; REVISE AND FINALIZE REPLY BRIEF IN FURTHER SUPPORT OF LANDOWNER'S	5	2,100.00

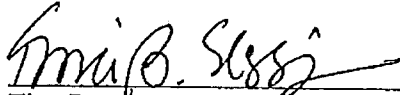
APPLICATION FOR REASONABLE LITIGATION
EXPENSES.

8/1/2012	306 JEFFREY TIBBALS	REVIEW BILLING RECORDS SINCE MAY 18, 2012.	0.4	126.00
8/1/2012	306 JEFFREY TIBBALS	REVIEW AND CONSIDER BYBEE AFFIDAVIT.	0.2	63.00
8/1/2012	306 JEFFREY TIBBALS	DRAFT SUPPLEMENTAL AFFIDAVIT REGARDING RATES AND RECENT ACCRUED COSTS.	0.7	220.50
	UNBILLED TOTALS: WORK:	59 records	41.1	14,199.00
	UNBILLED TOTALS: BILL:		38.1	13,254.00
	GRAND TOTALS: WORK:	59 records	41.1	14,199.00
	GRAND TOTALS: BILL:		38.1	13,254.00

CERTIFICATE OF MAILING

I, Tina B. Sessions, an employee with the law firm of Nexsen Pruet, LLC, do hereby certify that I have mailed a copy of the **REPLY BRIEF IN FURTHER SUPPORT OF LANDOWNER'S APPLICATION FOR REASONABLE LITIGATION EXPENSES** and our Certificate of Mailing in the foregoing action upon the recipient below this 3rd day of August, 2012, by placing a copy of same in the United States Mail, postage prepaid and return address clearly indicated, addressed as follows:

John S. West, LLC
Attorneys at Law
207 Carolina Avenue
Post Office Box 1869
Moncks Corner, SC 29461


Tina B. Sessions

Charleston, South Carolina

August 3, 2012

STATE OF SOUTH CAROLINA

County of Berkeley

Road/Route U.S. Route 71A
File 8.165B
Item
Project STP-UR08(007)
PCN 32502

IN THE CIRCUIT COURT

Case No. 2009-CP-08-3890

South Carolina Department of Transportation,

Condemnor,

v.

RI CS5, LLC,

Landowner(s)

and

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

Other Condemnee(s).

ORDER DENYING LITIGATION
EXPENSES

This matter is before me on the Landowner's Application for Award of Reasonable Litigation Expenses. The court heard counsel in this matter in Moncks Corner on October 2, 2012.

The Landowner, as a prevailing party in a condemnation case, has requested that the Court award it fees for two attorneys in the amount of \$114,068.82 plus other costs and expert witness fees in the amount of \$12,049.32 for a total award of \$126,730.82. The condemnor, the Department of Transportation, submitted a return requesting that the Court deny the same on the grounds that the litigating position of the Department in the condemnation case was substantially justified under the meaning of that term in the governing statute. I find that the condemnor's litigating position was substantially justified, being reasonably grounded in the facts and law,

and that under the circumstances of the case an award of costs against the State would not be just or equitable. I therefore deny landowner's application.

Initially, I will briefly discuss the landowner's argument that an award of fees and costs are part of the just compensation due under the law of eminent domain, therefore, denial of that recovery would unconstitutionally reduce the amount of that compensation. The constitutions of South Carolina and that of the United States require that just compensation be made and paid to a landowner before taking private property for public use. S.C. Code Ann. Constitution, art. 1, §13; U.S. Constitution, Amend. V. The constitutions do not define just compensation but leave that to the legislature. The South Carolina General Assembly has defined the term in the Eminent Domain Procedure Act, S.C. Code Ann. §28-2-10, *et. seq.*, as the value of the property taken plus any diminution in the remaining property less any benefits provided by the project. S.C. Code Ann. §28-2-370 (Rev. 2007). In a separate section of the Act, discussed more fully below, the legislature provided that the trial judge may award costs and fees to a prevailing party if it finds the government's litigating position was not "substantially justified" and no other circumstances make an award unjust. Clearly, if the General Assembly had intended that just compensation include fees against the State, it would have included that in the general definition instead of a separate section. With the exception of the specific section of the Eminent Domain Procedure Act, I find nothing in the law that would differentiate a condemnation case from any other class of cases that are governed by the "American Rule" that each party to litigation bear its own costs.

The law governing fee awards in condemnations is contained in S.C. Code Ann. §28-2-510 (B)(1)(Rev. 2007). That Code section is part of the S.C. Eminent Domain Procedure Act enacted in 1987. The section provides that the court on application from a prevailing party may

award fees and costs as part of the condemnation judgment. “Prevails” is defined as compensation awarded that is at least as close to the highest valuation testified to on behalf of the landowner as the highest amount testified to on behalf of the condemnor. The section goes on to say that,

The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny the award, to the extent that the landowner, during the course of the action, engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust.

The “substantially justified” language above mirrors that in the main federal fee-shifting statute involving the government, the Equal Access to Justice Act, 28 U.S.C.A. § 2412.¹ That statute, enacted in 1980, provides in part,

(d)(1) ...a court shall award to a prevailing party other than the United States fees and expenses...unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust.

South Carolina appellate courts have relied on federal jurisprudence for the definition of “substantially justified.” There is an abundance of legislative history and case law interpretations of the federal statute. See, generally, 69 A.L.R. Fed. 130 (“What constitutes substantial justification of government’s position so as to prohibit awards of attorneys’ fees under the Equal Access to Justice Act, (28 U.S.C.A. § 2412(d)(1)(A).”) With regard to the legislative history, that annotation refers to the House Judiciary Committee Report which states that the substantial justification test is essentially one of reasonableness. Thus, no award is intended where the government can show that its case had a reasonable basis in both law and in

¹ Both the federal and the South Carolina statutes negate the “American Rule” that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000). Further, statutes waiving the state’s immunity from suit being in derogation of sovereignty must be strictly construed and the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.

fact. The Report explains that 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, and indicates that the standard does not require the government to establish that its decision to litigate was based on a substantial probability of prevailing. 69 A.L.R. Fed 130.

Regarding the federal case law, Am. Jur. Fed. has a good summary:

To be substantially justified means, of course, more than merely undeserving of sanctions for frivolousness. However, a position can be justified even though it is not correct and can be substantially (that is, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. It must have enough foundation in law and fact that a reasonable person could think it correct; in other words, such position must be sufficiently colorable to engender "genuine dispute."

32 Am. Jur. 2d Federal Courts, §260.

Our appellate courts have used similar language in interpreting the term substantially justified contained in another fee-shifting statute, S.C. Code Ann. §15-77-300 (Supp. 2011) (the "State action" statute.) In Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990), after remand to the circuit court to consider the factors in Code section 15-77-300, on re-appeal the Supreme Court stated that,

Secondly, we must examine whether the Council acted without substantial justification in pressing its claim. In *Pierce*, the Supreme Court discussed the definition of "substantial justification" in the context of attorney's fees a determined that this term does not mean "justified to a high degree", but rather 'justified in substance or in the main'-that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2250. To say that there was no substantial justification is not the same as a determination that a claim was frivolous. Therefore, a court need not go so far as to brand a claim "frivolous" in order for it to be found to be without substantial justification. *Pierce v. Underwood*, 108 S.Ct. at 2551.

Heath, supra, 302 S.C. at 183, 394 S.E.2d at 712.

In Video Gaming Consultants, Inc. v. S.C. Dep't. of Revenue, 358 S.C. 647, 652, 595 S.E.2d 890, 892 (Ct. App. 2004), the Court of Appeals reversed the trial court's award of fees against the State in a case concerning a South Carolina statute that arguably had been made unconstitutional by a decision of the U.S. Supreme Court. The Court stated that the U.S. Supreme Court decision was subject to interpretation and that, in any event, the SCDOR attorneys were obligated to follow the statute since all statutes are presumed to be constitutional until stricken by a competent court. The State's position was substantially justified and fees should not have been awarded.

Trial of this case, as most condemnation cases, involved the testimony of expert appraisal witnesses as to their opinions of the value of the property condemned. Mr. Thomas F. Hartnett testified for the landowner. Messrs. Charles F. Crider and David Ray Graydon, Jr. testified for the condemnor. Each was qualified as an expert to testify as to their opinion on the real estate valuation. The law and rules governing such testimony are contained in case law and in certain published appraisal standards of the appraisal industry, primarily the publication Uniform Standards of Professional Appraisal Practice and Advisory Opinions, the Appraisal Foundation (2005) ("USPAP"). With regard to the case law,

It must be remembered that in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment.

4 Sackman, Nichols on Eminent Domain, §12.01, p, 12-31; Standard Oil Co. of New Jersey v. Southern Pac. Co., 268 U.S. 146, 156, 45 S.Ct. 465, 467, 69 L.Ed. 890 (1925).

Nichols states,

All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive

and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.

Irrespective of the method adopted for the ascertainment of such value, it is incumbent on the condemnor to endeavor to reach a result that is truly "just compensation," that is, fair to the public as well as to the owner of the property taken.

4 Sackman, Nichols on Eminent Domain, §12.01, pp. 12-1 – 12-7.

USPAP recognizes a number of valid approaches to determining value. The most relevant with regard to commercial real property are the cost approach, the sales comparables approach, and the income approach. After analyzing each, the appraiser then applies his judgment as to which approach to accord the greater weight and which approaches to discount or disregard. See, generally, USPAP, Standard 1.

Mr. Hartnett testified that his analysis indicated a value for the property under the sales comparable approach as \$444,500. However, in his reconciliation of the values, he gave greater weight to the capitalization of income approach using the existing lease and discounting the capitalized rent for certain reasons. His opinion was that the property was worth \$900,000.

On the other hand, Messrs. Crider and Graydon, in their testimony for the condemnor, discounted the income approach relying more heavily instead the sales comparable approach. Their stated reasons for doing so were that the actual rent was not arrived at in a true arms-length transaction and was much higher than the comparable rents for convenience stores locally. All three appraisers agreed that the rent was above market. The opinions of the condemnor's appraisers have ample support in the record.

Michael Robert Pfeiffer, executive vice president of the landowner's parent company, Realty Income Corporation, testified at trial as to the background of his company's acquisition of

the real estate and the process followed for valuing it and determining rental rates. At some point in 2008, a company, Sun Capital, approached Realty Income concerning its desire to purchase 75 convenience stores owned and operated by the Worsley Companies. Not desiring to own the real estate but only the operating business, Sun asked Realty Income to purchase the land and improvements and lease it back to them. Realty Income then closed on a purchase of all the properties of Worsley for \$65,350,000. Then Realty Income allocated the total purchase price among the properties with the result that it valued the Moncks Corner store at \$1.15 million. Realty Income then determined that it required a rate of return of 8.9% and applied that percentage to the allocated values of each of the stores. The result was that the rent set for the store at issue was \$8,517.67 per month to be increased periodically per the CPI.

According to the Department, the conclusion to be drawn from the foregoing is that, although the global purchase price of all the Worsley properties was reached between the buyer and seller in an arms-length transaction, and Worsley/Sun assented to the overall rental rate of return on all of the properties, the actual rental for the Moncks corner store was set unilaterally and arbitrarily by the owner, landowner, Realty Income for their subsidiary RICS 5. Moreover, Worsley or Sun had no incentive or reason to protest the rental rate on the Moncks Corner store because a high rental there would necessarily result in a lower rental for another property. The individual store rents were not a concern of the lessee companies because their focus was on the overall rent on all of the properties based upon the global purchase price.

Although this court agreed with the landowner's witness that the actual contract rent should be given the greatest weight in determining the compensation due, that is not to say that the condemnor's appraisers' opinions were not substantially justified in discounting or even disregarding the actual rent for the Moncks Corner store. Clearly a reasonable person could

think that this view is correct. The landowner should not be awarded its attorneys' fees and costs solely because the court agreed with its theory of the case and not with the State's.

Finding substantial justification for the State's position, I must next determine under section 28-2-510 whether the application should be reduced in amount or denied altogether. In my view, this case presents circumstances where an award taxing the landowner's litigation costs against the State would be unjust and thus should be denied.

As the United States Supreme Court said in a lead case on this issue:

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). As reflected in the record as well as in this court's order in this case, Realty Income, Inc., is large and profitable national corporation listed on the New York Stock Exchange. It deemed it prudent and had the wherewithal to retain two experienced attorneys and agreed to pay \$310-370 per hour to each to challenge the Department's offer of compensation. Clearly such an arrangement is not necessary for the typical condemnee in Berkeley County to obtain counsel. Due to the amounts at stake, it is reasonable to conclude that Realty Income would have taken the same course without the inducement provided by the fee shifting statute. Thus, in my view, justice would not be served by causing the State to bear its litigation costs in addition to its own where the landowner could and would have contracted services at those costs in any event.

Finally, and contrary to petitioner's assertions, the issues in this suit were not novel or complex. Rather, the case was a routine condemnation case involving well settled valuation approaches. All appraisals of retail properties, whether for condemnations, bank loans, or other purposes analyze the income approach to value. The purported difficulty and complexity do not outweigh the considerations outlined above so that a cost award would be justified.

I deny the petition for fees and costs.

AND IT IS SO ORDERED.

Robert E. Watson, Judge

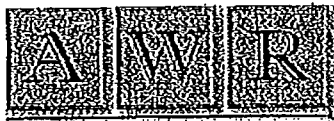
Moncks Corner, S.C.

_____, 2012

In The Matter Of:
SC Department of Transportation vs
RI CS5, LLC, et al

Hearing
October 2, 2012

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF BERKELEY

IN THE CIRCUIT COURT

3 SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,

4 Condemnor,

5 vs.

CASE NO. 2009-CP-08-3890

6 RI CS5, LLC,

7 Landowner(s)

8 and

WORSLEY OPERATING CORPORATION, a North Carolina
Corporation, Lessee, and BERKELEY COUNTY

9 TREASURER'S OFFICE, Lien Holder,

10 Other Condemnee(s).

11 HEARING BEFORE

12 THE HONORABLE ROBERT E. WATSON

13 DATE: October 2, 2012

14 TIME: 1:45 p.m.

15 LOCATION: Berkeley County Courthouse
16 300-B California Avenue
Moncks Corner, SC

17 REPORTED BY: Patricia L. Thompson,
18 Registered Professional Reporter

19
20 A. WILLIAM ROBERTS, JR. & ASSOCIATES
21 Fast, Accurate & Friendly

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pdominick@nexsenpruet.com

Also Present:

Beacham O. Brooker, Jr.
SC Department of Transportation
Assistant Chief Counsel

1 THE COURT: I'm assuming we're here
2 today on the issue regarding reasonable litigation
3 expenses; is that correct?

4 MR. DOMINICK: That's correct, your
5 Honor.

6 THE COURT: Who wants to be heard
7 first?

8 MR. DOMINICK: It's my application,
9 I believe, your Honor.

10 THE COURT: I'll let you go.

11 MR. DOMINICK: Paul Dominick, your
12 Honor, on behalf of the landowner.

13 Your Honor, as the Court noted, this is
14 for the court on the landowner's application for
15 the award of reasonable litigation expenses under
16 the eminent domain statute in South Carolina and
17 particularly the section SC Code S28-2-510.

18 It's my understanding that the
19 Department of Transportation, the condemning
20 authority here, has not contested that we are the
21 prevailing party in the litigation but contends its
22 position was substantially justified, and thus
23 under the statute the landowner is not entitled to
24 fees.

25 Your Honor, I'm not aware of any case

4

1 law in South Carolina denying legal fees to a
2 prevailing party in a condemnation action and
3 certainly am not aware of any case law in South
4 Carolina that denies the fees on the basis that
5 there was no substantial justification,
6 particularly where you've got the prevailing party
7 formula. And in this particular case the landowner
8 clearly surpassed that hurdle to be the prevailing
9 party.

10 Unlike cases cited by the DOT, those
11 were cases under the Equal Access to Justice Act,
12 the Federal Act, and then basically South
13 Carolina's version of that act, 15-77-800.
14 Here you've got a condemnation case where the state
15 is taking by force of condemnation a landowner's
16 property. And you can't have just compensation,
17 your Honor, if the condemnor in this case is denied
18 -- or the landowner is denied attorneys' fees that
19 were required to achieve the just compensation.
20 Essentially the Court's order of award would be
21 reduced by the legal fees that our client had to
22 pay to obtain the just compensation.

23 So I think in this particular case
24 certainly legal fees are certainly reasonable, and
25 we would be entitled to those.

1 A couple other points I would point
2 out. All of this was pretty detailed in the
3 briefs, so I'll try not to repeat all of this. But
4 in this case there was a substantial gap here
5 between what the Department of Transportation was
6 offering, their highest valuation at trial of
7 351,000, and then my client the highest valuation
8 of 1,150,000.

9 This is not just a case where you've
10 got a \$50,000 difference between the parties and
11 not a case where the legal fees would exceed the
12 difference between the parties. Here you've got a
13 substantial gap. So my client had no choice but to
14 come to this hearing and fight this case on the
15 merits, and in fact prevail. This is not a case
16 where you've got a runaway jury. This is a nonjury
17 case where the Court considered the evidence and
18 issued an order.

19 I think some of the substantial
20 justification language and equitable fairness and
21 whatever else is in the condemnation statute --
22 I can understand if you've got a runaway jury
23 situation, the jury ignored the testimony, but here
24 the Court adopted the testimony of one of the
25 appraisers as the valuation. So we really don't

6

1 have that situation.

2 Had the landowner in this case accepted
3 the highest valuation of the Department of
4 Transportation my client would have received 39% of
5 what they actually ended up receiving from the
6 Court. So certainly the client was justified in
7 pursuing the full compensation.

8 Additionally, a couple of things about
9 the DOT's argument. The cases cited, again, are
10 not cases under the eminent domain statute but
11 under -- one of the South Carolina statutes that
12 was cited by the South Carolina DOT 15-77-300 where
13 the terminology "substantial justification" was
14 talked about and defined as being taking a
15 reasonable position. But even our Supreme Court,
16 South Carolina Supreme Court, in the case of layman
17 versus state of South Carolina 658 S.E. 2d 320 the
18 Court held that although it is not a presumption of
19 substantial justification when an agency loses on
20 the merits, the substance and outcome of the matter
21 litigated is nevertheless relevant to the
22 determination as to whether there was substantial
23 justification in pressing the claim.

24 So even though that's not a case under
25 the condemnation, the eminent domain statutes still

1 think that that language works toward our favor.

2 The Court's order and findings, which
3 I've gone through in the reply brief -- the
4 findings themselves establish that there were no
5 substantial justification in this case and their
6 position.

7 First, as the Court will recall, the
8 key issue here was whether the lease could be
9 considered in the valuation of the property. If
10 the DOT was taking the legal position contrary to
11 South Carolina law and contrary to statute and case
12 law, the lease could not be considered in
13 establishing just compensation.

14 Our position was that it could be
15 considered, and the Court in its order rejected the
16 SCDOT legal position, so there was no substantial
17 justification for them taking that position if it
18 was contrary to both case and statutory law in
19 South Carolina.

20 Furthermore, the Court went on to find
21 in the order and pointed out that the lease was
22 properly considered under the statute and case law;
23 found that the South Carolina Department of
24 Transportation's appraisers' opinions were found to
25 be not supported by the evidence, ill-founded and

1 not justified. And I won't go through all the
2 different quotes, but they've set out in the reply
3 brief and basically cited back to the Court's order
4 where those findings were made by the Court.

5 I also point out there has been no
6 appeal to the Court's final order in this case. So
7 that order of \$900,000 is final. In the face of
8 these rulings I just don't see how the South
9 Carolina Department of Transportation can
10 legitimately claim to be substantially justified to
11 the point of denying my client the right to legal
12 fees as the prevailing party in a condemnation
13 action.

14 THE COURT: I'm not going to deny you
15 the right to legal fees. That's not -- I'm not
16 going to deny them. So the issue is going to be,
17 from my perspective at least, unless you gentlemen
18 convince me otherwise, that I need to use the low
19 star method -- what I call the low star method
20 where you take kind of a reasonable rate and
21 determine what should be paid. That's kind of
22 where I am right now.

23 MR. DOMINICK: And I think that's the
24 law. I know the Court has rejected the continued
25 fee methodology, and basically that would be our

1 position.

2 I just point out that we -- this is a
3 case where we ask -- where both parties went to an
4 early mediation to try to resolve the case, and it
5 wasn't resolved at this early mediation. So I
6 don't think there is any question that we had to go
7 through the trial in order to obtain the
8 compensation.

9 Now, of course you've got that. We've
10 submitted our hours. We've submitted our rates.
11 We've submitted an affidavit of Richard Bybee, who
12 -- as far as I know in this scenario he's kind of
13 the dean of the condemnation lawyers. He does
14 condemnation work all over the state, and he does
15 it in this county. And he gave an affidavit that
16 our fees were reasonable. There is no independent
17 affidavit on the part of the South Carolina
18 Department of Transportation. Mr. West did give an
19 affidavit, but I think the Court -- and he's an
20 advocate.

21 I think the Court should weigh the fact
22 that there is not an independent affidavit
23 provided, and we would ask that the Court file and
24 award us legal fees according to the affidavits
25 that we presented and our amended application.

10

1 THE COURT: All right.

2 MR. BROOKER: Thank you, your Honor.

3 I'm Beacham Brooker of the DOT out of Columbia, and
4 I appreciate the Court's decision that you will
5 award some fees. But for the record, if you don't
6 mind, I would like to go through our --

7 THE COURT: That would be fine.

8 MR. BROOKER: First addressing the
9 statement Mr. Dominick made that somehow just
10 compensation is reduced by the failure to award
11 fees -- that is not correct. The just compensation
12 is a precondition to using the power of eminent
13 domain that you must make fair compensation to the
14 landowner before taking his property, but the
15 constitution does not define what just compensation
16 is.

17 The legislature and General Assembly in
18 1987 enacted the eminent domain procedure and the
19 Eminent Domain Procedures Act which has a separate
20 section in 28-3-70 which defines just compensation
21 as the value of the land taken, damages to any
22 remaining land, and then that is reduced -- that
23 compensation is reduced by benefits from the
24 project which increase the value of the land.

25 The attorneys' fees are allowed in a

1 separate section of that Section 5-10, but the
2 point is that the General Assembly did not have to
3 do that because of the American rule that each
4 party bears its own litigation fees, and they do
5 not say that attorneys' fees will always be awarded
6 -- you have to be a prevailing party and get above
7 this split threshold in order to do it.

8 So it gives the trial court discretion
9 to award fees or reduce the fees. So when you
10 receive an application and you find that the
11 litigating position of the state was substantially
12 justified, then you have the discretion to reduce
13 the fees or refuse them altogether, and we would
14 suggest that they be refused in this case for the
15 following reasons: What is substantially justified
16 is the Court of Appeals in South Carolina and the
17 Supreme Court referred to and adopted the federal
18 juris prudence, which is very extensive on the
19 definition of that term, "substantially justified,"
20 being just something that can defeat an argument
21 that is frivolous and avoid sanctions for being
22 frivolous. But a position based on the facts and
23 the law that are reasonable has a reasonable basis
24 and the facts of the law that a reasonable person
25 can find correct.

12

1 Of course, the Court, as you know, did
2 not find that our position was correct, but that is
3 not the standard, your Honor. It's whether our
4 litigating position is substantially justified in
5 being reasonable. We think it was.

6 Turning to the actual case and the
7 parties' litigating position, condemnation cases
8 generally, especially with income producing
9 properties are -- the trials are basically expert
10 testimony of appraiser witnesses, and there were
11 three in this case, two on the Department's side
12 and one testified for the landowner.

13 What appraisers do under their
14 professional standards, which is USPAP, plus the
15 case law defines it as well -- when you have an
16 income producing property you have to analyze in
17 your report three approaches to value and cover
18 each of them on an income approach where you take
19 the income stream from the property and then
20 basically capitalize that to come up with a value
21 of the property.

22 The second is the sales comparison
23 approach where you go out in the local area in
24 Moncks Corner, in this case, and find comparable
25 sales of convenience stores. Our appraisers did

1 that. And then the third approach would be the
2 replacement approach, the construction cost
3 approach; how much would it cost to rebuild this
4 convenience store. Replace it.

5 Then after the appraiser goes through
6 these three methods then they have to use their
7 professional judgment to either discount one;
8 emphasize the other, depending on the actual facts
9 of the case. And that's what went on the trial of
10 the case, your Honor. The Department's appraiser
11 discounted the actual rent that was being paid by
12 the Sun companies to the landowner here, Realty
13 Income or RI CS5, because of the actual situation
14 in the transaction by which the rent was set.

15 As you recall, Realty Income had
16 purchased all of the land under about 60 or 65
17 convenience stores in the area, and I don't know
18 what the area is. It must be coastal South
19 Carolina.

20 THE COURT: I think they bought around
21 75 stores.

22 MR. BROOKER: And they agreed with the
23 Worsley company, who is the seller, on a price of
24 \$65,350,000. And then you had this Michael Robert
25 Pfeiffer, who is the vice-president and general

14

1 counsel of Realty Income, testify before you as to
2 how he arrived at the value on the Moncks Corner
3 store. And he testified that what he did is he sat
4 down by himself and allocated values to each of
5 these 65 stores and he placed -- we think just
6 arbitrarily -- a value on the Moncks Corner stores
7 of 1.15 million.

8 Then they had decided that they wanted
9 -- of this entire \$65 million purchase transaction
10 they wanted an 8.9% return for the investors, the
11 shareholders. So he allocated 1.15 million as the
12 value to the Moncks Corner store, applied 8.9%
13 percent to that, and came up with an annual rent or
14 a monthly rent of \$8,517.

15 The point is, your Honor, that that is
16 not an arm's length transaction, although the Sun
17 Company, the tenant, the operator of these stores
18 who is paying the rent to Realty Income, would care
19 what they paid overall per year on all 65 stores as
20 rent. It doesn't matter a bit to them how it's
21 allocated, because if you have a high value placed
22 on the Moncks Corner store they're going to get
23 lower rent somewhere else to come up with 8.9% on
24 the 65 million, and that's what we think is a
25 substantial justification for our appraisers.

1 discounting that actual rent and actual value to be
2 put on there, because it's essentially -- you make
3 up a value for the store. You apply the rent to it
4 and then hire an appraiser who capitalizes the rent
5 back up to what you started with in the first
6 place.

7 We have not -- as Mr. Dominick said, we
8 have an appeal in this case. We're satisfied with
9 the judgment, but our point is -- and I want to
10 emphasize that our litigating position was not
11 unreasonable. A reasonable person could have found
12 us correct even though the Court did not; and just
13 simply winning does not entitle you to attorneys'
14 fees.

15 As far as between the decision -- and
16 the Court does have the discretion to either reduce
17 the fee request or refuse it altogether. As I've
18 said and another court said it disagrees, I think
19 that this is an excellent case for not shifting the
20 fees to the government. This is a very, very
21 large, well capitalized company, a company listed
22 on the New York Stock Exchange, and the point and
23 the purpose of fee shifting statutes in general is
24 to allow someone who has a claim against the state
25 or is being treated wrong by the state and who does

16

1 not have the wherewithal and may not be able to
2 afford to hire local counsel to be able to do so by
3 taking the assurance that if it is a meritorious
4 case, if he's successful the state will pick up
5 those fees; and therefore, it is to give the
6 attorney some assurance to take on the case and
7 reduce the chance that he will not be paid anything
8 at all.

9 Here we had a very large national
10 company on the New York Stock Exchange hiring one
11 of the biggest law firms in the state. They put
12 two lawyers on it at very high fees, \$410 an hour.

13 The point is that Realty Income would
14 have done that anyway. There is no reason to cause
15 the taxpayer to pay these fees in order to induce
16 an attorney to take -- or allow Realty Income to
17 find an attorney to take its case. They would have
18 done it anyway.

19 Just to summarize that point, your
20 Honor, if this is not a case where you would deny
21 instead of reducing fees -- I can't think of one
22 where you would. McDonald's case is pretty
23 frequent, but we think this is one where it should
24 be denied or substantially reduced to the
25 prevailing rates in the Moncks Corner area.

1 I thank you, your Honor.

2 THE COURT: Do you have any cite on the
3 case where our appellate court said denied?

4 MR. BROOKER: I think the video gaming
5 case -- I think they found that DRS position was
6 substantially justified.

7 THE COURT: I couldn't recall seeing
8 one.

9 MR. DOMINICK: That's not a
10 condemnation case. That was under that other
11 statute, your Honor. I don't think there is
12 anything in the statute about how much money your
13 client has got. The state has more money than my
14 client. I don't really it really matters. But
15 they wanted the property for their project, and I
16 think my client needs to be fairly compensated, and
17 I think that would include their right to legal
18 fees under the statute. That's why the statute is
19 there..

20 Thank you, your Honor.

21 THE COURT: Thank you..

22 MR. WEST: If I may, just by way of
23 clarification, you had asked the question about any
24 case law. We corresponded with the Court after the
25 filing of our return and supplemented our

18

1 submission to the Court by delivering two cases,
2 one of which was the video gaming case that
3 Mr. Brooker was referring to. So your file should
4 contain the actual case.

5 THE COURT: That is right.

6 MR. WEST: Thank you, your Honor.

7 THE COURT: I think you would have the
8 opportunity to question about the lawyer fees,
9 question the lawyers who submitted their fee
10 requests. Is there any desire to do that?

11 MR. BROOKER: Well, your Honor, I think
12 Mr. West's affidavit that he submitted, 250 an hour
13 -- I think that is sufficient to allow someone to
14 hire an attorney in this area.

15 THE COURT: All right. Anything else?

16 Thank you again for coming, and I'll
17 give you folks an answer very quickly. I have read
18 all the briefs. I don't know how you missed that
19 case, Mr. West, but I just had to clarify.

20 MR. WEST: Judge, if for whatever
21 reason you don't have any material I can email it.

22 MR. DOMINICK: If you want a copy of
23 the case, the Layman case, I can provide you
24 with --

25 THE COURT: I've got the Layman case.

1 I pulled several cases myself. I probably have
2 that case somewhere.

3 MR. WEST: Judge, I've got it right
4 here.

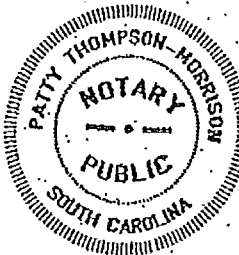
5 (Hearing concluded at 2:25 p.m.)
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CERTIFICATE OF REPORTER

I, Patricia L. Thompson, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed by official seal this 26th day of February 2013 at Charleston, Charleston County, South Carolina.



Patricia Morrison

Patricia L. Thompson
Registered Professional Reporter
My Commission Expires
October 19, 2015

1 portfolio. Between 1969 and 1985, we acquired
2 around 600-plus properties. And in 1995 October,
3 we consolidated all of our partnerships and went
4 public on the New York Stock Exchange.

5 So what we do is we acquire properties
6 and own them for the long-term and lease them to
7 national or regional tenants and pay a monthly
8 dividend to our shareholders. We have -- we're
9 public. We have around 90,000 investors. We're
10 known as "The Monthly Dividend Company." We are
11 one of the few public companies that pays their
12 dividends monthly. Since 1969, we have paid every
13 single monthly dividend, and we increase our
14 dividend on a quarterly basis.

15 Q. What is the source of income,
16 generally, for those dividend payments?

17 A. All of the income comes solely and
18 completely from lease revenue or rental revenue.
19 Being a REIT, or real estate investment trust,
20 there is very specific rules that we have to comply
21 with in order to not pay corporate tax. And that's
22 owning property for long-term income production.
23 We receive our rents, generally, on the 1st; and we
24 pay our dividends to our shareholders on the 15th
25 of every month.

1 this case?

2 A. I am.

3 Q. How did Realty Income learn that the
4 subject property was for sale?

5 A. Our acquisition department had been in
6 contact with Sun Capital. Sun Capital is a private
7 equity company located in Boca Raton, Florida.
8 They had acquired Marsh Supermarkets in 1995. And
9 Marsh Supermarkets had a subsidiary, which was
10 Village Pantry. They spun off Village Pantry --
11 they were one of the largest gas/convenience stores
12 in the Midwest -- and had contacted us as to
13 whether or not we would be interested in acquiring
14 some of those properties.

15 And then their desire, as a private
16 equity company, was to expand the base of their
17 gas/convenience stores. So they did further
18 acquisitions after that transaction with companies
19 called Imperial, Ameristop, and then finally
20 Worsley. So we had a relationship with them
21 because we did the initial Village Pantry
22 transaction. Then we did properties with Imperial,
23 properties with Ameristop. And then this specific
24 transaction was with Worsley.

25 Q. And by the time that Worsley -- by the

1 time that Realty Income became involved at Sun
2 Capital or one of its affiliate entities, had it
3 already purchased the stores? Or was that
4 something in process?

5 A. That was something in process. And
6 what they were actually looking for was to have --
7 Worsley owned a lot of -- or owned almost all or
8 most of their properties. So what they wanted to
9 do was come in Sun Capital -- come in and buy the
10 business operations, consolidate those business
11 operations into the Village Pantry parent, and sell
12 the properties.

13 We would step in and, at the closing of
14 the business sale, provide some of the capital
15 through acquiring this properties and then enter
16 into long-term leases with the tenant, which would
17 be guaranteed by Village Pantry.

18 Q. Okay. So the subject property here in
19 Moncks Corner was part of a much larger ^ dict ^
20 transaction. Is that correct?

21 A. That is correct.

22 Q. What due diligence did Realty Income
23 conduct, generally, with respect to the overall
24 transaction?

25 A. Well, we did a due diligence, of which

1 I was a part, with Village Pantry. They were the
2 parent who was going to be the operator of the
3 entire portfolio of gas/convenience stores. We
4 went in and met with the management team. We
5 looked at their financial statements. We wanted to
6 understand how they were going to operate, what
7 their expansion programs were.

8 And because it was gas/convenience, I
9 generally go and meet with the companies. Because
10 I want to understand any environmental risks or
11 liabilities. And the tenant undertakes all
12 responsibility related to that with complying with
13 the state underground storage tanks rules.

14 So from a financial perspective, we got
15 comfortable with Village Pantry. We then for this
16 specific transaction wanted to understand how
17 Worsley's operations were, but knowing that Worsley
18 was going to be selling and the Village Pantry
19 operators would be continuing, in essence.

20 Q. So by the time that this was all over
21 and the transaction was complete, Worsley, the
22 original owners of Worsley, were out of the
23 picture. Is that right?

24 A. That's correct. There were some people
25 through the Worsley company that stayed on working

1 for the new parent, Sun Capital or Village Pantry.
2 But we have absolutely no connection with those
3 people. All we want to make sure is that the rent
4 is paid and that the tenant complies with all of
5 the terms of the lease.

6 Q. And there's no common ownership between
7 Realty Income and Sun Capital or Worsley or any of
8 the other entities involved in this transaction, is
9 there?

10 A. Absolutely none.

11 Q. Tell me about the due diligence that
12 Realty Income conducted, not with respect to the
13 transaction in its entirety, but with respect to
14 the specific property here in Moncks Corner.

15 A. Sure. We had an individual go out and
16 look at the property. For this specific property,
17 that person was Janet Windman. She was an employee
18 of the company. And she went out and did a
19 drive-by of the property, did the video that I
20 described earlier in my testimony, looked at any
21 information she could find relating to the specific
22 property, relating to competition, relating to
23 demographics, relating to traffic, and put together
24 a report and presented that report to the
25 investment committee.

1 Q. I would like to hand you an exhibit
2 that has been premarked as Landowner's Exhibit
3 Number 2. And I'd ask you if you are familiar with
4 this document, Mr. Pfeiffer.

5 A. I am.

6 Q. Is this the report that you referred to
7 regarding the due diligence on the specific
8 property prepared by Janet Windman?

9 A. It is. Would you like me to describe
10 that at all?

11 Q. Sure. That would be fine.

12 A. All right. The report includes
13 information that shows the location of the property
14 with different maps. It includes what we call a
15 handdrawn map, which shows the property and who the
16 neighboring properties are, and information
17 relating to the market, the county. Often the
18 person who goes out in our research department will
19 talk to people within the local area, the trade
20 area. It includes demographics, traffic
21 generators. And then the last several pages are
22 the demographics that we used from a company called
23 AnySite.

24 Q. And this report is something that's
25 prepared in order to assist Realty Income in

1 determining a purchase price for the specific
2 property?

3 A. Yes. It's one of the things that we do
4 look at, and also to determine whether or not we
5 want to purchase the property. Because after going
6 out and looking at each of our properties, there
7 are some properties we choose not to buy because
8 they may not meet our criteria.

9 Q. In this particular case, the subject
10 property was a property that you desired to
11 purchase and that did meet your criteria. Is that
12 right?

13 A. That is correct.

14 Q. Did Realty Income determine an offer
15 price for the entire portfolio of properties?

16 A. We did.

17 Q. Do you happen to recall the total
18 purchase price?

19 A. It was initially, with the LOI, over
20 \$65 million, I believe.

21 Q. I'm going to hand you an exhibit that
22 is marked as Landowner's Exhibit Number 10. I
23 would like for you to take a look at that document
24 and let me know if you are familiar with Exhibit
25 Number 10, please.

1 A. I am.

2 Q. Can you tell me what Exhibit Number 10
3 is?

4 A. It is our final settlement statement
5 that we used when we acquired the portfolio of
6 Worsley properties in North Carolina and South
7 Carolina. First American Title Insurance Company
8 was the escrow agent. And also, they provided a
9 title report on each and every one of the
10 properties that we acquired.

11 Q. And this is actual cash money that
12 Realty Income paid in the amount of \$6,535,000
13 (sic) for the portfolio properties. Is that right?

14 A. \$65 million, that is correct. We had
15 to wire-transfer those funds to First American.
16 And they distributed those money -- that money to
17 the seller.

18 Q. And that was paid on March 27, 2008.
19 Is that right?

20 A. That's correct.

21 MR. WEST: If your Honor please, just
22 for clarification purposes, are you offering these
23 in evidence or --

24 MR. TIBBALS: Yes. Yes. I would like
25 to offer both of these first two in evidence. And

1 MR. TIBBALS: I would like to offer
2 Exhibit Number 1 into evidence.

3 MR. WEST: No objection.

4 THE COURT: It's admitted.

5 (LANDOWNER'S EXH. 1, admitted into
6 evidence.)

7 BY MR. TIBBALS:

8 Q. And if you follow with me, the total
9 column on Page 2 of Exhibit Number 1, where you see
10 portfolio total, it's the second-to-last entry
11 there --

12 A. That's correct.

13 Q. -- and you see that it reflects a total
14 purchase price of 65,535,000?

15 A. That's correct.

16 Q. And that is consistent, is it not, with
17 the Exhibit Number 10?

18 A. Yes, sir.

19 Q. How did Realty Income determine an
20 appropriate allocated purchase price for the
21 subject property?

22 A. It starts with the purchase price for
23 the entire portfolio. Sun Capital was -- we were
24 only one of the many people that Sun Capital
25 approached to buy this portfolio of properties. It

1 was a highly marketed transaction, where they
2 wanted to get the highest purchase price they
3 could.

4 So we looked up at the portfolio. We
5 analyzed the properties, and we went back with a
6 suggested purchase price. That was negotiated back
7 and forth. I think that they could have gotten a
8 higher purchase price, but they wanted to use us
9 because we had done prior transactions with them.
10 They knew that we would be able to close when they
11 needed to for the acquisition of the business.
12 They also knew that we jumped through hoops to
13 accommodate getting a transaction closed.

14 We had relationships with companies
15 like First American Title, with the surveyor, with
16 an environmental consultant so that we can do it
17 expeditiously. So once that was completed,
18 we -- and in addition, along with that, we looked
19 at each of the property valuations and analyzed the
20 property-specific information I talked about
21 earlier and what we looked at when we're doing a
22 property transaction; looked at the profitability
23 of each of the locations to make sure that that met
24 with our criteria; and came up with a allocation
25 for each and every one of the properties.

1 And once we do that, the specific price
2 for the property then is determinative of what the
3 rent will be for that location.

4 Q. Was this transaction an arm's-length
5 transaction between a willing buyer and a willing
6 seller?

7 A. Absolutely.

8 Q. Did the purchase price of \$1.15 million
9 constitute fair market value at the time with
10 Realty Income purchased --

11 MR. WEST: Objection, your Honor.

12 BY MR. TIBBALS:

13 Q. -- the subject property?

14 THE COURT: What's the objection?

15 MR. WEST: My objection is that he is
16 apparently being asked an opinion as to fair market
17 value on the property.

18 MR. TIBBALS: Well, he's the owner of
19 the property, your Honor.

20 THE COURT: I think he can testify
21 being the owner of the property -- representing the
22 owner of the property.

23 MR. WEST: Thank you, your Honor.

24 THE COURT: I'll allow it. Go ahead.

25 THE WITNESS: Yes. Absolutely, I think

1 Q. I'm going to hand you a document
2 premarked as Exhibit Number 7, Landowner Exhibit
3 Number 7. Are you familiar with Exhibit Number 7?

4 A. I am.

5 Q. Can you tell me what Exhibit Number 7
6 is?

7 A. This is the specific lease for the
8 property that we acquired on South Live Oak Drive.

9 MR. TIBBALS: I'm going to offer this
10 Exhibit Number 7 into evidence.

11 MR. WEST: No objection.

12 THE COURT: Thank you. It's admitted.

13 (LANDOWNER'S EXH. 7, admitted into
14 evidence.)

15 BY MR. TIBBALS:

16 Q. Can you tell me what the amount of the
17 base monthly rent is, pursuant to Section 4.2 of
18 the lease?

19 A. I can. It is \$8,517.67.

20 Q. Was that ever subject to increase?

21 A. It was. The lease provides that there
22 were annual increases. And those increases were
23 determined upon the CPI, or Consumer Price Index.
24 And how it was calculated is I believe it was 2
25 times the CPI, not to exceed 2 percent per year.

1 that was the business. We would acquire portfolios
2 of property, have leases in place, and then
3 immediately start marketing those properties for
4 sale.

5 And there was a very high demand for
6 people to buy these types of properties. And we
7 would get the spread between the difference on the
8 price that we paid and the price that we were able
9 to sell the properties. And in every single
10 instance, we made more and, in most instances, much
11 more than what we paid.

12 Q. If the lease were assigned to another
13 property owner, the tenant would remain obligated
14 to pay monthly rent to the owner, to the new owner.
15 Right?

16 A. That is correct. There was not a
17 release of that tenant provided for in the lease.

18 Q. Did Realty Income conduct an analysis
19 of the creditworthiness of the tenant, Worsley
20 Operating Corporation, prior to entering into the
21 lease?

22 A. We did.

23 Q. What did Realty Income conclude
24 regarding the tenant's long-term ability to pay the
25 rent.

1 A. We felt comfortable with the tenant's
2 operations, but we also made sure that we would get
3 a guarantee on this lease. We felt comfortable
4 that the parent, Village Pantry, would have the
5 financial wherewithal to insure the payment of the
6 lease for the 20-year duration.

7 Q. Whether the store continued in
8 operation or not, correct?

9 A. There was nothing provided for in the
10 lease that the tenant had the ability to not pay
11 rent. So despite what happened at that specific
12 location, we were relying upon the rent to be
13 received.

14 Q. And if the rent wasn't paid by the
15 tenant, then you would look for the guarantor to
16 make the rental payments. Is that right?

17 A. That is correct.

18 Q. What is the term of the lease? And
19 I'll direct your attention to Section 3.1.

20 A. It was a 20-year term.

21 Q. Does the lease contain renewal options
22 beyond the initial term?

23 A. It does, two 10-year options to renew.
24 And these -- all of these items were negotiated, as
25 well, at arm's-length.

1 Q. All right. I'm going to hand you a
2 document that's been marked as Landowner's Exhibit
3 Number 9. You testified earlier about a guarantee
4 of the lease.

5 A. That is correct. This exhibit you just
6 handled me is the actual form of guarantee.

7 MR. TIBBALS: I would like to offer
8 Exhibit Number 9 into evidence.

9 MR. WEST: No objection.

10 THE COURT: It's admitted.

11 (LANDOWNER'S EXH. 9, admitted into
12 evidence.)

13 BY MR. TIBBALS:

14 Q. And did Realty Income conduct a
15 creditworthiness analysis of Village Pantry's
16 holding corp?

17 A. Yes, we did.

18 Q. What did Realty Income concluded about
19 the creditworthiness of the guarantor.

20 A. We were comfortable with the
21 creditworthiness of the tenant. We believed that
22 they had the financial wherewithal to pay rent for
23 the duration of the lease and the other leases that
24 we acquired, so we were very comfortable with it.
25 And since we have done the transaction with Village

1 Pantry, including the Worsley, the Imperial, and
2 the Ameristop transactions, they have paid rent on
3 every property every single month.

4 Q. There's never been a default by the
5 tenant on any of those other leases in the
6 portfolio?

7 A. That is correct.

8 Q. Did RI CS5 or Realty Income have any
9 affiliation or relationship with Worsley Operating
10 Corporation other than that of landlord tenant
11 after the lease was executed?

12 A. We never did, no.

13 Q. Was there ever any common ownership of
14 RI CS5 and Worsley?

15 A. Never.

16 Q. Any common ownership between Realty
17 Income and Worsley?

18 A. No. We knew -- I -- we never knew
19 anyone with Worsley until this transaction.

20 Q. Would Realty Income have any reason
21 whatsoever to inflate the purchase price for the
22 subject property?

23 A. No. Actually what we try to do is
24 negotiate a lower purchase price and -- which would
25 equate to lower rent, if we can. We don't want to

1 pay more for a property. We really are
2 conservative in nature. And we believe that this
3 valuation, or the price that we paid, was the fair
4 market value at that time. It was a very, as I
5 indicated, competitive nature and there were other
6 people wanting to pay more for this specific
7 property.

8 Q. At the time of the taking, did Realty
9 Income own any going-concern business interest in
10 the convenience store?

11 A. No. As I indicated, REITs are
12 prohibited from doing that. So the only thing we
13 actually own is the property with the lease in
14 place with Worsley to pay us rent.

15 Q. Would Realty Income have been
16 interested in purchasing the subject property as
17 raw land or land with the improvement?

18 A. No. We would never do that. All of
19 the transactions that we do, have a lease in place.
20 So we don't buy raw land. We don't speculate. We
21 rely upon the income of our leases to come in with
22 rent being received, generally on the 1st, and our
23 dividends being paid out to our shareholders on the
24 15th.

25 Q. So the lease here is the essence of the

1 transaction for Realty Income. Right?

2 A. That is correct.

3 Q. And without a lease on the property,
4 Realty Income would not have been interested in
5 purchasing the subject property.

6 A. That's exactly correct. We rely upon
7 the lease and the lease income for the 20-year
8 during in evaluating the property.

9 Q. Realty Income is not in the business of
10 operating convenience stores, is it?

11 A. No, sir. We do not do that.

12 Q. Does Realty Income operate any
13 convenience stores or any of the other commercial
14 businesses that are operated on its properties?

15 A. No. We never do that.

16 Q. Just for completeness, I'm going to
17 offer a couple of other exhibits. And then we'll
18 be finished, Mr. Pfeiffer, for the time being.

19 Do you know whether or not there were
20 any addendums or amendments to the lease?

21 A. Yes, I do. And there were.

22 Q. Okay. I'm going to hand you two
23 documents so that we're sure that we have a
24 complete copy of the lease, including all
25 amendments. I'm handing you what has been marked

1 as Landowner's Exhibit 8 and Exhibit 11.

2 MR. TIBBALS: Your Honor, I do not have
3 an extra copy of Exhibit Number 11. I had not
4 intended to introduce it. But I just want to be
5 sure that on the record, we have a complete copy of
6 the lease. It's not that I don't want to give you
7 a copy, I just didn't bring one.

8 There is 8, which is the addendum.

9 BY MR. TIBBALS:

10 Q. And I'd just like to ask you,
11 Mr. Pfeiffer, do you recognize Exhibit Number 8 and
12 Exhibit Number 11?

13 A. I do.

14 Q. Okay. Can you tell me what those
15 respective documents are?

16 A. Yes. The addendum to the lease related
17 to some requirements that we have an environmental
18 insurance policy in place, and we wanted to comply
19 with the insurance program and got a endorsement to
20 our policy relating to having underground storage
21 tanks for South Carolina.

22 Q. And what about the amendment?

23 A. The amendment to the lease related to a
24 dispute that we had because of this condemnation,
25 as well as the underground storage tank system.

1 The definition in the lease for the underground
2 storage tanks included language that was going to
3 be detrimental for Worsley to be able to finance
4 some of their equipment, so we changed the
5 definition to be more beneficial for them.

6 MR. TIBBALS: I'm going to offer
7 Exhibit Number 8 and Exhibit Number 11 into
8 evidence.

9 MR. WEST: May I look at that?

10 MR. TIBBALS: 11, he's got the only
11 copy I brought of it.

12 MR. WEST: Excuse me. Your Honor, may
13 I approach the witness?

14 THE COURT: You may.

15 MR. WEST: No objection, Judge.

16 (LANDOWNER'S EXH. 8 and 11, admitted
17 into evidence.)

18 BY MR. TIBBALS:

19 Q. Mr. Pfeiffer, do you now have before
20 you a full and complete copy of the lease,
21 including all amendments, addendums, and other
22 modifications?

23 A. Yes, sir.

24 MR. TIBBALS: That's all the questions
25 I have for, Mr. Pfeiffer. Thank you.

1 THE COURT: Okay.

2 MR. WEST: Your Honor, I hate to ask
3 the Court this, but can we take about a
4 three-minute break before we start cross?

5 THE COURT: That will be fine.

6 (A recess transpired.)

7 THE COURT: You may be seated.

8 Mr. West, are you ready for
9 cross-examination?

10 MR. WEST: If it please the Court, your
11 Honor.

12 CROSS-EXAMINATION

13 BY MR. WEST:

14 Q. Mr. Pfeiffer, welcome to Berkeley
15 County, South Carolina. It's a long ways from
16 California. We're glad to have you here.
17 Appreciate your testimony.

18 When I hear your testimony, at least in
19 part, it's very obvious I think to all of us that
20 this was a very large and sophisticated business
21 transaction that resulted in RI CS5 becoming the
22 owner of a number of convenience store sites,
23 including the Scotchman site here in Moncks Corner.
24 A pretty large and sophisticated transaction, you
25 would agree with that?

1 A. Yes.

2 Q. And you have described in great detail
3 the financing arrangement. You have described the
4 due diligence that was conducted by your
5 organization, including the investment committee.
6 You have described in great detail the criteria,
7 the three-legged stool.

8 So it appears, I think to me and to all
9 of us and I'm sure to the Court, that this was not
10 a transaction that was casually entered into but
11 the result of a very sophisticated and detailed
12 analysis of the merits of the project. Is that a
13 fair statement?

14 A. Yes.

15 Q. All right. Now, one of the things that
16 you talked about is, is that there were folks who
17 came down. And I believe her name was Ms. Wideman,
18 is that -- do I remember her name correctly?

19 A. Windman.

20 Q. Windman. And she did some due
21 diligence on this site in particular, as I recall
22 your testimony. Is that right?

23 A. Yes.

24 Q. And she produced a report that you
25 testified to earlier. And I want to talk about

1 that report just a little bit. And of course,
2 we're referring to Landowner's Exhibit Number 2.
3 And I'm going to ask you, if you will, please, sir,
4 to take a look at that document again and refresh
5 your memory.

6 By the way, did you see that document
7 itself during the course of your examination of the
8 project?

9 A. I have seen this. Yes.

10 Q. You saw that contemporaneously with the
11 due diligence that was going on?

12 A. Yes.

13 Q. All right. Do you see anything in that
14 document that speaks to the fact that there was a
15 very strong likelihood at the time that document
16 was produced, if not certainty, that U.S. Highway
17 17A would be widened in the vicinity of the
18 Scotchman store on Live Oak Drive? Do you see
19 anything in that document that speaks to that
20 issue?

21 A. I do not.

22 Q. All right. Do you believe that that
23 would have been a material piece of information
24 that the decision makers, including yourself and
25 the investment committee, would have taken into

1 account in whether to include Store Number 82?

2 By the way, that's the store number
3 that I think you testified to as it relates to this
4 particular site.

5 A. Yes.

6 Q. Is that correct?

7 If it had been known by the investment
8 committee and yourself and other decision makers at
9 Realty Income that U.S. Highway 17A would be
10 widened and that the Store Number 82 site, or
11 Tract 244 site, would be impacted by that widening,
12 would that have been material?

13 A. Yes.

14 Q. And if it were known that the entire
15 site was going to be acquired, or at least the
16 potential of the entire site being acquired, you
17 would likely have excluded Store Number 82 from the
18 portfolio acquisition, would you not?

19 A. Yes.

20 Q. All right. I'm going to hand you a
21 document that is part of the material that your
22 lawyers provided to me and ask you if you have ever
23 seen what has been premarked for identification
24 purposes as Condemnor's Exhibit Number 3.

25 A. I saw this today.

1 Q. I'm asking an open-ended question, and
2 you can -- we might zero in on that in a minute.

3 Does each property have an anticipated
4 and expected rate of return?

5 A. We expect to receive rent for the
6 duration of the lease. So if you are referring to
7 that, then yes.

8 Q. That was not my question. My question
9 is: Do you expect a particular percentage rate of
10 return on your investment in each individual site?

11 A. If you multiple the rent, then the
12 answer is yes.

13 Q. And what would that rate of return be?

14 A. The way that it's reflected is
15 somewhere around an 8.9 percent rate of return.

16 Q. All right. And that's in the documents
17 that you have in front of you, which have been
18 marked as Condemnor's Exhibit -- bear with
19 me -- Number 4?

20 A. Yes, sir.

21 MR. WEST: All right. Your Honor, I
22 omitted offering Number 3, Condemnor's Number 3 and
23 Number 4 now in evidence, subject to counsel's
24 request to be able to substitute that last page of
25 Condemnor's Number 3.

1 THE COURT: No objections?

2 MR. WEST: No objections.

3 (LANDOWNER'S EXH. 6 admitted into
4 evidence.)

5 BY MR. DOMINICK:

6 Q. Looking at your appraisal -- and we'll
7 go through the -- some of the details in process in
8 a minute. But if you would, just tell the Court,
9 what was your final determination in this appraisal
10 of the value of the property at issue?

11 A. In the appraisal report which is dated
12 May the 19th, 2009, which has been identified as
13 Landowner's Exhibit Number 6, my appraisal of the
14 before value of the property, before the
15 acquisition by the Department of Transportation,
16 was \$900,000.

17 And I arrived at that number through a
18 coalition, a coalition of approaches to value which
19 I had used. I used a sales comparison approach,
20 wherein I attempted to locate sales of convenience
21 stores that were considered relatively comparable
22 to the subject property. And that value -- that
23 approach indicated a value of the real estate of
24 \$444,500.

25 I then did a direct capitalization

1 comparison approach of the real estate using the
2 sales of convenience stores throughout South
3 Carolina, which indicated a value of \$444,500.

4 The direct capitalization approach, of
5 course, took into consideration the existing lease.
6 It is a 20-year lease, I think, with one or two
7 10-year options. The monthly rent is \$8,517.67.
8 When you multiple that times 12 months, it comes
9 out to about \$102,101 and some change, which would
10 have been the value indicated by the direct
11 capitalization approach.

12 I then took off 5 percent for
13 management and 3 percent for vacancy and credit
14 loss, although it is a triple net lease. There are
15 appraisers who don't do that. I just consistently
16 allow for management and vacancy and credit loss,
17 which that then gave a net income to the property
18 of \$94,188 as opposed to the gross income of
19 \$102,212.

20 I used an overall capitalization rate
21 of 8 -- 0.883 percent, close to 9 percent but
22 between 8.5 and 9 percent. And when I capitalized
23 the net operating income of \$94,188, that indicated
24 a value of 1,067,000.

25 The third approach was as an ongoing

1 MR. DOMINICK: Just one second, your
2 Honor. I think I'm just about through.

3 THE COURT: Okay.

4 BY MR. DOMINICK:

5 Q. Assuming that you are appraising
6 income-producing or investment properties, wouldn't
7 it be appropriate to use the income capitalization
8 approach?

9 A. Tell me what property you are talking
10 about.

11 Q. Well, I mean, anytime you have an
12 income-producing or investment property, shouldn't
13 you use an income capitalization approach to value?

14 A. I don't know that that's always true.
15 I can tell you specifically in convenience stores,
16 you look at both sales and the income approach. As
17 I mentioned, that is a consideration. But the
18 income is a function of a factor or multiplier.

19 Q. You're familiar with the South Carolina
20 DOT appraisal manual, aren't you?

21 A. Absolutely.

22 Q. And are you also aware that the manual
23 provides that the income capitalization approach to
24 value must be demonstrated when appraising
25 investment-type properties?

1 A. And I agree with that, first of all.
2 And the use of a multiplier or a factor is a part
3 of the income approach and direct capitalization.
4 It's just done with multiplication instead of
5 division. It's the same thing.

6 Q. And you would agree there is a
7 difference between an investment property and a
8 property that you're buying to operate a business
9 on?

10 A. Market value is market value. It
11 doesn't matter the situation. It's only worth one
12 number.

13 MR. DOMINICK: I don't have any further
14 questions. Thank you.

15 MR. WEST: Nothing on redirect, your
16 Honor.

17 THE COURT: All right. Before we leave
18 this witness, that paper that you handed to him, I
19 want to look at it and maybe make it an exhibit.

20 MR. DOMINICK: It is an exhibit.

21 THE COURT: No. The one --

22 MR. DOMINICK: Oh, the one we had?

23 THE COURT: Yeah, the one that was
24 talked about. I would like to see what it --

25 MR. TIBBALS: And we'll want to explain

1 A. No, not necessarily.

2 Q. Okay. Taking it back to 10 doesn't do
3 anything to the capitalization --

4 A. No. What happens is the
5 reversion -- that's the sale of the property at the
6 end of a holding period. The reversion is realized
7 a lot sooner in 10 years. In other words, it has
8 greater value because you receive that reversion
9 10 years from now. If that reversion is not
10 received till 20 years, it maybe even be a higher
11 figure.

12 Q. Okay. So it's a wash probably between
13 the --

14 A. It's basically a wash whether it's done
15 over 10 years or 20 years.

16 Q. I see. Okay.

17 You didn't find any rental comps in
18 Berkeley County, did you?

19 A. I did not.

20 Q. Did you find any in the Tricounty area?

21 A. No, I did not.

22 Q. All of your rental comps were from the
23 Greenville area. Is that right?

24 A. Yes. They were from upstate South
25 Carolina. Like I said, most convenience stores are

1 owner occupied. There are some that are leased,
2 but it is a minority. I'm appraising one right now
3 in North Carolina that is leased for \$35 per square
4 foot, and it's just a three-year-old facility with
5 state-of-the-art equipment.

6 Q. Who is the -- is the landlord wanting
7 to sell that one?

8 A. The landlord no longer wants to own
9 it -- I mean, wants to manage the business. And
10 it's sold to somebody who is operating it.

11 Q. So the owner is simply selling the
12 business, but retaining the realty?

13 A. In a typical lease, the tenant gets the
14 real property and the personal property, the -- and
15 the business.

16 Q. Okay. I'm just trying to explain what
17 is going on in this one that you're valuing right
18 now.

19 A. Right.

20 Q. And that is, is it currently owner
21 occupied?

22 A. It was, till they had a tenant in
23 place.

24 Q. Okay. So now he has a tenant in place
25 and he no longer runs the business. Is that right?

THE STATE OF SOUTH CAROLINA

In the 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 CSS, LLC.....Respondent,

and

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

Brief of Appellant

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August 5, 2013

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred as a matter of law by failing to give effect to all parts of the relevant fee-shifting statute including language in the statute that fees may be denied where the litigating position of the State was substantially justified or where special circumstances make an award unjust?
2. Whether the court erred in finding that the litigation position of the State was not substantially justified?
3. Whether the landowner's stature as a large profitable corporation is a special circumstance making an award unjust where it can well bear its own cost and did not need the promise of fee-shifting against the State to induce an attorney to represent it?
4. Whether the trial court relied on erroneous findings of fact and law awarding a high rate of fees based upon the landowner's contract with its attorneys?

STATEMENT OF THE CASE

The South Carolina Department of Transportation appeals the Order of the Honorable Robert E. Watson, Special Circuit Judge, dated February 4, 2013, awarding litigation costs to the landowner and against the condemnor. Appellant asserts that trial court misinterpreted the relevant statutory law authorizing the award of cost and fees to prevailing parties in condemnation cases. This error of law along with the court's erroneous findings of facts causes the Order to be an abuse of discretion that this Court should reverse. We believe that if the language contained in S.C. Code Ann. §28-2-510 (B)(1) (Rev. 2007) regarding denial of fees where the litigating position of the State is substantially justified or that special circumstances make an award unjust is to be given any meaning, this Court must reverse the award made by the trial court herein.

STATEMENT OF FACTS

This matter arose on the application of Respondent who was a prevailing party in a condemnation case for an Order taxing its litigation costs including attorney fees against the condemnor under S.C. Code Ann. §28-2-510 (B)(1). R.p. 26. Both parties submitted memoranda and a hearing was held in open court in Moncks Corner on October 2, 2012, where counsel for each party presented their arguments for and against the award of fees. R.p. 78, 91, 137. At the hearing, prior to the opportunity for condemnor's counsel to be heard, the judge announced his decision that he would award fees and deny the condemnor's request that he not. R.p. 145. The hearing was followed by a written order signed February 4, 2013, where the court awarded fees and costs in the amount of \$126,730.82 based on the finding of a reasonable hourly rate of \$350.

The underlying condemnation case involved the acquisition of 0.391 acres on Live Oak Boulevard in Moncks Corner constituting the entire parcel owned by the landowner. The parcel was improved by a Scotchman convenience store operated by other condemnee Worsley Operating Corporation. The acquisition was for the purpose of widening U.S. Route 17A. R.p. 170-81. At the trial, presided over by the Honorable Robert E. Watson without a jury, testimony was given by Mr. Robert Michael Pfeiffer, Executive Vice President, General Counsel, and Corporate Secretary of Realty Income, the corporate parent of the landowner, RI CS5, Mr. Thomas F. Hartnett, appraisal expert for the landowner, and Charles F. Crider and David Graydon, appraisal experts for the Department. Mr. Hartnett testified to the value of the acquisition as \$900,000. Mr. Crider's opinion of value was \$201,000. Mr. Graydon's value was \$351,000. R.p. 14, 15, and 17.

In his final order, the trial court found that Mr. Crider's testimony was not credible, noted Mr. Graydon's testimony that he considered a "going concern" value on the basis of the property's rents to be \$924,000 before rejecting that approach, and ruled that the value was \$900,000 as testified to by Mr. Hartnett. R.p. 26. We did not appeal the finding of just compensation. R.p. 9.

ARGUMENT

- I. **By disregarding language in the relevant statute regarding denial of fees where the government's litigating position is "substantially justified" or where special circumstances make and award unjust, the trial court misinterpreted the statute.**

In his interpretation of the condemnation fee shifting statute, S.C. Code Ann. §28-2-510 (B) (Rev. 2007), the trial judge conflated the definition of "prevailing party" therein with language permitting the court to reduce or deny fees to such a party where the condemnor's litigating position is found to be "substantially justified." This interpretation has the effect of nullifying the "substantially justified" language--a view that the court appears to endorse by reference to an opinion of this Court, 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." R.p. 5. Because the court's award of fees was grounded on this erroneous conclusion of law, the Order constitutes an abuse of discretion.

The court's interpretation violates the basic rules of statutory construction: 1) In construing statutory language, the statute must be read as a whole, and sections which are

part of the same general statutory law must be construed together and each one given effect. Sloan Construction Company, Inc. v. Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011); TNS Mills v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); and 2) In construing a statute, a court must presume that the legislature did not intend a futile act, but rather intended its statutes to accomplish something. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008); Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008). The condemnor was entitled to have the court hear and consider its opposition to fees under all parts of the governing statute and failure to do so was error.

The court also disregarded the statutory language permitting denials where special circumstances make an award unjust. As we set forth in section III of this brief, the landowner herein is a large, highly capitalized, public corporation. It is difficult to imagine a situation where special circumstances exist than this case. The court's decision that overlooked that factor is error as well.

The trial court's refusal to construe the statute as a whole and give meaning to all of its parts is an error of law and an abuse of discretion requiring reversal.

II. The litigating position of SCDOT was substantially justified within the meaning of that term in S.C. Code §28-2-510.

The trial court erred in finding that the State's litigating position was not substantially justified as a basis for its fee award against the State.

The law governing fee awards in condemnations is contained in S.C. Code Ann. §28-2-510 (B)(1)(Rev. 2007). That Code section is part of the S.C. Eminent Domain

Procedure Act enacted in 1987. The section provides that the court upon application from a prevailing party may award fees and costs as part of the condemnation judgment. “Prevails” is defined in subsection (B)(2) as compensation awarded that is at least as close to the highest valuation testified to on behalf of the landowner as the highest amount testified to on behalf of the condemnor. The section goes on to say that,

The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny the award, to the extent that the landowner, during the course of the action, engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust.

Our Supreme Court has based its consideration of the term “substantially justified” in another South Carolina fee-shifting statute, the “State action” statute, S.C. Code Ann. §15-77-300 (Supp. 2012), on the U.S. Supreme Court’s interpretation of similar language in the main federal fee-shifting statute involving the government, the Equal Access to Justice Act, 28 U.S.C.A. § 2412.¹ Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990); see, also, Video Gaming Consultants, Inc. v. S.C. Dep’t. of Revenue, 358 S.C.647, 595 S.E.2d 890 (Ct. App. 2004). That statute, enacted in 1980, provides in part,

(d)(1) ...a court shall award to a prevailing party other than the United States fees and expenses...unless the court finds the position of the United States was substantially justified or that special circumstances make and award unjust.

In Heath, our Supreme Court noted,

In Pierce [v. Underwood], 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)], the Supreme Court discussed the definition of “substantial

¹ Both the federal and the South Carolina statutes negate the “American Rule” that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000). Further, statutes waiving the state’s immunity from suit being in derogation of sovereignty must be strictly construed and the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.

justification" in the context of attorney's fees and determined that this term does not mean "'justified to a high degree', but rather 'justified in substance or in the main'-that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2250. To say that there was no substantial justification is not the same as a determination that a claim was frivolous. Therefore, a court need not go so far as to brand a claim "frivolous" in order for it to be found to be without substantial justification. Pierce v. Underwood, 108 S.Ct. at 2251.

Heath, 394 S.E.2d at 712.

There is an abundance of legislative history and case law interpretation of the federal statute. We refer the Court to the annotation at 69 A.L.R. Fed. 130 ("What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees under the Equal Access to Justice Act, (28 U.S.C.A. § 2412(d)(1)(A)).") With regard to the legislative history, the annotation refers to the House Judiciary Committee Report which states that the substantial justification test is essentially one of reasonableness. Thus, no award is intended where the government can show that its case had a reasonable basis in both law and in fact. The Report explains that 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, and indicates that the standard does not require the government to establish that its decision to litigate was based on a substantial probability of prevailing. 69 A.L.R. Fed 130.

Regarding the federal case law, Am. Jur. Fed. has a good summary:

To be substantially justified means, of course, more than merely undeserving of sanctions for frivolousness. However, a position can be justified even though it is not correct and can be substantially (that is, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. It must have enough foundation in law and fact that a reasonable person could think it correct; in other words, such position must be sufficiently colorable to engender "genuine dispute."

32 Am. Jur. 2d Federal Courts, §260.

Trial of this case, as most condemnation cases, involved the testimony of expert appraisal witnesses as to their opinions of the value of the property condemned. Mr. Thomas F. Hartnett testified for the landowner. Messrs. Charles F. Crider and David Ray Graydon, Jr., testified for the condemnor. Each was qualified as an expert to testify as to their opinion on the real estate valuation. The law and rules governing such testimony are contained in case law and in certain published appraisal standards of the appraisal industry, primarily the publication Uniform Standards of Professional Appraisal Practice and Advisory Opinions, the Appraisal Foundation (2005) ("USPAP"). With regard to the case law,

It must be remembered that in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment.

4 Sackman, Nichols on Eminent Domain, §12.01, p. 12-31; Standard Oil Co. of New Jersey v. Southern Pac. Co., 268 U.S. 146, 156, 45 S.Ct. 465, 467, 69 L.Ed. 890 (1925).

Nichols states,

All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.

Irrespective of the method adopted for the ascertainment of such value, it is incumbent on the condemnor to endeavor to reach a result that is truly "just compensation," that is, fair to the public as well as to the owner of the property taken.

4 Sackman, Nichols on Eminent Domain, §12.01, pp. 12-1 – 12-7.

USPAP recognizes a number of valid approaches to determining value. The most relevant with regard to commercial real property are the cost approach, the sales comparables approach, and the income approach. After analyzing each, the appraiser then applies his judgment as to which approach to accord the greater weight and which approaches to discount or disregard. See, generally, USPAP, Standard 1.

Mr. Hartnett testified that his analysis indicated a value for the property under the sales comparable approach as \$444,500. R.p. 183. However, in his reconciliation of the values, he gave greater weight to the capitalization of income approach using the existing lease and discounting the capitalized rent for certain reasons. His opinion was that the property was worth \$900,000. R.p. 184.

On the other hand, Messrs. Crider and Graydon, in their testimony for the condemnor, discounted the income approach relying more heavily instead the sales comparable approach. Their stated reasons for doing so were that the actual rent was not arrived at in a true arms-length transaction and was much higher than the comparable rents for convenience stores locally. All three appraisers agreed that the rent was above market. The opinions of the condemnor's appraisers have ample support in the record.

Mr. Michael Robert Pfeiffer, executive vice president of the landowner's parent company, Realty Income Corporation, testified at trial as to the background of his company's acquisition of the real estate and the process followed for valuing it and determining rental rates. At some point in 2008, a company, Sun Capital, approached Realty Income concerning its desire to purchase 75 convenience stores owned and operated the Worsley Companies. R.p. 159. Sun Capital is a private equity company located in Boca Raton, Florida. Sun and Realty Income have had a long-term and

geographically wide landlord-tenant relationship involving acquisitions of convenience store companies. Sun is not in the business of owning realty but only the operating business of convenience stores. Thus, Sun asked Realty Income to purchase the land and improvements and lease it back to them. R.p. 160-65, Realty Income then closed on a purchase of all the properties of Worsley for \$65,350,000. Thereafter, Realty Income allocated the total purchase price among the properties with the result that it valued the Moncks Corner store property at \$1.15 million. R.p. 167-68. Realty Income then determined that it required a rate of return of 8.9% and applied that percentage to the allocated values of each of the stores. R.p. 169 and 182. The result was that the rent set for the Moncks Corner store was \$8,517.67 per month to be increased periodically per the CPI. R.p. 169.

The point of the foregoing is that, although the global purchase price of all the Worsley properties was reached between the buyer and seller in an arms-length transaction, and Worsley/Sun assented to the overall rental rate of return on all of the properties, the actual rental for the Moncks corner store was set unilaterally and arbitrarily by the owner, landowner Realty Income for their subsidiary RI CS5. Moreover, Worsley or Sun had no incentive or reason to protest the rental rate on the Moncks Corner store because a high rental there would necessarily result in a lower rental for another property. The individual store rents were not a concern of the lessee companies because their focus was on the overall rent on all of the properties based upon the global purchase price.

In his conclusion under the income approach to value, Mr. Hartnett utilized the existing rent then capitalized that amount to find a value. This circular valuation method

is flawed because the rents used were grounded on an arbitrary property value in the first place.

Given the foregoing, the condemnor's appraisers were substantially justified in discounting or even disregarding the actual rent for the Moncks Corner store. This view is reasonable because a stranger to the Sun/Realty Income relationship would be wary of paying a price based upon above market rent where Sun would no longer have the offsetting benefit of low rents elsewhere. It is also likely that the sale of the single store would be the result of the global deal between Realty Income and Sun Capital falling apart. This view is buttressed by the landowner's own expert, Mr. Hartnett, who testified that under the sales comparison appraisal approach the value would be \$444,500. In other words, that amount would be what a willing buyer in the local market would expect to pay for a convenience store property. Our courts have recognized the following definitions of "fair market value": (1) "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction"; (2) "the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell". Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010); Mazloom v. Mazloom, 382 S.C. 307, 321, 675 S.E.2d 746, 753 (Ct. App. 2009). The value the court found was not the result of an open market sale in an arm's length transaction.

Finally, we note that in his Order, the trial judge stated as justification for his award of the high rate of fees that "this case involved a relatively novel issue of law in South Carolina." R.p. 2. However, the judge did not attempt to reconcile this finding with an explanation of how one of the two points of view in a debate over a "novel issue

of law” could be considered unsubstantial. In Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004), this Court denied fees to the plaintiff on the grounds that the litigating position of the State was substantially justified. The Court stated,

The parties argued extensively about the proper interpretation of 44 Liquormart during the ALJ hearing. The circuit court likewise engaged in a substantial discussion of the case’s impact in its order affirming the ALJ decision. We find no point at which the Department maintained a position that can be viewed as disingenuous.

The trial court did not agree with our theory of the case. But that is not the standard under the statute. Clearly a reasonable person could think that our view was correct. The State should not have to pay the other party’s attorneys’ fees and costs solely because the Court agreed with its theory of the case and not with the State’s. Heath, supra.

III. The landowner’s stature as a large and profitable public corporation is a “special circumstance” that makes an award unjust.

Under S.C. Code §28-2-510 (B), the trial court may reduce or deny an award if, inter alia, it finds special circumstances which would make an award unjust. The landowner’s size and capability of funding its own litigation costs is such a special circumstance. As the trial judge expounded in his order on just compensation, Realty Income, the parent of landowner RICS5, LLC, is a large publicly-owned real estate investment trust based in Escondido, California. It has paid dividends to its 90,000 shareholders monthly since 1969. R.p. 11; R.p. 158. It is publicly traded on the New York Stock Exchange (stock symbol “O”) and has a market capitalization of \$8.89 billion. <http://finance.yahoo.com/q?s=O> (May 1, 2013).

For this case, the landowner decided to retain two partners from a large state-wide law firm, Nexsen Pruet, LLC. It agreed to pay them at hourly rates of \$382 and \$310 respectively. Realty Income certainly had the wherewithal to pay and chose to pay those rates. The promise of a potential shift of fees to the State was not necessary to induce Nexsen Pruet undertake representation of Realty Income in this case. The most certainly would have done so anyway.

IV. The trial court's endorsement of the fee request submitted by the landowner's counsel was not supported by credible facts and that basis is, in any event, inappropriate under the governing case law.

In his Order, the trial judge "adopted" the affidavit of Richard D. Bybee, along with those of the landowner's attorneys themselves, as factual findings in the fee determination. R.p. 2. This should not have been done. Mr. Bybee, according to his affidavit, handles condemnation cases in Berkeley County. R.p. 110. His opinion was that the rates charged by the landowner's attorneys, \$310 and \$382 per hour, were reasonable for a condemnation case in Berkeley County. This is not surprising. Instead of "adopting" this opinion, the Court should have completely disregarded it. It should have been given no credibility in that it is not coming from a disinterested party.

Aside from the need to support those who support them, the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible. The higher this fee award is the more useful it will be as precedent for the lawyer signing the affidavit when he seeks a high fee award in his own cases. The affiants are anything but "disinterested."

* * *

Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers

in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members of the group are to be paid. C.f. H.L. Mencken, A Little Book in C Major 22 (John Lane Co. 1916) ("It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.").

Kenny A. v. Perdue, 532 F.3d 1209, 1231-32 (11th Cir. 2008), reversed on other grounds by Perdue v. Kenny A., 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed. 494 (2010) (Reversing the award of an enhancement).

Rather than relying on the affidavits the landowner produced, the court should have relied instead on the affidavit of John S. West produced by the condemnor in support of its return to the fee application. R.p. 87-88. Mr. West practices law and handles condemnation cases in Moncks Corner, South Carolina, the location of the condemned convenience store herein. Mr. West testified in the affidavit that he charges \$250 per hour for private legal work and that fees in Berkeley County average between \$150 and \$250 per hour. An amount in that range should have been found to be a reasonable fee given the purpose of fee shifting statutes.

South Carolina courts follow the "lodestar" formula for determining a reasonable rate. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The contract between the attorney and his client does not control; rather the court is to find a reasonable rate for the particular locality. Id. The purpose of fee shifting statutes is to provide for a reasonable fee sufficient to induce a capable attorney to undertake representation in a meritorious case. Perdue v. Kenny A., *supra*, 130 S.Ct. at 1672. They are not for the purpose of providing a form of economic relief to improve the financial lot of attorneys. Perdue, *supra*, at 1673 quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 120 L.Ed. 439 (1986).

As the U.S. Supreme Court stated in Delaware Valley, *supra*:

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.

478 U.S. at 565, 106 S.Ct. at 3098, 92 L.Ed.2d 439.

After citing the Jackson v. Speed decision which holds that the contract between the lawyer and his client does not control the amount of a reasonable fee, the trial court proceeded to do just that. The court took the rates charged by the two landowner's counsel of \$383 per hour and \$310 per hour and averages them to \$346 per hour then declares \$350 per hour to be a reasonable rate. As justification for this conclusion, he creates a "Tri-County area" later identified as the "Charleston tri-county area, including Berkeley"² He then relies upon the affidavits submitted by the landowner as evidence that those rates are not unreasonable. This is not an appropriate method of analysis for a lodestar rate under the case law governing fee shifting. The inquiry should be, "At what rate could a landowner hire a competent attorney in Moncks Corner or Berkeley County to represent him in a condemnation case?" The answer is certainly less than \$383 or even \$310 per hour. The best evidence available to the court was the affidavit of Mr. West that he accepts such cases at \$250 per hour.

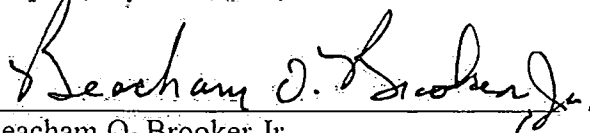
² The third, presumably contiguous, county is not identified.

As further justification for accepting the high rates requested, the court opines that the case involved a novel issue of law, complex transactions, and difficult valuation issues. Also, that the case was complicated by the Condemnor's "aggressive course of litigation" which involved "discovery, mediation and trial." This is overwrought. Condemnation cases, which are in essence land valuation determinations, represent one of the most routine and formulaic proceedings tried by our court system. The land appraisal rules are the same used in foreclosures, divorce settlements, tax cases, estate administration, and many other proceedings. With regard to valuation of income producing properties, the appraisal rules have long been settled and consistently used in court for many purposes. Likewise, "discovery, mediation and trial" do not represent any undue burden on a party but rather are the normal and customary incidents of litigation. The court abused its discretion in accepting the landowner's proffered rates and its justifications therefor instead of making his own independent analysis as mandated by the case law.

CONCLUSION

For the foregoing reasons, the Department requests that the Court reverse the taxation of fees against it below.

Respectfully submitted,



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Certificate

I certify that this Brief of Appellant complies with Rule 211, SCACR.

Bertram D. Gaskin

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Berkeley County, South Carolina

The Honorable Robert E. Watson, Master-in-Equity

Appellate Case No. 2013-000394

Case No. 2009-CP-08-3890

South Carolina Department of Transportation, Appellant,

v.

RICS5, LLC, Respondent.

And

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

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Court Abused Its Discretion in Awarding Reasonable Litigation Expenses to the Prevailing Party Pursuant to S.C. Code § 28-2-510?
- II. Whether the Trial Court Abused Its Discretion By Refusing to Deny or Reduce the Award of Litigation Expenses on the Basis of “Substantial Justification”?
- III. Whether Condemnor Preserved Its Argument that Special Circumstances Existed to Justify a Denial of Reduction of Litigation Expenses?
- IV. Whether the Trial Court Abused Its Discretion by Declining to Deny or Reduce the Award of Litigation Expenses on the Basis that Landowner is a Corporation?
- V. Whether the Trial Court Abused Its Discretion in Determining that the Hourly Rate of Landowner’s Attorneys’ Fees Was Reasonable?

STATEMENT OF THE CASE

This case was commenced on December 1, 2009, through the filing of a Notice of Condemnation in Berkeley County Circuit Court by the South Carolina Department of Transportation ("Condemnor") and subsequent service upon RI CS5, LLC ("Landowner") on December 7, 2009. Condemnor sought to take by eminent domain a certain parcel of real property located at 1445 South Live Oak Drive, Moncks Corner, South Carolina, upon which a convenience store and gas station operated (the "Property"). Landowner owned the real property but did not own the store operations. Rather, Landowner leased the Property to the store operator. Landowner did not challenge the right to condemn, but only the amount of just compensation. After an early but unsuccessful mediation, the parties engaged in written discovery and depositions.

The case was referred to the Berkeley County Master-In-Equity Robert E. Watson by a Consent Order of Reference dated March 21, 2011. Ultimately, the case was tried without a jury before Judge Watson on December 14, 2011. Landowner prevailed at trial, and, on May 17, 2012, a Final Order and Judgment was entered, awarding Landowner just compensation for the taking in the amount of \$900,000. Condemnor neither moved for reconsideration nor appealed the Final Order and Judgment.

On June 1, 2012, Landowner served and filed an Application for Award of Reasonable Litigation Expenses (the "Application") pursuant to S.C. Code § 28-2-510, seeking an award of reasonable litigation expenses, including attorneys' fees and other costs of litigation expended in the course of the action. The Application was made within fifteen (15) days after entry of the Final Order and Judgment in accordance with S.C. Code § 28-2-510. Landowner was entitled to seek the award based on its recovery of \$900,000, which amount was closer to the highest

valuation of the Property attested to at trial on behalf of the Landowner (\$1,150,000) than it was to the highest valuation of the Property attested to at trial on behalf of the Condemnor (\$351,000).

Condemnor opposed the Application and filed a Return to Landowner's Application on June 25, 2012. Landowner served a Reply Brief and supporting affidavits on August 3, 2012. On October 2, 2012, the Master held a hearing on the Application, and finally, on February 14, 2013, the Master entered an Order Granting Landowner's Application for Award of Reasonable Litigation Expenses (the "Order") in the amount of \$126,730.82. Condemnor appeals this Order.

ARGUMENT

Condemnor challenges a statutory award of litigation expenses in this case where the trial court found just compensation in the amount of \$900,000, more than 447% higher than Condemnor's initial tender of \$201,000, and over 256% more than the highest valuation presented by Condemnor at trial, \$351,000. Condemnor objects to the fee award despite the fact that Condemnor utilized two appraisers, both of whom, along with Condemnor, refused to recognize any value associated with a lease on the Property, in contravention of Condemnor's own appraisal standards, the facts of the case, and controlling law.

The trial court's award of litigation expenses pursuant to S.C. Code § 28-2-510 is an exercise of discretion, and subject to reversal only for an abuse of discretion. An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing

reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion."

South Carolina Dept. of Transp. v. Revels, 399 S.C. 423, 427, 731 S.E.2d 897, 898-899 (S.C.App. 2012) (quoting *Kiriakides v. School Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008))). The Supreme Court of South Carolina has further instructed that "[w]here an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E. 2d 296, 297 (1989) (citing *Singleton v. Collins*, 251 S.C. 208, 161 S.E. 2d 246 (1968)). Neither errors of law nor unsupported factual conclusions are present here, and the fee award is supported by ample competent evidence, so that this Court should uphold the award in its entirety.

Condemnor challenges the award upon several equally unpersuasive grounds. First, Condemnor mistakenly claims that the trial court misinterpreted the statute by disregarding the substantial justification clause; however, the Court specifically addressed and rejected Condemnor's argument on this point. Second, Condemnor's argument that its position was substantially justified consists of attempts to relitigate issues fully and finally determined in the Final Order and Judgment. Third, the corporate and financial status of Landowner does not constitute "special circumstances" under which the fee award should have been denied or reduced. Finally, the trial court did not err when it relied upon affidavit testimony of an experienced eminent domain attorney in finding that Landowner's attorneys' hourly rates were reasonable.

I. The Trial Court Correctly Interpreted the Fee Shifting Statute.

Condemnor suggests that the trial court assumed that the prevailing party in a condemnation case is always entitled to an award of litigation expenses. The findings and conclusions in the Order flatly contradict this argument. Condemnor complains that “prior to the opportunity for [C]ondemnor’s consent to be heard, the judge announced his decision that he would award fees and deny the [C]ondemnor’s request that he not.” Appellant’s Brief at 2. However, a review of the hearing transcript quickly reveals that Condemnor’s argument is baseless. The trial judge stated, “I’m not going to deny you the right to legal fees. That’s not—I’m not going to deny them. So the issue is going to be, from my perspective at least, *unless you gentlemen convince me otherwise*, that I need to use the [lodestar] method . . .” (R. p. 145) (emphasis added). Therefore, the trial court remained open to the possibility of denying a fee award, if the Master could be convinced. Additionally, prior to the hearing, both parties had extensively briefed the fee award arguments, including the issue of substantial justification. Thus at the time of the hearing, Judge Watson was familiar with Condemnor’s position, but correctly remained skeptical of it, for reasons that will follow in this brief.

Condemnor’s assertion that the trial court misread the statute collapses entirely upon even a cursory review of the Order. Condemnor claims that the trial court effectively nullified the “substantial justification” provision by “conflating” it with the definition of “prevailing party”, and that the trial court failed to hear and consider its argument, resulting in an error of law. Appellant’s Brief at 3-4. However, the trial court devoted nearly two pages of the Order to an analysis rejecting Condemnor’s contentions on this issue, under the specific heading, “*The Condemnor’s litigating position was not substantially justified.*” (R. pp. 5-6).

Finally, Condemnor's argument that the trial court misinterpreted the fee shifting statute rests upon a fundamental flaw in statutory construction. After reciting that a landowner who prevails at trial may recover reasonable litigation expenses, the fee-shifting statute goes on to state:

The court, *in its discretion*, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the landowner, during the course of the action, engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust.

S.C. Code § 28-2-510(B)(1) (emphasis added). Thus, according to principles of statutory construction, the language allowing a denial or reduction in the award is *permissive*, rather than *mandatory*. "The use of the word "may" signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute." *Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 353, 549 S.E.2d 243, 250 (S.C. 2001) (citing *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980)). The explicit language of the statute erases any doubt as to legislative intent that the denial or reduction of a fee award is permissive by using the explicit language "in its discretion".

Therefore, Condemnor's argument is misguided. *Even if the trial court had found that Condemnor's position was "substantially justified", the statute did not require the trial court to deny or reduce the award.* A finding of "substantial justification" simply provides a trial court with permission, *at the trial court's discretion*, to reduce or deny the award. In this case, the trial court did not even find that Condemnor's position was substantially justified. Because of the finding that Condemnor's position was not substantially justified, the trial court did not have the discretion to deny or reduce the award on that specific basis. Thus, Condemnor's first argument has no merit.

II. The Trial Court Properly Declined to Deny or Reduce the Fee Award Based Upon Its Determination that Condemnor's Position Was Not Substantially Justified.

Condemnor asserts that the Order should be reversed on the basis that the trial court abused its discretion when it did not deny or reduce the fee award because Condemnor claimed that its position was substantially justified. The trial court rejected both Condemnor's proposed standard and Condemnor's argument that its position was "substantially justified." (R. pp. 4-6).

A. Condemnor's Proposed Standard for "Substantially Justified" Would Cause an Exception to Swallow the Fee Shifting Rule.

Condemnor seeks to have this Court implement a new, nearly impassable hurdle for all landowners seeking recovery of legal expenses as the prevailing party under S.C. Code § 28-2-510. First, Condemnor borrows the standard of "substantial justification" from the Equal Access to Justice Act. The standard, as espoused by Condemnor, is "more than merely undeserving of sanctions for frivolousness," ultimately, "a reasonable basis in law and fact." Appellant's Brief at 6 (quoting 69 A.L.R. Fed. 130).

Condemnor's advocated approach to fee awards in eminent domain cases in South Carolina is highly problematic in both theory and practice. First, Condemnor borrows this "more than frivolous" standard from a statute with mandatory language, unlike S.C. Code § 28-2-510. The federal statutory provision, 28 U.S.C. § 2412(d)(1) states that a court "shall award" fees and expenses to a prevailing party "unless the court finds the position of the United States was substantially justified. . ." This language stands in contrast to the eminent domain fee shifting statute, which provides that the trial court may award litigation expenses, and gives the trial court *discretion* to reduce or deny a fee award on the basis of substantial justification. Therefore, as discussed, *supra*, and in contrast to the federal statute, the trial court need not deny or reduce a fee award even if it finds that the condemnor's position was substantially justified.

Next, Condemnor asserts that all eminent domain cases involving valuation disputes among appraiser expert witnesses involve “the exercise of judgment.” Appellant’s Brief at 7. In other words, Condemnor posits, there is no rigid, inflexible “right” or “wrong” valuation, but simply differences in professional judgment and opinion. In effect, Condemnor seeks a decision of this Court that would ensure that payment of litigation expenses to a prevailing landowner is a thing of the past. This is because, under Condemnor’s proffered standard, any time it hires an expert appraiser who testifies at trial, that expert appraisal will make a “judgment call,” on valuation, which will cloak Condemnor in reasonableness, and ergo, substantial justification. This Court should soundly reject Condemnor’s attempt to change the landscape of eminent domain law in this state, and keep the playing field level for landowners whose property is taken against their will. Condemnor’s biased reading of the statute runs afoul of the clear legislative intent to prevent a condemning authority from making “lowball” offers to landowners, who would be pressured to accept less than fair market value when facing litigation expenses that could not be recouped.

B. The Trial Court Did Not Abuse Its Discretion in Finding that Condemnor’s Position Was Not Substantially Justified Under Its Own Proposed Standard.

Condemnor next attempts to reopen the merits of the valuation issues in a futile effort to demonstrate that its litigation position was substantially justified. As a threshold matter, Condemnor’s argument on this point is rife with factual errors and distortions of the record, and also demonstrates continued confusion by Condemnor of the underlying facts of the case. Some of these factual errors appear as follows:

- Condemnor claims that its experts Crider and Graydon “discounted the income approach” in part because “the actual rent . . . was much higher than the comparable rents for convenience stores locally.” Appellant’s Brief at 8. In fact, neither Crider nor Graydon testified

as to comparable local rents. Crider failed to provide any market rent comparables whatsoever, and Graydon's rent comparables were all from the upstate region. (R. p. 17; R. pp. 187-188).

- Condemnor claims that “[a]ll three appraisers agreed that the rent was above market.” Appellant’s Brief at 8. This statement is simply false. Hartnett testified that the rent was not “out of line” with the market, and Crider provided no rental market analysis, because he mistakenly believed the lease to be irrelevant. (R. p. 17; R. p. 14).

- Condemnor claims that Realty Income, the parent company of Landowner, allocated a purchase price to the Property *after* it closed on the entire portfolio transaction. Appellant’s Brief at 9. Condemnor makes this claim in an attempt to buttress its recycled and rejected argument that Landowner’s purchase price for the Property was “artificial.” However, the only evidence introduced at trial proved that allocations of value to individual properties within the portfolio were made *prior* to closing, and in fact, prior to the contract to purchase and sell the properties. (R. pp. 166-168).

- Condemnor claims that the “actual rental for the Moncks corner (sic) store was set unilaterally and arbitrarily by the owner” and “individual store rents were not a concern of the lessee companies”. Appellant’s Brief at 9. This statement lacks a basis in evidentiary fact, and is unsupported by the Final Order and Judgment which Condemnor failed to challenge.

- Condemnor criticizes Hartnett’s use of the lease to conduct an analysis for an income based approach valuation, stating that Hartnett’s “circular valuation method is flawed because the rents used were grounded on an arbitrary property value . . .” Appellant’s Brief at 10. Again, this statement has no support in the record and is directly contrary to the Final Order and Judgment. The only evidence presented showed that due diligence was performed

specifically on the Property in order to properly determine the value and purchase price of the specific Property. (R. pp. 11-12).

- Stunningly, Condemnor argues once again that its decision to disregard the lease altogether was reasonable and justified. Appellant's Brief at 10. This position directly contradicts the Final Order and Judgment and controlling law.

- Condemnor accelerates into rampant speculation by postulating that "a stranger to the Sun/Realty Income relationship would be wary of paying a price based upon above market rent" and "[i]t is also likely that the sale of the single store would be the result of the global deal between Realty Income and Sun Capital falling apart." Appellant's Brief at 10. These conjectures not only lack any factual basis, but they also wholly ignore the testimony of Condemnor's expert Graydon, who testified that the value of the lease, even taking into consideration his belief that the rent was above market and discounting the income as a sale/leaseback transaction, was \$924,000. (R. pp. 23).

- Condemnor suggests that Hartnett testified that a sales comparison approach valuation amount of \$444,500 is "what a willing buyer in the local market would expect to pay for a convenience store property." Appellant's Brief at 10. In fact, Hartnett testified that convenience stores are bought and sold on the basis of income production. (R. p. 14).

This Court should reject Condemnor's substantial justification argument because it represents nothing more than an effort to relitigate the key factual and legal issues already decided by a final, unappealed judgment. Thus, Condemnor's position runs squarely against the law of the case. Orders that are not interlocutory, and not timely appealed, become the law of the case. *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). Moreover, Condemnor has

mischaracterized the record and created facts with no evidentiary support in an effort to avoid paying fees to the prevailing party. Such efforts should be soundly rejected by this Court.

The Order, and the underlying evidence upon which it is based, paints a far different picture than the one portrayed by Condemnor now. Below are examples of findings by the Court that are directly contrary to Condemnor's argument that its position was substantially justified:

I find Mr. Crider's testimony to be little, if any, value for a number of reasons. First, Mr. Crider based his opinions regarding the relevance of the Lease upon the erroneous assumption that the Landowner and the tenant, Worsley Operation Corporation, were related entities. This assumption has no support in the record and, in fact, is thoroughly refuted by the evidence.

(R. p. 15).

There is no evidence to support Mr. Crider's contention that the Landowner and Worsley Operating Corporation were the same entity.

(R. p. 16).

Mr. Crider's mistaken assumptions regarding the nature of the transaction render his opinions unreliable. For example, his faulty premise that the landlord and tenant were the same entity served as his justification to exclude the Lease from his analysis of the fair market value of the Property. As discussed in further detail below, I find that the Lease must be considered in determining the fair market value of the Property. In addition, Mr. Crider's erroneous factual analysis led him to wholly ignore the distinction between the Landowner and the owner of the business operations.

(R. p. 16).

Mr. Crider provided additional ill-founded opinions. For example, Mr. Crider testified that the Lease was actually a mortgage, and therefore not reflective of market rent. Tr. at p. 177, l. 4-p. 178, l. 20. However, Mr. Crider admitted on cross-examination that he performed no analysis of market rent. Tr. at p. 183, 15-24. Finally, Mr. Crider also erroneously testified that personal property was bought by the Landowner and leased from the Landowner to the tenant, Tr. at p. 177, l. 17-24; p. 190, l. 17-24, when the record and the Lease prove the contrary. See Landowner's Exhibit 7 at p. 1, defining the "Premises" as the "Land and Improvements" defined in Exhibit "A" to the Lease, together with the Storage Tank System.

(R. p. 17).

Mr. Graydon's final opinion of value is based upon the replacement cost approach, but he admitted on cross-examination that where real property is purchased for investment for a stream of income, the most appropriate appraisal method is the income capitalization approach. Tr. at p. 218, l. 19-24.

(R. p. 17).

Mr. Graydon gave no justification for excluding the value of the Leased Fee Estate, other than his opinion that the Lease contained a higher than typical market rental rate, and therefore it appeared to him that the rent "may contain the going concern or the business value.

(R. p. 17).

The primary legal issue to be decided is whether to take the value of the Lease into consideration in determining the fair market value of the Property, and consequently the just compensation to be awarded to the Landowner." Id. at 10 ...The Condemnor's reliance upon *Bolt* and its progeny is misplaced in this case. The undisputed facts establish that the Landowner does not have any ownership interest in the operations of the convenience store located on the Property. The Landowner owned only the real estate, while the business operations were owned by Worsley Operating Corporation. Thus, the Condemnor did not take any "going concern" from the Landowner – the Landowner owned no "going concern" business to lose. The separation of the real property and the business operations distinguishes this case from *Bolt*, and other South Carolina cases excluding the going concern value, where the owner of the real property and the business were one and the same.

(R. pp. 18-19).

Condemnor's refusal to acknowledge the value of the lease stood in defiant contradiction to both Condemnor's own appraisal policies and existing law. Condemnor's own Right of Way Appraisal Manual states that the income capitalization approach must be demonstrated when appraising investment property. (R. pp. 185-186). Condemnor blatantly flouted its own guidelines in this case by choosing to ignore the value provided by the lease. Moreover, Condemnor's refusal to include the value of the lease in its just compensation analysis flew in the face of S.C. Code § 28-2-340(5), which provides for the admissibility of information regarding leases and rents in determining just compensation. Thus, even under Condemnor's

proposed standard, its position was not reasonable in fact or in law, and this Court correctly so ruled.

Additionally, Condemnor stubbornly refused to acknowledge that the lease had any value throughout the case, and during trial. Even now, Condemnor clings to the notion that the lease should have been disregarded. Appellant's Brief at 10. Condemnor had appeared to capitulate on this issue in Condemnor's proposed order, at paragraph 17 of the Conclusions of Law section, which stated "I consider the lease to have some bearing on the value of the subject property." Condemnor's Proposed Order at 17. Until that point, Condemnor had steadfastly denied that the lease was relevant to just compensation. More importantly, by the time that Condemnor finally appeared to recognize that the lease held compensable value, the vast majority of attorneys' fees and costs had been spent. Over a hundred thousand dollars in fees and costs was necessary to finally convince Condemnor that its position was ill-founded. Even now, it appears that Condemnor remains unconvinced of this established legal principle of eminent domain law. Because it was not reasonable to refuse to consider the lease, Condemnor's position was not substantially justified, even under its chosen standard.

III. Condemnor Failed to Preserve Its Special Circumstances Argument.

Condemnor claims that the trial court abused its discretion by not denying or reducing the fee award in light of "special circumstances" because Landowner's parent corporation is a publicly traded company, and has the financial means to pay legal fees. This argument was not contained in condemnor's Return to Landowner's Application for Award of Reasonable Litigation Expenses. At the hearing on October 2, 2012 regarding the fee request, counsel for condemnor briefly touched upon this issue. (R. pp. 152-153). The trial court did not specifically

rule upon this point in the Order. Therefore, it was incumbent upon Condemnor to raise this issue in a Rule 59 motion to alter or amend in order to preserve the issue for appeal.

A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004) (emphasis in original). Because Condemnor failed to file a Rule 59 motion requesting that the trial court rule upon its special circumstances argument, this ground should be denied for failure to preserve the issue.

IV. Rejection of Condemnor's Special Circumstances Argument Was Appropriate.

As an alternate ground, and assuming that the trial court implicitly denied Condemnor's faulty reasoning that well-capitalized corporations should not receive the benefit of S.C. Code § 28-2-510, Condemnor's argument is wholly without merit. Condemnor bases its argument on the mistaken assumption that the sole purpose of a fee-shifting statute is to induce lawyers to assist parties that may not have the means to obtain legal representation otherwise. In fact, there are many policy rationales behind the enactment of fee-shifting statutes. These include: (1) simple fairness considerations; (2) ensuring that a litigant is made financially whole; (3) a punitive measure to deter and punish misconduct; (4) the public usefulness of advancing or protecting a type of interest; (5) affecting the relative strengths of the parties by reducing an imbalance in financial resources; and (6) creating economic incentives in litigation conduct, such as the pursuit of claims, settlement incentives, and the speed of disposition. *See, generally*, Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982

DUKE L.J. 651, 657 (1982). Condemnor focuses only on the fifth factor listed above, ignoring all other policy reasons supporting a fee shifting statute.

Moreover, Condemnor's argument that corporations should not receive equal treatment under the law is unsupported by South Carolina jurisprudence and constitutes bad policy. Landowner is aware of no South Carolina Court that has denied fees pursuant to S.C. Code § 28-2-510 simply because the prevailing party is a well-capitalized corporation. Consistent with the equal protection clause of the South Carolina Constitution, Article I, Section 3, the South Carolina Eminent Domain Procedure Act recognizes that a corporation or other landowning entity is considered to be a "Person" for purposes of condemnation actions. *See*, S.C. Code § 28-2-30 (6), (12), and (16).

Our United States Supreme Court has also recognized that corporations have constitutional rights in *Citizens United v. FEC*, 130 S.Ct. 876 (2010). If corporations had no legal rights or protection, their property could be seized without any justification or compensation. Obviously, this is not the law, and Condemnor's argument that Landowner should be treated unfairly due to its corporate status is an argument for an unconstitutional taking. The trial court did not abuse its discretion in giving this argument scant attention.

V. The Trial Court Properly Relied Upon Independent Testimony to Find That Landowner's Attorneys' Rates Were Reasonable.

Finally, Condemnor asserts that the trial court should have disregarded the affidavit testimony of Richard D. Bybee, Esquire regarding the reasonableness of Landowner's attorneys' hourly rates. Condemnor claims that Bybee was not a disinterested party because he handles condemnation cases in Berkeley County, and therefore, Condemnor contends, he has an interest in higher fee awards for landowner attorneys. Ironically, Condemnor asserts that the Court should have *only* considered the affidavit of John S. West, *Condemnor's counsel in this very*

case, as to a reasonable hourly rate. Obviously, Mr. West had a greater interest in the outcome of the fee award as counsel for Condemnor than did Mr. Bybee, whose tenuous interest, if any, was far removed from the heat of the battle. The record contains ample evidence of the reasonableness of Landowner's fee request, and the trial court thoroughly examined all factors of the lodestar formula set forth in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). Thus, the record contains sufficient support of the trial court's award.

Condemnor does not challenge any lodestar formula factor other than the hourly rate of Landowner's attorneys. Appellant's Brief at 12-15; (R. p. 155). However, Condemnor apparently takes issue with the trial court's finding that the case "involved a relatively novel issue of law in South Carolina and involved complex transactions¹ and difficult valuation issues." (R. p. 2). Condemnor retorts that condemnation cases "represent one of the most routine and formulaic proceedings tried by our court system . . . [w]ith regard to valuation of income producing properties, the appraisal rules have long been settled and consistently used in the court for many purposes." Appellant's Brief at 15.

Perhaps more than any argument Landowner could construct, these admissions by Condemnor show precisely why the trial court was fully justified in granting the fee award in this matter. This case *should* have been simple and routine. This case *should* have been quickly and fairly resolved on the basis of accepted appraisal principles, including Condemnor's own appraisal guidelines. This case *should* have necessitated only one appraiser expert witness for Condemnor. However, the case was none of these things due to Condemnor's dogged insistence, which persists even now, that the lease should not have been considered in the valuation of the Property. Condemnor's unjustified position on the lease prolonged the case, resulted in a failed

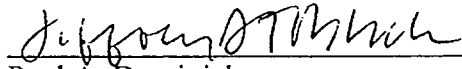
¹ Although Condemnor now seemingly disputes the statement that this case involved complex transactions, Condemnor's trial counsel characterized Landowner's purchase of the Property as a "large and sophisticated transaction." Transcript of Final Hearing at p. 51, l. 24-25.

mediation, created novel issues due to Condemnor's creative attempts at avoiding the relevance of the lease, and led to confusion and a departure from accepted appraisal standards by Condemnor's own expert witnesses.

Mr. Graydon knew the value of the income stream from the lease, in his words, the "leased fee estate." He assigned it a valuation of \$924,000, very close to Hartnett's opinion of value and the final just compensation award. Had Condemnor simply conceded that the lease, which was the primary reason for Landowner's purchase of the Property and the driver of value, must be considered, the case would have been quickly settled, as the parties' valuation of the Property when including the effect of the lease was very close. Valuation issues were difficult only as a result of Condemnor's litigation posture. Therefore, the trial court's fee award was completely justified.

CONCLUSION

In conclusion, Landowner requests that this Court of Appeals affirm the Order of the trial court granting Landowner's application for reasonable litigation expenses, and ordering Condemnor to pay Landowner litigation expenses in the amount of \$126,730.82. Landowner reserves all rights to seek additional fees and costs associated with this appeal defending the fee award.



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August 26, 2013

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the 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.

Reply Brief of Appellant

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REPLY ARGUMENT

- I. The trial court failed to consider the fee shifting statute as a whole as evidenced by his order wherein he states that South Carolina “has consistently allowed attorney fees” in condemnations and cites this Court’s opinion that the statute shifts the source of attorneys’ fees.

In section I. of its brief, Respondent argues in response to our argument that the trial court did not fully and independently analyze the “substantially justified” factor in S.C. Code Ann. §28-2-510 that the court need not have done so because, under the statute, such consideration is discretionary. However, it is clear from the statements in the court’s written order that “South Carolina case law has consistently allowed attorneys’ fees to the prevailing party in condemnation actions”, R.p. 4-5, and that this Court in S.C. Dep’t of Transp. v. Revels, 399 S.C. 423, 731 S.E.2d 897 (Ct. App. 2012), held that S.C. Code Ann. §28-2-510 “shifts the source of the prevailing party’s attorney fees to the losing party,” R.p. 5, that the trial court considered the prevailing-party factor to be overriding and the substantial justification analysis to be a mere formality to be rejected solely because he agreed with the landowner in the main case and not with the condemnor. Our argument is that the trial court determined the substantially justified factor on his own view of the evidence in the main case. This ignores the well-established case law defining the term “substantial justification” and constitutes a misinterpretation of the statute and an error of law. As we expressed in our main brief, a litigating position is substantially justified where it has enough foundation in law and fact that a reasonable person could think it correct. Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 358 S.C.647, 595 S.E.2d 890 (Ct. App. 2004); 32 Am. Jur. 2d,

Federal Courts, §260. The trial court's determination that the Department's case was not substantially justified based upon his own findings in the main case and ignoring the reasonable fact-finder standard was an abuse of discretion. The fact that determinations under the condemnation fee shifting statute are permissive rather than mandatory does not excuse the court from following a clear interpretations by State and federal courts of the term "substantially justified" common to many fee-shifting statutes. Were a court to find the government's position to be substantially justified and grant the applicant's fee request for no other reason than it was in his discretion to do so, such an order would certainly be reversible by the appellate courts as an abuse of discretion.

Respondent also objects to our statement in our main brief that the judge pre-judged the matter prior to condemnor's counsel's opportunity to present its argument at the hearing. Respondent claims the transcript supports the view that the judge remained open to denying the fee request at the time. The actual transcript supports our view and not respondent's:

THE COURT: I'm not going to deny you the right to legal fees. That's not—I'm not going to deny them. So the issue is going to be, from my perspective at least, unless you gentlemen convince me otherwise, that I need to use the low star (sic) method where you take kind of reasonable rate and determine what should be paid. That's kind of where I am right now.

R.p. 145.

II. The litigating position of SCDOT was substantially justified within the meaning of that term in S.C. Code Ann. §28-2-510.

In section II. A. of its brief, respondent complains that our argument improperly borrows the standard of substantial justification from federal court decisions under the

Equal Access to Justice Act, 28 U.S.C. §2412(d)(1), and that such a standard is inappropriately applied to S.C. Code Ann. §28-2-510 because the latter provides the trial court with discretion. Next, respondent argues that our view of the law if adopted would erect an “impassable hurdle” for condemnees seeking reimbursement of their fees because the condemnor would only have to put up an expert appraisal witness who testifies as to his judgment of valuation. Neither argument is persuasive.

Respondent’s argument regarding the definition of substantially justified ignores the fact that South Carolina appellate courts have already adopted the federal definition. See, Video Gaming, supra, 358 S.C. at 650, 595 S.E.2d at 891-92; Heath v. County of Aiken, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990). These decisions interpreted the identical phrase “substantially justified” contained in the “State action” fee-shifting statute, S.C. Code Ann. §15-77-300 (Supp. 2012), as appears in the condemnation fee section of the Eminent Domain Procedure Act, S.C. Code Ann. §28-2-510. That is justified in substance or in the main to the degree that would satisfy a reasonable person.

Contrary to respondent’s argument, it is the statutory interpretation it advances (and used by the trial court) that would impose and impassable hurdle to condemnors in opposing fee application in condemnation cases and not to the prevailing condemnee. All a court would need to do to rule against a claim of substantial justification is to point to its own order in the condemnation case. Such an interpretation would contradict the foundational rule in the interpretation of all fee-shifting statutes against the government that an agency’s loss on the merits does not create a presumption that its position was not substantially justified. Video Gaming, supra, citing Kiareldeen v. Ashcroft, 273 F.3d 542, 554 (3d Cir. 2001).

Respondent's next argument is that under our interpretation of the statute, all a condemnor would have to do to be considered substantially justified is to introduce the testimony of a credentialed valuation expert. However, appraisers frequently err in using bad data, flawed methodology, or untenable reasoning. Our argument is only that where a reasonable person could consider the analysis that was followed by the expert witness to be correct, the State's position should be found to be substantially justified and the fee request should be denied. The reasonable person standard has a long progeny in the law. See, e.g., Ducworth v. Neely, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995); Restatement 2d Torts, §283. That standard is perfectly appropriate here.

Respondent's brief's section II. B. contains a number of bullet points mainly to the effect that it was wrong for the Department's witnesses to use alternate approaches to value other than its preferred approach of capitalization of rental income using the rental rate it assigned itself. There is ample evidence to support our appraisers' judgment including the testimony of respondent's own expert, Mr. Hartnett, that a similar convenience store property in Moncks Corner sold for \$444,000. R.p. 183. Clearly a reasonable person could conclude that a buyer would be wary of paying \$1.15 million, R.p. 168, for a property where others locally have traded for \$444,000 in reliance upon a lease between two corporate partners with a nationwide relationship.

In one of its bullets, respondent objects to our recounting of the testimony of Mr. Pfeffer regarding the methodology used to assign values to the individual properties in the 75 property purchase transaction. The actual testimony was as follows:

Q. How did Realty Income determine an appropriate allocated purchase price for the subject property?

A. It starts with the purchase price of the entire portfolio.

R.p. 166. Mr. Pfeiffer continues to explain his due diligence for the purchase transaction of the entire portfolio and his assignment of a value to the Moncks Corner Store. There is no evidence that the lessee Sun Capital/Worsley was involved in the due diligence nor in the assignment of value to the store property at issue. Objectively, as we pointed out in our main brief, they would have little concern with the individual store rents since their concern was with the rental expense of the portfolio as a whole. A high rental rate on one property would result in a lower one on another.

Next, respondent asserts that we are barred from arguing the substantial justification of our position because the court ruled against us in the main case and that ruling is now the law of the case. Respondent inserts numerous passages from the final order in the condemnation case exhibiting the trial court's contempt for the testimony of Mr. Crider and for the Department's case. The condemnation case on the one hand and the proceedings to tax attorney fees and costs on the other are two separate proceedings under two different legal standards. The judgment in the first does not determine the law for the second. A reasonable person could disagree with the judge although obviously he does not disagree with himself.

Next, respondent argues that the condemnor's "refusal to acknowledge the value of the lease" was illegal and thus cannot be substantially justified. The Department's witness did not ignore the lease. It is part of the record and among the data that both our appraisers reviewed. Those witnesses simply did not think the contract rents had much value as support for an income approach to valuation of the property due to the circumstances under which the rental rate was set. Instead they turned to other equally legitimate approaches to valuation.

Finally, respondent complains that it is entitled to its fees because it had to fully litigate its case. In essence, respondent is asserting that unless the State capitulates and pays whatever demand for compensation a landowner makes, it must pay fees if the landowner prevails. This is contrary to the plain language of the statute which expressly includes the language concern substantial justification, protraction of proceeding, and other circumstances that would make an award unjust. The statute must be read as a whole giving effect to all parts. In ruling on substantial justification, the court should consider the totality of the circumstances in the case both before and during trial. Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984). Both the decision by the Department to litigate the compensation and the positions it took at the trial had a legitimate basis in law and in fact.

III. Appellant's special circumstances argument was preserved for review and this Court should reverse the trial court on that basis.

As respondent notes in its brief, the Department did discuss the language of the statute regarding reduction or denial of fees where special circumstances exist that would make an award unjust. R.p. 152-53. As we pointed out in section I. above, the trial court granted fees on the basis that it has always been done where a condemnee is a prevailing party. Thus the matter was raised and ruled upon. Respondent may not have it both ways arguing that the decision must be affirmed because it is in the discretion of the trial judge and then ask this Court not to consider one of the factors that guides that discretion.

Our argument in this respect is that, because the aim of fee shifting statutes against the government is to allow a citizen to obtain counsel who would otherwise not be able to do so, the capability of the respondent herein to hire two highly-paid attorneys

from a major law firm moots this objective. Respondent replies with a summary of a 1982 law review article listing various policy rationales for fee-shifting statutes in general. However, the rationale for shifting fees against the government has been stated by a much more recent and much more authoritative source: the United States Supreme Court opinion Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 120 L.Ed. 439 (1986); see, also, Perdue v. Kenny A., 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed. 494 (2010). Specifically,

[T]he 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.

Delaware Valley, supra.

Contrary to respondent's arguments, we do not claim that corporations are not legal persons entitled to equal treatment as landowners in eminent domain actions. Rather, that under the language of the specific statute in question, that fees be denied where special circumstances would make an award unjust, this condemnee's status as a well-capitalized, publicly-traded corporation easily able to pay its own legal costs is such a special circumstance.

IV. The trial court's reliance on affidavits of respondent instead of that of appellant with regard to the rate of fees was error.

In its section V., respondent argues that the court correctly relied on the affidavit of Mr. Bybee supporting its fee request and rejected that of Mr. West for the Department because the former was not involved in the case. Mr. Bybee is "independent" only in the

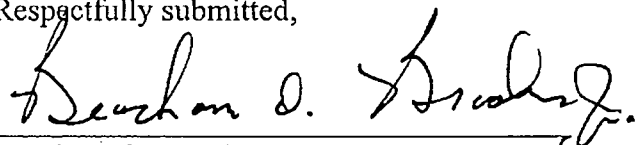
sense that he represented no one in the present case. "Independent" does not mean "disinterested." As we pointed out in our main brief attorneys who practice law in a particular area are not disinterested in the amount others of the group are paid. Mr. Bybee's testimony that the fee request was reasonable was an opinion. In contrast, Mr. West testified to a fact, namely what he as a local attorney practicing condemnation law charges clients for representation in those cases. This fact is directly relevant to the rate issue.

Finally, respondent is incorrect that the trial judge correctly followed the lodestar formula. That formula requires the judge to find a reasonable hourly rate charged for similar legal services in the locality. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) ("[T]he court should consider the following six factors when determining a reasonable attorney's fee: ... (6) customary legal fees for similar services.") The court did not do that. Instead, he simply adopted the contract fee rate between counsel and the condemnee, averaged them, then declared the result to be a reasonable hourly fee.

CONCLUSION

The trial court failed to give credit to all of the language of the relevant statute. He followed the wrong standard in finding the Department's litigating position unjustified. Finally, he failed to properly analyze the fee request under the lodestar formula. The Court should reverse the taxation of fees against State below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Beacham O. Brooker Jr.", written over a horizontal line.

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Certificate

I certify that this Reply Brief of Appellant complies with Rule 211 SCAGR.

Beocham O. K. [Signature]