THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY

Robert E. Watson, Circuit Court Judge

Appellate Case No. 2014-001908

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.

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

Our appeal is that the trial judge summarily dismissed our contention that our litigating position was substantially justified by simply restating his determination in the main case—that our valuation witnesses failed to take the contract rent into account. In doing so, the court erred as a matter of law in failing to consider the "reasonable person" standard that governs the determination of whether a losing party was substantially justified in its position. This error was further illustrated by statements that fees are "consistently allowed" in condemnation cases because the governing statute "shifts the source of the prevailing party's attorneys' fees to the losing party." The trial court failed to give full meaning to all parts of the statute which includes a determination of whether the government defendant's position was substantially justified and whether other circumstances exist that would make an award unjust.

The sole reason the trial court gave for the conclusion that the Department's position was not substantially justified is that its valuation witnesses did not take the lease between RICS5 and Sun Capital on the subject store property into account. Respondent defends this conclusion citing various appraisal standards concerning the income approach to valuation which it argues is mandatory. Contrary to Respondent's arguments, the Department's witnesses did not ignore the income approach. Rather, they discounted those rents contained in the lease as not having been established by an arms-length transaction and instead relied more heavily on market rent and a sales comparison approach. As more fully set forth in our main petition, in 2008, Sun Capital, a private equity firm out of Boca Raton, Florida, approached Realty Income, the parent of landowner RICS5 concerning acquisition of 75 convenience stores. Sun and Realty Income were frequent partners in such deals where Realty Income's REIT subsidiaries purchase the properties to lease to Sun who operates the stores. Realty Income negotiated a global purchase price for all

the stores then decided that is desired an 8.9% annual return on that price. Its officer then unilaterally assigned a $1.15 million value to the Moncks Corner store. At trial, the resulting rent of $8,517.67 was then re-capitalized by the landowner's expert, Mr. Hartnett, at an 8% rate to arrive at a market value of $900,000. This is despite his finding a recent sale of a similar convenience store in Moncks Corner for $444,000.

Clearly, a reasonable person could have found Appellant's position justifiable under these facts.

I. The trial court misinterpreted the fee-shifting statute.

Respondent argues that because the statute allowing fees to be rejected or reduced is permissive, the trail judge could have awarded the fees even upon a finding that our position was substantially justified. Therefore, the appellate court must affirm that finding. This argument ignores the abuse of discretion standard of review. If a court finds a party's position to be substantially justified and awards fees anyway for no stated reason or for arbitrary or capricious reasons, the appellate court should reverse. Here, we believe the lower abused its discretion by simply repeating its holding in the main case failing to consider that a reasonable person could believe otherwise. This is a misinterpretation of the law requiring reversal.

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 definition 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 definition 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 Consultants, Inc. v. S.C. Dep't of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 891-92 (Ct. App. 2004); 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 landowner. 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. Pfieffer 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 neither 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 with 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 an error in statutory interpretation 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 IV., 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.

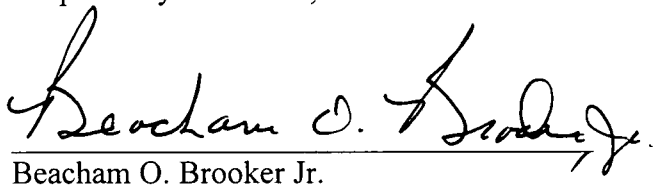
Respondent confuses the two senses of the word "interested." Mr. West, of course, is interested in the outcome of the case in the sense of that word as to be curious or engaged. He has no pecuniary interest in the outcome of the fee award unlike Mr. Bybee who has interest in the rate of fees in Berkeley County where he sometimes represents landowners in condemnation cases.

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,



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October 27, 2014

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CERTIFICATE OF SERVICE

I certify that I have served the REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI on RI CS5, LLC, addressed to its attorney of record as follows by depositing copies of it in the United States Mail, postage prepaid on October 27, 2014:

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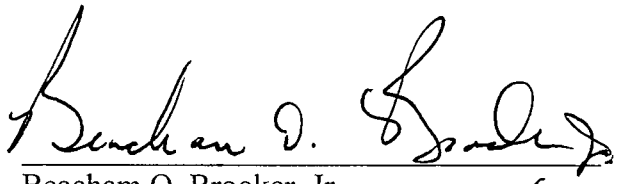

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