

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

Civil Action No.: 2013-CP-02-2157

John Burke, William Burt, Sr., Thomas
Cooper, Mike Ellison, Harold J. Hanson,
David McKee,)

Plaintiffs,)

vs.)

The South Carolina Department of
Transportation,)

Defendants.)

CIV-591-01

**ORDER ON PLAINTIFF'S MOTION FOR
ATTORNEY FEES AND INTEREST**

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SEP 12 2017

SC Court of Appeals

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Burke initiated this action on September 20, 2013 alleging negligence and inverse condemnation. The complaint was subsequently amended to include 5 other Plaintiffs in November of 2013 alleging similar flooding issues. Over the course of three and one-half years of litigation, the parties exchanged more than 2500 pages of documents in discovery, many of a highly technical nature, and 13 depositions were taken by both parties. Plaintiff filed two motions to compel and successfully defended a motion for summary judgment made by Defendant.

The parties attempted to mediate the case in January 2016 but were unsuccessful. The highest settlement offer ever made by SCDOT prior to trial was \$50,000.00. Plaintiff's demand at the time of trial was \$150,000.00.

A jury trial was held between March 27, 2017 and March 29, 2017 in Aiken County. After the close of Plaintiff's case in chief, Plaintiff elected to forego his claim of negligence and submit only the inverse condemnation cause of action to the jury. After three days of testimony

and argument, the jury awarded Plaintiff the amount of \$134,000.00 as just compensation for the market value of the property taken through the actions of Defendant.

On April 12, 2017, Plaintiff moved this Court for an award of attorney fees and costs pursuant to S.C. Code § 28-2-240 and S.C. Code §28-11-30. On April 24, 2017, two other Plaintiffs settled their claims at mediation. Harold Hanson settled his claim for \$100,000.00 and David McKee's claim was settled for \$50,000.00. The parties stipulated that Plaintiff Hanson could seek an award of attorney fees on his settlement, but that the McKie settlement was full and final with no additional award of attorney fees available. On May 22, 2017, Plaintiff amended his motion for an award of attorney fees and costs to include Plaintiff Hanson pursuant to the same statutory authority.

APPLICABLE LAW

South Carolina Law Requires the Award of Attorney Fees and Costs pursuant to S.C. Code §28-11-30

South Carolina Code § 28-11-30(3) states:

(3) Where an inverse condemnation proceeding is instituted by the owner of a right, title, or interest in real property because of use of his property in a program or project, the court, rendering a judgment for the plaintiff in the proceeding and awarding compensation for the taking of property, or the attorney effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court or the agency's attorney, reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

The Supreme Court has repeatedly stated the term "shall" is mandatory. "The use of the word 'shall' shows that confirmation by the Court is mandatory, not discretionary." *Wigfall v. Tideland's Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). There is no question that

Plaintiff Burke instituted and prevailed on his inverse condemnation cause of action before an Aiken County jury. There is no question that Plaintiff Hanson effected a settlement of his claims at the mediation on April 24, 2017. Under the Statute, both Plaintiffs are entitled to be reimbursed for their reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

Costs Due To Plaintiff

Plaintiff Burke submitted a summary of all disbursements and costs incurred during the three and one-half years of litigation in this case. After objections were raised by Defendant, Plaintiff conceded that \$375.00 of fees from expert Kevin Gillian were incurred solely for the benefit of another Plaintiff's case and were not recoverable. The remainder of the costs are reasonable and necessary for the litigation and prosecution to the claims of both Plaintiff Burke and Plaintiff Hanson. Therefore, those costs are recoverable pursuant to South Carolina Code § 28-11-30(3). The total amount of costs to be reimbursed to Plaintiffs Burke and Hanson equals **\$23,984.89**. Obviously, none of the costs awarded here can be recovered by any other person in any other proceeding.

South Carolina law allows an award of interest on the judgment of just compensation

Pre-judgment interest

S.C. Code § 28-2-420 states:

A condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on funds on deposit with the clerk of court must be offset against the interest computed pursuant to

this section. Interest shall not accrue during the twenty-day period commencing upon the date of verdict or order of judgment. If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.

Defendant cites *Vick v. S.C. DOT*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001) in support of its argument that Plaintiff is not entitled to prejudgment interest. *Vick* dealt with an appeal in which the SCDOT challenged the jury charge that allowed the jury to determine prejudgment interest. The applicable language in that case reads as follows:

A plaintiff is generally entitled to interest in property cases. (emphasis added) 11 S.C. Juris. Damages § 8(a) (1992); see *E. I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co.*, 219 F.2d 328, 342 (4th Cir. 1955). This court noted in a condemnation case that "the purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property has been taken." *S.C. Dep't of Transp. v. Faulkenberry*, 337 S.C. 140, 149, 522 S.E.2d 822, 826 (Ct. App. 1999). The addition of prejudgment interest is designed to pay the landowner for the time value of money that should have been received at the time of the taking and is an element of just compensation. *Id.* We find this principle is equally applicable in an action for inverse condemnation; however, unlike government condemnations, the legislature has not set a rate or method for determining interest in inverse condemnation actions. South Carolina case law implies that interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages. See *S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 392, 117 S.E.2d 561, 564 (1960) (stating, "assuming, without deciding," that interest was recoverable, "it was the duty of the respondents to call the matter of interest on the award to the attention of the trial judge and request an instruction upon such so that the jury could, by their verdict, determine what was 'just compensation'."). Moreover, "the court may even consider the market rate of interest rather than the statutory legal rate, if that will be required to compensate the plaintiff fully."

Vick v. S.C. DOT, 347 S.C. 470, 480-481, 556 S.E.2d 693, 699 (Ct. App. 2001). Nowhere in this language does it say that a Plaintiff waives his ability to recover pre-judgment interest by failing to request a jury charge. The Court of Appeals stated that it is "implied" that the issue of

prejudgment interest can be charged to the jury. Even the precedent relied upon by the Court of Appeals indicates it was “assuming, without deciding” that interest was recoverable.

The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Smith-Hunter Constr. Co.*, 365 S.C. at 128, 616 S.E.2d at 421; *Babb*, 310 S.C. at 353, 426 S.E.2d at 791; *Wayne Smith Constr. Co.*, 294 S.C. at 146-47, 363 S.E.2d at 119. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985). A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor's money beyond the date payment was due. *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987). In this case, Defendant owed money to Plaintiff from the time of the taking. The amount was determinable by operation of law through an inverse condemnation proceeding and was reduced to a liquidated sum by the jury on March 29, 2017. Nothing in the law prohibits Plaintiff from

seeking prejudgment interest from the Court after a verdict. Therefore, I find that Plaintiff Burke is entitled to prejudgment interest under the common law of South Carolina.

In this case, the time of interest should be calculated from the date the original complaint was filed, September 20, 2013, through the date of the verdict, March 29, 2017. The statutory rate of interest is 8% is reasonable and appropriate in this case. The calculations of interest due pursuant to S.C. Code § 28-2-420 is as follows:

Per Year Interest = \$10,720.00 * 3 years = \$32,160.00.

Per Day Interest = \$29.37 * 191 days = \$5609.67

Total Prejudgment Interest Owed = \$37,769.67

Post-Judgment Interest

The judgment of \$134,000.00 was delivered by the Aiken County jury on March 29, 2017. That judgment was not paid to Plaintiff Burke until May 26, 2017. S.C. Code § 28-2-420 applies to traditional condemnation cases initiated by the State and allows a 20 day grace period during which no interest accrues. However, this is an inverse condemnation case. Therefore, I find that S.C. Code §34-31-20 applies. S.C. Code §34-31-20 does not contain a grace period. Therefore, I find that Plaintiff Burke is entitled to post-judgment interest at the rate of 7.75% for a total of 56 days, **equaling \$1650.10.**

Amount of Attorney Fees

Upon retention in this matter, Plaintiffs agreed to a hybrid contingency with their attorney in which they would not be required to pay any amount in attorney fees if they were unsuccessful in recovering monies. The hybrid element allowed counsel to track his hours spent in the case for purposes of a possible attorney fee award upon successful conclusion of the case.

The maximum reduction of a verdict in favor of Plaintiff would never exceed a certain amount, but in the event attorneys fees were awarded in excess of the contingency, counsel would be entitled to that larger amount. The specific breakdown is as follows:

Maximum reduction of a verdict will not exceed:

- 25% plus all fees and costs if the matter settles prior to filing a Summons and Complaint;
- 33% plus all fees and costs if the matter settles prior to the initiation of a trial;
- 40% plus all fees and costs if the matter proceeds to opening statements or beyond at a trial.

The hourly rate agreed upon for calculation of the fee earned was \$400.00 per hour. The rate was elevated due to the risk taken by counsel in the event of an unsuccessful verdict. Counsel's standard hourly rate is \$300/hour. Pursuant to the hybrid retainer agreement between Plaintiff and his counsel, the minimum amount of attorney fees that could be awarded is based on the sliding percentage scale provided above.

Our courts have held that contingency fees are reasonable in condemnation cases and can be awarded by the presiding courts. *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). While courts are not bound by such agreements, if the Court finds such fees reasonable under the applicable factors, such awards will not be disturbed absent an abuse of discretion. Plaintiff Burke's case proceeded to verdict dictating that counsel is entitled to 40% of the amount recovered. Once interest is added pursuant to this Order, counsel earned a contingency fee of 40% of \$171,769.67, or \$68,707.87. Hanson settled prior to verdict for the sum certain of \$100,000.00. Pursuant to the retainer agreement, Plaintiff Hanson is entitled to \$33,000.00 in attorney fees.

Counsel submitted amounts for both contingency and hourly calculations of the attorney fees incurred during the prosecution of this matter. Defendant objected to the hourly calculations based on the argument that counsel represented five separate plaintiffs in this matter and the distribution of his time must be split between all five plaintiffs. As the Court is awarding fees based on the contingency analysis, such arguments are moot. However, the hourly calculations demonstrate that the contingency award is fair and reasonable as it actually less than the contracted hourly rate between Plaintiffs and their counsel, but more than counsel's standard hourly rate he would have earned if working on retainer. In addition, a contingency award eliminates any recovery based on work done for other Plaintiffs who may not be entitled to an award of attorney fees for their claims.

The Six-Factor Test.

The Supreme Court has stated,

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) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.

Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). These factors fully support Plaintiff's request for fees and an award of the contingency amount pursuant to the retainer agreement.

(a) The nature, extent, and difficulty of the case. This case dealt with complex issues of roadway design, engineering calculations and hydrology. There were more than 3000 pages of documents involved when the pleadings, deposition transcripts and exhibits are taken into account. The case took 3 and ½ years to bring a single Plaintiff's claim to trial. That single

claim took 3 days to bring to verdict. Clearly, it was of a nature, extent and difficulty to justify an award of attorney fees of \$68,707.87 for Plaintiff Burke and \$33,000.00 for Hanson.

(b) The time necessarily devoted to the case. Counsel's time devoted to the case is detailed in Exhibit B to his motion. Over the last 3 and ½ years, counsel devoted more than 207 hours to Plaintiff Burke's case, with an additional 30 hours of time devoted solely to Plaintiff Hanson. This amount of time is commensurate with the fees being awarded under a contingency basis. Therefore, I find it is reasonable and fair under this factor.

(c) Professional standing of counsel. Counsel attached the Affidavits of David Miller and James D. Mosteller to establish his professional standing in the Aiken legal community. Defendant offered no affidavits or other evidence to dispute the opinions of these lawyers. Therefore, this factor justifies the award of fees discussed above.

(d) Contingency of compensation. To the extent, if any, that this factor relates to the ability of the party for whom the services were performed to pay her legal fees, *see, e.g. Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991), the compensation is contingent. The average citizen is not financially able to pay a lawyer nearly \$100,000.00 in fees to prosecute a civil action without a guaranty of recovery. There is no evidence that either Plaintiff seeking attorney fees from this Court are different from the average citizen. Therefore, I find that neither Plaintiff was able to pay counsel in advance through a traditional retainer arrangement.

To the extent that "contingency of compensation" refers to whether the cause of action is of a type that is typically brought on a contingency basis rather than by hourly fee, and thus compensation is dependent on being victorious, *see, e.g., Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 285, 377 S.E.2d 296 (1989), this case was brought on a contingency basis. Counsel for

Plaintiff took nearly all the risk that Plaintiff did not obtain any monetary compensation in this case. In addition, counsel advanced nearly \$12,000.00 in costs on behalf of Plaintiff during the course of the litigation with no guarantee of reimbursement. Therefore, there can be no question that this case was handled on a contingency basis.

(e) Beneficial results obtained. The results obtained were beneficial. Defendant argued that Plaintiff Burke did not obtain beneficial results. There is no merit to this argument. Plaintiff's final demand before trial was \$150,000.00. After the mandatory award of attorney fees, costs and interest, the amount to be paid by Defendant for Plaintiff Burke's claim will exceed \$250,000.00. Using Defendant's final offer to Plaintiff Burke as the benchmark, Defendant is paying more than five times the amount of that final offer to Burke, and nearly three times that offer to Plaintiff Hanson. Clearly, counsel obtained beneficial results for his clients.

(f) Customary legal fees for similar services. According to the Affidavit of James D. Mosteller, the customary rates for attorneys in Aiken range from \$250.00 to \$350.00 an hour. Rates for experienced trial-level litigators range from \$250.00 to \$600.00. See *Layman v. State*, 376 S.C. at 454, 658 S.E.2d at 332 (approving hourly rates from \$200 for junior counsel to \$600 for senior counsel, pre-multiplier). Plaintiff's counsel was skilled, experienced, and effective. The contingency fees being awarded are standard in the industry for Plaintiff attorneys and are consistent with the time devote by counsel for his actual work in the case. This factor supports the award of attorney feed dictated above.

CONCLUSION

S.C. Code § 28-11-30 requires this Court to award Plaintiff reasonable attorney fees and costs, including engineering and appraisal costs, incurred in prosecuting this action. S.C. Code §

28-2-420 and South Carolina Common law allows the award of interest on the jury verdict at a statutory rate of 8%. Therefore, the Court awards the following reimbursements under South Carolina Law:

- **Costs of \$23,984.89;**
- **Prejudgment interest of \$37,769.67;**
- **Post-judgment interest of \$1650.10;**
- **Attorney fees in the Amount of \$68,707.87 for Plaintiff Burke; and**
- **Attorney fees in the amount of \$33,000.00 for Plaintiff Hanson.**

This amount shall be paid within 15 days of the date of this Order. No post-judgment interest shall accrue during those 15 days. After 15 days, post-judgment interest on the total amount shall begin to accrue at the rate established by the South Carolina Supreme Court.

IT IS SO ORDERED.

This ____ day of June, 2017

Judge Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit



Aiken Common Pleas

Case Caption: John Burke , plaintiff, et al VS Department Of Transportation South Carolina , defendant, et al
Case Number: 2013CP0202157
Type: Order/Other

So Ordered

s/D.A. Early III 2136