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.

BRIEF OF RESPONDENT RI CS5, LLC

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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 entitles. 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, 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.

(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 transactions[1] 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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CERTIFICATE OF COUNSEL

The undersigned certifies that the *Brief of Respondent RI CS5, LLC,* complies with Rule 211(b), SCAR.

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BRIEF OF RESPONDENT RI CS5, LLC

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I, Laura L. Thomason, hereby certify that on August 26, 2013, I served a copy of the Brief of Respondent RI CS5, LLC, on all participating counsel of record, via the United States Postal Service, postage pre-paid and addressed as follows:

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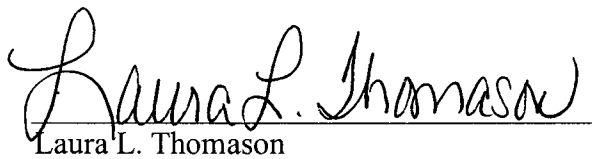

Laura L. Thomason

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August 26, 2013