

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

JAN 17 2013

SC Court of Appeals

Appeal from Dorchester County  
Court of Common Pleas  
The Honorable D. A. Early, III

Case No. 2007-CP-18-01914

Michael T. McCoy and Arcada J. McCoy, .....Plaintiffs,

v.

Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I;  
Al C. Browder, Jr., a/k/a Al C. Browder; Kelly J.  
Browder; Douglas M. Miles and South Carolina  
Department of Health and Environmental Control ..... Defendants,

of whom Greenwave Enterprises, Inc., d/b/a Greenwave  
Amoco I; Al C. Browder, Jr., a/k/a Al C. Browder; and Kelly J.  
Browder are ..... Appellants,

and

Douglas M. Miles is ..... Respondent.

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

ATTORNEYS FOR APPELLANTS

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FORM 1  
NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

D. A. Early, III, Circuit Court Judge

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Case No. 2007-CP-18-01914

---

Michael T. McCoy and  
Arcada J. McCoy

v.

Greenwave Enterprises, Inc.,  
d/b/a Greenwave Amoco I;  
Al C. Browder, Jr., a/k/a  
Al C. Browder; Kelly J.  
Browder; Douglas M. Miles  
and South Carolina  
Department of Health and  
Environmental Control

of whom Greenwave  
Enterprises, Inc., d/b/a  
Greenwave Amoco I; Al C.  
Browder, Jr., a/k/a Al C.  
Browder; and Kelly J.  
Browder

are Appellants

and

Douglas M. Miles

is Respondent

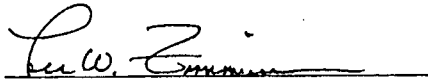
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NOTICE OF APPEAL

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Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I; Al C. Browder, Jr. a/k/a Al C. Browder; and Kelly J. Browder appeal the order of the Honorable D. A. Early, III dated May 21, 2012. Appellants received written notice of entry of this order on June 15, 2012.

July 13, 2012

  
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Attorneys for Appellants

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Summerville, South Carolina 29483

Attorney for Respondent

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER )

C/A NO.: 2007-CP-18-01914

Michael T. McCoy and Arcada  
J. McCoy, )

Plaintiffs, )

vs. )

ORDER

Greenwave Enterprises, Inc., )  
d/b/a Greenwave Amoco I, )  
Al C. Browder, Jr., a/k/a Al )  
C. Browder; Kelly J. Browder; )  
Douglas M. Miles and South )  
Carolina Department of Health )  
and Environmental Control )

Defendants. )

CLERK OF COURT  
DORCHESTER COUNTY

2012 JUN 14 PM 2:51

THIS MATTER came before me on February 6, 2012 pursuant to Defendant, Douglas M. Miles' (Miles) Motion for Reconsideration for so much of my Summary Judgment Order dated December 20, 2011, which awarded attorney's fees to Defendants, Greenwave Enterprise, Inc., d/b/a Greenwave Amoco I, Al C. Browder and Kelly J. Browder (Browder Defendants).

This Court issued its Order Granting Defendant Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I, Al C. Browder and Kelly J. Browder's Motion for Summary Judgment as to All Causes of Action on January 12, 2012. In that Order, this Court found Cross-claim Defendant Miles breached the Purchase Agreement with the Browder Defendants and the breach resulted in the Browder Defendants incurring costs and expenses in defending the lawsuit filed by the Plaintiffs. The Court held Defendant Miles was liable for all costs and expenses incurred by the Browder Defendants resulting from the Plaintiffs instituting their action against the Browder Defendants.

*DAE*  
*ATF*

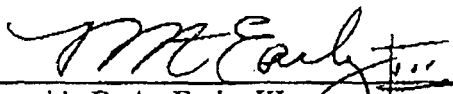
On December 31, 2011 Defendant Miles filed a Motion for Reconsideration as to the Award of Costs and Expenses to the Browder Defendants. The Browder Defendants filed a Response on January 9, 2012 and the Court heard oral argument on February 6, 2012. No new evidence was presented to the Court during oral argument, but the Court heard argument on whether or not the Browder Defendants were entitled to an award of attorney's fees from Defendant Miles. At the hearing, the Browder Defendants presented the Court with a decision issued by the South Carolina Court of Appeals on February 1, 2012 in the case of *Salley v. Navy Federal Credit Union, Inc.* (S. C. Ct. App., Opinion 4937) to support its position that the award of attorney's fees was proper. At the conclusion of the hearing, the Court provided the parties with the opportunity to submit additional information supporting their positions. The Browder Defendants provided the Court with two additional opinions, *Addy vs. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), and *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992), *aff'ing*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990).

After hearing oral argument and reviewing the submitted cases, the Court has determined that the Purchase Agreement between Defendant Miles and the Browder Defendants does not specifically provide for the recovery of attorney's fees and cannot find a statute or ground inequity entitling the Browder Defendants to an award of attorney's fees.

Accordingly, the Court grants Cross-claim Defendant Miles Motion for Reconsideration and only modifies the Order dated December 20, 2011 so as to specifically exclude the award of attorney's fees to the Browder Defendants; and,

IT IS SO ORDERED.

*May 21*, 2012  
Bamberg, South Carolina

  
The Honorable D. A. Early, III  
Circuit Court Judge of the Second Judicial Circuit

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIRST JUDICIAL CIRCUIT  
) Case No. 2007-CP-18-1914

Michael T. McCoy and Arcada J. McCoy )

Plaintiffs,

V.

Douglas M. Miles, et al.,

Defendants.

*Christy Williams*  
CLERK OF COURT  
DORCHESTER COUNTY

2012 MAR -2 PM 1:55

CERTIFIED COPY

ORDER ACCEPTING SETTLEMENT AGREEMENT

The parties have entered into a settlement agreement (Exhibit 1) for the above-captioned case. The settlement agreement was read into the record in open court on this date and memorialized in the written settlement agreement attached to this Order.

The Court inquired of the parties if they fully understand the terms of the agreement, and they all confirmed they did. The Court inquired of the parties if they have discussed the terms of the agreement with their counsel and that they have no questions about the terms. The parties affirmed that they voluntarily enter into the settlement agreement.

The Court has reviewed the terms of the settlement agreement and finds that they are fair and reasonable and are entered into by the parties voluntarily and without coercion.

*4/2/12*

NOW, THEREFORE, IT IS ORDERED that the Court accepts the terms of the attached Settlement Agreement and orders that it be enforced.

SG ORDERED.



Edgar W. Dickson  
Circuit Judge

St. George, South Carolina  
March 2, 2012

*Handwritten initials*

McCoy v. Miles  
Terms of Settlement  
McCoy v. Greenwave Enterprises, Inc., et al.  
C.A. 2007-CP-18-1914

CERTIFIED COPY

2012 MAR -2 PM 1:55

*Cheryl Helms*  
Plaintiffs Michael T.  
DORCHESTER COUNTY

Defendant Douglas M. Miles (Defendant Miles) to pay to Plaintiffs McCoy and Arcada J. McCoy (Plaintiffs McCoys) \$1,275,000.00 in full settlement of all claims in the second amended complaint. (Allocation of funds to be agreed to in the most tax advantageous means for the parties allowed by law.)

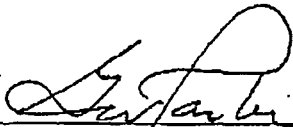
Defendant Miles to pay one half of the total settlement (\$637,500) within thirty (30) days from the date of this agreement. Defendant Miles to pay the balance of the settlement not later than six (6) months of this agreement. If payment of the balance is paid by Miles within sixty (60) days of this agreement, there will be no statutory interest applied. Any balance remaining unpaid after sixty (60) days will accrue interest at the statutory rate as published by the Supreme Court of South Carolina. All payments to be made by certified check.

Plaintiffs McCoys to vacate the premises within a reasonable time not to exceed six (6) months. Prior to vacating the premises, Plaintiffs McCoys shall have undisturbed possession. Upon payment of the full settlement amount, Plaintiffs McCoys to execute a warranty deed to the property to Defendant Miles.

The plat of the property showing the points of ingress and egress, which is a part of Plaintiffs' Exhibit 3, (attached hereto as Attachment 1) shall be introduced in the record of this case. Plaintiffs' Exhibit 19 (attached hereto as attachment 2) shall be introduced in the record of the case, and may be placed under seal at the request of Defendant Miles or his counsel.

EXHIBIT  
1

In the event Defendant Miles fails or refuses to make payment according to these terms, Plaintiffs McCoys will bring enforcement of settlement proceedings with all costs and attorneys fees incurred by Plaintiffs McCoys to be paid by Defendant Miles.



G. Waring Parker  
Counsel for Defendant Douglas M. Miles

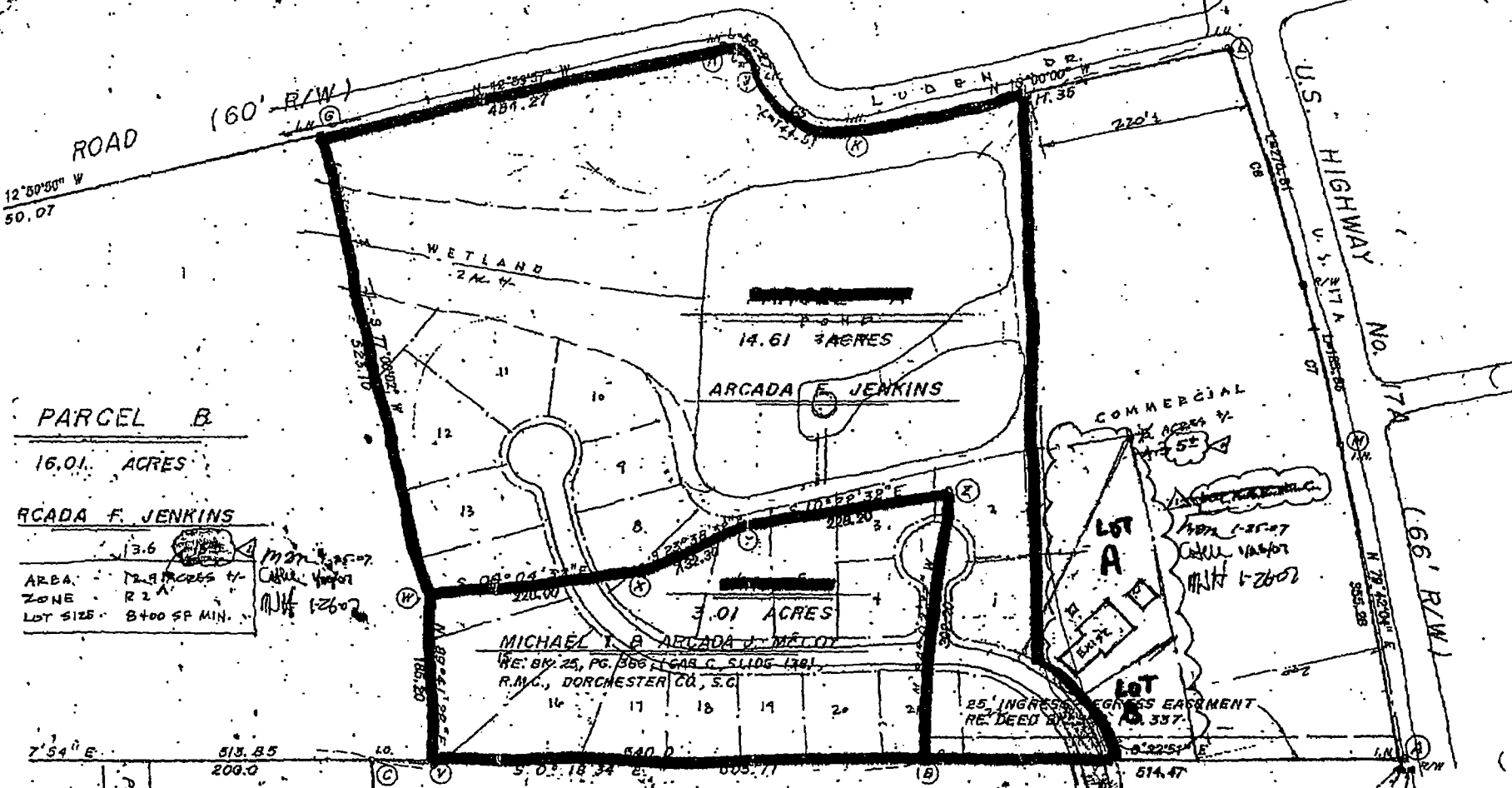


L. Gray Geddie, Jr.  
Eric C. Schweitzer  
Counsel for Plaintiffs Michael T.  
McCoy and Arcada J. McCoy



ATTACHMENT 1

CARROLL ST. and U.



PARCEL B

16.01 ACRES

ARCADA F. JENKINS

13.6 ACRES  
ARBA: 12.9 ACRES +/-  
ZONE: R2  
LOT SIZE: 8400 SF MIN.  
MAY 1-26-07

MICHAEL T. B. ARCADA & MARY  
RE: BK. 25, PG. 366 (CAB. C, SLIDE 178),  
R.M.C., DORCHESTER CO., S.C.

COUNTRY CLUB ESTATES S/D

SNIRLEY STRANG &  
CHARLES T. FRAMPTON  
RE: BK. 24, PG. 267,  
(CAB. C, SLIDE 111)

RE: BK. 14, PG. 43 (CAB. B, SLIDE 18), R.M.C.

Record p. 0010

ATTACHMENT 2

TO: ERIC SCHWEITZER

FAX: 853-9992

FROM: GW PARKER

CERTIFIED COPY

2012 MAR -2 PM 1:55

*C. Cheryl Chaslow*

CLERK OF COURT  
DORCHESTER COUNTY



*[Handwritten mark]*

*These Exhibits removed  
from copy sent to client.  
CP  
3/6/2012*

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT  
C/A NO.: 2007-CP-18-1914

Michael T. McCoy and Arcada J. McCoy, )  
Plaintiffs, )

vs. )

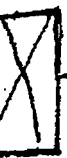
Greenwave Enterprises, Inc., d/b/a )  
Greenwave Amoco I; Al C. Browder, Jr., )  
a/k/a Al C. Browder; Kelly J. Browder; )  
Douglas M. Miles, and South Carolina )  
Department of Health and Environmental )  
Control, )  
Defendants. )

**ASSETS OF DOUGLAS M. MILES**

**REAL ESTATE**

109 Wendy Way, Summerville  
304 Crestview Drive, Summerville  
304 Crestview Drive, Summerville  
304 Crestview Drive, Summerville  
109 Timberlane Drive, Summerville  
Lot Boonhill Road, Summerville  
1515 W. 5<sup>th</sup> North St., Summerville  
509-A Corey Boulevard, Summerville  
459 Santee Drive, Santee, S.C.  
800 Elm Hall Circle, Summerville  
20 acres Uthan Ave. J@ Horseford Dr., Dorchester County

\$76,000.00  
64,000.00  
64,800.00  
64,800.00  
211,600.00  
50,000.00  
150,000.00  
130,100.00  
~~242,500.00~~  
80,000.00  
40,700.00



*See Doug  
Miles copy...  
for inclusion*

Total \$1,174,510

*514,300*

~~1,174,510~~  
*1,041,110*

**CASH AND INVESTMENTS**

Community First ✓  
Palmetto First ✓  
S.C. Federal (1)  
Heritage Trust  
Bank of S. C.  
*Southeast Community Bank*

\$300,000.00  
127,000.00  
252,000.00  
~~116,000.00~~  
18,000.00

*591,170.07 ✓*  
*143,116.82 ✓*  
*261,348.67*  
*15,122.61*

Total \$807,000.00

**TOTAL** *1,141,560.81*

**NOTES AND MORTGAGES**

500 Boonchill (G.W.A.) 5/17/04 \$1,200,000 w/47% tax \$1,000,000 @ 6, 181.45	
(\$1,000,000.00 @ 5.5% for 20 years)	\$ 800,000.00 (est) 691,000
211 Warrington, William Penn 8/11/2006 75,000	10,000.00 (est) 5,000 62,500
227 Crestwood, Michael Shell 4/20/07 -15,000	20,000.00 (est) 9,000 93,000
139 South Main St., Summerville	
(Sold 5 years ago for \$300,000.00)	200,000.00 (est) 236,155
350,000 <sup>+</sup>	Total \$1,000,000.00 1,082,724

(1) This account is pledged to the Clerk of Court to cover bail bonds he has written.

**NOTES**

- In late October or early November, 2011, he closed CD's and investment accounts for \$1,200,000.00 to purchase a Folly Beach house. This was placed in a LLC owned by his children, MERW, LLC.
- The accounts shown above are what remain
- I believe I saw a Crescon Bank on his 2011 tax return. This was a stranger as it didn't show on his 2009 or 2010. May be a holding company for an account he closed. Related to me he had no idea who it was.
- He tells me the value he placed on his real estate is based on the assessed value, which is generally under market value un less in a depressed area.

Dated this 28<sup>th</sup> day of February, 2012.

Doug Miles CONSTRUCTION

- 4 LOTS @ 304 CRESTVIEW  
Purchased 7/22/2011 For 175,000  
CURRENT VALUE 4 @ 64,800 258,400
  - 109 TIMBERLANE DR  
Purchased 2/22/2011 \$150,000 211,600
  - LOT IN GREENHURST Suburban  
9/12/2011 80,000
  - Ridgeville Property } from Tomon K  
JTBVA LLC 7/2/2011 } 245,000
- Total 795,000<sup>c</sup>

Southcoast Community Bank  
 P.O. Box 1551  
 530 Johnnie Dodds Boulevard  
 Mt Pleasant, SC 29463-1551  
 (843) 884-0504

Account Snapshot

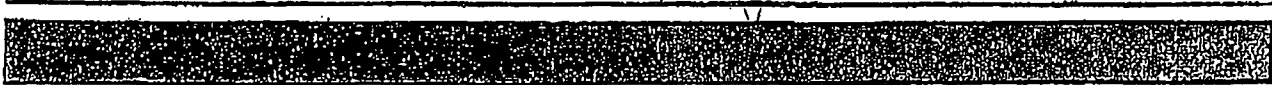
02/29/2012  
 81052000

Douglas M Miles  
 PO Box 1177  
 Summerville, SC 29483

Branch: 8 - Summerville  
 Phone: (843) 884-0504  
 Fax:

Date: 02/28/2012  
 Period: 12/01/2011 to 02/29/2012  
 91 (Days)

Personal Banker: Adrianna Michal Wilder



Transaction Information

Effective Date	Entered Date	CK #	Description	Amount	Balance
12/16/2011	12/15/2011		Interest Credit	\$184.56	\$29,658.43
12/16/2011	12/15/2011		Maturity	\$0.00	\$29,658.43
12/16/2011	12/15/2011		Rate Change: 1.250 % To 0.450 %	\$0.00	\$29,658.43
12/16/2011	12/15/2011		Renewal	\$29,658.43	\$29,658.43
12/26/2011	12/26/2011		Renew/Pending Expiration	\$0.00	\$29,658.43

Southeast Community Bank  
 P.O. Box 1561  
 530 Johnnie Dodds Boulevard  
 Mt Pleasant, SC 29463-1561  
 (843) 854-0504

Account Snapshot

02/29/2012  
 STOS2000

Branch: 8 - Summerville  
 Phone: (843) 844-0504  
 Fax:  
 Date: 02/29/2012  
 Period: 12/01/2011 to 02/29/2012  
 91 (Days)  
 Personal Banker: Adrienne Nichol Wilder

Douglas M Miles  
 PO Box 1177  
 Summerville, SC 29483



Transaction Information

Effective Date	Entered Date	CX #	Description	Amount	Balance
12/16/2011	12/15/2011		Interest Credit	\$526.23	\$100,526.23
12/16/2011	12/15/2011		Maturity	\$0.00	\$100,526.23
12/16/2011	12/15/2011		Rate Change: 1.350 % To 0.450 %	\$0.00	\$100,526.23
12/16/2011	12/15/2011		Renewal	\$100,526.23	\$100,526.23
12/26/2011	12/25/2011		Renew Pending Expiration	\$0.00	\$100,526.23

\*

**Portfolio 6108095 - All Names**

[1] DOUGLAS M MILES  
 [2] POD WILLIAM BRIAN MILES  
 [3] POD DOUGLAS M MILES JR  
 PO BOX 1177  
 SUMMERVILLE SC 29484-1177  
 See Names

Ref	Birthdate	Phone	Tax Identification
P	*****	*****	*****
	*****	*****	

**Certificate Summary**

	Names	Ref	Certificate Value	Rate	Maturity Date
⊗	2180000230 - 18 MO & UNDER-FIXED	*1	\$98,386.98	0.9000%	Feb 25, 2013
⊗	2180000740 - 18 MO & UNDER-FIXED	*1	\$98,399.07	0.9000%	Feb 22, 2013
⊗	2180002406 - 18 MO & UNDER-FIXED	*1	\$100,067.32	0.8500%	Aug 04, 2012
⊗	2180002407 - 18 MO & UNDER-FIXED	*1	\$100,067.33	0.8500%	Aug 04, 2012
⊗	2180002542 - OVER 18 MO-FIXED	*1	\$95,609.60	1.0900%	Dec 01, 2012
⊗	2180003317 - OVER 18 MO-FIXED	*1	\$98,549.77	2.2300%	Jun 10, 2012
	<b>Total Certificates:</b>		<b>\$591,176.07</b>	<b>1.1355%</b>	

*Community 6/24*



LIFE SAVINGS

P.O. Box 190112, N. Charleston, SC 29419-0012  
 Tel: 843-297-2200, Toll Free: 800-843-0432  
 www.scfcu.com

Effective January 1, 2012, your debit card will no longer earn CURewards® Points. Any accumulated points may be redeemed until December 31, 2012. For convenient access to your points, log in at CURewards.com.

DOUGLAS M MILES  
 PO BOX 1177  
 SUMNERVILLE SC 29484-1177

STATEMENT OF ACCOUNT

SAVINGS ACCOUNT  
 SUFFIX NO.: 00

Beginning Balance: 70.00

Credit union bylaws require that members maintain a minimum \$5.00 where account balance.  
 YTD Dividends: 0.00

SENIOR SERV CHECKING  
 SUFFIX NO.: 71

Beginning Balance: 26.39

Deposits	0.00	
Checks	0.00	
Debits*	0.00	
Main/Service Charges	0.00	
Ending Balance		26.39
* Transactions other than checks		
Average Daily Balance		25.39

Summary of Overdraft and Returned Item Fees

	Total for this period	Total year-to-date
Total Overdraft Fees	0.00	0.00
Total Returned Item Fees	0.00	0.00

YTD Dividends: 0.00

12 MO JUMBO  
 SUFFIX NO.: 88

Certificate owners receive reminders prior to maturity. A separate renewed notice isn't sent. New term and date is specified on statement after renewal.

Beginning Balance: 261,037.69

DATE	DESCRIPTION	AMOUNT	BALANCE
10/27	DIVIDEND	328.98	261,366.67

Annual Percentage Yield earned from 07/27/11 through 10/28/11 is .50

Joint Owners:	CLERK OF COURT CHERYL GRAHAM	
YTD Dividends:	328.98	0.00
Maturity Date:	07/28/12	07/27/11
Annual Percentage Yield:	0.50	0

FOR 2011 REPORTING:

IRA YTD Dividends	Other YTD Dividends	Total YTD Dividends	Total YTD Withholding	Total YTD Forfeitures
0.00	6,874.88	6,874.88	0.00	0.00



**Demand Deposit 200003682 - DOUGLAS M MILES**

[01] DOUGLAS M MILES  
 P O BOX 1177  
 SUMMERVILLE SC 29484-1177

Rel Birthdate Phone Tax Identification  
 P \*\*\*\*\* \*\*\*\*\*

Tax Name: [1] DOUGLAS M MILES

**Memo Balances**

Current Ledger Balance:	\$15,722.61	Current Reg CC Cash Available:	\$15,165.60
Plus Presentments:	\$9,000.00	Plus Float Available Today:	\$557.01
<b>Memo Ledger Balance:</b>	<b>\$24,722.61</b>	<b>Memo Available Balance:</b>	<b>\$15,722.61</b>

**Presentments**

Description	Memopost	Expiration	Ledger Adjustment	Available Adjustment
[X] Source: Teller-Terminal 223345 (9) DEPOSIT BK OF S.C. 1515	Feb 28, 2012 4:04 pm.	Feb 29, 2012	\$9,000.00	

**Current Cycle**

Description	Debits	Credits	Date	Balance
Balance Forward:			Feb 10, 2012	\$35,831.13
LOWES/GEMB CHECKPAYMT 1832	\$70.79		Feb 13, 2012	\$33,760.34
AUTO-OWNERS INS. PREM 1833	\$729.75		Feb 14, 2012	\$35,030.59
AUTO-OWNERS INS. PREM 1834	\$776.81		Feb 14, 2012	\$34,253.78
AUTO-OWNERS INS. PREM 1831	\$2,242.67		Feb 14, 2012	\$32,011.11
FIA CardServices CHECK FYMT 1839	\$71.40		Feb 16, 2012	\$31,939.71
Check #1838	\$1,350.88		Feb 17, 2012	\$30,588.83
Check #1840	\$500.00		Feb 21, 2012	\$30,088.83
Check #1841	\$87.45		Feb 22, 2012	\$30,001.38
Check #1843	\$1,200.00		Feb 22, 2012	\$28,801.38
Check #1842	\$12,000.00		Feb 22, 2012	\$16,801.38
WAL-MART STORES PURCHASE 1845	\$73.08		Feb 27, 2012	\$16,728.30
SUMMSC Check #1844	\$75.00		Feb 27, 2012	\$16,653.30
Deposit		\$1,234.31	Feb 28, 2012	\$17,887.61
ADJUSTMENT-CREDIT		\$520.00	Feb 28, 2012	\$18,407.61
Check #1846	\$2,685.00		Feb 28, 2012	\$15,722.61
Balance This Statement:			Feb 28, 2012	\$15,722.61

12-17 MONTHS 100,000 AND OVER  
414746707  
Printed by: KATHLEEN MILLER

FIRST PALMETTO SAVINGS BANK

2/29/2012 10:07:47 AM  
Reporting Institution: 27

**Certificate 414746707 - DOUGLAS M MILES SR**

	Rel	Birthdate	Phone	Tax Identification
[D1] DOUGLAS M MILES SR		*****	*****	*****
[D4] POD CHERYL BEATY			*****	
1525 W 5TH NORTH STREET PO BOX 1177 SUMMERVILLE SC 29484				

Additional Relationships  
Beneficiary Information Available  
Tax Name: [1] DOUGLAS M MILES SR

**Summary**

Memo Balance:	\$18,495.52	Term:	12 Months
Current Balance:	\$18,495.52	Maturity Date:	May 30, 2012
Interest Balance:	\$32.92	Last Anniversary May 30, 2011:	\$18,366.47
Redemption Amount:	\$18,478.27	Last Deposit Oct 31, 2006:	\$100,000.00
Forfeiture:	\$50.17	Original Issue Date:	Oct 31, 2006
Current Rate:	1.1000%		

**Interest**

Current Accrued Interest:	\$32.92	Current Rate:	1.1000%
Date Accrued Through:	Feb 28, 2012	Current Effective Rate:	1.1009%
Date Next Interest:		Deposit Rate Index:	[63] 12-17 MONTHS JUMBO
Interest Payment Frequency:	Cycle Date	Rate Adjuster Option:	Rate Adjuster Is Not Expressed as a Percentage

Interest Cycle:	[103] Cycle Specifications	Rate Adjuster:	0.0000%
Interest Payment Method:	Compound	Compounding Code:	Daily
Days Into This Period:	59	Reg DD Compound Frequency:	Interest Frequency
Previous Accrued Interest:	\$32.36	Interest Method:	[0] Date of Deposit: 365/365
Last Interest Dec 31, 2011:	\$51.21	Interest Reporting Code:	1099-INT
Balance Last Interest:	\$18,495.52	Withholding Code:	No Withholding
Net Interest Adjustment:	\$0.00	Rate Change Frequency:	At Maturity
Interest This Period:	\$50.79	Rate Change Method:	[B] Variable Rate
Total Days This Period:	91	Base Rate:	1.1000%
		Maturity Rate Method:	Current Rate
		Maturity Date:	May 30, 2012
		Interest Cycle Rates	
		Jan 01, 2012	1.1000%



TO: ERIC SCHWEITZER  
FAX: 853-9992  
FROM: GW PARKER

FAX  
JAM



12-17 MONTHS 414752770  
Printed by: KATHLEEN MILLER

FIRST PALMETTO SAVINGS BANK

2/29/2012 10:06:20 AM  
Reporting Institution: 27

**Certificate 414752770 - DOUGLAS M MILES SR**

[01] DOUGLAS M MILES SR  
[13] POD DOUGLAS MILES JR  
1525 W 5TH NORTH STREET  
PO BOX 1177  
SUMMERYVILLE SC 29484

Rel	Birthdate	Phone	Tax Identification
	*****	*****	*****
	*****	*****	*****

Additional Relationships  
Beneficiary Information Available  
Tax Name: [1] DOUGLAS M MILES SR

**Summary**

Memo Balance:	\$124,760.42	Term:	12 Months
Current Balance:	\$124,760.42	Maturity Date:	Jan 04, 2013
Interest Balance:	\$201.14	Last Anniversary Jan 04, 2012:	\$124,760.42
Redemption Amount:	\$124,638.55	Last Deposit Jan 04, 2012:	\$124,760.42
Forfeiture:	\$323.01	Original Issue Date:	Jan 04, 2012
Current Rate:	1.0500%		

**Interest**

Current Accrued Interest:	\$201.14	Current Rate:	1.0500%
Date Accrued Through:	Feb 28, 2012	Current Effective Rate:	1.0508%
Date Next Interest:	Apr 03, 2012	Deposit Rate Index:	[53] 12-17 MONTHS
Interest Payment Frequency:	Quarterly	Rate Adjuster Option:	Rate Adjuster Is Not Expressed as a Percentage Variance 0.0000%
Interest Cycle:	(None)	Rate Adjuster:	
Interest Payment Method:	Compound	Compounding Code:	Daily
Days Into This Period:	56	Reg DD Compound Frequency:	Interest Frequency
Previous Accrued Interest:	\$197.55	Interest Method:	[0] Date of Deposit-365/365
Net Interest Adjustment:	\$0.00	Interest Reporting Code:	1099-INT
Interest This Period:	\$327.02	Withholding Code:	No Withholding At Maturity
Total Days This Period:	91	Rate Change Frequency:	[B] Variable Rate
		Rate Change Method:	1.0500%
		Base Rate:	Current Rate
		Maturity Rate Method:	Jan 04, 2013
		Maturity Date:	
		Interest Cycle Rates	1.0500%
		Jan 04, 2012	

STATE OF SOUTH CAROLINA )

COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT  
C/A NO.: 2007-CP-18-1914

Michael T. McCoy and Arcada J. McCoy, )

Plaintiffs, )

vs. )

Greenwave Enterprises, Inc., d/b/a )  
Greenwave Amoco I; Al C. Browder, Jr., )  
a/k/a Al C. Browder; Kelly J. Browder; )  
Douglas M. Miles, and South Carolina )  
Department of Health and Environmental )  
Control, )

Defendants. )

PROPERTY SOLD BY MILES FROM 12/3/2004 TO PRESENT

5/20/2002	To Francis J. Heath Lot 224, Dorchester Regency	\$ 15,000.00
1/11/2005	To Vernon M. Lacey (Summer Village M/H Park) Net to Miles - \$883,758.91	\$900,000.00
7/27/2007	To Vicki L. Miles (Corrective Deed for 213 Crestwood Dr.)	\$ 5.00
9/11/2007	To Michael J. Schell 227 Crestwood Drive	\$125,000.00
10/23/2007	To Fariha Quadir and Mohammed S. Siddiqui (Exxon station @ corner of Main St. And Richardson Ave.) \$50,000 cash and \$300,000 Note and Mortgage Taken by Seller	\$350,000.00

2/22/2008	To RenDev, LLC 1525 W. 5 <sup>th</sup> North Street (Gas and convenience store)	\$998,000.00
7/28/2011	To Doug Miles Construction Co., Inc. (Lots 3-A, 3-B, 3-C, 3-D Sec. IV, Briarwood Subdivision); Note; Paid \$175,000 per Doug	\$ 5.00

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT  
C/A NO.: 2007-CP-18-1914

Michael T. McCoy and Arcada J. McCoy, )

Plaintiffs, )

vs. )

Greenwave Enterprises, Inc., d/b/a )  
Greenwave Amoco I; Al C. Browder, Jr. )  
a/k/a Al C. Browder; Kelly J. Browder; )  
Douglas M. Miles, and South Carolina )  
Department of Health and Environmental )  
Control, )

Defendants. )

DEEDS INTO DOUGLAS MILES CONSTRUCTION CO., INC.

7/5/2011	Smoak Jedburg, LLC (Property near Ridgeville)	\$245,000.00
9/12/2011	Frank James Zanin, Jr. (Lot in Greenhurst Subdivision)	\$ 80,000.00
2/22/2011	Bank of New York (Lot 5, Timberlane Drive)	\$150,000.00
7/22/2011	Douglas Miles 4 lots on open view	\$5.00

*Prd*  
*(175,000)*

*\$ 350,000*

STATE OF SOUTH CAROLINA )

COUNTY OF DORCHESTER )

Michael T. McCoy and Arcada J. McCoy, )

Plaintiffs, )

vs. )

Greenwave Enterprises, Inc., d/b/a  
Greenwave Amoco I; Al C. Browder, Jr.,  
a/k/a Al C. Browder; Kelly J. Browder;  
Douglas M. Miles, and South Carolina  
Department of Health and Environmental  
Control, )

Defendants. )

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

C/A NO.: 2007-CP-18-1914

**CLARIFICATION ON LOTS: 3-A, 3-B, 3-C, AND 3-D**  
**BRIARWOOD SUBDIVISION**  
**RADCLIFFE TO MILES**

Deeds show he paid \$175,000 and then immediately transferred into  
Doug Miles Construction Co., Inc. Both transactions were on 7/27/11.



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DORCHESTER )  
 )  
 Michael T. McCoy and Arcada )  
 J. McCoy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Greenwave Enterprises, Inc., )  
 d/b/a Greenwave Amoco I, )  
 Al C. Browder, Jr., a/k/a Al )  
 C. Browder; Kelly J. Browder; )  
 Douglas M. Miles and South )  
 Carolina Department of Health )  
 and Environmental Control )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C/A NO.: 2007-CP-18-01914

**ORDER GRANTING DEFENDANT  
 GREENWAVE ENTERPRISES, INC.,  
 D/B/A GREENWAVE AMOCO I, AL  
 C. BROWDER AND KELLY J  
 BROWDER'S MOTION FOR  
 SUMMARY JUDGMENT AS TO ALL  
 CAUSES OF ACTION**

*Handwritten signature*  
 CLERK OF COURT  
 DORCHESTER COUNTY  
 2012 JAN 12 PM 12:44  
 CERTIFIED COPY

The Plaintiffs filed this action via a Second Amended Complaint on January 11, 2011, alleging causes of action arising out of an alleged release of petroleum from a service station located at 500 Boonehill Rd. in Summerville, South Carolina 29483 (Property). Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I, Al C. Browder, Jr., a/k/a Al C. Browder, and Kelly J. Browder (Browder Defendants) filed their Answer to the Second Amended Complaint and their Cross-claim against Douglas M. Miles (Defendant Miles) on January 13, 2011.

This matter was brought before the Court by the Browder Defendants' Motion for Summary Judgment filed on September 27, 2011. Oral argument was held on October 17, 2011. After a careful review of the pleadings, the briefs submitted by the parties, including exhibits and relevant portions of deposition transcripts, and the oral argument of counsel, the Court hereby grants the Browder Defendants' Motion for Summary Judgment dismissing with prejudice the

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Plaintiffs' claims against the Browder Defendants and grants judgment in favor of the Browder Defendants in their cross-claim against Defendant Miles.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000).

Summary judgment should be granted where the pleadings and evidentiary materials of record demonstrate that "there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law." Rule 56(c) SCRPC; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are indisputable. Etheredge v. Richland School Dist. One, 341 S.C. 307, 311, 534 S.E.2d 275, 277 (2002). When ruling on a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party; nonetheless, a court cannot ignore facts unfavorable to that party, and it must determine whether a verdict for that party would be reasonably possible under the facts. Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (Ct. App. 1994). Moreover, a responding party may not rely on mere allegations in its pleadings to avoid summary judgment, but must set forth specific facts showing that there is a genuine

issue of material fact for trial. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct.App. 1994).

#### FINDINGS OF FACTS

It is undisputed that at some time prior to 1989, Defendant Miles acquired ownership of the Property and began operating a gasoline station on the Property. On or about July 17, 1989, Defendant Miles notified the South Carolina Department of Health and Environmental Control (DHEC) that a release of petroleum had occurred on the Property in the vicinity of the underground storage tanks (USTs) then located on the Property (Release or 1989 Release). This Release was confirmed by DHEC on or about August 12, 1989. In or about 1991, Defendant Miles had the USTs then located on the Property removed and some soils contaminated by petroleum were removed. In 1993, petroleum constituents were identified in a groundwater sample from a well on the Plaintiffs' land, which is located southwest of the Property. Since 1989, DHEC has been working with Defendant Miles to assess and remediate the 1989 Release. Between 1991 and 2001 various types of businesses operated on the Property until Defendant Miles constructed a new gasoline service station and installed new USTs on the property in 2001.

In June 2004, Defendants Al C. Browder Jr. and Kelly J. Browder took title to the Property and the business then known and operated as Greenwave Amoco from Defendant Miles. Since 2004, the corporation Greenwave Enterprises, Inc. has operated the gasoline service station and convenience store, Greenwave Amoco I, located on the Property. The Browder Defendants had no connection to the Property or the operation of the service station and convenience store prior to their purchasing the Property in 2004.

After careful review of the pleadings, the briefs submitted by the parties, including exhibits, relevant portions of deposition transcripts, and affidavits, the Court finds the following facts are not in dispute and are sufficient for disposition of the Browder Defendants' Motions:

1. Defendant Miles owned the Property from 1981 through about June 10, 2004. [Title to Real Estate, Ex. 2 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

2. Defendant Miles owned and operated a service station on the Property from 1981 until 1992 and owned and operated seven petroleum Underground Storage Tanks (USTs) located on the Property from 1981 until their removal in 1992. [South Carolina Department of Health and Environmental Control (DHEC) letter to Browder, 9/7/05, Ex. 3 to Browder Defendants' Memorandum in Support of Motion Summary Judgment; Depo. of D. Miles, p. 65, ln. 7-13]

3. On or about July 17, 1989, a release of petroleum product from one or more of the seven USTs was identified and reported to DHEC. [DHEC letter to Browder, 9/7/05, Ex. 3 to Browder Defendants' Memorandum in Support of Motion Summary Judgment; Depo, of J. Grant p. 30-31]

4. DHEC began remediation activities to address the petroleum release in 1989. [DHEC letter to Miles, 10/12/89, Ex. 4 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

5. On October 12, 1989, DHEC advised Defendant Miles it had determined that Defendant Miles was responsible for the Release and since that time DHEC has been in periodic communication with Defendant Miles concerning the investigation, assessment, and remediation of the Release. [DHEC letter to Miles, 10/12/89, Ex. 4 to Browder Defendants' Memorandum in

Support of Motion Summary Judgment; DHEC Overview of UST #12097, Ex. 5 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

6. Under the State Underground Petroleum Environmental Response Bank ("SUPERB Act"), SC Code Ann. § 44-2-10, et seq., DHEC is responsible for directing, overseeing and funding the remediation of releases from eligible USTs. [Depo. of J. Grant, p. 38]

7. DHEC determined the seven USTs on the Property were SUPERB-eligible USTs. [DHEC letter to Miles, 4/18/96, Ex. 6 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

8. The seven USTs were removed from the Property in 1992. [UST Registry, Ex. 7 to Browder Defendants' Memorandum in Support of Motion Summary Judgment; DHEC letter to Browder, 9/7/05, Ex. 3 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

9. The Plaintiffs own real property (McCoy Land) southwest of the Property, and groundwater travels from the Property to the McCoy Land.

10. The groundwater in the area of the Property generally flows in a southwesterly direction at a rate of 50 feet or less per year. [Depo. of J. Grant, p.35-36 and 45; Rapid Assessment Report, May 1998, p. 4, Ex. 10 to Browder Defendants' Memorandum in Support of Motion Summary Judgment; Consultech Tier II Report, 9/21/06, Ex. 11 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

11. In August of 1993, an analysis of groundwater samples taken from a monitoring well on the McCoy Land indicated the groundwater contained elevated BTEX (benzene, toluene, ethylbenzene, and xylenes), constituents of petroleum. [Depo. of J. Grant, p. 36; Fuss and

O'Neill letter to McCoys, 8/27/07, p. 2, Ex. 9 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

12. The petroleum released from the USTs on the Property does not pose an imminent threat to human health, safety, or the environment. [Depo. of J. Grant p. 26-28; Depo. of M. McCoy p. 99; Rapid Assessment Report, May 1998, p. 6-7 and Appendix III, Exposure Analysis, Ex. 10 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

13. DHEC has directed and funded petroleum remediation activities on the Property and on the McCoy Land and continues to conduct and fund additional remediation activities.

14. On or about May 17, 2004, Defendant Miles and the Browders entered into and executed a Purchase Agreement for the Browders' purchase of Greenwave Amoco. [Purchase Agreement, Ex. 1 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

15. In the Purchase Agreement, Defendant Miles represented to the Browders that no claim, litigation, proceeding, or investigation was pending or threatened against Defendant Miles or Greenwave Amoco that would materially adversely affect Greenwave Amoco. [Purchase Agreement § 6.8, Ex. 1 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

16. Defendant Miles represented to the Browders that "none of the representations or warranties of [Defendant Miles] contain or will contain any untrue statement of a material fact or omit or will omit or misstate a material fact necessary in order to make statements in [this Purchase] Agreement not misleading." Also, Defendant Miles represented he knew of "no fact[s] that [have] resulted, or that in the reasonable judgment of [Defendant Miles] will result in material change in the business, operations, or assets of [Defendant Miles] that [were] not set forth in [this Purchase]

Agreement or otherwise disclosed to [the Browders].” [Purchase Agreement § 6.9, Ex. 1 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]

17. The Browders entered into the Purchase Agreement in reliance on the assertions contained in Sections 6.8 and 6.9 of the Purchase Agreement and elsewhere in the Purchase Agreement. [Depo of A. Browder, p. 16 ln. 1-8]

18. Defendant Miles knew at the time he signed the Purchase Agreement DHEC had been and was continuing to investigate the Property. [Depo. of D. Miles, p. 122, ln. 16-20; DHEC letter to Miles, 7/25/03, Ex. 14 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]

19. Defendant Miles transferred title to the Property and Greenwave Amoco to the Browders on or about June 10, 2004. [Title to Real Estate, Ex. 2 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]

20. Since purchasing the Property, the Browder Defendants have provided reasonable access to the Property to DHEC and its contractors to conduct remedial activities on the Property. [Depo. of S. Briney, p. 99, ln. 21 – p. 100, ln. 12, Depo. of J. Padgett p. 58, ln. 20 – p. 60, ln. 1.]

21. Analytical results from a comprehensive groundwater sampling event on October 8, 2010, show that concentrations of chemicals of concern related to the release have generally remained stable or decreased and the groundwater contaminant plume “continues to decrease in size.” [DHEC letter to Miles, 11/2/10, Ex. 12 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]

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22. No constituents of petroleum that may have existed on the Property at the time the Browder Defendants purchased the Property in 2004 have migrated onto the McCoy Land. [Depo. of J. Grant, p. 45-46]

23. As a result of the present litigation, which arose out of proceedings or investigations related to the Release of petroleum from USTs owned by Defendant Miles in or before 1989 and were ongoing prior to the Browder Defendants acquiring Greenwave Amoco, the Browders and/or Browder Defendants have incurred substantial costs and damages to themselves and their business.

CONCLUSIONS OF LAW AS TO THE PLAINTIFFS' CLAIMS

There is no genuine issue as to any material fact and, therefore, the Browder Defendants are entitled to judgment dismissing the Plaintiffs' claims as a matter of law.

*Plaintiffs' First Cause of Action - Negligence/Gross Negligence*

In order to prevail under claims of Negligence/Gross Negligence, Plaintiffs must establish three essential elements: (1) the Browder Defendants owed Plaintiffs a duty of care, (2) a breach of that duty by a negligent act or omission, and (3) the breach was the proximate cause of the Plaintiffs' injury. Reiland v. Southland Equipment Service, Inc., 330 S.C. 617, 634, 55 S.E.2d 145, 154 (Ct. App. 1998). If the Plaintiffs fail to prove any one of these elements, the action will fail. Id.

The Plaintiffs allege the injury to the McCoy Land resulted from the release of petroleum product in or before 1989 from USTs located on the Property. When a release of petroleum occurs from a UST, liability for the release rests with the owner or operator of the UST at the time of the release. [Depo. of J. Padgett p. 56, ln. 7 - p. 57, ln. 13] Defendant Miles was the owner of the USTs at all times relevant to this matter. The leaking USTs were removed from the Property by Defendant Miles in 1992 and the Browder Defendants did not acquire the Property

until 2004, fifteen years after the Release was first discovered by DHEC. DHEC has been directing the remedial actions at the Property since that time. The remedial actions have been conducted by DHEC approved contractors and have been funded under the SUPERB Act Financial Responsibility Fund, SC Code Ann. § 44-2-10, et seq.

In the present case it is also undisputed, as established by the deposition testimony of the DHEC's witnesses, that the Browder Defendants have not breached any duty they may have as the current owners of the Property. Based on the chronology set forth above, there is no evidence of any release from the USTs located on the Property after the Browder Defendants acquired the Property. [Depo. of J. Padgett, p. 57, ln. 13-14; Depo. of J. Grant, p. 34, ln. 13 – p. 35 ln. 11] The Browder Defendants have: 1) operated and maintained any and all equipment and appurtenances associated with storage, dispensing, and sale of petroleum products in accordance with all applicable statutes and regulations; 2) allowed for free and clear access to DHEC staff and contractors to carry out necessary actions in response to the 1989 Release from former USTs at the Property; and, 3) conducted activities at the Property in a manner that does not impede remediation activities or contribute to or exacerbate any existing contamination in the soil or groundwater below the Property.

In addition to proving a duty and breach of that duty, to prevail on a negligence/gross negligence claim, the Plaintiffs must prove any breach was the proximate cause of the injury alleged. Based on the undisputed facts in this case, the Plaintiffs are unable to do so. Proximate cause requires both proof of causation in fact and legal cause. Bramlette v. Charer-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is proved by establishing the damage would not have occurred “but for” the defendant’s negligence and legal cause is proved by establishing foreseeability. Id. With the undisputed facts in this case, the

Plaintiffs are unable to prove either causation in fact or legal cause against the Browder Defendants. The damage alleged by the Plaintiffs was caused by a release of petroleum from the Property years before the Browder Defendants took title to the Property. Undisputed testimony from the Plaintiffs' expert witness establishes any contamination existing on the Property at the time the Browder Defendants took title in 2004 will not reach the McCoy Land until at least 2022. [Depo. of J. Grant, p. 35, ln. 12 – p. 36 ln. 7, p. 46 ln. 4-6] Even if the Plaintiffs could point to some undisputed fact that supports their contention that the Browder Defendants had breached some duty imposed on them after they became owners of the Property in 2004, the Plaintiffs cannot show “but for” that breach an injury would not have occurred. The contamination found on the McCoy Land in 1993 and again in 2007 existed independent of any actions taken or not taken by the Browder Defendants. The facts also do not support legal cause on the part of the Browder Defendants, as the contamination of the Plaintiffs' land occurred prior to the Browder Defendants taking title to the Property.

The Browder Defendants have not breached any duty they may have to the Plaintiffs and no actions or inactions by the Browder Defendants proximately caused the injury alleged by the Plaintiffs in this case. Plaintiffs have produced no evidence to the contrary. Because the Plaintiffs are unable to prove all three elements necessary to recover under a negligence/gross negligence cause of action, the cause of action must fail. Therefore, there is no genuine issue as to any material fact and Browder Defendants are entitled to judgment as a matter of law on all Negligence/Gross Negligence claims.

Plaintiffs' Second Cause of Action - Negligence per se

In the Second Amended Complaint, Plaintiffs assert generally that the Browder Defendants “violated and intentionally violated” the South Carolina Pollution Control Act, §48-

1-10 et seq., SC Code Ann., the State Underground Petroleum Environmental Response Bank Act, SC Code Ann. §§ 44-2-10 et seq., and the South Carolina Hazardous Waste Management Act, SC Code Ann. §§44-56-10 et seq., and regulations promulgated thereto.

The legal obligations of a person who subsequently acquires title to a site where a petroleum release has occurred and the leaking underground storage tanks have been removed are set forth by the SUPERB Act, S.C. Code Ann. § 44-2-10 to -150, and in particular S.C. Code Ann. § 44-2-80(c). Since acquiring ownership in 2004, the Browder Defendants have complied with their obligations set forth in the SUPERB Act and applicable implementing regulations including S.C. Code Ann. Regs. 61-98, by allowing DHEC and its contractors access to the Property to conduct any and all actions that have been determined by DHEC to be necessary to respond to the 1989 Release.

The Plaintiffs have neither alleged any violative actions by the Browder Defendants nor produced any evidence that the Browder Defendants have not complied with statutory requirements. As previously addressed, DHEC personnel have testified the Browder Defendants have and continue to fulfill their statutory obligations regarding the operation of Greenwave Amoco I and have provided DHEC contractors free and clear access to the Property to undertake necessary actions related to the 1989 Release.

For negligence per se, Plaintiffs must not only establish a statutory duty and breach of that duty, but they must also establish that the breach was the proximate cause of the injury alleged. "The finding of a statutory violation, however, does not end the inquiry. The causation of the injury must also be evaluated." Whitlaw v. The Kroger Co., 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991). As discussed above, based on the facts developed in this case, the Plaintiffs are

unable to prove that any action or inaction by the Browder Defendants after they became owners of the Property in 2004 was the proximate cause of the injury alleged by the Plaintiffs.

Accordingly, the Plaintiffs' claim of negligence per se against the Browder Defendants fails not only because the facts do not establish that the Browder Defendants violated a statutory requirement meant for the protection of the Plaintiffs, but also because actions by the Browder Defendants were not the proximate cause of the injury alleged by the Plaintiffs. The Browder Defendants are entitled to judgment as a matter of law on the Plaintiffs' negligence per se claims.

Plaintiffs' Third Cause of Action - Trespass

To succeed in establishing an actionable trespass by the Browder Defendants, the Plaintiffs must show: (1) the Browder Defendants committed an affirmative act; (2) the Browder Defendants intentionally invaded the Plaintiffs' land; and, (3) the injury to the Plaintiffs' property was a direct result of that invasion. Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991). "Trespass does not lie for nonfeasance or failure to perform a duty." Id. Plaintiffs do not allege in their Complaint, and no evidence has been developed, that the Browder Defendants committed an affirmative act required for an action in trespass. Second, there is no evidence that the Browder Defendants intentionally invaded the Plaintiffs' property and, therefore, since there was no invasion by the Browder Defendants, there was no injury caused by the Browder Defendants.

Here it is undisputed that petroleum contaminants were first discovered in a monitoring well on the Plaintiffs' property in 1993, eleven years before the Browders acquired the Property. The Browder Defendants have taken no affirmative action since obtaining title to the Property in 2004 to invade Plaintiffs' property. On the contrary, since taking title to the Property, the Browder Defendants have: 1) operated and maintained any and all equipment and appurtenances

associated with storage, dispensing, and sale of petroleum products in accordance with all applicable statutes and regulations; 2) allowed for free and clear access to DHEC staff and contractors to carry out necessary actions in response to the 1989 release from former USTs at the Property; and 3) conducted activities at the Property in a manner that does not impede remediation activities or contribute to or exacerbate any existing contamination in the soil or groundwater below the Property.

Plaintiffs' own expert, Jeremy Grant, testified during his deposition that because of the distance between the Property and the McCoy Land and the flow rate of the groundwater in the area, no petroleum constituents that may have been present in the soils and/or groundwater under the Property in 2004 when the Browders took title to the Property have reached the McCoy Land. The Browder Defendants clearly cannot be said to have taken an affirmative act to intentionally invade the McCoy Land that resulted in harm. Any contamination impacting the McCoy Land is the result of constituents from the 1989 Release while the Property and USTs were owned and operated by Defendant Miles.

Because the Plaintiffs cannot establish an intentional invasion of the Plaintiffs' property as a result of an affirmative act by the Browder Defendants, the Browder Defendants are entitled to judgment as a matter of law on this cause of action.

Plaintiffs' Fourth Cause of Action - Strict Liability

Plaintiffs' allege the handling, storage, and management of petroleum in underground storage tanks are abnormally dangerous and ultra-hazardous activities and Browder Defendants are strictly liable for the injury to the Plaintiffs. "The extent to which the common law recognizes liability without fault is quite limited. Traditionally, 'no fault' or 'strict' liability was confined to a few narrowly defined categories such as cattle trespass, public callings, certain

kinds of nuisance, and so-called ultrahazardous activities.” Snow v. City of Columbia, 305 S.C. 544, 549-50, 409 S.E.2d 797, 800 (Ct. App. 1991).

There are three requirements to find an activity is ultra-hazardous:

- 1) the activity must involve a risk of serious harm to person or property;
- 2) the activity must be one that cannot be performed with complete safety no matter how much care is taken; and
- 3) the activity must not be of common occurrence in the particular community.

Ervin, South Carolina Requests to Charge – Civil, §2-5, South Carolina Bar Continuing Legal Education Division, 1994. Additionally, the injuries alleged must flow from the abnormally dangerous propensities of the condition or thing. Id.

Operation of a service station meets none of these requirements. Operating a service station does not involve a risk of serious harm, can be done safely, and the existence and operation of service stations is a common occurrence in communities across South Carolina. Plaintiffs’ expert, who has been involved in environmental remediation activities at approximately 100 service stations [Depo. of J. Grant, p. 41 ln. 21-23], testified in his deposition that a service station can be operated safely [Depo. of J. Grant, p. 42 ln. 13-15] and service stations are located in close proximity to retail and residential areas. [Depo. of J. Grant, p. 43 ln. 7-11]

Further, it is undisputed that the release or activity that is the cause of the alleged harm to the Plaintiffs arose some 15 years before the Browder Defendants began operating Greenwave Amoco I. Because Plaintiffs have asserted no facts that sustain a claim that the common gas station activities conducted by Browder Defendants since 2004 have a high degree of risk, that any associated risk cannot be eliminated, and that gas stations and associated activities are not

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common usage, the Plaintiffs' cause of action against Browder Defendants based on strict liability fails and are dismissed as a matter of law.

Plaintiffs' Fifth Cause of Action - Nuisance

In order to prevail on a claim of nuisance against Browder Defendants, Plaintiffs must demonstrate: (1) there has been an unreasonable interference; (2) with use and enjoyment of land; and (3) a wrongful act by the Browder Defendants was the natural and proximate cause of the injury suffered by the Plaintiffs. Michael G. Sullivan and Douglas S. MacGregor, Elements of Civil Causes of Action, 4<sup>th</sup> Ed., South Carolina Bar Continuing Legal Education (2009)

There are no facts establishing any action by the Browder Defendants is the natural and proximate cause of the contamination existing on the McCoy Land. The undisputed evidence establishes the Release that allegedly harmed Plaintiffs occurred sometime in or before 1989 and no releases have occurred during the time the Browders have owned the Property and operated Greenwave Amoco I. [Depo. S. Briney, p. 91, ln. 24- p. 92, ln. 14] As previously discussed, the Browder Defendants did not take title to the Property until 2004 and any contaminants existing on the Property when the Browder Defendants took title have not migrated to the McCoy Land. Recent data shows concentrations of chemicals of concern on Plaintiffs' property are remaining stable or decreasing and the groundwater contaminant plume on the McCoy Land is continuing to decrease in size. [DHEC letter to Miles, 11/2/10, Ex. 12 to Browder Defendants' Memorandum in Support of Motion Summary Judgment] Further, DHEC continues to undertake remediation at the Property to address concentrations of chemicals of concern. [DHEC letter to Miles, 10/7/11, Ex. 13 to Browder Defendants' Memorandum in Support of Motion Summary Judgment]

Because there is no factual dispute that the Browder Defendants have not unreasonably interfered with the Plaintiffs' use and enjoyment of their property and no action by the Browder Defendants is the natural and proximate cause of the injury allegedly suffered by the Plaintiffs, the Browder Defendants are entitled to judgment as a matter of law on this cause of action.

Plaintiffs' Sixth Cause of Action - Civil Conspiracy

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people; (2) for the purpose of injuring the plaintiff; (3) that causes special damages.

LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp., 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage.") (citation omitted). It is essential that the plaintiff prove all of these elements in order to recover. Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

The undisputed facts in this case establishes the Browder Defendants' first contact with Defendant Miles was in 2004 [Depo. of A. Browder, p. 63; Depo. of D. Miles, p. 114-115] and their first contact with DHEC concerning the Property was in 2005 [Depo. of A. Browder, p. 20]. It is undisputed the Release of petroleum at the Property occurred in or before 1989 and contamination had already reached the McCoy Land in 1993. It is also undisputed any action or

inaction by the Browder Defendants after they first had contact with Defendant Miles and DHEC in no way influenced the migration of contaminants from the Property to the McCoy Land. Accordingly, as contaminants had already reached the Plaintiffs' property at least eleven years prior to Browder Defendants first meeting Defendant Miles or DHEC, it is impossible that the Browder Defendants conspired with Defendant Miles or DHEC to take action to injure the Plaintiffs.

Further, Plaintiffs' claim of civil conspiracy fails on its face as Plaintiffs have failed to allege or establish special damages. Under the heightened pleading standard set forth in Rule 9(g), SCRPC, "[w]hen items of special damage are claimed, they shall be specifically stated." Plaintiffs' failure to properly plead the third element is automatically fatal to their claim.

Accordingly, Plaintiffs' have presented no facts establishing the elements of a civil conspiracy and the Browder Defendants are entitled to judgment as a matter of law on this cause of action.

CONCLUSIONS OF LAW AS TO THE BROWDERS CROSS-CLAIM AGAINST  
DEFENDANT MILES

The undisputed facts also establish Defendant Miles is liable to the Browder Defendants for making false and misleading statements in the Purchase Agreement and breaching the terms of the Purchase Agreement, which have required the Browder Defendants to expend significant costs to defend themselves for actions arising out of the matters not disclosed.

It is undisputed Defendant Miles and the Browder Defendants entered into the Purchase Agreement on May 17, 2004 for the sale of the Property and Greenwave Amoco from Defendant Miles to the Browders. It is also undisputed that in the Purchase Agreement Defendant Miles represented: "Seller [Miles] has no knowledge of any claim, litigation, proceeding, or investigation pending or threatened against Seller that might result in any material adverse

change in the business or condition of the assets being conveyed under this Agreement.” [Purchase Agreement § 6.8, Ex. 1 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]. The Agreement also stated: “[n]one of the representations or warranties of Seller contain or will contain any untrue statements of a material fact or omit or will omit or misstate a material fact necessary in order to make statements in this Agreement not misleading. Seller knows of no fact that has resulted, or that in the reasonable judgment of Selling [sic] will result in material change in the business, operations, or assets of Seller that has not been set forth in this Agreement or otherwise disclosed to Buyer.” [Purchase Agreement § 6.9, Ex. 1 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment] The Agreement also states that the obligation of the Browders to purchase the assets is subject to the fulfillment, prior to or at the closing date, of certain conditions, one of which is that: “All representations and warranties made in this Agreement by Seller . . . shall be true as of the closing date as fully as those such representations and warranties had been made on or as of the closing date, and, as of the closing date, Seller shall not have violated or shall have failed to perform in accordance with any covenant contained in this Agreement.” [Purchase Agreement §10.1, Ex. 1 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment] Finally, the Agreement states, “This Agreement constitutes the entire agreement between the parties pertaining to its subject matter and it supersedes all prior contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all parties.” [Purchase Agreement §15.6, Ex. 1 to Browder Defendants’ Memorandum in Support of Motion Summary Judgment]

The evidence is clear that as early as 1989, Defendant Miles knew DHEC was investigating the release of petroleum at the Property. The evidence also establishes DHEC was

in regular contact with Defendant Miles from beginning in 1989 and continuing even after the Browder Defendants took title to the Property in June 2004. [DHEC Overview of UST #12097, Ex. 5 to Browder Defendants' Memorandum in Support of Motion Summary Judgment] Significantly, in July 2003 DHEC sent a letter to Miles informing him that five monitoring wells that had been installed on the Property had been destroyed and he needed to have them replaced. [DHEC letter to Miles, 7/25/03, Ex. 14 to Browder Defendants' Memorandum in Support of Motion Summary Judgment] However, Defendant Miles took no action to replace the destroyed wells, and they were not replaced until September 2006, after Defendant Miles transferred the Property to the Browder Defendants. [Consultech Tier II Report 9/21/06, Ex. 11 to Browder Defendants' Memorandum in Support of Motion Summary Judgment] As a result, the Browder Defendants had no knowledge of monitoring wells on the Property prior to purchasing the Property in 2004.

On May 17, 2004, when Defendant Miles executed the Purchase Agreement with the Browder Defendants, he knew about the ongoing DHEC investigation of the Property, yet he represented to the Browder Defendants in the Purchase Agreement that there was no investigation pending or threatened that might result in any material adverse change in the business or condition of the assets being conveyed under this Agreement. He also represented that the representations and warranties made by him in the Purchase Agreement "shall be true as of the closing date." Defendant Miles breached this provision of the Purchase Agreement when he remained silent and allowed the transfer to take place on the closing date knowing there was an ongoing DHEC investigation of the Property. The Browder Defendants relied on Defendant Miles' representations when executing the Purchase Agreement and when closing the

transaction. The Browder Defendants had a right to rely on Defendant Miles' representation that resulted in their executing the Purchase Agreement and purchasing the Property.

The false and misleading actions and statements made by Defendant Miles to induce the Browders into executing the Purchase Agreement and Defendant Miles' failure to correct the false and misleading actions and statements prior to the closing of the transaction are in breach of the Purchase Agreement and, therefore, render Defendant Miles in default of the Purchase Agreement and liable for all costs and expenses incurred by the Browder Defendants resulting from the Plaintiffs' instituting this action against the Browder Defendants. The amount of costs and expenses will be determined in a separate damages phase of trial.

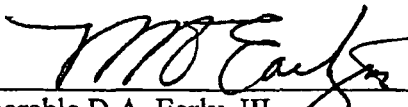
**ORDER**

For the foregoing reasons, the Court grants the Browder Defendants' Motion for Summary Judgment dismissing with prejudice the Plaintiffs' claims against the Browder Defendants and grants judgment in favor of the Browder Defendants in their cross claim against Defendant Miles.

IT IS SO ORDERED THAT the Plaintiffs' Second Amended Complaint against Defendants Al C. Browder Jr., Kelly J. Browder, and Greenwave Enterprises, Inc. d/b/a Greenwave Amoco I should be and is hereby dismissed and ended, with prejudice.

Further, IT IS SO ORDERED THAT Defendant Miles is liable to the Browder Defendants for all costs and expenses incurred by the Browder Defendants in defending this action in an amount to be determined in a damages phase of trial.

December 2, 2011  
Bamberg, South Carolina

  
The Honorable D.A. Early, III  
Circuit Court Judge – Second Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	C/A NO.: 2007-CP-18-1914
Michael T. McCoy and Arcada J. McCoy,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	DEFENDANT MILES' MOTION FOR
	)	RECONSIDERATION AS TO THE
Greenwave Enterprises, Inc., d/b/a	)	AWARD OF COSTS AND EXPENSES
Greenwave, II, a/k/a E.E.'s O.B.	)	TO THE BROWDERS, DEFENDANTS
Enterprises, Inc., Greenwave Ents, Inc.,	)	
Smitty's Citco, Smitty's Citgo, a.k.a	)	
Browder Properties, LLC; Greenwave	)	
Amoco, d/b/a Greenwave Amoco I, a/k/a	)	
Amoco Oil Company, f/k/a Country Club	)	
Shell, f/k/a Amoco Quick Stop; Al C.	)	
Browder, Jr., a/k/a Al C. Browder; Kelly J.	)	
Browder; Douglas M. Miles, and South	)	
Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Defendants.	)	

DOUGLAS M. MILES, through his undersigned attorney, moves for reconsideration of so much of the Order of the Honorable Doyet A. Early, III, dated December 20, 2011, which grants relief to the Browder Defendants for costs and expenses for the following reasons:

(1) The Defendants, Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I, Al C. Browder, Jr. a/k/a Al C. Browder and Kelly J. Browder (hereafter the "Browders"), entered into a "Commercial Real Estate Purchase Agreement" (Agreement) dated October 11, 2005, with Douglas M. Miles, for the purchase of Greenwave Amoco. (See Exhibit "1")


(2) At the time the Browders and Miles entered into the Agreement, there were no facts that would result in the material change in the business or assets of the Seller (Miles) not set forth in the Agreement. (See Exhibit No. 1, paragraph 6.9, page 5).

(3) At the time of the sale by Miles to the Browders, there were no suits or actions threatened or instituted to restrain, enjoin, or otherwise prohibit the consummation of the Agreement. (It has not been contested that the Browders have been prevented from operating Greenwave Amoco since October 11, 2005). (See Exhibit No. 1, paragraph 10.4, page 8).

(4) The fact that Miles had been requested to remediate the site of Greenwave Amoco is not disputed. However, as may be seen from Exhibit No. 10, "Rapid Assessment Report dated May 1998, the site was remediated with the offending tanks removed. (See Exhibit No. 10, page 1). Furthermore, the Rapid Assessment Report indicates there were no apparent damages to the public. (See Exhibit No. 10, paragraph 5.1, page 2).

(5) Based on the above, Miles believes there is a genuine issue of fact as to any misrepresentation for cost of fact made at the time of entering into the Agreement with Browders.

THEREFORE, Defendant Miles, prays that so much of the Honorable Doyet A. Early, III's, Order dated December 20, 2011, be modified to relieve Miles from costs and expenses to the Browders.

  
\_\_\_\_\_  
G. Waring Parker  
G. WARING PARKER LAW FIRM, LLC  
907-B N. Main Street (29483)  
P.O. Box 786  
Summerville, SC 29484  
(843) 821-7323 (Telephone)  
(843) 821-7097 (Facsimile)  
[gwarinparker@bellsouth.net](mailto:gwarinparker@bellsouth.net)

St. George, South Carolina  
December 29, 2011

(Sheet 1 13 pages)

**COMMERCIAL REAL ESTATE PURCHASE AGREEMENT**

This Agreement entered into this the 4<sup>TH</sup> day of May, 2004 by and among Douglas Miles, (hereinafter "Seller"), and Al C. and Kelly <sup>J. AB KB</sup> Browder, (hereinafter "Buyer").

WHEREAS, Seller owns a business known as Greenwave Amoco; and

WHEREAS, Seller owns equipment, inventory, contract rights, and miscellaneous assets used in connection with the operations of its business; and

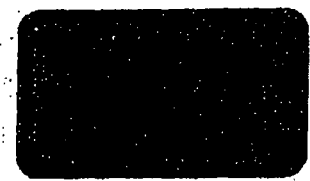
WHEREAS, Buyer desires to acquire substantially all of the real estate and associated or useful to, or intended to be used in the operation of Seller's business and Seller desires to sell such real estate and assets to Buyer; and

NOW, THEREFORE, in consideration of mutual covenants contained herein and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

**SECTION I. REAL ESTATE AND ASSETS PURCHASED; LIABILITIES ASSUMED**

1.1 **ASSETS PURCHASED.** Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller, on the terms and conditions set forth in this Agreement the following inventory and real estate ("Assets") ("Real Estate"): Greenwave Amoco 500 Boone Hill Road Summerville, SC 29483. Inventory and equipment to transfer with sale is listed on exhibit "A" and attached to this Agreement.

A.B.  
O.T.  
KB



1.1.2 All inventories and supplies owned by Seller together with any replacements or additions to the inventories made prior to the closing date, but excluding inventory disposed of in the ordinary course of Seller's business.

1.1.3 Seller's goodwill and Business name upon approval of any franchise holders.

**1.2 ASSUMPTION OF LIABILITIES**

Buyer shall be responsible for any unfilled orders from any vendors or equipment service contracts, employee taxes, liability insurance, and utilities from closing. Buyer to secure property/casualty loss policy and name Seller as loss payee on property insurance until balance of purchase price is paid in full.

**SECTION 2. EXCLUDED ASSETS**

Excluded from this sale and purchase are Seller's : \_\_\_\_\_

**SECTION 3. PURCHASE PRICE FOR ASSETS**

The purchase price for the Real Estate and assets, as shown on exhibit "A" shall be \$1,200,000.00, (One million two hundred thousand dollars) .

**SECTION 4. PAYMENT OF PURCHASE PRICE**

The price for the Assets shall be paid as follows:

JR  
DM  
KB

4.1 At the time of acceptance by all parties the terms of this contract Buyer shall cause to be delivered to Seller the sum of \$10,000.00 (ten thousand dollars).. See terms.

4.2 On the closing of this transaction the Buyer will accept a general warranty deed, with transfer stamps affixed, a cash payment to Seller of \$190,000.00 and the Buyer will execute a note and mortgage for the balance of the purchase price (\$1,000,000.00), to be paid in equal monthly payments of \$6,881.45 for twenty years. The payments will include the principle and interest at the rate of 5.5%.

4.3 Late fees will incur if any payment is ten days late at the rate of ten per cent of the payment amount. After thirty days default by the Buyer Seller shall at his option begin foreclosure proceedings and Buyer will be responsible for all costs incurred by the Seller to bring the proceedings.

**SECTION 5. OTHER AGREEMENTS**

At closing, the parties shall execute the following additional agreements:

- [ 5.1 The non-competition agreement between Buyer and Seller.
- 5.2 The non-competition agreement between Buyer and Selling Shareholder.
- 5.3 The Consulting Agreement between Buyer and Selling Shareholder. ]

**SECTION 6. CONTINGENCIES**

6.1 This sale shall be contingent upon the Buyer being able within ninety days of the signing of this agreement to obtain a Lottery and Beer sales license from the State of South Carolina. If Buyer is unable to obtain the license, after making all applications in a timely manner than Seller will refund the deposit amount of \$10,000.00. Any other failure on the part of the Buyer to proceed with the terms of this contract will result in Buyer forfeiting the deposit.

H.B.  
ms  
KB

6.2 Closing shall take place within 100 days of the signing of this agreement at a place determined by Buyer. Buyer to pay attorney fees for title search and title insurance. Buyer to pay for any survey's done.

6.3 **TITLE TO ASSETS.** Except as described in the Agreement, Seller holds good and marketable title to the assets, free and clear of restrictions on or conditions to transfer or assignment, and free and clear of liens, pledges, charges or encumbrances except utility easements and City and County easements.

6.4 **BROKERS AND FINDERS.** Neither Seller nor Selling Shareholder has employed any broker or finder in connection with the transaction contemplated by this Agreement or taken action that would give rise to valid claims against any party for a brokerage commission, finder's fee or other like payment.

6.5 **TRANSFER NOT SUBJECT TO ENCUMBRANCES OR THIRD PARTY**

**APPROVAL.** The execution and delivery of this Agreement by Seller and the consummation of the contemplated transactions, will not result in the creation or imposition of any valid lien, charge or encumbrance on any of the assets, and will not require the authorization, consent, or approval of any third party, including any governmental division or regulatory agency.

6.6 **LABOR AGREEMENTS AND DISPUTES.** Seller is neither a party to, nor otherwise subject to any collective bargaining or other agreement governing the wages, hours, in terms of employment of Seller's employees. Seller is not aware of any labor dispute or labor trouble involving employees of Seller.

6.7 **NONCANCELLABLE CONTRACTS.** At the time of closing, there will be no material leases, employment contracts, contracts for services, or other similar

A.B.  
Q  
KD

contracts, existing or related to or connected with the operation of Seller's business not cancellable within thirty (30) days.

**6.8 LITIGATION.** Seller has no knowledge of any claim, litigation, proceeding, or investigation pending or threatened against Seller that might result in any material adverse change in the business or condition of the assets being conveyed under this Agreement.

**6.9 ACCURACY OF REPRESENTATIONS AND WARRANTIES.** None of the representations or warranties of Seller contain or will contain any untrue statements of a material fact or omit or will omit or misstate a material fact necessary in order to make statements in this Agreement not misleading. Seller knows of no fact that has resulted, or that in the reasonable judgment of Seller will result in material change in the business, operations, or assets of Seller that has not been set forth in this Agreement or otherwise disclosed to Buyer.

**SECTION 7, NOT APPLICABLE**

**SECTION 8. COVENANTS OF SELLER AND SELLING SHAREHOLDER**

**8.1 SELLER'S OPERATION OF BUSINESS PRIOR TO CLOSING.** Seller and selling shareholder agree that between the date of this Agreement and the date of closing Seller will:

**8.1.1** Use its best efforts to preserve its business organization and preserve the continued operation of its business with its customers, suppliers, and others having business relations with Seller.

**8.1.2** Not assign, sell, lease or otherwise transfer or dispose of any of the assets listed on Exhibit "A", except to Buyer.

B.  
Jm  
10

§.1.3 Maintain all of its assets other than inventories in their present conditions, reasonable wear and tear and ordinary usage accepted and maintain the inventories at levels normally maintained.

§.2 ACCESS TO PREMISES AND INFORMATION. At reasonable times prior to the closing date, Seller will provide Buyer and its representatives with reasonable access during business hours to the assets, titles, contracts and records of Seller and furnish such additional information concerning Seller's businesses Buyer may from time to time reasonably request.

§.3 EMPLOYEE MATTERS.

§.3.1 Prior to closing, Seller will deliver to Buyer lists of the names of all persons on the payroll of Seller, together with a statement of amounts paid to each during Seller's most recent fiscal year and amounts paid for services from the beginning of the current fiscal year to a closing date. Seller will also provide Buyer with a schedule of all employee bonus arrangements and a schedule of other material compensation or personnel benefits or policies in effect.

§.3.2 Prior to the closing date, Seller will not, without Buyer's prior written consent, enter into any material agreements with its employees, increase the rate of compensation or bonus payable to or to become payable to any employee or effect any change in the management, personnel policies, or employee benefits, except in accordance with existing employment practices.

§.3.3 As of or prior to the closing date, Seller will terminate all of its employees not having employee agreements transferable to Buyer and will pay each employee all wages, commissions, and accrued vacation pay earned up to the time of termination, including overtime pay.

A.B.  
B.M.  
Kd

**8.4 CONDITIONS AND BEST EFFORTS.** Seller will use its best efforts to effectuate the transactions contemplated by this Agreement and to fulfill all the conditions of the obligations of Seller and Selling Shareholder under this Agreement, and will do all acts and things as may be required to carry out their respective obligations under this Agreement and to consummate and complete this agreement.

**SECTION 9. COVENANTS OF BUYER**

**9.1 CONDITIONS AND BEST EFFORTS.** Buyer will use its best efforts to effectuate the transaction contemplated by this Agreement and to fulfill all the conditions of Buyer's obligations under this Agreement, and shall do all acts and things as may be required to carry out Buyer's obligations and to consummate this Agreement.

**9.2 CONFIDENTIAL INFORMATION.** If for any reason the sale of Assets is not closed, Buyer will not disclose to third parties any confidential information received from Seller or Selling Shareholder in the course of investigating, negotiating, and performing the transactions contemplated by this Agreement.

**SECTION 10. CONDITIONS PRECEDENT TO BUYER'S OBLIGATIONS**

The obligation of Buyer to purchase the Assets is subject to the fulfillment, prior to or at the closing date, of each of the following conditions, any one or portion of which may be waived in writing by Buyer:

**10.1 REPRESENTATIONS, WARRANTIES AND COVENANTS AND SELLING SHAREHOLDER.**

All representations and warranties made in this Agreement by Seller and Selling Shareholder shall be true as of the closing date as fully as those such representations and warranties had been made on or as of the closing date, and, as of the closing date, Seller shall not

A.S.  
 @ J.V.  
 F.B.

have violated or shall have failed to perform in accordance with any covenant contained in this Agreement.

**11.2 LICENSES AND PERMITS.** Buyer shall have obtained all licenses and permits from public authorities necessary to authorize the ownership and operation of the business of Seller within ninety days of the acceptance of this agreement of all parties.

**11.3 CONDITIONS OF THE BUSINESS.** There shall have been no material adverse change in the manner in of operation of Seller's business prior to the closing date.

**11.4 NO SUITS OR ACTIONS.** At the closing date, no suit, action or other proceeding shall have been threatened or instituted to restrain, enjoin or otherwise prevent the consummation of this Agreement or the contemplated transactions.

All representations and warranties made in this Agreement by Buyer shall be true as of the closing date as fully as though such representations and warranties have been made on and as of the closing date, and Buyer shall not have violated or shall not have failed to perform in accordance with any covenant contained in this Agreement.

**SECTION 11. BUYER'S ACCEPTANCE**

Buyer represents and acknowledges that it has entered into this Agreement on the basis of its own examination, personal knowledge, and opinion of the value of the business. Buyer is not to rely on any representations made by Seller other than those specified in this Agreement. Buyer further acknowledges that Seller has made no agreement or promise to repair or improve any equipment, rolling stock or other personal property being sold to Buyer under this Agreement, and that Buyer takes all such property in the condition existing on the date of this Agreement, except as otherwise provided in this Agreement.

**11.3 BUYERS INDEMNIFICATION.** Buyer agrees to defend, indemnify and hold

*A.R.*  
*D.V.*  
*K.B.*

harmless Seller from and against:

11.3.1 Any all claims, liabilities and obligations of every kind and description arising out of or related to the operation of the business following closing or arising out of buyers faith to perform obligations of Seller assumed by buyer pursuant to this agreement.

11.3.2 Any all damage or deficiency resulting from any material misrepresentation, breach of warranty or covenant, or non fulfillment of any agreement on the part of Buyer under this agreement.

**SECTION 12. CLOSING**

12.1 TIME AND PLACE. This agreement shall be closed at the offices of \_\_\_\_\_ within 100 days of the acceptance of this agreement by all parties, or such other time as the parties may agree in writing.

12.2 OBLIGATIONS OF SELLER AT CLOSING. Seller shall deliver to buyer the following:

12.2.1 Bills of Sale, Assignments, properly endorsed Certificate of Titles, and other instruments of transfer, and form and substance reasonably satisfactory to counsel for Buyer, necessary to transfer and convey all of the assets to Buyer.

12.2.2 Non-competition Agreements referenced in Section 5.

12.2.3 Such other certificates and documents as may be called for by the provisions of this Agreement.

12.3 OBLIGATIONS OF BUYER AT CLOSING. At the closing Buyer shall delivery to Seller the following:

*Handwritten initials and signature*  
AJP  
D...  
KB

12.3.1 A mortgage and note with the payment terms of the amount financed (\$1,000,000.00). A cash or certified check in the amount of \$190,000.00.

12.3.2 Such other certificates and documents as may be called for by the provisions of this Agreement including casualty and loss insurance certificate with Seller listed as loss payee.

**SECTION 13. RIGHTS AND OBLIGATIONS SUBSEQUENT TO CLOSING**

13.2 **SELLER'S RIGHT TO PAY.** In the event Buyer fails to make any payment of taxes, assessments, insurance premiums, or other charges that Buyer is required to pay to third parties under this Agreement, Seller shall have the right, but not the obligation, to pay the same. Buyer will reimburse Seller for any such payment immediately upon Seller's demand, together with interest at the same rate provided in the Note from the date of Seller's payment until Buyer reimburses Seller. Any such payment by Seller shall not constitute a waiver by Seller of any remedy available by reason of Buyer's default for failure to make the payments.

**SECTION 14. TERMINATION OF AGREEMENT**

14.1 **BY MUTUAL CONSENT.** This Agreement may be terminated by mutual written consent of Buyer and Seller.

**SECTION 15. MISCELLANEOUS**

15.1 The provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

15.2 Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be mailed by certified mail, return receipt requested, postage prepaid, addressed to the parties as follows:

**SELLER: PO Box 1177**

**BUYER:**

A.R.  
Ow  
KO

**Summerville, SC 29484**

All notices and other communications shall be deemed to be given at the expiration of three (3) days after the date of mailing. The addresses to which notices or other communications shall be mailed may be changed from time to time by giving written notice to the other party as provided above.

14.3 In the event of a default under this Agreement, the defaulting party shall reimburse the non defaulting party or parties for all costs and expenses reasonably incurred by the non defaulting party or parties in connection with the default, including without limitation attorney fees. Additionally, in the event a suit or action is filed to enforce this Agreement or with respect to this Agreement, the prevailing party or parties shall be reimbursed by the other party for all costs and expenses incurred in connection with the suit or action, including without limitation reasonable attorney fees at the trial level and on appeal.

14.4 No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

14.5 This Agreement shall be governed by and shall be construed in accordance with the laws of the State of South Carolina.

14.6 This Agreement constitutes the entire agreement between the parties pertaining to its subject matter and it supersedes all prior contemporaneous agreements, representations and understandings of the parties. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all parties. **IF YOU DO NOT UNDERSTAND THIS AGREEMENT YOU SHOULD SEEK LEGAL ADVICE.**

β.  
Dm  
KB

Witness the signatures of the parties this the 17 day of May, 2004

SELLER: Douglas M. Mil BUYERS: R.C. Brooker

BY: Witness Cheryl V. Beatz BY: Witness Kelly J. Sawyer  
Cheryl V. Beatz

STATE OF South Carolina  
COUNTY OF Dorchester

PERSONALLY appeared before me, the undersigned authority in and for the county and state aforesaid, the within named \_\_\_\_\_ who acknowledged to me that he is \_\_\_\_\_ of \_\_\_\_\_, and who acknowledged that he signed, delivered and executed the above and foregoing instrument on the date and year therein mentioned, for and on behalf of said corporation after first having been duly authorized so to do.

GIVEN under my hand and official seal, this the 17 day of May, 2004

Cheryl V. Beatz  
NOTARY PUBLIC

MY COMMISSION EXPIRES: October 11, 2005

A B:  
D M.  
KB

STATE OF D.C.  
COUNTY OF Dorchester

PERSONALLY appeared before me, the undersigned authority in and for the county and state aforesaid, the within named \_\_\_\_\_ who acknowledged to me that he is \_\_\_\_\_ of \_\_\_\_\_ and who acknowledged that he signed, delivered and executed the above and foregoing instrument on the date and year therein mentioned, for and on behalf of said corporation aforesaid first having been duly authorized so to do.

GIVEN under my hand and official seal, this the 17 day of May 2007

*Carol V. Beaty*  
NOTARY PUBLIC

MY COMMISSION EXPIRES:  
October 11, 2008

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DIVISION OF UNDERGROUND  
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**RAPID ASSESSMENT REPORT**  
at  
**COUNTRY CLUB SHELL**  
**500 BOONE HILL ROAD**  
**SUMMERVILLE, SOUTH CAROLINA**  
**DORCHESTER COUNTY**  
**SITE ID: 12097**

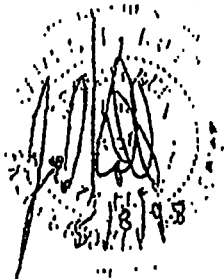
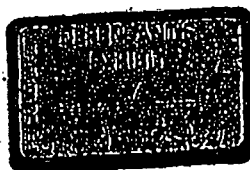
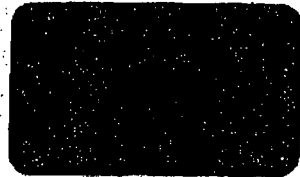
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**Project No. 39-10157-01I**

**May 1998**



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## EXECUTIVE SUMMARY

Omega Environmental Services completed a Rapid Assessment at the Country Club Shell to determine the impact of the surficial aquifer by petroleum hydrocarbons. The Rapid Assessment commenced with the collection of groundwater samples from twenty-one monitoring wells. Aquifer (slug) tests were performed at three monitoring wells. One soil boring was completed to procure soil samples for laboratory analysis for total organic carbon (TOC) and for grain size. A Tier 2 assessment, based on a receptor survey, was completed for the site. Site Specific Target Levels (SSTLs) were established for all chemicals of concern for groundwater based on modeling and field investigation results by Omega. Based on the results of the Rapid Assessment, a Tier 3 Assessment through development of a Corrective Action Plan (CAP) is recommended for the site.

## 1.0 INTRODUCTION AND FACILITY BACKGROUND

Omega Environmental Services (Omega) was retained by Mr. Douglas Miles to prepare a Rapid Assessment (RA) for Country Club Shell, located at 500 Boone Hill Road (US Highway 17A), Summerville, Dorchester County, South Carolina (Figure 1). This RA was approved for implementation by the South Carolina Department of Health and Environmental Control (SCDHEC) in correspondence dated June 14, 1997.

The property (Site ID: 12097) was formerly utilized as a gasoline service station, and is currently utilized as a used car sales facility and servicing garage. The underground ground storage tanks (USTs) have been removed from the site. The remnant locations of the former dispenser islands are apparent (Figure 2).

A soil and groundwater quality assessment was completed at the site by General Engineering Laboratories on June 30, 1989. Four soil borings/monitoring wells were installed at the site during the investigation. Additional assessment was subsequently performed by Virogroup, Inc - BTE Division, including an Expanded Assessment during 1992 and 1993. A total of twenty-two monitoring wells have been installed at the site.

The site is located on the northwest corner of Boone Hill Road and Helen Drive. The site is situated in a mixed residential and commercial area. The site is bordered to the north by a residential property, to the east by Helen Drive and a residential property beyond, to the south by Boone Hill Road and a wooded area beyond, and to the west by a small wooded area and a residential property beyond.

The site and surrounding properties are serviced with potable water supply from the City of Summerville. An apparent well house for a presumed water supply well was observed on a residential property approximately 250 feet south of the site. The residential area in which this property is located is serviced with municipal water supply. No other water supply wells were observed to be

present within a 1,000 ft. radius of the site. A nursery located at 515 Boone Hill Road reportedly utilizes a pond for plant irrigation. The pond is located approximately 700 feet to the southwest.

## **2.0 SITE CHARACTERISTICS**

### **2.1 Site Topography and Surface Water**

The topography of the area is essentially flat. Surface drainage is controlled by drainage ditches located parallel to Boone Hill Road, Helen Drive and Boone Hill Parkway. As indicated previously, a pond utilized for plant irrigation is located approximately 700 feet to the southwest. An apparent wetlands area is located approximately 250 feet west-northwest of the site. Sawmill Branch, a tributary of the Ashley River, is located approximately 3,000 feet south of the site. A tributary to the Sawmill Branch is located approximately 1,500 feet to the northeast.

### **2.2 Regional Geology and Hydrogeology**

The site is located within the Lower Coastal Plain Physiographic Province in southeast Dorchester County, South Carolina (Horton, 1991). The geology of the coastal plain originated from repeated marine transgressions and regressions which occurred due to fluctuating sea levels during the Pliocene and early Pleistocene. The deposition of stratigraphic units occurred in back barrier lagoonal settings, shallow inner bays, estuarine environments and on the open shallow shelf. Pliocene-Pleistocene strata of the coastal plain were deposited unconformably on older beds ranging in age from late Miocene to late Cretaceous. Overlapped were deltaic and shallow marine sands of the Cretaceous, silts and glauconitic sands of the Paleocene, limestones and calcareous quartz arenites of the Eocene and Oligocene and calcareous and phosphatic sands of the Miocene (Horton, 1991).

In the Dorchester County area, five water-bearing units comprise the Coastal Plain aquifer system. These are, from youngest to oldest, the Surficial Aquifer System, Floridan Aquifer System, Black Creek Aquifer, Middendorf Aquifer and the Cape Fear Aquifer. These aquifers are separated by a

series of low-permeability confining units, which control the vertical movement of water within these systems. The confining unit between the surficial aquifer system and the underlying aquifers is the Cooper Formation, which generally consists of phosphoric limestone and calcareous clay. The Cooper Formation acts as a confining unit for the underlying Santee Limestone of the Floridan Aquifer System. The Floridan Aquifer System is the preferred source of groundwater in southeast Dorchester County.

### 2.3 Site Geology and Hydrogeology

Based on stratigraphic descriptions obtained during soil boring and well installations of previous assessments, soil underlying the site consists primarily of silty to clayey sand which extends from the surface to an average depth of four to eight feet. The lithology then grades to a sandy clay unit, two to three feet in thickness, which overlies a dense variegated clay with inter-bedded silt and sand stringers. The Cooper Marl occurs at approximately thirty feet below land surface (BLS). Figure 3 is a site map illustrating two lines of cross-section. Figures 4A and 4B show two lines of cross-section at the site, approximately parallel and perpendicular to the direction of ground water flow, respectively.

During a groundwater measuring event performed on April 7, 1998, depths to groundwater ranged from 0.88 feet BLS in well MW-14 to 2.19 feet BLS in monitoring well MW-12. The water level in deep well MW-20 was measured at 6.33 feet BLS. No free product was detected in any of the monitoring wells. The depths to groundwater and groundwater elevations for the two measuring events are summarized in Table 1. Based on the April 7, 1998 groundwater elevation data, the direction of groundwater flow at the site appears to be radial (Figure 5) with an apparent potentiometric high in the area of well MW-7. Another potentiometric high are is apparent in the area east of well MW-21. An average hydraulic gradient ( $dh/dl$ ) of 0.005 feet/feet was estimated for the surficial aquifer.

As indicated in Table 1 and as depicted in the geologic cross sections of Figures 4A and 4B, groundwater occurs above the top of screen in some wells. This effect may be a seasonal trend, in that abundant rainfall of the winter and early spring months together with the seasonal lack of evapotranspiration may induce elevated groundwater levels in the monitoring wells.

On April 7, 1998, aquifer (slug) tests were performed on monitoring wells MW-7, MW-13 and MW-15. The aquifer test data is summarized in Appendix I. The aquifer tests resulted in an average conductivity ( $K_h$ ) of 2.72 ft/day (0.829 m/day). The average hydraulic gradient ( $dh/dl$ ) was estimated calculated to be 0.005 feet/feet. A representative effective porosity ( $n_e$ ) of 40 percent was assumed as effective porosity of the saturated silty/clayey sands of the site surficial aquifer. Using the average hydraulic conductivity ( $K_h$ ) of 2.72 feet/day and assuming linear isotropic and homogeneous conditions (Heath, 1983), the estimated horizontal seepage velocity ( $V_s$ ) for the site is calculated as follows:

$$V_s = (K_h \, dh/dl) + n_e$$

$$V_s = 0.034 \text{ ft/day, or approximately } 12 \text{ ft/year}$$

### 3.0 SOIL CONTAMINATION ASSESSMENT

#### 3.1 Field Investigation Activities and Results

On April 7, 1998, one soil boring (SS-1) was completed with a decontaminated stainless steel hand auger at a location five feet east of well MW-16. Soil boring SS-1 extended in depth to three feet. A soil sample was collected at the depth interval of 2.0 to 2.5 feet and was designated for laboratory analysis for total organic carbon (TOC). An additional soil sample was collected from a depth interval of 2 to 3 feet for grain size analysis.

Laboratory analysis yielded a TOC concentration of 2,960 mg/kg. The grain size analysis indicated clayey, silty fine sand consisting of clay (22%), silt (28 %) and sand (50 %). The laboratory analytical results are included in Appendix II.

#### **4.0 GROUNDWATER CONTAMINATION ASSESSMENT**

##### **4.1 Field Investigation Activities**

On June 24, 25 and 26, 1997 and on April 7, 1998, groundwater samples were collected from the monitoring wells at the site. All wells were sampled with the exception of well MW-10, which could not be located. This well had been installed on a private gravel drive, which reportedly had been scraped, re-graveled and compacted. The ground water samples were submitted for laboratory analysis for benzene, toluene, ethylbenzene, and total xylenes (total BTEX), methyl tert butyl ether (MTBE) and naphthalene by Environmental Protection Agency (EPA) Method 8260, and polynuclear aromatic hydrocarbons (PAH) by EPA Method 8270. The results are summarized in Table 2 and the laboratory data sheets are included in Appendix II.

Purge water generated as a part of the Rapid Assessment will be disposed of properly by Solid Waste Technologies of Americus, Georgia. A manifest documenting proper disposal will be submitted subsequent to disposal procedures.

##### **4.2 Chemicals of Concern**

The groundwater analytical results are depicted in Figures 6A and 6B. The groundwater quality map indicates that groundwater has been influenced above Risk Based Screening Levels (RBSL) for all BTEX parameters in wells MW-1 and MW-5. Wells MW-2, MW-3 and MW-7 yielded concentrations of benzene, toluene and ethylbenzene above RBSL. Wells MW-8 and MW-19 yielded concentrations of benzene and ethylbenzene above RBSL. Well MW-11 yielded a concentration of benzene above RBSL. MTBE was detected above RBSL in wells MW-2, MW-5 and MW-19.

Naphthalene was detected above RBSL in wells MW-1, MW-2, MW-3, MW-5, MW-7, MW-8, MW-11 and MW-19. Wells MW-6 and MW-9 yielded no concentrations of COC above RBSL. Wells MW-12, MW-13, MW-14, MW-15, MW-16, MW-17, MW-18, MW-21 and MW-22 yielded no concentrations of COC above method detection limits.

Deep well MW-20, screened in the lower sediments of the surficial aquifer yielded no concentrations of COC above method detection limits. Well MW-4, which is screened at medium depth in the surficial aquifer, yielded concentrations benzene (290 ug/l), MTBE (480 ug/l) and naphthalene (38 ug/l) above RBSL.

## 5.0 TIER 2 EVALUATION

### 5.1 Exposure Pathway Analyses

The exposure pathway analysis is summarized in Appendix III, which includes Exposure Pathways for Current Land Use and Future Land Use. The subject site is commercially utilized and its adjacent properties to the north, east, south and west are utilized for single family residences and/or are undeveloped. All properties in the vicinity of the facility are serviced by the City of Summerville with potable water supply.

Subsurface utilities include water supply lines and storm sewer lines located along Boone Hill Road and Helen Drive. Additionally, a subsurface telephone communication cable is located along Boone Hill Highway. No buildings with basements were noted to be present within 1,000 feet of the site.

There are currently no on-site residents at the facility. The site is anticipated to remain commercially utilized, and the facility is expected to maintain public water supply. Therefore, no current and future exposure pathways to on-site residents, workers or visitors are apparent in regard to ingestion of groundwater, inhalation or dermal contact while showering.

Because the site is capped with concrete/asphalt, dermal contact with contaminated soils, soil ingestion and vapor inhalation are not considered current exposure pathways for on-site visitors or workers. The possibility remains that if excavation is performed in the area of the former basin, product dispensers and piping, soils impacted with petroleum hydrocarbons could be contacted.

An apparent water supply well was noted to be present on a property located approximately 250 south of the site. Municipal water supply is available in this residential area. The well may be currently utilized for potable water supply or possibly for irrigation. Therefore, inhalation of petroleum hydrocarbon chemical compounds while showering, dermal contact while showering and ingestion of impacted groundwater are considered current and future potential exposure pathway for off-site residences.

An apparent wetlands area is located approximately 250 feet to the west-northwest. A pond utilized for plant irrigation is located approximately 700 feet to the southwest. Previous groundwater assessments at the site have indicated a radial flow pattern with seasonal fluctuations in groundwater flow direction. The dissolved contaminant plume is expected to migrate in the same direction as groundwater flow. At some time in the future, dissolved petroleum hydrocarbons could discharge into the wetlands area or irrigation pond.

Therefore, the two closest receptors are: 1) the property with an apparent water supply well, located approximately 250 feet south of the site, and 2) the wetlands area located approximately 250 feet to the west-northwest.

## 5.2 Exposure Point

An exposure point is that point at which it is assumed that a receptor, either actual or potential, can come in contact with the COC. The receptors, identified as: 1) a property with an apparent water supply well, and 2) an apparent wetlands, area are both approximately 250 feet from the source. The source is defined as the dissolved contaminants in the area of wells MW-1, MW-2 and MW-5.

### 5.3 Point of Compliance

Because of the radial groundwater flow pattern, which seasonally fluctuates, an upgradient point of compliance is not discernable. The downgradient points of compliance are wells MW-12, MW-13, MW-14, MW-15, MW-16, MW-17, MW-18, MW-21 and MW-22.

### 5.4 Site Specific Target Levels

To determine the corresponding site-specific target levels (SSTL) for the COCs, the soil leaching to groundwater pathway, the groundwater ingestion pathway, and the dermal contact and vapor inhalation pathways are analyzed.

#### 5.4.1 Soil Leaching to Groundwater Pathway Analysis

The soil leachability model, described in Appendix B of SCDHEC's guidance document, *Risk-Based Corrective Action for Petroleum Releases* (June 1995), is performed to determine whether leachates from petroleum contaminated soils migrate to the groundwater and to determine the Site Specific Target Levels (SSTL) for cleanup of impacted soil. Due to the shallow water table at the site (approximately 2 feet BLS) a soil leachability model was not deemed necessary.

#### 5.4.2 Groundwater Ingestion Pathway Analysis

Site specific target levels (SSTL) for dissolved COC in groundwater were approximated utilizing the Domenico Model as represented in the SCDHEC publication entitled *Risk-Based Corrective Action For Petroleum Releases*, dated January 1998. The SSTLs were estimated for benzene, toluene, ethylbenzene, xylenes, MTBE and naphthalene. These COC were chosen for the Domenico Model based on the assigned RBSL value for each chemical compound and the contaminant concentrations observed in the monitoring wells. The source was defined as the dissolved concentrations detected in wells MW-1, MW-2 and MW-5.

The receptors were assumed to be a property south of the site where an apparent water supply well is located and an apparent wetlands area, west-northwest of the site. Both receptors are located approximately 250 feet (75 meters) from the source. Both receptors are assumed to be located directly down-gradient from the source, parallel with direction of ground water flow. The following approximations were utilized in the Domenico Model: 1) width of source perpendicular to groundwater flow (20 m), vertical thickness of source (3 m), and 3) fraction organic carbon content (0.0030 g/g) based on the detected value of TOC (2,960 mg/kg) and a non-detected value of TPH-3550, based on previous soil quality assessments. The Domenico Model data sheets are included in Appendix IV.

Based on SCDHEC recommended guidelines, the estimation of SSTLs is a two step procedure: First, for each COC, an asymptotic relationship of concentration versus time is developed through the Domenico equation to estimate the maximum concentration that can be reached at the receptor given a continuous source. The dissolved concentration at the source for each COC was estimated as follows: benzene (23,000 ug/l), toluene (27,000 ug/l), ethylbenzene (3,000 ug/l), xylenes (15,000 ug/l), MTBE (2,000 ug/l), and naphthalene (1,000 ug/l). These estimates were based on the detected dissolved concentrations in wells MW-1, MW-2 and MW-5. Second, for estimation of the SSTL for each COC, a second asymptotic relationship is developed for concentration versus time through the inverse of the Domenico equation to estimate the minimum concentration (SSTL) at the source. The Domenico Model data sheets are included in Appendix IV and the estimated SSTLs for each COC are summarized and in Table 3.

#### 5.4.3 Dermal Contact/Vapor Inhalation Pathway Analysis

Because the site is capped with concrete and no current or future plans exist for an on-site excavation, no apparent pathway exists for dermal contact (groundwater or soil). Therefore, SSTLs were not estimated for this pathway. Similarly, because no exposure pathway is apparent for vapor inhalation, SSTLs were not estimated for this pathway.

## 6.0 COMPUTER FATE AND TRANSPORT MODELING

Computer fate and transport modeling was performed utilizing the American Petroleum Institute Risk/Exposure Assessment Decision Support System (API/DSS). A fate and transport model was developed for benzene, toluene, ethylbenzene, xylenes, MTBE and naphthalene. For each model, the source is defined as the dissolved contaminant plume in the area of wells MW-1, MW-2 and MW-5. The model was constructed with the assumption that the two receptors are located hydraulically downgradient from the source and parallel with the direction of ground water flow. The dimensions of the dissolved contaminant plume were estimated as follows: 20 meters (parallel to ground water flow direction), by 20 meters (perpendicular to ground water flow direction), by 3 meters (vertical extent of contaminant source). The source of contaminants was defined as an instantaneous release. The amount of each chemical released instantaneously (Dahmanl, 1992) was defined as follows: benzene (30 kg), toluene (40 kg), ethylbenzene (8 kg), xylenes (30 kg), MTBE (2 kg), and naphthalene (4 kg). The amounts of COC at instantaneous release are assumed and are used in the fate and transport model strictly for empirical purposes and are not indicative of any actual known release of petroleum product. Longitudinal, transverse, and vertical dispersivity values were calculated in accordance with SCDHEC suggested formulae. The distance from source to receptor was estimated at 75 meters. A value for fraction organic carbon was calculated using a TOC concentration of 2,960 mg/kg and a non-detected concentration of TPH-3550. The results are summarized in Table 4. The modeling data sheets are included in Appendix V.

To augment the data obtained from the API/DSS fate and transport analysis, the Domenico equation was utilized for estimating maximum time of travel and maximum concentration at receptor for each COC. The calculations were performed with the same input parameters utilized for calculating the SSTLs for each COC as described in Section 5.4.2, Groundwater Ingestion Pathway Analysis. Values for maximum time and maximum concentration for each COC are estimated as the complimentary error function (*erfc*) in the Domenico equation approaches zero. The Domenico equation data sheets for maximum values of time and concentration are included in Appendix VI.

The results of the API/DSS fate and transport analysis, as augmented by the Domenico equation are discussed below:

Benzene – A dissolved concentration of 6 ug/l reaches the receptor at 7 years. A maximum concentration of 1,190 ug/l reaches the receptor at 27 years. At 100 years, the concentrations decrease to value a value of 22 ug/l.

Toluene – A dissolved concentration of 1,000 ug/l reaches the receptor at 26 years. A maximum concentration of 1,210 reaches the receptor at 33 years. After 47 years, the concentrations decrease to values below RBSL (1,000ug/l).

Ethylbenzene – A maximum concentration of 204 ug/l reaches the receptor at 41 years. The concentrations do not exceed RBSL (700 ug/l).

Xylenes – A dissolved concentration of 269 ug/l reaches the receptor at 100 years, the time limitation of the API/DSS model. The concentrations will most likely increase to a maximum 925 ug/l in 165 years based on the Domenico equation (Appendix VI). The concentrations are not expected to exceed RBSL (10,000 ug/l).

MTBE – A dissolved concentration of 36 ug/l reaches the receptor at 7 years. A maximum concentration of 152 ug/l reaches the receptor in 14 years. After 32 years, the concentrations decrease to values below RBSL (40 ug/l).

Naphthalene – A dissolved concentration of 2 ug/l reaches the receptor at 100 years, the time limitation of the API/DSS model. The concentrations will most likely increase to a maximum 62 ug/l in 370 years based on the Domenico equation (Appendix VI).

## 7.0 CONCLUSIONS AND RECOMMENDATIONS

Based on the defined source (the dissolved COC of wells MW-1, MW-2 and MW-5) and exposure point/receptor analysis, further action may be advisable for the Country Club Shell facility. The further action should address mitigation of the dissolved component of COC in ground water to levels below the estimated SSTLs. Compliance monitoring of the contaminant plume to ensure that the dissolved COC concentrations do not increase is recommended pending mitigation of the dissolved contaminant plume. A Tier III evaluation in the form of a Corrective Action Plan (CAP) is recommended for the site.

## 8.0 REFERENCES

American Petroleum Institute, 1994, "Risk/Exposure Assessment Decision Support System (DSS)", Version 1.0 (computer software, copyright May, 1994).

Dahmani, M.A., K. Forster, D.P. Ahlfeld, G.E. Hoag, and R.J. Carley, 1992, "Evaluation of TCLP for Gasoline-Contaminated Soils", Proceedings of the Conference entitled Petroleum Hydrocarbons and Organic Chemicals in Ground Water: Prevention, Detection and Restoration, Eastern Regional Ground Water Issues, November 4-6, 1992, Houston, TX, pp. 19-33.

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South Carolina Department of Health and Environmental Control, January 1998, Columbia, SC. "Risk-Based Corrective Action for Petroleum Releases". (technical guidance document), 11p.

# **EXPOSURE ANALYSIS**

**EXPOSURE PATHWAYS - CURRENT LAND USE**

Country Club Shell  
Summerville, South Carolina  
Site ID #12097

Selection of exposure pathways is based on the following site conceptual model: Source of COC - release of petroleum fuels from leaking UST, groundwater contains levels of COC in excess of RBSL. Current and Expected Use of Land and Groundwater - The site is a former petroleum fuels retail facility from which USTs have been removed. Surrounding properties are commercial, residential and undeveloped. Site and surrounding properties are serviced with public water supply, water table is 1.5 to 2.5 feet below land surface. Receptors - apparent water supply well 250 feet south, wetlands area 250 feet west-northwest.

Potentially Exposed Population	Exposure Point, Medium, and Exposure Point	Pathway Selected For Evaluation?	Reason for Selection or Non-Selection
Off-site Resident	Ingestion of ground water from impacted water well	No	Off-site properties are serviced by public water supply
	Direct contact with surface soil	No	Off-site soils have not been influenced from on-site source
	Inhalation while showering	No	Serviced by public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	Yes	However unlikely, volatiles could enter sanitary sewer due to shallow water table
On-Site Resident	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	No	Surface soils are non-influenced
	Inhalation while showering	No	Site is serviced with public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	No	No on-site residents
Worker	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	No	Surface soils are non-influenced
	Inhalation while showering	No	Public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	Yes	However unlikely, volatiles could enter sanitary sewer due to shallow water table
Visitor	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	No	Surface soils are non-influenced
	Inhalation while showering	No	Public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	Yes	However unlikely, volatiles could enter sanitary sewer due to shallow water table

**EXPOSURE PATHWAYS - FUTURE LAND USE**

Country Club Shell  
Summerville, South Carolina  
Site ID #12097

Selection of exposure pathways is based on the following site conceptual model: Source of COC - release of petroleum fuels from leaking UST, groundwater contains levels of COC in excess of RBSL. Current and Expected Use of Land and Groundwater - The site is a former petroleum fuels retail facility from which USTs have been removed. Surrounding properties are commercial, residential and undeveloped. Site and surrounding properties are serviced with public water supply, water table is 1.5 to 2.5 feet below land surface. Receptors - apparent water supply well 250 feet south, wetlands area 250 feet west-northwest.

Potentially Exposed Population	Exposure Point, Medium, and Exposure Point	Pathway Selected For Evaluation?	Reason for Selection or Non-Selection
Off-site Resident	Ingestion of ground water from impacted water well	Yes	Water supply well could be installed for potable water supply
	Direct contact with surface soil	No	Off-site soils have not been influenced from on-site source
	Inhalation while showering	Yes	Water supply well could be installed
	Dermal contact while showering	Yes	" "
	Inhalation of volatiles	Yes	" "
On-Site Resident	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	No	No residents on-site
	Inhalation while showering	No	Site is serviced with public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	No	No on-site residents
Worker	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	Yes	Future excavation could expose impacted soils
	Inhalation while showering	No	Public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	Yes	Future excavation could expose impacted soils
Visitor	Ingestion of ground water	No	Site is serviced with public water supply
	Direct contact with surface soil	Yes	Future excavation could expose impacted soils
	Inhalation while showering	No	Public water supply
	Dermal contact while showering	No	" "
	Inhalation of volatiles	Yes	Future excavation could expose impacted soils

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DORCHESTER )  
 )  
 Michael T. McCoy and Arcada )  
 J. McCoy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Greenwave Enterprises, Inc., )  
 d/b/a Greenwave Amoco I, )  
 Al C. Browder, Jr., a/k/a Al )  
 C. Browder; Kelly J. Browder; )  
 Douglas M. Miles and South )  
 Carolina Department of Health )  
 and Environmental Control )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C/A NO.: 2007-CP-18-01914

**BROWDER DEFENDANTS'  
 RESPONSE TO DEFENDANT MILES'  
 MOTION FOR RECONSIDERATION  
 AS TO THE AWARD OF COSTS AND  
 EXPENSES TO THE BROWDER  
 DEFENDANTS**

The Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I, Al C. Browder, Jr., a/k/a Al C. Browder, and Kelly J. Browder (hereinafter "Browder Defendants") through their undersigned counsel, submit this Response in opposition to Defendant Miles' Motion for Reconsideration, filed on December 29, 2011, and received on January 4, 2012.

In his Motion for Reconsideration, Defendant Miles indicates that the May 1998 Rapid Assessment Report (Exhibit 10, Browder Defendants' Memorandum in Support of Motion for Summary Judgment<sup>1</sup>) states that the property located at 500 Boonehill Road and at issue in the present case (known at that time as Country Club Shell) (hereinafter "Property") "was remediated with the offending tanks removed." While the underground storage tanks from which the release at the Property occurred were removed from the Property in 1992, the Rapid

<sup>1</sup> Exhibits referenced herein are the Exhibits to Browder Defendants' Memorandum in Support of Motion for Summary Judgment.

Assessment Report does not conclude that remediation of the Property had been completed. In fact, the Rapid Assessment Report's Conclusion and Recommendations Section states:

Based on the defined source (the dissolved COC of wells MW-1, MW-2 and MW-5) and exposure point/receptor analysis, further action may be advisable for the Country Club Shell facility. The further action should address mitigation of the dissolved component of COC in ground water to levels below the estimated SSTLs. Compliance monitoring of the contaminant plume to ensure that the dissolved COC concentrations do not increase is recommended pending mitigation of the dissolved contaminant plume. A Tier III evaluation in the form of a Corrective Action Plan (CAP) is recommended for the site.

(Exhibit 10, §7.0, p. 11) (emphasis added)

As documented in the South Carolina Department of Health and Environmental Control's (hereinafter DHEC) overview of activities associated with the cleanup of the petroleum release at the Property (Exhibit 5), on-site remediation activities conducted after the issuance of the Rapid Assessment Report, are still being conducted today, and will be conducted in the future. The DHEC October 7, 2011 letter forwarding analytical results of the August 2011 sampling event states, "[t]wo AFVR [Aggressive Fluid and Vapor Recovery] events will be conducted in the source area within the next 2 to 3 months" and "[a] ground-water sampling event will be conducted approximately six months from the last sampling event." (Exhibit 13)

The undisputed facts relevant to the issues presented to the Court are: 1) DHEC began investigating the release of petroleum products on the Property in 1989; 2) DHEC conducted investigation and remediation activities continuously up to and including the time Defendant Miles executed the Commercial Real Estate Purchase Agreement on May 4, 2004<sup>2</sup> (Agreement); 3) through execution of the Agreement, Defendant Miles asserted he was aware of no ongoing

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<sup>2</sup> Defendant Miles' Motion for Reconsideration incorrectly states the Commercial Real Estate Purchase Agreement was entered on October 11, 2005; however, it appears that date is merely the date of expiration of the attesting Notary's commission and not the date the Agreement was entered.

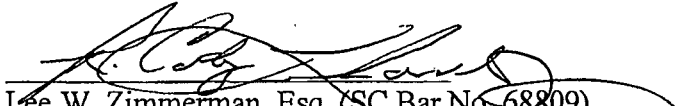
investigation at the Property; 4) prior to and at the time of execution of the Agreement, Defendant Miles was fully aware and knowledgeable of the ongoing investigation and remediation activities being conducted by DHEC at the Property; 5) at the time of execution of the Agreement there was an outstanding request from DHEC to Defendant Miles to reinstall five monitoring wells on the Property that were "essential to the rehabilitation activities being conducted at this facility" (Exhibit 14); 6) the wells were not reinstalled until September 2004, after Miles transferred the Property to the Browders; 7) investigation and remediation activities have been on-going at the Property since transfer of the Property to the Browders (Exhibit 5); and, 8) investigation and remediation activities will continue to take place on the Property in the future. (Exhibit 13).

Based on the forgoing undisputed facts, the Browder Defendants request that this Court deny Defendant Miles' Motion for Reconsideration.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

BY:

  
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J. Browder, Greenwave Enterprises, Inc. d/b/a  
Greenwave Amoco I.*

Charleston, South Carolina  
Dated: January 9, 2012

State of South Carolina )  
County of Barnwell )

Court of Common Pleas  
2007-CP-18-01914

Michael T. McCoy, et al., )  
Plaintiffs )  
vs. )  
Greenwave Enterprises, Inc., )  
et al., )  
Defendants )

Transcript of Record

February 6, 2012  
Barnwell, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

G. Waring Parker, Esq.  
Attorney for the Plaintiffs

R. Cody Lenhardt, Jr., Esq.  
Lee W. Zimmerman, Esq.  
Attorneys for the Defendants

Lisa H. Davenport, RPR  
Official Court Reporter

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I N D E X   O F   W I T N E S S E S

Statement by Mr. Parker.....	3
Statement by Mr. Lenhardt, Jr.....	5

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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(None offered)

1 (Whereupon, on February 6, 2012 the following  
2 proceedings were held:)

3 THE COURT: All right. Gentlemen, I have a motion to  
4 reconsider my order granting summary judgment which  
5 included some fees and costs; is that correct?

6 MR. PARKER: That's correct, Your Honor; very  
7 limited.

8 THE COURT: Yes, sir.

9 MR. PARKER: Your Honor, I just wanted to point out  
10 very briefly that Mr. Miles and the Browders entered into  
11 a contract to sell the Greenwave Amoco I think it was on  
12 May 4, 2004. At that time the underground -- old  
13 underground storage tanks had already been replaced, new  
14 ones put down, and a new station built. There were  
15 monitoring wells there without any doubt.

16 In 2004 I doubt that anybody was aware that gas had  
17 leaked out of those old tanks, had formed a plume, and  
18 gone under the McCoy's property who are the plaintiffs in  
19 this case. The plaintiffs signed an agreement to sell  
20 their property I believe it was on January 26 of 2007 --  
21 some three years after the station was sold and it wasn't  
22 until later on that year that Summerville Homes who had  
23 signed the contract to purchase the property realized that  
24 it was underground water contamination; so they used that  
25 as an escape clause to get out of the contract and that

1 led up to this lawsuit filed against Greenwave Amoco, the  
2 Browders, and Doug Miles.

3 My contention is that reading the agreement between  
4 Miles and the Browders -- and let me back up just one  
5 second. Since the Browders took over running the  
6 Greenwave Amoco it's operated continuously. There's been  
7 no threatened action prior to that or subsequent to that  
8 that DHEC that DHEC was going to shut them down or anybody  
9 else would shut them down and it wouldn't affect the  
10 business operations and I don't think there is anything in  
11 that agreement that would allow them to prevail on an  
12 award of attorney's fees and costs and I agree with Your  
13 Honor in dismissing the Browders and Greenwave Amoco from  
14 the suit, but I still think that the agreement between  
15 Miles and the Browders certainly was neither in  
16 contemplation of either party that the contaminants had  
17 gone across the road onto the McCoy's property.

18 So, not anything being in that agreement and neither  
19 party having been aware that the contaminants had spread  
20 beyond the Greenwave Amoco, I just -- I don't think that  
21 it was appropriate to ---

22 THE COURT: Well, you take the position it's sort of  
23 like a foreclosure action. If the mortgage and or note  
24 does not call for attorney's fees and there is no  
25 contractual obligation to pay attorney's fees then you're

1 not entitled to it and the only way you're entitled to it  
2 is by either the statute and/or contract and there was  
3 absent any of that in this situation basically is what  
4 you're saying?

5 MR. PARKER: That's's what I am saying, Your Honor.  
6 It just doesn't fit with any of the catch-all phrases in  
7 the contract that would allow the Browders to recoup their  
8 costs.

9 THE COURT: Okay. Let me hear from the Browders.

10 MR. LENHARDT, JR.: Thank you, Your Honor. Cody  
11 Lenhardt here on behalf of the Browder defendants. I  
12 would just in response to what counsel has raised with  
13 regard to costs and attorney's fees and costs and expenses  
14 that were awarded at the motion for summary judgment,  
15 clearly the contract -- we're not -- have never been in a  
16 position that the contract stipulates that attorney's fees  
17 would be recoverable. Our position with regard to the  
18 attorney's fees is those are costs and expenses that would  
19 not have been incurred by our client but for the breach of  
20 contract action -- the breach of contract by Doug Miles --  
21 by the defendant -- and as arising out of the lawsuit that  
22 we were then subjected to by the plaintiffs in this case  
23 our client has had to be out of pocket ---

24 THE COURT: Well, what -- There is no contract that  
25 allows for attorney's fees, is there?

1 MR. LENHARDT, JR.: None.

2 THE COURT: Do you know of any statutory provision  
3 that allows for it?

4 MR. LENHARDT, JR.: I do not know of a statutory  
5 provision that provides for attorney's fees in this case;  
6 however, I would point to a recent case from the South  
7 Carolina Court of Appeals which provided that attorney's  
8 fees were recoverable in an action where but for the  
9 action of a third-party action -- in this case the lawsuit  
10 by the plaintiffs against our client -- that attorney's  
11 fees were recoverable in the action.

12 THE COURT: Have you got a copy of that case? I'm  
13 not aware of it.

14 MR. LENHARDT, JR.: I do ---

15 THE COURT: Your lawyer behind you does. That was  
16 just decided -- Gracious me, this is hot off the press.

17 MR. LENHARDT, JR.: Yes, Your Honor.

18 THE COURT: No wonder I hadn't heard of it. It was  
19 decided this week. With a huge notice -- this opinion has  
20 not been released for publication.

21 MR. LENHARDT, JR.: And, Your Honor, I would also  
22 point out that we are not seeking to recover fees or  
23 attorney's fees related to the cross-claim against  
24 counsel's client. We're trying to recover the costs to  
25 defend the action brought against our client by the

1 plaintiffs in this case; so it's a cost -- We're taking  
2 the position that it's a cost that but for the breach of  
3 contract that our client would not have had to incur to  
4 defend against the plaintiff's claim.

5 THE COURT: And you say this case that you've just  
6 handed me that was just decided five days ago, six days  
7 ago, Solley, S-O-L-L-E-Y, versus Navy Federal Credit Union  
8 gives me some --

9 MR. LENHARDT, JR.: I believe ---

10 THE COURT: -- reason to allow it in this case?

11 MR. LENHARDT, JR.: I believe it sets up a new rule  
12 that -- or a ruling -- it is a ruling that would provide  
13 some support for the position that we've taken in the case  
14 that the claim -- the cost and expenses and recovery of  
15 attorney's fees, it's not purely attorney's fees but a  
16 cost that our client had to incur -- real damage to our  
17 client.

18 THE COURT: All right.

19 MR. LENHARDT, JR.: Also, Your Honor, just in  
20 response to the motion to reconsider, it appears to me  
21 that as it's styled the motion is a motion to reconsider  
22 and the motion itself doesn't stipulate which rule it's  
23 been brought pursuant to. I certainly understand that a  
24 motion to reconsider is generally a 59(e) motion, but in  
25 this case counsel has asked for relief from a judgment.

1 The award of costs and damages would certainly sound to be  
2 a 60(b) motion.

3 THE COURT: Well, I hadn't awarded the amount of  
4 attorney's fees, have I?

5 MR. LENHARDT, JR.: Correct. No, Your Honor, and  
6 that was to be handled in a separate hearing on damages.

7 THE COURT: Well, I think it is properly before me.  
8 At least I knew what he was here for. I thought I knew  
9 what he was here for. He argued what I thought he was  
10 here for.

11 You're right. The judgment has not in effect -- in  
12 effect has not been entered because I haven't made a --

13 MR. LENHARDT, JR.: Correct.

14 THE COURT: -- finding as to the amount; so it would  
15 be a --

16 MR. LENHARDT, JR.: Yes, sir.

17 THE COURT: -- motion to reconsider or -- That's all  
18 it could be right now.

19 MR. LENHARDT, JR.: And to that point I believe, you  
20 know, as Your Honor is certainly aware, a 59(e) motion to  
21 reconsider is for an issue of preservation on appeal.

22 THE COURT: That's correct.

23 MR. LENHARDT, JR.: And I don't believe that anything  
24 that's been raised today or in counsel's motion raises any  
25 issue that was raised and not ruled on by this court. It

1 is simply re-litigating the issues that were before the  
2 court on summary judgment as to whether or not there was a  
3 genuine issue of material fact. The contract itself is  
4 quite clear and unambiguous with regard to whether the  
5 seller has knowledge or had knowledge at the time of the  
6 contract that there was an investigation ongoing. It says  
7 -- The seller represented that he had no knowledge. The  
8 undisputed facts are clear that he had knowledge that  
9 there was an investigation ongoing and that, frankly, that  
10 investigation is still ongoing to this date; so I -- You  
11 know, with the position that there is a genuine issue of  
12 material fact or that the court should reconsider it, that  
13 was done at summary judgment. Any issues with regard to  
14 that were raised and ruled on by this court.

15 THE COURT: Well, the case that you've handed up to  
16 me is -- it says about what I just said. It says that  
17 absent a contract, statute, or recognized ground of equity  
18 the prevailing party does not recover attorney's fees as  
19 costs of litigation and in this case there is -- I guess  
20 what they say it's a ground of equity because this is a  
21 slander of title.

22 MR. LENHARDT, JR.: Correct.

23 THE COURT: They say in some situations there is --  
24 attorney's fees can be special damages in malicious  
25 prosecution, slander of title, and those sorts of things;

1 so it's basically what I said except this one is a slander  
2 of title which allowed -- All right.

3           Gentleman, what I am going to do is I am going to --  
4 Obviously, I just glanced at this case you handed up here.  
5 Let me have time to digest it and there is also a big  
6 issue on election of remedies. We just had that in a case  
7 we just tried in the week before last on a legal  
8 malpractice case. Let me look at this case.

9           Gentlemen, if y'all want to provide anything  
10 additional to what you've already sent me, I'll look at  
11 it. If not, I'll try to get a ruling in the next two  
12 weeks.

13           MR. PARKER: Your Honor, just one other bookkeeping  
14 thing, I guess --

15           THE COURT: Yes, sir.

16           MR. PARKER: -- housekeeping thing. I don't know how  
17 you're going to rule, but if it goes my way it won't be a  
18 problem, but if it doesn't go my way, would the amount of  
19 the damages be litigated when we have this trial at the  
20 end of the month or will we have to come back before you  
21 to establish the amount of the damages?

22           THE COURT: Well, I assume it'll be the fees that you  
23 caused him to incur allegedly and normally the way I do  
24 that I'll allow him to send me an itemized affidavit as to  
25 what he's done and let you look at it and then if you want

1 to have a hearing to contest those damages or to question  
2 them on the propriety of the damages, then that's a  
3 necessity. I say damages -- the fees. Obviously, I'll be  
4 more than happy to give you an opportunity to cross  
5 examine him on that, but if I rule against you then we got  
6 to establish the amount. I'll let him provide an  
7 affidavit, let you look at it. If you want to question  
8 him on the affidavit, I won't make a ruling on the amount  
9 until you've had an opportunity to cross examine him  
10 and/or present your own witnesses as to whether or not the  
11 fees are in line or whatever like any typical attorney's  
12 fees dispute.

13 MR. LENHARDT, JR.: Your Honor, just to make sure I'm  
14 clear, is the issue then that the court would be taking  
15 under advisement is just the award of damages ---

16 THE COURT: It is 59(e).

17 MR. LENHARDT, JR.: Just ---

18 THE COURT: Just 59(e).

19 MR. LENHARDT, JR.: Okay. But as to the award of  
20 damages as to whether or not caused ---

21 THE COURT: If I disagree with him and maintain what  
22 I've already ruled on --

23 MR. LENHARDT, JR.: Correct.

24 THE COURT: -- then you'll submit an affidavit with  
25 the amount of fees and costs to him. If he wants to cross

1 examine you or have a hearing on it, we'll be glad to do  
2 so. It may be such a small amount that he won't contest  
3 it.

4 MR. PARKER: I don't think so. As a matter of fact,  
5 I know so.

6 THE COURT: Well, I know who they work for; so I sort  
7 of agree with you.

8 MR. PARKER: I've already got an inkling.

9 THE COURT: I am saying that with all due respect.

10 MR. LENHARDT, JR.: I understand; absolutely.

11 THE COURT: No, but if I rule for him, then,  
12 obviously, I won't need to know the amount.

13 MR. PARKER: The name of the case, Cody, that you  
14 just passed up?

15 THE COURT: It is this: Solley, S-O-L-L-E-Y, versus  
16 Navy Federal Credit Union. Here's the cite: 2012 WL -- I  
17 assume that's Westlaw -- 288501.

18 MR. PARKER: Thank you, Your Honor.

19 THE COURT: 288501.

20 MR. LENHARDT, JR.: Your Honor, to that case I think  
21 what we're trying to assert is that it just shows that  
22 there is a logic to separating out the attorney's fees  
23 related to our defense of -- I mean our claim against  
24 Mr. Miles versus the attorney's fees and costs incurred to  
25 defend the action by the plaintiffs.

1 THE COURT: I understand.

2 MR. PARKER: Of course, I can't comment on it because  
3 I hadn't seen it, Your Honor; so...

4 THE COURT: Well, it basically just says what I said  
5 a while ago except there's some exceptions under equity  
6 which allow it. I'm not sure just a general contract  
7 action falls within that section, but I'll look at it and  
8 go from there.

9 MR. LENHARDT, JR.: Thank you, Your Honor.

10 THE ATTORNEY: Thank you, Your Honor.

11 (End of Transcript of Record.)

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February 8, 2012

Lee W. Zimmerman

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Via E-mail (dearlylc@sccourts.org)

The Honorable D. A. Early, III  
Circuit Court of the Second Judicial Circuit  
Post Office Box 90  
Bamberg, South Carolina 29003

Re: McCoy vs. Greenwave Enterprises, Inc., et al.  
CA No. 2007-CP-18-1914

Dear Judge Early:

At the conclusion of the February 6, 2012 hearing concerning Defendant Miles's Motion for Reconsideration, you provided the parties with the option of submitting documentation supporting their position to the Court. In support of the Browder Defendants' position that the Browder Defendants are entitled to recover from Defendant Miles their costs and expenses, including attorneys' fees, incurred in defending the action brought against them by the Plaintiffs, the Browder Defendants refer the Court to the opinions of the South Carolina Supreme Court in *Addy vs. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), and *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992), *aff'ing*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). Copies of these three opinions are attached. The logic supporting the decision in *Solley v. Navy Federal Credit Union*, No. 49387, 2010 WL 288501 (S.C. Ct. App. Feb. 1, 2012), handed up to this Court during the hearing, to award attorneys' fees as damages is borne out in *Addy* and *Town of Winnsboro*, as explained below.

In *Addy*, the Supreme Court held the landlords, who successfully defended a suit brought by their tenants for damages sustained in a fire negligently caused by the general contractor the landlords hired, were entitled to recover their costs and attorneys' fees from the general contractor. The Court concluded where "the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." *Id.* at 34, 183 S.E.2d at 710.

In *Town of Winnsboro*, the Supreme Court, citing *Addy* among other cases, noted the Court has long recognized the principle of equitable indemnification and held the recovery of costs and attorneys' fees is allowed "when as a result of the defendant's breach of contract or tortious activity the plaintiff is required

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to either defend itself or bring an action against a third party. The attorney fees and costs must be the natural and necessary consequence of the defendant's act." *Id.* at 132, 414 S.E.2d at 121 (internal citations omitted). Here, Miles's breach of the contract resulted in the Browder Defendants being forced to defend themselves in an action brought by a third party. The costs and expenses incurred in the defense of that lawsuit are the natural and necessary consequence of Miles's breach.

Based on the legal authorities cited in this letter and in the attached decisions of the South Carolina Supreme Court and Court of Appeals, the Browder Defendants respectfully request that this Court deny Defendant Miles's Motion for Reconsideration and hold that the Browder Defendants are entitled to recover their costs and expenses, including their attorneys' fees, incurred in defending the action brought against the Browder Defendants by the Plaintiffs in this case.

Respectfully submitted,

MCNAIR LAW FIRM, P. A.,



Lee W. Zimmerman

LWZ/rwm  
Attachments

cc: G. Waring Parker, Esquire (via e-mail [gwarinparker@bellsouth.net](mailto:gwarinparker@bellsouth.net))

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
JAN 17 2013  
SC COURT OF APPEALS

Appeal from Dorchester County  
Court of Common Pleas

The Honorable D. A. Early, III

Case No. 2007-CP-18-01914

Michael T. McCoy and Arcada J. McCoy, .....Plaintiffs,

v.

Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I;  
Al C. Browder, Jr., a/k/a Al C. Browder; Kelly J.  
Browder; Douglas M. Miles and South Carolina  
Department of Health and Environmental Control ..... Defendants,

of whom Greenwave Enterprises, Inc., d/b/a Greenwave  
Amoco I; Al C. Browder, Jr., a/k/a Al C. Browder; and Kelly J.  
Browder are ..... Appellants,

and

Douglas M. Miles is ..... Respondent.

**CERFITICATE OF COUNSEL**

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

Respectfully submitted,

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By: *Lee W. Zimmerman*  
Lee W. Zimmerman

Attorneys for Appellants

January 17, 2012

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Dorchester County  
Court of Common Pleas

The Honorable D.A. Early, III

Case No. 2007-CP-18-01914

RECEIVED

JAN 17 2013

SC Court of Appeals  
Plaintiffs

Michael T. McCoy and Arcada J. McCoy, ..... Plaintiffs

v.

Greenwave Enterprises, Inc., d/b/a Greenwave Amoco I; Al  
C. Browder, Jr., a/k/a Al C. Browder; Kelly J. Browder;  
Douglas M. Miles and South Carolina Department of  
Health and Environmental Control ..... Defendants,

of whom Greenwave Enterprises, Inc., d/b/a Greenwave  
Amoco I; Al C. Browder, Jr., a/k/a Al C. Browder; and  
Kelly J. Browder are ..... Appellants,

and

Douglas M. Miles is ..... Respondent.

**CERTIFICATE OF SERVICE**

I, ElizaBeth A. Blich, do hereby certify that I have this date served one (1) copy of the Record on Appeal upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid, properly affixed thereto and addressed as follows:

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Hart Hyland Shepherd, LLC  
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Summerville, South Carolina 29484.

*ElizaBeth A. Blich*  
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January 17, 2012

Columbia, South Carolina