THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Robert E. Watson, Circuit Court Judge

Appellate Case No. 2013-000394
Case No. 2009-CP-08-3890

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

vs.

RI CS5, LLC.....Respondent,

and

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

Initial Brief of Appellant

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STATEMENT OF THE CASE

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

STATEMENT OF FACTS

This matter arose on the application of Respondent who was a prevailing party in a condemnation case for an Order taxing its litigation costs including attorney fees against the condemnor under S.C. Code Ann. §28-2-510 (B)(1). R.p. ___ (application for fees) Both parties submitted memoranda and a hearing was held in open court in Moncks Corner on October 2, 2012, where counsel for each party presented their arguments for and against the award of fees. R.p. ___. (Fee memoranda) At the hearing, prior to the opportunity for condemnor's counsel to be heard, the judge announced his decision that he would award fees and deny the condemnor's request that he not. R.p. ___ (fee hearing transcript, p. 8) The hearing was followed by a written order signed February 4, 2013, where the court awarded fees and costs in the amount of $126,730.82 based on the finding of a reasonable hourly rate of $350.

The underlying condemnation case involved the acquisition of 0.391 acres on Live Oak Boulevard in Moncks Corner constituting the entire parcel owned by the landowner. The parcel was improved by a Scotchman convenience store operated by other condemnee Worsley Operating Corporation. The acquisition was for the purpose of widening U.S. Route 17A. R.p. ___ (trial transcript pp. 43-54) At the trial, presided over by the Honorable Robert E. Watson without a jury, testimony was given by Mr. Robert Michael Pfieffer, Executive Vice President, General Counsel, and Corporate Secretary of Realty Income, the corporate parent of the landowner, RI CS5, Mr. Thomas F. Hartnett, appraisal expert for the landowner, and Charles F. Crider and David Graydon, appraisal experts for the Department. Mr. Hartnett testified to the value of the acquisition as

$900,000. Mr. Crider's opinion of value was $201,000. Mr. Graydon's value was $351,000. R.p. ___, ___, and ___ (Final Order and Judgment, pp. 6, 7, 9)

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

ARGUMENT

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

In his interpretation of the condemnation fee shifting statute, S.C. Code Ann. §28-2-510 (B) (Rev. 2007), the trial judge conflated the definition of "prevailing party" therein with language permitting the court to reduce or deny fees to such a party where the condemnor's litigating position is found to be "substantially justified." This interpretation has the effect of nullifying the "substantially justified" language--a view that the court appears to endorse by reference to an opinion of this Court, S.C. Dep't. of Transp. v. Revels, 399 S.C. 423, 731 S.E.2d 897 (Ct. App. 2012), for the proposition that attorney fees are "consistently allowed" because §28-2-510 (B) "shifts the source of the prevailing party's attorneys' fees to the losing party." R.p. ___ (Order on Fees). Because the court's award of fees was grounded on this erroneous conclusion of law, the Order constitutes an abuse of discretion.

The court's interpretation violates the basic rules of statutory construction: 1) In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. Sloan Construction Company, Inc. v. Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011); TNS Mills v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); and 2) In construing a statute, a court must presume that the legislature did not intend a futile act, but rather intended its statutes to accomplish something. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008); Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008). The condemnor was entitled to have the court hear and consider its opposition to fees under all parts of the governing statute and failure to do so was error.

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

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

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

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

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

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

Our Supreme Court has based its consideration of the term "substantially justified" in another South Carolina fee-shifting statute, the "State action" statute, S.C. Code Ann. §15-77-300 (Supp. 2012), on the U.S. Supreme Court's interpretation of similar language in the main federal fee-shifting statute involving the government, the Equal Access to Justice Act, 28 U.S.C.A. § 2412.[1] Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990); see, also, Video Gaming Consultants, Inc. v. S.C. Dep't. of Revenue, 358 S.C.647, 595 S.E.2d 890 (Ct. App. 2004). That statute, enacted in 1980, provides in part,

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

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

In Heath, our Supreme Court noted,

> In Pierce [v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)], the Supreme Court discussed the definition of "substantial justification" in the context of attorney's fees and determined that this term does not mean "'justified to a high degree', but rather 'justified in substance or in the main'-that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2250. To say that there was no substantial justification is not the same as a determination that a claim was frivolous. Therefore, a court need not go so far as to brand a claim "frivolous" in order for it to be found to be without substantial justification. Pierce v. Underwood, 108 S.Ct. at 2251.

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

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

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

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

> in other words, such position must be sufficiently colorable to engender "genuine dispute."

32 Am. Jur. 2d Federal Courts, §260.

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

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

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

> All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.
>
> Irrespective of the method adopted for the ascertainment of such value, it is incumbent on the condemnor to endeavor to reach a result that is truly "just compensation," that is, fair to the public as well as to the owner of the property taken.

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

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

Mr. Hartnett testified that his analysis indicated a value for the property under the sales comparable approach as $444,500. R.p. ___ (Trial Tr. 108) However, in his reconciliation of the values, he gave greater weight to the capitalization of income approach using the existing lease and discounting the capitalized rent for certain reasons. His opinion was that the property was worth $900,000. R.p. ___ (Trial transcript, page 110)

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

Mr. Michael Robert Pfeiffer, executive vice president of the landowner's parent company, Realty Income Corporation, testified at trial as to the background of his company's acquisition of the real estate and the process followed for valuing it and determining rental rates. At some point in 2008, a company, Sun Capital, approached Realty Income concerning its desire to purchase 75 convenience stores owned and operated the Worsley Companies. R.p. ___ (Trial Tr. 23) Sun Capital is a private equity

company located in Boca Raton, Florida. Sun and Realty Income have had a long-term and geographically wide landlord-tenant relationship involving acquisitions of convenience store companies. Sun is not in the business of owning realty but only the operating business of convenience stores. Thus, Sun asked Realty Income to purchase the land and improvements and lease it back to them. R.p. ___ (Tr. 24-29) Realty Income then closed on a purchase of all the properties of Worsley for $65,350,000. Thereafter, Realty Income allocated the total purchase price among the properties with the result that it valued the Moncks Corner store property at $1.15 million. R.p. ___(Tr. 32-33) Realty Income then determined that it required a rate of return of 8.9% and applied that percentage to the allocated values of each of the stores. R.p. ___ and ___ (Tr. 41 and 69) The result was that the rent set for the Moncks Corner store was $8,517.67 per month to be increased periodically per the CPI. R.p. ___ (Trial Tr. 41)

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

In his conclusion under the income approach to value, Mr. Hartnett utilized the existing rent then capitalized that amount to find a value. This circular valuation method is flawed because the rents used were grounded on an arbitrary property value in the first place.

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

Finally, we note that in his Order, the trial judge stated as justification for his award of the high rate of fees that "this case involved a relatively novel issue of law in

South Carolina." R.p. ___ (Fee Order, p. 2) However, the judge did not attempt to reconcile this finding with an explanation of how one of the two points of view in a debate over a "novel issue of law" could be considered unsubstantial. In Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004), this Court denied fees to the plaintiff on the grounds that the litigating position of the State was substantially justified. The Court stated,

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

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

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

Under S.C. Code §28-2-510 (B), the trial court may reduce of deny an award if, inter alia, it finds special circumstances which would make an award unjust. The landowner's size and capability of funding its own litigation costs is such a special circumstance. As the trial judge expounded in his order on just compensation, Realty Income, the parent of landowner RICS5, LLC, is a large publicly-owned real estate investment trust based in Escondido, California. It has paid dividends to its 90,000 shareholders monthly since 1969. R.p. ___ (Final Order and Judgment); R.p. ____ (Tr.

P. 9) It is publicly traded on the New York Stock Exchange (stock symbol "O") and has a market capitalization of $8.89 billion. http://finance.yahoo.com/q?s=O (May 1, 2013).

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

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

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

> Aside from the need to support those who support them, the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible. The higher this fee award is the more useful it will be as precedent for the lawyer signing the

> affidavit when he seeks a high fee award in his own cases. The affiants are anything but "disinterested."
>
> * * *
>
> Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members of the group are to be paid. C.f. H.L. Mencken, A Little Book in C Major 22 (John Lane Co. 1916) ("It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.").

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

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

South Carolina courts follow the "lodestar" formula for determining a reasonable rate. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The contract between the attorney and his client does not control; rather the court is to find a reasonable rate for the particular locality. Id. The purpose of fee shifting statutes is to provide for a reasonable fee sufficient to induce a capable attorney to undertake representation in a

meritorious case. Perdue v. Kenny A., supra, 130 S.Ct. at 1672. They are not for the purpose of providing a form of economic relief to improve the financial lot of attorneys. Perdue, supra, at 1673 quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 120 L.Ed. 439 (1986).

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

> A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-shifting statute has been satisfied.

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

After citing the Jackson v. Speed decision which holds that the contract between the lawyer and his client does not control the amount of a reasonable fee, the trial court proceeded to do just that. The court took the rates charged by the two landowner's counsel of $383 per hour and $310 per hour and averages them to $346 per hour then declares $350 per hour to be a reasonable rate. As justification for this conclusion, he creates a "Tri-County area" later identified as the "Charleston tri-county area, including Berkeley"[2] He then relies upon the affidavits submitted by the landowner as evidence that those rates are not unreasonable. This is not an appropriate method of analysis for a

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

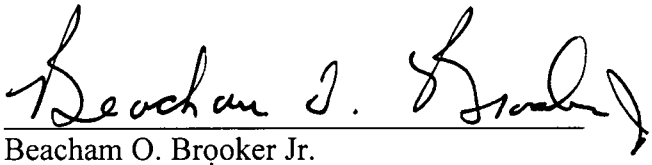
lodestar rate under the case law governing fee shifting. The inquiry should be, "At what rate could a landowner hire a competent attorney in Moncks Corner or Berkeley County to represent him in a condemnation case?" The answer is certainly less than $383 or even $310 per hour. The best evidence available to the court was the affidavit of Mr. West that he accepts such cases at $250 per hour.

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

CONCLUSION

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

Respectfully submitted,



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