

IN THE MISSOURI SUPREME COURT

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Appeal No. SC 85617

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66, Inc.,

*Appellant-Cross-Respondent,*

vs.

Crestwood Commons  
Redevelopment Corporation, *et al.*,

*Respondents-Cross Appellants.*

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# Appellant's Substitute Opening Brief

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## POINTS RELIED ON

### I.

The trial court erred in its summary judgment order denying 66 recovery of the mortgage interest it paid on the Property after the refinancing of the mortgage loan on November 28, 1989, because the mortgage interest was an actual loss inflicted on 66 as a result of having its assets tied up, in that the condemnation action continued to prevent 66's sale of the Property after the refinancing of the mortgage loan.

*66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32 (Mo. banc 1999)

*Leisse v. St. Louis & Iron Mountain Railroad Co.*,

2 Mo. App. 105 (1876), *aff'd* 72 Mo. 561 (1880)

*Missouri State Park Board v. McDaniel*, 513 S.W.2d 447 (Mo. 1974)

*North Missouri R. Co. v. Lackland*, 25 Mo. 515 (1857)

## II.

The trial court erred in its summary judgment order denying 66 recovery of the \$60,000 in lease termination payments it paid before the condemnation was filed, because the condemnation caused the lease termination payments to be without value to 66, in that the lease termination payments were made to facilitate a prompt sale of the Property, the condemnation prevented the sale of the Property, and the Emmis sublease would have terminated on its own, without lease termination payments, while the condemnation was still pending.

*66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32 (Mo. banc 1999)

*Leisse v. St. Louis & Iron Mountain Railroad Co.*,

2 Mo. App. 105 (1876), *aff'd* 72 Mo. 561 (1880)

*North Missouri R. Co. v. Lackland*, 25 Mo. 515 (1857)

*St. Louis v. Meintz*, 107 Mo. 611, 18 S.W. 30 (Mo. 1891)

### III.

The trial court erred in applying the \$182,000 in contract extension payments received by 66 from Crestwood Festival after May 1, 1990, as a set-off to the mortgage interest damages awarded 66, because applying this set-off effectively eliminated any recovery by 66 for mortgage interest damages caused by having the Property tied up by the condemnation, in that it was inconsistent and arbitrary for the trial court to terminate 66's entitlement to mortgage interest as of November 28, 1989, and then reduce those sums for collateral contract extension payments received months after the cut-off date.

*66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32 (Mo. banc 1999)

*Leisse v. St. Louis & Iron Mountain Railroad Co.*,

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*Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo. banc 1992)

#### IV.

The trial court erred in applying \$112,764 of the statutory interest awarded to 66 in the condemnation action as a set-off to the condemnation case attorneys' fees awarded 66 in this case, because there is no duplication between the statutory interest awarded to 66 in the condemnation action and the damages awarded to 66 in the present action, in that the statutory interest award is not damages and 66 was barred from obtaining any recovery for personal damages in the condemnation action.

*66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32 (Mo. banc 1999)

*Leisse v. St. Louis & Iron Mountain Railroad Co.*,

2 Mo. App. 105 (1876), *aff'd* 72 Mo. 561 (1880)

*Missouri State Park Board v. McDaniel*, 513 S.W.2d 447 (Mo. 1974)

*State ex rel. Washington Univ. Med. Ctr. Redev. Corp. v. Gaertner*,

626 S.W.2d 373 (Mo. banc 1982)

V.

**The trial court erred in its summary judgment order in denying 66 prejudgment interest on its damages, because a prevailing plaintiff is entitled to an award of prejudgment interest if its damages are liquidated or readily ascertainable, in that each of the items of damages suffered by 66 (excluding attorneys' fees) were for amounts that were either fixed and not subject to dispute or otherwise readily ascertainable.**

*21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858 (Mo. App. 1995)

*Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5 (Mo. banc 1997)

*Investors Title Co. v. Chicago Title Ins.*, 983 S.W.2d 533 (Mo. App. 1998)

*Lundstrom v. Flavan*, 965 S.W.2d 861 (Mo. App. 1998)

## JURISDICTION

This is an appeal from a final judgment in a civil case. The Circuit Court for St. Louis County entered judgment following remand by the Missouri Supreme Court in *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32 (Mo. banc 1999) (“*Crestwood IV*”).<sup>1</sup>

Following the remand, the parties filed cross-motions for summary judgment on the issue of damages, the only issue remaining in the case. The trial court granted partial summary judgment to defendants and denied summary judgment to 66, Inc. (“66”) on January 10, 2001. [LF 235-41]. The parties tried the remaining damage issues to the court without a jury. The court entered judgment in favor of 66 and against defendants in the sum of \$392,612 on April 9, 2002. [LF 8, 242-47].

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<sup>1</sup> Reported decisions in related cases are: *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991) (“*Crestwood I*”) (reversing denial of condemnation); *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 882 S.W.2d 319 (Mo. App. 1994) (“*Crestwood II*”) (affirming award of condemnation interest); and *66 Drive-In, Inc. v. Hycel Partners III, L.P.*, 897 S.W.2d 203 (Mo. App. 1995) (“*Crestwood III*”) (affirming dismissal of third-party beneficiary claim).

66 timely filed its notice of appeal to both the judgment and the January 10, 2001 summary judgment order in the Missouri Court of Appeals, Eastern District, on April 19, 2002. [LF 8, 248]. Defendants filed their cross-appeal May 17, 2002. [LF 8, 262]. The Court of Appeals issued its opinion August 19, 2003, affirming in part and reversing in part the judgment of the trial court, and remanding for further proceedings. 66 applied for transfer to the Missouri Supreme Court. The Court of Appeals denied transfer October 2, 2003. This Court granted transfer November 25, 2003.

## OVERVIEW

This appeal raises important issues about the damages recoverable by a landowner following abandonment of condemnation proceedings brought by a private corporation. Due to the number and the complexity of the issues raised in this appeal, an overview of the case in advance of the statement of facts may be useful.

This Court's prior decision held that the damages available to a landowner in a common law condemnation abandonment case include both (1) the attorneys' fees and other expenses incurred in defending the condemnation action ("defense costs") and (2) the "actual losses" suffered by the owner resulting from the institution and maintenance of the condemnation. *Crestwood IV*, 998 S.W.2d at 38, 40 (authorizing recovery of "the costs, expenses and actual losses

inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land after the proceedings are discontinued”). The prior decision, however, did not specify the particular costs, expenses, and actual losses recoverable by the landowner in an abandonment action.

66 contends that the recoverable damages in the present case can be grouped in four categories: (1) attorneys’ fees incurred to defend the condemnation action; (2) attorneys’ fees incurred in the abandonment action; (3) out of pocket expenses, such as lease termination payments, that 66 incurred in readying its property at 9122 Watson Road, Crestwood, St. Louis County, Missouri (the “Property”) for a sale that was blocked by the condemnation (referred to below as “sunk costs”<sup>2</sup>); and (4) out of pocket expenses, such as mortgage interest and real estate taxes, that 66 incurred in having its Property tied up during the pendency of the condemnation (referred to below as “carrying costs”). [See LF 104-12].

The trial court held that 66 was entitled to its attorneys’ fees both in the condemnation action and in the abandonment action. [LF 240, 241, 243-44]. This

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<sup>2</sup> 66 defined “sunk costs” as “development expenses for the property incurred by plaintiff prior to the initiation of the condemnation action which were lost as a result of the condemnation...” [LF 105].

holding was favorable to 66 and is a subject of defendants' cross-appeal. The attorneys' fees issues will not be further discussed in this brief.

The trial court held that the "sunk costs" were not recoverable as damages. [LF 237]. 66 is appealing this ruling. Because of the large number of small dollar sunk costs items, and given the substantial record needed to establish 66's entitlement to all sunk costs, 66 is limiting its appeal on the sunk costs issue to the \$60,000 in sublease termination payments 66 made prior to condemnation.

The trial court made numerous rulings on "carrying costs." These carrying costs are the actual out of pocket losses 66 claims resulted from having the Property tied up during the condemnation. 66's carrying costs, consisting primarily of mortgage interest paid on the Property during the period 66 was its unwilling owner, total \$2,819,955. [LF 105-06, 182].<sup>3</sup>

The trial court recognized that these carrying costs *could* be an element of damages, holding that if the condemnation blocked 66's sale of the Property:

then the damages Plaintiff suffered are: a.) not getting the purchase price on that date, and b.) having to remain the

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<sup>3</sup> 66's economic losses from having its Property tied up for four years after it would have sold it for \$7 million cash plus a limited partner interest in the developer entity greatly exceeds the actual out of pocket losses 66 claims as damages. *See infra* at 61–63 & nn.11–12.

owner of the property after that date. As the owner of the property after September 13, 1989, Plaintiff incurred both liabilities (e.g. real estate taxes) and benefits (e.g. profits from the operation of the movie business).

[LF 237]. “Plaintiff is entitled to separate recovery for those amounts if, but for the condemnation, Plaintiff would have been able to sell the property, thereby satisfying the mortgage...” [LF 238 (trial court discussing 66’s mortgage interest claim)].

66 does not appeal from the trial court’s favorable ruling that 66 is entitled to recover mortgage interest paid after the date of the blocked sale. 66 does appeal, however, from the trial court’s other, unfavorable rulings limiting the amount of mortgage interest recovered by 66. These rulings ultimately resulted in 66 receiving zero damages for its interest carrying costs.<sup>4</sup>

First, 66 appeals the trial court’s ruling that 66’s right to recover mortgage interest paid after the date of the blocked sale ended when 66 refinanced its mortgage November 28, 1989. *This ruling limited 66 to only **six weeks** of interest*

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<sup>4</sup> The trial court also held that 66 should recover real estate taxes paid after the blocked sale, limited, however, to the amount of any operating loss incurred by 66 from its business operations on the Property. [Tr. 239].

*payments even though the condemnation action and the interest payments continued for **three years**.* The trial court so ruled even as it recognized that the condemnation, by preventing the sale of the Property, *caused* 66 to refinance its mortgage. [LF 238, 245; Exhibit 4].

Second, 66 appeals the trial court's ruling that 66 was not damaged by the mortgage interest it paid because of its inability to sell the Property and thereby finance a sister company's business acquisition. The acquisition of the General Cinema chain took place at the time of the mortgage refinancing just six weeks after the date the Property would have been sold but for the condemnation. The trial court denied these damages even as it recognized that the condemnation, by preventing the sale of the Property, caused 66 to accomplish the General Cinema acquisition "through the mechanism of a loan rather than outright cash expenditure." [LF 238-39].

In addition to the issues outlined above, the appeal raises two issues involving set-offs or credits in favor of the defendants against the condemnation damages allowed by the trial court.

First, this appeal raises issues about the relationship, if any, between an award of statutory interest to the landowner in the condemnation proceedings pursuant to Section 523.045, RSMo., and the common law damages recoverable by the landowner in a separate action for condemnation abandonment. Specifi-

cally, this case presents the issue of if and when the condemning party is entitled to a set-off against common law condemnation damages for any of the statutory interest. Here, the trial court awarded defendants a set-off against damages for a portion of the statutory interest awarded 66 in the condemnation. [LF 246-47]. 66 contends the trial court erred in granting defendants any set-off for the condemnation interest award.

Second, 66 appeals the trial court's ruling giving defendants an additional credit in the amount of \$182,045. This sum reflected contract extension payments 66 received in 1990 for extending the closing date of a sale contract for the Property originally scheduled to close September 13, 1989. The sale contract was made before the condemnation, and the sale itself was blocked by the condemnation. [LF 245]. 66 contends that the giving of this credit to defendants is inconsistent with the trial court's ruling cutting-off 66's damages for mortgage interest payments as of the refinancing date long before the extension payments were received, and therefore cannot be justified.

Finally, 66 appeals the trial court's denial of prejudgment interest. [LF 240]. Here, the major components of 66's damages, such as the mortgage interest it paid, were liquidated sums. Consequently, prejudgment interest was required.

## STATEMENT OF FACTS

This case has been pending since November, 1992. 66 seeks damages caused by the filing and subsequent abandonment of a condemnation of its Property. A concise history of the factual and procedural background can be found in the Court's 1999 decision. *Crestwood IV*, 998 S.W.2d at 36-38.

As stated in the 1999 opinion, the facts relating to defendants' liability were undisputed. The only dispute was whether the facts stated a cause of action under Missouri law. *Id.* at 43. The Court held in favor of 66 on all liability issues and remanded the case for trial on the issue of damages only. *Id.*

In the present appeal, the material facts are again undisputed, or were decided favorably to 66. There is no dispute 66 paid out the money it is claiming as damages, just as there is no dispute as to the amount of each payment, the date each payment was made, or the purpose of each payment. The only disputed material facts relative to this appeal were: (1) whether the condemnation prevented the sale of the Property; (2) whether particular legal services claimed by 66 as damages were reasonably related to the condemnation action and its abandonment; and (3) whether Crestwood Festival, the entity that had a contract to purchase the Property, reimbursed 66 for some of the sunk costs. It was undisputed, however, that Crestwood Festival did not reimburse 66 for the lease termination payments.

On the first issue, defendants presented no evidence and the trial court found that the condemnation prevented the sale of the Property.

The second issue relates to defendants' cross-appeal on attorneys' fees and is therefore not an issue in 66's appeal. The trial court found in 66's favor on the attorneys' fees issue.

The third issue has been removed from the case by 66's abandonment on appeal of its claim for sunk costs other than the lease termination payments.

Consequently, 66 does not need to overcome any factual findings made by the trial court to prevail on its appeal. Consequently, as discussed in the argument, the standard of review on 66's appeal is *de novo*.

**I. 66 and its place in the Wehrenberg family of companies.**

Fred Wehrenberg Circuit of Theatres, Inc. ("Circuit") provides management services to numerous related motion picture theaters. Two corporations, Wehrenberg, Inc. ("Wehrenberg") and Ronnie's Enterprises, Inc. ("Ronnie's"), own all of the theaters managed by Circuit, either directly or through wholly-owned subsidiaries. 66 is a wholly-owned subsidiary of Ronnie's. Circuit, Wehrenberg, and Ronnie's are owned by Ronald P. Krueger and his family trust, the Gertrude Wehrenberg Trust. [LF 274-75; *see also* LF 144, 146-49].

Circuit, Wehrenberg, and Ronnie's, together with their various subsidiaries, including 66, refer to themselves together as the Wehrenberg family of companies. [Tr. 92-93].

Mr. Krueger is chief executive officer of 66 and of all of the companies in the Wehrenberg family of companies. [Tr. 169-170]. Charles Nicks is the chief financial officer of 66 and of all of the companies in the Wehrenberg family of companies. [LF, 274; Tr. 93-94].<sup>5</sup>

## **II. Events before defendants' filing of the condemnation petition.**

### **A. 66's acquisition of the fee interest in the Property.**

From 1946 until November 1993, 66 operated a drive-in theater on the Property. [LF 78, 173]. For most of this period, 66 occupied the Property under a long-term lease. On November 28, 1988, 66 purchased fee title ownership of the Property. *See Crestwood I*, 812 S.W.2d at 907; *see also* LF 79, 173, 236.

66 acquired the fee interest in the Property in anticipation of either selling the Property to a developer at a fair market price or redeveloping the Property itself in partnership with an established developer. [LF 178; *see* LF 119-20,

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<sup>5</sup> Although Mr. Nicks served as chief financial officer of the Wehrenberg family of companies continuously from December, 1988 through the trial [Tr. 92-94; LF 126], he has since left the company. Mr. Nicks was 66's chief financial officer at all times relevant to this appeal.

281].<sup>6</sup> Continuing drive-in theater operations were not an economically feasible use of the Property. “The drive-in movie theater took up eighteen acres and the net revenue[s] from drive-in operations were very low compared to — were very low for eighteen acres.” [LF 174; *see* LF 119-20].

Purchase of fee ownership of the Property cost \$3.5 million. 66 borrowed this sum from Mercantile Bank. The loan was secured by a deed of trust on the Property. [LF 80, 175].

**B. Expenses of preparing the Property for sale, including buying-out a tenant’s lease at the cost of \$60,000.**

To be better able to sell or develop the Property, 66 needed the Property to be free from tenants. Emmis Broadcasting, operator of KSHE radio, subleased a portion of the Property from 66 as the site for its broadcast antennae. Once 66 acquired fee ownership of the Property in November, 1988, 66 contracted with

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<sup>6</sup> Defendants never filed any response to the statement of material facts filed by 66 in support of its cross-motion for summary judgment. [*See* LF 178-83 (statement of additional material facts); LF 186-95 (reply to cross-motion for summary judgment)]. The facts stated in support of the cross-motion are therefore deemed admitted. *See* Rule 74.04(c)(2). In any case, defendants never presented any evidence to contradict 66’s evidence but only argued that 66’s evidence did not support damages under Missouri law.

Emmis to buy-out Emmis's leasehold. This buy-out was agreed to before the condemnation. The lease termination agreement required 66 to make two payments to Emmis of \$30,000 each, one in 1988 and the second in 1989. 66 made both payments *before* the condemnation. [LF 120, 178; *see* LF 104, 110, 119-20, 281].

66 claims the \$60,000 in lease termination payments to Emmis as damages. If 66 had not entered into the lease termination agreement, Emmis's sublease would have expired March 31, 1991. The condemnation was abandoned July 10, 1992. Thus, absent the lease termination agreement, Emmis's sublease would have expired of its own accord while the condemnation was pending. Because the condemnation blocked the sale of the Property, 66 could not sell the Property until after the condemnation was abandoned. Consequently, 66 was unable to sell the Property until after the lease would have expired on its own accord. Because of this sequence of events, 66 contended that defendants should be liable to reimburse 66 the \$60,000 it paid in lease termination payments. [LF 119-21, 179]. Mr. Nicks explained 66's view in his testimony:

Q: Tell me, if you would, how the payments to Emmis Broadcasting relate to the condemnation action.

A: In order for the property to be sold, the company bought the fee interest in the property with the intent of either devel-

oping it or selling it; and as a prerequisite for doing that, it was felt that a tenant on the property would be cumbersome to selling; so, the company negotiated a Lease Termination Agreement with Emmis Broadcasting, to remove their KSHE broadcast tower.

The condemnation came along, and we were unable to do anything with the property while the condemnation was still in effect ... *we were unable to turn the property as a result of the condemnation, and we terminated the lease to be able to turn the property.*

[LF 281 (testimony of Charles Nicks) (emphasis added)].<sup>7</sup>

**C. 66's pre-condemnation contract to sell the Property for \$7 million plus ten percent of the developer entity.**

66 entered into a contract to sell the Property to Crestwood Festival Associates ("Crestwood Festival") for \$7 million plus a ten percent (10%) limited

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<sup>7</sup> 66 also lost the rent that Emmis would have paid through March, 1991 had the sublease not been bought out. 66 did not claim this lost rent as damages at trial so as to avoid any potential argument by defendants that it was speculative whether Emmis would have paid all of the rent required by the sublease if the sublease continued through March, 1991.

partnership interest in the purchaser or successor developer entity. *Crestwood I*, 812 S.W.2d at 908; Exhibit 5. The contract, entered into before defendants filed the condemnation action, called for the sale to close on or before September 13, 1989. [Tr. 170-71; Exhibit 5].

Crestwood Festival, the buyer, intended to tear down the drive-in theater and build a shopping center, including a National Supermarket and a Toys-R-Us. This development would cost millions of dollars to build. [Tr. 171-73].

After defendants filed the condemnation, 66 and Crestwood Festival extended the closing date for the sale of the Property almost a dozen times before the transaction finally died in July, 1990. These extensions are described below in the discussion of events occurring during the pendency of the condemnation action.

### **III. Events during the pendency of the condemnation, beginning with the filing of the condemnation on July 13, 1989, and ending with its abandonment on July 10, 1992.**

On July 13, 1989, defendants Hycel Partners III, L.P. (“Hycel”) and Schnuck Markets, Inc. (“Schnuck”), acting through their *alter ego*, Crestwood Commons Redevelopment Corporation (“Crestwood Commons”), filed a condemnation action to acquire the Property. *Crestwood IV*, 998 S.W.2d at 36-37, 41-42.

**A. 66's inability to sell the Property during the pendency of the condemnation.**

As noted above, 66's contract to sell the Property to Crestwood Festival was to close on or before September 13, 1989. By the time September 13 arrived, all contingencies to closing had been satisfied or waived by Crestwood Festival. The sale did not close, however, because 66 could not grant clean title on the Property due to the condemnation. [Tr. 173].

Notwithstanding the condemnation, Crestwood Festival still wanted to buy the Property. Crestwood Festival and 66 therefore entered into a contract extension — the first of many — extending the closing date to October 16, 1989. [Tr. 173-74; Exhibit 5 (First Amendment)]. When October 16 arrived, the condemnation was still pending, so a second extension was executed, extending the closing date to November 17, 1989. [Tr. 174-75; Exhibit 5 (Second Amendment)]. When November 17 arrived, the condemnation was still pending, so a third amendment was executed, extending the closing date to December 15, 1989. [Tr. 175; Exhibit 5 (Third Amendment)]. As each new closing date arrived, 66 and Crestwood Festival extended their contract again and again, next to January 17, 1990, then to February 16, 1990, then March 3, 1990, and May 1, 1990. [Tr. 176-79; Exhibit 5 (Fourth, Fifth, Sixth, and Seventh Amendments)].

Each time, the sole reason the sale did not close was the pendency of the condemnation. [Tr. 173-79].

With the Seventh Amendment to the contract, 66 and Crestwood Festival changed some substantive terms of the contract. First, Crestwood Festival agreed to pay 66 the sum of \$2,000 per day for each additional day of contract extension. [Tr. 178-79; Exhibit 5 (Seventh Amendment)]. Ultimately, 66 received \$182,000 in contract extension payments. [Tr. 121-26, 148-49]. Second, 66 agreed to release all claims it had against Crestwood Commons if Crestwood Commons permitted the sale to Crestwood Festival to close. [Tr. 178-79; Exhibit 5 (Seventh Amendment)]. 66's agreement was intended to encourage Crestwood Commons to end the condemnation and permit the sale to Crestwood Festival to go forward. 66 and Crestwood Festival had discussions with Hycel and Schnuck, the parties who controlled Crestwood Commons, but the condemnation did not end. [Tr. 180].

The Eighth Amendment to the Crestwood Festival contract extended the closing date to May 16, 1990, and increased the cash portion of the sale price from \$7 million to \$7.6 million. The additional \$600,000 was to compensate 66 for agreeing to release all claims against Crestwood Commons *and Hycel and Schnuck*, should they end the condemnation and permit the sale to Crestwood Festival to go forward. Nevertheless, the condemnation still did not end and the

sale still did not close. As had been the case throughout, the sole reason why the sale to Crestwood Festival did not close was the pending condemnation. [Tr. 180-82; Exhibit 5 (Eighth Amendment)].

The Ninth Amendment extended the closing date to June 15, 1990, and the Tenth and Eleventh Amendments extended the closing date to July 31, 1990. [Tr. 182; Exhibit 5 (Ninth, Tenth, and Eleventh Amendments)]. The reason for two amendments reflecting the same July 31 closing date extension does not appear in the record.

In June or July, 1990, the Trammell Crow Company, one of the partners in Crestwood Festival, developed serious financial problems. This was a new problem that did not exist when the sale contract was initially to close or during the numerous prior extensions. Because of Trammell Crow's financial problems, 66's sale contract with Crestwood Festival was allowed to expire at the end of the July 31, 1990 extension. [Tr. 182-83].

Following expiration of the Crestwood Festival contract, 66 entered into other sale contracts for the Property with other entities. These contracts also failed to close because of the condemnation. [Tr. 183]. Although defendants contended that the pending condemnation action did not pose a legal barrier to sale of the Property, the unrebutted evidence at trial established that the condemnation presented an actual impediment to sale. Mr. Nicks testified:

Q: Well, 66 could have sold the property any time it wanted, couldn't they?

A: Up until the condemnation. After the condemnation they couldn't sell it.

Q: Was there an order entered by the Court in the condemnation that 66 Drive-In couldn't sell the property?

A: There were no buyers who were willing to take the property under the cloud of condemnation.... Every contract that we entered into one of the contingencies was that the condemnation go away. The people who are knowledgeable about real estate and the market, the real estate market, apparently felt it was a big enough issue. It could have possibly been sold under a fire sale scenario, but there was no economic incentive to do that on the part of 66, Inc.

[LF 127].

The trial court in its judgment implicitly found that the condemnation prevented 66's sale of the Property. The trial court held in its summary judgment order that 66 was entitled to carrying cost damages — taxes and interest — *only if* the condemnation prevented the sale. [LF 237-39]. Then, in its final judgment, the trial court awarded 66 taxes and interest as damages. [LF

244-46]. The only conclusion to be drawn is the trial court found that the pending condemnation in fact prevented the sale of the Property.

**B. The General Cinema acquisition.**

In 1989, at the time of the planned sale of the Property to Crestwood Festival, the Wehrenberg family of companies had the opportunity to acquire the operations of General Cinema, a competitor, in St. Louis and Springfield, Missouri. [LF 162, 283-84, 289]. The General Cinema transaction was important to the Wehrenberg family of companies:

[W]hat drove the transaction was to get the additional movie theater screens in St. Louis, in Springfield and to eliminate another exhibitor, motion picture exhibitor, in St. Louis and Springfield; the General Cinema Theaters. That was the primary driver for that is to enhance our market position in the city.

[LF 130].

The General Cinema assets consisted solely of leasehold interests in theaters and thus there was not enough collateral value to support a bank loan. [LF 129]. The Wehrenberg family of companies concluded that the only asset available to fund the acquisition was the Property:

When the opportunity came up to acquire the General Cinema Theaters we inquired of both Mercantile Bank and Mark Twain Bank here's our opportunity, how can we make it work, how can we get some funding to make it work. And, you know, the question was, well, do you have any assets at Wehrenberg, Inc.? Nothing that is not already collateralized. What assets do we have available? We have the 66 Drive-in property.

[LF 131]. Indeed, the Property was the *only* asset *any* company in the Wehrenberg family of companies owned with sufficient equity to support the acquisition.

[LF 81, 176-77, 283-85]. Thus, Mr. Krueger decided to fund the General Cinema purchase with the Property's sale proceeds. Unfortunately, defendants filed their condemnation, preventing the sale of the Property. Thus, the only way for 66 to reach its equity in the Property was to borrow against it.

In his testimony, Mr. Nicks explained 66's position:

Q: And you're claiming in this case that Crestwood Commons should be forced to pay the interest charges on the Mark Twain Bank loan which was used to fund through 66, Inc., the Wehrenberg purchase of General Cinema, correct.

A: Yes.

Q: And remind me what is the theory that underlies that claim?

A: 66, Inc., and Wehrenberg, Inc., are related companies. And the way the companies operate is as cash is required and the requiring company has the need for cash, if it's not available it borrows it from one of the other related companies.

A business opportunity came up to acquire the General Cinema Theaters in 1989. Had the 66 property been sold, there would not have been — there would have been cash available for the sale of the property to lend appropriate cash to Wehrenberg, Inc., with which to make the acquisition of the General Cinema Theaters. Because of the condemnation, the property was not able to be sold. The only way then to get any cash out of the property, any benefit out of the property, was to borrow against it. So 66, Inc., borrowed enough money from Mark Twain Bank to pay off the existing mortgage on the property which was held by Mercantile Bank and to fund the acquisition price of the General Cinema Theaters through a loan to Wehrenberg, Inc. So in either case the assets of 66 Drive-In were utilized to make the acquisition. Had we been able to sell the property, we wouldn't have to borrow the cash to effect the acquisition.

[LF 129; *see also* LF 283-84].

66 used the Property to secure a loan of \$5,850,000 from Mark Twain Bank. 66 used the loan to pay off the Mercantile Bank loan secured by the Property and then lent the balance of \$2,266,587.99 to Wehrenberg to finance the General Cinema acquisition. *The refinancing transaction and the concurrent acquisition of General Cinema took place just six weeks after the date on which the sale of the Property to Crestwood Festival had been scheduled to close.* [LF 81, 129, 131, 177].

Mr. Krueger, 66's owner, explained that he believed the defendants should pay the interest on the funds 66 borrowed to finance the General Cinema acquisition, “[b]ecause if I had the money from a sale of the property, I would have not had to borrow the additional \$2.-some-odd-million.” [LF 162].

#### **IV. Events following abandonment of the condemnation action.**

On July 10, 1992, Crestwood Commons, at the direction of the other defendants who controlled it, abandoned the condemnation of the Property. [LF 80, 175]. 66 filed a motion in the condemnation proceedings for an award of statutory interest pursuant to Section 523.045. In June, 1993, the condemnation court awarded \$250,586.64 statutory interest to 66. Crestwood Commons appealed the award, which was affirmed in *Crestwood II*.

66 was unable to collect the statutory interest because Crestwood Commons had no assets. *Crestwood IV*, 998 S.W.2d at 37.<sup>8</sup>

After defendants abandoned the condemnation, 66 entered into a contract to sell the Property to The Sansone Group. [Tr. 184]. After that deal was announced, Hycel Properties Company's president, Lee Wagman, sent a letter to Anthony F. Sansone, Sr., president of The Sansone Group, Inc., asserting defendants' alleged continuing rights to the Property. [Tr. 184; Exhibit 20-A].

This June 4, 1993, letter stated:

Dear Tony:

I saw the article in Wednesday's St. Louis Post-Dispatch announcing that the Sansone Group has a contract to purchase the 66 Drive-In Theatre property in Crestwood. As you certainly would see on a title search or in the records of the City of Crestwood, the property remains subject to an ordinance and continuing agreement giving development

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<sup>8</sup> It was not until October, 1999, after this Court issued its 1999 opinion in *Crestwood IV* holding Hycel and Schnuck each liable for Crestwood Commons' obligations to 66, that defendants finally satisfied the statutory interest award. [LF 73, 75, 81, 176].

rights to Crestwood Commons Redevelopment Corporation, the joint venture of Hycel and Schnucks. Although you probably are aware that Crestwood Common abandoned its pending condemnation action on July 10, 1992, *we are entitled to reinstitute condemnation proceedings after July 10, 1994....*

[Exhibit 20-A (emphasis added)].

66 sold the Property to National Super Markets, Inc. (“National”), in November, 1993, for \$7,934,500. [LF 81, 176]. Defendants do not contend that 66 did not diligently seek a buyer for the Property following abandonment.

#### **V. The trial court’s damages rulings.**

The trial court awarded 66 attorneys’ fees. 66 is not appealing from this aspect of the judgment.

66 sought carrying costs consisting of real estate taxes of \$398,445 and mortgage interest of \$2,421,510. [LF 106].

The trial court held that 66 could recover real estate taxes paid from the initiation of the condemnation through the date that the Property was sold to National after the condemnation was abandoned. The trial court further held, however, that 66 could only recover the *lesser* of the annual real estate taxes or operating losses for each calendar year. [LF 239, 241]. The trial court therefore reduced the real estate tax component of 66’s damages to \$90,058. [LF 246].

66 has decided not to appeal the trial court's rulings on its real estate tax carrying cost claim, and the issue will not be further discussed in this brief.

Regarding mortgage interest, an item for which 66 claimed \$2,421,510, the trial court awarded 66 the sum of \$47,174, before set-offs. [LF 244-45]. The reason the sum awarded was so much less than the sum claimed is that the trial court limited the recoverable interest to a six-week period. This six-week period adopted by the trial court began September 13, 1989, the date the sale of the Property would have originally closed but for the condemnation, and ended November 28, 1989, the date 66 refinanced its mortgage. [LF 236, 245]. During this six-week period, the mortgage had a balance of \$3,510,625 and accrued interest at the rate of 10.75 percent. The mortgage interest for the six-week period totaled \$47,174. [LF 244-45].

In limiting the mortgage interest to the six-week period, the trial court rejected two of 66's contentions. First, 66 contended that it was entitled to recover mortgage interest relating to its acquisition of the fee interest in the Property for the entire period from the date the sale to Crestwood Festival should have closed (the same starting date used by the trial court) through the date 66 ultimately sold the Property to National Supermarkets in November, 1993, a period of four years.

The trial court rejected this contention, holding that the refinancing of the mortgage loan cut off defendants' liability even as to that portion of the Mark Twain Bank loan that merely refinanced the existing Mercantile Bank loan. The trial court gave no rationale for this ruling. [LF 236].

Second, 66 contended that it should recover the additional mortgage interest it paid to finance the General Cinema acquisition from the date of the refinancing through the date of the sale of the Property to National. By the phrase "additional mortgage interest," 66 refers to the interest on the 39% of the new Mark Twain loan used to fund the General Cinema acquisition rather than to refinance the existing Mercantile loan. The trial court rejected this contention as well. *While the trial court recognized that, "if the condemnation did prevent the sale of Plaintiff's property on September 13, 1989, it did cause the [General Cinema] purchase to be accomplished through the mechanism of a loan, rather than outright cash expenditure," it nevertheless held that 66 was not damaged.* The trial court's rationale was that 66 was not damaged by the interest it paid on the portion of the Mark Twain loan used to acquire General Cinema because 66 could have charged Wehrenberg a higher level of interest to cover those interest payments. [LF 238-39].

After having limited the mortgage interest carrying cost damages to just six weeks of interest, the trial court then subjected the \$47,174 in 1989 mortgage

interest it permitted as damages to be set-off by the \$182,045 in closing extension payments received by 66 from Crestwood Festival in mid-1990. *The trial court therefore reduced the mortgage interest component of 66's carrying costs damages to zero.*<sup>9</sup>

At trial 66 sought approximately \$98,000 in sunk costs. \$60,000 of these sunk costs were for the lease termination payments to Emmis. The trial court awarded 66 *zero dollars* (\$0) for sunk costs. The trial court ruled that the sunk costs would be covered in the damages 66 would receive for the failure of the Crestwood Festival contract to close because of the pendency of the condemnation. Specifically, the trial court held:

If the pending condemnation did prevent the closing on the Crestwood Festival contract, then the damages Plaintiff suffered are: a.) not getting the purchase price on that date...

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<sup>9</sup> The trial court did not apply the balance of the closing extension payments to reduce the real estate tax component of 66's carrying costs damages, ruling that the extension payments were not operating income but an extraordinary item not related to the operation of 66's drive-in theater business. Thus the \$182,045 in extension payments eliminated the mortgage interest damages but did not affect the real estate taxes damages as determined by the trial court. [LF 245].

Plaintiff claims as damages the “sunk costs” it spent getting the property in a position to be redeveloped. This total is approximately \$98,000. The Court finds that these costs are wrapped into the purchase price Crestwood Festival was willing to pay for the property, and are not, therefore, separately recoverable by Plaintiff.

[LF 237].

The trial court, however, did not award 66 *any damages* for its failure to get the purchase price on the Crestwood Festival contract. [LF 242-47 (judgment awarded damages only for attorneys’ fees, six weeks of mortgage interest payments less set-offs, and the lesser of real estate taxes paid and operating losses from the operation of the drive-in theater on the Property)]. 66 is appealing the trial court’s denial of all sunk costs damages.

Consistent with its rulings described above, the trial court found that, “the total damages to which 66 is entitled is the sum of \$278,811 plus \$136,507, plus \$90,058, totaling \$505,376.” [LF 246]. The \$278,811 was the attorneys’ fees incurred in the condemnation action; the \$136,507 was the attorneys’ fees incurred as of that date in the pending action; and the \$90,058 was the amount of real estate taxes paid by 66, limited by its operating losses. [LF 242, 243, 246].

The trial court then credited the defendants for forty-five percent (45%) of the statutory interest of \$250,586.54 awarded to 66 in the condemnation action.

The trial court explained its rationale for this credit:

The damages awarded under § 532.045 are for compensation to the property owner for the loss of its right “to receive and use” the money, awarded by the commissioners as its damages, while the condemnation proceeding is pending. Missouri State Park Board v. McDaniel, 513 S.W.2d 447, 451-2 (Mo. 1974). The transcript of the hearing held June 4, 1993 on 66’s claim for an award under § 532.045 was received into evidence at the present hearing. The Court looks to the testimony in the June 4, 1993 hearing for guidance as to what “use” 66 would have made of the money awarded it by the condemnation commissioners. In that hearing, legal fees and other expenses, and expenses on the promissory note in the amount of \$340,000 were testified to by 66. As testified in the instant hearing, the legal fees incurred are \$278,811. This Court finds the expenses presented at the June 4, 1993 hearing are evidence of the use to which 66 could have put the condemnation award had it been promptly paid by Defen-

dants. Accordingly, 66 had expenses of \$618,811 it could have used the commissioners' award to pay. The attorneys' fees "use" is forty-five percent (45%) of those expenses. Forty-five percent (45%) of the § 532.045 award is \$112,764.00. In order to avoid duplicative recovery, the amount of the § 532.045 award that was for the use of paying the attorneys' fees, which are also awarded herein, should be credited against those attorneys' fees.

[LF 246-47].

#### **VI. The Court of Appeals' damages ruling.**

On appeal, the Court of Appeals, Eastern District, held that the property owner's damages in a condemnation action were limited to the attorneys' fees incurred in the condemnation action. *Slip. op.* at 20. The Court of Appeals based this holding, at least in part, on its additional holding that the statutory interest provided by Section 523.045 provided the owner his or her *exclusive* remedy for all losses resulting from an abandoned condemnation other than defense costs. *Slip op.* at 22. 66 applied for transfer on the ground that the Court of Appeals' decision was inconsistent with the Court's decision in *Crestwood IV*. The Court granted transfer November 25, 2003.

## ARGUMENT

**I. The trial court erred in its summary judgment order denying 66 recovery of the mortgage interest it paid on the Property after the refinancing of the mortgage loan on November 28, 1989, because the mortgage interest was an actual loss inflicted on 66 as a result of having its assets tied up, in that the condemnation action continued to prevent 66's sale of the Property after the refinancing of the mortgage loan.**

The standard of review of an order granting summary judgment is “essentially *de novo*.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). “The propriety of summary judgment is purely an issue of law. As the trial court’s judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court’s order granting summary judgment.” *Id.*

This case does not deal with the issue of whether 66 is entitled to recover damages for the personal injuries it suffered as a result of the condemnation action. That issue has already been decided by this Court in 66’s favor. *Crestwood IV*, 998 S.W.2d at 38-39. This case deals only with the measure of the damages 66 is entitled to recover.

A. **Missouri’s condemnation abandonment cases hold that the owner’s damages include both defense costs, including attorneys’ fees, as well as actual losses, such as losses resulting from the property being tied up by the condemnation proceeding.**

The analysis starts with the Court’s decision in the prior appeal. The Court adopted a broad view of damages, holding:

Non-governmental condemners are liable for the **costs, expenses and actual losses** inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land after the proceedings are discontinued.... Under the common law, the property owner is entitled as a matter of right to recover **attorney’s fees and other reasonable expenses and losses** suffered as a result of a private condemner’s abandonment of the condemnation.

*Crestwood IV*, 998 S.W.2d at 38, 40 (citations and internal quotations omitted; emphasis added); *Nifong v. Texas Empire Pipe Line Co.*, 40 S.W.2d 522, 523-24 (Mo. App. 1931), quoting *Leisse v. St. Louis & Iron Mountain Railroad Co.*, 2 Mo. App. 105, 113-114 (1876), *aff’d* 72 Mo. 561 (1880). “Abandonment of condemnation proceedings invariably damages the landowner usually because of incurring

legal expense and **having assets tied up**, etc.” *Missouri State Park Board v. McDaniel*, 513 S.W.2d 447, 449 (Mo. 1974) (emphasis added). See also *State ex rel. City of St. Louis v. Beck*, 63 S.W.2d 814, 817 (Mo. banc 1933).

Common law damages for defense costs *and* actual losses are distinct from an award of statutory interest under Section 523.045. “Allowance of interest on the money defendant was entitled to receive when the commissioners’ report was made **is not damages** suffered as a result of the pendency of condemnation proceedings.” *Crestwood IV* at 40, quoting *Missouri State Park Board*, 513 S.W.2d at 451 (emphasis added).

In short, this Court held in *Crestwood IV* that an owner is entitled to three types of damages following condemnation abandonment: (1) defense costs; (2) actual losses; and (3) interest pursuant to Section 523.045. *Id.* at 39-40. Defense costs and actual losses are recovered “as a matter of right” in a separate common law action, as in the case at bar. *Id.* at 40. Statutory interest is discretionary with the trial court and may be awarded in the condemnation action. *Id.*

This holding, and the position advocated by 66, is consistent with the historical cases awarding condemnation abandonment damages. As long ago as 1857, this Court held:

It is obvious that if the company is permitted to discontinue [a condemnation], all the costs and expenses of the landowner

should be paid by the company. This will embrace all the costs of the case and counsel fees, both here and in the court where the case was tried.

*North Missouri R. Co. v. Lackland*, 25 Mo. 515, 534 (1857).

A few years later, the Court held that *lost rents* on the property could be included as part of the damages:

In some cases it has been held that, when the company discontinues the proceedings, it becomes liable for the damages sustained by the land-owner, and that the damages will include **loss of rents and counsel fees**.

*St. Louis v. Meintz*, 107 Mo. 611, 615, 18 S.W. 30, 31 (Mo. 1891) (emphasis added); accord *State ex rel. Washington University Med. Ctr. Redev. Corp. v. Gaertner*, 626 S.W.2d 373 (Mo. banc 1982), where, in a condemnation action, the landowner filed a counterclaim seeking, among other damages, *loss of rental income* for the period between the date of the declaration of his property as blighted and the time of the actual taking of the property. *Id.* at 374. This Court prohibited the trial court from proceeding on the counterclaim, holding: “Such a claim is a personal action sounding in tort... landowner’s relief lies in pursuing in a separate action the claim... Our prior cases have recognized such a right on the part of the landowner.” *Id.* at 377, 378.

Thus, this Court recognized that the owner's claim for rent lost on a property tied up in a condemnation was a proper item to be recovered in a condemnation abandonment case. The damages sought by 66 here are similar to lost rent in that both arise from the landowner's inability to make full use of property tied up during the pendency of the condemnation.

Significantly, here the trial court found that the condemnation prevented 66 from selling its property under a preexisting sales contract, and thereby caused 66 to incur mortgage interest expenses and real estate taxes it would not have incurred but for the condemnation action. Under the holding of *Crestwood IV* and the older cases cited above, 66's full losses resulting from its inability to freely use, sell or redevelop its property — which include *all* of the mortgage interest resulting from this inability — should be allowed as damages.

*Leisse*, which was cited by the Court in *Crestwood IV*, is another early case that adopted a very broad view of the damages available in condemnation abandonment actions as including both rents and lost profits resulting from the suspension of business activities. *Leisse*, 2 Mo. App. at 113-14. The Court of Appeals recognized that its decision below could not be reconciled with *Leisse*. Rather than conforming its decision to *Leisse*, the Court of Appeals took the position (now vacated on transfer) that *Leisse* had been silently reversed years earlier. The Court of Appeals was wrong in so concluding.

While the Court of Appeals acknowledged that *Leisse*, “held that recovery for loss of rent or suspension of business caused by the pending condemnation are recoverable” in a common law condemnation abandonment action, *slip op.* at 19, it nevertheless concluded that *Leisse* was no longer good law, stating that, “After *Simpson [v. City of Kansas City, 20 S.W. 38 (Mo. 1892),]* no Missouri court has affirmed an award of *Leisse*-type damages for loss of use upon abandonment of condemnation on the authority of *Leisse*.” *Slip op.* at 20.

The Court of Appeals erred in rejecting the authority of *Leisse*, which was not only a Court of Appeals decision but a Court of Appeals decision affirmed by this Court. First, the Court of Appeals ignored this Court’s approving quotation in *Crestwood IV*, via *Nifong*, of *Leisse*’s holding that, “Non-governmental condemners are liable for the costs, expenses and ‘actual losses inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land’ after the proceedings are discontinued.” *Crestwood IV*, 998 S.W.2d at 38, quoting *Nifong* quoting *Leisse*. The Court apparently continues to view the authority of *Leisse* as good law — at least good enough to quote and follow.

Second, the Court of Appeals misread *Simpson*, the case it stated effectively overruled *Leisse* and removed lost rent and business profits from the damages recoverable in a condemnation abandonment. The Court of Appeals erred in its analysis. *Simpson*, in contrast with the present case and in contrast

with *Lackland*, *Nifong*, *Leisse*, and the other cases relied upon by 66, involved a condemnation brought by a *governmental* entity — the City of Kansas City — and not a private condemner. The case is therefore not controlling. “Missouri law draws a clear distinction between governmental and non-governmental condemners.” *Crestwood IV*, 998 S.W.2d at 38.

More importantly, the facts and holding in *Simpson* do not support the Court of Appeals’ interpretation. In *Simpson*, the City of Kansas City brought a condemnation action against numerous landowners for the widening of a street. Several owners appealed from the jury’s award of damages, but the *Simpson* plaintiffs did not appeal and were not parties to the appeal. 20 S.W. at 38. After nine years, while the appeals were still pending, the City abandoned the project and the condemnations. The *Simpson* plaintiffs filed suit, stating that they were unable to rent the property or to sell it for its real value or to otherwise improve and use it during the pendency of the condemnation, and were therefore damaged. *Id.* The trial court sustained a demurrer, finding that the claim did not state a cause of action. This Court *reversed* the demurrer, holding:

We think that, unless defendant [Kansas City] can show that this long delay was unavoidable, and that reasonable diligence was used in the prosecution of the proceedings in the appellate court, then plaintiffs should receive compensation

for their damages. We think the long, unexplained, and wrongful delay charged, and the final dismissal of the proceedings, with the alleged injuries, make a *prima facie* case, and the demurrer should have been overruled.

*Simpson*, 20 S.W. at 40, 40-41.

Significantly, the *Simpson* plaintiffs did not claim as damages any defense costs in the underlying condemnation action, but claimed only lost rent, lost use, and lost sales opportunities. If the Court of Appeals' holding below that damages are limited to defense costs were correct, the Supreme Court in *Simpson* would have affirmed the demurrer because the only damages claimed by the *Simpson* plaintiffs were actual losses other than defense costs.

In short, *Simpson* does not reject the measure of damages stated by *Leisse*. *Simpson* simply holds, consistent with other Missouri cases, that a governmental entity will not be held *strictly* liable for the landowner's damages upon abandonment of a condemnation. *Id.* at 40. Instead, *Simpson* holds that a governmental entity will be liable for damages, such as lost rent and lost sales opportunities, only if its delay in abandonment is "long, unexplained, and wrongful." This is the same rule that was stated by this Court in *Crestwood IV*. See 998 S.W.2d at 38.

Thus the legal principles applicable to this case — legal principles that have been in place for over one and a half centuries and that have been recently

reaffirmed by the Court in *Crestwood IV*, support 66's claims to *all* of the mortgage interest it paid after the date defendants through their condemnation prevented its sale of the Property.

**B. Applying these legal principles establishes 66's entitlement to recovery of its mortgage interest payments for the period beginning with the date 66 would have sold its Property but for the condemnation and ending on the date, after condemnation abandonment, when 66 sold the Property.**

The Court's recognition that *lost rents* and *having assets tied up* as components of abandonment damages establishes the trial court's error in sharply limiting 66's recovery to less than all of the mortgage interest it paid as a result of its inability to sell the Property while the condemnation was pending.

The trial court limited 66 to *just six weeks* of mortgage interest damages, notwithstanding that the condemnation action was pending for *three years* before it was abandoned, and notwithstanding that it took 66 another year of diligent effort after abandonment to sell the Property.

The trial court correctly found that if the condemnation prevented 66 from selling its Property, it prevented 66 from satisfying the mortgage on the Property. [LF 237-38]. The trial court, through its finding that 66 was entitled

to both mortgage interest and real estate tax damages, necessarily found that the condemnation prevented 66 from selling the Property.

Because, as the trial court found, 66 was injured in being stymied in its efforts to satisfy the mortgage and avoid the payment of mortgage interest for the first six weeks after it was prevented from selling the Property, the only reasonable conclusion is that 66 continued to be injured during the weeks, months, and years following, as it continued to be prevented from selling the Property and satisfying the mortgage throughout the continuing pendency of the condemnation.

Three years — the duration of the condemnation action — is 156 weeks. The six weeks for which the trial court awarded 66 mortgage interest damages constitutes *less than four percent (4%)* of the 156-week time period during which the condemnation remained pending. Four percent of 66's losses is not "just compensation" to 66, and comes nowhere near to restoring 66, the innocent and involuntary injured party, close to the position it would have been in but for the condemnation.<sup>10</sup>

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<sup>10</sup> If one considers the additional year it took 66 to ultimately sell the Property after the condemnation was abandoned, the mortgage interest damages awarded by the trial court constituted less than three percent of the total injury.

The trial court in its summary judgment order nevertheless cut-off recovery of the mortgage interest as of the date of refinancing, stating:

Here, the condemnation did not prevent the business decision made by Plaintiff and Wehrenberg, Inc. to acquire General Cinema, but if the condemnation did prevent the sale of Plaintiff's property on September 13, 1989, it did cause the purchase to be accomplished through the mechanism of a loan, rather than outright cash expenditure. The Court finds Plaintiff was not damaged by this form of purchase. Wehrenberg did acquire General Cinema, therefore, the value of any principal payments made on the loan was received. Plaintiff did pay the interest on the principal amounts. Wehrenberg later paid to Plaintiff all the interest payments it had made. Plaintiff claims that it should have received interest from Wehrenberg, Inc. for Plaintiff making the interest payments on the Mark Twain Bank loan. However, whether Plaintiff decided to charge Wehrenberg interest on the portion of the loan it used for Wehrenberg, Inc. to acquire General Cinema was a business decision totally in the control of Plaintiff and Wehrenberg, Inc., and not caused by the condemnation. If

Plaintiff had wanted its sister corporation, Wehrenberg, Inc., to pay it interest on the payments Plaintiff was making to Mark Twain Bank, it was not prevented from doing so by the condemnation. Plaintiff, therefore, did not suffer damages to complete this internal business deal among sister companies caused by the condemnation.

[LF 238-39].

The trial court's ruling misapprehends the issue. If one breaks the analysis down into more manageable segments, the trial court's errors become clear.

To begin with, one needs to distinguish between the "old money" and the "new money" involved in the refinancing. The total of the Mark Twain refinancing loan was approximately \$5.85 million. [LF 238]. The "old money" was the \$3,510,625 used to pay the existing Mercantile debt on the Property. Simple arithmetic shows that this old money equals 61% of the refinancing. [See LF 245]. The "new money" was the \$2,266,587.99 used to finance Wehrenberg's acquisition of the General Cinema business. This new money equals 39% of the refinancing. [LF 81, 129, 131, 177].

**C. The condemnation prevented 66 from selling the Property and satisfying its existing debt. The refinancing merely changed the identity of the bank to whom the interest was being paid. Thus, the trial court had no ground to terminate 66's right to recover these interest payments as a result of the refinancing.**

As to the old money, that is, the portion of the Mark Twain loan which simply refinanced the existing Mercantile debt, the trial court's discussion concerning the General Cinema acquisition misses the point. 66 had a \$3.5 million mortgage debt going into the refinancing, and this existing \$3.5 million debt simply rolled over into the new loan. 66 still could not sell the Property and pay off the \$3.5 million in old debt. Thus 66 continued to be stuck paying interest on its old debt for another three years — just as if it had not refinanced. It makes no sense to deny 66 recovery of the interest paid on the old money portion of the mortgage debt because of a refinancing that merely changed the identity of the bank being paid the interest, but that did not change any of the underlying financial or economic terms.

As noted above, the old money portion of the debt equaled 61% of the total Mark Twain loan. Between November, 1989 and June, 1992, inclusive, the total mortgage interest paid by 66 was \$1,655,738.54. [See Exhibit 13]. 61% of

\$1,655,738.54 is \$1,010,000. When added to the \$47,174 in mortgage interest paid prior to refinancing, the total mortgage interest paid by 66 on the “old money” part of its debt, both pre- and post-refinancing, up through condemnation abandonment in July, 1992, was \$1,057,174. [*Id.*].

66 contends it is entitled to recover all of its mortgage interest payments, not only the interest it paid through abandonment, but also the interest paid up to the date it sold the Property to National Supermarkets in November, 1993. 66’s obligation to pay mortgage interest did not magically disappear upon abandonment of the condemnation. 66 could not instantly sell the Property for a reasonable value the moment the condemnation was abandoned. In contrast with the payment of defense costs, the payment of mortgage interest and taxes is not something the landowner in a condemnation can turn on and off like a faucet. [LF 295].

The trial court recognized this reality with its ruling that 66 was entitled to recover the real estate taxes it paid *through the date of the sale to National Supermarkets*. [LF 245]. The same analysis and result should have been applied to the mortgage interest.

The total mortgage interest paid by 66 from November, 1989 through November, 1993 was \$2,291,105.12. 61% of that amount is \$1,397,574. When you add to this sum the \$47,174 in mortgage interest paid before the refinancing, the

total mortgage interest paid by 66 on the “old money” part of the debt, up through the sale of the Property in November, 1993, is \$1,444,748. [See Exhibit 13].

**D. The condemnation prevented 66 from selling the Property and financing the purchase of the General Cinema theaters as planned.**

The above analysis includes only the “old money” portion of the refinancing debt, that is, the amount which replaced the prior debt. 66 contends, however, that it is also entitled to recover the mortgage interest it paid on the “new money” portion of the refinancing debt, that is, the debt incurred to enable the General Cinema acquisition. The business reasons for the General Cinema transaction were discussed previously. The rationale for including the “new money” mortgage interest is straightforward. *But for the condemnation, 66 would have closed on the sale of the Property to Crestwood Festival and would have had in hand the cash necessary to effect the transaction six weeks later without borrowing.* As Mr. Krueger testified: “Had we been able to sell the property, we wouldn’t have to borrow the cash to effect the acquisition.” [LF 129]. Defendants filed the condemnation. Defendants prevented the sale of Property. The trial court found that defendants “cause[d] the [General Cinema]

purchase to be accomplished through the mechanism of a loan, rather than outright cash expenditure.” [LF 238].

Two arguments have been raised against allowing 66 to recover the portion of the Mark Twain debt used to finance the General Cinema acquisition. First, defendants contend that 66 is not entitled to recover the interest it paid to Mark Twain Bank for the money borrowed to make the General Cinema acquisition because its sister company, Wehrenberg, paid interest to 66 on the funds at the same interest rate paid by 66 to Mark Twain. [See, e.g., LF 136].

There is a problem, however, with defendants’ argument. 66 would have received interest from Wehrenberg *whether or not* 66 paid interest to the bank. If 66 could have sold the Property and used *sale proceeds* instead of borrowings to finance the General Cinema acquisition, 66 could have kept all of the interest received from Wehrenberg instead of passing the interest through to the bank. More specifically, if the sale to Crestwood Festival had been permitted to close, 66 would have had approximately \$3.5 million in hand, consisting of the \$7 million cash portion of the sale proceeds less the \$3.5 million Mercantile mortgage that would have been paid at closing. 66 would have had the funds to lend to Wehrenberg without paying anyone interest, and would have earned income on the intercompany transaction in the amount of the interest paid by Wehrenberg. Because the Property was under condemnation, however, 66 had

to borrow the funds and pay interest to the bank. *In short, 66 would have had the same income from its loan to Wehrenberg regardless of whether the condemnation was pending, but it would not have had the interest expense but for the condemnation.*

The second argument was raised by the trial court, not defendants:

Plaintiff claims that it should have received interest from Wehrenberg, Inc. for Plaintiff making the interest payments on the Mark Twain Bank loan. However, whether Plaintiff decided to charge Wehrenberg interest on the portion of the loan it used for Wehrenberg, Inc. to acquire General Cinema was a business decision totally in the control of Plaintiff and Wehrenberg, Inc., and not caused by the condemnation.

[LF 238].

This statement shows that the trial court may have misapprehended 66's position. 66 never claimed "that it should have received interest from Wehrenberg..." as the trial court states. Contrary to the trial court's assumption, 66 in fact charged and received from Wehrenberg interest on the intercompany loan. The supposed absence of interest payments from Wehrenberg is not the basis of 66's claims.

66 was injured because it was forced to pay mortgage interest to reach its equity in its Property, rather than simply selling the Property and getting cash pursuant to a valid sale contract in effect at the time the condemnation was filed. The method used to finance the General Cinema acquisition was not a business decision within 66's control. It was in defendants' control. As the trial court found, it was *defendants* who, by tying up 66's equity in the Property for the duration of the condemnation, *caused* 66 to finance the General Cinema acquisition through debt rather than equity.

The trial court thus erred in not awarding 66 the full amount of mortgage interest it paid from September 13, 1989 through November, 1993. Consequently, the Court should reverse this aspect of the trial court's judgment and award 66 the sum of \$2,355,052 to reflect the actual mortgage interest paid by 66 during the period it was forced by defendants to be the unwilling owner of the Property.

**E. The total interest expense claimed by 66 as damages is significantly less than the economic losses suffered by 66 on the entire \$7 million Property tied up by the condemnation.**

66 recognized that \$2,355,000 is a large dollar amount and may appear at first to be excessive or overcompensating. This impression is unwarranted. The amount compensates 66 for having its Property, a parcel worth more than

\$7 million, tied up and unable to be sold or developed for approximately four years. The time-value of \$7 million over four years is significant.

The trial court ruled that:

If the pending condemnation did prevent the closing on the Crestwood Festival contract, then the damages Plaintiff suffered are: a.) not getting the purchase price on that date...

[LF 237]. This ruling, if fully implemented, would yield a substantially greater damage amount than the amount claimed by 66.

The purchase price 66 would have received on September 13, 1989, had the Crestwood Festival contract not been blocked by condemnation, was \$7 million cash plus a ten percent limited partnership interest in the developer entity.

If one assumes that the ten percent interest in the developer had no value, the \$7 million cash component nevertheless gives rise to a substantial damage figure over time. The annual interest on \$7 million, applying Missouri's statutory interest rate of nine percent (9%), is \$810,000.

Thus, the total interest that would accumulate on the purchase price that 66 did not get, during the four year period ending with the sale of Property to National, at the rate of \$810,000 per annum simple interest, is \$3,240,000. If one adds in the real estate taxes paid (capped by operating losses) of \$90,058 [LF

245], the total is \$3,330,058. This larger sum is the amount lost by 66 by “not getting the purchase price on that date” from Crestwood Festival.

Even if the \$3,330,058 sum is reduced by \$182,000 in contract extension payments and by \$250,000 for the statutory interest awarded in the condemnation and by the \$60,000 in lease termination payments, **the full economic loss to 66 in having its Property tied up for four years — for “not getting the purchase price” on the date the sale to Crestwood Festival would have closed but for the condemnation — is \$2,838,058, excluding defense costs.** This amount is more than half a million dollars greater than the out of pocket non-defense damages of \$2,323,110 claimed by 66 on appeal.<sup>11</sup>

This calculation demonstrates that 66’s damage claims are not excessive or overreaching.<sup>12</sup>

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<sup>11</sup> \$2,323,110 equals \$2,255,052 in mortgage interest, plus \$60,000 in lease termination payments, plus \$90,058 in real estate taxes capped by operating losses, less \$182,000 in contract extension payments.

<sup>12</sup> Far from seeking to inflate its damages, 66 sought only the interest it actually paid and did not seek recovery of the interest it could have earned on the balance of its equity had it invested it as surplus cash. [LF 285-86]. Indeed, according to Mr. Nicks, from a pure accounting standpoint the losses incurred by 66 as a result of the condemnation “would approach \$5 million.” [LF 282].

**II. The trial court erred in its summary judgment order denying 66 recovery of the \$60,000 in lease termination payments it paid before the condemnation was filed, because the condemnation caused the lease termination payments to be without value to 66, in that the lease termination payments were made to facilitate a prompt sale of the Property, the condemnation prevented the sale of the Property, and the Emmis sublease would have terminated on its own, without lease termination payments, while the condemnation was still pending.**

The standard of review is again “essentially *de novo*.” *ITT Commercial Finance Corp.*, 854 S.W.2d at 376. The general principles of damages are again the same as discussed in the first point relied upon, and the cases discussing condemnation abandonment damages are also the same. *Crestwood IV; Nifong; Leisse; Missouri State Park Board; Beck; Lackland; and Meintz*.

In its summary judgment order, the trial court held:

Plaintiff claims as damages the “sunk costs” it spent getting the property in a position to be redeveloped. This total is approximately \$98,000. The Court finds that these costs are wrapped into the purchase price Crestwood Festival was

willing to pay for the property, and are not, therefore, separately recoverable by Plaintiff.

[LF 237].

There are two problems with this ruling. First, the trial court did not award 66 *any* compensation for its failure to receive the purchase price on the Crestwood Festival contract at the time that contract was to close. [See LF 242-47]. Consequently, awarding 66 the lease termination payments would not result in duplicative compensation to 66.

Second, the trial court's ruling might have some merit, in part, if the condemnation had been abandoned before the Emmis sublease expired of its own terms. It is undisputed, however, that the condemnation continued longer than the sublease would have. Thus, when the Property became sellable again after abandonment, 66 effectively received no value at all for its \$60,000 in lease termination payments. The Property would have been free of tenants following abandonment without the payments. [LF 119-21, 179, 281].

Given these facts, all of which were undisputed, 66 clearly sustained a loss equal to the lease termination payments it made. The trial court therefore erred in denying 66 recovery of the lease termination payments, and this Court should

reverse this aspect of the judgment and award 66 the additional sum of \$60,000 for those payments.<sup>13</sup>

**III. The trial court erred in applying the \$182,000 in contract extension payments received by 66 from Crestwood Festival after May 1, 1990, as a set-off to the mortgage interest damages awarded 66, because applying this set-off effectively eliminated any recovery by 66 for mortgage interest damages caused by having the Property tied up by the condemnation, in that it was inconsistent and arbitrary for the trial court to terminate 66's entitlement to mortgage interest as of November 28, 1989, and then reduce those sums for collateral contract extension payments received months after the cut-off date.**

The trial court's decision appears to consist of both factual and legal components. The factual component primarily relates to the trial court's implicit factual finding that 66 would not have received the contract extension payments

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<sup>13</sup> If the Court awarded 66 damages based on the interest that would have been earned on the \$7 million Crestwod Festival purchase price during the condemnation period, then the trial court's conclusion that the sunk costs were "wrapped into the purchase price" would have had merit and an award of the lease termination payment would be duplicative.

from Crestwood Festival but for the condemnation and the delays in the closing dates resulting from the condemnation. 66 does not challenge this implicit factual finding.

The legal component of the trial court's decision relates to whether it was reasonable for the trial court to apply the contract extension payments as a set-off to 66's damages. While generally the standard of review of legal errors is *de novo*, on this issue it appears that the proper standard of review should be abuse of discretion. That is because the trial court's decision to apply these payments as a set off, standing alone, appears defensible. It is the combination, however, of this decision with the trial court's other decisions limiting the recovery of mortgage interest to that paid during a six-week period that makes the decision improper.

Consequently, the trial court's decision to apply the contract extension payments as a set-off ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration," *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997), and should be reversed.

While abuse of discretion is a difficult appellate standard to meet, it is met here.

The general principles of damages are the same as discussed in the first point relied upon, and the cases discussing condemnation abandonment damages are also the same. *Crestwood IV; Nifong; Leisse; Missouri State Park Board; Beck; Lackland; and Meintz.*

66 does not contend that contract extension payments could not be applied as a set-off to 66's mortgage interest recovery *if* 66 had been awarded substantially full recovery of mortgage interest payments for the duration of the condemnation. It seems generally fair and reasonable to reduce a landowner's damages caused by a condemnation by sums it would not have received but for the condemnation.

Nevertheless, where, as here, the trial court starts off by arbitrarily and unreasonably limiting a landowner's condemnation abandonment damages to a mere four percent (4%) of the total time period that the property was in condemnation — in this case, limiting the damages to the first six weeks of an at least 156 week period — it is clearly against the logic of the circumstances, as well as arbitrary and unreasonable, for the trial court to then “open up” the time period so as to reach many months beyond the six weeks to identify receipts to be used as a set-off to reduce the total damages for mortgage interest payments to zero.

In short, 66 made some \$2.3 million in interest payments during the years it was prevented by defendants from selling the Property. The trial court,

through its application of an arbitrary six-week damages period and other errors, reduced this \$2.3 million figure to a mere \$47,174 in damages. Then, notwithstanding its application of a six-week limitation on the damages side for 66, the trial court reached far beyond the six weeks to bring in offsetting income and reduce the \$47,174 to zero. [LF 244-45].

Under these circumstances, 66 respectfully suggests that it has met its burden of establishing that the trial court's ruling that the \$182,045 in contract extension payments should be applied as a set-off to 66's mortgage interest recovery was an abuse of discretion. Under the trial court's ruling, 66 is denied any recovery for its substantial losses in the category of mortgage interest payments. The trial court's ruling therefore violates "the fundamental principle or theory [of] ... just compensation, indemnity, or reparation for the loss or injury sustained by the injured party, so that he may be made whole, and restored, as nearly as possible, to the position or condition he was in prior to the injury." *Powell v. American Motors Corp.*, 834 S.W.2d 184, 187 (Mo. banc 1992).

This Court should therefore reverse the trial court's application of the contract extension payments as a set-off; provided, however, that if this Court reverses the trial court on the issues asserted in 66's first point relied upon and awards 66 all or substantially all of the mortgage interest damages to which 66

is entitled, then it would no longer be arbitrary to apply the \$182,045 set-off, and this point relied upon would thereupon be deemed withdrawn.

**IV. The trial court erred in applying \$112,764 of the statutory interest awarded to 66 in the condemnation action as a set-off to the condemnation case attorneys' fees awarded 66 in this case, because there is no duplication between the statutory interest awarded to 66 in the condemnation action and the damages awarded to 66 in the present action, in that the statutory interest award is not damages and 66 was barred from obtaining any recovery for personal damages in the condemnation action.**

The point relied upon presents a question of law only. The standard of review is therefore *de novo*, without any deference to the findings and conclusions of the trial court. *Yahne v. Pettis County Sheriff Dept.*, 73 S.W.3d 717, 719 (Mo. App. 2002) (questions of law are reviewed *de novo*).

The trial court erred in using any portion of the statutory interest awarded in the condemnation action as a set-off to damages because there is no overlap between statutory interest and damages and thus there was no duplicative recovery to be eliminated.

Section 523.045, the statutory interest provision, states:

If, within thirty days after the filing of any such commissioners' report, the condemnor shall have neither paid the amount of the award to said persons or to the clerk for them nor filed its written election to abandon the appropriation, but shall thereafter timely file such written election to abandon, then the court may, upon motion filed by said persons within ten days after the filing of said election, assess against the condemnor six percent interest on the amount of the award from the date of the filing of the commissioners' report to the date of the filing of such election, enter judgment thereon and enforce payment thereof by execution or other appropriate proceeding.

This case, in the prior appeal to this Court, presented the question of whether Section 523.045 superceded the common law cause of action for condemnation abandonment. The Court held that the statute did not supercede the common law, stating:

The right to damages for abandonment of condemnation is not extinguished or pre-empted by the statute, section 523.045, that allows interest to be awarded in the trial court's discretion. Section 523.045 was enacted in 1959 to provide for

payment of interest on the condemnation award by a condemnor that abandons the condemnation more than thirty days after the filing of the commissioners' report. Section 523.045 does not mention damages incurred by the property owner as a result of that abandonment...

Section 523.045 does not expressly state that it is displacing the common law remedy. Moreover, it is only a partial remedy for the property owner.... Under the common law, the property owner is entitled as a matter of right to recover attorney's fees and other reasonable expenses and losses suffered as a result of a private condemnor's abandonment of the condemnation. Section 523.045 provides only for interest on the condemnation award during the period it should have been available to the property owner, and the award is not a matter of right, but is discretionary with the trial court.... The statutory remedy provided by section 523.045 should not be interpreted to supercede the common law damages remedy. However, we leave it to the trial court, upon remand, to avoid duplicative recovery if damages claimed in the wrongful abandonment claim overlap the

interest award provided by section 523.045, if that interest judgment has been paid.

*Crestwood IV*, 998 S.W.2d at 39-40.

Not only is the statutory interest provided by Section 523.045 not a complete replacement for the common law claim for damages resulting from abandonment of a condemnation, *this Court has held in other cases that statutory interest assessment is not intended to be even a partial compensation for such damages*. Instead, statutory interest fulfills an entirely different purpose:

The provision of 523.045 for interest from the time plaintiff should have paid the award into court to the time of abandonment *allows a condemnee nothing for damages* such as allowed for costs, attorneys' fees, and other expenses in some states....

Our view is that allowance of interest on the money defendant was entitled to receive when the commissioners' report was made *is not damages* suffered as a result of the pendency of condemnation proceedings. *Instead it is a provision for interest as compensation for the loss of his right to receive and use the money, awarded by the commissioners*

*as his damages, while the condemnation proceeding is pending.*

*Missouri State Park Board*, 513 S.W.2d at 449, 451 (emphasis added), quoted in part in *Crestwood IV*, 998 S.W.2d at 40. Thus, the statutory interest is not damages. It only reflects the time value of the money the condemnor should have paid to the landowner while the condemnation action was proceeding. *Id.*

A condemnation proceeding is a special and limited statutory proceeding of limited jurisdiction. As such, 66 could not have legally prosecuted its present claim for personal damages in that proceeding. *Rule 86.08, Mo. R. Civ. P.; State ex rel. Washington University Med. Ctr. Redev. Corp. v. Gaertner*, 626 S.W.2d 373, 377, 378 (Mo. banc 1982).

Moreover, the damages actually suffered by 66 had no part to play in the amount of statutory interest awarded, which amount is set by statute. The fact that 66 offered testimony during the statutory interest hearing in the condemnation court about its interest expenses and attorneys' fees does not change the analysis. [See LF 246]. The award of statutory interest by the condemnation court is purely discretionary. Actual damages are *not* an element that needs to be proven to establish entitlement to an award of statutory interest. Consequently, there can be no double recovery in awarding a property owner both the statutory interest and actual damages.

Since the statutory interest judgment only compensated for loss of the use of the commissioners' award, and not for its personal damages caused by the condemnation, it is neither just nor appropriate to apply the statutory interest amount as a set-off to the damages suffered by 66.

Finally, the trial court misconstrued the language in *Missouri State Park Board* that statutory interest is to compensate the landowner for the loss of its right "to receive and use" the commissioners' award during the pendency of the condemnation. [LF 246]. The trial court looked at the notion of "using" the money, but limited its consideration solely to "the expenses presented at the June 4, 1993 hearing [as] evidence of the use to which 66 could have put the condemnation award had it been promptly paid by Defendants," and then allocated the statutory interest amount among those expenses. [LF 246-47].

There is no basis for ruling that a landowner must expend the commissioners' award on its legal defense in the condemnation action, as the trial court appears to have concluded. If defendants had deposited the commissioners' award in court while the condemnation was pending, 66 could have withdrawn the funds and used them for *any purpose* it desired. 66 could have put the funds in the bank or invested it in government securities or in stock. It could have used it to pay off the mortgage. It did not have to spend it on lawyers. But regardless of the use to which 66 would have put the funds, that use would not have dimin-

ished the personal damages 66 suffered as a result of the pendency of the condemnation — personal damages entirely apart from and in addition to 66's loss of the use of the condemnation award during the condemnation.

The Court should therefore reverse the trial court's judgment to the extent that it reduced 66's damages by any part of the statutory interest awarded in the condemnation action.

**V. The trial court erred in its summary judgment order in denying 66 prejudgment interest on its damages, because a prevailing plaintiff is entitled to an award of prejudgment interest if its damages are liquidated or readily ascertainable, in that each of the items of damages suffered by 66 (excluding attorneys' fees) were for amounts that were either fixed and not subject to dispute or otherwise readily ascertainable.**

The standard of review is *de novo*, without any deference to the findings and conclusions of the trial court. *Yahne v. Pettis County Sheriff Dept.*, 73 S.W.3d 717, 719 (Mo. App. 2002) (questions of law are reviewed *de novo*).

The condemnation was abandoned July 10, 1992. For more than eleven years, defendants have fought every attempt by 66 to receive compensation for its losses. 66 is entitled to prejudgment interest to compensate it for this extended delay.

As defendants conceded in the trial court, prejudgment interest is recoverable where a plaintiff's damages are "liquidated" or "readily ascertainable." [LF 98]. "Generally, prejudgment interest *must* be awarded on liquidated claims." 21 *West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858, 871 (Mo. App. 1995) (emphasis added). "In order to be liquidated as to bear interest, a claim must be fixed and determined or readily determinable, but it is sufficient if it is ascertainable by computation or by a recognized standard." *Investors Title Co. v. Chicago Title Ins.*, 983 S.W.2d 533, 538 (Mo. App. 1998). "[E]xact calculation of a claim is not necessary for a claim to be liquidated." *Id.*; *cf. Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 521 (Mo. App. 1999) (where plaintiff's damages consisted of invoiced amounts, the amounts were ascertainable and therefore liquidated); *Bolivar Insulation v. R. Logsdon Builders, Inc.*, 929 S.W.2d 232, 236 (Mo. App. 1996), quoting *Schnucks Markets, Inc. v. Cassilly*, 724 S.W.2d 664, 668 (Mo. App. 1987). Moreover, established law provides for the payment of prejudgment interest *in condemnation actions* even in the absence of any statute or contract providing for such relief. *St. Louis Housing Authority v. Magafas*, 324 S.W.2d 697, 699 (Mo. 1959).

Here, each of the injuries suffered by 66 as a result of the condemnation or its abandonment, excepting only attorneys' fees, were either liquidated or readily ascertainable:

***Real estate taxes.*** The amount of real estate taxes paid by 66 during each year of the condemnation and through the date the Property was sold was fixed, known, and not subject to dispute. [Exhibit 6].

While the trial court subjected the real estate taxes to a limitation based on net operating losses, this limitation did not render the amounts unliquidated because the amount of each year's operating loss was also fixed and easily determinable. [Exhibits 7-11]. "An award of less damages than requested does not preclude an award of prejudgment interest on the ascertained damages." *Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 7 (Mo. banc 1997); *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 397 (Mo. App. 1998) (awarding prejudgment interest where damages, consisting of commissions plus medical bills minus the deductible, were readily determinable and ascertainable by computation).

***Mortgage interest payments.*** The amount of mortgage interest paid by 66 each month from the filing of the condemnation through the sale of the Property to National was fixed, known, and not subject to dispute. [Exhibits 12, 13].

While, as reflected in this appeal, there were disputed legal issues as to (a) whether 66 is entitled to its mortgage interest through the date the Property was sold to National, or only until the condemnation was dismissed, or only for the

six-week period awarded by the trial court, as well as to (b) whether 66 is entitled to mortgage interest on the portion of the refinancing loan that paid for the General Cinema acquisition, those legal issues as to liability and the proper measure of damages do not affect the liquidated nature of the mortgage interest claim. These legal issues go to 66's *entitlement* to particular components of its mortgage interest payments and *not to their amounts*. It is well established that a dispute as to liability does not render a claim unliquidated. *See Lundstrom v. Flavan*, 965 S.W.2d 861, 866 (Mo. App. 1998) (existence of a dispute relative to liability does not render a claim unliquidated, and prejudgment interest should be awarded).

This Court should therefore reverse the trial court's judgment to the extent that it denied 66 prejudgment interest on its damages for mortgage interest, real estate taxes, and lease termination payments.

### CONCLUSION

This Court should reverse the judgment of the Circuit Court for St. Louis County as detailed above, and should direct the trial court to enter judgment in favor of 66 for a principal sum of **\$2,738,428**, plus prejudgment interest in the sum of **\$2,038,529**, plus post-judgment interest through January 9, 2004 in the sum of **\$686,958**, plus post-judgment interest after January 9, 2004 in the amount of **\$1,075.47 per day**, plus post-judgment attorneys' fees.

These sums are calculated as follows:

For mortgage interest paid: \$2,355,052, less the \$182,000 in closing extension fees, for a net amount of \$2,173,052.

For real estate taxes paid, limited by operating losses: \$90,058.

For lease termination payments: \$60,000.

For attorneys' fees in the condemnation action: \$278,811.

For attorneys' fees in the present action: \$136,507, plus post-judgment attorneys' fees, including fees incurred on appeal.<sup>14</sup>

Prejudgment interest is calculated on the damage sums above, excluding attorneys' fees, at the statutory rate of nine percent (9%) per year, simple interest, from the date of abandonment, July 10, 1992, through the date of judgment, April 9, 2002.

Post-judgment interest is calculated on the above sums, including prejudgment interest and attorneys' fees, at the statutory rate from the date of judgment, April 9, 2002, through January 9, 2004, and at a daily rate after January 9, 2004.

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<sup>14</sup> At the conclusion of briefing, 66 will submit an affidavit stating the amount of post-judgment attorneys' fees incurred in the present case, including this appeal.

The overall total damages that the Court should therefore enter in favor of 66 and against defendants is **\$5,463,915**, plus post-judgment attorneys' fees, plus daily interest as stated above.

Respectfully submitted,

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