

IN THE MISSOURI SUPREME COURT

Appeal No. SC 85617

66, Inc.,

Appellant-Cross-Respondent,

vs.

**Crestwood Commons
Redevelopment Corporation, *et al.*,**

Respondents-Cross Appellants.

**Appellant's Substitute
Responding Brief**

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POINTS RELIED ON

I.

Response to defendants' first point relied on: The trial court did not err in awarding 66 damages because 66 suffered a loss and did not profit from the condemnation and its abandonment; the sale of the Property in November 1993 was too remote in time to establish the fair market value of the Property in September 1989.

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

Conway v. Judd, 723 S.W.2d 905 (Mo. App. 1987)

Louis Steinbaum Real Estate Co. v. Maltz, 247 S.W.2d 652 (Mo. 1952)

Ours v. City of Rolla, 14 S.W.3d 627 (Mo. App. 2000)

II.

Response to defendants' second point relied on: The trial court did not err in awarding 66 the sum of \$136,507 in attorney's fees for the work performed in the condemnation abandonment action.

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

Doss v. Epic Healthcare Management Co., 997 S.W.2d 523 (Mo. App. 1999)

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

III.

Response to defendants' third point relied on: The trial court did not err in awarding 66 its real estate taxes paid during the period 66 was an involuntary owner of the Property because the condemnation prevented 66's sale of the Property.

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

IV.

Response to defendants' fourth point relied on: The trial court did not err in allowing 66 to recover all of its attorney's fees related to the defense of the condemnation action.

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

V.

Response to defendants' points relied on five and eight: The trial court did not err in denying defendants a set-off for the complete amount of the Section 523.045 interest judgment awarded in the condemnation proceeding; as shown in the Opening Brief, the trial court erred in giving defendants any set-off at all for this sum.

Crestwood Commons Redev. Corp. v. 66 Drive-In, Inc.,

882 S.W.2d 319 (Mo. App. 1994)

City of Cottleville v. American Topsoil, Inc., 998 S.W.2d 114 (Mo. App. 1999)

VI.

Response to defendants' sixth through eighth points relied on: 66 is entitled to recover damages for the interest it paid on its mortgage after the sale of its property to

Crestwood Festival was blocked as well as for the \$60,000 it spent in lease termination payments prior to the filing of the condemnation for the reasons stated in the Substitute Opening Brief.

No additional authority cited

VII.

Response to defendants' ninth point relied on: 66 is entitled to prejudgment interest on its claims for carrying costs, including both mortgage interest and taxes, and on the \$60,000 lease termination payments to Emmis.

Ehrle v. Bank Bldg. & Equip. Corp of America,

530 S.W.2d 482 (Mo. App. 1975)

STATEMENT OF FACTS

In their Statement of Facts, defendants assert that the Statement of Facts in 66's Substitute Opening Brief violates Rule 84.04(c) because it is "largely based on unsupportable legal arguments and certain facts not supported by the record and rejected by the trial court." *Respondents' Substitute Brief* at 8.

This is a completely inaccurate assertion. The lack of any basis for the assertion is apparent because defendants do not point to a single fact in 66's brief that they claim is contrary to a factual finding by the trial court. It is regrettable that defendants have chosen to rely on baseless attacks in lieu of reasoned argument. If 66 had asserted any fact rejected by the trial court, it is certain that defendants would have highlighted it. The facts in the case, however, were largely undisputed. Indeed, as to the only area where there was a genuine *factual* dispute between the parties at trial — attorney's fees — the trial court found 66's evidence credible and awarded 66 the full amount claimed.

As demonstrated in the Substitute Opening Brief, the trial court did not reject 66's facts. The trial court essentially adopted 66's facts in total but rejected many of 66's legal arguments.¹ [*See* LF 244-46]. That is why, with the sole exception of 66's

¹ The exception to the trial court's adoption of 66's facts related to expert witness Donna Smith's calculation of the real estate taxes paid. *Compare* LF 245-46 (¶ 16) with Exhibit 4. *See also* Tr. 155-58 (cross-examination of Smith); *Respondents' Substitute Brief* at 18 n.3. 66 does not dispute the trial court's rejection of this aspect of Smith's calculations,

third point relied on, the standard of review on 66's appeal is *de novo*, while the standard of review on defendants' cross-appeal is the standard established by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).²

Indeed, it is defendants who from time to time stray into the improper assertion of facts that are either unsupported by the evidence or that have actually been rejected

and therefore did not appeal the portion of the judgment relating to calculation of the property tax element of 66's carrying costs damages. *Substitute Opening Brief* at 38.

² The standard of review on 66's third point relied on is abuse of discretion because the trial court's award to defendants of a set-off to damages for 66's receipt of real estate sales contract extension payments beginning in May 1, 1990 was clearly against the logic of the trial court's ruling cutting-off 66's entitlement to mortgage interest carrying costs as of November 28, 1989. *Substitute Opening Brief* at 66-70.

by the courts either in this case or in the prior condemnation proceedings. Defendants’ misstatements of fact relate primarily to two issues — the evidence supporting the award of attorney’s fees and the circumstances surrounding the sale contract between 66 and Crestwood Festival.

1. Evidence of attorney’s fees.

Defendants assert that 66’s evidence of its attorney’s fees incurred in the condemnation action was based solely upon the combination of the testimony of a “purported” expert, Charles Seigel, III, and “scattered billing statements.” *Respondents’ Substitute Brief* at 15-16.

Defendants’ assertions mischaracterize and omit evidence, and run in the face of the trial court’s express finding that:

The Court finds Mr. Seigel’s testimony credible as to the attorneys fees incurred by 66 in connection with the condemnation action. In addition, the Court, as an expert in legal fees, finds the total amount being sought by 66 as damages for legal fees incurred in the underlying condemnation action is reasonable and necessary, even when incurred by multiple law firms, and for the defense of the declaratory judgment action brought by the City of Crestwood.

[LF 244]. In addition, as shown below, the detailed bills for the law firms that provided services to 66 in the condemnation as well as the time records for the Nations & Mueller law firm were fully available to defendants at trial.

The trial court properly found Seigel to be an expert on the subject of attorney's fees. Seigel received a bachelor's degree in accounting in 1981 and a law degree in 1984. He has practiced law his entire career in St. Louis, beginning at Gallop Johnson & Neuman, a large Clayton law firm. He was elected a partner at Gallop Johnson in 1991. At the time, he was the youngest person ever made a partner at the firm. He formed his own law firm in 1992. [Tr. 16-17].

Throughout his career, Seigel has worked on condemnations and other real estate and business litigations. Shortly before this trial, he had tried "a very complex issue involving the rights of a tenant to participate in a condemnation award" before Judge Wallace, the trial judge in this case.³ He frequently represents real estate developers and construction companies, and represented the City of Creve Coeur in a complicated zoning matter. [Tr. 18-19].

Seigel provides legal services primarily on an hourly basis. He handles all of the billings to clients for his law firm, and also had significant billing responsibility while at Gallop Johnson. He has previously testified about the reasonableness of attorney's fees. [Tr. 19-20].

In preparing to provide his opinion, Seigel reviewed all of the pleadings, the deposition transcripts, the numerous appellate court opinions rendered in this case, exhibits, invoices, and

³ The case is reported as *City of Peerless Park v. Dennis*, 42 S.W.3d 814 (Mo. App. 2001).

other documents substantiating the fees. [Tr. 21]. He went through “each one of the invoices ... reviewed every single page of the entries...” [Tr. 32]. He met with attorneys Dan Rabbitt, Terry Mueller, and Joe Jacobson to discuss their roles in the case, the nature of the fees that were incurred, and the issues that they dealt with. He did this “so I could get a sense for both the general bottom-line figure as to whether or not it was reasonable and also whether the individual entries that were on the invoices were reasonable and were required as a result of the condemnation action.” [Tr. 21].

Seigel reviewed the invoices from both of Rabbitt’s law firms, reviewed the checks that were issued to those firms on behalf of 66, and compared those documents to the amounts being claimed by 66 for attorney’s fees to Rabbitt’s law firms. Although he noted that some of the fees were incurred by Rabbitt in a declaratory judgment action brought while the condemnation was pending, he concluded that those fees were necessary to defend 66’s position in the condemnation action. [Tr. 21-24].

Seigel reviewed the Nations & Mueller bills and time records. Based on this review and his conversations with Mueller, it was obvious to Seigel that Nations & Mueller had a very substantial role in the condemnation litigation, doing legal research and drafting, and working with the Rabbitt law firm. Seigel concluded that Nations & Mueller’s fees were reasonable and necessary to the condemnation action. [Tr. 24-26].

Seigel considered that Nations & Mueller never formally entered their appearance in the condemnation action, and gave his opinion that this did not affect either the reasonableness or necessity of their fees:

Certainly, that wouldn't be unusual for a firm to request fees, reasonable fees for attorneys who may not be formally entered as counsel for a particular party.

For example, Bryan Cave may have three people listed as the attorneys of record, but their billing records may show seven or eight different lawyers. And, certainly, no one would conclude because they used seven or eight lawyers they wouldn't be entitled to reasonable fees...

[Tr. 24-25].⁴

⁴ Seigel also compared the attorney's fees claimed by 66 with the attorney's fees that defendants paid to their primary counsel, Bryan Cave, in the condemnation action. Bryan Cave was paid fees of \$324,730 in the condemnation action, compared with the \$278,811 paid to the Rabbitt and Nations & Mueller law firms jointly. [Tr. 28-31; Exhibits 16A-C; *see also*

Tr. 87-92 (identifying exhibits 16A-C)]. Seigel's comparison did not include the fees paid by defendants to Greensfelder Hemker & Gale, Bryan Cave's co-counsel in both the condemnation and the present action.

After making this general review, Seigel reviewed each individual invoice for reasonableness:

When I went through the invoices of Mr. Rabbitt's firm and Mr. Mueller's firm, what I looked at was the hourly rates charged for the particular individuals that were working on the cases. I also looked through line items to see whether there was any items that stuck out as being an unusual item. For example, if somebody had a telephone conference over a particularly small issue and it had five hours of time down there, that would have sent out a red flag. If somebody had five hours for researching what I believe to be a relatively complex issue, that would certainly be acceptable. *So I did go through each one of the invoices* to determine both the — that the hourly rates were reasonable and that the entries — and while I'm not going to purport to tell you that I did an in-depth study of every single entry, what I was looking for when *I reviewed every single page of the entries* is if there was something that stuck out to be an unreasonable charge, and I found none.

[Tr. 31-32 (emphasis added)].

Exhibits 2 and 3 were admitted in evidence as summary of Seigel's expert opinions. [Tr. 27, 34]. These summarized the various attorney's fees bills, both in the condemnation action, Exhibit 2, and in this abandonment action, Exhibit 3. [Tr. 34-35]. *Seigel testified that he reviewed the underlying documents, including invoices and cancelled checks, and "all of*

the numbers added up.” [Tr. 49]. The documents reviewed by Seigel included detailed records of Nations & Mueller’s legal services through condemnation abandonment. [Tr. 77-79; *see also* Exhibit 21].

Thus, Seigel was a qualified expert who had available to him documentary and other evidence sufficient to support his opinions as to the necessity and reasonableness of the attorney’s fees. Moreover, the billing invoices were neither “scattered” nor “random,” as defendants characterize them. Exhibit 21, for example, provides detailed daily descriptions of the work performed by Nations & Mueller throughout the condemnation, as well as during the periods immediately before and after the condemnation. Exhibit 21 includes both typed monthly “time service records” as well as the handwritten daily paper time slips prepared by the lawyers at Nations & Mueller. Bills for Rabbitt’s law firms can be found in Exhibit A.⁵

⁵ Although the time records for Rabbitt’s legal services were not offered in evidence, the bills submitted by him and paid by 66 reflect the time spent and services provided. [Exhibit A]. There is no dispute that the only matters Rabbitt’s law firms handled for 66 related to the condemnation. [Tr. 105].

Finally, defendants' suggestion that the Nations & Mueller bills included time expended by the firm in their role as general counsel for the Wehrenberg family of companies is not supported by any evidence. Defendants' assertion that Nations & Mueller "merely assigned a percentage of the total ... without any indication that those items related to the defense of the condemnation action," *Respondents' Substitute Brief* at 16, misstates the record and improperly focuses on one exhibit, Exhibit 3, without considering the other exhibits, including Exhibit 21. Charles Nicks, 66's chief financial officer, testified that the only portion of the Nations & Mueller bills included in the damages were those bills paid during the condemnation relating to the condemnation. [Tr. 105]. Nicks testified that when he initially prepared the schedule of damages, Mueller went through the invoices, identified those items not related to the condemnation, and deducted those amounts. [Tr. 108-10].

Mueller's deposition testimony, offered in evidence by defendants, contradicts defendants' contentions that 66 only provided scattered invoices to establish its attorney's fees, and that the attorney's fees accrued while the appeal in *Crestwood Commons Redev. Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991) ("*Crestwood I*"), was pending were not accrued in connection with the condemnation action.

Mueller is a lawyer. He has been licensed in Missouri since 1972. [LF 25]. He testified concerning the attorney's fees of Nations & Mueller which are claimed as damages by 66. [LF 26]. Mueller and his firm began providing legal representation to Wehrenberg Theaters and its related companies, including 66, in 1978. [LF 29]. The fees for his law firm claimed as

damages by 66 begin with the filing of the condemnation July 11, 1989, and end with its abandonment July 10, 1992. [LF 26].

At his deposition, Mueller provided defendants' counsel with time slips supporting each attorney's fee charge relating to Nations & Mueller for which 66 sought recovery. [LF 43-45; *see* Exhibit 21 (includes copies of the time slips)]. These were "the time service slips which are generated by my law firm as work is accomplished for a client, and a copy of the time service record which accompanied statements to 66 Drive-In, Inc. over the applicable period..." [LF 27].

The total legal fees that 66 is requesting relating to Nations & Mueller's services is \$170,690. [LF 31, 43]. Mueller's calculation of legal fees *excludes* services to 66 other than defense against the condemnation action or work on real estate contracts that did not close as a result of the pendency of the condemnation action. [LF 42-43]. Mueller eliminated from his calculation all charges to 66 for day-to-day legal matters or other corporate legal services, such as tax advice or general corporate advice. [LF 43].

During the period while the *Crestwood I* appeal was pending, prior to the termination of the Crestwood Festival contract, 66 and the defendants were engaged in extensive negotiations for a "global settlement" that would have included abandonment of the condemnation filing. Nations & Mueller represented 66 in these negotiations, which led to documents being drafted and put in escrow but never consummated. [LF 37-38]. 66's attorneys were also engaged in the same time period in a declaratory judgment action tied to the condemnation.

The declaratory judgment involved all parties, it was partly as a consequence of the city's unusual step of having approved [Crestwood Commons] as a developer at the same time as having issued a conditional use permit to Crestwood Festival Associates and conditioning that ... on the outcome of a declaratory judgment action as to which of the parties ought to be able to proceed to develop the property....

If there had not been a pending condemnation action, there would not have been a need for a declaratory judgment action. There would have been a conditional use permit issued to Crestwood Festival, [and] 66 Drive-In would have closed on Crestwood Festival...

[LF 48 (testimony of Mueller)].

During the same period, Nations & Mueller were actively engaged in providing 66 with advice about the pending appeal and reviewing the briefs, in negotiating and drafting different contracts for 66's unsuccessful attempts to sell the property, and in negotiating with defendants' counsel towards the proposed "global settlement" of the condemnation proceedings. [LF 52-53; *see also* Tr. 180]. Mueller's view is that all of these efforts were closely tied to the condemnation action. [LF 53]. The trial court, as the finder of fact, agreed.

2. 66's sale contract with Crestwood Festival.

Defendants assert that 66 had a contract to sell the Property to Crestwood Festival for \$7.2 million, and that although the contract was originally scheduled to close September 13,

1989, “the parties disputed whether Crestwood Festival was actually willing and able to close at that time.” *Respondents’ Substitute Brief* at 12 & n.2.

These assertions are incorrect. First, the contract price was not for \$7.2 million. It was for \$7 million plus a 10% ownership interest in Crestwood Festival. The 10% ownership interest was “worth at least \$700,000, if not more, if the property had been developed.” [Tr. 170, 176 (testimony of Ronald Krueger, owner and chief executive officer of 66); Exhibit 5; *see also* Tr. 205-06].⁶

⁶ In support of their \$7.2 million figure, defendants cite LF 218. *See Respondents’ Supplemental Brief* at 12 n.2. LF 218 is a page from the transcript of the summary judgment motion hearing. The only dollar figure mentioned on the page, \$7 million, appears in a question by the trial judge to counsel. No witness was testifying, and the figure is obviously being used as an approximate figure in the question.

Remarkably, defendants made the same erroneous statements about the contract value in their original brief in the Court of Appeals. They repeat the error before this Court notwithstanding that their error was pointed out to them below.

Second, while defendants' counsel have repeatedly *asserted* that Crestwood Festival was not willing and able to close in September 1989, defendants have never offered any evidence to support this naked assertion. Their brief does not cite any portion of the record or other evidence in support of the assertion. Consequently, there was *no factual dispute* between the parties on this issue. The only evidence offered on the issue at trial was that Crestwood Festival was ready, willing and able to close on September 13, 1989, and remained ready, willing and able to close on its purchase of the Property until running into financial difficulties in June or July, 1990. [Tr. 173-83].

Defendants' assertion is also contrary to the trial court's implicit factual findings that it was the condemnation that prevented the sale of the Property to Crestwood Festival in September 1989, *see discussion in Substitute Opening Brief* at 31-32, 37-39, which indicates that the trial court accepted Krueger's testimony that Crestwood Festival was ready, willing, and able to close in September 1989. The trial court's implicit factual finding was consistent with the factual findings in prior proceedings between these parties. Indeed, the Court of Appeals in its 1994 opinion affirming the award of interest in the condemnation action, rejected defendants' argument that the condemnation did not block the sale to Crestwood Festival. "The trial court found [66] was entitled to interest because the condemnation proceeding hindered its ability to sell the property during the condemnation proceedings and [66] suffered financial loss." *Crestwood Commons Redev. Corp. v. 66 Drive-In, Inc.*, 882 S.W.2d 319, 321 (Mo. App. 1994) ("*Crestwood II*").

Defendants' assertion that Krueger admitted that 66's contract with Crestwood Festival was not contingent upon termination of the condemnation is also incorrect. *See Respondents' Substitute Brief* at 18. Krueger testified that the contract required him to convey good title and that he could not do so as long as the condemnation was pending. [Tr. 197-99; Exhibit 5]. As noted above, the trial court in the condemnation case found that the condemnation proceeding hindered the sale to Crestwood Festival, thereby damaging 66, and the Court of Appeals affirmed that finding. *Crestwood II*, 882 S.W.2d at 321.

ARGUMENT

I. *Response to defendants' first point relied on: The trial court did not err in awarding 66 damages because 66 suffered a loss and did not profit from the condemnation and its abandonment; the sale of the Property in November 1993 was too remote in time to establish the fair market value of the Property in September 1989.*

Defendants' first point relied on contends that 66 is not entitled to any damages because it is supposedly "an opportunistic real estate speculator" who allegedly made a big profit from the Property and is therefore not entitled to any damages. *Respondents' Substitute Brief* at 29.⁷

⁷ Defendants' contention that 66 voluntarily and opportunistically involved itself in the condemnation has previously been rejected. *Crestwood II*, 882 S.W.2d at 322. 66 occupied the Property since 1946 pursuant to a long-term lease. [LF 78]. In 1988, when 66

closed on its purchase from the prior owner of the reversionary or fee interest in the Property, 66 had an additional 20-plus years remaining on its lease. This lease was at a bargain rate of \$10,000 per year. [LF 236; Tr. 188-90, 204-05]. The leasehold interest was worth \$6 million or more. [Tr. 207]. 66 paid \$3.5 million for the reversionary rights, a sum well in excess of its value, so that 66 could get absolute control over the Property for redevelopment. [Tr. 207]. It was defendants, in contrast, who acted wrongfully. “[T]here is nothing in the record that indicates [66] delayed the proceeding other than by refusing to accept appellant’s offer that was well below other offers it had received, and over a million dollars below the price it ultimately received for the property.” *Crestwood II*, 882 S.W.2d at 322.

Defendants' argument is as follows:

First, the measure of damages for an owner whose sale of property is interrupted is the same whether the interruption is caused by a breaching buyer or by a third-party, such as a condemner. *Respondents' Substitute Brief* at 31-33, citing *Ours v. City of Rolla*, 14 S.W.3d 627 (Mo. App. 2000) (citations omitted).

Second, the measure of damages for an owner whose sale of property is interrupted is the contract price less the fair market value on the date the sale should have been completed. Where the fair market value equals or exceeds the contract price, the owner suffers no loss and is therefore not entitled to damages. *Id.*

Third, the contract price for the sale to Crestwood Festival was approximately \$7.2 million and 66 ultimately sold the Property to National Super Markets for nearly \$8 million. Consequently, 66 "actually realized a benefit of \$800,000" as a result of the interruption of the Crestwood Festival sale and therefore was not damaged. *Respondents' Substitute Brief* at 30, 33.

Fourth, 66 further benefitted from the condemnation by receiving \$182,000 in contract extension payments by Crestwood Festival and by receiving \$400,000 [actually \$250,000] in condemnation interest from defendants, and thus reaped a "windfall" from having its Property condemned. *Id.* at 33.⁸

⁸ Defendants' fourth contention was addressed in the Substitute Opening Brief at 66-76 and thus is not discussed in the response to this point relied on.

Defendants' argument is misguided and misstates both the applicable law and the applicable facts. The standard of review is *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Under this standard, the judgment of a trial court should be affirmed unless “there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.* Defendants’ first point relied on should be denied. The trial court’s decision to reject defendants’ “no damages” argument is supported by the evidence and does not erroneously declare or apply the law.

1. Although *Ours* supports the conclusion that condemnation abandonment damages are to be determined by the same measure of damages as used in breach of contract cases, the differences in the circumstances faced by an owner whose sale is frustrated by a buyer’s breach and one whose sale is blocked by a condemnation are sufficiently great as to make the *Ours* Court’s analogy inappropriate.

66 agrees that *Ours* holds, as defendants contend, that the damages available to a frustrated seller of real property are the same regardless of whether the sale is frustrated by the buyer’s breach or by the sale being prevented by a third party. *Ours*, 14 S.W.3d at 629. Although in *Ours* the sale was prevented by the filing of an injunction and not a condemnation action, *id.* at 628, the reasoning in *Ours* appears on its face to apply to cases where a real estate sale is prevented by the filing of a condemnation.

66 respectfully suggests that, *Ours* notwithstanding, the interruption of a sale by reason of a breach by the buyer is not the same as an interruption caused by the filing and pendency

of a condemnation. In a breach by the buyer, the owner can within a reasonable period of time sell the property to another at its fair market value. This is part of the meaning of fair market value. “‘Fair market value’ ... is a phrase without ambiguity in the law. It means ‘the price which property will bring when it is offered for sale by an owner who is willing but under no compulsion to sell and is bought by a buyer who is willing or desires to purchase but is not compelled to do so.’” *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. banc 1990) (citation omitted).

Consequently, the general damage rule reflects the common sense recognition that an owner is not injured if he can turn around and in a reasonable amount of time sell the property for more money than he had been contractually bound to accept. *In an interruption of a sale by reason of a condemnation, however, the condemning entity has interrupted not just the immediate sale contract but all potential replacement sales at fair market value for so long as the condemnation remains in force.* That is because a condemnation invariably ties up the assets being condemned. *Missouri State Park Board v. McDaniel*, 513 S.W.2d 447, 449 (Mo. 1974); *Crestwood II*, 882 S.W.2d at 321; *see also* LF 127; *accord Phoenix Redevelopment Corp. v. Walker*, 812 S.W.2d 881, 884 (Mo. App. 1991) (sales made under threat of condemnation not admissible as comparable because price reflects a compromise rather than fair market value); *Metropolitan State Ry. Co. v. Walsh*, 94 S.W. 860, 864 (1906) (same).

A major reason condemnation effectively blocks the sale of condemned property, especially property for development, is that “[t]he law of Missouri has long held that one who obtains an interest in land after the commencement of condemnation proceedings takes the

land subject to those condemnation proceedings.” *State v. Starling Plaza Partnership*, 832 S.W.2d 518, 521 (Mo. banc 1992) (post-filing purchaser not entitled to either notice or hearing in condemnation proceedings), citing *City of St. Louis v. Busch*, 252 Mo. 209, 158 S.W. 309, 312 (1913). Consequently, when a property is in condemnation, both the money used to acquire the property as well as any money spent on developing the property is at risk so long as the condemnation is pending.

Thus the owner whose sale is interrupted by a condemnation does not have the ability of the jilted seller to realize the fair market value of his property by turning around and selling it to another. It is therefore not appropriate to measure condemnation abandonment damages solely in terms of the comparison between contract price and market value.

The reasoning of *Ours* is also not fully applicable in condemnation abandonment cases because the owner in such a case is entitled to damages not available to a frustrated seller in a breach of contract case, including “attorney’s fees and other reasonable expenses...” *66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999) (“*Crestwood IV*”); *see also id.* at 38 (damages include costs, expenses, and actual losses). In other words, this Court’s decision in *Crestwood IV* has already established a damages measure different than that applied in breach of contract cases.

2. Even if the breach of contract analogy were appropriate, the proper measure of damages under that model would look to the market value of the Property on the date the sale to Crestwood Festival would have taken place and not the price at which 66 ultimately sold the Property four years later.

Assuming for the purposes of argument that defendants are correct in their contention that *Ours* is controlling here and that the breach of contract measure of damages applies, defendants' first point relied on should still be rejected because defendants misapply the law of damages applicable to breach of contract cases.

Defendants point to the price at which the Property ultimately sold four years after the date it would have sold to Crestwood Festival but for the condemnation, and conclude that 66 has no damages because "the property became more valuable — for whatever reason." *Respondents' Substitute Brief* at 33 & n.8. This argument, however, misstates the law of damages applicable in breach of real estate sale contract cases. Damages in such cases, as made clear by the decision in *Ours* and in countless other cases, are the difference between the contract price and the market price *on the day that the sale would have closed but for the breach*, without regard to the profit that the seller may have made in a subsequent advantageous disposition.

Defendants' argument also misstates the facts. First the facts.

Defendants assert that 66's contract to sell the Property to Crestwood Festival was for \$7.2 million. In fact, as noted previously, 66's contract was to sell the Property to Crestwood Festival for \$7 million plus a 10% equity interest. The 10% equity interest was valued by 66

at no less than \$700,000, for a total contract value of no less than \$7.7 million. The Crestwood Festival contract was to close September 13, 1989. [Tr. 170, 176; Exhibit 5; *see also* Tr. 205-06]. The ultimate sale of the Property did not take place until November 1993 — more than four years later — at a price of \$7.9 million. *Crestwood IV*, 998 S.W.3d at 37. Thus, the ultimate sale price exceeded the prevented sale price by approximately \$200,000, not the \$800,000 difference stated by defendants, and only after a four year delay. There was no evidence offered at trial as to what the market value of the Property was on or about September 13, 1989, the date the sale to Crestwood Festival should have closed.

Now the applicable law.

Ours, the chief case relied on by defendants in their first point, held:

If Cracker Barrel had breached the sales contract, unquestionably, the City's measure of damage would have been the "difference between the contract price and the market value of the property *on the date the sale should have been completed.*" ... A defaulting buyer is entitled to show the seller of real estate suffered no damage if the fair market value of the subject property equals or exceeds the purchase price.

Ours, 14 S.W.3d at 629 (citation omitted; emphasis added).

"The damage from the contract breach is neither reduced nor increased by subsequent events because the amount is set by values on the sale date. No obligation therefore controls the action of the seller as to a resale and that detail is immaterial unless either party choose to rely on the resale as evidence of market value at the time of the first aborted sale." *Leonard*

v. American Walnut Co., Inc., 609 S.W.2d 452, 455 (Mo. App. 1980). “It follows that a resale ... even at a price which enables him to realize an overall profit on the transaction, does not affect the *measure* of damages, *i.e.*, damages are not decreased because of a subsequent advantageous disposition.” *Louis Steinbaum Real Estate Co. v. Maltz*, 247 S.W.2d 652, 655 (Mo. 1952) (purchaser damages); *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 551 (Mo. App. 1983). “The seller may resell the property or retain it and, in either event, be entitled to recover his loss measured by the difference between the contract price and the market price.” *Hawkins v. Foster*, 897 S.W.2d 80, 87 (Mo. App. 1995); *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 332 (Mo. App. 1995).

Here, while defendants could have presented expert opinion testimony or other evidence as to the market value of the Property in September 1989, when the sale to Crestwood Festival would have closed but for the condemnation, they failed to present any such evidence. Instead, defendants rely on the price at which the Property sold in November 1993, more than four years later, and on the condemnation commissioners’ award of \$7.4 million entered in December 1991, more than two years after the sale should have closed.

While Missouri law recognizes that a subsequent sale of a property can be evidence relevant to its value on the date that an earlier, aborted sale would have taken place, this rule requires the subsequent sale to take place within a reasonable time after breach. *Leonard*, 609 S.W.2d at 455; *Gilmartin*, 916 S.W.2d at 332 (six month gap reasonable).

There was no evidence that the November 1993 sale was relevant to the market value of the Property in September 1989. Conflicts in the evidence concerning real estate values are

for resolution by the fact finder. *State v. Salmark Home Builders, Inc.*, 375 S.W.2d 92, 99-100 (Mo. 1964); *Hawkins*, 897 S.W.2d at 87. Here the trial judge considered defendants' contention that the sale to National should affect her damage calculation and rejected it, holding:

Defendants claim Plaintiff cannot be damaged at all by the condemnation because Plaintiff sold the property for more than the purchase price it would have received from the Crestwood Festival contract. However, it is only speculation that the increase in the value of the property was caused by the condemnation. The increase in the value of the property could have been due to other economic forces unrelated to the condemnation. Therefore, Plaintiff can still recover for damages caused by the abandoned condemnation even though it ended up selling the property to National for more than the purchase price in the Crestwood Festival contract.

[LF 239 (¶ 14)].

Defendants' assert, without citation to authority, that the cause of the sale price increase is "irrelevant. The only pertinent point is that the property became more valuable — for whatever reason." *Respondents' Substitute Brief* at 32 n.8. Defendants' position is patently erroneous. The only pertinent point is what the fair market value of the Property was on the date the sale to Crestwood Festival should have closed. The sale price on a date four years later is irrelevant except to the extent it helps establish the fair market value of the Property on the

earlier date on which damages are to be calculated. *Indeed, defendants’ assertion that “the property became more valuable” completely undercuts any basis for contending that the November 1993 sale price is evidence of the Property’s market value in September 1989.*

The commissioners’ award, while two years closer in time to the date of the blocked sale, is *not* a market price and was for approximately \$300,000 *less than* the value of the Crestwood Festival contract. Thus, if the \$7.4 million award in December 1991 was evidence of the Property’s market value in September 1989 — and 66 does not contend that it is — that award would support the conclusion that 66 was damaged by approximately \$300,000 just on the prevented sale alone, without consideration of attorney’s fees and the other damages an owner is entitled to in a condemnation abandonment case. *See Ours*, 14 S.W.3d at 629 (damages equal contract price less market value).

3. Defendants’ breach of contract damages theory actually supports greater damages than those sought by 66.

The trial court did not err in finding that the price at which the Property ultimately sold was not relevant to 66’s damages. There simply was not sufficient evidence at trial from which the court could find the fair market value of the Property at the time the Crestwood Festival contract would have closed. The absence of this evidence is appropriate — this is not a breach of contract case and the evidence that was properly submitted to the Court was the evidence of 66’s actual damages. These damages are established on the record with precision and in great detail. *See, e.g., Substitute Opening Brief* at 24-26, 56-58.

Nevertheless, if one accepts defendants' invocation of a breach of contract damages theory, the amount of damages to which 66 would be entitled would be greater than the amount sought. Excluding the attorney's fees for the moment, 66 is seeking \$2,173,052 for actual mortgage interest paid less closing extension fees, \$90,058 for real estate taxes paid limited by operating losses, and \$60,000 for lease termination payments. *Id.* at 80. These items total \$2,323,110.

If one applies damages under a breach of contract theory, however, the damages would be \$2,520,000, excluding attorney's fees. *Id.* at 62. The analysis and calculation is straightforward. Under Missouri law:

There is respectable authority to the effect that where the seller, after breach by the buyer, resells the land to a third person and obtains the *full* contract price on resale, he can recover no damages for breach of the contract by the buyer **except interest for the interval before resale.**

Conway v. Judd, 723 S.W.2d 905, 909 (Mo. App. 1987) (emphasis added).

In *Conway*, “[t]here was no direct evidence as to the market value, as distinguished from the contract price, of the property,” on the date the sale was to take place. *Id.* at 910. Noting that the owner would not have sustained any loss of profit unless the market value was below the contract price, the court held that the owner nevertheless sustained a loss from the delay in receiving the purchase price. *Id.* The court therefore awarded the owner breach of contract damages equal to the statutory interest at nine percent (9%) on the original contract price for

the period running from the date the sale would have closed but for the breach until the date the property ultimately sold. *Id.*

Applying the same approach here, and assuming for the purpose of argument that the 10% interest in Crestwood Festival that 66 would have received was without value, the damage calculation is:

- \$7 million purchase price.
- Four year delay in receiving the purchase price.
- Annual interest at nine percent is \$630,000.
- Total interest over four years is \$2,520,000.

It is 66's view, however, that it is entitled to the lesser of (a) the interest on the delayed purchase price and (b) its actual out of pocket losses. Consequently, the Court should enter judgment in favor of 66 on all damage items other than attorney's fees in the amount of \$2,323,110, not \$2,520,000.

3. *Response to defendants' second point relied on:* The trial court did not err in awarding 66 the sum of \$136,507 in attorney's fees for the work performed in the condemnation abandonment action.

Defendants assert that, under the "American Rule," 66 is not entitled to recover its attorney's fees in the condemnation abandonment case, but is limited to its attorney's fees in the underlying condemnation action. The standard of review is *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Defendants are in error. The logic of the Missouri Supreme Court's decisions affirming the existence of a cause of action for condemnation abandonment supports the conclusion that 66 is entitled to recover all of its legal fees, both in the condemnation action and in the abandonment action.

In one of the earliest cases to recognize a cause of action for abandonment of condemnation, this Court held:

It is obvious that if the company is permitted to discontinue [the condemnation], all the costs and expenses of the land owner 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 (Mo. 1857) (emphasis added), quoted in *Meadow Park Land Co. v. School District of Kansas City*, 257 S.W. 441, 444 (Mo. 1923).

It cannot reasonably be disputed that the present litigation "was the natural and proximate result of the wrong or breach of duty" by defendants. See *Crestwood IV*, 998 S.W.2d at 40-42. "*Abandonment of condemnation proceedings invariably damages the landowner.*" *Id.*

at 42 (emphasis added). Moreover, under Missouri law, the landowner's claim for condemnation damages *must* be filed in a separate action; it cannot be filed in the condemnation action itself. *Id.* at 39. It is undisputed that the attorney's fees in the condemnation action are proper damages. Furthermore, this Court previously held that the attorney's fees have been multiplied by defendants Schnuck's and Hycel's improper use of an uncapitalized *alter ego*. *Id.* at 42 (multiplicity of lawsuits caused by defendants).

It would be odd indeed to hold that in a case where the measure of damages includes attorney's fees, and where the rules of civil procedure require the "counterclaim" for damages be filed in a separate action and not in the condemnation action, that the attorney's fees incurred in the separate but linked "counterclaim" action should be excluded from the damages.

These circumstances thus make this case fall within the recognized exception to the "American Rule" for collateral litigation:

In Missouri attorney's fees are ordinarily recoverable only when authorized by statute or contract, when a court of equity finds it necessary to award them in order to balance benefits, or when they are incurred because of involvement in collateral litigation....

To be awarded attorney's fees incurred as a result of collateral litigation, the wronged party must show that the litigation was the natural and proximate result of the wrong or breach of duty by the other party, that the fees were necessarily and in good faith incurred to protect the wronged party from injury and that the amount of the fees is reasonable.

Doss v. Epic Healthcare Management Co., 997 S.W.2d 523, 525 (Mo. App. 1999), quoting *Forsythe v. Starnes*, 554 S.W.2d 100, 111 (Mo. App. 1977). Here, the present litigation was “the natural and proximate result of the wrong” committed by defendants, as the only method by which 66 could recover its damages for the condemnation and its abandonment was by filing a separate suit.

Defendants contend that 66 is not entitled to claim the benefit of the collateral litigation exception to the American Rule on attorney’s fees because, purportedly, that exception only applies to litigations with a third party. *See Respondents’ Substitute Brief* at 35. While the cases cited by defendants stand for the proposition stated, they do not defeat 66’s claim for attorney’s fees.

None of the cases involves a claim for attorney’s fees in a condemnation abandonment case. Defendants concede, as they must in light of this Court’s rulings, that the owner in a condemnation abandonment case is entitled to recover attorney’s fees; the only issue is the scope of that right. Condemnation abandonment cases should reasonably present another exception to the American Rule for fee recovery. None of the cases cited by defendants analyze the scope of the landowner’s entitlement to attorney’s fees following abandonment of a condemnation, and thus none is controlling here.

Furthermore, this case literally fits within the third party litigation requirement of defendants’ cases. The condemnation was filed by Crestwood Commons Redevelopment Corporation. It was not filed by Schnuck or Hycel. The abandonment action, however, had to be filed against Schnuck and Hycel because, due to their use of Crestwood Commons as their

uncapitalized *alter ego*, it was impossible for 66 to recover its damages in the condemnation by a suit against Crestwood Commons alone. *See Crestwood IV*, 998 S.W.2d at 42.

Thus, given that (1) condemnation abandonment cases are cases where recovery of attorney's fees is a primary element of the owner's damages and are thus themselves an exception to the "American Rule" on attorney's fees, and (2) that the rules of civil procedure require that such damages claims be brought in a separate lawsuit and not as a counterclaim in the condemnation action, and (3) that the only plaintiff in the condemnation action was Crestwood Commons, an uncapitalized shell corporation incapable of even paying the interest judgment entered in that action, and (4) that Crestwood Commons' uncapitalized status resulted in 66 having to sue Schnuck and Hycel, the third parties who controlled it, it is reasonable to conclude that the trial court did not err in awarding 66 its attorney's fees in the present action as part of its damages.

4. *Response to defendants' third point relied on:* The trial court did not err in awarding 66 its real estate taxes paid during the period 66 was an involuntary owner of the Property because the condemnation prevented 66's sale of the Property.

The standard of review for defendants' third point relied on is *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The bulk of the defendants' argument under its third point relied on does not address the specifics of the real estate tax portion of 66's carrying cost damages that are the supposed subject of the point, but instead offers a rehash of why damages should not be permitted in cases of condemnation abandonment. *See Respondents' Substitute Brief* at 37-42. The

doctrine adopted by the appellate courts of this State and most recently restated by this Court in *Crestwood IV* may be “unique,” as stated by defendants, or not. It does not matter. The doctrine is a fair, just, and appropriate rule that a *non-governmental entity* granted the awesome power of eminent domain be financially responsible for the expenses and losses it imposes on a landowner whose property it condemns if it abandons the condemnation. It is a good rule, it is one that this State has followed for over 150 years, and it is one that this Court recently unanimously affirmed. *Crestwood IV*. For these reasons, 66 shall not address defendants’ arguments about why it is supposedly such a bad rule.

Defendants also argue that 66’s claim for damages is for “incidental and consequential damages,” and that such damages can only be recovered in a tort action. *Respondents’ Substitute Brief* at 43. Defendants contend that this Court “analyzed it [the condemnation abandonment cause of action] as a quasi-contractual matter based on principles of ‘inherent equity,’” and that therefore 66 is not entitled to the “incidental and consequential” damages claimed. *Id.*, citing *Crestwood IV*, 998 S.W.2d at 38.

Defendants’ arguments are wrong for several reasons:

First, this Court never categorized, labeled or analyzed the condemnation abandonment cause of action as “quasi-contractual,” and indeed it is not. Contractual relationships, including quasi-contractual relationships, are entered into voluntarily. It cannot be disputed that 66 did not enter into a voluntary relationship with Crestwood Commons or the other defendants. *See Crestwood IV*, 998 S.W.2d at 41-42 (“the condemnee ... forced by the condemnation action to deal with the corporation alone”).

Second, it is not the case that incidental and consequential damages are only available in tort actions. *See, e.g., Cooper v. Bluff City Mobile Home Sales*, 78 S.W.3d 157, 166 (Mo. App. 2002) (incidental and consequential damages available for breach of contract to purchase goods under U.C.C.); *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 920 (Mo. App. 1994) (reasonably foreseeable consequential damages available for breach of contract). Thus, while 66 does not believe that its damages are properly characterized as incidental and consequential because they reflect direct losses resulting from defendants' blocking of the sale to Crestwood Festival, even if they were properly so characterized, that label would not require the common law condemnation abandonment claim to be a tort.

Third, it is not 66's position that condemnation abandonment is necessarily a tort. While the doctrine is more similar to a tort doctrine than it is to any of the other legal categories usually used, such as contract, status, statutory, and property, it is unique. Like condemnation actions themselves, the cause of action for condemnation abandonment is *sui generis*, as defendants themselves acknowledge. *Respondents' Substitute Brief* at 43. *But see City of Cottleville v. American Topsoil, Inc.*, 998 S.W.2d 114, 119 (Mo. App. 1999) (condemnation abandonment is a tort).

Fourth, defendants' argument that a private condemnor does not "breach a legal duty" to an owner by abandoning a condemnation because it has a statutory right to abandon a condemnation, proves too much. If a private condemnor had an absolute statutory "right" to abandon a condemnation without paying damages, as defendants contend, this Court would not have unanimously held that damages are due in these circumstances. With great power comes

great responsibility. By assuming the State’s awesome power of eminent domain, defendants also assume the responsibility of paying for the damages that they cause in the exercise of that power.

The balance of the general arguments raised by defendants in this subsection of their third point relied on have been previously addressed in detail in the Substitute Opening Brief and do not need to be repeated in detail here. Suffice it to say that contrary to defendants’ assertions that the only damages permitted in these cases have been for attorney’s fees and litigation costs, *see Respondents’ Substitute Brief* at 44-45, the courts have consistently held that the owner is entitled to “costs, expenses and actual losses ... attorney’s fees and other reasonable expenses and losses,” *Crestwood IV*, 998 S.W.2d at 38, 40; due to “incurring legal expense and having assets tied up, etc.,” *Missouri State Park Board*, 513 S.W.2d at 449; “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). If the damages were limited, as defendants assert, to attorney’s fees and litigation costs, these other items, such as lost rents and having assets tied up, would not have been included over the years in the courts’ opinions on the damages recoverable in a condemnation abandonment case.

Finally, defendants are dismissive of 66’s citation of and reliance upon “dicta” from the “condemnation blight” case of *State ex rel. Washington Univ. Med. Ctr. Redev. Corp. v. Gaertner*, 626 S.W.2d 373 (Mo. banc 1982). *See Respondents’ Substitute Brief* at 45. This criticism is odd, as this Court in its prior opinion in this case cited and relied upon the exact same portions of the case as does 66 in the current appeal. *Crestwood IV*, 998 S.W.2d at 39.

1. The real estate taxes paid after the date of the sale of the Property to Crestwood Festival would have closed are an appropriate element of damages.

At pages 45 through 48 of Respondents' Substitute Brief, defendants finally address the issue of real estate taxes as an element of 66's carrying costs claim.

Defendants' argument is simple: 66 owned the land; 66 used the land; nothing stopped 66 from selling the land, albeit for substantially below fair market value; therefore 66 owed the taxes.

To make this argument, however, defendants grossly misrepresent the record and the law.

As to the record, it is not the case that "[t]he only competent testimony in the record showed that 66's inability to close on its contract with Crestwood Festival was caused not by the condemnation, but by the faltering finances of Crestwood Festival's principal." *Respondents' Substitute Brief* at 46. As shown in detail in the *Substitute Opening Brief* at 28-32 (citing Tr. 173-83, and Exhibit 5), the closing date for the sale to Crestwood Festival was continued eleven times over the course of nine months due solely to the condemnation. It was not until after the final extension was made, in June or July 1990, that Trammell Crow ran into financial difficulty causing it to abandon the project. [*Id.*; *see also* Tr. 195-97]. The only testimony on this issue was that of Mr. Krueger, and it is inappropriate — and contrary to the standard of review — for defendants to misrepresent his testimony in this fashion.

Similarly, defendants' statement that the record establishes that 66 could have sold the Property but did not because Krueger wanted more money, *Respondents' Substitute Brief* at

46, is also misleading. An owner is not obliged to give his land away to avoid the burden of forced ownership after a condemnor stops the sale of the property. Obviously, one can usually price any property, including one under condemnation, low enough that a speculator will be willing to take the risk of buying it subject to the condemnation. The price that will attract such a buyer, however, is not going to be anywhere near the fair market price for the property. There is nothing improper about 66 wanting to receive the fair market value of its property. *Crestwood II*, 882 S.W.2d at 322.

Finally, defendants contend that 66's acquisition of the fee interest in the Property when it was subject to a blighting ordinance demonstrates that the condemnation did not prevent the sale of the Property to Crestwood Festival. It is well established under Missouri law that until a condemnation action is actually filed, persons are free to buy and sell property within a blighted area at will without adverse implication should a condemnation ultimately be filed. That is because every property is deemed to be at risk of condemnation and the presence of a blighting ordinance does not sufficiently increase that risk to the damage of the property or its owner. *State ex rel. State Hwy. Comm'n v. Armacost Motors, Inc.*, 552 S.W.2d 360 (Mo. App. 1977).

The rationale for 66's damage claim for the recovery of some of the real estate taxes it paid is straightforward. But for the condemnation, 66 would have closed on the sale of the Property to Crestwood Festival and would not have had the obligation to pay taxes on the Property. The trial court recognized the merits of this claim, but also recognized that 66 had a potential benefit from continued ownership and possession of the Property, that is, the ability

to continue to use the Property as a drive-in theater and thereby make money from it. The trial court therefore held that 66 could only recover its taxes on the Property if it in fact operated the theater at a loss, and that the amount that could be recovered would be limited to the lesser of the taxes and the loss. [LF 239].

The limitations imposed by the trial court on this damage element are reasonable, and this portion of the judgment should be affirmed.

5. *Response to defendants' fourth point relied on:* The trial court did not err in allowing 66 to recover all of its attorney's fees related to the defense of the condemnation action.

The facts relevant to defendants' fourth point relied on are stated at length in 66's reply statement of facts, *supra* at 13–22. The standard of review on this point relied on is *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Defendants make numerous assertions about the absence of factual evidence in support of 66's claims. As demonstrated in the reply statement of facts, defendants' assertions are without merit. 66 has met its burden of proving both the reasonableness and the necessity of its attorney's fees incurred in the condemnation action.

Defendants' cases are inapposite. In *Hester v. American Family Mut. Ins. Co.*, 733 S.W.2d 1 (Mo. App. 1987), the party seeking attorney's fees "offered no evidence at all concerning attorney's fees, the amount of work done, or the reasonable value of the services." *Id.* at 3. In *Manfield v. Auditorium Bar & Grill, Inc.*, 965 S.W.2d 262 (Mo. App. 1998), the party seeking attorney's fees simply asked for and received 15% of the balance owed on certain

promissory notes as attorney's fees, notwithstanding the notes' requirement that the fees be reasonable. Given the complete absence of any evidence as to the nature of the legal services performed, other than that this was a "simple promissory note case," the Court of Appeals held that it could not affirm a flat 15% fee as reasonable. *Id.* at 268. In *Tepper v. Tepper*, 763 S.W.2d 726 (Mo. App. 1989), a dissolution case, wife requested \$10,000 in attorney's fees and \$5,000 in expert costs with no explanation other than she felt she needed the money to continue the litigation. The Court of Appeals held that, given the complete absence of any evidence in the record as to what the fees and expenses were for, the order could not be affirmed. *Id.* at 726.

Here, in contrast with defendants' cases, there was plenty of evidence in the record to support the award of attorney's fees. There was extensive testimony by an experienced expert witness who reviewed every page of every invoice, interviewed the lawyers who provided the legal services in the condemnation action and reviewed their depositions, reviewed all of the pleadings, orders, and appellate decisions, and who otherwise became fully familiar with the condemnation litigation, and who expressed his expert opinion under oath that the fees claimed were reasonable and necessary both in the aggregate and individually, that the hourly rates were reasonable, that everything added up, and that there was nothing in any fee claim that raised any suspicion. [Tr. 16-87]. In addition, underlying billing records, including both monthly statements and daily time slips, were available to defendants and in evidence. [Exhibits 21, A, B, and C]. The trial court found Seigel's expert testimony credible. This evidence, by itself, was sufficient to support the trial court's judgment on attorney's fees.

Defendants' citation to *Mueller v. Bauer*, 54 S.W.3d 652 (Mo. App. 2001), and *State ex rel. Missouri Hwy. & Transp. Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642 (Mo. App. 1992), and other cases excluding expert witness testimony, are simply not on point. In *Mueller*, plaintiff attempted to introduce portions of supposed depositions in evidence through the use of an unsigned and unnotarized expert witness's affidavit. The "affidavit" stated that the expert could not offer an opinion on the issues raised in defendant's motion of summary judgment due to the absence of documentary evidence. *Mueller*, 54 S.W.3d at 657-68. In *Modern Tractor*, the trial court permitted expert witnesses to testify to land value in a condemnation case based on a land plat developed by a non-testifying expert that was both contrary to the zoning regulations and contrary to the testifying experts' own opinions about the proper development of the land. The Court of Appeals held the expert testimony inadmissible as based on improperly speculative evidence. *Modern Tractor*, 839 S.W.2d at 654-55. Here, in contrast, the expert witness, Seigel, conducted his own investigation, reviewing all of the relevant invoices and interviewing the fact witnesses, *i.e.*, the attorneys in the condemnation action. His opinions were based on evidence, not speculation.

Furthermore, the trial court is an expert on attorney's fees. While defendants contend that this expertise does not come into play here because Judge Wallace was not the judge who tried the condemnation action, *see Respondents' Substitute Brief* at 51 n.15, defendants omit to mention that Judge Wallace handled the condemnation abandonment case for some two years, holding several conferences, reviewing extensive cross-motions on summary judgment on damages, hearing a full afternoon of argument for summary judgment, and presiding over

a bench trial. She has undoubtedly obtained sufficient familiarity with all of the issues to be able to opine with expertise on the reasonable attorney's fees in the prior condemnation action, especially as she had the advantage of Seigel's expert opinion testimony and summary documents, Exhibits 2 and 3.

While defendants make specific objections to various charges for attorney's fees, it had the opportunity to make those objections to the trial court, which rejected them. Defendants' assertions about Mueller's testimony, such as his supposed admissions of improper charges, are also inaccurate and misleading, as can be easily seen by reading the Mueller deposition transcript. [LF 42-55]. For example, defendants contend that 66's damages figures include unrelated legal services. Mueller explained in his deposition that the attorney's fees originally calculated by 66 were greater than the figures ultimately submitted because Nicks, the CFO, had erroneously included the full amount of the charges made to 66 in his original schedules and did not at that time have the benefit of Mueller's subsequent review, which limited the charges to only those related to the condemnation. [LF 42-43].

In short, the evidence of the attorney's fees in the condemnation action was substantial and was sufficient to support both the expert witness testimony of Seigel as well as the trial court's judgment. Defendants' request that the case be remanded for yet another hearing is without merit and should be denied.

6. *Response to defendants' points relied on five and eight:* The trial court did not err in denying defendants a set-off for the complete amount of the Section 523.045 interest judgment awarded in the condemnation proceeding; as shown in the Opening Brief, the trial court erred in giving defendants any set-off at all for this sum.

This issue was addressed in large measure in the fourth point relied on in the Substitute Opening Brief at 70-76. The arguments will not be repeated here. Defendants do raise an additional argument, however, that ought to be addressed. Defendants contend that because 66 presented evidence at the interest hearing in the condemnation court concerning the fact that it had incurred attorney's fees and interest expenses as a result of the condemnation, the entire principal amount of the interest award should be held to be duplicative of the damages awarded in this case, and that there should therefore be a set-off for the entire interest award amount, \$250,586.

Defendants' contention is wrong. The opinion of the Court of Appeals in defendants' appeal from the interest judgment is directly on point and is consistent with that of the various courts cited in the Substitute Opening Brief. That is, the award of interest in a condemnation proceeding is unrelated to any damages the owner may have suffered from the condemnation abandonment and only relates to the loss of the use of the money the condemnor should have paid into court while the condemnation was proceeding. The Court of Appeals held:

In this case the condemnor did not elect to abandon until 206 days after the commissioners' report was filed nor did the condemnor pay the award to the condemnee or the court. There is no dispute about these facts.

Respondent did not have use of the \$7,399,990.00 award after the commissioners' report was issued. Its loss was the return it would have made on that sum. Therefore, the trial court's finding that respondent suffered financial loss was correct. Whether respondent did or did not suffer additional losses during the 206 days is not relevant to the interest award because, as stated above, § 523.045 covers a specific loss to the condemnee namely, the return it could have earned by making use of the award from the date of the report. Respondent suffered a loss because the award was not available for its use and that is the damage § 523.045 compensates. Respondent requested relief under § 523.045 and the trial court's finding of financial loss is supported by the evidence. The court's decision was in accordance with the statute. Appellant's contention is denied.

Crestwood II, 882 S.W.2d at 332 (emphasis added).

Because the attorney's fees and carrying costs incurred by 66 are "not relevant to the interest award" made in the condemnation action, but are rather the basis for the damages to which 66 is entitled in this separate case, it makes no sense to assert that the interest award is duplicative of the damages here simply because irrelevant evidence about attorney's fees and carrying costs was admitted at the interest award hearing.

In short, the interest award provided compensation to 66 for loss of use of the funds; the damages in this case provide 66 compensation for the expenses incurred as a direct result

of the condemnation. There is no overlap and there should be no set-off, let alone the complete set-off demanded by defendants.

Defendants cite *City of Cottleville v. American Topsoil, Inc.*, 998 S.W.2d 114 (Mo. App. 1999), apparently as support for their contention that the interest award provided by Section 523.045 overlaps or duplicates the damages resulting from abandonment of a condemnation action. *Respondents' Substitute Brief* at 57. Presumably, the interest award would therefore be compensating the owner for the same loss that is compensated by the common law remedy detailed in *Crestwood IV*, thus leading to defendants' conclusion that the two remedies are overlapping and duplicative.

While this is a nice argument, it is not well supported by the decision in *Cottleville*. The holding in *Cottleville* is simple: an award of interest pursuant to Section 523.045 is discretionary, as stated in the statute itself. *Cottleville*, 998 S.W.2d at 117. The *Cottleville* court nowhere states, however, that the discretionary interest is duplicative of or overlaps with the common law damage claim. Indeed, the strong implication is that the *Cottleville* court recognized that the interest award and common law damages do not overlap:

Prior to the enactment of Section 523.045, condemnees had no right, under the constitution or by statute, to collect damages sustained by virtue of the pendency of the proceedings in abandoned condemnation actions. Any damages were recoverable only in a tort action. In particular, condemnees had no right to interest on damage awards in such actions and courts had no power to award such interest.

Id. at 119 (citations omitted).

We last consider defendant's argument that the trial court improperly relied on its failure to prove "special" damages. In its order, the trial court recited the procedural history of the motion, which included defendant's declination of the court's offer to hold an evidentiary hearing on damages. The trial court's inclusion of this fact does not indicate that the trial court's ruling was improperly based on plaintiff's failure to prove any non-recoverable damages resulting from the condemnation award. Instead, the court was giving the landowner the opportunity to show any circumstances which would make a discretionary award of interest equitable because of any practical deprivation of ownership rights which may have occurred after the commissioners' report was filed. The landowner did not offer any such evidence.

Id. at 120.

These two quotes together make it plain that, first, the interest that is awarded under Section 523.045 is not available in the common law action, and, second, the interest award is intended to be equitable and not based on whether the owner proves or fails to prove any special damages.

The clear import of the *Cottlesville* decision is that it does not purport to change the prior existing law that held, as shown in the Substitute Opening Brief, that the interest judgment entered in the condemnation action is not duplicative of the damages to be awarded in a

common law abandonment action, and that therefore defendants should not be entitled to any set-off or credit for any portion of the interest award, let alone the entire amount.

7. *Response to defendants' sixth through eighth points relied on:* 66 is entitled to recover damages for the interest it paid on its mortgage after the sale of its property to Crestwood Festival was blocked as well as for the \$60,000 it spent in lease termination payments prior to the filing of the condemnation for the reasons stated in the Substitute Opening Brief.

It is 66's view that the defendants' sixth through eighth points relied on, which respond in turn to 66's first through fourth points relied on, do not raise any argument that requires any extended response beyond those already made above or argued in the Substitute Opening Brief.

66 would note, however, that it does not contend that mortgage interest or lease termination fees would be proper elements of damages in all condemnation abandonment cases. In a case involving a residence where the family continues to reside in the home throughout the condemnation proceedings, for example, an award of mortgage interest would most likely not be appropriate because the family is making full use of the home as their residence. In contrast, if a family was in the process of selling their home in connection with an out of town transfer at the time the condemnation is filed, thus blocking their ability to sell the home and reducing the rent that they are able to charge for it, it would be appropriate that they be entitled to recover the difference between the cost of keeping ownership of the house, including mortgage interest, and the rent they can earn on it.

Similarly, where a company is operating a business on the condemned property without having contracted to cease operations and sell the property presents a situation quite different from that here, where 66 had contracted to sell the Property for the purpose of generating funds to expand its business.

In short, each case must be judged on its own facts in the common law tradition, as the courts of this State have always done.

When a loss has been imposed on a party by the actions of another, it is equitable and just that the party causing the loss be held financially responsible for it. That is all that 66 is seeking here. Missouri law permits and favors such a result.

8. *Response to defendants' ninth point relied on:* 66 is entitled to prejudgment interest on its claims for carrying costs, including both mortgage interest and taxes, and on the \$60,000 lease termination payments to Emmis.

It is clear that the amount of mortgage interest and real estate taxes that 66 paid on the Property each month that the condemnation was pending is a stated and liquidated sum, as was the \$60,000 lease termination payment made to Emmis. At all times during these proceedings, the only question about these items was whether, as a matter of law, these sums could be awarded to 66 as damages for defendants' condemnation abandonment. These sums are therefore quintessentially liquidated and 66 is properly compensated for the extraordinary eleven-plus year delay it has suffered in the recovery of its damages with an award of prejudgment interest.

If a claim is liquidated, the interposition of a counterclaim, set-off, or defense does not convert the liquidated demand into an unliquidated one or preclude recovery for prejudgment interest even though the counterclaim, setoff or defense places the amount payable in doubt. Prejudgment interest is the measure of damages for failure to pay money when payment is due, even though the obligor refuses payment because he questions legal liability for all or portions of the claim. It is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a liquidated sum.

Ehrle v. Bank Bldg. & Equip. Corp of America, 530 S.W.2d 482, 497 (Mo. App. 1975) (citations and internal quotations omitted).

Thus, just because defendants contested their liability in damages for the mortgage interest, real estate taxes, and lease termination fees paid by 66 does not render these sums unliquidated. They are liquidated sums, and the defendants should pay prejudgment interest on them.

The other points asserted by defendants regarding prejudgment interest have been previously addressed in the Substitute Opening Brief and need not be repeated here.

CONCLUSION

66 should be granted the relief requested in its Substitute Opening Brief. The relief requested by defendants in their cross-appeal should be denied.

Respectfully submitted,

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