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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc. ..... Appellant

vs.

South Carolina Department of Commerce, Division of Public Railways ..... Respondent

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APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

On January 17, 2024, this Court issued its Opinion No. 28184 affirming the Order of the Circuit Court. The Appellant, in response to this Court's Opinion, respectfully offers the following points this Court overlooked or misapprehended in issuing its Opinion.

I. THE DECISION OF THIS COURT IS IN DIRECT CONFLICT WITH RULINGS BY OTHER STATE SUPREME COURTS AND COURTS OF APPEAL.

Appellant argued in its Final Brief and Reply Brief that other states had recognized moving and reestablishment expenses were not limited in condemnation cases. Appellant cited *Jacksonville Express Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1959) in which the Florida Supreme Court allowed moving expenses consistent with the Florida Constitution (Section 29 of Art. XVI).

The Oklahoma Supreme Court in *State ex. rel. Dep't of Trans. v. Little*, 2004 OK 74, 100 P.3d 707 (Okla. 2004) held "administrative reimbursement proceedings were 'a supplementary scheme of recovery under which funds can be used to reimburse a person displaced from a home, business or farm by a government project for that person's moving and related expenses where such expenses are not otherwise fully compensable under state condemnation law.'"

The Oklahoma Supreme Court in that Opinion stated:

> This Court should never be unmindful that a Landowner is entitled to be compensated fully when the latter's property is taken in the exercise of the eminent domain power. The mandate of the State and Federal Constitutions strongly supports full indemnification by just compensation.

The Michigan Court of Appeals in considering their reimbursement and/or reestablishment statutes also considered just compensation principals under the United States Constitution in *Dep't of Trans. v. Gilling*, 289 Mich. App. 219, 796 N.W.2d 476 (2010). The Michigan Court found:

> We find nothing in the Uniform Relocation Assistance and Real Property Acquisition Act (FURA) (42 U.S.C. 4601, *et seq.*) to indicate that the administrative scheme it creates was designed to precede resort to the courts..... The federal regulations implementing the FURA recognized that compensation made under judicial eminent-domain principles of state law may precede the filing of a FURA claim and, when read in conjunction with 42 U.S.C. 4631(b), implicitly acknowledge that state law condemnation compensation may include items that would also be compensable under the FURA.

In reaching its Opinion in *Gilling*, the Michigan Court of Appeals wrote "no act of the Legislature can take away what the Constitution has given." As a result, Michigan and Oklahoma courts allowed business owners to receive unlimited business-interruption and/or reestablishment damages including moving and relocation expenses consistent with the United States Constitution.

This Court in its Opinion neither cites nor distinguishes *Gilling* or *Little* or acknowledges its Opinion is different from those Courts' decisions. In fact, the Court ignores Michigan, Florida and Oklahoma Opinions. Appellant believes that such a decision is erroneous as a matter of law and that

this Court has not reached the ultimate issue: Does the United States Constitution limit reestablishment expenses in a condemnation action? The resounding answer is "No." Accordingly, Appellant requests a rehearing or at the very least that the Court address this issue directly.

The *Gilling* and *Little* decisions are directly in opposition to this Court's footnote which states:

> Twenty-five other states have a statute authorizing the repayment of reestablishment expenses to a displaced farm, nonprofit organization, or small business as a result of eminent domain with a set monetary cap. The constitutionality of the statutes in other states has apparently not been challenged.

II. S.C. CODE § 28-11-30(4) VIOLATES EQUAL PROTECTION.

During the hearing and in its briefs, Appellant noted that reestablishment expense limitations pursuant to S.C. Code § 28-11-30(4) is discriminatory. Our statute limits reestablishment expenses for small businesses, farms or non-profit organizations to $50,000.00. The statute has no limitation for large businesses, for example, Michelin, BMW or other big companies. If those companies had to reestablish their business in another location because of a condemnation, this statute would not apply and there would be no limitation on their reestablishment expenses. Appellant raised this issue at the hearing before this Court that S.C. Code § 28-11-30(4) gives a unconstitutional preference to large businesses and does not limit their reestablishment expenses. This is, of course, the reason the Oklahoma Supreme Court in *Little* and the Michigan Court of Appeals in *Gilling* found that the statute was supplementary. If it were not supplementary, it would limit condemnation awards for reestablishment expenses and would thus violate the Equal Protection Clause of the United States Constitution. Large companies would be singled out for preferential treatment, while other businesses (small businesses, farms and nonprofits) would be limited as to their recovery of reestablishment expenses. Such a statute violates basic fairness principles. Preferential treatment to large businesses for reestablishment expenses is discriminatory *ab initio*.

In sum, there is no rational basis why small businesses, farms and nonprofits mare limited to $50,000.00 in reestablishment expenses while larger businesses are not so limited. (*Fraternal Order of Police v. South Carolina Dept. of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002); *Quinn v. Millsap*, 491 U.S. 95 (1985) (holding unconstitutional provision of the Missouri Constitution establishing a land ownership requirement for membership on board charged with drafting plans to recognize the governments of the city and county of St. Louis); *Metropolitan Life Ins. Co. v. Ward*, 420 U.S. 869 (1985) (holding unconstitutional Alabama's Domestic Preference Tax Statute imposing a substantially lower gross premium tax rate on domestic insurance companies than on out of state insurance companies); *Zobel v. Williams*, 457 U.S. 55 (1982) (finding unconstitutional Alaska's law that a portion of state's mineral income fund states adult residents based on a citizen's length of residency in Alaska); *James v. Strange*, 407 U.S. 128 (1972) (holding unconstitutional Kansas's statute enabling the state to recover in subsequent civil proceedings legal defense fees for indigent defendants but not for nonindigent defendants); *Whyy, Inc. v. Burrow of Glassboro*, 393 U.S. 117 (1968) (holding unconstitutional New Jersey statute denying tax exemption to foreign nonprofit corporations who own a property in New Jersey on the sole ground that those corporations had not been incorporated in New Jersey); *Atchinson, Topeka and Sante Fe Railway v. Vosburg*, 238 U.S. 56 (1915) (holding unconstitutional a Kansas law which allowed recovery of an attorney's fee by a shipper in a case of delinquency by the carrier but the carrier no right to attorney's fees in case of delinquency on the part of a shipper).)

The Court's Opinion did not address this issue but should do so in light of the obvious nature of the problem presented. In sum, this Court's ruling favors big business over small business in an unconstitutional manner.

CONCLUSION

It is not logical nor rational that small businesses reestablishment expenses be limited by law to $50,000.00 while big businesses have the right to unlimited reestablishment expenses. Finally, the decision by this Court is far reaching in that it limits reestablishment expenses for one class of claimants while allowing a second class the right to unlimited reestablishment expenses. In effect, a situation which discriminates against one group in favor of another. This Court's Opinion discriminates in favor of one group and holds it is a policy decision of the Legislature which makes the statute unconstitutional on its face. Applied Building Sciences, Inc. requests the Court withdraw the Opinion of January 17, 2024 and issue a new Opinion in conformity with Appellant's arguments.

Respectfully submitted,

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