THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge
Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc.,

Appellant,

v.

South Carolina Department of Commerce,
Division of Public Railways,

Respondent.

RESPONDENT'S RETURN TO APPELLANT'S MOTION FOR REHEARING

Appellant was a leaseholder of property condemned by Respondent. Appellant was fully compensated for its interest in the property and also received complete reimbursement for its moving costs. While Appellant is free to upfit its new location however it wants, Respondent is not liable for those expenses beyond the reestablishment expenses permitted by statute. The statute limits the reimbursement to $50,000 and this Court found that the limit was constitutional. Despite the well-reasoned and unanimous Opinion, Appellant has now moved for rehearing.

As an initial matter, this case is not appropriate for a rehearing. "[T]he purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). As the *Arnold* case noted:

> It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a "rehash" of what the losing party has said before, matters which the court has already considered well and disposed of.

Id., 167 S.E. at 238. Appellant's first argument is simply a rehash of the arguments already presented to and rejected by this Court.

In addition, "the purpose of a petition for rehearing **is not to present points which lawyers for the losing parties have overlooked or misapprehended….**" *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (emphasis added) (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999); *see also Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."). Appellant's second argument was not raised in the briefs submitted to this Court and cannot now be presented on a motion for rehearing.

Moreover, on their merits, the arguments Appellant presents do not support rehearing, as set forth more fully below.

I. This Court's decision is in accord with the United States and South Carolina Constitutions and any conflict with other state appellate court decisions has no impact.

Appellant's argument that this Court's Opinion is in conflict with appellate courts in Florida, Michigan, and Oklahoma is merely a repeat of its initial arguments. Furthermore, those decisions are not mandatory authority to be followed by this Court. In its Brief, Respondent has already distinguished these cases and fully explained why none of them should be adopted as persuasive authority. (Resp. Brief pp. 14-15). Moreover, persuasive authority from other

jurisdictions cannot be applied in a manner that would overrule state supreme court precedent. *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019). This Court has repeatedly held that damages for just compensation in a takings case are limited to the value of the thing taken unless otherwise provided by statute. *See*, *e.g.*, *Westside Quik Shop Inc. v. Stewart*, 341 S.C. 297, 305, 534 S.E.2d 270, 274 (2000) ("The Fifth Amendment Takings Clause concerns itself solely with the owner's relation to the physical thing and not the consequential damages."); *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 417-18 (1963) ("[I]t is the general rule that injury to or loss of business resulting from the taking is not considered an element of damage in eminent domain proceedings in the absence of a statute expressly allowing such damages.") Application of the law from those out-of-state cases would effectively overturn longstanding South Carolina precedent. To summarize, the fact that three states have included relocation expenses as an element of damages is meaningless in this case.

Appellant also claims that this Court has not reached the issue of whether the United States Constitution limits reestablishment expenses in a condemnation. While the United States Supreme Court (hereinafter, "the Supreme Court") has not expressly ruled on this issue, it has indicated that compensation, other than that for market value, must be statutorily provided. As this Court noted, the United States Constitution has not defined "just compensation" but case law has recognized that phrase to mean "market value." Op. No. 28184 at p. 5, citing *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946). Additionally, the Supreme Court has held that certain expenses are not compensable as an element of damages "unless made so by express statute." *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676 (1923) (considering whether the cost of removing personal property from land taken is a proper element of damages). Thus, this Court properly followed federal takings jurisprudence established by existing Supreme Court case law. Under the

federal rubric, expenses other than market value are only permitted if there is an express statute, such as S.C. Code Ann. § 28-11-30(4). Because reestablishment expenses are separate from damages awardable as just compensation under the United States and South Carolina Constitutions, the $50,000 cap violates neither the state nor the federal Constitutions.

II. There is no violation of equal protection because S.C. Code Ann. § 28-11-30(4) does not provide large businesses with the right to receive reestablishment expenses.

Appellant states that "[t]he Court's Opinion did not address this issue but should do so in light of the obvious nature of the problem presented." Memorandum of Law in Support of Petition, p. 4 (hereinafter, "Memorandum"). However, the reason this Court did not address an equal protection argument is because Appellant did not present it in either its Brief or Reply Brief.

Appellant claims that it raised this issue at the hearing before this Court. Appellant did, in passing, mention that small businesses were limited to the cap but "everybody else [gets] whatever they want." Supreme Court Video Portal, https://media.sccourts.org/videos/2021-000051.mp4 at the 7:00 minute mark. However, Appellant did not argue a violation of equal protection in its briefs to the Court.[1] Moreover, in its briefs, Appellant actually argued that the statutory cap would apply to Michelin: "As a prime example, suppose the State of South Carolina condemned the Michelin tire plant in Greenville to build a road….the personal property/moving or reestablishment costs of Michelin would be limited to $50,000.00." App. Brief, p. 15; *see also* Reply Brief, pp. 2-3. It is clear that Appellant failed to assert any equal protection claim at any time prior to its most recent filing and, as noted above, an issue cannot be presented for the first time in a petition for rehearing. *See Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("… a

[1] In fact, Appellant did not even include the violation of equal protection as a claim in its Complaint. R. pp. 226-229.

party may not raise an issue for the first time in a petition for rehearing."); *Kennedy v. S.C. Ret. Sys.*, *supra* ("The dissent argues the appellants' petition should be granted because of 'one significant argument not previously considered by the Court.' The argument was not considered because it was never presented to this Court.").[2]

Furthermore, Appellant has misconstrued the application of S.C. Code Ann. § 28-11-30(4). Appellant claims that the statute limits reestablishment expenses for small businesses, farms, or non-profit organizations but that there is "no limitation for large businesses, for example, Michelin, BMW or other big companies." Memorandum, p. 3. Appellant argues that this supposed bias in favor of large businesses constitutes a violation of equal protection. Section 28-11-30(4) states:

> Reestablishment expenses related to the moving of a **small business, farm, or nonprofit organization** payable for transportation projects pursuant to federal guidelines and regulations may be paid in an amount up to fifty thousand dollars, notwithstanding a lower limitation imposed by federal regulations.

(emphasis added). By the plain language of the statute, large businesses are not entitled to <u>any</u> compensation. This, of course, is completely rational. Large companies such as BMW or Michelin are better positioned to pay for reestablishment expenses than small businesses, farms, and non-profit organizations. The statute is not unfair to or preferential against Appellant and there is no basis for an equal protection claim.[3]

Accordingly, Appellant's Motion for Rehearing should be denied.

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[2] Appellant also cites a string of cases on page 4 of the Memorandum that have never been cited before.

[3] Reimbursement for actual moving expenses is not limited for either small or large companies. As noted previously, Appellant was fully reimbursed for its actual moving expenses. The issue in this case is whether Appellant was entitled to uncapped reestablishment expenses.

Respectfully submitted,

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