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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

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The Appellant Applied Building Sciences, Inc. (ABS) offers the following Reply to the Respondent's Initial Brief.

ARGUMENT

I. THE DEFENDANT'S ARGUMENT THAT OTHER STATE CASES ARE BASED ON STATE LAW IS ERRONEOUS.

The Respondent goes to great length to argue that the court rulings of Michigan, Oklahoma, and Florida on reestablishment expenses are different because of their respective state laws. Appellant reports to the Court that this argument is misplaced and illogical.

In *Jacksonville Express Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1959), the Respondent argues this case is purely a matter of Florida law. However, the Florida Supreme Court in deciding this case interpreted Section 12 of the Declaration of Rights which provided "Nor shall private property be taken without just compensation." 108 So.2d at 290.

In *Dep't of Trans. v. Gilling*, 796 N.W.2d 476 (Mich. Ct. App. 2010), the Michigan Court of Appeals decided a similar case based on the Michigan Constitution which states "private property may not be taken for public use without just compensation."

In *State ex. rel. Dep't of Trans. v. Little*, 2004 OK 74, 100 P.3d 707 (Okla. 2004), the Oklahoma Supreme Court in deciding the issue of reestablishment expenses cited Article II, Section 24 of the Oklahoma Constitution which says, "private property shall not be taken without just compensation."

These provisions in the Oklahoma, Michigan and Florida Constitutions are exactly the same as South Carolina's Constitution Article I, § 13 which states "private property shall not be taken for public use without just compensation."

The Oklahoma, Florida and Michigan Courts made it clear that when someone's property (personal or real) is being taken, the owner is entitled to be made whole. See *Jacksonville Express Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1959). In *State ex. rel. Dep't of Trans. v. Little*, 100 P.3d 707 (Okla. 2004), the Oklahoma Supreme Court held in a case of first impression that a landowner was entitled to full compensation and also was entitled to "every lawful interest which can be enjoyed in property." Further, the Oklahoma Supreme Court defined property as more than real property and includes any intangible loss resulting from the property. 100 P.3d at 709.

In sum, the Constitutional provisions of Oklahoma, Florida and Michigan make those cases excellent precedent for this Court to hold that reestablishment expenses are not limited to an arbitrary \$50,000.00 limit as provided for in S.C. Code § 28-11-30(4).

The argument that relocation assistance is a separate and distinct damage in terms of the Constitution is not only erroneous, but it is logically inconsistent to the overriding theme that an owner of real property is entitled to be fully compensated when the government takes his or her property.

II. ABS DID NOT CHOOSE TO EXPEND FUNDS ON RENOVATIONS BUT WAS COMPELLED BY STATE ACTION.

The Respondent in its brief argues that ABS chose to expend funds on renovations to its replacement property in excess of the statutory cap of \$50,000.00. Nothing could be further from the truth. ABS (for over 20 years) had been a tenant on the property which was taken by Defendant and had no intention of moving its entire business operation to a new location. Further, ABS was compelled to renovate the property not because it wanted to, but because it had to for its business. As has been argued in Appellant's Initial Brief, ABS should not be penalized because it had to move and renovate its property. ABS should be fully compensated for those measures. The same thing would occur if the State decided to condemn the BMW Plant in Greenville or the Michelin Plant in Spartanburg. The reestablishment expenses in moving the BMW or Michelin Plant would be

enormous and a limitation of \$50,000.00 would require Michelin or BMW to expend its own monies (property) to reestablish its business. The United States and all State Constitutions prohibit such limitations, and the property owner should not be made to suffer because of the government's decision to condemn its property.

III. THE JURY WOULD DECIDE REASONABLE REESTABLISHMENT EXPENSES.

The Respondent argues in its brief that ABS would be entitled to all of its reestablishment expenses. This is in fact not the case. The Respondent would be fully allowed to challenge ABS's reestablishment expenses in open court before a jury. The jury would not be required to award any amount for reestablishment expenses but only that amount which was proven by a preponderance of the evidence.

IV. THE CASES CITED BY RESPONDENT ARE NO LONGER APPLICABLE.

The Respondent has cited numerous cases from the 1950s, 1960s and 1970s for the argument that moving and relocation costs are separate from constitutional just compensation. Appellant believes that recent decisions of the United States Supreme Court say different. Appellant asserts that recent decisions of the United States Supreme Court have effectively overruled the cases that Respondent cites. See *Lucas v. Coastal Council*, 505 U.S. 1003 (1992) and *Horne v. Dept. of Agriculture*, 576 U.S. 350 (2015) in which the United States Supreme Court held that taking of personal property violated the United States Constitution.¹ Further, as has been seen in Appellant's Initial Brief, money is property and the government's taking of money is no different than the government's taking of a car, a boat, a tractor or a train, and is afforded the same constitutional

¹ See also S.C. Code Ann. § 14-1-10. "Property" defined. The word "property" as used in this Title, includes property, real and personal. See also *Bowman v. Bowman*, 357 S.C. 186, 591 S.E.2d 654 (S.C. App. 2004). (The term "property" is a general term used to designate a right of ownership and it includes every subject of whatever nature upon which the right of ownership can legally attach, including choses in action.)

protection as real property. In effect, the condemnation actions of the Respondent in this case physically appropriated ABS's personal property requiring it to spend money it did not want to spend on reestablishment costs for a new office location. This is clearly prohibited by the United States and South Carolina Constitutions and, thus, S.C. Code Ann. § 28-11-30(4) is unconstitutional because it arbitrarily limits expenses to \$50,000.00.

In sum, the State cannot constitutionally pay unlimited damages for real property condemnation cases but limit reestablishment damage claims to \$50,000.00. Such a proposition is repugnant to the Constitutions and must be struck down.

V. JUST COMPENSATION AND REESTABLISHMENT EXPENSES ARE INDIVISIBLE IN CONSTITUTIONAL TERMS.

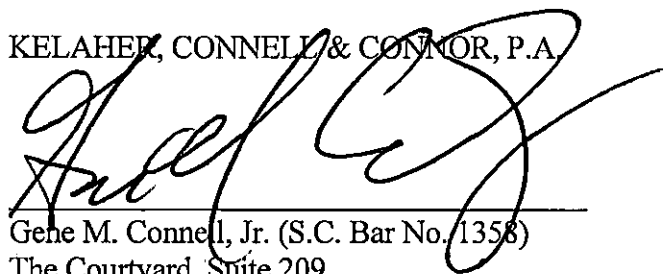
Here, the issue is simple. The State cannot possibly justify the difference between compensation for land and reestablishment expenses. The United States Supreme Court made clear in *Horne v. Dept. of Agriculture*, 576 U.S. 350 (2015) that the taking of personal property has the same constitutional protections as real property. In *Horne*, the Court held the takings clause of the Fifth Amendment applies with equal force to personal as well as real property. Thus, the Respondent's argument that there is a distinction between just compensation and reestablishment expenses is both arbitrary and capricious as a matter of law.

CONCLUSION

Accordingly, Appellant requests the Court reverse the Order of the trial court and remand this case for a trial on reestablishment costs and/or expenses.

Respectfully submitted,

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April 22, 2021
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Applied Building Sciences, Inc. Appellant

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the Reply Brief of Appellant on the 22nd day of April, 2021, by depositing a copy of same in the United States Mail, postage prepaid, to:

David L. Paavola, Esquire
Keith M. Babcock, Esquire
Lewis Babcock L.L.P.
P. O. Box 11208
Columbia, SC 29211

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 22nd day of April, 2021.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

KELAHER, CONNELL & CONNOR, P.C.

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April 22, 2021

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Re: Appellate Case No. 2021-000051
*Applied Building Sciences, Inc. v. South Carolina Department of Commerce, a
Division of Public Railways*
C/A No. 2019-CP-10-04387
Our File No. 2019-0378C

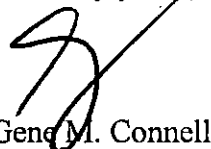
Dear Ms. Kitchings:

Enclosed please find the Reply Brief of Appellant and Proof of Service for filing in the above-captioned case.

Please be so kind as to return a filed copy of the Proof of Service in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated documents on Respondent through counsel of record.

Sincerely yours,



Gene M. Connell, Jr.

GMCJr:sm
Enclosures

cc w/enc.: David L. Paavola, Esquire
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