

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**May 14 2025**

**SC Court of Appeals**

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

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C/A No. 2018CP0202797  
Appellate Case No. 2024-000079

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Elroy D. Fischer, Jr., CD&F Interests, LLC, Howard Lumber Company, and the  
Robert E. Pentecost Trust, Respondents,

vs.

South Carolina Department of Transportation, Appellant.

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SUPPLEMENTAL RECORD ON APPEAL

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1 MR. MCCANTS: Yes.

2 THE COURT: All right, very good. So that -- does  
3 that work? Any objection?

4 MR. MCCANTS: No objection. And, in fact, my plan  
5 is to move when you allow me to for directed verdict.

6 THE COURT: Certainly. Do you, do you anticipate  
7 that will be a lengthy motion? Can we do --

8 MR. MCCANTS: You know me, Judge.

9 THE COURT: All right. Can we handle that now?

10 MR. MCCANTS: I could do it in 10 minutes, sure.

11 THE COURT: I'm not rushing you. We can, we can  
12 handle it after lunch.

13 MR. MCCANTS: It's not going to be terribly  
14 lengthy, but I do want to make a record, obviously --

15 THE COURT: Yes.

16 MR. MCCANTS: -- and explain to you. Are you  
17 prepared for that?

18 THE COURT: I am. Let's do that now.

19 MR. MCCANTS: All right.

20 And I want to emphasize, Judge, that I treat any  
21 motion in any case seriously. But I recognize that  
22 sometimes we just have to make motions for the record.  
23 But I want to emphasize these are not perfunctory  
24 motions I'm making in this case. I believe very  
25 strongly in them and I think the evidence so far shows

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1 there's a basis to grant them. So that's why I'm  
2 moving. And I'm going to do them in this particular  
3 order.

4 The two causes of actions as Mr. Player has  
5 explained to you in this case are for an inverse  
6 condemnation, a taking, and also an injunction. And  
7 Judge, I will be probably open to the notion that there  
8 are questions of fact with regard to whether or not  
9 there has been a taking in this particular case. That  
10 even though I believe strongly as a matter of law, and  
11 this kind of bleeds into my motion as to release that I  
12 pled as part of this case. But the -- I think the  
13 evidence is only capable of one interpretation in that  
14 these landowners, these plaintiffs in this particular  
15 case were well aware of what I'll just call water  
16 issues with regard to the Chadwick Development many,  
17 many moons ago. And knew what they were dealing with,  
18 and knew they had to plan this development to respond  
19 to serious water issues that had been evident for  
20 years.

21 Now what's interesting about that is probably the  
22 best historical witness on that as you, of course, is  
23 Mr. Leroy Fischer who testified. He's really the only,  
24 I don't know if he's the only surviving, but the only  
25 living representative of the original landowners that

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1 were involved in the condemnation in 2006. If you  
2 recall Mr. Franke's father was, and there were others,  
3 Mr. Badger's father with the lumber company were  
4 involved, but those gentlemen have not testified as  
5 part of this case. So I think the Court should look to  
6 Mr. Fischer's testimony.

7         And the other -- the evidence just shows that  
8 there has not been an aggressive or affirmative act by  
9 the Department of Transportation since they finished  
10 the Palmetto Parkway to serve as a taking. You can't  
11 take what's already been taken. This, this, the  
12 condition of this property has been such that it is  
13 today for apparently hundreds of years. It's certainly  
14 been in the same condition prior to any touching of the  
15 property, any construction undertaken by the DOT in the  
16 mid-2000s. So that's my position as a matter of law.  
17 There has not been a taking in this case.

18         But I respect the Court in terms of, well, maybe  
19 there is a question in that regard so we should proceed  
20 to the defense case. The mitigation issue is also a  
21 defense to the allegation of an inverse condemnation.  
22 And it relates to that and also relates to the issue of  
23 damages, which is not in front of you today, even  
24 though we talk about damages which have occurred on  
25 this property for years and years.

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1           And you've heard the testimony. Since DOT  
2           acquired the 25 acres, paid for that, there has been no  
3           effort by the plaintiffs in this case to mitigate their  
4           damages. Which, again, I think goes to the cause of  
5           action for inverse condemnation as well as damages,  
6           which we don't believe we should get to in this  
7           particular case. I think this case should end here.

8           Now I saved for the Court a real basis, I think,  
9           for directed verdict in this case. And it relates to  
10          our defense, the claims that the original landowners  
11          had, as part of the condemnation, were fully released  
12          when they accepted \$504,560 for the 25 acres at the top  
13          of their development. And undertook as part of the  
14          acceptance of that money to release in writing any  
15          claims they had for DOT to date, or any claims they may  
16          have in the future with regard to the construction of  
17          this portion of the interstate, the Palmetto Parkway.

18          Now I'm an officer of the court. And I've been  
19          told by my client, DOT, that you're also a lawyer for  
20          all the taxpayers in this state. And I have to treat  
21          them fairly, and I would do that anyway. And the  
22          reason I make that announcement to you is, is I don't  
23          know if anybody has noticed but the release language  
24          that Mr. Fischer on that release he signed is different  
25          than the release language that Mr. Badger's father

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1 signed. And you have got the exhibit and I'll go ahead  
2 and point it out to you. I don't think it makes a  
3 material difference for purposes of my argument, but I  
4 want to be fair to the landowners, and obviously, be  
5 honest to this Court and tell them that language is  
6 different.

7 If you look at the release that Mr. Fischer  
8 signed, it talks about in exchange for \$504,560 he is  
9 releasing DOT from any and all claims, demands,  
10 damages, actions, causes of action, and suits at law or  
11 in equity of whatever kind and nature arisen, arising,  
12 or to arise from or because of any matter relating to  
13 the construction of the Palmetto Parkway, Bobby Jones  
14 Expressway, I-520 in Aiken County, South Carolina.

15 Now because I think the testimony has shown  
16 through Plaintiff's case, we had a number of different  
17 landowners and interests passed down, and it's obvious  
18 it was complicated to settle the condemnation case.  
19 There were a lot of plates in there with regard to  
20 that. And eventually Howard Lumber's interest in the  
21 land, and you have heard testimony about how they got  
22 their interest. If you look at the release signed by  
23 Mr. Badger, again Will Badger's father, which -- and I  
24 should have known these dates, I understand, Judge.  
25 It's this document dated 11 June 2007. If you look at

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1 Page 3 of the releasing language. In Paragraph 1 it  
2 talks about condemnees Howard Lumber Company and  
3 Lighting Galleries Incorporated, hereby release and  
4 discharge the State of South Carolina and its agencies,  
5 departments, institutions, boards, and commissions and  
6 officials, agents, employees thereof or successors  
7 thereto and particularly the South Carolina Department  
8 of Transportation, from any and every right and all  
9 manner of action or actions, causes of action, claims  
10 and demands of any kind which they now have or at any  
11 time claim, arising from or because of any matter  
12 relating to this condemnation action.

13 I agree that that's a little bit different than  
14 the language in Mr. Fischer's release. I don't think  
15 it makes a difference. I think these folks -- we  
16 didn't have Mr. Badger here today. I understand that's  
17 the man who signed the release, but I do believe this  
18 honestly, that Mr. Fischer, again, is the best witness  
19 from a historical and other standpoint to tell the  
20 Court what was done by those original landowners as  
21 part of the condemnation case with regard to settling  
22 that case.

23 And they released it. And I made a point of  
24 making sure that I had testimony. And I believe  
25 Mr. Fischer is a very honest man, with very -- a great

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1 deal of integrity. I would never challenge his honesty  
2 in that respect. But he told you that he was familiar  
3 with the condition of the interior of his property at  
4 the time he signed that release.

5 We can talk about whether or not Exhibit Number 6  
6 is a man-made roadbed or the product of natural water  
7 flow through there, but regardless, it showed interior  
8 water problems that Mr. Fischer was aware of. And he  
9 accepted that \$172,000 plus change as part of that  
10 condemnation case in settlement of all the claims and  
11 the condition in future claims he knew existed on his  
12 property.

13 And we can only use his testimony, I believe, and  
14 transport it to the rest of the landowners with regard  
15 to their knowledge and intent with regard to accepting  
16 over a half million dollars to end any claim they had  
17 against DOT.

18 So I am asking for a directed verdict in this case  
19 based upon the release, and based upon the documents  
20 and testimony that was introduced at the trial of the  
21 case and through the testimony of individuals. And I  
22 would be happy to answer any questions you may have,  
23 but that's our position with regard to a directed  
24 verdict.

25 THE COURT: All right. Thank you, Mr. McCants.

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1 No questions at this time from the Court. Mr. Player,  
2 would you like to respond?

3 MR. PLAYER: Yes, Your Honor. I'll be brief.  
4 Positive aggressive act -- what Clarke wants you to  
5 take is, well, they knew then that they were getting  
6 water. Yeah, from 82 acres. The testimony is they are  
7 getting 220 acres worth of water now. Moreover, this  
8 entire plan would create a large amount of new water  
9 that they had to deal with. So this has never been  
10 implemented. It's never been approved. There is no  
11 easement of record. This demonstrates, which they have  
12 all freely admitted from the stand, they knew water was  
13 going through there.

14 But what DOT did, the positive aggressive action  
15 was to take and I, I don't know if Billy testified to  
16 it, I think he did. Before they built 520 there was a  
17 28-inch pipe that carried the water from the other side  
18 of the interstate. They now have a 54 and a 28. The  
19 engineer, David, says the volume didn't change. I  
20 disagree with him, and you will understand that when I  
21 cross their expert. But he said the velocity is what's  
22 causing the damage.

23 The original complaint and I'll, I will freely  
24 admit that I, you know, I threw everything in there. I  
25 said volume, I say they are destroying the land, they

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1 cut it in half. All of the evidence of the previous  
2 conditions with the erosion coming from a different  
3 direction, I don't think we can claim that. But what  
4 we saw in those videos they don't have an answer for.  
5 And they're not -- that can't happen. Nobody can use  
6 property when that much water is flowing at a specific  
7 point. There is a way to fix it, and that's really all  
8 we want.

9 Mitigation is a defense. But it's a scaling  
10 defense. It is to lower the amount that you -- the  
11 rule is you are required to mitigate, and if you don't,  
12 it doesn't mean you don't get anything. It means  
13 whatever you could have recovered through reasonable  
14 mitigation efforts, you don't get to recover from the  
15 other defendant. My question, and we've got evidence  
16 in there that they couldn't develop it because of the  
17 underwater -- the underground water.

18 If it's -- if there is water flowing underneath  
19 the property, and it is destabilizing the soil, you  
20 can't build on it. But more importantly, my clients  
21 saw the problem as they are sending us too much water  
22 at this one point. The only way to fix it is to block  
23 it. They don't have room. They don't have extra  
24 property. I mean, they could have gone out there and  
25 built a detention pond for, for DOT but, you know, the

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1 one thing about this is, this is DOT's water.

2 If this is an easement to DOT, this is DOT's  
3 water. There is a natural path, but they are already  
4 admitting in the '80s that that path, the water in that  
5 path belongs to DOT. What this shows you is that just  
6 82 acres of water needed a retention pond. There is no  
7 retention pond for 220 acres that are run through  
8 concrete pipes across the interstate and pointed at my  
9 clients' property like a sniper rifle. There is  
10 nothing there.

11 Now I know they're going to bring up the riser.  
12 Make sure you understand what Clarke said. The riser  
13 was installed in 2013. And it wasn't part of the  
14 plans. So all of this testimony -- and what they are  
15 going to put up is, well, it's always been going there.  
16 That damage came from water. There were three years  
17 from the completion of 520 and the installation of that  
18 54-inch and 28-inch pipe where there was nothing,  
19 nothing. So what you see in the videos, which were all  
20 taken after 2013, and is not what it was like between  
21 2010 and 2013. It was worse. And that can't happen.

22 Mitigation, I'm going to hear it -- if we get to a  
23 jury all of that comes in on it. All of the knowledge  
24 of other erosion on the property, how much acreage is  
25 affected, how much -- that's all damages issue. The

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1 only issue before the Court is did DOT take an act that  
2 caused any part of their property to be taken. We've  
3 given you pictures, videos, and lots of testimony of  
4 trees that have just been taken out right where this  
5 water is being dumped. So if they took a single tree,  
6 it's a taking. The issue is for a jury to decide how  
7 much it's worth.

8 But the injunction is the water is too fast for us  
9 to use it for anything. We want the water stopped.  
10 Then we can develop it. And then the damages at that  
11 point may change. I don't know, but if what they are  
12 doing violates the regs, which I will demonstrate  
13 through their expert, they don't have a leg to stand  
14 on. They are not following their own rules, and that's  
15 what we'll show in their side of the case. But right  
16 now the testimony is the only expert says the water is  
17 too fast. He's not objecting to the volume, but it's  
18 the speed at which it's released which violates the  
19 standards and takes the value from my property, takes  
20 the value of my clients that they have in the property.  
21 But Number 2 -- and I forgot what I was going to say.

22 It's taking, it is literally taking their land  
23 through the erosion, through the erosion of the soil  
24 and knocking down trees. If all we could prove was  
25 that they sent too much water and it took down one

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1 tree, I get to a jury. I mean it's that simple. This  
2 is a very narrow particular legal issue for the Court  
3 to decide, whether or not they took an aggressive act  
4 that caused some diminution of value or use of the  
5 property. And I think all you really need to do is  
6 look at those videos, because you can't do anything  
7 when that much water is flowing that fast.

8 The release, it's a legal issue. I don't believe  
9 that you can waive future claims when you have no idea  
10 what's going to happen. Under, I mean, the only thing  
11 that was within the jurisdiction of the Court at the  
12 time that agreement was made was the property that they  
13 condemned. That's the way it works. They condemn the  
14 owners and the property. Everything that we're dealing  
15 with now was not within the jurisdiction of the Court.  
16 So I don't know how they can waive something in a case  
17 when it wasn't even within the purview of the Court.

18 But think about what Clarke is saying, okay? If  
19 that was affected and DOT just decided to start dumping  
20 all of their waste on my clients' land, we can't do  
21 anything because we've waived it. Had no idea it was  
22 ever going to happen, but we waived every claim forever  
23 and ever against DOT, resulting from the construction  
24 of 520. 520 construction had not even begun. The  
25 plans weren't done when this happened. So how can they

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1 waive when they have no idea what the future holds, or  
2 what DOT is going to do unless it is confined to the  
3 property that was within the jurisdiction of the Court  
4 when the releases were signed?

5 And I disagree with Clarke. I appreciate him. I  
6 love him because I didn't catch it, but that Badger  
7 release does not release future claims. Mr. Elroy's  
8 does appear to say that, but the Badger claim is claims  
9 made and when they were made. It doesn't say future  
10 claims, so there is no way that that release is going  
11 to (inaudible) Howard Lumber.

12 So I don't think the release works. It is a legal  
13 issue that's out there, but I just don't think, you  
14 know, the fundamental elements of a contract are a  
15 meeting of the minds. There's no way that Keith  
16 Badcock or any of my clients or their predecessors  
17 signed that release with the intent to allow DOT to  
18 flood them with water on the property they still owned.  
19 That's, that's just not rational. They wouldn't have  
20 done that.

21 So I think the DV should be denied. We should  
22 move forward and hear Defense's case, and then I'll be  
23 back up here to argue it again when that's done. Thank  
24 you.

25 THE COURT: Any response -- thank you Mr. Player.

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1 Any response, Mr. McCants?

2 MR. MCCANTS: Yes, ma'am.

3 THE COURT: All right.

4 MR. MCCANTS: Just only on the issue of the  
5 release and its effect in this context that Mr. Player  
6 presented to you, that executes under that release  
7 allowed an unfettered right to the state and the DOT to  
8 do anything to these land -- nice landowners in the  
9 future. If you read that releasing language it is a  
10 release of claims with respect to the Parkway and the  
11 construction of the Parkway. Very tight, very limited,  
12 but it does apply to future claims on it's face, Your  
13 Honor. And I disagree with Tucker in that regard. And  
14 I, I feel very strong on behalf of my client that they  
15 acted in good faith in the payment of this amount of  
16 money for that 25 acres that these landowners did  
17 release any claims to date, or in the future, related  
18 to the construction of the Parkway.

19 THE COURT: Very good. Thank you, sir. All  
20 right, gentlemen, I'm going to take that motion for  
21 directed verdict under advisement over the lunch break.  
22 And so it's 12:10 now. We will come back here at about  
23 1:25 or so.

24 MR. MCCANTS: Oh, make it like 1:30.

25 THE COURT: I know. I was just thinking I could

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1 use that extra five minutes. We'll do that. We'll  
2 come back at 1:30.

3 MR. MCCANTS: Yes, ma'am.

4 THE COURT: And so, if it is necessary -- I'll  
5 make my ruling then. If it is necessary, you have how  
6 many witnesses?

7 MR. MCCANTS: I'm going to call Mr. Saunders, the  
8 appraiser in 2005. That shouldn't be terribly long.  
9 We're not getting into values.

10 THE COURT: Sure.

11 MR. MCCANTS: Only into his photographs and what  
12 he observed. Mr. Robert Giddens is here from DOT. He  
13 is the chief right-of-way, or head of the right-of-way  
14 department for the department. He is here to talk a  
15 little bit about the condemnation process. I'm not  
16 sure if I'm going to call Mr. Usry --

17 THE COURT: Okay.

18 MR. MCCANTS: -- who's been sitting with me. He's  
19 the construction type engineer. And finally I have  
20 Mr. Krishjen Auld, my engineer, to testify. If I had  
21 to tell you I think Mr. Auld will probably take more  
22 time than the other witnesses --

23 THE COURT: Okay.

24 MR. MCCANTS: -- but I'm going to move forward  
25 deliberately in an effort to try and conclude this

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1 matter today if we can.

2 THE COURT: Okay. We'll see.

3 MR. MCCANTS: If possible.

4 THE COURT: Yes, sir. We'll certainly see if  
5 that's possible. If not it's available to us tomorrow.

6 MR. MCCANTS: Thank you, Judge.

7 THE COURT: But my staff is going to be real  
8 upset, (inaudible).

9 MR. MCCANTS: What then, what course should I  
10 take? I don't want to upset -- should I try to end it  
11 or end tomorrow?

12 THE COURT: I don't, I won't be upset. You know  
13 our tradition here in Aiken is the doors are usually  
14 locked on Fridays.

15 MR. PLAYER: That's not just Aiken. That's true  
16 much across --

17 THE COURT: Well, we'll see -- we will not let  
18 that hinder us from finishing and doing, doing a  
19 thorough job. So we will come back at 1:30 and, and  
20 get that started, and we'll see how the rest of the day  
21 goes. All right?

22 MR. MCCANTS: Thank you, Your Honor.

23 THE COURT: Court is adjourned.

24 (WHEREUPON, the Court took a recess.)

25 THE COURT: All right, gentlemen. I have made a

Certificate of Counsel

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Dated: May 14, 2025

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