

RECEIVED

Aug 04 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

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

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

vs.

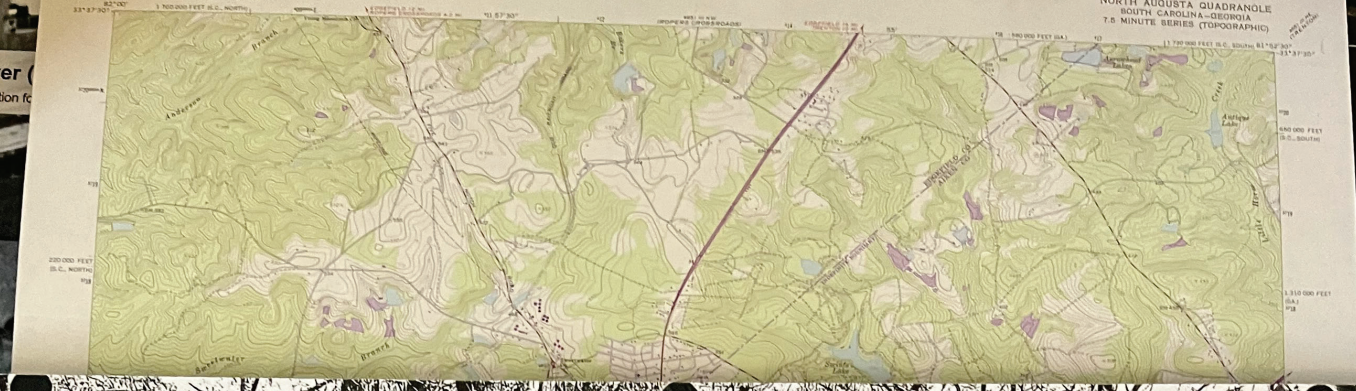
South Carolina Department of Transportation, Appellant.

RECORD ON APPEAL
(Appendix)

INDEX

Defendant’s Exhibits 3, 4, & 5.....513
Motions for Directed Verdict.....516

Landcover
Write a description for



DEFENDANT'S EXHIBIT
3
9/20/23

15 meters well as shown by dashed corner ticks.
Fine red dashed lines indicate selected fence and field lines, where generally visible on aerial photographs. This information is unchecked.
Red tint indicates areas in which only landmark buildings are shown.

Areas shown in purple compiled by the Geographical Survey from aerial photographs taken 1977 and other source data. This information not field checked. Map dated 1980.
Purple tint indicates extension of urban areas.

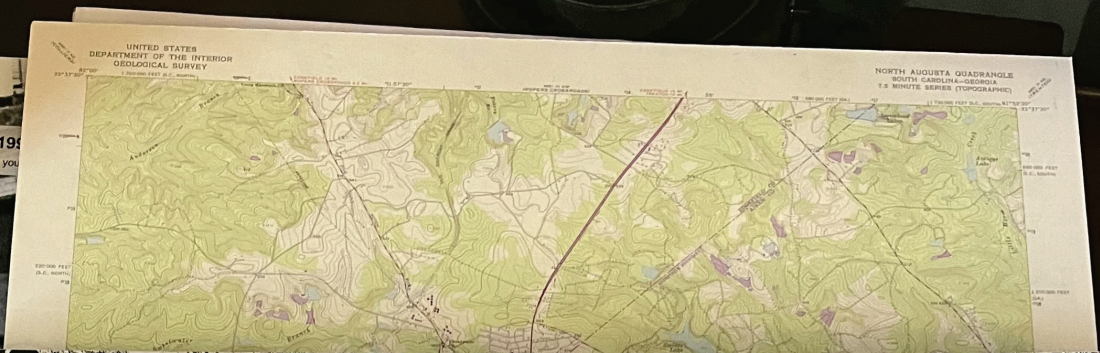
THIS MAP COMPLIES WITH NATIONAL MAP ACCURACY STANDARDS FOR SALE BY U. S. GEOLOGICAL SURVEY, RESTON, VIRGINIA 22092. A FOLDER DESCRIBING TOPOGRAPHIC MAPS AND SYMBOLS IS AVAILABLE ON REQUEST.

QUADRANGLE LOCATION

NORTH AUGUSTA, S. C. - GA.

DEFENDANT'S EXHIBIT
10
9/20/23

N1330-W8152.5/7.5
DMA
PHOTOREVISED 1980
DMA 451 (1) SW-SERIES V846



Landcover (19...)
Write a description for you



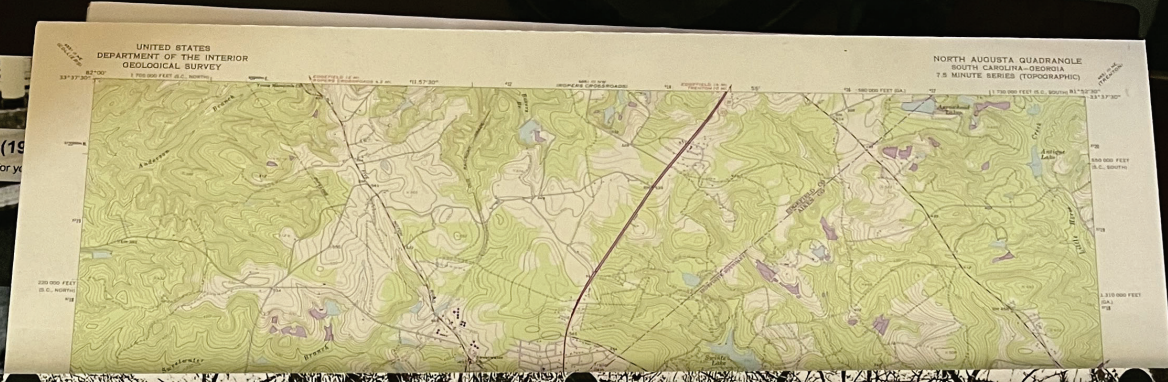
DEFENDANT'S EXHIBIT 5 4/27/23 21

PHOTOGRAPHED, 1982
DMA 441 11 SW-SERIES 7446

DEFENDANT'S EXHIBIT 5 4/27/23 21
raph
flow
flow
time

HOLIDAY TREE
24 IN (61 cm)

Landcover (19
Write a description for y



DEFENDANT'S EXHIBIT
4
7/20/03

DEFENDANT'S EXHIBIT
15
7/21/03

time
low
low

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7/21/03

DMA 651 (1) SW - SERIES 1646

Civil-Com
TREE

24 IN (61 cm)

Simono - Re-Redirect by Mr. Player

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

Simono - Re-Redirect by Mr. Player

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

Simono - Re-Redirect by Mr. Player

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

Simono - Re-Redirect by Mr. Player

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

Simono - Re-Redirect by Mr. Player

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.

Simono - Re-Redirect by Mr. Player

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

Auld - Cross by Mr. Player

1 A. I could not say that one way or the other.

2 Q. Okay.

3 MR. PLAYER: Give me just one second. You're in
4 luck. No further questions. So Clarke will be the one
5 that takes us past five.

6 THE COURT: Mr. McCants, any redirect, sir?

7 MR. MCCANTS: I don't think so, Your Honor.

8 THE COURT: All right. All right. Please watch
9 your step.

10 THE WITNESS: Thank you. Do y'all want these for
11 evidence?

12 MR. PLAYER: I think that one -- you put the one I
13 handed to you?

14 COURT REPORTER: I did.

15 MR. PLAYER: Judge, you can have this. It's
16 whatever number it is.

17 (Whereupon an off-the-record discussion was
18 held by court personnel.)

19 THE COURT: All right. Mr. McCants, any further
20 witnesses, sir?

21 MR. MCCANTS: I do not, Your Honor. That would be
22 the presentation of the defendant's case.

23 THE COURT: All right. Gentlemen, do you all have
24 any closing remarks or any motions to make?

25 MR. MCCANTS: Mr. Player and I have talked about

1 closing remarks. I do have motions, Your Honor. For
2 the record I would renew the motions that I made at the
3 end of the presentation of Plaintiffs' case.

4 THE COURT: Yes.

5 MR. MCCANTS: I understand that you denied those
6 and I would renew those. And I understand that you,
7 perhaps, respectfully deny those at this point also, so
8 I'm just making sure I'm protecting my record --

9 THE COURT: Certainly.

10 MR. MCCANTS: -- if there's anything else I need
11 to add to that, please let me know. And I would make
12 more objections if I can. But for the time being I'm
13 going to rest on the motions that I made at the end of
14 the plaintiffs' case.

15 THE COURT: Yes. All right. Mr. McCants, I'm
16 going to respectfully deny, but your record is
17 available.

18 MR. MCCANTS: Thank you.

19 THE COURT: All right.

20 MR. MCCANTS: He and I talked about how -- we
21 very -- you have been very engaged in this case, we can
22 tell, Your Honor. We appreciate that because this is
23 an intricate and detailed case with a lot (inaudible).
24 I think I can speak for Tucker when I say we don't want
25 to keep you, at this point, listening to us argue

1 points which we think you and your law clerk have
2 understood and got your arms around. But we're happy
3 to do so if you want us to. But we don't necessarily
4 feel that we have to, to help our clients as part of
5 this process. (inaudible) said he was very comfortable
6 with you.

7 THE COURT: I will note it is a practice where I
8 take notes, even down to the time we change our
9 witnesses.

10 MR. MCCANTS: Sure.

11 THE COURT: So we do have, I think, I am
12 comfortable with the argument you have made thus far.
13 However, I do not wish to stop you from any argument if
14 that is what you wish to do.

15 MR. MCCANTS: We don't wish to do it, do we
16 Mr. Player?

17 MR. PLAYER: I always like to argue, but I mean,
18 Your Honor, here's -- this is more of just how, how do
19 you want to do this. Because in a case like this, I
20 mean, I don't think a verdict form, just a feeling -- I
21 I don't think that's sufficient for everything that is
22 in this. So I think there's going to be a written
23 order, which more often than not the judge says you
24 win, write the order. Or you say both submit proposed
25 orders, and if that one is going to happen then I'm,

1 like, then we're just going to put our arguments in
2 that and present it to the Court. Now, Clarke's old
3 and busy and he don't want to write a brief. But I
4 don't think he's going to have a choice, especially if
5 he wins.

6 THE COURT: Well, he's got young Mr. McCants.

7 MR. MCCANTS: Sorry?

8 THE COURT: You have got young Mr. McCants.

9 MR. MCCANTS: (inaudible). That's how old I am.

10 THE COURT: That's okay. You've got young
11 Mr. McCants should it be necessary that you write an
12 order.

13 MR. MCCANTS: That's correct.

14 THE COURT: So what I will do is look over all of
15 our notes extensively, as well as the exhibits. Are
16 there smaller versions of these that you wish for me to
17 have, or you wish for me to take? I mean, I can
18 certainly can store (inaudible).

19 MR. PLAYER: Clarke, why don't you just send her
20 digital copies, copies through email and then she can
21 print them out or do whatever she wants to? I can do
22 that with all my exhibits for sure.

23 MR. MCCANTS: What would you prefer? The reason
24 I'm asking that is because the detail in that,
25 especially in that Chadwick plan, is such that I think

1 you need a large view of it.

2 MR. PLAYER: Yeah. You can't read it unless you
3 have the large version.

4 THE COURT: Okay. We certainly will take that.
5 I've got, again, I've got room in my office where we
6 can display --

7 MR. MCCANTS: That would be great for the time
8 being.

9 THE COURT: -- and we will take the bigger version
10 of that and I will render a decision just as soon as
11 I've had the opportunity to look over all of my notes
12 and to do my own research and look over all the
13 exhibits. And so, please, look to hear from me. I
14 cannot give you timeline on it.

15 MR. MCCANTS: No pressure, Judge.

16 THE COURT: Except to say we'll do so as
17 expeditiously as possible.

18 MR. MCCANTS: And it's kind of like, okay, Judge,
19 I understand my motions with respect to the release and
20 mitigation. But the -- we would invite you, if you
21 think you need briefing on a particular area, I've
22 always thought that that's a good way to go about it.

23 THE COURT: Yes. I will certainly request that
24 should we get stuck in a place that needs more
25 information, I will. So don't be surprised if you see

1 that. But I will request briefing if I need to do
2 that.

3 MR. MCCANTS: Thank you, Judge. Great.

4 THE COURT: Anything further, gentlemen?

5 MR. PLAYER: No, Your Honor.

6 THE COURT: All right. Very good. It's been a
7 pleasure to -- because I know the both of you --

8 MR. PLAYER: Yes, ma'am.

9 THE COURT: -- so I hope y'all have a great rest
10 of the weekend.

11 MR. PLAYER: Thank you.

12 MR. MCCANTS: Thank you, Judge.

13 THE COURT: Thank you very much.

14 END OF TRANSCRIPT OF RECORD
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Certificate of Counsel

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

Dated: August 4, 2025

MCCANTS & MCCANTS

s/ Clarke W. McCants, III

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