STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**CA NO.: 2020-CP-40-04769**
In the House, LLC,	)	
	)	**ORDER GRANTING IN PART SOUTH**
Plaintiff,	)	**CAROLINA DEPARTMENT OF**
	)	**TRANSPORTATION'S MOTION FOR**
-vs-	)	**ELECTION OF REMEDIES AND**
	)	**DENYING MOTIONS TO ALTER OR**
Richland County, City of Columbia,	)	**AMEND OR FOR A NEW TRIAL**
and the South Carolina Department	)	**ABSOLUTE OR FOR A NEW TRIAL**
of Transportation,	)	**REMITTITUR**
	)	
Defendant(s).	)	

This matter came before me by way of several post-trial motions filed by the South Carolina Department of Transportation (SCDOT) on October 9, 2025. The SCDOT filed motions for election of remedies, to alter or amend this Court's order dated September 29, 2025, for a new trial or for a new trial absolute. After carefully considering the motions and supporting briefs, the Court grants the motion for election of remedies in part and denies the other post-trial motions.

The Court tried this case and heard the presentation of evidence over almost eight days of testimony with eighteen (18) witnesses and well over one hundred (100) exhibits. Thereafter, each of the parties submitted lengthy, detailed orders including findings of fact and conclusions of law in support of their respective positions and what they contended was proven at trial. The court entered judgment for the Plaintiff in a

detailed twenty-nine page order with findings of fact and conclusions of law on September 29, 2025.

MOTION FOR ELECTION OF REMEDIES

"Election of remedies involves a choice between different forms of redress afforded by law *for the same injury* or different forms of proceeding on the same cause of action." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152-53 (2010)(*emphasis added*) (*quoting Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996)). "It is the act of choosing between inconsistent remedies allowed by law on the *same set of facts*." *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45. "The basic purpose of election of remedies is to prevent double recovery for a single wrong.

In its return to the Defendants'[1] motions, the Plaintiff acknowledges that it is not entitled to multiple recoveries *for the same injury* and that the Plaintiff is not seeking multiple recoveries *for the same wrong*. The Plaintiff further acknowledged to the extent that its damage overlaps in certain causes of action that it is limited to a single recovery. However, the Court differs from the Defendants as to what must be elected and how overlapping damages should be handled.

The Court agrees that as between the causes of action for trespass, inverse condemnation and negligence, that the Plaintiff should elect as these claims are for the same injury; however, since negligence includes damages for partial paving of the

[1] Richland County also filed post-trial motions.

parking lot, which is a distinct injury not included in the other causes of action, then that is not a double recovery so any election other than negligence would leave a claim for negligence in that amount. See Order ¶ 173 (1/3 of paving, $15,546). Since of these three causes of action, only inverse condemnation applies to SCDOT, no election is required as to SCDOT from these three causes of action.

The Court concludes that the Plaintiff does not have to elect between its cause of action related to breach of the special provisions in the slope agreement and the other causes of action as this is a different injury and different wrong from the other causes of action discussed above. The Marion quote is a measure of the amount of damage for breach of the special provisions of the contract. It is not an award of the Marion quote itself. However, the Court acknowledges that the Marion quote is included in the damages for the other three causes of action for which an election will be required including inverse condemnation as to SCDOT; therefore to avoid a double recovery, any recovery by the Plaintiff shall apply equally to satisfy the judgments for both the breach of special provisions, inverse condemnation and such other remedy as may be elected by the Plaintiff (except the distinct injury for negligence discussed above.)

MOTION TO ALTER OR AMEND

Affirmative Aggressive Act

Like the County, SCDOT is seeking to recast this case as a mere failure to act to avoid liability for inverse condemnation. The Court denies this attempt.

SCDOT cites *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004); however this case is distinguishable. In *Hawkins*, the court found as follows:

In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the ServiceMaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are *merely failures to act*. Specifically, Hawkins asserts the City improperly *allowed* the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by "affirmative, positive, aggressive" acts by the governmental agency. Allegations of mere failure to act are insufficient. Hawkins, 358 S.C. at 291

Likewise, the limited affirmative acts found by the court in *Hawkins* are wholly different in the kind and quality of the evidence. The court held, "The only affirmative acts Hawkins cites as forming the basis of his inverse condemnation claim are the replacement of the double-box culvert with the large arched pipe in Laurel Creek in 1994 and the installation of the riprap material along the banks of the creek in 1997. The record contains no evidence that either of these acts caused the flooding of the ServiceMaster property in 1997. Hawkins' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin Emphasis added.

This is not a mere failure to act case. The evidence is clear that Richland County for the benefit and under the ultimate approval of SCDOT constructed an elevated roadbed that trapped water and channeled it onto Mr Barczak's property. Richland

County and SCDOT didn't merely "allow" the berm to be built, they built it as required by SCDOT.

Several cases not cited by SCDOT in their motion are more closely, if not directly on point. It has long been recognized in South Carolina that "the casting of water on adjoining premises by some act of the governmental authority in the course of making improvements to a public way constitutes a taking of property in violation of Article I, Section 17, of the Constitution." *Kline v. City of Columbia*, 249 S.C. 532 at 536. In *Milhous v. State Highway Department,* the South Carolina Supreme Court held that the landowner had cause of action against the state for damage to his land resulting from the obstruction of natural flow of surface waters caused by the state's raising of the grade of the highway roadbed. *Milhous v. State Highway Dep't*, 8 S.E.2d 852, 856 (1940). Similarly, in *Spradley v. South Carolina State Highway Department*, the South Carolina Supreme Court found a plaintiff "could recover just compensation for the taking and damaging" of her land "caused by the dumping and spilling of surface water" upon the plaintiff's land as a result of highway improvement. *Spradley v. South Carolina State Highway Dep't*, 256 S.C. 431, 437, 182 S.E.2d 735, 738 (1971). In *Spradley*, the Highway Department failed to provide proper drainage. *Id.* Moreover, the Court of Appeals upheld a verdict for a property owner who brought an inverse condemnation action against a town for flood damage he sustained during heavy rain following

reconstruction of adjoining street. *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989). The town's reconstruction raised the level of the street approximately seventeen inches. *Id.* During a storm and unusually high tide after the road reconstruction, the road dammed excess water and caused the water to congregate at the lowest piece of land along the road, which was in the plaintiff's house. *Id.* The Court of Appeals held in *Newsome* that "[f]rom this evidence the jury could have easily concluded that the building up of [the street] satisfied the requirement of an overt or positive action by the Town necessary to prove a taking under a cause of action for inverse condemnation." *Id.*

On page 16 of its brief, the SCDOT cites a trio of cases for the overly broad proposition that "every single reported South Carolina case recognizing a physical taking involves the governmental entity that actually undertook to construct the project or improvements at issue." However, none of the trio of cases cited by SCDOT appear to have involved intergovernmental projects where one or more governmental entity constructed a project for the benefit of another. In each of those cases, it appears that a single governmental entity took action to benefit itself. SCDOT cites to *Owens v. S.C. State Highway Dep't*, 239 S.C. 44, 121 S.E.2d 240 (1961) in support of its position, but that case is materially different in several important ways. First, unlike the present case, the SCDOT was adversarial to the United States Government which eventually constructed

the relocated road using the United States Corp of Engineers. "The appellant [SCDOT] refused to close this portion of the highway, even though request therefor was made by the United States Government." *Owens* was always a federal project and not a state and local project. Second, as stated in the case, "that the appellant [SCDOT] has no title whatsoever to the said highway, its roadbed, or any of the rights of way pertaining thereto." The exact opposite is true in this case as it is undisputed that SCDOT owned North Main Street as part of its inventory before the project ever started and would be the beneficiary of the improvements made to the road. Third, the Court noted in that case that there was an absence of any evidence indicating that appellant [SCDOT] "contracted in any way" for the construction of the same. In short, the Court found that the only involvement in that case was preparing a relocation survey.

In this case, the SCDOT had intergovernmental agreements with Richland County related to the project. They had the rights of inspection and attended bi-weekly meetings during construction according to the testimony of Kimberly Toney. SCDOT had the right to review the design plans and provide comments. SCDOT and the County had the right to inspect all work by the contractor. The Permission Agreement executed in this case by Mr. Barczak was granted to SCDOT on an SCDOT form. Through their LPA arrangement, Richland County had to provide SCDOT with monthly reports and answer their questions. Their contract provided that the County and the SCDOT shall jointly conduct a final inspection of the Project. Many of the items

which the Court found were not present in *Owens* are present in this case. The conduct of SCDOT in this case was far more extensive then merely preparing a survey for the suggested relocation of the road on a federal project.

Two more points are worth noting in this case. First, the case was brought as a negligence case and not as a taking case. It was only after SCDOT filed a motion for non-suit after the conclusion of Plaintiff's case, the trial judge stated the only way this case could be maintained is as a takings case. Therefore, the Plaintiff did not prepare and present the case as a takings case. Second, the trial judge submitted " a question of fact for the determination of the jury whether or not the appellant constructed or took part in the construction of said roadway." *Owens v. S.C. State Highway Dep't*, 239 S.C. 44, 121 S.E.2d 240, 243 (1961)(Emphasis added.)

The Court also incorporates by reference paragraphs 143-150 of its order.

As to paragraphs 9-10[2] of SCDOT's motion, the evidence showed that SCDOT owned the lot and that it was used by LJ as a staging area for equipment. Rule 201(d), SCRE, explicitly states that "a court shall take judicial notice if requested by a party and supplied with the necessary information." Rule 201(d), SCRE(emphasis added) S.C. Code Ann. § 19-5-10 provides that certified copies of public records "must be received in evidence" in lieu of the original, further supporting their admissibility and the

[2] SCDOT filed both a lengthy motion and a memorandum. Paragraph referenced are to the numerical assignments of error in the motion to amend.

mandatory nature of judicial notice when the requirements are met. S.C. Code Ann. § 19-5-10 (emphasis added). Judicial notice is proper at any point in the litigation. See Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding.").

The evidence showed in both photographs and eyewitness testimony by Mr. Barczak that mud and silt flowed downhill from this lot to the Trestle Building lot. SCDOT claims this was not argued in the pleadings, but trials are organic and as evidence is developed during trial, this is proper to be pursued and admitted. This was not a new theory at trial but additional evidence that the Defendants channeled mud and silt to Mr. Barczak's property.

SCDOT and the Permission Agreement

SCDOT argues that there is "no evidence" that SCDOT is a party to the Slope/Permission Agreement. The agreement itself specifically names SCDOT as the party to which the Slope/Permission was granted and the agreement was signed on a standard SCDOT form (SCDOT R/W Form 803). Also, the agreement contains the following provision, "All right of way agreements must be in writing and are subject to rejection **by the South Carolina Department of Transportation**." There is no dispute that the area covered by the slope agreement will be under SCDOT jurisdiction and control. While the City of Columbia through its agent, David Link negotiated the agreement, the Court has already held that the City of Columbia is not liable under the contract.

The Court has recognized the general principle that an agent is not liable to be sued upon contract made by him on behalf of his principal if the name of his principal is disclosed and made known to the person contracted with at the time of entering into the contract. *Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 352, 396 S.E.2d 122, 123 (Ct. App. 1990). The liability, if any, is that of the principal alone. *Skinner & Ruddock, Inc. v. London Guarantee & Acc. Co.*, 239 S.C. 614, 619, 124 S.E.2d 178, 180 (1962).

The SCDOT also asserts the dead doctrine of lack of privity. First, the Court has found that the Plaintiff was in privity with SCDOT as they are named in the document. Second, our courts have consistently held that doctrine is not favored. "The erosion of the concept of privity has been a legal phenomenon for more than a decade, and this Court has not been reluctant to contribute to its demise. .... [L]ack of privity as a defense to a cause of action has been of questionable vitality in South Carolina. Today, we seek to still all whispers of its continued existence." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 345, 384 S.E.2d 730 (S.C. 1988).

It is telling that both Richland County and SCDOT have raised lack of privity as a defense and the City of Columbia has been dismissed. Ms. Tripp in her testimony and based on her extensive experience with condemnations lamented the lack of information and clarity given an owner in the right of way process. It would be unfair and unjust to allow SCDOT, who clearly has the ultimate power over the project and will be its ultimate beneficiary, to avoid contractual liability without anyone else being

responsible. If SCDOT believes another entity is responsible, then it could have cross-claimed for indemnification.

SCDOT also argues that the Plaintiff refused to allow the contractual conditions to be fulfilled. The Court did not view the evidence that way. The Plaintiff did not refuse to allow the contractual conditions to be fulfilled. SCDOT argues that Mr. Barczak was offered options to complete the work which he rejected. The Court addresses this in the order, where the court held,

> There was evidence that Richland County attempted to comply with some of the provisions in the agreement. Exhibit 95 was an email by Jason Patterson to Johnathan Eichelberger by presenting a Tract 53 Plan Sheet which showed various slope ratios of 2:1, 4:1, and 6:1 onto Mr. Barczak's property along with some stairs and replacement shrubs. Mr. Barczak rejected this proposal. The problem with this proposal is that the ratios would have resulted in property sloping toward Mr. Barczak's building and Mr. Barczak did not want the drain inlets in his front yard. David Link, the right of way agent specifically noted in his field notes that the City could eliminate the drainage permissions.

(Order, ¶186-187)

Not only would the greater slope ratios slope toward the building, but they would also occupy a significant portion of the front yard, which was a functional, usable space before. Mr. Barczak was not forced to simply take whatever interpretation of alleged compliance was offered. Furthermore, there was little evidence of additional negotiation or attempts to satisfy these conditions. Mr. Barczak testified he was willing to negotiate on these matters, but the Defendants were not.

As the Court found in the order, "The sidewalks and certain landscaping items have not been replaced, nor has the sprinkler system been repaired and returned to as good or better condition. The construction is not tied in smoothly with the landscape wall and the property is not properly graded to the concrete apron. Mr. Barczak provided photographs showing his previous sidewalks ending in the side of the embankment and people during a public event on North Main Street helping each other climb up the hill of the embankment in leaving the property." (Order, ¶39-41). The court concludes that the Plaintiff did not refuse compliance, but only partial and unreasonable compliance.

Drop Inlet in Parking Lot

As to paragraph 14, and the installation of the catch basin on the property in the parking lot, the testimony showed that it did appear in the plans, but just not at that location, it was in the driveway. Ms. Toney testified that SCDOT had direct approval of all change orders. (Toney, p.49, 10-11) There is no evidence whether the new location for this drop inlet went through the change order process.

Contractors and Constitutional Duty In Inverse Condemnation

As to paragraphs 15-17, the Court incorporates by reference ¶143-150 of the court's order. SCDOT argues that this was not pled and should not be included in the order. However, the Plaintiff pled that both SCDOT and Richland County were liable

for inverse condemnation for the project and SCDOT has denied responsibility, in part, by arguing third parties are responsible. This case law makes it clear that entities cannot avoid their constitutional responsibilities by shifting the blame to contractors (independent or not.)

Declaratory Judgment

SCDOT artificially limits the court's power to declare affirmative relief among the parties and the liberal policy of the declaratory judgment act. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree. S.C. Code § 15-53-20. The Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15–53–130 (2005).

The Plaintiff specifically requested in its Second Amended Complaint for the Court to declare "the responsibility for the maintenance of the drain installed to the South of the Property." ¶40(e). There is no question that through a change order (which was subject to SCDOT approval), that the parties had no qualms in dealing with the third-party landowner to install the drain inlet on Tract 52 to the South of Mr. Barczak's property. All the experts in the case testified it was essential that this drain is properly maintained to limit the water channeled on to Mr. Barczak's property.

Kim Toney testified in her deposition and through the Rule 32(a)(5) testimony that there was an agreement, but she was not sure if it was written. (Toney, pg. 47, lines 22-25) No such agreement was ever produced to the Plaintiff or offered in evidence at trial. SCDOT testified that the outlet did not appear to be within the SCDOT right of way. Thus, there is a clear uncertainty regarding who will maintain the drain that is essential in minimized the flooding on Mr. Barczak's property.

Mr. Barczak testified that the drain was not being maintained and that the weeds and shrubs were so overgrown that it would be difficult to even find the drain. So any agreement to maintain by the Defendants was clearly ineffectual. Thus, the Court was well within its judicial declaratory powers to declare affirmative relief requiring Richland County (who has already dealt with this landowner) and SCDOT to secure an access easement allowing Mr. Barczak to maintain this drain to protect his property.

In its post trial motions, SCDOT argues that "if the County asks SCDOT to accept responsibility for either catch basin, SCDOT would at a minimum require that a maintenance easement first be obtained." This, of course is what Mr. Barczak requested and the Court ordered, except that the maintenance easement for the south inlet be granted to Mr. Barczak and not the SCDOT.

Stay of Enforcement of Affirmative Declaratory Relief

The Plaintiff stipulated and did not seek enforcement on its judgment during the Court's consideration of these post-trial motions. However, the Court denies the stay of

injunctive relief pending resolution of any appeal. As the trial testimony bore out, the adequate functioning of the drain installed on the property to the south of the Plaintiff is essential to limiting the flow of water onto the Plaintiff's property. Multiple experts testified to this. Further, the evidence showed that there was no written agreement as to its maintenance and that the property was not in the SCDOT right of way. An appeal, if filed, could last up to two years and this certainly would prejudice the Plaintiff if the drain were not maintained during this period. Neither SCDOT or Richland County has offered a plan or assurance how this drain would be maintained and the Plaintiff's property protected during the pendency of any appeal.

Therefore, the Court denies this request and orders that the parties comply with the terms of the order.

Causation of Water Intrusion

There was ample evidence to support causation from the North Main Street project. (Order, ¶116-123)

On or about November 15, 2018, Jason Patterson, PE (the Resident Construction Engineer with Richland County PDT) had a site visit with Hugh Wilson and others. He commented on the site visit observations that that the build-up on North Main Street blocks approximately 0.10 Acres on Tract 52 (South of The Property); prior to construction, this area would flow into North Main Street to a catch basin. The buildup has blocked this area from reaching North Main Street. Mr. Patterson prepared a

graphic exhibit (Exhibit 90) in which he showed this area (colored in blue) immediately South and above The Property with the box callout, "[a]pproximate Area from Richland GIS Contours that is trapped by roadway embankment (Approx. .10 acre)."

Dan Creed, P.E., the Plaintiff's expert, corroborated Mr. Patterson's testimony. He testified that the elevated road bed trapped the water and based on the topography– it was foreseeable that water would be trapped by the elevated highway and channeled to the Property. He further testified that was the purpose of installing a drain inlet south of the Property.

The County and SCDOT seem to suggest that the magic words "to a reasonable degree of engineering certainty" had to be stated. The Court disagrees. In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." *Gamble v. Price*, 289 S.C. 538, 347 S.E.2d 131 (Ct. App. 1986). It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes...." *Norland v. Washington General Hospital*, 461 F.2d 694, 697 (8th Cir. 1972) In this case, the Court was judicially impressed by Dan Creed's testimony that the elevated bank from the project was the most likely cause of the flooding of Mr. Barczak's property. Indeed, there was virtually no other alternative evidence presented as to causation.

Mr. Barczak testified that prior to construction he had a single water intrusion

event, several years prior to the Project, which is why he installed a French drain along the southern border of his building. He testified that, during the 2015 Columbia catastrophic rain event, The Property did not flood; yet after the Project, the first-floor, front area flooded repeatedly. Mr. Barczak offered numerous photographs of the flooding of his property with mud, silt and the water intrusion onto the first floor of his building. The record is replete with emails from Mr. Barczak notifying the Defendants of this problem and requesting relief. Ms. Sabrina Odom (then President of the North Main Street Business Association) corroborated Mr. Barczak's testimony. Her office was on the first floor of The Property, and her desk is visible in photographs offered into evidence. Like Mr. Barczak, she testified that prior to the Project, she had no problem with flooding, but that after the Project, she came to the office expecting to use a mop. Further, prior to her departure during rain events, she placed chairs on top of the desks.

On March 15, 2019, Hugh Wilson with LJ, Inc. (the County contractor) submitted RFI No. 13 (Request for Information) to Jason Patterson, the resident construction engineer. Hugh Wilson observed that several tracts in Phase IA2 that previously drained to the roadway were blocked due to the build-up. He further noted that at tract 53 (The Property) no provisions have been made to address the water that is now flowing to, and being trapped, on portions of his property. Based on his review of the cross sections, water at the toe of the proposed slope from portions of tract 205 and all of tract 52, flow down gradient to the Trestle Building property. To further complicate

the issue, there are two short walls on the south end of this property that trap water; the water builds up and flows back towards the building. There are no provisions in the plans to address these walls (although portions of the walls are within the new right of way) nor are there any provisions in the plans to address water that is being trapped between the new toe of slope and The Property. (Ex. 80).

As to paragraph 39, the Court references the trial testimony of Chris Barczak and Michael Wilson, and Exhibit 103;

As to paragraphs 40, the installation of the catch basin on the property in the parking lot, it did appear in the plans, but just not at that location, it was in the driveway. Ms. Toney testified that SCDOT had direct approval of all change orders. (Toney, p.49, 10-11) There is no evidence whether the new location for this drop inlet went through the change order process. Contrary to SCDOT's asserting, the evidence does not show that Mr. Barczak agreed to the installation or location.

Damages

SCDOT, like the County, is focused on establishing an arbitrary specific date for the taking when the evidence is clear that the flooding was continuous and occurred over time. Ms. Tripp, who is a highly qualified MAI appraiser testified that she did not think picking a 2018 valuation date was appropriate given the ongoing nature of the flooding and impact on the property. She testified that she had performed hundreds of condemnation appraisals including many for the SCDOT. Likewise, it does not make

logical sense to limit repair estimates to the 2018–2019 time frame when the relevant issue is how much it would cost to repair the property now. The Defendants had ample time to repair the property back then but refused to do so or provide the Plaintiff with sufficient funds to do so. Mr. Barczak testified he could not afford to do more than the mitigation efforts he performed.

As for the interest, the Court only awarded interest as to the unpaid rent which has a definite time frame. (Order, pg. 21 ftn. 8).

Personal Property

Mr. Barczak, as the owner of the personal property testified as to the items he has stored in the area, which was damaged by the flooding, one of which was his mother's credenza. He offered pictures showing that the furniture had to be placed on blocks, and pictures of the credenza with the veneer peeling. An estimate as to value of his property may be stated by the owner of household goods, wearing apparel and personal effects. 2 Jones on Evidence, 4th Ed.,15 Sec. 386, page 728; 3 Wigmore on Evidence, 3rd Ed., Sec. 716, page 48. "In the case of *Howell v. State Highway Department,* 167 S.C. 217, 166 S.E. 129, we held that it was proper for a landowner to give his estimate of the total amount of damage sustained by him on the taking of his land for a road, cutting down a bank, destruction of trees, and depreciation in value of his remaining property. Certainly, if it was proper for the owner of land to estimate the total amount of his damages, the same rule accords the owner of personal property the

right to give his estimate as to the value thereof. We think it was proper for the respondent to give his estimate of the reasonable value of his personal property lost in the fire." *Nelson v. Coleman Co.*, 249 S.C. 652, 660, 155 S.E.2d 917, 921 (1967). The Court awarded the Plaintiff $3,000 which is supported by Mr. Barczak's testimony.

Mitigation Work

SCDOT does not contest the amount of the invoices claimed by the Plaintiff for the mitigation work, or that they were incurred, but the alleged lack of proof that this work and associated invoices were caused by actionable conduct by SCDOT. The Court incorporates by reference its previous findings and conclusions of SCDOT liability for inverse condemnation and the invoices claimed by Mr. Barczak were the direct and proximate result of the flooding.

Costs Estimates for additional work

The Court concludes its appropriate to date the estimate of repair as close to when they will be performed as some arbitrary historical date. To hold otherwise would unfairly undercompensate the Plaintiff and not provide just compensation. In the context of property damage and repair, measuring the cost at the date of the trial (or as close to it as you can) recognizes the economic reality that restoration requires current funds. If an owner is only awarded the historical cost, they are guaranteed to be unable to complete the repair in an inflationary environment, resulting in under-compensation. This problem is intertwined with the plaintiff's duty to mitigate losses.

While a plaintiff is generally expected to repair damage promptly, if the plaintiff's financial stringency or lack of means prevents them from undertaking immediate repairs—especially when the government has refused to acknowledge the taking or compensate them—then courts may assess damages at the date repairs could reasonably commence. This approach prevents the government from benefiting from its own refusal to pay or from the victim's financial inability to fund the restoration in advance of litigation. This is especially true when the court is not awarding interest on the cost of repair damages. The goal is just compensation. *See Inflation and the Law of Torts and Contracts*, Ottawa Law Review, Vol. 14, pg. 465, discussing *Dodd Properties v. Canterbury City Council*, 1 All E.R. 928, [1980]

Tripp Appraisal

SCDOT's analysis of the Tripp appraisal is confusing since the court only awarded the lost rent and stigma damages from the Tripp appraisal, not the other items the SCDOT discussed in its memorandum.

Ross Travis Estimates

SCDOT argues that the Court should adopt the estimate of its expert, Ross Travis, and ignore the testimony and proposals of the Plaintiff's experts Dan Creed, and David Marion; however, the Travis quote is insufficient to provide the Plaintiff with just compensation. As the Court notes in the order, "There are several differences between the two experts' estimates. Mr. Marion's quote includes a retaining wall between North

Main Street and the front lawn of the Trestle Building which he testified would result in more functional, useable space. He also said it would help in maintenance. Mr. Travis's estimate does not include any pavers only grading and Mr. Travis's drainage estimate includes one large yard drainage inlet and one drop inlet; whereas Mr. Marion's quote is for a trench inlet by the retaining wall. Finally, Mr. Travis's quotes do not include any landscaping (except sod) or replacement for the sprinkler system or trees and shrubbery." Order, ¶ 193-194.

The constitution calls for just compensation, not the cheapest compensation. The Marion quote was not extravagant and used concrete, not brick pavers, and did not include a pergola. It provided the maximum amount of functional space which Mr. Barczak had invested in prior to the project and eliminated the drain inlets which Mr. Barczak specifically said he did not want. It will be easier to maintain. Mr. Travis' quote would leave Mr. Barczak with a drain field containing two drop inlets and little to no utility. David Marion was a highly qualified and experienced expert who gave compelling testimony about his quote and what was needed. The Court carefully listened to the expert witness testimony and found this quote appropriate.

Loss Rental Value

As for the lost rental calculations, Ms. Tripp did a thorough rental analysis based on comparable properties and provided a basis for her opinion. Ms. Tripp's expert opinion set the rental value at 11.00sf or $4,583 a month. Mr. Barczak testified that it

was approximately $6,100 per month and contrary to the SCDOT's assertion he was competent to testify. He was licensed residential real estate appraiser, and while this was commercial property, he owned and rented it. Thus, Ms. Tripp's rental value is within the range of the evidence submitted to the court, and there is no evidence that winding back the clock two years would have made a substantial difference. The Defendants offered no evidence to contradict the lost rental value, other than the Plaintiff's responses to Requests for Admission which only reflect actual rental income and not what was lost or could have been earned. Also, SCDOT argues that the temporary loss of rental value did not affect the entire building, the Court agreed as it only awarded lost rent for the front portion of 5,000 square feet which is supported by the testimony at trial. (Order, ¶99)

The Court carefully reviewed the evidence presented and how it calculated the lost rent in the order, there is no basis to alter or amend the order and the award of lost rent was fully in this Court's discretion. (Order, ¶ 87-99).

Stigma/diminution in value

The evidence for stigma damage is fully supported by Ms. Tripp's and Mr. Barczak's testimony. Ms. Tripp specifically rejected the argument that if the property were repaired, there would be no stigma because it is based on risk perception. Ms. Tripp had specifically studied and valued properties which were subject to flooding and stigma. She testified that she thought the 5% figure was conservative and low.

Further Mr. Barczak testified about the permanent impact on his property. He pointed out that his property was now in a hole and not as visible, that he could not erect an advertising sign, lack of ADA accessibility and loss of functional utility of front yard space. As owner of the property he was competent to testify to value. (See Order, ¶103-106)

SCDOT argues that Mr. Crider's testimony was more credible, but the Court evaluated the witnesses and their testimony and like many cases both experts presented their expert opinions; however, this Court concludes stigma should be awarded.

The SCDOT also suggests since this is commercial property that Mr. Barczak would not have to disclose the prior flooding into the front part of his building under the Residential Property Disclosure Act, but the Act is not the only reason a party would have to disclose the flooding. Mr. Barczak as a broker and residential appraisal would know that the failure to disclose a material fact like prior flooding in the building could lead to future lawsuit on this basis. The Court's order on this issue is supported by the evidence and does not need to be amended. (Order, ¶ 100-106).

MOTION FOR A NEW TRIAL ABSOLUTE

The Court did not err in permitting Mr. Barczak to testify regarding the market and rental value of the property and this is not a basis for a new trial. As the property owner, Mr. Barczak is qualified to provide such testimony. South Carolina courts have consistently held that property owners are competent to testify about the value of their

property. In *Austin v. Stokes-Craven Holding Corp.*, the Supreme Court of South Carolina stated, "ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (citing *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992). Unless the owner's lack of qualification is so complete that their testimony is entirely worthless, it is for the jury to assess the weight of the testimony. *Id.* Additionally, "a property owner is competent to estimate their property's value as a matter of law." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 561, 671 S.E.2d 79, 87 (Ct. App. 2008); *see also Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984) (in an inverse condemnation proceeding, a property owner's testimony that she was knowledgeable about real property in her neighborhood and believed her property to be 75,000 dollars was admissible). Lastly, challenges to a property owner's qualifications to testify about the value of their property go to the weight of the testimony, not its admissibility. (*See previous cited cases.)*

SCDOT penalizes Mr. Barczak because he has appraisal knowledge and skills as a property owner. This is part of who he is as an owner, and he never represented that he was giving his testimony as an expert commercial appraiser.

It also was not error to allow Mr. Barczak to testify about his personal observations of how the surface water behaved on and around his property both before

and after the North Main Street Project. Opinion testimony from a lay witness is admissible if it is: (a) rationally based on the perception of the witness, (b) helpful to the determination of a fact in issue, and (c) does not require special knowledge, skill, experience, or training. Rule 701, SCRE. Here Mr. Barczak, as the owner and developer of the property, personally observed the surface water on the front lot drain into the street before the project and be trapped by the road embankment after the project. Likewise, he observed that the water from the land to his South also drained into the street before the project, but after the project drained down hill dragging mud and silt with it. He also could testify based on his own personal experience and knowledge that the property only flooded once before the project even during the 1000-year flood interval but repeatedly flooded after the project. Mr. Barczak's testimony was consistent with the other testimony of Jason Patterson and Dan Creed.

There was also no error in allowing Dan Creed to testify as to causation. He was designated as an expert prior to trial; the Defendants subpoenaed his file which included the Baxter Survey and topography map. They took his deposition which included Plaintiff's Exhibit 97 as an Exhibit to the deposition which contains Mr. Creed's site observation that "The drop inlet constructed on the property to the south very near the common property line and road right of way appears to have been added to the scope of the roadway improvement project in order to divert runoff forced to travel along the right of way into the roadway drainage system before it is discharged

onto the subject parcel. There was no surprise or prejudice to his opinion and it was corroborated by the County's own witness Jason Patterson. See Exhibits 90 and 91.

There was no error in permitting Mr. Cantey with Cantey Foundation to testify as an expert witness. The Court incorporates by reference the Plaintiff's response to the motion in limine. In short, the Plaintiff's identified a foundation specialist (Mount Valley) as an expert witness early in the litigation. Subsequently, the Plaintiff deciding to use a different foundation expert but he retired, leading to Michael Wilson, Cantey Foundation Specialist. The Defendants had this quote from a 4th supplemental document production since October 25, 2023 which includes Mr. Wilson's name, email address and phone number and a detailed description of the proposed work. There is no prejudice or surprise. The motion for a new trial absolute is denied.

.MOTION FOR A NEW TRIAL NISI REMITTITUR

There is no reason or basis for the Court to reduce the judgment awarded the Plaintiff. The judgment awarded is not unduly liberal and is fully supported by the evidence presented at trial. The judgment is fundamentally fair. The order is based on quotes from qualified experts witnesses and is necessary to restore the Plaintiff to as good a position as he was prior to the taking and to give Mr. the Barczak the benefit of his bargain when he agreed to allow the government to use his property. The Ross Travis quote is insufficient. As Mr. Creed testified to in his deposition, he would not be comfortable with a grading only solution. Also as discussed at trial it included two

drains which Mr. Barczak did not want and would turn his front yard into a drain field. The Marion quote in contract meets the criteria of the Special Provisions, provides less intrusive drainage solutions, and preserves the front yard for use by Mr. Barczak. The motion for new trial nisi remittitur is denied.

THEREFORE, IT IS HEREBY ORDERED:

The motion for election is granted in part. The Plaintiff does not have to elect between inverse condemnation and breach of the special provisions in the permission agreement as this is a different injury and different wrong from inverse condemnation; however, to avoid a possible double recovery, any recovery by the Plaintiff shall apply equally to satisfy the judgments for both the breach of special provisions and inverse condemnation. SCDOT'S motions to alter or amend, motion for a new trial absolute, and motion for new trial nisi remittitur are denied.

IT IS SO ORDERED.

Richland Common Pleas

Case Caption: In The House Llc vs City Of Columbia , defendant, et al

Case Number: 2020CP4004769

Type: Order/Other

So Ordered

s/ Daniel Coble, 2774