

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E. C. Burnett, III and Roger Couch, Circuit Court Judges

APPELLATE CASE NO. 2012-212473
OPINION NO. 4970

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S.C. Supreme Court

Carolina Convenience Stores, Inc.,
Harry Lancaster, Jr., as Power of
Attorney for Harry Lancaster, Sr.
and Willard Oil Company, Inc.,

Petitioners,

v.

City of Spartanburg, SC,

Respondent.

BRIEF OF RESPONDENT

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ISSUE ON APPEAL

Whether damage to property constitutes an inverse condemnation when the building was damaged by police responding to an emergency hostage situation in order to save the life of Sara Patel, one of the owners of the convenience store and capture the barricaded subject.¹

STATEMENT OF THE CASE

This action was initially filed as a negligence case on May 10, 2005. After being stricken pursuant to SCRCF 40 (j), the action was restored. In winter 2009, the Petitioner amended to include a claim for inverse condemnation. In summer 2009, the Respondent filed a summary judgment motion as to both claims. The Respondent's motion for summary judgment was heard by the Spartanburg County Court of Common Pleas, Judge E. C. Burnett, III, approximately two weeks prior to trial, on November 3, 2009. At that hearing, summary judgment was granted on the record as to the inverse condemnation claim. A formal order was to be entered at a later date. The Court denied summary judgment as to the negligence claim.

The negligence claim was tried before a jury the week of November 16, 2009. After a four day trial, the jury returned a verdict in favor of the City/Respondent finding no negligence in their handling of this hostage incident or in the planning and execution of the operation to rescue

¹ The different Petitioners have differing property interests. Petitioner Lancaster owned the property. Petitioner Carolina Convenience Stores, Inc. leased the property and operated a convenience store therein and Petitioner Willard Oil had no property interest but simply sold gasoline to the convenience store. Whether these property interests would be sufficient for an inverse condemnation claim has never been adjudicated as this case was decided on a summary judgment motion.

Sara Patel. Specifically, the Petitioners challenged the decision making process claiming that the police should have adopted some other method of saving Sara Patel other than damaging the building. The jury found the decision made by the police was reasonably made.

On November 30, 2009, Judge E. C. Burnett, III issued his formal Order granting summary judgment as to the inverse condemnation claim. The Petitioner timely appealed from the issuance of that Order.

At the trial of the case, the Court allowed a substitution of parties and that substitution affects the caption of the case on appeal. Carolina Convenience Stores, Inc. was substituted as the proper plaintiff in place of M. P. Patel and Saroj Patel. The Patels were owners of the convenience store and Ms. Patel was the hostage. They leased the property. Harry Lancaster, Jr. as Power of Attorney for Harry Lancaster, Sr. was substituted as the proper party plaintiff in place of Harry "Skipper" Lancaster. Lancaster owns the property. Willard Oil Company remained a Plaintiff. Willard Oil sold gasoline to the convenience store.

On February 24, 2012, the Court of Appeals affirmed the grant of summary judgment, finding that there was no exercise of the power of eminent domain and that this was a proper exercise of the police power. The Court further found that the City did not physically appropriate the property for public use. The mere fact that the crime and the City's ensuing actions occurred on the property is insufficient to show that the City appropriated the property for the public use. The Court further noted that the majority rule in other states reaches the same conclusion that a property owner has no claim in inverse condemnation in an action against police for property damage caused by police action in responding to a crime or emergency.

BACKGROUND

The Respondent was confronted with a sudden and extraordinary emergency situation. Sara

Patel of Carolina Convenience Stores, Inc. was held hostage inside the store with no way out. The perpetrator was threatening to kill her. The police were informed by the hostage negotiator, the FBI hostage negotiator and a mental health specialist on site that the perpetrator was likely to carry out his threats if the police did not rescue Sara Patel immediately. (R. 107-108) The police acted in response to that sudden and extraordinary emergency situation in an attempt to save Ms. Patel's life. The building had only one door and the suspect was shooting through that door. As there was no safe entrance into this fortress, the police utilized a bulldozer to create a hole in the building so they could safely enter. Their actions damaged the building but they were successful in rescuing Ms. Patel and saving her life.

As a result of the damage to the structure, the Petitioners contend that they have been damaged. They brought this action for inverse condemnation and negligence. The only cause of action on appeal is inverse condemnation.

The trial court granted summary judgment on the inverse condemnation claim. The Petitioners' also sued for negligence, contending that the police were negligent in their planning and execution of this operation. That claim proceeded to trial. The jury returned a verdict in favor of the City of Spartanburg finding that the City's actions in planning and executing this operation were reasonable under the circumstances. That verdict has not been appealed and is the law of the case.

The Court of Appeals affirmed the grant of summary judgment to the City. The court correctly found that there was no exercise of the power of eminent domain and no taking of property for public use. The Court further found that the City exercised the police power rather than the power of eminent domain.

ARGUMENT

I. The Court of Appeals correctly found that Respondent properly exercised the police power so that no compensation is due.

The Court of Appeals correctly found that the police activity in issue here was a legitimate exercise of the police power. South Carolina has long recognized that police power is to be distinguished from the power of eminent domain, and that no compensation is due from the exercise of the police power.

The Respondent was faced with a sudden and extraordinary emergency situation. They had a barricaded suspect who had already used deadly force. He had a hostage and threatened to kill her. All on site negotiators indicated the hostage was in imminent danger as they believed that the suspect would carry out his threat.

The Respondent made a tactical decision on how to immediately rescue the hostage and capture the suspect. In our society, that decision cannot be hindered by considerations of civil liability mandated upon them for damage to private property. Such a rule would chill law enforcement officers from acting swiftly and effectively to protect public safety in emergency situations.

Respondents contend, and the Court of Appeals agreed, that this was a proper exercise of the police power for which damages are not recoverable. Further, there was no physical or regulatory taking of property. There was no appropriation of property and no property was put to the public use. The test enunciated by the Supreme Court in *Penn Central*, for regulatory takings does not apply here. The Court of Appeals decision is in accord with the majority view in the United States and should be affirmed.

A. The police power defined.

The police power of the government is difficult to define but from its very nature it:

... must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights.

City Council of Charleston v. Warner, 17 S.E. 33 (1893).

The Court has also defined the police power in this way:

It cannot be doubted, however, that the origins of this (police) power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption upon which constitutions rest; for the state, whether we regard it as an association of individuals, or as a moral organism must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with the power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality.... It has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society. (citations omitted).

State ex rel. George v. City Council of Aiken, 20 S.E. 221 (SC 1894).

In that case, the Court went on to say that the police power may best be described by the Latin phrase *Salus populi suprema lex*, which translates to “**The safety of the people is the Supreme Law.**”

A detriment to private property which results from the legitimate exercise of the police power does not constitute the taking of property for public use. *Richards v. City of Columbia*, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 91 S.E.2d 280 (1956).

South Carolina has long held that private property may be regulated pursuant to the police power, even if it results in some loss of profit to the landowner, for the benefit and general welfare of the public. *Arnold v. City of Spartanburg*, 23 S.E.2d 735 (1943). In *Arnold*, the Court found that a municipality may regulate any business which might injuriously affect the public

health, morals, safety or comfort. In the exercise of its police power a municipality might exclude particular occupations from parts of the city. The Court found no merit in the contention that the enforcement of the regulation would result in financial loss to the businesses. The Court said that “in this State the law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, that it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one.” *Arnold @ 741*.

The police power is the ability to govern. Its purpose is to secure and promote the public welfare and it accomplishes that by restraint and compulsion. While the police power is most often litigated with regard to regulation, it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints. The essence of this power is that every individual must submit to such restraints in the exercise of his liberty or property rights as may be required to remove or reduce the danger of the abuse of these rights by others. The safety of the public is of paramount interest, as the most essential requirement of life in any civilization is the protection from crime, open force and violence. Peace officers are vested with the power to deal with present or imminent commission of felonies or breaches of the peace as a matter of law and must be able to do so without fear of civil liability.

B. Uses of the police power.

Extreme exercises of the police power include the deprivation of a person’s liberty or the destruction of their property. The exercise of that power is constricted by the reasonableness of the action taken under the circumstances present. Actions taken pursuant to the police power are restricted only if they are arbitrary or unreasonable exercises of that power under the

circumstances. A landowner does have a right to challenge the reasonableness of the actions of authorities and the authorities must justify their action. *Savannah v. Mulligan*, 95 Ga. 323, 22 S.E. 612, (1895); *Tanner v. City of Gainesville*, 290 S.E.2d 541, (1982); *People ex. rel. Copcutt v. Yonkers*, 25 N.E. 320 (1893); *Newark & S. O. H. R. Co. v. Hunt*, 50 N.J.L. 308 (1888).

While Petitioners dispute the reasonableness of the City's actions here, that issue has been resolved. After a four day trial, a jury in Spartanburg County returned a verdict in favor of the City on the Petitioners' negligence claim. The jury found that the actions of the City were reasonable under the circumstances. The Petitioners have not appealed that verdict and that is the law of the case.

Examples of the reasonable exercise of police power to destroy property include the destruction of property that is imminently dangerous. *Meeker v. Van Rensselaer*, 14 Wend. 397, (N.Y. 1836); *City Council of Montgomery v. Hutchinson*, 13 Ala. 573, (Ala. 1848). The police power also allows destruction to protect other property when trees, animals or destructive vermin or disease threaten ruin to other property of like character. *State v. Main*, 37 A. 80, (Conn. 1897) holding that "It is within the police power of the general assembly to order the destruction of a tree, affected by the "yellows," without compensation to the owner, and against his will."

Property can also be destroyed to avoid a calamity. For instance, where it is necessary to stop the spread of the fire by a fire stop, property can be destroyed without any obligation to pay the property owner. The law has long recognized that the preservation of life is paramount. Therefore the destruction of property, when necessary, is justifiable in order to save a life.

New York courts have also considered the police power in conjunction with the intentional destruction of a building to prevent the spread of a fire. The authority conferred by the statute of New York (2 Rev.Laws, p. 368, § 81) to order the destruction of buildings to prevent the

spreading of a fire is not a grant of the right of eminent domain, and is not, therefore, within the constitutional provision requiring compensation to the owner of private property taken for public use. *Russell v. City of New York*, 1845 WL 4880 (1845). Additionally, the New Jersey courts have said that the statute of New Jersey authorizing the destruction of property in conflagrations is not unconstitutional; it is the mere regulation of the right of necessity and self-preservation, and not an authority to take private property for public use under the right of eminent domain.

Am. Print Works v. Lawrence, 23 N.J.L. 590 (1851).

The Courts in Iowa have reached a similar result with similar reasoning.

The great weight of judicial authority holds that the destruction of property under authority conferred by law upon officers of municipal corporations is not an exercise of the power of eminent domain, but is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity, to prevent the spreading of fire or other great calamity. The following cases hold that, the destruction of property under such circumstances is not the exercise of the right of eminent domain: *Russell v. Mayor, etc., of N. Y., supra*; *The Am. Print Works v. Lawrence*, 3 Zabriskie, 595, 615; *McDonald v. City of Red Wing*, 13 Minn., 38, 41, 42; *Stone v. Mayor, etc., of N. Y.*, 25 Wend., 172, 173; Opinion of Senator VERPLANK; *Surocco v. Geary*, 3 Cal., 69, 73, 74; *Dunbar v. The Alcalde, etc., of San Francisco supra*. The following cases, while they do not expressly decide, support the same doctrine: *Taylor v. Plymouth*, 8 Met., 462, 465; *The Mayor, etc., v. Lord*, 18 Wend., 126; *Conwell v. Emrie*, 2 Carter (Ind.), 35. *Field v. City of Des Moines*, 39 Iowa 575, 587 (1874).

Here, the right of the police officers to damage or destroy private property is more compelling. Not only did they have a barricaded suspect who had used deadly force, but they also had the life of Sara Patel dependent upon their ability to rescue her. The exercise of their obligation to rescue Sara Patel was not an exercise of the power of eminent domain, but an exercise of the police power.

C. The police power and eminent domain distinguished.

The police power and the power of eminent domain are distinguishable; “[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, or

if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.’ ” Eggleston, 148 Wash.2d at 768, 64 P.3d 618 (quoting Conger v. Pierce County, 116 Wash. 27, 36, 198 P. 377 (1921)). “The gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society.” Id.

Brutsche v. City of Kent, 193 P.2d 110, 120 (Wash. 2008).

D. Eminent domain/ inverse condemnation.

Petitioners incorrectly contend that *Kiriakides v. School District of Greenville County*, 675 S.E.2d 439 (2009) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978) control this case. However, they misunderstand the application of the elements of inverse condemnation.

There are two main categories of takings: (1) a physical appropriation of property; and (2) where state law so regulates property that it has lost all economic value. For a regulatory taking, a plaintiff must show only an affirmative act and a taking. *Byrd v. City of Hartsville*, 620 S.E.2d 76 (2005). For a physical appropriation taking, the plaintiff must show: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for public use. 620 S.E.2d @ 79.

Petitioners do not contend here that any regulation is in issue. Instead, this is an act of the police during an emergency situation in which they ventured onto the property to save the life of Sara Patel.

In *Byrd*, this court held wisely that the *Penn Central* analysis applies to regulatory takings. In that context, the issue is what use of the property has been lost to regulation. The factors to consider are much different than those relevant to analysis of an emergency life or death

situation.

In the regulatory context, the government's decisions are made in the comfort of council chambers with the exercise of measured discretion in policy decisions. In this instance, Spartanburg's decision was made by a police captain in the field during a sudden and extraordinary life or death emergency. There was no time for measured discretion or reflection. There was no time for the policy-making body to consider the situation. In either case, the challenge is to the government action. In the regulatory setting, with measured discretion, the factors that must be considered before enactment of the regulation include the effect on the property being regulated. In some instances, property rights may be vested by substantial expenditures. Those factors are appropriate for consideration by the legislative body. In challenging their decision, it is appropriate to apply the *Penn Central* balancing test because that considers the factors that the legislature should have applied in making their decision.

It is not appropriate to expand the *Penn Central* analysis to the facts of this case. The Respondents here never had the opportunity to consider those factors. Their decision was not made with the luxury of measured discretion. A challenge to government action here is a challenge to the decisions made quickly under dire circumstances. The test is whether those decisions were reasonable under the circumstances. That has been decided by jury verdict.

Petitioners' contend that the investment backed expectations dictate that this be declared a taking. However, when considering the circumstances, that is an irrational result. Holding the police liable for a taking when the price is high would result in situations where something valuable inside a building, such as an unknown Rembrandt painting on a wall that is destroyed, would dictate the ultimate classification of the police actions. The police would have no way of knowing of the existence of that painting, but its existence would determine whether they were

“taking” property - clearly an untenable result.

In the majority opinion written by Chief Justice Toal in *Hardin v. SCDOT*, the Court set out the proper analysis for a takings claim. First, "a plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking." 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007). The Court noted that the takings clause was once understood to only apply to direct appropriation of property or the functional equivalent of an ouster of possession but it is now accepted that regulation of property can be a taking when it sufficiently limits its use. It is this latter, regulatory type of taking that requires a *Penn Central* analysis. The analysis of a takings claim begins by "classifying the nature of the government's actions which the property owners allege give rise to takings." *Id.* at 605, 441. Since the plaintiffs did not allege the enactment of any regulation that directly regulated the use of their properties, the Court found that a taking could only have taken place if SCDOT physically appropriated some aspect of them. Thus, the fairness/balancing test was not necessary or appropriate.

Similarly, Petitioners do not allege a regulatory taking. The balancing test from *Penn Central* and *Kiriakides* therefore is inapplicable.

There has been no physical appropriation of Petitioners' property by the City of Spartanburg. Petitioners still have title and possession of the property. The property was damaged by police response to criminal activity but no taking occurred. Additionally, there has been no "public use" of the property. In fact, there was no "use" of the property at all by the City of Spartanburg. The City did not use the property to capture the suspect. The property simply happened to be the situs of the activity. The Just Compensation clause of the Constitution has no application to the facts of this case.

Instead, the Respondent was faced with a sudden and extraordinary emergency situation in which Sara Patel was in imminent danger. The police had been informed that she would likely be killed if they did not get her out of the building immediately. Necessity required creating a hole in the building for entry to save Sara Patel. The only motivation or intent was to rescue Sara Patel. The property was not appropriated and the property was not put to any public use.

Additionally a fair reading of the Constitution leads to but one conclusion – the drafters did not intend for police damage or destruction to private property to be a taking. The just compensation clause requires that private property cannot be taken without just compensation being “*first made*”. It would be impossible for a municipality to prepay for damage to private property caused by police operations to protect the public and enforce the criminal laws. Compensation for such police action was not contemplated by the drafters of Article I Section 13 of the South Carolina Constitution. *See, Brutsche v. City of Kent*, 193 P.2d 110, 120 (Wash. 2008). Instead, the exercise of measured discretion for the public good was contemplated.

Based on the great weight of authority in the United States, the actions of the Respondent in this emergency situation were an exercise of the police power, for the protection of the public and preservation of life, not the power of eminent domain for the taking of property.

II. The Court of Appeals decision is in accord with the majority rule that police action does not result in a taking of property.

The Court of Appeals analyzed case law from other jurisdictions and determined that the majority rule is that police action like that here does not result in a taking of property. The Court analyzed the rationale of those decisions and that general rule. The Court determined that the rationale for the rule is sound and applies here.

In *Customer Company v. City of Sacramento*, 895 P.2d 900 (Cal. 1995), the court faced the

exact issue present in this case. A convenience store owner brought an action in inverse condemnation and tort against the City to recover for damage to his store and its contents caused by efforts of police to apprehend a suspect who had taken refuge in his store. Note that the allegations of that case are similar to the issues at hand with one exception: the Respondent had to deal with a hostage whose life was at stake as well. In *Customer*, the suspect was thought to be armed and dangerous. He took refuge in the convenience store and refused to surrender. During the course of attempting to apprehend the suspect, the police fired tear gas into the store causing extensive damage. The issue as framed by the Court was precisely the issue here:

“The issue we address is whether the owner of the store may bring an action for inverse condemnation against the public entities that employed the law enforcement officers, on the theory that the damage caused by the officers constituted a taking or damaging of private property for public use within the meaning of the “just compensation” clause of the California Constitution.

Customer Company @ 901.

The *Customer* Court concluded that no action for inverse condemnation lies to recover damages caused by law enforcement officers enforcing the criminal laws. Instead, the Court found that the public entities could be held liable, if at all, only in an action at tort. The Court noted that although the concept of “just compensation” has been extended from the traditional eminent domain context to damaging of private property by regulation or by public improvement projects, it has never been extended to apply to damage to property caused by law enforcement officers enforcing the criminal laws nor any other public employees acting within the course and scope of their employment. *Customer @ 905-07.*

Petitioners attempt to distinguish *Customer* by noting that the Plaintiff there conceded that the authorities acted reasonably. Petitioners then claim that they argue just the opposite, that the methods used by law enforcement to rescue Sara Patel and save her life were unreasonable.

What Petitioners fail to recognize is that the reasonableness of the actions of the police here has been determined by a jury. While the Petitioners allege the actions were unreasonable, that issue has been decided and there had been no appeal from that determination. The actions of the Respondent were reasonable given the circumstances they were facing and the task, saving a life, they were executing.

Petitioners also contend that the existence of a reimbursement program in California distinguishes this case too. However, the opinion does not rely upon that program. Further, that statutory scheme simply allows a City or County to set up a victim's fund if they choose to do so. There is no indication that any such fund applied there or that it would have compensated the Plaintiff if it had existed. Plaintiff's attempt to distinguish the reasoning of *Customer* on that basis is illusory.

The clear majority rule across the United States is that no action lies in inverse condemnation for destruction or damage to private property caused by police actions in attempting to enforce the criminal laws. While Petitioners contend that the majority rule favors them, there are only three states that have opinions somewhat favorable to them. Each of those cases are distinguishable and dissimilar to the case at hand. The Court of Appeals correctly noted the majority rule in stating: "Moreover, the majority of states considering this issue have determined a property owner cannot bring an inverse condemnation action against the government for destruction or damage to private property caused by police actions in attempting to enforce criminal laws." 727 S.E.2d 28 @ 33.

The Florida Court of Appeals considered a similar case in 2003. *In Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate Number TPCLDP217477 v. City of St. Petersburg*, 864 So.2d 1145 (Fla.App. 2003), the police executed a search warrant at an

apartment. They threw “flash-bang” grenades into the apartment before entering. However, unknown to the police officers, the apartment had insulating foam installed on the walls and ceilings to muffle sounds of a recording studio. The grenades started a fire in the foam that destroyed the entire apartment. The innocent owner of the apartment lived in another state and rented the apartment out. She brought suit against the City for her losses claiming inverse condemnation in addition to other claims. The Court held that the destruction of her property occurred as a result of lawful action by law enforcement activities by employees acting within the course and scope of their employment. Consequently, under both the federal and state just compensation clauses, any damage resulting from these activities did not constitute a taking. Any damages were recoverable, if at all, only under state tort law.

Petitioners attempt to distinguish this case claiming that the fire was an unintended consequence of throwing flash bangs into the house. Apparently Petitioners claim that the intent of law enforcement is the distinguishing focus. If the intent is the focus, there certainly was no intent by the Respondent to exercise the power of eminent domain or to take the property for a public purpose. *See also, Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997) (“Similarly, in *State ex rel. Coffey v. District Court*, 547 P.2d 947 (Okla. 1976), the Oklahoma Air National Guard fired a 19 gun salute at the governor's inauguration and the concussion caused damage to several houses nearby. We issued a writ, prohibiting the district judge from proceeding with a suit filed by the landowners for inverse condemnation. We found that there was not a sufficient interference with the landowners' use and enjoyment of their land to constitute a “taking” by the sovereign. We also found that there was no *intention* on the part of the state, in this single, isolated act, to exercise the power of eminent domain or to take the owners' property for a public use.”) *Id.* @ 225. In any event, the intent of the Respondent was to

create an entry into the building so they could rescue Sara Patel. They had no reason to intend to destroy the building as Petitioners allege. They certainly had no intent to take the Petitioners property, and never had any intent to convert the property to public use.

Petitioners also claim that the use of the flash bangs In Florida was lawful whereas the creation of a hole in the building here was unreasonable. Again, the jury determined that the actions and methods used by Respondent were reasonable given the circumstances they faced.

The Supreme Court of Iowa has held that actions of police officers damaging a residence when making forcible entry in order to execute an arrest warrant was the result of a reasonable exercise of police power rather than the power of eminent domain so that no cause of action for inverse condemnation lies. *Kelley v. Story County Sheriff*, 611 N.W.2d 475 (2000).

The Supreme Court of Washington held that damage done to property by law enforcement officers using a battering ram to gain entry in order to execute a search warrant did not constitute a taking as there was no permanent physical occupation of the property. Further, they held that the gathering and preservation of evidence of police officers is a police power function, necessary for the safety and general welfare of society. *Brutsche v. City of Kent*, 193 P.3d 110 (Wash. 2008). Interestingly, *Brutsche* and most of the other reported cases do not involve situations as dire or immediate as Spartanburg's. The exercise of the police power is even more compelling in the present case.

Petitioners' attempt to distinguish this case is disingenuous. They claim that the government does not have to pay for the collection of evidence and that explains the result in *Brutsche* that no compensation was required. In effect, Petitioners claim that government has to pay for damaging a building to save the life of a citizen but they do not have to pay for damaging a building to collect evidence. The result urged by Petitioner defies common sense.

Additionally, the Washington Court has also held that no inverse condemnation claim existed when the execution of a criminal search warrant and preservation order rendered Plaintiff's home uninhabitable. The Court held that a police power function that takes or damages public property is not for the public "use", but instead is to conserve the safety, morals, health and general welfare of the public. Therefore no inverse condemnation claim exists. *Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003).

No action for inverse condemnation lies when police officers executing a search and arrest warrant use smoke grenades, tear gas and percussion and flash grenades in a rented residence. The use of those items ultimately caused a fire that destroyed the residence. *Patel v. U.S.*, 823 F.Supp. 696, 699 (N.D.Cal. 1993). The Court found that a takings analysis was inappropriate.

Petitioners again attempt to distinguish this decision on illogical grounds. They claim that the Court failed to perform the *Penn Central* balancing test. The case, like this one, did not involve a regulatory taking and therefore the *Penn Central* analysis did not apply. Petitioners claim that the Plaintiff admitted that the police action was legitimate as another distinguishing factor. Again, the jury here found that the police action was legitimate and reasonable. They also claim that the case is different because it involved the execution of a search warrant and that distinguishes it from this case. Clearly, the successful effort to save a life in this case presents a far more compelling exercise of the police power than executing a warrant to search a residence.

The Indiana Court of Appeals has held that no action for inverse condemnation lies when police fired tear gas into the Plaintiff's home, thereby damaging the home, to capture a felony suspect who had taken refuge inside the home. *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind.Ct.App. 1984). The Indiana Court reasoned that the conduct was in the nature of a tort and the only remedy, if any, was in tort.

Petitioners attempt to distinguish this case by claiming that the sole issue was immunity under the state tort claims act. Petitioners overlook the fact that the court considered the Plaintiff's inverse condemnation claim and dismissed it. The court stated: "May's further argument, citing eminent domain cases, that the acts of the police amount to a taking is without merit. This conduct is in the nature of a tort." *Id.* Certainly, the eminent domain argument was also presented and ruled upon.

The Oklahoma Supreme Court in *Sullivant, supra*, found that a fair reading of the just compensation clause indicates that it is designed to require compensation for the exercise of the power of eminent domain, not the exercise of the police powers. The Court analyzed situations involving incidental or consequential property damage caused by police operations. They determined that in each of those situations, the police intended to execute a warrant or undertake other police activity. There was never any intent to exercise the power of eminent domain or any intent to take the private property and convert it to public use. For those reasons, the Court found no taking when the damage occurred during the exercise of the police power. *Sullivant*, 902. P.2d @ 224-25.

The distinctions raised by Petitioners to the *Sullivant* analysis are erroneous. Again, Petitioners argue that the case is distinguishable because the court did not apply the *Penn Central* analysis. The reasons that it does not apply have been discussed previously. Next, Petitioners claim that the just compensation clause is different than South Carolina's in some meaningful manner. That is simply incorrect. The first sentence of the Oklahoma just compensation clause is clearly similar to South Carolina's clause. The remaining portions of Oklahoma's clause simply demonstrate the procedures for determining cases under that clause.

The Georgia Court of Appeals held that, when a volunteer's motor vehicle was damaged

while he assisted law enforcement officers in searching for a weapon involved in a crime, no action for inverse condemnation existed. In *Bray v. Houston County*, 348 S.E.2d 709 (Ga.App. 1986), the Court reasoned that there was no “taking” of Plaintiff’s property and even if there was, the taking was pursuant to the police power rather than the power of eminent domain.

Petitioners correctly point out that Bray consented to allow the police to use his vehicle and that consent would defeat any takings claim. However, Petitioners overlook the fact that the court indicated that there may be a factual issue about the consent. Despite that factual issue, the court held that the case could not go forward because the police were acting under the police power as a matter of law rather than the power of eminent domain.

The Georgia Court of Appeals earlier considered a similar case where a private pond was drained by police when they were searching for a body. *McCoy v. Sanders*, 148 S.E.2d 902 (1966). The draining of the pond damaged the Plaintiff’s fish and damaged the pond. Again, the Court found no inverse condemnation. The Court noted that the action was taken pursuant to the police power. The Court noted that police power extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals and is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interest. Interestingly, the Georgia Court cited *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 for the proposition that:

The power of eminent domain is that sovereign power to take property for a public use or purpose, and this cannot even be done without just and adequate compensation. On the other hand, the police power is that power by which the Government may destroy or regulate the use of property in order to promote the health, morals and safety of the community, and the police power may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property. *Adams @ 666.*

Like Georgia, South Carolina has also cited the *Adams* opinion for the same explanation of

the difference between the power of eminent domain and the police power. *See, Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). That difference applies in *McCoy* just as it applies in this case. Both cases involve the exercise of police powers. Both involve the general health and welfare of the public. One involves the search for a decedent. This case involves the protection of a living person who is being held hostage and the capture of a barricaded person who has shot at the police. In both situations, the police power “may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property.”

The McCoy court further explained:

The police power is that inherent and plenary power in the state over persons and property, when expressed in the legislative will, which enables the people to prohibit all things inimical to the comfort, safety, health, and welfare of society, and is sometimes spoken of as the law of overruling necessity.’ *567 23 Ill.Law R. 186. ‘Police powers have their origin in the law of necessity,’ and ‘are inherent in every sovereignty.’ Prentice Police Powers (1894) pp. 4, 6. The power extends to ‘the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals,’ *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 669, 24 L.Ed. 1036, is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interest. *Camfield v. United States*, 167 U.S. 518 (17 S.Ct. 864, 42 L.Ed. 260). It includes the ‘prevention and punishment of injuries and offenses to the public.’ *People v. Brazee*, 183 Mich. 259, 149 N.W. 1053, L.R.A.1916E, 1196.

It is not to be confused with the power of eminent domain, under which property is acquired for the making of public improvements upon condition that the owner be compensated for the taking or damaging of his property. ‘This police power or the law of overruling necessity is not controlled by the constitutional limitation that private property shall not be taken for public use without compensation, which was not designed for, and should not be extended to such cases.’ Prentice, Police Powers, supra, p. 6. And see, 2 Kent Com. 338; Bl.Com. IV, 30.

‘Under certain circumstances and conditions, a municipality may, acting under its police power for the general welfare of the public, take or use the property of a person or corporation without paying compensation therefor * * *.’ *Atlantic Coast Line R. Co. v. Southern R. Co.*, 214 Ga. 178, 182, 104 S.E.2d 77, 80. Cf. *Crum v. Bray*, 121 Ga. 709, 49 S.E. 686; *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202; *Hall v. Twin City*, 203 Ga. 52, 45 S.E.2d 412; *Frank v. City of Atlanta*, 72 Ga. 428; *Dunbar v. City Council of Augusta*, 90 Ga. 390, 170 S.E. 907; *Americus v. Mitchell*, 79 Ga. 807, 5 S.E. 201; *City of Macon v. Southern Bell T. & T. Co.*, 89 Ga.App. 252, 267, 79 S.E.2d 265. ‘Uncompensated obedience to a regulation enacted for the public safety under the police

power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest.' *Cleveland v. City Council of Augusta*, 102 Ga. 233, 240, 29 S.E. 584, 587, 43 L.R.A. 638.

At common law the State might destroy buildings in an effect to stop the spread of a conflagration under its police power, and the owner was entitled to no compensation. 2 Kent Com. 339; *Bowditch v. City of Boston*, 101 U.S. 16, 25 L.Ed. 980; *United States v. Caltex*, 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157. A statutory provision of payment, however, may be provided. See Code s 88-401. In Georgia this was done from the adoption of the first Code in 1863, until the statute was apparently repealed by Ga.L.1964, pp. 499, 650, Code Ann. s 88-9902(2)(21). Being in derogation of the common law, a strict construction of the statute was required and it could not be extended beyond the express provisions. *Bowditch v. Boston*, supra; *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 250, 56 S.Ct. 212, 80 L.Ed.202. Provision was made for payment only when houses are destroyed to prevent the spread of fire or of contagious diseases, and there have been instances when compensation was paid under it. See *President and Councilmen of the Town of Dawson v. Kuttner*, 48 Ga. 133; *Vandevender v. City of Atlanta*, 150 Ga. 443, 104 S.E. 227. But a feather bed on which a victim of scarlet fever had slept was destroyed as a nuisance and without payment of compensation. *Mayor &c. of Savannah v. Mulligan*, 95 Ga. 323, 22 S.E. 621, 29 L.R.A. 303. See generally Saye, *The Tort Liability of Municipalities in Georgia*, 17 G.B.J. 456; Sentell, *The Law of Municipal Tort Liability in Georgia* (1964), p. 131.

In a general way the police power extends to all the great public needs. It may be put forth in the aid of what is sanctioned by usage, or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

'(F)or the state or a municipal corporation to take private property without compensation, except where it does so under a valid exercise of the police or other sovereign power, constitutes a deprivation of property without due process of law within the meaning of the Fourteenth Amendment.' (Emphasis supplied). 5 McQuillan on Municipal Corporations (3d Ed.) p. 519, s 19.19.

But the exercise of police power is not so proscribed for 'neither the (Fourteenth) amendment-broad and comprehensive as it is-nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power * * *.' *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 359, 28 L.Ed. 923. '(It is) the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' *District of Columbia v. Brooke*, 214 U.S. 138, 149, 29 S.Ct. 560, 563, 53 L.Ed. 941.

'All property is held subject to the police power of the state. * * * The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of public safety. * * * Damages cannot be recovered by one because he incurs expense in obeying a police regulation enacted for the common welfare and safety of the public. * * * The police power has never been surrendered by the states. * * * (and) (t)o the exercise of police power, all rights of natural persons and corporations are subject.' *Atlantic C.L.R. Co. v. State*, 135 Ga. 545, 557, 562, 69 S.E. 725, 731, 733, 32 L.R.A.,N.S., 20.

148 S.E.2d @ 903-05.

Interestingly, the *McCoy* court referred matters “greatly and immediately necessary” as matters within the police power. Other courts have referred to this as the necessities doctrine. In either characterization, it refers to the police power of the government to protect the welfare (and life) of its citizens.

The United States Supreme Court even recognized in *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1075, 112 S. Ct. 2886, 2925, 120 L. Ed. 2d 798 (U.S.S.C. 1992), that the doctrine of public necessity has long operated as a defense to takings claims.

The principal “otherwise” that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of “real and personal property, in cases of actual necessity, to prevent the spreading of a fire” or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18–19, 25 L.Ed. 980 (1880); see *United States v. Pacific R., Co.*, 120 U.S. 227, 238–239, 7 S.Ct. 490, 495–496, 30 L.Ed. 634 (1887).
505 U.S. @ 1075, 112 S. Ct. @ 2925.

The recognition that the government has the police power to destroy real and personal property to forestall grave threats to the lives of others is a clear recognition of the police power as utilized in this case.

III. The Court of Appeals properly concluded that the elements of inverse condemnation were not met, even if the power of eminent domain were applicable.

Even if the power of eminent domain was exercised by a police captain in determining how to rescue a hostage whose life was in imminent danger, there was still no taking. Since the property has not been put to any productive use by the Respondent, the concern that the government is enriching itself at the expense of the property owner is not implicated. The relatively short time of entry onto the property is more akin to a trespass than a taking. The location of the activity was not arbitrarily chosen, but was dictated by the hostage situation

occurring on the property. The purpose of the Respondent's activity was not to appropriate property or put it to a public use, but was to create an entry into the property to allow for the rescue of the hostage and the elimination of the imminent peril she was in. Finally, the character of the Respondent's action was to save a life even if it caused some damage to property. Life is always valued over property. No taking occurred.

The Court of Appeals properly concluded that there was no taking because there was no physical appropriation of the property for a public use. The Petitioners maintained title to and possession of the property at all relevant times. No physical appropriation occurred. The property was the site of the activity but that does not demonstrate a taking. The Court of Appeals ruling should be affirmed.

IV. The cases cited by Petitioners are under incorrectly decided and different circumstances than those presented here.

Petitioners rely upon the Texas case of *Steele v. City of Houston*, 603 S.W.2d 786 (Tex.1980) for the proposition that police action that set a house ablaze in order to capture fugitives hiding inside constitutes a taking. *Steele* was on appeal from the granting of summary judgment to the City. The Supreme Court of Texas reversed the grant of summary judgment and remanded the case for trial. They refused to distinguish between an exercise of the police power and the power of eminent domain. In its opinion, the Court set forth what the parties would have to prove upon remand in order to prevail.

Plaintiffs, upon remand, will be entitled to make proof that the City of Houston, acting through its officers with authority or color of authority, intentionally set the house on fire or that the City prevented the fire's extinguishment after it was set. They must also prove that the destruction was done "for or applied to public use." See *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 702-709 (1959). That is the factor which distinguishes a negligence action from one under the constitution for destruction. That the destruction was done for the public use is or can be established by proof that the City

ordered the destruction of the property because of real or supposed public emergency to apprehend armed and dangerous men who had taken refuge in the house.

The defendant City of Houston may defend its actions by proof of a great public necessity. Mere convenience will not suffice. Uncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence or other great public calamity. Destruction has been permitted in instances in which the building is adjacent to a burning building or in the line of fire and destined to destruction anyway.² Professor Prosser has said concerning the defense:

Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. Thus one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances. The "champion of the public" is not required to pay out of his own pocket for the general salvation. The number of persons who must be endangered in order to create a public necessity has not been determined by the courts. It would seem that the moral obligation upon the group affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.

Prosser, *The Law of Torts* s 24 (4th ed. 1971). The scant proof made by the City of Houston in this case does not establish as a matter of law that it is excused from making compensation for the destruction of plaintiffs' dwelling and personal property.

603 S.W.2d @ 791-92.

Contrary to Petitioners' assertions, the Court did not find a taking: instead, it reversed the summary judgment granted to the City and remanded the case for trial. The City was still able at trial to offer proof of necessity as a defense to the takings claim. Most other states allow proof of necessity or an emergency situation as giving rise to an exercise of the police powers.

Interestingly, the Texas constitution has a markedly different just compensation clause.

No person's property shall be taken, ***damaged or destroyed*** for or applied to public use without adequate compensation being made ... (emphasis added) *Steele* @788.

South Carolina's just compensation clause contains no language regarding property being damaged or destroyed. That is a significant difference in the two clauses. In order for inverse condemnation to apply in Texas, there does not have to be a taking of the property and an appropriation to public use. Instead, all that is required is that the property be damaged or

destroyed. South Carolina's just compensation clause requires that the property be taken and appropriated to a public use, neither of which occurred here.

In the cases cited previously in this brief, the other states considered and rejected the Texas' court's reasoning: California, *Customer, Id.*; Oklahoma, *Sullivant, Id.*; Washington, *Eggleston, Id.* Iowa, *Kelly, Id.*; and Florida, *Certain Interested Underwriters at Lloyds, Id.*; In *Customer Co.*, the California Supreme Court stated:

The opinion in *Steele* is poorly reasoned and internally inconsistent. The opinion in *Wegner* relies primarily upon the faulty reasoning in *Steele*. Neither decision gives serious consideration to the body of authority governing actions for inverse condemnation. Accordingly, we decline to follow these decisions. 895 P.2d at 912.

Clearly, the Texas court's reasoning has been roundly rejected.

The Minnesota court's opinion in *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991), is likewise inapplicable because of differing constitutional provisions. Like Texas, the Minnesota constitution provides that compensation be paid when property had been taken, damaged or destroyed. In *Wegner*, the police fired tear gas into a home in an attempt to apprehend an armed suspect barricaded in the home. Certainly the emergency situation there was not comparable to that encountered by the Respondents here. However, the Court held that an eminent domain analysis was not appropriate.

We agree that this is not an eminent domain action and should not be analyzed as such. This action is based on the plain meaning of the language of Minn. Const. art I, § 13, which requires compensation when property is damaged for a public use. 479 N.W.2d @40.

South Carolina has no comparable counterpart in our constitution. *Wegner's* analysis is inapplicable to this case.

V. The Court of Appeals correctly noted the public policy implications for law in determining that no inverse condemnation occurred here.

Law enforcement officers must be permitted to respond to public emergencies without fear of constitutional liability mandated upon them for their decisions that might endanger private property. In this instance, law enforcement had the life of Ms. Patel at stake and had information that she would likely be killed if they did not act quickly. The spectre of constitutional liability would require the law enforcement officers to make a financial decision at the same time they are making their decision as to how to best save the life of the hostage. They would be required to evaluate the potential cost to determine if perhaps they should not wait longer, thereby imperiling the life of the victim, due to the potential financial cost to the municipality. Such a result would deter law enforcement officials from acting swiftly and effectively to protect the public safety during emergency situations. Life should always be protected above property! South Carolina values life over property. South Carolina Courts have never sanctioned such a result.²

Allowing recovery for damage to property in inverse condemnation under these circumstances would also give rise to an unacceptable anomaly. A plaintiff could recover for property damage to their building and the contents. However, had Ms. Patel been injured by falling blocks when the bulldozer struck the building, she would not be entitled to recovery for the very same police action! Allowing recovery for property damage but not for personal injury or even death clearly makes no sense and was not a result intended by the drafters of our Constitution.

A law enforcement activity to protect the public during emergency situations is not at all

² Legend has it that in the Great Fire of London in 1666, the fire and destruction of London could have been avoided if the Mayor had acted quickly to order a fire break by the destruction of buildings to prevent the spread of the fire. 2. According to legend, the Mayor hesitated to order that break due to concerns of financial liability to the property owners. True or not, the lesson remains.

similar to a taking of property by eminent domain. Forcibly knocking a locked door open or firing a weapon should not automatically give rise to an inverse condemnation action for recovery of property damage. Every time a police officer fires a weapon in the line of duty, some potential property damage and personal injury is conceivable. Mandating liability in inverse condemnation for such property damage (but not personal injury) has never been required or allowed under South Carolina law.

Some may contend that fairness dictates that an innocent property owner should be compensated by the government for his loss caused by police actions. While that argument may appear “fair”, inverse condemnation is not the appropriate vehicle or cause of action to accomplish that result. Inverse condemnation does not render a “fair” result. Under that theory, a property owner whose property had been damaged or destroyed could potentially recover in inverse condemnation. The innocent person inside the store who suffered personal injuries could not recover. Additionally the property owner could recover his attorney’s fees. The injured victim inside could not recover attorneys fees even if they could recover under the South Carolina Tort Claims Act. There is no rational basis for distinguishing between damaged property and an injured person for their right to recovery. Indeed, there is no difference between their ability to recover. They are both entitled to recover if they have a claim under the South Carolina Tort Claims Act. That is the appropriate remedy, if any.

The “Just Compensation” clause does not afford Petitioners a remedy under these circumstances. There has been no taking of property by eminent domain. There has been no physical appropriation of the Petitioners’ property. There has been no taking for public “use”. There has been no “use” at all of the Petitioners’ property by the City of Spartanburg. Any damage to the Petitioners’ property was the result of lawful police actions undertaken pursuant to

the police power. Those actions were undertaken in order to protect the public safety and welfare. Indeed, those actions were undertaken in order to immediately protect the life of Ms. Patel and to capture a barricaded subject who had used deadly force. The City police were heroes, not villains. There was no exercise of the power of eminent domain. There is no claim for inverse condemnation. The Respondent is entitled to have the grant of summary judgment affirmed.

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ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina

April 4, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E. C. Burnett, III and Roger Couch, Circuit Court Judges

APPELLATE CASE NO. 2012-212473
OPINION NO. 4970

Carolina Convenience Stores, Inc.,
Harry Lancaster, Jr., as Power of
Attorney for Harry Lancaster, Sr.
and Willard Oil Company, Inc.,

Petitioners,

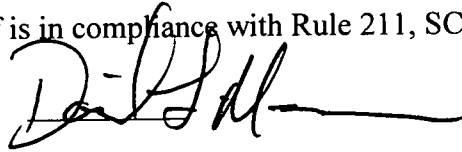
v.

City of Spartanburg, SC,

Respondent.

**CERTIFICATE OF COMPLIANCE FOR
RESPONDENT'S FINAL BRIEF**

This will certify that Respondent's Final Brief is in compliance with Rule 211, SCACR.



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THE STATE OF SOUTH CAROLINA
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APR - 8 2014

APPEAL FROM SPARTANBURG COUNTY
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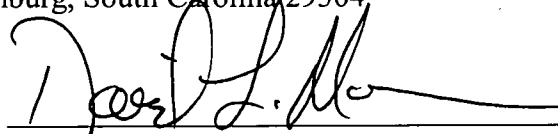
City of Spartanburg, SC,

Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Morrison Law Firm, LLC, attorney for the Defendant, does hereby certify that service of the Brief of Respondent in the above-captioned action was made upon all counsel of record by mailing these documents the 4th day of April 2014, addressed as follows:

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David L. Morrison

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR -8 2014

S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E. C. Burnett, III and Roger Couch, Circuit Court Judges

APPELLATE CASE NO. 2012-212473
OPINION NO. 4970

Carolina Convenience Stores, Inc.,
Harry Lancaster, Jr., as Power of
Attorney for Harry Lancaster, Sr.
and Willard Oil Company, Inc.,

Petitioners,

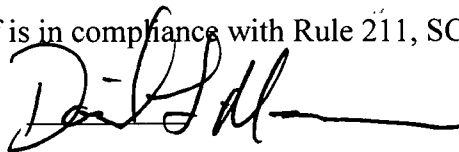
v.

City of Spartanburg, SC,

Respondent.

**CERTIFICATE OF COMPLIANCE FOR
RESPONDENT'S FINAL BRIEF**

This will certify that Respondent's Final Brief is in compliance with Rule 211, SCACR.



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Columbia, South Carolina
April 4, 2014