THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001773

West/Hobby, LLC, ... Respondent,

v.

County of Newberry, ...Appellant.

INITIAL BRIEF OF APPELLANT

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April 7, 2017

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STATEMENT OF THE CASE

This matter was commenced with the filing of the Summons and Complaint on January 26, 2012, pursuant to which the Respondent West/Hobby, LLC (hereinafter referred to as "West/Hobby") alleged that it owned a 40.7 acre tract of real estate adjacent to or abutting property that the Appellant Newberry County formerly had used as a municipal solid waste landfill from approximately 1970 until 1993, that contaminants emanating from the closed landfill had contaminated the West/Hobby tract, and asserted causes of action sounding in Inverse Condemnation, Trespass, Negligence and Gross Negligence, and Negligence *per se*, and the action being assigned civil action number 2012-CP-36-00046. *See*, Complaint. The Respondent Newberry County answered, interposing a qualified general denial and certain affirmative defenses. *See*, Answer. The parties engaged in discovery through 2012 and 2013, and Newberry County filed its Motion for Summary Judgment January 28, 2014. *See* Newberry County Motion for Summary Judgment (January 28, 2014). West/Hobby amended its Complaint on or about February ___, 2014, asserting causes of action sounding in Inverse Condemnation, Injunction, Nuisance *per se*, and Gross Negligence. *See*, Amended Complaint. Newberry County answered on or about April 2, 2014, denying liability and asserting various affirmative defenses, including statute of limitations and assumption of the risk with regard to the Inverse Condemnation claim, and laches, waiver, and estoppel. Answer to Amended Complaint.

The case appeared on a trial roster in the Spring of 2014, when it was stricken pursuant to SCRCP Rule 40(j) by Order dated April 29, 2014. *See*, Consent Order

Pursuant to Rule 40(j), SCRCP. With the 40(j) strike, Newberry County withdrew its Motion for Summary Judgment.

By Order dated February 10, 2015, the matter was restored under the original civil action number with the proviso that it not be called for trial until one hundred eighty days after it was restored. *See*, Consent Order Restoring Case to Roster (Rule 40(j), SCRCP).

After the parties engaged in further discovery in the Spring and Summer of 2015, Newberry County re-filed its Motion for Summary Judgment August 13, 2015, and West/Hobby filed its own Motion for Summary Judgment. *See*, Newberry County Motion for Summary Judgment and West/Hobby Motion for Summary Judgment. The motions were heard and denied by Order dated August 26, 2015. *See*, Form 4 Order Denying Motions for Summary Judgment.

On December 14-15, 2015 Trial was held, non-jury, before the Honorable Donald B. Hocker, on the sole issue of whether a taking had occurred under West/Hobby's Inverse Condemnation cause of action, with West/Hobby abandoning its other causes of action and pursuing only its Inverse Condemnation claim. *Cf.*, Trial Transcript p. 7, line 8 to p. 8, line 12 (West/Hobby's opening statement: "I can tell you that this is an inverse-condemnation case. Now, you may recall that in our amended complaint, we had other causes of action. We have decided to forgo any pursuit of the other ones, other than inverse condemnation."). Following the two-day trial, the Trial Judge took the matter under advisement; and by Order dated February 11, 2016 and filed February 25, 2016, the Trial Judge found that a taking of West/Hobby's property had occurred, and issued his Order in

favor of West/Hobby on its Inverse Condemnation claim. *See*, Findings of Fact and Conclusions of Law.

Newberry County received written notice of the entry of the order on February 26, 2016, and filed and served its Notice of Motion and Motion to Alter or Amend Pursuant to SCRCP Rule 59(e) on March 7, 2016. *See*, Notice of Motion and Motion to Alter or Amend. By letter dated March 8, 2016 sent by email only and pursuant to SCRCP Rule 59(g), Newberry County provided a copy of the motion to the Trial Judge. *Cf.*, Letter of Patrick J. Frawley to the Honorable Donald B. Hocker, Circuit Court Judge (March 8, 2016)(Transmittal letter from Newberry County attorney to Trial Judge, sending clocked-in copy of the Rule 59(e) Motion). Hearing on the motion was held May 5, 2016. Transcript of Record, pp. 1-49 (May 5, 2016). The Trial Judge denied the Rule 59(e) motion by Order dated July 29, 2016 and filed August 1, 2016. *See*, Order (July 29, 2016).

Newberry County received written notice of the entry of the July 29, 2016 Order on August 2, 2016, and served its Notice of Appeal on Counsel for West/Hobby August 24, 2016, filing the Notice with the South Carolina Court of Appeals August 26, 2016. *See* Notice of Appeal and Proof of Service.

West/Hobby served its Motion to Dismiss on Newberry County September 14, 2016, seeking to dismiss the appeal as interlocutory. Motion to Dismiss. Newberry County served its Return to Motion to Dismiss September 26, 2016, filing it with the Court September 28, 2016. Appellant's Return to Motion to Dismiss. By Order filed December 8, 2016, the Court denied the Motion to Dismiss, but allowed the parties to argue the issue of appealability in their briefs. *See*, Order (December 8, 2016).

STATEMENT OF FACTS

West/Hobby, LLC is a real estate development company in the business of acquiring commercial property, then developing or selling it. Trial Transcript, p. 339, lines 3-10. Although West/Hobby currently owns the 40.7 acre tract subject of this action, the tract was originally purchased by Billye West and Ray Hobby in their individual capacities in November, 2000. *See, e.g., id.*, p. 38, line 25 to p. 39, line 21; Plaintiff's Exhibit 2. West and Hobby later formed West/Hobby, LLC in 2002, and conveyed the tract to the LLC in June, 2002. *E.g.*, Plaintiff's Exhibit 3. At the time of the June, 2002 conveyance of the property to West/Hobby, LLC, the LLC was managed by Billye West's daughter, Misty West. Trial Transcript, p. 56, lines 12 to 17. Misty West was college-educated, a licensed general contractor for over twenty years, and Vice President of the family business, West Electrical Contractors since 1988. *Id.*, p. 57, line 14 to p. 58, line 9; p. 339, line 22 to p. 340, line 13. In addition to managing West/Hobby, LLC at the time of trial, Misty West also managed several family property LLCs. *Id.*, p. 58, lines 10-14; *see, generally, id.* p. 341, line 16 to p. 343, line 22. At the time of trial, West/Hobby was solely owned by Billye West. *Cf.*, Trial Transcript, p. 340, line 14 to p. 341, line 10 (Billye West's daughter, Misty West, testifying that, although she manages the day-to-day operations of West/Hobby, her father is the sole owner.). The 40.7 acre tract subject of this action is the only remaining piece of property owned by West/Hobby, with several other pieces of property formerly owned by West/Hobby having been conveyed to the other family property LLCs managed by Misty West. *Id.*, p. 341, line 13 to p. 343, line 22.

The Newberry County Landfill site is located at 432 Cockrell Road, approximately 2 miles east of the City of Newberry and approximately 40 miles northwest of Columbia, adjacent to and southwest of I-26 at the SC Highway 219 exit. *See, e.g.*, Plaintiff's Exhibit 16N, p. 1, §1.0. The tract is triangle-shaped, bounded on the west by Cockrell Road, a paved two-lane road running north from Highway 219, on the northeast by I-26, and on the southeast by property owned by an LLC not a party to this action. *See id.*, Appendix 1, Figure 1, Site Location; *see also*, Defendant's Exhibit 1 (SCS Engineers Site Plan). The Landfill acreage is 56.70 acres, and consists of a "Phase I" of 27.20 acres on the northern portion of the site, and a "Phase II" of 29.50 acres on the southern portion of the site. *Id.*, Appendix 1, Figure 1, Site Plan; Defendant's Exhibit 4, p. 1, §1.1, Background. Cockrell Road bisects a trapezoid-shaped tract into two triangular tracts, each appearing to be a mirror-image of the shape of the other, with the former Landfill lying east of the road and the tract owned by West/Hobby lying west of the road. *See id.*, Appendix 1, Figure 1, Site Location; *see also*, Plaintiff's Exhibit 16V, Appendix A, Figure 2, Site Plan.

Newberry County operated the landfill, accepting municipal solid waste, from the early 1970's until December, 1993. *See, e.g.*, Defendant's Exhibit 4, p. 1, §1.1, Background. The Phase II disposal area was closed with a two-foot engineered soil cap in November, 1994. *Id. See also*, Trial Transcript p. 147, line 15 to p. 148, line 13, p. 149, lines 8-10 (Plaintiff's Expert Clymer), p. 237, lines 10-21 (witness John Abernathy of SCDHEC). Installation of a clay cap on a closed landfill was required by SCDHEC in the mid-1990's. *E.g., id.*, p. 237, lines 16-18. Since that time, the County has had various companies monitoring the property and ground water for contaminants through the

installation and use of, among other things, groundwater monitoring wells, vertical passive gas vents, and trenches at the direction of the South Carolina Department of Health and Environmental Control (hereinafter "SCDHEC") and reporting the results of the monitoring in Semi-Annual Groundwater and Methane Monitoring Reports to the South Carolina Department of Health and Environmental Control. *Cf., e.g., id.*, p. 237, line 19 to p. 239, line 11 (SCDHEC John Abernathy describing County reporting and compliance from SCDHEC's perspective), p. 269, line 16 to p. 270, line 22, p. 272, line 6 to p. 273, line 12 (Newberry County Public Works Director Mike Pisano describing County reporting and compliance from County perspective). The reporting documentation is maintained by both SCDHEC and the County, and is available to the public through a Freedom of Information Request. *Id.*, p. 238, line 14 to p. 239, line 6; p. 273, lines 13-21.

With the clay cap in place since 1994, the annual reports indicate no methane or landfill gas detected at the Newberry County Landfill from 1997 through 2000, according to the Plaintiff's expert Chuck Clymer's trial testimony of his review of the annual reports for those years. *See id.*, p. 152, line 24 to p. 153, line 8; *see also*, Plaintiff's Exhibits 16E, 16F, 16G, and 16H (annual reports for, respectively, 1997, 1998, 1999, and 2000).

Although West/Hobby was the Plaintiff in this action and is the Respondent in this appeal, the 40.7 acre tract subject of this appeal was originally purchased by Billye West and Ray Hobby in their individual capacities November 1, 2000, paying $290,000 for the tract. *See, e.g.,* Trial Transcript, p. 38, line 25 to p. 39, line 21; Plaintiff's Exhibit 2. West and Hobby later formed West/Hobby, LLC in 2002, and conveyed the tract to the LLC in June, 2002. *E.g.*, Trial Transcript, p. 40, line 12 to p. 41, line 3; Plaintiff's Exhibit 3. At

the time of the purchase, West knew the tract was across the road from a closed landfill. *Id.*, p. 50, lines 7-17, p. 50, line 24 to p. 51, line 2. West testified that he was "very large in property in Newberry County," invested regularly in properties, and had been investing in real estate since 1988, in addition to running a successful electrical contracting business. *Id.*, p. 37, lines 12-20. West testified that his plan in purchasing the 40.7 acres was to sell it and make something more than the purchase price, for it to be a future industrial site, and that he planned on making a sound business decision in buying the property. *Id.*, p. 51, lines 11-22.

West further testified that, despite his understanding of the concept of exercising due diligence in adequately investigating property prior to purchasing it, the only due diligence he exercised prior to purchasing the tract was relying on his own prior knowledge of how the adjoining property had been used as a landfill. *Id.*, p. 51, line 23 to p. 52, line 4, lines 16-20. West testified that he thought he knew what he was purchasing when he bought the property in 2000, but then admitted that he did not know that the adjoining property, which had been a landfill, had a clay cap installed, and that the clay cap might cause landfill gases to migrate horizontally. *Id.*, p. 52, lines 8-15; *see also*, *id.*, p. 149, lines 8-19, p. 201, lines 16-23, p. 202, lines 17-25 (Plaintiff's expert, Clymer, testifying that the presence of an impermeable clay cap could cause the horizontal migration of methane gas generated by the landfill). West testified that he never considered getting a Phase I environmental site assessment on the tract before the purchase, although he had gotten "several" on "different types of property ... not farmland." *Id.*, p. 53, lines 10-17. He testified that he and Hobby did not get an

environmental site assessment on the property, but apparently sufficiently appreciated the risks inherent in purchasing land adjacent to a closed landfill because he testified that he felt comfortable that the State and the County were monitoring the landfill. *Id.*, p. 53, line 25 to p. 54, line 4. *See also*, *id.*, p. 76, lines 13-24, p. 77, line 14 to p. 78, line 4 (West responding to questions from the Court indicating that prior to the purchase he knew the State or the County were monitoring the landfill, and responding to re-cross examination that he made one call to SCDHEC, did not get a response, and never called again).

Between November, 2000 and June 18, 2002, West and Hobby received no written or cash offers to purchase the 40.7 acre tract. *Cf.*, *id.*, p. 58, line 15 to p. 59, line 9 (Billye West testifying no written, cash offers to purchase the property from the time he acquired it until January, 2011). On June 18, 2002, more than seven years after Newberry County had the clay cap installed on the closed landfill, West and Hobby conveyed the 40.7 acre tract to the current owners and the Plaintiff herein, West/Hobby, LLC, along with several other tracts they then owned. *Cf.*, Plaintiff's Exhibit 3 (Tracts VII and VIII in deed conveying 18 pieces of property). Between June 18, 2002 and January 2011, West/Hobby received no written or cash offers to purchase the 40.7 acre tract. Trial Transcript, p. 58, line 15 to p. 59, line 9.

Evidence at trial indicated that methane gas was detected for the first time at the property boundaries of the landfill in December, 2003, *nine years after* the clay cap was installed. *Id.*, p. 152, lines 9-17; p. 153, lines 10-12; Plaintiff's Exhibit 4. In response to the December, 2003 readings, B.P. Barber & Associates, Inc. submitted a Methane Remediation Plan for the Newberry County Landfill, dated September, 2005. Trial

Transcript 151, line 22 to p. 152, line 4, p. 153, lines 13-18; Plaintiff's Exhibit 4. In the Remediation Plan, B.P. Barber recommended an off-site survey to determine if methane had migrated off site, and further recommended corrective measures consisting of an Interceptor Trench, Passive Gas Vents, and Active System with Gas Vents and Flare. *See*, Trial Transcript p. 153, line 19 to p. 154, line 9; Plaintiff's Exhibit 4, pp. 8-10, §§ 3.1 and 3.2. After describing the three corrective measures, B.P. Barber recommended a "phased approach" for the remedy, conducting the off-site survey first, followed by installation of the corrective measures from least to most costly. Plaintiff's Exhibit 4, pp. 10-12, §§3.2.1, 3.2.2, 3.2.3, and 3.3. *See also*, Trial Transcript, p. 154, line 10 to p. 157, line 11 (Plaintiff's expert Clymer testifying to the spectrum and relative effectiveness of the three corrective measures, opining that the "most effective" was the active system).

By letter dated February 6, 2006, Newberry County wrote to West/Hobby, LLC, advising that the County had received a request from SCDHEC that it perform subsurface testing just outside the borders of the old Newberry County Landfill, and since the West/Hobby property was located adjacent to the landfill, requesting permission for access to the West/Hobby property to perform those tests. *See*, Plaintiff's Exhibit 5. Billye West received the letter and gave his permission for the testing by signing his consent to the second page of the letter. Trial Transcript, p. 44, line 16 to p. 45, line 4; Plaintiff's Exhibit 5, p. 2. B.P. Barber performed its off-site methane investigation March 23-24, 2006, with seven Geoprobe test holes being placed at the eastern perimeter of the West/Hobby property adjacent to Cockrell Road. Plaintiff's Exhibit 6, pp. 8-9, §§3.1, 3.2; *see also*, *id.*, Table 2 on p. 8 and "Exhibit D" Geoprobe Test Hole Location Map on p. 9 (showing the

methane readings from the seven Geoprobe test holes G-13 through G-19 on the West/Hobby property, and the location of the test holes). The result of the investigation indicated methane levels between 17% and 51% for five of the seven test holes. *Id.*

By letter dated May 24, 2006 to the Division of Hydrology, Bureau of Land Management, of SCDHEC, B.P. Barber followed up with SCDHEC and requested approval for installation of a proposed Interceptor Trench to minimize the off-site methane migration. Plaintiff's Exhibit 7. The County followed up with yet another request to West/Hobby, by letter dated May 30, 2006, this time requesting additional subsurface testing of West/Hobby's property. Plaintiff's Exhibit 8. *See also*, *id.*, pp. 1 and 2 ("Received" stamp by West Electrical Contractors on page 1 and Billye West signature on page 2). Although Billye West was not a copy recipient of the B.P. Barber letter to DHEC, and although West denied having received or reviewed the April, 2006 B.P. Barber Offsite Methane Investigation Report, *compare* Plaintiff's Exhibit 7, p. 2, *with* Trial Transcript p. 45, line 12 to p. 46, line 5, both documents were maintained at SCDHEC and the County, and were available had West followed up with either DHEC or the County after the County requested testing on his property. *Cf.*, Trial Transcript, p. 238, line 14 to p. 239, line 6; p. 273, lines 13-21(DHEC's Abernathy and County's Pisano testifying that the reporting documentation is maintained by both SCDHEC and the County, and is available to the public).

There was no supporting test evidence of any methane on the West/Hobby property for the years 2007, 2008, 2009, and 2010. *Cf.*, Trial Transcript, p. 304, line 14 to p. 305, line 11, p. 337, lines 11-14 (Newberry County's expert witness Steve Lamb: "there's no

data to – to verify that – that statement that gas – that landfill gas has been moving from 2006 to 2011. It wasn't tested on '07; wasn't tested in '08; no data in '09; no data in 2010:").

In January 2011, despite having had no offers to purchase the property since acquiring it in November, 2000, Billye West negotiated a contract to sell the 40.7 acre tract to Kiswire, Inc. for $520.00. Trial Transcript, p. 41, line 20 to p. 42, line 14; Plaintiff's Exhibit 12. Billye West had known David Minnick, a vice-president of Kiswire, for approximately 16 years, was friends with Minnick, and West's electrical contracting business had done a great deal of the electrical work for the Kiswire plant. Trial Transcript, p. 59, lines 10-15, line 19 to p. 60, line 3, p. 345, lines 11-17. Billye West's friend and the vice-president of Kiswire offered $520,000 to purchase the property across the road from the landfill—nearly twice the $267,283.00 tax appraisal value the County had for the property only months before. *Id.*, p. 345, lines 4-10. Kiswire inserted a 120-day "Feasibility Study Period" into the contract, affording it time to conduct its own due diligence, and within which time Kiswire could back out of the contract "for any reason or no reason." *See*, Plaintiff's Exhibit 12, ¶3, Feasibility Study. Among the several factors Kiswire included as factors in its feasibility study were "environmental matters." *Id.*

As part of its due diligence, Kiswire commissioned a Columbia, South Carolina environmental company, S&ME, which issued its Phase I Environmental Assessment March 7, 2011, concluding that their investigation revealed no recognized environmental conditions (REC's) other than "[p]otential migration of elevated methane levels onto the subject property is considered a *business environmental risk* in connection with the site."

Plaintiff's Exhibit 13, p. 22, ¶10 (emphasis in original). Minnick terminated the contract for Kiswire to purchase the tract by letter dated April 14, 2011 pursuant to Section 3 of the Agreement, without specifically mentioning why. Trial Transcript, p. 102, line 21 to p. 104, line 9; Plaintiff's Exhibit 14. Minnick conceded at trial that that there were still items remaining to be resolved in his due diligence inquiry before Kiswire would have been ready to purchase the property. Trial Transcript, p. 89, lines 17-20.

S&ME followed up with a Limited Soil Gas Assessment April 29, 2011—two weeks after the date of Minnick's letter terminating the contract to purchase—and found that there were traces of constituents typically associated with municipal landfills at the property boundary, most of which did not exceed the SCDHEC benchmarks for vapor intrusion. Plaintiff's Exhibit 15, p. 6, ¶5.0 The report further indicated "the extent of geographic penetration into the site is unknown," and that "the future effects of the landfill on the site is [sic] unknown ... [t]hese data represent current conditions on the day of sampling only." *Id.* S&ME recommended consideration of the installation of a vapor mitigation system for new buildings to be constructed on the site. *Id.*, p. 7, ¶6.0.

Newberry County hired Steve Lamb, of SCS Engineers, in 2012 to assist in the defense of the West/Hobby lawsuit. Trial Transcript p. 283, line 20 to p. 284, line 2. Lamb and SCS Engineers were then further commissioned to perform a corrective measure study of the closed landfill in or about 2013, and then to implement the construction of a soil gas extraction system active remediation project in late 2014, which project was completed in May, 2015. *Id.*, p. 284, lines 3-23. *See also*, Defendant's Exhibit 4 (excerpt of project describing the system). Chuck Clymer's company, Terracon, conducted a

limited site investigation in March, 2014, did four soil-gas probes on the West/Hobby property, and did not find methane above the detection limit. Trial Transcript, p. 178, lines 10-17. *See also*, Plaintiff's Exhibit 16V (Terracon Limited Site Investigation (March 21, 2014)).

STANDARD OF REVIEW

An action brought by a property owner against a [governmental entity] for the taking of the owner's property without just compensation is and action at law. *Frampton v. South Carolina Department of Transportation*, 406 S.C. 377, ___, 752 S.E.2d 269, 273 (Ct. Ap. 2014), citing *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 337 S380, 388, 523 S.E.2d 193, 197 (Ct. Ap 1999), aff'd sub nom. *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001). On appeal from an action at law tried with or without a jury, the appellate court's standard of review extends only to the correction of errors at law. *Id.*, citing *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976).

The factual findings of the trial judge will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports his findings. *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT WEST/HOBBY WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AND OBJECTIVE APPLICATION OF THE DISCOVERY RULE WHEN EVIDENCE INDICATED THAT, HAD WEST/HOBBY EXERCISED REASONABLE DILLIGENCE, IT SHOULD HAVE DISCOVERED ITS CLAIM IN 2001, WHEN IT PURCHASED THE PROPERTY, OR IN 2006, WHEN IT WAS GIVEN NOTICE OF POTENTIAL LANDFILL GAS MIGRATION.

West/Hobby alleges that the "[County's] act of placing a clay cap on top of the closed Landfill constituted an affirmative, aggressive, and positive act by the [County] which has resulted in a taking of the Property by the [County] by inverse condemnation without compensation." Amended Complaint, ¶22. West/Hobby further alleges that "[County's] taking is in all likelihood *permanent*." *Id.*, ¶25 (emphasis added).

Among its defenses, Newberry County has affirmatively pled statute of limitations as its Fourth Defense. Answer to Amended Complaint, ¶¶13-14.

The applicable statute of limitations for an inverse condemnation action is three years, pursuant to *S.C. Code Ann.* §15-3-530 (1988 as amended). *See, e.g., Cutchin v. South Carolina Department of Highways and Public Transportation*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990); *Fuller-Ahrens Partnership v. South Carolina Department of Highways and Public Transportation*, 311 S.C. 177, 179, 427 S.E.2d 920, 921(Ct. Ap. 1993). If the injury is of a permanent character, then it follows that the Plaintiff has a single cause of action which cannot be split. *Cutchin*, 301 S.C. at 36, 389 S.E.2d at 648, citing *Webb v. Greenwood County*, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956). The Court in *Cutchin* goes on to state that, where the cause of the injury is abatable, each injury

gives rise to a new cause of action which may be commenced within the applicable limitations period. 301 S.C. at 36, 389 S.E.2d at 648. However, West/Hobby alleged permanent injury in this case.

In *Fuller-Ahrens*, the South Carolina Court of Appeals affirmed a lower court grant of summary judgment, dismissing an inverse condemnation claim against the South Carolina Highway Department relating to 140 feet of 18-inch reinforced concrete pipe installed in 1956, discharging surface water from a highway onto property purchased by Fuller-Ahrens in 1985, when the Plaintiff claimed it had only discovered the pipe sometime after the property had been purchased. *See*, 311 S.C. at 179, 427 S.E.2d at 921. The Court found that publicly recorded records gave constructive notice of the 1956 installation of the pipe to the Plaintiff as prospective purchasers of the property, and that the Plaintiff's action was time-barred. *Id.* at 179-182, 427 S.E.2d at 921-923.

West/Hobby's own expert witness Clymer testified that the installation of the clay cap about which he bases his opinions was in 1994-1995. Trial Transcript, p. 147, lines 15-17, p. 148, lines 5-13. *See also*, id., p. 197, p. 16 to p. 198, line 18 (Clymer learned of the clay cap, and readings indicating the presence of methane on the West/Hobby property in 2006 from the same SCDHEC documents that Billye West or Misty West of West/Hobby could have accessed had they exercised due diligence at the purchase of the property in 2000 or later, in 2006); id., p. 54, line 11 to p. 55, line 7 (Billye West admitting that, had he hired Clymer's company back before he bought the property, he would have known then what he knew at trial); *id.*, p. 343, p. 23 to p. 344, line 15 (Misty West conceding that purchasing a piece of property across the street from a known landfill

without getting an environmental site assessment is taking a risk that there may be environmental problems).

Although West/Hobby withdrew its gross negligence cause of action under the South Carolina Tort Claims Act just prior to trial, the "discovery rule," which South Carolina courts apply in determining when the applicable statute of limitations begins to run was discussed in a Tort Claims Act case, *Young v. South Carolina Department of Corrections*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. Ap. 1999). According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Id.* at 719, 511 S.E.2d at 416. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Id. See also*, *Wiggins v. Edwards*, 314 S.C. 126, ___, 442 S.E.2d 169, 170 (1994)(exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; the statute of limitations begins to run from this point, and not when advice of counsel is sought or a fully-blown theory of recovery is developed).

Billye West testified at trial that he already knew the 40.7 acre tract he and Ray Hobby were purchasing was across the road from a closed landfill, and he was aware that he could get records from the County or SCDHEC, but he never did. Trial Transcript, p. 50, lines 7-17, p. 50, line 24 to p. 51, line 2. West testified that his plan in purchasing the 40.7 acres was to sell it and make something more than the purchase price, for it to be a future

industrial site, and that he planned on making a sound business decision in buying the property. *Id.*, p. 51, lines 11-22. He did not get a Phase I environmental site assessment of the tract prior to purchasing it, although he testified he had gotten "several" on "different types of property." *Id.*, p. 53, lines 10-17. West testified that prior to purchase of the 40.7 acre tract, he knew that the State and County were monitoring the landfill, yet he made only one call to DHEC, did not get a response, and never called again. Id., p. 76, lines 13-24, p. 77, line 14 to p. 78, line 4. Had Billye West exercised any degree of reasonable diligence in 2000 when he bought the property for investment purposes, or had West/Hobby checked with the County and SCDHEC with regard to records readily available to it—as its expert witness did done since the filing of this lawsuit—it could have discovered before the purchase of the tract that which it now bases as the cornerstone of its inverse condemnation claim, and could have either averted the purchase altogether, or timely commenced its suit.

Even in 2006, when Billye West and West/Hobby received correspondence from the County, making reference to DHEC inquiries and requesting permission for the County to conduct testing on the West/Hobby property subject of this action, West testified that it raised no red flags with regard to a potential problem or threat to the West/Hobby property. See, Plaintiff's Exhibits 5 and 8. He testified that, while he "presumed" that the B.P. Barber Off-Site Investigation Report from April, 2006, indicating a methane presence on the West/Hobby property, was public record and available at Newberry County or DHEC, he could probably not have found the information contained in document because of "[l]ack of interest." Trial Transcript, p. 65, line 10 to p. 66, line 2. He further admitted

that, if the B.P. Barber document was at Newberry County, he could have read it back in April, 2006. *Id.*, p. 66, line 19 to p. 67, line 2.

Billye West and West/Hobby had two opportunities—in 2000 after acquiring the property, and in 2006, after being asked not one time, but *two times* by the County to conduct testing on the 40.7 acre tract—to exercise reasonable diligence where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of theirs had been invaded or that some claim against another party might exist; but West and his LLC failed both times. It was not until West and his LLC sought advice of counsel and found an attorney who developed a fully-blown theory of recovery that West and his LLC acted. That was too late. *Cf.*, *Wiggins v. Edwards*, 314 S.C. 126, ___, 442 S.E.2d 169, 170 (1994)(exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; the statute of limitations begins to run from this point, and not when advice of counsel is sought or a fully-blown theory of recovery is developed).

The Trial Court erred in ruling that the statute of limitations did not bar the Plaintiff's claim, and the Order should be reversed.

II. THE TRIAL COURT ERRED IN FINDING THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, WHEN THE EVIDENCE INDICATED THAT BILLYE WEST AND WEST/HOBBY PURCHASED THE PROPERTY KNOWING IT WAS LOCATED ADJACENT TO A CLOSED MUNICIPAL SOLID WASTE LANDFILL, YET MADE THE PURCHASE WITHOUT FIRST GETTING AN ENVIRONMENTAL SITE ASSESSMENT, THEREBY ASSUMING THE RISK THAT THE PROPERTY MAY BE CONTAMINATED THEN OR IN THE FUTURE.

Newberry County has affirmatively pled assumption of the risk as its Tenth Defense. Answer to Amended Complaint, ¶¶25-26.

South Carolina first adopted assumption of risk within the employment context. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 77-78, 508 S.E.2d 565, 568-69 (1998), citing *Hooper v. Columbia & Greenville R.R. Co.*, 21 S.C. 541, 547 (1884). The doctrine rested in contract and was founded upon a theory of consent whereby the servant assumed those risks of employment that he knew of or should have known about. *Davenport,* 333 S.C. at 78, 508 S.E.2d at 569, citing *Stogner v. Great Atlantic & Pacific Tea Co.*, 184 S.C. 406, 192 S.E. 406 (1937). The South Carolina Supreme Court ultimately extended the defense to negligence cases outside the traditional master-servant context, at one point holding that "[assumption of the risk] *applies to any case* ... where the facts proved show that the person against whom the doctrine of assumption of the risk is pleaded knew of the danger, appreciated it, and acquiesced therein." (emphasis added). *Davenport,* 333 S.C. at 78, 508 S.E.2d at 569, citing *Smith v. Edwards*, 186 S.C. 186, 195 S.E. 236 (1938). Although the Supreme Court ultimately abolished assumption of the risk as an "all or nothing" defense to negligence claims and held in *Davenport* that a Plaintiff was not barred from recovery by the doctrine unless the

degree of fault arising therefrom was greater than the negligence of the defendant, 333 S.C. at 87, 508 S.E.2d at 573-74, it still retained the defense as a component of its comparative fault analysis. *Cf., id.* ("[The Plaintiff] may still be barred from recovery if his negligence exceeds [the Defendant's] negligence. Thus, his conduct in assuming the risk remains part of the comparative negligence analysis.").

While West/Hobby has withdrawn its gross negligence cause of action, assumption of the risk is arguably still applicable as a defense to the inverse condemnation claim. *See, e.g., Davenport,* 333 S.C. at 78, 508 S.E.2d at 569. The Court in *Davenport* noted that assumption of the risk began in a contractual context, and then quoted the above-cited language from *Smith v. Edwards*, that "[assumption of the risk] *applies to any case* ... where the facts proved show that the person against whom the doctrine of assumption of the risk is pleaded knew of the danger, appreciated it, and acquiesced therein." *Id.*, (emphasis added). The Court further addressed assumption of the risk as a defense in an inverse condemnation case in *Cutchin v. South Carolina Department of Highways and Public Transportation*, 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990), citing with approval *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958) for the proposition that the defense of assumption of the risk is established when the plaintiff freely and voluntarily enters into a known danger and is subsequently injured. Although the Court held that there was no evidence supporting the defense that the Plaintiffs, claiming a taking by virtue of flooding, had knowingly purchased their home in a flood plain, in even discussing and considering the substance of the defense, the Court implicitly accepted its applicability.

Although West/Hobby was the Plaintiff in this action and is the Respondent in this appeal, the 40.7 acre tract was originally purchased by Billye West and Ray Hobby in their individual capacities November 1, 2000, paying $290,000 for the tract. *See, e.g.,* Trial Transcript, p. 38, line 25 to p. 39, line 21; Plaintiff's Exhibit 2. West and Hobby later formed West/Hobby, LLC in 2002, and conveyed the tract to the LLC in June, 2002. *E.g.*, Trial Transcript, p. 40, line 12 to p. 41, line 3; Plaintiff's Exhibit 3. At the time of the purchase, West knew the tract was across the road from a closed landfill. *Id.*, p. 50, lines 7-17, p. 50, line 24 to p. 51, line 2. West testified that he was "very large in property in Newberry County," invested regularly in properties, and had been investing in real estate since 1988, in addition to running a successful electrical contracting business. *Id.*, p. 37, lines 12-20. West testified that his plan in purchasing the 40.7 acres was to sell it and make something more than the purchase price, for it to be a future industrial site, and that he planned on making a sound business decision in buying the property. *Id.*, p. 51, lines 11-22.

West further testified that, despite his understanding of the concept of exercising due diligence in adequately investigating property prior to purchasing it, the only due diligence he exercised prior to purchasing the tract was relying on his own prior knowledge of how the adjoining property had been used as a landfill. *Id.*, p. 51, line 23 to p. 52, line 4, lines 16-20. West testified that he thought he knew what he was purchasing when he bought the property in 2000, but then admitted that he did not know that the adjoining property, which had been a landfill, had a clay cap installed, and that the clay cap might cause landfill gases to migrate horizontally. *Id.*, p. 52, lines 8-15. He testified that

he never considered getting a Phase I environmental site assessment on the tract before the purchase, although he had gotten "several" on "different types of property ... not farmland." *Id.*, p. 53, lines 10-17. He testified that he and Hobby did not get an environmental site assessment on the property, but apparently sufficiently appreciated the risks inherent in purchasing land adjacent to a closed landfill because he testified that he felt comfortable that the State and the County were monitoring the landfill. *Id.*, p. 53, line 25 to p. 54, line 4. *See also*, *id.*, p. 76, lines 13-24, p. 77, line 14 to p. 78, line 4 (West responding to questions from the Court indicating that prior to the purchase he knew the State or the County were monitoring the landfill, and responding to re-cross examination that he made one call to SCDHEC, did not get a response, and never called again).

Despite his claimed comfort level due to his knowledge that the State and County were monitoring the landfill adjacent to the property he was about the purchase, West testified he never checked with the County for any records relating to the closed landfill before purchasing the tract, never checked with the State beyond one phone call that he never followed up on, and conceded that, had he hired a company like S&ME, which Kiswire had hired for a Phase I, or like Terracon, which West/Hobby had hired as experts in prosecuting this lawsuit, he would have known back before he bought the property exactly what he knew at trial about clay caps and what problems he now was claiming with the 40.7 acre tract that he and his LLC attributed to the closed landfill. *Id.*, p. 53, line 22 to p. 55, line 7.

Billye West's own testimony at trial established his assumption of the risk in that he 1) knew of the danger—the adjoining property being a closed landfill—2) appreciated

the risk—in that he assumed the County and State would be monitoring the landfill—and 3) acquiesced therein, in that he not only did not check with the County and State with regard to the monitoring, but chose to forgo a Phase I Environmental Site Assessment prior to purchase, even though he testified that he had gotten several on different types of property. *Cf.*, *Davenport,* 333 S.C. at 78, 508 S.E.2d at 569 ("[assumption of the risk] *applies to any case* ... where the facts proved show that the person against whom the doctrine of assumption of the risk is pleaded knew of the danger, appreciated it, and acquiesced therein."[emphasis added]). *See also*, *Hoeffner v. The Citadel,* 311 S.C. 361, 367, 429 S.E.2d 190, 193 (1993)(The Plaintiff's conduct may imply assumption of the risk where it is shown that he understood and appreciated a known danger created by the Defendant, and then freely and voluntarily exposed himself to it.).

Billye West was an astute business owner and owner of numerous tracts of commercial property, and he purchased this particular 40.7 acre tract as commercial property to develop or resell. He knew of the potential environmental risks inherent in purchasing the property without exercising due diligence, and now through his LLC, West/Hobby, he seeks redress for the very injury that he and his LLC could have averted had they not assumed that risk in forgoing the due diligence appropriate for purchasing land adjacent to a closed municipal solid waste landfill. *Cf.* Trial Transcript, p. 343, line 23 to p. 344, line 15 (Misty West conceding that purchasing property for development or speculation located across the street from a known closed landfill without first getting an environmental site assessment is a risk).

The Trial Judge erred in not ruling that West and his LLC, West/Hobby, assumed the risk, and that the West/Hobby claim should be barred. The lower court Order should be reversed.

III. THE TRIAL COURT ERRED IN FINDING THAT NEWBERRY COUNTY'S PLACING OF THE CLAY CAP ON THE WASTE MASS OF THE CLOSED LANDFILL IN 1994 WAS THE AFFIRMATIVE, POSITIVE, AGGRESSIVE ACT RESULTING IN A TAKING OF WEST/HOBBY'S PROPERTY, WHEN UNREBUTTED EVIDENCE INDICATED THAT THERE WAS NO METHANE OR LANDFILL GAS READINGS DETECTED UNTIL DECEMBER, 2003, SOME 9 YEARS AFTER THE CLAY CAP HAD BEEN INSTALLED, AND THE GRAVAMEN OF WEST/HOBBY'S CLAIM WAS ACTUALLY BASED UPON A PERCEIVED FAILURE BY NEWBERRY COUNTY TO TIMELY IMPLEMENT AN ACTIVE REMEDIATION PLAN, RATHER THAN UPON A POSITIVE, AFFIRMATIVE, AGGRESSIVE ACT BY THE COUNTY.

Although West/Hobby alleged in its February, 2014 Amended Complaint that Newberry County's "placing of a clay cap on top of the closed Landfill constituted an affirmative, aggressive and positive act ... which has resulted in a taking," and that; "[a]s a direct and proximate result" of that "affirmative, aggressive and positive act," the West/Hobby property was contaminated and had little or no fair market value, *see*, Amended Complaint, p. 4, ¶¶22-23, West/Hobby's emphasis at trial and the opinions of its expert instead focused on the perceived failures of Newberry County to timely implement an active remediation system over the passive treatment the County had exercised following the closure of the landfill and installation of the clay cap in 1994. While such proof of the failure to do something may have been relevant to and carried the day in a negligence cause of action, West/Hobby had abandoned all but its Inverse Condemnation claims at trial. *Cf.*, Trial Transcript p. 7, line 8 to p. 8, line 12 (West/Hobby's opening statement: "I can tell you that this is an inverse-condemnation case. ... in our amended complaint, we had other causes of action. We have decided to forgo any pursuit of the other ones, other than inverse condemnation."). Proof that Newberry County failed to

perform was insufficient to establish a taking, and the Trial Court erred as a matter of law in finding a taking.

To establish an inverse condemnation, a Plaintiff must show 1) an affirmative, positive, aggressive act on the part of the governmental entity, 2) a taking, and 3) the taking is for public use. *See, e.g., Byrd v. City of Hartsville*, 365 S.C. 650, ___, 620 S.E.2d 76, 79 (2005). South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proven by affirmative, positive, aggressive acts by the governmental entity. *Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (2004). Allegation and proof of mere failure to act are insufficient. *Id.*, citing *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) and *Gray v. South Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App.1993).

Evidence at trial established that the clay cap West/Hobby alleged was the affirmative, positive, aggressive act that amounted to a taking of its property was installed in 1994 pursuant to SCDHEC requirements, and that no methane gas was detected at the landfill boundaries until December, 2003, more than nine years after the installation. *Cf.*, Trial Transcript, p. 237, lines 10-18 (clay cap required by DHEC for closure of a landfill in mid-1990's); *id.*, p. 152, lines 9-17; p. 153, lines 10-12; Plaintiff's Exhibit 4 (methane gas detected for the first time at the property boundaries of the landfill in December, 2003). West/Hobby's expert witness, Chuck Clymer, testified at length to the corrective measures recommended by B.P. Barber and the passive measures the County implemented in response to the December, 2003 methane detection, Trial Transcript, p. 154, line 6 to p.

157, line 7, and opined that "the most effective is an active system." *Id.*, p. 157, lines 8-11. The expert then testified to his understanding, with some apparent confusion, of the County's perceived failure to install geoprobes on the West/Hobby property, *id.*, p. 163, line 12 to p. 164, line 10, to how ineffective the interceptor trench was in eradicating the methane, *id.*, p. 164, line 11 to p. 165, line 8, and to the County only apparently installing 6 passive gas vents after getting DHEC approval for installation of 32. *Id.*, p. 165, lines 10-20, p. 166, line 19 to p. 167, line 5. All of those deficiencies Clymer testified to involved the perceived failure of the County to do something, to adequately or effectively implement a system to combat the methane, or to implement a sufficient number of authorized gas vents.

Near the conclusion of his direct examination at trial, Clymer agreed with the leading question asked by Wet/Hobby's attorney that, since December, 2003, Newberry County had been struggling with a methane gas or landfill gas problem with its landfill. Trial Transcript, p. 183, lines 17-21. He further testified that, while he thought that Newberry County had complied with all of DHEC's requirements concerning methane gas at its property boundaries "in a minimal sense," that the County had finally "got to the point now in 2015 where *they have an active system.*" *Id.*, p. 185, lines 13-20 (emphasis added). Clymer then rendered his opinion that, had Newberry County installed an active system to deal with the landfill gas in 2006, the West/Hobby property would not have been contaminated with landfill gas in 2011, qualifying his answer with the caveat that he couldn't "say without a shadow of a doubt" there would be nothing on the West/Hobby property, but that concentrations at the property boundary would have been reduced, "there

would be no more coming across the property," and "the concentrations might be lower than action levels," concluding that "there wouldn't be a continuing source of material." *Id.*, p. 185, line 21 to p. 186, line 15. Again, Clymer was testifying that the County's perceived failure to implement the active system sooner resulted in the methane, and had the County sooner implemented the active system, perhaps the methane would not have been present. That testimony had nothing to do with the clay cap; it was an indictment of the County not installing the active system until May, 2015.

After having solicited that opinion from his expert—that, had Newberry County implemented its active system earlier in the process, the methane gas problem could have been averted—Counsel for West/Hobby then, "to sum up," recounted with his expert witness a litany of perceived failures by the County: the passive and alleged ineffectual failures of Newberry County to combat the landfill emanations: first detection of methane in December, 2003, the B.P. Barber methane remediation plan proposal from 2005, the off-site testing in 2006, the passive gas-vent system, the trench, and the 2010 six passive methane-vent system, after all of which methane was still detected by the S&ME Limited Soil-Gas Assessment. *Id.*, p. 186, line 16 to p. 188, line 7. Counsel for West/Hobby then concluded that, "only after they installed the active remediation system five years later in May of 2015, did the gas levels come down; is that right?" *Id.*, p. 188, lines 8-10. West/Hobby's expert agreed, with the exception of one monitoring point.

In the wrap up of West/Hobby's presentation of its case, neither West/Hobby's attorney nor the expert witness mentioned the clay cap installed pursuant to SCDHEC requirements in 1994, nine years before the first whiff of methane gas was detected.

Instead, they focused on and attributed the continuing methane gas problem allegedly impacting the West/Hobby property to the County's failure to implement an active remediation system sooner.

West/Hobby had forecast its intended focus of its case on the perceived failures of the County in the opening statement, stating that "[o]ur problem and our concern and the evidence will show is that they have known -- the county has known since 2004 that there was landfill gas in excess of the lower explosive limits at their property boundaries. They were given a plan. They eventually implemented the plan, but they were slow to very react. That is what we think our evidence will show." Trial Transcript, p. 17, lines 19-25. That is the evidence that West/Hobby offered at trial to support its inverse condemnation claim, and that is what the Trial Court relied upon in determining that there was a taking—that the clay cap was installed six years before Billye West purchased his property and nine years before any methane was detected at the landfill boundaries, and that the methane and landfill gas migration could have been averted by, and was the product of, the failure of the County to implement the active remediation system sooner than it did.

Proof of the County's failure to act soon enough is insufficient to prove the affirmative, positive, aggressive act required to establish a taking, and it was error for the Trial Court to so rule. The lower court Order finding a taking should be reversed.

CONCLUSION.

For the foregoing arguments that the West/Hobby Inverse Condemnation claim is barred by the statute of limitations, barred by the doctrine of assumption of the risk, and further, that the evidence at trial and the focus of the West/Hobby claim assert a failure to act, not a positive, affirmative, aggressive act as is required under South Carolina law to prove an Inverse Condemnation claim. The Trial Court committed errors of law in misapplying the evidence at trial to the existing law, and the lower Court ruling finding a taking should be reversed.

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April 7, 2017.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001773

West/Hobby, LLC, Respondent,

v.

County of Newberry Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that this Initial Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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West/Hobby, LLC, ... Respondent,

v.

County of Newberry, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant County of Newberry's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Respondent West/Hobby, LLC by depositing a copy of it in the United States Mail, postage prepaid on April 7, 2017, addressed to their attorney of record, Benjamin C. Bruner, Esquire, Bruner, Powell, Wall & Mullins, LLC, P.O. Box 61110, Columbia SC 29260-1110.

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April 7, 2017

The Honorable Jenny Abbott Kitchings
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RE: *West/Hobby, LLC vs. County of Newberry*;
Appellate Case No. 2016-001773;
Civil Action No. 2012-CP-36-0046; Our File No. 25712.16.

Dear Ms. Kitchings:

Enclosed, please find the original and one copy each of the Initial Brief of Appellant County of Newberry, Appellant's Designation of Matter to be Included in the Record on Appeal, and Proof of Service for the referenced appeal. Please file the originals, and return the copies to me, clocked in, in the enclosed self-addressed, stamped envelope.

By copy of this letter to the attorneys for the Respondent West/Hobby, LLC, I am serving them with copies of the enclosed documents as well.

Thank you in advance for your help.

Yours very truly,

Patrick J. Frawley
/pjf
Enclosures

cc: Benjamin C. Bruner, Esquire
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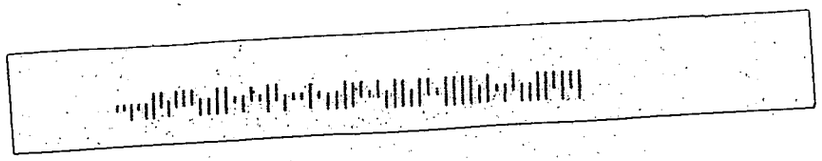

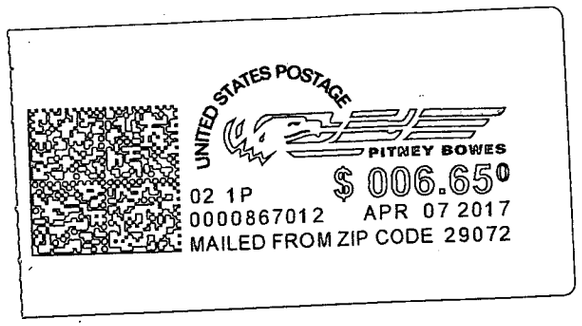

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