

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appellant Case No.: 2017-001881

**APPEAL FROM AIKEN COUNTY
Court of Common Pleas**

Doyet A. Early, III, Circuit Court Judge

Civil Action No.: 2013-CP-02-2157

John Burke, Respondent

vs.

The South Carolina Department of Transportation, Appellant

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DOES SOUTH CAROLINA LAW ALLOW A JUDGE TO DETERMINE THE AMOUNT OF PREJUDGMENT INTEREST TO BE AWARDED IN AN INVERSE CONDEMNATION CASE**

II. STATEMENT OF THE CASE

Respondent initiated this action on September 20, 2013 alleging negligence and inverse condemnation. The complaint was subsequently amended to include 5 other Plaintiffs in November of 2013 alleging similar flooding issues. A jury trial was held between March 27, 2017 and March 29, 2017 in Aiken County. After the close of Respondent's case in chief, Respondent elected to forego his claim of negligence and submit only the inverse condemnation cause of action to the jury. After three days of testimony and argument, the jury awarded Respondent the amount of \$134,000.00 as just compensation for the market value of the property taken through the actions of Appellant.

On April 12, 2017, Respondent moved the lower court for an award of attorney fees and costs pursuant to S.C. Code § 28-2-240 and S.C. Code §28-11-30. On April 24, 2017, two other Plaintiffs settled their claims at mediation. Harold Hanson settled his claim for \$100,000.00 and David McKee's claim was settled for \$50,000.00. The parties further stipulated that Respondent could not recover prejudgment interest on either of the settled claims. On May 22, 2017, Respondent amended his motion for an award of attorney fees and costs to include Respondent Hanson pursuant to the same statutory authority.

On June 16, 2017, the lower Court issued an Order granting the following relief to Respondent:

- Costs of \$23,984.89;
- Prejudgment interest of \$37,769.67 on the jury award only;
- Post-judgment interest of \$1650.10;
- Attorney fees in the Amount of \$68,707.87 for Respondent; and
- Attorney fees in the amount of \$33,000.00 for Hanson.

Appellant filed a motion to reconsider the lower court's June 16, 2017 Order on June 26, 2017, seeking reconsideration of the lower court's "Order awarding prejudgment interest." The lower court denied the motion to reconsider on August 11, 2017.

FACTS

Respondent is a homeowner in Aiken County whose property was flooded by stormwater runoff from the recently constructed I-520. Respondent filed an inverse condemnation action claiming that Appellant redirected and increased the flow of stormwater onto his property, resulting in a constitutional taking of his property for public use. An Aiken County jury agreed and awarded him \$134,000.00 in damages for the loss of value of his property. Via post trial motion, the lower court awarded costs, attorney fees, and prejudgment interest to Respondent.

ARGUMENTS

Standard of Review

The single issue in this appeal is an interpretation of law in the State of South Carolina. Therefore, the standard of review is plenary. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 1999); S.C. Code Ann. § 14-8-200 (Supp. 1999) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

South Carolina law allows an award of interest on the judgment of just compensation

S.C. Code § 28-2-420 states:

A condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on funds on deposit with the clerk of court must be offset against the interest computed pursuant to this section. Interest shall not accrue during the twenty-day period commencing upon the date of verdict or order of judgment. If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.

Appellant cites *Vick v. S.C. DOT*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001) in support of its argument that Respondent is not entitled to prejudgment interest. *Vick* dealt with an appeal in which the SCDOT challenged a jury charge that allowed the jury to determine prejudgment interest. The applicable language in that case reads as follows:

A Plaintiff is generally entitled to interest in property cases. (emphasis added) 11 S.C. Juris. Damages § 8(a) (1992); see *E. I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co.*, 219 F.2d 328, 342 (4th Cir. 1955). This court noted in a condemnation case that "the purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property has been taken." S.C.

Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 149, 522 S.E.2d 822, 826 (Ct. App. 1999). The addition of prejudgment interest is designed to pay the landowner for the time value of money that should have been received at the time of the taking and is an element of just compensation. *Id.* We find this principle is equally applicable in an action for inverse condemnation; however, unlike government condemnations, the legislature has not set a rate or method for determining interest in inverse condemnation actions. South Carolina case law implies that interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages. *See S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 392, 117 S.E.2d 561, 564 (1960) (stating, "assuming, without deciding," that interest was recoverable, "it was the duty of the respondents to call the matter of interest on the award to the attention of the trial judge and request an instruction upon such so that the jury could, by their verdict, determine what was 'just compensation'."). Moreover, "the court may even consider the market rate of interest rather than the statutory legal rate, if that will be required to compensate the Respondent fully."

Vick v. S.C. DOT, 347 S.C. 470, 480-481, 556 S.E.2d 693, 699 (Ct. App. 2001). Nowhere in this language does it say that a Respondent waives his ability to recover pre-judgment interest by failing to request a jury charge. The Court of Appeals stated that it is "implied" that the issue of prejudgment interest can be charged to the jury. Even the precedent relied upon by the Court of Appeals indicates it was "assuming, without deciding" that interest was recoverable. The most important language in the *Vick* case is the last sentence quoted above. The Court of Appeals specifically said that "**the court** may even consider the market rate of interest rather than the statutory legal rate, if that will be required to compensate the Plaintiff fully." (emphasis added). If the court is allowed to consider the market rate of interest for purposes of prejudgment interest, it cannot be a matter within the exclusive province of the jury.

To understand Appellant's only argument, this Court must examine *S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 392, 117 S.E.2d 561, 564 (1960). *Miller* was the primary authority cited by the court in *Vick* in finding that South Carolina law implied that interest is an

issue for the jury. However, *Miller* was decided before the legislature established a statutory right to interest in condemnation cases. In fact, the underlying issue in *Miller* dealt with traditional condemnation and not inverse condemnation. Accordingly, *Miller* was overruled by the statutory scheme enacted legislature and has no precedential value to the issue currently before this Court. Without *Miller*, *Vick* is without any foundational or precedential support and cannot now support Appellant's argument.

If this Court were to adopt the theory of Appellant, a troubling paradox could be created delineating statutory condemnation cases from inverse condemnation cases. In both instances, a citizen is deprived of property by an action of the government. In cases where the government initiates the litigation, the citizen is guaranteed to be awarded interest if he prevails under S.C. Code §28-2-420. Under the scheme argued by Appellant, such interest is uncertain and left to the discretion of the jury. Such a dichotomy would be unjust and may actually incentivize the government from foregoing the statutory condemnation procedure in an effort to escape the certainty of interest under S.C. Code §28-2-420. This cannot be the intent of the legislature nor an outcome authorized by this Court.

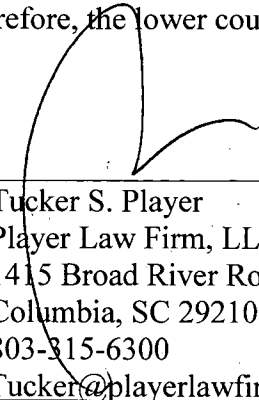
The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim

arose. *Smith-Hunter Constr. Co.*, 365 S.C. at 128, 616 S.E.2d at 421; *Babb*, 310 S.C. at 353, 426 S.E.2d at 791; *Wayne Smith Constr. Co.*, 294 S.C. at 146-47, 363 S.E.2d at 119. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985). A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor's money beyond the date payment was due. *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987).

In this case, Appellant owed money to Respondent from the time of the taking. The amount was determinable by operation of law through an inverse condemnation proceeding and was reduced to a liquidated sum by the jury on March 29, 2017. This Court only allowed prejudgment interest from the time the Complaint was filed, and not from the time of the actual taking. This comports with South Carolina law. *See Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789(1993)

Nothing in the law prohibits Respondent from seeking prejudgment interest from the court after a verdict. In order to prevent an unjust and unequal outcome between citizens under a statutory condemnation proceeding and those under an inverse condemnation proceeding, both must be entitled to prejudgment interest. The law clearly states that the presiding court may determine the rate of interest. Therefore, the determination of the actual amount of interest is a matter of multiplication that can be accomplished by either the jury or the presiding judge. In such circumstances, the outcome would be the same and any error in not directing the jury to compute that interest was harmless error. The lower court did not err in awarding the interest

and, even if such error did occur, it was harmless error. Therefore, the lower court must be
AFFIRMED.



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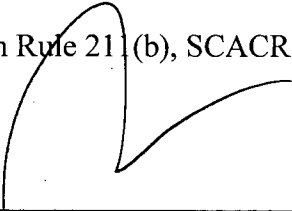
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CERTIFICATE OF COUNSEL

The undersigned certified that this Initial Brief complies with Rule 21(b), SCACR.



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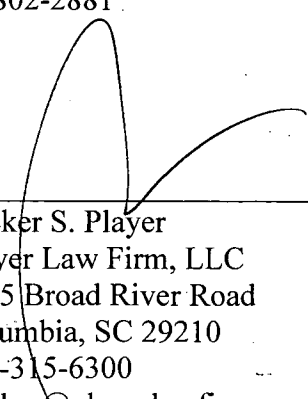
vs.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on opposing counsel at the following address:

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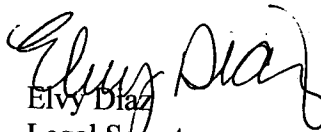
RE: Burke v. SC Department of Transportation
Civil Action No.: 2013-CP-02-2157
Our File No.: CIV-591-01

To whom it may concern:

Please find enclosed an original and one copy of the Initial Brief of Respondent and Designation of Matter to be filed in the above referenced matter. Please return a filed copy of each to me in the envelope I have enclosed. If you have any questions or concerns, please contact our office at the number listed below. Thank you for your assistance with this matter.

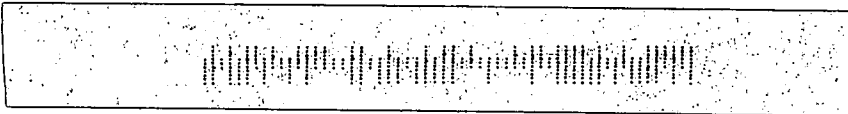
By copy of this letter I am serving opposing counsel with a copy of the same.

Kind regards,


Elvy Diaz
Legal Secretary

Enclosure(s) as state

Cc: James D. Nance, Esq. (w/enclosure)



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