

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No.: 2013-CP-02-02157

Case Number 2017-001881

John Burke, William Burt, Sr., Thomas Cooper, Mike Ellison, Harold J. Hanson, David McKee,
Plaintiffs,

Of whom John Burke is the Respondent,

v.

The South Carolina Department of Transportation, Appellant.

RECORD ON APPEAL

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JAN 29 2018

SC Court of Appeals

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

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

John Burke, William Burt, Sr., Thomas
Cooper, Mike Ellison, Harold J. Hanson,
David McKee,

Plaintiffs,

vs.

The South Carolina Department of
Transportation,

Defendants.

ORDER

CIV-591-01

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Burke 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 Plaintiff's case in chief, Plaintiff 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 Plaintiff the amount of \$134,000.00 as just compensation for the market value of the property taken through the actions of Defendant.

On April 12, 2017, Plaintiff moved this 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 stipulated that Plaintiff Hanson could seek an award of attorney fees on his settlement, but that the McKie settlement was full

and final with no additional award of attorney fees available. On May 22, 2017, Plaintiff amended his motion for an award of attorney fees and costs to include Plaintiff Hanson pursuant to the same statutory authority.

On June 16, 2017, this Court issued an Order granting the following relief to Plaintiff:

- **Costs of \$23,984.89;**
- **Prejudgment interest of \$37,769.67;**
- **Post-judgment interest of \$1650.10;**
- **Attorney fees in the Amount of \$68,707.87 for Plaintiff Burke; and**
- **Attorney fees in the amount of \$33,000.00 for Plaintiff Hanson.**

Defendant filed a motion to reconsider the Court's June 16, 2017 Order on June 26, 2017, seeking reconsideration of the Court's "Order awarding prejudgment interest."

APPLICABLE LAW

Defendant is only seeking reconsideration of that portion of the Court's Order which granted Plaintiff prejudgment interest. Therefore, this is the only issue that will be addressed in this Order.

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

Pre-judgment interest

• 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.

Defendant cites *Vick v. S.C. DOT*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001) in support of its argument that Plaintiff 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 plaintiff 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 Plaintiff 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.

Defendant also cites to the case of *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 the Court.

If this Court were to adopt the theory of Defendant, 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 Defendant, 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 implementing 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, Defendant owed money to Plaintiff 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 Plaintiff 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. This Court did not err in awarding the interest and, even if such error did occur, it was harmless error. Therefore, Defendant's motion is DENIED.

This ____ day of August, 2017

The Honorable Doyet Early, III
Presiding Judge



Aiken Common Pleas

Case Caption: John Burke , plaintiff, et al VS Department Of Transportation South Carolina , defendant, et al
Case Number: 2013CP0202157
Type: Order/Relief

So Ordered

s/D.A. Early III 2136

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

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

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vs.

The South Carolina Department of
Transportation,

Defendants.

**ORDER ON PLAINTIFF'S MOTION FOR
ATTORNEY FEES AND INTEREST**

CIV-591-01

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Burke 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. Over the course of three and one-half years of litigation, the parties exchanged more than 2500 pages of documents in discovery, many of a highly technical nature, and 13 depositions were taken by both parties. Plaintiff filed two motions to compel and successfully defended a motion for summary judgment made by Defendant.

The parties attempted to mediate the case in January 2016 but were unsuccessful. The highest settlement offer ever made by SCDOT prior to trial was \$50,000.00. Plaintiff's demand at the time of trial was \$150,000.00.

A jury trial was held between March 27, 2017 and March 29, 2017 in Aiken County. After the close of Plaintiff's case in chief, Plaintiff 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 Plaintiff the amount of \$134,000.00 as just compensation for the market value of the property taken through the actions of Defendant.

On April 12, 2017, Plaintiff moved this 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 stipulated that Plaintiff Hanson could seek an award of attorney fees on his settlement, but that the McKie settlement was full and final with no additional award of attorney fees available. On May 22, 2017, Plaintiff amended his motion for an award of attorney fees and costs to include Plaintiff Hanson pursuant to the same statutory authority.

APPLICABLE LAW

South Carolina Law Requires the Award of Attorney Fees and Costs pursuant to S.C. Code §28-11-30

South Carolina Code § 28-11-30(3) states:

(3) Where an inverse condemnation proceeding is instituted by the owner of a right, title, or interest in real property because of use of his property in a program or project, the court, rendering a judgment for the plaintiff in the proceeding and awarding compensation for the taking of property, or the attorney effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court or the agency's attorney, reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

The Supreme Court has repeatedly stated the term "shall" is mandatory. "The use of the word 'shall' shows that confirmation by the Court is mandatory, not discretionary." *Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). There is no question that

Plaintiff Burke instituted and prevailed on his inverse condemnation cause of action before an Aiken County jury. There is no question that Plaintiff Hanson effected a settlement of his claims at the mediation on April 24, 2017. Under the Statute, both Plaintiffs are entitled to be reimbursed for their reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

Costs Due To Plaintiff

Plaintiff Burke submitted a summary of all disbursements and costs incurred during the three and one-half years of litigation in this case. After objections were raised by Defendant, Plaintiff conceded that \$375.00 of fees from expert Kevin Gillian were incurred solely for the benefit of another Plaintiff's case and were not recoverable. The remainder of the costs are reasonable and necessary for the litigation and prosecution to the claims of both Plaintiff Burke and Plaintiff Hanson. Therefore, those costs are recoverable pursuant to South Carolina Code § 28-11-30(3). The total amount of costs to be reimbursed to Plaintiffs Burke and Hanson equals **\$23,984.89**. Obviously, none of the costs awarded here can be recovered by any other person in any other proceeding.

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

Pre-judgment interest

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.

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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 plaintiff fully."

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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.

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seeking prejudgment interest from the Court after a verdict. Therefore, I find that Plaintiff Burke is entitled to prejudgment interest under the common law of South Carolina.

In this case, the time of interest should be calculated from the date the original complaint was filed, September 20, 2013, through the date of the verdict, March 29, 2017. The statutory rate of interest is 8% is reasonable and appropriate in this case. The calculations of interest due pursuant to S.C. Code § 28-2-420 is as follows:

Per Year Interest = \$10,720.00 * 3 years = \$32,160.00.

Per Day Interest = \$29.37 * 191 days = \$5609.67

Total Prejudgment Interest Owed = \$37,769.67

Post-Judgment Interest

The judgment of \$134,000.00 was delivered by the Aiken County jury on March 29, 2017. That judgment was not paid to Plaintiff Burke until May 26, 2017. S.C. Code § 28-2-420 applies to traditional condemnation cases initiated by the State and allows a 20 day grace period during which no interest accrues. However, this is an inverse condemnation case. Therefore, I find that S.C. Code §34-31-20 applies. S.C. Code §34-31-20 does not contain a grace period. Therefore, I find that Plaintiff Burke is entitled to post-judgment interest at the rate of 7.75% for a total of 56 days, **equaling \$1650.10.**

Amount of Attorney Fees

Upon retention in this matter, Plaintiffs agreed to a hybrid contingency with their attorney in which they would not be required to pay any amount in attorney fees if they were unsuccessful in recovering monies. The hybrid element allowed counsel to track his hours spent in the case for purposes of a possible attorney fee award upon successful conclusion of the case.

The maximum reduction of a verdict in favor of Plaintiff would never exceed a certain amount, but in the event attorneys fees were awarded in excess of the contingency, counsel would be entitled to that larger amount. The specific breakdown is as follows:

Maximum reduction of a verdict will not exceed:

- 25% plus all fees and costs if the matter settles prior to filing a Summons and Complaint;
- 33% plus all fees and costs if the matter settles prior to the initiation of a trial;
- 40% plus all fees and costs if the matter proceeds to opening statements or beyond at a trial.

The hourly rate agreed upon for calculation of the fee earned was \$400.00 per hour. The rate was elevated due to the risk taken by counsel in the event of an unsuccessful verdict. Counsel's standard hourly rate is \$300/hour. Pursuant to the hybrid retainer agreement between Plaintiff and his counsel, the minimum amount of attorney fees that could be awarded is based on the sliding percentage scale provided above:

Our courts have held that contingency fees are reasonable in condemnation cases and can be awarded by the presiding courts. *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). While courts are not bound by such agreements, if the Court finds such fees reasonable under the applicable factors, such awards will not be disturbed absent an abuse of discretion. Plaintiff Burke's case proceeded to verdict dictating that counsel is entitled to 40% of the amount recovered. Once interest is added pursuant to this Order, counsel earned a contingency fee of 40% of \$171,769.67, or **\$68,707.87**. Hanson settled prior to verdict for the sum certain of \$100,000.00. Pursuant to the retainer agreement, Plaintiff Hanson is entitled to **\$33,000.00** in attorney fees.

Counsel submitted amounts for both contingency and hourly calculations of the attorney fees incurred during the prosecution of this matter. Defendant objected to the hourly calculations based on the argument that counsel represented five separate plaintiffs in this matter and the distribution of his time must be split between all five plaintiffs. As the Court is awarding fees based on the contingency analysis, such arguments are moot. However, the hourly calculations demonstrate that the contingency award is fair and reasonable as it actually less than the contracted hourly rate between Plaintiffs and their counsel, but more than counsel's standard hourly rate he would have earned if working on retainer. In addition, a contingency award eliminates any recovery based on work done for other Plaintiffs who may not be entitled to an award of attorney fees for their claims.

The Six-Factor Test.

The Supreme Court has stated,

the court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.

Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). These factors fully support Plaintiff's request for fees and an award of the contingency amount pursuant to the retainer agreement.

(a) The nature, extent, and difficulty of the case. This case dealt with complex issues of roadway design, engineering calculations and hydrology. There were more than 3000 pages of documents involved when the pleadings, deposition transcripts and exhibits are taken into account. The case took 3 and ½ years to bring a single Plaintiff's claim to trial. That single

claim took 3 days to bring to verdict. Clearly, it was of a nature, extent and difficulty to justify an award of attorney fees of \$68,707.87 for Plaintiff Burke and \$33,000.00 for Hanson.

(b) The time necessarily devoted to the case. Counsel's time devoted to the case is detailed in Exhibit B to his motion. Over the last 3 and ½ years, counsel devoted more than 207 hours to Plaintiff Burke's case, with an additional 30 hours of time devoted solely to Plaintiff Hanson. This amount of time is commensurate with the fees being awarded under a contingency basis. Therefore, I find it is reasonable and fair under this factor.

(c) Professional standing of counsel. Counsel attached the Affidavits of David Miller and James D. Mosteller to establish his professional standing in the Aiken legal community. Defendant offered no affidavits or other evidence to dispute the opinions of these lawyers. Therefore, this factor justifies the award of fees discussed above.

(d) Contingency of compensation. To the extent, if any, that this factor relates to the ability of the party for whom the services were performed to pay her legal fees, *see, e.g. Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991), the compensation is contingent. The average citizen is not financially able to pay a lawyer nearly \$100,000.00 in fees to prosecute a civil action without a guaranty of recovery. There is no evidence that either Plaintiff seeking attorney fees from this Court are different from the average citizen. Therefore, I find that neither Plaintiff was able to pay counsel in advance through a traditional retainer arrangement.

To the extent that "contingency of compensation" refers to whether the cause of action is of a type that is typically brought on a contingency basis rather than by hourly fee, and thus compensation is dependent on being victorious, *see, e.g., Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 285, 377 S.E.2d 296 (1989), this case was brought on a contingency basis. Counsel for

Plaintiff took nearly all the risk that Plaintiff did not obtain any monetary compensation in this case. In addition, counsel advanced nearly \$12,000.00 in costs on behalf of Plaintiff during the course of the litigation with no guarantee of reimbursement. Therefore, there can be no question that this case was handled on a contingency basis.

(e) Beneficial results obtained. The results obtained were beneficial. Defendant argued that Plaintiff Burke did not obtain beneficial results. There is no merit to this argument. Plaintiff's final demand before trial was \$150,000.00. After the mandatory award of attorney fees, costs and interest, the amount to be paid by Defendant for Plaintiff Burke's claim will exceed \$250,000.00. Using Defendant's final offer to Plaintiff Burke as the benchmark, Defendant is paying more than five times the amount of that final offer to Burke, and nearly three times that offer to Plaintiff Hanson. Clearly, counsel obtained beneficial results for his clients.

(f) Customary legal fees for similar services. According to the Affidavit of James D. Mosteller, the customary rates for attorneys in Aiken range from \$250.00 to \$350.00 an hour. Rates for experienced trial-level litigators range from \$250.00 to \$600.00. See *Layman v. State*, 376 S.C. at 454, 658 S.E.2d at 332 (approving hourly rates from \$200 for junior counsel to \$600 for senior counsel, pre-multiplier). Plaintiff's counsel was skilled, experienced, and effective. The contingency fees being awarded are standard in the industry for Plaintiff attorneys and are consistent with the time devote by counsel for his actual work in the case. This factor supports the award of attorney fee dictated above.

CONCLUSION

S.C. Code § 28-11-30 requires this Court to award Plaintiff reasonable attorney fees and costs, including engineering and appraisal costs, incurred in prosecuting this action. S.C. Code §

28-2-420 and South Carolina Common law allows the award of interest on the jury verdict at a statutory rate of 8%. Therefore, the Court awards the following reimbursements under South Carolina Law:

- **Costs of \$23,984.89;**
- **Prejudgment interest of \$37,769.67;**
- **Post-judgment interest of \$1650.10;**
- **Attorney fees in the Amount of \$68,707.87 for Plaintiff Burke;and**
- **Attorney fees in the amount of \$33,000.00 for Plaintiff Hanson.**

This amount shall be paid within 15 days of the date of this Order. No post-judgment interest shall accrue during those 15 days. After 15 days, post-judgment interest on the total amount shall begin to accrue at the rate established by the South Carolina Supreme Court.

IT IS SO ORDERED.

This ____ day of June, 2017

Judge Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit



Aiken Common Pleas

Case Caption: John Burke , plaintiff, et al VS Department Of Transportation South Carolina , defendant, et al
Case Number: 2013CP0202157
Type: Order/Other

So Ordered

s/D.A. Early III 2136

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ELECTRONICALLY FILED - 2017 Jun 16 8:42 AM - AIKEN - COMMON PLEAS - CASE#2013CP0202157

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
John Burke,)
Plaintiff,)
v.)
The South Carolina Department)
of Transportation,)
Defendants.)

IN THE COURT OF COMMONS PLEAS
Civil Action No.: 2013-CP-02-02157

**NOTICE OF MOTION AND
MOTION TO RECONSIDER**

TO: THE PLAINTIFF AND HIS ATTORNEY, TUCKER S. PLAYER, ESQUIRE

PLEASE TAKE NOTICE that pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure, the undersigned attorney for the Defendant, the South Carolina Department of Transportation, will move the Honorable Court, at a date and time set by the Court, to reconsider its Order awarding the Plaintiff prejudgment interest that was signed on June 15, 2017.

This motion is based upon the provisions of Rules 52 and 59 of the South Carolina Rules of Civil Procedure or any other rule that may apply, the content of the above-referenced Order and any other laws of this state that may apply.

June 26, 2017

NANCE, McCANTS & MASSEY

/s/ James D. Nance
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Post Office Box 2881
Aiken, South Carolina 29802-2881
(803) 649-6200

Attorney for Defendant:
South Carolina Department of Transportation

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
John Burke, William Burt, Sr.,)
Thomas Cooper, Mike Ellison,)
Harold Hanson & David McKee,)
)
Plaintiffs,)
)
v.)
)
The South Carolina Department)
of Transportation,)
)
Defendants.)
_____)

IN THE COURT OF COMMONS PLEAS
Civil Action No.: 2013-CP-02-02157

DEFENDANT'S
MEMORANDUM IN SUPPORT OF
ITS MOTION FOR RECONSIDERATION

The John Burke case was tried by a jury in March of 2017 in Aiken County. The jury awarded the Plaintiff a verdict in the amount of \$134,000.00. The only cause of action that was submitted to the jury was that of inverse condemnation. Thereafter, the Plaintiff moved the Court for an award of costs, prejudgment interest, post-judgment interest and attorneys fees pertaining to the Plaintiffs Burke and Hanson.

In SCDOT's memorandum addressed to the Plaintiff's motion, the Defendant took issue with the award of prejudgment interest indicating that it was not allowed to be awarded by the Court in an inverse condemnation case, but must be considered by the jury and included in any jury verdict. In Vick v. South Department of Transportation, 347 S.C. 470, 556 SE2d 693(2001), the Court of Appeals distinguished condemnation actions and inverse condemnation actions. It indicated that condemnation actions were controlled by statute and these statutes set forth how the interest would be awarded. It stated that an inverse condemnation case is different from a condemnation case because it is a common law constitutional action. That the right to

prejudgment interest in an inverse condemnation action stems from the just compensation clauses of the United States and State constitutions.

The Court indicated that although prejudgment interest is recoverable in an inverse condemnation action, it is an issue which must be decided by the jury. Specifically, the Court stated "it was the duty of the respondents to call a 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."

In this case the Plaintiff did not request that a jury charge pertaining to prejudgment interest be made, nor did the Court charge this issue on its own initiative:

In the case of South Carolina State Highway Department v. Miller 237 S.C. 386 & 117 SE2nd 561 (1960), although it was a statutory condemnation case, addressed the issue of whether or not the Court absent a statute giving it the authority could award prejudgment interest and add it to the jury's verdict. Apparently, at the time this case was decided the legislature had not established a statutory scheme whereby the Court could award prejudgment interest, etc., in condemnation cases or the landowners elected to have just compensation award determined by the jury.

The Court stated that "the trial Court upon motion of the parties or ex merò moto could have directed the jury to include interest from the date of the taking or reserve that matter itself in entry of the judgment on the verdict. Not having entertained either course, the Court had not justification for the addition of interest to the amount of the verdict."

It went on to state that the Court "cannot add interest to a verdict when the interest is a part of the damages and not a mere legal incident to the landowner's claim, nor when it is

impossible to ascertain whether the jury has awarded interest in an action on an unliquidated claim.”

The Court concluded that “the trial judge had no authority of power to add interest to the verdict of the jury in this case because interest being a part of the just compensation for which the landowner was entitled, such should have been submitted, under the appropriate instructions for the consideration of the jury in affixing damages.”

It is clear that prejudgment interest can be awarded as part of a jury verdict in an inverse condemnation action. It is clear that the statutory scheme established for condemnation actions does not apply to inverse condemnation actions. It is clear that a jury charge pertaining to the award of prejudgment interest was not requested or made in this case.

Based upon the foregoing, it is requested that the Honorable Court reverse its position in regards to prejudgment interest and reduce it from amount awarded to the Plaintiff in its post-trial motion for attorneys fees, costs, etc.

Respectfully Submitted,

July 21, 2017

NANCE, McCANTS & MASSEY

/s/ James D. Nance
SC Bar No.: 004171
218 Newberry Street, SW (29801)
Post Office Box 2881
Aiken, South Carolina 29802-2881
jimnance@nancefirm.com
(803) 649-6200

Attorney for Defendant:
South Carolina Department of Transportation

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case a copy of the Defendant's Memorandum in Support of its Motion for Reconsideration by the United States Postal Service with sufficient postage affixed:

Tucker S. Player, Esquire
PLAYER LAW FIRM, LLC
1415 Broad River Road
Columbia, SC 29210

Submitted this 21st day of July, 2017.

/s/ James D. Nance
James D. Nance
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Attorney for Defendant:
South Carolina Department of Transportation

COUNTY OF AIKEN)

John Burke, William Burt Sr., Thomas)
Cooper, Mike Ellison, Harold J. Hanson,)
David McKee)

Plaintiffs,)

vs.)

The South Carolina Department of)
Transportation, and The County of Aiken,)
South Carolina,)

Defendants:)

CIV-591-01

Case Number: 2013-CP-02-2157

**AMENDED COMPLAINT
(JURY TRIAL DEMANDED)**

FILED 12.6.13
Liz England
C.C.P. & G.S.
Anita Knoepfle
Deputy Clerk

TO: DEFENDANTS ABOVE-NAMED:

Plaintiffs above-named, complaining of Defendants hereby alleges:

1. Plaintiffs are citizens and residents of the County of Aiken, State of South Carolina.
2. Defendant, South Carolina Department of Transportation [hereinafter "SCDOT"] is a governmental entity of the State of South Carolina.
3. Defendant, County of Aiken South Carolina is a political subdivision of the State of South Carolina.
4. Venue and jurisdiction are proper before this Court.

FACTS

5. In 2010, Plaintiffs began to notice excessive, destructive and unreasonable water intrusion through and onto their properties during any significant rain event.
6. The excessive, destructive and unreasonable water intrusion onto Plaintiffs' properties has

2010.

7. Plaintiffs, both individually and as a group have contacted SCDOT and the County of Aiken to seek a remedy for the aforementioned water intrusion.
8. SCDOT has attempted to implement minor remedial measures to the neighborhood and area.
9. To date any and all remedial measures taken by SCDOT and the County of Aiken have failed to not alleviate any of the aforementioned water intrusion issues.
10. Plaintiffs have suffered and continue to suffer damages to their land, homes and quiet enjoyment of their properties as a result of the negligent, willful and reckless acts of both the SCDOT and County of Aiken.
11. The water intrusion has caused damage to Plaintiffs' properties in the following particulars:
 - a. Washed out driveways, making them impassable;
 - b. Washed out properties, exposing electrical lines, pipes, foundations and septic tanks;
 - c. Flooded basements;
 - d. Rendered properties unusable due to water intrusion and flooding;
 - e. Damaged or Rendered unusable personal properties and real properties
12. Upon information and belief, the water runoff causing damage to Plaintiffs' properties is a result of the recent construction of the 520 Bypass in Aiken County.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS COUNTY OF AIKEN
AND SCDOT**

(Negligence in Violation of South Carolina Tort Claims Act)

13. The allegations of the preceding paragraphs are hereby repeated and incorporated herein.

of the Defendants, in one or more of the following particulars:

- a. In engaging in the construction of an extension of the highway system without considering the wastewater run-off and sewage implications;
- b. In failing to properly construct, maintain, and monitor wastewater run-off apparatuses.
- c. In failing to utilize best management practices for sediment and erosion control;
- d. In failing to augment discharge structures and install items required by regulatory agencies;
- e. In failing to construct and maintain necessary swales, sediment traps and mats to minimize or eliminate erosion;
- f. In failing to submit reports required by regulatory agencies;
- g. In allowing the discharge of organic and inorganic materials onto the Plaintiffs' properties and into the environment and waters of the state;
- h. In failing to take necessary and sufficient corrective action to completely remedy the ongoing discharges and damage to Plaintiffs' properties;
- i. In failing to properly consider the topography of surrounding properties prior to and during the time it performed work on the highway extension;
- j. In failing to obtain the assistance of proper experts and engineers to deal with the problems associated with soil, water, and sediment problems prior to and during its land disturbance work; and
- k. In failing to take such action as a reasonable and prudent person would do to prevent

15. One or more of the above actions were in violation of the rules of regulatory agencies and the laws of the State of South Carolina.
16. As a direct and proximate result of Defendants' negligence as described above, Plaintiffs suffered and continue to suffer damages to be determined by a jury.

**FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS COUNTY OF AIKEN
AND SCDOT**

(Trespass in Violation of South Carolina Tort Claims Act)

17. The allegations of the preceding paragraphs are hereby repeated and incorporated herein.
18. Defendants intended, knew, or had substantial reason to know that its aforesaid actions would cause more water, silt, vegetation and debris to physically intrude upon Plaintiffs' properties.
19. That the aforesaid actions of the Defendants amounted to a deliberate physical invasion of Plaintiffs' properties and property rights tantamount to a continuous taking or damaging of Plaintiffs' properties.

**FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS COUNTY OF AIKEN
AND SCDOT**

(Nuisance in Violation of South Carolina Tort Claims Act)

20. The allegations of the preceding paragraphs are hereby repeated and incorporated herein.
21. By aforesaid actions Defendants created a condition tending to both cause damage to Plaintiffs' properties and created a danger of future damage. In light of the conditions thereby created, Defendants' use of the properties cannot be considered lawful or reasonable, but rather constitute a nuisance.
22. Defendants' use of the easements and wastewater management apparatuses unreasonably

utilizing their properties in the intended manner.

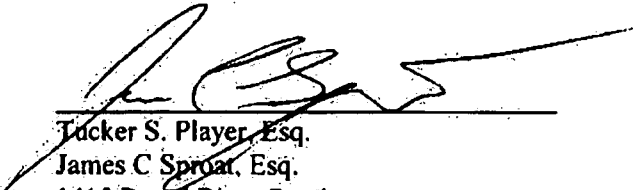
**FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANTS COUNTY OF AIKEN
AND SCDOT**

(Inverse Condemnation)

23. The allegations of the previous paragraphs are hereby repeated and incorporated herein.
24. By aforesaid mentioned actions, Defendants did affirmatively direct water onto Plaintiffs' properties, causing them to flood.
25. By directing water onto Plaintiffs' properties SCDOT and County of Aiken, did take Plaintiffs' properties rendering them unusable for the purposes for which they were purchased.
26. Plaintiffs suffered and continue to suffer damages due to the taking of their properties.
27. Defendants have failed to pay Plaintiffs for the value of their property as required by the Fifth Amendment of the United States Constitution.
28. That as a proximate result of the Defendants' actions heretofore described in the first, second, third, and fourth causes of actions, Plaintiffs suffered actual damages in an amount to be determined by a jury.

WHEREFORE, Plaintiffs demand a jury trial and pray for an award of actual damages, compensatory damages, special damages, attorney's fees and costs against the individual Defendants, all in an amount to be determined by a jury. Finally, Plaintiffs pray for such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED



Tucker S. Player, Esq.
James C Sproat, Esq.
1415 Broad River Road
Columbia, SC 29210
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(803) 772-8037-facsimile
Jim@playerlawfirm.com

Columbia, South Carolina
This 3rd day of December, 2013

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

) Civil Action No.: 2013-CP-02-02157

)
)
) John Burke, William Burt Sr., Thomas
) Cooper, Mike Ellison, Harold J. Hanson,
) David McKee,

)
)
) Plaintiffs,

)
)
) ANSWER TO AMENDED COMPLAINT
) FOR DEFENDANT SCDOT
) (Jury Trial Demanded)

)
) vs.

)
) The South Carolina Department of
) Transportation, and The County of Aiken
) South Carolina,

)
) Defendants.
)
)

Defendant SCDOT, answering Plaintiffs' Amended Complaint, alleges:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiffs' Complaint not herein specifically admitted, qualified, or explained is denied either due to the false nature of the allegation or the Defendant's lack of sufficient information to form a belief.

2. Defendant SCDOT admits the allegation contained in paragraph 2 of the Complaint.

3. Defendant SCDOT has insufficient information to form a belief as to the allegations contained in paragraphs 5, 6, 11, and 13 of the Complaint and, therefore, denies those allegations.

4. Defendant SCDOT denies the allegations contained in paragraphs 9, 10 and 12 of the Complaint.

FILED 2-7 2014
Luis Godard
C.C.P. & O.S.
[Signature] 12:30pm
Deputy Clerk

5. As to paragraphs 7, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, and 28 of the Complaint, Defendant SCDOT has insufficient information to form a belief as to the condition of Plaintiff's property prior to 2010 or any flooding that may have occurred since 2010 and, therefore, denies those allegations. However, Defendant SCDOT specifically denies that any of its actions has caused flooding to Plaintiffs' property.

6. Defendant SCDOT denies the portion of paragraph 8 that states "remedial" and admits the remaining allegations of paragraph 8 of the Complaint.

FOR A SECOND DEFENSE

7. Each and every allegation of the Defendant SCDOT's paragraphs 1 through 6 above is incorporated herein as if repeated verbatim.

8. Defendant SCDOT pleads the division of S.C. Code §15-78-60, which is incorporated herein by reference in its entirety, as a complete bar to all or a portion of the matters alleged in the Plaintiffs' Amended Complaint.

FOR A THIRD DEFENSE

9. Each and every allegation of the Defendant SCDOT's paragraphs 1 through 8 above is incorporated herein as if repeated verbatim.

10. Defendant SCDOT pleads the provisions of the S.C. Code §15-78-100, which is incorporated herein by reference in its entirety, as a complete bar to all or a portion of the claims made by the Plaintiffs' Amended Complaint and further allege that this action has been filed in violation of the appropriate statute of limitations.

[SIGNATURE BLOCK ON FOLLOWING PAGE.]

February 6, 2014

NANCE, McCANTS & MASSEY

By: 

James D. Nance
Attorney for the Defendant SCDOT
218 Newberry Street, S.W.
Post Office Box 2881
Aiken, South Carolina 29802-2881
(803) 649-6200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached Answer, Interrogatories to the Plaintiff, Request for Production, Inspection and Copying of Documents and Notice of Deposition have been served upon counsel by and addressed as follows:

Case Name: John Burke, William Burt Sr., Thomas Cooper, Mike Ellison,
Harold J. Hanson, David McKee v. The South Carolina
Department of Transportation and The County of Aiken South
Carolina
Civil Action No.: 2013-CP-02-02157
Date of Loss: 12/30/2010
Our File No.: N-333

Ms. Elizabeth Godard
Clerk of Court
Post Office Box 583
Aiken, S.C. 29802

Tucker S. Player, Esquire
James C. Sproat, Esquire
PLAYER LAW FIRM, LLC
1415 Broad River Road
Columbia, South Carolina 29210

- Depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.
- Handing counsel a copy thereof.
- By facsimile and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 6 day of February, 2014
NANCE, MCCANTS & MASSEY

BY Wanda F. Garrett
Wanda F. Garrett, Paralegal to
James D. Nance, Esquire

FILED 2-7 2014
Liz Godard
C.C.P.&G.S.
12:30pm
Deputy Clerk

State of South Carolina
County of Aiken

Court of Common Pleas

John Burke,)
)
) Plaintiff,)
) v.)
))
) The South Carolina)
) Department of)
) Transportation,)
))
) Defendant.)

Excerpt
Transcript of Record
2013-CP-02-02157

March 29, 2017
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge; and a jury.

A P P E A R A N C E S:

Tucker S. Player, Esquire
Attorney for the Plaintiff

James D. Nance, Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

1 Now, having said that, those are sort of
2 general propositions of law on all civil cases.
3 Let's turn now to the case at hand. What we're left
4 with is what we call an inverse condemnation action.
5 And that is based on the constitution of the state
6 of South Carolina, and I suspect every other
7 constitution in every other state. We have to do
8 ours on our state. But the constitution says that
9 private property shall not be taken for public use
10 without just compensation being made for the
11 property.

12 Now, what we normally have, under that
13 constitutional provision, we have what we call
14 condemnation actions or eminent domain actions. If
15 the State decides they need to put a road from point
16 A to point B and that road is going to go through
17 people's land or U.S. Government decides they're
18 going to take property from people from the Savannah
19 River Site, they have a right to condemn that
20 property and take it for that public use, but they
21 have to pay the people for the property, they have
22 to give them just compensation. So they bring an
23 action, a condemnation action, and determine what
24 they should pay them for it, what's the fair market
25 value of their property.

1 This is sort of a -- sort of an offshoot of
2 that. This is what we call an inverse condemnation
3 action, and that's where the landowner claims that
4 the Government takes his private property for public
5 use, but the Government has not brought any type of
6 condemnation action to do so. And so the plaintiff
7 is claiming that the Government has taken his
8 property for public use, and as a result of that
9 taking, he's entitled to be fairly compensated, just
10 compensation.

11 Inverse condemnation is a cause of action
12 against a governmental entity to recover the value
13 of the property which has been taken in fact by the
14 government defendant, even though no formal exercise
15 of eminent domain has been attempted by the taking
16 agency; in other words, there's not been a formal
17 condemnation proceeding, but the plaintiff is
18 claiming that the Government has taken his property
19 for public use.

20 Now, in order to prove his case, the plaintiff
21 has to prove by the preponderance or greater weight
22 of the evidence that his private property has been
23 taken for public use without just compensation
24 having been made. Now, what is taking? Taking has
25 been defined by our courts as the -- depriving the

1 private landowner of the ordinary beneficial use and
2 enjoyment of his property.

3 And if he has been deprived of the ordinary
4 beneficial use and enjoyment of his property and can
5 prove it, that is a taking, and it is as much a
6 taking as though the property were actually
7 appropriated to the public use. And there's no
8 distinction between taking and damaging and that
9 least amount of damage to a property constitutes a
10 taking within the purview of the constitution.
11 There may be a taking of the property in the
12 constitutional sense although there has been no
13 actual entry within its bounds and no artificial
14 structure had been erected upon it.

15 When a public agency uses land which it has
16 lawfully acquired for public purposes in such a way
17 that neighboring real estate is destroyed or
18 impaired its usefulness, there is a taking within
19 the meaning of the constitution. So in this case,
20 obviously the Government took land to build I-520
21 and had condemnation proceedings.

22 The plaintiff is claiming now when they took
23 that land and planned the -- how the runoff water
24 was going to be handled, he's claiming that the
25 runoff water has come onto his property creating a

1 taking and he's been damaged. The Government says,
2 yes, we took the land on I-520 and, yes, we had to
3 get rid of the waste water, but our plan did not
4 throw the water onto his property.

5 So that question is -- the basic question is,
6 is there a taking by water coming onto his property
7 or did the water not come onto his property? And in
8 that situation, the case law in the state of South
9 Carolina has always been, a long time has been, and
10 I'm reading from a case that says that it's long
11 been recognized in our state, and they use the word
12 casting, that the casting of water on adjoining land
13 by some act of a governmental authority in the
14 course of making improvements to another public
15 right-of-way constitutes a taking of property in
16 violation of the constitution.

17 So the question you have to ask yourselves, the
18 question you have to answer is, did the plaintiff
19 prove by the preponderance or the greater weight of
20 the evidence, from the evidence that he's presented
21 in the courtroom, did that water which was cast off
22 from I-520, did it go onto his property? If he
23 proves that, it's a taking; if he hasn't proved
24 that, it's not a taking.

25 If you find that it is a taking, then,

1 obviously, you have to go to the question of just
2 compensation. And the law in that regard says the
3 amount that the governmental agency should pay a
4 landowner in order to adequately compensate the
5 landowner for a taking of his property is called
6 just compensation. It is that amount of money which
7 would put the -- or attempt to put the landowner in
8 as good a position monetarily as he was prior to the
9 taking of the property.

10 In order to be compensated fully, the landowner
11 must be put in as good a position monetarily as if
12 the use of his property had not been taken. He's
13 entitled to have the full equivalent of the value of
14 such use at the time of the taking and paid with the
15 taking. In determining just compensation, only the
16 value of the property to be taken, any lessening in
17 the value of the landowner's remaining property, and
18 any benefits may be considered.

19 And normally when a portion of a tract of land
20 is taken, it is permissible to assess damages upon
21 the basis of the fair value of the land taken plus
22 any special damages to the remainder. Where only a
23 part of a tract is taken, the owner is entitled to
24 recover not only compensation for the fair market
25 value of the part taken, but for any damages to the

1 remaining part.

2 And this is probably the heart of what just
3 compensation is: The measure of damages from the
4 taking is the difference in the value of the
5 landowner's land before the taking and after the
6 taking. What it was worth before and what is it
7 worth after? That's the measure of damages. And
8 you do that by determining what the fair market
9 value of the land was before and the fair market
10 value of the land after.

11 And fair market value has been defined by our
12 courts as simply this: Fair market value is the
13 price a willing buyer would pay and a willing seller
14 would accept in the ordinary course of business when
15 neither is being compelled to act. It's not a
16 sentimental value, but it's what it could be sold
17 under ordinary circumstances.

18 Fair market value is a price that a purchaser
19 would give and a seller would take when neither the
20 seller nor the buyer is acting under any
21 circumstances of compulsion, what one party would be
22 willing to sell for and what one party would be
23 willing to pay for it.

24 So in this case you have to -- your main
25 decision, after we boil it all down, is you have to

1 determine whether or not plaintiff has proven by the
2 preponderance or greater weight of the the evidence
3 that the governmental entity, i.e., the defendant
4 SCDOT, has cast water from I-520 onto his adjacent
5 premises, and if he has, what's his just
6 compensation. If you find that he has not proven
7 that by the preponderance or greater weight of the
8 evidence, then the SCDOT would be entitled to a
9 verdict. That's your chore, that's your job, that's
10 your task in this case.

11 Now, you will have a verdict form in the jury
12 room, Madam Forelady. It's very simple: If you
13 find that he has proven a taking, then you determine
14 what the just compensation is. And it says: We
15 find for the plaintiff in the amount of blank
16 dollars as just compensation. If you find that he
17 has failed to prove by the preponderance or the
18 greater weight of the evidence that water went onto
19 his property, therefore there would be not taking,
20 then you find for the SCDOT.

21 Your verdict has to be unanimous; all 12 of you
22 must agree. We're not here to punish any enemies,
23 to reward any friends, we're here as a member of the
24 public. These parties could not agree on this
25 situation and we call on the 12 of you to serve in

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

**Doyet A. Early, III, Circuit Court Judge
Case No.: 2013-CP-02-02157**

Case Number 2017-001881

John Burke, Respondent,

vs.

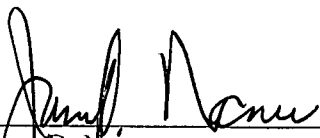
South Carolina Department of Transportation, Appellant.

RECEIVED
JAN 29 2018
SC Court of Appeals

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Record on Appeal contains all material proposed to be included by the parties and not any other material.

NANCE, McCANTS & MASSEY



James D. Nance
P.O. Box 2881
Aiken, SC 29802
(803) 649-6200 Ext. 2
Attorney for Appellant

January 11, 2018