STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge
Case No. 2017-CP-10-5382
Appellate Case No. 2019-001125

South Carolina Department of Commerce,
Division of Public Railways,

Appellant,

v.

Gateway Properties of Greater Charleston, LLC,

Respondent,

and

NBSC a division of Synovus Bank, VFC Partners 15 LLC, Capella Carolinas, LLC, Donivon Glassburn, and the Loft Pilates Center, LLC,

Other Condemnees.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. For over seventy years, the South Carolina Supreme Court has defined just compensation as the property's fair market value. For over forty years, the South Carolina Supreme Court has described fair market value as the value a willing buyer would pay and a willing seller accept, where neither party is under compulsion to enter the transaction. Landowner's appraiser testified that his valuation did not reflect fair market value or what a willing buyer would pay for Landowner's property. Did the lower court err in admitting testimony from Landowner's appraiser?

II. Public Railways asked the jury to return a verdict of no less than $1,800,000. The only evidence offered on fair market value was for $1,800,000 and $1,750,000. Did the lower court err in denying Public Railways' motion for directed verdict in the amount of $1,800,000?

III. The South Carolina Supreme Court has defined just compensation as the property's fair market value. Did the lower court err in charging the jury that if the jury considered fair market value to be unfair to either party it could use some other formula?

IV. Rule 803(6), SCRE, business records exception to hearsay, provides that only records kept in the course of a regularly conducted business activity are admissible, and explicitly excluded from admission are those records containing subjective opinions and judgments. Did the lower court err in admitting as a business record an email from Landowner's Certified Public Accountant providing a subjective reconstruction cost estimate created in response to the condemnation?

STATEMENT OF THE CASE

This is a condemnation action. The South Carolina Department of Commerce, Division of Public Railways ("Public Railways" or "Appellant") commenced this condemnation action on October 19, 2017. (Condemnation Notice and Tender of Payment (Oct. 19, 2017)). A jury trial was held on March 25-28, 2019, in Charleston County. As with most condemnation cases, the sole issue in this case is the amount of just compensation due to the landowner Gateway Properties of Greater Charleston, LLC ("Landowner," or "Respondent") for the acquisition of its entire three-acre property and 7,800 square foot building in Charleston. Public Railways deposited $1,800,000 with the Charleston County Clerk of Court at the commencement of this action as its tender of just compensation. (Condemnation Notice and Tender of Payment). The jury returned a verdict in the amount of $3,750,000. (Trial Tr. vol. IV, 598:18-20).

This is an appeal from the circuit court's order denying Appellant's post-trial motions. The circuit court issued its order denying Appellant's post-trial motions on June 4, 2019, which was then filed on June 11, 2019. (Order on Condemnor's Post-Trial Motions). Appellant received notice of entry of the order denying its post-trial motions on June 17, 2019. Appellant served its Notice of Appeal on July 10, 2019. (Notice of Appeal).

Appellant contests the following issues: (1) the admission of testimony from Respondent's appraiser Mr. Thomas Hartnett; (2) the failure of the lower court to direct a verdict in the amount of $1,800,000; (3) the lower court's charge to the jury that if it considered fair market value unfair to either party it could use some other formula for just compensation; and (4) the admission of evidence containing hearsay through the business records exception. Appellant requests that the Court direct a verdict in accordance with the undisputed evidence on fair market value of the acquired property, or in the alternative grant a new trial.

STATEMENT OF THE FACTS

In October 2017, Public Railways, a division of the South Carolina Department of Commerce, condemned the entire tract of land and building owned by Gateway Properties of Greater Charleston, LLC ("Landowner," or "Respondent") located at 1799 Meeting Street (the "Property"), which is near the Charleston Naval Complex. (Trial Tr. vol. I, 114:13-23). Public Railways acquired the Property as part of its construction of the Navy Base Intermodal Container Transfer Facility and associated railway lines. (Trial Tr. vol. I, 96:3-6).

In 2007, Landowner constructed a building on the Property to house Lifespaces, Inc., a technology contractor doing business as eLifespaces. (Trial Tr. vol. II, 164:18-22, 169:19, 240:7-9). Landowner and Lifespaces are both owned by Fred Fabian and various family members. (Trial Tr. vol. II, 163:15-17, 165:20-21). The portion of the building occupied by Lifespaces included a home theatre room and acoustical treatment room used to demonstrate various products that could be installed in a home or business. (Trial Tr. vol. II, 202:21-203:13, 210:17-211:7, 225:19-227:2, L. Exs. 30, 38). Landowner's appraiser, Mr. Thomas Hartnett, testified that the home theater room is not a big room and was perhaps 20ft. x 20ft. and the acoustical room perhaps 30ft. x 30ft. (Trial Tr. vol. III, 388:21-389:3; 409:21-410:3). The home theatre and acoustical rooms only occupied a portion of the building's first floor. (L. Exs. 11, 59 (floor plans)).

Mr. Fabian testified that Lifespaces occupied the entire building until the great recession, when it began leasing space to a bingo operating company and software development company; when the software company left, it leased space to a Pilates studio. (Trial Tr. vol. II, 246:22-247:17, 248:18-249:4, 249:22-250:4). At the time of condemnation, the building of approximately 7,816 square feet housed three tenants: Lifespaces (4,275 square feet), Capella Carolinas, a bingo operator (2,251 square feet), and The Loft Pilates Center, LLC, a Pilates studio (959 square feet). (Trial Tr. vol. II, 248:18-249:4, 249:22-250:4, 308:11-309:5; L. Ex. 59). Mr. Fabian testified that

the Landowner could have leased the Lifespaces space to another office tenant if needed. (Trial Tr. vol. II, 302:13-21). Landowner's appraiser, Mr. Hartnett, also testified that another tenant could have used the Lifespaces area for another purpose. (Trial Tr. vol. III, 411:2-8).

Mr. Fabian was Respondent's first witness during its case-in-chief. Over Appellant's objection, Mr. Fabian was permitted to testify to an email exchange with his Certified Public Accountant concerning the estimated costs to reconstruct the building, and Respondent was allowed to enter this email into evidence over Appellant's objection. (Trial Tr. vol. II, 265:20-271:21; L. Ex. 63). In this email, Mr. Fabian's CPA provided a cost estimate to reconstruct the building at the time of condemnation. (L. Ex. 63). The CPA was not present to testify to the cost estimate reflected in the email and was not qualified as an expert in property valuation. The court recognized the email as hearsay but denied Appellant's hearsay objection and admitted the email under the business record exception to hearsay. (Trial Tr. vol. II, 269:4-24). Mr. Fabian testified that Mr. William Ford appraised the Property for Public Railways prior to the condemnation at $1,800,000 and that this was the amount of Public Railways' initial offer. (Trial Tr. vol. II, 264:7-265:12). Respondent moved Public Railways' initial offer letter reflecting Mr. Ford's valuation into evidence. (L. Ex. 66).

Landowner offered expert appraisal and property valuation testimony from Mr. Thomas Hartnett. Appellant contested the admission of testimony from Mr. Hartnett. Appellant first moved in limine to exclude testimony from Mr. Hartnett based on deposition testimony that his valuation was not based on fair market value and did not reflect what a willing buyer would pay for the Property at the time of condemnation. (Trial Tr. vol. I, 44-71). Appellant's motion in limine was denied. (Trial Tr. vol. I, 70:8-10). Appellant again moved to exclude the testimony of

Mr. Hartnett when Respondent offered him as an expert witness at trial and this motion was denied. (Trial Tr. vol. III, 379:6-16).

Mr. Hartnett testified that he did not value the Property using the sales comparison approach or the income capitalization approach, but instead he valued the Property using the cost approach. (Trial Tr. vol. III, 401:5-402:15). Based on the cost approach, Mr. Hartnett valued the Property at $4,580,000. (Trial Tr. vol. III, 386:25-387:5, 401:21-402:15). Mr. Harnett testified that a willing buyer would not have paid $4,580,000 for the Property in October of 2017, (Trial Tr. vol. III, 414:10-415:4), and that his cost approach valuation did not reflect fair market value, (Trial Tr. vol. III,415:5-15). Appellant renewed its motion to exclude Mr. Hartnett's testimony at the conclusion of Mr. Hartnett's testimony. (Trial Tr. vol. III, 442:2-21). Appellant's motion was denied. (Trial Tr. vol. III, 453:13-18). Appellant moved for a directed verdict at the close of Respondent's case-in-chief on the basis that Mr. Hartnett's testimony should be excluded and a verdict directed on the only remaining evidence of just compensation, as offered through Mr. Fabian. (Trial Tr. vol. III, 444:2-15). This motion was denied. (Trial Tr. vol. III, 453:13-18).

Appellant presented testimony from an expert real estate appraiser, Ms. Deborah Haskell. Ms. Haskell valued the Property using the sales comparison and income capitalization approaches to value. (Trial Tr. vol. III, 483:2-4; 492:14-16). She testified that her valuation was based on fair market value, which is the value a willing buyer would pay and a willing seller accept, where neither party is under compulsion to enter the transaction. (Trial Tr. vol. III, 482:14-483:1). Under the sales comparison approach, Ms. Haskell testified that she was able to locate sales of similar buildings near the Property, and based on these sales, the Property's value was $1,850,000. (Trial Tr. vol. III, 483:7-484:25; 492:7-13). Ms. Haskell also testified that the Property could be leased and that based on market rents of similar buildings, the Property's value was $1,600,000. (Trial

Tr. vol. III, 492:14-493:11). Ms. Haskell weighted the sales comparison approach slightly higher than the income approach and testified that her reconciliation of fair market value for the Property at the time of condemnation was $1,750,000. (Trial Tr. vol III, 494:8-495:10).

Appellant renewed its motion for directed verdict at the close of evidence, asking the court to exclude Mr. Hartnett's testimony and enter a verdict based on the only evidence of fair market value—Mr. Fabian's testimony as to Mr. Ford's valuation and Ms. Haskell's testimony as to the fair market value of the Property. (Trial Tr. vol. III, 525:2-20). That motion was denied. (Trial Tr. vol. III, 525:2-20).

Over Appellant's objection, the court charged the jury as follows:

> Let's look at the damages formula. The approved formula for determining damages in a condemnation case provides for payment to the Landowner a fair market price of the property taken. If that formula is unfair to either party, some other formula may be used.

(Trial Tr. vol. IV, 587:15-19). Appellant objected to the final sentence of this jury charge and its objection was overruled. (Trial Tr. vol. IV, 593:5-17). The jury returned a verdict in the amount of $3,750,000. (Trial Tr. vol. IV, 598:18-20).

Appellant filed post-trial motions. (Condemnor's Post Trial Motions). All of Appellant's post-trial motions were denied. (Order on Condemnor's Post Trial Motions). This appeal followed.

ARGUMENT

I. Summary of Arguments.

Just compensation is measured by fair market value, which is that value a willing buyer would pay and a willing seller accept as of the date of condemnation for the property being taken where neither party is under compulsion to enter the transaction. Landowner's appraiser Mr. Hartnett testified that his cost approach valuation did not reflect fair market value and did not reflect the value a willing buyer would have paid for the Property as of October 2017. For this reason, the trial court erred in admitting the testimony of Mr. Hartnett and in not directing a verdict based on the only competent evidence of just compensation presented at trial. The court further erred by instructing the jury that it could set aside the fair market value measure of just compensation and use "some other formula" if it determined that fair market value was unfair to either party. In essence, the jury was told that it could value the Property however it wanted. This was error.

Additionally, Appellant was prejudiced by the erroneous admission of testimony and an email reflecting a reproduction cost estimate from Landowner's CPA, who was not present and testifying at trial and who was not qualified as an expert in property valuation.

These errors entitle Appellant to a directed verdict based on the competent evidence of fair market value presented at trial, or in the alternative, a new trial.

II. Mr. Hartnett's Testimony Should Have Been Excluded Because it Did Not Reflect Fair Market Value and the Amount a Willing Buyer Would Have Paid for the Property at the Time of Condemnation.

Landowner offered its opinion of just compensation through appraiser Thomas Hartnett. Mr. Hartnett testified that he did not value the Property using the sales comparison approach or the income capitalization approach but instead valued the Property using the less frequently used cost approach. (Trial Tr. vol. III, 401:5-402:15). Mr. Hartnett also testified that his $4,580,000

opinion of just compensation using the cost approach did not represent fair market value and did not reflect the amount a willing buyer would have paid for the Property at the time of condemnation. (Trial Tr. vol. III, 387:4-5, 414:10-415:15). For decades, South Carolina courts have defined just compensation as fair market value, or that value a willing buyer will pay and a willing seller will accept, neither being under compulsion to do so. Mr. Harnett's testimony was unreliable because it did not comport with South Carolina condemnation law defining just compensation. For this reason, Mr. Hartnett's testimony should have been excluded from evidence.

A. Standard of Review

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) (citing *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990)). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (citing *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Chavis*, 412 S.C. at 106, 771 S.E.2d at 338 (citing *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)). As well, "[a] trial court's ruling on admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citation omitted). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that

there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* (citations omitted).

A trial court serves as a gatekeeper for expert testimony sought to be introduced pursuant to Rule 702, SCRE. *White*, 382 S.C. at 274, 676 S.E.2d at 689 ("We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific."). "In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact." *Id.*

B. Just Compensation in a Condemnation Action Is Only Based on Fair Market Value.

The circuit court erred when it permitted Mr. Hartnett to testify to an opinion of just compensation that did not reflect fair market value. The only measure of just compensation that South Carolina courts have approved is fair market value, which is that value a willing buyer will pay and a willing seller accept, where neither party is under compulsion to enter the transaction.

When a governmental entity takes private property for public use through its power of eminent domain in a condemnation action, the landowner is entitled to receive just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); S.C. Const. art. I, § 13 ("private property shall not be taken . . . for public use without just compensation being first made for the property"). In 1987, South Carolina codified its procedure for eminent domain actions in the South Carolina Eminent Domain Procedure Act (hereinafter, the "Eminent Domain Act"). S.C. Code Ann. § 28-2-10, et seq. The Eminent Domain Act provides that "[i]n determining just compensation, only the value of the property taken, any diminution in the value of the landowner's remaining property, and any benefits [to the landowner's remaining property] may be considered." S.C. Code Ann. § 28-2-370.

In this case, the Landowner's entire Property was acquired through condemnation and the only factual question for the jury to determine was the "value of the property taken." S.C. Code Ann. § 28-2-370. South Carolina courts have defined "value of the property taken" as equating to its "fair market value," or the value a willing buyer would pay a willing seller, where neither party is under compulsion to enter the transaction. Fair market value is measured at the time of the taking and may vary from the amount the landowner has spent on the property. *Olson v. United States*, 292 U.S. 246, 254-55 (1934). As the United States Supreme Court has explained:

> [Market value] may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes, and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain.

Id. at 255. Even where there is not an active market for the property taken through condemnation, just compensation is still measured by *market value*. *Olson*, 292 U.S. at 257 (observing where there was no active market for flowage easements the "*market value must be estimated*" (emphasis added)).

For over seventy years, the South Carolina Supreme Court has repeatedly defined just compensation, the "value of property taken," in a condemnation action as the property's fair market value. *Howell v. State Highway Dep't*, 167 S.C. 217, 166 S.E. 129, 130 (1932) (approving jury charge stating that "actual value of the land means the fair market value of the land, upon a fair market, upon fair advertisement, and a fair sale at normal times").[1] The South Carolina Court of

[1] *Accord S.C. State Highway Dep't v. League's Estate*, 251 S.C. 368, 372, 162 S.E.2d 532, 533 (1968) (holding the admissibility of comparable sales "depends upon preliminary proof of sufficient similarity in the transactions to satisfy the trial judge in the exercise of a sound discretion that the evidence will be of aid in determining the fair market value of the property taken" (emphasis added)); *S.C. State Highway Dep't v. Bryant*, 253 S.C. 400, 406, 171 S.E.2d 349, 352 (1969) ("That the condemnee had no intention whatever of selling any portion of his property

Appeals has similarly defined just compensation and "the value of property taken" as its fair market value.[2] Fair market value has been further described by the South Carolina Supreme Court for over forty years as the value at which a willing seller will sell, and a willing buyer will buy, where neither party is under compulsion to do so.

> And [m]arket value of property taken or injured for public use means the *fair value of the property as between one who wants to purchase and one who wants to sell*, its present value at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale, not what could be obtained for it at a forced sale or under peculiar circumstances, nor a value obtained from the necessities of another.

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should not deprive him of his right to be compensated for it at its fair market value based on the highest and best use thereof." (emphasis added)); *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 369, 175 S.E.2d 391, 396 (1970) ("The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use." (emphasis added) (citing *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 131 S.E.2d 264 (1963))); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 407, 175 S.E.2d 805, 820 (1970) ("In a condemnation proceeding the issues are simple. The court is in quest of the reasonable fair market value of the property taken."); *S.C. State Highway Dep't v. Carodale Assocs.*, 268 S.C. 556, 562, 235 S.E.2d 127, 129 (1977) ("[F]air market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking." (quoting with approval *United States. v. Reynolds*, 397 U.S. 14, 16-17 (1970))); *S.C. Dep't of Highways & Pub. Transp. v. Cheston*, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982) ("In addition, we have held that it is permissible to assess damages upon the basis of the fair value of the land taken plus any special damages to the remainder." (citing *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 131 S.E.2d 264 (1963))); *City of Folly Beach v. Atl. House Props., Ltd.*, 318 S.C. 450, 453, 458 S.E.2d 426, 427 (1995) ("The unique nature of the property coupled with expert testimony as to its value allowed the jury to determine the fair market value of the property within the range of evidence presented at trial." (emphasis added)).

[2] *City of N. Charleston v. Claxton*, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) ("Generally, in establishing the *fair market value* of the condemned property, it is permissible to use expert testimony based on 'comparable' sales in the area. This includes the price paid for similar property in the vicinity within a reasonable time of the condemnation hearing." (emphasis added) (citing S.C. Code Ann § 28-2-340(A)(5))); *Hous. Auth. of City of Charleston v. Olasov*, 282 S.C. 603, 320 S.E.2d 478, 481 (Ct. App. 1984) ("The landowner was entitled to the fair market value of her property at the time of the taking, not its speculative value." (citing *South Carolina State Highway Dep't v. Miller*, 237 S.C. 386, 117 S.E.2d 561 (1960); *United States v. Twin City Power Co.*, 248 F.2d 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958))).

S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 416, 131 S.E.2d 264, 266 (1963) (emphasis added). This is the same definition of fair market value that the United States Supreme Court has recognized for over eighty years. *Olson v. United States*, 292 U.S. 246, 257 (1934) ("In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by *fair negotiations between an owner willing to sell and a purchaser desiring to buy*." (emphasis added)); *see also United States v. Miller*, 317 U.S. 369, 374 (1943) ("The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given', or, more concisely, 'market value fairly determined'. . . . It is usually said that market value is what a willing buyer would pay in cash to a willing seller.").

South Carolina courts have consistently applied this willing buyer willing seller definition of fair market value in condemnation cases. *Cty. of Charleston v. McAdory*, No. 2015-UP-370, 2015 WL 4555493, at *1 (S.C. Ct. App. July 29, 2015) ("Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." (quoting *Hous. Auth. of City of Charleston v. Olasov*, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984))).[3]

[3] *Accord Burroughs & Chapin Co. v. S.C. Dep't of Transp.*, 352 S.C. 535, 543, 574 S.E.2d 751, 755 (Ct. App. 2002) ("The trial judge's charge was correct to the extent that it stated the jury must find the fair market value of the property, which is what a willing buyer will pay a willing seller."); *City of N. Charleston v. Claxton*, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (observing trial court charged jury that "[f]air market value is the price a willing buyer would pay and a willing seller would accept in the ordinary course of business *when neither person is being compelled to act*" and finding the record reasonably supported jury's determination that comparable sales were

South Carolina condemnation law defines the constitutional requirement of just compensation, and its statutory equivalent of "the value of property taken," as the property's fair market value, which is that value a willing buyer will pay and a willing seller accept where neither party is under compulsion to enter the transaction. In view of this longstanding and well-established measure of just compensation, the lower court erred in permitting Mr. Hartnett to offer an opinion of value that did not reflect the fair market value of the Property taken by Public Railways.

C. The Cost Approach to Valuation Must Reflect the Price a Willing Buyer Would Pay for the Property at the Time of Condemnation.

Mr. Hartnett's opinion of just compensation was based on the cost approach to property valuation. (Trial Tr. vol. III, 386:25-387:5, 401:21-402:15). Mr. Hartnett did not value the Property using the more frequently used and reliable approaches of either sales comparison or income capitalization. (Trial Tr. vol. III, 401:5-402:119). The cost approach combines the raw land value of the property as if vacant with the cost to reconstruct or reproduce the improvements at the time of condemnation, and then deducts an estimate of accumulated depreciation on the improvements reflecting their age at the time of condemnation. (*See* Trial Tr. vol. III, 401:24-402:12). Even assuming the cost approach to value is appropriate in this case, which Public Railways disputes, the cost approach must still reflect that value a willing buyer would have paid for the Property at the time of condemnation. Mr. Hartnett testified that his cost approach valuation did not reflect what a willing buyer would have paid for the Property at the time of condemnation. (Trial Tr. vol. III, 414:10-415:15).

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not made under compulsion (emphasis in original)); *Olasov*, 282 S.C. at 608, 320 S.E.2d at 481 ("Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." (citing cases)).

Numerous courts and authorities have criticized use of the cost approach to valuation in condemnation actions for its unreliability. *See, e.g., United States v. Benning Hous. Corp.*, 276 F.2d 248, 250 (5th Cir. 1960) ("[R]eproduction cost evidence almost invariably tends to inflate valuation." (citations omitted)); *United States v. Certain Interests in Prop. in Champaign County*, 271 F.2d 379, 382 (7th Cir. 1959) ("[The cost approach] method generally is held to be one of the least reliable indicia of market value." (citations omitted)).

According to Real Property Valuation in Condemnation, published by the Appraisal Institute, the leading professional association for real estate appraisers, "[t]he usefulness of the cost approach is discounted in many condemnor appraisal guidelines." Appraisal Institute, Real Property Valuation in Condemnation 108 (2018) (Condemnor's Post Trial Motion). As an example of guidelines disfavoring the cost approach, the Appraisal Institute cites the following passage from the Uniform Appraisal Standards for Federal Land Acquisitions:

> While not inherently flawed, **the cost approach has often been misused**, leading a number of courts to identify the cost approach as "one of the least reliable indicia of market value" for the purpose of measuring just compensation. Indeed, as the Fifth Circuit observed, when improperly applied, "reproduction cost evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult." As a result, the cost approach is rarely acceptable as a stand-alone indication of value for federal acquisitions . . . .
>
> **[T]he cost approach as a means of measuring value "may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid."** Its relevance to market value therefore cannot be merely assumed in federal acquisitions; rather, the appraiser must demonstrate that application of the cost approach to a specific property would be relevant to market participants. . . . Federal courts agree that **reliance on the cost approach is improper "when no one would think of reproducing the property," or when no prudent investor would reproduce it for the figure or amount estimated as replacement or reproduction cost**. Thus courts reject the cost approach without "unequivocal evidence that the [improvements] involved would be reproduced by private investors at the risk of private capital."

Id. (emphasis added) (citing *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed. (Washington, D.C.: U.S. Government Printing Office, 2016), § 4.4.3-4.4.3.1, pp. 131-133).

Even where courts observe that reproduction cost may be an appropriate valuation methodology for measuring just compensation in a condemnation action, they still require competent testimony showing that a willing buyer would pay the cost to build or reproduce the subject property and would consider reproduction cost relevant to establishing the purchase price of the property. *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 (1949) ("Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost. So with reproduction cost, *when no one would think of reproducing the property*." (emphasis added)).[4] Where an expert cannot testify that a willing buyer would pay the cost to reproduce the property or consider the reproduction cost relevant to establishing a market price for the property, the expert should not be permitted to testify that reproduction cost equates to just compensation. *E.g., 55.22 Acres of Land, More or Less, in Yakima Cty., Wash.*, 411 F.2d at 435. This is exactly the result that should have happened in this case where Mr. Hartnett testified that his cost approach opinion of value did not reflect the amount a willing buyer would have paid for the Property at the time of condemnation.

[4] *Accord United States v. 55.22 Acres of Land, More or Less, in Yakima Cty., Wash.*, 411 F.2d 432, 435 (9th Cir. 1969) (approving the exclusion of reproduction cost value where party "did not offer to prove that a prudent investor would reproduce the improvements at the reproduction cost figure his expert witness was prepared to state" and "did not offer to show that willing vendees and vendors would deem reproduction cost less depreciation relevant in negotiating a purchase and sale of the property"); *United States v. Certain Interests in Prop. in Cumberland Cty., N.C.*, 296 F.2d 264, 270 (4th Cir. 1961) ("In other words, this court has in the past favored a broad rule of admissibility and consideration of evidence in condemnation cases; the *only condition has been that there be a showing that willing vendees and vendors* would deem such evidence or information relevant in their negotiations. It seems plain that a showing . . . to the effect that a reasonable investor would reproduce the project for the amount given as reproduction or replacement cost would be required before a willing vendee would consider such a figure relevant in his negotiations with a willing vendor." (emphasis added)).

D. Mr. Hartnett's Testimony Should Have Been Excluded Because it Did Not Comport with the Legal Standard of Just Compensation.

Public Railways moved in limine to exclude Mr. Hartnett's testimony because he had previously testified during his deposition that his opinion of value was not based on fair market value and did not reflect the value a willing buyer would have paid for the Property at the time of condemnation. (Trial Tr. vol. I, 48:18-49:20, 51:8-14). This motion was denied. (Trial Tr. vol. I, 70:8-10). When Mr. Hartnett was offered as an expert witness, Public Railways renewed its motion to exclude his testimony, which the lower court again denied. (Trial Tr. vol. III, 379:6-16). During trial, and consistent with his prior deposition testimony, Mr. Hartnett testified that his cost approach opinion of value did not reflect fair market value or the value a willing buyer would have paid for the Property at the time of condemnation. (Trial Tr. vol. III, 414:10-415:15). At the conclusion of Mr. Hartnett's testimony, Public Railways renewed its motion to exclude his testimony. (Trial Tr. vol. III, 442:2-25, 453:13-18). This renewed motion was also denied. *Id.* The circuit court erred in denying Public Railways' motion to exclude Mr. Hartnett's testimony.

The circuit court serves a gatekeeper for expert testimony under Rule 702, SCRE. Before expert testimony is presented to the jury, the court must "ensur[e] the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Reliability is the "central feature of Rule 702 admissibility." *Id.* "[T]he trial court must evaluate the substance of the testimony and determine whether it is reliable." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

Here, the circuit court's decision to admit Mr. Hartnett's testimony over Appellant's objection was an abuse of discretion because it ignored decades of legal precedent defining just compensation as fair market value, and willing buyer, willing seller, under no compulsion. The circuit court did not evaluate the reliability of Mr. Hartnett's valuation methodology—not based

on fair market value or a willing buyer—given decades of case law defining just compensation as fair market value and willing buyer. Courts have long instructed that in condemnation actions the cost approach to value must reflect what a willing buyer would have paid for the property at the time of condemnation. The circuit court did not evaluate the reliability of Mr. Harnett's cost approach that explicitly excluded consideration of what a willing buyer would have paid for the Property at the time of condemnation. This was error.

The admission of Mr. Hartnett's testimony was prejudicial because there is a reasonable probability that it influenced the jury. Mr. Harnett testified to an opinion of value and just compensation of $4,580,000, and the jury returned a verdict of $3,750,000. Setting Mr. Hartnett's non-fair market value testimony aside, the only competent evidence in the record of the Property's fair market value was Mr. Fabian's testimony concerning Mr. Ford's appraised value of the Property of $1,800,000, (Trial Tr. vol. II, 264:7-265:12), and testimony from Public Railways' expert appraiser Deborah Haskell who testified that the fair market value of the Property based on the sales comparison and income approaches was $1,750,000, (Trial Tr. vol. III, 482:6-23). Viewing the verdict in light of the evidence of fair market value, there is a reasonable probability that the jury's verdict was influenced by Mr. Hartnett's inadmissible testimony.

Accordingly, Public Railways was prejudiced by the erroneous admission of Mr. Hartnett's testimony. Once Mr. Hartnett's testimony is excluded, a verdict should be directed in accord with the remaining evidence of fair market value in the amount of $1,800,000, or in the alternative, a new trial should be granted.

III. The Lower Court Erred in Not Directing a Verdict in the Amount of $1,800,000.

Public Railways moved for directed verdict at the close of Landowner's case-in-chief on the ground that Mr. Hartnett's expert opinion testimony should have been disregarded and excluded from evidence because his opinion of just compensation was not based on the legal

definition of fair market value.[5] (Trial Tr. vol. III, 444:2-15). Public Railways requested that judgment be entered based on the only record evidence of just compensation at that point in the trial of $1,800,000. *Id.* Public Railways renewed its motion for directed verdict at the close of evidence, preserving this issue for review. (Trial Tr. vol. III, 525:1-13). The lower court denied the motion for directed verdict. (Trial Tr. vol. III, 525:18-20). Public Railways moved for judgment notwithstanding the verdict during post-trial motions, (Condemnor Post Trial Motions), which was denied (Order on Condemnor's Post-Trial Motions).

Once Mr. Hartnett's testimony is properly excluded, the remaining evidence presented at trial of just compensation was for $1,800,000 or $1,750,000. Because Public Railways requested that the jury not return a verdict for anything less than $1,800,000, the amount it tendered at the beginning of this case, (Trial Tr. vol. I, 92:8-16), a verdict should have been directed in the amount of $1,800,000. The lower court erred in not directing a verdict for $1,800,000.

A. Standard of Review

Pursuant to Rule 50(a), SCRCP, a party may move for a directed verdict when a trial presents only a question of law. If a party's motion for directed verdict is denied, it may later move for judgment notwithstanding the verdict to have the judgment set aside. Rule 50(b), SCRCP. The party moving for judgment notwithstanding the verdict must have renewed its motion for a directed verdict at the close of all the evidence. *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 196, 781 S.E.2d 534, 541 (2015).

On a motion for directed verdict, the evidence and all reasonable inferences are viewed in the light most favorable to the nonmoving party. A denial of a directed verdict may be reversed where there is an error of law. *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714

[5] *See* Argument II.

S.E.2d 869, 873 (2011). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Maybank v. BB&T Corp.*, 416 S.C. 541, 568, 787 S.E.2d 498, 512 (2016) (citation omitted). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Id.* at 568-69, 787 S.E.2d at 512 (internal quotation marks and citation omitted).

B. A Verdict Should Have Been Directed Based on the Evidence of Fair Market Value.

A verdict should have been directed at the close of Landowner's case-in-chief or at the close of evidence in the amount of $1,800,000. In view of Mr. Hartnett's testimony that his valuation was not fair market value, the only evidence admitted during trial of fair market value was Mr. Fabian's testimony concerning Mr. Ford's appraised value of the Property of $1,800,000, (Trial Tr. vol. II, 264:7-265:12), and testimony from Public Railways' expert appraiser Deborah Haskell, who testified that the fair market value of the Property based on the sales comparison and income approaches was $1,750,000, (Trial Tr. vol. III, 482:6-23). Because Public Railways told the jury to return a verdict no lower than $1,800,000, a verdict should have been directed in this amount based on the evidence presented at trial.

During Landowner's case-in-chief, it introduced the initial offer letter from Public Railways to Landowner. (L. Ex. 66). Mr. Fabian testified that Mr. William Ford appraised the Property for Public Railways at $1,800,000, which Landowner rejected. (Trial Tr. vol. II, 264:7-265:12). Apart from Mr. Fabian's testimony, no other witness for Landowner testified to the fair market value of the Property. A landowner is permitted to offer its opinion of property value, but Mr. Fabian chose not to testify as to Landowner's opinion of value.

During Public Railways' case-in-chief, Ms. Deborah Haskell testified that in her expert opinion the Property was valued at $1,750,000 at the time of condemnation. (Trial Tr. vol. III,

482:6-23). Ms. Haskell valued the Property using the sales comparison and income capitalization approaches to value. (Trial Tr. vol. III, 483:2-4; 492:14-16). She testified that her valuation was based on fair market value, or the willing buyer, willing seller, under no compulsion concept. (Trial Tr. vol. III, 482:14-483:1). Under the sales comparison approach, Ms. Haskell testified that she was able to locate sales of similar buildings near the Property and based on these sales the Property's value was $1,850,000. (Trial Tr. vol. III, 483:7-484:25; 492:7-13). Ms. Haskell also testified that the Property could be leased and that based on market rents of similar buildings, the Property's value was $1,600,000. (Trial Tr. vol. III, 492:14-493:11). Ms. Haskell weighted the sales comparison approach slightly more than the income approach and testified that her reconciliation of fair market value for the Property at the time of condemnation was $1,750,000. (Trial Tr. vol III, 494:8-495:10).

Apart from Ms. Haskell's testimony and Mr. Fabian's testimony concerning Mr. Ford's appraised value, no other witness testified to the fair market value of the Property at the time of condemnation. Viewing this evidence in a light most favorable to Landowner, a verdict should have been directed in the amount of $1,800,000. Based on the competent testimony offered on fair market value, a jury could have arrived at no other reasonable conclusion other than a verdict in the amount of $1,800,000. Accordingly, Appellant asks that the circuit court's decision be reversed and a verdict entered in the amount of $1,800,000.

IV. The Court Erred in Charging the Jury That if it Found Fair Market Value Unfair to Either Party, "Some Other Formula May Be Used."

Just compensation is measured by a property's fair market value. The court erred in charging the jury that it could ignore fair market value if it determined fair market value was unfair to either party, in which case "some other formula" could be used. This charge was an incorrect statement of law and served only to confuse the jury and affect the jury's verdict that was greatly

in excess of the testimony on the Property's fair market value. Accordingly, a new trial should be granted.

A. Standard of Review

A court is required to charge only the current and correct law of South Carolina. *State v. Adkins*, 353 S.C. 312, 317, 577 S.E.2d 460, 463 (Ct. App. 2003) (citing *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002)). Review of a jury charge is considered in light of the evidence and issues presented at trial. *Id.* at 318, 577 S.E.2d at 463. "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

B. It Was Error to Charge the Jury That it Could Use "Some Other Formula" to Arrive at Just Compensation.

Just compensation is measured by fair market value. The circuit court charged the jury on the fair market value measure of just compensation but then give it discretion to ignore this measure if the jury determined that fair market value "is unfair to either party," in which case "some other formula may be used." (Trial Tr. vol. IV, 587:15-19).

Specifically, the court charged the jury as follows:

> Let's look at the damages formula. The approved formula for determining damages in a condemnation case provides for payment to the Landowner a fair market price of the property taken. *If that formula is unfair to either party, some other formula may be used.*

(Trial Tr. vol. IV, 587:15-19 (emphasis added)). The court gave no further instruction, factors to consider, or direction on calculating and applying "some other formula." This incorrect jury charge only served to confuse the jury on the measure of just compensation and gave it license to ignore the law and testimony on fair market value. The jury did in fact ignore the law and

testimony on fair market value in arriving at a verdict of $3,750,000. (Trial Tr. vol. IV, 598:18-20).

There were only three valuation figures testified to at trial, and only two of which were based on fair market value: (1) Landowner's representative Mr. Fabian testified to William Ford's appraised value of $1,800,000, (Trial Tr. vol. II, 264:7-265:12); (2) Mr. Hartnett testified to a cost approach appraised value of $4,580,000, not based on fair market value, (Trial Tr. vol. III, 386:25-387:5, 414:10-415:15); and (3) Ms. Deborah Haskell testified to fair market value of $1,750,000, (Trial Tr. vol. IV, 482:6-23). The court's jury charge gave the jury the ability to ignore the fact that Mr. Hartnett's valuation was not based on fair market value and return a verdict significantly in excess of the testimony on fair market value.

Mr. Hartnett freely admitted that a willing buyer would not have purchased the Property at his reproduction cost valuation. (Trial Tr. vol. III, 414:10-415:4). In support of the jury charge on "some other formula," Landowner argued from a single sentence of dicta in *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 188 S.E.2d 188 (1972)[6], that Mr. Harnett could testify to a value that did not represent fair market value and willing buyer, and that the jury could use whatever formula it decided was most fair. (Trial Tr. vol III, 445:1-5). This was an expansive and incorrect reading of *Carolina Power*. In more than forty-five years since the South Carolina Supreme Court's decisions in *Carolina Power*, the case has never been cited for the proposition

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[6] The cited portion of Carolina Power reads as follows:

> The approved formula for determining damages in condemnation cases in this state provides for payment to the landowner of fair market price of property taken, plus payment for diminution in value caused to The remainder of the landowner's property. If that formula is unfair to either party some other formula may be used. For example, if church property is involved, another formula would be required because there is no fair market value for church property.

Carolina Power & Light Co., 258 S.C. at 217, 188 S.E.2d at 193.

that just compensation can be based on anything other than fair market value, and certainly never for the proposition that just compensation is arrived at first through the jury's determination of the "fairness" of the evidence on fair market value and then through an application of such an amorphous concept as "some other formula" that the jury determines is most fair to the parties. A jury does not have the discretion to ignore the legal definition of just compensation as equating to fair market value, and the court erred in instructing the jury as such.

In fact, when properly viewed, *Carolina Power* clearly supports Public Railways' position that fair market value is the measure of just compensation. Carolina Power argued that it was error for the landowner's expert witnesses to testify to a value of just compensation that was something other than pure fair market value because their opinion of value blended fair market value with speculative profits that would be earned after future development. *Carolina Power*, 258 S.C. at 211-12, 188 S.E.2d at 190 ("The heart of the question is whether the landowner's witnesses blended into their appraisals not only fair market value, but also, profits which might be brought into being by promotion and development of a rural residential subdivision."). The *Carolina Power* court repeatedly referenced "fair market value" as the proper measure of just compensation and it did not sanction giving the jury the discretion to develop its own formula of just compensation.[7]

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[7] *Carolina Power*, 258 S.C. at 212, 188 S.E.2d at 190 ("A careful reading of the record in this case strongly indicates that the landowner's witnesses' appraisals were not based entirely upon their estimation of the *fair market value* of the condemned property . . . ."); *id.* at 214, 188 S.E.2d at 191-92 ("It is not unusual in the trial of condemnation cases for judges to be plagued with the duty of distinguishing reasonable *fair market value* of property taken, on the one hand, from profits which might be earned by skillful development and improvement of the property taken, on the other hand."); *id.* at 214-15, 188 S.E.2d at 192 (stating that potential highest and best use of the property "is one of the factors which determines *market value*"); *id.* at 215, 188 S.E.2d at 192 ("The uses which may be considered must be so reasonably probable as to have an effect on the *present market value* of the land . . . ."); *id.* at 216, 188 S.E.2d at 192 ("The *fair market value* of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers; it is the *fair market value* of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in

The circuit court's charge to the jury that it could ignore fair market value and come up with its own formula of just compensation if "fairness" so dictated was erroneous and prejudicial. This charge either confused the jury or impermissibly gave it discretion to deviate from the legal definition of just compensation as fair market value, which has been the bedrock of South Carolina condemnation law for over seventy years. The substance of this jury charge did not accurately reflect the current law of South Carolina, but instead introduced a new and amorphous "unfairness" exception into the fair market value standard.

This erroneous charge was highly prejudicial to Railways because it gave the jury freedom to completely disregard the evidence on fair market value when determining just compensation. The only competent evidence in the record on fair market value was the appraised values of Mr. Ford and Ms. Haskell, which were $1,800,000 and $1,750,000, respectively. Mr. Hartnett testified to a non-fair market value reproduction cost valuation of $4,580,000. The jury delivered a verdict well in excess of the evidence on fair market value and much closer to Mr. Hartnett's testimony of non-fair market value. Based on the evidence in the record, it is reasonable to conclude that the jury could not have returned a verdict of $3,750,000 without this erroneous charge confusing the jury and permitting it to ignore the testimony on fair market value in favor of a greatly inflated reproduction cost valuation.

The lower court erred when charging the jury that it could ignore fair market value and arrive at "some other formula" if fairness so dictated. As a result of this erroneous charge, Public Railways was prejudiced when the jury returned a verdict significantly in excess of the testimony on fair market value. Accordingly, a new trial should be granted.

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accordance with its best and highest capabilities . . . .") (emphasis added to each quoted passage above).

V. The Court Erred in Admitting an Email from a Non-Testifying Certified Public Accountant Containing the Accountant's Subjective Opinions Prepared For Condemnation.

Over Appellant's objection, the circuit court admitted an email from Landowner's Certified Public Accountant containing subjective opinions on the replacement cost for the building at the time of condemnation of $4,024,500. Appellant objected to this evidence as hearsay and the court agreed that it was hearsay, but admitted it under the business record exception to hearsay. This was error because Rule 803(6), SCRE, explicitly excludes subjective opinions from the business records exception and because an email created by Landowner's CPA for use in the condemnation is not a record of a regularly conducted business activity. Admission of the CPA's cost estimate prejudiced Appellant because it bolstered Mr. Harnett's cost approach valuation by providing a second purported cost estimate in the four-million-dollar range and because it was generated by a CPA, whose professional designation alone carries a certain amount of public credibility. The erroneous admission of the CPA's cost estimate prejudiced Public Railways and a new trial should be granted.

A. Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003) (citation omitted). "The trial judge's determination of admissibility will not be disturbed absent abuse of discretion resulting in prejudice to the complaining party." *Id.* (citations omitted). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.* (citing *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)).

B. Third Party Certified Public Accountant's Replacement Cost Estimate Should Have Been Excluded from Evidence.

Public Railways moved for a new trial based on the erroneous and prejudicial admission of an email between Landowner and its Certified Public Accountant wherein the CPA claims to have taken the historical cost to build the subject property and adjusted it for inflation to the time of condemnation. (Landowner Exhibit 63; Condemnor's Post Trial Motions). Landowner introduced the CPA's email into evidence through Mr. Fabian. Public Railways objected to the introduction of the email on hearsay grounds because it included statements and subjective opinions from someone other than Mr. Fabian. (Trial Tr. vol. II, 265:20-271:21). Landowner argued that the CPA's email fell under the hearsay exception for business records. The Court agreed that the email was hearsay, but overruled Public Railways' objection and permitted Landowner to introduce the email into evidence under the business records exception to hearsay. (Trial Tr. vol. II, 269:23-24).

The admission of the CPA's email over Public Railways' hearsay objection was error because it was not a business record and because it contained numerous subjective opinions on the cost to rebuild the Property. The CPA's subjective opinions were highly prejudicial because they provided a second cost estimate prepared by a licensed CPA that was not subject to cross examination and that only served to bolster Mr. Hartnett's cost approach valuation. Even were Landowner's CPA present at the trial, he would not have been competent to testify about just compensation, property value, and the reproduction cost approach to valuation. Landowners and licensed real estate appraisers are the only persons permitted to offer opinions of property value in condemnation cases. *See Lewis v. State Highway Dep't*, 293 S.E.2d 434, 436 (S.C. 1982). Individuals who testify to property value without being properly licensed appraisers are subject to criminal penalties. S.C. Code Ann. § 40-60-30. The erroneous introduction of this highly

prejudicial email from an individual who would not have been allowed to testify as to property value warrants a new trial.

The business records exception to hearsay applies to documents that are kept in the course of regularly conducted business activity and that are prepared as part of the regular practice of that business activity. Rule 803(6), SCRE. Even where these requirements are met, subjective opinions and judgments found in business records are inadmissible. Rule 803(6), SCRE.

Landowner's representative, Mr. Fabian, testified that he built the Property to house his audio/visual business Lifespaces. (Trial Tr. vol. II, 169:19, 240:7-9). Mr. Fabian testified at great length about the preparation of the building for Lifespaces' regular business activity in audio/visual services. Landowner is not in the business of accounting, calculating building costs, inflating ten-year-old costs to present day value, or developing land value estimates, and the information sought to be admitted pursuant to the business records exception was not prepared as part of Landowner's normal business operations. The fact that the document was an e-mail received by Landowner does not by default make it a business record. *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) ("While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B)."). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." *Id.* In fact, Landowner's representative Mr. Fabian testified that he requested his CPA to prepare a cost estimate because of the pending condemnation of the subject property. (Trial Tr. vol. II, 270:2-271:19). By Landowner's own admission, this document was <u>not</u> prepared

in the normal course of his business but was instead specially created for this condemnation. Therefore, it was not a record of a regularly conducted business activity.

Moreover, Landowner introduced this email solely for the subjective opinion of its CPA, and for that reason the business records hearsay exception also did not apply. Under a plain reading of Rule 803(6), the South Carolina Supreme Court has held that "[t]he business records exception does not allow subjective opinions to be introduced into evidence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (2009).

The email at issue was a correspondence between Landowner and CPA Brandon Hoffman. In pertinent part, Mr. Hoffman wrote the following to Mr. Fabian:

> At your request, we extracted the actual cost associated with 1799 Meeting Street Road from various schedules. From these schedules, you requested that we develop an estimated cost to rebuild your facility by applying current labor rates, land values, and other related financial factors. The results of your analysis listed below are estimates and do not represent audited numbers nor do they reflect actual contractor bid estimates.
>
> | | |
> |---|---|
> | Building | $3,134,000 |
> | Land | 740,000 |
> | Land Improvements | 150,000 |
> | Total | $4,024,500 |
>
> Given the unique nature of the building and the extensive amount of personal property/equipment used for the building systems to function, we included both an estimate of the cost of the structure as well as the related systems equipment in arriving at the building cost estimate.

(L. Ex. 63).

As is evident, Mr. Hoffman's email contained the following subjective opinions that should not have been admitted into evidence without his being present, testifying, and subject to cross examination: (1) estimated actual cost to build 1799 Meeting Street extracted from schedules and inflated for labor rates and "other related financial factors"; (2) the building was of "unique nature"; (3) estimated cost of equipment for the building systems to function; (4) land value taken

from another party, Daniel Atwell (double hearsay); and (5) an inflation factor of 1.73% per year. (L. Ex. 63).

The admission of the CPA's email was prejudicial because it bolstered Landowner's argument through Mr. Hartnett that the cost approach was the appropriate measure of just compensation and that the total cost to build the subject property at the time of condemnation was in the four-million-dollar range. It was also prejudicial because CPAs, simply by the fact of their professional designation, carry a certain amount of public standing in the community at large. Moreover, the CPA's email provided a subjective value by a third-party who was not offered by Landowner as a witness, whose opinion was not subject to cross examination or review, and who would not have been qualified to offer an opinion of property value in a condemnation action. No documents were introduced by Landowner to substantiate this alleged cost value prepared by its CPA. This email was clearly prejudicial and influential for the jury.

Further demonstrating the email's great importance to Landowner, it was the only exhibit highlighted by Landowner during its reply in closing argument, where it asked the jury to return a verdict based on the cost to rebuild the property. (Trial Tr. vol III, 560:6-18).

For these reasons, it was error to admit the cost-estimate email from Landowner's CPA into evidence and permit its subjective opinions to be repeatedly presented to the jury. In light of jury's verdict of $3,750,000, there is a reasonable probability that this document influenced the jury's verdict. Accordingly, a new trial should be granted.

CONCLUSION

The lower court erred in admitting Mr. Hartnett's cost approach opinion of value that was not based on fair market value and that did not reflect the value a willing buyer would have paid for the Property at the time of condemnation. The only evidence of the Property's fair market value was the appraised values from Mr. Ford and Ms. Haskell in amounts of $1,800,000 and

$1,750,000, respectively, and the court should have directed a verdict reflecting these fair market valuations.

The lower court also erred in charging the jury that it could ignore evidence of the fair market value if determined that fair market value was unfair to either party, in which case it could then use "some other formula." This was an incorrect statement of law and only served to confuse the jury and inflate the jury's verdict.

Additionally, the lower court erred in admitting an email from Landowner's CPA into evidence over Public Railways' hearsay objection where the email contained subjective opinions on the cost to rebuild Landowner's property and where the email was prepared in response to the condemnation. This email was highly prejudicial because it provided a second cost estimate prepared by a licensed CPA that was not subject to cross examination and that only served to bolster Mr. Hartnett's inadmissible cost approach valuation.

In light of these significant errors, Public Railways requests that a verdict be directed in the amount of $1,800,000, reflecting the testimony on fair market value and the minimum amount Public Railways asked the jury to return for Landowner. In the alternative, Public Railways requests that a new trial be granted based on the errors identified herein.

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Columbia, South Carolina
October 16, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr.
Case No. 2017-CP-10-5382
Appellate Case No. 2019-001125

South Carolina Department of Commerce,
Division of Public Railways,

Appellant,

v.

Gateway Properties of Greater Charleston, LLC,

Respondent,

and

NBSC a division of Synovus Bank, VFC Partners 15 LLC, Capella Carolinas, LLC, Donivan Glassburn, and the Loft Pilates Center, LLC,

Other Condemnees.

PROOF OF SERVICE

I, Connie W. Grugan, legal assistant to the law firm of Lewis Babcock L.L.P., hereby certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to said counsel addressed as follows:

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This 16th day of October, 2019.

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October 16, 2019

HAND DELIVERED
Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: South Carolina Department of Commerce, Division of Public Railways v. Gateway Properties of Greater Charleston, LLC, et al.
Case No. 2019-001125

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal in regard to the above-referenced matter for filing with your office. Please return a clocked copy via our courier.

By copy of this letter, we are hereby serving a copy of same upon opposing counsel.

Very truly yours,

Keith M. Babcock

KMB:cg
Enclosure
cc: G. Trenholm Walter, Esquire
John Phillips Linton, Jr., Esquire
Robert S. Dodds, Esquire