IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Alex Kinlaw, Jr., Circuit Court Judge

Civil Action 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.

BRIEF OF RESPONDENT, GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Constitution

Secondary Sources

STATEMENT OF THE ISSUES ON APPEAL

I. Whether the circuit court erred in admitting the testimony of Respondent's appraiser, Thomas F. Hartnett, where Railways agreed he was qualified as an expert in the field and where his opinion on just compensation utilized one of the three recognized approaches to real property valuation?

II. Whether the circuit court erred in denying Railways' motions for a directed verdict of $1,800,000 when substantial evidence supported the verdict, including evidence of a cost estimate and testimony concerning the costs of construction of the Property in addition to Hartnett's testimony?

III. Whether the circuit court's jury charge, the challenged portion of which was a verbatim excerpt from a South Carolina Supreme Court case, was, as a whole, a correct statement of the law?

IV. Whether the circuit court abused its discretion in admitting into evidence, over Railways' hearsay objection, an e-mail communication received by the Respondent as part of its regularly conducted business activities and sent to Railways' agent at his request.

STATEMENT OF THE CASE

This case involves an appeal from the verdict rendered in the trial of a condemnation case. The South Carolina Department of Commerce, Division of Public Railways ("Railways," "Condemnor," or "Appellant") commenced this condemnation action on October 19, 2017, with the filing of a Summons, Lis Pendens, Condemnation Notice, and Tender of Payment. **(Summons, R. pp. 35-36; Lis Pendens, R. pp. 37-39; Condemnation Notice and Tender of Payment, R. pp. 40-46; Affidavit of Alec Thompson, R. pp. 49-50, Notice of Filing, and Notice of Taking Possession, R. pp. 51-52)**. 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, ¶ 15, R. p. 43); (Notice of Taking Possession, R. pp. 51-52)** (". . . the amount of just compensation stated in the notice as determined pursuant to Section 28-2-70(a) was deposited therewith on [October 19, 2017]"). Railways demanded a jury trial to determine just compensation. **(Condemnation Notice and Tender of Payment, R. pp. 40-46)**

(stating "JURY TRIAL DEMANDED"); **(Affidavit of Alec Thompson filed 10-19-17, ¶ 3, R. p. 47)** (". . . the Condemnor demands a trial by jury.").

Gateway Properties of Greater Charleston, LLC ("Gateway" or "Respondent" or "Landowner") filed an Answer asserting that the sum offered by Condemnor was not just compensation for the taking and, like Railways, demanded a trial by jury to determine the amount of just compensation to be paid. **(Notice of Appearance and Answer to Condemnation Notice and Tender of Payment, R. pp. 53-54).**

The Honorable Alex Kinlaw, Jr., circuit judge, presided over the trial from March 25 through March 28, 2019. The ultimate fact to be decided by the jury was the amount of just compensation due to Gateway for the taking. On the fourth day of trial, and after almost four hours of deliberations, the jury returned a verdict in the amount of $3,750,000. **(Trial Tr. R. p. 765, l. 17-19)** (jury sent evidence at 10:13 a.m.); **(Trial Tr. R. p. 767, l. 8)** (verdict is reached at 2:05 p.m.); **(Trial Tr. R. p. 768, l. 15-20); (Verdict Form, R. p. 3).** Railways then requested the court poll the jury and each member of the jury affirmed the verdict was theirs. **(Trial Tr. R. p. 768, l. 25-p. 772, l. 17).**

Following the verdict, Railways filed a Motion for Judgment Notwithstanding the Verdict; a Motion for New Trial Nisi Remittitur; a Motion for New Trial; a Motion for New Trial Absolute; and Motion for New Trial Pursuant to the Thirteenth Juror Doctrine. **(R. pp. 105-131).** The circuit court issued its order denying all of Appellant's post-trial motions on June 4, 2019, that was filed on June 11, 2019. **(R. pp. 8-30).**

Gateway filed a Motion for Interest and Application for Litigation Expenses. **(Motion for Interest filed 4- 9-2019, R. pp. 185-186); (Application for Litigation Expenses filed 4- 9-2019, R. pp. 187-201).** By Order dated June 4, 2019, filed on June 10, 2019, the Court ordered that

interest in the amount of $224,383.56 and litigation expenses in the amount of $135,341.71 be added to the judgment. **(Order filed 6-10-19, R. pp. 4-7).** The Court issued an Amended Order on Landowner's Post-Trial Motion for Interest and Application for Litigation Expenses on June 25, 2019, filed July 12, 2019, awarding the same amounts as its earlier order. **(Order filed 7-2-19, R. pp. 31-34).**

Railways appealed the circuit court's order denying its post-trial motions by Notice of Appeal dated July 10, 2019. **(Notice of Appeal, R. pp. 247-248).**

STATEMENT OF THE FACTS

Prior to Railways' exercise of the government's right to condemnation, Gateway was the record owner of 1799 Meeting Street Road, Charleston (TMS #464-02-00-017) ("the Property"). Gateway is an entity comprised of members of the Fabian family. See **(Trial Tr. R. p. 390, l. 15-20).** The Property had been in the Fabian family for four generations, and Gateway had no intention of selling the Property. See **(Trial Tr. R. pp. 350, l. 15-p. 351, l. 3)** (Fred Fabian testifying that the Property has been in his family since his great-grandmother). The building on the Property was custom designed and constructed in 2006-2007 for the specific requirements of the intended tenant, Lifespaces, Inc., their family owned technology company, which does business as eLifespaces. **(Trial Tr. R. p. 351, l. 18-22); (Trial Tr. R. p. 352, l. 20-21); (Trial Tr. R. p. 356, l. 16-p. 357, l. 24).** Because the building was a custom, state of the art facility, the Fabian family structured the lease so that even improvements funded by the tenant became the property of the Gateway, the landlord. **(Landowner Ex. 6, R. pp. 775-792)** (lease); **(Trial Tr. R. p. 366, l. 20-p. 368, l. 25)** (Landowner explaining that the lease provided that as additional consideration for the rental of the premises, tenant agreed to make improvements to the building including but not limited to flooring, home theater, acoustic isolations and acoustic treatments, and

that such improvements become property of the landlord). As explained below, eLifespaces, the tenant, made numerous specialized improvements to the building, including various displays constructed into the building, featuring theaters, acoustical treatments, sound isolation, audio-visual equipment, energy management, security, network, and communications.

Fred Fabian started eLifespaces after many years working in various technology related businesses. **(Trial Tr. R. p. 351, l. 23-p. 352, l. 19)**. eLifespaces was first located in rental space in Mt. Pleasant, South Carolina, but in 2007 he moved the business to the newly constructed custom-built facility on the Property. **(Trial Tr. R. p. 352 , l.25-p. 353, l. 4); (Trial Tr. R. p. 427, l. 7-9); (Trial Tr. R. p.352, l. 5-18)** (the Fabian family owned the property so they could invest into special features that were important to the business). Gateway constructed the technology center on the Property with the encouragement of the City of Charleston that desired to bring a technology corridor to the neglected "neck" area of Charleston where the Property is located. **(Trial. Tr. R. p. 355, l. 15-p. 356, l. 15); (Trial Tr. R. p. 430, l. 2-l. 8)** (Fabian discussing Mayor Joe Riley cutting the ribbon at the grand opening of the eLifespaces facility); **(Landowner's Ex. 41 & 43, R. pp. 820-821).**

Fabian developed the concept for the facility and was intimately involved with the technical work for the building's unique features. **(Trial Tr. R. p. 369, l. 6-15).** The purpose of the building was to house and showcase the advanced technology systems built into the building that were sold by eLifespaces. See e.g., **(Landowner's Ex. 48, R. p. 822)** (Wall cutout demonstrating staggered stud construction used for acoustical isolation); **(Trial Tr. p. 433, l. 2-l. 9)** (discussing the stagger stud showcase); **(Trial Tr. R. p. 363, l. 2-l. 21)** (antenna tower). The Property is located next to an active railroad track, allowing an effective way of demonstrating the efficiency of the sound buffering elements constructed into the building. **(Trial Tr. R. p.355, l. 8-l. 14) (Trial Tr. R. p.**

399, l. 24-p. 400, l. 3) ("Q. [Mr. Walker] After all this work going in this [theater] room, did you test it with trains going by right outside? A. We did. Yes, sir. Q. Could you hear the trains? A. No, sir.")

Because the facility was built to test and feature advanced technological systems, it was not only designed to be cutting edge at the time it was built, but also to adapt to new technological advances in the future:

> Q. When you designed this building, what technology were you designing for? Were you doing it for the then-existing technology?
>
> A. Oh, no. We had to think way out. ***And you hear a lot of stuff about future proofing. And we had to get even beyond that concept and how it was built so that we could keep adapting to these changes.*** Like there's -- throughout the building, there was open railway on cable trays so that if I needed something different I could easily go lay it in a cable tray and route it to a specific area of the building.

(Trial Tr. R. p. 403, l. 1- l. 11) (double emphasis added). There is no other facility with these special technological features available in the marketplace:

> Q. [Mr. Walker] Do you know of any comparable property, physical property, in the Charleston region that has similar physical features to those that are in your building?
>
> A. No.
>
> Q. Do you know of any in the southeast region?
>
> A. No.

(Trial Tr. R. p. 417, l. 2-l. 8). The building's elements were so particular and unusual that it would not be feasible to convert a standard office space into a similar facility. **(Trial. Tr. R. p. 427, l. 3- l. 6)** ("Q. . . . Mr. Fabian, would it have been feasible to convert a typical office space to incorporate all those features that you showed us before lunch? A. No, sir."). Because these systems are embedded in the structure of the building itself and cannot be unplugged and moved,

Gateway is in the process of planning and permitting a replacement building to lease to eLifespaces that will include the same type of features. **(Trial Tr. R. p. 433, l. 10- l. 21).**

Two of the most notable features of the building were a state-of-the-art theater room and an acoustical room. See **(Landowner's Ex. 30, R. p. 814)** (theater room); **(Landowner's Ex. 38, R. p. 819)** (acoustical room). The construction of the theater room included detailed calculations and custom work to achieve the acoustical isolation and highest-level viewer experience. Fabian, who trained in theater design at the Skywalker Ranch in California and is certified by THX in designing theaters, played an important technical role in designing the advanced theater room. **(Trial Tr. R. p. 369, l. 20-370, l. 21).** The theater room was designed first and the remainder of the building designed around it. **(Trial Tr. R. p. 369, l. 24-p. 370, l. 6)** (theater room designed before the remainder of the building structure and then the building was designed around it).

Many steps were involved in accomplishing the desired level of acoustical isolation, including constructing the theater room as a floating shell. Specifically, the walls are comprised of two walls using special floating wall construction methods. **(Trial Tr. R. p. 373, l. 18-p. 375, l. 3).** As explained by Fabian: "So we've floated these exterior walls, and then we do it again interiorly so that there is no possible way sound can penetrate through both of these walls." **(Trial Tr. R. p. 373, l. 25-p. 375, l. 3); (Trial. Tr. R. p. 391, l. 24-p. 392, l. 8)** ("But right there [indicates] is where we take an acoustical bracket, if you will, and then slide through -- this [indicates] gets mounted to the stud. And if you look at it, this is rubber, so when I slide this through and then mount the sheetrock to it, technically I've created a barrier between the sheetrock and the stud. So this rubber material, this acoustical absorption material, will -- that vibration that occurs from sound hitting the sheetrock gets absorbed into that material.").

The floating wall construction included steel framing and two layers of special, extra heavy sheet rock, called "QuietRock," which has steel built into the middle of it and requires special screws for handing. **(Landowner's Ex. 23, R. p. 808)** (photo of the inside of the theater room wall demonstrating the sounds barrier system); **(Trial Tr. R. p. 393, l. 4-l. 13)** (discussing that QuietRock "has steel in the middle of this sheetrock, so it requires even special types of screws to get through it to attach it to the hat channel."); **(Landowner's Ex. 24, R. p. 809)** (photo of specialty sheetrock called "QuietRock"). The QuietRock is more than three times heavier than standard sheetrock. See **(Trial Tr. R. p. 375, l. 4-l. 8).** ("Now, keep in mind that the sheetrock, when we start talking about that is remember I told you the difference between a standard piece of sheetrock that weighs 55 pounds and a -- one of these things that weighs 180 pounds.").

The ceiling of the theater room was constructed using special shock absorbers and multiple layers designed to prevent sound from penetrating through either the floors or the ceiling. See **(Trial Tr. R. p. 377, l. 2- l. 17)** (Fabian discussing that the ceiling of the theater room is not fixed—it is suspended in air using special shock absorbers made by Mason Industries); **(Landowner's Ex. 21)** (Theater room flooring); **(Trial Tr. R. p. 388, l. 11-l. 22)** (Fabian explaining that the theater room flooring includes multiple layers and shock absorbers). Even the doorway threshold was constructed in a way to prevent sound penetration. See **(Landowner's Ex. 31)** (entrance to the theater room); **(Trial Tr. R. p. 398, l. 25-p. 399, l. 13)** (Fabian discussing the threshold to the theater room, which show the elevation created to make room for the special flooring and isolation of the threshold to eliminate any sound transferring to and from the room).

In addition to isolating the theater room from outside noise, the room was specially designed for optimal sound reflection and absorption:

Q. . . . What is this a design of?

> A. This was the preliminary design for the theater. In other words, when you do a real THX theater, not only do you hear my voice but you're going to hear it reflected off of a wall. And the goal in a theater is to replicate the true sound, not total absorption but a reflection so that there's not so much reflection where -- like in this room, terrible -- echoes. I can hear echoes everywhere. In this kind of room, you would not hear an echo.

(Trial Tr. R. p. 373, l. 5-15). The acoustical treatment included custom millwork specifically calculated to diffuse and reflect sounds at particular angles, absorption material and other acoustical material used to cover absorption material and invisible speakers. See **(Landowner's Ex. 14, R. pp. 795-798)** (acoustic treatments for the interior of the theater room); **(Trial Tr. R. p. 378, l. 17-p. 380, l. 1)** (Fabian discussing some of the acoustical treatments in the theater room such as the special millwork, barrel diffusers and absorption and reflection panel); **(Landowner's Ex. 15, R. pp. 799-801)** (calculations used in the construction of the theater room); **(Landowner's 25 and 26, R. pp. 810-811)** (blocks in the theater room); **(Trial Tr. R. p. 394, l. 7- l. 22; p. 395, l. 10-l. 16)** (Fabian explaining the wood blocks used to deflect sound for optimal acoustical experience in the theater room); **(Landowner's Ex. 27, R. 812)** (columns utilized in the theater room); **(Trial Tr. R. 396, l. 7-18)** (Fabian discussing columns that were hand-manufactured to diffuse sounds similar to the barrel diffusing millwork); **(Landowner's Ex. 28, R. 813)** (absorption material being installed in the ceiling of the theater room); **(Trial Tr. R. p. 398, l. 4-l. 11)** (Fabian discussing the fabric acoustical material used to cover speakers or absorption material in the theater room as seen in Landowner's Exhibit 30). The detailed approach to the theater room was not limited to optimizing the sound—the viewer experience, including field of view was considered. **(Trial Tr. R. p. 375, l. 25-p. 376, l. 13)** (Fabian discussing calculations made in design of the theater room related to field of view, designed to combat viewer fatigue through building design).

Next to the theater room was an acoustical room that was constructed using the same noise-muffling construction methods as the theater room, but at a lower level of treatment. **(Landowner's Ex. 38, R. p. 819)** (acoustical room); **(Trial Tr. R. p. 389, l. 12-p. 390, l.13)** (Fabian explaining that the acoustical room is just a step-down from the theater room); **(Trial Tr. R. p. 413, l. 9-p. 414, l. 2)** (Fabian discussing some of the uses of the acoustical room: video calibration, ISF calibration, and testing speaker quality and performance). While not a floating shell inside another floating shell like the theater room, the acoustical room utilized special acoustical techniques including a custom subfloor and staggered stud wall construction. See **(Landowner's Ex. 22, R. p. 807)** (special flooring in the acoustical room).

The special construction of the theater room and acoustical room created a substantially greater dead load than traditional construction, requiring the superstructure to be built with steel and concrete along with extra steel supporting members, to sustain the building's unusually heavy features. See **(Landowner's Ex. 19, R. p. 804)** (building being constructed using structural steel and concreate); **(Landowner's Ex. 20, R. p. 805)** (steel framing); **(Trial Tr. R. p. 387, l. 5- l.16)** (Fabian explaining that the weight of those acoustical rooms on the west side of the building required additional structural support); **(Trial Tr. R. p. 375, l. 9-l. 15)** ("So we've got tons of load issues, and we have structural steel elements that -- because not only on the sides, we're floating this above. I don't want that stuff falling down on anybody's head. So you have to create reinforced steel above you, to support this kind of weight, so that these kinds of ceilings aren't falling down."); **(Trial Tr. R. p 357, l. 8-l.9)** ("...these acoustical rooms weigh, gosh, in excess of twenty-five tons."); **(Trial Tr. p. 386, l. 10-l.1 5).**

Fabian testified to many other customized systems that were incorporated into the building itself. Special lighting control systems were installed in the building, providing real-time energy

usage monitoring, reporting, and controlling. **(Trial Tr. R. p. 372, l. 19-22); (Landowner's Ex. 34, R. 817)** (lighting control panel); **(Trial Tr. R. p. 404, l. 20-p. 405, l. 22)** (Fabian discussing special lighting control systems built into the building and that this type of system was not available in eLifespaces prior space located in a shopping center); **(Trial Tr. R. p. 405, l. 5-l. 8)** (energy use monitoring, reporting, and controlling). The building included an electronic storm shutter system that was invisible when disengaged and programable to automatically engage at particular wind speeds. See **(Landowner's Ex. 33, R. p. 816)**; **(Trial Tr. R. p. 401, l. 25-p. 402, l. 23)** (Fabian explaining that the electronically controlled storm shutters were not visible unless in use because of a built-in storage cavity and were able to be programed to close if wind speeds hit a particular threshold.)

With its many advanced electronic systems, the building necessitated a power conditioner that would purify the power before transferring it to electronics and a windowless electronics workroom that was used to test new technology and demonstrate features such as invisible speakers. See **(Landowner's Ex. 34, R. p. 817)** (power conditioner); **(Trial Tr. R. p. 403, l. 25-p. 404, l. 19)** (Fabian discussing that power conditioning is important for high level performing technology). **(Landowner's Ex. 36, R. 818)** (electronic bench area); **(Trial Tr. R. p. 410, l. 20-p. 412, l. 18)** (discussing the windowless room built to house and test some of the major electronic devises and display the backside of invisible speakers so customers could see them). Because the building was designed as a technology center with extensive computer systems and electronics, it was constructed with an advanced grounding system, utilizing a grounding mesh and rebar bonded to the steel structure, to protect the sophisticated electronics located in the building. **(Landowner's Ex. 17, R. 802)** (foundation and grounding system); **(Trial Tr. R. p. 384, l. 4-14)** (Fabian discussing the special grounding system utilizing a grounding mesh within the concreate slab of

the building, which is bonded to the rebar and pilings, which is then bonded to the steel in the building); **(Landowner's Ex. 18, R. p. 803)** (grounding system); **(Trial Tr. R. 385, 7- l. 15)** (Fabian explaining that the purpose of advanced grounding system is to avoid damage to any of the special electronic equipment housed in the building).

Gateway was officially notified of the condemnation of the Property on July 21, 2016, when Fabian received a letter from Oscar Rucker of Michael Baker International, Railways' right of way acquisition agent. Rucker informed him that Railways was going to take the Property for the Navy Base Intermodal Facility and suggested a meeting to explain the project and the appraisal process. **(Landowner's Ex. 53, R. p. 823)**; **(Trial Tr. R. p. 438, l. 16-19).** Following the letter, on August 4, 2016, Fabian met with Rucker, showed him the building, explained the special features, and further explained that Gateway would have to build a replacement building at another location if Railways proceeded with its condemnation. **(Trial Tr. R. p. 440, l. 10-p. 442, l. 9).** On August 5, 2016, Fabian sent Gateway's lawyer, Robert Dodds, and Rucker an e-mail summarizing the meeting on site with Rucker and one of his associates. **(Landowner's Ex. 55, R. pp. 824-825**). In that e-mail Fabian memorialized the following:

* * *

- . . . [Railways] would be seeking an appraisal which should be in hand within 90 days at which time they would make an offer. Rucker stated that they use an appraiser (last name Ford) from Summerville, SC for these efforts. . ."

- They set forth a timeline of 18 months at which time the rail would want to start their construction process and we would need to be out.

* * *

- I asked if they could provide assistance with governmental entities (Cities of Charleston and North Charleston) to expedite building permits, etc. to facilitate our relocation – responding they were limited in these regards.

- Expressing concern over the timeline, I explained the ***specialized requirements*** we would have in the preparation of another facility and the background that led us to this location.

- I gave them a brief tour of the facility, including the "floating" theater, acoustical rooms, conditioned power and network areas, integrated electrical and electronic control elements, specialized earth grounding provisions, structural foundation aspects, and more. Time prohibited our addressing other elements of the facility.

- ***They expressed that their preconceived thoughts on our facility were dislodged and they would be discussing with Ford his comfort level in performing the appraisal because of the specialized nature of the facility.*** He also stated that he would be discussing this further with the Palmetto Railway group in regards to his preliminary findings.

- Enlightening them to my *possible* plans to relocate to 1831 Meeting Street Rd (after viewing the attached map and Palmetto Railway plans), I stated that Monday I would be engaging architectural and engineering services to complete the plans for permitting at that site. They asked that I delay that action until Rucker returned at the end of the month. ***They wanted to review what they had learned today*** and did not want me exerting expenses at this point based on this initial meeting. Again, citing that time is of the essence, I expressed concern that delays in the process for our relocation would make their 18 month timeline harder to uphold.

(Landowner's Ex. 55, R. pp. 824-825) (double emphasis added).

Next, on August 16, 2016, Gateway received a letter from Bill Ford, Railways' selected appraiser, to coordinate a property inspection. **(Landowner's Ex. 57, R. 826).** In response to that letter, Fabian coordinated a meeting with Ford at the Property where they walked through and observed many of the special features of the building. **(Trial Tr. R. p. 445, l. 5-l. 8); (Trial Tr. R. 450, l. 23-p. 451, l. 1).** Ford requested that Fabian provide him the costs to construct the building. **(Trial Tr. R. p. 452, l. 20- p. 453, l. 7).** To make sure he was providing the most accurate information, Fabian asked his accountant to use the actual cost data from the construction of the building nine years before with an adjustment for inflation; Fabian furnished this information to Ford by e-mail. **(Trial Tr. R. p. 446, l. 2-5)** (Fabian explaining that Ford "asked for cost data, so I contacted my accountant and asked him if he would write up -- extract from the cost associated with that building so that I could share with Mr. Ford."); **(Landowner's Ex. 63, R. pp. 850-851).**

At Ford's request, Fabian's accountant estimated the total cost of the Property at $4,024,500 by adding the original scheduled cost values (adjusted by the annual inflation rate) to a land value provided by a real estate consultant. **(Landowner's Ex. 63, R. pp. 850-851);** see also, **(Trial Tr. R. p. 457, l. 4-p. 458, l. 22).** Ford responded stating that "the total cost numbers are much appreciated. Any detail showing different systems, HVAC, Security, Structure, electrical, plumbing, etc., would help even further. It is not a problem if this is not available, it would simply speed the process on my end." **(Landowner's Ex. 63, R. pp. 850-851).**

Fabian later received an offer from Railways for $1,800,000 based upon an appraisal by Ford who ignored all the cost information he had previously requested that had been provided by Fabian and his accountant. See **(Landowner's Ex. 66, R. p. 852); (Trial Tr. R. p. 451, l. 20-p. 452, l. 19).** Gateway rejected the offer. In October 2017, Gateway received the condemnation notice. **(Trial Tr. R. p. 452, l. 15-l. 16); (Trial Tr. R. p. 458, l. 23-p. 459, l. 4); (Condemnation Notice and Tender of Payment, R. pp. 40-46).**

The case proceeded to trial on March 25-28, 2019. Gateway had three witnesses in its case in chief and Railways had two witnesses.

Gateway called Fabian who testified as to the background, the special nature of the building, the special features of the building, and the discussions and communications with Railways all discussed above.

Gateway put up the testimony of Steve Morey of Design Build, LLC, a commercial general contracting firm, who personally oversaw portions of the original construction of the facility. **(Trial Tr. R. p. 524, l. 4-p. 525-l. 4).** He remembered the project well and testified that it was not a normal office building. **(Trial Tr. R. p. 526, l. 3-l. 5)** ("Q. [Mr. Linton] Steve, the original construction at 1799, was this a normal office building? A. No, it was not."); **(Trial Tr. R. p. 526,**

l. 12-l. 20) (Morey testifying that the foundation and steel construction of the building were different from a normal office building and that the he had never encountered an office building with a theater room like the one built into the Property). By way of example, Morey explained that during original construction he had a difficult time getting a bid for the steel package—the design was so complex some steel suppliers questioned it and others simply declined to bid. **(Trial Tr. R. p. 525, l. 5- l.17).**

Morey also testified to the cost to reconstruct the building. Without objection from Railways, the Court qualified Morey as an expert witness in estimating construction costs. **(Trial Tr. R, p. 523, l. 14-l. 20).** Morey prepared an estimate of the total cost to reconstruct the building by using the detailed construction drawings of the existing building. He had subcontractors actually bid the project and prepared his overall cost estimate based upon the information he received from those subcontractors, the same way he does in his day-to-day work for Design Build, LLC. See **(Trial Tr. R. p. 527, l. 3-l. 9); (Landowner's Exs. 71 and 72, R. pp. 853-857); (Trial Tr. R. p. 529, l. 5-p. 533, l. 1).** Morey testified that the total estimated cost to reconstruct the building[1] taken by Railways is $4,319,040. **(Trial Tr. R. p. 528, l. 23-p. 529, l. 4); (Trial Tr. R. p. 535, l. 14-l. 20)** (explaining the bid price is only for the costs to rebuild the structure at a new location).

Thomas F. Hartnett, a real estate appraiser, also testified for Gateway and rendered his opinion of just compensation for the taking. Hartnett has been in the real estate business in the Charleston area since 1963. He is licensed by the state as a general appraiser and holds a general

[1] Mr. Morey did testify that there were slight changes and the addition of an elevator to the design, because code changes since the original construction required those changes and it would be illegal to build the building without complying with today's code. **(Trial Tr. R. p. 533, l. 10-p. 534, l. 8).**

appraiser certificate from the National Association of Realtors Appraisal Section. **(Trial Tr. R. p. 559, l. 10-p. 560, l. 16).** He has performed innumerable commercial real estate appraisals in the Charleston area and on Meeting Street Road, the specific location for the Property. **(Trial Tr. R. p. 560, l. 17-p. 561, l. 4).**

The Court qualified Hartnett as an expert witness in real estate appraisal and valuation. **(Trial Tr. R. p. 561, l. 22-p. 562, l. 4).** Hartnett testified that, in his expert opinion, just compensation for the taking of the Property was $4,580,000. **(Trial Tr. R. p. 562, l. 25-p. 563, l. 8).** Hartnett testified in detail about the basis for his opinion and the method of appraisal he utilized in forming that opinion. Prior to forming an opinion of the value, he inspected the Property, including the interior and its features. **(Trial Tr. R. p. 563, l. 24-p. 564, l. 7).** He "noticed right away, upon entering the building, that it was not constructed like any ordinary or any typical office building" because he observed "steel conduits running everywhere with wiring in it," "a special theater," and "a special audio room in it." **(Trial Tr. R. p. 564, l. 9-l. 14).** "It was ***not like any other office building*** that [he has] appraised, or that [he] ha[s] been in, ***anywhere in South Carolina***." **(Trial Tr. R. p. 564, l. 15-l. 17)** (double emphasis added); see also, **(Trial Tr. R. p. 564, l. 21-p. 565, l. 10)** (describing some of the special features of the theater room including that the acoustical isolation made it feel like a "tomb"); **(Trial Tr. R. p. 572, l. 1-l. 9)** ("upon entering that building, I knew right away this is not a typical office building. It's an office building, but it's not a typical office building. No building. I saw pictures, as I'm sure the jury did, of the massive steel that went into the construction, the steel skeleton, the foundation, the sixty or seventy-foot pilings that were driven into the ground, the electrical systems. It was not an ordinary office building.").

After his site inspection, Hartnett considered all three approved approaches to value: the sales comparison approach, the income approach, and the cost approach. He determined the sales comparison approach could not be utilized because he could not find any buildings that sold recently that he thought were comparable to this building. **(Trial Tr. R. p. 566 l. 17-l. 19); (Trial Tr. R. p. 569, l. 17-l. 24** (sales comparison approach and income approach could not be utilized because there were no similar properties in the marketplace). Similarly, he determined the income approach could not be utilized because the building was unique and the lease of one family entity to another was not a good indicator of value. **(Trial Tr. R. p. 567 l. 8,-p. 568, l. 5).**

He then turned to the cost approach, which he testified is appropriate for special purpose buildings and for when there are no comparable sales available. **(Trial Tr. R. p. 568, l. 6-l. 12)** ("The third approach is called the cost approach. It's generally used for newer buildings, for special-purpose buildings, hospitals, gymnasiums, football stadiums, armories, buildings that there are not a lot of them that sell that you could say, oh, here's another armory that sold, here's another football stadium that sold, and here's a -- so I can use that."). In utilizing the cost approach, Hartnett determined the value of the land, using comparable sales of vacant land. **(Trial Tr. R. p. 570, l. 5-p. 571, l. 3).** His analysis resulted in land value of $563,000. **(Trial Tr. R. p. 570, l. 5-p. 571, l. 3).**

The second step in the cost approach is valuing the cost of rebuilding the improvements. **(Trial Tr. R. p. 571, l. 2-l. 7).** To determine the cost to rebuild the structure, Hartnett relied upon the detailed estimate created by Steve Morey, $4,319,040. **(Trial. Tr. R. p. 571, l. 7-l. 13); (Trial Tr. R. p. 572, l. 23-p. 573, l. 11)** (explaining that while cost manuals can be used by an appraiser to estimate reconstruction costs, the actual costs estimate is more reliable). He then used an "age-life method of depreciation" and depreciated the reconstruction cost estimate provided by Morey.

(Trial Tr. R. p. 571, l. 17-l. 22). After completing his depreciation calculation and adding the land value, Hartnett opined that, based on the cost approach that he utilized because the two other recognized approaches to value were inapplicable to this special purpose building, just compensation for the taking of the Property was $4,580,000. **(Trial Tr. R. p. 562, l. 25-p. 563, l. 8).**

Railways only called one witness in its case-in-chief, an appraiser named Deborah Haskell. **(Trial Tr. R. p. 631, l. 20-l. 25); (Trial Tr. R. p. 642, l. 7-l. 12)** (the Court qualifying Haskell as an expert witness). Haskell testified that there are "[t]here are three generally accepted appraisal methodologies[:]" the cost approach, the sales comparison approach, the income approach. **(Trial Tr. R. p. 639, l. 5-p. 640, l. 17).** With regard to the cost approach she explained that it is utilized when determining the value of certain types of properties:

> The last approach is the cost approach. And this approach is generally the most relevant for fairly new properties. If a property has just been constructed, we know what it's going it cost. ***As well as special-purpose properties where there is no market*** and no really new -- special-purpose projects is ***a property in which the design and construction is so unique that it is highly unlikely that another person would*** -- or another entity would be able to use it, and also that ***the market for this type of property is so limited that there are not -- that there are not buyers in the market.***

(Trial Tr. p. 640, l. 6-l. 17) (double emphasis added). She then went on to identify several specific examples of special purpose properties she has appraised using the cost approach. **(Trial Tr. R. p. 640, l. 18-p. 641, l. 3).**

Although she recognized the cost approach is an appropriate valuation method for special purpose buildings, she opined that this building was nothing more than a standard office building. She therefore valued it as a generic office building, giving no consideration to the special uses and features for which it was custom designed and built. **(Trial Tr. R. p. 657, l. 6-l. 13)** (Haskell stating the highest and best use was as an office building); **(Trial Tr. R. p. 668, l. 12-p. 669, l. 7)**

(explaining that she did not use the cost approach because she thought the "special unusual characteristics" of the building would depreciate quickly and she felt confident with the data once she completed the sales comparison and income approaches); **(Trial Tr. R. p. 695, l. 7-p. 696, l. 15)** (Haskell stating that there was nothing unusual about the building because in her opinion it was both designed and constructed as an office building); **(Trial Tr. R. p. 696, l. 16-l. 20)** ("Q. The bottom line of your opinion is that this was, plain and simple, an office building and it should be compared with the sale of other office buildings in the immediate area or Charleston market? A. Yes.").

Haskell's opinion of the value of the Property as a run-of-the-mill office building was $1,750,000. **(Trial Tr. R. p. 657, l. 14-l. 20).** In reaching that opinion, which is $50,000 less than Railways' first appraiser's opinion, she utilized the sales comparison approach, determining value based upon the sales of office buildings in the area which she asserted were comparable. **(Trial Tr. p. R. 658, l. 2-l. 4); (Trial Tr. p. 658, l. 5-p. 667, l. 13)** (Haskell discussing the sales of office buildings she compared to the Property and adjustments she made). She also utilized the income approach where she looked at reported rents of local office buildings and extrapolated what she believed the Property could be rented for if converted to an office. **(Trial Tr. R. p. 667, l. 17, p. 668, l. 11).**

After almost four hours of deliberations, the jury returned a verdict in the amount of $3,750,000, roughly $800,000 less than the $4,580,000 testified to by Hartnett. **(Trial Tr. R. 765:17-19); (Trial Tr. R. 767:8-768:15-20); (Verdict Form, R. p. 3).**

STANDARD OF REVIEW

I. Admission of Expert Testimony

The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. Maybank v. BB&T Corporation, 787 S.E.2d 498, 511, 416 S.C. 541, 566 (2016) (citing Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)). "The trial court does not abuse its discretion in qualifying experts and allowing their testimony as long as the witnesses have acquired by study or practical experience such knowledge of the subject matter of their testimony as would enable them to give guidance and assistance to the jury in resolving a factual issue that is beyond the scope of the jury's good judgment and common knowledge." State v. Mealor, 825 S.E.2d 53, 64-65, 425 S.C. 625, 645-46 (Ct. App. 2019) (citations, internal quotations and alterations omitted). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error in the ruling and resulting prejudice." Maybank, at 511, 416 S.C. at 567 (citation omitted).

II. Judgment Notwithstanding the Verdict

"When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, [the appellate] Court applies the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Maybank, at 512, 416 S.C. at 568. (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004)). 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. Id. (citing Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994)). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Id. at 512, 416 S.C. at 568-69 (quoting Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). "In

deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." Id. at 512, 416 S.C. at 569 (citing Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (2000)).

III. Jury Charge

When an appellate court reviews an alleged error in a jury charge, it must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. See Id. (quoting Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id. at 198, 781 S.E.2d at 542 (quoting Keaton, 334 S.C. at 497, 514 S.E.2d at 575). "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" Id. (quoting Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009).

IV. Admission of Evidence

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." Keene v. CNA Holdings, LLC, 827 S.E.2d 183, 188, 426 S.C. 357, 366 (Ct. App. 2019) (citations and internal quotations omitted). "Determining whether prejudice exists depends on the circumstances, and the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. (citations and internal quotations omitted). "Prejudice in this context means there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id. (citations and internal quotations omitted).

ARGUMENT

I. The circuit court correctly admitted the testimony of Thomas F. Hartnett because it was undisputed that he was qualified as an expert in the field and his opinion utilized one of the undisputed, recognized approaches to real property valuation.

Railways never objected to Hartnett testifying as an expert witness on the basis of his qualifications or experience as an appraiser of real estate. Railways instead objected to the approach to valuation he used which, as explained below, even Railways concedes is one of the three accepted valuation methods. The circuit court did not abuse its discretion in admitting the testimony of Hartnett.

Railways initiated its challenge to Hartnett by making a pretrial motion in limine seeking to exclude Hartnett from testifying. See **(Railways' Motion in Limine to Exclude the Testimony of Thomas F. Hartnett, filed 3-25-19, R. pp. 55-57)**. The trial court denied that motion during the pre-trial hearing on the basis that whether the approach used by Hartnett was appropriate depended upon the factual foundation of that approach, i.e. whether the property is a special use property, and the jury would have to determine the sufficiency of his foundation . **(Trial Tr. R. p. 298, l. 1-p. 304, l. 15).**

During the trial, the circuit court approved Hartnett as expert over Railways' objection that his opinion was inadmissible. **(Trial Tr. R. p. 562, l. 1-l. 4).** Railways raised the same issue in its post-trial motions and the circuit court again ruled that Hartnett's testimony should not be excluded. **(Order filed 6-11-19, R. pp. 16-19).**

In its appeal Railways attempts for the fourth time to obtain a ruling that Hartnett's opinions were inadmissible.

The admission of expert testimony is left to the sound discretion of the trial court. See

Maybank, at 511, 416 S.C. at 566. Hartnett was qualified as an expert in appraising property. Therefore, his opinion on the value of the Property at the time of its condemnation was admissible. His testimony was not inadmissible *as a matter of law*, as argued by Railways.

a. The circuit court correctly ruled that Hartnett's opinion of just compensation was admissible and that Railways' attacks on Hartnett's opinions went to the foundation of his opinion and were for the jury to evaluate.

Pursuant to Rule 702 of the South Carolina Rules of Evidence, a person qualified as an expert may testify in the form of an opinion when their specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. See SCRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.") The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 60–61, 495 S.E.2d 205, 211 (1998). Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989).

In the particular context of a condemnation case, our Supreme Court has held a qualified appraiser should not be excluded on the basis that the opposing party challenges the sufficiency of the facts relied upon by the appraiser:

> The argument of appellate counsel, in written brief and oral statement before the Court, is largely directed at the quality of the expert testimony rather than its admissibility. John Brock, who testified for the landowner, is a licensed real estate broker with eight years experience in real estate appraisal work. ***He was definitely qualified to testify, and if he could give no rational basis for his testimony, as contended by the appellant, it was a matter for the jury to consider.*** We cannot say that his testimony should have been stricken and, accordingly, the exceptions addressing themselves to this question are without merit.

Duke Power Co. v. Opperman, 266 S.C. 99, 102, 221 S.E.2d 782, 782–83 (1976) (double emphasis added); City of N. Charleston v. Claxton, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (condemnation case noting that "if an expert is qualified, the sufficiency of the foundation for his opinion on value is ordinarily a question of weight for the jury, not a basis for excluding the evidence." (citation omitted)).

Railways exhaustively cross-examined Hartnett, challenging his method of valuation and the foundation of his opinion. It was for the jury to decide what weight to give Hartnett's testimony—whether to believe all, some, or none, just as the circuit court instructed they were entitled to do when considering the testimony of an expert. See **(Trial Tr. R. p. 758, l. 24-p. 760, l. 5)** (trial court charging the jury concerning expert witness testimony). The trial court correctly determined that the sufficiency of the basis for Hartnett's opinion was for the jury to decide. **(Order filed 6-11-19, R. pp. 16-19).**

Railways' objection to Hartnett's testimony is solely that he used the cost approach in rendering his opinion of the amount of just compensation. Yet, Haskell, Railways' expert, testified that the cost approach is one of the three *accepted* approaches to real estate valuation. She testified the cost approach is appropriate for special purpose properties, and even she has employed it in valuing special purpose properties in the past. See **(Trial Tr. R. p. 639, l. 5-p. 640, l. 17)** (Haskell testifying that there are "[t]here are three generally accepted appraisal methodologies[:]" the cost approach, the sales comparison approach, the income approach.); **(Trial Tr. R. p. 640, l. 6-l. 17)** (Haskell explain the types of properties most reliably valued using the cost approach); **(Trial Tr. R. p. 649, l. 18-p. 641, l. 3)** (Haskell noting specific examples of special purpose properties she has appraised using the cost approach).

Haskell and Hartnett are not alone in recognizing that the cost approach is an accepted approach to the valuation of real estate. It is uniformly accepted by appraisers that there are three approaches to valuation and that the cost approach is among them. The Appraisal of Real Estate, a leading treatise on real estate appraisal, recognizes the cost approach as a valid approach and explains "[t]he cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised . . .are not amenable to valuation by the income capitalization approach." See **Appraisal Institute, The Appraisal of Real Estate, 353-54 (12th ed. 2001); (Landowners' Memo. in Opp. Condemnor's Post-Trial Motions, filed 4-25-19 at Ex. A, R. pp. 235-237).**

South Carolina appellate courts also recognize that the cost approach is one of the three generally accepted approaches to real estate valuation. See generally, Reliance Ins. Co. v. Smith, 327 S.C. 528, 533, 489 S.E.2d 674, 676 (Ct. App. 1997) (affirming the ALC in a property tax appeal where "[t]he ALJ concluded that the cost approach yielded the most accurate valuation of the Property."); S.C. Tax Commn. v. S.C. Tax Bd. of Rev., 287 S.C. 415, 417, 339 S.E.2d 131, 132 (Ct. App. 1985) (noting in tax appeal case that the appraisers in that case employed ". . .the usual and customary methodology in arriving at the fair market value of the subject property, i.e.: the income or capitalization approach, the replacement value approach, and the market data or comparable sales approach).

Numerous other courts have found that the cost approach is an acceptable approach to valuation in takings cases under certain circumstances. See Pete v. United States, 209 Cl. Ct. 270, 291, 531 F.2d 1018, 1031 (1976) ("The reproduction cost less depreciation approach, used by both parties and all the valuation witnesses, is a valid method of determining fair market value and one particularly well adapted to use under the circumstances of the case."); Yaist v. U.S., 17 Cl. Ct.

246, 260 (Cl. Ct. 1989) (endorsing the cost approach in a takings case and stating that "lack of data on market sales does not preclude compensation").[2]

By way of example, the Oregon Court of Appeals, quoting Nichols on Eminent Domain, ruled the cost approach is an appropriate valuation methodology in condemnation cases involving special use property for which comparable sales data is unavailable:

> 'It occasionally happens that a parcel of real estate taken by eminent domain is of such a nature, or is held or has been improved in such a manner, that, while it serves a useful purpose to its owner, if he desired to dispose of it he would be unable to sell it at anything like its real value. A church, or a college building, or a club-house located in a town in which there was but one religious society, or college, or club, might be worth all it cost to its owners, but it would be absolutely unmarketable. * * *. Even such a piece of property as a mill site or a reservoir site, or a factory or store of abnormal size may, to a somewhat lesser degree, be difficult to dispose of, though of great value to its owner.
>
> In such a case as similar property is not commonly bought and sold it is impossible to ascertain market value by the usual tests. In fact, as market value presupposes a willing buyer, the conditions upon which such value is based are not present, and it is sometimes said that in cases of this character market value is not the measure of compensation. As it is conceded that the owner cannot on that account be deprived of his property without any compensation whatever, some other measure is sought. It must, however, be remembered that market value is always based upon hypothetical conditions, and that it is never necessary to show that there was in fact a person able and willing to buy. The measure is still what another religious society, or college, or club, or public service corporation, or abutting owner, would pay if there were one at hand; in other words, the measure is still market value. However, since the usual means of ascertaining market value are lacking, other means must from the necessity of the case be resorted to. It is, therefore, proper in such cases to deduce market value from the intrinsic value of the property, and its value to its owners for their special purposes. * * *.'

City of Bend v. Juniper Util. Co., 242 Or. App. 9, 24–25, 252 P.3d 341, 349–50 (Or. App. 2011) (quoting 4 Nichols, Eminent Domain 133, § 12.32) (additional citation omitted). The Oregon

[2] It is worth noting that this case includes not only Gateway's right to just compensation under the South Carolina Constitution, but also its right to just compensation under the United States Constitution.

Court of Appeals continued and stated, "[t]he cost approach is one of the 'other means' for deducing the fair market value of special use property in eminent domain cases." Id.; see also, Matter of Suffolk County, 47 N.Y.2d 507, 511, 392 N.E.2d 1236, 419 N.Y.S.2d 52 (1979); In re Lido Boulevard, Town of Hempstead, Lido Beach, 43 A.D.2d 45, 49, 349 N.Y.S.2d 422, 427 (1973)[3]; see also, City of Glen Cove v Switzer Constr. Co., 47 A.D.2d 917, 918, 367 N.Y.S.2d 43 (1975).

The decision of the Supreme Court of Rhode Island in Warwick Musical Theater, Inc. v. State of Rhode Island, 525 A.2d 905 (2005), is particularly instructive. In that condemnation proceeding the property taken was a theatre, one of the principal special purpose uses of the Property in this case. The Supreme Court of Rhode Island upheld the trial judge's factual determinations that the theater was a special use property that should be valued under the cost approach rather than the sales comparison approach:

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[3] The New York court in In re Lido Boulevard, supra, established four criteria that a property owner in a condemnation case must satisfy to recover reproduction or replacement cost that were fully met by the proof of the Landowner in this case:

> ...Before a property can qualify as a specialty entitled to the summation approach, the following criteria must be established.
>
> (a) The improvement must be Unique and must be specially built for the specific purpose for which it is designed;
>
> (b) There must be a Special use for which the improvement is designed and the improvement must be so specially used;
>
> (c) There must be No market for the type of property (here, a beach and cabana club) and no sales of property for such use; and
>
> (d) The improvement must be an appropriate improvement at the time of the taking and its use must be Economically feasible and reasonably expected to be replaced.

349 N.Y.S.2d 427 (capitals in original).

> ***Although the comparable-sales method of determining fair-market value is the preferred method of valuation in condemnation proceedings, it is within the discretion of the trial justice to depart from this method when he finds that the subject property is unique or special purpose.*** ... In light of the testimony regarding the unique character and use of the theater building, it appears that the trial justice was not clearly wrong in his determination that the facility was used for a special purpose that precluded the use of comparable-sales valuation.
>
> The trial justice then accepted the method of valuation employed by the theater's expert. When evidence of comparable sales is not available or is inappropriate, the reproduction cost of the building less depreciation is admissible as proof of market value.
>
> ....In his testimony regarding the replacement cost of the theater, the theater's expert used the actual-cost-of-construction figures as provided by the theater's accountant. He consulted the E.H. Boeckh system of cost analysis to obtain a time-modifying factor in order to bring the actual costs up to date. Testimony regarding the actual expenditures made to improve the land is relevant to a determination of damages sustained because of a condemnation and is admissible as a consideration in such assessment.

525 A.2d 910-911 (internal citations omitted; double emphasis added).

Even the United States Supreme Court recognizes that the sales comparison approach is not the only approach to just compensation. United States v. 564.54 Acres, 441 U.S. 506, 513, 99 S.Ct. 1854, 1858 (1979) (citations omitted); U.S. v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402–03, 70 S. Ct. 217, 221 (1949) (noting that in the absence of appropriate comparable sales other approaches to value may be relevant).

Based upon the above cited authorities and Haskell's own testimony, there is no dispute that the cost approach is an accepted approach to valuation. An attack on the valuation method utilized by an expert is nothing more than attack on the foundation of the expert's opinion, and our courts have determined that such an attack is no basis for exclusion of a qualified appraiser's testimony. See Opperman, 266 S.C. at 102, 221 S.E.2d at 782–83; Claxton, 315 S.C. at 59, 431 S.E.2d at 612. Further, it was for the jury to decide whether the Property was a special purpose

property that even Railways' expert conceded should be valued using the cost approach. See **(Trial Tr. R. p. 640, l. 6-l. 17).**

Here, Hartnett testified extensively on the features of the building that led him to utilize the cost approach, as described in the Statement of Facts, supra. Fabian and Morey's testimony described in the Statement of Facts, supra, also supported the foundation of Hartnett's opinion that the property was a special use property.

For these many reasons, the circuit court correctly ruled that Hartnett should not be excluded as an expert on the ground he utilized the cost approach in rendering his opinion on just compensation for the taking of the Property.

b. Hartnett's opinion was not inadmissible as a matter of law for the further reason that he testified as to just compensation for the value of the property taken.

Railways argues that Hartnett's testimony should have been excluded as a matter of law because, according to Railways, just compensation is defined solely as fair market value meaning what a willing buyer would pay a willing seller.

Pursuant to the South Carolina and United States Constitutions, the question for the jury was the amount of ***just compensation*** to be paid to the owner for the taking of the land, building, and improvements on the Property. See U.S. Const. amend. V; S.C. Const. art. I, § 13(A) ("Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property."). The Constitution does not define "just compensation," or prescribe how it shall be made. See S.C. State Hwy. Dept. v. S. Ry. Co., 239 S.C. 1, 5, 121 S.E.2d 236, 238 (1961); Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301, 303 (1918) ("the Constitution does not define just compensation, or prescribe how it shall be made. . . "). Consistent with these

constitutional provisions, the South Carolina Eminent Domain Procedures Act provides that the "value of the property to be taken" may be considered in determining just compensation.

> ***In determining just compensation***, only ***the value of the property to be taken***, any diminution in the value of the landowner's remaining property, and any benefits as provided in Section 28-2-360 may be considered.

S.C. Code § 28-2-370.

Railways argues the term "value" as used in the above quoted statute means one thing and one thing only - fair market value as defined by what a willing buyer would pay to a willing seller with neither acting under compulsion. The argument should be rejected for multiple reasons.

First, had the legislature intended to limit just compensation for the property taken to its "fair market value as defined by what a willing buyer would pay to a willing seller," the legislature could have inserted those words. Its failure to do so means that the legislature did not intend "value" to only mean "fair market value". See CFRE, LLC v. Greenville County Assessor, 716 S.E.2d 877, 881, 395 S.C. 67, 74-75 (2011) (general rules of statutory construction); Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 321, 194 S.E. 139, 142 (1937) ("Full effect must be given to each section [of a statute], and the words must be given their plain meaning. Whe[n] there is no ambiguity, words must not be added to or taken from the statute.")

Second, nothing in the Eminent Domain Procedures Act altered the ***constitutional requirement*** that the landowner be paid "just compensation." In fact, the legislature could not have changed or impaired the constitutional right to "just compensation" by statute. See Blue Ridge Elec. Co-op. v. Combined Util. System of City of Easley, 279 S.C. 135, 303 S.E.2d 91 (1983) (affirming the trial court's ruling in case concerning a specific statute regarding the condemnation of certain utility facilities stating that ". . . the statutory formula was constitutional so long as it was construed as a minimum, not a limitation, on what factors the arbiter could use to

determine just compensation" and explaining that "[w]hile the Legislature may fix the procedure to be followed in asserting a claim for compensation, it may not impair or deny an essential element thereof.") (citations omitted)); S.C. State Hwy. Dept. v. S. Ry. Co., 239 S.C. 1, 9, 121 S.E.2d 236, 240 (1961) ("While the Legislature may fix the procedure to be followed in asserting a claim for compensation, it may not impair or deny an essential element thereof." (Oxner, J., dissenting)).

Railways argues that the Supreme Court has for over 70 years considered "just compensation" to be solely defined as "fair market value" and that for at least 40 years that has been defined as what a willing buyer would pay a willing seller for a property. See Railways Brief, 10-11, n. 1 & 2. Railways includes an extensive string of citations where the words "fair market value" appeared in a court opinion. However, Railways does not cite a single case where our courts have held that fair market value defined by what a willing buyer would pay a willing seller for a property is the *exclusive* definition of just compensation.

Stated differently, none of the cases cited by Railways holds that fair market value is the exclusive test for just compensation. See Howell v. State Hwy. Dept., 167 S.C. 217, 166 S.E. 129, 130 (1932) (the issue considered by the Court has nothing to do with the definition of just compensation and was limited to the appropriate time for the valuation of the property: "[t]he particular assignment of error is that by this charge the jury were left to fix the value as of a time they thought to be normal, whereas they should have been instructed that the value must be fixed as of the time of taking."); S.C. State Hwy. Dept. v. League's Est., 251 S.C. 368, 371, 162 S.E.2d 532, 533 (1968) (("Our decisions recognize that the value of real property ***may*** be shown by evidence of the price realized from voluntary sales of similar property in the vicinity when not too remote in point of time.) (double emphasis added)); S.C. State Hwy. Dept. v. Bryant, 253 S.C. 400, 406–07, 171 S.E.2d 349, 352 (1969) (affirming the decision of the lower court not to charge

the jury that the landowner had to show a probability that the land would be developed as residential because the Landowner was entitled to the highest and best use of the property stating that "the condemnee had no intention whatever of selling any portion of his property 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. *Under the circumstances of the case, the requested charge would, in effect, have told the jury that the condemnee could not recover the value of the condemned acreage for rural residential purposes, even though such was the highest and best use thereof,* since it was obvious that he had no intention of putting the property to such use within the immediate future or within a reasonable time had such not been condemned.") (emphasis added)); S.C. State Hwy. Dept. v. Wilson, 254 S.C. 360, 367, 175 S.E.2d 391, 395 (1970) (case only concerned severance damages/diminution in value of the remaining parcel and the value of the land taken was not an issue in the case); South Carolina State Highway Department v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963) (same); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 407, 175 S.E.2d 805, 820 (1970) (Overruling an objection that the court did not give new counsel for one of the parties sufficient time to prepare for trial: "In a condemnation proceeding the issues are simple. The court is in quest of the reasonable fair market value of the property taken. There is nothing in the transcript before us to convince us that ample opportunity to explore that issue was not afforded the landowner."); S.C. State Hwy. Dept. v. Carodale Associates, 268 S.C. 556, 562, 235 S.E.2d 127, 129 (1977) (finding the "scope-of-the-project test" was inapplicable to that case); S.C. Dept. of Highways & Pub. Transp. v. Cheston, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982) (stating that "while the 'before and after' method of evaluating damages is sound, it is not exclusive" and "it is permissible to assess damages upon the basis of the fair value of the land taken plus any special damages to the remainder."); City of Folly Beach v. A. H. Properties, Ltd., 318 S.C. 450,

452–53, 458 S.E.2d 426, 427 (1995) (in a case concerning the amount of compensation due to an owner of "the only known beach front parcel exempt from the Beach Front Management Act," the court affirmed a jury verdict even though the appraisers in the case had a difficult time valuing the unique property, noting that "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."); City of N. Charleston v. Claxton, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) ("the City contend[ed] that the trial court erred in denying a new trial because the jury verdict was based on testimony regarding the sale of comparable properties which the City claims were bought under compulsion."); Hous. Auth. of City of Charleston v. Olasov, 282 S.C. 603, 608–09, 320 S.E.2d 478, 481–82 (Ct. App. 1984) (noting that a landowner is not entitled to speculative value and affirming a jury award because "the valuation of $18,000 falls well within the range of values testified to by the witnesses. We think the award is supported by both the 'any' evidence standard and the 'substantial' evidence standard."); U.S. v. Twin City Power Co., 248 F.2d 108, 115 (4th Cir. 1957) ("The Supreme Court has held that compensation need not be made for the element of value represented by availability for water power development. It has not held that other elements of value may be ignored or that the government may take for nothing an interest in land merely because the land lies along a navigable stream."); Olson v. U.S., 292 U.S. 246, 248, 54 S. Ct. 704, 705 (1934) ("The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that inter alia will be available for the generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled."); U.S. v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943) (noting that while courts have looked to value, market value and fair market value as measures of

just compensation, "[i]t is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.").

To be sure, some of the cases cited by Railways describe fair market value as what a willing buyer will pay and a willing seller will accept. However, none holds that to be the only measure of just compensation. See e.g., County of Charleston v. McAdory, 2015-UP-370, 2015 WL 4555493, at *1 (Ct. App. July 29, 2015) (unpublished opinion noting the definition of fair market value in ruling that the admission of evidence is within the trial court's discretion); Burroughs & Chapin Co., Inc. v. S.C. Dept. of Transp., 352 S.C. 535, 541, 574 S.E.2d 751, 754, 2002 WL 31748921 (Ct. App. 2002) (noting the definition of fair market value when holding that evidence regarding timber prices was admissible but that the "unit rule" precludes the jury from valuing the property as separate units).

Not only has our state Supreme Court never held that the exclusive test for just compensation is what a willing buyer would pay a willing seller or that the cost approach is inadmissible, South Carolina courts have broadly defined just compensation recognizing it is a constitutional imperative that the courts cannot circumscribe. For example, our courts have held that just compensation is that amount of money which would put the landowner in as good a position monetarily as he was in prior to the taking of the property. See e.g., Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299, 304, 43 S. Ct. 354, 356 (1923) (("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. ***It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken***. He is entitled to the damages inflicted by the taking." (internal citations omitted)(double emphasis added)); Blue Ridge Elec. Co-op. v.

Combined Util. System of City of Easley, 279 S.C. 135, 139, 303 S.E.2d 91, 93 (1983) ("The purpose of payment of just compensation is to put the condemnee in as good a position pecuniarily as he would have been had his property not been taken."); U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C., CV 9:16-2550-RMG, 2019 WL 1450578, at *3 (D.S.C. Apr. 2, 2019) ("Generally speaking, in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment. 'Just compensation' is the amount of money necessary to put a landowner in as good a pecuniary position, but no better, as if his property had not been taken." (internal quotations and citations omitted)); see also, generally, Howell v. State Hwy. Dept., 167 S.C. 217, 166 S.E. 129, 132 (1932) ("The Constitution of the state provides that, when private property is taken for public use, just compensation shall be made to the owner. The method for the final fixing of the amount of such just compensation is by the verdict of a jury, which arrives at its verdict by finding the right conclusion from a consideration of the facts, and then applying its findings of fact to the law as the court has given it.").

Particularly relevant in this case is Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 188 S.E.2d 188 (1972). In Carolina Power our Supreme Court commented that in some instances, such as with a specialty purpose property, the jury is not limited to fair market value and may value the property taken by another method:

> 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.***

188 S.E.2d 193 (double emphasis added).

Furthermore, it is worth noting that under South Carolina law an owner who is familiar with his property is allowed to give his or her estimate of the value of the land and damages thereto,

even though he or she is not an expert. See Vick v. South Carolina Dept. of Transp., 556 S.E.2d 693, 700, n. 5, 347 S.C. 470, 482 (Ct. App. 2001)("A landowner may always testify to the value of his or her property except in extreme cases . . . we find Vick's testimony was proper."); South Carolina Dept. of Transp. v. Richardson, 516 S.E.2d 3, 5, 335 S.C. 278, 282 (Ct. App. 1999).[4] The testifying owner is not limited to testifying only if in his view his value is what a willing buyer would pay a willing seller.

Additionally, the Eminent Domain Procedures Act specifically provides for the admissibility of evidence of value beyond the expert testimony as to what a willing buyer would pay a willing seller that Railways argues is the only evidence allowed as to just compensation. See S.C. Code §28-2-340 ("For the purpose of determining the value of the land sought to be condemned and fixing just compensation in . . . a trial before a jury, the following evidence (in addition to other evidence which is relevant, material, and competent) is relevant, material, and competent and may be admitted as evidence and considered by the judge or the jury. . .").

In this case, where the sole question was the correct amount of just compensation, it was clearly up to the jury to weigh the evidence and decide if there were no comparable sales for Gateway's Property, and the decision of the circuit court to admit Hartnett's testimony should be affirmed.

II. The circuit court correctly denied Railways' motions for a directed verdict of $1,800,000 because substantial evidence supported the verdict, including a cost estimate and testimony concerning the costs of construction of the Property, in addition to Hartnett's testimony.

The circuit court correctly ruled that the verdict was supported by substantial evidence and correctly denied Railways' motion for a directed verdict in the amount of its pre-condemnation

[4] Fabian testified that $1,800,000 was *not* just compensation. **(Trial Tr. R. p. 475, l. 11-13).**

tender. **(Order filed 6-11-19, R. p. 15)** ("In sum, the evidence fully supports the jury's verdict and requires the denial of Railways' Motion for JNOV"). In rejecting Railways' argument that the verdict should be directed for $1,800,000 because, according to Railways, the only evidence of value was Haskell's opinion, the circuit court ruled that Hartnett's opinion was properly admitted *and* that other evidence fully supported the verdict:

> Even if Hartnett's opinion was disregarded as Railways argues, there is still other evidence that supports the amount of the verdict. For example, Fabian testified that the property was a special use property; that there are no similar properties in the area; and that Landowner intends to rebuild a similar facility at a new location just down the street. Fabian testified extensively to the unique construction of this special use building, as previously described. Further, Morey testified, that the cost to reconstruct the building taken was $4,319,040. Two versions of Morey's estimate were admitted into evidence. Railways cross examined Morey at length. Morey's testimony independently supports the jury's verdict.

(Order filed 6-11-19, R. p. 15).

Here, as the circuit court correctly found, substantial evidence supports the jury's verdict. Hartnett, an expert witness qualified in real estate valuation and the appraisal of real estate, testified as to his opinion that the value of the land taken was $4,580,000. **(Trial Tr. R. p. 562, l. 25-p. 563, l. 5).** As explained in detail above, this opinion was based upon one of the three accepted approaches to real estate valuation, the cost approach.

Hartnett was exhaustively cross examined on his approach, particularly the depreciation he applied to the costs included in his opinion. **(Trial Tr. R. p. 598, l. 13-p. 602, l. 6).** The evidence supports that the jury believed Hartnett, but may have felt his valuation was slightly high or that he should have depreciated the improvements more. Either way, the jury's verdict is fully supported by Hartnett's testimony. Therefore, the circuit court's order denying Railway's motion for JNOV must be affirmed.

As correctly observed by the circuit court, even if Hartnett's opinion was disregarded, there is still other evidence that supports the amount of the verdict. Fabian testified that the property was a special use property; that there are no similar properties in the area; and that the Landowner intends to rebuild a similar facility at a new location just down the street. **(Trial Tr. R. p. 351, l. 18-22); (Trial Tr. R. p. 352, l. 20-21); (Trial Tr. R. p. 356, 1. 16-p. 357, l. 24); (Trial Tr. R. p. 417, l. 2-l. 8); (Trial Tr. R. p. 433, l. 10- l. 21).** Steve Morey testified, without objection, that the cost today to reconstruct the building taken was $4,319,040. **(Trial Tr. R. p. 528, l. 23-p. 529, l. 4)**; see also, **(Landowner Exs. 71 & 72, R. pp. 853-857)**; Railways cross examined Morey at length about his estimate, including questioning certain costs attributable to complying with the current version of the building code, such as the cost of an elevator. **(Trial Tr. R. p. 537, 17-p. 541, l. 7).** Morey testified the additional costs attributable to changes in the building code were 10-15% of the total. **(Trial Tr. R. p. 534, l. 4- l. 8).** The jury could have believed Morey's testimony but decided to only award the land value and the cost of rebuilding identical improvements. Simply put, Morey's testimony independently supports the jury's verdict.

Finally, Railways asserts that it was entitled to an entry of judgment for $1,800,000 as a matter of law because the jury had to accept Haskell's testimony as the only evidence of fair market value, i.e., the amount a willing buyer would have paid, or a willing seller would have accepted. Railways is incorrect. Even assuming, arguendo, Railways' tortured argument that just compensation can only be defined using the willing buyer-willing seller paradigm, there is absolutely no proof the jury did not determine that a willing seller of the unique facility would have only accepted $3,750,000 to sell the property and that a willing buyer in search of such a property would have paid that amount. The jury may well have determined that Hartnett's opinion constituted fair market value, i.e., what a willing buyer desiring a special purpose building like this

one who would use it for the same purposes would pay a willing seller of a special purpose building like this one. Railways has not shown, and cannot show, that the verdict was not the jury's determination of fair market value as well as just compensation. In fact, based upon the costs of building a facility such as the Property, which were admitted without objection, such a conclusion would have been entirely reasonable. Therefore, for all of these reasons, the Court should affirm the circuit court's denial of the motion for directed verdict.

III. The circuit court's jury charge concerning fair market value and just compensation, the challenged portion of which was a verbatim excerpt from a South Carolina Supreme Court case, was a correct statement of the law and should be affirmed.

a. This issue is not preserved for review.

Rule 51 of the South Carolina Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." SCRCP 51; see also, e.g., Belue v. City of Greenville, 226 S.C. 192, 84 S.E.2d 631 (1954) (refusing to consider on appeal a contention regarding the trial court's jury instruction that was not raised at trial); Sierra v. Skelton, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992).

Railways agreed to the Court charging the jury on the definition of just compensation as follows:

> The Constitution of this state and of our United States require that a property owner be paid just compensation for the taking or damaging of his or her property for public use. You are called upon as jurors in this case to determine the just compensation to be paid.
>
> * * *
>
> As I said before, the amount a Condemnor should pay a Landowner in order to adequately compensate the Landowner for the taking of his property is called just compensation. ***It is that amount of money which would put the Landowner in as good a position monetarily as he was in prior to the taking of the property.*** In

> order to be compensated fully, ***the Landowner must be put in as good a position pecuniary as the use of his property had not been taken.***
>
> ***He is entitled to have the full equivalent of the value of such use at the time of taking.*** The owner is to be given, as compensation for his land, ***a fair price for any use*** for which it was -- has commercial value of its own in the immediate present or in the reasonable anticipation in the near future.

(Trial Tr. R. p. 756, l. 8- p. 757, l. 10) (double emphasis added).

Now, Railways asserts that the definition of just compensation is something different, namely that just compensation is exclusively defined as what a willing buyer would pay and what a willing seller would accept. Railways waived any argument to this effect by agreeing to the jury charge on just compensation.

Additionally, the determination of "just compensation" was the question posed to the jury on the verdict form that Railways agreed upon. See **(Trial Tr. R. p. 685, l. 10- l. 14); (Trial Tr. R. p. 686, l. 9-l. 12); (Verdict Form, R. p. 3).** Railways could have insisted that the verdict form ask the jury to determine fair market value: what a willing buyer would have paid for the property taken; or what a willing seller would have accepted. Recognizing the constitutional imperative that Gateway receive just compensation, Railways did not object to the verdict form. The failure of a party to object to the verdict form before it is submitted to the jury constitutes a waiver and cannot be the basis for setting aside the jury's verdict based on that form. Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 420, 453 S.E.2d 908, 912 (Ct. App. 1995); Gause v. Smithers, 403 S.C. 140, 150, 742,S.E.2d 644, 650 (2013) (Party fails to preserve any issue related to the verdict form by not objecting to jury verdict form until after verdict read).

Now, Railways is essentially arguing that the jury was required to deliver a verdict that represented its expert's opinion of fair market value rather than "just compensation." Railways is precluded from making these arguments because of its consent to the form of the verdict. This

failure to object to the verdict form is of the same force and effect as failing to object to a jury charge. Johnson, 453 S.E.2d 912.

b. Even if the issue were preserved for appeal, the circuit court's charge was correct as a matter of law and should be affirmed.

Railways asserts a portion of the jury charge, that was a verbatim excerpt from Carolina Power & Light Co., was a misstatement of law, even though that case has not been overturned and has even been cited by the federal court since the trial in this case. See U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C., CV 9:16-2550-RMG, 2019 WL 1450578, at *3 (D.S.C. Apr. 2, 2019) (citing Carolina Power & Light Co. v. Copeland).

The challenged charge, which was taken word-for-word from Carolina Power & Light Co. v. Copeland is as follows:

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

(Trial Tr. p. R. 757, l. 15- l. 19); Carolina Power & Light Co., at 193, 258 S.C. at 217. ("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. . . . If that formula is unfair to either party some other formula may be used.").

This charge is consistent with the authorities cited above for the meaning of "just compensation." Railways' purported criticism of this charge is that it did not specifically instruct the jury that the *exclusive test* for just compensation must be what a willing buyer will pay and a willing seller will accept. Overlooking that Railways has not found a single case stating, even in dicta, that the formula it proposes is exclusive, the jury charge as a whole included numerous references to fair market value. The Court's instructions also included other jury charges based upon the Eminent Domain Procedures Act that Railways did not object to.

"A trial court must charge the current and correct law." Stephens v. CSX Transp., Inc., 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015) (citations omitted). "When an appellate court reviews an alleged error in a jury charge, it 'must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Id. (quoting Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id. at 198, 781 S.E.2d at 542 (quoting Keaton, 334 S.C. at 497, 514 S.E.2d at 575). "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" Id. (quoting Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009).

The two sentences from the jury charge that Railways attacks are a correct statement of the law. The charge is taken directly from a South Carolina Supreme Court case, and Railways has come forward with no legal authority calling the accuracy of the charge into question. Additionally, it is important to note that the challenged charge is consistent with South Carolina and United States Supreme Court precedent. See Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken."); Phelps v. U.S., 47 S.Ct. 611, 612, 274 U.S. 341, 344 (1927) ("The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking.")

Additionally, even if the two sentences were not an accurate statement of the law, the charge contained numerous references to the formula for fair market value that Railways claims is

exclusive. See **(Trial Tr. R. p. 756, l. 14-l. 16) (Trial Tr. R. p. 757, l. 15-l. 19); (Trial Tr. R. p. 757, l. 20-p. 758, l. 3); (Trial Tr. R. p. 758, l. 5-11); (Trial Tr. R. p. 758, l. 12-l. 17); (Trial Tr. R. p. 758, l. 18-l. 23); (Trial Tr. R. p. 760, l. 6-7); (Trial Tr. R. p. 761, l. 7-l.8).** Additionally, as explained above, the charge included agreed upon charges on "just compensation" and that the Landowner is entitled to the "value" of the property taken. **(Trial Tr. R. p. 756, l. 8- p. 757, l. 10).** Simply put, the charge did not contain legal error, was not an abuse of discretion and was a correct statement of the law.

IV. The circuit court correctly admitted Landowner's Exhibit 63 into evidence over a hearsay objection because the exhibit was a communication received by the Landowner as part of his regularly conducted business activities.

The circuit court did not abuse its discretion in admitting Landowner's Exhibit 63 into evidence. Gateway's exhibit 63 was an e-mail chain where Fabian sent Railway's first appraiser information related to the costs to construct the building, information that the appraiser, Bill Ford, had requested. **(Trial Tr. R. p. 452, l. 20-p. 453, l. 7). (Order filed 6-11-19, R. pp. 25-26)**

After meeting with Ford onsite and showing him many of the special features of the building, Ford requested Fabian provide him information related to the costs to construct the building. **(Trial Tr. R. p. 445, l. 5-l. 8); (Trial Tr. R. p. 450, l. 23-p. 451, l. 1). (Trial Tr. R. p. 452, l. 20- p. 453, l. 7).** Fabian asked his accountant to provide the requested information and his accountant used actual cost data from the construction of the building and adjust those costs for inflation. **(Trial Tr. R. p. 446, l. 2-5)** (Mr. Fabian explaining that Mr. Ford "asked for cost data, so I contacted my accountant and asked him if he would write up -- extract from the cost associated with that building so that I could share with Mr. Ford."); **(Landowner's Ex. 63).** Fabian then provided that information to Ford. **(Landowner's Ex. 63, R. pp. 850-851).** Fabian's accountant estimated the total value of the property at $4,024,500 by adding the original scheduled cost values

(adjusted by the annual inflation rate) to a land value provided by a real estate consultant. **(Landowner's Ex. 63, R. pp. 850-851);** see also, **(Trial Tr. R. p. 457, l. 4-p. 458, l. 22).** Ford responded stating that "the total cost numbers are much appreciated. Any detail showing different systems, HVAC, Security, Structure, electrical, plumbing, etc., would help even further. It is not a problem if this is not available, it would simply speed the process on my end." **(Landowner's Ex. 63, R. pp. 850-851).**

The only objection at trial was hearsay. **(Trial Tr. R. p. 453, l.19- l.21).** The Court overruled the objection on the basis that the business records exception to the hearsay rule applied. **(Trial Tr. R. p. 456, l. 18-l. 24);** see also, SCRE 803(6). Fabian testified that the communications in the exhibit were kept as part of his regularly conducted business. **(Trial Tr. R. p. 454, l. 22-p. 455, l. 6).** Railways now argues that the email was inadmissible because it was not generated in the scope of Fabian's business at eLifespaces. However, Fabian is a member and the contact person for the Gateway. **(Trial Tr. R. p. 350, l. 15-l. 20); (Trial Tr. R. p. 478, l.12-l. 15); (Trial Tr. R. p. 452, l. 20-p. 453, l. 7).** It is clear from the exhibit that he received and sent these communications within the scope of that real estate business. Gateway is in the business of owning and renting property and the taking of that property is clearly within the scope of activities conducted in a real estate business.

Railways suggests even if properly admitted as a business record, the e-mail should have been excluded on the basis that it contains subjective opinions of an accountant. Railways projects subjectivity onto the calculation continued in the exhibit. The accountant states that he used actual schedules and simply performed a calculation to provide costs in today's dollars. **(Landowner's Ex. 63, R. pp. 850-851).** Additionally, because the cost calculation is significantly lower than the cost estimate performed by Steve Morey, any subjectivity was an error in Railways' favor and

Railways can show no prejudice. See generally, Fields v. Regional Medical Center Orangeburg, 609 S.E.2d 506, 509, 363 S.C. 19, 26 (2005) ((noting that 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.")(citations omitted)).

Moreover, the exhibit is not inadmissible hearsay for two additional reasons. First, it was admissible for reasons unrelated to the truth of the matter asserted, i.e. the cost estimate. SCRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Landowner's Ex. 63 was admissible to show that Railways' former appraiser requested and received the cost information but chose not to use it. The inference from Landowner's Exhibit 63 is that Railways did not want the cost approach utilized even if its own appraiser thought it was the appropriate approach—Railways just wanted an appraisal with the lowest number possible.

Second, as mentioned, Landowner's Exhibit 63 shows Railways' first appraiser asked for and received cost information. This entire e-mail string is an admission of a party opponent by Railways' appraiser Bill Ford that he made in the scope of his agency for Railways with its substance relating to his task of appraising the Property. See SCRE 801(d)(2) (admission of a party opponent). Therefore, Landowner's Exhibit 63 was not hearsay and was properly admitted into evidence.

Even if Railways were correct, there was no prejudice. Any alleged error was harmless. Morey and Hartnett both testified concerning the costs of construction in today's dollars, which was substantially higher than the cost estimate included in the contested exhibit. Morey's testimony and exhibits concerning reproduction cost were all admitted into evidence without

objection. "Where the hearsay is merely cumulative to other evidence, its admission is harmless." Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)); see also, Collins Ent. Corp. v. Coats and Coats Rental Amuse., 355 S.C. 125, 135, 584 S.E.2d 120, 126, n.9 (Ct. App. 2003), *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006) (citing the same rule).

Finally, Railways highlights in its brief that counsel for Landowner mentioned Ex. 63 in his reply argument to the jury. See Railways Brief, 29.[5] Railways suggests that it was a significant evidentiary point because counsel for Landowner mentioned it in reply. Railways omits that counsel for Gateway only mentioned the exhibit in response to the statement to the jury by counsel for Railways in his closing argument that Gateway never provided any information about the cost of the original construction. Specifically, counsel for Railways argued to the jury that Gateway did not provide information related to the original cost of construction because it was trying to keep that information from the jury:

> Mr. Morey was involved with the original construction of the building. Mr. Fabian was involved in the original construction of the building. They didn't bring you the original construction cost for that building.
>
> And wouldn't that be something that you would want to know if you were trying to look at what the value of the building was, what they actually put into the building ten years ago and having had the use of the building for ten years because the condemnation occurred, the valuation, in October of 2017? Isn't that information that would make sense? **They didn't bring it to you. And I wonder why.**

[5] Railways statement in its brief that exhibit 63 was the only exhibit highlighted by counsel for Landowner in his reply closing is completely inaccurate. See **(Trial Tr. R. p. 735, l. 24-p. 737, l. 20)** (Counsel for landowner specifically discussing Landowner exhibits 20, 26, 30, 43, 34, 36, 47 and Condemnor exhibit 12).

(Trial Tr. R. p. 730, l. 5-l. 17) (bold added). Counsel for Gateway only briefly mentioned exhibit 63 in reply and only to rebut the argument that Landowner was hiding the original cost of construction made by counsel for Railways. See **(Trial Tr. R. p. 735, l. 6-l. 13).**

As explained above, Landowner Ex. 63 was properly admitted, there are additional reasons the exhibit should have been admitted over a hearsay objection, and even it were hearsay, Railways cannot show any prejudice.

CONCLUSION

For the reasons stated above, the circuit court's rulings should be affirmed.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC

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February 24, 2020
Charleston, South Carolina

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February 24, 2020
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge
Common Pleas 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b) SCACR.

February 24, 2020

G. Trenholm Walker