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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc. ..... Appellant

vs.

South Carolina Department of Commerce, Division of Public Railways ..... Respondent

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN HOLDING THAT APPELLANT'S CLAIM FOR REESTABLISHMENT EXPENSES WAS LIMITED BY S.C. CODE § 28-11-30(4) TO FIFTY THOUAND DOLLARS ($50,000.00)?

STATEMENT OF THE CASE

Applied Building Sciences was a tenant at 1890 Milford Street, Charleston, South Carolina, when Defendant South Carolina Department of Commerce, a Division of Public Railways brought a condemnation action against Hibernian Heights, LLC (the Landlord) and Applied Building Sciences, Inc. (the Tenant). Applied Building Sciences, Inc. is an engineering firm and as a result of the condemnation was forced to move its business operations to a new location. Applied Building Sciences, Inc. applied for relocation assistance pursuant to South Carolina law (S.C. Code § 28-11-30(4)). The South Carolina Department of Commerce found that Applied Building Sciences, Inc.'s relocation expenses were limited by law to $50,000.00 pursuant to S.C. Code § 28-11-30(4) and that S.C. Code § 28-11-30(4) was constitutional and limited Applied Building Sciences, Inc.'s damages. (R. ____). The parties agreed to sever this claim from the real property condemnation claim of Hibernian Heights and allow Applied Building Sciences, Inc. to file this lawsuit. The Release agreed to by the parties provided:

> All rights of Landowner and/or Other Condemnee to appeal or contest matters involving Relocation Assistance are preserved and are not part of the settlement of this condemnation case. (R. ____).

Applied Building Sciences, Inc. immediately brought this lawsuit for inverse condemnation and asserted that S.C. Code § 28-11-30(4) was illegal in that it limits relocation and reestablishment damages and is a taking of Applied Building Sciences, Inc.'s property which violates both the South Carolina and United States Constitutions.

Applied Building Sciences, Inc. specifically argued to the Circuit Court that S.C. Code § 28-11-30(4) violates both the State and Federal Constitutions. S.C. Code § 28-11-30(4) states as follows:

> Reestablishment expenses related to the moving of a small business, farm, or nonprofit organization payable for transportation projects pursuant to federal guidelines and regulations may be paid in an amount up to fifty thousand dollars, notwithstanding a lower limitation imposed by federal regulations.[1]

The case was heard by the Circuit Court with Applied Building Sciences, Inc. and the South Carolina Department of Commerce, a Division of Public Railways both filing competing motions for summary judgment. The Court denied Appellant's motion and granted Respondent's motion in a Form Order. (R. ____). The Appellant then filed a Motion for Reconsideration. (R. ____). The Circuit Court then issued a written Order dated December 18, 2020 and found as a matter of law Applied Building Sciences, Inc. is not constitutionally entitled to recover reestablishment expenses in excess of $50,000.00 and is statutorily limited to recover reestablishment expenses in an amount up to $50,000.00. (R. ____). The Court thereafter denied the Motion for Reconsideration in a form Order. (R. ____). This appeal follows.

STANDARD OF REVIEW

This case involves a legal challenge to S.C. Code Ann. § 28-11-30(4) (2020). Specifically, the circuit court found as a matter of law that S.C. Code Ann. § 28-11-30(4) limits the amount of monies paid for reestablishment expenses for moving a small business from a condemnation to an amount less than $50,000. (R. __). Thus, the standard of review when an appellate court is called upon to decide a novel question is that this court is free to decide novel questions of law without particular deference to the lower court. *See.Ex Parte Capital U-Drive-It, Inc.*, 369 S.C 1, 630 S.E.2d

[1] Significantly the statute uses the word "may" which is permissive. Thus, the Court should hold S.C. Code § 28-11-30(4) is a supplemental remedy to any inverse condemnation action and does not bar Appellant's claim.

464 (2006). See also *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005); *Willis v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (S.C. 2004); see also *Moriarity v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d. 672 (2000) (the Appellate Court is free to decide all questions of law with no particular deference to the lower court. See S.C. Constitution Art. V, §§ 5 and 9; S.C. Code of Laws Ann. § 14-3-320, § 14-3-330 and § 14-8-200); *Southern Railway Co. v. Coltex*, 285 S.C. 213, 329 S.E.2d 736 (S.C. 1985) (if an appeal is based on pure questions of law the Court of Appeals is required to decide the appeal on that ground); *Swindler v. Swindler*, 355 S.C. 245, 247, 584 S.E.2d 438 (S.C. App. 2003) (Court of Appeals is not bound by a trial court's legal determination); *Johnson v. Arbabi*, 347 S. C. 132, 553 S.E.2d 453, rehearing denied, reversed, 355 S.C. 64, 584 S.E.2d 111 (S.C. App. 2001) (Court of Appeals is free to decide issues presented with no particular deference to the trial court's findings when there are novel issues of law).

In this case, this court is called upon to determine the legality of S.C. Code Ann. § 28-11-30(4) (2020) and its interplay with certain sections of the South Carolina and United States Constitutions. The South Carolina Constitution, Article I § 13(A) provides:

> 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.

Also, the Fifth Amendment to the United States Constitution (U.S. Const. V) provides in part as follows:

> ... nor shall private property be taken for public use without just compensation.

Here, the sole question for the Court is whether reestablishment costs of a business are limited to S.C. Code § 28-11-30(4)'s provisions which provide that those costs may not exceed $50,000.00. Appellant asserts this ruling by the Circuit Court is erroneous as a matter of federal and state constitutional law (including statutory construction) and that S.C. Code § 28-11-30(4) does not limit

reestablishment expenses because the statute uses the word "may." See *State v. Hill*, 314 S.C. 330, 444 S.E.2d 255 (S.C. 1994) (For purposes of statutory and constitutional construction, the word "may" ordinarily signifies permission and generally means action spoken of is optional and discretionary); *Sherman v. W&B Enterprises, Inc.*, 357 S.C. 243, 592 S.E.2d 307, rehearing denied (S.C. App. 2003) (The use of the word "may" in a statute signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present state).

ARGUMENT

I. THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS DEMAND FULL COMPENSATION BE PAID FOR REESTABLISHMENT COSTS.

On June 13, 2017, the South Carolina Department of Commerce, Division of Public Railways filed a condemnation action against Hibernian Heights, LLC (Landowner) for property located at 1890 Milford Street, Charleston, South Carolina. Applied Building Sciences, Inc. was a long-term tenant of the property and was named as "Other Condemnee" in that action. The real property portion of the condemnation case was settled by the parties through a Release dated June 14, 2019. (R. ____). However, the parties could not agree that Applied Building Sciences, Inc. had a right to relocation and reestablishment costs in excess of $50,000 (See S.C. Code § 28-11-30(4)). The parties agreed that Applied Building Sciences, Inc. was free to file and proceed in this action to present its claim that it was entitled to more than $50,000.00 for reestablishment expenses. (R. ____).

Applied Building Sciences, Inc. thereafter filed this action for inverse condemnation pursuant to the United States and South Carolina Constitutions. Those provisions provide:

South Carolina Constitution, Article I, § 13(A) provides:

> 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.[2]

The United States Constitution, specifically, the Fifth Amendment (U.S. Const. V) provides:

> ... nor shall private property be taken for public use without just compensation.

The South Carolina Department of Commerce paid Applied Building Sciences, Inc. $50,000.00 pursuant to S.C. Code § 28-11-30(4) and informed Applied Building Sciences, Inc. that no additional reestablishment costs would be paid or is allowed by law. Applied Building Sciences, Inc. submitted a bill for its reestablishment costs in the amount of $561,365.00.which is part of the record in this case. (See Affidavit of Alan Campbell (R. ____)).

Applied Building Sciences, Inc. asserts that the Constitutions of both the United States and South Carolina require full compensation in inverse condemnation actions of both personal and real property. The government cannot limit relocation expenses to $50,000.00 and to do so violates the above cited sections of the South Carolina and United States Constitutions and is a taking of private property. The Constitutional imperative, with any exercise of eminent domain powers, is that the Government pay the "full and perfect equivalent" for whatever has been taken. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893); *see also Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704 (1934) (explaining that "[j]ust compensation includes all elements of value that inhere in the property."); *United States. v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if this property had not been taken." 317 U.S. at 373). In *Kimball Laundry v. United States*, 338 U.S. 1, 69 S.Ct. 1434 (1949), Justice

[2] Specifically, the Constitution does not distinguish between real estate and personal property and neither should this Court.

Frankfurter reaffirmed this principle, explaining that where a business seeks just compensation for its going-concern value, the "value compensable under the Fifth Amendment... is [] that value which is capable of transfer from one owner and thus of exchange for some equivalent." 338 U.S. at 5.

The Supreme Court of the United States has defined the scope of "private property" in the Takings Clause very broadly, saying it includes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." Courts have often recognized that the taking of personal property for public use requires just compensation under the Constitution. Examples of this can be found in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (relating to interest from IOLTA accounts); *Schneider v. Cal. Dept. of Corr.*, 151 F.3d 1194(9th Cir. 1998) (relating to interest from inmate funds placed in trust); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (holding that "taking" of presidential papers requires just compensation). As will be seen later in this brief, the Supreme Court has recently issued a strongly worded opinion requiring compensation for personal property and that there is no distinction for condemnation purposes. See *Horne v. Dept. of Agriculture*, 569 U.S. 513, 237, 576 U.S. 350, 135 S. Ct. 2419 (2015).

Thus, Plaintiff firmly believes that the State of South Carolina and its political entities cannot limit relocation expenses to $50,000.00 (as it is property) and to do so violates the Constitutions of South Carolina and the United States.

II. OTHER STATE COURTS RECOGNIZE MOVING AND REESTABLISHMENT EXPENSES ARE NOT LIMITED IN CONDEMNATION CASES.

The Courts which have addressed this matter have recognized that moving expenses and reestablishment expenses demand full compensation and are not limited. In the landmark case of *Jacksonville Express Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1959), the Florida Supreme Court held that moving expenses were allowed as a separate item outside of real property value. In *Jacksonville Express Authority* the Appellee was a corporation engaged in the heavy

construction business. Certain portions of its land were condemned and it was required to vacate its buildings and move its equipment and supplies to a new location three miles away. At trial, the jury found $6,000.00 to be a reasonable amount for the costs of moving. The Florida Supreme Court reviewed Section 29 of Article XVI of the Florida Constitution which reads as follows:

> No private property, or right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner,....

The Court further noted:

> We feel our constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain. 108 So.2d at 290.

The *Jacksonville Express Authority* Court then referred to a number of decisions in other jurisdictions that provided for the payment of personal property which had to be moved because of condemnation. Two cases were cited in *Jacksonville Express Authority* for the proposition that full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guarantee is that the owner shall be made whole so far as possible and practicable. See *Dade County v. Brigham, Fla.*, 47 So.2d 602 (1950) and *Housing Authority of Savannah v. Savannah Iron Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671, 675 (1955).

Further, the court observed that the burden of proving the cost of moving personal property was upon the condemnee and was a jury decision. See *Housing Authority of Shreveport v. Green*, 200 La. 463, 8 so.2d 295 (1942).

In sum, the Florida Supreme Court and the Georgia Supreme Court both subscribe to the theory that the Constitutional requirement of full or just compensation for appropriation of private property is one requiring a practical attempt to make the owner whole. A person who is put to expense

through no desire or fault of his own can only be made whole when his reasonable expenses are included in compensation. See *Jacksonville Express Authority*, 108 So.2d at 292 (affirming compensation for actual cost of moving personal property after finding such constitutionally guaranteed and not too speculative for consideration). See also, *Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy. Cnty*, 208 F. Supp. 3d 1331 (N.D. Fla. 2017).

In *Dep't of Trans. v. Gilling*, 289 Mich. App. 219, 796 N.W.2d 476 (2010), the issue was whether or not moving and relocation expenses were the only available means for compensation of those expenses under state law. The Michigan Court of Appeals held that claims for business-interruption damages did not allow for lost profits but did permit recovery of moving and relocation expenses (reestablishment expenses).

The Court in a well-reasoned opinion held relocation assistance acts are "not the exclusive remedy for reimbursement of moving and related expenses in those jurisdictions where such expenses are recoverable in a condemnation proceeding." (796 N.W. 2d 477).

The Michigan Court also cited to *State ex. rel. Dep't of Trans. v. Little*, 2004 OK 74, 100 P.3d 707 (Okla. 2004) as controlling authority. In that case, the Oklahoma Supreme Court concluded that administrative reimbursement proceedings were "a supplementary scheme of recovery under which funds can be used to reimburse a person displaced from a home, business or farm by a [government] project for that person's moving and related expenses where such expenses are not otherwise fully compensable under state condemnation law."

The Court also observed:

> This Court should never be unmindful that a Landowner is entitled to be compensated fully when the latter's property is taken in the exercise of the eminent domain power. The mandate of the State and Federal Constitutions strongly supports full indemnification by just compensation.

The Michigan Supreme Court cited additional cases for that proposition. See *Malone v. Florida Dep't of Transp. Admin. Div.*, 438 So. 2d 857 (Fla. App. 1983), overruled in part by *Sys Components Corp. v. Florida Dep't of Trans.*, 14 So. 3d 967 (Fla. 2009); *Mississippi State Hwy. Comm. v. Rives*, 271 So. 2d 725 (Miss. 1972). These cases hold the owner of property is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking.

The Michigan Court in *Dep't of Trans. v. Gilling*, 289 Mich. App. 219, 796 N.W.2d 476 (2010), also considered just-compensation principles under its own Constitution and the United States Constitution.[3] The Court held that moving and relocation expenses and business-interruption damages were clearly allowed.

There is additional supporting case law in Michigan for this principle. See *Grand Rapids & I R Co. v. Weiden*, 70 Mich. 390, 38 N.W. 294 (1888). In *Weiden*, the Michigan Supreme Court observed that property owners were "using their property in a lucrative business in which the locality and its surroundings had some bearing on its value." Therefore, the Court concluded that Appellants were entitled to compensation for their losses that resulted from interruption of their business in addition to the value of the property itself." The Court in reversing a jury verdict because it failed to adequately compensate for business damages stated:

> It appeared affirmatively, and without contradiction, that actual expenses of moving the business reached within a few dollars of all that the jury awarded for those purposes and for his buildings and improvements. The testimony shows that the buildings and improvements were of considerable value. The verdict is not only grossly unfair, but given without any reference to uncontradicted testimony. Juries have no right to disregard facts and follow their caprices. There is no reasonable ground on which the verdict can be sustained. *Weiden*, 70 Mich. at 395.

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[3] The Michigan Constitution is identical to the South Carolina Constitution. It states, "Private property shall not be taken for public use without just compensation." (Article X, § 2 Michigan Constitution, eff. Jan 1, 1964).

In *Dep't of Trans. v. Gilling*, 289 Mich. App. 219, 796 N.W.2d 476 (2010), the Michigan Department of Transportation argued that state and federal statutes exclusively govern recovery for moving and relocation expenses. The Michigan Court easily dispatched that argument in light of the numerous condemnation cases it had analyzed and held that the administrative-recovery provisions supplement, rather than supplant, a property owner's constitutional right to receive just compensation for moving and relocation expenses as a result of a business interruption. The Court noted relocation and financial assistance allowed under the act are independent of and in addition to compensation for land, buildings or property rights and shall not be the subject of consideration in condemnation proceedings. In sum, relocation assistance acts are not the exclusive remedy for reimbursement of moving and related expenses and are recoverable in a condemnation proceeding.

The Court stated:

> We find nothing in the Uniform Relocation Assistance and Real Property Acquisition Act (FURA) (42 U.S.C. 4601, et seq.) to indicate that the administrative scheme that it creates was designed to precede resort to the courts..... The federal regulations implementing the FURA recognized that compensation made under judicial eminent-domain principles of state law may proceed the filing of a FURA claim and, when read in conjunction with 42 U.S.C. 4631(b), implicitly acknowledge that state law condemnation compensation may include items that would also be compensable under the FURA.

In reaching its opinion, the Michigan Court wrote "no act of the Legislature can take away what the Constitution has given." See *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 468 Mich. 367, 374, 663 N.W.2d 436 (2003). Thus, the Michigan courts have repeatedly allowed a business owner to receive business-interruption reestablishment damages including moving and relocation expenses as constitutional just compensation for the taking of private property.

III. SOUTH CAROLINA LAW IS IN ACCORD WITH MICHIGAN.

South Carolina inverse condemnation law provides the appellant a remedy for uncompensated taking of property for public use. Applied Building Sciences, Inc., like all tenants, is entitled to

recover just compensation for all personal property taken or damaged for public use whether the damages are direct or consequential. Our courts have repeatedly upheld the constitutional right of South Carolinians for compensation when private property is taken for public use. See *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005); (both United States Constitution and South Carolina Constitution provide that if the government takes private property for public use, that it must compensate the owner for the value).

In *Berry's On Main v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (S.C. 1981), the City of Columbia removed public sidewalks to install and relocate water meters and pipes as part of a downtown development project. Heavy rain flooded the basement of Berry's building because the City failed to backfill the excavation site. The rain damaged Berry's basement and the new merchandise stored in that basement. Berry's argued that the City's action was an unconstitutional taking for which it did not receive compensation. The Supreme Court agreed; the removal of the sidewalk was an "affirmative, positive, aggressive act" on the part of the City; and destruction of personal property and damage to the building had "some degree of permanence."[4] Thus, based on *Berry's on Main*, Applied Building Sciences, Inc. recognizes that the appellate courts of this state have allowed for compensation for taking of personal property.

In a 2009 Opinion, *Kiriakides v. School District of Greenville*, 382, S.C. 8, 675 S.E.2d 439 (S.C. 2009), the Supreme Court of South Carolina further clarified the law of inverse condemnation, distinguishing between the two types of inverse condemnation claims. The Court found that "inverse condemnation claims can result from two instances." In the first, and more traditional, instance, the government physically appropriates private property, but fails to initiate condemnation proceedings. The Court further went on to observe those inverse condemnation factors in *Byrd v. City of Hartsville*,

[4] (Destruction of personal property, as is here alleged, is certainly permanent, ...) 281 S.E.2d at 796.

365 S.C. 650, 620 S.E.2d 76 (S.C. 2005) must be proven. Those factors include: (1) an affirmative conduct of a governmental entity; (In this case requiring ABS to spend monies to reestablish its business.) (2) the conduct effects a taking; (In this case ABS lost its right to use the building owned by Hibernian and the reestablishment damages it suffered.) and (3) the taking is for a public purpose. (In this case, the S.C. Department of Commerce took ABS's lease and it had to relocate its entire business operation for a railway system for the Port of Charleston.)

IV. STATE AND FEDERAL COURTS ROUTINELY HOLD A TAKING OF PERSONAL PROPERTY REQUIRES JUST COMPENSATION.

It is well settled that the above-cited constitutional provisions, both state and federal, make no verbal distinction between real property and personal property with respect to the requirement of "just compensation." Federal decisions under the due process clause have repeatedly applied inverse condemnation principles in cases involving both personalty and intangibles. See, e.g., *Armstrong v. United States*, 364 U.S. 40 [4 L. Ed. 2d 1554, 80 S. Ct. 1563] (1960) (destruction of materialmen's liens on boats held compensable taking); *Monongahela Nav. Co. v. United States*, 148 U.S. 312 [37 L. Ed. 463, 13 S. Ct. 622] (1893) (destruction of value of a franchise held a compensable taking).

Also, various California decisions have not distinguished between real and personal property. See, e.g., *Patrick v. Riley*, 209 Cal. 350 [287 P. 455] (1930) (conceding that just-compensation clause applied to destruction of diseased cattle but concluding that police power justified such destruction without payment of compensation);[5] *Green v. Swift*, 47 Cal. 536 (1874) (plaintiff's cattle destroyed by flood allegedly aggravated by public improvement); *Affonso Bros. v. Brock*, 29 Cal. App. 2d 26 [84 P.2d 515] (3d Dist. 1938). California decisions sometimes speak of inverse condemnation as applying only to a taking or damaging of real property, see, e.g., *Albers v. County of Los Angeles*, 62

[5] This is not a police power case where the government is concerned about public health.

Cal. 2d 250 [42 Cal. Rptr. 89, 398 P.2d 129] (1965), but such language should be regarded as inadvertent and as referring solely to the facts of the particular case (i.e., the only damage claims under consideration were, in fact, to land)." (See cases compiled in 29A C.J.S. Eminent Domain, § 65, pp. 312-313, fn. 50; also 26 Am .Jur. 2d Eminent Domain, § 80, p. 737, fn. 5.).[6] See also *Sutfin v. California*, 261 Cal. App. 2d 52 (1968) (We reverse the judgment of the trial court, and in so doing hold that in proper cases recovery may be had through inverse condemnation for the taking or damaging of private property for public use, whether said property be real or personal).

In any event, the great weight of authority is a state court must yield to federal constitutional requirements in this regard, and as noted above, takings of personalty are clearly compensable under the Fifth Amendment.

V. THE TAKINGS CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS INCLUDES TAKINGS OF "PERSONAL PROPERTY".

The Circuit Court found that moving expenses were limited to $50,000.00 as per South Carolina law. (See S.C. Code § 28-11-30(4)). The Circuit Court also found that the United States Supreme Court has ruled that expenses and relocation losses are not allowed in federal condemnation proceedings. See *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596 (1946). Appellant respectfully disagrees. The United States Supreme Court in recent decisions has significantly expanded the takings clause of the Fifth Amendment since *Petty Motor Co.* In *Lucas v. Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798 (1992), the Supreme Court held that even though one continues to own real property the plaintiff could sue for economic value of the property lost. In the case of *Lucas*, the plaintiff still owned the property but just could not build a residence on the

[6] See also *Moragne v. United States*, 16 F. Sup. 1008 (1937) (valid contract is " property within constitutional prohibition against taking of property without just compensation, and hence rights arising against United States arising out of contract are protected under United States Constitution, Fifth Amendment.)

beachfront property. The Court held that the state had "taken" plaintiff's property within the meaning of the Fifth Amendment.

In 2015, the Supreme Court was again faced with this issue in the case of *Horne v. Dept. of Agriculture*, 569 U.S. 513, 237, 576 U.S. 350, 135 S. Ct. 2419 (2015). In *Horne I* and *Horne II*, the Supreme Court recognized that the takings clause of the Fifth Amendment applies to "personal property." (The taking in this case is personal property which are reestablishment costs incurred by ABS). In the *Horne* cases, a government program required raisin growers to give raisins to the government to try to stabilize the prices. The Supreme Court held that this requirement implicated the takings clause and thus a constitutional cause of action arose from the actions of the government.

In *Horne II*, the Supreme Court made clear that the takings clause protects personal property just like real property. Chief Justice John Roberts, writing for the Court, held that the Fifth Amendment requires the government and its agencies pay just compensation when it takes personal property from any citizen. Chief Justice Roberts further concluded that personal property had not been given any less protection than real property for at least 800 years and that the physical appropriation of any property gives rise to a *per se* taking. Applying this rule, Chief Justice Roberts held that the raisin reserve requirement constituted a physical taking.

A similar analysis applies here. Applied Building Sciences, Inc. was required under government compulsion to move its business and incur reestablishment and moving expenses. Applied Building Sciences, Inc. had to incur and/or spend a significant amount of money for moving costs and reestablishment costs which is clearly "personal property." Whether it be raisins or money, cars, boats, trains or planes, personal property may not be "taken" by the government without payment

for just compensation. See *Horne v. Dept. of Agriculture*, 569 U.S. 513, 237, 576 U.S. 350, 135 S. Ct. 2419 (2015).[7]

This same principle has been addressed and expounded upon repeatedly in Oklahoma, Michigan, Florida and South Carolina. Just compensation for personal property which is the result of a condemnation may not be limited by a statute such as S.C. Code § 28-11-30(4). It is only limited by what a jury could find at a trial. In this case, the Affidavit of Alan Campbell clearly establishes the relocation and reestablishment costs that Applied Building Sciences, Inc. incurred in this case. (R. ___). Campbell's Affidavit also establishes that those costs for reestablishment of Applied Building Sciences, Inc.'s business is and was personal property and that the government under well-established constitutional principles cannot take "personal property" for governmental use. (R. ___).

The limitations set forth in S.C. Code § 28-11-30(4) cannot possibly be constitutional under any argument. In fact if a statute can be read as constitutional this Court must do so. The way to accomplish that goal is to find S.C. Code § 28-11-30(4) is supplemental to a constitutional claim for damages. Established Constitutional law decisions dictate that personal property not be treated differently than real property. Appellant foresees the same scenario occurring over and over again in South Carolina. As a prime example, suppose the State of South Carolina condemned the Michelin tire plant in Greenville to build a road. The value of the real property would be paid based on just compensation consistent with the Constitutions of South Carolina and the United States. However, the personal property/moving or reestablishment costs of Michelin would be limited to $50,000.00. It would cost Michelin millions of dollars to move the plant, its equipment and thousands of employees; but under the Circuit Court ruling in this case the Michelin plant would be limited to

[7] The same logic applies to South Carolina Constitution, Article I, Section 13(A) since our courts have relied on federal common law in interpreting South Carolina's Takings Clause. See *Hardin v. S.C. Dept. of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007).

$50,000.00 reestablishment costs. Clearly, such a situation violates the takings provisions of both State and Federal Constitutions.

VI. THE CIRCUIT COURT'S FINDING THAT APPLIED BUILDING SCIENCES, INC. DID NOT APPEAL THE DEPARTMENT OF COMMERCE'S DETERMINATION TO THE ADMINISTRATIVE LAW COURT IS OF NO CONSEQUENCE.

The circuit court Order makes reference to the fact that Appellant did not appeal the Department of Commerce's determination regarding reestablishment claims to the Administrative Law Court. This, of course, makes no difference for a number of reasons. First, the parties agreed that Applied Building Sciences, Inc.'s reestablishment claim would continue after the settlement by Hibernian Heights of its real property condemnation case. (R. ___)

Second, it is well established law in South Carolina that an Administrative Law Court does not have the authority to rule on a constitutional claim. In *Travelscape, LLC v. S.C. Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), the Supreme Court held that administrative law courts were without power to pass on the constitutionality of a statute. See also *Video Gaming Consultants v. S.C. Department. of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000).

Third, the law does not require a futile act. In this case, appealing a decision by the chief legal counsel of the Department of Commerce to the Administrative Law Court would be futile. This is especially true when the issue is whether or not S.C. Code § 28-11-30(4) is constitutional.

Finally, the Department of Commerce, in a July 23, 2019 letter written by its counsel, Karen Manning, (R. ___) stated:

> ... you raise legal arguments that are more appropriately addressed by the Administrative Law Judge and/or the circuit court, ... Second, as noted by Oscar Rucker in his May 1, 2019 report and reiterated herein, the reestablishment expenses provided in Section 28-11-30(4) are not constitutionally required and, instead, provide additional compensation above and beyond the "just compensation" required pursuant to eminent domain laws." (R. ___).

In sum, the Department of Commerce in its letter not only agrees that these legal issues may be brought in either circuit court or to an Administrative Law Judge, but admits it is not required by the Constitution to pay "just compensation" – the very issue in this case.

VII. THE CIRCUIT COURT ORDER FAILS TO ADDRESS *HORNE V. DEPT. OF AGRICULTURE*, 569 U.S. 513, 237, 576 U.S. 350, 135 S. Ct. 2419 (2015).

Pages 10 and 11 of the Circuit Court's Order do not comply with the United States Supreme Court's most recent opinions. The Respondent cites *Creative Displays, Inc. v. S.C. Highway Department*, 272 S.C. 68, 248 S.E.2d 916 (1978) for the proposition that the loss of personal property cannot be considered an element of damages in a condemnation action.[8] The circuit court's decision to rely on *Creative Displays* ignores constitutional precedent established by the Supreme Court in *Horne v. Dept. of Agriculture*, 569 U.S. 513, 237, 576 U.S. 350, 135 S. Ct. 2419 (2015). In *Horne*, the Supreme Court specifically held that the takings clause of the Fifth Amendment applied to "personal property." As a result, *Creative Displays, Inc.* is no longer valid precedent since it interferes with the Constitution. Here, Appellant was required to move its personal property under government compulsion and to reestablish its ongoing business in a new location which was very expensive. This act of the government was a "taking" of Appellant's money. Appellant asserts that *Horne, supra* clearly prohibits such conduct and thus the circuit court erred in finding this to be the case.

CONCLUSION

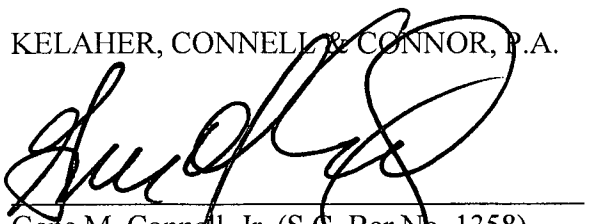
Appellant requests this Court find that the limitation in S.C. Code § 28-11-30(4) of $50,000.00 for reestablishment and moving costs is merely supplemental to any remedy in a condemnation action otherwise it is unconstitutional. Appellant further requests that this Court hold that moving and reestablishment costs are not limited and S.C. Code § 28-11-30(4)) is not the exclusive remedy but

[8] Chief Justice Lewis dissented and argued the plaintiff shall be entitled to compensation for the sign which had been damaged when it was removed.

merely supplemental for reestablishment and moving costs since to hold otherwise would violate the United States and South Carolina Constitutions.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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Attorney for Appellant

March 15, 2021
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAR 17 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc. ..... Appellant

vs.

South Carolina Department of Commerce, Division of Public Railways ..... Respondent

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the Initial Brief of Appellant on the 15th day of March, 2021, by depositing a copy of same in the United States Mail, postage prepaid, to:

David L. Paavola, Esquire
Keith M. Babcock, Esquire
Lewis Babcock L.L.P.
P. O. Box 11208
Columbia, SC 29211

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 15th day of March, 2021.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

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March 15, 2021

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Appellate Case No. 2021-000051
Applied Building Sciences, Inc. v. South Carolina Department of Commerce, a Division of Public Railways
C/A No. 2019-CP-10-04387
Our File No. 2019-0378C

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-captioned matter:

(1) Original and one copy of Initial Brief of Appellant, with Proof of Service;

(2) Original and one copy of Appellant's Designation of Matter to be Included in Record on Appeal, with Proof of Service.

Please be so kind as to return a filed copy of the Proof of Service of each document in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated documents on Respondent through counsel of record.

Sincerely yours,

Gene M. Connell, Jr.

GMCJr:sm
Enclosures

cc w/enc.: David L. Paavola, Esquire
Keith M. Babcock, Esquire

KELAHER, CONNELL & CONNOR, PC

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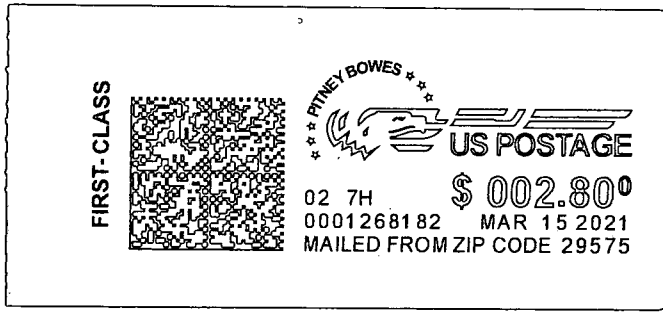

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