STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge
Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc.,

Appellant,

v.

South Carolina Department of Commerce,
Division of Public Railways,

Respondents.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 5

ARGUMENT 6

I. ABS Received South Carolina's Statutory Limit of $50,000 for Reestablishment Expenses. 6

II. Constitutional Just Compensation Is Separate and Distinct From Statutory Relocation Assistance Benefits Offered to Displaced Businesses 10

III. Public Railways Did Not Condemn ABS's Personal Property; Rather, It Condemned ABS's Leasehold Interest For Which it Paid Just Compensation 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Andrus v. Allard, 444 U.S. 51 (1979) 18

Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981) 19

Brown v. City of North Charleston, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) 7

Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005) 18, 19

Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 642 S.E.2d 751 (2007) 5

Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) 5, 6

City of North Charleston v. Claxton, 315 S.C. 56, 431 S.E.2d 610 (Ct. App. 1993) 14

Creative Displays, Inc. v. South Carolina Highway Department, 272 S.C. 68, 248 S.E.2d 916 (1978) 12, 13, 14

Department of Transportation v. Gilling, 796 N.W.2d 476 (Mich. Ct. App. 2010) 15

Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001) 5

Gray v. South Carolina Dept. Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992) 20

Hamilton v. Martin, 270 S.C. 223, 241 S.E.2d 569 (1978) 20

Hardin v. South Carolina Dept. Transp., 371 S.C. 598, 641 S.E.2d 437 (2007) 12, 15, 20

Horne v. Department of Agriculture, 576 U.S. 350 (2015) 17, 18

Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So.2d 289 (Fla. 1958) 15

Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999) 6

Kiriakides v. Sch. Dist. of Greenville Cty., 382 S.C. 8, 675 S.E.2d 439 (2009) 18

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17

Malone v. Division of Admin., State of Florida Dept. of Transp., 438 So.2d 857 (Fla. Dist. Ct. App. 1983) 15

Mitchell v. United States, 267 U.S. 341 (1925) 12

Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000) 6

Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co., of Virginia, 464 U.S. 30 (1983) 7, 16

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) 5

State v. Neuman, 384 S.C. 395, 683 S.E.2d 268 (2009) 6

State of Oklahoma Department of Transportation v. Little, 100 P.3d 707 (Okla. 2004) 15

S.C. Hum. Affs. Comm'n v. Zeyi Chen, 430 S.C. 509, 846 S.E.2d 861 (2020) 6, 9

S.C. State Highway Dep't v. Bolt, 242 S.C. 411 (1963) 12

South Carolina Department Highways Public Transp. v. Najma Records, Inc., 288 S.C. 169, 341 S.E.2d 649 (Ct. App. 1986) 14

South Carolina Dept. Transp. v. M&T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) 20

South Carolina State Highway Department v. Smith, 253 S.C. 639, 172 S.E.2d 827 (1970) 13, 14

Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) 10

United States v. 7,215.50 Acres of Land, 507 F. Supp. 228 (D.S.C. 1980) 12

United States v. General Motors Corp., 323 U.S. 373 (1945) 11

United States v. Petty Motor Co., 327 U.S. 372 (1946) 11, 15

United States ex. rel T.V.A. v. Powelson, 319 U.S. 266 (1943) 12

Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000) 12

Williams v. State Highway Commission, 113 S.E.2d 263 (N.C. 1960) 13

Constitutions

S.C. Const. art. I, § 13 10

U.S. Const. amend. V 10

Statutes

S.C. Code Ann. § 28-2-360 11

S.C. Code Ann. § 28-2-370 11

S.C. Code Ann. § 28-2-460 ..... 20, 21

S.C. Code Ann. § 28-11-10 ..... 6, 7, 16

S.C. Code Ann. § 28-11-30(4) 1, 7, 8, 10

S.C. Code Ann. § 28-11-70 11

42 U.S.C. § 4601 7

42 U.S.C. § 4622 7

42 U.S.C. § 4630 7

Other Authorities

Federal Highway Administration Guidelines for the Relocation Assistance Act, 49 CFR § 24.303 8

South Carolina Department of Transportation Relocation Assistance Manual 8

STATEMENT OF ISSUE ON APPEAL

I. In South Carolina, relocation expenses are not part of constitutional just compensation for condemnations. The South Carolina Relocation Assistance statute, S.C. Code Ann. § 28-11-30(4), caps reestablishment expenses for a displaced business at $50,000. Applied Building Sciences, Inc. was paid $50,000 for reestablishment expenses. Did the lower court properly dismiss Applied Building Sciences' inverse condemnation claim seeking additional reestablishment expenses?

STATEMENT OF THE CASE

On June 13, 2017, as part of its Navy Base Intermodal Facility ("NBIF") project in Charleston County, Public Railways condemned the entire tract of land and office building owned by Hibernian Heights, LLC located at 1890 Milford Street Charleston, South Carolina (the "Milford Property") in a condemnation action styled as South Carolina Department of Commerce, Division of Public Railways v. Hibernian Heights, LLC, and Applied Building Sciences, Inc., case number 2017-CP-10-3029. Applied Building Sciences, Inc. ("ABS") was named as an Other Condemnee in that action as the sole tenant of the Milford Property. (R. p. 286, ¶ 4). At the time of condemnation, Mr. Alan Campbell was the sole owner of Hibernian Heights, LLC and a part owner of ABS. The condemnation action was settled by the parties and a consent order of dismissal was entered on June 18, 2019. (R. pp. 220-22). The parties agreed that ABS reserved its right to challenge relocation assistance outside of the condemnation action. (R. pp. 223-225).

ABS was offered relocation assistance as part of the condemnation process for the Milford Property, which consisted of moving expenses, payment for losses of tangible property, search expenses to find a replacement location, and reestablishment expenses. (R. p. 33, ¶ 8). ABS received the statutory cap of $50,000 in reestablishment expense reimbursements. ABS's request for additional reestablishment expense reimbursements in excess of the $50,000 statutory cap was denied. (R. pp. 96-99). On August 21, 2019, ABS filed an action for inverse condemnation, contending that it incurred in excess of $560,000 of uncompensated expenses to reestablish its business at its replacement location. (R. p. 227; R. p. 266).

Public Railways moved for summary judgment in this matter on January 31, 2020, contending that as a matter of law it paid the maximum amount of reestablishment expenses. ABS moved for summary judgment on February 24, 2020, arguing that reestablishment expenses are constitutional and cannot be limited by statute. The circuit court heard oral argument on June 18,

2020, and thereafter, on October 22, 2020, granted Public Railways' motion for summary judgment through a Form 4 Order. On October 27, 2020, ABS moved for reconsideration of the order, a reasoned opinion, and a ruling on its own motion for summary judgment. The Court issued an order on December 18, 2020, denying ABS's motion for reconsideration and denying ABS's motion for summary judgment. This appeal followed.

STATEMENT OF THE FACTS

The underlying facts are not in dispute. (R. p. 2). ABS was required to relocate its business as a result of the Milford Property's condemnation. Michael Baker International was hired to perform right of way acquisition services for the NBIF project, which included working with tenants on relocation and reestablishment assistance. (R. p. 32, ¶ 4). On January 17, 2017, Oscar Rucker, Special Projects Manager for Michael Baker International, provided Mr. Alan Campbell and Hibernian Heights, LLC with an Availability of Payments – Relocation Assistance letter. (R. p. 34, ¶ 13). This letter outlined the various categories of covered costs associated with relocating and reestablishing a business that are available under South Carolina law. (R. p. 34, ¶13). These eligible cost categories include: (1) costs for moving personal property along with preapproved incidentals such as licenses, permits, replacement stationary, and utility connection for replacement site; (2) direct losses of tangible personal property specifically identified; (3) reestablishment expenses up to $50,000; and (4) replacement site search expenses. (R. p. 34, ¶ 13 and R. pp. 59-62). The letter also provided bids from third parties to move ABS's personal property to a location within fifty miles. (R. p. 34, ¶ 13 and R. pp. 59-62). Moving expenses are established by actual bids and are not capped, whereas reestablishment expenses are limited by statute to $50,000.

Mr. Campbell notified Michael Baker on May 4, 2017, that ABS located a replacement site at 2308 Cosgrove Avenue. (R. p. 34, ¶ 14). Public Railways paid to move ABS's tangible personal

property to its replacement site. ABS undertook renovations to 2308 Cosgrove and sought reimbursement for such reestablishment expenses. (R. p. 34, ¶ 14). On or about October 2017, ABS, through Mr. Campbell, submitted a claim for $34,398.94 in reestablishment expenses for framing and demolition at 2308 Cosgrove Avenue. (R. p. 34, ¶ 15 and R. pp. 63-66). The claim form reflected the cap on reestablishment expenses of $50,000, and a remaining balance after the initial payment of $15,601.06. Mr. Campbell signed the claim form and Public Railways paid the first claim. (R. p. 34, ¶ 15 and R. pp. 63-67).

On or about November 2017, ABS submitted a second claim for reestablishment expenses of $16,543.44, but because it had reached the cap for reestablishment expenses, only $15,601.06 was approved for payment. (R. p. 35, ¶ 16 and R. pp. 68-70). Mr. Campbell signed this second claim form and Public Railways paid this second claim. (R. p. 35, ¶ 16 and R. pp. 68-71). In total, Public Railways paid $50,000 of reestablishment expenses to ABS. (R. p. 35, ¶ 17).

ABS then made a claim for reestablishment expenses in excess of the $50,000 statutory cap. Public Railways' Relocation Manager made the determination that ABS was not entitled to receive reestablishment expenses beyond $50,000.[1] (R. pp. 128-130). ABS appealed the Relocation Manager's determination to Public Railways' Chief Legal Counsel. Public Railways' Chief Legal Counsel denied ABS's appeal. (R. pp. 96-99). ABS did not appeal the Chief Legal Counsel's determination to the Administrative Law Court. Instead, ABS filed this inverse condemnation action seeking in excess of $560,000 of additional reestablishment expenses.

[1] Public Railways adopted the South Carolina Department of Transportation's regulations and guidelines for Relocation Assistance. These guidelines provide that relocation assistance determinations are first made by the Relocation Manager. An applicant may appeal the Relocation Manager's determination to the Chief Legal Counsel for Public Railways. An applicant may then appeal the decision of the Chief Legal Counsel in the Administrative Law Judge Division within thirty days.

STANDARD OF REVIEW

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). "In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Id.* (citing *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)).

"The issue of interpretation of a statute is a question of law for the court." *Id.* (citing *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). The appellate court is "free to decide a question of law with no particular deference to the circuit court." *Id.* (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000)).

"[Appellate courts have] a very limited scope of review in cases involving a constitutional challenge to a statute." *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 528, 846 S.E.2d 861, 871 (2020) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (internal quotation marks omitted)). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id.* (internal quotation marks and citation

omitted). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Id.* (internal quotation marks and citation omitted). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Id.* (quoting *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009)).

ARGUMENT

I. ABS Received South Carolina's Statutory Limit of $50,000 for Reestablishment Expenses.[2]

In South Carolina, businesses that are displaced because of condemnation are statutorily entitled to receive relocation assistance. S.C. Code Ann. § 28-11-10, *et seq.* ABS received relocation assistance, including the statutory maximum of $50,000 in reestablishment expenses, when it was required to move out of the Milford Property. (R. p. 35, ¶ 17). Because it has reached the statutory cap, ABS is not eligible to receive reimbursement for any additional reestablishment costs.

In 1970, the federal government, recognizing the potential hardships created for persons displaced as a result of condemnations, enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, *et seq.* ("Relocation Assistance Act"), for projects using federal money.[3] South Carolina's relocation assistance statute expressly

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[2] Sections I-III of Appellant's argument are addressed in Respondent's section II, and Respondent's section III addresses Appellant's argument sections IV-VII.

[3] The Relocation Assistance Act specifically applies to state projects that involve federal dollars. *Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co., of Virginia*, 464 U.S. 30, 32 (1983) (citing 42 U.S.C. § 4630).

incorporates all payments that are required to be made to displaced persons under the federal Relocation Assistance Act, and makes such payments mandatory on all projects in South Carolina regardless of whether state or federal funds are used. S.C. Code Ann. § 28-11-10.[4]

The Relocation Assistance Act, and South Carolina's relocation statute, provides for payment of (1) actual moving expenses, (2) direct losses of tangible personal property as a result of moving, (3) actual reasonable expenses in searching for a replacement site, and (4) actual reasonable expenses necessary to reestablish a displaced business up to $25,000. 42 U.S.C. § 4622. When incorporating the Relocation Assistance Act, South Carolina increased the cap on reestablishment expenses to $50,000. S.C. Code Ann. § 28-11-30(4). South Carolina's provision for reestablishment expenses is set forth 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.*

S.C. Code Ann. § 28-11-30(4) (emphasis added).[5] There is no cap on moving expenses.[6] Public Railways communicated these eligible categories of relocation assistance to ABS. (R. p. 34, ¶ 13

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[4] South Carolina courts have recognized that condemning authorities are statutorily obligated to pay relocation assistance to displaced tenants regardless of whether a state project involves federal funds. In *Brown v. City of North Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994), displaced tenants brought an action for relocation costs after being denied financial assistance to move by the City because the project did not have any federal funding. *Id.* at 299, 442 S.E.2d at 634. The court held that S.C. Code Ann. § 28-11-10 requires relocation assistance to displaced tenants regardless of whether a project has federal funding. *Id.* at 300, 442 S.E.2d at 635. The court looked to statutory law, not constitutional, to reach this result.

[5] Contrary to ABS's argument, the use of the permissive phrase "may be paid" does not render this section a "supplemental remedy," (App. Brief, FN1), to constitutional damages for a taking. In fact, it simply acknowledges that reestablishment costs may not be present in every case, and where reestablishment costs are present, they may go beyond the federal limit of $25,000 up to $50,000.

[6] In this instance, among other eligible moving costs, Public Railways provided ABS with a bid of $23,212.74 to move the majority of its personal property as well as a bid of $7,250 to disconnect and reconnect IT/network equipment at the replacement location. (R. p. 60).

and R. pp. 59-62).

Eligible reestablishment expenses typically include items such as repairs or improvements to bring a replacement property in compliance with current building codes, modifications to make the replacement location suitable to conduct the business, installation costs for signage, redecorating or replacing worn surface such as paint or carpet, and two years of increased operating costs due to the move. (R. pp. 120-21) (following Federal Highway Administration Guidelines for the Relocation Assistance Act, 49 CFR § 24.303). Such expenses are reviewed by the condemning authority to ensure they are actual, reasonable, and necessary. *Id.*

ABS located a replacement property at 2308 Cosgrove Avenue in North Charleston and decided to undertake renovations, fully aware of the $50,000 limit on reimbursement of reestablishment expenses. (R. p. 34, ¶ 14). On or about October 2017, ABS, through Mr. Campbell, submitted a claim for $34,398.94 in reestablishment expenses for framing and demolition at 2308 Cosgrove Avenue. (R. p. 34, ¶ 15 and R. pp. 63-66). The claim form reflected the cap on reestablishment expenses of $50,000, and a remaining balance after the initial payment of $15,601.06. Mr. Campbell signed the claim form and Public Railways paid the first claim. (R. p. 34, ¶ 15 and R. pp. 63-67). On or about November 2017, ABS submitted a second claim for reestablishment expenses of $16,543.44, but because it had reached the cap for reestablishment expenses, only $15,601.06 was approved for payment. (R. p. 35, ¶ 16 and R. p. 68-70). Mr. Campbell signed this second claim form and Public Railways paid this second claim. (R. p. 35, ¶ 16 and R. p. 68-71). In total, Public Railways paid $50,000 of reestablishment expenses to ABS. (R. p. 35, ¶ 17).

ABS now contends that it incurred more than $560,000 in additional reestablishment expenses and that South Carolina's statutory cap on relocation expenses is unconstitutional and

cannot limit the amount that ABS can claim for reimbursement. (R. p. 228-29, ¶¶ 19-20). As one example of the type of expenses that ABS is attempting to claim in this lawsuit, it is seeking payment of more than $110,000.00 for over 400 hours of site visits conducted by its owner, Alan Campbell, billing at a rate of $285/hour. (R. p. 230-267). ABS is asking the government to pay for numerous employee/owner site visits and 100% of its leasehold improvements to its new location. ABS chose to renovate its newly leased location in amounts grossly in excess of the express statutory limit on reestablishment expenses. ABS was free to do so, and it will have the full benefit of its improvements, but it cannot now demand that Public Railways pay for these leasehold improvements. The statutory cap on reestablishment expenses prevents such gamesmanship that would result if a displaced business could spend an unlimited amount on renovations to a replacement location and demand repayment.

ABS has offered no basis upon which it can be said that the South Carolina General Assembly's statutory cap of $50,000 for reestablishment expenses is repugnant to the constitution beyond a reasonable doubt. *Zeyi Chen*, 430 S.C. at 528, 846 S.E.2d at 871 ("A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." (internal quotation marks and citation omitted)). South Carolina's relocation assistance mirrors the federal Relocation Assistance Act and, in fact, has a more favorable limit on reestablishment expenses. The $50,000 statutory limit on reestablishment expenses is not unconstitutional.

It is undisputed that ABS received the statutory maximum amount of reestablishment expenses. Because there is no dispute of fact on this issue, the lower court property granted

summary judgment holding that as a matter of law because ABS has received the statutory cap of $50,000 in reestablishment expenses under S.C. Code Ann. § 28-11-30(4), it is not entitled to receive any additional reestablishment funds from Public Railways.

II. Constitutional Just Compensation Is Separate and Distinct From Statutory Relocation Assistance Benefits Offered to Displaced Businesses.

When Public Railways acquired the entire Milford Property through eminent domain it was constitutionally required to pay just compensation, which equates to the fair market value of the property acquired.[7] The only property belonging to ABS that Public Railways acquired was its leasehold interest in the Milford Property, which Public Railways paid for when it settled the amount of just compensation. Separately, Public Railways paid statutory relocation assistance to ABS, as a displaced tenant, to move its personal property and help defray the costs of setting up at its replacement location. As part of relocation, ABS chose to make certain leasehold improvements to its new building, but at no point in time has Public Railways ever taken possession of, or deprived ABS the use of, these improvements; therefore, no additional constitutional just compensation is owed to ABS.

In South Carolina, the costs to relocate a displaced business from a condemned property are not constitutionally compensable and are not part of the equation of just compensation, but instead fall under a statutory framework for relocation assistance. South Carolina's Eminent Domain Procedure Act explicitly provides that "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property,

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[7] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); S.C. Const. art. I, § 13 ("private property shall not be taken . . . for public use without just compensation being first made for the property"); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 407, 175 S.E.2d 805, 820 (1970) ("In a condemnation proceeding the issues are simple. The court is in quest of the reasonable fair market value of the property taken.").

and any benefits as provided in § 28-2-360 may be considered." S.C. Code Ann. § 28-2-370. In accord, South Carolina's Relocation Assistance statute provides that: "Nothing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding." S.C. Code Ann. § 28-11-70. This distinction between just compensation and relocation assistance is consistent with how federal courts and South Carolina courts have interpreted constitutional just compensation.

The United States Supreme Court has long held that businesses displaced as a result of condemnation *do not* have a constitutional right to receive moving and related expenses. *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946) ("Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, *evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings*." (emphasis added)); *United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945) ("Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership *does not include losses to his business or other consequential damage*." (emphasis added)). Federal district courts in South Carolina reflect the Supreme Court's approach. *U.S. v. 7,215.50 Acres of Land*, 507 F. Supp. 228 (D.S.C. 1980) ("the expenses of relocation and other consequential losses *are not allowed* in federal condemnation proceedings" (citing *Mitchell v. United States*, 267 U.S. 341, 344 (1925); *United States ex. rel T.V.A. v. Powelson*, 319 U.S. 266 (1943) (emphasis added)).

South Carolina condemnation law follows federal takings jurisprudence in excluding moving and relocation costs for personal property from constitutional just compensation. *See*

Hardin v. South Carolina Dept. Transp., 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007) ("South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking."). "The Fifth Amendment Takings Clause concerns itself solely with the owner's relation to the physical thing and not with consequential damages." *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 305, 534 S.E.2d 270, 274 (2000); see also *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 417-18 (1963) ("[I]t is the general rule that injury to or loss of business resulting from the taking is not considered as an element of damage in eminent domain proceedings in the absence of a statute expressly allowing such damages.").

In *Creative Displays, Inc. v. South Carolina Highway Department*, 272 S.C. 68, 248 S.E.2d 916 (1978), the State Highway Department acquired a right-of-way easement that required the removal of an outdoor billboard. The sign owner refused to take down the sign and remove it from the easement, so the highway department removed the sign and stored it for the owner's retrieval. *Id.* at 70, 72, 248 S.E.2d at 916-17. Creative Displays argued that it was entitled to just compensation for its sign, in part based on the federal Relocation Assistance Act where a federal agency was required to acquire an equal interest in fixtures and improvements that would be adversely affected by the land acquisition. *Id.* at 72, 73, 248 S.E.2d at 917, 918. The lower court awarded compensation but the South Carolina Supreme Court reversed, finding that because the sign was personal property (which could be moved) and not a fixture, the sign owner was not entitled to compensation. *Id.* To reach this result, the court looked to *South Carolina State Highway Department v. Smith*, 253 S.C. 639, 172 S.E.2d 827 (1970), in which it had previously ruled that personal property located on condemned realty was not compensable. *Creative Displays*, 272 S.C. at 72, 248 S.E.2d at 918 ("When land is taken under the power of eminent

domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected: and the owner is entitled to remove same as was done here." (quoting *Smith*)). As it had in *Smith*, the South Carolina Supreme Court quoted with approval language from the North Carolina Supreme Court observing that:

> 'A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property.'

Id. at 72–73, 248 S.E.2d at 918 (quoting *Williams v. State Highway Commission*, 113 S.E.2d 263, 266 (N.C. 1960) (citing numerous sources for this proposition, included courts in Illinois, New Hampshire, and Massachusetts)). Ultimately, the court ruled that the federal Relocation Assistance Act did not intend to provide compensation for personal property, and even if it did, it "cannot and does not change the South Carolina Constitution and statutory law," that personal property is not compensable in condemnation where its owner is not deprived of its use. *Id.* at 73-74, 248 S.E.2d at 918.

In *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (Ct. App. 1993), *cert. denied*, the City of North Charleston condemned property that resulted in mobile homes having to relocate. On appeal, the landowners argued that it was error for the trial court to exclude testimony of the economic loss they suffered as a result of having to relocate their mobile homes. *Id.* at 61-62, 431 S.E.2d at 613. In affirming the exclusion of relocation expense testimony, this Court cited *Creative Displays* and *Smith* for the proposition that removal costs of personal property are not an element of damages in eminent domain because "such loss is not a taking of property." *Id.* at 62, 431 S.E.2d at 614 (quoting *Creative Displays*, 272 S.C. at 72-73, 248 S.E.2d at 918). This Court also observed that: "It is well settled law in this state that when land is taken under the power of

eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected." *Id.* Admitting testimony on relocation costs as damages would have "overrul[ed] existing case law, an action which is beyond the authority of this Court." *Id.* This ruling was consistent with this Court's prior observation that: "A landowner is not entitled to damages in condemnation actions for personal property not taken as a result of a highway condemnation." *South Carolina Department Highways Public Transp. v. Najma Records, Inc.*, 288 S.C. 169, 341 S.E.2d 649 (Ct. App. 1986) (citing *South Carolina State Highway Department v. Smith*, 253 S.C. 639, 172 S.E.2d 827 (1970)) (ruling that removable recording equipment was personal property and not compensable in condemnation).

ABS ignores "well settled South Carolina law" and relies on case law from Michigan, Oklahoma, and Florida to argue that moving and relocation expenses are constitutionally required in South Carolina. However, these jurisdictions each rely on state-specific condemnation law, not federal law, and none of the cases cited by ABS suggest that these jurisdictions would allow an unlimited amount of reestablishment expenses as ABS is arguing for here.

In *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289 (Fla. 1958), the Florida Supreme Court looked to the state constitution and state statutes to determine if moving expenses should be compensated in condemnation. *Jacksonville Expressway*, 108 So.2d at 290. The court observed that: "Admittedly the current weight of authority in the United States supports appellant's contention that no compensation to the owner for the cost of moving his personal property should be allowed." *Id.* at 291 (citing *U.S. v. Petty*, 327 U.S. 372 and various state courts). Even so, the court ruled that as a matter of *Florida law*, moving expenses could be a factor in just compensation. *Id.* at 292; see also *Malone v. Division of Admin., State of Florida Dept. of Transp.*,

438 So.2d 857, 861 (Fla. Dist. Ct. App. 1983) ("[O]ur function is to assess the validity of the cost items based *solely upon our interpretation of Florida law.*" (emphasis added)).

In *Department of Transportation v. Gilling*, 796 N.W.2d 476 (Mich. Ct. App. 2010), the Michigan Court of Appeals undertook a review of Michigan case law ruling that what Michigan classifies as business interruption damages, "moving and relocation expenses," are constitutionally required in Michigan separate and apart from statutory relocation provisions. *Id.* at 481-488 (*"state law condemnation compensation may include items that would also be compensable under the provisions of the* [Federal Relocation Act]" (emphasis in original) (citations and internal quotation marks omitted)). The *Gilling* court relied exclusively on Michigan case law and did not address federal takings jurisprudence, which South Carolina follows. *Hardin*, 371 S.C. at 605, 641 S.E.2d at 441.

In *State of Oklahoma Department of Transportation v. Little*, 100 P.3d 707 (Okla. 2004), the Oklahoma Supreme Court relied exclusively on Oklahoma case law to find that moving and related expenses are elements of just compensation in Oklahoma and the Relocation Assistance Act did not displace that historic case law. *Little*, 100 P.3d at 717, 719 ("The relocation assistance acts do not add to or subtract from the components of value or damage due a condemnee as just compensation *under the state law of eminent domain.*").

Contrary to these other jurisdictions, in South Carolina, as with the federal government, relocation assistance is separate and distinct from constitutional just compensation. When a condemnation results in a tenant's displacement, such as here where ABS was required to relocate because the entire Milford Property was condemned by Public Railways, the tenant is statutorily eligible to receive relocation assistance. S.C. Code Ann. § 28-11-10, *et seq.* Relocation assistance exists to help defray the costs of finding and moving to a replacement location when that move

was occasioned by government conduct—it is not part of constitutional just compensation but a legislative effort to address inequities that may result from traditional condemnation law. *See Norfolk Redevelopment and Housing Authority*, 464 U.S. at 37 (recognizing the federal Relocation Assistance Act was enacted to address the inequity that could result from traditional concepts of eminent domain where an owner would receive market value for the condemned property but a tenant receive nothing).

In the underlying condemnation action, Public Railways and Hibernian Heights agreed on the amount of just compensation owed for the Milford Property, and Hibernian Heights received payment. (R. pp. 220-22). The amount of just compensation due for the Milford Property is settled and Public Railways is under no further constitutional obligation to pay any additional amounts to any person. ABS had a statutory right to receive relocation assistance, which it received. ABS's personal property was moved to its replacement location; it was not taken by Public Railways. As such, no compensation is owed to ABS for its personalty previously located at the Milford Property.

ABS repeatedly argues that its personal property was taken when the Milford Property was condemned, but it fails to identify any personal property over which Public Railways took possession or control. Rather, ABS is seeking payment for leasehold improvements that it chose to make to its replacement location and over which it has full control and will receive the full benefit. ABS's decision to spend money to improve its new leasehold is not a taking, and it does not fall within the definition of just compensation owed for the Milford Property.

Accordingly, the lower court correctly ruled that reestablishment expenses are not constitutionally compensable in condemnation and are instead governed by statute.

III. Public Railways Did Not Condemn ABS's Personal Property; Rather, It Condemned ABS's Leasehold Interest For Which it Paid Just Compensation.

Public Railways has not taken ABS's personal property. None of ABS's property rights were condemned by Public Railways apart from its leasehold interest in the Milford Property, which was fully compensated for in the settled condemnation action.

The underlying condemnation by Public Railways was a direct appropriation of real property owned by Hibernian Heights and leased to ABS as an office building, for which Public Railways paid just compensation. Contrary to ABS's position in its opening brief, it was neither a regulatory taking, where an enacted regulation deprived ABS of all economically viable use of its property (as in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)), nor a physical appropriation of personal property, where ABS's personal property was physically taken by the government (as in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), in which the Supreme Court held that just compensation was owed for the government's physical appropriation of a grower's raisin inventory). The only constitutional property right of ABS's that was condemned was its leasehold interest in the Milford Property, which is why ABS was named as a party to the condemnation. (R. p. 286, ¶ 4). None of ABS's personal property located at the Milford Property was physically appropriated by Public Railways; in fact, it was moved to ABS's replacement location.

Because none of its personal property was physically appropriated, ABS's reliance on *Horne v. Department of Agriculture*, 576 U.S. 350 (2015) is misplaced. In *Horne*, raisin growers objected to having to physically turn over a percentage of their raisin crop each year to the federal government as part of a program to stabilize market prices. *Id.* at 355-56. The Supreme Court held that, just as with real property, when the government physically appropriates personal property it is a taking and just compensation is owed. *Id.* at 358. Here, Public Railways did not

physically appropriate ABS's personal property, it paid to move ABS's property to a new location. ABS was required to relocate from the Milford Property, but it retained sole discretion over the nature and extent of its renovations to the replacement property; ABS was not directed or controlled by Public Railways. *See Horne*, 576 U.S. at 364-65 (discussing *Andrus v. Allard*, 444 U.S. 51 (1979), where the Supreme Court found no taking occurred where there was no restraint on owner's property). The fact that ABS chose to expend funds on renovations to its replacement property in excess of the statutory cap of $50,000—renovations which it alone will enjoy throughout its future leasehold—cannot be transformed into a property right that was taken by Public Railways. ABS's leasehold improvements are now part of the value of its replacement property, which was not taken by Public Railways. Accordingly, Public Railways does not owe just compensation for ABS's leasehold improvements.

ABS's reliance on *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 675 S.E.2d 439 (2009) and *Byrd v. City of Hartsville*, 365 S.C. 650, 662, 620 S.E.2d 76, 82 (2005) is unavailing. Under the South Carolina Supreme Court's guidance on inverse condemnation cases in *Kiriakides*, Public Railways' condemnation of the Milford Property would fall under the first category of a physical appropriation of the real property, not the second category of a government-imposed limitation on the use of private property (i.e., a regulatory taking). Public Railways paid just compensation for its physical appropriation of ABS's property—its leasehold interest—it did not impose a regulatory restriction on ABS's property. In *Byrd*, the landowner argued that delay in zoning change approval caused damage to its property. *Byrd*, 365 S.C. at 655, 620 S.E.2d at 78. The court in *Byrd* denied damages, ruling that it is only an unreasonable delay that is compensable under *Penn Central*. No such regulatory delay has occurred here. Another case cited by ABS, *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 15, 281 S.E.2d 796, 797 (1981), is likewise

inapplicable, as that case involved the government's physical destruction of tangible property. ABS's only potential constitutional damages from the condemnation was its loss of leasehold interest in the Milford Property, for which it chose not to pursue an apportionment hearing.

When an entire property is taken by eminent domain, a leasehold interest is one of the property rights that is acquired and compensated for by the payment of just compensation. When Public Railways acquired the entire Milford Property through condemnation and paid just compensation for the Milford Property, Public Railways paid the full amount of constitutional compensation necessary to acquire the complete scope of property rights in the Milford Property, including the value of ABS's leasehold interest, if any. Counsel for the landowner Hibernian Heights and tenant ABS agreed that the amount of just compensation had been settled. (Consent Order of Dismissal and Cancellation of Lis Pendens, attached as Exhibit B to Public Railways' Motion for Summary Judgment). There are no property rights in the Milford Property that Public Railways did not acquire through condemnation.

Accordingly, to the extent that ABS had a constitutional claim for just compensation in recognition of its leasehold interest in the Milford Property at the time of condemnation, ABS's claim fell within the amount of just compensation paid by Public Railways to acquire the Milford Property. In other words, ABS may have had a claim for an apportionment of just compensation for its lease as between itself, as tenant, and Hibernian Heights, LLC, as landlord, as envisioned by the South Carolina Eminent Domain Procedure Act, which provides as follows:

> Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment must be made jointly to all the parties and may be paid to the clerk of court. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties.

S.C. Code Ann. § 28-2-460. However, ABS has never had a freestanding property claim against Public Railways for its leasehold interest outside of the amount due as just compensation for the total taking of the Milford Property.

ABS could have challenged the apportionment of just compensation as between itself and its landlord Hibernian Heights, LLC, but it chose not to.[8] *South Carolina Dept. Transp. v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 653, 667 S.E.2d 7, 12 (Ct. App. 2008) ("A proceeding to allocate any condemnation funds is by statute a proceeding in equity" (citing S.C. Code Ann. § 28-2-460)). Had ABS done so, South Carolina courts have recognized that "leasehold value in a total condemnation is the difference between the market value rent and the rent paid by the tenant over the full course of the lease including renewal options." *M&T Enterprises*, 379 S.C. at 662, 667 S.E.2d at 16; *Gray v. South Carolina Dept. Highways and Public Transp.*, 311 S.C. 144, 153, 427 S.E.2d 899, 904 (Ct. App. 1992) (same) (citing *Hamilton v. Martin*, 270 S.C. 223, 241 S.E.2d 569 (1978)), *overruled on other grounds by Hardin v. South Carolina Dept. Transp.* 371 S.C. 598, 641 S.E.2d 437 (2007). If ABS had been found to be entitled to value for its leasehold interest, this amount would have been apportioned from the amount of just compensation on deposit with the court, not separately paid by Public Railways. S.C. Code Ann. § 28-2-460.

Accordingly, ABS does not have any property rights that were condemned apart from its leasehold interest in the Milford Property, for which Public Railways has paid just compensation. Therefore, summary judgment was properly granted by the lower court.

[8] ABS is partially owned by Alan Campbell, who is also the sole owner of Hibernian Heights.

CONCLUSION

Public Railways does not have a constitutional obligation to pay any amounts beyond just compensation for its taking of the Milford Property. South Carolina's relocation assistance statute placed a statutory obligation on Public Railways to pay certain benefits to displaced persons. Public Railways paid ABS the statutory limit on reestablishment expenses and met its statutory obligation.

As a matter of law, ABS is not constitutionally entitled to receive reestablishment expenses, and it is only statutorily entitled to receive up to $50,000 in reestablishment expenses. A ruling that ABS is entitled to a virtually unlimited amount of reestablishment expenses would be contrary to well-established state law and an expansion of long-established condemnation procedure—such a sea change in South Carolina condemnation law is not justified. There is no dispute of fact that ABS has already been paid the statutory limit of $50,000 for reestablishment expenses. For these reasons, the lower court's grant of summary judgment should be affirmed.

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Columbia, South Carolina
May 27, 2021

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge
Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc.,

Appellant,

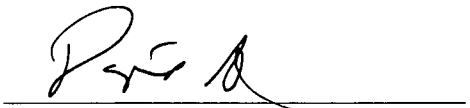
v.

South Carolina Department of Commerce,
Division of Public Railways,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.



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