THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Please for the Ninth Circuit

Thomas L. Hughston, Circuit Court Judge

Case No. 2009-CP-10-6185

Henry W. Frampton, III.....Respondent,

v.

South Carolina Department of Transportation.....Appellant.

BRIEF OF RESPONDENT

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Statement of Issues

This appeal contains serious issue preservation problems because: of the failure of SCDOT to object to the admission of evidence which is now being complained about; its failure to make the basic, but essential motions for a directed verdict and for judgment notwithstanding the verdict; and because of its failure to appeal rulings which it now seeks to contest. Even if one ignores these issue preservation defects, the SCDOT's central contention that this temporary taking of access case should be analyzed as a regulatory taking is in direct conflict with the South Carolina Supreme Court's most recent pronouncements on the taking of the well established real property right of access. Hilton Head Automotive, LLC. v. SCDOT, 394 S.C. 27, 714 S.E.2d 308 (2011); Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011). This case was properly analyzed by the trial court as a physical taking using the recently reaffirmed "material impairment of an easement of access test". Hilton Head Automotive, LLC, 714 S.E.2d 308; South Carolina State Highway Department v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007); South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). Finally, SCDOT's appeal of the court's award of litigation expenses is based on an interpretation of the wrong statute. The statute governing attorney fees and expenses in an inverse condemnation claim is S.C. Code Ann. § 28-11-30. This is the statute pursuant to which the trial court awarded the litigation expenses and is directly applicable to inverse condemnation cases.

Frampton hereby incorporates each of the sections below into his Statement of Issues.

Counter Statement of the Case

This is an inverse condemnation case filed by the Plaintiff Henry W. Frampton, III ("Hal Frampton") against the South Carolina Department of Transportation ('SCDOT") on September 29, 2009. *See* Complaint. (R. p. 85). The action is brought pursuant to the Fifth Amendment of the United States Constitution, Article I, Section 13 of the South Carolina Constitution, and the common law of the State of South Carolina. Frampton demanded a jury trial. At the time of the filing of the original complaint, Hal Frampton's wife, Dale Frampton, was also a named Plaintiff. The original complaint alleged a taking/inverse condemnation of three separate parcels of property abutting Folly Road on James Island. The parcels are identified as 699 Folly Road, 693 Folly Road and 685 Folly Road. The alleged taking arose out of the temporary but complete denial of access to parcel 699 as well as the installation of a median in front of all three of the parcels. The SCDOT answered on November 3, 2009. *See* Answer of DOT. (R. p. 90). The Answer contained a general denial. The Answer did not contain any objection to the jury trial demand of Frampton. The Answer did not allege any affirmative defenses. Thereafter, discovery commenced by both parties. On September 30, 2010, the action was transferred to the jury roster pursuant to Rule 40, SCRCP.

On June 27, 2011, nine months after the transfer of the case to the jury roster, the SCDOT filed and served a motion to transfer the case to the non-jury roster. *See* SCDOT Motion to Transfer to Non Jury Docket. (R. p. 60). This was the first objection to Hal Frampton's jury demand. The SCDOT argued that an inverse condemnation case is in equity, and the Judge makes both findings of fact and conclusions of law. Id. at p. 2. (R. p. 61). As such, the SCDOT argued that "[f]orcing the Department to try both the taking

issue and the just compensation issue before a jury **would deprive the department of a mode of trial to which it is entitled and thus impair a substantial right.**" Id at p. 2. (R. p. 61). (emphasis supplied). On September 28, 2011, the Honorable Kristi Lea Harrington, denied the SCDOT's motion to transfer the case to the non-jury roster. *See* Form 4 Order, September 28, 2011. (R. p. 8). The SCDOT did not appeal this order.

As a result of the Supreme Court's ruling in Hilton Head Automotive v. SCDOT, 714 S.E.2d 308, the complaint was amended on December 14, 2011 to dismiss the inverse condemnation claims relative to two of the parcels, 693 Folly Road and 685 Folly Road, and to remove Dale Frampton as a party. The only alleged damages to these parcels arose out of the installation of the median. *See* Amended Complaint. (R. p. 92). Therefore, the property located at 699 Folly Road, owned by Hal Frampton, was the only property remaining as the subject of the action (hereinafter sometimes referred to as the "Property"). Id. Consistent with the original complaint, Hal Frampton alleged a temporary taking arising out of the complete denial of access to his property for over a year. As a result of the taking, he alleged damages arising out of the denial of access and damages associated with the installation of the median. On February 6, 2012, the SCDOT filed an answer to the amended complaint. *See* Answer to Amended Complaint. (R. p. 97). The Answer contained a general denial. The Answer did not allege any affirmative defenses.

A trial was held before the Honorable Thomas L. Hughston on February 6-8, 2012, pursuant to a joint request for priority and a day certain trial in the Charleston County Court of Common Pleas. *See* Attachments to Plaintiff/Landowner's Memorandum in Response to the SCDOT's Rule 59 Motion, March 1, 2012. (R. p. 24).

After the jury was qualified, but prior to the striking of the jury, the SCDOT once again made the motion as to "the mode of trial procedures for trying this case." Transcript at p. 5. (R. p. 104). The Court noted that this motion relative to the "mode of trial" had already been denied. Transcript at p. 9. (R. p. 108). The SCDOT argued that the Court must try the issue of whether there is a taking outside the presence of the jury, and, if the Court found a taking, then Hal Frampton could elect to have a jury decide the issue of damages. Transcript at pp. 6-9. (R. p. 105-108). Hal Frampton argued that the SCDOT's motion was a motion to bifurcate the trial because its objection to the mode of trial had already been denied by Judge Harrington and was not appealed. Transcript at p. 15. (R. p. 114). He argued that bifurcation was not appropriate in this case, a temporary physical taking case, because it would require him to put up his case twice because the liability and damage issues were interrelated and required many of the same proof of facts. Id. The Court denied the motion to bifurcate the trial. Transcript at p. 27. (R. p. 126). Importantly, the Court ruled and Hal Frampton agreed that the issue of the existence of a taking was to be decided by the Court and the issue of the existence and amount of damages was to be decided by the jury. Id.; Transcript p. 56 (R. p. 155); Transcript pp. 411-416 (R. p. 510-515). Both, the Judge and the jury, would simply hear the overlapping evidence at the same time. The jury was also instructed as to their role in the case relative to damages, if any, and the Court's role in determining the existence of a taking. Transcript p. 56 (R. p. 155); Transcript pp. 411-416 (R. p. 510-515). No exception was taken by the SCDOT to the instructions to the jury.

The parties then agreed that most efficient way to try the case was to have Hal Frampton put up his case first but wait to put in any evidence on the actual amount of

damages. Transcript p. 281-284. (R. p. 380-383). The SCDOT would then put up its case relating to the takings issue and not the damages issue. Id. The Court agreed to this procedure based upon the consent of the parties. Hal Frampton then put up its case, without damages figures, through two witnesses, Larry Phinney, the former SCDOT right of way agent, and Hal Frampton. At the conclusion of Hal Frampton's case on the takings issue, the SCDOT did not make a motion for directed verdict or any other motion that Frampton failed to meet his burden of proof on the takings issue as a matter of law or that the evidence presented by him in his case in chief did not constitute a taking as a matter of law. The SCDOT did not make a motion stating that the evidence presented by Frampton was relative only to the exercise of the SCDOT's police power. The SCDOT simply followed Frampton and put up its case on the takings issue. The SCDOT again did not make any motions at the conclusion of all the evidence on the takings issue. Accordingly, and based upon the evidence, on February 7, 2012, the Court ruled that there was a temporary taking of Hal Frampton's property due to the denial and material impairment of access for a period of sixteen (16) months. Transcript at pp. 383-384 (R. p. 482-483); Transcript at p. 388 (R. p. 487). The Court ruled and instructed the jury as follows:

"And the law, in regard to that claim, provides that I, as the judge, have to make a decision about whether or not that did amount to a taking under the constitution and the code of laws of South Carolina. So at this point, I have decided that there was a taking of his right to get in and out of his property to the public road. He had a right, no question about it, under the law. In my opinion no question about it, he had a right of ingress and egress to his property to that public road. And in my opinion, by a greater weight of the preponderance of the evidence, he has proven his claim that the Department of Transportation denied him that right, denied him his access to the public road for the period of time November 2008 through February 2010, that that was a substantial deprivation, a substantial taking, of his right and that occurred for that period of time."

Transcript at p. 413. (R. p. 512). The Court also ruled that Frampton was not entitled to any damages arising out of the installation of the median.[1] The SCDOT did not make a directed verdict motion either prior to or after the ruling. Frampton then went on to put in evidence of the actual damage amount claimed. This evidence was put in through two witnesses, Hal Frampton and Thomas Harnett, MAI. Thereafter the SCDOT called its construction engineer on the damages issue. Once again, at the close of all of the evidence, the SCDOT did not make a motion for a directed verdict or JNOV or any other motion relative to the insufficiency of the Frampton's evidence or the Court's application of an improper legal standard.[2]

On February 8, 2012, the jury returned a verdict in favor of Landowner Frampton in the amount of $36,527.00. The jury, as requested by the SCDOT, was charged that they were to assign the proper rate of interest, if any, on the condemnation award. The SCDOT has not appealed the Court's charges to the jury.

On February 16, 2012, the SCDOT filed a post trial motion pursuant to Rule 59(a) and (e). *See* Defendant's Rule 59 Motion. (R. p. 11). The SCDOT argued the Court made the following errors:

- Permitting the jury to sit during the takings phase of the trial denied it a mode of trial to which it was entitled;
- The Court's ruling that a taking occurred was based on an erroneous application of the law;
- The Court and the jury misapplied the evidence; and

[1] Frampton did not appeal the ruling on the median damages, and it is not an issue in the current appeal. Importantly, any and all damages claimed by Frampton relating to the installation of the median were proffered outside the presence of the jury. Though the SCDOT claims as a ground for this appeal that the testimony of Thomas Hartnett, MAI relative to the median damages and the testimony of Frampton relative to separate property prejudiced it in front of the jury (*see* Appellant's Brief at p. 8), this testimony was proffered outside the presence of the jury. The jury never heard any of it.

[2] Indeed, as a result of its failure to make a directed verdict motion, the SCDOT could not make a JNOV motion. Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E.2d 823 (Ct.App. 1993) ("A motion for a directed verdict is a prerequisite for a subsequent motion for a judgment notwithstanding the verdict"); *see also* Rule 50(b), SCRCP.

- The Court's and the jury's determination was outside the bounds of the facts presented and outside the scope of the pleadings.

None of the foregoing allegations of error, with the exception of the first "mode of trial" argument that was previously denied and unappealed, was presented to the trial court during the trial nor were they the subject of contemporaneous objections by the SCDOT.[3] On February 17, 2012, Landowner Frampton filed a motion for litigation expenses pursuant to S.C. Code Ann. § 28-11-30(3). (R. p. 63).

On April 23, 2012, the Court denied the SCDOT's Rule 59, SCRCP, motion and granted the Landowner's Motion for litigation expenses. The Court awarded the Landowner $80,726.77 in litigation expenses pursuant to S.C. Code Ann. § 28-11-30(3).

The SCDOT has served eight (8) separate notices of appeal in this action. The first notice was dated February 8, 2012. This notice of appeal was relative to the Court's finding of a taking. This appeal was never properly filed, and thus never perfected. Three more notices of appeal were served on March 5, 2012. They were filed on March 6, 2012 with the circuit court and the Court of Appeals. They relate to the SCDOT's allegation that it was denied a mode of trial, the Court's finding of a taking, and the Court's decision to award compensation for the taking. On March 16, 2012, the SCDOT served three more "amended notices of appeal" relating to the same issues appealed on March 6, 2012. All of the foregoing notices of appeal are prior to the Court's order on the SCDOT's Rule 59, SCRCP, motion. The amended notices of appeal do not attach or reference the Rule 59, SCRCP Order. Therefore, the Court's Rule 59, SCRCP Order is

[3] Accordingly, the remaining grounds alleging the insufficiency of the evidence are not proper in a Rule 59 motion. *See* Peay v. Ross, 292 S.C. 535, 537, 357 S.E.2d 482, 483 (1987) ("More fundamentally, an objection to the sufficiency of the evidence cannot be raised for the first time in a motion for a new trial; a motion for a directed verdict is a prerequisite for a motion for a new trial on the ground that the evidence does not support the verdict.").

not the subject of this appeal. On May 8, 2012, a notice of appeal was served and filed relative to the Court's order awarding litigation expenses.

Statement of the Facts

On March 19, 2007, the SCDOT began construction on a bridge improvement project located on State Highway 171 ("Folly Road") at Ellis Creek on James Island. Construction initially took place on the south side of Ellis Creek. The construction project was pursuant to SCDOT Plan and Profile Sheets ("Project Plans") signed and sealed by the project engineer on July 19, 2005 and pursuant to contract documents and specifications. *See* Plaintiff's Exhibit 7. (R. p. 635-645). The contract for the project was awarded to a contractor named Cape Romain Contractors. *See* Portion of Plaintiff's Exhibit 8. (R. p. 711-718).

Hal Frampton's Property, 699 Folly Road, is located on the north side of Ellis Creek immediately adjacent to Ellis Creek over which the bridge spans.[4] The Property contains a small house that has been used as rental property by Hal Frampton's family since at least 1955. Testimony of Hal Frampton, Transcript at p. 149. (R. p. 248). It has always had its own driveway and has always been used as a separate income producing property notwithstanding the fact the Frampton family owns adjacent parcels. Testimony of Hal Frampton, Transcript at p. 155. (R. p. 254). Larry Phinney, the former right of way agent for the SCDOT, testified that there was nothing unsafe about the Property's driveway prior to the bridge improvement project. Testimony of Larry Phinney, Transcript at pp. 118-120. (R. p. 217-219). The SCDOT in fact approved a subdivision

[4] Folly Road is part of the state highway system. Folly Road is held by way of an easement interest by the SCDOT. *See* Testimony of Larry Phinney, Transcript at pp. 89-94 (R. p. 188-189) ; Plaintiff's Exhibit 3 (R. p. 647). As a result of the road interest being held in easement rather than a fee simple interest, the abutting owners, including Hal Frampton, continue to own the underlying fee in the road.

of the former larger parcel and did not require the issuance of a driveway encroachment permit for the Property in 2005. Id; *see* Plaintiff's Exhibit 17. (R. p. 657).

The Project Plans called for a permanent guardrail to be installed in front of the Property's driveway. Plaintiff's Exhibit 7. (R. p. 635-645); Testimony of Larry Phinney, Transcript at pp. 103-108 (R. p. 202-207); Testimony of Cliffton Hough, Transcript at pp. 356-357 (R. p. 455-456). When installed, this guardrail would permanently deny all access to Folly Road and to any other public roadway from the Property. Id. Mr. Phinney informed Frampton of this intended closure and complete denial of access. Id; *see also* Testimony of Hal Frampton, Transcript at p. 172. (R. p. 271). Moreover, Mr. Phinney informed Frampton that he specifically asked the engineers to shorten the guardrail so as to not deprive access to the property, and this request was denied. Id. The guardrail was to be installed and the Property was to be denied all access. Testimony of Larry Phinney, Transcript at p. 104 (R. p. 203).

In October 2008, construction activities for the project began on the north side of Ellis Creek immediately adjacent to the Property. As a result of the construction activities and the access issues related to the interference with the driveway, the tenant occupying the property left when the construction adjacent to the driveway began. *See* Testimony of Hal Frampton, Transcript at p. 244-245 (R. p. 343-345).

The SCDOT began a series of affirmative acts which blocked vehicular access to the Property from Folly Road. It first installed orange construction fencing and concrete barriers that blocked access to the Landowner's Property in November of 2008. Plaintiff's Exhibit 19-A (R. p. 662); 19-D (R. p. 665); 19E (R. p. 670). A silt fence, required by the contract documents and the South Carolina Department of Health and

Environmental Control, was also installed in front of the Hal Frampton's property in November of 2008, and it blocked all access. Plaintiff's Exhibit 19-A; 19-B; 19E; 19-J; 19-K; 19-L; 19-R; 19-Y; 19-Z; 19-AA; 19-BB; 19-CC; 19-DD; 19-EE; 19-FF; 19-GG; 19-HH; 19-II. (R. p. 662-696). The silt fence was not installed in front of the other driveways adjacent to Folly Road and these properties were permitted access to Folly Road during construction. Plaintiff's Exhibit 19-D (R. p. 665); 19-M (R. p. 674); 19-W (R. p. 684); Testimony of Cliffton Hough, Transcript pp. 356-357 (R. p. 455-456). The concrete driveway providing access to the Property and adjacent curb and gutter was also removed in November and December of 2008. Plaintiff's Exhibit 19-A; 19-B; 19-C (R. p. 662-664); 19-G; 19-H; 19-I (R. p. 668-670). New sewer pipe trenches were excavated and new sewer pipes installed across the former driveway for the Property. Plaintiff's Exhibit 19-A; 19-B; 19-C; 19-G; 19-H; 19-I. Id. The SCDOT constructed a new sidewalk and curb and gutter in front of the former driveway that blocked all access from Folly Road to the Property in January of 2009. Plaintiff's Exhibit 19-N; 19-O; 19-P; 19-Q. (R. p. 675-678) The other adjacent properties were provided a drop curb/driveway in the new sidewalk and curb allowing continued access during and after the project. Plaintiff's Exhibit 19-M. (R. p. 674). The area in front of Hal Frampton's access driveway was also used as a "lay down area" throughout the project and the equipment, port-o-lets, and materials blocked all access to the property throughout the project. Plaintiff's Exhibit 19-A; 19-B; 19-C; 19-G; 19-H; 19-I; 19-S; 19-T; 19-U; 19-V; 19-W; 19-X; 19-Y; 19-Z; 19-AA; 19-BB; 19-CC. (R. p. 662-690)

The silt fence, orange blockades, construction lay down area, curbs, and port-o-let remained until July of 2009. Testimony of Cliffton Hough, Transcript p. 361-363. (R. p.

460-462). At that time, in July of 2009, the guardrail blocking the former driveway was installed. Plaintiff's Exhibit 19-EE; 19-FF; 19-GG; 19-HH; 19-II. (R. p. 692-696).

At the trial of this action, Hal Frampton put into evidence the numerous pictures, cited above, showing the affirmative SCDOT actions which constituted the denial of access to the property from November of 2008 through January of 2010. There was no dispute that the pictures depicted that access to the Property was blocked by the SCDOT. The Project Manager for the SCDOT on this project, Bobbie D. Burton, testified regarding the pictures as follows:

Q. Okay. And you, sir, sat in this courtroom, as well, and viewed the photographs with everybody else?
A. That's correct.
Q. Okay. And its not your position that access to this piece of property was not blocked by the DOT, correct? That's not your position?
A. Restate?
Q. It's not your position that access was not blocked, right?
A. [no response]
Q. Access was blocked, right?
A. It was.
Q. There was no—
A. It was blocked. That is correct.

Testimony of Bobbie D. Burton, Transcript p. 339. (R. p. 438).

During the latter phase of the project the SCDOT announced that they would shorten the guardrail and construct an access drive to the Property. Testimony of Larry Phinney, Transcript, p. 108. (R. p. 207). This would allow the access to be restored at the end of the project.[5] Prior to this time, however, the SCDOT did not provide any alternative access or make any effort to provide access to the Property because the closure of the access was intended to be permanent. As depicted in the pictures cited

[5] At this time, Hal Frampton began making repairs to the rental house on the Property to prepare it to be rented again now that access was going to be restored. Testimony of Hal Frampton, Transcript at pp. 219-220 (R. p. 318-319); Transcript at p. 250 (R. p. 349).

above, access to the adjacent properties was never planned to be permanently closed and those driveways remained open during the entire construction period, except for brief intermittent closures.

The SCDOT restored access to the Property in January of 2010 after a series of grading, drainage and pot hole problems were addressed and after the SCDOT was able to tie the property back into the roadway pursuant to S.C. Code § 57-5-1100. Plaintiff's Exhibit 19-JJ; 19-KK; 19-LL; 19-MM; 19-NN; 19-PP; 19-QQ; 19-RR; 19-SS; 19-TT; 19-UU. (R. p. 697-708). The grading, drainage, pothole restoration, and paving were required to be performed by the SCDOT pursuant to State law. *See* S.C. Code Ann. § 57-5-1140 ("The department shall construct at its expense with its maintenance forces the portion within the right-of-way of entrances and aprons to state highways at any point necessary to render adequate ingress and egress to the abutting property at locations where the driveways will not constitute hazardous conditions.[****] The entrances to be constructed as outlined in this section shall include base and surfacing as necessary to provide an **all weather** driveway entrance."). Hal Frampton was able to rent the property again, after a short marketing period, beginning in March of 2010. There was no evidence presented by the SCDOT that the one month period was an unreasonable marketing period. The only evidence presented was that this was a reasonable marketing period for the property. Testimony of Hal Frampton, Transcript pp. 219-220. (R. p. 318-319).

Hal Frampton put in evidence of his damages arising out of the loss of access to the Property for the 16 month period. The first element of his damages was his own testimony and back up invoices as to "cost to cure" damages. Testimony of Hal Frampton, Transcript pp. 417-419. (R. p. 516-518). This amount totaled $3,835.25 and

represented the costs associated with tying in the driveway to the Property. Id. The SCDOT did not object to these damages, and, in fact expressly stated on the record it had no objection to them. Transcript pp. 416-422. (R. p. 515-521). The second element of damages was the cost of utility bills that would have been paid by the tenant had there been any access to the Property during the time of the take. Testimony of Hal Frampton, Transcript pp. 421-422. (R. p. 520-521). This amount totaled $950.54. The SCDOT did not object to these damages, and, in fact expressly stated on the record it had no objection to them. Transcript pp. 416-422. (R. p. 515-521). The final of element of damages was put in through the expert witness real estate appraiser Thomas Hartnett, MAI. Testimony of Thomas F. Hartnett, MAI, Transcript pp. 427-434. (R. p. 526-533). Subsequent to being qualified as an expert without objection, Mr. Hartnett opined that the property was worth $250,000 in the before setting. Testimony of Thomas F. Hartnett, MAI, Transcript pp. 449-450. (R. p. 548-553). He then opined that it was proper to use the income producing method of real estate appraisal, and an expected rate of return at that time on a $250,000 real estate investment would be eight percent. Testimony of Thomas F. Hartnett, MAI, Transcript pp. 449-454. (R. p. 548-553). This amounted to $20,000.00 per year or $1,666.67 a month. Id. This was the loss of use damages. He then multiplied this amount by the 16 month taking period. Id. The SCDOT did not object to this calculation of damages. Id. Finally, Mr. Hartnett applied the statutory rate of interest in direct condemnation cases of eight (8%) and applied it to the cost to cure and the loss of use damages. Id; Testimony of Thomas F. Hartnett, MAI, Transcript pp. 469-470. (R. p. 568-569). The SCDOT did not object to the use of the eight percent interest figure. Id.

The total amount of claimed damages was $36, 527.00. This amount was awarded by the jury.

Standard of Review

The SCDOT argues that "eminent domain cases sound in equity" and "that they are special proceedings of equitable origin." SCDOT Brief p. 7. For this proposition, the SCDOT cites Hardin v. SCDOT, 359 S.C. 244, 249, 597 S.E.2d 814, 816 (Ct.App. 2004) *rev'd by* Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007). In the opinion issued in the case by the Court of Appeals, the Hardin Court stated as follows:

> "The trial judge bifurcated the [inverse condemnation] proceedings below and conducted a trial in equity solely to determine the question of whether [the landowners] were deprived of a property right entitling them to just compensation. We note that the issue of whether the proceeding conducted by the Circuit Court in a case of this type is equitable or legal is novel in South Carolina. We conclude that the proceeding is equitable in nature and adopt the reasoning of the Supreme Court of Florida in Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989)."[6]

An eminent domain proceeding is, however, an action at law. Notwithstanding the Court of Appeals decision in Hardin, which was reversed by the Supreme Court, stating that the issue was "novel" in South Carolina, the Supreme Court has already ruled that an eminent domain proceeding, whether inverse or direct, is an action at law. In South Carolina Public Service Authority v. Arnold, the South Carolina Supreme Court held as follows:

"Respondents contend a condemnation action is a 'special proceeding' rather than an action at law. While this classification is correct, it appears that it was made simply to distinguish condemnation actions from other actions at law. It did not create a fully separate classification. **Clearly, a condemnation action is an action at law.**

[6] The citation to the Florida case is interesting for at least two reasons. First, the Florida case recognizes the general rule that a complete denial of access is a taking. Second, it does not state anywhere in the opinion that an inverse condemnation case is an equitable proceeding. In fact, it specifically states that the Judge must decide as a "matter of law" whether a taking has occurred. The fact that a claimant does not have a right to a jury trial does not automatically make the action sound in equity rather than in law.

FN2 Respondents seek to distinguish Milhouse and Chick Springs[7] because they were inverse condemnation actions. This is a distinction without a difference."

287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986) (emphasis supplied). As such, even if the pronouncement by the Court of Appeals in Hardin regarding the equitable nature of the proceedings survived its reversal by the Supreme Court, the holding is in conflict with the law of the State of South Carolina as declared in Arnold. This is an action at law. The South Carolina South Carolina Supreme Court recently reiterated that an inverse condemnation case is an action at law in Dunes West Golf Club, LLC v. Town of Mount Pleasant, Opinion No. 27208 (S.C.Sup.Ct. filed January 9, 2013) (Shearouse Adv.Sh. No. 2 at 32) ("The question of a taking is one of law.") (citation omitted).

In an action at law where the Judge makes findings of fact and conclusions of law, this Court's standard of review is limited to properly preserved errors of law and reviews factual findings only for evidence which reasonably supports the court's findings. Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 591 (1998).

Argument

I. The undisputed evidence is that the Landowner was denied access to his property for a period of 16 months by the affirmative actions of the SCDOT. This amounts to a physical taking under South Carolina law.

The SCDOT argues that the Landowner "did not prove facts supporting a taking of property, temporary or otherwise." There is, however, as will be explained below, no way for this Court to evaluate or rule on this assertion as the SCDOT did not make a

[7] The Chick Springs Court, evaluating an inverse condemnation case over 80 years ago, stated unequivocally as follows: "From the above authorities it is indisputable that the constitutional provision quoted above [Article I, Section 17] is self executing, and, the Legislature having enacted no statute providing for the compensation guaranteed by the Constitution applicable to the facts of this case, **an action at law will lie to recover such compensation." 159, S.C. 481,** 157 S.E. 842, 848 (1931)(emphasis supplied).

single objection or motion to the trial court pointing to a specific element of the Landowner's claim that did not have a factual basis, was objectionable, or did not meet elements of a temporary taking. It is clear under South Carolina law that "a directed verdict motion is required to preserve any issue regarding the sufficiency of evidence." 15 S.C. Jur. Appeal and Error § 80 *citing* Barber v. Citizens & Southern Bank, 268 S.C. 16, 231 S.E.2d 295 (1997); *See* Peay v. Ross, 357 S.E.2d 482, 483. In the context of an eminent domain case, the Supreme Court held as follows:

> "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity."

SCDOT v. First Carolina Corporation of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007). Here, the SCDOT has failed to meet any of the four requirements. There was no motion made to the trial court. There was no timely objection made to the trial court. The trial court did not rule on any objection or motion as to the sufficiency of the evidence.

Notwithstanding the SCDOT's failure to preserve any argument, the SCDOT now argues that "rerouting and diversion of traffic" is a police power act of the sovereign, and the evidence submitted by the Landowner relates only to police power acts of the sovereign. This is not a road relocation case. This is not a diversion of traffic case. The overwhelming and uncontradicted evidence at the trial of this action was that the SCDOT physically and materially took Mr. Frampton's easement of access to his property from the public road way for a 16 month period after informing him that a permanent guardrail would be installed. The law is clear on this takings issue, and it was succinctly stated in the recent decision of Hilton Head Automotive, LLC v. SCDOT, 394 S.C. 27, 714, S.E.2d 308 (2011) as follows:

"As an abutting property owner, [the landowner] had 'an easement of access' to [the highway] regardless of whether it had access to and from an additional public road. In addition, [the landowner] had 'an easement for access to and from the public road system. If governmental action materially injured either of these easements, such that [the landowner] no longer enjoyed the reasonable means of access to which it was entitled, a **physical taking** has occurred."

(emphasis supplied). The Court in Hilton Head Automotive went on to expressly state that the analysis of this type of taking, a physical taking of access, required the "material injury test," and the Court cited to longstanding precedent. Id at 714 S.E.2d 311, n. 4 *citing* Sease v. City of Spartanburg, 242 S.C. 520, 524–25, 131 S.E.2d 683, 685 (1963) ("The protection of [the South Carolina "takings" clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."); Brown v. Hendricks, 211 S.C. 395, 403–04, 45 S.E.2d 603, 606–07 (1947) ("The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value ... and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto.") *see also* South Carolina State Highway Department v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). In addition to the Supreme Court's recent pronouncement in Hilton Head Automotive of the physical nature of a denial of access, the Supreme Court has evaluated a denial of access claim pursuant to a physical takings analysis rather than a regulatory takings analysis in Hardin v. SCDOT, 641 S.E.2d 437 and Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011).

Therefore, this is a physical takings case. The only distinction between the present case and the foregoing jurisprudence is that this is a temporary physical taking

case. This is, however, a distinction without a difference as the Supreme Court ruled that temporary takings are compensable and the "some degree of permanence" element is no longer required when analyzing a physical takings claim. *See* Byrd v. City of Hartsville, 620 S.E.2d at 79 ("First, we remove the element 'some degree of permanence,' for it conflicts with the principle that the government must compensate for even a temporary taking."). The Byrd court, therefore, held that there are now three elements to a physical inverse condemnation case: (1) affirmative conduct of a governmental entity; (2) effecting a taking; and (3) the taking is for a public use.[8] Byrd, 620 S.E.2d 79. "A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking" of a recognized property right. Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011). Subsequent to Byrd, it is irrelevant if the damage/taking is only for a duration that is not permanent. The real inquiry is whether a recognized property right—in this case something as fundamental as an abutting landowner's right of access—has been materially injured. *See* South Carolina State Highway Department v. Allison,143 S.E.2d 800 (a property owner in South Carolina has an easement for access to and from any public road that abuts his property.); Brown v. Hendricks, 45 S.E.2d 603; South Carolina State Highway Dept. v. Wilson, 175 S.E.2d 391.

At the trial of the present case, the evidence was abundant that the SCDOT deprived the landowner of all access to his property for a period of 16 months. The case law is clear that a landowner has an easement of access to the public road way. Hilton Head Automotive, LLC. v. SCDOT, 714 S.E.2d 308. This easement was extinguished temporarily by the SCDOT. This is a taking. *See* Hardin v. SCDOT, 641 S.E.2d at 443

[8] There is no dispute that the project was for a public use.

("an easement is either taken or it is not."). The evidence was abundant that the period of the denial of access was sixteen (16) months. The evidence was manifest that the total deprivation of access for that period to the Landowner's property was a material impairment of his easement. In fact, a total denial of the use of an easement is the highest impairment of a property owner's rights in an easement. There cannot be a more material impairment of an easement of access than the extinguishment of its use. Indeed, the South Carolina General Assembly, in addition to the common law cited above, has specifically spoken to the SCDOT's obligations regarding access. South Carolina Code Ann. § 57-5-1100 states as follows:

"Any such existing driveway or side-road entrance or exit constructed prior to February 16, 1956, and adjudged by the Department to be unsafe for the traveling public may be changed by the Department so as to eliminate any unsafe features or closed or displaced by substitution therefore of another driveway or side-road entrance or exit at such place or of such design as may be deemed safe, **but no such existing side road or driveway may be closed unless other reasonable access to the highway is provided by a frontage road or otherwise.**"

(emphasis supplied). Though there is no evidence the access to Frampton's property was unsafe, the statute is clear that access cannot be taken away in full without just compensation.

The SCDOT does not discuss in its brief the "material injury test," or Section 57-5-1100. Instead, SCDOT argues because Frampton did not ask them to move all of the barricades, the guardrail, the materials, equipment, and the silt fence so he could gain access to his property from the road way, that the actions of the SCDOT did not constitute a taking. The SCDOT ignores the fact that it told Frampton the access was to be cut off permanently, and he acted accordingly. The SCDOT ignores the fact that it actually "affirmatively acted" to cut off access. The SCDOT only now seeks to argue

that its actions were not "affirmative actions," but were in fact "police power" acts done with regard to safety concerns. However, the SCDOT's most recent argument ignores two important and undisputed facts. First, there is no evidence the access driveway to the 699 property was unsafe at any point. *See* Testimony of Larry Phinney, Transcript pp. 119-120. (R. p. 218-219). Second, there is a statutory process to deal with unsafe driveways; and the SCDOT took no action under that statute. S.C. Code Ann. § 57-5-1120 states as follows:

> Any abutting property owner or lessee may file an application within thirty days from a decision of the department in the administration of Sections 57-5-1080 to 57-5-1110 for a hearing in the matter before a circuit judge at chambers or in open court in the judicial circuit in which the property is located, and such court or judge is hereby vested with jurisdiction to set the matter for a hearing upon ten days' written notice to the department of such hearing and thereupon to determine whether the action of the department is in accordance with the provisions of law. The decision of the circuit judge may be appealed in the manner provided by the South Carolina Appellate Court Rules.
>
> **Provided, however, that the above procedure shall be an alternative method of relief and shall not abrogate or deny any property owners' rights as to relief under any existing law relating to the condemnation of property.**

(emphasis supplied). If the SCDOT was not affirmatively acting to cut off access, but, as it now contends, was acting pursuant to its police power to regulate unsafe access, it failed to follow the statutory procedures. There is nothing in this record to indicate that the SCDOT initiated any administrative proceeding to close the driveway or revoke the driveway permit to the property. Such action must be preceded by notice and an opportunity for a hearing. See S.C. Code Ann. §§ 1-23-310 et seq. Indeed, even if it had followed the statutory procedure, the statute specifically recognizes that if other reasonable access is not supplied the landowner may seek compensation in a condemnation action. S.C. Code Ann. § 57-5-1120.

The only other argument presented by the SCDOT, and simply a variation of the first argument, is that Frampton did little to help himself, and that he is somehow barred by the doctrine of laches. Notwithstanding the fact that this argument is glaringly disingenuous, these arguments relate to affirmative defenses that the SCDOT did not plead in its Answer and of which there is no evidence in the SCDOT's case in chief. "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Again, Frampton had no reason to "help himself" as his access was to be denied permanently. Moreover, upon learning that access was to be restored, Frampton immediately took steps to restore the property so it could be rented. There is ample evidence in the record and under the proper standard of review that access was denied for a 16 month period. This is a physical taking under South Carolina law.

II. The Trial Court applied the correct standard in its determination of a taking.

Much of the SCDOT's brief is spent arguing that the circuit court applied the incorrect law in finding a temporary taking. However, as with each of the other objections raised by the SCDOT in its brief, this issue was never presented to the trial court. The SCDOT did not make a motion that Frampton failed to submit factual evidence relating to a legal element it argued was necessary to prevail on a temporary inverse condemnation claim. The SCDOT did not object to evidence entered by Frampton as irrelevant to the legal elements it now asserts should have been applied by the trial court. Most importantly, the SCDOT did not make a motion stating that the evidence submitted by the landowner was insufficient, and has now, therefore, waived any such argument. *See* 15 S.C. Jur. Appeal and Error § 80 *citing* Barber v. Citizens &

Southern Bank, 268 S.C. 16, 231 S.E.2d 295 (1997); Peay v. Ross, 357 S.E.2d 482, 483; SCDOT v. First Carolina Corporation of S.C., 641 S.E.2d 903.

The SCDOT now relies solely on arguments it made in a Rule 59 motion for the first time. This is flawed for two reasons. First, it is axiomatic that arguments cannot be made to the trial court for the first time in a Rule 59(e) motion. *See* SCDOT v. First Carolina Corporation of S.C., 641 S.E.2d 903, 907 ("[A]n issue may not be raised for the first time in a post trial motion.") Secondly, the Court's Order on the Rule 59(e) motion has not been appealed by the SCDOT. As such, these arguments are not preserved in any way for appeal.

Notwithstanding the jurisdictional and procedural flaws in its argument, the SCDOT's argument ignores South Carolina law. The SCDOT argues that physical encroachments that fall short of permanent physical occupations are known as "temporary physical invasions." It argues that such "temporary physical invasions" are not per se physical takings under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) because they do not have a degree of permanence. The SCDOT cites Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000) for this proposition. Main v. Thomason, however, in addition to being factually inapposite to the present case, was overruled by the South Carolina Supreme Court in Byrd v. City of Hartville, *supra*, because the "permanence" element of a taking has been rejected by the United States Supreme Court. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Most importantly, South Carolina law requires that the taking of an abutter's easement within the context of an inverse condemnation action must be analyzed

pursuant to the "material injury" test. *See* Hilton Head Automotive, 714 S.E.2d 308, 311, n. 4. Rather than applying the material injury test, the SCDOT argues that the test that should have been applied by the lower court was the Penn Central Transportation Co. v. New York City, 438 US 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) test for regulatory takings. The SCDOT argues that the denial of access to the property is synonymous with a regulatory delay. This is not a regulatory delay case. This is a denial of access case, and pursuant to South Carolina law it must be analyzed as a physical takings case pursuant to the material injury test. *See* Hilton Head Automotive, *supra.*

Moreover, even if the present case was analyzed under the three prong Penn Central test, there are facts in the record to meet each element of the test. *See* Ark. Game and Fish Commn. v. U.S., 133 S.Ct. 511 (2012) (holding that temporary flooding rather than permanent flooding may give rise to a taking); *see also* US v. General Motors, 323 US 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (finding and awarding damages for a temporary taking rather than a permanent taking during war time). The general rule under a Penn Central analysis is that "essentially **ad hoc factual inquires**" must be made that balance all relevant circumstances to determine whether the government has taken property. Byrd, 620 S.E.2d at 80 *citing* Penn Central, 438 U.S. at 124 (emphasis supplied). "Two circumstances are especially important: (1) 'the economic impact on the claimant, and, particularly, the extent to which the government has interfered with distinct investment backed expectations;' and (2) 'the character of the governmental action.'" Id.; *see also* Dunes West Golf Club, LLC v. Town of Mount Pleasant, Opinion No. 27208.

Here, the Court sitting as the finder of fact ruled that Frampton had historically used the Property as a rental income property, suffered complete loss of access to his property and a substantial decrease, if not elimination of, in the economically viable use of the property. *See* Testimony of Hal Frampton, Transcript pp 172-221 (R. p. 271-320); Testimony of Thomas F. Hartnett, Transcript pp. 445-446 (R. p. 545-546). Mr. Hartnett opined that without access this piece of property was most likely incapable of being marketed for sale or of leasing at its fair market value. Testimony of Thomas F. Hartnett, Transcript pp. 445-446. Id. Therefore, Frampton could not rent or even use the property as he legitimately expected to and had in the past. This right of use is the essence of property ownership. Moreover, the record is clear that it was the affirmative actions of the SCDOT that caused the denial of access. First, the SCDOT expressly informed Mr. Frampton that access was to be cut off from Folly Road. The SCDOT then took actions to physically block the access. All of these actions were incidental consequences of its public purpose bridge replacement project and not actions taken to prevent harm or remedy unsafe conditions caused by the driveway. South Carolina State Highway Dept. v. Wilson, 175 S.E.2d 391. Therefore, any argument that the Penn Central test should have been applied and was in fact not applied is at best harmless error. There is ample evidence in the record to support the Court's judgment finding a temporary taking.

III. The testimony of the landowner's appraiser was competent and credible.

The SCDOT argues that the verdict was based upon the testimony of the Frampton's appraiser that contained hypotheticals and suppositions that were not credible. Once again, however, the SCDOT did not object to any of the testimony of the appraiser that went in front of the jury. It is not, therefore, clear what hypotheticals and suppositions

were made and were improper. Mr. Harnett testified as to how he arrived at the value of the property. When questioned on cross examination regarding the value of the actual lease compared to "market value," Mr. Harnett explained why it was his expert opinion that he should use market value rather than actual lease terms. *See* Testimony of Thomas F. Hartnett, Transcript pp. 472-473. (R. p. 571-572). The SCDOT did not put forth an appraiser to testify or dispute any of the opinions given by the Frampton's appraiser.

The SCDOT next argues that Mr. Hartnett erred in using the eminent domain statutory rate of interest of 8% in computing interest on the damages incurred by Mr. Frampton. The SCDOT did not object to Mr. Hartnett using the statutory rate of interest. Moreover, the Court, at the request of the SCDOT, charged the jury that they could decide the rate of interest, and the Court instructed them they did not have to use Mr. Hartnett's rate of interest. *See* Transcript pp. 524-525. (R. p. 623-624). The SCDOT did not offer a competing rate of interest. In its brief, the SCDOT argues that the Court should have taken judicial notice of the some other interest rate. The SCDOT did not, however, request the Court to take judicial notice of anything or supply the Court with any evidentiary basis to apply judicial notice to the extent that would have been appropriate. Like the market value evidence and the income based appraisal method employed by Mr. Hartnett, the interest rate of 8% is the only evidence in the record upon which the jury could have relied in reaching their award of damages. Finally, the South Carolina Eminent Domain Procedures Act provides for an 8% rate of interest for direct takings. Our Supreme Court has held that the provisions of the South Carolina Eminent Domain Procedures Act can apply, where applicable, to inverse condemnation actions. *See* Cobb v. SCDOT, 365 S.C. 360, 618 S.E.2d 299 (2005).

Like every other portion of the SCDOT's brief, they request this Court to change the outcome of this trial based upon requests, complaints, and general dissatisfaction that were not raised to the trial court, were not argued before the jury, and appear for the first time in this appellate brief. There is ample factual evidence in the record to support the judgment of the jury on the issue of damages.

IV. The SCDOT failed to appeal the Order of the Honorable Kristi Lea Harrington, and, therefore, any issue in the present appeal relating to whether or not the SCDOT was deprived of a "mode of trial" is not properly before this Court.

Pursuant to the motion filed on June 27, 2011, the SCDOT moved to have the case transferred to the non-jury docket and argued before Judge Harrington that because it had denied there was a taking in this inverse condemnation case, the Landowner Plaintiff was not entitled to have the case on the jury docket, and the SCDOT was, therefore, entitled as a matter of substantial right to have the case transferred to the non-jury docket. In the September 28, 2011 Order, Judge Harrington denied the SCDOT's motion to transfer the case to the non-jury roster. This order was not appealed. "If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review." Cobb v. SCDOT, 618 S.E.2d 299. Therefore, this argument is not properly before this Court on appeal.

Moreover, though the same motion regarding mode of trial was indeed made before the Honorable Thomas L. Hughston at the outset of trial, Judge Hughston was without authority to reverse the order of Judge Harrington. *See* Rule 43, SCRCP ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any

other judge in that action.") *see also* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial). Therefore, Judge Hughston's order cannot be the subject of appeal.

Finally, even if the Court were to consider this ground for appeal, the Cobb court held that a landowner is entitled to have an inverse condemnation case on the jury docket, because a landowner is entitled to have a jury decide the issue of compensation. 618 S.E.2d at 301-02. Therefore, the Cobb court held the decision to try the takings phase outside the presence of the jury lies within the discretion of the Court pursuant to its authority to decide to require a separate trial pursuant to Rule 42(b), SCRCP.

V. The trial judge did not abuse his discretion denying SCDOT's bifurcation motion.

"Trial judges have discretion as to whether to bifurcate a trial." Durham v. Vinson, 360 S.C. 639, 644 n. 2, 602 S.E.2d 760, 763 n. 2 (2004). "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct.App.1998) *citing* Fortune v. Gibson, 304 S.C. 279, 403 S.E.2d 674 (Ct.App.1991). "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." Id. An appellate court "must review a trial judge's decision to bifurcate the issues of liability and damages under an 'abuse of discretion' standard." Id. *citing* Keels v. Pierce, 315 S.C. 339, 433 S.E.2d 902 (Ct.App.1993). In addition to showing that bifurcation was required, the appellant must demonstrate prejudice to establish a trial court's abuse of discretion. Id.

Here, the Landowner opposed bifurcation because he would have been required to put up his case twice if the proceedings were separated, because the issues of a taking and damages, in this case, were so interrelated that the evidence and witnesses would be the same for each phase of the case. Testimony concerning the affirmative acts of the SCDOT, their duration and impact were relevant to both the taking liability issue and damages. Specifically, it was the SCDOT's defense that, while its activities blocked the driveway access, the Landowner only had to request that access be provided and accommodations would be made. This defense relates to the evidence of liability for a taking, the duration thereof, the damages, if any, caused by the blockage of access, the materiality of the impairment of access, and mitigation of damages. The Landowner's witnesses, Phinney and Frampton, both provided their description, duration, and history of the project. This testimony is necessary for the establishment of both the taking and of damages. Moreover, these witnesses established that the Landowner had previously been informed that the access blockage would be a permanent consequence of the installation of the bridge guardrail called for in the project plans. The Landowner was only informed that a prior request to shorten the guardrail and relocate the driveway would be granted late in the project, and he thereafter took steps to mitigate damages by preparing the rental house to be marketed. The Landowner also testified as to the nature of the blockage of access and the process surrounding the restoration of access after over a year.

Notwithstanding the interrelation of the issues and its own defenses, the SCDOT argues that is was prejudiced by the Court's refusal to bifurcate the action because irrelevant evidence was put before the jury. The SCDOT, however, did not object to a single piece of evidence on the grounds of relevance at the trial. Even now, the

SCDOT's brief does not cite to a single piece of evidence that led to prejudice before the jury. The only evidence cited by the SCDOT was never presented to the jury, and it is only in the record pursuant to a proffer. The SCDOT cannot show any specific prejudice, and, therefore, cannot show the trial judge abused its discretion relative to the evidence submitted to the jury.

Likewise, the SCDOT cannot show prejudice pursuant to any procedural mechanism that was denied it due to the trial court's decision to try the case all at once. By way of an example of potential procedural prejudice, in support of its argument on bifurcation, the SCDOT cites to the Cobb case. In Cobb, the SCDOT argued that bifurcation was necessary and a failure of the trial judge to bifurcate the action would cause prejudice because it would deprive the SCDOT of the opportunity to "undo" its actions as an alternative to compensation. 618 S.E.2d at 302. Though the SCDOT has not made this argument in the present case, the complete denial of access for sixteen (16) months could not be "undone." The damage had already been inflicted. As stated above, the SCDOT has not pointed to any other instance of prejudice.

VI. The award of Attorneys' fees by the Court pursuant to S.C. Code Ann. § 28-11-30 was proper.

The SCDOT argues that it was the prevailing party in this action as determined by S.C. Code Ann. 28-2-510. The SCDOT, however, relies on the incorrect statute to govern the award of attorney's fees in inverse condemnation cases rather than direct condemnation cases. The correct statute is found at S.C. Code 28-11-30 and states, in pertinent part, as follows:

> Where an inverse condemnation proceeding is instituted by the owner of a right, title, or interest in real property because of use of his property in a program or project, the court, rendering a judgment for the plaintiff in the proceeding and awarding compensation for

the taking of property, or the attorney effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court or the agency's attorney, reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

The purpose of a different attorney fee standard in an inverse condemnation is well established in law and logic. The federal government adopted the policy and transportation funding condition that States cannot force their citizens to sue for the taking of interests in real estate without being reimbursed for their attorney fees and other litigation expenses. *See* 49 C.F.R. § 24.102 ("If the Agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property."). In response to this federal policy, South Carolina adopted S.C. Code § 28-11-30 to apply to inverse condemnation actions. It is undisputed that this Project was constructed with some federal funds. *See* Plaintiff's Exhibit 8, p. 9. (R. p. 711-718). There is evidence in the record that the closure of access to the Property was intentional. *See* Testimony of Clifford Hough, Transcript pp. 353-356. (R. p. 452-455).

It is compelling logic that a different standard should exist for inverse litigants who must prevail on liability and valuation issues. Direct condemnation litigants have no liability issues to prove, only the burden to prevail on the valuation issues. The prevailing party standard in direct condemnation cases found in Section 28-2-510 is specifically tailored for only a valuation dispute. Requiring an inverse litigant to prevail on liability and then be limited to such a test for litigation expenses would limit the ability of citizens to vindicate their constitutional rights in an extremely unfair fashion.

For these reasons our General Assembly has created two different standards and the court below applied the correct statute in a reasonable manner to allow for the full vindication of constitutional rights.

VII. This Court should affirm the decision of the lower court based upon any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

This Court should affirm the decision of the lower court based upon any and all legal conclusions it may draw and any and all factual conclusions to which it is bound under the proper standard of review from any and all evidence appearing in the Record on Appeal. *See* Rule 220(c), SCACR; Rule 208(b)(2), SCACR.

Conclusion

For all the foregoing reasons, the ruling of the lower court should be affirmed and remanded to the Court below.

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3. 27, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Please for the Ninth Circuit

Thomas L. Hughston, Circuit Court Judge

Case No. 2009-CP-10-6185

Henry W. Frampton, III.....Respondent,

v.

South Carolina Department of Transportation.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the attached Brief of Respondent is in compliance with Rule 211(b) , SCACR.

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March 27, 2013

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PROOF OF SERVICE

I certify that I have served the Respondent's Brief on the Appellant by depositing a copy in the United States Mail, Postage prepaid on March 28, addressed to their attorney of record as follows:

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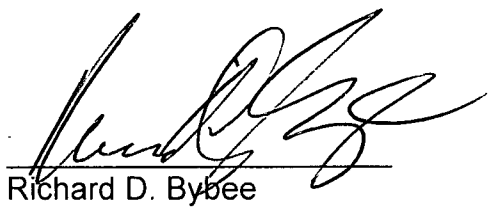

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