

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Circuit Court Judge

Appellate Case No. 2012209046

Case No. 2009-CP-10-6185

Henry W. Frampton, IIIRespondent,

v.

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

Reply Brief

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Appellant (the Department) respectfully submits this reply to Respondent's brief.

Reply to Respondent's Statement of the Issues, Counter-statement of the Case, and Statement of Facts.

Respondent's statement of the issues, counter-statement of the case, and statement of fact argues mainly that Appellant failed to preserve the issues it appeals. This is not correct. All of our issues were raised and ruled upon below.

Appellant delivered to the court a trial brief fully explicating the governing law, primarily that the court should determine a taking utilizing the "parcel as a whole rule" where the temporal aspect of the alleged taking should be a factor in the balancing test required by the law of inverse condemnation. At the beginning of the trial, we argued our motion that the taking and compensation issues be separated for separate proceedings with the compensation phase only being tried before a jury if necessary. We requested that the jury be sent home until it was determined that a compensation trial was appropriate. R.p. 104-08: The trial judge denied our motion and seated the jury for both phases of the case. R.p. 126..

At the opportunity afforded for a summation at the end of the takings trial, we again argued our view of the law and pointed out that Mr. Frampton's property was worth as much or more after project completion as it was before. Mr. Frampton's property had not been diminished in substance resulting from any act of the State. Additionally, at this point in the proceedings, the Department served upon plaintiff a notice of appeal of the trial judge's determination that there was a taking. This was to protect the Department

from allegations that it waived its objection to the takings proceedings and the order thereon by assenting to court's intent to proceed directly to a jury trial on compensation.

Following the trials, defendant filed its motion for a new trial and to alter and amend the judgment. Plaintiff filed its application for attorney fees. Both motions were heard by Judge Hughston in Charleston on March 13, 2012, and resulted in a written order dated April 18, 2012, in which the court again rejected our arguments that it was prejudiced by having the jury sit during the takings trial and that the court applied the wrong law finding a physical taking without considering the parcel as a whole doctrine. The court granted plaintiff's application for costs and attorneys' fees. R.p. 1. The Order was attached to our notice of appeal to this Court on May 8, 2012.

Standard of Review

We believe this Court was correct in its pronouncement that inverse condemnation cases are equitable in nature in South Carolina. Hardin v. S.C. Department of Transportation, 359 S.C. 244, 249, 597 S.E.2d 814, 816 (Ct. App. 2004), reversed on other grounds, 371 S.C. 598, 641 S.E.2d 437 (2007). Moreover, we see no conflict between this Court's pronouncement in Hardin, supra, and the Supreme Court's holdings in a number of cases that the determination *vel non* of a taking is a question of law for the court. Dunes West Golf Club, LLC, v. Town of Mount Pleasant, ___ S.C. ___, ___ S.E.2d ___ (S.C. Sup.Ct. filed January 9, 2013)(Shearouse Adv. Sh. No. 2, 2013 WL 90419).

The power to take private property for public use without an owner's consent is one of the powers inherent in the concept of sovereignty. Constitutional provisions neither directly nor impliedly grant this power, but are simply limitations on a power

already in existence which would otherwise be unlimited. 1 Sackman, Nichols on Eminent Domain, §1.14. The power of eminent domain is vested in the legislature which it may delegate to its agencies or other public entities. Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545 (1918).

The takings clause of the South Carolina Constitution provides in full:

§13 Taking private property.

Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor. (1970 (56) 2684; 1971 (57) 315.)

S.C. Const., art. I, §13 (Rev. 1991). This clause, like the corresponding clause of the Fifth Amendment to the U.S. Constitution for just compensation for the property taken, is merely a limitation on the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. United State v. Jones, 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015 (1883); Parrish v. Town of Yorkville, 96 S.C. 24, 79 S.E. 635 (1913).

The plain language of the takings clauses, the history of the Fifth Amendment, and the history of eminent domain in South Carolina demonstrate that takings clauses are prohibitory in nature, and violations are to be addressed by the equitable remedy barring continued interference with plaintiff's property rights without just compensation. An opposite view would in many cases have the effect of judicially converting a temporary taking into a permanent one resulting in the judicial exercise of eminent domain power. C.f. First Evangelical Church of Glendale v. City of Los Angeles, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987) (The decision to exercise the power of eminent

domain is a legislative function “for Congress and Congress alone to determine.”) Once a court determines a taking has occurred, the government retains the whole range of options already available including the right to withdraw from the action found to be a taking. Id. 482 U.S. at 321, 107 S.Ct. at 2389.

The Supreme Court’s statement that the question of taking is one of law does not conflict with the foregoing. It is well settled that the takings clause of the South Carolina Constitution is self-executing and requires no legislation. Chick Springs Water Co., Inc. v. State Highway Department, 159 S.C. 481, 157 S.E.2d 842 (1931). The fact that an inverse condemnation case is brought under the “law,” however, does not mean that the appellate courts must defer to any finding, factual or otherwise, that may support a conclusion of a taking under any theory. As noted in Hardin, supra, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. 359 S.C. at 249, 597 S.E.2d at 816 (quoting Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989)). This Court may make its own decision as to whether the evidence presented by the plaintiff constitutes a taking under the relevant case law.

Reply Argument

I. There was no physical taking of Respondent’s property.

In section I of his argument, Respondent misconstrues our Supreme Court’s recent jurisprudence regarding takings of an abutter’s access to public roads. Specifically, the Court has not replaced the analysis set forth in Penn Central

Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), with a “material injury test” requiring only that a landowner show an injury to the easements of access across public roads defined in Hardin (& Tallent) v. S.C. Dep’t. of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007). The pre-Hardin cases Respondent cites, which may or may not support his view, have been supplanted by Hardin (& Tallent), which comprehensively rewrote the law governing this subject matter.

In Hardin (& Tallent), the Supreme Court began its discussion by noting that although the existence of property interests is often determined by independent sources (independent of the takings clauses themselves) such as state law, South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which they analyze whether interference with someone’s property interests amount to a constitutional taking. Hardin (& Tallent), *supra*, 371 S.C. at 604, 641 S.E.2d at 441. Citing Penn Central, *supra*, the Court stated that that analysis involves *ad hoc*, factual inquires to weigh the character of the government’s action against the economic impact of the action including the degree to which the action interferes with the owner’s investment-backed expectations. The Court noted that there were only two categories of cases that do not require courts to perform the Penn Central analysis: 1) where the government physically occupies private property, or 2) where enforcement of a government regulation denies all economically beneficial use of land. Citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) , and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), respectively.

In analyzing the character of the government's action, the focus, according to the Court, should be on the landowner's easements which the Court described as the right to get on and off of an adjoining public road and the right to access the public road system.¹ Hardin (& Tallent), 371 S.C. at 606, 641 S.E.2d at 437. Because easements of the plaintiffs in Hardin and Tallent, and those of the landowners in the later cases, Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011), and Hilton Head Automotive, LLC, v. SCDOT, 394 S.C. 27, 714 S.E.2d 308 (2011)², remained intact, the Court did not proceed to discuss the other half of the balancing test, the economic impact on the claimant. Should the character of the government's action weigh in favor of a taking, consideration of the economic impact on the plaintiff including his investment-backed expectations would, in most cases, be *pro forma* since a landlocked parcel of land has only nominal value unless it can be profitably combined with an adjoining tract.

The federal courts have had numerous occasions to consider the demarcation between *per se* physical takings of land and other actions by the government that may be held takings under the Penn Central test. In Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002), the court, quoting Loretto, said,

A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owners' right to possession, use, and disposal of the property.

In Stearns Company, Ltd., v. United States, 396 F.3d 1354 (Fed. Cir. 2005), the court held,

The application of the SMCRA to Appellee's mineral property and accompanying implied appurtenant easement is not a physical taking. A

¹ The two easements are, in effect, the same since the ability to get onto an adjoining road is of no use if it leads nowhere.

² In footnote 2, 394 S.C. at 30, 714 S.E.2d at 310, the Court explained that it was resolving the matter as a physical taking because that was the way appellant presented it.

physical taking occurs “when the government itself occupies the property or ‘requires the landowner to submit to a physical occupation of his land.’ Forest Props., Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (quoting Yee v. City of Escondido, 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); see also Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1135 (Fed. Cir. 2004) (explaining that physical takings require physical possession).

Here, all work complained of occurred entirely upon existing State highway right-of-way. The fact that Respondent has an implied right to use that right-of-way for access does not give him a possessory interest in it. See Hardin (and Tallent), supra (“The existence of the road was the condition that created the easement, not the other way around.”) 371 S.C. at 607, 641 S.E.2d at 442, f.n. 2. Respondent retained the rights to possession, use, and disposal of his rental house tract. As we noted in our main brief, “government action outside the owner’s property that causes consequential damages within,” are not always takings. Loretto, 458 U.S. at 428, 102 S.Ct. at 3164. They are more akin to regulatory takings cases because the gravamen of the complaints, as here, are that the use of the property was restricted for a time, not that the owner has been dispossessed.

Next, Respondent argues that the Supreme Court’s decision in Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005), that removed the element in existing case law that a landowner to prevail in an inverse condemnation case show that the taking have “some degree of permanence,” compels this Court to affirm the trial court’s finding of a physical taking for sixteen months.³ This argument overlooks the fact that Byrd himself brought a temporary taking claim that was rejected. The “some

³ Regarding the sixteen months, we reiterate that there was never any allegation nor any proof that the driveway was blocked for such a continuous period. Respondent’s argument that he needed additional time to market the property after his parking area was paved may go to damages but does not support his argument of a physical taking for that time period.

degree of permanence” element of the threshold test was removed pursuant to First Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), which held that failure to show that element is not necessarily fatal to a takings claim. As we noted in our main brief, the California court on remand found that there was no taking since the restriction on the landowner’s use of its property was not unreasonable in purpose, duration, or scope. First Evangelical was superseded in most respects by Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465 152 L.Ed.2d 517 (2002). In that case, three years in which a building moratorium was in place did not constitute an unreasonably burdensome period of restriction. The removal of the permanence factor in the threshold test does not mean that all temporary interferences with property rights are takings *per se*.

The U.S. Supreme Court has had occasion recently to revisit the law in this area, however. In Arkansas Game and Fish Commission v. United States, ___ U.S. ___, 133 S.Ct. 511 (Dec. 4, 2012), the Court held that recurrent floodings of private property are not categorically exempt from takings clause liability simply because they are of finite duration. The facts of that case are easily distinguishable. There, the recurrent flooding of timberland by releases from a federal dam for a period of six years caused catastrophic tree mortality and substantially changed the character of the terrain necessitating reclamation efforts. The destruction of the trees led to the invasion of undesirable plant species, making natural regeneration of the forests improbable in the absence of reclamation efforts. *Id.* at 517. This represents a temporary action that had long-term physical effect on the property. Here, once the bridge project was complete, all use and

even a higher value of Respondent's land returned. Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, *supra*, 535 U.S. at 331-32, 122 S.Ct. at 1484, 152 L.Ed.2d at 546.

Next, Respondent cites and reproduces certain sections of Article 7, Title 57, S.C. Code Ann. "**Controlled-Access Highway Facilities; Private Side Roads, Driveways and the Like**" and argues that the Department failed to follow the statutory law. To the contrary, all actions of the Department were in accordance with and taken pursuant to the procedures set forth in these Code sections. Section 57-5-1100 grandfathers driveways in existence of the date of the Act in 1956 from permit requirements and requires that the Department supply the landowner with another driveway or side road entrance in the event it determines they should be closed. In this case, SCDOT originally proposed to construct a new side-road entrance to benefit the parcel at 699 Folly Road where the existing driveway was to be impaired by the guardrail from the James Island Creek bridge. When that plan failed due to Respondent's refusal, it shortened the guardrail, moved the drive entrance, and paved a new parking area for Mr. Frampton. Each of these actions is fully embraced by S.C. Code Ann. §57-5-1100.

Respondent's reference to S.C. Code Ann. §57-5-1120 is simply inapt. It gives landowners the right to a hearing before a Circuit Court judge of the Department's denial of new driveway permits or the closure of existing ones. Respondent, instead, chose to sue.

In this part of his brief, Respondent also argues that he was told that access to the rental property was to be cut off permanently, so he acted accordingly, i.e. let a tenant break his lease and decline to ever discuss his concerns with the contractor or SCDOT's

project managers. To the contrary, there is no evidence that SCDOT ever intended to eliminate access to Mr. Frampton's rental property. Its plan was to construct a service road, then when rejected, it shortened the guardrail. There was no plan in the interim to eliminate access completely. When Mr. Frampton refused permission to enter his property to construct the service road to provide a single entrance for all three of his properties, Mr. Phinney, SCDOT's right-of-way agent, had three options: 1) condemn property to allow room for the service road, 2) refer the matter to the legal department for the defense that it was Mr. Frampton's act is subdividing the parcel into such a small piece that a safe driveway could not be accommodated and not any act of the Department that caused any loss of access, or 3) try and convince the Department's traffic engineers to shorten the planned length of the bridge guardrail so that the new parcel could be served by a separate driveway. He was ultimately successful as to 3.

Next, Respondent attempts to refute our argument that the Department's actions were non-compensable, police power acts instead of acts exercising the power of eminent domain. Respondent argues that the Department did not prove that his driveway was unsafe, therefore the construction activities interfering with it could not have been taken under the police power. In support, Respondent cites the testimony of Larry Phinney that he didn't know the driveway to be unsafe. Respondent appears to be arguing that the bridge design to extend the guardrail, to combine his three driveways into one entrance served by a service road, and ultimately to install a raised concrete median in the center of Folly Road were not legitimate police power acts.

The police power is the power of the sovereign to legislate in behalf of the public health, morals or safety by general regulations reasonably adapted to the end

in view and not creating any arbitrary discrimination between different classes of men or things. 1 Sackman, Nichols on Eminent Domain, §1.42, p. 1-145; Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); see, also, Richards v City of Columbia, 227 S.C. 538, 553, 88 S.E.2d 683, 689 (1955) (“Statutes and municipal ordinances calculated to better the health, safety and welfare of the people have long and universally been recognized to be with the police power.”) The Richards court goes on to state:

‘Regulations and restrictions upon the manner in which a property owner may use his property when necessary for the general welfare are properly a part of the police power of legislative bodies and, if reasonable, are valid in so far as they tend to prevent harm to the public and to promote the common good. Under the police power, the legislative authority may, within proper limitations, impose and enforce regulations governing buildings upon privately owned property without violating the constitutional property rights of the owner. Necessary and reasonable expenses or loss of value, which will be sustained by an owner of property as a result of regulations made in the lawful exercise of the police power, do not invalidate such regulations and are *damnum absque injuria*.

Quoting 9 Am.Jur., Buildings, 199, 200. It is only when the police power “goes too far” that it will be recognized as a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

Larry Phinney was the Department’s right-of-way agent. He is not a traffic engineer. In fact, the determination as to the safety of driveways and side road entrances onto primary State highways involves extended calculations involving factors such as “conflict points” (turning and crossing conflicts), the highway design speed, the volume of traffic and the like. See, National Academy of Sciences, Transportation Research Board, Access Management Manual, Chapter 2 (2003). The existence of three driveways in quick succession conflict with each other as well, also impacting the calculations. The

Department was to install the service road, and ultimately installed the concrete median at considerable public expense. It would not have done so if highway safety were not a consideration. These matters appear in the record. The Court should defer to judgment of the Department's engineers on these questions. 2 Am. Jur. 2d, Administrative Law, §566 (The presumption in favor of an action of an administrative agency involving a finding of fact is fortified where it involves the expertise and experience of a particular agency.)

Finally, Respondent protests our argument on laches that he never approached the Department's personnel with his various grievances concerning the activities on the right-of-way outside his property. His argument is that, as an affirmative defense, laches must be pleaded. However, our argument is not in the nature of an affirmative defense. Rather, it is a counterpoint to Respondent's attempts to prove the elements of a taking. As this Court has held, the burden is on the landowner to prove that a temporary taking has occurred and is compensable. Sea Cabins on the Ocean Homeowners Association, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 397, 523 S.E.2d 193, 202 (Ct. App.1999) (affirmed 345 S.C. 418, 348 S.E.2d 595). In that case, the defendant City, in its motion to alter or amend under Rules 59(b) and 59(e) requested that the court address its defense that the owners had not been deprived of all economically viable use of their property. The trial court denied the motion on the basis that the defense was not pleaded in the answer. This Court disagreed noting that that must be proven is the temporary taking deprived the owner of "all economically viable use" of the property. Here, the Department's claim is that it did not intentionally prevent Mr. Frampton or his tenants from entering and using the rental house property. Had he asked, he would have been

accommodated as he was as to his other properties. This goes to the character of the government action and is part of the ad hoc factual inquiry courts are to make in such a case.

II. The trial court ignored the defendant's repeated attempts to get him to rule on the correct law.

We have responded to most of the arguments Respondent advances in section II of his Argument in our main brief and in section I above. We add the following:

Respondent argues that we failed to raise our legal arguments before the trial judge and failed to object to testimony by plaintiff's witnesses. This is incorrect. Our position that plaintiff's claim should be analyzed under the Penn Central factors and among those considerations, the temporal aspect of plaintiff's rights in his property per the decisions in Byrd and Tahoe Sierra. We were unsuccessful. The trial court adopted early on plaintiff's theory that a physical obstruction to the driveway for any period is a taking of his property that must only be multiplied by the period he proves in order to recover damages. He could not be dissuaded.

In particular, we fully covered our arguments herein in our pre-trial brief submitted to the court pursuant to Rule 16(c), SCRCF. The arguments were made again at the opportunity provided for closing statements after the close of the takings phase of the trial. R.p. 479-93. Finally, our legal theory was fully espoused and fully rejected by our motion under Rule 59, SCRCF and the court's order thereon. With regard to objections to the evidence at trial, none of plaintiff's witnesses' testimony was objectionable. Relevance is not at issue. Our argument is that the evidence *in toto* did

not go far enough and plaintiff failed to carry his burden to establish a taking. The fact that he admitted that full value returned to his property after the bridge project is sufficient to counteract testimony as to any inconvenience he may have suffered in the interim.

In his next paragraph, plaintiff continues to advance his argument that the substantive law in this area has changed and that cases such as Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000), that found that temporary entries onto private property did not amount to a taking of that property, were not actionable, were overruled by Byrd, supra, that removed the “some degree of permanence” element from the threshold test for inverse condemnation. (Presumably Byrd would have overruled a number of other cases as well such as Sea Cabins, supra. As we note above, under this theory Byrd would have overruled itself.) As we have stated previously, the question is still one of a taking regardless of the fact that a showing of permanence is not an immediate bar.

There was obviously no impediment to Mr. Frampton selling his property due to the Department’s actions. The bridge project had a finite completion date after which full use would return. As we have heretofore mentioned, Mr. Frampton did rent his property during the project period and could have during the remainder with minimal communication with the Departments’ personnel. Additionally, he used part of the period to make renovations to the property in order to increase the rent. Finally, we deny that there is any evidence to support his assertion that he was ever told that access would be denied permanently.

III. The jury's verdict was excessive and not grounded on credible evidence.

Respondent admits that it forgot to ask for a directed verdict and judgment *n.o.v.* on the compensation verdict. However, the trial judge had opined previously that the damages should be the actual rent the plaintiff was receiving before the project. R.p. 488-92. We argued the same—that actual rent lost should be the proper measure of damages. R.p. 492. The court relented and allowed testimony as to the “market rent.” Thus, the matter was raised and ruled upon by the court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

IV. Appellant's procedural argument may be reviewed.

In section IV of his argument, Respondent asserts that our failure to appeal Judge Harrington's order on our motion to transfer the case to the non-jury roster for purposes of a trial to determine the takings issue bars the Court's review of our appeal of the procedural errors below. If the landowner was successful as to a taking, he could elect a jury trial (or a non-jury trial or an appraisal panel) in accordance with the Eminent Domain Procedure Act. Judge Harrington denied our motion by form order. Thereafter, at the beginning of the trial, Respondent moved the court to separate the trial into a takings phase and a compensation phase (if necessary). Although the court did conduct separate proceedings on liability and compensation, it allowed the jury to sit during both proceedings. Allowing the jury to hear claims of damage that were ultimately judged not takings is the harm to which we complain. The defendant was necessarily prejudiced by this in that the jury would be naturally inclined to award a high amount on the takings that were found knowing that the plaintiff had also suffered from non-compensable, police power acts by the State.

In Cobb v. SCDOT, 365 S.C. 360, 618 S.E.2d 299 (2005), the Supreme Court held that denial of a motion to transfer an inverse condemnation case to the non-jury docket is not a matter that is immediately appealable. According to the Cobb Court, the question of whether to separate the takings and compensation issues at trial is a matter for the trial judge. Thus, this appeal is Appellant's first opportunity to challenge the procedure pursued below.

V. The State defendant was prejudiced by the procedure below.

In his section V., Respondent argues that separation of the proceedings into takings and compensation phases is unfair to landowners in inverse condemnation cases because they would be forced to present their cases twice. This is incorrect and ignores the roles of the judge and jury in such a case. The evidence regarding the SCDOT's acts, their duration, the history and description of the project and the like, go to the question of a taking which is for the court sitting alone. Upon resolving the evidence to conclude whether there was a taking, the judge empanels a jury and instructs them as to the property or property rights he has found to have been taken.

It is well settled in South Carolina, that the only issue for the fact finder in a condemnation matter is the amount of compensation owed. Johnson v. S.C. State Highway Dept., 236 S.C. 424, 114 S.E.2d 591 (1960); S.C. Code §28-2-470 (Rev. 1991). In inverse condemnation cases, the court's decision as to a taking provides the ground rules for any subsequent fact finders inquest as to compensation. Moreover, if the Court's ruling at law is that there is a taking, it should be rendered with sufficient specificity so that the fact finder in the compensation phase has clear instructions as to what it is to assess. United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 1069, 90 L.Ed.

1206 (1946). As noted by the United States Supreme Court, the court's determination and definition of the property right taken provides the parameters for a determination of an award. In United States v. Reynolds, 397 U.S. 14, 18, 90 S.Ct. 803, 806, 25 L.Ed2d 12 (1970), the Court stated, "a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within the ground rules established by the trial judge." *Id.*, 397 U.S. at 20, 90 S.Ct. at 807. Another federal court has stated, "Whether or not Tract 2 had access to a public road falls outside the narrow constraints of the jury's domain in eminent domain proceedings. The answer to the question is one of the ground rules that guides the jury's determination on the precise issue of the amount of compensation." National Railroad Passenger Association v. 25,900 Sq. Ft. of Land, New London, Ct., 766 F.2d 685 (2d Cir. 1985); accord New Port Largo Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996).

In the instant case, the trial judge ruled that Respondent's property was taken by the State for sixteen months. The only evidence necessary was an expert witness's testimony as to the diminution in value of the property. Background facts concerning the activities of the State that the court has found to constitute a taking are irrelevant at this point. The taking has been found.

Contrary to Respondent's assertion, the trial transcript of the takings phase is replete with testimony concerning the adverse impact of the installation of the raised center median on the value and utility of his properties. This was ruled not to be a taking under Hardin (& Tallent), *supra*, and Hilton Head Automotive, LLC, v. SCDOT, 394 S.C. 27, 714 S.E.2d 308 (2011). It would never have been heard had the appropriate

procedure been followed. Having a jury present prior to the establishment of a taking was premature under the law and prejudicial to the defendant.

VI. Code section 28-2-510 governs awards of attorney fees in all eminent domain cases.

With regard to attorney fees, Respondent argues that two separate statutory procedures exist for awards of attorney fees in inverse condemnation cases versus direct condemnations. He claims that attorney fees in inverse condemnation actions are governed solely by S.C. Code Ann. §28-11-30. Respondent argues that the Code section, enacted in 1972, was adopted in response to federal regulations promulgated in order to prevent states from causing landowners to bring suits to recover just compensation for land taken by the states. Respondent is correct in his analysis of the history of that code section. Many states at the time the federal-aid act was enacted practiced “condemnation by invasion” physically occupying property and causing the landowner to sue for his compensation. South Carolina has always conducted takings by notice. S.C. Code Ann. §57-5-430 (1977); Act 47, 1951 S.C. Acts 457. S.C. Code Ann. §28-2-510 (Rev. 2007) was enacted in 1987 as part of a comprehensive law, the Eminent Domain Procedure Act, S.C. Code Ann. §§28-2-10, *et seq.*, that provided the exclusive procedures for all condemnors in the State. Section 510 governs attorney fees in eminent domain. It modifies and qualifies the granting of fees in direct condemnations and those that may be awarded in inverse condemnation cases as well.

As our Supreme Court noted in Cobb v. SCDOT, *supra*, the General Assembly intended jury trials to be available to determine compensation due a landowner in inverse condemnation cases under the Eminent Domain Procedure Act. The Court should find

their intent to apply the attorney fee statute of that Act, S.C. Code Ann. §28-2-510, as well.

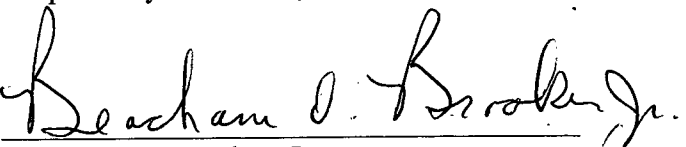
VII. The Respondent presented no evidence that any period his use of his property was restricted was unreasonable and the court made no such finding. The delay was not unreasonable and value returned after the project. This Court should reverse the finding of a taking.

In section VII., Respondent asks the Court to affirm the trial court on any evidence it finds in the record. However, the landowner herein never presented any evidence that the delay in his use of his land was unreasonable in relation to any other bridge replacement project. The trial court applied an erroneous reading of the law that any interference with a driveway during a highway project is a taking of property that simply must be multiplied by the period of duration thereof to find damages in the amount of loss of rent. Respondent has had full use and value of his property since the completion of the bridge. His property has not been taken and any damages are the unavoidable and incidental result of the State's police power acts in maintaining highways and bridges that all abutting landowners must suffer from time to time.

Conclusion

The Court should reverse the trial court and remit the matter for the complaint to be dismissed.

Respectfully submitted,



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Columbia, S.C.
March 19, 2013

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2012209046
Case No. 2009-CP-10-6185

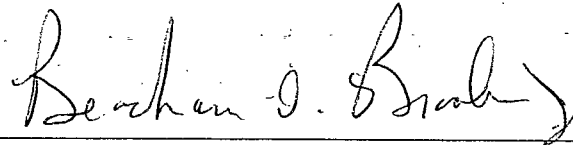
Henry W. Frampton, III..... Respondent,

v.

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

CERTIFICATE

The undersigned counsel for Appellant certifies that the Brief of Appellant and Reply Brief comply with Rule 211 SCACR.



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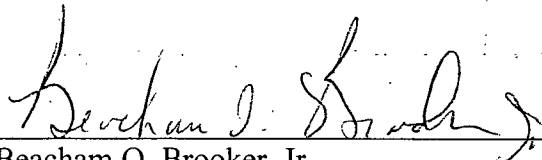
v.

South Carolina Department of Transportation Appellant.

PROOF OF SERVICE

I certify that I have served the BRIEF OF APPELLANT, REPLY BRIEF and RECORD ON APPEAL on Henry W. Frampton, III, by depositing a copy of each of these pleadings in the United States Mail, postage prepaid on March 21, 2013, addressed to his attorney of record, Richard D. Bybee, as follows:

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