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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Civil Action No.: 2018-CP-26-6424
Appellate Case No. 2021-000393

South Carolina Electric & Gas Company, Respondent,

v.

Barbara Todd, Landowner,

and

Public Service Authority; Pitch Landing, LLC; and David O. Heniford, Jr., Other Condemnees,

of which Pitch Landing, LLC is the Appellant.

AND

South Carolina Electric & Gas Company, Respondent,

v.

Pitch Landing, LLC, Appellant,

and

South Carolina Public Authority; Horry Telephone Cooperative; Grand Strand Water and Sewer Authority; Coastal Carolina National Bank; Billy J. McDowell & Sally R. McDowell; Bobby D. McDowell, Other Condemnees.

PETITION FOR REHAERING OF
UNPUBLISHED OPINION No. 2023-UP-202
Submitted May 17, 2023 – Filed May 24, 2023

Pursuant to Rule 221, SCACR, Appellant, "Pitch Landing, LLC" (hereinafter, "Pitch Landing"), hereby petitions this Court for rehearing of its decision in South Carolina Electric & Gas Company, Respondent, v. Barbara A. Todd, Landowner, and Public Service Authority; Pitch Landing, LLC; and David O. Heniford, Jr., Other Condemnees, of which Pitch Landing, LLC is the Appellant AND South Carolina Electric & Gas Company, Resondent, v. Pitch Landing, LLC, Appellant, and South Carolina Public Authority; Horry Telephone Cooperative; Grand Strand Water and Sewer Authority; Coastal Carolina National Bank; Billy J. McDowell & Sally R. McDowell; Bobby D. McDowell, other Condemnees, Opinion No. 2023-UP-202 (May 24, 2023). This Petition for Rehearing should be granted as this Court has overlooked or misapprehended material points of law and/or fact. As is more fully set forth in the accompanying Memorandum in Support of this Petition incorporated herein, this standard is readily satisfied here.

Appellant respectfully requests this Court rehear and reconsider its Opinion No. 2023-UP-202. In so requesting, Appellant appreciates and acknowledges this Court's attention to this important matter. Issues of public importance concerning the proper mode of trial for a determination of just compensation due Appellant pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-10 et seq., would be served by reexamination of the proper application of the requirements of the Act as it effects the trial of these matters.

Appellant seeks rehearing and reconsideration as to the Court's conclusion that the trial court correctly denied Appellant access to a trial by jury in the matter against Todd, et al, and thus also correctly denied Appellant's motion to consolidate the two matters for trial.

For the above reasons and those set forth more fully in the attached and incorporated Memorandum in Support of this Petition, this Court should grant this petition for Rehearing, vacate its prior Opinion, and conduct rehearing proceedings.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.

_s/Robert S. Shelton
Robert S. Shelton, SCB# 68543
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
rshelton@bellamylaw.com
Attorney for Appellant Pitch Landing, LLC

NEILL LAW FIRM, PA

_s/Mark D. Neill
Mark D. Neill, Esq., SCB# 14273
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
mneill@neilllawfirm.com
Attorney for Appellant Pitch Landing, LLC

Myrtle Beach, South Carolina
Dated: June 14, 2023

Other Counsel of Record:

Gregory M. Alford, Esq.
Alford Law Firm, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29938
gregg@alfordlawsc.com
843-842-5500

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South Carolina Public Authority; Horry Telephone Cooperative; Grand Strand Water and Sewer Authority; Coastal Carolina National Bank; Billy J. McDowell & Sally R. McDowell; Bobby D. McDowell, Other Condemnees.

APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHAERING OF UNPUBLISHED OPINION No. 2023-UP-202 Submitted May 17, 2023 – Filed May 24, 2023

Pursuant to Rule 221(a), SCACR Appellant Pitch Landing, LLC ("Appellant" or "Pitch Landing") seeks rehearing of this Appellate Case No. 2021-000393.

1. Background

In its Condemnation action against Todd (the "Todd Case"), Respondent SCE&G ("Condemnor") procured only a fifty-foot-wide strip of land through the middle of the Todd parcel. This strip was fully encumbered by an easement servient to the parcel to the rear of the Todd tract. That easement was reserved by the prior owner of both the Todd and the Pitch Landing tracts and was established when Todd purchased her tract. (R. pp. 21-30) The rear parcel and the easement across the Todd tract are owned by Pitch Landing. (R. p. 25 and R. pp. 71-82) The rear parcel is also the subject of the Condemnation action against Pitch Landing (the "Pitch Landing Case"). (R. pp. 71-97)

The circuit court determined: the Todd Case should be restored, as its dismissal was without the consent of Pitch Landing; the Todd Case would be placed on the non-jury roster; and, that the two matters would not be consolidated for trial. (R. pp. 12-14 and R. pp. 9-11) The two matters were combined for appellate review. Additional background and procedural posture have been fully briefed and remain within the present record.

2. Procedural History

Without oral argument, this Court Affirmed the Court below on May 24, 2023, first holding the "circuit court did not err by placing the Todd Case on the non-jury docket because the South Carolina Eminent Domain Procedure Act only provides for the condemnor or landowner to request a jury trial, and Pitch landing is not a landowner of the property at issue in the Todd Case." Secondly, this court held the "circuit court did not err by denying Pitch Landing's motion to

consolidate" based on the reasoning set forth in the court's first holding "and because Pitch Landing demanded a jury trial in the Pitch Landing case." SCE&G v Todd and Pitch Landing, Op. No. 2023-UP-202 (S.C.Ct.App, filed May 24, 2023).

This Petition for Rehearing followed.

3. Argument

This Court properly held the question whether a party is entitled to a jury trial is a question of law, that such questions are reviewed *de novo*, and that there is no constitutional right to a jury trial in an eminent domain case, but that such a right is provided by statue. The Court next proceeded to rely upon four primary sections of the Eminent Domain Procedure Act, S.C.Code Sec. 28-2-10, et seq. ("the Act") to affirm the circuit court. Those sections are:

i. Section 28-2-230(12) (2007) reads in full as follows:

(12) "Landowner" means one or more condemnees having a record fee simple interest in the property condemned or any part thereof, as distinguished from condemnees who possess a lien or other nonownership interest in the property; where there are more than one, the term means the condemnees collectively, unless expressly provided otherwise.

ii. Section 28-2-240(A)-(B) reads in full as follows:

(A) If the condemnor elects to proceed under this section, and the amount tendered in the Condemnation Notice is rejected, the condemnor shall file the Condemnation Notice with the clerk of court, if not already filed, and shall serve upon the landowner and file with the clerk an affidavit stating:

(1) that the amount tendered in the Condemnation Notice has been rejected;

(2) that the condemnor demands a trial not earlier than sixty days after the date of service of the affidavit, which date must be certified on the copy of filed with the clerk;

(3) whether the condemnor demands a trial by jury or by the court;

(4) whether the condemnor demands that the trial be given priority over other cases; and

(5) the name and known address of each landowner whom the clerk should notify of the call of the case for trial. The affidavit may be executed by the condemnor or by its attorney.

(B) After the filing of the affidavit, the case shall proceed as provided in Article 3.

iii. Section 28-2-280(C)(8) reads in full as follows:

(8) if the action is brought under Section 28-2-240, contain at least the following notice:

"THE CONDEMNOR HAS ELECTED NOT TO UTILIZE THE APPRAISAL PANEL PROCEDURE. Therefore, if the tender herein is rejected, the condemnor shall notify the clerk of court and shall demand a trial to determine the amount of just compensation to be paid. A copy of that notice must be served on the landowner. That notice shall state whether the condemnor demands a trial by jury or by the court without a jury. The landowner has the right to demand a trial by jury. The case may not be called for trial before sixty days after the service of that notice, but it may thereafter be given priority for trial over other civil cases. The clerk of court shall give the landowner written notice by mail of the call of the case for trial.

"THEREFORE, IF THE TENDER HEREIN IS REJECTED, THE LANDOWNER IS ADVISED TO OBTAIN LEGAL COUNSEL AT ONCE, IF NOT ALREADY OBTAINED."

iv. Section 28-2-310(A)-(B) reads in full as follows:

(A) Upon the filing of the affidavit described in Section 28-2-240(A) or the filing of a Notice of Appeal under Section 28-2-260(B) or (C), the action must be tried as provided in this article.

(B) If the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. Otherwise, the action must be placed on the jury trial roster.

The Court then relies upon Section 28-2-280(C)(8) for the premise a "landowner has the right to demand a trial by jury."

Pitch Landing submits the Court's conclusion employing Section 28-2-280(C)(8) for the proposition *only* a landowner is entitled to a jury trial in an eminent domain matter misapprehends the intent of the Act already stated in the above sections. Section 28-2-230(12) (2007) is among the definitions provided in the Act. Pitch Landing has maintained its interest in the property condemned in the Todd Case rises to a level of ownership and control over the land such that Pitch Landing should be included within the definition of "landowner."[1]

[1]The [circuit] court's decision contradicts established treatise and caselaw. Where the easement supporting the dominant estate has been taken, the just compensation is the difference between the value of the dominant estate with the easement and its value without the easement. Nichols on Eminent Domain, § 12(D).02(1). In cases like the present, "the amount of compensation for the fee simple interest of the servient estate will not adequately compensate the dominant estate which has lost its access since ordinarily an access road…will not diminish the

Setting aside the question whether Pitch Landing's interest in the Todd Case rises to the level of landowner under the Act, the remaining two Act sections relied upon by the Court make clear these matters are to be on the roster of cases to be tried by a jury, and the Court's reasoning further makes clear they should be consolidated. Thus, the trial court rulings should be reversed.

First, Section 28-2-240 was entitled by the legislature "Election to proceed with condemnation by way of trial after rejection of amount tendered" and outlines an obligation of condemnor to file an affidavit with the clerk of court. Section 28-2-280, "form and content of condemnation notice," then dictates the obligations of the condemnor and the clerk of court in

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value of the servient estate by the amount it benefits the dominant estate." *Condemnation of Easements,* James L. Thomspon, *Eminent Domain and Land Valuation Litigation*, January 2003.

In *United States v. Gossler*, 60 F.Supp.971 (1945), the Court determined that the owner of a dominant tenement was entitled to compensation for his interests separate from the fee held by the owner of the servient estate. The condemnor unsuccessfully argued the owner of the easement was only entitled to share in the single award paid to the owner of the servient estate. The Court disagreed, reasoning:

> The fallacy of the reasoning which lies at the basis of these motions arises from the concept of the title of real property as a thing with physical attributes, whereas title is a conglomerate of jurisdiction and substantive legal rights fused with the residuals of equitable remedies all developed historically out of feudal notions and medieval conditions. By this proceeding the United States does not acquire a physical thing by taking the fee simple title of the Gosslers, but sets up another title by extinguishment of all interests inconsistent with use by the Government. Since the United States is investing itself with an utterly new title and extinguishing the whole aggregate of rights connected with this piece of ground by condemnation, the Fifth Amendment requires compensation for all property rights so erased.
>
> The United States cannot abrogate all, but pay for the particular right known as the fee simple title alone. The owner of another recognized property interest attached to the soil would then receive no compensation just or otherwise. Indeed in practice, the value of the fee simple title might well be materially reduced by the existence of this right of way. If payment were made for a specific interest such as the fee title, out of the aggregate, the Government would abrogate the other interests without paying monetary consideration therefor. Such a result does not satisfy the demands of the amendment. The United States is liable to the owner of an easement appurtenant in a suit condemning the fee of the servient estate. *Id*. at 973-974.

filing and serving the Condemnation Notice. While each of these code sections includes jury and nonjury language, neither establishes any procedural requirements in that regard.

However, Section 28-2-310, "Application of Article 3; demand for nonjury trial; precedence of action; minimum time between notice and trial," sets forth specific requirements for the court. Section (A) reiterates the language found in Section 28-2-240(B), stating that upon the filing of the affidavit… the action must be tried as provided in this article." This is critical, as it required the clerk and the circuit court judge to follow the dictate of section 28-2-310(B), "**[i]f the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. Otherwise, the action must be placed on the jury trial roster**." (Emphasis added). It is a demand for a trial by the court without a jury that is available upon demand of both condemnor and landowner. By its plain language the Act makes clear a jury trial is the default mode of trial required in the absence of a joint demand.

In the present matters, Todd has made no filing with the clerk of court at all. The only document of record in either of these matters bearing a signature on Todd's behalf is the Consent Order dismissing the Pitch Landing Case, which makes absolutely no reference to any mode of trial, jury or nonjury. (R. pp. 4-8) It is clear, therefore, that landowner Todd did not demand "trial by the court without a jury." Without further debate whether Pitch Landing qualifies as a landowner under Section 28-2-30(12), landowner Todd made no such demand. Accordingly, Section 28-2-310(B) required the Todd matter "must" have been placed on the jury trial roster upon being restored and remain on the jury trial roster while the motion to consolidate was considered, as Todd had not appeared in opposition to either of Pitch Landing's motions.

Lastly, in the Pitch Landing Case, Landowner Pitch Landing likewise made no demand for a nonjury trial. (R. pp. 104-106) Thus, insofar as the denial of the motion to consolidate was

affirmed by this Court "because" Pitch Landing made a jury trial demand, and that demand (along with the statutory scheme outlined above) now places both cases on the jury trial roster, consolidation is appropriate. This outcome not only properly follows the statutory scheme for the trial of eminent domain actions, it is the only outcome that would provide Pitch Landing the opportunity to seek truly just compensation for the taking of its property.

Accordingly, Pitch Landing respectfully requests this Court reconsider its decision and reverse the circuit court's decision.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.

_s/Robert S. Shelton
Robert S. Shelton, SCB# 68543
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
rshelton@bellamylaw.com
Attorney for Appellant Pitch Landing, LLC

NEILL LAW FIRM, PA

_s/Mark D. Neill
Mark D. Neill, Esq., SCB# 14273
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
mneill@neilllawfirm.com
Attorney for Appellant Pitch Landing, LLC

Myrtle Beach, South Carolina
Dated: June 14, 2023

Other Counsel of Record:

Gregory M. Alford, Esq.
Alford Law Firm, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29938
gregg@alfordlawsc.com
843-842-5500

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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by depositing a copy of it in the United States mail, postage prepaid, on June 14, 2023, addressed to its attorney of record, Gregory M. Alford, Esq., Alford Law Firm, LLC, Post Office Drawer 8008, Hilton Head Island, SC 29938.

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
s/Robert S. Shelton
Robert S. Shelton, SCB# 68543
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
rshelton@bellamylaw.com
Attorney for Appellant Pitch Landing, LLC

NEILL LAW FIRM, PA
s/Mark D. Neill
Mark D. Neill, Esq., SCB# 14273
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
mneill@neilllawfirm.com
Attorney for Appellant Pitch Landing, LLC

HOWELL V. BELLAMY, JR.
EDWARD B. BOWERS, JR.*
M. EDWIN HINDS, JR.
DAVID B. MILLER+
C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYICEK
MARTIN C. DAWSEY*
ROBERT S. SHELTON+
HOWELL V. BELLAMY, III
GEORGE W. REDMAN, III + ** ++
BENJAMIN A. BAROODY + **

* LLM TAXATION
** LICENSED IN SC & NC
+ CERTIFIED MEDIATOR
++ CERTIFIED ARBITRATOR

THE BELLAMY LAW FIRM
1000 29TH AVENUE NORTH • P.O. BOX 357 • MYRTLE BEACH, SC 295
TELEPHONE (843) 448-2400 • FACSIMILE (843) 448-3022
WWW.BELLAMYLAW.COM

PHILLIP H. ALBERGOTTI* **
HAYES K. STANTON + **
KARA J. KEITH **
HOLLY M. LUSK
LAUREN BREARLEY BENTON
JON CRAIG HOWELL, JR.
ZACHARY J. CROWL**
BRICE A. BERTSCHIN
ALLIE BARTH TILLER

RETIRED:
JOHN K. RUTENBERG (1939-2012)
JOHN E. COPELAND
CLAUDE M. EPPS, JR.
DAVID R. GRAVELY
JILL F. GRIFFITH
BRADLEY D. KING

Writer's Direct Dial: 843-916-7163
Writer's Email: RShelton@BellamyLaw.com

June 14, 2023

VIA EMAIL ONLY: ctappfilings@sccourts.org
Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: South Carolina Electric & Gas Company v. Barbara Todd
and
South Carolina Electric & Gas Company v. Pitch Landing, LLC, et al
Appellate Case No.: 2021-000393

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Petition for Rehearing, Memorandum in Support of Petition for Rehearing, and Proof of Service in the above referenced matter. The filing fee will follow under separate letter.

Please do not hesitate to contact me should you have any questions.

With kindest regards, I am

Yours very truly,
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

s/Robert S. Shelton
Robert S. Shelton

RSS:nmr
Enclosures as noted

cc: Client
Gregory M. Alford, Esq. *(Via U.S. Mail and Email)*