

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Civil Action No.: 2018-CP-26-6424

UNPUBLISHED OPINION No. 2023-UP-202 (Filed May 24, 2023)

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 WRIT OF CERTIORARI

September 28, 2023

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INDEX

CERTIFICATE OF COUNSEL2

QUESTIONS PRESENTED2

STATEMENT OF THE CASE2

ARGUMENTS.....4

 1. The Court of Appeals Erred by Failing to Require the Trial Court to Place the Matter of Dominion vs. Todd on the Jury Trial Roster.

 2. Regardless Whether Pitch Landing met the Statutory Definition of Landowner, the Act Required the Matter to be Placed on the Jury Trial Roster.

 3. The Court of Appeals Erred by Failing to Require Consolidation for Trial of the Two Matters on Appeal.

CONCLUSION.....10

CERTIFICATE OF COUNSEL

Counsel for Petitioner certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals August 18, 2023.

QUESTIONS PRESENTED

1. Whether the Court of Appeals Erred by Failing to Require the Trial Court to Place the Matter of Dominion vs. Todd on the Jury Trial Roster.
2. If, Regardless Whether Pitch Landing met the Statutory Definition of Landowner, the Act Required the Matter to be Placed on the Jury Trial Roster.
3. Whether The Court of Appeals Erred by Failing to Require Consolidation for Trial of the Two Matters on Appeal.

STATEMENT OF THE CASE

Petitioner Pitch Landing, LLC (“Pitch Landing”) hereby petitions this Court for a writ of certiorari to review Opinion No. 2023-UP-202 filed May 24, 2023. This combined appeal stems from the following eminent domain actions: 1) the October 29, 2018 acquisition of real property from Barbara Todd along with Petitioner’s interest in that same real property (the “Todd Case,” 2018-CP-26-06064); and 2) the November 14, 2018 acquisition of adjacent real property from Petitioner (the “Pitch Landing Case,” 2018-CP-26-6424).

Background

In its eminent domain action against Todd, Respondent SCE&G (“Condemnor”) procured only a fifty-foot-wide strip of land through the middle of the Todd parcel. This exact 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 created when Todd purchased her tract. (R. pp. 21-30) The rear parcel and the easement through the Todd tract

were 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).¹

Following the dismissal of the Todd case, and Pitch Landing’s Motion to Restore, 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, 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.

Procedural History

Without oral argument, the Court of Appeals affirmed the circuit court 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, the Court of Appeals 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).

Appellant’s June 14, 2023 Petition for Rehearing was Denied August 18, 2023. Petitioner’s briefs to the Court of Appeals and the Record on Appeal in this combined matter are hereby incorporated herein by reference and made part of this Petition.

ARGUMENTS

1. The Court of Appeals Erred by Failing to Require the Trial Court to Place the Matter of SCE&G vs. Todd on the Jury Trial Roster.

This Court properly held the question whether a party is entitled to a jury trial is one 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 statute. 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), which 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. (Emphasis added.)

ii. Section 28-2-240(A)-(B), which 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 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), which 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), which 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.* (Emphasis added.)

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's 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;" it is more than the "nonownership interest" excluded by 28-2-230(12). Pitch Landing's interest in the Todd parcel is defined in the deed to Todd as "an unobstructed, unencumbered easement and right of way." (Deed attached hereto and incorporated herein as Exhibit C). Todd never held enough title to the real property acquired in the Todd matter to in any way impede Pitch Landing's control. Moreover, the Todd action takes by eminent domain Pitch Landing's entire interest in the Todd parcel. Pitch Landing, as a result of the Condemnation Notice filed in the Todd case, has been entirely deprived of its control within any portion of the Todd parcel, and has lost that access to the Pitch Landing parcel forever.

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.ⁱⁱ 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.

This reasoning is perfectly suited to the present matter in which Todd's tract and Pitch Landing's easement across Todd's tract were created when the grantor to Todd reserved "an unobstructed, unencumbered easement and right of way in, over and across that certain 50 foot private road access easement as shown on the above referenced plat for the purpose of ingress, egress and installation and maintenance of utilities."

This easement is a dominant, appurtenant easement, separate and distinct from Todd's fee simple estate. The Pitch Landing real interest in the Todd tract is that "which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal..." Black's Law Dictionary, Sixth Ed., definition, in part, of "appurtenance." Here, the easement is annexed to the Pitch Landing tract "more worthy as principal." As such, Pitch Landing as the property owner of this easement interest should have been fully included in the matter against

Todd, in order to properly compensate Pitch Landing for all impacts of the taking of its affected real property interest.

2. Regardless Whether Pitch Landing met the Statutory Definition of Landowner, the Act Required the Matter to be Placed on the Jury Trial Roster.

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.

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 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 requires 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.

3. The Court of Appeals Erred by Failing to Require Consolidation for Trial of the Two Matters on Appeal.

The holdings below contradict 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). This value can only be ascertained if the Todd and Pitch Landing cases are consolidated for trial. 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 value of the servient estate by the amount it benefits the dominant estate." *Condemnation of Easements*, James L. Thompspon, *Eminent Domain and Land Valuation Litigation*, January 2003.

Lastly, in the Pitch Landing Case, Landowner Pitch Landing made no demand for a nonjury trial. (R. pp. 104-106) Thus, insofar as the denial of the motion to consolidate was affirmed by the Court of Appeals “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 required statutory scheme for the trial of eminent domain actions, it is the only outcome that provides Pitch Landing the opportunity to seek truly just compensation for the taking of its property.

CONCLUSION

For the reasons stated herein, Petitioner asks this Court to grant the petition for a writ of certiorari.

September 28, 2023

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ⁱThe document attached hereto and incorporated herein by reference as Exhibit A is the rendering filed with the Condemnation Notice in the Pitch Landing matter and depicting the acquisition therein. The document attached hereto and incorporated herein by reference as Exhibit B is the rendering filed with the Condemnation Notice in the Todd matter and depicting the acquisition therein.

ⁱⁱ Respondent's assertion the "Court correctly ruled that the outcome in this case does not offend the principles set forth in *U.S. v. Gossler*" is unsupported in the Record, which includes all Orders and Opinions, none of which examine or in any manner reference *Gossler*. Respondent's Return to Petition for Rehearing, P5.