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

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, Landowner, 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.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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July 10, 2023
Hilton Head Island, South Carolina

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Comes now the Respondent Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company, filing its Return in opposition to Pitch Landing's Petition for Rehearing of this Court's Opinion Number 2023-UP-202 (May 24, 2023).

STATEMENT OF THE CASES

Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company ("Dominion") filed Case No: 2018-CP-26-06064 on October 29, 2018 (the "Todd Case"). The Todd Case was filed to obtain a 50" natural gas transmission easement. Barbara Todd is the fee simple owner of the real property subject to condemnation in the Todd Case. Pitch Landing was named as "other condemnee" in the Todd Case because it held an easement over the same 50" area that was being condemned. (R. at 35). The Pitch Landing Easement gave Pitch Landing a right of way and utility access to a parcel Pitch Landing owns in fee simple which is the subject of the separate Pitch Landing Case No. 2018-CP-26-6424. (described below).

In the Todd Case, Pitch Landing received notice of the filing of the proposed settlement with the Landowner, the disposition of funds, the proposed Order, the final Order and the other attendant filings to memorialize Dominion's settlement with the landowner. Pitch Landing never objected to the proposed Consent Order, never indicated that there was any dispute as to the disposition of the condemnation proceeds and never requested a hearing in accordance with S.C. Code 28-2-460. The case was dismissed on March 6th but, upon motion of Pitch Landing, the Todd Case was restored for an equitable proceeding in accordance with S.C. Code 28-2-460. Pitch Landing appealed and this Court affirmed the Trial Court's findings.

The Pitch Landing Case No. 2018-CP-26-6424

Respondent Dominion filed Case No. 2018-CP-26-6424 against Pitch Landing, LLC on November 14, 2018 (the "Pitch Landing Case"). Pitch Landing is the fee simple owner of the real property subject to the condemnation action in the Pitch Landing Case. The only error alleged by Pitch landing with respect to the Pitch Landing case is that the Trial Court denied its motion to combine the Pitch Landing Case with the Todd Case. This Court affirmed that holding.

As a Landowner in the Pitch Landing Case, Pitch Landing is entitled to just compensation for the damage to its fee simple estate through a jury trial. Without conceding any positions on any legal or evidentiary issues which may necessarily arise in the trial of the Pitch Landing Case, Respondent notes that Pitch Landing's Memorandum in Support of its Petition for Rehearing argues that the crux of the value of the easement over the Todd property is the value added to their dominant estate (the subject of the Pitch landing Case). Pitch Landing will have an opportunity for a jury trial to determine the just compensation resulting from a taking or damage to its fee simple interests. It is up to Pitch Landing to prove its damages to that parcel in the context of the Pitch Landing Case trial.

Argument

I. Pitch Landing Is not a "Landowner" in the Todd Case as defined by The South Carolina Eminent Domain Act.

Pitch Landing's first argument requests that this Court disregard its own jurisprudence[1] and the plain language of the South Carolina Eminent Domain Act (hereinafter the "Act"). In order

[1] *See: SC Dept. of Commerce v. Clemson University, et. al.,* 432 S.C. 352, 851 S. E.2d 735 (S.C. App. 2020).

to get a jury trial, Pitch Landing asks this Court to declare it a "Landowner" under the Act.[2] However, the Trial Court and this Court correctly applied the Act and found Pitch Landing to be an Other Condemnee in the Todd Case.

The Record contains no evidence that Petitioner Pitch Landing holds a fee simple interest in the Todd Property, only an easement. Without holding a deeded fee simple interest, under the Act, an easement holder cannot be a landowner and is not entitled to the same rights.

Also, Section 28-2-30(12) reads:

> **(12) "Landowner" means one or more condemnees having a record fee simple interest in the property to be condemned or any part thereof *as distinguished from* condemnees who possess a lien or other non ownership interest in the property . . ."**

The words "as distinguished from condemnees who possess a lien or other non ownership interest in the property" have an intended meaning. If this Court were to accommodate Pitch Landing's position, then every lien holder, easement holder, lessee and the holder of any other interest other than fee simple which may be created in real property, would potentially be entitled to its own separate jury trial. This could result in multiple jury trials for each condemnation action. This was clearly not the legislative intent of the Act as it would halt the use of eminent domain . Section 28-2-460 of the Act specifically controls the rights of other condemnees. Section 28-2-460 of the Act provides:

> **"Unless the parties served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment must be made jointly to all parties and must be paid to the clerk of court pending the final order of the court of common pleas *in an equity proceeding* to which**

[2] **"**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"

all persons served with the Condemnation Notice must be necessary parties. From the order of the court of common pleas there may be an appeal as provided for appeals from the Court in equity cases."

Section 28-2-240 of the Act further clarifies the point that the Legislature intended that only Landowners are entitled to jury trials.

Section 28-2-240 Election to proceed by way of trial after rejection of amount tendered.

(A) If the condemnor elects to proceed under this section, and the amount tendered 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 and affidavit stating: . . .

(5) the name and known address of each landowner whom the clerk should notify of the call of the case for trial. . .

Under Section 28-2-240, other condemnees are not required to be given notice of the call of the case for trial. They are however, under Section 28-2-460 entitled to notice of any proposed distribution of the award arising from the trial held under Section 28-2-240, or of any proceeding to determine any apportionment of the award.

Further, Pitch Landing is getting a jury trial in the Pitch Landing case. To the extent its fee simple property (i.e. the dominant estate served by the easement over the Todd property) has devalued its holdings as a "landowner," Pitch Landing will have an opportunity to present alleged damages at trial, ,, whatever they may be proven to be, which will be a jury trial

II. Section 28-2-310(B)'s wording cannot be construed to override the definition of "landowner" and the requirements of Section 28-2-460 of the Act.

Pitch Landing's next argues that because Section 28-2-310(B) requires the clerk to put a condemnation action on the Jury trial roster by default other condemnees get a jury trial of their

own. This interpretation would render Sections 28-2-280(C)(2), Section 28-2-30(12), Section 28-2-240 and Section 28-2-460 of the Act meaningless.

Section 28-2-310(B) does not allow an "other condemnee" to bootstrap its way into an independent jury trial. In fact, if a jury had awarded any amount, then the mandates of Section 28-2-460 would still apply as to the apportionment of the jury's award or any settlement. That post-verdict, proceeding in accordance with Section 28-2-460 would be in equity and other condemnees can present their claims as to the apportionment of just compensation award.

In addition, the Court correctly ruled that the outcome in this case does not offend the principles set forth in *U.S. v. Gossler, 60 F. Supp. 971 (D. Or. 1945)*, because Pitch Landing, unlike the dominant estate holder in *Gossler*, is getting a jury trial on the issue of its just compensation vis a vis damage to its property, the dominant parcel, in the Pitch Landing Case. In *Gossler*, the United States was held to owe compensation to a dominant estate holder (gravel and sand pit owner) due to the taking of an easement which abolished the access for gravel hauling company that was paying the dominant estate holder for gravel and sand. However, in *Gossler*, the dominant estate holder had no other forum in which to assert its claims as to the damage to the dominant estate. The *Gossler* dilemma is not presented in the present case because Pitch Landing is getting a jury trial on damages to its dominant estate. Further, the *Gossler* Court expressly acknowledged that its ruling was made in the absence of any Oregon case or statutory law to guide the District Court. *Id at 974.* In the present case, the South Carolina Act directly instructs the procedural path for Todd Case and the Pitch Landing case.

Conclusion

This Court correctly affirmed the Trial Court's decision which allows Pitch Landing all its rights within the framework of the Act. Therefore, this Court should deny Pitch Landing's Petition for Rehearing.

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PROOF OF SERVICE

I certify that I have served Respondent's Return in opposition to Pitch Landing's Petition for Rehearing by email on July 10, 2023 and by depositing a copy of it in the United States mail, postage prepaid, addressed to its attorney of record, Robert S. Shelton, Bellamy Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Post Office Box 357, Myrtle Beach, SC 29578 and Mark D. Neill, Neill Law Firm, P.A., P.O. Box 2810, Murrells Inlet, SC 29576.

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