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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2024-000079

Elroy D. Fischer, Jr., CD & F Interests, LLC, Howard Lumber Company and the
Robert E. Pentecost Trust, Respondents,

v.

South Carolina Department of Transportation, Appellant.

INITIAL REPLY BRIEF
OF APPELLANT

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I. THE TRIAL COURT ERRED BY NOT SPECIALLY SETTING FORTH FINDINGS OF FACTS AND CONCLUSIONS OF LAW TO SUPPORT ITS DECISION FOR THIS CASE.

The Appellant initially notes that in the Respondents' Brief for this matter they argue that the evidence presented at the trial of this case supports the trial court's ruling that they did not release all of their claims against the Appellant as part of the settlement of the 2015 condemnation case. As stated in its Brief, the Appellants do not dispute that Judge Clyburn Pope correctly ruled with respect to this issue.

As to her ruling on the ultimate issue presented at the trial of this case – that is, whether the Appellant inversely condemned the Respondents' property – the Appellant respectfully maintains that Judge Clyburn Pope did not specially set forth her findings of fact and conclusions of law, as required by applicable law.

In her order dated November 6, 2023, under the heading "Factual Determination" Judge Clyburn Pope wrote:

After reviewing the testimony and evidence submitted at trial, this Court finds that Defendant permanently and inversely condemned the remainder of Plaintiff's property. The Court finds that the design of the outfall adjacent to Plaintiffs' property is defective and transmits water onto the Plaintiffs' property with excessive speed and volume. The pictures and video evidence demonstrate visible damage to Plaintiffs' property.

Order dated 11/6/23.

The Appellant does not suggest here that the Respondents intentionally misstated the provisions of this Order. However, their Brief sets forth that the "Factual Determination" section of this Order states:

After reviewing the testimony and evidence submitted at trial, this Court finds that Defendant permanently and inversely condemned the remainder of Plaintiff's property. *The Court agrees with David Simoneau, the expert engineer for the Plaintiff* that the design of the outfall adjacent to Plaintiffs' property is defective and transmits water onto the Plaintiffs' property with excessive speed and

volume. The pictures and video evidence demonstrate visible damage to Plaintiffs' property.

(Respondents' Brief, Page 9) (emphasis added).

The difference between the Respondents' characterization of Judge Clyburn Pope's Order and what that Order actually says is important for purposes of resolving the issue presented as part of this appeal.

Just as the Appellant did in its Initial Brief, the Respondents in their Initial Brief review the lay and expert testimony and evidence presented to Judge Clyburn Pope during the trial of this case. They agree, at a minimum, that the evidence was "competing" which means it was also conflicting. (Respondents' Brief, Page 11).

As set forth in both the Appellant's Brief and the Respondent's Brief, a great deal of both lay and expert testimony and other evidence was presented during the two-day trial held before Judge Clyburn Pope. In her Order, however, she makes no reference to the names of the individual witnesses who provided testimony at the trial nor does she refer to any of the many items of documentary evidence submitted by the parties. She further offers no thoughts as to the particular weight she placed on any evidentiary matters, or why she believed certain witnesses as opposed to other witnesses.

In particular, the Respondents state that Judge Clyburn Pope "believed Respondents' expert over Appellant's expert." (Respondent's Brief, Page 11). Her Order dated November 7, 2023, does not set forth such a finding or conclusion, nor does it state that there are even disagreements between any of the experts who testified at trial. (Order, Dated November 7, 2023). While the Appellant agrees that the expert testimony presented at trial is very important in this case, the lay evidence is likewise very important – especially, as to how that lay evidence is viewed and used by the expert witnesses in forming their opinions in this case.

In its Initial Brief the Appellant attempted to summarize the not insignificant amount of testimony and evidence presented at the trial of this case. Such an effort was undertaken for the principal purpose of demonstrating there is a need for the trial court to summarize and weigh that evidence such as “to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law.” See Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991). The Parties cannot assist this Court with making such a determination absent clear guidance from the trial court as to how and why it reached the decision it made, and whether the evidence presented reliably supports that decision.

CONCLUSION

For the reasons stated above the Appellant requests that this Court remand this matter to the trial court with instructions that it set forth specially its findings of facts and state separately its conclusions of law for its decision in this case.

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Dated: October 24, 2024

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Elroy D. Fischer, Jr., CD&F Interests, LLC, Howard Lumber Company, and the
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vs.

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PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Initial Reply Brief on Counsel for the Respondents by electronic mail to the e-mail address of record with AIS at tucker@playerlawfirm.com, on October 24, 2024.

NANCE & McCANTS

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