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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

C/A No. 2018CP0202797
Appellate Case No. 2024-000079

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

vs.

South Carolina Department of Transportation, Appellant.

FINAL BRIEF OF APPELLANT

McCANTS & McCANTS

s/ Clarke W. McCants, III
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Dated: May 26, 2025

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STATEMENT OF ISSUES ON APPEAL

The Appellant respectfully submits that the following issues are presented for the Court's consideration in this matter:

1. DID THE TRIAL COURT ERR BY DENYING THE APPELLANT'S MOTION TO ALTER AND AMEND PURSUANT TO RULE 52(a), SCRCP, AND BY WHICH IT REQUESTED THAT THE TRIAL COURT SET FORTH SPECIALLY ITS FINDINGS OF FACTS AND STATE SEPARATELY ITS CONCLUSIONS OF LAW FOR ITS DECISION IN THIS CASE?

2. DID THE TRIAL COURT OTHERWISE ERR BY DETERMINING THAT THE APPELLANT INVERSELY AND PERMANENTLY CONDEMNED THE RESPONDENTS' PROPERTY?

STATEMENT OF THE CASE

The Respondents commenced this civil action in November 2018 and allege that the Appellant inversely and permanently condemned the entirety of a large tract of land they own located in Aiken County. (R. pp. 7-11). The Respondents contend that beginning in 2010 they noticed "excessive, destructive and unreasonable water intrusion through and onto the property during any significant rain event". (R. p. 8-9). They further allege that the actions of the Appellant significantly lowered the fair market value of the property and rendered it unusable and unmarketable for sale. (R. p. 10). They seek recovery of damages as well as issuance of an injunction against the Appellant, contending that the intrusion of harmful water continues to this day. (R. p. 11).

The Appellant denies that it inversely condemned the Respondents' property. (R. pp. 12-19). It further denies that the Respondents are entitled to recover damages in this case as well deny that they are entitled to an injunction.

The Parties agreed that the issue of whether the Appellant inversely condemned the Respondents' land should first be heard by the Court sitting without a jury. A two-day trial for that purpose was held before the Honorable Courtney Clyburn Pope in September 2023. On November 6, 2023, she issued her order for this case. (R. pp. 1-3). In that order she set forth that the Appellant has permanently and inversely condemned the Respondents' property and this matter should now be heard by a jury for purposes of determining if the Respondents are entitled to recover damages from the Appellant. (Id).

The Appellant subsequently moved, pursuant to Rule 52(a), SCRCP, to alter and amend Judge Clyburn Pope's decision for this case. (R. pp. 20-21). On December 13, 2023, the Circuit Court denied the Appellant's motion, without explanation, and this appeal followed. (R.

pp. 4-6; pp. 22-28).

ARGUMENTS

I. THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION TO ALTER AND AMEND PURSUANT TO RULE 52(a), SCRCP, AND BY WHICH IT REQUESTED THAT THE TRIAL COURT SET FORTH SPECIALLY ITS FINDINGS OF FACTS AND STATE SEPARATELY ITS CONCLUSIONS OF LAW FOR ITS DECISION IN THIS CASE

Rule 52(a), SCRCP provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 52(a), SCRCP.

Our Supreme Court has held that Rule 52(a) is directorial in nature so "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991). However, the Supreme Court has also stated:

> Trial courts, sitting without juries in an action at law, write their findings specially and separately 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. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

In re Treatment & Care of Luckabaugh, 351 S.C. 122, 132, 568 S.E.2d 338, 343 (2002).

Furthermore, compliance with Rule 52(a) allows the trial judge to satisfy the interest of judicial economy by dealing fully and properly with all issues before the court. See In re Las Colinas, Inc., 426 F.2d 1005 (1st Cir.1970) (construing Fed.R.Civ.P. Rule 52 on which our rule is based). The Court has noted that it does not require a lower court to set out findings on all the myriad factual questions arising in a particular case. Noisette, Id., See also Golf City, Inc. v. Wilson Sporting Goods, Co., Inc., 555 F.2d 426 (5th Cir.1977). But the findings must be sufficient to allow a Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. "The absence of factual findings makes our task of reviewing the court order impossible because the reasons underlying the decision [are] left to speculation." Kiawah Property Owners Group v. Public Serv. Com'n of South Carolina, 338 S.C. at 96, 525 S.E.2d at 866 (quoting Able Communications, Inc. v. S.C. Public Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give deference. See Welsh Co. of California v. Strolee of California, Inc., 290 F.2d 509 (9th Cir.1961); In re Treatment and Care of Luckabaugh, 568 S.E.2d 338, 351 S.C. 122 (S.C. 2002).

In her order dated November 6, 2023, Judge Clyburn Pope first determined that the Respondents' claims in this matter should not be dismissed based upon the Appellant's contention that they released those claims as part of the settlement of a related 2006 condemnation action. (R. pp. 1-3). The Appellant does not appeal that part of her decision.

As to the Respondents' claim for inverse condemnation Judge Clyburn Pope summarily ruled that the Appellant "permanently and inversely condemned the remainder of the Respondents' property". In that regard, her order states:

> 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.
>
> R. p. 2.

Eight witnesses testified at the two-day trial held before Judge Clyburn Pope, two of which were expert, private civil engineers retained by the parties to evaluate certain issues presented in this case. The transcript of the trial proceedings is comprised of over 500 pages. Without objection, numerous exhibits in the form of documents, records, reports, maps, a development plat, video and still photographic images were introduced into evidence at trial. In her order Judge Clyburn Pope makes no reference to the testimony of any witnesses, nor any of the documentary and other evidence which was used by the parties to support their respective positions in this case. (R. pp. 1-3).

Further, Judge Clyburn Pope did not include in her order any conclusions of law based upon the testimony and other evidence contained in the record for this case. She also did not cite any legal authorities to support her decision. (Id).

Given the absence of such findings of fact and conclusions of law it is impossible for the Appellant to assemble a complete and full brief to this Court explaining why it believes the trial court's ultimate ruling should not be upheld. The order forming the basis for this appeal does not allow this Court to review this matter and determine if the trial judge has "faithfully executed the law". See Kiawah Property Owners Group, *supra*.

It is also unfair to the litigants in this matter who are depending on their counsel to advise them with respect to the merits of their respective positions on appeal, and to allow those counsel to adequately represent them. Noisette, *supra*.

Our Supreme Court has established the procedure to be used in inverse

condemnation cases in this State and the elements which must be proven to sustain such a claim:

> In an action for inverse condemnation, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking, entitling him to compensation. Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 618 S.E.2d 299 (2005). Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine. Id. To prevail in such an action, a plaintiff must prove "an affirmative, aggressive, and positive act" by the government entity that caused the alleged damage to the plaintiff's property. Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967).
>
> WRB Ltd. Partnership v. County of Lexington, 630 S.E.2d 479, 369 S.C. 30 (S.C. 2006).

There are significant questions in this case as to the existence and sufficiency of evidence to support the Respondents' claim that the Appellant inversely condemned their property. While not suggesting that Judge Clyburn Pope should have to rule on the myriad of questions arising from the testimony and other evidence presented at trial the Appellant submits that she did not, in her order for this case, analyze and address certain crucial factual and legal issues which exist in this case. An outline of some of those issues follows herein.

As background, the Respondents' claims have their origin in the development and construction of U.S. Interstate 520 which serves as a southernly by-pass around Augusta, Georgia for vehicles using U.S. Interstate 20 to travel east or west. (R. pp. 83). The portion of I-520 located in South Carolina is known as the "Palmetto Parkway". (R. p. 61, lines 4-8).

In order to construct the Palmetto Parkway, the Appellant had to acquire ownership of the land where the new roadway was to be located. (R. p. 61, lines 4-8). In 2006, the Appellant filed a condemnation action to acquire approximately 25-acres of land located near the point where the Palmetto Parkway was designed to connect with I-20 in South Carolina. (R. pp. 29-34). The 25-acres needed for construction of the new roadway was part of a 68.22-acre tract of land owned

by the Respondents or their predecessors-in-title.[1] (Id). Following a period of negotiation the Appellant paid the sum of $504,760.00 to acquire the 25-acres and resolve 2006 condemnation action. (Id). Construction of the Palmetto Parkway then commenced and continued until the roadway was officially opened for traffic in December 2009. (R. p. 89, lines 5-13).

The Respondents contend that the Appellant has inversely condemned the entirety of the remaining 42.99 acres of their land. They allege that in 2010 they first noticed the "excessive, destructive and unreasonable water intrusion through and onto the property during any significant rain event." (R. pp. 7-11). The Respondents further allege this intrusion of water occurs at an "outfall area" located where the property acquired by the Appellant by way of the condemnation action borders the remainder of the tract of land owned by them. (R. p. 368, lines 12-16). The Respondents do not complain so much about the volume of water which they contend flows across their property; they complain more with respect to the speed, or velocity, of the water as enters and crosses their property. (R. p. 371, lines 4-21; R. p. 252, lines 13-17).

There is no dispute in this case that water produced by rain from above, and referred to generally as "storm water", has fallen upon land located to the north of the Respondents' property and flowed naturally, in varying degrees and amounts, onto and across the Respondents' property for generations. (R. pp. 257-261; R. p. 476). Such has been the case a long time before the Palmetto Parkway was built, and even well before the portion of Interstate 20 located in Aiken County was constructed in 1964. (Id). As reflected by a topographical map prepared by the United States Geological Survey in 1964, the ancient southward path of this storm water toward and through the Respondents' property is designated as an "intermittent blue line stream". (R. p. 268;

[1] The Respondent Elroy D. Fischer, Jr. is the only remaining party to the 2006 condemnation action. The other Respondents acquired their interest in the land by way of inheritance or other conveyance.

R. p. 476).

As part of the construction of Interstate 20 in the early 1960s the Appellant began to manage and control the storm water which flowed through the blue line stream. (R. p. 232, lines 7-22). The construction of any roadway requires than its designers and planners account for and manage any natural water which might flow across it at any time, and to ensure that the bed of the roadway does not "washout" during heavy rainfalls and endanger those using the roadway. (R. p. 232-233). Typically, such management is accomplished by way of piping installed underneath the road or the construction of bridges. (R. p. 232, lines 15-17).

In the mid-1980s the Respondent Fischer and his then partners undertook to develop the property involved in this case into a private, planned residential community known as "Chadwick". (R. p. 477). A plat dated April 1, 1985, and depicting the layout and details of the Chadwick Development, was introduced as an exhibit at the trial before Judge Clyburn Pope and was a focal point of much of the testimony presented to her. (Id).

The blue line stream shown on the 1946 topographical map flows directly onto and across the Chadwick Development. (R. p. 268; R. p. 476). The engineers, developers and planners of Chadwick obviously recognized the need to account for and manage the storm water represented by the blue line stream, whether it flowed intermittently or otherwise. (See generally, R. p. 477). The location of Interstate 20 is shown on the right side of the plat for Chadwick, as well as an area designated as "Drainage Easement from I-20".[2] (Id). The path of this easement across Chadwick was highlighted with a yellow marker at the trial of this case, including where it is labeled as "30' Drainage and Utility Easement". (Id). Significantly, the easement follows the path

[2] Diligent but unsuccessful efforts were made to locate any writings or documents which established and recorded this easement.

of the blue line stream shown on the topographical map. (R. p. 220). The easement continues southeastward through the development and crosses underneath Chadwick Drive where 72-inch reinforced concrete pipes were to be used to facilitate and control the flow of storm water below the roadbed. (R. p. 477, Note D-13).

Photographs of several unused and intact sections of 72-inch reinforced concrete pipes littered about the Respondents' property were introduced at the trial of this case. (R. p. 178; R. p. 219). Both parties' engineer witnesses testified that the proposed use of 72-inch reinforced concrete pipes as part of any residential development necessarily means that its planners and designers anticipate a need to manage large volumes of water which would flow across the property forming the development.

The Chadwick Plat also notes that a dam with an emergency spillway was to be installed below Chadwick Drive, which included the use of a "24" Vertical Riser w/ Slotted Holes [3" x. 1"] With Trash Rack" (R. p. 476, Insert at Top Left of Plat). This type of system is used to manage and control the amount of flow and speed of storm water by containing it and then discharging it at a slower speed using the riser. (R. p. 256). As discussed below the Appellant also used a riser system to manage the flow and speed of stormwater from the area around the Palmetto Parkway onto neighboring lands.

Stuart Saunders, an appraiser from Mt. Pleasant, South Carolina, testified at the trial for this case. Mr. Saunders appraised the property involved in this matter in 2005 and as part of the 2006 condemnation action filed by the Appellant. (R. pp. 478-500). In order to properly complete his appraisal, Mr. Saunders walked through the entirety of the Respondents' property and took photographs of portions of the interior of the property. (R. p. 299, lines 13-17).

Mr. Saunders' full appraisal, including his photographs, was introduced into

evidence at the trial before Judge Clyburn Pope. (R. pp. 478-500). Much was discussed at the trial with respect to the images captured photographically by Mr. Saunders in 2005.

From the Appellant's perspective Mr. Saunders' photographs depict direct and clear evidence, in existence before 2005, of severe storm water erosion in the areas where the blue line stream crosses the Respondents' property, and specifically along the easement shown on the Chadwick Development Plat. (R. pp. 478-500). For example, Mr. Saunders testified that he is five-foot, eleven inches in height and at least one of the eroded areas he observed is taller than him. (R. p. 302). This evidence supports the proposition that Chadwick's planners recognized they had to deal with the management and control of large volumes of storm water which flowed across the proposed development. At a minimum it proves that the Respondents' property suffered from the intrusion of significant amounts of storm water well before the construction of the Palmetto Parkway. The Chadwick Development was never fully completed. Testimony presented before Judge Clyburn Pope revealed that sometime in 1986 an accidental discharge of a large amount of diesel fuel oil occurred at a storage tank facility located across Interstate 20 from the proposed development. (R. p. 369). This fuel oil spill contaminated portions of the land in the development. (Id). As a result, the South Carolina Department of Health and Environmental Control stopped further development of the property. (R. p. 370). By the time the property was deemed safe to continue with its development the original owners of the land decided not to proceed further in that regard. (Id).

The Respondents cannot deny that natural storm water has flowed across their property for many, many years. As noted, they do not complain so much about that fact as much as they complain about the velocity or speed of that water as it crosses their land, and the effect such fast-moving water has degraded the value and potential use of their property.

Before the Appellant began construction of the Palmetto Parkway it undertook to have hydraulic studies performed to evaluate the existing flow of storm water in the areas of construction, as well as what would be expected in that regard after construction was completed. (R. p. 121, lines 19-24). Importantly, the Respondents' engineer witness testified that the Appellant's pre- and post-construction hydraulic studies were accurate. (Trial Transcript, Testimony of Mr. Simono). His opinions were more directed toward the speed or velocity of the water and its effect upon the surface of the land it crosses, once the water enters the Respondents' property at the area of the outfall noted above. (R. p. 121-122). The Respondents introduced videos showing the flow of water at the outfall during weather events which produced large amounts of rain. (Videos, USB drive).

The Respondents contend that the video evidence showing the flow of water onto their land speaks for itself and conclusively establishes the liability of the Appellant this case, perhaps in an attempt to apply the doctrine of res ipsa loquitur to support their claims. To the contrary, the Appellant submits that the Respondents must establish that it failed to properly design and construct a storm water system which was adequate to manage any increase in the amount or speed of such water during severe weather events.

The Appellant's engineer testified not only that the volume of flow and the speed of storm water near the Respondents' property did not increase after construction of the Parkway, but the systems also designed and constructed by the Appellant to manage storm water post-construction were done correctly. (R. pp. 268-269). The Respondents' engineer stated that the speed of water entering the Respondents' property at the outfall was such that it would cause erosion to their lands. (R. pp. 138-139). He does not offer an direct opinion that the Appellant's system, as designed, was defective, and perhaps more importantly he does not offer an opinion

with respect to what the Appellant should have done to correctly design and construct such a system.

The evidence presented before Judge Clyburn Pope further shows that in 2013 the Appellant undertook to install a riser and drainage system, in a detention pond located across the Palmetto Parkway from the Respondents' and other landowners' properties, to further control the amount of flow and speed of storm water that traveled the path of the ages-old blue line stream. (R. pp. 254-261). This riser and drainage system is similar to that which was planned for the Chadwick Development. (R. p. 258, lines 5-9). Significantly, the Respondents' engineer testified that he was unaware of the existence of the riser and drainage system, which was installed in 2013, and further that it does not affect his opinion in this case. (R. pp. 197-198).

The installation of this new system is extremely important in this case. It tends to show that even if a damaging amount of storm water entered the Respondents' property after construction of the Parkway, such damage was abated following its installation, and any harmful intrusion of storm water upon the Respondents' property is not permanent, contrary to the language set forth in Judge Clyburn Pope's order. It appears that the Court did not issue an injunction as part of its order in this case because the Court is not convinced the harm the Respondents' allege they suffered is permanent.

The outline provided above is not meant to be an exhaustive review of all of the testimony and other evidence presented at the trial of this case. The Appellant remains mindful of the appellate decisions which hold that a trial judge is not required to sort through and analyze every item of evidence presented to them while reaching a decision in a case.

Respectfully, though, Judge Clyburn Pope did not undertake to summarize and evaluate the weight and value of any of the testimony and evidence presented to her. She did not

express why she did, or did not, believe the testimony of certain critical witnesses, including the Appellant's engineer or Mr. Saunders. She did not express any comment with respect to the relevant documentary and photographic evidence presented by the Appellant.

The Appellant before this Court presented reliable and convincing evidence at trial bearing on critical issues to be decided by the trial judge, and in particular evidence which goes to the heart of whether the Respondents have established their claim of inverse condemnation - that is, whether the Appellant "damaged [their] property to the extent of an actual taking" by way of "an affirmative, aggressive, and positive act" that "caused the alleged damage." Cobb, supra, Berry's On Main, Inc., supra, and Kline, supra.

In order to enable the Appellant to fully present its positions before this Court on appeal it must have available for review beforehand complete and adequate findings of fact and conclusions of law. Respectfully again, the order of the trial court in this case does not give that opportunity to the Appellant.

II. THE TRIAL COURT OTHERWISE ERRED BY DETERMINING THAT THE APPELLANT INVERSELY AND PERMANENTLY CONDEMNED THE RESPONDENTS' PROPERTY.

"On appeal of an action at law tried by the judge without a jury [the Court of Appeals] will review the [judge's] factual findings to determine if there is any evidence to support them." State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 51, 496 S.E.2d 875, 878 (Ct. App. 1998).

As outlined above the Appellant is unable to present its arguments to this Court with respect to Judge Clyburn Pope's ultimate decision in this case without an understanding of the factual and legal basis she used to support her decision. An effort has been made to set forth the Appellant's arguments with respect to what it believes are the important factual and legal issues

presented here. From the Appellant's perspective those arguments support a reversal of the trial court's decision in this matter.

The Appellant, however, first asks this Court to remand this matter to the trial judge to allow her to specially find the facts which support her decision and to also require her to state separately her conclusions of law for this matter. In the alternative, the Appellant submits that the Order of the Trial Judge should be reversed.

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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