

**Order Ruling in Favor of Landowners
(June 25, 2015)**

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2012-CP-234064

SEP 10 2015
SC Court of Appeals

Piedmont Natural Gas Company, Inc.,)
Condemnor,)
Vs.)
Richeous Smith, et al.,)
Landowners,)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 JUN 25 PM 3 29

BS

The within matter came before me pursuant to an order of reference consented to by all parties in appearance. Piedmont Natural Gas Company, Inc. (hereinafter "PNG") instituted the within eminent domain proceeding pursuant to S.C. Code §28-2-10 et. seq.

Michael S. Chambers appeared on behalf of PNG. The landowners consist of several generations of the Richeous Smith family. Those in appearance were represented by Erin Culbertson and David B. Ward. Also, Paul Andrew McKee, III recently appeared representing several landowners.

Proper notice was given to all of the parties herein, including the unrepresented and unknown heirs. Also present and participating was attorney Kelley Y. Woody, the duly appointed Guardian ad Litem for the unknown claimants.

The property in question consists of a 73.6 acre tract located at the end of Rock Road in Greenville County. A bridge across Rock Road is the only access to the subject property. The property is surrounded by high-end residential real estate developments and the Enoree River on the northeast. Its highest and best use is for high-end residential development.

1


ENTERED COMPUTER

Scanned

PNG took a fifty foot (50') right of way (hereinafter "ROW") for a high pressure natural gas transmission pipeline across the front of the property at the bridge over Rock Road. Important to understand is that this ROW is located fairly soon after you cross over the only access point to the tract, the bridge noted above, and the ROW runs on both sides of the roadway along the full length of the tract. The area within the ROW totals 2.515 acres, and a severance strip totaling .747 acres adjoins the ROW. The ROW is approximately one thousand nine hundred feet (1900) feet in length across the entire width of the front of the subject property. The ROW includes various ground markers including a gate, a monitoring device and a caution sign located immediately at the entrance to the subject property. Such caution sign, monitoring device and gate were a part of the original taking. The caution sign in question is at the front of the property at the entranceway, not more than approximately twenty feet five (25') to thirty (30') feet or so onto the tract, and is clearly visible from Rock Road. Copies of the sign were introduced into the record. The subject sign reads:

CAUTION
HIGH PRESSURE
NATURAL GAS
NO SMOKING
NO TRESPASSING
IN CASE OF EMERGENCY CALL
(PIEDMONT NATURAL GAS)
GIVE THE BELOW NOTED
INFORMATION/DESIGNATION WHEN YOU CALL
1-800-432-8420

The background of the sign is bright yellow and the word CAUTION is in bright red. The purpose of the sign is to give notice to the public of the natural gas transmission line. The parties stipulated that the take took place on June 22, 2012.



At trial PNG first called its engineer, Adam Long, the Engineering Project Manager for the Line 378 Project, which involves the tract in this litigation. Mr. Long testified to the extent of the right of way, with the plat of the same being introduced without objection. Mr. Long testified that the pipe line is a transmission line not a distribution line. Therefore landowners along the pipe line may not tap into it. Mr. Long stated that the CAUTION sign was not required and had been subsequently removed. Mr. Long indicated he did not know when the sign had been installed nor removed. However, the evidence establishes that the sign was present on the date of the taking, June 22, 2012. As noted below, there are similar caution signs along the same transmission line ROW's involving other tracts of land.

At that juncture, counsel for the landowners offered and referred to discovery which had taken place, reading into the record appropriate portions. Firstly, it was noted that on October 27, 2014 notice was given to PNG attorneys that photographs of the caution sign would be among the exhibits offered at trial. Then reference was made to supplemental interrogatory responses from PNG filed on May 18, 2015, which indicate that the landowners were first informed on April 28, 2015 that the sign had been removed on February 17, 2015. Landowners counsel then asked the court to take judicial notice of the ADR report filed in the action which indicates that mediation had taken place on some twelve days earlier on February 5, 2015 without success.


Evidence was then introduced both on cross-examination of Mr. Long and by the testimony of appraiser of the landowners, Bruce Owen, that three of the landowners along the same ROW had previously settled their cases, which were not part of this lawsuit, but the above described caution signs remained on those properties.

A handwritten signature or set of initials, possibly "BO", written in black ink. The signature is stylized and somewhat abstract, with a large loop on the left side and a horizontal line extending to the right.

A member of the Smith family, Alma Rene Smith Murray, who has lived on the property all of her life, testified the caution sign had been placed on the gate when the pipe line was installed initially. She also testified about her concern, fear and the stigma of the transmission ROW being on the tract of land and that, in her opinion, the ROW negatively impacted the value of the tract.

The landowners proffered the testimony of Mr. Bruce Owen as an expert real estate appraiser. PNG stipulated that he is an expert real estate appraiser. In addition, Mr. Owen has been actively involved in real estate development and construction, having constructed more than fifty houses (50) himself. Mr. Owen's record of many years experience clearly indicates he has interfaced with developers and contractors in various aspects of his experience and training, as well as constructing houses himself. Mr. Owen testified that in his opinion, in addition to the value of the land within the take and damage to the small severance area, there was significant damage to the remainder based upon the size and nature of the ROW. He testified that one methodology that he considered appropriate to ameliorate damage to the remainder would be to allow for a buffer zone along the right of way and depreciating the buffer zone for additional damages.

The value of the entire premises by both appraisers, who are both well qualified and experienced, was approximately the same. Mr. Owen testified that he had made an investigation into the land values by comparable sales of tracts of land. He also testified that he had discussions with developers to determine the extent, if any, to which the offending right of way with accompanying caution sign would diminish the value of the remaining tract.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the bottom.

Based on his research above and his years of experience, Mr. Owen determined that the damages for the area within the right of way and the small severance equal the sum of One Hundred Seventy Five Thousand Three Hundred Twenty Four (\$175,324.00) Dollars. Also, he determined that the remainder had suffered significant damages in the sum of Two Hundred Thirty Nine Thousand Four Hundred Twenty Eight (\$239,428.00) Dollars for allowance for the proposed buffer zone. Therefore, he determined total damages for the take in the sum of Four Hundred Fourteen Thousand Seven Hundred Fifty Two (\$414,752.00) Dollars.

In addition to the buffer zone methodology, Mr. Owen further offered the opinion that he had considered general damages to the remainder without specifying or without considering the buffer zone as a method of ameliorating damages. In that vein, he arrived at an estimate of 6% diminution in value to the remainder, such figure being nearly identical to his initial analysis using the criteria set forth above.

The appraiser for PNG, H. Corbin Haskell, offered an opinion as to damages for only the portion of the premises lying within in the fifty foot (50') right of way and a small severance strip, for total damages of the 3.262 acre in the sum of One Hundred Seventy Two Thousand Two Hundred (\$172,200.00) Dollars. Mr. Haskell's investigation and opinion did not make any allowance for proximity damages to the remainder since in his opinion there was no such damage or diminution based upon the ROW. It should be noted that he visited the premises and conducted his initial appraisal on March 30, 2012, which was before the installation of the pipeline, gate, monitoring device and caution sign. Moreover, his testimony indicates he did not visit the property again until after the caution sign had been taken down.

A handwritten signature in black ink, appearing to be the initials 'HCH' or similar, written in a cursive style.

PNG through its expert, H. Corbin Haskell, offered examples of other subdivisions whereby a natural gas line ROW, in his opinion, did not negatively affect the relative sales prices of houses within those subdivisions. In Mr. Haskell's opinion, in the present case, the existence of the natural gas pipeline ROW did not decrease the property values nor would it deter builders from placing lots and houses near or on the ROW.

One of these subdivisions used as a comparable was The Townes at Riverwood Farm. In that instance, the fifty foot (50') gas line right of way runs parallel along a one hundred foot (100') Duke Power right of way. Mr. Owen testified he had visited that property and examined the public records of it. There, the developer had designated all of such right of way areas as "common area", and had installed a road along the fifty foot (50') PNG right of way as a "buffer area". Mr. Owen testified that having a road with dwellings only on one side shifts all of the cost of the road and utility improvements to one side. He testified that the cost of such road would typically be between Four Hundred (\$400.00) Dollars and Five Hundred (\$500.00) Dollars per foot, and that by only constructing houses on one side, additional costs of approximately Three Hundred Thousand (\$300,000.00) Dollars would be incurred by the developer to use the road as a buffer zone. There was evidence that the road in question may have been only one thousand feet (1,000') or so, but nevertheless it is apparent that the developer did in fact use a buffer zone methodology for the purpose of ameliorating or minimizing damages. Mr. Owen further testified that there was no caution sign on that ROW.

A second subdivision referred to by PNG is located in Spartanburg County and is known as Mason's Crossing. Mr. Owen testified that he also visited that subdivision. He offered into evidence the deed showing that that property had been purchased for One

A handwritten signature or set of initials, possibly "CO", written in black ink.

Hundred Thirty Thousand (\$130,000.00) Dollars for 26 acres, or some \$5,000.00 per acre. Mr. Owen did not consider that subdivision comparable to the high-end real estate as involved in the present action. He indicated that the houses built were smaller houses or starter houses, and a number of them had constructed privacy fences or buffers, and a number of them had constructed privacy fences or buffers behind their residences. Moreover, he indicated that the right of way in question was not across the front of the subdivision but off to one side, and there was no caution sign delineating the right of way.


At the beginning of the trial PNG made a *motion in limine*, which was denied except as to the Court prohibiting use of Wikipedia, to exclude the testimony of Mr. Owen on the premise that it was improper for Mr. Owen to:

(1) Offer opinion of diminution of value to the remainder of the property due to any claim negative conception in the market place caused by fear or "stigma" associated with proximity to the natural gas pipe line.

(2) That there is no scientific basis for using a buffer zone as a method of ameliorating proximity damages.

(3) That in his written report Mr. Owen, in support of his conclusion that negative perception exists as to proximity to a natural gas line, included an addenda from Wikipedia titled "List of Pipe Line Accidents in the United States in the Twenty First Century".

PNG argues, among other things, that no South Carolina legal precedent directly addresses the question of whether fear or stigma would be a proper element of damages to be considered by a qualified real estate expert.

7 

South Carolina has always been deferential and liberal in allowing testimony of damages in eminent domain actions. The adoption of S.C.R.C.P. Rule 703 allowing experts to rely upon inadmissible evidence, actually confirms a long standing practice in this state.

Cartee v. Lesley, 286 S.C. 249, 333 S.E.2d 341 (S.C.App. 1985) involved a dispute over assets of an estate. The trustees argued that the expert witness was never properly qualified as an expert, and was allowed to testify from hearsay sources, answer improper hypothetical questions and was allowed to testify to irrelevant comparable rentals. The court held that opinion testimony by an expert witness regarding rental value of the property was not improperly based on what would otherwise be inadmissible hearsay, where the witness derived much of his knowledge from a publication listing market values and from talking with renters in the area. The court observed:

The trustees next argue that the Cartees' expert witness was never properly qualified as an expert, was allowed to testify from hearsay sources, was permitted to answer improper hypothetical questions, and was allowed to testify to irrelevant comparable rentals.

We find no merit to any of these arguments. Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue are matters resting largely in the discretion of the trial judge. *State v. Lambert*, 276 S.C. 398, 279 S.E.2d 364 (1981); *Prince v. Associated Petroleum Carriers*, 262 S.C. 358, 204 S.E.2d 575 (1974). The Cartees' witness who testified as an expert on rental values was an M.A.I. appraiser with seventeen years of experience in appraising properties in South Carolina. Cartee, at 346

The court also stated:

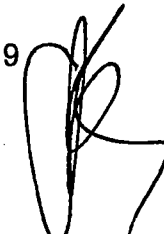
Further, an expert may base his opinion on information "whether or not inadmissible, made available to him before the hearing if the information is of a type reasonably relied upon in the field to make opinions." *Dreher, a Guide to Evidence Law in South Carolina*, P.20 (1979). The trustees' objection relates to the fact that much of the expert witness' knowledge regarding rental value

for the subject property came from a publication called "Market Valuation Service" and from information he obtained from talking to renters in the area. As stated in the case of *Miller v. Travelers Insurance Co.*, 111 Ga.App. 245, 141 S.E.2d 223 (1965), "every expert derives much of his knowledge from books as well as from experience." Cartee, at 346

See also, State Highway Commission v. E. R. Conrad and Sally D. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965). The expert relied upon a drawing prepared by a non-civil engineer in arriving at his estimate of damages. The condemnor objected as the drawing was not prepared by a civil engineer and did not comply with good engineering practices. The court held:

"A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property * * *." Stansbury: North Carolina Evidence, 2d Ed., s. 128, p. 300. "The fact that certain elements are not independently admissible in evidence * * * does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said: 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' Conrad, at 557

Contrary to the argument of PNG, Mr. Owen based his decision on his vast experience as an appraiser and as one experienced in dealing with land development in every aspect, including building and dealing with developers. The central question is whether or not a developer or other

9 

purchaser would be inhibited to some degree in an offering price to purchase the property given the natural gas transmission ROW in the particular location on this tract.

In Western Farmers Electric Coop. v. Enis, 1999 OK CIV APP 111, 993 P.2d 787 (1999), the appellate court allowed an expert appraiser's opinion about the impact on value of perceived fear of EMFS (electrical) based on public disseminated information as a relevant factor in determining fair market value. The court went on to observe that the generally accepted definition of fair market value is the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.

The court went on to observe:

Unfortunately, the effect of fear on the willingness of a buyer to purchase a piece of land is not easily assessed or measured, but the same is true of other intangible factors such as aesthetic qualities of land. The difficulty in quantifying or valuing fear should not prevent both parties from offering available evidence to show that certain fears either do nor do not have an effect on the value of property. Western Farmers Electric Coop., at ¶16.

The court also stated:

The "considerations" that go into fair market value include "any factors which a reasonably prudent buyer would consider before purchasing property," State by and through Alabama State Docks Dept. v. Atkins, 439 So. 2d 128, 131 (Ala. 1983), and "all elements reasonably affecting value." Wright v. Metropolitan Atlanta Rapid Transit Authority, 293 S.E.2d 466, 469 (Ga. 1981). Fair market value should also reflect "all favorable and unfavorable circumstances." Bellingham Community Hotel Co. v. Whatcom County, 70 P.2d 301, 304 (Wash. 1937); and, "any competent evidence of matters which would be considered by prospective vendor or purchaser or which tend to enhance or diminish value of property." Douglas County Bank & Trust Co. v. Stamper, 505 N.W.2d 693, 696 (Neb. 1993). Western, at ¶13.



The Court in Western found no error in admitting expert testimony which took into account the depreciating value of land near the transmission line occasioned by perception on the part of the general public. Obviously, that perforce would apply to a major natural gas transmission line.

Perhaps more telling is the case of Arents v. ANR Pipeline Co., 2005 WI App 61, 696 N.W.2d 194, 281 Wis. 2d 173, cited by PNG. There the court allowed expert appraisal testimony as to fear or stigma damages to the remainder excluding only the testimony of pollsters (conducting "man on the street interviews"), as not being scientific. The trial court allowed the landowner's appraiser to testify about fear and stigma and to how it purportedly decreased the property values.

The greater weight of authority and modern trend is to allow testimony of fear or stigma damages. In fact, even the notion that the fear may be unreasonable does not preclude evidence of such fear in considering damages.

Indeed, the authorities cited by PNG support the conclusion that such testimony of fear or stigma by a qualified expert is proper. Joseph Criscuola et al. v. Power Authority of the State of New York, et al., 81 N.Y.2d 649, 621 N.E.2d 1195, 602 N.Y.S.2d 588 (1993) cited by PNG establishes that the modern view is to allow such damage claims even if the fear is unreasonable.

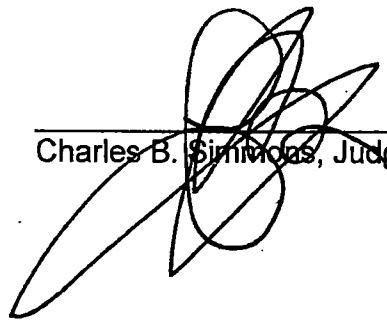
That case involved the issue of whether or not "cancer phobia", even though it may be an unreasonable fear, could be considered as a public perception in assessing damages.



It is my conclusion and I so find that fear or stigma associated with the particular natural gas pipe transmission line ROW involved herein and the accompanying signage and markers are proper element to be considered by the Court. Further, I find that the methodology employed by Mr. Owen in forming his appraisal is both reasonable and appropriate. Simply put, the evidence establishes under the unique facts of this case that the purpose, location, size, length, signage and warning markers on the ROW have diminished the value of the tract as more fully set forth above.

Based on the foregoing, it is my conclusion and I find that the landowners are entitled to just compensation for the taking, including damages to the remainder, in the sum of Four Hundred Fourteen Thousand Seven Hundred Fifty Two (\$414,752.00) Dollars.

IT IS SO ORDERED.



Charles B. Simmons, Judge

June 23, 2015

Piedmont Natural Gas Company, Inc.

FILED-CLERK OF COURT Richeous Smith, et al.

SC Court of Appeals

CONDEMNOR
 PLAINTIFF(S)

GREENVILLE CO., S.C.
 LANDOWNERS
 PAUL B. WICKEN
 DEFENDANT(S)

Submitted by: David B. Ward

2015 JUN 25 PM 3 29

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Court retains jurisdiction to determine pre-verdict interest, attorney's fees and costs.

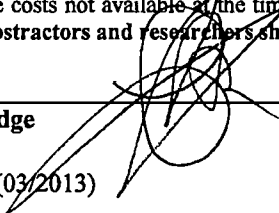
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Richeous Smith, et al.	Piedmont Natural Gas Company, Inc.	\$414, 752. 00
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge  3023 Judge Code 06-23-2015 Date

