THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Case No. 2012-CP-23-04064
Appellate Case No. 2015-001909

Piedmont Natural Gas Company, Inc., ...Appellant/Respondent,

v.

Richeous Smith, Worthly Smith a/k/a Worley Smith, Pearl Terry, Ethel Butler, Tweety Smith a/k/a Tweety Smith Harris, Doreth Smith, Fletcher Lee Harris, Alma Williams Smith, James R. Smith, Loree Smith, Gene A. Smith, Adolf Smith, Janie Sue Smith, Samuel Paul Smith, Ruby Smith Mansell, Buford Mansell, Ethel Mae Smith, Wilson Smith, Patrick R. Smith, Reginald Lamont Smith, Eric Smith, Christine Smith Dawkins, William G. Dawkins, Alma Renee Smith Murry, Sharai Smith Brock, Robert Lee Smith, Melissa F. Smith, Rosalyn Annette Steven, Edith Smith Foster, George Waymon Foster, Bridgette Smith Blassingame, Tara Smith, Waymon Odell Smith, Martha Miller Smith, Calvin Lee Smith, Reece W. Smith, Raymond Eddie Smith, Michael Smith, Odell Smith, Dorothy Smith Pearson, Gary Pearson, Jerome Smith, Jaygo Terry, Ida Terry, Mack Terry, Zone Terry, Leola Terry Smith, James Smith, J.P. Terry, David Brayvell Terry, Ettie Pearl Booker, Tecora O. Terry Mason, Odell Mason, Lenora Holley, Dorothy Terry Sheppard, Orangelee Sheppard, Vernon Sheppard, Kasandra Sheppard Jenkins, Karen Sheppard Spates, Theodore Terry, Sr., Gracie Terry, Kelvin F. Terry, Theodore Terry, Jr., Keith Terry, Leola Terry Daniels, Wilford Daniels, Terrance Leslie, Sr., Derrick McGee, Jr., Fred Smith, Jr., Mannell Terry, Patricia Terry, Sheila Terry, Barbara Evans, Leonard Evans, Linda Evans, Thomas Evans, Johnny R. Williams, Connie Evans, Michael Evans, Iola Terry Cox, William Henry Cox, Johnny F. Cox, Joyce A. Smith, Anthony Cox, Alfred Cox, J. Henry Cox, Charlette J. Cox, Charles J. Cox, Michael Cox, Supearl Terry Gilliam a/k/a Supearl Terry Gilliam Miranda, Eugene Gilliam, Terry Gilliam, Jerry Gilliam, Warren Gilliam, Eugene Gilliam, Jr., Melvin Gilliam, Rodney Gilliam, Cindy Gilliam, Shakima Gilliam, Carmella Cottom, Nina Gilliam, Vermell Gilliam Phillips, Shaynise Alston, John Gilliam, Donald Gilliam, Sr., Leunette Gilliam, Donnette Gilliam Ortchere, Leslie Gilliam Peter, Angela Gilliam, Donald E. Gilliam, Raymond T. Gilliam, Juan Miranda, Carmen Miranda a/k/a Carmen Miranda Glavin, John Glavin, Sr., John Glavin, Jr., Miranda Glavin, Jeffrey Glavin, Yolanda Glavin, Ezell Terry, Magaline Terry, Leroy Terry, Kenneth Terry, James (Jimmy) Terry, Pearlie Mae Terry, Winnie L. Terry Anderson, Furman Anderson, Tommy Anderson, Abigail Dodd, Angela Reid, Sandra McDowell, Harold Anderson, Mary Ann Davis, Charlene Peake, Albert

Anderson, Paul Terry, Betty Jo Terry, Donald E. Terry, Deloris I. Terry, Paul A. Terry, Mark G. Terry, Terry Sholer, Jamie Terry, James O.C. Smith, Pauline Smith, Gloria Gore, Paul Smith, Ethel Allen, Desiree Golden, Pauline Workman, Brenda Moulhem, and if any of the aforementioned be decesased, then their heirs, successors, devisees, distributees, Administrators, Executors and Personal Representatives, and any party claiming by or through them, Landowners,

and

The United States of America, acting by and through its agency, the Internal Revenue Service, The United States of America, acting by and through its agency the United States Department of Justice, The South Carolina Department of Revenue, The South Carolina Department of Mental Health, The State of South Carolina, Bullhead Investments, LLC, Arrow Financial Services, LLC, Sharonview Federal Credit Union, Discover Bank, Zachery Arnold, GE Commercial Finance Business Property Corporation, Midland Funding, LLC, and Greenville County, Other Condemnees,

and

John Doe and Mary Roe, being fictitious names used to represent all persons and condemnees whose true names are not known, including the heirs, successors, devisees, distributees, Administrators, Executors and Personal Representatives of any of the above named Landowners and Other Condemnees who may be deceased; and also all Condemnees whose names are not known, including heirs, infants, persons under disability and persons who may be in Military service, who claim, or may claim, an interest in the property being condemned, and also all other persons unknown, claiming any right, title, estate, interest in or lien upon the real estate described in the Condemnation Notice and Tender of Payment herein, said property being identified as a portion of Greenville County Tax Map Numbers 053101010200 and 0531010102101, Unknown Claimants,.....

Of whom Ethel Allen, Shaynise Alson, Harold Anderson, Tommy Anderson, Bridgette Smith Blassingame, Sharai Smith Brock, Carmella Cottom, Alfred Cox, Mary Ann Davis, William G. Dawkins, Abigail Dodd, Linda Evans, Michael Evans, Thomas Evans, Chavonte Gilliam, Cindy Gilliam, Derrick Gilliam, Donald E. Gilliam, Jr., John L. Gilliam, Lakisha Gilliam, Latonya Gilliam, Leunette Gilliam, Mattie M. Gilliam, Nina Gilliam, Raymond TI Gilliam, Rodney Gilliam, Shakima Gilliam, Warren Gilliam, Desiree Golden, Gloria Gore, Lenora Holley, Kasandra Sheppard Jenkins, Terrance Leslie, Sr., Sandra McDowell, Derrick McGee, Jr., Brenda Moulhem, Alma Rene Smith Murry, Charlene Peake, Leslie Gilliam Peter, Angela Reid, Orangelee Sheppard, Vernon Lee Sheppard, Charles Terry Sholer, Calvin Smith, Eric Smith, Fred Smith, Jr., Gene A. Smith, James R. Smith, Joyce A. Smith, Loree Smith, Martha Miller Smith, Patrick Smith, Paul Smith, Reginald Lamont Smith, Tara Smith, Karen Regenia Spates, Rosalyn Annette Steven, Betty Jo Terry, Donald E. Terry, Deloris I. Terry, Gracie Terry, Jamie Terry, Keith Terry, Kelvin F. Terry, Leroy Terry, Mark G. Terry, Paul Terry, Jr., Theodore Terry, Jr., Porsha Williams, and Pauline Workman are the Respondents/Appellants,

and

Unknown landowners, Reece W. Smith, Raymond Eddie Smith, Michael Smith, Odell Smith, United States of America and the United States of America, acting by and through its Agency, the Internal Revenue Service, Midland Funding, LLC, Sharonview Federal Credit Union, SC Department of Revenue, County of Greenville, Arrow Financial Services, LLC, SC Dept. of Mental Health, SC Attorney General, and Bullhead Investments, LLC, Zachery Arnold, Ettie Pearl Booker, Ira K. Carol, Johnny F. Cox, Wilford Daniels, Angela Gilliam, Bianca S. Gilliam, Demetrius J. Gilliam, Jerry Gilliam, Kehimonnie S. Gilliam, Terry Gilliam, John Glavin, Jr., John Glavin, Sr. Jeffrey Glavin, Miranda Glavin, Yolanda Glavin, Terrance Leslie, Terrell Leslie, Tearia Leslie, Donnette Ortchere, Jerome Smith, Melissa F. Smith, Michael Smith, James (Jimmy) Terry, Patricia Terry, Pearlie Mae Terry, and Sheila Terry are the Respondents.

FINAL REPLY BRIEF OF APPELLANT PIEDMONT NATURAL GAS COMPANY, INC.

Kevin Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
(864) 591-2030
kevindunlap@parkerpoe.com

Attorney for Appellant/Respondent Piedmont Natural Gas Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. RESPONDENTS IMPROPERLY ATTEMPT TO SAVE THEIR UNSUBSTANTIATED CLAIM FOR STIGMA DAMAGES TO THE BUFFER ZONE BY BOLSTERING IT WITH AN ALTERNATIVE VALUATION METHOD.

A. Respondents' Expert Repeatedly Abandoned the Alternative "Overall Diminution of Value" Method at Trial.

The crux of this appeal is whether the trial court erred in awarding damages equal to 85% of the value of a 100-foot wide area adjacent to an easement for a natural gas pipeline (the "Buffer Zone") as a result of alleged fear or stigma in the marketplace associated with the proximity to the pipeline ("Stigma Damages"). In its Initial Brief, Appellant argued extensively that the trial court abused its discretion when it allowed Respondents' expert, Bruce Owen ("Owen") to testify about damages to the Buffer Zone in spite of Owen's: (1) admitted lack of training or specialized knowledge in the area (R. p. 273, lines 4-6); (2) admission he had never read about the "Buffer Zone Method," seen the method in industry-recognized practice manuals, or even heard about the method being used in any other instance (R. p. 273, lines 7-9, p. 274, lines 9-11, p. 276, lines 17-19); and (3) failure to conduct any comparable sales analyses to support his opinion on the alleged impact to the Buffer Zone. (R. p. 271; lines 4-7). Respondents now attempt to salvage Owen's testimony by arguing that their claim for Stigma Damages is also supported by an "Overall Diminution in Value Method." Owen, however, clearly abandoned this method at trial:

> A: [W]hat I elected to do in this particular case was to try to remedy some of the damage by putting in a buffer zone or establishing a buffer zone between the pipeline and the rest of the property to be developed. So, there are really two methods, but I decided on the buffer zone method....

(R. p. 253, lines 4-9). (emphasis added).

Q: During your deposition did you testify that you chose to do [the valuation of Stigma Damages] according to the buffer zone theory rather than the percentage of damage, correct?

A: Yes.

Q: Is that still your testimony?

A: Yes.

(R. p. 269, lines 14-19).

Q: You've not used the methodology of value of damages as a percentage to the entire property but instead have done the buffer zone methodology?

A: Yes. That's what I did.

(R. p. 264, lines 7-10).

THE COURT: At your deposition, did you give an answer that you felt there was up to 15 percent diminution in the value?

A: Yes, sir.

THE COURT: But today you're stating, if I understand correct, that you are relying upon a buffer zone theory?

A: Yes, sir.

(R. p. 268, lines 13-18).

This Court should reject Respondents' improper attempt to bolster their claim for alleged stigma damages using the alternative method of evaluating diminution of value to the overall property because this method was clearly and repeatedly abandoned by Respondents' expert at trial.

B. Even if the "Overall Diminution of Value" Method Was Not Abandoned at Trial (Which it Clearly Was), Testimony Regarding Alleged Stigma Damages Based on This Method Should Have Been Excluded.

Owen's testimony on alleged stigma damages based on the Overall Diminution of Value Method should have been excluded, even if Owen had not abandoned the method

at trial, because this testimony was unqualified, conclusory and unreliable. Owen's testimony failed to meet the criteria for admissibility under Rule 702 of the South Carolina Rules of Evidence ("SCRE"), which requires the trial court to find the following before expert witness testimony is admitted: (1) the subject matter is beyond the ordinary knowledge of the jury and required an expert to explain the matter to the jury; (2) the witness has knowledge and skill to qualify as an "expert in the particular subject matter" of the proposed testimony; and (3) the substance of the testimony is reliable. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The trial court abused its discretion in admitting Owen's testimony regarding alleged stigma damages because Owen's admitted a total lack of knowledge and skill in evaluating stigma damages and his testimony as to alleged stigma damages was unsupported by the evidence.

Respondents' counsel elicited Owen's testimony on the Overall Diminution of Value Method over Appellant's objection, even though Owen testified that his opinion was based on the Buffer Zone Method. (*See* R. p. 254, line 11 - p.255, line 3). In addition, and tellingly, as to the Buffer Zone Method upon which Owen actually relied, Owen flatly admitted that he has no training or specialized knowledge. (R. p. 273, lines 4-6). Owen further testified that he had never read about the Buffer Zone Method, seen the method in industry-recognized practice manuals, or even heard about the method being used in any other instance. (R. p. 273, lines 7-9, p. 274, lines 9-11, p. 276, lines 17-19).

Not only did Owen's testimony fail to provide any support for the use of the Overall Diminution of Value Method, Owen testified at trial that his estimated overall diminution of value dropped from between 10 and 15 percent (as he had testified at deposition) to between 6 and 10 percent without providing a shred of testimony on the

basis of the change. (*See* R. p. 256, line 16 - p. 257, line 2). What changed? Owen's testimony provides no explanation. The best indication of Owen's motivation for dropping his estimate by as much as half was his testimony that, by reducing the overall diminution in value estimate to 6 percent, the estimated damages were "virtually the same" as the damages estimated using the Buffer Zone Method. (R. p. 257, lines 18-20). Far from bolstering the reliability of Owen's valuation of damages to the Buffer Zone, Owen's testimony reveals that his opinions are simply a numbers game, wholly unsupported by a reliable, industry-accepted method or by market data.

Respondents list "research" that they claim support Owen's opinion on alleged stigma damages for the Buffer Zone and Overall Diminution in Value. (Resp'ts' Br. p. 24-25). Tellingly, the listed "research," including "discussions with local property developers" and Owen's own experience as a real estate appraiser and developer, does not include an analysis based on actual market data. Without any market-based support, Owen's opinions amount to nothing more than an arbitrary value based on Owen's unqualified "gut feeling." (*See* R. p. 252, lines 10-14). ("[B]ased on what I perceived at [the interviewed developers'] perceptions and my own perceptions, I felt like there was damage to the remainder....").

Respondents also list "online research into 21st century pipeline accidents" as a basis for Owen's opinion on alleged stigma damages. (Resp'ts' Br. p. 25). Respondents are presumably referring to a 15-page article printed from Wikipedia, which Owen's attached to his appraisal report. (*See* R. p. 276, lines 21-25).[1] Taken together, the list of "research" that Respondents argue supports Owen's opinion on alleged stigma damages, without any market-based analysis, simply falls short of the minimum criteria for

[1] PNG notes that the Trial Court properly held that the Wikipedia article was not admissible at trial. (Resp'ts' Br. p. 10).

reliability under Rule 702, SCRE. *See Kipps v. Virginia Natural Gas, Inc.*, 247 Va. 162, 163, 441 S.E.2d 4, 5 (Va. 1994) (holding that proffered testimony of an expert on alleged stigma damages resulting from a natural gas pipeline easement was properly excluded at trial because the expert's "personal assessment of the matter was unsupported by any study or analysis by him, and his opinion was based only upon conversations he had with developers in the [] area, and a newspaper article about a pipeline explosion").

C. Appellant Did Not Admit, and Specifically Objected to, Respondents' Expert's Reported Qualification as an Expert in Evaluating Alleged Stigma Damages.

Respondents attempt to mislead this Court by asserting that there was no prejudice in admitting Owen's testimony on alleged stigma damages because Appellant "stipulated to the qualification of Landowners' witness as an expert." (Resp'ts' Br. p. 23). This is outrageous. Appellant objected to Owen's qualification to testify as to alleged stigma damages in a pre-trial Motion *in Limine*, at trial, and in its post-judgment Motion to Reconsider, Alter, or Amend. (*See, e.g.*, R. p. 189, lines 4-8) ("We do not challenge Mr. Owen's qualifications or credentials as an expert witness in real estate appraisals generally. Our objection goes to [] the reliability of his opinion as it goes to diminution of value due to fear or stigma caused by proximity to a natural gas pipeline."). (R. p. 71, lines 11-24, p. 277, line 23 - p. 278, line 5).

In short, Appellant clearly and repeatedly objected to Owen's testimony on the basis that his opinion as to alleged stigma damages was unqualified and unreliable. Owen reviewed no comparable sales or other market data, had no educational background in the area, and had never read about, seen or heard about his method of evaluation being used in other instances. *See Player v. Motiva*, No. Civ. 02-3216, 2006 WL 166452 at *6-8 (D.N.J. Jan. 20, 2006), *aff'd by Player v. Motiva Enter.*, LLC, No.

06-1663, 2007 WL 2020086 (3d Cir. 2007) (holding that a general real estate appraisal expert with 22 years of experience was not qualified to opine on the effects of the alleged stigma of contaminated real property).

For all of the above reasons, Owen's testimony on alleged stigma damages, whether based on the Buffer Zone Method that he relied on at trial, or the alternative Overall Diminution in Value Method that Respondents now attempt to use to bolster his testimony, should have been excluded based on its failure to satisfy the minimum admissibility requirements under Rule 702, SCRE. Even if the Trial Court did not abuse its discretion when it admitted Owen's testimony on alleged stigma damages (which it did), the Trial Court had no legitimate legal foundation to find that Owen's opinion carried more weight than Appellant's expert's opinion (*i.e.*, that comparable sales do not show diminished values of properties adjoining pipeline right-of-ways), which was formed through an industry-accepted market-based approach. *See infra*, Sec. II.

D. Rule 702, SCRE Applies to Bench Trials As Well As Jury Trials, and the Testimony of Respondents' Expert Should Have Been Excluded.

In their brief, Respondents argue for the first time that the three-factor test for admissibility of expert witness testimony provided in *Watson* only applies to jury trials, and does not apply in the case at bar, which was tried before a Master-In-Equity. Appellant raised an objection to the admission of Owen's opinion on alleged stigma damages under the *Watson* test in its pre-trial motion *in limine*. (R. pp. 80-81). Appellant also repeatedly objected to the Owen's testimony on alleged stigma damages on the grounds that his testimony was unreliable at trial. (*See* R. p. 254, lines 11-21, p. 277, line 23 - p. 278, line 2). Yet Respondents never argued that *Watson* only applies to jury trials – not in their response to Appellant's motion *in limine*, not during the pre-trial hearing on the motion *in limine*, and not in response to Appellant's objections to Owen's

testimony at trial. As this Court well knows, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Respondents waived the argument that the *Watson* test did not apply at this bench trial by failing to raise the issue at trial and this argument should not now be considered for the first time on appeal.

Even if Respondents had not waived this argument, expert testimony must still meet the basic reliability requirements under *Watson* in bench trials. *See Seaboard Lumber v. United States*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002) (providing that the standards of relevance and reliability for expert witness testimony must be met at bench trials); *Bradley v. Brown*, 852 F. Supp. 690, 700 (N.D. Ind.), *aff'd*, 42 F.3d 434 (7th Cir. 1994) (granting a motion *in limine* to deny expert witness testimony at a bench trial and reasoning that the court's gate-keeping function for expert testimony "is equally apropos regardless of the identity of the fact-finder."). In this case, where Owen's testimony on alleged stigma damages clearly failed to meet the basic reliability requirements under *Watson*, and should have been excluded at trial.

II. APPELLANT'S EXPERT CONDUCTED THE ONLY COMPARABLE SALES ANALYSIS IN THIS CASE, AND HIS ANALYSIS DID NOT SHOW THAT A NATURAL GAS PIPELINE RIGHT-OF-WAY DIMINISHED ADJOINING PROPERTY VALUES.

Both Appellant's and Respondents' experts were qualified to determine the value of land and impacts to land based on a comparable market analysis, but only Appellant's expert, Corbin Haskell ("Haskell"), formed an opinion on damages to the remainder based on an analysis of comparable sales data. As provided above, Respondents' expert provided no objective basis for his opinion on the alleged stigma damages. By Owen's own admission, he did not conduct a comparable market analysis to evaluate the potential

effect of the presence of a natural gas pipeline to the market value of the Property. (R. p. 272, lines 15-18). Even in jurisdictions that allow evidence of stigma damage in condemnation actions, many courts have held that testimony on alleged damages is only admissible when the testimony is backed up by comparable sales data. *See, e.g., Southeast Supply Header v. 47.75 Acres in Covington County, Miss.*, No. 2:07-CV-216, 2008 WL 553019, *3 (S.D. Miss. Feb. 27, 2008).

Respondents' argument that there were not comparable sales for Owen to analyze in this case fails to pass muster when Appellant's expert testified that he identified and analyzed two comparable developments in the area that were built in the proximity of existing natural gas pipelines (*i.e.*, the Mason's Crossing development and the Townes at River Farms development). (R. p. 293, line 14 - p. 295, line 15).

In his analysis, Appellant's expert compared the sales of lots that bordered natural gas pipeline easements against sales of lots in the same developments that did not border the easements (*i.e.*, "interior lots"). (R. p. 294, lines 1-6). Haskell found that some lots sold along the natural gas pipeline easement "represented some of the higher values" of lots sold within the development, while others represented lower values. (R. p. 294, lines 9-15). Based on this objective analysis of actual, market data, Appellant's appraiser "did not find that there was any measurable diminution in value in the lots that adjoin the natural gas right-of-way versus lots that did not." (R. p. 293, lines 19-21).

Respondents argue that the subdivisions evaluated by Appellant's appraiser are not comparable because the property in these existing subdivisions were valued less than Respondents' property on a cost-per-acre basis. (Resp'ts' Br. p. 33). This is illogical. There is no reason that alleged "negative perception in the marketplace," if it existed (and Respondents have presented no objective evidence that it does), would not be evident in

lower-valued property. Families with less purchasing power surely have equal concerns regarding alleged safety as wealthier families. Likewise, it does not make sense that a developer would disregard concerns regarding "logistical difficulties" in the proximity of a natural gas pipeline for lower-priced developments. If there was a perceived risk associated with natural gas pipelines as Respondents claim, the "negative perception in the marketplace" would manifest itself in the relative sales prices of lots adjacent to the natural gas pipeline easements as compared to the "interior lots" regardless of the cost-per-acre of the property. Yet, the only objective market-based analysis conducted in this case – the analysis conducted by Appellant's expert – did not show a measurable diminution in value of the lots adjacent to the natural gas pipeline. (R. p. 293, lines 15-21).

Respondents' claim that the comparable sales analysis of the existing subdivisions is "meaningless" because the Respondents' property is in a "very prosperous area" is without merit and should be rejected. At the end of the day, Respondents' expert failed to perform a market-based analysis, and his subjective opinion on diminished property value to the remainder based on alleged stigma should not have been admitted at trial. If Owen had conducted a market-based analysis of the property values he would have found, like Appellant's expert, that his perceived "negative perception" of the pipeline in the marketplace was non-existent. Respondents' expert's testimony on alleged stigma damages was not based on reliable evidence or methodology and it should have been excluded at trial.

III. THIS COURT SHOULD REJECT RESPONDENTS' REQUEST THAT STIGMA DAMAGES BE RECOGNIZED FOR THE FIRST TIME IN THIS CASE.

Respondents accurately note that no South Carolina appellate court has recognized stigma damages as an element of just compensation in a South Carolina condemnation action. (Resp'ts' Br. pp. 13-14). This Court should reject Appellants' request for this Court to open the floodgates to claims of alleged stigma damages in condemnation actions by sustaining the Order in this case, which awarded stigma damages without any supporting market-based evidence.

A. Case Law Cited by Respondents for the Proposition that Stigma Damages are Appropriate Under the Constitution of South Carolina Applies to the Arbitrary and Unreasonable Use of Police Power and Has No Bearing on this Case.

Respondents argue that this Court should, for the first time, recognize stigma damages in a condemnation action based on the case law that establishes this Court's respect for individual rights and property rights under the State Constitution. However, each of the three cases cited by Respondents involved the government's unconstitutional application of the police power in violation of the State Constitution, and not to condemnation actions properly instituted in accordance with the procedures of South Carolina's Eminent Domain Procedures Act (the "Act"). Further, not a single one of these South Carolina cases cited by Respondents involved, or even mentioned, alleged stigma to property.

In *James v. City of Greenville*, the owner of a trailer park challenged an ordinance that rezoned his property so that only single family residences were permitted. 227 S.C. 565, 88 S.E.2d 661 (1955). Under the ordinance, the operation of the trailer park was a non-conforming use, and the owner was notified that he would have to discontinue such use within one year of the ordinance's passage. *Id.* at 567. The landowner challenged

the ordinance on the grounds that it was arbitrary, amounted to a taking of his property without just compensation or due process of law, and was improper "spot zoning" that improperly singled out owner's property. *Id.* at 568-69. The Court agreed and held that redistricting the area and requiring landowner to discontinue use of his property was unconstitutional. *Id.* at 581.

Similarly, in *Henderson v. City of Greenwood*, a property owner complained that a city ordinance was unconstitutional. 172 S.C. 16, 172 S.E. 689, 689 (1934). The *Henderson* plaintiff applied for and was granted a city-issued building permit for the erection of a brick building on her property. *Id.* Before beginning construction on the building, the city revoked the permit and issued a new ordinance forbidding the construction of a building or other structure within two hundred feet of a railroad crossing without special permission of the city. *Id.* at 690. Under the new ordinance, plaintiff was prohibited from constructing the desired building. *Id.* The South Carolina Supreme Court held that the ordinance was unreasonable and an unconstitutional use of the police power that deprived the plaintiff of her property without due process of law. *Id.* at 692. This case does not reference eminent domain a single time, much less alleged stigma damages to the plaintiff's property.

Respondents also cited Justice Harwell's dissenting opinion in *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895 (1991), which that was subsequently reversed by the United States Supreme Court. In *Lucas,* the South Carolina Supreme Court found that a property owner was not entitled to compensation for a "regulatory taking" by the South Carolina Beachfront Management Act ("SCBMA"), which prohibited him from erecting permanent habitable structures on his beach front property. *Id.* at 378, 404 S.E.2d at 896. The United States Supreme Court reversed on

the grounds that the state court improperly relied on precedent holding that a property owner is not entitled to just compensation for a regulatory taking when the purpose of the underlying statute is to abate a nuisance. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The United States Supreme Court (consistent with Justice Harwell's dissent, which was cited by Respondents) held that the property owner in *Lucus* could be entitled to compensation for a regulatory taking under the SCBMA, which was not intended to abate a nuisance, but rather to preserve beaches and dunes as a valuable public resource. *Id.* at 1032. As in *James* and *Henderson*, stigma damages to property is neither alleged nor even mentioned in this case.

Each of these three cases cited by Respondents involves the alleged "take" of a property through a regulatory action – not a traditional eminent domain proceeding. In short, these cases are simply irrelevant. In the case at bar, there was a "take" of Respondents' property for a public use in accordance with Article 1, Section 13 of the South Carolina Constitution. Appellant exercised its right to take in accordance with the Eminent Domain Procedures Act, and Respondents did not challenge Appellant's right to take. It is undisputed that there was a take of a portion of Respondents' property and Respondents are entitled to just compensation for the take. Indeed, excluding alleged stigma damages, Appellant's and Respondents' experts' determination of the value of just compensation were strikingly similar (Appellant's expert arriving at a value of $172,226 and Respondents' expert arriving at a value of $175,324). (R. p. 8).

In sum, the cases cited by Respondents are not helpful to this court's consideration of the questions on appeal. At issue here is not whether a take occurred (it did), or whether Respondents are entitled to just compensation (they are), but simply whether alleged stigma damages were properly awarded as a component of just

compensation. Appellant urges this Court to reverse the Trial Court's award for alleged stigma damages in this eminent domain action, which is the first of its kind in South Carolina. As a matter of law, alleged "fear and stigma" in the marketplace should not be considered when determining the measure of just compensation for lawful public projects. Further, the award of stigma damages in this case, where the claim for the alleged damages is not supported by any market-based evidence, would open the floodgates to unsubstantiated claims for damages based on fear and stigma in condemnation actions throughout the State.

B. Respondents' Reliance on Other Jurisdictions is Misplaced.

Not surprisingly, considering the total absence of any evidentiary support on the record for the stigma damages award, Respondents encourage this Court to adopt the most far-reaching rule that recognizes stigma damages in jurisdictions outside South Carolina. This rule holds that alleged stigma damages based on alleged fears of prospective purchasers are compensable even without having to prove the reasonableness of the fears. This rule is out-of-step with South Carolina precedent, which requires landowners claiming damages to real property to substantiate their damages claims and disallows the recovery of speculative damages. *See Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971). Adoption of this extraordinarily permissive rule would be totally unfair to condemnors, it would invite unsubstantiated claims for alleged stigma damages in condemnation actions throughout South Carolina.

Indeed, as provided in *Willsey v. Kansas City Power & Light Co.*, a case cited by Respondents, the landowners must prove that the alleged fear will result in an actual loss in market value even in jurisdictions that apply a "no reasonableness required" rule. 6 Kan.App.2d 599, 611, 631 P.2d 268, 277 (Kan. App. 1981). In *Willsey*, the Kansas court

held that "[r]emote, speculative and conjectural damages are not to be considered," but loss of market value, including losses resulting from alleged fears may be compensable if such loses are "proven with a reasonable degree of probability." *Id.* In short, even under the extremely far-reaching and liberal rule that Respondents request this Court adopt for South Carolina, the Trial Court's award of stigma damages in this case cannot be sustained. Respondents failed to provide any objective evidence of lost value based on alleged fear and stigma, and any claim for stigma damages is too remote, speculative and conjectural to be considered as a measure of just compensation.

Appellant argues that, as a matter of law, alleged fear and stigma in the marketplace should not be considered when determining the measure of just compensation for lawful public projects in South Carolina. However, no matter which rule is adopted – landowners must prove a connection between the alleged fear and a reduction in property value. *Id.*

Respondents offered no evidence, much less sufficient evidence, that the alleged fears adversely impacted market value. In contrast, Appellant did present market-based evidence that a natural gas pipeline in the area would *not* diminish the value of the remainder. (*See* R. p. 293, line 14 - p. 295, line 15). Consequently, even if this Court were to adopt a rule that allowed recovery of stigma damages even if the alleged fear is unreasonable (which it should not), this Court should reduce the verdict by $239,428 which represents and removes the amount of damages awarded for alleged stigma.

C. Chief Justice Toal's Warning Against Recognizing Stigma Damages "In Any Form" Should be Heeded in This Case, In Which Respondents Claim Diminution of Value to the Remainder Based on Stigma Without Any Objective, Market-Based Evidentiary Support.

Respondents' request that this Court adopt a rule allowing recovery of damages for fear and stigma in the marketplace where there is no evidence that the alleged fear and

stigma is reasonable flies in the face of the recent warning in Chief Justice Toal's dissent in *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82 (2015) (with Justice Kitteridge joining). Chief Justice Toal warns that she would "decline Appellants' request to adopt stigma damages in any form as an appropriate measure of damages in South Carolina." *Id.* at 232, 776 S.E.2d at 86. The speculative nature of stigma damage claims in general, and particularly in this case where Respondents' offer no market-based evidence to support their claim, does not give this Court adequate reason to throw open the door to alleged stigma damages in South Carolina condemnation actions.

D. Respondents' Bizarre Claim that the Taking Was Not for a Public Purpose Was Not Raised at Trial and Should Be Barred.

Appellant condemned the easement for a natural gas pipeline right-of-way, which is necessary for a public purpose as required under South Carolina's Eminent Domain Procedures Act (the "Act"). *See* S.C. Code § 28-2-60. (*See also* R. p. 210, lines 4-6). Respondents now, for the first time, make the bizarre argument that the pipeline is not for a public use because it is a distribution pipeline that will serve a General Electric facility. (Resp'ts' Br. p. 21).[2] Respondents did not contest the right to take under the Act. Rather, Respondents seem to suggest that, because the easement is allegedly not for a public use, the improper award of stigma damages should be sustained on public policy grounds. Nonsense. First, Respondents provide no legal basis for its conclusory statement that, because the pipeline will serve General Electric, it will not serve a public use. Further, Respondents improperly attempt to raise this baseless argument that the taking does not serve a public purpose for the first time on appeal and the argument is therefore waived.

[2] Appellant notes that its witness, Adam Long, offered undisputed testimony at trial that the pipeline will serve not only General Electric, but will also feed a distribution station. (R. p. 218, line 24 - p. 219, line 1).

Herron, 395 S.C. at 465, 719 S.E.2d at 642 ("It is axiomatic that an issue cannot be raised for the first time on appeal.").

IV. LAY OPINION TESTIMONY OF THE LANDOWNER REGARDING ALLEGED DIMINUTION IN VALUE TO THE PROPERTY WAS IMPROPERLY ADMITTED AND IT WAS PREJUDICIAL TO APPELLANT.

Respondents argue the lay opinion testimony of the landowner witness, Alma Rene Murray, that the pipeline "possibly could decrease [the] value of the property" (R. p. 243, lines 1-2) was admissible and, even if the trial court erred in allowing the testimony, Ms. Murray's testimony was harmless because it was "merely cumulative" to the testimony of Respondent's expert witness. Appellant disagrees. Appellant has consistently objected to the testimony of Respondents' expert regarding alleged stigma damages on the grounds that it is irrelevant, unqualified and unreliable. Heaping inadmissible lay witness testimony on top of improperly admitted expert testimony absolutely prejudiced Appellant at trial.

Ms. Murray's testimony regarding her opinion that the pipeline could "possibly" diminish the value of the property is inadmissible under Rule 701, SCRE because, among other reasons argued in Appellant's Initial Brief, the assessment of diminution of property value is not within the common knowledge and experience of most lay persons, and Respondents did not provide any foundation that Ms. Murray had the special knowledge, skill, expertise or training to make such an assessment. *See Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 561-63, 671 S.E.2d 79, 86-87 (Ct. App. 2008) (lay witnesses permitted to testify on general value of land but not diminution of value as a result of highway construction). Not surprisingly, in their response, Respondents do not dispute the fact that Ms. Murray did not have the required specialized knowledge, skill, experience or training to give testimony on diminished property values.

In addition, Ms. Murray's testimony that the pipeline could possibly diminish the property value is speculative and totally unsupported by any objective, market-based data. This defect was not cured by Respondents' expert, whose assessment of alleged stigma damages also had no objective market-based support. Every bit of evidence that Respondents offered at trial related to diminished property value as a result of alleged fear and stigma was unqualified, speculative and unreliable. Only Appellant's expert conducted an objective analysis of the potential impact of a natural gas pipeline to property values of adjoining residential lots, and his analysis did not show that the proximity of a natural gas pipeline results in any measureable diminution in value. (R. p. 293, lines 15-21).

The trial court erred in allowing this lay witness opinion testimony into evidence over Appellant's objections and also erred when it admitted Respondents' expert witness testimony regarding alleged stigma damages. As such, the trial court should be reversed and the verdict should be reduced by $239,428, which represents the part of the award for stigma damage.

V. REMOVAL OF THE CAUTION SIGN DOES NOT SHOW "NEFARIOUS" INTENT AND THERE IS NO RELIABLE EVIDENCE THAT THE SIGN DIMINISHED THE PROPERTY VALUE.

In the absence of any market-based support for the stigma damages award, Respondents double down on their misplaced emphasis on a caution sign that was located at the entrance to the property at the time of the take by suggesting that Appellant's subsequent removal of the sign is evidence of "nefarious intent." (Resp'ts' Br. p. 29). Nothing could be further from the truth. Appellant's witness, a senior engineering project manager for Piedmont, testified that the sign at issue was a "facility sign" that is intended for use at above-ground natural gas facilities. (R. p. 214, lines 18-23).

However, the natural gas pipeline on Respondents' property is completely underground. There are no above-ground facilities on the property. (R. p. 210, lines 7-14). Upon learning that the caution sign was placed on the property despite a total absence of above-ground facilities, Appellant's engineer had the sign removed. (R. p. 215, line 9 - p. 216, line 5). In sum, Appellant removed the caution sign from Respondents' property because this sign simply was not intended for use at the type of underground, natural gas pipeline that exists on Respondents' property.

Further, the former placement of the caution sign on the property does not support the claim for alleged stigma damages. Respondents' expert himself admits that there is no market-based data to support Respondents' claim that the caution sign diminished the value of the property. Respondents' entire position is simply based on their expert's "general" (and, as described above, unqualified) opinion:

> Q: So, you don't really have any market data or evidence to support any theory or opinion of yours that signs themselves cause a loss of value or damage to the remainder?
>
> A: Other than just general opinion, no.

(R. p. 275, lines 12-15). There is no evidence that prospective purchasers actually viewed this caution sign, which no longer exists on the property, or that the sign would have diminished the value of the property even if potential purchasers had seen it.

CONCLUSION

For the reasons stated herein and in the Initial Brief of Appellant, Appellant requests that this Court reverse the judgment of the trial court and reduce the verdict by the amount of $239,428, which represents the part of the award for stigma damage and accordingly reverse the trial court's order granting attorneys' fees and costs or, in the alternative, remand and order a new trial.

Respectfully submitted this the 24 day of May, 2016.

Kevin Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
(864) 591-2030
kevindunlap@parkerpoe.com

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Case No. 2012-CP-23-04064
Appellate Case No. 2015-001909

Piedmont Natural Gas Company, Inc., ...Appellant/Respondent,

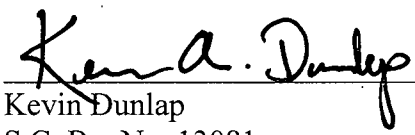
v.

Richeous Smith, *et al.* ..... Respondents/Appellants and Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing Final Reply Brief of Appellant Piedmont Natural Gas Company, Inc. complies with Rule 211(b) SCACR.

This the 24th day of May, 2016.



Kevin Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
(864) 591-2030
kevindunlap@parkerpoe.com

Attorney for Appellant/Respondent
Piedmont Natural Gas Company, Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 24 2016
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Case No. 2012-CP-23-04064
Appellate Case No. 2015-001909

Piedmont Natural Gas Company, Inc., ...Appellant/Respondent,

v.

Richeous Smith, *et al.* ..... Respondents/Appellants and Respondents.

CERTIFICATE OF SERVICE

I certify that I have caused to be served the FINAL REPLY BRIEF on counsel of record and respondents in this action by depositing a copy of the same in the United States Mail, postage prepaid, addressed as follows:

David B. Ward
Horton Law Firm
307 Pettigru Street
Greenville, South Carolina 29601
(864) 233-4351
dward@hortonlawfirm.net
Attorney for Respondents/Appellants

Erin Culbertson
Kehl Culbertson Andrighetti & Komfeld, LLC
114 Manly St.
Greenville, SC 29601
(864) 370-8222
erin@palmettolawfirm.com
Attorney for Respondents/Appellants

This the 24 day of May, 2016.

Parker Poe Adams & Bernstein LLP