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SC Court of Appeals

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 deceased, 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 BRIEF OF APPELLANT
PIEDMONT NATURAL GAS COMPANY, INC.**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN HOLDING THAT STIGMA DAMAGES WERE NOT BARRED AS A MATTER OF LAW IN THIS CONDEMNATION ACTION FOR A NATURAL GAS TRANSMISSION PIPELINE RIGHT-OF-WAY?
- II. DID THE TRIAL COURT ERR IN AWARDING STIGMA DAMAGES TO THE ARTIFICIAL BUFFER ZONE WHEN RESPONDENTS FAILED TO PRESENT EVIDENCE THAT THE ALLEGED FEAR OR STIGMA WAS REASONABLE?
- III. DID THE TRIAL COURT ERR IN AWARDING STIGMA DAMAGES TO THE ARTIFICIAL BUFFER ZONE WHEN THERE WAS INSUFFICIENT EVIDENCE OF A NEXUS BETWEEN THE ALLEGED FEAR OR STIGMA AND THE ALLEGED DIMINUTION IN MARKET VALUE TO THE REMAINDER?
- IV. DID THE TRIAL COURT ERR IN AWARDING STIGMA DAMAGES TO THE ARTIFICIAL BUFFER ZONE WHEN APPELLANT'S EXPERT TESTIFIED THAT A MARKET-BASED ANALYSIS OF TWO SUBDIVISIONS IN THE AREA CONTAINING NATURAL GAS PIPELINE RIGHT-OF-WAYS DID NOT SHOW THAT THE PIPELINE REDUCED PROPERTY VALUES AND RESPONDENTS' EXPERT HAD NO CONTRARY MARKET DATA?
- V. DID THE TRIAL COURT ERR IN ALLOWING RESPONDENTS' EXPERT TO TESTIFY ABOUT ALLEGED STIGMA DAMAGES TO THE ARTIFICIAL BUFFER ZONE WHEN:
 - A. HE ADMITTED HE LACKED TRAINING, EXPERIENCE OR SPECIALIZED KNOWLEDGE IN THE AREA;
 - B. HE ADMITTED HE HAD NEVER SEEN OR HEARD OF THE METHOD THAT HE USED TO FORM HIS OPINION BEING USED IN ANOTHER INSTANCE; AND
 - C. HIS OPINION WAS NOT SUPPORTED BY MARKET DATA?
- VI. DID THE TRIAL COURT ERR IN ALLOWING LAY WITNESS TESTIMONY ABOUT DIMINUTION IN PROPERTY VALUE EVEN THOUGH THE LAY WITNESS HAD NO EXPERIENCE OR EXPERTISE IN DETERMINING THE DIMINUTION, IF ANY, IN PROPERTY VALUE CAUSED BY THE PRESENCE OF THE PIPELINE?

STATEMENT OF THE CASE

Piedmont Natural Gas Company, Inc. (“PNG” or “Appellant”) condemned a 2.515-acre strip of property (the “Easement”) on the northern boundary of an approximately 70-acre parent tract (the “Property”) to install an underground, 12-inch natural gas transmission pipeline (the “Pipeline”). (R. pp. 4-5; R. p. 204, lines 19-20). The Pipeline, a public utility, 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. (R. p. 210, lines 4-6). The condemnees did not challenge Appellant’s right to take under the Act. The take took place on June 22, 2012 when Appellant filed an initial Condemnation Notice and Tender of Payment with the Clerk of Court for Greenville County. (R. p. 5).

An amended Condemnation Notice and Tender of Payment was filed on January 31, 2014 to include and reflect additional condemnees based on information obtained by Appellant after the initial filing. (R. p. 48-76). The Court appointed a Guardian *ad Litem Nisi*, Kelly Y. Woody, to represent the interests of unknown claimants on September 26, 2014. On Appellant’s motion, the condemnation action was referred to the Honorable Charles B. Simmons, Jr., as Master in Equity for Greenville County, on January 22, 2015. A trial of the condemnation action was held before Judge Simmons on May 28, 2015.

Prior to trial, Appellant filed a motion *in limine* to exclude certain testimony of Respondents’ expert witness, R. Bruce (“Owen”), insofar as Owen’s testimony involved his opinion of diminished value to the remainder as a result of alleged fear or stigma in the marketplace associated with the proximity to the Pipeline (hereinafter “Stigma Damages”). (R. p. 77). Appellant’s motion *in limine* also sought to exclude evidence of alleged perceived safety hazards involving natural gas pipelines in general. *Id.* Judge Simmons denied Appellant’s motions *in limine* during the pre-trial hearing on May 28, 2015 and

heard testimony from both parties' experts at trial. (R. p. 198, lines 14-17). The Court entered an Order on June 25, 2015 awarding the condemnees just compensation of \$414,752, which was consistent with the value estimated by Respondents' expert. (R. p. 15).

Appellant filed post-judgment Rule 59 motions. (R. p. 110). Respondent filed a post-judgment application for litigation expenses, including attorneys' fees on June 25, 2015 and sought pre-judgment interest on the full measure of the just compensation awarded at trial (versus pre-judgment interest on the difference between the amount deposited with the Court at the commencement of the condemnation proceedings and the verdict). (R. p. 154).

A hearing on the post-judgment motions was held before Judge Simmons on July 20, 2015. (R. p. 326). Judge Simmons entered three Orders on August 10, 2015, as follows: (1) the first order denied Appellant's Motion to Alter or Amend the Judgment (the "First Order") (R. p. 16); (2) the second order awarded attorneys' fees to the Respondents (the "Second Order") (R. p. 19); and (3) the third order held that the Respondents were only entitled to pre-judgment interest on the difference between the amount deposited with the Court at the time of the take and the awarded just compensation (the "Third Order"). (R. p. 22). On August 13, 2015, Respondents filed a Motion to Alter or Amend the Judgment on the Third Order related to the issue of pre-judgment interest. (R. p. 157). The Court denied Respondents' Motion to Alter or Amend the Judgment on August 17, 2015. (R. p. 26).

Appellant timely served a Notice of Appeal on September 9, 2015 and filed the Notice of Appeal with this Court and the Court of Common Pleas in Greenville County on September 10, 2015.

STATEMENT OF THE FACTS

Appellant condemned the Easement on June 22, 2012 for the public purpose of installing, operating and maintaining an underground, 12-inch natural gas pipeline. (R. p.

005; R. p. 204; lines 19-20; R. p. 210, lines 4-6. The parent tract, located in Greenville County, is 72.6 acres, and it contains one single-family residence and other out buildings. (R. p. 4). The Easement is 50 feet wide and totals 2.515 acres. (R. p. 5). The Easement also cuts off a 0.747-acre area between the Easement and the northern boundary of the Property (the “Severed Area”). *Id.*

Both Appellant and Respondents retained appraisers to evaluate and support their claims as to the amount of just compensation for the taking under the Act. The parties agreed that residential development would be the highest and best use of the Property. (R. p. 004). Appellant’s expert valued the Property at \$55,000 per acre (R. p. 282, lines 20-23) and Respondents’ expert valued the Property at \$56,000 per acre (R. p. 252, lines 15-17). The appraisers’ estimations of the total value of the Easement and the Severed Area were strikingly similar with Appellant’s appraiser arriving at a value of \$172,226 and Respondents’ appraiser arriving at a value of \$175,324. (R. p. 8).

The paths of the two experts then parted dramatically. Respondents’ appraiser also included, without alleging any wrongdoing, an additional measure of just compensation based on 85% damage to a 100-foot wide buffer (the “Buffer Zone”) adjoining and parallel to the Easement based on alleged stigma damages of “the negative perception in the market” associated with the mere existence of the utility easement on the Property. (R. p. 79; R. p. 277, lines 1-4). The area of the Buffer Zone totals 5.03 acres. (R. p. 190, lines 1-3). The estimated value of the alleged Stigma Damages within the Buffer Zone totaled \$239,428, bringing the total value of Respondents’ appraiser’s measure of just compensation to \$414,752. (R. p. 8).

Over Appellant’s objections, the trial court admitted the testimony of Respondents’ appraiser despite the fact that he admitted: (1) he had not done any studies to support his

theory of Stigma Damages (R. p. 275, lines 5-11); (2) he did not have any comparable sales to support his theory of Stigma Damages (R. p. 272, lines 15-22); (3) he did not utilize any paired sales analysis in his approach (R. p. 271, lines 12-14); and (4) to his knowledge, there is no law or regulation that requires a “buffer zone” adjacent to a natural gas pipeline easement. (R. p. 270, lines 2-5). Appellant’s expert did perform a market-based analysis based on comparable sales in two residential developments near or adjacent to natural gas pipelines in Spartanburg and Greenville Counties and testified that his analysis showed that presence of a natural gas pipeline did not diminish the value of the properties. (See R. p. 293, line 14 - p. 295, line 15).

The trial court held in favor of Respondents, setting the amount of just compensation at \$414,752, including damages to the Easement, the Severed Area and Stigma Damages to the Buffer Zone. (R. p. 15). The trial court’s award for Stigma Damages in this eminent domain action is the first of its kind in South Carolina.

ARGUMENT

I. THE TRIAL COURT, AS A MATTER OF LAW, SHOULD HAVE DENIED STIGMA DAMAGES BASED ON ALLEGED FEAR OF THE NATURAL GAS TRANSMISSION PIPELINE.

A. Standard of Review – *De Novo*

The determination of which factors may be properly considered as elements of just compensation under the Act is a question of law. *See South Carolina & Western Ry. v. Ellen*, 95 S.C. 68, 78 S.E. 963, 966 (1913). Appellate courts review questions of law *de novo* with no particular deference to the lower court. *Neely v. Thomasson*, 365 S.C. 345, 518 S.E.2d 884 (2005). For actions at law tried by a Master in Equity, as in this case, the reviewing court “is free to decide questions of law with no particular deference to the trial court.” *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 542 (Ct.

App. 2008), citing *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

B. Stigma damage is not a proper element for consideration when determining just compensation.

No South Carolina appellate court has recognized stigma damage associated with a lawful activity in an eminent domain action when determining just compensation prior to this case. In fact, South Carolina courts have refused to award damages for alleged diminution in property value caused by damage to the “reputation” of property. *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971). The *Gray* court refused to consider the plaintiff’s contention that market value and sales potential had been reduced and diminished by “psychological factors” or the “bad name” and “bad reputation” of the property. *Id.* at 568-69, 183 S.E.2d at 443. The *Gray* court decided, however, that it need not rule on the recovery of such injury given the speculative nature of damages and causation (among several possible sources) in that case. *Id.* at 568, 183 S.E.2d at 443. Specifically, the Court stated:

[w]hile proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.

Id. at 569, 183 S.E.2d at 444.

There is simply nothing in *Gray* to suggest that this Court should extend South Carolina law to compensate landowners for stigma damages in eminent domain actions where the South Carolina courts have not yet recognized that category of recovery in any context, much less in the context at hand. See also *Clark v. Greenville County*, 313 S.C. 205, 208, 437 S.E.2d 117, 118 (1993) (affirming the trial court’s granting of summary judgment against plaintiffs that owned property adjacent to a landfill when there was no

evidence of impact to the property); Jennifer L. Young, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. Rev. 409, 422 (2001) (no stigma damage claim exists under South Carolina law).

In the recent decision in *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82 (2015), which was decided after the trial court in the case at bar reached its decision, Chief Justice Toal strongly warned against opening the door to stigma claims in her dissent with Justice Kitteridge joining. *Id.* at 232, 776 S.E.2d at 86 (“I would hereby decline Appellants' request to adopt stigma damages in any form as an appropriate measure of damages in South Carolina.”) (emphasis added). *Id.* at 230, 776 S.E.2d at 85. Chief Justice Toal also warned that the speculative nature of the claims did not give the Court adequate reason to depart from South Carolina’s historical refusal to award stigma damages. *Id.* at 231-32, 776 S.E.2d at 86.

While Chief Justice Toal in *Chestnut* issued a stern warning against recovery based on claims of stigma damages, the majority declined to decide an issue of such significance on a 12(b)(6) motion, but held instead that discovery should proceed. In contrast, the case at bar was decided at trial, not on a Rule 12(b)(6) motion. Chief Justice Toal’s stern warning against the recognition of stigma damages “in any form” strengthens the Court’s precedent in *Gray*, and urges this Court to hold, as a matter of law, that Respondents cannot recover damages to the remainder in this eminent domain action based on an allegation of stigma damages due to an allegedly negative perception in the marketplace. Finally, as discussed in the next section of this brief, numerous cases do not even allow evidence of stigma damage by an expert in condemnation matters. This is further precedent for a finding as a matter of law that stigma damages are not recoverable in the case at hand.

Respondents indicated at the trial court level that *Yadkin Brick Co. v. Materials Recovery Co.*, 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000), concluded that stigma damages were recoverable. (R. p. 2). That is wrong. The Court did not even use the words “stigma” (or the related word “reputation”) a single time. The Court merely found that, in cases involving polluted property, the measure of damages is diminution in value if the pollution cannot be cleaned up (*i.e.*, the damage is permanent) and loss of rental value if the contamination can be addressed (*i.e.*, the damage is temporary). *Id.* at 646, 529 S.E.2d at 767. Indeed, the Court stressed the well-established rule in South Carolina that “[n]either the existence, causation nor amount of damages can be left to the judge or jury’s conjecture, guess or speculation” and “bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution.” *Id.* The *Yadkin Brick* case, rather than lending support for stigma damages, rails against the very types of speculative claims that Chief Justice Toal warns about in *Chestnut*. Finally, and perhaps most importantly, Chief Justice Toal’s remarks in the *Chestnut* case decided this year make it clear that South Carolina’s rule against stigma damages is alive and well.

In sum, Respondents rely on vague and unsubstantiated allegations that Appellant’s lawful public project would diminish the value of the Buffer Zone by 85% as a result of negative perception in the market. This Court should follow the stern warning against extending South Carolina law to include stigma damages in *Gray* and *Chestnut*. 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.

C. South Carolina should adopt the rule that there is no stigma damages recovery for alleged fears of prospective purchasers but, even under the alternative rules, Appellant is entitled to prevail due to Respondents' failure to satisfy the alternative standards.

A survey of case law across the United States outside South Carolina shows there are three approaches: (1) there is no compensation for alleged diminution due to the fears of a prospective purchaser about a natural gas pipeline; (2) no compensation is allowed if the fears are unreasonable or there is insufficient evidence of the nexus between the fears and the alleged diminution in market value; and (3) fears of prospective purchasers are not compensable unless it is proven that prospective purchasers entertained fears that adversely impact the property value. *See* Vitauts M. Gulbis, J.D., *Fear of Powerline, Gas or Oil Pipeline, or Related Structures as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R. 4th 631 (2015). No matter which rule is adopted – landowners must prove a connection between the alleged fear and a reduction in property value. *Id.* at § 2[b] (“[C]ompensation for diminution in value of property due to the public fear of utility easements requires proof on the part of the landowner that the fair market value of the property was in fact diminished because of the utility easement.”).

As set forth above, South Carolina has not allowed for a recovery of stigma damages prior to the case at bar. Appellant therefore asks this Court to implement the rule that there is no compensation for stigma damages due to the alleged fears of prospective purchasers about an underground, natural gas transmission pipeline. Due to the inherently speculative nature of such alleged fears and purported damage, and South Carolina’s position of not allowing stigma damages, Appellant also submits that this rule is the most appropriate to apply in the case at hand. Respondents failed to present any market evidence at all connecting the alleged fears of a prospective purchaser to a reduction in values. Under this rule, Respondents would be entitled to no compensation for the purported fears. Appellant

consequently requests that the Court reduce the verdict by \$239,428 which represents and removes the amount of damages awarded for alleged stigma. (R. p. 10).

Appellant firmly believes that is the right result in the scenario at hand. In the alternative, out of an abundance of caution, Appellant asks that the Court adopt a rule that no compensation is allowed if the fear is not reasonable or there is insufficient evidence of the required nexus between the fears and the alleged diminution in market value. *See, e.g., Southeast Supply Header, LLC v. 47.75 Acres in Covington County, Miss.*, No. 2:07-CV-216, 2008 WL 553019 at *3 (S.D. Miss. Feb. 27, 2008) (barring testimony by the landowners as to fear as a separate element of damages but allowing evidence of a reduction in market value “if this reduction can be backed up by comparable sales data”). Respondent in this case placed no evidence in the record, much less significant evidence, about the reasonableness of any alleged fears related to the natural gas pipeline. In addition, Respondents also offered no evidence, much less sufficient evidence, that the alleged fears adversely impacted market value. Consequently, even under the alternative rule, Appellant is entitled to prevail. 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). Should the Court adopt this alternative rule, Appellant requests that the Court reduce the verdict by the amount of damages awarded for alleged stigma, or \$239,428.

The final option is to adopt a rule that fears are compensable as stigma damages without having to prove the reasonableness of the fears in prospective purchasers. Appellant respectfully submits that such a rule is totally inappropriate. Landowners in condemnation actions in South Carolina are required to substantiate their damages and South Carolina has consistently disallowed the recovery of speculative damages. *See Gray*,

256 S.C. at 568, 183 S.E.2d at 443. Adoption of the final option as the rule would effectively be a strict liability rule in which fears do not even have to be reasonable. Such a rule would be totally unfair to condemnors as it would result in recoveries when there is no reasonable basis for the alleged fear.

D. Allowing Stigma Damages Would Open the Floodgates to Unsubstantiated Claims of Diminished Value for Public Works Projects Throughout the State.

As indicated above, Chief Justice Toal, with Justice Kitteridge joining, cautioned against opening the door to stigma claims “in any form” in *Chestnut*. 413 S.C. at 232, 776 S.E.2d at 86. The warning is particularly relevant in this case. Respondents do not allege that Appellant has engaged (or will engage) in any wrongful conduct. Rather, Respondents seek damages to property in the proximity of a natural gas pipeline – lawfully constructed and operated and used for the public purpose of transporting natural gas to meet the increasing natural gas demands of the surrounding area – based solely on a vague and unsubstantiated claim that the pipeline creates a negative perception in the marketplace.

This is a slippery slope that the South Carolina courts have avoided up to now and which, if allowed, will throw the Court’s doors open to stigma damages claims in condemnation actions. Public works projects throughout South Carolina are dependent upon the fair and consistent implementation of the Eminent Domain Procedures Act to manage timing and cost. Such public works projects include not only natural gas pipelines, but roads, parking lots and other transportation infrastructure, public utilities, and various public improvements and facilities. Affirming stigma damages in this case would be an open invitation for landowners to allege that any multitude of purported fears diminish the value of property near public works projects. Whether the alleged fears are reasonable or not, a landowner would be able to seek stigma damages for the taking of property for public

purposes for the perceived risk of: flooding or sinkholes from burst water mains; nighttime loitering, intoxication and crime near parks, accidents and vandalism near roads, etc. The possibilities are endless.

The run-away possibility problem is even more true where, as in the case at bar (and as described in further detail below), the trial court awarded stigma damages for property within a 100-foot “buffer zone” from the easement taken due to alleged negative perception in the marketplace based on vague allegations of diminished value without any supporting market-based analysis. Affirming this award for stigma damages would be an open invitation to every condemnee in the State (or even property owners in the proximity of easements) to seek alleged stigma damages for “buffer areas” adjacent to easements for natural gas pipelines or any other types of utility right-of-ways and public works projects throughout the State. The unbridled results for condemnees would drive up the expense of public works projects. Allowing the recovery of stigma damages in eminent domain proceedings would also delay condemnation actions as the South Carolina courts navigate what, if any, limits apply to stigma damages and what standards of proof apply to claims for recovery. As indicated above, there was a clear message this very year against a recognition of stigma damages. *Chestnut*, 413 S.C. at 232, 776 S.E.2d at 86. Allowing stigma damages in this case, where the alleged diminished value is vague and unsubstantiated, risks throwing open the floodgates to tenuous stigma damages claims for public works projects throughout the State. Appellant urges this Court to hold that stigma damages are not available in eminent domain actions as a matter of law.

II. RESPONDENTS' EXPERT'S TESTIMONY REGARDING ALLEGED STIGMA DAMAGE TO THE ARTIFICIAL BUFFER ZONE SHOULD HAVE BEEN EXCLUDED.

As set forth below, both Appellant's expert witness, Corbin Haskell ("Haskell"), and Respondents' expert witness, Owen, estimated the value of just compensation for the Easement and the Severed Area. Appellant's expert witness estimated the value of the taking based on these three elements to be \$172,200. Respondents' expert witness estimated the value of the Easement and the Severed Area to be just slightly higher at \$175,324. (R. p. 5). Owen, however, without any training or specialized knowledge in the area, provided additional testimony that he applied an 85% damage value to a 100-foot Buffer Zone adjacent to the Easement due to the alleged negative perception of the Pipeline in the marketplace. (R. p. 79; R. p. 277, lines 18-22). For the reasons provided below, the trial court abused its discretion by admitting this evidence as expert testimony under Rule 702, SCRE and the trial court's error prejudiced Appellant.

A. Standard of Review – Abuse of Discretion

The qualification of expert witnesses and the admissibility of their testimony is discretionary but not without limits. *Walker v. The Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996). Rule 702, SCRE governs the admissibility of expert testimony and provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial court's "gatekeeping duties" required it to determine before an expert testified that: (1) the subject matter was beyond the ordinary knowledge of the jury and required an expert to explain the matter to the jury; (2) the witness had knowledge and skill

to qualify as an “expert in the particular subject matter” of the proposed testimony; and (3) the substance of the testimony was reliable. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The offering party bears the burden of proving that offered expert witness testimony is admissible. *State v. Robinson*, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). Screening the reliability of non-scientific expert testimony is part of the gatekeeping responsibility of a trial court and should be determined prior to admission into evidence. The trial court failed to fulfill its gatekeeping duties as to expert testimony and abused its discretion when it admitted testimony of Respondents’ expert as to the artificial Buffer Zone because his testimony failed to satisfy the second and third prongs of this test.

B. The Trial Court erred in denying Appellant’s request to exclude the testimony of Respondents’ expert under *Watson* and its progeny.

1. *Watson* and its progeny require a purported expert to have expertise in the issue before the Court.

To be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that the expert is better qualified than the jury to form an opinion on the particular subject of his testimony. *Botehlo v. Bycura*, 282 S.C. 578, 585-86, 320 S.E.2d 59, 64 (Ct. App. 1984). *See also State v. Norton*, No. 2011-UP-586, 2011 WL 11736357, at *1 (Ct. App. Dec. 21, 2011) (finding that the trial court erred in admitting proffered testimony that was beyond the scope of the witness's expertise). As an example, in a factual scenario like that in the case at hand involving real estate appraisers, in *Player v. Motiva*, No. Civ. 02-3216, 2006 WL 166452 at *4-8 (D.N.J. Jan. 20, 2006), the plaintiffs offered a general real estate appraisal expert with 22 years of experience to opine on the value of contaminated real property. The court granted the defendant’s challenge explaining:

Although [Plaintiff's expert] McDonald is an experienced appraiser, no evidence indicates he has any experience appraising contaminated properties or is qualified to value the effects of stigma on property values.

....

Because nothing in McDonald's experience indicates knowledge or expertise in issues of contamination, he is unqualified to testify to the loss of value to Plaintiffs' properties arising from the alleged contamination.

Id. at 6, 8, *aff'd* by *Player v. Motiva Enter., LLC*, No. 06-1663, 2007 WL 2020086 (3d Cir. 2007).

Player understandably requires experience with the particular situation before the Court before the expert is allowed to testify. Generalized experience totally fails to qualify. *Player* involved a very experienced general real estate appraiser, but the court ruled he did not satisfy the standard in the area of valuing contaminated property. The court noted: "Where a proposed expert's area of expertise is adjacent to but not actually encompassing the subject matter of his testimony, he may be deemed unqualified." *Id.*

In *Watson*, the South Carolina Supreme Court threw out an \$18 million compensatory damage verdict. Plaintiffs' expert did not have expertise in the particular subject matter of cruise control systems though he had worked in the automotive industry for years and conducted seminars to train automobile technicians concerning brake systems in vehicles. *Watson*, 389 S.C. at 446, 699 S.E. 2d at 175. Again, the *Watson* court made it clear that the expert must have the requisite knowledge and skill to qualify as an expert "in the particular subject matter." *Id.*

2. The *voir dire* of Respondents' expert exposed a startling absence of required expertise.

Owen did not use a comparable market analysis to assess the impact to the Buffer Zone. He testified:

Q: [Y]ou've not tried to review any sort of sales or anything like that to try to quantify or show that people pay less for property that's close to a natural gas pipeline, have you?

A: No, sir.

(R. p. 271, lines 4-7). Rather, Owen artificially applied what he referred to as the "buffer zone method," in which he established an artificial 100-foot Buffer Zone adjacent to the Easement, to which he magically applied a damage value of 85%. (See R. p. 253, lines 4-9). Owen flatly admitted at trial that he has no training or specialized knowledge in using this so-called "buffer zone method" to estimate stigma damages:

Q: You haven't been to any seminars or courses and taught this approach to estimating damages to the remainder, have you?

A: No, sir.

(R. p. 273, lines 4-6). Indeed, Owen admitted he had never read about the method, seen the method in industry-recognized practice manuals, or even heard about the method being used in any other instance.

Q: You've not seen this particular method of estimating damages to the remainder in any appraisal journals, have you?

A: No, sir.

(R. p. 273, lines 7-9).

Q: Are you aware of any support in [Uniform Standards of Professional Appraisal Practice] materials for estimating damages to the remainder as you've done in this case?

A: No, sir.

(R. p. 274, lines 9-11).

Q: So, you don't actually know of any other instances where this approach has been used?

A: No, sir.

(R. p. 276, lines 17-19).

Plain and simple – by his own testimony, Owen admitted that he did not have the expertise required by *Watson* and *Player*. Working as a general real estate appraiser does not crown him as someone with expertise in alleged stigma damages concerning a natural gas pipeline when he reviewed no comparable sales or other market data, had no educational background in the area, and had never read about, seen or even heard about the method being used in other instances.

If Owen did not disqualify himself by all of these admissions, no expert ever will. Owen made a mockery of *Watson* and its progeny by testifying in an area in which he admitted he had no expertise and by not being able to point to any peer-reviewed literature or appraisal principles to provide the required foundation for his analysis. Affirmation of the trial court's decision would mean the *Watson* gatekeeping function either has been reversed or is such a low hurdle to clear that it is meaningless. This case provides an ideal opportunity to send a supportive message to the trial courts of this State that the *Watson* standard is alive and well and the appellate courts want and expect the trial courts to enforce the standard and uphold their gatekeeping responsibilities.

3. Courts have routinely excluded expert testimony concerning purported stigma damage due to alleged marketplace fear of a natural gas pipeline.

In *Kipps v. Virginia Natural Gas, Inc.*, 247 Va. 162, 441 S.E.2d 4 (1994), the condemnor filed a condemnation petition to condemn an easement for a natural gas pipeline. The owner's real estate appraiser sought to testify that the remainder of the land was diminished because of prospective purchasers' fears or apprehension of a natural gas pipeline and a potential explosion. On appeal, the trial court found that the appraiser was qualified as an expert in real estate valuation but did not have the expertise to testify about

perceived dangers and an alleged effect on the value of the remainder. The Supreme Court of Virginia affirmed the exclusion of the evidence and explained:

As the trial court observed, the witness had not researched the subject, had performed no analysis of the pipeline's effect on the residue's value, and had no education or training in the subject. Moreover, his 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 Charlottesville area, and a newspaper article about a pipeline explosion.

Id. at 163, 441 S.E.2d. at 5 (emphasis added).

Similarly, in *Texas Gas Trans. v. Bd. of Levee Commissioners for the Yazoo-Mississippi Delta*, No. 2:08CV240-B-V, 2012 WL 6057991 (N.D. Miss. Dec. 6, 2012), the landowner's appraiser used a "hazard zone" theory of damage to the remainder. The court first noted that some courts have held that fear of a perceived danger caused by a taking may be admissible if an appraiser used comparable sales comparing properties with and without the alleged damages to show the impact on value. The Court then excluded the testimony and explained:

Mr. Crook had no market data to quantify the hazard zone's effect on the market value of the levee.

He admitted that using a hazard zone and the proportional increases in the acreage and factors in appraising property was not an appraisal principle of any kind, had not been subject to any peer review, had not been taught by an instructor in appraisal technique, and was unique to this appraisal.

[T]he appraisal methodology utilized lacks supporting precedent, is unsubstantiated, and is based upon the occurrence of highly unlikely speculative events, and the potential of these events occurring is so remote that it cannot be considered in arriving at a proper measure of just compensation on damages. The Court instead finds that the

direct sales comparison approach, as employed by the Plaintiff, provides the more reasonable measure of just compensation under the facts of this case.

Id. at *9. *See also Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 41-42 (Miss. 2003) (holding that appraiser's method of using a 750-foot wide buffer zone from the acquired highway right-of-way to ascertain remainder damages was not presented in textbooks, not taught in seminars, not a principle of any kind, and unique to this appraisal and should not have been allowed into evidence at trial"); *Arents v. ANR Pipeline Co.*, 281 Wis. 2d 173, 696 N.W. 2d 194, 201 (Ct. App. 2005) (affirming the exclusion of expert testimony when the experts failed to draw the "pertinent nexus in the calculation of damages between evidence of that fear and the market value of the property being condemned following the taking."); *Rockies Exp. Pipeline LLC v. Hopkins*, No. 1:08-CV-00751, 2012 WL 1622532, at *5 (S.D. Ind. May 9, 2012) (finding that expert testimony was "too unreliable for consideration" where the expert "did not conduct any market analysis pertinent to the issue and his stigma opinion is a personal one and not market-based" and further finding that "[o]ne would expect that if the presence of an underground natural gas pipeline makes residential development economically non-viable, then some market data would exist to evidence that."); *Pliura Intervenors v. Illinois Commerce Comm'n*, No. 4-14-0592, 2015 IL App (4th) 140592-U, ¶ 29 (Ill. App. Ct. May 19, 2015) (the impact of fear and stigma caused by the existence of a pipeline must be based on "factual market data, not speculation or guesswork"); *Western Farmers Electric Coop. v. Enis*, 1999 OK Civ. App. 111, 993 P.2d 787, 793 (Ok. 1999) ("[N]either the owner nor anyone else may base an opinion of value on personal fear. Admissible evidence is an opinion of value of a qualified witness based on the existence of fear in the buying public in general which affects market value.") (internal quotations omitted); *Crusciola v. Pasny*, 81 N.Y.2d 649, 653, 621 N.E.2d 1195 (1993)

(“We, of course, do not hold that claimants are relieved from giving any proof to establish their claims and just compensation damages. Rather, claimants must still establish some prevalent perception of a danger emanating from the objectionable condition ... no witness, whether expert or non-expert, may use his or her personal fear as a basis for testifying about fear in the marketplace. ... Some credible, tangible evidence that a fear is prevalent must be presented to prove the adverse market value impact.”).

4. Unsubstantiated speculation by an expert does not satisfy *Watson*.

- (a) Respondents’ expert’s conversations with developers do not enable him to clear the *Watson* hurdle.

Respondents’ expert testified that he formed his opinion of diminished value within the 100-foot wide Buffer Zone based solely on discussions with developers:

Q: Other than discussing this with some developers, you don't have any other objective criteria to base your opinion of damage to the remainder of the property, correct?

A: No, sir.

(R. p. 272, lines 11-14). Indeed, Owen admitted at trial that he only spoke with a single developer before he prepared his expert report, and that he did not even discuss the Pipeline with that developer, but only spoke to him about flood plain issues and “[t]hat sort of thing.”

(R. p. 272, lines 5-7). In sum, Owen established an arbitrary value of damage to the remainder based solely on his own personal opinion of “negative perception in the marketplace,” which he was not qualified to give. It was only after Owen’s deposition that he interviewed additional developers in a belated attempt to bolster the unsubstantiated opinion on diminished value in his appraisal. Even then, Owen was unable to decouple this information from his own personal assessment of the alleged damage:

A: I talked to a number of various developers in the area and based on what I perceived as their perceptions and my own perceptions, I felt

like that there was damage to the remainder as well as the actual taking of the right-of-way itself and severances.

(R. p. 252, lines 10-14) (emphasis added).

To the extent that Respondents' expert relies on alleged conversations with developers, as indicated above, courts have disallowed that very type evidence as a basis for stigma damage. In *Kipps*, the court excluded testimony by an expert appraiser because the expert did not have the expertise to testify about the impact of a natural gas line. *Id.* at 163, 441 S.E.2d. at 5. The court barred the expert because "his opinion was based only upon conversations he had with developers in the Charlottesville area and a newspaper article about a pipeline explosion." *Id.* at 163-64, 441 S.E.2d. at 5. As such, Respondents' attempt to rely on alleged remarks by developers is another "swing and a miss." In addition, the alleged conversations with the developers were totally inadequate to prove the required connection between alleged fear and diminution in value. Respondents' expert merely testified very generally about these conversations and nowhere near enough detail was provided in the record for Respondents to satisfy their burden of proof.

(b) Respondents' expert's admitted failure to review market data is fatal to the admissibility of his testimony.

Respondents' expert's testimony is precisely the type of unqualified testimony that the above precedent and Rule 702, SCRE are designed to exclude. Respondents' expert was only qualified to determine the value of land and the impacts to land based on a comparable market analysis – an analysis that he did not perform to evaluate the potential effect of the presence of the Pipeline to the market value of the Property. (R. p. 272, lines 15-18). Respondents' expert provided no objective basis for his opinion on the alleged stigma damages. In *Southeast Supply Header*, the court held that testimony would be allowed concerning diminution in value if "the reduction can be backed up by comparable sales

data.” 2008 WL 553019 at *3. *See also Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75-77, 735 S.E.2d 650, 656-57 (2012) (affirming the exclusion of three experts’ testimony under Rule 702, SCRE because the experts failed to provide objective criteria for their opinions). It is undisputed in the case at bar that Respondents’ expert failed to perform a comparable market analysis to evaluate potential stigma damage. (R. p. 272, lines 15-18). As such, his testimony about alleged stigma damages should have been excluded.

(c) Respondents’ expert’s argument that there was no market data fails to satisfy *Watson*.

Respondents’ expert defended his failure to perform a market-based comparable sales analysis by alleging that there were no such comparable properties to evaluate. *See to evaluate the potential effect of the presence of the Pipeline to the market value of the Property.* (R. p. 272, lines 15-19). It snaps the bounds of reason to argue that there is no other undeveloped property in the vicinity of a natural gas pipeline that has been sold and could be evaluated. Differences in comparable properties identified from the Respondents’ property could have been accounted for by itemizing and discounting the differences either positively or negatively. This approach is routine and was used by Owen himself to establish the value of the Property without considering the presence of the Pipeline. (R. p. 272, lines 20-22). Claiming that there were no comparable properties was nothing more than a “hail Mary” attempt to justify the appraiser’s conduct that was non-justifiable.

Equally as important, Appellant’s expert did perform a market-based analysis based on comparable sales of residential properties in developments near or adjacent to natural gas pipelines in Spartanburg County (*i.e.*, the Mason’s Crossing development) and Greenville County (*i.e.*, the Townes at River Farms development). (R. p. 293, line 14 - p. 295, line 15). Through this market-based analysis, Appellant’s expert determined that the presence of a natural gas pipeline did not diminish the value of the Property. Appellant’s expert testified:

A: We looked at two subdivisions that had right-of-ways through the properties and looked at sales located both backing up to the right-of-way versus lot sales on the interior portions of the lot that were not affected by the right-of-way, and we did not find that there was any measurable diminution in value on lots that adjoin the natural gas right-of-way versus lots that did not.

Q: Can you tell me then what kind of technique was that that you were using? What were you doing in looking at sales?

A: Well, it could be referred to as a match-paired sale[s] analysis.

Q: Did I understand you looked at sales of lots that were bordered on natural gas pipeline easements, correct?

A: That's correct.

Q: Then did you also look at sales of lots in that same subdivision that were not bordering on a natural gas pipeline?

A: That's correct.

Q: And when you compared those, did you find any difference in sales prices?

A: No, sir. The different lots sold for different amounts, but overall, looking at them, some of the lots that sold along the natural gas right-of-way represented some of the higher values and some of the lower values and also in the interior some of the higher values and lower values. We were not able to draw any conclusion that there was any type of stigma or damage associated with those lots that backed up to the natural gas right-of-way.

(R. p. 293, line 15 - p. 294, line 15). Respondents' expert tried to distinguish those areas.

(See R. p. 306, line 14-p. 311, line 24). At the end of the day, however, Respondents' expert failed to perform a market-based analysis. He did not use the sale price of a single other property in the vicinity of a natural gas pipeline. Not one. The failure to use market data is fatal to his ability to give opinions about diminished property value based on stigma when considered with his other admissions. See, e.g., *Arents*, 696 N.W. 2d at 201.

- (d) The much overblown reliance on the “caution sign” has no market basis and does not provide the required foundation for Respondents’ expert’s opinion on alleged stigma damages.

Respondents’ claim for stigma damages was overly reliant on the alleged presence of a caution sign that provided notice of the Pipeline’s presence, which was located within the Easement at the entrance to the Property.¹ Respondents’ expert testified:

Q: What about the fear or stigma of a pipeline with this sign being on it? How would that impact it from a developer's standpoint?

A: Well, if you go immediately into the subdivision and cross the bridge and you look to your left and you see the big caution sign, I think that would certainly have a negative impact on the marketability of the property, be it for the developer buying it as a whole or if it's developed with the lots and people that were buying homes there.

(R. p. 253, line 24 - p. 254, line 7) (emphasis added). Then, incredibly, Respondents’ expert admitted that his estimation of stigma damages as a result of a caution sign was, in essence, just a “general opinion” not based on data or recognized methodology:

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). Respondents’ expert did not conduct a market study as to any corresponding diminution in value, nor did he offer any objective evidence on the impact of a caution sign on prospective buyers. As such, the caution sign does not satisfy this expert standard for admissibility as to whether the Pipeline resulted in fear on the part of prospective buyers. There is no market data that the caution sign, or other above ground markings or monitoring devices, decrease the value of the Buffer Zone. Moreover, there

¹ While the trial court found that the caution sign was part of the original taking on June 22, 2012, Appellant’s witness, Adam Long, an engineering project manager for the Pipeline, testified that the caution sign was not the type of sign that would be used in connection with an underground natural gas pipeline pursuant to Appellant’s policies, and that the caution sign had been removed prior to the hearing. (R. p. 214, line 18-p.215, line 24).

was no evidence that prospective purchasers viewed this caution sign as an obstacle to property acquisition. Not a shred of evidence.

In sum, Respondents' expert used a "buffer zone method" for which he had no specialized knowledge, training or skill. Indeed, Owen had no knowledge of the method and appears to have created the method magically out of whole cloth to assign a damage value (without any supporting market data) based on an alleged fear in the marketplace.

If Respondents' expert 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 had no specialized knowledge, training or skill to evaluate damages from fear or stigma using the "buffer zone methodology." His testimony amounted to little more than his "general opinion" and the trial court abused its discretion by admitting any testimony by Respondents' expert on the measure of stigma damages.

5. Respondents' expert fails the Rule 702, SCRE reliability prerequisite and any alleged probative value was outweighed by its prejudicial effect.

The opinions proffered by Respondents' expert on the issue of stigma damages are not reliable as required under Rule 702, SCRE. Respondents' expert had no training, experience, or specialized knowledge in the "buffer zone method" he used to evaluate the alleged diminution of property and, as described in detail above, Respondents' expert admitted at trial that these values were based solely on his discussion with a few local developers without any objective support. (See R. p. 272, lines 11-14). Respondents' expert admitted at trial that he had not done any studies to support his theory of alleged stigma damages to the Buffer Zone:

Q: [H]ave you done any of those kind of studies or anything like that or survey to see if a sign of this sort would have an effect or cause damage to the remainder such as you've testified to?

A: No studies, no, sir.

(R. p. 275, lines 7-11). Respondents' expert also admitted at trial that he did not look at studies regarding how alleged public fears of natural gas pipelines could adversely impact market values:

Q: In connection with this case and your appraisal in this case, you've not reviewed or produced any studies that show, or tend to show, or suggest that there is a public fear in this area of being placed [near] a natural gas pipeline, have you?

A: No, sir.

(R. p. 270, line 24 - p.271, line 3). Finally, Respondents' expert admitted at trial that he did not look at market data regarding how the presence of a natural gas pipeline could adversely impact market values:

Q: And you did not utilize any sort of market data or evidence to support the buffer zone theory, did you?

A: No, sir.

(R. p. 271, lines 12-14).

Even in jurisdictions that have recognized stigma damages (which South Carolina has not), the courts have required proof that the alleged hazard actually affects market value. Respondents' expert proffered no evidence of a general public or market fear of natural gas pipelines in this area, nor did he produce any evidence of any diminution in market value due to such fear. Without such evidence, Respondents' expert's opinion lacks the foundational reliability requirement necessary for admissibility of nonscientific expert testimony. The burden of proof is on the landowners to prove damages with a reasonable basis and it has been a long-standing rule in South Carolina not to allow speculative

damages. *Piggy Park Enter., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968). The testimony offered must prove the fact in question with reasonable certainty. The North Carolina Supreme Court held in a land condemnation case:

Although each expert had experience in appraising real estate, none articulated any method used to arrive at his figures, even when closely questioned. To the contrary, these experts' testimony about feelings and personal opinions, unsupported by objective criteria, explains and justifies the trial court's concern that these opinions were based upon hunches and speculation. Because the trial court's threshold determines that the experts' method of proof lacked sufficient reliability was neither arbitrary nor the result of an unreasonable decision, we hold that the trial court's grant of Plaintiff's motion for a directed verdict was not an abuse of discretion.

Dept. of Transp. v. Haywood County, 360 N.C. 349, 626 S.E.2d 645 (2006). The simple fact is that Respondents' expert's "expert testimony" is based upon his speculation due to his personal views – not on reliable evidence or methodology – and it should have been excluded at trial.

6. The trial court's attempts to rescue Respondents' expert from a lack of expertise miss the mark.

The trial court attempted to "prop-up" Respondents' expert's lack of expertise by indicating that he was a real estate appraisal expert. Respondents' expert's purported expertise with general real estate appraisal issues does not rescue the expert from his lack of qualifications with the "buffer zone" methodology. The general appraiser with over two decades of general appraisal work in *Player* did not have the required expertise to value contaminated real property. As another example, a heart surgeon is a doctor, knows a lot about medicine, and is qualified and licensed to perform surgery. A brain surgeon is a doctor, knows a lot about medicine, and is qualified and licensed to perform surgery. Yet, a heart surgeon would not qualify to testify as an expert about brain surgery. Likewise, Respondents' expert's alleged prior experience with land development misses the mark.

The expert offered no testimony at trial that his prior real estate development work involved natural gas lines and assessing the impact of those lines on property value. (See R. p. 249, line 12 - p. 250, line 8). The unfortunate consequence of the trial court's opinion is that it allowed an expert without the proper expertise to issue opinions in areas in which he was not qualified. That is precisely what the *Watson*, *Player* and *Kipps* courts would not allow to happen.

It is also noted here, as discussed in Section III below, that testimony on alleged diminution of value requires special knowledge, skill, experience and training is totally inadmissible as that lay witness. See Rule 701, SCRE. Not only did the trial court improperly admit testimony of Respondents' unqualified "expert" in violation of Rule 702, SCRE, but the proffered testimony was also inadmissible as lay witness testimony.

7. To the extent that the trial court awarded stigma damages due to a finding that Respondents' expert's testimony held greater weight than the testimony of Appellant's expert, such finding should be reversed because there is no evidence reasonably supporting such a finding.

Generally, this Court will upset the factual findings of a Master in Equity when there is no evidence to reasonably support it and this Court has found that standard to be satisfied in other cases. See, e.g., *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 337 S.C. 380, 523 S.E.2d 193 (Ct. App. 1999). In *Sea Cabins*, the Master found that the denial of a city-issued permit to rebuild a pier was a temporary taking under the theory of inverse condemnation, which required the plaintiffs to prove that they had been deprived of "all economically viable use" of their property during the time in question. *Id.* at 400, 523 S.E.2d at 204. This Court reversed on the grounds that the plaintiffs' provided evidence of actual rental income they had received for their properties during the

time in question, and there could therefore be no support for their claim that the property had no economically viable use. *Id.* at 399, 523 S.E.2d at 203-04.

In this case, the Master found in favor of the Respondents, awarding just compensation consistent with the value established by Respondents' expert over the value established by Appellant's expert including the measure of alleged stigma damages. (R. p. 015). Appellant strongly believes, as detailed above, that the testimony of Respondents' expert as to stigma damages is inadmissible. Respondents' expert was not qualified to form an opinion on stigma damages based on his utter lack of training, experience or specialized knowledge, his "buffer zone" methodology was manufactured of whole cloth without any foundation in peer-reviewed literature, trade journals or otherwise, and his opinions lack any objective basis. However, if this Court were to find that Respondents' expert's testimony on alleged diminished value based on negative perception in the market place is admissible (which it should not), the Court should reverse the Master's finding that Respondents' expert's testimony carried more weight than the testimony of Appellant's expert. Appellant's expert testified that he conducted a routine market-paired analysis showing that presence of a natural gas pipeline right-of-way in or near two residential subdivisions in Spartanburg County did not result in a reduction of the property values. This market-based analysis showed, and formed the basis of his opinion that, the Pipeline does not reduce the value of the remainder of the Property. The Master simply had no reasonably evidentiary basis to find that Respondents' expert's opinion on alleged stigma damages, which had absolutely no objective support, carried more weight than Appellant's expert's opinion formed through a market-based approach.

III. THE TRIAL COURT ERRED IN ADMITTING LAY OPINION TESTIMONY ABOUT DIMINUTION IN PROPERTY VALUE

A. Lay opinion testimony about property value diminution runs afoul of Rule 701, SCRE.

Rule 701, SCRE governs the admissibility of opinion testimony by lay witnesses.

Pursuant to Rule 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, *and* (c) do not require special knowledge, skill, experience or training.

(emphasis added). Thus, to meet the standards, proposed lay witness testimony *must meet all three criteria*. Failure to meet even one criterion is grounds for exclusion. In the instant case, no lay opinion testimony on the alleged diminution in property value due to the presence of the natural gas pipeline meets any of those three criteria, let alone all three and, therefore, any such testimony should have been excluded pursuant to Rule 701, SCRE.

B. Property value diminution assessment due to the proximity of a pipeline requires special knowledge, skill, experience and training.

As set forth in the notes to Rule 701, SCRE, the language of subsection (c) "is intended to emphasize the fact that lay persons may not give expert opinions." *See* Notes to Rule 701, SCRE. The notes further provide that "[a]s to subsection (c) ... expert testimony is essential where the topic is not a matter within the common knowledge and experience of most lay persons. Subsection (c) merely states this proposition in the reverse." *Id.* (internal citations omitted).

Absent any knowledge, experience, skill, training or expertise concerning the valuation of real property allegedly impacted by the presence of a natural gas pipeline, a lay witness is simply not qualified to render and express opinions as to any impairment in value to the subject property resulting from the presence of a natural gas pipeline. *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). Accordingly, to allow a lay witness to testify about impairment of such value would be a complete violation of Rule 701(c), SCRE. While it is not uncommon for courts to allow owners to testify about the value of their land, which is based on their familiarity with their own land, this principle does not apply to diminution of value or development value.

The trial court also improperly allowed into evidence testimony by a lay witness about diminution in property value. Alma Renee Smith, an owner of the Property was allowed, over objection, to testify that: (1) the presence of the gas line could decrease the value of the property (R. p. 242, line 17 - p. 243, line 2); (2) potential purchasers may not want to locate in proximity to the pipeline (R. p. 243, lines 4-6); and (3) there were health and safety concerns associated with the natural gas pipeline. (R. p. 240, lines 1-17). This testimony was used to bolster the Respondents' claims for alleged stigma damages of "the negative conception in the market" associated with the mere existence of the utility easement on the Property. It is undisputed that Ms. Smith did not have the required specialized knowledge, skill, experience or training to give testimony in this area.

This landowner's testimony and Respondents' expert's testimony regarding stigma damages runs afoul of the prohibition of lay witness testimony concerning an "after value" or alleged diminution due to the presence of a natural gas pipeline. This is already an area reserved for expert testimony. The trial court erred in allowing this lay witness opinion testimony into evidence. As such, the trial court should be reversed and the verdict should be reduced by \$239,428. In the alternative, the case should be remanded for a new trial.

C. The lay opinion testimony was not helpful to the trier of fact.

Rule 702, SCRE states that expert testimony can be admitted if the scientific, technical or other specialized knowledge of the witness will assist the trier of fact to understand the evidence or to determine a fact in issue on a subject that is beyond the scope of the jury's good judgment and common knowledge. Given that both parties called experts in land valuation, additional lay testimony on the same topic did not provide any meaningful assistance to the trier of fact. Further, because evaluation of undeveloped land requires consideration of complex issues of highest and best use, temporary versus permanent damage, development costs, present discounted values and the like, this is precisely the type of knowledge that is governed by Rule 702, SCRE. Likewise, alleged diminution in value involves consideration of issues like after values based on market data, appraisal issues analyzing alleged impacts from the natural gas pipeline, etc. The landowner could testify about the "before" value of the raw land but not the diminution issue. By way of simple example, a farm owner might be able to testify about the value of raw land but cannot testify as to what the farm would be worth if developed into a condominium complex or allegedly impacted by a natural gas pipeline.

D. Lay witness opinion testimony in the area at issue was inherently speculative.

Speculative analysis is invalid as a matter of law. In *Gray*, the South Carolina Supreme Court concluded that diminution damages that sought to allocate all alleged diminution in value to one particular source, to the exclusion of other possible sources, was inappropriate as a matter of law. 256 S.C. at 569-70, 183 S.E.2d at 443.

The case of *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) is also instructive. In *Baughman*, property owners alleged that their property was damaged by pollution from a refinery. The plaintiffs simply asserted in their answers and

depositions that pollution had caused diminution in their property values. In agreeing the evidence amounted to “bald allegations,” the South Carolina Supreme Court stated: “There is a total absence of any competent evidence showing the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of [respondents]. Accordingly, we affirm trial court’s grant of partial summary judgment on Plaintiffs’ claims for property damages.” *Id.* at 117, 410 S.E.2d at 546.

Similarly, in this case, any attempt by Plaintiffs simply to offer lay witness opinion evidence regarding any alleged diminution in value and to then speculate that the diminution is directly and solely attributable to the presence of the natural gas pipeline (as opposed to any one of numerous other factors impacting value) is inadmissible and should not be allowed as a matter of South Carolina law. Therefore, the opinion testimony is also not properly admissible as evidence in this case pursuant to Rules 104(a) and 702.

Even in states that do allow a landowner to testify about a reduction in value, landowners must base the testimony on market data. In *Southeast Supply Header*, *supra* 2008 WL at 553019, the court explained:

The landowners, however, would be permitted to present testimony regarding a reduction in market value if this reduction can be backed up by comparable sale data.

The Federal Rules of Evidence permit landowners to testify as experts on the value of their land under Rule 702 because of the special knowledge of the property which is presumed to arise out of ownership. Although the Rule permits a landowner tremendous latitude in testifying, their opinion must remain grounded in facts that translate into reduced market value for the property. Testimony that has no basis in fact, or is founded on naked conjecture from known factors, remains inadmissible under the Rule.

Respondents in the case at bar offered no market evidence that the presence of natural gas pipelines resulted in a diminution of value. Not a single market transaction was

introduced by Respondent. As such, the claim for diminution was improper and nothing more than “naked speculation.”

E. The testimony was not rationally based on the perception of the witness.

None of the witnesses can claim any opinion is rationally based on their perception since, up until the time of this litigation, they had no perception one way or another. *Cf. State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973) (opinion must be based upon the personal observation of the witness and not merely upon the statements of another witness.). What they may have learned since derives either from experts hired for this case or from activities directly related to this litigation, neither of which qualifies. In sum, the trial court improperly admitted lay opinion testimony of a property owner about diminution in property value.

In sum, the trial court erred by admitting Respondents’ expert’s testimony as to stigma damages of “the negative perception in the market,” which was not admissible as either expert witness testimony under Rule 702, SCRE or as lay witness testimony under Rule 701, SCRE. The trial court further erred by admitting the lay witness testimony of a landowner as to the alleged diminution in property values due to the presence of the Pipeline. Appellant strongly urges this Court to adopt a rule that stigma damages are not available in condemnation actions for utility right-of-ways as a matter of law. Even if this Court does not so rule, Respondents in this case are not entitled to stigma damages for the lawful Pipeline because they have not presented a shred of admissible evidence to prove damages with a reasonable basis. *See Piggy Park*, 251 S.C. at 391-92, 162 S.E.2d at 708.

IV. THE TRIAL COURT IMPROPERLY CONSIDERED THE MEDIATION IN THIS MATTER AND SETTLEMENTS IN OTHER CASES.

The Order in this trial refers to both: (1) a mediation that took place in an effort between the parties to attempt to reach a compromise on the issue of just compensation; and

(2) actual settlements between the Appellants and owners of third-parties who own land along the same natural gas pipeline that is the subject of the case at bar. (R. p. 6). The trial court erred in considering this evidence, which is both irrelevant and inadmissible. Public policy provides that evidence of conduct or statements made in compromise negotiations is inadmissible, including any evidence of offers to pay valuable consideration to settle a dispute. *See* Rule 408, SCRE. Any reference to mediation conferences and the Appellant's settlement of other matters was inadmissible under Rule 408, SCRE. Further, even if the consideration of such evidence did not violate the public policy considerations in Rule 408, SCRE (which it did), the fact that the parties engaged in a mediation conference and that Appellant settled with other landowners along the right-of-way was totally irrelevant to the facts and claims at issue in this case – particularly whether stigma damages were recoverable in this condemnation action – and the admission of any such evidence was highly prejudicial to Appellant. Therefore, the evidence is further inadmissible under Rule 403, SCRE. Condemnor respectfully submits that this Court should reverse the trial court for improperly considering this information.

V. RESPONDENTS ARE NOT ENTITLED TO ATTORNEYS' FEES AND COSTS TO THE EXTENT THAT APPELLANT PREVAILS ON APPEAL ON THE ISSUE OF JUST COMPENSATION.

Under the Act, a landowner who prevails in a condemnation trial, meaning that the compensation awarded is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor, may recover reasonable litigation expenses. S.C. Code Ann. § 28-2-510. Respondents were awarded attorneys' fees and costs pursuant to S.C. Code Ann. § 28-2-510 by order of the trial court filed on August 10, 2105. To the extent that the compensation awarded is reduced by the amount of \$239,428, which

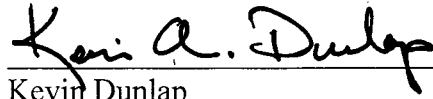
represents the part of the award for stigma damage, Respondents would not be entitled to litigation expenses under the Act since the award would be closer to Appellant's appraised value for just compensation the Respondents' value. Appellants therefore requests that this Court reverse the trial court's order granting attorneys' fees and costs to Respondents to the extent that it finds that stigma damages were improperly awarded in this case.

CONCLUSION

Appellant requests that this Court: (1) reverse the judgment of the trial court and find that stigma damages are not recoverable as a matter of law and reduce the verdict by the amount of \$239,428 which represents the part of the award for stigma damage; (2) reverse the judgment of the trial court and find that the trial court improperly admitted the testimony of Respondents' expert concerning stigma damages and reduce the verdict by the amount of \$239,428 which represents the part of the award for stigma damage; (3) reverse the judgment of the trial court and find that the trial court improperly concluded that stigma damages were available when there was insufficient evidence that the alleged fear or stigma was reasonable and reduce the verdict by \$239,428; (4) reverse the judgment of the trial court and find that the trial court improperly concluded that stigma damages were available when there was insufficient evidence of a nexus between the alleged fear or stigma and the diminution in market value to the remainder and reduce the verdict by \$239,428; (5) reverse the judgment of the trial court and find that the trial court improperly concluded that stigma damages were available when the only market-based analysis on potential diminution in value to the remainder that was presented at trial showed no evidence that the existence of a natural gas pipeline would diminish property values due to alleged fear or stigma and reduce the verdict by \$239,428; or (6) in the alternative, remand and order a new trial due to the

improper admission of testimony; and (7) reverse the trial court's order granting attorneys' fees and costs.

Respectfully submitted this the 24th day of May, 2016.

A handwritten signature in black ink, reading "Kevin A. Dunlap". The signature is written in a cursive style with a horizontal line underneath it.

Kevin Dunlap

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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

RECEIVED

MAY 24 2016

SC Court of Appeals

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

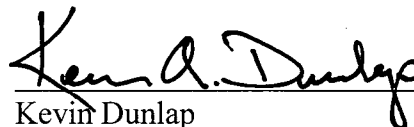
v.

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

CERTIFICATE OF COUNSEL

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

This the 24th day of May, 2016.



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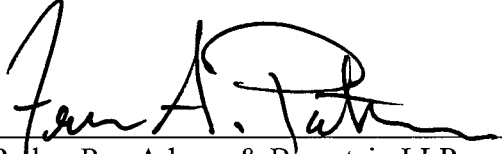
CERTIFICATE OF SERVICE

I certify that I have caused to be served the FINAL BRIEF OF APPELLANT
PIEDMONT NATURAL GAS COMPANY, INC. on counsel of record and respondents
in this action by depositing a copy of the same in the United States Mail, postage prepaid,
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This the 24th day of May, 2016.


Parker Poe Adams & Bernstein LLP