

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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
SEP 20 2018
S.C. SUPREME COURT

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

v.

Richeous Smith, Worthy 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, Latonya Gilliam, Porsha Williams, Chavonte Gilliam, Lakisha Gilliam, Derrick Gilliam, Rodney Gilliam, Donald Ray Gilliam, 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., Mattie Gilliam, Ira K. Carroll, Demetrius J. Gilliam, Kehimonies S. Gilliam, Bianca S. Gilliam, 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, Pearl

Mae Terry, Winnie L. Terry Anderson, Furman Anderson, Tommy Anderson, Abigail Dodd, Angela Reid, Sandra McDowell, Harold Anderson, Mary Ann Davis, Charlene Peak, 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 0531010102100 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 Tl 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,

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

SEP 20 2018

S.C. SUPREME COURT

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

v.

Richeous Smith, Worthy 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, Latonya Gilliam, Porsha Williams, Chavonte Gilliam, Lakisha Gilliam, Derrick Gilliam, Rodney Gilliam, Donald Ray Gilliam, 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., Mattie Gilliam, Ira K. Carroll, Demetrius J. Gilliam, Kehimonies S. Gilliam, Bianca S. Gilliam, 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, Pearl

Mae Terry, Winnie L. Terry Anderson, Furman Anderson, Tommy Anderson, Abigail Dodd, Angela Reid, Sandra McDowell, Harold Anderson, Mary Ann Davis, Charlene Peak, 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 0531010102100 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 Tl 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.

SOUTH CAROLINA DEPARTMENT OF
COMMERCE'S *AMICUS CURIAE* BRIEF

Keith M. Babcock, SC Bar 456
Ariail E. King, SC Bar 8952
LEWIS BABCOCK L.L.P.
Post Office Box 11208
1513 Hampton Street (29201)
Columbia, South Carolina 29211-1208
Tel.: (803) 771-8000
Fax: (803) 733-3534
Email: kmb@lewisbabcock.com
aek@lewisbabcock.com

Attorneys for Amicus Curiae South
Carolina Department of Commerce

Table of Contents

Table of Authoritiesii

Statement of the Facts1

Interest of the Amicus Curiae1

Argument1

 I. Damages for stigma are not recoverable as an element of damages
 in South Carolina condemnation cases.1

 II. The use of a 100-foot buffer zone is not an appropriate method to
 determine damages in eminent domain.6

Conclusion8

Certificate of Counsel10

Table of Authorities

Cases

<u>Alabama Power Co. v. Keystone Lime Co.</u> , 67 So. 833 (Ala. 1914)	4
<u>Central Illinois Light Co. v. Nierstheimer</u> , 185 N.E.2d 841(Ill. 1962).....	4
<u>Chestnut v. AVX Corp.</u> , 413 S.C. 224, 776 S.E.2d 82 (2015)	1-3
<u>Criscuola v. Power Auth.</u> , 621 N.E.2d 1195 (N.Y. 1993)	3, 8
<u>Gray v. S. Facilities, Inc.</u> , 256 S.C. 558, 183 S.E.2d 438 (1971)	2, 3
<u>Horry County v. Ins. Reserve Fund</u> , 344 S.C. 493, 544 S.E.2d 637 (Ct.App.2001)	5
<u>Louisville & N. R. Co. v. Hall</u> , 136 S.W. 905, 906 (Ky. 1911).....	5
<u>Mississippi Transp. Comm'n v. McLemore</u> , 863 So. 2d 31, 40–41 (Miss. 2003)	6
<u>Rockies Exp. Pipeline LLC v. Hopkins</u> , No. 1:08-CV-00751-RLY, 2012 WL 1622532 (S.D. Ind. May 9, 2012).....	8
<u>Sacramento & San Joaquin Drainage Dist. v. Reed</u> , 29 Cal. Rptr. 847 (Cal. App. 3d Dist. 1963).....	3
<u>Stinson v. Arkla Energy Res., a Div. of Arkla, Inc.</u> , 823 S.W.2d 770 (Tex. App. 1992).....	4
<u>Trunkline Gas Co. v. O'Bryan</u> , 171 N.E.2d 45 (Ill. 1960)	4

Statutes and Regulations

Federal Hazardous Materials Safety Regulations, Title 49 of the Code of Federal Regulations (“CFR”), Parts 100 through 185.....	7
Pipeline Safety Regulations (<i>See</i> Title 49 CFR, Parts 190 through 199)	7

Other Authorities

Brandee L. Caswell, <i>A Primer and Update on Damage Claims Based on Fear and Stigma There Is A Lot to Learn from the Fear and Loathing in San Bruno</i> , 28 No. 2 Prac. Real Est. Law., May 2012.....	3, 4
--	------

E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. Envtl. L. & Pol'y 185 (1997)..... 1-3

Transmission Pipelines and Land Use: A Risk-Informed Approach - Special Report 281 (Transportation Research Board, Wash. D.C. 2004)7

Statement of the Facts

The South Carolina Department of Commerce (hereinafter “Commerce”), adopts the Statement of Facts set forth by Piedmont Natural Gas Company, Inc. in its Briefs filed with this Court.

Interest of the Amicus Curiae

Commerce operates and controls common carrier railroads in South Carolina through its Division of Public Railways. It currently is constructing an Intermodal Container Transfer Facility on the former Charleston Naval Complex that will provide access to Class 1 rail carriers serving Charleston, South Carolina. As part of this project, the power of eminent domain will be used to acquire land. The issue regarding whether stigma damages may be raised in this case are significant to the Intermodal Container Transfer Facility (and other Commerce projects) and, if the Supreme Court of South Carolina does not reverse the trial court’s decision in this case, Commerce believes that stigma damages claims are likely to be raised in those condemnation proceedings or related future inverse condemnation actions.

ARGUMENT

I. Damages for stigma are not recoverable as an element of damages in South Carolina condemnation cases.

South Carolina has not previously recognized stigma damages as an element of damages. Stigma damages are, in essence, defined as damages for injury to the reputation or perception of the property, rather than actual, physical damage. *See, e.g., Chestnut v. AVX Corp.*, 413 S.C. 224, 230–31, 776 S.E.2d 82, 85 (2015), citing E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. Envtl. L. & Pol’y 185, 185 (1997). The problem with awarding

damages based on stigma is obvious – “stigma damages are based solely upon public perceptions – perceptions which can change at any given moment.” Johnson, *supra*.¹

In Gray v. S. Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971), the plaintiff alleged stigma damages in a case against a petroleum plant operator. The plaintiff claimed that a fire, allegedly started by a fuel leak at the plant had diminished the value of the plaintiff’s property because “prospective buyers allegedly would be reluctant to purchase the property due to the fear of a similar occurrence in the future.” Id. at 558, 569, 183 S.E.2d at 443. The court in Gray found that generally, “injury to the reputation of ... property has been held not to be a proper element of damage.” Id., citing 22 Am.Jur.2d Damages § 136. While the court in Gray acknowledged that South Carolina had not made a determination to allow or bar stigma damages, it held that no such determination was needed at that time.

More recently, this Court acknowledged that it had not yet determined whether to adopt a “no stigma damages rule; an all stigma damages rule; or a modified rule.” Chestnut v. AVX Corp., 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015). In her dissent in that case, then-Chief Justice Toal asserted that South Carolina should not “adopt stigma damages in any form as an appropriate measure of damages....” Id. Chief Justice Toal noted that that the appellants there had “pled no physical damage to their properties, but instead present speculative claims of a diminution in market value and damages to the reputation of their properties that *may* be realized *if* Appellants ever attempt to sell their properties.” Id. at 231, 776 S.E.2d at 86. These are exactly the type of speculative and

¹ Even if this Court were to recognize stigma damages in condemnation cases, “...stigma damages should never be awarded prior to a plaintiff realizing an actual harm from the stigma.” Johnson, *supra*, at 186.

contingent damages the landowners seek in this case. The speculative nature of such claims should not form the basis for any damages.²

Usually, there are three (3) approaches to the issue of the admissibility of evidence of stigma damages: 1) admissible even without proof of reasonableness of fear; 2) admissible only with proof of reasonableness of fear; 3) fear damages inadmissible. Brandee L. Caswell, *A Primer and Update on Damage Claims Based on Fear and Stigma There Is A Lot to Learn from the Fear and Loathing in San Bruno*, 28 No. 2 Prac. Real Est. Law., May 2012, at 21, 22. Regardless of reasonableness of the fear, to be admissible the evidence must prove that the object of that fear **actually affects market value**. *Id.* In other words, a landowner must submit actual proof of the diminution of value of the property due to the stigma.

However, the proof needed to show the fear effect on market value is difficult and indefinable. Proof cannot be testimony of the landowner's or expert's personal fear. Criscuola v. Power Auth., 621 N.E.2d 1195, 1197 (N.Y. 1993) ("No witness, whether expert or non-expert, may use his or her personal fear as a basis for testifying about fear in the marketplace"); Sacramento & San Joaquin Drainage Dist. v. Reed, 29 Cal. Rptr.

² It is also important to note that both Gray and Chestnut were not eminent domain cases, but involved properties adjacent to other properties that had been contaminated or otherwise damaged. Here, there are no such allegations of physical contamination damage to any property. See also, E. Jean Johnson, Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases, 15 UCLA J. Envtl. L. & Pol'y 185, 208 (1997) ("Cases involving environmental stigma damages generally involve properties falling into three categories: (1) properties that were contaminated and subsequently remediated; (2) properties that are contaminated, but that will be remediated in the future; and (3) properties that have never been contaminated, but that are in proximity to contaminated property.") The property at issue here does not fit into any of these categories.

847, 853-54 (Cal. App. 3d Dist. 1963), modified only as to cost, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963) (appraiser should not be allowed to support his otherwise incompetent opinion of value by attributing his opinions to that of a prospective purchaser.). General evidence relating to the “unsafe nature” of pipelines, transmission lines, or other infrastructure “is irrelevant and inadmissible even under the broadest test of admissibility.” Caswell, *supra*. Some landowners seek to introduce evidence of prior accidents or explosions but those reports alone are insufficient; the reports or other accidents must be linked to fear in the marketplace. See, e.g. Stinson v. Arkla Energy Res., a Div. of Arkla, Inc., 823 S.W.2d 770, 771 (Tex. App. 1992). Instead of an objective test, this marketplace fear is usually demonstrated by the subjective opinions of real estate appraisers, again demonstrating the speculative nature of stigma damages.

To avoid the uncertainties and inconsistencies that would result from the lack of objective standards, many courts simply bar damages for fear or stigma as too speculative. See, Alabama Power Co. v. Keystone Lime Co., 67 So. 833, 836-37 (Ala. 1914) (finding that fear is based on pure speculation by an ignorant public and can never be an element of damages even if it affects the market value of the land); Trunkline Gas Co. v. O'Bryan, 171 N.E.2d 45 (Ill. 1960) (determining that the mere fear of gas transmission line was not compensable); Central Illinois Light Co. v. Nierstheimer, 185 N.E.2d 841, 843-44 (Ill. 1962) (reversing trial court decision allowing testimony from various witnesses expressing fears from overhead power line, including potential for broken wires, danger from fire and lightning, danger to crops if the towers were blown over, and danger of trespass by utility employees finding such imagined sources of fear “so remote and speculative and uncertain as to afford no basis for allowance of

damages”); Louisville & N. R. Co. v. Hall, 136 S.W. 905, 906 (Ky. 1911) (testimony regarding fears of trespassers and frightening of horses and cattle due to railroad right of way held inadmissible speculative testimony not tied to market value).

Because of the speculative nature of stigma or fear damages and the lack of objective evidence as to the effect of fear on the marketplace, allowing stigma damages to be awarded in an eminent domain case is the beginning of a slippery slope that would negatively impact multiple public works projects in this State. Not only would pipelines, such as the one in this case, be affected, but power lines, roads, railways, and other improvements could be subjected to stigma damages, regardless of the unreasonableness of the fear, the lack of wrongdoing by the condemnor, or the absence of any true evidence that property values have been diminished. In effect, allowing stigma damages would open the floodgates to claims of diminished value, despite the absence of physical damage to the property nor any substantiated, objective proof of diminution. As result, court proceedings in eminent domain matters would be more complicated and time consuming, further delaying important public works. This Court should adopt a bright-line rule that stigma damages are not recoverable as a matter of law in eminent domain cases in South Carolina.³

Furthermore, allowing stigma damages in eminent domain cases would open the door for a multitude of inverse condemnation cases by landowners. Inverse condemnation is a cause of action against a governmental defendant to recover the value of property the landowner asserts was taken, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Horry County v. Ins.

³ Commerce takes no position as to stigma damages where property has been physically contaminated as result of negligence or nuisance as that issue is not before this Court.

Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct.App.2001). Thus, any construction begun on government land that an adjacent landowner deems unattractive or unsafe--whether it be a pipeline, a railway, a highway, etc.-- could result in lawsuit for inverse condemnation. The potential for frivolous litigation based on stigma damages is staggering.

II. The use of a 100-foot buffer zone is not an appropriate method to determine damages in eminent domain.

The use of a buffer zone is arbitrary and artificial and has no basis in the law or the record in this case. Here, the Respondents' appraiser claimed that a 100-foot wide buffer zone parallel to the easement had suffered an 85% damaged based on stigma (i.e., the proximity to the pipeline). The fact that a 100-foot buffer was randomly selected shows the subjective nature of stigma damages. At trial, the landowners' expert flatly admitted that:

- (1) 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);
- (2) he never attended any seminars or courses that taught a "buffer zone method" of estimating damages to the remainder (R. p. 273, lines 4-6);
- (3) he had never seen the method described in any appraisal journals (R. p. 273, lines 7-9);
- (4) he was unaware of any support for the "buffer zone method" in the Uniform Standards of Professional Appraisal Practice (R. p. 274, lines 9-11); and
- (5) was unaware of any other instance in which the "buffer zone method" had been used to assess alleged damages to property. (R. p. 276, lines 17-19)

The landowners' expert also testified that he had no comparable market analysis to evaluate alleged diminution of value to the 100-foot buffer. (R. p. 271, lines 4-7) Why is the width alleged buffer area 100 feet instead of 50 feet? Why is the "damage"

determined to be 85 percent instead 10%, 25%, or 50%? There simply is no objective or scientific basis governing the use of buffer zones or the alleged damage thereto.

Other courts have rejected the use of these arbitrary buffer zones. For example, in Mississippi Transp. Comm'n v. McLemore, 863 So. 2d 31, 40-41 (Miss. 2003), the landowner's expert claimed that there was a 750-foot line abutting the proposed interstate right-of-way (the buffer zone) that would have less value than it did before. The expert asserted that there was a certain distance from the right-of-way at which the proposed construction no longer has an adverse effect on the property's desirability, and that that point was between 500 to 1,000 feet. Arbitrarily splitting the difference, the expert picked 750 feet as the part of the property that would be more adversely affected. McLemore at 41. In rejecting the expert's view, the court noted that: 1) the 750-foot line method had not been tested in the appraisal field; 2) the expert's method had not been the subject of any peer review, nor was his theory in textbooks or taught in courses and seminars; 3) there was a high potential rate of error associated with the expert's theory because there is no evidence that the location of this line was based on anything more than the expert's speculation; 4) there was no evidence of any standards that control the operation of the expert's 750-foot line method; and 5) the expert admitted the method was unique to his appraisal.

Here, as the landowner's expert admitted, there is no statute or regulation in South Carolina that sets forth a required buffer zone, so there is no standard that supports the use of a 100-foot buffer zone. (R. p. 270, lines 2-5) There are simply no buffer zone requirement in the Federal Hazardous Materials Safety Regulations (*See* Title 49 of the Code of Federal Regulations ("CFR"), Parts 100 through 185) and the Pipeline Safety

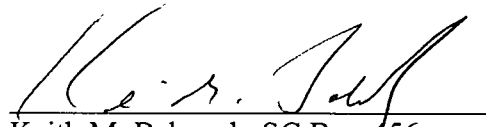
Regulations (*See* Title 49 CFR, Parts 190 through 199) governing the design, construction, operation and maintenance of natural pipelines. Likewise, there are no studies, textbooks, or other data supporting the use of a 100-foot buffer here. In fact, according to the Record on Appeal, the landowners' own appraiser admitted that there were no State or Federal regulations requiring a buffer zone next to a pipeline. (R.p. 272:2-5). He also acknowledged that he had not read about the buffer zone method nor was he aware that it had been used in any other appraisal. (R.p. 273:4-9; 274:9-11; 276:9-19). The expert also agreed that his value on the buffer zone theory was based on his own subjective opinion. (R.p. 277:18-22). Thus, the only conclusion is that the 100-foot buffer is the arbitrary creation of the expert and the percentage of damage assigned is his unsupported opinion.⁴ Allowing the creation of artificial and arbitrary buffer zones by experts, without any basis in law or objective data in support, would set a dangerous precedent for public works and eminent domain cases in South Carolina and should be rejected.

CONCLUSION

Stigma damages are, by their nature, inherently speculative. This was clearly demonstrated by the landowner's experts unsupported and arbitrary methods in this case. The speculative nature of stigma damages would make it nearly impossible to plan for and budget public works projects, such as the Intermodal Container Transfer Facility (and other Commerce projects). For the reasons stated herein, Commerce respectfully submits

⁴ As noted earlier, "No witness, whether expert or non-expert, may use his or her personal fear as a basis for testifying about fear in the marketplace." Criscuola v. Power Auth., 621 N.E.2d 1195, 1197 (N.Y. 1993). *See also*, Rockies Exp. Pipeline LLC v. Hopkins, No. 1:08-CV-00751-RLY, 2012 WL 1622532, at *5 (S.D. Ind. May 9, 2012)(the absence of market data to support the expert relegates his stigma opinion to a personal one, and therefore insufficient).

that allowing claims for alleged stigma damages would have such a deleterious effect on the use of eminent domain for public works that this Court should adopt a rule prohibiting stigma damages in condemnation cases. Similarly, Commerce respectfully urges this Court to bar the use of buffer zones as an element of damages.



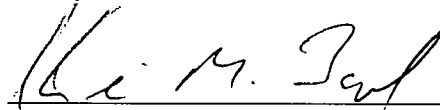
Keith M. Babcock, SC Bar 456
Ariail E. King, SC Bar 8952
LEWIS BABCOCK L.L.P.
Post Office Box 11208
1513 Hampton Street (29201)
Columbia, South Carolina 29211-
1208
Tel.: (803) 771-8000
Fax: (803) 733-3534
Email: kmb@lewisbabcock.com
ae@lewisbabcock.com

Attorneys for Amicus Curiae South
Carolina Department of Commerce

September 19, 2018
Columbia, SC

CERTIFICATE OF COUNSEL

The undersigned certifies that this brief complies with Rules 208(b) and 211, SCACR and this Court's orders on personal identifiers.



Keith M. Babcock, SC Bar 456
Ariail E. King, SC Bar 8952
LEWIS BABCOCK L.L.P.
Post Office Box 11208
1513 Hampton Street (29201)
Columbia, South Carolina 29211-
1208
Tel.: (803) 771-8000
Fax: (803) 733-3534
Email: kmb@lewisbabcock.com
aek@lewisbabcock.com

Attorneys for Amicus Curiae South
Carolina Department of Commerce

September 19, 2018
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 20 2018

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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, Latonya Gilliam, Porsha Williams, Chavonte Gilliam, Lakisha Gilliam, Derrick Gilliam, Rodney Gilliam, Donald Ray Gilliam, 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., Mattie Gilliam, Ira K. Carroll, Demetrius J. Gilliam, Kehimonies S. Gilliam, Bianca S. Gilliam, 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 Peak, 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 0531010102100 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.

CERTIFICATE OF SERVICE

I, Connie W. Grugan, employee of the law firm of Lewis Babcock L.L.P., hereby certify that I have served South Carolina Department of Commerce's Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief upon counsel of record and unrepresented Respondents, by mailing a copy of same, postage prepaid and return address clearly indicated, addressed as follows:

Kevin Dunlap, Esquire
Parker Poe Adams & Bernstein, LLP
100 Dunbar St., Suite 206
Spartanburg, SC 29306
*Attorney for Piedmont Natural Gas Company,
Inc.*

Michael S. Chambers, Esquire
121 Manly St., Suite B
Greenville, SC 29601
*Attorney for Piedmont Natural Gas Company,
Inc.*

Doris B. Ward, Esquire
Horton Law Firm
307 Pettigru Street
Greenville, South Carolina 29601
Attorney for the Respondents/Appellants

Eric Culbertson, Esquire
Kehl Culbertson Andrighetti & Komfeld, LLC
114 Manly Street
Greenville, South Carolina 29601
Attorneys for the Respondents/Appellants

Paul A. McKee, III, Esquire
Hanover Title Agency, Inc.
PO Box 2196
Spartanburg, SC 29304
*Attorney for Reece W. Smith, Raymond Eddie
Smith, Michael Smith, and Odell Smith*

Kelley Y. Woody
PO Box 6432
Columbia, SC 29260
Guardian ad Litem for unknown Landowners

A. Lance Crick, Esquire
US Attorney's Office
55 Beattie Place, Suite 700
Greenville, SC 29601
*Attorney for the United States of America and
the United States of America, acting by and
through its Agency, the Internal Revenue
Service*

Wylie W. Clarkson, Esquire
PO Box 287
Columbia, SC 29202
Attorney for Midland Funding, LLC

Charles N. Griffin, III, Esquire
PO Box 19806
Raleigh, NC 27619
*Attorney for Sharonview Federal Credit
Union*

Kiera Courtney Dillon, Esquire
SC Department of Revenue
PO Box 12265
Columbia, SC 29211
Attorney for SC Department of Revenue

Jeffrey D. Wile, Esquire
County Attorney's Office
301 University Ridge, Suite 2400
Greenville, SC 29601
Attorney for County of Greenville

Ettie Pearl Booker
21 Cotswold Terrace
Taylors, SC 29687
Landowner/Condemnee

Johnny F. Cox
6420 Guildford Rd.
Rockford, IL 61107
Landowner/Condemnee

Terry Gilliam
47 Myers St.
Buffalo, NY 14211
Landowner/Condemnee

Jerry Gilliam
5 Myers St.
Buffalo, NY 14211
Landowner/Condemnee

Donnette Gilliam Ortchere
444 Emslie St.
Buffalo, NY 14212
Landowner/Condemnee

Angela Gilliam
445 Emslie St.
Buffalo, NY 14212
Landowner/Condemnee

James (Jimmy) Terry
105 Bailey Rd.
Greer, SC 29651
Landowner/Condemnee

Pearlie Mae Terry
PO Box 6942
Greenville, SC 29606
Landowner/Condemnee

John Glavin, Sr.
21 Murray Terrace
Tonawanda, NY 14150
Landowner/Condemnee

Jeffrey Glavin
21 Murray Terrace
Tonawanda, NY 14150
Landowner/Condemnee

Yolanda Glavin
21 Murray Terrace
Tonawanda, NY 14150
Landowner/Condemnee

Miranda Glavin
21 Murray Terrace
Tonawanda, NY 14150
Landowner/Condemnee

John Glavin, Jr.
196 Moore St.
Tonawanda, NY 14150
Landowner/Condemnee

Kenneth Terry
117 Sunnyglen Dr.
Greer, SC 29561
Landowner/Condemnee

Eric Smith
10 Fort Dr.
Simpsonville, SC 29681
Landowner/Condemnee

Tonya S. Turner
3494 Pinegate Trail
Snellville, GA 30039
Landowner/Condemnee

LaTasha D. Terry
90 Preakness Dr.
Alpharetta, GA 30022
Landowner/Condemnee

Ira K. Carroll
1348 Cochran Crossing
McDonough, GA 30252
Landowner/Condemnee

Demetrius J. Gilliam
4328 Thyme Ave.
Las Vegas, NV 89910
Landowner/Condemnee

Kehimonnie S. Gilliam
4328 Thyme Ave.
Las Vegas, NV 89910
Landowner/Condemnee

Bianca S. Gilliam
4328 Thyme Ave.
Las Vegas, NV 89910
Landowner/Condemnee

Terrance Leslie, Jr.
204 Herman St.
Buffalo, NY 14211
Landowner/Condemnee

Terrell Leslie, Sr.
204 Herman St.
Buffalo, NY 14211
Landowner/Condemnee

Teaira Leslie
204 Herman St.
Buffalo, NY 14211
Landowner/Condemnee

Jerome Smith
232 Sunnyglen Dr.
Greer, SC 29651
Landowner/Condemnee

Wilford Daniels
144 Sweet Ave.
Buffalo, NY 14212
Landowner/Condemnee

Patricia Terry
211 Eagle St., #701
Buffalo, NY 14204
Landowner/Condemnee

Sheila Terry
211 Eagle St., #701
Buffalo, NY 14204
Landowner/Condemnee

Melissa F. Smith
142 Wilson Creek Rd.
Iva, SC 29655
Landowner/Condemnee

The Hon. Alan Wilson
SC Attorney General
PO Box 11549
Columbia, SC 29211

John H. Magill
SC Dep't of Mental Health
2414 Bull St.
Columbia, SC 29202

Trace M. Dillon
Arrow Financial Services, LLC
1130 Hurricane Shoals Rd., Suite 600
Lawrenceville, GA 30044

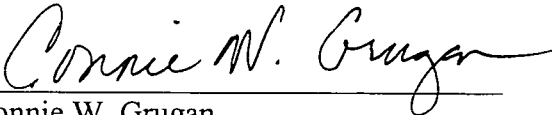
Ahmad S. Washington
Arrow Financial Services, LLC
1211 E. Morehead St.
Charlotte, NC 28204

Richard L. Jackson
Bullhead Investments, LLC
1315 Westbrook Plaza Dr., Suite 100
Winston-Salem, NC 27103

Zachery Arnold
460 Durham Td.
Greer, SC 29650

CT Corporation System
Discover Bank
2 Office Park Court, Suite 103
Columbia, SC 29223
Registered Agent for Respondent Discover Bank

CT Corporation System
GE Commercial Finance Business Property Corporation
2 Office Park Court, Suite 103
Columbia, SC 29223
Registered Agent for Respondent GE Commercial Finance Business Property Corporation



Connie W. Grugan

This 20th day of September, 2018.