THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Civil Action No. 08-CP-40-8425

Caroline LeGrande, H. Paul LeGrande, Jr.,
and Marion Mancini, ...Appellants,

v.

South Carolina Electric & Gas Company, ...Respondent.

FINAL BRIEF OF RESPONDENT

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Statement of the Case

This action arises out of the cutting of certain trees along Turkey Farm Road in November 2005 by a subcontractor working for South Carolina Electric and Gas Company ("SCE&G"). On November 26, 2008, the Plaintiffs, Caroline H. LeGrande, Paul LeGrande, Jr., and Marion LeGrande Mancini, initiated this action by filing a Complaint against SCE&G in the Richland County Court of Common Pleas, asserting causes of action for trespass, conversion, and two separate statutory claims for destruction of trees and for destruction of a fence. [Complaint, R. pp. 68-73.] The statutory claim for destruction of a fence was later stricken by order of the circuit court. [Order, R. p. 45.]

Plaintiffs' Complaint alleges that in connection with a project to upgrade overhead electrical power lines along Turkey Farm Road, SCE&G's contractor damaged a fence and cut down certain trees, which Plaintiffs believed to be on their property. [Complaint, R. pp. 68-73.] SCE&G filed an Answer setting forth various defenses including estoppel, statute of limitations, and also the defense that it had the legal authority to cut the trees at issue. [Answer, R. pp. 74-78.]

On May 13, 2010, the Plaintiffs filed a separate lawsuit against the South Carolina Department of Transportation ("SCDOT"), seeking to enjoin SCDOT from widening Turkey Farm Road. [Complaint, LeGrande v. SCDOT, 2010-CP-40-3108, R. pp. 123-27.] Richland School District Two was subsequently brought into the case as a third party defendant. [SCDOT Answer, R. pp. 128-34.] At this time, SCDOT was widening the roadway to accommodate increased vehicle traffic resulting from the construction of a new school, Westwood High School, located across the road from the Plaintiffs' property. In their lawsuit against SCDOT, Plaintiffs alleged that the widening of Turkey Farm Road would

cause the road to extend onto their property. [Id.] SCDOT countered that it owned a 66 foot wide strip of land along Turkey Farm Road (33 feet wide on each side of the road measured from the existing center line) and that any improvements to Turkey Farm Road would take place within this 66 foot wide strip. [Master's Final Order, R. p. 47.] By Order of Appointment dated June 24, 2010, the matters in dispute were referred to the Richland County Master-in-Equity, Joseph M. Strickland. [R. p. 67.] The reference to the Master occurred with the consent of all parties to the two actions (i.e., LeGrande v. SCDOT and LeGrande v. SCE&G) and with the recognition by all parties that there were common factual and legal issues involved in both cases regarding the existence of SCDOT's right of way and whether the trees that were cut were in the right of way. [See Brief of the Appellants, p. 8.] Circuit Judge Alison Renee Lee issued an Order staying the trial of Plaintiffs' case against SCE&G until the Master issued a decision in the action brought by Plaintiffs against SCDOT.

Following a non-jury trial on August 8-9, 2010, the Master issued a Final Order on March 30, 2011, in which he concluded that SCDOT owns a 66 foot wide right of way on Turkey Farm Road adjacent to the Plaintiffs' property. [Final Order, pp. 46-65.] The Master ruled that SCDOT was not barred from asserting its title to the right of way. [Final Order, R. pp. 62, 64.] The Master found that SCDOT's predecessor in interest, the South Carolina State Highway Department ("Department"), through its eminent domain powers, condemned and took ownership of a 66 foot wide right of way through the property then owned by the Plaintiffs' father, Hazel P. Legrande. [Final Order, R. p. 58.] He also found that the cut trees and fence at issue were located within SCDOT's right-of-way. [R. p. 12.] The Plaintiffs did not perfect an appeal as to the Master's Final Order.

Thereafter, in the present case, SCE&G filed a Motion for Summary Judgment on the grounds, among others, that the cut trees and fence were located within the 66 foot wide right of way owned by SCDOT, and therefore, Plaintiffs cannot recover for trespass, destruction of trees or conversion as to land and trees that were on land they never owned. A hearing on the summary judgment motion was held before Judge Lee on October 31, 2011, and the matter was taken under advisement. The following day, with counsel present, Judge Lee announced her decision on the record, granting summary judgment in favor of SCE&G. Judge Lee noted that Judge Strickland's Final Order had determined that SCDOT owns the 66 foot wide strip of land along Turkey Farm Road and that the trees cut and fence allegedly damaged by SCE&G's contractor were within this strip of land owned by SCDOT. [Hearing Transcript, R. p. 34, lines 18-25.] Accordingly, she concluded summary judgment was appropriate on Plaintiffs' claims against SCE&G because Plaintiffs sought to recover damages for the cutting of trees and alleged damage to a fence within a 66 foot wide strip that they do not own. [Hearing Transcript, R. p. 38 line 25- p. 39, line 5.] A "Form 4" Order granting SCE&G's motion for summary judgment was subsequently entered. [Form 4 Order, R. p. 1.]

Plaintiffs filed a Notice of Appeal on November 22, 2011, and the instant appeal ensued.

Statement of Facts

On September 22, 1936, SCE&G's predecessor in interest, Broad River Power Company, obtained an Easement for construction of utility poles and power lines along Turkey Farm Road. [Easement dated 9/22/1936, R. pp. 97-98.] Thereafter, utility poles were erected along Turkey Farm Road. Pursuant to this Easement, SCE&G has "the right, privilege and authority to cut or trim trees along said line necessary to keep the wires thereof

clear at least ten (10') feet." [Id.] The Easement also states: "PROVIDED, however, any damage (other than tree damage) to the property of the undersigned, caused by the said company in maintaining or repairing said electric transmission line, shall be borne by said company, its successors and assigns." [Id.]

On May 30, 1953, the Plaintiffs' father, Hazel P. LeGrande, purchased 95.5 acres along Turkey Farm Road in Blythewood, South Carolina. [5/30/53 Deed, R. p. 216-17.] At that time, Turkey Farm Road was a two lane dirt road. [Final Order, R. p. 53.] A number of years later, on March 6, 1967, the Department issued a "Notice of Condemnation" to Hazel P. LeGrande, notifying him of the Department's acquisition of a 66 foot right of way through his property for the construction and improvement of Turkey Farm Road.[1] [Final Order, R. p. 53; Notice of Condemnation dated 3/22/1967, R. p. 206-07.] The Department also provided notice of the condemnation to Farmers Home Administration as mortgagee of Mr. LeGrande's property. [R. p. 206-07.] The Notice of Condemnation describes the property being condemned as:

> **All that parcel or strip of land** within 33 feet of the centerline of the survey on the left between approximate survey stations 47+85 and 74+45 and being bounded on the north by other lands of Mrs. [sic] Hazel P. Legrand, and on the east and west by lands of Lessie L. Smith Martin, and on the south by Road S-1694.
>
> **Also condemned is all that parcel or strip of land** within 33 feet of the centerline of the survey on the right between approximate survey stations 52+50 and 85+69, being bounded on the north by Road S-1694, on the east by lands of Ruth W. Morrfield, on the south by lands of Mrs. [sic] Hazel P. Legrand, on the west by lands of Mary W. Davis.
>
> All right of way herein condemned is shown more particularly on sheets 11, 12 and 13 of plans for this project.

[1] The Department sent condemnation notices to the other property owners along Turkey Farm Road as well.

(Emphasis added) [R. p. 206-07.] The Department's repeated use of the phrase "all that parcel or strip of land" indicates its intention to acquire a fee simple ownership interest.[2]

After receiving notice of the condemnation, Mr. LeGrande attended a Condemnation Proceedings hearing held before the Condemnation Board on March 22, 1967. Immediately following the hearing, the Condemnation Board issued a "Resolution of the Board of Condemnation," in which the Board concluded that no cash consideration was due to Mr. LeGrande because the benefits to him of having a paved road abutting his property exceeded the value of the strip of land being taken. [Final Order- Finding of Fact 17(d), R. p. 54; "Resolution of the Board of Condemnation," R. p. 208-09.] The Resolution states, "Be it Resolved by this Board of Condemnation that, after taking into consideration the benefits accruing to the landowner by the construction or improvement of the highway, the **value of the lands being taken** together with any special damages occasioned by the construction or improvement of the highway and deducting the total value of the benefits from the total value of the damages in accordance with the statutes, the members of this Board find that the benefit exceeds the damage and we therefore make an award of No Cash Consideration." (Emphasis added) [R. p. 208-09.] No appeal was taken from the Board's decision. [Final Order, R. p. 54.]

During the hearing before the Condemnation Board, Mr. LeGrande had objected to the location of the road improvement project because he thought it would require certain cedar trees on his property to be cut down. [Final Order- Finding of Fact 17(b), R. p. 53.] The Condemnation Board's presiding member advised Mr. LeGrande that the Board had no

[2] "The basic question where an interest in land was acquired by eminent domain is what interest the taking authority intended to acquire, as shown by the relevant documents." 27 Am. Jur. 2d Eminent Domain § 841 (2012).

authority to make any changes in the engineering features of the road and suggested that he "take that up with the highway department." [R. p. 53-54.]

Mr. LeGrande raised this issue with the Department as evidenced by the fact that on March 29, 1967, he executed a "Right of Way Easement" that included a special provision stating that the right of way would be relocated as shown on the Department's plans "by a heavy dashed line between approximate survey stations 49+17.4 and 76+36.5." ["Right of Way Easement" dated 3/29/67, R. p. 210-11.] The Department's Official Plan Sheets indicate that the Department's engineers revised the plans on March 31, 1967, to relocate the right of way approximately 9 feet north only along the area where Mr. LeGrande owned property on both sides of Turkey Farm Road. [Final Order- Finding of Fact 17(e), R. p. 55; Highway Department's Official Plan Sheets, R. p. 212-15.] The right of way was not relocated where Mr. LeGrande did not own property on both sides of the road. [Final Order- Finding of Fact 17(e), R. p. 55.]

The relocation was specifically made as an accommodation to Mr. LeGrande to try to avoid having some of his cedar trees cut during road construction. [R. p. 55.] The sole purpose of the "Right of Way Easement" signed by Mr. LeGrande on March 29, 1967, was to move the existing boundaries of the 66 foot wide strip of land 9 feet northward along a certain section of Turkey Farm Road where he owned property on both sides of the road. By the time that the Right of Way Easement was executed, the Department had already acquired title to the strip of land through its issuance of the Notice of Condemnation on March 6 and through the Board of Condemnation's issuance of the Resolution on March 22.[3]

[3] "Title to land taken by condemnation generally passes to the condemnor upon the determination and payment of just compensation, and when payment is made the title relates back to the date of the filing of the condemnation petition." 29A C.J.S. Eminent Domain § 65 (2012). The Board of Condemnation issued its Resolution on March 22, 1967, determining that no compensation was owed to Hazel P. LeGrande, Plaintiffs' predecessor in title. Mr.

Significantly, Judge Strickland found in his Final Order that the cedar trees cut by SCE&G's contractor in 2005 were within the 66 foot right of way, while uncut cedar trees remained in an area adjacent to the right of way, which is where the relocation had taken place. [Final Order- Finding of Fact 20, R. p. 57.]

During the 1980s, Mr. LeGrande subdivided and sold various portions of his property along Turkey Farm Road. [Final Order- Finding of Fact 3, R. p. 48.] In 1988, Mr. LeGrande passed away and left the remaining acreage of the Turkey Farm Road property to his wife. In 1995, Mr. LeGrande's widow sold the property, which consisted of 68.74 acres at that time, to their three children, the Plaintiffs Marion LeGrande Mancini, H. Paul LeGrande, Jr., and Caroline LeGrande. [1995 Deed, R. p. 220-21; Final Order- Finding of Fact 6, R. p. 49.]

Thereafter, the Plaintiffs carved and sold various parcels from this property to others. Incident to these sales, the Plaintiffs executed deeds which referenced plats reflecting SCDOT's 66-foot wide right-of-way [Final Order, R. p. 60-61.]

For example, in 2002, the three Plaintiffs sold a 4.06 acre tract carved from the property to Keith Didyoung and other grantees. [Deed from Plaintiffs to Didyoung recorded 1/24/2002, R. p. 222-23; Final Order- Finding of Fact 8, R. pp. 49-50.] The deed referenced a Plat prepared for H.P. LeGrande by Registered Land Surveyor Daniel Ballentine in 1984. [Id.] The 1984 Ballentine Plat shows Turkey Farm Road as a 66 foot wide right of way, and it also shows that this right of way serves as a property line for Plaintiffs' property. [1984 Ballentine Plat recorded at Bk 50 Page 1043, R. p. 232.]

LeGrande did not appeal the Resolution of the Board of Condemnation, and accordingly, the taking and correlative passing of title to the Department became complete. See Timmons v. The South Carolina Tricentennial Commission, 254 S.C. 378, 390, 175 S.E.2d 805, 811 (1970) ("The title being acquired in a condemnation proceeding is determined by the pleadings; the Petition and Declaration of Taking in this case contemplate a fee simple title being acquired from the landowner.")

In 2003, Plaintiff Caroline LeGrande had a survey performed and plat prepared of the remaining farm property by Registered Land Surveyor Richard Yongue. The Yongue Plat, which was recorded by Caroline LeGrande in the Richland County Register of Mesne Conveyances on April 4, 2003, shows Turkey Farm Road as a 66 foot wide right of way and also shows that this right of way is the property line for Plaintiffs' property. [Yongue Survey recorded at Bk 823 Page 572, R. p. 233.]

In 2004, the three Plaintiffs sold a 3.978 acre tract carved from the farm property to Richland School District Two for the construction of the new Westwood High School to be built, in part, upon this tract. Incident to this construction, Turkey Farm Road was widened to accommodate additional traffic, including the addition of a requisite turning lane for school buses. [Final Order ¶ 13, R. p. 51-52.] These road improvements are within the existing 66 foot wide right of way. [Id.]

Plaintiffs' deed conveying the 3.978 acre tract to the school district references a plat prepared for Turkey Farm, LLC, by Civil Engineering of Columbia, Inc., dated September 5, 2003, and recorded in Plat Book 50, page 1043. [Deed to RSD2 recorded 6/7/2004, R. p. 224-25.] The plat shows Turkey Farm Road as a 66 foot wide right of way. The plat expressly states that "R.O.W. is property line" for properties abutting Turkey Farm Road. [Civil Engineering of Columbia Inc. Plat recorded Bk 851 Page 615, R. p. 234.]

Over the course of several days in November 2005, Asplundh Tree Expert Co. ("Asplundh"), a subcontractor for SCE&G, cut a number of trees along Turkey Farm Road. These trees were located within SCDOT's 66 foot wide right of way. [Final Order- Finding of Fact 20, R. p. 57.] Thereafter, in order to widen Turkey Farm Road to accommodate traffic in connection with the new school, including the construction of a new turning lane for

school buses, this same area where the trees and fence had been was subsequently paved over. [Court's Exhibits 1-4 from Summary Judgment hearing; SJ Transcript 10/31/11, R. p. 14, lines 2 – 18.]

After bringing the present lawsuit against SCE&G in 2008, the Plaintiffs then filed the previously referenced action against SCDOT in 2010. Judge Strickland ruled that SCDOT owns the strip of land that comprises the right of way, and he further ruled that SCDOT is not barred from asserting title to the 66 foot wide parcel. He made specific statements, findings and conclusions of law in his Final Order concerning SCDOT's ownership of, and right to assert title to, the right of way including the following:

- "This case involves a dispute about the scope and extent of SCDOT's **ownership** of a right of way for Turkey Farm Road (State Road S-1694) **adjacent to Plaintiffs' property** located near Blythewood in Richland County." [Final Order, R. p. 46.]

- "**SCDOT claims title** to a 66 foot wide right of way for Turkey Farm Road by virtue of a 1967 condemnation action brought against Plaintiffs' father and predecessor in title Hazel P. LeGrande, also known as H.P. LeGrande and Hazel P. Legrand, and a Right of Way Easement he granted to the S.C. State Highway Department in 1967." [Final Order, R. p. 47.]

- **"SCDOT is not prevented** by laches **from asserting its title** to the 66 foot wide right of way for Turkey Farm Road along the Plaintiffs property." [Final Order- Conclusion 8, R. p. 62.]

- "Plaintiffs' contention that SCDOT is barred from **asserting title** to the right of way by the 20 year statute of limitations in S.C. Code Section 15-3-310 must also be denied." [Final Order- Conclusion 12, R. p. 64.]

- "There was adequate evidence to put Plaintiffs upon a duty of inquiry as to the width of the right of way acquired by SCDOT from their father. **Had Plaintiffs inquired with SCDOT they would have been provided the documents evidencing ownership.**" [Final Order- Conclusion 7, R. p. 62.]

- "Plaintiffs knew or should have known of **SCDOT's ownership** of the 66 [foot] wide right of way easement for Turkey Farm Road ..." [Final Order- Conclusion 5, R. p. 60.]

- "Based upon not only the 1967 condemnation action, but also, the 1967 Right of Way Easement, **SCDOT owns** a 66 foot wide right of way for Turkey Farm Road (S-1694) **adjacent to Plaintiffs property**." [Final Order- Conclusion 3, R. p. 59.]

- "Tony A. Magwood, SCDOT's Resident Maintenance Engineer, testified that according to plans submitted by the School District, the improvements to Turkey Farm Road will take place within the existing 66 foot wide right of way that **SCDOT owns** according to records on file in his office." [Final Order- Finding 13, R. pp. 51-52.]

- "Luther A. Lown, a registered land surveyor, testified that he has been practicing land surveying since 1974. He reviewed the right of way documents for Turkey Farm Road on file at SCDOT, including the Official Plan Sheets. He testified that the documents show that **SCDOT owns a 66 foot wide right of way through and along Plaintiffs' property**. He conducted a field survey adjacent to the Plaintiffs' property to determine the location of the as built road in reference to the 1967 documents and plans. His findings are summarized and delineated on a "Sketch Plan of Turkey Farm Road, S-1694, as built for the South Carolina Department of Transportation," dated June 22, 2010, a copy of which was admitted into evidence as Defendant's Exhibit 24. **He concluded that the cedar stumps adjacent to the Plaintiffs' property between approximate survey stations 75 and 86 are located within the 66 foot wide right of way.** There are uncut cedar trees still standing along a fence which is located within the 66 foot wide right of way between approximate survey stations 49 and 76. This is the area of the right of way was relocated in 1967." [Final Order- Finding 20, R. p. 57.]

- "Plaintiffs are **estopped** from claiming that Turkey Farm Road is not a 66-foot wide right-of-way by reason of their execution of deeds which referenced plats showing the road as a 66-foot wide right-of-way." [Final Order- Conclusion 6, R. p. 61.]

- "Because SCDOT acquired a 66-foot wide right-of-way for Turkey Farm Road from Plaintiffs' father, and they are in privity of estate with him, they are **estopped** to deny this conveyance." [Final Order- Conclusion 10, R. p. 64.]

[Final Order, R. pp. 46-65.] (Emphasis added).

Following the issuance of Judge Strickland's Order, Judge Lee held a hearing on SCE&G's motion for summary judgment, and the motion was granted. [Form Order granting summary judgment, R. pp. 1-2.] Judge Lee noted on the record that Judge Strickland's Final

Order referred to SCDOT's "title" to the 66 foot wide strip of land as well as its "ownership" of the land. [Hearing Transcript, p. 33.] She stated:

> Specifically in [Judge Strickland's] order he states that what he was required to do under the 2010 action was determine the scope and the extent and ownership of that strip, and in going through all of the documents that he reviewed and then through his findings of fact he made certain findings that South Carolina Department of Transportation owns that 66-foot right-of-way, and I understand that the language that's used in the order seems to place qualifiers on the ownership of the property because it talks about title, it talks about deeding, it talks about ownership, and then it refers to a right-of-way. I think the words right-of-way are only designed to assign – to place a name on a particular strip of property; so instead of saying a strip of land that was 66-foot wide, he just referred to it as the right-of-way.

[Hearing Transcript, R. p. 35, lines 1-15.]

Judge Lee noted that the cut trees at issue were within the 66 foot strip of land owned by SCDOT. [Hearing Transcript, R. p. 39.] Judge Lee concluded that as a matter of law Plaintiffs are not entitled to recover damages from SCE&G for the removal of trees that were located within the right of way owned by SCDOT. [R. p. 40.]

Summary Judgment Standard

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP; Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. Durkin v. Hansen, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993).

Argument

Introduction

Plaintiffs argue in their brief that SCDOT does not have outright ownership of the strip of land where the trees and fence were located and that SCDOT merely holds an easement over this land. Plaintiffs suggest that they are the fee owners of this property. However, the Master's Final Order, which is binding on Plaintiffs under the doctrine of collateral estoppel, addressed the ownership issue and determined that SCDOT owns the land in question. In fact, the Master's Final Order found that Plaintiffs "knew or should have known" of SCDOT's ownership. Additionally, there are no fewer than eight (8) findings and conclusions in the Final Order that reference SCDOT's ownership or title to the strip of land. Accordingly, the Circuit Court judge correctly held that the issue of ownership had already been resolved in the prior proceedings before the Master, and she properly granted summary judgment to SCE&G.

Plaintiffs nevertheless maintain that the Master's Final Order is binding only as between themselves and the parties to the prior proceeding– SCDOT and Richland School District Two. Plaintiff's position is contrary to the well established principle, recognized in South Carolina appellate court decisions, that a non-party may use a prior judgment against a party who previously litigated and lost an issue. Moreover, Plaintiffs' position that the Master's ruling does not have a preclusive effect in the present case is undercut by an admission in their brief that "all of the parties to the two actions ... perceived the presence of common legal and factual issues" and consented to a consolidated reference to the Richland County Master-in-Equity in order "to avoid duplication and potentially inconsistent results." [Brief of the Appellants, p. 8.] Therefore, Plaintiffs' argument that collateral estoppel does

not apply is without merit, and the Circuit Court's summary judgment ruling in favor of SCE&G should be affirmed.

I. The trial judge correctly granted summary judgment to SCE&G because the Master's Final Order established that the trees and fence were located on land owned by SCDOT.

"Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Stone v. Roadway Express, et al., 367 S.C. 575, 580, 627 S.E.2d 695, 700 (2006); Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). The Master's Final Order established that in March 1967, SCDOT's predecessor, the South Carolina State Highway Department, acquired by eminent domain a 66-foot wide parcel, which included a portion of the land once owned by the Plaintiffs' father, their predecessor in interest. The Final Order also established that this land acquired by the Department encompassed the area where the subject trees and fence were located. The Master found that SCDOT owns, and is entitled to assert its title to, the 66 foot wide strip of land within which the fence and trees were located.[4]

The Plaintiffs are collaterally estopped from relitigating issues regarding ownership and title to the right of way because those issues were ruled upon in the Master's Final Order. Judge Lee correctly found that the Final Order conclusively established that Plaintiffs do not own the strip of land where the trees and fence were located. The trees and fence allegedly damaged by SCE&G's contractor, Asplundh, never belonged to the Plaintiffs. The Final Order is dispositive of the Plaintiffs' claims in the present matter because the Plaintiffs

[4] The Master's Final Order states: "SCDOT claims title to a 66 foot wide right of way for Turkey Farm Road by virtue of a 1967 condemnation action ... [Final Order, R. p. 47]; "SCDOT is not prevented by laches from asserting its title to the 66 foot wide right of way ..." [Final Order- Conclusion 8, R. p. 62]; "Plaintiffs' contention that SCDOT is barred from asserting title to the right of way by the 20 year statute of limitations in S.C. Code Section 15-3-310 must also be denied." [Final Order- Conclusion 12, R. p. 64.]

cannot recover for trespass, destruction of trees, or conversion as to land and trees which the Plaintiffs never owned.

In 1995, the Plaintiffs bought 68.74 acres from their mother which was adjacent to land and trees that had been owned by SCDOT since March of 1967. The Master found that ownership of the 66 foot wide strip of land rests with SCDOT, not the Plaintiffs. [Final Order, pp. 46-65.] Therefore, Plaintiffs' claims in the instant case must fail as a matter of law.

The Master's Final Order has a binding effect in the present action, and as Judge Lee properly held, there is no genuine issue of material fact as to ownership or title to the 66 foot wide right of way. Under the doctrine of collateral estoppel, the unchallenged ruling of Judge Strickland as to SCDOT's ownership of, and right to assert title to, the 66 foot wide strip of land is dispositive on the issue of whether Plaintiffs own this parcel. If Plaintiffs did not agree with Judge Strickland's ruling, they could have perfected an appeal of his Final Order to challenge his conclusions; however, Plaintiffs chose not to do so. See Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State, 221 S.C. 23, 68 S.E.2d 629 (1952) (The rulings in a case, whether they are right or wrong, become the law of the case and res judicata).

A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, all of these required elements for applying collateral estoppel are met. First, Plaintiffs filed the declaratory judgment action against SCDOT seeking a determination as to

the ownership of the property along Turkey Farm Road where the subject trees were cut. Plaintiffs had a full and fair opportunity to litigate all issues in their action against SCDOT. Ownership of the parcel was a central issue during the trial before the Master. The Final Order states, "Plaintiffs have asked this court to construe the terms of the 1967 Easement and issue a Declaratory Judgment determining the rights of the parties in regard to the right of way." [Final Order, R. p. 47.] Second, the Master directly determined the issue of ownership by ruling that SCDOT owns, and may assert its title to, the right of way. Third, the Master's determination as to ownership of the right of way was necessary to support the prior judgment since practically all of the claims and defenses asserted by the parties therein hinged on whether SCDOT owns the right of way.[5]

Any assertion or inference made by Plaintiffs that Judge Strickland's Order does not have preclusive effect on them should be rejected. The Plaintiffs contend in their brief that the Master's Final Order constitutes a bar to any redetermination of the issues decided therein only as to the Plaintiffs, SCDOT, and the School District. [Brief of the Appellants, p. 9.] This is incorrect. Relitigation of any issues decided in the Master's Final Order is also barred as between Plaintiffs and SCE&G. The trial court's consolidated reference to the Master of common issues involved in both the Plaintiffs' action against SCDOT and the action against SCE&G occurred with the consent of all parties and was designed to avoid duplication and inconsistent verdicts. On this point, Plaintiffs' brief includes the following admission:

> All of the parties to the two actions – the tree case and the road project case – perceived the presence of common legal and factual issues relating to the scope of the right-of-way. Seeking to avoid duplication and potentially inconsistent results, the parties all consented to a consolidated reference to the

[5] Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." Carolina Renewal, 385 S.C. at 555, 684 S.E.2d at 782. Here, there are no considerations of equity, efficiency, or public policy that weigh against the use of collateral estoppel.

> Richland County Master-in-Equity for final determination of these common issues.

[Brief of the Appellants, p. 8.] In light of the foregoing admission by Plaintiffs, their position that the Master's Final Order has no binding effect on them in the present case lacks merit.

It appears that Plaintiffs are arguing that the Master's Final Order has no binding effect against them in the present action because SCE&G was not a party to the SCDOT action. This position is based upon an outdated view of collateral estoppel. Decades ago, the prevailing law allowed only those who were parties in a prior case to assert collateral estoppel in a subsequent action (i.e., the doctrine of mutuality); however, more recent South Carolina decisions have abandoned the doctrine of mutuality altogether because in many instances it permitted continued relitigation of the same issue by the same party. Accordingly, a non-party may now use a prior judgment against a party who previously litigated and lost an issue. This topic was discussed in detail by the Court of Appeals in Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009):

> Carolina Renewal's absence from the previous slander lawsuit does not insulate it from issue preclusion. As far back as 1982, our supreme court held the doctrine of collateral estoppel barred the plaintiff from relitigating an issue even though the defendant was not a party, or in privity with a party, to the initial action. *Graham v. State Farm Fire & Cas. Ins. Co.,* 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982); *Irby v. Richardson,* 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). In subsequent cases, our appellate courts have applied collateral estoppel against a defendant in actions in which the plaintiff was not a party, or in privity with a party, to the initial action. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal–Mart Stores, Inc.,* 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991); *Beall,* 281 S.C. at 372, 315 S.E.2d at 191. More recently, our supreme court has noted "mutuality is no longer a requirement of collateral estoppel." *Doe v. Doe,* 346 S.C. 145, 149, 551 S.E.2d 257, 259 (2001). As these decisions make clear, the identity of the parties, and their relationships to one another, is

> simply not a concern when deciding whether to apply the doctrine of collateral estoppel. Accordingly, the trial court did not err in applying collateral estoppel against Carolina Renewal even though it was not a party to the initial slander lawsuit between Smith and SCDOT.

Carolina Renewal, 385 S.C. at 556, 684 S.E.2d at 783.

In light of the foregoing, the Plaintiffs are collaterally estopped from attempting to relitigate issues concerning ownership and title to the right of way.

II. The trial judge correctly concluded that SCDOT has actual ownership of the 66 foot wide parcel, rather than merely having an easement.

Plaintiffs contend SCDOT's interest in the 66 foot wide parcel is impliedly restricted to using the property only for the construction of a paved public road. [Brief of Appellants, p. 14.] In this regard, Plaintiffs argue that SCDOT does not have outright ownership of the 66 foot wide parcel because "the non-monetary nature of the compensation awarded to Mr. Legrande, Sr., in 1967 by the Board of Condemnation necessarily implied a restriction on SCDOT's interest in the 66- foot wide strip." [Id.] Plaintiffs' argument is flawed.

Restrictions on a party's interest in real property ordinarily do not arise by implication, but rather must be expressly set forth in a written instrument. See e.g., 28 Am. Jur.2d Estates § 156 (2012) ("A condition will not be raised by implication from a declaration in a deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition.") Here, none of the relevant documents pursuant to which the highway department took the strip of land by eminent domain (i.e., the Notice of Condemnation and the Condemnation Board's Resolution) placed any restrictions on how the condemned property could be used. Although the Notice of Condemnation and the Condemnation Board's Resolution both state that the land is being

taken for the construction of a state highway, there is no language in either document indicating the Department's taking of the property was limited to, or contingent upon, using the strip of property for a highway.

Nor was a reversionary interest ever reserved in Hazel P. LeGrande and his heirs in the event that the Department did not construct or maintain a highway over the strip of property. Furthermore, references to the construction of a state highway that appear in the Notice of Condemnation and the Condemnation Board's Resolution merely describe the Department's intention of appropriating the strip of land for a "public purpose", which is a requirement for any governmental taking of privately owned land. Kelo v. City of New London, 125 S.Ct. 2655, 2661, 545 U.S. 469, 477 (2005) (the government's taking of property must satisfy the "public use" requirement of the Fifth Amendment).

Plaintiffs also contend that Judge Lee "mistakenly found SCDOT's interest in the 66 foot wide strip in question went beyond a mere easement." [Brief of Appellants, p. 11.] Plaintiffs maintain that the Master's use of the term "right of way" in the Final Order should have been interpreted by Judge Lee to mean that SCDOT merely holds an easement over the strip of land. Plaintiffs' brief states "an easement or right-of-way is a right which one person has to use the land of another for a specific purpose; it gives no title to the land on which the servitude is imposed." [Brief of the Appellants, p. 12.]

Plaintiffs' argument ignores the reality that the term "right-of-way" often caries dual meanings. The U.S. Supreme Court has noted that the term, "right-of-way," has two distinct meanings: 1) it sometimes is used to describe merely a right of passage over any tract; and 2) it is also used to describe ownership of a strip of land. Joy v. City of St. Louis, 138 U.S. 1, 44, 11 S.Ct. 243, 256, 34 L.Ed. 843 (1890) (The term "right-of-way" has a two fold

signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land actually acquired to construct a road-bed or rail line). Here, Judge Lee correctly found that the Master's usage of the term "right-of-way" in the Final Order employed the latter meaning. See Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998) (noting the dual meaning of the term "right of way"); McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (1958) ("Here, we think the term 'right of way' was used as merely descriptive of the purpose to which the land was to be put, and was not intended to cut down to an easement the fee conveyed in the granting clause"); Frink v. North Carolina Bd. of Transp., 41 N.C. App. 751, 255 S.E.2d 746 (Ct. App. 1979) (in determining the specific interest obtained by the State of North Carolina through condemnation, the court held the term "right of way" meant fee simple ownership, rather than a mere easement).

Judge Lee's ruling that SCDOT owns the subject strip of land is supported by the fact that the Master's Final Order concluded SCDOT is entitled to assert its title to the land. The term "title" means the formal right of fee ownership of property. Black's Law Dictionary has defined "title" as:

> The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land; also the evidence of such ownership. Such ownership may be held individually, jointly, in common, or in cooperate or partnership form.

Black's Law Dictionary 1485 (6th ed. 1990). Black's has also similarly defined "title" as:

> 1. The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself ... 2. Legal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence ...

Black's Law Dictionary (9th ed. 2009).

Consequently, Judge Lee did not err in concluding that SCDOT owns the 66 foot wide strip of land.

III. SCE&G had lawful authority to cut the trees that were within the 66 foot wide strip of land.

The Master's Final Order conclusively established that SCDOT is the owner of the 66 foot wide strip of land where the trees and fence were located. However, even if, as Plaintiffs contend, SCDOT is not the fee owner of the 66 foot wide strip of land, SCE&G nonetheless had authority to remove the trees pursuant to S.C. Code Ann. §§ 58-9-2020 (1977) and 58-27-130 (1987).[6] Code sections 58-9-2020 and 58-27-130 provide a broad grant of authority to electric utilities to construct, maintain, and operate lines upon any of the highways or public roads of the State.

S.C. Code Ann. § 58–9–2020 (1977) provides: "Any telegraph or telephone company ... may construct, maintain and operate its line ... under, over, along and upon any of the highways or public roads of the State... ."

Section 58-27-130 grants to electric utilities the "same rights, powers and privileges" that are conferred upon telegraph and telephone companies under S.C. Code Ann. § 58–9–2020.[7]

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[6] Furthermore, SCE&G holds an easement dated September 22, 1936, which was granted to SCE&G's predecessor in interest, Broad River Power Company. The easement was for the construction of utility poles and power lines along Turkey Farm Road, and pursuant to this easement, SCE&G has "the right, privilege and authority to cut or trim trees along said line necessary to keep the wires thereof clear at least ten (10') feet." [Easement dated 9/22/1936, R. pp. 97-98.]

[7] Section 58-27-130 provides: "Subject to the same duties and liabilities, all the rights, powers, and privileges conferred upon telegraph and telephone companies to acquire rights-of-way for the construction, maintenance, and operation of lines under §§ 58-9-2020 to 58-9-2030 are granted unto electric lighting and power companies incorporated under the laws of this State ..."

The expansive grant of authority provided by sections 58-9-2020 and 58-27-130 governing a utility's maintenance of power lines gives SCE&G the lawful right to trim and cut trees standing within SCDOT's right of way on Turkey Farm Road. There is no limiting language within the relevant statutory provisions that would indicate otherwise.

Plaintiffs cite to Leppard v. Central Carolina Telephone Company, 205 S.C. 1, 30 S.E.2d 755 (1944), in support of their position that SCE&G did not have statutory authority to cut the cedar trees within the right of way. In Leppard, the plaintiff sought to recover damages against a telephone company for injuries to her "lawn and shrubbery." 30 S.E.2d at 759. The lower court granted judgment in favor of the telephone company, but the Supreme Court remanded for consideration of special damages, if any. Id. Plaintiffs assert that Leppard "address[es] destruction of shrubbery located within a right-of-way." [Brief of the Appellants, p. 15.] However, a reading of the Supreme Court's opinion reveals that it is likely that the damaged shrubbery in Leppard was located on the plaintiff's residential property, and not within a right-of-way. In describing the special damages claimed by the plaintiff, the opinion states that there was evidence that "certain hedge bushes on her property were broken down or pulled up ..." Id. (emphasis added). Consequently, any reliance on Leppard by Plaintiffs in the present appeal is misplaced.

Plaintiffs also argue that they must have been the owners of the cedar trees because SCE&G initially sought their permission to cut the trees pursuant to an SCE&G company policy. [Brief of Appellants, pp. 16-17.] This argument is baseless. Whether SCE&G contacted the Plaintiffs prior to cutting the trees to seek permission to cut the trees is entirely irrelevant and has no bearing on the legal issue of who owns title to the strip of land where the trees and fence were located. The Master has already decided this issue, concluding that

SCDOT, not Plaintiffs, has ownership of the strip of land, and as previously discussed, this conclusion is now binding on Plaintiffs.

Conclusion

The Master found in his Final Order that in March 1967, SCDOT acquired by eminent domain a 66-foot wide parcel, which included a portion of the land once owned by the Plaintiffs' father, their predecessor in interest. The strip of land acquired by SCDOT through eminent domain in 1967 encompasses the area where the cedar trees and fence at issue were located. The Master concluded that SCDOT owns the 66 foot wide right of way and that SCDOT is not barred from asserting its title.

The Circuit Court, in granting summary judgment in favor of SCE&G, correctly found that Plaintiffs are collaterally estopped from relitigating the issue of ownership and title to the right of way because that issue was decided in the Master's Final Order. The Court properly found that the Master's Final Order conclusively established that Plaintiffs do not own the strip of land where the trees and fence were located, and accordingly, the Court ruled that Plaintiffs were not entitled to recover damages against SCE&G for the cutting of trees located within the right of way owned by SCDOT.

The Circuit Court's grant of summary judgment in favor of SCE&G is also supported by South Carolina Code sections 58-9-2020 (1977) and 58-27-130 (1987), which provide a broad grant of authority to electric utilities to construct, maintain, and operate lines upon any of the highways or public roads of the State.

Because Plaintiffs have no factual or legal basis to impose liability upon SCE&G, the Circuit Court properly granted summary judgment. For the foregoing reasons, SCE&G respectfully urges the Court of Appeals to affirm the Circuit Court's ruling.

Respectfully submitted,

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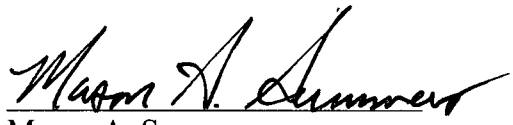
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Respondent's Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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