IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2008-CP-40-8425

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

vs.

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

REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

In its brief, SCE&G argues ownership of the trees and fence at issue between the LeGrandes and SCE&G was finally determined by the Master's Final Order, so that the circuit court correctly gave preclusive effect to that prior determination. This argument mistakenly assumes that the Master was ever asked to decide who owned the trees and fence.

SCE&G further argues the Master's repeated and consistent use of the phrase "right of way" to describe SCDOT's interest should be construed to mean something analogous to "highway corridor" as opposed to "easement," even though nothing in the Master's Final Order indicates an awareness of any potential dual meaning for that phrase, let alone an intention to use the phrase in the sense suggested by SCE&G. In essence, SCE&G argues that the Master's use of the phrase is ambiguous and the ambiguity should be resolved in favor of taking the greatest estate possible, i.e., a fee simple interest. This argument runs directly counter to the rule that an intent to condemn a fee simple interest will not be presumed. Kunkle v. South Carolina Electric & Gas Co., 251 S.C. 138, 161 S.E.2d 163 (1968); *see also*, Windham v. Riddle, 370 S.C. 415, 635 S.E.2d 558 (Ct. App. 2006)(in case of ambiguity, that construction which least restricts the property will be adopted).

SCE&G correctly notes that the LeGrandes did not perfect their appeal of the Master's Final Order.[1] This is easily explained by the LeGrandes' belief that the Master's Final Order did not determine ownership of the trees and fence, or SCE&G's right to destroy them. The case before the Master was tried on the theory that SCDOT had lost whatever interest it may otherwise have had through non-use and lack of notice. Thus, the LeGrandes understood the Master's Final Order as deciding only that SCDOT retained ownership of its March 1967 easement. Had the LeGrandes

[1] *See*, Respondent's Brief at pages 3 and 15.

understood the Master's Final Order to include the rulings now urged by SCE&G, they would not have allowed their appeal of the Master's Final Order to lapse.

A careful analysis of the issues before the Master and the rulings in the Master's Final Order reveals the fallacy in SCE&G's position.

1. Issue Preclusion Does Not Apply to Ownership of the Trees

In its brief, SCE&G correctly notes that, as a general rule, collateral estoppel applies to those issues which were actually litigated and necessarily decided by the Master's Final Order.[2] However, the pleadings in the LeGrandes' case against SCDOT nowhere mention the trees or the fence. [R.A. pp. 123 - 127; pp. 128 - 136][3] Likewise, nowhere does the Master's Final Order say anything about who owned the trees and the fence in 2005. SCE&G nevertheless argues the Master necessarily determined that issue.

It was quite simply unnecessary for the Master to determine who owned the trees and fence because they had already been destroyed in 2005 and thus posed no impediment to the 2010 road widening project. The only issues the Master was required to determine – and which he actually determined – were: (1) the location of the easement acquired by SCDOT in March 1967; (2) whether that easement had been abandoned following almost 40 years of non-use;[4] and (3) whether the

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[2] *See*, Respondent's Brief at page 14.

[3] Significantly, throughout its Answer to the LeGrandes' Complaint, the SCDOT refers to its interest along Turkey Farm Road as "the 1967 Easement," never once describing that interest as the entire fee. *See*, R.A. p. 129 at ¶5; p. 130 at ¶7 and ¶8; p. 131 at ¶10 and ¶16; p. 132 at ¶23 and ¶24. Obviously, SCDOT's own learned counsel believed its interest amounted to a mere easement. At no time did SCDOT ever contend before the Master that its interest was anything more than the easement described by its own pleadings.

[4] The LeGrandes argued to the Master that the doctrines of estoppel, laches and acquiescence applied to prevent SCDOT from asserting its right-of-way easement.

LeGrandes had actual or constructive notice of the easement when they bought Cedar Lane Farm from their mother in 1995.

The Master was not asked to decide whether SCDOT (or SCE&G) owned the trees and fence. Nor did the Master actually decide that issue. Instead, the Master's Final Order explicitly notes that SCE&G's right to cut the trees was the subject of another pending action, leaving the determination of that issue to the trial of that separate action. [R.A. p. 51 at ¶12] Accordingly, the LeGrandes were not collaterally estopped from further litigating ownership of the trees and fence, or SCE&G's right to destroy them, in the circuit court.[5]

2. "Right-of-Way" Is Not Synonymous with Fee Simple Ownership

In its brief, SCE&G argues that because the trees and fence were located on land owned by SCDOT, it was alright for SCE&G to destroy them. In support of its position, SCE&G presents for the first time on appeal the argument that the phrase "right-of-way" has a latent, dual meaning which in this case should be translated as something like "highway corridor" as opposed to "easement," as the phrase is most commonly understood.

Throughout his Final Order, the Master consistently uses the phrase "right of way" to describe the property interest at issue.[6] But nowhere does the Master define or ascribe any particular meaning to his use of the phrase "right of way." Indeed, nothing in the Master's Final Order even

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[5] It bears noting that the case against SCDOT principally involved a declaratory judgment. A declaratory judgment is not *res judicata* as to matters not at issue and not passed upon. *Res judicata* is only a bar to matters which were actually litigated, not those that might have been litigated. Robison v. Asbill, 328 S.C. 450, 492 S.E.2d 400 (Ct. App. 1997).

[6] By way of illustration, on Pages 10 and 11 of the Respondent's Brief, eleven paragraphs from the Master's Order are bullet-pointed. Each of the those paragraphs contains the descriptor "right of way." None of those paragraphs contain the phrase "fee simple."

remotely suggests the Master's awareness of a dual meaning, let alone an intention to use the phrase in one sense as opposed to the other.

Accordingly, the entire record must be reviewed to determine whether SCDOT obtained an easement or the entire fee in March 1967. *See*, Eldridge v. City of Greenwood, 331 S.C. 398, 425, 503 S.E.2d 191, 205 (Ct. App. 1998)("We must therefore review the trial court's conclusion that the Railroad condemned only an easement . . . or if not an easement, then a fee simple determinable.")

The March 1967 condemnation proceeding against Hazel P. LeGrande, Sr. was initiated pursuant to S.C. Code Ann. §33-121 *et seq.* (Code 1962, as amended), which governed condemnations by the Highway Department for construction of the state highway system. Section 33-122, in effect at that time, provided in pertinent part:

> The Department may acquire an easement or fee simple title to real property by gift, purchase, condemnation or otherwise as may be necessary.

Whether the March 1967 condemnation proceeding sought an easement or fee simple title is thus a key issue raised by SCE&G's position.[7]

Statutes authorizing the acquisition of a fee simple title by condemnation do not mean that in every instance of the exercise of such power the fee is acquired. Kunkle, *supra.* Where a condemnor has the optional ability to condemn a fee simple interest, the condemnation proceeding must clearly show the interest or estate sought to be acquired, otherwise the condemnee has inadequate notice of the extent of the taking. Ibid. The fact that the property to be taken is described generically, e.g., as "lands," does not mean the entire fee is being acquired. Id., 251 S.C. at 148, 161

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[7] As SCE&G correctly notes, 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. *See*, Respondent's Brief at page 6, footnote 2.

S.E.2d at 166. In construing condemnation proceedings to determine whether the entire fee was acquired, it will not be assumed in case of doubt that more was taken than was reasonably necessary to accomplish the public purpose. Id. Where a condemnation proceeding does not specify the interest or estate to be taken, and it is optional whether the fee or an easement will be taken, only an easement will be held to have been acquired if an easement will adequately serve the proposed use. Id.[8]

Importantly, it has been held that when a condemnation takes place without any cash compensation being paid to the condemnee, only an easement is acquired. Lewis v. Wilmington & Manchester R.R. Co., 45 S.C.L. (11 Rich.) 91, 95 (1857); Eldridge, *supra*, 331 S.C. at 424, 503 S.E.2d at 204. The March 1967 condemnation process did not result in any cash compensation being paid to Mr. LeGrande. [R.A. p. 208]

The 1967 Notice of Condemnation [R.A. p. 206] states in part as follows (emphasis added):

> PLEASE TAKE NOTICE That the South Carolina State Highway Department . . . requires a **right-of-way** for a public highway through and across lands in which the above-named person . . . claims title . . . . All **right of way** herein condemned is shown more particularly on sheets 11, 12 and 13 of plans for this project.
>
> The above-described property will be condemned and a **right-of-way** established by the State Highway Department, and
>
> YOU WILL TAKE FURTHER NOTICE That a public hearing will be held at 11:30 a.m. on the 22nd day of March, 1967 . . . to ascertain the amount of damages in excess of benefits as a result of **using said lands for the proposed highway improvement.**

The Notice of Condemnation refers only to a "right of way" to be "use[d]" for "highway improvement." There is no explicit reference to fee simple title and no clear indication a fee simple

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[8] That no roadway was actually constructed to occupy the disputed portion of the right-of-way easement for almost 40 years speaks volumes as to the necessity of acquiring the entire fee.

interest is being sought. Following the referenced March 22, 1967 hearing, a Resolution of Board of Condemnation was issued [R.A. p. 208], holding as follows (emphasis added):

> After due notice served upon the above-named person . . . that a **right-of-way** would be condemned . . . and compensation fixed and damages assessed. . . .

The Resolution mentions only a "right-of-way" rather than fee simple title.

Following the issuance of the Resolution, Mr. LeGrande negotiated with the Highway Department to relocate a portion of the planned roadway. Mr. LeGrande thereafter executed a "Right of Way Easement" [R.A. p. 210] containing the following language (emphasis added):

> KNOW ALL ME BY THESE PRESENTS that I Hazel P. Legrande . . . have bargained, sold and released . . . unto said South Carolina Highway Department and its successors and assigns, a **right-of-way** for the construction of a section of the State Highway . . . . for the purpose of locating, constructing, improving and maintaining the above described highway. . . . Said **right-of-way** to have a width of 66 feet, . . .
>
> "Special Provision:" **Right of way** herein granted is along a relocation as shown on plans . . . .
>
> It is agreed that buildings, fences, signs or other obstructions will not be erected . . . within the limits of the **right-of-way** herein conveyed and that such buildings and fences as are now within the limits of the **right-of-way** herein conveyed will be moved from the **right-of-way** . . . at the expense of the State Highway Department . . . .
>
> TO HAVE AND TO HOLD, all and singular, the said **right-of-way** and the rights herein before granted, unto the said South Carolina State Highway Department, its successors and assigns forever.

This "Right of Way Easement" repeatedly describes the interest being acquired as only a "right of way." The language relating to "successors and assigns" simply indicates the intention to convey an appurtenant easement (which runs with the land) as opposed to an easement in gross.

One can certainly ask the rhetorical questions, Why would SCDOT negotiate with Mr.

LeGrande for a "Right of Way Easement" if the condemnation already granted SCDOT the entire fee? Why would Mr. LeGrande sign a "Right of Way Easement" instead of a "Deed" if the entire fee were being conveyed? Why would SCDOT itself repeatedly refer to its interest as "the 1967 Easement" if instead it owned the entire fee?[9] The implication here is that only an easement was condemned and only an easement was conveyed. There certainly is no clear indication the entire fee was being condemned or conveyed.

In summary, the Notice of Condemnation does not clearly identify fee simple title. Instead, it refers only to a "right of way." The Resolution of Board of Condemnation does not clearly identify fee simple title, but rather only a "right of way." The Right of Way Easement does not clearly identify fee simple title, but rather only a "right of way." The pleadings before the Master refer only to an "easement." The Master's Final Order nowhere mentions fee simple title but instead repeatedly uses the phrase "right of way" to qualify SCDOT's ownership interest. Neither the condemnation documents themselves, nor the Master's Final Order, clearly indicate that a fee simple interest was at stake.

It is interesting to note several reported South Carolina cases in which a "right of way" or "right of way easement" has been involved. For example, in Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) a "right of way easement" was treated as a mere easement, not a fee simple conveyance. The case of Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006) referred to an SCDOT "right of way" as merely an easement. In Creative Displays, Inc. v. South Carolina Highway Dept., 272 S.C. 68, 248 S.E.2d 916 (1978) a "right of way easement" conveyed to SCDOT was treated as a mere easement. Wilson v. South Carolina State Highway

[9] *See*, footnote 3, *supra*.

Department, 264 S.C. 22, 212 S.E.2d 61 (1975) also treated a "right of way easement" granted to the South Carolina Highway Department as merely an easement. These cases strongly suggest the phrases "right of way" and "right of way easement" typically mean an easement, not the entire fee.

None of the cases cited by SCE&G require a finding that "right of way" should be translated to mean "fee simple" or "highway corridor." For example, Joy v. City of St. Louis, 138 U.S. 1, 44, 11 S.Ct. 243, 256 (1891) contained the following comments:

> Now the term 'right of way' has a two-fold signification. It sometimes is 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 which railroad companies take upon which to construct their road-bed. **Obviously in this paragraph it is used in the latter sense.** Through both of these contract the terms "'right of way,' 'track,' and 'road bed' frequently appear, and in all cases the term 'right of way' is used as descriptive of the strip above referred to (emphasis added).

The LeGrandes respectfully suggest it is hardly clear let alone "obvious" that the March 1967 condemnation documents and the Master's Final Order use the phrase "right of way" as a synonym for "fee simple" or "highway corridor." Additionally, McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (NC 1958) did not involve condemnation but rather "a regular form deed of bargain and sale," 101 S.E.2d at 334 (emphasis added) which is clearly different from the form "Right of Way Easement" used in this case. Lastly, Frink v. North Carolina Board of Transportation, 41 N.C.App. 751, 255 S.E.2d 746 (1979) construed the statutory phrase "right of way" to mean fee simple only in light of other language in the same statute indicating that any condemnation proceeding thereunder would "divest the owner of the land condemned of all right, title, interest and possession," this being incompatible with a mere easement.

In summary, the LeGrandes' case against SCDOT involved a trial over whether SCDOT's 1967 easement had been lost by almost 40 years of non-use, or defeated by a lack of actual or

constructive notice to the LeGrandes. Ownership of the trees and fence was not an issue because the trees and fence were already gone. SCDOT did not believe it owned the entire fee, but SCE&G cleverly seized upon the language in the Master's Final Order to convince the circuit court that ownership of the trees and fence had already been litigated and decided. It was error for the circuit court to take this bait and misconstrue the proceedings before the Master by applying issue preclusion to issues of ownership which had not, in fact, been heard let alone decided.

3. The Trees Were Never Owned by SCE&G

In its brief, SCE&G fails to rebut the indisputable fact that whatever the result of the 1967 condemnation process may have been, ownership of the trees and fence was most certainly not conveyed *to SCE&G*. Since SCE&G clearly did not itself own the trees, SCE&G was constrained to deal with someone else's trees (owned either by the LeGrandes or SCDOT) only in such a way as was reasonably necessary to maintain its utility poles and power lines. *See*, Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(noting the exercise of statutory power must be restricted to the reasonable necessities of the case and discussing the evidence of such necessity set forth in the record.) There is no evidence in the record to suggest that clear-cutting the trees in November 2005 was reasonably necessary to SCE&G's maintenance of the poles and lines along Turkey Farm Road. Neither the Master nor the circuit court made any such factual inquiry or finding. The undisputed fact that the trees, fence, utility poles and power lines were all able to peacefully co-exist for many decades belies any suggestion the November 2005 clear-cutting was reasonably necessary.

4. The 1936 Easement to Broad River Power Company Was Not Raised or Ruled Upon

In its brief, SCE&G suggests that an easement granted to the Broad River Power Company

in 1936 gave it the right to destroy the trees and fence in November 2005.[10] A review of the transcript of the hearing held before the circuit court [R.A. pp. 7 - 16] reveals this issue was not raised by SCE&G. A review of the circuit court's oral bench ruling [R.A. pp. 33 - 39] reveals this issue was not ruled upon, either. An issue which has not been raised and ruled upon in the trial court cannot be presented for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011); Proctor v. Steedley, Op. No. 4999 (S.C.Ct.App. filed July 11, 2012)(Shearhouse Adv.Sh. No. 23 at 121).

Had SCE&G argued this issue in the circuit court, the LeGrandes were prepared to present testimony about the history of power lines along Turkey Farm Road, including testimony that prior to the 1970s any such lines were located across Turkey Farm Road from Cedar Lane Farm and that the 1936 easement was not located in the area of the cedar trees and fence at issue. Because SCE&G did not present any evidence or argument to the circuit court in reliance upon the 1936 easement, the LeGrandes made no effort to respond. This Court should therefore decline SCE&G's invitation to decide the instant appeal on the basis of an argument which does not appear anywhere in the record of the proceedings before the lower court. *See*, SCACR 220(c).

CONCLUSION

Nothing appears anywhere in the Master's Final Order to suggest an awareness of any proposed dual meaning for the phrase "right of way," let alone an intention to use that phrase to generically refer to a "highway corridor" as opposed to the legal extent of the property interest condemned by SCDOT. It is therefore a mistake to accept SCE&G's suggestion that the phrase was used with a meaning other than that ascribed to it by multiple South Carolina cases construing a

[10] *See*, Respondent's Brief at pages 4 - 5; and at page 21, footnote 6.

"right of way" or "right of way easement" as nothing more than an easement.

If the circuit court perceived a dual meaning in the Master's Final Order, it was error to resolve that ambiguity in favor of SCE&G when the condemnation documents do not evince a clear intent to condemn the entire fee as opposed to a mere right-of-way easement.

It was error for the circuit court to construe the Master's Final Order as determinative of the issue of ownership of the trees and fence. That issue was neither presented to the Master, ruled upon by the Master, nor necessary for the Master's decision on the issues he was presented for decision. The circuit court's entry of summary judgment for SCE&G should therefore be reversed and this case remanded to the circuit court for trial.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Sept. 28, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant, Reply Brief of Appellant, and the Record on Appeal all comply with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the redaction of personal data identifiers and other sensitive information from documents filed with the Court.

October 8, 2012

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