STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
MASTER-IN-EQUITY

O. Davie Burgdorf, Master-in-Equity

Case No.: 2007-CP-38-1424

John W. Williams, III and Kathryn J. Williamson ..... Petitioners,

v.

The County of Orangeburg ..... Respondent.

RESPONDENT'S RETURN
TO
PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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ISSUES RAISED BY PETITIONERS

I. The Master and the Court of Appeals are alleged to have erred by ignoring Petitioners' evidence of lack of necessity in Respondent's action in eminent domain.

II. The Master and the Court of Appeals are alleged to have erroneously disregarded that Petitioners' case was prejudiced by the Master's evidentiary rulings.

STATEMENT OF THE CASE

Respondent, County of Orangeburg, served Petitioners with its Condemnation Notice and Tender of Payment on September 27, 2007. On October 29, 2007, Petitioners filed an action challenging the condemnation. The case proceeded to trial before the Honorable O. Davie Burgdorf, Master-in-Equity for Orangeburg County, on October 21, 2008. Following the conclusion of the non-jury trial on October 23, 2008, the Master issued a written Order dated and filed January 21, 2009. In his Order, the Master ruled that the condemnation was lawful. Final Order, Williamson v. County of Orangeburg, No. 2007-CP-38-1424 (R. p. 3).

Petitioners purchased a 238 acre property in Orangeburg County on the South Fork of the Edisto River in March 2005 (R. p. 593) (R. p. 78, ll. 2-8). At the time of purchase, there existed on the property a lease to the County for use of an existing public boat ramp and public access to the South Fork of the Edisto River (R. p. 85, l. 23; R. p. 86, l. 13). Pursuant to the terms of the lease agreement, Petitioners cancelled the lease by having their attorney send a rescission letter to the County on March 1, 2006 (R. p. 92, ll. 23-25).

County Council member Heyward Livingston met with Petitioner John Williamson in July 2006 to discuss reopening the landing but nothing was resolved (R. p. 101, ll. 21-25). He had two further meetings with Mr. Williamson (R. p. 273, l. 16; R. p. 274, l. 12). About

six weeks after Mr. Livingston's first meeting, Petitioner John Williamson met with County Administrator William Clark and Deputy Administrator Earl Whalen (R. p. 102, l.16; R. p.103, l. 11; R. p. 104, ll. 8-14). Again, nothing was resolved. In September of 2006 Respondent, by unanimous resolution, authorized its County Administrator and Attorney, to "do whatever is necessary to keep the landing open" (R. p. 583, 584). There ensued further discussions and negotiations between the parties, which negotiations were unsuccessful in reopening the landing (R. p. 152, l. 19; R. p. 153, l. 7). In November of 2006 Respondent, by unanimous resolution, further authorized its personnel, "to proceed with legal activity to reopen Ness Landing to the public" (R. p. 580) (R. p. 118, l. 15 - p. 120, l. 1). Negotiations and discussions continued through the summer of 2007 (R. p.170, l. 8 - p. 172, l. 22).

By November 2006, Respondent believed that the possibility of a voluntary resolution between the parties was much diminished (R. p. 228, l. 2 - p. 233, l. 18). As the negotiations and discussions between the parties continued, Respondent pursued several tracks simultaneously to make a landing on the South Fork of the Edisto available to the public. The various tracks included 1) obtaining a consensual extension of the lease agreement; 2) purchasing the property; 3) acquiring an alternate site by purchase; and, 4) condemnation of a site (R. p. 228, l. 2 - p. 233, l. 18). Respondent pursued "multiple different approaches to looking to open back up a site of public access" (R. p. 228, l. 2 - p. 230, l. 3).

In January 2007 Respondent County engaged professional engineer Berry Still to provide engineering consulting services to study potential alternative sites for Ness Landing along the South Edisto (R. p. 410, l. 23 - p. 411, l. 18). The trial court qualified Mr. Still, without objection, as an "expert in civil engineering, transportation engineering, site

selection, site design and environmental considerations concerned with all of the above." (R. p. 420, ll. 1-10). Mr. Still testified that he was aware that some controversy surrounded the prior site of the Ness Boat Landing on the Petitioners' property and made it clear that the process, the selection of the preferred site for the boat landing, would have no preconceived ideas (R. p. 422, l. 21 - p. 428, l. 16). Mr. Still testified that, to start the process, "first we had to develop a purpose and need." (R. p. 424, l. 23 - p. 425, l. 2).

Mr. Still began a study process with a steering committee, the Boat Landing Assessment Committee (or, "BLAC") (R. p. 230, ll. 14-20) (R. p. 412, l. 5 - p. 432, l. 21). The Committee "went through all that process. We went through establishing a purpose and need." (R. p. 432, ll. 9-24). The study involved a mailed-out survey as well as a public hearing (R. p. 432, l. 17 - p. 438, l. 21) (R. p. 448, l. 1 - p. 464, l. 15). Mr. Still testified that, "We needed to establish – one thing is establishing a need. So they put out a Need Assessment Survey, which you heard about earlier that Mr. Young did." (R. p. 432, l. 24 - p. 433, l. 2). Mr. Still testified that, "Well, basically that was – it was a Need Assessment Survey. So we set out there to calculate what the need is, and basically of the ones that came back, the majority of them, 82 of them, said yes." (R. p. 451, ll. 11-22) (R. p. 452, ll. 3-20) Mr. Still testified, "We went and did the survey, an assessment of need survey, and it came back that yes; a majority of the people say it's needed." (R. p. 471, ll. 2-5). "And our purpose and need is in the proposal – not the proposal, but in my decision document." (R. p. 425, ll. 12-25). Mr. Still testified, "You don't just go and just figure out what the study area is before you start figuring out what your purpose and need is. You don't start going and looking at sites before you go through these processes." (R. p. 430, ll. 13-17).

The report identified Petitioners' property as the preferred alternative out of, first, eighteen alternative locations, and finally, four alternative locations (R. p. 428, l. 1 - p. 432, l. 21) (R. p. 454, l. 19 - p. 462, l. 20). The Committee did not make a decision then as to a preferred site: The Committee took its findings to the public to see what the Committee's thought process was and comment on the process and let the Committee know if it needed to be different or if the Committee missed anything. (R. p. 399, ll. 11-18) (R. p. 432, ll. 17-21). To get the comment and input of the public, the Committee first sent out a Need Assessment Survey and received returned, completed surveys and, second, held a publicized public hearing. (R. p. 397, l. 24 - p. 398, l. 8) (R. p. 454, l. 19 - p. 462, l. 20).

Orangeburg County Council voted in open session at its February 2007 Retreat to make a boat landing on the South Fork of the Edisto River one of its priorities (R. p. 376, ll. 11-18). According to Mr. Clark, that vote was reached after discussion and deliberation and input from the council members and County staff (R. p. 543, l. 14 - p. 546, l. 21). The Boat Landing Assessment Committee completed its work in Spring 2007 and presented its findings to the Orangeburg County Council in a report which identified the Petitioners' property as the preferred of several alternatives. Orangeburg County Council voted to accept the report and move forward with the acquisition of the landing site on the Petitioners' property (R. p. 547, l. 17 - p. 550, l. 24) (R. p. 558, l. 6 - p. 559, l. 14). On or about September 28, 2007, some seventeen months after Petitioners cancelled the boat landing lease, Respondent served Petitioners with its Condemnation Notice and Tender of Payment.

This appeal stems from the condemnation of 4.42 acres of land (R. p. 616) from Petitioners' 238 acre property. Respondent sought to condemn and obtain the property "for

public purposes, more particularly for the J.B. Ness Boat Landing Project, a recreational and transportation improvement project near S.C. Route 70 in Orangeburg County." (R. p. 616).

Petitioners filed a separate action challenging the condemnation on several grounds (R. p. 38). Petitioners alleged that the condemnation action is "parochial, illogical, arbitrary, wasteful, and an abuse of discretion" (R. p. 27, ¶ 32), "unreasonable, unnecessary, wasteful, arbitrary and capricious" (R. p. 28,¶ 36) and that Respondent "acted in bad faith and grossly abused its authority and discretion by deciding to take [Petitioners'] land for inappropriate parochial reasons without benefit of having examined the actual public necessity of the taking in advance." The non-jury trial ended on October 23, 2008, the Master issued a written Order dated and filed January 21, 2009, and Petitioners filed their appeal. The Court of Appeals affirmed the Master on February 10, 2011 (Unpublished Opinion No. 2011-UP-052) and denied Petitioners' Motion for Rehearing on March 24, 2011.

ARGUMENT

I. The Master and the Court of Appeals did not ignore, disregard or overlook Petitioners' failure to prove that Respondent's project lacked the necessity required of an action in eminent domain.

Petitioners claim the Court of Appeals ignored Petitioners' alleged evidence of lack of necessity in Respondent's action in eminent domain. Petitioners claim the County never considered the necessity for the taking before making the decision to condemn and that the "evidence simply cannot support a finding that the County ever assessed need, let alone that it did so prior to its condemnation decision." (Petitioners' Petition for Rehearing, § II, p. 5 - 6). Petitioners simply ignore the record, the sequence of events established by the record and

the import of these events. The County considered a number of alternatives to condemnation and did not condemn Petitioners' property until it had thoroughly studied the matter with the benefit of an engineering consultant, an engineering study and a public hearing which identified Petitioners' property as the preferred alternative site for the J. B. Ness Boat Landing. The sequence of the events is set forth in chronological outline below:

March 15, 2005	Landowners purchased the 238 acre property. (R. p. 78, ll. 2-8) (R. p. 593).
March 1, 2006	Landowners cancelled the lease by having their attorney send a rescission letter (R. p. 572) to County. (R. p. 92, ll. 23-25).
June 26, 2006	Landowners installed a gate and closed the boat landing without interference by the County. (R. p. 94, l. 22 - p. 95, l. 13).
July 2006	County Councilman Livingston met with Mr. Williamson. (R. p. 95, ll. 7-15).
August 2006	About six weeks after Mr. Livingston's first meeting, Mr. Williamson met with County Administrator Clark and Deputy Administrator Whalen. (R. p. 102, l. 11 - p. 103, l. 11).
Summer 2006	Deputy Administrator Whalen met with Mr. Williamson several times and all meetings were "very cordial." (R. p. 349, l. 12 - p. 351, l. 13; p. 354, ll. 7-10) and proceeding in a positive manner. (R. p. 351, ll. 1-13). There were no threats of condemnation (R. p. 350, ll. 12-20; p. 259, l. 22 - p. 260, l. 13, p. 354, ll. 14-22) which would have been counterproductive to the positive discussions with the Landowners. (R. p. 259, l. 25 - p. 260, l. 13).
September 5, 2006	County Council, by unanimous resolution, authorized its County Administrator and County Attorney, to "do whatever is necessary to keep the landing open." (R. p. 116, l. 13 - p. 117, l. 24).
October 13, 2006	County Administrator Clark wrote Landowners stating that the County was prepared to address their concerns. (R. p. 112,

	l. 22 - p. 115, l. 12). This letter was intended to elicit written criteria for an agreement with the Landowners. (R. p. 258, ll. 13-22).
Fall, 2006	County Administrator Clark and Deputy Administrator Whalen investigated alternative locations for the Ness boat ramp. (R. p. 356, l. 5 - p. 357, l. 24). County Administrator Clark met with staff of SCE&G to explore alternative boat ramp locations. (R. p. 254, l. 9 - p. 255, l. 20).
November 21, 2006	County, by unanimous resolution, further authorized its personnel, "to proceed with legal activity to reopen Ness Landing to the public." (R. p. 118, l. 15 - p. 119, l. 22).
November 2006	As the negotiations and discussions with the Landowners continued, the County pursued several tracks simultaneously to make a landing on the South Fork of the Edisto available to the public. The various tracks included 1) obtaining a consensual extension of the lease agreement; 2) purchasing the property; 3) acquiring an alternate site; and, 4) condemnation of a site: "My directive was to pursue all of these tracks, and that is why we engaged the boat landing commission to begin to explore alternate sites." "We made multiple different approaches to looking to open back up a site of public access." (R. p. 228, l. 2 - p. 229, l. 14).
January 5, 2007	County engaged Engineer Still to provide engineering consulting services to study potential alternative sites for a landing along the South Edisto. (R. p. 410, l. 23 - p. 411, l. 18).
January 27, 2007	County Council voted in its publicly-noticed open-session planning meeting at its 2007 Retreat to make additional boat landings on the South Fork of the Edisto River, on the North Fork of the Edisto River, and on Lake Marion "community resource goals." (R. p. 543, l. 18 - p. 545, l. 16).
January 29, 2007	Engineer Still introduced "the elephant in the room" and explained to the Boat Landing Assessment Committee that the process "will have no preconceived ideas." (R p. 422, l. 9 - p. 424, l. 22). Engineer Still addresses purpose and need. (R. p. 426, l. 11 - p. 432, l. 21). The Committee mailed out an Need Assessment Survey which announced a public hearing

	to be held on February 15, 2007. (R. p. 432, l. 22 - p. 434, l. 13). There were mail-outs and posters in the newspaper regarding the public meeting. (R. p. 394, ll. 1-5). The result of the survey indicated ". . . . that yes; a majority of the people say it's needed." (R. p. 471, ll. 2-5).
February 15, 2007	According to Deputy Administrator Whalen, there was a public hearing and there were 40 to 50 people who attended the public hearing. (R. p. 364, l. 14 - p. 365, l. 15). Deputy Administrator Young testified there were "up towards to 50" [sic] people who attended the public hearing. (R. p. 405, ll. 1-6). At the public meeting, the Committee had perhaps four or five sites mapped but also had the entire county map for the South Fork of the Edisto, and during the meeting the Committee members were asking people if they knew of any other locations along the river. (R. p. 399, ll. 7-23).
February 22, 2007	Engineer Still reported that the Committee reduced the number of potential sites from six to four which reduced the contract payment to his company, RPM Engineers. (R. 601).
February 28, 2007	Engineer Still reported that he had received the public comments and surveys. (R. 602 - 603).
March 7, 2007	Engineer Still conducted site visits. (R. 602).
April 20, 2007	The Boat Landing Assessment Committee presented its report to the County Council. (R. p. 504, l. 19 - p. 505, l. 2). The final report was presented, voted on and accepted by County Council. (R. p. 547, l.17 - p. 548, l. 15).
September 4, 2007	County Administrator Clark wrote the Orangeburg Sheriff, with a copy to the Landowners, regarding desirable law enforcement activities at the boat ramp. (R. p. 250, l. 3 - p. 253, l. 9).
September 27, 2007	The County served Landowners with the unfiled Condemnation Notice, seeking to acquire "4.42 acres of land, more or less, composed of a portion of land located south of S.C. Highway 70" (R. p. 616).

Orangeburg County may exercise powers of eminent domain for, among other public

uses, transportation and recreation. S.C. Code Ann. § 4-9-30 (Supp. 2008). Pursuant to S.C. Code Ann. § 4-9-25 (Supp. 2008), Orangeburg County is permitted to exercise those powers "'respecting any subject as appears to them necessary and proper for the . . . general welfare' and these powers must be liberally construed." Hospitality Ass'n of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). ("The powers of a county must be liberally construed in favor of the county . . . ." S.C. Code Ann. § 4-9-25 (Supp. 2008)). The question of the public necessity of constructing a project as a whole is a legislative or political one. Bookhart v. Central Electrical Power Co-op, Inc., 222 S.C. 289, 72 S.E.2d 576 (1952).

In ruling on this matter, the Court of Appeals did not ignore Petitioners' failure to prove that Respondent's project lacked the necessity required of an action in eminent domain. The Court of Appeals' opinion specifically addressed the issue of necessity:

> "[T]he decision of the question of necessity lies with the one to whom the state has delegated the authority to take property for a public use and is not subject to review by the court in the absence of fraud, bad faith, or abuse of discretion." Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 158-59, 121 S.E.2d 743, 747 (1961). Accordingly, judicial review of a legislative condemnation decision such as the one in this case is deferential.

(Unpublished Opinion No. 2011-UP-052, p. 3, § II)

Petitioners have not shown that the legislative process – deliberations or decision-making – was arbitrary, incorrect, incomplete or unreasonable. County Administrator Clark testified that, in early 2007, Orangeburg County Council had held a Retreat, a public meeting of council for planning purposes, and discussed and considered recreational priorities and the need for boat landings on three bodies of water: North Fork [of the Edisto River], South Fork

[of the Edisto River], and Lake Marion. (R. p. 543, l. 18 - p. 545, l. 16). County Administrator Clark testified that the report of the Boat Landing Assessment Committee was placed on the agenda for County Council, presented to County Council, and that County Council voted on the report at a public meeting. (R. p. 547, l. 17 - p. 548, l. 23). This determination of need was properly a legislative and political determination.

Mr. Still testified without objection as an "expert in civil engineering, transportation engineering, site selection, site design and environmental considerations concerned with all of the above" (R. p. 420, ll. 1-10) that, the Boat Landing Assessment Committee studied the geographic area of Orangeburg County through which the South Fork of the Edisto River passes. (R. p. 427, l. 18 - p. 428, l. 7). He testified that the Committee mailed out questionnaires to the public for return (R. p. 432, l. 22 - p. 437, l. 15; p. 448, l. 2 - p. 454, l. 18) and held an advertised public hearing to gather public input on various potential boat landing sites under consideration, purpose and need. (R. p. 437, ll. 18-25; p. 439, l. 18). Mr. Still testified extensively about the many aspects of the study which the Committee addressed. Mr. Still testified that the responses from the public at the public hearing and the responses of the public through the mailed questionnaires confirmed that there was a need for an additional landing on the South Fork of the Edisto River. (R. p. 451, l. 11 - p. 452, l. 20; p. 470, l. 15 - p. 471, l. 5). Mr. Still testified, "We went and did the survey, an assessment of need survey, and it came back that yes; a majority of the people say it's needed." (R. p. 471, ll. 2-5). This determination of need was a validation of the legislative and political determination of need.

Petitioners allege that the existence of Claude's Landing, a boat landing in Bamberg

County, just a few miles distant, makes an Orangeburg County boat landing on the same river duplicative, unnecessary and unneeded. County offered Dennis Hardwick as an expert witness in canoeing, paddling, and in navigable rivers without objection by Petitioners. (R. p. 520, ll. 16-24; p. 535, ll. 7-8). Mr. Hardwick testified that he and other paddlers with different skill levels like to take different lengths of trips. He testified that "a landing side by side within a hundred yards, that would not be practical or feasible." (R. p. 533, ll. 5-14). He also testified,

> I think access to rivers is important. I think the public access is important. (R. p. 531, ll. 22-23).
>
> . . . .
>
> I have a lot of skill in paddling. Some people are novices, some people are beginning, some people are medium paddlers, but people with different skill levels need different lengths to access. So the more access it is, the better it is for the public, whether they are experts or not. (R. p. 532, ll. 11-16).
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> . . . .
>
> Well, I think it's more for just for the people in general, the citizens in general, to get to the river. Not just the skill levels, but whether they're fishermen, whether they're paddlers. Whatever their recreational interests are. The rivers need the access for the public to get to it. (R. p. 532, l. 24 - p. 533, l. 4).
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> . . . .
>
> You know, I keep hearing from Claude's [landing] to Ness [landing]. I look at not just from Claude's [landing] to Ness [landing], but from Ness [landing] down to Bobcat [landing]. That's about eight miles, I think. That's a good float trip. From Claude's to Ness is a good Sunday afternoon float trip or a float trip for somebody that is possibly handicapped, somebody elderly, somebody with kids, just to do a short trip, a pleasure trip to enjoy the river. (R. p. 533, ll. 16-23).
>
> . . . .
>
> Well, sometimes if somebody is injured, if you've got – the more access points, the more ability to get somebody out of the river. (R. p. 538, ll. 22-24).

Mr. Hardwick described several river hazards which made access important: insects such as wasps, low water and log jambs [sic], lightning and snakes. (R. p. 538, l. 25 - p. 540, l. 11).

Without access, the guarantee of our State Constitution that "all navigable waters within the limits of the State, shall be common highways and forever free, ..." is reduced to a worthless platitude. S.C. Const. art. XIV [Eminent Domain], § 1 and § 4. Just as a controlled-access highway may have multiple on ramps and off ramps in a single county, so may a common river highway have multiple boat landings in single county.

Petitioners also argue that County's determination that a boat landing in Orangeburg County, under the control of the County, is unreasonable and is not a justification for need. Administrator Clark testified that the County Council had discussed having an Orangeburg landing on the river, controlled by the County, so the County could guarantee its citizens access to the river. (R. p. 249, ll. 3-11). Petitioners' cancellation of the County's lease amply demonstrates the reasonableness of this concern. The County had no control over the landing on Petitioners' property; the County could not simply "go kick the gate open." The County has no control over Bamberg County or South Carolina Department of Natural Resources boat landings and cannot prevent their closure at some point – just as Horry County could not anticipate or prevent the closure of the Myrtle Beach Air Force Base. Without County control of a boat ramp or boat ramps, the County cannot guarantee its citizens access to the South Fork of the Edisto River.

Of significance is that no expert witness testified for Petitioners that an additional boat landing on the South Fork of the Edisto River would be redundant or unnecessary, or that Mr. Still's work, or the report of the Boat Landing Assessment Committee was deficient or insufficient. The Court of Appeals correctly noted that Respondent "conducted a survey to assess need and location preference and chose a boat landing which already existed, had

been regularly utilized by its citizens for thirty years, could be put to use immediately, and presented minimal costs." (Unpublished Opinion No. 2011-UP-052, p. 3, § II).

As part of their argument, Petitioners claim that County made the decision to condemn Petitioner's property for the Ness Boat Landing on September 5, 2006 and again on November 21, 2006 and before County began the engineering study; however, this argument ignores the truth that County did not condemn Petitioners' property for the Ness Boat Landing until after concluding the engineering study and voting to accept the recommendation of the engineering report. Before that last, significant vote, efforts by County were directed towards "different approaches to looking to open back up a site of public access." (R. p. 228, l. 2 - 229, l. 14). The different approaches included 1) obtaining a consensual extension of the lease agreement with Petitioners; 2) purchasing Petitioners' property; 3) acquiring an alternate site for Ness Landing; and, 4) condemnation of a site for Ness Landing. (R. p. 228, l. 2 - 229, l. 14). County efforts toward a compromise and settlement continued until nearly the very last moment. (R. p. 250, l. 3 - p. 253, l. 9).

II. The Master and the Court of Appeals did not ignore, disregard or overlook that Petitioners failed to prove their case was prejudiced by the Master's evidentiary rulings.

As a threshold matter, Petitioners are asking to supplement the Record on Appeal with two newspaper articles which Petitioners aver were part of the trial record and designated in the Record on Appeal, but were "mistakenly omitted" from the bound appeal record. These are two articles published in the Times & Democrat (Orangeburg, S.C.): Lee Hendren, "A pretty beautiful stretch of water", Times & Democrat (Orangeburg, S.C.),

September 14, 2006, at 1A, 5A (R. p. 623 - p. 624); Gene Zaleski, Trouble landing on peaceful waters, Times & Democrat (Orangeburg, S.C.), March 24, 2007, at 1A, 5A (R. p. 625 - p. 626). Respondent does not disagree that the articles were part of the trial record and designated in the Record on Appeal; however, Respondent does not waive any objections Respondent has to these articles.

Petitioners claim the Court of Appeals misapprehended or overlooked that Petitioners relied to their detriment on the Master's preliminary ruling admitting three newspaper articles: Lee Hendren, 'A pretty beautiful stretch of water', Times & Democrat (Orangeburg, S.C.), September 14, 2006, at 1A, 5A (R. p. 623 - p. 624); Lee Hendren, Public vs. Private Rights: Landowner says he's protecting his family; county trying to restore public access to river, Times & Democrat (Orangeburg, S.C.), December 12, 2006, at 1A, 6A (R. p. 585 - p. 586); Gene Zaleski, Trouble landing on peaceful waters, Times & Democrat (Orangeburg, S.C.), March 24, 2007, at 1A, 5A (R. p. 625 - p. 626). At the beginning of the hearing, Respondent's counsel moved in limine to exclude evidence of four types: ". . . [t]he leasehold, the newspaper articles, anticipated or past negligence or anticipated or past criminal activity." (R. p. 63, l. 5 - p. 68, l. 3). The Master ruled on Respondent's Motion in Limine and denied Respondent's motion. (R. p. 55, l. 18 - p. 57, l. 25; p. 63, l. 5 - p. 68, l. 3; p. 73, l. 23 - p. 75, l. 17). To preserve an issue for appellate review, a contemporaneous objection must be made when the evidence is offered. State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (S.C.App. 2006) (rehearing denied, certiorari denied.). During trial, Respondent's counsel sought and obtained continuing objections to those matters raised in Respondent's Motion in Limine. (R. p. 85, ll. 12-19; p. 88, ll. 14-21; p. 93, l. 24 - p. 94, l.

1; p. 99, l. 22 - p. 100, l. 14; p. 103, l. 19 - p. 104, l. 5; p. 345, ll. 3-23).

Petitioners had prior notice that Respondent would object to certain evidence (R. p. 55, ll. 18-20) and at trial Respondent's counsel handed the Master Respondent's Notice of Motion (in Limine), Motion in Limine and Memorandum of Law in Support of Motion in Limine. (R. p. 57, ll. 15-17). Petitioners' counsel argues Petitioners relied on the Master's ruling as a final ruling on the admissibility of the evidence which Respondent sought to exclude. The Master's ruling on Respondent's Motion was not the ultimate disposition on the admissibility of Petitioners' evidence. As this Court has held:

> Trial judges must not be held, conclusively, to preliminary rulings made without benefit of all the pertinent and relevant evidence. We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence.

State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988).

The Court of Appeals did not ignore, disregard or overlook Petitioners' reliance on the Master's evidentiary ruling. Citing Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009), this Court stated: "The admission of evidence is a matter left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion." Petitioners misapprehended the Master's ruling on Respondent's Motion in Limine as an "unequivocal" final ruling on the admissibility of the evidence which Respondent sought to exclude.

Assuming that the Master denied both parties' motions for a directed verdict (R. p. 299; p. 332) at the conclusion of Petitioners' case, and ruled at the conclusion of Petitioners' case that he would admit the news articles, Petitioners did not move after receipt of the Final

Order, for the trial court to either reconsider the Final Order or to reopen the record so that Petitioners could call and examine the reporters as to the veracity of the matters reported in the news articles. (R. p. 10).

Petitioners argue facts outside the record when, in their Petition for Rehearing, they state that they had "served the subpoena on the newspaper reporter prior to trial" and "obtained from the master a short trial break for the express purpose of calling Jay Bender, the lawyer for the newspaper reporter who authored the article, to release the reporter from his trial subpoena." (Petitioners' Petition for Writ of Certiorari, Argument, § 2, p. 21-22) (R. 74, l. 20 - p. 75, l. 6). Two different reporters (Lee Hendren and Gene Zaleski) authored the three articles in the record on appeal and nowhere does the record on appeal reflect which of the two reporters was under subpoena, much less that any reporter was under subpoena. Even if these allegations were in evidence, this event occurs at the beginning of the case, when the Master denied Respondent's Motion in Limine. It was then that Petitioners' misapprehended the Master's ruling as a final ruling on the admissibility of the evidence which Respondent sought to exclude.

Petitioners claim that the Court of Appeals ignored, disregarded or overlooked that two of the party opponent declarants (Administrator Clark, County Attorney Haydel) quoted in the news articles were present throughout the trial and two of the party opponent declarants (Administrator Clark, Councilman Livingston) quoted in the news articles testified at trial and none of these ever disputed the accuracy of their quoted, out-of-court admissions. The Court of Appeals actually held that the out-of-court statements made by county employees and representatives concerning the condemnation decision were not hearsay

because they are admissions by a party opponent under Rule 801(d)(2)(A), (C), or (D), SCRE; however, the statements by the newspaper and reporters asserting that the county employees and representatives made these statements was hearsay because these were offered to prove the truth of the matters asserted.

Petitioners and Respondent County called as a witness at trial County Administrator William Clark. (R. p. 214, l. 17 - p. 262, l. 18). Petitioners' counsel had full opportunity to examine Administrator Clark as to his statements reported in the newspaper articles. Petitioners' counsel did examine Administrator Clark about some of the statements reported in the newspaper articles. (R. p. 218, l. 25 - p. 220, l. 15; p. 221, l. 3 - p. 225, l. 9). As Petitioners correctly note, "The administrator testified and discussed some of the contents of articles, never questioning the accuracy of the quotes attributed to him." (Petitioners' Petition for Writ of Certiorari, Argument, § 2, p. 23) As the Master stated in the Final Order, ". . . [T]his court does not consider the content of the articles introduced at trial except as to those statements which a witness has confirmed making."

Petitioners, not Respondent County, also called as a witness at trial County Councilman Heywood Livingston. (R. p. 270, l. 8 - p. 298, l. 6). Petitioners' counsel had full opportunity to examine Councilman Livingston as to his statements reported in the newspaper articles. Petitioners' counsel did examine Councilman Livingston about some of the statements reported in the newspaper articles. (R. p. 277, l. 9 - 12). Petitioners did not call as a witness at trial County Attorney D'Anne Haydel. Admittedly, none of the three individuals quoted in the news articles testified as to the accuracy or inaccuracy of their reported, quoted, out-of-court statements. What is significant is not that the three individuals

did not testify as to the accuracy or inaccuracy of the newspaper reports, but that nothing in their reported, quoted, out-of-court statements is evidence of, much less relevant to, bad faith on the part of Respondent County. Petitioners' mere insistence that these reported statements evidence bad faith is not supported by the either the totality of the articles themselves or the totality of the record of the trial.

Most significantly, although Petitioners have claimed the exclusion of the articles themselves, in their entirety, is prejudicial, Petitioners have not explained or shown exactly how the articles or the statements in the articles are relevant or material to their case or how the exclusion of the articles is prejudicial to Petitioners' case. Petitioners have not shown which of the statements in the articles any of the "witness has confirmed making." The articles themselves do not evidence bad faith or abuse of discretion on the part of the County acting through the County Council. Petitioners never sought to introduce only the quotes in the articles apart from the articles. Rather, Petitioners sought to introduce the articles in their entirety without redacting those portions which constitute hearsay and which are not party opponent declarants' statements.

Because these three newspaper articles do not fall within any hearsay exception, and because the articles themselves do not prove that the County acted in bad faith or abused its discretion in deciding to condemn Petitioners' property, the Master was correct to exclude them. Petitioners have not shown how the statements, although admissions, were admissions actually against the County's interest, or how the statements proved the County acted in bad faith and abused its discretion in deciding to condemn their property. Because Petitioners have asserted but not shown that exclusion of these articles was prejudicial to their case,

Petitioners have failed to show prejudice from the Master's decision to exclude them.

Petitioners claim that the quotes in the articles "were relevant to the subjective bad faith on the part of the condemnor." To support this claim, Petitioners take newspaper reports and quotes out of context and out of chronological order. (Petitioners' Petition for Writ of Certiorari, § 2, p. 23). Petitioners complain that these reported, uncorroborated statements are "dismissive of the Petitioners' legal position", "oversimplifications of condemnation law" and "negligent statements." Even assuming that these reported, uncorroborated statements are accurate, the context in which they were made is unknown and unstated. A reader cannot know, and this Court cannot speculate, as to what question or line of inquiry the alleged statement might have been responsive. Each of the articles, in their entirety, was a creation of an absent, out of court witness and subject to editorial and space limitations of which a reader cannot know, and this Court cannot speculate.

Petitioners characterize certain reported, uncorroborated statements as "negligent statements denying the fact that the county had received certified notice of the lease cancellation"(Petitioners' Petition for Writ of Certiorari, § 2, p. 23): "The boat landing users have a valid complaint, she [Haydel] said, because, 'from a legal standpoint, we still have a lease . . . We've never received written notice from anyone' that the property owner wanted to cancel the lease." (R. p. 586). According to the County Administrator, the Poole letter (R. p. 572 - 573; Petitioners' attorney's certified notice of the lease cancellation) was embarrassingly and mistakenly misplaced in the County Administrator's office. (R. p. 256, l. 15 - p. 258, l. 12). There is no evidence the County Attorney was negligent in any way with regard to the handling of Petitioners' attorney's certified notice of the lease cancellation.

Furthermore, our appellate courts have held that wrongful conduct cannot be predicated on mere negligence. USAA Property and Casualty Insurance Co. v. Rowland, 312 S.C. 536, 435 S.E.2d 879 (Ct.App.1993) (Citations omitted).

Petitioners characterize certain reported, uncorroborated statements as "oversimplifications of condemnation law from the county attorney, which overlooked the necessity requirement."(Petitioners' Petition for Writ of Certiorari, § 2, p. 23): "But Haydel said the law gives public bodies, such as council, the right to take private property as long as it is for a public use." (R. p. 626). Again, this statement lacks context. It is not "relevant to the subjective bad faith on the part of the condemnor" or evidence of bad faith on the part of the condemnor. Assuming that this statement is accurately reported, this statement is accurate as a matter of law and supported by the analysis supplied by this Court in Georgia Dept. of Transp. v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003). In that case, this Court cited Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956):

> The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.

Edens, 228 S.C. at 573, 91 S.E.2d at 283. The involuntary taking of an individual's property by the government is not justified unless the property is taken for public use — a fixed, definite, and enforceable right of use, independent of the will of a private lessor, of the condemned property. Karesh v. City Council of City of Charleston, 271 S.C. 339, 344, 247 S.E.2d 342, 345 (1978).

Petitioners' examples, summary reports of what the County Attorney said –

editorially omitting content and context – are sterling examples of the dangers inherent in admitting newspaper articles for the truth of the matters asserted. Even assuming that the County Attorney is accurately reported in the newspaper as making these statements, Petitioners have not demonstrated how these statements are probative of the County's bad faith in the condemnation of Petitioners' property. Even if Petitioners are correct that these reports are accurate and the reported conduct shows bad faith, which Respondent denies, at most these reports show bad faith in the County's communications to the newspaper and the general public or bad faith by the newspaper in the reporting of the communications, and not bad faith in the condemnation of Petitioners' property.

Assuming for purposes of argument that the quotes in the news articles are accurate (which County cannot and does not admit), a review – whether in context in the articles or out of context below for purposes of illustration – of the direct and indirect quotes attributed to County's representatives evidences no bad faith or abuse of discretion by County in ultimately condemning Petitioner's property in September 2007, many months after the newspaper reports (The quotation marks are those supplied by the newspaper:

From Lee Hendren, <u>County Seeking Way to Reopen Boat Landing</u>, Times & Democrat (Orangeburg, S.C.), September 14, 2006, at 1A, 5A. (R. p. 623 - p. 624):

> "Property was provided for public boat landing purposes through an easement that was granted," Orangeburg County Administrator Bill Clark said. (R. p. 623).
>
> "If the property changed hands, there were provisions that allowed the new owners to terminate those easements at their discretion," Clark said. (R. p. 623) "And that's the situation we find ourselves in." (R. p. 624).
>
> "We had 15 to 20 individuals at that meeting who came to express their concern to have the landing remain open" to the public, Clark said. [in reference to a meeting a County Council meeting in late June, 2006] (R. p. 624).

Clark said he has talked with Williamson twice. "The first time was to get his concerns about the landing," he said. "The second time was when I came back to him to address what I believe the county could do to address the concerns he gave me previously." "I laid out a proposal for him. He didn't commit one way or the other, but seemed interested in wanting to receive it in writing," Clark said. One concern was liability. "I proposed an agreement that would indemnify him from liability," Clark said. Another was litter. "We have a supervised crew that does cleanup activity," Clark said. "I proposed that we place that location (on a list) as part of their rotation." (R. p. 624).

"I am summarizing our last conversation into a letter. He will receive it next week. It will give him some official communication to respond to," Clark said. "I want to remain optimistic about the dialogue at this point. We've given him some ideas to think about. He needs adequate time to review the proposal in writing," Clark said. (R. p. 624).

From Lee Hendren, <u>Public vs. Private Rights: Landowner says he's protecting his family; country trying to restore public access to river</u>, Times & Democrat (Orangeburg, S.C.), December 12, 2006, at 1A, 6A. (R. p. 585 - p. 586):

Reported, not a direct quote:

Orangeburg County is continuing its efforts to restore public access to the Ness Boat Landing on the Edisto River, County Attorney D'Anne Haydel says. (R. p. 585).

Reported, not a direct quote:

Since lease negotiations with the property owner broke down, the county is preparing to exercise its power of eminent domain, also known as condemnation, to acquire the property, she says. (R. p. 585).

Reported, not a direct quote:

Haydel said the document is by far the most formal and detailed of the county's agreements for public use of privately owned property, such as boat landings. [in reference to an earlier lease between Georgia-Pacific Corp. and Orangeburg County Commission] (R. p. 586).

Reported, not a direct quote:

Their calls to the county to express their concerns are what alerted county officials to the situation, Haydel said. (R. p. 586).

The boat landing users have a valid complaint, she [Haydel] said, because, "from a legal standpoint, we still have a lease . . . We've never received written notice from anyone" that the property owner wanted to cancel the lease. (R. p. 586)

Reported, not a direct quote:

Haydel was surprised to learn that a revised contract existed. She said she would like to see a copy of it. (R. p. 586).

Reported, not a direct quote:

Haydel said the law gives public bodies, such as council, the right to take private property as long as it is for public use. (R. p. 586).

Reported, not a direct quote:

Haydel said the boat landing serves the public purpose to providing public access to the river, which is a natural resource available to all. (R. p. 586).

Reported, not a direct quote of the County Attorney:

Two of Williamson's requests were for a new access route to the boat landing and for more litter pickup and prevention efforts by county employees. Haydel said that could have been worked out rather easily. However, Haydel said the county could not accommodate two other requests. (R. p. 586).

One was the indemnification, and at one point in the negotiations, County Administrator Bill Clark said, "I proposed an agreement that would indemnify him from liability." (R. p. 586).

However, Haydel said new accounting rules won't allow the county to do that to an unlimited degree. The county can only purchase insurance with a stated maximum dollar amount. (R. p. 586).

The other request was for an increased presence of law enforcement personnel, but Haydel said, "We can't direct the Sheriff to give anybody special treatment." (R. p. 586).

At one point, Councilman Heyward Livingston, whose district includes that area of the county, said he thought the county should "go down and knock the gate down." (R. p. 586).

Reported, not a direct quote:

Haydel said the law is specific: it not only lays out the condemnation process, but actually spells out, word for word, the texts of the letters the county must send to the property owner. (R. p. 586).

From Gene Zaleski, <u>Troubled landing on peaceful waters</u>, Times & Democrat (Orangeburg, S.C.), March 24, 2007, at 1A, 5A. (R. p. 625 - p. 626):

Reported, not a direct quote:

The county sent out a letter March 16 to Williamson asking permission for an appraiser with expertise in eminent domain to visit the property next week, Orangeburg County attorney D'Anne Haydel said. (R. p. 625).

"We do not have a voluntary agreement with Mr. Williamson to sell or lease it," Haydel said. "This has not occurred. There has been a lot of discussion on how to do this on a voluntary basis . . . but this did not come to fruition." (R. p. 625).

All these issues, Haydel is convinced, are "100 percent in our (the county's) favor." (R. p. 625).

"The most important factor is public access," Haydel said, explaining that the newly completed study, commissioned by Orangeburg County Council, reveals and confirms the Ness landing is the best site for river access. (R. p. 625).

Reported, not a direct quote:

The condemnation process is both expensive and time-consuming. How long or how expensive can vary, says Haydel, adding that a voluntary surrender would obviously be much less expensive then the condemnation process. (R. p. 625).

Reported, not a direct quote:

But Haydel said the law gives public bodies, such as council, the right to take private property as long as it is for public use. (R. p. 626).

Reported, not a direct quote:

Haydel said the boat landing serves the public purpose by providing public access to the river, which is a natural resource available to all. (R. p. 626).

Reported, not a direct quote:

Haydel said the county has not received any notice to cancel this lease. (R. p. 626).

"I have not seen that document," she said. "There have been many sit-down meeting between the county and Mr. Williamson." [in reference to the lease cancellation letter (R. p. 572)] (R. p. 626).

No claim, emphasis, exaggeration or mischaracterization of any of these quotes can distort them into evidence of bad faith on the part of Orangeburg County. Petitioners have not shown through these quotes or otherwise that Orangeburg County or Orangeburg County Council, as a body, acted in bad faith to condemn Petitioners' property for the boat landing.

CONCLUSION

This case involves legislative or political action of the Respondent which was reasonably necessary to guarantee public access to the South Fork of the Edisto River for

public use. The Court of Appeals did not ignore, misapprehend or overlook that Petitioners failed to prove their case was prejudiced by the Master's evidentiary rulings. Petitioners sought to introduce newspaper articles at trial. These articles are hearsay and, because they do not fall within any hearsay exception, the Master was correct to exclude them. Significantly, Petitioners have not shown and cannot show any prejudice from the exclusion of the articles which, if admitted, are not probative of bad faith on the part of the Respondent.

The Court of Appeals did not ignore, misapprehend or overlook that Petitioners failed to carry their burden and prove that Respondent's action in eminent domain was unnecessary. Petitioners claim the "evidence simply cannot support a finding that the County ever assessed need, let alone that it did so prior to its condemnation decision." A careful review of the record on appeal flatly contradicts this claim. The Court of Appeals correctly found that the County had established necessity to the satisfaction of the applicable standard. The rule in this State is that the decision of the question of necessity lies with the one to whom the State has delegated the authority to take property for a public use, subject to deferential judicial review.

RESPECTFULLY SUBMITTED,

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June 23, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM ORANGEBURG COUNTY
MASTER-IN-EQUITY

O. Davie Burgdorf, Master-in-Equity

Case No.: 2007-CP-38-1424

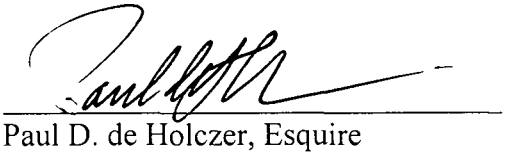
John W. Williams, III and Kathryn J. Williamson ..... Petitioners,

v.

The County of Orangeburg ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Return to Petitioners' Petition for Writ of Certiorari complies with Rule 211 (b), SCACR and is in compliance with the Supreme Court's Order dated August 13, 2007.



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June 23, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
MASTER-IN-EQUITY

O. DAVIE BURGDORF, MASTER-IN-EQUITY

Case No. 2007-CP-38-1424

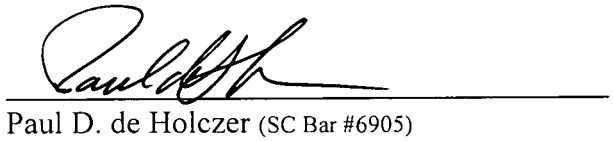
John W. Williamson, III and Kathryn J. Williamson ..... Petitioners,

v.

The County of Orangeburg ..... Respondent.

PROOF OF SERVICE

I hereby certify that I have served a copy of **Respondent's Return to Petitioner's Petition for Writ of Certiorari** by United States Mail, on June 24, 2011, addressed to Petitioners' attorneys of record, Wm. Howell Morrison and Phyllis W. Ewing, of Moore & Van Allen, PLLC at their office address of 40 Calhoun Street, Suite 300, Charleston, SC 29401-3535.



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June 24, 2011