THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Markley R. Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-000060

Project: Intermodal Container Transfer Facility

Tract: 11

South Carolina Department of Commerce, Division of Public Railways.....Respondent

v.

Clemson University .....Respondent

And

Charleston County School District .....Appellant

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STATEMENT OF ISSUES ON APPEAL

I. **Is the School District entitled to a jury trial in this action governed by the South Carolina Eminent Domain Procedure Act ("Act"), where neither Respondent has specifically requested a non-jury trial and, in fact, the Respondent Condemnor has requested a jury trial under the Act?**

Suggested Answer: *Yes.*

II. **Did the trial court err in concluding that S.C. Code § 28-2-460 requires a non-jury trial, where there has been no judicial determination of the value of the undivided fee and where the Respondent Condemnor has not deposited the judicially determined value with the Court?**

Suggested Answer: *Yes.*

III. **Did the trial court err in concluding that South Carolina law requires a non-jury trial, simply because the School District's interest in the property at issue is equitable in nature?**

Suggested Answer: *Yes.*

STATEMENT OF THE CASE

I. BACKGROUND

On December 23, 2010, South Carolina Department of Commerce, Division of Public Railways ("Condemnor") — one of the Respondents in this appeal — commenced this condemnation action pursuant to the South Carolina Eminent Domain Procedure Act ("Act"), S.C. Code. §§ 28-2-10, *et seq.*, condemning 69.93 acres on the former naval base in the City of North Charleston (the "Entire Tract") to construct an Intermodal Container Transfer Facility. (*See generally* R. pp. 063-72). In its Condemnation Notice and Tender of Payment ("Notice"), Condemnor named as a party Clemson University (the "Owner"), the fee owner of the Entire Tract and the other Respondent in this appeal. (*See* R. p. 064 ¶ 2). Condemnor also named Appellant Charleston County School District (the "School District" or "CCSD") as an Other Condemnee "by virtue of a possible sublease agreement, as amended, on a portion of the subject property," *i.e.,* the School District Tract (*See* R. p. 066 ¶ 11).

Condemnor's Notice also named the following entities as "Other Condemnees" as parties to this action:

- Charleston Naval Complex Redevelopment Authority: "by virtue of certain easements, declarations, reservations, covenants, and restrictions on the subject property";
- City of North Charleston: "by virtue of certain easements, declarations, reservations, covenants, and restrictions on the subject property" and "by virtue of a possible conditional right of repurchase and possible terms of a Transfer and Option Agreement on the subject property";
- Commissioners of Public Works of the City of Charleston: "by virtue of the operation of a water distribution system and certain easements on the subject property";
- North Charleston Sewer District: "by virtue of the operation of a sewer system and certain easements on the subject property";
- BellSouth Telecommunications, Inc.: "by virtue of certain easements on the subject property";

- Business Telecom, Incorporated: "by virtue of certain easements on the subject property";

- South Carolina Electric & Gas Company: "by virtue of certain easements on the subject property";

(*See* R. pp. 064-66 ¶¶ 3-10). The claims regarding all the Other Condemnees have been resolved, and they are not parties to this appeal. (*See generally* R. pp. 041-53). Thus, the only parties remaining in this matter are: Condemnor, Owner and the School District. (*See id.*).

In its Notice, Condemnor noted its appraised value for the Entire Tract and offered that amount to Owner:

> THE CONDEMNOR HAS DETERMINED JUST COMPENSATION FOR THE PROPERTY AND RIGHTS TO BE ACQUIRED HEREUNDER TO BE THE SUM OF NINE MILLION SIX HUNDRED FORTY-FIVE THOUSAND DOLLARS ($9,645,000) AND HEREBY TENDERS PAYMENT THEREOF TO THE LANDOWNER.

(*See* R. p. 067 ¶ 19). The Notice further provided that, if the Owner rejected that tender, the matter would be resolved by trial (as opposed to an appraisal panel):

> [I]f the tender herein is rejected, the Condemnor shall notify the Clerk of Court and shall demand a trial to determine the amount of just compensation to be paid. A copy of that notice must be served on the Landowner. That notice shall state whether the Condemnor demands a trial by jury or by the Court without a jury. The Landowner has the right to demand a trial by jury. The case may not be called for trial before sixty (60) days after the service of that notice, but it may thereafter be given priority for trial over other civil cases. The Clerk of Court shall give the Landowner written notice by mail of the call of the case for trial.

(*See* R. p. 068 ¶ 23). Condemnor endorsed the caption of the Notice with a jury trial demand: "(Jury Trial Demanded)." (*See* R. p. 63). On the same date (December 23, 2010), Condemnor also filed an Affidavit of Keith M. Babcock, Esq. (*See generally* R. pp. 072-73). In this Affidavit, Condemnor again demanded a trial by jury:

> 2. That the Condemnor demands a trial no earlier than sixty (60) days after the date of service of the affidavit upon the Landowner;
>
> 3. *That the Condemnor demands a trial by jury;*

(*See* R. p. 072-73 ¶¶ 2-3 (emphasis added)).

On May 23, 2011, Attorney Abigail B. Walsh filed a Notice of Appearance (Jury Trial Demanded) on behalf of the School District. (*See generally* R. pp. 074-75 (Jury Trial Demanded)). In its Notice of Appearance — which endorsed the caption "(JURY TRIAL DEMANDED)" — the School District "demand[ed] a jury trial on the issue of just compensation." (*See id.*).

On April 25, 2014, the Court entered a Consent Order of Limited Reference and Scheduling Order, which referred only certain specific questions relating to the School District's claims to Attorney John Massalon, as Special Referee:

> The parties all agree that in 1996, a sublease was entered into between the Charleston Naval Complex Redevelopment Authority ("RDA"). and the District concerning the Academic Magnet High School. However, there are various issues about which the parties do not agree, and they are presented as follows: (1) whether the sublease expired; (2) how much property was covered by the sublease ("Property"); (3) whether the District had any rights to the Property after it was conveyed from the RDA to the City of North Charleston ("North Charleston"); (4) whether the District had any rights in the Property after the Property was conveyed from North Charleston to Clemson; and (5) whether the District had any rights in the Property at the time of the filing of the Notice of Condemnation in December of 2010.
>
> The parties all agree that judicial economy and issue resolution consistency dictate that both cases should be stayed until these questions are answered. The parties have all also agreed that the matters at issue in this Order should be referred to a Limited Special Referee. The parties have all agreed that John Massalon, Esquire should be appointed as the Limited Special Referee, and he has agreed to this appointment.

(*See* R. pp. 003-21). That Order also stayed this action, as well as another lawsuit that the School District had filed against the Owner and the City of North Charleston pending those proceedings.[1]

The Special Referee conducted trial in September and October of 2014 on those various issues. One of the questions that the School District presented to the Special Referee was "DID CCSD HAVE ANY RIGHTS TO IN THE PROPERTY AT THE TIME THAT THE CONDEMNATION NOTICE WAS FILED ON DECEMBER 22, 2010?" (*See* R. p. 023). The

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[1] That lawsuit — styled *Charleston County School District v. Clemson University, et al.*, No. 2012-CP-10-5093 — involved the School District's claim to certain real property where it had previously operated its Academic Magnet High School. That action has been dismissed.

Special Referee concluded that the School District did not have a sublease or title to the School District Tract at the time of filing the condemnation. (*See generally id.*). However, the Special Referee further held that "CCSD had an equitable interest in the 3.74 acre AMHS parcel [("School District Tract")] because of improvements made to that Property during the term of the Sublease and CCSD's use of the property thereafter." (*See* R. pp. 027-28). This equitable interest in the School District Tract "extended up to and including" the date of the filing of this action. (*See* R. p. 029).

Importantly, the Special Referee recognized that the parties had agreed to a limited reference to him, which did not encompass the remaining issues in this lawsuit, including the amount of compensation due to the School District for its equitable interest:

> My understanding of the reference to me is that my authority is limited to a determination of whether or not the CCSD had an equitable interest in the property at the time the condemnation notice was filed, but that *my authority does not include whether that interest has any monetary value, and if so, how much.*

(*See* R. p. 030 (emphasis added)). Because the Special Referee determined that the School District held an equitable property interest in the School District Tract, only two issues remain for determination: (a) the monetary value of just compensation for the taking of Entire Tract acres; and (b) value of the School District's equitable interest in the School District Tract to be paid from the compensation from the Entire Tract. The School District intends to present its own evidence regarding the proper valuation of just compensation for both the Entire Tract and the School District's equitable interest therein pertaining to the component School District Tract.

By Order dated February 23, 2016 and filed on March 16, 2016, the Special Referee denied motions to alter or amend that the Condemnor, the Owner and the City of North Charleston had filed. (*See generally* R. pp. 031-37). In that Order, the Special Referee rejected the assertion of the Condemnor, the Owner and the City of North Charleston that "none of the documents introduced into evidence reflect any acknowledgment by the City that the CCSD would have a long term presence on the Navy Base." (*See* R. p. 032). The Special Referee also found that there was evidence that the Owner had acknowledged the School District's "likely" long-term presence

on the property. (*See* R. p. 034). The Special Referee also concluded that there was evidence that there was acquiescence to the School District's expenditure of funds on the property. (*See* R. p. 035).

By Order for Case Assignment to the Business Court Pilot Program, filed on June 2, 2016, Judge Roger M. Young, Sr., *sua sponte*, assigned this case to the Business Court:

> On this Court's motion and with consent of all the parties, it is hereby ordered that assignment to the Business Court Pilot Program for Charleston County is granted. It is further ordered that exclusive jurisdiction over this case be assigned to the Honorable R. Markley Dennis, Jr. to hear and handle all pretrial motions and other matters pertaining to this case.

(*See* R. pp. 038-40).

II. PROCEDURAL HISTORY RELEVANT TO THIS APPEAL

On June 2, 2016, Condemnor filed a Motion to Transfer Case to the Non-Jury Docket ("Motion to Transfer"). (*See generally* R. pp. 092-95). In its Motion to Transfer, the Condemnor asserted, in relevant part:

> 1. The South Carolina Eminent Domain Procedures Act (S.C. Code § 28-2-10, *et seq.*) only gives a Landowner a right to a jury trial, not the Other Condemnees.
>
> 2. The "equitable interest" found by the Limited Special Referee calls for this Court sitting in equity, not a jury, to determine the nature, extent, and value (if any) of the equitable interest, as well as whether any equitable defenses affect the equitable interest.
>
> 3. Any compensation owed to the District, if any, should be determined by this Court in an equitable proceeding similar to that provided in S.C. Code Ann. § 28-2-460.

(*See* R. p. 094).

A hearing on Condemnor's Motion to Transfer Case to Non-Jury Docket was held on August 23, 2016 before the Honorable R. Markley Dennis, Jr. The trial court and the School District learned at the initial hearing on Condemnor's Motion to Transfer Case to Non-Jury Docket that Condemnor and Owner had entered a settlement agreement:

> Please the Court, Your Honor, an agreement in principle was always in place between the landowner and the condemnee. We have now written and signed it.

> The Board of Trustees of Clemson has approved this document. We are waiting for that written minutes to be approved and the clerk of the Board of Trustees to give a true copy to attach. Commerce has also signed the document and they are waiting for the SFAA to give their technical approval before it can be attached here. I would like with your permission to give a copy of the executed, but quite not final, settlement agreement to Commerce attorney in this action who could not be involved in those settlement negotiations and pass it to Your Honor.

(*See* R. pp. 174:18-175:7). That Settlement Agreement Between the South Carolina Department of Commerce, Division of Railways, and Clemson University ("Settlement Agreement") was ultimately formally filed with the trial court on December 14, 2016. (*See generally* R. pp. 210-50).

Under the Settlement Agreement — to which the School District was not a party — the Condemnor and Owner agreed that the owner "will receive land in exchange for the condemnation of the Property in lieu of financial consideration, and, as a result, [Owner] has agreed to waive its right to any financial compensation from [Condemnor] in this action." (*See* R. p. 211). The Settlement Agreement does not fix a monetary value on either the Entire Tract or the School District Tract. To date, neither of those properties has been properly, fairly and impartially valued. Moreover, the Settlement Agreement does not even establish a monetary value for the property "swapped" ("Swapped Property") to the Owner in return for the Entire Tract.

The trial court, *per* Judge Dennis, granted Condemnor's Motion to Transfer Case to Non-Jury Docket and entered an October 19, 2016 (filed on October 21, 2016) Order Transferring Case to the Non-Jury Docket. (*See generally* R. pp. 054-60). In doing so, Judge Dennis concluded that the governing provisions of the South Carolina Eminent Domain Procedure Act did not entitle the School District to a jury trial. The Court noted that it believed Condemnor had raised three meritorious reasons to transfer this matter to the non-jury docket:

(a) The Act only provides the Owner, as the "landowner," a right to a jury trial (as opposed to other condemnees).

(b) The "equitable interest" of the School District, which the Special Referee found, requires that this matter be decided by a judge sitting in equity.

(c) Any compensation owed to the School District should be determined in an equitable proceeding under South Carolina Code Section 28-2-460.

(*See id.*).

On November 3, 2016, the School District filed its Rule 59(e) Motion to Reconsider Grant of Motion to Transfer This Case to the Non-Jury Docket ("Motion to Reconsider"). (*See generally* R. pp. 129-52). On December 14, 2016, the Condemnor filed its Memorandum in Response to Charleston County School District's Motion to Reconsider Order Transferring Case to the Non-Jury Docket. (*See generally* R. pp. 153-57). On the same date, Judge Dennis conducted a hearing on the School District's Motion to Reconsider. By Order Denying Motion for Reconsideration filed on December 16, 2016, the trial judge denied the School District's Motion to Reconsider. (*See generally* R. pp. 061-62.).

On January 9, 2017, the School District filed a timely Notice of Appeal from the orders transferring this case to the non-jury docket and denying the School District's Motion to Reconsider. (*See* R. pp. 0158-71 Notice of Appeal). That appeal is presently before this Court.

For the reasons set forth herein, the trial judge erred in depriving the School District of its right to a jury trial under South Carolina law.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review in this appeal is well-settled and does not require that this Court give deference to the trial judge's determination:

> Whether a party is entitled to a jury trial is a question of law. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

See Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010). For the reasons that follow, this Court should determine that the School District is entitled to a jury trial under governing statutory and common law.

II. THE COURT SHOULD REVERSE THE TRIAL COURT'S TRANSFER OF THIS CASE TO THE NON-JURY ROSTER

A. The School District Is Entitled to a Jury Trial Under the South Carolina Eminent Domain Procedure Act

1. By Its Self-Operation, the Eminent Domain Procedure Act Requires a Jury In this Matter

South Carolina law zealously guards the rights of parties to trial by jury. Under Article I, Section 14 of the South Carolina Constitution, "the right of trial by jury shall be preserved inviolate." Similarly, such protections can also be found in the South Carolina Rules of Civil Procedure. "The right of a trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived." S.C.R. Civ. P. 38(a). Once a party demands a jury trial:

> as provided in Rule 38, the trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

See S.C.R. Civ. P. 39(a).

"The right to a jury trial is protected under this provision only if such a right existed in 1868 when our constitution was adopted." *Cobb v. South Carolina Dep't of Transp.*, 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005); *accord Unisys Corp. v. South Carolina Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 172, 551 S.E.2d 263, 271 (2001) ("It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868.").

This lawsuit is a condemnation action under the Act, which is an action at law for the determination of the amount of just compensation for property taken. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535,537 (1986). The Act is the "*exclusive procedure* whereby condemnations may be undertaken in this State." *See* S.C. Code §28-2-60 (emphasis added). The S.C. General Assembly passed the Act:

> to create a uniform procedure for *all exercise* of eminent domain power in this State. It is not intended by the creation of this act to alter the substantive law of condemnation, and any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration. In the event of a conflict between this act and any other law with respect to any subject governed by this act, this act shall prevail.

S.C. Code Ann. §28-2-20 (emphasis added). The Act applies to the condemnation of "property, real property, or land," which the General Assembly defined for purposes of condemnation actions as "all lands, including .... every estate, **interest and right, legal or equitable** [*emphasis added*], in lands or water and all rights, interests, privileges, easements, encumbrances ... or otherwise." *See* S.C. Code §28-2-30.

"Despite the fact there is no constitutional right to a jury in an eminent domain case, such a right is provided by statute." *Cobb*, 365 S.C. at 365, 618 S.E.2d at 301 (*citing* S.C. Code § 28-3-310). Specifically, under Article 3 of the Act, the right to a jury trial exists unless the Condemnor and Owner expressly demand *not* to try the matter to a jury:

(A) Upon the filing of the affidavit described in Section 28-2-240(A) or the filing of a Notice of Appeal under Section 28-2-260(B) or (C), the action must be tried as provided in this article.

(B) If the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. *Otherwise, the action* ***must*** *be placed on the jury trial roster.*

See S.C. Code § 28-2-310(A)-(B) (emphasis added).

The statute is clear that, unless the Condemnor, Owner and the School District effectively demand a **non**-jury trial, there is a mandatory right to a jury trial in an action under the Act. While this statute states who may demand a trial *without a jury*, it is silent as to who may request a jury in the first instance. That is because no demand is specifically required in the Act. In the absence of mutual express demands for a non-jury trial, a jury trial is the mandatory default. If the parties are silent, they are entitled to a jury trial. Because there is no evidence of unanimous demand for a non-jury trial, the Act plainly provides that the School District is entitled to a jury trial in this matter.

Therefore, for the foregoing reasons, this Court should reverse the trial court's denial of its request for a jury trial.

2. The Condemnor and the School District Have Demanded a Jury Trial

Even if the Act requires an affirmative act to make a jury request, a jury trial is proper in this matter because the Condemnor has not merely failed to demand a non-jury trial; it demanded a trial by jury under the Act. Under such circumstances the Condemnor's decision binds it to its election. Additionally, the School District has demanded a jury trial in its initial filing in this matter. Under Rules 38 and 39, which govern jury trial demands, those elections are still controlling on the Condemnor.

The typical procedure for demanding a jury trial is spelled out in the South Carolina Rules of Civil Procedure; one of those rules provides that once a jury demand is made, a party cannot simply withdraw that selection:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time

> after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.
>
> (c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. *A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).*

See S.C.R. Civ. P. 38(b)-(d) (emphasis added). Once a jury trial is demanded in accordance with the rules, a jury trial is mandatory:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded *shall be by jury*, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

See S.C.R. Civ. P. 39(a) (emphasis added). Under these rules and statutes, it is apparent that the School District is now entitled to a jury trial in this case.

The Act also provides for the procedure whereby the Condemnor could demand a jury trial. Where, as here, the Condemnor elects to proceed under Section 28-2-240 by way of trial (as opposed to an appraisal panel) after the Owner's rejection of the amount tendered, the Act requires the Condemnor to file an affidavit with the clerk of court stating whether it demands a trial by jury or court as to the valuation of the property condemned. *See* S.C. Code §28-2-240. The Condemnor must serve written notice of the condemnation action upon all Condemnees named in the Notice. *See* S.C. Code §28-2-230. "After filing of the affidavit, the case shall proceed as provided in Article 3" of the Act. S.C. Code Ann. §28-2-240(b).

The Condemnor has effectively demanded a jury trial and, under the Act and the Rules of Civil Procedure, the School District is now entitled to a jury trial of all remaining issues. It is undisputed that the Condemnor's initial filings all expressly requested that this case — in which the Condemnor named the School District as an Other Condemnee — be tried to a jury. For example, the Condemnor's Notice stated:

> THE CONDEMNOR HAS ELECTED NOT TO UTILIZE THE APPRAISAL PANEL PROCEDURE. Therefore, if the tender herein is rejected, the Condemnor shall notify the Clerk of Court and shall demand a trial to determine the amount of just compensation to be paid. A copy of that notice must be served on the Landowner. That notice shall state whether the Condemnor demands a trial by jury or by the Court without a jury. The Landowner has the right to demand a trial by jury. The case may not be called for trial before sixty (60) days after the service of that notice, but it may thereafter be given priority for trial over other civil cases. The Clerk of Court shall give the Landowner written notice by mail of the call of the case for trial.

(*See* R. p. 068 ¶ 23). Condemnor's Notice and Tender of Payment states that, in this matter, Condemnor demanded a jury trial. (*See* R. p. 063 (endorsed "Jury Trial Demanded")). On December 23, 2010, Condemnor filed an Affidavit of its counsel, stating:

> 2. That the Condemnor demands a trial no earlier than sixty (60) days after the date of service of the affidavit upon the Landowner;
>
> 3. *That the Condemnor demands a trial by jury;*

(*See* R. pp. 072-73 ¶¶ 2-3 (emphasis added)).

In the instant case, Condemnor, in accordance with the Act and the Rules of Civil Procedure, effectively demanded a jury trial in its Affidavit of Keith Babcock and Notice. If Condemnor wanted not to try this case to a jury, the proper time to raise that would have been in that Affidavit. Upon the filing of that Affidavit requesting a jury trial, the Act requires that the remained of this case be tried to a jury. Having demanded a jury in accordance with the Act and Rules 38 and 39, the Condemnor could not simply change its mind and withdraw its demand without the written consent of all parties. The School District has never consented to the withdrawal of the Condemnor's demand. Therefore, the Condemnor must honor its initial election

of a jury trial. Moreover, there is no evidence that the Owner ever made an election to try this case non-jury.

Additionally, the School District has also demanded a trial by jury. On May 23, 2011, Attorney Abigail B. Walsh filed a Notice of Appearance (Jury Trial Demanded) on behalf of the School District. (*See generally* R. pp. 074-75 (Jury Trial Demanded)). In that Notice of Appearance — which endorsed the caption "(JURY TRIAL DEMANDED)" — the School District "demand[ed] a jury trial on the issue of just compensation." (*See id.*). Since the School District has also demanded a jury trial — and the Condemnor can cite no legal authority prohibiting it from demanding a jury — the trial court erred in depriving the School District of its statutory right to a jury trial.

The trial judge based his deprivation of the School District's right to a jury trial, in part, upon his belief that Section 28-2-310(A) of the Act only permits the Owner, as the "landowner," a right to a jury trial (as opposed to other condemnees). However, this section of the Act does not limit the right to demand a jury trial to only the Condemnor and Owner. To the contrary, South Carolina Code Section § 28-2-310(B) clearly provides only that the Condemnor and Owner may demand a *non*-jury trial. It does not grant to them alone the right to a jury trial. At all relevant times, the School District has indicated its desire and intention to fully exercise its right to a jury trial. Under the Act, it is clear that — unless the Condemnor and Owner specifically waive that right in accordance with the governing Rules of Civil Procedure — the question of the valuation of just compensation for the entire tract should be tried to a jury.

Therefore, for the foregoing reasons, this Court should reverse the trial court's denial of its request for a jury trial.

B. The Trial Court Erroneously Relied Upon Section 28-2-460 to Deny the School District's Statutory Right to a Jury Trial

The trial court based its transfer of this matter to the non-jury docket substantially upon the following provision of the Act:

> Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, *the appraisal panel determination, verdict, or judgment must be made jointly to all the parties and may be paid to the clerk of court*. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. *The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding* to which all persons served with the Condemnation Notice must be necessary parties. From the order of the court of common pleas there may be an appeal as provided for appeals from the court in equity cases.

See S.C. Code § 28-2-460 ("Section 460") (emphasis added). The School District respectfully posits that Section 460 does not apply to the circumstances of this case.

1. The Statutory Prerequisites of Section 28-2-460 Have Not Been Satisfied

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The South Carolina Supreme Court has held:

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted)). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Under the plain meaning of the language that the legislature chose, it is beyond doubt that Section 460 does not apply in this case. First, Section 460 presumes that there be a *determination* (whether by appraisal panel or a court) of value of the property in question (*i.e.*, the Entire Tract). There has never been any determination of the total value of the Entire Tract. Under the Settlement Agreement, Condemnor and Owner merely swapped two properties, without any independent determination of the total value. Second, Section 460 requires (upon such a determination of value of the larger property at issue) that Condemnor pay the determined amount into the Court pending

the equitable determination of a claim to a part of that value envisioned in Section 460. It is undisputed that — because no court ever determined the total value of the Entire Tract — the Condemnor and the Owner never deposited such a judicially determined amount into the Court. In fact, when the School District attempted to obtain an order compelling the Condemnor to deposit even the amount of its own initial appraisal into the trial court, the Condemnor strongly opposed such a request. (*See generally* R. pp. 076-91).

In light of the foregoing, the trial judge erred in relying on S.C. Code § 28-2-460 to deprive the School District of its statutory right to a jury trial.

2. The Settlement Agreement Between Condemnor and the Owner Is Not a Sufficient Determination of Value to Support Application of Section 28-2-460

In denying the School District's right to a jury trial, the trial judge stated that: "[i]t is entirely appropriate for Railways [Condemnor] and the Landowner [Owner] to resolve all issues between them related to the condemnation of the property." (*See* R. p. 056). The School District respectfully asserts that this contention does not permit the Condemnor and Owner to exercise their right to resolve disputes as between the two of them so as to deprive the School District of its right to a jury trial.

The Act does recognize the right of "the parties" to compromise or settle all or part of a condemnation action. *See* S.C. Code §28-2-40 ("At any time before or after commencement of a condemnation action, *the parties* may agree to and carry out, according to its terms, a compromise or settlement as to any matter, including all or any part of the compensation or other relief.") (emphasis added). In other words, *all* relevant parties may collectively agree to resolve their disputes under the Act. However, this does not permit *some* of the parties to reach an agreement impacting the rights of other parties without the involvement or participation of those parties. It also does not permit some of the parties, through their own deal, to deprive another party of its right to a jury's determination of the value of the undivided fee. In the context of a settlement agreement, the equitable procedure of Section 28-2-460 can only potentially apply where

condemnor, landowner *and all other condemnees collectively* agree to a compensation award as to the entire property (the undivided fee). *See South Carolina Dep't of Transp. v. M&T Enterp. of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) (invoking Section 28-2-460 equitable procedure to allocate condemnation award between landlord and tenant, where SCDOT, *landlord and tenant* agreed to that award). The Settlement Agreement — which does not value the undivided fee (*i.e.,* the value of the Entire Tract) and does not include the School District in any way — is not a proper basis for the invocation of Section 460.

Condemnor can cite *no* South Carolina authority permitting it and the Owner to deprive the School District of its right to a jury trial by settling only between themselves — without the School District's knowledge or involvement — especially in connection with an in-kind "land swap" settlement agreement. In fact, the Act does not expressly authorize non-cash, in-kind settlements and does not allow other parties to set the value of the total taking without the involvement of other condemnees. It is undisputed that the School District was not a party to the Settlement Agreement and that the Condemnor and Owner excluded the School District from its negotiation. The Settlement Agreement that Condemnor and Owner executed does not assign a value for just compensation for the Entire Tract. It appears that Condemnor and Owner acted in their own interests, never recognizing the rights of the School District. Condemnor and Owner have created their own novel procedure in derogation of the Act. This conduct would have the effect of denying the School District its right to participate in the jury trial process of valuation of the Entire Tract and prevents the School District from presenting evidence on value of the Entire Tract.

If the Court permits Condemnor to evade a jury trial by settling around the School District, it will encourage condemnors to prevent other condemnees from exercising their rights through skillful procedural maneuvering in blatant contravention of the Act. The arrangement between Condemnor and Owner, involving only in-kind property transfers and not valuing the total taking, would allow clever condemnors to settle around other condemnees, and would furthermore set the precedent for condemnors to evade the Act's requirement of depositing the condemnor's appraised

value with the clerk of court to protect the real property interests involved in the underlying condemnation.

Thus, for the foregoing reasons, the trial court erred in using the Settlement Agreement to side-step Section 460's requirement of a judicial determination of the value of the undivided fee.

C. The Mere Fact That the School District's Interest is "Equitable" Does Not Deprive It of the Right to a Jury Trial

The trial judge also concluded that the fact that the Special Referee held that, because the School District's interest in the property at issue is an "equitable interest," a judge sitting in equity must decide the valuation of that interest. The School District respectfully posits that the trial judge erred in that respect.

South Carolina Code § section 28-2-30(17) defines the terms "[p]roperty", "real property", or "land" to mean "all lands, including improvements and fixtures thereon, lands under water, easements and hereditaments, corporeal or incorporeal, every estate, interest and right, *legal or equitable*, in lands or water . . . ." *See id.* (emphasis added). Thus, the Act expressly recognizes and intends that its procedures — discussed above — may encompass equitable interests. The mere fact that the School District 's interest in the School District Tract is "equitable" (as determined by the Special Referee) does not mandate that the *amount* — as opposed to the *existence* — of that interest can only be decided in equity without first having a jury trial on the valuation of the Entire Tract. Irrespective of the legal source for the School District's right, the Act plainly provides that the amount of just compensation for the land acquired is a jury issue. Condemnor cannot show that the School District is not entitled to a jury trial on the valuation of either the Entire Tract or its equitable interest therein.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's transfer of this matter to the non-jury roster and should determine that the School District is entitled to a jury trial on all remaining issues in this case.

May 11, 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Markley R. Dennis, Jr., Circuit Court Judge

Appellate Case No. 2017-000060

Project: Intermodal Container Transfer Facility

Tract: 11

South Carolina Department of Commerce, Division of Public Railways.....Respondent

v.

Clemson University .....Respondent

And

Charleston County School District .....Appellant

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The undersigned certified that Appellant Charleston County School District's Final Appellant's Brief and Final Appellant's Reply Brief comply with Rule 211(b), SCACR.

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