

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

RECEIVED

Dec 03 2020

SC Court of Appeals

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

v.

Clemson UniversityRespondent

And

Charleston County School DistrictAppellant

APPELLANT CHARLESTON COUNTY SCHOOL DISTRICT'S
PETITION FOR REHEARING AND INCORPORATED MEMORANDUM IN SUPPORT

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 400 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
jfletcher@barwnwell-whaley.com

Abigail B. Walsh, Esq.
S.C. Bar No. 71291)
WILLIAMS AND WALSH, LLC
652 Rutledge Avenue, Unit B
Charleston, South Carolina 29403
(843) 722-0157

Christopher L. Murphy, Esq.
Murphy Law Offices, LLC
Post Office Box 2008
Mt. Pleasant, South Carolina 29465-2008
(843) 278-9025

*Attorneys for Appellant Charleston County
School District*

INTRODUCTION

A. Background Facts

On December 23, 2010, Respondent South Carolina Department of Commerce, Division of Public Railways ("Condemnor") 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"). (*See generally* R. pp. 063-72). In its Condemnation Notice and Tender of Payment ("Notice"), Condemnor named Clemson University (the "Owner"), the fee owner of the Entire Tract. (*See* R. p. 064 ¶ 2). Condemnor 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).

In its Notice, Condemnor offered its appraised value of the Entire Tract to Owner. (*See* R. p. 067 ¶ 19). The Notice further provided that:

[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. . . . 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.

(*See* R. p. 068 ¶ 23). Condemnor endorsed the caption of the Notice with "(Jury Trial Demanded)." (*See* R. p. 63). It also filed an Affidavit of Keith M. Babcock, Esq. demanding a jury trial. (*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, demanding "a jury trial on the issue of just compensation." (*See generally* R. pp. 074-75).

On April 25, 2014, the trial court made a limited reference of specific questions relating to the School District's claims to a Special Referee. (*See* R. pp. 003-21). The Special Referee concluded 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). He also recognized that his limited reference did not authorize him to determine the amount of compensation due for this equitable

interest. (*See* R. p. 030 (emphasis added)). After the Special Referee's determinations, the remaining issues for trial are: (a) the value of just compensation for Entire Tract; and (b) the value of the School District's equitable interest in that total.

B. Procedural History in the Trial Court

On June 2, 2016, Condemnor filed a Motion to Transfer Case to the Non-Jury Docket ("Motion to Transfer"), asserting in relevant part that the School District was not entitled to a jury trial. (*See* R. p. 094). The trial court and the School District learned at the initial hearing on Condemnor's Motion to Transfer that Condemnor and Owner had entered into a settlement agreement ("Settlement Agreement"). (*See* R. pp. 174:18-175:7). Under that Settlement Agreement, the Condemnor and Owner agreed that the Owner would "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 did not fix a monetary value on either the Entire Tract or the School District Tract. The Settlement Agreement does not set forth a monetary value for the property that those parties "swapped."

The trial court, *per* Judge Dennis, granted Condemnor's Motion to Transfer and entered an October 19, 2016 Order Transferring Case to the Non-Jury Docket. (*See generally* R. pp. 054-60). Judge Dennis concluded that the South Carolina Eminent Domain Procedure Act did not entitle the School District to a jury trial, for three reasons:

- (a) The Act only provides the Owner, as the "landowner," (as opposed to other condemnees) a right to a jury trial.
- (b) The "equitable interest" of the School District, which the Special Referee found exists, 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.*). The trial judge denied the School District's Motion to Reconsider, and this appeal followed.

C. This Court's Opinion

On November 18, 2020, this Court filed its Opinion affirming the trial judge's denial of the School District's right to a jury trial. The Court first held that the School District was not entitled to a jury trial under the Act: "We conclude the Act provides only the landowner and condemnor—as opposed to other condemnees—the right to a jury trial in a condemnation action." (*See* Opin., at 7). This Court further noted that, because the School District only had an equitable interest in part of the Entire Tract, it was "not a landowner under the Act and is therefore not entitled to participate in trial." (*See id.*, at 8). The Court also stated that "even if the School District were entitled to a jury trial, nothing in the Act entitled it to a jury trial to determine the value of the Entire Tract." (*See id.*). Additionally, the Court held that Condemnor was not bound by its election of a jury trial in its filings with the trial court. (*See id.*, at 8-9).

Second, the Court held that South Carolina Code § 28-2-460 "suggest[s that] the value of the School District's interest in a small portion of the Entire Tract—the issue to be decided in this case—is an equitable, rather than a legal, issue." (*See id.*, at 10). Finally, the Court rejected the School District's argument that "the equitable nature of its interest does not preclude it from having a jury trial." (*See id.*, at 11).

For the reasons that follow, this Court should grant the School District's Petition for Rehearing and reverse the trial judge's transfer of this matter to the nonjury roster.

ARGUMENT

A. 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 grant the School District's Petition for Rehearing and should reverse the denial of the School District's right to a jury trial.

B. The South Carolina Eminent Domain Procedure Act Does Not Limit the Right to a Jury Trial to Only the Owner and Condemnor

In the Opinion, this Court held that "the Act provides only the landowner and condemnor — as opposed to other condemnees — the right to a jury trial in a condemnation action." (*See* Opin., at 7). For the reasons that follow, this Court erred in finding that the School District does not have a right to a jury trial under the governing statutes.

The South Carolina Rules of Civil Procedure provide that "[t]he 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 by the South Carolina constitution if such a right existed in 1868, when that constitution was adopted. *Cobb v. South Carolina Dep't of Transp.*, 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005).

This lawsuit is a condemnation action under the Act, which authorizes an action at law. 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 General Assembly passed the Act “to create a uniform procedure for *all exercise* of eminent domain power in this State.” See S.C. Code § 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.” 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, the Act creates a presumptive right to a jury trial, unless the Condemnor and Owner demand *not* to have a jury trial:

(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). *Unless* Condemnor and Owner both demand a *non-jury* trial, there is a mandatory right to a jury trial. While the Act states who may demand a trial *without a jury*, it is silent as to who may *request* a jury and does not limit that right to only Owners and Condemnors. In fact, the Act does even not require a jury trial demand; rather, a jury trial is the default. If the Owner and Condemnor do not both initially demand a *non-jury* trial, the Court must try the case to a jury.

Nothing in the Act limits the right to a jury trial or excludes the School District from insisting upon a jury trial. This Court's Opinion reads language into the Act that is simply not there. To the contrary, that statute grants a broad jury trial right in the broadest of terms. This Court erred in adopting Condemnor's strained construction of the Act.

As a result, this Court should grant this Petition for Rehearing and should reverse the trial judge's denial of the School District's constitutional right to a jury trial.

C. The Condemnor Is Bound by Its Demand for a Jury Trial

A jury trial is also proper because Condemnor is bound by its prior demand for a jury trial. Under the South Carolina Rules of Civil Procedure, "[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." *See* S.C.R. Civ. P. 38(d). Once demanded, a jury trial is mandatory:

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). The Court's Opinion erroneously concluded that — notwithstanding these clear rules — the Condemnor was allowed to change its mind and take back its prior demand for a jury trial.

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 § 28-2-240(b). It is undisputed that the Condemnor's initial filings expressly requested that this case — in which the Condemnor named the School District as an Other Condemnee — be tried to a jury. 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 "[t]hat the Condemnor demands a trial by jury." (See R. pp. 072-73 ¶ 3). If Condemnor wanted *not* to have a jury trial, the proper time to raise that would have been in that Affidavit. Upon the making of an effective jury demand, the Act requires that the entire case be tried to a jury. Condemnor could not withdraw its demand without the written consent of *all* parties. Condemnor must honor its election of a jury trial.

As a result of the foregoing, this Court should grant this Petition for Rehearing and should honor the School District's right to a jury trial.

D. The Opinion Erroneously Relies Upon Section 28-2-460 to Deny the School District's Statutory Right to a Jury Trial

The Opinion relied, in part, upon the following provision of the Act to support its denial of the right to a jury trial, concluding that the remaining issues in this matter should be tried in an equity action:

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 and, as a result, the Court should grant this Petition for Rehearing and reverse the trial judge's disregard of the School District's right to a jury trial.

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

The Act recognizes the right of "the parties" — meaning all parties to the litigation — to compromise or settle a condemnation action. See S.C. Code § 28-2-40 (“[T]he 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). All relevant parties may agree to resolve disputes under the Act. This does not permit only *some* parties to reach an agreement that impacts the rights of other parties without their involvement. It 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 equitable procedure to allocate condemnation award between landlord and tenant, where all parties agreed to award). The Settlement Agreement — which does not value the Entire Tract and does not include the School District as a party — is not a proper tool for the invocation of Section 460.

There is *no* South Carolina authority permitting Condemnor and the Owner to deprive the School District of its right to a jury trial by settling among themselves — especially in connection with an in-kind “land swap.” 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

(See Opinion, at 8). Respectfully, this statement is inaccurate under the law and the facts of this case. The School District demanded a jury trial at the outset on the value of the Entire Tract before the parties agreed to refer *limited* issues to the Special Referee. Irrespective of whether the School District demanded a jury trial right to the value of the Entire Tract, the Act requires – and logic dictates – that the value of the entire tract must be determined in a jury trial, because the Condemnor invoked its right to a jury trial under the Act. The School District is entitled to have a jury determine the value of the Entire Tract, even if it might ultimately be achieved by stipulating to the value in a jury trial setting based on the Condemnor's appraisal or the value of the Condemnor's and Landowner's Settlement Agreement in its entirety. The School District never consented to circumventing the Act's requirement of a jury determination of the value of the Entire Tract.

Settlement Agreement and that the Condemnor and Owner excluded the School District from its negotiation. This would deny the School District its right to a jury trial for the valuation of the Entire Tract and prevent the School District from presenting evidence on value of the Entire Tract.²

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 permit 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. For these reasons, the Court should grant the School District's Petition for Rehearing.

E. The Opinion Mistakenly Suggests That the Mere Fact That the School District's Interest is "Equitable" Deprives It of the Right to a Jury Trial

In its Opinion, the Court states that, because the School District's interest in the property at issue is an "equitable interest," a judge in equity must determine the value of that interest.

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). The Act recognizes that its procedures encompass *equitable* interests. The mere fact that the School District's interest is equitable does not mandate that its *value* — as opposed to its *existence* — can only be decided in

² The School District did not inform the circuit court it did not demand a jury trial on the Entire Tract. To the contrary, the School District informed the circuit court that it agreed to refer the matter to the Special Referee only to determine what, if any, interest the School District had in a portion of the Entire Tract among other issues. (*See R.*, at pp. 183:21-184:8). The School District never waived or withdrew its demand for a jury trial in the condemnation action or waived its right to a determination of the value of the Entire Tract by jury trial or stipulation in the Order of Reference. The record is clear that none of the issues before the Special Referee dealt with the valuation of the Entire Tract or the School District's interest. The School District advised the circuit court that it did not have an agreement on the value of the Entire Tract or its equitable interest; therefore, "right now by statute by the pleadings we have got to get a verdict on the amount of the 69.8 acres that was condemned and then we will move to the apportionment hearing. And that's the procedure." (*See R.*, at p. 188:2-8).

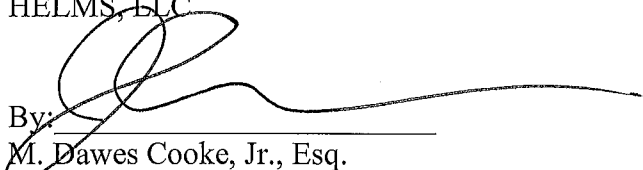
equity without first a jury trial on the Entire Tract's value. The Act plainly provides that the *amount* of just compensation is a jury issue. Condemnor cannot show that the School District is not entitled to a jury trial on the valuation of either the Entire Tract or its equitable interest therein.

CONCLUSION

For the reasons set forth above, this Court should grant the School District's Petition for Rehearing in this matter.

December 3, 2020

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.

John W. Fletcher, Esq.

Barnwell, Whaley, Patterson & Helms, LLC

211 King Street, Suite 400 (29401)

P. O. Drawer H

Charleston, SC 29402

(843) 577-7700 Fax: (843) 577-7708

mdc@barnwell-whaley.com

jfletcher@barwnwell-whaley.com

Abigail B. Walsh, Esq.

S.C. Bar No. 71291)

WILLIAMS AND WALSH, LLC

652 Rutledge Avenue, Unit B

Charleston, South Carolina 29403

(843) 722-0157

Christopher L. Murphy, Esq.

Murphy Law Offices, LLC

Post Office Box 2008

Mt. Pleasant, South Carolina 29465-2008

(843) 278-9025

***Attorneys for Appellant Charleston County
School District***

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APPEAL FROM CHARLESTON COUNTY
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SC Court of Appeals

Project: Intermodal Container Transfer Facility

Tract: 11

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

v.

Clemson UniversityRespondent

And

Charleston County School DistrictAppellant

PROOF OF SERVICE

I certify that I have served the Appellant Charleston County School District's Petition for Rehearing and Incorporated Memorandum in Support on the above-referenced Respondents by email and by depositing a copy of it in the United States Mail, postage prepaid, on December 3, 2020, addressed to their attorneys of record:

Keith M. Babcock, Esq. (SC Bar #456)
Ariail E. King, Esq. (SC Bar #8952)
Lewis Babcock L.L.P.
P.O. Box 11208
Columbia, South Carolina 29211

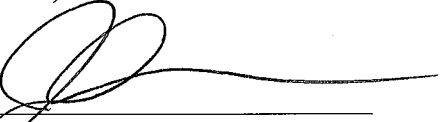
Karen Blair Manning, Esq. (SC Bar #66216)
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201

Derek F. Dean, Esq. (SC Bar #65279)
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412

Stephen A. Spitz, Esq. (SC Bar #5287)
Stevens & Lee
151 Meeting Street, Suite 350
Charleston, South Carolina 29401
*Attorneys for Respondent South Carolina Department of Commerce,
Division of Public Railways*

Wendy W. Parker, Esq.
NELSON MULLINS RILEY & SCARBOROUGH, LLP
151 Meeting Street, Suite 600
Charleston, South Carolina 29401-2239
Attorneys for Respondent Clemson University

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq. (SC Bar #1376)
John W. Fletcher, Esq. (SC Bar # 69550)
211 King Street, Suite 400 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

Abigail B. Walsh, Esq. (SC Bar #71291)
WILLIAMS AND WALSH, LLC
652 Rutledge Avenue, Unit B
Charleston, South Carolina 29403
(843) 722-0157

Christopher L. Murphy, Esq. (SC Bar #1418)
Murphy Law Offices, LLC
Post Office Box 2008
Mt. Pleasant, South Carolina 29465-2008
(843) 278-9025
*Attorneys for Appellant Charleston County
School District*

EST. 1938

BARNWELL WHALEY

ATTORNEYS AT LAW

JOHN W. FLETCHER

SPECIAL COUNSEL

JFLETCHER@BARNWELL-WHALEY.COM

December 3, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: South Carolina Department of Commerce, Division of Public Railways v. Clemson
University and Charleston County School District
Appellate No. 2017-000060
BWPH File No.: 5236.001

Dear Ms. Kitchings:

Please find enclosed Appellant Charleston County School District's Petition for Rehearing and Incorporated Memorandum in Support and Proof of Service of the same, along with our firm check for \$50.00 for the filing fee.

Thank you for your assistance.

Sincerely,

s/John W. Fletcher

John W. Fletcher

JWF/jgc
Enclosures

cc: **VIA E-MAIL ONLY**

Keith M. Babcock, Esq. (keith.babcock@lewisbabcock.com)
Ariail E. King, Esq. (ariail.king@lewisbabcock.com)
Karen Blair Manning, Esq. (kmanning@sccommerce.com)
Derek F. Dean, Esq. (dfdean@charlestonattorneys.net)
Stephen A. Spitz, Esq. (sasp@stevenslee.com)
Wendy W. Parker, Esq. (wendy.parker@nelsonmullins.com)
Abigail Walsh, Esq. (abigail@williamsandwalshlaw.com)
Christopher L. Murphy, Esq. (chris@chrismurphyllawfirm.com)

{01047422.DOCX.1}

BARNWELL WHALEY PATTERSON & HELMS LLC

211 KING STREET, SUITE 300
CHARLESTON, SC 29401
P: 843-577-7700 F: 843-577-7708

201 NORTH FRONT STREET, SUITE 1003
WILMINGTON, NC 28401
P: 910-679-1388 F: 910-679-4663

BARNWELL-WHALEY.COM

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