THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Markley R. Dennis, Jr., Circuit Court Judge

Appellate Case No. 2021-000070

South Carolina Department of Commerce,
Division of Public Railways,

Respondent,

v.

Clemson University,

Respondent,

and

Charleston County School District,

Petitioner.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC RAILWAYS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This matter is a condemnation action in which South Carolina Department of Commerce, Division of Public Railways ("Railways") condemned an approximately 70 acre tract of property owned by Clemson University ("Clemson" or "Landowner"). The condemnation notice was filed by Railways on December 22, 2010. (R.p. 63). The Charleston County School District ("District" or "Petitioner"), was one of several Other Condemnees. Id. The District's interest pertains to a 3.74 acre portion of Clemson's property where the District previously operated its Academic Magnet High School ("School").

Because certain issues needed to be decided for both the condemnation case and a related case *(Charleston County School District v. Clemson University*, C/A 12-CP-10-5093), the parties agreed to transfer these issues to a Limited Special Referee, John A. Massalon, Esquire, to determine those issues. (R.p. 3). The Limited Special Referee ruled on the issues before him and the case proceeded forward. (R.pp. 23; 31).

Railways has resolved the condemnation case with regard to the Landowner Clemson. (R.p. 210). This resolution did not include a monetary payment to Clemson. Id. Because the condemnation issues with Clemson (the Landowner) were resolved, leaving only equitable issues in the case, Railways moved to transfer the matter to the non-jury roster. (R.p. 92). After a hearing on the motion, the Honorable R. Markley Dennis, Jr. issued an order granting the motion and transferring the matter to the non-jury roster. (R.p. 54). The District moved to alter or amend, but the motion was denied. (R.p. 129, 61). The Court of Appeals issued an opinion in favor of Railways and the District now seeks a writ of certiorari.

COUNTER-STATEMENT OF THE FACTS[1]

On September 10, 1996, the United States Government leased certain property ("Primary Lease") on the Charleston Naval Complex to the Charleston Naval Complex Redevelopment Authority ("RDA"). (R.p. 262). On September 10, 1996, the RDA entered into a Sublease Agreement with the District. (R.p. 251). The Sublease attached the Primary Lease and incorporated the Primary Lease by reference. Id. The Sublease attached a map with a cross-hatched marking, which showed the Property to be subleased as the building identified as Building 199 (known as Cochrane Hall) and the adjacent parking area ("Property"). (R.p. 262). This area on the map was subsequently determined to be 3.74 acres, and this Property is at issue in this case.

Paragraph 6 of the Sublease provided for the term of the Sublease. (R.p. 252). This paragraph of the Sublease was replaced in its entirety by the First Amendment to the Sublease entered into by the RDA and the District on February 26, 1998 (the "Amendment") and provided for an initial five (5) year term with the right to extend in five year-increments upon written notice, up to a maximum of fifty (50) years. (R.p. 327). The District failed to provide proper written notice for an extension, and the Sublease expired on September 3, 2001. (R.p. 25-26) The issue of the expiration of the lease and whether the District had renewed (and whether that renewal was for a term of 50 years, as the District claimed) were some of the issues referred to and resolved by the Limited Special Referee (R.pp. 22-37). The Limited Special Referee determined that after September 3, 2001, the District continued as a tenant at will in the Property. (R.p. 25)

In 2002, the District Board decided to move the School to a new building at the

[1] These facts derive from the orders of the Special Limited Referee and the undisputed facts in the record before him.

former Bonds Wilson High School site ("Bonds Wilson site") along with the School of the Arts and began the master plan for that move. Id. The Board specifically chose to construct the new joint school campus at the Bonds Wilson site over the Charleston Naval Complex, at least in part due to environmental concerns at the Naval Complex. The Board initially intended to construct both schools between 2005 and 2009.

In 2003, the District stopped paying rent due to the amount of improvements that the District had made to the Property pursuant to its agreement with the RDA. Paragraph 5 of the Sublease provided that the District's expenses for building improvements, alterations, and additions would be credited against rental payments in the event ownership had not been conveyed to the District by the end of the initial five (5) year term. (R.p. 252). In 2003, the RDA provided the District with a refund of approximately Thirty-thousand Dollars ($30,000.00) and notified the District that it would no longer be required to pay rent.

By quitclaim deed recorded August 19, 2004, the United States Government conveyed certain property to the RDA, including the Property used by the District. On December 21, 2004, the RDA conveyed the Property to the City of North Charleston. (R.p. 33). By deeds in 2007 and 2010, the City conveyed the entire parcel to Clemson. (R.pp. 28; 35). The 3.74 acre area used by the School was included in the second deed. (R.p. 37).

During this time frame, the District continued its plans to move the School away from the Naval Base property. In 2008, the District began construction on the facility for the new School at the Bonds Wilson site, with the intention to open by 2010. The District moved the School to the new facility at the Bonds Wilson site in the spring of 2010. On December 22, 2010, the South Carolina Department of Commerce, Division of Public Railways filed its condemnation notice. (R.p. 63).

In the hearing before the Limited Special Referee, the District initially claimed that it had exercised the right to extend the lease and that the lease was extended for a 50 year term--an argument that was rejected by the Limited Special Referee. (R.pp. 25-26). Alternatively, the District claimed that after the RDA conveyed the Property to the City, the District had either equitable title to the 3.74 acre School campus and/or an equitable interest in the 3.74 acre School parcel because of improvements to the Property. (R.p. 27). The Limited Special Referee found that the District did not have equitable title to the Property at the time it was conveyed to the City by RDA. Id. The Limited Special Referee did find that the District "had an equitable interest in the 3.74 acre [School] parcel because of improvements made to that Property during the term of the Sublease and [the District's] use of the property thereafter."[2] (R.pp. 27-28). However, the Limited Special Referee did not determine whether that equitable interest had any monetary value, and if it did, how much it was worth. (R.p. 30). Ultimately, the lower court will need to make determinations as to the issues concerning the District's "equitable interest."

After the orders of the Limited Special Referee were issued, this case was assigned to Judge Dennis. In the Summer of 2016, Railways and the Clemson (the Landowner) settled the condemnation case. (R.p. 210). The settlement provided for an exchange of property, rather than monetary compensation. (Id.; p. 204: 11-15). Railways sought to have the issues with the District transferred to the non-jury roster because the only issues for the lower court to determine were: 1) whether the District's equitable interest is compensable; 2) what the interest is; 3) whether the interest has value; and 4) if it has value, what that value is. All other issues

[2] Railways does not concede that the District has an equitable interest in the property. In fact, Railways filed an appeal of the Special Referee's Orders, which was dismissed as interlocutory. However, Railways has preserved the right to appeal, if desired, the findings of those orders at the conclusion of this case.

involving the entire parcel of 70 acres have been resolved and do not require a trial, either jury or non-jury. The lower court transferred the matter to the non-jury roster and the District Appealed.

In its unanimous and well-reasoned opinion, the Court of Appeals affirmed the lower court. The Court of Appeals found the South Carolina Eminent Domain Procedure Act gave the landowner the right to demand a jury trial and noted the difference between a landowner -- one with fee simple title to the property-- and a condemnee-- which may include a person or entity with a lesser interest. S.C. Dep't of Commerce, Div. of Pub. Railways v. Clemson Univ., 432 S.C. 352, 851 S.E.2d 735, 739-740 (Ct. App. 2020), reh'g denied (Dec. 23, 2020). The court also found 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 since Clemson and Railways had settled their dispute. *Id.* In addition, the court rejected the District's argument that Railways' initial demand for a jury was dispositive, noting that under Rule 39, SCRCP, a party can withdraw a jury demand or a court can determine that a right to a jury trial does not exist.

ARGUMENT

I. South Carolina law gives only the fee-simple Landowner and the Condemnor the authority to control the litigation, including the mode of trial.

Petitioner first claims that the South Carolina Eminent Domain Procedure Act ("the Act"), does not limit the right to a jury trial only to an owner of fee simple interest and a condemnor.[3] As support for this argument, Petitioner cites City of Greenwood v. Psomas, 249 S.C. 519, 155 S.E.2d 310 (1967) for the proposition that South Carolina follows the

[3] Petitioner has no constitutional right to a jury trial. Our Supreme Court has clearly held that such a right does not apply in a condemnation cases. See, Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005)("We have specifically held there is no constitutional right to a jury trial in an eminent domain case because there was no such right when our constitution was adopted."). Thus, any right to a jury trial must derive from a statute (here, the Act). Id.

"undivided fee" rule under which the court determines compensation to all parties in a single proceeding, as a single award. There are several reasons why this case does not support the District's position.

In Psomas (a case that predates the Act by twenty years), the court did not expressly address the question of whether a non-landowner could demand a jury trial if the landowner and condemnor did not seek one. In addition, the court's analysis of the rights of the parties in a condemnation action actually supports Railways' argument that the fee simple owner controls the posture of the litigation.

To provide background, the Psomas case involved the condemnation of land which was subject to successive life estates in Pansy Psomas and her minor son, George Psomas, and was under lease to Club Soda, Inc., and Ralph W. Alexander ("the lessees"). The City served all parties with notice of condemnation. Under the procedure at that time, a board was appointed and either party was permitted to appeal the board's award to the Court of Common Pleas. The City appealed and asked for a trial de novo before a jury, which resulted in a verdict for $31,937.50 against the City. After the conclusion of that case, the lessees sought a separate jury trial to determine their interest.

The court held that the interests of the lessees had been adjudicated in the condemnation proceeding and were included in jury award. The court did not expressly address the question of whether non-landowner parties were entitled to demand a jury trial. Instead, the court in Psomas found that lessees of a condemned property did not have a right to a separate trial after a jury trial[4] on the value of the land had already been conducted. In so ruling, the court

[4] Counsel for the lessees attended but did not participate in the trial. At trial, several witnesses testified as to the fair market value of the property, including testimony that they considered the

prioritized the rights of an actual landowner over a party with a lesser interest in the property, noting that the landowner had the right to control a condemnation proceeding:

> It was appropriate that counsel for the Psomases be in active charge since Section 25-162 of the Code relating to 'Condemnation by Municipalities' gives to the actual owner or Owners, as distinguished from other interested parties designated in Section 25-1, the right to name the members of the condemnation board who will represent the condemnees at the board hearing.

City of Greenwood v. Psomas, 249 S.C. 519, 522, 155 S.E.2d 310, 312 (1967). The 1962 code sections referenced and the court's holding in Psomas actually support Respondent's argument that other condemnees are not entitled to a demand a jury trial, as more fully demonstrated below.

Here, South Carolina Code Ann. § 28-2-310 governs the mode of trial for condemnation actions. It provides:

> 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.

S.C. Code § 28-2-310 (emphasis added).[5] The definitions in the Act make it clear that a "landowner" only includes the person or entity with a fee simple interest: " 'Landowner' means one or more condemnees **having a record fee simple interest in the property condemned or any part thereof, as distinguished from condemnees who possess a lien or other nonownership interest in the property**...." S.C. Code § 28-2-30 (12)(emphasis added).[6]

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lease (which was admitted as evidence) in making the appraisal since the fair market value of the property is affected by an existing lease.

[5] Absent statutory authority, a party is only entitled to a jury trial for matters of law, not equity. S.C. Const. Art. 1 § 14; Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) ("Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.")

[6] This definition is similar to the provision in the 1962 code, which the Psomas court held gave the actual owner, as distinguished from other interested parties (i.e., "other condemnees") the

There is no mention of "other condemnees" in §28-2-310 concerning the mode of trial, nor does any other section address the mode of trial afforded to "other condemnees."[7] South Carolina case law also indicates that the right to a jury trial is the landowner's right to exercise or waive. Richland Cty. v. Lowman, 307 S.C. 422, 424, 415 S.E.2d 433, 434 (Ct. App. 1992) ("In a condemnation proceeding, a **landowner** has right to demand a trial by jury, however this right can be waived.") (emphasis added); Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) (South Carolina law "provides in an eminent domain action a **property owner or the condemnor** may elect a jury trial on the issue of compensation")(emphasis added).

In other words, only the landowner or condemnor, and not the "Other Condemnees," are entitled to a trial by jury. In fact, as the Court of Appeals properly recognized:

> The statutory scheme of the Act contemplates that the **landowner, and not other condemnees**, is the interested party in most phases of the action. Thus, the **landowner alone** is served with the condemnation notice and accepts or rejects the tender or challenges the right to condemn, is served with the condemnor's election to proceed with trial, and consents to abandonment of the action. If an appraisal panel is used, the **landowner** appoints a member of the appraisal panel, receives notice of its decision, and has the right to appeal to court. Similarly, the **landowner** receives the notice of trial, if any issues. The other condemnees receive notice only of filing the action and of any proceedings to disburse the proceeds.

S.C. Dep't of Commerce, Div. of Pub. Railways v. Clemson Univ., 851 S.E.2d 735, 740 (S.C. Ct. App. 2020), reh'g denied (Dec. 23, 2020) (citing 18 S.*C. Juris. Eminent Domain* § 44)(emphasis added). Of course, it is only logical that the landowner, as the fee simple owner of the property,

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right to name the members of the condemnation board. Thus, that case actually supports Respondent's argument that Act only permits a landowner, and not other condemnees, the right to control the mode of trial pursuant to S.C. Code Ann. § 28-2-310.

[7] S.C. Code Ann. § 28-2-280 describes the contents of the notice of condemnation. It requires that the notice designate as "landowner" all persons who are record owners of fee simple title and as "other condemnees" all persons who, to condemnor's knowledge, have or claim any record interest in the property to be taken...." Here, the District falls within the category of "other condemnee."

has the right to control the condemnation litigation. It would be impractical and unwieldy to allow multiple "other condemnees," with minimal interest in the land, to control the litigation or veto decisions of the landowner.

Here, the Landowner is Clemson University. Railways and Clemson have resolved the condemnation of Clemson's land, and there will be no trial, either jury or non-jury, as to Clemson's compensation. Petitioner is an "Other Condemnee" and Court of Appeals correctly concluded that the District has no right to demand a jury trial under the Eminent Domain Act.

II. Neither the rules of procedure nor Railways' initial demand for a jury trial conferred upon the District an independent right to a jury trial.

The District next claims that it is entitled to a jury trial under Rule 38, SCRCP, which states that "the right of 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." As noted previously, here, any right to a jury trial comes only from the statute, as there is no constitutional right to a jury trial in a condemnation case. Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005).

The District argues that the Act applies to condemnation of all interests, including equitable, citing S.C. Code 28-2-30(17). Subsection (17) states, in full:

> "Property", "real property", or "land" means 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 and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise.

S.C. Code Ann. § 28-2-30(17). This definition merely means that when property is condemned, property interests that are less than fee simple are also included. Railway does not dispute that

fact. However, the District seems to equate this section with a guarantee of a jury trial for entities with any interest, however minimal, in the property. Yet, clearly, the other section of the Act, specifically §28-2-310 and § 28-2-30(12) (as discussed in Section I above), provide that only a fee simple owner and the condemnor have the right to control the mode of trial.

Petitioner then looks to Rules 38 and 39, SCRCP, claiming that because Railways initially sought a jury trial and all parties have not filed a written stipulation consenting to a non-jury trial, the District is therefore entitled to a jury trial. Rule 39(a), SCRCP states:

> 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.**

(emphasis added).

Petitioner's argument ignores the fact that Rule 39 specifically allows a court "upon motion or its own initiative" to find that an issue is not entitled to a trial by jury. That situation is exactly what happened here. After the ruling of the Limited Special Referee and settlement with the Landowner, Railways moved to have the only remaining issues -- which are equitable in nature-- transferred to the non-jury docket.[8] As one practice guides notes, among the ways to "lose" the right to a jury trial is by:

> court order, by motion or on the court's initiative, on the ground that [a] right to a jury trial on some or all of the issues does not exist ***(note that this is not truly the loss of a right, because no right ever existed)***.

[8] Clemson did not oppose the motion to transfer.

Trial Handbook for South Carolina Lawyers § 2:33 (emphasis added). Here, the District is not "losing" its right to a jury trial because one never existed. As the Court of Appeals properly ruled in this case:

> Rules 38 and 39, SCRCP, in and of themselves, do not create the right to a jury trial. Rather, pursuant to Rule 39(a)(2), SCRCP, if the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required even if the parties have demanded one. Thus, notwithstanding [Railways'] initial demand for a jury trial, Rule 39(a), SCRCP, did not confer upon the School District the right to a jury trial. Further, under the School District's suggested reading of the Act, any other condemnee having a nonownership interest in the property at issue could demand a jury trial even if both the landowner and the condemnor have elected a non-jury trial. We do not believe the legislature intended this result.

S.C. Dep't of Commerce, Div. of Pub. Railways v. Clemson Univ., 851 S.E.2d 735, 741 (S.C. Ct. App. 2020), reh'g denied (Dec. 23, 2020).

By clinging to its argument that Railways initially sought a jury trial, Petitioner also fails to recognize that posture of this case changed significantly since its inception in 2010. While Railways and Clemson may have initially needed a jury trial, their settlement obviated that need. Moreover, the fact that the District filed a Notice of Appearance of counsel and demanded a jury trial is of no consequence, since the District -- as an "Other Condemnee"-- is not entitled to a jury trial under the Act.

III. The issues in this case are similar to those present in a proceeding under S.C. Code § 28-2-460 and thus a similar equitable proceeding is appropriate.

Petitioner claims that the Court of Appeals improperly relied on S.C. Code § 28-2-460 in concluding that it was not entitled to a jury trial. That section of the Act provides for an equity proceeding to determine the rights of the Landowners or the Other Condemnees, stating:

> 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.

S.C. Code § 28-2-460.

The Court of Appeals found that while the exact procedure could not be used because Railways received no monetary payment, a similar proceeding was appropriate, stating:

> Section 28-2-460 has no bearing upon whether the School District had a statutory right to a jury trial. As we stated, the value of the Entire Tract is not at issue. Further, nothing in section 28-2-460 requires a jury to determine just compensation or the value of an equitable interest in a portion of the condemned property....However, section 28-2-460 does suggest 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.

S.C. Dep't of Commerce, Div. of Pub. Railways v. Clemson Univ., 851 S.E.2d 735, 742 (S.C. Ct. App. 2020), reh'g denied (Dec. 23, 2020).

The District argues that a similar procedure cannot be utilized here because there has been no determination of the value of the entire parcel and Railways has not tendered any funds to the court. It appears that the District is seeking jury trial on the value of the entire 69.963 acres (see, Pet. Brief p. 11, Fn. 1). However, the District's equitable interest is limited to just 3.74 acres. Moreover, despite the District's claims to the contrary, this issue is not preserved for appeal, as the District specifically waived it at the December 14, 2016 hearing: "We are not demanding a trial of the entire 97 [sic] acres. We are perfectly happy with a jury trial as to the value of our equitable interests in the--" (R.p. 206:1-3). Having waived the request for a jury

trial on the entire parcel in open court, the District cannot claim it is entitled to a jury trial on all 69.623 acres on appeal.[9]

Furthermore, this case presents a unique situation unlike those present in most condemnation cases -- the Condemnor and Landowner have settled; the settlement is a property exchange; and the Other Condemnee's interest (an equitable interest only) is in a small *portion* of the property.[10] Requiring a jury trial on the value of the entire 69.963 acres would be an exercise in futility (and a waste of judicial resources) as there is no dispute between the Landowner and Railways, **and** the Court would still have to hold a proceeding in equity, pursuant to S.C. Code §28-2-460, to determine the value, if any, of the District's equitable interest in the 3.74 acre parcel after such a jury trial.[11]

The District also argues that Railways (the Condemnor) and Clemson (the Landowner) cannot settle the condemnation action without the District's consent. The District has misconstrued the case law and the Act. It is entirely appropriate for Railways and the Landowner to resolve all issues between them related to the condemnation of the property. The South Carolina Eminent Domain Act specifically permits:

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[9] The District attempts to argue that regardless of whether it demanded or waived a jury trial as to the entire tract, the Act requires the value of the entire tract to be determined by a jury trial because Railways initially demanded one. The District also claims that it "never consented to circumventing the Act's requirement of a jury determination of the value of the Entire Tract." (Pet. p. 12). Both of these arguments ignore that Railways and Landowner never needed the District's consent as to whether the matter should be tried by a jury initially, nor did they need the District's consent to settle the case without a jury determination.

[10] In contrast to, for example, a mortgagee, whose interest is in the entire property.

[11] The District does not even have standing to assert the value of the entire 69.963 acres of the property because it only has an equitable interest in 3.74 acres. Moreover, it would be confusing and unwieldly for a jury to determine the value of the entire property as well as the value of an equitable interest in a small portion of the property.

> At any time before or after commencement of an 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.

S.C. 28-2-40. In effect, the District is trying to challenge the right of two parties to settle their dispute.[12]

In claiming that its consent is required, the District relies on S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 651, 667 S.E.2d 7, 11 (Ct. App. 2008). However, that case did not analyze whether all parties must agree to a settlement and only briefly mentioned, in its recitation of facts, that "Tenant, Landlord, and SCDOT agreed to a condemnation award of $100,000." Id. To say that the M&T case requires consent from other condemnees would be disingenuous. Petitioner also claims that there is "*no* South Carolina authority permitting Condemnor and Owner to deprive the School District to its right to a jury trial by settling among themselves...." (Pet. p. 12). Of course, Petitioner can cite *no* case requiring the Other Condemnees to consent to any settlement between the Landowner and Condemnor. Moreover, if Other Condemnees were required to consent to a settlement, the Other Condemnees, who generally have limited interests derived through the Landowner, could prevent settlements. It is axiomatic that settlements are favored by our judicial system. 6 *S.C. Juris. Compromise and Settlement* § 18 (It is well established that "that the law favors compromise."); Deal v. Deal, 91 S.C. 351, 74 S.E. 482 (1912)("The law favors the avoidance or settlement of litigation....").

[12] The District claims that the S.C. Code § 28-2-40 means *all parties* may agree to a compromise or settlement but the General Assembly did not include that phrase. It used the term "the parties" which is consistent with the Act's other provisions which give the fee simple landowner (and the condemnor) the right to control the litigation. *See, e.g.,* §§ 28-2-30(6) and (12), 28-2-310, 28-2-280.

IV. The value, if any, of the District's equitable interest should be determined by the court sitting in equity without a jury.

The Limited Special Referee made certain conclusions of equity, including a determination that the School District held an "equitable interest," but he specifically declined to determine whether that interest had any monetary value, and if so, how much that value was. (R.pp. 27-28; 30). Electing not to exceed his limited authority, the Limited Special Referee explicitly noted he expressed no opinion as to the question of whether the "CCSD equitable interest has value or what the value may be." (R.p. 30).

As a result of the Limited Special Referee's opinion, the questions that will have to be determined by the lower court are the very equitable questions not answered by the Limited Special Referee, including what value, **if any,** the equitable interest found by the Limited Special Referee has. The equitable questions not addressed by the Limited Special Referee are matters for the lower court to decide, sitting in equity, without a jury.

The Court of Appeals affirmed the lower court's determination that this equitable interest could be determined without a jury:

> As we stated, the parties entitled to a jury trial in a condemnation action are the landowner and condemnor. When, as here, the landowner and condemnor have settled their dispute, the Act does not require a jury trial on the issue of just compensation for any other parties that do not fall into one of these categories. Therefore, we find the circuit court did not err by finding the School District was not entitled to a jury trial to determine the value, if any, of its equitable interest in the 3.74-acre portion of the property.

S.C. Dep't of Commerce, Div. of Pub. Railways v. Clemson Univ., 851 S.E.2d 735, 742 (S.C. Ct. App. 2020), reh'g denied (Dec. 23, 2020).

Petitioner argues that an "equitable interest" does not need to be determined by a court in equity. Petitioner relies on the definition of "property" in S.C. Code § 28-2-30(17) which includes "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 and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise." (emphasis added). All that definition does is recognize that condemned property may consist of legal and equitable interests, but it does not provide for a jury trial for a solely equitable interest (and neither does any other provision of the Act).

Even though the District's case before the Limited Special Referee argued the equities of the case,[13] the District now wants to ignore the fact that its interest is limited to one in equity. Despite this shift in the District's argument, there are multiple bases supporting the lower court's transfer of this matter, rooted in equity, to the non-jury roster.

First, the fact that the Special Referee explicitly held that an "equitable interest" exists squarely supports the conclusion that there is nothing for a jury to decide. The District itself relied on multiple equitable maxims[14] in the trial before the Limited Special Referee, which obviously indicates that the lower court should sit on the "equity side" of a Circuit Court's jurisdiction.

Additionally, cases involving an "equitable interest" have overwhelmingly been interpreted as a clear signal for a judge to decide the nature and value of the equitable interest. There is simply nothing at all for a jury to even address or decide. *See*, e.g., Kinard v. Hiers, 3 Rich Eq. 423 (1851 Court of Appeals of Equity in S.C.) (holding that the "equitable interest" that existed was to be decided solely by the lower court with no jury); McNair v. Moore, 50 S.E.197 (S.C.1905) (finding that the claimed equitable interest was a question of law for the lower

[13] See, for example R.p. 27, in which the Special Referee addressed the District's arguments regarding equitable title and equitable interest.

[14] One such maxim is referenced in the Order of the Special Referee, R.p. 28, FN1.

court);[15] Gilkerson v. Connor, 24 S.C. 321 (S.C.1866) (finding that an "equitable interest" was a question of equity for the Court and not for a jury); Witsell v. City of Charleston, 7 S.C. 88 (1876) (determining whether or not an "equitable interest" of land was or was not within the scope of a married women's right of separate use and holding this question was a question of law for the Court itself to decide); White v. Kavanagh, 8 Rich. 377 (1855 S.C. Court of Errors) (holding that scope of the phrase equitable interests in land was a question for the Court); Oskin v. Johnson, 736 S.E.2d 459 (S.C. 2012) (transfer of an equitable interest of land from wife to LLC and whether or not this was fraud was a question of equity for the Court)[16].

CONCLUSION

In conclusion, the Court of Appeals properly affirmed the lower's courts transfer of the case to the non-jury roster because, *inter alia*, neither the South Carolina Constitution nor the South Carolina Eminent Domain Act provide the District with a right to a jury trial. Furthermore, a determination of the value of the entire 69.623 acre parcel is not needed to determine the nature and value, if any, of the District's equitable interest in a small 3.74 acre portion of the property. The questions before the lower court (including the nature, extent, and value, if any, of the equitable interest) are question of equity to be decided by the Court itself without the need or aid of any jury. Since the issues present are exclusively equitable, there is nothing left for a jury to decide in this case. The Court of Appeals' decision is consistent with years of condemnation case

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[15] Apparently, this question was twice appealed, see McNair v. Moore, 41 S.E.829 (S.C. 1902) (Lower Court issued a decree that both parties appealed).

[16] Remarkably, in over 200 years of litigation, only one South Carolina case involving an "equitable interest in land" was remanded the case for a jury. *See*, Bell v. Bell, 99 S.C. 501, 84 S.E. 369, 369 (1914), appeal after remand 103 S.C. 95, 87 S.E. 540 (1915). That case is distinguishable as the jury issue present in that case was a question of fact as to whether a purchaser of property had notice of a claim of title in the premises by another before the purchase paid the purchase price.

law in which the fee simple owner controls the litigation. Thus, the Petition for Writ of Certiorari should be denied.

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