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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson,
Circuit Court Judge

Appellate Case No. 2021-000393

South Carolina Electric & Gas Company, Respondent,

v.

Barbara Todd, Landowner, and Public Service Authority; Pitch Landing, LLC; and David O. Heniford, Jr., Other Condemnees, of which Pitch Landing, LLC is the Appellant.

AND

South Carolina Electric & Gas Company, Respondent, v. Pitch Landing, LLC, Landowner, Appellant, and South Carolina Public Authority; Horry Telephone Cooperative; Grand Strand Water and Sewer Authority; Coastal Carolina National Bank; Billy J. McDowell & Sally R. McDowell; Bobby D. McDowell, Other Condemnees.

RESPONDENT'S INITIAL BRIEF

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November 17, 2021
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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Trial Court correctly applied *S.C Dep't of Commerce v. Charleston County School District,* S.C. App. (2020) as it relates to the rights of "Other Condemnees" in the 2018-CP-26-06064 "Todd Case."

II. Whether the Trial Court erred by placing the restored 2018-CP-26-06064 Todd Case on the non-jury docket.

III. Whether the Trial Court erred by denying Appellant's Motion to Consolidate the 2018-CP-26-06064 Todd Case with the Pitch Landing Case (No. 2018-CP-26-06424).

STATEMENT OF THE CASES

Respondent Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company ("Dominion") filed South Carolina Electric & Gas Company v. Barbara A. Todd Landowner, et. al., Case No: 2018-CP-26-06064 on October 29, 2018 (the "Todd Case").

Respondent Dominion filed South Carolina Electric & Gas Company n/k/a Dominion of South Carolina v. Pitch Landing, LLC, et. al., Case No. 2018-CP-26-6424 on November 14, 2018 (the "Pitch Landing Case").

A. **The Todd Case**:

In the Todd Case, Dominion commenced an action to condemn an easement over the property owned in fee simple by Barbara Todd as provided in the Notice of Condemnation and described as follows:

> All that certain piece, parcel or tract of land shown as "PROPOSED 50' SCE&G GAS EASEMENT 1.23 +/- AC." on that certain survey drawing entitled "PROPOSED SCE&G EASEMENT, THE LANDS OF BARBARA A. TODD, PREPARED FOR SOUTH CAROLINA ELECTRIC & GAS, CONWAY TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA, prepared and certified by Cox Surveyors & Associates, J. Jason Cox (SCRLS #26950), dated 05/31/2018, attached hereto as **Exhibit "A"** and incorporated herein by reference.
> (R. at ____). (the "Todd Easement").

Pitch Landing was named in that action as an "Other Condemnee" because it held an easement for access and utilities over roughly the same 50 foot Todd Easement acquired by Dominion. (R at __). On December 24, 2018, Pitch Landing filed an Answer and demanded a jury trial in the Todd Case. (R. at __)

Dominion settled with Barbara Todd (Landowner), and a Proposed Consent Order of Dismissal was uploaded and filed on May 15, 2019. (R. at ____). Pitch Landing received notice of the proposed Consent Order through the e-filing system on May 16, 2019. (R. at ___). The Order was entered on May 29, 2019. (R. at ___). Pitch Landing received notice of the Consent Order being entered through the e-filing system on May 29, 2019. (R. at ____).

On June 10, 2019, Dominion filed the "Return of the Condemnation Notice (annotated) from the Register of Deeds, Pitch Landing received notice of this filing through the e-filing system on June 10, 2019. (R. at ____). On July 25, 2019, Dominion filed a Notice of Dismissal through the e-filing system. (R. at ____). On July 25, 2019, through the e-filing system Pitch landing received notice of filing of the Notice of Dismissal. (R. at ____). On July 26, 2019, Dominion filed a cancellation of Lis Pendens. (R. at ____). On July 26, 2019, Pitch Landing received notice of both of these filings. (R. at ____).

Pitch Landing received notice of the filing of the proposed settlement, the Order, and the other filings listed above to memorialize Dominion's settlement with the Landowner. Pitch Landing never objected to the proposed Consent Order, never indicated that there was any dispute as to the disposition of the condemnation proceeds and never requested a hearing in accordance with S.C. Code 28-2-460.

Pitch Landing's only filing subsequent to its Answer came almost one year later, and was limited to a motion for a proposed scheduling order on March 3, 2020. (R. at __). On March 6,

2020, the Trial Court declined to enter a scheduling order finding that "Case is dismissed, therefore Scheduling Order is denied." (R. at ____).

Pitch Landing did not object to the Trial Court's March 6, 2020 order, nor did it file any other pleadings until September 3, 2020. On that date, over 5 months after the entry of the March 6th Order, Pitch Landing filed a Motion to Restore the Todd Case. (R. at ____). The Trial Court held a virtual hearing on March 1, 2021. On March 3, 2021, The Trial Court granted Pitch Landing's Motion to Restore the case stating:

> **"The defendant Pitch Landing, LLC's motion to restore this case is GRANTED. This case is restored to the active roster and placed on the non-jury docket. The defendant Pitch Landing LLC is entitled to an equitable proceeding to determine its equitable interest in the condemned property. See SC Dept. of Commerce v. Clemson University, et. al. 432 S.C. 352, 851 S. E.2d 735 (S.C. App. 2020)."** (R. at ____).

Pitch Landing moved to Alter or Amend on March 15, 2021. (R. at ____). The Trial Court denied the motion by form 4 Order dated March 17, 2021. (R. at ____). Pitch Landing filed a Notice of Appeal on April 15, 2021. (R. at ____).

B. The Pitch Landing Case.

In the Pitch Landing Case, Dominion sought to condemn an easement over land owned by Pitch Landing as provided in the Notice of Condemnation and described as follows:

> All that certain piece, parcel or tract of land shown as "PROPOSED 50' SCE&G GAS EASEMENT 1.39 +/- AC." on that certain survey drawing entitled "PROPOSED SCE&G EASEMENT, THE LANDS OF PITCH LANDING, LLC, PREPARED FOR SOUTH CAROLINA ELECTRIC & GAS, CONWAY TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA, prepared and certified by Cox Surveyors & Associates, J. Jason Cox (SCRLS #26950), dated 05/31/2018, attached hereto as **Exhibit "A"**. (R. at ____) (the "Pitch Landing Easement").

Pitch Landing filed an Answer and demanded a jury trial on December 24, 2018. (R. at ____). Thereafter, the case proceeded with the parties engaging in discovery and discovery

related motion practice. On September 4, 2020, Pitch Landing filed a motion to Consolidate the Pitch Landing Case with the Todd Case. The Trial Court heard this motion in conjunction with the Motion to Restore in the Todd Case on March 1, 2021.

On March 3, 2021, the Trial Court issued a Form 4 order stating as follows:

> "**Motion to Consolidate this case with SCE& G v. Todd, et. al. 2018CP2606064 is DENIED.**
>
> **Defendant Pitch Landing, LLC (as Landowner) is entitled to a jury trial in this case. However, Pitch Landing, LLC (as non-landowner/equitable condemnee) is not entitled to a jury trial in SCE&G v. Todd, 2018CP2606064."** (R. at ____).

On March 15, 2021, Pitch Landing filed a Motion to Reconsider. (R. at ____). On March 17, 2021, the Trial Court issued a Form 4 order denying the Motion to Reconsider. (R. at ____). Pitch Landing filed a Notice of Appeal on April 15, 2021. (R. at ____).

STANDARD OF REVEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Likewise, "[a]n issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). "[T]his Court reviews questions of law de novo." Id. (alteration in original) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

A motion to consolidate is addressed to the sound discretion of the trial judge, but the exercise of that discretion will be disturbed, if it deprived a party of a substantial right to which he is entitled under the law. *Bishop, et al. v. Bishop*, 164 S.C. 493, 162 S.E.2d 756 (1932). *In Re Norwood's Adoption*, 258 S.E.2d 869 (N.C.App.1979). *Alcorn v. Ford Motor Co*., 276 S.E.2d 925, 276 S.C. 180 (S.C. 1981).

ARGUMENT

I. **The Trial Court correctly applied the law controlling the rights of an "Other Condemnee" in Case No: 2018 CP-26-06064 (the "Todd Case").**

Appellant misunderstands, and therefore misstates the reasoning and holding of *S.C. Dep't of Commerce v. Clemson Univ*., 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020). The Court of Appeals in that case decided the precise issue faced by the Trial Court in the Todd Case. The question: "Is an "other condemnee" (i.e. not the "Landowner") entitled to a jury trial?" In *S.C. Dept. of Commerce,* this Court answered in the negative and explained:

> **The Act defines a "condemnee" as "a person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30(6) (2007).**
>
> **"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 non-ownership interest in the property; where there are more than one, the term means the condemnees collectively, unless expressly provided otherwise. S.C. Code Ann. § 28-2-30(12) (2007) (emphasis added); see also 18 S.C. Jur. Eminent Domain § 44 (1993) (noting "[t]he Act distinguishes between other condemnees and the landowners");**
>
> **S.C. Code Ann. § 28-2-30(17) (2007) (" 'Property' ... means all lands, including improvements and fixtures thereon, ... easements and hereditaments, ... every estate, interest and right, legal or equitable, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto ....").**
>
> **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.**

> **18 S.C. Jur. Eminent Domain § 44 (footnotes omitted) (summarizing the provisions of sections 28-2-220 to -260, 28-2-290, and 28-2-460 of the Act (2007 & Supp. 2019)).**
>
> **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. Section 28-2-310(B) 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." The definition of landowner does not include "condemnees who possess a lien or other non-ownership interest." See § 28-2-30(12). Rather, the term encompasses only those condemnees "having a record fee simple interest in the property condemned or any part thereof." Id. By definition, the term "landowner," regardless of whether it includes multiple condemnees, does not include all condemnees. Based on a plain reading of the Act, we conclude it contemplates the parties entitled to participate in trial are limited to the landowner and the condemnor, and only those parties who are entitled to participate in trial are entitled to a jury trial. See S.C. Code Ann. § 28-2-240 (2007) ; S.C. Code Ann. § 28-2-280 (2007) ; § 28-2-310. The School District—having only an equitable interest in a 3.74-acre portion of the Entire Tract—is not a landowner under the Act and is therefore not entitled to participate in trial. Accordingly, we conclude the School District is not entitled to a jury trial under the Act. S.C. Dep't of Commerce v. Clemson Univ., 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020).**

From a factual perspective and despite Pitch Landing's contentions to the contrary, the record reflects that Pitch Landing received notice of the action and received multiple notices of the Landowner's and Condemnor's agreement to end the Todd Case. R at ___, ___, ____,). After receiving notice of the proposed settlement order, Pitch Landing made no objection. (R. at ____). After the order was entered, Pitch Landing made no objection. (R at ___). After the Lis Pendens was released, the Condemnation Notice returned as Annotated, and after the case was dismissed, Pitch Landing made no objection. (R. at ___).

The Trial Court correctly interpreted and applied *S.C. Dep't of Commerce v. Clemson Univ*., 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020). In the Todd Case, Pitch Landing as an easement holder is an "Other Condemnee" and thus is not entitled to a jury trial.

II. The Trial Court correctly placed the Restored 2018 CP-26-06064 Todd Case on the Non-Jury Docket.

The application of the Eminent Domain 28-2-10, et. seq. as interpreted by *S.C. Dep't of Commerce v. Clemson Univ*., 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020), necessarily directed and controlled the Trial Judge's decision to place the restored case on the nonjury roster.

Pitch Landing's reliance on *City of Greenwood v. Psomas,* 155 S.E.2d 310, 249 S.C. 519 (S.C. 1967), is misplaced. In fact, that case further supports the Trial Court's rulings. In *City of Greenwood v. Psomas,* the Court noted:

> The lease was presented in evidence to the jury and several witnesses testified that they considered the same in making the appraisal. This was, of course, relevant since the fair market value of the property is affected by an existing lease. The jury is concerned with the whole fair market value; **the City has no voice in the distribution of the award; the allocation of the funds among the condemnees is for a court of equity, as contemplated by Section 25--2. (emphasis added).**

In the Todd case, Pitch Landing, had notice of the proposed settlement through the E-filing system and yet took no steps to oppose or even question the proposed and then finalized valuation settlement. The Appellant in *City of Greenwood,* seemed to have acted in a similar manner during the docketing and even trial of the case. As the reviewing court noted:

> "There is no contention but that this case was docketed in the regular fashion and these respondents had full opportunity to participate in the trial of the case if they had so elected. Certainly, counsel for the respondents and the manager for Club Soda, Inc., were aware of the fact that this case, to which these respondents were parties, was being adjudicated and took no action prior to the jury verdict to seek a separate trial. *City of Greenwood v. Psomas*, 155 S.E.2d 310, 249 S.C. 519 (S.C. 1967).

Pitch Landing, like Club Soda, Inc., in the *City of Greenwood Case,* received numerous notices of the proposed settlement of the Todd Case. The Proposed Consent Order of Dismissal was uploaded and filed on May 15, 2019. (R. at ____). Pitch Landing received notice of the

proposed Consent Order through the e-filing system on May 16, 2019. (R. at ___). The Order was entered on May 29, 2019. (R. at ___). Pitch Landing received notice of the Consent Order being entered through the e-filing system on May 29, 2019. (R. at ____). Pitch Landing received notice of the entry of the March 6, 2020 Order.

Pitch Landing cites a number of cases involving compensation to the "landowner." *S.C. DOT v. Powell*, *Normandy Corp., Phelps.* Dominion does not dispute that these cases are good and settled law, as they apply to the rights of the Landowners and what may or may not be presented to a jury by a **Landowner** (emphasis added). However, these cases do not apply in the context of an "other condemnee." Rather, the principles set forth in *Greenwood v. Psomas,* 155 S.E.2d 310, 249 S.C. 519 (S.C. 1967), as refined by *S.C. Dep't of Commerce v. Clemson Univ*., 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020) control the procedural rights of an "other condemnee." As this Court clearly held, under the South Carolina Eminent Domain Act, fee simple "landowners" and "other condemnees" have different procedural and substantive rights in condemnation actions. The Trial Court correctly discerned this delineation.

In addition, Appellant cites dicta from *United States v. Gossler,* 60 F. Supp. 971 (1945). In *Gossler*, condemnation defendants brought a motion for a new trial because as easement holders, defendants felt they were not adequately compensated for the potential profit from a gravel and sand hauling contract with the United States Government. *Id at 976.* The trial judge refused to let the jury consider the value of any sand, gravel or potential loss of profit, by the easement holder. *Id.* The reviewing Court found no error in this instruction. *Id at 977. Gossler* is of no help to the Appellants because it rules on the propriety of jury instructions given in a different state, that is not governed by the South Carolina Eminent Domain Act.

III. **<u>The Trial Court did not abuse its Discretion in denying Appellant's Motion to Consolidate.</u>**

The general rule applied in ordering consolidations of cases at law is that the different actions shall be pending in the same court, at the same time, between the same parties, and involve substantially the same subject matter, issues, and defenses. *Binswanger v. Green,* 216 S.C. 108 (1949). In the present context, the subject matter of the Todd Case is the 1.23 acre Todd Easement. In the Pitch Landing Case the subject matter is the 1.93 acre Pitch Landing Easement. The "subject matter" of the cases Pitch Landing seeks to consolidate is not the same. With respect to the parties: Barbara Todd, nor the named "other condemnees" in the Todd Case are named in the Pitch Landing Case. The parties in the Todd Case are different than the parties in the Pitch Landing Case. Thus, the Trial Court did not abuse its discretion in denying the motion to consolidate when neither the subject matter nor the parties are the same.

The granting or refusing of motions to consolidate actions for trial must be left to the discretion of the trial judge, but his exercise will be disturbed if it deprives a party of a substantial right which he can show he is entitled to under the law. Abuse of discretion merely means that the trial judge committed an error of law in the circumstances *Winchester v. United Insurance***,** 231 S.C. 462 (1957).

An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Rice,* 368 S.C. 610, 613 (S.C. Ct. Appeals 2006). In *Keels v. Pierce,* the appellate court held that where a claim would still be available in a second action, there was no abuse of discretion in denying a motion to consolidate. *Keels v.*

Pierce, 315 S.C. 339, 342 (S.C. Ct. App. 1993). Pitch Landing has reached the same result: a non-jury/ equity proceeding in the Todd Case, and a jury trial in the Pitch Landing Case.

Respondent respectfully submits that to have granted the motion to consolidate would have been an abuse of discretion. This is so because there was no unity of subject matter, no unity of parties, and no deprivation of a right to a jury trial.

Pitch Landing is alleging that the denial of the motion to consolidate has resulted in the denial of their substantial fundamental right to a jury trial in the Todd Case. But as the Court analyzed in *S.C. Dept. of Commerce, supra.,* no such right exists in that context. However, Pitch Landing is not being denied and is specifically being given a jury trial in the Pitch Landing Case.

The Trial Court did not abuse its discretion, nor did it commit an error of law, because it correctly applied *S.C. Dept. of Commerce*. Pitch Landing is not being denied a substantial right because it is getting a jury trial in the Pitch Landing Case. The trial Court properly denied the motion to consolidate.

CONCLUSION

For the reasons stated above, the Trial Court should be **AFFIRMED**.

Respectfully Submitted,

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Hilton Head Island, South Carolina

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson,
Circuit Court Judge

Appellate Case No. 2021-000393

South Carolina Electric & Gas Company, Respondent,

v.

Barbara Todd, Landowner, and Public Service Authority; Pitch Landing, LLC; and David O. Heniford, Jr., Other Condemnees, of which Pitch Landing, LLC is the Appellant.

AND

South Carolina Electric & Gas Company, Respondent, v. Pitch Landing, LLC, Landowner, Appellant, and South Carolina Public Authority; Horry Telephone Cooperative; Grand Strand Water and Sewer Authority; Coastal Carolina National Bank; Billy J. McDowell & Sally R. McDowell; Bobby D. McDowell, Other Condemnees.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States mail, postage prepaid, on November 17, 2021, addressed to its attorney of record, Robert S. Shelton, Bellamy Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Post Office Box 357, Myrtle Beach, SC 29578 and Mark D. Neill, Neill Law Firm, P.A., P.O. Box 2810, Murrells Inlet, SC 29576.

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(NOT FOR CONFIDENTIAL COMMUNICATIONS)

November 17, 2021

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Re: Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company v. Barbara Todd
and
Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company v. Pitch Landing, LLC, et al
Appellate Case No.: 2021-000393

Dear Mr. Shelton & Mr. Neill:

Please find enclosed Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal regarding the above referenced matter, which is hereby served upon pursuant to the enclosed Proof of Service.

With kindest regards, I remain

Sincerely,
ALFORD LAW FIRM, LLC

Gregory M. Alford

GMA/vka
Enclosures