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

Civil Action No.: 2018-CP-26-6424
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, 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.

APPELLANT'S FINAL BRIEF

January 11, 2022

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1. Whether the trial court erroneously relied upon *SC Department of Commerce v. Clemson University, et al.* 432 S.C. 352, 851 S.E.2d 735 (S.C.App. 2020).

2. Whether the trial court erred by placing the restored matter on the non-jury docket.

3. Whether the trial court erred by denying Appellant's Motion to Consolidate the two matters for trial.

STATEMENT OF THE CASE

I. Background

SCE&G v. Todd, *et al.* (the Todd action) was filed October 29, 2018 and SCE&G v. Pitch Landing was filed November 14, 2018 (the Pitch Landing action). (Todd Summons and Complaint, R. pp. 21-30 and Pitch Landing Summons and Complaint R. pp. 71-97). In each action, Condemnor acquired a fifty-foot wide easement within which to install and maintain a gas line owned by Condemnor. (Todd Summons and Complaint, R. pp. 21-30 and Pitch Landing Summons and Complaint R. pp. 71-97). At the time of the filing, Barbara Todd owned a parcel between the Pitch Landing parcel and Pitch Landing Road, as depicted on the May 31, 2018 plat attached to Condemnor's respective Complaints (the Plat). (Todd Summons and Complaint, R. p. 30 and Pitch Landing Summons and Complaint R. p. 82). Also shown upon that plat is an "EXISTING 50' PRIVATE ROAD EASEMENT" with the notation "P.B. 204, PG. 13." (Pitch Landing Summons and Complaint R. p. 82). That road provides access to the Pitch Landing parcel located behind the Todd parcel, as is clear on the Plat. (Todd Summons and Complaint R. p. 30 and Pitch Landing Summons and Complaint R. p. 82). Condemnor named Pitch Landing as an "Other Condemnee" in the Todd matter and "Landowner" in the Pitch Landing matter. (Todd Summons and Complaint R. pp. 21-30 and Pitch Landing Summons and Complaint R. pp. 71-97).

II. Procedural History

According to the Complaint in the Todd matter, "Pitch Landing, LLC is made a party in this action by virtue of the reservation between Issac Lacy Cannon, Jr. and Barbara A. Todd recorded in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 2854 at Page 355." (Todd Summons and Complaint, p. 3 R. p. 25).

Condemnor and Barbara A. Todd entered into a settlement agreement on February 14, 2019. (Notice of Dismissal R. pp. 51-54). Thereafter a Consent Order of Dismissal as to Barbara A. Todd was filed on May 29, 2019. (Consent Order of Dismissal as to Barbara Todd R. pp. 4-8). A second Stipulation of Dismissal, apparently as to the entire case, was filed on July 25, 2019. (Notice of Dismissal R. pp. 50-54). Pitch Landing was not a party to either of these filings.

Pitch Landing filed a Motion to Restore on September 3, 2020, setting forth the series of events that had taken place without the involvement of or notice to Pitch Landing and enclosing evidence of continued discovery communications with counsel for Condemnor, in the Todd matter, following the dismissal of the Todd matter. (Motion to Restore R. pp. 108-114). On September 4, 2020, Pitch Landing filed a Motion to Consolidate the Todd matter and the Pitch Landing matter. (Motion to Consolidate Cases R. pp. 136-137). The Honorable Judge Benjamin H. Culbertson heard both motions on March 1, 2021. (Transcript of Record dated March 1, 2021 R. pp. 157-179)

On March 3, 2021, the circuit court filed an Order Restoring the Todd matter, and an Order Denying Pitch Landing's Motion to Consolidate. (Todd Form 4 Order R pp. 12-14 and Pitch Landing Form 4 Order R. pp. 9-11). The Order Restoring the Todd matter placed the case on the non-jury docket.

Pitch Landing filed Motions to Reconsider on March 15, 2021 in both the Todd matter and the Pitch Landing matter. (Todd Motion to Reconsider, Alter and/or Amend R. pp. 117-135 and Pitch Landing Motion to Reconsider, Alter and/or Amend R. pp. 138-156). Pitch Landing's Motion to Reconsider the restoration of the Todd matter was as to its placement on the Non-Jury Docket. (Todd Motion to Reconsider, Alter and/or Amend R. pp. 117-135). On the same day, Pitch Landing filed a Motion to Reconsider the Order denying the Pitch Landing Motion to Consolidate the two matters. (Pitch Landing Motion to Reconsider, Alter and/or Amend R. pp.

138-156). On March 17, 2021 the Honorable Judge Benjamin H. Culbertson denied both Motions to Reconsider. (Todd Form 4 Order R. pp. 15-17 and Pitch Landing Form 4 Order R. pp. 18-20).

Pitch Landing filed a Notice of Appeal of both Orders on April 15, 2021.

ARGUMENT

I. Standard of Review

This appeal addresses the refusal of the trial court to permit Pitch Landing to present its evidence before a jury. That is a question of law and requires no deference to the trial court for appellate correction of error. *Verenes v. Alamos*, 387 S.C. 11, 15, 690 S.C.2d 771,772-3 (2010).

Also before the Court is the denial of Pitch Landing's Motion to Consolidate these two matters for trial. This would normally be left to the sound discretion of the trial court, but may be disturbed if one party is deprived of a substantial right. *Bishop v. Bishop*, 164 S.C. 493, 496, 162 S.E. 756, 757 (1932). Pitch Landing submits this error of law, the denial of a jury trial, satisfies the abuse of discretion standard.

II. The trial court erroneously relied upon *SC Department of Commerce v. Clemson University, et al.* 432 S.C. 352, 851 S.E.2d 735 (S.C.App. 2020).

The *Clemson* case is readily distinguishable from the present appeal. The entire reasoning of the trial court in restoring the Todd, *et al.* matter was stated by the court as follows:

> 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 Department of Commerce v. Clemson University, et al., 432 S.C. 352, 851 S.E.2d 735 (S.C.App. 2020) (Todd Form 4 Order R. p. 12).

The trial court clearly misapprehended the purpose of the equitable hearing in the *Clemson* matter. In *Clemson*:

> The circuit court issued a consent order of limited reference in April of 2014, which stayed the underlying condemnation action. According to the order, all parties agreed that in 1996, the Charleston Naval Complex Redevelopment Authority (the

> RDA) and the School District entered in to a sublease concerning an Academic Magnet School. (Footnote omitted.) However, the parties submitted the following matters to a limited special referee: (1) whether the sublease expired, (2) how much property was included in the sublease, (3) whether the School District had any rights to such property after it was conveyed from the RDA to the City of North Charleston, (4) whether the School District had any rights in such property after North Charleston conveyed it to Clemson, and (5) whether the School District had any rights in the property when the condemnation notice was filed.

Clemson, p. 356-357.

By contrast, the Condemnation Notice Respondent filed in the present matter acknowledged:

> 4.(b) Pitch Landing, LLC is made a party in this action by virtue of the reservation between Issac Lacy Cannon, Jr. and Barbara A. Todd recorded in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 2854 at Page 355. (Todd Summons and Complaint, p. 3 R. p. 25)

Respondent has not alleged any question of fact or law that would require inquiry of the court in an equitable proceeding to determine any "equitable" interest of Pitch Landing. The interest held by Pitch Landing was created by deed and recorded as noted in Respondent's Complaint. The deed referenced in Condemnor's Complaint included a reservation of "an unobstructed, unencumbered easement and right of way, in, over and across that certain 50 foot private road access easement as shown on the above referenced plat for the purpose of ingress, egress and the installation and maintenance of utilities." (Todd Motion to Reconsider, Alter and/or Amend R. pp. 117-135).

Respondent located that easement on the plat attached to its Complaint and identified therein as Exhibit A to the Complaint. (Todd Summons and Complaint R. p. 30). Respondent acknowledged in its very pleading Pitch Landing held a recorded property interest in the subject tract. (Todd Summons and Complaint R. pp. 21-30). There exists no dispute between the parties: Pitch Landing is the owner of the easement appurtenant described in the deed referenced in the Todd Complaint, and there exists no need for an equitable hearing to determine whether Pitch Landing holds an interest in the condemned property. The deed that created the Todd parcel

reserved to the owner of the parent tract from which the Todd parcel was severed the easement appurtenant to provide access to the remaining, larger parcel to the rear of the Todd parcel. That larger parcel (the dominant parcel) is presently owned, and was at the time of the taking, by Appellant Pitch Landing. The easement appurtenant traversed through the middle of the Todd parcel from Pitch Landing Road to the Pitch Landing parcel. The condemned property in the Todd matter is precisely the same fifty-foot wide strip of real property as that which was burdened by the Pitch Landing easement. (Todd Summons and Complaint R. pp. 21-30).

Finally, the *Clemson* matter, as of this writing, has been resolved by the parties and dismissed by the Court.[1] The orders of the trial court should be reversed and the matter remanded to the trial court for a factual determination of the amount of the just compensation due Pitch Landing as a result of the acquisition of its real property interest through the Todd parcel.

III. The trial court erred by placing the restored matter on the non-jury docket.

The trial court compounded the error below by restoring the servient parcel (Todd) matter to the non-jury docket. (Todd Form 4 Order R. pp. 12-14). Inasmuch as Respondent filed a Summons and Complaint in the present matter, rather that the customary Condemnation Notice, Pitch Landing likewise filed and Answer. (Pitch Landing Answer R. pp. 35-37; Transcript of Record dated March 1, 2021, p. 006 R. p. 162). Therein, Pitch Landing demanded a jury trial in the caption, again in its third defense, and a third time in its prayer for relief. (Pitch Landing Answer, pp. 1, 2, 3 R. pp. 35-37).

Pitch Landing's jury demand is consistent with South Carolina law, which follows the "undivided fee" rule. Pursuant to this rule, all parties to a condemnation action are entitled to

[1] According to the Opinions of The Supreme Court and Court of Appeals of South Carolina Advance Sheet No. 40

present evidence of the total value of the property taken by the government. As our Supreme Court has recognized:

> "The lessees were properly made parties to the proceeding. They have an interest in the property condemned by virtue of their lease. Section 33-132 of the 1952 Code of Laws of South Carolina requires the Highway Department in condemnation proceedings to give notice to an 'owner' of the land of its intention to condemn. The word 'owner' as used in a condemnation statute has been construed to embrace not only the owner of the fee, but a lessee and any other person who has an interest in the property which will be affected by the condemnation. *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 84 S.C. 306, 66 S.E. 194; 18 Am. Jur. 862, Sec. 229. The Highway Department is entitled to an assessment of all damages arising by virtue of the taking in a single proceeding and all persons whose presence is necessary to accomplish this purpose should be parties to the proceeding. See *Shonnard v. South Carolina Public Service Authority*, 217 S.C. 458, 60 S.E. (2d) 894. This is but an application of the settled policy of the law to bring before the court in one proceeding all parties who have a lawful interest in the subject matter of the action so as to avoid a multiplicity of suits."

Greenwood v. Psomas, 249 S.C. 519, 524-525, 155 S.E.2d 310, 313 (1967), quoting *South Carolina State Highway Department v. James H. Hammond*, 238 S.C. 317, 120 S.E. (2d) 21.

As in the *Clemson* matter currently pending consideration by the Supreme Court, this matter, too, was settled by agreement rather than trial. Pitch Landing was not aware of nor included in the negotiation of that settlement and was not provided an opportunity to show proof of valuation of its interest in the real property condemned. Pitch Landing was likewise prevented from questioning the determination of valuation Condemnor claimed. Moreover, as the easement crossing the Todd property reserves a critical right of access and pathway for utilities to the larger Pitch Landing parcel condemned separately, the total valuation of the servient Todd parcel cannot be accurately ascertained without a proper valuation of Pitch Landing's easement, which would require Pitch Landing's involvement.

While Pitch Landing did not participate in the negotiations settling the matter as to Todd, presumably only the Todd interest in the condemned property was considered. The remaining Todd property on each side of the portion condemned retains access to the roadway, thus the

damages to the remainder are minimized as to Barbara Todd's interest. Also, the valuation of the portion of the Todd property actually condemned is presumably minimized as well; this property was burdened as servient to the Pitch Landing parent tract to the rear and could not be fully utilized by Todd to the exclusion of Pitch Landing.

The property condemned in the Todd matter is the precise property containing the Pitch Landing easement. (Todd Summons and Complaint R. pp. 21-30). Condemnor, unlike heirs or assigns, took the property without being subject to the reservations benefitting the dominant Pitch Landing parcel. The entire Pitch Landing easement, along with the Todd interest in the real property condemned, was acquired. Thus, the dominant parcel lost the access and area for utilities that had been provided by the easement appurtenant to the Todd parcel. Notably, in the present matter, Condemnor is a utility company, and its exercise of eminent domain extracted from Pitch Landing its recorded property right and ability to install and maintain its own utilities (in addition to access) in the area Condemnor took. Still, the Todd parcel was settled by Respondent and Barbara Todd; Pitch Landing was prevented from participating in the determination of the amount of just compensation to which it was constitutionally entitled.

Were the trial court order to stand, Pitch Landing would be relegated to a non-jury hearing to determine whether it held an equitable interest in the property condemned. The trial court order does not indicate what it intended would happen should the interest of Pitch Landing be determined valid. Should it be the trial court's intent the matter would then remain on the non-jury docket, Pitch Landing would be foreclosed from presenting its case before a jury. This would be error.

The determination of the value of the Pitch Landing interest in the Todd matter is a question of fact intended to provide Pitch Landing the recovery of money in place of the real property taken. "[P]rivate property shall not be taken for private use without the consent of the owner, nor for

public use without just compensation being first made for the property." Article I, Section 13 of the South Carolina Constitution. *S.C. DOT v. Powell*, 424 S.C. 206, 210, 818 S.E.2d 433, 435 (2018) In addition to the value of the property to be taken, any diminution in the value of the landowner's remaining property and any benefits derived from the proposed project may be taken into account in determining just compensation. S.C. Code Ann. § 28-2-370. *Normandy Corp. v. S.C. DOT*, 386 S.C. 393, 404, 688 S.E.2d 136, 142 (2009). In order for the landowner to be compensated fully, the government must "put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking." *Phelps v. United States*, 274 U.S. 341, 344, 71 L. Ed. 1083, 47 S. Ct. 611 (1927). See also *HN7 Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974); *State Roads Comm'n v. G.L. Cornell Co. Sav. & Profit Sharing Trust*, 85 Md. App. 765, 584 A.2d 1331 (Md. Ct. Spec. App. 1991). *S.C. DOT v. Faulkenberry*, 337 S.C. 140, 148, 522 S.E.2d 822, 826 (1999).

Pursuant to South Carolina Rules of Civil Procedure, Rule 39(a) once a party demands a jury trial, as Pitch Landing did here, “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.”

The South Carolina Eminent Domain Procedure Act, S.C. Code Ann. Sec. 28-2-10, et seq, creates a presumptive right to a jury trial in the present matter. Pursuant to Section 28-2-310:

> (A) Upon the filing of the affidavit described in 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 place on the jury trial roster.

There was no demand by both Respondent and Todd in the Todd matter; thus, the action was to have been placed on the jury trial roster by the clerk in accordance with the Act.

The court's decision contradicts established treatise and case law. Where the easement supporting the dominant estate has been taken, the just compensation is the difference between the value of the dominant estate with the easement and its value without the easement. *Nichols on Eminent Domain*, § 12(D).02(1). In cases like the present, "the amount of compensation for the fee simple interest of the servient estate will not adequately compensate the dominant estate which has lost its access since ordinarily an access road…will not diminish the value of the servient estate by the amount it benefits the dominant estate." Thompson, James L., "Condemnation of Easements." *Eminent Domain and Land Valuation Litigation*, January 2003.

In *United States v. Gossler*, 60 F.Supp. 971 (1945), the Court determined that the owner of a dominant tenement was entitled to compensation for his interests separate from the fee held by the owner of the servient estate. The condemnor unsuccessfully argued the owner of the easement was only entitled to share in the single award paid to the owner of the servient estate. The Court disagreed, reasoning:

> The fallacy of the reasoning which lies at the basis of these motions arises from the concept of the title of real property as a thing with physical attributes, whereas title is a conglomerate of jurisdiction and substantive legal rights fused with the residuals of equitable remedies all developed historically out of feudal notions and medieval conditions. By this proceeding the United States does not acquire a physical thing by taking the fee simple title of the Gosslers, but sets up another title by extinguishment of all interests inconsistent with use by the Government. Since the United States is investing itself with an utterly new title and extinguishing the whole aggregate of rights connected with this piece of ground by condemnation, the Fifth Amendment requires compensation for all property rights so erased.

> The United States cannot abrogate all, but pay for the particular right known as the fee simple title alone. The owner of another recognized property interest attached to the soil would then receive no compensation just or otherwise. Indeed in practice, the value of the fee simple title might well be materially reduced by the existence of this right of way. If payment were made for a specific interest such as the fee title, out of the aggregate, the Government would abrogate the other interests without paying monetary consideration therefor. Such a result does not satisfy the demands of the amendment. The United States is liable to the owner of an easement appurtenant in a suit condemning the fee of the servient estate. *Id*. at 973-974.

Accordingly, the circuit court erred by relegating the restored Todd matter to the non-jury docket and should be instructed to place the matters on the jury docket.

IV. The trial court erred by denying Appellant's Motion to Consolidate the two matters for trial.

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. *Alcorn v. Ford Motor Co*., 276 S.C. 180, 182, 276 S.E.2d 925, 926 (1981). *Bishop, et al. v. Bishop*, 164 S.C. 493, 162 S.E. (2d) 756 (1932); *cf. In Re Norwood's Adoption*, 258 S.E. (2d) 869 (N.C. App. 1979). In the present matters, Respondent's pleadings make clear: the two properties are contiguous geographically; Pitch Landing owns an interest in each of the properties; the Todd property is burdened for the benefit of the rear Pitch Landing property; the two condemnation actions were filed by the same Condemnor, for the same project; and, the same appraisers were used by Condemnor and Pitch Landing in each matter and likely will serve as the primary experts for the respective parties. (Todd Summons and Complaint R. pp. 21-30 and Pitch Landing Summons and Complaint R. p. 71-97).

Pitch Landing owns both the dominant tenement across the servient Todd parcel as well as the parent parcel to the rear. That rear parcel is accessible in only two locations. The damages outlined in the appraisal Pitch Landing produced to Condemnor make clear Horry County requires a second point of access for the development of parcels with more than fifty (50) home-sites; and,

as a result of the taking of the easement across the Todd tract, the parent Pitch Landing tract will be dramatically impacted by the loss of the second access.

It is not surprising Condemnor so vehemently opposes consolidation of the two matters. Were they consolidated, Condemnor would risk being held financially accountable to Pitch Landing for the actual diminution in value to its parent tract as a result of the installation of Condemnor's gas line. That result, while undesirable to Condemnor, is the exact result envisioned by the Constitution. The purpose of the takings clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Sea Cabins on the Ocean IV H.O.A., et al v. City of North Myrtle Beach*, 345 SC 418, 548 SE2d 595, 601 (2001); *citing Armstrong v. United States,* 364 US 40, 49, 80 S.Ct. 1563, 4 L.Ed 2d 1554 (1960).

Regardless, the trial court erred in its decision as to consolidation in reliance upon the *Clemson* case yet again. The entire analysis in the order denying consolidation is a 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 jury trial in SCE&G v. Todd, 2018CP2606064.
> (Pitch Landing Form 4 Order R. p. 9)

Thus compounding its erroneous reliance upon the distinguishable *Clemson* matter, the court below greatly prejudiced Pitch Landing and should be reversed. These matters should be consolidated and remanded for jury trial.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's transfer of thie matter to the non-jury roster; should determine Pitch Landing is entitled to a jury trial in the Todd matter, and should reverse the trial court decision and consolidate these matters for trial.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211 SCACR.

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