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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

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 REPLY BRIEF

January 11, 2022

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I. The Todd Matter

This Honorable Court rendered the opinion in the *Dep't of Commerce v. Clemson Univ.*, 432 S.C. 352, 851 S.E.2d 735 (S.C. App. 2020) matter.[1] Appellant does not presume to have a better understanding of that case than this Court. However, the primary issue on appeal in *Clemson* was clearly stated by the parties thereto as whether the hold-over tenant, who a special referee (chosen pursuant to a consent order of limited reference) determined had an equitable interest in some portion of the underlying fee, was entitled to participate in the jury trial of the matter.

Unlike the School District in the *Clemson* matter, Appellant owns a part of the record fee simple interest in the property condemned. It is undisputed Appellant owns the permanent, transferrable, unencumbered right to the actual area taken for ingress, egress, and the **installation and maintenance of utilities**. This interest, as conceded in Respondent's pleadings, was created by the very document that created the greater tract involved in the Todd matter. Paragraph three (3) of Respondent's Complaint quotes the deed which created the Todd parcel. That deed specifically reserved to the owner of the property condemned in the Pitch Landing matter as follows:

> There is excepted and reserved unto John J. Dargan and/or New River Corporation, their heirs, successor and assigns, 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 Summons and Complaint, R. pp. 21-30)

This is precisely what Respondent condemned, describing it in paragraph five (5) of its Complaint as follows:

[1] The Petition for a Writ of Certiorari to the South Carolina Supreme Court in the *Clemson* matter was shown as having been dismissed on November 9, 2021 in Advance Sheet No. 40 dated November 17, 2021.

> 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, PREPARD 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.

(Todd Summons and Complaint, R. p. 25)

Exhibit A to Respondent's respective complaints in the Todd matter and the Pitch Landing matter are shown on the following two pages.

Exhibit A – Todd Matter

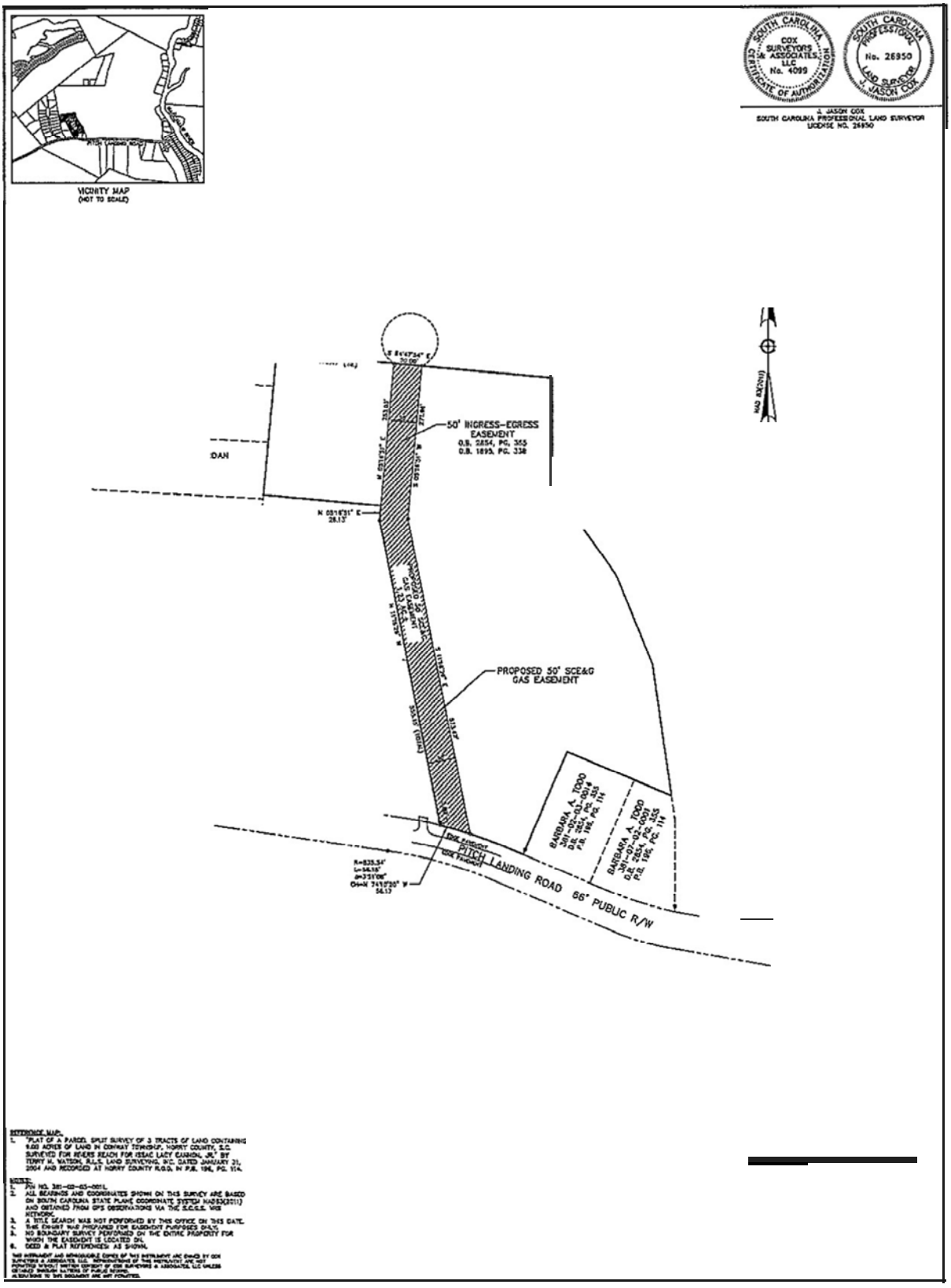
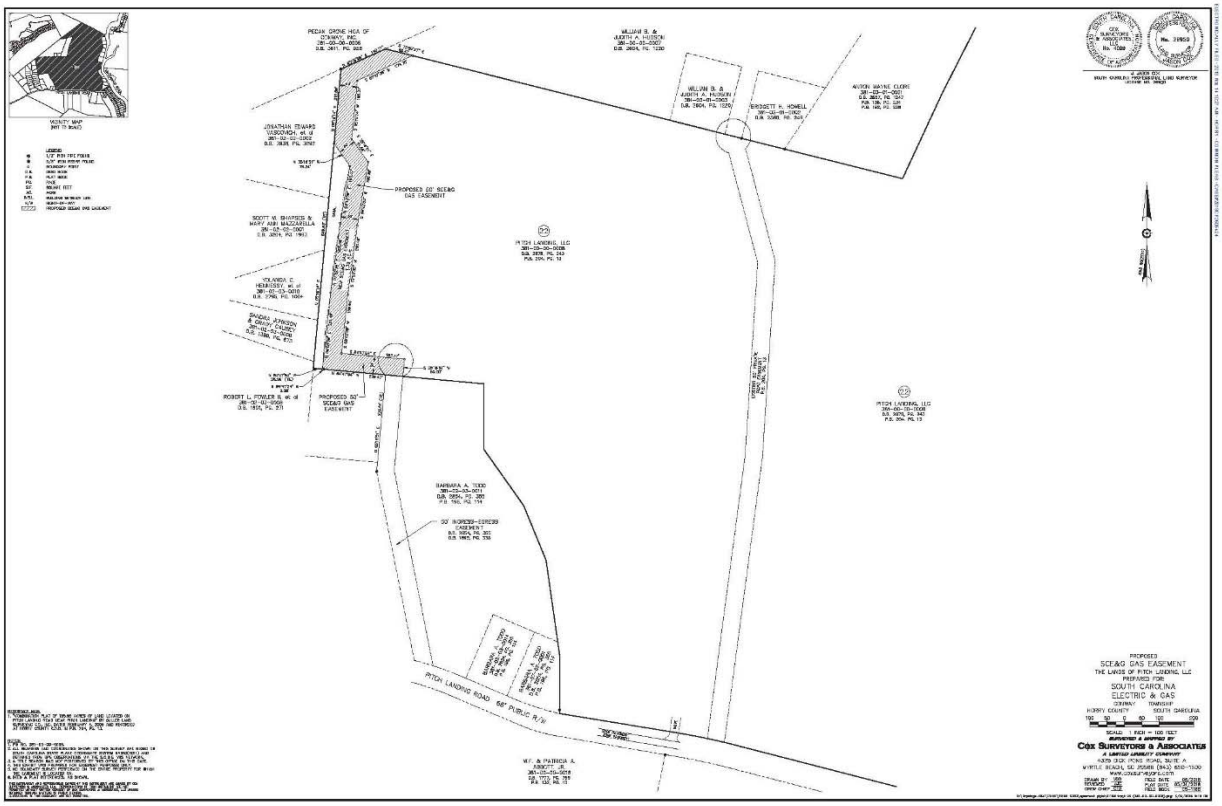


Exhibit A – Pitch Landing Matter



The entire property interest condemned by Respondent in the Todd matter was owned by Appellant. Todd, who was named by Respondent as the Landowner, did not own the right to encumber the area of the take for any purpose, and specifically not for the installation and maintenance of utilities. That specific use is the only part of the property taken by Respondent, and it was owned by Appellant alone.

By contrast, the School District in *S.C. DOC v. Clemson Univ.*, 432 S.C. 352, 852 S.E.2d 735 (S.C. App. 2020) held "only an equitable interest in a 3.74-acre portion of the Entire Tract." *Id. at 361*. In fact, the School District held no *record* interest at all, as its lease had expired prior to the initiation of the suit. Moreover, its lease, when intact, did not encumber the entire tract of land.

Moreover, Appellant's real property interest in the Todd matter was known to Respondent prior to preparation of its pleadings and is fully admitted in those pleadings. *To wit*, Respondent set forth in its pleadings the "Acquisition Interest" as follows:

> 6. The interests sought to be acquired in and to the Property by the Condemnor is/are the following:
>
> (a) A fifty foot (50') natural gas pipeline easement ("Easement"), as shown on Exhibit "A", for the purpose of laying, constructing, maintaining, operating, repairing, altering, replacing and removing pipe lines, together with valves, tieovers and appurtenant facilities, for the transportation of gas, oil petroleum products, or any other liquids, gases or substances which can be transported through a pipe line over, through and across the Property;
>
> (b) A non-exclusive temporary easement for construction, ingress and egress and the storage and maintenance of materials, equipment and other matter related to the Easement;
>
> (c) Together with the right from time to time to redesign, rebuilt or alter said pipe lines and to install such additional pipe lines, apparatus and equipment as Condemnor may at any time deem necessary and the right to remove any pipe line or any part thereof, all within the Easement;

(d) Together with the right of ingress, egress, and access to and from the Easement and upon the Property as may be necessary or convenient for purposes connected with the Easement;

(e) Together with (i) the right from time to time to remove or clear and keep clear such trees, underbrush, structures and other obstructions, upon the Easement and such trees beyond the same ("Danger Trees") as in the judgment of Condemnor may interfere with or endanger said lines or appurtenances when erected, provided that Condemnor will pay to Landowner the fair market value of such Danger Trees at the time of cutting as determined by a registered professional forester, and (ii) the right of entry upon the Property for all the purposes aforesaid;

(f) Provided, however, that (i) all pipe shall be buried to such depth so that it will not interfere with the ordinary cultivation of said land, (ii) any damage to the Property (other than to property cleared or removed as provided herein) caused by Condemnor in the course of constructing, rebuilding or repairing said pipe line shall be borne by Condemnor, and (iii) Landowner shall reserve the right to cultivate and use the ground within the limits of the Easement, provided that such use shall not interfere with or obstruct the Condemnor's rights, and provided further than no building or other structure shall be erected by Landowner within the Easement.

(Todd Summons and Complaint, R. pp. 25-27)

The bundle of rights described above as the Acquisition Interest was reserved when Todd bought her parcel; Todd never purchased these rights. Appellant was the only owner from whom property was condemned in this action, and should have been permitted to fully participate in the matter, whether by settlement or jury trial.

Respondent's repeated assertions that Appellant was involved by virtue of having received notice of proposed settlement agreements as to Barbara Todd are of no merit. Appellant was clearly not invited to participate in the settlement negotiations. Moreover, counsel for Appellant made clear in the hearing below Appellant received no notices, and Respondent has produced no evidence to the contrary. In fact, Respondent continued to communicate with Appellant regarding a scheduling order long after having separately settled with Todd. (Motion to Restore Case to Docket R. pp. 108-114)

Much like its presentation to the court of its understanding of the *Clemson* matter, Respondent insists Appellant misplaces its reliance on *City of Greenwood v. Psomas*, 249 S.C. 519, 525, 155 S.E.2d 310 (S.C. 1967). However, Respondent goes on to quote the Court in *Psomas* as clarifying the respondents in that matter "had full opportunity to participate in the trial of the case had they so elected." *Id.* at 525. In the present matter, that is precisely what Appellant desires; Appellant seeks only full inclusion in the jury trial process to present evidence of the value of that which Respondent took by eminent domain.

As such, Appellant respectfully requests the court below be reversed and this matter be restored to the jury roster for trial with priority.

II. The Issue of Consolidation

Respondent claims Appellant has suffered no ill as a result of the denial of its Motion to Consolidate the two matters. However, as shown above, Appellant is entitled to a jury trial in each matter. Yet, Respondent claims there exists no unity of title. However, Respondent only condemned that which Appellant owned: a fifty (50) foot utility easement. Todd did not own the easement, but her property was servient to it. Todd could not have sold the easement to Respondent, nor could Todd have permitted Respondent to install utilities within the easement. Todd was prevented from encumbering the easement by the language of the easement itself. Pitch Landing, therefore, is rightly the primary private party in the Todd matter, and the only private party in the Pitch Landing matter.

Judicial economy and Appellant's constitutional right to just compensation require the consolidation of the two matters. Neither the true value of the Pitch Landing tract nor the true value of the easement condemned can be accurately ascertained upon examination of either of the two

adjacent parcels without consideration of the other. As such, the decision below not to consolidate deprives Appellant of its fundamental right to a jury trial and should be reversed.

CONCLUSION

For the reasons stated in its Initial Brief and those stated herein, this Court should reverse the trial court's transfer of this matter to the non-jury roster; should determine itch 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 Reply Brief complies with Rule 211 SCACR.

January 11, 2022

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