

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Thomas L. Hughston, Circuit Court Judge

Case No. 2009-CP-10-6185

RECEIVED

NOV 20 2013

SC Court of Appeals

Henry W. Frampton, III.....Respondent,

v.

South Carolina Department of Transportation.....Appellant.

RESPONDENT’S RETURN TO THE APPELLANT’S PETITION FOR REHEARING

Respondent Henry W. Frampton, III (hereinafter “Landowner Frampton”) submits this Return to the Appellant South Carolina Department of Transportation’s (hereinafter “SCDOT”) Petition for Rehearing and states as follows:

I. Return to SCDOT’s Statements on the Substantive Law of Inverse Condemnation.

The SCDOT’s central contention before the trial court, before the Court of Appeals, and now in their Petition for Rehearing is that this temporary taking of access case should be analyzed as a regulatory taking. This argument is in direct conflict with the South Carolina Supreme Court’s most recent pronouncements on the taking of the well established real property right of access. Hilton Head Automotive, LLC. v. SCDOT, 394 S.C. 27, 714 S.E.2d 308 (2011); Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429,

706 S.E.2d 501 (2011). This case was properly analyzed by the trial court and the Court of Appeals as a physical taking case using the recently reaffirmed “material impairment of an easement of access test”. Hilton Head Automotive, LLC, 714 S.E.2d 308; South Carolina State Highway Department v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007); South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970).

The overwhelming and uncontradicted evidence at the trial of this action was that the SCDOT physically and materially took Mr. Frampton’s easement of access to his property from the public road way for a 16 month period after informing him that a permanent guardrail would be installed. The law is clear on this takings issue, and it was succinctly stated in the recent decision of Hilton Head Automotive, LLC v. SCDOT, 394 S.C. 27, 714, S.E.2d 308 (2011) as follows:

“As an abutting property owner, [the landowner] had ‘an easement of access’ to [the highway] regardless of whether it had access to and from an additional public road. In addition, [the landowner] had ‘an easement for access to and from the public road system. If governmental action materially injured either of these easements, such that [the landowner] no longer enjoyed the reasonable means of access to which it was entitled, a **physical taking** has occurred.”

(emphasis supplied). The Court in Hilton Head Automotive went on to expressly state that the analysis of this type of taking, a physical taking of access, required the “material injury test,” and the Court cited to longstanding precedent. Id at 714 S.E.2d 311, n. 4 citing Sease v. City of Spartanburg, 242 S.C. 520, 524–25, 131 S.E.2d 683, 685 (1963) (“The protection of [the South Carolina “takings” clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street.”); Brown v. Hendricks, 211 S.C. 395, 403–04, 45 S.E.2d 603, 606–07 (1947) (“The accessibility of one's property may in some

instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value ... and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto.”) *see also* South Carolina State Highway Department v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). In addition to the Supreme Court’s recent pronouncement in Hilton Head Automotive of the physical nature of a denial of access, the Supreme Court has evaluated a denial of access claim pursuant to a physical takings analysis rather than a regulatory takings analysis in Hardin v. SCDOT, 641 S.E.2d 437 and Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011).

Therefore, this is a physical takings case. The only distinction between the present case and the foregoing jurisprudence is that this is a temporary physical taking case. This is, however, a distinction without a difference as the Supreme Court ruled that temporary takings are compensable and the “some degree of permanence” element is no longer required when analyzing a physical takings claim. *See* Byrd v. City of Hartsville, 620 S.E.2d at 79 (“First, we remove the element ‘some degree of permanence,’ for it conflicts with the principle that the government must compensate for even a temporary taking.”). The Byrd court, therefore, held that there are now three elements to a physical inverse condemnation case: (1) affirmative conduct of a governmental entity; (2) effecting a taking; and (3) the taking is for a public use.¹ Byrd, 620 S.E.2d 79. “A plaintiff’s right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking” of a recognized property right. Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011). Subsequent to Byrd, it is

¹ There is no dispute that the project was for a public use.

irrelevant if the damage/taking is only for a duration that is not permanent. The real inquiry is whether a recognized property right—in this case something as fundamental as an abutting landowner’s right of access—has been materially injured. See South Carolina State Highway Department v. Allison, 143 S.E.2d 800 (a property owner in South Carolina has an easement for access to and from any public road that abuts his property.); Brown v. Hendricks, 45 S.E.2d 603; South Carolina State Highway Dept. v. Wilson, 175 S.E.2d 391.

The SCDOT argues that physical encroachments that fall short of permanent physical occupations are known as temporary physical invasions. It argues that such temporary physical invasions are not per se physical takings under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) because they do not have a degree of permanence. The SCDOT cites Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000) for this proposition. Main v. Thomason, however, in addition to being factually inapposite to the present case, was overruled by the South Carolina Supreme Court in Byrd v. City of Hartville, *supra*, because the “permanence” element of a taking has been rejected by the United States Supreme Court. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Most importantly, South Carolina law requires that the taking of an abutter’s easement within the context of an inverse condemnation action must be analyzed pursuant to the “material injury” test. See Hilton Head Automotive, 714 S.E.2d 308, 311, n. 4. Rather than applying the material injury test, the SCDOT argues that the test that should have been applied by the lower court was the Penn Central Transportation Co. v. New York City, 438 US 104, 98 S.Ct. 2646, 57

L.Ed.2d 631 (1978) test for regulatory takings. The SCDOT argues that the denial of access to the property is synonymous with a regulatory delay. This is not a regulatory delay case. This is a denial of access case, and pursuant to South Carolina law it must be analyzed as a physical takings case pursuant to the material injury test. See Hilton Head Automotive, supra.

At the trial of the present case, the evidence was abundant that the SCDOT deprived the landowner of all access to his property for a period of 16 months. The case law is clear that a landowner has an easement of access to the public road way. Hilton Head Automotive, LLC. v. SCDOT, 714 S.E.2d 308. This easement was extinguished temporarily by the SCDOT. This is a taking. See Hardin v. SCDOT, 641 S.E.2d at 443 (“an easement is either taken or it is not.”). The evidence was abundant that the period of the denial of access was sixteen (16) months. The evidence was manifest that the total deprivation of access for that period to the Landowner’s property was a material impairment of his easement. In fact, a total denial of the use of an easement is the highest impairment of a property owner’s rights in an easement. There cannot be a more material impairment of an easement of access than the extinguishment of its use. Indeed, the South Carolina General Assembly, in addition to the common law cited above, has specifically spoken to the SCDOT’s obligations regarding access. South Carolina Code Ann. § 57-5-1100 states as follows:

“Any such existing driveway or side-road entrance or exit constructed prior to February 16, 1956, and adjudged by the Department to be unsafe for the traveling public may be changed by the Department so as to eliminate any unsafe features or closed or displaced by substitution therefore of another driveway or side-road entrance or exit at such place or of such design as may be deemed safe, **but no such existing side road or driveway may be closed unless other reasonable access to the highway is provided by a frontage road or otherwise.**”

(emphasis supplied). Though there is no evidence the access to Frampton's property was unsafe, the statute is clear that access cannot be taken away in full without just compensation.

II. Return to SCDOT's Statements that Respondent did not Prove a Taking.

The SCDOT states in its Petition that the Court "concluded that because the Department's bridge replacement project did not involve the rerouting or diversion of traffic, it was not acting under the police power, thus, the issue is only one of eminent domain." Appellant's Petition, pp. 7-8(emphasis supplied). This is simply not what the Court found or concluded or stated in any way. It is SCDOT who argued in this appeal that the "rerouting and diversion of traffic" were police power actions that did not constitute a taking. Appellant's Brief, p. 12. The Court of Appeals ruled that Frampton never argued that the taking involved the rerouting or diversion of traffic. Order, p. 10. Rather, Frampton argued that the "[SC]DOT's construction and related activities blocked his easement for access to 699 Folly such that it constituted a physical taking." Id.

The SCDOT argues that because the material impairment of access was done at a time when it was repairing or maintaining a bridge it cannot be a taking as a matter of law. This is incorrect and in conflict with the case law cited above as well as in direct conflict with Sease v. City of Spartanburg, 242 S.C. 520, 524-25, 131 S.E.2d 683, 685 (1963) wherein the Court ruled as follows:

"The protection of [the South Carolina "takings" clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."

SCDOT goes on to argue and cite case law related to the authority of the sovereign to legislate general regulations, statutes and municipal ordinances to better the health, safety and welfare of the public. See Appellant's Petition, pp. 8-9. As the Court found, this has nothing to do with the present case as there is no regulation, statute or municipal ordinance in question. Order, p. 8 (“[SC]]DOT does not cite any regulation or government-imposed limitation that would give rise to what it alleges is a regulatory takings claim. We disagree with any portion of DOT's argument that contends a regulatory taking analysis applies to this case. The record and Frampton's complaint reflect that Frampton premised his claim on DOT's physical appropriation of private property and not a regulatory taking.”). Moreover, there is no evidence that in the record that prior to the actions by the SCDOT that Landowner Frampton's access to the property was unsafe or impacted the health, safety, or welfare of the public in any way.

The overwhelming and uncontradicted evidence at the trial of this action was that the SCDOT physically and materially took Mr. Frampton's easement of access to his property from the public road way for a 16 month period after informing him that a permanent guardrail would be installed. This material impairment of access is a taking. Hilton Head Automotive, LLC, 714 S.E.2d 308; South Carolina State Highway Department v. Allison, 143 S.E.2d 800; Hardin v. SCDOT, 641 S.E.2d 437; South Carolina State Highway Dept. v. Wilson, 175 S.E.2d 391; Carolina Chloride, Inc. v. SCDOT, 706 S.E.2d 501; Sease v. City of Spartanburg, 131 S.E.2d 683; Brown v. Hendricks, 45 S.E.2d 603.

SCDOT next argues that the Court misconstrued its argument that Landowner Frampton did not prove an affirmative act by the SCDOT in order to demonstrate a

taking. Appellant's Petition, pp. 9-10. The SCDOT, however, argued in its Brief before the Court of Appeals that because Landowner Frampton did not ask the SCDOT to remove the silt fence, one of the material obstructions to his property, he could not prove an affirmative act by the SCDOT. Appellant's Brief, pp. 14-15. The Court did not misconstrue this argument and in fact directly ruled on it as follows:

“[SC]DOT attempts to avoid liability by stating while the initial placement of the silt fence may have been an affirmative action, Frampton's complaint is about the passive event of not taking down the silt fence. However, we do not believe that is an accurate representation of Frampton's claim. Frampton complains there was no access to 699 Folly during DOT's construction from various actions of DOT and its contractors, including the placement of the silt fence. To prove a physical taking, Frampton must show governmental action materially injured his access easement, such that he could no longer enjoy the reasonable means of access to which he is entitled. *See Hilton Head Auto.*, 394 S.C. at 30-31, 714 S.E.2d at 310. Despite DOT's contention that Frampton never requested the silt fence be moved to gain access to 699 Folly, case law does not require the property owner to make such a request before bringing an action at law for a taking. DOT further argues the contractors and subcontractors on the project never refused entrance to 699 Folly to anyone with rights to enter the property. Even if this were true, Frampton testified and provided pictures of constant disturbance and blockage around the access point to 699 Folly. He also testified that when contractors were asked to move their equipment, other contractors would almost immediately move different equipment into the easement for access.

Order, p. 10.

Next, the SCDOT argues that the Court of Appeals erred in ruling that there was sufficient evidence of a taking for the period of sixteen (16) months. For this position the SCDOT states that the photographs in evidence depict a “parking area” that was fully open and usable during some portion of the sixteen (16) months. Appellant's Petition, p. 10. This argument is not appropriate based upon the standard of review, discussed below, in this appellate action. Additionally, the parking area has nothing to do

with whether or not Landowner Frampton could actually access this parking area. Access is the whole issue in this case.

Finally, the SCDOT argues that Landowner Frampton's legal "partition of his property" should be ignored by the Court. The SCDOT argues that the partition occurred after the government's action resulting in a taking. The record is clear, however, that Landowner Frampton intended to partition his property prior to any government action and in fact did so by way of a plat dated March 7, 2005 and revised on September 22, 2005. See Plaintiffs Ex. 18 (R. p. 658); Testimony of Hal Frampton, Transcript at pp. 156-158 (R. pp. 255-257). The SCDOT was aware of the partition, approved it, and acknowledged that the access driveway for the property at issue in the present action as already in existence. See Plaintiffs Ex. 17 (R. p. 657); Testimony of Hal Frampton, Transcript at pp. 156-158 (R. pp. 255-257). The evidence is clear that the property contains a small house that has been used as rental property by Landowner Frampton's family since at least 1955. Testimony of Hal Frampton, Transcript at p. 149. (R. p. 248). It has always had its own driveway and has always been used as a separate income producing property notwithstanding the fact the Frampton family owns adjacent parcels. Testimony of Hal Frampton, Transcript at p. 155. (R. p. 254). All of this occurred prior to the taking which Landowner Frampton alleged and proved began in November of 2008. In fact, the SCDOT engineer testified that up until the time of the taking the landowner can do whatever he wants with his property, including subdivide it. Testimony of Larry Phinney, Transcript at pp. 117-118. (R. pp. 217-217).

Therefore, the SCDOT's argument that actions of the landowner that occur after the taking should be ignored by the Court has absolutely nothing to do with the partition of this property prior to the taking.

III. Return to SCDOT's Statements on Standard of Review.

The Court of Appeals applied the correct standard of review. An eminent domain proceeding is an action at law. South Carolina Public Service Authority v. Arnold, 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986). On appeal from an action at law tried with or without a jury, the appellate court's standard of review extends only to the correction of errors of law. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976). The factual findings of the jury or the trial judge will not be disturbed "unless a review of the record discloses that there is no evidence which reasonably supports [its] findings." Id.

In its Brief to this Court, the SCDOT argued that this was an action in equity. Appellant's Brief p. 7. The SCDOT now seems to agree that this is an action at law; however, it still argues, without any support, that this Court is entitled to review facts without any deference to the findings of fact in the lower court. This is incorrect. The Court applied the correct standard of review.

IV. Return to SCDOT's Statements on Procedural Issues.

Pursuant to the motion filed on June 27, 2011, the SCDOT moved to have the case transferred to the non-jury docket and argued before Judge Harrington that because it had denied there was a taking in this inverse condemnation case, the Landowner Plaintiff was not entitled to have the case on the jury docket, and the SCDOT was, therefore, entitled as a matter of substantial right to have the case transferred to the non-

jury docket. In the September 28, 2011 Order, Judge Harrington denied the SCDOT's motion to transfer the case to the non-jury roster. This order was not appealed. "If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review." Cobb v. SCDOT, 618 S.E.2d 299.

Therefore, the Court of Appeals was correct in finding as follows:

"In the case before us, DOT asserted a right to a non-jury trial for the takings phase of the inverse condemnation case. The trial court's order denied DOT's request for a non-jury trial during the takings phase and required it to go forth with a jury trial. This ruling could not be overturned by the trial judge who eventually tried the case. *See Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (one circuit judge does not have the power to reverse an order of another circuit judge regarding the proper mode of trial); *see also Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005) ("If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review."). We find DOT did not preserve this issue for our review because it did not immediately appeal the trial court's order affecting the mode of trial, which is a substantial right."

Order, pp. 6-7.

V. Return to SCDOT's Statements on Attorneys' Fees.

The SCDOT argues that it was the prevailing party in this action should be determined by S.C. Code Ann. 28-2-510. The SCDOT, however, relied on the incorrect statute to govern the award of attorney's fees in inverse condemnation cases rather than direct condemnation cases. The correct statute is found at S.C. Code 28-11-30 and states, in pertinent part, as follows:

Where an inverse condemnation proceeding is instituted by the owner of a right, title, or interest in real property because of use of his property in a program or project, the court, rendering a judgment for the plaintiff in the proceeding and awarding compensation for the taking of property, or the attorney effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff,

as a part of the judgment or settlement, a sum that will, in the opinion of the court or the agency's attorney, reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding.

The Court was correct in finding that this is the applicable statute. Order, p. 12-15. The SCDOT's current arguments stating that the Court's ruling somehow amounts to the treatment of inverse condemnees better than the treatment of direct condemnees is disingenuous, at best. Federal regulations adopted by the South Carolina legislature by reference, prohibit the SCDOT from intentionally making it necessary for an owner to institute legal proceedings to prove the fact that the taking of real property. *See* SC Ann. Section 28-11-10 et seq.; 42 U.S.C. §§ 4601 et seq.; 49 C.F.R. § 24.102. Therefore, by the very nature of this requirement, SCDOT should, as a matter of public policy, bear the costs of litigation where an inverse condemnee proves a taking because the SCDOT necessarily must take the position that no taking has occurred. As the Court succinctly and correctly stated:

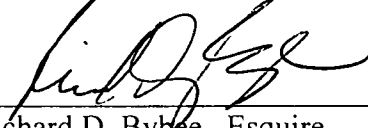
Unlike in a typical condemnation case, where the government and the landowner simply disagree on the value of the land taken, in most inverse condemnation cases, the government denies there was a taking at all, and thus, its valuation of the land is zero. The landowner must then foresee whether the jury would award a judgment at least as close to the highest valuation of the property attested to on his behalf as it is to the likely zero valuation of the property attested to by the government.

Conclusion

For all the foregoing reasons, the Appellant's Petition for Rehearing should be denied.

[Signature page follows]

SMITH, BUNDY, BYBEE & BARNETT, P.C.



Richard D. Bybee., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for Respondents

Mt. Pleasant, South Carolina

November 20, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Thomas L. Hughston, Circuit Court Judge

Case No. 2009-CP-10-6185

RECEIVED

NOV 20 2013

SC Court of Appeals

Henry W. Frampton, III.....Respondent,

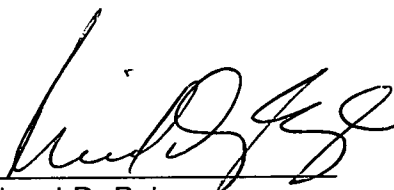
v.

South Carolina Department of Transportation.....Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to the Petition for Rehearing on the Appellant by depositing a copy in the United States Mail, Postage prepaid on November 20, 2013 addressed to their attorney of record as follows:

Beacham O. Brooker, Jr., Esquire
SC Department of Transportation
Post Office Box 191
Columbia, SC 29202-0191



Richard D. Bybee
M. Brent McDonald
Smith, Bundy, Bybee & Barnett
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623

Attorneys for Henry W. Frampton, III

November 20, 2013