THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

Case No. 2010-CP-26-07961

OPINION NO. 5368 (FILED DECEMBER 9, 2015)

Appellate Case No. 2013-001759

South Carolina Department of Transportation ..... *Respondent,*

v.

David Franklin Powell ..... *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 19, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by failing to acknowledge SC Code § 28-2-370 does not permit inquiry into Petitioner's property *rights*, but, instead, requires inquiry into Petitioner's property *value*?

2. Did the Court of Appeals err by making and affirming factual conclusions not supported in the record?

3. Did the Court of Appeals err by failing to acknowledge no "material injury" need be found where actual appropriation of property takes place pursuant to the Eminent Domain Procedures Act.?

STATEMENT OF THE CASE

Petitioner David Franklin Powell ("Petitioner" or "Mr. Powell") hereby petitions this Court for a writ of certiorari to review Appellate Case No. 2013-001759 filed December 9, 2015. This case stems from the August 27, 2010 acquisition of real property from Petitioner as part of the highway project Respondent South Carolina Department of Transportation ("Respondent," "SCDOT," or "Condemnor") deemed the "Interchange at US 17 Bypass and SC 707/Farrow Parkway." (R.pp. 16, 117)

Prior to this condemnation, Mr. Powell's property had a "clear view" from Hwy. 17 Bypass separated only by a power line easement and was accessible from Hwy. 17 via Emory Road. (R.p. 258, line 6; R.p. 271, line 17) As a result of the SCDOT highway project and subsequent condemnation action, the intersection at Hwy. 17 and Emory Road was closed and Mr. Powell's property was left accessible via a frontage road one could enter from Hwy. 17 one (1) mile to the north. (R.p. 265, line 23)

Central to his argument below and in the Court of Appeals, Petitioner seeks to be provided just compensation for the diminution in value resulting from the acquisition and reconfiguration of his property by the South Carolina Department of Transportation as an integral part of the construction of the Interchange at U.S. Highway 17 Bypass SC 707/Farrow Parkway.

After completing mediation and discovery, this case was set for date-certain trial on March 11, 2013 before the Honorable Benjamin Culbertson. (R.p. 3) Prior to the start of the trial, counsel for SCDOT informed counsel for Mr. Powell there had been a change in the road plan. (R.p. 7) As a result of the change, the frontage road would no longer extend to the entrance one (1) mile north, but would dead-end as a cul-de-sac just north of Mr. Powell's land. (R.p. 266, line 2) According to SCDOT's Rule 30(b)(6), SCRCP witness, Mike Barbee, in order to access Mr. Powell's tract after the plan change, a motorist must travel 2.24 miles. (R.p. 304, line 7) Moreover, the pathway to Mr. Powell's property would no longer be easily discernable; whereas his tract was historically accessible in a visible, *typical* manner, in the *after* condition the property is only accessible *indirectly*, and the route of access is not visible to northbound travelers on Hwy. 17 By-pass. (R.p. 370, lines 18-25; R.p. 371, lines 1-7)

On Condemnor's Motion, rather than starting the trial as scheduled, Judge Culbertson permitted SCDOT five (5) days to revise its appraisal report to reflect the change to the plans and the court simultaneously continued the case for trial beginning on April 1, 2013. (R.p. 7) On Friday, March 14, 2013, SCDOT tendered the revised appraisal report of Corbin Haskell outlining his opinion of just compensation considering

the changed plans pursuant to which SCDOT took a portion of Mr. Powell's real property. (R.p. 117) Notably, in each of Mr. Haskell's appraisals he acknowledged SCDOT was condemning a portion of Mr. Powell's property. Whereas Mr. Haskell had assessed no damages at all to Mr. Powell's remaining property in any of his three (3) earlier reports, in his fourth (4th) report Mr. Haskell, as Condemnor's proposed real estate valuation expert, determined Mr. Powell's remaining property had been damaged Fifty percent (50%) as a result of the acquisition, and determined just compensation to which Mr. Powell was entitled totaled Five Hundred and Seventeen Thousand and no/100 ($517,000.00) Dollars. (R.p. 286, lines 1-14)

One week later, ten (10) days prior to the scheduled start of trial, counsel for SCDOT submitted yet *another* appraisal report of Corbin Haskell. (R.p. 505) This *fifth* (5th) report was tendered to the Appellant's counsel on March 21, 2013, which was beyond the time limit permitted by Judge Culbertson. On the cover of this report, Mr. Haskell printed the following disclaimer:

> I have been requested to revise my appraisal since legal counsel advises that the reconfiguration of the roadways does not constitute damages to the remainder in this case. Therefore, there are no damages to the subject. . . .

(R.p.505) Mr. Haskell went on to set forth his appraisal of just compensation for the land SCDOT physically took from Mr. Powell and, as in his first three (3) reports, determined there were no damages to the remainder of Mr. Powell's property, per Condemnor's instruction, and determined Mr. Powell was only entitled to $72,000.00 for the property actually acquired. (R.p. 530)

Thereafter, on March 25, 2013, Condemnor field a Motion in Limine to exclude any reference at trial, by either the Condemnor or Mr. Powell, to diminution in value to Mr. Powell's remaining property as a result of changes in access. (R.p. 32) Judge Cottingham heard argument and entered Exhibits into the record on April 1, 2013, which was to have been the first day of the trial of the action below. From the bench, Judge Cottingham held, *inter alia*:

> Now, in this case, it is clear to me that reasonable jury would find that there is a consider[able] loss in the after [sic].

(R.p. 110, lines 21-22)

Judge Cottingham further stated:

> It is clear to me that there would be some diminution in value. Now, whether that's payable under Hardin and Tallent is a different issue. I don't think it is, but I'll let the Supreme Court deal with it and they can overrule or modify it. But in fairness to the landowner, there is some diminution in value.

(R.p. 111, lines 17-24)

Judge Cottingham continued:

> I think my ruling will be on the issue of admissibility of evidence, which is a partial summary judgment which is in and of itself immediately appealable.

(R.p. 112, lines 24-25; R.p. 113, lines 1-2)

Finally, Judge Cottingham made clear:

> THE COURT: Well, that's why I want my – in fairness to the landowner and, you, sir, I want my order to provide that

I would conclude that there is diminution in value, clearly.

MR. BELLAMY: I understand.

THE COURT: You can agree with that I'm sure, Mr. McCutcheon?

MR. MCCUTCHEON: Yes, sir.

(R.p. 114, lines 3-10) (Emphasis Added.)

Immediately following the above exchange, counsel for Condemnor converted its Motion in Limine to a Motion for Partial Summary Judgment as to the admission of evidence at trial regarding the diminution in value of Mr. Powell's remaining property resulting from the reduction of access to Mr. Powell's property caused by the taking of his property for the underlying road project. (R.p. 113, lines 3-15) The trial court ruled in favor of Condemnor, and Mr. Powell appealed the matter to the Court of Appeals which heard oral arguments December 10, 2014 and affirmed the trial court decision December 9, 2015.

Petitioner's briefs to the Court of Appeals, as well as the Record on Appeal in this matter and the transcript of oral argument before the Court of Appeals are hereby incorporated herein by reference and made part of this Petition.

ARGUMENTS

1. The Court of Appeals Erred by Failing to Acknowledge SC Code § 28-2-370 does not permit inquiry into Petitioner's property *rights*, but, instead, requires inquiry into Petitioner's property *value*.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control

> Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992) (Emphasis added).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

South Carolina's Eminent Domain Procedure Act, S.C. Code Ann. §28-2-30 instructs that the "provisions of this chapter shall constitute the exclusive procedure whereby condemnation may be undertaken in this State." The Act thereafter defines, at § 28-2-370, the "only" factors a court may consider in determining just compensation:

> In determining just compensation, **only the value** of the property to be taken, ***any*** **diminution in the value of the landowner's remaining property**, and ***any*** benefits as provided in Section 28-2-360 may be considered. (Emphasis added).

Furthermore, as noted by the Court of Appeals:

> 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."

S.C. Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 148, 522 S.E.2d 822, 826 (Ct. App. 1999) (quoting *Phelps v. United States*, 274 U.S. 341, 344, 47 S. Ct. 611, (1927)).

While the language in S.C. Code Ann. § 28-2-370, as well as the tenet of just compensation iterated by *Faulkenberrry* are clear and unambiguous, the Court of Appeals elected to disregard damages to Mr. Powell's remaining property, holding:

> Viewing the evidence in the light most favorable to Powell, we hold the circuit court did not err in finding **any diminution in value of Powell's property as a result of the change in road access is not compensable.** While the circuit court's reliance on *Hardin* was error, pursuant to *Carodale*, a landowner has no vested rights in the continuance of a public highway and in the continuation of maintenance of traffic flow past his property. Therefore, **any damage to the remainder of Powell's property as a result of the closure of the intersection of Emory Road and Highway 17 is not compensable.** [Cite page in Court of Appeals Opinion where this is stated]

Emphasis added.

This finding by the Court of Appeals is not only in error, but directly contrary to the plain text of S.C. Code § 28-2-370 which *requires* "only the value of the property to be taken, *any* diminution in the value of the landowner's remaining property, and *any* benefits as provided in Section 28-2-360 may be considered." All parties to this appeal agree Mr. Powell's remaining property has a diminished value as a result of the highway project for which it was condemned. Both the holding by the Court of Appeals as well as any South Carolina precedent contrary to this result are in error.

S. Carolina Dep't of Transp. v. Powell, 415 S.C. 299, 781 S.E.2d 726, 730 (Ct. App. 2015), reh'g denied (Feb. 19, 2016)

Judge Cottingham found and Counsel for SCDOT concurred on the record: SCDOT's taking necessarily caused a diminution in value to Mr. Powell's remaining property, which conclusions are consistent with the determination by the appraiser SCDOT hired. (R.p. 114, lines 3-10) Pursuant to the clear and unambiguous language of S.C. Code Ann. §28-2-370, Mr. Powell is entitled to present evidence as to "any" such diminution. Both the holding by the Court of Appeals as well as any South Carolina precedent contrary to this result are in error.

2. The Court of Appeals Erred by Making and Affirming Factual Conclusions not Supported in the Record.

> S.C. Code Ann. § 28-2-280 outlines the form and content of the condemnation notice to be filed in instances where a condemning authority acquires private property under the power of eminent domain. Section (C)(8) of that statute provides in part the notice "shall state whether the condemnor demands a trial by jury." In the present matter, the Condemnation Notice filed by SCDOT contained the declaration in the caption "jury trial demanded." Moreover, Rule 38, S.C.R.C.P.(a) explains in part "[i]ssues 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." Petitioner has not waived his right to a trial by jury for the determination of the facts relevant to the determination of the amount of just compensation he is due in the present matter.

However, despite Petitioner's clear right to have the facts of his case determined by a jury, both the trial court and the Court of Appeals have rendered conclusions of fact for which no testimony has been taken, and they have done so without concern for Mr. Powell's right to have these matters determined by a jury. The Court of Appeals stated in its opinion: "Viewing the facts in the light most favorable to Powell, we hold the circuit court did not err in finding any diminution in value of Powell's property as a result

of the change in road access is not compensable." However, the facts of record support neither the trial court's nor the Court of Appeals determinations in several regards.

First, no evidence exists in the record that Petitioner's property was taken for the purpose of rounding the intersection of Emory Road and Old Socastee Highway. While the Court of Appeals makes clear in its opinion its concern in determining the purpose for the taking of Mr. Powell's property, it summarily adopts the trial court conclusion the purpose was for the rounding of the intersection. However, Condemnor submitted no evidence in either court, and cites none in any of its filings, to support this finding.

Moreover, no evidence exists in the record to support the conclusion of the trial court or the Court of Appeals that SCDOT could have eliminated the intersection of Emory Road and Highway 17 without taking Petitioner's property. Again, each of the courts below has rendered conclusive determinations on this issue without the presentation of any testimony or presence of a jury. In this instance, again, Mr. Powell was provided no opportunity to dispute Condemnor's evidence or present evidence to the contrary, as no evidence was presented by Condemnor to support the courts' conclusion.

Likewise, there exists no evidence of record to contradict Petitioner's position that, but for the overall construction of the project deemed the "Interchange at US 17 Bypass and SC 707/Farrow Parkway," his property would not have been condemned. Moreover, no evidence exists in the record: to contradict Petitioner's position any damage attributable to the project deemed the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" is an incidental result of the exercise of the power of eminent

domain; or, that this highway project was the result of the exercise of Condemnor's police power.

> When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *B & B Liquors, Inc. v. O'Neil,* 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004); *Redwend Ltd. P'ship v. Edwards,* 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud,* 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford,* 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Young v. South Carolina Dep't of Corrections,* 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999).

Mulherin Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005)

Lastly, the Court of Appeals accepted the opinion of and referred to SCDOT proposed witness Corbin Haskell as the SCDOT "real estate valuation expert." However, the trial court never provided Mr. Powell the opportunity to question Haskell as to his qualifications, analysis, or determinations. This, too, was error below and warrants review of the Court of Appeals decision. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson,* 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004). Even the property owner in *South Carolina State Highway Department*

v. Carodale Associates, 268 S.C. 556 (1977) , upon which the Court of Appeals relied, was provided his right to a jury. Haskell was never qualified as an expert of any sort at the trial court. Accordingly, Petitioner respectfully requests this Court grant Certiorari to review the decision of the Court of Appeals.

3. The Court of Appeals Erred by Failing to Acknowledge No "Material Injury" Need be Found Where Actual Appropriation of Property Takes Place Pursuant to the Eminent Domain Procedures Act.

As was acknowledged in *Hilton Head Auto*:

> "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." (quoting *Foster Lumber Co. v. Arkansas Valley & Western Ry. Co.,* 20 Okla. 583, 95 P. 224, 228 (1908). *Hilton Head Auto., LLC v. S. Carolina Dep't of Transp.*, 394 S.C. 27, 32, 714 S.E.2d 308, 311 (2011)

Emphasis added.

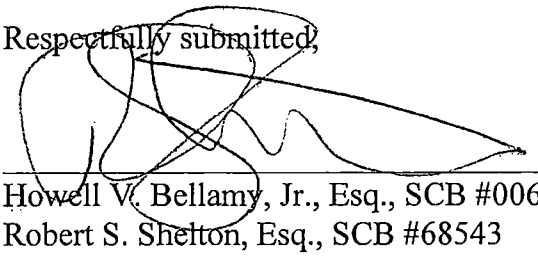
Hilton Head Auto expressly left recourse available to landowners whose property had not been condemned but, had instead suffered "material injury" as a result of government action. In the present matter, there is complete agreement among the parties, as well as the trial judge below: Petitioner's property has suffered a diminution in value as a result of the highway project for which it was condemned. Whether the diminution to Petitioner's property value is such that it would satisfy the material injury standard set forth in *Hilton Head Auto* has not been determined. The trial court and Court of Appeals

simply determined no such inquiry was proper under *Hardin* and *Carodale*, respectively. However, each of these analyses ignores not only the holding in *Hilton Head Auto* (that damage to property value may well take place even where there exists no condemnation action), but the plain text of S.C. Code § 28-2-370 as well. The South Carolina legislature has clearly foreclosed inquiry into property rights where there exists a taking by condemnation in a particular project. In those instances, the inquiry as to whether a landowner's property rights have been materially impaired is necessarily concluded *prior* to the governmental determination requiring the filing of the condemnation action. Thereafter, the only inquiry is to the determination of just compensation due the landowner for the taking, which inquiry is made, pursuant to the Act by determining the amount by which landowner's property has suffered **any** diminution in value. Accordingly, Petitioner respectfully requests certiorari be granted for the review of the opinion below.

CONCLUSION

For the reasons stated herein, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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OPINION NO. 5368 (FILED DECEMBER 9, 2015)

Appellate Case No. 2013-001759

South Carolina Department of Transportation ..... *Respondent,*

v.

David Franklin Powell ..... *Petitioner.*

PROOF OF SERVICE

I certify that I have served the **Petition for a Writ of Certiorari** in the above-captioned matter on the following individuals by depositing a copy in the United States Mail, with sufficient first-class postage affixed, addressed as follows:

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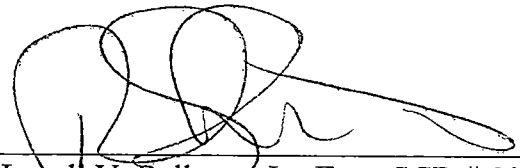

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March 21, 2016

VIA FEDERAL EXPRESS
The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Re: SCDOT v. David Franklin Powell (Tract 13)
Civil Action No. 2010-CP-26-7961
Appelle Case No. 2013-001759

Dear Mr. Shearouse:

Enclosed herewith for filing, please find the following:

(1) One (1) original and six (6) copies of Petitioner's Petition for a Writ of Certiorari;
(2) Two (2) copies of the Appendix (one bound, and one unbound); and
(3) One (1) original and two (2) copies of the Proof of Service.

Also enclosed is our Firm's check in the amounts $100.00 representing the Court's filing fee for the enclosed Petition. Upon the filing of the above listed documents, please return a clocked copy of the Proof of Service to me in the self-addressed, stamped envelope I have provided for your convenience.

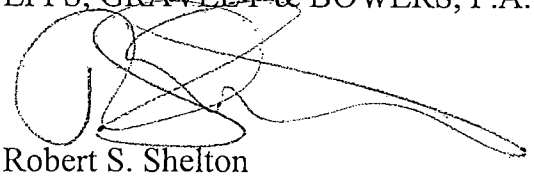
By copy of this letter to The Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals, I am enclosing one (1) copy of the Petition and two (2) copies of the Proof of Service. Upon filing of these documents in the Court of Appeals, please return a clocked copy of the Proof of Service to me in the self-addressed, stamped envelope have provided. In addition, and also by copy of this letter, I hereby serve upon other counsel of record one (1) copy of the Petition for a Writ of Certiorari and Proof of Service.

If you have any questions, please do not hesitate to contact me. Thank you in advance for your assistance in this matter.

With kindest regards, I am

Yours very truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.



Robert S. Shelton

RSS/nmr
Enclosures as stated
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