

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2016-000594

Case No. 2010-CP-26-7961

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APR - 6 2016

SC SUPREME COURT

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

vs.

David Franklin PowellAppellant,

Respondent's Return to Petition for Certiorari

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April 4, 2016

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QUESTION PRESENTED

Whether the courts below correctly followed this Court's precedents in determining whether just compensation in a condemnation includes the diminution in the value of the landowner's remaining land resulting from police power acts on other land remote from the portion taken from the landowner?

COUNTER-STATEMENT OF THE CASE

This is an appeal by a landowner/condemnee, David Franklin Powell, of an Order of the Circuit Court for Horry County, the Honorable Edward B. Cottingham, suppressing evidence in a trial on just compensation for land taken which has yet to occur.

The highway improvement project that impacted Petitioner's land was the "Interchange at US 17 Bypass and SC 707/Farrow Parkway, File 26.036774A," referred to as the airport "back gate" project in Myrtle Beach. The project involved the closure of the intersection of US 17 and Emory Road including the milling up of a short section of Emory Road between Old Socastee Highway and US 17. Also, Old Socastee Road was terminated in a cul-de-sac prior to its intersection with Railroad Bed Road.

Prior to the acquisition of part of it, Powell owned an unimproved tract of land containing 2.51 acres. It was bounded by Emory Road and Old Socastee Highway. It had no frontage on U.S. 17 or on the segment of Old Emory Road between Old Socastee and U.S. 17 being separated from U.S. 17 by Old Socastee and by other lands. As a consequence of the closure of the U.S. 17/Emory Road intersection, there is no longer any crossing traffic at Old Socastee and

Emory. Therefore, 0.183 acres of land was taken from the corner of appellant's land for the purpose of converting the corner to a curve to improve traffic flow. The stop sign on Old Socastee where it entered Emory was removed.

Respondent condemnor had moved the Circuit Court *in limine* for an order suppressing any evidence of diminution in the value of Petitioner's remaining land due to the loss of "access" to U.S. 17 caused by the closure of the intersection of that highway with Emory Road on the grounds that Petitioner's land did not abut U.S. 17 and had no private property right with respect to that road. R.p. 32. Appellant's "easements" with respect to the public roads he did abut, as described in Hardin (& Tallent) v. S.C. Dep't of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007), had not been disturbed by the project. Additionally, SCDOT asked that damages to the remainder caused by loss of visibility from U.S. 17 be excluded.

At the hearing on condemnor's motion, after the court indicated he would rule in favor of the motion, landowner's counsel requested that condemnor convert its motion to one of partial summary judgment to accommodate an appeal. The condemnor agreed to do so and the judge sanctioned the conversion. R.p. 112-13. The court issued a written order filed May 14, 2013, in which he found that the landowner's loss of access is not compensable, excluded from the trial any evidence of loss of access, and refrained from ruling on the issue of loss of visibility leaving that issue to the trial judge. R.p. 111. Landowner's Motion to Alter or Amend under Rule 59(e), SCRCP, was denied by written Order on July 26, 2013. Appellant timely noticed his appeal on August 15, 2013.

In a published opinion, No. 5368 filed December 9, 2015, the Court of Appeals held that the Circuit Court erroneously relied on Harden (& Tallent), supra, and other inverse

condemnation access cases because the present case is a direct condemnation. However, it concluded on the basis of the opinion in South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977), involving a direct condemnation, and other authorities, that damages resulting from police power acts elsewhere on the same project where an owner's land is taken is not recoverable as damages to the landowner's remaining land where the taking was only an incidental result of the closure of the intersection and was not indispensable to and inseparable from or a substantial part of the overall project. R.p. 326.

ARGUMENT

I. The holdings of the Court of Appeals and the Circuit Court should be affirmed as in accord with this Court's precedence.

The Court should affirm the Court of Appeals and the Circuit Court because the resolutions of those courts are completely in accord with this Court's precedents as represented by South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977); S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970); Wilson v. Greenville County, 110 S.C. 110 S.C. 321, 96 S.E.2d 301 (1918); and the jurisprudence of United States jurisdictions generally. That law is that the loss of value to a condemnee's remaining property resulting from police power acts elsewhere from his property is not recoverable as just compensation unless the land taken from him is indispensable to, inseparable from, and a substantial part of the overall project and the acts complained of. S.C. Dep't of Transp. v. Powell, 415 S.C. 299, 309, 781 S.E.2d 726, 731 (Ct. App. 2015), R.p. 326, and cases cited therein.

Nichols provides the following on the question of whether compensable damages to a condemnee's remaining land must be made in every case where there is an actual appropriation of land by eminent domain even though those damages arise from a police power act that would not otherwise be a taking in an inverse condemnation case.

The mere fact that a taking occurred does not resolve the issue of whether or not any consequence of the taking is measurable in damages therefrom.

The court in Hales v. Kansas City [248 Kan. 181, 804 P.2d 347 (1991)] addressed a landowner's claim that the mere acquisition of part of its land by the exercise of eminent domain rendered all damages resulting from a highway construction project compensable under the before-and-after rule applicable to a taking. While the court in Hales acknowledged its previous holding that the reasonableness of a police power regulation may be administratively asserted at any time by a city and tried in a condemnation action, the state may nevertheless, concurrent with a compensable taking in a condemnation proceeding validly exercise the police power for traffic control and public safety for which there may be no compensation even if it affects the method of ingress and egress to the affected property. In other words, the mere fact that a public project may also necessitate the physical appropriation of a portion of one's property does not necessarily entitle one to compensation for an otherwise valid exercise of police power associated with the same project.

4A Sackman, Nichols on Eminent Domain, §14A.01[6][a], p. 14A-25. As the Court of Appeals correctly noted, had a neighbor performed the same acts on his property, the landowner would have no right to prevent it. This distinguishes the fact situation herein from that where the acts complained occur on the land taken from the landowner. In that case, ownership of the land gave the owner the right to limit any obstructions on the land. See, Dimond D Properties v. Alaska DOT, 806 P.2d 843 (Alaska 1991). This right was taken from him and damages thus recoverable. This is the right to exclude others that the U.S. Supreme Court has noted was perhaps the most fundamental of all property interests. Lingle v. Chevron, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed 2d 876 (2005).

Petitioner's first argument is that the rule of statutory construction that language in a statute be given its plain and ordinary meaning and that the statutory definition of just compensation is that it includes "any diminution in the value of the landowner's remaining property." S.C. Code Ann. §28-2-370 (Rev. 2007). However, this argument ignores the fact that this Court has already interpreted that language. In S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264, 266-67 (1963), this Court said,

The special damages referred to in the above statutes relate to injury or damage to the remainder of the property from which a portion is taken. They would include any damage or any decrease in the value of the remainder of the landowner's property which are the direct and proximate consequence of the acquisition of the right of way.

Thus, the damages to the remainder are confined to those damages resulting from the taking and not necessarily from the project as a whole. The Department has done nothing on the 0.183 acres taken from the condemnee to cause damages within his remaining land. What Petitioner lost is frontage on a valuable traffic artery. This is not a property right in South Carolina.

The landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public. Re-routing and diversion of traffic are police power regulations.

Carodale Assocs., supra, 268 S.C. at 561, 235 S.E.2d at 129. See, also, Cherry v. Rock Hill, 48 S.C. 553, 26 S.E. 798, 801 (1897):

But we do not think that the alteration made in this street at a point where it did not adjoin plaintiff's property can be regarded as the taking of private property for public use. So far as appears from the allegations of the complaint, the only right which the plaintiff had in the street in question was the right to which, in common with all other citizens, he was entitled, of using this street as a public highway. That right is not, in our judgment private property, protected by the constitutional provision which is invoked.

A contrary holding would have a devastating impact on the ability of public authorities to redesign and realign highways and improve traffic flow. The Courts below did not misinterpret the law.

II. No further fact findings were necessary to support the holdings below.

In his section 2, Petitioner complains that the trial court should have allowed the jury to determine facts before deciding the motion on the law. However, no additional facts beyond the pleadings were necessary for Order suppressing the evidence.

Condemnation trials to determine just compensation for land taken are not Rule 1, SCRPC, civil cases. Rather, procedure is governed by the Eminent Domain Procedure Act, S.C. Code Ann. §§28-2-10, *et seq.* That Act stipulates that its provision prevail over the Rules of Civil Procedure where there is a conflict. Condemnation cases are begun by delivery of a condemnation notice. S.C. Code Ann. §28-2-220. The condemnation notice must contain, *inter alia*, “a map, diagram, sketch, or reference to project plans showing, as far as practical, the property to be taken.” S.C. Code §28-2-280 (5). Further, the notice must specify a location within the county where the property to be taken is situated at which the landowner may inspect the project plans. *Id.*, subsection (6). It is the practice of SCDOT to deliver to landowners copies of the plan sheets relevant to their properties.

Petitioner argues that the geometric facts relied upon by the courts below are facts that a jury in the trial of just compensation must be allowed to decide. However, these facts are the basis of the taking and not facts going to the amount of compensation due for the rights taken. They are part of the pleadings and not evidence of just compensation. The mechanism provided by the law should a landowner consider any matters in the notice to be inaccurate is to file a

separate action in equity under S.C. Code Ann. §28-2-470 challenging the condemnor's right to condemn. If the condemnor is not authorized to condemn the property or the proposed taking is not necessary for a legitimate public purpose, the court will make a determination in those proceedings which are separate from any just compensation trial. Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748 (1993).

Here, the fact that the corner of Petitioner's property taken was for rounding it and removing the stop sign is clearly depicted on the project plans. R.p. 315. Likewise, the fact that the taking and the intersection closing are physically separated is illustrated thereon. The only logical conclusion is that these two aspects of the project are independent of each other and that the closure could have been done without the taking of the corner. Lastly, Petitioner claims that summary judgment was premature because he was not allowed to cross-examine the condemnors valuation expert. However, valuation is not an issue. That branch of the case is yet to be tried. The determination made by the court was one of law that an appraisal witness would be qualified to opine upon.

Finally, in section 3, Petitioner argues that the diminution in the value of his remaining land constitutes a "material injury" to his property rights as set forth in the inverse condemnation case, Hilton Head Automotive, LLC v. SCDOT, 394 S.C. 27, 714 S.E.2d 308 (2011). This argument in essence is what the Court in Hardin (& Tallent) v. S.C. Dep't of Transportation, 371 S.C. 598, 443 (fn. 4), 641 S.E.2d 437 (2007), termed putting the cart before the horse. As the Court of Appeals has stated:

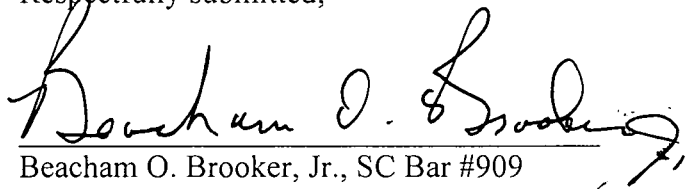
An injury for which damages must be paid is injury to the property itself. The property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use.

Gray v. S.C. Dep't of Hwys. And Public Transp., 311 S.C. 144, 427 S.E.2d 899 (1992), overruled on other grounds by Hardin, supra. Neither of the "easements" described in Hardin, the right to get on and off the abutting streets and to use Emory Road to access the general system of streets and roads have been disturbed. The character of the government's action is the physical acquisition of 0.183 acres of land for which compensation for its fair market value will be determined by a jury.

CONCLUSION

The Court should dismiss the appeal and remand the case to the Circuit Court for Horry County for a trial to determine the just compensation owed Petitioner for the land the Department has taken.

Respectfully submitted,



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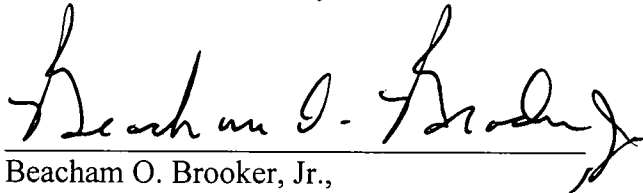
David Franklin Powell Appellant,

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Certiorari on the Appellant by depositing a copy of it in the United States Mail, postage prepaid on April 5, 2016, addressed to his attorneys of record, Howell V. Bellamy, Jr. and Robert S. Shelton, and upon John B. McCutcheon, Jr., as follows:

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