THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Judge

Appellate Case Number 2016-001440

Carolina Chloride, Inc. .....Appellant,

v.

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

[INITIAL] BRIEF OF RESPONDENT

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November 17, 2016

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly held as a finding of fact that Carolina Chloride owned no property adjoining Farrow Road on which to base a direct abutter's easement onto that road?

2. Whether the trial court's finding of non-abutting is reasonably supported by the evidence?

3. Whether the trial court correctly held that Carolina Chloride failed to follow statutory procedures to apply for an encroachment permit to allow Respondent to mitigate its damages prior to filing suit in inverse condemnation?

STATEMENT OF THE CASE

This is Carolina Chloride's appeal of a decision of the Circuit Court for Richland County in an inverse condemnation case involving access rights to a highway. The trial court (Hon. Joseph M. Strickland, Special Circuit Judge) had originally granted summary judgment to the plaintiff finding a taking. Respondent appealed and the Supreme Court reversed pursuant to its decision in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007), finding that, of the two easements held by a landowner with respect to public roads, Carolina Chloride did not lose its rights to access the general system of roads as a result of the closing of the rail/highway grade crossing at Killian and Farrow Roads because it could still travel east on Killian Road with little difficulty. However, because the case was decided on summary judgment, there had been no determination of whether the landowner actually owned any of the land adjoining Farrow Road that would support its entitlement to the second easement constituting access rights—an abutter's direct, on-off, easement to enter an adjoining highway. The Court remanded the case for that sole determination.

After a trial October 20, 21, and 22, 2014, the trial court found that Carolina Chloride could not prove its ownership of the land, rather the greater weight of evidence, including its own title and the admission of its principle, supported ownership by the Norfolk Southern Corporation and not Carolina Chloride. As a secondary holding, the court found that the landowner had never availed itself of the procedures set forth in S.C. Code Ann. §57-5-1080 (Rev. 2006) to apply for a permit for a drive entrance onto Farrow Road. Thus, the Department had been deprived of its right to administratively resolve

this matter before being haled into court. Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990).

STATEMENT OF FACTS

We believe that all facts necessary to affirm Judge Strickland's Order and dismiss this appeal are contained in that Order. R.p. ___. Specifically, the Judge found upon undisputed evidence, that the Norfolk Southern Railroad and not Carolina Chloride owned the land abutting Farrow Road at this location and was thus the only entity with access rights to that highway. Further, the court found that Appellant never availed itself of the statutory right all landowners abutting State highways possess to apply for an encroachment permit to enter that highway across the public right-of-way. We respond to Appellant's specific fact statements as follows:

At page 5, Appellant states that its property is located "at the southeastern corner of Killian Road and Farrow Road, abutting both roads." This is incorrect. Both Appellant's title and plat and the testimony of its principal and the concession of its counsel prove that its land abutted the land of the railroad and not Farrow Road. R.p. ___.

Beginning at the bottom of page 5 and continuing onto page 6, Appellant appears to imply that the arrangement negotiated between the Department and Norfolk Southern to replace the grade crossing at Farrow and Killian with an overpass at nearby Clemson Road was somehow improper. In fact this project was pursuant to the legislative policy contained in S.C. Code Ann. §58-15-1635 (Supp. 2008) where the General Assembly directs the highway department to close highway/rail grade crossings where feasible.

The Department had no property rights in the section of Killian Road crossing the land and tracks of Norfolk Southern; rather, that crossing existed by the permission of and sufferance of the railroad company. Numerous Code sections provide for participation by railroads of the cost of replacing grade crossings with overpasses, underpasses, or in improving them. See, e.g., S.C. Code Ann. §§1660, 1930. Here, the Department negotiated a 5% cost participation by the railroad.

In the first full paragraph on page 6, Appellant complains of the inconvenience the new traffic pattern caused it. However, this discussion is irrelevant. The Supreme Court reversed the Circuit Court's holding regarding this factor and remanded the case to determine whether Appellant owned the land adjoining Farrow Road and thus possessed a direct abutter's access rights to that highway. The reversal was pursuant to its decision in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007) where, in defining a landowner's access rights, the Court stated,

> Further, as long as a landowner still has access to the public road system, this easement is unaffected [footnote omitted]. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction. *See* 73 A.L.R.2d 689, 691-98.

Id. 641 S.E.2d at 442.

In any event, the general road system serving Appellant and others was improved by the project. Named the "Clemson Road/Northern Arterial" project, the improvements were for the purpose of connecting I-20 on the east with I-77 on the west. Commercial and industrial shipping in the area in general is greatly enhanced.

Beginning at the first full paragraph on page 9, Appellant discusses the business's use of the railroad siding in shipping its product. Appellant does not connect this

discussion to any argument as to how the highway grade crossing affected this function. The rail siding lies on its side of the tracks and not the Farrow Road side. Appellant could and can continue to use the siding. In any event, the fact that Appellant leased land from the railroad for the siding supports ownership in the railroad and not itself.

From the foregoing paragraph through page 3, Appellant discusses its use of the property and the effect of the grade closure on its business. However, a takings analysis in this regard is not use-based. Rather, the inquiry is whether access rights were taken. See, S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127, 129 (1977) ("Succinctly, the restriction of ingress and egress to and from one's property is the right that must be compensated if infringed when a highway is closed by condemnation.") Should a taking be found the factors Appellant cites may be relevant in determining the diminution of the value of its property. However, this goes to damages and not the issue *vel non* of a taking. In any event, loss of business is not a factor in the damage phase of a condemnation case. S.C. State Hwy. Dep't v. Bolt, 242 S.C. 411, 413, 131 S.E.2d 264, 268 (1963).

At page 15, Appellant complains of the unfairness of Norfolk Southern's choice to close the Killian Road crossing instead of other grade crossings along Farrow Road. It mentioned the testimony of Brian Keys that the railroad was calling the shots. As mentioned above, the Department had no property interest in the crossing. It existed by permission and at the sufferance of the railroad which was free to revoke it at any time. The Clemson Road project with its planned overpass gave it the opportunity to do so. The closure greatly enhanced traffic safety in the vicinity.

Finally, at the top of page 19, Appellant implies that the Department was somehow obligated to inform him of his access rights. The Department does not undertake to advise all landowners abutting its highways of their property rights. Rather, it reviews driveway permit applications for safety purposes after receipt of applications as required by the Code of Laws.

STANDARD OF REVIEW

We agree with Appellant's exposition of the standard of review and would note that Judge Strickland's finding of fact that Carolina Chloride's land did not abut Farrow Road is not a finding where the evidence is reasonably susceptible to the opposite conclusion only. Columbia Venture, LLC v. Richland County, 413 S.C. 423, 776 S.E.2d 900 (2015). The court's finding was based upon plaintiff's title and plat showing a boundary only with the railroad land and the admission of plaintiff's principle and its attorney that the land belonged to the railroad.

ARGUMENT

I. The trial court correctly held that Appellant's land did not physically abut Farrow Road thus had no pre-existing right to access that road from its property.

In its first argument, Appellant discusses a number of cases in the municipal annexation, real property tax, and regulatory law areas as precedents for its contention that its property actually abuts Farrow Road as a matter of law. As the trial court stated, these cases are not relevant to the instant case that involves actual physical access between a parcel of land and a highway. R.p. __.

Initially, we should respond to Appellant's argument that our Supreme Court's opinion in Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999), supports it contention that it is an abutting landowner. This is incorrect for a number of reasons. First, we believe that the Court's statement in Mosteller that a landowner may be considered an abutting owner where its land is separated only by a stream or river is a mere reference to the common law of South Carolina regarding the ownership of lands beneath non-tidal rivers and streams. South Carolina has never rejected the English rule that a riparian owner's title extends to the centerline of freshwater rivers or streams. State v. Sloan Construction Co., 284 S.C. 491, 328 S.E.2d 84 Ct.App. 1985), cert. denied (S.C. Aug. 12, 1985); Wyche and Finklea, Environmental Law in South Carolina (S.C. Bar 1999), page 235. Secondly, the Court in Mosteller cited a North Carolina case, Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262 (1921), as authority for the above statement. In Anderson, the North Carolina Supreme Court stated the following:

> By the term "abutting property" is meant that between which and the improvement there is no intervening land. Millan v. Chariton, 145 Iowa, 648, 124 N.W. 766.
>
> * * *
>
> Indeed, premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream, and he is liable to assessment provided he has the right of ingress and egress over the intervening land to the improvement.

Id., 109 S.E. 264.

Thus, Mosteller does not support Appellant's contention that its land abuts Farrow Road, that the Court may disregard fee simple ownership of intervening land owned by a third party, nor sanction trespass.

Next, Appellant cites cases involving municipal annexation in support of its argument that findings of contiguousness under those laws equals abutting for present purposes. Those cases are simply inapt to the law governing this case. The General Assembly, which created municipalities in the first place, may prescribe any rules it wishes for expansion of municipal boundaries including the authority to ignore intervening roads, railroads, or even private land. The statutes and cases do not alter fundamental common law regarding titles to land in this State.

Sonoco v. S.C. Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), was a property tax case where the Court held that railroad tracks bisecting property of the same landowner on either side of the tracks did not divide the land into two tracts so that it may be considered a single parcel for tax assessment. This is common real property law. Where a landowner owns the fee estate on each side of railroad tracks and underneath the tracks, the tracks are a mere easement for a particular use and an encumbrance on the underlying land. It does not apply here where the railroad tracks are situated on land owned in fee simple by another person, the railroad.

The unique case history of Eldridge v. South Carolina Dep't of Transportation, 384 S.C. 548, 683 S.E.2d 483 (2009), distinguishes that case from the facts at bar. That case is not contra to the legal principles discussed in the foregoing paragraph. There, as noted in the dissent, a trial judge at one point during the lengthy proceedings had declared that, because the highway lying between plaintiff's larger parcel of land and the area across the road where plaintiff maintained a sign had become vested in the highway department through more than 20 year use as a public road,[1] the State and not plaintiff

[1] We believe this holding to be incorrect. Twenty year use as a public road would only establish a prescriptive easement for use as a public highway. It would not divest the underlying fee owner of its title

owned that strip of property. The majority in that decision did not appear to accept that ruling nor consider it the law of the case. Instead, it decided the case under the principles we discussed above that an easement in another for a use encumbering underlying land does not divide that land. Further, we would note as did the trial court that Eldridge and other cases cited by Appellant define contiguity for administrative purposes such as defining on-premises for outdoor advertising, tax parcels, and the like. Here, Appellant argues that it is entitled to physically cross the land of the Norfolk Southern, asking the Court to divest that landowner of part of its domain.

Finally, we should note that all of the foregoing discussion concerns abutting Farrow Road in the area defined by extending the north and south boundaries of Appellant's property to the edge of that highway's right-of-way. There has been no proof by Appellant that its land shared a boundary with the rectangle that contained the Killian Road crossing of the Norfolk Southern land. At most, Appellant's land touched it at a corner, but it had no right to enter it directly as an abutting owner. Thus, Appellant had no rights to the closed section differing from any other member of the travelling public. The Supreme Court in a similar case, Cherry v. Rock Hill, 48 S.C. 553, 26 S.E. 798 (1897), said

> 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 constitution.

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nor vest the State with fee ownership. State v. Hughes, 145 S.E.297 (1928). As was held in City of Greenville v. Bozeman, 254 S.C. 306, 317-28, 175 S.E.2d 211, 216 (1970), vacation and abandonment of a public street vests absolute possession and title in the abutting property owners to the centerline and not to the original owner.

Id., 26 S.E.801.

II. Appellant's claim is barred by its failure to give Respondent the opportunity to cure the alleged taking.

Pursuant to S.C. Code Ann. §57-5-1080 (Rev. 2006), a landowner must obtain a permit from the Department of Transportation prior to opening a drive entrance onto a State primary highway. Those permits are granted where the owner proposes an entrance at a "safe and suitable point as determined by engineering principles." Act 621, 1956 S.C. Acts 1594. Appellant has never applied for a permit.

The general rule "that administrative remedies must be exhausted absent circumstances supporting an exception to the rule" is well established in South Carolina. Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). At its core, the doctrine of exhaustion serves two main purposes: (1) the protection of administrative agency authority; and (2) the promotion of efficiency. Woodford v. Ngo, 548 U.S. 81, 89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). An administrative agency's authority is protected by exhaustion because it gives the agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into ... court, and discourages disregard of the agency's procedures." Id. (internal quotation omitted). Efficiency is promoted by the exhaustion doctrine because claims generally can be resolved more rapidly and economically by agency hearings and procedures than by litigation in court. Id. Moreover, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." Id.

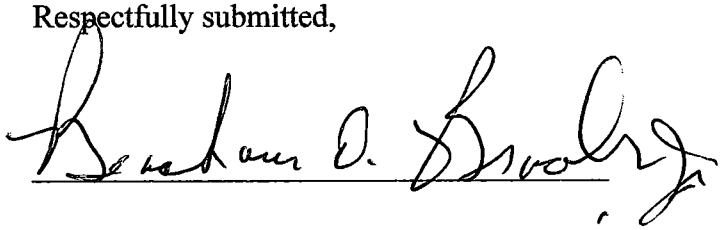
A permit application in this case would give Respondent the opportunity to prove that it owns the strip of land abutting Farrow Road. If so, a permit will be granted and further proceedings before this Court would be rendered unnecessary.

Related to exhaustion, and specific to the law of inverse condemnation, is the principle that a claimant must notify the government of his complaint and afford it the opportunity to correct an alleged taking. Here, Appellant complains that it has sold the land and would not benefit from the cure of a new driveway. It is universally held in the law of inverse condemnation that a claimant must first make a meaningful request to allow governmental agencies to exercise their discretion. Palazzola v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 2459, 150 L.Ed.2d 592 (2001); Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). Appellant's failure to afford the Department the opportunity to mitigate its alleged taking bars the claim herein.

CONCLUSION

This Court should affirm the Order of the Circuit Court on the grounds that undisputed evidence proved that Appellant's land did not abut the highway to which it seeks access. The Court should also affirm the lower court's dismissal of the case on the grounds that Appellant's failure to afford Respondent the opportunity to correct the alleged taking bars its lawsuit.

Respectfully submitted,



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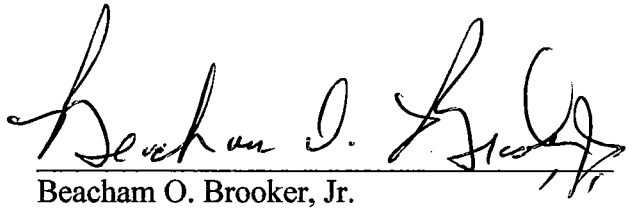
South Carolina Department of Transportation .....Respondent.

CERTIFICATE OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matter on Carolina Chloride, Inc., by depositing a copy of it in the United State Mail, postage prepaid, On November 17, 2016, addressed to its attorneys or record, Edward D. Sullivan, Post Office Box 11714, Columbia, South Carolina 29211 and Christian D. Stegmaier, Collins & Lacy, P.C., Post Office Box 12487, Columbia, South Carolina 29211.

November 17, 2016



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The Honorable Jenny Abbott Kitchings
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RE: Carolina Chloride, Inc. v. SC Dept. of Transportation
Appellate Case No. 2016-001440

Dear Ms. Kitchings:

Enclosed please find one copy of Respondent's Initial Brief, Respondent's Designation of Matter to be Included in the Record on Appeal, and my certificate that the foregoing have been served on Appellant's counsel.

Very truly yours,

Beacham O. Brooker, Jr.
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Cc: Christian Stegmaier
Edward D. Sullivan