

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

OCT 19 2017

S.C. SUPREME COURT

APPEAL FROM Horry COUNTY
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

Case No. 2010-CP-26-07961

Appellate Case No. 2016-000594

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

v.

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

BRIEF OF PETITIONER

Howell V. Bellamy, Jr., Esq., SCB # 00642
Robert S. Shelton, Esq., SCB # 68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
Attorneys for Petitioner

Other Counsel of Record:
John B. McCutcheon, Esq.
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
Attorney for Respondent

Beacham O. Brooker, Jr., Esq.
South Carolina Department of Transportation
P.O. Box 91
Columbia, SC 29202-0191
Attorney for Respondent

TABLE OF CONTENTS

Table of Authoritiesii-iii

Statement of the Issues on Appeal1

Statement of the Case.....1

Facts2

Standard of Review6

Arguments.....7

 1. BECAUSE SC CODE § 28-2-370 DOES NOT PERMIT INQUIRY INTO
 PETITIONER’S PROPERTY RIGHTS, BUT, INSTEAD, REQUIRES INQUIRY
 INTO PETITIONER’S PROPERTY VALUE, THE COURTS BELOW ERRED
 IN DETERMINING DIMINUTION TO PETITIONER’S REMAINING
 PROPERTY WAS NOT COMPENSABLE.....7

 2. BECAUSE RESPONDENT PRESENTED NO EVIDENCE OF THE PURPOSE
 OF THE ACQUISITION; WHETHER RESPONDENT COULD HAVE
 ELIMINATED THE INTERSECTION IN QUESTION WITHOUT FILING THE
 PRESENT ACTION; WHETHER, BUT FOR THE OVERALL
 CONSTRUCTION OF THE PROJECT, PETITIONER’S PROPERTY WOULD
 HAVE BEEN CONDEMNED; OR, WHETHER THE APPRAISER ENGAGED
 BY RESPONDENT QUALIFIED AS AN EXPERT, THE COURTS BELOW
 ERRED BY REACHING FACTUAL CONCLUSIONS NOT SUPPORTED BY
 EVIDENCE IN THE RECORD11

 3. BECAUSE THERE HAS BEEN NO INQUIRY AS TO WHETHER THE
 DIMINUTION TO PETITIONER’S REMAINING PROPERTY CONSTITUTED
 A MATERIAL INJURY, THE COURT ERRED IN DETERMINING
 PETITIONER WAS NOT ENTITLED TO RECOVER THIS DIMINUTION....13

Conclusion15

TABLE OF AUTHORITIES

CONSTITUTIONS

Article I, § 17 of South Carolina’s Constitution	9
--	---

STATUTES

S.C. Code Ann. § 28-2-60 (1976)	7
S.C. Code Ann. § 28-2-280 (1976)	11
S.C. Code Ann. § 28-2-360 (1976)	7, 10
S.C. Code Ann. § 28-2-370 (1976)	7, 8, 10, 14
S.C. Code Ann § 33-135 (1962)	9

RULES

Rule 56 SCRPC	6
Rule 56(c) SCRPC	6
Rule 38(a) SCRPC	11

CASES

<u>Bell v. Progressive Direct Ins. Co.</u> , 407 S.C. 565, 757 S.E.2d 399 (2014)	6
<u>Brockbank v. Best Capital Corp.</u> , 341 S.C. 372, 534 S.E.2d 688, 42 U.C.C. Rep. Serv. 2d 310 (2000)	6
<u>Brown v. Hendricks</u> , 211 S.C. 395, 403–04, 45 S.E.2d 603, 606–07 (1947)	13
<u>Charleston County Sch. Dist. v. State Budget and Control Bd.</u> , 313 S.C. 1, 437 S.E.2d 6 (1993)	7
<u>Chick Springs Water Co. v. State Highway Dept.</u> , 159 S.C. 481, 157 S.E. 842 (1931).	9
<u>City of Rock Hill v. Cothran</u> , 209 S.C. 357, 40 S.E.2d 239 (1946)	8
<u>Cullum Mechanical Const., Inc. v. South Carolina Baptist Hosp.</u> , 344 S.C. 426, 544 S.E.2d 838 (2001)	6
<u>Doe ex rel. Doe v. Batson</u> , 345 S.C. 316, 548 S.E.2d 854 (2001)	6
<u>Early v. South Carolina Public Service Authority</u> , 228 S.C. 392, 90 S.E.2d 472 (1955)	9
<u>Ellis v. Davidson</u> , 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).....	13
<u>Foster Lumber Co. v. Arkansas Valley & Western Ry. Co.</u> , 20 Okla. 583, 95 P. 224, 228 (1908).....	13
<u>Hardin v. South Carolina Department of Transportation</u> , 371 S.C 598, 641 S.E.2d 437 (2007)	2, 14

<u>Hilton Head Automotive Group, LLC v. South Carolina Dept. of Transp.</u> , 394 S.C. 27, 714 S.E.2d 308 (2011)	8, 13, 14
<u>Hodges v. Rainey</u> , 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)	7
<u>In re Vincent J.</u> , 333 S.C. 233, 509 S.E.2d 261 (1998)	7
<u>Milhous v. State Highway Dept.</u> , 194 S.C. 33, 8 S.E.2d 852 (1940)	9
<u>Moriarty v. Garden Sanctuary Church of God</u> , 341 S.C. 320, 534 S.E.2d 672 (2000)	13
<u>Owens v. South Carolina State Highway Dept.</u> , 239 S.C. 44, 121 S.E.2d 240 (1961)	9
<u>Paschal v. State Election Comm'n</u> , 317 S.C. 434, 454 S.E.2d 890 (1995)	7
<u>Phelps v. United States</u> , 274 U.S. 341, 344, 47 S. Ct. 611, (1927).....	8
<u>Sloan v. Department of Transp.</u> , 379 S.C. 160, 666 S.E.2d 236 (2008)	6
<u>S.C. Dep't of Transp. v. Faulkenberry</u> , 337 S.C. 140, 148, 522 S.E.2d 822, 826 (Ct. App. 1999)	8
<u>South Carolina Dept. of Transp. v. Powell</u> , 415 S.C. 299, 307 (2015).....	8
<u>South Carolina State Highway Dept. v. Allison</u> , 246 S.C. 389, 143 S.E.2d 800 (1965)	9
<u>South Carolina State Highway Department v. Bolt</u> , 242 S.C. 411, 131 S.E.2d 264 (1963)	10
<u>South Carolina State Highway Department v. Carodale Associates</u> , 268 S.C. 556, 561, 235 S.E.2d 127, 128 (1977)	8, 14
<u>S.C. State Highway Dep't v. Wilson</u> , 254 S.C. 360, 366–68, 175 S.E.2d 391, 395 (1970)	10
<u>Webb v. Greenwood County</u> , 229 S.C. 267, 92 S.E.2d 688 (1956)	9

OTHER AUTHORITIES

Norman J. Singer, <i>Sutherland Statutory Construction</i> § 46.03 at 94 (5th ed. 1992)	7
18 Am. Jur. § 265, p. 905.....	10

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURTS BELOW ERR BY FAILING TO ACKNOWLEDGE SOUTH CAROLINA 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 COURTS BELOW ERR BY MAKING AND AFFIRMING FACTUAL CONCLUSIONS NOT SUPPORTED IN THE RECORD?
3. DID THE COURTS BELOW ERR BY FAILING TO INQUIRE WHETHER THE DIMINUTION TO PETITIONER'S REMAINING PROPERTY CONSTITUTED "MATERIAL INJURY" ENTITLING PETITIONER TO RECOVER THE DIMINUTION AS JUST COMPENSATION?

STATEMENT OF THE CASE

This eminent domain was initiated by the South Carolina Department of Transportation ("SCDOT" or "Condemnor") with the filing of a Condemnation Notice on August 27, 2010 in Horry County to facilitate construction of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" (the "Project"). Following discovery and mediation, the matter was set for trial to begin March 11, 2013 before the Honorable Benjamin Culbertson. (R.p. 3) Having forgotten to notify Mr. Powell of a change in the highway plans affecting access to his tract, Condemnor, on the morning trial was to begin, made a motion for a continuance. (R.p. 7, 8) The matter was continued until April 1, 2013, and SCDOT was assessed costs associated with the continuance to be paid to the Mr. Powell. (R.p. 7, 8) Condemnor filed a Motion in Limine to exclude any reference at trial to diminution in value of Petitioner's remaining property resulting from changes in access. (R.p. 32) Condemnor's motion was converted to a Motion for Summary Judgment and heard by Judge Edward Cottingham April 1, 2013. (R.pp. 69-116). The trial judge granted Respondent's motion on May 6, 2013. (R.pp. 009-014) Petitioner filed a Motion to Alter or Amend June 17, 2013. (R.p. 063-064) The trial court denied Petitioner's motion July 26, 2013 (R.p. 015)

Mr. Powell appealed the matter to the Court of Appeals, which heard oral argument December 10, 2014 and rendered its decision December 9, 2015. (R.pp. 318-327) Because this is not an inverse condemnation case, but a direct taking, the Court of Appeals held the trial court erroneously applied Hardin v. South Carolina Department of Transportation, 371 S.C 598, 641 S.E.2d 437 (2007). (R.p. 318-327, 323) However, the Court of Appeals concluded Mr. Powell was not entitled to just compensation for diminution in the value of his remaining property due to “change in road access.” (R.p. 318-327, 324) Petitioner filed a Petition for Rehearing on December 28, 2015 which Petition was denied by the Court of Appeals February 19, 2016. (R.pp. 328-330, 364-365) Petitioner petitioned this Court for a writ of certiorari March 21, 2016. Petitioner’s Petition for Certiorari was denied August 25, 2017, but granted by Amended Order August 30, 2017.

FACTS

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” (the “Project”). (R.pp. 16, 117) As confirmed by SCDOT Rule 30(b)(6) SCRCF witness Michael Barbee, the acquisition from Mr. Powell is part of the Project and the Project is being funded with an Horry County one-cent sales tax as part of the Ride on a Penny referendum approved by Horry County voters. (R.p. 304-305) Central to his argument in the courts below, Petitioner seeks to be provided just compensation for the diminution in value of his remaining property resulting from the acquisition of his property and reconfiguration access thereto by the South Carolina Department of Transportation as part of the construction of the Interchange at U.S. Highway 17 Bypass SC 707/Farrow Parkway.

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 Project and subsequent condemnation action, the intersection at Hwy. 17 and Emory Road was closed and Mr. Powell's property was initially left accessible via a frontage road one could enter from Hwy. 17 approximately one (1) mile to the north. (R.p. 79) 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 Condemnor's own testimony, 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. 139; R.p. 274-275; R.p. 322)

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 taking into account the revision of the SCDOT plans and increased remoteness of access to Mr. Powell's 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. This *fifth* (5th) report was tendered to Petitioner'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.248) 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. 248)

Thereafter, on March 25, 2013, Condemnor filed 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 20-22)

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 17-22)

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 filed a Petition for Rehearing on December 28, 2015, which Petition was denied by the Court of Appeals February 19, 2016. Petitioner petitioned this Court for a writ of certiorari March 21, 2016. Petitioner's Petition for certiorari was denied August 25, 2017, but granted by Amended Order August 30, 2017.

STANDARD OF REVIEW

The Supreme Court reviews the grant of a summary judgment motion under the same standard as the trial court pursuant to the rule providing that 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. Rules Civ.Proc., Rule 56(c). Sloan v. Department of Transp., 379 S.C. 160, 666 S.E.2d 236 (2008). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Rules Civ.Proc., Rule 56. Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (2014). Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. Doe ex rel. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Rules Civ.Proc., Rule 56(c). Cullum Mechanical Const., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 544 S.E.2d 838 (2001). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. Rules Civ. Proc., Rule 56(c). Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688, 42 U.C.C. Rep. Serv. 2d 310 (2000).

ARGUMENTS

I. BECAUSE SC CODE § 28-2-370 DOES NOT PERMIT INQUIRY INTO PETITIONER'S PROPERTY RIGHTS, BUT, INSTEAD, REQUIRES INQUIRY INTO PETITIONER'S PROPERTY VALUE, THE COURTS BELOW ERRED IN DETERMINING DIMINUTION TO PETITIONER'S REMAINING PROPERTY WAS NOT COMPENSABLE.

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. §28-2-60 mandates 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."

Emphasis added. 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 Faulkenberry 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**. South Carolina Dept. of Transp. v. Powell, 415 S.C. 299, 307 (2015).

Emphasis added.

Neither court below conducted a proper evidentiary inquiry in order to determine whether, as the court recognized in Carodale, "the vacation of a street or the creation of a cul de sac with the concomitant diversion of traffic and loss of frontage has been held a 'taking' of property." South Carolina State Highway Department v. Carodale Associates, 268 S.C. 556, 561, 235 S.E.2d 127, 128 (1977). Citing City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). However, despite this Court's analysis of whether increased complexity and remoteness of access constitutes damage in Hilton Head Auto, an inverse condemnation case rather than a direct taking as here, neither Court below in the present matter conducted any inquiry as to whether the reconfiguration of Petitioner's access was reasonable or constituted material injury to his remaining property. Hilton Head Automotive Group, LLC v. South Carolina Dept. of Transp., 394 S.C. 27, 714 S.E.2d 308 (2011). In Hilton Head Auto, remoteness of access was increased

“approximately 0.6 miles” to the west and “a mere 0.3 miles” to the east. Id. Fn 1. In this matter, SCDOT employee and Rule 30(b)(6), SCRCPP, witness explained access to Petitioner’s remaining property was relocated 2.24 miles from where it had been, a distance so remote that SCDOT’s own appraiser, when not mandated by SCDOT to ignore access damages, determined Mr. Powell’s remaining property was worth fifty percent (50%) less as a result. (R.p. 304, 286) This represented, according to SCDOT, Five Hundred and Seventeen Thousand and no/100 (\$517,000.00) Dollars in damage to Mr. Powell’s remaining property. (R.p. 286) Yet, each of the courts below refused to award Mr. Powell just compensation for his loss.

As was made clear in Wilson:

The Constitution of this State, Article I, Sec. 17, provides that ‘* * * private property shall not be taken * * * for public use without just compensation being first made therefor.’ We have consistently held that the deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a taking as though the property were actually appropriated to the public use. We have consistently held that within the purview of this constitutional provision, there is no distinction between taking and damaging and that the least damage to property constitutes a taking within the *367 purview of the Constitution. Owens v. South Carolina State Highway Dept., 239 S.C. 44, 121 S.E.2d 240 (1961); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956); Early v. South Carolina Public Service Authority, 228 S.C. 392, 90 S.E.2d 472 (1955); Milhous v. State Highway Dept., 194 S.C. 33, 8 S.E.2d 852 (1940); Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157 S.E. 842 (1931).

Section 33-135 of the 1962 Code of Laws provides for just compensation to the landowner, upon the acquisition of a highway right of way, and specifically includes any special damages resulting therefrom.

In the recent case of South Carolina State Highway Dept. v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965), we held, inter alia, that, ‘* * * an abutting property owner has a right of access over a street adjacent to his property, as an appurtenance thereto. And that an obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a ‘taking’ of the property for which recovery may be had. The fact that other

means of access to the property are available affects merely the amount of damages, and not the right of recovery.'

With respect to special damages, which the landowner is entitled to recover, we, in South Carolina State Highway Department v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963), quoted with approval the following from 18 Am.Jur. 905, Sec. 265,

'In other words, he is entitled to full compensation for the taking of his land and all its consequences; * * * nor is there any requirement that the damage be special and peculiar, or such as would be actionable at common law; it is enough that it is a consequence of the taking. The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the *368 use for which the land was taken and All the reasonably probable effects of its devotion to that use.' (Emphasis added.)

S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 366–68, 175 S.E.2d 391, 395 (1970)

The findings below are 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.” Emphasis added. 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. The holdings below are based on Petitioner’s property *rights* rather than his property’s *value*, and are in error.¹

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. The holdings below are thus erroneous.

¹ The additional error of the Courts below to conduct factual inquiry as to the extent of diminution SCDOT caused to Petitioner’s remaining property are addressed in the arguments below.

II. BECAUSE RESPONDENT PRESENTED NO EVIDENCE OF: THE PURPOSE OF THE ACQUISITION; WHETHER RESPONDENT COULD HAVE ELIMINATED THE INTERSECTION IN QUESTION WITHOUT FILING THE PRESENT ACTION; WHETHER, BUT FOR THE OVERALL CONSTRUCTION OF THE PROJECT, PETITIONER'S PROPERTY WOULD HAVE BEEN CONDEMNED; OR, WHETHER THE APPRAISER ENGAGED BY RESPONDENT QUALIFIED AS AN EXPERT, THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY REACHING FACTUAL CONCLUSIONS NOT SUPPORTED BY EVIDENCE IN THE RECORD.

South Carolina 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 Courts below 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. This was erroneous. 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 conclusions of the trial court nor the Court of Appeals 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 adjacent to his parcel. However, Condemnor submitted no evidence in either court, and cites none in any of its filings, to support this finding. No sworn testimony, by affidavit or otherwise, has been presented on this issue by either party. The holding as to the purpose of the acquisition of Mr. Powell's property is erroneous.

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 assertion or present evidence to the contrary. Again, for want of proper factual inquiry, this determination was erroneous.

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 support SCDOT's position that any damage to Mr. Powell's remaining property is not directly and proximately attributable to the acquisition and thus non-compensable or, that this highway project was the result of the exercise of Condemnor's police power. No factual inquiry has been made into these matters, and nothing in the record supports the conclusions below. Those conclusions are in error.

Each of the conclusions referenced above involve material issues essential to the erroneous determination that Mr. Powell is not entitled to recover the diminution to his remaining property attributable to reduction of access. Mr. Powell is entitled to have these issues submitted to a jury.

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 reversal 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). Haskell was never qualified as an expert of any sort at the trial court.

Clearly, much contest of material fact remains in the present matter and the grant of summary judgment was erroneous and highly prejudicial to Mr. Powell. Petitioner respectfully requests the holdings below be reversed and this matter be remanded for trial.

III. BECAUSE THERE HAS BEEN NO INQUIRY AS TO WHETHER THE DIMINUTION TO PETITIONER’S REMAINING PROPERTY CONSTITUTED A MATERIAL INJURY, THE COURTS BELOW ERRED IN DETERMINING PETITIONER WAS NOT ENTITLED TO RECOVER THIS DIMINUTION.

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.

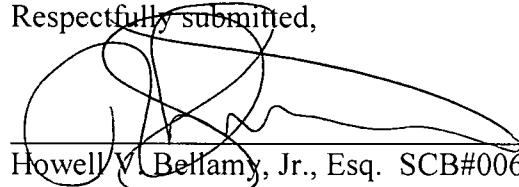
Hilton Head Auto expressly left recourse available to landowners whose property had not been condemned but, had instead suffered “material injury” as a result of government action. In the present matter, there is complete agreement among the parties, as well as the trial judge below: Petitioner’s property has suffered a diminution in value as a result of the highway project for which it was condemned. There has been no proper inquiry as to whether that diminution to Petitioner’s property value is such that it would satisfy the material injury standard set forth in Hilton Head Auto for inverse condemnation cases, nor has there been a determination whether the material injury test need be met in instances where there exists a direct condemnation. 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 the holdings below be reversed and this matter be remanded for trial.

CONCLUSION

For the foregoing reasons, Landowner David Franklin Powell respectfully requests the grant of summary judgment below be reversed and this matter be remanded for jury trial.

Respectfully submitted,



Howell V. Bellamy, Jr., Esq. SCB#00642
Robert S. Shelton, Esq. SCB#68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843)448-2400
Attorneys for Petitioner

Myrtle Beach, South Carolina
Dated: October 19, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

OCT 19 2017

S.C. SUPREME COURT

APPEAL FROM Horry COUNTY
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

Case No. 2010-CP-26-07961

Appellate Case No. 2016-000594

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

v.

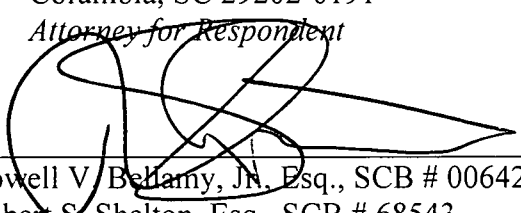
David Franklin Powell.....*Petitioner.*

PROOF OF SERVICE

I certify that I have served the **Brief of Petitioner** 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:

John B. McCutcheon, Esq.
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
Attorney for Respondent

Beacham O. Brooker, Jr., Esq.
South Carolina Department of Transportation
P.O. Box 91
Columbia, SC 29202-0191
Attorney for Respondent



Howell V. Bellamy, Jr., Esq., SCB # 00642
Robert S. Shelton, Esq., SCB # 68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
Attorneys for Petitioner

Myrtle Beach, South Carolina
October 19, 2017