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

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

vs.

David Franklin Powell ..... Petitioner,

Brief of Respondent

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November 14, 2017

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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. The project is now complete. Generally, Old Socastee (now renamed Emory Road) and Emory Road were incorporated into a frontage road system which includes a new road, Fred Nash Road, that connects Emory Road with Farrow Parkway to the south which then enters U.S. 17.

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 Petitioner'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. Petitioner'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. Petitioner 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.

STATEMENT OF FACTS

Respondent will not set forth a full statement of the facts rather rely on those set forth by the trial court and the Court of Appeals.

With regard to Petitioner's statements at the top of page 3 that his property was separated from Hwy. 17 Bypass by a power line easement, we believe that strip of land was a former railroad bed serving the Myrtle Beach Air Force Base and now vested in the County. In any event, Petitioner has never claimed to own the fee. See, Hoogenboom v. City of Beaufort, 315 S.C. 306, 313, 433 S.E.2d 875, 881 (Ct. App. 1992) ("In an action to quiet title, the plaintiff must recover on the strength of his own title, not on the alleged weakness of the defendant's title.")

Next, we object to Petitioner's claim that he must now travel 2.24 miles to reach U.S. 17 Bypass whereas previously it was immediate. As we argue herein, a condemnee's rights are only to the roads he abuts. The distance to a non-contiguous road is irrelevant. Petitioner may now

use the newly constructed Fred Nash Boulevard to reach Farrow Parkway and the general system of streets and highways: a distance of 2100 feet (0.04 miles).

Finally, Petitioner complains of the number of appraisal report revisions delivered to him by the Department. This frequently occurs where right-of-way acquisitions for highway projects proceed concurrently with the project's design phase. It inconveniences both parties but is unavoidable. With regard to the revision eliminating damages for access, it is the role of government counsel to advise the valuation experts on property rights. Contract appraisers are frequently unfamiliar with eminent domain law which constitutes a minor fraction of their professional practice. There was nothing improper in the advice of counsel causing the revision in the appraisal report.

STANDARD OF REVIEW

As explained in our arguments below, the trial court's ruling was on law only based upon the pleadings and plans mandated by the Eminent Domain Procedure Act, S.C. Code Ann. §28-2-10, *et seq.* We agree that the appellate courts' review is *de novo.*

This appeal results from a motion *in limine* made by the Department, the condemnor, prior to a jury trial to determine just compensation to the landowner/condemnee for a taking of part of his property. Condemnor sought to exclude as evidence testimony and a written report of its appraiser and proposed valuation witness Corbin Haskell which found a 50% devaluation of Petitioner's remaining property as a result of the intersection closure and recommended that amount as part of the compensation due. Because damages resulting from the intersection closure were the major part of the landowner's claim, both parties and the court agreed that the

motion would be converted to one for partial summary judgment so that Powell could pursue an immediate appeal on the theory that the order finally determines a major part of his claim.

As noted in our arguments below, all matters in eminent domain other than just compensation for the property or property rights adjudged to be taken are for the condemnor as designee of the legislature or for the trial judge. See, Hardin v. South Carolina Department of Transportation, 359 S.C. 244, 249, 597 S.E.2d 814 (Ct. App., 2004) reversed on other grounds Hardin (& Tallent), supra.

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 indespensable 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.

Two other appellate cases presented facts similar to the case at bar. In Woods v. State of South Carolina, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993), the landowner abutted a frontage road that was closed at the end where it entered Fairview Street. He claimed a loss of access to Fairview Street. The Court of Appeals noted that he still had access to the frontage road he abutted and never had a right of direct access to Fairview Street. In Mosteller v. County of Lexington, 336 S.C. 360, 520 S.E.2d 620 (1999), Mr. Mosteller claimed a taking of access rights due to the closure of the end of White Owl Road at a railroad crossing prior to entering U.S. 76. The Court noted that Mosteller's property did not abut any part of White Owl, rather he abutted Harvestview Road which separated his property from White Owl and could in fact use Harvestview to access U.S. 76 by travelling north or south.

Carodale, supra, was a direct condemnation case whereas Cherry, Woods, and Mosteller, all supra, were inverse condemnation cases indicating that this court's explication of the property right of access to adjoining public roads in Hardin (and Tallent) are the same for both types of cases. See, e.g., Cobb v. SCDOT, 365 S.C. 360, 618 S.E.2d 299 (2005) (noting the similar historical treatment of inverse condemnation and eminent domain cases); Board of Regents of State Colleges v. Roth, 408 U. S. 564, 577 92 S.Ct. 2701, 33 L.Ed.2d 548, (1972) (The Fifth Amendment protects property but doesn't define it. That is left to other sources such as state law.) In any event, however, as the Court of Appeals held, the precedent in Carodale is sufficient to deny Mr. Powell's claims.

Realignment of highways frequently devalues business properties established on the former main route. If this were recoverable in every instance, further improvement of the highway system would be impossible. Rather, the law distinguishes between the loss of the ability to travel on the former more convenient route (passage along public roads), and the

property right of access. Carodale, supra ("Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation."); Snow v. N.C. Highway Comm'n, 262 N.C. 169, 136 S.E.2d 678, 681 (N.C. 1964) (an owner is not entitled to "freeze the map"); 2A Nichols §6.02 [5][f], p. 6—134-135. The courts below did not misinterpret the law.

On page 8 of his brief, Petitioner complains that the Court of Appeals disregarded damage to the remainder of his property. It did not. As set forth in Gray v. S.C. Dep't of Hwys. and Public Transp., 311 S.C. 144, 151, 427 S.E.2d 899, 903 (Ct. App. 1993) (rev'd on other grounds by Hardin (&Tallent), supra), "The property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use." Citing 26 Am.Jur.2d Eminent Domain, Section 160 (1966). The substance in this instance are the easements described in Hardin (& Tallent), supra, 371 S.C. at 607, 641 S.E.2d at 442. Also, on page 8, Petitioner cites City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1936), in support of an argument that the trial court did not conduct a proper inquiry to find that the vacation of a street or diversion of traffic etc. had caused him a material injury resulting in a taking of his property. First, Cothran, is no longer good law having been overruled by Hardin (&Tallent), supra. Secondly, the court did make such a determination based upon the geometric facts shown on the plans, i.e. Petitioner never had the right to use the closed section of Emory Road to reach U.S. 17 for the simple fact that he did not abut it being separated from that segment by Old Socastee Road. See, e.g., Mosteller, supra. No further fact findings were necessary to support the holdings below.

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

In his section II, 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, SCRCP, 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 provisions 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).

Petitioner's argument represents an improper mixing of the court's and the factfinder's role in an eminent domain matter and incorrect procedure. The court's role where the quantity of a taking is challenged is to define with specificity the precise property rights taken. This provides the fact finder with guidelines for assessing compensation. The fact finder is confined to the narrow function of determining compensation within the parameters previously set forth by the trial judge. See, Johnson v. S.C. State Highway Dep't, 236 S.C. 424, 430-31, 114 S.E.2d 591, 594 (1960). At a minimum, the questions reserved to the court in any eminent domain case are:

- the condemnor's legal authority to take and the limits thereon
- the public or private purpose of the taking
- the necessity of the taking
- what property is being taken
- whether a compensable interest exists
- whether there has been a compensable taking of property
- questions of title

27 Am. Jur. 2d, Eminent Domain, §545, p. 165.

Thus, the court's findings as to liability necessarily must precede any further action by the state in negotiating with the plaintiff or the fact-finder's determination of the amount of compensation that would make him whole.

The foregoing principle has long been recognized in other jurisdictions. The court's determination and definition of the property right provides the parameters for a determination of an award. In United States v. Reynolds, 397 U.S. 14, , 20, 90 S.Ct. 803, 807, 89 L.Ed.2d 12 (1970), the Supreme Court held that "a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a

compensation award within the ground rules established by the trial judge." Another federal court has stated, "Whether or not Tract 2 had access to a public road falls outside the narrow constraints of the jury's domain in eminent domain proceedings. The answer to the question is one of the ground rules that guides the jury's determination on the precise issue of the amount of compensation." National Railroad Passenger Association v. 25,900 Sq. Ft. of Land, New London, Ct., 766 F.2d 685 (2d Cir. 1985); accord New Port Largo Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996).

Many state courts are in accordance with this view including those cited by the Court of Appeals in Hardin v. SCDOT, supra; Palm Beach v. Tessler, 538 So.2d 846 (Fla. 1989); Dept. of Public Works v. Wilson and Company, 340 N.E.2d 12 (Ill. 1975); Guerard v. North Dakota, 220 N.W.2d 525 (N.D. 1975); Brock v. State Highway Commission, 404 P.2d 934 (Kan. 1965). As stated in Brock:

> If the appellants did not establish a taking of access rights, there should have been no question whatsoever for the jury to decide.
>
> * * *
>
> Whether or not a governmental agency has exceeded its police power and taken private property for public use is a question of law for the determination of the court under the existing facts and circumstances of the particular case. Not until the trial court determines that private property has been taken for public use is the question of the amount of damages ripe for determination of a jury.

Brock at 939.

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 condemnor's 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 not be qualified to opine upon.

III. There was no "material injury" to Petitioner's remaining land resulting from the taking of 0.183 acres.

Finally, in section III, 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, 443 (2007), termed putting the cart before the horse. As the Court of Appeals has stated:

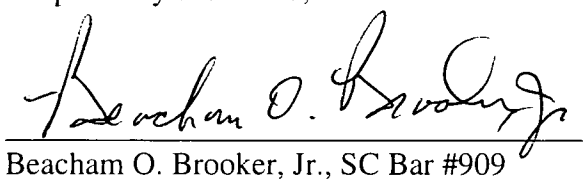
> An injury for which damages must be paid is injury to the property itself. The property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use.

Gray v. S.C. Dep't of Hwys. And Public Transp., supra, 311 S.C. at 151, 427 S.E.2d at 903, overruled on other grounds by Hardin (&Tallent), 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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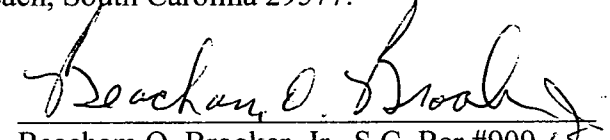
Proof of Service

I certify that I have served one copy of the BRIEF OF RESPONDENT on Petitioner's counsel by depositing it in the United States Mail, postage prepaid, on November 15, 2017, addressed to Howell V. Bellamy, Jr., Esq., and Robert S. Shelton, Esq., at 1000 29th Avenue North, Myrtle Beach, South Carolina 29577.



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