

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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APPEAL FROM Horry COUNTY  
COURT OF COMMON PLEAS

THE HONORABLE EDWARD B. COTTINGHAM, CIRCUIT COURT JUDGE

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Appellate Case No. 2016-000594

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

v.

David Franklin Powell,..... Petitioner.

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*AMICUS CURIAE* BRIEF OF THE  
SOUTH CAROLINA ASSOCIATION OF COUNTIES

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Robert E. Lyon, Jr., General Counsel  
John K. DeLoache, Sr. Staff Attorney  
South Carolina Association of Counties  
Post Office Box 8207  
Columbia, South Carolina 29202  
803-252-7255  
Attorneys for *Amicus Curiae*

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## INTERESTS OF AMICUS CURIAE

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. Efficient, safe transportation networks are a vital interest to the state's counties. The South Carolina General Assembly granted the counties the general police power to design, construct, and maintain public roadways. Local governments are expected to protect the community through prudent infrastructure planning that best addresses the needs of the general public. The majority's opinion in this case dramatically expanded the scope of compensability to remote property owners for non-adjacent infrastructure projects. The majority significantly blurred the distinction between the legitimate exercise of police power and the exercise of eminent domain.

## ARGUMENT

The Court of Appeals was correct in holding that *S.C. Highway Dept. v. Carodale Assocs.*, 268 S.C. 556, 235 S.E.2d 127 (1977) and not *S.C. State Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) controlled the issue of whether a property owner is entitled to recover remainder damages for the closing of a roadway intersection that does not directly abut his property.

The majority's analysis of applicable South Carolina case law and its relationship to the condemnation statute is flawed. Respectfully, the majority opinion has misapprehended the legislative intent of the General Assembly in enacting the South Carolina Eminent Domain Procedure Act (Act No. 173 of 1987) ("the Act").

This act amends the law of this State relating to procedures for acquisitions of property and to the exercise of the power of eminent domain. It is the intention of the General Assembly that this act is designed to create a uniform procedure for

all exercise of eminent domain power in this State. *It is not intended by the creation of this act to alter the substantive law of condemnation, and any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration.* In the event of conflict between this act and any other law with respect to any subject governed by this act, this act shall prevail.

S.C. Code Ann. § 28-2-20 (emphasis added).

The Act expressly states that the provisions concerning the substantive law of condemnation are intended to recite the general principles of substantive law that had been established by the court's historic jurisprudence. While the Act modified the state's condemnation procedure, the prior substantive law of eminent domain was unmodified. The majority subsequently applied § 28-2-370 without reference to this express legislative intent.

That section provides that:

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 § 28-2-360 may be considered.

In this case, Mr. Powell claimed that the increased remoteness of his property to a highway bypass that did not abut his property caused the diminution in the property's value. Due to the commercial nature of the property, Mr. Powell argued the trial court was required to permit the introduction of all evidence of damage he might have sustained as a result of the road project pursuant to §28-2-370. The loss in value was not a direct result of the condemnation of .183 acres of Mr. Powell's property. The court of appeals was correct that the redesigning of traffic patterns along Highway-17 bypass and the intersection closure at Emory Road were legitimate acts of police powers.

This Court has long-recognized the distinction between a government's valid exercise of its police powers and its exercise of eminent domain. As this Court recognized in *Wilson*, "just compensation is required in the case of the exercise of eminent domain *but not for the loss by the*

*property owner which results from the constitutional exercise of the police power.”* (Emphasis added.)

There is no dispute that the redesign of highways or redirecting of traffic are valid exercises of police power. SCDOT correctly argued that any diminution in value to Powell’s property after the closure of the Emory Road–Highway 17 Bypass intersection and the creation of the cul-de-sac on Old Socastee Highway was a result of SCDOT’s legitimate exercise of its police power. The diminution was not the direct result of the exercise of eminent domain. Thus, the Association agrees with the court of appeals that the diminution was not compensable pursuant to *Carodale*.

In *Carodale*, approximately half an acre was acquired from the landowner for the construction of an exit ramp off Interstate 77 in Richland County. 268 S.C. at 560. The landowner’s property abutted U.S. Highway 1, but was disconnected from the highway when it was relocated as part of the project. The landowner’s property regained its connection to Highway 1 by the construction of a new street connecting the property to Highway 1. *Id.* The landowner received a jury verdict for the physical taking of the half acre and for damage to the remainder of its land attributable to the diversion of traffic that previously passed its property on Highway 1. This Court reversed the award of damages to the remainder. *Id.* at 564. In that decision this court held:

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.

*Id.* at 561.

Here, Powell presented essentially the same remainder damage claim this court rejected in *Carodale*. The evidence at trial established that Powell's property continued to abut both Emory Road and Old Socastee Highway as it did before the eminent domain of the .183 acres of his property. *Carodale* does not permit the recovery of remainder damages flowing from the closing of the Highway 17 Bypass–Emory Road intersection and the creation of the cul-de-sac. As this court noted in *Carodale*:

Closing a street inherently produces a diversion of traffic and loss of frontage on a viable traffic artery. However, these repercussions *are not compensable elements of damage*. Succinctly, *the restriction of ingress and egress to and from one's property is the right which must be compensated* if infringed when a highway is closed by condemnation.

268 S.C. at 561, 235 S.E.2d at 129 (emphasis added).

Even though the closure of the Emory Road–Highway 17 Bypass intersection and the creation of the cul-de-sac on Old Socastee Highway may cause a diversion of traffic, *Carodale* requires this court to hold this repercussion is not compensable. Mr. Powell has the exact same access to and from his property on the same roads his property abutted before the project began.

The Association believes that the majority incorrectly applied *Wilson*. In *Wilson*, the highway department took a piece of property in order to align a county road directly abutting Wilson's property. 254 S.C. at 363. Wilson's property directly abutted Highway 15. *Id.* The highway department then constructed a median in the center of Highway 15 running the length of Wilson's property, thereby eliminating Wilson's ability to access portions of Highway 15. *Id.* at 363-64. The facts in *Wilson* are quite different from those presented in this case. This court emphasized that prior to condemnation, the Wilson tract directed abutted Highway 15 for a distance of nearly 700 feet. The direct result of the condemnation, however reduced this frontage to less than 350 feet. *Id.* at 368. The road project also severed the Wilson property into two

tracts, neither of which retained direct access to Highway 15. This court determined that it was the deprivation and diminution of direct access to Highway 15, coupled with the physical taking of a portion of Wilson's property that determined the issue of compensability. This court relied on its previous decision in *South Carolina State Highway Department v. Allison*, 246 S.C. at 393, 143 S.E.2d at 802 where it concluded that:

[A]n 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.

This Court's previous reliance upon *Allison* demonstrates that compensability in Wilson was heavily based on the creation of an obstruction that materially diminished Wilson's access to and from the road directly abutting the property. The facts in this case are quite different. The realigning of traffic patterns on the Highway 17-bypass had no effect on Mr. Powell's access to or from the property in dispute. Mr. Powell retained the same access to and from his property that he enjoyed prior to the Department's road project.

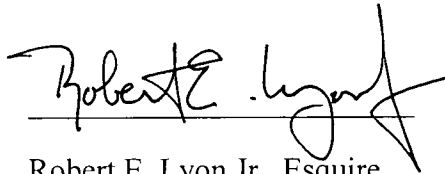
The majority in this case mistakenly determined Wilson applied because the closure of the intersection and the termination of the frontage road into a cul-de-sac impaired the property's access to the Highway 17-Bypass. However, as this Court has previously determined in both *Carodale* and *Allison*, impairment of access to a road that the property does not abut is not compensable under *Wilson*. That case is limited to instances in which a landowner's access to a road abutting his property has been diminished. This case is not a case of deprivation of access to and from a road which the property formerly abutted. The property has exactly the same access to the abutting roads that it enjoyed before the project. Thus, no part of the *Wilson* analysis applies to the facts of this case.

## CONCLUSION

The majority has significantly broadened the scope of recoverable damages in large scale infrastructure projects to add property owners that are now more remotely connected to roads that have been altered. The majority has effectively neutered its previous holding in *Carodale*, resulting in blurring the distinction between a noncompensable exercise of police power and a compensable exercise of eminent domain.

The Association respectfully asks this Court to accept SCDOT petition for rehearing, and reconsider its decision. The determination of compensability should be guided by *Carodale* rather *Wilson*.

Respectfully Submitted,

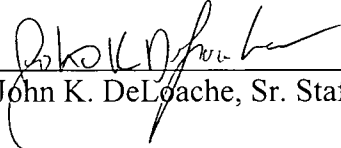
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Robert E. Lyon Jr., Esquire  
John K. DeLoache, Esquire  
South Carolina Association of Counties  
PO BOX 8207  
Columbia, South Carolina 29202  
(803) 252-7255  
Attorneys for Amicus Curie

August 23, 2018

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 23th day of August, 2018 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:

  
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John K. DeLoache, Sr. Staff Attorney