

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable J. Ernest Kinard, Jr., Circuit Court Judge
Case No. 2013-CP-07-02255

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APR 06 2015

SC Court of Appeals

Appellate Case No. 2014-001587

Mamdouh Sabry Abdelrahman,

Appellant,

vs.

Daufuskie Island Utility Company, Inc.,

Respondent,

REPLY BRIEF

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**RESPONDENT IMPROPERLY RELIES ON THE
DEFENSE OF *RES JUDICATA***

The Respondent's Initial Brief (pages 19-26) is dedicated to the argument that Respondent's action in condemnation to recover from Appellant real property that was the subject of a prior court action to void the tax sale deed, was not barred by SC Code §15-67-20. Respondent alleged the two actions that sought the recovery of the same real property were not the same causes of action and therefore not barred by the Doctrine of *Res Judicata*. This argument is clearly erroneous.

In 1988, the General Assembly amended S.C. Code § 15-67-20 to read:

The Plaintiff in actions for the recovery of real property or the recovery of the possession of real property is limited to one action for recovery.

The predecessor statute, § 10-2402 permitted two actions against the same Defendant for the recovery of the same land. Two actions between the same parties for claims to the same land constituted an exception to the general bar of a second action by the doctrine of *Res Judicata*. Winn v. Grantham, 263 S.C. 368, 210 S.E.2d 602 (S.C. 1974). In 1988, the General Assembly amended the prior statute to SC Code § 15-67-20, to allow the Plaintiff in actions for the recovery of real property or recovery the possession of real property to one action. The effect of that amendment ended the exception or exemption and prohibited subsequent actions between the same parties for the recovery of the same real estate. The Respondent's argument that they are protected by the Doctrine of *Res Judicata* because their second action sounding in condemnation did not contain the same elements as the action seeking to recover the real property through the process to void the tax sale deed, would render SC Code § 15-67-20 meaningless. By its plain language, SC Code §15-67-20 provides a Plaintiff is limited to only one action to the recovery of possession to real property. To read that statute as suggested by Respondent, the law would then allow a plaintiff to file a third

action perhaps in trespass or a fourth for adverse possession or additional actions for conversion or ejectment. Under Respondent's argument, those additional subsequent actions would also not be barred. And that is not within the plain language of the law or contemplated in the decisions of our courts.

**RESPONDENT'S CONTENTION THAT THEY ARE PROTECTED BY THE
DOCTRINE OF *RES JUDICATA* WAS NOT RAISED IN THE TRIAL COURT AND
NOT PROPERLY PRESERVED**

Generally claims or defenses not presented in pleadings will not be considered on appeal. See McNealy v. S.C. Farm Bureau Mutual Insurance Co., 259 S.C. 339, 109 S.E.2d 499 (1972). The rule is consistent with the general restriction that one cannot present and try a case on one theory and then attack the result below by presenting another theory. Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997). The record below including the Order Granting Defendant's Motion for Summary Judgment as to all Causes of Action and the Respondent's pleadings do not include any argument or claim that they are protected by the Doctrine of *Res Judicata*. Accordingly, that issue was not raised or ruled upon by the trial court and is not properly preserved for review. Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998).

**THE EMINENT DOMAIN PROCEDURE ACT DOES NOT GRANT THE
RESPONDENT UNLIMITED RIGHTS OF ACTIONS TO ACQUIRE APPELLANT'S
PROPERTY**

The Respondent is a privately held for profit corporation that is permitted by the South Carolina Public Utility Commission to operate a water and sewer utility on Daufuskie Island, South Carolina. As such, they appear be authorized to seek to acquire real property pursuant to the Eminent Domain Procedure Act. S.C. Code § 28-2-210 that provides:

"The right to institute actions; exclusive procedures. Any Condemnor may

institute an action under this Chapter for the acquisition of an interest in real property necessary for any public purpose. The provisions of this act constitute the exclusive procedure whereby condemnation may be undertaken in this State.”

The Eminent Domain Procedure Act does not permit unlimited rights to repeatedly seek to acquire real property nor does the act carve out any exception to the applicable limitations of actions or to excuse the Respondent from the limitations of S.C. Code § 15-67-20. In fact, the Eminent Domain Procedure Act expressly provides landowners the right to challenge condemnor’s right to condemn under S.C. Code § 28-2-470 Proceeding to challenge condemnor’s right to condemn:

“An action challenging a condemnor’s right to condemn must be commenced in a separate proceeding filed in the Court of Common Pleas in the county in which the property or a portion thereof is located....”

The Respondent’s incorrectly alleges that Eminent Domain Procedure Act and S.C. Code §15-67-20 are in conflict and therefore the Eminent Domain Procedure Act prevails and therefore they have a unlimited right to seek to condemn or acquire Appellant’s property. That argument is simply not true. There is nothing in the Eminent Domain Procedure Act that excuses compliance with §15-67-20 or any other defense available under the law.

In Southern Development Land and Golf Co., Ltd. v. S.C. Public Service Authority, 311 S.C. 29, 426 S.E.2d 748 (S.C. 1993), the condemnee landowner brought an action challenging Santee Cooper’s right to condemn a portion of their golf course. Southern Development’s Complaint alleged that Santee Cooper’s condemnation of a portion of the property constituted an abuse of discretion and based on principles of estoppel for false and misleading representations made to the landowner. The South Carolina Supreme Court held that Santee Cooper did not have an absolute right to condemn and were in fact stopped from maintaining an action in condemnation based upon

Santee Cooper's misleading representations to the landowner.

Accordingly, the Eminent Domain Procedure Act does not provide special rights or defenses to a condemnor but the Act does provide all rights and defenses to a landowner to illegal or improper condemnation actions. Accordingly, S.C. Code § 15-67-20 does not conflict or modify the Eminent Domain Procedure Act.

Respondent's had several choices in this matter. They chose to seek to acquire the property through a suit to void a tax sale and that case was ended in favor of respondent by Order of the Court. They could have first bought and action to acquire the property in condemnation in lieu of the action to void the tax sale and that action would not have been barred by §15-67-20, but once that first action was ended any subsequent actions are barred as a matter of law.

**THE TAX SALE ACTION IS AN ACTION FOR THE RECOVERY OF
REAL PROPERTY WITHIN THE MEANING OF
S.C. CODE ANNOTATED § 15-67-20
AND CONSTITUTES A BAR TO THE CONDEMNATION ACTION FILED BY
RESPONDENT**

The tax sale action filed by the Respondent was an action acknowledging that the tax deed was issued to the Appellant that Appellant was declared the legal owner of the property in question. (See Complaint filed July 26, 2010, Civil Action Number 2012-CP-07-2715). More specifically, Respondent requested the Court to declare the deed to the Appellant invalid, void, unenforceable and to enjoin Appellant from interfering in any manner with the Respondent's title to and possession of the property and further, to enter a declaratory adjudication that the Respondent is the true legal as well as beneficial owner of the property with the right to exclusive possession of the property. (See paragraphs 1 and 2, pages 7 and 8 of Complaint).

By the plain and ordinary language of the Respondent's Complaint, they were seeking to

recover the property that had been conveyed to the Appellant by the Beaufort County Auditor because of the failure of Respondent to pay their taxes and to redeem the property within the statutory period of one year. They sought to have a deed conveyed to Respondent and for the exclusive possession of the property to the exclusion of the Appellant. There can be no other characterization other than their action was to recover or lay claim to real property in the title and name of the Appellant. The fact that Respondent seek to characterize their action as one to void a tax deed is of no consequence. The character of an action is not determined by the terminology.

The Supreme Court of South Carolina has repeatedly held that in determining whether a proceeding is an action for the recovery of real property within the meaning of S.C. Code § 10-2402 (amended to S.C. Code § 15-67-20 with the limitation of one action) the pleadings as a whole must be considered. Winn v. Grantham, 263 S.C. 368, 210 S.E.2d 602 (S.C. 1974), Walsh v. Evans, 112 S.C. 131, 99 S.E.2d 546 (1919). In considering the pleadings as a whole, if there can be no doubt that the first action was one to recover possession of land involved that being the same goal of the second action, then the second action must be barred by S.C. Code §15-67-20. Accordingly, Plaintiff's Complaint in condemnation to acquire the real property subject of the action sought to be re-acquired and the prior tax sale action is barred as a matter of law.

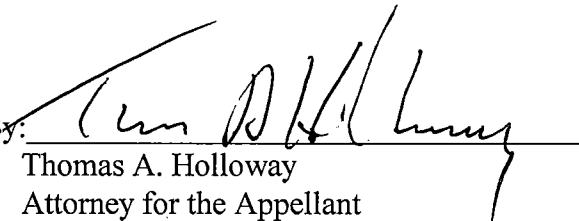
CONCLUSION

The long history of the intention of the legislature was plainly to protect persons from the burdensome litigation about real property and from repeated and continued attacks on his title. In this case before the Court, the Respondent clearly had a right to attack and seek to acquire the Appellant's title to the property in question but they did not have a right to repeated attacks. Accordingly, it is respectfully requested that the Court reverse the decision of the trial court and

remand the matter for further proceedings.

Respectfully submitted,

HARVEY & BATTEY, P. A.

By: 
Thomas A. Holloway
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Beaufort, South Carolina
April 2, 2015

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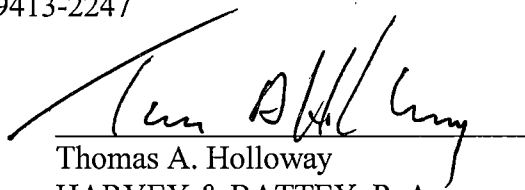
Daufuskie Island Utility Company, Inc.,

Respondent,

PROOF OF SERVICE

I certify that I have served the Reply Brief in the above matter upon the following attorney:

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Re: Mamdouh Sabry Abdelrahman vs. Daufuskie Island Utility Company, Inc.
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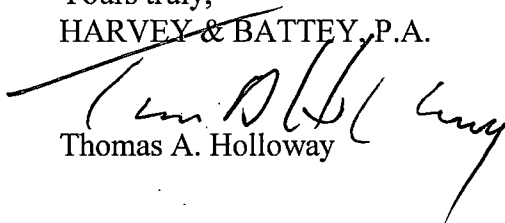
Dear Ms. Kitchings:

Enclosed for filing with your court, please find the original and one copy of Appellant's Reply Brief relative to the above, as well as Proof of Service upon Thomas P. Gressette, Jr., Esquire, attorney for the Respondent. I would greatly appreciate it if you would return a clocked copy of same to me in the envelope provided.

By copy of this letter I am forwarding a copy of same to Mr. Gressette.

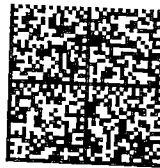
Thank you for your attention to this matter.


Yours truly,
HARVEY & BATTEY, P.A.


Thomas A. Holloway

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Enclosures

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