



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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SC Court of Appeals

Appellate Case No. 2014-001587

Mamdouh Sabry Abdelrahman, Appellant,

v.

Daufuskie Island Utility Company, Inc., Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

DOES S.C. CODE ANN. § 15-67-20 BAR A CONDEMNATION ACTION LAWFULLY INITIATED PURSUANT TO THE SOUTH CAROLINA EMINENT DOMAIN PROCEDURE ACT SIMPLY BECAUSE THE CONDEMNOR PREVIOUSLY FILED (BUT THEN VOLUNTARILY DISMISSED) A DECLARATORY JUDGMENT ACTION REGARDING A COUNTY'S FAILURE TO COMPLY WITH REQUIRED TAX SALE PROCEDURE?

STATEMENT OF THE CASE

Daufuskie Island Utility Company, Inc., ("DIUC") is a public utility authorized by the Public Service Commission of South Carolina to serve the public interest as the provider of water services to Daufuskie Island in Beaufort County, South Carolina. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 9 (**R. p. 153, ¶ 9**). As part of the DIUC water service system, DIUC operates a 125,000 gallon above-ground storage tank located on a .337 acre parcel on Daufuskie Island ("the Property"). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 12 (**R. p. 153, ¶ 12**).

In late 2011, Beaufort County sold the Property at a tax sale to Mamdouh Sabry Abdelrahman ("Sabry") who paid only \$526.70 for the Property. See Defendant's Statement of Undisputed Facts filed May 23, 2014, Civil Action Number 2013-CP-07-02255 (**R. p. 199, ¶ 5**) and Exhibit 3 thereto (Tax Title, Book No. 03102, Pages 0169 – 0170, File No. 2011061014, Office of the Register of Deeds for Beaufort County, State of South Carolina) (**R.p. 252**). DIUC did not know about the scheduled tax sale of the Property for two reasons. First, DIUC did not receive any tax statements from Beaufort County for the Property, and second, Beaufort County did not properly post notice of the tax sale on the Property, as required by Title 12, Chapter 51 of the South Carolina Code.

See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraphs 19-22 (**R. p. 154, ¶¶ 19-22**) and Exhibit 3 thereto (Tax Sale Action Complaint filed July 26, 2012, Civil Action Number 2012-CP-07-02715) (**R. pp. 169-176**).

Upon learning of the tax sale of the Property to Sabry, DIUC filed a declaratory judgment action against Beaufort County, Beaufort County Treasurer, and Mr. Sabry alleging that the requirements of Title 12, Chapter 51, of the S.C. Code were not satisfied by the Defendants Beaufort County and Beaufort County Treasurer prior to issuance of the December 1, 2011, tax deed from Beaufort County to Sabry (“Tax Sale Action”). On April 8, 2013, the Tax Sale Action was voluntarily dismissed by DIUC. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 154, ¶ 23**), and Exhibit 4 thereto (Stipulation of Dismissal filed April 8, 2013, Civil Action Number 2012-CP-07-02715) (**R. p. 177**).

On September 12, 2013, DIUC filed a Condemnation Notice and Tender of Payment thereby initiating Civil Action 2013-CP-07-2338 (“Condemnation Action”). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 27 (**R. p. 154, ¶ 27**), and Exhibit 5 thereto (Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-02338) (**R. pp. 178-192**). The property named in the Condemnation Action is the .337 acre tract on Daufuskie Island upon which DIUC operates its elevated 125,000 gallon storage tank and related water system facilities (“the Property”). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph

12 (**R. p. 153, ¶ 12**). The Condemnation Notice names the Appellant, Mamdouh Sabry Abdelrahman (“Sabry”), as the Landowner-Condemnee.

Sabry filed a separate case (the action below) challenging DIUC’s authority to condemn the Property (“Sabry Complaint”). See Sabry Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 (**R. pp. 22-36**). The Complaint alleges several challenges to DIUC’s condemnation authority under S.C. Code Ann. § 28-2-470, entitled “Proceedings to Challenge Condemnor’s Right to Condemn.” Id. On November 25, 2013, DIUC filed Defendant’s Motion for Summary Judgment along with the Affidavit of John Guastella. A hearing on the Motion for Summary Judgment was scheduled for June 3, 2014.

As the hearing on DIUC’s Motion for Summary Judgment began, counsel for Mr. Sabry conceded all causes of action pled in Sabry’s Complaint, except one remaining issue upon which the Honorable J. Ernest Kinard, Jr. ruled. See Transcript of Proceedings before The Honorable J. Ernest Kinard, Jr. on June 3, 2014 (**R. p. 142, lines 10-11**). That issue is whether S.C. Code Ann. § 15-67-20 bars the Condemnation Action.

South Carolina Code Ann. § 15-67-20 states:

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

S.C. Code Ann. § 15-67-20. Upon review of the law and facts in this matter, Judge Kinard ruled the Tax Sale Action filed then voluntarily dismissed by DIUC prior to the Condemnation Action and the Condemnation Action are not actions “for the recovery of real property or the recovery of the possession of real property” and therefore the Condemnation Action is not barred by S.C. Code Ann. § 15-67-20. See Order Granting

Defendant's Motion for Summary Judgment as to all Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 (**R. pp. 4-10**). The Circuit Court ruled S. C. Code Ann. § 15-67-20 does not bar the Condemnation Action filed by DIUC after dismissal of the Tax Sale Action because:

1. The Tax Sale Action filed by DIUC was not an action "for the recovery of real property."
2. The Condemnation Action filed by DIUC pursuant to The South Carolina Eminent Domain Procedure Act is not an action "for the recovery of real property."
 - a. Condemnation actions pursuant to the Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-20, et seq., do not question title of the land taken.
 - b. The Eminent Domain Procedure Act distinguishes actions to condemn property from all other causes of action affecting real property.
3. Even if there is a conflict between S.C. Code Ann. § 15-67-20 and the Eminent Domain Procedure Act, the Eminent Domain Procedure Act controls.
4. In order for S.C. Code Ann. § 15-67-20 to bar a subsequent action related to real property, both actions must be for the same cause of action. The Tax Sale Action and the Condemnation Action are by their plain terms not the same cause of action.

See Order Granting Defendant's Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 (**R. pp. 4-10**).

This appeal by Mr. Sabry followed.

FACTS

Since 1986, Daufuskie Island Daufuskie Island Utility Company (“DIUC”) and its predecessors in interest have provided water and wastewater services to Beaufort County citizens as a public utility subject to the regulatory jurisdiction of the Public Service Commission of South Carolina (“PSC”). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 8 (**R. p. 153, ¶ 8**) and S.C. Code Ann. § 58-5-10(4). DIUC’s authorized service area includes Daufuskie Island, South Carolina. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 9 (**R. p. 153, ¶ 9**). The DIUC water supply system includes a 125,000 gallon elevated storage tank and related facilities located on a .337 acre tract in Haig Point, Daufuskie Island, South Carolina (“the Property”). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 12 (**R. p. 153, ¶ 12**).

Haig Point Utility Company, Inc. previously owned the Property. See Defendant’s Undisputed Statement of Facts filed May 23, 2014, Civil Action Number 2013-CP-07-2255 (**R. p. 199, ¶ 1**), and Exhibit 2 thereto (Special Warranty Deed and Bill of Sale Title, Book 01402, Pages 2190-2192, File No. 2001018868, Office of Register of Deeds for Beaufort County) (**R. pp. 249-251**).

On March 6, 2009, Haig Point Utility Company, Inc. was approved to and did change its name to Daufuskie Island Utility Company, Inc. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 153, ¶ 14**), and Exhibit 2 thereto (Public Service Commission of South Carolina Order Approving Request for Name Change and to Maintain Books and Records Out of State

filed March 6, 2009, Docket No. 2007-414-WS – Order No. 2009-154) (**R. pp. 166-168**). Following the name change, DIUC provided its updated mailing address to Beaufort County. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 15 (**R. p. 153, ¶ 15**). However, DIUC did not receive tax bills for the Property, and the taxes were not paid. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 16 (**R. p. 153, ¶ 16**).

In October of 2010, Beaufort County sold the Property at public auction to Mamdouh Sabry Abdelrahman (“Sabry”) for the sum of \$526.70. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraphs 17-18 (**R. pp. 153-154, ¶¶ 17-18**); Defendant’s Statement of Undisputed Facts filed May 23, 2014, Civil Action Number 2013-CP-07-02255 (**R. p. 199, ¶ 5**), and Exhibit 3 thereto (Tax Title, Book No. 03102, Pages 0169 – 0170, File No. 2011061014, Office of the Register of Deeds for Beaufort County, State of South Carolina) (**R. pp. 252-253**).

Beaufort County did not properly place the statutorily required tax sale notices on the Property, so DIUC did not learn about the auction until early 2012, after the conveyance to Sabry. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraphs 19-20 (**R. p. 154, ¶¶ 19-20**). After learning of the tax sale and deed to Sabry, DIUC filed the Tax Sale Action which was a declaratory judgment action against Beaufort County, the Beaufort County Treasurer, and Sabry seeking adjudication that the tax sale was invalid, void, and unenforceable because the County failed to follow the statutorily required procedures. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph

21 (**R. p. 154, ¶ 21**) and Exhibit 3 thereto (Tax Sale Action Complaint filed July 26, 2012, Civil Action Number 2012-CP-07-02715) (**R. pp. 169-176**).

The Tax Sale Action Complaint alleged that the requirements of Title 12, Chapter 51, of the South Carolina Code were not satisfied by the Defendant Beaufort County and the Defendant Beaufort County Treasurer prior to issuance of the December 1, 2011, tax deed conveying the Property to Sabry; as such, the purpose of the case was to set aside the tax sale. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 23 (**R. p. 154, ¶ 23**) and Exhibit 3 thereto (Tax Sale Action Complaint filed July 26, 2012, Civil Action Number 2012-CP-07-02715, at Paragraphs 14–18 and request for “a declaratory adjudication that the tax sale ...[is]... invalid, void, and unenforceable.”) (**R. pp. 173-174, ¶¶ 14-18**).

By Stipulation of Dismissal filed April 8, 2013, the Tax Sale Action Complaint was dismissed pursuant to South Carolina Rule of Civil Procedure 41(a). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 23 (**R. p. 154, ¶ 23**) and Exhibit 4 thereto (Stipulation of Dismissal filed April 8, 2013, Civil Action Number 2012-CP-07-02715) (**R. p. 177**).

On September 12, 2013, DIUC filed a Condemnation Notice and Tender of Payment seeking to condemn the Property. That case was assigned Civil Action No. 2013-CP-07-2338 (“Condemnation Action”). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 27 (**R. p. 154, ¶ 27**) and Exhibit 5 thereto (Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-2338) (**R. pp. 178-183**). The Condemnation Notice states that DIUC seeks to condemn the Property for public use, public benefit, and public

purposes including, but not limited to, supplying water to the citizens of Daufuskie Island. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 28 (**R. p. 154, ¶ 28**) and Exhibit 5 thereto (Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-2338) (**R. pp. 178-183**).

Douglas J. Kinard, PE, Director of Drinking Water Protection Division for DHEC's Bureau of Water, agrees that "it is in the public interest for [DIUC] to own or remain in control of all of its facilities so that they are able to remain in compliance with the [Safe Drinking Water Act] and the [State Primary Drinking Water Regulations]." See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 154, ¶ 26**), and Exhibit 6 thereto (Letter from Kinard to Guastella dated October 3, 2013) (**R. p. 184**).

There is no evidence in the Record that Sabry is in any way qualified to operate a water or wastewater services plant, and Sabry does not possess the required authorization from the South Carolina Public Services Commission. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraphs 8-9 (**R. p. 153, ¶¶ 8-9**). In fact, DIUC is the exclusively authorized provider of such services to the service area occupying Daufuskie Island. Id.

Sabry also recognizes the elevated storage tank and associated facilities located on the Property are owned by DIUC, as evidenced by the allegations of the Sabry Complaint in the underlying action which seeks "an Order requiring the Daufuskie Island Utility Company, Inc. to relocate its facility from Plaintiff's [Sabry's] land and vacate the Property

immediately.” See Sabry Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 27, ¶ 18**).

In addition to demonstrating its condemnation authority, DIUC also presented the Circuit Court with evidence that DIUC has an independent right to utilize the Property for water supply services. See Defendant’s Memorandum of Law in Support of Motion for Summary Judgment filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Page 15 (**R. p. 70**) and Exhibit 6 thereto (Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property at Haig Point, Daufuskie Island, South Carolina, dated August 31, 1985, and the Assignment of Rights dated December 30, 2005) (**R. pp. 99-134**) DIUC (or its predecessor in interest) owned the Property when the water system and facilities were constructed on the Property. Even now, pursuant to the Declaration and Assignment, DIUC has the right to continue operating the tank and related facilities on the Property. See id.

Sabry paid Beaufort County only \$526 for the Property. See Defendant’s Statement of Undisputed Facts filed May 23, 2014, Civil Action Number 2013-CP-07-02255 (**R. p. 199, ¶ 5**), and Exhibit 3 thereto (Tax Title, Book No. 03102, Pages 0169 – 0170, File No. 2011061014, Office of the Register of Deeds for Beaufort County, State of South Carolina) (**R. pp. 252-253**).

In conjunction with the Notice of Condemnation and Tender of Payment, DIUC provided Sabry with a copy of its appraisal indicating the fair market value of the Property to the Condemnee is \$3,700.00. See Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-02338 (**R. pp. 37-44**); Defendant’s Undisputed Statement of Facts filed May 23, 2014, Civil Action Number 2013-CP-07-

02255 (R. p. 200, ¶ 4), and Exhibit 4 thereto (Letter from Gressette to Sabry dated July 24, 2013 (DIUC-000069)) (R. p. 254).

Sabry did not accept the \$3,700.00 Offer of Just Compensation. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 37 (R. p. 155, ¶ 37).

On September 4, 2013, Sabry filed the Sabry Complaint thereby initiating the underlying action, Civil Action Number 2013-CP-07-02255. The Sabry Complaint alleges this case is brought pursuant to the Eminent Domain Procedure Act, specifically S.C. Code Ann. § 28-2-470. See Sabry Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 at Paragraphs 10 and 14 (R. p. 26, ¶ 10 and R. p. 27, ¶ 14).

South Carolina Code Ann. § 28-2-470 authorizes certain types of challenges to condemnation actions. See S.C. Code Ann. § 28-2-470 (“An action challenging a condemnor's right to condemn must be commenced in separate proceedings filed in the court of common pleas in the county in which the property or a portion thereof is located.”)

On October 4, 2013, DIUC filed its Answer to the Sabry Complaint. See Answer filed October 4, 2013, Civil Action Number 2013-CP-07-02255 (R. pp. 45-50).

On November 25, 2013, DIUC filed its Motion for Summary Judgment and the Affidavit of John F. Guastella, the Manager of DIUC, asserting there is no triable issue as to any material fact, and the Defendant DIUC is entitled to a judgment as a matter of law. See Defendant's Motion for Summary Judgment filed November 25, 2013, Civil Action Number 2013-CP-07-02255 (R. pp. 51-55; R. pp. 152-197).

On May 23, 2014, DIUC filed additional pleadings in support of its Motion. See Defendant's Statement of Undisputed Facts filed May 23, 2014, Civil Action Number

2013-CP-07-02255 (**R. pp. 198-257**), and Defendant's Memorandum of Law in Support of Motion for Summary Judgment filed May 23, 2014, Civil Action Number 2013-CP-07-02255 (**R. pp. 56-134**). Sabry did not file any affidavits or sworn statements in opposition to the DIUC Motion for Summary Judgment.

On June 3, 2014, the Honorable J. Ernest Kinard, Jr. held a hearing on DIUC's Motion for Summary Judgment. As the hearing began, counsel for Mr. Sabry conceded as to all Counts 2 through 7 of the Sabry Complaint, leaving only Count 1. See Transcript of Proceedings before The Honorable J. Ernest Kinard, Jr. on June 3, 2014 (**R. p. 142, lines 10-11**). Count 1 alleges that South Carolina Code Ann. § 15-67-20 bars the Condemnation Action. See Sabry Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 25, ¶ 4**).

Upon review of the law and facts in this matter, Judge Kinard ruled the Tax Sale Action filed and dismissed by DIUC prior to the Condemnation Action and the Condemnation Action are not actions "for the recovery of real property or the recovery of the possession of real property" as that term is used in S.C. Code Ann. § 15-67-20 and, therefore, the Condemnation Action is not barred by S.C. Code Ann. § 15-67-20. See Order Granting Defendant's Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 (**R. pp. 9-10**).

Judge Kinard ruled S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action filed by DIUC after dismissal of the Tax Sale Action because:

1. The Tax Sale Action filed by DIUC was not an action "for the recovery of real property."
2. The Condemnation Action filed by DIUC pursuant to the South Carolina Eminent Domain Procedure Act is not an action "for the recovery of real property."

- a. Condemnation actions pursuant to the Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-20, et seq., do not question title of the land taken.
 - b. The Eminent Domain Procedure Act distinguishes actions to condemn property from all other causes of action affecting real property.
3. Even if there is a conflict between S.C. Code Ann. § 15-67-20 and the Eminent Domain Procedure Act, the Eminent Domain Procedure Act controls.
 4. In order for S.C. Code Ann. § 15-67-20 to bar a subsequent action related to real property, both actions must be for the same cause of action. The Tax Sale Action and the Condemnation Action are by their plain terms not the same cause of action.

See Order Granting Defendant's Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255. (R. pp. 4-10).

This appeal by Mr. Sabry followed.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC." Lord v. D & J Enters., 407 S.C. 544, 552-3, 757 S.E.2d 695, 699 (2014) citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Etheredge v. Richland Sch. Dist. One, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v.

Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). However, the moving party's initial responsibility may be discharged by showing that "there is an absence of evidence to support the nonmoving party's case." Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Specifically, "[a] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008), cert. denied (Oct. 21, 2009), reh'g denied (Jan. 27, 2009).

ARGUMENT

I. The Circuit Court correctly ruled that S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action filed by DIUC after dismissal of the Tax Sale Action.

As previously stated, the sole issue on appeal is whether S.C. Code Ann. § 15-67-20 bars a condemnation action lawfully initiated pursuant to the South Carolina Eminent Domain Procedure Act simply because the condemnor previously filed (but then voluntarily dismissed) a declaratory judgment action regarding a county's failure to comply with required tax sale procedure.

Or, stated more succinctly, this Court must decide whether the Circuit Court was correct in ruling S.C. Code Ann. § 15-67-20 does **not** apply to bar the Condemnation Action brought by DIUC against the Appellant Sabry.

When construing Section 15-67-20, this Court must do so in light of the previous common law rule from which the statute evolved. See Ladd v. Dupre, 247 S.C. 328, 147 S.E.2d 253 (1966). As such, a brief history of the statute is in order.

A. The history of S.C. Code Ann. § 15-67-20 demonstrates its intent and function is to apply the well-established principles of res judicata to actions for recovery of real property.

At common law and under the technical pleading requirements of the same, a party out of possession of real property could bring multiple, successive actions to recover possession of the property. See Ladd v. Dupre, 247 S.C. 328, 147 S.E.2d 253 (1966) and Carr v. Mouzon, 93 S.C. 161, 163, 76 S.E. 201, 204 (1912). Under “the common law of England, the title and right to the possession of real property was regarded with special favor, and it was thought that such important rights should not be finally determined by one action.” Carr v. Mouzon, 93 S.C. at 163, 76 S.E. at 202. Therefore, actions disputing title were not subject to the rule of res judicata.

The statute now codified as S.C. Code Ann. § 15-67-20 has a history dating back to 1712. See Carr v. Mouzon, 93 S.C. at 163, 76 S.E. at 202. In the following years, numerous versions of the statute were passed and repealed and passed again. Id. The version immediately prior to current S.C. Code Ann. § 15-67-20 applied a modified version of res judicata by limiting the number of actions a party could bring for the recovery of real property to two such actions. See 1962 S.C. Code § 10-2402.

S.C. Code Ann. § 10-2402 (1962) read as follows:

The plaintiff in all actions for recovery of real property or the recovery of the possession thereof is hereby limited to two actions for such recovery and no more. And before any such action shall be brought the cost of the first action shall be first paid.

S.C. Code Ann. § 10-2402 cited in Winn v. Grantham, 263 S.C. 368, 210 S.E.2d 602 (1974). Under S.C. Code Ann. § 10-2402 a party out of possession of real property, who lost his first action, was permitted a second action for the same claim. See Ladd v. Dupre, 247 S.C. at 331, 147 S.E.2d at 255.

South Carolina Code Ann. § 10-2402 (1962) and its permission for two actions related to the recovery of real property was renumbered as S.C. Code Ann. § 15-67-20 (1976). Then, in 1988, the General Assembly amended S.C. Code Ann. § 15-67-20 to read:

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

That is the language of the statute as it applies today and to this action. See S.C. Code Ann. § 15-67-20.

In summary, then, the common law viewed real property as unique and allowed multiple actions for recovery of real property as an exception to res judicata. That unlimited allowance of repeated actions for the same claim was eventually restricted by statute to a limit of two actions for the recovery of real property which was, in turn, finally reduced to one action as is stated in the current S.C. Code Ann. § 15-67-20. So, under the current version of S.C. Code Ann. § 15-67-20, actions for the recovery of real property are now subject to the application of res judicata – only one action between the same parties on the same claim for recovery of real property is allowed. See Carr v. Mouzon, 93 S.C. 161, 166, 76 S.E.201, 203 (1912) (discussing history of exception to res judicata stating the second claim must be for same action between same parties).

B. Applying res judicata analysis, the Tax Sale Action and the Condemnation Action are not both for the “recovery of real property or the recovery of the possession of real property” and, therefore, S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action.

To establish res judicata bars a subsequent action, a party must prove: “(1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.” Pye v. Aycock, 480 S.E.2d 455, 458, 325 S.C. 426, 432 (Ct. App. 1997) (citing Johnson v. Greenwood Mills, 317 S.C. 248, 452 S.E.2d 832 (1994)).

1. Because the Tax Action was voluntarily dismissed, there has been no prior adjudication of any issue.

Beginning in reverse order, the third element for application of res judicata is clearly not established here – there has been no prior adjudication of any issue. The previous declaratory judgment action brought by DIUC (the Tax Sale Action), which Sabry alleges is a bar to the Condemnation Action, was voluntarily dismissed pursuant to S.C. R. Civ. P. 41(a). See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255, at Paragraph 23 (**R. p. 154, ¶ 23**) and Exhibit 4 thereto (Stipulation of Dismissal filed April 8, 2013, Civil Action Number 2012-CP-07-02715) (**R. p. 177**). In situations such as these, the doctrine of res judicata should be applied with great caution. See Garris v. Governing Bd. of the State Reinsurance Facility, 333 S.C. 432, 450, 511 S.E.2d 48, 57 (Ct. App. 1998) (even if actions and parties are identical, restraint in the application of res judicata is warranted when the prior action was dismissed on procedural grounds). Furthermore, the Supreme Court has specifically held, “It is fundamental that a voluntary dismissal or nonsuit brings about the same situation or result as if no suit had been brought.” Allen v. Atlanta & Charlotte Air Line Ry., 216 S.C. 188, 57 S.E.2d 249, 250 (1950); see also S.C. Dep’t of Soc. Servs. v. Basnight, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001) (citing Gault v. Spoon, 168 S.C. 160, 167 S.E.

229 (1932)) (rejecting defendant's plea of res judicata against the plaintiff in the plaintiff's second action in claim and delivery, where the first action failed because the plaintiff failed to execute the bond required by statute, because the first action was not allowed to proceed to a conclusion and therefore decided nothing) and McEachern v. Black, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998) (concluding a dismissal without prejudice is not an adjudication upon the merits and does not have res judicata effect).

The reasoning is sound – when a plaintiff voluntarily dismisses an action without prejudice, as DIUC did here, that dismissal does not constitute any finding, ruling, or adjudication on the merits and therefore the dismissed action has no res judicata effect. See McEachern v. Black, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998). Because the Tax Sale Action was dismissed, the action did not proceed. No factual findings were made, no rulings of any kind were issued, and no adjudications were made.

Although the Tax Sale Action was dismissed and does not implicate res judicata, the other elements of res judicata are likewise not established here. Specifically, the second requirement of res judicata cannot be established because the two actions are not the “same subject matter.”

In order for a “judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identity of the subject matter.” Nunnery v. Brantley Constr. Co., 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986). “When applying principles of res judicata, a fundamental test used for comparing causes of action is to determine whether the primary right and duty and the delict or wrong are the same in each action.” Pye, 480 S.E.2d at 433, 325 S.C. at 458, quoting Nunnery v. Brantley Const. Co., 289 S.C. at 209, 345 S.E.2d at 743. “Under this test, there is but one cause of action

where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right." Nunnery, 289 S.C. at 210, 345 S.E.2d at 743 quoting 46 Am Jur. 2d., Judgments § 406 at 575 (1969). If there is a subsequent suit between the same parties on a different claim, the former judgment is only conclusive as to those issues actually determined in the prior action. See Sur. Realty Corp. v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967). Therefore, a plea of res judicata applies **only** to those matters actually adjudicated in the former action. Id.

Because there were no matters adjudicated in the Tax Sale Action prior to its dismissal, there is no res judicata. Even if there had been an adjudication in the Tax Sale Action, the "wrong" at issue in that case was Beaufort County's failure to follow statutory requirements. There is no "wrong" alleged in the Condemnation Action; in fact, the Condemnation Action concedes Sabry is the owner of the Property. See Complaint filed September 12, 2013, Civil Action Number 2013-CP-07-02338, at Paragraph 2 (**R. p. 39, ¶ 2**). The Condemnation Action is an exercise of the power of eminent domain. Thus, the claims are not the same, and res judicata does not apply.

Because there was never a prior adjudication of any issue in the Tax Sale Action and because the subject matter of the Tax Sale Action and the Condemnation Action are not the same, the second and third elements of res judicata cannot be established. Therefore, the Circuit Court was correct in finding S.C. Code Ann. § 15-67-20's application of res judicata to land actions does not bar the Condemnation Action. Summary Judgment in favor of DIUC was appropriate.

2. Because the Tax Sale Action was a declaratory judgment action, the only res judicata preclusion would relate to issues actually raised and decided in the Tax Sale Action.

Despite the fact that it was dismissed and is therefore not binding, the Tax Sale Action is also without preclusive res judicata effect because it was a declaratory judgment action.

“Although res judicata normally applies to issues that were previously raised or that could have been raised in the prior action, declaratory judgments are distinguishable.” Catawba Indian Nation v. State, 407 S.C. 526, 539, 756 S.E.2d 900, 908 (2014). In examining a previous declaratory judgment action, res judicata applies “only as to issues actually decided by the court.” Id (emphasis added). As the Supreme Court has explained:

A declaratory judgment is not res judicata as to matters not at issue and not passed upon. *Unlike other judgments, a declaratory judgment determines only what it actually decides and does not preclude, under res judicata principles, other claims that might have been advanced.*

Catawba Indian Nation v. State, 407 S.C. at 540, 756 S.E.2d at 908 (2014), citing 22A Am. Jur. 2d Declaratory Judgments § 244 (2013) (emphasis in original). Additionally, the Supreme Court has endorsed the rule that “a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced.” Id. quoting 50 C.J.S. Judgments § 944 (2009).

There were no issues actually decided in the declaratory judgment Tax Sale Action; it has no effect as to any later claims. As a declaratory judgment case, even had there been a decision on the County’s failure to comply with pre-sale statutory notice provisions, that decision would only serve as res judicata on the actual issue decided, not any other issues that *could* have been raised.

The Circuit Court was correct in finding that the Tax Sale Action had no preclusive effect under S.C. Code 15-67-20.

C. The Circuit Court correctly ruled that S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action filed by DIUC pursuant to the South Carolina Eminent Domain Procedure Act because it is not an action “for the recovery of real property.”

1. Condemnation actions pursuant to the Eminent Domain Procedure Act do not question title of the land taken; instead, condemnation actions admit the property subject to taking is owned by the landowner-condemnee.

First, the plain language of the Eminent Domain Procedure Act, codified at Title 28, Chapter 2, of the South Carolina Code states the General Assembly’s intentions:

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. A condemnation action brought pursuant to the Act is an exercise of the power to condemn and to acquire property owned by the named landowner-condemnee; such cases are not a debate over title to property or an action to recover property under S.C. Code Ann. § 15-67-20.

In Walsh v. Evans, 112 S.C. 131, 99 S.E. 546 (1919), the Supreme Court drew a distinction that is particularly relevant here. In analyzing whether a litigation constitutes a second action for the recovery of real property, as that term is used in what became S.C. Code Ann. § 15-67-20, the Court pointed out that when in the second action the plaintiff does not deny the property rights of the defendant, it cannot be said to constitute an action for the recovery of real property. See id. at 137, 99 S.E. at 549. Therefore,

In determining whether this provision of the Code applies, it becomes necessary to ascertain, first, whether this is "an action for the recovery of real property or the recovery of the possession thereof." This question is to be determined by the complaint and not by the answers, which raise the question of title.

Elmore v. Davis, 49 S.C. 1, 3, 26 S.E. 898, 899 (1897). Sabry's ownership interest in the Property is not challenged by the complaint in the Condemnation Action; in fact, Sabry's ownership in the Property is affirmatively alleged because it is necessary to the condemnation action. See Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-02338 at Paragraphs 2 and 4 (**R. p. 39, ¶ 2; R. p. ¶ 4**). The Complaint alleges, admits, and relies upon the ownership of the land by Sabry.

Examination of the Condemnation Action's complaint, as instructed by applicable case law, demonstrates the Circuit Court correctly ruled the Condemnation Action is not an action for the recovery of real property under S.C. Code Ann. § 15-67-20. The Circuit Court should be affirmed.

2. The Eminent Domain Procedure Act distinguishes actions to condemn property from all other causes of action affecting real property; therefore, a condemnation action is not an action for the recovery of real property under S.C. Code Ann. § 15-67-20.

The Eminent Domain Procedure Act, by its own mandate, distinguishes actions to condemn property from all other causes of action affecting real property. See S.C. Code Ann. § 28-2-60 ("The provisions of this chapter shall constitute *the exclusive procedure whereby condemnation may be undertaken* in this State) (emphasis added). Clearly, the Legislature intended condemnation actions to be unique, uniform, and distinguished from

all other actions, including actions “for the recovery of real property,” as that term is used in S.C. Code Ann. § 15-67-20. See id.

The Circuit Court properly agreed and should be affirmed. S.C. Code Ann. § 15-67-20 does not apply to condemnation actions because to do so would effectively apply additional requirements for eminent domain actions thereby violating S.C. Code Ann. § 28-2-60’s instruction that there be only one, uniform procedure for the exercise of eminent domain authority.

D. The Circuit Court correctly ruled that even if there is a conflict between S.C. Code Ann. § 15-67-20 and the Eminent Domain Procedure Act, the Eminent Domain Procedure Act controls; therefore, any action brought pursuant to the Eminent Domain Procedure Act is not classified as an action “for the recovery of real property” under S.C. Code Ann. § 15-67-20.

Even if the Court were to find that there is some conflict between the Eminent Domain Procedure Act and S.C. Code Ann. § 15-67-20 applies additional conditions on the exercise of eminent domain, the procedure and power set forth in the Eminent Domain Procedure Act controls because S.C. Code Ann. § 28-2-20 unequivocally states, “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 Circuit Court also properly ruled that S.C. Code Ann. § 28-2-60, which states “A condemnor may commence an action under this chapter for the acquisition of an interest in *any real property* necessary for any public purpose,” establishes the Eminent Domain Procedure Act’s authority over any other statutes that may limit condemnation procedure or condemnable property. See Order Granting Defendant’s Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 at page 5 (**R. p. 8, ¶ 1**).

The Circuit Court's ruling as to any potential conflicts between the statutes is also in accord with South Carolina rules of statutory interpretation. The Supreme Court has clearly instructed,

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.

Kiriakides v. UA Commc'ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Bohlen v. Allen, 228 S.C. 135, 141, 89 S.E.2d 99, 102 (1955)). Furthermore, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03, at 94 (5th ed. 1992)).

The plain language of the Eminent Domain Procedure Act is clear. See S.C. Code Ann. § 28-2-20. From this Section of the Act, entitled "Intent of General Assembly," the Court is provided three essential directives:

1. "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";
2. "Any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration"; and
3. "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."

Id. Each of these clear statements of intent supports the Circuit Court's finding that to agree with Appellant would be to apply S.C. Code Ann. § 15-67-20 to improperly modify the Eminent Domain Procedure Act. This reading of the statute also harmonizes the statute "with its subject matter and accords with its general purpose," as is the prescribed result.

See Eagle Container Co., L.L.C. v. Cnty. of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

E. The Circuit Court correctly ruled that the Tax Sale Action filed by DIUC was not an action “for the recovery of real property;” therefore, S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action filed by DIUC after dismissal of the Tax Sale Action.

The Tax Sale Action filed by DIUC was an action dealing with the failure of Beaufort County to properly notice and conduct a tax sale. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255 at Paragraph 21 (**R. p. 154, ¶ 21**) and Exhibit 3 thereto (Complaint filed July 26, 2012, Civil Action Number 2012-CP-07-2715) (**R. pp. 169-176**). More specifically, DIUC’s case against Beaufort County dealt with Beaufort County’s failure to comply with the requirements of Title 12, Chapter 51, of the South Carolina Code. See Id. and S.C. Code Ann. § 12-51-40 (entitled “Default on Payment of Taxes; Levy of Execution by Distress and Sale; Notice of Delinquent Taxes; Seizure of Property; Advertisement of Sale”). Quite simply, the Tax Sale Action was not an action “for the recovery of real property,” as that term is used in S.C. Code Ann. § 15-67-20. The purpose of S.C. Code § The Circuit Court findings and ruling on this issue should be affirmed. See Order Granting Defendant’s Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-002255 at page 4 (**R. p. 7, ¶ 2**).

F. The Circuit Court correctly ruled that in order for S. C. Code Ann. § 15-67-20 to bar a subsequent action related to real property, both actions for recovery of real property must be for the same cause of action; because the Tax Sale Action and the Condemnation Action are not for the same cause of action, S.C. Code Ann. § 15-67-20 does not bar the Condemnation Action.

The Supreme Court has made it clear that the actions for recovery of real property covered by S.C. Code Ann. § 15-67-20 (and its predecessor statute prior to amendment) must be for the *same* cause of action. See Carr v. Mouzon, 93 S.C. 161, 76 S.E. 201 (1912). Again, this demonstrates S.C. Code Ann. § 15-67-20 operates to simply apply res judicata. See Section I. A., supra. The Circuit Court correctly noted this principle in ruling that when two separate actions merely bring title to property into discussion, as is the case here, the actions are not actions “for the recovery of real property,” as that term is used in S.C. Code Ann. § 15-67-20. See Order Granting Defendant’s Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 at page 6 (**R. p. 9, ¶ 2**).

Specifically, the Supreme Court has held:

To be sure, there are other forms of action by which the title to real property may be brought in issue and determined, as for instance, an action for damages or trespass in the nature of common law action of trespass quare clausum fregit, an action for rents and profits, and actions for foreclosure of mortgage or partition in which a defendant sets up an independent legal title in himself, but none of these are actions “for recovery of real property” and therefore they do not fall within the provisions of [the statute].

See Carr v. Mouzon, 93 S.C. 161, 166, 76 S.E. 201, 202 (1912); see also Tompkins v. R.R. Co., 30 S.C. 479, 9 S.E. 521 (1889) (holding under previous version of statute that actions seeking different relief are not repeated actions “for the recovery of real property”).

The Condemnation Action currently pending does not challenge Sabry’s title to the Property. In fact, it states that he is named in the action by virtue of his status as Landowner of the Property. See Affidavit of John F. Guastella filed November 25, 2013, Civil Action Number 2013-CP-07-02255 (**R. p. 154, ¶ 18**), and Exhibit 5 thereto (Condemnation Notice

and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-02338) at Paragraph 2 (**R. p. 178, ¶ 2**). As such, the claim in the Condemnation Action is distinguishable from the Tax Sale Action regarding tax sale procedures; and the causes of action are not the same, as is required for application of S.C. Code Ann. § 15-67-20.

The Appellant's Brief properly states "Under S.C. Code Ann. § 15-67-20 both actions at issue must be to 'recover' the land in question in order to bar the second action." See Initial Brief of Appellant at 3 (**R. p. 263, ¶ 2**). In support of this statement, the Appellant cites Foster v. Foster, 81 S.C. 307, 62 S.E. 320 (1908). However, the Supreme Court in Foster found that the statute did not apply to bar a second action because the second action was not an action to recover property; instead, it was an action for partition and, as such, not only was the second claim not for "the recovery of real property," it was not a repeat of the previous action. See Foster v. Foster, 81 S.C. at 311, 62 S.E. at 322.

The Appellant also relies upon repeatedly stating it is "the allegations, character, and the relief sought" which should govern this Court's determination of whether the Tax Sale Action and Condemnation Action are the same. See Initial Brief of Appellant dated January 12, 2015 at 4 and 5 (**R. pp. 264-265**). Appellant goes on to assert that "there is no difference between the relief sought in both the two suits." Id. at 5. That is simply not an accurate statement of law or an accurate characterization of the Tax Sale Action and the Condemnation Action. In Elmore, 49 S.C. 1, 26 S.E. 898, the Supreme Court explains that when determining whether two actions are "for the recovery of real property or the recovery of the possession thereof," the "question is to be determined by the Complaint and not by the Answers," even if the Answers raise questions of title. See Elmore, 49 S.C. at 3, 26 S.E. at 899. Again, in examining the two Complaints at issue herein, it is clear that the

relief sought between the two cases is not the same, nor are the legal theories. The Tax Sale Action alleges impropriety in the tax sale procedure and requests the voidance of a tax deed; the Condemnation Action alleges no question of title and seeks to take the landowner's property by virtue of the South Carolina Eminent Domain Procedure Act. See Tax Sale Action Complaint filed July 26, 2012, Civil Action Number 2012-CP-07-02715 (**R. pp. 11-21**) and Condemnation Notice and Tender of Payment filed September 12, 2013, Civil Action Number 2013-CP-07-02338 (**R. pp. 37-44**).

The Circuit Court correctly found that "When two separate actions merely bring title to property into issue, as is the case here, the actions are not actions 'for the recovery of real property,' as that term is used in S.C. Code Ann. § 15-67-20." See Order Granting Defendant's Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 at page 6 (**R. pp. 9-10**). The Circuit Court should be affirmed because the Tax Sale Action and the Condemnation Action are for the same cause of action.

G. S.C. Code Ann. § 15-67-20 does not create a cause of action or independent grounds to challenge a condemnation action brought under the Eminent Domain Procedure Act.

The South Carolina Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-20, et seq., is intended to "create a uniform procedure for all exercise of Eminent Domain power in this State." S.C. Code Ann. § 28-2-20. Furthermore, "In the event of conflict between this act and any other law with respect to subject governed by this act, this act shall prevail." Id. Finally, "any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration." Id.

Within the Act's exclusive procedure is S.C. Code Ann. § 28-2-470, entitled "Proceedings to Challenge Condemnor's Right to Condemn," which states:

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

S.C. Code Ann. § 28-2-470. On September 4, 2013, the Appellant initiated the underlying action by the filing of a complaint in Beaufort County, the county in which the Property is located. That Complaint raised seven causes of action. See Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 (**R. pp. 22-36**). At the outset of the Circuit Court's hearing on DIUC's Motion for Summary Judgment, the Plaintiff conceded to DIUC's Motion for Summary Judgment as to counts 2 through 7 of the Sabry Complaint. See Order Granting Defendant's Motion for Summary Judgment as to All Causes of Action filed June 17, 2014, Civil Action Number 2013-CP-07-02255 at page 3 (**R. p. 6, ¶ 2**). The Court then heard argument as to whether S.C. Code Ann. § 15-67-20 applies to limit the Condemnation Action at issue, which was brought pursuant to the South Carolina Eminent Domain Procedure Act. S.C. Code Ann., supra.

The Respondent's conceded causes of action relate to whether DIUC is properly authorized as a condemnor, whether the property sought is for a public purpose, and whether DIUC is vested with the right of condemnation under the Eminent Domain Procedure Act. See Sabry Complaint filed September 4, 2013, Civil Action Number 2013-CP-07-02255 at Paragraphs 4-16 (**R. pp. 25-27, ¶¶ 4-16**). These are the types of challenges that are permissible under S.C. Code Ann. § 28-2-470.

In addition to the arguments previously set forth herein, the Respondent also asserts that S.C. Code Ann. § 28-2-470's permission to file a separate proceeding in order to

challenge a condemnor's "right to condemn" does not extend to include the Appellant's allegations regarding S.C. Code Ann. § 15-67-20. As part of the Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-470 establishes a landowner's right to challenge authority of a condemnor. See S.C. Code Ann. § 28-2-470. This section does not grant a right to raise any other claims in order to demand a stay of the condemnation action. Because the claim under S.C. Code Ann. § 15-67-20 is the only remaining cause of action in the underlying case, summary judgment was also appropriate on the grounds that S.C. Code Ann. § 15-67-20 does not establish an independent cause of action and, therefore, cannot support a separate proceeding below, which has resulted in a stay of the Condemnation Action.

Therefore, in addition to the other grounds asserted herein that justify this Court in affirming the Circuit Court's Order Granting Defendant's Motion for Summary Judgment as to all Causes of Action, this Court could also rule that S.C. Code Ann. § 15-67-20 does not authorize or create an independent cause of action, the underlying action should be dismissed, and the stay of the Condemnation Action must be lifted.

CONCLUSION

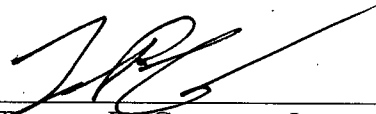
S.C. Code Ann. § 15-67-20 does not bar a condemnation action lawfully initiated pursuant to The South Carolina Eminent Domain Procedure Act simply because the condemnor previously filed (but then voluntarily dismissed) a declaratory judgment action regarding county's failure to comply with required tax sale procedure.

THEREFORE, this Court should AFFIRM the ruling of the Circuit Court that S.C. Code Ann. § 15-67-20 does not apply to bar the Condemnation Action brought by DIUC.

against the Appellant Sabry and AFFIRM the grant of Summary Judgment in favor of the Respondent.

Respectfully submitted,

PRATT-THOMAS WALKER, P.A.



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May 22, 2015

Charleston, South Carolina

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SC Court of Appeals

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

Appellate Case No. 2014-001587

Mamdouh Sabry Abdelrahman, Appellant,


v.

Daufuskie Island Utility Company, Inc., Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent in the above matter by
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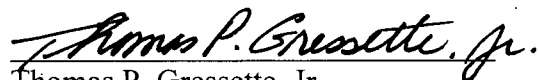
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CERTIFICATE OF COUNSEL

Respondent, by and through its undersigned attorneys, certifies that the Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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