

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

MAY 31 2016

R. Lawton McIntosh, Circuit Court Judge

SC Court of Appeals

Case No. 2015-CP-36-00120

Appellate Case No. 2016-001037

Oien Family Investments, LLC.....Appellant

v.

Piedmont Municipal Power Agency.....Respondent

**APPELLANT'S RETURN IN OPPOSITION TO MOTION
TO LIFT STAY OR REQUIRE BOND**

Appellant Oien Family Investments, LLC ("Oien") opposes Respondent's Motion to Lift Stay or Require Bond. On May 18, 2016, Appellant Oien filed its petition/motion for enforcement of statutory automatic stay, for injunction and/or supersedeas. By letter of this Court of Appeals on May 18, 2016, the parties were informed that this Court had granted appellant's said petition/motion. Respondent PMPA then filed its motion dated May 20, 20126 (served on appellant on May 23, 2016) seeking to overturn the ruling of this Court on May 18 which enforced the stay of the lower court ruling during the

pendency of this appeal.

Appellant opposes the motion to lift this Court's stay based on the following

facts:

1. Defendant filed a Notice of Condemnation for a high voltage electric transmission line on February 9, 2015, to cross through the middle of plaintiff's tract of 116 acres of real property in Newberry County.
2. On March 6, 2015, plaintiff timely filed an action challenging the routing of said taking based on Southern Development v. SC Public Service Authority, 305 S.C. 507, 409 S.E.2d (Ct. App. 1991), aff'd as modified, 311 S.C. 29, 426 S.E.2d 748 (1993).
3. Pursuant to S.C. Code §28-2-470:

“All proceedings under the Condemnation Notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise....”
(emphasis added).
4. Plaintiff filed its Notice of Appeal of the Amended Order and the Form 4 Order denying appellant's motion for reconsideration.
5. PMPA counsel informed counsel for appellant via email of May 18, 2016, that PMPA did not agree that an appeal stayed the condemnation and further that PMPA was proceeding with its condemnation construction.
6. Because of PMPA's position, in addition to filing its notice of appeal of the Amended Order and the Form 4 Order, appellant also filed its Petition/Motion for Enforcement of Statutory Automatic Stay Injunction and/or Supersedeas on May 18, 2016.
7. This Court granted appellant's petition/motion on May 18, 2016.
8. This action challenging PMPA's taking, which was brought pursuant to S.C. Code §28-2-470, is not “disposed of,” as this appeal is pending. The automatic stay of S.C. Code §28-2-470 is therefore still in effect.
9. The ruling in Southern Development v. SC Public Service Authority, 305 S.C. 507, 409 S.E.2d (Ct. App. 1991), aff'd as modified, 311 S.C. 29, 426 S.E.2d 748 (1993) affirming the lower court's granting an injunction against the condemning authority, Santee Cooper, was based on this Court's finding that Santee Cooper had failed to legitimately consider the costs to acquire land in

the three alternate routes involved in that case because it assumed the land values of the alternate routes were identical. The lower court in the instant case overlooked that, just as in Southern Development, PMPA valued all land in the alternate routes as identical and failed to consider properly the cost to acquire land.

10. The lower court here also stated on the record at the conclusion of the testimony that PMPA did not have to adhere to the transmission routing standards which were followed by SCE&G, Duke, and Central Electric Power Cooperative because it [PMPA] was relatively “new” to transmission route developments. The Court also noted that PMPA may have been “a little more lax than they should have.”
11. If this Court were to lift the stay, the high voltage transmission line, with poles 80’ – 100’ high, would run through the middle of appellant’s property in proximity to Oien’s planned retirement home on which Oien has already spent \$100,000 for house plans, underground electric service, land clearing, and well installation. Expert appraisal testimony by appellant’s expert was that the damage in fair market value to appellant’s property, including damage to the remainder, would be between \$182,000 and \$210,000 if PMPA’s selected route through the middle were constructed.
12. Continued implementation of the statutory automatic stay, and denial of respondent’s motion to lift said stay, would preserve the status quo and prevent appellant from the irreparable harm which would occur if the middle route proposed by PMPA were allowed to be constructed during the pendency of this appeal.

ARGUMENT

A. This Matter is Properly Subject to the Automatic Stay Provided in South Carolina Code §28-2-470

The stay granted by this Court acknowledged that the automatic stay of S.C. Code §28-2-470 is still in effect, as this matter is on appeal and is not disposed of. The plain language of that section is that “all proceedings under the condemnation notice are automatically stayed until the disposition of the action....” (emphasis added).

As a legal term, “disposition” is defined in Black’s Law Dictionary as “a final settlement or determination.” Black’s Law Dictionary 484 (7th Ed. 1999). “Disposition”

is also defined as “the court’s final determination of a law suit.” See Nolo’s Plain English Legal Dictionary. www.nolo.com/dictionary/disposition. See also, Wiktionary. <http://en.wiktionary.org/wiki/disposition> (where “disposition” is defined as “final decision or settlement”). Respondent has presented no authority defining “disposition” as an “order of a trial court while that order is under appeal.”

The automatic stay provision in §28-2-470 was adopted by the General Assembly in recognition of the fact that the right of eminent domain is a powerful right which must be exercised by condemning authorities in a proper fashion. In Southern Development v. SC Public Service Authority, 305 S.C. 507, 409 S.E.2d (Ct. App. 1991), aff’d as modified, 311 S.C. 29, 426 S.E.2d 748 (1993), our Supreme Court, in a unanimous opinion, recognized that proper route selection must be employed based upon an objective comparative analysis of several factors. In the instant case, appellant’s expert testimony was that PMPA’s route analysis was arbitrary and capricious, lacking in a factual foundation, and a clear abuse of discretion.

Respondent’s construction of the term “disposition” in S.C. Code § 28-2-470 would lead to an absurd result not intended by the legislature. Were Respondent’s argument adopted by this Court, the statute would, as practical matter, mean that all appeals of a trial court’s denial of a landowner’s challenge of a condemnor’s right to take would be moot. See, Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) (courts will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention). This is illustrated by the circumstances present in this case. Should this Court lift the stay as requested by Respondent and thereby allow PMPA to

begin construction of the transmission line bisecting Appellant's property along its selected route during the pendency of this appeal, any later decision by this Court or the Supreme Court reversing the trial court would be too little, too late.

B. This Matter is also Stayed Under the General Rule of Rule 241(a), South Carolina Appellate Court Rules

Rule 241(a), SCACR, also provides that in civil matters the service of a notice of appeal acts to automatically stay the relief ordered in the appealed order. The effect of the lower court ruling here is that appellant's challenge to the route selection of PMPA is denied and its condemnation can proceed. Under Rule 241(a), the ruling of the lower court is now stayed. The exceptions to this general rule are listed in Rule 241(b). South Carolina Code §28-2-470 does not include any exception for appeals in cases which involve challenges to route selection. Had the legislature intended an exception to either the statutory stays or that of Rule 241(a), it would have said so.

PMPA's motion asserts that in condemnation cases this general rule should not apply. No case on this point is cited by PMPA. Instead, it argues that this action is akin to a court "ordering the possession of property" to be allowed, citing Stearns Bank v. Glenwood Falls, 375 S.C. 423, 653 S.E.2d 274 (2007). This case is inapplicable because it is not a condemnation action and because in that case the debtor never sought a stay, unlike in the instant case. Further, the court noted that the case involved an exception to the general rule, a money judgment, in which the defendant was in default.

In the instant case, respondent's request to lift the stay has the effect of allowing PMPA to cause \$200,000, or more, of damage to Oien's property by running its line through the middle of it. If appellant prevails on appeal, the damage to it will be

irreparable. It cannot be reversed, unlike in Stearns Bank, where a monetary award by the lower court, upon conclusion of an appeal, could be returned intact with interest.

The legislature did not intend such a result. Rather, the legislature, by not specifically defining “disposition”, intended the term to have its ordinary and plain meaning. S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) (unless the statute requires a different interpretation, the words used in a statute must be given their ordinary meaning); Centex Intern., Inc. v. SCDOR, 406 S.C. 132, 750 S.E.2d 65 (2013) (words must be given their plain and ordinary meaning without resort to subtle or forced construction of statutory words for the purpose of expanding or limiting a statute's operation as such is prohibited). As a result, “disposition”, as used in S.C. Code § 28-2-470, can only mean a final adjudication of the Appellant’s action challenging PMPA’s right to take its selected route.

The circumstances at play here are the very reason the general rule under Rule 241(a) exists. This Court, in Tillman v. Oakes, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012), explained the effects of an appeal.

“When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. ***This is the purpose of a stay under Rule 241—to determine whether the appealed order may be carried out or enforced—not to determine whether the action may proceed in the lower court while the appeal is pending.***”

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal...." Under Rule 205, the lower court is deprived of the power to proceed with matters that are *affected by the appeal...* (emphasis added).

Chief Judge Few clarified that the question of whether a lower court's order is stayed is not controlled by the existence or nonexistence of a stay, but is instead determined by "whether the issue sought to litigated in the lower court is a 'matter affected by the appeal'". *Id.* at 51. Here, the order on appeal denies Appellant's challenge to the right to take and provides that Respondent may proceed with the condemnation of Appellant's property. By the instant motion, Respondent has expressed its intent to proceed with the condemnation if the stay is lifted. Therefore, there is no question that the matter at issue is a "matter affected by the appeal". As a result, the lower court has no jurisdiction to proceed and PMPA is prohibited from taking possession of Appellant's property pursuant to the condemnation action.

C. The Request for Bond Should Be Denied

PMPA alternatively seeks for appellant to be required to post a bond. It cites no authority for a bond to be required, as there is none. Appellant's action is provided by statute, and the rights of a landowner were further clarified by the Supreme Court of this state in Southern Development v. SC Public Service Authority, 305 S.C. 507, 409 S.E.2d (Ct. App. 1991), *aff'd as modified*, 311 S.C. 29, 426 S.E.2d 748 (1993):

CONCLUSION

Based on the foregoing, appellant requests that this Court's Order granting its petition/motion for enforcement of statutory stay, injunction and/or supersedeas remain in effect and that this Court deny Respondent PMPA's Motion to Lift Stay or Require Bond.

POPE AND HUDGENS, P.A.

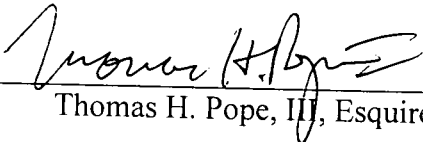
PO Box 190

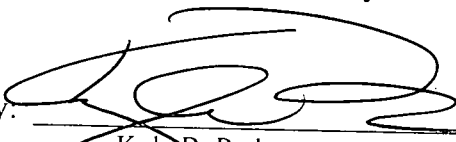
1508 College Street

Newberry, SC 29108

Phone: 803-276-2532; Fax: 803-276-8684

Email: thpope@popeandhudgens.com

By: 
Thomas H. Pope, III, Esquire

By: 
Kyle B. Parker
Attorneys for Oien Family Investments, LLC

May 31, 2016
Newberry, SC

RECEIVED
MAY 31 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-36-00120

Appellate Case No. 2016-001037

Oien Family Investments, LLC.....Appellant

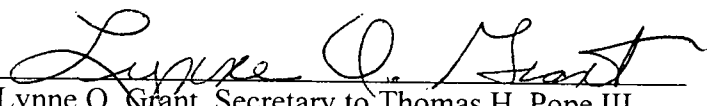
v.

Piedmont Municipal Power Agency.....Respondent

CERTIFICATE OF SERVICE

The undersigned employee of Pope & Hudgens, P.A. does hereby certify that she has this date served one (1) copy of the Appellant's Return in Opposition to Motion to Lift Stay or Require Bond dated May 31, 2016 in the above-captioned case upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid, affixed thereto, and addressed as follows:

O.W. Bannister, Esquire
Bannister, Wyatt & Stalvey
P.O. Box 10007
Greenville, SC 29603



Lynne O. Grant, Secretary to Thomas H. Pope III
Pope & Hudgens, P.A.
PO Box 190
Newberry, SC 29108

May 31, 2016
Newberry, SC

THOMAS H. POPE III
W. CHAD JENKINS
KYLE B. PARKER

**DOPE
&
HUDGENS**
ATTORNEYS, P.A.

JOSEPH W. HUDGENS
Of Counsel
THOMAS H. POPE
(1913-1999)

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

RECEIVED

MAY 31 2016

May 31, 2016

SC Court of Appeals

HAND-DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Oien Family Investments, LLC v. Piedmont Municipal Power Agency
Appellate Case No. 2016-001037

Dear Ms. Kitchings:

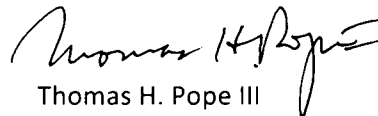
On behalf of the appellant, I enclose herein for filing the original and six copies of Appellant's Return in Opposition to Motion to Lift Stay or Require Bond, together with our certificate of service of same on counsel for respondent, O. W. Bannister, Esquire.

We also attach herewith an extra copy of this filing which I would appreciate your clocking in and providing it to our courier.

With best regards.

Sincerely,

POPE AND HUDGENS, P.A.


Thomas H. Pope III

THP III/lg
Enclosures

cc: O. W. "Bill" Bannister, Jr., Esquire, w/encls.
Bruce Bannister, Esquire, w/encls.
Luke Burke, Esquire, w/encls.