

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 15 2016

APPEAL FROM THE NEWBERRY COUNTY
Court Of Common Pleas

SC Court of Appeals

Donald B. Hocker, Circuit Court Judge

APPELLATE CASE NO.: 2016-001773

West/Hobby, LLC Respondent,

v.

County of Newberry Appellant.

MOTION TO DISMISS

Respondent West/Hobby, LLC (“West/Hobby”), by and through its undersigned counsel, hereby moves pursuant to Rule 201, SCACR and S.C. Code Ann. §§ 14-3-330, 18-1-30 and 18-1-130 for an Order dismissing this appeal because the Order which Appellant County of Newberry (“County”) asks this Court to review is not immediately appealable.

FACTUAL AND PROCEDURAL BACKGROUND

West/Hobby commenced this inverse condemnation case in 2012. The trial court bifurcated the taking and compensation phases of the case for trial consistent with the holding in Cobb v. S.C Dept. of Transportation, 365 S.C. 360, 618 S.E.2d 299 (2005).

After a two-day bench trial during the taking phase of the case, the trial court entered an order on February 25, 2016 finding West/Hobby proved the first phase of its inverse condemnation claim. The County filed a motion to alter or amend, which the trial court denied on August 1, 2016. The County then served its notice of appeal . The compensation phase of the case has not been scheduled for trial due to the County's motion to alter or amend and this appeal. In the instant motion, West/Hobby moves for an order dismissing this appeal for lack of jurisdiction because neither of the orders from which the County appeals is immediately appealable.

ARGUMENT

“The right of appeal arises from and is controlled by statutory law.” Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). “Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14-3-330.” Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). According to section 14-3-330, a party may appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; [and]
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action

S.C. Code Ann. § 14-3-330 (Law Co-op 1976 & Supp. 2015). “An order which involves

the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” Wilson, 367 S.C. at 13 (quoting Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)).

“The phrase ‘involving the merits’ is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467-68 (2006).

“Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.’” Wilson, 367 S.C. at 14, 625 S.E.2d at 208 (quoting Mid-State Distribs., 310 S.C. at 335, 426 S.E.2d at 780 n.4. A party who seeks appellate review of an intermediate order because the order effects a substantial right must show not only that the order involves a right but also that the order prevents a judgment from which an appeal might be taken. Cobb v. Maccaro, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992); Rutledge v. Tunno, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902). “Pursuant to section 14-3-330(2), this Court may not review an order that does not prevent a judgment from being rendered in the action, and from which the appellant can seek review . . . in any appeal from the final judgment.” Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (internal quotations omitted).

“The provisions of Section 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.” Hagood, 362 S.C. at 196, 607 S.E.2d at 709. “Piecemeal appeals should be avoided and most errors can be corrected by the remedy of

a new trial.” Id. (citing Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (holding order denying motion for change of venue was not immediately appealable because any error in the order could be corrected by new trial); Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (holding order denying bifurcation of trial on issues of liability and damages in personal injury case was not immediately appealable as affecting a substantial right because any error could be corrected on appeal following trial); Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) (holding denial of motions for disqualification of a judge and for a continuance were interlocutory orders not affecting the merits, and thus were reviewable only on appeal from a final order); Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (reaffirming that order allowing amendment of a pleading generally is interlocutory and is not appealable until final judgment); Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (holding an order directing a party or a non-party to submit to discovery is not immediately appealable under 14-3-330; instead, the party or non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery order); Tatnall, 350 S.C. at 138, 564 S.E.2d at 379 (holding order denying motion to amend pleadings to assert third party claims was not immediately appealable because the order did not affect a substantial right and at the end of the action, moving party could either appeal the final judgment or file a separate, first-party action)).

The circumstances of this case present several compelling reasons for dismissing the County’s appeal at this stage in the litigation. First, the orders are interlocutory because no final judgment has been rendered. The County has “not arrived at the end of

the road.” Mid-State Distribs., 310 S.C. at 334-335, 426 S.E.2d at 780. See also Watson v. Underwood, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (“An order is not immediately appealable when appellants have not ‘arrived at the end of the road’ and would be able to appeal the decision after the trial was finished.”) (internal quotations omitted). “The supreme court has noted ‘if the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal.’” Watson, 407 S.C. at 459, 756 S.E.2d at 164 (quoting Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, 41, 21 S.E.2d 209, 212 (1942)). The trial court’s orders finding a taking and denying the County’s motion to alter or amend are interlocutory because the findings in them will be inherent in any final judgment the trial court enters. The County will have the ability to raise those issues in its appeal from the final judgment.

Second, dismissal of this appeal will avoid the Court reviewing this case piecemeal because the County and West/Hobby will have the right to appeal after the Court enters final judgment following trial on the compensation phase of the case. See Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537-38, 773 S.E.2d 144, 146 (2015) (“The provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding ‘piecemeal appeals.’”); Good, 201 S.C. at 42, 21 S.E.2d at 213 (“The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases . . . which can be decided upon an appeal from such final judgment as mat later be entered by the trial Court.”).

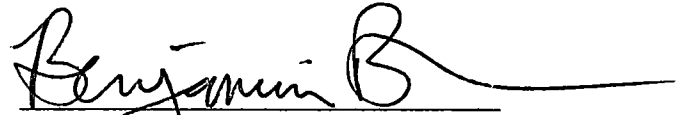
Third, dismissal of the County's appeal will discourage piecemeal appeals of other inverse condemnation cases. Unlike other causes of action, inverse condemnation cases are more commonly bifurcated into two phases: the takings phase and the compensation phase. Cobb v. SCDOT, 365 S.C. at 365, 618 S.E.2d at 301 ("Accordingly, in an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request."). Allowing a municipality the right to immediate appeal of an order finding a taking would subject a successful property owner, who has proven a taking, to multiple appeals rather than a single one. That procedure would also require this Court to entertain two appeals on two records, rather than one. Conversely, dismissing an appeal at this stage will result in no prejudice to the County because all issues the County could raise now will be preserved for review after entry of final judgment. S.C. Code Ann. §§ 14-3-330(1) & 18-1-130. See also Cobb v. Maccaro, 310 S.C. at 305, 423 S.E.2d at 157 (reaffirming that avoidance of trial is not a substantial right).

CONCLUSION

In this inverse condemnation case, the County appeals interlocutory orders of the trial court finding West/Hobby proved a taking and denying the County's motion to alter or amend. The Court should dismiss this appeal and remand the case for a trial on the compensation phase of the case because the orders are not immediately appealable. No final judgment has been entered; the County will have the right to raise the same issues after entry of final judgment; and allowing the appeal to proceed at this stage will promote piecemeal appeals of inverse condemnation cases. After entry of final judgment,

the parties will have the ability to ask this Court to review that judgment, as well as the two orders from which the County appeals now.

September 14, 2016

A handwritten signature in cursive script that reads "Benjamin C. Bruner". The signature is written in black ink and extends across the width of the page.

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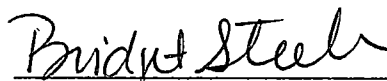
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County of Newberry Appellant.

PROOF OF SERVICE

I, Bridget Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Respondent West/Hobby, LLC, certify that I served a copy of the attached *Motion to Dismiss* by depositing a copy of it in the U.S. Mail, postage prepaid, on September 14, 2016, addressed to Patrick J. Frawley, Esquire, Davis Frawley, LLC, Post Office Box 489, Lexington, South Carolina 29071.

September 14, 2016


Bridget Steele

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September 14, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *West/Hobby, LLC v. County of Newberry*
Appellate Case No.: 2016-001773
BPWM File No.: 1-2247.100

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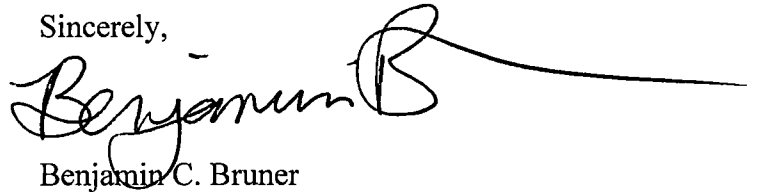
Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the Motion to Dismiss in the above referenced action. Please file the original, clock-in the copy and return them to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With my kindest regards, I am,


Sincerely,


Benjamin C. Bruner

BCB/bs

cc: Patrick J. Frawley, Esq.



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