

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2012-CP-36-0046
Appellate Case No. 2016-001773

West/Hobby, LLC,

v.

County of Newberry

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SEP 28 2016

SC Court of Appeals

Respondent,

Appellant.

APPELLANT'S RETURN TO MOTION TO DISMISS

The Appellant County of Newberry (hereinafter "Newberry") makes its Return to Motion to Dismiss of the Respondent West/Hobby, LLC (hereinafter "West/Hobby"), asserting that the Orders it appeals from constitute an intermediate judgment in a law case involving the merits of an action commenced in the Court of Common Pleas, as contemplated by *S.C. Code Ann.* §14-3-330(1), which Orders have determined a substantial matter forming the whole or a part of the central cause of action and defenses asserted by the parties in this matter with finality, and are immediately appealable.

STATEMENT OF FACTS.

This matter was filed January 26, 2012, with West/Hobby filing and serving a Summons and Complaint alleging causes of action sounding in inverse condemnation, trespass, negligence/gross negligence, and negligence *per se*. Newberry answered, raising various affirmative defenses, and the parties engage in discovery until the case appeared on a trial roster in

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late February, 2014. West/Hobby sought a 40(j) strike of the case, to which Newberry consented, and the matter was off the docket until February 2015, when it was restored under the 2012 civil action number. During the period the case was inactive, West/Hobby amended its Complaint, alleging causes of action sounding in inverse condemnation, injunction, negligence *per se*, and gross negligence. Newberry answered, asserting affirmative defenses of statute of limitations, comparative negligence, South Carolina Tort Claims Act defenses to the negligence claims, assumption of the risk to the inverse condemnation claim, and other defenses.

In early August, 2015 when the case appeared on a trial roster, West/Hobby dropped all causes of action except its inverse condemnation claim, and citing *Cobb v. South Carolina Department of Transportation*, 365 S.C. 360, 618 S.E.2d 299(2005), requested that the trial be bifurcated, with the inverse condemnation claim on the issue of whether there had been a taking tried nonjury, and then the issue of compensation would be submitted to a jury. *See*, Letter of James L. Bruner to the Honorable Donald B. Hocker (August 10, 2015), copy attached hereto. In its letter, West/Hobby's attorney voiced his client's position that "if there was a 'taking,' then the damages are not disputed." *Id.*

The matter was tried over two days, December 14-15, 2015, with both parties calling several witnesses. At the conclusion of the trial, the Judge took the matter under advisement. By Order dated February 11, 2016, filed February 25, 2016, the Trial Judge found that there had been a taking. Newberry filed and served a Motion to Alter or Amend under SCRCR Rule 59(e) on March 7, 2016, which motion was heard May 5, 2016 and denied by Order dated July 29, 2016.

Newberry filed and served its Notice of Appeal August 24, 2016.

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DISCUSSION.

The determination of whether a trial court's order is immediately appealable is governed by statute. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, ___, 773 S.E.2d 144, 145 (2015); *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

Pursuant to statute, appellate courts have jurisdiction to immediately review:

(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;

(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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (emphasis in original).

Although the provisions of §14-3-330 have been construed by the South Carolina Supreme Court to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals," *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709, by its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis. *Morrow*, 412 S.C. at ___, 773 S.E.2d at 146. *Accord*, *Dorn v. Cohen*, Appellate Case No. 2015-000659, Opinion No. 5432,



p. 11 (Ct.Ap. August 3, 2016).

Intermediate orders involving the merits may be immediately appealed pursuant to *S.C. Code Ann.* § 14-3-330(1). *Ex Parte Wilson*, 367 S.C. 7, ___, 625 S.E.2d 205, 208 (2005). An order “involves the merits,” as that term is used in section 14-3-330(1), and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Watson v. Underwood*, 407 S.C. 443, ___, 756 S.E.2d 155, 163 (Ct. Ap. 2014), citing *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006).

An inverse condemnation action—brought by a property owner against a governmental entity for the alleged taking of the owner’s property without just compensation—is an action at law. *Frampton v. South Carolina Department of Transportation*, 406 S.C. 377, ___, 752 S.E.2d 269, 273 (Ct. Ap. 2014). The sole cause of action tried by the parties in December, 2015 was West/Hobby’s inverse condemnation claim, an action at law, was fully litigated by the parties on the merits, and resulted in an Order pursuant to which the trial judge found a taking by Newberry of West/Hobby property, determining with finality that substantial issue. The taking question was the central issue to the sole surviving claim of West/Hobby in the trial, and was central to all of the defenses raised by Newberry. The February 11, 2016 Order of the Trial Judge, filed February 25, 2016 meets all of the requirements of *S.C. Code Ann.* § 14-3-330(1) as constituting an intermediate judgment—it is an Order in a law case, involving the merits, in an action commenced in the Court of Common Pleas, and definitively and with finality determines the respective rights of the parties as to the taking issue.

For West/Hobby to now argue that unreasonable delay will be incurred or judicial efficiency compromised is disingenuous, given West/Hobby’s taking the 40(j) strike when the case first appeared on a trial roster in February, 2014, delaying the case for a year, and when the

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case was restored to its 2012 docket number with Newberry's consent, West/Hobby, itself, further protracting the matter by requesting the bifurcation of the trial, with the taking issue to be heard non-jury.

CONCLUSION.

The February 11, 2016 Order, and the Order denying Newberry's Rule 59(e) Motion, are intermediate judgments affecting substantial rights of Newberry, and are immediately appealable under *S.C. Code Ann.* § 14-3-330(1) and case law cited herein. The West/Hobby Motion to Dismiss should be denied.

Davis Frawley, LLC

BY: 

Patrick J. Frawley
140 East Main Street (29072)
Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: 803-359-2512
pat@oldcourthouse.com
ATTORNEYS FOR APPELLANT

Lexington, South Carolina
September 26, 2016

Other Counsel of Record:

Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia SC 29260-1110



BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.*
WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS, III, P.A.
BRIAN P. ROBINSON, P.A.

WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

ANN ALLISON LEE
CAITLIN C. HEYWARD

* Of Counsel
** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: JBRUNER@BRUNERPOWELL.COM

August 10, 2015

VIA ELECTRONIC
AND FIRST CLASS MAIL

The Honorable Donald B. Hocker
PO Box 972
Laurens, South Carolina 29360
dhockerlc@sccourts.org

Re: *West/Hobby, LLC vs. County of Newberry*
C/A No: 2012-CP-36-00046
Our File No: 1-2247.100

Dear Judge Hocker:

I represent the plaintiff in the above-referenced case. Pat Frawley from Lexington represents the defendant. The case is #1 for trial during the term of Common Pleas for Newberry County beginning August 24th.

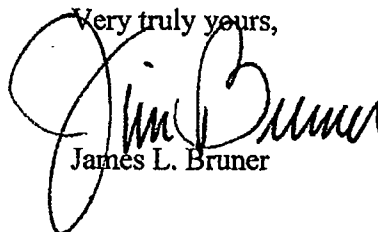
This is an inverse condemnation case against Newberry County for alleged contamination of property adjacent to the closed Newberry County Landfill on Cockrell Road near the intersection of Hwy 219 and Interstate 26. It is my understanding from applicable case law that the Court must first determine if there was a "taking" and then a jury determines what damages, if any, were incurred. Cobb v. S. C. Dept. of Transp., 365 S.C. 360, 618 S.E.2nd 299 (2005) (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.) It is also our position in this case that if there was a "taking", then the damages are not disputed.

That being so, I have filed a motion for summary judgment with supporting affidavits. I am attaching a copy of the motion filed (without attachments) for your information. Since this case is #1 for trial on the jury trial roster, I did not want to wait until the last minute to inform the Court about the nature of this case. It may be useful for the Court and counsel for both parties to discuss the prospective handling of the case in a conference call this week or next, if you are available.

The Honorable Donald B. Hocker
August 10, 2015
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With my kindest regards, I am,

Very truly yours,

A handwritten signature in black ink, appearing to read "Jim Bruner". The signature is written in a cursive style with a large initial "J" and "B".

James L. Bruner

JLB/kw
Enclosure

CC: Patrick J. Frawley, Esq.
w/encl.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2016-001773

West/Hobby, LLC,

v.

County of Newberry

Respondent,

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondent's Motion to Dismiss on West/Hobby, LLC by depositing a copy of it in the United States Mail, postage prepaid on September 26, 2016, addressed to their attorney of record, Benjamin C. Bruner, Esquire, Bruner, Powell, Wall & Mullins, LLC, P.O. Box 61110, Columbia SC 29260-1110.

DAVIS FRAWLEY, LLC

BY: 

Patrick J. Frawley
140 East Main Street (29072)
Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: 803-359-2512
pat@oldcourthouse.com
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James Randall Davis
Patrick J. Frawley
Jeff M. Anderson
John J. McCauley ◊
Carey M. Ayer Δ
Ryan M. Wingard
Evan M. Gessner

Of Counsel
Robert K. Bouknight
George S. Nicholson, Jr.

Francis C. Jones
(1919 - 1968)
Hubert E. Long
(1921 - 2000)

Davis | Frawley LLC

Attorneys at Law

Direct Dial: (803) 951-7419
pat@oldcourthouse.com

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September 26, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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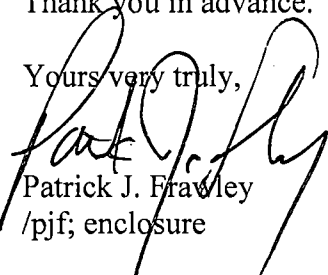
RE: *West/Hobby, LLC vs. County of Newberry;*
Appellate Case No. 2016-001773
Our File No. 25712.16.

Dear Ms. Kitchings:

Enclosed, please find the original and seven copies of the County of Newberry's Return to Respondent's Motion to Dismiss in the referenced matter. Please file the originals and return a clocked-in copy to me in the enclosed self-addressed, stamped envelope, so that my file will reflect the filing.

Thank you in advance.

Yours very truly,


Patrick J. Frawley
/pjf; enclosure

cc: Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110,
Columbia SC 29260-1110

Mr. Wayne Adams

A. J. Tothacer, Jr., Esquire



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Davis | Frawley LLC

Attorneys at Law

140 East Main Street
Old Courthouse Place
P.O. Box 489, Lexington, SC 29071

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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