
IN THE
SUPREME COURT OF ARKANSAS

ZARA L. THOMAS, TRUSTEE OF THE
ZARA L. THOMAS REVOCABLE TRUST
U/D/T NOVEMBER 20, 1998, AND OF THE
MARY C. THOMAS REVOCABLE TRUST
U/D/T NOVEMBER 20, 1998

APPELLANT

v.

Case No. 11-930

CITY OF FAYETTEVILLE, ARKANSAS

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY

THE HONORABLE JOANNA TAYLOR, CIRCUIT JUDGE

**CITY OF FAYETTEVILLE'S MOTION TO DISMISS APPEAL FOR
LACK OF JURISDICTION AND FOR EXPEDITED CONSIDERATION,
AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF**

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MOTION

COMES NOW, the City of Fayetteville, Arkansas, Appellee herein, by and through its attorneys, Christopher B. "Kit" Williams, City Attorney, and Jason B. Kelley, Assistant City Attorney, stating and alleging the following in support of the City of Fayetteville's Motion to Dismiss Appeal for Lack of Jurisdiction and for Expedited Consideration, and Memorandum of Authorities in Support Thereof:

1. The City of Fayetteville ("City") filed a Complaint in eminent domain against Appellant, Zara L. Thomas, Trustee, in the Washington County Circuit Court, Division Seven, the Honorable Joanna Taylor, Circuit Judge, presiding, on July 27, 2011, seeking to condemn permanent easements on a portion of real property owned by Appellant needed for the construction, maintenance, repair and/or replacement of a multi-use recreational and transportation trail, pursuant to authority granted by Ark. Code Ann. § 14-269-103, § 18-15-201 and § 18-15-301 *et seq.*

2. Concurrent with filing the Complaint, the City filed a Motion for an Order of Immediate Possession seeking the Circuit Court's approval of the City's deposit of \$17,300.00 into the registry of the Circuit Court as just compensation for the taking, and authorizing the City's immediate entry onto the property to commence construction activities. Mr. Thomas, through counsel, objected to the granting of the Motion.

3. Mr. Thomas asserted that the statutory procedure for exercising eminent domain used in this case violates the U.S. and/or Arkansas Constitutions, or alternatively, that the City lacks statutory authority to exercise eminent domain for purposes of obtaining rights in real estate for the construction, maintenance and use of a recreational and transportation trail. The Circuit Court rejected Mr. Thomas' arguments and granted the City's Motion on August 19, 2011. It is from this interlocutory Order that Mr. Thomas seeks to appeal.

4. The August 19, 2011, Order of the Circuit Court is not a final appealable order necessary to vest this Court with jurisdiction as authorized by Ark. R. App. P. Civ. 2(a)(1), nor is the Order one that "determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action[.]" Ark. R. App. P. Civ. 2(a)(2).

5. Any interpretation of the Circuit Court's Order or the applicable rules which would permit an interlocutory appeal works to frustrate the clear intent of the General Assembly in enacting Ark. Code Ann. § 18-15-303(b)—that "determinations of questions in controversy in the proceedings" not "retard the progress of construction."

6. Failure to present an appealable order fails to vest this Court with jurisdiction to consider the appeal.

7. By Order of September 8, 2011, the Circuit Court stayed proceedings in this action, including the August 19, 2011, Order approving the registry deposit and granting a right of possession, pending an appeal to this Court. Construction of the trail has halted, and the City has withdrawn from Mr. Thomas' property in conformity with the Circuit Court's Order.

8. Determination of legal matters at issue in this case has retarded the progress of construction of this recreational and transportation trail, and the expedited consideration of this Court is requested to reduce the costs to the taxpayers of the City of Fayetteville caused by the delay of this public project.

WHEREFORE, the City of Fayetteville, Arkansas, Appellee herein, prays the Supreme Court of Arkansas grant its Motion to Dismiss Appeal for Lack of Jurisdiction and for Expedited Consideration, remand this case to the Washington County Circuit Court for further proceedings, and grant any and all further relief to which the City of Fayetteville, Arkansas is entitled.

MEMORANDUM OF AUTHORITIES

There are “[t]wo facets to . . . [eminent domain] litigation which are to be resolved before there is a final judgment: 1) the right of the city to exercise eminent domain, and 2) the right of the landowners to just compensation.” Hyatt v. City of Bentonville, 275 Ark. 210, 211, 628 S.W.2d 326, 327 (1982). To permit an appeal without both considerations having been met “constitutes piecemeal

litigation.” Id. at 212, 628 S.W.2d at 327. See also, Lamb v. JFM, Inc., 311 Ark. 89, 842 S.W.2d 10 (1992) (as to the general rationale for requiring finality). “In order for a judgment to be final and appealable, it must dismiss parties from court, discharge them from the action or conclude their rights to the subject matter in the controversy.” Ford Motor Co. v. Harper, 353 Ark. 328, 330, 107 S.W.3d 168, 169 (2003) (citing Warren v. Kelso, 339 Ark. 70, 3 S.W.3d 302 (1999)).

The finality requirement is a critical jurisdictional issue which this Court must raise, even if the parties fail to do so. Wilburn v. Keenan Cos., 297 Ark. 74, 75-76, 759 S.W.2d 554, 555 (1988) (citing Mueller v. Killam, 295 Ark. 270, 748 S.W.2d 141 (1988)). “Where no final or otherwise appealable order is entered, [the Supreme Court] lacks jurisdiction to hear the appeal.” Ford Motor Co., 353 Ark. at 330, 107 S.W.3d at 169 (citing Smith v. Smith, 337 Ark. 583, 990 S.W.2d 550 (1999) and Hall v. Lunsford, 292 Ark. 655, 732 S.W.2d 141 (1987)). Interlocutory orders or decisions on other incidental matters in the Circuit Court are not appealable because they are not final. Banquet Foods v. McGlothin, 26 Ark. App. 130, 132, 760 S.W.2d 880, 881 (1988). The fact that the interlocutory issue decided by the Circuit Court is an important one is not sufficient to confer jurisdiction on this Court to consider an appeal. Ford Motor Co., 353 Ark. at 330, 107 S.W.3d at 169 (citing Scheland v. Childres, 313 Ark. 165, 852 S.W.2d 791 (1993)).

Of the specific types of interlocutory orders this Court will review on appeal, as provided in Ark. R. App. P. Civ. 2, none include an order of the sort issued in the instant case by the Circuit Court on August 19, 2011. Any strained interpretation of the Order which might operate to include it operates to frustrate the clearly stated intent of the General Assembly in adopting Ark. Code Ann. § 18-15-303(b)-- that construction not be delayed by legal controversies.

When the determination of questions in controversy in the proceedings is likely to retard the progress of construction, the court, or judge in vacation, shall designate an amount of money to be deposited by the municipal corporation, subject to the order of the court and for the purpose of making the compensation and paying damages when the amount thereof has been assessed. The court or judge shall designate the place of the deposit. Whenever a deposit has been made in compliance with the order of the court or judge, it shall be lawful for the municipal corporation to enter upon the lands in controversy and proceed with its work of construction prior to the assessment and payment of damages and compensation.

Ark. Code Ann. § 18-15-303(b)(1)-(2) (2003).

Furthermore, this case *does not* present “one of the comparatively rare instances . . . in which an order must be regarded as appealable because otherwise the order would divest a substantial right in such a way as to put it beyond the power of the court to place the party in its former condition.” Omni Farms, Inc. v. Ark. Power & Light Co., 271 Ark. 61, 63, 607 S.W.2d 363, 364 (1980). See Ark. R. App. P. Civ. 2(a)(2). Improvements placed on the property could be removed and the open land returned to Mr. Thomas in its prior condition. No permanent

structures are being removed or destroyed in order to complete the public trail project. Permitting this case to proceed to conclusion before an appeal does not place Mr. Thomas' arguments beyond the power of a court to consider. His rights are additionally protected in that he could, if warranted, maintain an action for inverse condemnation against the City. See generally Collier v. City of Springdale, 733 F.2d 1311 (8th Cir. 1984), cert. denied, 469 U.S. 857 (1984).

Omni Farms dealt with a privately-owned public utility and not a governmental entity. The "broad discretion" a property owner must overcome when challenging the government's exercise of eminent domain (that the government operated in bad faith, abused discretion or committed fraud) weighs heavily against allowing an order approving a deposit and granting immediate possession to be appealable. Pfeifer v. City of Little Rock, 346 Ark. 449, 461, 57 S.W.3d 714, 722 (2001).

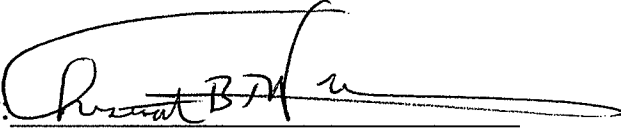
The public policy of this state weighs substantially against permitting property owners to "hold up" public works projects through procedural delay tactics in eminent domain cases. Permitting interlocutory appeals and stays pending resolution of such appeals could encourage property owners to threaten such delays (which could not only delay needed projects, but also increase construction costs) to force payment of more than just compensation. The costs of delay then become a negotiation factor between the owner and the government.

The major purpose of the General Assembly in enacting Ark. Code Ann. § 18-15-303(b) is to preclude just such an occurrence. This Court should not sanction activity which is clearly against the public policy of the state.

For the foregoing reasons, the Court's consideration of this case at this time is premature.

Respectfully Submitted,

CITY OF FAYETTEVILLE, ARKANSAS
APPELLEE

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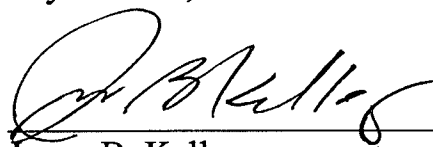
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CERTIFICATE OF SERVICE

I, Jason B. Kelley, hereby certify that a true and correct copy of the City of Fayetteville's Motion to Dismiss Appeal for Lack of Jurisdiction and for Expedited Consideration, and Memorandum of Authorities in Support Thereof has been served this date by placing the same in the U.S. Mail, first-class postage pre-paid, addressed to the following persons:

S. Lance Cox, Esq.
COX, COX & ESTES, PLLC
P.O. Box 878
Fayetteville, AR 72702

Honorable Joanna Taylor
CIRCUIT JUDGE, DIVISION 7
123 N. College, Suite 101
Fayetteville, AR 72701



Jason B. Kelley

September 23, 2011

Date