July/Aug. 2020 Volume XL, Nos. 1-2

Torts; Inverse Condemnation; Trespass; Private Nuisance; Constitutional Claims; Public Enterprises; Water Leak

Wagner v. City of Charlotte, ___ N.C. App. ___ (No. COA18-1084, Mecklenburg– 2/4/20), *disc. review denied, appeal dismissed*, ___ N.C. ___, (No. 116P20, 8/14/20)

- ***Holding*– In plaintiffs' appeal alleging multiple claims from broken pipe, Court of Appeals holds *inter alia* that a single instance of temporary flooding of plaintiffs' properties without the possibility of recurrence did not constitute a taking for purposes of an inverse condemnation claim.**

- ***Key Excerpt*–** Plaintiffs appealed from an order: (1) granting summary judgment for defendant-City as to claims for inverse condemnation, negligence, private nuisance, trespass, and violations of due process and equal protection under the N.C. Constitution and dismissing plaintiffs' claims in both 16 CVS 19141 and 17 CVS 21467; and (2) dismissing as moot, *inter alia*, plaintiffs' motion for partial summary judgment on inverse condemnation, motion to strike the affirmative defenses or, in the alternative, for summary judgment as to affirmative defenses, motion for protective order, and request to consolidate the related actions.

The Court initially observed, "On appeal, the dispositive issues are whether the trial court properly granted Summary Judgment for the City on Plaintiffs': (I) Inverse Condemnation claim based on a single, nonrecurring incidence of flooding resulting in temporary damage arising from the broken water pipe; (II) Negligence claims; (III) Private Nuisance claims; (IV) Trespass claims; and (V) the remaining state constitutional claims."

The Court first addressed the inverse condemnation claim. "In light of our Supreme Court's decision in Akzona [Inc. v. S. Rwy. Co., 314 N.C. 488, 334 S.E.2d 759 (1985)], it would seem clear a single instance of flooding from a broken water pipe that was repaired within hours would not give rise to an inverse-condemnation claim. Plaintiffs, however, argue … Arkansas Game & Fish Commission v. United States [568 U.S. 23, 26, 184 L. Ed. 2d 417, 423 (2012)] altered the waterfront for analyzing inverse-condemnation claims

arising from flooding. We disagree. To the contrary, Arkansas Game & Fish Commission is generally consistent with the analysis historically employed by our state courts…. [O]ur Supreme Court's decision in Lea Co. [v. N.C. Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983)] is generally consistent with Arkansas Game & Fish Commission and, in fact, largely foreshadowed that decision. As such, Arkansas Game & Fish Commission does not alter our course here. Akzona followed the reasoning from Lea Co. and remains binding on this Court. Thus, we conclude a single instance of temporary flooding of Plaintiffs' properties without the possibility of recurrence did not constitute a taking for purposes of an inverse condemnation claim. *See* Akzona, Inc., 314 N.C. at 493-94, 334 S.E.2d at 762-63." (Citations omitted.)

As to the negligence claims, plaintiffs advanced theories that the City was negligent in failing to properly maintain or repair the pipe so as to prevent the leak and/or in its response to the leak once it occurred. Citing Mosseller v. Asheville, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966), the Court determined that there was no evidence that defendant-City had prior actual notice of any defect or problem with the water main resulting in the leak. The Court did not find the existence of one work order dating back five years determinative. "Plaintiffs contend this interrogatory answer shows the City had prior knowledge of a problem with the water main in the vicinity of the leak at issue in this case. Additional evidence, including deposition testimony of a City employee who pointed to the specific work order, reflected this was a service call to locate pipes and not actually a repair. Plaintiffs point to no other evidence that this was a repair to create any issue of fact. Moreover, taken at face value, the interrogatory answer reflects a leak that was repaired and would not create direct notice to the City of a subsequent leak at a different point in the lines." The Court also noted that plaintiffs' own expert testified the there was no duty to inspect underground water lines if there had been no reported issues. "Plaintiffs' expert further testified: 'I would not think that the [C]ity would have to worry about every inch of water line . . . if they did not have a reason to expect that the water line was ready to be broken or . . . is in poor repair[.]' Another Plaintiffs' expert, when asked if in his opinion there was anything the City could have done to prevent this leak, testified in deposition: 'Not this specific event, no.' Plaintiffs' evidence thus falls short of establishing a triable issue of fact as to whether the City exercised 'ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection.' Mosseller, 267 N.C. at 107, 147 S.E.2d at 561." Turning to the timely response theories, the Court reversed the entry of summary judgment for the City as to one property (Wagner/Lichstrahl) that allegedly may not have flooded until an hour after the City could have shut off the water.

As to the private nuisance claim, the Court affirmed, citing Hughes v. City of High Point, 62 N.C. App. 107, 109, 302 S.E.2d 2, 3 (1983). "[T]his Court … pointed out the critical distinction: 'As we understand the law, it is the maintenance of a structure or condition permanent in nature which constitutes a nuisance. The defendant would not be liable for a nuisance if it had negligently maintained or performed some work on a structure which caused some temporary inconvenience to the plaintiffs.' Id. In this case, Plaintiffs' claim arises from a single incident of a burst water main resulting in temporary damage to their properties. As such, we conclude Plaintiffs' claims do not sound in

nuisance. Thus, we affirm the trial court's grant of Summary Judgment to the City on Plaintiffs' Private-Nuisance claims."

As to the trespass claims, the Court concluded, "Here, there is no contention the City committed an intentional trespass. Rather, Plaintiffs rely on their claims for Negligence. As we have already concluded Summary Judgment was proper for the City as to Henke and Siravo on both theories of Negligence, we affirm Summary Judgment as to them on their Trespass claims in the 2016 Lawsuit and dismissal of the same claim in the 2017 Lawsuit. Likewise, we affirm Summary Judgment to the City as to Wagner and Lichstrahl on the theory the City negligently maintained the water main. However, we reverse Summary /Judgment as to Wagner and Lichstrahl on the theory the City was negligent in their response to the water main burst resulting in flooding of their property in the 2016 Lawsuit and reverse dismissal of the 2017 Lawsuit on this limited theory."

As to the constitutional claims, plaintiffs argued that the trial court erred in granting summary judgment regarding the claims arising from alleged violations of State constitutional protections affording the right to due process and equal protection, when defendant-City denied their claims arising from the flooding: specifically, they contended the forecast of evidence revealed that they were afforded different treatment than other similarly situated residents who submitted claims for flood damage solely because plaintiffs had property casualty insurance, thus constituting the basis for the City's denial. The Court held that the trial court properly granted summary judgment as to plaintiffs' remaining constitutional claims. "While it is true the City denied their claims and the evidence reflects Plaintiffs did have such insurance, we see no evidence in the Record to support any correlation between these two facts. To the contrary, our review of the evidence reflects the City applied the same process to Plaintiffs' claims as it did to others identified in the Record."

In sum, the Court affirmed summary judgment for defendant-City as to plaintiffs' inverse-condemnation, nuisance, and remaining constitutional claims. The Court affirmed summary judgment for the City on the negligence claims by Henke and Siravo. The Court affirmed summary judgment for the City as to the negligence claim of Wagner and Lichstrahl on the theory of negligent maintenance of the water main but reversed summary judgment on the theory of the City's alleged negligent response to the water main break. Likewise, the Court affirmed summary judgment in the 2016 Lawsuit and dismissal of the 2017 Lawsuit as to the trespass claims brought by Henke and Siravo and reversed summary judgment in the 2016 Lawsuit and dismissal of the 2017 Lawsuit as to the trespass claims of Wagner and Lichstrahl based on the theory of the City's alleged negligence in responding to the water main break. Accordingly, the Court vacated the trial court's dismissal of the remaining motions as moot and remanded the matter to the trial court to proceed on those motions, as necessary, and to proceed with the remaining claims of Wagner and Lichstrahl.

- ***Synopsis***— Appeal by plaintiffs from April 2018 orders. Affirmed in part, reversed in part, vacated in part, and remanded. Opinion by Judge Hampson, with Judge Dillon concurring. By separate opinion, Judge Murphy concurred in part and in result only in part. On August 14, 2020, the N.C. Supreme Court denied plaintiffs' petition for discretionary review and allowed defendant's motion to dismiss plaintiffs' appeal based upon constitutional question.

Torts; Law Enforcement; Individual Capacity Claim; Public Official Immunity

Bartley v. City of High Point, ___ N.C. App. ___ (No. COA19-1127, Guilford– 7/7/20)

- ***Holding*– Majority affirms trial court's partial denial of summary judgment as to claims for malicious prosecution, false imprisonment/arrest, and assault and battery filed against officer, driving unmarked car in traffic stop ending in plaintiff's residential driveway, in his individual capacity.**

- ***Key Excerpt*–** Officer Blackman contended the trial court erred, given the defense of public official immunity, wherein he argued that, because he was a public official conducting his duty, he was entitled to the protection of public official immunity. In August 2017, defendant-Officer Blackman was driving in an unmarked car, when he observed plaintiff pass a slow-moving truck over a double yellow line in violation of G.S. 20-146(a): he believed the truck was not moving so slow as to impede the flow of traffic, and accordingly decided to initiate a traffic stop of plaintiff's vehicle. Viewing the facts in the light most favorable to plaintiff, this case involved Officer Blackman's stop of plaintiff within his residential driveway in order to cite plaintiff for a traffic infraction. Without first identifying himself as a police officer and the reason for his presence, Officer Blackman allegedly slammed the 60-year old unarmed plaintiff (who was not being threatening or attempting to run away) against his car and handcuffed him tightly. Here, plaintiff alleged that Officer Blackman acted with malice by body slamming him into the trunk and charging and arresting him for resisting an officer without probable cause.

Ultimately, the majority found this case readily distinguishable from defendant-officer's cited case of Brown v. Town of Chapel Hill, 233 N.C. App. 257, 756 S.E.2d 749 (2014). "There, the plaintiff was walking home when a police officer who mistakenly believed the plaintiff was the subject of several arrest warrants ordered the plaintiff to stop. Brown, 233 N.C. App. at 258-59, 756 S.E.2d at 751. When the plaintiff asked why he was being told to stop, the officer grabbed the plaintiff's hand, spun him around, pushed him against the back of a police vehicle, pulled the plaintiff's other arm behind his back, and tightly fastened handcuffs on his wrists. *Id.* at 258, 756 S.E.2d at 751. The officer then pushed the plaintiff against the vehicle a second time and patted him down. *Id.* at 259, 756 S.E.2d at 751. While doing so, the plaintiff alleged the officer tried to 'inflict great pain' and made condescending and racist remarks. *Id.* at 269, 756 S.E.2d at 758. After verifying the plaintiff's identity and confirming there were no warrants for his arrest, the officer let the plaintiff go. *Id.* at 270, 756 S.E.2d at 758. This Court held that the officer was entitled to the defense of public official immunity on the claim of false imprisonment because, under those facts, the plaintiff could not establish malice. *Id.* at 271, 756 S.E.2d at 759."

Finding the matter here readily distinguishable, the majority observed, "This Court found that it was reasonable for the defendant in Brown to arrest the plaintiff because he reasonably believed the plaintiff was a wanted man with several warrants out for his arrest, even though the defendant later learned he was mistaken. *Id.* at 270, 756 S.E.2d at 758. In addition, the Brown plaintiff merely vaguely alleged that the defendant 'tried to inflict great pain' on him during the arrest and made disparaging comments. We thus held that '[w]ithout more, [the] plaintiff's bare contention that the handcuffs were painful is not enough to rise to the level of wanton[ness] or show an intent to

injure.' *Id.* In contrast, plaintiff here was detained on his private property for refusing to follow an unidentified individual's commands for him to get back into his car. The reason for Officer Blackman's stop was not based on suspicion that plaintiff had warrants out for his arrest, like the plaintiff in Brown, but rather in order to cite plaintiff for a traffic infraction. Nevertheless, without first identifying himself as a police officer and the reason for his presence, Officer Blackman allegedly slammed plaintiff against his car and handcuffed him tightly." The majority determined that the facts here differed markedly from Brown, and were sufficient to raise an issue of genuine fact as to whether the officer acted with malice.

- ***Dissent***— Judge Tyson dissented, voting to reverse the trial court's partial denial of summary judgment and remand for entry of an order granting Officer Blackman's motion. "The majority's opinion erroneously asserts purported genuine issues of material fact exist and affirms the trial court's partial denial of summary judgment on Officer Blackman's claim of public official immunity. The majority's opinion fails to recognize the burden plaintiff carries on this issue and defendant's presumptive entitlement to judgment." Judge Tyson emphasized that no genuine issues of material fact existed in the pleadings, depositions, and affidavits to overcome defendant's motions and to deny summary judgment. Judge Tyson observed, "Here, undisputed evidence shows Officer Blackman handcuffed plaintiff because: (1) plaintiff ignored his commands, creating an 'officer safety issue'; (2) Officer Blackman 'ha[d] no way of knowing what [plaintiff's] intentions [we]re to [him] or any other aspect of the stop;' and, (3) plaintiff's refusal to comply with his commands to get back into his vehicle constituted probable cause to charge plaintiff with resisting, delaying, or obstructing a public officer."

"Plaintiff acknowledges and agrees it is unusual for a driver to get out of his vehicle during an investigatory stop and, after being told to return and re-enter his vehicle, to start walking towards the police officer making the stop. He agrees police officers are rightfully wary of this movement, because it presents a potential danger to the safety of the officer."

"Plaintiff further agreed he could not ignore Officer Blackman's directives just because he had continued to drive after Officer Blackman had activated his blue lights and siren and did not stop until after he had entered his driveway. Plaintiff also agreed there was nothing unlawful or inappropriate about a police officer telling him to return to and remain in his car during the course of a traffic stop. Along with the admitted lawful validity of the investigatory stop, these four admissions are sufficient to defeat plaintiff's claims. *Id.* [State v. Carrouthers, 200 N.C. App. 415, 418, 683 S.E.2d 781, 784 (2009)]."

- ***Synopsis***— Appeal by defendant-Officer Blackman from October 2019 order. Affirmed by a divided panel. Opinion by Judge Arrowood, joined by Judge Dietz. Judge Tyson dissenting.

Nota Bene (N.B.)— Other Recent Decision of Note

Torts; 42 U.S.C. 1983; New Trial; Jury Instruction; No Reversible Error
Lambert v. Town of Sylva (Lambert II), ___ N.C. App. ___ (No. COA19-727, Jackson— 7/7/20) (This is the second time the case is on appeal: in Lambert I, 259 N.C. App. 294, 307, 816 S.E.2d 187, 197 (2018), the Court granted plaintiff a new trial on his claims alleged under 42 U.S.C. § 1983 for violations of constitutional rights and for wrongful termination in violation of public policy. On remand and following a new

trial, the jury returned a verdict in defendant-Town's favor. Plaintiff appealed from the trial court's July 2018 judgment consistent with the jury verdict. Here, the Court concluded that there was no reversible error at trial and affirmed the trial court's judgment. "It is true the trial court likely could have more clearly delineated Plaintiff's Section 1983 Claim for violation of his federal constitutional rights from Plaintiff's additional claims sounding in North Carolina law and policy. In effect if not in substance, however, the trial court's instruction asked the jury to consider if there is a 'direct causal link' between Defendant's termination of Plaintiff and the alleged constitutional deprivation. [Canton v.] Harris, 489 U.S. [378] at 385, 103 L. Ed. 2d [412] at 424 [(1989)]. Implicit in the jury verdict here is the finding there was no constitutional harm to Plaintiff, a requisite for a violation of Section 1983 and for municipal liability under Monell [v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 56 L. Ed. 2d 611 (1978)]. *See* [Los Angeles v.] Heller, 475 U.S. [796] at 799, 89 L. Ed. 2d. [806] at 810-11 [(1986) (*per curiam*)]. Thus, even assuming it was error for the trial court to decline to instruct the jury on the question of whether Defendant's alleged constitutional 'deprivation resulted from [municipality's] official policy or custom[,]' the jury verdict finding Plaintiff's filing to run for sheriff was not a substantial or motivating factor in his termination renders any error harmless. Outlaw [v. Johnson], 190 N.C. App. [233] at 243, 660 S.E.2d [550] at 559 [(2008)] ('Even assuming *arguendo* that the trial court erred by failing to give Defendants' requested jury instruction, we find that any such error was harmless error in light of the jury verdict.'). Therefore, the trial court's jury instruction did not amount to reversible error.") (Appeal by plaintiff from July 2018 judgment. No prejudicial error. Opinion by Judge Hampson, with Judge Bryant and Judge Collins concurring.))