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Immunity; Insurance Contract; Summary Judgment Motion; Interlocutory Order; Substantial Right

Cline v. James Bane Home Bldg., LLC, 2021-NCCOA-266 (No. COA20-422, Gaston— 6/15/21)

- ***Holding*— Where plaintiffs-homeowners did not meet their burden of production as to insurance contract before the trial court, Court of Appeals holds inter alia that trial court correctly entered summary judgment in favor of County and its environmental health administrator, in his official capacity, because plaintiffs-homeowners failed to forecast evidence demonstrating existence of a genuine issue of material fact as to whether governmental immunity was waived to the extent of purchase of liability insurance.**

- ***Key Excerpt*—** This is an action brought by purchasers (plaintiffs-homeowners) of a new home against several defendants, including *inter alia* the builder and real estate agent, as well as the County and its environmental health administrator (Hopper). Following discovery, defendant-County and defendant-environmental health administrator (Hopper) sought summary judgment, arguing they were entitled to governmental immunity and public official's immunity. In a March 2020 order, the trial court granted the motion, ordering "Defendants Gaston County and Curtis Hopper are entitled to judgment as a matter of law on the bases of governmental immunity and public official[']s immunity." Plaintiffs-homeowners appealed. (The other defendants remain in the case and did not appeal the order.)

The Court initially determined that it had subject matter jurisdiction, as the County's health department was not a state agency or institution. The Court also disagreed with the contention that the appeal warranted dismissal as interlocutory given insufficient grounds for appellate review. The Court pointed to the principle that an appeal from an order granting governmental immunity affects a substantial right.

As to the claims against defendants-County and Hopper (the environmental health administrator) in his official capacity, plaintiffs-homeowners argued the trial court erred by granting summary judgment on the grounds that the County

waived its governmental immunity for itself and its employees when it purchased liability insurance. As to the governmental function issue, the Court observed, "[plaintiffs-homeowners] do not argue, at the trial court level or on appeal, that Gaston County or Hopper, in his official capacity, were not performing a governmental function when they were allegedly negligent. As such, whether Gaston County or Hopper, in his official capacity, were performing a governmental function is deemed abandoned and not an issue before us on appeal. *See* N.C. R. App. P. 28(a) (2021) ('The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.')"

As to the purchase of insurance coverage issue, G.S. 160A-435, the Court stated, "Here, the Record reflects a liability insurance policy for Gaston County was in effect from 1 July 2015 to 1 July 2016. However, the insurance contract in its entirety is not contained in the Record and does not appear to have been presented to the trial court. A total of three pages from the actual policy are included in the Record, entitled: the *Schedule of Forms and Endorsements*, the *Public Risk Liability Retained Limit Policy Declarations*, and the '*Wrongful Act' Claims-Made Coverage*. These three pages do not contain the language of the coverage provisions or exclusion provisions and their exact language does not appear anywhere else in the Record. In her affidavit, [the County Manager] provided a parol summary of her interpretation of the policy…. While Appellees' motion for summary judgment indicates reliance on discovery responses, nothing in the Record indicates presentation of the insurance contract to the trial court for examination of its contents."

"The lack of the insurance contract and exclusionary language in the Record restricts us from determining the existence of coverage for the alleged acts of Gaston County or Hopper in his official capacity…. The [plaintiffs-homeowners], as the non-moving party, had the burden to produce the insurance contract to allow an examination of Gaston County's potential waiver of governmental immunity. The [plaintiffs-homeowners] failed to forecast evidence showing the existence of a genuine issue of material fact as to whether Appellees waived governmental immunity to the extent of Gaston County's insurance coverage. The entry of summary judgment in favor of Gaston County and Hopper, in his official capacity, was proper." (Citation omitted.) (While the Court affirmed the trial court's judgment insofar as its ruling was based on governmental immunity, the Court reversed in part the trial court's decision to grant summary judgment as to Hopper, a public employee sued in his individual capacity, on the basis of public official's immunity.)

- ***Synopsis—*** Appeal by plaintiffs from March 2020 order. Affirmed in part; Reversed in part. Opinion by Judge Murphy, with Judge Dillon and Judge Arrowood concurring.

Land Use; Unified Development Ordinance; Non-Conforming Use; Campsite

85' and Sunny, LLC v. Currituck County, 2021-NCCOA-422 (No. COA20-648, Currituck– 8/17/21)

- **Holding– Non-conforming uses and structures are not favored under public policy, and zoning ordinances are construed against indefinite continuation of a non-conforming use. In appeal by campground, decision of Board of Adjustment upheld.**

- ***Key Excerpt–*** This case arose from petitioner's proposed improvements to a campground. Both respondent-County and petitioner appealed from the superior court's order reversing the Board of Adjustment's: (1) determination of the number of campsites that existed on the campground as of January 1, 2013, and (2) conclusion that the County's Unified Development Ordinance (UDO) permitted some, but not all, of petitioner's proposed improvements to the campground. On appeal, the County contended that the superior court erred by: (1) failing to articulate the standard of review applied to each issue; (2) reversing the Board's decision as to the number of campsites existing as of January 1, 2013; and (3) reversing the Board's decision that certain proposed modifications in petitioner's Plan were not permitted under the UDO. Petitioner contended that the superior court erred by affirming the Board's determination that the swimming pool was not allowed under the UDO. The Court of Appeals left the Board of Adjustment's order undisturbed.

  Respondent argued that the superior court's order had to be vacated for failure to articulate the standard of review applied to each issue. The Court disagreed, determining that the superior court had articulated the proper standard of review to apply to each issue on appeal.

  Turning to the merits, the Court first addressed the determination of the number of campsites. In holding in favor of the County, the Court stated, "While the court must take into account 'contradictory evidence or evidence from which conflicting inferences could be drawn[,]' '[t]he "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*[.]' Thompson v. Wake Cnty. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted)."

  "Here, the Board's determination of the number of campsites was supported by substantial evidence. Although there was the evidence from which conflicting inferences could have been drawn, the superior court erred by replacing the Board's judgment with its own, even if 'the court could justifiably have reached a different result had the matter been before it *de novo*[.]' *Id.* The superior court thus incorrectly applied the whole-record test to the issue of the number of campsites at the Campground on 1 January 2013."

  The Court then addressed the proposed improvements to the campground. The Court initially observed, "The resolution of this dispute turns on the proper construction of Chapter 8 of the UDO. Chapter 8 of the UDO regulates nonconforming uses. While nonconforming uses 'are allowed to continue, and are encouraged to receive routine maintenance[,]' UDO § 8.1.2., the 'purpose and intent' of Chapter 8 'is to regulate and limit the continued existence' of nonconforming uses. UDO § 8.1.1. Non-conforming uses and structures 'are not favored under the public policy of North Carolina, and zoning ordinances are

construed against indefinite continuation of a non-conforming use.' Jirtle v. Bd. of Adjustment for the Town of Biscoe, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005) (quotation marks and citation omitted)."

Finding it possible to construe the general provisions concerning nonconforming uses and the specific provisions concerning campgrounds harmoniously, the Court stated, "…. Petitioner's interpretation of Chapter 8 is contrary to the principle that '[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.' Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990) (*quoting* State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). Petitioner's interpretation would allow any and all improvements to a nonconforming campground so long as they do not enlarge the campground's land area or number of campsites beyond that which existed on 1 January 2013 or otherwise change the campground to another nonconforming use under section 8.2.2 [which provides that '[a] nonconforming use shall not be changed to any other nonconforming use[,]']. Under this interpretation, an owner could indefinitely extend the lifespan of a nonconforming campground by regularly upgrading the campground with new amenities. This would contradict the stated purposes of Chapter 8 to 'regulate and *limit* the continued existence' of nonconforming uses, UDO § 8.1.1. (emphasis added), and promote the continued viability of a land use that the County has deemed 'generally incompatible with the permitted uses in the district[,]' *see* UDO § 8.2.1. (defining nonconforming uses)."

"The Board's determination that '[t]he new facilities proposed by [Petitioner] qualify as an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted' was in accordance with law, consistent with the purpose and intent of UDO Chapter 8 regulating and limiting the continued existence of nonconforming uses, and properly preserved the legislative body's intent. The trial court did not err by affirming the Board's conclusion that the pool was not a permissible proposed improvement. However, the trial court erred by reversing the Board's conclusion that the remainder of the new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted."

The Court concluded its opinion by stating, "The superior court incorrectly applied the whole record test to the Board's determination of the number of campsites on Petitioner's campground as of 1 January 2013 as the Board's decision concerning the number of campsites on the Campground was supported by substantial, competent evidence in view of the entire record. The superior court correctly applied *de novo* review and properly affirmed the Board's conclusion that Petitioner's proposed swimming pool is an impermissible expansion, enlargement, and intensification of a nonconforming use and is not permitted under the UDO. The superior court incorrectly applied *de novo* review and erred by reversing the Board's conclusion that the remaining new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted. Accordingly, we affirm the portion of the superior court's order that affirms the Board's conclusion regarding the pool. We reverse the remainder of the superior court's order and remand this matter to the superior court to affirm the remainder of the Board's order. The net result is that the Board's order [is] affirmed."

• ***Synopsis—*** Appeal by respondent-County and cross-appeal by petitioner from March 2020 order. Affirmed in part; Reversed and remanded in part. Opinion by Judge Collins, with Chief Judge Stroud and Judge Wood concurring.

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

Procedure; Pleading and Proving Ordinances State v. McKoy, 2021-NCCOA-257 (No. COA20-582, Robeson- 6/1/21) (***unpublished***) (The Court of Appeals held *inter alia* that the trial court erred in denying defendant's motion to dismiss the charge of discharging a weapon within city limits in violation of Lumberton's ordinance. The Court initially observed that: (1) G.S. 160A-79(a) requires that "[i]n all civil and criminal cases a city ordinance that has been codified in a code of ordinances adopted and issued in compliance with [G.S.] 160A-77 *must be pleaded by both section number and caption*"; and (2) G.S. 8-5 further provides that "[i]n a trial in which the offense charged is the violation of a town ordinance, *a copy of the ordinance* alleged to have been violated, proven as provided in [G.S.] 160A-79, *shall be prima facie evidence* of the existence of such ordinance." (Emphasis added.) *See also* Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach, 251 N.C. App. 771, 776, 796 S.E.2d 120, 123 (2017) (courts "cannot take judicial notice of the provisions of municipal ordinances"). Here, the State conceded that the charging documents did not comply with the statute, but argued that defendant had actual notice of the caption of the ordinance nonetheless. The Court observed that the State cited no authority to support its argument, and that this issue was not dispositive because the State also failed to introduce the ordinance in evidence at trial. "Only after the close of evidence, and outside the presence of the jury, did the prosecutor present copies of the ordinance, along with the proposed jury instruction, to the trial court. That was too late. *See* In re Jacobs, 33 N.C. App. 195, 197, 234 S.E.2d 639, 641 (1977) (reversing the trial court where '[t]he ordinance was clearly not proven at trial and the record does not contain a caption')." Accordingly, the Court reversed the trial court's denial of defendant's motion to dismiss the charge of discharging a firearm within city limits and vacated defendant's judgment of conviction on this charge. The Court held that the trial court did not err in upholding the other charges brought by the State against defendant. (Appeal by defendant from May 2019 judgment. No error in part; vacated in part. Opinion by Judge Inman, with Judge Murphy and Judge Wood concurring.))