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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)

- ***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 claims, nuisance claims, 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.

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

Land Use; Zoning; Electronic Gaming Businesses; Sweepstakes; Change in Ownership Starlites Tech Corp. v. Rockingham Cty., ___ N.C. App. ___ (No. COA19-406, Rockingham— 2/18/20)

(Petitioners appealed from the trial court's order affirming respondent-County Board of Adjustment's determination that the operation of petitioners' business violated the special use permit requirements set forth in the County's amended Unified Development Ordinance (UDO). Petitioners argued *inter alia* that the trial court applied the wrong standard of review in affirming the Board of Adjustment's decision. Specifically, petitioners maintained that the trial court erroneously concluded, under *de novo* review, that the property's "change of ownership caused its use to discontinue, which prohibited Starlites from operating as a permissible prior non-conforming use under Rockingham County's Unified Development Ordinance[,]" and that "change of ownership is an impermissible factor to support a determination that the Stoneville property became a nonconforming use under the 2014 amended [Ordinance]." The Court agreed that a change of ownership did not constitute a change of use. The Court noted that approximately four months before the amended ordinance was enacted, defendant-County issued a zoning permit allowing MM&K to operate a sweepstakes business on the property (in compliance with the County's then-existing ordinance). Citing Graham Court Associates v. Town Council of Chapel Hill, 53 N.C. App. 543, 281 S.E.2d 418 (1981), the Court stated, "The permit designated MM&K as the Property's owner, and 'Starlite Technologies' as the applicant and occupant. The County's approval of MM&K's permit application indicates that, at the time the permit was issued, the Property met and complied with the requirements for such a permit. The Property's subsequent change of ownership had no impact on the *use* of the Property. Starlites maintains that section 13-4(f) of the amended Ordinance [addressing the impact on nonconforming uses of structures in existence when the amended Ordinance was enacted] essentially constitutes a 'grandfather clause,' allowing a prior permissible nonconforming use to continue so long as such use was not discontinued for a period of one year. We agree. We base our decision, first and foremost, upon the plain language of section 13-4(f) of the amended Ordinance. Moreover, we note that the amended Ordinance contains no provision that a change in ownership will constitute a 'new' use or otherwise invalidate a prior permissible nonconforming use." (Emphasis in original.) In so concluding, the Court stated, "'In sum, the rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here.' [Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment], [365 N.C. 152] at 162, 712 S.E.2d [868] at 874 [(2011)]. The Board improperly concluded that Starlites was in violation of the 2014 amended Ordinance. Accordingly, because the Board's interpretation of its amended Unified Development Ordinance constituted an error of law, we reverse." (Appeal by petitioner from October 2018 order. Reversed. Judge Zachary wrote the opinion, joined by Judge Stroud and Judge Murphy.))

Public Enterprises; Impact Fees; Interlocutory Order; Substantial Right; Petition for Writ of Certiorari Lennar Carolinas, LLC v. County of Union, ___ N.C. App. ___ (No. COA19-576, Union– 2/4/20) (***unpublished***) (Defendant-County appealed from and requested certiorari review of an order denying summary judgment. The Court dismissed defendant-County's appeal for lack of jurisdiction because: (1) an order denying summary judgment is not a judgment subject to certification for immediate appeal, N.C. R. Civ. Pro. Rule 54(b); and (2) defendant-County failed to demonstrate that the interlocutory order affected a substantial right

within the meaning of G.S. 7A-27(b)(3). The Court also denied defendant-County's petition for writ of certiorari in its discretion. The Court stated, "Here, the trial court denied summary judgment and certified the decision for immediate appeal. Because the trial court's order is not a judgment subject to certification pursuant to Rule 54(b), Knighten [v. Barnhill Contr. Co.], 122 N.C. App. [109] at 111, 468 S.E.2d [564] at 565 [(1996)], we have jurisdiction to hear the County's appeal only if the order affects a substantial right. The order does not disclose a substantial right that will be lost absent immediate review, and we can identify no such right from the record." As to the latter issue, the Court rejected defendant-County's contentions regarding three putative substantial rights allegedly impaired by the trial court's order: (1) the enforcement of legislative authority free from judicial restraint or interference; (2) the financial stability of the County; and (3) the availability of the County's retroactive legislation defense, which the County contended was struck by denial of summary judgment. "An interlocutory order denying summary judgment, with limited exception, rarely impacts a substantial right. Bockweg [v. Anderson], 333 N.C. [486] at 490, 428 S.E.2d [157] at 160 [(1993)]. Certiorari review is likewise unavailable outside of 'extraordinary circumstances.' Moore [v. Moody], 304 N.C. [719] at 720, 285 S.E.2d [811] at 812 [(1982)]. The County has not, in this instance, 'present[ed] a compelling case for premature review.' Community Bank v. Whitley, 116 N.C. App. 731, 733, 449 S.E.2d 226, 227 (1994). Accordingly, we dismiss the County's appeal as interlocutory and deny certiorari in our discretion." (Appeal by defendant-County from March 2019 order. Appeal dismissed; petition for writ of certiorari denied. Opinion by Judge Inman, with Judge Arrowood and Judge Brook concurring.))

Public Enterprises; Impact Fees; Interlocutory Order; Substantial Right; Petition for Writ of Certiorari

True Homes, LLC v. Cty. of Union, ___ N.C. App. ___ (No. COA19-572, Union—2/4/20) (***unpublished***) ("This appeal is one of eight companion cases to Lennar Carolinas, LLC v. County of Union, No. COA19-576 ___ N.C. App. ___ (2020) (***unpublished***) [*see* summary *supra*], in which the County of Union appeals and seeks certiorari review of an interlocutory order denying summary judgment in its favor. Each case was consolidated for hearing, both in the trial court and on appeal, and all seek review of the same order and present the same issues. For the reasons stated in Lennar Carolinas, we dismiss this appeal as interlocutory and deny certiorari in our discretion." (Appeal by defendant-County from March 2019 order. Appeal dismissed; petition for writ of certiorari denied. Opinion by Judge Inman, with Judge Arrowood and Judge Brook concurring.)). ***Note***: The Court of Appeals had a similar disposition in six other cases upon consolidation for hearing, all being *unpublished* decisions against Union County: No. COA19-573 (Shea Homes, LLC); No. COA19-574 (Shops at Chestnut, LLC); No. COA19-575 (M/I Homes of Charlotte, LLC); No. COA19-577 (Calatlantic Grp., Inc.); No. COA19-578 (McInnis Constr. Co., Inc.); No. COA19-579 (Eastwood Constr. Co., Inc.); No. COA19-580 (Pace/Dowd Props., Ltd).