MUNICIPAL LAW NOTES

NC LEAGUE OF MUNICIPALITIES
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November 2016 Volume XXXVI, No. 5

Public Contracts; Indemnity Provision

CSX Transp., Inc. v. City of Fayetteville, ___ N.C. App. ___ (No. COA15-1286, Cumberland– 5/17/16), *disc. review denied,* ___ N.C.___ (No. 235P16, 9/22/16)

- ***Holding–*** A contract may validly provide for the indemnification of one against, or relieve one from liability for, one's own future acts of negligence.

- ***Key Excerpt–*** The Court held that the trial court erroneously concluded that, under the 1951 Crossings Agreement, plaintiff CSX was barred from recovering indemnification from the Fayetteville Public Works Commission (PWC) because of CSX's admission of negligence in the harm caused to CenturyLink. (In 2011, CSX's crane hit PWC's power lines, causing a power surge resulting in damage to electrical equipment owned by CenturyLink.)

"In Cooper [v. H.B. Owsley & Son, Inc., 43 N.C. App. 261, 258 S.E.2d 842 (1979)], this Court analogized indemnification provisions to liability insurance policies, which 'have long been enforced by the courts.' Cooper, 43 N.C. App. at 266, 258 S.E.2d at 846. Rejecting the defendant's argument that it would be against public policy to permit the plaintiff to be indemnified against its own negligence, we noted 'it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence[.]' *Id.* at 267, 258 S.E.2d at 846 ('[Defendant] contends that it is against public policy to permit [plaintiff] to be indemnified against its own negligence or against that of its employee for which it is responsible. We perceive, however, no sound reason why this must be so.'). More recently, this Court, citing Cooper, explicitly rejected the notion that North Carolina does not permit the contractual indemnification of a party for its own negligent acts. Malone v. Barnette, ___ N.C. App. ___, ___, 772 S.E.2d 256, 260-61 (2015)…."

"Here, the trial court granted summary judgment in favor of PWC on the grounds that CSX had admitted its negligence in causing or contributing to the incident, which gave rise to Centu-

ryLink's claim, and this admission barred CSX from receiving indemnification from PWC as a matter of law. As discussed *supra*, this conclusion is contrary to well-established North Carolina law. The trial court's conclusion of law was incorrect and summary judgment entered upon this erroneous conclusion was improper. The trial court's 8 June 2015 order, which granted summary judgment in favor of PWC as a result of CSX's admitted negligence, is reversed."

The Court then turned to the enforceability of the indemnity provision. "Both parties also stipulated at oral argument that the language of the indemnity provision in the Crossings Agreement is not ambiguous and should be interpreted by this Court as a matter of law. CSX contends the second phrase in the indemnification provision, which requires indemnification where the injury is 'by reason of the exercise of any of the privileges conferred by this license or agreement[,]' mandates indemnification for the situation at bar. CSX reasons the only 'privilege[] conferred' by the agreement was to allow PWC to place power lines over the railroad tracks. CSX argues if not for, or 'but for,' the presence of the power lines above the railroad tracks, which exist only as a result of PWC's exercise of its privilege under the license granted, CSX's crane would not have hit PWC's power lines and damaged CenturyLink's equipment."

. . . .

"The language in the Crossings Agreement provides for indemnification for damage 'which may be incurred by the Railroad Company *by reason of* the construction, maintenance, use or operation of the said conductors, wires or supports, or *by reason of* the exercise of any of the privileges conferred by this license or agreement.' (emphasis supplied)."

"PWC forcefully argues 'by reason of' does not mean 'but for,' and is more akin to a proximate causation requirement. PWC asserts it is only required to indemnify CSX for injuries incurred 'by reason of,' or caused by, the construction, maintenance, use, or operation of PWC's equipment. We disagree with this narrow interpretation. If this Court were to accept PWC's interpretation of the indemnification provision, it would 'effectively rob[] the indemnity clause of nearly all meaning.'" (Citations omitted.)

. . . .

"The Crossings Agreement was an arm's length, bargained-for exchange between two equally sophisticated parties. The language in the indemnification provision, which both parties concede is unambiguous, was granted as consideration for, and as a result of, PWC's power lines being installed and maintained over CSX's railroad tracks. This provision allows CSX to be indemnified for damages paid to CenturyLink, because the damage was 'by reason of,' or 'by virtue of,' PWC's exercise of its privilege, *i.e.* hanging power lines above the railroad tracks."

"In other words, but-for, or 'stemm[ing] from,' PWC's exercise of its privilege and license pursuant to the Crossings Agreement, CenturyLink's equipment would not have been damaged as a result of CSX's crane colliding with PWC's power lines. Under the agreement, CSX is entitled to indemnification from PWC, even though damages resulted from CSX's own negligence. On *de novo* review, CSX's motion for partial summary judgment on its claim for contractual indemnity is granted." (Citation omitted.)

- ***Synopsis***− Appeal by plaintiff from May 2015 and June 2015 orders. Reversed and remanded. Opinion by Judge Tyson, with Judge Calabria and Judge Hunter, Jr. concurring. The Supreme Court denied defendants' petition for discretionary review on September 22, 2016.

Constitutional Law; Noise Ordinance; Probable Cause; Adequate State Remedy

Adams v. City of Raleigh, ___ N.C. App. ___ (No. COA15-782, Wake− 2/16/16), *disc. review denied*, ___ N.C.___ (No. 102P16, 9/22/16)

- ***Holding−*** In plaintiff's action involving arrest for violating the City's Amplified Entertainment Permit (AEP) Ordinance, upon which charge was later dropped, Court of Appeals holds that trial court properly granted defendant-City's motion for summary judgment based on the presence of probable cause.

- ***Key Excerpt−*** The Court first addressed the issue of probable cause. "Here, defendant had probable cause to believe that plaintiff was violating the AEP ordinance on 19 August 2011. The AEP application that plaintiff filled out includes a one-page instruction sheet that states in bold and underlined text, 'A business may not provide Amplified Entertainment until it has received an Amplified Entertainment Permit.' Moreover, defendant had knowledge that plaintiff applied for the AEP and that an AEP had not been issued to Juice Bar. When the Netforces team and Raleigh Police arrived at Juice Bar, they observed a cash-box being used to collect admission fees, televisions mounted to the walls playing music videos, and a DJ playing amplified music through a sound system."

"Although the AEP ordinance does not specifically state how the exemption applies, Sergeant Peterson was reasonable in concluding there was a 'practical nontechnical probability that incriminating evidence' was involved. *See* [State v.] Biber, 365 N.C. [162] at 169, 712 S.E.2d [874] at 879 [(2011)]. Because an officer's probable cause determination is not one of a legal technician, *see* [Illinois v.] Gates, 462 U.S. [213] at 231, 76 L. Ed. 2d [527] at 544 [(1983)], Sergeant Peterson acted as a reasonable, prudent person in concluding that plaintiff was providing amplified entertainment, plaintiff was required to have an AEP, plaintiff could not present an AEP to Netforces, and, as a result, plaintiff was in violation of the AEP ordinance—a misdemeanor."

"Probable cause is not eliminated based on an after-the-fact decision by the State not to prosecute a particular claim or a conclusion by a court that a defendant is not guilty. Law enforcement officers need not have *prima facie* proof of guilt of illegal activity, only a probability. Although plaintiff emphasizes that Sergeant Peterson has arrested thousands of people in his career but he has never arrested someone for failing to have an AEP, this is not relevant to the probable cause inquiry. Because a finding of probable cause necessarily defeats plaintiff's claims for false arrest and malicious prosecution, we need not address governmental immunity as there is no liability." (Citations omitted.)

The Court next addressed the constitutional claims: plaintiff argued that he did not have an adequate remedy under state law due to defendant's assertion of governmental immunity. The court rejected plaintiff's argument, which was based on Craig v. New Hanover County Board of Education, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009). The Court stated, "In Corum v. University of North Carolina, our Supreme Court stated, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, unlike Craig, governmental immunity does not stand as an absolute bar to plaintiff's state law claims. 'Because state law gives plaintiff the opportunity to present his claims and provides "the possibility of relief under the circumstances," plaintiff's state constitutional claims must fail.' Wilkerson v. Duke Univ., 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013)."

- ***Synopsis***−Appeal by plaintiff from March 2015 order. Affirmed. Opinion by Judge Elmore, with Judge Calabria and Judge Zachary concurring. On September 22, 2016, the N.C. Supreme Court denied plaintiff's petition for discretionary review.

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

Land Use, Standing; Associations; Bylaws Willowmere Cmty. Ass'n, Inc. v. City of Charlotte, ___ N.C. App. ___ (No. COA15-977, Mecklenburg− 11/1/16) (In plaintiffs' appeal from trial court's order allowing summary judgment, Court of Appeals holds that trial court correctly granted summary judgment dismissing plaintiffs' action challenging rezoning based upon lack of standing, as neither plaintiff complied with their respective bylaws to authorize the initiation of litigation. (Appeal by plaintiffs from April 2015 order. Affirmed. Opinion by Judge Stroud, with Judge Elmore concurring. Judge Dietz concurring in a separate opinion.)).

Land Use; Site Development Plan; Truck Stop Campbell v. City of Statesville (Campbell II), ___ N.C. App. ___ (No. COA16-101, Iredell− 10/4/16) (***unpublished***) (In petitioners' appeal from order affirming the determination of the City Council approving a site development plan to build a truck stop on a roughly 14.4-acre site in the B-4 Highway Business zoning district, Court of Appeals affirms. (Appeal by petitioners from October 2015 order. Affirmed. Opinion by Judge Calabria, with Chief Judge McGee and Judge Stroud concurring.) For Campbell I, *see* Campbell v. City of Statesville, ___ N.C. App. ___ (No. COA15-329, Iredell- 5/3/16) (***unpublished***), *disc. review denied*, ___ N.C. ___ (No. 218P16, 8/18/16) (*MLN* October 2016, p. 4).