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Torts; Governmental Immunity; Insurance Contract; Endorsement; Interpretation

Meinck v. City of Gastonia ("Meinck II"), ___ N.C. App. ___ (Gaston─ COA16-892-2, 1/2/19)

Upon remand from N.C. Supreme Court, N.C. Court of Appeals holds that, applying canons of contract interpretation in the light most favorable to plaintiff as the non-moving party, trial court erred by entering summary judgment upholding defendant-City's waiver of governmental immunity, notwithstanding defendant-City's purchase of liability insurance.

- ***Holding***─ In October 2018, the Supreme Court reviewed the March 2017 Court of Appeals' decision and *inter alia* reversed in part, holding that "the trial court correctly determined that defendant[-City] was engaged in a governmental function[.]" Meinck I, ___ N.C. at ___, 819 S.E.2d 353, 367. (The facts underlying this case are set forth in detail in both opinions. *See also* Meinck I, ___ N.C. App. ___, 798 S.E.2d 417 (2017), *rev'd in part, disc. review improvidently allowed in part, and remanded*, ___ N.C. ___, 819 S.E.2d 353 (2018). *See MLN* November 2018, p. 1.) Otherwise remanding in part, the Court directed the Court of Appeals to determine the precise issue of "whether the trial court correctly ruled that defendant[-City] did not waive governmental immunity by purchasing liability insurance." *Id*. at __, 819 S.E.2d at 367. (In June 2016, the trial court had concluded that defendant-City's liability insurance policy "contained an express non-waiver provision" and that defendant[-City] had not waived governmental immunity. Because the Court of Appeals previously held that defendant-City was engaged in a proprietary function, its initial March 2017 opinion did not further address plaintiff's argument that defendant-City's non-waiver provision in its liability insurance contract did not preserve defendant-City's governmental immunity.) The Supreme Court also determined that discretionary review as to the issue of plaintiff's contributory negligence had been improvidently allowed. *Id*.

Here, in this January 2019 decision issued pursuant to remand, the Court of Appeals addresses whether defendant-City waived governmental immunity by purchasing liability insurance. The Court of Appeals reversed the trial court's ruling and remanded to the trial court for

further proceedings given the Court's determination of waiver of immunity.

- ***Key Excerpt***− "Unlike the clear and explicit contract exclusionary provisions in Hart [v. Brienza, 246 N.C. App. 426, 434, 784 S.E.2d 211, *disc. review denied*, 369 N.C. 69, 793 S.E.2d 223 (2016)], [Estate of] Earley [v. Haywood Cty. Dep't of Soc. Servs., 204 N.C. App. 338, 342, 694 S.E.2d 405, 408-09 (2010)], and Patrick [v. Wake Cty. Dep't of Human Servs., 188 N.C. App. 592, 596, 655 S.E.2d 920, 923 (2008)], the endorsement at issue here is ambiguous. *See id*. Hart, Earley, and Patrick provide prominent examples for how exclusionary clauses have been drafted to be clear and unambiguous. Under the endorsement at issue, it is unclear whether the exclusion for coverage applies to claims for which sovereign or governmental immunity would apply."

"With the ambiguous language in the endorsement, we 'strictly construe' the insurance policy Defendant[-City] purchased as providing coverage for claims which clearly stated provisions preserving governmental immunity would otherwise bar. *See* Daniel [v. City of Morganton], 125 N.C. App. [47] at 53, 479 S.E.2d [263] at 267 [(1997)] ('If the language in an exclusionary clause contained in a policy is ambiguous, the clause is to be strictly construed in favor of coverage.' (citation and internal quotation marks omitted))."

"With the purchase of liability insurance coverage, Defendant[-City] has waived governmental immunity up to the amount of its general liability policy limits of $1,000,000. *See* [G.S.] 160A-485(a) ('Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.'). The ambiguous exclusionary endorsement, strictly construed in favor of coverage and against the drafter, does not exclude the express coverage the [defendant-]City obtained when it purchased the liability insurance policy. Furthermore, the unambiguous provisions of the [defendant-]City's general liability policy clearly provides coverage for 'bodily injury' up to a limit of $1,000,000."

"Following our precedents and construing the coverage provisions of the policy liberally and the ambiguous exclusionary provision narrowly, Defendant[-City] has not preserved governmental immunity to the extent of the $1,000,000 coverage limit. *See* Lambe Realty [Inv., Inc. v. Allstate Ins. Co.], 137 N.C. App. [1] at 11, 527 S.E.2d [328] at 335 [(2000)]; Stanback [v. Westchester Fire Ins. Co.], 68 N.C. App. [107] at 114, 314 S.E.2d [775] at 779 [(1984)]."

"The trial court's grant of summary judgment to Defendant[-City], partly on the basis the City did not waive governmental immunity by purchasing liability insurance through the exclusionary provision, is reversed."

- ***Synopsis***− Upon remand in part from N.C. Supreme Court. Reversed and remanded. Opinion by Judge Tyson, with Judge Elmore and Judge Dietz concurring.

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

Eminent Domain, Inverse Condemnation Wilkie v. City of Boiling Spring Lakes ("Wilkie II"), ___ N.C. App. ___ (No. COA16-652-2, Brunswick─ 12/18/18 (***unpublished***) (By way of background, the Supreme Court filed an opinion in March 2018 reversing a previous decision of the Court of Appeals and remanding for consideration of issues not previously addressed below: The facts underlying this case are set forth in detail in Wilkie I, ___ N.C. ___, 370 N.C. 540 (No. 44PA17, 2018) (*see MLN* Nov. 2017- Feb. 2018, p. 8). In an opinion issued December 18, 2018. the Court of Appeals states, "The City … initially appealed from an order entered in a proceeding for inverse condemnation in which the trial court found that a taking had occurred. This Court reversed the trial court, finding the property owned

by … [Plaintiffs] … had not been taken by Defendant City for a public use or benefit. Plaintiffs appealed this Court's decision. Our Supreme Court reversed our decision, holding that a public use or benefit is not an element of takings under inverse condemnation analysis, and remanded the case back to this Court for determination of the remaining issues raised by Defendant City. Defendant City argues the trial court erred in holding that a taking by inverse condemnation occurred because (1) flooding of the Plaintiffs' property was temporary and not likely to recur; (2) the encroachment upon and damage to Plaintiffs' property was not foreseeable; (3) the trial court misapplied the principles enunciated in Arkansas Game and Fish Commission v. United States, 568 U.S. 23 (2012); (4) Plaintiffs were estopped from complaining about the effects of a decision they had requested Defendant City make; and (5) the trial court failed to make adequate findings of fact concerning the boundaries of Plaintiffs' property and of the property Defendant City had allegedly taken. We affirm the trial court in part and remand in part." Court of Appeals concludes, "the trial court did not err in finding that a compensable taking of Plaintiffs' property by Defendant City did occur. We remand for the trial court to determine the identity of the land actually taken and valuation thereof." (Upon remand from N.C. Supreme Court. Affirmed in part; remanded in part. Opinion by Judge Berger, Jr., with Judge Elmore and Judge Dietz concurring.))

Land Use; Rezoning; Standing Brinkley Props. of Kings Mountain, LLC v. City of Kings Mountain, ___ N.C. App. ___ (No. COA18-615, Cleveland– 12/18/18) (***unpublished***) (Upon noting that plaintiffs presented two issues on appeal (namely that the rezoning was invalid because the City violated various procedural requirements of the zoning ordinance and because defendant-City violated state law by allowing substantial changes to defendant Orchard Trace's rezoning application on the same day it was approved by the City Council), the Court of Appeals stated that it was unnecessary to reach either of these issues because plaintiffs did not have standing to maintain this action. "Mr. Killian [the Director of the Planning and Economic Development Department] presented the rezoning application [requesting that 120-acres of land owned by defendant] Orchard Trace be rezoned from residential to conditional use property, enabling Orchard Trace to proceed with plans to develop multi-family market rate apartments, active living housing, neighborhood offices and retail space, and single-family, detached homes] to the … Planning and Zoning Board … at a public meeting on 13 December 2016. The Planning and Zoning Board voted to recommend that the … City Council … approve the application. The City Council considered and approved the rezoning application on 20 December 2016." In February 2017, plaintiff Brinkley Properties initiated an action for declaratory judgment, requesting a declaration that the rezoning amendment authorized by the Council was invalid and an injunction to bar proceeding with the development because: (1) the rezoning was submitted by a non-existent entity; (2) the properties did not qualify to be a planned unit development; (3) the incompleteness of the rezoning application; (4) the Board did not hold a public hearing; (5) the public hearing before the Council was not sufficiently noticed; (6) the project's site plan was improperly changed just before the public hearing; (7) the Council failed to properly identify the properties that it purported to rezone; and (8) the Council gave contradictory instructions regarding the project and failed to make key findings. Determining that there was a lack of standing, the Court affirmed the trial court's order granting summary judgment for defendants, denying plaintiffs' motion for summary judgment, and dismissing its second amended complaint. (Appeal by plaintiffs from March 2018 order. Affirmed. Opinion by Judge Arrowood, with Judge Tyson and Judge Inman concurring.))

Procedure; Appellate Procedure; Interlocutory Appeal; Statement of the Grounds for Appellate Review; Dismissal WBTV, LLC v. Ashe Cty., ___ N.C. App. ___ (No. COA18-452, Ashe– 12/4/18) (***unpublished***) (Dismissing plaintiff's appeal for lack of jurisdiction, the Court of Appeals stated, "[Plaintiff] brings this interlocutory appeal

challenging the dismissal of two defendants in this multi-party Public Records Act lawsuit…. [Plaintiff] failed to show that the challenged order [granting the two defendants' motion for judgment on the pleadings] affects a substantial right—indeed, [plaintiff's] brief does not even include the mandatory statement of the grounds for appellate review [N.C. R. App. P. 28(b)(4); *see* Larsen v. Black Diamond French Truffles, Inc., 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 95-96 (2015)] necessary to confer jurisdiction under our case law. The defendants pointed out this fatal jurisdictional defect in their appellee brief, but [plaintiff] did not acknowledge the defect or take any action to remedy it, for example, by filing a petition for a writ of certiorari. Thus, under well-settled precedent governing our power to hear appeals, we are constrained to dismiss this appeal for lack of appellate jurisdiction." The Court observed, "[The two defendants] included an entire section in their appellate brief explaining why [plaintiff] failed to establish appellate jurisdiction, ending with the observation that [plaintiff] 'utterly failed in its brief to address the issue of whether its appeal affects a substantial right.' [Plaintiff] never responded to this argument or acknowledged its mistake; nor did it petition this Court for a writ of certiorari to cure the jurisdictional defect. Accordingly, consistent with past cases, we are constrained to dismiss this appeal for lack of jurisdiction." (Appeal by plaintiff from December 2017 order. Dismissed. Opinion by Judge Dietz, with Judge Bryant and Judge Inman concurring.)