NO. COA08-1396

NORTH CAROLINA COURT OF APPEALS

Filed: 19 January 2010

STEVEN FEIERSTEIN & LISA FEIERSTEIN,

Plaintiffs-Appellees,

v.

From the N.C. Industrial Commission TA-18276

N.C. DEPT. OF ENVIRONMENTAL & NATURAL RESOURCES,

Defendant-Appellant.

Appeal by defendant from opinion and award entered 31 July 2008 by the Industrial Commission. Heard in the Court of Appeals 6 May 2009.

George B. Daniel, P.A., by George B. Daniel, and Everett Gaskins Hancock & Stevens, LLP, by Michael J. Tadych and James M. Hash, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

ELMORE, Judge.

This case involves a septic permit issued in 1987 by an agent of the North Carolina Department of Environmental and Natural Resources (NCDENR) to Steven and Lisa Feierstein for a lot in Person County. The permit stated that the lot was suitable for a septic system, and the Feiersteins spent considerable amounts of

money preparing the lot for a residence. The Feiersteins later learned that the lot was actually not suitable for a septic system. After exhausting their avenues of appeal within NCDENR, the Feiersteins filed an action with the Industrial Commission (Commission).

The Commission ultimately found that the Feiersteins' claim was not barred by the statute of limitations nor statute of repose and awarded the Feiersteins $149,821.49 in damages, plus interest. Both parties appealed the amount of damages awarded, and NCDENR also appealed the Commission's findings that the action was not barred by the statute of limitations or statute of repose. For the reasons stated below, we affirm in part and reverse and remand in part.

FACTS

In 1987, the Feiersteins were interested in buying a 0.92 acre lot (Lot 49) on Hyco Lake in Person County. On 3 November 1987, Randall Barnett, a registered sanitarian employed by the Person County Health Department (Health Department) and an agent of the State with regard to sewage treatment, certified that Lot 49 was "suitable for a sewage disposal system which can be permitted by the local health department." The Feiersteins bought Lot 49 on 27 June 1990 for $57,000.00. In October 1990, the Feiersteins contracted with Jimmy Lewis for the installation of a holding tank and a drain field but not a complete septic system. Lewis installed nitrification drain lines on 25 October 1990.

From 1995 through 2000, the Feiersteins spent approximately $31,285.60 in additional improvements to Lot 49 in anticipation of constructing a residence thereon. On 19 June 2000, the Feiersteins applied for a new septic permit to replace the one that Barnett had issued, which had expired in 1992. On 3 July 2000, the application was denied by Janet Clayton at the Health Department. Clayton indicated that Lot 49 was not suitable for a ground absorption sewage system. Clayton also indicated that the Feiersteins had two paths of recourse: they could pursue a "provisionally suitable" classification, and they could also appeal the Health Department's decision.

On 31 July 2000, the Feiersteins filed a petition with the Office of Administrative Hearings (OAH) for a "provisionally suitable" classification. Meanwhile, the Feiersteins also had the Health Department's agent, Fred Smith, reevaluate Lot 49 on 12 December 2000, in the hopes that he would reverse Clayton's decision. Smith's 18 December 2000 letter to the Feiersteins stated that Lot 49's soil was indeed unsuitable for a septic system but that he would have to return later with a backhoe to check the condition of saprolite rock beneath the surface. Smith returned on 13 February 2001 and used a backhoe to expose the nitrification trenches that had been installed by Lewis in 1990. In a letter dated 14 February 2001, Smith concluded that neither Lot 49's soil nor its saprolite rock was suitable for a septic system. Smith also stated that the rules for determining septic suitability were essentially the same in 2001 as they were in 1987. This was the

conclusion of the Feiersteins' attempt to get NCDENR to reverse itself concerning the suitability of Lot 49 for a sewage system. Smith suggested that the Feiersteins could pursue a permit from Progress Energy, which owned an easement around Hyco Lake, allowing discharge directly into the surface waters.

The Feiersteins contacted Duane K. Stewart & Associates, an engineering firm, to consider the option provided by Smith. The firm designed a sand filtration device that the State approved on 26 July 2002. The Feiersteins then voluntarily dismissed their OAH claim for a "provisionally suitable" classification. However, the Feiersteins did not immediately pursue the sand filtration device, which had a cost of $20,000.00.

On 18 December 2003, the Feiersteins filed a tort claim with the Commission against NCDENR claiming damages of $149,821.89, which included the cost of purchases and improvements to Lot 49 and were itemized on the Claim for Damages form. Meanwhile, on 29 August 2007, Progress Energy denied the Feiersteins' request for discharging treated water into Hyco Lake.

The Feiersteins had employed appraiser Wayne Ross in December 2000 who stated that Lot 49's value would have been $125,000.00 had it met the minimum standards for residential construction; with its septic permit revoked, Ross estimated its value at $37,500.00. Ross again appraised Lot 49 in July 2007, where he estimated its value with a septic permit would be $300,000.00, but only $70,000.00 to $80,000.00 without such a permit. NCDENR's appraiser, Alan Jordan, determined the value of Lot 49 in January

2000 was $102,000.00 with a permit, but only $38,000.00 without the permit.

NCDENR argued to the Deputy Commissioner George T. Glenn, II, that the Feiersteins' claims were barred by the statute of limitations and statute of repose. Deputy Commissioner Glenn's opinion and award, issued 8 January 2008, stated that the Feiersteins' claims were not barred by the statute of limitations or the statute of repose and awarded the Feiersteins $220,000.00, a figure based on Ross's appraisals of the difference in value of Lot 49 with and without the septic permit. NCDENR appealed to the Full Commission, which issued an opinion and award on 11 August 2008 awarding the Feiersteins their original claim of damages of $149,821.89, plus interest at the statutory rate.

NCDENR appealed the Commission's findings that the statute of limitations and statute of repose did not bar the Feiersteins' claims; both NCDENR and the Feiersteins appealed the Commission's calculation of damages. For the reasons stated below, we affirm the Commission's Decision and Order in part and reverse in part.

ARGUMENTS

I.

Defendant NCDENR argues that the Commission committed reversible error when it held that the Feiersteins' claims were not barred by the statute of limitations. NCDENR argues that the Feiersteins were injured in July 2000 when they received Clayton's letter denying their improvement permit, while the Feiersteins argue that they were not injured until February 2001 when their

avenues of recourse with NCDENR were exhausted. Since the Feiersteins did not file their cause of action with the Commission until 18 December 2003, NCDENR argues, the Feiersteins' claim was barred by the Tort Claims Act's three-year statute of limitations. *See* N.C. Gen. Stat. § 143-299 (2007). We disagree and affirm the Commission's holding on this point.

"[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Trans.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). The question of whether a cause of action is barred by the statute of limitations is ordinarily a mixed question of law and fact. *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001). However, when the relevant facts are not in conflict, the question becomes a matter of law. *Id.* In the present case, neither party disputes the dates stated above. The dispute between the parties concerns exactly which one of those dates represents when the Feiersteins' claim began accruing. Therefore, this is fully a question of law, and we will review the Commission's finding under a *de novo* standard of review. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

North Carolina General Statutes provide that "[a]ll claims against any and all State departments, institutions, and agencies shall henceforth be forever barred unless a claim be filed with the

Industrial Commission within three years after the accrual of such claim." N.C. Gen. Stat. § 143-299 (2007).

A cause of action cannot accrue until a plaintiff is entitled to institute an action. *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004). In order to institute a valid claim for negligence, the Feiersteins had to show that NCDENR breached its duty to the Feiersteins, and that this breach proximately caused injury or loss to the Feiersteins. *Peace River Electric Coop. v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 214 (1994). As NCDENR admits, the first element – breach of a duty – occurred in 1987 when Barnett negligently certified that Lot 49 was suitable for a septic system.

However, the Feiersteins had not yet suffered any injury. NCDENR claims that the injury was incurred on 3 July 2000, when the Feiersteins received Clayton's letter denying the septic permit renewal. However, Clayton's letter stated that it was subject to two paths of appeal through NCDENR, including pursuit of a "provisionally suitable" classification and appeal of the Health Department's decision. The Feiersteins pursued both of these avenues. "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before resource may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). Additionally, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust

administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999); *see also Craig v. Faulkner*, 151 N.C. App. 581, 583, 565 S.E.2d 733, 735 (2002). As such, if the Feiersteins had attempted to bring a cause of action immediately after Clayton's 3 July 2000 letter, then the action would have been dismissed because the Feiersteins still had viable paths for appeal within NCDENR. The first point at which the Feiersteins could have brought a viable action against NCDENR was on 14 February 2001, when NCDENR's agent Smith concluded that neither the soil nor the saprolite rock under Lot 49 were suitable for a septic system, and the Feiersteins' routes of appeal through NCDENR were thereby exhausted.

Since a cause of action cannot accrue until a plaintiff is entitled to institute an action, then the Feiersteins' statute of limitations began tolling on 14 February 2001, which means that their filing of a cause of action on 18 December 2003 fell within the Tort Claims Act's three-year statute of limitations. *Register*, 358 N.C. at 697, 599 S.E.2d at 554 (citation omitted); N.C. Gen. Stat. § 143-299 (2007). As such, the Commission properly determined that the statute of limitations was not a bar to the Feiersteins' claim. NCDENR's argument fails, and we affirm the Commission's finding in this matter.

II

Defendant NCDENR argues that the Commission committed reversible error when it held that the Feiersteins' claims were not

barred by the statute of repose. We disagree and affirm the Commission's finding in this matter.

A statute of repose provides a fixed time period within which the cause of action must be filed, regardless of the date of injury or accrual. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994). Whether the statute of repose has expired is strictly a legal issue. *Cellu Prods. Co. v. G.T.E. Prods. Corp.*, 81 N.C. App. 474, 477, 344 S.E.2d 566, 568 (1986).

There are two major flaws with NCDENR's argument that the Commission committed reversible error by not barring the Feiersteins' claims under a statute of repose. First, the Feiersteins' cause of action was pursued under the Tort Claims Act, which contains a statute of limitations but does not contain any statute of repose. N.C. Gen. Stat. § 143-299 (2007). The legislature has created statutes of repose in other circumstances, which indicates the legislature's willingness and ability to create such statutes, yet the legislature did not create one for the Tort Claims Act. *See* N.C. Gen. Stat. § 1-50(5), 1-52(16) (2007). NCDENR claims that the Feiersteins' claims were barred by N.C. Gen. Stat. § 1-50(a)(5), which is not within the Tort Claims Act; this section states:

> [n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5) (2007).

However, the negligent action taken by NCDENR's agent was not classified as an "improvement to real property" by the Commission, and no case has held that section 1-50 applies to actions against the State under the Tort Claims Act. As such, there is no evidence that N.C. Gen. Stat. § 1-50(a)(5) applies to the present facts. NCDENR's only support for its argument is the case *Gillespie v. Tommy Ray Coffey*, 86 N.C. App. 97, 356 S.E.2d 376 (1987). In *Gillespie*, the plaintiff sued a municipal building inspector and the City of Lenoir, and this Court suggested that N.C. Gen. Stat. § 1-50 barred plaintiff's claims. *Id.* at 99-100, 356 S.E.2d at 377. However, in *Gillespie*, the State was not a party, the action was not pursued under the Tort Claims Act, and the plaintiff had not even made out a *prima facie* case for negligence, which rendered this Court's brief discussion of section 1-50 *dictum*. As such, its facts and holding are not dispositive to the present case.

Since "[t]he role of the courts is to interpret statutes, not enact them," it would be inappropriate for this Court to impose a statute of repose onto the Tort Claims Act when the legislature did not include such a bar. *In re R.L.C.*, 179 N.C. App. 311, 317, 635 S.E.2d 1, 4 (2006).

The second major flaw in NCDENR's argument is that, even assuming *arguendo* that a six-year statute of repose applies, the Feiersteins still filed their claim within that window. N.C. Gen. Stat. § 1-50(a)(5) provides that no action "shall be brought more than six years from the later of the specific last act or omission

of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5) (2007). As stated in Section I, *supra*, NCDENR's last act giving rise to the injury element required for a tort claim was in February 2001 when the Feiersteins exhausted their routes of appeal within NCDENR. As such, NCDENR's "last act or omission . . . giving rise to the cause of action" was less than three years before the Feiersteins instituted a suit against NCDENR, which easily fits within the six year statute of repose that NCDENR argues should apply. N.C. Gen. Stat. § 1-50(a)(5) (2007).

In conclusion, we do not find NCDENR's argument that the Tort Claims Act contains a six-year statute of repose to be meritorious; but even assuming *arguendo* that the Tort Claims Act does contain a statute of repose, the Feiersteins filed their claim within six years of the last act of NCDENR giving rise to the tort claim. As such, NCDENR's argument fails, and we affirm the Commission's finding that the Feiersteins' claim was not barred by any statute of repose.

III

Finally, NCDENR and the Feiersteins contend that the Commission erred in its calculation of damages. Both parties argue that, rather than awarding damages based on out-of-pocket expenses, the Commission should have used diminution in value as the proper measure of damages. However, the Feiersteins argue that the proper diminution in value amount is $220,000.00, while NCDENR calculates it as $35,000.00. In addition, NCDENR challenges the Commission's

decision to award post-judgment interest on the principal amount awarded to the Feiersteins.

In its decision and award, the Commission found as fact that "[t]he greater weight of the evidence shows that plaintiffs were damaged in the amount of $149,821.89 as documented on their December 18, 2003, Affidavit . . . ." In addition, the Commission concluded as a matter of law that, "[a]s a direct and proximate result of defendant's negligence[,] plaintiffs were damaged and are entitled to recover $149,821.89 plus interest at the statutory rate." At no point in its order did the Commission ever explicitly state the measure of damages that it employed in concluding that the Feiersteins should recover $149,821.89 from NCDENR. However, the measure of damages utilized by the Commission can be deduced from the amount that it actually awarded.

The affidavit to which the Commission made reference listed numerous expenditures that the Feiersteins made in connection with the purchase and improvement of the Hyco Lake lot, including $57,347.00 paid at the time that they purchased the lot in 1990; $49,875.00 in accrued interest on the purchase loan; $6,500.00 paid in Person County property taxes; $1,988.00 paid in order to obtain the original septic permit and certain septic system improvements in 1995; $26,392.50 paid in 1995 in connection with the construction of their boat dock, including the driveway leading to that facility; $1,803.10 paid for gravel and for brush clearing work in the latter part of the 1990s; $3,989.89 paid for road paving work in 1999; and $2,656.40 paid in attempting to design and

install a septic or other wastewater treatment system on the property in 2001. As a result, the effect of the Commission's decision was to award the Feiersteins what appears to be an amount equal to all of their out-of-pocket expenditures associated with the Hyco Lake lot, including the cost of purchasing it. In other words, the Commission appears to have used an "out-of-pocket expenditures" measure of damages.

"Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983) (citing *Greene v. Board of Education*, 237 N.C. 336, 75 S.E.2d 129 (1953)). "Under the Act, negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citing *MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 387, 93 S.E.2d 557, 559 (1956)). Although "[t]he Commission's order may not be disturbed unless, in view of the Commission's findings as to the nature and extent of the injury, the award is so large as to shock the conscience[,]" *Jackson v. N.C. Dept. of Crime Control and Public Safety*, 97 N.C. App. 425, 432, 388 S.E.2d 770, 774 (1990), the applicability of this general principle hinges on the assumption that the Commission has properly applied the measure of damages that would be utilized in an ordinary negligence action.

"[F]or negligent damage to real property, the general rule is that where the injury is completed . . . the measure of damages 'is the difference between the market value of the property before and after the injury.'" *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995) (quoting *Huff v. Thornton*, 23 N.C. App. 388, 393-94, 209 S.E.2d 401, 405 (1974)); *see also Paris v. Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967) (stating that, "[i]n cases where the injury is completed or by a single act becomes a *fait accompli*, and which do not involve a continuing wrong or intermittent or recurring damages, the correct rule for the measurement of damages is the difference between the market value of the property before and after the injury") (citing *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 17 S.E.2d 646 (1941); *Casstevens v. Casstevens*, 231 N.C. 572, 58 S.E.2d 368 (1950)). "Nonetheless, replacement and repair costs are relevant on the question of diminution in value[,] and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value." *Huberth*, 120 N.C. App. at 353, 462 S.E.2d at 243. "When, however, the land is used for a purpose that is personal to the owner, the replacement cost is an acceptable measure of damages." *Id.*, 120 N.C. App. at 354, 462 S.E.2d at 243 (citing *Plow v. Bug Man Exterminators*, 57 N.C. App. 159, 162-63, 290 S.E.2d 787, 789 (1982) (stating, in a case involving an allegedly negligent failure to detect the presence of termites in a house prior to purchase by the plaintiff, that, "[w]hile the

difference in market value before and after the injury is one permissible measure of damages, it is by no means the only one" and that "[d]amages based on cost of repair are equally acceptable")). As a result, it appears that the reported decisions in this jurisdiction allow damages resulting from negligence-based injuries to real property, including cases involving purchases of real property stemming from the negligent provision of incorrect information, *Plow*, 57 N.C. App. at 162-63, 290 S.E.2d at 789, to be based upon the diminution in property value, replacement cost, or the cost of repair, with evidence as to replacement costs and cost of repair being admissible for the purpose of "assessing the diminution in value." *Huberth*, 120 N.C. App. at 353, 462 S.E.2d at 243.

The damage award approved in the Commission's order clearly does not rest upon an attempt to determine the difference between the value of the Feiersteins' Hyco Lake lot had it been able to support a septic system and the value of the Feiersteins' lot as it is. Similarly, the amount of damages awarded by the Commission is clearly not based on any evidence tending to show the amount that would be necessary to purchase a replacement lot or to modify the Feiersteins' lot so that it would support some sort of sewage disposal system. Instead, the Commission's damage award appears to be based on a calculation that simply totals up everything that the Feiersteins have ever spent in connection with the Hyco Lake lot, including the cost of purchasing the lot in question and the property tax payments that the Feiersteins have made by virtue of

owning the lot, and requires NCDENR to reimburse the Feiersteins for those payments. We are not aware of any authority that permits the use of such an "out-of-pocket expenditures" measure of damages, and the Commission has not cited any support for this approach. As a result, we conclude that the Commission utilized an erroneous measure of damages in its decision and award. Therefore, we reverse that portion of the Commission's order that addresses the damage issue and remand this case to the Commission for the entry of a new order with respect to the issue of damages that utilizes a legally permissible measure of damages, with the question of whether to take additional evidence left to the Commission's sound discretion.

Given that the Commission did not utilize a legally permissible measure of damages, given that it should be provided with an opportunity to examine the damages issue utilizing a permissible approach to valuing the amount of plaintiffs' injury, and given that it has not had a chance to determine what procedures should be employed on remand, we do not believe that we should address the merits of defendant's "set-off" theory at this stage of the proceeding.

As we have already noted, the Commission also ordered that NCDENR pay post-judgment interest on the principal amount awarded to the Feiersteins. This determination is not supported by law and is erroneous.

> For more than sixty years our Supreme Court has held that post-judgment interest may not be awarded against the State unless the State has manifested its willingness to pay interest

> by an Act of the General Assembly or by a lawful contract to do so. That rule has been applied in numerous cases of this Court as well.

Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 640, 630 S.E.2d 200, 207 (2006) (quotations and citations omitted). Given that no portion of the Tort Claims Act allows an award of post-judgment interest against the State and that neither party has presented evidence of any contract whereby the State agreed to pay post-judgment interest, the Commission erred by ordering NCDENR to pay post-judgment interest on the principal amount of the Feiersteins' award. In this case, the Commission is not permitted to order such relief against the State.

CONCLUSION

Therefore, we affirm the Commission's determination that NCDENR is liable to the Feiersteins, but reverse the Commission's damage award and its decision that NCDENR pay post-judgment interest on the amount of that damage award, and remand this case to the Commission for the entry of a new order with respect to the issue of damages that utilizes a legally permissible measure of damages, with the question of whether to take additional evidence left to the Commission's sound discretion.

Affirmed in part, reversed and remanded in part.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).