

NO. COA10-912

NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 2011

STEVEN FEIERSTEIN & LISA
FEIERSTEIN,
Plaintiffs,

v.

N.C. Industrial Commission
No. TA-18276

N.C. DEPT. OF ENVIRONMENT
& NATURAL RESOURCES,
Defendant.

Appeal by defendant from order entered 21 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2011.

George B. Daniel, P.A., by George B. Daniel; and Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for plaintiff-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for defendant-appellant.

STEELMAN, Judge.

Where the injury to plaintiff's real property was completed as of 14 February 2001 and there was not a continuing wrong or intermittent or recurring damages, the correct measure of damages was the difference between the fair market values of the property immediately before and after the injury. The Commission erred in using fair market values of the property

from 2007.

I. Factual and Procedural Background

Steven and Lisa Feierstein (plaintiffs) initiated this negligence action after the North Carolina Department of Environmental and Natural Resources (NCDENR) (defendant) conducted a soil evaluation and issued a septic permit for their building lot in 1987 and then later determined that the lot was unsuitable for a septic system in 2001. The facts of this case are set forth in the first appeal to this Court. *See Feierstein v. N.C. Dep't of Env'tl. & Natural Res.*, ___N.C. App. ___, 690 S.E.2d 558 (2010) (unpublished).

In the first appeal, this Court reversed the Commission's award of damages based upon plaintiffs' out-of-pocket expenditures, and remanded the 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." *Id.* On remand, the Commission determined that the proper measure of damages was the diminution in value of plaintiffs' property.

The Commission determined that the fair market value of the property on 7 December 2000 with the permit was \$125,000.00, and that with the revocation of the permit, the "marketability of the lot was reduced by 70%." The Commission went on to find that the appraised value of the property as of 11 July 2007 was \$300,000.00 with all permits in place and that the value as of

11 July 2007 without the permit was \$70,000.00 to \$80,000.00. Based upon these findings, the Commission awarded damages to plaintiffs of \$220,000.00. Defendant appeals.

II. Damages based upon Diminution in Value for
a Completed Injury

In its only argument, defendant contends that the Commission erred in calculating the diminished value of plaintiffs' property using values from 2007 rather than 2001. We agree.

Where the injury to real property is completed or by a single act becomes a *fait accompli*, and where it does not involve a continuing wrong or intermittent or recurring damages, a plaintiff is entitled to recover the difference between the fair market value of the property *immediately* before and *immediately* after the damage. See *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967); *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 469, 17 S.E.2d 646, 649 (1941); *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995); *Huff v. Thornton*, 23 N.C. App. 388, 393-94, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975). Our Supreme Court has adhered to this diminution in value formula in cases where the injury is completed, and has held that a trial court's instruction for damages based upon diminution in value was correctly stated as the difference in

market value immediately before the damage and immediately after the damage. See *Paris*, 271 N.C. at 484, 157 S.E.2d at 141; *Huff*, 23 N.C. App. at 393-394, 209 S.E.2d at 405.

In the present case, the injury to plaintiffs' property was complete on 14 February 2001, the date that defendant issued a final denial letter for plaintiffs' septic permit application. Damages to plaintiffs' property should have been computed based upon the diminution of value as of 14 February 2001. The market values of the property as of 11 July 2007 are irrelevant to plaintiffs' damages in this case.

The Commission erred in awarding plaintiffs \$220,000.00 in damages based upon market values from 2007.

The Commission's order awarding plaintiffs \$220,000.00 in damages is reversed and remanded to the Commission for calculation of damages based upon diminution in value that utilizes the fair market values immediately before and after the injury.

REVERSED AND REMANDED.

Judges ELMORE and ERVIN concur.