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NO. COA01-1547

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

THOMAS PAYNE and wife JERLEAN
BOLES PAYNE,
Plaintiffs-Appellees,

v.

Surry County
No. 98 CVS 62

DEPARTMENT OF TRANSPORTATION
of the STATE OF NORTH CAROLINA,
Defendant-Appellant.

Appeal by defendant from judgment and order entered 25 September 2001 by Judge William H. Freeman in Superior Court, Surry County. Heard in the Court of Appeals 8 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, for the State.

Max D. Ballinger for plaintiffs-appellees.

McGEE, Judge.

Thomas Payne and Jerlean Boles Payne (plaintiffs) filed a complaint against the North Carolina Department of Transportation (defendant) on 20 April 1994. Plaintiffs' first cause of action sought money damages for inverse condemnation for an alleged taking of a construction easement and permanent right-of-way. Their second cause of action sought an order to reopen a closed segment of old U.S. Highway 601 in Surry County. The trial court determined that there was not a taking of plaintiffs' property but

allowed a trial on the issue of structural damages to plaintiffs' building resulting from road construction. After a jury trial, judgment was entered against defendant on 14 November 1996 in the amount of \$27,200. Plaintiffs were awarded attorney's fees of \$23,000 on 1 March 1997. Plaintiffs filed a voluntary dismissal without prejudice of their second cause of action on 16 January 1997.

Plaintiffs filed another complaint against defendant on 16 January 1998, alleging that defendant's decision to close a section of old U.S. Highway 601 in Surry County was arbitrary and capricious and that defendant failed to give proper notice before closing the section of old U.S. Highway 601. Plaintiff sought closure of the newly constructed section of U.S. Highway 601 and a reopening of the closed section of old U.S. Highway 601. Defendant filed an answer and a motion to dismiss on 20 April 1998. Defendant's motion to dismiss based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and sovereign immunity was denied by Judge Clarence Carter in an order filed 6 July 1999.

Defendant filed a motion for summary judgment on 7 December 1999. Following a hearing, Judge Carter denied defendant's motion for summary judgment in an order filed on 4 January 2000. Plaintiff made an oral motion for summary judgment during the hearing, but the trial court declined to rule on the motion. A second hearing was held on 21 August 2000 before Judge William H. Freeman. Defendant renewed its motion to dismiss and motion for summary judgment before the trial court heard arguments on the

motions. The trial court entered a judgment and order on 25 September 2000 granting summary judgment for plaintiffs and ordering the closed section of old U.S. Highway 601 to be reopened.

The trial court made findings of fact that tended to show that plaintiffs owned real property at the intersection of U.S. Highway 601 and N.C. Highway 268 in Surry County, North Carolina. U.S. Highway 601 bordered plaintiffs' property on the west and N.C. Highway 268 bordered the property on the south. At the time of trial in August 2000, plaintiffs no longer owned the convenience store and real property that is the subject of this case. Defendant completed a highway construction project in June 1992 that rerouted part of U.S. Highway 601 and created a new intersection with N.C. Highway 268 to the east of plaintiffs' property. The old section of U.S. Highway 601 remained open from N.C. Highway 268, but barricades were erected at the two places where the old U.S. Highway 601 intersected with the new U.S. Highway 601. No notice was given and no public hearing was held by defendant before barricades were placed at the intersecting points of the old and new sections of U.S. Highway 601. The trial court's findings included:

[A]t the time of the closing and removal of that segment of old US Highway 601 from the State Maintained System of Highways in 1992, and as of the date of the re-filing of plaintiffs' complaint in 1998, the plaintiffs' property did not abut that segment of the old US Highway 601, beyond the barricade, that was closed and removed from the State maintained system in 1992; rather, plaintiffs' property adjoined and fronted on that segment of old US Highway 601 that remained on the State Maintained System of Highways after the 1992

highway project.

In its conclusions of law, the trial court stated that plaintiffs were entitled to notice of the intended closing and a hearing from the Department of Transportation. The trial court also concluded that any Surry County resident could have brought an action to reopen the road. Judge Freeman also stated that he was bound by the previous ruling of Judge Carter concerning defendant's motion to dismiss and motion for summary judgment.

Defendant argues the trial court erred in granting summary judgment for plaintiffs and ordering defendant to reopen the closed section of U.S. Highway 601 and to connect it with the new section of U.S. Highway 601.

Facts required to support summary judgment must be established by the pleadings, depositions, answers to interrogatories, admissions, or affidavits. Findings of fact and conclusions of law are not required in a summary judgment order. Findings of fact "do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment."

Metts v. Turner, 149 N.C. App. 844, 846, 561 S.E.2d 345, 347 (2002) (citations omitted). "A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal." *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1978).

Summary judgment is only proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." . . . "The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded." . . . On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law. Further, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant."

Goodwin v. Webb, ___ N.C. ___, ___, 568 S.E.2d 311, 312-13 (2002) (citations omitted). Errors of law are reviewed *de novo*. "De novo review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001) (citation omitted).

In the case before us, there is no evidence in the record that demonstrates plaintiffs owned property that adjoined a section of U.S. Highway 601 that was abandoned. Instead, evidence shows that plaintiffs owned property that adjoined the section of old U.S. Highway 601 that remained open. The trial court made findings of fact consistent with this evidence. However, the trial court's conclusions of law stated that plaintiffs were entitled to notice and a hearing.

N.C. Gen. Stat. § 136-55.1 (2001) states that

[a]t least 60 days prior to any action by the Department of Transportation abandoning a segment of road and removing the same from the State highway system for maintenance, . . . the Department of Transportation shall notify

by registered mail or personal delivery all owners of property adjoining the section of road to be abandoned whose whereabouts can be ascertained by due diligence.

In reviewing this issue *de novo*, there is no issue of material fact in that plaintiffs' property adjoined the section of U.S. Highway 601 that remained open. Plaintiffs were not entitled to notice or a hearing before the barricades were placed on parts of old U.S. Highway 601 because they did not own property that adjoined this stretch of road. The trial court's conclusion of law is unsupported by the findings of fact and is erroneous. Accordingly, plaintiffs were not entitled to judgment as a matter of law and were not entitled to relief through an order reopening the closed section of old U.S. Highway 601.

Defendant also argues the decision to move part of U.S. Highway 601 was not arbitrary and capricious. While plaintiffs alleged the decision was arbitrary and capricious in their complaint, the trial court did not address the issue in its order. There is sufficient evidence in the record for this Court to conclude that defendant's decision to reroute a section of old U.S. Highway 601 was not arbitrary and capricious.

[T]he "whole record" test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious. . . . Under the whole record test, "the reviewing court [must] examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" Substantial evidence is "'more than a scintilla' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" However, the whole record test "does not permit the

court 'to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*,' but "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." If the agency's findings are supported by substantial evidence, they must be upheld.

Zimmerman v. Appalachian State Univ., 149 N.C. App. 121, 129-30, 560 S.E.2d 374, 379-80 (2002) (citations omitted). The Department of Transportation has discretionary authority in the exercise of its governmental functions and that discretion should not be disturbed by judicial review without proof that the agency abused its discretion. *Hochheiser v. N.C. Dept. of Transportation*, 82 N.C. App. 712, 348 S.E.2d 140 (1986); *Guyton v. Board of Transportation*, 30 N.C. App. 87, 226 S.E.2d 175 (1976).

An examination of the entire record demonstrates that there is substantial evidence to support defendant's decision. Defendant submitted an affidavit that highlighted the dangerous conditions on old U.S. Highway 601 and the need for the road to be rerouted. The affidavit discussed the poor sight distance for motorists at the intersection, sharp curves, and history of accidents at the intersection as bases for defendant's decision. While plaintiffs submitted four affidavits emphasizing the danger of the new intersection, there remains substantial evidence that could allow a reasonable mind to support a conclusion that a safer alternative to the old intersection was warranted. This argument is overruled.

Plaintiffs cross-assign error to the trial court's refusal to admit evidence that plaintiffs did not abut the closed segment of

the road. Plaintiffs contend that such evidence would have provided plaintiffs an alternative basis in law to support the judgment. In order to preserve an issue for appellate review, "the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Plaintiffs failed to make an offer of proof concerning this excluded evidence and its significance is not apparent from the record. This issue has not been preserved for our review. This assignment of error is without merit.

After reviewing the evidence in the record, there is no genuine issue of material fact concerning plaintiffs' property adjoining old U.S. Highway 601. The record and the trial court's findings of fact demonstrate that plaintiffs' property did not adjoin the portion of the highway that was abandoned by defendant. Plaintiffs were not entitled to notice or a hearing and defendant was entitled to judgment as a matter of law on the issue. In light of this decision, we do not reach defendant's remaining arguments and assignments of error.

We reverse the order of the trial court and remand for an entry of summary judgment for defendant.

Reversed and remanded.

Judges GREENE and WYNN concur.

Report per Rule 30(e).