

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-525

Filed 3 December 2024

Wake County, No. 20CVS004067

DEPARTMENT OF TRANSPORTATION, Plaintiff,

v.

WONDER DAY PARTNERSHIP, a North Carolina General Partnership, Defendant.

Appeal by plaintiff from order entered 31 January 2024 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 6 November 2024.

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*Cranfill Sumner LLP, by George B. Autry, Jr., Stephanie H. Autry, and Jeremy P. Hopkins, for defendant-appellee.*

GORE, Judge.

The North Carolina Department of Transportation (“DOT”) appeals from the order of the Superior Court, Wake County, denying its motion under N.C.G.S. § 136-108. We conclude that DOT’s appeal is interlocutory and does not affect a substantial right. Accordingly, we dismiss the appeal.

This case involves a condemnation action under Chapter 136 of the North Carolina General Statutes to determine just compensation owed to defendant Wonder Day Partnership (“Wonder Day”) for the taking of its property in Holly Springs for the construction of the Southern Wake Expressway (R-2721). The taking occurred on 16 March 2020. One year earlier, on 20 March 2019, Wonder Day filed an inverse condemnation action under N.C.G.S. § 136-111 seeking compensation for the restrictions placed on the property by DOT under the Map Act from 6 August 1996 to 11 July 2016.

The General Assembly passed the Roadway Corridor Official Map Act (Map Act) in 1987. *Kirby v. N. Carolina Dep’t of Transportation*, 368 N.C. 847, 848 (2016). Under the Map Act, once the DOT filed a highway corridor map with the county register of deeds, restrictions were placed on properties within the corridor indefinitely, preventing the issuance of building permits or approval of subdivisions for affected properties. *Id.* at 849. In 2016, following the North Carolina Supreme Court’s ruling in *Kirby*, which determined that the Map Act’s restrictions constituted “a taking of fundamental property rights,” the Legislature rescinded these restrictions. *Id.* at 856. House Bill 959 requires DOT to notify property owners that the restrictions have been lifted and to remove the restrictions from public records.

Property owners can seek compensation through inverse condemnation for the reduction in their property’s value, measured by the difference in fair market value before and after the taking. *Id.* at 855–56. To succeed in such a claim, owners must

show substantial interference with property rights and a decrease in the property's overall market value. *Id.* at 856.

In the inverse condemnation case, DOT moved under N.C.G.S. § 136-108 to have the court determine that the Map Act restrictions still encumbered the property on the date of the direct condemnation filing. DOT admitted, however, that the Map Act restrictions no longer encumbered the property as of 16 March 2020, the date of taking, but requested that the property be valued as though the restrictions were still in place. The court ruled that the Map Act restrictions had ended before the date of taking and that the property should be valued as unencumbered. DOT also filed a motion under Rule 42 to consolidate the direct condemnation with the inverse case based on similar contentions, but the court denied that motion as well.

On 21 July 2023, and again on 15 September 2023, DOT filed motions under N.C.G.S. § 136-108, acknowledging that the new motion relied on the same facts and law as the previous § 136-108 motion in the inverse case and the earlier motion to consolidate. In its Complaint for direct condemnation, DOT affirmatively stated that there were no encumbrances on the property other than those listed in Exhibit A, which did not include Map Act restrictions. DOT's appraisal described the property as suitable for development, and the plat filed with the court on 7 May 2021 did not reference any Map Act restrictions.

Nearly four years after filing the direct condemnation, DOT did not amend its pleadings to claim that the property was encumbered by the Map Act restrictions on

the date of taking. The court found that DOT sought an order under N.C.G.S. § 136-108 to obtain a ruling potentially subject to an immediate, though interlocutory, appeal. The court also determined that since DOT's pleadings did not allege that the property was encumbered by Map Act restrictions at the time of taking, the only issue remaining for litigation was damages.

The court ultimately concluded that DOT's argument, that the property should be valued as encumbered by Map Act restrictions on the date of taking, was legally unsound—as the Map Act restrictions had been repealed in 2016. The invalidation of the ordinance that resulted in the taking converted it into a temporary one. As of 16 March 2020, the property was not subject to any Map Act restrictions. DOT's Complaint stated that the property was subject only to the liens and encumbrances listed in Exhibit A, which did not include the repealed Map Act restrictions. DOT is bound by this judicial admission.

While leave to amend is generally granted freely when justice requires, DOT had not requested to amend its Complaint. Even if it had, the court stated, such a motion would have been denied due to “undue delay, futility, prejudice to Wonder Day, and dilatory motive.” The court also barred DOT under the doctrine of judicial estoppel from asserting that the property was encumbered by Map Act restrictions on the date of taking.

Under N.C.G.S. § 136-108, the court may address issues raised by the pleadings aside from damages. Since the only issue raised in the pleadings is

damages, the court denied DOT “any order either granting or denying its motion under N.C.G.S. § 136-108.”

DOT’s appeal is interlocutory. “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950) (citation omitted). Generally, there is no right to appeal from interlocutory orders unless the order affects a substantial right that would be lost without immediate review. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990). “[T]he ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208 (1978).

“In determining our appellate jurisdiction, we are not to look at the *merits* of [DOT’s] claim to a substantial right in answering the threshold jurisdictional question. To do so would, in the words of the United States Supreme Court, ‘conflate the jurisdictional question with the merits of the appeal.’” *Beroth Oil Co. v. N. Carolina Dep’t of Transportation*, 256 N.C. App. 401, 421 (2017) (Dillon, J., dissenting) (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628 (2009)). “In other words, in considering whether we have appellate jurisdiction, we are to ask whether the right *claimed* by the appellant is one that is substantial and whether the

order appealed from would affect that right, assuming appellant's claim to that right has merit." *Id.* at 421–22.

Here, DOT claims the order is immediately appealable because it affects DOT's substantial right to have an accurate determination of the parties' respective title to the property. DOT argues the restrictions imposed by the Map Act on Wonder Day's property created a negative easement of "indefinite duration," and that determining how long DOT held those easement rights affects the title. DOT also acknowledges, however, that it "does not and cannot contend" that the Map Act restrictions were in effect on the date of taking, as they were rescinded in 2016. DOT further states that it does not assert the Map Act restrictions were an encumbrance on the date of taking but argues that the trial court should have valued the property as though it were encumbered.

DOT's brief confirms that it does not assert ownership of any interest in Wonder Day's property on the date it filed the condemnation, and no other party claims an interest in the property. Therefore, the appeal cannot involve an issue of title. *See id.* at 412 (holding that, if title to the interest is contested, the substantial right accrues only to one who holds an interest in the subject property of the eminent domain proceeding). The issue of whether the trial court should have treated the property as encumbered for valuation purposes relates to damages, which is not appropriate for determination under Section 108. *See* § 136-108 (emphasis added) ("the judge, upon motion and 10 days' notice . . . shall . . . hear and determine any and

all issues raised by the pleadings *other than* the issue of damages . . .”).

Furthermore, the appeal should be dismissed because the trial court applied judicial estoppel—preventing DOT from contradicting its pleadings. The court held that DOT was barred from claiming the Map Act restrictions were an encumbrance on the date of taking, leaving damages as the only controverted issue raised in the pleadings. As a result, the court denied DOT’s motion under Section 108, which did not resolve any vital preliminary issues or any issues under Section 108 at all.

For the above stated reasons, the particular facts and procedural history of this case warrant dismissal of this interlocutory appeal.

DISMISSED.

Judges FLOOD and THOMPSON concur.

Report per Rule 30(e).