Rel: October 18, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180257

City of Gulf Shores

v.

D. Kay Meador

Appeal from Baldwin Circuit Court
(CV-13-901533)

PER CURIAM.

AFFIRMED. NO OPINION.

Bolin, Shaw, Bryan, Mendheim, and Stewart, JJ., concur.

Murdock, Special Justice,[1] concurs specially.

Parker, C.J., and Sellers and Mitchell, JJ., dissent.

Wise, J., recuses herself.

[1]Retired Associate Justice Glenn Murdock was appointed on August 29, 2019, to serve as a Special Justice in regard to this appeal. When Justice Murdock was appointed, there was equal division among the eight members of the Court then sitting on this case on a question material to the determination of the case. See § 12-2-14, Ala. Code 1975.

MURDOCK, Special Justice (concurring specially).

D. Kay Meador sued the City of Gulf Shores ("the City") and two City employees seeking to hold the defendants liable after she was forced to stop construction of a residence on land she believed she owned in a subdivision known as Lagoon Estates. Meador began construction of the residence in reliance upon certain acts and omissions on the part of the City. She subsequently was informed by the City that the City itself actually owned the land in question and, for that reason, was forced by the City to stop construction of the residence.

The land in question at one time constituted a right-of-way that, as reflected in the Baldwin County probate records, the City purported to vacate in 1956. Had this vacation been effective, the predecessors to Meador in title would have become owners of the land. A judgment entered in 1986 by the Baldwin Circuit Court, however, held that the attempted vacation had been ineffective. Evidence of the 1986 judgment was never recorded in the probate records. Unaware of the 1986 judgment, Meador accepted delivery of a deed in 2010 purporting to convey title to the property to her.

Following the entry of a summary judgment on other claims asserted by Meador, she proceeded to trial only on a claim against the City for negligence. The jury returned a verdict in favor of Meador in the amount of $133,000, a little less than the construction costs Meador had incurred. The trial court denied the City's renewed motion for a judgment as a matter of law and entered a judgment based on the jury's verdict.

A majority of the Court votes today to affirm the trial court's judgment. I join that vote and write to explain my reason for doing so.

It strikes me that this is a somewhat unique case. It is not a case where title to the land is in some third party and, thus, as between the City and the plaintiff, the plaintiff ought to have had superior knowledge of this fact. The City itself owns the land. If superior knowledge as to ownership of the land is to be charged to the owner of that land, then that charge in this case is to the City.

Despite "winning" ownership of the land in the 1986 case, the City chose for some reason not to record any evidence of its ownership in the probate records so as to give

constructive notice of that fact to the world.[2] Although this choice in and of itself breached no duty to Meador or her predecessors in title, it is against the backdrop of this omission that notice is taken of the maintenance in the probate records of a plat of Lagoon Estates that contained a handwritten notation referencing "the vacation of this street" and the location within the probate records of the City's 1956 vacation resolution. Furthermore, the City maintained for public viewing, and provided to Meador, zoning and street maps indicating that the property was privately owned and suitable for residential construction, made oral representations to Meador to similar effect, gave Meador and her architect information regarding setback requirements, and, ultimately, issued a building permit to Meador authorizing her to construct a residence on the property. In addition, representatives of the City visited the site on multiple occasions, initially halting construction over an

[2]The fact that the 1986 judgment could be found in the circuit-court files by someone who knew to look for it, and where to look, makes no difference in my view. It was not recorded in the probate records, the "record of record" for land transactions.

environmental concern, then giving Meador approval to resume construction.

Despite this history, the City subsequently chose to invoke its own title to the property and thereby to deprive Meador of the benefit of the construction costs she had incurred in reliance on the City's acts and omissions.

I believe there was enough in the unique facts of this case to allow the jury to find, under Alabama law, that the City had assumed a duty to Meador, that the City breached that duty, and that the City should compensate Meador for the moneys she expended in reasonable reliance on the City's acts and omissions and then lost when the City reasserted its own title to the land.

SELLERS, Justice (dissenting).

Introduction

D. Kay Meador sued the City of Gulf Shores ("the City"). Also named as defendants in Meador's action were the City's planning and zoning director, Andy Bauer, and the City's building official, Brandon Franklin. Meador sought to hold the defendants liable after she was forced by the City to stop construction of a residence on property she erroneously believed she owned. After Meador began construction of the residence, she was informed by the City that she was actually building on a public right-of-way held by the City.

The trial court entered a summary judgment in favor of Bauer and Franklin and granted the City's summary-judgment motion on all counts except the count asserting negligence. The negligence claim proceeded to trial, and a jury returned a verdict in favor of Meador in the amount of $133,000. The trial court denied the City's renewed motion for a judgment as a matter of law, and the City appealed. Because I do not believe that Meador established that the City owed her a duty, I respectfully dissent from the Court's decision to affirm the trial court's judgment in her favor.

Factual Background

The Lagoon Estates subdivision was created in Baldwin County in 1954. In 1956, the Baldwin County Commission adopted a resolution purporting to vacate part of Lagoon Drive, a public right-of-way located in Lagoon Estates. The record indicates that, at that time, Lagoon Drive was not within the limits of any municipality.

The resolution reflecting the purported vacation was recorded in the Baldwin County probate records. In addition, a plat of Lagoon Estates that was, at the time of the trial in this case, kept in the Baldwin County probate records contained a handwritten notation acknowledging "the vacation of this street" and referencing the location of the 1956 resolution in the probate records.

In 1986, Walter Hammond, an owner of property in Lagoon Estates, wanted to build a condominium complex on the property over which the allegedly vacated portion of Lagoon Drive ran. The record indicates that Lagoon Drive was, at that time, located within the limits of what was then the Town of Gulf Shores ("the Town"). Accordingly, Hammond requested a building permit from the Town. His request, however, was

denied because, according to the Town, the portion of Lagoon Drive on which Hammond proposed to build had not been validly vacated.

Hammond filed an action in the Baldwin Circuit Court seeking a judgment determining the validity of the 1956 vacation. One of the defendants in Hammond's suit was George Phillips, the coordinator of community development for the Town and the official to whom applications for building permits were submitted.[3] The trial court entered a judgment declaring that the 1956 resolution had not effectively vacated the relevant portion of Lagoon Drive ("the Hammond judgment"). The Alabama Court of Civil Appeals affirmed the Hammond judgment. Hammond v. Phillips, 516 So. 2d 707 (Ala. Civ. App. 1987). The parties in the present case agree that, because of the Hammond judgment, all of Lagoon Drive remained an existing public right-of-way.

Nothing evidencing the Hammond judgment was ever recorded in the Baldwin County probate records. Thus, there was apparently no express indication in those records that the 1956 resolution purporting to vacate a portion of Lagoon Drive

[3]The record suggests that George Phillips is deceased.

was, in fact, ineffective. That said, there is nothing before this Court indicating that the Hammond judgment was not, like any other civil judgment in an open proceeding, part of the public record available for inspection in the circuit clerk's office. Likewise, the decision by the Court of Civil Appeals affirming the Hammond judgment was a readily accessible public record.

Notwithstanding the ineffectiveness of the 1956 resolution, in July 2010, a family limited partnership with which Meador was associated purported to convey the property at issue to Meador.[4] The parties agree that, because of the Hammond judgment and the invalidity of the purported vacation, the deed to Meador was a nullity, because the partnership had no right, title, or interest to convey.[5]

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[4]Meador testified that she did not pay any consideration for the deed from the limited partnership.

[5]The record suggests that, in 1989, two "business partners" of Meador's father, one of whom was Walter Hammond, whose lawsuit had resulted in the Hammond judgment in 1986, gave Meador's mother a quitclaim deed to the relevant property. That deed referred to "any and all interest which may have accrued to the grantor's benefit as a result of the vacation" of the relevant portion of Lagoon Drive. The record also suggests that Meador herself was aware of the 1989 deed, because she notarized its signatures in her capacity as a notary public. Later, Meador's mother gave a quitclaim deed

The portion of Lagoon Drive at issue is currently unimproved, and there is no indication that a passable street has ever existed upon it. Apparently unaware that the deed from the limited partnership did not convey any interest in the property, Meador planned to build a residence on it.

Meador and her architect met with Bauer and another representative of the City's planning and zoning department, Jennifer Watkins. Bauer showed Meador the City's zoning map and told her that the property was located in a zone in which residential construction was allowed. Bauer also gave Meador and her architect information regarding setback requirements.

After Meador's architect created plans for construction of the residence, Meador attempted to obtain a building permit. Tabitha Norman, a representative of the City's building department, told Meador that a structural engineer would need to approve the architect's plans. After Meador got the approval of an engineer and took other necessary steps,

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to the family limited partnership, which eventually purported to convey the property to Meador in 2010. Meador, however, flatly denied during the trial that she was ever aware of the Hammond judgment and the invalidity of the 1956 resolution purporting to vacate the relevant portion of Lagoon Drive.

Norman informed Meador that the building permit had been issued. Meador began construction at some point thereafter.[6]

While Meador was in the process of building the residence, City building official Franklin temporarily halted construction after he discovered that Meador's builder had pushed sand into a wetland. He later authorized the recommencement of construction after the problem had been remedied. Meador testified that other City inspectors visited the property at various times. It is undisputed that, during the permitting and construction-inspection process, no City representative informed Meador that she did not own the property.

In September 2012, the City's attorney discovered that Meador was building the residence and notified the City that the construction was taking place on a public right-of-way. Accordingly, the City issued a stop-work order directing

[6]Apparently, in 2007, well before Meador received a deed purporting to convey the property to her, Meador inquired whether she could build a pier on the property extending into a body of water adjoining it. She testified that Norman "gave [her] a list of things to do" in order to get a City permit to build the pier. It is not clear that she actually applied for and received the permit. It is clear that she never built the pier.

Meador to cease construction and to demolish the partially completed structure. Meador claimed that, before the stop-work order was issued, she had incurred nearly $150,000 in construction expenses.

Discussion

Meador's negligence claim against the City was based on the City's failure, specifically George Phillips's failure, to record evidence of the Hammond judgment in the Baldwin County probate records, the failure of the City's zoning and street maps to show a public right-of-way running over the property, and the failure of various City representatives to inform Meador during the permitting and construction-inspection process that she did not own the property. Meador claims that, in failing in those alleged duties, the City was negligent and is liable for Meador's damages resulting from constructing a house on property she did not own. The City, on the other hand, argues that Meador did not establish that the City owed her the duties she alleged it breached and that the trial court therefore should have granted the City's motion for a judgment as a matter of law.

"The determination whether a duty exists is generally a question of law for the court to decide." Aliant Bank v. Four Star Invs., Inc., 244 So. 3d 896, 908 (Ala. 2017). In the present case, however, it appears the trial court allowed the jury to decide whether the City owed the duties alleged. Meador asserts in her brief that, "where the facts that would determine the existence of a duty are in dispute, the task of resolving whether those facts exist is for the jury." In Jones v. Blount County, 681 So. 2d 202 (Ala. Civ. App. 1995), upon which Meador relies, the Court of Civil Appeals held that a trial court had erred in entering a summary judgment because a jury question existed regarding whether Blount County had voluntarily assumed a duty to repair or replace a downed stop sign located at an intersection in Jefferson County. The plaintiff, who was injured when a car entered the intersection without stopping and struck the car being driven by the plaintiff, presented evidence indicating that Blount County had replaced the stop sign in the past, that Blount County had placed "stop ahead" signs and painted "stop ahead" legends on the road leading to the intersection, and that the Blount County sheriff's office had reported the downed stop sign to

the Blount County assistant engineer. The Court of Civil Appeals pointed to precedent providing that "'it is not error to submit the question [of duty] to the jury if the factual basis for the question is in sufficient dispute'" and that, "'[w]here the facts, upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury.'" 681 So. 2d at 205 (quoting Garner v. Covington Cty., 624 So. 2d 1346, 1350 (Ala. 1993), and Alabama Power Co. v. Alexander, 370 So. 2d 252, 254 (Ala. 1979) (emphasis added)). The Court of Civil Appeals concluded: "Viewing these facts [supporting an inference that Blount County had assumed a duty to repair or replace the stop sign] in the light most favorable to the nonmovant ... the summary judgment was not proper with regard to the question of duty ...." 681 So. 2d at 206. Although it certainly is not entirely clear from the opinion in Jones that the "facts" supporting the inference that a duty existed were in dispute, the Court of Civil Appeals' citation to precedent arguably suggests that there was such a factual dispute. Moreover, in 2013, this Court decided Ex parte BASF Construction Chemicals, LLC, 153 So. 3d 793 (Ala. 2013). In that case, this Court clearly held that,

if the facts supporting an argument that a defendant voluntarily assumed a duty are not disputed, then the question whether the alleged duty exists is one for the court. In the present case, it does not appear that any of the facts upon which Meador relies in alleging that the City assumed various duties are disputed. Thus, the question is one for the court.

In pertinent part, § 11-47-190, Ala. Code 1975, provides:

> "No city or town shall be liable for damages for injury done to or wrong suffered by any person ..., unless such injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer, or employee of the municipality engaged in work therefor and while acting in the line of his or her duty ...."

Thus, a city can be held liable for the negligence of its agents, officers, and employees. See Aliant Bank, 244 So. 3d at 909 ("[Section] 11-47-190 provides that a municipality can be sued for the negligent acts of its agents ...."); Morrow v. Caldwell, 153 So. 3d 764, 770 (Ala. 2014) ("[T]he first sentence [of § 11-47-190] provides that a municipality may be liable for the negligent acts of its agents or employees ....").

While recognizing the applicability of § 11-47-190, both the City and Meador cite precedent discussing the common-law

requirement that, in order for a negligence claim to stand, the plaintiff must demonstrate that the defendant owed the plaintiff an affirmative duty. See generally Hilliard v. City of Huntsville, 585 So. 2d 889, 890 (Ala. 1991) ("[W]e recognize that before liability for negligence can be imposed upon a governmental entity, there must first be a breach of a legal duty owed by that entity. In determining whether a claim is valid, the initial focus is upon the nature of the duty. There must be either an underlying common law duty or a statutory duty of care with respect to the alleged tortious conduct." (citations omitted)); Chatman v. City of Prichard, 431 So. 2d 532, 533 (Ala. 1983) (applying § 11-47-190 to a personal-injury claim against a municipality and indicating that the "'four well-known elements'" necessary to support a traditional negligence claim, including the existence of a duty, had to be established).

This Court has said:

> "'"In determining whether a duty exists in a given situation ... courts should consider a number of factors, including public policy, social considerations, and foreseeability. The key factor is whether the injury was foreseeable by the defendant."' Patrick v. Union State Bank, 681 So. 2d 1364, 1368 (Ala. 1996) (quoting Smitherman v. McCafferty, 622 So. 2d 322, 324 (Ala. 1993)). In

> addition to foreseeability, Alabama courts look to a number of factors to determine whether a duty exists, including '"(1) the nature of the defendant's activity; (2) the relationship between the parties; and (3) the type of injury or harm threatened."' Taylor [v. Smith], 892 So. 2d [887,] 892 [(Ala. 2004)] (quoting Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 114 (Ala. 1985))."

DiBiasi v. Joe Wheeler Elec. Membership Corp., 988 So. 2d 454, 461 (Ala. 2008).

Meador has not pointed to any specific law that would, for purposes of supporting her negligence claim, impose an affirmative duty on a municipality to record in the records of the probate court evidence of a civil judgment declaring the ineffectiveness of a previously recorded instrument purporting to vacate a portion of a public right-of-way. And, considering the factors courts traditionally consider in determining whether a duty exists for purposes of supporting a negligence claim, I would hold that the City did not owe Meador such a duty.

As for the City's zoning map, although that map identifies some public rights-of-way, zoning maps are meant to broadly identify the types of structures that may be constructed in particular areas of a municipality. They do not constitute an undertaking by a municipality to guarantee

accurate identification of every right-of-way or other impediment on private property, nor are they intended to accurately identify the owners of real property. Meador did not demonstrate that, by creating zoning maps, the City assumed a duty to her to accurately identify all rights-of-way.[7] Likewise, street maps are intended to aid the public in navigating city streets; they are not intended to be conclusive guarantees as to every public road in a city or to conclusively identify the private or public owners of real property. I would hold that the City did not owe Meador a duty to ensure the accuracy of its street maps.

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[7]City of Mobile v. Sullivan, 667 So. 2d 122 (Ala. Civ. App. 1995), upon which Meador relies, is distinguishable. In that case, the Court of Civil Appeals suggested that, by adopting zoning ordinances, creating zoning maps, and making multiple representations to two specific individuals regarding the zoning of a particular piece of property, a city assumed a duty to those individuals to take care that its representations regarding the zoning of the property were accurate. The individuals began building a structure in reliance on the representations that the structure was proper under zoning regulations, representations that turned out to be false. The Court of Civil Appeals held that the city was liable for its "repeated erroneous representations made ... regarding the zoning of [the] property." 667 So. 2d at 127. The same circumstances are not present in the instant case, which does not involve multiple misrepresentations that a particular piece of property was zoned for a particular use.

As for the failure of City representatives to inform Meador during the permitting and construction-inspection process that she did not own the property, municipalities issue building permits and inspect construction sites in an effort to enforce zoning regulations and other laws and to make structures within municipal limits safer for the public as a whole. In my opinion, Meador did not establish that, by issuing building permits and inspecting construction sites, the City assumed a duty to purported owners of property to ensure that they actually own the property on which the construction is occurring. Purchasers and owners of real property are in a better position than is a municipality to investigate and confirm good and marketable title to real property. A municipality's actions related to zoning, mapping, licensing, permitting, and inspecting do not create a duty to confirm that a person proposing to improve real property owns that property.

Conclusion

In my opinion, Meador did not establish that the City owed the duties she alleged the City breached. Thus, I believe the trial court should have granted the City's renewed

motion for a judgment as a matter of law. Accordingly, I would reverse the trial court's judgment.[8]

[8]The City also argues that Meador's action is barred by § 11-47-23, Ala. Code 1975, which is the notice-of-claim statute applicable to claims against municipalities. In addition, the City argues that, because the trial court entered a summary judgment in favor of Bauer and Franklin, the trial court had no choice but to grant the City's motion for a judgment as a matter of law. Like the majority, however, I am not persuaded by those two arguments.