

RENDERED: DECEMBER 21, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2017-CA-000065-MR

AMERICAN DIVERSIFIED  
DEVELOPMENTS, INC; NEWPORT  
ASSOCIATES LIMITED PARTNERSHIP;  
AND KENTUCKY PROPERTIES COMPANY, LLC

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 12-CI-01071

SANITATION DISTRICT NO. 1 OF  
CAMPBELL, KENTON AND BOONE COUNTIES,  
KENTUCKY aka SANITATION  
DISTRICT NO. 1 OF NORTHERN KENTUCKY  
aka SANITATION DISTRICT NO. 1; AND  
CITY OF NEWPORT, KENTUCKY

APPELLEES

NO. 2017-CA-000070-MR

CITY OF NEWPORT, KENTUCKY

CROSS-APPELLANT

v. CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 12-CI-01071

AMERICA DIVERSIFIED  
DEVELOPMENTS, INC; NEWPORT  
ASSOCIATES LIMITED PARTNERSHIP;  
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CROSS-APPELLEES

AND

NO. 2017-CA-000100-MR

SANITATION DISTRICT NO. 1 OF  
CAMPBELL, KENTON AND BOONE COUNTIES,  
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AMERICA DIVERSIFIED  
DEVELOPMENTS, INC; NEWPORT  
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CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: This appeal and two cross-appeals involve a collapsed  
water line on property owned by the Appellants/Cross-Appellees (collectively,

“ADDI”). The Appellees/Cross-Appellants (collectively, the “City”) deny negligently damaging ADDI’s private property, taking ADDI’s private property, or breaching an alleged contractual duty with respect to ADDI’s private property. After review, we affirm in both the appeal and cross-appeals.

## I. BACKGROUND

In the mid-twentieth century, ADDI installed two galvanized corrugated steel pipes across property (the “Property”) that now features the Newport Shopping Center and the Newport Plaza. Two open streams ran underneath the Property, and the pipes carried water from the streams to a junction box located under the Newport Plaza parking lot. One pipe measured 96 inches in diameter, and the other measured 120 inches in diameter. Together, they eventually began transporting runoff from an 800-acre watershed.<sup>1</sup>

Sometime in 2007, ADDI’s representatives noticed several depressions on the Property parking lot surface. They suspected an issue with the pipes and sought a solution from a structural engineer. ADDI built a bridge across the depressions, consistent with the engineer’s design.

Despite the superficial improvements, the parking lot condition worsened. ADDI thereafter retained a specialty contractor to inspect the pipes. In

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<sup>1</sup> The area includes runoff flowing from the open streams and from direct connections at the Property surface.

February 2011, the contractor discovered that a section of the 96-inch pipe had disintegrated.

Following discovery of the disintegrated pipe, ADDI sued the City. The complaint, filed in August 2012, alleged various theories of liability. Chief among them was that the City had a duty to maintain ADDI's pipes and negligently failed to do so. ADDI claimed that the City informally adopted the pipes into its municipal storm water system by diverting off-site runoff into them. According to ADDI, this informal adoption imposed a maintenance obligation on the City.

In addition to negligence, ADDI alleged that the City committed a trespass to land by diverting runoff into the pipes. ADDI also asserted that the City filled the pipes with corrosive sanitary wastewater, which from ADDI's perspective, constituted an inverse condemnation. Finally, ADDI accused the City of breaching a Storm Water Transfer Agreement, entered between the City of Newport and the Sanitation District, by refusing ownership of ADDI's water lines.<sup>2</sup>

As litigation progressed, several noteworthy procedural events took place. At first, the circuit court dismissed the negligence claim against the Sanitation District on sovereign immunity grounds. The claim was revived,

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<sup>2</sup> ADDI amended its complaint to assert the claims for inverse condemnation and breach of contract.

however, following the Kentucky Supreme Court's decision in *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015).

With the negligence claim against the Sanitation District reinstated, the City filed for summary judgment a second time, arguing that ADDI's claims were barred by the applicable statute of limitations. When this motion was denied, the City moved for summary judgment as to each of ADDI's claims. The circuit court agreed with the City regarding the breach of contract claim, concluding that ADDI lacked standing, but denied summary judgment as to ADDI's negligence claim. Importantly, the circuit court concluded that ADDI's trespass and inverse condemnation claims were not independent causes of action but a single claim for inverse condemnation. The circuit court did not grant summary judgment regarding this merged claim. Rather, it held a bench trial confined to determining whether the City's conduct amounted to an unconstitutional taking.

Ultimately, the circuit court found that a taking did not occur and dismissed each of ADDI's claims, save the one for negligence, following ADDI's case-in-chief. ADDI brought the instant appeal challenging the circuit court's order dismissing its claims. The City also cross-appealed, arguing that the circuit court should have granted summary judgment regarding its statute-of-limitations defense.

## II. STANDARD OF REVIEW

The clearly erroneous standard governs appellate review of a trial court's factual findings. CR<sup>3</sup> 52.01. "[F]indings are clearly erroneous if they are without adequate evidentiary support or occasioned by an erroneous application of the law." *Rogers v. Lexington-Fayette Urban County Government*, 175 S.W.3d 569, 571 (Ky. 2005). Legal conclusions from a bench trial are not entitled to deference, but are reviewed *de novo*. *Goshorn v. Wilson*, 372 S.W.3d 436, 439 (Ky. App. 2012).

## III. DISCUSSION

### 1. ADDI's negligence claim is not barred by the statute of limitations

We will begin our analysis by first addressing the City's cross-appeal from the order denying summary judgment as to ADDI's negligence claim. Essentially, the City asserts that the claim was barred by the applicable statute of limitations because ADDI should have discovered the damaged pipe in 2007—when the depressions appeared in the parking lot—and sued the City within five years of the discovery. In support of this position, the City relies on the deposition testimonies provided by Ron Wakser, ADDI's Chief Operating Officer, and by

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<sup>3</sup> Kentucky Rules of Civil Procedure

Jaimie Niemczura, ADDI's on-site property manager.<sup>4</sup> Particularly, the City points out that the representatives admitted knowing there was an issue with the underground pipe in 2007. For the following reasons, however, we do not find the City's argument persuasive.

Although generally unappealable, an order denying summary judgment will be reviewed when "the only basis of the ruling is a matter of law." *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487, 489 (Ky. App. 1994) (quoting *Gumm v. Combs*, 302 S.W.2d 616, 617 (Ky. 1957)). Whether an action was procedurally barred under the statute of limitations is a matter of law. *Hill v. State Farm Ins. Co.*, 390 S.W.3d 153, 155 (Ky. App. 2012). The applicable statute of limitations when negligence causes damage to real property is five years from the date the cause of action accrued. *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 610 (Ky. App. 2003). The accrual date may be the day the tortfeasor damaged the property, or if unknown, the day the plaintiff should have discovered, through the reasonable exercise of diligence, that the tortfeasor damaged the property. *See id.* at 617 (applying discovery rule to property damage actions); *see also R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 659 (Ky. App. 2009)

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<sup>4</sup> During a deposition, Wakser explained that "when you have any storm sewer, underground pipe, if you see evidence on top, of depression, sink holes, water coming up, there's obviously a problem that has to be investigated." Wakser Dep. at 126:8-11. As for Niemczura, she testified as follows: "There was an assumption I think that . . . there was a problem with the pipe which is why . . . our structural engineer designed a bridge-type repair, so it wasn't putting any more weight on the pipe." Niemczura Dep. at 34:1-5.

(“reasonable diligence” satisfied by acting as majority would under circumstances).

Here, the City mischaracterized the deposition testimonies of ADDI’s representatives. Wakser and Niemczura certainly admitted knowing there was a problem with the pipe in 2007, when the parking lot depressions formed, but their statements did not betray any suspicion that the City damaged the pipes. On the contrary, the representatives acknowledged a need to investigate the problem, which ultimately led to a consultation with a structural engineer and an implementation of his design. It was only after the problem persisted, despite the attempted fix, that ADDI hired a specialty contractor and discovered the disintegrated pipe. ADDI’s course of action, though perhaps inefficient, reasonably prompted the underlying lawsuit 18 months later. Hence, the circuit court’s judgment with respect to the cross-appeal is affirmed.

## **2. There was no unconstitutional taking**

Turning now to ADDI’s appeal, the sole issue presented during the bench trial asked whether the City effected an unconstitutional taking. ADDI did not challenge the circuit court’s merger of its trespass to land and inverse



condemnation claims. There is likewise no preserved argument that the City's municipal infrastructure permanently physically occupied the Property.<sup>5</sup>

In its order dismissing ADDI's complaint, the circuit court correctly explained that a "taking" under Kentucky law, occurs when the government enters "upon private property and [devotes] it to public use so as to deprive the owner of all beneficial enjoyment." *Siding Sales, Inc. v. Warren County Water District*, 984 S.W.2d 490, 494 (Ky. App. 1998) (quoting *Commonwealth Natural Resources and Environmental Protection Cabinet v. Stearns Coal & Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984)).

Here, the circuit court found ADDI installed the pipes to serve the commercial development on the Property. The circuit court then observed that the City had not frustrated this intended utility, even though public storm water flowed through the pipes. These determinations sufficiently supported the conclusion that ADDI had not been deprived of all beneficial use of its land. Accordingly, it was appropriate for the circuit court to dismiss ADDI's taking claim.<sup>6</sup>

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<sup>5</sup> From our review of the record, specifically the circuit court's findings regarding the testimony of engineer Jay Bayer, there are several connections to ADDI's private water lines "outside of the ADDI's properties." Appellant Brief Appendix A, Trial Court Order at 8 (Dec. 6, 2016). ADDI even characterizes the connections as "offsite" in the subheading supporting its primary argument on appeal. Hence, there is no preserved argument under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434, 102 S. Ct. 3164, 3175, 73 L. Ed. 2d 868 (1982).

<sup>6</sup> The circuit court's analysis continued, stating that ADDI could prove a taking by showing that "[the City] consistently repaired and maintained the pipes to the extent that it became responsible for them." This was not the proper test regarding whether an inverse condemnation by taking

### **3. ADDI has no viable claim arising from the Storm Water Transfer Agreement**

For its final argument on appeal, ADDI asserts that the City interpreted a Storm Water Transfer Agreement in an arbitrary manner that denied it equal protection under the law. ADDI admits it was not a party to this contract; nevertheless, it claims third-party beneficiary status as a local rate payer, property owner, and business operator. We disagree.

Here, ADDI's equal protection claim is not properly before this Court. It was not raised at the trial level and does not invoke palpable error review even though it is a constitutional challenge. *See Harrison v. Leach*, 323 S.W.3d 702, 708 n.17 (Ky. 2010) (quoting *Camp v. McNair*, 93 Ark. App. 190, 198, 217 S.W.3d 155, 159 (2005) (“even constitutional arguments must be raised below”)). Moreover, ADDI failed to present any genuine factual dispute that it was entitled to a direct benefit under the Storm Water Transfer Agreement. *See* CR 56.03 (summary judgment warranted when record presents no genuine factual issue and moving party entitled to legal judgment).

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occurred. Rather, the circuit court's statement asked whether the City was responsible for maintaining the privately-owned water lines. Our Supreme Court's decision in *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003), is controlling on this issue. Municipalities must non-negligently maintain and repair any privately-built sewer system that conveys water for the public infrastructure. *Id.* at 506.

In this Commonwealth, a stranger to a contract must show that the contract in question was made for his direct benefit, *see Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985), and the only record evidence supporting ADDI's claim as a beneficiary is a depiction on a map attached to the Storm Water Transfer Agreement. The depiction designates portions of the 96-inch pipe as "publicly maintained," but that is all. There is no statement obligating the City to maintain the 96-inch pipe, nor is there an indication that the City owes blanket contractual performance to all local stakeholders. Accordingly, the circuit court did not err in granting summary judgment as to this issue.

#### **IV. CONCLUSION**

For the foregoing reasons, the judgments of the Campbell Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-  
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BRIEF FOR APPELLEES/CROSS-  
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BRIEF FOR APPELLEE/CROSS-  
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