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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-925

Filed: 1 November 2016

Pender County, No. 14 CVS 528

JAMESTOWN PENDER, L.P., Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and WILMINGTON
URBAN AREA METROPOLITAN PLANNING ORGANIZATION, Defendants

Appeal by defendants from orders entered 28 January 2015 by Judge Jay D. Hockenbury and 22 April 2015 by Judge Gary E. Trawick in Pender County Superior Court. Heard in the Court of Appeals 10 February 2016.

Ward and Smith, P.A., by Ryal W. Tayloe, Alexander C. Dale, and Jeremy M. Wilson, and Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for defendant-appellant North Carolina Department of Transportation.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin, and Smith Moore Leatherwood LLP, by Matthew A. Nichols and James "Jay" R. Holland, for defendant-appellant Wilmington Urban Area Metropolitan Planning Organization.

CALABRIA, Judge.

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Jamestown Pender, L.P. (“plaintiff”) brought the underlying action against the North Carolina Department of Transportation (“NCDOT”) and Wilmington Urban Area Metropolitan Planning Organization (“WMPO”) (collectively, “defendants”) concerning the putative taking of plaintiff’s property. The trial court denied defendants’ motions to dismiss, and entered an order granting partial judgment on the pleadings, finding that the recording of a transportation corridor official map for the Hampstead Bypass pursuant to the Transportation Corridor Official Map Act, N.C. Gen. Stat. § 136-44.50 *et seq.* (“the Map Act”), by WMPO constituted a taking of plaintiff’s property. Defendants appeal.

I. Factual and Procedural Background

The Map Act authorizes several entities, including NCDOT and WMPO, to file a “transportation corridor official map” with a county’s register of deeds, creating a protected corridor in the future location of a planned roadway project. N.C. Gen. Stat. § 136-44.50 (2015). Filing the map effectuates restrictions on the demarcated land, so that “no building permit shall be issued for any building or structure or part hereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor.” N.C. Gen. Stat. § 136-44.51(a). Pursuant to the Map Act, as it stood during the time in which the events of this case transpired, these restrictions were to last “for an indefinite period of time.” *Kirby v. N.C. Dep’t of*

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Transp., ___ N.C. ___, ___, 786 S.E.2d 919, 921 (2016) (citing N.C. Gen. Stat. § 136-44.51). After the map is filed, NCDOT is not obligated to build or complete the highway project. *Id.*

In November of 2011, WMPO filed a transportation corridor official map. Plaintiff, a Delaware limited partnership, owned property which fell within the boundary of the transportation corridor. Prior to 2011, plaintiff was in the process of developing the property as a mixed-use commercial and residential development. Plaintiff sought administrative remedies, the adequacy and futility of which were a subject of dispute.

On 27 June 2014, plaintiff brought the underlying action against defendants in Pender County Superior Court. Plaintiff's complaint alleged inverse condemnation, unconstitutional taking, negative easement, violations of substantive and procedural due process, and violations of equal protection, and sought a declaratory judgment requiring defendants to compensate plaintiff for the taking of property and holding the Map Act unconstitutional.¹

On 3 September 2014, NCDOT filed an answer, motion to dismiss, and motion for hearing. Its motion to dismiss was made pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, based upon failure to state a claim

¹ Plaintiff sought no remedy against WMPO except to have WMPO bound by the judgment. Plaintiff explicitly noted in its complaint that "No monetary relief is sought from WMPO in this action. WMPO is named as a nominal party for notice purposes as a result of its recording of . . . that certain Transportation Corridor Official Map . . . as more fully described herein."

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upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C. Gen. Stat. § 136-111, lack of standing and ripeness, statutes of limitation and repose, failure to exhaust administrative remedies, and failure to join necessary parties. On 30 September 2014, WMPO filed a motion to dismiss pursuant Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, alleging failure to exhaust administrative remedies, lack of standing, lack of subject matter jurisdiction, and failure to state a claim. These motions were heard on 17 December 2014, at which time the trial court, in open court, denied them in part and granted them in part. On 7 January 2015, WMPO filed an answer to the complaint. On 14 January 2015, WMPO gave notice of appeal from the trial court's oral partial denial of its motion to dismiss.

On 28 January 2015, the trial court entered a written order on defendants' motions to dismiss. The trial court allowed dismissal of plaintiff's equal protection claims for failure to state a claim, and plaintiff's second and third claims for being duplicative, and denied the remainder of defendants' motions. On 5 February 2015, NCDOT gave notice of appeal. On 10 February 2015, WMPO gave supplemental notice of appeal.

On 17 February 2015, this Court entered its unanimous opinion in the case of *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. App. ___, 769 S.E.2d 218 (2015) (hereinafter *Kirby I*), *aff'd*, ___ N.C. ___, 786 S.E.2d 919 (2016). In *Kirby I*, this Court considered

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a similar action against NCDOT, alleging a taking pursuant to the Map Act, in which the trial court granted NCDOT's motion to dismiss plaintiffs' complaints. This Court reversed and remanded the matter for consideration of the damages suffered by plaintiffs, and declined to address several of the issues raised. *Id.* at ___, 769 S.E.2d at 236.

On 23 February 2015, plaintiff moved for partial judgment on the pleadings, seeking that the trial court determine that NCDOT executed a taking of plaintiff's property pursuant its power of eminent domain, and that the trial court order a jury trial on the issue of compensation. On 22 April 2015, the trial court entered an order on this motion. This order cited *Kirby I* as part of its reasoning. In its order, the trial court held that WMPO was acting as an agent of NCDOT, that NCDOT had appealed *Kirby* to the Supreme Court of North Carolina, and that a determination of the facts in the instant case would better be delayed until after the Supreme Court's decision in *Kirby*. The trial court declined to address the nature and extent of the taking of plaintiff's property, but allowed plaintiff's motion for partial judgment on the pleadings, holding that NCDOT had executed its power of eminent domain, that this constituted a taking and inverse condemnation of plaintiff's property, and that a jury trial would be scheduled to determine the amount of compensation due plaintiff. The trial court further certified this order for appeal to this Court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Defendants gave notice of appeal.

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From the trial court's order dated 28 January 2015, partially denying their motions to dismiss, and the trial court's order dated 22 April 2015, granting plaintiff's motion for partial judgment on the pleadings, defendants appeal.

On 10 June 2016, our Supreme Court issued its opinion in *Kirby*, affirming the decision of this Court. *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. ___, 786 S.E.2d 919 (2016) (hereinafter *Kirby II*). On 11 July 2016, the North Carolina General Assembly approved House Bill 959 ("H.B. 959"). This bill, *inter alia*, rescinded all transportation corridor official maps filed pursuant to the Map Act, and imposed a moratorium on the filing of new maps, effective 1 July 2016 until 1 July 2017. N.C. Sess. Laws 2016-90 §§ 16, 17(a); *see also* N.C. Gen. Stat. § 136-44.50(h) (2016).

On 9 August 2016, this Court entered an order directing the parties to file supplemental briefs addressing the Supreme Court's decision in *Kirby II* and the impact of H.B. 959. All parties did so.

II. Interlocutory Appeal

As a preliminary matter, we note that the instant appeal is from the partial grant of a motion to dismiss, and the grant of a partial motion for judgment on the pleadings. These orders, which do not dispose of the entirety of the case but leave matters for further action by the trial court, are interlocutory. *See Royal Oak Concerned Citizens Ass'n v. Brunswick Cty.*, 233 N.C. App. 145, 148, 756 S.E.2d 833, 835 (2014).

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“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). “[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review ‘sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.’” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff’d per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted).

A. Motions to Dismiss

“An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order.” *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). However, sovereign immunity raises a jurisdictional issue that is immediately appealable because it affects a substantial right. *Arrington v. Martinez*, 215 N.C. App. 252, 256,

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716 S.E.2d 410, 413 (2011). NCDOT asserts that its sovereign immunity insulates it from suit, and allows immediate appeal from the denial of its motion to dismiss.

We note, however, that NCDOT explicitly declined to pursue immunity at the hearing. The trial court found this fact in its order on the motions to dismiss. We hold, therefore, that because NCDOT waived its sovereign immunity, no jurisdictional issue exists that would affect a substantial right.

WMPO contends that the dismissal order impacts a substantial right, in that plaintiff failed to exhaust administrative remedies, and in that the denial of its motion subjected WMPO to legal liability for performing its governmental duties.

A plaintiff's failure to exhaust administrative remedies is grounds for dismissal because it deprives the court of subject matter jurisdiction. *Steward v. Green*, 189 N.C. App. 131, 133, 657 S.E.2d 719, 721 (2008). Thus, a motion to dismiss for failure to exhaust administrative remedies is equivalent to a motion to dismiss for lack of subject matter jurisdiction. However, "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). As such, an interlocutory appeal based on failure to exhaust administrative remedies is not immediately appealable.

Similarly, being subjected to legal liability is not a substantial right that is immediately appealable. "Avoidance of trial is not a substantial right entitling a party

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to immediate appellate review.” *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999). Additionally, the speculative threat of future trials does not qualify as a substantial right entitling a party to an immediate appeal. *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 651, 736 S.E.2d 197, 200 (2012). In the instant case, avoiding the current action is not a substantial right of WMPO, and concerns about the “potentially dozens of more” trials are mere speculation. Thus, this argument also fails to demonstrate that WMPO is entitled to immediate appeal.

Because neither NCDOT nor WMPO has demonstrated the existence of a substantial right with respect to the denial of their motions to dismiss, we hold that those motions are interlocutory, and dismiss this appeal with respect to those motions.

B. Partial Judgment on the Pleadings

“When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. Nonetheless, the trial court may not, by certification, render its decree immediately appealable if [it] is not a final judgment.” *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citations and quotations omitted). In the instant case, the trial court certified its order on plaintiff’s motion for partial judgment on the pleadings pursuant to Rule 54(b). Although the order leaves open the issue of

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damages, it is final with respect to defendants' liability, and we therefore hold that this order, as certified, is immediately appealable.

III. Partial Judgment on the Pleadings

In various arguments, defendants contend that the trial court erred in granting plaintiff's motion for partial judgment on the pleadings. We disagree.

A. Standard of Review

This Court reviews a motion for judgment on the pleadings *de novo*. *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 305, 665 S.E.2d 767, 772 (2008).

"In deciding [a motion for judgment on the pleadings], the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *N.C. Concrete Finishers v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (quoting *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 37-38 (2009)). A judgment on the pleadings is properly entered only if " 'all the material allegations of fact are admitted[,] . . . only questions of law remain[,] ' and no question of fact is left for jury determination." *Id.* (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)).

B. Analysis

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First, defendants contend that the trial court was divested of authority to rule on plaintiff's motion for partial judgment on the pleadings after defendants filed their notices of appeal from the trial court's order denying their motions to dismiss.

“As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*.” *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346, 570 S.E.2d 510, 513 (2002). “Where a party appeals from a *nonappealable* interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case.” *Id.* at 347, 570 S.E.2d at 514. As we have held, above, that defendants' appeals from the trial court's denial of their motions to dismiss were interlocutory, those appeals did not divest the trial court of its jurisdiction. We hold that the trial court had jurisdiction to hear plaintiff's motion for partial judgment on the pleadings.

Defendants next raise several arguments challenging the merits of plaintiff's motion for partial judgment on the pleadings, and the trial court's reliance upon *Kirby I* in reaching its decision. Ultimately, these arguments can be condensed to a single issue: whether the trial court erred in granting plaintiff's motion for partial judgment on the pleadings.

In its complaint, plaintiff alleged, *inter alia*, the following relevant facts:

20. For all purposes under the Act, WMPO acts on behalf of NCDOT and is an agent of NCDOT.

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21. The Hampstead Bypass is an NCDOT project.
22. The Map was filed with the coordination, oversight, and approval of NCDOT.
23. WMPO does not have the power of eminent domain.
24. The recorded documents for the Hampstead Bypass associated with the Map set forth the list of properties and property owners whose real property purportedly is located within the mapped protected corridor pursuant to N.C. Gen. Stat. § 136-44.51 (“Protected Corridor”).
25. The Property is within the Protected Corridor.
26. The Map is cross-indexed under Jamestown’s name in the Pender County Register of Deeds. Pender County tax maps also depict the route of the Hampstead Bypass across the Property.
27. The Hampstead Bypass has not been completed.
28. NCDOT plans to purchase or condemn properties located within the Hampstead Bypass in order to allow NCDOT to construct and develop the Hampstead Bypass.
29. Prior to the recording of the Map and at all times thereafter, NCDOT did not have, and has not had, the funds available to acquire the properties necessary for the Hampstead Bypass or for its construction.
30. Despite these plans to purchase or condemn the properties, NCDOT has informed Jamestown that it will be ten (10) years or more—perhaps thirty (30) years—before NCDOT actually purchases or condemns the properties.
- ...
31. The Property is located within the Hampstead

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Bypass project.

32. The Property is heavily impacted by the Hampstead Bypass.

33. The Hampstead Bypass, when developed, will divide the Property into two pieces. It also will result in the taking of all of that portion of the Property previously approved for commercial development.

In its answer to plaintiff's complaint, NCDOT denied allegations 20, 22, 29, and 30; in short, NCDOT denied that WMPO was its agent, that it had oversight over WMPO's filing, that it lacked the funds to acquire the property at issue, and that it would be ten or thirty years before NCDOT condemned or purchased the property. With respect to allegation 24, NCDOT contended that it did not draft or file the corridor map, and that it therefore lacked knowledge of the allegations. The remaining relevant allegations were admitted. More specifically, in its answer, NCDOT admitted the following:

31. It is admitted that a portion of Plaintiff's property lies within the protected corridor. Except as herein admitted, the remaining allegations are denied.

32. It is admitted that the proposed project is anticipated to impact plaintiff's property and areas that plaintiff's [sic] intended for commercial development. Plaintiff will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.

33. It is admitted that the proposed project is anticipated to impact plaintiff's property and that Plaintiff

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will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.

NCDOT made additional admissions, each acknowledging that “plaintiff will be justly compensated for any taking of property rights[.]”

In its answer to plaintiff’s complaint, WMPO denied allegation 20, and alleged that it was without knowledge with respect to allegations 29 and 30. The remainder of the relevant allegations were admitted.

At a minimum, defendants admitted that plaintiff’s property was within the transportation corridor, and that plaintiff’s property would be impacted as a result. NCDOT explicitly admitted that plaintiff should and would be compensated for any taking that occurred. Given that the material facts were admitted, the only question remaining was one of law, namely whether the impact on plaintiff’s property constituted a taking, requiring defendants, or more specifically NCDOT, to compensate plaintiff.

Defendants contend that a taking did not occur. NCDOT alleges that this is due to the fact that WMPO, not NCDOT, filed the map at issue. However, NCDOT fails to offer statutory citations or other authority to explain why this precludes plaintiff from suffering a taking.

H.B. 959 contains language relevant to this issue. Specifically, it provides that:

Notwithstanding any provision of law to the contrary, damages, right-of-way costs, and planning and design costs

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related to litigation concerning the adoption of a transportation corridor official map under Article 2E of Chapter 136 of the General Statutes shall be paid from the tier under Article 14B of Chapter 136 of the General Statutes in which the project covered by the transportation corridor official map was funded under or is programmed to be funded under. For projects covered by a transportation corridor official map that were not funded, or are not programmed to be funded, under Article 14B of Chapter 136 of the General Statutes, damages, right-of-way costs, and planning and design costs related to litigation concerning the adoption of the transportation corridor official map shall be paid from the regional allocation of funds under Article 14B of Chapter 136 of the General Statutes for the region covered by the transportation corridor official map.

N.C. Sess. Laws 2016-90 § 15.

If the words of a statute “are clear and unambiguous, they are to be given their plain and ordinary meanings.” *Savage v. Zelent*, ___ N.C. App. ___, ___, 777 S.E.2d 801, 804 (2015) (citations and quotations omitted). “Where the legislature has made no exceptions to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.” *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 313 (1999) (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965)).

In the instant case, the language of H.B. 959 is clear and unambiguous. H.B. 959 specifies that the costs resulting from litigation surrounding the filing of maps

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pursuant to the Map Act are to be paid from funds set up by NCDOT's Transportation Investment Strategy Formula, N.C. Gen. Stat. § 136-189.11 (2015). Section 15 does not mention any distinctions between maps recorded by NCDOT and those recorded by other organizations in terms of liability. Rather, according to the "plain and ordinary meaning" of the statute, the costs associated with litigation over the filing of a map are paid by a predetermined fund, and exactly which fund is used to pay these costs is determined by which project is covered by the Map Act. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804.

The General Assembly did not include an exception to this rule for maps recorded by agencies other than NCDOT, for sovereign immunity reasons or otherwise, so we must presume that the General Assembly did not intend for there to be such an exception. *Sara Lee Corp.*, 351 N.C. at 36, 519 S.E.2d at 313. Because we must carry out the General Assembly's intent "to the fullest extent," we cannot read such an exception into the statute. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804. We decline to hold that NCDOT is exempt from liability simply on the basis of another agency filing the map.

NCDOT further contends that the trial court erred in relying on *Kirby I* to support the theory that a taking occurred, arguing that our holding in *Kirby I* did not in fact demonstrate a taking in contexts like this one.

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In *Kirby I*, we held explicitly that “the Map Act empowers NCDOT with the right to exercise the State’s power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map . . . which power, when exercised, requires the payment of just compensation.” *Kirby I*, ___ N.C. App. at ___, 769 S.E.2d at 232. We further held that, “[u]pon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map . . . the statutory restrictions of [the Map Act] are applicable to each ‘affected’ owner[.]” *Id.* at ___, 769 S.E.2d at 234. We concluded that NCDOT had not merely made plans to acquire property, but had exercised its power of eminent domain. *Id.* at ___, 769 S.E.2d at 235. While we noted that this determination required a fact-specific inquiry, we held that the demands of such an inquiry were met.

As an additional matter, we note that in *Kirby II*, our Supreme Court further held that “the Map Act restricted plaintiffs’ fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiff’s elemental property rights by eminent domain.” *Kirby II*, ___ N.C. at ___, 786 S.E.2d at 921.

NCDOT contends that the trial court erred in relying upon *Kirby I* because that case did not involve a putative agency relationship, as is the case before us, but rather direct action by NCDOT. As we noted above, however, direct action by NCDOT

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is not required for a taking to occur under statute, requiring payment from funds set aside for that purpose. NCDOT further contends that liability for a taking requires a fact-specific inquiry into the values of properties and the degree of impact upon them. However, this matter is still before the trial court; plaintiff's partial motion for judgment on the pleadings left open the degree to which a taking occurred, and the just compensation for the taking. The only issue disposed of was the legal question of *whether* a taking had occurred. NCDOT's argument does not truly challenge that ruling.

We hold that, based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff's complaint and defendants' answers established that a taking had occurred. The trial court did not err in granting plaintiff's motion for partial judgment on the pleadings on that limited issue.

This argument is without merit.

IV. Conclusion

Because defendants fail to show that the denial of their motions to dismiss impacted a substantial right, those arguments are dismissed as interlocutory. Because the pleadings, taken as a whole and considering defendants' admissions, demonstrated no genuine issue of whether a taking had occurred, the trial court did not err in granting plaintiff's motion for partial judgment on the pleadings on that issue.

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DISMISSED IN PART, AFFIRMED IN PART.

Judge TYSON concurs.

Judge DAVIS concurs in the result only.

Report per Rule 30(e).