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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-72

Filed: 1 December 2020

Cumberland County, No. 15 CVS 2896

JACK A. THOMPSON, LISA THOMPSON f/k/a LISA T. SHORT, ALEX J. THOMPSON, DELORES T. AMMONS, REBECCA T. BYRD f/k/a REBECCA R. THOMPSON, JESSE H. BYRD, JR., FRANK L. THOMPSON and CLAIRE TUTTLE f/k/a CLAIRE T. SLOAN, Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION, Defendant.

Appeal by Defendant from judgment entered 11 July 2018 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Court of Appeals 11 August 2020.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough and H. Addison Winters; Hendrick, Bryant, Nerhood, Sanders & Otis, LLP, by Matthew Bryant and T. Paul Hendrick, for the Plaintiffs-Appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., and Assistant Attorneys General Alexandra Hightower and William A. Smith; Teague Campbell Dennis & Gorham, by Jacob H. Wellman and Matthew W. Skidmore; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Steven M. Sartorio and William H. Moss, for the Defendant-Appellant.

McGEE, Chief Judge.

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The North Carolina Department of Transportation (“NCDOT”) appeals from the trial court’s judgment awarding Plaintiffs just compensation and reimbursement for *ad valorem* taxes paid for real property designated by a corridor protection map filed pursuant to the Roadway Corridor Map Act, N.C. Gen. Stat. §§ 136-44.50—44.54 (1992). This appeal was filed in this Court along with a companion case, *Chappell v. Department of Transportation*. The North Carolina Supreme Court decided *Chappell* on direct appeal. *See Chappell v. N.C. Dep’t of Transportation*, 374 N.C. 273, 841 S.E.2d 513 (2020). Following our Supreme Court’s decision in *Chappell*, we affirm the trial court’s awards of just compensation and reimbursement of taxes, and reverse and remand for reconsideration of the applicable pre-judgment interest rate.

I. Factual and Procedural Background

Plaintiffs are the owners of a 20.62 acre tract of undeveloped real property in Cumberland County (the “Property”). NCDOT recorded a corridor protection map on 29 October 1992 pursuant to the Roadway Corridor Map Act, N.C. Gen. Stat. §§ 136-44.50—44.54 (1992) (the “Map Act”), designating approximately 17.37 acres of the Property as a corridor reserved for use in constructing the Fayetteville Outer Loop highway system. Under the Map Act, owners of designated properties are prevented from developing or subdividing the designated properties without prior approval from NCDOT. *See* N.C. Gen. Stat. § 136-44.51 (1992).

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Plaintiffs filed a complaint against NCDOT on 27 April 2015, contending that NCDOT's designation of the Property via the corridor protection map was a taking by inverse condemnation. Following a N.C. Gen. Stat. § 136-108 hearing, the trial court determined as a matter of law that, by filing the corridor protection map, NCDOT had “taken an interest [in the Property] in the nature of a negative easement that never expires[.]”

Prior to trial, the trial court held a joint hearing on motions *in limine* shared between this case and its companion case, *Chappell v. Department of Transportation*. NCDOT proffered evidence during the hearing showing that the nature of the taking caused by the corridor protection map was merely temporary, arguing that N.C. Gen. Stat. § 136-44.51(b) (1992) allowed Plaintiffs to place a maximum duration of three years on Map Act encumbrances.¹ In addition, NCDOT proffered expert testimony calculating the fair market value of the Property after the taking by considering the proposed temporary nature of the taking. The trial court excluded NCDOT's proffered evidence.

At trial, Plaintiffs presented expert testimony that the Property was valued at approximately \$99,000 before the corridor protection map was filed, but depreciated

¹ “[N]o application for building permit issuance or subdivision plat approval for a tract subject to a valid transportation corridor official map shall be delayed by the provisions of this section for more than three years[.] If the entity that adopted the . . . map has not initiated acquisition proceedings or issued approval within [three years,] an applicant within the corridor may treat the real property as unencumbered and free[.]” N.C. Gen. Stat. § 136-44.51(b).

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to a value of approximately \$8,000 after NCDOT filed the map. A second expert witness for Plaintiffs testified that “[t]here was no market for properties inside the corridor.” The second expert stated that NCDOT “took the fundamental rights of a property owner to improve, or subdivide, or develop, and basically that destroyed the primary value of [the Property].” Therefore, the expert concluded, there was “no longer a market” for the Property. NCDOT presented no evidence to the jury at trial.

The trial court instructed the jury that “in arriving at the fair market value of [the Property] subject to [NCDOT’s] restrictions on its use immediately after the taking, you should consider [the Property] as it will be at the conclusion of the project.” During their deliberations, the jury sent the trial court a note, asking: “Is the conclusion the finished Highway? Are we considering that the highway is present?” The trial court reiterated that the jury should “consider the roadway as completed on the date of the filing of the Map Act corridor as it affects [the Property].” The jury returned a verdict determining just compensation for the Property, and the trial court entered judgment granting Plaintiffs just compensation and reimbursement for *ad valorem* taxes paid on the Property, as well as interest and attorney’s fees. NCDOT appeals.

This appeal was filed in our Court along with *Chappell*. Our Supreme Court elected to decide *Chappell* on direct, discretionary review on 11 June 2019. Plaintiffs moved for this Court to stay the outcome of this case pending our Supreme Court’s

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opinion in *Chappell*. This Court allowed Plaintiffs' motion on 12 July 2019, ordering "this matter shall be held in abeyance pending determination of *Chappell v. N.C. Department of Transportation*[]" by the North Carolina Supreme Court." The Supreme Court filed an opinion in *Chappell* on 1 May 2020.

II. Analysis

This case is controlled by our Supreme Court's decision in *Chappell*. In *Chappell*, NCDOT recorded two corridor protection maps designating approximately 2.25 acres of the plaintiffs' 2.92 acres as a reserved corridor. *Chappell*, 374 N.C. at 277, 841 S.E.2d at 518. The plaintiffs sued NCDOT, alleging that NCDOT had taken their property by inverse condemnation. During the joint hearing on motions *in limine* shared with the present case, the trial court excluded NCDOT's proposed evidence valuing the plaintiffs' property by considering the taking to be temporary in nature. *Id.* at 278, 841 S.E.2d at 518.

At trial, the plaintiffs presented two expert witnesses who testified regarding the fair market value of the plaintiffs' property before and after NCDOT filed the corridor protection maps. The first expert witness testified that plaintiffs' property had a fair market value of approximately \$156,000 before the Map Act takings, but was valued at approximately \$13,000 after the takings. *Id.* The second expert witness testified that there was no market for any of plaintiffs' properties after they were designated by the corridor protection maps, because "there were plenty of

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alternative properties for sale in Cumberland County that were not encumbered, and prospective buyers would not ‘want to buy something that does not work for the purpose that its designed.’” *Id.* NCDOT presented no evidence to the jury at trial. *Id.*

The trial court then instructed the jury that “in arriving at the fair market value of the property subject to [NCDOT’s] restrictions on its use immediately after the taking, you should contemplate the project in its completed state and any damage to the remainder due to the use to which the part appropriated may, or probably will, be put.” *Id.* at 282, 841 S.E.2d at 521. The jury issued a verdict on the amount of just compensation the plaintiffs were entitled, and the trial court entered a final judgment awarding the plaintiffs just compensation and reimbursement for taxes paid, plus attorney’s fees and interest. *Id.* at 279, 841 S.E.2d at 518–19.

NCDOT appealed the trial court’s judgment, making the following arguments on appeal:

- (1) the trial court erred by effectively holding the filing of the corridor protection map effected a fee simple taking, by denying NCDOT’s proffered testimony, and by improperly instructing the jury based upon the plaintiffs’ evidence;
- (2) the trial court erred by adding the plaintiffs’ discounted property taxes to its award of just compensation; and
- (3) the trial court erred in calculating the appropriate

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interest rate for the plaintiffs' award.²

Chappell, 374 N.C. at 275–77, 841 S.E.2d at 517. Following a *de novo* review, the Supreme Court held that (1) “any error in the trial court’s characterization of the taking was harmless in light of the evidence in [the] case”; and that “the trial court’s treatment of the reduced property taxes was consistent with [the Supreme Court’s] instruction in [*Kirby v. N.C. Department of Transportation*, 368 N.C. 847, 786 S.E.2d 919 (2016)].” *Id.* at 277, 841 S.E.2d at 517. The Supreme Court also held that the trial court improperly considered equity investment in determining the applicable compound interest rate, and “reverse[d] the portion of the trial court’s order concerning the proper evaluation of the pre-judgment interest rate because it was contrary to [the Supreme Court’s] precedents, and [] remand[ed] for further proceedings to apply a pre-judgement interest rate consistent with [its] prior cases.” *Id.*

The factual and procedural history of the present case and *Chappell* are almost identical, and, in this case, NCDOT makes substantively the same three arguments on appeal as our Supreme Court addressed in *Chappell*. We adopt the Supreme Court’s holdings in *Chappell*.

A. Jury Instructions

² NCDOT alleged a fourth argument on appeal in *Chappell* concerning the trial court’s denial of its statutory “quick-take” rights over the property at issue on the eve of trial. This issue is not relevant to the present case.

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First, the trial court appropriately excluded NCDOT's proffered evidence of the Property's fair market value because it was not based upon legally acceptable methods of appraisal. Based on the evidence presented at trial, the trial court's jury instructions did not amount to prejudicial error. The trial court's rulings on whether to admit or exclude evidence are overturned only for an abuse of discretion. See *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 480, 810 S.E.2d 217, 220 (2018). Legal conclusions presented in jury instructions are reviewed *de novo*, *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014), but are only reversible where "a different result would have likely ensued had the error not occurred[.]" *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983).

Just compensation for the "fundamental restraint on fundamental property rights" caused by a Map Act designation is the diminution in the fair market value of the designated property, determined "by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926. "Thus, the relevant determination when calculating just compensation for a taking that involves less than the entire parcel of property starts with the fair market value of the entire property before the taking and the fair market value of

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what remains after the taking.” *Chappell*, 374 N.C. at 284, 841 S.E.2d at 522. In our review of the trial court’s evidentiary rulings and instructions to the jury, “what matters is whether the trial court correctly applied the law concerning how just compensation is measured, not the label given by the trial court or the parties to the taking that occurred.” *Id.* at 283, 841 S.E.2d at 521.

NCDOT’s proffered expert testimony sought to determine the fair market value of the Property based on its view that the corridor protection map created a three-year negative easement. This view was in direct contradiction with the trial court’s prior determination that the corridor protection map created a “negative easement [burdening the Property] that never expires[,]” as well as our Supreme Court’s prior holding that Map Act designations create an “*indefinite* restraint on fundamental property rights[,]” *Kirby*, 368 N.C. at 855–56, 786 S.E.2d at 925–26. “[A]n opinion concerning a property’s fair market value is inadmissible if it materially relies on factors that legally cannot be considered.” *Chappell*, 374 N.C. at 285–86, 841 S.E.2d at 523. In contrast, Plaintiffs’ expert witnesses offered testimony that appropriately considered the indefinite nature of the taking and properly compared the fair market value of the Property before its Map Act designation and the fair market value after the corridor protection map was filed. “The trial court’s evidentiary rulings concerning the expert testimony here were not an abuse of

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discretion because they were based on a correct understanding of the proper measure of just compensation.” *Chappell*, 374 N.C. at 283, 841 S.E.2d at 521.

NCDOT contends that the trial court’s jury instructions in this case were prejudicial notwithstanding *Chappell* because the facts of this case are distinguishable from *Chappell*. We disagree. Similar to *Chappell*, the trial court in this case instructed the jury to consider the Property as it would be “at the conclusion of the project”—after the Fayetteville Outer Loop would be completed. But, in this case, the trial court also reiterated its jury instruction error—instructing the jury to consider the corridor protection map as a completed, physical taking—when it responded to the jury’s questions during its deliberations. Nonetheless, the trial court’s repeated instruction is immaterial and does not cause this Court to reach a different result. The only evidence of the fair market value of the Property before and after its designation by the corridor protection map was that provided by Plaintiffs’ expert witnesses. This evidence presented a calculation determined by appropriate legal methods, considering the Property as it actually was directly following the Map Act designation and not assuming the Fayetteville Outer Loop had been completed. “Therefore, regardless of the trial court’s instruction regarding the road being built, the evidence admitted at trial supported the jury’s verdict on fair compensation. The error, if any, would not have impacted the result in this particular trial.” *Id.* at 289, 841 S.E.2d at 525.

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NCDOT makes an additional, related argument specific to this case, contending that the trial court erred by refusing to admit evidence that the Property was no longer subject to the roadway corridor map as of July 2011. During trial, NCDOT attempted to admit an application for a variance on the Property allegedly filed with NCDOT in July 2008, thus lifting the Map Act restrictions that encumbered the Property as of July 2011 pursuant to N.C. Gen. Stat. § 136-44.51(b) and mooted any taking that may have occurred. Plaintiffs objected to evidence of this application and the trial court sustained the objection. The witness NCDOT called to authenticate the application document was not a NCDOT employee when the application was allegedly filed, was unable to identify most of the parties named within the application, and was unable to make any connection between Plaintiffs and the parties named within the document. Plaintiffs' names or other identifying information did not appear anywhere in the proffered application. There was no evidence at trial showing that the application was filed by Plaintiffs, by a legal representative of Plaintiffs, or by any other party holding title to the use of the Property. We hold the trial court did not abuse its discretion by refusing to admit the application evidence.

B. Reimbursement of Taxes

Second, the trial court did not err by reimbursing Plaintiffs' discounted *ad valorem* taxes because the evidence presented at trial showed that the Property had

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virtually no fair market value. Properties designated under the Map Act are assessed lower *ad valorem* property taxes. See N.C. Gen. Stat. §§ 105-277.9, -277.9A (2019). When determining just compensation for property designated by the Map Act, the trier of fact should “tak[e] into account . . . any effect of the reduced *ad valorem* taxes.” *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926. The trial court in this case, interpreting *Kirby*, reimbursed Plaintiffs for the actual *ad valorem* taxes they paid following the filing of the corridor protection maps, rather than the full amount of taxes they would have paid had the Property not been designated under the Map Act. “[I]n this case, where the evidence was that the property essentially had no fair market value once the 1992 corridor map was recorded,” “it was appropriate, following *Kirby*, for the trial court to take into account the effect of the reduced *ad valorem* taxes in the way that it did, and compensate [Plaintiffs] for the actual taxes they paid at a time when their property had virtually no fair market value.” *Chappell*, 374 N.C. at 289, 841 S.E.2d at 525.

C. Interest Rate

Third, “the trial court erred in applying a compounded interest rate . . . based on a prudent investor’s investment portfolio that included equity investments.” *Id.* at 291, 841 S.E.2d at 526. In both the present case and in *Chappell*, the expert witnesses for the landowners offered interest rates determined by a combined investment portfolio of 60 percent equity securities and 40 percent government bonds.

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The trial court accepted this approach and used the proposed portfolio to determine the applicable interest rate.

A plaintiff receiving an award in an inverse condemnation action may seek interest on the amount awarded, but must either (1) accept the statutory rate of interest at the time of trial, or (2) rebut it with a compounded interest rate determined by a “prudent investor’s” diversified portfolio during the pertinent period of time. *Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 261–64, 345 S.E.2d 355, 359–61 (1986). If the plaintiff elects to rebut the statutory rate, “the interest rate available under the ‘prudent investor’ standard for determining the appropriate interest rate to apply to a judgment in an inverse condemnation case must be a rate produced by debt instruments or debt obligations, such as commercial bonds or treasury bills during the relevant time period.” *Chappell*, 374 N.C. at 291, 841 S.E.2d at 526.

Plaintiffs in this case elected to rebut the statutory rate by presenting evidence of an appropriate compound interest rate. The interest rate in this case was determined by considering, in part, equity securities and the record in this case does not show “what rates of return a prudent investor might have obtained from a diversified portfolio of [solely] commercial bonds and/or treasury bills[.]” *Id.* at 291, 841 S.E.2d at 527. Therefore, “we remand to the trial court for further proceedings to determine the appropriate interest rate to apply consistent with this opinion” and our Supreme Court’s opinion in *Chappell*. *Id.*

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III. Conclusion

Following our Supreme Court's decision in *Chappell*, we hold that the "trial correctly applied the statutorily defined measure of damages for a partial taking and made evidentiary rulings consistent with what is relevant to determining fair market value" and that "[a]ny error in the jury instructions was harmless in light of the evidence in this case." *Chappell*, 374 N.C. at 292, 841 S.E.2d at 527. Further, the trial court did not err by reimbursing Plaintiffs for *ad valorem* taxes paid on property that had virtually no value. *Id.* We also hold that the trial court erred in calculating the applicable compounded interest rate under the "prudent investor" standard. *Id.* We reverse and remand that portion of the trial court's judgment. On remand, all parties may present additional evidence regarding the appropriate compounded interest rate.

AFFIRMED IN PART; REMANDED IN PART.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).