An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-852

No. COA22-321

Filed 20 December 2022

Moore County, No. 21 CVS 903

EQUESTRIAN LAKES, LLC, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant.

Appeal by Plaintiff from order entered on 20 October 2021 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 1 November 2022.

The Justice Firm, LLC, by Keenya T. Justice, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Kelly A. Moore, for Defendant-Appellee.

JACKSON, Judge.

¶ 1 Plaintiff-Appellant Equestrian Lakes, LLC ("Plaintiff") appeals the trial court's order granting Defendant-Appellee North Carolina Department of Transportation's ("Defendant") motion to dismiss and dismissing Plaintiff's complaint with prejudice. After careful review, we affirm.

I. Background

¶ 2 This inverse condemnation suit commenced before we decided *Dep't of Transp. v. McLendon Hills Prop. Owners' Ass'n*, 2022-NCCOA-306, 871 S.E.2d 579, 2022 WL 1311143 (unpublished), which was a direct condemnation action that shared some facts in common with this case. We summarize *McLendon Hills* before explaining the facts of this case.

A. DOT v. McLendon Hills

¶ 3 In the direct condemnation action, the North Carolina Department of Transportation ("NCDOT") filed a complaint on 5 July 2019 to acquire Highway Project No. 50218.2.1, Parcel No. 99 from the McLendon Hills Property Owners' Association ("the POA"). The purpose of the project was to widen Highway 211 in Moore County from Highway 73 to the west of Holly Grove School Board. *McLendon Hills*, 2022-NCCOA-306, ¶ 3. The land subject to a taking by NCDOT was a half-acre tract of land that was a designated common area ("the common area") in McLendon Hills. *Id.* ¶ 2. The tract included the front entrance gate and monument of McLendon Hills and an onsite vehicular stacking area, where vehicles and horse trailers wait off the public road before entering the gate and into the subdivision. *Id.*

¶ 4 In its answer, the POA filed three motions. *Id.* ¶ 6. The POA filed a motion under Rule 19 of the North Carolina Rules of Civil Procedure to add all fee simple lot owners in McLendon Hills as necessary parties. *Id.* The POA also filed a motion under Rule 20 of the North Carolina Rules of Civil Procedure to add all fee simple lot

owners in McLendon Hills as proper parties. *Id.* And lastly, the POA filed a motion under N.C. Gen. Stat. § 136-108 requesting a hearing on the property and interests taken by NCDOT. *Id.* The trial court held a Section 108 hearing and denied the POA's motions to add the individual lot owners as necessary parties and to redefine the property subject to taking as the entire McLendon Hills subdivision, including all individual lots. *Id.* ¶ 7.

¶ 5 On appeal, we affirmed the trial court. *Id.* ¶ 1. Regarding the issue of necessary and proper parties, we concluded that the individual lot owners were proper but not necessary parties because the POA failed to sufficiently allege that the individual lot owners' claims were uncommon, and because they were common, the POA could adequately represent all of their interests. *Id.* ¶¶ 18–19. Regarding the POA's motion to redefine the taken property as the entire McLendon Hills subdivision, we concluded that the trial court did not err in denying the POA's motion because the POA failed to show unity of ownership between the common area and all of the individual lots that make up McLendon Hills. *Id.* ¶¶ 22–28.

B. The Present Action

¶ 6 On 26 August 2019, Plaintiff and Defendant executed an agreement entitled "Deed for Highway Right of Way," which was recorded on 29 October 2019, in Book 5217, Pages 227–29 in the Moore County Registry. As part of Project 50218.2.1, the deed granted Defendant a temporary drainage easement from Parcel No. 97 and fee

simple in certain land in Mineral Springs Township in Moore County, in exchange for $4,500.

¶ 7 On 30 June 2021, while *McLendon Hills* was pending at our Court, Plaintiff filed a complaint against Defendant seeking damages arising out of Defendant allegedly interfering with and negatively impacting Plaintiff's recorded easement of ingress and egress and interest in the POA entrance monument[1] that Defendant acquired. Specifically, Plaintiff alleged that the POA's entrance monument no longer functions as originally designed, Plaintiff has been deprived of reasonable access to and from its property, Defendant's taking creates a less aesthetically pleasing appearance, and the taking diminishes the value of Plaintiff's property. As part of its complaint, Plaintiff attached the Deed for Highway Right of Way as Exhibit C and incorporated it by reference in the complaint.

¶ 8 In response, Defendant filed a motion to dismiss, arguing that the complaint should be dismissed under Rule 12 of the North Carolina Rules of Civil Procedure. The trial court granted the motion and dismissed Plaintiff's complaint with prejudice.

¶ 9 Plaintiff entered timely notice of appeal.

II. Appellate Jurisdiction

---

[1] As an owner of lots within the subdivision, Article IX, Sections 2 and 3 of the Restrictive Covenants of McLendon Hills Subdivision Phase 5 provide Plaintiff an easement of ingress and egress and an interest in the POA entrance monument.

¶ 10 "Interlocutory orders may be appealed immediately under two circumstances." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005). The first is when the trial court "certifies no just reason exists to delay the appeal after a final judgment as to fewer than all the claims or parties in the action." *Id.* The second is when the appeal "involves a substantial right of the appellant and the appellant will be injured if the error is not corrected before final judgment." *Id.*

¶ 11 We hold that this appeal involves a substantial right. Interlocutory orders "concerning title or area taken must be immediately appealed as 'vital preliminary issues' involving substantial rights adversely affected." *Id.* (citations omitted). Since this appeal involves a taking by Defendant, the trial court's interlocutory order is immediately appealable.

III. Standard of Review

¶ 12 "The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*." *Locklear v. Cummings*, 262 N.C. App. 588, 592, 822 S.E.2d 587, 590 (2018). "The Court must consider 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.'" *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 448 (2008) (citation omitted). A complaint should not be dismissed for insufficiency "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could

be proved in support of the claim." *Brown v. Miller*, 63 N.C. App. 694, 696, 306 S.E.2d 502, 504 (1983) (internal quotation marks and citation omitted).

¶ 13 However, "if the complaint discloses an unconditional affirmative defense which defeats the claim asserted, it will be dismissed." *Id.* Moreover, "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C. Gen. Stat. § 1A-1, Rule 10(c) (2021).

IV. Analysis

¶ 14 This appeal presents the question of whether the release attached to Plaintiff's complaint and incorporated therein by reference defeated Plaintiff's claims. We hold that it did.

A. The Release Barred Plaintiff's Claims

¶ 15 "Where a landowner has granted a right of way over his land, he must look to [the] contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid, and all its conditions have been complied with by the grantee." *Feldman v. Transcon. Gas Pipe Line Corp.*, 9 N.C. App. 162, 166, 175 S.E.2d 713, 715 (1970) (internal quotation marks and citation omitted). Additionally, a landowner will not be compensated again if the grantee already compensated the landowner and uses the land as previously agreed. *Hildebrand v. S. Bell Tel. & Tel., Co.*, 221 N.C. 10, 14, 18 S.E.2d 827, 829–30 (1942).

¶ 16 In *Hildebrand*, our Supreme Court held that the defendant was entitled to

dismissal of the plaintiff's condemnation suit because the plaintiff had already been compensated for the defendant's use of a right-of-way that the plaintiff granted the State Highway and Public Works Commission ("the Commission"). *Id.* at 11, 13–14, 18 S.E.2d at 829–30. The Commission and the defendant had previously entered into an agreement in which the Commission granted a license to the defendant to install poles at specific points on the right-of-way, which was on a highway. *Id.* at 11, 18 S.E.2d at 828. The plaintiff alleged that the plaintiff's land was subject to a taking, and the trial court awarded the plaintiff $3,600. *Id.* Our Supreme Court was unpersuaded, and held that the defendant, who was an assignee of the Commission, was allowed to encroach upon the highway without paying anything to the plaintiff because the plaintiff had already been paid. *Id.* at 13–14, 18 S.E.2d at 829–30.

¶ 17 Similarly, while unpublished and therefore noncontrolling, N.C. R. App. 30(e), as Defendant argues, our decision in *Tyson v. N.C. Dep't of Transp.*, 242 N.C. App. 523, 776 S.E.2d 897, 2015 WL 4620291 (unpublished), is also instructive. There, the plaintiff filed a complaint against NCDOT and CenturyLink in an inverse condemnation action after the defendants attempted to relocate underground fiberoptic telecommunication lines within their right-of-way but inadvertently severed a septic system drain line that led to the plaintiff's house. *Id.* at *2. The plaintiff claimed that NCDOT exceeded the right-of-way granted to it by an agreement between the plaintiff's and NCDOT's predecessors-in-interest. *Id.* Citing

Hildebrand, we held that the language of the agreement released NCDOT from liability. *Id.* at *5. The agreement granted a

> right-of-way for said highway project as hereinafter described and *release[d] the Commission[, NCDOT's predecessor-in-interest,] from all claims for damages by reason of said right-of-way across the lands of the undersigned and of the past and future use thereof* by the Commission, its successors and assigns, for all purposes for which the Commission is authorized by law to subject such right-of-way[.]

Id. at *1 (emphasis added). We also explained that NCDOT had already compensated the plaintiff. *Id.* at *1, *6.

¶ 18 Just as in *Tyson*, so too here, the Deed for Highway Right of Way provides:

> The Grantors acknowledge that the project plans for Project # 50218.2.1 have been made available to them. The Grantors further acknowledge that the consideration stated herein is full and just compensation pursuant to Article 9, Chapter 136 of the North Carolina General Statutes for the acquisition of the said interests and areas by the Department of Transportation and *for any and all damages to the value of their remaining property; for any and all claims for interest and costs; for any and all damages caused by the acquisition* for the construction of Department of Transportation Project # 50218.2.1, Moore County, *and for the past and future use of said areas by the Department of Transportation, its successors and assigns for all purposes for which the said Department is authorized by law to subject the same.*

(Emphasis added.)

¶ 19 Defendant thus paid Plaintiff $4,500 for "any and all damages" to Plaintiff's property, "any and all damages" caused by NCDOT's acquisition, and "the past and

future use of said areas" by NCDOT and its successors-in-interest. Because an exhibit to Plaintiff's complaint – the release quoted above – discloses an unconditional affirmative defense that defeats Plaintiff's claims, the language of the agreement serves as an insurmountable bar to recovery for Plaintiff and justified dismissal under Rule 12(b)(6).

V. Conclusion

¶ 20 We affirm the order of the trial court because the release attached to Plaintiff's complaint was an affirmative bar to Plaintiff's recovery.

AFFIRMED.

Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).