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Appellate Court of Maryland.

CANDACE MCCARTHY
v.
BOARD OF COMMISSIONERS FOR FREDERICK COUNTY, MARYLAND

No. 1792, September Term, 2023
|
Filed: June 27, 2025

Circuit Court for Frederick County Case No. C-10-CV-20-000456

Berger, Tang, Kehoe, Christopher B. (Senior Judge, Specially Assigned), JJ.

Opinion

Opinion by Tang, J.

***1** The appellant, Candace McCarthy ("McCarthy"), sued the appellee, Board of Commissioners for Frederick County, Maryland (the "County"), for negligence and private nuisance. [1] McCarthy, who worked for the Office of the Public Defender (the "OPD"), claimed that she suffered respiratory injuries due to exposure to black mold while working in the John Hanson House. [2] This building is part of the Frederick County Courthouse Complex, where the OPD leased office space from the County.

After conducting discovery, the County moved to dismiss or, in the alternative, for summary judgment on both claims. The court granted summary judgment on the negligence claim because it was barred by governmental immunity. It also granted summary judgment on the private nuisance claim on the merits. On appeal, McCarthy presents two questions, which we have rephrased: [3]

1. Did the circuit court err in granting summary judgment as to the negligence claim on the basis that the County enjoys governmental immunity?

2. Did the circuit court err in granting summary judgment as to the private nuisance claim?

***2** For the following reasons, we answer both questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

The Frederick County Courthouse Complex, located at 100 West Patrick Street in Frederick, Maryland, consists of two buildings: (1) the courthouse proper, where court proceedings occur and where certain State and County agencies are located; and (2) the John Hanson House, where the OPD leased office space from the County during the relevant period.

In August 2017, McCarthy began working at the OPD. She worked in the John Hanson House, where she claimed to smell a constant, damp, and mildewy odor from the building and its air vents that made her ill. In 2018, she complained about the problem and learned that mold was present in the building's basement. She asserted that her exposure to the mold resulted in her developing an autoimmune disease. Thereafter, McCarthy sued the County for negligence and private nuisance.

After discovery, the County filed a motion to dismiss, or in the alternative, a motion for summary judgment. The County argued that the negligence claim was barred by governmental immunity. It contended that the John Hanson House, where the mold exposure occurred, was part of the Courthouse Complex, and thus, the maintenance of the John Hanson House fell under the governmental function of maintaining a courthouse, which enjoys immunity. In addition, the County asserted that it did not derive any profit from leasing office space to the OPD in a way that would render its maintenance of the John Hanson House proprietary. Regarding the private nuisance claim, for which the County does not enjoy immunity, the County argued that the claim failed because it was undisputed that McCarthy,

as an employee working in the building, had no ownership interest in the property.

McCarthy opposed the motion. She argued that the John Hanson House is not part of the Complex; it functioned as an office space where the County leased areas to State agencies, rather than serving as a courthouse. She contended that maintenance of this building was not conducted out of a governmental duty to the public. Instead, it was carried out under the terms of the memorandum of understanding and lease agreements between the County and the State for which the County received payments. She argued that this situation amounted to a proprietary function, thereby taking it outside the protection of immunity. Regarding the claim of private nuisance, McCarthy maintained that, as an employee, she "lawfully occupied" the John Hanson House and therefore had a property interest in the building.

After holding a hearing, the circuit court announced its decision. First, the court granted summary judgment on McCarthy's negligence claim due to governmental immunity. The court explained:

> What I find in this case is that the John Hanson House, in essence, has been subsumed within the courthouse. I mean it is built so that it is accessible in the courthouse. It has the mailing address of the courthouse. The fact that it's a stand-alone building and that for preservation purposes was maintained ... I find under the facts that I think are really undisputed in the case and I do find that they all are, is that I would conclude that the use of the John Hanson House is part of the courthouse in Frederick County.

***3** The court rejected McCarthy's claim that the County was profiting from its lease arrangement with the OPD:

> I would find that the [C]ounty is not, in my opinion, de[r]iving what I would say is a profit as that is defined. The memorandum of understanding between the [S]tate and the [C]ounty provides that the [C]ounty is to receive, in essence, the percentage of costs associated with the maintenance of that property, and I think that comes in line with the other cases that were cited by [McCarthy] with respect to some of these ancillary uses .... I believe the use of the public defender in the courthouse buildings is ancillary to the governmental function. The Public Defender's office is necessary for the administration of justice in the buildings; that it makes sense to have the Public Defender's Office either in or near by the courthouse where much of their work is done .... I find that the County is not making a profit as that is defined under the terms of governmental immunity. So based on that, I do find that governmental immunity applies with respect to the negligence claim in the case.

Second, the court granted summary judgment on McCarthy's private nuisance claim. The court explained that, to prove a private nuisance, the plaintiff must possess a property interest in the property in question. The court found that it was undisputed that McCarthy, as an employee of the OPD, did not have any such interest in the John Hanson House.

The court entered an order to this effect, and McCarthy timely appealed. We shall include additional facts as necessary in the discussion.

STANDARD OF REVIEW

When a party moves for summary judgment, the court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment

is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013). In an appeal from the grant of summary judgment, this Court conducts a de novo review to determine whether the circuit court's conclusions were legally correct. *See D'Aoust v. Diamond*, 424 Md. 549, 574 (2012). We consider the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party. *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 107–08 (2014). "A plaintiff's claim must be supported by more than a 'scintilla of evidence,' as there must be evidence upon which [a] jury could reasonably find for the plaintiff." *Id.* at 108 (cleaned up and citations omitted).

DISCUSSION

I.

NEGLIGENCE

"[T]he doctrine of governmental immunity is alive and well in Maryland today." *Heffner v. Montgomery Cnty.*, 76 Md. App. 328, 333 (1988). However, the doctrine "does not treat all governmental units equally." *Id.* "Unlike the total immunity from tort liability which the State and its agencies possess, the immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a 'governmental' rather than a 'proprietary' function." *Austin v. Mayor of Balt.*, 286 Md. 51, 53 (1979). The Supreme Court of Maryland has "recognized the difficulty in distinguishing between those functions which are governmental and those which are not[.]" *Rios v. Montgomery Cnty.*, 386 Md. 104, 128 (2005) (citation omitted). Nevertheless, in *Mayor of Balt. v. State ex rel. Blueford*, 173 Md. 267 (1937), the Court announced a multi-factored test to determine whether a function is "governmental" or "proprietary":

> ***4** Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.

Id. at 276. "Another way of expressing the test ... is whether the act performed is for the common good of all or for the special benefit or profit of the corporate entity." *Tadjer v. Montgomery Cnty.*, 300 Md. 539, 547 (1984). [4]

Our appellate courts have evaluated the "profit or emolument" factor to determine whether a local government's earning of a significant profit could support a finding that a function or activity is proprietary. *See Tadjer*, 300 Md. at 549–50 (explaining that a county's operation of a **landfill** could, if it resulted in significant profit, at least theoretically be a proprietary function); *Reed v. Mayor of Balt.*, 171 Md. 115, 118–19, 122 (1936) (in a slip and fall case, holding that the city engaged in a proprietary function where it owned the market and "deriv[ed] revenue" by renting the market's stalls, emphasizing that it had a duty to keep the market "reasonably safe for public travel"); *Bagheri v. Montgomery Cnty.*, 180 Md. App. 93, 96 (2008) (holding that the county was engaged in a governmental function where it did not derive profit from operating a parking garage); *Town of Brunswick v. Hyatt*, 91 Md. App. 555, 564–65 (1992) (holding that the town was engaged in a governmental function where it did not derive more than a modest profit from operating and charging for entry to public pool); *Burns v. Mayor of Rockville*, 71 Md. App. 293, 308 (1987) (holding that the city engaged in a governmental function where it derived "little or no dollar profit or emolument" from charging tickets for a ballet program); *Austin*, 286 Md. at 66 (holding that the city's provision of day camp activities was a governmental function where the fees generated for day camp were sufficient to cover day-to-day expenses but did not result in a profit or emolument inuring to the city); *Blueford*, 173 Md. at 276 (holding that the city's maintenance of public pool as governmental function was not affected by fact that nominal fees were charged to use pool, where fees were insufficient to cover the expenses of its maintenance).

The question here is whether the alleged mold exposure occurred during the County's performance of a governmental function; that is, we must determine whether the County's maintenance of the John Hanson House is a governmental function. If that were the case, then the County would be immune from the negligence claim. *See Blueford*, 173 Md. at 272 ("[T]he primary and essential inquiry is whether the tortious act was done in the course of the performance of some governmental duty or function.").

A.

Summary Judgment Evidence

Before addressing this question, we summarize the summary judgment evidence about the John Hanson House and its relationship with the Courthouse Complex. The evidence consisted of various documents and the deposition testimony of the Chief of the County's Office of Capital Asset, Lease and Acquisition Management; the Lead Building Technician for the Courthouse Complex; and the Accounting Supervisor for the County's Division of Finance.

1. County's Acquisition of John Hanson House for the Courthouse Complex

***5** In 1975, the County acquired a 4.3-acre parcel of land, consolidated from the City of Frederick and other entities, for the purpose of constructing a new courthouse at 100 West Patrick Street. As part of this land acquisition, the County obtained the property that had been home to John Hanson. The proposed architectural concept was to integrate the John Hanson House into the Courthouse Complex. It was determined that renovating the existing structure would be less expensive than building a new facility. The John Hanson House was envisioned to be used as commercial or office space in support of the new Complex, with potential occupants including the Office of the Public Defender.

2. MOU Regarding the Construction and Maintenance of the Courthouse Complex

On July 21, 1975, the State and the County entered a Memorandum of Understanding ("MOU") to cooperatively construct the Courthouse Complex, wherein "both the State and County will occupy space to provide a more efficient and effective delivery of services to the residents of Frederick County." The MOU provided that the State agencies to occupy the State's proposed space "shall include the District Court of Maryland, Office of the Public Defender, [t]he Department of Public Safety and Correction Services (Division of Parole and Probation) and the Department of Health and Mental Hygiene (Division of Juvenile Services), and any other agency as deemed appropriate."

The MOU required that construction costs would be shared between the State and County agencies, based on the respective percentage of the Complex each entity was expected to occupy. According to the MOU, the County agreed to cover 70% of the construction costs, while the State would be responsible for the remaining 30%.

The MOU also provided that the County would be responsible for all operating, maintenance, and repair services in the Complex. This includes building management services such as custodial care, heating, lighting, air conditioning, and electrical maintenance. As with construction costs, the State and the County agreed to cover their proportional share of these expenses based on the ratio of the space they occupied in the Complex.

3. Completion of the Courthouse Complex

The Courthouse Complex was built in the early 1980s. As mentioned, it comprises the courthouse proper and the John Hanson House, with one address (100 West Patrick Street).

The Complex has been continuously used by the judiciary, various State and County agencies, and the police department. The courthouse proper has housed various State and County agencies, including the Child Support Division of the State's Attorney's Office, an office of the Maryland Department of Veterans Affairs, and an office of the State Comptroller. The John Hanson House, a four-story building that includes a basement, has been occupied by the OPD and the Juvenile Division of the State's Attorney's Office. [5]

The courthouse proper and the John Hanson House are connected by a shared stairwell and a ten-foot breezeway. Members of the public can access the John Hanson House through this breezeway, where security is managed by the same service responsible for the Complex. In addition, the County is responsible for the maintenance of the Complex,

including the John Hanson House, with oversight from the building manager of the Complex.

4. County's Lease Agreements with the OPD

The OPD has been leasing office space in the John Hanson House since 1984. The lease agreement between the State and the County does not differentiate between the John Hanson House and the courthouse proper; it refers to the property as the "Frederick County Courthouse, 100 West Patrick Street." The lease outlines which State agencies occupy space in the Courthouse Complex and specifies each agency's proportionate share of expenses consistent with the MOU. In this context, "rent" refers to the percentage of building operating and maintenance costs.

***6** The lease has been updated periodically to reflect changes in the State's proportionate share of rent based on the proportion of the Complex it occupies. The County first calculates what proportion of the net rentable square footage of the Complex is occupied by each agency, which can vary year to year. Then, at the end of each fiscal year, the County determines its actual operating expenses for the Complex as a whole, including costs for building maintenance, facility services, and courthouse security. Finally, each agency's proportionate share of operating and maintenance expenses is computed by multiplying its proportionate occupancy, expressed as a percentage, by the total annual operating and maintenance expenses. During the relevant period, the OPD occupied 17.67% of the net rentable square footage of the Complex (4,234 square feet of the OPD space / 23,955 total square feet of rentable space in the Complex = 0.176748), and thus the County charged OPD for 17.67% of the operating and maintenance expenses.

The County's Division of Finance generates invoices and sends them to the State agencies. Payments are made monthly by each agency to the County at a specified rate. These payments are credited toward the total annual charge described above. For the years leading up to the alleged injury, the County charged the OPD as follows: $98,561.14 total for fiscal year 2016, $101,708.86 for fiscal year 2017, $109,327.69 for fiscal year 2018, and $124,931.60 for fiscal year 2019.

B.

Analysis

1. The John Hanson House Is a Part of a Courthouse.

McCarthy argues that the John Hanson House is neither a courthouse nor part of the Courthouse Complex because no court proceedings or administrative functions take place there. Instead, the John Hanson House is physically separate from the courthouse proper and serves a distinct purpose. She highlights that during the early planning stages, the John Hanson House was earmarked for "commercial" use and has continued to operate as an office building for government agencies. We are not persuaded by the distinction McCarthy makes to isolate the John Hanson House from a courthouse, and we reject her contention that the John Hanson House is not part of the Courthouse Complex.

Harford County Commissioners v. Love, 173 Md. 429 (1938), is instructive. In *Love*, the plaintiff fell while on her way to the restroom in the basement of the Harford County courthouse. *Love*, 173 Md. at 430. The Supreme Court of Maryland concluded that the maintenance of a courthouse is a governmental function that entitles the county to immunity. *Id.* at 434. It explained:

> The maintenance of a courthouse is a distinctive function of government. It is requisite for the convenient administration of public justice. The buildings devoted to that primary purpose in the counties are also customarily used by the county commissioners in the performance of their functions as the governing body of the county, and by other officials who are engaged in rendering essential public services. The judicial and administrative purposes to which such buildings are devoted necessarily impress them with a governmental character.
>
> ... 'A municipal corporation is not liable for negligence in the construction and maintenance of buildings or apparatus used solely for governmental purposes; and this rule applies to a courthouse and its appurtenances ....'

Id. at 433 (citation omitted). The Court concluded that the "plaintiff's injury [was] received in her use of accommodations, gratuitously provided for the public

convenience, in the building maintained by Harford [C]ounty for governmental purposes as a courthouse[.]" *Id.* at 434.

There is no genuine dispute of material fact that the John Hanson House is part of the Courthouse Complex, and, therefore, it is part of a courthouse. The summary judgment evidence clearly established that the John Hanson House was reconstructed to be incorporated into the Complex, sharing the same footprint and address. The decision to maintain it as a separate building was made solely to preserve its historic value and to avoid the costs associated with demolishing and fully reconstructing it.

***7** Furthermore, the rationale in *Love* supports the idea that the immunity a local government enjoys as part of its maintenance of a courthouse is not limited to the areas where courtrooms are located or where administrative tasks related to the court are performed. Rather, that immunity extends to other parts of the building, or in this case, the buildings within the Complex, that are occupied by agencies essential for the effective administration of justice and are used by various officials providing important public services. Indeed, the MOU explicitly states that the purpose of occupying the Complex with State agencies, such as the OPD, is to "provide a more efficient and effective delivery of services to the residents of Frederick County." The OPD provides legislatively mandated legal services,[6] and its location in a building of the Complex enhances the effective and efficient delivery of these services.

McCarthy focuses on specific language from *Love*, interpreting it narrowly to mean that if a building is not used "solely" and "gratuitously" for public purposes, it cannot be classified as a courthouse, entitling the County to immunity. She points out that public access to the interior of the OPD office in the John Hanson House was limited and that the County received funds for leasing space to State agencies like the OPD.

McCarthy's interpretation falls short. If we were to follow her reasoning, it would suggest that the County would not have immunity for tort claims that arise in a judge's chambers, since chambers are not accessible to the public. Likewise, her reasoning would imply that the County would not be immune for tort claims arising in the clerk's office, as that office charges filing fees and does not operate "gratuitously."

2. Whether the County Profited from Leasing the John Hanson House Was Not a Question of Fact for the Jury.

Relying on *Tadjer v. Montgomery Cnty.*, 300 Md. 539 (1984), McCarthy contends that the determination of whether the County received substantial benefits from the lease is a question of fact for the jury and thus summary judgment should have been denied. In *Tadjer*, the Supreme Court of Maryland ruled that whether expenses for a county **landfill** were more than the revenue derived was a factual question:

> If, as in *Austin* and [*Blueford*], the income was not adequate to maintain the **landfill** or if this income were barely adequate to cover expenses, we would agree that this **landfill** operation was a governmental function. On the other hand, if the income derived was in an amount substantially in excess of the County's expenses for rent, operation and the like, so that the **landfill** was a real moneymaking proposition, it would be a proprietary function. *Only a trial on its merits can make this determination*.

300 Md. at 549–50 (emphasis added).

Tadjer is distinguishable from the case sub judice. In *Tadjer*, the trial court granted a demurrer to a plaintiff's claim for negligence against Montgomery County based on immunity. 300 Md. at 545. The Court reversed the trial court and this appellate court because there was no evidence before either court about the amount of expenses and revenues derived from the **landfill**:

> ***8** All we have is the fact set forth in the declarations that the County derived "substantial income" from this operation. We, of course, have no way

> of knowing the amount of this income. It may be great or small.

Id. at 549.

Unlike the Court in *Tadjer*, we have before us the expense and payment figures for the lease of space to the OPD, and thus this case is governed by the holding in *Blueford*, where the Court had sufficient evidence before it to determine that the operation of a swimming pool was not a profit-making proposition. *See* 173 Md. at 276–77; *see also Burns*, 71 Md. App. at 300–01 (rejecting the plaintiff's reliance on *Tadjer* to support the notion that whether the operation of a recreational ballet program at the civic center resulted in profit was a factual question because expense and income figures were developed in the record).

Significantly, the issue being challenged is not a question of fact. McCarthy did not dispute the figures presented in the documents during the proceeding below. She did not contest the actual costs of operating and maintaining the Courthouse Complex, the proportionate share charged to the OPD, or the amounts received by the County. Instead, she presented the circuit court with the conclusion that the undisputed facts showed that the County profited from the lease. *See Burns*, 71 Md. App. at 301–02 (explaining that plaintiffs did not present a factual dispute as to whether the municipality made a profit from its activity). Accordingly, under the circumstances here, whether the County derived a "profit or emolument" under the government/proprietary analysis was not a factual dispute for the jury to decide.

3. The County Did Not Profit from Leasing Space in the John Hanson House.

McCarthy argues that the circuit court erred in concluding that the County did not derive any profit from leasing space in the John Hanson House. She argues that the County's leasing of office space to State agencies like the OPD provided "substantial benefits" to the County in various ways and should be considered a proprietary function.

McCarthy asserts that the County's profits and benefits were significantly higher than the minimal fees charged for the use of municipal properties in the cases cited above. For support, she cites *Blueford*, 173 Md. at 269, where the municipality charged $0.05 for use of a public pool; *Burns*, 71 Md. App. at 299 n.1, where the municipality charged $1.50 per ticket for a recreational ballet program at a civic center; and *Austin*, 286 Md. at 61, where the municipality charged $3.50 per week for participation in a day camp. In contrast, she contends that the County earned over $124,000 in fiscal year 2019 by leasing office space in the building to the OPD.

The problem with McCarthy's argument is that she focuses on the amounts charged in other cases, comparing them to those charged in this case and equating them to a "profit," instead of evaluating whether the income generated by the County's leasing of the John Hanson House substantially exceeded its operational expenses. *See Tadjer*, 300 Md. at 549 (explaining that we assess whether "the income derived was in an amount substantially in excess of the County's expenses for rent, operation and the like, so that the [activity] was a real moneymaking proposition"). It is undisputed that the amount received from the OPD covered its proportionate share of the costs associated with operating and maintaining the Courthouse Complex during the relevant period, which includes the John Hanson House. Furthermore, it is undisputed that the County did not earn any profit from this arrangement. Thus, it is clear from the record that leasing space to the OPD was not a money-making venture for the County.

***9** McCarthy takes another approach to the argument, stating that the OPD was charged for "significant expenses that were not related to the State's tenancy," which existed only in the courthouse proper and did not serve or benefit the OPD. Such expenses include payment for courtroom security, maintenance of the courthouse proper, and custodial services provided to the courthouse proper. McCarthy claims that the County meets the "profit or emolument" criterion because, by charging the OPD for some costs of running the Complex, the County reduces its accrued expenses. [7] McCarthy does not cite any legal authority to support this argument, and our research did not reveal any case law that suggests this type of attenuated benefit is the kind of "profit or emolument" that supports a finding that a given function is "proprietary."

If we were to follow that reasoning, it could be applied to any government activity that charges fees, such as the public pool, the ballet program, or the day camp mentioned in the cases earlier. This implies that these activities could be considered

proprietary because the fees collected help cover some of the costs associated with their maintenance and operation —costs that would not have been alleviated without these payments. Essentially, according to McCarthy's reasoning, any reduction in the County's expenses would be viewed as a benefit to the County, which would render the activity a proprietary function. However, as stated, the relevant inquiry in the governmental/proprietary assessment is not whether the local government collects any income at all, but whether the activity was a money-making proposition. *See Tadjer*, 300 Md. at 549.

4. The Maintenance of the John Hanson House Was Not a Proprietary Function.

McCarthy contends that the maintenance responsibilities arising from the lease, for which the County receives payment, render that activity a proprietary function. She asserts that the performance of maintenance obligations arising from the lease, which was intended to serve the tenant (the OPD), does not qualify as a governmental function. This is because it does not exclusively serve a public purpose or promote the welfare of the public.

We are unpersuaded by McCarthy's attempt to separate the purpose of the Courthouse Complex, which includes the John Hanson House, from the maintenance of the John Hanson House itself. McCarthy overlooks the public benefits of having a Complex that houses State agencies like the OPD. The MOU explicitly acknowledged that State and County agencies would "occupy space to provide a more efficient and effective delivery of services to the residents of Frederick County." The purpose of the Complex is furthered by the maintenance of all its parts, all of which serve the public by supporting efficient and effective delivery of governmental services. *See Burns*, 71 Md. App. at 305 (rejecting the plaintiffs' attempt to separate the recreational program of ballet in the civic center building from the maintenance of the building in which the program was conducted).

McCarthy places significant weight on the profit/emolument factor. However, determining whether an activity is governmental or proprietary "based primarily on whether the activity makes a profit does not comport with the test announced in *Blueford*." *Hyatt*, 91 Md. App. at 564. "[T]he purpose of the activity (*i.e.*, whether the activity 'tends to benefit the public health and promote the welfare of the whole public') is to be accorded equal weight with the question of profit." *Id.*

The policy issues related to the doctrine of governmental immunity and the maintenance and operation of courthouse components like the John Hanson House cannot be ignored. *See Blueford*, 173 Md. at 274 (specifically addressing the nature of a public swimming pool and its role in the community). Taking "the protection of governmental immunity away from the municipality would have a chilling effect on the municipality's willingness to provide this most vital and substantial public service." *Hyatt*, 91 Md. App. at 565. As discussed earlier, the County's use and maintenance of the John Hanson House, which houses occupants like the OPD, are devoted to delivering essential services to the public.

***10** For the reasons stated, the circuit court did not err in granting summary judgment on the negligence count in the County's favor on grounds of governmental immunity.

II.

PRIVATE NUISANCE

Unlike with negligence claims, "counties and municipalities have never been accorded immunity from nuisance suits." *Bd. of Educ. of Prince George's Cnty. v. Mayor of Riverdale*, 320 Md. 384, 388 (1990). "[T]he lack of county and municipal immunity in nuisance actions is based on the theory that a municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land." *Id.* (citations and internal quotations omitted).

McCarthy argues that the court erred in granting summary judgment on the private nuisance claim on the basis that she did not have a property interest in the leased premises in the John Hanson House where she worked. McCarthy contends that the private nuisance claim was viable, arguing that she was a "lawful occupant of the John Hanson House" because she worked in the building pursuant to her employment with the OPD.

Maryland courts have adopted Section 821D of the Restatement (Second) of Torts (1965), which defines private nuisance as "a nontrespassory invasion of another's interest in the private use or enjoyment of land." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 92 (2014). Ownership of the property in question is unnecessary to bring a claim of private nuisance. *Hoffman v. United Iron & Metal Co.*, 108 Md. App. 117, 133 (1996). As relevant here, however, such a claimant must either have lawful possession of or have a right to occupy the land. *Id.* at 133–34 (concluding that minors living on a property were "lawful occupants"—and therefore had standing to bring nuisance claims—based on their parents' lawful occupancy); *see also Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 75 (1909) (holding that a tenant who had "exclusive possession and control of the rooms she occupied" could theoretically recover on a claim of private nuisance because the blasting and explosions she complained of were unquestionably a nuisance when performed "in the vicinity of another's dwelling house"); *Lurssen v. Lloyd*, 76 Md. 360, 367 (1892) (holding that the resident plaintiff, despite having sold the property under mortgage, could bring a claim of private nuisance as long as he remained in physical possession of the property).

Section 821E of the Restatement (2d) of Torts (1977), titled "Who Can Recover for Private Nuisance," enumerates three classes of individuals who "have property rights and privileges in respect to the use and enjoyment of the land affected, including (a) possessors of the land, (b) owners of easements and profits in the land, and (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment."

Section 328E defines a "possessor of land" as "(a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

***11** McCarthy argues that she was a "lawful occupant" of the John Hanson House and suggests that we broaden private nuisance law to permit claims by employees who have a legal right to be present at their workplace. However, she has not cited any legal authority to support the proposition that an employee has a sufficient property interest in their workplace to pursue a private nuisance claim. Our research of Maryland law has not yielded any results to support her claim. Therefore, we look to treatises and decisions from other jurisdictions for guidance.

In *Prosser and Keeton on the Law of Torts*, Professor Prosser summarizes the property rights protected in an action for private nuisance, explaining that the "original character of private nuisance as an invasion of interests in land has been preserved. Apparently any interest sufficient to be dignified as a property right will support the action." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 87, at 621 (5th ed. 1984). Thus, a private nuisance claim "will lie in favor of a tenant for a term ... , or a mortgagor in possession after foreclosure, or even one in adverse possession without title. Likewise it may be maintained by the holder of an easement, such as a right of way or a right to passage, light and air" and family members of the possessor sharing the possession with him. *Id.* at 621–22 (footnotes omitted).

> *On the other hand, it is generally agreed that anyone who has no interest in the property affected, such as* a licensee, *an employee* or a lodger on the premises, cannot maintain an action based on a private nuisance.

Id. at 621 (emphasis added and footnotes omitted); *accord* 66 C.J.S., *Nuisances* § 106, Westlaw (database update May 2025) ("[A] person having nothing more than the mere naked possession of land, without any title or vested interest therein, cannot maintain a suit to restrain a nuisance which injures the land.").

In *Higgins v. Connecticut Light & Power Co.*, 30 A.2d 388 (Conn. 1943), the plaintiff's intestate, Higgins, along with another plaintiff, Jacobson, were employed by the Connecticut state highway department to trim trees along a public highway. During this work, one of them died and the other was injured. *Id.* at 390. The complaint included claims of negligence and nuisance. *Id.* The Connecticut Supreme Court held that no recovery could be obtained for a private nuisance because the employees had no legal interest in the land in question. *Id.* at 391.

In *Kilts v. Kent County Board of Supervisors*, 127 N.W. 821, 821 (Mich. 1910), the plaintiff's decedent fell to his death when a tower platform collapsed as the decedent worked on a water tank covering. The plaintiff alleged both negligence and public and private nuisance against the board of supervisors that authorized the tower's construction, the contractors who built it, and the subcontractor who supplied the faulty joists responsible for the accident. *Id.* at 821–22. The trial court disposed of the negligence claim on the ground of governmental immunity. *Id.* at 821.

As for the nuisance claims, the plaintiff argued that the county should nevertheless be held liable because the tower and tank constituted a nuisance. *Id.* at 822. The Supreme Court of Michigan rejected the nuisance claims because to accept that "would be an extension of the law of nuisance." *Id.* The court explained:

> *The enunciation of the doctrine contended for would be attended by far-reaching results, and practically make every man the insurer of his help, his guests, and even strangers rightfully upon the premises. Practically it would have a tendency to eliminate the whole doctrine of negligence* in large classes of cases, for juries would be asked to find that buildings, machines, walks, roads, and all other articles or structures were nuisances if in any way defective or out of repair, because dangerous to those approaching them. *The doctrine of contributory negligence would go with that of negligence [i]f counsel's contention is correct*.
>
> ***12** We are of the opinion that a nuisance involves, not only a defect, but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same, and that *the doctrine should be confined to such cases*.

Id. (emphasis added).

In *Reber v. Illinois Central Railroad Co.*, 138 So. 574 (Miss. 1932), the plaintiff sued a railroad company, asserting that the company's operations caused a nuisance because the train engines that passed by his residence created a great volume of smoke and noise. *Id.* at 575. However, the evidence demonstrated that the plaintiff's home belonged to his employer, and his employer permitted the plaintiff to live there rent-free as part of his compensation for employment. *Id.* at 575–76. While finding that the plaintiff did not provide sufficient evidence to establish a nuisance, the court also found that, as a mere employee, the plaintiff did not have a sufficient interest in the property to bring a nuisance claim. *Id.* at 577–78. The court opined that:

> The complainant here owns no interest in the real property affected. He is not even a lessee. Nor is he a tenant in the legal sense of the term. He is a mere employee occupant at will, a weekly wage earner, occupying the house as an incident to his employment, and as a part of the compensation in consideration of his services. A person must have some estate, be it ever so little, such as that of a tenant at will, or on sufferance, to be a tenant. Occupation as servant, or licensee, does not make one a tenant.

Id. at 577.

Finally, in *Page v. Niagara Chemical Division of Food Machinery & Chemical Corp.*, 68 So.2d 382 (Fla. 1953), the Supreme Court of Florida considered a private nuisance claim brought by railroad employees against the owner of an adjacent factory. *Id.* at 383. The plaintiff employees alleged, *inter alia*, that "each of said plaintiffs is a lawful occupant of said Atlantic Coast Line export yard during their working hours." *Id.* at 384. Citing *Reber*, *supra*, the Supreme Court of Florida rejected that theory of occupancy, explaining that presence on the property during work was "not sufficient to show that [the employees] have such an interest in or relation to their employer's property as would entitle them to maintain a suit to enjoin the defendant's operation as for a private nuisance." *Id.*

We find these authorities instructive in holding that an employee's right to be present in the workplace does not confer upon her an interest in the property affected that would entitle her to maintain a private nuisance suit. Adopting McCarthy's interpretation would broaden the law of private

nuisance to allow claims from licensees, invitees, and others without an interest in the property affected. At the hearing, the circuit court illustrated this very concern:

> [I]f you go to the point of allowing employees to assert, in essence, property rights of their employers, there's nothing to prevent that to be extended to business invitees in a property; and then even people who have even less interest in there if they're an occupant that is allowed on a property. So if I'm a homeowner, and I have guests over to my house, and I allow them on the property, does that mean then they have the rights to then assert the nuisance claim for something that occurred in my property that was from a neighbor[?] Say somebody has bad asthma, and the next door neighbor has a big bonfire out there putting particulates in the air, and the particulates come over into my—into the property and caused an asthma attack, and we say it was the nuisance, but I think at that point nuisance becomes unattached to the property interest, and I believe that the appropriate analysis would be that there needs to be some property-related interest for a person to assert a nuisance claim.

***13** The court's insightful assessment of the potential consequences of adopting McCarthy's stance is on point. We add that embracing McCarthy's proposed expansion of private nuisance law "would have a tendency to eliminate the whole doctrine of negligence in large classes of cases," including the defense of contributory negligence, as discussed in *Kilts*, 127 N.W. at 822. Furthermore, such an expansion would enable a plaintiff whose negligence claim against a local government is barred by governmental immunity to circumvent that defense by asserting an alternative claim for private nuisance.

For the reasons stated, the court did not err in granting summary judgment on the private nuisance claim.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

All Citations

--- A.3d ----, 2025 WL 1778818

Footnotes

1 In 2020, McCarthy and a co-worker filed the lawsuit against the Board of Commissioners for Frederick County, Maryland. However, years earlier, in 2014, "Frederick County became a charter county, with a County Executive and a County Council, rather than a Board of County Commissioners." *75-80 Props., LLC v. Rale, Inc.*, 470 Md. 598, 612 n.3 (2020). Neither side raised an issue with the Board of Commissioners not being the proper party in the case. Accordingly, we shall not address it. *See Singer v. Steven Kokes, Inc.*, 39 Md. App. 180, 181 n.1 (1978) (declining to address issue of improper parties where parties did not raise issue below or on appeal). For convenience, we shall refer to the Board of Commissioners as the County.

The County moved to dismiss the original complaint. The circuit court granted this motion without prejudice, allowing McCarthy and her co-worker to conduct discovery regarding the issue of governmental immunity. After completing discovery, they amended their complaint to include claims of negligence and public and private nuisance. Ultimately, the court granted summary judgment on all counts. The co-worker did not file an

appeal. Additionally, McCarthy chose not to appeal the court's decision to grant summary judgment on her public nuisance claim. Therefore, her claims for negligence and private nuisance are the only ones before us.

2 From 1781 to 1782, John Hanson was the President of the United States in Congress Assembled under the Articles of Confederation.

3 In her brief, McCarthy phrased the issues as follows:

> I. Did the circuit court err as a matter of law when it granted summary judgment in favor of [the County] because the question of whether maintenance functions at the John Hanson House served a proprietary purpose is a question for the jury at trial?
>
> II. Did the circuit court err as a matter of law when it granted summary judgment in favor of [the County] by finding that a claimant must have a proprietary interest in a premises to maintain a claim for private nuisance?

4 One line of cases—addressing the so-called "public ways exception"—holds that the maintenance of public ways, such as sidewalks and roadways, is proprietary and that members of the public injured while traveling on such public ways may bring actions in negligence. *See, e.g.*, *Creighton v. Montgomery Cnty.*, 254 Md. App. 248, 254–55 (2022) (compiling cases). This exception is not applicable in this case.

5 The OPD has also occupied space in the courthouse proper.

6 The OPD is an executive branch agency of the State. *State v. Walker*, 417 Md. 589, 607 n.14 (2011); *see* Md. Code Ann., Crim. Proc. § 16-202. The purpose of the OPD is to:

> (1) provide for the realization of the constitutional guarantees of counsel in the representation of indigent individuals, including related necessary services and facilities, in criminal and juvenile proceedings in the State; [and]
>
> (2) assure the effective assistance and continuity of counsel to indigent accused individuals taken into custody and indigent individuals in criminal and juvenile proceedings before the courts of the State ....

Md. Code Ann., Crim. Proc. § 16-201.

The OPD must have at least one office in each district. *Id.* §§ 16-203(g)(2), 16-101(c). Among the various districts for the jurisdictions in the State, Frederick County is in District 11. *See* Md. Code Ann., Cts. & Jud. Proc. § 1-602(11).

7 That State agencies are charged for their respective occupancies of the Courthouse Complex regardless of which building or buildings they occupy undermines McCarthy's attempts to meaningfully distinguish the two buildings in her earlier argument.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

LITTLE BENT FARM, LLC APPELLANT
v.
WESTERN KENTUCKY UNIVERSITY; CITY OF BOWLING GREEN, KENTUCKY; DR. PAUL WOOSLEY; AND JOSEPH REYNOLDS APPELLEES

NO. 2024-CA-0191-MR
|
RENDERED: JUNE 27, 2025, 10:00 A.M.

APPEAL FROM SIMPSON CIRCUIT COURT HONORABLE KENNETH H. GOFF, II, JUDGE ACTION NO. 21-CI-00069

Attorneys and Law Firms

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BRIEF FOR APPELLEES WESTERN KENTUCKY UNIVERSITY, PAUL WOOSLEY, PhD, AND JOSEPH REYNOLDS: Colton W. Givens Thomas N. Kerrick Bowling Green, Kentucky

BRIEF FOR APPELLEE CITY OF BOWLING GREEN, KENTUCKY Hillary Hightower Bowling Green, Kentucky Jason Bell Elizabethtown, Kentucky

BEFORE: COMBS, LAMBERT, AND McNEILL, JUDGES.

OPINION AFFIRMING

LAMBERT, JUDGE:

***1** Little Bent Farm, LLC (hereinafter "LBF") appeals from the January 9, 2024, order summarily dismissing its claims of breach of an implied warranty and negligent failure to comply with the labeling of a pesticide for the sale of allegedly contaminated compost. After careful review of briefs, record, and law, we affirm the dismissal of LBF's suit.

BACKGROUND FACTS AND PROCEDURAL HISTORY

This appeal involves the composting activities conducted on Western Kentucky University's Farm [1] (hereinafter "the Farm"), an 800-acre property located in Bowling Green, Kentucky. The Farm began its composting operation in approximately 1987 as part of an agreement with the City of Bowling Green (hereinafter "the City") to accept and lawfully dispose of the leaves that the City collected from within city limits as a free service.

Under the terms of the initial agreement, the City agreed to reimburse Western Kentucky University (WKU) for its costs, up to $27,871.10. WKU, in turn, agreed to provide the labor, tools, and sundry items needed to run the compost yard. Half of the compost produced by WKU was to be considered the City's property and the compost not used by the City, along with WKU's share, was to be marketed and sold by WKU, with the City entitled to any proceeds received on its share.

Via yearly municipal orders, the City has continued in this arrangement with WKU, with minimal modifications. These modifications included that, beginning in 2015, the City's financial contribution increased to the current sum of $45,900.00, and at some point the City began receiving a set 25% of the compost sale's proceeds.

WKU uses the funds from the City as the operating account for the compost yard, with any shortfalls being advanced by the Farm's budget and repaid, when possible, by WKU's portions of the proceeds from compost sales. In addition to the City's 25% of the proceeds, a portion of the sales is paid to WKU Facilities Management. This portion is used to defray its cost for transporting food scraps, which have been used in the compost since 2017, from WKU's dining halls to the Farm. Surplus funds, if any, are then put towards student scholarships. [2] Over the years, the composting yard has grown, and it received two government grants to increase its production. In fiscal year 2020, compost sales generated approximately $14,623.00 in revenue.

Dr. Paul Woosley and Joseph Reynolds are employees of WKU. Dr. Woosley is the Director of the Farm. Joseph Reynolds, a licensed compost operator who reports directly to Dr. Woosley, is solely responsible for the compost yard management. Reynolds creates the compost from the leaves provided by the City, food scraps collected from WKU's dining halls, and animal bedding, sawdust, and manure collected from the Farm and the expo center. He uses his judgment and experience to determine what to add to the compost pile, when to turn the pile, and when the composting process is completed. In addition to these duties, Reynolds also handles the marketing and selling of the compost produced by the Farm.

***2** In April 2019, Dr. Woosley applied GrazonNext, a pesticide[3] containing aminopyralid, on 51 acres of fields at the Farm. Dr. Woosley did not inform Reynolds of this action, and Reynolds denies any independent knowledge.

On March 26, 2020, LBF purchased two dump truck loads of compost from the Farm. LBF is a five-acre farming business operating in Simpson County, Kentucky, that grows vegetables and sells its produce at farmers' markets. Reynolds, who handled the sale and delivery, was familiar with LBF and its intended use for the compost. After LBF applied the compost to its vegetable fields, the crops exhibited damage consistent with contamination from aminopyralid, which LBF does not use. Suspecting that the compost was the source of the contamination, LBF had a sample tested, and the results were positive for aminopyralid.

Thereafter, LBF contacted the Kentucky Department of Agriculture (hereinafter "the KDA"), to determine whether it could sell its produce despite the suspected pesticide contamination, and the KDA opened an investigation into the Farm's use of pesticides to verify compliance with state and federal laws. The KDA and Reynolds, who had received other complaints about possible pesticide contamination, collected samples from the compost purchased by LBF and from WKU's remanent pile, the bulk of the product having been sold, and submitted them for testing at different labs. Additionally, the KDA also collected and submitted foliage samples from LBF's affected plants.

The parties dispute the significance of the different testing methods, the laboratories used, what samples were actually tested, and the results, but the tests conducted by the KDA and WKU were negative for aminopyralid. And, relatedly, WKU's bioassays, testing seed germination when grown with the compost versus a control soil, did not suggest pesticide contamination. Based on its test results, the KDA concluded that the compost was not contaminated and closed its investigation. Despite this, LBF was instructed by a different KDA employee that its produce could not be sold, and so LBF destroyed its 2020 crop.

On March 17, 2021, LBF filed the underlying suit alleging the following causes of action against WKU, Reynolds and Dr. Woosley, in their individual capacities, and the City: (1) breach of implied warranty of fitness, regarding the unsuitability of the compost for its intended purpose of growing vegetables and (2) negligent failure to comply with pesticide labeling.[4] LBF sought lost profits, consequential damages, lost future sales and reputational damages, costs to restore the contaminated property to its former state, and punitive damages. The respondents denied liability, and the parties engaged in extensive discovery.

On October 31, 2022, WKU and its employees filed a motion for summary judgment. In the motion, WKU and its employees argued that they had total immunity, governmental and qualified official immunity, respectively, from LBF's suit. They additionally asserted that summary judgment was proper because all of LBF's claims were precluded by the KDA's finding of no contamination and by the economic loss rule.[5] As for the claims against Reynolds and Dr. Woosley individually, the parties asserted that the Uniform Commercial Code (UCC)[6] and the Kentucky Product Liability Act (KPLA)[7] barred LBF's action because neither Reynolds nor Dr. Woosley qualified as sellers or manufacturers. Rather they were merely agents of the seller/manufacturer, WKU. Finally, WKU and its employees argued summary judgment was proper because LBF had failed to establish its entitlement to damages or that WKU and its employees had breached a duty of care.

***3** On December 7, 2022, the City filed its own motion for summary judgment. Arguing that LBF's claims arose from the City's exercise of its good faith legislative or quasi-legislative discretion to adopt the municipal order approving dumping leaves at WKU and its exercise of discretion to allocate its resources, the City asserted immunity pursuant to the

Kentucky Claims Against Local Government Act (CALGA), codified at KRS 65.200 *et seq.*

The City additionally asserted that it had been exonerated of direct liability because LBF neither complained of the City's conduct nor did it allege that the leaves supplied by the City were the source of the contamination. As for vicarious liability, the City disputed that it had engaged in a joint venture or enterprise, noting that it has no formal partnership agreement with WKU, that the two entities do not share a common purpose or pecuniary interest, and that the City exercises no control over the compost yard operation. The City asserted that its only role was to dump its leaves at the Farm for a fee, defrayed to a limited extent by future sales. Finally, the City echoed WKU's arguments that the KDA investigation foreclosed LBF's suit and that LBF had failed to prove a redressable injury.

LBF filed its memorandum in opposition to summary judgment on January 31, 2023. Therein, LBF argued against immunity for any of the respondents, disputed that either the KDA investigation or the economic loss rule precluded its claims, and maintained that the evidence was sufficient to survive summary judgment and to establish a redressable injury.

After reply briefing, the circuit court held a hearing on March 9, 2023, wherein the parties reiterated their arguments on the respondents' claims of immunity. The court then entered an order on January 9, 2024, concluding that the respondents were immune and granting summary judgment in their favor. The court also concluded that summary judgment was alternatively proper as to all respondents because the KDA findings and the economic loss rule foreclosed LBF's claims and because LBF had failed to produce evidence of the respondents' liability or of recoverable damages. Finally, the court determined that the individual claims against Dr. Woosley and Reynolds were contrary to both the UCC and the KPLA and, accordingly, dismissed all counts against them. This appeal timely followed. [8]

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 56.01 provides that a claimant "may, at any time, ... move with or without supporting affidavits for a summary judgment ..." in his or her favor. And CR 56.03 instructs that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Court in *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010), set out the standard of review.

> The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The trial judge must view the evidence in a light most favorable to the nonmoving party, resolving all doubts in its favor. Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions.

***4** *Id.* With this standard in mind, we turn to LBF's claims.

ANALYSIS

First, LBF challenges the court's determination that WKU had governmental immunity from its suit.

An agency of state government has governmental immunity from civil damage actions arising from its performance of integral governmental acts. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). "The immunity does not extend, however, to agency acts which serve merely proprietary ends, *i.e.*,

non-integral undertakings of a sort [that] private persons or businesses might engage in for profit[,]" especially if the intent is to raise revenue or to participate in a commercial market. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). "[E]ducation is an integral aspect of state government and ... activities in direct furtherance of education will be deemed governmental rather than proprietary." *Id.* "The issue of whether a defendant is entitled to the defense of sovereign or governmental immunity is a question of law" reviewed de novo. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

Citing testimony that the proceeds from the compost sales are used to defray WKU's costs and to fund scholarships, that WKU, in its discretion, gives compost to non-profits and to local farmers for free, and that classes in soil microbiology, environment, and horticulture use the compost yard to teach students about the composting process, the circuit court concluded that the compost yard's operations were educational, and thus, WKU was immune from LBF's suit. The court deemed it immaterial that WKU sold the compost to the public, asserting that Kentucky law provides that revenue generating activities performed by educational institutions are governmental when the revenue is used to further education.

On appeal, LBF contends that the circuit court impermissibly disregarded the evidence most favorable to LBF, specifically, that WKU does not offer any courses in composting, that Reynolds is not qualified to teach the science involved in composting, that WKU has not historically recognized the composting unit for educational purposes in promotional materials, and that the primary purposes of the program is to save WKU and the City money and to compete with private entities in a commercial market and not, as the court seemed to conclude, to raise funds for student scholarships. LBF further asserts that, because WKU receives a tangible benefit from its composting activities, pursuant to *Brabson v. Floyd County Board of Education*, 862 F. Supp. 2d 571, 576 (E.D. Ky. 2012), the activities are proprietary and are not subject to immunity. Consequently, LBF maintains that the order dismissing its suit must be reversed.

Urging this Court to affirm, WKU states that, like in *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717-18 (Ky. 2007), the challenged conduct, operating a farm in this case versus operating a dormitory in *Autry*, was prescribed by KRS 164.300 and, therefore, governmental in nature and subject to immunity. As for the import of WKU selling the compost to the public at large, WKU asserts that the court's conclusion that this did not render its activities proprietary is supported by *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003); *Brabson*, *supra*; and *Saunier v. Lexington Center Corporation*, No. 2018-CA-1290-MR, 2020 WL 1898406 (Ky. App. Apr. 17, 2020) (unpublished). Finally, WKU argues that LBF is, essentially, contesting WKU's immunity on the basis of its belief that the composting program poorly serves WKU's educational mission, but, as the Supreme Court of Kentucky recognized in *Prater*, passing judgment on policy decisions of coordinate branches of government is not the function of the court. *Prater*, 292 S.W.3d at 887. Instead, the court is solely tasked with determining whether the challenged activities further education. *Id.* And because there is no dispute that the composting activities, in conjunction with WKU's larger program of agricultural education, provide learning opportunities and raise scholarship funds for students, WKU maintains that the court correctly deemed the activity educational.

***5** In its reply brief, LBF stresses that the focus must be on whether the compost yard standing alone, not WKU's farming operations as a whole, addresses a state-level governmental concern. For its position, LBF relies on *Kentucky River Foothills Development Council, Inc. v. Phirman*, 504 S.W.3d 11 (Ky. 2016) (arguing that the court in that case differentiated between Kentucky River's substance abuse program, the activity at issue in the suit, from its other services as a community action agency) and on *Northern Kentucky Water District v. Carucci*, 600 S.W.3d 240 (Ky. App. 2019) (asserting that the Court's denial of the Water District's immunity claim was limited to its actions involving the installation of a water meter to measure a consumer's personal consumption for billing purposes, not its overall services). LBF states that the compost yard, in and of itself, is neither a necessary nor essential part of carrying out WKU's state-level governmental function. And it argues that WKU's composting activity is materially different from providing dormitories for students, like in *Autry*, or the operation of a hospital in conjunction with a medical school, addressed in *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky. 1997).

Regarding whether the fact that WKU does not profit from the proceeds of its compost sales precludes that activity from being proprietary in nature, LBF argues that the

authority relied on by WKU is distinguishable because in both *Schwindel* and *Saunier* the sole purpose of the challenged activity was fundraising for a recognized governmental function, whereas here the primary purpose is to defray WKU's solid waste disposal fees.

We are unpersuaded by LBF's arguments. As an initial matter, we reject that we must confine our consideration to the compost yard activities alone for two reasons.

First, the authority on which LBF relies is distinguishable. In *Phirman*, the plaintiff's claims pertained solely to the substance abuse recovery services of Liberty Place, a separate entity that was merely administered by Kentucky River, a community action center, and which did not perform Kentucky River's debatably governmental function of alleviating poverty. 504 S.W.3d at 14. Herein, there is no assertion or evidence that the compost yard is a formally separate entity from the Farm. Indeed, the compost yard is listed as one of the Farm's facilities in the brochure LBF refers to this Court. As for *Carucci*, LBF is correct that, despite opining that the services provided by the water district were not governmental in nature, the Supreme Court of Kentucky further analyzed and decided the issue based on the specific conduct at issue, the installation of a water meter for purposes of billing a private consumer. Arguably, this more specific analysis was not required; however, this brings us to our second basis for rejecting LBF's claim, the scope of the activities at issue in the suit.

Unlike *Carucci*, which involved an isolated act of installing an individual meter, the activities relevant to LBF's suit encompass the management of the Farm in general. For example, in its brief LBF asserts that its expert identified the following potential sources of pesticide contamination: water contamination of surface drainage, lateral movement of the pesticide into unsprayed areas, repeated applications of the pesticide within 12 months without reporting which fields were sprayed, lack of proper record keeping for crop rotation to avoid contamination in the hay potentially used for composting, and contamination resulting from failing to clean the sprayer after applying pesticides. These all relate to the acts or omissions of the Farm as a whole and not the discrete acts of the compost yard.

KRS 164.300 provides that "the purpose of state universities and colleges is to give instruction at the college level ... in academic, vocational[,] and professional subjects[,] to conduct field service and research, and to render such supplemental services as conducting ... farms." Accordingly, we agree with WKU that, pursuant to *Autry*, its operation of the Farm, including the compost yard, in accordance with the dictates of KRS 164.300 entitles it to governmental immunity in this suit. As such, the only remaining issue is whether WKU forfeited that immunity through its contract with the City and its sales of compost to the general public.

***6** The undisputed evidence is that WKU uses the money received from the city as the operating budget for the compost yard's activities and any proceeds not returned to the City or passed to WKU Facilities Management to defray costs are then used to fund student scholarships. Even assuming LBF is correct that the primary purpose of the compost yard is to defray WKU's and the City's waste disposal expenses, we remain unconvinced that this converts its activities to proprietary. Indeed, contrary to LBF's claim, the Supreme Court of Kentucky has recognized that defraying costs and fundraising for other school activities are permissible activities that do not forfeit a school's immunity. *Schwindel*, 113 S.W.3d at 168-69. Accordingly, we affirm the court's conclusion that WKU was immune from the underlying suit.

Next, LBF challenges the court's determination that Reynolds and Dr. Woosley have qualified official immunity from the underlying suit. Although the parties devote significant portions of their briefs to this issue, we conclude that the question is moot. As detailed in the fact section of this Opinion, the court made independent, alternative rulings supporting dismissal, one of which was that Reynolds and Dr. Woosley could not be held liable as individuals because they did not qualify as sellers or manufacturers under the UCC and the KPLA, and LBF has not challenged this ruling in this appeal. [9] Because the claims against Reynolds and Dr. Woosley have been dismissed, we need not address whether they were otherwise immune.

LBF next argues that the court erred in finding that the City was immune pursuant to CALGA. [10] KRS 65.2003 provides that:

> a local government shall not be liable for injuries or losses resulting from:
>
> ...

> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:
>
> > (a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;
> >
> > ...
> >
> > (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources[.]
>
> Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

The City argued, and the court agreed, that the gravamen of LBF's suit was the City's legislative decision, memorialized by an annual municipal order, to dump leaves at the Farm, and thus, it was immune under CALGA. On appeal, LBF asserts that the court mischaracterized its claims as it does not contest the City's decision or its allocation of its resources. Rather, LBF asserts that the City is liable by virtue of its partnership with WKU for the defective product that it jointly owned with WKU, and the court erred in granting the City immunity.

It is uncontested that the City's involvement with WKU's composting operation is the result of its legislative decision-making authority and its discretion in allocating its resources. However, we cannot agree with the circuit court that LBF's claims, that the compost it purchased was contaminated through the respondents' non-compliance with pesticide labeling instructions and that this was a breach of an implied warranty, arise from the City's decisions but rather from its alleged vicarious negligence in executing those decisions. Accordingly, we disagree that the City is immune from the suit.

***7** We must therefore address whether the court correctly determined that LBF could not establish the City's liability. LBF claims that the City was in a partnership with WKU and, thereby, vicariously liable for the defective compost or for Dr. Woosley and Reynolds's alleged negligence. *See* KRS 362.210-362.220. The parties agree that the Kentucky Uniform Partnership Act (KUPA), KRS 362.150 *et seq.*, controls this determination. A partnership is defined as "an association of two (2) or more persons to carry on as co-owners a business for profit[.]" KRS 362.175. KRS 362.180 further instructs that:

> [when] determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by KRS 362.225 persons who are not partners as to each other are not partners as to third persons.
>
> (2) ... joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business[.]

On appeal, LBF asserts that the court failed to consider the evidence that, per the annual municipal order, WKU and the City jointly own the compost, that the entities share in the "revenue" generated from its sale, and that the compost operation provides both entities the cost-saving benefit of avoiding **landfill** dumping fees. Additionally, LBF states that both entities have publicized their respective joint contributions to the composting operations, though it only cites to a statement made by WKU in a grant application.

The City, in response, argues that the court properly rejected LBF's claim because both it and WKU are non-profit entities, there is no intent to generate profits (indeed the City loses approximately $42,000.00 annually), and the City is not a co-owner in the business, as it is uncontested that it has no role or say in the composting process, it owns none of the equipment or land, and it does not provide any of the labor. The City maintains that its sole aim is to dispose of the leaves collected each year as a free public service to its citizenry in a lawful and financially prudent manner.

Caselaw applying the applicable sections of the KUPA is sparse. In *Roethke v. Sanger*, 68 S.W.3d 352 (Ky. 2001), the Supreme Court of Kentucky held that no partnership existed between a father and son, even though they both operated a crane service business from the same address, used the same phone number and business name, and accepted consolidated payments from customers. The Court based this holding on the facts that the Father and son did not share profits, they were not co-owners of any property, and each kept the money he separately earned (the father remitting to the son his portion of any consolidated payments). In *Smith v. Kelley*, 465 S.W.2d 39 (Ky. 1971), our predecessor Court held that, despite publicly holding out the employee as a partner of the accounting firm, no partnership existed where there was no agreement to share in profits or losses and the employee had no role in the management of the firm.

The commentary to Uniform Partnership Act provides additional guidance. Relevantly, Comment Subsection (a) states that:

> [c]onsistent with the common law and UPA (1914), under this act "co-ownership" is a key concept.
>
> ***8** Ownership involves the power of ultimate control (albeit a power that can be substantially diminished by agreement) and a right to share in the profits of the co-owned business. To state that partners are co-owners of a business is to state that: (i) they share in the profits (if any) of the enterprise; and (ii) *ab initio* at least, they collectively have the power of ultimate control. Consequently:
>
> • mere passive co-ownership of property, as distinguished from using the property to carry on a business, does not establish a partnership, ... and
>
> • merely sharing gross revenues is likewise insufficient[.]

Uniform Partnership Act, Uniform Laws Annotated § 202, Formation of Partnership (2013).

Herein, the only evidence of the City's alleged business ownership is the agreement that the City owns a portion of the final compost product. This is nothing more than passive ownership that does not demonstrate any level of control in the operations of the compost yard. Similarly, LBF concedes that all the City receives is revenue from a portion of the compost sales, but the KUPA uses the term *profits*, which is "the excess of revenues over expenditures[.]" BLACK'S LAW DICTIONARY (12th ed. 2024). Accordingly, we conclude that the court did not err in granting the City summary judgment in its favor.

Given our above analysis, we do not reach the issues of liability or damages.

CONCLUSION

For the foregoing reasons, the order of the Simpson Circuit Court is AFFIRMED.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2025 WL 1774698

Footnotes

1 References to the Farm are interchangeable with Western Kentucky University, unless the context of the sentence requires otherwise.

2 LBF notes without any specificity, explanation, or supporting citations that it disputes "WKU's contention that 75% of the revenue from compost sales goes to student scholarship[s.]"

3 Specifically, the product is an herbicide, which is a subset of pesticides.

4 LBF also sued for negligent failure to warn of possible pesticide contamination and the substantial danger to broadleaf vegetable plants and fraud by omission for failure to disclose the actual or possible pesticide contamination. However, the court dismissed these claims, concluding they had been waived or abandoned, and LBF has not challenged this determination.

5 "The 'economic loss rule' prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law." *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 733 (Ky. 2011).

6 Kentucky Revised Statute (KRS) 355.2-314.

7 KRS 411.320(1).

8 LBF also appeals the court's October 29, 2021, order granting WKU's motion to suppress an alleged pre-litigation admission made by Reynolds that the compost had been inadvertently

contaminated with pesticides. However, as we do not reach the issue of liability, we likewise do not need to further address this claim.

9 We also note that LBF never addressed this issue before the circuit court, despite the fact WKU raised it in its motion for summary judgment.

10 CALGA applies to all tort actions against a local government of the Commonwealth for property damages proximately caused by, relevantly, any defect in public property. KRS 65.2001(1)(a). The parties do not dispute that CALGA applies.

2025 WL 1773247
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Texarkana.

PAULA ATKINSON, Appellant
v.
LAND ENDEAVORS, LLC, AND
ALLEN L. EVANS, Appellees

No. 06-24-00024-CV
|
Submitted: January 6, 2025
|
Decided: June 27, 2025

On Appeal from the County Court at Law

Panola County, Texas

Trial Court No. 2023-089

Before Stevens, C.J., van Cleef and Rambin, JJ.
Memorandum Opinion by Chief Justice Stevens
Concurring Opinion by Justice Rambin

MEMORANDUM OPINION

Jeff Rambin Justice

***1** This appeal addresses whether a trial court's determination of fair market value of heirs' property under Section 23A.006 the Uniform Partition of Heirs' Property Act (the UPHPA) is a final, appealable order. *See* TEX. PROP. CODE ANN. § 23A.006. We conclude that it is not, and we dismiss the appeal for lack of jurisdiction.

I. Background

Paula Atkinson and her two sisters each inherited an undivided interest in the surface estate and one-half of the mineral estate of 162.44 acres located in Panola County, Texas (the Property), when their father died in 1986. [1] Following their father's death, the sisters treated the Property as a "timber investment property." In 2022, one of Atkinson's sisters sold her interest in the Property to Appellee Jay Rossi's predecessor-in-interest, Land Endeavors, LLC, and Atkinson's other sister sold her interest in the Property to Appellee Allen L. Evans.

After acquiring their interests, Rossi and Evans sued Atkinson for partition of the Property under the UPHPA. [2] , [3] While the case was pending, Rossi and Allen signed right-of-way agreements with Agua Plata, LLC, to allow a pipeline easement on the Property, for which they were each paid $37,210.46. Rossi and Evans later filed a motion to appoint a surveyor and an appraiser. Atkinson objected to the appointments as premature due to the right-of-way agreements. Atkinson claimed Agua Plata might be a necessary party to the partition and that the right-of-way agreements had clouded the title of the Property and affected determination of the Property's fair market value.

After a hearing, the trial court found the Property to be heirs' property under the UPHPA, appointed real estate and timber appraisers to prepare an appraisal of the Property, and clarified that it would set a future hearing to determine the fair market value of the Property. The order further stated no party had yet requested a partition by sale but made no definitive determination as to how to partition the Property. Atkinson filed written objections to the appraisal alleging (1) that the timber appraiser had valued the fair market value of the Property even though he was only appointed to value the timber, (2) that, while Section 23A.006(e) required the appraiser to file the independent appraisal, Rossi and Evans had filed the appraisals, and, (3) that the appraisals had not taken into account the effect of the right-of-way agreements on the value of the Property. *See* TEX. PROP. CODE ANN. § 23A.006(e).

The trial court overruled Atkinson's objections at a "determination of value" hearing. At the hearing, Atkinson's counsel informed the trial court that Atkinson believed the appraised value was too low and the price per acre was closer to the upper end of the per-acre range determined by the real estate appraiser than the mid-range number the appraiser utilized. Atkinson expressed a desire to put her opinion regarding valuation on the record, but when offered the opportunity to put anything on the record, she did not call

any witnesses. Considering that no party had timely requested partition by sale[4], the trial court questioned whether its appraisal would "even have any bearing" on the partition procedure since Atkinson did not intend to take advantage of Chapter 23A of the Texas Property Code's cotenant buyout procedures. *See* TEX. PROP. CODE ANN. § 23A.007. Atkinson objected to the trial court's proceeding with the appointment of commissioners and stated that she had "not made her determination of any kind in the sale." The trial court accepted the appraisers' valuations and signed an order setting the fair market value of the Property at $605,619.00 (the FMV Order).

***2** Atkinson appeals.

II. Issues on Appeal

In four issues, Atkinson asks (1) whether the trial court had subject-matter jurisdiction over the partition suit, (2) whether the FMV Order is an appealable final order, (3) whether the trial court erred in determining the fair market value of the property, among other things, and (4) whether the cumulative errors by the trial court have been harmful and prejudicial.

III. Subject-Matter Jurisdiction

"Whether a court has subject matter jurisdiction is a question of law we review de novo." *Tex. Disposal Sys. **Landfill**, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752, 757 (Tex. 2024).

First, Atkinson urges that the trial court lacked subject-matter jurisdiction because the Property's fair market value exceeded the trial court's amount-in-controversy limit. Atkinson bases this argument on Section 25.003(c)(1) of the Texas Government Code, which establishes the amount-in-controversy limit for statutory county courts[5] at $250,000.00, well below the fair market value of the Property. *See* TEX. GOV'T CODE ANN. § 25.0003(c)(1). In support of her position, Atkinson cites *Eris v. Giannakopoulos*, 369 S.W.3d 618, 622 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd).

In *Eris*, our sister court determined that a Harris County statutory county court had jurisdiction over the underlying partition suit only "so long as the action [wa]s within the amount-in-controversy range over which Harris County courts at law have concurrent jurisdiction with district courts." *Id.* at 621. But *Eris* does not apply here, because Harris County and Panola County have separate statutes that govern their jurisdictional limits.

For example, statutory county courts in Harris County have the same jurisdiction "prescribed by law for county courts," which would include Section 23.002(a)'s $250,000 amount-in-controversy limit. TEX. GOV'T CODE ANN. § 25.1032(a). Yet, a Panola County statutory county court has no such limitation. Rather, the Panola County jurisdictional statute specifies that the trial court, which is a statutory county court, "has concurrent jurisdiction with the district court." TEX. GOV'T CODE ANN. § 25.1852(a). "In addition to the jurisdiction provided by Section 25.0003 and other law," Section 25.1852(a) grants to any county court at law in Panola County "concurrent jurisdiction with the district court" "notwithstanding any law granting exclusive jurisdiction to the district court." *Id.*

To the extent that a "specific [jurisdictional] provision for a particular court or county" conflicts with a general jurisdictional provision in Chapter 25 of the Texas Government Code, "the specific provision controls." TEX. GOV'T CODE ANN. § 25.0001(a). Accordingly, since the trial court had concurrent jurisdiction with the district court, which had no amount-in-controversy limit, the trial court had subject-matter jurisdiction over the partition suit. *See* TEX. GOV'T CODE ANN. §§ 24.007(b), 25.1852(a); TEX. PROP. CODE ANN. § 23.002(a).

***3** Next, Atkinson questions whether the parties' lack of equal possessory interests defeated the trial court's subject-matter jurisdiction. "A joint owner or claimant of real property ... may compel a partition of ... the property among the joint owners ...." TEX. PROP. CODE ANN. § 23.001. One of the three prerequisites necessary to force a partition is "the party seeking the partition must have an equal right to possess the land with the other joint owners." *See First Nat'l Bank in Dallas v. Tex. Fed. Sav. & Loan Ass'n*, 628 S.W.2d 497, 498 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.) (decided under prior statute); *cf. Trevino v. Trevino*, 64 S.W.3d 166, 171 (Tex. App.—San Antonio 2001, no pet.) ("[A partition] plaintiff need only establish that he owns an interest in the property and has a right to possession of a portion thereof." (citing TEX. PROP. CODE ANN. § 23.001; *Manchaca v. Martinez*, 148 S.W.2d 391, 391 (Tex. 1941))).

Atkinson claims Appellees did not prove their entitlement to partition because the parties lacked equal possessory interests due to differences in ingress and egress rights to the surface relating to the mineral estate. Yet, an equal right to possess an undivided parcel of land is not the same as an equal interest in the land, and the UPHPA does not require a finding that cotenants have the same interest in land prior to partition. This is because a property is heirs' property under the statute if property is "held in tenancy in common" and, among other things,

> (C) any of the following applies:
>
> (i) 20 percent or more of the interests are held by cotenants who are relatives;
>
> (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
>
> (iii) 20 percent or more of the cotenants are relatives.

TEX. PROP. CODE ANN. § 23A.002(5). Simply put, lack of an equal interest does not defeat the trial court's jurisdiction. [6]

Lastly, Atkinson claims that "[t]he [t]rial [c]ourt lack[ed] subject matter jurisdiction because necessary parties were not included" in the suit. But "joinder [of parties] does not affect a trial court's subject matter jurisdiction." *City of Amarillo v. Nurek*, 546 S.W.3d 428, 438 (Tex. App.—Amarillo 2018, no pet.) (citing *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162 (Tex. 2004)).

Having determined the trial court had subject-matter jurisdiction over this case, we overrule Atkinson's subject-matter-jurisdiction complaint.

IV. Appealability of Partition Judgments

Next, we must now determine whether our Court has jurisdiction to hear Atkinson's appeal from the trial court's order determining the fair market value of the Property. Atkinson proposes that the question of appealability of the trial court's FMV Order is one of first impression in our State, and, on this point, we agree. Neither party has cited, and we have not found, Texas authority determining this issue.

Even so, with certain exceptions, appeals may be taken only from "final decrees and judgments." *Indus. Specialists, LLC v. Blanchard Refin. Co.*, 652 S.W.3d 11, 13 (Tex. 2022) (quoting Judiciary Act of 1789, ch. XX, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (2012))). This "final-judgment rule" has been continually narrowed by the Texas Legislature over the last forty years, as the Legislature initially codified four interlocutory appellate rights in 1985, and, by the end of the 87th Legislative Session in 2021, that number had grown to seventeen. *Id.* at 14 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)). The Legislature has additionally created a permissive appeal provision under which an appellate court may accept the appeal of an interlocutory order that a trial court has previously authorized. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (Supp.). The Texas Supreme Court has recognized "the shifting legal landscape" narrowing the final-judgment rule and has observed that "the practice of '[l]imiting appeals to final judgments can no longer be said to be the general rule.' " *Indus. Specialists, LLC*, 652 S.W.3d at 14 (alteration in original) (quoting *Dallas Symphony Ass'n v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019)).

***4** An additional deviation from the final-judgment rule exists in certain types of proceedings in which more than one final, appealable judgment may be rendered, including partition suits. *See Griffin v. Wolfe*, 610 S.W.2d 466, 466 (Tex. 1980) (per curiam). "Unlike most other proceedings, a partition case involves two or more final appealable orders." *John Deere Constr. & Forestry Co. v. Rodriguez*, No. 14-24-00030-CV, 2025 WL 1461152, at *2 n.3 (Tex. App.—Houston [14th Dist.] May 22, 2025, no pet. h.) (citing *Griffin*, 610 S.W.2d at 466–67; *Est. Land Co. v. Wiese*, 546 S.W.3d 322, 325–26 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *Fry Sons Ranch, Inc. v. Fry*, No. 03-19-00684-CV, 2020 WL 6685772, at *2 (Tex. App.—Austin Nov. 13, 2020, pet. denied) (mem. op.)). "[A] partition proceeding is —at least—a two-step process." *Id.* (alteration in original) (quoting *Long v. Spencer*, 137 S.W.3d 923, 925 (Tex. App. —Dallas 2004, no pet.) (citing *Carr v. Langford*, 144 S.W.2d 612, 613 (Tex. App.—Dallas 1940), *aff'd*, 159 S.W.2d 107, 108 (Tex. 1942)); TEX. R. CIV. P. 760 ("court shall determine share or interest of each claimant and all questions affecting title to property"); TEX. R. CIV. P. 761 ("court shall determine whether property is subject to partition in kind"))). "An appeal at each step 'provides a practical way to review controlling, intermediate decisions before the consequences of any error do irreparable injury.' " *Id.* (quoting *Long*, 137 S.W.3d at

926). "A partition order that disposes of all issues in a discrete phase of the proceeding must be appealed immediately under the usual time periods governing appeals; issues determined by the order cannot be attacked collaterally after a later order or judgment is signed." *Id.* (citing *Wiese*, 546 S.W.3d at 325–26; *Long*, 137 S.W.3d at 925–26).

In proceedings with more than one appealable judgment, each of the multiple judgments is sometimes said to have "resolve[d] a discreet issue" in the proceeding, making that judgment appealable. *Huston v. Fed. Dep. Ins. Corp.*, 800 S.W.2d 845, 847 (Tex. 1990) (receivership); *see De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006) (probate). To determine whether Atkinson has appealed a judgment that resolves a discreet issue, we compare the UPHPA to law related to partition suits under Chapter 23 of the Texas Property Code.

A. Partition Under Chapter 23

Under Chapter 23, "[t]he first judgment, often characterized as preliminary, determines 'the interest of each of the joint owners or claimants, all questions of law affecting the title, and appoints commissioners and gives them appropriate directions.' " *Champion v. Robinson*, 392 S.W.3d 118, 122 n.6 (Tex. App.—Texarkana 2012, pet. denied) (quoting *Ellis v. First City Nat'l Bank*, 864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, no writ)); *see Bowman v. Stephens*, 569 S.W.3d 210, 221–22 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (discussing determinations made during stage one of a partition proceeding under Chapter 23). Our Court has referred to this order after the first stage of a partition suit as the order "decreeing a partition." *Siber v. Devlin*, 508 S.W.2d 658, 663 (Tex. App.—Texarkana 1974, no writ).

"In the second stage [of a Chapter 23 partition proceeding], the commissioners consider the property's characteristics and evaluate objective considerations for dividing the property to retain the partitioned tracts' highest value." *Bowman*, 569 S.W.3d at 222. "The commissioners determine a property division and make a report to the trial court," at which point "any party to the partition suit may file objections." *Id.* Subsequently, the trial court enters its second judgment, which "may approve the commissioner's report and 'set aside to the joint owners or claimants their fractional share or interest in the disputed property in accordance with that report, or it may find the report "to be erroneous in any material respect, or unequal and unjust" and reject it.' " *Id.* (quoting *Bolinger v. Williams*, No. 07-14-00024-CV, 2015 WL 9473924, at *3 (Tex. App.—Amarillo Dec. 21, 2015, no pet.) (mem. op.)).

***5** "Matters that were or should have been decided in the first stage cannot be challenged in an appeal from the second judgment that issues at the completion of the second stage." *Id.*

B. Partition Under the UPHPA

Partition suits under the UPHPA follow a different procedure. [7] "[I]f the court determines that the property that is the subject of a partition action is heirs' property," the UPHPA directs that the trial court "shall determine the fair market value of the property" through one of a number of methods, including ordering an appraisal. TEX. PROP. CODE ANN. § 23A.006. Following the determination of fair market value, the trial court is to notify the parties of that value, *id.*, and, "[i]f any cotenant requested partition by sale," the court is to conduct a "cotenant buyout" procedure through which cotenants who did not request partition by sale may buy out the interest of any cotenant who requested partition by sale, TEX. PROP. CODE ANN. § 23A.007. The previously determined fair market value provides the basis for determining the purchase price of that interest, and a cotenant who seeks to purchase that interest pays the apportioned price into the court. *Id.*

If partition is achieved through the cotenant buyout procedure, the trial court is to "issue an order reallocating all the interests of the cotenants" and "disburse the amounts held by the court to the persons entitled to them." TEX. PROP. CODE ANN. § 23A.007(e)(1); *see also* TEX. PROP. CODE ANN. § 23A.007(f) (providing for issuance of an order reallocating interests and disbursement of funds at later stages in the buyout procedure). Depending on the desires of the cotenants and the presence of at least one cotenant wishing to partition by sale, the heirs' property may then be retitled without the need for any further partition procedure, such as appointment of commissioners.

If partition under the UPHPA is not resolved through the cotenant buyout procedure, as in this case, the trial court is directed to partition the property in kind unless, after taking into consideration a statutory list of factors favoring partition

in kind, *see* TEX. PROP. CODE ANN. § 23A.009, the trial court "finds that partition in kind will result in substantial prejudice to the cotenants as a group," TEX. PROP. CODE ANN. § 23A.008(a). If the trial court does not partition in kind, the trial court is to partition by sale under Section 23A.010 or dismiss the suit. TEX. PROP. CODE ANN. § 23A.008(b).

C. Analysis

"A departure from the final judgment rule in the form of an interlocutory appeal must be strictly construed because it is 'a narrow exception to the general rule that interlocutory orders are not immediately appealable.' " *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 736 (Tex. 2019) (quoting *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011)).

The UPHPA requires determination of the fair market value of the property before any partition decree similar to the initial appealable order under Chapter 23 is rendered. As a result, the determination of value through the issuance of an order such as the FMV Order is a preliminary step in the UPHPA partition process. Here, the FMV Order merely found that the UPHPA applied and determined that the fair market value was $605,619.00. Because Atkinson did not wish to avail herself of the UPHPA cotenant buyout provisions, the trial court questioned whether its fair market value determination mattered. Notably, the FMV Order did not determine that the Property would be partitioned in kind and did not appoint commissioners. Thus, unlike the orders that are appealable under Chapter 23A, the FMV Order (1) did not determine the interest of each of the joint owners or claimants, (2) did not answer all questions of law affecting the title, (3) did not appoint commissioners or give them appropriate directions, and (4) did not contain any approval of a commissioner's report. Instead, our review of the FMV Order shows that no interests of the claimants or parties were determined. *See White v. Mitchell*, 60 Tex. 164, 165 (1883) (describing a partition decree as "final in its character" because it "determined the rights of the respective parties in the [property] of which partition was sought). As a result, the fair market value was simply a preliminary determination that Atkinson would need to pay two-thirds of that amount in order to buy out Rossi and Evans.

***6** We conclude that, under the facts and circumstances of this case, the FMV Order is not a final, appealable order. As a result, we conclude that we have no jurisdiction over the appeal, and we do not reach the remaining issues.

V. Conclusion

We dismiss Atkinson's appeal for lack of jurisdiction.

CONCURRING OPINION

I join in dismissing for lack of jurisdiction, but I would do so because of mootness.

Via this appeal, Atkinson seeks the novel procedural relief of the ability to appeal the trial court's Chapter 23A FMV Order.[8] As the majority notes, Atkinson did not timely invoke the cotenant buyout procedures of Section 23A.007. Indeed, Atkinson did not invoke buyout until June 3, 2024, some three months after the FMV Order she seeks to challenge via this appeal and some two months after her notice of this appeal.[9]

Because Atkinson did not timely invoke buyout, there was no buyout. The facts and circumstances of this case do not involve a party who was actually bought out at a value they believe is too low. Nor do the facts and circumstances involve a party who stood ready to do the buying out but refrained from doing so because the trial court set the value at an amount they believe is too high.[10] Since those facts and circumstances are not present, I do not view the majority as speaking to them. Further, because such facts are not present, that narrows the scope of what is in controversy in this appeal.

***7** Though the trial court's FMV Order did not impact buyout, Atkinson contends that there remains a live controversy to be decided in this appeal. I believe the controversy is presented by Atkinson's second appeal, which we decide today in a companion case.

In this appeal, Atkinson contends that, though there was no buyout, the trial court's fair market value determination *might* impact the subsequent Sections 23A.008/23A.009 partitionability inquiry.

The impact, if any, of the FMV Order on partitionability was a "what if" when the notice of this appeal was filed. [11] The partionability trial had yet to occur. The "what if" has since become a reality. The trial court held a Sections 23A.008/23A.009 partitionability trial. Via a separate appeal, Atkinson appeals the order resulting from that trial.

In the partitionability trial, Atkinson did not challenge the *dollar amount* of the fair market value determined by the trial court. Instead, Atkinson adopted that dollar value and then pointed to the *existence* of the fair market value determination as the reason that partition via sale would be more efficient than partition-in-kind. Atkinson's filing immediately before the partition trial stated: "this request (and all aspects of it) are conditioned on the current Court's finding of the Fair Market Value of the (surface estate) at $605,619 per Order dated March 4, 2024." Atkinson followed that up with an oral request to the trial court:

> And so the best thing and the quickest thing, and we would all be done and go home and don't have to spend another however many months dealing with commissioners and fighting over their recommendations is just if you ordered a sale, and the statute provides for an heirs' property that it's an open market sale, so it wouldn't be a sheriff's public auction, that wouldn't benefit anybody, but the Court would appoint a neutral real estate broker that's familiar with the local property area to list it, and you've already established the fair market value.

In sum, the question of sale-or-partition is at issue in our companion case. "The mootness doctrine—a constitutional limitation founded in the separation of powers between the governmental branches—prohibits courts from issuing advisory opinions." *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 634 (Tex. 2021) (orig. proceeding). "[A] trial court's entry of a final judgment will often moot an interlocutory appeal or mandamus petition that challenges a prior trial-court order." *Id.* at 635. The situation at hand is not a preliminary order followed by a post-trial judgment. But it is closely akin. *See id.*

***8** Atkinson's actual challenge regarding the impact of the FMV Order on partitionability is at issue in her second appeal. Therefore, I join in the dismissal for lack of jurisdiction. I respectfully concur to say that I would dismiss this appeal on grounds of mootness.

All Citations

Not Reported in S.W. Rptr., 2025 WL 1773247

Footnotes

1 We express no opinion as to the ownership of the mineral interests in the Property, nor do we address the partition of the mineral interests, as the mineral estate had previously been severed from the surface estate. Appellees did not seek to partition the mineral interest through their partition suit, and the trial court limited its partition of the Property to the surface estate.

2 TEX. PROP. CODE ANN. §§ 23A.001–.013.

3 The parties do not dispute the application of the UPHPA.

4 Atkinson later filed an election of partition by sale well after the forty-five-day deadline for a party to notify the court of its intention to purchase the interest of a party that requested partition by sale, allowing a continuation

of the cotenant buyout process, which is necessarily premised on a party having requested partition by sale, making Atkinson's election untimely. *See* TEX. PROP. CODE ANN. § 23A.007.

5 Statutory county courts are also referred to as county courts at law.

6 Also, as stated above, Appellees did not claim ownership in the mineral estate. They sought to partition only the surface estate, and the trial court limited its partition to the surface estate.

7 When a trial court determines that a property is heirs' property as defined by the UPHPA, the UPHPA "supplements [and supersedes to the extent of any inconsistencies] Chapter 23 and the Texas Rules of Civil Procedure governing partition of real property." TEX. PROP. CODE ANN. § 23A.003(b).

8 Atkinson's other issues turn on whether the determination of value is appealable. Consequently, while I agree with the majority's resolution of the other issues, I would not have used this appeal as the vehicle to address them.

9 I agree with what the majority said in the Background section: "no party had timely requested partition by sale." As a consequence, buyout was not at issue when the FMV Order was entered, nor was it at issue when the notice of this appeal was filed. TEX. PROP. CODE ANN. § 23A.007(a) (conditioning buyout on "[i]f any cotenant requested partition by sale"). For this reason, I respectfully question the majority's assertion that "the fair market value was simply a preliminary determination that Atkinson would need to pay two-thirds of the amount required to buy out Rossi and Evans." Atkinson raised buyout immediately before trial on the Sections 23A.008/23A.009 partitionability inquiry. When buyout was belatedly raised, it was raised in terms of Atkinson wanting to be bought out or wanting the entire property to be sold. It was *not* raised in terms of Atkinson doing the buying out. Regardless of Atkinson's intent, Rossi and Evans did not opt for partition via sale, so Atkinson could not have bought them out, even belatedly, via the procedure of Section 23A.007. Thus, in this case, the buyout discussion is all a matter of a "what if."

10 For reasons expressed in the immediately preceding footnote, the facts demonstrate that this case does not present what I will call the "frustrated buyer" scenario.

11 Imagine freezing the trial proceedings at the instant the notice of this appeal was filed. Proceed, then, with this appeal. In such a scenario, we would be wrestling with the novel question of the appealability of a Chapter 23A fair market value order where the controversy was over how the fair market value order *might* impact partitionability. We would be faced with deciding a novel question of law in a factual vacuum. Even assuming the value was set at $605,619.00 as the result of error, parties would not yet have staked out positions on what the value should have been, nor would they have taken positions on how any difference in the dollar value of the fair market value actually impacted partitionability. Better, then, to let the passage of time force the "what if" to coalesce from ether into concrete reality.

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Supreme Court of Texas.

Southern Methodist University
and Paul J. Ward, Petitioners,
v.
South Central Jurisdictional Conference of the United Methodist Church and Bishop Scott Jones, Respondents

No. 23-0703
|
OPINION FILED: June 27, 2025

On Petition for Review from the Court of Appeals for the Fifth District of Texas

JUSTICE YOUNG, joined by Justice Devine and Justice Sullivan in full, and by Chief Justice Blacklock as to Parts I, III, and IV, concurring.

Opinion

Evan A. Young Justice

The Court gets today's case right. SMU's articles of incorporation clearly state that SMU is "to be forever owned, maintained and controlled by the South Central Jurisdictional Conference of The United Methodist Church," whose predecessor created SMU as part of its religious mission. Among the forms of "control[ ]" that the articles expressly reserve to the Conference is that "[n]o amendment to these Articles of Incorporation shall ever be made" unless the Conference "affirmatively authorize[s] and approve[s]" the amendment.

But in 2019, SMU attempted to amend those articles of incorporation without the Conference's consent. They were not just any old amendments, either. Instead, they purported to eliminate all the Conference's authority and indeed all reference to the Conference. SMU sought to do to the Conference what Pharaoh (according to Cecil B. DeMille, at least) sought to do to Moses: "Let the name of Moses be stricken from every book and tablet, stricken from all pylons and obelisks, stricken from every monument of Egypt." *The Ten Commandments* (Paramount Pictures 1956).

The Court holds today that Texas law allows the Conference —and any religious organization that creates a corporation to achieve its mission—to protect its rights and petition a Texas court to determine whether the corporation's articles of incorporation were lawfully amended. And if they were not, the result will be to restore a religious organization's authority and autonomy.

Multiple paths lead to today's judgment. The clearest and most basic, as the Court describes, is found in § 22.207 of the Business Organizations Code. That statute's text focuses exclusively on religious organizations' authority to control nonprofit corporations—the exact circumstance of this case. The statute does very little, if anything, if it does not manifest authority for religious organizations to defend that control even in the face of more generic statutory rules, such as the general limitation on lawsuits in § 20.002 of the Business Organizations Code.

Beyond its correctness as a matter of pure statutory interpretation, the Court's approach prevents us from having to formally address a different path to the same outcome: the church-autonomy doctrine. It is always preferable to resolve a case on nonconstitutional grounds when possible. But that constitutional doctrine still looms over the dispute, in part because § 22.207 codifies some of its principles. I therefore gladly join the Court's opinion but write separately for three distinct reasons.

First, as the Court observes, its reading of § 22.207 would flow from the doctrine of constitutional avoidance even if there were doubt about whether § 22.207 authorizes declaratory-judgment actions. *Ante* at 18. In fact, even absent § 22.207, this Court may have read § 20.002 in favor of religious autonomy; with § 22.207, we face no such difficult choice. Through that provision, the legislature has lifted a regulation that would otherwise burden religious self-governance.

Second, the church-autonomy doctrine, which underlies § 22.207, is a constitutional principle of literally transcendent

importance. Reaching any result other than the one the Court reaches today would pose grave concerns under the doctrine because it would threaten religious organizations' authority to govern themselves. This Court has had only a handful of opportunities to address the church-autonomy doctrine (which, of course, protects religious entities of any faith despite the "church" shorthand). Significant questions about its scope and application remain, as illustrated by the dueling briefs of the two amici curiae in this case, First Liberty Institute and the Becket Fund for Religious Liberty. Their briefs share many foundational premises and express a common goal, yet they reach diametrically opposed outcomes. I hope that these amici and others will continue examining the church-autonomy doctrine so that in future cases, the risk of error on the Court's part will be reduced.

Third, and relatedly, I write to call attention to the need to examine the *Texas* church-autonomy doctrine. Our cases thus far have turned only on *federal* constitutional law. Federal principles, of course, are binding—but they are not necessarily *limiting*. The Texas Constitution's text is markedly different in ways that, I suspect, may materially affect how Texas courts analyzing church-autonomy disputes will react. Our Constitution strikes me as even more protective of the autonomy of religious organizations. Texans have never purported to "grant" religious freedom to anyone; they instead have always acknowledged it as an inalienable right that government should protect. The Texas Constitution's church-autonomy doctrine reflects our People's deep humility in affirmatively disclaiming any power, much less any intention, to interfere in the relationship between God and man. Mapping our Constitution's distinct contours based on its original public meaning will, again, require assistance from amici, the bar, the public, litigating parties, and our colleagues on the lower courts.

I

Business Organizations Code § 22.207 makes this an easy case. It does not just permit a board to be "elected" by a religious organization but to be "controlled" by one. Without that statute, the Conference would have to overcome Business Organizations Code § 20.002, which SMU compellingly argues forecloses the Conference's ability to challenge the validity of the amendments to SMU's articles of incorporation. SMU likewise persuasively argues that articles of incorporation generally cannot be the foundation for a breach-of-contract claim.

As the Court today observes, the doctrine of constitutional avoidance demands that we harmonize § 22.207 and § 20.002, thereby safeguarding constitutional protections enjoyed by religious organizations. It is possible, in fact, that § 20.002 would not apply to entities like the Conference *even if § 22.207 did not exist.* The U.S. Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), shows why that might be so.

In *Catholic Bishop*, the Court confronted the NLRB's assertion of authority to subject parochial schools to its jurisdiction under the National Labor Relations Act. *Id.* at 504. If the Act in fact authorized such jurisdiction, the Court would need "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507. The Court was able to avoid those constitutional questions by observing that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," *id.* at 504, and then refusing to interpret the Act as conferring jurisdiction over schools operated by churches "in the absence of a clear expression of Congress' intent to" do so, *id.* at 507. In other words, even though the Act did not expressly *exclude* parochial schools, the Court refused to read it as *including* them unless Congress made that intent clear.

Similarly, and especially in a State that likely privileges religious self-governance more than the minimum required by the federal Constitution, I would expect greater clarity from the legislature before concluding that it had imposed the limitations of § 20.002 on religious organizations like the Conference. Of course, the Court today does not decide whether § 20.002 is insufficient on its own to foreclose a religious organization's recourse to court to vindicate its control over a nonprofit corporation, and I do not purport to do so either. But under the *Catholic Bishop* approach, it is far from implausible that this Court would interpret § 20.002 in favor of religious autonomy.

Fortunately, our legislature *has* provided the further guidance that was lacking in *Catholic Bishop*, which is where § 22.207 enters the scene. Rather than supplying the "clear expression of an affirmative intention" to subject religious

organizations to § 20.002, what we find is § 22.207, which pushes in exactly the opposite way. Far from confirming that religious organizations may lose their control when § 20.002 would apply, it resoundingly reaffirms their control, and "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

As the Court observes, *see ante* at 20–21, our State's Constitution—unlike the federal Constitution—has imposed a duty upon the legislature to pass laws to ensure that religious entities are not stymied in carrying out their "mode" of worship. Tex. Const. art. I, § 6. Section 22.207 is one such law. It offers extra protection for religious organizations, and only for them. By dispensing with the general requirements of § 20.002 in the context of religious self-governance, § 22.207 "lift[s] a regulation" that otherwise "burdens the [Conference's] exercise of religion." *Amos*, 483 U.S. at 338. In so doing, it prevents § 20.002 from becoming a tool that would diminish religious organizations' ability to control corporations that help them "carry out their religious missions." *Id.* at 335, 339.

I thus agree with the Court that at the very least, § 22.207 must be read as preserving religious organizations' authority to seek recourse to the courts even when § 20.002 might drain that authority in other contexts. In that way, § 22.207 is in part a manifestation of the church-autonomy doctrine as enacted by the legislature.

II

Relevant to the Court's invocation of constitutional avoidance is the insistence from amici to apply the church-autonomy doctrine. That doctrine is implicated here given the Conference's efforts to preserve its religious self-governance under Texas corporate-formation law. As Justice Thomas recently observed, religious organizations "do not exist apart from the secular world." *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, ___ U.S. ___, ___, No. 24-154, 2025 WL 1583299, at *11 (U.S. June 5, 2025) (Thomas, J., concurring). Even if they are not *of* the world, they are still *in* it, and they must regularly engage in mundane tasks like buying and selling property, hiring and paying staff, forming contracts, and (alas) filing lawsuits. *See id.* "These and other considerations make the formation of corporate entities essential for many religious institutions." *Id.* And when they form corporations, "the First Amendment ... gives special solicitude to the rights of religious organizations," not lesser solicitude. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

Section 22.207 is a law that affords such "special solicitude," but beyond that provision, the courts must protect religious autonomy by upholding the lawful secular choices that religious organizations make. Doing so is not always as easy as it sounds (or as easy as it is in today's case). There are impermissible lines that courts may not cross. Courts may not consider, much less rule upon, disputed doctrinal questions. Nor may courts intervene in a church's mode of self-governance or second-guess the resulting decisions. A court doing so may well intend to defend religious autonomy, but such a court would both exceed its authority and undermine the very principles it hoped to advance.

I turn first to the principles of the church-autonomy doctrine. I only briefly sketch its central features, many of which are so well covered in precedent and in scholarship as to warrant very little discussion here. But other corners of the doctrine are somewhat less commonly recognized, including why the church-autonomy doctrine can command the entire government, including courts, whether affected parties invoke it or not. I discuss those nuances at somewhat greater length. Second, I examine how those principles apply here and conclude that but for our ability to rely on § 22.207, and assuming we could not read § 20.002 as I hypothesized above, the Court—and not just a concurring opinion—would have to confront serious constitutional issues yet would reach the same result.

One final prefatory note: the tentative nature of what follows. It is hard to imagine a corner of the law that is more important (or more challenging) for the courts to get right. My goal is to identify several central issues that warrant further analysis, describe corresponding principles that seem grounded in our constitutions' religious-liberty provisions, and invite future parties, amici, and others to take aim at my conclusions. Further research and analysis may confirm my provisional views; perhaps those views will be dislodged in whole or part, and if so, nothing said today will commit me in a

case tomorrow to any particular position. Either way, any resulting assistance will benefit us by making it more likely that when the Court must bind itself to some understanding—when, unlike in this case, we face a concrete yet unavoidable constitutional conflict—the understanding we adopt will be sound.

A

The church-autonomy doctrine represents a commitment inherent in the federal and Texas Constitutions' protections of religious liberty to affirm the inalienable right of religious organizations, and their individual adherents, to their own beliefs and forms of self-governance. It is a *substantive* commitment that raises *jurisdictional* obstacles by delineating a zone of belief and practice into which the government may not enter. Those obstacles apply to the entire government—not only in litigation. When the church-autonomy doctrine does arise in that context, how a court should respond depends on the nature of the issues raised, not merely on whether religious organizations are involved. Sometimes a court must decline to exercise jurisdiction over part or all of a case; sometimes the exact opposite is true. In every instance, what matters is which action is consistent with the overriding principle of church autonomy.

1

"[T]he jurisdictional line prohibiting civil courts from intruding on ecclesiastical matters is an ancient one" that became "so entrenched in English history that even [Sir Edward] Coke—the seventeenth century's fiercest champion of civil jurisdiction and the common law—respected it." *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1077 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc). Governments and courts in America have not always plotted this line with perfect clarity or fidelity, to put it mildly. But the basic contours of the autonomy principle have always been present in this country, including before the Constitution itself was ratified.

In a striking and early example of the doctrine's extrajudicial force, a group of French Catholics in 1781 requested that Congress, then operating under the Articles of Confederation, approve their appointment of a bishop in America amid a political crisis with the French magisterium. Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. (forthcoming June 2025) (manuscript at 144), https://ssrn.com/abstract=5099688. In response, Benjamin Franklin was instructed to notify the French minister that "the subject of his application ... being purely spiritual, it is without the jurisdiction and powers of Congress." *Id.*

Back in the judicial branch, the U.S. Supreme Court has outlined the First Amendment's protection of church autonomy in about a dozen significant cases. Justice Alito recently summarized the substance and scope of the Court's church-autonomy precedents:

> As early as 1872, our church-autonomy cases explained that "civil courts exercise no jurisdiction" over matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 13 Wall. 679, 733 (1872). That is so because the Constitution protects religious organizations "from secular control or manipulation." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). The religious organizations protected include churches, religious schools, and religious organizations engaged in charitable practices, like operating homeless shelters, hospitals, soup kitchens, and religious legal-aid clinics ... among many others.

Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1096 (2022) (statement of Alito, J., respecting the denial of certiorari).

This Court, relying on the same line of cases, has similarly emphasized that "[u]nder the First Amendment, ... courts must abstain from exercising civil jurisdiction over claims that require them to 'resolve a religious question' or 'impede the church's authority to manage its own affairs.' " *In re Diocese of Lubbock*, 624 S.W.3d 506, 509 (Tex. 2021) (quoting *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007)). The case law reflects two basic boundary lines separating religious authorities from the civil government:

questions of religious doctrine and matters of religious self-governance.

At its core, the church-autonomy doctrine is merely a formal restatement of basic truths that the Constitution adopts. Specifically, every individual has a preexisting and inalienable right to worship according to his own conscience. That right encompasses associating with others of like mind and includes each individual's ability to join religious institutions. The autonomy of a religious organization within the religious sphere is a necessary consequence and manifestation of *individual* religious liberty. Whether for a massive, international church or a tiny cluster of believers, application of the church-autonomy doctrine respects that "different and higher plane" upon which ecclesiastical relationships stand. *Minton v. Leavell*, 297 S.W. 615, 622 (Tex. Civ. App.—Galveston 1927, writ ref'd).

The government can avoid instructing citizens on matters of faith or purporting to measure a church's compliance with its own dogma without being blind to the existence of religious practice. The federal and Texas Constitutions require the government to protect religious liberty at least as thoroughly as other kinds. Thus, with respect to religious organizations' self-governance, the government's only (yet quite significant) role is to vindicate an ecclesiastical community's right to organizational and doctrinal independence. When a religious organization chooses the corporate form for one part of its mission—a parish church, an entity committed to community outreach, or a university—the government, including the courts, must respect and uphold that choice.

2

It can be tempting to think of the church-autonomy doctrine as mostly about judicial "subject-matter jurisdiction." It obviously extends to the judicial power, *see infra* Part II.A.3, but it unduly constrains the doctrine to view it as applying in court while forgetting about the rest of the government.

Accordingly, I pause to emphasize that this Court has been clear in stating that *any* "[g]overnment action that interferes with [religious] autonomy or risks judicial entanglement with a church's conclusions regarding its own rules, customs, or laws is ... prohibited by the First Amendment." *Diocese of Lubbock*, 624 S.W.3d at 513. The church-autonomy doctrine "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without *government intrusion*." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (emphasis added) (internal quotation marks omitted). That means that *any* "[*s*]*tate interference* in that sphere would obviously violate the free exercise of religion, and *any attempt* by *government* to dictate or even to influence such matters would constitute" an unconstitutional "intrusion." *Id.* (emphases added).

This broad prohibition against the "government" *in toto, see Diocese of Lubbock*, 624 S.W.3d at 512–13, is "a structural restraint," *see Westbrook*, 231 S.W.3d at 397, that commands each branch of government to consistently measure its own conduct against the substantive principle that religious organizations must govern themselves. That principle does not merely confer rights, as important as they are; it also provides an absolute boundary dividing civil governmental power from a wholly different realm of sovereignty.

And while religious organizations (and individual believers) obviously benefit from the government's refusal to meddle in matters of religious doctrinal truth or self-governance, the civil government also benefits. Steering clear of this forbidden area—resisting temptations and even invitations to instruct any religious community about the contents of its faith or the propriety of its internal governance—helps the government preserve its own integrity. In short, limitations from the church-autonomy doctrine, like other fundamental restrictions on judicial power, do not belong solely to the litigants in a case to invoke or not as they deem fit. The doctrine is the common inheritance of every citizen, and because it represents an exclusion of civil authority and not just the recognition of private rights, it becomes the common duty of *any* state actor to respect the doctrine's core limits however (or whether) it is invoked.

3

With that foundation, I now turn to the narrower question of what the church-autonomy doctrine requires specifically of the judicial department. Church-autonomy litigation often involves the government, but it also arises within purely private disputes about the contested ownership of property

dedicated to religious use or, as in this case, about corporate governance. Of course, a court's initial obligation in any case is to assess its own jurisdiction, and the church-autonomy doctrine can specifically require courts to disclaim jurisdiction over part or all of a lawsuit, even where the parties have not raised or may have arguably forfeited the issue. By the same token, however, the church-autonomy doctrine can require courts to *exercise* jurisdiction. I therefore proceed by addressing the church-autonomy doctrine and (1) its relationship to the doctrines of waiver and forfeiture, (2) its effects on courts' jurisdiction, and (3) its applicability to both public and private litigation.

First, it is notable at the outset how the church-autonomy doctrine first arose in this case. It was not the parties, but the court of appeals, that identified the risks of treading on prohibited grounds. The question thus arises: When parties fail to timely invoke the church-autonomy doctrine, or perhaps when they affirmatively *want* the courts to adjudicate religious disputes, do the usual waiver and forfeiture tests apply? In other words, may courts disregard the church-autonomy doctrine when the parties themselves fail to raise it or ask the courts to look past it?

The court of appeals acted responsibly by addressing the matter itself. Indeed, when a question is not merely one that implicates religious rights but is altogether outside a court's constitutional authority to answer, such a limitation cannot be subject to ordinary invocations of waiver or forfeiture. The ability to waive or forfeit an objection traditionally belongs to the parties themselves, but as I have discussed, the church-autonomy doctrine belongs to the People and applies as a structural limitation on the government. When a religious organization fails to object to a court's taking a constitutionally unauthorized step—or even if the organization expressly invites it—the court remains duty-bound not to take actions or decide questions forbidden by the church-autonomy doctrine.

That duty is no less relevant than if the parties are willing for the court to render judgment in a collusive suit, or to opine on a case that is now moot or in which the plaintiff never had standing, or to render an advisory opinion on a matter of great interest to the public, or to answer a political question that is not susceptible to principled judicial decision-making. In none of those circumstances do notions of waiver and forfeiture matter. *Cf. Tex. Disposal Sys. **Landfill**, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752, 760 (Tex. 2024) ("[P]arties cannot confer jurisdiction by agreement."). Parties and counsel must identify plausible jurisdictional objections as soon as they are aware of them. *See, e.g., Tex. Right to Life v. Van Stean*, 702 S.W.3d 348, 356 (Tex. 2024). But whether they comply with this obligation or not, what matters in each situation is that the courts protect their own integrity as institutions exercising only judicial power. The same is true here. Courts lack *authority* to opine on the true meaning of religious doctrine or to inject themselves into a religious organization's self-governance regardless of the parties' litigation conduct.

Second, it may be tempting to develop a jurisdictional "rule" that, like a drop of arsenic in a glass, is fatal to justiciability whenever a dispute is of religious significance to the parties. That circumstance should alert judges to the potential for serious constitutional limitations, but if religiosity automatically defeated subject-matter jurisdiction, religious organizations would have *fewer* rights than everyone else.

The correct test derives from the doctrine's substantive principles: If a court cannot resolve an otherwise-proper claim without second-guessing religious organizations' modes of self-governance or purporting to settle disputed questions of faith or doctrine, the court lacks jurisdiction to act or answer. " 'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings' ...." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Jurisdiction here bears its truest and rawest meaning: *power*. Courts are not "divested" of jurisdiction in some formalistic sense—they simply lack any power in the first place to opine as to religious truth or to meddle in the inner-workings of religious entities.

The U.S. Supreme Court confronted a clear invitation to transgress this boundary in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). A local church sought to emancipate itself from the larger denomination, and under Georgia law, "the right to [its real] property" depended on a "jury decision as to whether the [larger] church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." *Id.* at 441. The Supreme Court made clear that awarding rights to property based on how a civil court assesses the meaning and importance of

religious doctrine is always impermissible. *Id.* at 449. Instead, "civil courts [must] decide church property disputes without resolving underlying controversies over religious doctrine." *Id.*

Because of that limitation, a case that raises only purely religious issues must be dismissed. Courts lack the *power* to resolve such issues. But cases that seem to invite such religious assessment, at least at first blush, may yet be justiciable. In *Presbyterian Church*, for example, the dispute was religiously motivated but could be (and on remand to the Georgia Supreme Court *was*) disposed of without resolving ecclesiastical questions. *See id.*; *see also Presbyterian Church in U.S. v. E. Heights Presbyterian Church*, 167 S.E.2d 658, 659–60 (Ga. 1969). Other examples arise where courts exercise authority strictly to protect church autonomy without ever addressing any religious issue. The issue in any case is *how* to avoid red lines. Above all, the court may do nothing more than use secular tools to recognize (and not actually itself make) decisions that the religious entity alone can reach. *See Presbyterian Church*, 393 U.S. at 449 (noting the "severely circumscribe[d] role" of the courts).

This area is not the only one that presents significant difficulty for courts, of course. The separation-of-powers context provides a useful analogue. Some questions are beyond the courts' capacity or authority to address at all—particularly those that are expressly left to another branch of government. But resolving separation-of-powers disputes is a core judicial function—the courts do not *themselves* answer the underlying issue, but they can identify the correct entity to do so and enforce whatever decision that entity makes. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 196–97, 201 (2012) (noting that the courts could not "decide the political status of Jerusalem" but that they could decide which political actor could make that choice); *In re Tex. House of Representatives*, 702 S.W.3d 330, 334 (Tex. 2024) (recognizing the Court's inability to resolve the underlying criminal-law dispute but addressing "the important but unresolved separation-of-powers question presented" that asked "how the People of Texas have structured their government and to which governmental entities they have allocated specific kinds of authority").

Just as courts may vindicate the authority of a properly authorized branch of government to make decisions that the courts themselves may not make, courts may vindicate property rights or the like even in cases with obvious "religious implications." Using civil tools to determine *who* is authorized to make a decision that is binding in a civil court is—and must be—wholly distinct from the court itself making such a choice, which can be motivated by religious considerations. Assessing the *religious* propriety of the choice goes beyond the courts' authority, just as resolving separation-of-powers disputes does not depend on the *political* propriety of a choice belonging to another branch of government.

None of this is to say that it will always be *easy* for courts to use secular tools to resolve disputes involving religious entities. The exercise is fraught with peril, and courts must constantly guard against inadvertent slippage into unauthorized terrain—to mistakenly slide from vindicating church autonomy into supplanting it.

Compounding this difficulty is the important point that jurisdictional limitations are granular; they are not necessarily case-level decisions. The solution in *Presbyterian Church* was not dismissal—it was for the Georgia courts to apply a standard that did not require them "to resolve ecclesiastical questions." 393 U.S. at 449.

The jurisdictional question, therefore, is not binary. Perhaps the most famous church-autonomy case of them all is *Watson v. Jones*, which involved another dispute among Presbyterian churches that heatedly debated each other's religious bona fides. 80 U.S. (13 Wall.) 679 (1871). The Supreme Court declared that the theological controversy was "strictly and purely ecclesiastical in its character" and thus beyond the jurisdiction of civil courts to adjudicate. *Id.* at 733. But that did not mean that the Court treated the *case* as failing to clear a genuine jurisdictional bar, which would have required dismissal. Rather, it affirmed the circuit court's decree on the merits, which had in turn deferred to the governing assembly's decision as to who was properly authorized to constitute the Presbyterian church in question. *Id.* at 700, 735. The case was justiciable, even though the underlying religious controversy was not. *Watson* provides enduring guidance to courts resolving property disputes that arise amid religious quagmires.

This Court followed *Watson* when confronted with a similar fact pattern. We did not declare the case nonjusticiable; we explained that *Watson* "shows conclusively that the determination of an ecclesiastical court as to its jurisdiction

over a given question is as conclusive upon the civil courts as is its decision of the question when made." *Brown v. Clark*, 116 S.W. 360, 364 (Tex. 1909). We lacked jurisdiction to reopen an ecclesiastical decision on a matter of doctrine, even where that doctrinal decision in turn compelled a particular result for property ownership. *Id.* Rather than requiring dismissal, we were required to reinstate the trial court's judgment, which had awarded the property consistent with the church body's decision, and even to assess costs against the plaintiffs in error. *Id.* at 365; *see also Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 605–06 (Tex. 2013) (observing that *Brown*, properly understood, adopted a "neutral principles" approach to church-property disputes).

The lack of civil jurisdiction over religious questions, therefore, does not necessarily entail a lack of jurisdiction over the *entire* dispute. Courts should maintain their focus on whether, in resolving an otherwise justiciable controversy, they must cross one of the red lines that the Supreme Court's and this Court's cases have identified. If so, they may not take that step; if they can resolve the dispute in a way that does not so trespass, then their jurisdiction is not threatened.

The same principle, however, can generate the contrary outcome—where courts must *exercise* jurisdiction, at least so long as all other jurisdictional prerequisites are met. In such circumstances, failing to exercise jurisdiction would undermine and even violate the doctrine. Consider the U.S. Supreme Court's decision in *Kedroff*, in which rival factions of the Russian Orthodox Church contested who was in control of the cathedral and the church's functions in New York—that is to say, who was the true archbishop. *See* 344 U.S. at 96. The New York legislature passed a law that had the effect of transferring this authority to one faction. *Id.* at 97–99. Unsurprisingly, the Supreme Court held that the statute violated the Constitution. *Id.* at 107, 119. The "controversy concerning the right to use St. Nicholas Cathedral [was] strictly a matter of ecclesiastical government," implicating a power clearly lodged in the mother church and certainly not susceptible to change by governmental fiat. *Id.* at 115. Accordingly, *exercising jurisdiction* was necessary to vindicate the relevant religious community's allocation of authority.

Vindicating church autonomy is sometimes possible, in other words, only when a court *exercises* subject-matter jurisdiction, which can ensure that the substantive constitutional principle is not honored in name while defiled in practice. This can require deeming governmental actions invalid in some cases or restoring the *status quo ante* if private parties seek to drain a religious entity of its control. In no instance may a court become an arbiter of religious doctrine or the proper inner-workings of a religious entity, but dismissing a case asking a court to *protect* the religious entity's authority to make those very choices for itself would jeopardize the "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 115–116 (citing *Watson*, 80 U.S. at 727). Taken to its extreme, a talismanic dismissal of cases for "lack of subject-matter jurisdiction" risks closing the courthouse doors to religious organizations, rendering them helpless to protect their constitutional rights and achieving the exact opposite of the religious-liberty aspirations of our constitutions.

In proper circumstances, therefore, the church-autonomy doctrine may require a court to exercise jurisdiction and rule for the religious entity on the merits—not because of any religious inquiry but because of the church-autonomy doctrine's substantive reach. In *Hosanna-Tabor* and *Morrissey-Berru*, the U.S. Supreme Court again applied the church-autonomy doctrine's substantive principles, concluding in both cases that the religious organizations (specifically, the religious schools) *won* because of the substantive promise that the government *will not second-guess* how a religious organization undertakes the fundamental task of choosing its leaders. *Hosanna-Tabor*, 565 U.S. at 198; *Morrissy-Berru*, 591 U.S. at 762.

Such a win is on the merits. It does not depend on scrutinizing religious choices, beliefs, or self-governance. The merits decisions did not turn on whether the church's reasons for terminating the teachers' jobs were sufficiently grounded in the faith—or whether they turned on religious reasons at all. Instead, *regardless* of the reason, "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185. The church-autonomy doctrine's breadth, in other words, can allow courts to respect and vindicate the interests of religious organizations on the merits and without crossing any impermissible red line.

Beyond cases in which the courts are facially deprived of jurisdiction (*i.e.*, when they are affirmatively asked to opine as to religious truth) or cases in which the courts must exercise jurisdiction (*i.e.*, when doing so would vindicate a religious organization's autonomy), there may be a third variant. Specifically, dismissal may be inevitable for cases in which it is impossible to impose general secular law against a religious organization without affecting its internal governance, even if the court does not formally address any question of doctrine. Several of our precedents fit in this category, at least from my perspective.

Take the defamation and intentional-infliction-of-emotional-distress claims in *Diocese of Lubbock.* We explained that "[a]lthough tort law imposes a duty not to defame or intentionally inflict emotional distress upon others, a civil suit that is inextricably intertwined with a church's directive to investigate its clergy cannot proceed in the courts." *Diocese of Lubbock*, 624 S.W.3d at 517 (internal citation omitted). The principle, we said, was that "courts are prohibited from risking judicial entanglement with ecclesiastical matters." *Id.* at 514 (citing *Morrissey-Berru*, 591 U.S. at 761). We concluded that "to the extent [the] suit directly challenges the Diocese's application of Canon Law in its internal governance process, the court lacks jurisdiction." *Id.* at 516. The particular red line was that the suit was " 'inextricably intertwined' with the Diocese's decision to investigate its own clergy, judicial review of which would impermissibly interfere with a church's ability to regulate the character and conduct of its leaders," and "exercising jurisdiction would invade the Diocese's internal management decision to investigate its clergy consistent with its own norms and policies." *Id.* at 516–18.

Likewise, in *Westbrook v. Penley*, we considered a legislatively mandated duty of confidentiality for professional counselors as issued in a state regulation. 231 S.W.3d at 402–03. "But however highly we might rate the importance of that interest, it is by no means absolute when impingement on free-exercise rights results." *Id.* In that case, the same defendant was a minister and a licensed counselor, and he revealed to his congregation that the plaintiff had engaged in an affair and was thus to be subjected to church discipline, to which she had agreed. *Id.* at 391. There was no way to hold the defendant to his secular duties without penalizing him for following the ecclesiastical process that the church had mandated. *Id.* at 400.

Just as I described above the risk of courts too quickly dismissing cases that should be adjudicated despite the initial appearance of serious religious disputes, the converse risk also exists. We ultimately "must carefully scrutinize the circumstances so as not to become entangled in a religious dispute." *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12 (Tex. 2008). In other words, we look hard to ensure that what *seems* to be secular is not a mere stalking horse—intentional or otherwise—for subjugating a religious organization to civil authority for matters that actually are ecclesiastical.

Third, and finally, it is worth reiterating that while the church-autonomy doctrine is one that limits the government, it also plays a significant role in private litigation. What is more, many cases applying the doctrine involve private litigation in which the courts must render judgment rather than dismiss, thus vindicating religious autonomy. The U.S. Supreme Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), provides one good example. There, the private lawsuit subjected a church to extensive judicial scrutiny about its compliance with its internal canon law, which resulted in the reinstatement of a particular bishop as the "Diocesan Bishop." *Id.* at 708; *see also id.* at 725 (Rehnquist, J., dissenting) (observing that the litigation was purely private). The Supreme Court rejected this extraordinary intrusion, but it did not demand dismissal for want of jurisdiction—it instead required the state courts to accept the binding determination of the "mother church," which in turn determined the ownership of certain property. *Id.* at 713 (majority opinion).

B

The Conference alleges a wrongful divestiture of its control over SMU. Given the church-autonomy doctrine, the outcome that the Court reaches today seems inevitable—if not under § 22.207, then under the constitutional principles described above. I proceed in three brief steps. First, there is sufficient governmental involvement here to implicate the doctrine, although I doubt that any particular state action is even needed. Second, litigating corporate articles and litigating property disputes are materially indistinguishable for these purposes—both are delicate, but both are doable. And third,

this case does not come close to crossing any of the red lines that would require dismissal rather than vindication of a religious organization's claim. Allowing the Conference to make its case cannot possibly violate the church-autonomy doctrine, but denying it that chance likely would.

1

First, SMU downplays the church-autonomy issue by depicting the case as purely private, simply "requir[ing] resolution of settled, neutral principles of law" to prevent what it depicts as a complete outsider—the Conference—from wresting control of the university. (The Conference likewise regards the case as simple, but it casts the board of trustees rather than itself as the interloper.) Assuming that any particular state action is needed, it is easy enough to find. To the extent the State is involved, it was because SMU's board asked the secretary of state to accept amended articles that, if effective, would emancipate SMU from the Conference.

The days have long passed in Texas when corporate formation required an express act of the legislature. *See, e.g., Paxton v. Annunciation House, Inc.*, ___ S.W.3d ___, 2025 WL 1536224, at *4–5 (Tex. May 30, 2025). It remains true, however, that corporations are legally created and altered "dependent upon the consent of the sovereign power." *A. B. Frank Co. v. Latham*, 193 S.W.2d 671, 673 (Tex. 1946) (citation omitted). *Both* parties agree that the secretary of state's role here, although ministerial, was legally decisive and indispensable. Regardless of whether the board *ought* to have filed the amended articles with the secretary, in other words, everyone agrees that her acceptance of the filing is what makes it legally enforceable. By contrast, merely deleting references to the Conference in some internal memo would have had no force; removing any mention of the Conference from SMU's articles and then filing them *with the State* is what does. Such recourse to state authority supplies sufficient connection to government to implicate the church-autonomy doctrine, despite the involvement being passive and the State's lack of any interest in whether, under properly amended articles, the Conference retains or relinquishes its control.

SMU was apparently left free, if its students and staff disagreed with any doctrine of the larger United Methodist Church, to distance itself from those doctrinal stances. SMU did so in numerous ways even as this litigation was unfolding, assuring students that the university disagreed with the church's (now abandoned) "Traditional Plan," that the university would still provide the inclusive learning environment the plan purportedly threatened, and that the university would continue to comply with federal civil-rights guidance on sexual orientation notwithstanding any (apparently illusory) contrary guidance from the church. Whatever authority the Conference may have had to countermand any of these steps, it seemingly chose restraint. And whatever else SMU might be able to do to signal its own distinct views, it could not (1) demand that *the State* join in by engineering an amendment that entirely ousts the Conference from its position of control and then (2) prevent scrutiny either via a declaratory action or under the church-autonomy doctrine. Texas's constitutional guarantee that "no human authority" will improperly interfere in religious matters, Tex. Const. art. I, § 6, may not be so easily evaded.

In any event, as I discussed in Part II.A.3, *supra*, whether against the government, purely private, or some hybrid, at least in some cases the exercise of judicial power itself may amply implicate the church-autonomy doctrine. *See, e.g., Milivojevich*, 426 U.S. at 708. Here, SMU purported to unilaterally secede from the Conference despite being subject to its control. SMU could have brought a declaratory action *before* filing the amendments to obtain judicial approbation of its contested authority to do so. Instead of turning to the courts, however, SMU turned to the secretary of state, filing revised articles of incorporation that deleted the Conference's role and authority without its consent, and by doing so, it purported to free itself of the Conference's preexisting control. Can it really be that the church-autonomy doctrine—a fundamental precept of federal and Texas constitutional law, central to our very identity, providing a defining limit to the structure of our government, and imparting a core basis for the protection of religious self-governance—has such a gaping loophole that its evasion requires nothing more than a surreptitious filing of revisions to articles of incorporation? Can it possibly be true that what a litigator could never achieve, a transactional lawyer can do with a mere filing in the secretary of state's office? Religious liberty would be fragile indeed if SMU could so easily deprive the Conference of any way to protect its substantial rights.

The overriding question is always whether the government will protect church autonomy or whether the government will

allow that autonomy to be drained away. I see no real reason why this dispute, like other cases in which private religious entities asserted conflicting secular rights, *see supra* Part II.A.3, requires any additional "government" involvement to implicate the doctrine.

2

One reason for that result is that this case shares the material features of a property dispute, which everyone agrees requires no distinct government involvement for civil courts to resolve. We have repeatedly stated that "courts are to apply neutral principles of law to issues such as land titles, trusts, and *corporate formation, governance, and dissolution*, even when religious entities are involved." *Episcopal Diocese of Fort Worth v Episcopal Church*, 602 S.W.3d 417, 424 (Tex. 2020) (emphasis added) (quoting *Masterson*, 422 S.W.3d at 606). We added that "specific, lawful provisions in a corporation's articles of incorporation or bylaws" will govern how a corporation, including one set up for religious purposes, "can change its articles of incorporation." *Id.* at 432 (quoting *Masterson*, 422 S.W.3d at 609). The authority to make such amendments presents "secular, not ecclesiastical, matters" unless the documents provide otherwise. *Id.* (quoting *Masterson*, 422 S.W.3d at 609).

These statements, arising from cases that turned on scrutinizing documents including articles of incorporation, are surely right. How is a dispute among religious entities about which has the right to use real property meaningfully different from a dispute about which has the right to amend (or forbid amendment of) a corporation's articles? *Someone* must have title to church property; the articles of incorporation of a Texas corporation either were validly amended, or they were not. These are not the kinds of cases that the church-autonomy doctrine bars at the courthouse door.

Of course, religious organizations are free to make *any* of these rights turn on religious questions that civil courts may not themselves answer. When they do—such as by vesting title in a congregation on the condition that it remains true to a particular doctrine—the courts' work becomes more complicated. But even then, that work does not impermissibly extend to resolving the disputed religious questions; it only looks to the proper authority to provide the binding answer. In that sense, the "neutral principles" approach collapses into "deference," as in this Court's seminal decision in *Brown*. If neutral principles—*i.e.*, reading secular documents as they are usually read—themselves point to a result predicated on religious determinations, then the issue becomes ensuring that deference is properly yielded. That may sound hard, and sometimes it is. But if it can be done in a property-rights context, then I see no reason why it could not happen in a corporate-formation or corporate-governance context.

Happily, there will be no such difficulty in this case. The articles of incorporation simply state that SMU is "forever" part of the Conference's mission and under its control; they expressly forbid any amendment to the articles absent the Conference's consent. *How* the Conference chooses to exercise that control or grant that consent, or whether its decisions reflect true and pure Methodism, is wholly beside the point—those are ecclesiastical matters. The text tells us everything that civil courts need to know to assess the amendments' validity. By contrast, if the articles stated that the Conference remained in control of SMU only so long as it remained true to John Wesley's teachings, we would obviously be unable to adjudicate a challenge on the grounds that it has departed from that doctrine. Here, however, there are no religious questions to answer—only religious rights to vindicate.

Thus, I again see no real difference from property cases. The church-autonomy doctrine, at least sometimes, represents "an invitation to *churches*, where they deem it appropriate, to ask courts to assist them in resolving certain church property disputes." *McRaney*, 980 F.3d at 1071 (Ho, J., dissenting from denial of rehearing en banc) (describing the principles articulated in *Jones v. Wolf*, 443 U.S. 595, 602–04 (1979)). I agree. That "invitation" is presumably open for the defense of other kinds of rights besides claims to Blackacre.

3

The church-autonomy doctrine requires courts to *act* to protect church autonomy subject to the now-familiar red lines —that a "court may exercise jurisdiction over a controversy if it can apply neutral principles of law that will not require inquiry into religious doctrine, interference with the free-exercise rights of believers, or meddling in church

government." *Diocese of Lubbock*, 624 S.W.3d at 513 (citing *Westbrook*, 231 S.W.3d at 398–400). These red lines are not at issue here, which is why the church-autonomy doctrine does not bar consideration of the Conference's claim. The only question for a civil court will be whether the Conference in fact has the authority that the articles of incorporation state or if, for some other lawful reason that does not offend the church-autonomy doctrine, SMU can nonetheless dislodge it. What will play no role is whether SMU's motivation for attempting to discard the Conference's authority was noble or base, was informed by the purest religious motives or the least creditable, or was altogether uninfluenced by matters of faith.

To confirm all this, first consider whether the Conference's case against SMU requires ruling on a religious question. Though SMU's break with the Conference may have grown from a dispute over Methodist ethics (despite the university's protests to the contrary), resolving the validity of the articles' stated ownership or control of SMU does not require selecting one exegetical approach over another, nor does it require elevating one set of beliefs over another. No court will adjudge one view of any religious question true or false.

Next ask whether resolving the case will threaten church authority to manage internal affairs. Another easy no. All parties agree that the Conference (a religious entity) owned SMU at one point in time. The merits question is whether, in light of SMU's unilateral attempt to break away from the Conference, the Conference has any recourse to maintain control over SMU. From that view of the facts and arguments, I see no way in which reaching the merits question could "*impede* the church's authority to manage its own affairs." *Diocese of Lubbock*, 624 S.W.3d at 509 (emphasis added). The opposite is true.

The case law draws a line between disputes that simply *involve* a religious entity and those that threaten "*government interference* with an internal church decision that affects the faith and mission of the church itself." *Id.* at 517 (citing *Hosanna-Tabor*, 565 U.S. at 190 (emphasis added)). The Court is therefore right to recognize that, "far from interfering with ecclesiastical matters," the exercise of our jurisdiction "respects and enforces" the Conference's choice to structure SMU under Texas corporate law. *Ante* at 10. That simple recognition makes this case unlike, say, *Diocese of Lubbock*, where civil-court second-guessing of internal church investigative procedures over clergy could have ended with a hefty monetary judgment against the Diocese and in turn imposed civil coercion on it regarding how it dealt with internal disciplinary matters. *Diocese of Lubbock*, 624 S.W.3d at 517.

* * *

While courts should always approach questions that even implicate religious practice with great humility and self-doubt, this case is an example of when judicial *inaction* would undermine the larger principle of church autonomy. Because a court will not need to answer any religious question to decide the dispute, nor threaten to otherwise interfere with church self-governance by hearing it at all, the church-autonomy doctrine does not require dismissal. Dismissal is what would jeopardize church autonomy. Refusing to recognize the Conference's authority over SMU—or, more precisely, refusing to allow the Conference to try to prove that authority—would turn church autonomy on its head.

III

Finally, and briefly, I turn to the question that in the end may prove most consequential: Given the Texas Constitution's distinct language and history, is its church-autonomy doctrine meaningfully different from its federal counterpart? As with other important constitutional guarantees, the answer is: "We still do not really know, even as we approach the sesquicentennial of our current Constitution." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 664 (Tex. 2022) (Young, J., concurring).

Like the due-course clause in § 19 of the Bill of Rights at issue in *Crown Distributing*, the freedom-of-worship provision in § 6 remains unchanged since February 15, 1876, when the Constitution took effect. Yet our church-autonomy cases are exclusively federal in character, with only occasional references to our own Constitution. Chief Justice Blacklock, for example, has observed that "[b]oth the Texas Constitution and the United States Constitution compel judges to acknowledge that there are places where our imperfect judicial system does not belong, places where earthly judges have no power." *Diocese of Lubbock*, 624 S.W.3d at 520 (Blacklock, J., concurring). That case did not

offer the Court any opportunity to explore how those two constitutions might differ.

Chief Justice Phillips has explained why our understanding of the Texas Constitution's religious-liberty provisions remains underdeveloped:

> Because [the relator] has not argued persuasively for a different application of the provisions of the First Amendment and Article I, Section 6 as they pertain to the free exercise of religion, we assume without deciding that the state and federal free exercise guarantees are coextensive with respect to his particular claims .... While interesting developments are occurring in state religion clauses in other jurisdictions, we are reluctant to decide an issue as important as the scope of the Texas Constitution's free exercise guarantee under these circumstances.

Tilton v. Marshall, 925 S.W.2d 672, 677 n.6 (Tex. 1996) (citing Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 St. Thomas L. Rev. 49 (1992)). Nearly thirty years later, those "circumstances" are unchanged. We have not had litigants accept Chief Justice Phillips's implied invitation—one that I extend again today.

To the varying extent that the parties and amici in this case have discussed church autonomy, they (as in past cases) have proceeded as though federal law and state law are identical in their potential to protect the Conference's religious autonomy from interference. And our cases have uniformly and exclusively talked about "the First Amendment" in church-autonomy contexts. *See, e.g., Diocese of Lubbock*, 624 S.W.3d at 509, 512–14, 516–19 & n.3; *Episcopal Diocese*, 602 S.W.3d at 420, 424, 426–29, 431, 435; *Masterson*, 422 S.W.3d at 596, 601–03; *Pleasant Glade Assembly of God*, 264 S.W.3d at 2, 5–8, 13 (citing § 6 without discussion); *Westbrook*, 231 S.W.3d at 394–97 & n.6, 399, 400–05.

It is not *wrong*, of course, to apply the First Amendment's church-autonomy doctrine, as our cases have done. The federal Constitution binds the government of Texas, and its religious-liberty promises are fully enforceable in our courts. But church autonomy is also an independent principle arising from the *Texas* Constitution, and the federal Constitution does not limit its scope so long as it violates no federal requirements.

There is reason to think that, compared to its federal analogue, the Texas church-autonomy doctrine is *at least* as robust—and potentially far more rigorous. In relevant part, the First Amendment forbids Congress from making a law "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The soaring text of the Texas Constitution suggests an even more powerful commitment by our People to leaving the high matters of religious self-governance and doctrinal truth to religious communities:

> FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. *No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion*, and no preference shall ever be given by law to any religious society or mode of worship. *But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.*

Tex. Const. art. I, § 6 (emphases added).

Both with respect to prohibition ("No human authority") and affirmative protection ("the duty of the Legislature"), our

Constitution implies greater scope than its federal analogue. Moreover, our framers were aware of the federal Constitution. Sometimes, as with the contracts clause, they chose to copy its language almost verbatim. *See City of Baytown v. Schrock*, 645 S.W.3d 174, 183 (Tex. 2022) (Young, J., concurring). Elsewhere, as with the takings clause, our framers substantially expanded upon the federal language, presumably to generate different results. *Id.* The freedom-of-worship clause in § 6 markedly expands on its federal analogue, so it is at least plausible that the framers and ratifiers of our Constitution anticipated substantially different and more protective substantive outcomes. Particularly given that the First Amendment had not yet been incorporated against the States by 1876, the choice to not merely adopt the federal baseline but instead choose ostensibly *greater* restrictions on government in the ecclesiastical sphere should not be elided by reflexively conflating the First Amendment and § 6.

One specific potential distinction may—and I emphasize *may*—lie in the extent of the church-autonomy doctrine's jurisdictional consequences. In *Hosanna-Tabor*, for example, the Supreme Court emphasized that "the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have *no role* in filling ecclesiastical offices." 565 U.S. at 184 (emphasis added). Yet in the same case, the Court described the ministerial exception (*i.e.*, the aspect of the church-autonomy doctrine at issue) as "an affirmative defense to an otherwise cognizable claim, *not a jurisdictional bar*." *Id.* at 194 n.4 (emphasis added). This Court has stated that it will follow U.S. Supreme Court guidance with respect to that question—although we have read that Court's precedents more aggressively than the *Hosanna-Tabor* Court itself might have, emphasizing the clearly "jurisdiction[al]" holding in *Watson* instead. *See Diocese of Lubbock*, 624 S.W.3d at 512 n.1.

But we have not yet considered whether, wholly aside from wherever the U.S. Supreme Court leads, some matters treated as "affirmative defenses" under federal law might be "jurisdictional bars" under the Texas Constitution's more rigorous structural limitation. In other words, compared with how the U.S. Supreme Court views the First Amendment, our Constitution may more resolutely preclude courts from engaging with litigation that would risk judicial tinkering with religious decision-making. If so, there could be a heightened need for Texas courts to guard against stepping into forbidden terrain even when the parties treat it as within the civil court's domain.

Such a result would have at least two significant consequences. First, it would mean that some cases may well turn out differently under the Texas Constitution. And second, it would mean that the failure to develop the full meaning of the Texas Constitution's church-autonomy doctrine may be preventing Texas courts from obeying their mandate. While it is more than ideal for parties to develop Texas constitutional arguments within the course of litigation, and at the earliest possible stages, some requirements of our Constitution may constrain courts whether parties invoke them *or not. See supra* Part II.A.3 (describing why waiver and forfeiture are, at least in part, inapplicable in this context).

Given these possibilities, and looking to future cases, I therefore hope that litigants will resist the "almost routine" pattern of assuming that the protection afforded by federal and state constitutional provisions must be coterminous. *City of Baytown*, 645 S.W.3d at 184 (Young, J., concurring). It is disquieting to think that the failure to consider the vivid language in our own Constitution could lead courts to decide questions or whole cases that are beyond their authority. The sooner we have high-quality assistance, the better. I hope, therefore, that amici—like the two excellent friends of the Court that have participated in this case, and many others—along with the bar, the academy, and all other interested parties on any side, will help us determine the church-autonomy contours flowing from the original public meaning of § 6 of our Bill of Rights.

* * *

To be clear, I do not purport to resolve the extent of § 6's possibly unique protections. Suspicions aside, I can only speculate that the facial textual differences between that provision and the First Amendment hint at such a delta. I remain open to any possibilities, including that, in the end, perhaps there will be no material differences between the two under current law. If, for example, the U.S. Supreme Court's religion-clause jurisprudence has expanded the First Amendment's church-autonomy scope beyond what the framers of our Constitution would have expected, then the *practical* gap between the two may have shrunk or even

disappeared. But it is not at all clear that this has happened or that they are coterminous—even before taking newer provisions into account, such as § 6-a's religious-service provision, which the Court interpreted for the first time earlier this month. *See Perez v. City of San Antonio*, ___ S.W.3d ___, 2025 WL 1675639, at *3–13 (Tex. June 13, 2025). With the benefit of comprehensive briefing in future cases, I expect to form a firmer view.

IV

As a formal matter, today's decision returns the case to the lower courts for further proceedings. The Court holds only that § 22.207 allows the Conference to seek a judicial interpretation about the articles of incorporation and, under the auspices of the same statute, to proceed with its contract claim. In my view, the work of the courts on remand will be quick, and I expect that the Conference's rights will be fully vindicated—if the case must proceed. In light of the Court's clarifying holding, however, I hope that it is not too late for these litigants to reconsider. Must they settle what divides them in this way rather than through some other kind of conciliation?

As my opinion today makes clear, most of those matters go beyond my authority as a judge; if the litigation must continue, so be it. I cannot help but express hope, however, that divisions of this sort can be repaired by those who once walked arm in arm in unity of purpose without recourse to the civil courts—courts that have the power to resolve disputes and vindicate rights, and that will do so to the best of the abilities of those who staff them, but that in so doing cannot help but tarnish with earthly grime what should be holy.

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Commonwealth Court of Pennsylvania.

People's Property, LLC and
Annie Marie, LLC, Appellants
v.
Lower Nazareth Township Zoning Hearing
Board and Lower Nazareth Township

No. 701 C.D. 2024
|
Argued: April 8, 2025
|
FILED: June 27, 2025

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE STACY WALLACE, Judge HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION NOT REPORTED

MARY HANNAH LEAVITT, President Judge Emerita

People's Property, LLC (People's Property) and Annie Marie, LLC (Annie Marie) (collectively, Owners) have appealed an order of the Court of Common Pleas of Northampton County (trial court) that denied Owners' land use appeal regarding their properties located at 4683 Ash Drive, known as "Lot 99," and at 4673 Ash Drive, known as "Lot 97," in Lower Nazareth Township (Township). In so holding, the trial court affirmed the decision of the Township Zoning Hearing Board (Zoning Board) that Lots 97 and 99 are not lawful, nonconforming lots that can be developed for a reasonable use. The trial court also affirmed the Zoning Board's denial of variances from the Township's Floodplain Management Ordinance (Floodplain Ordinance)[1] to allow Lots 97 and 99 to be used for a residence with an accessory on-lot septic system. Owners contend that the trial court and the Zoning Board erred in holding that Lots 97 and 99 could not be developed for any purpose and in holding that Owners' evidence did not establish grounds for variances from the Floodplain Ordinance. Upon review, we reverse the trial court and remand the matter to the trial court for further proceedings.

Background

Lots 97 and 99 are located in the Township's low density residential zoning district (LDR District), which currently requires a minimum lot size of one acre. The two lots were created in the subdivision and development plan for Ridge View Estates East that was recorded on October 15, 1973. Each lot is approximately 0.33 acre in size.

By resolution of January 27, 1982, the Township Board of Supervisors (Township Supervisors) revoked its approval of the 1973 plan under authority of Ordinance No. 63 of 1977, known as the Township's Subdivision and Land Development Ordinance (SALDO). Reproduced Record at 142a-43a (R.R. __). Paragraph 1 of the resolution stated that "[*t*]*he final subdivision approval of* **lots** 5, 15-19, 25-31, 35-45, 49-58, 67-70, 91-96, **99**, as shown on the Plan of Ridge[V]iew Estates East *is revoked* and *said plan is hereby recalled as to said lots and appurtenant subdivision improvements*." *Id*. at 143a. (emphasis added). Paragraph 2 of the resolution directed the then-developer, KBK Associates, "to submit subdivision and land development plans and supporting documents and material consistent with Township Ordinance No. 63 *before continuing the development of its above referenced holdings*." R.R. 143a (emphasis added). In a "whereas" clause, the resolution stated that "substantial development has occurred only in Phase I consisting of lots: 6-14, 32, 33, 34, **97**, 98 of [KBK Associates'] holdings[.]" R.R. 142a (emphasis added). In short, the 1982 resolution did not apply at all to Lot 97 and, as to Lot 99, merely required the future development of Lot 99 to conform to the SALDO.

On February 13, 1987, KBK Associates recorded a new subdivision plan (1987 Plan) for Ridge View Estates East, titled "Plan of Lots—Phase II." R.R. 138a. The notes to the 1987 Plan state, in pertinent part, as follows:

> Note 1. The subdivision plan of Ridge[V]iew Estates East, approved by the [Township Supervisors] on August 9, 1973, is recorded in the Office of the Recorder of Deeds for Northampton County in Plan Book 31, Page 2.

> Note 2. *This plan has been prepared to meet the directions set forth by the* [*Township Supervisors*] *Resolution adopted the 27th day of January, 1982*.

Id. (emphasis added). At the bottom of the 1987 Plan is a small inset map of lots that shows "Phase II" lots in shading but without lot numbers. That inset map also shows the location of an "associated off[-]site storm water control facility." *Id*. At the approximate location of Lot 97 (outside the shaded lots) is an asterisk that refers to a note on the 1987 Plan that states as follows:

> * *Flood Plain Preservation Area—*
>
> *This land to be merged with adjoining lot* or dedicated or sold to Lower Nazareth Township or Northampton County or the Lehigh Valley Conservancy, or some other similar organization.

R.R. 138a (emphasis added). The 1987 Plan did not further define "this land" to be "merged with adjoining lot" or dedicated either to a political subdivision or a conservancy. *Id*.

Additional notes on the 1987 Plan state as follows:

> *Lot Numbers 91, 92 and 93 are not suitable for on-lot sewage disposal systems at this time*. Earth fill material shall be placed to final grade and may be tested according to [the Department of Environmental Resources (D.E.R.)] regulations. [2]
>
> Lot Numbers 94, 95 and 96 have been filled with earth and graded in September, 1984. Testing for site suitability shall be according to D.E.R. regulations.

R.R. 138a (emphasis added).

In 1988, the Township adopted its first floodplain ordinance. The current Floodplain Ordinance, which took effect in 2014, placed all of Lot 99 and most of Lot 97 within the 100-year flood plain.

On March 22, 1988, KBK Associates conveyed Lots 95-99 in a single deed to William J. Schnierlein and Kenneth A. Erney, co-partners, who conveyed these lots in a single deed to Kenneth A. Erney Jr. (Erney) on November 27, 2002. In 2020, Erney conveyed these lots to five separate LLCs, each owned or operated by Adam Pooler (Pooler). Pertinent to this appeal, People's Property purchased Lot 99, and Annie Marie purchased Lot 97.

Land Use Appeal on Lot 99

On December 15, 2020, People's Property applied for a permit to install an on-site septic system on Lot 99. The Township's zoning and floodplain administrator, Lori Seese (Seese), refused to process the application for the stated reason that it did not identify the use for which the sewage system would be installed and did not comply with the Floodplain Ordinance. People's Property appealed to the Zoning Board to require a review of the application or, in the alternative, the grant of a variance from the Floodplain Ordinance.

On February 3, 2021, People's Property applied for a building permit for Lot 99, which was denied for the stated reason that a single-family dwelling was not permitted on Lot 99 under the Floodplain Ordinance. The Floodplain Ordinance permits land in the floodplain to be used for "front, side, and rear yards," but "such yards are not to be used for on-site sewage disposal systems[.]" FLOODPLAIN ORDINANCE, § 4.01.F. Because all of Lot 99 is located in the floodplain district, "the proposed septic systems are within the setbacks." Original Record (O.R.), Item 6 at 2b (Zoning Officer's File (ZA2021-04), March 9, 2021, letter denying application for single-family dwelling). The denial letter stated that a variance was needed for the proposed single-family dwelling and accessory use of Lot 99.

People's Property appealed to the Zoning Board, seeking a determination that Lot 99 is a lawful nonconforming lot that can be developed for a reasonable use under Section 1409.C of the Township's Zoning Ordinance, [3] ZONING ORDINANCE, § 1409.C, and a variance from Article 4 (Sections 4.01, 4.01.F, and 4.02.B) and Article 8 of the Floodplain Ordinance. FLOODPLAIN ORDINANCE art. 4, 8.

Land Use Appeal on Lot 97

On February 23, 2021, Annie Marie applied for building and sewer permits for Lot 97, which were denied for the

same reasons, *i.e.*, that the applications did not comply with the Floodplain Ordinance. Specifically, the proposed septic systems, the rear yard, and a majority of the side yards "are within the floodplain[.]" O.R., Item 6 at 3b (Zoning Officer's File (ZA2021-05), March 9, 2021, letter denying application for single-family dwelling). The denial letter stated a variance was needed for the proposed single-family dwelling and accessory use of Lot 97.

Annie Marie appealed the denials to the Zoning Board. It also requested a determination that Lot 97 is a lawful nonconforming lot that can be developed for a reasonable use under Section 1409.C of the Zoning Ordinance and a variance from Article 4 (Sections 4.01, 4.01.F, and 4.02.B) and Article 8 of the Floodplain Ordinance.

The appeals of Annie Marie and People's Property were consolidated. The parties agreed that testimony regarding Lot 99 would be incorporated into the Lot 97 appeal.

Zoning Board Hearings

The Zoning Board held six hearings.

Pooler, the principal of the five LLCs, testified that prior to purchasing the five lots, he contacted Seese, who advised that the lots were not "buildable lots" and would not pass the percolation test necessary for an on-lot septic system. Notes of Testimony (N.T.), 3/23/2021, at 13; R.R. 177a. However, the percolation tests were "successful" and approved by the Township's sewage enforcement officer. N.T., 3/23/2021, at 13-14; R.R. 177a-78a. Pooler applied for, and was granted, building permits for Lots 95 and 96, on which two homes have been built.

Seese's letter of September 25, 2017, was introduced into evidence. Referring to "4663--4683 Ash Drive-Floodplain and Zoning Analysis," the letter stated, in pertinent part, as follows:

> Dear Mr. Pooler:
>
> Per your request, I have reviewed the single-family dwelling applications submitted for the five lots located at 4663 thru [sic] 4683 Ash Drive. You requested they be reviewed for compliance with the Zoning Ordinance and the [T]ownship's Floodplain Ordinance. My comments are as follows:
>
> 1. Zoning—*These five lots are existing non*[ ]*conforming lots located in the* [*LDR District*]. The lots are all less than a half-acre. The current minimum lot size for a single-family dwelling is 1 acre. That being said, *the non*[ ]*conforming lot size does not prevent the lots from being developed.* The setbacks depicted on the approved subdivision plan would apply to these lots.
>
> 2. Floodplain Ordinance—*All five lots are located either partially or entirely with*[*in*] *the AE zone of the 100-year floodplain* (FIRM Map Panel #42095C0255E, effective 7/16/14). An image from [the Federal Emergency Management Agency's (FEMA)] website is attached. I have outlined the parcels and their locations within the floodplain below.
>
> Parcel # Address Portion in Floodplain [*Lot 99*] 4863[sic] Ash Drive *All* [Lot 98] 4677 Ash Drive Majority [*Lot 97*] 4673 Ash Drive *Majority* [Lot 96] 4669 Ash Drive Small Portion [Lot 95] 4663 Ash Drive Small Portion
>
> *Pursuant to* [ ] *Township Floodplain Ordinance #212-06-14, a single*[-]*family dwelling is not permitted in the Floodplain District (Article IV, Uses).*
>
> *Furthermore, Section 8.03, Design and Construction Standards requires that no part of the on-site sewage system be located within the identified floodplain area. This means that Lots* [*99, 98 and 97*] *are not buildable for single*[-]*family dwellings.*
>
> In regard to Lots [96 and 95], however, it is possible that single[-]family dwellings could be constructed on these lots since smaller portions of these lots are within the floodplain. This is assuming compliance with the Floodplain Ordinance and other applicable State and Local regulations, particularly for on-lot sewage facilities.

R.R. 100a-01a (emphasis added). The AE Zone is an area with a risk of flooding such that it requires purchase of flood insurance. [4]

Pooler testified that after he bought the properties, the Township offered him $10,000 for Lots 97-99. Pooler paid $32,000 for each lot and did not accept the offer.

Owners presented several expert witnesses. Roger Lehmann (Lehmann), a certified Pennsylvania sewage enforcement officer, testified that in July of 2020, his soil tests identified two areas suitable for the installation of a septic system. Lehmann explained that state law permits the installation of septic systems in floodplains but not in "floodways," which are designated by FEMA and refer to streams that overflow their banks on occasion. N.T., 3/23/2021, at 72; R.R. 237a. Neither Lot 99 nor 97 is located in a floodway. Lehmann testified that he has supervised the installation of septic systems in floodplains throughout Pennsylvania, and "they function appropriately." N.T., 3/23/2021, at 73-74; R.R. 238-39a. Lehmann opined that Lot 99 was appropriate for the proposed on-lot system.

Lehmann proposed an elevated septic system designed to prevent sewage from leaking into the environment. During a flood, the effluent from the septic tank is pumped into the mound. The pressurized system prevents effluent from penetrating drain fields, which treats the effluent, or from surcharging into the house.

Lehmann then responded to questions from Steven Nordahl, vice chair of the Zoning Board, as follows:

> [ ] Nordahl: And what about the effluent that's in the [drain] field once it's flooded, it's going to discharge.
>
> [Lehmann:] It's going to go down. When the flood waters recede, for all intent and purposes, they go down and anything inside the mound is going to go vertically as it does when the water is put into it from the sewage disposal system. The systems are installed in flood plains all across the Commonwealth of Pennsylvania.
>
> [ ] Nordahl: *But in this case, a flood plain in this situation with the actual field, that field is going to be saturated; it's going to have effluent in it, and it's going to be mixing in with the flood waters which means it's going to discharge into the flood waters. Any residual that's there is going to discharge into the flood waters.*
>
> [Lehmann:] *I guess anything is possible*.

N.T., 3/23/2021, at 76-77; R.R. 241a-42a (emphasis added).

Jason Bailey (Bailey), a civil engineer, also testified about Owners' proposed septic system, opining that it constituted the minimum variance and least modification necessary to allow reasonable use of Lots 97 and 99. Further, the system would comply with Pennsylvania's laws on sewage regulation. Bailey stated that the addition of 2,000 cubic feet of fill would raise the base flood elevation by "a half inch. But then you have to take that over the actual area of the entire upslope waterway and it would be negligible at that point in time." N.T., 3/23/2021, at 93; R.R. 258a. Bailey opined that a variance would not "increase[ ] flood elevations [or] additional threats to public safety[.]" N.T., 3/23/2021, at 97; R.R. 262a.

Jeremy Madaras (Madaras), a licensed professional engineer with expertise in floodplains, testified that the floodplain on Lot 99 has a base flood elevation of 353 feet. The residence is proposed at an elevation of 355 feet, 2 feet above the floodplain. N.T., 12/21/2021, at 71-72; R.R. 359a-60a. "The top of soil" for the proposed septic system would be at elevation 353.5 feet. N.T., 12/21/2021, at 72; R.R. 360a. He opined that the fill proposed for the house and the septic system will not increase the base flood elevation because the house will be built on a slab, "outside of the floodplain." *Id*. Madaras also opined that the proposed house and septic system would not present a risk to the public health, safety and welfare.

Madaras opined that the 1987 Plan is ambiguous on the contours of the "Floodplain preservation area." N.T., 2/24/2022, at 13; R.R. 558a. The asterisk on the inset map could be construed to mean "all lots which are unshaded on the original plan." *Id*. Even so, the note does not specify whether the "land" for preservation included "all three lots, one lot, or a portion of a lot[.]" *Id*. The note did not specify which lot was the "adjoining lot." *Id*. Madaras found no restrictive covenant recorded for either Lot 97 or 99. Madaras opined that the 1987 Plan did not effect a restriction on the development of Lots 97-99.

The Township intervened and offered the testimony of Seese. She testified that Lots 95 and 96 could be developed with single-family homes. However, Lots 97-99 could not be developed because of their location in the AE Zone. She so advised Pooler before he bought the lots and again in 2020.

Seese testified that in 2019, the Township decided that Lots 95-99 could be useful in addressing the Township's stormwater issues. Seese and Lori Stauffer, the Township manager, informed Erney (then owner of the lots) of the Township's interest in purchasing his lots for stormwater remediation and obtained an appraisal. The Township advised the appraiser that the lots were not buildable due to their location in the AE Zone. Erney declined the Township's offer. In February 2020, shortly after his purchase of the lots, Pooler requested copies of the Township's appraisals for purposes of entertaining the Township's potential purchase of the lots. Pooler rejected the Township's offer of $10,000.

The Township presented the expert witness testimony of Mark Bahnick (Bahnick), a professional engineer, who reviewed the 1987 Plan. Bahnick opined that the "Flood Plain Preservation Area" note at the bottom of the 1987 Plan applied to Lots 97-99. N.T., 1/25/2022, at 24; R.R. 444a. He explained that "off-site improvements" such as stormwater controls, open space, or "recreation areas" would not be shown "on" the affected lots, but would nevertheless be established by the recorded plan. N.T., 1/25/2022, at 40; R.R. 460a. Bahnick explained that "the preparation of a record plan is a voluntary action by the landowner" and opined that the landowner's 1987 Plan made Lots 97-99 "non-building lots." N.T., 1/25/2022, at 41, 43; R.R. 461a, 463a.

Regarding Owners' appeal of the Township's handling of its sewage permit, the Township offered the testimony of Christopher Noll (Noll), its sewage enforcement officer. He commented on the sewage permit applications but neither granted nor denied the applications. He opined that the applications did not satisfy Act 537 [5] or the Township's on-lot sewage disposal ordinance because there was not a submitted planning module. Noll acknowledged that state law does not prohibit a septic system in floodplains.

The Zoning Board also heard from numerous neighbors who opposed Owners' applications. They testified to the increased frequency and intensity of storms that cause flooding and negatively impact their personal safety and property. The neighbors presented, *inter alia*, photographs and videos of floods that impacted Lots 97-99.

Zoning Board Decision

On June 10, 2022, the Zoning Board issued one decision denying all three appeals.

Crediting Bahnick's testimony, the Zoning Board found that the note on the 1987 Plan established that Lots 97-99 were to be merged with Lot 96 or sold "as a nondevelopable property to an outside agency." Zoning Board Decision at 33-34, Finding of Fact No. 393. As such, the Board found that "there can only be 2 homes constructed on the collection of [L]ots 95, 96, 97, 98, and 99[,]" which has already occurred on Lots 95 and 96. *Id*. at 34, Finding of Fact No. 394. The Board found that Lots 97-99 are "nondevelopable" and cannot be considered lawful nonconforming lots for purposes of the Zoning Ordinance. *Id*. at 34, Finding of Fact No. 403.

The Zoning Board found Pooler not credible. It found that he knew that the subject lots could not be developed with single-family residences under the Floodplain Ordinance. Pooler's testimony that he believed he could remedy the situation with variances was "arbitrary and irresponsible." Zoning Board Decision at 34, Finding of Fact No. 399. Any hardship was created by Pooler, who took title to Lots 95-99 in five separate LLCs. *Id*., Finding of Fact No. 401.

The Zoning Board discredited Madaras' testimony that a single-family house built on a slab two feet above the base flood elevation would have no tangible effect on the floodplain. It also rejected his opinion that the 1987 Plan did not render Lots 97 and 99 nondevelopable.

The Zoning Board discredited Lehmann's testimony because he did not consider the Floodplain Ordinance when he designed the sewage disposal system for Lot 99. Further, Lehmann acknowledged that it was "possible" that effluent could discharge into the flood waters under his proposed septic system. Zoning Board Decision at 35; Finding of Fact No. 411.

Based on the foregoing findings, the Board concluded that Owners failed to meet their burden of proof for a variance from the Floodplain Ordinance for Lots 97 and 99.

Owners appealed to the trial court, which took no additional evidence.

Trial Court Decision

By amended order of May 13, 2024, [6] the trial court affirmed the Zoning Board's decision. The trial court held that the record supported the Zoning Board's finding that Lots 97 and 99 are not developable as lawful, nonconforming lots entitled to reasonable use under Section 1409.C of the Zoning Ordinance. The Township Supervisors' 1982 resolution and the 1987 Plan eliminated any possible development of Lots 97 and 99. The trial court held that the Zoning Board's decision on this point was properly based on Bahnick's expert testimony that interpreted the 1987 Plan. The trial court further reasoned that Owners failed to prove the existence of a nonconforming lot because there was no evidence that "the subject land" had been developed with a single-family residence when the Floodplain Ordinance became effective in 2014. Trial Court Op., 5/13/2024, at 10 (quoting *Smalley v. Zoning Hearing Board of Middletown Township*, 834 A.2d 535, 539 (Pa. 2003)).

The trial court affirmed the Zoning Board's denial of a variance from the Floodplain Ordinance to allow single-family residences and on-site septic systems on Lots 97 and 99. The trial court held that Owners failed to satisfy the standards for a variance set forth in Section 111.E.3 of the Zoning Ordinance and Section 7.02.F of the Floodplain Ordinance. Trial Court Op., 5/13/2024, at 12. The Zoning Board acted within its discretion to discredit Madaras' testimony that the proposed development on Lots 97 and 99 would not be detrimental to the public welfare or affect the base flood elevation. As the trier of fact, the Zoning Board was entitled to draw conclusions on the credibility of the witnesses, accepting some, all, or none of the testimony proffered. Trial Court Op., 5/13/2024, at 13.

Owners appealed to this Court.

Appeal

On appeal, [7] Owners present three issues for our review. [8] First, Owners argue that the trial court erred in affirming the Zoning Board's determination that Lots 97 and 99 are not lawful, nonconforming lots by reason of the approved 1973 subdivision plan. Second, Owners argue that the Zoning Board erred in denying their application for a variance from the Floodplain Ordinance to construct a single-family residence and on-site septic system on Lots 97 and 99. Finally, Owners argue that the trial court and Zoning Board erred in not addressing their argument that the zoning officer improperly usurped the authority of the Township's sewage enforcement officer by rejecting the septic permits based on requirements in the Floodplain Ordinance. We address these issues *seriatim*.

I. Lawful Nonconforming Lots

In their first issue, Owners argue that the trial court erred in affirming the Zoning Board's determination that Lots 97 and 99 are not lawful, nonconforming lots. The Zoning Board erred in finding that a note on the 1987 Plan effected a restrictive covenant on the use and development of Lots 97-99. Lot 98 was not even the subject of the Zoning Board proceeding. More problematic is the notion that an asterisk on a development plan can create a restrictive covenant. Such covenants are "not favored in the law" and must be "strictly construed;" further, they may not be "*extended by implication unless the parties clearly so understand and intend*." Owners Brief at 22 (quoting *Sandyford Park Civic Association v. Lunnemann*, 152 A.2d 898, 900 (Pa. 1959)) (emphasis added). The 1987 Plan made no reference to Lot 99 and, at most, a possible reference to Lot 97 because the asterisk was placed in its approximate location. Simply, the 1987 Plan did not expressly state that Lot 97 or 99 was not to be developed for any reasonable use, and the 1987 Plan is not cited in any of the deeds for Lots 95-99. Owners argue that the property rights conferred by the deeds to Lots 95-99 "have to be adjudicated by the [trial] court in a separate legal action." Owners Brief at 22. That legal question is beyond the jurisdiction of the Zoning Board.

Owners contend that Lot 97 remains a lawful, nonconforming lot because its 1973 approval was not revoked by the 1982 resolution of the Township Supervisors. As to Lot 99, the 1982 resolution merely required that future development of Lot 99 comply with the 1977 SALDO. Finally, the Floodplain Ordinance was not adopted until 1988.

Owners argue that the question of whether the note in the 1987 Plan extinguished the vested development rights of Lots 97 and 99 created by the 1973 subdivision plan is a question of law subject to a *de novo* review. The trial court applied an improper standard by deferring to the Zoning Board's credibility determinations on this question instead of conducting a *de novo* review of the legal question.

In sum, Owners argue that both Lots 97 and 99 have retained a vested development right that was created by the 1973 subdivision plan. That right was not extinguished by the Township Supervisors' 1982 resolution or the 1987 Plan.

In response, the Zoning Board reiterates its finding that the inset map on the 1987 Plan placed Lots 97, 98, and 99 in a "Floodplain Preservation Area." Zoning Board Brief at 22 (citing R.R. 138a). The credited testimony of Bahnick established that "off-site improvements" such as stormwater controls or preservation areas did not have to be shown on the inset map. Zoning Board Brief at 23 (quoting N.T., 1/25/2022, at 40-44; R.R. 460a-64a).

The Township's arguments echo those of the Zoning Board. The Township acknowledges Lots 97-99 are "lots" that "may be used, developed or built upon" under the Zoning Ordinance. Township Brief at 12. However, these lots cannot be developed for residential use under the Floodplain Ordinance. The Township argues that Lots 97-99 were rendered nondevelopable by the 1987 Plan. Restrictions in a "recorded subdivision plan are enforceable even if these [restrictions] are not set forth in the deeds" to the affected lots. *Id*. (citing *Doylestown Township v. Teeling*, 635 A.2d 657, 660 (Pa. Cmwlth. 1993)).

We begin with a review of the Zoning Ordinance provisions relevant to a "Nonconforming Lot," which is defined in Section 202 as follows:

> A lot which does not conform with the minimum lot width or area dimensions specified for the district where such lot is situated, but was lawfully in existence prior to the effective date of this Ordinance or is legally established through the granting of a variance by the Zoning Hearing Board.

ZONING ORDINANCE, § 202. Section 1409.C.2 of the Zoning Ordinance governs the development of "Nonconforming Lots" and states, in pertinent part, as follows:

> 2. Nonconforming Lots.
>
> a. *Permitted structures and uses may be constructed* or expanded on a non[ ]conforming lot of record *only in compliance with the following requirements*:
>
> (i) Lawfully Existing. *A use may only be developed on a non*[ ]*conforming lot if it is a lot of record that lawfully existed prior to the adoption of this Ordinance or an applicable subsequent amendment.*
>
> (ii) Setbacks. Yard setbacks and other requirements of this Ordinance shall be complied with unless a variance is granted by the Zoning Hearing Board, or unless the Zoning Hearing Board allows construction under the following waiver:
>
> ....
>
> (iii) *Only one principal use and its customary accessory uses that are permitted by right in that District may be developed on a nonconforming lot*.
>
> (iv) In a LDR District, as an absolute minimum, in no case shall a variance be granted for the development of a principal building on a nonconforming lot with minimum lot area of less than 5,000 square feet or a minimum lot width at the minimum building setback line of less than 45 feet.
>
> (v) For any variance or special exception request under this Section, *the Zoning Hearing Board shall consider if any reasonable use could be made of the property other than a proposed use* that would less significantly adversely affect the established character of an existing residential neighborhood.
>
> (vi) The nonconformity shall not have been self-created.

> (vii) Contiguous nonconforming lots under common or closely related ownership shall be considered one lot.
>
> (viii) *Any lot proposed to use an on-lot septic system shall meet all* [*Department of Environmental Protection (DEP)*] *requirements*, plus shall have sufficient open area that would also meet D.E.P requirements for a second drainfield, for use in case the first drainfield fails.

ZONING ORDINANCE, § 1409.C.2 (emphasis added).

In its opinion, the trial court used the terms "nonconforming lot" and "nonconforming use" interchangeably. However, they are distinct legal concepts. As explained in *Loughran v. Valley View Developers, Inc.*, 145 A.3d 815, 821 (Pa. Cmwlth. 2016), a nonconforming lot is one that "has been rendered undersized by the passage of an ordinance requiring a larger lot size than what was previously required for the permitted use in the zoning district where the lots are located; in such instances, the undersized lot becomes a 'nonconforming lot.' "[9]

Here, the Zoning Ordinance defines a "nonconforming lot" as one that (1) fails to conform to area or dimension requirements, and (2) was lawfully in existence prior to the effective date of the Zoning Ordinance. ZONING ORDINANCE, § 202. Lots 97 and 99 are each less than a half-acre in size and were created by the 1973 subdivision plan and lawfully in existence before the Zoning Ordinance set the minimum lot size for the LDR District at one acre. Lots 97 and 99 are nonconforming lots and can be developed, provided they meet the requirements of Section 1409.C.2 of the Zoning Ordinance.

The Zoning Board held that the Township Supervisors' 1982 resolution and the 1987 Plan prohibited any development of Lots 97 and 99. Thus, it never addressed whether they could be put to a reasonable use in accordance with Section 1409.C.2 of the Zoning Ordinance. For several reasons, we disagree with the Zoning Board's conclusion that the 1982 resolution and the 1987 Plan rendered Lots 97 and 99 nondevelopable.

The 1982 resolution revoked "[t]he final subdivision approval" of 1973 for Lot 99 in light of the then-recently adopted SALDO. R.R. 143a. The only consequence of the revocation was to require the submission of "subdivision and land development plans and supporting documents and material consistent with" the SALDO before Lot 99 could be developed. *Id*. Lot 99 remained a valid lot. The 1982 resolution did not revoke the 1973 subdivision plan as to Lot 97; to the contrary, it stated that "substantial development has occurred" in "Phase I consisting of [L]ots ... 97." R.R. 142a. Thus, Lot 97 also remained a valid lot.

Nor did the 1987 Plan render Lots 97 and 99 undevelopable. This determination of the Zoning Board turned entirely on the inset map that placed an asterisk in the approximate location of Lot 97 with a notation that this "land" would be merged or sold to a government or conservancy. R.R. 138a. The note does not specify this "land" by lot number or by a metes and bounds description. In finding that the "land" included the entirety of Lots 97, 98 and 99, the Zoning Board read words into the 1987 Plan that do not appear. Further, the word "lot," as used in the note, cannot signify three lots. Likewise, it cannot be determined whether the "adjoining lot" is Lot 96 or Lot 98. R.R. 138a.

Bahnick's testimony, which was credited, did not overcome these omissions in the 1987 Plan. Bahnick testified that "[o]ff-site improvements" such as stormwater controls would not be shown on the affected lots on the development plan. N.T., 1/25/2022, at 40; R.R. 460a. This testimony is belied by the 1987 Plan document, which shows the "associated off[-]site storm water control facility" on the inset map and the lots affected. R.R. 138a. Further, the 1987 Plan expressly states that "Lot Numbers 91, 92 and 93 are not suitable for on-lot sewage disposal systems at this time." R.R. 138a. It contains a similar statement for Lot Numbers 94, 95, and 96. *Id*. Bahnick did not explain why similar clarity was not used in the 1987 Plan if the intention was to place Lots 97-99 into preservation.

A restrictive covenant must be "strictly construed" and is "not to be extended by implication unless the parties clearly so understand and intend." *Sandyford Park Civic Association*, 152 A.2d at 900. Simply, KBK Associates' intent for a "Floodplain Preservation Area" in the 1987 Plan cannot be determined. First, the note expresses an inchoate preservation intent, at best, because it recites different possibilities that might take place in the future. Second, the "land" placed

in that area was not identified by lot number or by any meaningful description. Finally, Bahnick could not testify to KBK Associates' intent because he did not prepare the 1987 Plan.

The 1987 Plan is entitled "Ridge[V]iew Estates East – Phase II." R.R. 138a. It specifies the dimensions, setback lines and square footages for Lots 15-19, 26-31, 35-43, 51, and 91-96, which are expressly shown and numbered. Phase II did not include Lots 97-99. No future purchaser of Lot 97 or 99 would have any reason to consider the 1987 Plan because it is a plan that addressed other lots in the development. If a future purchaser of Lots 97 or 99 did get out a magnifying glass to examine the tiny inset map on the 1987 Plan, that examination, for the reasons set forth above, would lead to the conclusion that there was no restrictive covenant on the use of either Lot 97 or Lot 99.

The interpretation of the 1987 Plan is a question of law. The Zoning Board used Bahnick's opinion to conclude that the 1987 Plan set aside Lots 97 and 99 for preservation. Leaving aside the inconsistencies and omissions in Bahnick's testimony, his opinion is not a substitute for legal analysis of the language in the operative documents. The trial court erred in upholding the Zoning Board without doing a legal analysis of the scope and meaning of the language of the 1987 Plan.

We hold that Lots 97 and 99, by definition, are nonconforming lots under Section 202 of the Zoning Ordinance. ZONING ORDINANCE, § 202. Because the Zoning Board held that Lots 97 and 99 had been set aside for preservation, it did not address whether Lots 97 and 99 have met the requirements of Section 1409.C.2 of the Zoning Ordinance and, thus, are eligible for a reasonable use. Therefore, we remand the matter to the trial court to consider whether Lots 97 and 99 satisfy the requirements of Section 1409.C.2 of the Zoning Ordinance.

II. Variance from the Floodplain Ordinance

Owners argue, next, that the Zoning Board erred in denying their application for variances to construct single-family residences and accessory on-site septic systems on Lots 97 and 99. Owners contend that the "dimensional constraints on these lots" have created an unnecessary hardship that makes compliance with the Floodplain Ordinance impossible and prevents any reasonable use of Lots 97 and 99 absent a variance. Owners Brief at 29. Owners further contend that they have satisfied the substantive standards for a variance set forth in Section 7.02 of the Floodplain Ordinance. FLOODPLAIN ORDINANCE, § 7.02. Their expert witness demonstrated that two viable drain fields had been identified for both lots and meet all state regulations. They also testified that the proposed development would not present a risk to public health, safety, and welfare and would not increase the base flood elevation. Owners contend that the trial court erred in applying the variance standards in Section 111 of the Zoning Ordinance to their applications, which are irrelevant to this case, which concerned a variance from the Floodplain Ordinance, not the Zoning Ordinance.

Owners contend that Pooler's knowledge of "the dimensional nonconformities" of Lots 97 and 99 at the time of his purchase did not establish that the hardship was self-created. Owners Brief at 31. The right to develop such a lot "runs with the land and vests in subsequent buyers." *Id*. (citing *N. Pugliese, Inc. v. Palmer Township Zoning Hearing Board*, 592 A.2d 118, 121 (Pa. Cmwlth. 1991) (*Pugliese*)). "[I]t makes no difference whether the application for the variance is sought by the original owner or a successor in title." *Id*. In *Pugliese*, this Court held that it was error for the zoning board to hold that a purchaser of a property created the hardship because he bought the lot with knowledge that it was undersized.

In response, the Zoning Board argues that it properly denied the variances because it found that the proposed development on Lots 97 and 99 would negatively affect the safety and welfare of the residents of the Township. The Floodplain Ordinance prohibits single-family dwellings on slabs and above-ground septic systems on land located in the AE Zone. Pooler's failure to do due diligence into these restrictions is a hardship of his own making, as the Zoning Board properly found.

The Township raises similar arguments as those raised by the Zoning Board.

We begin with a review of the pertinent Floodplain Ordinance provisions: Article 2 (Sections 2.02 and 2.04), Article 4 (Sections 4.01, 4.01.F, and 4.02.B), and Article 8, from which Owners sought variances.

The Floodplain Ordinance requires all development to satisfy its provisions. It states:

> A *Permit shall be required before any construction or development is undertaken within any area of the Lower Nazareth Township*. Construction and development activities subject to permit requirements in the Floodplain District regardless of value include, but are not limited to: construction, reconstruction, placement, replacement, expansion, extension, repair, or other improvement of uses or structures; placement of manufactured homes; mining; dredging; filling; grading; logging; paving; excavation; drilling operations.

FLOODPLAIN ORDINANCE, § 2.02. Regarding the permit application procedures and requirements, the Floodplain Ordinance states as follows:

> A. Application for such a Permit shall be made, in writing, to the Floodplain Administrator on forms supplied by Lower Nazareth Township. Such application shall contain the following:
>
> 1. Name and address of applicant.
>
> 2. Name and address of owner of land on which proposed construction is to occur.
>
> 3. Name and address of contractor.
>
> 4. Site location including address.
>
> 5. Listing of other permits required.
>
> 6. Brief description of proposed work and estimated cost, including a breakout of flood-related cost and the market value of the building before the flood damage occurred where appropriate.
>
> 7. A plan of the site showing the exact size and location of the proposed construction as well as any existing buildings or structures.
>
> 8. State whether or not the structure includes a basement.
>
> B. If any proposed construction or development is located entirely or partially within any identified floodplain area, applicants for Permits shall provide all the necessary information in sufficient detail and clarity to enable the Floodplain Administrator to determine that:
>
> 1. all such proposals are consistent with the need to minimize flood damage and conform with the requirements of this and all other applicable codes and ordinances;
>
> 2. all utilities and facilities, such as sewer, gas, electrical and water systems are located and constructed to minimize or eliminate flood damage;
>
> 3. adequate drainage is provided so as to reduce exposure to flood hazards;
>
> 4. structures will be anchored to prevent floatation, collapse, or lateral movement;
>
> 5. building materials are flood-resistant;
>
> 6. appropriate practices that minimize flood damage have been used; and
>
> 7. electrical, heating, ventilation, plumbing, air conditioning equipment, and other service facilities have been designed and located to prevent water entry or accumulation.

FLOODPLAIN ORDINANCE, § 2.04.A-.B.

The Floodplain Ordinance limits uses in the Floodplain District as follows:

> Section 4.01 Uses Permitted in the Floodplain District
>
> The following uses and others are permitted in the Floodplain District, *provided they are allowed in the underlying zoning district and provided they do not involve any grading or filling which would cause any increase in*

flood elevations or frequency, and provided they comply with other sections of this Ordinance:

....

F. *Front, side, and rear yards and required lot area in any zoning district, provided such yards are not to be used for on-site sewage disposal systems and further provided that no land in the Floodplain District shall qualify in computing the minimum district area where specified in the Lower Nazareth Township Zoning Ordinance*.

....

H. Sanitary collection mains and storm sewers with the approval of the Township Engineer and the Board of Supervisors. These systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into the flood waters.

I. Floodproofing of lawfully existing non[ ]conforming structures and lawfully existing non[ ]conforming uses within structures.

FLOODPLAIN ORDINANCE, § 4.01.F, .H-.I (emphasis added). The Floodplain Ordinance further provides that "[*a*]*ll structures and accessory structures not otherwise specifically permitted under Section 4.01 or allowed as a Special Permit Use under Section 4.03*[10]" are prohibited uses in the floodplain district. FLOODPLAIN ORDINANCE, § 4.02.B (emphasis added).

Finally, Article 8 of the Floodplain Ordinance, titled "technical provisions," provides, in pertinent part:

Section 8.03 Design and Construction Standards:

The following minimum standards shall apply for all construction and development proposed within any identified floodplain area:

....

C. Water and Sanitary Sewer Facilities and Systems

1. *All new or replacement water supply and sanitary sewer facilities and systems shall be located, designed and constructed to minimize or eliminate flood damages and the infiltration of flood waters.*

2. *Sanitary sewer facilities and systems shall be designed to prevent the discharge of untreated sewage into flood waters.*

3. *No part of any on-site sewage system shall be located within any identified floodplain area except in strict compliance with all State and local regulations for such systems. If any such system is permitted, it shall be located so as to avoid impairment to it, or contamination from it, during a flood.*

....

FLOODPLAIN ORDINANCE, § 8.03 (emphasis added).

In support of their request for variances from the Floodplain Ordinance, Owners explain that Lots 97 and 99 cannot be developed for single-family dwelling with on-site septic systems in strict conformity with the provisions of the Floodplain Ordinance because of "dimensional constraints."[11] Owners Brief at 29. On that basis, Owners seek a use variance from the Floodplain Ordinance.

The Floodplain Ordinance allows land in a floodplain district to be used for "[f]ront, side, and rear yards and required lot area in any zoning district, *provided such yards are not to be used for on-site sewage disposal systems*[.]" FLOODPLAIN ORDINANCE, § 4.01.F (emphasis added). Uses that are not permitted under Section 4.01 or allowed by a special permit under Section 4.03 are prohibited in the floodplain district. *Id*., § 4.02.B. Read together, a single-family dwelling and on-site septic system cannot be built on a floodplain. Only "[f]ront, side and rear yards" can be located within the floodplain district. *Id*., § 4.01.F.

All of Lot 99 is located within the floodplain district. The record shows that Lot 99's "front, sides and rear yards are entirely within the floodplain[;] [and t]he proposed septic systems are within the setbacks." O.R., Item 6 at 2b (Zoning Officer's File (ZA2021-04), March 9, 2021, letter denying application for single-family dwelling). Therefore, Owners cannot construct a single-family dwelling or an on-site septic system on Lot 99 absent a variance from Section 4.01F of the Floodplain Ordinance.

As to Lot 97, the proposed septic system is located "entirely within the floodplain;" "[t]he rear yard is entirely in the floodplain[;] and a majority of the side yards are within the floodplain[.]" O.R., Item 6 at 3b (Zoning Officer's File (ZA2021-05), March 9, 2021, letter denying application for single-family dwelling). The proposed single-family house is not located in the AE Zone. However, Owners cannot construct the accessory on-site septic systems on Lot 97 absent variance relief from Section 4.01.F of the Floodplain Ordinance.

Relevant to a variance, the Floodplain Ordinance states, in pertinent part, as follows:

> A. *If compliance with any of the requirements of this Ordinance would result in an exceptional hardship to a prospective builder, developer or landowner, the Zoning Hearing Board may, upon request, grant relief from the strict application of the requirements.*
>
> B. *Variance applications shall be submitted to the Zoning Hearing Board pursuant to the provisions of Lower Nazareth Township Zoning Ordinance Article 1 and the supplementary procedures and conditions defined in Section 7.02 of this ordinance.* The Zoning Hearing Board shall solicit testimony from the Township Engineer, or other qualified and licensed professional engineer, to review and comment on technical matters pertaining to this Ordinance.

FLOODPLAIN ORDINANCE, § 7.01 (emphasis added).

Article 1 of the Zoning Ordinance, entitled "General Provisions and Administration," addresses matters ranging from ordinance interpretation to permit procedures. ZONING ORDINANCE, §§ 105, 108. Article 1 creates the Zoning Board, identifies its function, and sets forth the rules on form and content for appeals and applications submitted to the Zoning Board, and hearing time limits. *Id*., §§ 111.A, .E-.G. Article 1 obligates the Zoning Board, *inter alia*, to "hear requests for variances filed with the Board in writing by any landowner (or any tenant with the permission of such landowner)." *Id*., § 111.E.3(a). [12]

The Floodplain Ordinance addresses variances as follows:

> *Requests for variances shall be considered by the Zoning Hearing Board in accordance with the procedures contained in Lower Nazareth Township Zoning Ordinance Article 1 and the following*:
>
> A. *No variance shall be granted within any Identified Floodplain Area that would cause any increase in* [*the Base Flood Elevation, or*] *BFE*. In a Zone A Area, BFEs are determined using the methodology in Section 3.03.C.
>
> ....
>
> D. *If granted, a variance shall involve only the least modification necessary to provide relief*.
>
> E. In granting any variance, Lower Nazareth Township shall attach whatever reasonable conditions and safeguards it considers necessary in order *to protect the public health, safety, and welfare, and to achieve the objectives of this Ordinance*.
>
> F. In reviewing any request for a variance, Lower Nazareth Township shall consider, at a minimum, the following:
>
> 1. That there is good and sufficient cause.
>
> 2. That failure to grant the variance would result in exceptional hardship to the applicant.
>
> 3. That the granting of the variance will
>
> a. neither result in an unacceptable or prohibited increase in flood elevations, additional threats to public safety, or extraordinary public expense,
>
> b. nor create nuisances, cause fraud on, or victimize the public, or conflict with any other applicable state or local ordinances and regulations.
>
> ....
>
> Notwithstanding any of the above, however, all structures shall be designed and constructed so as to have the capability of resisting the base flood.

FLOODPLAIN ORDINANCE, § 7.02 (emphasis added).

In sum, the Floodplain Ordinance authorizes a variance where strict compliance "would result in an "exceptional hardship[.]" FLOODPLAIN ORDINANCE, § 7.01.A. Such variance applications "shall be submitted" to the Zoning Board in writing. *Id*., § 7.01.B; ZONING ORDINANCE, § 111.E.3(a). However, the Floodplain Ordinance specifies that it is only the "procedures" in Article 1 of the Zoning Ordinance that apply to floodplain variances. FLOODPLAIN ORDINANCE, § 7.02. The substantive variance standards in the Floodplain Ordinance, not the substantive variance standards in the Zoning Ordinance, applied to Owners' variance applications. ZONING ORDINANCE, § 111.E.3(b). Notably, the standard for a floodplain variance is "exceptional hardship" not "unnecessary hardship." *Cf*, FLOODPLAIN ORDINANCE, § 7.01.A; ZONING ORDINANCE, § 111.E.3(b)(i).

In denying Owners' variance applications from the Floodplain Ordinance, the Zoning Board discredited Lehmann's and Madaras' testimony that the proposed development would have no effect on flooding or public safety. Indeed, all of Owners' witnesses were discredited, and all the testimony of residents and Township employees offered in opposition to the variance was credited. Based on its credibility determinations, the Zoning Board concluded that Owners "failed to meet [their] burden of proof for the issuance of the variances requested for the subject lots." Zoning Board Decision at 35, Findings of Fact and Conclusions of Law No. 413. In reaching this conclusion, the Zoning Board did not cite the applicable law or do any legal analysis.

The trial court affirmed the Zoning Board. In doing so, it cited and applied the substantive variance standards in Article 1 of the Zoning Ordinance. The trial court erred. To be sure, "the credibility of witnesses and the weight to be accorded to witness testimony are matters for the Zoning Board in its capacity as fact[ ]finder." *Hawk v. City of Pittsburgh Zoning Board of Adjustment*, 38 A.3d 1061, 1065 (Pa. Cmwlth. 2012). However, the Zoning Board's decision must conform to the law. The trial court erred in using the substantive variance standards in the Zoning Ordinance rather than those set forth in Sections 7.01 and 7.02 of the Floodplain Ordinance to review the Zoning Board's decision. This error requires a reversal.

III. Septic Permits

Finally, Owners argue that the trial court and Zoning Board erred in not addressing their argument that the zoning officer improperly usurped the authority of the Township's sewage enforcement officer by rejecting the septic permits based on requirements in the Floodplain Ordinance. However, the record shows that the zoning officer returned the incomplete sewer permit application for Lot 99, which failed to identify the primary use of that lot. A review of the record also shows that Noll, the sewage enforcement officer, eventually reviewed the sewage permit application and prepared a comment letter. Noll also testified that the applications did not satisfy the Township sewage ordinance because there is no sewage planning module in place for the subject lots.

A review of the septic permits under Act 537 and the sewage ordinance is premature in light of the fact that Owners cannot develop Lots 97 and 99 for residential use absent a use variance from the Floodplain Ordinance. The trial court's failure to address Owners' argument on the zoning officer's improper review of the septic permits was a harmless error.

Conclusion

Lots 97 and 99 are nonconforming lots under Section 202 of the Zoning Ordinance. ZONING ORDINANCE, § 202. The 1987 Plan purported to create a "Floodplain Preservation Area," but it did not state that Lots 97 and 99, in whole or in part, were placed therein. R.R. 138a. We reverse the trial court's affirmance of the Zoning Board's holding that Lots 97 and 99 are not developable and remand the matter to the trial court to address whether Lots 97 and 99, as nonconforming lots, meet the requirements of Section 1409.C.2 of the Zoning Ordinance and, thus, are eligible for a reasonable use. The trial court's findings on this question shall be "based on the record below as supplemented by the additional evidence, if any." Section 1005-A of the MPC, 53 P.S. § 11005-A. [13]

The 2014 Floodplain Ordinance placed the majority of Lot 97 and all of Lot 99 in the AE Zone. Owners sought variances to construct a single-family residence and accessory on-site septic system on each lot. The procedures set forth in Article 1 of the Zoning Ordinance applied to Owners' variance

applications, but the substantive standards in Article 1 did not. The trial court erred in applying the substantive standards for a zoning variance to Owners' applications for a variance from the Floodplain Ordinance. For this reason, we reverse the trial court's affirmance of the Zoning Board's denial of the variances and remand the matter to the trial court to consider Owners' floodplain variances under the substantive standards set forth in Sections 7.01 and 7.02 of the Floodplain Ordinance.

For these reasons, we reverse the trial court's May 13, 2024, order and remand the matter for further proceedings consistent with this opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

People's Property, LLC and Annie Marie, LLC, Appellants

v.

Lower Nazareth Township Zoning Hearing Board and Lower Nazareth Township

No. 701 C.D. 2024

ORDER

AND NOW, this 27th day of June, 2025, the order of the Court of Common Pleas of Northampton County, dated May 13, 2024, in the above-captioned matter, is REVERSED. The matter is REMANDED to the Court of Common Pleas of Northampton County for further proceedings consistent with the foregoing opinion.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, President Judge Emerita

All Citations

Slip Copy, 2025 WL 1779840 (Table)

Footnotes

1 LOWER NAZARETH TOWNSHIP FLOODPLAIN MANAGEMENT ORDINANCE, No. 212-06-14, enacted June 11, 2014, *as amended*.

2 The Pennsylvania Department of Environmental Resources is now known as the Pennsylvania Department of Environmental Protection.

3 LOWER NAZARETH TOWNSHIP ZONING ORDINANCE, enacted November 28, 2001, *as amended* (Zoning Ordinance).

4 The Floodplain Ordinance defines "AE Area/District" as "those areas identified as an AE Zone on the [Flood Insurance Rate Maps (FIRM)] included in the [Flood Insurance Study (FIS)] prepared by FEMA for which Base Flood Elevations have been provided[.]" FLOODPLAIN ORDINANCE, § 3.03.B. According to FEMA, "Zone AE is a high-risk area. Mandatory flood insurance purchase requirements and floodplain management standards apply." FEMA, *Read your Flood Map*, https://www.fema.gov/sites/default/files/documents/how-to-read-flood-insurance-rate-map-tutorial.pdf (last visited June 26, 2025).

5 Act 537 refers to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Act 537).

6 The original order was dated April 29, 2024, but amended to correct the docket number.

7 "Where the trial court receives no additional evidence on appeal from a zoning hearing board's decision, an appellate court's standard of review is to determine whether the board committed an abuse of discretion or an error of law." *Harrisburg Gardens, Inc. v. Susquehanna Township Zoning Hearing Board*, 981 A.2d 405, 410 (Pa. Cmwlth. 2009).

8 Owners list the following questions for our review in the Statement of Questions Involved:

> 1. Did the [trial court] err and apply an incorrect standard of review when it affirmed the [Zoning Board's] determination that Lots 97 and 99 are not lawfully nonconforming lots pursuant to the 1973 subdivision plan and were rendered undevelopable by the 1987 subdivision plan, where the 1987 subdivision plan does not relate to and was never recorded against Lots 97 and 99?
>
> 2. Did the [trial] court err as a matter of law or abuse its discretion by affirming the [Zoning Board's] determination that [Owners] failed to establish entitlement to variances from requirements of the Floodplain Ordinance where the [trial] court improperly applied the variance standards imposed by the Zoning Ordinance and where [Owners] satisfied all variance standards set forth in the Floodplain Ordinance?
>
> 3. Did the [trial] court err as a matter of law or abuse its discretion by failing to conclude that the zoning officer's rejection of the septic permits usurped the authority of the sewage enforcement officer and that septic permits must be issued because [Owners] complied with all requirements of Act 537?

Owners Brief at 5.

9 In contrast, a nonconforming use is "a use predating the subsequent prohibitory zoning restriction." *Hafner v. Zoning Hearing Board of Allen Township*, 974 A.2d 1204, 1210 (Pa. Cmwlth. 2009).

10 Uses in a floodplain district that require a special permit from the Zoning Board include parking lot, private roads and driveways, active recreational use, grading of lands, sewage treatment plant, sealed public water supply wells, stormwater management, repair or expansion of riparian buffers, public and private dams, water monitoring devices, public utility facilities, fishing hatcheries, and other uses similar to the above. FLOODPLAIN ORDINANCE, § 4.03.

11 "A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with regulations, whereas a use variance involves a request to use property in a manner that is wholly outside zoning regulations." *Tri-County **Landfill**, Inc. v. Pine Township Zoning Hearing Board*, 83 A.3d 488, 520 (Pa. Cmwlth. 2014).

12 The Zoning Ordinance's standards for a zoning ordinance variance came from Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2. Section 111.E.3(b) of the Zoning Ordinance states:

> b. The Board may grant a variance only within the limitations of State law. The [MPC] as amended provides that all of the following findings must be made, where relevant:
>
> (i) *There are unique physical circumstances or conditions* (including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property) *and that the unnecessary hardship is due to such conditions and not the*

circumstances or conditions generally created by the provisions of this Ordinance in the neighborhood or district in which the property is located; and

(ii) Because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and a variance therefore [is] necessary to enable the reasonable use of the property; and

(iii) Such unnecessary hardship has not been created by the applicant; and

(iv) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(v) *The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue*.

ZONING ORDINANCE § 111.E.3(b) (emphasis added).

13 Added by the Act of December 21, 1988, P.L. 1329. Section 1005-A states:

If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916.1 shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. *If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.*

53 P.S. § 11005-A (emphasis added).

End of Document

2025 WL 1659903
Only the Westlaw citation is currently available.

Supreme Court of Mississippi.

The PROMENADE D'IBERVILLE, LLC
v.
JACKSONVILLE ELECTRIC AUTHORITY

NO. 2023-CA-01273-SCT
|
CONSOLIDATED WITH NO. 2017-IA-00167-SCT
|
06/12/2025

Synopsis

Background: Developer of retail shopping center in Mississippi brought action against Florida municipal utility, alleging that use of defective soil stabilizer product using material from utility's power plant in construction of shopping center caused extensive property damage. The Circuit Court, Harrison County, Christopher L. Schmidt, J., adopted special master's recommendation and denied utility's motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity, denied utility's motion for summary judgment, and denied both parties' motions for partial summary judgment. Following the United States Supreme Court's decision in *Franchise Tax Board of California v. Hyatt (Hyatt II)*,578 U.S. 171, 136 S. Ct. 1277, 194 L.Ed. 2d 431, the Circuit Court, Schmidt, J., granted utility's motion to reconsider, granted utility's motion for partial summary judgment, and denied developer's motion to amend the complaint. After initially granting developer's motion for interlocutory appeal, the Mississippi Supreme Court subsequently dismissed and remanded for consideration based on the United States Supreme Court's decision in *Franchise Tax Board of California v. Hyatt (Hyatt III)*, 587 U.S. 230, 139 S.Ct. 1485, 203 L.Ed.2d 768. On remand, the Circuit Court, Schmidt, J., granted utility's motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. Developer appealed.

Holdings: The Supreme Court, Sullivan, J., held that:

[1] Florida municipal utility did not enjoy interstate sovereign immunity from developer's action in Mississippi, and

[2] developer's product liability claim in Mississippi court against Florida municipal utility did not violate full faith and credit or comity principles.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (7)

[1] **Federal Courts** 🔑 Municipal corporations; cities

Municipal, County, and Local Government 🔑 Other particular entities

Did interstate sovereign immunity apply?

No

Material Facts

- Florida municipal utility was not arm of State of Florida for purposes of Eleventh Amendment, but rather electric utility operated by city and was instrumentality of that municipality
- Utility enjoyed only limited waiver of statutory immunity under Florida law

Causes of Action

Products Liability > Design Defect (Negligence, Strict Liability, or Warranty)

Products Liability > Failure to Warn (Negligence, Strict Liability, or Warranty)

Breach of Warranty > Implied Warranty of Merchantability

Breach of Warranty > Implied Warranty of Fitness for Particular Purpose

Breach of Warranty > Breach of Express Warranty

Florida municipal utility did not enjoy interstate sovereign immunity from developer's action in Mississippi, alleging utility supplied a defective product which caused property damage to retail shopping center; utility was not an arm of the State of Florida for purposes of the Eleventh Amendment, but rather an electric utility operated by city and was an instrumentality of that municipality, and enjoyed only a limited waiver of statutory immunity under Florida law. U.S. Const. Amend. 11; Fla. Stat. Ann. § 768.28.

More cases on this issue

[2] **Municipal, County, and Local Government** Other particular entities

Under Mississippi law, out-of-state entities such as municipalities and their instrumentalities should enjoy no greater status than any other similarly situated civil defendant absent compelling public policy considerations.

[3] **States** Full Faith and Credit in Each State as to Public Acts and Records of Other States

The Full Faith and Credit Clause does not compel a state to substitute statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate; for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. U.S. Const. art. 4, § 1.

[4] **States** Full Faith and Credit in Each State as to Public Acts and Records of Other States

Whereas the full faith and credit command is exacting with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, it is less demanding with respect to choice of laws. U.S. Const. art. 4, § 1.

[5] **States** Full Faith and Credit in Each State as to Public Acts and Records of Other States

Under the Full Faith and Credit Clause, a state may apply its own law in the face of another state's conflicting statute as long as its choice of law is neither arbitrary nor fundamentally unfair. U.S. Const. art. 4, § 1.

[6] **Courts** Comity between courts of different states

States Full Faith and Credit in Each State as to Public Acts and Records of Other States

Did allowing claims violate full faith and credit or comity principles?

No

Material Facts

- Utility was an instrumentality of a city and not entitled to sovereign immunity

- There was no conflict with Florida law
- There was sufficient evidence that utility knowingly shipped an allegedly defective product to Mississippi that caused harm to developer
- Proceeding in Mississippi was not arbitrarily or fundamentally unfair to utility since developer asserted claims and sought damages similar to those that would be allowed against a public utility in Florida

Causes of Action

Products Liability > Failure to Warn (Negligence, Strict Liability, or Warranty)

Products Liability > Negligence (General)

Allowing developer of shopping center to proceed with its product liability claims in Mississippi court against Florida municipal utility did not violate full faith and credit or comity principles; utility was an instrumentality of a city and not entitled to sovereign immunity, there was no conflict with Florida law, there was sufficient evidence that utility knowingly shipped an allegedly defective product to Mississippi that caused harm to developer, and proceeding in Mississippi was not arbitrarily or fundamentally unfair to utility since developer asserted claims and sought damages similar to those that would be allowed against a public utility in Florida. U.S. Const. art. 4, § 1; U.S. Const. Amend. 11; Miss. Const. art. 3, § 17; Fla. Stat. Ann. § 768.28.

More cases on this issue

[7] **Eminent Domain** Nature and grounds in general

Products Liability Negligence or fault

Products Liability Proximate Cause

An inverse condemnation claim against a municipality is similar to a products liability manufacturing defect case in that the plaintiff in both types of cases is not required to prove fault, and both types of claims require the plaintiff to establish a proximate cause of the plaintiff's damages.

HARRISON COUNTY CIRCUIT COURT, HON. CHRISTOPHER LOUIS SCHMIDT, JUDGE

Attorneys and Law Firms

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ATTORNEYS FOR APPELLEE: HUGH RUSTON COMLEY, Jackson, JOE SAM OWEN, Gulfport, PAUL STEPHENSON, JAMES JOSEPH CRONGEYER, JR., Jackson

BEFORE RANDOLPH, C.J., MAXWELL AND SULLIVAN, JJ.

Opinion

SULLIVAN, JUSTICE, FOR THE COURT:

1** ¶1. The Harrison County Circuit Court granted Jacksonville Electric Authority's (JEA's) motion to dismiss for lack of subject-matter jurisdiction based on sovereign immunity pursuant to ***California Franchise Tax Board v. Hyatt (Hyatt III), 587 U.S. 230, 139 S. Ct. 1485, 203 L.Ed. 2d 768 (2019). Alternatively, the trial court held that the Full Faith and Credit Clause and comity principles mandated dismissal due to the presuit notice and venue requirements

under Florida Statute Section 768.28. Promenade D'Iberville, LLC, appeals.

¶2. Because we find that ***Hyatt III*** does not apply in this case and that neither the Full Faith and Credit Clause nor comity mandate dismissal, we reverse the trial court's judgment of dismissal. The case is remanded to the Harrison County Circuit Court for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶3. Promenade is the owner and developer of a large retail shopping center in D'Iberville, Mississippi. The facility covers seventy-three acres and accommodates more than fifty commercial tenants. Construction began on the facility in 2008 and was completed in the fall of 2009. In the spring of 2009, Promenade discovered heaving and swelling problems with the soil underneath the facility while construction was ongoing.

¶4. In 2010, Promenade filed suit in the Harrison County Circuit Court against the project's general contractor, EMJ Corporation; the sitework contractor, M. Hanna Construction Company, Inc.; geotechnical engineer Gallet & Associates, Inc.; a Louisiana materials supplier, LA Ash; and JEA, a Florida public utility. The complaint alleged damages caused from the use of OPF42 as a soil stabilizer in the construction of the shopping center. The complaint asserted claims of defective product, failure to warn, breach of duty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of express warranty, and physical invasion to land.

¶5. The OPF42 was purchased from LA Ash and used at the project by M. Hanna. The complaint alleged that the OPF42 reacted chemically when exposed to water, forming ettringite crystals and causing rapid soil expansion. This expansion caused extensive property damage, including buckled and cracked floors, cracks and separation in walls, and damage to pavement and sidewalks. [1]

¶6. The main component of the OPF42 used at the site was bed ash material from JEA's power plant in Florida, a byproduct from the plant's electric generation process. Promenade alleged that JEA had supplied the bed ash to LA Ash, which had marketed and sold the OPF42 used in the project. According to Promenade, JEA had intended that its byproduct be used in construction projects such as the D'Iberville shopping center.

¶7. JEA answered Promenade's complaint and filed a motion to dismiss for lack of subject-matter jurisdiction. JEA asserted, *inter alia*, that as a sovereign entity of the State of Florida, it could not be sued in the courts of a sister state, Mississippi. JEA contended that Promenade had conceded that JEA had sovereign status by using Florida's Public Records Act to obtain "volumes" of data from JEA. Alternatively, JEA argued that it was immune from suit to the extent provided by either Florida's immunity provisions or the Mississippi Tort Claims Act (MTCA).

2** ¶8. At that time, JEA acknowledged that under ***Franchise Tax Board of California v. Hyatt (Hyatt I), 538 U.S. 488, 123 S. Ct. 1683, 155 L.Ed. 2d 702 (2003), a sovereign body of one state is *not* constitutionally immune from suit in the courts of a sister state. JEA instead argued that Mississippi should decline to exercise jurisdiction over Promenade's claims against it as a matter of comity, "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations[.]" ***Id.*** at 493, 123 S. Ct. 1683 (internal quotation marks omitted).

¶9. A special master was appointed in the case. The special master rejected JEA's comity argument and recommended that JEA's motion to dismiss be denied. The special master reviewed ***Church v. Massey***, 697 So. 2d 407, 409 (Miss. 1997), which involved a Mississippi resident injured in a traffic accident by an employee of Brewer State Junior College, an Alabama entity. Brewer State argued that Alabama law applied and that because it was immune from suit in Alabama, it should be immune from suit in Mississippi. ***Id.*** The trial court dismissed the Mississippi resident's lawsuit against Brewer State as a matter of comity. ***Id.*** The ***Church*** Court found that the matter did "not present a question dealing with the principle of comity[;]" instead, the case presented "a classic choice of law problem." ***Id.*** at 410. ***Church*** reiterated that "Mississippi has [subscribed] to the most significant relationship test embodied in the Restatement (Second) of Conflicts of Law." ***Id.*** (quoting ***McDaniel v. Ritter***, 556 So. 2d 303, 310 (Miss. 1989)). ***Church*** resolved the test in favor

of applying Mississippi law. ***Id. Church*** held that "[a] foreign governmental entity enjoys no greater status under our tort law than any other similarly situated tort defendant." ***Id. Church*** found "no compelling public policy considerations which would dictate that Brewer State Junior College should enjoy immunities above and beyond those provided to our citizens." ***Id.*** Thus, the MTCA afforded no immunity to the Alabama governmental entity. ***Id.***

¶10. The special master found that under ***Hyatt I*** and an earlier case, ***Nevada v. Hall***, 440 U.S. 410, 99 S. Ct. 1182, 59 L.Ed. 2d 416 (1979), later overruled by ***Hyatt III***, 587 U.S. at 233, 139 S.Ct. 1485,[2] no constitutional impediment existed to prevent the court's exercise of subject matter jurisdiction over JEA, a Florida municipal entity. The special master found that under the most significant relationship test and the center of gravity test, Mississippi law applied. Applying ***Church***, the special master found that JEA's status as a "municipal utility and body politic of the State of Florida" did not afford it any immunity from suit under the MTCA. The special master found that "JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the Mississippi Tort Claims Act." The trial court adopted the special master's report and recommendation and denied JEA's motion to dismiss for lack of subject matter jurisdiction.

***3** ¶11. After its motion to dismiss was denied, JEA moved for summary judgment. It argued that its only role had been supplying bed ash in rail carloads to LA Ash, which then had manufactured and sold a soil stabilization and fill product for the Promenade project. JEA denied any role in manufacturing the fill material, contending it merely had supplied a raw material that had been altered by LA Ash after it left JEA's control. JEA averred that it had lacked any knowledge that LA Ash would sell it for use in the Promenade project. JEA admitted that the process used by LA Ash to convert JEA's bed ash to the fill material consisted of putting water on it, or hydrating it, using a water bath. And it admitted that a "byproduct marketing agreement" had existed between JEA and LA Ash, but it urged that the agreement had been terminated in 2008 before the fill material at issue had been sold for use in the Promenade project. JEA denied any agency relationship with LA Ash.

¶12. In response, Promenade argued that genuine issues of material fact existed on each of its claims against JEA. Promenade submitted evidence that bed ash is regulated by the Florida Department of Environmental Protection (FDEP) as solid waste. But the FDEP can grant an exemption of industrial byproducts, such as bed ash, from this restriction if they are beneficially used. In July 2005, FDEP granted a Beneficial Use Determination (BUD) to JEA for EZ Base, a product JEA made from bed ash at the Northside Generating Station. The BUD approved several of JEA's proposed uses for EZ Base, including top surface for roads and in civil road construction applications, provided the conditions of the BUD were met. The BUD said that "any other uses of the material which involve placing it into or upon any land or water may be considered disposal of solid waste by the Department." The BUD placed restrictions on the manner in which EZ Base would be applied to prevent environmental contamination. The BUD also placed duties on JEA to conduct sampling and testing, to monitor the chemical characteristics of the product, and to maintain records. Another requirement was that "a majority of the industrial byproducts [must be] demonstrated to be sold, used, or reused within one year." The BUD said that "This approval letter ... applies only to the engineered uses of EZ Base listed above ...." Thus, FDEP approval for use of JEA's bed ash within Florida extended only to EZ Base and to those uses of EZ Base allowed by the BUD.

¶13. Promenade claimed that because JEA's bed ash production had been exceeding storage capacity at the facility in Florida and JEA could not obtain FDEP approval to market all of it inside Florida, JEA had contracted with LA Ash to market the bed ash in other states for use as fill material in construction projects. In September 2003, LA Ash and JEA entered into the byproduct marketing agreement providing for the sale of JEA's bed ash both within and outside Florida. The BUD JEA had obtained in 2005 allowed JEA to use some of its bed ash in Florida but only bed ash designated as EZ Base.

¶14. In 2008, due to liability concerns that arose after users experienced problems with the bed ash, JEA cancelled its contract with LA Ash. But JEA continued to pay LA Ash $2,100 per loaded rail car to remove bed ash from its facilities in Florida to LA Ash's facility in Port Bienville, Mississippi. Promenade asserted that LA Ash had acted as JEA's agent in its sale of bed ash for use in the Promenade project.

¶15. According to Promenade, JEA's internal documentation shows its officials had determined that paying LA Ash to haul away and market the bed ash would be much cheaper than paying for **landfill** disposal in Florida. A JEA market opportunity profile report on the southeastern United States had identified Mississippi as a "Low Barrier to Entry State" for selling ash byproducts as construction material. Scott Shultz, JEA's director of byproduct services, testified in his deposition that JEA had three options for dealing with the ash produced as a byproduct of electricity generation: (1) it could be shipped by rail car to LA Ash, (2) it could be processed into EZ Base for use in Florida under the BUD, or (3) it could be trucked to a **landfill**, an option that Shultz said was costly.

***4** ¶16. Shultz testified that the bed ash used at Promenade was not EZ Base. According to Shultz, EZ Base is ash that is hydrated onsite by JEA. JEA marketed and sold EZ Base for use in several construction projects in Florida pursuant to the BUD.[3] Shultz explained that, unlike EZ Base, the bed ash used at Promenade was dry when it left JEA. Because the BUD applied only to EZ Base, the bed ash used at the Promenade project was outside the scope of the BUD. The bed ash used at Promenade had not been approved for use as construction fill in Florida.

¶17. Promenade argued that evidence showed the construction fill used at the mall was not a raw material, was defective when it left JEA, and was in substantially the same condition when it was installed at Promenade. Promenade contended that, unbeknownst to LA Ash, JEA had introduced powdered Kaolin, an aluminum silicate, into its fuel mixture, which had yielded bed ash that was unsuitable for use as construction fill. And Promenade argued that the contractors and engineers on the Promenade project had no way of knowing that the bed ash that ultimately was delivered to the construction site had been adulterated by aluminum.

¶18. Promenade attached an expert opinion that testing had shown the expansion of subsurface materials had been caused by the formation of ettringite crystals. According to the expert, environmental science professor Dr. George C. Flowers, the hydration process used by LA Ash would not have eliminated the specific ingredient, aluminum, that had caused delayed ettringite crystal formation. Dr. Flowers opined that, "[i]n light of its potential to expand over time, a product with these qualities is not fit or appropriate for the particular purpose of being used in soils under improvements such as pavements or structures." Promenade asserted that JEA's internal documents showed the company had been aware of this problem. In its reply, JEA again asserted that it had sent a raw material to LA Ash, which LA Ash had processed and converted to the fill material.

¶19. During the pendency of JEA's summary-judgment motion, Promenade filed a motion for leave to amend its complaint to add claims for physical invasion of property under theories of nuisance, nuisance *per se*, and trespass, common plan or design, and for its demand for relief to include punitive damages. The trial court granted leave to amend, and Promenade filed the amended complaint, which JEA answered. JEA moved for summary judgment on Promenade's additional claims, and Promenade moved for summary judgment on its physical invasion claim.

¶20. The trial court denied JEA's motion for summary judgment and both parties' motions for partial summary judgment. And trial was set to begin in October 2016.

¶21. Prior to trial, the United States Supreme Court handed down ***Franchise Tax Board of California v. Hyatt (Hyatt II)***, 578 U.S. 171, 136 S. Ct. 1277, 194 L.Ed. 2d 431 (2016). ***Hyatt II*** held that the Full Faith and Credit Clause prevents a state from applying its damages law in a manner that "reflects a special, and constitutionally forbidden, " 'policy of hostility to the public Acts' of a sister State[.]" ***Hyatt II***, 578 U.S. at 173-74, 136 S.Ct. 1277 (internal quotation marks omitted) (quoting ***Hyatt I,*** 538 U.S. at 499, 123 S.Ct. 1683).

¶22. JEA thereafter filed a motion to reconsider its comity arguments in light of ***Hyatt II***. JEA argued that ***Hyatt II*** abrogated this Court's decision in ***Church v. Massey*** that a public entity of another state would be treated no differently under Mississippi law than a private tortfeasor and would not be afforded the benefits of the MTCA.

5** ¶23. Given the implications of ***Hyatt II, the trial court cancelled the scheduled trial. In addition to responding to JEA's motion to reconsider, Promenade requested that if the trial court determined that ***Hyatt II*** applied, that Promenade be allowed to amend its complaint to add a claim for inverse condemnation under the Mississippi Constitution.

¶24. After briefing and oral argument, the trial court resolved all these issues in its "Omnibus ***Hyatt II*** Order." The trial court found that JEA is a "municipal utility and body politic located in the State of Florida" and recognized that Florida courts have held that Florida's statutory waiver of sovereign immunity extends to JEA. The trial court ruled that JEA is a foreign governmental entity entitled to the protection afforded under ***Hyatt II***.

¶25. The trial court found that under ***Hyatt II***, denying JEA a cap on damages would be inconsistent with both Florida [4] and Mississippi law and would amount to a special rule of law evincing a policy of hostility to Florida contrary to the Full Faith and Credit Clause. Thus, the trial court found that under ***Hyatt II***, the court was "required to afford JEA the protection of a damages cap so as not to unconstitutionally apply a special rule of Mississippi law that is hostile to the sovereign status of its sister State of Florida. To do otherwise would be in violation of the Full Faith and Credit Clause." Accordingly, the trial court ruled that Promenade's available damages would be limited to the $500,000 cap provided by the MTCA.

¶26. The trial court denied Promenade's motion to amend the complaint to add a claim for inverse condemnation. It granted JEA's motion for partial summary judgment on injunctive relief. Finally, the trial court found that the property damage at the Promenade site was a single occurrence for the purpose of the MTCA's damages cap. Miss. Code Ann. § 11-46-15 (Rev. 2019). [5]

¶27. Promenade petitioned this Court for interlocutory appeal, which was granted. While the interlocutory appeal was pending, the Supreme Court handed down ***Hyatt III***, which overruled ***Nevada v. Hall***. ***Hyatt III*** held that the United States Constitution does not "permit[ ] a State to be sued by a private party without its consent in the courts of a different State." ***Hyatt III***, 587 U.S. at 233, 139 S.Ct. 1485.

¶28. In view of ***Hyatt III***, this Court subsequently dismissed the interlocutory appeal and remanded the case to the trial court for further consideration based on ***Hyatt III***. En Banc Order, ***The Promenade D'Iberville, LCC v. Jacksonville Elec. Auth.***, No. 2017-IA-00167-SCT (Miss. May 16, 2019).

¶29. On remand, the trial court granted JEA's motion to dismiss for lack of subject matter jurisdiction. The trial court found that it has no jurisdiction over JEA pursuant to ***Hyatt III***. Alternatively, the trial court dismissed JEA from the suit because both comity and full faith and credit mandate dismissal due to the presuit notice and home-venue requirements under Florida law.

6** ¶30. Promenade appeals from the trial court's judgment of dismissal. It claims that (1) ***Hyatt III does not limit Mississippi's exercise of jurisdiction over a nonstate entity such as JEA; (2) under the circumstances of this case and the analytical framework provided in ***Hyatt II***, JEA was not entitled to final dismissal; (3) depriving Promenade the opportunity to conform its complaint and proof to the new "inter-state" immunity framework adopted by the trial court is patently unfair; and (4) in the event the trial court's extension of ***Hyatt II*** stands, Promenade should be allowed to present its claims for injunctive relief to the fact-finder rather than suffer dismissal.

DISCUSSION

I. *Hyatt*

¶31. This is a case of first impression for this Court regarding the application of ***Hyatt III***. [6] Because the trial court's order dismissing JEA primarily relies on ***Hyatt III*** and ***Hyatt II***, we provide a brief summary of all three ***Hyatt*** decisions.

¶32. They involve a dispute between a former California resident, Gilbert Hyatt, who relocated to Nevada in the early 1990s, and the California Franchise Tax Board (Board). ***Hyatt I***, 538 U.S. at 490-91, 123 S.Ct. 1683. After Hyatt left California, the Board audited Hyatt to determine whether he had underpaid state income taxes by misrepresenting when he became a Nevada resident. ***Id.*** The Board determined that Hyatt was still a California resident beyond the date he represented on his tax return that he became a Nevada resident. ***Id.*** at 490, 123 S. Ct. 1683. The Board "issued notices of proposed assessments ... and imposed substantial civil fraud penalties." ***Id.*** at 491, 123 S. Ct. 1683. Hyatt challenged the assessments through the Board's administrative process. ***Id.***

¶33. While those proceedings were pending in California, Hyatt filed suit against the Board in a Nevada trial court. ***Id.*** He claimed the Board had committed numerous torts during the audit, "including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation." ***Id.***

¶34. The Board petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal of the case based on jurisdiction. ***Id.*** The Nevada Supreme Court held that the trial court " 'should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles' but that the intentional tort claims could proceed to trial." ***Id.*** at 492, 123 S. Ct. 1683.

¶35. The Nevada Supreme Court recognized that while Nevada law does not allow its state agencies to claim immunity "for intentional torts committed within the course and scope of employment," California law "expressly provide[s] [the Board] with complete immunity." ***Id.*** at 492-93, 123 S. Ct. 1683 (internal quotation mark omitted). The Nevada Supreme Court explained that the Board's statutory immunity for negligent acts would "not contravene any Nevada interest in this case." ***Id.*** at 493, 123 S. Ct. 1683 (internal quotation mark omitted). But "affording [the Board] statutory immunity" with regard to the intentional torts, would contravene "Nevada's policies and interests in this case." ***Id.*** (internal quotation marks omitted). Therefore, " 'Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees,' should be accorded greater weight 'than California's policy favoring complete immunity for its taxation agency.' " ***Id.*** at 493-94, 123 S. Ct. 1683.

7** ¶36. On certiorari, the United States Supreme Court unanimously affirmed the judgment of the Nevada Supreme Court. ***Id. ***Hyatt I*** concluded that "the Full Faith and Credit Clause does not compel ' "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." ' " ***Id.*** at 494, 123 S. Ct. 1683 (quoting ***Sun Oil Co. v. Wortman***, 486 U.S. 717, 722, 108 S. Ct. 2117, 100 L.Ed. 2d 743 (1988)). ***Hyatt I*** held that "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." ***Id.*** at 499, 123 S. Ct. 1683.

¶37. On remand, a Nevada jury awarded Hyatt approximately $450 million in compensatory and punitive damages. ***Hyatt II***, 578 U.S. at 175, 136 S.Ct. 1277. California appealed to the Nevada Supreme Court, arguing that Nevada statutes would impose a $50,000 cap on damages were this a suit against Nevada officials. ***Id.*** The Nevada Supreme Court rejected California's argument; instead, the Nevada Supreme Court reduced the damages award to $1 million for Hyatt's fraud claim. ***Id.*** [7]

¶38. The United States Supreme Court granted California's petition for certiorari, agreeing to decide two questions: "First, whether to overrule ***Hall***." ***Hyatt II***, 578 U.S. at 175, 136 S.Ct. 1277. Second, were ***Hall*** not overruled, whether "the Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a similar suit against its own state agencies." ***Id.*** at 175-76, 136 S. Ct. 1277.

¶39. The ***Hyatt II*** Court divided four-to-four on whether to overrule ***Hall***. ***Id.*** at 176, 136 S. Ct. 1277. On the second question, ***Hyatt II*** held that by allowing for damages greater than the amount limited to its own agencies, Nevada "applied a special rule of law applicable only in lawsuits against its sister States, such as California." ***Id.*** at 178, 136 S. Ct. 1277. Such a rule "reflects a special, and constitutionally forbidden, ' "policy of hostility to the public Acts" of a sister State,' namely, California." ***Id.*** at 173, 136 S. Ct. 1277 (quoting U.S. Const. art. IV, § 1 (Full Faith and Credit Clause); ***Hyatt I***, 538 U.S. at 499, 123 S.Ct. 1683)). ***Hyatt II*** said that, "viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground *is* hostile to another State." ***Id.*** at 178, 136 S. Ct. 1277. "In light of the 'constitutional equality' among the States, Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule of Nevada law that discriminates against its sister States." ***Id.*** at 179, 136 S. Ct. 1277 (citations omitted).

8** ¶40. Chief Justice Roberts wrote a dissenting opinion joined by Justice Thomas. ***Id. at 180-88, 136 S. Ct. 1277 (Roberts, C.J., dissenting). The dissent said that the majority's "decision is contrary to our precedent holding that the [Full Faith and Credit] Clause does not block a State from applying its own law to redress an injury within its own borders." ***Id.*** at 181, 136 S. Ct. 1277. The dissent opined that even if the

majority "is correct that Nevada violated the Full Faith and Credit Clause ... it is wrong about the remedy." ***Id.*** at 188, 136 S. Ct. 1277. The majority "does not require the Nevada Supreme Court to apply either Nevada law (no immunity for the Board) or California law (complete immunity for the Board), but instead requires a new hybrid rule, under which the Board enjoys partial immunity." ***Id.*** According to the dissent,

> The majority's approach is nowhere to be found in the Full Faith and Credit Clause. Where the Clause applies, it expressly requires a State to give full faith and credit to another State's laws. If the majority is correct that Nevada has no sufficient policy justification for applying Nevada immunity law, then California law applies. And under California law, the Board is entitled to full immunity. Or, if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the Board is subject to full liability.

Id. at 188, 136 S.Ct. 1277.

¶41. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with the statutory cap for Nevada agencies. ***Hyatt III***, 587 U.S. at 235, 139 S.Ct. 1485. California again petitioned for certiorari, which the Supreme Court granted on "[t]he sole question ... [of] whether ***Nevada v. Hall*** should be overruled." ***Hyatt III***, 587 U.S. at 235, 139 S.Ct. 1485.

¶42. In a five-to-four decision, ***Hyatt III***, authored by Justice Thomas, overruled ***Hall*** and held that "the Constitution [does not] permit[ ] a State to be sued by a private party without its consent in the courts of a different State." ***Hyatt III***, 587 U.S. at 233, 139 S.Ct. 1485. ***Hyatt III*** said that ***Nevada v. Hall*** "is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." ***Hyatt III***, 587 U.S. at 236, 139 S.Ct. 1485.

¶43. ***Hyatt III*** said that "[a]fter independence, the States considered themselves fully sovereign nations." ***Id.*** at 238, 139 S. Ct. 1485. And " '[a]n integral component' of the States' sovereignty was 'their immunity from private suits." ' ***Id.*** (quoting ***Fed. Mar. Comm'n v. S.C. Ports Auth.***, 535 U.S. 743, 751-52, 122 S. Ct. 1864, 152 L.Ed. 2d 962 (2002)). Hence, "[t]he founding generation thus took as given that States could not be haled involuntarily before each other's courts." ***Id.*** at 239, 139 S. Ct. 1485. Rather, "the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts." ***Id.*** at 241, 139 S. Ct. 1485.

¶44. ***Hyatt III*** explained that there were fears early on that Article III would be construed as having "implicitly waived the State's sovereign immunity against *private* suits in federal courts." ***Id.*** at 242, 139 S. Ct. 1485. "But '[t]he leading advocates of the Constitution assured the people in no uncertain terms' that this reading was incorrect.' " ***Id.*** (quoting ***Alden v. Maine***, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L.Ed. 2d 636 (1999)). These fears, however, were soon realized with the Court's decision in ***Chisholm v. Georgia***, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (1793), which held that "Article III allowed the very suits that the 'Madison-Marshall-Hamilton triumvirate' insisted it did not." ***Hyatt III***, 587 U.S. at 242, 139 S.Ct. 1485 (quoting ***Hall***, 440 U.S. at 437, 99 S.Ct. 1182 (Rehnquist, J., dissenting)). ***Hyatt III*** said that "decision precipitated an immediate 'furor' and 'uproar' across the country." ***Id.*** 242-43, 139 S. Ct. 1485. Congress and the states then "acted swiftly to remedy the Court's blunder by drafting the Eleventh Amendment." ***Id.*** at 243, 139 S. Ct. 1485.

¶45. ***Hyatt III*** said "[t]he Eleventh Amendment confirmed that the Constitution was not meant to 'rais[e] up' any suits against the States that were 'anomalous and unheard of when the Constitution was adopted.' " ***Id.*** (second alteration in original) (quoting ***Hans v. Louisiana***, 134 U.S. 1, 18, 10 S. Ct. 504, 33 L.Ed. 842 (1890)). "In proposing the Amendment, 'Congress acted not to change but to restore the original constitutional design.' " ***Id.*** (quoting ***Alden***, 527 U.S. at 722, 119 S.Ct. 2240). ***Hyatt III*** reiterated that " 'sovereign immunity of the States' ... 'neither derives from nor is limited by, the terms of the Eleventh Amendment.' " ***Id.*** (quoting ***Alden***, 527 U.S. at 713, 119 S.Ct. 2240).

9** ¶46. ***Hyatt III concluded that "***Nevada v. Hall*** is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." ***Id.*** at 249. ***Hyatt III*** held that the Board is immune from Hyatt's suit in Nevada's courts. ***Id.***

II. Post-*Hyatt III*

¶47. As the trial court noted, there are relatively few decisions so far from other jurisdictions considering ***Hyatt III***.

¶48. The most recent is from Pennsylvania, ***Galette v. NJ Transit***, 332 A.3d 776, 779 (Pa. 2025), which involved a traffic accident between a bus owned and operated by New Jersey Transit Corporation (NJ Transit) and a Pennsylvania resident. The resident sued NJ Transit for negligence in a Pennsylvania state court. ***Id.*** The ***Galette*** court concluded that NJ Transit is an entity of the State of New Jersey "created as an instrumentality of that State." ***Id.*** at 791. ***Galette*** held that, consistent with ***Hyatt III***, "interstate sovereign immunity precludes" the plaintiff's suit in Pennsylvania. ***Id.***

¶49. New York's highest court, however, reached a different conclusion. ***Colt v. New Jersey Transit Corp.***, No. 72, ___ N.Y.3d ___, ___ N.Y.S.3d ___, ___ N.E.3d ___, 2024 WL 4874365 (N.Y. Nov. 25, 2024) (unpublished decision). In a negligence case involving a NJ Transit bus and a New York pedestrian, the ***Colt*** court concluded that NJ Transit "is not an arm of New Jersey and may not invoke sovereign immunity" in a New York state court. ***Id.*** at ___, 2024 WL 4874365 at *7.

¶50. In ***Farmer v. Troy University***, 382 N.C. 366, 879 S.E.2d 124, 128 (2022), the North Carolina Supreme Court held that Troy University was an arm of the State of Alabama, and, under ***Hyatt III***, is "entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." The ***Farmer*** court also held, however, that Troy University had explicitly waived its sovereign immunity from suit in North Carolina when it "conducted business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause ...." ***Farmer,*** 879 S.E.2d at 131.

¶51. Both the New York Court of Appeals and the Pennsylvania Supreme Court looked to Eleventh Amendment jurisprudence for guidance in determining whether an entity is an extension of the state for purposes of interstate immunity. ***Colt***, ___ N.E.3d at ___ – ___, 2024 WL 4874365, at **3-5; ***Galette***, 332 A.3d at 786-87.

¶52. The ***Colt*** court said its "analysis aligns with the framework many courts apply in analyzing whether a state-created entity may invoke sovereign immunity in federal court—often called Eleventh Amendment immunity—which is rooted in the same pre-ratification notions of State dignity." ***Colt***, ___ N.E.3d at ___, 2024 WL 4874365, at *3 (footnote omitted) (citations omitted). ***Colt*** held that when "considering whether a foreign state-created entity is entitled to sovereign immunity in New York, courts should consider: (1) how the State defines the entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity." ***Id.*** at ___, 2024 WL 4874365, at *5.

¶53. The ***Galette*** court found that a six-factor test previously articulated by the Pennsylvania Supreme Court in a state case[8] "lends insight into whether a state-created entity is designed to act as either: (1) an arm of the State that enjoys the immunity associated with the Eleventh Amendment; or (2) something separate from the State, such as a corporation, that is not shielded by such immunity." ***Galette***, 332 A.3d at 787 (quoting ***Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle***, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977) ("The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.")).

10** ¶54. The ***Farmer court did not speak to Eleventh Amendment jurisprudence. ***Farmer*** simply concluded that Troy University, like North Carolina state institutions of higher learning, is deemed to be an arm of the state protected by sovereign immunity. ***Farmer***, 879 S.E.2d at 127-28.

¶55. The Utah Supreme Court acknowledged ***Hyatt III*** in a negligence case brought against an Arizona municipality by a Utah resident seeking damages for injuries from a

motor vehicle accident with an Arizona municipal employee. ***Galindo v. City of Flagstaff***, 452 P.3d 1185, 1186 (Utah 2019). In a footnote, however, ***Galindo*** said it was unnecessary to address ***Hyatt III***'s "sea change in sovereign immunity practice because 'municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit' under the Eleventh Amendment ...." ***Id.*** at 1187 n.2 (quoting ***Jinks v. Richland Cnty.***, 538 U.S. 456, 466, 123 S. Ct. 1667, 155 L.Ed. 2d 631 (2003)).

¶56. ***Galindo*** expressed that "[i]t is important to clarify that sovereign immunity does not flow from the Eleventh Amendment[;] [rather,] [s]overeign immunity is a concept the founders 'took as given.' " ***Id.*** (quoting ***Hyatt III***, 587 U.S. at 239, 139 S.Ct. 1485). ***Galindo*** recognized that early in the country's history, numerous courts held that sovereign immunity extended to political subdivisions. ***Id.*** But "courts found ways to chip away at its scope, until it became a rarity." ***Id.***

¶57. ***Galindo*** concluded that

> Under either of these interpretations of the development of political subdivision immunity, ***Hyatt***—which addressed constitutionally protected sovereign immunity—does not apply to political subdivisions. The principles set forth in ***Hall*** continue to govern a state's governmental immunity grant to its political subdivisions and the respect that should be attributed to it by other states.

Id.

III. JEA's Status

¶58. JEA conceded to the trial court that it is not an arm of the State of Florida for Eleventh Amendment purposes. But it maintains that it still enjoys the same "pre-ratification" immunity status as contemplated by ***Hyatt III***, 587 U.S. 230, 139 S.Ct. 1485. JEA contends that no court or plaintiff has made the argument that when ***Hyatt III*** uses the word "State," it means only one of the fifty States. ***Id.*** JEA argues that if this were so, it would have been completely unnecessary for ***Hyatt III*** to discuss the holding in ***Hall*** when a "State" was not the party. ***Id.*** JEA further submits that ***Hyatt III*** was applied not to California but to its agency, the Board, which had immunity granted by a California statute. ***Id.***

¶59. JEA also relies on ***Cauley v. City of Jacksonville***, 403 So. 2d 379, 381 (Fla. 1981), in which the Florida Supreme Court said that in Florida, "[p]rior to 1776, the common law doctrine of sovereign immunity applied without distinction between governmental entities." And "[t]here was no statutory right to recover for a municipality's negligence predating the adoption of the declaration of rights contained in the Florida constitution, nor was there a cause of action at common law as of July 4, 1776, adopted under section 2.01, Florida Statutes." ***Id.*** at 385.

¶60. At the outset, and contrary to JEA's suggestion otherwise, the State of Nevada, itself, was a party throughout the trial and appeals process in ***Hall***. *See* ***Hall***, 440 U.S. at 411-12, 99 S.Ct. 1182 ("Respondents filed this suit for damages in the Superior Court for the city of San Francisco, naming the administrator of the driver's estate, the University, and the State of Nevada as defendants."). And while the State of California was not a party in the ***Hyatt*** cases, federal courts have recognized that the Board is, nevertheless, an arm of that state and enjoys Eleventh Amendment immunity. *See, e.g.*, ***Davis v. California***, 734 Fed. Appx. 560, 564 n.6 (10th Cir. 2018) ("States and their agencies 'enjoy sovereign immunity from suit under the Eleventh Amendment.' " (quoting ***Muscogee (Creek) Nation v. Pruitt***, 669 F.3d 1159, 1166 (10th Cir. 2012))).

11** ¶61. With regard to the Florida Supreme Court's decision in ***Cauley, we read it differently than JEA. At issue in ***Cauley*** was the constitutionality of a damages cap in tort actions against a municipality under Florida Statute Section 768.28(5). ***Cauley***, 403 So. 2d at 380. The ***Cauley*** court began its discussion by explaining that "[c]ommon law sovereign immunity for the state, its agencies, and counties remained in full force until section 768.28's enactment." ***Id.*** at 381. But unlike with those entities, Florida courts, starting with ***City of Tallahassee v. Fortune***, 3 Fla. 19 (1850), "began to except certain municipal activities from the sovereign immunity rule." ***Cauley***, 403 So. 2d at 382. What resulted were certain

rules governing municipal immunity prior to the enactment of section 768.28:

> 1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;
>
> 2) as to those activities which fall in the category of governmental functions "... a municipality is liable in tort, under the doctrine of respondent (sic) superior, (..) only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation."
>
> 3) as to those activities which fall in the category of judicial, quasi judicial, legislative, and quasi legislative functions, a municipality remains immune.

Cauley, 403 So. 2d at 383 (alterations in original) (quoting ***Gordon v. City of West Palm Beach***, 321 So. 2d 78, 80 (Fla. Dist. Ct. App. 1975), *superseded by* § 768.28); *see also* ***Com. Carrier Corp. v. Indian River Cnty.***, 371 So. 2d 1010, 1015 (Fla. 1979) (reviewing the history of municipal sovereign immunity and recognizing that before section 768.28, a municipality would be held liable for torts committed in the performance of proprietary acts).

[1] ¶62. We find nothing provided by either ***Hyatt III*** or Florida case law demonstrates to us that JEA enjoys the same "pre-ratification" (or now, "interstate") immunity status as contemplated by ***Hyatt III***, 587 U.S. 230, 139 S.Ct. 1485. JEA is not an arm of the State of Florida; rather, it is "an electric utility operated by the City of Jacksonville" and is an instrumentality of that municipality. ***Jetton v. Jacksonville Elec. Auth.***, 399 So. 2d 396, 398 (Fla. Dist. Ct. App. 1981) (citing ***Ven-Fuel v. Jacksonville Elec. Auth.***, 332 So. 2d 81 (Fla. Dist. Ct. App. 1975); ***Amerson v. Jacksonville Elec. Auth.***, 362 So. 2d 433 (Fla. Dist Ct. App. 1978)). What it enjoys is a limited waiver of statutory immunity under section 768.28. ***Id.*** (quoting Fla. Stat. § 728.28(2) (1977)).

¶63. For these reasons, we find that ***Hyatt III***'s holding does not apply in this instance.

IV. Mississippi Policy

¶64. In ***Church***, this Court held that "[a] foreign governmental entity enjoys no greater status under our tort law than any other similarly situated tort defendant." 697 So. 2d at 410. ***Church*** found "no compelling public policy considerations which would dictate that [a foreign governmental entity] should enjoy immunities above and beyond those provided to our citizens." ***Id.***

¶65. ***Church***'s holding was fully compatible with the general rule before ***Hyatt III*** that states were allowed but not constitutionally required to extend sovereign immunity to a sister state as a matter of comity. ***Hall***, 440 U.S. at 425, 99 S.Ct. 1182. [9] Following ***Hyatt III***, Mississippi no longer has the discretion whether to recognize another state's sovereign immunity; it is now constitutionally obligated to do so. ***Hyatt III***, 587 U.S. at 249, 139 S.Ct. 1485.

12** **[2]** ¶66. But ***Church still remains good law with respect to out-of-state entities such as municipalities and their instrumentalities, like JEA. Mississippi continues to recognize that such entities should enjoy no greater status under our law than any other similarly situated civil defendant absent compelling public policy considerations. ***Church***, 697 So. 2d at 410. [10]

¶67. Here, JEA has provided no compelling reason(s) why it should enjoy greater status, other than its claim that the Full Faith and Credit Clause mandates that Florida law, specifically section 768.28, should govern based on both ***Hyatt III*** and ***Hyatt II***. We find that neither ***Hyatt II*** or ***III*** interprets the Full Faith and Credit Clause as JEA would have it.

¶68. ***Hyatt III*** simply references the clause and reiterates that it "precludes States from 'adopt[ing] any policy of hostility to the public Acts' of other States." ***Hyatt III***, 587 U.S. at 245, 139 S.Ct. 1485 (quoting ***Hyatt II***, 578 U.S. at 176, 136 S.Ct. 1277).

¶69. In ***Hyatt II***, the Court began its discussion by reaffirming ***Hyatt I***'s explanation of the Clause and holding that

> (1) the Clause does not require one State to apply another State's law that violates its "own legitimate public policy," ***Franchise Tax Bd.***, supra, at 497-498, 123 S. Ct. 1683 (citing ***Hall***, supra, at 424, 99 S. Ct. 1182), and (2) Nevada's

choice of law did not "exhibi[t] a 'policy of hostility to the public Acts' of a sister State." ***Franchise Tax Bd.***, supra, at 499, 123 S. Ct. 1683 (quoting ***Carroll v. Lanza***, [349 U.S. 408, 413, 75 S. Ct. 804, 99 L.Ed. 1183 (1955)].

Hyatt II, 578 U.S. at 177, 136 S.Ct. 1277 (alteration in original).

¶70. What ***Hyatt II*** found violative of full faith and credit in the case was Nevada's decision after ***Hyatt I***'s remand to allow for damages against the Board above the statutory cap that would apply to Nevada agencies under similar circumstances. ***Hyatt II***, 578 U.S. at 175, 136 S.Ct. 1277. By doing so, according to the ***Hyatt II*** majority, Nevada had instituted a special rule that was both "hostile to its sister State[ ]," and "inconsistent with the general principles of Nevada immunity law ...." ***Id.*** at 179, 178, 136 S. Ct. 1277.

[3] **[4]** **[5]** ¶71. But ***Hyatt I***'s explanation of the Full Faith and Credit Clause still holds true. "[T]he Full Faith and Credit Clause does not compel ' "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." ' " ***Hyatt I***, 538 U.S. at 494, 123 S.Ct. 1683 (quoting ***Sun Oil Co.***, 486 U.S. at 722, 108 S.Ct. 2117). "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." ***Id.*** at 495-96, 123 S. Ct. 1683 (alteration in original) (internal quotation marks omitted) (quoting ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L.Ed. 2d 628 (1985)). "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment ... rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment' it is less demanding with respect to choice of laws." " ***Id.*** at 494, 123 S. Ct. 1683 (alterations in original) (citation omitted). In short, a state may apply its own law in the face of another state's conflicting statute as long as its choice of law is "neither arbitrary nor fundamentally unfair," ***Hyatt I***, 538 U.S. at 494-95, 123 S.Ct. 1683 (internal quotation mark omitted) (quoting ***Shutts***, 472 U.S. at 818, 105 S.Ct. 2965), and does not evince a " 'policy of hostility to the public Acts' of a sister State." ***Id.*** at 499, 123 S. Ct. 1683 (quoting ***Carroll***, 349 U.S. at 413, 75 S.Ct. 804).

***13** **[6]** ¶72. Here, we find that allowing Promenade to proceed with its claims against JEA in a Mississippi court would not be either arbitrarily or fundamentally unfair to JEA, and it would not be hostile to Florida law.

¶73. Promenade has presented evidence in support of its allegations that JEA knowingly allowed approximately 32,000 tons of bed-ash waste material from its power generating plant to be shipped into Mississippi for commercial use. There is evidence that this was a decision by JEA to save and bypass the costs associated with Florida's regulatory requirements for disposing or storing the material in Florida. Evidence also has been presented that JEA sought to market and sell this material as a product for use in construction projects outside of Florida. And as a product, LA Ash felt no approval from Mississippi was necessary to sell OPF42 in Mississippi as a matter of interstate commerce. There is also evidence that the Mississippi Department of Environmental Quality warned certain individuals that it believed the material was a waste and that if it were sold in Mississippi, they would be doing so at their risk.

¶74. There is further showing that Cedar Bay, another Florida electric utility, had placed firm restrictions on the use of its own ash material and required approval from the receiving state's environmental regulatory agency. There is testimony that "Cedar Bay had a policy that you had to have a BUD permit from the state that you were going to use it in before [Cedar Bay] would allow it to be used in th[at] state." But JEA did not have the same requirement because it considered its ash material a product.

¶75. And there is the claim by Promenade that, unbeknownst to everyone besides JEA, the product that ultimately was delivered to and used at Promenade's site had been adulterated by aluminum after JEA had introduced powdered Kaolin into its fuel mixture that allegedly resulted in the damage that occurred to Promenade's property.

¶76. As we see it, what is alleged to have occurred in Mississippi most likely would not have occurred in Florida given Florida's regulations and, in particular, the fact that the bed ash used at Promenade had not been approved for use as construction fill in Florida. Had it occurred in Florida, though, we cannot say how Florida law would be applied—meaning, whether JEA would have enjoyed immunity under section 768.28.

¶77. We think it bears mentioning that for purposes of section 768.28, Florida courts have held that when the statutory caps provided by section 768.28(5) are found to apply in any cause of action, the governmental entity still has to defend the action to determine its liability above the damages cap in order to support a claims bill to the Florida Legislature. ***City of Ft. Lauderdale v. Hinton***, 276 So. 3d 319, 326 (Fla. Dist. Ct. App. 2019) (citing ***Gerard v. Dep't of Transp.***, 472 So. 2d 1170, 1172 (Fla. 1985)). In other words, the governmental entity is not immune from suit above the statutory cap. ***Id.*** (citing ***Gerard***, 472 So. 2d at 1172).

¶78. Apart from section 768.28, however, we observe that property interests in Florida, like every other state, are protected from eminent domain takings for public use without just compensation by the United States and Florida Constitutions. U.S. Const. amend. V; Fla. Const. art. 10, § 6. Florida also recognizes that "[w]here no formal exercise of eminent domain power is undertaken, a property owner may file an inverse condemnation claim to recover the value of property that has been *de facto* taken." ***Fla. Dep't of Env't Prot. ex rel. Bd. of Trs. of Internal Improvement Fund v. West***, 21 So. 3d 96, 98 (Fla. Dist. Ct. App. 2009). Section 768.28 does not apply to inverse condemnation claims. ***Dep't of Agric. & Consumer Servs. v. Polk***, 568 So. 2d 35, 38 (Fla. 1990).

14** ¶79. Mississippi likewise recognizes the legal remedy of inverse condemnation for property owners whose property was taken for public use where no formal eminent domain proceeding was initiated. ***Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 712-15 (Miss. 1970). The concept is rooted in the Takings Clause of the Mississippi Constitution. Miss. Const. art. 3, § 17. Similar to Florida law, such claims fall outside the strictures of the MTCA. ***McLemore v. Miss. Transp. Comm'n***, 992 So. 2d 1107, 1109-11 (Miss. 2008).

¶80. Mississippi's constitution also contains a damage provision that further protects private property rights in this state. ***Id.*** at 1110-11. ***McLemore*** explained that prior to the 1890 Constitution, the "Legislature could limit a landowner's recovery to compensation for the land appropriated for public use ...." ***Id.*** at 1111 (quoting ***Parker v. State Highway Comm'n***, 173 Miss. 213, 162 So. 162, 164 (Miss. 1935). But with the adoption of section 17, "any effort on the part of the Legislature to shield the government or any arm thereof from payment of damages occasioned by it on the appropriation of land would be futile and of no effect." ***Id.*** (quoting ***Parker***, 162 So. at 164). Section 17 is "self-executing," and it "is mandatory." ***Id.*** (quoting ***Parker***, 162 So. at 164). Further, section 17 "requires payment for damage to private property taken for public use whether such damage be the result of negligence or not." ***McDowell v. City of Natchez***, 242 Miss. 386, 135 So. 2d 185, 186 (1961) (quoting ***City of Jackson v. Cook***, 214 Miss. 201, 58 So. 2d 498, 500 (1952)); *see also* ***Baker v. Miss. State Hwy. Comm'n***, 204 Miss. 166, 37 So. 2d 169, 170 (1948) (recognizing that such damages claims "are purely consequential" when "not a condemnation proceeding"). [11]

¶81. We point this out to illustrate that a Mississippi property owner whose property was damaged by a Mississippi public utility engaging in the same type of conduct alleged here very likely could establish a viable inverse condemnation case against that entity, notwithstanding the MTCA. And we think a Florida property owner could as well, irrespective of Florida's tort claims act.

¶82. Promenade, however, cannot state an inverse condemnation claim in this instance because, as JEA rightly argues on appeal, JEA has no authority to condemn property in Mississippi for public use.

[7] ¶83. But because Promenade cannot assert an inverse condemnation claim against JEA does not also mean that Promenade should be without redress similar to what article 3, section 17, provides. As one jurisdiction has recognized, "[i]nverse condemnation is similar to a products liability manufacturing defect case in that the plaintiff in both types of cases is not required to prove fault." ***Greenway Dev. Co., Inc. v. Borough of Paramus***, 163 N.J. 546, 750 A.2d 764, 769 (2000) (citing ***Myrlak v. Port Auth. of N.Y. & N.J.***, 157 N.J. 84, 96, 723 A.2d 45 (1999)). Likewise, section 17 "requires payment for damage to private property taken for public use whether such damage be the result of negligence or not." ***McDowell***, 135 So. 2d at 186 (quoting ***Cook***, 58 So. 2d at 500). Both types of claims require the plaintiff to establish a proximate cause of the plaintiff's damages. *See* ***id.*** at 186-87 (plaintiff was required to establish "the line of causation" between the work done by the city and the damage to the plaintiff's property); ***3M Co. v. Johnson***, 895 So. 2d 151, 161 (Miss. 2005) (plaintiff must prove "the defective

and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages").

15** ¶84. JEA acknowledges that this is a product liability construction case. And we find that genuine issues of material fact abound as to whether, at the time JEA's product left its plant in Jacksonville: "(1) the product was designed in a defective manner; (2) the defective condition rendered the product unreasonably dangerous to [Promenade]; and (3) the defective and unreasonably dangerous condition of the product was the proximate cause of the [Promenade's] damages." ***Johnson, 895 So. 2d at 161.

¶85. We find nothing violative of full faith and credit or comity principles to allow Promenade to proceed with its case against JEA in the Harrison County Circuit Court, seeking damages similar to those that would be allowed in a case brought against a Mississippi public utility under article 3, section 17, of the Mississippi Constitution. Neither the MTCA nor section 768.28 is applicable to this case.

CONCLUSION

¶86. We reverse the circuit court's judgment of dismissal and remand this case to the circuit court for further proceedings consistent with this opinion.

¶87. **REVERSED AND REMANDED.**

RANDOLPH, C.J., KING AND COLEMAN, P.JJ., MAXWELL, CHAMBERLIN, ISHEE, GRIFFIS AND BRANNING, JJ., CONCUR.

All Citations

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Footnotes

1 This type of expansion is referred to throughout the record as "heaving."

2 In ***Hall***, California residents were injured in an automobile accident negligently caused by a University of Nevada employee driving a University of Nevada vehicle in California. 440 U.S. at 411, 99 S.Ct. 1182. The California Supreme Court held that the State of Nevada was amenable to suit in California courts, and it upheld a $1,150,000 damages award against the State of Nevada despite a Nevada statute that placed a $25,000 cap on damages in tort actions against the state. ***Id.*** at 411-12, 99 S. Ct. 1182. The United States Supreme Court affirmed, holding that the United States Constitution "does not confer sovereign immunity on States in courts of sister States." ***Hyatt I***, 538 U.S. at 497, 123 S.Ct. 1683 (citing ***Hall***, 440 U.S. at 414-21, 99 S.Ct. 1182). And "the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy." ***Hyatt I***, 538 U.S. at 497, 123 S.Ct. 1683 (citing ***Hall***, 440 U.S. at 424, 99 S.Ct. 1182).

3 An expert report commissioned by JEA showed that several of these projects in Florida incurred damage similar to what occurred at Promenade.

4 Florida law would provide JEA immunity above $200,000 in this lawsuit. Fla. Stat. § 768.28(5).

5 In its order granting partial summary judgment in favor of JEA, the trial court rejected Promenade's claim of 437 occurrences for each truckload of OPF42 delivered to the project in its claim for damages. The trial court

ruled that there was one occurrence—thus, the trial court capped Promenade's potential damages award at $500,000.

6 This Court briefly discussed ***Hyatt III*** in ***University of South Alabama ex rel. USA Health University Hospital (In re Estate of Matute) v. Perez***, 293 So. 3d 224, 227 (Miss. 2020), in which the University of South Alabama (USA) claimed sovereignty immunity in an estate case. But this Court did not decide ***Hyatt III***'s applicability in the case since USA had agreed that the chancery court had jurisdiction to adjudicate its probated claim against the estate. ***Id.***

7 The Nevada Supreme Court remanded for a retrial on the question of damages for Hyatt's intentional infliction emotional distress claim, and it stated that such damages are not subject to any statutory cap. ***Hyatt I***, 578 U.S. at 175, 136 S.Ct. 1277. Based on comity principles, the Nevada Supreme Court held that Hyatt was precluded from recovering punitive damages from the Board "[b]ecause punitive damages would not be available against a Nevada government entity ...." ***Franchise Tax Bd. of Cal. v. Hyatt***, 130 Nev. 662, 335 P.3d 125, 154 (2014), *overruled by* ***Hyatt II***, 578 U.S. 171, 136 S.Ct. 1277.

8 ***Galette*** referred to ***Goldman v. Southeast Pennsylvania Transportation Authority***, 618 Pa. 501, 57 A.3d 1154, 1185 (2012), in which the Pennsylvania Supreme Court concluded that the Southeastern Pennsylvania Transportation Authority was not an arm of Pennsylvania "and thus not entitled to immunity under the Eleventh Amendment."

9 ***Church*** was decided before ***Hyatt I***.

10 In ***Horne v. Mobile Area Water & Sewer System***, 897 So. 2d 972, 974 (Miss. 2004). ***Horne*** held that the chancery court had personal jurisdiction over the City of Mobile and the Board of Water & Sewer Commissioners of the City of Mobile from a complaint filed by numerous Mississippi property owners alleging property damage from the Board's release of significant amounts of water from an Alabama reservoir. Applying Mississippi's long-arm statute, ***Horne*** said that "Mississippi has a strong interest in adjudicating the dispute because Mississippi residents were injured, Mississippi property was destroyed, and the City and the Board continue to release water." ***Id.*** at 981.

11 ***Baker*** also recognized that there may be exceptional circumstances when the before-and-after rule (the difference between the fair market value of the damaged property before, as compared to the value after) would not be the proper test. ***Baker***, 37 So. 2d at 176. "In these exceptional cases all that can be done is to apply thereto a rule supported by reason, logic, and common sense, designed to result, as far as humanly possible, in the ascertainment of the true, accurate damage the property owner has suffered." ***Id.***