IN THE SUPREME COURT OF THE STATE OF NEVADA

JANET WARNER; MARY TELFORD; HELEN DURANT; JEWEL SHEPARD; JOE BIASE; LORI LUNAK; LAURIE MACFEE; AND JOSEPH DE LAPPE,
Appellants,
vs.
CITY OF RENO,
Respondent.

No. 52728

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a tort, contract, and takings action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellants Janet Warner, Mary Telford, Helen Durant, Jewel Shepard, Joe Biase, Lori Lunak, Laurie Macfee, and Joseph De Lappe own real property along the Last Chance Ditch (the Ditch), which is owned and operated by the Last Chance Irrigation Company (the Company). In 2002, the Company and the City of Reno (the City) entered into an agreement (the Agreement) relating to the Ditch in which the City was granted the right to dispose of storm water runoff into the Ditch through existing storm drain connections.

In 2005, after a large rainstorm, the Ditch overflowed, causing damage to appellants' real property. Appellants brought suit against the City for breach of express warranty, breach of contract, negligence, negligence per se, nuisance, taking, and trespass. The district court granted partial summary judgment as to appellants' breach-of-express-

warranty and breach-of-contract claims and summary judgment on appellants' remaining claims.[1] In doing so, it determined that appellants were not intended third-party beneficiaries to the Agreement and that the City was entitled to statutory immunity pursuant to NRS 41.032 and NRS 41.033. This appeal followed.

There are three primary issues presented on appeal: (1) whether appellants are intended third-party beneficiaries of the Agreement, (2) whether the City is entitled to statutory immunity under NRS 41.032 and NRS 41.033, and (3) whether the district court erred in granting summary judgment on appellants' takings claim.

For the reasons set forth below, we disagree with appellants' arguments. Accordingly, we affirm the order of the district court.

Standard of review

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact

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[1]We note the dispute between the parties as to the standard of review on appeal with respect to the district court's orders. We have considered this issue and conclude that both were summary judgment dispositions, subject to a summary judgment standard of review on appeal. See, e.g., Schmidt v. Washoe County, 123 Nev. 128, 133, 159 P.3d 1099, 1103 (2007), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008) (an order of dismissal, where matters outside the pleadings were offered, will be treated upon appellate review as a grant of a motion for summary judgment unless the district court has excluded the matters outside the pleading from consideration).

[remains] and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting NRCP 56(c)). In reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id.

Appellants were not intended third-party beneficiaries of the Agreement

Appellants argue that the district court erred when it granted partial summary judgment on their breach-of-express-warranty and breach-of-contract claims. Specifically, they assert that the underlying intent of the Agreement was to protect their property and therefore they were intended third-party beneficiaries.

In reviewing whether an individual is a third-party beneficiary of a contract, we look at whether the contracting parties demonstrated a clear intent to benefit the third party and whether the third party's reliance was foreseeable. Lipshie v. Tracy Investment Co., 93 Nev. 370, 380, 566 P.2d 819, 825 (1977). We construe contracts from "the written language and enforce [them] as written." Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). Evidence outside the contract "that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous" is not admissible. Ringle v. Bruton, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004). Questions of contract construction, "in the absence of ambiguity or other factual [issues], . . . are suitable for determination by summary judgment." Ellison, 106 Nev. at 603, 797 P.2d at 977.

In the present case, the Agreement states that it "is intended only to benefit the parties hereto, their successors and assigns, and does not create any rights, benefits or causes of action for any other person, entity or member of the general public." (Emphases added.) The language of the Agreement is plain. It clearly and unambiguously establishes that

the City and the Company did not intend the Agreement to benefit a member of the general public or anyone other than the parties to the Agreement. Given the clear and unambiguous language of the Agreement, we conclude that appellants were not intended third-party beneficiaries and cannot enforce the Agreement. Accordingly, the district court properly granted partial summary judgment on appellants' breach-of-express-warranty and breach-of-contract claims.[2]

The City is entitled to statutory immunity under NRS 41.032 and NRS 41.033

Appellants contend that the district court erred when it determined that the City is entitled to statutory immunity pursuant to NRS 41.032 and NRS 41.033. We address each statute separately, beginning with NRS 41.032.

NRS 41.032

Appellants argue that the City is not entitled to discretionary-act immunity under NRS 41.032 because, although the City's decision to divert storm water into the Ditch may be entitled to discretionary-act immunity, the City had a duty to be involved in the operation of the Ditch, such as maintaining it, which is not entitled to immunity.

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[2]We note appellants' reliance on Williams v. City of North Las Vegas, 91 Nev. 622, 541 P.2d 652 (1975), in support of their argument. Williams, however, is distinguishable from the present case, given that the agreement in that case was embodied in a public ordinance, which was clearly intended to benefit the public, id. at 626-27, 541 P.2d at 655-56; whereas, here, the plain language of the Agreement unambiguously demonstrates that the City did not intend the Agreement to benefit a member of the general public or anyone other than the parties to the Agreement.

NRS 41.032(2) states, in relevant part, that no action may be brought against the state or its agents if the action is "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions."

Government actions fall within the scope of discretionary-act immunity when they "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." Martinez v. Maruszczak, 123 Nev. 433, 446-47, 168 P.3d 720, 729 (2007). While policy decisions involving the consideration of competing economic, social, and political factors are subject to discretionary-act immunity, operational level decisions are not. Id. at 445, 168 P.3d at 728; see Nguyen v. State, 788 P.2d 962, 964-65 (Okla. 1990). Operational level decisions are those involved in the day-to-day operations of government and those required to implement the discretionary policy decisions. See generally Martinez, 123 Nev. at 444 n.32, 168 P.3d at 728 n.32.

Here, the City's decision to divert storm water into the Ditch was one that involved an element of individual judgment or choice, because the City chose to divert a portion of the storm water that naturally occurred within the City and decided that the best way to do so was to divert the water into the Ditch. The City's decision was also based on consideration of governmental policymaking or planning because the City assumed responsibility for disposing of the City's storm water and implemented a plan/policy to do so by diverting the storm water into the Ditch. See id. at 446, 168 P.3d at 729 ("[I]f the injury-producing conduct is an integral part of governmental policy-making or planning, . . . immunity will likely attach under the second criterion."). Moreover, to the extent

that appellants contend that the City had an operational duty to maintain the Ditch, pursuant to the Agreement, as noted above, appellants were not intended third-party beneficiaries to the Agreement. Therefore, the duty to maintain existed only for the benefit of the parties to the Agreement—the City and the Company. Accordingly, we conclude that the City's decision to divert storm water into the Ditch falls squarely within the confines of the discretionary-act immunity test and that the district court properly determined that the City is entitled to immunity pursuant to NRS 41.032.

NRS 41.033

Appellants contend that the district court erred when it determined that the City is also immune pursuant to NRS 41.033. They argue that the City was obligated to inspect, repair, and maintain the Ditch.

Pursuant to NRS 41.033(1), no action may be brought against the state or its agents if the action is based upon the

> (a) Failure to inspect any building, structure, vehicle, street, public highway or other public work, facility or improvement to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect; or
>
> (b) Failure to discover such a hazard, deficiency or other matter, whether or not an inspection is made.

(Emphases added.)

In Schroeder v. Ely City Municipal Water Department, 112 Nev. 73, 76, 910 P.2d 260, 261 (1996), this court considered whether the City of Ely and its water department were immune from liability pursuant to NRS 41.033 for its failure to maintain a water line. The plaintiffs argued that the City of Ely and its water department had an affirmative

duty to maintain the city's water lines pursuant to the water department's rules and regulations. Id. at 76, 910 P.2d at 261-62. This court held that because the city and its water department had no affirmative duty to maintain the water line, the plaintiffs' claim could only be viewed as one based on the city's and water department's failure to inspect the water line. Id. at 76-77, 910 P.2d at 262. Accordingly, this court concluded that because "NRS 41.033 clearly provides that municipalities such as Ely are immune from liability for the failure to inspect[,] . . . the district court was correct in granting . . . summary judgment pursuant to NRS 41.033." Id. at 77, 910 P.2d at 262 (emphasis added).

Schroeder applies to the instant case. Similar to our conclusion in Schroeder—that the City of Ely and its water department were under no affirmative duty to maintain the water line—the City had no affirmative duty, under the Agreement, to maintain and repair the Ditch for appellants' benefit. Appellants have also failed to demonstrate that the City was aware of a hazard relating to the Ditch and failed to correct it once it became known. See id. at 76, 910 P.2d at 262 (governmental immunity under NRS 41.033 may only attach if public entity has knowledge of a hazard and fails to act reasonably to correct it once it becomes known). Therefore, as we concluded in Schroeder, appellants' claims are based on the City's failure to inspect the Ditch and because NRS 41.033 clearly provides that municipalities, such as the City, are immune from liability for the failure to inspect, the district court properly determined that the City is entitled to immunity pursuant to NRS 41.033.

In sum, we conclude that the City is immune from tort liability under NRS 41.032 and NRS 41.033 and therefore the district

court properly granted summary judgment on appellants' negligence, negligence per se, nuisance, and trespass claims.

Taking

Finally, appellants assert that the district court erred in granting summary judgment on their takings claim.

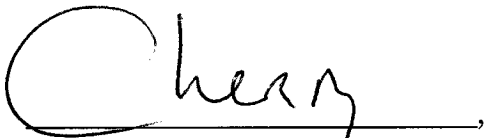
To support a takings claim, an individual must possess a valid interest in the property affected by the governmental action. ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). "A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." Id. "A physical appropriation by ouster occurs when the government substantially interferes with an owner's right of access to his or her property." Id. at 648, 173 P.3d at 740.

In ASAP Storage, the City of Sparks evacuated some businesses, barricaded the street entrance, and denied business owners access to their businesses due to a storm-induced flood. Id. at 641, 173 P.3d at 736. Flood waters damaged the business owners' personal property and, as a result, they initiated an inverse condemnation action against the City of Sparks. Id. at 644, 173 P.3d at 738. The district court granted summary judgment, determining that no taking had occurred. Id. This court affirmed the district court, concluding that the city's temporary interference and prohibition on access was not a "substantial interference" rising to the level of a compensable taking. Id. at 650, 173 P.3d at 741.

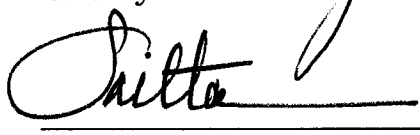
As in ASAP Storage, appellants' inverse condemnation action does not involve a taking based on government regulation or a physical seizure or occupation of appellants' real property; rather, it is based on a physical appropriation by ouster resulting from the rainstorm-induced

overflow of the Ditch. Thus, similar to the landowners in ASAP Storage, appellants must demonstrate a "substantial interference" with their right of access to their property. The evidence in this case, however, viewed in the light most favorable to the appellants, demonstrates that their damages are the result of a temporary, one-time occurrence and not a permanent, continuous, or inevitably recurring interference with property rights associated with and requisite in a compensable taking. See, e.g., id. at 649-50, 173 P.3d at 741 (concluding that a temporary 48-hour interference with property rights did not, as a matter of law, amount to a substantial interference). Accordingly, we conclude that the district court properly granted summary judgment on appellants' taking claim.[3] For the reasons set forth above, we

AFFIRM the order of the district court.



_____, J.
Cherry



_____, J.
Saitta

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Gibbons

[3]We have considered appellants' remaining contentions and determine that they are without merit.

cc: Hon. Steven R. Kosach, District Judge
William E. Nork, Settlement Judge
Nancy F. A. Gilbert
Reno City Attorney
Washoe District Court Clerk